ARTICLES >>
Expanding the Games: Tension Between League Expansion and Anti-Gambling Sentiment ................................................................. 2
   By Michael Singer
   This article discusses the relationship between league expansion in professional sports and Daily Fantasy Sports regulation in those cities.

From the Journal of an NBA Cheerleader: Employer Compliance with the Fair Labor Standards Act........................................................................................................ 4
   By Maacah R. Scott
   This article discusses the uncertainty surrounding whether cheerleaders for professional sports teams qualify as employees under the Fair Labor Standards Act

NEWS AND ANNOUNCEMENTS
SAVE THE DATES:

   APRIL 6, 2017: ABA Video Games & Digital Media Conference (San Francisco, CA)

   MARCH 30–31, 2017: International legal Symposium of the World of Music, Film, Television, & Sports (Coral Gables, FL)

Expanding the Games: Tension between League Expansion and Anti-Gambling Sentiment
By Michael Singer*

Over the past decade, the National Football League (“NFL”) international series has expanded the NFL’s fan base and promoted the spread of football’s storied traditions. However, while crossing borders to celebrate football’s heritage in innovative ways, the expansion has raised questions about the future of the game. Most prominently, the NFL’s growth has fueled the prolonged legal battles surrounding sports betting.¹

American professional sports continue to expand their presence in markets abroad where gambling is not only an accepted practice, but is a fervent part of the culture. Since 2007, the NFL has hosted eighteen games as part of its international series, seventeen of which have been held in London.² Establishing such a strong relationship with the United Kingdom is significant because gambling is an integral part of the English sports experience. The Nation’s most prominent professional conference, the English Premier League (“EPL”), actively promotes gambling. Not only can fans attending EPL games place wagers at stadium betting booths, but gambling companies also sponsor many of the EPL’s organizations.³ While the NFL continues to promote its annual games in an open betting environment, the U.S. judicial system stifles sports gambling.

The Professional and Amateur Sports Protection Act (“PASPA”), which was passed as federal law in 1992, solidified the ban on sports gambling in the United States.⁴ Pursuant to PASPA, sports betting is illegal in all but four states: Nevada, Oregon, Montana, and Delaware.⁵ However, PASPA has come under scrutiny in recent years and faced legal challenges—particularly in New Jersey, which attempted to legalize sports betting in 2014.⁶ Governor Chris Christie signed controversial legislation into law only to be met by a successful opposition from

---

five major sports leagues, including the National Collegiate Athletic Association (“NCAA”), National Basketball Association (“NBA”), NFL, National Hockey League (“NHL”), and Major League Baseball (“MLB”).

The NFL has remained opposed to the legalization of sports gambling as a means to preserve the “integrity of the game.” NFL Commissioner Roger Goodell has taken the position that “an association with gambling would damage fans’ perception of the NFL” and negatively impact the League’s reputation. Despite its staunch opposition to the legalization of sports betting, the NFL appears dedicated to the continuation of its international relationships. As of 2015, the NFL committed to host games in London through 2020, with an option to extend through 2025. Commissioner Goodell has made clear that the NFL’s stance has remained “very much opposed to legalized gambling on sports” and will not be altered based on continued international expansion. The NFL takes the position that its temporary presence in the betting culture is a means to expand their brand, while still respecting the host nation’s local practices.

Now that the NFL has expanded abroad into cities that encourage sports betting, professional sports teams have their sights on Las Vegas, the gambling capital of the United States. The Nevada legislature recently approved funding to build a football stadium in Las Vegas, which has paved the way for a new NFL city. At the same time, these plans have

---

14 See supra note 1.
reinvigorated arguments in favor of the legalization of sports betting.\textsuperscript{16} With a new stadium coming to Las Vegas, Oakland Raiders’ owner Mark Davis quickly indicated his desire to move his team into the facility and, as of January 19, 2017, filed the requisite forms to claim the City’s new arena.\textsuperscript{17} In order to solidify the move, Davis needs approval from three-quarters of fellow NFL franchise owners.\textsuperscript{18} While the NFL’s international games temporarily expose the League to legalized gambling, it has been able to maintain a safe distance from the gaming culture at home.

However, if the Raiders relocate to Las Vegas, it could lead to a softening of the NFL’s position on gambling.\textsuperscript{19} In addition, if a professional franchise successfully relocates to a market beyond the PASPA’s jurisdiction, it could be the first step towards acceptance of sports gambling on a national scale—this is particularly true in light of the NHL’s plans to introduce a new franchise, the Vegas Golden Knights, later this year.\textsuperscript{20} The current trend towards expansion could potentially remove the stigma surrounding sports gambling and, as a result, reduce concerns regarding the negative implications on the leagues’ reputation.

\textit{Michael Singer is a recent graduate of Fordham University School of Law where he served as an Associate Editor for the Intellectual Property, Media and Entertainment Law Journal and Chair and Director of the 2016 Fordham Sports Law Forum Symposium.}

---

\textbf{From the Journal of an NBA Cheerleader: Employer Compliance with the Fair Labor Standards Act}
\textit{By Maacah R. Scott}

In my former life, I was a Luvabull: a cheerleader for the Chicago Bulls. My employment agreement was with a third party, but I was required to release certain rights to the Chicago Bulls. I was paid a flat fee of $45.00 per game (irrespective of the number of hours worked) and a fee that varied for appearances. Additionally, my employment agreement obligated me to make certain uncompensated appearances and attend approximately eight (8) to ten (10) hours of practice per week, all of which were unpaid. However, it is unclear whether the Chicago Bulls could be liable for any unpaid wages because it is uncertain whether I qualified as an employee of the Chicago Bulls. Even if I did qualify as an employee, my employment may have fallen

\textsuperscript{20} Mike Coppinger, \textit{Las Vegas NHL expansion team will be named “Golden Knights,”} USA TODAY, Nov. 22, 2016, at http://www.usatoday.com/story/sports/nhl/2016/11/22/las-vegas-nhl-expansion-team-name-golden-knights/94308010/.
under the seasonal amusement exemption of the Fair Labor Standards Act (the “FLSA”). These issues are explored below.

Are Cheerleaders Employees?

Under the FLSA, employers are required to pay minimum wage and overtime to their employees, but not independent contractors.21 Employees are often misclassified as independent contractors and denied access to benefits they are entitled to by law, such as minimum wage, overtime compensation, paid leave, and unemployment insurance.22

Traditionally, courts have looked at the level of control an employer has over a worker to determine whether that worker is an employee.23 Today, courts additionally look at the totality of the relationship between the employer and worker to determine whether the worker is an employee,24 which requires the court to consider the following factors, none of which are determinative: (1) the extent to which the work performed is an integral part of the employer’s business; (2) whether the worker’s managerial skills affect his or her opportunity for profit and loss; (3) the relative investments in facilities and equipment by the worker and the employer; (4) the worker’s skill and initiative; (5) the permanency of the worker’s relationship with the employer; and (6) the nature and degree of control by the employer.25

While courts will consider written agreements between parties, the fact that the worker has signed an agreement stating that he or she is an independent contractor may be immaterial in determining the existence of an employment relationship.26 This is because the inquiry focuses on the reality of the working relationship.27 Cheerleaders may be categorized as employees under this factor test since it examines the totality of the relationship and makes the label of independent contractor inconsequential.

Even if cheerleaders are properly classified as employees, there is an exemption to the federal minimal wage requirement under Section 213(a)(3) of the FLSA which relieves any seasonal “amusement or recreational establishment” of the obligation to pay minimal wage and overtime.28 The seasonal employee defense applies to businesses that (a) do not operate for more than seven months in a given calendar year or meets the receipts test, or (b) the business’ average receipts for any six months of such year were not more than 33-1/3 per centum of its

---

23 Buffalo Jills Cheerleaders, Inc., N.L.R.B. Case No. 3-RC-10223, 8-9 (1995); see generally Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (establishing that the right of control test should be used to determine who is an employee).
25 Id.
26 Id.
27 Id.
average receipts for the other six months of such year (generally referred to as the “Receipts Test”).

National Football League (“NFL”) and National Basketball Association (“NBA”) teams provide amusement and recreational services, but it is unclear whether they have a defense under Section 213(a)(3) of the FLSA. Teams tend to receive a significant percentage of their revenue during the off-season (from season ticket deposits, broadcast agreements, sponsorship deals, etc.), and therefore it is unlikely that they would satisfy the six-month receipts requirement. Moreover, teams hoping to claim seasonal exempt status under the FLSA’s seven-month operational exception will need to show that their operations only include their regular season and not the activities conducted during the off-season.

**Recent Lawsuits Brought By Cheerleaders Against Professional Sports Franchises**

In the last few years, cheerleaders from five NFL teams—the Buffalo Bills, Cincinnati Bengals, the New York Jets, the Oakland Raiders, and the Tampa Bay Buccaneers—and one NBA team—the Milwaukee Bucks—filed claims against their respective teams for violations of the FLSA, including failure to pay minimum wage, failure to pay overtime compensation, and failure to reimburse for business expenses. The cheerleaders were paid a flat fee per game or season, which they argued resulted in compensation that was less than minimal wage.

In order for the FLSA’s minimum wage and overtime provisions to apply to a worker, the worker must be an employee of the organization and not an independent contractor. Accordingly, the cheerleaders argued that they were employees under the FLSA. Not surprisingly, the teams responded that the cheerleaders were independent contractors who were not covered by the FLSA.

---

29 Id.
31 Id.
32 Id.
34 Id.
37 Id.
Eventually, many of the teams settled with their cheerleaders out of court and changed their practices to categorize cheerleaders as employees and pay them in accordance with the FLSA. The Buccaneers paid its cheerleaders a settlement of approximately $825,000.00; the Bengals settled with its cheerleaders for an undisclosed sum; and the Oakland Raiders paid its cheerleaders $1.25 Million in back pay.\(^{38}\) In response to the Oakland Raiders lawsuit, the State of California passed legislation that requires professional sports teams to classify their cheerleaders as employees.\(^ {39}\) California is the first state in the country to expressly require that professional cheerleaders be classified as employees.

**What Is Next?**

Although settlements were reached in many of the cheerleader cases, the characterization of who is and who is not an employee in the context of the sports business has been a hot topic in its own right and will continue to be so until resolved.

Maacah Scott is a former cheerleader for the Chicago Bulls. Scott is Staff Counsel for the Arizona Diamondbacks and Associate Professor at Arizona State University, where she teaches Ethics and Legal Issues in Sports. Scott is also Vice Chair of the Entertainment and Sports Committee, Young Lawyers Division, for the American Bar Association.

---


NEWS AND ANNOUNCEMENTS

VIDEO GAMES & DIGITAL MEDIA CONFERENCE

Save the Date!

Thursday, April 6, 2017

University of California
Hastings College of Law
Alumni Reception Center, 200 McAllister, 2nd Floor
San Francisco, CA

SAVE THE DATE

2017 Annual Meeting
October 5-7, 2017
The Cosmopolitan
of Las Vegas

Details scheduled for release in January

Registration Now Open
International Legal Symposium
on the World of Music, Film,
Television and Sports

March 30-31, 2017
University of Miami
Coral Gables, FL

Details Scheduled for Release in February

Visit http://ambar.org/LS-Miami
for preliminary details