

Fantasy Football – Real World Concerns

By Christopher D. Lang (Dallas)

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.

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The Feds Are In The Lobby

And They Want To Review Your H-1B Records

By Sarah Hawk (Atlanta)

The number of H-1B audits will continue to rise in 2010, so H-1B employers should be prepared for unannounced site visits from U.S. Citizenship and Immigration Services (USCIS) to confirm the information submitted in H-1B filings. The USCIS Office of Fraud Detection and National Security (FDNS) has recently commenced an audit of the H-1B program.

Under H-1B regulations, FDNS does not need a subpoena to investigate H-1B employers. One of the USCIS Service Centers has already transferred approximately **20,000** cases to FDNS as part of the H-1B assessment program. As a result, it's clear that site visits will continue and all H-1B employers must be prepared for an unannounced site visit at anytime.

As a part of the audit program, investigators are verifying the accuracy of the information listed by employers in H-1B petitions. Since 2005, H-1B employers have paid a \$500 fraud-prevention fee, which assists in funding this investigative program. Fraud in an H-1B petition may include any intentional misrepresentation, falsification or omission of a material fact in the H-1B petition and supporting documentation.

Overview

The H-1B category allows an employer to sponsor a foreign national for employment in a specialty or "professional" position. To qualify for H-1B status, the position must be one that requires at least a bachelor's degree in a specific, relevant field and the foreign national must possess the relevant academic degree or the equivalent of a U.S. bachelor's degree by virtue of education or experience. As part of the H-1B petition process, you must provide information about an employee's specific job title, duties, wage, and location. Once the petition is approved, you cannot change the terms and conditions of the H-1B employee's employment without notifying USCIS.

Types Of H-1B Fraud

The purpose of the H-1B site visit is to discover H-1B petitions that were filed based on fraudulent information. Types of misrepresentations uncovered through the H-1B audit program include cases where the business did not exist, educational degrees or experience letters submitted were confirmed to be fraudulent, the H-1B employee was performing duties that were significantly different from those described in the H-1B petition, or the H-1B employee was not receiving the required wage that was stated in the petition.

"Benching" an H-1B employee due to lack of work is not allowed. You are obligated to pay the required wage to the H-1B worker if the unproductive status is at the direction of the employer. Terminating an H-1B worker prior to the expiration of their H-1B validity also triggers an employer's obligation to offer return transportation for employees to return to their last residence abroad.

The Site Visit

An FDNS investigator may arrive unannounced either at the employer's principal place of business or at the employee's worksite location listed on the H-1B petition. Upon arrival, the investigator will want to speak with the employer's representative who signed the H-1B petition.

The purpose of speaking to the employer's representative will be to verify:

- the employer's business, locations, number of employees, and revenue;
- the H-1B employee's date of employment, job title, duties, work location, and wage;
- the number of H-1B petitions the employer has filed; and
- the authenticity of company representative's signature on the H-1B petition.

To further confirm the accuracy of the information on the petition, the investigator may also ask for a copy of the company's tax returns, quarterly wage reports, and other company documentation to establish that the business is legitimate and information in the petition is accurate.

Next, the investigator may ask to speak with the H-1B employee to confirm:

- employment dates, job duties, salary, and work location;
- education background and previous employment experience;
- current address and information about dependents; and
- whether the H-1B employee paid any of the H-1B filing fees, and attorneys' fees.

In addition, the investigator may request to speak with the H-1B employee's direct supervisor or a co-worker to further confirm the H-1B employee's and representative's statements. The investigator may request a tour of the facility and ask to take photographs of the facility. This sounds like a lot, but a typical site visit should not last longer than one hour.

Here are some tips for preparing for a site visit:

Review Your H-1B files

Ensure that all information provided in the H-1B petition is true and accurate. Check the Labor Condition Application public access file for each H-1B employee to verify that the file contains all required documentation.

Keep copies of H-1B petition documentation and be familiar with the information. During a site visit, if the company representative doesn't know the answer to a specific question, don't improvise or guess about the answer. Instead, determine the correct response and follow-up with the investigator later.

Consult your immigration counsel to amend any H-1B cases if there are substantial changes in work duties, location, or salary to determine whether an amended H-1B petition should be filed.

Withdraw an H-1B petition if an H-1B employee's employment ends before the end date listed on the H-1B approval notice. This requires written notification to USCIS and DOL.

Establish A Site Visit Policy

Designate an H-1B company representative, and make sure the representative is prepared to answer questions. It's a good idea to designate an alternative contact person if the company representative is not available.

Notify all of your H-1B employees of the possibility of a site visit. Instruct H-1B employees that they should not speak with an investigator without the company representative's knowledge.

If a H-1B employee is placed at a client's facility, notify the client of the possibility of a site visit. The client should be prepared to discuss the terms and conditions of the H-1B employee's placement at its facility, including the agreement between the H-1B employer and client for the placement.

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Worker (Mis)classification Can Lead To Trouble

By Joel W. Rice and Brian K. LaFratta (Chicago)

Over the past year, federal and state governmental agencies have signaled their intent to more seriously investigate the misclassification of employees as independent contractors. For various reasons, employers often find it desirable to classify certain workers as independent contractors, but state and federal agencies often look at classification decisions very closely.

One reason is because independent contractors are not covered by most employment laws since they are not “employees.” Additionally, classification of individuals as independent contractors deprives federal and state governments of tax revenue for such individuals, as they are not subject to payroll taxes. For instance, the federal government lost an estimated \$34.7 billion in tax revenue between 1996 and 2004 due to such classification of workers.

While there are instances where individuals are legitimately classified as independent contractors, such individuals are often in fact misclassified employees – and penalties can be severe.

“Hey You!” What You Call Them Doesn’t Count

Clearly, just calling someone an independent contractor does not make them one – and that’s so even if the employee has agreed in writing to accept that status. While state laws vary somewhat, generally, workers are considered employees if they are subject to another’s right to control the manner and means of performing the work. In contrast, independent contractors are individuals who obtain customers on their own to provide services. They may have other employees working for them, and they are not subject to close control over the manner by which they perform their services.

The independent contractor relationship can offer advantages to both businesses and workers. Businesses may choose to hire independent contractors because it enables them to easily expand or contract their workforces to accommodate workload fluctuations or fill temporary absences. Workers may choose to become independent contractors to have greater control over their work schedules or when they pay taxes, rather than have employers withhold taxes from their paychecks.

But there are incentives to *misclassify* employees as independent contractors. While employers are generally responsible for matching the Social Security and Medicare tax payments their employees make and paying all federal unemployment taxes and a portion of or all state unemployment taxes, independent contractors are generally responsible for paying their own Social Security and Medicare tax liabilities and do not pay unemployment taxes because they are not eligible to receive unemployment insurance benefits. In addition, businesses generally are not required to withhold the income, Social Security, or Medicare taxes from payments made to independent contractors that they are required to withhold for their employees. Independent contractors may also be responsible for making their own workers’ compensation payments, depending on their state program.

Proposed Federal Legislation . . .

Last year, the Taxpayer Responsibility, Accountability and Consistency Act of 2009 was introduced in Congress. The proposed legislation would allow individuals classified as independent contractors to petition the IRS to determine their proper classification, would limit the ability of employers to classify individuals as independent contractors, and would increase penalties for misclassification. Both bills are in committee. If passed, the legislation would expose employers with independent contractors to increased likelihood of investigation and more severe monetary penalties than under current law.

. . . And Heightened Enforcement Of Existing Laws

Under existing employment laws, federal and state agencies are beginning to scrutinize employers for potential misclassification. On the federal level, the Government Accountability Office (GAO) recently issued a detailed report entitled “Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention.” You can view the report online at www.gao.gov/new.items/d09717.pdf.

The GAO report notes that policing misclassification had been historically difficult because the two agencies directly affected by misclassification issues, the U.S. Labor Department (DOL) and the IRS, do not share information. The GAO report also determined that the DOL did not investigate misclassification as such, but rather addressed it in the context of other wage complaints, which compromised its ability to police misclassification. The report concluded that the DOL was neglecting to review key documents or tax filings in the course of conducting investigations, and as a result was not proactively addressing the problem of employee misclassification.

The report also criticized the DOL for not educating employers and employees about misclassification and for failing to assess appropriate penalties to employers who were intentionally misclassifying their employees. Finally, the report also noted that the DOL does not generally share information with its state counterparts. According to the GAO the IRS has a better track record with respect to misclassification enforcement and had much more effective investigatory and enforcement programs in place than did the DOL, but the effectiveness of such programs was limited by the lack of communication between the DOL and the IRS.

There are 19 specific recommendations in the report, which are addressed to the heads of the DOL and IRS, aimed at helping prevent and correct employee misclassification. These include: clarifying the definition of independent contractor under federal law; providing employees with greater rights to complain about misclassification; defining misclassification as a wage law violation; revising the Internal Revenue Code to make misclassification more difficult; increasing education and outreach; requiring withholding of taxes for independent contractors; enhancing compliance with IRS regulations by employers; and increasing coordination and information sharing between federal agencies.

Although the recommendations were advisory, the GAO Report stated that “both DOL and IRS generally agreed with our recommendations, and either agreed to implement or to take steps consistent with our recommendations, such as exploring their implementation.” Consistent with the report, the IRS has signed information sharing agreements with labor agencies in 29 states, through which the IRS and the state agencies will share the results of misclassification audits. Additionally, in February 2010, the IRS will begin an audit of 6,000 different employers over three years in an effort to uncover occurrences of misclassification and to recover lost revenue. It’s likely that the DOL will increase its enforcement activity in light of the GAO report as well.

At the state level, many states, (including Colorado, Illinois, Maryland, Massachusetts, New Jersey, and New Mexico) have passed laws aimed at misclassification in the construction industry, an industry with a history of misclassification issues. By way of example, the Illinois Employee Classification Act, which became effective in January 2008, was enacted with the stated purpose of recapturing lost tax revenue. The Act restricts the ability of construction contractors to classify individuals as independent contractors. It also provides the Illinois Department of Labor with broad investigatory and enforcement powers, and establishes penalties of up to \$1,500 per day for a violation of the Act, as well as liquidated damages.

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During The Investigation

When an investigator arrives, obtain name, title, and contact information, and inform the investigator that you would like to contact your immigration attorney. You should immediately call your legal counsel for guidance during the visit. FDNS will allow counsel to be present by phone if requested but will not typically reschedule a site visit for counsel to be physically present during the site visit.

Take detailed notes of the meeting with the investigator and keep a list of all documentation you supply. If the investigator wishes to tour the facility or speak with the H-1B employee or other employees, the company representative or another designated individual should accompany the investigator. The investigator should be accompanied at all times during the visit and should not be permitted to roam freely throughout the employer's facility.

Penalties

Once the site investigation is complete, the investigator will make a determination about whether the petitioner or beneficiary committed fraud in the H-1B petition. If the investigator concludes that fraud has been committed, the case will be referred to Immigration Customs and Enforcement (ICE) for consideration of a formal criminal investigation and prosecution. This may lead to criminal or civil penalties.

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If ICE does not accept the case for investigation, FDNS will forward its finding to USCIS which may deny or revoke the H-1B visa. H-1B employees who are in the United States will be placed in removal proceedings. A finding of fraud by an employer will detrimentally impact an employer's ability to sponsor other employees for immigration benefits in the future.

Summing It Up

The H-1B visa is a popular category for employers seeking to hire professionals. Whether you are an employer preparing to file a new H-1B petition or whether your company currently employs H-1B workers, you must ensure that the information provided in a H-1B petition is accurate and that the company remains in compliance with H-1B requirements. Audits are part of the program, however, and remember that an H-1B audit may also trigger an I-9 audit as well. For help with both, visit our website at www.laborlawyers.com or contact any attorney in our Global Immigration Group.

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It also creates a private cause of action, with the right to backpay, lost benefits, and liquidated damages. Such damages can be significant. Indeed, in December 2009, the Illinois Department of Labor imposed a \$328,500 penalty on a construction contractor based on the misclassification of 18 employees as independent contractors. This is the largest penalty to date under the Illinois Employee Classification Act.

Other states, such as Iowa, Michigan, New York, and Wisconsin, have created taskforces designed to uncover instances of misclassification. These taskforces have been active and effective. In 2009, New York's taskforce reported that it uncovered 12,300 instances of misclassification, which resulted in \$6 million in employment taxes and penalties.

What This Could Mean To Your Business

The revenue shortfalls at the state and federal level during the past several years appear likely to continue for the foreseeable future. Governments, which are loathe to raise taxes or cut services, are searching for ways to make up this shortfall. It is therefore likely that governments will continue the trend of increased and more serious worker misclassification investigations, as occurrences of misclassification often result in significant penalties.

In addition to more aggressive investigations, state and federal laws may soon be amended to make the classification of individuals as independent contractors more difficult and riskier. The heightened governmental attention to these issues will also lead to more private civil lawsuits, as the damages available in such cases make them attractive to plaintiffs' attorneys.

In light of these developments, you should assess carefully how you classify your employees and ensure that any individuals classified as independent contractors are, in fact, properly classified. It is far better to internally uncover and proactively address any potential misclassification issues, rather than to learn of such issues for the first time when confronted by a governmental audit. And because of the technical nature of assessing whether employees are properly classified, it's a good idea to seek the advice of knowledgeable employment counsel.

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