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## Not Just a Game: the Employment Status and Collective Bargaining Rights of Professional ESports Players

Hunter Amadeus Bayliss  
*Washington and Lee University School of Law*

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# Not Just a Game: the Employment Status and Collective Bargaining Rights of Professional ESports Players

*Hunter Amadeus Bayliss\**

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### *I. Introduction*

Ten years ago, only a microscopic percentage of the populace knew the term “eSports.”<sup>1</sup> Even today it is a term outside of everyday parlance.<sup>2</sup> The popularity of eSports is on the rise, however, and traditional sports media outlets have begun to address the phenomenon.<sup>3</sup> From its humble beginnings, eSports

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1. See Nick Wingfield, *In E-Sports, Video Gamers Draw Real Crowds and Big Money*, THE NEW YORK TIMES (Aug. 30, 2014), [http://www.nytimes.com/2014/08/31/technology/esports-explosion-brings-opportunity-riches-for-video-gamers.html?\\_r=0](http://www.nytimes.com/2014/08/31/technology/esports-explosion-brings-opportunity-riches-for-video-gamers.html?_r=0) (noting that, though game competitions have been around for decades, eSports’ recent would have been “unthinkable, even laughable, a few years ago”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. See Andy Chalk, “*Esports*” is Now Officially in the Dictionary, PCGAMER, (May 7, 2015), <http://www.pcgamer.com/esports-is-now-officially-in-the-dictionary/> (noting that the term ‘esports’ has only been accepted as a recognized word recently) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. See Brenna Hillier, *League of Legends World Championships to be Broadcast on ESPN*, VG247 (Oct. 17, 2014), <http://www.vg247.com/2014/10/17/league-of-legends-world-championships-to-be-broadcast-on-espn/> (noting that the League of Legends world championships were broadcast on the Entertainment and Sports Programming Network (ESPN)) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Nick Schwartz, *ESPN Embraces eSports, Broadcasts Dota 2 Championship ‘The International’*, USA TODAY (July 21, 2014) (addressing ESPN’s decision to broadcast eSports events on its streaming site) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

has grown into a multimillion dollar industry.<sup>4</sup> Tens of millions of individuals watch competitive eSports, and millions of dollars are given out in prizes alone.<sup>5</sup>

The largest eSport program is Riot Games' League of Legends, which has millions of daily players.<sup>6</sup> League of Legends is a free-to-play game, with micro-transactions limited to the purchasing of cosmetic in-game items.<sup>7</sup> League of Legends dwarfs its competition in a sheer size comparison, with seven to ten times as many concurrent users as its next closest rival.<sup>8</sup> Due to its size and League of Legends' ongoing mission to advance the eSports professional scene,<sup>9</sup> this note focuses on issues facing League of Legends and its professional players.

Despite impressive player and viewership numbers, eSports suffers from uncertainty. Specifically, it is unclear whether eSports professional players are employees or independent actors.<sup>10</sup> Employee status can provide multiple benefits for

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4. Don Riddell, *ESports: Global Revenue Expected to Smash \$1 Billion by 2019*, CNN (May 29, 2016), <http://edition.cnn.com/2016/05/29/sport/esports-revolution-revenue-audience-growth/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

5. *The Worldwide eSports Market Reaches 134 Million Viewers*, SUPERDATA (May 4, 2015), <http://www.superdataresearch.com/blog/esports-brief/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

6. Paul Tassi, *Riot's 'League of Legends' Reveals Astonishing 27 Million Daily Players, 67 Million Monthly*, FORBES (Jan. 27, 2014), <http://www.forbes.com/sites/insertcoin/2014/01/27/riots-league-of-legends-reveals-astonishing-27-million-daily-players-67-million-monthly/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. *Id.*

8. See Zoe Hawkins, *Dota 2 vs League of Legends: By the Numbers*, LAZYGAMER (July 4, 2014), <http://www.lazygamer.net/general-news/dota-2-vs-league-of-legends-by-the-numbers/> (noting that League of Legends had 7.5 million concurrent users, compared to Dota 2's all-time peak of 843,024 users) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Tassi, *supra* note 6.

9. See Jon Robinson, *'League of Legends' Mimics Regular Sports*, ESPN (Jan. 30, 2013), [http://espn.go.com/blog/playbook/tech/post/\\_id/3979/league-of-legends-mimics-regular-sports](http://espn.go.com/blog/playbook/tech/post/_id/3979/league-of-legends-mimics-regular-sports) (examining League of Legends' promotion of eSports as a real sport and viable professional occupation) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

10. See Bryce C. Blum & Stephen D. Fisher, *The Rise of eSports: League of Legends Article Series*, FOSTER PEPPER PLLC 4 (Jan./Feb. 2014), <http://www.foster.com/documents/foster-pepper-white-paper/riseofesportswhitepaper-fosterpepper> (explaining briefly the uncertain employment status of League of Legends professional players) (on file with the

professional players, such as collective bargaining.<sup>11</sup> Given Riot Games' control over the League of Legends franchise and professional scene, professional players are in a precarious position in regards to their rights.<sup>12</sup> This note will examine the current law to determine whether professional League of Legends eSports players are employees, and how best to ensure players' rights are protected as the eSports industry continues to expand.

## II. Background

### A. *It's all Geek to Me: What is League of Legends?*

League of Legends is, at its core, a competitive online game that uses real time strategy and role playing game elements.<sup>13</sup> League of Legends takes the form of a Multiplayer Online Battle Arena (MOBA), which consists of two teams fighting against each other on the same map to accomplish contrasting objectives.<sup>14</sup> For current League tournament games, two teams of five players try to destroy the opposing team's nexus, which is protected by various obstacles.<sup>15</sup>

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Washington and Lee Journal of Civil Rights and Social Justice).

11. See 29 U.S.C. § 157 (2012) (granting employees the right to collectively bargain without restraint).

12. See *End User License Agreement (EULA), League of Legends*, LEAGUE OF LEGENDS, <http://na.leagueoflegends.com/en/legal/eula> (last modified May 31, 2016) (outlining Riot Games' substantial control over the use of the League of Legends client) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also *League of Legends Championship Series: 2015 Season Official Rules*, LEAGUE OF LEGENDS CHAMPIONSHIP SERIES (Jan. 2015), [https://riot-webstatic.s3.amazonaws.com/lolesports/Rule%20Sets/2015\\_LCS\\_Rule\\_Set\\_2.01.pdf](https://riot-webstatic.s3.amazonaws.com/lolesports/Rule%20Sets/2015_LCS_Rule_Set_2.01.pdf) (providing the extensive rules governing what actions players and teams may take to remain within the League Championship Series).

13. See *What is League of Legends?*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/get-started/what-is-lol/> (last visited Sept. 12, 2016) (giving a brief overview of League of Legends' style of play) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

14. See *Multiplayer Online Battle Arena*, GIANT BOMB (Aug. 2014), <http://www.giantbomb.com/multiplayer-online-battle-arena/3015-6598/> (last modified Dec. 12, 2015) (defining MOBAs, giving a brief history of their development, and a list of typical gameplay elements) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

15. See David Segal, *Behind League of Legends, E-Sports's Main Attraction*,

Before the game begins, players choose from a pool of over 120 champions (and growing), and have the option to ban other champions from play.<sup>16</sup> The game is played using a mouse and keyboard.<sup>17</sup> As the game progresses, players gain gold by killing AI-controlled minions and enemy player characters.<sup>18</sup> Items are purchased by gold that provide additional powers to a player's character.<sup>19</sup> Teams work together to destroy objectives and gain more gold, so that they can push into the enemy base, overcome its defenses, and raze the enemy nexus point, winning the game.<sup>20</sup> These games require strategic movement and intense hand-eye coordination.<sup>21</sup>

*B. Professional League of Legends: The Entities Involved and the Agreements that Govern*

Professional League of Legends play involves six main actors: sponsors, Riot Games, the League of Legends Championship Series (LCS), the team organizations, the professional players,

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N.Y. TIMES (Oct. 10, 2014), <http://www.nytimes.com/2014/10/12/technology/riot-games-league-of-legends-main-attraction-esports.html> (giving a brief overview of the game mechanics of League of Legends) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Ranked Game*, League of Legends Wiki, [http://leagueoflegends.wikia.com/wiki/Ranked\\_game](http://leagueoflegends.wikia.com/wiki/Ranked_game) (last visited Sept. 12, 2016) (providing a brief explanation of the pre-game phases) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Tom Giratikanon, Jon Huang & Jeremy White, *Watch 10,000 League of Legends Games in 30 Seconds*, N.Y. TIMES (Oct. 10, 2014), <http://www.nytimes.com/interactive/2014/10/10/technology/league-of-legends-graphic.html> (aggregating 10,000 League of Legends games and giving a brief description of overall gameplay goals) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

16. Segal, *supra* note 15.

17. See *New Player Guide*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/get-started/new-player-guide/> (last visited Sept. 15, 2016) (giving brief introductory information for people new to the game) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

18. *Id.*

19. *Id.*

20. *Id.*

21. See Segal, *supra* note 15 (noting the skill and coordination required to play the game).

and streaming sites.<sup>22</sup> Of these entities, three specifically deal with players: teams, streaming sites, and the LCS.<sup>23</sup>

The LCS is a Delaware Limited Liability Company that establishes the rules for professional League of Legends play.<sup>24</sup> The LCS is a subsidiary of Riot Games, a California corporation, and the LCS deals directly with professional players who have qualified for the League of Legends Championship Series.<sup>25</sup> The exact relationship between Riot Games and the LCS is not precisely clear. The LCS maintains an extremely close relationship with Riot Games, including sharing a log-in network,<sup>26</sup> sharing individual employees who act on behalf of both organizations, and mutually recognizing penalties and regulations promulgated by each other.<sup>27</sup> For the purposes of this note, and for the purposes of LCS actions, Riot Games' regulations and rules can be treated as LCS regulations.<sup>28</sup>

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22. See Bryce Blum & Stephen Fisher, *Player Contracts: Defining Expectations to Avoid Conflict*, FOSTER PEPPER PLLC 2 (Aug. 2014), [http://www.foster.com/documents/foster-pepper-white-paper/playercontracts\\_definingexpectationstoavoidconflict.aspx](http://www.foster.com/documents/foster-pepper-white-paper/playercontracts_definingexpectationstoavoidconflict.aspx) (giving a helpful illustration of basic contractual relationships within the realm of League of Legends).

23. *Id.*

24. See *League of Legends Championship Series: 2016 Season Official Rules*, LEAGUE OF LEGENDS CHAMPIONSHIP SERIES 5 [hereinafter *Season Six Official Rules*] (Dec. 18, 2015), [https://riot-web-static.s3.amazonaws.com/lolesports/Rule%20Sets/2016%20Spring%20LCS%20Rule%20Setv3\\_01.pdf](https://riot-web-static.s3.amazonaws.com/lolesports/Rule%20Sets/2016%20Spring%20LCS%20Rule%20Setv3_01.pdf) (introducing the LCS and defining the purpose of the LCS ruleset) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

25. See Blum & Fisher, *supra* note 22 (giving a helpful illustration of basic contractual relationships and giving a very brief description of the parties).

26. Compare LEAGUE OF LEGENDS, <http://na.leagueoflegends.com>, with LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, <http://na.lolesports.com>. To comment on either of the websites, the PVP.net identity, the front-end interface for the user, must be established. This identity is used to access the same account for the League of Legends Client (<http://i.cubeupload.com/MZC0LW.png?>). Both sites redirect to a shared support system, forum, and discussion page.

27. See, e.g., Nick Allen ("RiotNickAllen"), *Competitive Ruling: Counter Logic Gaming*, LEAGUE OF LEGENDS CHAMPIONSHIP SERIES (Dec. 10, 2014), <http://na.lolesports.com/articles/competitive-ruling-counter-logic-gaming> (ruling actions by the team, Counter Logic Gaming, as violating the LCS rules) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Nick Allen is the former League Operations Manager for Riot Games (see <https://twitter.com/NickAllen>). Despite his title, he was also responsible for all official rulings of the LCS. He has recently stepped down. *Id.*

28. See *Season Six Official Rules*, *supra* note 24, RULE 10.2.8 (incorporating the Riot Games' Terms of Use, End User License Agreement, and other rules

The LCS maintains a 10-team league in North America, whose top-performing teams are qualified to enter the League of Legends World Championships.<sup>29</sup> The LCS directly deals with the European and North American professional scenes, and is the governing body for the World Championships.<sup>30</sup> The teams that take part in the LCS are drawn in part from the prior year's LCS members (the top eight teams) and in part from the winners of the "Challenger Series," a competition to enter the LCS.<sup>31</sup>

The current version of the LCS contracts are kept confidential, though the yearly rules are published for each season.<sup>32</sup> The LCS adopted the policy of keeping specific contracts secret after public uproar surrounding the leak of a "restricted games" clause, which prohibited players from streaming online while playing specific other games.<sup>33</sup> Though the restrictions

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into the LCS rules).

29. See LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, <http://na.lolesports.com> (last visited Sept. 15, 2016) (explaining the basic breakdown of teams and the championship series) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Leah 'SpiNN' Jackson, *Welcome to the 2015 Spring Expansion Tournament!*, LEAGUE OF LEGENDS CHAMPIONSHIP SERIES (Nov. 13, 2014), <http://na.lolesports.com/articles/welcome-2015-spring-expansion-tournament> (outlining the new Challenger Series expansion tournament, which will increase the number of teams in the LCS from eight to ten) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

30. See LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, <http://na.lolesports.com/> (last visited Sept. 13, 2016) (providing articles and administrative rulings on the LCS, and live coverage of LCS events for both the European and North American professional scenes) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

31. See *League of Legends Champion Series—About* [hereinafter LCS Challenger series], LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, <http://2015.na.lolesports.com/about> (last visited Sept. 13, 2016) (explaining the challenger series and how the LCS interacts with the challenger series teams) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Note that for the upcoming season, as the LCS is being expanded, the number one challenger team will be automatically added to the LCS. See *id.*

32. See generally *Season Six Official Rules*, *supra* note 24.

33. See Cody 'evoli' Connors & Rod 'slasher' Breslau, *Riot Season 4 LCS Contracts Stipulate Players Cannot Stream Dota 2*, *Blizzard Games*, ONGAMERS (Dec. 4, 2013), <http://www.gamespot.com/articles/riot-season-4-lcs-contracts-stipulate-players-cann/1100-6436489/> (providing information on the restricted games clause leak and its initial effect on the League of Legends community) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Rory Young, *League of Legends LCS Contracts Ban Streaming of Dota 2*, *World of Tanks*, *Blizzard Games*, NEOSEEKER (Dec. 4, 2013),

were eventually lifted,<sup>34</sup> the LCS has since attempted to shroud its contract provisions from the public. Despite this secrecy, the LCS' interactions with players and teams are largely based on their published rules and the League of Legends "Summoner's Code" as outlined in the Riot Games' end user license agreement (EULA).<sup>35</sup> Finally, the LCS also envisions player management by their respective teams, as outlined in a teams' "Player Agreement."<sup>36</sup> These groups of contracts, and the LCS challenger system, govern professional League of Legends play in the United States.<sup>37</sup>

Lastly, it is important to note that League of Legends players are most likely employees of their respective LCS team.<sup>38</sup> Teams provide pay for services, and exercise high levels of control over players.<sup>39</sup> Even if professional players have an employment relationship with their teams, this relationship does not prevent

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<http://www.neoseeker.com/news/24256-league-of-legends-lcs-contracts-ban-streaming-of-dota-2-world-of-tanks-blizzard-games/> (reporting on the League of Legends' community's response to the contract leak) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

34. See Travis Gafford, *Riot Games Reverses Course on LCS Player Streaming Policy—Players Are Now "Free to Stream Any Games They Want"*, ONGAMERS (Dec. 6, 2013), <http://www.gamespot.com/articles/riot-games-reverses-course-on-lcs-player-streaming/1100-6436520/> (reporting that Riot Games and the LCS had removed the streaming provision).

35. See *End User License Agreement (EULA), League of Legends*, *supra* note 12.

36. See *Season Six Official Rules*, *supra* note 24, § 4 (containing multiple provisions that specifically fall outside the LCS agreement and should be addressed in the player agreement).

37. See *About*, LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, <http://gameinfo.na.leagueoflegends.com/en/game-info/> (last visited Sept. 13, 2016) (describing how League of Legends works) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

38. *Infra* Part III.B.3.

39. See Jimmy Thang, *League of Legends - Team Curse Interview*, MAXIMUM PC (Mar. 6, 2013), <http://www.pcgamer.com/league-of-legends-team-curse-interview/> (noting that the players on Team Curse practiced on average of twelve to fourteen hours per day, which was orchestrated and controlled by Team Curse management); *Season Six Official Rules*, *supra* note 24, at § 2.2 (noting that teams provide pay to players, as well as the money provided by LCS, and that "nothing in [the LCS rules] is intended in any way to limit the compensation a team pays to its players"); see also *Season Six Official Rules*, *supra* note 24, at § 4.1 ("[E]ach team shall be responsible for making any and all payments to its players which are required by its Player Agreements.").

professional players from also having a legally recognized employment relationship with another entity.<sup>40</sup> This note does not address the relationship between teams and their players, it only seeks to determine the employment status of players in relation to Riot Games and the LCS.

### *III. Analysis: Are Professional League of Legends Players Employees of Riot Games?*

#### *A. Laws that Govern*

Though the specific LCS contracts are kept secret, other Riot Games contracts, such as the Terms of Use (ToU) and EULA,<sup>41</sup> state that the laws of the United States of America and the State of California shall apply to those agreements without regard to conflict of law principles.<sup>42</sup> The ToU and EULA also reject the application of the United Nations Convention on Contracts for the International Sale of Goods.<sup>43</sup> As such, the issue of

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40. See 29 U.S.C. § 152 (2012) (listing the categories of employee that are not recognized by the National Labor Relations Act, which does not contain a prohibition against multiple employment relations); 29 U.S.C. § 213 (2012) (listing the substantial group of individuals not covered by the Fair Labor Standards Act, but containing no provisions against holding multiple employment relations). In fact, the FLSA can cause employers to become financially liable for claims brought by an employee in connection to a second or third employer. Gregory W. McClune, *Serving Two Masters Can Trigger Overtime Claims*, FOLEY & LARDNER LLP (July 18, 2011), <http://www.laboremploymentperspectives.com/2011/07/18/serving-two-masters-can-trigger-overtime-claims/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

41. Nota Bene: Terms of Use and End User License Agreements provide the contractual framework that governs the relationship between a game owner and its players. League of Legends players are actually using a service provided by Riot Games (the League of Legends client). These agreements outline under what terms the service can be used (covered by the ToU) and the extent to which the license to use that service may be exercised (covered by the EULA). See sources cited *infra* note 42 (explaining the Terms of Use and the End User License Agreement).

42. *End User License Agreement (EULA), League of Legends*, LEAGUE OF LEGENDS § XV(G), <http://na.leagueoflegends.com/en/legal/eula> (last modified May 31, 2016); *Terms of Use Agreement (ToU), League of Legends*, LEAGUE OF LEGENDS § XV(G), <http://na.leagueoflegends.com/en/legal/termsfuse> (last modified May 31, 2016).

43. *End User License Agreement (EULA)*, *supra* note 42 (rejecting the

employment for professional League of Legends players necessarily turns on the employment definitions of California and Federal Law.

## *B. Applicable California Employment Law*

### *1. Definitions of Employees*

The California Labor Code defines an employee as every person in the service of an employer under any oral or written appointment or contract of hire, express or implied.<sup>44</sup> Employment status extends even to aliens and minors.<sup>45</sup> Contractually specified relationships *do not affect* the determination of an employment relationship for statutory purposes.<sup>46</sup>

### *2. Proving Employment*

Once a plaintiff comes forward with evidence that he or she provided services for an employer, the plaintiff has established a prima facie case that the relationship was one of employer/employee.<sup>47</sup> The burden then shifts to the employer, which may prove that the presumed employee was an independent contractor.<sup>48</sup> Proving employment relies heavily on

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application of the United Nations Convention on Contracts for the International Sale of Goods, though recognizing that additional laws may apply if the game is accessed from another country); *Terms of Use Agreement (TOU)*, *supra* note 42 (same).

44. CAL. LAB. CODE § 3351 (West 2015).

45. *Id.* § 3351(a).

46. See *Narayan v. EGL, Inc.*, 616 F.3d 895, 897 (9th Cir. 2010) (“[S]tatutes enacted to confer special benefits on workers are ‘designed to defeat rather than implement contractual arrangements.’” (quoting *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring))).

47. *Id.* at 900 (citing *Robinson v. George*, 105 P.2d 914, 917 (Cal. 1940); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1100 (9th Cir. 2014) (“Once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee.”); *Cristler v. Express Messenger Sys., Inc.*, 171 Cal. App. 4th 72, 83 (2009).

48. *Narayan*, 616 F.3d at 900 (citing *Cristler*, 171 Cal. App. 4th at 89)

the control of the employer over the alleged employee.<sup>49</sup> The Supreme Court of California listed an additional series of factors for determining control, based off the Restatement of Agency.<sup>50</sup> The factors considered by the Court are: a) whether or not the one performing the services is engaged in a distinct occupation or business; b) the kind of occupation that normally performs the work in question; c) the skill required in the particular occupation; d) which party supplies the tools and place of work; e) the length of time for which the services are to be performed; f) the method of payment (whether by time or by the job); g) whether or not the work is a part of the regular business of the principal; and h) whether or not the parties believe they are creating an employer/employee relationship.<sup>51</sup>

Though this control test was a helpful addition to the jurisprudence, it was soon found to be lacking in certain areas.<sup>52</sup> The Supreme Court of California noted that applying the control test “rigidly and in isolation” was often of “little use in evaluating the wide variety of service arrangements.”<sup>53</sup> To solve this issue, the Supreme Court of California enumerated a number of “secondary” indicia of an employment relationship, which were similar to the control test.<sup>54</sup> Of these, the right to discharge at

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(“[O]nce the employee establishes a prima facie case, the burden shifts to the employer . . . [to prove] that the presumed employee was an independent contractor”); see *Bemis v. People*, 240 P.2d 638, 644 (1952) (“It is also the law that, generally speaking, . . . when a prima facie case of employment has been established, the burden shifts to the one claiming that the so-called employee was in fact an independent contractor”) (citations omitted).

49. See *Tieberg v. Unemp’t Ins. App. Bd.*, 471 P.2d 975, 977 (Cal. 1970) (“The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”).

50. See *id.* at 979 (listing factors for determining the employee relationship from the Restatement of Agency).

51. See *id.* (citing RESTATEMENT (FIRST) OF AGENCY § 220 (1933)) (listing the factors to determine control).

52. See *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (noting the control test could not adequately address all types of service arrangements).

53. *Id.*

54. See *id.* (explaining that, while the right to control work may be the “more significant” consideration, several other indicia are useful in determining the nature of a service relationship).

will, without cause, was deemed paramount.<sup>55</sup> The Supreme Court of California also found five other indicia, originally adopted in other jurisdictions, helpful, including: 1) the alleged employee's opportunity for profit or loss depending on his managerial skill; 2) the alleged employee's investment in equipment or materials required for the task, or the employment of helpers; 3) whether the service rendered requires a special skill; 4) the degree of permanence in the working relationship; and 5) whether the service rendered is an integral part of the alleged employer's business.<sup>56</sup> Though varying in their importance, these factors must be assessed and weighed together.<sup>57</sup>

### *3. League of Legends Players, Teams, and the California Employment Factors*

Accordingly, it must first be determined whether League of Legends Professional Players can prove the prima facie case for employment.<sup>58</sup> Marc Merrill, a Riot Games co-founder and the company president, stated that the LCS tournaments, though a money loser for the company, function as a marketing tool.<sup>59</sup> Though Riot Games and the LCS strive to make the LCS more profitable, and charge admission to spectators that attend events live, Riot Games largely uses the LCS to inspire enthusiasts and bring additional players into the game.<sup>60</sup> In order for the LCS to perform this goal, it must have professional players to play in its

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55. See *Narayan v. EGL, Inc.*, 616 F.3d 895, 901 (9th Cir. 2010) (citing *S.G. Borello*, 760 P.2d at 404) (noting that the Supreme Court determined the right to "discharge at will" to be most important among the secondary indicia).

56. *Id.* at 900–02.

57. See *id.* at 901 (noting the factors must be weighed together and not applied as separate tests); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (quoting *Germain v. Worker's Comp. Appeals Bd.*, 123 Cal. App. 3d 776, 783 (1981)) ("Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.").

58. *Infra* Part III.B.2.

59. Segal, *supra* note 15.

60. *Id.* As the LCS has been slowly making more money for Riot Games each year, it is possible that the LCS could become independently profitable within a few years' time.

games.<sup>61</sup> Because professional players and teams provide, at the very least, services in the form of marketing, they seem to satisfy the prima facie case for employment in California, which requires “services” rendered for an employer.<sup>62</sup> As the LCS becomes more profitable, this service relationship should only strengthen.

According to the LCS rules, no employees of Riot Games may participate in an LCS event.<sup>63</sup> The LCS rules go further, banning any employee of an affiliate of Riot Games from participating in the LCS as well.<sup>64</sup> It is clear from this provision of the LCS that the parties do not believe they are creating an employer/employee relationship.<sup>65</sup> The relationship-defining language of the contract, however, does not determine the employer/employee relationship for the purpose of the California Labor Code.<sup>66</sup> Thus, the two inquiries to consider are the measures of control exercised over potential employees and the business indicia exhibited by the relationship.<sup>67</sup> The analysis for professional League of Legends players thus has two prongs: determining whether the LCS has an employment relationship with LCS teams, and whether the LCS has an employment relationship with professional players.

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61. *Id.* High level play helps to inspire enthusiasts and bring spectators and the LCS models provides stability for players entering that profession.

62. *See Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (citing *Robinson v. George*, 105 P.2d 914, 917 (Cal. 1940)) (“Once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee.”); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1100 (9th Cir. 2014).

63. *Season Six Official Rules*, *supra* note 24, § 1.4.

64. *See id.* (defining an affiliate as any entity which owns or controls, is under the ownership or control of, or is under common ownership or control with Riot Games).

65. *See Tieberg v. Unemp’t Ins. App. Bd.*, 471 P.2d 975, 979 (Cal. 1970) (citing RESTATEMENT (FIRST) OF AGENCY § 220 (1933)) (finding that parties’ belief that they are creating an employer/employee relationship is one of the indicia of the control relationship). Note that the LCS, as a subsidiary of Riot Games, is likely considered an affiliate by the company.

66. *See Narayan v. EGL, Inc.*, 616 F.3d 895, 897 (9th Cir. 2010) (“[S]tatutes enacted to confer special benefits on workers are ‘designed to defeat rather than implement contractual arrangements’” (quoting *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring))).

67. *Supra* Part III.B.2.

*a. League of Legends Teams*

Does the LCS exert sufficient control over LCS teams to render them employees? The LCS arranges for teams to receive compensation for participating in the League of Legends Championship Series.<sup>68</sup> The amount given to teams is not known by the LCS, and is arranged via a “Team Agreement.”<sup>69</sup> Teams must also pay players a “Minimum Player Compensation,” consisting of at least \$12,500 to its starting players (which is provided by the LCS to the team as part of their compensation via the Team Agreement).<sup>70</sup> Teams may provide additional compensation to players, but that is not addressed by the LCS agreement.<sup>71</sup> Finally, the agreement also stipulates that two teams in different LCS regions, with the same owner, may not use the same name.<sup>72</sup>

Beyond monetary control, the LCS also controls aspects of publicity and team roster management.<sup>73</sup> Failure to abide by these LCS rules can result in fines for LCS teams.<sup>74</sup> League teams are given certain deadlines that must be observed when switching player positions, although flexibility exists in the form of temporary substitutions.<sup>75</sup>

Excluding the initial subsidy of base player salaries, team income is largely unregulated by the LCS.<sup>76</sup> Sponsorship deals

68. *Season Six Official Rules*, *supra* note 24, § 2.

69. *Id.* §§ 2.1, 4.1 (specifically noting that the LCS agreement does not take into account or inhibit the payment teams provide players in their agreements).

70. *Id.* § 2.2.

71. *See id.* § 2.2, 4.1 (noting that the LCS does not address the amounts paid to players in other contracts between the player and team).

72. *Id.* § 3.1.

73. *Season Six Official Rules*, *supra* note 24, § 4; *see id.* at 56–57 (providing example forms for roster trades, acquisitions, and player demotions/promotions).

74. *See, e.g.*, Nick Allen (“RiotNickAllen”), *NA LCS Competitive Ruling—Andy “Reginald” Dinh*, LEAGUE OF LEGENDS (Aug. 14, 2014), <http://na.lolesports.com/articles/na-lcs-competitive-ruling-andy-%E2%80%99Reginald%E2%80%9D-dinh> (fining a League of Legend team’s owner for failing to abide by the LCS roster change rules) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

75. *See Season Six Official Rules*, *supra* note 24, § 4 (providing rules for temporary substitutions when unforeseen issues arise).

76. *See id.*, § 2.2 (“Nothing in these Rules is intended in any way to limit the compensation a team pays to its players.”).

occur outside of LCS supervision, and are negotiated by teams and the sponsors alone.<sup>77</sup> Teams provide their own practice equipment to players, who only use some LCS provided equipment at tournaments.<sup>78</sup> Teams are also, typically, worth far more than the money provided them by the LCS,<sup>79</sup> which, under the control test, suggests that teams function more akin to Independent Contractors than employees.<sup>80</sup>

Given this autonomy and the monetary stakes, it seems difficult to classify teams participating in the League Championship Series as LCS employees. The LCS may provide teams with some funds, but that money must go to players under the LCS rules.<sup>81</sup> Though the LCS can fine improper roster switches, and defines the procedure for establishing and

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77. See Jack Etienne, *Air Force Reserve Sponsors League of Legends Gaming Team, Cloud 9*, CLOUD 9 HYPERX (May 2014), <http://cloud9.gg/news/air-force-reserve-sponsors-c9> (explaining that Cloud 9 and the Air Force Reserve entered into a sponsor relationship, without mentioning approval or interaction with the LCS) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

78. See *Season Six Official Rules*, *supra* note 24, § 5 (noting what equipment is provided by LCS at tournaments and what equipment is provided by teams).

79. The actual value of teams is hard to determine, given their private nature and the high number of sponsorship relationships. A rough estimate of *only* website traffic can provide some insight. See *How Much is Solomid.net Worth*, WORTH OF WEB CALCULATOR, <http://www.worthofweb.com/website-value/solomid.net> (last visited Sept. 14, 2016) (valuing website traffic revenue of Team Solo Mid, a League of Legends Team, at over \$ 47,000) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The vast majority of team value, however, comes from sponsorships. Tournament winnings also augment team value, see *Riot League Championship Series/North America/2014 Season/Spring playoffs*, LEAGUEPEDIA [http://lol.gamepedia.com/Riot\\_League\\_Championship\\_Series/North\\_America/2014\\_Season/Spring\\_Playoffs](http://lol.gamepedia.com/Riot_League_Championship_Series/North_America/2014_Season/Spring_Playoffs) (last modified Sept. 21, 2015) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Riot League Championship Series/North America/2014/Summer Playoffs*, LEAGUEPEDIA [http://lol.gamepedia.com/Riot\\_League\\_Championship\\_Series/North\\_America/2014\\_Season/Summer\\_Playoffs](http://lol.gamepedia.com/Riot_League_Championship_Series/North_America/2014_Season/Summer_Playoffs) (last modified Sept. 21, 2015) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The top two teams from each tournament took \$75,000 in total prize winnings. *Id.*

80. See *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (noting that the amount of money which the entity earns by its own skill, rather than a salary for the company, weighs toward considering an entity an independent contractor rather than employee).

81. *Season Six Official Rules*, *supra* note 24, at 10.

managing the roster, the LCS cannot mandate employee salary beyond the minimum amount, and does not control practice methods of teams.<sup>82</sup> The indicia of control, as outlined above, do not seem present to label the relationship between the LCS and participating teams as a control relationship.<sup>83</sup>

Other indicia must be considered, however, before determining that LCS teams are not employees for the purposes of California law.<sup>84</sup> Paramount to this analysis is the right to discharge at will.<sup>85</sup> Currently, no LCS team has ever been discharged. The harshest rebuke suffered by any team has been a fine.<sup>86</sup> Though it remains possible for the LCS to *ban* a team from playing,<sup>87</sup> effectively discharging them, it is unclear as to whether this would or could ever occur.

Though teams may theoretically be free from banning, the permanence of their relationship with the LCS is volatile. Teams are eliminated from the LCS if they cannot maintain a high level of play.<sup>88</sup> This uncertainty means that a team's success, both on the field and in obtaining sponsorship and compensation from the LCS, is highly based on the team's own skill and ability to recruit and train skilled players. Coupled with the tempered autonomy teams enjoy when determining their rosters, League of Legends teams seem to fall outside of the employee determination under the Supreme Court of California's additional indicia.<sup>89</sup> As such,

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82. See Thang, *supra* note 39 (noting the players on team curse practiced on average of 12–14 hours per day). The LCS Official rules do not specifically cover practice schedules of teams. See generally *Season Six Official Rules*, *supra* note 24.

83. See *supra* Part III.B.2.

84. *Id.*

85. *Id.*

86. See Allen, *Competitive Ruling: Counter Logic Gaming*, *supra* note 27 (fining the LCS team Counter Logic Gaming for violating the LCS rules).

87. See *Season Six Official Rules*, *supra* note 24, § 11 (noting that the LCS maintains sole discretion over punishment for misconduct); see, e.g., Nick Allen, *Competitive Ruling: Counter Logic Gaming*, *supra* note 27 (fining the team Counter Logic Gaming \$10,000 dollars for prohibited conduct under the LCS rules).

88. See LCS Challenger Series, *supra* note 31 (noting that the last teams in the LCS bracket are demoted to the challenger series, and that the penultimate team must defend its position against a challenger team).

89. See *Narayan v. EGL, Inc.*, 616 F.3d 895, 900–01 (9th Cir. 2010) (citing *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 769 P.2d 399, 404 (Cal.

the LCS cannot use its control over LCS teams to establish an employment relationship with professional players.<sup>90</sup> The analysis now turns to the relationship between professional League of Legends players and the LCS.

*b. League of Legends Players*

Compared to teams, League of Legends professional players have a closer relationship to the LCS. The LCS mandates minimum salaries that players receive.<sup>91</sup> Players are also governed by the ToU, the EULA, the “Summoner’s Code,” and specific player conduct provisions entered into upon downloading the League of Legends client.<sup>92</sup> The penalties for violating these mandatory conduct codes may be assigned by the LCS at its *sole discretion*.<sup>93</sup> Though the LCS provides a list of potential penalties to players, this list of penalties does not limit the LCS’s sole authority to issue other penalties as it sees fit.<sup>94</sup>

The effect of these penalties can be extreme. The most typical form of punishment is a fine, which often amounts to thousands of dollars.<sup>95</sup> As the LCS incorporates ToU and EULA violations, it is even possible for the LCS to enact harsher penalties, including bans.<sup>96</sup> Given that players typically rely on League of Legends

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1989)) (outlining the additional indicia when evaluating an employer/employee relationship).

90. *Id.*

91. *See Season Six Official Rules*, *supra* note 24, § 2.2 (setting aside \$12,500 per player for each half of the tournament year).

92. *See id.* § 10 (outlining a long list of prohibited conduct); *see also id.* § 10.2.8 (incorporating the ToU, EULA, Summoner’s Code, and other rules of League of Legends).

93. *Id.* § 10.4.

94. *Id.* § 10.5.

95. *See Allen*, *League of Legends Competition Ruling: Counter Logic Gaming*, *supra* note 27 (fining four of the five members of the Counter Logic Gaming team \$1,250 for violating the League of Legends ToU).

96. *See End User License Agreement League of Legends*, *supra* note 42, at § V(E) (listing a series of responses that Riot Games may take in response to violation of the EULA, including banning); *Terms of Use League of Legends*, *supra* note 42, at §V(E) (same); *see also* Scott Parkin (“Riot aBhorsen”), *League of Legends Competition Ruling — Suspension of Nukeduck and Mithy*, *League of Legends* (June 2, 2014), <http://forums.euw.leagueoflegends.com/board/showthread.php?t=1749326>

play (whether professional or streaming) to make a living, a ban is a very serious punishment.<sup>97</sup>

The ability to ban (effectively ejecting a player permanently from the professional scene) provides the LCS a higher level of control over players, akin to discharge.<sup>98</sup> Because of this higher level of control, determining whether professional League of Legends players are employees becomes more complicated and nuanced. The analysis must consider both the control of the potential employer over its employees, as well as the secondary indicia listed by the California Supreme Court.<sup>99</sup> As control is a particularly difficult area of analysis, consisting of multiple sub-parts, it is prudent to address that issue first.

#### *i. The Multipart Control Test*

Perhaps the most vexing question involving League of Legends professional players is whether they are engaged in a distinct occupation or business.<sup>100</sup> Though all professional League of Legends players compete in tournaments and receive the minimum mandatory compensation required by the LCS, many other players also work as professional streamers.<sup>101</sup> Some

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(suspending two challenger series players for the use of “highly offensive language” as prohibited under the League of Legends ToU and EULA) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

97. See Tim Chester, *Want to Make \$200,000 killing blue monsters? Here's How*, GQ (Feb. 19, 2014), <http://www.gq-magazine.co.uk/entertainment/articles/2014-02-19/professional-video-gaming-salary> (noting that Michael Santana [Imaqtpie], a professional League of Legends player on Team Dignitas at that time, streamed and played League of Legends as his profession) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

98. *Infra* Part III.B.2.

99. See *Tierberg v. Unemp't Ins. App. Bd.*, 471 P.2d 975, 977 (Cal. 1970) (reviewing the issue of control); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (reviewing the issue of secondary indicia).

100. See *Tierberg*, 471 P.2d 975, 979 (Cal. 1970) (citing RESTATEMENT (FIRST) OF AGENCY § 220 (1933)) (outlining the list of factors for control, specifically whether a potential employee is engaged in the distinct occupation).

101. See Chester, *supra* note 97 (noting that Michael Santana [Imaqtpie], a professional League of Legends player on Team Dignitas at that time, made \$8,000 from streaming in a month); Brett Farrow, *League of Legends Streamer Stats: December 2014*, GAMURS (Apr. 7, 2016), <https://gamurs.com/articles/league-of-legends-streamer-stats-december-2014> (giving viewer counts and time

players even write articles or guides for websites.<sup>102</sup> Despite the many hats that professional LCS players *may* wear, not all players participate in these activities. At minimum, all professional players participate in the occupation of playing League of Legends at a professional level, which in turn requires an incredible amount of skill.<sup>103</sup> This skill does not translate smoothly to professional play of similar game types.<sup>104</sup> The specificity of these skills, which are only applicable toward League of Legends, thus connotes an employer/employee level of control over professional players.<sup>105</sup>

Continuing the control test analysis: what are the tools and place of work for a professional eSports player? Pro League of Legends players practice in locations chosen by their teams, using their own, or team-owned equipment (which is then replaced during tournaments with LCS equipment).<sup>106</sup> However, this equipment may not be used to play in a tournament without access to the League of Legends game client, as access to the client is required to play the game. Access to the client is controlled by Riot Games, the LCS, and is further governed by

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data on popular League of Legends streamers, which are dominated by professional players) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Alex Magdaleno, *Playing Video Games is a Full-Time Job for this Twitch Streamer*, MASHABLE (Mar. 27, 2014), <http://mashable.com/2014/03/27/twitch-streamers/> (giving example income figures for various streamers) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

102. See Yannick Le Jacq, *Beginner's Tips for Playing League of Legends* (May 8, 2015), <http://kotaku.com/a-beginner-s-guide-to-league-of-legends-1703090875> (giving advice on how to get started playing League of Legends) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

103. See *Tierberg* 471 P.2d 975, 977 (Cal. 1970) (listing the RESTATEMENT (SECOND) OF AGENCY factors, specifically the degree of skill and training necessary to perform the particular work). Where the skill required is specialized and not easily transferrable, this suggests an employer/employee relationship.

104. Skill in League of Legends does not translate to skill in another video game. Some mechanical proficiencies, such as actions per minute (APM), may carry over, in much the same way that the athleticism of a football player may help that player pick up a new sport. Actual professional level play, however, would take significant training and resources to achieve.

105. *Infra* Part III.B.2.

106. See *Season Six Official Rules*, *supra* note 24, § 5.1 (explaining what materials are provided by the LCS).

the EULA, ToU, and Summoner's Code.<sup>107</sup> Unlike traditional sports, where a team can actively train without using league-owned equipment, professional League of Legends players must have access to the game client.<sup>108</sup> This suggests that Riot Games and the LCS supply the critical tool for professional players to perform the necessary part of their work, which tilts toward finding an employee relationship.<sup>109</sup>

The method of payment and length of time for which services are to be performed<sup>110</sup> are clearer cut issues, though still somewhat nebulous. The LCS rules agreement provides \$12,500 to each starting player at the start of each split.<sup>111</sup> There are two splits per year, the "spring" and "summer" splits, which each contain a promotion series, the actual split, and then a playoff series.<sup>112</sup> Each season is 11 weeks in length, with roughly four additional weeks of play for the promotion and playoffs.<sup>113</sup> The LCS rules contract lasts for each overall "season," containing both spring and summer splits.<sup>114</sup> This amounts to roughly 30 weeks of play per year, with \$25,000 in salary (not including players maintaining good conduct in the off-season, as is required under

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107. See *id.* § 10.2.8 (noting that the obligations listed in the LCS rules, the EULA, and the ToU apply to professional players).

108. Though it is theoretically possible for a team to only practice its hand-eye coordination and clicks per minute (which would not require the game client), no team could adequately maintain its standing in the LCS without the ability to actually practice the game.

109. See *Tieberg v. Unemp't Ins. App. Bd.*, 471 P.2d 975, 979 (Cal. 1970) (citing the factor of who supplies the tools and place of work). An independent contractor would be expected to supply his or her own tools. *Id.* at 982.

110. See *id.* (listing the factor of method of payment, and whether payment is by time or by the job).

111. See *Season Six Official Rules*, *supra* note 24, § 2.2.

112. See *Riot League Championship Series North America 2014*, LEAGUEPEDIA, [http://lol.gamepedia.com/Riot\\_League\\_Championship\\_Series/NorthAmerica/2014\\_Season/Spring\\_Round\\_Robin](http://lol.gamepedia.com/Riot_League_Championship_Series/NorthAmerica/2014_Season/Spring_Round_Robin) (last modified Sept. 21, 2015) (providing an overview of the spring and summer splits, as well as statistics on wins, losses, weeks of play, and team composition) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

113. *Id.*

114. See *Riot League Championship Series North America 2014*, *supra* note 112 (providing an overview of the total season, which consists of the spring and summer splits: ten week periods of professional League of Legends tournament play, with prizes awarded to the top teams at the end of each split).

the Summoner's Code).<sup>115</sup> Players may receive prizes if their team wins the playoffs, but any team in the LCS receives salary benefits regardless of how the job is performed.<sup>116</sup> Poor performance in the LCS risks a player's team being dropped from the LCS, rather than salary cuts.<sup>117</sup> Given that most teams are not relegated from the LCS,<sup>118</sup> and teams are paid for the entire time they remain in the LCS (not just for particular games), this cuts toward finding an employer/employee level of control (as employers typically hire independent contractors on a job-by-job basis, not anticipating a continued default future relationship).<sup>119</sup>

To complete the analysis, the identity of the principal in the employment relationship must be ascertained.<sup>120</sup> Professional League of Legends players are bound to the LCS via the rules agreement.<sup>121</sup> The LCS can discipline players for acting outside of this agreement, it can act as a necessary intermediary regarding player mobility, and it can set the minimum salary for players (and for some players, this is the majority of income they receive).<sup>122</sup> Given the level of control the LCS exerts over players, which the LCS uses to advertise League of Legends,<sup>123</sup> the LCS would function as the principal.<sup>124</sup>

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115. *Id.*

116. *See Season Six Official Rules*, *supra* note 24, § 2.2 (providing payment to players for time played in the split, without considering performance).

117. *See LCS Challenger Series*, *supra* note 31 (outlining the procedure for rotations into and out of the LCS).

118. *See Counter Logic Gaming*, LEAGUEPEDIA, [http://lol.gamepedia.com/Counter\\_Logic\\_Gaming](http://lol.gamepedia.com/Counter_Logic_Gaming) (last modified Sept. 8, 2016), (noting that Counter Logic Gaming (CLG), a League of Legends eSports team, was founded in April, 2010, making it the oldest League of Legends team still active) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

119. *See Tierberg v. Unemp't Ins. App. Bd.*, 471 P.2d 975, 980 (Cal. 1970) (citing *Isenberg v. Cal. Emp't Stabilization Comm'n*, 180 P.2d 11 (Cal. 1947)) (noting that jockey contracts, which had automatic renewal provisions, were evidence of an employer/employee relationship).

120. *See id.* (listing the RESTATEMENT (SECOND) OF AGENCY factors).

121. *See Season Six Official Rules*, *supra* note 24, at 5 (explaining that the official rules apply to all teams who have qualified to play in the LCS).

122. *See id.* §§ 2.2, 4, 10 (outlining player compensation, player mobility, and penalties, respectively).

123. *See Segal*, *supra* note 15 (explaining that the main purpose of the LCS is to advertise League of Legends by showcasing the game in competitive matches with professional players).

124. It is possible that Riot Games could be the principal of these players, as

Considering these factors as a whole, the LCS sufficiently controls League of Legends professional players to satisfy the control aspect of the employment analysis. Professional players are engaged in distinct occupations and skills only marketable to the LCS, must use the League of Legends client to practice, are engaged in continuing contracts with the potential to last indefinitely, and are a crucial part of the LCS's business.<sup>125</sup> Next the secondary indicia, as outlined above, must be considered.<sup>126</sup>

### *ii. The Secondary Indicia*

The paramount secondary indicium is the right to discharge at will, without cause.<sup>127</sup> This right does not seem present in the LCS agreements.<sup>128</sup> The LCS and Riot Games exercise a wide berth of discretion over player conduct, as evidenced by the expansive conditions of the Summoner's Code, EULA, and ToU.<sup>129</sup> The code of conduct specifically explains that "transmitting or communicating any content which, in the sole and exclusive discretion of Riot Games, is deemed offensive" is a violation.<sup>130</sup> Such violations can result in bans from the LCS.<sup>131</sup> For example,

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it exerts control over the LCS (which is a subsidiary of Riot Games). The exact nature of the control relationship between the two is not public knowledge, however there is a high likelihood that the LCS functions as an agent of Riot Games (as mentioned in Section II). As control by the LCS is required for such a relationship in the first place, however, and would successfully create an employment relationship, this analysis will only focus on the relationship between the LCS and players.

125. *Supra* Part III.B.3.b.i.

126. *See* S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989) (listing the secondary indicia).

127. *See* Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010) (noting that the right to discharge an employee without cause is the most important factor of the control test).

128. *See generally* Season Six Official Rules, *supra* note 24 (no clause of the LCS rules specifically allows for discharge at will, without cause).

129. *End User License Agreement League of Legends*, *supra* note 42, at § XV(G); *Terms of Use Agreement (ToU), League of Legends*, *supra* note 42, at § XV. These agreements provide wide latitude in determining what content is offensive, and thus bannable.

130. *End User License Agreement League of Legends*, *supra* note 42, at § XV(G); *Terms of Use League of Legends*, *supra* note 42, at § XV(E).

131. *Season Six Official Rules*, *supra* note 24, § 10.

two professional players were suspended for using offensive language in the summer of 2014, essentially ending their ability to perform in the LCS summer split.<sup>132</sup> This suggests that though a player may not be fired absolutely at will, the right to discharge is *extremely* expansive.<sup>133</sup> Given the expansive nature of the right, the LCS falls extremely close to satisfying this indicium.<sup>134</sup>

Additional indicia address the actual nature of the working relationship in action, such as the investment in tools, the skills required to perform the work, and the degree of permanence in the work.<sup>135</sup> Professional players invest in their own equipment for practicing, though they must use the League of Legends Client in order to effectively access the game.<sup>136</sup> Similarly, the working relationship of a player and the LCS lasts as long as the player maintains good behavior, coupled with his or her team maintaining a high level of play (which is influenced by the skills of each player).<sup>137</sup> In this way, the permanence of the relationship between the parties is somewhat shaky, though the rotation of a team out of the LCS happens only after a split concludes, and does not affect 80% of the teams.<sup>138</sup> At minimum,

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132. See Parkin, *supra* note 96 (suspending Alfonso Rodriguez and Elrend Holm from the LCS and the Challenger series through the end of 2014).

133. *E.g., End User License Agreement League of Legends*, *supra* note 42, at § VII(B) (noting that Riot Games may alter, add, and interpret the code of conduct at its sole discretion).

134. *Supra* Part III.B.2.

135. See S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989) (listing secondary indicia beyond the initial indicia of control).

136. See *Season Six Official Rules*, *supra* note 24, § 5.2 (listing player-owned equipment such as PC keyboards, PC mice and cordholders, and mouse pads that may be brought into the LCS); *Season Six Official Rules*, *supra* note 24, § 5.1 (noting that LCS material may be provided, but *only* during official gameplay activities); *End User License Agreement League of Legends*, *supra* note 42, § III (listing additional licensing limitations); *Terms of Use League of Legends*, *supra* note 42, § III (prohibiting parties from providing use or access to the League of Legends client via means not-provided by Riot Games).

137. See LCS Challenger Series, *supra* note 31 (noting that the last and penultimate teams in the LCS bracket are demoted to the challenger series); *Season Six Official Rules*, *supra* note 24, § 10 (incorporating the Summoner's Code and a set of conduct that must be followed to maintain good standing and the ability to play in the LCS); see also *supra* Part III.B.3.b.i. (analyzing the extensive skill required to play at a professional level).

138. See LCS Challenger Series, *supra* note 31 (noting that the last team in

however, players maintain a split-long relationship with the LCS.<sup>139</sup>

The last factor to consider in the secondary indicia analysis is the alleged employee's opportunity for profit or loss.<sup>140</sup> As mentioned above, professional League of Legends players have many avenues for potential profit (such as streaming, writing articles, etc.).<sup>141</sup> However, professional players have their baseline income established by the LCS.<sup>142</sup> Thus a professional League of Legends player's potential for profit or loss is limited solely, with regards to the LCS, to whether or not the player's team manages to successfully place within the top three teams of the split (which will earn the team prize money).<sup>143</sup> In this fashion, these rewards function as bonuses or incentives to performing well, but losing such events does not have a negative effect on the player's income for that split.<sup>144</sup>

Considering the secondary indicia as a whole, the evidence leans toward considering professional League of Legends players to be employees.<sup>145</sup> At the very least, the LCS appears to exert sufficient control over players to preclude them from being typical independent contractors.<sup>146</sup> Coupled with the level of control exercised over professional League of Legends players, it seems

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the LCS bracket, *after the 10-week split*, is demoted to the challenger series, while the penultimate team must best a challenger team to remain in the bracket). Overall the LCS has an 80% retention rate per split (or higher as challenger teams fail to beat the penultimate teams in most cases). *Id.*

139. *See id.* (noting relegation occurs after the season ends).

140. *See S.G. Borello*, 769 P.2d at 404 (listing the secondary indicia).

141. *Supra* Part III.B.3.b.i.

142. *See Season Six Official Rules*, *supra* note 24 at § 2.2.

143. *See Riot League Championship Series/North America/2014 Season/Spring playoffs*, *supra* note 79 (explaining that the top three teams in the League receive a portion of the prize money for that split).

144. *See Season Six Official Rules*, *supra* note 24, § 2.2 (noting that the \$12,500 given to players for a split does not consider team standing); *see also* LCS Challenger Series, *supra* note 31 (explaining that the relegation of teams from the LCS occurs after the split itself). As the LCS currently consists of ten teams, this means that five teams (placing fourth through eighth) automatically remain in the LCS even though they do not receive prizes for finishing in first, second, or third.

145. *Supra* Part III.B.3.b.i.

146. *See supra* Part III.B.3.b. (assessing the control of the LCS over players).

apt to consider these player employees of the LCS. Professional League of Legends players are employees under California law.

### *C. Applicable Federal Employment Laws*

The United States contains multiple labor regimes designed to protect employees. These regimes provide additional rights to employees, particularly the right of collective bargaining.<sup>147</sup> These laws apply even if entities have attempted to implement contractual arrangements to eliminate them.<sup>148</sup> Such rights can have profound effects on the employee-employer relationship, as well as the industry involved.<sup>149</sup> For such rights to attach, however, two analyses must be completed. First, the industry must sufficiently impact interstate commerce so as to grant Federal Jurisdiction over the regulation of that industry.<sup>150</sup> Second, the individuals to be covered must satisfy the definition of applicable employees under the acts that govern.<sup>151</sup>

#### *1. League of Legends Tournaments and Interstate Commerce*

The Federal Government has the power to regulate the channels and instrumentalities of interstate commerce, as well as activities that substantially affect interstate commerce.<sup>152</sup> The

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147. See 29 U.S.C. § 157 (2012) (declaring the rights of employees to self-organize and bargain collectively for their mutual aid or protection).

148. See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring) (noting that statutes enacted to confer special benefits on workers are “designed to defeat rather than implement contractual arrangements.”).

149. See generally 29 U.S.C. § 151 (2012).

150. See U.S. CONST. art. I § 8 (enumerating power to the federal government to regulate commerce among the several states, foreign nations, and Indian tribes).

151. See National Labor Relations Act, 29 U.S.C. § 152 (2012) (explaining that the definition of employee, as used in the Act, applies only to those that meet the definition provided therein).

152. See U.S. CONST. art. I § 8 (providing congress the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”); *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (“Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . .”) (internal citations omitted).

internet is one such instrumentality.<sup>153</sup> Most professional sports have been recognized to have a substantial effect on interstate commerce.<sup>154</sup> The LCS broadcasts content via Twitch, Azubu, and Youtube to millions of viewers all over the globe,<sup>155</sup> in a format mimicking professional sports.<sup>156</sup> LCS games provide income to Riot Games<sup>157</sup> and online broadcasters<sup>158</sup> in their various locations around the globe. Given that commerce clause-based jurisdiction has been granted for activities having less effect on interstate commerce,<sup>159</sup> LCS tournaments more than likely substantially affect interstate and international commerce for the purposes of Federal Labor law.

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153. See, e.g., *United States v. Sutcliffe*, 505 F.3d 944, 953–54 (9th Cir. 2007) (noting the internet is an instrumentality of commerce); *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (same); *United States v. MacEwan*, 445 F.3d 237, 245 (3rd Cir. 2006) (same); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (same).

154. See *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1206 (1971) (recognizing basketball as affecting interstate commerce); *Deesen v. Prof'l Golfers' Ass'n of Am.*, 358 F.2d 165 (9th Cir. 1966) (recognizing golf as affecting interstate commerce); *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957) (recognizing football as affecting interstate commerce for the purposes of the Sherman Antitrust Act); *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 244–45, 247 (1955) (recognizing boxing as affecting interstate commerce and specifically noting that boxing promoters made “substantial utilization of the channels of interstate trade and commerce.”); *Nassau Sports v. Peters*, 352 F.Supp. 870, 870 (E.D.N.Y. 1972) (recognizing hockey as affecting interstate commerce for purposes of the Sherman Antitrust Act).

155. See Segal, *supra* note 15 (noting the different ways by which the LCS is broadcast); see Travis Gifford, *League of Legends 2014 World Championship Viewer Numbers (Infograph)*, GAMESPOT (Dec. 1, 2014), <http://www.gamespot.com/articles/league-of-legends-2014-world-championship-viewer-n/1100-6438540/> (showing 27 million unique viewers for the *finals match* alone, as well as 11.2 million concurrent viewers at peak viewership).

156. See Robinson, *supra* note 9 (noting the aspects of eSports that are akin to real sports).

157. See Segal, *supra* note 15 (noting the nature of the LCS and how it works).

158. See Gifford, *supra* note 155 (noting that over 40 broadcasters covered the world championship tournament).

159. See *NFIB v. Sebelius*, 132 S.Ct. 2566, 2579 (citing *Wickard v. Filburn*, 37 U.S. 111 (1942)) (noting that government commerce power can be expansive, and can even extend to a farmer's decision to grow wheat solely for his own consumption, given the effect that such growth has on commerce).

## 2. The NLRA Definitions of an Employee

If League of Legends play is within the government's purview, are professional players employees under Federal Law? The law governing this issue is the National Labor Relations Act ("NLRA").<sup>160</sup> The NLRA was passed in 1935 (and amended over time) to protect the rights of employees and employers, encourage collective bargaining, and limit practices that harmed the general welfare of workers, businesses, and the U.S. economy as a whole.<sup>161</sup> The act defines employer according to the plain meaning of the word, including individuals acting as agents of the employer (directly or indirectly), with some exceptions.<sup>162</sup> The term employee includes any employee and is not limited to the employees of a particular employer, but is subject to some exceptions.<sup>163</sup> For the purposes of the NLRA, a person is one or more individuals, labor organizations, corporations, associations, trustees, trustees in cases under title 11, or receivers.<sup>164</sup>

Since the NLRA's inception, courts determined that the applicability of the NLRA is to be broadly interpreted, based on the economic facts of the situation, instead of relying solely on previously established legal classifications.<sup>165</sup> When determining employee status, a reviewer must determine both the technical and traditional concepts of employee and employer, as well as the

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160. See generally National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (2012).

161. National Labor Relations Act, NLRB (last accessed Sept. 14, 2016), <http://www.nlr.gov/resources/national-labor-relations-act>.

162. 29 U.S.C. § 152(2) (2012). The Act does not categorize U.S. Government corporations, the Federal Reserve Bank, states and their divisions, any labor organizations (except when the organization is acting as an employer), anyone acting in the capacity of officer or agent of such a labor organization, and any individual subject to the Railway Labor Act as employers. *Id.*

163. *Id.* § 152(3). Such exceptions include, inter alia, agricultural laborers, any individual employed by their parent or spouse, any independent contractor, or any individual subject to the Railway Labor Act.

164. *Id.* § 152(1).

165. See *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 129 (1944) (noting the language of the act leaves "no doubt that its applicability is to be determined broadly"); see also *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949) ("[W]e think in view of the general purpose and policy of the Act that Congress did not intend to restrict the duty to bargain collectively only to those subjects which up to 1935 had been commonly bargained about in negotiations between employers and employees.").

economic realities of the situation.<sup>166</sup> Determining employee status is thus a fact-bound determination applying the common law principles of agency.<sup>167</sup> The key question in this agency analysis is the alleged employer's ability to control the purported employee, as evidenced by the employer's control over the manner and means by which the work is performed.<sup>168</sup>

### *3. Are League of Legends Professional Players Employees Under the NLRA?*

Determining control over a purported employer requires an examination of many characteristics of the working relationship.<sup>169</sup> Such characteristics may include: how payment for services is determined, whether the employer provides benefits, who provides the tools and materials to perform the work, who designates where the work is done, the permanency of the relationship, and chiefly whether the employer controls the manner and means by which the work is performed.<sup>170</sup> Though evidence of economic control is not per se proof of the control

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166. See *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403–04 (1947) (noting that the technical and traditional concepts of employer and employee, as well as the economic reality of the situation, must be taken into account).

167. *NLRB v. O'Hare-Midway Limousine Serv., Inc.*, 924 F.2d 692, 694 (7th Cir. 1991) (citing *NLRB v. U.S. Ins. Co. of Am.*, 390 U.S. 254, 256 (1968)).

168. See *id.* (noting that the “inquiry centers on the employer’s ability to control” the alleged employee, which is determined based on a number of factors) (*citations omitted*); *Local 777 Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 874 (D.C. Cir. 1978) (“Control exercised over the ‘manner and means of performance’, not merely the economic controls which many corporations are able to exercise over independent contractors with whom they contract, is the identifying characteristic of an employer/employee relationship.” (*internal citations omitted*)).

169. See *O'Hare-Midway Limousine Serv., Inc.*, 924 F.2d at 695 (“the word, ‘control’ suggests the need for an examination of the many characteristics of an employer-worker. . . .”).

170. *Id.*

necessary to show an employee-employer relationship,<sup>171</sup> the economic realities of the parties must not be overlooked.<sup>172</sup>

The federal law employee/independent contractor analysis for professional League of Legends players thus centers on whether the LCS exercises sufficient control over them.<sup>173</sup> The LCS does not provide benefits for players beyond the mandatory salary it allots at the beginning of each split.<sup>174</sup> Though a relationship with the LCS may be permanent (and in fact is required to continue if the team maintains a level of play above competitors), the relationship can end if a team fails to maintain a high level of play.<sup>175</sup>

Further, control over manner and means of performance is also a difficult matter to determine.<sup>176</sup> The LCS exercises a wide berth of discretion in penalizing activity that it feels is offensive,<sup>177</sup> as well as penalizing “unfair” behavior.<sup>178</sup> In this way, the LCS is able to oversee and control the manner and means of performance by imposing multiple limits on what can and cannot be done. However, it does not directly exercise control over individual practicing habits, team strategies, etc.

The other methods of control the LCS exerts on players are requiring the use of the League of Legends client and choosing

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171. See *Brown v. NLRB*, 462 F.2d 699, 703 (9th Cir. 1972) (citing *Carnation Co. v. NLRB*, 429 F.2d 1130, 1134–35 (9th Cir. 1970)) (Economic control is “not necessarily proof of the kind of control that is relevant to a decision [of] whether a person is a contractor or employee.” (internal citations omitted)).

172. *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403–04 (1947).

173. See *NLRB v. O’Hare-Midway Limousine Serv., Inc.*, 924 F.2d 692, 694 (7th Cir. 1991) (noting the employer/employee relationship centers on the employer’s ability to control the alleged employee); *Local 777 Democratic Union Org. Comm.*, 603 F.2d 862, 874 (D.C. Cir. 1978) (noting the employer/employee relationship is chiefly a matter of control).

174. See *Season Six Official Rules*, *supra* note 24, § 2.2 (stating that starting players must receive a minimum of \$12,500 for each split).

175. See LCS Challenger series, *supra* note 31 (noting that the last team in the LCS bracket is relegated to the challenger series).

176. *O’Hare Midway Limousine Serv., Inc.*, 924 F.2d at 694.

177. See *End User License Agreement League of Legends*, *supra* note 42 (noting that Riot Games has sole, exclusive, and essentially unlimited discretion to determining offensive conduct).

178. See *Season Six Official Rules*, *supra* note 24, §§ 10.4, 10.5 (stating that the LCS has sole and absolute discretion to penalize what it considers to be “unfair play,” and that the LCS may, without limitation, issue a wide variety of penalties).

the venue where LCS events will be held.<sup>179</sup> The LCS and Riot also sanction third party games conferences outside of the LCS season.<sup>180</sup> It is hard to adequately translate the requirement of using the League of Legends client into the typical corporate or sports control structure.<sup>181</sup> The closest analogue to the League of Legends client use requirement is mandatory software suites used in large corporations.<sup>182</sup> The only difference between these two requirements is that League of Legends players must access the game client to practice, whether at an event or not (whereas an employee could write a proposal or other work on a word processor and then transfer it to the company's computers at a later date).<sup>183</sup> Thus almost all outside work for League of Legends is bound to the game client. While this seems to be an even higher level of control over the means of work than of a normal professional, the oversight exercised by the LCS and Riot in these settings is typically scant (Riot normally only responds to game play violations if a player is reported under their reporting system).<sup>184</sup> Still, such control seems akin to the type exerted by employers over employees.

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179. See *Season Six Official Rules*, *supra* note 24, at § 8 (requiring players to attend LCS events at the time and location determined by LCS officials); *Id.* §§ 10.2.7, 10.2.8 (noting that the LCS or Riot may punish players who do not follow the League of Legends Terms of Service or End User License Agreement, which both prohibit use of the client outside by providers not approved by Riot).

180. See *Intel Extreme Masters—Legacy*, INTEL EXTREME MASTERS <http://en.intelxtrememasters.com/legacy/> (last visited Sept. 15, 2016) (providing basic information on the current and previous Intel Extreme Masters (IEM) seasons) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Riot authorized League of Legends to enter the IEM in Season 6 (replacing Defense of the Ancients). *Id.*

181. See *supra* Part III.B.3.b.i.

182. See *Software Use Policy*, MICROSOFT, <https://www.microsoft.com/en-us/sam/softuse.aspx> (last visited Sept. 15, 2016) (providing example company use policies, which inform employees of a corporation that they may not use software outside of the license agreement entered into by their company) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

183. See *End User License Agreement League of Legends*, *supra* note 42 (providing a limited license to users, who in turn may not offer the game client, in any other form, to other potential users). If users may not access the client legally through any party other than Riot, then a team would be unable to practice the game unless they used the official League of Legends client. *Id.*

184. See Riot Games Support, *Reporting a Player*, Comment to *Picture of a Horse*, LEAGUE OF LEGENDS (May 01, 2015), <https://support.riotgames.com/hc/en-us/articles/201752884-Reporting-a-Player> (outlining the reporting process for

The last issue to consider is that of economic control and economic reality.<sup>185</sup> Courts have noted multiple, additional factors that help color this analysis: the degree of control by the alleged employer, the extent of the relative investments of the worker and alleged employer, the degree to which the worker's opportunity for profit and loss is determined by the alleged employer, and the skill required in performing the job.<sup>186</sup> Some considerations, such as degree of control, overlap with earlier analysis.

The murkiest of these additional factors is the degree to which the worker's opportunity for profit and loss is determined.<sup>187</sup> Many professional League of Legends players receive money from other activities.<sup>188</sup> For some players who stream while playing, the \$25,000 per year provided by the LCS is a small fraction of their total income.<sup>189</sup> For each of these high profile streamers, there are also LCS personalities that do *not* stream (or are simply unsuccessful at it).<sup>190</sup> For these players, the

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typical League of Legends play) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Note that just because Riot has taken a more relaxed approach to monitoring its players, it maintains the potential right to monitor more intensely. See *End User License Agreement League of Legends*, *supra* note 42.

185. See *Brown v. NLRB*, 462 F.2d 699, 703 (9th Cir. 1972) (citing *Carnation Co. v. NLRB*, 429 F.2d 1130, 1134–35 (9th Cir. 1970)) (noting that control, alone, is not only factor to consider); *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403–04 (1947) (noting that the technical and traditional concepts of employer and employee, as well as the economic reality of the situation, must be taken into account).

186. See *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 327 (5th Cir. 1993) (listing multipole factors used to gauge the degree of an alleged employee's dependency).

187. See *id.* (noting the degree of control over the worker's opportunity for profit or loss is a factor in the employment analysis).

188. See, e.g., Farrow, *supra* note 101 (giving viewer counts and time data on popular League of Legends streamers, which are dominated by professional players); Magdaleno, *supra* note 101 (giving example income figures for various streamers).

189. See Chester, *supra* note 97 (noting that Michael Santana [Imaqtpie], a professional League of Legends player on Team Dignitas at that time, made \$8,000 from streaming in a month). This would amount to roughly four times the amount of income than that provided by the LCS (assuming the player remained in the LCS for the complete, year-long season).

190. Streaming requires fairly large numbers of viewers (and then a large number of those viewers willing to watch ads) in order to maintain steady

money they receive from the LCS and the additional funds they may receive from their team are their only sources of guaranteed income. Though a team may increase its income via tournament winnings,<sup>191</sup> or decrease its income by performing so poorly that it is kicked out the LCS entirely,<sup>192</sup> these are extreme circumstances, and are only achieved through teamwork (or the lack thereof). Thus an individual employee's actual ability to manipulate their overall profits or loss is fairly contained and dependent on the LCS.

The next factor to consider is the monetary investment of employees.<sup>193</sup> The monetary investment to become a League of Legends player is typically low.<sup>194</sup> Beyond a computer setup and Internet connection, nothing else is required to play the game. Even using top-end materials, a gaming setup typically costs less than \$2,000.<sup>195</sup> The true investment required to become a professional League of Legends player is the time required to

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income. *See How Much Do Pro Gamers Make Streaming*, PROGAMERHUB (Aug. 28, 2014), <http://progamerhub.com/streaming-money/> (giving a brief break down of the Twitch.tv streaming payment system) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

191. *See Riot League Championship Series/North America/2014 Season/Spring playoffs*, LEAGUEPEDIA, [http://lol.gamepedia.com/Riot\\_League\\_Championship\\_Series/North\\_America/2014\\_Season/Spring\\_Playoffs](http://lol.gamepedia.com/Riot_League_Championship_Series/North_America/2014_Season/Spring_Playoffs) (last modified Sept. 21, 2015) (showing the distribution of the \$100,000 in prizes in the Spring Playoffs) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Riot League Championship Series/North America/2014/Summer Playoffs*, LEAGUEPEDIA, [http://lol.gamepedia.com/Riot\\_League\\_Championship\\_Series/North\\_America/2014\\_Season/Summer\\_Playoffs](http://lol.gamepedia.com/Riot_League_Championship_Series/North_America/2014_Season/Summer_Playoffs) (last modified Sept. 21, 2015) (showing the distribution of the \$100,000 in prizes in the Summer Playoffs) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

192. *See* LCS Challenger Series, *supra* note 31 (explaining the process for removing the last placing team from the LCS).

193. *See* Reich v. Circle C. Invs., Inc., 998 F.2d 324, 327 (5th Cir. 1993) (citing Donovan v. Tehco, 642 F.2d 141, 143 (5th Cir. 1981)) (explaining that the investments of both employers and employees must be considered when addressing the issue of economic reality).

194. *See, e.g., Welcome to League of Legends*, League of Legends <http://na.leagueoflegends.com/en/site/guide/index.html> (noting that the game is free to play and download) (last visited Sept. 15, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

195. *E.g., Desktops*, ALIENWARE, <http://www.alienware.com/Landings/desktops.aspx> (last visited Sept. 15, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The most expensive level of Alienware gaming desktops start at \$1,699.99 per unit. *Id.*

become proficient at the game.<sup>196</sup> Professional teams typically engage in extensive practice, consisting of both team and individual practice times.<sup>197</sup> Without such intensive practice schedules, teams are unable to compete at levels necessary to remain competitive (especially considering that multitudes of challenger-tier teams are frothing at the bit to enter the LCS).<sup>198</sup> This is a sizable investment in man-hours, but unlike typical independent contractor investment, the time spent practicing League of Legends is applicable *almost exclusively* to League of Legends. This is not an investment by individuals that are in business for themselves, but rather individuals dependent on receiving funding and employment from the LCS.

Weighing the factors of control and the economic realities of professional League of Legends players,<sup>199</sup> the scales tip toward classifying pro players as employees. Professional players are reliant upon the LCS for guaranteed income (and for some players, the majority of their income).<sup>200</sup> The LCS exerts significant control over player conduct, with the ability to fine, suspend, or ban players.<sup>201</sup> Finally, the economic realities of the relationship between the LCS and professional players suggests that, despite substantial player investment, players are dependent on the LCS for funding and employment.

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196. See Thang, *supra* note 39 (quoting Team Curse's jungler, Saintvicious, who relayed that on average Team Curse practices twelve to fourteen hours per day, six days a week, mixed between five to eight hours of team scrims and three to five hours of streaming or self-practice).

197. Thang, *supra* note 39.

198. See LCS Challenger Series, *supra* note 31 (noting that the series contains the top teams from the challenger bracket, which includes a large number of semi-professional teams aiming for a spot in the LCS).

199. See *NLRB v. O'Hare-Midway Limousine Serv., Inc.*, 924 F.2d 692, 694–95 (7th Cir. 1991) (listing the control factors); *Brown v. NLRB*, 462 F.2d 699, 703 (9th Cir. 1972) (citing *Carnation Co. v. NLRB* 429 F.2d 1130, 1134–35 (9th Cir. 1970)) (listing the economic realities factors); *NLRB v. E.C. Atkins & Co.* 331 U.S. 398, 403–04 (1947) (explaining the issue of economic reality).

200. See *Season Six Official Rules*, *supra* note 24, § 2.2 (providing \$12,500 to LCS players per split).

201. See *Season Six Official Rules*, *supra* note 24, § 10 (granting sole discretion to the LCS and Riot Games to determine what is or is not offensive conduct, and how to appropriately respond to such conduct).

#### 4. *The FLSA Definitions of Employee*

The Fair Labor Standards Act, another federal employment regime, mostly concerns itself with employee standards of living.<sup>202</sup> The FLSA, like the NLRA, defines an employee as any individual employed by an employer, subject to certain exceptions.<sup>203</sup> Additionally, the FLSA adds that “employ” means to suffer or permit work.<sup>204</sup> This additional consideration seems to suggest a slightly broader interpretation of employee under the FLSA, compared to the NLRA.

Accordingly, the test for employment under the FLSA is the economic reality test.<sup>205</sup> The crux of this test is whether, as a matter of economic reality, the alleged employee is in business for herself.<sup>206</sup> An individual who is economically dependent upon the business to which she renders her services is thus an employee under this test.<sup>207</sup>

When seeking to determine the economic reality of the nature of the working relationship, courts look at all the circumstances of the work activity.<sup>208</sup> Courts have considered multiple criteria when considering such circumstances: the nature and degree of the alleged employer’s control over the manner and means of the work, the employee’s opportunity for profit or loss depending upon his managerial skill, the employee’s investment in equipment or materials for the task or his employment of workers, whether the services rendered require a special skill, the degree and permanency and duration of the

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202. 29 U.S.C. § 202(b) (2012).

203. See 29 U.S.C. § 203(e)(1–5) (2012) (noting that individuals employed by the United States Government, some State Government employees, and Agricultural employees, *inter alia*, are not included under the FLSA).

204. 29 U.S.C. § 203(g) (2012).

205. See *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961).

206. See *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 327 (5th Cir. 1993) (citing *Donovan v. Tehco*, 642 F.2d 141, 143 (5th Cir. 1981)).

207. See *id.* (noting that the issue of economic reality turns on whether the alleged employee is economically dependent upon the business to which she renders her services).

208. See *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)) (noting courts consider all the circumstances of the work activity when determining the economic reality of the nature of the working relationship).

relationship, and the extent to which the service rendered is an integral part of the alleged employer's business.<sup>209</sup>

The FLSA analysis overlaps much of the agency and control analyses listed above.<sup>210</sup> Under the LCS rules and the League of Legends EULA, the LCS has a great deal of control over professional players.<sup>211</sup> Though streaming provides opportunities for additional income, non-streaming player income is not greatly affected by individual managerial skill.<sup>212</sup> Professional League of Legends players do not employ workers to play for them. The relationship between the LCS and a player is fairly stable and permanent.<sup>213</sup> League of Legends play requires extensive skill, which is specialized toward playing League of Legends and is not easily transferrable.<sup>214</sup> Finally, professional players are key parts of the LCS and its mission to advertise and create a broader League of Legends community.<sup>215</sup> These factors all suggest that professional league of legends players are employees of the LCS under the FLSA.

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209. *See id.* (citing *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (listing six factors that assist in the economic reality determination); *McComb*, 331 U.S. at 730 (1947)); *see also Reich*, 998 F.2d at 327 (5th Cir. 1993) (outlining similar factors while providing the caveat that the factors are “merely aids in determining the underlying question of dependency” and that no lone factor is determinative).

210. *Supra* Part III.C.3.

211. *See supra* Part III.B.3.b (addressing the various methods of control that the LCS exerts over players).

212. *See supra* Part III.C.3 (explaining that beyond tournament winnings and being kicked out of the league, which are both highly team based, player potential to suffer losses or profits is constrained).

213. *See Season Six Official Rules, supra* note 24, § 4 (outlining prohibitions on player mobility decisions without LCS approval); LCS Challenger Series, *supra* note 31 (noting that the last and penultimate teams in the LCS bracket are demoted to the challenger series).

214. *See supra* Part III.B.3.b. (explaining that League of Legends professional play requires an exceptionally high degree of skill, yet this skill does not easily transfer to other eSports).

215. *See Segal, supra* note 15 (explaining that Riot Games uses the LCS as an advertising tool).

*IV. Analysis: Employment Benefits and What Rights Professional Players Currently Lack*

*A. What Employment Status Brings a Professional League of Legends Player*

Even assuming that League of Legends players are employees, why should they seek employee benefits? Employment laws in this country were enacted largely for two purposes: to protect employees and to ensure commercial success by curtailing practices noted to cause industrial strife and unrest.<sup>216</sup> Multiple regimes cover different employee rights.<sup>217</sup> The NLRA is mostly concerned with collective bargaining.<sup>218</sup> The FLSA concerns itself with providing a minimum standard of living for employees, without substantially curtailing employment or earning power.<sup>219</sup> Both regimes constrict employer rights so as to ensure employee protections.<sup>220</sup>

For professional League of Legends players, the regime with the greatest potential effect is the NLRA. The FLSA, which covers employee benefits, overtime, minimum wage, and other factors of employment,<sup>221</sup> is largely satisfied by the current League of Legends contractual framework. For example, the current yearly payment for a professional League of Legends

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216. See 29 U.S.C. § 151 (2012) (declaring the broad purposes behind the passing the NLRA as protecting workers so as to remove causes of industrial strife, which impair efficiency of commerce and diminution of employment and wages); 29 U.S.C. § 202 (2012) (noting that the maintenance of a minimum standard of living necessary for the health, efficiency, and general well-being of workers helps ensure the orderly and fair marketing of goods in commerce).

217. *Supra* Part III.C.

218. 29 U.S.C. § 151 (2012).

219. 29 U.S.C. § 202(b) (2012).

220. See generally 29 U.S.C. § 151 (2012) (declaring the broad purposes behind passing the NLRA, including protecting employer rights by prohibiting some employer action); 29 U.S.C. § 202 (2012) (declaring the policy of the FLSA as ensuring workers gain certain benefits so as to ensure a healthy workforce, which necessarily results in curtailing some employer power).

221. See *Handy Reference Guide to the Fair Labor Standards Act*, DEPT. OF LABOR WAGE AND HOUR DIV. (Nov. 2014), <http://www.dol.gov/whd/regs/compliance/wh1282.pdf> (providing a very basic overview of some of the protections provided by FLSA and related laws).

player amounts to roughly \$12.02 per hour in wages, which is well above federal and state minimum wages.<sup>222</sup> The collective bargaining provisions of the NLRA, in contrast, are not satisfied in any form by any of the player relationships.<sup>223</sup>

*B. What Can Collective Bargaining Address and to What Categories of Employer Does It Apply?*

The crux of the NLRA is Section 7, which covers the rights of employees as to organization and collective bargaining.<sup>224</sup> In particular, Section 7 provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid.”<sup>225</sup> Interfering with this right constitutes an unfair labor practice by an employer.<sup>226</sup>

Collective bargaining does not, however, apply to all potential matters of employment.<sup>227</sup> Cases are in accord, however,

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222. See *Season Six Official Rules*, *supra* 24, § 2.2 (requiring a payment of \$12,500 per player for each split, amounting to \$25,000 per year for a player engaged in both events); *Minimum Wage*, DEPT. OF INDUST. RELATIONS DIV. OF LABOR STANDARDS. ENF'T, [http://www.dir.ca.gov/dlse/faq\\_minimumwage.htm](http://www.dir.ca.gov/dlse/faq_minimumwage.htm) (last visited Sept. 15, 2016) (noting that the minimum wage in California, as of January 1, 2016, is \$10.00 per hour); *Handy Reference Guide to the Fair Labor Standards Act*, DEPT. OF LABOR WAGE AND HOUR DIV., <http://www.dol.gov/whd/regs/compliance/wh1282.pdf> (last visited Sept. 15, 2016) (noting that, as of July 24, 2009, the federal minimum wage is \$7.25). Dividing \$25,000 by 2080 (40 hour typical work weeks multiplied by 52 weeks per year) yields \$12.01923 per hour. This number is not precisely accurate, as a team could play any number of hours per year. But even comparing this to the yearly minimum wage value in California shows that the LCS provides more payment by a fairly wide margin.

223. See Richard Lewis, *How Fair is an LCS Contract? We Asked a Lawyer*, THE DAILY DOT, <http://www.dailydot.com/esports/lcs-contract-analysis-league-of-legends-riot-games/> (last updated Dec. 11, 2014) (noting that no labor law provisions are addressed or apparently considered in contracts signed between teams and players).

224. 29 U.S.C. § 157 (2012).

225. *Id.*

226. 29 U.S.C. § 158(a)(1) (2012).

227. See 29 U.S.C. § 158 (2012) (providing that unfair labor practices only occur when a certain subset of terms are not subject to collective bargaining).

that the NLRA allows collective bargaining on matters relating to the rates of “pay, wages, hours of employment, or other conditions of employment.”<sup>228</sup> Further, Courts have rejected the notion that the NLRA only covers subjects commonly bargained about at the time of the NLRA’s inception.<sup>229</sup> Mandatory subjects of collective bargaining thus extend to issues that settle an aspect of the relationship between the employer and employees.<sup>230</sup>

Though collective bargaining may apply to a wide variety of issues, the National Labor Review Board (NLRB) does not have jurisdiction over all categories of employers.<sup>231</sup> The NLRA specifically allows the NLRB in its discretion, by rule of decision or published rules adopted pursuant to the Administrative Procedure Act, to “decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in

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228. 29 U.S.C. § 158(d) (2012); *see generally* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); *see also* Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939) (noting that the NLRA provides the subject matter of collective bargaining to be rates of pay, wages, hours of employment and other conditions of employment); Wilson & Co. v. NLRB, 115 F.2d 759, 763 (8th Cir. 1940) (noting the obligation to bargain in good faith both collectively and exclusively with a representative of the majority of an employer’s employees on the matters of wages, hours or employment, and working conditions); NLRB v. Boss Mfg. Co., 118 F.2d 187, 189 (7th Cir. 1941) (noting that collective bargaining is a procedure employees may use to address wages, hours, and other conditions of employment); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (noting that the mandatory subjects of collective bargaining are those outlined section [158(d)] of the NLRA).

229. *See* W.W. Cross & Co. v. NLRB, 174 F.2d 875, 878 (1st Cir. 1949) (“[W]e think in view of the general purpose and policy of the Act that Congress did not intend to restrict the duty to bargain collectively only to those subjects which up to 1935 had been commonly bargained about in negotiations between employers and employees.”); *see also* NLRB v. Katz, 369 U.S. 736, 743 (1962) (noting that changes in sick-leave policies were “conditions of employment” under the NLRA); Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (1948) (explaining that matters of concern arising from the employer-employee relationship may be recognized as included under the Act, despite not being specifically referred to); Conn. Light & Power, Co. v. NLRB, 476 F.2d 1079, 1081 (1973) (“It is well established that included in the language are such “non-wage” benefits as the group health insurance here involved.”).

230. *See* Pall Corp. v. NLRB, 275 F.3d 116, 119–20 (D.C. Cir. 2002) (quoting Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971)) (“only issues that settle an aspect of the relationship between the employer and employees are mandatory subjects of bargaining”) (internal citations omitted).

231. *See* 29 U.S.C. § 164(c)(1) (2012) (giving the NLRB discretion over jurisdiction of disputes).

the opinion of the board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.”<sup>232</sup> However, the NLRB cannot decline to assert jurisdiction over any labor dispute that it *would* have asserted jurisdiction under the standards prevailing upon August 1, 1959.<sup>233</sup>

The NLRB has declined jurisdiction over activities with some interstate ramifications, but which principally affect local matters.<sup>234</sup> The NLRB also applies policy considerations when declining jurisdiction.<sup>235</sup> As such, new categories of employment may be outside NLRB jurisdiction, even if they would qualify as employers under the Act.<sup>236</sup>

For the purposes of eSports, sound policy reasons discourage the NLRB from declining to extend jurisdiction.<sup>237</sup> League of Legends, alone, has wide reaching economic effects, the majority of which are not limited to any state.<sup>238</sup> Beyond economic effects, the NLRB has exercised jurisdiction over similar actions (i.e. professional sports, which the LCS mimics).<sup>239</sup> Given the past actions of the NLRB and the policies of the NLRA, if professional

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232. *Id.*

233. *Id.*

234. *See, e.g.*, Centennial Turf Club, Inc., 192 N.L.R.B. No. 97 at 698 (1971) (declining to extend NLRB jurisdiction over a horseracing track, as the effects of the track were essentially local in character, despite affecting interstate commerce).

235. *See, e.g.*, Evan & Kunz, Ltd., 194 N.L.R.B. No. 197 at 1218 (1972) (concluding that it “would not effectuate the policies of the act” for the NLRB to assert jurisdiction over law firms or lawyers).

236. *Id.*

237. *Infra* Part IV. D.

238. *See* Tassi, *supra* note 6 (providing information on the millions of players, per diem, who play League of Legends all over the globe); *PC Gaming Leading the Way with eSports and Video Streaming*, ETEKNIX (2013), <http://www.eteknix.com/pc-gaming-is-leading-the-way-with-esports-video-streaming/> (noting eSports has become a multi-billion dollar global industry) (on file with Washington and Lee Journal of Civil Rights and Social Justice); *The Worldwide eSports Market Reaches 134 Million Viewers*, SUPERDATA, (May 4, 2015), <http://www.superdataresearch.com/blog/esports-brief/> (providing data on the millions of individuals, from across the globe, who watch League of Legends) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

239. *See* cases cited *supra* note 154 (listing NLRB decisions asserting jurisdiction over various professional sports); *see also* Jon Robinson, *supra* note 9 (noting the LCS mimics traditional sports).

League of Legends players are considered employees, the NLRB will likely have to assert jurisdiction.<sup>240</sup>

### C. Who Would Bargain?

If League of Legends players are employees, what form would their bargaining take? Though a group can collectively bargain, employers are only required to bargain with representatives designated or selected for the purposes of collective bargaining “by the majority of the employees in a unit appropriate for such purposes.”<sup>241</sup> The division of the unit is determined by the NLRB, subject to certain specific considerations.<sup>242</sup> The NLRB is not required to select the *most* appropriate bargaining unit, rather it must only choose a *unit within the range of appropriate units* under the circumstances.<sup>243</sup>

The critical consideration for determining the appropriateness of a bargaining unit is whether the employees within the unit share a “community of interest.”<sup>244</sup> In determining this community of interest, the NLRB is free to consider a wide variety of non-exclusive factors.<sup>245</sup> Such factors include the wishes of employees, the similarity of the working duties and conditions, the character of various workplaces, and

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240. See, e.g., cases cited *supra* note 154 (listing NLRB decisions asserting jurisdiction over various professional sports).

241. 29 U.S.C. § 159(a) (2012).

242. *Id.* at § 159(b).

243. See *NLRB v. J.C. Penney Co., Store No. 29-9*, 620 F.2d 718, 719 (9th Cir. 1980) (internal citation omitted) (noting the NLRB is only required to choose an appropriate unit, not the most appropriate unit); *N.L.R.B. v. Bogart Sportswear Mfg. Co.*, 485 F.2d 1203, 1206 (5th Cir. 1973) (internal citations omitted) (same); see also *N.L.R.B. v. Mercy Hosps. of Sacramento, Inc.*, 589 F.2d 968, 972 (9th Cir. 1978) (internal citations omitted) (explaining that it is well-settled that the NLRB has a large measure of discretion in determining appropriate bargaining units).

244. See *J.C. Penney Co., Store No. 29-9*, 620 F.2d at 719 (citing *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172–73 (1971)).

245. See *Libbey-Owens-Ford Co. v. NLRB*, 495 F.2d 1195, 1200 (3rd Cir. 1974) (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941)) (“[T]he board is free to consider a wide variety of factors, and the presence of absence of one or even several of them is not necessarily determinative of the case.”).

the anticipated effectiveness of the bargaining unit in maintaining industrial peace.<sup>246</sup>

Professional League of Legends Players, as a bargaining unit, would likely only consist of players, with no additional protections granted to LCS employees or other Riot employees. There are two interrelated reasons for this to occur. First, it is not in the best interest for LCS employees to include other employee types within any potential players union.<sup>247</sup> The economic considerations of players, compared to other LCS employees, are very different.<sup>248</sup>

The second reason builds off the first. Though the NLRB determines the bargaining unit, it *may not* determine a unit that includes both professional and non-professional employees unless a majority of the professional employees therein vote to include the non-professionals.<sup>249</sup> Professional employees include any employee engaged in work that is: predominantly intellectual and varied; involves consistent exercise of discretion and judgment in its performance; of such a character that the output produced cannot be standardized in relation to a given period of time; or requires knowledge in an advanced intellectual field or specific instruction from an institution of higher learning.<sup>250</sup> Professional League of Legends players engage in sophisticated play against other players, using their own discretion during games.<sup>251</sup> The results of such games are almost impossible to predict with great accuracy, and the situation of each game can vary wildly.<sup>252</sup> This

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246. *Pittsburgh Plate Glass Co.*, 313 U.S. at 156 (1941).

247. *See generally* 29 U.S.C. § 158(d) (2012). Given that bargaining units discuss rates of wages, hours of employment, etc., it seems easier for players to more adequately represent their own interests and time schedules by including only players. Especially when one considers that eSports players are subject to many more agreements (such as the LCS Official Rules) than a normal LCS employee.

248. *See, e.g., ESports Associate Manager*, Riot Games (last visited Sept. 15, 2016), <http://www.riotgames.com/careers/120787> (providing an outline of duties for an eSports LCS associate manager, whose duties are very administrative and vastly different from a professional player).

249. *See* 29 U.S.C. § 159(b) (2012) (providing professionals the opportunity to vote on whether non-professionals should be included in bargaining unit).

250. *Id.* § 152(12)(a) (2012) (defining professional employees).

251. *See supra* Part III.B.3.b.

252. *See, e.g.,* Thang, *supra* note 39 (specifically noting a comeback play by team curse to win the game, despite the enemy team attacking their final

suggests that professional League of Legends players are professional employees under the NLRA.<sup>253</sup> Given that League of Legends players are subject to unique stresses (such as playing the game or conforming to the additional LCS rules) they would likely fail to agree to any potential bargaining unit that included nonprofessionals (such as the majority of LCS staff).

#### *D. Why Bargain?*

Even if professional League of Legends players are entitled to bargain, there is no guarantee that the players *would* enter into a bargaining unit. As of the writing of this note, there is not a great divide between LCS policy and player action.<sup>254</sup> Much of the typical bargaining subjects, such as wages, appear to be satisfactorily handled so far.<sup>255</sup> So why would players even consider bargaining?

Despite the apparent harmony between the LCS and pro players, there are two areas where players maintain little to no rights.<sup>256</sup> These areas, player mobility and administrative actions, may have dire effects on players.<sup>257</sup> In particular, administrative actions by the LCS can potentially destroy a player's entire career, with no options for a player to contest such rulings within the LCS.<sup>258</sup>

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structure).

253. See 29 U.S.C. § 152(12)(a) (2012) (defining professional employees).

254. See *Season Six Official Rules*, *supra* note 24, at 5 (outlining the policy and purpose of the rules, which aim to ensure a healthy professional eSports scene).

255. See *supra* Part IV.B. (noting that wages, a typically contentious bargaining issue, appear satisfactorily handled under the current LCS framework).

256. *Infra* Part IV.D.1–2.

257. See, e.g., Parkin, *supra* note 96 (suspending professional players from playing League of Legends, which in turn prevents them from working as professional players during that period).

258. See generally *Season Six Official Rules*, *supra* note 24, § 11.1 (noting all decisions regarding the interpretation of the LCS rules, as well as penalties given for misconduct, are final and cannot be appealed).

### 1. Player Mobility

The LCS governs certain aspects of player mobility under sections three and four of the LCS Regular Season Rules.<sup>259</sup> The LCS rules cannot be violated by any contracts among players and teams regarding these aspects of mobility, though additional terms beyond the LCS rules may be imposed.<sup>260</sup> Even discretionary team actions, such as promoting or demoting players, require LCS approval, are governed by specific rules, and require specific forms.<sup>261</sup>

This extra level of control by the LCS limits bargaining power of players. When bargaining with their team, the player/team agreement may dictate terms such as “no assignment” or “no trading” deals.<sup>262</sup> However, beyond these terms, the basic mobility rules are limited to LCS control.<sup>263</sup> Though players and teams may create various terms in their contracts, the LCS rules act as a behemoth above them.<sup>264</sup> Not only are these LCS rules controlling over agreements that conflict with them, but their scope and nature may be changed by the LCS in its discretion.<sup>265</sup>

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259. See generally *Season Six Official Rules*, *supra* note 24, §§ 3–4 (outlining the requirements and limits on player mobility imposed by the LCS).

260. See *id.* § 4.1.2 (forbidding team/player agreements from contractually violating any clauses on player substitution as outlined in the LCS rules); *id.* § 4.3.2 (establishing the mandatory schedule for free agent signing during the regular seasons); *id.* § 4.3.4 (requiring free agent signing requests to be submitted to and approved by the LCS before becoming effective); *id.* § 4.3.4.1–5 (providing the mandatory information that *must* be provided to the LCS).

261. See *id.* § 4.4.3 (regarding LCS approval); *Id.* §§ 4.4.3.1–3 (outlining the process and rules for receiving approval); *Id.* §§ 4.4.5.1–4.4.5.2.2 (listing the required forms necessary).

262. *Id.* § 4.2.7

263. See *id.* § 11.1 (noting that interpretation of player eligibility and mobility lies with the LCS).

264. See *Season Six Official Rules*, *supra* note 24, at 5 (stating that the rules apply to all players who wish to participate in the LCS, and are not negotiated upon); *Id.* § 10.5 (stating that not obeying the rules results in penalties which include being unable to participate in the LCS).

265. See *id.* § 11.2 (“These Rules may be amended, modified, or supplemented by LCS, from time to time, in order to ensure fair play and the integrity of LCS.”).

Due to their mutable yet inscrutable form, the LCS rules effectively eliminate many types of player security.<sup>266</sup> Even if players formed a bargaining unit solely to deal with their individual team, the LCS rules effectively undo any such agreements between teams and their players.<sup>267</sup> Thus without the ability to effectively engage with the LCS and assert control over its rule creation process, player influence is eviscerated.

## 2. Administrative Action

What makes the LCS rules most oppressive is the complete discretion and control granted to LCS administrative decisions.<sup>268</sup> In the aptly named “Spirt of the Rules” section within the LCS ruleset, all decisions regarding the interpretation of the rules are bequeathed solely to the LCS.<sup>269</sup> The LCS warns that all decisions with respect to the LCS rules “cannot be appealed and shall not give rise to any claim for monetary damages or other legal or equitable remedy.”<sup>270</sup>

The only ability to overturn such LCS rulings is via a review process, which is solely under the discretion of the LCS.<sup>271</sup> There are no hard guidelines for the review, but the LCS provides “general principles” that it claims to apply in its review.<sup>272</sup> These principles are wide-reaching, but are typically based on the frequency and magnitude of a player’s “toxic behavior.”<sup>273</sup> The

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266. *Id.* By providing the LCS the ability to amend rules at its whim, players have little ability to guarantee that certain rights currently provided by the LCS will remain in effect.

267. *E.g.*, Nick Allen, *NA LCS Competitive Ruling—Andy “Reginald” Dinh*, *supra* note 74 (fining the Team Solo Mid manager \$ 2,000 for failing to wait for LCS approval in announcing a contract between Team Solo Mid and the Korean player “Lustboy.”).

268. *Season Six Official Rules*, *supra* note 24, § 11.

269. *Id.* § 11.1.

270. *Id.*

271. *See* Nick Allen, *Competitive Policy Revision: Permabanned Players*, LEAGUE OF LEGENDS (Nov. 20, 2014), <http://2015.na.lolesports.com/articles/competitive-policy-revision-permabanned-players> (noting that those players eligible for review shall be reviewed by the LCS Operations Team) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

272. *Id.*

273. *Id.*

LCS also claims to conduct thorough investigations and reviews, though the exact nature of the review is not posted, nor is its validity challengeable by a player.<sup>274</sup> For players who rely on their ability to play in order to receive income, such rulings can have dramatic effects.<sup>275</sup>

The LCS review process is atypical compared to other professional sports. In the NBA, for example, misconduct by players or teams is handled pursuant to Article 35 of the NBA Constitution, with decisions appealable to either the Board of Governors or an arbitrator.<sup>276</sup> The arbitration procedure is described within the National Basketball Players Association's (NBPA) Collective Bargaining Agreement (CBA).<sup>277</sup> The procedure outlined in the CBA provides methods for initiating grievances,<sup>278</sup> rules for pre-hearing motions,<sup>279</sup> rules for hearings,<sup>280</sup> the procedure governing appeals and appointing an administrator,<sup>281</sup> the ability of an arbitrator to offer awards,<sup>282</sup>

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274. See, e.g., Nick Allen, *End-Of-Suspension Review: Erlend "NukeDuck" Holm*, LEAGUE OF LEGENDS (Dec. 9, 2014), <http://2015.na.lolesports.com/articles/end-suspension-review-erlend-%E2%80%9Cnukeduck%E2%80%9Dholm> (lifting the suspension of Erlend Holm after he showed "drastic improvement" to his in game behavior) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The LCS does not provide additional information after review, beyond the ruling provided above.

275. See Press Release, Ninjas in Pajamas Gaming, Erlend "NukeDuck" Holm and Alfonso "Mithy" Rodriguez Have Been Released from Ninjas in Pajamas (June 2, 2014) (on file with author) (noting that as a "direct result of the recent suspension" both players received, that Ninjas in Pajamas must drop the two from their roster, as they are unable to compete in any upcoming events).

276. See NAT'L BASKETBALL ASSOC., CONSTITUTION AND BY-LAWS OF THE NATIONAL BASKETBALL ASSOCIATION Art. 35 (May 29, 2012), <http://prawfsblawg.blogs.com/files/221035054-nba-constitution-and-by-laws.pdf> (noting that rulings on misconduct may be appealed by teams to the Board of Governors, or by players to an arbitrator in accordance with Art. XXXI of the National Basketball Players Association Collective Bargaining Agreement).

277. See *National Basketball Association—National Basketball Players Association Collective Bargaining Agreement* [hereinafter NBA-NBPA CBA] Art. XXXI (2011), <http://nbpa.com/cba/> (providing the arbitration procedure to be followed by the Union and the Association).

278. *Id.* § 2.

279. *Id.* § 3.

280. *Id.* § 4.

281. *Id.* §§ 5, 7.

282. *Id.* § 6.

and issues regarding appeals.<sup>283</sup> Via these provisions, professional basketball players within the NBA protect themselves from the potential risk of arbitrary or unfair decisions.<sup>284</sup> That is not to say that the system is one hundred percent balanced between players and the NBA, but there are far more protections in place than there are in the LCS system.<sup>285</sup>

Via collective bargaining, LCS players could attempt to create similar provisions to those found in the NBA-NBPA CBA. For LCS players to include these administrative matters into a potential CBA, professional players must prove that the disciplinary action at hand threatened matters outlined in the NLRA.<sup>286</sup> Factors that help color the analysis of such a disciplinary system include whether the final arbiter is a “neutral third party chosen freely by both sides” and whether the system is designed “entirely by employers and owners.”<sup>287</sup> For the case of the LCS, the administrative system consists of both a non-neutral arbiter *and* is designed completely by the LCS.<sup>288</sup> As such, a potential professional League of Legends players’ collective bargaining unit could bargain with the LCS on these issues.<sup>289</sup>

This is not to say that the collective bargaining done by any potential player unit would result in draconian, untenable provisions. On the contrary, including the players in the bargaining process would help create a more open penalty system, which would provide players with more security. It would also serve to further legitimize eSports as actual sporting events.<sup>290</sup>

283. *Id.* § 9.

284. *See generally* NBA-NBPA CBA Art. XXXI (providing courses of actions players can use to protect themselves against certain actions by the NBA).

285. *Compare id. with Season Six Official Rules, supra* note 24, §§ 10-11.

286. *See* The Am. League of Prof'l Baseball Clubs, 180 N.L.R.B. No. 30, 191 n.13 (1969) (noting that the NLRB could become involved within baseball’s internal regulation system if the disciplinary action promoted by baseball arbitrators threatened rights protected under 29 U.S.C. § 157).

287. *Id.* at 191.

288. *See Season Six Official Rules, supra* note 24, § 11 (noting the LCS has the discretion to modify and change the rules it has promulgated at its discretion).

289. *The Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. at 191 n.13.

290. *See, e.g., Radovich v. Nat'l Football League*, 352 U.S. 445 (1957) (recognizing the NFL as being subject to NLRB jurisdiction); *Haywood v. Nat'l*

*E. The Potential Dark Side of Bargaining*

Even if professional League of Legends players are deemed employees by the NLRB, and a collective bargaining unit is created, there is no guarantee that such an action might not end up causing more hardship for players. Specifically, without careful consideration of how to use the bargaining unit, professional players might destroy their very profession.

The LCS, itself, is a money loser, according to Riot Games staff.<sup>291</sup> By subjecting the LCS to the costs of lawyers, the time costs of actual dispute resolution, and the potential costs of having to provide additional benefits to players (while suffering the threat of strikes or walk-outs), the LCS may reach a level of unprofitability that is untenable.<sup>292</sup> In response the LCS may restructure its rules to remove player compensation in an attempt to destroy any potential employee relationship, or the LCS might simply disband.<sup>293</sup> In either case, players take a huge hit: either they lose their compensation or they lose their venue to play.

Such naysaying is likely misplaced. The main issues affecting players under a potential CBA would likely be player mobility and penalty administration, as salary and benefits appear adequately covered in other areas of the relationship and rules.<sup>294</sup> As such, the CBA may not be particularly onerous.<sup>295</sup> Further, the LCS can arrange for “No Strike” or “No Lockout” provisions, in order to maintain stable relations, even in times of player-LCS

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Basketball Ass’n, 401 U.S. 1204 (1971) (recognizing basketball as being subject to NLRB jurisdiction). Professional sports are typically subject to NLRB jurisdiction.

291. See Segal, *supra* note 15 (noting that Mark Merrill, the Riot Games CEO, admitted the LCS is a money loser).

292. See *id.* (noting that the LCS provides revenue from advertising that apparently offsets its cost).

293. See *Season Six Official Rules*, *supra* note 24, § 11.2 (allowing the LCS to amend, modify, or supplement the rules).

294. See *supra* Part IV.B. (explaining that players seem to enjoy adequate wages from the LCS).

295. See *id.* (noting that, because monetary compensation seems well established, the LCS can largely avoid a large amount of monetary cost due to bargaining).

disagreement.<sup>296</sup> Using such provisions, the LCS may perhaps create *more* stability for the future, by assuring that any grievances that could arise would be handled in predictable ways.<sup>297</sup> Further, the reputation of the LCS and League of Legends as a professional sport would be greatly enhanced by player collective bargaining, as it provides further evidence that League of Legends players are legitimate sports professionals.<sup>298</sup> This legitimacy may provide greater viewer attraction to the LCS and attract more players to League of Legends.<sup>299</sup>

Another problem facing a potential player collective bargaining unit is the issue of minority representation. The NLRA makes it the duty of the employer to bargain collectively with the chosen representatives of her employees, and exacts a *negative duty* to treat with no others.<sup>300</sup> With the wide variety of professional League of Legends players, and their distinct backgrounds, it may be difficult to adopt a representative that does not isolate a large minority of players.<sup>301</sup> Though the NLRA

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296. See, e.g., NBA-NBPA CBA Art. XXX §§ 1–2 (2011) (containing such a provision). These provisions minimize potential disruption to play schedules.

297. See *id.* (by preventing strikes and lockouts, the NBA-NBPA CBA prevents disruptions from those activities).

298. See, e.g., *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957) (noting football, a professional sport, is subject to collective bargaining); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971) (noting basketball, a professional sport, is subject to collective bargaining).

299. See *Robinson*, *supra* note 9 (noting the aspects of eSports that are akin to real sports). As making the LCS more sports-like seems to be an effective marketing strategy, furthering its legitimacy may increase this effectiveness.

300. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–84 (1944) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937)) (noting the act exacts a negative duty to bargain only with the chosen representatives of the unit employees); see also *Gypsum Co. v. United Steelworkers of Am.*, 384 F.2d 38, 45 (5th Cir. 1957) (noting that the duty to deal only with the bargaining unit representative chosen by the majority is strong, but “no less stringent is the duty not to deal with one having only minority support.”); *NLRB v. Appletown Elec. Co.*, 296 F.2d 202, 207 (7th Cir. 1961) (internal citations omitted) (noting that Congress gave an appropriate bargaining unit selected by a majority the right to obtain recognition for the entire unit, including a non-consenting minority).

301. E.g., *Team Solo Mid—Player Roster*, LEAGUEPEDIA, [http://lol.gamepedia.com/Team\\_SoloMid#Player\\_Roster](http://lol.gamepedia.com/Team_SoloMid#Player_Roster) (last visited Sept. 15, 2016) (providing the demographics of the Team Solo Mid player roster, which includes three United States citizens, two Danish citizens, and one Canadian citizen) (on file with the Washington and Lee Journal of Civil Rights and Social

itself<sup>302</sup> and case law<sup>303</sup> seek to protect these unit minorities, such protections are not always effective.

Again, such worries are likely unfounded for a pro League of Legends bargaining unit. The key issues of player mobility and administrative penalties are mostly based on a lack of options or appeals.<sup>304</sup> Player interests likely intersect on these points, which apply equally to all players in multiple circumstances.<sup>305</sup> The fact that players have so many different backgrounds may actually ensure that the bargaining unit can only succeed in these specific areas, simply due to the lack of consensus on more personalized issues.<sup>306</sup>

### V. Conclusion

ESports is still in its infancy, despite a long gestation period.<sup>307</sup> Individuals may now support themselves solely from playing video games.<sup>308</sup> For professional players of the game League of Legends, the game mimics professional sports in both

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Justice).

302. See 29 U.S.C. § 159(c) (2012) (providing minorities the right to seek separate representation by filing a petition to the NLRB).

303. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (internal citations omitted) (explaining that the statutory obligation that a bargaining unit represent all its members requires the unit to make an honest effort to serve all those members, without hostility to any).

304. See *Season Six Official Rules*, *supra* note 24, §§ 2.2, 4, 10 (outlining player compensation, player mobility, and penalties, respectively).

305. See *id.* § 4 (noting that player mobility provisions apply to all teams, and thus all teams' players).

306. See *Team Solo Mid—Player Roster* *supra* note 301 (giving an example of the vast demographics that can be found on League of Legends teams).

307. See Owen Good, *Today is the 40th Anniversary of the World's First Known Video Gaming Tournament*, KOTAKU (Oct. 19, 2012), <http://kotaku.com/5953371/today-is-the-40th-anniversary-of-the-worlds-first-known-video-gaming-tournament> (remembering the "Space War" tournament on Stanford's campus, which awarded the tournament winner a year's subscription to ROLLING STONE magazine) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

308. See discussion Part IV.A. (explaining that professional eSports players receive, at minimum, a salary higher than minimum wage); see also Chester, *supra* note 97 (noting that Michael Santana [Imaqtpie], a professional League of Legends player on Team Dignitas at that time, made \$8,000 from streaming in a month).

form and the relationship between players and the LCS.<sup>309</sup> The LCS appears to exert sufficient control over pro League of Legends players so as to qualify those players as employees of the LCS.<sup>310</sup>

Employee status provides players with benefits that truly mimic those of professional athletic sports players. These benefits include the right to collectively bargain.<sup>311</sup> Through collective bargaining, League of Legends players can fight for fair provisions under LCS agreements, and ensure that future professional eSports players can enjoy just and healthy employment in the field.<sup>312</sup>

Currently, players have not attempted to form a collective bargaining unit and the NLRB has not asserted jurisdiction over eSports. There is no guarantee that the LCS, after learning of the potential for a collective bargaining action, will not stop providing payment (in an attempt to eliminate the employee relationship) or dissolve altogether. However, by embracing the employee status of professional employees, the LCS can further legitimize itself as an actual sport.<sup>313</sup> This, in turn, would likely bring more potential players into League of Legends (increasing the game's profitability) while also bringing more viewers to LCS events.

The path ahead for eSports is murky. There is little guarantee that they will ever rise to the level of athletic sports in terms of profitability, prestige, or function. Attempting to frustrate player rights by consistently billing eSports professionals as non-employees, however, will only ensure that eSports never reach that higher goal. The LCS and professional League of Legends players have the potential to shape the future of eSports, in a way that has never been possible until this time.

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309. See discussion *supra* Part II.A. (outlining the sports-like qualities of League of Legends); see also discussion *supra* Part II.B. (providing basic information on the relationship between the LCS and professional players); discussion *supra* Part III (analyzing LCS relationship in depth).

310. Discussion *supra* Part III.

311. 29 U.S.C. § 157 (2012).

312. See generally 29 U.S.C. § 158(d) (2012) (ensuring that issues such as wages, hours, and other necessary terms of employment are subject to bargaining).

313. See cases cited *supra* note 298 (listing the various sports over which the NLRB has authorized collective bargaining, which League of Legends could join if professional players were found to be employees).

For the good of the entire eSports enterprise, both groups should embrace the employee status of professional League of Legends players, and work together to ensure a bright future for both players and game makers.