Insights, News & Events

THE RISE OF IN-HOUSE COUNSEL WITHIN COLLEGE ATHLETICS DEPARTMENTS

News
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Without question, high-profile litigation against the NCAA and NFL for debilitating injuries linked to repeated head trauma has forced us to consider ways in which football can be played safer. To date, that litigation has largely spared individual schools and teams. As a result, change regarding safety has been top down, guided either by the NFL or NCAA as opposed to individual teams or schools.

This may be about to change at the college level, however, as individual schools are now being targeted more often with lawsuits. It is worth noting that historically university athletics departments have operated with considerable autonomy within universities. Generally speaking, there has been very little broad institutional involvement with items like setting practice schedules, picking appropriate equipment, providing training to medical personnel, crafting informed consent notices for student athletes, etc. It would be a rare occurrence indeed for anyone in athletics to says, “let’s see what the attorneys have to say about this.”

This uptick in lawsuits, however, has the potential to thrust in-house counsel at major universities into a much more prominent role in assessing these issues. This is especially true if mere institutional compliance with NCAA protocols fails to serve as an adequate defense in subsequent tort cases. Put another way, athletics may start looking like any other institutional risk management issue with a brand new set of players who have no background in sports and who ask fundamental questions that have the potential to substantially reshape the way their institutions handle athletics safety issues.

Among the questions I can see being asked are the following:

Is our equipment state of the art?
The pace of equipment development – especially helmets – is amazing. Like all new technology, though, fitting players with the most "high tech" equipment is expensive. With lawyers and risk managers taking more of an interest in taking reasonable steps to mitigate litigation risk, it is likely that the modified cost-benefit analysis will push institution procurement departments toward seeking the highest safety standards when purchasing equipment.

Are we following NCAA guidelines and is that enough?
Under a new set of concussion prevention and management guidelines released by the NCAA, live contact football practices are recommended only twice per week during the season and in the spring and only four times per week in the preseason. Rather than simply defer to athletic directors, I expect in-house counsel will start taking a more active role in monitoring compliance with these guidelines.
Perhaps more importantly, proactive counsel will likely start asking more provocative questions about whether the guidelines go far enough in protecting students who participate in athletics. For instance, much head trauma is incurred in practice. Should live contact drills be limited to one day per week? Eliminated entirely? These are the sort of issues counsel would have deferred to coaches on in the past but will now be wading into more often.

Should we implement medical surveillance programs?
OSHA requires employers to provide on-going medical surveillance to employees who are exposed to certain hazards in the workplace. While OSHA does not cover college athletics, it does not seem too far-fetched for lawyers who are accustomed to the law questioning, for instance, why baseline neurocognitive testing could not be done which would subsequently be monitored on a regular basis over the course of a player's athletic career.

Should the university be involved in this activity at all?
There are some student activities that most institutions do not allow because of an unfavorable risk-benefit calculus. For instance, it is hard to find a university-sponsored sky diving club. Despite media suggestions to the contrary, for most universities, the economic model for college sports is already terrible. Tacking on substantial litigation-related risk may tip the scales in favor of shutting down programs altogether.

Just by way of example, several years ago, La Salle University paid $7.5 million to settle a lawsuit brought by a football player who suffered a concussion in practice. Around the same time, La Salle discontinued its football program. While the university contended there was no connection between the two, suffice it to say that the litigation did not help the cause of those lobbying to keep the program.

As it stands now, some universities are actively contemplating abandoning football for economic reasons. In this litigation climate, it certainly would not surprise me if the question of “why are we doing this” is not raised more often.

Conclusion

An increase in the number of lawsuits targeting individual colleges and universities for the injuries sustained by student athletes will likely enhance the role of lawyers in college athletics. This has the potential to fundamentally reshape the way football is practiced and played and perhaps whether a college plays it all.