

Sports Law-for-All

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Atty. Alberto C. Agra and
Atty. Jessica Marie L. Agra

Which is Which? Are National Athletes Employees, Independent Contractors, Service Providers or Beneficiaries of their National Sports Association?

The objective of this 3rd primer is to start the conversation on the status of our national athletes. If we claim to exist for them, for them to become better humans, then this matter must be clarified and appropriate changes made.

1. What is a National Sports Association (NSA)?

Under the By-Laws of the Philippine Olympic Committee (POC), an NSA, whether classified as regular, associate or recognized by the POC, is the "national governing body of the sport to which it corresponds in the country," i.e., the Philippines. The NSA must "adopt an Articles of Incorporation/ Constitution and By-Laws for its internal organization and government."

NSAs are typically incorporated as non-profit and non-stock corporations and registered with the Securities and Exchange Commission. NSAs "select the athletes, trainers, coaches and other officials for its national teams taking into consideration not only their athletic abilities but also their moral character."

On the other hand, an independent contractor, under Order No. 174-17 of the Department of Labor and Employment is a contractor or subcontractor:

- Engaged in a distinct and independent business and undertakes to perform the job or work on its own responsibility according to its own manner and method;
- Who has substantial capital to carry out the job farmed out by the principal on his/ her account, manner and method, investment in the form of tools, equipment, machinery and supervision; and
- In performing the work farmed out, free from control and/ or direction of the principal in all matters connected with the performance of the work except as to the result thereto.

Thus, depending on the circumstances, a National Athlete can either be an employee, independent contractor or service provider, while an NSA can be an employer, principal or contracting party.

4. If a National Athlete is an employee, what are the consequences?

If a National Athlete is an employee of the NSA, then it enjoys the rights and benefits of an employee under the Labor Code. For one, s/he can only be disciplined, terminated or dismissed in compliance with due process requirements – there must be just or authorized cases and there must be notice and hearing. S/he must also be entitled to the minimum wage, 13th month pay, vacation and sick leaves, rest days, overtime work pay, compensation for holiday work, night shift differential, social security privileges, among others.

If a National Athlete is not an employee of the NSA, then the relationship between them is contractual where the terms and conditions, and the breach thereof would be subject to the agreement of the parties. The relationship is consensual and general laws on contract, not the Labor Code, follow.

5. When is there Employer-Employee Relationship (Er-Ee-R)?

The existence of an Er-Ee-R is not a matter of stipulation, but is defined and prescribed by law (Chavez v. NLRC, G.R. No. 146530, January 17, 2005). A written contract is not necessary for the creation and validity of the relationship (Compania Maritima v. Ernesta Cabagnot Vda. De Hia, G.R. No. L-10675, April 29, 1960).

Whether the NSA or National Athlete likes it or whether they both agree, the Labor Code, not their agreement, governs their relationship, rights and obligations.

8. Is there any other test that could be used if the control test is insufficient?

The Economic Reality/ Dependence Test or the Two-tiered Approach is applied when the control test is not sufficient to determine the relationship between parties and there exists a genuine confusion as to the existence of the arrangement (Angelina Francisco v. NLRC, Kasei Corp., etc., G.R. No. 170087, August 31, 2006). The existing economic conditions between the parties are used to determine whether Er-Ee-R exists. This is resorted to when there is serious doubt as to the relationship of the employee with the employer. The standard of "economic dependence" of the employee is whether the worker is dependent on the alleged employer for his/ her continued employment in that line of business.

The determination of the relationship between employer and employee depends upon the circumstances of the whole economic activity, such as:

- The extent to which the services performed are an integral part of the employer's business;
- The extent of the worker's investment in equipment and facilities;
- The nature and degree of control exercised by the employer;
- The worker's opportunity for profit and loss;
- The amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise;
- The permanency and duration of the relationship between the worker and the employer; and
- The degree of dependency of the worker upon the employer for his/ her continued employment in that line of business.

10. How do we differentiate National Athletes from Professional Team Athletes?

Professional Team Athletes or those hired and play for teams representing brands or local governments and who compete in leagues and tournaments that are not normally or necessarily recognized by National Olympic Committees or IFs are traditionally regarded as employees. The Four-Fold test applies to these athletes. The employers are usually for-profit organizations.

On the other hand, National Athletes represent the country, not one brand or locality, in order to bring honor to the flag. They are tapped and selected by the NSAs which are not-for-profit associations. The National Athletes, if so chosen, enter competitions under the banner of the IOC and/or IF.

11. Is there a relevant case decided elsewhere about Er-Ee-R?

Yes. In the United Kingdom (UK), in the landmark decision of *Jessica Varnish vs. The British Cycling Federation and UK Sport*, the Employment Tribunal in 2019 held that athletes and competitors are not employees or workers of the governing bodies. The appeal lodged by *Varnish* was recently dismissed by the UK Employment Appeal Tribunal.

The Employment Tribunal stated that the "irreducible minimum" for a contract of employment in the UK comprised the elements of mutuality of obligation, personal performance and control. While acknowledging that control is a "significant feature" of an Er-Ee-R, the Employment Tribunal found that even if *Varnish* was subject to control as reflected in the clauses of the Athlete Agreement, there is no mutuality of obligation and no personal performance consistent with a contract of employment.

The Employment Tribunal, in ruling against the claim of *Varnish* that she was an employee, relied on the policies of the Federation, the athlete's ability to negotiate the terms of the Athlete's Agreement, the extent to which she was integrated into the Federation, the restrictions on her engagement with the media and her obligation to make appearances, the fact that she did not work in exchange for a wage and that no work was given her. She was not deemed an employee because of her desire and personal commitment to perform to the best of her ability and to represent her country at international competitions and that the governing body gave her assistance, not the other way around, in order for her to excel like the provision for state-of-the-art equipment, a range of services and a coach to which she could avail of should she wishes.

2. Who is a National Athlete?

Under the National Athletes and Coaches Benefits and Incentives Act (Republic Act No. 10599), "national athletes" are athletes including persons with disabilities who are Filipino citizens, members of the national training pool, recognized and accredited by the POC and the Philippine Sports Commission (PSC), including athletes with disabilities (AWD) who are recognized and accredited by the National Paralympic Committee of the Philippines (NPC PHIL) and the PSC and who have represented the country in international sports competitions.

A national athlete, following the POC Charter, is selected by the concerned NSA due to his/ her athletic abilities and moral character to represent the country "at the Olympic Games as well as at regional, continental and intercontinental games having the patronage of the International Olympic Committee (IOC)" and presumably, other events and competitions sanctioned by the NSA and its International Federation (IFs).

The following are subject to the policies of the concerned NSA and the relevant rules of its IF:

- Qualification, number, evaluation and performance standards of athletes;
- Selection frequency, process and criteria;
- Amount, form and source of compensation, remuneration and benefits;
- Training rules and regulations; and
- Means, methods and procedures to achieve the desired outcome and ends.

The answers to these questions may vary from NSA to NSA. There is no one-size-fits-all.

3. Who is an Employer? Employee? Independent Contractor?

An employer employs the services of another and pays for the latter's salaries and wages. An employer is a person whom employees work for (*Angat River Irrigation System, et al. v. Angat River Workers' Union, et al.*, G.R. Nos. L-10943 & L-10944 December 28, 1957).

An employee is a person engaged in the services of another, performs services for another and works for salaries or wages, where the work is subject to the control of the employer (*Feati University v. Bautista, G.R. No. L-21278, December 27, 1966*).

6. What are the tests to determine if an Er-Ee-R exists?

The Four-Fold Test is primarily used to determine the existence of an Er-Ee-R. The elements are the following:

- Selection and engagement of the employee;
- Payment of wages or salaries. The mode of paying the salary or compensation of a worker does not preclude existence of the Er-Ee-R;
- Exercise of the power of dismissal; and
- Exercise of the power to control the employee's conduct (*Philippine Global Communications Inc. v. De Vera, G.R. No. 157214 June 27, 2005*).

7. Which of these tests is most important?

The control test or means-and-method control test is the controlling test and the most important element in determining the existence of an Er-Ee-R (*Brotherhood Labor Unity Movement of the Philippines, et al. v. Zamora, G.R. No. 48645, January 7, 1987*).

This test is based on the extent of control the hirer exercises over a worker. The greater the supervision and control the hirer exercises, the more likely the worker is deemed an employee. The converse holds true as well – the less control the hirer exercises, the more likely the worker is considered an independent contractor (*Sonza v. ABS-CBN Broadcasting Corp., G.R. No. 138051, June 10, 2004*).

This power of control refers merely to the existence of the power and not to the actual exercise thereof. It is not essential that employer actually supervises the performance of duties. It is enough that the employer has a right to wield the power (*Mendoza v. CA, G.R. No. 159333, July 31, 2006*).

Deemed to be such an important factor that the other requisites may even be disregarded and still there could be an Er-Ee-R (*Royale Homes Marketing Corp. v. Alcantara, G.R. No. 195190, 2014*).

9. Please check the relevant boxes.

To our NSAs and National Athletes, examine your relationship with each other, and check if the following seven considerations exist:

Considerations	Yes	No
The NSA, through a rigorous screening process like qualifying races, selects an athlete into the National Team.		
The training of National Athletes must be exclusively conducted, sanctioned and approved by or under the auspices of the NSA.		
National Athletes have no equipment or training gear except those provided by the NSA.		
The NSAs determine the events and tournaments the National Athlete can join (and not join) and the performance standards and targets the National Athletes must meet in order to compete.		
The National Athlete, after being selected by the NSA, must meet specified targets and desired ranking, otherwise, s/he will be penalized or disciplined.		
Sanctions or disciplinary actions can be imposed by the NSA on the National Athlete for any violation of rules and policies of the NSA.		
National Athletes are paid their salaries by the NSAs and are fully dependent on the NSA for their livelihood.		

If the answers to all the above considerations are yes, the National Athlete, most likely but not conclusively, is an employee of the NSA, the employer. Even if not all in the affirmative, the National Athlete could still be an employee, or s/he could be an independent contractor, service provider or a contractual party. In sum, it is case-to-case.

12. Are our National Athletes the beneficiaries of NSAs?

The *Varnish* case presents a noble perspective. NSAs serve the interest of the National Athletes and not vice-versa. As beneficiaries, our National Athletes are the beneficiaries and the principals of the NSAs. Any engagement or arrangement with them are therefore contractual, cannot be forced upon them and must ultimately redound to their benefits. NSAs, as duty-bearers, represent the National Athletes and must promote and protect their interests, not the other way around. NSAs are here to make them better humans.

So which is which?

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Atty. Jessica Marie L. Agra

For your comments, inquiries and suggestions, email the author at agrasportslawforall@gmail.com. Previous editions of Sports Law-for-All may be downloaded free at www.albertocagra.com.



Atty. Al Agra is the President of the Pilipinas Obstacle Sports Federation Asia-Pacific, and East Asia Southeast Asia Freerunning Parkour Union, and Vice-President of the Asia Freerunning Parkour Union. He is the General Counsel of the Philippine Olympic Committee. He is also Professor of Law. He is an active obstacle course racer and javelin thrower for his age-group.



Atty. Jessica Agra is the Legal Officer of CNW Philippines and the Legal Affairs Commission Chairperson of World Obstacle. She obtained a Graduate Certificate in Entertainment Law and Technology and Entrepreneurship Law along with her Master of Laws Degree from the University of Southern California. She was the number one junior tennis player in the Philippines before she received her tennis scholarship from Santa Clara University in California. She is also a tennis coach.