

# Linklaters

## Esports series #1 Esports & Employment law – Staying ahead of the game

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Esports is one of the most rapidly growing sports in terms of popularity, salaries and betting stakes.

This has led to an increase in employment law issues for both the players and their teams/clubs or so-called “clans”.

These employment law issues overlap with the issues that arise in traditional sports but also have some aspects specific to esports.



We take a closer look at the key points with perspectives from China, Europe and the US and consider four key issues relating to determining players’ employment status; to the enforceability of their specific contractual terms; the positive action that can be taken to combat the perceived lack of diversity and; tackling allegations of bullying and discrimination that the esports industry is facing.



## 01

## Employment status of esports players

**Employee or contractor?**

Determining whether a player is actually employed by the team/club or is a self-employed contractor providing a service is key as, in a number of jurisdictions, the employment rights, duties and obligations vary according to an individual's employment status. Notably it is often only employees that are entitled to holiday pay, sick pay and minimum wage and social security entitlement.

Individuals have brought cases to challenge their self-employed status to bring claims for national minimum wage, underpaid remuneration and holiday pay across various sectors in recent years.

Where individuals form part of a class or category of staff who have been misclassified, there can be a significant liability for employers. Incorrect employment classification can also:

**create a reputational risk:** where perceived as mistreatment, creating negative press coverage;

**create a tax risk:** where tax authorities may seek to recover any taxes the company should have paid (e.g. National Insurance / Social Security Contributions); and

**render some commercial terms of the underlying contract unenforceable** (e.g., the agreed liquidated damage for the player's early termination of the agreement).

Given the significant consequences of an individual's employment status, the evolving case law in this area as well as potential insurance and tax obligations, legal advice should be taken to determine whether an employment relationship could exist.

**Example of Germany**

Factors that will point more towards an employment relationship include:

- > if the esports players are organised in clans when competing, since fixed structures with distinctions between team leaders, regular players, or substitutes would be similar to those in conventional sports;
- > the establishment of a gaming house by the respective clan (with, for example, regular esports training sessions players are required to participate in);
- > a requirement for esports players to be involved in advertising activities that promote the clan; and
- > if players are earning their living through esports.

**Example of Mainland China**

The recognition of an employment relationship existing between the team/club and the player by courts are commonly based on the following reasons:

- > the content of the work/service agreement concluded between the player and the team/club include elements of an employment contract required by law;
- > the team/club and the player respectively satisfy the qualification requirements for an employer and an employee;
- > there is a clear subordinate relationship between the player and the team/club;
- > the internal policies of the team/club are applicable to the player and the player complies with the team/club's day-to-day management;
- > the player is engaged by the team/club to provide labour and is paid by the latter; and
- > the services provided by the player constitute part of the team/club's business.

**Esport specific regulation**

There is little specific regulation relating to esports player contracts so the status of an esports player is determined in the usual way and this varies across jurisdictions.

Typically, the legal status of a relationship between a company and an individual is not defined by its label under the written contract.

Employee relationships must therefore be determined on a case-by-case basis looking at the reality of the relationship and how it works in practice.

## 02

## Restrictive covenants &amp; other employment contract terms

**Restrictive covenants**

Employers often seek to impose specific restrictive covenants (e.g., non-compete and non-poaching obligations) on their employees in their employment contracts. These clauses are intended to prevent them from joining a competitor or poaching other employees to work for a competitor for a specified period after termination of employment.

The enforceability of such clauses varies across jurisdictions and continues to evolve:

Some jurisdictions (such as Spain and Mainland China) require compensation to be paid for the duration of the non-compete clause whilst others have banned non-compete clauses except in specific circumstances (California and Ontario).

Some jurisdictions will restrict the term of non-compete period (e.g., in Mainland China, the law also states that the post-employment non-compete period may not be longer than two years)

In a number of jurisdictions (e.g., the UK, Germany and Singapore), non-compete clauses are unenforceable as a restraint of trade, unless the employer can prove they are required to protect legitimate business interests and extend no further than is reasonably necessary to protect those interests.

In the US the [Federal Trade Commission has also issued a final rule](#) banning almost all non-compete agreements between employers and employees. While intended to enter into effect in September 2024 [numerous lawsuits have been filed against the proposed ban](#).

**Esport specific examples**

In the esports world, there have been steps taken to prevent non-compete clauses from being used e.g:

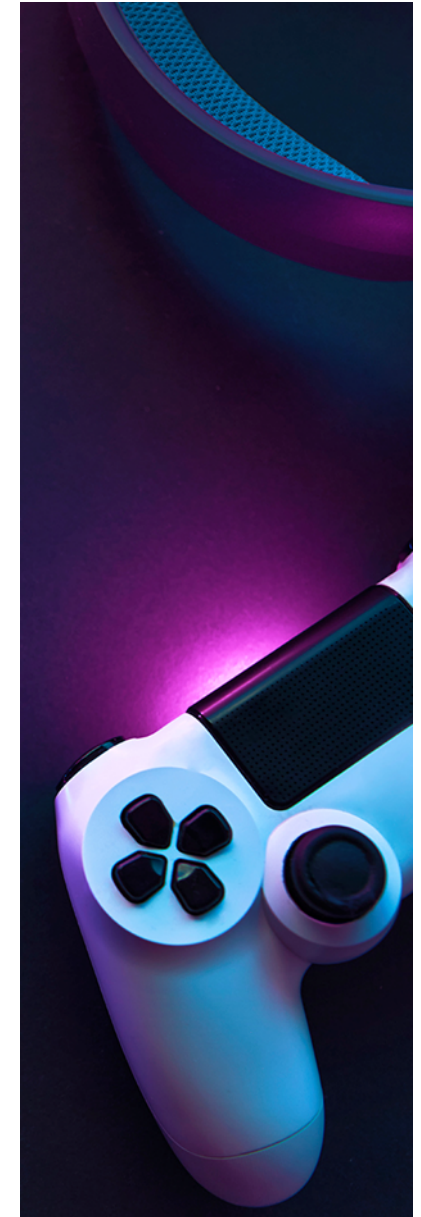
- > Riot Games, publisher of the online game League of Legends, specifically prohibited non-compete clauses for clans participating in its EMEA Championship (LEC) and League Championship Series (LCS) in 2015.
- > Certain publishers have also imposed specific competition regulations: some esports leagues organised under Riot Games established so-called “anti-poaching rules” according to which players (whose contract length can be viewed in a [public database](#)) must not be contacted directly by other teams and must not contact other teams themselves for the purpose of initiating contracts.

Interestingly, it is also Riot Games who requires that [no player contracts should last for more than four years](#), as this is seen as a long enough time for teams to lock down their players whilst also not unfairly depriving the players of their right to move teams or renegotiate their contract terms.

**Transfer windows**

To ensure competitive integrity during the season, Riot Games has installed so-called Global Transfer Windows in their leagues to prevent unregulated transfers during important competition phases. Under these rules, new team players and free agents, who previously were under contract with a different team, may only sign with a team during specified dates set out by the respective league.

Given the complexity surrounding the enforcement of these types of employment clauses specific legal advice should be taken at the contract negotiation stage.





## 03

## Positive action on Diversity, Equity and Inclusion

**Criticisms of the industry**

The esports industry has been [criticised in recent years for a perceived lack of diversity](#). As with some traditional sports, there has been criticism that the management of esports companies and professional gamers alike are dominated by people from a limited number of racial and ethnic backgrounds. A number of esports athletes and executives have come forward to express their support for increasing diversity and creating a more inclusive esports environment.

**Role of positive action**

In this context, esports organisations are increasingly recognising the role that “positive action” measures can play in preventing or remedying workplace discrimination and fostering an inclusive culture. Positive action is a way of applying preferential treatment to certain groups or persons with a particular characteristic as a means of redressing disadvantages or under-representation.

As a concept, it is prima facie discriminatory, but many jurisdictions have legislated to permit positive action in limited scenarios. The terminology used to describe positive action varies across jurisdictions:

■ whilst the UK and other EU countries describe such measures as “positive action” with the reverse being “positive discrimination”

■ other non-European countries are more likely to use “affirmative action” and “reverse discrimination”.

Legislative frameworks in some jurisdictions prescribe specific circumstances in which employers may take lawful positive action (such as the UK and across the EU).

Meanwhile other jurisdictions rely on an interpretation of case law and anti-discrimination laws (such as the US, where affirmative action has recently come under scrutiny following decisions of the US Supreme Court in the higher education sector).

Even in jurisdictions where there is a legislative framework permitting employers to take positive action, there is often ambiguity over the extent to which employers can take positive action without such action amounting to unlawful discrimination.

In any case, positive action measures need to be carefully considered, supported by data and evidence.

As this is a developing and complex area of law, esports organisations should be mindful of the applicable legal restrictions when implementing Diversity, Equity and Inclusion measures.

Any measure implemented should also be continually reviewed to assess whether it has remedied the inequality it was put in place to address.

**Positive action measures**

In the UK and across the EU, there is a focus on proportionality: measures should have transparent and legitimate objectives and be directly connected to those aims. Examples of measures which are generally lawful may include:

- > the establishment of employee resource groups and ally networks;
- > aspirational diversity targets;
- > the funding of outreach and bursary programmes for protected groups; and
- > open days, work experience and mentoring and development programmes targeted at protected groups.





## 04

Policies and processes to tackle  
Discrimination, Bullying &  
Harassment**Scandals in the industry**

The esports industry has unfortunately [attracted significant attention due to bullying and harassment scandals](#).

Allegations of sex discrimination and harassment and racial discrimination have been made against game developers, executives, team owners, managers, coaches, streamers and players.

Whilst the detailed legal regimes which outlaw harassment vary across different jurisdictions, industry participants are recognising that action needs to be taken to create more inclusive esports communities and to minimise legal and reputational risk (which also create commercial risk).

**Clear and accessible policies**

Esports organisations should have clear and accessible policies addressing discrimination, bullying and harassment.

The policies should explain the organisation's stance on these issues, what the organisation does to prevent them occurring, the internal reporting mechanisms and the potential sanctions for violations.

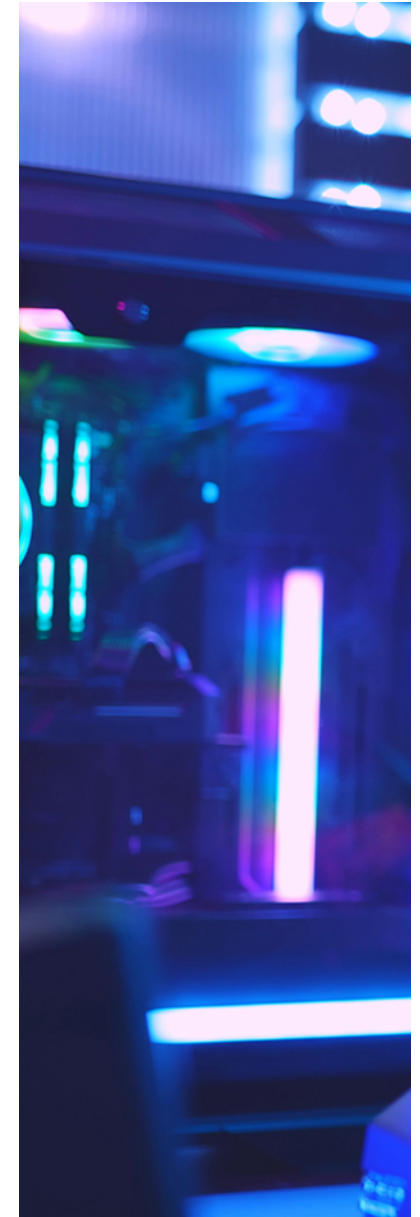
**Fair processes**

Organisations should also commit to a fair process to investigate any genuine complaints to encourage victims to speak up and to ensure anyone accused of bullying or harassment is given a fair opportunity to respond to any allegations against them and has a right of appeal.

**An open workplace culture**

More generally, esports organisations would be well advised to commit to creating an open workplace culture where employees feel comfortable speaking up. This may involve:

- **Ensuring that the organisation has a whistleblowing policy**, with an emphasis on the protection of and support for whistleblowers;
- **Appointing a whistleblowers' champion** to provide independent oversight and accountability for the organisation's whistleblowing arrangements and to raise the profile of whistleblowing within the organisation;
- **Engaging with their workforce** (e.g. through workforce advisory panels or staff surveys) to identify any cultural issues and necessary action;
- **Providing regular and specific training** to employees, management, line managers and HR in relation to whistleblowing, discrimination and bullying and harassment; and
- **Regularly communicating with staff** about the policies in place, the support available to them and the practical arrangements in place to protect them from victimisation.



## Fast Forward

Esports operate within a highly dynamic sector that is currently barely regulated. Those involved in the esports sector will continue to face challenges regarding the employment status of players and applicable labour law provisions. As the legal status of players may differ from one jurisdiction to another, and considering the lack of conclusive case law, esports companies are well-advised to consult with legal experts on a case-by-case basis. This approach helps navigate the complex web of contractual challenges and ensures compliance with relevant laws as well as frameworks set out by publishers or tournament organizers.

Additionally, bearing in mind the potential legal and reputational risks arising from allegations of discrimination, bullying, and harassment, esports companies should adopt a proactive approach to addressing these issues directly. Seeking expert advice in this matter is also advisable.



If you would like to discuss any of the topics raised in our esports series, please do get in touch with any of our key contacts.



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