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DON'T GET DEFLATED: FOUR THINGS EMPLOYERS CAN LEARN FROM THE TOM BRADY "DEFLATEGATE" RULING

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On Thursday, September 3, 2015, a federal judge overturned the NFL's four-game suspension imposed on star quarterback Tom Brady, ruling that the league couldn't discipline him for allegedly deflating footballs in order to make them easier to throw. Employers can learn a few valuable lessons from this decision, right in time for the new football season about to kick off.

Background

First, a quick background. During the January 2015 AFC Championship game between the Indianapolis Colts and New England Patriots, the league became aware that the footballs used by the Patriots were under-inflated below league standards. The NFL hired a law firm to conduct an investigation into the irregularities. Several months later, the investigation report concluded that it was more probable than not that Brady was at least generally aware that someone had deflated the footballs.

As a result, the league suspended him for four games. Brady's union filed a grievance appealing the decision, but after a full-day arbitration hearing, NFL Commissioner Roger Goodell upheld the suspension. With the 2015 season rapidly approaching, the parties took their case to court to get a definitive ruling on what has become known as "Deflategate."

Just days before the start of the NFL season, Judge Richard Berman struck down the suspension in a 40-page ruling. Although the NFL has already announced it will appeal the decision, employers can learn some lessons from the

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situation to avoid their own courtroom drama. Here are four things you can learn from Deflategate:

- 1. Your employees should know your company rules.** One of the main reasons the judge overturned the decision is because he found that the league never informed Brady that he could be suspended for an equipment violation. Although the league had rules in place, it never told its employees about the possible ramifications of breaking those rules. The lesson here is simple: make sure your written policies include a thorough listing of your workplace rules, make sure they include a specific admonishment that discipline and termination could be imposed, and make sure you can prove that the rules are distributed to all of your workers. A signed acknowledgement page from your handbook will work, as will an electronic signature for any policies posted on your company intranet.
- 2. Your discipline needs to be applied consistently.** The judge noted that there seemed to be an inconsistent application of the rules regarding footballs. He pointed out two other examples where teams were alleged to have manipulated game balls to gain a competitive advantage, but in each situation, no player discipline was imposed at all. This is always dangerous for an employer. When you are about to discipline a worker for a rules violation, make sure you have built a track record that shows you always impose that same kind of discipline for that same kind of violation. Otherwise, you could open yourself up to a discrimination claim, as it might appear that you are singling out an employee because of a protected class status.
- 3. Your punishment needs to fit the crime.** Although not specifically noted as a reason for his decision, no doubt the judge was unimpressed with the scale of the alleged wrongdoing as it compared to the severity of the punishment. The judge noted that, once the deflated footballs were removed from the game, Brady actually played even better and led his team to an easy victory. In other words, the alleged misconduct didn't seem to have much of an impact. When confronted with a possible violation of your rules, you should consider the totality of the circumstances before dropping the hammer. How long has your employee worked for you? How senior in

your company is the employee? How many prior offenses does the employee have? What overall impact did the violation have? Remember, even though the worker might have violated the letter of the law, no doubt a judge, jury, arbitrator, or government investigator will ask these same questions when rendering a decision.

4. Arbitration decisions are still (mostly) sacred. This decision stands out from the norm because a judge overturned an arbitration decision. The law usually gives overwhelming deference to arbitrators and almost always allows their decisions to stand. Judges are usually very reticent to stick their noses in to review arbitration decisions on appeal. But this case was incredibly unique because of the way the NFL sets up their grievance process: Commissioner Goodell essentially acted as judge and jury by serving as both arbitrator and head of the league. Add in the fact that the league didn't let Brady's lawyers cross-examine one of the investigators or have access to certain information and documents, and you can understand why the judge didn't mind inserting himself into this situation. If you have an arbitration process in place, you'll want to review it to make sure it appears sufficiently independent and affords an adequate opportunity for employees and any unions involved to mount a defense to your charges.

If you have any questions about this case, or how it may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.