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How Employers Can Avoid Getting Blitzed By Fantasy Football

By Ben James

Law360, New York (September 08, 2014, 3:53 PM ET) -- Now that the National Football League season has kicked off, employers are huddling with attorneys to address concerns that worker participation in fantasy football leagues might sack productivity and expose them to lawsuits.

While productivity is at the forefront of companies' concerns when it comes to fantasy football and the workplace, legal problems can trip employers up as well. Gambling laws may be implicated if money changes hands, and employees who feel shunned or pressured to participate despite religious objections could cite those negative experiences to support a discrimination claim.

Attorneys say clients have been coming to them with questions about potential legal liabilities as well as queries about how to tackle any potential drain on their workers' output. But they note that fantasy football can also encourage camaraderie and communication between workers, building team spirit.

Different workplaces may call for different approaches. But lawyers generally advise against outright bans on fantasy football and recommend coaching rank-and-file workers on what's expected of them as well as training front-line supervisors to stay attuned to any potential problems that may develop.

"If it's managed correctly, it could be it can be a really positive thing," said Barbara Hoey, chairwoman of Kelley Drye & Warren LLP's labor and employment practice. "Make sure employees don't allow it to interfere with their work, make sure employees don't exclude anyone in a way that looks discriminatory or downright mean, and train managers to remind everyone that while we are in fantasy football season, the regular rules still apply."

Employers that are comfortable with employee participation in fantasy football should make their game plan clear to employees. Fantasy football may be a relatively new, Internet-age wrinkle in the workplace, but the ground rules for what constitutes appropriate employee conduct are long-settled, lawyers said.

"Have fun with it, but don't exclude people from participating for any impermissible reason or pressure them to join," said Michael Arnold, a partner at Mintz Levin Cohn Ferris Glovsky & Popeo PC. "And we expect you to come here and work, and this should not interfere with your job in any way."

Not only will an outright ban on fantasy football be tough to enforce in a smartphone-saturated workforce, but if some employees are disciplined over fantasy football activity on work time and others aren't, the employer could be accused of discrimination, lawyers

said, adding that concerns about fantasy football-related allegations in the discrimination context aren't purely theoretical.

In a race discrimination case against Cingular Wireless Employee Services LLC, which was **revived by the Sixth Circuit in October** and involved a black worker who said he was laid off despite exceptional performance, the plaintiff received a low score in a 2004 annual evaluation in part because he allegedly worked on fantasy football during a training session.

A sex bias case filed against Cook County, Minnesota, by a former deputy in 2006 alleged that she was excluded from fantasy football leagues and other social events.

And though an appellate court upheld a win for the employer in 2004, a New Jersey state court case brought by two brokers against UBS/Paine Webber Inc. involved a claim that a manager said the office fantasy football league was "the gentiles against the Jews and the plaque should never hang in anybody's office that doesn't celebrate Christmas."

The potential discrimination issues that come with exclusion from fantasy football are essentially the same as the issues attendant to more traditional worker excursions or gatherings, like book clubs or hunting trips, lawyers say.

"If certain people are excluded, it could be viewed as discrimination, but only to the extent that that exclusion actually impacts working conditions," Ford & Harrison LLP partner Andy Tanick said.

League members getting more face time with the boss, raises or promotions could potentially lead to legal issues, he added.

Employees should be directed to invite their co-workers to take part in fantasy football, and managers should be attuned to any potential issues related to exclusion and ready to nip any potential problem in the bud, lawyers say.

"Being a good manager means taking the pulse of your department," Hoey said.

Tanick recommended discouraging supervisors from being in the same fantasy football leagues as the workers they oversee, though he acknowledged that the feasibility of such a policy depends on the specifics of the workplace.

In addition to discrimination, one thing that employers should be on the lookout for — and prohibit in the workplace — are fantasy football arrangements that amount to gambling, attorneys say.

Fantasy football is a perfectly legal, billion-dollar industry in which big names like ESPN and CBS sponsor host websites where anyone can play, Hoey noted. But if you have a league where people in the office put in money that funds a prize for the winner, an employer might need to throw a flag.

"Technically, that's gambling, and gambling in most states is illegal," she said. "You certainly don't want to encourage or allow anything in the workplace that is illegal."

Employers might want to actually take a proactive role and organize an office fantasy football league, and if so, the prize for the victor should be something nonmonetary, like a trophy, Hoey added.

And if someone is running a fantasy football pool for profit — making all the participants chip in and then taking a cut before paying out to the winner or winners at the end of the season — that could run afoul of the law, Tanick said.

"Then it's almost more like a bookmaking operation," Tanick said, adding that while a company may not be liable for an employee's misconduct, authorities swooping in to grab company computers and subpoena emails would be bad news.

"I don't know that the employer could be implicated, but it could be a major inconvenience and certainly lead to negative publicity," he said.

Despite the potential problems — and while it may not be feasible for every business — taking a permissive approach toward fantasy football while reminding workers of the employer's expectations may be a smart play.

Many workers will be receptive to the message that fantasy football shouldn't hamper their productivity and appreciate their employer giving them the opportunity to participate, Arnold noted.

"If you're enhancing morale, increasing retention rates and loyalty, you may actually have a long-term net positive here," Arnold said.

--Editing by Jeremy Barker and Brian Baresch.

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