Fantasy Football – Real World Concerns

Insights
2.01.10

(Labor Letter, February 2010)

It will be no surprise if employees approach this year's office Super Bowl or NCAA Tournament pools with a little more trepidation. Last month, Fidelity Investments made national headlines when it fired four employees for participating in a fantasy football league. For those unfamiliar with it, fantasy football is a game in which participants are organized in a competitive league, earning "fantasy points" by using the statistics of real professional football players.

Fantasy football allows fans to use their knowledge of players, statistics, and strategy to manage their own virtual team based upon the actual performance of professional football players. The participants compete head-to-head with other participants in the league on a weekly basis, with the participant in each weekly match-up with the highest number of fantasy points being the winner. In some cases, the participants pool money for a league champion, but in many other cases, winning only earns pride and glory for the participant.

Surprisingly, Fidelity's rationale for the firing was not so much that the employees were using company time and resources to participate in the league, but rather the company's designation of fantasy football as a form of gambling. Fidelity Investments' spokesman Vin Loporchio told the Fort Worth Star-Telegram, "We have clear policies that relate to gambling. Participation in any form of gambling through the use of Fidelity time or equipment or any other company resource is prohibited . . . ."

But it's debatable as to whether fantasy football constitutes "gambling," and there is some authority that supports the view that it's not. The Federal District Court for the District of New Jersey addressed the question of whether participating in a fantasy football league with an entry fee constitutes gambling (although not in the context of group participants privately pooling money to award to the league champion), and ruled that fantasy league participants do not sustain "gambling losses" within the meaning of the gambling statutes at issue and thus league participants are not engaged in gambling. *Humphrey v. Viacom, Inc.*

Are Employees Gambling With Their Money?

Charles E. Humphrey, Jr. brought claims in a number of states against the operators of multiple online fantasy sports leagues to recover the entry fees paid by fantasy league participants as gambling losses. In addition to finding that fantasy league participants do not sustain gambling losses within the meaning of the gambling statutes at issue, the court concluded that fantasy participants pay an entry fee and bargain for and receive a number of services, including, but not limited to, statistical tracking, analysis of team performance, and access to analytical information concerning professional football players.

Finally, the court also concluded that the entrance fee to join a league was not a "wager" or a "bet" because the entrance fees are paid unconditionally, the prizes offered to participants are for amounts certain and are guaranteed to be awarded, and the defendant operators did not compete for the prizes.

Are They Gambling With Their Jobs?

Regardless of whether participating in a fantasy football league constitutes "gambling" in the legal sense, it is clear that Fidelity was well within its rights to fire employees for using company resources and time to participate in an activity that was not work-related. Fantasy football participants may complain about Fidelity's decision or deem it to be overly harsh, but employers typically have a great deal of flexibility in setting rules of conduct in the workplace. So what is the takeaway for employers?

First, set up clear rules for your employees. If you wish to disallow fantasy sports leagues or office pools, say so clearly and enforce that rule evenly. Second, if these types of activities are not prohibited, make it clear that participation in these activities must not be during work time. Setting up clear expectations for your employees and enforcing those rules evenly will ensure that if problems do develop, they will be handled in a fair and appropriate manner.