

## EXPLORATION OF THE NFL FRANCHISE TAG FUNCTIONING AS A NON-COMPETE CLAUSE<sup>♦</sup>

INTRODUCTION .....	124
I. OVERVIEW OF NFL, COLLECTIVE BARGAINING, SALARY CAP, AND FRANCHISE TAG .....	129
A. <i>Professional Football Background and Collective         Bargaining History</i> .....	129
B. <i>The Salary Cap and Franchise Values</i> .....	130
C. <i>Mechanics of the Franchise Tag</i> .....	132
D. <i>Functional Effects of the Franchise Tag</i> .....	136
II. NON-COMPETE CLAUSES.....	139
A. <i>Non-Compete Clauses Defined: Elements and         Enforceability</i> .....	139
B. <i>States Legislatures and Non-Compete Clauses</i> .....	141
C. <i>Courts and Non-Compete Clauses</i> .....	143
D. <i>Summary of Non-Compete Clauses</i> .....	145
III. THE NFL FRANCHISE TAG AS A NON-COMPETE CLAUSE .....	146
A. <i>NFL Players' Employers, Duration of Employment, and         Governing Law</i> .....	146
B. <i>The Franchise Tag and Its Relation to Legitimate         Business Interests of Owners</i> .....	148
C. <i>If the Franchise Tag Was in Other Industries</i> .....	150
D. <i>The NFL Franchise Tag as a Non-Compete Clause,         Summarized</i> .....	152
IV. RECOMMENDATIONS FOR THE FRANCHISE TAG .....	153
A. <i>The Franchise Tag Should Be Changed to Restricted Free         Agency</i> .....	153
B. <i>NFL Adopting NBA Bird Rights</i> .....	156
C. <i>Restricted Free Agency Designation Is Better Suited for         the NFL than Bird Rights</i> .....	158
CONCLUSION.....	164

---

<sup>♦</sup> Permission is hereby granted for noncommercial reproduction of this Note in whole or in part for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included in all copies.

## INTRODUCTION

The Collective Bargaining Agreement (CBA) between the National Football League (NFL) and the players' union, the National Football League Players Association (NFLPA), is set to expire on the last day of the league year in 2020.<sup>1</sup> In order for the NFL and the NFLPA to ensure avoiding a work stoppage upon the expiration of the CBA, there are a variety of issues in the CBA for these two organizations to solve. Such issues include (i) the commissioner's power to discipline players for their conduct, (ii) the rookie compensation system, (iii) how the salary cap is calculated, (iv) the amount (or lack) of money spent on player contracts, and (v) the Franchise Tag.<sup>2</sup> As in any negotiation, both sides will have to make concessions. During the last round of negotiations in 2011, the NFL made one such concession by reducing the number of live practices and offseason training time, in theory to increase player health.<sup>3</sup> In return, the NFLPA agreed to the current rookie contract structure.<sup>4</sup> In 2020, there are certain to be disagreements between the NFLPA and the NFL during the CBA negotiations, specifically regarding whether the commissioner can retain the full authority to discipline players and the salary cap calculation.<sup>5</sup> One of the easier concessions the NFL can make, which would provide the NFL with a bargaining chip to negotiate in connection with issues that will require more attention, is the modification or elimination of the Franchise Tag.<sup>6</sup>

The NFL is a big business with a variety of unique employment relationships. Many of these dynamics are created via a valid and enforceable CBA.<sup>7</sup> One of the more problematic dynamics is caused by

<sup>1</sup> See NFL PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT, art. 69 (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

<sup>2</sup> See Andrew Brandt, *The CBA at Halfway, Part I*, SPORTS ILLUSTRATED (Sept. 22, 2016), <https://www.si.com/mmqb/2016/09/22/cba-halfway-point-part-one>; Andrew Brandt, *The CBA at Halfway, Part II*, SPORTS ILLUSTRATED (Sept. 29, 2016), <https://www.si.com/mmqb/2016/09/29/nfl-cba-halfway-point-part-two>.

<sup>3</sup> See Brandt, *Part II*, *supra* note 2; Brandt, *Part I*, *supra* note 2.

<sup>4</sup> See Brandt, *Part II*, *supra* note 2; Brandt, *Part I*, *supra* note 2.

<sup>5</sup> See Brandt, *Part II*, *supra* note 2; Brandt, *Part I*, *supra* note 2.

<sup>6</sup> See Brandt, *Part I*, *supra* note 2; see also Pat McManamon, *Sources: Browns Trading Two Draft Picks to Dolphins for Jarvis Landry*, ESPN (Mar. 10, 2018), [http://www.espn.com/nfl/story/\\_/id/22705144/cleveland-browns-trading-two-draft-picks-miami-dolphins-wide-receiver-jarvis-landry](http://www.espn.com/nfl/story/_/id/22705144/cleveland-browns-trading-two-draft-picks-miami-dolphins-wide-receiver-jarvis-landry). The Franchise Tag, when created, was a tool for teams to use to ensure a signature player would remain on their team; it has now morphed to a tool teams use to sap a player of his negotiating power and ensure a team does not lose a player without receiving compensation. Jarvis Landry is the perfect example of this. This will be discussed more in depth in Part I, Section D of this Note.

<sup>7</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996) (holding that if the parties agree to conditions via good faith bargaining relating to wages, the court defers to the national labor policy favoring free and private collective bargaining). Here, the Franchise Tag relates to wages,

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 125

the Franchise Tag, because it has the effect of a non-compete clause by restricting player movement.<sup>8</sup> A brief overview of the Franchise Tag and the views by some key NFL stakeholders about it is necessary before exploring how the Franchise Tag functions as a non-compete clause.

The Franchise Tag is a mechanism that enables a team to maintain negotiation rights with one of its players and to prevent that player from becoming an unrestricted free agent.<sup>9</sup> A free agent is “a professional athlete who is not under contract and is free to auction off his or her services and sign a contract with the team that offers the most money.”<sup>10</sup> From the players’ perspective, the Franchise Tag is a designation that robs them of negotiating power in the open market of unrestricted free agency.<sup>11</sup> In the 1993 labor negotiations between the NFL and the NFLPA, free agency was created along with the Franchise Tag “to help teams adjust to true free agency.”<sup>12</sup> The Franchise Tag ensured that true franchise Quarterbacks like Dan Marino, John Elway, Troy Aikman, and Brett Favre, for example, would remain as signature players for their teams.<sup>13</sup> As a result, the dynamic between free agency and the Franchise Tag is inherently problematic, as the latter greatly restricts a player’s freedom to move to another team.<sup>14</sup> Two major stakeholders in the NFL, who have taken issue with the Franchise Tag, are the players as well as their agents.

Leigh Steinberg is considered a “super-agent”<sup>15</sup> and has

---

because it determines a tagged player’s salary. Therefore, because the Franchise Tag was agreed to in the CBA, it is a valid provision. As a side note, one of the more unique dynamics is that while the New York Giants and Dallas Cowboys are bitter rivals, the respective owners, John Mara and Jerry Jones, are partners in a joint venture. A discussion of the dynamic among the owner as competitors and partners is beyond the scope of this Note.

<sup>8</sup> See Marc Sessler, *Josh Norman Signs 5-Year, \$75M Deal with Redskins*, NFL.COM (Apr. 24, 2016, 7:49 AM), <http://www.nfl.com/news/story/0ap3000000655390/article/josh-norman-signs-5year-75m-deal-with-redskins>. Josh Norman is a perfect example of this. The Carolina Panthers had designated Norman with the Franchise Tag, and he had no offer sheets from any other teams. Within two days of the Panthers rescinding the designation, he had chosen the Washington Redskins from among a few teams and signed the biggest contract in the NFL for a Cornerback.

<sup>9</sup> See Russell S. Baxter, *The Ultimate Guide to NFL Franchise Tags: How They Work and Why They Matter*, BLEACHER REP. (Feb. 17, 2013), <http://bleacherreport.com/articles/1531539-the-ultimate-guide-to-nfl-franchise-tags-how-they-work-and-why-they-matter>.

<sup>10</sup> *Free agent*, DICTIONARY.COM, <http://www.dictionary.com/browse/free-agent?s=t> (last visited Sept. 22, 2017).

<sup>11</sup> See Baxter, *supra* note 9.

<sup>12</sup> See Mike Florio, *It’s Time to Dump the Franchise Tag*, NBC SPORTS: PRO FOOTBALL TALK (Mar. 16, 2016, 5:38 PM), <http://profootballtalk.nbcsports.com/2016/03/16/its-time-to-dump-the-franchise-tag/>.

<sup>13</sup> See Brandt, *Part I*, *supra* note 2.

<sup>14</sup> See Sessler, *supra* note 8 (mentioning that Norman received the largest contract for his position two days after the Franchise Tag designation was removed, showing that the Franchise Tag restricts a player’s movement).

<sup>15</sup> See James Vlahos, *Show Leigh Steinberg the Money (Again)*, N.Y. TIMES (Jan. 15, 2015), <https://www.nytimes.com/2015/01/18/magazine/show-leigh-steinberg-the-money-again-.html> (describing Leigh Steinberg as “the man who represented eight No. 1 picks in the N.F.L. draft,

represented eight number one overall picks in the NFL draft, sixty-two NFL first-round picks, and also athletes in basketball, baseball, and hockey, among other sports.<sup>16</sup> Furthermore, Steinberg has been rated the sixth Most Powerful Person in the NFL according to *Football Digest* and, perhaps most impressively, is often credited as the inspiration for *Jerry Maguire*.<sup>17</sup> Steinberg believes the Franchise Tag acts as a restraint on the free market and is unnecessary.<sup>18</sup> He also believes that teams always have the ability to sign their key players to long-term contract before free agency occurs and that the tag gives teams unnecessary leverage with the biggest stars in the game.<sup>19</sup>

In recent years, superstars such as Jimmy Graham, Dez Bryant, Von Miller, and Le'Veon Bell have had issues with the Franchise Tag. Graham battled the NFL and the New Orleans Saints regarding whether he was a Tight End or Wide Receiver for the purpose of the Franchise Tag. He was ultimately deemed a "Tight End," a designation that cost him roughly \$5 million.<sup>20</sup> Bryant, a Wide Receiver, received the Franchise Tag from the Dallas Cowboys in 2015 and had threatened to sit out games in protest until a long-term deal was ultimately worked out.<sup>21</sup> Miller, a Defensive End for the Denver Broncos, also refused to play until a long-term deal was worked out.<sup>22</sup> Bell, the Pittsburgh Steelers Running Back, wanted to be considered a Wide Receiver for the purpose of the Franchise Tag, but did not threaten to sit out to force a long-term deal, and ultimately signed the Franchise Tag.<sup>23</sup> Most

---

the negotiator who secured huge contracts for his clients, the self-promoting white knight whom the director Cameron Crowe shadowed in preparation for his movie 'Jerry Maguire'").

<sup>16</sup> See *About Us*, STEINBERG SPORTS & ENT., <http://www.steinbergsports.com/about/> (last visited Nov. 21, 2017).

<sup>17</sup> See *id.*

<sup>18</sup> See Leigh Steinberg, *NFL Franchise Tag Thwarts Free Agency*, FORBES: SPORTSMONEY (Mar. 2, 2016, 4:11 PM), <https://www.forbes.com/sites/leighsteinberg/2016/03/02/nfl-franchise-tag-thwarts-free-agency/#637bf0b05173>.

<sup>19</sup> See *id.*

<sup>20</sup> See Mike Triplett, *Jimmy Graham Ruled a Tight End*, ESPN (July 8, 2014), [http://www.espn.com/nfl/story/\\_/id/11167916/nfl-arbitrator-rules-jimmy-graham-new-orleans-saints-tight-end](http://www.espn.com/nfl/story/_/id/11167916/nfl-arbitrator-rules-jimmy-graham-new-orleans-saints-tight-end) (mentioning that the tender offer for Wide Receivers was \$12 million, while the tender offer for Tight Ends was \$7 million); see also Darren Heitner, *Jimmy Graham Should Be Infuriated By Tight End Franchise Tag*, FORBES: SPORTSMONEY (July 5, 2014, 1:58 PM), <https://www.forbes.com/sites/darrenheitner/2014/07/05/jimmy-graham-should-be-infuriated-by-tight-end-franchise-tag/#ef3cd424952d>.

<sup>21</sup> See David Fleming, *Behind Dallas' Move to Tag Dez Bryant and Let DeMarco Murray Walk*, ESPN (Sept. 14, 2015), [http://www.espn.com/nfl/story/\\_/id/13630818/how-dallas-decision-tag-dez-bryant-not-demarco-murray-upset-nfl-balance-power](http://www.espn.com/nfl/story/_/id/13630818/how-dallas-decision-tag-dez-bryant-not-demarco-murray-upset-nfl-balance-power).

<sup>22</sup> See Michael David Smith, *Von Miller: I Won't Sign Franchise Tag. It's "A League-wide Problem"*, NBC SPORTS: PRO FOOTBALL TALK (July 11, 2016, 4:20 PM), <http://profootballtalk.nbcsports.com/2016/07/11/von-miller-i-wont-sign-franchise-tag-its-a-league-wide-problem/related/>.

<sup>23</sup> See Jon Benne, *Le'Veon Bell Ends Holdout and Rejoins Steelers*, SB NATION (Sept. 4, 2017, 1:56 PM), <https://www.sbnation.com/nfl/2017/9/1/16100912/leveon-bell-holdout-franchise-tender-steelers>; see also Jeremy Fowler, *Pittsburgh Steelers RB Le'Veon Bell Says He Won't Sit Out* 2018 Season, ESPN (Mar. 8, 2018),

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 127

players believe that the Franchise Tag is an unfair system, because it prevents them from exploring their value on the open market.<sup>24</sup> Scott Fujita, former linebacker and NFLPA Executive Committee member, summarized the feelings of the players and their representatives when he said, “[e]veryone who isn’t an owner is pretty much in agreement: [t]he Franchise Tag sucks.”<sup>25</sup>

Although not all NFL stakeholders agree with Fujita, NFL team owners are generally in favor of the Franchise Tag. The late Al Davis of the Oakland (formerly Los Angeles, soon to be Las Vegas) Raiders caused a delay in the labor negotiations when the Franchise Tag was first created due to his belief that each team should be able to designate five franchise players, as one was not enough.<sup>26</sup> In fact, Pat Bowlen, the owner of the Denver Broncos, thought of the idea of the Franchise Tag.<sup>27</sup> Bowlen was nervous about even the prospect of losing John Elway; so, Bowlen suggested a new rule to allow each team to prevent one player from hitting the open market when his contract expired.<sup>28</sup>

Surprisingly, even though two of the most important NFL stakeholders, the players and the owners, have opposite views on the Franchise Tag, it does not affect a large number of players per year; in fact, less than 1% of NFL players get the Franchise Tag.<sup>29</sup> Even though

---

[http://www.espn.com/nfl/story/\\_/id/22690200/pittsburgh-steelers-rb-leveon-bell-says-sit-2018-season](http://www.espn.com/nfl/story/_/id/22690200/pittsburgh-steelers-rb-leveon-bell-says-sit-2018-season); Austin Knoblauch, *Le’Veon Bell Does Not Sign Tag, Will Miss 2018 Season*, NFL.COM (Nov. 14, 2018), <http://www.nfl.com/news/story/0ap3000000987961/article/leveon-bell-does-not-sign-tag-will-miss-2018-season> (stating that Bell wanted to be considered a Wide Receiver in the event he was designated with the Franchise Tag, because he was the Steelers’ second leading Receiver, and the tag value for a Wide Receiver was higher than it was for a Running Back). After playing the 2017 season, Bell was designated with the tag again for the 2018 season, as a Running Back. Bell did not sign the Franchise tender by the deadline stipulated under the CBA; therefore, Bell was ineligible to play in the 2018 season, and as a result lost \$14.45 million in salary in hopes of securing a long-term contract.

<sup>24</sup> See SI Wire, *Von Miller: Denver Broncos LB Discusses Franchise Tag*, SPORTS ILLUSTRATED (July 12, 2016), <https://www.si.com/nfl/2016/07/12/von-miller-denver-broncos-franchise-tag-league-wide-problem>.

<sup>25</sup> See Fleming, *supra* note 21.

<sup>26</sup> See Len Pasquarelli, *‘Franchise’ Tag Isn’t What It Used to Be*, ESPN (Feb. 23, 2002, 12:33 PM), [http://a.espn.com/nfl/columns/pasquarelli\\_len/1338642.html](http://a.espn.com/nfl/columns/pasquarelli_len/1338642.html).

<sup>27</sup> See Robert Mays, *Popping Tags: Why It’s Time to Do Away with The Franchise Designation*, GRANTLAND (July 16, 2015), <http://grantland.com/the-triangle-popping-tags-why-its-time-to-do-away-with-the-franchise-designation/>.

<sup>28</sup> *Id.*

<sup>29</sup> See Kevin Seifert, *Everything You Need to Know About the NFL’s 2017 Franchise Tag*, ESPN (Feb. 23, 2017), [http://www.espn.com/blog/nflnation/post/\\_/id/231112/everything-you-need-to-know-about-the-nfls-2017-franchise-tag](http://www.espn.com/blog/nflnation/post/_/id/231112/everything-you-need-to-know-about-the-nfls-2017-franchise-tag); see also Marc Lillibridge, *The Anatomy of a 53-Man Roster in the NFL*, BLEACHER REP. (May 16, 2013), <http://bleacherreport.com/articles/1640782-the-anatomy-of-a-53-man-roster-in-the-nfl> (stating that, over the last five seasons, the Franchise Tag has only been extended forty-seven times. An NFL roster contains fifty-three active players on it, and thirty-two teams play in the league, so 1,696 active players play in the league each season. Therefore, over the last five seasons, there have been 8,480 active players, and only forty-seven of them have had the Franchise Tag extended to them, the equivalent of 0.55% of active players.).

the tag affects such a small number of players, it is still a very divisive issue among the players and their agents and the owners, because it has the effect of a non-compete clause.

As currently constructed, the Franchise Tag functions as a non-compete clause, because it prevents the player who is given the tag from negotiating with other teams. A non-compete clause is a type of restrictive covenant,<sup>30</sup> which is a contract term that prohibits employees from taking specific actions during the term of employment or after the term of employment ends.<sup>31</sup> When a player is designated with the Franchise Tag, it prevents him from negotiating with another team, an action he normally would be able to do.<sup>32</sup> Therefore, the Franchise Tag functions as a non-compete clause.

The negotiations in 2020 for the new CBA will involve issues that affect every single player in the league. By leveraging the modification or elimination of the Franchise Tag during the negotiation process, the NFL and NFLPA could alleviate the potential for a player strike, and the NFL could gain a valuable bargaining chip to use in negotiations, in conjunction with more important issues such as overall revenue allocation.<sup>33</sup> This Note explores the possibilities of modifying, or eliminating, the Franchise Tag. Part I of this Note will provide an in-depth description of the NFL Franchise Tag and its history. Part II will discuss non-compete clauses, specifically the factors that determine whether a non-compete clause is enforceable. Part III of this Note will discuss how the Franchise Tag has the practical effect of a non-compete clause and why it would be unenforceable if it were part of a regular employment contract. Part IV of this Note presents two proposals for how to remedy the problems associated with the Franchise Tag in an attempt to satisfy both the owners and the players. The first is a proposal to change the Franchise Tag to more resemble restricted free agency, and the second is a proposal for NFL Bird Rights. Ultimately, this Note recommends that the Franchise Tag, if not eliminated, should be modified to resemble restricted free agency, because it is more

---

<sup>30</sup> See Jean Murray, *What Is a Restrictive Covenant in Business Law?*, BALANCE: BUS. L. & TAXES (May 27, 2016), <https://www.thebalance.com/what-is-a-restrictive-covenant-in-business-law-398201>.

<sup>31</sup> See *id.* (stating that a non-compete clause restricts an employee from competing with his or her employer, by going to another employer for a specified period of time within a specified area).

<sup>32</sup> See Sessler, *supra* note 8. Again, Norman chose to sign with the Redskins over a few other teams two days after the Panthers rescinded the Franchise Tag. He did not have any offers from other teams before the Franchise Tag was rescinded. Therefore, the Franchise Tag prevents players from being able to negotiate with other employers.

<sup>33</sup> The Franchise Tag is a philosophical problem, because, even though it is small based on the number of players it affects, it is a symbol of the owners' power over the players. As a matter of negotiation theory, the NFL modifying the Franchise Tag could be expected to improve the relationship between the NFL and the NFLPA and serve as a bargaining chip during the negotiation of other issues of more importance to the NFL.

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 129

aligned with the current goals and salary cap structure of the NFL.

# I. OVERVIEW OF NFL, COLLECTIVE BARGAINING, SALARY CAP, AND FRANCHISE TAG

## A. Professional Football Background and Collective Bargaining History

Professional football began in 1892, when the Allegheny Athletic Association football team played the Pittsburgh Athletic Club, and one of the players on Allegheny was openly paid \$500 for the game.<sup>34</sup> However, professional football began to somewhat resemble the modern-day NFL on June 8, 1966, when the American Football League and the National Football League announced they would merge.<sup>35</sup>

Shortly after the merger, labor battles between the NFL and the NFLPA began. In 1970, the National Labor Relations Board certified the NFLPA, and in 1971 the union brought an antitrust action against the NFL, seeking to eliminate the Rozelle Rule.<sup>36</sup> The Rozelle Rule required a team signing a player from a different team to compensate the player's former team by means of players or draft selections at the commissioner's discretion of fair compensation.<sup>37</sup> Then, in 1976, the Eighth Circuit Court of Appeals ruled for the NFLPA in *Mackey v. National Football League* by invalidating the Rozelle Rule; however, the NFLPA was only granted limited free agency with compensation under a new CBA.<sup>38</sup> Ten years later, the NFLPA went on strike after two games; the owners hired replacement players, and ultimately, the NFLPA sought the court's assistance in overturning the NFL's rules restricting free agency.<sup>39</sup>

<sup>34</sup> See *Birth of Pro Football*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/football-history/-/-/-/birth-of-pro-football/> (last visited Sept. 29, 2017).

<sup>35</sup> See *NFL and AFL Announce Merger*, HISTORY: THIS DAY IN HISTORY, <http://www.history.com/this-day-in-history/nfl-and-afl-announce-merger> (last visited Sept. 29, 2017).

<sup>36</sup> See *Chronology of NFL Labor History Since 1968*, ESPN (Mar. 3, 2011), [http://www.espn.com/nfl/news/story?page=nfl\\_labor\\_history](http://www.espn.com/nfl/news/story?page=nfl_labor_history); see also *Kapp v. Nat'l Football League*, 390 F. Supp. 73, 77 (N.D. Cal. 1974).

<sup>37</sup> See William N. Wallace, *Rozelle Rule Found in Antitrust Violation*, N.Y. TIMES (Dec. 31, 1975), <http://www.nytimes.com/1975/12/31/archives/rozelle-rule-found-in-antitrust-violation-rozelle-rule-judged-in.html> (stating that the Rozelle rule required a team signing a player who made himself a free agent to compensate that player's former team, by means of players and/or draft selections, at the commissioner's discretion of fair compensation).

<sup>38</sup> See *Chronology of NFL Labor History Since 1968*, *supra* note 36; see also *Mackey v. Nat'l Football League*, 543 F.2d 606, 623 (8th Cir. 1976); Jarrett Bell, *Timeline of NFL Labor Disputes*, USA TODAY (Mar. 12, 2011, 12:36 AM), [http://usatoday30.usatoday.com/sports/football/nfl/2011-03-03-nfl-labor-disputes-timeline\\_N.htm](http://usatoday30.usatoday.com/sports/football/nfl/2011-03-03-nfl-labor-disputes-timeline_N.htm) (stating that a new CBA was created as part of the settlement resulting from the court saying the parties were better able to settle this issue via collective bargaining).

<sup>39</sup> See *Chronology of NFL Labor History Since 1968*, *supra* note 36; see also *Powell v. Nat'l*

In the wake of the NFLPA strike, federal judge David Doty declared he would not allow three hundred NFL players to become free agents, and urged the two sides to go back to the bargaining table.<sup>40</sup> Judge Doty said he believed the NFLPA would win the upcoming antitrust trial.<sup>41</sup> In 1989, Plan B—a limited free agency system allowing teams to match offers for thirty-seven players or receive compensation—began, and the NFLPA decertified as a union, so the players could take their individual cases to the courts.<sup>42</sup> Over the next three years, Judge Doty ruled that the players could pursue individual antitrust cases against the NFL; he invalidated the NFL's labor exemption, allowed the individual players to pursue free agency, and declared four players as unrestricted free agents for five days.<sup>43</sup> Additionally, a Minneapolis jury struck down Plan B free agency in 1992.<sup>44</sup> Then, in 1993, Reggie White filed a class-action lawsuit, and new negotiations began, resulting in a CBA that included more open free agency, a salary cap, and the Franchise Tag.<sup>45</sup> The 1993 CBA was extended multiple times over the next fifteen years, until the NFL opted out of the CBA in 2008 when the owners voted to negotiate a new CBA for the 2011 season.<sup>46</sup> However, the overall structure of free agency and the salary cap created by the 1993 CBA was agreed to in the 2011 negotiations; so, in effect, the negotiated structure from the 1993 CBA still governs the NFL today.

### B. *The Salary Cap and Franchise Values*

Two examples that highlight the difference in treatment between the owners and the players are the history of the salary cap calculation and franchise values. First, salary cap calculations reveal that the players' share of revenue has decreased since its inception. The initial salary cap was set at 67% of total designated revenues, which at the time meant mainly television and gate receipts, and would level off at 62% of those revenues in 1996.<sup>47</sup> That initial number was \$34.6 million

---

Football League, 764 F. Supp. 1351 (D. Minn. 1991).

<sup>40</sup> See *Chronology of NFL Labor History Since 1968*, *supra* note 36; see also *Powell*, 764 F. Supp. at 1351.

<sup>41</sup> *Chronology of NFL Labor History Since 1968*, *supra* note 36; see also *Powell*, 764 F. Supp. at 1351.

<sup>42</sup> See *Chronology of NFL Labor History Since 1968*, *supra* note 36; see also *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992).

<sup>43</sup> See *Chronology of NFL Labor History Since 1968*, *supra* note 36.

<sup>44</sup> *Id.*; see also *McNeil*, 790 F. Supp. at 871.

<sup>45</sup> See *Chronology of NFL Labor History Since 1968*, *supra* note 36; see also *White v. Nat'l Football League*, 822 F. Supp. 1389 (D. Minn. 1993).

<sup>46</sup> See *Chronology of NFL Labor History Since 1968*, *supra* note 36.

<sup>47</sup> See Bob Oates, *NFL Owners, Players Sing in Harmony: Pro Football: Labor Settlement Will Create Free Agency and Salary Cap, and Will Limit Money for Rookies*, L.A. TIMES (Jan. 7, 1993), [http://articles.latimes.com/1993-01-07/sports/sp-1078\\_1\\_free-agency](http://articles.latimes.com/1993-01-07/sports/sp-1078_1_free-agency).



## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 131

per team.<sup>48</sup> For the 2018 season, the salary cap was set at \$177 million per team.<sup>49</sup> However, the salary cap calculations per the last CBA afford the players a much lower percentage of all revenue, with a low of 46% in 2017 and 2018 and a high of 48.1% of all revenue in 2011.<sup>50</sup> Thus, it follows that the players' share of revenue has significantly decreased since the initial salary cap; however, the overall revenue has significantly increased. Therefore, both the percentage of revenue and the gross amount of revenue the NFL takes have significantly increased yearly, at the expense of the players' share.<sup>51</sup> The salary cap is but one example that highlights the financial mistreatment of the players.

Secondly, franchise values have increased significantly more than the salary cap has increased since its inception. For example, in 1993, the Carolina Panthers and Jacksonville Jaguars were purchased for \$206 million and \$208 million, respectively.<sup>52</sup> As of 2017, the two teams were valued at \$2.3 billion and \$2.075 billion, respectively.<sup>53</sup> Additionally, there have been recent massive increases in franchise values. In fact, the Jaguars sold in 2011 for \$770 million, and the Panthers, in the wake of a scandal involving former owner Jerry Richardson, sold in 2018 for \$2.3 billion.<sup>54</sup> There was clearly a much more significant jump in franchise value from 2011 to 2018 than 1993 to 2018. Some franchise values have increased ten times in the years from 1993 to 2018;<sup>55</sup> however, the salary cap has yet to even increase

<sup>48</sup> See Cork Gaines, *Sports Chart of the Day: History of The NFL Salary Cap*, BUS. INSIDER (July 20, 2011, 5:52 PM), <http://www.businessinsider.com/nfl-sports-chart-of-the-day-history-nfl-salary-cap-2011-7>.

<sup>49</sup> See Edward Lewis, *NFL Salary Cap for 2018 Season Set at \$177.2 Million*, NFL.COM (Mar. 5, 2018, 7:17 PM), <http://www.nfl.com/news/story/0ap3000000919680/article/nfl-salary-cap-for-2018-season-set-at-1772-million>.

<sup>50</sup> See NFL PLAYERS ASS'N, *supra* note 1, at art. 12 (stating that there is now more than just television and gate receipts that comprise all revenue).

<sup>51</sup> While the players have benefitted from the NFL becoming more lucrative, as evidenced by a significantly higher salary cap number, they still receive 20% less of the pie than when the salary cap was introduced. Clearly, the revenue has been reallocated from the players to the owners.

<sup>52</sup> See Kevin Baumer & Dashiell Bennett, *What Every NFL Owner Paid for Their Team – And What It's Worth Today*, BUS. INSIDER (Nov. 16, 2010, 12:10 PM), <http://www.businessinsider.com/how-much-did-nfl-owners-paid-for-their-teams-2010-10?op=1/#cksonville-jaguars-price-208-million-10>.

<sup>53</sup> See *The Business of Football List*, FORBES, <https://www.forbes.com/nfl-valuations/list/#tab:overall> (last visited Sept. 29, 2017).

<sup>54</sup> See Mike Ozanian, *Jacksonville Jaguars Sold To Illinois Businessman For \$770 Million*, FORBES: SPORTSMONEY (Nov. 29, 2011, 1:31 PM), <https://www.forbes.com/sites/mikeozanian/2011/11/29/jacksonville-jaguars-sold-to-illinois-businessman-for-760-million/#7b69b1fd2ab6>; see also Kurt Badenhausen, *Why The Small-Market Carolina Panthers Sold To David Tepper For A Record \$2.3 Billion*, FORBES: SPORTSMONEY (May 22, 2018, 2:18 PM), <https://www.forbes.com/sites/kurtbadenhausen/2018/05/22/how-the-small-market-carolina-panthers-sold-for-a-record-2-3-billion/#7dbb33991786>.

<sup>55</sup> See Katherine Peralta & Joseph Person, *Carolina Panthers Could Pick a New Owner Sooner than You Think*, CHARLOTTE OBSERVER (Mar. 7, 2018), <http://www.charlotteobserver.com/sports/nfl/carolina-panthers/article203736424.html> (stating

by six times over the same time span. Therefore, the owners have seen their value increase at a much higher rate than the players' value since 1993. This is another example of the owners benefitting from the increasing value of the NFL, without a similar increase in value flowing to the players.

### *C. Mechanics of the Franchise Tag*

The NFL Franchise Tag allows teams to retain a prospective free agent longer than his contract stipulates.<sup>56</sup> A team can choose one of three types—the nonexclusive rights, the exclusive rights, or the transition tag—of Franchise Tags to apply to one pending free agent that the team chooses to designate as the franchise player.<sup>57</sup> A player has little control over whether he is tagged, and it is generally not a player-friendly practice, because it prevents players from reaching unrestricted free agency.<sup>58</sup> However, a team can only designate one player who would otherwise be a free agent, unrestricted or restricted, as a franchise player during each year under the current CBA.<sup>59</sup> A team that designates a franchise player will be the only team that the player can negotiate or sign a contract with during the period in which he is designated as the franchise player.<sup>60</sup> The three designations serve the same purpose—they allow a team to retain its designated player; however, each designation is distinctive.

The nonexclusive franchise tender is the most common use of the tag.<sup>61</sup> It is an offer for a one-year contract for the greater of (a) the average of the five largest prior year salaries of players who played the same position at which the franchise player participated in the most snaps during the prior league year, or (b) 120% of the player's prior year salary.<sup>62</sup> The average of the five largest salaries is determined by combining the amounts of the Franchise Tags for players at that position for the five preceding years, dividing that amount by the sum of the salary caps for the five preceding years, and multiplying that percentage by the salary cap for the upcoming year.<sup>63</sup>

---

that the Panthers have been valued between \$2.3 and \$2.8 billion in relation to the upcoming sale of the team, an increase of between eleven and fourteen times the original value of the team).

<sup>56</sup> See SI Wire, *What Is the Franchise Tag?*, SPORTS ILLUSTRATED (Feb. 14, 2017), <https://www.si.com/nfl/2017/franchise-tag-contract-rules-explanation>.

<sup>57</sup> See Seifert, *supra* note 29 (stating that only one pending free agent per year can be designated with the Franchise Tag; however, the team can choose which of the three designations their sole franchise player receives).

<sup>58</sup> See *id.*

<sup>59</sup> See NFL PLAYERS ASS'N, *supra* note 1, at art. 10.

<sup>60</sup> See *id.*

<sup>61</sup> See Seth Walder, *NFL Franchise Tags: Exclusive and Non-exclusive, Explained*, N.Y. DAILY NEWS (Feb. 28, 2017, 6:55 PM), <http://www.nydailynews.com/sports/football/nfl-franchise-tags-exclusive-non-exclusive-explained-article-1.2985100>.

<sup>62</sup> See NFL PLAYERS ASS'N, *supra* note 1, at art. 10.

<sup>63</sup> See *id.*

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 133

However, if a team designates a player with the nonexclusive franchise tender, the player can negotiate a contract with another team with the stipulation that in the event the player signs with another team, the signing team has to give the player's former team two first-round draft picks.<sup>64</sup> Furthermore, if the player signs an offer sheet from another team, his prior team has the chance to match it.<sup>65</sup>

As a result of those restrictions and high costs for other teams, players who are designated with the non-exclusive Franchise Tag rarely change teams.<sup>66</sup> Giving up two first-round draft picks in order to sign another team's player is a steep price for a team to pay.<sup>67</sup> In 2017, Melvin Ingram of the San Diego Chargers, Trumaine Johnson of the Los Angeles Rams, Chandler Jones of the Arizona Cardinals, Jason Pierre-Paul of the New York Giants, and Kawann Short of the Carolina Panthers were all designated with their respective teams' non-exclusive Franchise Tags.<sup>68</sup> None of those players switched teams for the 2017 season via free agency.<sup>69</sup> In the 2018 offseason, only one player designated with the non-exclusive Franchise Tag switched teams; however, that was via a trade and not through his own negotiations in free agency.<sup>70</sup> Therefore, the 2017 and 2018 offseasons are evidence that the non-exclusive Franchise Tag greatly restricts player movement, even though, in theory, a player can negotiate with other teams.

The second more expensive and less common type of Franchise Tag is the exclusive Franchise Tag.<sup>71</sup> The exclusive tag is a one-year

---

<sup>64</sup> See *id.*

<sup>65</sup> See Walder, *supra* note 61.

<sup>66</sup> See Sessler, *supra* note 8. When Josh Norman was designated with the non-exclusive Franchise Tag, he did not have offers from other teams. Within two days of the tag being rescinded, he signed the biggest contract in the NFL at his position. Clearly, the two first-round picks have the effect of restricting player movement, *id.*

<sup>67</sup> See Ty Schalter, *How the NFL Franchise Tag Process Works*, BLEACHER REP. (Feb. 16, 2014), <http://bleacherreport.com/articles/1960713-how-the-nfl-franchise-tag-process-works>; see also Sessler, *supra* note 8 (stating that Norman's story helps highlight that a player generally does not leave his team when designated with the non-exclusive tag because of a prospective team's reluctance to surrender two first-round draft picks).

<sup>68</sup> See Jeremy Bergman, *Franchise Tag Roundup: Browns Decline Tag for Pryor*, NFL.COM (Mar. 1, 2017, 4:04 PM), <http://www.nfl.com/news/story/0ap3000000788559/article/franchise-tag-roundup-who-has-been-designated?campaign=fb-nf-sf59471239-sf59471239>.

<sup>69</sup> See *NFL Franchise Tags 2017: No Deals Signed at the July 17 Deadline*, SB NATION: NFL (July 17, 2017, 4:07 PM), <https://www.sbnation.com/2017/7/14/15821734/nfl-franchise-tag-2017-contracts-kirk-cousins-leveon-bell>.

<sup>70</sup> See *The NFL Teams That Used the Franchise Tag in 2018*, ESPN (Mar. 6, 2018), [http://www.espn.com/nfl/story/\\_/id/22667868/the-nfl-teams-used-franchise-tag-2018](http://www.espn.com/nfl/story/_/id/22667868/the-nfl-teams-used-franchise-tag-2018); see also Jarvis Landry, *Browns Reach Agreement on Five-year, \$75 Million Contract*, USA TODAY (Apr. 12, 2018, 11:30 AM), <https://www.usatoday.com/story/sports/nfl/browns/2018/04/12/jarvis-landry-cleveland-browns-contract/510589002/>. Jarvis Landry was the lone player designated with any type of Franchise Tag in the 2018 offseason to switch teams. For a more in-depth discussion of how this occurred, see Part I, Section D and *infra* notes 88–92.

<sup>71</sup> See Walder, *supra* note 61. This is more expensive, because it is the average of the five largest salaries from the previous season at the same position the player plays, not a weighted average over the five seasons like the amount of the non-exclusive tag is.

contract for the greater of (a) the average of the five largest salaries in player contracts for that year, at the end of the restricted free agent signing period for the player at the position in which he participated in the most plays, and (b) 120% of the player's prior year salary.<sup>72</sup> The exclusive Franchise Tag only allows the player to negotiate with his former team that designated him with the tag;<sup>73</sup> therefore, it is a complete restriction on player movement and is significantly more restrictive than the non-exclusive tag.

The non-exclusive and exclusive Franchise Tags are similar in that they both become more expensive if they are applied to the same player multiple times. Per the CBA, under either tag, if a team designates a player as a franchise player for a third time, the contract is for the greater of (i) the average of the five largest prior year salaries for the player at the position with the highest average (almost always Quarterbacks); (ii) 120% of the average of the five prior year salaries for the player at the position which he participated in the most plays during the past year; or (iii) 144% of his last year's salary.<sup>74</sup> Additionally, when designated as a franchise player for a third time, that team is the only team with whom the player is allowed to negotiate or sign a contract.<sup>75</sup> So, a player designated as a franchise player for the third time in 2018 will be offered a one-year contract for the greater of (i) the average five largest 2017 salaries of the position with the highest average top five salaries; (ii) 120% of the average of the five largest salaries for his position; and (iii) 144% of his last year's salary.<sup>76</sup> A brief hypothetical pending free agency situation may make these mechanics easier to understand.

For example, assume the Giants have a very talented Wide Receiver entering the last year of his rookie contract (therefore not having been previously designated with the Franchise Tag), with a salary of \$8 million. If the Giants were to apply the non-exclusive Franchise Tag for the 2018 season, he would be offered a one-year contract for \$15.982 million.<sup>77</sup> Then, assuming the Giants do not want to lose this player, in 2019 they can give him the non-exclusive Franchise Tag for a second consecutive season, much like what the

---

<sup>72</sup> See NFL PLAYERS ASS'N, *supra* note 1, at art. 10.

<sup>73</sup> See Jon Benne, *What Is the NFL Franchise Tag and How Does It Work?*, SB NATION (Feb. 14, 2017, 10:17 AM), <https://www.sbnation.com/nfl/2016/2/16/10956324/nfl-free-agency-2016-franchise-tag-definition-value-candidates>.

<sup>74</sup> See NFL PLAYERS ASS'N, *supra* note 1, at art. 10.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.* The CBA does not contemplate a player being designated with the Franchise Tag beyond three times; it also appears the calculation of the amount of the Franchise Tag for a second-time designation is the same method of calculation as outlined for the first time being tagged.

<sup>77</sup> See *The NFL Teams That Used the Franchise Tag in 2018*, *supra* note 70. This amount is calculated as the average of the top five Wide Receiver salaries from 2012 through 2016.

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 135

Redskins have done with Kirk Cousins.<sup>78</sup> In that scenario, the Giants would then have to pay the player in 2019 the higher of 120% of his 2018 salary (which ends up being \$19.178 million), and the average of the top five Wide Receiver salaries for the 2019 season. Again, assuming the Giants do not want to lose the player, but have not yet been able to reach an agreement, they can designate the player as their franchise player for a third straight season. In that case, the Giants would be offering the Wide Receiver a one-year contract for the 2020 season that is the greater of (i) 144% of his 2019 salary (\$27.617 million), (ii) 120% of the average of the top five Wide Receiver salaries for 2020, and (iii) the average of the five largest contracts for the position with the top five highest average salaries (again almost always Quarterbacks). Clearly, continuing to use the Franchise Tag on the same player, year after year, becomes very expensive.<sup>79</sup>

The third type of franchise designation is the transition tag; it is somewhat less expensive than the other two tags.<sup>80</sup> This is very rarely used, because it still allows the player to negotiate and sign with other

<sup>78</sup> See Nick Shook, *Kirk Cousins Expected to Play Under Franchise Tag*, NFL.COM (July 17, 2017, 5:17 PM), <http://www.nfl.com/news/story/0ap3000000820192/article/kirk-cousins-expected-to-play-under-franchise-tag>; see also Nick Shook, *Kirk Cousins Expects to Be Free Agent in March*, NFL.COM (Feb. 2, 2018, 1:38 PM), <http://www.nfl.com/news/story/0ap3000000913587/article/kirk-cousins-expects-to-be-free-agent-in-march>; John Keim, *Kirk Cousins Says Redskins Trade for Alex Smith 'Came as a Surprise'*, ESPN: NFL (Feb. 2, 2018), [http://www.espn.com/nfl/story/\\_/id/22300119/kirk-cousins-surprised-washington-redskins-trade-alex-smith](http://www.espn.com/nfl/story/_/id/22300119/kirk-cousins-surprised-washington-redskins-trade-alex-smith); Vincent Frank, *What Will Kirk Cousins' Free Agent Contract Look Like?*, FORBES: SPORTSMONEY (Jan. 6, 2018, 4:30 PM), <https://www.forbes.com/sites/vincentfrank/2018/01/06/what-will-kirk-cousins-free-agent-contract-look-like/2/#6d87dd576fcd>; Ian Rapoport, *Inside Kirk Cousins' Historic Contract with Minnesota Vikings*, NFL.COM (Mar. 15, 2018, 3:12 PM), <http://www.nfl.com/news/story/0ap3000000921414/article/inside-kirk-cousins-historic-contract-with-minnesota-vikings>. The Redskins, after applying the Franchise Tag to Kirk Cousins for the 2016 and 2017 seasons, ended up trading for a different Quarterback for the 2018 season. Cousins is now set to finally be a free agent. He is now expected to receive a king's ransom and surpass the recent deals that Derek Carr and Matthew Stafford signed, thus giving him the biggest contract in NFL history. Cousins ultimately signed with the Minnesota Vikings for the largest yearly salary in NFL history. The Redskins lost their star player and the face of the franchise, exactly what the tag was supposed to prevent, when it was created. The Redskins were resigned to trading for Alex Smith, in part because of how cost-prohibitive applying the Franchise Tag multiple times made it to retain Cousins.

<sup>79</sup> See David Levine, *Projecting the NFL Salary Cap for 2016–20 Seasons*, SALARYCAPCRUNCH (Feb. 20, 2016), <http://salarycapcrunch.com/projecting-nfl-salary-cap-2016-20-seasons/>; see also Edward Lewis, *NFL Salary Cap for 2018 Season Set at \$177.2 Million*, NFL.COM (Mar. 5, 2018, 7:17 PM), <http://www.nfl.com/news/story/0ap3000000919680/article/nfl-salary-cap-for-2018-season-set-at-1772-million>. Under this hypothetical and salary cap projections for the 2018 and 2019 season, the Giants would only have \$23 million in salary cap space for the 2018 season, almost the minimum amount of the Wide Receiver's contract for the 2018 season and even less than the 2019 contract value. The 2019 salary cap space per team cannot be accurately projected until the 2018 season ends; however, this, along with the Kirk Cousins saga, shows the Franchise Tag becomes prohibitively more expensive year over year, to the point where a team can no longer afford the player.

<sup>80</sup> See Schalter, *supra* note 67.

teams; however, there is no draft pick compensation associated with the loss of a player, provided he signs with a new team.<sup>81</sup> Any team that designates a transition player following the expiration of his last contract offers him a one-year contract for the greater of the salary cap percentage average of the ten largest prior year salaries for players at the position at which the player participated in the most plays during the last season, or 120% of his salary from the season before.<sup>82</sup>

Additionally, a signed franchise tender is a guaranteed one-year contract.<sup>83</sup> However, if a player's contract is terminated because of his failure to establish or maintain his excellent physical condition, he will be subject to review of a neutral physician whose findings will be conclusive in any arbitration proceeding relating to the physical condition of the player at the time of the exam.<sup>84</sup> Therefore, it could be argued that a signed franchise tender is a conditionally, not fully, guaranteed contract.<sup>85</sup>

#### *D. Functional Effects of the Franchise Tag*

It appears that the Franchise Tag, while offering players, at worst, a top ten positional salary for one season, severely limits a player's options when he is designated as a franchise player. Even if a player is designated with the non-exclusive tag, he is essentially locked into the team that designated him with the Franchise Tag, because other teams are not generally willing to part with two first-round picks for the player.<sup>86</sup> Once a player is tagged, his only option besides working out a long-term deal, or playing under the one-year deal, is to threaten to hold out (refuse to play under the offered contract).<sup>87</sup> A person should not be restricted from choosing his employer; at a bare minimum, a person should be allowed to at least seek out prospective employers, and the Franchise Tag severely limits a player's ability to do that.

Furthermore, the Franchise Tag is not always used to advance its stated purpose of allowing a team to retain a signature player who otherwise would be eligible for free agency. For example, Jarvis Landry is a perfect example of how teams have morphed the use of the

---

<sup>81</sup> *Id.*

<sup>82</sup> See NFL PLAYERS ASS'N, *supra* note 1, at art. 10.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> NFL contracts not being guaranteed is an issue, which requires a more in-depth discussion than this Note can provide.

<sup>86</sup> See Jon Benne, *NFL Players Hate the Franchise Tag, even if It Means a Big Paycheck*, SB NATION (Feb. 15, 2017, 9:00 AM), <https://www.sbnation.com/nfl/2017/2/15/14584704/nfl-players-hate-franchise-tag-salary-holdout-eric-berry-kirk-cousins>; see also Sessler, *supra* note 8 (stating that Norman signed the largest contract in the league at his position two days after the non-exclusive tag designation was rescinded. Once the draft pick compensation was removed from the equation, Norman immediately became the highest paid Cornerback).

<sup>87</sup> Benne, *supra* note 86; see also Sessler, *supra* note 8.

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 137

Franchise Tag. Landry was drafted by the Miami Dolphins in 2014 and since then has become a star and one of the best Wide Receivers in the NFL.<sup>88</sup> Landry led the NFL in receptions and had the third most touchdown receptions during the 2017 season.<sup>89</sup> Since beginning his NFL career, Landry has the third most receptions in the NFL and has been named to the Pro Bowl three times.<sup>90</sup> However, less than three weeks after the Dolphins designated Landry with the non-exclusive Franchise Tag, he was traded from the Dolphins to the Cleveland Browns for a fourth and seventh round pick.<sup>91</sup> Landry's situation is evidence that the Franchise Tag has morphed from being a tool that a team uses to retain a player to being one that a team uses to ensure they do not lose a player, without receiving compensation. Most importantly, this situation also shows that a team does not require two first-round picks as compensation for losing a player under the current structure of the non-exclusive Franchise Tag, because it would settle for much less.<sup>92</sup>

In addition to the significant change in Franchise Tag's use since its creation, players tend to dislike the Franchise Tag, even though it can provide them with a high salary for one year. The Franchise Tag strips the players of "almost all leverage during a time when they are hoping to cash in on big seasons," while also not offering any long-term financial security.<sup>93</sup> For instance, Eric Berry, the Kansas City Chiefs star Safety, was franchise-tagged for the 2016 season and said he was going to sit out the entire 2017 season if he was given the Franchise Tag again, even though playing under the tag would have resulted in a one-year salary of \$13 million.<sup>94</sup>

The Franchise Tag does not provide players with long-term security, because it only provides a one-year salary.<sup>95</sup> The story of Henry Melton is a perfect example of why players do not like the lack of security associated with the Franchise Tag. Melton, a former Chicago Bears Defensive Tackle, was designated as the Bears franchise player in the 2013 offseason for a salary of \$8.45 million.<sup>96</sup> Melton was one of

<sup>88</sup> See *Jarvis Landry* – *Cleveland Browns*, ESPN, [http://www.espn.com/nfl/player/\\_id/16790/jarvis-landry](http://www.espn.com/nfl/player/_id/16790/jarvis-landry) (last visited Mar. 11, 2018).

<sup>89</sup> See McManamon, *supra* note 6; see also *NFL Player Receiving Statistics – 2017*, ESPN, [http://www.espn.com/nfl/statistics/player/\\_stat/receiving/sort/receivingTouchdowns](http://www.espn.com/nfl/statistics/player/_stat/receiving/sort/receivingTouchdowns) (last visited Mar. 11, 2018).

<sup>90</sup> See McManamon, *supra* note 6.

<sup>91</sup> *Id.*

<sup>92</sup> See *id.*; see also NFL PLAYERS ASS'N, *supra* note 1, at art. 10.

<sup>93</sup> See Benne, *supra* note 86.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See Michael C. Wright, *Bears Tag DT Henry Melton*, ESPN (Mar. 1, 2013), [http://www.espn.com/chicago/nfl/story/\\_id/9006202/chicago-bears-place-franchise-tag-henry-melton](http://www.espn.com/chicago/nfl/story/_id/9006202/chicago-bears-place-franchise-tag-henry-melton).

the best Defensive Tackles in the league and was a Pro Bowler the season before.<sup>97</sup> If Melton had reached a long-term deal, he would have been in line for a guarantee of more than \$25 million.<sup>98</sup> In week three of the 2013 season, he tore his ACL and missed the remainder of the season.<sup>99</sup> The next season, Melton signed a contract with the Dallas Cowboys, in which only \$2.25 million was guaranteed.<sup>100</sup> Even though the contract had a three-year team option attached to it for up to \$24 million, the Cowboys chose not to exercise it after the season and released Melton.<sup>101</sup> For the 2015 season, Melton was reduced to signing another one-year deal—this time with the Tampa Bay Buccaneers for up to \$5 million.<sup>102</sup> Melton then signed a contract for the 2016 season with the Denver Broncos for \$760,000, none of which was guaranteed.<sup>103</sup> The Broncos released Melton before the season began, and as of the start of the 2017 season, no other team had signed him.<sup>104</sup> In the five years since Melton was designated as the Bears franchise player, he earned about \$16 million, which is only two-thirds of what he was in line to be guaranteed had he not been designated the team's franchise player.<sup>105</sup>

In sum, the Franchise Tag is a tool that enables team owners to retain a player while ensuring that if the player leaves the team, he will

<sup>97</sup> See Lester A. Wiltfong Jr., *Chicago Bears Injury Update: Henry Melton Out for the Year with a Torn ACL*, WINDY CITY GRIDIRON (Sep. 23, 2013, 11:24 AM), <https://www.windycitygridiron.com/2013/9/23/4762336/chicago-bears-injury-update-henry-melton-out-year-with-torn-acl>.

<sup>98</sup> See Jarrett Bell, *Major Injuries Make Franchise Tag a Gamble for Players*, USA TODAY (Sept. 25, 2013, 11:19 PM), <https://www.usatoday.com/story/sports/nfl/columnist/bell/2013/09/25/franchise-tag-dilemma-henry-melton-anthony-spencer-michael-johnson-jairus-byrd/2873207/>.

<sup>99</sup> See Wiltfong, *supra* note 97. ACL means Anterior Cruciate Ligament, a major knee ligament.

<sup>100</sup> See Todd Archer, *Breaking Down Henry Melton's Contract*, ESPN: DALL. COWBOYS (Mar. 19, 2014), [http://www.espn.com/blog/dallas/cowboys/post/\\_id/4725914/breaking-down-henry-meltons-contract](http://www.espn.com/blog/dallas/cowboys/post/_id/4725914/breaking-down-henry-meltons-contract).

<sup>101</sup> See Arthur Weinstein, *Cowboys Decide to Part Ways with Former Pro Bowl DT Henry Melton*, SPORTING NEWS: NFL (Feb. 14, 2015, 1:32 PM), <http://www.sportingnews.com/nfl/news/dallas-cowboys-henry-melton-contract-nfl-free-agency/9h53pdw1962019m0arxjn43nv>. This alludes to the issue of guaranteed versus non-guaranteed contracts.

<sup>102</sup> See Mike Chiari, *Henry Melton to the Buccaneers: Latest Contract Details, Comments and Reaction*, BLEACHER REP. (Mar. 12, 2015), <http://bleacherreport.com/articles/2386500-henry-melton-to-buccaneers-latest-contract-details-comments-and-reaction>.

<sup>103</sup> See Jon Heath, *Broncos Signed Defensive Lineman Henry Melton for a Bargain*, BRONCOS WIRE (Aug. 24, 2016, 9:53 AM), <http://broncoswire.usatoday.com/2016/08/24/henry-melton-denver-broncos-contract/>.

<sup>104</sup> See *Henry Melton*, OVER THE CAP, <https://overthecap.com/player/henry-melton/1813/> (last visited Jan. 1, 2018).

<sup>105</sup> See Bell, *supra* note 98. The total amount of money Melton would have received as a free agent, rather than the \$8.45 million he received under the Franchise Tag, would likely have been more than the \$16 million he made for the rest of his career, and the guaranteed \$25 million he was in line for as a free agent.



## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 139

receive some form of compensation.<sup>106</sup> While it provides the player with a high salary for one season, it severely limits him from being able to negotiate his own terms of employment with an employer of his choosing, and it also greatly reduces his financial security in case of an injury. To be sure, the Franchise Tag can directly impact only thirty-two players in any season (one per team); however, the NFL's willingness to modify or eliminate it can be a useful bargaining chip during the CBA negotiations in 2020.

## II. NON-COMPETE CLAUSES

### *A. Non-Compete Clauses Defined: Elements and Enforceability*

A non-compete agreement is “a contract limiting a party from competing with a business after termination of employment or completion of a business sale.”<sup>107</sup> Non-compete clauses “are designed to protect a business owner's investment by restricting potential competition.”<sup>108</sup> Courts generally evaluate the “clauses for their reasonableness to determine whether they constitute an unfair restraint on trade.”<sup>109</sup> Different states have different standards of analysis to determine whether a clause is reasonable; however, the majority use a three-part test in which the agreement must be reasonable in terms of (i) length; (ii) size of geographical territory included; and (iii) the business's necessity for the agreement.<sup>110</sup> Additionally, courts closely scrutinize covenants that restrict the behavior of former employees.<sup>111</sup> In a free market, most businesses cannot reasonably assert a need to restrict competition.<sup>112</sup>

Looking at various cases, restatements, and treatises, some general concepts regarding the enforceability of non-compete clauses emerge.<sup>113</sup>

<sup>106</sup> See McManamon, *supra* note 6. Again, looking at Jarvis Landry, there is a very strong argument the purpose of the Franchise Tag has now become to ensure a team does not lose a player without receiving compensation and is no longer to ensure a team retains a star player.

<sup>107</sup> See *Noncompete Agreement*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Noncompete+Agreement> (last visited Oct. 1, 2017); see also 2 BUREAU OF NAT'L AFFAIRS, INC., RESTRICTIVE COVENANTS AND TRADE SECRETS IN EMPLOYMENT LAW: AN INTERNATIONAL SURVEY 55-2 4 (Bloomberg L. 2018).

<sup>108</sup> See *Noncompete Agreement*, *supra* note 107; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-4.

<sup>109</sup> See *Noncompete Agreement*, *supra* note 107; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-4.

<sup>110</sup> See *Noncompete Agreement*, *supra* note 107; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-5.

<sup>111</sup> See *Noncompete Agreement*, *supra* note 107.

<sup>112</sup> *Id.*

<sup>113</sup> While not binding, the Restatement of Employment Law and treatises are very useful for this Note, because the NFL has teams in multiple jurisdictions, and state law governs contracts. A non-compete clause is a provision of a contract; so, it is subject to the laws of the state in which the contract is formed. The Restatement and treatises present overall principles of a non-compete clause regarding its elements and enforceability.

Courts will only enforce covenants between an employer and a former employee that restrict the former employee's working activities, if the covenants (i) are reasonably tailored in scope, geography, time, and (ii) protect the legitimate interests of the employer.<sup>114</sup> Legitimate employer interests include (a) trade secrets and other protectable confidential information that do not meet the definitions of trade secrets; (b) customer relationships; (c) investment in the employee's reputation in the market; and (d) a purchase of a business owned by the employee.<sup>115</sup> However, there are exceptions in which the restrictive covenant will be unenforceable, even if it is properly tailored.<sup>116</sup> The first exception is when the employer discharges the employee on a basis that makes the enforcement of the covenant inequitable; the second is if the employer acted in bad faith in requiring the covenant; the third is if the employer materially breached the underlying agreement; and, the fourth is if there is a great public need for the special skills of the former employee that outweighs any legitimate interests of the employer in enforcing the covenant.<sup>117</sup>

Furthermore, restrictive covenants contain dueling interests, and as such, courts must balance those competing interests. On one hand, they enable employers to protect customer relationships, invest in an employee's reputation, and advance other legitimate interests, as detailed above.<sup>118</sup> On the other, restrictive covenants inhibit the freedom of employees to leave their employers and move to other employment, where they can be more productive. Additionally, they frustrate the public interest in promoting competition.<sup>119</sup>

Therefore, a court, in examining restrictive covenants, should determine whether the employer has a protectable interest and whether the restrictive covenant is reasonably tailored to further that interest.<sup>120</sup>

---

<sup>114</sup> See RESTATEMENT OF EMP'T LAW § 8.06 (AM. LAW INST. 2017); see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 1077, at 55-5. See generally *HR Staffing Consultants LLC v. Butts*, 627 F. App'x 168, 171 (3d Cir. 2015); *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1231 (11th Cir. 2009); *Certified Restoration Dry Cleaning Network L.L.C. v. Tenke Corp.*, 511 F.3d 535, 548 (6th Cir. 2007); *Lampman v. DeWolff Boberg & Assocs.*, 319 F. App'x 293, 299 (4th Cir. 2009); *ANSYS, Inc. v. Computational Dynamics N. Am., Ltd.*, 595 F.3d 75, 79 (1st Cir. 2010); *Osler Inst., Inc. v. Forde*, 333 F.3d 832, 838 (7th Cir. 2003). The listed cases highlight that circuit courts throughout the country, in applying state law, incorporate a test of reasonableness, in which the restrictions must be reasonable in at least scope, geography, time, or protection of the employer's legitimate business interest.

<sup>115</sup> See RESTATEMENT § 8.07; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-4; *Proudfoot Consulting Co.*, 576 F.3d at 1231; *Certified Restoration Dry Cleaning Network L.L.C.*, 511 F.3d at 548.

<sup>116</sup> RESTATEMENT § 8.06; see also *HR Staffing Consultants LLC*, 627 F. App'x at 171; *Lampman*, 319 F. App'x at 299; *ANSYS, Inc.*, 595 F.3d at 79.

<sup>117</sup> See RESTATEMENT § 8.06; *HR Staffing Consultants LLC*, 627 F. App'x at 171; *Lampman*, 319 F. App'x at 299; *ANSYS, Inc.*, 595 F.3d at 79.

<sup>118</sup> RESTATEMENT § 8.06 cmt. a.

<sup>119</sup> See *id.*

<sup>120</sup> *Id.* § 8.06 cmt. b; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-5;

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 141

If the restrictive covenant is reasonably tailored to protect the legitimate interest at stake, it will be enforced.<sup>121</sup> A reasonably tailored covenant cannot be more restrictive than necessary in duration, scope of activities, or geography to protect the legitimate interest.<sup>122</sup> The reasonableness determination will vary from case to case and depends on the circumstances of each case, including industry practice and the nature of the interest justifying the restrictive covenant.<sup>123</sup> Courts will inquire whether the employer's legitimate interest could not be equally well-served by a narrower restriction.<sup>124</sup> However, courts will look favorably upon enforcing a non-compete contract if there is a garden leave clause in the contract.<sup>125</sup> A garden leave clause is one in which the employee promises to give a certain amount of notice to the employer in advance of the employee's resignation from employment, and the employer does not require the employee to work during the garden leave period.<sup>126</sup> The employee still receives a salary and is an employee of the employer during that period.<sup>127</sup>

In short, a non-compete clause is a contract between two parties in which one party agrees not to compete with the other for a period of time; in order to be enforceable, the non-compete clause must be reasonable.<sup>128</sup>

### B. States Legislatures and Non-Compete Clauses

The majority of states permit non-compete clauses to be a part of employment contracts.<sup>129</sup> Only California, North Dakota, and Oklahoma default to not allowing non-compete clauses in employment

---

*Proudfoot Consulting Co.*, 576 F.3d at 1231; *Certified Restoration Dry Cleaning Network L.L.C.*, 511 F.3d at 548; *Lampman*, 319 F. App'x at 299; *ANSYS, Inc.*, 595 F.3d at 79; *Osler Institute, Inc.*, 333 F.3d at 838.

<sup>121</sup> RESTATEMENT § 8.06 cmt. c; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-5; *Proudfoot Consulting Co.*, 576 F.3d at 1231; *Certified Restoration Dry Cleaning Network L.L.C.*, 511 F.3d at 548; *Lampman*, 319 F. App'x at 299; *ANSYS, Inc.*, 595 F.3d at 79; *Osler Institute, Inc.*, 333 F.3d at 838.

<sup>122</sup> See RESTATEMENT § 8.06 cmt. b; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-5; *Certified Restoration Dry Cleaning Network L.L.C.*, 511 F.3d at 548; *Lampman*, 319 F. App'x at 299; *ANSYS, Inc.*, 595 F.3d at 79.

<sup>123</sup> See RESTATEMENT § 8.06 cmt. b; see also *HR Staffing Consultants LLC v. Butts*, 627 F. App'x 168, 171 (3d Cir. 2015); *Proudfoot Consulting Co.*, 576 F.3d at 1231.

<sup>124</sup> See RESTATEMENT § 8.06 cmt. b; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-5; *Certified Restoration Dry Cleaning Network L.L.C.*, 511 F.3d at 548; *ANSYS, Inc.*, 595 F.3d at 79.

<sup>125</sup> See RESTATEMENT § 8.06 cmt. b.

<sup>126</sup> See Jeffrey S. Klein & Nicholas J. Pappas, 'Garden Leave' Clauses in Lieu of Non-Competes, 241 N.Y. L.J. 24 (2009).

<sup>127</sup> See *id.*

<sup>128</sup> See *Noncompete Agreement*, *supra* note 107; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-4.

<sup>129</sup> See Russel Beck, *Employee Noncompetes: A State by State Survey*, BECK REED RIDEN LLP (July 11, 2017), <https://www.faircompetitionlaw.com/wp-content/uploads/2017/07/Noncompetes-50-State-Survey-Chart-20170711.pdf>.

contracts.<sup>130</sup> However, a majority of states that permit non-compete clauses to be a part of employment contracts have banned non-compete clauses from specific professions and have limited their enforceability to specific circumstances.<sup>131</sup> New York, Colorado, and California provide examples of how different state legislatures deal with non-compete clauses in their own ways.

The New York statute prohibits non-compete clauses in a specific industry.<sup>132</sup> The statute specifically says a broadcasting industry employer may not require, as a condition of employment, that an employee refrain from obtaining employment in any specified geographic area, for a specific time period, or with any particular employer or in any particular industry, after the conclusion of employment with the broadcasting employer.<sup>133</sup>

In Colorado, any covenant not to compete that restricts the right of any person to receive compensation for performance of labor for any employer is void, unless it is for (i) the purchase and sale of a business or the business's assets; (ii) the protection of trade secrets; (iii) a contractual provision providing for recovery of the expense of education and training an employee who served an employer for a period of less than two years; or (iv) executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.<sup>134</sup> Therefore, in Colorado, non-compete clauses are void with only four exceptions.<sup>135</sup>

California has taken a much stronger stance against non-compete clauses. According to Section 16600 of the California Business and Professions Code, "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."<sup>136</sup> The exceptions listed in the chapter include (1) non-compete agreements between a buyer and seller of an ownership interest in the sale of a business entity or division;<sup>137</sup> (2) dissolution or dissociation of a partner from a partnership in which the partnership or its members still carry on a like business;<sup>138</sup> and (3) dissolution or termination of interest in a limited liability company.<sup>139</sup>

The New York, Colorado, and California statutes highlight that

---

<sup>130</sup> *See id.*

<sup>131</sup> *See id.*

<sup>132</sup> *See* N.Y. LAB. LAW § 202-k (McKinney 2008).

<sup>133</sup> *See id.*

<sup>134</sup> *See* COLO. REV. STAT. ANN. § 8-2-113 (West 1982).

<sup>135</sup> *See id.*

<sup>136</sup> *See* CAL. BUS. & PROF. CODE § 16600 (West 1941).

<sup>137</sup> *See id.* § 16601.

<sup>138</sup> *See id.* § 16602.

<sup>139</sup> *See id.* § 16602.5.

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 143

state legislatures vary regarding the views they take with respect to non-compete clauses—legislatures also vary in terms of whether non-compete clauses are allowable in certain industries and professions.

*C. Courts and Non-Compete Clauses*

State and federal courts have ruled on the enforceability of non-compete clauses, with the federal courts applying the applicable state law.<sup>140</sup> A look at five cases shows how various courts apply the applicable state law and how the principles highlighted in the previous section of this Note are reflected in various courts' holdings.

In *Kelton v. Stravinski*, the Court of Appeal for the Fifth District of California held that a covenant not to compete between two partners was unenforceable, because it did not fall under the two narrow situations created by Sections 16601 and 16602 of the California Business and Professions Code.<sup>141</sup> Because the covenant to not compete in that case was not executed as part of the sale of the goodwill of a business, or dissolution of a partnership, the court held it unenforceable and was not able to prevent the application of Section 16600.<sup>142</sup> Additionally, the court held that when a contract creates an illegal restraint on trade, there is nothing the parties can do that will in any way add to its validity; if the contract is void, it cannot be ratified by a right or conduct.<sup>143</sup>

In addition to a state court holding a non-compete clause unenforceable for statutory reasons, the New York Court of Appeals has, at times, held non-compete clauses unenforceable based on the standard of reasonableness. In *BDO Seidman v. Hirshberg*, the Court of Appeals of New York applied the modern common-law standard of reasonableness for employee agreements not to compete: a three-pronged test.<sup>144</sup> Under that test, “a restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.”<sup>145</sup> All three prongs must be met, or else the restrictive covenant is rendered invalid.<sup>146</sup> In *BDO Seidman*, the central issue before the court was whether the clause in an agreement

---

<sup>140</sup> See 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-3; see also *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S.Ct. 500, 504 (2012). In a case involving an arbitration agreement and non-compete clause, the Supreme Court stated that the determination of the validity of a non-compete clause rests with the arbitrator as a matter of applicable state law.

<sup>141</sup> See *Kelton v. Stravinski*, 41 Cal. Rptr. 3d, 877, 881 (Ct. App. 2006). The two exceptions from Sections 16601 and 16602 respectively are, when a person sells the goodwill of a business, and when a partner agrees not to compete in anticipation of dissolution of a partnership.

<sup>142</sup> See *id.* at 883.

<sup>143</sup> See *id.* at 881.

<sup>144</sup> See *BDO Seidman v. Hirshberg*, 93 N.Y. 2d 382, 388 (1999).

<sup>145</sup> *Id.* at 388-89.

<sup>146</sup> See *id.* at 389.

between Hirshberg (a manager) and BDO (an accounting firm) required Hirshberg to compensate BDO for serving any former clients of the firm's Buffalo office, within eighteen months following the termination of his employment, in an amount equal to one and a half times the fees BDO charged the client over the last fiscal year of the client's patronage.<sup>147</sup> The court held that this covenant was in violation of the first prong of the common-law rule, because the extending of this covenant to all BDO clients, even those with whom the defendant did not develop a working relationship with while an employee at the firm, constituted a restraint greater than was necessary to protect BDO's legitimate interest of maintaining its clients.<sup>148</sup>

In *AG Spectrum Company v. Elder*, the Court of Appeals for the Eighth Circuit, applying Iowa law, was faced with a non-compete clause between AG Spectrum and Elder, a sales representative with whom the company had an independent contractor agreement.<sup>149</sup> The clause "prohibit[ed] Elder from competing with AG Spectrum for three years if either party end[ed] the relationship."<sup>150</sup> Here, the court used a four-factor test to determine whether the restrictive covenant was reasonable.<sup>151</sup> Some relevant factors were "(1) the employee's closeness to customers; (2) the employee's [sic] 'peculiar knowledge gained through employment that provides a means to pirate the customer'; (3) the amount and sophistication of employer-provided training and the nature of the business; and (4) 'matters of basic fairness.'"<sup>152</sup> Additionally, the court stated that the ultimate goal is to prevent unjust enrichment.<sup>153</sup> The court held that the covenant was unenforceable under the reasonableness test, after weighing the benefits and burdens of the covenant.<sup>154</sup> The provision was held to be not reasonably necessary to protect AG Spectrum's business, in part because AG Spectrum gave Elder ordinary on-the-job training and support, which do not deserve extra protection; additionally, the provision is excessively burdensome

---

<sup>147</sup> See *id.* at 387.

<sup>148</sup> The Court held that the covenant requiring "defendant to compensate BDO for lost patronage of clients with whom he never acquired a relationship through the direct provision of substantive accounting services during his employment" was invalid and unenforceable. The Court reasoned that "it would be unreasonable to extend the covenant to personal clients of defendant who came to the firm solely to avail themselves of his services and only as a result of his own independent recruitment efforts, which BDO neither subsidized nor financially supported as part of a program of client development." The Court severed the overbroad portion of the restrictive covenant and enforced only the portions of the covenant that satisfied the test of reasonableness. See *id.* at 392–93.

<sup>149</sup> See *AG Spectrum Co. v. Elder*, 865 F.3d 1088, 1089 (8th Cir. 2017).

<sup>150</sup> *Id.*

<sup>151</sup> See *id.* at 1091.

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 1092.

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 145

to Elder, while beneficial to AG Spectrum.<sup>155</sup>

Similarly, the Court of Appeals for the Second Circuit has held that a non-compete clause was unenforceable, because it was unreasonable in scope.<sup>156</sup> In *Crye Precision LLC v. Duro Textiles LLC*, the two companies had a non-compete clause that prohibited Duro from “making any products that [were] similar to MULTICAM through [any] color palette, pattern, arrangement or placement of any elements incorporated in MULTICAM.”<sup>157</sup> The court, applying New York law, evaluated the non-compete clause for reasonableness and undue hardship by focusing, in part, on the particular facts and circumstances, giving context to the agreement.<sup>158</sup> The court held that the non-compete clause was unreasonable in scope, and because the enforcement of the clause would be contrary to public policy, Duro could invalidate the non-compete clause, even though it was included at its own behest.<sup>159</sup>

In *ITN Flix v. Hinojosa*, the Ninth Circuit Court of Appeals, applying California law, was faced with a non-compete that prohibited actor Danny Trejo from playing other vigilante characters besides the one he played in ITN Flix’s movie *Vengeance*.<sup>160</sup> Here, the court ruled the agreements that prohibited Trejo from playing vigilante characters were void as unlawful restraints on trade, because they limited Trejo’s right to pursue lawful employment.<sup>161</sup> The court also held that the right of publicity for a living person does not apply as an exception to Section 16600 of the California Business and Professions Code, because it is not explicitly listed in the statute.<sup>162</sup> The court rejected the plaintiff’s argument that applying Section 16600 to the entertainment industry would be unworkable, since personal service contracts are needed to ensure celebrity availability. The court also held when a contract creates an illegal restraint on trade, there is nothing the parties can do to add to its validity.<sup>163</sup>

#### D. Summary of Non-Compete Clauses

In consideration of the preceding discussion, the states’ statutes and courts’ guidelines can be applied to the NFL and its players in a variety of ways. If NFL players are likened to broadcasters (both are small groups of professionals with specialized skills), the New York

---

<sup>155</sup> See *id.*

<sup>156</sup> See *Crye Precision LLC v. Duro Textiles, LLC*, 689 F. App’x 104, 106 (2d Cir. 2017).

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> See *id.* Even though this case deals with two entities, it still shows how a court evaluates reasonableness and shows that a non-compete clause can be invalidated, even if the party seeking to have it invalidated was the party that insisted on including it.

<sup>160</sup> See *ITN Flix, LLC v. Hinojosa*, 686 F. App’x 441, 443 (9th Cir. 2017).

<sup>161</sup> See *id.* at 444.

<sup>162</sup> See *id.*

<sup>163</sup> See *id.*

statute presents an argument that the players should not be subject to non-compete clauses.<sup>164</sup> The labor that NFL players bring to their teams does not fall under one of the four exemptions the Colorado statute has created for enforcing non-compete clauses.<sup>165</sup> Similarly, the players' labor does not fall under one of the exceptions to the California general rule of not enforcing non-compete clauses.<sup>166</sup> Non-compete clauses serve the purpose of protecting confidential business information, trade secrets, and customer relationships. NFL players do not further these purposes; therefore, something that has the effect of a non-compete clause has no place in the NFL and should not be enforced on the NFL players.

Ultimately, a non-compete clause is a contract that limits a party from competing with the business after termination of employment.<sup>167</sup> The clauses will generally be upheld if the court deems it reasonable regarding its restraint on trade; however, the determination of reasonableness varies from state to state.<sup>168</sup> Some courts have held non-compete clauses to be unenforceable and void because of state statutes, while other courts have found non-compete clauses to be unenforceable based on the common-law test of reasonableness.<sup>169</sup> The reasonableness of the non-compete clause considers many factors, including, but not limited to, the scope of the restriction; the limitation of the employee to pursue other employment; the essentiality of the clause in protecting the employer's legitimate business interests; and how burdensome the clause is to the employee and employer respectively.<sup>170</sup> Additionally, a court must look at each clause while considering the totality of the circumstances and facts surrounding the clause at issue.<sup>171</sup>

### III. THE NFL FRANCHISE TAG AS A NON-COMPETE CLAUSE

#### A. *NFL Players' Employers, Duration of Employment, and Governing Law*

The Franchise Tag acts as a non-compete clause, because it effectively prevents a player, who otherwise would be an unrestricted free agent, from being able to freely negotiate and sign with an employer of his choosing.<sup>172</sup> As previously discussed in Part II, a non-

---

<sup>164</sup> See N.Y. LAB. LAW § 202-k (McKinney 2008).

<sup>165</sup> See COLO. REV. STAT. ANN. § 8-2-113 (1982).

<sup>166</sup> See CAL. BUS. & PROF. CODE §§ 16600, 16602, 16602.5 (West 1941).

<sup>167</sup> See *Noncompete Agreement*, *supra* note 107; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-4.

<sup>168</sup> See *Noncompete Agreement*, *supra* note 107; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-5.

<sup>169</sup> See Courts and Non-Compete Clauses, *supra* Part II.C.

<sup>170</sup> See *id.*

<sup>171</sup> See *Crye Precision LLC v. Duro Textiles, LLC*, 689 F. App'x 104, 106 (2d Cir. 2017).

<sup>172</sup> See Sessler, *supra* note 8. Josh Norman, while designated with the non-exclusive Franchise



## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 147

compete clause restricts employees from competing against their former employers and will be held enforceable only if it is reasonably tailored.<sup>173</sup> As such, the first step in analyzing the NFL Franchise Tag as a non-compete clause is to determine who the NFL player's employer is. According to the preamble of the 2011 NFL CBA, all professional football players are employed by a member club of the NFL.<sup>174</sup> The second step of this analysis is to determine when an NFL player's employment with his NFL team ends. This can be done by reading the NFL Player Contract, Appendix A to the NFL CBA.<sup>175</sup> The player's contract states the term of the contract will cover "X" number of football season(s) and will begin on the date of execution or March 1st of the year listed, whichever is later, and end at the end of February of the listed year, unless extended, terminated, or renewed as specified elsewhere in the contract.<sup>176</sup> Thus, an individual NFL team employs each individual NFL player, and the player's term of employment ends as of the date specified in Section 1 of the NFL Player Contract. Because the Franchise Tag can only be applied to players who are eligible to enter free agency, a player who is designated with the Franchise Tag is one whose contract has expired, and therefore, the player is no longer an employee of his previous team.<sup>177</sup> Therefore, because the Franchise Tag is a designation by a former employer to a former employee which restricts that employee's actions—such as seeking future employment from prospective employers—the Franchise Tag functions as a non-compete clause.<sup>178</sup>

Another important aspect of this analysis is to determine what law governs each player's contract. Per Section 22 of the Player Contract, the applicable state law for each contract varies by the individual player's contract.<sup>179</sup> Because the state law of where each team is located governs the contracts it signs with its players, there are twenty-two applicable state law jurisdictions.<sup>180</sup> As previously discussed in Part II, Section D, based on the statutes in California, Colorado, and New York, NFL players should not be subject to non-compete clauses.<sup>181</sup> The

---

Tag, which in theory allows a player to negotiate with other teams, had no contract offers from any teams, besides the Carolina Panthers; however, within two days of the designation being removed, Norman was able to choose from multiple teams and ultimately decided to sign with the Washington Redskins.

<sup>173</sup> See *supra* Part II (discussing the elements and enforceability of a non-compete clause).

<sup>174</sup> See NFL PLAYERS ASS'N, *supra* note 1, at xiv.

<sup>175</sup> See *id.* at 256.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* at 44.

<sup>178</sup> See *Noncompete Agreement*, *supra* note 107; see also 2 BUREAU OF NAT'L AFFAIRS, INC., *supra* note 107, at 55-4.

<sup>179</sup> See NFL PLAYERS ASS'N, *supra* note 1, at 263.

<sup>180</sup> See *NFL Teams by State*, 1KEYDATA.COM, <https://state.1keydata.com/nfl-teams-by-state.php> (last visited Nov. 3, 2017).

<sup>181</sup> See State Legislatures and Non-Compete Clauses, *supra* Part II.B (arguing that if NFL players

nineteen other states with NFL teams (twenty, if including Nevada, because of the Oakland Raiders' pending move)<sup>182</sup> vary in their enforcement of non-compete clauses; however, there are a few similar general guidelines that each state follows.<sup>183</sup>

A vast majority of the states with NFL teams hold that the protectable legitimate employer business interests are trade secrets, confidential information, and goodwill.<sup>184</sup> A few of those states also hold employee training and customer relationships to be protectable interests as well.<sup>185</sup> However, almost all of the states with NFL teams hold that, in order for a non-compete clause to be enforceable, the clause must not be any broader than necessary to protect the employer's legitimate business interest, and the clause must be reasonably necessary to protect the employer's legitimate business interest.<sup>186</sup>

Altogether, a player's term of employment ends with his team when the date on his contract occurs.<sup>187</sup> Because the Franchise Tag restricts an employee's actions post-employment by not allowing him to negotiate with other teams once he has been tagged, it qualifies as a non-compete clause. While there are twenty-two different jurisdictions to consider the enforceability of non-compete clauses, common themes have emerged among them. In the relevant jurisdictions, a non-compete clause will be enforceable if it is relating to trade secrets, confidential information, or goodwill and if it is not broader or more restrictive on the employee than necessary to protect one of the above listed interests.

#### *B. The Franchise Tag and Its Relation to Legitimate Business Interests of Owners*

As previously stated in the introduction to this Note, the NFL Franchise Tag was first created in order to ensure that teams would be able to keep their star players.<sup>188</sup> The team owner's (i.e., the employer in the case of the owner-player relationship) interest in keeping the star player does not relate to a trade secret<sup>189</sup> or confidential information.<sup>190</sup>

---

are likened to broadcasters, then the New York statute would apply, making non-compete clauses unenforceable for NFL players).

<sup>182</sup> See Paul Gutierrez, *Owners Vote 31-1 to OK Raiders Move*, ESPN: NFL (Mar. 27, 2017), [http://www.espn.com/nfl/story/\\_/id/19016323/raiders-move-las-vegas-approved-31-1](http://www.espn.com/nfl/story/_/id/19016323/raiders-move-las-vegas-approved-31-1)

<sup>183</sup> See Beck Reed Riden LLP, *supra* note 129.

<sup>184</sup> See *id.*

<sup>185</sup> See *id.*

<sup>186</sup> See *id.*

<sup>187</sup> See NFL PLAYERS ASS'N, *supra* note 1, at 256.

<sup>188</sup> See Mays, *supra* note 27.

<sup>189</sup> See Legal Information Institute, *Trade Secret*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/trade\\_secret](https://www.law.cornell.edu/wex/trade_secret). (last visited Nov. 4, 2017). Trade secrets derive value from not being generally known to the public. An NFL player's talent is on display for millions of people every week of the season to observe.

<sup>190</sup> See *Confidential Information*, BLACK'S LAW DICTIONARY (10th ed. 2014) (stating that confidential Information means knowledge or facts not in the public domain but known to some,

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 149

The other common protectable interest amongst the states with NFL teams is goodwill.<sup>191</sup>

However, determining whether keeping a star player on one's team constitutes "goodwill" for an owner's business is a bit more complicated than the analysis of whether keeping the player relates to a trade secret or confidential information. Goodwill has been defined as the excess amount paid for a business above the business's book value.<sup>192</sup> Under that definition, an NFL player does not factor into goodwill, because an NFL player is not a business that is being purchased. Goodwill has also been said to be the assumed value of the attractive force that generates sales revenue in a business.<sup>193</sup> Following that definition, there is a very strong argument that an owner keeping a star player constitutes goodwill, because fans become attached to star players; in turn, fans will buy jerseys of such players, attend games to see them, and while at the game, purchase food, drinks, or souvenirs—all these acts generate revenue for an owner.

Even assuming that an owner retaining a star player is considered goodwill, the Franchise Tag still needs to be examined to determine whether it is reasonably necessary to protect the owner's legitimate business interest, and also whether it is broader than necessary to protect the owner's legitimate business interest.<sup>194</sup> When a team designates a star player with the Franchise Tag, it retains that player; however, there are other ways a team can retain a player besides preventing him from negotiating with other teams. One such way is for the team and the player to negotiate an arms-length employment agreement, rather than the team presenting the player with a take-it-or-leave-it employment offer.<sup>195</sup>

An arms-length deal is an example of a less restrictive measure a team can take to still protect its interest. While the two sides would still have to reach a deal, the Franchise Tag severely reduces the bargaining power of the player by giving the team the knowledge that, in the event the two cannot reach a deal, the team can still keep the player by applying the Franchise Tag.<sup>196</sup> Since the player does not have negotiating power when designated with the Franchise Tag, the

---

especially those with a fiduciary duty to not misuse the knowledge). NFL players do not have a fiduciary duty to the owners of the teams.

<sup>191</sup> See Beck Reed Riden LLP, *supra* note 129.

<sup>192</sup> See *Goodwill*, INVESTOPEDIA, <https://www.investopedia.com/terms/g/goodwill.asp> (last visited Nov. 4, 2017).

<sup>193</sup> See *Goodwill*, BUSINESSDICTIONARY, <http://www.businessdictionary.com/definition/goodwill.html> (last visited Nov. 4, 2017).

<sup>194</sup> See Courts and Non-Compete Clauses, *supra* Part II.C.

<sup>195</sup> See *Arm's Length Agreement*, LAW.COM, <http://dictionary.law.com/Default.aspx?selected=2433> (last visited Nov. 6, 2017).

<sup>196</sup> See Mays, *supra* note 27.

employment contract becomes more of an adhesion contract,<sup>197</sup> rather than an arms-length agreement.

Eliminating a former employee's ability to earn a living by reducing and, in the event of the exclusive Franchise Tag, eliminating the freedom to negotiate with other potential employers is broader than necessary to accomplish the goal of retaining the player.<sup>198</sup> The only possible protectable legitimate business interest in regards to retaining the star player is goodwill, and the Franchise Tag is more restrictive than necessary, because that goal can be accomplished through an arms-length agreement, rather than through a take-it-or-leave-it clause. Again, first, the teams would need to prove goodwill in retaining a player; otherwise, there is no need to determine whether the Franchise Tag is overly restrictive (or reasonably necessary), because then there are no protectable interests at stake.

### C. If the Franchise Tag Was in Other Industries

In some other industries besides professional sports, if a potential employee and employer cannot agree on salary, generally, the potential employee is free to leave and seek other employment. In the case of the NFL Franchise Tag, the potential employer is restricting the potential employee from seeking out other employment. Kirk Cousins, a Quarterback, was designated with the Redskins' Franchise Tag for two consecutive years, and as such, has not been able to attempt to negotiate an agreement with the many other potential employers for the 2016 and 2017 seasons.<sup>199</sup> While the technology industry is rife with trade secrets,<sup>200</sup> in 2008, Sheryl Sandberg, previously a key executive for

<sup>197</sup> See Legal Information Institute, *Adhesion Contract*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/adhesion\\_contract\\_contract\\_of\\_adhesion](https://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion) (last visited Nov. 7, 2017).

<sup>198</sup> See *ITN Flix, LLC v. Hinojosa*, 686 F. App'x 441, 444 (9th Cir. 2017); see also *McManamon*, *supra* note 6. Again, the story of Jarvis Landry calls into question what the actual goal of the Franchise Tag is.

<sup>199</sup> See *Kirk Cousins Expected to Play Under Franchise Tag*, *supra* note 78; see also Dan Graziano, *Now What for Kirk Cousins? 10 potential 2018 Suitors*, ESPN: NFL (July 17, 2017), [http://www.espn.com/nfl/story/\\_/id/20087811/now-kirk-cousins-washington-redskins-10-teams-sign-long-term-2018-nfl-offseason-free-agency](http://www.espn.com/nfl/story/_/id/20087811/now-kirk-cousins-washington-redskins-10-teams-sign-long-term-2018-nfl-offseason-free-agency); Mark Maske, *Plenty Changed This Week for Kirk Cousins and the NFL's Bloated Offseason QB Market*, WASH. POST: SPORTS (Nov. 2, 2017), [https://www.washingtonpost.com/news/sports/wp/2017/11/02/plenty-changed-this-week-for-kirk-cousins-and-the-nfls-bloated-offseason-qb-market/?utm\\_term=.b2450a3c48e9](https://www.washingtonpost.com/news/sports/wp/2017/11/02/plenty-changed-this-week-for-kirk-cousins-and-the-nfls-bloated-offseason-qb-market/?utm_term=.b2450a3c48e9). Cousins is now set to leave the Redskins after being subjected to the Franchise Tag twice. In this case, the owner failed to protect any goodwill he had an interest in by still failing to retain Cousins. Cousins was willing to sign a long-term deal after the 2015 season, but instead was designated with the Franchise Tag. It stands to then question if the Franchise Tag is even properly tailored to protect an employer's legitimate interest.

<sup>200</sup> See Zach Warren, *Trade Secrets Litigation: The No-Longer-Forgotten Part of the Tech IP Arsenal*, L. J. NEWSLS. (Oct. 2017), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/10/01/trade-secrets-litigation-the-no-longer-forgotten-part-of-the-tech-ip-arsenal/?slreturn=20180022212912>.

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 151

Google, left for Facebook.<sup>201</sup> As previously discussed in Part II, Section B, trade secrets are a legitimate protectable interest of the employer; yet, a key employee was allowed to switch from one of the biggest technology companies to another and was not forced to continue her employment under a one-year contract.<sup>202</sup> If the Franchise Tag was applicable in other industries, a key executive like Sheryl Sandberg would not be allowed to move from Google to Facebook, or, for example, an investment advisor at Fidelity would not be able to discuss a move to Morgan Stanley.

It is not just star players—Quarterbacks, Wide Receivers, and Running Backs—who are designated with the Franchise Tag. From 2007 to 2017, Kickers and Punters, combined, have been designated with the Franchise Tag more frequently than Quarterbacks, Running Backs, and Wide Receivers.<sup>203</sup> If the star players are the “face” of a team, the equivalent of a company’s management, the Kickers and Punters are akin to the everyday employees. It then follows, if employees from other industries, such as factory line workers from General Motors, were designated as Franchise Employees, they would not be able to discuss a move to Ford Motor Company. If other industries employed the same restrictive means of preventing an employee from discussing possible job offers from other employers for potentially more money, for an employer to retain a former employee in the name of possible goodwill, as the NFL did, the courts would strike down the clause for being too broad, limiting on the employee, and burdensome to the employee, as compared to the employer. This position is further supported by some of the cases discussed in this Note.

In consideration of the *ITN Flix* and *AG Spectrum* cases discussed in Part II, Section C of this Note, the Franchise Tag would be considered an unenforceable non-compete clause if the courts were able to rule on the validity of the Franchise Tag.<sup>204</sup> In *ITN Flix*, the court held a non-compete clause, which prohibited an actor from playing a role similar to the character he played in ITN Flix’s movie, unenforceable, because it limited the actor’s right to pursue lawful employment.<sup>205</sup> Similarly, the Franchise Tag, by preventing a player

<sup>201</sup> See Sheryl Sandberg Biography, BIOGRAPHY.COM, <https://www.biography.com/people/sheryl-sandberg> (last visited Nov. 6, 2017).

<sup>202</sup> See YAHOO! FIN., <https://finance.yahoo.com/sector/technology> (last visited Nov. 6, 2017).

<sup>203</sup> See Jonas Shaffer, *A Franchise Tag ... on a Kicker? It Happens Way More Often than You Think*, BALT. SUN (Feb. 16, 2016, 7:56 AM), <http://www.baltimoresun.com/g00/sports/bal-ravens-franchise-tag-justin-tucker-nfl-kickers-20160215-story.html?i10c.encReferrer=&i10c.ua=1>.

<sup>204</sup> See *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2120 (1996) (holding that, because the Franchise Tag was a validly bargained provision in a valid CBA, it was enforceable and subject to Labor Laws).

<sup>205</sup> See *ITN Flix, LLC v. Hinojosa*, 686 F. App’x 441, 443–44 (9th Cir. 2017).

from negotiating with another team, limits the player's right to pursue lawful employment in the field of professional football.<sup>206</sup> Thus, the *ITN Flix* court would find it invalid. Additionally, in *AG Spectrum*, the court held the non-compete clause at issue unenforceable in part, because the provision was excessively burdensome to the employee as compared to the employer.<sup>207</sup> The Franchise Tag is excessively burdensome on a player, because it strips the player of the ability to negotiate with prospective employers after his employment contract has expired,<sup>208</sup> and therefore, the court in *AG Spectrum* would also find the Franchise Tag an invalid non-compete clause. *ITN Flix* and *AG Spectrum* are just two brief examples of how courts could apply their analysis of the enforceability of a non-compete clause to the Franchise Tag in the NFL.

*D. The NFL Franchise Tag as a Non-Compete Clause, Summarized*

For the foregoing reasons, the NFL Franchise Tag prevents former employees from seeking future employment with prospective employers by allowing players to negotiate with their former teams only once designated with the exclusive Franchise Tag.<sup>209</sup> A player can be designated with one of two other designations: one of them is rarely used (the transition tag), and the other (the non-exclusive Franchise Tag) almost never leads to negotiations with other teams, because of what the prospective teams would be required to give the player's former team.<sup>210</sup> As a result, the Franchise Tag has the effect of limiting a former employee's future employment and does so by presenting the employee with an adhesion contract, rather than an arms-length contract. The owners' argument that retaining a player protects goodwill for the team is speculative at best.<sup>211</sup> If the NFL Franchise Tag was applicable to other industries, like technology or financial services, the employee movement that has been allowed would not have occurred,

---

<sup>206</sup> See Sessler, *supra* note 8. Again, Josh Norman was clearly desired by other teams; however, when he was designated with the non-exclusive Franchise Tag, which technically allows negotiations with other teams, he had no offers from other teams. Within two days of the designation being rescinded, however, he signed the largest contract at his position.

<sup>207</sup> See *AG Spectrum Co. v. Elder*, 865 F.3d 1088, 1092 (8th Cir. 2017).

<sup>208</sup> See Sessler, *supra* note 8. Had the Franchise Tag designation stayed with Norman, he would have received \$34 million less in guaranteed money, and \$60 million less overall. Clearly, the Franchise Tag has a significant financial burden on a player, while also sapping them of negotiation power.

<sup>209</sup> See Schalter, *supra* note 67.

<sup>210</sup> See *id.*; see also Sessler, *supra* note 8. Again, the fact that Josh Norman had multiple teams attempting to sign him immediately after the Franchise Tag designation was rescinded is evidence that teams are unwilling to sign a player when they would have to surrender two first-round draft picks.

<sup>211</sup> See McManamon, *supra* note 6. If the legitimate business interest the team is trying to protect is goodwill, then the application of the Franchise Tag was useless, because the team traded Landry after he was designated with the Franchise Tag. It stands to then reason that the Franchise Tag, as currently constructed, does not relate a legitimate business interest that non-compete clauses can be used to protect.

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 153

even though those industries involve what are unquestionably protectable business interests. As such, the NFL Franchise Tag has the effect of an overbroad, more restrictive-than-necessary non-compete employment clause that courts would find unenforceable if it were applied to other industries.

#### IV. RECOMMENDATIONS FOR THE FRANCHISE TAG

As currently constructed, the NFL Franchise Tag functions as a non-compete clause, because it restricts post-employment action. If the Franchise Tag was not a part of the CBA, it would be unenforceable, because (i) it is overbroad in its restrictions of a former employee's actions, (ii) does not relate to an employer's legitimate business interests, and even if it did, (iii) is more restrictive than necessary.<sup>212</sup> If the owners' true interest in including the Franchise Tag in the CBA is to enable them to retain their players whose contracts have expired and are set to enter free agency, they can accomplish this without eliminating a player's ability to negotiate with other teams.

Two different approaches that this Note discusses are (1) changing the Franchise Tag designation to resemble a more restricted free agency; and (2) the NFL adopting a form of the National Basketball Association's (NBA) Bird Rights. Opponents of changing the current Franchise Tag system will argue that, because it is a validly negotiated provision in the CBA, it should remain as is. However, just because something is technically valid does not mean there are not better methods to accomplish the same goal. Ultimately, this Note recommends following the proposal of modifying the Franchise Tag designation to resemble a more restricted free agency, because that proposal is more aligned with the NFL's current salary cap structure, supports the NFL's goal of parity and competitive balance, and still allows a team to accomplish the stated goal of the Franchise Tag by retaining the designated player.

##### *A. The Franchise Tag Should Be Changed to Restricted Free Agency*

Currently, NFL restricted free agency designation only applies to players with exactly three years of accrued playing time whose contracts expire at the end of the third year.<sup>213</sup> When a player is a

---

<sup>212</sup> See McManamon, *supra* note 6. Again, Landry, after being designated with the non-exclusive Franchise Tag, was traded for a third and seventh round draft pick. The current Franchise Tag system calls for two first-round picks as compensation to a team whose designated non-exclusive tagged player goes to another team. This is evidence that the current Franchise Tag system is more restrictive than necessary, because teams do not always require two first-round picks as compensation for losing a player designated with the Franchise Tag. They are sometimes willing to settle for at least a fourth and seventh round draft pick.

<sup>213</sup> See Adam Sites, *NFL Restricted Free Agency: Rules, Tender Amounts, and More*, SB NATION (Mar. 12, 2018, 5:41 PM), <https://www.sbnation.com/nfl/2017/3/8/14834554/nfl->

restricted free agent, a team has four different ways of keeping the player through different tender offers.<sup>214</sup> First, second, and original round tenders allow the player to negotiate with other teams; however, the player's former team also has the option to match any deal the player signs.<sup>215</sup> The different tender levels represent the compensation a player's prior team will receive in the event it chooses not to match the offer (and the value of the one-year contract associated with the tender offer) from another team.<sup>216</sup> If the former team designates the player with a first-round tender and it chooses not to match the player's deal from another team, the former team will receive a first-round pick from the new team.<sup>217</sup> A second-round tender results in a second-round pick, going from the new team to the old team; an original-round tender results in the new team sending a pick from the round in which the player was originally selected.<sup>218</sup> The fourth option a team can place on a player is right of first refusal, in which the team has the option to match any deal a former player receives. However, it will not receive any compensation if it chooses not to match.<sup>219</sup> Clearly, restricted free agency allows a team to keep its player; in all four tender options, a team has the ability to match any offer a player receives from another team.<sup>220</sup>

Modifying the current Franchise Tag system to one that allows teams to designate one player as a restricted free agent whose contract has expired, and is thus eligible for free agency, allows the owners to retain the player, which is the goal of the Franchise Tag.<sup>221</sup> Additionally, under this proposal, the owner would have to offer a more appealing contract to the player, as opposed to a one-year take-it-or-leave-it deal; the player would have the ability to negotiate his own contracts with prospective employers; and the player's former team would have the option of retaining him by matching the contract.<sup>222</sup>

---

restricted-free-agents-rules-tender-amounts.

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> See NFL PLAYERS ASS'N, *supra* note 1, at art. 9. Additionally, the CBA also creates limitations regarding the number of draft picks of a certain round that can be received by a team with multiple restricted free agents. Those limitations disincentive a team from designating all their players with first-round tenders, because a team cannot receive multiple first-round picks, unless both players designated with first-round tenders were first-round picks in the year they were drafted. The same is true for second-round tenders. These rules explain why a team cannot seek a first-round pick for each restricted free agent.

<sup>217</sup> See Stites, *supra* note 213.

<sup>218</sup> See *id.*

<sup>219</sup> See *id.*

<sup>220</sup> See *id.*

<sup>221</sup> See Brandt, *supra* note 2.

<sup>222</sup> See Stites, *supra* note 213. Because a player can negotiate with other teams as a restricted free agent, his former team will no longer be able to rely on stripping the player of negotiation ability via the current Franchise Tag system and will have to make a more appealing offer to the player to keep negotiations open; however, because the team still has the right of refusal in restricted



## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 155

Under this proposal, owners' worries of losing players would be minimized, because teams generally loathe giving up a first or second-round pick,<sup>223</sup> and the owners still could match any offer from another team.

Furthermore, if the other teams decide not to offer the player designated as the restricted free agent a contract, the owners will benefit financially. In 2018, the Franchise Tag value for a Quarterback was just over \$23.1 million;<sup>224</sup> however, the first-round tender value for a restricted free agent was just over \$4 million in 2018.<sup>225</sup> Even if a team was not deterred by the prospect of having to give up a first-round pick and presented the player with a contract, his former team would still have the right to retain the player by matching the contract.<sup>226</sup> It then follows, if the Redskins had been able to designate Kirk Cousins with a first-round tender offer, rather than the Franchise Tag, the organization either would have been able to (i) match any offer Cousins received from another team; (ii) receive a first-round pick if it chose not to match any offer; or (iii) in the event he did not receive an offer from another team, pay him almost \$19 million less for the one-year contract.<sup>227</sup> If the owners truly care about protecting the goodwill that comes with retaining the player, they will have to either match the contract from another team, or negotiate their own deal with the player.<sup>228</sup>

While the Franchise Tag currently allows for three different designations, two of which—the non-exclusive tag and the transition tag—allow for players to negotiate with other teams, it still restricts player movement.<sup>229</sup> Teams rarely use the transition tag, because if a

---

free agency, it can match a contract the player signs with another team.

<sup>223</sup> See Stite, *supra* note 213; see also Sessler, *supra* note 8; McMannon, *supra* note 6. Josh Norman was not offered a contract from another team while designated with the Franchise Tag, because the cost of two first-round picks was too high. Jarvis Landry, ultimately being traded for significantly less than two first-round picks, provides an argument that the compensation a player's old team is set to receive should be much lower than it currently is.

<sup>224</sup> See *The NFL Teams that Used the Franchise Tag in 2018*, *supra* note 70.

<sup>225</sup> See *Franchise, Transition, and RFA Tenders, OVER THE CAP*, <https://overthecap.com/franchise-transition-and-rfa-tenders> (last visited June 26, 2018).

<sup>226</sup> See Stites, *supra* note 213.

<sup>227</sup> See *id.* Under this proposal, Cousins at least gets to negotiate his own contract and will not be faced with a take it or leave it offer from the Redskins. At a minimum, he gets the freedom of negotiation.

<sup>228</sup> See Andrew Brandt, *Have We Seen the NFL's Last Restricted Free Agent?*, SPORTS ILLUSTRATED (Apr. 25, 2017), <https://www.si.com/mmqb/2017/04/25/nfl-mike-gillislee-restricted-free-agent-buffalo-bills-new-england-patriots-nfl-draft-preparation>; see also Sessler, *supra* note 8. Looking again to Jarvis Landry, it appears that the owners do not truly care about retaining a player for the goodwill that is associated via a star player and the team's fans. In reality, they do not want to lose a player without receiving any compensation. If the Dolphins truly cared about protecting the goodwill that Landry had created amongst the fans, it certainly would not have traded Landry for a fourth- and seventh-round pick. Under this proposal, the Dolphins, at worst, could have received a first-round pick, in the event it chose not to match an offer for Landry.

<sup>229</sup> See *What Is the Franchise Tag?*, *supra* note 56.

player leaves, they do not receive compensation. Additionally, players rarely change teams under the non-exclusive tag, because giving up two first-round picks is generally not worth it for prospective teams.<sup>230</sup> Therefore, the Franchise Tag, as currently constructed, has the function of restricting player movement to a much greater degree, as compared to a restricted free agency.<sup>231</sup> Changing the Franchise Tag to allow the team to designate the player as a restricted free agent provides the former team with the right of refusal that it currently enjoys under the transition and non-exclusive tags and provides teams with compensation in the event a player leaves, just as the non-exclusive tag does.<sup>232</sup> Additionally, because a restricted free agent has the ability to negotiate with other teams, and the compensation provided by the prospective team to the former team corresponds to the tender offer the player is given, designating a player as a restricted free agent has a much less restrictive effect than the Franchise Tag currently does.<sup>233</sup>

Ultimately, by changing the Franchise Tag to allow teams to designate one player who would normally be entering unrestricted free agency as a restricted free agent, the owners' interest in retaining their players is protected by the right of refusal inherent in restricted free agency.<sup>234</sup> Additionally, the players' ability to negotiate for employment would no longer be restricted by the Franchise Tag.

### B. NFL Adopting NBA Bird Rights

Looking to other professional sports, in the NBA, a team has a few different options, outside of traditional contract extension negotiation and restricted free agency, which enable teams to keep their players.<sup>235</sup>

<sup>230</sup> See Schalter, *supra* note 67; see also Sessler, *supra* note 8.

<sup>231</sup> See Bergman, *supra* note 68; see also 2016 NFL Free Agents Tracker, SPORTRAC, <http://www.sportrac.com/nfl/free-agents/2016/rfa> (last visited Feb. 28, 2018); Gregg Rosenthal, *Franchise Tag Tracker: Who's Been Tagged?*, NFL.COM (Mar. 2, 2016, 4:13 PM), <http://www.nfl.com/news/story/0ap3000000640089/article/franchise-tag-tracker-whos-been-tagged>; Nate Bouda, *2017 Restricted Free Agent Tracker*, NFLTRADE RUMORS.CO (Apr. 24, 2017), <http://nfltraderumors.co/full-list-2017-restricted-free-agents-tendered-contracts/>. Between the 2016 and 2017 offseasons, seven players who were restricted free agents were signed by other teams, as their former teams did not match the offers, thereby allowing the players to go to new teams. Over that same time span, none of the fourteen players who were designated with the Franchise Tag and did not have it removed during that offseason—except for Josh Norman and Oliver Vernon, who both had the designation removed and signed with new teams within a matter of days—had switched teams, and all of them played the following season for the team that had applied the designation to them.

<sup>232</sup> See Stites, *supra* note 213.

<sup>233</sup> See Schalter, *supra* note 67; see also Sessler, *supra* note 8.

<sup>234</sup> See Stites, *supra* note 213 (noting that teams have the right to match any offer that a restricted free agent receives).

<sup>235</sup> See Paul Augustin, *Understanding the NBA Salary Cap: It Is Rocket Science*, BLEACHER REP. (July 25, 2009), <http://bleacherreport.com/articles/224051-understanding-the-nba-salary-cap-it-is-rocket-science>; see also Kevin O'Connor, *More Money, More Problems: The Trouble with Max Contracts*, RINGER (Feb. 5, 2018, 6:00 AM), <https://www.theringer.com/nba/2018/2/5/16972634/trouble-nba-max-contracts>. The NBA and the

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 157

Unlike the NFL, the NBA has a soft salary cap, which has exceptions that allow it to be exceeded under certain conditions.<sup>236</sup> One of the major benefits of a soft salary cap is that it promotes a team's ability to retain its own players.<sup>237</sup>

One of the most notable options an NBA team has to retain its free agents in excess of the salary cap is the Qualifying Veterans Free Agent Exception, more commonly known as "Bird Rights."<sup>238</sup> An NBA team can exercise a player's Bird Rights to retain the player, even if it pushes its team salary above the salary cap.<sup>239</sup> Bird Rights provide an incentive to free agent players to return to their former teams, because such rights allow the teams to pay the players the maximum amount of salary the players are eligible for, while other teams are subject to the amount of salary cap space they have.<sup>240</sup> A player is not restricted from negotiating with other teams; however, only his former team has the ability to exercise the Bird Rights and offer the maximum salary, regardless of its salary cap room.<sup>241</sup> Therefore, Bird Rights allow a former employee to seek out future employment, but also provide the former employer with a unique bargaining chip to increase the chance of retaining that employee, because the former employer can offer the maximum salary the player is eligible for, regardless of its salary cap situation, while other employers would be limited by salary cap constraints.<sup>242</sup>

However, the NFL has a hard salary cap in part to help create parity and maintain competitive balance among its teams.<sup>243</sup> Bird Rights, which explicitly allow teams to exceed the salary cap to retain a player, may not be the best system for the NFL because of these considerations.<sup>244</sup> Nonetheless, that does not mean the idea behind Bird

---

NFL have very different salary cap and overall salary structures. One of the biggest differences is that the NBA has maximum salaries. It can be argued that the NBA maximum salary provision is even more restrictive than the Franchise Tag is. For a more in-depth discussion of maximum salaries, *see id.*

<sup>236</sup> *See* Augustin, *supra* note 235; *see also* O'Connor, *supra* note 235.

<sup>237</sup> *See* Augustin, *supra* note 235; *see also* O'Connor, *supra* note 235.

<sup>238</sup> *See* Charlie Zegers, *Free Agency and Bird Rights – An Exception to the NBA's Salary Cap*, THOUGHTCO (Sept. 10, 2018), <https://www.thoughtco.com/bird-rights-definition-325754>. Bird Rights were created in 1983, in conjunction with the creation of the NBA salary cap. They are called Bird Rights in honor of Larry Bird, the all-time Boston Celtic great, whose contract was expiring at the end of the 1983 season and who the Celtics did not want to lose. In that way, the creation of Bird Rights is similar to that of the Franchise Tag because of Pat Bowlen's worry of losing John Elway.

<sup>239</sup> *See id.*

<sup>240</sup> *See id.* Bird Rights allow a team to sign a pending free agent to a first-year salary up to the maximum player salary, regardless of its salary cap room, provided the player was on the roster for three consecutive seasons.

<sup>241</sup> *See* Augustin, *supra* note 235.

<sup>242</sup> *See* Zegers, *supra* note 238.

<sup>243</sup> *See* Louis Bien, *The 2015 Salary Cap Explained*, SB NATION (Mar. 2, 2015, 5:52 PM), <https://www.sbnation.com/nfl/2015/3/2/8134891/nfl-salary-cap-2015-franchise-tag-explained>.

<sup>244</sup> *See id.* The NFL imposes penalties for salary cap violations including fines, loss of contracts, and loss of draft picks.

Rights—allowing a free agent’s former team to offer more money to the player than any other team does in order to incentivize the player to remain with that team—would not work in the NFL. The NFL could introduce a system in which a team would be able to designate one player per year, who would otherwise be eligible for free agency, as their franchise player. Once the team has designated the prospective free agent, and if that player agrees to an offer sheet from another team, the former team can retain the player, by offering him a contract for 110% of the prospective team’s offer sheet that the player signed. Because the NFL has a hard salary cap, the extra 10% would not count towards the salary cap. Allowing for an exception for the extra 10% of salary contributing to a team’s overall salary, which is subject to the salary cap, creates an incentive for a player to remain with his former team, because the former team could offer more money than any other team.<sup>245</sup> In order to prevent poison pill offers, the prospective team would be restricted from offering a first-year salary greater than the positional salary amounts, as outlined by the current Franchise Tag.<sup>246</sup> Under the current CBA, an NFL team cannot exceed the salary cap; therefore, if the Franchise Tag value of the team’s franchise player would bring the team over the salary cap amount, the team either has to let the player enter unrestricted free agency or negotiate a long-term deal to retain the player.<sup>247</sup> The anti-poison pill provision helps ensure a team, which would be able to fit its designated Franchise Tag player under the salary cap in the old system, would still be able to do so, under this new proposed NFL Bird Rights system.<sup>248</sup> This method allows the player to more freely negotiate his future employment contract, while still giving the owner a tool to retain former players.

*C. Restricted Free Agency Designation Is Better Suited for the NFL  
than Bird Rights*

Changing the current Franchise Tag system to be in line with the NBA Bird Rights will most likely not work, mainly due to the NFL’s salary cap. Salary caps are a way to maintain competitive balance within a sports league; the NFL currently has a stringent salary cap in an attempt to create parity.<sup>249</sup> Theoretically, the salary cap leads to a level

---

<sup>245</sup> See Zegers, *supra* note 238.

<sup>246</sup> See Larry Coon, *Do Players and Teams Ever Have Under-the-Table Agreements for Future Contracts?*, NBA SALARY CAP FAQ, <http://www.cbafaq.com/salarycap.htm#Q30> (last visited Nov. 10, 2017). The Gilbert Arenas provision was created in order to help ensure that a new team could not offer a restricted free agent an offer sheet that the player’s former team would not be able to match, because of a lack of salary cap space.

<sup>247</sup> See NFL PLAYERS ASS’N, *supra* note 1, at art. 13 (stating that the team can also release or trade other players on the team in order to clear salary cap space for the designated player’s tag amount).

<sup>248</sup> See Bien, *supra* note 243.

<sup>249</sup> See Jim Pagels, *Are Salary Caps for Professional Athletes Fair?*, PRICEONOMICS (Aug. 19,

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 159

playing field, because all the teams are subject to the same spending limits.<sup>250</sup> No NFL team can exceed the salary cap, because the NFL has a hard cap, and the CBA has mechanisms in place to make it difficult for a salary cap violation to occur.<sup>251</sup> Also, the current penalties for a team that go above the salary cap vary from fines of millions of dollars to lost draft picks.<sup>252</sup> Additionally, statistics have shown that the NBA, with a soft salary cap, has a greater correlation between wins and money spent.<sup>253</sup> Therefore, it is highly unlikely that the owners would adopt a system allowing for a soft cap, as evidenced by the theory behind a stringent salary cap, the preventative measures of violations in the CBA, and the punishments for a violation.<sup>254</sup>

However, changing the current NFL Franchise Tag system to more resemble a modified restricted free agency structure works for multiple reasons and would better fit with the goals and structure of the NFL and the players' interests. First, as previously discussed in Part IV, Section A, restricted free agency allows for a team to retain the player at issue.<sup>255</sup> Therefore, the stated purpose of the Franchise Tag—retaining a player<sup>256</sup>—would still be met if the Franchise Tag system were changed to resemble a restricted free agent designation.<sup>257</sup> Second, under this proposal, the NFL can still maintain a stringent salary cap. Under the restricted free agency proposal, as opposed to the NFL Bird Rights proposal, a team does not have the ability to offer a designated player an extra 10% that does not count towards the salary cap; so, the NFL

---

2014), <https://priceonomics.com/are-salary-caps-for-professional-athletes-fair/>; see also Tom Cripps, *An Introductory Guide to the NFL's Salary Cap*, LAWINSPOORT (Mar. 11, 2016), <https://www.lawinsport.com/topics/articles/item/an-introductory-guide-to-the-nfl-s-salary-cap>.

<sup>250</sup> See Cripps, *supra* note 249.

<sup>251</sup> See *id.* (stating that the NFL office and the commissioner must approve all player contracts; any contract that would cause a team to violate the salary cap will be rejected).

<sup>252</sup> See Bien, *supra* note 243.

<sup>253</sup> See Pagels, *supra* note 249 (stating that the stronger NBA correlation suggests that, in the absence of spending restrictions, teams might gain a significant edge to decline, as a select few teams dominate each year).

<sup>254</sup> See Cripps, *supra* note 249; see also Bien, *supra* note 243.

<sup>255</sup> See *supra* Part IV.A (mentioning that restricted free agency allows a team to—at a minimum—have the right of first refusal to be able to match any offer sheet the player signs).

<sup>256</sup> See Brandt, *supra* note 2.

<sup>257</sup> See Adam Stites, *Why Did the Dolphins Trade Pro Bowl WR Jarvis Landry to Browns After Franchise-Tagging Him?*, SB NATION (Mar. 9, 2018), <https://www.sbnation.com/2018/3/9/17048396/jarvis-landry-miami-dolphins-franchise-tag-trade-cleveland-browns>. Again, looking at Jarvis Landry, if the goal of the Franchise Tag is to allow teams to retain a player, this use of the Franchise Tag runs completely against its stated purpose and is evidence that the Franchise Tag is no longer being used as it was intended to be when it was first created in 1993. Teams now use the Franchise Tag as a tool to ensure they do not lose a player without receiving compensation. Under the proposed system, the Dolphins would still have the ability to retain Landry, or trade him if it desired, after making the designation mirroring the situation that occurred once Landry was designated with the Franchise Tag. Changing to the proposed system would not restrict the teams in their actions regarding a player's contract situation, but it would allow the player more freedom.

would still have a hard salary cap.<sup>258</sup> Third, and perhaps most importantly for the players, this proposal is less restrictive than the current Franchise Tag system.<sup>259</sup> Under this proposal, the player designated as the restricted free agent would have a greater ability to negotiate for his own future employment, because, even if the player signs an offer from a new team and his former team chooses not to exercise its right of first refusal, the new team gives less compensation than it would under the current Franchise Tag system.<sup>260</sup> The fact that being a restricted free agent does not prevent a player from negotiating with other teams,<sup>261</sup> along with a player's new team having to provide less compensation to the player's old team,<sup>262</sup> has the effect of increasing player movement.<sup>263</sup> Fourth, this proposal is aligned with the NFL's goal of increasing parity and maintaining the competitive balance among the teams in the league, because increased player movement allows a team with a losing record to transform itself in one offseason.<sup>264</sup> Therefore, the proposal to modify the Franchise Tag to be a restricted free agency designation is aligned with the NFL's goals, while creating more freedom for the players.

Opponents of the proposal to modify the current Franchise Tag structure to one resembling a restricted free agency designation would likely cite to *Brown v. Pro Football, Inc.* and *National Football League Management Council v. National Football League Players Association* for support. Those two cases stand, in part, for the proposition that the parties to the CBA must abide by the provisions within the CBA, and the Franchise Tag is a provision in the CBA. However, the Franchise Tag is more like the Rozelle Rule, which was ruled invalid in *Mackey v. Professional Football*. Therefore, the Franchise Tag should be modified to resemble a restricted free agency designation, rather than remain as is.

<sup>258</sup> See Augustin, *supra* note 235 (stating that the NBA has a soft salary cap, which is why Bird Rights function in the NBA).

<sup>259</sup> See Schalter, *supra* note 67; see also Sessler, *supra* note 8.

<sup>260</sup> See NFL PLAYERS ASS'N, *supra* note 1, at art. 9. Under restricted free agency, the most compensation a new team conveys to the player's former team is one first-round pick; under the non-exclusive tag, a new team would have to convey two first-rounds in the event the player signed with them. This is as compared to the non-exclusive tag, because, as discussed in Part I, Section B, teams rarely use the transition tag, and the exclusive tag does not allow a player to negotiate with any other team.

<sup>261</sup> See *id.*

<sup>262</sup> See *id.*

<sup>263</sup> See *supra* note 231 and accompanying text; see also Sessler, *supra* note 8.

<sup>264</sup> See Elliot Harrison, *NFL Free Agency Has Empowered Players but Ruined Rivalries*, NFL.COM (Mar. 12, 2013, 3:00 PM), <http://www.nfl.com/news/story/0ap1000000146772/article/nfl-free-agency-has-empowered-players-but-ruined-rivalries>; see also Josh Looney, *Goodell, Hunt Stress Importance of Maintaining League Parity*, CHIEFS.COM (May 5, 2011), <http://www.chiefs.com/news/article-2/Goodell-Hunt-Stress-Importance-of-Maintaining-League-Parity/eebe6aca-6e49-4f96-a903-bcf8022fc480>.

## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 161

In *Brown*, the United States Supreme Court, applying the non-statutory labor exemption,<sup>265</sup> stated that the NFL's unilateral imposition of fixed salary for developmental squad players was valid and enforceable.<sup>266</sup> The Court held that, because the provision at issue took place during and immediately after a collective bargaining negotiation and involved a matter where the parties were required to negotiate collectively, it was subject to labor laws and not antitrust laws.<sup>267</sup> Opponents of this Note would use *Brown* as support that a provision in the CBA dealing with players' salaries is valid and enforceable because of the non-statutory labor exemption. However, the Franchise Tag is not like the provision at issue in *Brown*, because that provision did not prevent a player on one team's developmental squad from negotiating with another team once the contract had expired. That provision merely set a standard salary for all developmental squad players.<sup>268</sup>

In *National Football League Management Council*, more commonly known as "Deflategate," the Second Circuit Court of Appeals held that, because the commissioner did not exceed his disciplinary authority pursuant to the CBA, his decision to suspend Tom Brady for four games was valid.<sup>269</sup> The court stated that, because this dispute involved the CBA, the Labor Management Relations Act governed. The court further added that the CBA is more than just a contract, because it reflects the intent of the parties as to how they should be governed.<sup>270</sup> Opponents of this Note would use Deflategate as support for the argument that, because the Franchise Tag is a provision in the CBA and the parties have to abide by the CBA, the Franchise Tag can remain as is.<sup>271</sup> While both the provision at issue in Deflategate and the Franchise Tag are valid provisions in the CBA, they are not analogous, because the provisions at issue in Deflategate pertain to the commissioner's authority as an arbitrator, and the Franchise Tag relates to a player's salary.<sup>272</sup>

---

<sup>265</sup> See *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2120 (1996). The non-statutory labor exemption is an exemption from antitrust laws implied by the national labor policy favoring free and private collective bargaining requiring good faith bargaining over wages, hours, and conditions and delegates authority to the National Labor Relations Board. An in-depth discussion of the NFL and antitrust law is beyond the scope of this Note.

<sup>266</sup> See *id.* at 2117 (holding that federal labor laws shield from antitrust attack an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer, and the provision at issue here was an offer for a set wage amount for the developmental squad players).

<sup>267</sup> See *id.* at 2127. The provision at issue related directly to a required subject of negotiation: wages.

<sup>268</sup> See *id.* at 2117.

<sup>269</sup> See *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 532 (2d Cir. 2016).

<sup>270</sup> See *id.* at 536.

<sup>271</sup> See *id.* at 536.

<sup>272</sup> See *id.* at 532.

However, in *Mackey v. National Football League*, the Eighth Circuit Court of Appeals stated that the Rozelle Rule<sup>273</sup> was “significantly more restrictive than necessary to serve any legitimate purpose[] . . . .”<sup>274</sup> The court held that the Rozelle Rule significantly deterred teams from negotiations with and signing free agents; additionally, it denied players the right to sell their services in a free and open market. The court further added, absent the Rozelle Rule, there would be increased movement of players from one team to another.<sup>275</sup> The court also found the Rozelle Rule more restrictive than necessary, because it (i) applied to all players, regardless of their ability; (ii) was unlimited in duration; and (iii) gave the players no input into the process of determining compensation.<sup>276</sup> Furthermore, the court held that the reasons the NFL put forth as justification for the Rozelle Rule—recoupment of player development costs, possibility of declining quality of play, and maintenance of competitive balance—were not sufficient to overcome the restrictive nature of the rule.<sup>277</sup>

Comparing the Franchise Tag to the three CBA provisions discussed above, the Franchise Tag is most similar to the Rozelle Rule. Both the Franchise Tag and the Rozelle Rule required a team that signed a player, whose contract expired with a different team, to pay the player’s former team compensation.<sup>278</sup> The Franchise Tag and the Rozelle Rule are not perfect analogues though, because the Rozelle Rule was unilaterally implemented, while the Franchise Tag was created by valid collective bargaining.<sup>279</sup> However, it stands to reason that because the Rozelle Rule was ruled invalid in *Mackey*, the Franchise Tag too would be found invalid in light of the similarities to the Rozelle Rule if it were eligible for judicial review.

While the opponents of this Note’s proposal are correct in that *Brown* and Deflategate show a validly negotiated provision in the CBA

---

<sup>273</sup> See *Mackey v. Nat’l Football League*, 543 F.2d 606, 610 (8th Cir. 1976). The Rozelle Rule states that whenever a player signs a contract with a different club in the league, unless arrangements are made by the two teams, the commissioner may award the former club compensation in the forms of players or draft picks, as the commissioner deems fair and equitable.

<sup>274</sup> See *id.* at 622.

<sup>275</sup> See *id.* at 620.

<sup>276</sup> *Id.* at 622.

<sup>277</sup> *Id.* at 621.

<sup>278</sup> See *id.* at 610; see also NFL PLAYERS ASS’N, *supra* note 1, at art. 10; *What Is the Franchise Tag?*, *supra* note 56. Both the Rozelle Rule and the Franchise Tag, in addition to requiring compensation from the new team to the former team, do not provide for players’ input regarding whether they are designated with the Franchise Tag or how much they are being compensated; additionally, both the Rozelle Rule and the Franchise Tag can apply to all players who are set to enter free agency.

<sup>279</sup> See *Mackey*, 543 F.2d at 612; see also *White v. Nat’l Football League*, 822 F. Supp. 1389, 1413 (D. Minn. 1993). The NFL unilaterally adopted the Rozelle Rule after R.C. Owens played out his contract with the San Francisco 49ers and signed with the Baltimore Colts. The Franchise Tag was created as part of the settlement resulting from *White v. National Football League*.



## 2019] NFL FRANCHISE TAG AS NON-COMPETE CLAUSE 163

must be adhered to, this Note is not questioning the validity of the Franchise Tag.<sup>280</sup> This Note presents two major statements regarding the Franchise Tag. The first is that the Franchise Tag, as currently constructed, has the functional effect of an unenforceable non-compete clause and is only permissible because the Franchise Tag is the product of a valid CBA. The second is that, in order to allow the 2020 CBA negotiations to focus on more pressing issues, one of the concessions the NFL should make is to at least modify the Franchise Tag and use that modification as a bargaining chip on other issues.<sup>281</sup>

Ultimately, by changing the Franchise Tag from a take-it-or-leave-it offer, with heavy compensatory conditions attached, to a restricted free agency designation, the owner's interest in retaining the designated player is still protected, and the player is allowed more autonomy; this is a winning scenario for both parties.<sup>282</sup> The owners still have the ability to retain their players because of the right of refusal, and they will be compensated if they choose not to match the offer.<sup>283</sup> At the same time, the players can more freely seek out their future employer and now will be negotiating their own contracts, as opposed to being faced with take-it-or-leave-it offers.<sup>284</sup> This proposed system allows an owner to protect goodwill via retaining the designated player; however, it is not overly broad or restrictive, as it allows the player to negotiate for his own future employment. Furthermore, as a matter of negotiation theory, the NFL, by making the Franchise Tag system less restrictive for the players, could create a bargaining chip to use in negotiations for other issues. Therefore, if the owners are adamant on having the Franchise Tag be a provision in the next CBA, it should at a minimum be modified to more resemble a restricted free agency designation.

---

<sup>280</sup> See *Brown v. Pro Football, Inc.* 116 S. Ct. 2116, 2120 (1996); see also *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 532 (2d Cir. 2016).

<sup>281</sup> As a matter of negotiation theory, it can be expected that the NFL, by allowing the NFLPA to "win" on the issue of the Franchise Tag, will be able to have more leverage in other issues that have a bigger impact on the owners.

<sup>282</sup> It can be argued that even having the compensatory picks associated with this proposal makes the plan more restrictive than necessary, as the owner can still retain the designated player via a right of first refusal. However, Rome was not built in a day, and modifying, if not outright eliminating, the Franchise Tag to more resemble restricted free agency is a good first step towards creating a less restrictive player retention system.

<sup>283</sup> See Stites, *supra* note 213. While a matching offer has the effect of a take-it-or-leave-it offer, the player negotiated the deal that is being matched; thus, it is an offer that he had significantly more say in.

<sup>284</sup> See Schalter, *supra* note 67; see also Sessler, *supra* note 8. While seven restricted free agents switched teams during the 2016 and 2017 offseasons, of the sixteen players in total designated with one of the Franchise Tags, only Oliver Vernon and Josh Norman switched teams, and both had the tag designation removed prior to negotiations with the other teams.

## CONCLUSION

The NFL is a unique business with unique relationships between employers and employees. However, that does not mean that established standards of employee rights do not apply. Generally speaking, outside of the NFL, an unemployed person is free to negotiate his or her own future employment.<sup>285</sup> The NFL Franchise Tag has the effect of preventing an unemployed person from negotiating his own future employment.

The NFL is a multi-billion-dollar business,<sup>286</sup> and it will soon be undergoing another round of labor negotiations involving many issues that will be argued over. Nonetheless, one of the easier concessions the NFL can make to garner a bargaining chip for more contentious issues, such as overall revenue allocation, is the modification or elimination of the Franchise Tag. If the NFL will not outright abolish the Franchise Tag, it should consider a possible modification to make the Franchise Tag more resemble restricted free agency; this would allow teams to keep their players, while allowing players to negotiate their own contracts. This surmountable aspect of the CBA should leave the NFL to do what it does best: entertain the country. As Hank Williams once said, “[a]re you ready for some football?”<sup>287</sup> I know I am, and I hope the NFL and NFLPA are more ready for football than for fighting over the Franchise Tag.

*David B. Borsack\**

<sup>285</sup> See Mike Klis, *Temporary Unemployment Comes with NFL Free Agency*, DENVER POST (May 3, 2016, 11:48 PM), <https://www.denverpost.com/2012/02/15/temporary-unemployment-comes-with-nfl-free-agency-2/>.

<sup>286</sup> See Mike Florio, *NFL Will Reach \$14 Billion in 2017 Revenue*, NBC Sports: PROFOOTBALLTALK (Mar. 6, 2017, 11:29 AM), <http://profootballtalk.nbcsports.com/2017/03/06/nfl-will-reach-14-billion-in-2017-revenue/>.

<sup>287</sup> See Hank Williams, Jr., *All My Rowdy Friends Are Coming Over (For Monday Night Football)*, LYRICS ON DEMAND, <https://www.lyricsondemand.com/tvthemes/nflmondaynightfootballlyrics.html> (last visited Nov. 12, 2017).

\* J.D., Benjamin N. Cardozo School of Law, 2019. M.S., B.S., Pennsylvania State University, 2014. I would like to thank my friends and family for their unwavering love and support in addition to a special thank you to my parents, girlfriend, sister, and the members of the Waterbury Open.