

Tully Rinckey PLLC Director of Legal Services Neil McPhie discusses the pitfalls of NCAA bracket pools in the federal workplace with cyberFEDS®

March Madness office pools count as prohibited office gambling

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Legal Editor Washington Bureau IN FOCUS:

As March Madness swings into high gear, employees may be tempted to place friendly wagers on the games. So it's important that they realize that gambling is prohibited at the workplace and could result in discipline, said Neil McPhie, the director of legal services at Tully Rinckey PLLC and former chairman of the Merit Systems Protection Board. Even though federal agencies don't generally "throw the book at every gambling incident," McPhie told cyber

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they should look at the severity of the offense when determining how to address the incident. For example, an office pool between a few people in one division of an agency would be less likely to result in discipline than a popular agency wide pool, McPhie explained. "If it becomes too large, it draws a lot of attention." Technically, however, employees could be disciplined for participating in small NCAA March Madness office pools, but "you don't see those types of cases because supervisors are more likely to look the other way." If agencies choose to discipline, they must analyze the Douglas factors and use the agency table of penalties for gambling offenses to ensure the penalty is consistent with those imposed on other offenders, he added. A review of agency table of penalties available on cyber

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shows that a first offense of participating in an office gambling pool could

result in a reprimand to a 14-day suspension; the second offense, a 14- to 30-day suspension; and a 30-day suspension to removal for the third offense. When workplace gambling accompanies other charges of misconduct, the agency may remove an employee for a first gambling offense. For example, in *Jones v. Department of the Interior*, 104 LRP 45213, 97 MSPR 282

(MSPB 2004), the MSPB upheld the removal of an employee for gambling activity on duty and at the workplace and conduct unbecoming a federal employee when he distributed gambling slips in the form of football cards to coworkers and left coworkers who owed him money anonymous messages that sounded threatening. But even without the conduct unbecoming charge, the MSPB, said the gambling charge would have been sufficient for removal considering he was also found guilty of a felony charge for promoting gambling on agency premises. Avoid retaliation

Whether to discipline or not is an "individualized decision to be made within the policy of the particular agency," he said. But agencies need to watch out for inadvertently retaliating against an employee who reports an office pool as a violation of the anti-gambling rules. For example, "suppose somebody does not like what they see, they complain, you can't ignore it, because that person is now a whistleblower." In *Whitmore v. Department of Labor*, 112 LRP 27776

, 680 F.3d 1353 (Fed. Cir. 2012), an employee submitted a waste, fraud, and abuse claim to the Department of Labor's Office of Inspector General regarding another employee's illegal gambling pool for the NCAA Men's Basketball tournament, which he said involved the use of government resources. Two days later, the agency removed his authority as a rating official along with his responsibility for conducting performance evaluations. The MSPB rejected his whistleblower retaliation defense and upheld his removal based on charges of disruptive and intimidating behavior, conduct unbecoming a supervisor, and inappropriate conduct in the workplace. The employee contended that the removal was unlawful retaliation for his lawful whistleblowing disclosures. The Federal Circuit remanded the case, instructing the administrative judge to evaluate the whistleblower charge by considering the poor performance evaluations and removal of duties occurring after the employee reported the basketball pool. So, since agencies could face a whistleblower retaliation charge if they discipline the whistleblower, the key is to ensure that the discipline is not taken in retaliation for reporting the wrongdoing, but rather for actual misconduct. Reminders important

McPhie advised agencies to send periodic reminders, especially during times like March Madness and football season, since fantasy football leagues may also be a form of prohibited gambling in the workplace. But he also said realistically, agencies will not be able to stop the pools completely. "The folks who do this know it's a violation, but they take the risk anyhow," he said. "Reasonable employees and supervisors participate in moderated conduct and keep it under wraps." Another issue for supervisors to keep an eye on, he said, is productivity, since employees may become overly distracted by the games, many of which occur during traditional business hours. Non-workplace office pools are generally not going to give rise to discipline so long as the gambling does not lead to an

**arrest or involve using government computers, email, or other equipment,
he said.Reprinted with permission from: cyberFEDS®**

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