

COMMENT

THE ABCS OF GAMING: ACTIVISION, BIDEN, AND COVID-19 SET THE STAGE FOR LABOR UNIONIZATION IN THE VIDEO GAME INDUSTRY

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Over the past few decades, the video game industry has grown into one of the most lucrative markets in the United States. In 2021, the industry generated over \$100 billion in revenue; and by 2023, analysts predict that number to rise to \$200 billion. However, labor issues are not new to the video game industry. Its workforce has suffered from major wage inequities, below-standard working conditions, discrimination, harassment, and retaliation, especially its minority workers. Most recently, Activision Blizzard, Inc., one of the largest video game developers in the world, faced multiple lawsuits related to gender discrimination and sexual harassment in its “frat boy” workplace. Unionization is a proven, though controversial, solution to these types of labor issues.

This Comment finds support for industry-wide unionization by comparing successful examples of collective bargaining and unions to the current state of the video game industry. Specifically, this Comment highlights the significant effects of the recent Activision lawsuits, Joe Biden’s pro-labor administration, and the COVID-19 pandemic. Despite past failures, these new circumstances and widespread support can inspire employee action to finally achieve the labor rights the industry deserves.

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INTRODUCTION

At Activision Blizzard, Inc. (Activision), one of the largest video game companies in the world,¹ male employees frequently delegate additional work to women employees² so that they can participate in drunken “cube crawls” and play video games.³ Even when these “cube crawls” are not happening, those same employees are constantly subjected to crude comments, unwarranted sexual advances, and other forms of sexual harassment by their male counterparts.⁴ At the same time, the solely male leadership and human resources department continue to brush aside

1. J. Clement, *Activision Blizzard – Statistics & Facts*, STATISTA (June 14, 2022), <https://www.statista.com/topics/8033/activision-blizzard> [<https://perma.cc/TSU6-9N8V>] (reporting that Activision is the largest video game company by market capitalization with a market capitalization of \$63.51 billion as of February 2022). However, Microsoft recently announced its intent to acquire Activision for \$68.7 billion in cash, making Microsoft one of the largest video game companies in the world by revenue. *Microsoft to Acquire Activision Blizzard to Bring the Joy and Community of Gaming to Everyone, Across Every Device*, MICROSOFT NEWS CTR. (Jan. 18, 2022), <https://news.microsoft.com/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device/>. Microsoft has a current market capitalization of \$1.99 trillion and revenue of \$198 billion. Lionel Sujay Vailshery, *Microsoft – Statistics & Facts*, STATISTA (Feb. 3, 2022), <https://www.statista.com/topics/823/microsoft> [<https://perma.cc/V95S-G7P9>]; *Microsoft | MSFT – Market Capitalization*, TRADING ECON., <https://tradingeconomics.com/msft:us:market-capitalization> (last visited Sept. 12, 2022).

2. This Comment uses the term “women” to encompass all women-identifying persons and the term “male” to refer to persons that society perceives as cisgendered, straight males. Furthermore, this Comment acknowledges that many gender and sexual minority employees in the video game industry, including women, non-binary persons, and LGBTQIA+ persons, face similar issues of discrimination and harassment. *See, e.g.*, Dais Johnston, “Toxic Online Mentality”: *Trans Employees of Activision Blizzard Speak*, INVERSE (Aug. 26, 2021, 7:00 AM), <https://www.inverse.com/gaming/activision-blizzard-lawsuit-trans-lgbtq-employees> [<https://perma.cc/ZP9F-5AQH>].

3. Complaint ¶ 5, *Dep’t of Fair Emp. & Hous. v. Activision Blizzard, Inc.*, No. 21STCV26571 (Cal. Super. Ct. July 20, 2021) [hereinafter DFEH Complaint].

4. *Id.* ¶ 6.

harassment complaints and demote women complainants.⁵ The California Department of Fair Employment and Housing (DFEH) described Activision's "pervasive 'frat boy' workplace culture" in its recent lawsuit against the company.⁶ A more specific example is former *World of Warcraft* developer Alex Afrasiabi's infamous Cosby Suite at Activision's 2013 BlizzCon convention.⁷ The hotel suite, named after Bill Cosby, whose sexual assault conviction has since been overturned on other grounds, was identified by a portrait of the disgraced comedian and was described as "a booze-filled . . . hot spot for informal networking" among top male developers.⁸ In another incident during the company's earlier 2010 BlizzCon convention, a woman attendee inquired about the sexualization of *World of Warcraft*'s female video game characters.⁹ A former lead designer of the video game, Greg Street, and other Activision leadership answered with dismissive jokes, prompting the male attendees to boo the woman, which caused her to leave.¹⁰ The allegations against Activision are indicative of the day-to-day realities women employees face and shed light on the larger issue of rampant sexism within the male-dominated video game industry.¹¹

5. *Id.* ¶ 7.

6. *Id.* ¶¶ 5–6, 46, 49 (listing Blizzard Entertainment, Inc., Activision Publishing, Inc., and several members of the company's leadership as additional defendants). See *infra* Section II.A for examples of the allegations. The federal Equal Employment Opportunity Commission (EEOC) separately filed a lawsuit against Activision, making similar allegations. See Complaint ¶¶ 15–25, *Equal Emp. Opportunity Comm'n v. Activision Blizzard, Inc.*, No. 21-cv-07682 (C.D. Cal. Sept. 27, 2021) [hereinafter EEOC Complaint] (listing Blizzard Entertainment, Inc., Activision Publishing, Inc., King.com, Inc., and several members of the company's leadership as additional defendants).

7. Ethan Gach, *Inside Blizzard Developers' Infamous Bill 'Cosby Suite,'* KOTAKU (July 28, 2021, 2:05 PM), <https://kotaku.com/inside-blizzard-developers-infamous-bill-cosby-suite-1847378762> [https://perma.cc/9VJE-JXXF].

8. *Id.*

9. Zack Zwiezen, *Former World of Warcraft Designer Apologizes for Disastrous 2010 Blizzcon Answer,* KOTAKU (July 26, 2021, 1:30 PM), <https://kotaku.com/former-world-of-warcraft-designer-apologizes-for-disast-1847362737> [https://perma.cc/66XP-3XET].

10. *Id.* After the DFEH lawsuit was filed, the woman attendee reflected on her experience: "It just exemplifies so much of what's wrong right now with the industry at large. There is me being utterly dismissed by a panel of men who run the company and at the same time having a small, small group of women in the audience cheer and then that immediately being drowned out by men booing." Ethan Gach, *What Really Happened at that BlizzCon Panel, According to the Woman in the Video,* KOTAKU (Aug. 2, 2021, 2:02 PM), <https://kotaku.com/what-really-happened-at-that-blizzcon-panel-according-1847408469> [https://perma.cc/G6PK-QGUN].

11. Kari Paul, *Activision Blizzard Scandal a 'Watershed Moment' for Women in the Gaming Industry,* GUARDIAN (Aug. 8, 2021, 6:00 AM), <https://www.theguardian.com/technology/2021/aug/08/activision-blizzard-lawsuit-women-sexual-harassment> [https://perma.cc/9XUJ-ZCJU]. Despite their vital contributions, women have been marginalized within the computer gaming industry since

Over the past few decades, revenue has soared for the constantly growing industry.¹² It was estimated to have generated \$131 billion in revenue in 2018¹³ and \$180 billion in revenue in 2021.¹⁴ Industry analysts predict that revenue will rise to \$200 billion by 2023.¹⁵ Yet, its workforce has suffered major labor inequalities in terms of employment, working conditions, gender- and race-based discrimination, and sexual harassment and related retaliation.¹⁶ Unionization seeks to solve those exact types of labor inequalities.¹⁷ As former Blizzard developer, Jeff Strain, wrote in his call for industry-wide unionization: “Unions were started in this country to protect workers from abusive, cruel, abhorrent, unacceptable and illegal treatment from companies. That’s their entire purpose.”¹⁸

The National Labor Relations Act of 1935 (NLRA)¹⁹ sought to address the issues of labor inequality, as well as disruptions in the flow of commerce and economic depressions.²⁰ That is, labor unionization is a federally authorized legal right, and collective bargaining—a powerful tool for employees to stand on more equal ground with their employers—

it started. See Laine Nooney, *The Uncredited: Work, Women, and the Making of the U.S. Computer Game Industry*, 6 FEMINIST MEDIA HISTORIES 119, 126–27 (2020).

12. See generally J. Clement, *Video Game Industry – Statistics & Facts*, STATISTA (Nov. 19, 2021), <https://www.statista.com/topics/868/video-games> [<https://perma.cc/J5HF-65JL>]; see also J. Clement, *Gaming Monetization – Statistics & Facts*, STATISTA (June 21, 2022), <https://www.statista.com/topics/3436/gaming-monetization/#dossierKeyfigures> [<https://perma.cc/B9HQ-U5YT>].

13. Liz Lanier, *Video Games Could Be a \$300 Billion Industry by 2025*, VARIETY (May 1, 2019, 2:00 PM), <https://variety.com/2019/gaming/news/video-games-300-billion-industry-2025-report-1203202672> [<https://perma.cc/2CQX-5L5W>].

14. Tom Wijman, *The Games Market and Beyond in 2021: The Year in Numbers*, NEWZOO (Dec. 22, 2021), <https://newzoo.com/insights/articles/the-games-market-in-2021-the-year-in-numbers-esports-cloud-gaming> [<https://perma.cc/N7SX-M7X4>].

15. See, e.g., Karen Toulon, *Black Workers Find Little Opportunity in Growing Video Game Industry*, BLOOMBERG, <https://www.bloomberg.com/news/features/2021-03-14/call-of-duty-video-game-industry-seeks-black-workers-after-george-floyd-killing> [<https://perma.cc/L36J-BFKP>] (Mar. 16, 2021, 10:57 AM); Lanier, *supra* note 13.

16. See, e.g., Toulon, *supra* note 15; Michael Thomsen, *Why Is the Games Industry So Burdened with Crunch? It Starts with Labor Laws*, WASH. POST (Mar. 24, 2021, 3:09 PM), <https://www.washingtonpost.com/video-games/2021/03/24/crunch-laws> [<https://perma.cc/799E-CBVQ>]. See generally DFEH Complaint, *supra* note 3, ¶¶ 1, 3–7.

17. See Jehnyssa Zetino, Comment, *Out of Their League: An Antitrust Analysis of Esports Players Associations and Attempts at Unionization*, 58 HOUS. L. REV. 777, 780 (2021).

18. Matt Kim, *Former Blizzard Developer and ArenaNet, Undead Labs Founder: “We Need Unionization,”* IGN, <https://www.ign.com/articles/jeff-strain-its-time-letter-unionize-games-industry> [<https://perma.cc/5J3G-EUKR>] (Aug. 3, 2021, 12:39 PM) (publicizing Strain’s “open letter calling for full unionization within the games industry”).

19. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

20. *Id.* § 1 (findings and declaration of policy).

is at the core of labor unions.²¹ The decline of unions and employees' collective bargaining power has contributed to widening the wage gap between the upper and middle classes.²² Similarly, the lack of collective bargaining in male-dominated industries likely contributes to increasing workplace gender wage gaps.²³

However, unions remain controversial in the United States.²⁴ For example, in December 2021, the employees at a Starbucks location in Buffalo, New York voted to unionize, becoming the first of now over two hundred of the corporation's unionized locations, which motivated other locations to join a company-wide effort to unionize.²⁵ Starbucks argued that "significant" unionization could increase labor costs, and its "responses to any union organizing efforts could negatively impact how [its] brand is perceived and have adverse effects on [the] business, including on [its] financial results."²⁶ Although members realize invaluable benefits through unions, at the same time, those employees are targets for employers' legal and illegal forms of resistance, including union-busting tactics and retaliation.²⁷ The video game industry is not an exception.

21. *Id.* § 7; see also Kenneth G. Dau-Schmidt & Mohammad Khan, *Undermining or Promoting Democratic Government? An Economic and Empirical Analysis of the Two Views of Public Sector Collective Bargaining in American Law*, 14 NEV. L.J. 414, 425 (2014).

22. Lawrence Mishel, *Unions, Inequality, and Faltering Middle-Class Wages*, ECON. POL'Y INST. (Aug. 29, 2012), <https://www.epi.org/publication/ib342-unions-inequality-faltering-middle-class> [<https://perma.cc/MU3C-G496>]. For example, during the Great Compression—an era of extraordinary wage compression—the United States recognized that wages, worker productivity, and profit were closely connected; income gaps decreased; and the lowest-income households saw income increases of over forty percent. See generally STEVEN GREENHOUSE, *BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR* 94–106 (2019).

23. See Seth Santini, *Robust Unionism as a Compelling Interest: Evaluating the Exacting Policies of Janus*, 55 U.S.F. L. REV. 275, 289–90 (2021); Elise Gould & Celine McNicholas, *Unions Help Narrow the Gender Wage Gap*, ECON. POL'Y INST.: WORKING ECON. BLOG (Apr. 3, 2017, 8:00 AM), <https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap> [<https://perma.cc/HH9W-LL54>].

24. See generally LABOR UNIONS (Viqi Wagner ed., 2008).

25. Ian Kullgren, *For Starbucks Workers, N.Y. Union's Contract Push Marks Lodestar*, BLOOMBERG L.: DAILY LAB. REP. (Dec. 22, 2021, 5:07 AM), <https://news.bloomberglaw.com/daily-labor-report/for-starbucks-workers-n-y-unions-contract-push-marks-lodestar> [<https://perma.cc/V5CX-BHC9>]; *Starbucks Unionization Tracker*, LAW360, <https://www.law360.com/employment-authority/starbucks-tracker> [<https://perma.cc/8AGH-EF58>] (last updated Sept. 16, 2022).

26. Kullgren, *supra* note 25.

27. See generally GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., *FEAR AT WORK: AN INSIDE ACCOUNT OF HOW EMPLOYERS THREATEN, INTIMIDATE, AND HARASS WORKERS TO STOP THEM FROM EXERCISING THEIR RIGHT TO COLLECTIVE BARGAINING* (2020), <https://files.epi.org/pdf/202305.pdf> [<https://perma.cc/42GC-626H>].

This Comment explores how the recent Activision gender discrimination and sexual harassment lawsuits, President Joe Biden's pro-labor administration, and the COVID-19 pandemic have primed the video game industry for unionization, despite past failures. Part I provides a brief history of labor issues within the United States' lucrative video game industry, including previous barriers to formal unionization, through a gender-discrimination lens.²⁸ Part II further explores the Activision scandal, the Biden administration, and the COVID-19 pandemic. Part III examines the implications of those circumstances for widespread support of industry-level unionization. This examination compares the video game industry to other private sector entertainment industries, namely the film and television industry, delves into essential non-industry players like the government, and addresses the pandemic's role in union discourse. Part IV argues that these recent events are not enough. The coveted goal of formal unionization requires employee action in the face of remaining barriers. This Comment concludes by suggesting tactics to achieve the necessary employee action.

28. See generally Tanya Singh, *Gendered Barriers in the Gaming Industry*, 2 J. SPORTS L. POL'Y & GOVERNANCE 1, 1 (2020) (analyzing the underrepresentation of woman-identifying gamers and developers); Julie Prescott & Jan Bogg, *The Computer Games Industry: Women's Experiences of Work Role in a Male Dominated Environment*, in WOMEN IN ENGINEERING, SCIENCE AND TECHNOLOGY: EDUCATION AND CAREER CHALLENGES 138 (Aileen Cater-Steel & Emily Cater eds., 2010) (analyzing the experiences of women in the United Kingdom's computer game and information technology industries); Marsha Newbery, *Gender and the Games Industry: The Experiences of Female Game Workers* (Feb. 8, 2013) (M.A. thesis, Simon Fraser University) (on file with Simon Fraser University) (analyzing the experiences of women in Canada's video game industry).

I. THE HISTORY OF LABOR AND UNIONS IN THE VIDEO GAME INDUSTRY

Congress enacted the NLRA to level the playing field between employers and employees.²⁹ Pertinently, it grants private sector employees the right to form a union.³⁰ “A union is an organization of employees of a particular workplace that choose to join together to work toward achieving common employment goals . . . to collectively try and improve their working conditions, such as wages, hours, and job safety.”³¹ Many now unionized industries took advantage of collective bargaining and formal unionization to solve similar labor inequalities in their respective industries. For example, the film and television industry, unionized throughout the early 1900s, used formal unionization to advocate for job stability, reasonable hours, and higher pay.³² In 1909, the “Uprising of the 20,000,” which consisted of over twenty thousand apparel factory workers, primarily women, going on strike, led to industry-wide unionization; resulted in increased wages, decreased hours, and other improved terms of employment; and inspired unionization in related industries.³³ Similarly, the health care services industry, unionized throughout the mid-1900s, recently advocated for safety benefits in the wake of the COVID-19 pandemic.³⁴ More recently, the bipartisan Center for American Progress Action Fund confirmed that unions and collective bargaining decrease pay gaps between women and men and between

29. National Labor Relations Act §§ 1–19, 29 U.S.C. §§ 151–169 (aiming to protect employer and employee rights, unionization and collective bargaining, and the U.S. economy).

30. *Id.* § 7.

31. Deepti Orekondy, Comment, *What Makes Parties Joint Employers? An Analysis of the National Labor Relations Board’s Redefining of the “Joint Employer” Standard and Its Potential Effect on the Labor Industry*, 25 U. MIA. BUS. L. REV. 115, 118 (2017). Additionally, the NLRA defines “labor organization” as “any organization . . . or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” National Labor Relations Act § 2(5).

32. Natalie Kalbakian, *Workers of the Gaming World, Unite! The Uncertain Future of the Video Game Industry in the Aftermath of AB 5*, 40 LOY. L.A. ENT. L. REV. 351, 376–77 (2020). See generally Murray Ross, *Labor Relations in Hollywood*, 254 ANNALS AM. ACAD. POL. & SOC. SCI. 58 (1947).

33. See, e.g., GREENHOUSE, *supra* note 22, at 50–59 (“These young, inexperienced girls have proved that women can strike and strike successfully.”).

34. CELINA McNICHOLAS, LYNN RHINEHART, MARGARET POYDOCK, HEIDI SHIERHOLZ & DANIEL PEREZ, ECON. POL’Y INST., WHY UNIONS ARE GOOD FOR WORKERS—ESPECIALLY IN A CRISIS LIKE COVID-19: 12 POLICIES THAT WOULD BOOST WORKER RIGHTS, SAFETY, AND WAGES 5 (2020), <https://files.epi.org/pdf/204014.pdf> [<https://perma.cc/4TB2-U3ZD>]. See generally Richard N. Block, *Unionism in the Health Care Industry: An Overview*, 2 J. HEALTH & HUM. RES. ADMIN. 40 (1979).

employees of color and white employees.³⁵ Furthermore, industry-, region-, and nationwide unionization is even more effective at decreasing pay gaps than unionization in individual workplaces.³⁶

Although there is not a formal video game workers union, the idea of unionization is not a new consideration for the industry.³⁷ In the past, employees scorned by the industry and their allies engaged in union-like tactics, but the industry itself has successfully avoided formal unionization.³⁸ In 2018, hundreds of industry employees across the world created Game Workers Unite, a labor rights group hoping to achieve industry-wide unionization,³⁹ a goal they are still working toward. In 2019, employees of Riot Games, developer of *League of Legends*, formed Rioters for Change, a collective focused on addressing sexism within the workplace, and over 150 employees walked out to protest mandatory arbitration clauses.⁴⁰ Riot made some changes, such as including employees in redrafting the company's code of conduct, but it refused to consider discontinuing mandatory arbitration clauses until the litigation against it subsided.⁴¹ Until Rioters for Change can convince the company to voluntarily discontinue mandatory arbitration clauses, the clauses will remain enforceable.⁴² However, many employees were content with the

35. Robin Bleiweis, Jocelyn Frye & Rose Khattar, *Women of Color and the Wage Gap*, CTR. FOR AM. PROGRESS (Nov. 17, 2021), <https://www.americanprogress.org/article/women-of-color-and-the-wage-gap> [<https://perma.cc/9ZSP-ZUKD>]; see also Gould & McNicholas, *supra* note 23 (hourly wages are almost twenty-five percent higher for women in unions than their non-unionized counterparts).

36. See DAVID MADLAND & ALEX ROWELL, CTR. FOR AM. PROGRESS ACTION FUND, *COMBATING PAY GAPS WITH UNIONS AND EXPANDED COLLECTIVE BARGAINING I* (2018), <https://www.americanprogressaction.org/article/combating-pay-gaps-unions-expanded-collective-bargaining> [<https://perma.cc/WFK7-WLUF>].

37. See, e.g., Thomsen, *supra* note 16 (considering unionization as a solution to “crunch”—rampant uncompensated overtime in the video game industry).

38. See Robin LoBuglio, *Video Game and Tech Workers ‘Drop the U-Word’*, LAB. NOTES (Aug. 12, 2022), <https://labornotes.org/blogs/2022/08/game-and-tech-workers-drop-u-word> [<https://perma.cc/K76B-U6NM>]; see also Kalbakian, *supra* note 32, at 376 (“[T]he video game industry has not kept pace with other entertainment industries partly because of the misconception that an organized labor movement ‘might slow down a company’s ability to adapt to a changing market.’”).

39. LoBuglio, *supra* note 38; GAME WORKERS UNITE, <https://www.gameworkersunite.org/> (last visited Sept. 22, 2022).

40. Nathan Grayson, *Activision Blizzard Lawsuit Has Video Game Workers Using Union Tactics—But Not Unionizing*, WASH. POST (Sept. 17, 2021, 2:52 PM), <https://www.washingtonpost.com/video-games/2021/09/17/activision-blizzard-riot-ubisoft-harassment-union> [<https://perma.cc/4FZX-K5XS>].

41. Megan Farokhmanesh, *At Riot, the Walkout Was Just the Beginning*, VERGE (May 23, 2019, 9:09 AM), <https://www.theverge.com/2019/5/23/18629481/riot-walkout-company-policy-protests-forced-arbitration-employee-petition-directors> [<https://perma.cc/CXQ3-SX7M>].

42. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). However, Congress recently passed the Ending Forced Arbitration of Sexual Assault and Sexual

company's minimal changes and promises for future changes.⁴³ As with other industries, video game companies also promote anti-union ideologies within the workplace, threaten layoffs or other retaliation, and take advantage of existing labor law to discourage employees from assembling.⁴⁴

II. SETTING THE STAGE: ACTIVISION, BIDEN, AND COVID-19

Over the past few decades, the video game industry has grown into one of the most popular and “most profitable sectors of entertainment.”⁴⁵ And it keeps growing. In 2018, the global video game industry generated over \$130 billion in revenue; in 2021, the industry generated over \$170 billion in revenue.⁴⁶ North America is one of the largest markets, having generated over \$40 billion in revenue in 2018 and over \$60 billion in 2021.⁴⁷ Activision, valued at over \$63 billion with a reported revenue of nearly \$9 billion in 2021, is the largest U.S. video game company.⁴⁸

However, despite the industry's financial success, it continues to fail its workforce. One of the industry's major labor issues, known as “crunch,” normalizes unreasonable hours of uncompensated overtime,

Harassment Act of 2021, allowing employees with sexual assault and harassment claims to sue their employers, despite mandatory arbitration clauses. Pub. L. No. 117-90, §§ 401–402, 136 Stat. 26, 26–28 (2022).

43. Farokhmanesh, *supra* note 41; *see also* Gina Kim, *Riot Games Workers' \$100M Gender Bias Deal OK'd*, LAW360 (July 22, 2022, 7:43 PM), <https://www.law360.com/california/articles/1514425/riot-games-workers-100m-gender-bias-d> [<https://perma.cc/2TVK-ZHRT>] (announcing a settlement in a gender discrimination claim against Riot Games, alleging sexual harassment and a “bro culture” environment).

44. *See, e.g.*, LAFER & LOUSTAUNAU, *supra* note 27, at 6–7; Shannon Liao, *Activision Blizzard Employees File Unfair Labor Practice Suit Against Company*, WASH. POST (Sept. 14, 2021, 2:42 PM), <https://www.washingtonpost.com/video-games/2021/09/14/activision-blizzard-union-busting-nlr/> (“Activision Blizzard’s response to righteous worker activity was surveillance, intimidation and hiring notorious union busters.”).

45. Kalbakian, *supra* note 32, at 352. For a brief history of the U.S. video game industry, *see Video Game History*, HISTORY, <https://www.history.com/topics/inventions/history-of-video-games> [<https://perma.cc/PB3V-PKRY>] (June 10, 2019).

46. *See* J. Clement, *Games Market Revenue Worldwide 2015–2022, by Region*, STATISTA (May 18, 2022), <https://www.statista.com/statistics/539572/games-market-revenue-by-region> [<https://perma.cc/FH8Z-VREB>].

47. J. Clement, *Annual Revenue of the U.S. Video Game Industry 2016–2021, by Segment*, STATISTA (Mar. 10, 2022), <https://www.statista.com/statistics/249996/annual-revenue-of-the-us-video-game-industry-by-segment> [<https://perma.cc/89CL-RR6V>].

48. *See supra* note 1 and accompanying text; Press Release, Activision Blizzard, Inc., *Activision Blizzard Announces Fourth-Quarter and 2021 Financial Results* (Feb. 3, 2022), <https://investor.activision.com/news-releases/news-release-details/activision-blizzard-announces-fourth-quarter-and-2021-financial>.

sometimes upwards of 100 hours per week.⁴⁹ Traditionally, “crunch” periods aligned with important release dates, but now, some employees endure it year-round.⁵⁰ During “crunch” periods, employees—especially developers and quality assurance testers—“suffer . . . physical, mental, and social strains.”⁵¹ Another major labor issue within the industry is the misclassification of employees, such as developers, as independent contractors; under the NLRA, independent contractors enjoy fewer labor protections.⁵² Additionally, employees face unexpected mass layoffs and studio closures, even when “their employers are reporting their best-ever earnings.”⁵³ For instance, in early 2019, Activision announced an eight-hundred-person layoff despite reporting a record revenue of \$7.5 billion for 2018.⁵⁴

Employees also deal with retaliation and other union-busting tactics from their employers. Unfortunately, many employer tactics are legal. For example, employers can legally hang anti-union materials around the workplace, hire union-busting consultants, and even order supervisors to threaten the job security of employees who vote to unionize.⁵⁵ By targeting pro-union employees, employers effectively block any pro-union dialogue in the workplace and dissuades employees from disclosing or advancing their views on unionization.⁵⁶ Sometimes, even more serious, illegal employer tactics go unnoticed (or at least unaddressed).⁵⁷ Throughout 2016 and 2017, the National Labor Relations Board (NLRB) charged employers with violating their employees’ legal rights, including threats

49. Kalbakian, *supra* note 32, at 353 & n.8.

50. *Id.*

51. *Id.* See generally JASON SCHREIER, BLOOD, SWEAT, AND PIXELS 53 (2017) (“The word ‘crunch’ calls to mind the gnashing of teeth, [and] is . . . extended overtime . . . seen as integral to game development as buttons or computers.”).

52. Kalbakian, *supra* note 32, at 363, 378.

53. Paris Marx, *Toxic Workplaces Are Driving Video Game Developers to Unionize*, MEDIUM: ONEZERO (Nov. 12, 2019), <https://onezero.medium.com/toxic-workplaces-are-driving-video-game-developers-to-unionize-cda5c8b73317> [<https://perma.cc/AXK2-Q2SN>].

54. Alana Semuels, ‘Every Game You Like Is Built on the Backs of Workers.’ *Video Game Creators Are Burned Out and Desperate for Change*, TIME (June 11, 2019, 5:00 AM), <https://time.com/5603329/e3-video-game-creators-union/> [<https://perma.cc/KFZ9-RPP5>] (noting that other video game companies, like Electronic Arts, have also closed studios and laid off employees because they “are now focused on making a few big hits” as opposed to “dozens of games a year in the hopes of striking gold once or twice”).

55. LAFER & LOUSTAUNAU, *supra* note 27, at 5, 7 tbl.2 (noting that “[e]mployers spend \$340 million per year on ‘union avoidance’ consultants to deny workers the right to organize”).

56. *Id.* at 6.

57. See *id.* at 16 (“What happens if you violate the law? The probability is you will never get caught. If you do get caught, the worst thing that can happen to you is you get a second election.”) (quoting Joel D. Smith, *Consultants, Lawyers, and the ‘Union Free’ Movement in the USA Since the 1970s*, 33 INDUS. RELS. J. 197, 207 (2002)).

and retaliatory layoffs, in over 40% of union elections that it supervised.⁵⁸ However, violating employers often only receive a “slap on the wrist” or reach insignificant settlements.⁵⁹

Furthermore, women are underrepresented across the heavily male-dominated industry. In 2020, approximately 41% of gamers identified as women, but only 24% of employees within the video game industry identified as women and only 16% held executive level positions.⁶⁰ These systemic disparities perpetuate an industry culture that allows toxic spaces to persist. For example, in studios, gender minority employees frequently face gender- and sex-based discrimination and harassment while their male counterparts and leadership are not held accountable.⁶¹ On a larger scale, the #Gamergate movement provided an online platform to threaten and reveal information about notable women in the video game industry.⁶² Consequently, a large portion of the video game workforce suffers from major gender- and sex-based labor inequalities.⁶³

A. A for the Activision Blizzard, Inc. Lawsuits

Activision Blizzard, Inc., the video game company responsible for *Call of Duty*, *World of Warcraft*, *Overwatch*, *Diablo*, and other popular

58. *Id.* at 5.

59. *See, e.g.*, David Streitfeld, *How Amazon Crushes Unions*, N.Y. TIMES, <https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html> [https://perma.cc/DG6A-QFLG] (Oct. 21, 2021) (settling to “post an employee notice promising good behavior while admitting nothing”). *But see* Kim, *supra* note 43 (in a gender discrimination lawsuit, rejecting a \$10 million settlement and settling for \$100 million and promises for pay adjustments and transparency, inclusive hiring policies, and opportunities for independent contractors).

60. *See* Tomoka Yokoi, *Female Gamers Are on the Rise. Can the Gaming Industry Catch Up?*, FORBES (Mar. 4, 2021, 5:09 PM), <https://www.forbes.com/sites/tomokoyokoi/2021/03/04/female-gamers-are-on-the-rise-can-the-gaming-industry-catch-up>.

61. Paul, *supra* note 11; *see also* DFEH Complaint, *supra* note 3, ¶¶ 31–52; EEOC Complaint, *supra* note 6, ¶¶ 15–25.

62. The Gamergate movement is an “Internet culture war” between women seeking greater inclusion in the video game industry and misogynists and “traditionalists” who fear change in the industry. The movement later adopted #Gamergate after actor Adam Baldwin tweeted it. Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, WASH. POST (Oct. 14, 2014, 5:23 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read> [https://perma.cc/JU6Y-9XT2].

63. *See generally* Keza MacDonald, *Is the Video Games Industry Finally Reckoning with Sexism?*, GUARDIAN (July 22, 2020, 3:00 AM), <https://www.theguardian.com/games/2020/jul/22/is-the-video-games-industry-finally-reckoning-with-sexism> [https://perma.cc/D899-GP2X].

video games,⁶⁴ is the largest in the United States⁶⁵ and one of the top ten video game companies in the world.⁶⁶ Through various mergers and acquisitions, Activision currently operates multiple video game development subsidiaries: Activision Publishing, Blizzard Entertainment, and King Digital Entertainment (King).⁶⁷ King is known for its popular mobile games, such as *Candy Crush*.⁶⁸ The company also controls several independent studios (including Sledgehammer Games and Treyarch) and engages in media production, consumer products, and professional e-sports.⁶⁹ Significantly, it is headquartered in Santa Monica, California with most of its studios also located in California.⁷⁰ California is one of the most pro-labor states in the United States.⁷¹ Since California is home to the most video game companies in the United States, including Activision, many industry workers already benefit from increased labor protections.⁷²

64. *About Our Company*, ACTIVISION BLIZZARD, <https://www.activisionblizzard.com/about-us> [<https://perma.cc/MJ6C-2ZN9>] (last visited Sept. 15, 2022).

65. *See supra* note 48 and accompanying text.

66. *Top 25 Public Companies by Game Revenues*, NEWZOO, <https://newzoo.com/insights/rankings/top-25-companies-game-revenues> [<https://perma.cc/JKD4-6TG8>] (last visited Sept. 15, 2022).

67. *About Our Company*, *supra* note 64.

68. *See* KING, <https://www.king.com> [<https://perma.cc/3V8L-QSAZ>] (last visited Sept. 15, 2022).

69. *About Our Company*, *supra* note 64.

70. *Locations*, ACTIVISION BLIZZARD, <https://www.activisionblizzard.com/location> [<https://perma.cc/876U-VKH9>] (last visited Sept. 15, 2022).

71. *See* Melissa Shin & Rebecca Koenig, *Interactive Map: Best States for Worker Rights*, U.S. NEWS (Aug. 28, 2018, 2:54 PM), <https://money.usnews.com/careers/salaries-and-benefits/articles/2018-08-28/interactive-map-best-states-for-worker-rights> (cataloguing worker-friendly states' labor and employment laws, including California's mandatory paid sick and family leave statutes); *see also* GREENHOUSE, *supra* note 22, at 267–83. Additionally, California's courts and legislature have articulated an expansive test for whether an independent contractor is considered an employee for the purposes of workplace benefits. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 7 (Cal. 2018); Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (highlighting the harmful impacts of the previous classification test on the “erosion of the middle class and the rise in income inequality”).

72. *Cf.* Patrick Hankins, *Here Comes a New Challenger! Esports and California AB 5*, 31 MARQ. SPORTS L. REV. 129, 136 (2020). The majority of the e-sports industry's workers are employed as independent contractors. *Id.* at 129. However, Hankins argues that AB 5 could backfire and convince e-sport companies to move to less pro-labor states. *Id.* at 130–31.

In the wake of the #MeToo⁷³ and Time's Up⁷⁴ movements, many of Activision's California-based women employees submitted allegations of workplace discrimination and harassment to the DFEH, which prompted an approximately two-year investigation into the video game giant.⁷⁵ In July 2020, the investigation culminated in a gender discrimination and harassment lawsuit against Activision.⁷⁶ The complaint sets forth allegations of a "pervasive 'frat boy' work culture"—a "breeding ground for harassment and discrimination against women"—within which women employees' daily experiences are harrowing:

[W]omen across the company are assigned to lower paid and lower opportunity levels. . . . Female employees are subjected to constant sexual harassment, including having to continually fend off unwanted sexual comments and advances by their male coworkers and supervisors and being groped. . . . [E]mployees' complaints were treated in a perfunctory and dismissive manner and not kept confidential. As a result of these complaints, female employees were subjected to retaliation, including but not limited to being deprived of work on projects, unwillingly transferred to different units, and selected for layoffs.⁷⁷

In its immediate response, Activision failed to acknowledge the claims, stating that the complaint was "distorted, and in many cases false."⁷⁸ Yet, communications to staff conveyed differing responses. Activision Publishing's president, Rob Kostisch, called the allegations "deeply disturbing" and "not reflective of [the company's] values," and Blizzard Entertainment's then president, J. Allen Brack, called them "extremely troubling" and "unacceptable."⁷⁹ At the same time,

73. The Me Too Movement encourages survivors to speak out about sexual harassment and violence and works to "disrupt the systems that allow sexual violence to proliferate in our world." In 2017, the symbolic #MeToo hashtag went viral. *History & Inception, ME TOO*, <https://metoomvmt.org/get-to-know-us/history-inception> [<https://perma.cc/D984-TLMW>] (last visited Sept. 15, 2022).

74. The Time's Up movement, founded by women in the entertainment industry, advocates for gender equity in the workplace and "works to prevent sexual harassment and related forms of discrimination in the first place." *Our Story, TIME'S UP*, <https://timesupnow.org/about/our-story> [<https://perma.cc/D96E-N9QM>] (last visited Sept. 15, 2022).

75. Maeve Allsup, *Activision Blizzard Sued Over 'Frat Boy' Culture, Harassment (1)*, BLOOMBERG L.: DAILY LAB. REP., <https://news.bloomberglaw.com/daily-labor-report/activision-blizzard-sued-by-california-over-frat-boy-culture> [<https://perma.cc/7XNS-NSS8>] (July 21, 2021, 9:59 PM).

76. DFEH Complaint, *supra* note 3.

77. *Id.* at ¶¶ 4–7.

78. Gach, *supra* note 7.

79. *Id.*

Activision's chief compliance officer, Frances Townsend, called the lawsuit "truly meritless."⁸⁰

Despite the lack of a federally recognized union, workers for Activision and its subsidiaries, including independent contractors, still responded to the lawsuits, forming the Activision/Blizzard/King Workers' Alliance (ABK).⁸¹ Over three thousand employees signed a statement of intent with demands for improved working conditions.⁸² Among their demands: the discontinuation of mandatory arbitration, more equitable recruitment and promotion policies, and pay rate transparency.⁸³ Additionally, the employees protested after Activision hired a well-known anti-union law firm, WilmerHale, to represent it in the lawsuits; they also staged a walkout when their demands were not met.⁸⁴ Hundreds of employees protested in person, while more employees protested virtually due to COVID-19 concerns.⁸⁵

Former Activision employees, other video game companies, and other affiliated entities also contributed to the dialogue.⁸⁶ Co-founder and former president of Blizzard Entertainment, Mike Morhaime, tweeted: "I am extremely sorry that I failed you."⁸⁷ Bungie—the developer of popular games such as *Halo* and *Destiny*—tweeted: "We have a responsibility to acknowledge, reflect, and do what we can to push back on a persistent culture of harassment, abuse, and inequality that exists in our industry."⁸⁸ Almost five hundred employees of Ubisoft, the developer of popular games such as *Assassin's Creed*, announced their solidarity with Activision's employees, seeking accountability from their own leadership.⁸⁹ Streaming platforms halted coverage of Activision games,

80. *Id.*

81. Matt Kim, *Activision Blizzard Employees Form Coalition, Reject CEO's Choice of Law Firm*, IGN (Aug. 3, 2021), <https://www.ign.com/articles/activision-blizzard-employees-abk-coalition-reject-bobby-kotick-law-firm> [<https://perma.cc/M57Q-P9RE>] (publicizing ABK's open letter to executive leadership criticizing the decision to hire the anti-union law firm WilmerHale as a third-party auditor).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Recall former Activision developer Jeff Strain's open letter regarding unionization: "We need unionization. . . . I have nothing to fear from unionization . . . I'm giving my full endorsement and support to an industry wide adoption of unions." See Kim, *supra* note 18.

87. @MikeMorhaime, TWITTER (July 23, 2021), <https://twitter.com/mikemorhaime/status/1418796184471277569> [<https://perma.cc/CW3R-SSY7>].

88. @Bungie, TWITTER (July 22, 2021), <https://twitter.com/Bungie/status/1418317046413103109> [<https://perma.cc/SF3W-FD42>].

89. Ian Walker, *Ubisoft Workers Decry Industry's 'Culture of Abuse'*, KOTAKU, <https://kotaku.com/ubisoft-workers-decry-industrys-culture-of-abuse-1847380511> [<https://perma.cc/YS3Q-YYZ6>] (July 29, 2021, 6:05 PM).

with some e-sport players and streamers even refraining from playing Activision games during the walkout.⁹⁰

With pressure building, Activision's leadership reapproached the situation. Former president, Allen Brack, former chief legal officer, Claire Hart, and former executive producer of *Overwatch*, Chacko Sonny, left Blizzard Entertainment; and other employees were let go.⁹¹ Amidst calls to also oust Chief Executive Officer (CEO) Bobby Kotick, he took a pay cut, discontinued mandatory arbitration, and publicly claimed that he would step down if he was unable to fix the company's toxic culture.⁹² However, a later investigation revealed that Kotick was actively working to dismiss the claims of misconduct against the company and had actually harassed women employees himself.⁹³

In September 2021, Activision was met with several other related legal actions. A separate three-year investigation by the federal Equal Employment Opportunity Commission (EEOC) led to another gender discrimination, harassment, and retaliation lawsuit under Title VII of the Civil Rights Act of 1964.⁹⁴ Additionally, the Communications Workers of America (CWA),⁹⁵ on behalf of ABK, filed an unfair labor practice complaint against Activision alleging retaliation and intimidation.⁹⁶ The

90. Ari Notis, *Some Gaming Websites, YouTube Channels Halt Coverage of Activision Blizzard Games*, KOTAKU, <https://kotaku.com/some-gaming-websites-youtube-channels-halt-coverage-of-1847362179> [<https://perma.cc/YJ28-D49R>] (July 26, 2021, 2:00 PM).

91. Luke Plunkett, *Overwatch 2's Boss is Quitting Blizzard for 'Some Time Off'*, KOTAKU (Sept. 21, 2021, 7:30 PM), <https://kotaku.com/overwatch-2s-boss-is-quitting-blizzard-for-some-time-o-1847719663> [<https://perma.cc/BR35-SYJJ>].

92. Luke Plunkett, *Report: Activision CEO Bobby Kotick Will 'Consider' Quitting If He Can't 'Fix' Company's Culture*, KOTAKU (Nov. 21, 2021, 6:30 PM), <https://kotaku.com/report-activision-ceo-bobby-kotick-will-consider-quitt-1848100036> [<https://perma.cc/U3GR-CFD5>].

93. Kirsten Grind, Ben Fritz & Sarah E. Needleman, *Activision CEO Bobby Kotick Knew for Years About Sexual-Misconduct Allegations at Videogame Giant*, WALL ST. J. (Nov. 16, 2021, 10:59 AM), <https://www.wsj.com/articles/activision-videogames-bobby-kotick-sexual-misconduct-allegations-11637075680> [<https://perma.cc/4CCP-XHTC>].

94. EEOC Complaint, *supra* note 6; *see also* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (prohibiting employers from discriminating against employees in regard to hires, terms of employment, and other employment opportunities based on their "race, color, religion, sex, or national origin").

95. The CWA union represents employees in communications, media, higher education, health care, manufacturing, and more in the United States and Canada. *About*, CWA, <https://cwa-union.org/about> [<https://perma.cc/UBG6-QCKM>] (last visited Sept. 15, 2022). In 2020, it launched its Campaign to Organize Digital Employees (CODE-CWA) to support unionization in the technology and video game industries. *About CODE-CWA*, CODE-CWA, <https://www.code-cwa.org/about-code-cwa> [<https://perma.cc/RB4E-BPTK>] (last visited Sept. 15, 2022).

96. *Activision Blizzard, Inc.*, Case No. 31-CA-282822, Signed Charge Against Employer (Sept. 10, 2021).

Securities and Exchange Commission (SEC) also started an investigation into the company regarding labor-related disclosures.⁹⁷

Even though some cases are ongoing, directly beneficial outcomes for unionization are unlikely. The district court dismissed the SEC's case.⁹⁸ The EEOC and Activision settled for \$18 million—"mere pennies" to a company worth \$72 billion—despite arguments between the federal agency, EEOC, and the state agency, DFEH.⁹⁹ The DFEH argued that the settlement would cause "irreparable harm" to its case, and the EEOC argued a potential conflict of interest because a former EEOC lawyer was working on the DFEH case, but the judge rejected both arguments.¹⁰⁰ DFEH survived Activision's motion to dismiss its own case, with trial set for February 2023.¹⁰¹ However, hidden beneficial outcomes for unionization are likely, as analyzed below.¹⁰²

B. B for the Biden Administration

The current Biden administration will only strengthen the video game industry's move toward formal unionization. This administration is considered one of the most pro-labor presidential administrations ever, surpassing even the Franklin D. Roosevelt administration.¹⁰³ Indeed, the Biden administration has already publicly announced its support of unions

97. Erin Woo, *The S.E.C. Has Opened an Investigation into Activision Blizzard*, N.Y. TIMES, <https://www.nytimes.com/2021/09/20/business/activision-blizzard-sec-investigation.html> [https://perma.cc/VR8U-L8NN] (Oct. 28, 2021).

98. Maeve Allsup, *Activision Gets Investor Suit Over Sex Harassment Probes Tossed*, BLOOMBERG L. (Apr. 19, 2022, 7:45 AM), <https://news.bloomberglaw.com/social-justice/activision-gets-initial-investor-suit-over-sex-harassment-tossed> [https://perma.cc/GA5W-LM9Z].

99. Communication Workers of America (@CODE_CWA), TWITTER (Sept. 28, 2021, 7:25 PM), https://twitter.com/CODE_CWA/status/1443009016427208707 [https://perma.cc/356Q-GDUQ]; *What You Should Know About: EEOC's Settlement with Activision Blizzard*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/what-you-should-know-about-eeocs-settlement-activision-blizzard> [https://perma.cc/2ZYC-KFD8] (last visited Sept. 13, 2022).

100. Ash Parrish, *Judge Denies California's Attempt to Intervene in Activision Blizzard Settlement*, VERGE (Dec. 14, 2021, 4:42 PM), <https://www.theverge.com/2021/12/14/22834691/judge-denies-california-dfeh-block-activision-blizzard-eeoc-lawsuit-settlement> [https://perma.cc/TLG3-Q28T].

101. Shannon Liao, *Activision Blizzard Officially Settles Federal Sexual Harassment Suit for \$18 Million*, WASH. POST, <https://www.washingtonpost.com/video-games/2022/03/29/activision-blizzard-eeoc-settlement> [https://perma.cc/W96V-RC2U] (Mar. 30, 2022, 8:19 AM).

102. See *infra* Section III.

103. See Steven Greenhouse, *Biden Stakes Claim to Being America's Most Pro-Union President Ever*, GUARDIAN, <https://www.theguardian.com/us-news/2021/may/02/joe-biden-unions> [https://perma.cc/P8HR-8A7M] (May 2, 2021, 8:55 AM).

to strengthen the middle class—the backbone of the United States.¹⁰⁴ So far, President Biden’s actions align with his beliefs. He immediately fired the NLRB’s general counsel, Peter Robb, who opposed unions.¹⁰⁵ Soon after, Biden issued an executive order that created the White House Task Force on Worker Organizing and Empowerment.¹⁰⁶ He also appointed a pro-union director, Celeste Drake, for his new Made in America initiative.¹⁰⁷

The Biden administration is also currently working to enact the Protecting the Right to Organize Act (PRO Act).¹⁰⁸ In March 2021, the House of Representatives passed the Act; however, while the Senate’s Committee on Small Business and Entrepreneurship and Committee on Banking, Housing, and Urban Affairs have held hearings, the Act has not yet made any meaningful progress in the Senate.¹⁰⁹ If passed, the PRO Act would be the most pro-labor federal legislation since the NLRA.¹¹⁰ It addresses and claims to break down many of the barriers contributing to the decline in unionization, such as the misclassification of employees and the lack of workplace protections for independent contractors.¹¹¹ The PRO Act would extend many federally-protected workplace rights to independent contractors (just like California’s AB5), take away employers’ right “to permanently replace” employees on strike or engaged in other types of protesting, and overcome many states’ “right-to-work” laws regarding membership fees.¹¹²

104. Press Release, White House, Fact Sheet: Executive Order Establishing the White House Task Force on Worker Organizing and Empowerment (Apr. 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/26/fact-sheet-executive-order-establishing-the-white-house-task-force-on-worker-organizing-and-empowerment> [<https://perma.cc/8PWX-A2VN>].

105. See Eli Rosenberg & Reis Thebault, *Biden Fires Trump-Appointed Labor Board General Counsel and Deputy Who Refused to Resign*, WASH. POST (Jan. 21, 2021, 7:05 PM), <https://www.washingtonpost.com/business/2021/01/20/biden-fires-nlrb-peter-robb> [<https://perma.cc/25X4-MLGA>].

106. Exec. Order No. 14,025, 86 Fed. Reg. 22829 (Apr. 26, 2021).

107. Press Release, White House, President Biden Announces Key Hire at the Office of Management and Budget (Apr. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/27/president-biden-announces-key-hire-at-the-office-of-management-and-budget> [<https://perma.cc/JZQ6-TDEW>].

108. Protecting the Right to Organize Act of 2019 (PRO Act), H.R. 2474, 116th Cong. (2020); Protecting the Right to Organize Act of 2021 (PRO Act), S. 420, 117th Cong. (2021).

109. See Protecting the Right to Organize Act of 2021 (PRO Act), H.R. 842, 117th Congress (2021) (as passed by House, Mar. 9, 2021). See also *Small Business Franchising: An Overview of the Industry, SBA’s Role, and Legislative Proposals: Hearing on S. 420 Before the S. Comm. on Small Bus. & Entrepreneurship*, 117th Cong. (2022); *The Semiannual Monetary Policy Report to Congress: Hearing on S. 420 Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 117th Cong. (2022).

110. See Greenhouse, *supra* note 103.

111. S. 420, §§ 101, 104.

112. *Id.* at §§ 104, 111.

C. C for the COVID-19 Pandemic

The COVID-19 pandemic has put the issues of workplace disparities front and center. The pandemic highlighted the invaluable benefits of unions, including increased wages and safety measures.¹¹³ Statistics for unions in the United States reflect as much. Although the total number of union members declined, the percentage of union members increased.¹¹⁴ This comparison is explained by the overall decrease in employment.¹¹⁵ Additionally, numbers for industries such as food services declined, while numbers for industries such as motion pictures and sound recording increased.¹¹⁶ Due to health and safety concerns, restaurants were forced to temporarily or permanently close and fewer people were able or willing to enjoy restaurant meals.¹¹⁷ However, more people were forced to turn to technology for personal and professional use.¹¹⁸ Perhaps this need for technology in response to the pandemic prompted the PRO Act's call for the "right to use electronic communication devices and systems" for union and collective bargaining purposes, limited only by a "compelling business rationale denying or limiting such use."¹¹⁹

After the initial adjustment to remote work, many companies experienced a decrease in operating costs and an increase in profits.¹²⁰ Today, employees are afforded greater flexibility and potential for improved holistic wellness.¹²¹ However, employees in the video game industry face unique struggles concerning remote work. For a long time, video game companies have encouraged collaborative spaces to promote efficiency.¹²² Yet, sources assert varying perspectives on whether remote

113. McNICHOLAS, RHINEHART, POYDOCK, SHIERHOLZ & PEREZ, *supra* note 34.

114. See News Release, U.S. Bureau of Labor Statistics, Department of Labor, Union Members—2021 (Jan. 20, 2022, 10:00 AM), <https://www.bls.gov/news.release/pdf/union2.pdf> [https://perma.cc/L778-GUGP] (reporting increasing in union membership in 2020) [hereinafter 2021 Bureau of Labor News Release].

115. *Id.*

116. *Id.*

117. See Shihui Xiang, Saad Rasool, Yong Hang, Kamran Javid, Tasawar Javed & Alin Emanuel Artene, *The Effect of COVID-19 Pandemic on Service Sector Sustainability and Growth*, 12 FRONTIERS PSYCH., May 6, 2021, at 8.

118. *Id.*

119. Protecting the Right to Organize Act (PRO Act), S. 420, 117th Congress § 104 (2021).

120. Benjamin Rojas, *How Remote Work Can Increase Business Profits*, FORBES (Oct. 13, 2021, 7:00 AM), <https://www.forbes.com/sites/theyec/2021/10/13/how-remote-work-can-increase-business-profits/?sh=4d791d8917b8>.

121. *Id.*

122. Jason Schreier, *Covid Is Forcing Video Game Companies to Rethink Remote Work*, BLOOMBERG (Oct. 15, 2021, 9:31 AM), <https://www.bloomberg.com/news/articles/2021-10-15/covid-forces-video-game-makers-to-rethink-remote-work> [https://perma.cc/LY5L-DR3J].

work in the video game industry actually increased or decreased productivity, with many sources citing the number of delayed releases.¹²³

The Activision lawsuits, the Biden administration, and the COVID-19 pandemic played significant roles in breaking down longstanding barriers to unionization within the video game industry. An analysis of the video game industry's labor history, including its recent failures and the current discourse surrounding the frustrated industry, indicates employees are more likely than ever to prevail. Public support and employee action are necessary for unionization to occur, but the need for a pro-union government is also important. This Comment explores how these factors set up the video game industry to achieve formal unionization. Employees should take advantage of the disruption within the video game industry to become educated, advocate for themselves, and seriously consider unionization and collective bargaining.

III. THE VIDEO GAME INDUSTRY IS PRIMED FOR UNIONIZATION

Out of all of the tools at an employee's disposal, collective bargaining is arguably the most important. Collective bargaining allows employees to contribute to and participate in establishing, maintaining, and enforcing bargained-for employment terms and workplace conditions.¹²⁴ As a result, both individual and collective wants and needs are integrated into the bargaining process.¹²⁵ Furthermore, some scholars and professionals argue that collective bargaining, as opposed to individual bargaining, is more efficient, avoids the free-rider effect,¹²⁶ and decreases the likelihood the bargaining individual becomes an employer's target.¹²⁷

123. *See generally id.*

124. *See* Dau-Schmidt & Khan, *supra* note 21, at 429–31.

125. *See id.*

126. A potential free-rider effect may arise if individual employees engage in the costly and time-consuming process to negotiate terms of employment that ultimately extend to all employees, such as work hours, health care benefits, and evaluations. As a result, individual employees may not feel incentivized to individually bargain. *See id.*

127. *See id.*

The NLRA¹²⁸ claims to protect employees' right to advocate for a fair and safe workplace with employers in positions of power.¹²⁹ Since its enactment, employees have used collective bargaining to realize benefits such as increased wages, better benefits, and improved safety conditions.¹³⁰ However, over time, the state of labor law and views of unionization in the United States have created barriers for employees. Employers' union busting, the government's weakening of the NLRA, and overall decreases in the workforce have diminished collective bargaining.¹³¹ As a result, the amount of union members has decreased.¹³² Despite its lack of formal unionization, the video game industry is not immune from feeling these effects.¹³³

However, the recent Activision gender discrimination and harassment lawsuits,¹³⁴ President Joe Biden's pro-labor administration,¹³⁵ and the increased union numbers in response to the COVID-19 pandemic¹³⁶ create a turning point by breaking down barriers to formal labor unionization in the video game industry. The recent Activision lawsuits prompted industry-wide discourse on the "chronic" yet largely

128. This Comment does not address the direct effects of Title VII. However, Title VII has similarly proven ineffective in helping secure rights for workers in the video game industry. Title VII and subsequent case law permits lawsuits for discrimination and sexual harassment claims, but it typically requires a pre-investigation by the EEOC, and courts inconsistently analyze retaliation claims. *See generally* CHRISTINE J. BACK & WILSON C. FREEMAN, CONG. RSCH. SERV., R45155, SEXUAL HARASSMENT AND TITLE VII: SELECTED LEGAL ISSUES (2018). Additionally, unionization provides the benefit of a union representative, in contrast to solo litigation. *See* Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & CONTEMP. PROBS. 53, 54 (1986) (highlighting the necessity of Title VII's fee shifting statute and the high cost of legal services); *see also* Parrish, *supra* note 100 (reporting the perceived inadequacy of a settlement between the EEOC and Activision).

129. National Labor Relations Act § 1, 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . .").

130. *See generally* JOSH BIVENS, LORA ENGDahl, ELISE GOULD, TERESA KROEGER, CELINE McNICHOLAS, LAWRENCE MISHel, ZANE MOKHIBER, HEIDI SHIERHOLZ, MARNI VON WILPERT, BEN ZIPPERER & VALERIE WILSON, ECON. POL'Y INST., HOW TODAY'S UNIONS HELP WORKING PEOPLE: GIVING WORKERS THE POWER TO IMPROVE THEIR JOBS AND UNRIG THE ECONOMY (2017), <https://files.epi.org/pdf/133275.pdf> [<https://perma.cc/LKT3-MJRN>].

131. *See* 2021 Bureau of Labor News Release, *supra* note 114.

132. *Id.*

133. *See, e.g.*, Thomsen, *supra* note 16.

134. *See supra* Section II.A.

135. *See supra* Section II.B.

136. *See* 2021 Bureau of Labor News Release, *supra* note 114 (finding that union membership increased by 1.2% in 2020). *But see id.* (finding that union membership decreased by 0.9% in 2021).

unaddressed labor inequalities within the video game industry.¹³⁷ The Biden administration has already taken pro-union executive action, and it has potential to enact much needed labor law reform.¹³⁸ From 2019 to 2020, the percentage of union members increased,¹³⁹ and the COVID-19 pandemic highlighted the invaluable benefits of unions, including increased wages and safety measures.¹⁴⁰

A. *The Activision Lawsuits Spotlighted the Toxic Video Game Industry*

Since July 2021, the Activision lawsuits and the discourse they have generated continue to persist. The Los Angeles Superior Court rejected Activision's conflict-of-interest argument regarding the DFEH attorney who had previously worked for the EEOC during the course of the EEOC investigation, but the case still ended with a settlement.¹⁴¹ The settlement between Activision and the EEOC for \$18 million seeks to financially compensate victims, but it does not solve or even acknowledge the persistent issue of sexism within the company or the video game industry as a whole: What about future employees? What about unresolved issues such as leadership?¹⁴² Considering Activision's net worth of \$72 billion and its CEO Kotick's salary of \$154 million, the \$18 million settlement is unlikely to encourage highly paid executives to make significant changes to their policies and practices.¹⁴³ Furthermore, DFEH's interference with the federal agency's settlement only delayed the resolution of either case.¹⁴⁴ Despite the outcome, the lawsuits have rallied public support, which could encourage employees to act on their shared desire for formal unionization and collective bargaining while employers are discouraged, at least temporarily, from engaging in union-busting tactics.

137. See, e.g., Kim, *supra* note 18 (publicizing an industry leader's "open letter calling for full unionization within the games industry").

138. Greenhouse, *supra* note 103; see also Protecting the Right to Organize (PRO) Act, H.R. 2474, 116th Congress (2019).

139. See 2021 Bureau of Labor News Release, *supra* note 114.

140. McNICHOLAS, RHINEHART, POYDOCK, SHIERHOLZ & PEREZ, *supra* note 34.

141. Parrish, *supra* note 100.

142. Levi Winslow, *Labor Union Suggests \$18M Activision Blizzard Settlement Akin to Pennies*, KOTAKU (Sept. 29, 2021, 7:40 PM), <https://kotaku.com/labor-union-suggests-18m-activision-blizzard-settlement-1847771572> [<https://perma.cc/G5TJ-UZTT>] (sharing the CWA's tweet likening the EEOC and Activision's settlement to "mere pennies").

143. *Id.*; Theo Francis & Inti Pacheco, *From Tesla to GE, See How Much CEOs Made in 2020*, WALL ST. J. (June 1, 2021, 5:30 AM), <https://www.wsj.com/articles/from-tesla-to-ge-see-how-much-ceos-made-in-2020-11622539802> [<https://perma.cc/YWM4-EQR9>].

144. Shira Stein & Maeve Allsup, *Activision Harassment Suits Ignite EEOC-California 'Turf War'*, BLOOMBERG L.: DAILY LAB. REP. (Nov. 29, 2021, 3:45 AM), <https://news.bloomberglaw.com/daily-labor-report/activision-harassment-suits-ignite-eoc-california-turf-war> [<https://perma.cc/57BE-F794>].

Most recently, quality assurance testers at Activision’s Wisconsin-based Raven Software successfully voted to unionize,¹⁴⁵ and Microsoft announced its acquisition of Activision for nearly \$70 billion.¹⁴⁶ Microsoft is the second most valuable company in the world at a market value of \$2.3 trillion, with Apple being the most valuable.¹⁴⁷ The acquisition will make it the third largest video game company in the world in terms of revenue, with the Chinese company, Tencent, and the Japanese company, Sony, as the first and second largest, respectively.¹⁴⁸ Microsoft’s goal is to delve deeper into the “metaverse.”¹⁴⁹ Although the deal is set to close in July 2023; the U.S. Federal Trade Commission (FTC), U.K. Competition and Markets Authority, and E.U. European Commission still must approve it.¹⁵⁰ The acquisition would likely have serious implications for Activision’s employees.¹⁵¹ If Microsoft retains certain Activision leadership, labor issues may be exacerbated. If the acquisition overshadows the discrimination, it may decrease overall public support and veer the industry away from its recent trend towards unionization. Yet, many Activision employees do not expect the acquisition to affect their efforts, at least not in the short term.¹⁵² Microsoft signed a labor neutrality

145. Richard Lawler, *Activision Blizzard Will Begin Negotiations with QA Testers Union at Raven Software*, VERGE (June 10, 2022, 12:56 PM), <https://www.theverge.com/2022/6/10/23162611/activision-blizzard-raven-qa-union-recognized-negotiations> [<https://perma.cc/HP8X-A42X>].

146. Karen Weise, Andrew Ross Sorkin, Kellen Browning & Michael J. de la Merced, *Microsoft Will Buy Activision Blizzard, Betting \$70 Billion on the Future of Games*, N.Y. TIMES, <https://www.nytimes.com/2022/01/18/business/microsoft-activision-blizzard.html> [<https://perma.cc/HXB6-2QKM>] (Jan. 18, 2022, 10:03 PM).

147. *Id.*

148. *Id.*

149. Metaverse is “[a] slang term used to describe a virtual representation of reality implemented by means of virtual reality software.” *Metaverse*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/acref/9780199571444.001.0001/acref-9780199571444-e-2104?rskey=KGxnah&result=1> [<https://perma.cc/LAP8-R2WZ>] (last visited Oct. 16, 2022).

150. Leah Nylén, *FTC Is Scrutinizing Labor Impact of Microsoft-Activision Merger*, BLOOMBERG (June 6, 2022, 4:00 AM), <https://www.bloomberg.com/news/articles/2022-06-16/ftc-scrutinizing-labor-impact-of-microsoft-activision-merger> [<https://perma.cc/3884-LP9L>] (sharing the FTC’s concern regarding the acquisition’s impact on competition and the Activision employees involved in the gender discrimination and sexual harassment lawsuits); Humberto J. Rocha, *CMA to Probe Microsoft’s \$69B Buyout of ‘Call of Duty’ Maker*, LAW360 (July 6, 2022, 5:44 PM), <https://www.law360.com/articles/1508696/cma-to-probe-microsoft-s-69b-buyout-of-call-of-duty-maker> [<https://perma.cc/X4G2-NBZL>] (sharing the Competition and Markets Authority’s concern regarding the acquisition’s impact on competition); Pietro Lombardi & Samuel Stolton, *Microsoft Heads for Second Big EU Showdown—This Time over Gaming*, POLITICO (Jan. 24, 2022, 4:17 PM), <https://www.politico.eu/article/microsoft-activision-eu-showdown-video-game> [<https://perma.cc/4WRH-EC4Q>] (sharing the European Commission’s concerns regarding the acquisition’s impact on competition).

151. See Weise, Sorkin, Browning & de la Merced, *supra* note 146.

152. *Id.*

agreement, acknowledging its commitment to “maintaining a close relationship and shared partnership with all [its] employees, including those represented by a union.”¹⁵³ CWA even wrote a letter to the FTC supporting the acquisition.¹⁵⁴

1. SPOTLIGHTING THE TOXIC VIDEO GAME INDUSTRY GARNERED SUPPORT FOR INDUSTRY AND EMPLOYEE ACTION

Overall, decreases in the United States’ union numbers correlates with decreases in its middle class.¹⁵⁵ Decreases in union numbers “represent[] a serious loss of economic democracy.”¹⁵⁶ Unions provide a platform where low-wage employees can collectively bargain for wages, hours, and more. As employees achieve higher wages, more of them are pushed into the middle class.¹⁵⁷ By bolstering employees’ negotiating power, unions help bridge the gap between powerful employers and seemingly less powerful employees through statutorily protected collective bargaining.¹⁵⁸

Similarly, unions can help bridge the gap between the video game industry’s leadership, which is primarily made up of men, and its women employees. When minority employees (including gender minorities, sexual minorities, and racial minorities) enter workplaces, they are often afraid to assert their rights because of the potential risk of gender-, sex-, or race-based exploitation or violence.¹⁵⁹ Gender minorities in the video game industry are further discouraged due to the industry’s deep-rooted sexist culture and employers’ questionable responses (or lack thereof) to informal and formal complaints of gender discrimination and sexual harassment in the workplace.¹⁶⁰ Furthermore, women typically hold lower

153. Lawler, *supra* note 145 (quoting Brad Smith, *Microsoft Adopts Principles for Employee Organizing and Engagement with Labor Organizations*, MICROSOFT (June 2, 2022), <https://blogs.microsoft.com/on-the-issues/2022/06/02/employee-organizing-engagement-labor-economy> [<https://perma.cc/TC28-G3B8>]); Rocha, *supra* note 150.

154. Rocha, *supra* note 150.

155. See David Madland & Divya Vijay, *Unions Play a Major Role in Helping America’s Middle Class*, CTR. FOR AM. PROGRESS ACTION, fig.1 (Sept. 22, 2020), <https://www.americanprogressaction.org/article/unions-play-major-role-helping-americas-middle-class> [<https://perma.cc/BH2Q-ZGFA>].

156. Tim Rutten, *Wages, Unions and the End of the Middle Class*, UCLA BLUEPRINT (2015), <https://blueprint.ucla.edu/feature/wages-unions-and-the-end-of-the-middle-class> [<https://perma.cc/F4SA-GVVU>] (quoting Chris Tilly, the director of UCLA’s Institute for Research on Labor and Employment).

157. See *id.*

158. See National Labor Relations Act §§ 1–19, 29 U.S.C. §§ 151–169.

159. See JANE PILLINGER & NORA WINTOUR, *COLLECTIVE BARGAINING AND GENDER EQUALITY* 35 (2019) (discussing collective bargaining as a tool for gender equality).

160. See, e.g., Johnston, *supra* note 2.

paying positions compared to their male counterparts, increasing the number of low-wage workers and further affecting the middle class.¹⁶¹ Unions can provide a platform where women employees are able to address, for example, the gender pay gap and sexual harassment in the workplace, and collectively bargain for improved and safer working conditions.¹⁶² Indeed, studies of European countries with centralized bargaining show decreases in gender pay gaps.¹⁶³

From a practical standpoint, the media's publicization of the Activision lawsuits caused, and continues to cause, widespread uproar in the video game community. Both employees and allies have spoken out against the toxicity of the industry. Jeff Strain—one of Blizzard's first programmers and a former *World of Warcraft* team lead—released a letter sharing his own experiences with Blizzard and calling for unionization, describing the industry as “abusive, cruel, abhorrent, unacceptable, and illegal.”¹⁶⁴ In the letter, Strain reflected on his almost five-year stint with Blizzard:

[I]t showed me how abusive cultures can propagate and self-amplify over time; how ‘hardcore gamers only’ is a smokescreen for ‘bro culture’; how fostering a sense of exceptionalism inhibits people from speaking up because they should just deal with it if they love the company and its games; and how passive leadership that turns a blind eye can ultimately be the most abusive thing of all.¹⁶⁵

After an argument with one of Blizzard's founders regarding women's dismembered body parts in *Diablo*, Strain and his wife ultimately left Blizzard to establish ArenaNet.¹⁶⁶ Strain invited his four hundred or so ArenaNet employees¹⁶⁷ (compared to Activision's almost

161. See U.N. Secretary-General, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, ¶ 12, U.N. Doc. A/71/385 (Sept. 14, 2016); JANE PILLINGER, EUR. TRADE UNION CONFEDERATION, BARGAINING FOR EQUALITY: HOW COLLECTIVE BARGAINING CONTRIBUTES TO ELIMINATING PAY DISCRIMINATION BETWEEN WOMEN AND MEN PERFORMING THE SAME JOB OR JOB OF EQUAL VALUE 38 (2014) (finding that, in Belgium, increased minimum wages led to a decreased gender pay gap).

162. See PILLINGER & WINTOUR, *supra* note 159, at 35.

163. PILLINGER, *supra* note 161, at 11, 27.

164. Kim, *supra* note 18.

165. *Id.*

166. *Id.*

167. See ArenaNet LLC, LINKEDIN, <https://www.linkedin.com/company/arenanet/about> (last visited Sept. 13, 2022) (listing company size as between two hundred and five hundred).

ten thousand employees)¹⁶⁸ to unionize and urged his colleagues in leadership positions to also support industry-wide unionization.¹⁶⁹

The SEC lawsuit has led state treasurers to also push for the replacement of Activision's problematic leadership, albeit for different reasons. As the video game company's stock prices drop, state investors are motivated to assert their shareholder rights.¹⁷⁰ Illinois State Treasurer Michael W. Frerichs stated that the current leadership does not "have the skillset, nor the conviction, to institute these sweeping changes needed to transform their culture, to restore trust with employees and shareholders and their partners."¹⁷¹ In light of the aforementioned investigation into CEO Kotick, Frerichs' statement is not outlandish.¹⁷² "The support of political leaders on the national stage might also motivate video game workers to pursue their collective bargaining rights."¹⁷³

Employees want to unionize, but, currently, employer and government actions effectively bar that option. In a 2019 survey of video game developers, about 50% wanted unionization, about 25% "maybe" wanted unionization, and about 10% were unsure.¹⁷⁴ Yet, the majority (about 75%) were unhopeful or uncertain about the possibility.¹⁷⁵ Written feedback addressing the issue included employees' fears that employers would replace studios with non-unionized studios or replace outspoken employees with the more-than-sufficient supply of other developers.¹⁷⁶

168. See Activision, LINKEDIN, <https://www.linkedin.com/company/activision/about> (last visited Sept. 13, 2022) (listing company size as between five thousand and ten thousand); see also Dani Anguiano, *Activision Blizzard Employees Walk Out over Harassment and 'Frat Boy' Culture Allegations*, GUARDIAN, <https://www.theguardian.com/us-news/2021/jul/28/activision-blizzard-walkout-allegations-harassment-frat-boy-culture> [<https://perma.cc/5FF7-CKXN>] (Aug. 6, 2021, 5:40 PM) (reporting company size as ninety-five hundred).

169. Kim, *supra* note 18.

170. Isaiah Colbert, *Government Officials Pressuring Activision Blizzard Are Now Threatening the Company's Profits*, KOTAKU (Dec. 1, 2021, 5:30 PM), <https://kotaku.com/government-officials-pressuring-activision-blizzard-are-1848146295> [<https://perma.cc/4MBS-7AL6>].

171. *Id.*

172. Among CEO Kotick's many inexcusable actions, he failed to alert the Board of Directors and other executives regarding an alleged workplace sexual assault of an employee. Kotick also reportedly intervened to stop Activision's human resources department from firing Dan Bunting, a studio head who was accused of sexual harassment by a female employee. Grind, Fritz & Needleman, *supra* note 93.

173. Kalbakian, *supra* note 32, at 379.

174. GAME DEVELOPERS CONFERENCE, STATE OF THE GAME INDUSTRY 8 (2019), <https://reg.gdconf.com/gdc-state-of-game-industry-2019> [<https://perma.cc/L8N2-DZAS>].

175. See *id.* (finding that 39% believed that workers in the video game industry would actually unionize, 24% believed that they would not, and 15% were unsure).

176. *Id.*

These fears are even worse for gender minorities, who may not feel comfortable expressing their gender or sexuality.¹⁷⁷

The widespread public support from allied employees and other video game companies to solve the sexism pervasive in the industry can encourage employees to move toward formal unionization despite the fear of backlash from their employers.¹⁷⁸ Although efforts to unionize in response to “crunch” were unsuccessful, those efforts were primarily led by employees concerned about their hours and wages.¹⁷⁹ The current gender discrimination and harassment lawsuits further involve gender and sexual minorities, while state treasurers’ support of replacing Activision’s leadership mounts additional public pressure on the company (and hopefully the entire industry). The combination of the two could provide the additional industry support necessary to finally unionize and engage in collective bargaining.

2. SPOTLIGHTING THE TOXIC INDUSTRY HELPED OTHER ENTERTAINMENT INDUSTRIES ACHIEVE UNIONIZATION

Blue-collar employees are “emblematic” of unions in the United States,¹⁸⁰ and union membership in the public sector is consistently much higher than union membership in the private sector.¹⁸¹ However, white-collar employees are unionizing more,¹⁸² and private-sector entertainment industries such as film and television and art are witnessing the largest increases in union numbers.¹⁸³ The video game industry fits into these categories. Therefore, it also faces the same barriers to unionization and collective bargaining: “corporate practices and legal changes.”¹⁸⁴

Hollywood provides a prime example of a non-blue-collar, entertainment industry that has achieved formal unionization.¹⁸⁵

177. See, e.g., Johnston, *supra* note 2.

178. See Marx, *supra* note 53.

179. See Grayson, *supra* note 40.

180. Bret Schulte, *The Future of Unions Is White-Collar*, SLATE (Apr. 12, 2019, 1:00 PM), <https://slate.com/business/2019/04/white-collar-professionals-labor-unions.html> [<https://perma.cc/26PC-KC3M>].

181. Allen Smith, *Some Industries See an Increase in Unionization*, SOC’Y FOR HUM. RES. MGMT. (Feb. 7, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/some-industries-see-an-increase-in-unionization.aspx> [<https://perma.cc/SLQ3-CBG5>].

182. Schulte, *supra* note 180.

183. Smith, *supra* note 181.

184. LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, *ECON. POL’Y INST., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS: HOW CORPORATE PRACTICES AND LEGAL CHANGES HAVE UNDERCUT THE ABILITY OF WORKERS TO ORGANIZE AND BARGAIN* 9 fig.A (Nov. 18, 2020), <https://files.epi.org/pdf/215908.pdf> [<https://perma.cc/EW7Z-LTPN>] (noting sharp declines in private-sector unions in the 1970s and 1980s).

185. See generally Kalbakian, *supra* note 32, at 375–77.

Employees in the film and television industries face similar issues as those in the video game industry.¹⁸⁶ Like Hollywood, the video game industry seeks employees with “niche specializations whose services are not in consistent demand.”¹⁸⁷ As a result, those employees are typically categorized as independent contractors and face instability as they move between short-term projects.¹⁸⁸ Additionally, both of these passion industries attract employees and then exploit their passions by overworking and underpaying them.¹⁸⁹

These comparisons provide helpful insights into the video game industry’s current capacity for formal unionization.¹⁹⁰ Employees in the film and television industries took advantage of a “period of unrest,” where employees were generally dissatisfied with their employment conditions and relied on organized strikes.¹⁹¹ They benefited from an NLRB decision that recognized screenwriters as employees for purposes under the NLRA.¹⁹² They also capitalized on the public attention their industry gathered and pattern bargaining to realize industry-wide changes.¹⁹³ More recently, Hollywood’s unions convinced the industry to adopt acceptable COVID-19 policies to address health concerns and long

186. See generally *id.* at 375–79.

187. *Id.* at 377; see also W. Harry Fortuna, *The Gig Economy Is a Disaster for Workers. Hollywood’s Unions Can Help Them to Learn to Fight Back*, QUARTZ, <https://qz.com/1052310/hollywood-unions-offer-the-perfect-model-for-the-beaten-down-workers-of-todays-gig-economy> [<https://perma.cc/6YBN-8C4Q>] (July 20, 2022) (comparing the author’s experiences in Hollywood, “bouncing from project to project” and “ready to go at a moment’s notice,” to the gig economy’s labor issues).

188. *Id.* at 376. Short-term projects can lead to lack of credit to employees who are let go before releases and subsequently to decreased opportunities for future projects. See Jack Yarwood, *So, You Worked on a Video Game. You Might Not Appear in the Credits*, WASH. POST (May 18, 2021, 9:56 AM), <https://www.washingtonpost.com/video-games/2021/05/18/video-game-credits-policy> [<https://perma.cc/XVZ6-RDLZ>].

189. Paul Lombardo, *Video Game Developers—Overworked, Underpaid, in Trouble*, MEDIUM (Sept. 11, 2020), <https://medium.com/illumination/video-game-developers-overworked-underpaid-in-trouble-c66a80ff584a> [<https://perma.cc/K42K-2PTD>].

190. But see Kalbakian, *supra* note 32, at 375–79 (attributing the video game industry’s failure to improve employment conditions to a misconception that unionization “might slow down a company’s ability to adapt to a changing market”) (quoting Sam Dean, *As Video Games Make Billions, the Workers Behind Them Say It’s Time to Unionize*, L.A. TIMES (Apr. 12, 2019, 3:00 AM), <https://www.latimes.com/business/technology/la-fi-tn-video-game-union-movement-20190412-story.html> [<https://perma.cc/58JT-GXT2>]).

191. *Id.* at 376–77.

192. *Metro-Goldwyn-Mayer Studios*, 7 N.L.R.B. 662, 687–90 (1938) (“[W]e find that persons engaged by the respective Companies to perform services for them as screen writers are employees within the meaning of the Act.”).

193. Jan Wilson, *Special Effects of Unions in Hollywood*, 12 LOY. L.A. ENT. L.J. 403, 428–30, 433–35 (1992).

work hours due to the need for social distancing, personal protective equipment, and frequent testing.¹⁹⁴

Even though the NLRB has not yet determined that video game developers are considered employees for purposes under the NLRA, a majority of Activision's U.S. employees are likely protected by California's broad labor laws.¹⁹⁵ California uses a three-factor ABC test to determine whether a worker is an employee or an independent contractor for purposes under the NLRA. Under this test, employees, such as developers and quality assurance testers, are likely employees because they are (1) not free from their employers' control, often working long hours on a single project; (2) integral to the creation of video game and the sustenance of the video game industry; and (3) except for truly independent contractors, only engaging in independent trade because of the employers' preferences.¹⁹⁶ Hopefully, the Activision walkouts and President Biden's goal to protect employees' right to strike will lead to the same outcome for all employees in the video game industry as in the film and television industry: improved labor rights and work conditions.

Michael Kamper, who has worked as a manager and a worker in both the video game industry and other sectors of the entertainment industry, argues that unionization is beneficial for employers and workers.¹⁹⁷ Currently, video game companies experience high turnover rates and lack of creativity because workers are afraid to take risks.¹⁹⁸ Out-of-work industry workers are not entitled to insurance or other benefits.¹⁹⁹ Unionization could increase companies' revenues by decreasing turnover costs, increasing worker productivity, and encouraging company-wide innovation, as well as provide continuous insurance coverage and other benefits to union members.²⁰⁰

194. David Robb, *How Unions Saved Hollywood During the Pandemic and What's in Store for 2022*, DEADLINE (Dec. 30, 2021, 2:31 PM), <https://deadline.com/2021/12/unions-saved-hollywood-pandemic-2022-outlook-1234902148> [<https://perma.cc/2SDA-APJ9>]; Michael Sainato, 'We Are Not Machines': *Hollywood Workers Poised to Strike for Better Conditions*, GUARDIAN (Oct. 15, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/oct/15/hollywood-workers-pay-conditions-strike> [<https://perma.cc/ADQ2-W8G8>].

195. See, e.g., *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 32–33 (Cal. 2018) (discussing a tradition of liberal interpretations of the “suffer or permit to work” standard).

196. Cf. Hankins, *supra* note 72, at 130, 136–38 (outlining why e-sport workers who were previously categorized as independent contractors now constitute employees under AB 5).

197. Semuels, *supra* note 54.

198. *Id.*

199. See *id.*

200. See *id.*

B. The Pro-Labor Biden Administration Is Pushing for Meaningful Labor Reforms

Supporters, whether industry employees or politicians, praise unions for increased wages, better benefits, and safer workplace conditions, which ultimately result in increases in productivity, the middle class, and economic growth.²⁰¹ In contrast, opponents often view unions from an “employer first mentality.”²⁰² However, the general outlook on unions and collective bargaining can change drastically in response to new presidential administrations, partially evidenced by the decreases in union membership over the past several decades.²⁰³ President Biden has already proclaimed he will be “the most pro-union president you’ve ever seen,” which is reflected in his support of the proposed PRO Act amendments to the NLRA and in him signing related executive orders.²⁰⁴

1. THE BIDEN ADMINISTRATION SUPPORTS THE PRO ACT AND OTHER LEGISLATION

The NLRA statutorily authorizes employees’ right to unionize and engage in collective bargaining,²⁰⁵ but subsequent legislation and other government action have undermined the NLRA’s purported protections. First, the NLRA has its own inherent shortcomings.²⁰⁶ It impedes the formation process by requiring either voluntary recognition by an employer—an unlikely option for the video game industry—or support from at least thirty percent of employees for election representation or more than fifty percent of employees for automatic representation.²⁰⁷

201. See Harley Shaiken & David Madland, *Issue Brief: Unions Are Good for the Economy and Democracy*, CTR. FOR AM. PROGRESS (Dec. 9, 2008), <https://www.americanprogress.org/article/issue-brief-unions-are-good-for-the-economy-and-democracy> [https://perma.cc/YCU8-CX9N].

202. William C. Selfridge, *A More Pixelated Union: A Look at the Path to Unionization in the Video Game Industry Under Trump’s National Labor Relations Board*, 29 U. MIA. BUS. L. REV. 164, 178 (2021).

203. See *id.* at 178–82.

204. Alex Seitz-Wald, ‘Joe’s a Blue-Collar Guy’: After Years of Declining Power, Union Leaders Look to Biden, NBC NEWS, <https://www.nbcnews.com/politics/2020-election/joe-s-blue-collar-guy-after-years-declining-power-union-n1247819> [https://perma.cc/5CW5-VP28] (Nov. 15, 2020, 3:08 PM) (speaking at a pre-election day event in Pittsburgh, Pennsylvania).

205. National Labor Relations Act § 7, 29 U.S.C. § 157.

206. Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board’s Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 1 (2012).

207. National Labor Relations Act § 9; OFF. OF THE GEN. COUNSEL, NAT’L LAB. RELS. BD., *BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT: GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURES OF THE NATIONAL LABOR RELATIONS BOARD 7–8* (1997).

Additionally, employers are able to engage in a slew of legal union-busting tactics before employees even reach the election stage.²⁰⁸ Once employees do win an election, their employer can still resist reaching a collective bargaining agreement, as long as they continue to bargain in “good faith.”²⁰⁹ Furthermore, violating employers rarely face prompt or sufficient penalties that would actually deter them from future violations.²¹⁰ The Labor Management Relations Act of 1947²¹¹ significantly diminished union power further.²¹² Congress retained the NLRA’s pro-union and pro-collective-bargaining policy to avoid a veto by President Harry Truman, but it limited unions by designating particular union tactics as “unfair labor practices,” among other amendments.²¹³

If the current Senate can overcome the filibuster, President Biden is sure to sign the PRO Act into law and reverse some of those limitations.²¹⁴ The PRO Act can be compared to California’s current labor laws, which reveals its practical effects if it is passed.²¹⁵ Most significantly, the PRO Act would adopt California’s ABC test for classifying workers as employees for purposes under the NLRA.²¹⁶ Since the NLRB has not addressed video game developers, this adoption would work to protect all U.S. employees in the industry, not just those in California studios.²¹⁷ Therefore, even if only some parts of the proposed bill are able to pass through Congress, it would still constitute a major win for many employees, including those in the video game industry.

2. THE BIDEN ADMINISTRATION IS TAKING EXECUTIVE ACTION

Statutory reform requires Congressional support, but pro-union legislation is often met with resistance from more conservative politicians. Historically, conservative presidential administrations have been more likely to appoint anti-union NLRB members.²¹⁸ The resulting NLRBs have sought to protect employers from “disruptive union economic power”

208. LAFER & LOUSTAUNAU, *supra* note 27, at 1–2.

209. See *Bargaining in Good Faith with Employees’ Union Representative (Section 8(d) & 8(a)(5))*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative> [https://perma.cc/JGH3-83B6] (last visited Sept. 13, 2022).

210. Morris, *supra* note 206, at 70.

211. Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (1947) (codified as amended 29 U.S.C. §§ 141–197).

212. See *id.*; Morris, *supra* note 206, at 22 & n.83.

213. Labor Management Relations Act § 8; Morris, *supra* note 206, at 7, 28.

214. Greenhouse, *supra* note 103.

215. See Kalbakian, *supra* note 32, at 364, 371–75.

216. Protecting the Right to Organize Act (PRO Act), S. 420, 117th Congress § 101(b) (2021).

217. See Greenhouse, *supra* note 103.

218. Morris, *supra* note 206, at 46–60.

rather than protect employees.²¹⁹ As a result, the agency fails to take the necessary steps to effectively enforce the NLRA's provisions and policy.²²⁰ As predicted, President Biden's liberal administration ensured that pro-union Democrats regained the NLRB majority.²²¹ Under its new General Counsel Jennifer Abruzzo, the NLRB is pushing toward pro-union policy reforms, albeit rather slowly.²²²

In recent years, the power of federal executive action has expanded.²²³ Since his election, President Biden has already taken advantage of his power to support unions.²²⁴ Most notably, two of President Biden's recent executive orders on the matter declared his administration's pro-union policy and established the Task Force on Worker Organizing and Empowerment (Task Force) and the Made in America Office.²²⁵ While only advisory, the Task Force, headed by Vice President Kamala Harris, is responsible for gathering information to identify statutory and regulatory recommendations aligned with the administration's policy.²²⁶ Additionally, Director Drake, the inaugural director of the Made in America Office, is responsible for promoting U.S. goods and services.²²⁷

Other executive orders issued by Biden further strengthen the right to unionize, particularly in the male-dominated video game industry.²²⁸ Also, with approval ratings for unions increasing (although not aligning with the

219. *Id.* at 2; MISHEL, RHINEHART & WINDHAM, *supra* note 184, at 15–17.

220. Morris, *supra* note 206, at 5.

221. Ian Kullgren, 'Tsunami of Change' Forecast Once Democrats Regain NLRB Majority (1), BLOOMBERG L.: DAILY LAB. REP., <https://news.bloomberglaw.com/daily-labor-report/tsunami-of-change-forecast-once-democrats-regain-nlr-majority> [<https://perma.cc/R6WG-EV7U>] (Aug. 26, 2021, 6:44 PM).

222. *See, e.g.*, Daniel Wiessner, *Labor Law Landscape Likely to Shift in 2022 Under Biden-Era NLRB*, REUTERS, <https://www.reuters.com/legal/transactional/labor-law-landscape-likely-shift-2022-under-biden-era-nlr-2021-12-30> [<https://perma.cc/8C6G-X6WE>] (Dec. 30, 2021, 10:16 AM) (emphasizing the NLRB's focus on protected activities and expanded damages); Braden Campbell, *Biden NLRB's First Year Yields Little Policy Action*, LAW360 (Aug. 3, 2022, 7:47 PM), <https://www.law360.com/employment-authority/articles/1517927/biden-nlr-s-first-year-yields-little-policy-action> [<https://perma.cc/7ZEL-AW8P>] (emphasizing the NLRB's work toward settlements, precedent, and rules that are more favorable to employees).

223. *See generally* William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008).

224. *See generally* Greenhouse, *supra* note 103.

225. Exec. Order No. 14,005, 86 Fed. Reg. 7475 (Jan. 28, 2021); Exec. Order No. 14,025, 86 Fed. Reg. 22829 (Apr. 29, 2021).

226. Exec. Order No. 14,025, 86 Fed. Reg. 22829 (Apr. 29, 2021).

227. Exec. Order No. 14,005, 86 Fed. Reg. 7475 (Jan. 28, 2021); *see also* Greenhouse, *supra* note 103.

228. *See, e.g.*, Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021) ("All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."); Exec. Order No. 14,020, 86 Fed. Reg. 13797 (Mar. 8, 2021) (advancing the policy of "[t]he full participation of all people . . . across all aspects of our society").

number of workers belonging to unions),²²⁹ public accountability of presidential action helps set the foundation for President Biden to make significant pro-union moves throughout his term. As a result, the need for labor rights will be even more relevant. Fortunately, with many of the relevant executive department and agency heads in support of Biden's policies, the legal and political landscape should shift and help employees in advocating and organizing for their rights.

C. The COVID-19 Pandemic Has Positively Reframed Unions

Economic data shows that union membership tends to decline during economic depressions.²³⁰ While the COVID-19 pandemic has resulted in a global economic recession marked by a decline in jobs and income,²³¹ union membership percentages have increased, with union members receiving better job security and higher incomes.²³² Union numbers decreased for industries such as food service, likely because restaurants and bars were forced to close or comply with mandates that reduced overall profit, which also led to subsequent decreases in the workforce.²³³ In comparison, union numbers increased for industries such as telecommunications and entertainment, likely because the pandemic caused a need for remote work and other virtual activities and spaces.²³⁴ As a technology- and entertainment-focused industry, the video game industry likely falls into the latter category and would realize higher union numbers if there were formal unionization. Indeed, Microsoft's acquisition of Activision was rooted in a shared assumption that technology will continue to grow and expand and Activision's recognition that its

229. Megan Brenan, *At 65%, Approval of Labor Unions in U.S. Remains High*, GALLUP (Sept. 3, 2020), <https://news.gallup.com/poll/318980/approval-labor-unions-remains-high.aspx> [<https://perma.cc/8D8E-P9L7>] (reporting 83% approval from Democrats, 64% approval from independents, and 45% from Republicans).

230. Steffen Lehdorff & Thomas Haipeter, *Negotiating Employment Security: Innovations and Derogations*, in *THE ROLE OF COLLECTIVE BARGAINING IN THE GLOBAL ECONOMY* 20, 21 (Susan Hayter ed., 2011).

231. See *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and> [<https://perma.cc/8JBC-NDKK>] (Feb. 10, 2022).

232. See CELINE McNICHOLAS, HEIDI SCHIERHOLZ & MARGARET POYDOCK, ECON. POL'Y INST., *UNION WORKERS HAD MORE JOB SECURITY DURING THE PANDEMIC, BUT UNIONIZATION REMAINS HISTORICALLY LOW: DATA ON UNION REPRESENTATION IN 2020 REINFORCE THE NEED FOR DISMANTLING BARRIERS TO UNION ORGANIZING 1-4* (2021), <https://files.epi.org/pdf/218638.pdf> [<https://perma.cc/WQ6F-KVSS>]; see also 2021 Bureau of Labor News Release, *supra* note 114.

233. See 2021 Bureau of Labor News Release, *supra* note 114.

234. See *id.*

resources are limited compared to some of the larger technology companies.²³⁵

D. Video Game Employees Play an Essential Role in Unionization

Even if the Activision lawsuits fuel ongoing and widespread discourse on labor issues within the video game industry, the Biden administration is able to pass (even a part of) the PRO Act, and the increased unionization percentages in response to the COVID-19 pandemic continue to rise, formal unionization will still require employees to come together in meaningful ways. From a legal perspective, representation election requires only 30% of employees to sign authorization cards in order to unionize.²³⁶ Yet, in practice, a majority of employee support is almost always present before a demand for a representative election is made.²³⁷ Sometimes, the demand does not come until upwards of 80% of employees have signed authorization cards.²³⁸

However, those numbers can be hard to reach. If a sufficient number of employees are willing to endure current work conditions, employers have no need to bargain through unions.²³⁹ Although Activision boasts that 30% of its employees are diverse—which is “better than [its] peers”—women only make up about 20% of the video game industry’s workforce, including within Activision.²⁴⁰ Unionization works for larger video game companies, but it may not be as useful for smaller independent developers. However, the leadership of smaller companies has not shown as much resistance to unionization; rather, they have given their support for company-wide and industry-wide unionization.²⁴¹ Other external factors are necessary to foster the additional support necessary for formal unionization. The push to solve the video game industry’s toxic labor environment has already garnered support from video game developers

235. Weise, Sorkin, Browning & de la Merced, *supra* note 146.

236. See 29 C.F.R. § 103.21 (2021); see also NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 47 (Terry Schoone-Jongen ed., 2017).

237. William E. Fulmer, *Step by Step Through a Union Campaign*, 59 HARV. BUS. REV. 94, 94–95 (1981), <https://hbr.org/1981/07/step-by-step-through-a-union-campaign> [<https://perma.cc/FAF7-37DC>].

238. *Id.* at 95.

239. See generally *Your Right to Form a Union*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/your-right-to-form-a-union> [<https://perma.cc/Y4X7-NH2M>] (last visited Sept. 13, 2022).

240. Lauren Berg, *Activision Ends Required Arbitration Amid Harassment Issues*, LAW360 (Oct. 28, 2021, 5:18 PM), <https://www.law360.com/articles/1435547/activision-ends-required-arbitration-amid-harassment-issues> [<https://perma.cc/K4XY-29CX>]; see also Yokoi, *supra* note 60.

241. See, e.g., Kim, *supra* note 18.

and quality assurance testers due to issues with “crunch” culture.²⁴² The industry also faces pressure from the more recent Activision lawsuits, the pro-labor Biden administration, and the pandemic.²⁴³

The video game industry—particularly its employees—must educate themselves on unions, learn about the benefits of collective bargaining, and be persuaded to join the efforts.²⁴⁴ To reach formal unionization, employees and employers must engage in person-to-person interactions to encourage intracompany discussions and organization.²⁴⁵ As a campaign lead with CODE-CWA—the union that represented Activision’s employees in their NLRB lawsuit—contended, those types of interactions are necessary to “plant the seeds of organization.”²⁴⁶ On a similar note, another unionist argued, “[w]hen your [B]lack and women members see union rep[resentative]s who are like them and they see that they can do something to protect their rights, then they think that the union is relevant to them and they will join unions.”²⁴⁷ Accordingly, if the industry-wide view of unions and collective bargaining shifts to a less terrifying and more confident one, the industry can reap the same benefits that other technology and entertainment industries have already secured.

CONCLUSION

The allegations of gender-based discrimination, sexual harassment, and retaliation against Activision Blizzard, Inc. do not describe isolated incidents.²⁴⁸ Instead, they are indicative of the day-to-day realities of gender minority employees and the greater issue of misogyny throughout the video game industry.²⁴⁹ Unfortunately, these issues are not new to the ever-expanding video game industry.²⁵⁰ The industry has dealt with “crunch” periods marked by atrociously long hours of unpaid overtime, the misclassification of developers and other workers as independent contractors, and seemingly random mass layoffs and full studio closures.²⁵¹ The lawsuits simply shone an unavoidable spotlight on the video game industry’s abusive labor practices and on the employees that are no longer willing to endure them.

242. See Kalbakian, *supra* note 32, at 354–55.

243. See generally *supra* Sections II.A–C.

244. See generally Kalbakian, *supra* note 32, at 375–88.

245. Grayson, *supra* note 40.

246. *Id.*

247. PILLINGER & WINTOUR, *supra* note 159, at 3.

248. See *supra* note 6 and accompanying text.

249. See Johnston, *supra* note 2; Paul, *supra* note 11.

250. See Paul, *supra* note 11; *supra* notes 13–16 and accompanying text.

251. Kalbakian, *supra* note 32, at 353; Marx, *supra* note 53.

The video game industry is one of the most profitable entertainment industries,²⁵² and Activision is one of the most profitable video game companies in the United States and the world.²⁵³ Many employees in the video game industry pursue the work to be closer to the games they know and love.²⁵⁴ However, large companies often take advantage of their employees' passions and inclinations to work (sometimes to the level of workaholism).²⁵⁵ The idea of being closer to the games they know and love is a poor consolation prize in comparison to the unhealthy workplace conditions they must endure. The NLRA ideally protects employees' rights to unionize and collectively bargain for fair and safe workplaces.²⁵⁶ Instead, employees are frequently met with union busting and retaliation.²⁵⁷

The Activision lawsuits provided a public platform on which employee and non-employee, gender minority and non-gender minority, and industry and non-industry people and entities can speak out against the industry's toxicity.²⁵⁸ This public support benefits current employees by encouraging them to engage in union tactics, such as walkouts, and move closer to formal unionization while employers are discouraged from taking blatant retaliatory measures. Furthermore, the pro-union Biden administration's executive actions and efforts to pass the PRO Act could work to strengthen some of the NLRA's intended protections.²⁵⁹ Although it is unlikely that the full PRO Act will pass through the Senate, at minimum, the Biden administration has diminished conservative anti-union power and helped shift the United States' current views on unions.²⁶⁰ Lastly, the COVID-19 pandemic has highlighted the need for fair and safe workplaces, especially with an increased need for technology in all facets of our lives.²⁶¹

While the Activision lawsuits, Biden administration, and COVID-19 pandemic work together to break down significant barriers to the widespread support necessary for labor unionization, they do not

252. See *supra* note 45 and accompanying text.

253. See *supra* note 47 and accompanying text.

254. See Lombardo, *supra* note 189.

255. Kalbakian, *supra* note 32, at 377; see Kim, *supra* note 18.

256. National Labor Relations Act § 7, 29 U.S.C. § 157.

257. See LAFER & LOUSTAUNAU, *supra* note 27.

258. See, e.g., Kim, *supra* note 18 (publicizing an industry leader's "open letter calling for full unionization within the games industry"); see also Colbert, *supra* note 170 (providing state treasurers' arguments for replacing Activision's leadership).

259. See *supra* Section II.B.

260. See Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM) <https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts> [<https://perma.cc/YNG7-TRFL>].

261. See *supra* Section II.C.

guarantee it.²⁶² Most importantly, formal unionization requires significant employee action. Aside from the obvious need for numbers during elections,²⁶³ employees must be intentional about educating themselves and working with established groups such as the CWA. Due to unequal bargaining power and the fear of being targeted, pro-union employees are often afraid to voice their opinion, much less take active steps toward formal unionization.²⁶⁴ As a part of the educational process, employees must increase and strengthen employee support. Employees must not fall for the understandable, but ultimately detrimental, dissuasion by their employers. For union purposes, and especially for minority employees,²⁶⁵ there is strength in numbers. Employers must be convinced of the benefits as well. Supporters of unions list increased productivity, increased revenue, and economic growth as potential benefits for employers.²⁶⁶ As journalist Steven Greenhouse argued, unions must also find innovative ways to engage with the public and increase union numbers.²⁶⁷ For example, despite the risk of failure, unions could appoint a spokesperson to engage with the public or spend a significant amount of their budget on recruitment efforts.²⁶⁸ Such actions will shift the industry's current apprehension towards unionization and labor rights in a positive direction. The video game industry is ripe for achieving formal unionization, and its employees must seize this opportunity to realize improved labor rights.

262. See Aron Garst *How Video Game Unionization Would Happen*, VARIETY (Dec. 17, 2018, 8:00 AM), <https://variety.com/2018/gaming/features/video-game-industry-union-unionization-1203091114> [<https://perma.cc/BE35-4NN4>].

263. See 29 C.F.R. § 103.21 (2021).

264. See Shaiken & Madland, *supra* note 201.

265. Paul, *supra* note 11.

266. Semuels, *supra* note 54; see also Shaiken & Madland, *supra* note 201.

267. GREENHOUSE, *supra* note 22, at 335–38.

268. *Id.* at 336.