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## THE ROLE OF THE NBA'S COLLECTIVE BARGAINING AGREEMENT IN COVID-RELATED GAME ABSENCES

*Madeline S. Nelson*

*Editor's Note:* Since the writing of this blog post, the NBA has announced that, as of January 15, unvaccinated players will not be eligible to play in Toronto.<sup>1</sup> Additionally, the Brooklyn Nets relented and agreed to allow Kyrie Irving to play in all road games, except those against the New York Knicks and the Toronto Raptors.<sup>2</sup> Irving, while unvaccinated, remains ineligible to play in all Brooklyn Nets home games.<sup>3</sup>

With the National Basketball Association's ("NBA") 75th Anniversary on the horizon, the NBA had large plans for this season, but an unforeseen circumstance switched the focus of the season from the 75th Anniversary to the various coronavirus ("COVID-19") vaccination mandates.<sup>4</sup> NBA Commissioner Adam Silver announced in September that unvaccinated players in New York and San Francisco will not be paid if they miss games.<sup>5</sup> The inability to play is not only due to each city's mandates that require eligible people to be vaccinated for entry into public places—including stadiums and arenas—but also due to teams not wanting their players to play and practice half the time, thus becoming susceptible to injury and potentially damaging team relationships and dynamics.<sup>6</sup> Although this dilemma technically only affects three teams<sup>7</sup>—the New York Knicks, the Brooklyn Nets, and the Golden State Warriors—there is a large-market player at the center of it all: Kyrie Irving.<sup>8</sup>

Kyrie Irving negotiated a guaranteed contract worth \$35 million for the 2021–2022 season. For the home games that he cannot play in Brooklyn due to the New York City vaccine mandate, Irving is estimated to lose approximately 42.6% of his total salary this season, which is approximately \$15 million.<sup>9</sup> The Brooklyn Nets have stated that they will not allow Irving to play and that they have the legal right to restrict his ability to play and practice with the team, if Irving

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<sup>1</sup> Michael Shapiro, *Players Not Vaccinated Against COVID-19 Can't Play in Toronto*, SPORTS ILLUSTRATED (Dec. 7, 2021), <https://www.si.com/nba/2021/12/07/nba-players-not-vaccinated-covid-19-barred-playing-canada-toronto-raptors> [<https://perma.cc/5QSC-9K2E>].

<sup>2</sup> Adrian Wojnarowski & Ohm Youngmisuk, *Brooklyn Nets to Bring Back Kyrie Irving for Road Games Outside New York, Toronto*, ESPN (Dec. 17, 2021), [https://www.espn.com/nba/story/\\_/id/32891013/sources-brooklyn-nets-bring-back-kyrie-irving-road-games](https://www.espn.com/nba/story/_/id/32891013/sources-brooklyn-nets-bring-back-kyrie-irving-road-games) [<https://perma.cc/5944-9LRN>].

<sup>3</sup> *Id.*

<sup>4</sup> Tommy Beer, *Unvaccinated NBA Players Face Steep Fines for Each Game They Miss, According to Agreement*, FORBES (Oct. 4, 2021, 11:16 AM), <https://www.forbes.com/sites/tommybeer/2021/10/04/unvaccinated-nba-players-face-steep-fine-for-each-game-they-miss-according-to-agreement/?sh=3e0917936883> [<https://perma.cc/NRE9-VPHB>].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *But see Editor's Note, supra*, discussing how the NBA has since announced that unvaccinated players will no longer be eligible to play in games in Toronto. *See also* Shapiro, *supra* note 1.

<sup>8</sup> Jabari Young, *NBA Won't Pay Some Unvaccinated Players Who Miss Games – It's a Scare Tactic That Could Work*, CNBC (Sept. 30, 2021, 1:17 PM), <https://www.cnbc.com/2021/09/30/nba-wont-pay-unvaccinated-players-who-miss-games.html> [<https://perma.cc/R6SE-QYF3>].

<sup>9</sup> Eric Pincus, *Brooklyn Nets Team Salary*, BASKETBALL INSIDERS (Dec. 8, 2021), <https://www.basketballinsiders.com/brooklyn-nets-team-salary/> [<https://perma.cc/YC2J-4B25>].

will not get vaccinated.<sup>10</sup> Michele A. Roberts, the Executive Director of the National Basketball Players Association (“NBPA”), believes that Irving’s pay should not be affected, and she has agreed to fight for his wages. Irving, who is also the NBPA’s Vice President, is now at the center of a debate about the power structure built within the NBA’s Collective Bargaining Agreement (“CBA”).

The NBPA voted against mandatory vaccination for players in September 2021.<sup>11</sup> Nevertheless, Commissioner Silver announced before the season that any unvaccinated player risks a loss in wages if they cannot play in a certain market, due to not having taken the COVID-19 vaccine.<sup>12</sup> The NBPA’s position is that the NBA cannot financially reprimand a player for being unvaccinated. According to Roberts, “[t]he league’s position is that we don’t need your agreement because the CBA allows that anyway.”<sup>13</sup> The CBA does, in fact, place open-ended power into the hands of Commissioner Silver and the thirty teams that make up the league. Does that open-ended power extend into altering fully guaranteed contractual obligations?

Mediators, agents, the NBA, the NBPA, and the National Basketball Referees Association (“NBRA”) come together to craft the CBA every few years.<sup>14</sup> The newest CBA, drafted in 2017, lasts until, at least, the end of this season—it would expire at the end of the season if the NBA and the players agree to nullify it.<sup>15</sup> The 600-page long 2017 CBA details all of the terms and conditions for employment agreed upon by the NBA, the NBPA, and the NBRA.<sup>16</sup> The largest section in the CBA pertains to rules in player contracts, detailing how contracts can be drafted and outlining the specific amendments that can be made to contracts.<sup>17</sup> Irving has a fully guaranteed contract, as do many high-market NBA players.<sup>18</sup> According to the CBA, compensation in contracts can only be protected in cases of mental disabilities, death, basketball-related injuries, other injuries or illnesses, or lack of skill, if a player misses games for a reason not mediated upon in the initial contract negotiation and signing.<sup>19</sup> With none of these exceptions meeting the threshold of what is required to protect Irving’s pay, why is Irving estimated to make \$20 million this year without playing one game? Frantic negotiation that took place in early October made it possible for Irving to not play and still collect a portion of his wages.

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<sup>10</sup> Stefan Bondy, *NBA Players Union Boss Tells News League Shouldn’t Dock Pay for Unvaccinated Players Unable to Play*, N.Y. DAILY NEWS (Oct. 6, 2021, 12:37 PM), <https://www.nydailynews.com/sports/basketball/nets/ny-nba-union-michele-roberts-vaccine-pay-20211006-nh472rhwpjanvff4zzhph4alai-story.html> [https://perma.cc/W2VW-49LS].

<sup>11</sup> *Id.*

<sup>12</sup> Michael Kaskey-Blomain, *Unvaccinated NBA Players Won’t Be Paid for Every Game Missed Due to Local COVID-19 Mandates*, CBS SPORTS (Sept. 30, 2021, 5:48 PM), <https://www.cbssports.com/nba/news/unvaccinated-nba-players-wont-be-paid-for-every-game-missed-due-to-local-covid-19-mandates/> [https://perma.cc/DB2G-FUSQ].

<sup>13</sup> *Id.*

<sup>14</sup> *2017 NBA Collective Bargaining Agreement – Deal Points*, BASKETBALL INSIDERS (Oct. 15, 2021), <https://www.basketballinsiders.com/news/2017-nba-collective-bargaining-agreement-deal-points/> [https://perma.cc/VB78-F25P].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Sopan Deb, *Most N.B.A. Players Are Vaccinated, But Skeptics Speak Out*, N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/2021/09/27/sports/basketball/nba-vaccine-kyrie-irving.html> [https://perma.cc/4VEH-B3S6].

<sup>19</sup> COLLECTIVE BARGAINING AGREEMENT 22–26, NBA (Jan. 19, 2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [https://perma.cc/QM9Y-TA6G].

The NBA, NBPA, and NBRA had an emergency meeting before the beginning of the season to negotiate exactly what teams like the Brooklyn Nets—and potentially others, if city ordinances change—could do if their players aren't allowed to play in their home cities, rendering players ineligible to play in at least close to half of the NBA season.<sup>20</sup> The teams cannot fight city ordinances. What could soften the blow of losing a player like Kyrie Irving for a season and potentially missing out on an NBA championship? \$15 million.

Through mediation, the NBA and NBPA agreed to a reduction in pay of 1.09% of unvaccinated players' salaries for each game the players are forced to sit out due to vaccine-related regulations in their home cities.<sup>21</sup> Irving and the Nets have forty-three games in New York, between home games in Brooklyn and road games against the New York Knicks, making the amount the Nets can save approximately \$15 million.<sup>22</sup> The NBA and NBPA also agreed to allow unvaccinated players to play in cities that allow them to do so, making it that these players would, potentially, solely play and practice outside of their home turfs.<sup>23</sup> The Brooklyn Nets opted out of this partial solution at the beginning of the season, telling Irving that he must play every game or not play at all.<sup>24</sup>

Renegotiation seems on the horizon, as the NBPA has stated that it will fight for Irving's wages, and now back wages, whether he plays this season or not.<sup>25</sup> The Brooklyn Nets have said that they will welcome Irving back if he complies with the New York City vaccination mandate. Irving is eligible to sign a four-year, \$187 million extension with Brooklyn, or opt-out at the end of this season to potentially find a new team to lead.<sup>26</sup> Before any future talks occur with the organization, it is likely that Irving will seek arbitration to pursue his lost wages. Had he fallen to an injury, he would be entitled to the full amount of his salary.<sup>27</sup> Given the openness of the 2017 CBA, it is inevitable that he will seek mediation along with the NBPA to recoup his earnings, despite any vaccine mandates in New York City.

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<sup>20</sup> Bondy, *supra* note 10.

<sup>21</sup> *Id.*

<sup>22</sup> *Brooklyn Nets Schedule 2021–22*, ESPN, [https://www.espn.com/nba/team/schedule/\\_/name/bkn](https://www.espn.com/nba/team/schedule/_/name/bkn) [<https://perma.cc/2NM7-6XSF>] (last visited Oct. 30, 2021).

<sup>23</sup> Bondy, *supra* note 10.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Simon Gibbs, *Report: Kyrie Irving's Agent Responds to Potential Trades*, ON3 (Sept. 16, 2021), <https://www.on3.com/news/kyrie-irving-refuses-to-be-traded-brooklyn-nets/> [<https://perma.cc/37GQ-CGSJ>].

<sup>27</sup> COLLECTIVE BARGAINING AGREEMENT, *supra* note 19.