

THE SUPER BOWL SHOULDN'T BE A SUPER HEADACHE FOR EMPLOYERS

Insights

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Now that we know that the Kansas City Chiefs will be playing the San Francisco 49ers in Super Bowl LIV in a few weeks, it's time to assess whether this annual American tradition will create any workplace issues for your organization. With over 110 million television viewers expected to tune in – including die-hard supporters, casual fans, and those only interested in the halftime show and the commercials – you can be sure that many of your employees will be spending Sunday, February 2 watching football.

But in the days leading up to the big game, and in the days following it, you might see some impact on your workplace. There's no need for the Super Bowl to create a super headache, however. Following some simple suggestions and spending just a few minutes now to proactively prepare for these issues will ensure that you can kick back and enjoy the game without worrying about legal compliance issues.

BEFORE THE GAME: GAMBLING IN THE WORKPLACE

Employment lawyers find that they are often flooded with the same question from employers right before big-time sporting events like the Super Bowl or March Madness: "Is workplace gambling legal?" If your workplace sets up a small betting pool where participants "buy a square" or otherwise place wagers on various aspects of the game, sometimes encouraged or even organized by management, you're not alone. An estimated 54 million Americans join betting pools each year, many of them at the workplace. But you still might wonder what the risks are from a legal

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perspective. The short answer? It's probably not very risky from a legal perspective, but it could lead to other problems.

As of 2020, only 13 states have exemptions to their laws that permit some form of betting pools (generally so long as it is considered social gambling, with as the organizer not skimming money off the top, the pool limited to people you know, and the dollar levels remain relatively low), while 37 states still prohibit real-money pools. However, these laws are rarely enforced, and usually only come into play when a disgruntled participant decides to report them to the authorities.

The problems that could lead one of your workers to seek legal intervention are the kinds of problems you should be worried about in the first place. Rather than worrying about getting raided by police offices, you should be concerned about the kinds of problems that can befall a workplace when large amounts of cash are floating through the building. Theft is always a concern, and missing money can lead to hard feelings and accusations that could poison interpersonal dynamics. The same holds true for those workers who don't react well to losing (or who think they were somehow cheated); seeing someone they work side-by-side with profit while they have an empty wallet could lead to toxic discord in the workplace.

For these reasons, you should develop a gambling-in-the-workplace policy and enforce it consistently. It's up to you to determine whether you want to prohibit betting altogether or whether you'll want to put restrictions in place to keep things in check. You should assess your workplace culture and adopt rules that fit within your company values. If you don't have a policy in place, now is the perfect time to create one and circulate it around the office. If you already have one, now is the perfect time to disseminate a reminder. By reinforcing your rules now, in the days before the bets start flowing, you'll reduce the likelihood of any violations.

Many employers are deciding that the best way to address this issue is to not only jump on the workplace gambling bandwagon but to steer it themselves. They are starting a voluntary workplace pool that requires no entrance fee and awards prizes with company funds, turning what could be a problematic event into a morale booster. This will allow you to limit the amount of illegal gambling goes on in your place of business while recognizing that many people will want to have a stake in the outcome.

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DAYS LEADING UP THE GAME: PRODUCTIVITY AND DRESS CODE CONCERNS

Although gambling in the workplace is the first thing many employers think about when they consider the Super Bowl, you really should be thinking about the loss of productivity associated with the game. The consulting firm Challenger, Gray and Christmas concluded that the work slowdown in the week before the Super Bowl last year cost American businesses close to \$4.4 billion in lost productivity.

How could this happen? Now that the matchup is set, many of your workers are spending time reading about the teams in anticipation of the game. They are watching videos, scrolling through Twitter, and texting friends with their predictions instead of working – often using work-provided devices. While it you could (and should) have an office policy in place restricting the kinds of online activities that your employees can perform on business computers and company-issued smartphones, it's not hard to figure out that most of your employees can circumvent this policy by using personal devices.

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 true all throughout the year, and not just leading up to the Super Bowl.

Therefore, in the modern workplace, most companies ultimately care about whether the assigned work is getting done, avoiding the hassle of micromanaging every moment of the day. Instead, in such workplaces, 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 employ mainly salaried employees — it is better to have happy employees (which will in turn make them 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.

Regardless of the type of job your workers are doing, 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 San Francisco or Kansas City, you may want to address your company's dress code leading up to the game. If you are going to allow workers to wear Patrick Mahomes or Jimmy Garoppolo 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. Your employees should understand that they should still dress in appropriate attire while supporting their team. Consider whether any safety-related concerns could arise depending on the type of work that your employees are conducting.

THE WEEK AFTER THE GAME: MONDAY MORNING ABSENCES AND CHAMPIONSHIP PARADE

Looking ahead to February 3 – and perhaps a few days later if your company is located in the city that will be hosting the championship parade and rally – it would not be surprising to experience some absences, no-call/no-shows, and workers arriving late. Last year, in fact, approximately 13.9 million workers called in "sick" or used PTO the day after the Super Bowl, while millions more showed up late. And most employers know that unscheduled absences are far more costly to a business than planned time off.

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, 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. You may want to allow some realistic forbearance on Monday morning. If you employ workers in jobs that include safety-related responsibilities, make sure to monitor them to make sure 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 or local jurisdiction with a paid sick leave law, you should consult your state’s law to ensure that it does not restrict such a request.

Following these steps should allow you to sit back, relax, and actually enjoy the Super Bowl this year instead of worrying about the impact it will have on your workplace. For more information about how the Super Bowl might impact your workplace, contact your Fisher Phillips attorney.

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