



E-Sports: How Employers Can Solve Human Problems in a Digital World

Insights

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While you can debate all you want on whether e-Sports is a “real” sport (or if PC is better than console), this colossal global market of video game competition is currently valued at \$1.08 billion dollars – and is definitely making its presence known in the very real world of workplace law. During the height of the COVID-19 pandemic when traditional sports teams suffered dramatic losses due to events suspension (and when buying toilet paper was an extreme sport), e-Sports viewership and revenues grew exponentially. Among online streaming platforms, Twitch reported a 17% increase in hours watched at 3 billion watch-hours, while game spending stood at \$10.5 billion dollars. Major titles such as *League of Legends*, *Fortnite*, and *Rocket League* also saw an increase in users. Without a doubt, e-Sports benefitted substantially from the pandemic, and many of these gains are expected to survive well past COVID-19. However, explosive growth and fast changes also bring along workplace law challenges and issues that investors, team owners, developers, league operators, and vendors should be aware of.

Diversity, Equity, and Inclusion

Gen Z (born between 1997 and 2012) and Millennials (born between 1981 and 1995/6) now make up 46% of the U.S. full-time workforce. **This technologically advanced and socially aware workforce is much more capable and willing to confront diversity and inclusion issues – and that is for the better.** For many Gen Z and Millennials workers, “diversity, equity, and inclusion” is not just a catchphrase, but a requirement in all workplaces. This is also true in e-Sports – an industry heavily populated by Gen Z and Millennials from different racial and socio-economic backgrounds.

In 2020, dozens of competitive gamers and content creators shared their stories of harassment and sexism within talent management agencies and with other gamers they encountered. This movement eventually prompted the CEO of top-tier talent management agency to resign. In the same year, a top-tier e-Sports tournament, set to feature prominent streamers and industry leaders, was also cancelled – but not because of the coronavirus. Allegations of sexual harassment against the tournament’s leadership, the organization’s alleged failure to address sexual harassment/assault complaints, and alleged lack of effort in creating protective measures against harassment prompted the cancellation. It also forced the industry to confront its ongoing discrimination and harassment against employees and participants. In other places, discussions of unionization, demands for diversity and inclusion improvements, and leadership accountability have become front-and-center issues. Elsewhere, people started to pay more attention to organizations like the *Counter Strike*

issues. Elsewhere, people started to pay more attention to organizations like the *Counter-Strike Professional Players Association* (CSPPA) for defending pro-gamers against team owners' practice of restricting the type of leagues that players can participate in. These issues prove that the digital world cannot escape real human problems.

To be clear, discrimination/harassment lawsuit, unionization, and demands are hardly new concepts. Substantial case law on the subject shows that these issues continue to impact the modern workplace. What many employers failed to recognize and prepare for is their workforce's ever-increasing awareness and willingness to confront social inequity in the workplace.

Although there is no silver bullet to solve workplace issues, there are certain actions team owners and league managers can take to minimize employee dissatisfaction while promoting diversity, equity, and inclusion:

- **Regularly evaluating compensation levels and practices:** A transparent compensation practice and performance review process can prevent employees' money problems from turning into legal problems.
- **Workplace Safety and Addressing HR Complaints:** Be proactive. A "safe" workplace doesn't mean free of just physical hazards. Identifying problematic racial and gender-related behaviors (i.e. jokes, sexual-related banter, etc.) and providing trainings on such issues can dramatically reduce unwanted complaints and regretful incidents. This can also be done via third-party vendors who can provide audit and training services.
- **Employee Engagement and Transparency:** Employees don't get upset when management promptly and fairly addresses their concerns. Employees get upset when management ignores their complaints and/or fails to communicate resolutions. Instituting a process to solicit employee feedback on working conditions, mental health, and work quality can be one way to acknowledge and address concerns at its early stages.
- **Identify and Remove Problem Managers/Employees:** Codes don't (regularly) make mistakes – humans do. Most employees want a fair and safe workplace. Many times, workplace issues can be more personal than professional (i.e. conflicting communication styles, mannerism, etc.). Regardless, all complaints should be addressed and resolve promptly and effectively. If necessary, management should be prepared to remove repeated offenders to prevent personal problems from snowballing into legal problems.

Documenting and Paying Players/Influencers/Support Staff – The Right Way!

With explosive growth and money to be made, there are lots of movements within e-Sports in both pro and amateur brackets. U.S.-based teams began to draft pro-gamers from all over the world and relocated them to their Los Angeles mansions for an immersive experience. It's like Draft Day, but make it e-Sports.

Furthermore, the world of e-Sports is so established and prevalent internationally that professional

players are getting the same kind of sports athlete visas that are used for Major League Baseball, National Basketball Association, and other traditional sports. Like any athlete, a foreign competitor must show that they can document achievements at the top of their sport. Because domestic and international e-Sports leagues keep clear records of ranking, victories and other data, it is relatively simple to document the achievement. Within the world of international sports, e-Sports athletes enjoy much of the same benefits as traditional sports and in some ways can monetize the popularity of some sports more universally.

This growth also increases demand for support staff such as analysts, coaches, managers, videographers, editors, and influencers. In this exciting environment, albeit chaotic, it's easy for team owners and league operators to overlook their employment law compliance obligations. So, how do you ensure if you're in compliance?

Let's start by evaluating how everyone gets paid. Although requirements vary state by state, generally speaking, the Federal Labor Standards Act requires that employees must either:

1. Be paid at least the federal minimum wage for all hours worked and overtime not less than time one-half the regular rate of pay for all hours worked over 40 hours/week;
OR
2. Qualify for an exemption: paid at no less than \$684/week and meet certain tests regarding their job duties. While this is not an exhaustive list, management should pay close attention to Executive Exemption, Administrative Exemption, Professional Exemption, and Computer Employee Exemption (must be compensated at no less than \$684/week or no less than \$27.63/hour).

If someone is labeled as an independent contractor, then you must evaluate whether they've met the state and/or federal standard for Independent Contractor. **Remember: It is the law that defines whether someone is truly an independent contractor, not the contract that they signed.** For example, California (as one of the strictest state) uses the following ABC Test:

- Players/staff are free from control and direction of the hiring entity in connection with the work performance, both under the contract and in fact; AND
- Players/staff perform work outside the usual course of the hiring entity's business; AND
- Players/staff are customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Depending on where you operate, the test to determine whether a player/staff is an hourly employee, salaried employee, or independent contractor can be quite different. However, misclassification, no matter where you are, could expose you to a same set of problems: claims of unpaid wages, meal and rest breaks violations, unpaid overtime, and related penalties. In certain cases, these problems can also turn into complicated class actions that will put a straining financial burden on your team and league.

Timekeeping and More

For certain pro-gamers, being part of a team means double duties – being a e-Sports competitor and an influencer for the team’s brand. A quick look at certain well-known pro-gamers Instagram and TikTok accounts will show elaborate photos and videos of their team’s merch and logo. Whether intentional or not, such marketing requires extensive recording and editing efforts in addition to time that players/staff must spend in-game throughout the day.

Essentially, players/staff might never truly “clock out” of their job. It also blurs the line between “work” and “personal” time. While this may not be an issue for “salaried” players/staff, it may be difficult for hourly paid players/staff to track their time. This may expose team/league owners to liability for unpaid wages, claims that they failed to provide rest and meal periods, and allegations related to accurate time records under state and federal laws.

For these reasons, those employers involved in the world of e-Sports should retain workplace law counsel to conduct a review of your practices so you can identify any compliance issues that could land you in hot water down the road.

Unionizing – Old Concept in A New World

Unions have been around long before the internet. While it may be a new concept to e-Sports, employment law implications remain the same if players/staff are unionized: they involve the right to strike (which is not exclusive to union), collective bargaining agreement issues, and statutory and non-statutory labor exemption.

- **Right to Strike:** Under the National Labor Relations Act (NLRA), employees “shall have the right...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” This includes the right to strike for economic reasons and unfair labor practices. To be clear, the right to strike is not exclusive to a unionized workforce. A non-unionized workforce may nonetheless strike to demand better working conditions/pay. However, a unionized workforce’s labor strike will require much more negotiation and labor relation skills to navigate. If unionized, players/staff facing demanding work-schedule may strike for higher wages or an alternative work arrangement. For players/staff spending time at team-owned housing where they may never truly “clock out” of their job, living circumstances may also provide causes to strike for alternative working/living conditions. Such organized strikes can be costly, disruptive, and difficult to resolve.
- **Collective bargaining:** If unionized, players/staff could gain the upper hand in bargaining for different wages, working conditions, and other demands. However, representatives negotiating with team/league owners may inadvertently subject other players/staff to a salary cap without their input.
- **Non-statutory and Statutory Labor Exemption:** In general, non-statutory labor exemption (a court-created doctrine) and statutory labor exemption may shield employers from antitrust

liability if deals between unions and employers hinder employees' interests. In other words, where the Sherman Antitrust Act of 1890 forbids conspiracy restraining trade or commerce, statutory and non-statutory labor exemptions allow unions and employers to negotiate without violating such prohibition. Though far from being a free get-out-of-jail card, such exemptions can offer some protection to team/league owners in negotiating with unionized players/staff.

In-Game Gifts and Bonuses

In-game blueprints, currencies, skins, and loot items are often traded or gifted among players. Such in-game items may also hold real-world values and can be traded among players for actual dollars (yes, real money). So, what if, in lieu of a Christmas gift or performance bonus, players/staff are gifted with rare in-game items? Depending on whether such gifts are treated as tangible or intangible gifts, team/league owners should determine whether they are subject to taxation for such actions.

Power to the Players Means Power to your Business

The e-Sports industry is here to stay. This exciting industry also presents new challenges that requires flexibility and adaptability on behalf of team/league owners. Now it's not the time to be complacent on your workplace law compliance duties. Remember: the most valuable assets on your team are not the equipment or the sponsorship, but the players and support staff. Staying ahead of workplace issues and compliance obligations by addressing employees' concerns will ensure your longevity in this everchanging industry.

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