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Major League Baseball Players Association Issues New Agent Directive: Modified Regulations Change Rules of the Diamond

In recent months, stories detailing negative incidents involving athlete agents have proliferated in the media. These reports—such as the *Sports Illustrated* cover story about former NFL agent Josh Luchs' payments to nearly 30 college football players, former USC football star Reggie Bush's decision to forfeit his Heisman Trophy after receiving improper benefits from two agents, and the investigation of agent contacts within the University of North Carolina's football program— have brought the behavior of athlete agents into the spotlight. Perhaps responding to these developments in the world of athlete agents, the Major League Baseball Players Association ("MLBPA" or "Association") has overhauled its "Regulations Governing Player Agents."

The 40-plus pages of regulations impose many changes on how a baseball agent must operate his or her practice. Among other things, all certified agents are now required to submit new applications for certification. The MLBPA's revised regulations, which went into effect on October 1, 2010, are the first significant modifications since the original regulations took effect in 1988.

Expanded Coverage to Agency Employees

Unlike the previous regulations which only required MLBPA certification for individuals who negotiate contracts for players on Major League 40-man rosters, the new Regulations require all "recruiters" and individuals who perform "client maintenance services" for players on behalf of certified agents to obtain "limited certification."

Recruiters, more frequently referred to in the sports world as "runners," have always operated outside of the Association's direct control. Section 2(D) of the new Regulations, however, contains a broad, three-part definition of the terms "Recruit," "Recruiting," and "Recruitment" and gives the Association much greater control over these formerly unregulated individuals. In fact, even an individual who hands out business cards or promotional literature for a certified agent is considered a "recruiter" under the revised Regulations and must now seek an appropriate "limited certification."

Individuals who perform "client maintenance services," as defined in Section 2(E) of the Regulations, are also required to apply to the MLBPA for a "limited certification" level of authority. Such individuals include those who:

- (1) Seek, secure, and/or negotiate marketing and endorsement opportunities for players;
- (2) Provide legal, accounting, or financial services, including bill paying services, on the certified agent's behalf; or
- (3) Play a role in purchasing or supplying baseball equipment, securing training services or facilities, arranging for the transportation of vehicles, personal shopping services, or providing hotel and travel concierge services to any player.

In essence, any individual who works under the control of a certified agent and provides services to any individual player member of the Association is subject to the rules and regulations of the MLBPA.

Comprehensive Disclosure Requirements

While agents traditionally have been free to speak with and encourage players to switch representation at any time without informing the Association, the new Regulations require *all* communications between an agent and a player not represented by that agent to be disclosed. (Section 5(B)(8)).

For example, if an agent plans a scheduled recruiting meeting with a player who is currently represented by another agent, that agent must provide notice to the Association before the recruiting meeting occurs. In other situations, where the contact between the prospective agent and a player is initiated by the player or happens in a spontaneous, unplanned fashion, the agent must disclose the communication to the Association within 24 hours of the contact.

In addition, with respect to the Association's control of the recruiting of 40-man roster players, the amended Regulations contain disclosure requirements covering off-season agent activity. Section 5(B)(9) requires any player agent who travels during the off-season to meet with a player whom he or she currently does not represent to provide the MLBPA written notice of his or her travel itinerary.

New Limitation on Recruitment of Represented Players

The Associations' objective of ensuring quality agent representation for its members is evident in Section 6(L) of the new Regulations, which makes it more difficult for players to switch agents. Previously, the Association allowed its members the flexibility to select the agent of their choice, regardless of the time of the year or the current stage of a player's career. Such freedom is now limited. The new Regulations state that any player who is eligible for either free agency or salary arbitration during the following off-season must consult with the Association if he desires to change representation after the end of the current season. While the player's desire to make an agent change during this critical time in his career will not be rejected automatically, the Association wants to reserve the opportunity to confer with the player and make sure he understands the potential consequences that an agent change at the crucial point of salary arbitration eligibility or pending free agency could have on the negotiation of his next contract.

MLBPA Recognizes "Reasonable" Restrictive Covenants

As in any employment setting, baseball agents frequently switch jobs, either to work for another agency or establish a representation practice of their own. It is commonplace for a departing agent's employment contract to contain restrictive language that affects his or her ability to represent players from a former employer or to compete with an employer for a certain length of time.

Historically, the Association has allowed players to be represented by the agent of their individual choosing. This "freedom of agent choice" has led to a long-established Association position that any restrictive covenant which limited a player's ability to be represented by the agent of his choosing was a violation of Association regulations.

The Association's new Regulations take a different position in this controversial area. The MLBPA will now permit employers to utilize "reasonable" restrictive covenants in agent employment agreements. Determinations as to whether a specific covenant is reasonable will be made on an individual basis through an analysis of the facts and circumstances of each agreement. The party seeking enforcement of the restrictive covenant will have the burden of proving its reasonableness.

In addition, under Section 4(L)(2) of the Regulations, restrictive covenants must meet the following requirements to be enforceable:

- (1) The restrictive covenant must be included in a written agreement that is supported by consideration and signed by both parties;
- (2) A copy of the restrictive covenant terms and the name of the employee subject to the restrictive covenant must be disclosed to the MLBPA in writing; and
- (3) The proposed written agreement containing the restrictive covenant must contain specific language that requires any and all disputes arising from the agreement to be resolved exclusively through the arbitration procedures of the MLBPA.

Amendments Create Potential for More Arbitrable Disputes

Another significant change in the new MLBPA Regulations is expanded use of the Association's arbitration procedures to settle disputes. Historically, the Association mandated that all agent-player disputes be handled through the MLBPA's arbitration procedures, but the Association did not formally control agent-versus-agent disputes. Section 7 of the new Regulations now provides for final and binding arbitration as the exclusive method to resolve three specific categories of disputes:

- (1) All disputes between players and player agents that arise during the term of their player agent relationship;
- (2) All disputes between or among player agents and other player agents that relate to the representation and recruitment of players and disputes involving a duty of loyalty or restrictive covenant; and
- (3) Any appeal by a player agent aggrieved by an appealable decision of the MLBPA with respect to his or her certification or discipline as a certified agent.

Thus, the new Regulations ensure that almost all disputes involving agents can be handled in an arbitration setting rather than through a potentially lengthy and expensive litigation process.

Amendments Increase Need for Informed Counsel

Individuals who want to become certified baseball agents, as well as established agents and agencies, must proceed with caution to ensure compliance with the new Regulations. The expanded certification process requires firms to decide not only who should be certified, but also who must receive limited certification. Agents must also report all of their contacts with prospective clients to the union or face potential sanctions, up to and including decertification.

Under the new Regulations, player agents also face more potentially arbitrable issues. While outside counsel frequently advise agents in the arbitration process against players who fail to pay their fees, the

need for counsel is greater under the new Regulations as all agent disputes must be handled through the MLBPA arbitration process. No longer will the smaller agent or agency with fewer clients be left without a method of redress against perceived agent violations except a potentially lengthy and expensive civil lawsuit. The MLBPA is clearly attempting to level the playing field for all certified agents, large and small.

The MLBPA's move to support non-compete agreements restricting the free movement of agents between agencies is tempered by the caveat that only "reasonable" restrictive clauses that contain mandated Association language will be upheld. As a result, agencies must draft all baseball agent employee contracts with care.

* * *

If you have questions about any of the specific MLBPA player agent regulations or any state-specific legislation regulating agents' relationships with the athletes they represent, please contact Gregg Clifton at gregg.clifton@jacksonlewis.com or Jeff Toppel at toppelj@jacksonlewis.com.

Gregg Clifton is the co-chair of the firm's Collegiate and Professional Sports Industry Group. Gregg is an experienced labor and employment lawyer who worked as a certified MLBPA agent for over 20 years. He has vast experience handling salary arbitration matters, agent fee collection matters, and agent discipline arbitration hearings, as well drafting all types of employment agreements and restrictive covenant language.

Jeff Toppel is a member of the firm's Collegiate and Professional Sports Industry Group. He is also chair of the CLE Committee for the Arizona State Bar Association and a member of the American Bar Association Forum on the Sports and Entertainment Industries. He has extensive experience handling all labor and employment law issues and has testified before the Arizona State Senate on pending labor legislation.

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