

MEASURING BASEBALL'S HEARTBEAT: THE HIDDEN HARMS OF WEARABLE TECHNOLOGY TO PROFESSIONAL BALLPLAYERS

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ABSTRACT

After two-and-a-half decades of labor peace in Major League Baseball, storm clouds of a player strike are brewing as the operating Competitive Bargaining Agreement comes under fire. That same CBA includes Attachment 56, the most expansive allowance of wearable technology of the four major American professional sports. While the privacy of the athletes' data might be the foremost concern under Attachment 56, there are a myriad of untapped arenas involving the use and dissemination of data from wearables, including issues in good-faith contracting and contract and trade negotiations. After situating the wearables provisions in the context of the CBA and describing the approved technologies, this Note will identify three infrequently discussed problems in Attachment 56 before positing ways around these concerns.

INTRODUCTION

On December 1, 2016, Major League Baseball (“MLB”) owners and the Major League Baseball Players Association (the “Players Association”) agreed to a new Collective Bargaining Agreement (“CBA”) for the 2017-2021 seasons.¹ Just over a year later, two-time All-Star reliever Pat Neshek agreed to a two-year contract with the Philadelphia Phillies.² Neshek was thirty-seven years old,³ about a

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¹ Richard Justice, *Peace & Glove: Owners, Players Reach CBA Deal*, MLB (Dec. 1, 2016), <https://www.mlb.com/news/mlb-owners-players-agree-to-new-labor-deal/c-209969472>.

² Alec Nathan, *Report: Pat Neshek, Phillies Agree to Contract After July Trade to Rockies*, BLEACHER REPORT (Dec. 11, 2017), <https://bleacherreport.com/articles/2672426-report-pat-neshek-phillies-agree-to-contract-after-july-trade-to-rockies>.

decade older than the average Major League pitcher,⁴ and set to earn twice as much as the average MLB player.⁵ Yet it was Neshek who, on February 14, 2019, forecasted a grim future of labor peace in baseball, explicitly using the s-word: he “100 percent” expected a strike.⁶ “I think we signed a bad CBA, personally,” Neshek opined, “we’re not going to have baseball.”⁷

The last work stoppage in Major League Baseball occurred during the 1994 season; its resolution gave baseball the longest period of continuous labor peace across the four major American professional sports.⁸ Storm clouds are brewing in baseball, however, as player salaries have stagnated,⁹ offseason free agents are slow to sign,¹⁰ and teams spend proportionally less on players than ever before¹¹—all despite record revenues.¹² Commentators have focused on MLB’s

³ *Pat Neshek Player Page*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/n/neshepa01.shtml> (last visited Sept. 21, 2019).

⁴ *Major League Baseball Pitching Year-by-Year Averages*, BASEBALL REFERENCE, <https://www.baseball-reference.com/leagues/MLB/pitch.shtml> (last visited Sept. 21, 2019).

⁵ See *Pat Neshek*, SPOTRAC, <https://www.spotrac.com/mlb/philadelphia-phillies/pat-neshek-531/> (last visited May 3, 2019) (Neshek’s annual salary is \$8.125 million); see also Ronald Blum, *APNewsBreak: Average MLB Salary Down for 1st Time Since '04*, AP NEWS (Dec. 21, 2018), <https://www.apnews.com/cc612855378d4327969e8293c9dba050> (stating that the average annual salary in the MLB is \$4.1 million).

⁶ Gabe Lacques, *MLB Players Are Ready to 'Burn the Whole System Down.'* *Here's What They Want to Avoid a Strike*, USA TODAY (Feb. 22, 2019), <https://amp.usatoday.com/amp/2948101002>.

⁷ Thomas Lott, *Phillies Pitcher Pat Neshek Thinks MLB's Labor Peace Is Going to Come to an End*, SPORTING NEWS (Feb. 14, 2019), <http://www.sportingnews.com/us/mlb/news/mlb-news-hot-stove-pat-neshek-were-not-going-to-have-baseball-phillies/1d2ezrdldiypb1fzc1z5nv77y3>.

⁸ *Id.*

⁹ Blum, *supra* note 5.

¹⁰ Lott, *supra* note 7.

¹¹ Maury Brown, *MLB Spent Less on Player Salaries Despite Record Revenues in 2018*, FORBES (Jan. 11, 2019), <https://www.forbes.com/sites/maurybrown/2019/01/11/economic-data-shows-mlb-spent-less-on-player-salaries-compared-to-revenues-in-2018/#62e31a4d39d7>.

¹² Maury Brown, *MLB Sees Record Revenues of \$10.3 Billion for 2018*, FORBES (Jan. 7, 2019), <https://www.forbes.com/sites/maurybrown/2019/01/07/mlb-sees-record-revenues-of-10-3-billion-for-2018/#5e6162ee5bea>.

“broken” economics¹³ and how the Players Association might push for change in the next CBA.¹⁴ But the current MLB CBA contains the seeds of another problem that has received far less attention than lower salaries and fewer offseason transactions: the use and regulation of wearable technology.

Keeping high-performing athletes on the field has been hailed as the “Holy Grail” of professional sports,¹⁵ and the use of wearables appears to be the next step in its pursuit.¹⁶ In 2016, MLB approved the in-game use of specific wearable technology, or simply “wearables,” by players.¹⁷ Wearables are devices worn by athletes to measure, track, and record biometric data, ranging from heart rate to hormone levels.¹⁸ The most popular and commercially successful example of wearable technology is the Fitbit,¹⁹ but in the realm of sports, wearables become far more specific, more detailed, and more expensive than a wristwatch-like device measuring calories burned during exercise.²⁰ Despite being limited to only a handful of devices, MLB’s approval of wearable

¹³ See Jeff Passan, *Here's Why Baseball's Economic System Might Be Broken*, YAHOO! SPORTS (Jan. 16, 2018), <https://sports.yahoo.com/heres-baseballs-economic-system-might-broken-224638354.html>.

¹⁴ See Mike Axisa, *Five Ways the MLB Players Union Can Fix Baseball and Get Young Players More Money*, CBS SPORTS (Jan. 18, 2018), <https://www.cbssports.com/mlb/news/five-ways-the-mlb-players-union-can-fix-baseball-and-get-young-players-more-money/>.

¹⁵ Aaron Gordon, *Searching for Sports' Holy Grail*, VICE (Nov. 3, 2015), https://sports.vice.com/en_us/article/kbv4py/searching-for-sports-holy-grail.

¹⁶ See Rick Maese, *Moneyball 2.0: Keeping Players Healthy*, WASH. POST (Aug. 24, 2015), https://www.washingtonpost.com/sports/moneyball-20-keeping-players-healthy/2015/08/24/5011ac54-48e6-11e5-9f53-d1e3ddfd0cda_story.html?utm_term=.695337efe6c1.

¹⁷ See ASSOCIATED PRESS, *APNewsBreak: MLB Approves Wearable Technology*, USA TODAY (Apr. 5, 2016), <https://www.usatoday.com/story/sports/mlb/2016/04/05/ap-newsbreak-mlb-approves-wearable-technology/82660382/> (approving two devices). A third device came in 2017. See Darren Rovell, *MLB Approves Device to Measure Biometrics of Players*, ESPN (Mar. 6, 2017), http://www.espn.com/mlb/story/_/id/18835843/mlb-approves-field-biometric-monitoring-device.

¹⁸ See Barbara Osbourne, *Legal and Ethical Implications of Athletes' Biometric Data Collection in Professional Sport*, 28 MARQ. SPORTS L. REV. 37, 37–38 (2017) (defining biometric data and wearables).

¹⁹ FITBIT, <https://www.fitbit.com/home>.

²⁰ See *infra* Part I(b).

technology²¹ is the most expansive allowance to date, as no other league has permitted biometric data devices to be worn during official league games.²²

Understandably, Major League players and their union²³ have expressed concerns about the collection and use of their health information by teams.²⁴ The most common concern among players and commentators, imagining a world where teams can tell who got a good night's sleep on any given day, is that rapid expansion of wearables threatens privacy away from work.²⁵ While privacy might be the foremost concern, there are a myriad of untapped arenas involving the use and dissemination of data from wearables.²⁶

²¹ 2017-2021 BASIC AGREEMENT, ATTACHMENT 56—WEARABLE TECHNOLOGY, https://docs.wixstatic.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf [hereinafter "CBA"].

²² See Eric Fisher, *Wearable Tech Wins Over Major League Baseball*, N.Y. BUS. J. (Mar. 17, 2017), <https://www.bizjournals.com/newyork/news/2017/03/17/wearable-tech-wins-over-major-league-baseball.html>.

²³ Minor League players are not so lucky, without the same degree of union protection. See Nicholas Zych, *Collection and Ownership of Minor League Athlete Activity Biometric Data by Major League Baseball Franchises*, 14 DEPAUL J. SPORTS L. 129 (2018). Minor Leaguers were the subjects of the largest league performance study to date, with a device that had yet to be approved at the Major League level. See Garrett Hulfish, *Whoop and MLB Discover the Importance of Rest in Largest League Performance Study*, DIGITAL TRENDS (Dec. 12, 2016), <https://www.digitaltrends.com/outdoors/whoop-mlb-performance-study-results/#/1-5>.

²⁴ See Joe Lemire, *Baseball's Union Remains Wary of Wearables*, VOCATIVE (Aug. 8, 2016), <https://www.vocativ.com/348033/baseballs-union-remains-wary-of-wearables/>.

²⁵ See Rian Watt, *New Technologies Are Forcing Baseball to Balance Big Data with "Big Brother"*, VICE (Mar. 27, 2016), https://sports.vice.com/en_us/article/8qygbp/new-technologies-are-forcing-baseball-to-balance-big-data-with-big-brother.

²⁶ See, e.g., Marc Tracy, *With Wearable Tech Deals, New Player Data Is Up for Grabs*, N.Y. TIMES (Sept. 9, 2016), <https://www.nytimes.com/2016/09/11/sports/ncaafootball/wearable-technology-nike-privacy-college-football.html> (asking who has the rights to player data); see also Brian H. Lam, *Athletes and their Biometric Data—Who Owns It and How It Can Be Used*, NAT. L. REV. (Dec. 19, 2017), <https://www.natlawreview.com/article/athletes-and-their-biometric-data-who-owns-it-and-how-it-can-be-used> (exploring in part commercial use of biometric data); Adam Candee, *Key Questions Raised by Reported MGM-AAF Sports Betting Deal*, LEGAL SPORTS REP. (Sept. 10, 2018),

This Note will look beyond the confines of the privacy concerns raised by wearable devices. Specifically, this Note contends that data collection through wearable technology pursuant to Attachment 56 of the MLB CBA raises issues of good-faith contracting, team-player and team-team negotiations, and working conditions under United States labor law. Part I provides an overview of Attachment 56 of the CBA, which covers in-game use of wearable technology and treatment of the data it generates. The first Part sketches how the MLB CBA came about, how the CBA continues to protect the league from antitrust liability under the Sherman Act via labor law, and what the CBA contains therein. Part II discusses in detail three areas threatened by Attachment 56: health information asymmetry in trades between teams, coercion in contract negotiations between players and teams, and the intentional overexertion of expendable athletes. Additionally, Part II applies applicable background concepts in contracts and labor law to each of these three potential problems. Finally, Part III posits solutions to these problems that the league or the Players Association might pursue.

I. ATTACHMENT 56 OVERVIEW

Attachment 56²⁷ embodies the product of negotiations between the Players Association and league owners regarding the in-game use and regulation of wearable technology.²⁸ While the text of Attachment 56 alone can inform an analysis of the impacts of authorizing wearables, it is helpful to recognize this particular agreement's place in a larger, negotiated framework. This Part begins by looking at the CBA as a whole before diving into the language of Attachment 56 in particular. Next, this Part examines the handful of devices permitted through Attachment 56's authority, with a particular focus on why teams or players would want the information gleaned from such devices.

<https://www.legalsportsreport.com/23963/mgm-aaf-sports-betting-deal/> (raising the question of biometric data's place in legalized sports gambling).

²⁷ CBA, *supra* note 21, at ATTACHMENT 56. As part of the CBA, an Attachment contains the same legal force as the collectively bargained agreement between the Players Association and the league. Although the term "Attachment" might sound ancillary or insignificant, Attachments make up the largest single portion of the CBA in both quantity and space, between Articles, Attachments, and Appendices.

²⁸ *See id.*

A. *The MLB CBA*

In 1947, the Taft-Hartley Act²⁹ amended the National Labor Relations Act of 1935,³⁰ prohibiting unions from engaging in certain “unfair labor practices”³¹ while also protecting the affirmative right of employees and their unions to demand, among other things, that employers bargain with workers collectively.³² About twenty years after the passage of the Taft-Hartley Act, in 1968, the Players Association negotiated with baseball club owners to produce the first CBA in major American professional sports.³³ What separates professional athletics from most other unionized industries, however, is that athletes engage in bargaining at both the collective level and the individual level.³⁴ That is to say, the Players Association is “the sole and exclusive collective bargaining agent for all Major League Players . . . with regard to all terms and conditions of employment,”³⁵ but the individual players themselves nevertheless retain the right to negotiate their particular contracts with their respective teams.³⁶

1. *Why Have a CBA?*

The threat of antitrust liability, among other factors, has driven American professional sports leagues to institute players’ unions and CBAs.³⁷ The goal of antitrust, roughly stated, is to foster economic competition, which, in turn, is rendered impossible when one firm holds sufficiently dominant market power or when multiple firms cooperate in order to maintain market power.³⁸ Generally, a sports league is a self-selecting and self-regulating combination of competing teams cooperating to create a product—professional sports—that usually

²⁹ Taft-Hartley Act, 29 U.S.C. §§ 141–97 (2018).

³⁰ National Labor Relations Act (NLRA) of 1935, 29 U.S.C. §§ 151–69 (2018).

³¹ Taft-Hartley Act, 29 U.S.C. § 158(b).

³² See PAUL C. WEILER ET AL., SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS 98 (5th ed. 2015).

³³ *History of the Major League Baseball Players Association*, MLBPA, <https://www.mlbpa.org/history.aspx> (last visited May 3, 2019).

³⁴ See Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 341 n.12 (1989).

³⁵ CBA, *supra* note 21, at art. II.

³⁶ See *id.* at arts. III–IV.

³⁷ See WEILER, *supra* note 32, at 261.

³⁸ See EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 1–2 (3d. ed. 2018).

dominates its market.³⁹ By its very nature, then, this structure potentially implicates Sections 1 and 2 of the Sherman Antitrust Act,⁴⁰ which prohibit “[e]very contract, combination . . . , or conspiracy in restraint of trade,”⁴¹ and condemn “monopolization”⁴² respectively. Section 7 of the Sherman Act permits private actions against potential antitrust violators and awards treble damages for violations.⁴³ In a professional sport like baseball, where the average MLB team is worth \$1.645 billion, the average revenue is \$315 million, and the average operating income is \$29 million,⁴⁴ antitrust liability is too costly to risk.

Baseball, however, has an exceptional antitrust history.⁴⁵ Unlike every other major American professional sport, baseball contains an antitrust exemption, dating back to *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*⁴⁶ and reaffirmed in *Toolson v. New York Yankees*⁴⁷ and *Flood v. Kuhn*.⁴⁸ Nevertheless, the exemption has been tested frequently in court⁴⁹ and in Congress,⁵⁰ and the anomaly receives its fair share of recognition for being a “precedential island.”⁵¹ Its purpose is to “protect MLB from antitrust lawsuits challenging ‘decisions made for the collective good’” by preemptively tipping the scale in the league’s favor.⁵² In the past, MLB has backed down from potentially anticompetitive activities when its

³⁹ See WEILER, *supra* note 32, at 282–83. The exception is Major League Soccer, which pushed a successful “single-entity defense” in *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002).

⁴⁰ 15 U.S.C. §§ 1–7 (2018).

⁴¹ *Id.* at § 1.

⁴² *Id.* at § 2.

⁴³ *Id.* at § 15(a).

⁴⁴ Mike Ozanian, *Baseball Team Values 2018*, FORBES (Apr. 11, 2018), <https://www.forbes.com/sites/mikeozanian/2018/04/11/baseball-team-values-2018/#3e070dda3fc0>.

⁴⁵ See WEILER, *supra* note 32, at 180–215.

⁴⁶ 259 U.S. 200 (1922) (holding that the activity of baseball is not interstate commerce under the meaning of the term for antitrust regulation).

⁴⁷ 346 U.S. 356 (1953) (declining to overturn the *Federal Baseball* antitrust exemption in the context of the reserve system of team control over players).

⁴⁸ 407 U.S. 258 (1972) (declining to overturn *Federal Baseball* once again in the context of the reserve clause).

⁴⁹ See, e.g., *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686 (9th Cir. 2015).

⁵⁰ Curt Flood Act, Pub. L. 105-297, 105 Stat. 112 (1998).

⁵¹ *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1151 (10th Cir. 2016) (J. Gorsuch, concurring).

⁵² See WEILER, *supra* note 32, at 288.

antitrust immunity was threatened.⁵³ Done properly, collective bargaining agreements have the power to protect league actions that might otherwise seem to be anticompetitive or trigger antitrust liability.⁵⁴ Therefore, part of the MLB CBA's purpose is to serve as an additional protective layer shielding the league's actions from antitrust liability under what is called the non-statutory labor exemption.

There are two labor exemptions to the Sherman Act: statutory and non-statutory.⁵⁵ The statutory labor exemption traces its origins to § 6 of the Clayton Act, which gives labor unions a statutory exemption from being considered a "combination in restraint of trade."⁵⁶ The non-statutory exemption, meanwhile, was judicially created by two 1965 cases: *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co.*⁵⁷ and *United Mine Workers of America v. Pennington*.⁵⁸ The non-statutory exemption protects what might be considered restraints of trade by terms negotiated through collective bargaining.⁵⁹ In other words, in the face of what would otherwise be antitrust violations, the statutory exemption shields union activity and the non-statutory exemption shields agreements between employers and unions.⁶⁰

The case *Mackey v. National Football League*⁶¹ showcases the non-statutory labor exemption in a sports context. At issue was the NFL's so-called Rozelle Rule, which gave complete discretion to the Commissioner in regard to veteran free agent compensation.⁶² Although the CBA included the rule, the court concluded that the league could not

⁵³ See David Schoenfield, *Still 30 Teams: Contraction Timeline*, ESPN (Feb. 5, 2002), <http://assets.espn.go.com/mlb/s/2002/0205/1323230.html> (considering shrinking the number of MLB teams down to 28 by terminating the Minnesota Twins and Montreal Expos, Commissioner Bud Selig backed off in part due to legislation proposed by two Minnesota Congressmen "aimed at ending baseball's federal antitrust exemption").

⁵⁴ See WEILER, *supra* note 32, at 388–402.

⁵⁵ 1 JAMES T. GRAY, *SPORTS LAW PRACTICE* § 1.03 (Matthew Bender, 3d ed.) (2018).

⁵⁶ *Id.*

⁵⁷ 381 U.S. 676 (1965).

⁵⁸ 381 U.S. 657 (1965).

⁵⁹ See WEILER, *supra* note 32, at 388–402.

⁶⁰ GRAY, *supra* note 55.

⁶¹ 543 F.2d 606 (8th Cir. 1976).

⁶² *Id.* at 610–11. When a team signed a free agent player who had been under contract with another team in the NFL previously, the player's new team needed to provide adequate compensation to the player's old team, under the discretion of the League Commissioner.

invoke the non-statutory labor exemption.⁶³ The court assessed the rule and the CBA with a three-pronged test: the non-statutory exemption applies and federal labor law trumps antitrust where (1) “the restraint on trade primarily affects only the parties to the collective bargaining agreement,”⁶⁴ (2) “where the agreement sought to be exempted concerns a mandatory subject of collective bargaining,”⁶⁵ and (3) “where the agreement sought to be exempted is the product of arm’s-length bargaining.”⁶⁶ The court found that the NFL unilaterally imposed the Rozelle Rule on a fledgling players association, thereby failing the third prong.⁶⁷

Mackey, then, clarifies the non-statutory labor exemption to antitrust liability by drawing a line around what subjects may be part of a CBA and how a CBA may be negotiated.⁶⁸

2. *What Does the MLB CBA Cover?*

The MLB CBA is a veritable Frankenstein’s monster of topics relating to the terms and conditions of the players’ employment, given life so that baseball—like other leagues—can shelter itself from antitrust liability by placing itself under federal labor law. It is a dynamic document not only because of its negotiated origins, but also because it responds to the changing world around the game. Attachment 56, governing wearables, reflects the adaptation of sport and text.

a. *Textual Analysis of Attachment 56*

Attachment 56 memorializes, in nine numbered paragraphs, “the approval, use and implementation of ‘wearable technology.’”⁶⁹ This section of the Note will highlight terms and phrases critical to the forthcoming analysis.

Paragraph 1 defines “wearable technology” as “any equipment, program, software, device or attire which is designed to collect and/or

⁶³ *Id.* at 615–16.

⁶⁴ *Id.* at 614.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 615–16.

⁶⁸ *Id.*

⁶⁹ CBA, *supra* note 21 at ATTACHMENT 56. That the Attachment is a letter is by no means unusual for the MLB CBA. In fact, 38 of the 56 Attachments (and one of the Addenda) are communications of this sort between a representative of the league and a representative of the Players Association. *See id.*

analyze information or data related to a Player's health or performance at any location (including on-field, off-field and/or away from the ballpark)."⁷⁰ The paragraph then includes an exemplary list of such devices, including bat sensors, compression attire, and "any device . . . designed to measure a Player's health, performance and/or readiness."⁷¹

Paragraph 2 implicitly addresses the threat of coercion regarding the use of wearables.⁷² The paragraph provides that "[a]ny use of a wearable technology . . . shall be wholly voluntary and Clubs must refrain from making any suggestion that the use of such technology is anything less than wholly voluntary."⁷³ Players will not be penalized for declining or discontinuing use of wearables.⁷⁴

Paragraphs 3 and 4 concern themselves with data privacy and access. Paragraph 3 specifies that a player who elects to use the technology must receive a list of club officials who will have access to the data and that the team should make any data it collects available to the player, either through an account if the device functions with one or upon the player's request.⁷⁵ Paragraph 4 sets out the provisions regulating confidentiality and data protection: wearable data "shall not become a part of the Player's medical record, and shall not be disclosed by a Club to any party other than those persons listed in this Paragraph 4 without the express written consent of the Player and the Association."⁷⁶ Players can ask to have their data deleted at any time.⁷⁷

Paragraph 5 prohibits commercial use of information acquired through wearable technology by the League, any team, the player, or any other entity or third party.⁷⁸ Paragraph 6 prohibits players from wearing devices in games or in pre-game activities like batting practice if such

⁷⁰ *Id.* at ATTACHMENT 56, para. 1.

⁷¹ *Id.*

⁷² *See id.* at para. 2.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at para. 3.

⁷⁶ *Id.* at para. 4. Those persons include: "General Manager, Assistant General Manager, Field Manager, Team Physician, Certified Athletic Trainer, Strength and Conditioning Coach, Rehabilitation Coordinator and an individual hired by a Club to manage the use and administration of wearable technology. A Player may request in writing that the Club further restrict or expand the list of representatives who will have access to such information and data. If the Club does not comply with such a request, the Player may decline to use or discontinue his use of the wearable technology."

⁷⁷ *Id.*

⁷⁸ *Id.* at para. 5.

devices have not been approved.⁷⁹ Paragraph 7 establishes the Joint Committee on Wearable Technology, which reviews and recommends new technologies to the Playing Rules Committee.⁸⁰ Paragraphs 8 and 9 concern themselves with the future impact of the Attachment, setting aside 45 days to review and change Attachment 56 while also specifying that this wearables agreement in the 2017-2021 CBA has no bearing on future negotiation of such use.⁸¹

b. Approved Devices

Since the inclusion of Attachment 56 in the CBA, MLB has authorized the in-game use and data sharing use of four devices and the pre-game or outside use of four others.⁸² This section will examine the four on-field devices closely, summarizing how each device works, the data it collects, and why a team or player might benefit from that information.⁸³

⁷⁹ *Id.* at para. 6.

⁸⁰ *Id.* at para. 7.

⁸¹ *Id.* at para. 8–9.

⁸² See Stephanie Springer, *An Update on Wearable Baseball Technology*, *HARDBALL TIMES* (Aug. 7, 2018), <https://tbt.fangraphs.com/an-update-on-wearable-technology/>.

⁸³ Pursuant to Attachment 56, four bat-related devices were approved for pre-game activities but not for in-game use. See *id.* (“Interestingly, although the CBA does not apply to the minor leagues, Attachment 56 of the CBA specifies that the Blast Motion external bat sensor can be used for swing tracking in-game at all minor league levels, with the Blast Motion embedded bat sensor approved for in-game use in complex leagues.”). The technology consists of “external and embedded electronic bat sensors from Blast Motion and Diamond Kinetics used to track swings.” *Id.* However, in addition to not being “wearables” in the traditional sense, the bat devices do not provide much more information than can already be assessed by external means, such as bat-tracking cameras and software. See *id.* Regardless of how the data are acquired, metrics such as exit velocity and launch angle revolutionized baseball in recent years, and the approved bat devices are additional ways to reach what have become valuable predictive measures of offensive success. For exit velocity, see *Exit Velocity (EV)*, MLB, <http://m.mlb.com/glossary/statcast/exit-velocity> (last visited Sept. 21, 2019). For launch angle, see *Launch Angle (LA)*, MLB, <http://m.mlb.com/glossary/statcast/launch-angle> (last visited Sept. 21, 2019). For an example of using these data to inform player assessments, see J.J. Cooper, *Victor Robles' Exit Velocity Is Cause for Concern*, *BASEBALL AM.* (Feb. 6, 2019), <https://www.baseballamerica.com/stories/victor-robles-exit-velocity-is-cause-for-concern/>.

i. The motusTHROW Sleeve

One of the first two devices approved was the motusTHROW,⁸⁴ or simply the “Motus Sleeve.” The device is a compression sleeve that a player, usually a pitcher, wears on his throwing elbow.⁸⁵ Inside the sleeve is a sensor that weighs roughly as much as a quarter and contains an accelerometer and gyroscope.⁸⁶ The sensor measures a player’s precise movements and quantifies stress placed on the elbow during throws, monitors fatigue from a pitcher’s workload, and can detect subtle changes in release point or arm angle.⁸⁷ The data are transmitted to an iPad interface, which could be viewed in real-time were it not for MLB’s policy against instant transmission during games.⁸⁸

Motus’s CEO Joe Nolan stated that the goal of the Motus Sleeve is to reduce elbow injuries in the wake of the Tommy John surgery “epidemic.”⁸⁹ In this regard, players and teams alike can benefit from the biometric information collected by the device.⁹⁰ The Motus Sleeve has seen in-game use on the elbows of players like New York Yankees reliever Dellin Betances, who underwent Tommy John surgery in 2009.⁹¹

⁸⁴ MOTUS, <https://www.motusglobal.com/motusbaseball> (last visited Sept. 21, 2019).

⁸⁵ Tim Moynihan, *A Tiny Sensor Could Help End the MLB’s Epidemic of Elbow Injuries*, WIRED (Jun. 4, 2016), <https://www.wired.com/2016/06/motus-pro-sensor-baseball-mlb/>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* “Tommy John surgery,” or TJS, is shorthand for a surgical procedure in which the ulnar collateral ligament in usually a pitcher’s throwing elbow is replaced. See Chris Landers, *Just Who Is Tommy John, and Why Does Everyone Talk About His Surgery All the Time?*, CUT4 (Feb. 27, 2019), <https://www.mlb.com/cut4/why-is-it-called-tommy-john-surgery>. The surgery was named after the first pitcher to undergo the procedure, left-handed Tommy John, in 1974. See *id.* John, like many other pitchers who have since had surgery on his ulnar collateral ligament, returned to baseball and had his career extended, although a full recovery is not a guarantee. See *id.*

⁹⁰ Moynihan, *supra* note 85.

⁹¹ *Id.*

ii. *The Zephyr Bioharness*

The Zephyr Bioharness is a compression-wear undershirt that features a “physiological monitoring module” at its center.⁹² The device records six inputs: ECG, respiration, estimated core body temperature, accelerometry, time, and location.⁹³ Taken together, these variables can report and display biometric markers for fatigue, calorie expenditure, intensity, load, and athlete readiness.⁹⁴ Additionally, Zephyr software allows for data monitoring and collection of data on large groups of subjects at once, with data exportable to software such as MatLab.⁹⁵

While the Motus Sleeve was designed particularly to respond to and limit elbow injuries, the Zephyr Bioharness is more general in its application, having seen use across a number of collegiate and professional sports.⁹⁶ During Spring Training in 2016, before the device’s use was sanctioned in Attachment 56, roughly one third of the Pittsburgh Pirates tracked their health and fitness with the device.⁹⁷ Their use of the Zephyr Bioharness was not to protect themselves from a specific type of injury, but rather to keep themselves on the field and performing at their highest levels.⁹⁸ Such information would be instructive for managers deciding when to rest players, for front office analysts when assessing data such as batted ball exit velocity, and for players themselves when training.⁹⁹

⁹² MEDTRONIC, ZEPHYR PERFORMANCE SYSTEMS, <https://www.zephyranywhere.com/users/sports> (last visited Sept. 21, 2019). The module, as the company calls it, is reminiscent of Tony Stark’s arc reactor from Marvel’s Iron Man movies and comics. See Ben Lindbergh, *Iron Men: Quantifying the Pittsburgh Pirates’ Remarkable Injury Edge*, GRANTLAND (Sept. 11, 2014), <http://grantland.com/the-triangle/pittsburgh-pirates-healthy-season-playoff-chances-future-impact/>; see also IRON MAN (Paramount Pictures 2008); THE AVENGERS (Walt Disney Studios Motion Pictures 2012).

⁹³ *Victory Begins with How You Train*, MEDTRONIC, <https://www.medtronic.com/content/dam/covidien/library/us/en/product/health-informatics-and-monitoring/zephyr-performance-systems-sports-brochure.pdf> (last visited Sept. 3, 2019).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Travis Sawchik, *Plethora of New Tools Shows Analytics’ Growth in MLB*, TRIBLIVE (Mar. 26, 2016), <https://archive.triblive.com/sports/pirates/plethora-of-new-tools-shows-analytics-growth-in-mlb/>.

⁹⁸ *Id.*

⁹⁹ *Id.*

iii. The Catapult OptimEye S5

Among the most recent devices approved for in-game use is the Catapult OptimEye S5,¹⁰⁰ or the “Catapult Harness.” The device, described simply as a “GPS Tracker” by MLB,¹⁰¹ is an pullover harness with a sensor in the middle of the athlete’s shoulder blades, equipped with a GPS locator, accelerometer, gyroscope, and magnetometer.¹⁰² These components measure “the lean, the turn and the force of the body,”¹⁰³ which apply to hitting, pitching, and fielding alike.¹⁰⁴ Catapult has succeeded in soccer, football, and basketball with other wearable products, but the Harness is its first foray into baseball.¹⁰⁵

Catapult’s director of business operations, Ryan Warkins, admits that the Catapult Harness is still in its “data collection and discovery phase.”¹⁰⁶ For that reason, and for the want of professional baseball players publicly using the Harness, there is less to say about the utility of the device for teams and players.¹⁰⁷ Nevertheless, the cross of biometric data and machine learning is exciting.¹⁰⁸ The expectation is that, because the Catapult Harness identifies patterns of maximum effort and explosiveness, teams will look for players to reach past benchmarks before permitting them to return from injury.¹⁰⁹ As with Motus, the company hopes to move from reporting live data to identifying warning signs for injuries, especially elbow injuries, in advance.¹¹⁰

¹⁰⁰ CATAPULT WEARABLE TECHNOLOGY, <https://www.catapultsports.com/products> (last visited Sept. 21, 2019).

¹⁰¹ Springer, *supra* note 82.

¹⁰² Joe Lemire, *Catapult Harnesses AI to Help Solve Baseball’s Injury Problems*, SPORTTECHIE (July 19, 2017), <https://www.sporttechie.com/catapult-harnesses-ai-help-solve-baseballs-injury-problems/>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

iv. The WHOOP Strap

Rounding out the list of approved in-game devices is the WHOOP Strap.¹¹¹ Most akin to the popular FitBit, the WHOOP Strap is worn on the wrist and measures strain, recovery, and sleep through six separate sensors.¹¹² The company's goal is to optimize the wearer's performance by focusing on recovery and encouraging the wristband's user to respond accordingly.¹¹³ WHOOP was approved after a case study in the Minors in which players wore the device continuously.¹¹⁴

Unlike the devices summarized thus far, the WHOOP Strap is meant for all-day wear, through periods of activity and inactivity alike.¹¹⁵ To alleviate privacy concerns, players may select through WHOOP's security settings the data they wish to share.¹¹⁶ That said, WHOOP's off-field data collection stands out compared to the company's peers. The company has already studied the effects of travel and sleep deprivation on player performance.¹¹⁷ Front office staff could, for instance, inform the manager that Player X stayed up all night during an off day and should be benched for a game. Players who wear the device might, as WHOOP intends, adapt their habits to the data, prioritizing a good night's sleep and making other similar choices in order to maximize their production.¹¹⁸

II. ATTACHMENT 56'S THREATS TO PLAYERS AND TEAMS

This Note now examines three potential problems from Attachment 56 currently flying under the radar, along with applicable legal standards for assessing them. First, Attachment 56's confidentiality provisions create an information asymmetry problem in the context of trades between teams. Second, clubs may wield Attachment 56 in individual player contract negotiations, both for free agents and for players negotiating extensions. Third, few protections exist to prevent teams from taking advantage of ballplayers who have already forfeited

¹¹¹ WHOOP, <https://www.whoop.com> (last visited Sept. 21, 2019).

¹¹² *WHOOP on MLB Network (video)*, WHOOP, <https://www.whoop.com> (last visited Sept 21, 2019).

¹¹³ *Id.*

¹¹⁴ *See id.*; *see also* Billy Steele, *Major League Baseball Approves Another Wearable for In-Game Use*, ENGADGET (Mar. 3, 2017), <https://www.engadget.com/2017/03/06/major-league-baseball-whoop-wearable-in-game-use/>; Zych, *supra* note 23.

¹¹⁵ *See* Steele, *supra* note 114.

¹¹⁶ *Id.*

¹¹⁷ WHOOP, <https://www.whoop.com> (last visited Sept. 21, 2019).

¹¹⁸ *Id.*

their biometric data, risking their long-term health in order to maximize short-term effectiveness.

A. Trades of Players Between Teams

Before diving into any hypotheticals about player-team agreements, it is necessary to provide some background about MLB contracts. Attachment 56 contemplates a player agreeing with his club to use wearable technologies and share biometric information obtained by them.¹¹⁹ Accordingly, the arrangement of this agreement would be a team-offeror extending an offer “that creates a power of acceptance” in the player-offeree.¹²⁰ With consideration, the agreement to use and share data from wearables becomes a legally enforceable contract.¹²¹ This contract could—but need not—be memorialized in a separate written document.¹²² However, a team and a player might choose instead to include a deal to use wearables authorized under the CBA as part of a more comprehensive agreement: the Uniform Player’s Contract (“UPC”).¹²³

The UPC is the baseline contract for all Major League players currently rostered.¹²⁴ The document specifies both the agreed-upon term of the contract and the player’s semi-monthly salary.¹²⁵ The provisions that follow are a hodge-podge of the player’s duties to his team,¹²⁶ the obligations of the club to the player,¹²⁷ the grounds and procedure for termination,¹²⁸ and the league rules and regulations included by reference.¹²⁹

¹¹⁹ See CBA, *supra* note 21, at ATTACHMENT 56.

¹²⁰ JOHN E. MURRAY, JR. & TIMOTHY MURRAY, CORBIN ON CONTRACTS DESK EDITION § 1.05 (Matthew Bender 2017).

¹²¹ *Id.*

¹²² *Id.*

¹²³ CBA, *supra* note 21, at APPENDIX A.

¹²⁴ See Cork Gaines, *Take a Close Look at an Actual Major League Baseball Contract*, BUS. INSIDER (Apr. 6, 2011), <https://www.businessinsider.com/uniform-major-league-baseball-contract-2011-4>.

¹²⁵ See CBA, *supra* note 21, at appx. A.

¹²⁶ See *id.* For example, the player commits “to conform to high standards of personal conduct, fair play and good sportsmanship.” See *id.* at sec. 3.(a). The player also covenants not to participate in professional boxing while under contract. See *id.* at sec. 5.(b).

¹²⁷ See, e.g., *id.* at sec. 6.(e).

¹²⁸ See *id.* at sec. 7.

¹²⁹ See *id.* at secs. 8–9.

The final section of the UPC is titled “Special Covenants” and is where, for example, one might locate deferred payment plans more complicated than the UPC’s contract length and semi-monthly pay schedule default.¹³⁰ The lines under the title of the section are blank, giving the player and club a certain measure of flexibility when crafting this section.¹³¹ If player and team agreed to locate their bargain regarding wearable technology in the player’s individual contract using the UPC base, then they have the ability to enshrine the terms here. In fact, logistically, it might be simplest to record a wearables agreement here in the UPC; the Supplemental Agreements section just prior to Special Covenants states that the parties “agree that no other understandings or agreements, whether heretofore or hereafter made, shall be valid, recognizable, or of any effect whatsoever, unless expressly set forth in a new or supplemental contract executed by the Player and the Club . . . and complying with the Major League Rules.” Thus, not only could a player and team agree about biometric data in the UPC, but it might be more convenient for them to do so rather than to arrange a separate agreement exclusively for wearables.

Besides these UPC fundamentals, there is one additional provision that is important for the following example. Section 6(b) of the UPC governs the player’s disclosure obligations with regard to his medical information.¹³² Section 6(b)(1) grants the club access to all relevant medical information when the player consults the team physician or any other physician or medical professional.¹³³ The club is prohibited from re-disclosing that information to anyone without the player’s written consent.¹³⁴ Section 6(b)(2), meanwhile, offers an exception to this general rule against the disclosure of health information, allowing for the team to provide the physician’s records of the player to another team in the event of a contemplated trade or assignment, provided that there is no further re-disclosure without the player’s written consent.¹³⁵ The illustration to follow is a Section 6(b)(2) situation in which a player is traded between teams.

¹³⁰ *See id.*

¹³¹ *Id.*

¹³² *Id.* at sec. 6.(b).

¹³³ *Id.* at sec. 6.(b)(1).

¹³⁴ *Id.*

¹³⁵ *Id.* at sec. 6.(b)(2).

In November 2018, the New York Yankees traded three prospects to the Seattle Mariners for starting pitcher James Paxton.¹³⁶ Paxton was arguably the best starting pitcher traded in the 2018-2019 offseason, with only his spotty injury track record diminishing his profile.¹³⁷ Of course, because of the health disclosure requirements in the UPC under Section 6(b)(2), the Yankees would have known about any medical risks Paxton may have had before following through with the trade.¹³⁸ But, due to the privacy protections afforded by Paragraph 4 of Attachment 56,¹³⁹ New York might not have had the full picture.

During his time in Seattle, Paxton became a devotee of the Motus Sleeve, wearing it on his throwing arm when tossing between starts but not in-game.¹⁴⁰ The Mariners, who encouraged widespread use of wearable technology in their organization, had access to and reviewed the data it collected.¹⁴¹ Paxton would miss time in 2019, but for an unrelated knee injury rather than for any issue a Motus Sleeve might unearth.¹⁴² Nevertheless, this example illustrates the information asymmetry problem created by Attachment 56's confidentiality provisions. If one team has a player who agrees to wearing a device gathering biometric data, they have undiscoverable information that grants them leverage in trade talks. In every trade, a dealer knows her hand better than that of her adversary, but in a world of ubiquitous scouting, limitless analytical tools, and readily available health records, this information asymmetry barrier is falling. Attachment 56 lets data-collecting teams hide the ball, so to speak, by blocking the exchange of

¹³⁶ *Yankees Land James Paxton in Trade, Send Top Prospect to Mariners*, ESPN (Nov. 20, 2018), http://www.espn.com/mlb/story/_/id/25325582/yankees-land-james-paxton-trade-send-top-prospect-mariners.

¹³⁷ *See id.* ("Paxton is 41-26 in six major league seasons, making six trips to the disabled list in the past five years. He missed nearly four months with a strained left latissimus dorsi muscle in 2014, 3½ months with a strained tendon in his left middle finger in 2015, 10 days with a bruised left elbow in 2016, 3½ weeks with a strained left forearm and a month with a strained left pectoral muscle in 2017, and 2½ weeks with lower back inflammation this year.").

¹³⁸ *See CBA*, *supra* note 21, at appx. A, sec. 6.(b)(2).

¹³⁹ *See id.* at ATTACHMENT 56, para. 4.

¹⁴⁰ *See Joe Lemire, Seattle Mariners Embrace Data, Tech like Rapsodo, K-Motion, Motus, TrackMan*, SPORTTECHIE (June 25, 2018), <https://www.sporttechie.com/seattle-mariners-james-paxton-analytics-rapsodo-kmotion-motus-trackman/>.

¹⁴¹ *See id.*

¹⁴² *See Bob Klapisch, The Yankees' James Paxton Has a Sore Left Knee, and a Theory as to Why*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/05/sports/james-paxton-yankees.html>.

health-related information potentially indicative of long-term productivity and performance.

B. Free Agents and Contract Extensions

Turning to the players, agreement to Attachment 56 biometric data collection privileges may turn into a negotiating sticking point for free agents and become a blemish on the record of a player seeking an extension with his current club.¹⁴³ Due to the flexibility of the UPC, agents negotiating on behalf of players have the creative liberty to request, for instance, opt-out clauses that the player can elect midway through a long-term deal.¹⁴⁴ Analysts, in comparing contracts, have roughly estimated how much such an opt-out clause or a no-trade clause is worth to a player.¹⁴⁵ Agreeing to wearing data-collecting devices might be the next item in the UPC to receive a price tag, whereby a team could “purchase” from the athlete the right to require the use of wearable technology.

If data privacy is as strong of a concern as it seems,¹⁴⁶ it is unlikely that a big-time free agent would agree to be bound by a wearables provision as part of his contract. But the leverage that comes with being a high-profile star does not exist for marginal “replacement” players who, in what has been a slow free agent market since the formation of the new CBA,¹⁴⁷ may be more willing to exchange their data in exchange for more money or a spot in the starting lineup.

Contracts of all types can be breached, of course, so what are the material grounds and procedures for when a professional ballplayer violates the terms of his contract? Under UPC § 7(b), a team may, with ten days’ written notice, terminate the player’s contract if the player “fail[s], refuse[s] or neglect[s] . . . to keep himself in first-class physical condition or to obey the Club’s training rules; or . . . to render his services hereunder or in any other manner materially breach this

¹⁴³ MLB prohibits use of health information in salary arbitration proceedings. See Sheryl Ring, *Let’s Fix MLB’s Salary Arbitration System: Changing the Either/Or Model*, FANGRAPHS (Jan. 17, 2019), <https://blogs.fangraphs.com/lets-fix-mlbs-salary-arbitration-system-changing-the-either-or-model/>.

¹⁴⁴ See Jon Terbush, *Meet the Opt-Out Clause: A Baseball Player’s Best Friend*, THE WEEK (Jan. 22, 2014), <https://theweek.com/articles/452507/meet-optout-clause-baseball-players-best-friend> (illustrating the effects of the opt-out clause with pitcher Masahiro Tanaka’s contract with the Yankees).

¹⁴⁵ See Ben Clemens, *What’s an Opt-Out Worth?*, FANGRAPHS (Mar. 29, 2019), <https://blogs.fangraphs.com/whats-an-opt-out-worth/>.

¹⁴⁶ See, e.g., Watt, *supra* note 25.

¹⁴⁷ See Lott, *supra* note 7.

contract.”¹⁴⁸ If a contract includes a wearable technology agreement between player and team, a team might be able to pursue termination of the player’s contract under Section 7(b)(1) or Section 7(b)(3) if refusing to wear a device jeopardizes his “first-class physical condition,” violates the club training rules, or materially breaches the contract.¹⁴⁹

Therefore, enforceability of a contract containing a clause in which the player agrees to use wearables hinges upon the interplay between Attachment 56’s Paragraph 2 and Sections 7(b)(1) and (3) of the UPC. Paragraph 2 of Attachment 56 mandates that use of wearables must always remain voluntary.¹⁵⁰ It would appear that the CBA prohibits a player from waiving that provision and consenting to mandatory use of wearables,¹⁵¹ while Section 7 of the UPC allows the club to terminate his contract on, for example, player fitness grounds stemming from his refusal to wear a wearable device.¹⁵² What results is a tangle of contractual obligations, between collective bargaining and the player’s freedom to contract individually with his team. The subsequent uncertainty weighs in favor of the club, particularly in the context of “replaceable” players who might not be able to find employment without waiving their wearables protection.

Attachment 56 also affects players who have not yet entered free agency and are seeking an extension from their current team. Generally speaking, long-term deals with players before free agency are often seen as team-friendly.¹⁵³ Intuitively, without multiple suitors bidding for a player’s service, his final price will likely be lower. Attachment 56, however, gives the team additional leverage in these extension negotiations. If a player has in fact agreed to use wearables, then the player’s club is aware of his biometric health history.¹⁵⁴ The extra data may drive down the length or salary of the offered extension, as teams can point to any information gleaned from the devices as a reason to be wary of keeping the player over the long run. Attachment 56’s deletion

¹⁴⁸ CBA, *supra* note 21, at appx. A, sec. 7.(b).

¹⁴⁹ *See id.* at secs. 7.(b)(1), (3).

¹⁵⁰ *See id.* at ATTACHMENT 56, para. 2.

¹⁵¹ *See id.* at art. III; *see also* ATTACHMENT 56, para. 2.

¹⁵² *See id.* at appx. A, sec. 7.(b)(1)

¹⁵³ *See, e.g.,* Craig Edwards, *Mike Trout Leaves Money on the Table Again*, FANGRAPHS (Mar. 19, 2019), <https://blogs.fangraphs.com/mike-trout-leaves-money-on-the-table-again/> (calculating that the extension signed by Los Angeles Angels of Anaheim centerfield Mike Trout, while the richest contract in professional sports history, nevertheless underpays his projected value over the life of the deal).

¹⁵⁴ *See* CBA, *supra* note 21, at ATTACHMENT 56, paras. 3–4.

privileges¹⁵⁵ do little to fix the problem, as teams would operate on the memory of health records or interpret the athlete's election to delete as a red flag. Lastly, while the player can walk away from the extension talks and test the free market, the price offered by his current team will affect the player's free agent market as well. It is no wonder why athletes are hesitant to grant teams permission to collect their data: forgoing privacy might also mean forgoing a contract down the road.

C. *Treatment of "Replaceable" Labor*

Finally, while the devices approved under Attachment 56 often aim to promote athlete health, they may perversely incentivize teams to push players in unhealthy ways for the team's short-term gain. Most at risk are "replacement" players¹⁵⁶ whose marginal status renders them most easily coerced into waiving their privacy protections.¹⁵⁷ The concern here, however, is that they will become expendable rather than replaceable. The example below will illustrate this risk.

Players and teams all want players to be healthy. A team professes to its players the importance of putting a winning product on the field and that maximum success comes for both the individual and the team when everyone monitors their health, diet, and exercise. Confronted with this pitch, backup infielder X agrees to share his wearable data. At some point in the season, star shortstop A gets hurt and X takes his place. X plays well, but as a bench player, he has not had this workload all season. He starts to feel fatigued but wants to help the team and plays through the pain. Club officials monitoring his Zephyr Bioharness can tell that he is pushing himself beyond his capacity. But, so what? Players like X are a dime-a-dozen, and Player A will get back eventually. If X is injured, they believe, they can easily find another like him. If X does in fact get hurt, and the team withheld biometric data showing that he was headed towards injury, what consequences are there for the club?

¹⁵⁵ See *id.* at para. 4.

¹⁵⁶ A replacement-level player is likened to a readily-available minor leaguer, bench player, or free agent. See Steve Slowinski, *What is WAR?*, FANGRAPHS (Feb. 15, 2010), <https://library.fangraphs.com/misc/war/>. Many advanced, or sabermetric, statistics calculate the value of a player by comparing them to a hypothetical replacement player. See *id.* The term is not to be confused with players who replaced Major League players during the 1994-95 player strike. See Dave Sheinen, *The Last Replacement Player*, WASH. POST (Mar. 30, 2011), https://www.washingtonpost.com/blogs/baseball-insider/post/the-last-replacement-player/2011/03/30/AFXoTg3B_blog.html?utm_term=.3253580782d0.

¹⁵⁷ See *supra* Part II(b).

As far as Attachment 56 goes, the answer appears to be none. While Paragraph 3 requires the team to give the player a written description of the wearable device and provide him access to the data upon request,¹⁵⁸ they are not bound by any obligation to explain the data points to him or to treat the player any differently according to the metrics they obtain. Accordingly, use of this information, even when pitched as benefitting the player, falls decisively in the team's favor. Without any enforcement teeth either from within the CBA or from outside law, teams hold great discretion for the ways in which they put data from wearables to use.

There may, however, be a roundabout way to provide players with more protection by challenging the non-statutory labor exemption protecting Attachment 56. As stated above in the discussion of *Mackey*,¹⁵⁹ the three-pronged test of whether federal labor law's non-statutory exemption from antitrust liability applies is: (1) whether the restraint primarily affects only the parties to the CBA, (2) whether the agreement concerns the mandatory subjects of wages, hours, or conditions of work, and (3) whether the agreement is the product of arm's-length bargaining.¹⁶⁰ Attachment 56, as a condition of work subject to the assent of and affecting both players and teams, would likely receive the non-statutory labor exemption. The only exception that could plausibly challenge Attachment 56's protection under the non-statutory labor exemption would be if, as in *Mackey*,¹⁶¹ the league had coerced the Players Association into accepting its provisions. However, due to the clout of the Players Association and the relatively smooth CBA negotiations in the winter of 2016,¹⁶² it is unlikely that Attachment 56 is the product of unequal bargaining. That said, with the possibility of a strike and the observation that the Players Association does not have many other bargaining chips,¹⁶³ this conclusion might not ring as true for the next CBA.

The three-prong test for the non-statutory labor exemption is not the only way that federal labor law would apply to the validity of a CBA or other contract. Of particular importance is the duty to bargain in good

¹⁵⁸ See CBA, *supra* note 21, at ATTACHMENT 56, para. 3.

¹⁵⁹ See *supra* Part I(a)(1).

¹⁶⁰ *Mackey v. National Football League*, 543 F.2d 606, 614–15 (8th Cir. 1976).

¹⁶¹ See *id.* at 615.

¹⁶² See Tyler Kepner, *M.L.B. Labor Deal Is Struck, Averting a Work Stoppage*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/sports/baseball/major-league-baseball-collective-bargaining-agreement.html>.

¹⁶³ Lacques, *supra* note 6.

faith.¹⁶⁴ Section 8(d) of the National Labor Relations Act outlines this mandate as the duty to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms of employment, . . . but such an obligation does not compel either party to agree to a proposal or require the making of a concession.”¹⁶⁵ The weight of the duty to bargain in good faith is twofold. First, while § 8(d) applies to the collective bargaining between the league and players’ union, the obligations that comprise the duty apply equally well in principle to individual negotiations. In other words, the standards of negotiation when the league deals with the Players Association could extend to conversations between one team and one player. Second, should Attachment 56 become a cause for dispute in the next CBA, the duty to bargain in good faith frames what that negotiation must look like: namely, a process deeper than surface bargaining but otherwise as unyielding as either side wants.¹⁶⁶

The two greatest obligations under the duty to bargain in good faith are (1) that the employer provide all relevant information needed by the bargainer to perform her duties and (2) that the employer refrain from unilateral changes in the terms and conditions of employment until impasse has been established.¹⁶⁷ Extending these principles to contract negotiations, a team bargaining in good faith over the issue of wearable use should provide the player with the necessary information for the player to make an informed decision. Additionally, the second obligation would bar club imposition of a mandatory wearables policy as a unilateral change in terms of employment.

The problem is that there is no requirement in Attachment 56 that the team explain either the meaning, or its front office’s intended use, of wearable data. The provision that grants players access to their own data falls short of the obligation to furnish necessary information under the duty to bargain in good faith because players do not have access to all information relevant to the team. But, while that standard can inform a solution to this issue, as it stands, this obligation only applies between employer and the players’ exclusive bargaining representative.¹⁶⁸ Perhaps there exists a common law action for negligence or recklessness, or perhaps Player X can initiate a grievance hearing against the team. Without affirmative obligations for how teams

¹⁶⁴ See WEILER, *supra* note 32, at 122.

¹⁶⁵ National Labor Relations Act (NLRA), 29 U.S.C. § 158(d) (2018).

¹⁶⁶ See WEILER, *supra* note 32, at 123.

¹⁶⁷ See *id.* at 124.

¹⁶⁸ See *id.* at 122–24.

can treat players who have agreed to use wearables, there will be the potential for abuse of those players who are most easily replaceable.

III. POSSIBLE PATHS FORWARD

The 2017-2021 MLB CBA includes several provisions that harm player interests either explicitly or implicitly. Currently, given the chilled enthusiasm for free agents over the past few offseasons, some of the most visible examples of anti-player provisions relate to the luxury tax¹⁶⁹ or draft pick compensation,¹⁷⁰ both of which make signing a free agent riskier. However, where concerns over wearable data ownership and privacy do not even scratch the surface, Attachment 56 has the potential to hurt player interests in several key ways. This Note identifies three additional risks in Attachment 56: information asymmetry between teams when trading players, disadvantages for sub-elite players in free agent contract and contract extension negotiations with teams, and neglectful treatment by teams of “replaceable” players sharing wearable data.

The theme running through these identified concerns is one of undue leverage. When the Seattle Mariners traded James Paxton to the New York Yankees, only his former team in the position of dealer had access to his wearable data, giving them a leg up in the negotiation. Free agents who are not drawing as much interest as expected may be coerced by teams into sharing biometric data, which down the road can adversely alter the landscape of the offers they receive from this team and the rest of the league. The replaceable Player X, in an effort to stick with his team, signs his body away in a system that presently does not have the teeth to prevent teams from running a fatiguing athlete into the ground.

Law outside of the CBA and UPC does not seem to offer many solutions. Baseball holds its antitrust immunity and, with Attachment 56 likely being the product of arm's length negotiation rather than coercion, the non-statutory exemption of labor law further shields the terms. Looking ahead to the storm clouds of a strike before the next CBA negotiations in 2021, what possible avenues can the Players Association take if they also identify the above risks in Attachment 56?

Regarding trades, the players are not directly affected adversely by the inability to share data collected from wearables. Indeed, even for teams, it is a zero-sum game: the Mariners may have traded away an injured asset to an unsuspecting team, but their next transaction might see them being dealt a player with injury risks known only to the selling

¹⁶⁹ See CBA, *supra* note 21, at art. XXIII.

¹⁷⁰ See *id.* at art. XX(B)(4).

team. Sharing biometric data as part of health records would be good for team transparency, but it might also heighten the privacy risks currently frightening players away from wearables. But, in the realm of contract negotiations, the players have a more direct investment in the outcome and some creative options to take.

Naturally, players can demand more protections from coercion within the CBA. These future provisions could include automatic deletion of biometric data, a clearer resolution to the interplay between individual contracts and the CBA, and the right to have biometric data compared and interpreted for them on a regular basis to ensure an informed decision to use wearables. More interesting, however, the Players Association could follow the lead of the NFL and its athletes' Players Association and consider monetizing their data.¹⁷¹ At present, Attachment 56 prohibits the commercialization of any data collected by approved wearables pursuant to the CBA.¹⁷² While monetization would be a radical step towards fewer protections for players, the potential for economic gains as sports betting accelerates the demand for information could turn the tide in the favor of maximal public disclosure.¹⁷³

As the first major foray of professional sports into the wearable field, Attachment 56 takes a cautious approach but leaves confusion in its wake. The Players Association fixated on protecting the privacy of its clients, but in doing so, they strengthened the bargaining position of teams. Wearable technology continues to develop rapidly, and what are bioharnesses today might be microchips embedded in a player's body tomorrow.¹⁷⁴ The potential for these devices to help keep athletes uninjured and performing optimally on the field is immense, but only if the players themselves can feel comfortable using the technology. In baseball, it will take more than alleviating data privacy concerns for ballplayers to sleep easy—WHOOOP Strap or not.

¹⁷¹ See Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227, 249 (2017).

¹⁷² See CBA, *supra* note 21, at ATTACHMENT 56, para.5.

¹⁷³ See Candee, *supra* note 26.

¹⁷⁴ See *1984 Meets Moneyball: Who Owns Player Data?*, SXSW CONVERGENCE 2016, <https://soundcloud.com/officialsxsw/1984-meets-moneyball-who-owns-player-data-sxsw-interactivefilm-2016>.