

MORE THAN JUST A GAME: THE LABOR AND EMPLOYMENT ISSUES WITHIN ESPORTS

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I. INTRODUCTION

The electronic sports industry, also known as eSports, has experienced a boom in popularity and revenue in recent years, with professional leagues and teams sprouting worldwide. It is a space in which video games, professional players, team franchises, fans, sponsors, and league organizers converge to form a new market that is expected to exceed one billion dollars in revenue in 2020.¹ The meteoric rise of the electronic sports industry is undeniable and everyone, including professional sports owners, celebrities and venture capital firms, wants to be a part of this space.

A little less than ten years ago, only a miniscule percentage of people, outside of South Korea, knew the term “eSports.” Since then, eSports has grown into a billion-dollar industry with an audience, in the tens of millions, that watches competitive eSports. These viewers watch as their favorite eSports player or team compete for the millions of dollars that is given out as prize money at these competitive eSports events. Esports is a perfect combination of entertainment and sports and unsurprisingly its events attract even more unique viewers than traditional sports.²

In some respect, eSports is the modern-day sport. Some eSports programs even have organizational structures that resemble traditional sports, with leagues,

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¹ NEWZOO, GLOBAL ESPORTS MARKET REPORT (2020), <https://newzoo.com/insights/trend-reports/newzoo-global-esports-market-report-2020-light-version/#:~:text=Highlights%3A,from%20media%20rights%20and%20sponsorship>.

² See Annie Pei, *This Esports Giant Draws in More Viewers Than the Super Bowl and it's Expected to Get Even Bigger*, CNBC (Apr. 14, 2019), <https://www.cnbc.com/2019/04/14/league-of-legends-gets-more-viewers-than-super-bowlwhats-coming-next.html> (noting the popularity in the eSports space and comparing the viewership of eSports to major traditional sports).

teams, players, and even coaches.³ Like traditional sports, eSports require fans, professional players, franchises, team owners and league operators to succeed.⁴ However, despite the similarities, eSports differs from traditional sports in that the game publishers own the intellectual property of their video games and are in complete control of the industry.⁵ This creates a situation where a game publisher can maintain complete control of professional competitions involving its video games by forming the league itself.

Unlike traditional sports though, eSports is still in its infancy. As of now, the biggest eSport programs are Riot Games' League of Legends and Blizzard Entertainment's Overwatch. These two eSport programs are still maturing. However, Riot Games' League of Legends and Blizzard Entertainment's Overwatch eSports model may serve as the template for the rest of the industry and is closely monitored by others within the eSports space.⁶

In recent times, the eSports industry has been raising questions about employment terms, contract provisions, and labor laws. Currently, many eSports players are primarily compensated as freelance contractors through cash prizes for winning tournaments, though some of the more accomplished players do receive salaries.⁷ As the eSports industry continues to grow, eSports player unionization should be considered by, not only, the professional players, but by

³ See *About IESF*, INT'L E-SPORTS FED'N, <https://www.iesf.org/about/#members-nations> (outlining the International e-Sports Federation's mission and listing the member nations) (last visited October 28, 2020). In 2016, the United Kingdom attempted to regulate eSports for a second time, but this time the United Kingdom's government chose to work with an independent governing body, known as the British Esports Association.

⁴ See Juliana Koranteng, *The Crossover – What Esports and Traditional Sports are Learning From Each Other*, <http://mediainvestmentfinance.com/index.php/66-the-crossover-what-esports-and-traditional-sports-are-learning-from-each-other> (last visited October 28, 2020) (identifying the similarities between the major traditional sports and eSports).

⁵ This is a distinct and important difference as no one owns the game of American football. Thus, any individual can start a new league. Such was the case when the American the Alliance of American Football league was in February 2019. Whereas, a league may only be started with the permission of the video game publisher in eSports. See Thom Craver, *What is the Alliance of American Football? New Football League Starts in February*, CBS NEWS, <https://www.cbsnews.com/news/alliance-of-american-football-what-is-new-football-league-starting-in-february>, (last updated Jan. 21, 2019).

⁶ See Nick Fernandez, *The Biggest Esports Tournaments and Leagues in 2019 and Beyond*, ANDROID AUTH. (Aug. 18, 2019), <https://www.androidauthority.com/esports-tournaments-leagues-963799> (providing information on the biggest eSports tournaments and leagues).

⁷ See William Welser, *Why eSports Players Need to Unionise in 2019*, WIRED (Jan. 6, 2019), <https://www.wired.co.uk/article/esports-unions> (stating that professional eSports players are primarily compensated as freelance contractors through tournament winnings and that players currently receive less than fifteen percent of the revenue).

the operators of leagues as well.

In 2017, Riot Games, the publisher of League of Legends, launched a League of Legends Players Association (known as “LoL PA”).⁸ Although the LoL PA was a step forward for eSports player unionization, it is still not a union.⁹ The LoL PA has been criticized as a company union, which has no legal basis to collectively represent the LoL players.¹⁰ However, Riot Games maintains that “the players have not given up any guaranteed rights under the National Labor Relations Act” and that “the Players’ Association provides centralized representation for players in tri-party negotiations.”¹¹ Notwithstanding Riot Games’ claims, the plain language of section 8(a)(2) of the National Labor Relations Act prohibits employer financial support to achieve a collective bargaining agreement.¹²

Unlike League of Legends, the players association in Overwatch was started and led by workers of Overwatch.¹³ In fact, the Overwatch Players Association (known as “OWPA”) was created and led by a former professional Overwatch player.¹⁴ The OWPA has adopted some aspects of the National Football Players Association.¹⁵

Despite the uncanny similarities between eSports and professional sports, eSports still suffers from uncertainty. More specifically, it is unclear whether professional players in the eSports industry are employees or independent

⁸ See Ferguson Mitchell, *Riot Updates on Status of NA LCS Franchising and Players’ Association*, THE ESPORTS OBSERVER (Sept. 23, 2017), <https://esportsobserver.com/riot-updates-status-na-lcs-franchising-players-association> (providing details regarding the development of the North American LCS and North American LCS Players’ Association).

⁹ See Minnie Che, *Is Riot Games in Violation of the NLRA for Funding its Own Union?*, ONLABOR (May 1, 2019), <https://onlabor.org/is-riot-games-in-violation-of-the-nlra-for-funding-its-own-union> (explaining that Riot Games may be in violation of the NLRA with its league-funded North American LCS Players’ Association).

¹⁰ *Id.*

¹¹ Ellen M. Zavian & Jim Schmitz, *Genesis of an Industry: The Emerging Workforce and Regulations of eSports*, DOCKET (Apr. 04, 2019), <https://www.accdocket.com/articles/emerging-workforce-and-regulations-of-esports.cfm>. See also LoLeSports Staff, *Evolution of the NA LCS*, RIOT GAMES, <https://nexus.leagueoflegends.com/en-us/2017/01/evolution-of-the-na-lcs-2> (last visited October 28, 2020) (discussing changes to the league structure, including changes that give professional players more of a voice and better protections).

¹² See 29 U.S.C. § 158(a)(2). This means that players would have to form their own union.

¹³ See Mallory Locklear, *Two Major eSports Players Associations Are in the Works*, ENGADGET (Mar. 15, 2018), <https://www.engadget.com/2018/03/15/overwatch-counter-strike-players-associations-in-the-works> (noting the development of players associations within the eSports space and how eSports is beginning to resemble traditional professional sports).

¹⁴ *Id.*

¹⁵ *Id.*

contractors.

Given the game publishers' control over their video game and the professional scene, especially the players themselves, professional eSports players will likely be considered employees of the game publishers under the National Labor Relations Act, and thus should be eligible for unionization. It is this control that video game publishers have that places professional players in a risky position with regards to their rights. Considering this imbalance of power, professional players should seek to establish an employment relationship with the various video game publishers and a collective bargaining unit. By establishing and recognizing the employee status of professional players, a degree of balance can be imparted and will give the professional players, amongst other various benefits, the ability to collectively bargain and/or strike, protect their earnings in the event of injury, secure healthcare or retire benefits and negotiate revenue-sharing agreements.¹⁶

Unionizing would benefit professional players such that they will be able to standardize their employment conditions possibly improve upon them. Moreover, the establishment of collective bargaining will also benefit the operators of the leagues/video game publishers, as it will give them the benefit of the anti-trust exemption and help them avoid any violation of anti-trust or labor laws. Challenges exist with unionizing the eSports industry; however, it is in the interest of both the professional players and the operators of leagues to establish collective bargaining.

This paper will examine the present-day laws to determine whether professional eSports players are employees of video game publishers, and how best to ensure that their rights are protected as the eSports industry continues to develop. Due to the extensive buildout of certain video game franchises and the ongoing mission to advance the eSports professional scene of certain publishers, this paper will only focus on issues facing League of Legends and Overwatch, and its respective professional players. Part I of this paper will provide background information of what eSports is and explain the structure of professional League of Legends and professional Overwatch. Part II of this paper will examine the applicable federal employment laws and determine whether professional players are considered employees of their respective game publishers aka league operators under the applicable laws. Part III of this paper will explore the rights professional currently lack and the potential benefits of collective bargaining for the actors involved.

II. BACKGROUND

¹⁶ See William Welser, *Why eSports Players Need to Unionise in 2019*, WIRED (Jan. 6, 2019), <https://www.wired.co.uk/article/esports-unions> (explaining the need for unionization for professional eSports players to secure protections found in other industries).

A. *I Am a Newbie: What is eSports?*

Short for electronic sports, eSports describes the organized world of competitive video gaming at a professional level. In the same way that conventional sports like soccer and golf hold tournaments for the top teams and players in the world to compete for cash prizes and glory, eSports does the same. Esports bring individual players and teams to compete in competitive video games like League of Legends and Overwatch. Moreover, in the same way that conventional sports like football and basketball draw in tens of millions of fans and viewers, eSports does the same. Esports games are popular with casual players of the game and followed by tens of millions of fans around the world. These fans attend live events or tune in online to watch as their favorite digital athletes and teams play in real time.

B. *Current Structure of Professional League of Legends and Overwatch.*

Professional League of Legends and Overwatch involves much more than the team organizations and professional players themselves. It involves the publishers, Riot Games and Blizzard Entertainment, and the leagues, the League of Legends Championship Series (“LCS”) and Overwatch League (“OWL”). These actors all deal with the professional players in some capacity or another.

The LCS is a professional eSports league for League of Legends, a multiplayer online battle arena (“MOBA”) video game from Riot Games. The LCS maintains regional leagues in North America, Europe and Asia, whose top-performing teams are qualified to enter the League of Legends World Championships. It directly deals with the professional scenes in various regions. Further, it is responsible for establishing the rules for professional League of Legends play and dealing with professional players who have qualified for the League of Legends Championship Series.¹⁷

The rules of the LCS are published each season. For the most part, the LCS regulates the actions of players and teams based on their published rules and the League of Legends ‘Summoner’s Code’ as contained in Riot Games’ End User License Agreement.¹⁸ Moreover, the LCS regulates the ‘player agreements’ between players and teams to a certain extent, as well as player management by their respective teams as set forth in these player agreements.¹⁹ All these rules and agreements govern professional League of Legends play.

¹⁷ League of Legends Championship Series & LCS Academy League, *2019 Official Rules LCS and LACS* (2019), https://nexus.leagueoflegends.com/wp-content/uploads/2019/01/2019-LCS-Rule-Set-v19.3_uh6o67g0zd58db0o5p08.pdf.

¹⁸ *Riot Games Terms of Service*, RIOT GAMES, <https://www.riotgames.com/en/terms-of-service> (last updated Jan. 15, 2020).

¹⁹ League of Legends Championship Series, *supra* note 17.

The LCS is owned by League of Legends Championship Series LLC, a Delaware Limited Liability Company. The League of Legends Championship Series LLC is a subsidiary of Riot Games, a California corporation. The LCS has an extremely close relationship with Riot Games, and is in privity with, or an alter ego of, Riot Games. As such, for the purposes of this paper, Riot Games' rules and regulations can be treated as LCS regulations.

Like the LCS, the OWL is a professional eSports league for Overwatch, a team-based multiplayer first-person shooter video game from Blizzard Entertainment. The OWL is owned by Activision Blizzard, Inc., a Delaware Corporation. As a part of Activision Blizzard's eSports strategy, it has restructured its internal organization such that the Major League Gaming business, which includes the OWL and other eSports events, operates as a division of and is governed by Blizzard Entertainment. As such, Blizzard Entertainment is the entity that establishes the rules for professional Overwatch play and the one that deals with team organizations and professional players.²⁰ For the purposes of this paper, Blizzard Entertainment's rules and regulations can be treated as OWL regulations.

The OWL maintains a league with twenty teams from around the world; thirteen are based in North America, two in Europe, and five in Asia.²¹ It deals with the North American, European, and the Asian professional scenes. Although the franchises span across multiple continents, they are all governed by the same OWL regulations.

Currently, the OWL sets the rules and regulations governing professional Overwatch play across the globe.²² The OWL regulations and interactions with players and teams are mainly based on the published rules and code of conduct set forth by Blizzard Entertainment. Moreover, the OWL regulates player management by their respective teams such that signed players are paid a minimum annual salary set by the league, provided health and retirement benefits, housing, training support, and bonuses.²³

It is important to note that the professional League of Legends and Overwatch players are most likely employees of their respective franchised team. Not only do the teams provide pay to players, the teams also exercise high levels of control over players. Further, it is important to note that although professional players may have an employment relationship with their respective teams, this

²⁰ *Rules of Competition and Code of Conduct*, OVERWATCH LEAGUE (Feb. 09, 2019), <https://overwatchleague.com/en-us/news/21568602/rules-of-competition-and-code-of-conduct>.

²¹ *Teams*, OVERWATCH LEAGUE, <https://overwatchleague.com/en-us/teams> (last visited October 28, 2020).

²² Overwatch League, *supra* note 20.

²³ Bryce J. Jackson, *Hey Blizzard, Where's That OWL Players Union?*, CAREFUL 4 SPOILERS (Jan. 24, 2019), <https://www.careful4spoilers.com/blog/hey-blizzard-wheres-that-owl-players-union>.

relationship does not prevent them from also having a legally recognized employment relationship with another entity. This paper does not address the relationship between the professional players and their respective teams, rather, it seeks to determine the employment status of professional players in relation to the publishers and the leagues.

C. *The National Labor Relations Act*

The National Labor Relations Act bestows upon employees the right to unionize, engage in collective bargaining with their employer(s), and act for mutual aid and protection.²⁴ Any union that secures support from a majority of the employees at the workplace is certified as the exclusive bargaining agent for all the employees.²⁵ Although employers may come to unilateral decisions over some of their policies regarding employees, mandatory subjects of bargaining, such as wages, hours, and other terms and conditions of employment must be discussed with the union.²⁶

All the major traditional professional sports leagues have professional players' association. The NBA has the NBPA, the NFL has the NFLPA, and so on. Traditional major sports are governed by collective bargaining agreements that are entered between the owners through the leagues and the professional players through the players' associations. Unfortunately, this is not the case in the LCS or OWL.

There are no players' unions, collective bargaining agreements, or even mandatory subjects of bargaining in eSports.²⁷ Many of the terms and conditions of employment are found within the agreements signed 1) between the professional players and teams, 2) between teams and Riot Games, and 3) between Riot Games and the professional players. Theoretically, professional players can bargain for better terms and conditions, however, in practice it is nearly impossible to do as the professional players do not have the kind of leverage that comes with being part of a certified union. If a union were to be formed, it could potentially force Riot Games to discuss terms and conditions of employment, including rules that arbitrarily punishes professional players, that prevent the professional players from streaming other games, and so on.²⁸

D. *Professional Gamer Contracts*

Professional players have been as young as fifteen years old when first

²⁴ National Labor Relations Act, 29 U.S.C. § 157 (1935).

²⁵ *Id.* at § 159(a).

²⁶ *Id.*

²⁷ Jackson, *supra* note 23.

²⁸ *Id.*

entering into a contract.²⁹ The age of majority for a person to achieve full legal capacity to enter into a professional gamer contract depends on the jurisdiction. In the United States and Europe, for the most part, the age of majority is eighteen.³⁰

The game publishers have significant influence over the contracts between the professional players and the teams.³¹ For teams to compete in the publishers' games, they must adopt the game publishers' conditions and standards and incorporate them into their professional gamer contracts.³² These professional gamer contracts tend to require players wear certain brands or logos, live in a specific location, be subjected to disciplinary actions for their conduct, and provide services exclusively to that organization.³³ Typically, this level of control is exercised by an employer. As such, the question of whether game publishers are employers arises.

III. ANALYSIS: ARE PROFESSIONAL LEAGUE OF LEGENDS AND OVERWATCH PLAYERS EMPLOYEES OF THEIR RESPECTIVE VIDEO GAME PUBLISHERS?

The relationship between an employee and an employer is governed by law, not by the employer's judgment. This relationship, or employment status as an employee or independent contractor, can be very important, because it significantly impacts one's rights in the workplace and the remedies available for unlawful conduct by the employer. Employees are defined by federal law and are protected and governed by both state and federal laws. Whereas, independent contractor rights are primarily governed by state contract law. As such, the employee status for professional League of Legends and professional Overwatch players necessarily turns on the employment definitions of federal law.

²⁹ *The Top 10 Current eSport Athletes*, GAMEDESIGNING.ORG (Aug. 25, 2020), <https://www.gamedesigning.org/gaming/esport-athletes/>.

³⁰ *See Age of Majority*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, <https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/age-majority> (last visited Oct. 25, 2020) (stating that the age of majority in all European Union Member States, except for Scotland, is eighteen years and children are considered to have full legal capacity from the age of sixteen); *see also* Sheri Stitof, *Legal Age of Adulthood by State*, LIVEABOUT.COM, <https://www.liveabout.com/age-of-majority-chart-2300968> (last updated Apr. 09, 2018) (noting the age of majority by State in the United States).

³¹ *See* Ellen M. Zavian & Jim Schmitz, *Genesis of an Industry: The Emerging Workforce and Regulations of eSports*, DOCKET (Apr. 04, 2019), <https://www.accdocket.com/articles/emerging-workforce-and-regulations-of-esports.cfm>.

³² *Id.*

³³ *Id.*

A. *Federal Labor Laws That Govern*

The United States has a variety of comprehensive labor laws designed to safeguard employees from abuse by their unscrupulous employers.³⁴ These laws provide important rights to employees, particularly the right to collectively bargain.³⁵ Moreover, these laws still apply even if actors attempt to implement contractual obligations to eliminate them.³⁶ However, for such rights to attach, individuals must satisfy the definition of ‘employee’ under the statutes that govern.³⁷ Further, for the federal government to have power to regulate an industry, the industry must sufficiently impact interstate commerce.³⁸

1. *The Definition of an Employer and Employee Under the NLRA*

The key issue here is whether professional LCS and OWL players are employees under Federal Law. The law governing this issue is the National Labor Relations Act.³⁹ The NLRA was enacted “in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail . . . labor and management practices” that harmed “the general welfare of workers, businesses and the United States economy.”⁴⁰

The act defines ‘employer’ broadly and in very general terms. The plain meaning of “employer” is one who employs employees to work for wages and salaries.⁴¹ However, the act defines “employer” as “any person acting as an agent of an employer, directly or indirectly,” and applies to all employers, with

³⁴ There are states that have passed laws reinforcing and expanding the federal protections guaranteed under federal labor laws. *See Labor Laws and Issues*, USA.GOV, <https://www.usa.gov/labor-laws> (last visited October 25, 2020).

³⁵ *See* National Labor Relations Act, 29 U.S.C. § 157 (1935) (declaring that employees have the right to self-organize and bargain collectively for their mutual aid or protection).

³⁶ *See* Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring) (noting that statutes enacted to grant workers some special benefits are “designed to defeat rather than implement contractual arrangements.”).

³⁷ *See* 29 U.S.C. § 152 (noting that employee, as used in the Act, shall apply only to those that meet the definition as defined therein).

³⁸ *See* U.S. CONST. art. I, § 8 (enumerating the power of the federal government to regulate commerce among states, foreign Nations, and Indian Tribes).

³⁹ *See* National Labor Relations Act, 29 U.S.C. §§ 151. (2019).

⁴⁰ *National Labor Relations Act*, NLRB, <https://www.nlr.gov/how-we-work/national-labor-relations-act> (last visited Oct. 8, 2020).

⁴¹ *Employer*, BLACK’S LAW DICTIONARY, 471(5th ed. 1979) (defines “employer” as follows: Employer. One who employs the services of others; one for whom employees work and who pays their wages or salaries. The correlative of “employee.”).

a few exceptions.⁴² It was first noted by Justice Brennan that the NLRA defines “employer” as any person not within one of the eight expressed exceptions.⁴³

Likewise, the term “employee,” as defined by the NLRA, is broad. It “includes any employee and” is not “limited to the employees of a particular employer, unless” the act explicitly provides for an exception.⁴⁴ With regards to the NLRA, a person can be “one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.”⁴⁵

The National Labor Relations Board has interpreted the applicability of the NLRA broadly so that it may live up to the protective nature of the act.⁴⁶ Moreover, courts have found that the NLRA is to be broadly interpreted, rather than relying on legal classifications.⁴⁷ An employment relationship exists can

⁴² 29 U.S.C. § 152(2) (2020). The Act does not include the United States or wholly owned Government corporations, the Federal Reserve Bank, states and their political subdivisions, persons subject to the Railway Labor Act, labor organizations (except for when the organization is acting as an employer), and persons acting in the capacity of officer or agent of such a labor organization.

⁴³ *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 511 (1979) (Brennan, J., dissenting) (noting that NLRA § 2(2), 29 U.S.C. § 152(2) (1976), provides: The term “employer” includes “any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”).

⁴⁴ 29 U.S.C. § 152(3) (2020). Such exceptions include any persons employed as an agricultural laborer, by their parent or spouse, in the domestic service of another at the home, or by a person who is not an employer as defined, any independent contractor, or any person employed by an employer subject to the Railway Labor Act.

⁴⁵ 29 U.S.C. § 152(1) (2020).

⁴⁶ *See DR Horton, Inc.*, No. 184, 357 NLRB 2278, 2279 (2012). (determining that workers who join class actions to seek redress of FLSA violations is protected under the NLRA); *see also* Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013).

⁴⁷ *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). (finding that section 7 rights provide broad support to employees seeking to act in concert for collective bargaining and for mutual aid and protection. The court held that a group of employees who walked off the job because the workplace premises were too cold were protected by Section 7 of the Act; *see also* *W.W. Cross & Co. v. NLRB.*, 174 F.2d 875, 878 (1st Cir. 1949) (“in view of the general purpose and policy of the Act that Congress did not intend to restrict the duty to bargain collectively only to those subjects which up to 1935 had been commonly bargained about in negotiations

exist as a matter of common law or economic reality.⁴⁸ Therefore, when determining employee status, one must look to the economic reality of the situation in addition to the technical and traditional concepts of employer and employee.⁴⁹ The “common law agency” test looks to whether the worker is controlled by the employer and the degree to which the worker is controlled.⁵⁰ Specifically, who has the right to control what the workers do, when or where the workers perform the services, and how the services are performed. If the alleged employer has the right to exercise control over the worker or if the worker perform services subject to the control of the alleged employer, then the worker should be classified as an employee.⁵¹ The key to the agency analysis is whether the alleged employer has the ability to control the worker or impede the worker’s independence by which the work is performed.⁵² Whereas, the “economic

between employers and employees. On the contrary we think that Congress intended to impose upon employers a duty to bargain collectively with their employees’ representatives with respect to any matter which might in the future emerge as a bone of contention between them, provided, of course, it should be a matter ‘in respect to rates of pay, wages, hours of employment, or other conditions of employment.’”).

⁴⁸ See 211: Who is an Employee Under Federal and State Laws?, *in* Prin. Payroll Admin. 211 (2020), Westlaw 21790685; *see also* Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008) (noting that an employment relationship exists where a worker is, “as a matter of economic reality, ... economically dependent upon the alleged employer.”).

⁴⁹ See NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403–04 (1947) (noting that analysis of the employee and employer relationship should not be confined to the technical and traditional concepts of employee and employer, and that it should take into account the economic reality of the situation).

⁵⁰ Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751–752 (1989)) (“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. ... setting forth 20 factors as guides in determining whether an individual qualifies as a common-law ‘employee’ in various tax law contexts.”).

⁵¹ *Id.*

⁵² See NLRB v. O’Hare-Midway Limousine Serv., 924 F.2d 692, 694 (7th Cir. 1991) (noting that the “inquiry centers on the employer’s ability to control the purported employee,” which is determined based on a numerous factors); Local 777 Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 874 (D.C. Cir. 1978)

reality” test looks at whether the worker follows the usual path of an employee and is economically dependent on the business he serves.⁵³ If the worker is economically dependent on the business which he serves, the worker should be classified as an employee.⁵⁴

2. *Are Professional League of Legends and Overwatch Players Employees Under the NLRA?*

There is no simple way to determine whether an entity is an employer, or whether a professional eSports player is even an employee. The standard for determining when separate entities are employers is constantly changing.⁵⁵ An actor qualifies as an employer when it possesses sufficient control over the employees.⁵⁶ Specifically, actors are employers of a workforce when the actors are employers within the meaning of the common law and can decide on matters governing essential terms and conditions of employment.⁵⁷ The game producers, an alter ego of the league, exercises control over the terms and conditions of employment indirectly through the teams and significantly affect the professional players’ terms and conditions of employment.

An inquiry into the employer’s ability to control the worker requires an examination of the characteristics of the employment relationship.⁵⁸ These characteristics may include, but are not limited to: how payment for the services is determined; whether benefits are provided by the employer; whether the employer controls the manner and means by which the work is to be accomplished; who chooses where the work is to be performed; who provides the tools and materials to perform the work and whether the relationship is temporary or permanent.⁵⁹

(“Control exercised over the ‘manner and means of performance’, not merely the economic controls which many corporations are able to exercise over independent contractors with whom they contract, is the identifying characteristic of an employer/employee relationship.”).

⁵³ 211: Who is an Employee Under Federal and State Laws?, *supra* note 48.

⁵⁴ *Id.*

⁵⁵ See *Browning-Ferris Indus. of Cal. v. NLRB*, No. 16-1028

(D.C. Cir. 2018) (revising the standard for determining when two or more separate organizations employ the same employees.)

⁵⁶ *Id.*

⁵⁷ *Id.* at 1200-1201.

⁵⁸ See *NLRB v. O’Hare-Midway Limousine Serv., Inc.*, 924 F.2d 692, 694, (7th Cir. 1991) (“The word ‘control’ suggests the need for an examination of many characteristics of an employer-worker relationship.”).

⁵⁹ *Id.* (These characteristics include: “how payment for services is determined; whether the employer provides benefits; who provides the tools and other materials to perform the work; who designates where work is done and whether the relationship is temporary or permanent.”).

Thus, the analysis of whether a worker, a professional League of Legends or Overwatch player in this case, is an employee or an independent contractor centers on whether Riot Games or Blizzard Entertainment exercises sufficient control over them.⁶⁰

When it comes to professional League of Legends play, video game publisher Riot Games appears to be pulling all the strings. In professional League of Legends play, the LCS determines a mandatory salary at the beginning of each season.⁶¹ In addition to the mandatory salary, the LCS has mandated that teams provide benefits, including healthcare and 401(k) retirement plans, for their players.⁶² Further, the LCS exercises sole and absolute discretion and may use any form of punitive actions at their disposal against teams and/or players for activity that it feels constitutes a violation of the rules, misconduct, unfair play, offensive, or simply not within the confines of the best interests of the LCS.⁶³ In essence, Riot Games is able to control the means and manner of the professional player and team's performance by imposing restrictions on what they could or could not do and directing them to that end. However, it must be noted that despite Riot Games' ability to control the means and manner of the performance of the work, Riot Games does not directly exercise control over the professional players' training regimen, team strategies, team dynamics and so on. Still, such control is akin to the type of control exerted by employers over employees.

⁶⁰ *Id.* (noting the employer-employee relationship revolves around the employer's ability to control the purported employee).

⁶¹ *See North America League of Legends Championship Series: 2017 Season Official Rules*, § 2.2, (Mar. 27, 2017), <https://esports-assets.s3.amazonaws.com/production/files/rules/2017-Summer-LCS-Rule-Set-v1.pdf> (stating that starting players must receive a minimum of \$12,500 for each split); *See also* Kieran Darcy, *Riot's Players' Association Lays Groundwork for Unionization*, ESPN (June 12, 2017), https://www.espn.com/esports/story/_/id/19617991/riot-players-association-lays-groundwork-unionization (stating that the minimum player salary is being increased to \$75,000 with the new NA LCS reboot, and the players are guaranteed at least thirty-five percent of league revenues, which could lead to bonus payments).

⁶² *See* Jacob Wolf, *Riot Plans to Mandate Teams Give Players Employee Benefits*, ESPN (Nov. 1, 2016), https://www.espn.com/esports/story/_/id/17945538/league-legends-riot-plans-mandate-teams-give-players-employee-benefits (Riot Games, the developer of League of Legends and tournament organizer for the LCS, planned to mandate that all teams participating in its North American and European League Championship Series competitions contractually employ their players and coaching staff beginning with the 2017 season).

⁶³ *See North America League of Legends Championship Series: 2017 Season Official Rules*, §§ 10.4, 10.5, (Mar. 27, 2017), <https://esports-assets.s3.amazonaws.com/production/files/rules/2017-Summer-LCS-Rule-Set-v1.pdf> (stating that the LCS has sole and absolute discretion in regard to disciplinary action and that the LCS may, without any limitations, issue a multitude of penalties for what it considers to be "unfair play").

Riot Games exerts its control and influence on professional League of Legends players through the LCS not only by dictating the payment for services, benefits provided, conduct and activities of players, but also by dictating where the work is to be performed and by providing the tools and materials to perform the work.⁶⁴ Since the inception of professional League of Legends play, Riot Games, through the LCS, has selected the venues where professional League of Legends events will take place.⁶⁵ Moreover, the LCS has provided the needed equipment for players to perform their work at these events.⁶⁶ Necessary equipment includes personal computers and monitors, hand warmers, headsets and/or earbuds, microphones, tables and chairs, keyboards, personal computer mice, and mousepads.⁶⁷ It must be noted that the use of these LCS-provided equipment is not optional, as the LCS has expressly stated in their rules and regulations that “LCS players will exclusively use” the equipment provided.⁶⁸ Another tool that Riot Games and the LCS have provided is the League of Legends game client; this tool is also mandatory.⁶⁹ The LCS makes it so that players must use the League of Legends client to perform their work.⁷⁰ For professional League of Legends players to compete at events, practice, or perform any work related to the professional League of Legends play, they must access the game client.⁷¹ Thus, all work for professional play in League of Legends is bound to the game client.

The control Riot Games has on professional players extends far beyond the work within the LCS. Riot Games holds the intellectual property to the League of Legends game and it places stringent restrictions on the commercial use of the intellectual property by its players and the role sponsors play with teams and

⁶⁴ Hunter A. Bayliss, *Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional Esports Players*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 359, 386 (2016).

⁶⁵ See *North America League of Legends Championship Series: 2017 Season Official Rules*, §§ 7, 11, (Mar. 27, 2017), (requiring players to attend LCS events at the time and location determined by LCS officials).

⁶⁶ See *id.* § 5 (discussing LCS-provided equipment and requiring players to exclusively use the LCS-provided equipment).

⁶⁷ See *id.* (listing all the categories of equipment provided to players).

⁶⁸ See *id.* § 5.1 (“LCS officials will provide, and LCS players will exclusively use, equipment”).

⁶⁹ See *id.* § 5.6.

⁷⁰ See *id.* § 10.2.8 (noting that the LCS or Riot Games may punish players who do not adhere to the League of Legends Terms of Use or End User License Agreement, which prohibits the use of the client through providers not approved by Riot).

⁷¹ See *Riot Games Terms of Service* § 2.3, RIOT GAMES (last modified Jan. 15, 2020), <https://www.riotgames.com/en/terms-of-service> (If a user’s account is terminated or cannot access the client, then he/she would not be able to play the game).

players.⁷² Riot Games has their own sponsors, and in order to protect the business interest of the company and its sponsors, it dictates what equipment are used, what advertisements are played, and what players and teams can promote or wear during the game.⁷³ Above all, is the fact that this relationship that the LCS has with its players and teams can be permanent if the team maintains a high level of play.⁷⁴

Similarly, when it comes to professional Overwatch play, video game publisher Blizzard Entertainment is pulling all the strings in that game. In professional Overwatch play, the OWL determines the mandatory minimum salary for professional players.⁷⁵ The OWL has set a requirement for team franchises that the player agreements must provide for an annual salary and that a professional player's first year salary must be a minimum of \$50,000.00 USD.⁷⁶ In addition to the mandatory salary, the OWL has mandated that teams provide employer-sponsored health insurance, housing, retirement savings plans, training support, and other benefits as standard player contract terms.⁷⁷ In addition, Blizzard Entertainment has mandated that team franchises provide their players with bonuses representing at least half of the team's winnings and revenue.⁷⁸

Not only is Blizzard Entertainment dictating the contract terms between

⁷² See Paul Tassi, *Riot Games and TSM Are Going at It over 'League of Legends' eSports Policies*, FORBES (Aug. 24, 2016), <https://www.forbes.com/sites/insertcoin/2016/08/24/the-owners-of-riot-games-and-tsm-are-going-at-it-over-league-of-legends-esports-policies/#18c56985fdc3> ("Over time, LCS has become more demanding and restrictive and the dynamics of a mutually beneficial relationship have become more one-sided. LCS told team sponsors, which are a necessary source of revenue, that they can't even go backstage to watch the players compete. Teams can't have sponsor branding on beverages or hats. Logitech is one of our greatest and most supportive sponsors and they simply can't get visibility through us competing in LCS because we can't wear their headsets while competing. We had to push endlessly to get permission for our staff simply to be able to film backstage. LCS even threatened to fine us if we didn't remove sponsor content from our YouTube channel, such as [an] HTC commercial.").

⁷³ See *id.*

⁷⁴ See About League of Legends Champion Series, RIOT GAMES, <http://eu.lolesports.com/about/about-lol-esports> (last visited Oct. 16, 2019) (noting that the last team in the LCS bracket is relegated to the challenger series).

⁷⁵ See Kevin Webb, *Eight Teams Paid More than \$30 Million Each to Join the Overwatch League – Here's Everything You Need to Know Before the New Season Starts*, BUSINESS INSIDER (Dec. 29, 2018), <https://www.businessinsider.com/overwatch-league-season-2-2018-9>.

⁷⁶ See *id.* (noting the minimum salary and benefits that OWL players will receive).

⁷⁷ See *id.*

⁷⁸ *Player Signings, Salaries, and More in the Overwatch League*, BLIZZARD ENTM'T. (July 26, 2017), <https://overwatchleague.com/en-us/news/20937016> (stating that players will receive at least fifty percent of their team's performance bonuses).

teams and players, but it also exercises sole and absolute discretion when it comes to disciplinary or administrative actions.⁷⁹ Blizzard Entertainment has set forth a code of conduct and the professional players within the OWL are expected to follow it while playing and representing the league.⁸⁰ Those who violate the rules set by Blizzard Entertainment may face disciplinary action from Blizzard Entertainment, including suspension, fines, and even a permanent ban from competition.⁸¹ For example, Felix “xQc” Lengyel, a former member of the Dallas Fuel team, was suspended by the Blizzard Entertainment and OWL for four games for making disparaging comments about another player.⁸² Like Riot Games, Blizzard Entertainment controls the means and manner of the professional players’ and teams’ performance by imposing restrictions on what they could and directing them to that end. This type of control is typically found in employer-employee relationships and is exerted by employers over employees.

In addition to the traditional agency analysis of the employer’s ability to control the worker, the economic reality must also be considered when determining whether a worker is an employee.⁸³ Courts have set out some factors that they consider in determining whether the worker is economically dependent on the business which he serves.⁸⁴ The factors considered include: “(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker’s opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.”⁸⁵ Some of these considerations, such as degree of control,

⁷⁹ The Overwatch League, *Overwatch League Player Discipline Tracker*, BLIZZARD ENTMT’T. (Dec. 21, 2018), <https://overwatchleague.com/en-us/news/22823906/2019-player-discipline-tracker> (listing players who are disciplined for infractions of the Overwatch League rules of competition and code of conduct).

⁸⁰ *Id.*

⁸¹ Nicole Carpenter, *OWL Commissioner Nate Nanzer: “Of Course We’d be Supportive of a Players’ Union,”* DOT ESPORTS (Mar. 15, 2018, 5:47 PM), <https://dot.esports.com/general/news/overwatch-league-nate-nanzer-interview-21932>.

⁸² Richard Lawler, *‘Overwatch’ Pro Suspended for ‘Racially Disparaging’ Emote*, ENGADGET (Mar. 9, 2018), <https://www.engadget.com/2018/03/09/overwatch-pro-suspended-again-for-racially-disparaging-emote> (noting that players were punished for in-game actions, actions while streaming, and comments on social media).

⁸³ *See* *Brown v. NLRB*, 462 F.2d 699, 703 (9th Cir. 1972) (noting that control is not the only factor to consider); *see also* *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403–04 (1947) (noting that analysis of the employee and employer relationship should not be confined to the technical and traditional concepts of employee and employer, and that it should take into account the economic reality of the situation).

⁸⁴ *See* *Reich v. Circle C. Invs.*, 998 F.2d 324, 327 (5th Cir. 1993) (listing several factors used to measure the degree of the worker’s dependency).

⁸⁵ *Id.* (indicating that these factors merely assist in determining the question of dependency, and that no single factor is determinative).

the skill required in performing the job, and the permanency of the relationship, overlap with the previous analysis and will not be re-considered.

The remaining factor that needs to be examined is the degree to which the worker's opportunity for profit and loss is determined by the alleged employer.⁸⁶ Although numerous professional League of Legends players receive income from other activities, such as streaming,⁸⁷ the money they receive from their team and the LCS is their only sources of guaranteed income. Professional League of Legends players can increase or decrease their income through their performance.⁸⁸ They can increase it by placing in tournaments and securing tournament winnings or decrease it by failing to place in tournaments and/or being kicked out of the LCS.⁸⁹ Therefore, a professional player's actual ability to manipulate their profit or loss is limited and is completely dependent on the LCS.

Likewise, in the OWL, the opportunity for profit and loss is determined by the game publisher. The money professional Overwatch players receive from their team and the OWL is their only sources of guaranteed income and is determined by Blizzard Entertainment.⁹⁰ Overwatch players, like their League of Legends counterparts, are limited in the ways they can manipulate their earnings and are dependent on the OWL for the opportunity for profit.

Notwithstanding the fact that players are more closely connected with their teams and are likely employees of their respective teams, there is a high probability that Riot Games and Blizzard Entertainment could be classified as alter ego employers. When weighing the factors of control and the economic reality of professional League of Legends and Overwatch players, the balance tips in favor of classifying professional League of Legends and Overwatch players as employees of their respective league.⁹¹ Both the LCS and OWL exerts a significant amount of control over the management of professional players

⁸⁶ *Id.* (stating that the degree of control over a worker's opportunity for profit or loss is a factor in the employment analysis).

⁸⁷ Patrick Kobek, *How Much Do Competitive Esports Players Make?*, THEGAMER (Sept. 29, 2019), <https://www.thegamer.com/competitive-esports-players-salary/>.

⁸⁸ *See LCS/2019 Season*, GAMEPEDIA (last visited Oct. 6, 2020), https://lol.gamepedia.com/LCS/2019_Season (providing the data on the distribution of the prizes winnings in the playoffs).

⁸⁹ *See id.*

⁹⁰ Noah Higgins-Dunn, *Six-Figure Salaries, Million-Dollar Prizes, Health Benefits and Housing Included—Inside the Overwatch League*, CNBC (Sept. 29, 2019), <https://www.cnbc.com/2019/09/29/what-its-like-to-be-a-professional-gamer-in-the-overwatch-league.html>.

⁹¹ *See NLRB v. O'Hare-Midway Limousine Serv.*, 924 F.2d 692, 694–95 (7th Cir. 1991) (listing the control factors); Brown, *supra* note 83, at 703 (noting the economic realities factors); *E.C. Atkins*, *supra* note 83, at 403–04 (explaining the concern with economic reality).

through its ability to impose penalties such as fines, suspensions and bans.⁹²

Further, the economic reality of the relationship between the two leagues and their professional players, suggests that the professional players are reliant upon their respective league organizers for guaranteed income and employment.⁹³ Thus, the argument that professional League of Legends and Overwatch players are independent contractors and independent contractor agreements will likely not survive legal scrutiny.

IV. ANALYSIS: WHAT EMPLOYMENT BENEFITS AND RIGHTS PROFESSIONAL PLAYERS CURRENTLY LACK AND THE POTENTIAL BENEFITS FOR THE ACTORS INVOLVED.

A. *Benefits of Employee Status for Professional Players in League of Legends and Overwatch.*

Under the current contractual framework, professional League of Legends and Overwatch players are receiving minimum wage, benefits, and other advantages of employment. With this under consideration, why should professional players in League of Legends or Overwatch seek employment status? The answer is simple: to protect their rights and what they currently have, and to improve upon it and securing a better future for them.

Although professional League of Legends and Overwatch players are receiving better terms and conditions for their employment than they have in the past, they still face significant issues concerning their employment. Some of

⁹² *North America League of Legends Academy League: 2018 Official Rules*, version 18.05, § 15 (Jan. 11, 2018), https://esports-assets.s3.amazonaws.com/production/files/rules/2018_LCS_LACS_Rules.pdf (stating that the LCS and Riot Games have sole discretion to determine whether a team or player has violated the Summoner's Code, the League of Legends Terms of Use, or other rules of League of Legends, and may issue penalties for such conduct at their sole discretion as well); *Overwatch League Summary of Official Rules 2019 Season*, §§2–3, https://bnetcmsus-a.akamaihd.net/cms/content_entry_media/bb/BB6C3OEC530B1549590044543.pdf (stating that the OWL approves the process used to select which players will be eligible to participate in OWL games and that it is responsible for “creating, amending, modifying, interpreting, and/or applying all or any of the Official Rules”).

⁹³ *North America League of Legends Championship Series: 2017 Season Official Rules*, *supra* note 61, §2.2 (stating that starting players must receive a minimum of \$12,500 for each split); *Player Signings, Salaries, and More in the Overwatch League*, *supra* note 78 (stating that teams will sign players to a one-year guaranteed contract with the option to extend the contract; the minimum salary for players is \$50,000 per year; players will be provided with health insurance and a retirement plan; and players will receive at least fifty percent of their team's performance bonuses).

these issues that professional eSports players face, with respect to their employment, are identical to those faced by traditional sports players. They include a balanced daily work schedule, as professional League of Legends and Overwatch players practice fifty hours a week on average⁹⁴; post-career development; medical insurance; quality and term of housing, as many game publishers provide housing during the season; and the rights to their intellectual property, such as image and likeness.

The employment laws in the United States were mainly enacted for the purposes of protecting the general welfare of employees and fostering success in commerce by curtailing labor and management practices that caused industrial strife and unrest.⁹⁵ To this end, the National Labor Relations Act is designated to protect the “exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”⁹⁶ The National Labor Relations Act accomplishes this by means of restricting employer actions.⁹⁷ Unfortunately for professional eSports players, the collective bargaining provisions of the National Labor Relations Act are not satisfied in any form.⁹⁸ Thus, the National Labor Relations Act has a great potential of impact for professional League of Legends and Overwatch players.

The core of the Nation Labor Relations Act is Chapter 7, which contains the rights of employees as to self-organization, collective bargaining, and concerted activities.⁹⁹ In particular, Section 157 provides that:

employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

⁹⁴ Harrison Jacobs, *Here's the Insane Training Schedule of a 20-Something Professional Gamer*, BUSINESS INSIDER (May 11, 2015, 10:05 AM), <https://www.businessinsider.com/pro-gamers-explain-the-insane-training-regimen-they-use-to-stay-on-top-2015-5>.

⁹⁵ See 29 U.S.C. § 151 (2011) (noting that the broad purposes behind the enactment of the NLRA was to protect workers and businesses by curtailing the causes for industrial strife and unrest, which burdens or obstructs the efficiency of commerce and causes the diminution of employment and wages).

⁹⁶ *Id.*; see also 7 NLRB ANN. REP. 42 (1942).

⁹⁷ See generally 29 U.S.C. § 151 (2011) (stating the broad purposes underlying the enactment of the NLRA, including protecting employer rights by prohibiting some employer action).

⁹⁸ See Richard Lewis, *How Fair is an LCS Contract? We Asked a Lawyer*, DOT ESPORTS (Sept. 22, 2014, 6:51 AM), <https://dotesports.com/league-of-legends/news/lcs-contract-analysis-league-of-legends-riot-games-682> (discussing that labor laws are not addressed or even considered in contracts signed between teams and players).

⁹⁹ See 29 U.S.C. §157 (2016).

other concerted activities for the purpose of collective bargaining or other mutual aid, and shall also have the right to refrain from any or all of such activities.¹⁰⁰

Any interference with this right would constitute an unfair labor practice by an employer.¹⁰¹ However, not all matters of employment are subject to collective bargaining.¹⁰² The National Labor Relations Act allows collective bargaining on matters relating to “wages, hours, and other terms and conditions of employment.”¹⁰³ However, it does not mean that the National Labor Relations Act only covers and is restricted to subjects commonly bargained about between employers and employees up until the enactment of the National Labor Relations Act.¹⁰⁴ In fact, mandatory subjects of collective bargaining go beyond that and extend to subjects that deal with a characteristic of the employer-employee relationship.¹⁰⁵ Thus, being recognized as an employee under the National Labor Relations Act, will guarantee professional players the right to collectively bargain on issues that settle an aspect of the employment relationship, including but not limited to pay, work hours, other terms and conditions related to employment, and any issue that settles an aspect of the relationship between employers and employees.

Even if professional League of Legends and Overwatch players are entitled to collective bargaining under the National Labor Relations Act, the players may very well choose to not enter a bargaining unit. Currently, there is not a

¹⁰⁰ *Id.*

¹⁰¹ *See* 29 U.S.C. §158 (2015).

¹⁰² *See id.* (stating that unfair labor practices occur only when certain terms are not subject to collective bargaining).

¹⁰³ 29 U.S.C. § 158(d) (2015); *see also* *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209–10 (1964) (noting that employers have an obligation to meet and confer in good faith with respect to matters concerning wages, hours, and other terms and conditions of employment); *see also* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (noting that the mandatory subjects of collective bargaining are outlined in section 158(d) of the NLRA); *see also* *NLRB v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir. 1941) (noting that employees may use collective bargaining to address wages, hours, and other conditions of employment); *see also* *Wilson & Co. v. NLRB*, 115 F.2d 759, 763 (8th Cir. 1940) (noting the employer’s obligation to bargain in good faith with a majority representative of the employer’s employees on wages, hours, and other working conditions).

¹⁰⁴ *See* *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949) (“[W]e think in view of the general purpose and policy of the Act that Congress did not intend to restrict the duty to bargain collectively only to those subjects which up to 1935 had been commonly bargained about in negotiations between employers and employees.”).

¹⁰⁵ *See* *Allied Chem. & Alkali Workers, Loc. Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971) (“[O]nly issues that settle an aspect of the relationship between the employer and employees” are mandatory subjects of bargaining).

significant division between the policies within the leagues and the players who are involved in the professional play of their respective video games.¹⁰⁶ Many of the typical bargaining subjects, such as wages and benefits, have been taken care of by the current eSports framework.¹⁰⁷ It would appear that professional players would have no reason to even consider such propositions as collective bargaining. Albeit the contentedness of the professional League of Legends and Overwatch players, there is one subject that they may want to, or should want to, have addressed through collective bargaining: administrative actions. That is because professional players currently have next to no rights at all with regards to administrative actions, and this subject can have dire negative impact on players, as administrative actions can potentially ruin a player's career.¹⁰⁸ More importantly, the players have to accept any and all rulings issued by the leagues and have no recourse for redress.¹⁰⁹

The rules enacted by these league organizers are unfair, even oppressive, in that it gives the league organizers sole control and absolute discretion to administrative decisions.¹¹⁰ For example, in the official LCS rules it states, in no

¹⁰⁶ See *North America League of Legends Championship Series and North America League of Legends Academy League: 2018 Official Rules*, *supra* note 91, at 1 (noting the purpose of the rules is to foster a healthy eSports scene by ensuring “the integrity of the system established by the League for professional play of [League of Legends] and a competitive balance among the teams that play at the professional level.”; further noting the standardized rules benefit all parties who are involved in the professional play of League of Legends.).

¹⁰⁷ See *North America League of Legends Championship Series: 2017 Season Official Rules*, *supra* note 61, §2.2 (stating that starting players must receive a minimum of \$12,500 for each split); see also Kieran Darcy, *supra* note 61 (stating that the minimum player salary is being increased to \$75,000 with the new NA LCS reboot and the players are guaranteed at least thirty-five percent of league revenues, which could lead to bonus payments); see also Jacob Wolf, *supra* note 62 (Riot Games, the developer of League of Legends and tournament organizer for the LCS, planned to mandate that all teams participating in its North American and European League Championship Series competitions contractually employ their players and coaching staff beginning with the 2017 season).

¹⁰⁸ See Samuel Lingle, *Two ‘League of Legends’ Pros Banned After Using Racist Slurs*, DOT ESPORTS (June 2, 2014, 11:40 AM), <https://dotesports.com/league-of-legends/news/mithy-nukeduck-banned-league-of-legends-362> (noting that two professional players were suspended from playing League of Legends, which prevents them from working as professional players).

¹⁰⁹ See *North America League of Legends Championship Series and North America League of Legends Academy League: 2018 Season Official Rules*, *supra* note 91, § 16.1 (noting all decisions regarding the interpretation of the rules, player eligibility, as well as penalties for misconduct, are solely with the League and are final. These decisions cannot be appealed).

¹¹⁰ See, § 16; see also *Overwatch League – Summary of Official Rules 2019 Season*, *supra* note 91.

uncertain terms, that the LCS has the sole power and right to all decisions regarding the interpretation of the rules, player eligibility, and penalties for misconduct.¹¹¹ Not only that, but the LCS rules goes so far as to indicate that all decisions “with respect to [the] rules cannot be appealed (except as set forth in the League Operating Manual) and shall not give rise to any claim for monetary damages or any other legal or equitable remedy.”¹¹² The only means for a player to overturn a ruling issued by the LCS is through a review process.¹¹³ Unfortunately, this review process is also under the sole and absolute discretion of the LCS.¹¹⁴ Furthermore, league organizers such as the LCS, do not explicitly provide the guidelines that is supposedly in force during the review process to the players.¹¹⁵ Instead, the LCS explained that they apply “general principles” in their case reviews and that the review “may vary from case-to-case” because there is “no one-size-fits-all answer for every case.”¹¹⁶ These rulings can have dire effects and consequences on professional players, who rely on the ability to play for income. Although the LCS claims to conduct thorough investigations and reviews of complaints, these claims cannot be verified or challenged by players as the exact nature of the investigation or review is not disclosed.¹¹⁷ As such, the rulings issued by the LCS can seem unfair and arbitrary at times.

However, with a collective bargaining process that includes professional players, a more open and transparent disciplinary system can be created. This would serve to further legitimize the eSports space as a real sporting event.¹¹⁸ Further, and more importantly, this would provide the professional players with the security that they much desire.

¹¹¹ See *North America League of Legends Championship Series and North America League of Legends Academy League: 2018 Season Official Rules*, *supra* note 91, § 16.1 (noting all decisions regarding the interpretation of the rules, player eligibility, as well as penalties for misconduct, are solely with the League and are final).

¹¹² See *id.*

¹¹³ See Nick Allen, *Competitive Policy Revision: Permabanned Players*, LOLESPORTS (Nov. 20, 2014), <http://na.lolesports.com/articles/competitive-policy-revision-permabanned-players> [<https://web.archive.org/web/20141205111251>] (explaining that players who are eligible for review will be reviewed by the LCS Operations Team).

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ *Id.*

¹¹⁷ See League of Legends Esports Staff, *End-Of-Suspension Review: Erlend “NukeDuck” Holm*, RIOT GAMES, (last visited Oct. 11, 2020), <https://nexus.leagueoflegends.com/en-us/2014/12/end-of-suspension-review-erlend-nukeduckholm> (announcing that the suspension of Erlend Holm has been lifted after he showed “drastic improvement” to his behavior in game).

¹¹⁸ See generally *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204 (1971) (Professional sports are subject to the jurisdiction of the National Labor Relations Board).

B. *How to Secure the Win: Develop a System Similar to that of the NBA's*

As one can glean from the description of the LCS review process, it is unusual when compared to other professional sports. For instance, in the NBA, players' misconduct is taken care of in accordance to Article 35 of the NBA Constitution.¹¹⁹ Under the NBA Constitution, these decisions by the league are appealable to either the Board of Governors or an arbitrator, which is more fair and less biased.¹²⁰

The NBA's arbitration procedure is more fair and less biased because it has an extensive list of safeguards that is provided within the National Basketball Players Association's Collective Bargaining Agreement.¹²¹ The National Basketball Players Association's Collective Bargaining Agreement outlines the rules and procedures for initiating grievances, filing pre-hearing motions, hearings, appeals, an arbitrator's decision and award, appointing and replacing an arbitrator, and imposing fines and/or suspensions.¹²² Through these provisions, professional basketball players in the NBA are able to protect themselves from the risk of arbitrary or unfair disciplinary decisions.¹²³ Although the system implemented within the NBA, like other professional sports, is not completely balanced between the needs of the players and the league, it still has far more protections for its players than the current systems in professional eSports.

Professional LCS and OWL players could better protect themselves and enact similar provisions to those set out in the National Basketball Association—National Basketball Players Association's Collective Bargaining Agreement by means of collective bargaining. However, in order for LCS and OWL players to include administrative matters, such as disciplinary issues of players within the league, into a collective bargaining agreement, the professional players must show that the disciplinary system threatened rights outlined in the National Labor

¹¹⁹ See Nat'l Basketball Assoc., *Const. and By-Laws of the Nat'l Basketball Assoc.*, Art. 35, <https://athawksfanatic.github.io/NBA-BY-LAWS/constitution.html> (noting that decisions and actions on misconduct may be appealed by teams to the Board of Governors, or by players to an arbitrator in accordance with Art. XXXI of the National Basketball Players Association Collective Bargaining Agreement).

¹²⁰ *Id.*

¹²¹ See *Nat'l Basketball Assoc.—Nat'l Basketball Players Assoc. Collective Bargaining Agreement*, Art. XXXI (July 1, 2017), <http://nbpa.com/cba/> (setting out that the arbitration procedure be followed by the Union and the Association).

¹²² *Id.*

¹²³ See *id.* (specifying courses of action players may use to protect themselves from certain actions by the NBA).

Rights Act.¹²⁴ When determining whether such a disciplinary system threatened rights outlined in the National Labor Rights Act, courts consider a variety of factors, including whether the system is designed “almost entirely by employers and owners” and whether the final arbiter is a “neutral third party freely chosen by both sides.”¹²⁵ In the case of the LCS and OWL, the disciplinary system is designed entirely by the respective league and involves a non-neutral arbiter.¹²⁶ Thus, a potential collective bargaining unit for professional League of Legends and Overwatch players could bargain with their respective leagues on administrative matters.¹²⁷

C. Win-Win Situation: Benefits of Classifying Professional Players as Employees for the LCS and OWL

While employers may prefer to classify professional eSports players as independent contractors, the legal ramifications of a misclassification cannot be understated. Misclassification can subject the employer to significant liabilities.¹²⁸ In the case of the LCS and OWL, as well as the eSports industry, it may subject the leagues and the game publishers to antitrust liability.

The Sherman Antitrust Act makes illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”¹²⁹ The Act applies to nearly all markets, and the Supreme Court has even held that professional sports, except baseball, are subject to federal antitrust laws.¹³⁰ Section One of the Act prohibits certain means of anti-competitive behavior and is broad enough to prohibit practically any restraint on free trade.¹³¹ Thus, the Supreme Court has interpreted the language of section one that only unreasonable restraints on trade are within

¹²⁴ See *The Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. No. 30 (1969) (noting that the major league baseball’s internal self-regulation system has not prevented labor issues from arising and that the NLRB could become involved if the disciplinary action promulgated by the arbitrators threatened rights protected under 29 U.S.C. § 157).

¹²⁵ *Id.* at 191.

¹²⁶ See *North America League of Legends Championship Series and North America League of Legends Academy League: 2018 Official Rules*, *supra* note 91, § 15 (stating that the LCS has sole discretion to modify and change the rules it has promulgated at any time).

¹²⁷ See *The Am. League of Prof'l Baseball Clubs*, 180 NLRB No. 30 (1969).

¹²⁸ This includes, and is not limited to, wage and hour and tax liabilities.

¹²⁹ 15 U.S.C. § 1 (2018).

¹³⁰ See *Radovich v. Nat'l Football League*, 352 U.S. 445, 451-452 (1957) (acknowledging that football affects interstate commerce for the purposes of the Sherman Antitrust Act); see also O’Dea, *Professional Sports and the Antitrust Law*, 9 HASTINGS L.J. 18 (1957).

¹³¹ See *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

the prohibitions of the Act.¹³²

In the eSports context, the drafting system, free agency, salary caps, and the various league rules can be a violation of section one of the Sherman Antitrust Act as they can be proscribed as unreasonable restraints on free trade. For example, the LCS has a rule that prevents professional League of Legends players from streaming or professionally playing other games, which has an anti-competitive. This rule has an anti-competitive impact because it prevents players from selling professional video game playing services to various teams, leagues, or game publishers. In fact, it is akin to the NFL's rule in *North American Soccer League v National Football League*, 670 F.2d 1249 (1982), which significantly decreased opportunities for team owners in the "professional sports capital and skill market."¹³³ Like in *North American Soccer League*, where there were fewer potential team owners because of the NFL's rule and the restraints were found to have significant anti-competitive impact, here, the LCS restraints will result in fewer potential professional players for other leagues and video games because these other leagues and video games cannot use LCS players, and have a significant anti-competitive impact.

It is worrisome for game publishers such as, Riot Games and Blizzard Entertainment, because the LCS and OWL have a whole handbook of rules, which may contain even more anti-competitive restraints. To justify these company requirements, in part, Riot's director of eSports, RiotMagus, issued a statement expressing that Riot wants "League of Legends to be a legitimate sport" with a "true professional setting."¹³⁴ Further, RiotMagus stated that just as you probably would not see an NFL player promoting the Arena Football League or a Nike sponsored player wearing Reebok, he claimed that a League of Legends player should not be seen promoting DOTA 2 either.¹³⁵

With major traditional professional sports leagues, the antitrust issue is defined by the two main exemptions to the application of section one of the Sherman Antitrust Act.¹³⁶ The first is the single entity exemption.¹³⁷ To put it simply, a group of actors that effectively acts as a single unified body and has a single economic interest is not in violation of section one because a single entity cannot conspire with itself.¹³⁸ The management of the major traditional sports

¹³² See *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 61-62 (1911).

¹³³ See *North American Soccer League v. Nat'l Football League*, 670 F.2d 1249 (1982).

¹³⁴ *Id.* See also Pete Davison, *Riot Bans League of Legends Pros from Streaming Rival Games*, US GAMER, (Dec. 05, 2013) <https://www.usgamer.net/articles/riot-bans-league-of-legends-pros-from-streaming-rival-games>.

¹³⁵ *Id.*

¹³⁶ See Gregory J. Pelnar, *Antitrust Analysis of Sports Leagues*, 73 (Oct. 12, 2007).

¹³⁷ *Id.*

¹³⁸ *Id.*

leagues claims that their respective league is a single entity.¹³⁹ The NFL claims that the league would not be able to function if it did not have limitations on player acquisitions, player movement among the teams, player conduct, and so on.¹⁴⁰

The second is the statutory labor exemption created by the Norris-LaGuardia Act.¹⁴¹ This created an immunity for unilateral conduct that protects a union's economic interest.¹⁴² For example, the NFL claims that the restrictions it imposes upon their players are valid under the statutory labor exemption because the restrictions were achieved through a collective bargaining agreement with the NFL players union.¹⁴³ The statutory exemption created under the Norris-LaGuardia Act shields employers from inherently anti-competitive collective activities by employees because these types of activities are favored by federal labor policy.¹⁴⁴

Like major traditional professional sports leagues, the antitrust issue in eSports is defined by the two main exemptions to the Sherman Antitrust Act as well. However, unlike major traditional professional sports leagues, the single entity exemption does not apply to eSports because there are too many different and competing economic interests at play.¹⁴⁵ Under the current eSports model, the teams' interest are not necessarily aligned because each team franchise is a separate profit-maximizing actor. Thus, it is not likely that the single entity exemption will be applicable in eSports.

Instead, the game publishers should seek protection under the statutory labor exemption created by the Norris-LaGuardia Act or the non-statutory labor exemptions for their anti-competitive activities. The statutory labor exemption created by the Norris-LaGuardia Act will shield game publishers from antitrust issues and allow them to continue with its drafting system, restrictions on free agency, mandatory salary caps, and the various league rules as long as it was achieved through a collective bargaining agreement with a players' union.

The non-statutory labor exemption to federal antitrust laws also removes the antitrust restraints that are the result of a collective bargaining agreement between employees and employers. Should the players be recognized as employees and unionize, the non-statutory labor exemption will allow them and

¹³⁹ See Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 1 (1991).

¹⁴⁰ See *American Needle v. NFL*, 560 U.S. 183, 183 (2010).

¹⁴¹ See 29 U.S.C. §§ 101-15 (1964).

¹⁴² *Employee Bargaining Power Under the Norris-LaGuardia Act: The Independent Contractor Problem*, 67 YALE L.J. 98, (1957).

¹⁴³ *Brady v. NFL*, 644 F.3d 661, 662-683 (8th Cir. 2011).

¹⁴⁴ *Powell v. NFL*, 678 F. Supp. 777, 782 (D. Minn. 1988); see also Thomas Picher, *Baseball's Antitrust Exemption Repealed: An Analysis of the Effect on Salary Cap and Salary Taxation Provisions*, 7 SETON HALL J. SPORT & ENTMT'L. 5, 12 (1997).

¹⁴⁵ There is the game publisher's interest, the league's interest, and the teams' interest.

their employers to bargain collectively, free from potential antitrust scrutiny.¹⁴⁶ In such cases, where players are recognized as employees and unionize, labor laws will govern the relationship between the players and the employers. Moreover, the employers will largely be free from the restraints of antitrust laws due to the non-statutory labor exemption. This means that the players would lose virtually all of the protections afforded by antitrust laws.

However, for the non-statutory labor exemption to apply, the employers must engage in good faith and arm's length negotiation with their employees on mandatory subjects of collective bargaining.¹⁴⁷ These mandatory subjects of collective bargaining include hours, wages, and terms and conditions of employment.¹⁴⁸ This protection is greatly desired by employers, because it shields them from most, if not all, of the challenges under the Sherman Antitrust Act. The protection employers avail themselves of under the non-statutory labor exemption will continue if the bargaining relationship continues to exist. As such, as soon as the professional players decertify their union, the bargaining process can be seen as having ended and the employers, which includes game publishers, may no longer enjoy the protections that the non-statutory labor exemption affords.

V. TO AFK OR NOT TO AFK: WHAT SHOULD PROFESSIONAL ESPORTS PLAYERS DO IN THE INTERIM?

The undertaking of unionizing is complex. There are practical and legal challenges in establishing a collective bargaining unit within the eSports industry. This includes the challenges of classifying professional eSports players as “employees” and garnering enough support from the professional players to form a union. For the time being, team owners and game developers are satisfied with the current system. Moreover, the issues that professional players are concerned about could be resolved without having to go through the arduous process of forming a union, by improving communication between game developers, teams, and professional players. It remains to be seen whether professional eSports players will pursue unionization. However, observers of the eSports scene believe and agree that players’ unions are inevitable as the industry continues to grow.

¹⁴⁶ Fed. Baseball Club of Balt. v. Nat’l League, 259 U.S. 200, 200 (1922).

¹⁴⁷ Bargaining in good faith with employees’ union representative (Section 8(d) & 8(a)(5)), NLRB, <https://www.nlr.gov/rights-we-protect/whats-law/employers/bargaining-good-faith-employees-union-representative-section> (last visited Oct. 14, 2020).

¹⁴⁸ 29 U.S.C. § 158(d) (providing that employers shall bargain “in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement”).

In the meantime, the professional League of Legends and Overwatch players can form a workers' committee. The formation of a workers' committee is less complex compared to the formation of a union and is an alternative to strengthen the workers' clout and protections.¹⁴⁹ The National Labor Relations Act prohibits employers from retaliating against workers for engaging in "concerted" activity to improve their wages and/or working conditions, even when the workers are not trying to unionize.¹⁵⁰ Thus, by forming a workers' committee, the professional players will be able to freely discuss matters that they wish to discuss with management, without the management's interference.¹⁵¹ More importantly, the matters or issues brought up by the members of the workers' committee can then be brought forward by a single entity, that has more influence and leverage, to members of management, as the workers' committee can represent itself in discussions and negotiations with members of management.¹⁵²

VI. CONCLUSION

eSports is an emerging industry that is still in its infancy, however, it is quickly maturing and evolving. Like any new industry, the primary issues facing eSports actors, including organizations, employers, and employees, is applying existing laws and regulations to an industry that was never contemplated when the laws were written. Despite such complications, we can look to similar industries, such as the traditional professional sports industry, and use them as a guide for the eSports industry. The traditional professional sports industry has had many landmark cases that helped shape the industry, both from a legal and a financial position.

The eSports industry has imitated the traditional professional sports scene in both form and the relationship between the professional players and their respective leagues. Both the LCS and OWL appear to significantly affect players' terms and conditions of employment and exert sufficient control over their respective professional players so as to qualify those players as their employees. The recognition and establishment of employee status for professional players will give players benefits that truly mirror those found in traditional professional sports, including the right to collectively bargain. Because through collective bargaining, professional League of Legends and Overwatch players will be able to push for fairer provisions under the player agreements and ensure better working conditions in the scene.

To date, the National Labor Relations Board has not asserted jurisdiction over the eSports industry. Once the game publishers and leagues discover the

¹⁴⁹ *Workers' Committee Guidelines*, 14 LABOUR, CAPITAL AND SOCIETY / TRAVAIL, CAPITAL ET SOCIÉTÉ, 142-146 (1981).

¹⁵⁰ 29 U.S.C. § 157.

¹⁵¹ *Id.*

¹⁵² *Workers' Committee Guidelines*, *supra* note 149.

potential for collective bargaining, they may eliminate many of the benefits currently provided to professional players and mandated by them, as an attempt to eliminate the employer-employee relationship. Such a move is short-sighted and can hurt the industry in the long run. Instead, by embracing the employee status of professional players, the LCS and OWL can accomplish their goal of legitimizing eSports, League of Legends and Overwatch in particular, as an actual sport. The LCS, OWL, and their respective professional players have the potential to shape the future of the eSports industry and set the industry standard for various labor and employment issues. For the good of the industry, game publishers and professional players should embrace the employee status of professional players and work together in securing a better future for everyone involved.