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## Is Age Just a Number: The Intersection of the Fair Labor Standards Act and Professional Sports

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IS AGE JUST A NUMBER: THE INTERSECTION OF THE FAIR  
LABOR STANDARDS ACT AND  
PROFESSIONAL SPORTS

I. ADDICTION TO THE GAME: AN INTRODUCTION TO THE  
DEVELOPMENT OF PROFESSIONAL SPORTS

Change has only just begun in the world of professional sports.<sup>1</sup> When thinking of professional athletes, many think of those who played their sport in college and were drafted afterwards.<sup>2</sup> Rarely would the thought of a minor come to mind.<sup>3</sup> Even more unbelievable would be a fifteen-year-old.<sup>4</sup> However, in June 2021, the United States District Court for the District of Oregon ruled in favor of fifteen-year-old O.M. in her fight to be allowed to enter the National Women's Soccer League ("NWSL").<sup>5</sup> This vic-

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1. See *O.M. v. Nat'l Women's Soccer League, LLC*, 544 F. Supp. 3d 1063, 1077 (D. Or. 2021) [hereinafter *O.M.*] (ruling O.M. met burden of showing preliminary injunction is appropriate to stop National Women's Soccer League ("NWSL") from enforcing Age Rule, therefore, allowing fifteen-year-old O.M. to play in NWSL). This decision recognizes the protections provided to rules made under collective bargaining agreements and acknowledges that the league still may enter into a collective bargaining agreement with the National Women's Soccer League Players Association to impose such a rule. See *id.* at 1075 (noting that collective bargaining agreement would change circumstances of this case). However, because this rule was imposed prior to the formation of a Players Association and without a collective bargaining agreement, the court held the injunction was appropriate. See *id.* at 1066 (explaining collective bargaining agreement would have not allowed for this injunction to be imposed)

2. See *NFL Players By College On 2020 Rosters*, NAT'L COLLEGIATE ATHLETIC ASS'N (Sept. 8, 2020), [https://www.ncaa.com/news/football/article/2020-09-07/nfl-players-college-2020-rosters#:~:text=10.&text=Out%20of%20the%201%2C696%20players,percent\)%20come%20from%20FBS%20schools](https://www.ncaa.com/news/football/article/2020-09-07/nfl-players-college-2020-rosters#:~:text=10.&text=Out%20of%20the%201%2C696%20players,percent)%20come%20from%20FBS%20schools) [<https://perma.cc/JZ52-KX3M>] (noting in 2020, of 1696 players in NFL's active rosters, 1512 came from NCAA Division I Football Bowl Subdivision schools before being drafted into NFL).

3. See *O.M.*, 544 F. Supp. 3d at 1066 (noting plaintiff in *O.M.* was fifteen years old). For further discussion of how plaintiffs in other cases were either seventeen or eighteen years old, and thus exempt from child labor regulations, see *infra* notes 32–55 and accompanying text.

4. See TJ Mathewson, *How Young Is Too Young To Play Professional Sports?*, GLOBAL SPORTS MATTER (Apr. 25, 2019), <https://globalsportmatters.com/culture/2019/04/25/how-young-is-too-young-to-play-professional-sports/#:~:text=the%20NFL%20requires%20athletes%20to,and%2017%20for%20international%20players> [<https://perma.cc/HN88-RUSL>] (noting various age rules imposed by different professional leagues ranging from seventeen years old to twenty years old).

5. See *O.M.*, 544 F. Supp. 3d at 1066 (discussing result for then fifteen-year-old to enter professional ranks in NWSL).

tory for O.M. has now opened the doors up to minors to enter professional sports more than ever before.<sup>6</sup> With this new territory comes new regulations.<sup>7</sup> Leagues and teams may be left considering many open-ended questions.<sup>8</sup> However, they should primarily focus on child labor laws.<sup>9</sup>

Since the late 1800s, professional sports have been a classic American pastime.<sup>10</sup> Not surprisingly, since the mid-1900s, sports-related industries have rapidly expanded and become entrenched in American society.<sup>11</sup> Now a billion-dollar business, professional sports attract millions of viewers.<sup>12</sup> The increased importance of sports in American society brings a naturally occurring increase in competition among athletes and a proportionally smaller likelihood of becoming a professional athlete.<sup>13</sup> According to the Na-

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6. *See id.* at 1077 (setting forth new precedent by permitting fifteen-year-old minor athlete to compete in NWSL). The court closed its opinion acknowledging the “irreparable injury” to O.M. was not “counterbalanced by any cognizable harm” to the NWSL from a temporary injunction. *See id.* (issuing preliminary injunction against Defendant’s Age Rule).

7. For further discussion of how child labor laws came into existence and how they apply to sports, see *infra* notes 56–83 and accompanying text.

8. *See O.M.*, 544 F. Supp. 3d at 1074 (noting NWSL speculated court allowing minors to enter league “could further increase administrative costs” as one of many concerns with court granting O.M. ability to enter league).

9. *See* Ben Gipson & Benjamin R. Mulcahy, *Minors In Pro Esports Bring 3 Critical Legal Considerations*, DLA PIPER (July 28, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/07/minors-in-pro-esports-bring-3-critical-legal-considerations/> [<https://perma.cc/PJY6-4AFM>] (analogizing e-sport issues employers have to consider when employing minors that are applicable to sports generally).

10. *See* Steven A. Riess, *Professional Team Sports in the United States*, OXFORD RSCH. ENCYCLOPEDIA OF AM. HIST. (Feb. 27, 2017), available at <https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-198> [<https://perma.cc/HP86-L9FK>] (noting professional baseball quickly developed into “national pastime”); *see also* Ryan Quackenbush, *The Economic Impact Of Professional Sports In The United States*, at 5 (Dec. 16, 2020) (Masters Synthesis, SUNY Brockport), [https://soar.suny.edu/bitstream/handle/20.500.12648/3959/pes\\_synthesis/110/fulltext%20%281%29.pdf?sequence=1&isAllowed=Y](https://soar.suny.edu/bitstream/handle/20.500.12648/3959/pes_synthesis/110/fulltext%20%281%29.pdf?sequence=1&isAllowed=Y) [<https://perma.cc/Z4E6-FC22>] (highlighting importance of sports in American society, including how sports have developed over time).

11. *See* Quackenbush, *supra* note 10, at 5 (noting sports in American society have maintained their importance).

12. *See* Christina Gough, *Sports on U.S. TV – Statistics & Facts*, STATISTA (Mar. 10, 2021), <https://www.statista.com/topics/2113/sports-on-tv/> [<https://perma.cc/Z2NK-K3ZH>] (discussing substantial impact of professional sports of television in United States). Especially now, as 90% of sports fans are willing to pay for sports programming, the value of NFL television contracts is six billion dollars, the average cost of commercials during Game Five of the NBA finals is \$751,000, the Major League Soccer (“MLS”) Cup Final receives two million viewers, and the MLB World Series receives 9.78 million viewers. *See id.* (noting viewer habits and viewer willingness to pay for subscription services in order to view sporting events).

13. *See Estimated Probability of Competing in Professional Athletics*, NAT’L COLLEGIATE ATHLETIC ASS’N (Apr. 8, 2020), <https://www.ncaa.org/about/resources/>

tional College Athletic Association (“NCAA”), in 2019, only about 4.2% of eligible players were drafted into the National Basketball Association (“NBA”) and 3.8% of eligible players were drafted into the National Football League (“NFL”).<sup>14</sup> Despite these relatively minuscule numbers, the competition to become professional has only increased.<sup>15</sup>

This Comment analyzes the intersection between professional sports and child labor laws and regulations under the Fair Labor Standards Act (“FLSA”).<sup>16</sup> Section II discusses court cases where athletes filed suit against professional organizations over age restrictions under the Sherman Antitrust Act.<sup>17</sup> Section II also examines the history of the FLSA, why it was enacted, its child labor provisions, and provides an overview of efforts made by states to incorporate the FLSA. Further, this Section will introduce the case that identifies the need to acknowledge the FLSA within sports.<sup>18</sup> Section III discusses the results of prior cases and their similarities with each other, the courts neglect of minor professional athletes and the FLSA, and the impact the FLSA presents.<sup>19</sup> This Comment closes with remarks on what the future will hold in this area of law.<sup>20</sup>

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research/estimated-probability-competing-professional-athletics [https://perma.cc/AMA4-NMUR] (discussing likelihood college athletes make it into professional leagues).

14. *See id.* (noting small percentage of athletes actually making it out of college sports into professional leagues.)

15. *See Number of NCAA College Athletes Reaches All-time High*, NAT’L COLLEGIATE ATHLETIC ASS’N (Oct. 10, 2018), <https://www.ncaa.org/about/resources/media-center/news/number-ncaa-college-athletes-reaches-all-time-high> [https://perma.cc/M8KC-ZXLJ] (noting opportunity to compete in college athletics continues to rise). However, while the number of competing students may be increasing, the percentage of those who make it past college is not. *See Estimated Probability of Competing in Professional Athletics*, NAT’L COLLEGIATE ATHLETIC ASS’N (Apr. 8, 2020), <https://www.ncaa.org/sports/2015/3/6/estimated-probability-of-competing-in-professional-athletics.aspx> [https://perma.cc/7JAH-M6W2] (identifying almost 500,000 student athletes within NCAA, noting low percentage of those athletes entering professional league).

16. *See* Fair Labor Standards Act of 1938, 29 U.S.C.S. §§ 201–213 (1938) (LexisNexis 2021) (noting section of FLSA addresses child labor law, so was blueprint for later imposed Department of Labor and State Department regulations on topic).

17. For further discussion of the intersection between professional sports and age restrictions, see *infra* notes 32–55 and accompanying text.

18. For further discussion of the case history and precedent leading up to the current landscape, see *infra* notes 33–95 and accompanying text.

19. For further discussion of the results in prior cases of minor athletes, see *infra* notes 96–180 and accompanying text.

20. For further discussion of the future of this area of law, see *infra* notes 181–189 and accompanying text.

## II. FIGHTING BACK: PREVAILING OVER RESTRICTIONS

Since the 1970s, case law has established that athletes are entitled to sue professional organizations for age and eligibility restrictions affecting entry into their leagues.<sup>21</sup> In each case, the athlete-litigant has challenged different restrictions, which when looked at cumulatively, provides valuable insight into the current legal landscape of similar, though non-FLSA-related cases.<sup>22</sup> The most relevant of these contexts falls under the scope of the Sherman Antitrust Act, a 1890 statute prohibiting monopolistic business practices.<sup>23</sup> More relevant to this Comment, the FLSA was enacted in 1938 to prohibit dangerous or unfair business practices as they pertain to children.<sup>24</sup> The FLSA, like most federal laws and regulations, provides a floor for the states to abide by, but leaves the states free to provide more protection than the federal government.<sup>25</sup> Of particular import are Oregon's child labor provisions that were at issue at issue in *O.M. v. National Women's Soccer League*.<sup>26</sup> However, other states like New York and California have enacted and reinforced their position on specific rules regarding child professional athletes.<sup>27</sup> Section II will compare Oregon child labor laws with FLSA Section 212.<sup>28</sup> It will then continue by examining some states' efforts to incorporate minor athletes into FLSA exemptions.<sup>29</sup> Finally, Section II introduces the case that necessitated consideration of the intersection between minor athletes and the

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21. For further discussion of the case history of *O.M.*, see *infra* notes 32–55 and accompanying text.

22. For further discussion of case history of athletes suing professional leagues, see *infra* notes 35–57 and accompanying text.

23. For further discussion of the Sherman Antitrust Act, see *infra* notes 47–55 and accompanying text.

24. For further discussion of the FLSA and why it was enacted, see *infra* notes 56–69 and accompanying text.

25. For further discussion of the child labor provisions of the FLSA, see *infra* notes 61–69 and accompanying text.

26. For further discussion of state child labor regulations in Oregon, see *infra* notes 70–74 and accompanying text.

27. For further discussion of New York's and California's approaches to child athletes, see *infra* notes 78–83 and accompanying text.

28. For further discussion of the Fair Labor Standards Act and its background, see *infra* notes 56–69 and accompanying text.

29. For further discussion of state legislation regarding minor athletes, see *infra* notes 72–76 and accompanying text.

FLSA.<sup>30</sup> Following discussion of the above, this Comment will delve into the facts, holding, and rationale of *O.M.*<sup>31</sup>

### A. Lawsuit Frenzy

Professional leagues such as the NFL and the NBA have a long history of imposing and maintaining player age restrictions.<sup>32</sup> In the 1970s, Spencer Haywood, a basketball player for the Seattle Sonics, brought suit against the NBA for not allowing him to play until four years after high school graduation.<sup>33</sup> After signing with the Seattle Sonics, but less than four years after Haywood's high school class had graduated, the NBA threatened to disallow his contract.<sup>34</sup> After the NBA made these threats, Haywood brought an antitrust action against the NBA alleging that it was partaking in a group boycott in violation of the Sherman Antitrust Act.<sup>35</sup> Next, in 1977, Kenneth Linseman, a nineteen-year-old, sued the World Hockey Association ("WHA") because of a regulation that prohibited anyone under the age of twenty from playing professionally in the league.<sup>36</sup> Linseman was selected in the annual amateur draft of the WHA by the Birmingham Bulls before he had turned twenty

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30. For further discussion of *O.M. v. Nat'l Women's Soccer League*, see *infra* notes 84–95 and accompanying text.

31. For further discussion of *O.M. v. Nat'l Women's Soccer League*, see *infra* notes 84–102 and accompanying text.

32. For further discussion of age restrictions in professional leagues, see *infra* notes 32–44 and accompanying text.

33. See *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1204-05 (1971) [hereinafter *Haywood*] (discussing how Haywood brought lawsuit against NBA because its rules prevented college players from being drafted until four years after graduating high school, which is effectively twenty-two-year-old age requirement, since Haywood had signed with Seattle less than four years after graduating high school causing league to threaten to disallow contract, impose sanctions).

34. See *id.* at 1205 (discussing how Haywood came to sign with NBA's Seattle team, which resulted in his ineligibility under NBA rules).

35. See *id.* (noting lawsuit following from NBA's threatening action against Haywood). Haywood claimed that the NBA was partaking in a group boycott against him similar to boycotts held unlawful in *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941) and *Klor's v. Broadway-Hale Store*, 359 U.S. 207 (1959) to show per se violation of Sherman Antitrust Act. See *id.* at 1205 (noting prior case law used by plaintiff in his action against NBA).

36. See *Linseman v. World Hockey Assoc.*, 439 F. Supp. 1315, 1317 (D. Conn. 1977) [hereinafter *Linseman*] (discussing how WHA implemented "twenty-year-old rule" to prohibit teams from drafting players who had not turned twenty during calendar year of draft). The plaintiff was a nineteen-year-old amateur hockey player who was contracted to play professionally for one of the teams. See *id.* (noting beginning cause of Linseman's action was because he was drafted). He was seeking a preliminary injunction under his claim that the rule violated Section 1 of the Sherman Antitrust Act. See *id.* (describing why Linseman was seeking preliminary injunction and what his argument was based on).

years old.<sup>37</sup> The league then informed Linseman and the Bulls that their selection was null and void under the league's regulations, leading to his lawsuit.<sup>38</sup>

Following Linseman's lawsuit, in 1984, Robert Boris brought an action against the United States Football League ("USFL") challenging their eligibility rules that prohibited players from joining the league until they either used all of their college eligibility or five years had passed since the player first entered college.<sup>39</sup> A challenge of an eligibility rule is based on the set of rules that the NCAA and league issues for student athletes in order to participate in a particular sport.<sup>40</sup> Finally, in 2004, the NFL found themselves in the same legal battle after college football player Maurice Clarett sued to have the league eliminate its draft eligibility requirement of three seasons removed from their high school graduation.<sup>41</sup>

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37. *See id.* at 1318 (discussing how Linseman was selected at draft on June 16, 1977, but his twentieth birthday was not until December 31, 1977, so he was not twenty years old at time of draft).

38. *See id.* (discussing how President of WHA, William MacFarland, informed Linseman and Linseman's team that draft of Linseman was void under Section 17.2(a) of WHA's Operating Regulations so he was not eligible to be drafted, including if draft decision was upheld, Linseman would be prohibited from playing during 1977–1978 season).

39. *See Boris v. United States Football League*, 1984 U.S. Dist. LEXIS 19061, at \*3–7 (C.D. Cal. Feb. 28, 1984) [hereinafter *Boris*] (noting Robert Boris brought action for injunction against USFL for violating Section 1 of Sherman Antitrust Act). The USFL reasoned that the restriction was to "promote on-field competitive balance among USFL teams; very few college-age athletes are physically, mentally, or emotionally mature enough for professional football." *See id.* at \*3 (explaining reasons defendants offered in support of eligibility rule imposed on players). However, while the league's reasons had some degree of merit, the court found them to be ingenuine and as a way to help college football programs keep players in the college league longer. *See id.* at \*4 (noting court's thoughts on defendant's arguments to justify eligibility rule imposed).

40. *See Transfer Terms*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/student-athletes/current/transfer-terms> [https://perma.cc/G9EE-L5F7] (last visited Feb. 6, 2022) (explaining eligibility rules for NCAA); *see also The Rules of the Draft*, NAT'L FOOTBALL LEAGUE FOOTBALL OPERATIONS, (last visited March 9, 2022), <https://operations.nfl.com/journey-to-the-nfl/the-nfl-draft/the-rules-of-the-draft/> [https://perma.cc/PF87-QPB4] (explaining how players are eligible to play in both NCAA and NFL, based on requirements imposed by both).

41. *See Clarett v. Nat'l Football League*, 369 F.3d 124, 126 (2d Cir. 2004) [hereinafter *Clarett*] (discussing how, like in *Haywood*, Clarett sued NFL for alleged violations of Section 1 of Sherman Antitrust Act). The district court held that eligibility rules were "not immune from antitrust scrutiny under the non-statutory labor exemption." *See id.* at 125 (noting circuit court restated opinion of district court but disagreed with its conclusion, instead set forth its opinion explaining why). However, on appeal, the Second Circuit said that the NFL's labor market was organized with collective bargaining and the teams could set terms and conditions of employment without risking antitrust liability. *See id.* at 130 (noting key hole in Clarett's argument against NFL). This is the same exemption that was talked about in *O.M.*, where the court acknowledged that if there were to be a

Clarett was a former running back at Ohio State University and gained national attention during his freshmen season.<sup>42</sup> Prior to beginning his sophomore season, he was suspended by Ohio State University and forced to sit out his entire sophomore season.<sup>43</sup> This led to his action against the NFL because he wanted to enter the professional league, but the NFL draft eligibility restrictions prohibited him.<sup>44</sup>

All of these cases share in common both some type of age restriction challenge and claims brought under the Sherman Antitrust Act.<sup>45</sup> Specifically, these cases were brought under Section 1

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collective bargaining agreement, O.M. could lose her injunction and ability to play in the league. *See* O.M., No. 3:21-cv-00683-IM, 2021 WL 2478439, at \*8 (D. Ore. June 17, 2021) (describing consistently held belief in rulings by courts across board that collective bargaining agreements avoid scrutiny under Section 1 of Sherman Act).

42. *See Clarett*, 369 F.3d at 125-26 (noting Clarett was Big Ten freshman year, first college freshmen since 1940s to open season as starter for Ohio State University). Further, Clarett had helped lead the team to an undefeated season and even scored the winning touchdown in the 2003 Fiesta Bowl which claimed the national championship. *See id.* at 126 (commenting on Clarett's background and accomplishments as college athlete that led to his desire to enter league).

43. *See id.* (detailing events leading up to Clarett's departure from Ohio State Football); *see also* Associated Press, *Clarett Allowed To Keep Scholarship*, ESPN (Sept. 10, 2003), <https://www.espn.com/college-football/news/story?id=1612990> [<https://perma.cc/6LHV-CK42>] (noting Clarett's suspension was unrelated to action against NFL). However, he was suspended from Ohio State Football because he had been receiving extra benefits and lied to investigators about it. *See* Associated Press, *supra* note 43 (noting again suspension was unrelated to abilities on football field or actions towards NFL). Prior to his lawsuit, newspapers had predicted that the action he brought against the NFL could be one of two options for him, other option being transferring to another university. *See id.* (describing options presented to Clarett at time of his suspension).

44. *See Clarett*, 369 F.3d at 126 (explaining Clarett's season-long suspension led to him wanting to enter NFL, ultimately ended up with him bringing suit to allow him to do so). However, the court pointed out that an NFL rule meant to accommodate and encourage players to attend college before entering the league which was in place since 1925 did not allow him to enter the NFL. *See id.* (describing good intentions of NFL in imposing rule dating back eighty years). The court continued by explaining the history and reasoning behind the NFL's rule and noted that prior to 1990, the rule prohibited players from joining the league until after college or four seasons, but in 1990 the NFL relaxed the rule and allowed players to enter the draft after three full seasons following their high school graduation. *See id.* (observing despite relaxed rules, Clarett was still shy of requirements).

45. *See* Haywood, 401 U.S. 1204, 1205 (1971) (pointing to Haywood's cause of action); *see also* Linseman, 439 F. Supp. 1315, 1317 (D. Conn. 1977) (pointing also to Linseman's cause of action); Boris, 1984 U.S. Dist. LEXIS 19061, at \*1 (C.D. Cal. Feb. 28, 1984) (continuing to point to common cause of action); *Clarett*, 369 F.3d at 126 (discussing why, how these cases were brought). Having all been brought under the same section of the Sherman Antitrust Act and for the same general reason, it shows that there is a case history of age restriction issues throughout professional sports. *See* Haywood, 401 U.S. at 1205 (describing plaintiff's action for per se violation of Sherman Act); *see also* Linseman, 439 F. Supp. At 1317 (noting

of the Sherman Antitrust Act.<sup>46</sup> Under that section, any contract that results in a restraint of trade or commerce is illegal.<sup>47</sup> To bring an action under Section 1, the plaintiff must plausibly allege that the restriction imposed on them constitutes an unreasonable and unlawful restraint of trade.<sup>48</sup> In the sports context, players are claiming that an organizations' restrictions are unreasonably limiting their ability to compete in the marketplace of sports.<sup>49</sup> When considering a request for injunctive relief against an identified restriction, courts apply two different tests.<sup>50</sup> Under these tests, there must be a "clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious ques-

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plaintiff's allegation Defendant had violated Section 1 of Sherman Act); *Boris*, 1984 U.S. Dist. LEXIS 19061, \*1 (noting allegation of Section 1 violation); *Clarett*, 369 F.3d at 126 (also noting allegation of Section 1 violation).

46. For further discussion of the applicable cases, see *supra* note 45 and accompanying text.

47. See 15 U.S.C.S. § 1 (LexisNexis 2021) (pointing to the text of the statute); see also PRACTICAL LAW ANTITRUST, SECTION 1 OF THE SHERMAN ANTITRUST ACT: OVERVIEW (n.d.), Westlaw (declaring "every contract . . . in restraint of trade or commerce among the several States. . . is hereby declared to be illegal"). This means that if a contract is entered between parties and it restrains some type of trade or commerce then it is an illegal contract. See Practical Law Antitrust, *supra* note 47 (explaining how Section 1 of Sherman Act applies). An example of general Section 1 restraint of trade is price fixing, bid rigging, and customer or market allocation. See *id.* (identifying violations of Section 1).

48. See *Linseman*, 439 F. Supp. At 1320 (explaining how plaintiff can prevail under Section 1 of Sherman Antitrust Act). The three elements plaintiffs must prove are (1) an agreement (2) which unreasonably restrains trade and (3) an effect on interstate commerce. See *id.* (noting elements court requires to be successful). At first glance, a professional sports team seems to operate in one city, but because these team engage in games in different states and compete against different teams, they gain revenue interstate commerce and, thus, fall under Section 1 of the Sherman Antitrust Act. See Joe Barton, *Interference!*, SLATE (Dec. 9, 2009), <https://slate.com/news-and-politics/2009/12/why-is-congress-always-meddling-with-sports.html> [<https://perma.cc/ATB9-VPRK>] (commenting professional sports are in fact part of interstate commerce, leaving door open for Congress to regulate under Article I, Section 8 of United States Constitution).

49. See Carl W. Hettinger & Adam D. Brown, *Antitrust Law Looms Over Sports Contracts Analysis*, PITT. POST-GAZETTE (Feb. 14, 2011), <https://www.post-gazette.com/business/legal/2011/02/14/Antitrust-law-looms-over-sports-contracts-analysis/stories/201102140219> [<https://perma.cc/CJ8V-Y4V9>] (discussing how professional sports "engage in some conduct that is arguably fundamentally 'anti-competitive'" against their athletes, which results in limits on their ability to compete within marketplace). Because of this nature of anti-competitive deals, Congress and the courts have created exemptions and exceptions to the Sherman Act to avoid constant litigation in professional sports. See *id.* (noting these exemptions or exceptions protect professional leagues but still regulate their conduct to be consistent with free market principles Sherman Antitrust Act is based on).

50. See *Linseman*, 439 F. Supp at 1318 (explaining these two tests came from Second Circuit in an effort to make decisions on preliminary injunctions standard); see also *O.M.*, 544 F. Supp. 3d 1063, 1068 (D. Ore. June 17, 2021) (explaining further test being applied as standard in this decision).

tions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the party requesting the preliminary relief.”<sup>51</sup> Some courts include the additional requirement of showing irreparable injury and probable success, also known as balancing the equities.<sup>52</sup> If the plaintiff satisfies the applicable test, then the court grants their preliminary injunction.<sup>53</sup> A Section 1 claim is the most common way for an athlete to bring suit against a league for something they deem an unfair restriction.<sup>54</sup> However, no Section 1 claim has yet crossed over or interacted with the FLSA Child Labor Provision.<sup>55</sup>

### B. A Whole New World

The FLSA was enacted in 1938 as a way for Congress to stabilize the economy and protect the nation’s labor force.<sup>56</sup> After many

51. See *Linseman*, 439 F. Supp. At 1318 (explaining court can grant preliminary injunction if plaintiff can show both factors) (quoting *Sonesta Intern. Hotels Corp. v. Wellington Assocs.*, 438 F.2d 247, 250 (2d Cir. 1973)).

52. See *Heldman v. U.S. Lawn Tennis Ass’n.*, 354 F. Supp. 1241, 1249–50 (S.D.N.Y. 1973) (noting some courts require third factor to be shown to grant injunction). This third factor requires that the plaintiff must show that acquiring the injunction is “so important to them as to outbalance any inconvenience to be suffered by the defendants.” See *id.* (explaining by adding third factor, courts take equity approach in decision in granting injunction).

53. See *id.* (explaining if court concludes plaintiff satisfies factors, court must “balance the equities”—if balance tips in favor of plaintiff, preliminary injunction should be granted).

54. For further discussion of examples of claims under Section 1 of the Sherman Antitrust Act, see *supra* notes 32–44 and accompanying text.

55. See generally 29 U.S.C.S. § 212 (LexisNexis 2021) (commenting on child labor provision of FLSA’s lack of connection to Sherman Antitrust Act); see also *O.M.*, 544 F. Supp. 3d at 1073 (noting NWSL made argument allowing minors to play would require extra resources by them to comply with laws, which alludes to fact courts have not yet established how leagues or teams should comply—thus requiring extra resources by them). This is likely because when an athlete brings suit under Section 1, it is not because of child labor issue but constraint of trade issue. See *Linseman*, 439 F. Supp. At 1317 (describing *Linseman* claim was brought due to constraint of trade, but *Linseman* was over 18).

56. See Ann K. Wooster, *Validity, Construction, and Application of Fair Labor Standards Act – Supreme Court Cases*, 196 A.L.R. Fed. 507, \*2a (2004) (explaining back-drop of FLSA); see also *Fair Labor Standards Act (1938)*, LIVING NEW DEAL (Nov. 18, 2016), <https://livingnewdeal.org/glossary/fair-labor-standards-act-1938> [<https://perma.cc/Y9EE-D6MQ>] (explaining Congress enacted FLSA to help post-Great Depression, still-struggling America). Congress intended the Act to stabilize the economy and protect the common labor force of those who were “engaged in” or “in the production of goods for” interstate and foreign commerce. See Wooster, *supra* note 56 (explaining prior to FLSA, there had never been extensive labor protection law enacted anywhere in world). Enacted during the New Deal era by President Roosevelt, the FLSA created the Wage and Hour Division in the Department of Labor with the sole purpose of carrying out and creating regulations in accordance with FLSA’s provisions. See *id.* (noting department is still operating today as enforcer of FLSA).

failed attempts, President Roosevelt was finally able to muster a large majority of Congress to pass the FLSA.<sup>57</sup> At the time of the enactment during the post-Great Depression period, wages were low and businesses took advantage of workers.<sup>58</sup> The Act set a minimum wage floor, prevented and regulated child labor, and ensured overtime pay for employees.<sup>59</sup> Congress wanted to provide individual workers with the minimum protections that would ensure employees would receive “[a] fair day’s pay for a fair day’s work” and further that employees would be protected from “the evil of ‘overwork’ as well as ‘underpay.’”<sup>60</sup>

In addition to the quest of ensuring fair and proper compensation of employees, the fight to prevent and regulate child labor began.<sup>61</sup> Section 212 of the FLSA provides an outline that prohibits oppressive child labor by any employer taking part in the production of goods for commerce.<sup>62</sup> Title 29 of the Code of Federal Regulation further imposed regulations concerning the employment of minors under the age of sixteen.<sup>63</sup> Specifically, the Section provides that a minors age fourteen or fifteen may not work (1) more

57. See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle For a Minimum Wage*, U.S. DEP’T OF LABOR, <https://www.dol.gov/general/about-dol/history/flsa1938> [<https://perma.cc/FR2B-U47Y>] (last visited Jan. 7, 2022) (discussing history of struggle that led to Congress passing FLSA).

58. See *id.* (explaining FLSA was humanitarian measure, provided elaborate scheme for minimum wages, overtime pay).

59. See Catherine Ruckelshaus, *Fair Labor Standards Act at 80: It’s More Important Than Ever*, NAT’L EMP’T L. PROJECT (June 26, 2018), <https://www.nelp.org/commentary/fair-labor-standards-act-at-80-its-more-important-than-ever/#:~:text=Congress%20enacted%20the%20FLSA%20to,method%20of%20competition%20%80%9D%20against%20reputable> [<https://perma.cc/Y95D-5EXX>] (discussing importance of FLSA while emphasizing original intentions of FLSA in workforce). Congress enacted the FLSA to ensure that labor standards were high enough to ensure that workers could meet the minimum standard of living necessary for the general wellbeing of workers and their families. See *id.* (noting purpose behind FLSA was to promote general well-being of people).

60. See *Barrentine v. Ark. Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 588 (1942)) (explaining what FLSA was designed to do for American workers); see also Ruckelshaus, *supra* note 59 (discussing FLSA sought to give minimum protections to individual workers and offer protection from excessive overworking without proportional compensation).

61. See Ruckelshaus, *supra* note 59 (noting while FLSA’s overall goal was to ensure proper treatment of employees, government also sought to eliminate oppressive child labor to set standards for treating children).

62. See 29 U.S.C.S. § 212I (LexisNexis 2021) (“No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.”).

63. See 29 C.F.R. § 570.35 (2010) (stating restrictive hours requirement for minors ages fourteen or fifteen).

than forty hours in any one week when school is not in session, (2) more than eighteen hours in any one week when school is in session, (3) more than eight hours in any one day when school is not in session, (4) more than three hours in any one day when school is in session, including Fridays, (5) between 7 A.M. and 7 P.M. in any one day except during the summer when the evening hour will be 9 P.M.<sup>64</sup> Additionally, Section 213 provides for exemptions to the child labor provisions.<sup>65</sup> One of those exemptions states that the Section 212 does not apply to “any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”<sup>66</sup> In the years following FLSA’s enactment, most forms of oppressive child labor ended and disappeared.<sup>67</sup> However, the amount of children under eighteen employed in the United States has grown drastically.<sup>68</sup> Since 2001,

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64. See 29 C.F.R. § 570.35(a) (2010) (detailing specific number of hours minors fourteen or fifteen years of age can work during specific times of year). The minor’s hour limitations vary depending on if it is during the school year or not. See *id.* (commenting statute changes requirements depending on time of year, noting summer is considered June 1st through Labor Day).

65. See 29 U.S.C.S. § 213I-(d) (LexisNexis 2010) (providing FLSA’s exemption for child labor provision). The exemptions include those employed (1) in agriculture outside of school hours which is not hazardous, (2) as child actors or performers in motion pictures, theatrical, radio or television, and (3) as newspaper delivery workers. See *id.* (listing exemptions to FLSA child labor provisions).

66. See *id.* § 213I(3) (identifying child actor exception to Section 212); see also History.com Editors, *Hollywood*, A&E TELEVISION NETWORKS, L.L.C. (Aug. 21, 2018), <https://www.history.com/topics/roaring-twenties/hollywood> [<https://perma.cc/V22H-BQLF>] (stating child actors or performers are excluded from FLSA child labor provision). A reasonable explanation for this exemption is that when the FLSA was enacted in 1938, the economy was recovering and the entertainment industry was beginning to boom. See John Farr, *How Movies Got Us Through The Great Depression*, BEST MOVIES BY FARR (June 12, 2015), <https://www.bestmoviesbyfarr.com/articles/movies-from-the-great-depression/2015/06> [<https://perma.cc/5Z3Z-3P96>] (noting throughout 1930s, movie industry was at its peak).

67. See Jenna Merten, *Raising A Red Card: Why Freddy Adu Should Not Be Allowed To Play Professional Soccer*, 15 MARQ. SPORTS L. REV. 205, 206 (2004) (discussing FLSA as successful in eradicating oppressive child labor from American society). However, the article points out that because of the recent rise in children who are employed, the United States government has been unable to effectively enforce FLSA child labor guidelines, which has led to more violations. See *id.* at 206 (adding 4% of sixteen-year-old males had been employed in 1940 but in 1980, 44% of sixteen-year-old males were employed); see also *Youth Employment*, CHILD TRENDS (May 27, 2019), <https://www.childtrends.org/indicators/youth-employment> [<https://perma.cc/Z5YE-X9GM>] (noting near 50% rise in child employment).

68. See Merten, *supra* note 67, at 206 (identifying only 4% of sixteen-year-old boys in 1940 were employed but 44% of same group were employed in 1980); see also *Youth Employment*, *supra* note 67 (indicating as of 2018, 50% of children were employed).

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30% of children between the ages of fifteen to seventeen are typically employed.<sup>69</sup>

The FLSA is a federal law and therefore applies to all states; however, states are free to add in their own restrictions provided they comport with federal law.<sup>70</sup> As a result, many States have added their own provisions that generally enhance the restrictions imposed within that state's boundaries.<sup>71</sup> In Oregon, where O.M. signed to play professional soccer, the state adopted the FLSA's child labor provision in full, but added a few more requirements.<sup>72</sup> Specifically, Oregon further requires that there be (1) meal and rest periods, (2) jobs that minors are excluded from performing, (3) jobs that are excluded from these regulations, and (4) forms that non-agricultural, agriculture, and entertainment employers must fill out.<sup>73</sup> While Oregon law does not differ greatly from federal law, employers from states like Oregon need to ensure compliance with both federal and state law.<sup>74</sup>

### C. Never Say Never: Expanding the Law

Professional child athletes are nothing new in the field of individual sports, but those sports are hard to regulate without the presence of an employer such as a professional team.<sup>75</sup> For example, there has been a thirteen year-old professional golfer and a fifteen-

69. See Merten, *supra* note 67, at 206 (noting large number of employed children, while not like pre-FLSA time, has resulted in increase of child labor violations); see also Chris Kolmar, *High School Job Statistics 2022*, ZIPPPIA (Oct. 12, 2021), <https://www.zippia.com/advice/high-school-job-statistics/> [<https://perma.cc/BX8P-6JEL>] (noting percentage of teens employed remains around 30%).

70. See U.S. Const. art. VI, § 2 (establishing federal law's precedence over state laws in Supremacy Clause of United States Constitution). Since Section 212 of the FLSA is a federal regulation, it takes precedence over state law. See 29 U.S.C.S. § 212 (LexisNexis 2021) (laying out federal requirements, including standards for child labor).

71. See *id.* (discussing although federal law takes precedence over state laws, States can enhance federal law in their own state by adding onto regulations or adopting own laws).

72. See *Minor Workers*, OR. BUREAU OF LAB. & INDUS., <https://www.oregon.gov/boli/employers/pages/minor-workers.aspx#:~:text=there%20are%20no%20limits%20on,hours%20on%20non%20school%20days> [<https://perma.cc/3ULM-J72R>] (last visited Feb. 8, 2022) (noting Oregon legislature, state in which professional team O.M. is playing on is located, has adopted FLSA child labor provisions with additional restrictions, making it stricter than FLSA).

73. See *id.* (describing further restrictions Oregon requires in Section 570.35, enhancing Department of Labor's restrictions).

74. See *id.* (identifying Oregon's added restrictions and how employers must be careful about ensuring compliance when operating in Oregon).

75. See Merten, *supra* note 67, at 206 (discussing young athletes in individual sports who have risen in ranks of professional sports).

year-old professional gymnast in individual sports.<sup>76</sup> In 2004, Freddy Adu, a fourteen-year-old, signed a six-year contract with Major League Soccer, making him the youngest professional athlete in American team sports.<sup>77</sup>

In both New York and California, state legislatures have passed statutes regarding child entertainers and athletes.<sup>78</sup> California was the first state to enact its legislation and New York quickly followed with its own.<sup>79</sup> Both of these laws are concerned with the child's ability to enter into a contract as an entertainer or athlete, and both elaborate on the FLSA's entertainer exemption.<sup>80</sup> In both instances, the state statutes require judicial approval of the contracts.<sup>81</sup> However, even with these laws, there is no legislation outside of the FLSA that strictly regulates how many hours child athletes can train on their own outside of school attendance policies.<sup>82</sup> But it is promising that professional minor athletes of pro-

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76. *See id.* (stating Michelle Wie entered Women's Professional Golf Championship at thirteen years old, Carly Patterson won gold medal in Olympics at fifteen years old).

77. *See id.* (commenting on Freddy Adu, who was youngest professional athlete in over one hundred years on team sport within United States).

78. *See* Richard J. Hunter, Jr. & John H. Shannon, *Principles of Contract Law Applied To Entertainment and Sports Contracts: A Model For Balancing the Rights of the Industry With Protecting the Interests of Minors*, 48 *LOY. L.A. L. REV.* 1171, 1188 (2015) (discussing legislation New York, California have passed regarding child athletes to account for what FLSA (as enforced by Department of Labor) neglected to cover).

79. *See id.* (discussing how California's law was model for New York law); *see also* *Coogan Law*, *SCREEN ACTORS GUILD – AM. FED. OF TELEVISION AND RADIO ARTISTS*, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [<https://perma.cc/9MGZ-NSDM>] (last visited Jan. 8, 2022) (reporting New York enacted law similar to California's "Coogan's Law"). "Coogan's Law" was enacted in 1939 and named after a child actor, Jackie Coogan. *See* *SAG AFTRA*, [www.sagaftra.org](http://www.sagaftra.org), (last visited Feb. 21, 2022) (explaining Coogan was cast in Charlie Chaplin's famous film, *The Kid*, was then instant star who quickly made money). After his father died, Coogan came to find out that his father did not save any of his earnings for him and he eventually sued his mother. *See id.* (noting cause of action resulting in "Coogan's Law"). New York took "Coogan's Law" as a model for their legislation of the New York Arts and Cultural Affairs Law. *See* Hunter, *supra* note 78, at 1188 (explaining further what New York modeled law after).

80. *See* Hunter, *supra* note 78, at 1187 (noting New York, California each enacted legislation regarding child professional athletes in addition to child actor exemptions because legislators saw need for it—most importantly legislators saw need to ensure children were not being taken advantage of in contracts or by parents).

81. *See id.* (identifying how in both New York legislature, California legislature decided best course of action to protect child athletes was by requiring judicial imprimatur).

82. *See* Erica Siegel, *When Parental Interference Goes Too Far: The Need For Adequate Protection Of Child Entertainers And Athletes*, 18 *CARDOZO ARTS & ENT. L.J.* 427, 462 (2000) (discussing there is little way to regulate parents of children in en-

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fessional team sports will enjoy more well-regulated schedules as opposed to the schedules of individual sports because the minor becomes an employee of the team.<sup>83</sup>

The most recent case brought to the courts regarding an age restriction in professional sports is *O.M. v. National Women's Soccer League*.<sup>84</sup> Here, the plaintiff, O.M., was a fifteen-year-old seeking an injunction against the NWSL barring it from enforcing their Age Rule that all players be at least eighteen years-old to play in the league.<sup>85</sup> Previously, the court granted a temporary restraining order which prohibited the NWSL from enforcing the rule.<sup>86</sup> O.M. brought this action under Section 1 of the Sherman Antitrust Act and argued that the NWSL's teams have agreed among themselves that the League will not contract players under the age of eighteen regardless of their talent or ability to compete.<sup>87</sup> She made it clear that she was not seeking an order requiring a team to hire her, but was only seeking to fight and compete with others for a position on

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tainment or sports industries, but longest-standing laws regulating children's work hours use mandatory school attendance policies).

83. For further discussion of how courts disregarded the employer-employee relationship in team sports, see *infra* notes 85–95 and accompanying text.

84. See *O.M.*, 544 F. Supp. 3d 1063, 1066 (D. Or. 2021) (noting case is most recent to attract judicial consideration regarding age restrictions in professional sports).

85. See *O.M.*, 544 F. Supp. 3d at 1066 (providing background on O.M. including role in suit). In more detail, O.M. is fifteen-year-old soccer player who sued the NWSL hoping to be granted an injunction to prevent the League from enforcing their rule that requires all players in the League to be at least eighteen years old, otherwise known as the "Age Rule." See *id.* (noting background of case). Previously, the court had granted O.M.'s request for a Temporary Restraining Order (TRO) and this cause was brought for permanent one. See *id.* (noting previous court actions taken in case).

86. See *id.* (noting court granted temporary restraining order pending final consideration of request for injunctive relief).

87. See *id.* (noting age agreement among teams was not result of collective bargaining, therefore O.M. not barred from court under Section 1 claim); see also Opening Br. for Nat'l Women's Soccer League, LLC at 1, *O.M.*, 554 F. Supp. 3d 1063 (D. Ore. June 17, 2021) (noting O.M. argued Age Rule served "no legitimate business justification or procompetitive purpose" and Age Rule violates Sherman Antitrust Act). However, in the NWSL's brief to the court, the League argued that there are numerous legal and practical concerns about imposing the age restriction on minors to limit their participation in professional sports such as "(1) state child labor laws, (2) minors' ability to avoid employment contracts, (3) physical and athletic development of minors, and (4) concerns addressed in the Safe Sport Act." See Opening Br. for Nat'l Women's Soccer League, LLC at 6, *supra* note 87 (explaining NWSL's concerns presented to court). Lastly, the League argued that an age restriction was consistent practice among other professional sports leagues and therefore constituting a legitimate business purpose. See *id.* (continuing to explain NWSL's argument).

one of the teams.<sup>88</sup> O.M. argued that keeping her out of the league “will continually slow her development, delay her improvement, and more generally impede her career as a soccer player.”<sup>89</sup> After going through an extensive analysis, the court ruled in O.M.’s favor because she was able to show that enforcing the Age Rule would cause her irreparable harm.<sup>90</sup> The court applied previous standards to determine if O.M. was entitled to a preliminary injunction.<sup>91</sup> The court found that the merits clearly favored O.M., that she would be irreparably harmed if not granted the preliminary injunction, and that the balance of equities and public interest strongly favored providing her this opportunity.<sup>92</sup> The court also found that the NWSL was unable to provide a compelling procompetitive reason to justify an anticompetitive policy such as this Age Rule.<sup>93</sup> As a result, she met her burden of establishing that a preliminary injunction could be granted.<sup>94</sup> O.M. was able to sign with

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88. *See O.M.*, 544 F. Supp. 3d at 1066 (explaining O.M. is suing for opportunity to enter League rather than requiring NWSL to accept her on one of teams).

89. *See id.* (discussing background leading up to O.M.’s action including how she will suffer harm if court does not grant injunction).

90. *See id.* at 1076 (discussing O.M. has shown she will suffer irreparable injury without Court granting the injunction.). Specifically, O.M. has proven that the Age Rule is “impeding her development as a soccer player” and that careers in professional soccer are short and there is no substitute to help her “realize her full potential.” *See id.* (discussion of argument made by O.M., which court found credible).

91. For further discussion of the elements courts consider for a preliminary injunction, see *supra* notes 51–53 and accompanying text.

92. *See O.M.*, 544 F. Supp. 3d at 1067 (noting one of O.M.’s arguments was that MLS did not impose age restriction on men, therefore, because NWSL was only league available to her, it was unfair that boy of O.M.’s age would be able to compete but O.M. could not). The court addressed this argument when they said that the balancing of equities and public interest fell strongly in O.M.’s favor because it would be unfair that a boy was able to pursue the same opportunity in men’s Major League Soccer but not in the National Women’s Soccer League. *See id.* (explaining court’s reasoning behind finding in favor of O.M.).

93. For further discussion of the NWSL’s failure to produce compelling evidence justifying the policy, see *supra* note 87 and accompanying text. Particularly, the NWSL’s argument failed to justify why their policy would not be anticompetitive and presented the court with little to no evidence of a non-anticompetitive reason. *See O.M.*, 544 F. Supp. 3d at 1076 (finding court decided none of numerous legal or practical concerns presented by NWSL in opening brief were enough to prove Age Rule was sufficient to justify having inherently anticompetitive policy).

94. *See id.* (noting O.M. pleaded case sufficiently, so court granted relief sought). However, this injunction is only temporary until a final trial in the coming months. *See id.* (noting decision made by court was only for temporary injunction, with further court date set to decide on permanent injunction).

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the Portland Thorns and begin her professional career at age fifteen.<sup>95</sup>

### III. KICKING AND RUNNING TO CHANGE: AN ANALYSIS ON CHILD PROFESSIONAL ATHLETES

The United States District Court for the District of Oregon's opinion in *O.M.* opened the flood gates to questions on how to handle child labor laws in professional sports.<sup>96</sup> While it is only a preliminary injunction and the case will be decided at trial on the merits at a later date, the court stated that the merits clearly favor O.M.'s position.<sup>97</sup> In their counter-argument, the NWSL claimed that by limiting their employment to a certain age, the league was avoiding unnecessary wastes of time and resources required to comply with child labor laws.<sup>98</sup> The court quickly dismissed the NWSL's argument and did not address their concern on minor safety, but continued to focus on the standards for an antitrust claim.<sup>99</sup> Section III will argue that unlike Sherman Antitrust Act violations, the courts neglected to acknowledge and address the implications of allowing minors to be employed by professional sport organizations.<sup>100</sup> Additionally, Section III further explores the impact FLSA restrictions will have on day-to-day operations and schedules of professional sport teams and will present examples of how teams could be affected.<sup>101</sup> The court's dismissal of the NWSL's concern for minor safety laws and compliance will be addressed in the remainder of this Comment.<sup>102</sup>

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95. See *Portland Thorns' Olivia Moultrie, 15, Becomes Youngest NWSL Player Ever*, ESPN (June 30, 2021), <https://www.espn.com/soccer/portland-thorns-fc/story/4424066/portland-thorns-olivia-moultrie-15-signs-deal-to-become-youngest-nwsl-player> [<https://perma.cc/QC5E-M8CS>] (noting O.M. signed three-year deal with Portland Thorns as youngest player ever to sign with National Women's Soccer League team).

96. See *O.M.*, 544 F. Supp. 3d at 1076 (noting Court granted injunction to allow O.M. to play in NWSL as minor, so result of this decision will likely lead to other minors bringing similar claims against other team sports leagues).

97. See *id.* at 1067 (noting merits clearly favor O.M.).

98. See *id.* at 1073–74 (discussing how League argued limiting employment to players of certain age would avoid “significant time and resources” needed to comply with child labor laws).

99. See *id.* (discussing how League failed to show how much it would cost to have minor on team).

100. For further discussion of the implications of minors being employed by professional sports, see *infra* notes 129–163 and accompanying text.

101. For further discussion of the implications of the FLSA on sports, see *infra* notes 140–154 and accompanying text.

102. For further discussion of how the court did not acknowledge any of the NWSL's arguments regarding the difficulties of compliance with child labor laws, see *infra* notes 108–189 and accompanying text. .

The repercussions of applying the FLSA to professional sport organizations has yet to be seen due in part to a minor never having entered a team sport before.<sup>103</sup> As previously stated, prior cases brought to the court all began with the same argument that the restriction in place caused a restraint of trade issue and ultimately a Section 1 Sherman Act violation.<sup>104</sup> However, while the same argument applies to *O.M.* a different element comes into play – age, which implicates additional mandates on the teams.<sup>105</sup> The FLSA requires teams to comply with state and federal laws if they are going to employ an athlete who is under the age of sixteen.<sup>106</sup> The impact of the FLSA is not a minor one and will affect all facets of the operations in professional organizations.<sup>107</sup>

#### A. Game, Set, Match: Young Athletes Win in the Courts

All previous cases where athletes brought claims against professional sports leagues involved alleged violations of the Sherman Antitrust Act.<sup>108</sup> However, the big difference between those cases and *O.M.* is that those cases involved players who were over the age of sixteen years old.<sup>109</sup> Therefore, the assumption in those cases was that the FLSA would not have applied to these players because of their age.<sup>110</sup> In *Haywood*,<sup>111</sup> the Supreme Court found that the NBA is not exempt from antitrust laws and, in view of the equities

103. For further discussion of applying the FLSA to professional sports, see *infra* notes 108–179 and accompanying text.

104. For further discussion of how previous cases were brought against professional leagues, see *supra* notes 32 – 55 and accompanying text.

105. For further discussion of prior case results, see *infra* notes 108–128 and accompanying text.

106. For further discussion of FLSA implications, see *infra* notes 129–163 and accompanying text.

107. For further discussion of the impact of the FLSA, see *infra* notes 164–180 and accompanying text.

108. For further discussion of the legal action behind previous athlete lawsuits against their respective leagues, see *supra* notes 33–54.

109. See *Haywood*, 401 U.S. 1204-05 (1971) (noting that *Haywood* had been just shy of the four year post high school requirement and was twenty-one-years-old); see also *Linseman*, 439 F. Supp. 1315 (D. Conn. 1977) (noting that *Linseman* was nineteen-years-old); *Boris*, 1984 U.S. Dist. LEXIS 19061 (C.D. Cal. Feb. 28, 1984) (noting *Boris* was in his third year of college making him between twenty and twenty-one-years-old); *Clarett*, 369 F.3d 124 (2d Cir. 2004) (noting primary difference between previous cases versus *O.M.*'s case was age).

110. See 29 C.F.R. § 570.37 (2022) (noting because these athletes were not under age of sixteen, question of what happens when athlete is that young never arose before). However, the government had already issued regulations on how employees under the age of sixteen would be affected differently. See *id.* (explaining regulations are in place to direct employers on steps to take with minor employees).

111. *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971).

between the parties, the Court granted Haywood's preliminary injunction.<sup>112</sup> This was the Supreme Court's first decision considering whether the NBA was exempt from antitrust laws.<sup>113</sup> This decision was monumental because the last time the Court had addressed the topic was when it held that Major League Baseball was exempt from antitrust laws.<sup>114</sup>

Following *Haywood*, the *Linseman*<sup>115</sup> court agreed and came to the same conclusion when it held the WHA accountable for breaking antitrust laws by requiring its players to be at least twenty years old.<sup>116</sup> Specifically, the court found that the rule constituted an unreasonable restraint of trade.<sup>117</sup> Similarly, both *Boris*<sup>118</sup> and *Clarett*<sup>119</sup> found in the players' favor.<sup>120</sup> In *Boris*, the court adopted reasoning similar to *Haywood* and stated that requiring a player to compete in college before entering the draft constituted an illegal group boycott of amateur players and violated Section 1 of the Sherman Antitrust Act.<sup>121</sup> In *Clarett*, the court had originally decided for the plaintiff, but on appeal the court found that the non-statutory labor exemption immunized the challenged rules from

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112. *See id.* at 1205–06 (discussing previous case law allowed for there to be exemption to Sherman Antitrust Act for Major League Baseball). However, the court in *Haywood* decided that the exemption would not apply to the National Basketball Association and therefore Haywood was entitled to relief. *See id.* (noting significant decision made by court in this case, resulting in professional leagues, other than MLB, being subject to Sherman Antitrust Act).

113. *See Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball*, 259 U.S. 200, 208 (1992) (deciding baseball was "purely state" affair, so it was exempt from antitrust laws). However, the Supreme Court had not mentioned or decided this same outcome for any other professional sports leagues. *See id.* (noting court only addressed baseball, not any other sport).

114. *See id.* (noting baseball was exempt from antitrust laws, but courts had not carried this exemption over to any other sports).

115. *Linseman v. World Hockey Assoc.*, 439 F. Supp. 1315 (D. Conn. 1977).

116. *See Linseman*, 439 F. Supp. 1315, 1325–26 (D. Conn. 1977) (finding arguments presented by WHA were no different than those present in *Haywood*, then finding balance of equities favored plaintiff).

117. *See id.* (explaining court conclusion WHA Age Rule violated Section 1 of Sherman Antitrust Act by resulting an unreasonable restraint of trade).

118. *Boris v. United States Football League*, 1984 U.S. Dist. LEXIS 19061 (C.D. Cal. Feb. 28, 1984).

119. *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004).

120. *See Boris*, 1984 U.S. Dist. LEXIS 19061, at \*8 (noting court found United States Football League's rule violated Section 1 of Sherman Act, so it was a restraint of trade); *see also Clarett*, 369 F.3d at 125 (deciding both "eligibility rules" are in violation of Sherman Act).

121. *See Michael A. McCann & Joseph S. Rosen, Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RESV. L. REV. 731, 739 (2006) (discussing how *Boris* court found requiring players to complete college before entering draft violated Sherman Antitrust Act).

antitrust laws.<sup>122</sup> Clarett's case is an example of how collective bargaining can exempt a league from liability under antitrust laws.<sup>123</sup> However, it is key to point out that while some of these restrictions correlated with a given number of years out of high school or in college, there is ultimately another way to implicate an age restriction.<sup>124</sup> Despite those facts, none of these previous cases, including *O.M.*, tackled the issue of the FLSA and its child labor provision.<sup>125</sup>

Furthermore, in Freddy Adu's case, Major League Soccer ("MLS") did not have any age restrictions in place when he signed his professional contract.<sup>126</sup> This area of law has remained untouched by both courts and a majority of states.<sup>127</sup> Even with the attempts by New York and California, the topic of work hours and schedules under the FLSA has evaded judicial or legislative scrutiny.<sup>128</sup>

### B. Learning the Rules of the Game

Professional sports inherently participate in and benefit from interstate commerce.<sup>129</sup> Between games in different states and merchandise sales throughout the country, professional sports, particularly the NWSL, clearly engage in interstate commerce.<sup>130</sup> Therefore, through their participation in interstate commerce, the FLSA binds the NWSL and its teams.<sup>131</sup> The sole exception is when collective bargaining among the league, players, and teams pro-

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122. See *Clarett*, 369 F.3d at 129 (noting there was immunity from antitrust scrutiny because collective bargaining agreement brought about restriction).

123. See *id.* (noting Claret lost his case because League had preexisting collective bargaining agreement, which barred him from entering league due to draft eligibility rules).

124. For further discussion of how courts treated restrictions tied to age differently depending on the minor's age, see *supra* notes 112–120 and accompanying text.

125. For further discussion of what issues were brought before the courts in previous cases, see *supra* notes 32–44 and 84–95 and accompanying text.

126. See Jenna Merten, *supra* note 67, at 217 (noting solution to question posed about Freddy Adu's age would be to implement minimum age requirement for MLS because there currently is not one).

127. For further discussion of Freddy Adu and his professional career as a minor, see *supra* note 102 and accompanying text.

128. For further discussion of the attempts to incorporate child professional athletes in the law, see *supra* notes 78–83 and accompanying text.

129. See generally 29 U.S.C.S. § 212(a) (LexisNexis 2021) (noting FLSA applies to those who take part in interstate commerce).

130. See *id.* (noting FLSA's definition of who law applies to).

131. See *id.* (noting because League, teams are generally across state lines, they take part in interstate commerce).

duces any rules.<sup>132</sup> However, this exception does not apply to children under the age of sixteen, who are subject to extensive restrictions for employment.<sup>133</sup> Consequently, the professional sports world did not contemplate employing minors when Congress passed the FLSA or when courts created the collective bargaining exemption.<sup>134</sup> Additionally, courts did not address the employment of children in professional sports under the FLSA or antitrust provisions.<sup>135</sup> As a result, the guidance on minors employed as professional athletes is scarce.<sup>136</sup>

Section 213 of the FLSA created exemptions to the child labor provisions and particularly excluded child actors and performers.<sup>137</sup> However, while some professional leagues might argue that athletes under the age of sixteen are performers, the exemption specifies that the exempted children are those “in motion pictures or theatrical productions” which does not include athletes.<sup>138</sup> Unless otherwise provided by individual states, federal law does not exempt minor athletes.<sup>139</sup>

The FLSA’s restrictions do not necessarily affect the minor athlete as much as they affects the teams.<sup>140</sup> With restrictive work hours, teams will need to configure their schedules around the minor’s workable hours.<sup>141</sup> This will result in limited timeframes to hold practice, games, and other events that require their participa-

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132. See O.M., 544 F. Supp. 3d 1063, 1074 (D. Or. 2021) (noting long standing holding that collective bargaining agreements are exempt from scrutiny under Section 1 of Sherman Antitrust Act).

133. For further discussion of why collective bargaining agreements cannot impose restrictions that conflict with child labor law provisions, see *supra* notes 63–64.

134. See Merten, *supra* note 67 (explaining what prompted United States to enact FLSA).

135. For further discussion of how previous child professional athletes remained unaffected by the FLSA, see *supra* notes 75–83.

136. See 29 C.F.R. 570.37 (2010) (noting absence of guidance in this area, including lack of legislation).

137. See 29 U.S.C.S. § 213 (LexisNexis 2021) (discussing when FLSA was enacted in 1938, Congress promised to include exemptions to child labor provision, specifically so child actors, child performers would not need to comply fully with provision).

138. See *id.* § 213(c)(3) (noting it would be impossible to interpret as exemption for minor athletes because exemption specifically states who it applies to, does not leave room to interpret as including more professions).

139. For further discussion of New York and California’s attempt to exempt child athletes from child labor laws, see *supra* notes 78–83 and accompanying text.

140. See 29 C.F.R. § 570.35(a) (2010) (explaining children under age of sixteen cannot work during certain times).

141. See *id.* (requiring minors under age of sixteen have restricted work hours).

tion.<sup>142</sup> Except where otherwise specified by federal or state law, professional sports teams with minors under the age of sixteen are required to accept that the minors might be unable to participate in practice, games, or events that are considered part of their job during restrictive hours.<sup>143</sup> The most noticeable implication may be the start times of games.<sup>144</sup> For example, if a typical game is scheduled to start at 8 P.M., the minor cannot participate in the game after 9 P.M.<sup>145</sup> This would result in the team either starting games earlier in order to be finished by 9 P.M. or taking the minor off after that time.<sup>146</sup> This will also cause teams who do not employ minors on their individual team to have to ensure compliance with game times.<sup>147</sup> While this fine detail seems easy to fix, it would require the League and teams to completely reschedule games, rebook vendors, re-plan entire gameday schedules, and coordinate with each other on a large scale.<sup>148</sup>

Another major issue that the teams will run into if minors can play is formulating practice and event schedules.<sup>149</sup> Under Section 570.35 of the FLSA, a minor under sixteen years old cannot work more than eight hours in one day when school is not in session or three hours in one day when school is in session.<sup>150</sup> This would mean that a minor, like O.M., would be unable to practice or attend working events more than three hours per day while in

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142. *See id.* §570.35(c)(2) (noting time restrictions on work hours of minors will affect many aspects of how professional sports operate their schedules).

143. *See id.* (noting further how these restrictions will affect teams).

144. *See id.* §570.35(a) (noting 29 C.F.R. Section 570.35 requires minors not work between certain hours).

145. For further discussion of the time restrictions under 29 C.F.R. Section 570.35 and how this example (while seeming small) can cause a large impact, see *supra* note 64 and accompanying text.

146. *See* 29 C.F.R. § 570.35(c) (2010) (providing example of how regulation would apply in real practice towards professional team regarding game times).

147. *See id.* (providing example of how regulation affecting teams employing minors will also affect teams who compete against minors). This implication further reaches outside of compliance for just one organization to another. *See* 29 U.S.C.S. § 212(a) (LexisNexis 2021) (noting child labor provisions prohibit businesses from partaking in commerce with businesses who have oppressive child labor, therefore businesses must also be in compliance with child labor regulations set forth by Department of Labor).

148. *See* 2021 Schedule, NAT'L WOMEN'S SOCCER LEAGUE, <https://www.nwslsoccer.com/schedule?season=2021> [<https://perma.cc/9ME6-K4YA>] (last visited March 9, 2022) (displaying 2021 schedule for all teams in NWSL, noting many games do not begin until 7:30 or 8:00 P.M.).

149. For further discussion of the time restrictions imposed on minors that will affect day to day operations, see *supra* note 64 and accompanying text.

150. *See* 29 C.F.R. § 570.35(a)(4), (5) (2010) (noting restriction on work hours per day).

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school.<sup>151</sup> Particularly, from Labor Day to Memorial Day, the minor could only practice, participate in meetings, or engage in any other activity relating to their employment with the team for three hours each day during the week.<sup>152</sup> These restrictions would deeply impact when a team chooses to practice or schedules nonpractice events.<sup>153</sup> This could cause the teams to limit nonpractice events to weekends only or to choose between requiring the minor's attendance at a practice or nonpractice event.<sup>154</sup>

Even with recent situations in individual sports, such as tennis with players as young as thirteen years old entering the professional ranks, most states have not addressed the age issue.<sup>155</sup> Not only are individual sports hard to regulate, there is no identifiable "employer" as with team sports.<sup>156</sup> One of the few exceptions due to additional state requirements, in addition to California and New York, is Washington D.C., requires any minor who wants to enter professional sports to have their parent or guardian apply for a permit from the Board of Education.<sup>157</sup> For example, if O.M. lived in

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151. *See id.* (offering how hours regulation would practically affect O.M. in day-to-day training including work duties as employee of Portland Thorns).

152. *See id.* (providing example of type of employment activities minor athletes will end up being restricted to choose from).

153. *See id.* (providing additional information to further enhance example provided with details of how effect will take place).

154. *See id.* (noting generally these implications are highly relevant under these restrictions).

155. *See* Ryan Rodenberg, *Age Eligibility Rules in Women's Professional Tennis: Necessary for the Integrity, Viability, and Administration of the Game or an Unreasonable Restraint of Trade in Violation of Antitrust Law*, 7 *SPORTS LAW J.* 183, 185–86 (2000) (commenting on lack of interest in addressing FLSA implications on thirteen-year-old professional tennis player); *see also* Merten, *supra* note 67, at 206–07 (noting players in individual sports such as tennis, work as independent contractors, so have not been subject to antitrust litigation, nor have most states enacted laws regarding child professional athletes).

156. *See* Rodenberg, *supra* note 67, at 185–86 (noting major difference between team sports versus individual sports is employer aspect). In individual sports such as tennis or golf, athletes are self-employed and only interact with the league for competition, but their schedules and practice largely remain in their hands. *See id.* (noting difficulty of league to regulate or keep up with individual players). In contrast, in team sports, the athletes are not independent contractors but rather employees of the team. *See O.M.*, 544 F. Supp. 3d. 1063, 1076 (D. Or. 2021) (noting reference of "employee," "employer" used by court in team sport setting). This difference between "independent contractor" and "employee" is where regulation of child labor diverges. *See Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LABOR (last visited March 13, 2022), <https://www.dol.gov/agencies/whd/flsa/misclassification> [<https://perma.cc/2Q87-Q83E>] (speaking to the importance in identifying whether someone is an independent contractor or employee and the implications for both).

157. *See* Merten, *supra* note 67, at 208 (explaining Board of Education requires minors have "adequate provisions in education, safeguards for their health, and proper supervision" meaning in some cases, employers need to provide neces-

Washington D.C., she would be able to obtain a permit from the Board of Education in order to except her and the team from the FLSA's strict requirements.<sup>158</sup> Players can easily bring action under Section 1 of the Sherman Antitrust Act and seek injunctions to prevent enforcement of age or eligibility restrictions, provided that collective bargaining agreements did not produce the rule.<sup>159</sup> This is a win for athletes who want to start their professional careers, but it creates a fine line to walk on for teams.<sup>160</sup> This fine line will require teams and even leagues to navigate the restrictions regarding minors.<sup>161</sup> This will pose a challenge for teams and leagues because a majority of professional sports seasons, particularly the NWSL's, take place during the school year.<sup>162</sup> However, with time adjustments and well-thought-out planning, it should not be incredibly difficult for leagues and teams to maintain compliance with the FLSA's requirements.<sup>163</sup>

### C. Teamwork Makes The Dream Work: Planning for Child Athletes

The impact is simple—professional teams will feel the effect of contracting with younger players in their everyday schedules.<sup>164</sup> Courts, states, leagues, and teams have avoided considering the in-

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sary supplies, minors cannot work in two live performances in one day, or more in one week).

158. *See id.* (providing example where D.C. law would apply to minor who entered professional sports league, explaining how minor would avoid tough FLSA restrictions because of exemption in D.C.).

159. *See id.* at 220 (noting how easy is it for players to win lawsuit under Sherman Antitrust Act to remove age requirements).

160. For further discussion of how athletes were able to prevail and begin their careers as minors, see *supra* notes 108–128 and accompanying text.

161. For further discussion of the specific requirements under the child labor laws relating to time of day a minor can play, see *supra* notes 129–154 and accompanying text.

162. *See* Sandra Herrera, *NWSL 2021 Schedule, Key Dates and Things to Know: Challenge Cup Set for April Before 24-Game Season*, CBS SPORTS (Mar. 8, 2021), <https://www.cbssports.com/soccer/news/nwsl-2021-schedule-key-dates-and-things-to-know-challenge-cup-set-for-april-before-24-game-season/> [<https://perma.cc/S7U9-UQNY>] (discussing timeline for NWSL season—which begins May 15th and finishes up October 30th—would mean for half of season teams need to comply with further restricted hours for minor players). Players report to camp beginning February 1st, requiring that teams comply with FLSA standards for the duration of camp. *See id.* (noting beginning of timeframe for which teams will need to be in compliance with FLSA).

163. *See* 29 C.F.R. § 570.35 (2010) (noting restrictions leagues, teams would need to comply with).

164. For further discussion of specific restrictions causing professional leagues to change routines, schedules, and timing for minor employees, see *supra* notes 152–154 and accompanying text.

tersection of the FLSA and professional sports for years, but since the *O.M.* decision gained much attention, those groups may need to start exploring the crossover.<sup>165</sup> In the coming years, unless a collective bargaining agreement is implemented, it is likely there will be minors signing contracts in the NWSL.<sup>166</sup> The Portland Thorns, who signed O.M., submitted a compliance plan alongside their contract for O.M. to ensure her a safe work space.<sup>167</sup> A step like this will soon become common practice if players continue to become younger and younger, as fears of violating the FLSA and similarly applicable state regulations will increase.<sup>168</sup> It is unclear what their compliance plan consisted of, but such a plan might be considered commonplace if athletes under sixteen become the norm.<sup>169</sup> A compliance plan such as O.M.'s would likely include FLSA compliance, including consideration of state child labor provisions for every state they play games in.<sup>170</sup> Particularly, teams should be expected to explain how they will make schedules that comply with restricted hours.<sup>171</sup> Teams would also need to discuss whether minor athletes will operate on the same schedule as the unrestricted players, and, if they do so, what the likely result would be.<sup>172</sup> Furthermore, teams should be prepared to lay out a schedule to provide proof of hours for the minors and possibly have the

165. For further discussion of how the decision in *O.M.* brought attention to the FLSA, see *supra* notes 96–102 and accompanying text.

166. See *O.M.*, 544 F. Supp. 3d 1063, 1066 (D. Or. 2021) (noting O.M. recognized if Player's Association, NWSL enter into collective bargaining agreement on an age rule, she could lose her ability to play, but until then, there is no age rule).

167. See Jeff Kassouf, *Olivia Moultrie Wins Preliminary Injunction Against NWSL's Age Rule*, EQUALIZER (June 18, 2021), <https://equalizersoccer.com/2021/06/18/olivia-moultrie-wins-preliminary-injunction-against-nwsls-age-rule/> [<https://perma.cc/8CA5-X92K>] (discussing result of O.M.'s case including steps already taken by Portland Thorns to ensure law is being followed, minor player is offered safe work environment).

168. See 29 C.F.R. § 570 (2017) (citing to restrictions employers must meet to stay in compliance with FLSA).

169. See Kassouf, *supra* note 167 (noting Portland Thorns submitted compliance plan to league but team did not publicly release what was in compliance plan, how it complied with FLSA, or how team will ensure plan is followed). If the team was to release their compliance plan, it would be helpful to other professional teams and organizations that could find themselves in this situation one day soon. See *id.* (commenting on how Portland Thorns did not publicly release compliance plan present to league, but if they had, it would likely be helpful to other leagues or teams)

170. See *id.* (noting Portland Thorns' compliance plan never became public but it is reasonable to suspect what it will contain based on FLSA).

171. See *generally* 29 C.F.R. § 570.35 (2010) (identifying Portland Thorns' main issue in compliance plan for O.M. because regulation lays out general requirements).

172. See *id.* (identifying compliance plan's specific requirements). The schedule of the minor compared to that of the other players will be the largest discrep-

minor clock in and out.<sup>173</sup> By ensuring teams comply with all the main points, their compliance plans should be sufficiently clear, precise, and comprehensive to contract with minors.<sup>174</sup>

However, it is possible that Congress and the Department of Labor could, as they have before, create an FLSA exemption for professional athletes.<sup>175</sup> This would be similar in substance and function to the Department of Labor's exemption for child actors.<sup>176</sup> In addition to child labor restrictions, professional leagues and teams should also be aware of other legal implications.<sup>177</sup> Minors do not have the legal capacity to consent to medical treatment or other services.<sup>178</sup> This could present clubs with an additional

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ancy for teams to decide because of the heavily restricted hours of minors. *See id.* (pointing to time restrictions imposed by statute).

173. *See id.* (noting suggestions to help comply with Section 570.35 because it imposes extensive time regulations on the work of minors).

174. *See id.* (noting following restrictive hours should lead to compliance overall because if teams submit compliance plans following Section 570.35, likelihood of them violating FLSA is lower).

175. *See Exemptions to the FLSA*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/topic/youthlabor/exemptionsflsa> [<https://perma.cc/MVQ5-EQSC>] (last visited March 9, 2022) (noting there is opportunity for Congress to add amendment to FLSA or for Department of Labor to issue regulation in addition to FLSA as has been done with all of current child labor regulations in addition to FLSA). For reference, the Department of Labor has issued 29 C.F.R. § 570.35 to further explain and regulate Section 212 of the FLSA. *See id.* (identifying source of Department of Labor's intentions behind additional regulations). The FLSA is short in its explanation on the child labor provision and therefore it was necessary for the Department of Labor to issue further regulations to ensure the provision is enforced and to give employers a clearer idea of what they can and cannot require of minor employees. *See id.* (noting length, depth of Department of Labor's regulation exceeds FLSA).

176. *See* 29 C.F.R. § 570.125 (stating entertainers are exempt from FLSA coverage). This regulation exemption particularly states that minors who are employed as "actor[s] or performer[s] in motion pictures or theatrical productions, or in radio or television productions" do not need to comply with the FLSA regulation. *See id.* (explaining actors' exemption, performers' exemption under FLSA). The Department of Labor exempts these groups of minors from rules regarding the number of hours minors can work in one day and the timeframes in which they are allowed to work. *See id.* (referencing child labor laws this exemption applies to).

177. For further discussion of other concerns that will be presented to leagues outside of child labor laws, see *infra* notes 178–180 and accompanying text.

178. *See* Anna Rabe, *Working With Minor Athletes – Special Legal Issues*, FITLEGALLY (last visited March 9, 2022), [https://www.fitlegally.com/blogs/news/working-with-minor-athletes-special-legal-issues?\\_pos=1&\\_psq=working+with&\\_ss=e&\\_v=1.0](https://www.fitlegally.com/blogs/news/working-with-minor-athletes-special-legal-issues?_pos=1&_psq=working+with&_ss=e&_v=1.0) [<https://perma.cc/SDK5-EFJX>] (discussing special legal issues arising when working with minors). This is not an exhaustive list of legal issues that could arise in the course of working with minors in any sport setting, but it is a start for leagues and teams to be aware of for not only coaches but all of the professional staff. *See id.* (discussing list presented in article not only addresses legal implications that would be presented, but is useful because "being forewarned is to be forearmed").

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problem of requiring the minor's parents to sign off on everything done for them or to have parents sign waivers prior to contracting with minors.<sup>179</sup> Minors working as professional athletes is an area of the law that is just beginning to develop and because athletes are not included in entertainers, they are not exempt from FLSA, for now.<sup>180</sup>

#### IV. GO, FIGHT, WIN! THIS IS NOT THE END

Placing age restrictions on players in the United States has resulted in many lawsuits under the Sherman Antitrust Act.<sup>181</sup> These restrictions have, in most cases, not been a result of collective bargaining agreements, which the courts have found to be a permissible way of imposing an age restriction.<sup>182</sup> As a result, age restrictions have been lifted because they violate Section 1 of the Sherman Antitrust Act.<sup>183</sup> However, courts have neglected to speak on how these young players will affect professional teams' operations in a way ensuring compliance with state and federal child labor laws.<sup>184</sup> The question now is whether states or Congress will take the next step in addressing how to classify minor professional athletes, and whether the federal government will create additional FLSA exemptions.<sup>185</sup> Even further pressing is whether the Department of Labor will address this issue.<sup>186</sup> The Department of Labor has attempted to keep track of states that regulate child entertainment but has yet to address if these states include athletes or if the Department of Labor is willing to issue further guidance on the

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179. *See id.* (noting need for medical waivers to be signed by parents). Ensuring that waivers are signed for treatment of minor athletes is imperative because minors are still developing and are vulnerable and more susceptible to injury, and without a waiver teams and leagues leave their staff open to liability. *See id.* (noting higher likelihood minor athletes sustain injury over adult counterparts).

180. *See* 29 U.S.C.S. § 213(c)(3) (LexisNexis 2021) (noting exemption does not mention minors who enter professional sports as being entertainers or being exempt from FLSA restrictions on child labor).

181. For further discussion of Sherman Antitrust Act cases in professional sports, see *supra* notes 32–45 and 87 and accompanying text.

182. *See* O.M., 544 F. Supp. 3d 1063, 1074 (D. Or. 2021) (noting courts, in case of professional sports leagues, have held rules created through collective bargaining agreements are exempt from Section 1 of Sherman Antitrust Act).

183. For further discussion of case results, see *supra* notes 109–124 and accompanying text.

184. For further discussion of judicial inaction, see *supra* note 125 and accompanying text.

185. For further discussion of inaction by the government, see *supra* note 135 and accompanying text.

186. For further discussion of the Department of Labor's impact on the topic, see *supra* notes 175–176 and accompanying text.

topic.<sup>187</sup> Due to the inactivity by the Department of Labor, minors under the age of sixteen who are employed as professional athletes will be subject to child labor laws imposed by both their state and the FLSA.<sup>188</sup> It is hopeful that because some states have already started to address the topic, the law will catch up before too many minors enter the professional ranks.<sup>189</sup>

*Kacey McCann\**

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187. See *Child Entertainment Laws As of January 1, 2022*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [<https://perma.cc/D76X-JCJ7>] (last visited March 9, 2022) (noting interactive map, list Department of Labor provides on its website regarding child entertainment laws in different states).

188. See 29 U.S.C.S. § 212 (LexisNexis 1938) (noting child labor provision of FLSA is baseline start when complying with child labor laws, regulations).

189. For further discussion of how a few states have attempted to address the child professional athlete issue, see *supra* note 156–157.

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