

HOW EMPLOYERS CAN AVOID EMPLOYMENT FUMBLES AND WIN ON SUPER BOWL SUNDAY

Insights
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The stage has been set for Super Bowl LVI on February 13 – the Cincinnati Bengals will be playing the Los Angeles Rams in the Rams’ home stadium. This game is annually the most watched television broadcast event, with over 90 million anticipated television viewers in the United States, so you can be sure many of your employees will be tuning in. Although the Super Bowl and other major sporting events are held on the field or on the court, far removed from the workplace, they can still potentially create employment issues for an employer. Below are a few suggestions on how to proactively prepare for these issues so that everyone can enjoy the game.

Days Leading Up to the Game: Productivity and Dress Code Concerns

Although many employers first think about gambling in the workplace when they consider the Super Bowl, they really should be thinking about the loss of productivity associated with the game. In its [2021 Super Bowl Productivity Loss report](#), the consulting firm Challenger, Gray & Christmas, concluded that the work slowdown in the week before the Super Bowl costs American businesses approximately \$1.6 billion in lost productivity.

How could this happen? Now that the matchup is set, many of your workers will be spending time online reading about the teams in anticipation of the game. They will be watching videos, scrolling through Twitter, and texting friends with their predictions instead of working – often using work-provided devices. While it is helpful to create and enforce a

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policy restricting the kinds of activities that your employees can perform on business computers and company-issued smartphones, realistic employers know that most employees can circumvent this policy by using personal devices.

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But the bigger dose of reality is that most workers inevitably spend part of their working day doing personal business. Whether it's running an errand, shopping online, making a phone call, texting a friend or family member, or chatting with each other, most employees aren't chained to their desk the entire work day laser-focused on their work at every moment. This is especially true with nearly half of the country's workforce still working from home due to the ongoing COVID-19 pandemic.

Accordingly, most companies ultimately care about whether the assigned work is getting done rather than avoid the hassle of micromanaging every moment of the day – a practice that's nearly impossible anyway with a remote workforce. Instead, you should enforce productivity standards in the days leading up to the game just like you should be doing every other business day. Ultimately — especially in companies that mainly employ salaried employees — it is better to have a happy workforce (which will, in turn, make your workforce more productive) rather than coming down harshly on an employee who has one or two relatively unproductive days before or after the Super Bowl.

This isn't true of every workplace, of course. Many hourly workers and those in certain industries need to operate without distractions at every moment, whether for customer service reasons or due to the type of work being done. Meanwhile, all hourly employees have a responsibility not to steal time from the company and will need to remain diligently working at all times they are on the clock. For these workplaces, the next few weeks should be like any other week, not letting outside distractions interfere with the work that needs to be done. Of course, this may be an impossible feat with certain remote workers.

No matter your situation, the most critical concept to keep in mind is to ensure you and your managers are enforcing your productivity standards and associated policies in a consistent manner. Be realistic when addressing these situations, and make sure you don't come down exceedingly hard on one worker who is essentially doing the same thing as a coworker who escapes your scrutiny. By treating

workers in an inconsistent manner, you would be starting down the path to a discrimination claim.

Finally, and especially if your offices are located in Cincinnati or Los Angeles, you may want to address your company's dress code leading up to the game. If you are going to allow employees to wear Joe Burrow or Matthew Stafford jerseys or otherwise dress in team colors, make sure you are clear in your communications as to what types of team gear will be permitted. While you may not physically see many of your remote workers, you should be clear in your communications that the same dress code applies to those who plan to appear virtually for internal or external meetings or will otherwise be representing your company outside of their remote conditions during workhours. Consider also whether any safety-related concerns could arise depending on the type of work that your employees are conducting.

Winner, Winner, Super Bowl Squares Dinner: Gambling on The Big Game in The Workplace

Almost every workplace has them – Super Bowl squares pools. For many employees, it's a way to bond and have a slight distraction from work, one which can lead to employees being flush with large money payouts and office bragging rights. But employers should be aware that even small betting pools involving purchasing squares can cause the chips to fall in ways they hadn't considered.

Numerous states currently have exemptions to their laws that permit some form of betting pools. The general rule in these states allows "social" gambling, which includes the organizer not keeping a portion of the pool money and instead paying out all of the money in winnings, the pool being limited to people who all the participants know, and the dollar levels remaining relatively low. However, before employers go all in, other states still prohibit real money pools. For example, it is a crime in California to participate in a betting pool. The severity of the penalty depends on the amount of the pool. Cal. Pen. Code §§ 336.9, 337a(a). In practice, however, these laws are rarely enforced. Still, the possibility always remains for a disgruntled employee who did not hit the jackpot to inform the authorities.

Again, it is highly unlikely that you will find the police at your doorstep if your workplace has a small office pool going for the Super Bowl. However, that's not to say that other

problems couldn't arise. As you could have a significant amount of cash floating around, employers should be concerned about possible theft or accusations of theft. Another situation may involve a worker who reacts poorly to losing – either being jealous that another coworker won or believing there was collusion or cheating. Again, this can strain office relationships and will have a negative impact on the workplace.

For these reasons, it is recommended to double down and develop a gambling-in-the-workplace policy and enforce it consistently. Each employer must decide whether to prohibit betting altogether or simply put restrictions in place to keep things in check. Things to keep in mind for this policy should include a realistic assessment of the workplace culture and company values. If your company does not currently have a policy in place, now is the perfect time to create one and circulate it around the office. If the company already has a policy in place, now is the perfect time to send out a written reminder to all employees regarding the policy and expectations. By getting an early start, you can significantly reduce the likelihood of any violations.

One easy way to address this issue is what some employers have started to do – organize the workplace betting pool themselves. This typically involves setting up a voluntary workplace pool that requires no entrance fee and awards prizes with company funds. By setting up a company pool, the employer recognizes that many employees want to participate in a betting pool of some form and uses this as a morale booster with no cost to the participating employee.

The Week After the Game: Monday Morning Absences and the Championship Parade and Rally

Looking ahead to the day after the game – or perhaps a few days after the game if your city is hosting the championship parade and rally – you should prepare for some inevitable absences, no-call/no-shows, and workers arriving late. [A survey conducted in anticipation of last year's Super Bowl](#) found that an estimated 16.1 million workers were expected to take the following Monday off, with only 8.8 million workers planning to use a pre-approved day off. An estimated 4.4 million employees planned to call in sick to work and another 10.2 million employees planned to start work later than normal the day after the Super Bowl. And

most employers know that unscheduled absences are far costlier to a business than planned time off.

With nearly half of the country's workforce still working from home due to the ongoing pandemic, but with the comfort of hosting or attending social gatherings on the rise, you can expect additional, unique challenges not seen in years past. Last year's survey found that 33% of employees with remote-work arrangements said they would slack the Monday following the Super Bowl. Further, 2.9 million employees planned on "ghosting" their employer – meaning they intended on not working but also not telling anyone either. This is nearly double the number of employees who planned to ghost their employer after the 2020 pre-pandemic Super Bowl.

Now that state executive orders limiting social gatherings and mask mandates are on the decline, the anxieties of hosting or attending Super Bowl-related gatherings over the weekend will likely be on the decline as well. This, coupled with remote-work arrangements, could lead to more of the country's workforce slacking off or ghosting their employers than ever before. The ones who do show up are often distracted by water cooler chats, re-watching highlights from the game (or their favorite commercials), reviewing social media stories about the biggest plays on the field, laughing at memes about the half-time show or big plays, or nursing their hangovers. All of this adds up to diminished productivity.

When it comes to the workers who do show up for work, make sure you enforce your productivity standards just like you did in the days leading up to the game, allowing some realistic forbearance on Monday morning. If you employ workers in jobs that include safety-related responsibilities, make sure to monitor them to ensure that the "case of the Mondays" isn't a legitimate hazard that might require drug or alcohol testing or further investigation. And if you happen to work in the city of the losing team, feel free to cut your workers some slack and let them wallow in misery for a few hours.

As for the absent workers or the late-comers, you will want to enforce your attendance policies consistently. At the same time, you should keep in mind any state or federal leave laws that might protect absent workers or place administrative requirements on you before you take disciplinary action. Where allowed, you should consider

requiring “sick” employees to provide medical certification documenting the reasons for their absences, which may dissuade workers from trying to pull one over on you. If you operate in a state with a paid sick leave law, you should consult your state’s law to ensure that it does not restrict such a request.

Conclusion

Following these steps should allow you to sit back, relax, and enjoy the Super Bowl this year instead of worrying about the impact it will have on your workplace. We will continue to monitor developments related to all aspects of workplace law. Make sure you are subscribed to [Fisher Phillips’ Insight system](#) to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney or the authors of this Insight.