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Sidelining GINA: The Impact of Personal Genomics and Collective Bargaining in Professional Sports

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Introduction

Since this journal last addressed legal issues regarding the integration of genetic testing in professional sports in 2006,[3] the Genetic Information Nondiscrimination Act of 2008 ("GINA") became law, with Title II prohibiting employment discrimination on the basis of genetic information;[4] the Supreme Court of the United States issued its controversial, landmark decision in *14 Penn Plaza v. Pyett* on collective bargaining agreements and waivers of statutorily-derived nondiscrimination rights;[5] and concerns surrounding the use, attempted use, or possibility of use of DNA testing in youth, collegiate, and professional sports contexts repeatedly made headlines in the popular media.[6] A few legal scholars

[3]A.E. Rice, Eddy Curry and the Case for Genetic Privacy in Professional Sports. 6 Va. Sports & Ent. L. J. (2006).

[4]Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. 2000ff et seq..

[5]See generally, 14 Penn Plaza v. Pyett, 556 U.S. 247, 129 S. Ct. 1456 (2009).

[6]See, e.g., Katie Thomas and Brett Zarda, In N.C.A.A., Questions of Bias over a Test for a Genetic Trait. N.Y. Times (Apr. 12, 2010) at D1, available at http://www.nytimes.com/2010/04/12/sports/12sickle.html; Brett, Zarda, Lawsuit Prompts NCAA to Screen Athletes for Sickle Cell. USA Today (July 2, 2010), available at http://www.usatoday.com/sports/college/2010-06-30-sickle-cell-ncaa-cover_N.htm; Michael Schmidt and Alan Schwarz, Baseball's Use of DNA Tests on Prospects Finds Controversy, Too. N.Y. Times (July 22, 2009) at A1; Alan Schwarz, A Future in Baseball, Hinging on DNA. N.Y. Times (July 23, 2009) at B11; Michael Schmidt, DNA Testing of Baseball Prospects Continues Under New Rules. N.Y. Times, Oct. 10, 2010, at SP8, available at http://www.nytimes.com/2010/10/10/sports/baseball/10testing.html; Dan Vorhaus, MLB Meets GINA. Genetics Law Review (July 22, 2009), available at http://www.genomicslawreport.com/index.php/2009/07/22/mlb-meets-gina/; Dan Vorhaus, MLB's Genetic Testing Program at the Plate Again. Genomics Law Report (July 28, 2009), available at http://www.genomicslawreport.com/index.php/2009/07/28/mlbs-genetic-testing-program-at-the-plate-again/; Roger Groves, Is the NFL Going to Test Players for Genetic Defects?, Forbes Sports Money Blog (Jan. 19, 2011), available at http://blogs.forbes.com/sportsmoney/2011/01/19/is-the-nfl-going-to-test-players-for-genetic-defects/; Chuck Finder, A Doctor's Seven Ways to Avoid Damage from Concussion, Pittsburgh Post Gazette (Jan. 2, 2011), available at http://www.post-gazette.com/pg/11002/1115033-139.stm; Anonymous, Born to Play. GenomeWeb: The Daily Scan (May 20, 2011), available at http://www.genomeweb.com/blog/born-play; Anonymous, Genetic Research In Sport: Benefits And Ethical Concerns. Science Daily. (Sept. 21, 2007), available at: www.sciencedaily.com/releases/2007/09/070913132916.htm; Assael, Cheating is so 1999. ESPN the Magazine (Oct. 9, 2009), available at http://insider.espon.go.com/espn/insider/news/story?id=4536951; Briggs, Baby Olympian? DNA Test screens sports ability. MSNBC (Mar. 4, 2009), available at http://www.msnbc.msn.com/id/29496350/ns/health-kids_and_parenting/t/baby-olympian-dna-test-screens-sports-ability/; Campbell, Genetic Sports Testing Starts on the Playground (May 27, 2011), available at http://www.pennpoints.net/?p=32290; D'Arcy, "Sports gene" testing: Maybe Parents Shouldn't Care. Washington Post (Lifestyle Blog) (May 19, 2011), available at http://www.washingtonpost.com/blogs/on-parenting/post/sports-gene-testing-maybe-parents-shouldnt-care/2011/03/08/AFLpeG7G_blog.html; Epstein, D., Sports Genes, SI Vault, May 17, 2010, available at http://sportsillustrated.cnn.com/vault/article/magazine/MAG1169440/index/index.htm; Hersh, A., Genetic Insight Into Athletic Injuries, Competitor Magazine, May 23, 2011, available at http://running.competitor.com/2011/05/injuries/genetic-insight-into-athletic-injuries_27947; Lite, J., Can genes predict athletic performance?, Scientific American, Dec. 1, 2008, available at http://www.scientificamerican.com/article.cfm?id=genes-sports-talent; MacArthur, D., The ACTN3 sports genes test: what can it really tell you?, Wired, Nov. 30, 2008, available at: http://www.wired.com/wiredscience/2008/11/the-actn3-sports-gene-test-what-can-it-really-tell-you/; Macur, J. 2008. Born to Run? Little Ones Get Test for Sports Gene. New York Times. Nov. 30, 2008, available at http://www.nytimes.com/2008/11/30/sports/30genetics.html; Moody, J. 2011. Genetic Testing: Your Kid the Next Superstar Athlete? May 23, 2011, available at http://moodysnob.blogspot.com/2011/05/genetic-testing-your-kid-next-super.html; Moon, JR. 2011. Chicken of Egg First? Does DNA or Hard Work Make a Person a Great Athlete? The Sports Digest. Mar 29, 2011, available at http://thesportdigest.com/2011/03/chicken-or-egg-first-does-dna-or-hard-work-make-a-person-a-great-athlete/; Peveteaux, A. 2011. 'Athletic Gene' Test for Bad Parents. Mar 14, 2011, available at http://thestir.cafemom.com/toddler/117462/athletic_gene_test_for_bad; Salzberg, S. 2011. Genetic tests for kids' sports abilities: hype or science? Forbes Blogs. May 21, 2011, available at http://blogs.forbes.com/stevensalzberg/2011/05/21/genetic-tests-for-

have begun to acknowledge the importance of this unsettled, emerging area of the law, though the attention granted thus far has been focused predominately on league-imposed or team-initiated testing.[7] Moreover, the technological costs of personal genomics have declined in recent years[8] and personal genomics services—including some tailored for sports applications—have become more accessible to individuals outside traditional research and clinical settings.[9] In light of these developments, it is necessary to revisit the legal issue of genetic nondiscrimination rights in professional sports contexts.

This article begins by highlighting ways in which genetic testing has already been applied in sports contexts and describing the sports-related personal genomics services currently available. Next this article reviews the employment nondiscrimination rights created by Title II of GINA and addresses the question of how such provisions apply to the professional sports context. Subsequently, this article reviews the Supreme Court's decision in *14 Penn Plaza v. Pyett*, addressing the question of whether genetic nondiscrimination rights could be waived through collective bargain agreements negotiated by the players' associations. This includes a review of the collective bargaining agreements for five professional sports leagues. Finally, this article culminates with the argument that player-initiated personal genomics will relegate GINA to the sidelines where it belongs.

I. Genetic Testing (Applied Or Contemplated) In Sports

The integration of genetic technologies in sports is not a new concept, though the technologies available have undoubtedly changed considerably over the past few decades. Internationally, for example, genetic testing was part of official sex segregation policy of the International Association of Athletics Federations from 1966 until 1991 and of the International Olympic Committee from 1966 to 1999, as these organizations required Y-chromosomal testing to determine an athlete's eligibility to compete against females.[10]

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kids-sports-abilities-hype-or-science/; Stein, R. 2011. Genetic testing for sports genes courts controversy. Washington Post. May 18, 2011, available at http://www.washingtonpost.com/national/genetic-testing-for-sports-genes-courts-controversy/2011/05/09/AFkTuV6G_story.html?hpid=z3; Stein, R. 2011. Genetic Testing Company Promises to Prove Sports Testing Accuracy. Washington Post (Lifestyle Blog). May 25, 2011, available at http://www.washingtonpost.com/blogs/the-checkup/post/genetic-testing-company-promises-to-prove-sports-testing-accuracy/2011/05/25/AGD38FBH_blog.html; Tanner, L. 2011. Could DNA Tests Tell If Kids Will Be Sports Stars? Huffington Post. Mar 8, 2011, available at http://www.huffingtonpost.com/2011/03/08/could-dna-tests-tell-if-k_n_833132.html; Vandeveer, M. 2011. 11 News Special Report: Sports Genetic Testing. NBC 11 News. May 24, 2011, available at http://www.nbc11news.com/localnews/headlines/11_News_Special_Report_Sports_Genetic_Testing_122545049.html; Vorhaus, D. 2009. From decode to Athleticode in DTC Genetic Testing. Genomics Law Report. November 25, 2009, available at http://www.genomicslawreport.com/index.php/2009/11/25/from-decode-to-athleticode-in-dtc-genetic-testing/

[7]Existing law review articles have focused narrowly on Major League Baseball's use of genetic testing. See, e.g., Rhonda Evans, Striking Out: The Genetic Information Nondiscrimination Act of 2008 and Title II's Impact on Professional Sports Employers. 11 N.C. J. L. & Tech. 205 (2009); L.C. Frey, They Aren't Who We Thought They Were: The Importance of Genetic Testing in Major League Baseball to Prevent the Falsification of Players' Ages. 21 Marq. Sports L. Rev. 425 (2010); Jesse Bland, There Will be Blood…Testing: The Intersection of Professional Sports and the Genetic Information Nondiscrimination Act of 2008. 13 Vand. J. Ent. & Tech. L. 357 (2011); Rohan Hebbar, The Impact of the Genetic Information Nondiscrimination Act on Sports Employers: A Game of Balancing Money, Morality, and Privacy. 8 Willamette Sports L. J. 52 (2011); S. Stevens, Baseball's DNA Testing Policy Strikes Out: Genetic Discrimination in Major League Baseball. 41 Seton Hall L. Rev. 813 (2011); Michael Zitelli, The Controversy Ensues: How Major League Baseball's Use of DNA Testing is a Matter for Concern under the Genetic Information Nondiscrimination Act. 18 Sports Law. J. 21 (2011).

[8]See, e.g., DNA Sequencing Costs. National Human Genome Research Institute. (Feb. 4, 2011)., available at http://http://www.genome.gov/27541954.

[9]See, e.g., Jennifer Wagner and Misha Angrist, "The Smorgasbord of DTC Genetic Tests and Relevant Legal Protections." Nature Knowledge Project. (forthcoming).

[10]E.g., Bennett Foddy and Julian Savulescu, Time to Re-evaluate Gender Segregation in Athletics? 45 Brit. J. Sports Med. 1184 (2010) (Note that this is sometimes referred to as "gender verification testing," though cultural anthropologists would agree that analysis of sex chromosomes could never "verify" gender (though could be the basis of determining sex) of an individual.).

More than a decade ago (in 2001) the Professional Boxing and Martial Arts Board of Victoria considered compulsory genetic screening of boxers for the apolipoprotein (APOE) ε4 variant, to identify those who may have increased susceptibility to "punch drunk syndrome" or chronic traumatic brain injury.[11] By 2003 the World Anti-Doping Agency prohibited methods of "gene doping,"[12] viewing such methods as "a threat to the integrity of sport and health of athletes."[13] Eighteen of 24 players on an Australian Rugby team, the Manly Sea Eagles, were reported in 2005 as having had personal genetics testing involving analysis of 11 genes.[14] Additionally, reports indicated an unnamed soccer team in the English Premier League (rumored to be Arsenal F.C.) sent a Yale geneticist, Dr. Mario Kambouris, DNA samples from some of its players for analysis of 100 genetic loci (e.g. to identify genetic factors contributing to soft-tissue injury, muscle performance, and endurance capacity).[15] More recently, the English Institute of Sport indicated its interest in the integration of genetic technologies to "tailor the training, conditioning and preparation" of Britain's Olympic and Paralympic athletes.[16]

Contemplation and applications of sports-related genetic testing have not been restricted to international contexts. Perhaps the most widely known example is the Chicago Bulls' attempted genetic testing of then restricted free agent, Eddy Curry in 2005[17] for the purposes of ruling out hypertrophic cardiomyopathy (HCM), a condition that – while often confused with the benign condition known as "athlete's heart" – is the leading cause of sudden cardiac arrests among young individuals and athletes.[18] The National Football League ("NFL") has screened for genetic conditions for years (e.g., Sickle Cell and Tay Sach's disease under the expired 2006 NFL collective bargaining agreement[19] and

[11]See, e.g., J. Robotham, Pro Boxers Face Going Down for the Gene Count. The Sydney Morning Herald (Jun. 1, 2001); M. Spriggs, Compulsory Brain Scans and Genetic Testing for Boxers-or Should Boxing be Banned? 30 J. Med. Ethics. 515 (2004); See also, Essentially Yours: The Protection of Human Genetic Information in Australia. (ALRC Report 96), available at http://www.alrc.gov.au/publications/29-use-genetic-information-employment/current-use-genetic-information-australian-employ#_ftn20.

[12]See, e.g., The 2012 Prohibited List: International Standard. Section M3 "Gene Doping" at 6., available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibited-list/2012/WADA_Prohibited_List_2012_EN.pdf; See also Article 4.22, World Anti-Doping Code, available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf (first adopted 2003, last revised 2009).

[13]See, e.g., http://www.wada-ama.org/en/Science-Medicine/Science-topics/Gene-Doping/. The inclusion of "gene doping" among the prohibited methods followed WADA's first expert workshop on the topic held in March 2002 in New York.

[14]C. Dennis, Rugby Team Converts to Give Gene Tests a Try. 43 Nature 260 (Mar. 17, 2005)..

[15]N. Collins, Premier League Team Reads Players' DNA. The Telegraph, (Oct.16, 2011)., available at http://www.telegraph.co.uk/science/science-news/8829894/Premier-League-team-reads-players-DNA.html; Soccernet Staff. DNA to ID Injury-Prone Players. ESPN Soccernet (Oct. 17, 2011)., available at http://soccernet.espn.go.com/news/story/_/id/970540/premier-league-club-tests-dna-to-find-injury-prone-players?cc=5901; K. Hickey, Unnamed Premier League Club, Who We're Not Saying is Arsenal, DNA Testing for Injury Prone Players. Kickers (Oct. 17, 2011), available at http://www.kckrs.com/unnamed-premier-league-club-who-were-not-saying-is-arsenal-dna-testing-for-injury-prone-players/.

[16]S. Watts, Olympic Team GB trials gene tests for injury. BBC News Health (July 25, 2012), available at http://www.bbc.co.uk/news/health-18970982; See also, J. Enriquez. and S. Gullans, Genetically Enhanced Olympics are Coming. Nature, 297 (July 19, 2012).

[17]See, e.g., A.E. Rice, supra note 3; Trumble, 'Knickel' and Dime Issues: An Unexplored Loophole in New York's Genetic Discrimination Statute and the Viability of Genetic Testing in the Sports Employment Context. 70 Alb. L. Rev. 771 (2007); See also, Litke, Curry's DNA fight with Bulls 'Bigger than Sports World.' ESPN (Sept. 28, 2005), available at www.sports.espn.go.com/nba/news/story?id=2174877.

[18]See, e.g., B.J. Maron, Distinguishing Hypertrophic Cardiomyopathy from Athlete's Heart: a Clinical Problem of Increasing Magnitude and Significance. 91 Heart 1380 (2005) (noting HCM is the cause for approximately one-third of athletic field deaths in the United States); Ho, New Paradigms in Hypertrophic Cardiomyopathy: Insights from Genetics. 31 Progress in Pediatric Cardiology 93 (2011) (noting more than 1000 distinct mutations have been identified, but those found within two genes (MYH7 and MYBC3) collectively account for more than 75–80% of HCM); Cheng, Hypertrophic Cardiomyopathy vs Athlete's Heart. 131 Int'l J Cardiology 151 (2009) (noting that despite potential false negatives, genetic testing is the "most definitive way" to distinguish HCM from athlete's heart).

[19]NFL CBA. http://bizoffootball.com/docs/NFL-COLLECTIVE-BARGAINING-AGREEMENT_2006-2012.pdf and http://nflretired.baughweb.com/Resources/2006_NFL_CBA_2006_2012.pdf.

Sickle Cell and G6PD under the current 2011 NFL collective bargaining agreement[20])[21]. More recently, ESPN The Magazine's The Body Issue in 2009 featured a story about 23andMe, Inc.'s analysis of DNA samples from 100 current and former NFL linemen.[22] The same year, Major League Baseball ("MLB") notoriously began using genetic testing with prospective players from the Dominican Republic and other Latin American countries.[23] While the headlines of MLB's genetic testing typically have referred to the practice as "age verification," the genetic testing does not assess age; in actuality, the MLB analysis relies upon familial testing (which involves not only the prospective player but also his family members) to verify the prospective player's identity.[24] Collegiate sports have also integrated genetic testing, with the National Collegiate Athletic Association's ("NCAA") implementation of mandatory sickle cell screening for all Division I athletes[25] and contemplation of the screening program's possible expansion to include Division II[26] and III[27] athletes.

II. Sports-Related Personal Genomics Services Currently Available

The personal genomics industry is diverse, with the sports-related DNA testing sector occupying a niche that has received considerably less scholarly attention than the nutrigenomic,[28] ancestry,[29] and health-related sectors.[30] Therefore, a brief overview of this sector is warranted. More than a dozen companies have begun offering sports-related personal genomics tests and services.[31] While for some companies the sports-related DNA testing was merely a small part of a broader personal genomics service (*e.g.*, "muscle performance" is just one of more than 50 "traits" included in the personal genomics

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[20]Available at https://www.nflplayers.com/About-us/CBA-Download/; See also, Adam Seigel, and Frank Alverez, Sickle-Cell Testing and the Implications of GINA. Sports Litigation Alert (May 21, 2010), available at http://www.hackneypublications.com/sla/archive/001055.php (reporting that the NFL screens incoming rookies for sickle cell trait at the annual combine).

[21]While the CBAs specify a blood sample is used, they do not explain exactly what methods are used to perform the screens. Sickle cell screening, for example, can be performed using a number of methods, including isoelectric focusing, cellulose acetate electrophoresis, high-performance liquid chromatography, or DNA analysis.

[22]See S. Assael, Cheating is so 1999., ESPN the Magazine (The Body Issue) (Oct. 9, 2009), available at http://insider.espn.go.com/espn/insider/news/story?id=4536951.

[23]See, e.g, Michael Schmidt & Alan Schwarz, Baseball's Use of DNA Tests on Prospects Finds Controversy, Too. N.Y. Times (July 22, 2009); Alan Schwarz, A Future in Baseball, Hinging on DNA. N.Y. Times, (July 23, 2009); Michael Schmidt, DNA Testing of Baseball Prospects Continues Under New Rules. N.Y. Times (Oct.. 10, 2010), available at http://www.nytimes.com/2010/10/10/sports/baseball/10testing.html; Dan Vorhaus, MLB Meets GINA. Genomics Law Report (July 22, 2009), available at http://www.genomicslawreport.com/index.php/2009/07/22/mlb-meets-gina/; Dan Vorhaus, MLB's Genetic Testing Program at the Plate Again. Genetics Law Report (July 28, 2009), available at http://www.genomicslawreport.com/index.php/2009/07/28/mlbs-genetic-testing-program-at-the-plate-again/.

[24]See, e.g., Michael Schmidt and Alana Schwarz, A Future in Baseball, Hinging on DNA.

[25]See, e.g., Zarda,, Lawsuit Prompts NCAA to Screen Athletes for Sickle Cell. USA Today (June 30, 2010), available at www.usatoday.com/sports/college/2010–06-30-sickle-cell-ncaa-cover_N.htm (discussing the NCAA's genetic screening program was prompted following a lawsuit brought by the parents of Dale Lloyd II, a student athlete who died in 2006 as a result of sickle cell trait complications induced by intense training during football practice at Rice University).

[26]See, e.g., DII to consider required testing for sickle cell trait. NCAA.org (Aug. 12, 2011)., Available at www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2011/august/dii+to+consider+testing+program+for+sickle+cell+trait.

[27]See, e.g., G. Brown, Sickle cell testing proposal referred in Division III. NCAA.org (Jan. 14, 2012), available at www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/january/sickle+cell+testing+proposal+referred+in+division+iii.

[28]See, e.g., R. Sterling, The On-line Promotion and Sale of Nutrigenomic Services. 10 Genetics in Medicine 784–86 (2008).

[29]Jennifer Wagner, J. D. Cooper, D. Sterling, and C.D. Royal, Tilting at Windmills No Longer: a Data-driven Discussion of DTC DNA ancestry tests. 14 Genetics in Medicine 586–93 (2012).

[30]C.R. Lachance, L.R. Erby, B.M. Ford, V.C. Allen, and K.A. Kaphingst, Informational Content, Literacy Demands, and Usability of Websites Offering Health-related Genetic Tests Directly to Consumers. 12 Genetics in Medicine 304–312 (2010).

[31]Wagner JK and Royal CD. "Field of Genes: An Investigation of Sports-Related Genetic Testing." *Journal of Personalized Medicine*. 2012; 2(3):119–137.

service offered by 23andMe, Inc.), for other companies the sports-related DNA testing was a major focus of the business (*e.g.*, American International Biotechnology Services, or AIBiotech, selling the "Sports X Factor" panel; Athleticode, Inc., selling a "Race Time Kit" and a "Body Scope Kit"; Atlas Sports Genetics, LLC, selling the "Atlas First" or "Atlas Pro"; and Warrior Roots, LLC, selling the "Athletic Profile Test"). The content of the sports-related DNA test or analysis varies considerably from one to another: a comparison of four sports-related DNA tests shows little overlap in the specific genetic loci tested and marked differences in the information (*e.g.*, the test results and subsequent interpretations) returned to the consumer.[32] The companies often bundle the sports-related DNA tests and analyses with non-genetic/genomic services, such as personal athletic training information and materials. The prices for sports-related DNA tests and analyses, not surprisingly in light of this diversity, vary considerably, ranging from less than $100 to more than $1000.[33]

According to esteemed geneticists who have since 2001 provided annual reviews on sports-related genetic studies, more than 214 autosomal, seven X-linked, and 18 mitochondrial genes and quantitative trait loci have been reported as influencing fitness and performance phenotypes.[34] The relevant phenotypes include physical performance (*e.g.,* strength, cardiovascular endurance, exercise intolerance); hemodynamic traits (*e.g.,* blood pressure and heart rate); anthropometry and body composition; metabolism (*e.g.,* insulin and glucose); and lipid, lipoprotein, and hemostatic factors.[35] While these literature reviews provide convenient references as to the scientific understanding of genetic factors related to sports-related phenotypes, comparable references (*i.e.,* consumer guides) as to what genetic tests and analyses are actually available in the direct-to-consumer sports-related DNA testing sector remain unavailable. Nonetheless, an unpublished study conducted in May 2011 found 21 genes were available as part of one or more sports-related DNA tests or analyses (including *ACTN3, COL5A1, COL12A1, COL1Al, GDF5, ACE, ADRB2, PPARGC1A, MMP3, APOE, MYH7, MYBPC3, TNNT2, DIO1, NOS3, IL6, VEGFR, HIF1, MCT1, EPOR,* and *SCN5A*).[36] For example, the "DNAthlete: Athletic Profile" offered by Warrior Roots, provided consumers with genetic information related to muscle-fiber type, maximal oxygen consumption (VO_2 max), lactate levels, body fat, isometric grip strength, muscle mass and strength, exercise blood pressure, aerobic fitness, muscle efficiency, and endurance performance (genotyping loci in *ACTN3*, *MCT1*, *HIF1*, *ADRB2*, *DIO1*, *NOS3*, *PPARGC1A*, *ACE, EPOR*, respectively).[37] The quality (e.g. the analytical validity, clinical validity, and clinical utility) of these sports-related direct-to-consumer (DTC) DNA tests are debated even among geneticists;[38] nonetheless, individual athletes may be interested in accessing such personal genomic data and integrating this information into their training regimens.[39] Athleticode, Inc., for example, devotes substantial attention

[32]Id.
[33]Id.
[34]T. Rankinen,, The Human Gene Map for Performance and Health-related Fitness Phenotypes. 33 Med. & Science in Sports & Exercise 855–67 (2001).
[35]Id.
[36]JK Wagner and CD Royal. Unpublished Data; See, also, Wagner JK and Royal CD. "Field of Genes: An Investigation of Sports-Related Genetic Testing." *Journal of Personalized Medicine*. 2012; 2(3):119–137.
[37]E.g. Results report delivered by the company to the author in May 2011.
[38]A review of these debates is outside the scope of this article.
[39]Results report for the author obtained May 2011. Athleticode returns information to the consumer along with interpretations as to whether the genotypes are "Go Codes" or "Caution Codes" and subsequently articulates "pre-habilitation" principles and strategies for

to “prehabilitation” strategies, explaining to its customers how to interpret their particular genetic information as “caution codes” or “go codes” and suggesting how to modify training workouts to minimize, for example, risks of tendinopathy.

III. Title II Of The Genetic Information Nondiscrimination Act Of 2008

Discrimination on the basis of genetic information in health insurance and employment contexts became unlawful on May 21, 2008 when former President George W. Bush signed the Genetic Information Nondiscrimination Act of 2008 (“GINA”).[40] Passage of GINA was the culmination of roughly a dozen years of legislative effort,[41] with its implementation also proving difficult. The Internal Revenue Service, Department of Labor, and the Department of Health and Human Services’ Office of Civil Rights, the agencies charged with implementing Title I (which prohibits genetic discrimination in health insurance), failed to announce a Final Rule.[42] A Proposed Rule/Interim Final Rule was issued– albeit also behind schedule[43] –on October 7, 2009 and took effect on December 7, 2009.[44] The Equal Employment Opportunity Commission (“EEOC”), charged with implementation of Title II (which prohibits genetic discrimination in employment), was not quite so delayed, having issued its Proposed Rule/Interim Final Rule on March 21, 2009.[45] The EEOC issued its Final Rule for Title II on November 9, 2010, which took effect on January 10, 2011.[46] Because professional sports clubs often provide not only employment, but also exclusive medical care and coverage for their athlete-employees, the professional sports context has the potential to implicate both Titles I and II of GINA. This article reserves discussion of Title I for another time and, instead, focuses on Title II, the provisions of which are not triggered when an employee merely receives medical care from an employer that integrates genetic technologies and uses genetic information for medical diagnosis or treatment.[47]

Title II of GINA places prospective, current, and former employees in a protected statutory class.[48] Its provisions apply to employers with 15 or more employees as well as employment agencies, labor organizations, and joint labor-management training and apprenticeship program committees.[49] Bona fide private clubs are not included among Title II’s covered entities. Its provisions not only prohibit direct acts of genetic discrimination but

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the individual athlete to minimize genetic risks (e.g. risks for tendinopathy or ACL injury) and maximize the effectiveness of training programs. (?????)

[40]Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. §2000ff.

[41]GINA’s beginnings started with the introduction of a bill in the House of Representatives in 1995 by Louise Slaughter (D-NY) and in the Senate in1996 by Olympia Snowe (D-ME).

[42]As of July 9, 2012. See also, Jones, Finally, HIPAA/HITECH Act Privacy, Security, Breach Notification Enforcement Rules at OMB. HIPAA.com (Mar. 24, 2012), available at www.hipaa.com/2012/03/finally-hipaa-hitech-act-privacy-security-breach-notification-enforcement-final-rules-at-omb/.

[43]See, e.g., President Bush Signed GINA into Law! Coalition for Genetic Fairness, available at http://www.geneticfairness.org/act.html.

[44]56 Fed. Reg. 51664–51710.

[45]74 Fed. Reg. 9056–9071.

[46]75 Fed. Reg. 68912, 68939 (noting, at 68929, that GINA Title II’s effective date is officially Nov. 21, 2009).

[47]75 Federal Register, 68912 68913 (explaining “Title II of GINA would not apply to a medical examination of an individual conducted for the purpose of diagnosis and treatment unrelated to employment, which is conducted by a health care professional in the hospital or other health care facility where the individual is an employee”). See also, 75 Fed. Reg. 68912, 68938; 75 Fed. Reg. 68912, 68930 (explaining that “all entities covered by Title II of GINA, whether or not they are also covered by the HIPAA Privacy Rule, must follow the requirements of GINA [Title II] when they are acting as employers.”).

[48]75 Fed. Reg. 68912, 68932. See also 75 Federal Register 68913 (explaining the definition of “Employee”). By “prospective,” I mean a job applicant.

[49]75 Fed. Reg. 68912, 68932. See also, 75 Fed. Reg. 68912, 68914 (explaining the definitions of “Covered Entity” and “Employer”).

also indirect actions: in other words, no covered entity may cause another covered entity to engage in genetic discrimination.[50]

Title II defines a number of terms in nuanced legalese that may run counter to common or professional usage.[51] For example, "genetic information" is defined both more broadly and more narrowly than common usage would suggest. "Genetic Information" under GINA includes not only the results from a genetic test but also family medical history. Nonetheless, the definition excludes information about sex[52] (which most people consider easily decipherable from presence of a Y sex chromosome[53]). Moreover, "family member" is also defined in broader terms than is often used in biomedical practice and research. According to GINA this includes not only individuals who share close ancestry (e.g. grandparents, parents, children, grandchildren, siblings, and even up to fourth degree relatives) but also those who are not necessarily related biologically (e.g. adopted children and spouses).[54]

Title II is multifaceted in that it prohibits not only the use of genetic information in employment decisions, (*e.g.*, hiring and firing; classifying and segregating; compensating, promoting, and determining seniority; and establishing terms, conditions, and privileges of employment)[55] but also the acquisition of genetic information (*e.g.*, collecting genetic information through requests, requisitions, or purchases).[56] There are six enumerated exceptions that limit a cover entity's liability for passive acquisition of genetic information (e.g., "water cooler" exception covering inadvertent requests for genetic information[57] and the "commercially and publicly available" exception).[58] The EEOC has made clear, however, that a covered entity lacking specific intent to acquire genetic information may nonetheless violate the data collection proscriptions of Title II.[59] In other words, a covered entity's acts or requests for information that are likely to result in the acquisition of genetic information–regardless of whether the covered entity deliberately, knowingly, or purposefully seeks the genetic information–would trigger GINA Title II liability. The Final Rule contains "safe harbor" language that employers may use to make general information requests without being considered to have requested genetic information.[60]

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[50]75 Fed. Reg. 68912, 68934; See also, 75 Fed. Reg. 68912, 68918 (explaining Final Rule §1635.6 and noting that if an employment agency or labor union attempts to share genetic information about a member/prospective employee with an employer, the agency or union could be held liable directly as well as indirectly).

[51]75 Fed. Reg. 68912,68933; see also, e.g., 75 Fed. Reg. 68912, 68916 (explaining that "genetic services" includes education, not just genetic counseling and testing).

[52]75 Fed. Reg. 68912, 68933; see also, 75 Fed. Reg. 68912, 68916 (explaining definition of "genetic information").

[53]From a biological perspective, sex and sexual development is much more complex than a simple XX or XY karyotype. The details, however, are not necessary or relevant to the present discussion.

[54]75 Fed. Reg. 68912, 68933; see also, 75 Fed. Reg. 68912, 68915. Note that all individuals share common ancestry, so by "not necessarily related" I mean only to say that the individuals share very little identical by descent alleles (i.e. recent genetic ancestry) that would have biomedical relevance. Note, too, that present genetic technologies facilitate the possibility of an individual having multiple "biological mothers" (e.g., gestational mothers and genetic mothers).

[55]75 Fed. Reg. 68912, 68934.

[56]Id.

[57]Id.; 75 Fed. Reg. 68912, 68919 (explaining the "water cooler" exception).

[58]75 Fed. Reg. 68912, 68934 (This exception would apply when covered entities access resources easily available (such as websites, blogs, newspapers, and other resources not limiting information to a particular group or requiring permission of an individual to access that individual's information) that may contain genetic information. This exception is not applicable, however, if the covered entity accessed the resources with the intent of obtaining genetic information or if the covered entity accessed a resource that likely contains genetic information. Even when genetic information is acquired from a publicly and commercially available resource, it may not be used to make employment decisions.); 75 Federal Register 68924–68925 (In applying this rule, again, it is critical to apply the broad definition of "genetic information" given by GINA Title II, which includes family medical history.).

[59]75 Fed. Reg. 68912, 68913 (explaining why "deliberate acquisition" was removed from Section 1635.1).

[60]75 Fed. Reg. 68912, see also, 75 Federal Register 68920 (explaining the "safe harbor" provision).

Even when an employer lawfully comes into possession of genetic information and abstains from using that information to make employment decisions, GINA Title II liability could attach under its provisions stipulating how that information is retained and restricting disclosure of the genetic information.[61] Specifically, GINA Title II stipulates any genetic information lawfully acquired that is retained by the employer must be separated from personnel files and kept as a confidential medical record.[62] Notably, however, GINA Title II liability would not be triggered in the narrow instance when an employer offers a wellness program that integrates genetic technologies or information, provided that written, advance, and voluntary consent to participate in the program is obtained; access to the genetic information is restricted to the medical professionals involved with the wellness program; genetic information is not reported to the employer unless in aggregated form; and the financial incentives of the wellness program are not tied to the use or acquisition of genetic information.[63]

Like other antidiscrimination statutes, GINA Title II provides a basis of liability under theories of individual disparate treatment, systematic disparate treatment, retaliation, and harassment; however, GINA is unique by not providing a basis of liability under the theory of disparate impact.[64] GINA Title II does not preempt state statutes and local ordinances that provide greater protections.[65] GINA Title II's prohibitions on collection of genetic information and record maintenance requirements would not apply to genetic information the covered entity had in its possession prior to November 21, 2009, when the Proposed Rule/Interim Final Rule took effect.[66] The remedies for employment discrimination on the basis of genetic information as per GINA Title II include both compensatory and punitive damages; attorney's and expert's fees; and injunctive relief.[67]

The enforcement of GINA Title II rights is to be handled in the same general manner as employment discrimination on the basis of race.[68] Cases involving direct evidence of employment discrimination on any basis (e.g. race, sex, age, etc) are unusual, and most victims must prove individual disparate treatment claims through either a pretext or a mixed-motive framework. Cases of pretext (e.g. when an employment decision was purportedly because of lawful reason X when in actuality the decision was for unlawful reason Y) are considered under the *McDonnell Douglas* burden-shifting analysis.[69] Accordingly, once the plaintiff (employee) has established a prima facia case, it creates a presumption of discrimination and the burden shifts to the defendant (employer) to articulate a "legitimate, nondiscriminatory reason" ("LNDR") for the employment decision. If an LNDR is proven, the presumption of discrimination is removed and the plaintiff again has the burden of

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[61] 75 Fed. Reg. 68912, 68932; see also, 75 Fed. Reg. 68912, 68937.
[62] Id.
[63] 75 Fed. Reg. 68912,68935.
[64] 75 Fed. Reg. 68912, 68918.
[65] 75 Fed. Reg. 68912, 68938.
[66] 75 Fed. Reg. 68912, 68937; see also 75 Fed. Reg. 68912, 68927.
[67] 75 Fed. Reg. 68912, 68938.
[68] Jennifer Wagner, The Genetic Information Nondiscrimination Act of 2008: Minimal Protections but Maximum Publicity. Presented at the American Society of Human Genetics Annual Meeting. Philadelphia, PA (2008); Jennifer Wagner and Dan Vorhaus, The Burden of Enforcing GINA: EEOC v. Nestle Illustrates One Challenge in Pursuing Genetic Discrimination Claims. Genomics Law Report (Jun. 20, 2012), available at http://www.genomicslawreport.com/index.php/2012/06/20/the-burden-of-enforcing-gina-eeoc-v-nestle-illustrates-one-challenge-in-pursuing-genetic-discrimination-claims/.
[69] McDonnell Douglas v. Green, 411 U.S. 792 (1973).

proving that the LNDR was not the actual reason for the decision but that the unlawful discriminatory purpose was the determinative factor. Importantly, an LNDR is not a legitimate reason to use the unlawful information (e.g. an employee's sex, race, age, genetic information) in making the employment decision but, rather, a legitimate reason for the employment decision itself (e.g. hiring, firing, promoting, etc). In mixed-motive cases (e.g. when an employment decision was made pursuant to a combination of lawful and unlawful motives), employment discrimination claims are considered using the *Price Waterhouse*[70] and *Costa*[71] analysis. In such cases, once the plaintiff (employee) establishes a prima facia case that the unlawful purpose was a motivating factor in the employment decision, liability for employment discrimination attaches, and the defendant (employer) has only an opportunity to limit damages by proving the decision would have been made even in the absence of the unlawful reason. GINA Title II cases, when they reach the courts, will be handled in similar fashion.

Finally, it is important to note that GINA Title II offers no bona fide occupational qualification ("BFOQ") defense for employers.[72] This was not an oversight. Rather, during the rulemaking process, the EEOC expressly declined the opportunity to create an exception that would have permitted covered entities to request genetic testing and information as part of a medical exam "where doing so is necessary to determine whether an individual has a particular manifested disease, disorder, or pathological condition, and where information about the particular disease, disorder, or pathological condition, as opposed to its signs and symptoms, is necessary to evaluate an individual's ability to perform a particular job."[73] The EEOC rationale behind this decision was mainly that neither it nor its consulting experts could conceive of any fitting examples worthy of the defense.

IV. GINA's applicability to Professional Sports Contexts

Legal scholars have previously addressed whether the professional sports sector warrants legal distinction from other employment contexts.[74] For example, Robert D. Manfred Jr. has explained the National Labor Relations Act contains "no statutory basis…to treat professional athletes any different than any other type of employee" and has additionally noted the Supreme Court's rejection of special labor law treatment for professional athletes.[75] Similarly, the statutory text and legislative intent of GINA Title II make no broad

[70]Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[71]Desert Palace v. Costa, 539 U.S. 90 (2003).
[72]BFOQ defenses are provided in Title VII of the Civil Rights Act of 1964 and are limited to sex, religion, and national origin only (and exclude race and color). See e.g., Corbett, Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower? 12 U. Pa. J. Bus. L. 683 (2010) (citing 42 U.S.C. §2000e-2(e)) (There is no statutory provision in GINA that creates a BFOQ for genetic information); see also, Questions and Answers for Small businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008, available at http://www1.eeoc.gov//laws/regulates/gina_qanda_smallbus.cfm?re ("An employer may never use genetic information in making employment decisions, since the possibility that someone may develop a disease or disorder in the future has nothing to do with his or her current ability to perform a job.").
[73]75 Fed. Reg. 68912, 68927 (determining that the EEOC lacked information demonstrating a need justifying the creation of such an extra-statutory exception).
[74]Jesse Bland, There Will be Blood … Testing: The Intersection of Professional Sports and the Genetic Information Nondiscrimination Act of 2008. 13 Vanderbilt J. of Ent. & Tech L. 357–383 (2011) (discussing four specific arguments for why GINA should not apply in professional sports); Trumble, "Knickel" and Dime Issues: An Unexplored Loophole in New York's Genetic Discrimination Statute and the Viability of Genetic Testing in the Sports Employment Context. 70 Albany L. Rev.771–793 (2007) (arguing that heightened organizational dependence and financial dependence make the sports employment context unique); Rice, A.E., Eddy Curry and the Case for Genetic Privacy in Professional Sports. 6 Va Sports & Ent. L. J. 48 (2007) (arguing there are three major reasons to treat sports differently).

exemption of, or narrow exception for, professional sports employment. In fact, advocates lobbying for GINA's passage frequently relied upon a sports employment example (*i.e.,* the Chicago Bulls' request that then restricted free agent Eddy Curry have a genetic test before his contract would be renegotiated) as illustrative of the urgent need for a federal genetic privacy and/or nondiscrimination act.[76]

GINA's statutorily-protected class is broadly defined such that it would include both current and former players (as employees). The protected class would also include collegiate and amateur players (as applicants, *i.e.,* prospective employees). Collegiate and amateur athletes are unlikely to fit squarely within that protected class as it relates to clubs and teams until taking such actions that would justify the legal transition from a mere potential employee to a prospective employee. Such actions may include entering a league draft, participating in the scouting combines, and obtaining agent representation. However, it remains speculation as to what actions are sufficient to be deemed an "applicant." GINA defines covered entities broadly enough to include the clubs and teams (as employers) as well as the players' associations (as labor organizations). These covered entities would restrict behaviors of owners, managers, coaches, trainers, and any other agents. Given the recognized importance of collegiate sports on an athlete's recruitment and potential career in professional sports—particularly in football and basketball, though less so in soccer—, it is at least plausible that the NCAA, various athletic conferences, and individual universities could be considered covered entities for GINA purposes. Through their recruitment efforts and competitive distribution of scholarships, these entities engage in activities comparable to employment agencies and apprenticeship/training programs. While such legal stretches are necessary so long as student-athletes are not considered employees of the universities, conferences, and NCAA for whom their efforts bring in substantial revenues each season, GINA's reach would become certain (albeit unintentionally) if proposed reforms to pay student-athletes openly[77] were to be implemented.

GINA Title II, thus, prohibits clubs and teams from requesting DNA testing or otherwise acquiring genetic information of the prospective, current, and former players. While the club physicians would retain the right to use DNA testing for purposes related to the medical care of the players, the club organization generally is not to gain access to the player's full medical record (*i.e.,* any DNA testing and any genetic information which, recalling the nuanced definition under GINA, includes family medical history). Current practices vary from one professional sport to another. For example, the player medical history questionnaire now in use by MLB contains GINA's safe harbor language in English and

[75]Robert Manfred, Jr., Labor Law and the Sports Industry. 17 Hofstra Lab. & Empl. L. J. 133–138 (2000) (citing Brown v. Pro Football, Inc., 518 U.S. 231 (1996)).

[76]Haga and Willard,, Act Now to Prevent Genetic Discrimination. (Dec. 28, 2005), available at http://www.genome.duke.edu/press/op-eds/post.php?s=2005-12-28-act-now-to-prevent-genetic-discrimination; Rice, Eddy Curry and the Case for Genetic Privacy in Professional Sports. 6 Va Sports & Ent L J (2007); D. Krishna, DNA Testing for Eddy Curry? Creating a New Constitutional Protection. 9 J. Const. L. 1104–1129 (2007); Trumble, Knickel" and Dime Issues," at771–793.

[77]Richard Brown "It's time to stop the charade and compensate college athletes." The Register Guard (Aug. 9, 2011), available at http://special.registerguard.com/web/opinion/26663680-47/athletes-intercollegiate-sports-revenue-babbidge.html.csp; "NCAA: Why Student Athletes Should be Paid for Achievements in College." The Bleacher Report (Mar. 31, 2011), available at http://www.bleacherreport.com/articles/650687-ncaa-why-student-athletes-should-be-paid-for-achievements-in-college; Michael Rosenberg, A Simple solution to NCAA Corruption: Let Stars Get Paid. Sports Illustrated (Viewpoint Blog), (July 26, 2011)., Available at http://sportsillustrated.cnn.com/2011/writers/michael_rosenberg/07/25/ncaa.pay/.

Spanish and directs players to omit genetic information.[78] By contrast, the NFL's "standard minimum preseason physical examination" includes specifically the medical history of both the player and the player's family and continues to include blood testing for genetic conditions (*e.g.,* sickle cell).[79] Even when questionnaires and pre-season medical exams are GINA-compliant, the medical record of a player prior to his sports employment might contain genetic information. Analogous to receipt of medical care at a hospital by a hospital employee, the club physician's access to genetic testing and genetic information for medical care purposes is not curtailed by GINA despite the club physician's presence on the club's payroll or the care being provided to the player within club-owned or operated facilities.[80] However, there must be a firewall between medical and personnel records, with genetic information obtained on or after November 21, 2009 sequestered from the latter.[81]

Therein lies the looming problem for many professional sports clubs. A review of the collective bargaining agreements ("CBAs") and uniform player contracts reveals standing policies that indicate a pervasive, conspicuous absence of such firewalls between medical and personnel records in the NFL, MLB, National Basketball Association ("NBA"), and Major League Soccer ("MLS"), but at least the potential presence of a firewall (albeit a faint one) in the National Hockey League ("NHL").[82] The NHL, which does not appear to mention the disclosure of health information otherwise, uses a simple form for the disclosure of a player's health information between a physician and any club officials not involved in medical care: the "fitness to play determination form" gives the physician the opportunity to check one of two boxes to indicate whether a player is disabled and unable to play and gives the physician space with which to "identify [the] nature of injury, illness, condition or complaint that was the subject of the examination."[83] Presumably a club or independent physician need not disclose any genetic information on that form, though the NHL form currently lacks GINA Title II's safe harbor language.

Despite the above discussion about sports employer liability for such collection and retention of genetic information, sports employers could be safe from GINA liability if –as they are anticipated to argue—the "wellness program" exception to GINA Title II's prohibitions on collection of genetic information is applicable. Upon close inspection, however, this exception seems unfitting. For a covered entity (*e.g.,* a sports team) to rely

[78]Major League Baseball Collective Bargaining Agreement, at 159–162. Attachment 6: "Player Medical History Questionnaire. Collective Bargaining Agreement" Effective Dec. 12, 2011, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.
[79]National Football League Collective Bargaining Agreement, Appendix K: "Standard Minimum Preseason Physical Examination." at 291–293. Executed on Aug. 4, 2011, available at https://www.nflplayers.com/About-us/CBA-Download/.
[80]See 75 Fed. Reg. 68912, 68913 (explaining "Title II of GINA would not apply to a medical examination of an individual conducted for the purpose of diagnosis and treatment unrelated to employment, which is conducted by a health care professional in the hospital or other health care facility where the individual is an employee"). See also, 75 Fed. Reg. 68912,68938 and 75 Fed. Reg. 68912, 68930 (explaining that "all entities covered by Title II of GINA, whether or not they are also covered by the HIPAA Privacy Rule, must follow the requirements of GINA [Title II] when they are acting as employers.").
[81]See 75 Fed. Reg. 68912,68937.
[82]Much information about policies and practices of professional sports employment is not readily accessible; therefore, some of the conclusions drawn from the materials reviewed may be imprecise or even inaccurate. The following collective bargaining agreements and players contracts were reviewed: the current NFL CBA available at https://www.nflplayers.com/About-us/CBA-Download/; Major League Baseball's current CBA available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf; the expired CBA for the MLS available at www.mlsplayers.org/cba.html (as the current CBA is not yet publically available); the expired NBA CBA available at www.nbpa.org/cba/2005 (as the current CBA negotiated in 2011 may not yet be finalized and in any case is not yet publically available); and the NHL CBA that was extended to September 15, 2012, available at http://www.nhl.com/cba/2005-CBA.pdf.
[83]Exhibit 25A of the NHL CBA, available at http://www.nhl.com/cba/2005-CBA.pdf.

on the "wellness program" exception that would permit genetic testing and collection of genetic information, four prerequisites must be met: (1) the program must be voluntary, (2) the access to individual information must be restricted to only those providing the medical care or counseling, (3) the employer must only receive aggregated information, and (4) the financial incentives for participation cannot be tied to the integration of genetic testing or information.[84] The club-provided medical care is often mandated by CBAs.[85] While such provisions may not have garnered universal player approval, the players' associations are deemed to have acted on the individual player's behalf in negotiating those terms. While it seems likely that club-provided medical care mandated through a CBA is nonetheless "voluntary" from a legal perspective (applying established principles of agency), this is a grey area,[86] particularly as the mandate applies to players who enter the leagues after a CBA has gone into effect and, thus, were not parties to the negotiation process. The issue of whether players' associations can lawfully waive statutory rights (such as those provided by GINA) through the collective bargaining process is the focus of the next section of this article. Even if sports employers meet the first prerequisite for the wellness program (*i.e.,* voluntariness), current practices fail the second and third prongs. For example, the NBA CBA explains, "A Team physician may *disclose all relevant medical information* concerning a player *to (i) the General manager, coaches, and trainers* of the Team by which such player is employed … ."[87]

The NBA uniform player contract similarly provides that non-medical personnel would have access to individually-identified medical information (without exception made for genetic testing or genetic information as defined by GINA), requiring the player to undergo medical exams before, after, and during the season as necessary, "to provide a complete prior medical history" upon the club's request, and requiring the player to sign authorizations for the disclosure of any health information.[88] Similarly, the MLS CBA states in relevant part:

> Prior to the start and at the conclusion of each MLS season, Players shall submit to complete medical examinations by a physician designated by MLS, at times designated by MLS and at MLS's expense. The Player shall *answer completely* and truthfully all questions asked of him concerning his physical and mental condition…The player is required to execute any authorizations required to release *all of his medical records* to MLS and/or Team physicians, *officials,* and to the workers' compensation insurance carrier of MLS … .[89]

The CBA for MLB further provides, "Any Club physician or certified athletic trainer treating a Player…and any other physician or medical professional treating or consulting with a Player…is authorized to *disclose all relevant medical or health information*

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[84]See 75 Fed. Reg. 68912, 68922–68923 and 75 Fed. Reg. 68912, 68935 (articulating rules for GINA Title II, 29 CFR §1635.8(b)(2)).
[85]Article XXII, Section 5 at page 299 expired NBA CBA available at www.nbpa.org/cba/2005 (stating, "Each Team has the sole and exclusive discretion to select any doctors, hospitals, clinics, health consultants or other health care providers ("Health Care Providers") to examine and/or treat players pursuant to the terms of this Agreement … .").
[86]From a bioethical perspective, it is unlikely that such decisions could be considered "voluntary."
[87]Article XXII, Section 3(a) at page 297 of the expired NBA CBA available at www.nbpa.org/cba/2005 (emphasis added).
[88]Exhibit A, Section 7 "Physical Condition," Items (f)-(i) (at page A-4 and A-5) of the expired NBA CBA available at www.nbpa.org/cba/2005.
[89]Article 9, Section 9.1 Medical Examinations and Information at p16 of the expired CBA for the MLS available at www.mlsplayers.org/cba.html (emphasis added).

concerning the Player *to (a) the Club by which the Player is employed, including the Club officials* … .”[90] Moreover, the CBA for MLB makes explicit that the disclosures are “for any purpose relating to [the player’s] employment … .”[91] As a final example, the NFL also provides for disclosure of individual medical information (without any noticeable limitation or exception restricting disclosure of genetic information) to non-medical club officials. Interestingly, the NFL contract does not require the explicit authorization of the player but, rather, requires the club physician to “disclose to a player any and all information … that the physician may from time to time provide to a coach or other Club representative, whether or not such information affects the player’s performance or health … .”[92] Because the second and third prongs seem to be unfulfilled by professional sports employers, the fourth prerequisite for the wellness program does not warrant discussion here.

Another exception is anticipated to be both applicable and relevant in the professional sports context: the exception for acquisition of genetic information that is “commercially and publicly available.”[93] This exception makes it lawful for covered entities to obtain genetic information from a wide variety of media, including television, online, and print resources. Importantly, however, the exception does not apply if the covered entity accessed those resources for the purpose of discovering genetic information or if the resources were those to which access would likely include genetic information.[94] Recall that under GINA Title II “genetic information” includes not only results from genetic tests but also family medical history and that the definition relates to as distant as fourth-degree relatives, adopted-relatives, and spouses.[95] The potential for covered entities in sports employment to discover family medical history from seemingly innocuous sources is particularly great, considering the frequency of family legacies within the professional sports world. Take, as an obvious example, Muhammad Ali, known not only as a boxing great but also as a sufferer of Parkinson’s disease.[96] GINA Title II would prohibit sports employers (and other covered entities) from collecting this information—which is family medical history and therefore “genetic information” under GINA, regardless of whether his Parkinson’s disease is caused by genetic factors, environmental factors, or a complex combination of the two— as part of a background check when setting up Laila Ali, Muhammad’s daughter, with a prize fight or celebrity dance competition.[97] GINA Title II would also prohibit the collection of this information by the Miami Marlins as part of negotiations of the conditions and compensation of Asaad Amin’s, Muhammad’s adopted son’s, baseball contract.[98] This “commercially and publicly available” exception for acquisition of genetic

[90]Article XIII, Section G(3) at p56 of Major League Baseball’s current CBA available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (emphasis added); See also Attachment 18: “Authorization for the Use and/or Disclosure of Major League Player Health Information, at p189 (providing authorization for the player’s “entire health or medical record, including, but not limited to, all information relating to injury, sickness, disease, mental health condition, physical condition, medical history, medical or clinical status, diagnosis, treatment or prognosis, including without limitation clinical notes, test results, laboratory reports, x-rays and diagnostic imaging results”).

[91]Attachment 18: “Authorization for the Use and/or Disclosure of Major League Player Health Information, at p189 of the Major League Baseball’s current CBA available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.

[92]NFL Collective Bargaining Agreement, Art. 39 § 1(c), available at https://www.nflplayers.com/About-us/CBA-Download/.

[93]See 75 Fed. Reg., supra note 46, at 68,936; see also 75 Fed. Reg., supra note 46 at 68,924 (explaining the exception).

[94]See 75 Fed. Reg., supra note 46, at 68,936; see also 75 Fed. Reg., supra note 46 at 68,924 (explaining the exception).

[95]Id. at 68933.

[96]See, e.g., Muhammad Ali. Wikipedia, Available at en.wikipedia.org/wiki/Muhammad_Ali.

[97]See Michelle Tan, Dancing with the Stars’ Laila Ali: My Father, Myself. People (May 21, 2007), Available at http://www.people.com/people/archive/article/0,,20062263,00.html.

information is intended to be akin to inadvertent, passive discovery of the information through verbal communications (*i.e.,* the "water-cooler" exception).[99] While the exception would be available to the Miami Marlins for encountering this information on internet sources that are general in nature and lack access restrictions (such as an online newspaper), the exception would be inapplicable if the Marlins visited a website that is likely to display such genetic information (such as the 23andMe's Parkinson's Disease website, a site dedicated to genetic research related to Parkinson's Disease and features information about Muhammad Ali,[100] or the 23andMe parent website, which requires a subscription and individual permissions for genome sharing[101]) and inapplicable if the Marlins went to commercially and publicly available resources seeking such information. It is worth noting that when family medical history is so pervasive that it is common knowledge, individuals seeking GINA Title II protections (i.e. prospective, current, and former employees) may have significant difficulties meeting evidentiary burdens of proof that any information was "collected."

Regardless of whether the professional sports employers and players' unions *acquire* genetic information in a lawful manner, they would be prohibited from *using* that genetic information to limit, classify, or segregate players.[102] For example, requiring different workouts or determining field positions using genotypes would be prohibited. Additionally, sports clubs would be prohibited from using genetic information when making decisions to hire, fire, promote, compensate, or otherwise determine conditions and privileges of employment.[103] Coaches could not base length of playing time decisions on genetic information of the players available. Moreover, players' associations would be forbidden from using genetic information "to exclude or expel" or "otherwise discriminate against" a member.[104] Players' associations, for example, could not exclude a player from membership on the basis of genotypes for loci relevant to sickle cell carrier status, risk of soft tissue injuries, or training responses.

In the professional sports context, there are a finite number of clubs (employers) with a finite number of positions on any roster and league-imposed salary caps: the disclosure of favorable genetic information of one player would effectively be to the detriment of another whose genetic information is unknown, undisclosed, or unfavorable. It is, therefore, important to reiterate that disparate impact theories of genetic discrimination are unavailable under GINA Title II.[105] However, GINA Title II does prohibit one covered entity from causing another covered entity to discriminate.[106] This applies regardless of whether the information is favorable (*e.g.,* a genotype causally related to endurance training-induced

[98] See Katya Cengal, Growing up with The Greatest: Son of Ali Talks About his Famous Dad. Courier-Journal (June 20, 2010), available at http://www.courier-journal.com/article/20100621/FEATURES/6210304/Growing-up-Greatest-Son-Ali-talks-about-his-famous-dad; Ben Maller, Marlins celebrate with Ali, might sign his son, The Post Game (Apr. 5, 2012), http://www.thepostgame.com/blog/dish/201204/marlins-owner-interested-muhammad-alis-son.
[99] See 75 Fed. Reg. 68912, 68934; 75 Fed. Reg. 68912, 68919 (explaining the "water cooler" exception).
[100] 23andMe, Inc. Parkinson's Disease, available at https://www.23andme.com/pd/
[101] www.23andMe.com
[102] See id.
[103] See id.
[104] See id.
[105] See id.
[106] See id.

gains in maximal oxygen consumption) or unfavorable (*e.g.,* a genotype causally related to delayed recovery from concussions).[107] If universities, collegiate athletic associations, and talent agencies are determined to be covered entities, they could not act in such a way (*e.g.,* recommending only players with particular genotypes or providing scout access to only players with certain genotypes) that would cause prospective teams to discriminate on the basis of genetic information. In other words, one covered entity cannot do the dirty work of another without violating GINA Title II.

It is important in the context of GINA Title II rights to keep clearly distinct the unavailability of a BFOQ defense and potential LNDRs for employment decisions. A defendant accused of genetic discrimination would be permitted to show that the employment *decision* that is the focus of the claim was made for a LNDR and that the employment *decision* was not because of any genetic test or genetic information of the plaintiff. By contrast, a defendant would not be permitted to acquire or use genetic information to make an employment decision and subsequently argue the defendant was justified because of a bona fide reason to require genetic testing or use genetic information. The MLB policy for genetic testing of prospective players (and their family members) is illustrative.[108] The MLB's purported reason for the genetic testing policy of prospective employees is to "deal with the identity fraud problem."[109] While identity fraud is certainly a legitimate interest for the MLB,[110] GINA Title II does not provide them with the ability to require genetic tests of prospective employees and use that information to make an employment decision (*i.e.,* to decide whether or not to sign the individual). To do so would be a BFOQ (not a LNDR): while the MLB is permitted under GINA Title II to argue that they made an employment *decision* (e.g. not to sign a prospective player) for a legitimate nondiscriminatory reason (*i.e.,* players under 16 years of age are ineligible and the player's age or identity was in question), the MLB is not permitted under GINA Title II to defend the prohibited genetic testing and prohibited use of genetic information in employment contexts by *justifying those practices* under a bona fide reason (*i.e.,* the need to minimize or detect identity fraud). In short, the LNDR pertains to the ultimate employment decision taken, while a BFOQ (which is unavailable for genetic information and race) pertains to the prohibited conduct (*e.g.,* use of race, use of genetic information, or acquisition of genetic information through genetic testing) that was a motivating or determinative factor in the employment decision.

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[107] See id. at 68918 (explaining that if a labor organization were to share genetic information with an employer, the labor organization would be in violation regardless of the organization's intentions in sharing the information and, similarly, if an employer were to ask an employment agency to only send it applicants that met certain genetic criteria the employer would be in violation).

[108] A full discussion of the GINA Title II issues raised by the MLB's policy (e.g. the lack of an extraterritoriality provision, the exclusion of "age" from GINA's definition of "genetic information", etc) is outside the scope of this article and has been addressed elsewhere. See, e.g., Rhonda Evans, Striking Out: The Genetic Information Nondiscrimination Act of 2008 and Title II's Impact on Professional Sports Employers, 11 N.C. J.L. & T. 205 (2009); LC Frey, They aren't who we thought they were: the importance of genetic testing in major league baseball to prevent the falsification of players' ages. Marq. Spots L Rev. 2010; 21:425–443; Jesse Bland, There Will be Blood…Testing: The Intersection of Professional Sports and the Genetic Information Nondiscrimination Act of 2008, 13 Vand. J. of Ent. & Tech. L. 357 (2011); Rohan Hebbar, The Impact of the Genetic Information Nondiscrimination Act on Sports Employers: A Game of Balancing Money, Morality, and Privacy, 8 Williamette Sports L.J. 52 (2011); Comment, Baseball's DNA Testing Policy Strikes Out: Genetic Discrimination in Major League Baseball, 41 Seton Hall L. Rev. 813 (2011); and Michael Zitelli, The Controversy Ensues: How Major League Baseball's Use of DNA Testing is a Matter for Concern under the Genetic Information Nondiscrimination Act, 18 Sports Law. J. 21 (2011)

[109] Michael S. Schmidt & Alan Schwarz, Baseball's Use of DNA Tests on Prospects Finds Controversy, Too. N.Y. Times (July 22, 2009), available at http://www.nytimes.com/2009/07/22/sports/baseball/22dna.html

[110] See, e.g., Dan Vorhaus, MLB's Genetic Testing Program at the Plate Again. Genomics Law Report (July 28, 2009) http://www.genomicslawreport.com/index.php/2009/07/28/mlbs-genetic-testing-program-at-the-plate-again/.

V. 14 Penn Plaza v. Pyett: Can statutory employment nondiscrimination rights be waived through collective bargaining agreements?

The EEOC recognized a trend during the late 1990s of employers increasingly requiring waivers of statutory rights against employment discrimination and/or requiring the enforcement of any such claims through mandatory arbitration as a condition of employment.[111] While acknowledging the value that alternative dispute resolution can serve in resolving labor disputes, the EEOC's published position was that this move towards "privatization" of enforcement of federal employment nondiscrimination statutes contradicts strong public policy, which is not only to provide the victim of employment discrimination with redress from the employer but also to provide public accountability and deterrence.[112]

Since the mid-1970s, disputes regarding collective bargaining agreements and enforcement of individual rights were decided by the courts pursuant to the line of precedent set by *Gardner-Denver*[113] and its progeny.[114] In *Gardner-Denver*, at issue was whether an employee's submission of his racial discrimination claim to the binding arbitration process established through collective bargaining precluded him from subsequently pursuing the enforcement of his racial nondiscrimination rights in a judicial forum de novo. The court stated unequivocally:

> [W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII … VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII … ."[115]

While the *Gardner-Denver* court acknowledged that acknowledging that certain statutory rights (e.g. the right to strike provided by the National Labor Relations Act[116]) may be waived during the collective bargaining process, it made a bright-line distinction between employment nondiscrimination rights (such as those under the Civil Rights Act of 1964[117]) and other statutory labor rights.[118] This distinction was based upon Title VII's legislative intent demonstrating its design "was to supplement rather than supplant" existing laws and to give nondiscrimination rights the "highest priority."[119]

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[111] E.g., Enforcement Guidance on non-waivable employee rights under Equal Opportunity Commission (EEOC) enforced statutes, EEOC Notice No. 915.002 (Apr. 10, 1997), available at http://www.eeoc.gov/policy/docs/waiver.html; Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Notice No. 915.002 (July 10, 1997), available at http://www.eeoc.gov/policy/docs/mandarb.html.

[112] EEOC Notice No. 915.002 (July 10, 1997) (stating the role of federal courts as having the primary and ultimate responsibility for enforcement of federal nondiscrimination laws; and further noting the arbitration process is private which limits public accountability and lowers any deterrence value of enforcement, the arbitration process halts the development of the laws, and the arbitration system includes structural biases against claimants).

[113] Alexander v. Gardner-Denver Co. 415 U.S. 36 (1974).

[114] Barrentine v. Arkansas-Best Freight System, Inc. 450 U.S. 728 (1981); McDonald v. West Branch, 466 U.S. 284 (1984).

[115] *Alexander*, 415 U.S. at 51.

[116] National Labor Relations Act, Pub. L. No. 80–101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 151–169 (2006)).

[117] Civil Rights Act of 1964, Pub. L. No. 88–352, Title VII, 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. § 2000e (2006)).

[118] *Alexander*,415 U.S. at 51.

[119] Id. at 47–48.

In making its decision, the *Gardner-Denver* court rejected the argument that an arbitrator's award should be given deference and, in dicta, dismissed the suggestion that an arbitral forum affects only procedural rights.[120] The *Gardner-Denver* court emphasized the limitations of arbitrator authority, explaining that "the arbitrator has authority to resolve only questions of contractual rights,"[121] while having "no general authority to invoke public laws that conflict with the bargain between the parties."[122] A decade earlier it had been settled that the arbitrator's authority is derived from and limited to that provided within the collective bargaining agreement itself[123] and that an arbitrator's "award is legitimate only so long as it draws its essence from the collective bargaining agreement."[124] As a result, the *Gardener-Denver* court highlighted the fact that an arbitrator would be bound to follow the collective bargaining agreement when resolving disputes, even in such circumstances where the collective bargaining agreement's provisions conflict with applicable law or provide employees with only a subset of remedies that would otherwise be available.[125]

This area of the law was at best qualified and at worst destabilized in 1991, with the decision in *Gilmer*,[126] a case involving the Age Discrimination in Employment Act of 1967 (ADEA).[127] The *Gilmer* court distinguished the facts from those of *Gardner-Denver* precedent by reframing the questions involved and minimizing the significance of the *Gardner-Denver* rationale and dicta. The *Gilmer* court explained that *Gardner-Denver* (and its progeny) "involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims,"[128] rather than "the enforceability of an agreement to arbitrate statutory claims," which was at issue in *Gilmer*.[129] By highlighting the agreement in the instant case was an individually bargained agreement, the *Gilmer* court dismissed concerns regarding the adequacy of the arbitral forum to resolve nondiscrimination disputes and sidestepped the *Gardner-Denver* concerns regarding submitting statutory nondiscrimination rights (i.e. minority rights) to the collective bargaining (majoritarian) process. Unlike the *Gardner-Denver* court, the *Gilmer* court held the perspective that forum selection is only procedural in nature and, as such, does not affect substantive rights.[130] Relying upon *Mitsubishi*,[131] the *Gilmer* court established the following:"'[h]aving made the bargain to arbitrate, the party should be held to it unless

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[120]Id. at 56–57 (quoting U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359–360, 91 S. Ct. 409, 413–414 (1971) (Harlan, J., concurring) as follows, "[T]he choice of forums inevitably affects the scope of the substantive right to be vindicated.").
[121]Id. at 53–54.
[122]Id.
[123]United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 1361 (1960). E.g., Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 745, 101 S. Ct. 1437, 1447 (1981) (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 1361 (1960)). See also Way Bakery v. Truck Drivers Local No. 164, 363 F.3d 590, 593 (6th Cir. 2004) (citation omitted) (holding "[A]n award so fails when: (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement.").
[124]United Steelworkers of America, 363 U.S. at 597, 80 S. Ct. at 1361.
[125]Alexander, 415 U.S. at 57 (noting that while "the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII," other factors – including the informal and expedited fact-finding process of alternative dispute resolution-may make it "comparatively inferior to judicial processes in the protection of Title VII rights").
[126]Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20 (1991).
[127]Age Discrimination in Employment Act of 1967, Pub. L. No. 90–202, 81 Stat. 602 (1967) (codified, as amended, at 29 U.S.C. §§ 621–634 (2006)).
[128]*Gilmer*, 500 U.S. at 35.
[129]Id.

Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'"[132]

Moreover, it placed the burden on the employee "to show that Congress intended to preclude a waiver of a judicial forum" for the statutory nondiscrimination claims.[133] Upon reviewing the legislative intent for the ADEA, the *Gilmer* court failed to find sufficient evidence that Congress intended to preclude waivers of the judicial forum.[134] In sum, the *Gilmer* court held an employment agreement, regardless of whether it has been negotiated individually or collectively, that purports to waive statutory rights to a judicial forum and require arbitration of those statutory rights – including nondiscrimination rights such as those provided in the ADEA - is enforceable in the absence of congressional intent to preclude such a waiver of the judicial forum.[135]

In 2009 in *14 Penn Plaza v. Pyett*, the Supreme Court had an opportunity to address the tension between *Gardner-Denver* and *Gilmer* lines of precedent and to decide whether a collective bargaining agreement requiring employment discrimination disputes (including those based upon rights derived from federal statutes) be resolved through arbitration was enforceable.[136] *Pyett* involved an age discrimination claim and a collective bargaining agreement containing the following provision:

> §30 NO DISCRIMINATION: There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, …or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination."[137]

The Majority held, "a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."[138] While the decision may have been somewhat predictable given the present composition of the court, the *Pyett* court's 5–4 decision[139] sparked considerable controversy.[140]

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[130]Id. at 26 (explaining, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum") (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 3354 (1985)).
[131]Mitsubishi Motors Corp., 473 U.S. at 628.
[132]*Gilmer*, at 26 quoting Mitsubishi Motors Corp., 473 U.S. at 628).
[133]Id.
[134]Id. at 26–29.
[135]See Mathews v. Denver Newspaper Agency LLP, 649 F. 3d 1199, 1205 (2011) (explaining that Gilmer clarified the Gardner-Denver ruling and made clear that "an arbitration agreement can constitute an enforceable waiver of judicial forum for statutory civil rights claims regardless of whether negotiated individually or collectively, citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).
[136]14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009).
[137]Id. at 252.
[138]Id. at 274.
[139]Id.

The Court, following *Gardner-Denver* precedent,[141] reiterated "federal antidiscrimination rights may not be prospectively waived."[142] However, the Court attempted to limit the reach of *Gardner-Denver* in numerous ways. For example, backing away from the *Gardner-Denver* idea that nondiscrimination rights are distinct from basic labor rights and, as such, warrant special attention when determining eligibility for arbitration, the *Pyett* court explained plainly, "[t]he decision to fashion a collective-bargaining agreement to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery"[143] that are afforded to unions by the National Labor Relations Act.[144] The Majority in *Pyett*, following the *Gilmer* court's perspective, reasoned that a collective bargaining agreement's waiver of the judicial forum to enforce statutorily-derived employment antidiscrimination rights is "not a waiver of a 'substantive right.'"[145] The *Pyett* court continued along *Gilmer* lines, noting that if Congress intended an employment antidiscrimination statute to, in addition, provide protection against waiver of a judicial forum to enforce those statutory rights, that intent must be "deducible from text or legislative history."[146]

In reaching its decision, the majority in *Pyett* downplayed serious concerns previously stated by the *Gardner-Denver* court, (1) calling it a mistake to suggest that an arbitral forum is, for a host of reasons,[147] less suitable for resolution of antidiscrimination claims than resolution of contractual disputes and (2) dismissing conflict of interest concerns despite acknowledgment that "a union may subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit."[148] Instead, the *Pyett* majority emphasized the union has a "duty of fair representation" during negotiation, administration, and enforcement of the contracts[149] which can be breached "when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith."[150] The majority did not answer whether a collective bargaining agreement that mandates arbitration of employment antidiscrimination rights "when the union controls access to and presentation of employees' claims in arbitration, which is usually the case,"[151]

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[140]Kenneth M. Casebeer, Supreme Court Without a Clue: 14 Penn Plaza LLC v. Pyett and the System of Collective Action and Collective Bargaining Established by the National Labor Relations Act, 65 U. Miami L. Rev. 1063 (2011); J. Nicholas Haynes, On Precarious Ground: Binding Arbitration Clauses, Collective Bargaining Agreements, and Waiver of Statutory Workplace Discrimination Claims Post-Pyett, 2011 J. Disp. Resol. 225 (2011); Alan Hyde, Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them, 25 Ohio St. J. on Disp. Resol. 975 (2010); and Deborah A. Widiss, Divergent Interests: Union Representation of Individual Employment Discrimination Claims, 87 Ind. L. J. 421 (2012) (discussing the inherent conflict of interests that unions have when trying to maximize benefits for the collective group of union members while simultaneously trying to enforce the nondiscrimination rights of one or a minority of members). But see Michael Z. Green, Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration, 87 Ind. L. J. 367 (2012) (viewing the decision favorably and arguing for application of the "interest-convergence" theory to resolve discrimination disputes through arbitration).

[141]Alexander v. Gardner-Denver, 415 U.S. 36, 51 (1974) (stating, "To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII.").

[142]*14 Penn Plaza*, 556 U.S. at 265 (stating, "The Court was correct in concluding that federal antidiscrimination rights may not be prospectively waived..").

[143]Id.

[144]49 Stat. 449, as amended.

[145]*14 Penn Plaza*, 556 U.S. at 259.

[146]Id. at 259. (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29, 111 S. Ct. 1647, 1647, 114 L.Ed.2d 26 (1991)).

[147]E.g. the fact-finding is less comprehensive, the forum is less formal, arbitrators may have narrow expertise of the industry but lack expertise on the law and jurisprudence, etc.

[148]*14 Penn Plaza*, 556 U.S. at 269. (stating simply, "We cannot rely on this judicial policy concern as a source of authority…Absent a constitutional barrier, it is not for us to substitute our view of … policy for the legislation which has been passed by Congress.").

[149]Id. at 271. (citing Communications Workers of America v. Beck, 487 U.S. 735, 743).

[150]Id. at 271. (quoting Marquez v. Screen Actors, 525 U.S. 33, 44, 119 S. Ct. 292, 142 L.Ed.2d 242 (1998)).

although it did explain that such a question would focus on whether the collective bargaining agreement blocks employees from 'effectively vindicating' their 'federal statutory rights in the arbitral forum."'[152] The dissenting justices criticized the majority for ignoring 35 years of precedent distinguishing arbitration agreements negotiated by individuals and those negotiated by unions[153] and reiterated that statutory antidiscrimination rights are "on plainly different ground" than other "statutory rights related to collective activity," noting the former "concerns not majoritarian processes, but an individual's right to equal employment opportunities."[154]

Thus, in a post-*Pyett* era, it seems that when a collective bargaining agreement is silent as to whether statutorily-derived nondiscrimination rights must be enforced via the grievance and arbitration procedures, *Gardner-Denver* continues to be controlling precedent. Under such circumstances, merely using the arbitral forum to enforce contractual rights under the collective bargaining agreement is not a waiver of and does not preclude an employee's rights to seek enforcement of statutory antidiscrimination rights in a judicial forum.[155] The employee would have the right to a de novo hearing in a judicial forum even if contractual rights that were similar were pursued through the arbitral forum. The arbitration award could be introduced as evidence but would not be determinative. Additionally, it also seems that when a collective bargaining agreement does contain express requirement (*i.e.,* when it "clearly and unmistakably requires) that specific statutory claims – regardless of whether those rights relate to nondiscrimination or other labor rights– be resolved via the grievance and arbitration procedure, *Pyett* is controlling precedent. Under such circumstances, the collective bargaining agreement will be enforced (and the party would have no right to a de novo hearing in a judicial forum) unless the employee can demonstrate through legislative intent or textual analysis that Congress precluded waivers of the judicial forum.

Taken at face value, the majority opinion in *Pyett* did not alter the legal playing field regarding waivers of statutory employment nondiscrimination rights: quite simply, "federal antidiscrimination rights may not be prospectively waived."[156] However, closer examination reveals it dramatically redefined the boundaries by stating that forum selection is merely procedural and does not, as Justice Harlan indicated in 1971, "inevitably affect[s] the scope of the substantive right to be vindicated."[157] Second, as Rutgers Law Professor Alan Hyde has argued, the *Pyett* decision is vexing because it abandoned the presumption of arbitrability that had been ubiquitous in at least thirteen Supreme Court rulings and, in doing so, ushered in a novel approach requiring the close parsing of arbitration clauses within collective bargaining agreements.[158] Prior to *Pyett*, an arbitrator had the authority to look to and use statutory law when interpreting the collective bargaining agreement, but that

[151] Id. at 285. (Souter, J. dissenting) (internal citation omitted).
[152] Id. at 274. (quoting Green Tree Financial Corp.-Ala v. Randolph, 531 U.S. 79, 90 (2000)).
[153] *14 Penn Plaza v. Pyett*, 556 U.S. 247, 281, 129 S. Ct. 1456, 1479 (2009) (Souter, J. dissenting)
[154] Id. at 282.
[155] Alexander v. Gardner-Denver, 415 U.S. 36 (1974).
[156] *14 Penn Plaza*,556 U.S. at 265.
[157] U.S. Bulk Carriers v. Arguelles, 400 U.S. 351, 359–360, 91 S. Ct. 409, 413–414 (1971) (Harlan, J., concurring).
[158] Alan Hyde, Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them, 25 Ohio St. J. on Disp. Resol. 975, 1001 (2010) ("The question thus arises whether the novel Pyett approach to construing arbitration clauses (close parsing of language, no presumption of arbitrability) can co-exist with the traditional Warrior & Gulf approach (everything not expressly excluded is arbitrable, and even exclusions are narrowly read)").

informed interpretation and decision ultimately had no bearing on the individual's ability to seek subsequent judicial enforcement of the statutorily-derived rights (as those were seen as arising from an independent origin, distinct from the contractual rights imbedded in the collective bargaining agreement).[159] Thirdly, *Pyett's* emphasis that only those statutes containing clear preclusion of waivers to the judicial forum will be deemed outside the reach of collective bargaining agreements is awkward in light of the non-delegation doctrine, which specifies that the Legislature may not usurp the powers of the Judiciary by attempting to delegate adjudicatory powers to agencies and other non-Article III courts in the absence of "intelligible principles."[160] *Pyett's* implication that, by default and by silence, a piece of legislation creating nondiscrimination rights also authorizes arbitral forums to be *substitutes for* (and not merely supplements to) judicial enforcement of those statutory nondiscrimination rights warrants closer legal scrutiny, as it seems to be in serious tension with the separation of powers established in the Constitution.

Among the many questions *Pyett* left unanswered[161] is the role of the court when faced with a situation where an arbitration award attempting to resolve statutorily-derived nondiscrimination claims is challenged. Under the pre-*Pyett* reasoning (that made critical distinction between the collective bargaining of nondiscrimination rights and other labor rights as well as the distinction between rights arising under contract and those arising under statute, as articulated in Gardner-Denver and subsequent cases), courts were reluctant to overturn an arbitration award regarding a collective bargaining agreement and generally refused to review the case on its merits.[162] It is unclear whether the standard of review for courts in such circumstances would now be made parallel to standards of review used in administrative law (i.e., to determine whether an arbitration award was "arbitrary, capricious, or an abuse of discretion"[163] or "otherwise not in accordance of law"[164]). Additionally, *Pyett* left undetermined whether, due to the unions' role in determining whether and to what extent an individual grievance is pursued, any particular collective bargaining agreement and its dispute resolution procedure "prevents [individuals] from effectively vindicating their federal statutory rights in the arbitral forum."[165] Finally, the ability to render the collective bargaining agreement itself as unenforceable as contrary to public policy—a legal

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[159]See, e.g., Alan Hyde, Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them, 25 Ohio St. J. on Disp. Resol. 975 (2010).

[160]E.g. Schor v. CFTC, 478 U.S. 833, 850 (1986).

[161]E.g., Alan Hyde, Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them, 25 Ohio St. J. on Disp. Resol. 975, 976 (2010) (stating "Under any reading, however, Pyett will now lead to a lengthy future chain of cases to determine: (1) which employee legal claims may be stripped by collective agreements and sent to arbitration; (2) whether particular language in collective bargaining agreements will be needed to strip employees of statutory rights; (3) which demands (if any) to waive claims will constitute demands for individual bargaining, hence bargaining in bad faith; (4) whether other dispute resolution institutions might substitute for arbitration; (5) whether standards for fair representation need to be revised if unions are representing employees statutory claims; and (6) whether the role of courts changes when reviewing arbitration awards that deal with statutory rights"); and J. Nicholas Haynes, On Precarious Ground: Binding Arbitration Clauses, Collective Bargaining Agreements, and Waiver of Statutory Workplace Discrimination Claims Post-Pyett, 2011 J. Disp. Resol. 225 (2011) (indicating "the conclusions reached in Pyett have left the original nature of statutory workplace discrimination claims on uncertain terrain").

[162]See, e.g., David Wachutka, Note, Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies, 8 Pepp. Disp. Resol. L.J. 147, 160–162 (2008), available at: http://digitalcommons.pepperdine.edu/drlj/vol8/iss1/5 (discussing standards of review of arbitration awards and citing, e.g., United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960)).

[163]Motor Veh. Mfrs. Ass'n v. State Farm Insurance, 463 U.S. 29, 42 (1983).

[164]Chevron U.S.A., Inc. v. Natural Resources Defence Council, Inc. 467 U.S. 837 (1984).

[165]14 Penn Plaza v. Pyett, 556 U.S. 247, 273 (2009).

exception available to the courts pre-*Pyett* –is also uncertain.[166] Established by *Eastern Associated Coal Corporation v. United Mine Workers of America* in 2000,[167] the court's role in deciding to apply this exception was to determine whether the terms of the agreement were "contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests." Courts taking *Pyett's* approach may find few circumstances upon which to apply this exception, which, pre-*Pyett*, had been a valuable judiciary tool to keep collective bargaining agreements in check.[168]

VI. Applying Pyett to GINA Title II Rights and Professional Sports

Collective bargaining agreements (CBAs) are commonplace in professional sports,[169] and the CBAs for the MLB, MLS, NFL, and NHL (but not the NBA) contain provisions that seem to grant employment nondiscrimination rights similar to or duplicative of those rights provided by federal antidiscrimination statutes. The text of GINA Title II is silent as to whether the employment nondiscrimination rights it confers are enforceable in arbitral forums.[170] The legislative findings articulated in GINA indicate that its purpose was to provide "a national and uniform basic standard" of protection against genetic discrimination in employment and that GINA's passage was in response to a "compelling public interest in relieving the fear of discrimination and in prohibiting its actual practice in employment…"[171] Legislative intent was, however, that GINA would "not preempt any other state or local law that provides equal or greater protections,"[172] and its enforcement mechanisms and remedies were crafted by simply incorporating by reference those of Title VII of the Civil Rights Act of 1964.[173] It seems unlikely that a court following *Pyett* would find sufficient evidence "deducible from text or legislative history"[174] to substantiate the argument that Congress precluded waivers to a judicial forum when it created GINA[175] (unless such a court would find GINA's incorporation by reference to Title VII as sufficient

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[166]See, e.g., David Wachutka, Note, Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies, 8 Pepp. Disp. Resol. L.J. 147, 161–165 (2008), available at: http://digitalcommons.pepperdine.edu/drlj/vol8/iss1/5 (discussing the authority of arbitrators and the standard of review for an arbitration decision at 161–165).

[167]Eastern Associated Coal Corporation v. United Mine Workers of America, 531 U.S. 57, 62–63 (2000).

[168]E.g. Wachutka, Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies at 164.

[169]E.g., the National Football League Management Council (NFLMC) and the National Football League Players Association (NFLPA) executed its current collective bargaining agreement on August 4, 2011, available at https://www.nflplayers.com/About-us/CBA-Download/; Major League Baseball's current collective bargaining agreement between the 30 Major League Clubs and the Major League Baseball Players Association (MLBPA) took effect on December 12, 2011, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf; the collective bargaining agreement between Major League Soccer (MLS) and Major League Soccer Players Union (MLSPU) was renegotiated in 2010. The expired MLS collective bargaining agreement is available at www.mlsplayers.org/cba.html; the National Basketball Association (NBA) and the National Basketball Players Association (NBPA) negotiated a new collective bargaining agreement at the end of 2011, replacing the 2005 collective bargaining agreement available at www.nbpa.org/cba/2005; and the collective bargaining agreement between the National Hockey League (NHL) and the National Hockey League Players' Association (NHLPA) was extended through September 15, 2012 and is available at http://www.nhl.com/cba/2005-CBA.pdf.

[170]75 Fed. Reg. 68912, 68937 (Nov. 9, 2010) (establishing the powers and procedures for enforcement).

[171]Pub. L. No. 110–233, §122 Stat. 881 (2008) at Section 2 "Findings," paragraph 4.

[172]75 Fed. Reg. 68912, 68929 (Nov. 9, 2010). (explaining GINA was not intended to replace the myriad of state laws already in existence).

[173]75 Fed. Reg. 68912 68928 (Nov. 9, 2010) (explaining Final Rule §1635.10); 75 Fed. Reg.68912, 68937 (Nov. 9, 2010) (establishing the powers and procedures for enforcement and incorporating by reference Civil Rights Act of 1964, Pub. L. No. 88–352, Title VII, 78 Stat. 252 (1964) (codified as amended at 42 U.S.C. §2000e (2008)).

[174]14 Penn Plaza v. Pyett, 556 U.S. 247, 259 (2009) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29, 111 S. Ct. 1647, 1647, 114 L.Ed.2d 26 (1991)).

to incorporate Title VII's congressional intent that the rights be ultimately enforced in a judicial forum[176]). Thus, according to current case law, CBAs in professional sports cannot prospectively waive substantive rights to employment nondiscrimination derived from federal statutes, including those conferred by GINA Title II. However, in light of *Pyett*, it may be possible for the clubs and players' associations to negotiate terms mandating GINA Title II rights be enforced in arbitral forums and waiving rights to a judicial forum in the first instance. In the following section, an analysis of the CBAs and standard players contracts in five professional leagues is provided to explore the extent to which GINA Title II rights have been addressed in professional sports contexts to date.

A. Major League Baseball (MLB)

First, the MLB CBA grants players contractual non-discrimination rights as follows: "The provisions of this Agreement shall be applied to all Players covered by this Agreement without regard to race, color, religion, national origin, sexual orientation, or any other classification protected under Federal Law."[177]

While it does not explicitly mention genetic information, the catch-all provision for any protected class under Federal Law would implicitly include that right. Accordingly, genetic nondiscrimination rights in MLB would be derived from both GINA Title II and the contract itself. While the MLB CBA appears to mandate arbitration for the contractual rights, which would include those genetic information nondiscrimination rights implicitly included in the CBA's nondiscrimination provision, the CBA does not contain conspicuous, explicit language that would mandate arbitration and waive procedural rights to enforce GINA Title II rights through the EEOC or subsequently in a judicial forum. The MLB CBA requires that the arbitration or grievance procedure be used "as the exclusive remedy of the Parties" for "certain grievances and complaints."[178] The MLB CBA defines "grievance" as "[a] complaint which involves the existence of or interpretation of, or compliance with, any agreement or any provision of any agreement, between the Association and the Clubs or any of them, or between a Player and a Club…"[179]

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[175]See also About History: GINA. Genetics & Public Policy Center, available at http://www.dnapolicy.org/gina/gina.history.html; Legislative History: President Bush Signs Genetic Information Nondiscrimination Act of 2008. National Human Genome Research Institute, available at http://www.genome.gov/24519851/; Congressional Hearings and Testimony on Privacy and Discrimination, available at http://www.genome.gov/11510221 (which does not mention "arbitration" anywhere); A Guide to the Genetic Information Nondiscrimination Act: The History of GINA. Genetic Alliance, available at http://www.geneticalliance.org/ginaresource.history (which also does not mention "arbitration"); Boken AM. Getting to know GINA: History and Analysis of the Genetic Information Nondiscrimination Act of 2008, The Health Law and Public Policy Forum. 2009; 1(1): Article 2, pages 20–26, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0CHwQFjAI&url=http%3A%2F%2Flaw.vanderbilt.edu%2Fstudent-resources%2Fstudent-organizations%2Fhealth-law-society%2Fhealth-law-forum%2Fdownload.aspx%3Fid%3D4190&ei=WTEZUMfJC66u0AHj5IGgCA&usg=AFQjCNENF71MIiGmL-65Dk0JdUdbXxPc7g&sig2=kEHuaOZwN0X-ITJUkCOiUg

[176]Alexander v. Gardner-Denver, 415 U.S. 36, 57–59 (1974).

[177]Article XV Miscellaneous, Section A. No Discrimination, MLB CBA at page 60, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf See also Schedule A: Uniform Player's Contract, 9(b) at 286 ("All disputes between the Player and the Club which are covered by the Grievance Procedure as set forth in the Basic Agreement shall be resolved in accordance with the Grievance Procedure.").

[178]Article XI Grievance Procedure, MLB CBA at pages 38–48, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.

[179]Article XI Grievance Procedure, A. Definitions (1)(a), MLB CBA at page 38, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.

The MLB CBA excludes from the grievance procedure a limited number of agreements (e.g. the Players Benefit Plan); however, the section of the MLB CBA establishing the grievance procedure, like the nondiscrimination provision, does not expressly mention GINA or any other federal antidiscrimination statutes. The authority of the arbitral forum, as per the MLB CBA, does not include authority to apply federal nondiscrimination statutes or caselaw but, rather, is limited as follows:

> [T]he Arbitration Panel shall have jurisdiction and authority only to determine the existence of or compliance with, or to interpret or apply agreements or provisions of agreements between the Association and the Clubs or any of them, or between individual Players and Clubs. The Arbitration Panel shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of such agreements.[180]

Nonetheless, the MLB Uniform Player's Contract underscores that the contracts are subject to federal and state laws and regulations.[181] Taken together, it is apparent that MLB players retain both substantive and procedural rights to enforce genetic discrimination complaints outside of the arbitral forum in which other grievances are resolved.

B. Major League Soccer (MLS)

The MLS CBA required grievances to be resolved "exclusively" in an arbitral forum,[182] defining grievances as "any dispute arising after the effective date…and involving the interpretation of or application of, or compliance with, any agreement between the Union and MLS or between a Player and MLS."[183] The MLS CBA contained no mention of federal antidiscrimination laws with regard to waiver of rights to a judicial forum or mandatory arbitration of statutorily-derived nondiscrimination claims. The MLS CBA did contain a "No Discrimination" provision, which stated as follows: "This CBA shall be applied to all Players without discrimination on the basis of religion, race, color, national origin, sex, sexual orientation, age, disability, marital status, or, except as provided in Article 4, membership or non-membership in or support of or non-support of any labor organization."[184]

Notably, this provision –unlike the one contained in the MLB CBA—did not contain a catch-all provision that would have granted MLS players contractual protections from genetic discrimination. Accordingly, the players' rights of genetic nondiscrimination were exclusively derived from GINA Title II. Moreover, the authority of the Arbitrator was limited under the MLS CBA as follows:

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[180]Article XI Grievance Procedure, Section B. at page 44, MLB CBA, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.
[181]Schedule A: Uniform Player's Contract, 11 at page 287 MLB CBA, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (noting national emergency situations that may cause suspension of play).
[182]Article 21 Grievances and Arbitration. At pages 46–48 MLS CBA (expired), available at www.mlsplayers.org/cba.html (as the current CBA is not yet publically available).
[183]Article 21 Grievances and Arbitration. Section 21.1. At page 46. MLS CBA (expired), available at www.mlsplayers.org/cba.html (as the current CBA is not yet publically available).
[184]Article 7 No Discrimination, at 13. MLS CBA (expired), available at www.mlsplayers.org/cba.html (as the current CBA is not yet publically available).

> [T]he Impartial Arbitrator will not have the jurisdiction or authority to add to, subtract from, or alter in any way the provisions of this CBA or any SPA[185] or addendum In resolving grievances, the Impartial Arbitrator will have the authority to interpret, apply and determine compliance only with any provision of this CBA and/or an SPA. The Impartial Arbitrator shall have no authority to alter or modify the contractual relationship or status between a player and the League, other than where such remedy is expressly provided for in this CBA.[186]

Thus, the MLS arbitral forum lacked authority to apply statutory or common law principles when deciding disputes that would have altered or modified the agreement. As a result, the MLS arbitral forum would have lacked authority to determine genetic nondiscrimination claims derived exclusively from GINA Title II. Therefore, it seems apparent that MLS players –at least pursuant to the MLS CBA that was in effect through 2010—retained both substantive and procedural rights to enforce genetic discrimination complaints outside of the arbitral forum.

C. National Football League (NFL)

The NFL CBA provides players with contractual nondiscrimination rights but does not include genetic information among them. Rather, the NFL CBA provides nondiscrimination protections as follows: “There will be no discrimination in any form against any player by the NFL, the Management Council, any Club or by the NFLPA because of race, religion, national origin, sexual orientation, or activity or lack of activity on behalf of the NFLPA.”[187]

The NFL CBA requires that non-injury grievances be resolved in an arbitral forum, defining “grievance” as any dispute

> arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with any provision of this Agreement, the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and conditions of employment of NFL players…[188]

The standard NFL Player Contract contains a similar provision that states:

> [A]ny dispute between Player and Club involving the interpretation or application of any provision of the NFL collective bargaining agreement or this contract will be submitted to final and binding arbitration in accordance with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs.[189]

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[185]“SPA” refers to a standard player agreement.
[186]Article 21 Grievances and Arbitration. Section 21.8. At page 47. MLS CBA (expired), available at www.mlsplayers.org/cba.html (as the current CBA is not yet publically available).
[187]Article 49, Section 1, No Discrimination. At page 212. NFL CBA, available at https://www.nflplayers.com/About-us/CBA-Download/.
[188]Article 43, Section 1. At page 187. NFL CBA, available at https://www.nflplayers.com/About-us/CBA-Download/.
[189]Appendix A: NFL Player Contract. Section 19. At page 262 of the NFL CBA, available at https://www.nflplayers.com/About-us/CBA-Download/.

These mandatory arbitration provisions do not mention any federal statutes or state conspicuously that players must enforce GINA Title II employment nondiscrimination claims in the arbitral forum. Simply stated, the NFL CBA's nondiscrimination provision and mandatory arbitration provisions do not provide for GINA Title II disputes, so NFL players retain their procedural rights to enforce such claims in a judicial forum. Like the MLB and MLS CBAs, the authority granted to the arbitral forum by the NFL CBA is limited. The NFL CBA states:

> [T]he arbitrator will not have the jurisdiction or authority: (a) to add to, subtract from, or alter in any way the provisions of this Agreement or any other applicable document; or (b) to grant any remedy other than a money award, an order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order, a credit or benefit award under the Bert Bell/Pete Rozell NFL Player Retirement Plan, or an order of compliance with a specific term of this Agreement or any other applicable document, or an advisory opinion.[190]

Importantly, the NFL CBA contains a choice of law provision that makes New York law applicable in any instances not governed fully by federal law.[191] Because the CBA is to be "construed and interpreted under" federal or New York law, it is possible that the arbitral forum has some leeway to address genetic nondiscrimination rights derived from GINA Title II or New York state laws.[192] While the NFL Player Contract purportedly contains a waiver and release of "any claims relating to conduct engaged in pursuant to the express terms of any collective bargaining agreement during the term of any such agreement,"[193] it does not waive the player's rights to seek resolution under the arbitration procedures.[194] Thus, at most, the release has the effect of a waiver to procedural rights to a judicial forum. Because the release does not mention federal antidiscrimination statutes conspicuously, however, the waiver is unlikely to effectuate a waiver of genetic nondiscrimination rights afforded under GINA Title II. This is particularly important because, as previously discussed, the NFL CBA does contain provisions that appear to waive substantive GINA rights (e.g. employer access to family medical history and genetic testing as part of the required medical examination).

D. National Hockey League (NHL)

The NHL's CBA in effect through September 2012 gives players contractual rights to nondiscrimination:

> Neither the NHLPA, the NHL, nor any Club shall discriminate in the interpretation or application of this Agreement against or in favor of any Player because of religion, race, disability, color, national origin, sex, sexual orientation, age, marital

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[190]Article 43, Section 8. Arbitrator's Decision and Award. At page 190. NFL CBA, available at https://www.nflplayers.com/About-us/CBA-Download/.

[191]Article 70. Governing Law and Principles. Section 1. Governing Law. At page 254 of the NFL CBA, available at https://www.nflplayers.com/About-us/CBA-Download/.

[192]E.g. N.Y. Exec. Law §296 (McKinney's 2010).

[193]Appendix A: NFL Player Contract. Section 23, at 263, NFL CBA, available at https://www.nflplayers.com/About-us/CBA-Download/.

[194]Appendix A: NFL Player Contract. Section 23, at 263, NFL CBA, available at https://www.nflplayers.com/About-us/CBA-Download/ (stating "This waiver and release does not waive any rights player may have to commence a grievance under the 2006 CBA or to commence a grievance or other arbitration under the 2011 CBA.").

> status, or membership or non-membership in or support of or non-support of any labor organization.[195]

As is evident, the nondiscrimination provision does not mention genetic information and does not incorporate federal statutes generally or GINA Title II specifically. Thus, the only genetic nondiscrimination rights available to NHL players are those derived from statutes. The NHL CBA Standard Player's Contract requires arbitration of disputes, and states:

> The Club and the Player further agree that in case of dispute between them, except as to the compensation to be paid to the Player on a new SPC,[196] the dispute shall be referred within one year from the date it arose to the Commissioner of the League, as an arbitrator and his decision shall be accepted as final by both parties, unless, and to the extent that, other arbitration procedures are provided in any Collective Bargaining Agreement between the member Clubs of the League and the NHLPA to cover such dispute.[197]

The NHL CBA contains a broad release by each member of the NHLPA and the NHLPA for "any claim…which claim relates to, is caused by, flows from, or otherwise has arisen as a result of, whether directly or indirectly, … the negotiations that culminated in the execution of this Agreement … ."[198]

While the release does mention "any claim arising under the Antitrust or Labor Laws of the United States," the release does not mention GINA Title II specifically. The NHL CBA requires arbitration of "any dispute involving the interpretation or application of, or compliance with, any provision" of the NHL CBA and standard player contract,[199] and the arbitrator's decision is to be the full, final, and complete disposition of the grievance.[200] The arbitrator's authority, as established by the NHL CBA, is as follows:

> …The Impartial Arbitrator will not have the jurisdiction or authority to add to, subtract from, or alter in any way the provisions of this Agreement, including any SPC. In resolving Grievances, the Impartial Arbitrator has the authority to interpret, apply and determine compliance with any provision of this Agreement, including any SPC…[201]

Therefore, as was the case with the MLS, the NHL arbitral forum has no authority under the CBA to apply statutory or common law principles when deciding disputes regarding genetic discrimination. Moreover, the NHL CBA mentions no federal antidiscrimination laws specifically. Accordingly, NHL players seem to have retained both substantive and procedural rights to enforce their genetic nondiscrimination rights arising under GINA Title II outside of the arbitral forum.

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[195] Article 7, Section 2 at page 16 of the NHL CBA, available at http://www.nhl.com/cba/2005-CBA.pdf.
[196] SPC refers to Standard Player Contract.
[197] Standard Player's Contract, ex. 1.8, at page 253 of the NHL CBA, available at http://www.nhl.com/cba/2005-CBA.pdf.
[198] Article 27. Releases, at page 124 of the NHL CBA, available at http://www.nhl.com/cba/2005-CBA.pdf.
[199] Grievances, Arbitration, Impartial Arbitrator, Section 17.1 at page 89 of the NHL CBA, available at http://www.nhl.com/cba/2005-CBA.pdf.
[200] Id. at 93.
[201] Id.

E. National Basketball Association (NBA)

The NBA CBA that expired in 2011,[202] which—like the NFL CBA—contained a choice of law provision recognizing New York law as applicable whenever federal law was not,[203] contained no obvious provisions that would offer contractual nondiscrimination rights similar to or duplicative of federal laws, including GINA Title II. The NBA CBA did, however, contain a reservation of rights provision that stated:

> Upon the expiration or termination of this Agreement, no person shall be deemed to have waived, by reason of the entry into or effectuation of this Agreement…or by reason of any practice or course of dealing, their respective rights under law with respect to any issue or their ability to advance any legal argument.[204]

While the release and waiver provision in the NBA uniform player contract mentioned no federal nondiscrimination laws specifically,[205] it did mandate arbitration for resolution of "any and all disputes involving the interpretation or application of, or compliance with, the provisions of this Agreement or the provisions of a Player Contract, including a dispute concerning the validity of a Player Contract."[206]

The NBA CBA gave the arbitrator the authority to "interpret, apply, or determine compliance" with the CBA and the player contracts, to award damages and declaratory relief, and to resolve disputes arising under specific provisions of the CBA.[207] The arbitrator's authority granted under the CBA did not include the authority to "add to, detract from, or alter in any way" the CBA and, uniquely, did not include the ability to determine substantive arbitrability questions.[208] The systems arbitration procedure set forth by the NBA CBA included an appeals process that gave the appeals panel the authority to "review the findings of fact and conclusions of law made by the System Arbitrator using the standards of review employed by the U.S. Court of Appeals for the Second Circuit."[209]

Given the absence of any conspicuous waiver of nondiscrimination rights under any federal statute, NBA players retained their rights to a judicial forum for resolution of such claims. Moreover, because the NBA CBA contains a choice of law provision, not only would players have had genetic nondiscrimination rights under GINA Title II but also would they have had those genetic nondiscrimination rights under New York state law[210] deemed stronger than, and hence not preempted by, GINA Title II.

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[202] The expired NBA CBA, available at www.nbpa.org/cba/2005. See also, NBA Board of Governors ratify 10-year CBA, (Dec. 8, 2011), available at www.nba.com/2011/news/12/08/labor-deal-reached/index.html.
[203] Article XXXVIII. Choice of Law, NBA CBA, available at www.nbpa.org/cba/2005.
[204] Article XVI. Mutual Reservation of Rights, NBA CBA, available at www.nbpa.org/cba/2005.
[205] Id.
[206] Article XXXI. Grievance and Arbitration Procedure and Special Procedures with respect to disputes involving player discipline, at 326, NBA CBA, available at www.nbpa.org/cba/2005; See also Uniform Player Contract, NBA CBA, available at www.nbpa.org/cba/2005 (stating "In the event of any dispute arising between the Player and the Team relating to any matter arising under this Contract, or concerning the performance and interpretation thereof…such dispute shall be resolved in accordance with the Grievance and Arbitration Procedure set forth in Article XXXI of the CBA.").
[207] Article XXXI, Section 5(b) at 332, NBA CBA, available at www.nbpa.org/cba/2005.
[208] Id. (declaring that such questions must be answered by the Southern District of New York).
[209] Id. at 349.
[210] N.Y. Exec. Law §296 (McKinney's 2010).

In summary, a review of five major professional sports in the United States indicates that the collective bargaining agreements have not yet incorporated provisions that would be considered to be "clear and unmistakable" waivers of the judicial forum to enforce GINA employment nondiscrimination rights. Moreover, these CBAs do not attempt to waive substantive GINA rights either; however, some of the terms contained therein are GINA noncompliant (*e.g.,* the NFL's requirement that athletes submit to medical examinations that expressly include family medical history and the CBAs that purport to grant nonmedical personnel access to the athlete's full medical record without redactions of genetic information as that term is defined by GINA). Only the MLB CBA appears to create contractual rights that are similar to or duplicative of those arising under GINA Title II. It seems apparent that *Gardner-Denver* would be controlling precedent if players pursued resolution of any grievances through the leagues' arbitral forum and that, accordingly, players would retain the right to have a judicial forum consider de novo any genetic discrimination claims pursuant to GINA Title II.

VII. Sidelining GINA through Individual Athletes' Use of Personal Genomics

In light of *Pyett*, is GINA destined to "ride the pines" perpetually and make little impact in the professional sports or broader employment context? Alternatively, does *Pyett's* reassertion that substantive nondiscrimination rights cannot be prospectively waived make GINA poised to come off the bench to protect against genetic discrimination in employment contexts and possibly prevent the integration of genetic technologies in professional sports? The answer is the former. Player-initiated uses of personal genomics will keep GINA passively on the sidelines, where it belongs.

GINA Title II restricts top-down conduct related to genetic information in the sports employment context but, importantly, does not affect bottom-up conduct. In other words, GINA restrains the actions of those organizations and their agents perceived as holding positions of power (*i.e.,* the person deciding which players are drafted, which players are dropped; the person determining the amount of a player's salary and bonuses; the person who hands down disciplinary action and fines; the person who sets the depth chart and determines positions; the representatives who negotiate contracts on behalf of the collective of players; the committees who nominate or recommend players for awards and opportunities; etc.) and leaves unchanged the actions of individual athletes (*i.e.,* the prospective, current, and former players). This is not a shortcoming that needs legislative remedy. Rather, it is a cultural necessity arising from bioethical principles of respect for autonomy, essential constitutional principles recognizing each individual's rights and liberties to have access to and control the flow of information about one's self,[211] and international human rights "to share in scientific advancement and its benefits"[212] and "to seek, receive, and impart information … through any media."[213]

[211]See, e.g., Nissenbaum, Privacy in context: technology, policy, and the integrity of social life. Stanford, Calif.: Stanford Law Books (2010) (proposing a concept of "contextual integrity").
[212]UDHR, Art. 27(1).
[213]ICCPR, Art. 19.

There are legitimate reasons why individuals (prospective, current, and former players) would want to integrate all available information and technologies – including personal genomics - into their athletic training. For example, an individual could take additional precautions or monitor his behavior if he[214] knew his genetic risks of, for example, concussion,[215] hypertrophic cardiomyopathy,[216] and sickle-cell carrier status.[217] An athlete could intensify his training in specific ways and scale back in other ways if he had access to personal genetic information related to muscle performance,[218] tendinopathy risks,[219] and cardiopulmonary responses to exercise.[220] While employers (and players' associations, agents, etc) would be prohibited under GINA from classifying athletes by genotypes to tailor training and practices (even if when the entities want to do so with the players' best interests in mind), the increased availability and accessibility of personal genomics services empowers the athletes to control how and to what extent genetic information is considered in their workouts both on- and off-season. It is the DTC, personal genomics industry that allows GINA to function properly … on the sidelines, as "backup" support. This is true not only in the sports context but in the broader employment context as well. The combination of the personal genomics industry and GINA Title II effectively means that players are able to access and use personal genomic information for their own individual benefit and to the extent they personally desire; to assume, as they see appropriate, any potential or probable health risks of participation in competitive athletics; and, simultaneously, to exercise a "right not to know" and be free of employment decisions based on their genetic information.

In a sports context, there may be increased incentives for the employee (the athlete) to share personal genomic information with the covered entities and their agents. For example, a player may want his trainer and club physician to know his personal genomic information but would not want this information shared with the coach, manager, or club owner. However, this circumstance is not unique to sports. Healthcare employees, too, frequently obtain their medical care primarily and exclusively from employer-physicians and employer-owned facilities. Aware of this, legislators and administrators included among GINA provisions the requirement that there be a firewall between medical records and personnel records. Thus, an athlete's control of the flow of genomic information should be

[214]The masculine pronoun is used simply for convenience and should be considered to include he/she or him/her throughout. This usage is not to imply in any way that females and intersex individuals are not relevant as part of the conversation of genetic and athletic rights.

[215]See, e.g., Finnoff, Jelsing, and Smith, Biomarkers, Genetics and Risk Factors for Concussion. Princeton Medical Review (2011); Tierney, Apolipoprotein E Genotype and Concussion in College Athletes. Clin. 20 J. Sports Med. At 464–8 (2010); Terrell, APOE, APOE Promoter, and Tau Genotypes and Risk for Concussion in College Athletes. 18 Clin. J. Sport Med. 10–17 (2008).

[216]E.g. B.J. Maron, Distinguishing Hypertrophic Cardiomyopathy from Athlete's Heart: a Clinical Problem of Increasing Magnitude and Significance. 91 Heart 1380–1382 (2005); Harmon, Incidence of Sudden Cardiac Death in National Collegiate Athletic Association Athletes. 123 Circulation 1594–1600 (2011); Cheng, Hypertrophic Cardiomyopathy vs Athlete's Heart. Int. J. Cardiology 131, 151–155; Creswell, Hypertrophic Cardiomyopathy (HCM), The Athlete's Heart Blog 2009, available at: http://athletesheart.blogspot.com/2009/10/hypertrophic-cardiomyopathy-hcm.html (accessed July, 28 2012); Ho, New Paradigms in Hypertrophic Cardiomyopathy: Insights from Genetics. 31 Progressive Pediatroc Cardiologist 93–98 (2011).

[217]E.g. Tarini,, Brooks,, and Bundy, A Policy Impact Analysis of the Mandatory NCAA Sickle Cell Trait Screening Program. 47 Health Serv. Res. 446–61 (2012).

[218]E.g. MacArthur and North, A Genetic Influence on Muscle Function and Athletic Performance, 35 Exercise Sports Sci. Rev. 30–34 (2007); Clarkson, ACTN3 Genotype is Associated with Increases in Muscle Strength in Response to Resistance Training in Women. J. Applied Physiology 154–63 (2005).

[219]E.g., Posthumus, The Polygenic Profiles in Participants with Achilles Tendinopathy and Controls. 45 British J. Sports Med. 369 (2011).

[220]E.g. Hruskovicova, The Angiotensin Converting Enzyme I/D Polymorphism in Long Distance Runners, 46 J. Sports Med. Phys. Fitness 509–13 (2006); Contopoulos-Ionnidis, Maonli,, and Ionnidis, Meta-analysis of the Association of Beta2-adrenergic Receptor Polymorphisms with Asthma Phenotypes. 115 J. Allergy Clin. Immunology 963–72 (2005).

feasible. Sports employers, however, could strengthen player protections by revising their policies to redact genetic information from the general release of healthcare information from club physician to nonmedical personnel. For example, the leagues could adopt forms like those used in the NHL that disclose only basic information about manifested conditions and a physician's decision to clear an athlete for play.

The individual-initiated use of personal genomics and unsolicited sharing of that information with nonmedical personnel of the covered entity (*e.g.,* a scouting agent, a coach, an owner, the player's association) in the sports context places the spotlight on what GINA does not have (and may not need in any other employment context): a disparate impact theory of discrimination. In the professional sports context, individual athletes who obtain personal genomics services may share the information with the press or a covered entity in an attempt to use what they consider to be "favorable" information or genetic "assets" to seek a higher signing bonus, a higher draft position, a longer contract, or the like. By the same token, individual athletes who obtain personal genomics services may share the information with the press or a covered entity in an attempt to use what they consider to be "unfavorable" information or genetic "liabilities" to demonstrate their passion for the sport, their exceptional work ethic, their ability to overcome obstacles and, as those sharing "favorable" genetic information, seek additional benefits. Furthermore, individual athletes who avoid personal genomic services have no need to discuss the issue with scouting agents, the press, or others because GINA already prohibits a league entity from requesting or acquiring that information for employment purposes. When individual athletes share their genomic information broadly, there is a potential that this information will be considered when making employment decisions – even if its inclusion as a motivating factor or determinative factor in the decision-making process is unspoken. Because of the finite number of clubs (employers), each with a finite number of roster slots and salary caps, an individual athletes' disclosure of personal genomic information could ultimately have a detrimental impact on the employment conditions of those athletes who do not obtain and/or do not share their personal genomic information. Moreover, the competitive culture of sports may undermine the voluntariness of obtaining genomic information, as prospective athletes (as well as current athletes) may feel compelled to "keep up with the Jones," *i.e.,* athletes who obtain personal genomic services. While such cultural pressures to follow the crowd are predominately ethical rather than legal concerns,[221] the characteristics of the sports employment context may warrant the creation of a disparate impact basis for genetic discrimination. Fortunately, a Genetic Nondiscrimination Study Commission is set to reconsider whether such a disparate impact cause of action is warranted in 2014.[222]

The sports industry is not a monolithic culture. Rather, the sports industry consists of distinct sub-cultures consisting of purists, progressives, and everything in between.[223] It is not hard to imagine the co-existence of professional leagues that embrace and shun personal genomics. Different sports need not have the same rules and may emphasize different

[221]Individuals often make poor decisions because of trends. But that, in and of itself, is not a sufficient basis to establish laws that prohibit such conduct.
[222]75 Fed. Reg. 68912, 68918 (Nov. 9, 2010) (stating this Commission "is scheduled to begin its work on May 21, 2014").
[223]See, e.g., Shanoff, Purists vs. Progressives. ESPN.com (Sept. 27, 2004), available at http://sports.espn.go.com/espn/page2/story?page=election/party/issues.

characteristics of the athletes.[224] The challenge is ensuring the prevailing mentality is that the leagues exist for the players and not that the players exist for the leagues. Given GINA's applicability, all of the professional sports leagues could adopt disincentives for sharing information with anyone involved in the league and provide limited exception that the players may share the information with trainers and club physicians.

Player-initiated use of personalized genomics will effectively relegate GINA to the sidelines; however, the club officials must recognize that because substantive nondiscrimination rights cannot be waived prospectively through collective bargaining, any individual athlete whether a prospective, current, or former player could activate GINA at any time. Similarly, players' associations, given their "duty of fair representation" at all times, must recognize this duty is breached when its conduct toward any member is discriminatory.[225] Moreover, collective bargaining agreements may be unenforceable in whole or in part if courts determine their provisions to be contrary to public policy.[226] Accordingly, unless players' associations and the professional leagues are prepared for a grueling litigious workout, it would be prudent to amend collective bargaining agreements to include clear genetic nondiscrimination rights of individual athletes and to establish additional rules and procedures for appropriate use of personal genomics by individual athletes.

VIII. Conclusion

The Genetic Information Nondiscrimination Act of 2008 (GINA) is intended to prohibit employment discrimination on the basis of genetic information. Nonetheless, talent identification; age, identity, and sex verification; injury susceptibility; and doping detection are some of the prominent reasons why personal genetic/omic technologies appeal to the many diverse parties (league officials, club owners, coaches, trainers, scouts, players associations, and individual athletes) in the modern professional sports context.

Genetic nondiscrimination rights in the sports employment context would be strengthened if Congress were to amend GINA Title II to preclude waivers of the judicial forum and make clear that employment nondiscrimination rights are distinct from other statutory labor rights and must be ultimately enforced by the Article III courts.[227] Additionally, GINA could be strengthened to include a disparate impact cause of action. State legislatures could similarly strengthen their state genetic nondiscrimination laws (*e.g.,* CalGINA[228]) and give the courts clear judicial authority to review de novo genetic nondiscrimination claims derived from statutes. By contrast, restrictions on the integration of genetic information in the sports employment context would be relaxed if the Occupational Safety and Health Administration ("OSHA") were to mandate genetic monitoring of specific conditions, if Congress were to amend GINA to include a narrow exception for the professional sports industry, or if the

[224]See, e.g., Murray, Making Sense of Fairness in Sports. Hastings Center Report (2010). (Note that what is acceptable and desirable at a professional level may not be acceptable or appropriate in distinct youth, collegiate, and amateur leagues.).
[225]14 Penn Plaza v. Pyett, 556 U.S. 247, 271, 129 S. Ct. 1456, 1473 (2009) (quoting Marquez v. Screen Actors, 525 U.S. 33, 44, 119 S. Ct. 292, 142 L.Ed.2d 242 (1998)).
[226]Eastern Associated Coal Corporation v. United Mine Workers of America, 531 U.S. 57 (2000).
[227]See, e.g., Alan Hyde, Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them. 25 Ohio St. J. on Disp. Resol. 975 (2010).
[228]2011 CA S.B. 559; see also Jennifer Wagner, A New Law to Raise GINA's Floor in California, Genomics Law Report (Dec. 8, 2011), available at http://www.genomicslawreport.com/index.php/2011/12/07/a-new-law-to-raise-ginas-floor-in-california/.

EEOC were to adopt an extra-statutory rule that permits employers to raise BFOQ defenses when accused of unlawful genetic discrimination.

Whether in professional sports or other areas of employment, the statutorily-derived right to be free from genetic discrimination in employment provided by GINA Title II may not be waived through individual or collective bargaining agreements. In light of *Pyett*, and assuming courts find that Congress did not create a separate protection precluding waiver of the judicial forum, the collective bargaining process may require that disputes regarding genetic discrimination be resolved through the arbitral forum. Individual athletes may appropriately and lawfully integrate personal genomics into their training regimes and may even share that information; however, players' associations, club owners, and other league officials would be wise to establish disincentives for sharing that information with nonmedical personnel and develop clear policies to protect the genetic nondiscrimination rights of individual players. A review of current policies in five major professional sports highlights the need for leagues to review their policies (*e.g.,* the disclosure of genetic information, including family medical history, between medical and nonmedical personnel; the inclusion of family medical history and genetic tests as part of any pre- or post-season medical examination, etc.) to ensure GINA compliance.

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Biography

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