



An Employer's FAQ Guide to the Antitrust Battle Between LIV Golfers and the PGA Tour

Insights

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FAQs LAST UPDATED 9/9/22

We bet you're curious about the legal battle that has erupted between a group of high-profile golfers and the PGA Tour, centering around their relationship with a controversial Saudi-owned golf league and involving allegations of antitrust violations. The war of words turned into full-fledged litigation on August 3, raising the stakes for all those involved – and capturing the attention of businesses across the country. After all, the golfers suing the PGA have invoked antitrust laws, which should be on the minds of all employers these days due to recent developments. What do employers need to know about the dispute – and what might you learn from the allegations? Here is a series of FAQs to help you sort out the issue.

First and foremost, what is LIV Golf?

LIV Golf is a new golf tournament series that kicked off in 2022 with eight scheduled events. It is attempting to shake up the golf world by competing against the PGA with an innovative (some say *too* innovative) approach to play – each tournament has fewer golfers who play in teams, three rounds instead of four, no cuts, staggered “shotgun” starts, and massive guaranteed paydays.

How massive?

By massive, we mean *massive*. As much as \$25 million will be paid out to the competing golfers at each event. Each year the top golfers will share an additional \$30 million and top “teams” earning another \$50 million. The numbers golfers can collect if they survive the cut in a PGA event pale in comparison to what they can earn with LIV Golf – in some cases the event purse is doubled. And that doesn't even include eye-popping sums that some golfers have received for simply signing up with LIV – Phil Mickelson, for example, received a reported \$200 million signing bonus.

What does “LIV” mean?

They are actually the Roman numerals L, I, and V (although it is pronounced “live,” rhymes with “give”) that stand for 54 – the number of holes played at each event.

Why is it controversial?

Besides competing against the stalwart PGA, the traditional organizer of professional golf events in North America for almost 100 years, the series is financed by the Saudi Arabian Public Investment Fund – which essentially means it is owned by the Saudi government. A number of groups have opposed Saudi involvement in a major sports league competing in the United States due to allegations of human rights abuses, the 2018 killing of journalist of Jamal Khashoggi, and the 9/11 terrorist attacks.

Which golfers were lured by LIV Golf?

Former pro golfer Greg Norman was named CEO in 2021, and he and his team set to work to attract some of the world's best golfers. Phil Mickelson, Dustin Johnson, Bryson DeChambeau, Sergio Garcia, Brooks Koepka, Louis Oosthuizen, Ian Poulter, Patrick Reed, Henrik Stenson, and Bubba Watson are among the 60+ golfers who have signed a LIV contract or appeared in at least one event in 2022. Most hoped to continue to play in PGA events as well, but several (like Johnson, Garcia, and Osthuizen) resigned their memberships with the PGA and indicated they no longer wish to compete in its events.

How did the PGA respond?

It suspended anyone signing up with LIV from competing in events organized by the PGA for various lengths of time. These suspensions have been adjusted depending on a golfer's involvement with LIV. For example, the PGA originally suspended Mickelson for two months, then increased it to one year after he competed in LIV's first event in London in June, and boosted it to two years after he competed in LIV's next event in Oregon in July – meaning he cannot join a PGA event until March 2024.

What justification did the PGA give for the suspensions?

Typically, golfers on the PGA Tour need to request permission to play in unsanctioned tournaments under the "Conflicting Events Regulation" contained in the PGA bylaws. They have traditionally been permitted to play in three such events (usually European tour events) per season. But the PGA failed to grant such permission for the golfers who wanted to play in LIV events, and the PGA dropped the hammer when they played regardless.

So we won't see these golfers at major championships like the Masters or the U.S. Open for the foreseeable future?

That's not necessarily true. Most major events are run independently of the PGA and therefore the suspensions don't directly impact the golfers at these showcase events. However, PGA officials have reportedly begun to pressure the organizers of these major events to side with them and ban these golfers from competing in the majors as well.

How did the golfers respond?

Eleven of the golfers who did not resign their PGA memberships filed an antitrust lawsuit against the PGA in a federal court in Northern California on August 3. The plaintiffs are Bryson DeChambeau, Talor Gooch, Hudson Swafford, Matt Jones, Phil Mickelson, Ian Poulter, Abraham Ancer, Carlos Ortiz, Pat Perez, Jason Kokrak, and Peter Uihlein.

[9/9 update: four golfers recently withdrew from participating in the lawsuit – Abraham Ancer, Carlos Ortiz, Pat Perez, and Jason Kokrak.]

When did LIV Golf respond? (Question and answer added 9/9)

LIV Golf joined the lawsuit in an amended filing in late August, alleging that its “ability to maintain a meaningful competitive presence in the markets will be destroyed” without a ruling in its favor.

What are “antitrust” allegations anyway?

Federal law prohibits business entities from maintaining monopoly power over a certain field or industry and using that power to shut down challenges from business competitors. To succeed in their claim, the golfers will need to prove that the PGA Tour holds control over the professional golf market and is using anticompetitive practices to maintain that control. LIV Golf says that it is trying to bring true “free agency” to professional golf and that the PGA’s behavior squelching that opportunity is just such illegal activity. “There is simply no recognized justification for banning independent contractor professional golfers for simply contracting to play professional golf,” LIV recently said.

Besides the suspensions, what are the other complaints raised by the 11 golfers?

The golfers claim that the PGA threatened sponsors, vendors, and agents to coerce them to abandon their LIV opportunities, organized a group boycott with the European Tour to deny LIV Golf access to their members, and as noted above, started to pressure the organizers of golf’s major championships to ban them from competing in these high-profile events. According to the golfers, the PGA’s conduct “serves no purpose other than to cause harm to players and foreclose the entry of the first meaningful competitive threat the Tour has faced in decades” – and that sounds like classic anti-competitive antitrust behavior.

What are the golfers asking for?

Several of the golfers have requested that the court grant an injunction that would permit them to immediately begin competing in key upcoming PGA events while the lawsuit works its way through the legal system. Time is of the essence for them because the PGA playoffs begin this coming weekend (August 11-14) and they want a chance to play in this lucrative field for which they have already qualified. The playoffs take on outsized importance not only because of the prize money involved but also because they allow golfers a chance to accumulate points and earn their right to play in major events – not to mention that the high-profile nature of the playoff events can provide a

boost for branding and sponsorship opportunities. *(8/10 update: the court denied the request for an injunction on August 9. See below for more detail.)*

What are the standards for granting an injunction?

Typically, a party seeking an injunction needs to prove:

- they would suffer **“irreparable” injury** (not calculable) if an injunction is not granted;
- that the injury they are suffering **outweighs the harm** to the opposing party that would arise if an injunction were granted;
- that an injunction is **not adverse to public interest**; and
- that they have a **substantial likelihood of success** on the merits of their claim.

Will the golfers succeed in their injunction request?

It’s not uncommon for courts to grant such injunctions to give aggrieved parties what they are seeking (at least temporarily) while the lawsuit plays out in court. So, it wouldn’t be surprising to see the court quickly grant a temporary restraining order that would allow these golfers to compete in the upcoming PGA playoff events. A hearing is scheduled for tomorrow, August 9, but it is unclear whether the court will immediately issue a ruling or take some time before doing so. *(8/10 update: the court denied the request for an injunction on August 9. See below for more detail.)*

What did the PGA say in its legal response?

The PGA Tour responded this morning, attacking the claimed need for an emergency injunction. The PGA said that no real “emergency” exists at all because the players have known about the consequences of their actions for several months but waited until the eve of the playoffs to file their request. Further, the golfers all made personal choices to disassociate with the PGA and play on the LIV tour knowing the possible consequences of their actions – the PGA warned them about the Conflicting Events Regulation before they chose to jump ship. Moreover, the court could be swayed because of the lucrative financial rewards the golfers are receiving through LIV that more than make up for any earnings they might miss out on from the PGA playoffs. Finally, the PGA argued that jamming these additional golfers into the playoff field would force other non-LIV golfers to miss out, which is an unfair result for both the PGA and innocent bystander golfers.

How did the court rule in response to the injunction request? (Question and answer added 8/10)

U.S. District Court Judge Beth Labson Freeman denied the injunction request on August 9. She ruled that the three LIV golfers had not proven they would be irreparably harmed by being denied a chance to participate in the playoffs. Not only are the alleged financial damages easily calculable, the judge also said that they have likely earned more money than they would have had they remained

on the PGA Tour. As anticipated, she also ruled there was no emergency because the timing crunch was of “their own making.”

How will the PGA respond to the antitrust allegations?

Regardless of how the injunction battle goes, the real fight will take place when the parties duke it out over whether the PGA is violating antitrust laws. The PGA issued a memo to all of its golfers shortly after the lawsuit was filed indicating it felt confident in its legal defenses and providing a glimpse into its strategy. “Fundamentally, these suspended players – who are now Saudi Golf League employees – have walked away from the Tour and now want back in,” it said. “With the Saudi Golf League on hiatus, they’re trying to use lawyers to force their way into competition alongside our members in good standing.”

The PGA’s legal filings will probably contend that it is patently unfair for golfers who have aligned with a business competitor to gain a “free ride” back with the PGA. They will probably say it’s unfair for them to earn money off of the collective efforts of PGA participants that have thus far generated the value the Tour enjoys. Fundamentally, the PGA will say that it should not be forced to cooperate with a business competitor. We could even see the PGA turn the tables and argue that LIV is engaging in unfair predatory behavior by financially harming those golfers who choose not to play with LIV and stay with the PGA.

When will the underlying antitrust litigation take place? (Answer Updated 9/9)

The parties are set to argue their cases in court on July 23, 2023, in an effort to convince the judge to rule in their favor. If the case cannot be decided on briefing and oral argument, a full-scale trial will take place. It is tentatively scheduled to begin on January 8, 2024.

Does the PGA have cause for concern?

Absolutely – because the LIV golfers are not its only antitrust worry at the moment. The Wall Street Journal reported several weeks ago that the U.S. Department of Justice had opened up an investigation into whether the PGA Tour was engaging in anticompetitive behavior in its dealings with LIV Golf. One potential argument that the DOJ might look into: Why would the PGA want to ban some of the world’s best and most popular golfers from the playoffs? The golfers’ lawsuit made this specific point – that prohibiting them from its events degrades the strength of play and diminishes the quality of the product. Such actions only make business sense if the underlying goal is destroying competition. According to a Penn State sports law professor, this could be a dangerous argument for the PGA to face, because sacrificing short-term profits for long-term monopoly gain is often a key indicator of antitrust behavior.

Has the PGA Tour been investigated for antitrust issues in the past?

Yes, in the 1990's. The Clinton administration began looking at the Conflicting Events Regulation in 1994, but the Federal Trade Commission (FTC) dropped its investigation the next year without taking any action against the PGA Tour. The political dynamics currently in play in D.C. could lead to a different outcome this time around, however.

Why should employers care about this issue?

One of the most significant workplace law developments of the past year was the DOJ signaling it was on the verge of its first-ever successful criminal prosecution of a workplace antitrust action – a dramatic development that raises the stakes for employers across the country. Fairly commonplace business tactics (no-poach agreements and information sharing with business peers) are now coming under fire by the federal government. On top of that, the FTC just entered into agreements with other federal agencies to scrutinize independent contractor staffing arrangements with an eye towards uncovering antitrust violations. Given the high-profile nature of the PGA/LIV battle, you can expect to see business relationships put under the microscope like never before. If you want to avoid antitrust allegations at your workplace, you should review our six-step compliance plan here.

Conclusion

We will continue to monitor developments in this story and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Defection and Trade Secrets Practice Group or in our Sports Industry Group.

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