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## Cinderella Teams! The Big Dance! Bracketology! Is March Madness Hype Problematic for Your Employees?

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It's March and again time for the NCAA basketball tournament, a.k.a. "March Madness." As the 65 teams are selected, the brackets are announced, the pools are printed, and the agony of whether to select a Cinderella team or your alma mater begins. Talk of "picks" and the "final four" seems everywhere.

Gambling in this country is widespread; some form of gambling is legal in almost every state, and about 85 percent of U.S. adults have gambled at least once in their lives. So, not surprisingly, March Madness means office pools and friendly wagers. Sports analyst Danny Sheridan estimates that about \$6 billion dollars are wagered illegally on March Madness, making it the fourth largest sports betting event. A fair amount of that \$6 billion is wagered through office pools. Office pools certainly can be a lot of fun, usually involve only a few dollars, and can be a source of great employee camaraderie, but they also can present some risk. So, should employers be concerned about office pools and the bigger issue of gambling in the workplace?

Yes, because employers must be sensitive to the presence of "problem gamblers" in the workplace. According to the National Council on Problem Gambling ([www.ncpgambling.org](http://www.ncpgambling.org)), problem gambling is "behavior which causes disruptions in any major area of life – psychological, physical, social or vocational." That organization estimates that there are about 4 to 6 million U.S. adults who could be considered problem gamblers because they

EMPLOYERS THAT ALLOW SOME FORMS OF GAMBLING MUST BE PREPARED FOR THE POSSIBILITY OF COMPLAINTS FROM EMPLOYEES WHO MAY BE UNCOMFORTABLE WITH OFFICE POOLS.

are experiencing some of these disruptions due to their gambling behavior. Anti-gambling groups therefore often urge employers to stop sanctioning office pools, such as the pools that spring around March Madness.

Generally, office pools do not cause significant disruption in the workplace or have a major impact on productivity. However, as with anything, there is a possibility that pools can get out of hand. It is important to remember that sports gambling, especially on college sports, is illegal in almost every state. Although companies that look the other way when a pool is circulated do not face a great risk of a criminal investigation, company

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management should not officially sanction gambling pools. It is advisable to keep the amounts wagered small and avoid using the Internet to distribute pools or post results.

An employer also should consider having a written policy regarding workplace gambling to prevent things from getting out of control. The policy should define gambling, what behavior is prohibited, and what discipline will be taken against employees who violate the policy. Are all forms of gambling prohibited in the workplace and on company property? Are there exceptions for sports pools, raffles, or company-sponsored events supporting a specific cause?

Employers that allow some forms of gambling must be prepared for the possibility of complaints from employees who may be uncomfortable with office pools. For example, a complaint of a hostile work environment by an employee based on religious beliefs would not be surprising if the employee is harassed or harshly ridiculed for his beliefs and refusal to participate in a pool. Employers should be prepared to handle these complaints in the same fashion as any workplace complaint. After an assessment of the situation, the appropriate action needed to resolve the issue should be taken, and there should be a follow-up conversation with the complainant to make sure the solution cured the problem.

For most employees, March Madness is an exciting time and is not problematic. However, for those employees who have a gambling problem or addiction, March Madness pools or other games of chance may accelerate or trigger a growing gambling problem. An employer's supervisors should receive training on recognizing signs of problem gambling and on handling the situation. Some common signs of a gambling problem are:

- absenteeism and/or tardiness because of late nights of gambling-related activities, such as card games or trips to casinos
- long lunch periods or disappearance during the workday, especially in the afternoon
- use of vacation time in single-day increments instead of a block of days
- moodiness or irritability
- excessive use of the telephone, e.g., calls to bookies, off-track betting parlors, or creditors for money
- obsessive interest in sports scores or results
- theft, fraud or embezzlement
- garnishment of wages
- frequent requests for pay advances.

If an employee exhibits signs of problem gambling and this behavior is affecting his or her performance and productivity, the employer should express concern to the employee in a non-judgmental way. The employee should be reminded of the employer's Employee Assistance Plan (EAP) or other support organizations, such as Gamblers Anonymous or credit counseling.

The Americans with Disabilities Act specifically excludes compulsive gambling as a disability. Therefore, an employer is not obligated to accommodate an employee who is a pathological gambler, and cannot be held liable under this law for discrimination or failure to accommodate. However, after becoming aware that an employee is a "problem gambler," the employer should provide the employee with information about available counseling.



## Peppercast: Top Ten Things to Do in 2010

As we embark upon a new year, Susan Lessack, a partner in the Berwyn and Philadelphia offices of Pepper Hamilton, shares a checklist of key "to dos" in order to minimize the risk of employment-related litigation.

Listen today by visiting the Labor and Employment Law section of [www.pepperpodcasts.com](http://www.pepperpodcasts.com).

## Top Ten Things to Do in 2010

SUSAN K. LESSACK | LESSACKS@PEPPERLAW.COM

As you gear up for a new year, here are some key “to do’s” to minimize the risk of employment-related litigation:

1. Make sure your company has considered how a potential pandemic of the H1N1 virus could affect the operations and finances of your company and those of your suppliers, vendors and contractors. You also should estimate the effect of key employee absences; cross-train employees to help maintain vital functions; plan to use e-mail and teleconferencing more, to minimize face-to-face contact; and revise sick leave policies to reflect the new realities a pandemic can bring. To help allay any anxiety your employees may have about H1N1, you also should maintain up-to-date pandemic information from reliable sources, including strategies to reduce the spread of the flu through good hygiene, and be sure your employees know you’re prepared to handle the challenges of a pandemic.
2. The Genetic Information Nondiscrimination Act (GINA), designed to protect Americans against discrimination based on their genetic information when it comes to health insurance and employment, is now in effect. So now is the time to make sure that genetic information is listed as a protected class in all relevant policies, such as your non-discrimination and anti-harassment policies. Also, consult counsel about GINA’s impact on health risk assessments used in conjunction with wellness programs.
3. If you are a federal government contractor, make sure you are in compliance with the regulations issued by the Office of Federal Contract Compliance Programs (OFCCP), which require contractors that have \$50,000 or more in government contracts and 50 or more employees to have an affirmative action plan. The Obama Administration requested an increase in the 2010 budget of the OFCCP from approximately \$82 million to over \$109 million, as well as a significant increase in employees, and we would expect more aggressive enforcement activity. The beginning of the year is an opportune time to review recruiting and promotion practices to maximize the presence of females and minorities in the applicant pool.

REMEMBER THAT EMPLOYEES WHO FEEL THEY ARE TREATED FAIRLY AND WITH RESPECT ARE LESS LIKELY TO BRING CLAIMS AGAINST THEIR EMPLOYERS.

4. Review your disability leave policies to ensure that they do not contain inflexible provisions providing for automatic termination after an employee has been out for a certain period of time. The EEOC has recently been challenging those types of policies, taking the position that inflexible leave policies violate the Americans with Disabilities Act because they do not contemplate engaging in the interactive process to determine if additional leave or some other reasonable accommodation might be warranted.
5. Audit your wage-and-hour practices, especially whether exempt employees are classified properly and whether non-exempt employees are paid for all time worked, as well as overtime. Plaintiffs’ class action lawsuits under the Fair Labor Standards Act continue to make the news. Recently, several class action lawsuits have been filed against Pennsylvania hospitals, claiming that the plaintiffs were required to perform work during unpaid meal breaks.
6. Review any relationships with independent contractors to evaluate whether those individuals are classified properly or whether they should be classified as employees. If a worker who is actually an employee is treated as an independent contractor, the company could face tax penalties, liability for failure to pay overtime (if applicable), liability for failure to provide benefits, and be responsible for unemployment compensation.

7. In conjunction with the amendments to the Americans with Disabilities Act and the anticipated final regulations, consider having a policy that advises employees who need a reasonable accommodation to request one. In addition, make sure that managers and human resources personnel are trained in how to engage in the interactive process with employees who request reasonable accommodations.
8. In anticipation of the future passage of some variant of the Employee Free Choice Act and the Obama nominations to the National Labor Relations Board being confirmed by the Senate, review existing communication systems to ensure that employees have a way of raising concerns, and train managers to be effective in listening to and addressing those concerns. Companies should be assertive in using surveys, feedback systems, and audit teams to “take the pulse” of their employees. They also should educate managers on the risks of union representation and how to respond quickly to provide fast responses at the first hint of any organizing campaign.
9. Develop a policy concerning employee use of social media, such as blogs, Facebook, MySpace and the like. The policy should address whether employees can use such media while at work or on company computers, and should remind employees not to post anything that is harassing, defamatory, offensive or contains confidential company information.
10. Remember to document and communicate to employees any performance problems. Given the economy and the number of unemployed, we anticipate an increase in employment discrimination cases. Often, the best defense in a case brought by an employee who was terminated for poor performance is a strong record reflecting that the employer advised the employee of his or her performance problems, and afforded the employee opportunities to improve. In addition, be careful to review every adverse employment decision for consistency with past decisions affecting similarly situated employees, to minimize the risk that an employee will be able to prove that other employees were treated more favorably.

And, finally, remember that employees who feel they are treated fairly and with respect are less likely to bring claims against their employers.

## Webinar: Hidden Employment Law Risks in Doing Business in The United States

Wednesday, March 24, 2010

11:00 a.m. - 12:00 p.m. EASTERN

Pepper partner Richard J. Reibstein will discuss the hidden employment law risks Indian companies can face when conducting business in the United States or buying companies in the United States.

Topics will include:

- protecting trade secrets from employee theft
- avoiding liability when hiring employees from competitors
- creating state-of-the-art non-compete and non-solicitation agreements
- understanding the new tax and employment law risks from using independent contractors
- looming liabilities related to employment in the context of M&A transactions.

Moderator

Valérie Demont, partner, Pepper Hamilton LLP

Speaker

Richard J. Reibstein, partner, Pepper Hamilton LLP

To register, please visit

<https://www.regonline.com/employmentlaw>.

Contact Brian Dolan at 215.981.4568 or [dolanb@pepperlaw.com](mailto:dolanb@pepperlaw.com) with any questions.

## Understand How Whistleblower Laws Affect Employers, Employees

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Whistleblower statutes are designed to protect employees who report their employers for violating civil regulations or criminal laws. But that can seem like a risky proposition for employees, who may fear that reporting their employer to the authorities could cost them their jobs.

That's why whistleblower laws exist: To protect the public from unlawful or fraudulent conduct, they prohibit retaliation against employees who complain to public agencies about employer actions that may create a significant danger to the public health or safety or that otherwise may be a crime or regulatory violation.

Those laws also provide monetary damages for people who have lost their jobs after having "blown the whistle."

Some states, such as Pennsylvania, only protect public employees from retaliation for complaining about their employer violations. Pennsylvania courts, however, have reasoned that the protections of its whistleblower law extend to employees of health care providers and other private organizations that receive public monies administered by the Commonwealth. Other states, like California and New Jersey, extend those protections to both public and private employees who step forward to report their employers.

### WHAT IS WHISTLEBLOWING?

Most whistleblower statutes define protected activity to include:

- reporting to a public body a violation of a law, regulation or rule
- being asked by a public body to participate in an investigation.

Violations of whistleblower laws can only occur if the employer takes some disciplinary or other employment action after it learns an employee has blown the whistle. When an employee has made a report to a public authority or participated in an investigation, the whistleblower's case often will turn on whether the employer knew about the employee's alleged protected activity.

An employee must do more than merely state that he or she is going to complain about the employer's actions.

In some states, such as Michigan, plaintiffs can establish engagement in protected activity by demonstrating that they were *about to* report a suspected violation. Those laws, however, do not create a cause of action for private employees who only internally report issues of public concern to supervisors or upper-level management.

### BURDEN ON EMPLOYEE

A whistleblower doesn't have to demonstrate an actual violation of the law as long as the employee has a reasonable and good faith belief that a violation of the law has occurred or will occur in the future.

The whistleblower always bears the burden of establishing that he or she was justified in believing that a report was necessary. Accordingly, it's not protected whistleblowing when:

- the employee has no evidence of a violation of the law
- the employee's suspicions were not reasonable at the time he or she reported or made a threat to report.

In most states, including Pennsylvania, an employee whose subjective belief that wrongdoing has occurred is motivated solely by personal interests (not public concerns) generally won't be successful in establishing a whistleblower claim. A good faith report of wrongdoing would involve a report of violations of statutes or regulations that are not merely technical or minimal in nature.

### PROTECTION FROM RETALIATION

Each state has its own unique interpretation of its specific whistleblower statutes. However, most state courts have interpreted whistleblower laws using retaliation standards set by state civil rights acts.

As many employers have discovered, whistleblowers don't have to meet particularly onerous legal standards to make retaliation claims. Under retaliation standards, the employee must establish that he or she

1. engaged in a protected activity and
2. suffered an adverse employment action and

## Pepper Hamilton Enhances Labor and Employment Practice With the Addition of Matthew V. DeIDuca

Matthew V. DeIDuca has joined Pepper Hamilton as a partner in the Labor and Employment Practice Group, resident in the Princeton office.

Mr. DeIDuca is an experienced trial attorney and labor lawyer. His trial experience includes complex commercial and real estate litigation, individual and class employment cases, and product liability litigation. As a labor lawyer, Mr. DeIDuca regularly represents employers in state and federal labor and employment litigation involving claims of discrimination, wrongful discharge and defamation, as well as other related disputes. Mr. DeIDuca also represents employers in litigation to protect confidential information and trade secrets and to enforce restrictive covenants. In addition, he represents management in labor negotiations and unfair labor practice proceedings before the National Labor Relations Board. Mr. DeIDuca has handled labor arbitration proceedings in a variety of industries and counsels employers on employment and business matters.

“Matthew is a highly regarded attorney and a welcome addition to both the Princeton office and the labor and employment practice,” said Michael J. Mann, partner in

charge of Pepper’s Princeton office. “His extensive trial experience greatly increases our commercial litigation strength in New Jersey. We’re excited that he has chosen to join Pepper Hamilton.”

Jonathan Kane, partner and chairman of the firm’s Labor and Employment Group says, “Matt exemplifies the very best at what we do. He’s an experienced and excellent labor and employment counselor, and a great litigator with a wide range of successes in jury trials and class actions. We are delighted he is on board.”

Prior to joining Pepper Hamilton, Mr. DeIDuca was a partner with Dechert in Princeton.

Mr. DeIDuca noted, “Pepper’s combination of top quality lawyers and competitive pricing gives me the perfect platform for my client base. I am very excited about the opportunities here.”

Mr. DeIDuca is a 1986 *cum laude* graduate of Rutgers University School of Law. He earned his B.A. from Ursinus College in 1983.

3. can show a causal connection between the protected activity and any adverse employment action.

To win a whistleblowing retaliation case, an employer must articulate a legitimate business reason for the adverse employment action. If the employer offers a legitimate reason for the employment action, the employee has the opportunity to prove that it wasn’t the true reason, but only a pretext for retaliatory action.

Because retaliation claims are often fact intensive, many judges are quick to order trials.

Whistleblower statutes offer powerful protection for employees who attempt to expose their employers’ wrongdoing. Public and private employers increasingly face lawsuits filed by former employees claiming to be victims of retaliation for reporting violations of the law.

The state law remedies to which a successful whistleblower may be entitled include a full range of damages, such as back pay and front pay, damages for emotional distress, legal costs and reasonable attorney fees. By protecting whistleblowers, these acts also serve as another weapon to police employer conduct and thereby protect the public.