Esports Bar Association Journal

Volume 2020

Journal Management

Attorney Editor-in-Chief
RYAN FAIRCHILD
Brooks, Pierce, McLendon,
Humphrey & Leonard LLP

Student Editor-in-Chief
MICHAEL ARIN
University of Minnesota
Law School

Publication Committee Chairman
HARRIS PESKIN
ESG Law

Journal Editors

Michael J. Fagan, Jr.

Mikela Gassert

Michael Rivera

Zek Zhang

Table of Contents

Preface ii

Foreign Players Join American Teams for the American Dream but Can't American Stream
by Genie Doi and Samuel Johnson 1

Shaky Foundations – The Uncertain Legality of Publicly Funded Esports Venues
by Paul Santache[†] 11

Cooperative Gaming – Joint Employer Status in Esports
by Phillip Jones[‡] 22

Landlord-Tenant Law as Applied to Team Houses in Esports
by Spencer Mendez 33

[†] The Esports Bar Association Journal selected Paul Santache as the recipient of the scholarship for the Top Student Submission.
[‡] The Esports Bar Association Journal selected Phillip Jones as the recipient of the scholarship for the Student Runner-Up.

Cooperative Gaming – Joint Employer Status in Esports

By Phillip Jones†

Introduction

Professional gaming, or esports, is one of the fastest growing industries in the world with $4.5 billion invested in 2018, a year-over-year growth rate of 837 percent compared to 2017, and revenue projections exceeding $1.8 billion by 2022.[1] Viewership is trending upward with an anticipated 646 million fans in 2023, nearly double the 335 million recorded in 2017.[2] In 2018, Forbes estimated that nine esports teams were worth at least $100 million,[3] and over $211 million in prize money was earned from tournaments in 2019.[4] As the esports industry grows, so do the legal issues plaguing gamers, teams, league operators, and game developers. Labor and employment law issues are at the forefront of the industry with concerns over player unionization, wage theft, child labor law violations, Title VII compliance, and player immigration. At the heart of these issues lie questions over the employee-employer relationship.

Scholarship suggests that esports players are employees, and not independent contractors, of their teams; this finding is likely under both the ABC and economic realities tests.[5] This Article accepts that

---

† Phillip Jones is a student at the Indiana University Maurer School of Law. From 2010–2017, prior to attending law school, Phillip competed as a professional esports coach, under the handle 'Coach PhiL,' in the *Halo* videogame series. Some of Phillip's top esports achievements include placing Bronze in the 2016 Winter X Games and winning the 2017 Halo Dreamhack Atlanta Championships. Phillip now focuses his attention on labor and employment law issues with a special interest in leveraging his experience in the esports industry. For author correspondence please email phjjones5@gmail.com. Copyright © 2020 Phillip Jones.

[1] Mariel Soto Reyes, *Esports Ecosystem Report 2020: The Key Industry Players and Trends Growing the Esports Market Which is on Track to Surpass $1.5B by 2023*, BUS. INSIDER (Dec. 18, 2019), https://www.businessinsider.com/esports-ecosystem-market-report.

[2] *Id.*

[3] Team Cloud 9 held the highest evaluation at $310 million after a Series B funding of $50 million in October 2018. Mike Ozanian et al., *The World's Most Valuable Esports Companies*, FORBES (Oct. 23, 2018), https://www.forbes.com/sites/mikeozanian/2018/10/23/the-worlds-most-valuable-esports-companies-1.

[4] Kevin Hitt, *The Top 10 Esports of 2019 by Total Prize Pool*, ESPORTS OBSERVER (Dec. 27, 2019), https://esportsobserver.com/biggest-esports-2019-prize-pool.

[5] Jurisdictions apply varying tests to decide whether a worker is an independent contract or an employee; the two most popular tests are the ABC test and economic realities test. Under the ABC test, a hired person is presumed to be an employee unless the hiring party can show that the worker is (A) free from control or direction over their performance; (B) performing a service outside the usual course of the

conclusion and moves on to the issue of whether the teams are the only employers in this relationship. Under the joint employer doctrine, an employee may have a direct employer and a secondary employer.[6] Direct employers typically hire or fire, pay wages, and control the employee's schedule or working conditions.[7] Secondary employers, also known as joint employers, benefit from the employee's work but do not typically exert the same control as the direct employer.[8] A joint employer can be held liable if the direct employer fails to provide certain employee rights including minimum wage, overtime pay, benefits, and concerted activity protections.[9]

Esports leagues, typically sponsored or operated by game developers, make money from media and streaming deals, sponsorship agreements, and revenue from fans purchasing tickets or apparel.[10] As fan viewership drives the value of these various media and sponsorship agreements, and as fans come to watch their favorite players compete, it is fair to say that the leagues benefit from the skill and popularity of the players. Leagues also reserve control to schedule the season and penalize players for breaking league rules.[11] If found to be a joint employer, these entities would be held liable alongside the teams for violations of players' employee rights. Historically, it has not always been easy to identify joint employer status due to the ever-changing tests used by the relevant governing bodies.[12] Consequently, the Department of Labor (DOL) and National Labor Relations Board (NLRB) have recently established federal regulations adopting new tests to determine joint employer status under the Fair Labor Standards Act (FLSA) and National

---

employer's business; and (C) engaged in an independently established profession. *See* Michael Arin, *Esports & Employment After* Dynamex, ESPORTS B. ASS'N J. (Oct. 2019), https://esportsbar.org/journals/2019/10/esports-and-employment-after-dynamex (applying the ABC test to esports). The economic realities test examines a list of factors to determine if, as a matter of economic reality, the worker is dependent upon a potential employer. *See Are Esports Players Actually Independent Contractors?*, QUILES LAW (Apr. 17, 2015), http://www.esports.law/blog/archives/04-2015 (applying the economic realities test to esports).

[6] TODD H. LEBOWITZ, BAKER HOSTETLER, FIVE THINGS YOU SHOULD KNOW ABOUT JOINT EMPLOYMENT (2018), https://www.employmentlawspotlight.com/wp-content/uploads/sites/18/2018/10/Five-Things-You-Need-to-Know-About-Joint-Employment.pdf.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See* Nicole Pike, *Esports Playbook for Brands 2019*, NIELSEN, https://www.nielsen.com/wp-content/uploads/sites/3/2019/05/esports-playbook-for-brands-2019.pdf (last visited July 25, 2020); Reyes, *supra* note 1.

[11] *See* OVERWATCH LEAGUE, *RULES OF COMPETITION AND CODE OF CONDUCT* § 6 (2020), https://overwatchleague.com/en-us/news/21568602/rules-of-competition-and-code-of-conduct.

[12] *See* STEVE BERNSTEIN & JOHN POLSON, FISHER PHILLIPS, *5 THINGS YOU NEED TO KNOW ABOUT THE LABOR BOARD'S NEW JOINT EMPLOYMENT RULES* (2020), https://www.fisherphillips.com/resources-alerts-5-things-you-need-to-know-about.

Labor Relations Act (NLRA), respectively.[13] The new regulations are employer-friendly, as they tend to disfavor a joint employer designation, which bodes well for the leagues.

This Article outlines the DOL and NLRB's recent regulations and, using the Overwatch League (OWL) as an example, discusses the potential liability and joint employer status of esports leagues in relation to the players.

I. The Tests

A. Department of Labor

In January 2020, the DOL's Wage and Hour Division issued a regulation adopting a four-part balancing test for determining joint employer status under the FLSA.[14] The test considers whether a second, potential joint employer:

> (1) hires or fires the employee;
>
> (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
>
> (3) determines the employee's rate and method of payment; and
>
> (4) maintains the employee's employment records.[15]

The factors' weight is determined on a case-by-case basis, with no one factor dispositive in determining status.[16] Additional factors may be considered if they show that a potential joint employer significantly controls the terms and conditions of an employee's work.[17] An employee's economic dependence on a potential employer does not determine joint employer status.[18] DOL guidance indicates that the potential joint employer's ability, power, or reserved right to control the employee through one or more of the four factors does not automatically demonstrate status without some direct or indirect exercise of that control; however, such ability may be relevant in determining status.[19] The rule identifies two scenarios where joint employer status may be found under the FLSA; in the relationship of esports teams and leagues, we are primarily concerned with the first scenario, when "the employee

---

[13] *See infra* Parts I.A–B.

[14] *See* James J. Plunkett, *Department of Labor Issues Final Joint-Employer Regulation*, OGLETREE DEAKINS (Jan. 14, 2020), https://ogletree.com/insights/department-of-labor-issues-final-joint-employer-regulation.

[15] 29 C.F.R. § 791.2(a)(1)(i)–(iv) (2020).

[16] 29 C.F.R. § 791.2(a)(3)(i).

[17] 29 C.F.R. § 791.2(b).

[18] 29 C.F.R. § 791.2(c).

[19] 29 C.F.R. § 791.2(a)(3)(i).

has an employer who suffers, permits, or otherwise employs the employee to work, . . . but another person simultaneously benefits from that work."[20]

Employers under the FLSA provide non-exempt employees a federal minimum wage and overtime pay at least one-and-one-half times regular pay for hours worked over forty in a workweek.[21] The FLSA also defines compensable time, regulates child labor, requires certain employer record keeping, and establishes exemption status for certain employees.[22] An employer under the FLSA is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[23] Joint employers are "responsible, both individually and jointly, for compliance with the FLSA."[24]

Esports has been rife with concerns over player exploitation and wage theft. Wage theft is an employer's failure to provide wages or benefits earned by an employee.[25] There have been numerous complaints over esports teams not paying players their contractual salary or prize money winnings.[26] If players are found to be employees of the teams, and not independent contractors, as previously referenced, then players can seek remedies under the FLSA for wage theft claims.[27] Additionally, the leagues, if found to be joint employers, would be liable for a team's lack of payment.[28] Leagues often send prize money winnings to the team organization and have limited control over the disbursement to players or the payment of players' contractual

---

[20] 29 C.F.R. § 791.2(a)(1).

[21] *Wages and the Fair Labor Standards Act*, DEP'T OF LABOR, https://www.dol.gov/agencies/whd/flsa (last visited June 1, 2020).

[22] *Id.*

[23] 29 U.S.C. § 203(d) (2018).

[24] Zachary v. Rescare Oklahoma, Inc., 471 F. Supp. 2d 1175, 1178 (N.D. Okla. 2006).

[25] Specifically, an employer may commit wage theft by violating minimum wage and overtime laws, requiring an employee to work off the clock or during a break, or misclassifying an employee based on exemptions or as an independent contractor. *See* David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year.

[26] *See, e.g.*, Preston Byers, *Denial Esports Allegedly Owes Over €100,000 in Salaries and for CWL Pro League Payment*, DOT Esports (May 16, 2019), https://dotesports.com/call-of-duty/news/denial-esports-owes-salaries-pro-league; Scott Robertson, *Besiktas Esports Allegedly Hasn't Been Paying League of Legends or CS:GO Players*, DEXERTO (Aug. 28, 2019, 12:41 PM), https://www.dexerto.com/csgo/turkish-esports-team-non-payment-league-of-legends-940974; Jeff Yabumoto, *HOTS Players' Lawsuit Against Team Owner Alludes to Bigger Problems in Esports*, GAMECRATE (Jan. 21, 2019), https://www.gamecrate.com/hots-players%E2%80%99-lawsuit-against-team-owner-alludes-bigger-problems-esports/22004.

[27] *See Wage Theft: You're a Victim. Now What?*, NAT'L CONSUMER LEAGUE (July 2011), https://www.nclnet.org/wage_theft_you_re_a_victim_now_what.

[28] *See* LEBOWITZ, *supra* note 6.

salaries.[29] Employers willfully violating the FLSA may be required to compensate employees through backpay and liquidated damages.[30]

B. National Labor Relations Board

In February 2020, the NLRB issued its own regulation regarding joint employer status under the NLRA.[31] Under this standard, a joint employer relationship is found only when a second, potential joint employer and the primary employer "share or codetermine the employees' essential terms and conditions of employment."[32] Terms and conditions of employment exclusively include "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction."[33] To share or codetermine an employee's essential terms and conditions, a joint employer "must possess and exercise . . . substantial direct and immediate control over one or more essential terms or conditions of their employment" that would meaningfully affect the employment relationship.[34] A potential joint employer's indirect control over essential terms and conditions, contractually reserved but never exercised authority to control the essential terms and conditions, or "control over mandatory subjects of bargaining other than the essential terms and conditions" merely supports but does not solely determine a joint employer relationship.[35] The regulation defines "direct and immediate control" over each of the essential employment terms and conditions.[36] Joint employer status is determined on a case-by-case basis after reviewing all relevant facts.[37]

The NLRA gives employees the right to form or join unions and participate in protected, concerted activities regarding working

---

[29] *See, e.g.*, Hongyu Chen, *Chinese Organization Newbee Accused of Not Paying $100k in Prize Money to Fortnite Players*, ESPORTS OBSERVER (July 23, 2020), https://esportsobserver.com/newbee-nonpayment-fortnitewc2019; Cale Michael, *Former Team Manager and Players Accuse Vega Squadron of Not Paying Its Dota 2 Players*, DOT ESPORTS (Sept. 7, 2019, 6:35 PM), https://dotesports.com/dota-2/news/former-team-manager-and-players-accuse-vega-squadron-of-not-paying-its-dota-2-players.

[30] Franczek Radelet, *Wage and Hour Basics Series: Penalties for FLSA Non-Compliance*, WAGE & HOUR INSIGHTS (May 1, 2015), https://www.wagehourinsights.com/2015/05/wage-and-hour-basics-series-penalties-for-flsa-non-compliance.

[31] See Mark G. Kisicki & Erica M. Shafer, *Long-Awaited NLRB Joint-Employer Rule Sets Employer-Friendly Standard for Joint-Employer Determinations*, OGLETREE DEAKINS (Feb. 27, 2020), https://ogletree.com/insights/long-awaited-nlrb-joint-employer-rule-sets-employer-friendly-standard-for-joint-employer-determinations.

[32] 29 C.F.R. § 103.40(a) (2020).

[33] 29 C.F.R. § 103.40(b).

[34] 29 C.F.R. § 103.40(a).

[35] *Id.*

[36] 29 C.F.R. § 103.40(c)(1)–(8).

[37] *See* 29 C.F.R. § 103.40(a).

conditions; furthermore, in a unionized workplace, the employer and union are required to collectively bargain in good faith over terms and conditions of employment.[38] Besides certain exempted employees, the NLRA protects most union and non-union employees.[39] An employer is defined as "any person acting as an agent of an employer, directly or indirectly," excluding certain government entities and labor organizations.[40] Under the NLRA, joint employers must participate in collective bargaining with union representation over terms and conditions of employment; picketing directed at a joint employer is primary and lawful; and joint employers may be jointly and severally liable for the direct employer's unfair labor practices.[41]

Unionization is currently a hot topic in the esports industry with players seeking to form unions or players associations in multiple leagues.[42] If leagues are found to be joint employers, and if players seek to form a union under the NLRA, the leagues will be required to participate in collective bargaining along with the teams. Additionally, leagues would be held jointly and severally liable if the teams violated the NLRA through unfair labor practices, such as discriminating on the basis of labor activity or interfering with concerted activity. The NLRB investigates 20,000 to 30,000 charges per year regarding unfair labor practices.[43] Under the NLRA, the NLRB may seek make-whole remedies, informational remedies, or temporary injunctions in response to violations.[44]

II. Overwatch League

The OWL follows a franchise model, similar to traditional sports leagues, controlled and operated by the game's developer, Activision Blizzard.[45] Twenty franchises from cities across the globe compete in

---

[38] *Frequently Asked Questions – NLRB*, NLRB, https://www.nlrb.gov/resources/faq/nlrb (last visited June 1, 2020).

[39] An exemption would only apply if esports professionals are considered independent contractors, which this Article does not address. *See* 29 U.S.C. § 152(3) (2018).

[40] 29 U.S.C. § 152(2).

[41] *NLRB Issues Joint-Employer Final Rule*, NLRB (Feb. 25, 2020), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule.

[42] Liz Mullen, *Professional Overwatch and CS:GO Will Get Esports Players Associations Soon*, ESPORTS OBSERVER (Mar. 13, 2018), https://esportsobserver.com/pro-overwatch-and-csgo-players-associations.

[43] *About NLRB – Investigate Charges*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited June 1, 2020).

[44] *Id.*

[45] Due to Activision Blizzard's total control over the league, the pair will hereinafter be referred to as the OWL.

the titular videogame *Overwatch*.[46] Each franchise forms a team with a minimum of eight players through signing free agents, facilitating trades, or exercising team options.[47] Players receive a league imposed minimum salary of $50,000 plus franchise-provided benefits.[48] As the developer, Activision Blizzard holds the licensing rights to the game and imposes strict conditions on any third-party tournament organizers hoping to host an event outside of the OWL; these requirements make it more difficult for other professional leagues to host tournaments, thus limiting where players may compete.[49] Players must sign a contract with a franchise and the OWL, and the franchises have an agreement with the OWL requiring certain terms like the players' minimum salaries.[50] The OWL's Official Rules and Code of Conduct allows the league to create each season's schedule, impose player eligibility and league-sanctioned apparel requirements, restrict player movement, and enforce rules regarding player behavior and conduct.[51]

A. Fair Labor Standards Act

Under the FLSA, it is unlikely that the OWL is a joint employer because the OWL does not hire or fire the players, supervise or control the players' work schedule or conditions of employment, determine the players' rate and method of payment, or maintain the player's employment records. While the OWL may have the ability to ban or suspend a player for violating the code of conduct,[52] these actions would not terminate the contractual relationship between the player and their franchise. The franchise is responsible for signing, trading, and releasing players. Also, as previously referenced, the OWL's power and ability to penalize the players, even if it results in their inability to participate in

---

[46] *Homecoming: What's New in 2020*, OVERWATCH LEAGUE (July 16, 2019), https://overwatchleague.com/en-us/news/23059433/homecoming-what-s-new-in-2020.

[47] *2020 Roster Construction Rules*, OVERWATCH LEAGUE (July 30, 2019), https://overwatchleague.com/en-us/news/23051827/2020-roster-construction-rules.

[48] In 2019, the average player earned $114,000 from base salary, prize money, and signing bonuses. Matt Morello, *2020 Team Needs and Player Contract Status*, OVERWATCH LEAGUE (Oct. 4, 2019), https://overwatchleague.com/en-us/news/23178914.

[49] *Organize Your Own Community Esports Competition*, BLIZZARD ENTM'T, https://communitytournaments.blizzardesports.com/en-gb (last visited Aug. 29, 2020).

[50] Adam Melrose, *Legal Analysis of the Overwatch League Structure and the Code of Conduct: A Comparison Study*, LAW OF ESPORTS (Apr. 8, 2018), https://www.lawsofesports.com/single-post/2018/04/07/Legal-Analysis-of-the-Overwatch-League-Structure-and-the-Code-of-Conduct-A-Comparison-Study.

[51] *See generally* OVERWATCH LEAGUE, supra note 11.

[52] *Id.*

the league and therefore inability to fulfill their player contracts, does not automatically impose joint employer status.[53]

Although the OWL is responsible for creating the league's schedule of matches, the franchises control the players' work schedule by designating starting lineups, benching players, and making substitutions.[54] While the franchises' player agreements are not public information, it is likely these agreements further control the players' conditions of employment through enforcing streaming requirements, media obligations, and practice hours. The OWL imposes a minimum player salary within the league, but the franchises negotiate the player contracts; furthermore, the contract terms often go above and beyond the required minimum threshold with bonuses, sponsorship perks, and increased pay based on skill.[55] There is evidence that the OWL imposes a soft salary cap via a luxury tax on franchises which could impact the earning potential of players;[56] however, it is unlikely that a soft salary cap, an indirect control, alone would be sufficient to find a joint employer relationship.

Without further information from the OWL, it is impossible to know whether the player contracts are merely form contracts provided by the league with only a small subset of the terms being negotiated with the players. The extent to which the OWL assists in drafting the player contracts may be a factor in determining joint employer status.

While some may argue the OWL maintains employment records through the code of conduct agreements signed by the players, the regulation clearly states that only records pertaining to the first three factors are considered employment records in this context.[57] The code of conduct agreement does not seem to fit within one of the first three factors, and nothing suggests the OWL maintains additional records that might relate to a factor. Finally, even if the code of conduct agreement was found to be an employment record, the regulation clearly states that satisfaction of this factor alone is insufficient to support a finding of joint employer status.[58]

Finally, while the teams are franchises of the OWL, the FLSA's regulation indicates that operating as a franchisor does not make the joint employer finding more likely.[59]

---

[53] *See* 29 C.F.R. § 791.2(a)(3)(i) (2020).

[54] *See* OVERWATCH LEAGUE, *supra* note 11, § 5.16 (indicating franchises have the ability to designate starting lineups and manage substitutions).

[55] Morello, *supra* note 48.

[56] Richard Lewis, *Leaked Overwatch League Memo Drastically Shifts Housing Requirements, Confirms "Luxury Tax,"* DEXERTO (Aug. 7, 2019), https://www.dexerto.com/overwatch/overwatch-league-leak-housing-requirements-luxury-tax-888650.

[57] 29 C.F.R. § 791.2(a)(2).

[58] *Id.*

[59] 29 C.F.R. § 791.2(d)(2).

B. National Labor Relations Act

Similarly, it is unlikely that the OWL is a joint employer under the NLRA because the OWL does not have direct and immediate control over the players' wages, benefits, hours of work, hiring, discharge, supervision, or direction. Much like the DOL sets the minimum wage, the OWL sets the players' minimum salary, but the league does not ultimately determine the salary rate for each player. Franchises have full discretion to negotiate any salary above the minimum threshold.[60] The OWL requires that players be provided with housing, healthcare, and retirement benefits, but the franchises are responsible for actually providing these benefits.[61] Per the regulation, the OWL does not exercise direct control of the players' hours of work by establishing the league's operating hours, i.e. the season's schedule.[62] The franchises control player schedules through setting the team's lineup and contracting for practice or streaming hour requirements.

As previously discussed, the OWL does not have direct control to hire or discharge the players; all players are signed and discharged through a contract with a franchise. The OWL's restriction on player movement by setting free agency and trade periods is likely, at most, an indirect control on hiring that would not support a finding of joint employer status. The OWL does not supervise players through performance evaluations or give players instructions. Nor does the OWL direct players by assigning them a work schedule, task, or position.

The OWL does arguably have direct control over discipline through the league's reserved contractual powers under the code of conduct. In the past, the OWL has not hesitated in exercising this power to discipline players breaching the code.[63] This control, however, is likely not enough to favor a finding of joint employment. First, as previously mentioned, the OWL's ability to suspend or ban a player does not directly interfere with the player contract. A suspension may put the player in breach in his contract, but the OWL is not responsible for negotiating or enforcing that agreement; franchises have the option to bench a suspended player while keeping them under contract. Second, the OWL

---

[60] Albeit with some limitations from the reported luxury tax. *See* Lewis, *supra* note 56.

[61] *See* Daniel Rosen, *Overwatch League Players Will Have $50,000 Per Year Minimum Salaries, Benefits*, SCORE ESPORTS (July 26, 2017), https://www.thescoreesports.com/overwatch/news/14823-overwatch-league-players-will-have-50-000-per-year-minimum-salaries-benefits.

[62] 29 C.F.R. § 103.40(c)(3).

[63] *See, e.g.*, Bill Cooney, *Blizzard Hands Out Suspensions and Fines to 7 New League Players*, DEXERTO (Dec. 21, 2019, 12:36 PM), https://www.dexerto.com/overwatch/blizzard-hands-out-suspensions-and-fines-to-7-new-overwatch-league-players-261381; Owen S. Good, *Overwatch League Pro Suspended for Homophobic Remark on Livestream*, POLYGON (Jan. 20, 2018, 12:48 PM), https://www.polygon.com/2018/1/20/16913072/overwatch-league-pro-suspended-homophobic-remark.

only has potential control over one of the eight terms and conditions of employment defined under the regulation; a weighing of the factors would likely lead courts to not find a joint employer relationship.

Conclusion

A joint employer finding can open esports leagues to additional liability through the actions of the teams or franchises. Based on the DOL and NLRB's new regulations, it is unlikely that the OWL would be considered a joint employer of the players. Furthermore, other popular tournament series, such as the *Counter-Strike: Global Offensive* Majors, which operate as an open stage tournament series without franchises, are even less likely to have sufficient control to support a joint employer finding.

Postscript

As of the writing of this piece, and in relation to the aforementioned ever-changing tests, the DOL's new rule has recently been challenged by a group of eighteen state attorneys general in a New York federal court.[64] The court struck down key parts of the rule as not falling in line with the FLSA and in violation of the Administrative Procedure Act,[65] especially as related to vertical joint employment relationships.[66] The relevant relationship discussed between the league operators, teams, and players would fall under a vertical joint employment relationship.[67] Specifically, the court found that the rule improperly implements the statutory definitions of the FLSA by focusing solely on the FLSA's definition of "employer," without regards to the definition of "employ" and "employee," when determining joint-employer status; thus, narrowing the FLSA's definition of "employer" and ignoring the definition of "employ" as to "suffer or permit to work."[68] Furthermore, the rule improperly applies different tests for joint and primary employers despite there being no separate tests under the

---

[64] New York v. Scalia, No. 1:20-CV-1689-GHW, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020).

[65] *Id.* at 1.

[66] The court vacated the rule as applied to vertical joint employment but not in relation to horizontal joint employment. *Id.* at 34.

[67] Vertical joint employment "exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and an intermediary business contracting with that employer receives the benefits of the employee's labor." Marty Heller et al., *Federal Judge Strikes Down Key Parts of New Joint Employer Rule*, FISHER PHILLIPS (Sept. 9, 2020), https://www.fisherphillips.com/resources-alerts-federal-judge-strikes-down-parts. Horizontal joint employment exists "where the entities share a common legal or ownership arrangement." *Id.*

[68] *Scalia*, at 15–21.

FLSA.[69] Finally, the court found that the rule was arbitrary and capricious as the DOL did not properly justify the policy change or consider conflicts with the FLSA or the rule's impact on employees.[70]

It is likely that the DOL will either appeal the decision to revive the rule or seek to promulgate a new rule that comports with the recent ruling. In the meantime, employers, and league developers, should stay vigilant as to the rules within their respective jurisdictions. Some jurisdictions, like the Ninth Circuit,[71] will still follow a test similar to the new rule, while other jurisdictions, like the Second Circuit,[72] will follow tests centered on joint employment in light of the employee's economic dependence.

---

[69] *Id.* at 17–18.

[70] *Id.* at 31–33.

[71] Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983).

[72] Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003).

The Esports Bar Association Journal is published annually. The Journal solicits submissions through the Esports Bar Association website, www.esportsbar.org. Citations conform to *The Bluebook: A Uniform System of Citation* (20th ed. 2015). Please cite to articles herein using the following example: Genie Doi & Samuel Johnson, *Foreign Players Join American Teams for the American Dream but Can't American Stream*, 2020 ESPORTS B. ASS'N J. 1 (2020).

Articles herein to which the author has not retained a copyright may be duplicated for classroom use provided that the author and Esports Bar Association Journal are identified, proper notice of copyright is affixed to each copy, and the Esports Bar Association Publications Committee is notified of the use.

For inquiries regarding the Esports Bar Association Journal, please contact us via email at publications@esportsbar.org.

Copyright © 2020 by the ESPORTS BAR ASSOCIATION.