SUPER BOWL SPECIAL – NFL Teams Serve as a Reminder of Wage and Hour Issues

Labor & Employment Law Update

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As many prepare this week for Super Bowl parties to cheer on their favorite team, NFL teams' treatment of cheerleaders serves as a reminder to employers that no one can escape wage and hour laws. Moreover, it serves as reminder that if businesses/franchises worth billions of dollars have made the mistake of misclassifying an individual as an independent contractor instead of an employee, then so can you.

Over the past few years, more than five NFL teams including the Buffalo Bills, Cincinnati Bengals, New York Jets, Tampa Bay Buccaneers and Oakland Raiders have faced class action wage and hour lawsuits brought by their cheerleaders. In an industry, where many players and coaches make hundreds of thousands of dollars per game, it was "industry standard" to classify cheerleaders as independent contractors and only pay an appearance fee for each game.

Despite identifying cheerleaders as independent contractors, teams would typically exert significant control over how the cheerleaders performed – including their attire, dances, music, when and where they were to appear, participation in mandatory promotional events, and promotional materials. Additional mistakes included waiting to pay cheerleaders their appearance fees until the end of the season – at which time a team may unilaterally deduct fines. Similarly, many times expenses incurred by the cheerleader, such as travel, equipment, uniforms, etc., were deemed the sole responsibility of the cheerleader.

The Cost: The Oakland Raiders agreed to a $1.25 million dollar settlement; the Tampa Bay Buccaneers an $825,000 settlement, New York Jets a $325,000 settlement, Cincinnati Bengals a $255,000 settlement. Be aware, damages for wage and hour claims can grow very quickly and be enticing to pursue as they include liquidated damages, interest, and attorneys' fees and costs.

What to Avoid:

- Do not blindly follow industry standard. Class action lawsuits are changing the "industry standard" in many industries, including but not limited to construction contractors, truck drivers, limo drivers, taxi drivers, security

guards, painters, cable installers, etc.

- Understand if they are independent contractors – this means they must truly be independent from your control. So, if you control the number of hours they work, where they work, how they work, their appearance, what tools they use, how much they charge, or what they must do, then you may really be their employer.
- Are you the only company the individual does work for? If so, the scale just leaned a little more in favor of employee rather than independent contractor.
- Finally, do not blindly follow the advice of your accountant. While some accountants are aware of the legal standards, your accountant may not be aware of the most recent changes or case law.

If you are unsure of the individual's classification, seek the advice of legal counsel to determine whether the position is properly classified and what, if any, changes must be made to ensure you have a strong defense against a lawsuit or DOL audit.

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