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Hot Issues Alerts – Law Firms

Event Tickets For Federal Employees: Just Don't Do It

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Sunday at the Masters. Game Seven of the World Series. The Super Bowl. Far more people want to attend these events than the venues can accommodate, and securing tickets usually requires substantial connections, luck, money, or all three. So when you finally manage to nab two seats to see Federer-Nadal at the US Open finals, whom can you take? Can you take a federal employee – so long as he or she pays you face value for the ticket?

When the market value of tickets far exceeds their face value, which anyone

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who has used StubHub or a ticket broker knows is common, the legal analysis is murky, but the answer is simple: Don't do it.

This advice runs counter to what you might conclude after reading the Government's own rules on gifts. In general, the Office of Government Ethics (OGE) Standards of Ethical Conduct for Employees of the Executive Branch bars federal employees from receiving gifts from prohibited sources (which includes federal contractors).¹ "Gifts" are defined as "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value."² The guidance excludes many items given to federal employees from the definition of "gift," including "anything for which market value is paid by the employee."³ And the guidance defines "[t]he market value of a gift of a ticket entitling the

holder to food, refreshments, entertainment, or any other benefit" as "the face value of the ticket."⁴ Receiving immediate payment of face value thus appears to be a safe way to give tickets to federal employees.

A recent decision by the United States Court of Federal Claims, though it did not turn on this question, nonetheless demonstrates the dangers of relying on reimbursement of face value as a safe harbor. In *Chenega Management, LLC v. United States*,⁵ Chenega protested the award of an Air Force contract to a competing offeror. All of Chenega's arguments were denied as relatively routine disagreements with the agency's judgment except for one: Chenega alleged that the procurement had been tainted when an Air Force official received Super Bowl tickets from the president of a third offeror under the procurement.

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By taking the tickets, the official, who according to *Chenega* “had the power to directly and indirectly influence the award” in the third offeror’s favor, allegedly violated both the statutory ban on illegal gratuities and the limitations on gifts set forth in the OGE guidance.

The court denied the protest, holding that *Chenega* had not shown by “clear and convincing evidence” that the Air Force employee had received an illegal gratuity. The court relied on a report by the Air Force’s Office of Special Investigation regarding the allegations. The report concluded that (1) the Air Force official had waited in line with the third offeror’s president – a longtime friend and fellow Arizona Cardinals season-ticket holder – to buy tickets to see the Cardinals play the Pittsburgh Steelers in the 2009 Super Bowl; (2) the company president purchased the tickets; and (3) the Air Force official immediately reimbursed the president \$1650 in cash for the face value of two tickets, \$800 each plus a \$50 service charge. According to the report and the court, that immediate payment by the Air Force official meant the tickets were excluded from the OGE’s definition of improper gifts because the tickets fell under an exception for “anything for which market value is paid by the [government] employee.”

Thus, because the Air Force employee gave the offeror’s president cash equal to the face value of the tickets, the tickets arguably were not a gift. Indeed, the court relied on an admission by *Chenega*’s counsel at oral argument that, “if you paid face value, then I think you’ve complied with the regs.”

But the reality is that the Super Bowl tickets, as *Chenega* pointed out, had a “street value of \$6000 to \$7000.” In other words, regardless of the OGE definition equating the two, there was a dramatic difference between the face value and the market value of the tickets. The Air Force employee had received something of value that he did not pay for – the opportunity to pay face value for Super Bowl tickets that others could have obtained only by paying substantially more. Yet a literal reading of the OGE guidance does not address this nuance.

Other unaddressed nuances arise as well. For example, many event tickets

bear no stated face value, such as tickets to luxury suites rented under full-season contracts. The literal reading of the OGE guidance indicates that such tickets’ market value is zero, but no one would recommend giving a federal employee a free ticket to join you in a luxury box.

You may recall that actually happening as recently as four years ago, though. For a time, aides and staffers in the House of Representatives received free luxury-suite tickets from lobbyists. Because the tickets bore no face value, the staffers arguably did not violate the chamber’s ethics rules by accepting them. (The House had set and continues to set a \$50 cap on gifts.) This practice drew attention when prosecutors and journalists investigated lobbyist Jack Abramoff, who was alleged to have given nominally free tickets to staffers with the intention of influencing their official actions. Following the investigation, the House changed its rules in 2007, equating the value of unpriced event tickets to the highest-priced ticket available for the event – which are usually well above the chamber’s \$50 limit on gifts.

Still, even if the OGE guidance were read to incorporate the House’s approach, the guidance would not address situations similar to what occurred in *Chenega*, where a ticket’s market value exceeds its defined face value.

Another example further illustrates the nuances left unaddressed by literally reading the OGE guidance. At many major college athletics programs, all tickets bear relatively low prices, say \$60 each, but can be bought only after making a donation to the university’s booster club. Does the OGE guidance allow a federal employee to satisfy the reimbursement exclusion by giving a contractor only \$60 per ticket even when the ticketholder had to donate thousands of dollars for the opportunity to purchase them? The guidance, as read, appears to allow it, but contractors should nonetheless be wary of employing this practice.

Contractors should also be aware of other rules governing gifts to federal employees. Although the OGE guidance could be read to permit the near giveaways in *Chenega* and in these examples, neither the federal criminal statute barring gratuities, 18 U.S.C. § 201(c), nor the Federal Acquisition Regulation

(FAR) codification of the statute, FAR 3.101-2, equates face value and market value. The gratuities statute bars giving “anything of value” to federal officials for or because of official actions. The FAR rule similarly prohibits Government employees from accepting “any gratuity, gift, favor, entertainment, loan, or anything of monetary value” from many contractors. Even if these rules can be read to exclude gifts for which employees immediately repay the item’s market value, neither explicitly defines market value as the OGE guidance does. Thus, under the gratuities statute and FAR, “market value” presumably could be interpreted to mean, instead, the value discernible on StubHub and eBay.

Giving a federal employee tickets to popular events thus creates risks even when the employee pays face value for the tickets. The employee often will have received the tickets for far less than what most understand their actual “market value” to be. And putting aside whether there might be a defense based on OGE definitions, you can bet a competitor is going to see both of you at the event and try to make the most of it in court, just as occurred in *Chenega*.

That latter point is the most important lesson of *Chenega*. Even though the court, citing an OGE definition of “market value” that would put ticket scalpers out of business, found there was no “clear and convincing” showing of a crime, is that really much solace for all of those involved? The company president and the Air Force official suffered through repeated attacks on their integrity and incurred substantial expense defending themselves in multiple rounds of investigations and protests. Even more, these questions have been memorialized in a published opinion, allowing anyone to discover what the court in *Chenega* labeled “an appearance of impropriety.” For both the contractor and the official, the ultimate price they paid as a result of the ticket transaction was high – far higher than the Super Bowl tickets’ market value, however defined.

¹ 5 C.F.R. § 264.202(a).

² *Id.* § 2635.203(b).

³ *Id.* § 2635.203(b)(9).

⁴ *Id.* § 2635.203(c).

⁵ ___ Fed.Cl. ___, No. 10-221C, 2010 WL 3632960 (Sep. 14, 2010).