

## New York's Fantasy Sports Law at Work

On August 3, 2016, Governor Andrew Cuomo signed a law legalizing fantasy sports in New York. The timing is critical to the industry, as it may enable major fantasy sports providers to reopen operations in New York by the beginning of the National Football League season in September. Football is easily the most popular U.S. sport for fantasy sports.

It's hard to anticipate the full impact of the new law on New Yorkers' level of participation in fantasy sports. But it's safe to predict that many thousands of them will be back in the game soon. Most of these participants are employees somewhere, and many will be tempted to research or set their lineups during work time instead of performing their regular jobs. With this in mind, here's a fantasy sports primer for New York employers.

### Overview of Fantasy Sports

Americans have participated in fantasy sports for more than 30 years. Originally, the concept was for a group of friends, perhaps co-workers, to get together at the beginning of the season for a particular professional sports league and select a team of players from among those actually playing in the league. Each fantasy team earns points based on the real-life performance of their "players." Then, in essence, whichever team has the most points over the course of the season wins the fantasy league.

The internet facilitated the expansion of fantasy sports, making it much easier to administer leagues, including those with participants from various geographic locations.

Over the past few years, a new breed of fantasy sports has rapidly emerged. So-called "daily" fantasy sports (popularly abbreviated as "DFS") contests have been developed to enable people to pick a new team or teams as often as each day, rather than be stuck with the same players over the course of a whole season. Technically, the name of this sub-category of fantasy sports is something of a misnomer. DFS has developed to have contests ranging from only a small subset of a particular league's games in a single day to a number of games spread out over a whole week. But the key distinction is that the winner is determined based on a much shorter period than an entire season.

Because the results of DFS contests are based on so few games within a sport, they more closely resemble betting on particular games. As a result, this type of fantasy sports has drawn legal attack in a number of states even though the traditional season-long fantasy games have been generally tolerated with little challenge. In fact, since 2006, a federal law has seemingly carved out fantasy sports from prohibitions on internet gambling. However, the Unlawful Internet Gambling Enforcement Act does not itself make fantasy sports of any variety legal under state laws.

### Scope of the New Fantasy Sports Law

Fundamentally, the New York law specifically declares that "interactive fantasy sports are not games of chance." In other words, the Legislature has found that, based on the skill involved in these games, playing them is not gambling in New York.

The law is not technically limited to DFS. Rather, it encompasses more traditional fantasy sports games as well, even though the earlier-created season-long fantasy sports have not been subject to much scrutiny in the past.

Now, any person or entity that wishes to operate any fantasy sports contests in New York where entry fees are paid must register with the New York State Gaming Commission. The law provides for temporary permits to be issued to operators who had already been providing fantasy sports games prior to November 10, 2015 (when the New York State Attorney General had declared daily fantasy sports to be illegal).

Significantly, this law specifically prohibits the following people from playing fantasy sports where an entry fee is paid:

- Any member, officer, employee or agent of a fantasy sports operator or registrant;
- Certain family members living in the same household as a member, officer, employee, or agent of a fantasy sports operator or registrant;
- Anyone with non-public confidential information about fantasy sports contests;
- Any athlete whose performance may be used to determine the outcome of a fantasy sports contest;
- Any sports agent, team employee, referee, or league official associated with any sport or athletic event on which contests are based;
- Anyone located in a state where fantasy sports contests are prohibited; and
- Any minor under the age of 18.

The legislation also includes various safeguards intended as consumer protection measures and imposes a 15% state tax on gross revenues earned by fantasy sports operators. The tax revenue will go into the State Lottery Fund.

Notably, this new law may not finally resolve the legal status of fantasy sports in New York. Despite the Legislative declaration that fantasy sports are not games of chance, the New York Constitution does still generally prohibit “gambling” other than state-operated lotteries, pari-mutuel betting on horse races, and casino gambling as specifically authorized by the Legislature. In addition, it also remains debated whether federal law permits or prohibits particular forms of fantasy sports.

### **Effect on Employee Productivity**

Various estimates suggest that more than 50 million people played fantasy sports in the U.S. and Canada in 2015. Millions of those people play DFS, with exact numbers increasingly difficult to estimate due to ongoing restrictions to access from state to state. It is likely that millions of New Yorkers had played DFS before the State Attorney General shut down the major contest providers late last year. Indeed, the New York State Legislature declared in the new statute that “the internet has become an integral part of society, and interactive fantasy sports a major form of entertainment for many consumers.” Undoubtedly, the number of people playing DFS in New York State will increase exponentially (from near zero under the recent moratorium) when the major contest providers reopen in the state.

DFS is, by its nature, typically more time consuming than traditional season-long fantasy sports. Even casual players can spend hours in a day researching the best matchups for that day’s/week’s games. It is this research, and the reality that it affects DFS performance, that has enabled the New York Legislature to find that fantasy sports are games of skill. DFS players who don’t conduct some meaningful level of research are essentially throwing their money away in the long run. So the motivation to spend time selecting teams is clear.

What does this mean? DFS players have to make time to play. Some, perhaps many, will do so at work, using their employer’s equipment, or when they should be sleeping to rest up for the next day. This can lead to lost work time, lost productivity while working, and even risk to computer systems through viruses or other malware. Thus, employers may soon come to prefer that their employees avoid DFS, even to a greater degree than traditional fantasy sports.

What can employers do if DFS or other fantasy sports become a problem for their employees?

### **Restrictions on Employers**

Section 201-d of the New York Labor Law generally prohibits employers from taking adverse employment action against applicants and employees based on their recreational activities. The Labor Law specifically defines “recreational activities” as “lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.”

Based on this definition, it’s not clear whether playing daily fantasy sports would qualify as a recreational activity. DFS didn’t exist when the term was defined, and season-long fantasy sports were not nearly as prevalent as they are today. Various aspects of the definition could be questioned regarding this form of entertainment.

First, to be covered by Section 201-d, the activity has to be “lawful.” As discussed above, there is still some question as to the legality of fantasy sports, especially DFS, notwithstanding the new state law purporting to legalize them.

Second, is participation a “leisure-time activity, for which the employee receives no compensation”? Many people participating in fantasy sports are compensated, some quite handsomely. However, the compensation does not come from the employer. So, does this mean that the law only applies to people who are unfortunate enough never to win?

Third, are daily fantasy sports “generally engaged in for recreational purposes”? Fantasy sports are just a hobby for many participants. But, for many others, DFS is actually a business venture. Does this mean the individual’s motivations for playing determine their protection under the law?

Even assuming an employee would be considered to be engaging in lawful recreational activities when playing fantasy sports, the Labor Law does allow employers to put some restrictions on their participation. The law only protects employees for engaging in recreational activities outside work hours, off of the employer’s premises, and without use of the employer’s equipment or other property. So, employers can prohibit employees from playing DFS or other fantasy sports while at work and while using company computers, for example.

Finally, Section 201-d also has a general exception that eliminates employee protection for activity that “creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest.” This exception might create an argument, for example, that employers in the sports industry or with clients or customers in that industry could prohibit certain employees (even if they are not specifically prohibited from playing under the fantasy sports law) from participating in DFS altogether based on the risk of jeopardizing business relationships or enabling “insider trading.”

### Conclusion

Employers across New York should be prepared for the impact of fantasy sports in the workplace, particularly the re-introduction of daily fantasy sports. Most employers will at least want to ensure that DFS players are still getting their work done and not compromising company electronic systems and equipment.

At a minimum, computer usage policies should be reviewed and revised if necessary. For example, generic prohibitions on using company internet access for “gambling” arguably may no longer encompass fantasy sports. Accordingly, new provisions addressing fantasy sports, including DFS, may be warranted.

Some employers in related industries should take special precautions to advise employees (and other related parties) that they are prohibited from playing fantasy sports based on their relationship to the sports or contests involved.

Ultimately, if you experience a particular problem with employees based on their participation in fantasy sports, you will need to navigate not only New York Labor Law Section 201-d as addressed above, but other standard sources of employee protections, such as employment contracts, collective bargaining agreements, and anti-discrimination laws. It is highly recommend that you consult with an experienced labor and employment attorney before taking any disciplinary action based on fantasy sports or other “off-duty” conduct.

If you have any questions about this Information Memo, please contact [Scott P. Horton](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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