What's New in HR Law

A Focus on Esports: Are Professional Gamers Independent Contractors or Employees?

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The Esports industry is experiencing a groundswell of popularity and analysts do not expect that to change anytime soon, with projections that the industry will generate $1.1 billion in revenue in 2019. Esports is competitive professional video gaming, featuring all of the traditional aspects of the sports industry including individual "star" players, carefully selected teams, a dedicated fan base and, of course, a host of complex legal issues . This article focuses on the distinction between independent contractors and employees in this emerging industry.

Independent Contractor or an Employee?

Determining whether a worker is an independent contractor or an employee is a challenge in many industries. In the Esports arena specifically, where teams, leagues, and players are just starting to realize the immense potential of the industry, Esports organizations would be well-advised to consider the distinction between "employee" and "independent contractor", and think critically about the classification that best captures their relationship(s).

The Dangers of Misclassification

The manner in which a working engagement is classified has real and significant implications, particularly if the classification is incorrect. In Canada, classifying workers as independent contractors is an attractive option, as it generally reduces costs and administrative obligations. Compared to employees, independent contractors:

- have no entitlement to the rights or benefits conferred under employment standards legislation;
- are responsible for securing their own insurance, including workers' compensation coverage;
- control the operation of their own independent businesses; and
- make their own income tax remissions.

Being labelled a contractor can likewise be an attractive option for the worker. Perhaps most notably, the worker's income is not subject to source deductions, and they can avail themselves of various tax advantages as independent business owners.

When properly applied, the independent contractor classification has distinct advantages for all parties involved. However, Esports teams, leagues, and other interested parties, should be wary of the risks associated with misclassification.

More specifically, where a worker has been wrongly classified as an employee, the individual or entity properly considered the employer may be liable for: (i) Canada Pension Plan, Employment Insurance, and Employer Health Tax premiums; (ii) Workplace Safety and Insurance Board premiums; and (iii) income tax deductions; which were not properly paid or remitted during the period of engagement.

In addition to finding oneself unexpectedly on-the-hook for the above employer deductions, provincial employment standards and workers' compensation legislation in some jurisdictions, as well as the federal *Income Tax Act* which applies broadly across all of Canada, prescribe that various penalties may also be imposed where an employee has been improperly classified as an independent contractor.

It is also noteworthy that issues of misclassification often do not surface until the relationship comes to an end. While all parties involved may *initially* be content with an independent contractor classification, when the worker is informed of a desire to end the contractual arrangement, feelings can suddenly change. Further, an agreement to be characterized as an independent contractor does not preclude a claim for notice of termination (or pay in lieu thereof) and/or other benefits and payments a worker feels were not properly remitted during the period of engagement.

Specifically, absent a written contract of employment that expressly limits an individual's entitlements to the minimums prescribed by applicable employment standards legislation, it is open to an adjudicator to award common law reasonable notice, among other benefits and perquisites that may be owing to a worker who should more properly have been classified as an employee. This is the most frequently overlooked - and often the most costly - misclassification risk.

Guidance from the Supreme Court of Canada: Analyze the Entire Relationship

The legal distinction between employee and independent contractor is not new. That said, Canada's highest court, the Supreme Court of Canada, recently had opportunity to revisit the issue and reiterate the key legal considerations that apply when determining the proper classification of workers.

In *Modern Cleaning Concept Inc. v Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28, the Supreme Court of Canada assessed the employee versus contractor distinction. *Modern Cleaning Concept Inc.* involved a worker who was contracted to provide cleaning and maintenance services in public buildings. Although it was agreed by way of a written contract that the worker would be classified as an independent contractor, the Court ruled that the contract was not, in and of itself, determinative of the issue.

The principles enunciated by the Supreme Court of Canada apply broadly across all sectors. In particular, the Court reiterated the age-old judicial sentiment that: "[t]he working relationship has to be examined in its entirety to determine who bears the business risk."

In other words, in addition to assessing any contractual documents that are in place between interested parties, Canadian courts undertake a full contextual analysis, and will also look at other relevant factors. Such additional factors include, but are not limited to, whether the worker owns their own equipment, the degree of control and autonomy the worker has over the relationship, and which party determines working conditions. These and other factors are assessed in order to identify who, in fact, assumes the business risk and corresponding prospect of making a profit. Where the worker is determined to shoulder the business risk and opportunity for profit, the worker will be deemed to have been properly classified as an independent contractor.

Application to the World of Esports

Esports organizations would be well advised to turn their minds to the distinction between employees and independent contractors in order to determine which classification best suits their particular circumstances. Undertaking a contextual analysis of the working relationship, including a review of factors such as which party sets practices and playing times, which party controls travel schedules, and whether players are provided with "swag" and/or gaming equipment in consideration for their services, will help to elucidate which classification may be most appropriate.

The world of Esports is rapidly evolving, and organizations should consider – at an early stage – the legal issues that underpin the working relationships between players and teams.

Need more information?

For further information related to the above, or any labour and employment issue affecting your Esports organization, contact Derek Klatt at 416-408-5506, or your regular lawyer at the firm.

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