

When Sports and Employment Law Collide — Playbook of Considerations When Starting an Investigation

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Allegations of misconduct are not unique to a certain type of workplace, but when they occur in sports, a larger spotlight and the potential for serious financial and reputational damage often follow. An effective investigation can mitigate or even prevent these consequences. Just in the past few years, we have seen the Washington Commanders (then the Washington Football Team), Dallas Mavericks, Utah Jazz, Penn State University, New England Patriots and many others deal with high-profile investigations. The claims range from sexual harassment and verbal abuse to racism and bribery. This article gives employers in the sports industry practical tips to consider when they receive a complaint and initiate an investigation. These questions should be considered upon learning of a potential issue, as the answers determine which way to proceed.

1. WHO IS THE COMPLAINANT?

Identifying the complainant at the outset is important for determining who might be the right investigator and what laws, policies or rules govern how the investigation will be conducted. In the professional sports context, if a player is the complainant, the investigation will need to be handled in a manner consistent with the applicable collective bargaining agreement. If a coach, administrator or other staff member of a team, league or other sports entity is the complainant, more traditional employment law principles will apply, and the investigation will be handled as it would be in most other industries. If the complainant is some other third party—such as a member of an ownership group, corporate sponsor, vendor or fan—the analysis is further complicated.

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Due to the heightened public and media scrutiny on sports organizations, it is especially important to think critically about who is raising concerns before jumping into an investigation. While this is something to keep in mind during all stages of the process, it is most critical when choosing the investigator (question #3) to control the narrative from the outset. If the identity of the complainant becomes public before the process even begins, it could compromise the integrity of the entire investigation.

The [2020-21 Washington Commanders example](#) reveals how quickly a sports investigation can turn into a massive media story. Before the investigation even began, over 100 current and former employees came forward with allegations of workplace misconduct and sexual harassment, many made publicly in the *Washington Post* and while testifying before Congress. Eventually, the NFL took over and hired an external attorney to conduct the investigation.

2. WHO IS THE ACCUSED?

Knowing who the accused is helps outline the scope of the investigation, but it is also vital in order to make sure that person receives the requisite process outlined in any applicable contract or governing document. As with the complainant, the media attention on sports organizations makes this even more critical. If the media catches wind of who the accused is, a fair investigation becomes more difficult. An accused can also raise counterclaims if they believe the process is compromised or if allegations are defamatory.

In the Commanders case, owner Daniel Snyder was allowed to remain involved in team operations while the investigation was ongoing and there were allegations that he interfered in the process to intimidate witnesses. By contrast, in the 2018 investigation into workplace misconduct and sexual harassment within the [Dallas Mavericks](#) organization, owner Mark Cuban's approach was more broadly seen as not interfering and accepting the findings (and he paid \$10 million to women's organizations).

3. WHO IS THE INVESTIGATOR?

Who conducts the investigation is another key question. Similar to the other questions, in some instances who conducts the investigation may be governed by policies or agreements. An employee handbook may outline who conducts investigations when there are complaints of employee misconduct. However—*purely hypothetically of course*—if Human Resources would normally investigate a complaint but the complaint involves the CEO and the head of Human Resources captured having a relationship on an arena jumbotron, it would be difficult if not impossible for a Human Resources employee to effectively investigate their boss(es). In other circumstances, typically with complaints that are less serious and do not involve executive-level employees, internal Human Resources is appropriate as an investigator. Keep in mind, however, that investigations conducted by internal Human Resources are generally not subject to attorney/client privilege, leaving the possibility that information related to the investigation could become public.

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For more complex investigations and those involving high-level employees or non-employees (team ownership), it is typically advisable for an outside investigator—likely an attorney—to take the lead, particularly if the complaint could lead to subsequent litigation. Investigations conducted by attorneys for purposes of obtaining legal advice can be protected from disclosure by the attorney/client privilege. It is important to note that while an investigation report can be privileged in this context, the underlying facts are not. Further, an organization may choose to waive privilege on an attorney-led investigation if necessary to defend its actions in litigation.

Other factors to consider in investigator selection are that the investigator must be neutral (just like a good referee or umpire), free from conflicts of interest, and ideally have an expertise in sports regulations and employment law. The investigator will assess the credibility and potential motives of the witnesses, and must be comfortable making judgment calls. If the investigation is challenged, the investigator's qualifications, independence, and process will be scrutinized. For that reason, the investigator should understand the environment they are investigating. At the same time, the investigator should not be so ingrained in the environment being investigated that it would be easy for someone challenging the investigation to argue that the investigator was too embedded in the organization to be neutral.

The Commanders, Mavericks, and [Jazz](#) (2021) all chose to hire outside law firms in order to ensure independence and credibility. In the New England Patriots 2015 "[Deflategate](#)" scandal, the NFL was the client and hired external investigators. In the 2011-12 Penn State Jerry Sandusky child abuse scandal, the university commissioned the [Freeh Report](#), led by former FBI Director Louis Freeh.

4. WHO IS THE CLIENT?

Who the client is, comes into play particularly when an outside law firm or other entity is conducting the investigation. Sometimes, this question is straightforward and involves only one entity: an attorney represents a team when— an employee in the team's front office raises concerns about their manager, and the manager is also an employee. But other times the parties can be complex, and it is imperative for an attorney conducting an investigation to be clear about who the attorney represents. The client could also be a sports organization or governing body. Most importantly, who the client is determines who holds legal privilege over the investigation's findings and which conversations are confidential. The client also determines the scope of the investigation, receives the final report, and is responsible for acting on the investigation's findings.

Although the Commanders and Patriots were the organizations being investigated, the NFL was actually the client in both cases. With the Commanders, the NFL decided to receive only an oral briefing of attorney Beth Wilkinson's findings and refused to release a written report, which generated substantial criticism. Commissioner Roger Goodell cited promises of confidentiality to over 150 witnesses as part of the reason

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the report was not released. On the other hand, the NFL did release a written report after the “Deflategate” investigation.

The Mavericks, Jazz, and Penn State were all the clients in their respective investigations. Therefore, they were responsible for choosing which external law firm to hire (if any), deciding whether that firm should produce a written report, and critically, implementing changes based on the findings.

CONCLUSION

One common theme demonstrated by these examples discussed is that they all received intense media scrutiny. Taking allegations seriously from the start and having a clear plan to address them is a good lesson for sports employers to take away from these high-profile investigations.

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