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10 Labor And Employment Considerations In Esports

By Jonathan Stoler and Daniel Masakayan

Law360, June 6, 2019, 3:39 PM EDT

Electronic sports, known in the industry as esports, have seen remarkable growth in the last decade. The term esports refers to the growing world of competitive, organized video gaming, where professional video gamers play on a variety of different video game platforms and video games (esports titles) in heavily attended and publicized competitions and tournaments.

These competitions are watched by millions of fans across the globe on TV or online, and by others who attend live esports events. Expert projections have shown that this year will be especially significant, with the sport reaching revenues of $1.1 billion in 2019, or year-on-year growth of +26.7%. With a global audience growing to over 453.8 million worldwide in 2019, it is unsurprising that several companies are trying to break into this emerging market. In fact, reports have projected that sponsorship in esports will generate $456.7 million this year alone.

As new companies and individuals attempt to enter this space, it is important to consider several labor and employment consequences. While many of these recurring problems are not exclusive to esports, the unique characteristics of esports highlight the importance of considering these issues before or when employers get into the esports space.

Therefore, U.S. employers that are in — or are considering entering — the emerging esports market should consider the following 10 questions/issues:

Is the organization equipped to address potential Title VII issues?

The esports community has faced its issues with diversity. There is a documented lack of racial diversity among esports athletes that go pro within the U.S., even though some studies have shown that over 50% of all esports fans are minorities. It is also a community dominated by men. Studies have shown that worldwide, nearly 70% of esports athletes are men, even though reports show that statistically, nearly 50% of women ages 18-29 play video games. When women do enter the esports realm, they unfortunately often become victims of sexual harassment.

With the widely documented cases of harassment that can exist within the esports community, it is important that organizations maintain clear anti-discrimination policies. Title VII prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion. However, in some cases, employers can also be liable under Title VII for the conduct of their employees, particularly if their employees create a “hostile work environment.”

For example, an employer may be held liable for harassment by nonsupervisory employees or even nonemployees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action. In a gaming community that is male-dominated and is sometimes rife with lewd banter and boorishness, hostile work environment claims can be easily spawned through the comments or conduct of individuals.

To ensure that organizations do not face unwanted litigation or publicity, all organizations should adopt and frequently revisit their employee handbook and anti-harassment or anti-discrimination policies. Especially in the shadow of the #MeToo era, any risks of sexual misconduct should be addressed before problems arise.

Will a special immigration visa be needed for foreign competitors?

Because of the globalization of esports, like traditional professional athletes, foreign esports athletes may need to travel to compete within the U.S. And just like these traditional professional sports athletes, these foreign esports athletes will need immigration authorization to enter the U.S.

Depending on the unique circumstances for each esports athlete, to enter the U.S. legally, an athlete may try to obtain: (1) a P-1A visa, (2) a B-1 visitor visa, and (3) an O-1A visa.

P-1A visas are reserved for “internationally recognized athletes” who are coming to the U.S. temporarily to perform at a specific athletic competition as an athlete, individually or as part of a group or team, at an internationally recognized level of performance. A petition must first be filed with United States Citizenship and Immigration Services before the athlete can apply for the travel visa abroad at a U.S. Consulate.

While there has been considerable debate of whether esports players can qualify as “athletes” under immigration regulations, 2013 marked the first time that USCIS recognized an esports player as an athlete and granted him a P1-A visa. However, this does not mean that all esports players are eligible for a P1-A visa. Because each petition is fully evaluated on its own merits, simply because an esports athlete had been granted a P-1A visa in the past does not guarantee that all future esports athletes will receive similar approval.

B-1 visitor visas are reserved for those entering the U.S. temporarily for business of a legitimate nature. Employers should be aware that competing for prize money in an esports competition would not qualify as a permissible B-1 business activity under current laws. The same would hold true for athletes attempting to enter the U.S. from visa waiver countries. Moreover, any payment received from such athletes would require a special work visa.

Finally, O-1A visas are for individuals who possess extraordinary ability in the sciences, arts, education, business or athletics, or have a demonstrated record of extraordinary achievement in the motion picture or television industry and have been recognized nationally or internationally for those achievements. A petition must first be filed with USCIS before the athlete can apply for the travel visa abroad at a U.S. Consulate.

The visa process, especially for individuals in unique positions like esports athletes, is unfortunately unpredictable. Therefore, before determining which visa your esports athlete should apply for, you should consult counsel to ensure that he or she qualifies for the proper nonimmigrant visa. Failing to consider the immigration consequences of international travel for these foreign esports athletes can expose them to potential liability, rendering them subject for removal or denial of entry into the U.S.

Conversely, American athletes traveling abroad should consult about obtaining the right visa to compete in the country to which they are traveling.

Have the esports athletes been classified as employees or independent contractors?

Like all employers, as more esports athletes are added onto teams or become part of an organization, these entities should always consider: are these athletes employees or independent contractors?

While employers may prefer to characterize esports athletes as independent contractors, the legal consequences of a misclassification cannot be understated. Unfortunately, there is no single or simple way to determine whether an athlete is an independent contractor or employee, and the relevant legal test may change according to the applicable law. For example, while the “economic realities test” may be relevant for compliance with the Fair Labor Standards Act, the “ABC" test may be used in other situations.

Misclassification as an independent contractor or an employee can open the employer up to significant tax, wage-and-hour and benefit liabilities. For example, under the FLSA, an employer may be liable for the amount of unpaid wages and overtime, an equal amount in liquidated damages, and attorney fees and costs.[i] It can also expose employers to liabilities under anti-discrimination laws, the Employee Retirement Income Security Act of 1974, or workers' compensation statutes. Further, it could also potentially expose an employer to unwanted or unanticipated tort liability to third parties for injuries that may be caused by independent contractors.

Therefore, employers should not only tread carefully in their classification of esports athletes to ensure compliance with relevant federal and state laws, but to avoid costly liabilities under these laws.

What is the scope of a contract?

There are a wide variety of employment contracts used in the esports industry: they can range from professional services and endorsement agreements, to appearance agreements. However, as a corollary to the point above, it is important to make sure that those issuing these agreements carefully craft their language to ensure that (1) they are creating the intended relationship between the employer and the individual, and (2) that these contracts would withstand scrutiny. For example, athletes should scrutinize whether the language creates an employee-employer relationship. Also, athletes should be careful to consider whether an underlying agreement includes any confidentiality or noncompete provisions.

As with all agreements, esports employment agreements should be drafted with careful attention to their specificity, and all parties should be able to understand the obligations incurred and the legal relationships created.

What are the effects of restrictive covenants?

Restrictive covenants are commonly used as contractual devices in employment relationships and employment agreements. They are typically used to safeguard an employer's competitive interests, or confidential/trade secret information. The most commonly used restrictive covenants in the employment context include: noncompete agreements, confidentiality agreements and nonsolicitation agreements.

While U.S. federal laws may be implicated in these types of agreements, restrictive covenants are primarily governed by state law. Most states, through statute or common law, will only find that a restrictive covenant is enforceable if it is "reasonable." For example, to determine whether a restrictive covenant is "reasonable," states like Virginia will consider the restrictive covenant's function, geographic scope and duration.

In employment arrangements involving employees such as esports athletes, which compete across state lines, and often internationally, what is a "reasonable" restrictive covenant will be an issue. Can an esports athlete on one team be restricted from quitting his or her position on one team, and joining a rival team in a different state or country? Can the athlete be restricted from joining another esports league or after leaving one team, recruiting a teammate to join them on a new team? What if the esports athlete attempts to join a rival team, but as a player of a completely different game or platform? Can a team protect its proprietary strategies/tactics or knowledge base from being used by esports athletes who leave the team? These are all questions that may be open for debate, and may even be litigated in the near future.

What would unionization in esports look like?

Athletes within the popular North American sports leagues have unionized, forming players associations. As parallels are increasingly drawn between esports and traditional professional sports like basketball or football, talks have increased about

whether esports athletes should similarly unionize.

Unlike traditional North American sports, esports athletes face unique challenges in any potential unionization efforts. Below is a list of such potential issues, all of which would have to be addressed before esports athletes could successfully unionize:

Are the esports athletes that may attempt to unionize employees or independent contractors?

As mentioned above, this is a particularly problematic issue in the context of esports and has been handled differently in certain leagues, teams and organizations. In American competitive leagues like Overwatch, some gamers are full-fledged employees of the teams they represent, complete with a salary, medical benefits and a 401(k). In other arrangements, these athletes may be considered self-employed or independent contractors. Because the National Labor Relations Act only applies to "employees" and not independent contractors, such athletes would be barred from unionization if they are categorized as independent contractors.

What would the appropriate bargaining unit be among these esports athletes?

The unique characteristics of esports organizations/teams and competitions will make unionization efforts in esports different from other popular North American professional sports. For example, unlike professional basketball or football, where only one game is played within the league, in esports, there are several different video game titles in which esports athletes can compete, different major professional leagues a player can join, and different esports organizations/teams that exist independently from the professional leagues.

Therefore, esports athletes could potentially organize across organizations, teams, employers, leagues or even esports titles. However, the NLRB's unit analysis has undergone significant changes in the past few years, particularly in light of PCC Structurals Inc.[ii] With the NLRB's framework, and in a sport where the athletes within one esports organization or team can compete within several different video game titles, compete in different countries, experience widely different competitions, and have different compensation models, can the diverse spread of athletes within a single organization form a single bargaining unit? Or could it be argued that they lack a sufficient community of interest? Can these esports athletes organize across organizations, teams, employers, leagues or esports titles?

Can the athletes garner sufficient support from the player base to form a union?

Under the NLRA, at least 30% of the player base for a particular league or team would need to support unionization in order to proceed to an NLRB election. Because many of these teams and organizations have players from outside the U.S., over whom the NLRB would not have jurisdiction, these foreign players would not count toward the 30% figure. Moreover, in esports, video game titles are constantly falling in and out of

favor among fans and players alike, especially as updated versions of these games are released every few years. Initiating, supporting and maintaining a union for a short-lived esports title may disincentivize players from pursuing unionization.

Does the team comply with the Americans with Disabilities Act?

Like other traditional sports, there are always a few competitors seeking to gain an unfair edge on their competition. While some professional baseball players or football players may rely on human growth hormone or steroids to improve their muscle mass or stamina, many esports athletes have relied on amphetamines such as Adderall to increase their concentration, focus or reflexes, and to stay sharp throughout long days of competition. In a sport where split-second reactions and stamina are key tools to victory, some esports athletes without attention deficit hyperactivity disorder or attention deficit disorder consider these performance-enhancing drugs, or PEDs, like Adderall or Ritalin as putting their performance over the edge.

With the documented use of these PEDs, several organizations, such as the Electronic Sports League, have developed anti-doping regulations or lists of banned substances. In the background however, lies the ADA, which prohibits most employers from discriminating on the basis of disability in the workplace and requires covered employers to make reasonable accommodations for individuals who suffer from a disability, unless the accommodation would impose an undue hardship on the employer.

Some of these banned substances, such as Adderall or Ritalin, are legitimately used to treat ADD, which is recognized under the ADA. Therefore, even though there are several legitimate reasons to eliminate doping within esports, there are professional esports athletes that may actually need these drugs or suffer from legitimate psychological conditions like ADHD. For these athletes, it is important that teams, leagues and organizations consider the ADA and the protections it provides to employees.

How old are the athletes?

Part of the appeal of esports and video games is their accessibility across all age groups. However, age may be “nothing but a number” in esports competitions, until it comes to complying with child labor laws. If an esports athlete is under 18, an entity should ensure that the team complies with the applicable federal and state wage-and-hour laws regarding child labor.

For example, in California, child labor is heavily regulated under California’s Labor Code and its Education Code. California may also apply different regulations depending on the age of the minor (e.g., minors 14 or 15 may be treated differently from minors that are 16 or 17). Penalties in some states, such as California, can be civil or even criminal, and include fines and imprisonment. Ensuring that your organization carefully documents the age information of these esports athletes is integral to ensuring compliance with these state wage-and-hour regulations.

What consideration should be given to dispute resolution provisions?

In anticipation of any potential legal disagreements, employment agreements will often include a dispute resolution provision. They are used to set out the mechanism for the resolution of disputes between contractual parties, such as the employer and the employee. These types of provisions can dictate things like choice of law, jurisdiction, forum, venue or adjudicating body. These provisions also control whether legal disputes will go to court, or whether they can be settled in alternative dispute resolution arenas, such as mediation or arbitration. Especially in the context of an industry where disputes can easily become international in nature, these provisions are important to ensure the predictability of potential legal costs.

While typically, these dispute resolution provisions can be largely controlled by the agreement of the parties, there are instances where such provisions may be challenged. For example, even if parties come to a mutually agreed upon forum selection clause dictating venue, a court could still decide that the forum selection clause is unenforceable. It should be noted, however, that a failure to include such provisions can expose employers to arguments of “lex fori” or “forum non-conveniens.” Such challenges are not only complex, but can make dispute resolution even more expensive.

Employers in the esports industry should consider the various dispute resolution avenues available to them. In addition to litigation, mediation and commercial arbitration, there are esport-specific arbitral bodies and decision makers. For example, in 2016, the World Esports Association launched the arbitration court for esports, which is governed by special WESA arbitration rules.

Is there gambling involved?

In the same way that sports betting has become a multibillion-dollar industry, gamblers have looked toward esports betting as a new frontier for wagering. Since the Professional and Amateur Sports Protection Act, or PASPA, which prohibited sports betting across the majority of states, was struck by the U.S. Supreme Court in 2018, states have begun to pass or consider sports betting legislation. While to date, Nevada and New Jersey are the only states that have passed laws that specifically address the legality of esports betting, many other states have introduced legislation that specifically address or affect the legality of esports betting, including Illinois, Indiana, Maryland, Massachusetts, New Jersey and Tennessee.

Therefore, because of the constantly evolving nature of sports and esports betting regulations after PASPA, all entities organizing esports competitions should be wary of allowing wagers on competitions. It is important not only to consider pending or passed esports legislation, but to also monitor the effect of sports betting legislation on esports competitions, as many of these proposed sports betting laws are broad enough to

encompass esports.

Conclusion

Esports is growing and evolving quickly, and many experts consider 2019 to be a turning point for the emerging industry. Just as with any new industry, the primary issue facing esports employers, organizations and entities is applying the concepts of old existing laws and regulations to an industry that was never contemplated when writing these laws. While there is legal precedent for the issues mentioned above, there is always uncertainty in applying these older laws and principles to new industries.

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[i] 29 U.S.C. § 216(b).
[ii] PCC Structurals Inc., 365 NLRB No. 160 (Dec. 15, 2017)