

IT'S TIME TO BLOW THE WHISTLE ON PERFORMANCE ENHANCING DRUGS

by
Joshua D. Winneker*

Performance enhancing drug (“PED”) use is nothing new to the four major sports leagues in the United States. Nonetheless, these sports leagues struggle to manage PED use because it is a topic that must be negotiated and finalized in a collective bargaining agreement (“CBA”), by the players and the league. Players have consistently resisted the inclusion of stringent drug testing in CBAs for fear of the stigma attached to a positive drug test and the potential impact it could have on a player’s career. The time has come, however, to “clean up” PED use within the leagues once and for all. This Article proposes that the best way to diminish PED use within the major sports leagues is to address the issue directly from the inside—leagues should implement whistleblower policies through their respective CBAs. By providing insiders protection to “blow the whistle,” players can report PED use without the fear of being labeled a “rat” or being shunned by teammates. At the same time, a whistleblower policy allows the leagues to effectively “clean up” themselves. With a comprehensive whistleblower policy that this Article suggests, players would likely be inclined to break their silence regarding PED use and anonymously help regulate an issue that has plagued American sports leagues for decades.

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* Joshua D. Winneker, J.D., Assistant Professor, Misericordia University. I would like to thank Sam C. Ehrlich, Esq., and Alex Heath for their invaluable contributions, insights, and research assistance. I would also like to thank Nate Lenz for his research assistance.

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INTRODUCTION

These days (and years even), every time you turn on ESPN or go on the internet, there is another drug scandal in the four major professional sports leagues in the United States: Major League Baseball (“MLB”), National Basketball Association (“NBA”), National Football League (“NFL”), and National Hockey League (“NHL”).¹ The predominate amount of the drug abuse involves performance enhancing drugs

¹ The New York Mets’ Jenrry Mejia was recently suspended for 162 games for performance enhancing drug (“PED”) use. See Adam Rubin, *Mets’ Jenrry Mejia Suspended for Second Time This Season*, ESPN.COM (July 28, 2015), http://espn.go.com/new-york/mlb/story/_/id/13333683/new-york-mets-jenrry-mejia-suspended-162-games-positive-test. Mejia now faces a lifetime ban if he fails another PED test. MLB, probably the worst of the four major sports leagues in terms of PED abuse, also worked with Biogenesis, a lab in Miami that was allegedly supplying PEDs to players, to hand out suspensions to 13 MLB players including Alex Rodriguez and Ryan Braun. See Mike Axisa, *A-Rod and Cruz Among 13 Players Suspended for Ties to Biogenesis*, CBSSPORTS.COM (Aug. 5, 2013), <http://www.cbssports.com/mlb/eye-on-baseball/23024816/a-rod-and-cruz-among-13-players-suspended-for-ties-to-biogenesis>.

(“PED”), typically steroids or some other similar drug meant not for recreational pleasure, but instead for trying to gain a competitive edge.² The four leagues have worked throughout the years to address drug abuse in their respective leagues, with the results slow-going, given that drug testing is considered a mandatory subject of bargaining. Thus, the issue must be bargained over by the league/owners and the players’ unions for inclusion into their leagues’ collective bargaining agreements (“CBA”).³ The players have resisted stringent drug testing for years for fear of the stigma attached to a positive drug test and what it could do to an already-short shelf life of a career.⁴ But at this point, PED use has gotten out of control and it is time to create new policies that can help at least try to clean up the leagues. What better way to ferret out drug use than by attacking it from the inside; namely by providing a policy for the players or team personnel themselves who witness PED use to have a safe haven to report the misconduct without fear of subsequent retaliation. Therefore, this Article proposes that the CBAs in each of the four major professional sports leagues need a whistleblower-protection policy.

A “whistleblower” is generally defined as an informant who exposes wrongdoing within an organization in the hope of stopping it.⁵ A whistleblower tries to do what is right for the greater good, but the problem frequently lies in the repercussions for blowing the whistle. Many fear their job status and overall working environment will be negatively affected, which has necessitated the advent of whistleblower-protection policies.⁶

The origin of the word “whistleblower” may actually have its roots in sports because many believe that the term refers to “a referee using a whistle to call a foul.”⁷ Thus, it seems fitting that the four leagues would have whistleblower-protection policies, or least not be so far behind in creating the policies. Unfortunately, professional sport leagues have not undergone this natural progression, and the lack of whistleblower pro-

² *Performance-Enhancing Drugs*, NAT’L CTR. FOR DRUG FREE SPORT, <http://www.drugfreesport.com/drug-resources/performance-enhancing-drugs-steroids.asp>.

³ Mark M. Rabuano, Comment, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 442–46 (2002).

⁴ Karen Melnik, Note, *Giving Violence a Sporting Chance: A Review of Measures Used to Curb Excessive Violence in Professional Sports*, 17 J. LEGIS. 123, 127 & n.28 (1990) (noting that players are reluctant to bring a civil suit against another player due to their fear of being blacklisted around the league, as management may fail to renew the player’s contract when the player is considered a troublemaker).

⁵ *Whistleblower*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁶ See, e.g., Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C. and 22 U.S.C.); 5 U.S.C. § 2302(b)(8) (2012); CAL. GOV’T CODE § 8547.8 (West 2012); CAL. LAB. CODE § 1102.5 (West 2011); Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2012).

⁷ *Whistle-blower*, DICTIONARY.COM, <http://dictionary.reference.com/browse/whistleblower>.

tection has created a negative image for anyone who decides to speak out about issues in sports.⁸ No player wants to be labeled as a whistleblower or a “W.”⁹ This potential label is looked down upon in sports, is often hard to shake, and may hurt an employee’s current and future employment.¹⁰ For these reasons, it is necessary to create a policy that will protect employees who are brave enough to speak out about PED use.¹¹

Part I of this Article will discuss the current pervasive PED issues in the four major professional sports leagues. Part II will detail the up-to-date drug-testing policies in those leagues. Part III will address what whistleblower-protection policies exist both generally and in professional sports, and Part IV will examine the need for, and implementation of, a whistleblower-protection policy in the four major professional sports leagues.

I. CURRENT PED ISSUES IN PROFESSIONAL SPORTS

The idea of gaining a competitive advantage in sports dates back to the early Olympic Games.¹² There, athletes would eat bull testicles in order to increase their level of testosterone.¹³ Those games eventually were discontinued in 395 AD when the games were seen as “a hotbed of cheating, affronts to human dignity and doping.”¹⁴ Unfortunately, as this desire to be the best has persisted in sport, so has a willingness to look outside the rulebook to find a competitive advantage. This attitude of win-at-all-costs has fostered an environment of doping, which is evident by the number of players who continue to test positive for PEDs throughout the four major professional sport leagues.¹⁵

⁸ The negative stigma that goes along with being a whistleblower was most recently seen in the New Orleans Saints bounty scandal. Jimmy Kennedy, the accused whistleblower in the scandal, has been labeled a “W” by many within the league because he supposedly “told on” Anthony Hargrove. Gordon Schnell, Opinion, *NFL Falls Short in Protecting Its Bountygate Whistleblower*, SPORTS BUS. J., Nov. 5, 2012, at 25.

⁹ *Id.* This fear was seen when the news revealed that Jordan Schafer of the Atlanta Braves was accused of HGH use, which may have been revealed through an MLB tip line. Players and agents were afraid that whistleblowers would not remain anonymous and face negative consequences. Bill Madden, Teri Thompson & Michael O’Keeffe, *Jordan Schafer, Baseball’s Minor League Golden Boy, on HGH*, N.Y. DAILY NEWS (Apr. 10, 2009), <http://www.nydailynews.com/sports/baseball/jordan-schafer-baseball-minor-league-golden-boy-hgh-article-1.281372>.

¹⁰ Schnell, *supra* note 8, at 25.

¹¹ *Id.*

¹² Rudhard Klaus Müller, *History of Doping and Doping Control, in DOPING IN SPORTS 1* (Handbook of Experimental Pharmacology 195, Detlef Thieme & Peter Hemmersbach eds. 2010).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Piers Edwards, *The Gain Game: Why Do Sports Stars Cheat?*, CNN (Dec. 11, 2012), <http://www.cnn.com/2012/12/11/sport/sport-cheats-suarez-cazorla/>.

A. *Major League Baseball*

The “poster child” for PED use in professional sports has been MLB, and this reputation does not seem to be going away any time soon. Baseball’s drug problem first came to light in the middle of its historic 1998 season.¹⁶ That season, which saw sluggers Mark McGwire and Sammy Sosa chase, and eventually break, the 37-year-old record for home runs in a single season, has been credited as the cause for baseball’s resurgence after its 1994 work stoppage.¹⁷ But during this same season, *Sports Illustrated* writer Steve Wilstein spotted a bottle of androstenedione, an anabolic steroid that at the time was legal and sold over-the-counter, in McGwire’s locker.¹⁸ While McGwire freely admitted using the then-legal drug, this sparked a national uproar about the use of such drugs in baseball and placed a de facto asterisk on McGwire and Sosa’s accomplishments.¹⁹

Three years later, MLB unilaterally implemented random drug testing for its minor league players.²⁰ But while the Commissioner’s office had this authority over the non-unionized minor league players, drug testing with MLB players was a different story requiring collective bargaining with the players’ union. Until such terms were collectively bargained with the MLB players’ union, the MLB players could only be drug tested with “reasonable cause” and long after such allegations were made.²¹ Not surprisingly, under this “reasonable cause” policy, no suspected player ever tested positive.²²

The next year, after pressure from Congress and a drawn-out labor battle that nearly ended in baseball’s second strike in less than a decade, MLB and the Major League Baseball Players Association (“MLBPA”) finally came to preliminary terms on a “Joint Drug Prevention and Treatment Program.”²³ This policy came into effect after a mandatory screening found that more than 5% of MLB players tested positive for steroids

¹⁶ *Event Timeline*, MLB.COM, http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline.

¹⁷ Michiko Kakutani, *The Taint Baseball Couldn’t Wish Away*, N. Y. TIMES (July 5, 2005), <http://www.nytimes.com/2005/07/05/books/05kaku.html> (reviewing HOWARD BRYANT, *JUICING THE GAME* (2005)).

¹⁸ Harvey Araton, *A Hall of Fame Find by a Sports Reporter*, N. Y. TIMES (June 17, 2009), <http://www.nytimes.com/2009/06/18/sports/baseball/18harvey.html?ref=sports/>.

¹⁹ *Id.*

²⁰ GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 12 (2007) [hereinafter THE MITCHELL REPORT].

²¹ *Id.* at 15.

²² *Id.* at 16.

²³ *Event Timeline*, *supra* note 16.

during an anonymous survey implemented in 2003.²⁴ But this policy, which imposed no penalties for a first positive test, was considered weak and ineffective; in fact, no players were suspended in 2004, the first year of the program's implementation.²⁵ As a result, Congress continued to pressure MLB and the MLBPA to strengthen their policies.²⁶

In response to congressional demands, in 2005 MLB Commissioner Bud Selig appointed former Senate Majority Leader and federal prosecutor George Mitchell as a neutral investigator to report on the prevalence of PEDs in professional baseball.²⁷ After a 21-month investigation, Mitchell released a 409-page report (Mitchell Report) on December 13, 2007, detailing the use of PEDs by 86 players.²⁸ The Mitchell Report also addressed MLB's slow response to the steroid crisis, and the players' and MLBPA's steadfast refusals to either cooperate in the investigation or respond to allegations made by others.²⁹

Following the release of the Mitchell Report, MLB took actions to implement many of the recommendations suggested by Senator Mitchell including setting up an impartial Department of Investigations, requiring clubs to log all packages sent to clubhouses, and removing the overnight notice requirement for random tests, which had often leaked to the players.³⁰ MLB has also strengthened its penalty structure since the original 2002 Joint Drug Agreement. Initially, players were suspended for 50 games following their first offense (which has since been increased again to 80 games) as compared to the original agreement where it took four positive tests for a player to be suspended for 50 days, which is in effect equal to a suspension of less than 50 games due to the fact that MLB clubs generally play only five to six times per week.³¹

Despite the progress that MLB has made since the release of the Mitchell Report, in the past few seasons some of MLB's biggest stars have been in the news for PED use. One superstar who has had a recent run-in with the MLB Drug Policy is Milwaukee Brewers' leftfielder, Ryan Braun.³² This former Most Valuable Player first entered the news in 2011

²⁴ THE MITCHELL REPORT, *supra* note 20, at 12.

²⁵ *Id.* at 13.

²⁶ Duff Wilson & Michael S. Schmidt, *Baseball Braces for Steroid Report from Mitchell*, N. Y. TIMES, Dec. 13, 2007, at D1.

²⁷ *Id.*

²⁸ THE MITCHELL REPORT, *supra* note 20, at 86.

²⁹ *Mitchell Report: Baseball Slow to React to Players' Steroid Use*, ESPN.COM (Dec. 13, 2007), <http://sports.espn.go.com/mlb/news/story?id=3153509>.

³⁰ A.J. Perez, *Progress Made on Mitchell Report Recommendations*, USA TODAY (Dec. 10, 2008), http://usatoday30.usatoday.com/sports/baseball/2008-12-10-mitchell-recommendations_N.htm.

³¹ *Mitchell Report: Baseball Slow to React to Players' Steroid Use*, *supra* note 29.

³² See Bob Nightengale, *Ryan Braun's Victory Puts Baseball's System to Test*, USA TODAY (Feb. 24, 2012), <http://usatoday30.usatoday.com/sports/baseball/nl/>

when he tested positive for “elevated levels of testosterone.”³³ However, after an appeal process, Braun’s 50-game suspension was reversed because errors were made in the chain of custody and collection procedure due to “improper protocol followed in the collection of Braun’s urine.”³⁴ And, even though Braun’s suspension may have been overturned, many believe it was only due to a technicality and still consider Braun a cheater.³⁵ Indeed, there was never any evidence that the sample was tampered with or that the elevated levels of testosterone in his urine were created by his sample sitting for a few days while waiting to be shipped for testing.³⁶

Braun, after steadfastly proclaiming his prior innocence in a 20-minute press conference, then reappeared in the news when he was mentioned in the list of players connected with Biogenesis, an anti-aging clinic that is also believed to have provided athletes with PEDs.³⁷ Besides Braun, this list also included Alex Rodriguez, who had previously admitted to using PEDs while a member of the Texas Rangers from 2001–2003.³⁸ Biogenesis owner, Tony Bosch, decided to cooperate with MLB and provide information,³⁹ giving MLB a new source of information and confirmation of evidence that allowed them to seek suspensions for players linked to Biogenesis.⁴⁰

Based on this evidence, on August 5, 2013, MLB suspended 13 players for their links to the facility.⁴¹ Of these players, all but Ryan Braun and Alex Rodriguez were suspended for 50 games as a first-time offense, with Braun suspended for the remainder of the 2013 season (65 games).⁴² All

brewers/story/2012-02-23/ryan-braun-drug-appeal-suspension/53229326/1.

³³ *Id.*

³⁴ *Id.*

³⁵ Matthew Pouliot, *Ryan Braun Is Baseball’s Biggest Fraud*, CBSSPORTS (July 22, 2013), <http://mlb.nbcsports.com/2013/07/22/ryan-braun-is-baseballs-biggest-dipwad/>

³⁶ Jeré Longman, *A Flawed Policy for Drug Testing*, N.Y. TIMES (Feb. 26, 2012), http://www.nytimes.com/2012/02/26/sports/baseball/ryan-braun-case-shows-problems-with-baseballs-drug-testing.html?_r=0.

³⁷ Tom Gatto, *MLB Steroids: Ryan Braun’s Name Shows up in Biogenesis Records; Star Denies PED Use*, SPORTING NEWS (Feb. 6, 2013), <http://aol.sportingnews.com/mlb/story/2013-02-05/ryan-braun-ped-biogenesis-alex-rodriguez-mlb-steroids-drugs-anthony-bosch>.

³⁸ *Id.*

³⁹ T.J. Quinn, Pedro Gomez & Mike Fish, *MLB Seeks to Suspend A-Rod, Braun*, ESPN.COM: OUTSIDE THE LINES (June 5, 2013), http://espn.go.com/espn/otl/story/_/id/9301536/major-league-baseball-suspend-18-players-including-alex-rodriguez-ryan-braun-part-miami-investigation.

⁴⁰ *Id.*

⁴¹ Tim Brown, *MLB’s Biogenesis Investigation Leads to 13 More Suspensions*, YAHOO! SPORTS (Aug. 5, 2013), <http://sports.yahoo.com/news/mlb-s-biogenesis-investigation-leads-to-13-more-suspensions-190908682.html>.

⁴² *Id.*

of these players agreed to give up collectively bargained rights in exchange for lighter sentences and quick implementation of their sentences.⁴³

By contrast, Rodriguez, who immediately appealed his suspension, was suspended for the rest of 2013 and all of 2014 (211 games) for both his alleged drug use and for obstructing the investigation.⁴⁴ Rodriguez had purchased documents from Bosch relating to his and other players' involvement with Biogenesis and had shielded or destroyed these documents.⁴⁵ On January 11, 2014, arbitrator Frederic Horowitz upheld Rodriguez's suspension, but reduced it to 162 games (the entirety of the 2014 season, plus the 2014 post-season).⁴⁶ As noted earlier, PED use in baseball persists today and does not seem to be going away any time soon.⁴⁷

B. National Football League

Although MLB may be the "poster child" of PED use, other leagues, such as the NFL, also have issues with PEDs. For example, one particularly high-profile case of PED use in the NFL was the San Diego Chargers' Shawne Merriman, who was suspended for four games in 2006.⁴⁸ Merriman, a former NFL Defensive Rookie of the Year, violated the NFL's steroids and related-substances policy when "both the initial A sample and backup B sample came back positive."⁴⁹

The Houston Texans' Brian Cushing, another up-and-coming linebacker, also had issues with the PED policy.⁵⁰ In 2010, Cushing was suspended for four games, like Merriman, for violating the steroid policy.⁵¹ Cushing claimed "that he tested positive for a non-steroidal banned substance," but either way he gained a competitive edge through substanc-

⁴³ *Id.*

⁴⁴ Wallace Matthews, *A-Rod to Miss All of 2014 Season*, ESPN.COM (Jan. 12, 2014), http://espn.go.com/new-york/mlb/story/_/id/10278277/alex-rodriguez-suspension-reduced-162-games.

⁴⁵ Teri Thompson & Michael O'Keefe, *Legal Team Admits Alex Rodriguez Bought Evidence Linked to Biogenesis Investigation*, N.Y. DAILY NEWS (Oct. 23, 2013), <http://www.nydailynews.com/sports/i-team/a-rod-reps-yes-bought-evidence-stand-article-1.1494837>.

⁴⁶ Bob Nightengale, *A-Rod Suspension Reduced to 162 games*, USA TODAY (Jan. 11, 2014), <http://www.usatoday.com/story/sports/mlb/2014/01/11/alex-rodriguez-suspended-162-games/4429661/>.

⁴⁷ See Rubin, *supra* note 1.

⁴⁸ Sources: *Chargers' Merriman Suspended for Steroids*, ESPN.COM (Oct. 23, 2006), <http://sports.espn.go.com/nfl/news/story?id=2635475>.

⁴⁹ *Id.*

⁵⁰ Adam Schefter, *LB Cushing Suspended Four Games*, ESPN.COM (May 10, 2010), <http://sports.espn.go.com/nfl/news/story?id=5172060>.

⁵¹ *Id.*

es.⁵² In the past year, the NFL has continued to see issues with PEDs with San Diego Chargers' tight end Antonio Gates and Denver Broncos' defensive end Derek Wolfe suspended for PEDs as recently as July 2015.⁵³

One growing issue in the NFL has been the use of Adderall as a PED, which is what ultimately caused Seattle Seahawks' Brandon Browner, along with the Denver Broncos' Wes Welker and the New York Giants' Andre Brown, to be suspended for four games early in the 2014 season.⁵⁴ Later, the Indianapolis Colts' Laron Landry was suspended for four games on September 29, 2014, making him the 14th NFL player suspended for PED use in 2014 through the end of September.⁵⁵ Then on March 6, 2015, Landry was suspended again for PED use—this time for 10 games.⁵⁶ Thus, it is clear that PEDs continue to be an issue within the NFL, which leads one to believe that more must be done.

C. National Basketball Association

A professional sports league that has not had as extensive of a history with PED use but has still been in the news because of it is the NBA. One of the first players to make it into the headlines was Orlando Magic's Rashard Lewis in 2009.⁵⁷ Lewis failed his drug test for steroids when he had elevated levels of testosterone, which were caused by taking a substance that included dehydroepiandrosterone ("DHEA"), a banned sub-

⁵² *Id.*

⁵³ Dan Hanzus, *Antonio Gates Suspended Four Games for PEDs*, NFL.COM (July 2, 2015), <http://www.nfl.com/news/story/0ap3000000499903/article/antonio-gates-suspended-four-games-for-peds>; Marc Sessler, *Broncos DE Derek Wolfe Dealt Four-Game Suspension*, NFL.COM (July 24, 2015), <http://www.nfl.com/news/story/0ap3000000503455/article/broncos-de-derek-wolfe-dealt-fourgame-suspension>.

⁵⁴ *Brandon Browner Suspended*, ESPN.COM (Dec. 5, 2012), http://espn.go.com/nfl/story/_/id/8717501/brandon-browner-seattle-seahawks-suspended-four-game; Adam Schefter, *Wes Welker Suspended 4 Games*, ESPN.COM (Sept. 3, 2014), http://espn.go.com/nfl/story/_/id/11455813/wes-welker-denver-broncos-suspended-four-games-use-amphetamines; Mike Wilkening, *Report: Andre Brown Suspended Eight Games*, NBC SPORTS: PROFOOTBALLTALK (Sept. 4, 2014), <http://profootballtalk.nbcsports.com/2014/09/04/report-andre-brown-suspended-eight-games/>.

⁵⁵ *Colts Safety LaRon Landry Suspended Four Games for PED Violation*, SPORTS ILLUSTRATED (Sept. 29, 2014), <http://www.si.com/nfl/2014/09/29/laron-landry-suspended-ped-indianapolis-colts>; *NFL Suspensions Taking a Heavy Toll on 2014 Already*, SB NATION (Sept. 2, 2014), <http://www.sbnation.com/nfl/2014/7/3/5867515/nfl-suspensions-2014-robert-mathis-daryl-washington-lane-johnson>.

⁵⁶ Marissa Payne, *Laron Landry Suspended 10 Games for Using Performance Enhancing Drugs*, WASH. POST: EARLY LEAD (Mar. 6, 2015), <http://www.washingtonpost.com/blogs/early-lead/wp/2015/03/06/laron-landry-suspended-10-games-for-using-performance-enhancing-drugs/>.

⁵⁷ *Lewis Suspended 10 Games by NBA*, ESPN.COM (Aug. 7, 2009), <http://sports.espn.go.com/nba/news/story?id=4381822>.

stance.⁵⁸ This failed test resulted in a 10-game suspension and reminded the public that PED use exists in the NBA.⁵⁹ Another player that failed the NBA drug test due to DHEA was the Memphis Grizzlies' O.J. Mayo in 2011.⁶⁰ Although "[f]ew people consider DHEA a legitimate performance-enhancing drug . . . it is technically considered an androgenic steroid," and therefore O.J. Mayo faced a 10-game suspension just like Rashard Lewis.⁶¹ Mayo blamed the failed test on an energy drink he had purchased, which seems unlikely and makes one wonder if PEDs are a bigger problem in the NBA than one might think.⁶²

Hedo Turkoglu of the Orlando Magic also tested positive for methenolone, a type of anabolic steroid.⁶³ This positive test led to a 20-game suspension, and served as a reminder that PED use is possible in leagues other than the MLB and NFL.⁶⁴ Then in April 2014, Memphis Grizzlies' guard Nick Calathes was suspended for 20 games right before the Grizzlies' playoff series against Oklahoma City after testing positive for Tamoxifen.⁶⁵ Tamoxifen is a drug that is not by itself a PED but is commonly used as a masking agent for synthetic testosterone.⁶⁶ Calathes and the National Basketball Players' Association ("NBPA") fought the suspension, claiming that his use of the drug was for a private medical condition and that the drug was an innocent over-the-counter substance used for common medical conditions.⁶⁷

Although the NBA is not the first league that comes to mind when one thinks about PED use, many people believe that PEDs are actually

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Millard Baker, *The Short History of Steroid Incidents in the National Basketball Association*, MESO-RX (Feb. 15, 2013), <http://thinksteroids.com/news/history-steroids-nba-basketball/>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Anthony Riccobono, *Hedo Turkoglu Steroids: NBA Player Suspended for Using Performance-Enhancing Drugs*, INT'L BUS. TIMES (Feb. 13 2013), <http://www.ibtimes.com/hedo-turkoglu-steroids-nba-player-suspended-using-performance-enhancing-drugs-1083584>.

⁶⁴ *Id.*

⁶⁵ Brian Windhorst & J.A. Adande, *Nick Calathes Calls Suspension Unfair*, ESPN.COM (Apr. 19, 2014), http://espn.go.com/nba/playoffs/2014/story/_/id/10807964/memphis-grizzlies-nick-calathes-mounting-defense-calls-suspension-unfair.

⁶⁶ *Id.*

⁶⁷ Further testing on Calathes' sample found no traces of synthetic testosterone. *Id.* NBPA acting executive director Ron Klempner called Calathes' suspension a "true injustice," and indicated that Calathes' case will be discussed during the NBA and NBPA's next collective-bargaining negotiations. Adrian Wojnarowski, *Players Union Head: Calathes Suspension 'A True Injustice'*, YAHOO! SPORTS (Apr. 18, 2014), <http://sports.yahoo.com/news/grizzlies-guard-nick-calathes-suspended-20-games-for-banned-substance-001339105.html>.

rampant in all professional sports including the NBA.⁶⁸ But others maintain that PEDs are not a problem in the NBA because NBA players do not typically fit the body type.⁶⁹ However, Victor Conte, the infamous founder of the Bay Area Laboratory Co-Operative, or “BALCO,” says this argument is bogus and points to distance runners to support his position.⁷⁰ Charles Yesalis, another expert in this field, agrees saying that “[d]istance runners have been using anabolics and growth hormones in very small doses for years. . . . Not to build muscle. But to help recuperate. The myth of [PEDs] making you muscle-bound is so over.”⁷¹ Thus, the size of players is not an excuse to ignore the potential of PED use.⁷² A whistleblower-protection policy is even more important when the PED use may not be as “obvious” as it is in other sports.

D. National Hockey League

The NHL has had a similar history to the NBA when it comes to PED use. One of the most prominent examples of PED use in the NHL occurred in 2007.⁷³ This incident occurred when the New York Islanders’ Sean Hill received a 20-game suspension for failing the performance enhancing substance program.⁷⁴ One reason that this failed test received so much publicity was because it was the first failed test under the 2005 CBA and it occurred during the playoffs.⁷⁵ Many believed that this positive test proved that the program was working and also showed that PED use does exist in the NHL.⁷⁶

According to former players, PEDs are a bigger issue in the NHL than the test results may show.⁷⁷ One player that has been extremely vocal about PED use in hockey is Georges Laraque, a former enforcer for the Montreal Canadiens.⁷⁸ Laraque says that “he knew a lot of players, including some of the league’s top performers, who used steroids while he was in the league,” and he used the Winter Olympic Games to support his

⁶⁸ Patrick Hruby, *Why Wouldn't NBA Players Use PEDs?*, SPORTS ON EARTH (Feb. 15, 2013), <http://www.sportsonearth.com/article/41666640/>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *NHL Bans Islanders' Sean Hill 20 Games*, CBC SPORTS (Apr. 20, 2007), <http://www.cbc.ca/sports/hockey/story/2007/04/20/hill-suspension.html>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Benjamin Shingler, *NHL and Steroids: League Has a Problem with Performance-Enhancing Drugs Says Georges Laraque*, HUFFINGTON POST (Nov. 5, 2011), http://www.huffingtonpost.ca/2011/11/05/georges-laraque-nhl-has-steroids-problem_n_1077733.html.

⁷⁸ *Id.*

claim.⁷⁹ He pointed to the fact that “some talented players will experience an efficiency loss as well as a weight loss every four years, those years being the ones the Winter Olympics are held,” but “[i]n the following season they make a strong comeback; they manage a mysterious return to form.”⁸⁰ In Laraque’s opinion, this “mysterious return” can be credited to the use of steroids,⁸¹ which seemed more plausible after several Washington Capitals players were later linked to a PED dealer.⁸²

During the 2010 NHL season, several Washington Capitals players were connected to a chiropractor who was facing charges for steroid distribution.⁸³ Douglas Nagel, the chiropractor, had offices next to the Capitals’ facilities with many players as his clients.⁸⁴ He was arrested when he bought steroids from a steroid dealer who said: “You name the sport, and I’ve sold steroids to athletes who play it.”⁸⁵ The close relationship between Nagel and the Capitals raises the question whether steroids might have been purchased for these NHL players.⁸⁶

During the 2014–2015 season, Toronto Maple Leafs’ forward, Carter Ashton, was suspended without pay for 20 games for violating the NHL/National Hockey League Players’ Association (“NHLPA”) Performance Enhancing Substances Program after testing positive for the prohibited substance Clenbuterol, a steroid that helps breathing function.⁸⁷ According to Ashton, he had ingested the drug through an inhaler he borrowed from another athlete while having an asthmatic spasm during a training session.⁸⁸ Ashton stated that the use of the drug was not for per-

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Eric Warren, *Rumors of Drug Use in the NHL Fueled by the Capitals*, BLEACHER REP. (Apr. 22, 2010), <http://bleacherreport.com/articles/382545-rumors-of-drug-use-in-the-nhl-fueled-by-the-capitals>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* There are several reasons why many people, including Laraque, believe that the NHL has a PED issue. First, a lack of failed tests may not necessarily tell the whole story because the NHL historically had a weak drug-testing policy. For the longest time, the policy did not include off-season or post-season testing, which would make it easy to circumvent the system. *Id.* Second, as Laraque noted: “not a single player, not even me, would ever think of raising his hand to break the silence and accuse a fellow player.” *Id.* The NHL, in its most recent CBA, has begun to solve some of the policy issues by including random testing during the regular season, playoffs, and off-season. They will also begin to explore HGH testing, which will be another positive step. *Id.* However, they still have not addressed the “code of silence” issue, which is why protecting a whistleblower remains necessary.

⁸⁷ Kevin Allen, *Leafs’ Carter Ashton Suspended for PED Violation over Inhaler*, USA TODAY (Nov. 7, 2014), <http://www.usatoday.com/story/sports/nhl/leafs/2014/11/06/carter-ashton-suspended-ped-violation-inhaler/18610149/>.

⁸⁸ *Id.*

formance-enhancing purposes, but it shows the various ways players can get steroids and other PEDs into their bodies.⁸⁹

All of these examples highlight the fact that PED use remains rampant in the four major professional sports and more must be done to stop it. Some of the leagues have taken steps in the right direction by implementing PED policies but it is clearly not enough. For this reason, it is time for the four major leagues to implement a whistleblower policy that will ensure a whistleblower protection if athletes/employees speak out against PED use. With this type of protection in place, it might be possible to finally break the “code of silence” and try to begin to clean up our four major professional sports.

II. CURRENT DRUG-TESTING POLICIES IN THE FOUR LEAGUES

Currently, each of the four major professional sport leagues have drug-testing policies contained in their CBAs that address the issue of PED use, and outline the punishments for violating their policies. Although MLB and the NBA do provide confidentiality for those third parties who give information about an athlete's PED use, no league currently provides protection from retaliation if a whistleblower's name is made public. It is necessary to have a full understanding of each drug-testing policy in order to see how a whistleblower-protection clause would fit into the larger picture of these leagues.

A. Major League Baseball

1. Testing Procedures

As noted above, MLB's drug testing falls under their Joint Drug Prevention and Treatment Program (“Program”).⁹⁰ The testing policies for performance-enhancing substances and stimulants include in-season testing.⁹¹ All players are tested once they arrive for spring training and are subject to an additional urine sample on a random, unknown date.⁹² The Program also calls for additional random testing, which includes a total of 3,200 additional tests that will be performed on random players at unannounced times.⁹³ Some of these additional tests can also be performed during the off-season, and the Program called for up to 350 tests during the 2013–2014 season.⁹⁴

⁸⁹ *Id.*

⁹⁰ MAJOR LEAGUE BASEBALL, MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM (2006), <http://mlb.mlb.com/pa/pdf/jda.pdf>.

⁹¹ *Id.* § 3(A)(1).

⁹² *Id.* § 3(A)(1)(a).

⁹³ *Id.* § 3(A)(2).

⁹⁴ *Id.*

With the growing problem of Human Growth Hormone (“HGH”) use, the Program also implemented blood testing.⁹⁵ This type of testing will first take place at an unknown time during spring training.⁹⁶ Then, a player can be tested at any time when there is reasonable cause to believe that a player is using HGH.⁹⁷ Also, the Independent Program Administrator is allowed to schedule blood testing during the off-season, which is partnered with a urine test.⁹⁸ Originally, these blood tests would only take place during spring training and off-season so that the effects could be observed, but in-season testing began in the 2013 season.⁹⁹

Another important concept for the Program is the idea of reasonable-cause testing for performance enhancing substances and stimulants.¹⁰⁰ This allows for any person with information that creates reasonable cause that a player has used a performance enhancing substance to describe their information either orally or through a written description.¹⁰¹ Upon receiving this information, the player must submit a urine and/or blood specimen no later than 48 hours after the report has been made.¹⁰² However, if the player disagrees with the claim, then he has the opportunity to have a proceeding in front of the Arbitration Panel (“Panel”) chair.¹⁰³ This dispute has to be brought within 48 hours after the claim, and then the Panel will decide if reasonable cause exists or not.¹⁰⁴ The player’s testing will only occur after the Panel has decided that reasonable cause does exist.¹⁰⁵

2. *Discipline*

The first violation of PED use calls for an automatic 80-game suspension and a second violation is a 162-game suspension with a full season (183 days) of docked pay.¹⁰⁶ A third violation results in a permanent suspension from MLB, as well as the minor leagues.¹⁰⁷ However, after a two-year period has passed, the player may file for reinstatement with the Commissioner.¹⁰⁸ It is up to the discretion of the Commissioner whether

⁹⁵ *Id.* § 3(A)(3).

⁹⁶ *Id.*

⁹⁷ *Id.* § 3(A)(3)(b).

⁹⁸ *Id.* § 3(A)(3)(c).

⁹⁹ Paul Hagen, *In-Season HGH Testing to Begin This Year*, MLB.COM (Jan. 10, 2013), <http://www.mlb.com/news/article/40916028/in-season-human-growth-hormone-testing-to-begin-this-year-in-major-league-baseball>.

¹⁰⁰ MAJOR LEAGUE BASEBALL, *supra* note 90, § 3(C)(1)(a).

¹⁰¹ *Id.*

¹⁰² *Id.* § 3(C)(1)(b).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* §§ 7(A)(1)–(2).

¹⁰⁷ *Id.* § 7(A)(3).

¹⁰⁸ *Id.*

or not to reinstate the player.¹⁰⁹ The Commissioner must hear the player's reinstatement application within 30 days of filing, and then must make a determination within 30 days of the end of the hearing.¹¹⁰

In March 2014, MLB and the MLBPA strengthened their discipline policies for PED use, barring players suspended for PED use in a season from post-season play.¹¹¹ The change came after Detroit Tigers shortstop Johnny Peralta returned from a 50-game suspension one week before the end of the season and ended up playing a key role in the Tigers' American League Division Series win over the Oakland Athletics.¹¹² The changes also increased the penalties for PED use from 50 games to 80 games for a first-time violation and from 100 games to a full season for a second-time violation.¹¹³

MLB also tests and disciplines for the use of stimulants like Adderall and other amphetamines.¹¹⁴ For use of these types of stimulants, a first-time violation merits only follow-up testing.¹¹⁵ However, a second-time violation subjects a player to a 25-game suspension while a third-time violation calls for an 80-game suspension.¹¹⁶ If a player tests positive a fourth time, the policy gives the Commissioner the power to suspend the player under the Basic Agreement's "just cause" standard, giving MLB the power to suspend the player for any amount of time up to and including a permanent ban.¹¹⁷

3. *Appeal Process*

If the Braun saga proved anything to sports fans, it is that MLB has an appeal process for positive PED tests and that the player can actually

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Christine Brennan, *MLB Drug Policy Will Bar PED Users from Playoffs*, USA TODAY (Mar. 27, 2014), <http://www.usatoday.com/story/sports/mlb/2014/03/27/mlb-drug-policy-increased-penalty-no-playoffs-for-ped-suspensions/6984181/>.

¹¹² *Id.*

¹¹³ *Id.* A prime example of this rule change is New York Mets' relief pitcher Jenrry Mejia, who was suspended for 80 games on April 12, 2015 after testing positive for the synthetic steroid Stanozolol. Anthony DiComo, *Mejia Suspended 80 Games for PED Use*, MLB.COM (Apr. 12, 2015), <http://m.mlb.com/news/article/117655228/mets-closer-jenrry-mejia-suspended-80-games-for-peds>. Just three weeks after returning from that suspension, he was suspended for 162 games on July 28, 2015 after once again testing positive for Stanozolol—along with Boldenone, another anabolic steroid. Rubin, *supra* note 1. He now faces a lifetime ban if he fails another PED test.

¹¹⁴ MAJOR LEAGUE BASEBALL, *supra* note 90, § 3(C)(1)(a).

¹¹⁵ *Id.* § 7(B)(1).

¹¹⁶ *Id.* §§ 7(B)(2)–(3).

¹¹⁷ *Id.* Since the suspension would be under the Basic Agreement's "just cause" standard rather than under the JDA, such a suspension would—unlike other drug-related suspensions—be subject to challenge before an Arbitration Panel immediately. *Id.*

win.¹¹⁸ After the player is notified that he has tested positive for PEDs, the Commissioner's Office and the MLBPA will get together within three days to discuss the positive test result.¹¹⁹ If they agree that there was not a positive test, then the player will be notified of this decision.¹²⁰ If not, then the player will be suspended on the third business day after the discipline has been announced.¹²¹ If the player disputes this finding, it is up to the player and the MLBPA to file a grievance before this three-day period elapses.¹²²

Once a grievance is filed, it automatically becomes an appeal for the Panel to hear.¹²³ The Panel should hear the appeal within 10 days of a grievance being filed, and should strive to make a decision within 25 days of the opening of the appeal hearing.¹²⁴ Also, they must provide a written opinion no later than 30 days after issuing an award.¹²⁵ The Panel will either decide to uphold the player's suspension or find that no discipline is necessary.¹²⁶ If the Panel upholds the suspension, then the player must serve the suspension immediately.¹²⁷ However, a player still has the opportunity to fight a positive result if at any time new scientific evidence appears.¹²⁸ If a player believes that new scientific evidence exists that brings into question the accuracy of the positive test result, then they have the opportunity to present their case to the Panel.¹²⁹

4. *Baseball's Tip Hotline and Confidentiality for Third Parties*

MLB has implemented suggestions made by Senator Mitchell in the Mitchell Report, which included the creation of the Department of Investigations ("Department").¹³⁰ The role of the Department is to investigate any matter that may hurt the reputation of the game of baseball, which includes PED use.¹³¹ One tool that the Department has created is a hotline for "club employees regarding potential violations of MLB's rules

¹¹⁸ *Ryan Braun Wins Appeal of Suspension*, ESPN.COM (Feb. 24, 2012), http://espn.go.com/mlb/story/_/id/7608360/milwaukee-brewers-ryan-braun-wins-appeal-50-game-suspension.

¹¹⁹ MAJOR LEAGUE BASEBALL, *supra* note 90, § 8(C)(2).

¹²⁰ *Id.*

¹²¹ *Id.* § 8(C)(3).

¹²² *Id.*

¹²³ *Id.* § 8(C)(4).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* § 8(C)(4).

¹²⁷ *Id.* § 8(C)(5).

¹²⁸ *Id.* § 8(C)(6).

¹²⁹ *Id.*

¹³⁰ *MLB Appoints Bryan Seeley as Head of Department of Investigations*, MLB.COM (Sept. 4, 2014), http://mlb.mlb.com/news/print.jsp?ymd=20140904&content_id=93064204&vkey=pr_mlb&c_id=mlb.

¹³¹ *Id.*

and policies, including the use, possession or distribution by players or employees of prohibited substances.”¹³² This hotline is similar to the system that Federation Internationale de Football Association (“FIFA”), the world governing body for soccer, implemented for match-fixing.¹³³ The MLB implemented these suggestions, which do not appear in the collective bargaining agreement, without the consent of the MLBPA.¹³⁴

Another component that some professional sport leagues currently have in place is a confidentiality clause.¹³⁵ According to Jon Coyles, head of MLB drug testing, the Department and MLB work to keep names confidential when an individual decides to share information.¹³⁶ They are able to maintain this confidentiality through the creation of a secure website and by not requiring individuals to identify themselves when they call in.¹³⁷ However, the league is lacking any sort of protection for a player/employee if this confidentiality is breached, and his name is released to the public. Therefore, although the MLB has taken steps in the right direction, it is still missing the most important part of a whistleblower policy, which is a protection clause.

B. National Football League

1. Testing Procedures

In the NFL, an independent administrator oversees the league’s Performance Enhancing Substances Policy (“PES Policy”) under the auspices of the NFL Management Council.¹³⁸ The administrator’s responsibilities include, but are not limited to, the method of weekly testing, the selection of players to be tested, the number and frequency of reasonable-cause testing, the review and approval of therapeutic-use exemptions, and finding that a player has failed to cooperate with testing.¹³⁹

Players are subjected to urine testing as early as the pre-draft annual scouting combines.¹⁴⁰ All players are tested at least once per season,

¹³² *MLB Establishes Department of Investigations*, MLB.COM (Jan. 11, 2008), http://mlb.mlb.com/content/printer_friendly/mlb/y2008/m01/d11/c2343802.jsp.

¹³³ Katja Hoiriis, *FIFA Sets Up Match-Fixing Hotline*, PLAY THE GAME (Feb. 6, 2010), <http://www.playthegame.org/news/news-articles/2010/fifa-sets-up-match-fixing-hotline/>.

¹³⁴ MLB.COM, *supra* note 132.

¹³⁵ E-mail from Jon Coyles, Sr. Dir. of Major League Baseball Drug Program, to Ryan Ewin (May 3, 2013) (on file with Lewis & Clark Law Review).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ NAT’L FOOTBALL LEAGUE, POLICY ON PERFORMANCE ENHANCING SUBSTANCES §2.1 (2014) [hereinafter NFL PES POLICY], https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/PES_Policy_2014.pdf.

¹³⁹ *Id.*

¹⁴⁰ *Id.* § 3.1.

which generally occurs at training camp as part of a pre-season physical.¹⁴¹ Each week during the pre-season, regular season, and playoffs, 10 players on every team are tested at random.¹⁴² During the off-season, a player that is not retired may be tested up to six times.¹⁴³

Starting in 2014, the NFL and NFLPA updated their policy to allow for the collection of blood samples with the primary intent to test for HGH.¹⁴⁴ This new policy traded decreases in enforcement for recreational drugs like marijuana for more stringent testing for PEDs like steroids and HGH.¹⁴⁵

2. *Discipline*

The first time a player violates the policy with a positive test or an attempt to dilute or manipulate a test they will be suspended without pay.¹⁴⁶ The length of the suspension varies based on the substance: a player receives two games for a diuretic or masking agent, four games for a stimulant (such as Adderall), HGH, or anabolic agent, and six games if the player tested positive and tried to alter the test or dilute the sample.¹⁴⁷ The second time a player violates the policy he is suspended for 10 games and a third violation results in a two-year suspension—both regardless of the substance.¹⁴⁸ An interesting note is that as of 2014, if a player tests positive for a stimulant (such as Adderall) during the off-season, then he is subject to discipline not under the PES Policy, but rather the new Substances of Abuse Policy.¹⁴⁹ This new policy reduced some of the suspensions handed down during the 2014 season including those to Wes Welker and Stedman Bailey.¹⁵⁰ Under this policy, a player testing positive for the first time will instead be referred to the NFL's Intervention Program, with suspensions occurring after the second, third, and fourth of

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Mike Florio, *NFL to Conduct More Than 1,300 HGH Tests Per Year*, NBC SPORTS: PROFOOTBALLTALK, (Oct. 5, 2014), <http://profootballtalk.nbcsports.com/2014/10/05/nfl-to-conduct-more-than-1300-hgh-tests-per-year/>.

¹⁴⁵ Ray Fittipaldo, *Compromise Leads to New Drug Policy in NFL*, PITTSBURGH POST-GAZETTE (Sept. 18, 2014), <http://www.post-gazette.com/sports/steelers/2014/09/18/Compromise-leads-to-new-drug-policy/stories/201409180230>.

¹⁴⁶ NFL PES POLICY, *supra* note 139, § 6.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Lindsay H. Jones, *NFL Lifts Suspensions of Wes Welker, Two Others with Revised PED Policy*, USA TODAY (Sept. 17, 2014), <http://www.usatoday.com/story/sports/nfl/2014/09/17/nfl-lifts-suspensions-of-wes-welker-two-others-with-revised-ped-policy/15723307/>.

fenses.¹⁵¹ If the player tests positive for a stimulant during the season, the stimulant will be treated as a PES for disciplinary purposes.¹⁵²

3. *Appeal Process*

The NFLPA wanted greatly to have appeals heard by a third party, which the new policy allows.¹⁵³ Under the new policy, third-party arbitrators not affiliated with the NFL, NFLPA, or the Clubs handle appeals during the season and off-season for both substances of abuse and performance enhancing substances.¹⁵⁴ However, the Commissioner and the NFLPA Executive Director have the authority to settle any appeals.¹⁵⁵ Additionally, the policy leaves the Commissioner with the exclusive right to both discipline and hear appeals for legal violations related to the use, sale, and possession of drugs and other documented evidence-based violations.¹⁵⁶

4. *Confidentiality*

Although it is disappointing that the new policy does not include a whistleblower-protection provision, the NFL does take steps to ensure that confidentiality of any testing and results is a priority. The confidentiality clauses apply to all players (including authorized representatives), NFL employees, Club employees, NFLPA employees, Certified Contract Advisors, and persons involved in the administration of the Policy.¹⁵⁷ A breach of confidentiality carries up to a \$500,000 fine and possible termination if the breaching party is an NFL employee or other representative.¹⁵⁸

But while the new policy goes to great lengths to secure the confidentiality of the process and the player involved, it still does not take any steps to directly secure confidentiality for whistleblowers or to give them any kind of anti-retaliation protection. A creative reading of the Substances of Abuse Policy, specifically its charge to “take all reasonable steps to protect the confidentiality of the information acquired in accordance with the provisions of this policy,” may give rise to some confidentiality

¹⁵¹ NAT'L FOOTBALL LEAGUE, POLICY AND PROGRAM ON SUBSTANCES OF ABUSE § 1.4.1 (2014) [hereinafter NFL SOA POLICY], https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/Drug_SOA_Policy_9-29-14.pdf.

¹⁵² NFL PES POLICY, *supra* note 138, § 6.

¹⁵³ Mike Florio, *Revised Drug Policy Will Have Various New Features*, NBC SPORTS: PROFOOTBALLTALK (Sept. 12, 2014), <http://profootballtalk.nbcsports.com/2014/09/12/revised-drug-policy-will-have-various-new-features/>.

¹⁵⁴ *Id.*; see NFL PES POLICY, *supra* note 138, § 10; NFL SOA POLICY, *supra* note 151, § 4.

¹⁵⁵ See NFL PES POLICY, *supra* note 138, § 10; NFL SOA POLICY, *supra* note 151, § 4.

¹⁵⁶ NFL PES POLICY, *supra* note 138, §§ 4, 10.

¹⁵⁷ *Id.* § 12.

¹⁵⁸ *Id.* § 12.2.

protection, but this interpretation is fleeting at best.¹⁵⁹ However, there is no such language in the PES policy, and the PED policy does nothing to protect whistleblowers from any type of retaliation in case it does get out that the whistleblower revealed that the team's star player, or any other player for that matter, was taking PEDs.

C. *National Basketball Association*

1. *Testing Procedures*

The NBA has a detailed collection procedure.¹⁶⁰ To enforce their drug-testing policies in general, the NBA and the NBPA jointly select a Medical Director, who is a third-party person or entity experienced in the field of substance-abuse detection and enforcement.¹⁶¹ This expert subjects each player to four random urine tests per season and two random tests each off-season.¹⁶² These tests are conducted without prior notice to the player and without any involvement from the NBA or NBPA.¹⁶³ However, if the NBA receives information that a player may be using PEDs, that player can be brought before an Independent Expert within 24 hours of the allegation. If the Independent Expert decides that the evidence creates cause, the player will be tested.¹⁶⁴

Once a player arrives for a test, he must first show photo identification to prove he is the player to be tested.¹⁶⁵ Next, the player takes a urine test that is then distributed into two bottles for an "A" sample and a "B" sample.¹⁶⁶ These samples then go into a tamper-proof kit along with a chain-of-custody form completed by the player and the person providing the test.¹⁶⁷ This kit is then shipped overnight to the laboratory.¹⁶⁸ At the laboratory, the primary "A" sample will be tested.¹⁶⁹ The NBA notifies the NBPA of a positive test, and then notifies the player.¹⁷⁰ The player then has five days to request that his "B" sample be tested, which must be performed within 10 days of request.¹⁷¹

¹⁵⁹ NFL SOA POLICY, *supra* note 151, § 1.2.1.

¹⁶⁰ NBA COLLECTIVE BARGAINING AGREEMENT, art. XXXIII, § 4 (2011) [hereinafter NBA CBA], <http://mediacentral.nba.com/media/mediacentral/2011-Collective-Bargaining-Agreement.pdf>.

¹⁶¹ *Id.* art. XXXIII, § 2.

¹⁶² *Id.* art. XXXIII, § 6.

¹⁶³ *Id.*

¹⁶⁴ *Id.* art. XXXIII, § 5.

¹⁶⁵ NBA CBA, *supra* note 160, Exhibit 1-3.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* art. XXXIII, § 4.

¹⁷¹ NBA CBA, *supra* note 160, art. XXXIII, § 4.

As of the 2015–2016 season, the NBA and NBPA have added blood testing for HGH into their drug policy.¹⁷² According to this new policy, beginning with the start of 2015 training camps, all NBA players are subject to three unannounced HGH tests per year, with two of these tests implemented in-season and the final test during the off-season.¹⁷³

2. *Discipline*

The policy for Steroids, Performance-Enhancing Drugs (“SPEDs”), and masking agents calls for a 20-game suspension for a first violation.¹⁷⁴ If a player violates the policy a second time, then the player is suspended for 45 games and required to enter the league’s SPED program, which is a treatment program for steroids and PEDs.¹⁷⁵ Finally, after a third violation, the player will be dismissed from the NBA and may not have any association with his team or the league.¹⁷⁶ However, similar to MLB, a player may seek reinstatement after at least a two-year period. Reinstatement will be under the discretion of the NBA and the NBPA.¹⁷⁷ When HGH testing is fully implemented, discipline for positive tests will fall under this program and will carry the same penalties.¹⁷⁸

3. *Appeal Process*

According to the CBA, the Grievance Arbitrator handles appeals under the NBA Drug Policy.¹⁷⁹ The NBPA can start the appeal process once it has received approval from the player, and it must do so within 30 days after the facts of the incident are known.¹⁸⁰

Any party may initiate the process by sending written notice to the NBA.¹⁸¹ The parties then must schedule a hearing within 30 days of the NBA’s receipt of the notice.¹⁸² Once a hearing is set, the parties are required to submit a statement about the dispute at least seven days prior to the hearing.¹⁸³ This can be a joint statement or separate statements if the parties do not agree on the issue.¹⁸⁴ Next, the parties must share information, such as witnesses and evidence, three days prior to the hear-

¹⁷² Press Release, Nat’l Basketball Ass’n, NBA, NBPA to add HGH testing into anti-drug program, (Apr. 16, 2015), <http://www.nba.com/2015/news/04/16/nba-and-nbpa-to-introduce-hgh-blood-testing/>.

¹⁷³ *Id.*

¹⁷⁴ NBA CBA, *supra* note 160, art. XXXIII, § 9(c).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* art. XXXIII, § 12.

¹⁷⁸ Press Release, *supra* note 172.

¹⁷⁹ NBA CBA, *supra* note 161, art. XXXI § 6.

¹⁸⁰ *Id.* art. XXXI, § 2.

¹⁸¹ *Id.* art. XXXI, § 4.

¹⁸² *Id.*

¹⁸³ *Id.* art. XXXI, § 5.

¹⁸⁴ *Id.*

ing.¹⁸⁵ The parties may seek the Grievance Arbitrator's leave to file pre-hearing and post-hearing briefs.¹⁸⁶ The Grievance Arbitrator must issue a decision and written opinion as soon as possible, but no later than 30 days after the hearing's conclusion.¹⁸⁷

4. Confidentiality

In Section 3 of the Anti-Drug Program, the confidentiality clause reads, "neither the NBA nor the Players Association shall divulge to any other person or entity (including their respective members, affiliates, agents, consultants, employees, and the player and Team involved) . . . that it has received information regarding the use, possession, or distribution of a Prohibited Substance by a player."¹⁸⁸

This idea is further developed in Section 5 of the Anti-Drug Program. The Reasonable Cause Testing or Hearing provision states:

The parties acknowledge that the type of information to be presented to the Independent Expert is likely to consist of reports of conversations with third parties of the type generally considered by law enforcement authorities to be reliable sources, and that such sources might not otherwise come forward if their identities were to become known. Accordingly, neither the NBA nor the Players Association shall be required to divulge to each other or to the Independent Expert the names (or other identifying characteristics) of their sources of information regarding the use, possession, or distribution of a prohibited substance¹⁸⁹

Clearly, the NBA strives to keep a whistleblower's identity confidential. But, similar to MLB, there is no sign of any protection clause that would protect a player/employee from retaliation or discrimination if his name were to be made public. This missing component creates a major hole in any successful whistleblower policy because players or team representatives remain fearful of the potential negative consequences of sharing information.

D. National Hockey League

1. Testing Procedures

As noted earlier, recent scrutiny of the NHL's drug-testing procedures led to some changes in the 2012 CBA.¹⁹⁰ First, the NHL expanded

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* art. XXXI, § 6.

¹⁸⁸ *Id.* art. XXXIII, § 3.

¹⁸⁹ *Id.* § 5.

¹⁹⁰ NAT'L HOCKEY ASS'N, NHL/NHLPA PROPOSED CBA—SUMMARY OF TERMS 11 (Jan. 12, 2013) [hereinafter NHL/NHLPA PROPOSED CBA], <http://www.nhl.com/>

when players can be tested.¹⁹¹ Starting in the 2013 season, NHL players can be tested during training camp.¹⁹² Also, the League will continue to conduct “team testing” once during the regular season in addition to random testing.¹⁹³ The random testing can occur during the regular season, playoffs, and off-season.¹⁹⁴ However, the League is allowed no more than 60 tests during the off-season.¹⁹⁵ Another component that has been added to the most recent CBA is the idea of “reasonable cause testing,” which will look similar to the system in place in the MLB.¹⁹⁶ Finally, the NHL is looking into whether or not it should include HGH testing in its program.¹⁹⁷

2. Discipline

The NHL follows a similar disciplinary structure as MLB with a three-strike system.¹⁹⁸ After the first violation, a player faces a 20-game suspension without pay.¹⁹⁹ If a player tests positive a second time, then he is suspended for 60 games without pay.²⁰⁰ Finally, with a third violation, the player faces a lifetime ban from the League.²⁰¹

3. Appeal Process

The appeal process begins once a player has been notified that his A sample and B sample are positive.²⁰² After the player has received this notification, he has 48 hours to begin the appeal process.²⁰³ The next step is a pre-hearing where each party will have an opportunity to make their statements.²⁰⁴ The NHLPA will have to make its statements within 72

nhl/en/v3/ext/CBA2012/NHL_NHLPA_Proposed_CBA_-_Summary_of_Terms_FINAL_-_Jan._12,_2013%20(1).pdf.

¹⁹¹ *Id.* at 1.

¹⁹² *Id.* at 11.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 11–12.

¹⁹⁵ *Id.* at 12.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 11. HGH testing was delayed until the 2014-15 season at the earliest in August 2013. Mark Zwolinski, *NHL Delays Testing for Human Growth Hormone Until 2014–2015 Season at Earliest*, TORONTO STAR (Aug. 14, 2013), http://www.thestar.com/sports/hockey/2013/08/14/nhl_delays_testing_for_human_growth_hormone_until_201415_season_at_earliest.html. As of March 2015, there is still no timeline for implementing HGH testing.

¹⁹⁸ Andy Dolich, *Sports Drug Testing Policies: NFL, NBA, NHL, Olympics*, COMCAST SPORTSNET BAY AREA (Jan. 9, 2013), <http://www.csnbayarea.com/blog/bizball/sports-drug-testing-policies-nfl-nba-nhl-olympics>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² NHL/NHLPA PROPOSED CBA, *supra* note 190, at 12.

²⁰³ *Id.*

²⁰⁴ *Id.*

hours of the beginning of the hearing, and the NHL has within 36 hours.²⁰⁵ The actual hearing will commence shortly after the NHLPA files its intent to appeal.²⁰⁶ The hearing must begin within nine days of the NHLPA's appeal, and a decision must be made within six days after receiving the transcript from the Grievance Arbitrator.²⁰⁷ The union and the League jointly select the Impartial Arbitrator from the National Academy of Arbitrators to oversee all grievances.²⁰⁸ If for some reason an Impartial Arbitrator is not available to handle the appeal, then it will be up to the parties to appoint an Alternate Arbitrator.²⁰⁹

4. Confidentiality

Regarding confidentiality, the NHL has a clause that reads:

Test results will be kept confidential, subject to the following limited exceptions: once a positive test has been confirmed by the Impartial Arbitrator, or if no Grievance has been filed, the Player suspended will be identified, and it will be announced that the Player "has been suspended [for twenty (20) or sixty (60) NHL Games, or permanently] for violating the terms of the NHL/NHLPA Performance Enhancing Substances Program."²¹⁰

Thus, the League provides confidentiality to individuals causing the problem, but fails to provide confidentiality to those individuals who are trying to fix the problem of PED use by sharing information.²¹¹ These holes in the NFL and NHL CBAs show the need to create a system that protects the anonymity of individuals who share information about PED use as well as protection from potential retaliation if the confidentiality is broken.

III. WHISTLEBLOWER POLICIES BOTH GENERALLY AND SPORT-SPECIFIC

1. General Policies

Whistleblowing policies and statutes have a history deeply rooted in the corporate world. A major step towards openness and transparency was taken when Congress passed the Sarbanes-Oxley Act, which was en-

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION § 47.9 (2012) [hereinafter NHL CBA], http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf.

²⁰⁹ *Id.*

²¹⁰ *Id.* § 47.11.

²¹¹ *Id.*

acted after the historic scandals at organizations like Enron.²¹² This statute does not allow publicly traded companies to “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee,” which includes divulging information about illegal activities, specifically fraud, within the company.²¹³

All in all, there are 22 federal statutes that address whistleblowing, and these statutes cover a wide variety of industries.²¹⁴ For example, these policies range from the Federal Railroad Safety Act to the Clean Air Act. However, Congress has yet to pass a statute that specifically addresses professional sports, or sports generally, and it is difficult to see how any of the 22 federal statutes currently in place could be applied to professional sports.²¹⁵ This gap in legislation provides further support for pro-

²¹² Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2012).

²¹³ *Id.*

²¹⁴ *The Whistleblower Protection Programs*, U.S. DEP'T OF LABOR, http://www.whistleblowers.gov/statutes_page.html (citing 29 U.S.C. § 218C (2012); Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651 (2012); Clean Air Act, 42 U.S.C. § 7622 (2012); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (2012); Consumer Financial Protection Act of 2010, 12 U.S.C. § 5567(a) (2012); Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087 (2012); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (2012); FDA Food Safety Modernization Act, §402, 21 U.S.C. § 399d (2012); Federal Railway Safety Act, 49 U.S.C. § 20109 (2012); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (2012); International Safe Container Act, 46 U.S.C. § 80507 (2012); Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171 (2012); National Transit Systems Security Act of 2007, 6 U.S.C. § 1142 (2012); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (2012); Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 (2012); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (2012); Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2012); Seaman's Protection Act, 46 U.S.C. § 2114 (2012); Solid Waste Disposal Act, 42 U.S.C. § 6971 (2012); Surface Transportation Assistance Act, 49 U.S.C. § 31105 (2012); Toxic Substances Control Act, 15 U.S.C. § 2622 (2012); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (2012)). Additionally, at least 43 states provide legislative protection for whistleblowers. DAWN D. BENNETT-ALEXANDER & LAURA P. HARTMAN, *EMPLOYMENT LAW FOR BUSINESS* (8th ed. 2015).

²¹⁵ Floyd Landis's lawsuit against Lance Armstrong is an exception because of Armstrong's connection with the United States Postal Team. This allowed Landis to file a whistleblower lawsuit under the False Claims Act because it dealt with fraud against the government. Liz Clarke, *Floyd Landis Whistleblower Suit Targets More than Lance Armstrong*, WASH. POST (Jan. 17, 2013), http://articles.washingtonpost.com/2013-01-17/sports/36409945_1_tour-de-france-titles-whistleblower-suit-floyd-landis. Also, due to the vast connections between the government and universities, federal whistleblower statutes cover college sports in the same way as Title IX. The University of North Carolina's \$335,000 settlement with Mary Willingham, the whistleblower of UNC's alleged academic fraud spanning from 1993 to 2011, demonstrates this application. See Dan Kane, *To Settle Suit, UNC Pays Willingham \$335,000*, NEWS & OBSERVER (Mar. 16, 2015), <http://www.newsobserver.com/news/local/education/unc-scandal/article14690462.html>.

fessional sports leagues to take the matter into their own hands and create a policy to protect players, coaches, and employees who come forward with sensitive information about PED use.

Beyond federal statutes, many businesses have added whistleblowing policies to their own company rules and regulations.²¹⁶ The restaurant chain Ruby Tuesday's whistleblower policy is an example of corporate whistleblower policies enacted in response to Sarbanes-Oxley.²¹⁷ Ruby Tuesday's policy creates an environment that encourages openness and sharing when it comes to fraudulent and other illegal business activities.²¹⁸ In addition, the policy states that it "will not discharge, demote, threaten, harass or discriminate against" those who decide to share information about such crimes.²¹⁹ The policy also includes a hotline and an e-mail address where employees can divulge information about any illegal activity.²²⁰ Ruby Tuesday's policy exemplifies corporations' systemic shift towards developing their own whistleblower policies to address major problems within their industry while also providing employees with the necessary protection for speaking up.²²¹

2. *Sports-Specific Policies*

Unlike the business world, the sports world has been slower to adopt whistleblower-protection policies. In recent years though, some sports organizations/leagues, particularly internationally, have created whistleblower policies, albeit to address varying issues.

As noted earlier, FIFA is one sport organization that has made the move towards a whistleblower policy.²²² FIFA has a history of corruption, which has led to rampant allegations of match-fixing.²²³ The curtain on match-fixing was pulled back when the European Union's criminal-intelligence division "uncovered 680 suspicious games from 2008 to

²¹⁶ Frank J. Cavico, *Private Sector Whistleblowing and the Employment-at-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 617 (2004).

²¹⁷ AUDIT COMM. OF RUBY TUESDAY, INC., POLICY RELATED TO ACCOUNTING, AUDITING AND INTERNAL CONTROL MATTERS (2004), <http://www.rubytuesday.com/content/files/whistleblowerpolicy.pdf>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Fair Play—Joining Together to Protect Our Organisation Against Risks*, FÉDÉRATION INTERNATIONALE DE FOOTBALL ASS'N [hereinafter FIFA FAIR PLAY POL'Y], <https://www.bkms-system.net/bkwebanon/report/clientInfo?cin=6fifa61&language=eng>.

²²³ Brian Phillips, *Soccer's New Match-Fixing Scandal*, GRANTLAND (Feb. 8, 2013), <http://www.grantland.com/features/match-fixing-soccer/>; *Sepp Blatter and Michel Platini Get Eight-Year Bans*, BBC (Dec. 21, 2015), <http://www.bbc.com/sport/0/football/35144652>.

2011.”²²⁴ These suspicious games ranged from World Cup qualifiers to Korean league games, showing the pervasiveness of the problem.²²⁵ In order to address the problem and potential scrutiny, FIFA implemented a whistleblower system that allows players, coaches, and officials to report incidents of match-fixing.²²⁶

The channels for reporting an incident are two-fold.²²⁷ First, FIFA established a public website that allows whistleblowers to make claims and raise issues, such as violations of “statutory rules, rules of conduct and internal guidelines of our organization.”²²⁸ This platform allows whistleblowers to report violations 24/7, and the website assures that information will be “treated with the strictest confidentiality available under the applicable laws and regulations.”²²⁹ Second, “FIFA also has created a private telephone hotline for football officials to report corruption and ethics violations.”²³⁰ The ultimate goal of the website and telephone hotline is to create a sense of openness within the organization, and ultimately protect the integrity of the game of football.²³¹

However, FIFA’s whistleblower program has been heavily criticized following the “Garcia Report,” in which former United States Attorney Michael Garcia investigated allegations of corruption and bribery in the bidding process for the 2018 and 2022 World Cups.²³² Since the Garcia Report was released in November 2014, two whistleblowers that contributed to the report came forward to state that FIFA’s whistleblower policy is inadequate in both usefulness and protection.²³³ Both Bonita Meriades, a former Australia bid insider, and Phaedra Almajid, who worked on the Qatar 2022 campaign, heavily criticized FIFA’s decision not to publish the Garcia Report and instead publish a 42-page summary written by FIFA’s ethics judge. The two women stated that the ethics judge’s opinion was a “deliberate denigration of two women who have been cou-

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ FIFA FAIR PLAY POL’Y, *supra* note 222.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *FIFA Launches Website for Whistleblower Reports*, CBS SPORTS (Feb. 6, 2013), <http://www.cbssports.com/general/story/21655560/fifa-launches-website-for-whistleblower-reports>

²³¹ *Id.*

²³² Nick Harris, *FIFA Whistleblowers Break Their Silence: If You Question Governing Body, Be Prepared to Be Crucified, Be Prepared to Be Betrayed by Those Who Promised to Protect You . . .*, MAIL ONLINE (Nov. 15, 2014), <http://www.dailymail.co.uk/sport/football/article-2836114/FIFA-whistleblowers-break-silence-question-governing-body-prepared-crucified.html>.

²³³ *Id.*

rageous enough to say something.”²³⁴ In particular, Almajid stated that she was pressured into retracting previous accusations and was threatened with a \$1 million lawsuit by the Qatari government for speaking to Garcia.²³⁵ Thus, it is clear that FIFA’s whistleblower system, while admirable, still needs significant work and advances in protections for those who do decide to speak out.

The English Hockey League (“EHL”) is another organization with a type of whistleblower policy. The EHL’s whistleblower policy is designed to protect anyone who reports incidents of child welfare such as abuse within or outside the hockey environment by an adult towards a child or abuse between child team members.²³⁶ The EHL policy “makes it clear that individuals can raise a matter of concern without fear of victimization, subsequent discrimination or disadvantage.”²³⁷ The two primary purposes behind this protection are the EHL’s desire to handle issues in-house and to avoid issues being ignored.²³⁸

Another key component of the child-welfare whistleblower policy is the principle of confidentiality, which is why the policy is designed “to protect the identity of the whistleblower when they raise a concern and do not want their name to be disclosed.”²³⁹ This policy also has a process for handling false claims.²⁴⁰ The EHL states that it will take disciplinary action against any claim that is false or malicious in order to discourage lies and ensure that the information it receives is accurate.²⁴¹

The EHL policy provides an excellent example of whistleblower protection by establishing safeguards to protect both confidentiality and retaliation. Indeed, the EHL “recognises that the decision to report a concern can be a difficult one to make, not least because of the fear of reprisal from those responsible for the alleged poor practice” and in response, they will not tolerate any harassment or victimization and “will take appropriate action to protect individuals when they raise a concern in good faith.”²⁴² Further, the EHL states that it will do its best to protect the whistleblower’s identity when he does not want his name disclosed and will only reveal the name when required as part of the investigation and only with prior notice and a chance to discuss the consequences.²⁴³ While the EHL encourages whistleblowers to put their name to the alle-

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Reporting Procedures*, ENG. HOCKEY, <http://www.englishockey.co.uk/page.asp?section=631§ionTitle=Reporting+Procedures&preview=1>.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² ENG. HOCKEY, *supra* note 236.

²⁴³ *Id.*

gation, it does allow for anonymous allegations while weighing the seriousness of the issues, the credibility of the concern, and the likelihood of confirming the allegation from attributable records and evidence when deciding whether and how to investigate the claim.²⁴⁴

Next, the Union Cycliste Internationale (“UCI”), the world governing body for cycling, appears to be embracing the need for a whistleblower policy, by being “willing to provide an amnesty for those who give evidence to its independent commission on drug use in the sport providing that it does not contravene the World Anti-Doping Agency [(“WADA”)] code.”²⁴⁵ The organization “believes it is imperative witnesses give evidence ‘without fear of retribution or retaliation from the UCI.’”²⁴⁶ The UCI hopes to team up with WADA to “participate in a truth and reconciliation process covering all sports, or at least endurance sports,” but they are waiting for WADA to reconsider joining the effort as well as make necessary changes to their code.²⁴⁷ The ultimate goal is to establish a truth and reconciliation commission.²⁴⁸

The UCI already took a step in this direction when it “launched a 24-hour confidential anti-doping helpline for riders in the professional peloton.”²⁴⁹ It will be interesting to see if any more progress is made between UCI and WADA, but it certainly seems that whistleblower protection is the wave of the future.²⁵⁰

Another sporting organization that has recognized the need to move towards a whistleblower policy is British Cycling.²⁵¹ In 1998, England passed the Public Interest Disclosure Act, which was created to encourage the sharing of information.²⁵² In accordance with this law, British Cycling recognized the need to put measures in place to protect those that share information on issues ranging from “child abuse or behavior that pushes boundaries beyond acceptable limits.”²⁵³ This led British Cycling to take the position that it is “fully supportive of ‘whistle blowing’ for the sake of the groups, and will provide support and protect those who ‘whistle

²⁴⁴ *Id.*

²⁴⁵ *UCI Hopes Amnesty for Doping Whistleblowers Can Proceed*, GUARDIAN (Jan. 16, 2013), <http://www.guardian.co.uk/sport/2013/jan/16/uci-amnesty-doping-whistleblowers>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *SG 1.10 Whistle Blowing & Sharing of Information/Concerns*, BRIT. CYCLING, http://www.britishcycling.org.uk/zuvvi/media/bc_files/safeguarding/SG_1.10_Whistle_blowing.pdf.

²⁵² *Id.*

²⁵³ *Id.*

blow.”²⁵⁴ The organization also provided a Lead Officer, who the employees could report to regarding anything that was out of the ordinary or made them feel uncomfortable.²⁵⁵ However, the organization has not provided any information about the protection of whistleblowers from retaliation by those affected by the allegations.²⁵⁶

The progress seen with whistleblower policies abroad has started to make its way to some American sporting institutions, and occasionally in United States courts.²⁵⁷ One of the best-defined whistleblower policies in American sports belongs to USA Cycling.²⁵⁸ It has designed a policy that allows members of the organization to report any breaches of either its Code of Ethics or Code of Conduct to a Compliance Officer.²⁵⁹ USA Cycling’s policy makes sure to clearly state that there will be no retaliation for any report made by an individual and that the organization will do everything in its power to keep reports confidential.²⁶⁰ Finally, the USA Cycling policy makes it clear that any individual that makes false or malicious claims will face severe punishment, which was designed to limit any abuse of the policy.²⁶¹ USA Cycling’s well-defined whistleblower policy is a prime example of what a policy should look like, and can serve as a reference point for the four major professional leagues as they begin to expand and/or create policies that provide protection for whistleblowers.

As noted above, the only aspect of a quasi-whistleblower policy currently seen in professional sports is the existence of some confidentiality provisions. Only the MLB and NBA have implemented some protections, with the MLB creating an anonymous hotline in 2008 based on recommendations in the Mitchell Report²⁶² and the NBA incorporating a confidentiality component in its drug-testing program.²⁶³

But on the other end of the spectrum, the NFL and the NHL lack any direct confidentiality provision for a third party who shares infor-

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Former Rutgers basketball director of player of development Eric Murdock claims that Rutgers University administration dismissed him of his duties with the team because he blew the whistle on coach Mike Rice, who had been accused of abusing players. *Murdock Files Whistleblower Suit Against Rutgers*, CHI. TRIB. SPORTS XCHANGE (Apr. 5, 2013), http://articles.chicagotribune.com/2013-04-05/sports/chirutgers-murdock-whistleblower-suit-20130405_1_whistleblower-suit-mike-rice-tim-pernetti.

²⁵⁸ *USA Cycling Whistleblower Policy*, USA CYCLING, <http://www.usacycling.org/usa-cycling-whistleblower-policy.htm>.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Madden et al., *supra* note 9.

²⁶³ NBA CBA, *supra* note 160, art. XXXIII.

mation about PED use.²⁶⁴ Although these leagues provide confidentiality when a player tests positive for PEDs, they have yet to promise confidentiality and protection to third parties brave enough to share information.²⁶⁵

Although the steps taken by MLB and the NBA are positive ones for the professional sports world, all of the leagues still lack any sort of protection from retaliation for whistleblowers if their name is released to the public. In fact, questions about whether MLB will “be able to guarantee whistle-blowers’ anonymity” have already been raised.²⁶⁶

If MLB is not capable of guaranteeing anonymity/confidentiality, then it is important to have a policy in place to protect players/employees from any threat of retaliation. These fears show the need for MLB as well as all professional sport leagues to expand upon their current systems and create a complete policy that will protect whistleblowers against any form of retaliation.

IV. WHISTLEBLOWER-PROTECTION POLICY IN FOUR MAJOR SPORTS

A. *The Need for this Type of Policy*

There are many benefits to a whistleblower-protection policy, as well as reasons why it is necessary for professional sport leagues to adopt such a policy. One reason that professional sport leagues are in desperate need of a whistleblower-protection policy is because of “the unwritten code of silence that has protected drug users in pro sports from exposure and punishment.”²⁶⁷

The fear of being “labeled as a snitch or a rat” and the backlash that comes with such a label has kept players quiet.²⁶⁸ The consequences of “snitching” on a teammate can be severe. A player who turns in a fellow teammate can become an outcast within the clubhouse as well as become an “untouchable” in the eyes of many organizations.²⁶⁹ Ultimately, this

²⁶⁴ See NFL SOA POLICY, *supra* note 151, § 1.2.1; NHL CBA, *supra* note 208, § 47.11.

²⁶⁵ See NFL SOA POLICY, *supra* note 151, § 1.2.1; NHL CBA, *supra* note 208, § 47.11.

²⁶⁶ Madden et al., *supra* note 9.

²⁶⁷ Amy Shipley, *Baseball Starts Playing Hardball in South Florida Doping Probe*, SUN SENTINEL (Apr. 6, 2013), http://articles.sun-sentinel.com/2013-04-06/news/fl-mlb-drug-probe-20130407_1_usada-lance-armstrong-u-s-anti-doping-agency.

²⁶⁸ Jennifer Ann Heiner, Comment, *Concussions in the National Football League*. Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan and a Legal Analysis of the NFL's 2007 Concussion Management Guidelines, 18 SETON HALL J. SPORTS & ENT. L. 255, 280 (2008).

²⁶⁹ Ian Casselberry, *Can MLB Drug Testing Catch Up to Ever Evolving PED Industry?*, BLEACHER REP. (Jan. 16, 2013), <http://bleacherreport.com/articles/1487967-can-mlb-drug-testing-catch-up-to-ever-evolving-ped-industry>.

type of culture and fear is detrimental to professional sport leagues that are trying to clean up their sport because it fosters an environment where information is withheld.²⁷⁰ However, by implementing a whistleblower-protection clause, the leagues would be able to protect the player from the potential negative consequences that come along with divulging information. Not only would this type of policy help change the negative connotations associated with speaking out by discouraging the “snitch” label, but it would also have the positive consequence of trying to end pervasive PED use.²⁷¹

The second benefit of a whistleblower protection clause is that it will help create a deterrent for any player considering using PEDs. By creating an open environment, which calls for a free flow of information, a player would no longer feel comfortable that his actions would remain secret. This uncertainty would likely result in players thinking twice about using PEDs because they would never know if and when someone may turn them in. Unlike a drug test, these claims could come at any time an individual has knowledge of PED use, which could encourage players to abide by the rules at all times.

An up-and-coming sporting league has recently shown the value of protecting whistleblowers in the drug-testing realm. In July 2015, the world of electronic sports was enveloped in a scandal after Kory “Semphis” Friesen admitted that he and his team had taken Adderall during a competition in Turkey where they were playing the video game *Counter-Strike* for \$250,000 in prizes.²⁷² But instead of punishing Friesen for his truthfulness, the Electronic Sports League instead reacted swiftly by announcing that it was implementing a drug-testing policy for the first time with assistance from WADA.²⁷³ In this case, a whistleblower’s disclosure helped push drug testing further instead of allowing the PED users to hide in the shadows and gain an unfair advantage.

With the list of players testing positive for PEDs getting longer and longer, there is no doubt the current system is broken. Thus, it is important that professional sport leagues explore other options to curb PED use—and protecting whistleblowers is a natural place to start.

²⁷⁰ *Id.*

²⁷¹ Schnell, *supra* note 8, at 25.

²⁷² Darren Rovell, *ESL Announces Plans to Test for PEDs*, ESPN.COM (July 23, 2015), http://espn.go.com/moresports/story/_/id/13308581/esl-world-largest-e-sports-league-test-peds.

²⁷³ *Id.*

B. *Implementation of the Policy*

Using the other whistleblower policies detailed above as a guide, it is possible to shape an effective anti-retaliation clause for the four major professional sports leagues.²⁷⁴ The following is a proposed clause:

Professional Sports Whistleblower Protection Clause

1. No player, coach, or employee, who in good faith reports a violation of his or her respective league's Drug-Testing Policy, shall suffer discrimination, harassment, retaliation, or adverse employment consequence by his or her team, any other member team, or the League itself. Any owner, manager, player, team, or league employee who retaliates against someone who has reported a violation in good faith is subject to discipline up to and including termination of employment, or in the case of an owner, fines, surrendering draft picks, or even removal as an owner in the league.²⁷⁵
2. A Whistleblower Officer appointed by the League and approved by the League's respective Players Association will investigate any claims of discrimination, harassment, retaliation, or adverse employment consequence against a whistleblower. The Officer will evaluate factors such as proximity, testimony, and witnesses to determine the validity of the claims. The Whistleblower Officer should be a neutral, unbiased party jointly approved and paid for by the League and the Players Association.

²⁷⁴ *USA Cycling Whistleblower Policy*, *supra* note 258.

²⁷⁵ It is not unprecedented to seek to have an owner removed from a league, but prior attempts were not completely carried out. In 2014, the NBA began the process to remove then-Clippers' owner Donald Sterling from his ownership after racist comments he made about his players and others surfaced, but the process was abandoned when the probate court allowed Sterling's wife to sell the team to former Microsoft CEO Steve Ballmer for \$2 billion on Sterling's behalf. Nathan Fenno, *Donald Sterling Loses Court Battle to Prevent Sale of Clippers*, L.A. TIMES (July 28, 2014), <http://www.latimes.com/sports/sportsnow/la-sp-sn-sterling-donald-shelly-clippers-judge-ruling-20140728-story.html>. Major League Baseball has twice banned owners from being able to participate in ownership decisions, but both times allowed the owners to retain a controlling interest and left open a possible return after suspension. See Glen Macnow, *Reds Owner Is Suspended 1 Year, Fined the Penalty: \$25,000. Marge Schott Will Still Pay the Bills. But She Won't Be Able to Run the Team*, PHILA. INQUIRER (Feb. 4, 1993), http://articles.philly.com/1993-02-04/sports/25955938_1_cincinnati-reds-owner-marge-schott-inappropriate-language; Murray Chass, *Baseball; Faced With Suspension, Steinbrenner Sought an Alternative*, N.Y. TIMES, Aug. 1, 1990, at A13. The MLB also attempted to replace former Dodgers owner Frank McCourt with a league representative after accusations of McCourt's financial mismanagement of the club during a messy personal divorce, but attempts to actually remove the McCourts from ownership were abandoned when McCourt agreed to sell the club in 2011. Bill Shaikin, *McCourt Agrees to Sell Dodgers*, L.A. TIMES (Nov. 1, 2011), <http://latimesblogs.latimes.com/dodgers/2011/11/mccourt-agrees-to-sell-dodgers.html>.

In order to implement this new policy, the owners of the teams and the players' unions must agree on the terms, which will ultimately be included in their respective league's CBA.²⁷⁶ This policy would likely be considered a mandatory subject of bargaining because it would affect the terms and conditions of the players' employment and the employee's status by potentially leading to suspension or even termination.²⁷⁷

When examining the policy from a player's perspective, it is possible to see a few arguments against the whistleblower-protection policy. A Player's Association could argue that owners might try to insulate themselves from a claim of discrimination against a player by disguising their actions as merely a routine business decision. In practice, this should not be an issue because the Whistleblower Officer will investigate claims of retaliation. For example, by examining the proximity between the whistleblower's disclosure and the alleged retaliation, the Whistleblower Officer will be able to determine whether or not discrimination actually occurred or if it truly was a business decision.²⁷⁸

Conversely, the owners may argue that this policy will hinder their ability to make routine and necessary personnel decisions because a player who shares information about PED use is now protected and insulated from being considered for such things like trades, firings, or reprimands. The owners' concerns, like those of the players, are only legitimate when there are no safeguards in place. With a Whistleblower Officer in place to evaluate the facts and determine whether actions taken are legitimate personnel decisions or discriminatory, these arguments against whistleblower policies lack merit.

The players may also be concerned that this policy will stifle camaradery and damage the atmosphere and environment of a professional sports team locker room or clubhouse. A locker room is often known for practical jokes and poking fun at other players, which might make it difficult to determine whether acts that would otherwise be considered good-natured are actually acts of retaliation. Again, this is an area where the Whistleblower Officer will be indispensable. For example, if an investigation by the Whistleblower Officer uncovers that a player who disclosed PED use found plastic rats in his locker and was called a snitch by

²⁷⁶ A collective bargaining agreement is defined as a "[w]ritten, legally enforceable contract for a specified period, between the management of an organization and its employees represented by an independent trade union." *Collective Bargaining Agreement*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/collective-bargaining-agreement.html>.

²⁷⁷ *Id.*

²⁷⁸ See Elmer Nordstrom, 292 N.L.R.B. 889, 932 (1989) (holding that the Seattle Seahawks' decision to release wide receiver Sam McCullum was unlawful retaliation for McCullum's union activities and not a valid business decision). In *Nordstrom*, the team's union representative had criticized the team for allegedly releasing injured players before they had fully recovered. *Id.*

his teammates, then the facts would point the Whistleblower Officer to conclude that these actions are likely discriminatory and retaliatory. On the other hand, a practical joke played on a player months after reporting a teammate would most likely be viewed as commonplace in a locker room. Ultimately, the determination of what is good-natured and what is retaliation will fall to the Whistleblower Officer.

Another potential argument from either owners or players against whistleblower-protection policies is that termination of employment is too severe of a penalty for those committing the retaliation. This concern, however, is easily managed. First, the anti-retaliation clause reads “up to and including termination,” and therefore it is possible to have a range of penalties depending on the severity of the retaliation. Thus, a penalty could vary from a fine to a suspension to termination. This would be collectively bargained by the unions and owners. Ultimately, it is necessary to have the potential for severe penalties like termination because the goal is to eliminate discrimination and retaliation for sharing information about PED use and this can only be accomplished if there is a true deterrent.

Finally, how to handle a malicious claim made in bad faith may arise during player/owner negotiations about. For example, one player might falsely report PED use by another player, motivated solely by something that occurred on the field/court/ice. These types of claims are not a legitimate reason to forgo a whistleblower policy because the Whistleblower Officer would ferret out these individuals. For this reason, the team in this scenario could take action against the player making a false claim because such behavior is detrimental to the team and organization. Hopefully, a player or employee would be discouraged from reporting false information by the lack of protection for bad-faith claims and the system of checks and balances put in place by the Whistleblower Officer.

CONCLUSION

In the era of social media and 24/7 news coverage, media outlets are always digging and looking for a scandal.²⁷⁹ This constant search for the next big news story has caused private information to be leaked in the past, with the target often being professional sports figures.²⁸⁰ Indeed, Ryan Braun has previously claimed that the MLB breached his confiden-

²⁷⁹ John Price, Neil Farrington & Lee Hall, *Tweeting with the Enemy? The Impacts of New Social Media on Sports Journalism and the Education of Sports Journalism Students*, 1 JOURNALISM EDUC. 9, 18–19 (2012).

²⁸⁰ Michael O’Keeffe, *MLB, Union Say They Didn’t Violate Confidentiality, Leak News of Ryan Braun’s Positive Drug Test*, N.Y. DAILY NEWS (Feb. 24, 2012), <http://www.nydailynews.com/sports/baseball/mlb-union-didn-violate-confidentiality-leak-news-ryan-braun-positive-drug-test-article-1.1028253>.

tiality by leaking information about his positive drug test.²⁸¹ While establishing confidentiality for whistleblowers is a positive step taken by the MLB and NBA, more must be done in the event a whistleblower's name is revealed or leaked to the public.²⁸² Such a scenario is a real possibility when anyone can break the news with the touch of a fingertip in today's world of social media.²⁸³

For these reasons, it is imperative that professional sports leagues provide meaningful protection to whistleblowers if their names are made public. It is time for America's big four professional sports leagues to follow the lead of USA Cycling, the business world, and others by enacting whistleblower policies that provide adequate safeguards for those willing to speak out against PED use.²⁸⁴ Until the MLB, NFL, NHL, and NBA take this next logical step, players and employees will continue to work in fear because of the negative consequences²⁸⁵ that come with sharing information, and therefore the "code of silence" will persist.²⁸⁶ No employee should ever be afraid to voice his or her opinions and concerns, which is why it is time for American professional sports leagues to put a protection policy in place that will create a truly open environment and in the process hopefully begin to put an end to PED use.

²⁸¹ *Id.*

²⁸² NBA CBA, *supra* note 160, art. XXXIII.

²⁸³ *See generally* DAVID J. KRAJICEK, THE SOCIAL MEDIA REVOLUTION IN BREAKING-NEWS JOURNALISM (2012), http://thecrimereport.s3.amazonaws.com/2/e2/c/1338/krajicek_journalism_s_social_media_revolution_final2.pdf.

²⁸⁴ USA Cycling Whistleblower Policy, *supra* note 258.

²⁸⁵ Schnell, *supra* note 8, at 25.

²⁸⁶ *Laraque's Allegations Not So Easily Dismissed*, FOX NEWS (Nov. 9, 2011), <http://www.foxnews.com/sports/2011/11/09/laraques-allegations-not-so-easily-dismissed/>.