

Update Required: Esports Athletes Need to Unionize

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Scholarly Topics in Sports Law

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Table of Contents

<i>I. Introduction</i>	3
<i>II. Background</i>	6
A. The Law Governing Unionization	6
B. Traditional Sports Structure versus Esports Sports Structure	9
1. Traditional Sports Structures	9
2. Esports Structures	11
C. The NLRB Joint Employer Proposed Rule	12
D. Issues in Esports	14
1. Predatory Contracting Practices.....	14
2. Working Conditions.....	21
<i>III. The Hurdles: Employee and Joint Employer Status</i>	26
A. Asserting Employee Status	26
1. Teams.....	27
2. Leagues	28
B. Asserting Joint Employer Status	30
<i>IV. The Union Solution</i>	32
A. Predatory Contracting Practices	33
1. Procedural Solutions	33
2. Substantive Solutions.....	35
B. Working Conditions	36
<i>V. Conclusion</i>	38

I. Introduction

Julia Bright once aspired to become a professional Esports player in the Overwatch League ("OWL") until the weight of her dream was too much for her body to bear.¹ Bright played eight hours daily, seven days a week, training and practicing to showcase her skills to professional teams.² Eventually, Bright developed severe wrist pain after hundreds of hours of leaning forward in her seat with her eyes focused on her monitor and her hand tightly gripping her mouse.³ The pain sometimes became so excruciating that she would dump her hands in freezing ice water for relief.⁴ However, that relief was short-lived since Bright had to return to gaming.⁵ After suffering through the pain, she saw a doctor who diagnosed her with a torn ligament and displaced tendon in her mouse hand.⁶ Bright needed surgery, which meant she could not play for months, needing a cast, a brace, and rehab.⁷ Bright doubts she can play again even after receiving the treatment she needs.⁸ Teams would consider her old at only twenty years old, and her chance to be a professional gamer has almost entirely vanished.⁹ Now instead of worrying about making an Esports team, she worries if the pain in her hand will last for the rest of her life.¹⁰

Bright's story is not uncommon for many esports athletes who try to get signed.¹¹ Esports teams specifically target players who can grind and put in long hours.¹² The reward for athletes who

¹ Chris Baraniuk, *They dreamed of esports glory. then their bodies broke down*, WIRED UK (Oct. 17, 2020), <https://www.wired.co.uk/article/esports-injuries-mental-health>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Ben Westcott & Nanlin Fang, *They train 14 hours a day, 7 days a week, chasing million-dollar paydays. Meet China's New Breed of esports athletes*, KSLNEWSRADIO (Dec. 31, 2019), <https://kslnewsradio.com/1917037/they-train-14-hours-a-day-7-days-a-week-chasing-million-dollar-paydays-meet-chinas-new-breed-of-esports-athletes/>.

¹⁰ Baraniuk, *supra* note 1.

¹¹ See Jonathan Lee, *Esports stars have shorter careers than NFL players. Here's why*. THE WASH. POST (Apr. 19, 2022), <https://www.washingtonpost.com/video-games/esports/2022/04/19/esports-age-retirement/>.

¹² *Id.*

demonstrate their ability to push through discomfort and spend long hours gaming is more long hours gaming.¹³ And that happened to Jian Ziaho of the Esports team Royal Never Give Up ("RNG"), who practiced fourteen hours daily, training seven days a week.¹⁴ Days started at 1:00 p.m., ended at 4:00 a.m., and included few breaks.¹⁵ The team demanded much of him, and he demanded even more of his body.¹⁶ Eventually, the physical toll and the constant stress of the daily grind left permanent damage; Ziaho was diagnosed with Type 2 diabetes and obesity.¹⁷ Ziaho suffered from arm and back injuries that doctors told him had the health of a forty- to fifty-year-old, and he was only twenty-three.¹⁸ He even turned to pills to fight through the pain and stay competitive.¹⁹ In the end, doctors advised him that more severe complications would emerge if he kept pushing.²⁰

The demanding working conditions are only part of the problem for Esports athletes. The other part is the contracts they agree to in their desire to make the team. In his retirement address, Ziaho only mentioned how his health had deteriorated, forcing him to step away.²¹ He did not say why his health had deteriorated or how he suffered through long, arduous workdays.²² And even if he wanted to, he likely could not. Ziaho's contract would have had a term prohibiting players from saying anything construed as disparaging against the league and its teams.²³

¹³ Noah Smith, *Inside 'contract hell': Esports players say predatory contracts run 'rampant,'* THE WASH. POST (Mar. 4, 2022), <https://www.washingtonpost.com/video-games/esports/2022/03/04/esports-player-contracts/>.

¹⁴ Westcott & Fang, *supra* note 9. Amanda Tan, *Legendary AD carry uzi retires at 23 due to serious health concerns*, ONE ESPORTS (June 3, 2020), <https://www.oneesports.gg/league-of-legends/legendary-ad-carry-uzi-retires-at-23-due-to-serious-health-concerns/>.

¹⁵ Westcott & Fang, *supra* note 9. Tan, *supra* note 14.

¹⁶ Westcott & Fang, *supra* note 9.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Sabrina Ahn, *Uzi opens up on weibo*, RIFTFEED (Mar. 9, 2022), <https://riftfeed.gg/esports/uzi-message-on-weibo>.

²² *Id.*

²³ See Richard Lewis, *How fair is an LCS contract? We asked a lawyer*, DOT ESPORTS (Sep. 22, 2014), <https://dotesports.com/league-of-legends/news/lcs-contract-analysis-league-of-legends-riot-games-682> (describing a section in a League of Legends contract to "forbid defamatory or disparaging remarks with respect to the

The tandem of the working conditions and unfair contract terms has put Esports in desperate need of change.²⁴ Unlike nearly all traditional sports²⁵ in North America, Esports players do not have National Labor Relations Board ("NLRB") certified union protecting them.²⁶ Under the National Labor Relation Act of 1935 ("NLRA" or "Act"), only employees may form a certified union.²⁷ Esports athletes are classified as independent contractors in their contracts, preventing them from claiming employee status and unionizing.²⁸ Instead of unions, some Esports leagues have player associations, but these associations lack the legal protections of an NLRB-certified union and have proven largely ineffective.²⁹ Under the common law agency test³⁰ and proposed regulation issued by the NLRB, Esports athletes are in the best situation they have been in yet to challenge their independent contractor classification. For the Esports industry to survive, Esports athletes must unionize to address the contracting practices and their working conditions.

This paper will examine why Esports athletes must unionize and how the current regulatory environment presents athletes with the best opportunity to challenge their employment status. Part II of this paper provides background on the relevant law, regulation, Esports structure, and current industry practices. Part III applies the common law agency test and proposed joint employer rule

tournament, Riot, League of *Legends*, or anything made by or associated with Riot and its sponsors, employees, and investors.").

²⁴ *Id.*

²⁵ Traditional sports are sports such as football, basketball, hockey, and soccer.

²⁶ See Michael Macklon, *How labor unions changed pro sports*, INVESTOPEDIA (Jan. 11, 2023), <https://www.investopedia.com/financial-edge/0711/the-rise-of-labor-unions-in-pro-sports.aspx>

²⁷ 29 U.S.C. §§ 152.

²⁸ Christopher R. Amthor, *Five employment considerations for an expanding esports team*, BUCHANAN INGERSOLL & ROONEY PC (Aug 13, 2020), <https://www.bipc.com/five-employment-considerations-for-an-expanding-esports-team>.

²⁹ Jehnytssa Zetino, *Out of Their League: An Antitrust Analysis of Esports Players Associations and Attempts at Unionization*, 58 HOUS. L. REV. 777, 780 (2021) (discussing that player associations are not a solution to workers' rights because they do not have the legal power of a federally recognized union). See also Conor Atlas, *The LCS Players Association is Attempting Change but Finding Little Success*, THE GAME HAUS (Apr. 11, 2022), <https://thegamehaus.com/league-of-legends/the-lcs-players-association-is-attempting-change-but-finding-little-success/2022/04/11/> (explaining why the players association has not made any real progress since its inception).

³⁰ While there are other tests used to evaluate employee status, such as the economic realities test used by the Department of Labor, the scope of this paper focuses on the test used by the NLRB who enforce the NLRA.

to Esports athletes and teams. Part IV examines how unionization under the NLRA can address the issues players face by comparing the terms players in the National Football League Players Association ("NFLPA")³¹ were able to bargain for themselves. Part V concludes.

II. Background

Section II(A) discusses the law governing unionization. Section II(B) distinguishes the Esports league structure from the traditional North American sports league structure. Section II(C) identifies potential regulation that solves a problem the Esports league structure poses to athletes. Section II(D) addresses the issues currently facing Esports athletes.

A. The Law Governing Unionization

The National Labor Relations Act of 1935 establishes employees' rights to organize and collectively bargain.³² Only employees possess the right; the Act explicitly rejects workers with independent contractor status the same rights.³³ Congress enacted the NLRA to protect workplace employees in the private sector by providing them with a legal mechanism to negotiate terms of employment without fear of adverse action by the employer.³⁴ Workers must be considered employees to garner protections under the NLRA.³⁵

³¹ Although a certified union by the NLRB, the NFLPA is regarded by some as one of the weakest unions in professional sports. Accordingly, any union starting in Esports will be relatively soft, so this paper compares what an Esports sports union could negotiate to what a weaker union has been able to. *See Berry Tramel, NFL labor agreement: As usual, the players union folds*, THE OKLAHOMAN (Feb. 26, 2020), <https://www.oklahoman.com/story/sports/columns/berry-tramel/2020/02/26/17-game-schedule-headed-to-the-nfl-soon/60372697007/>.

³² 29 U.S.C. §157 (providing "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . .").

³³ 29 U.S.C. § 152 (providing "[t]he term 'employee' shall include any employee. . . but shall not include any individual. . . having the status of an independent contractor. . .").

³⁴ *See Guidance: National Labor Relations Act*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/guidance/key-reference-materials/national-labor-relations-act> (last visited Apr. 1, 2023) (describing the goal of the NLRA to protect "workplace democracy by providing employees at private-sector workplaces the fundamental right to seek better working conditions and designation of representation without fear of retaliation.").

³⁵ 29 U.S.C. §157.

Workers looking to establish rights under the Act must prove that the organization they work for is an employer and they are an employee. The first question that workers must consider is whether the business they work for fits the definition of an employer under the NLRA.³⁶ Then workers must consider if they fit the definition of employee under the NLRA.³⁷ The Supreme Court held the term "employee" as not explicitly defined because the NLRA did not directly define it.³⁸ Subsequently, with no explicit definition to determine employee status, the NLRB utilizes the common law agency test to distinguish independent contractors from employees.³⁹ An analysis under the common law agency test requires consideration of various factors, such as the employer's control, type of occupation, and length of employment.⁴⁰ Furthermore, the National Labor Relations Board ("NLRB") indicated that an "entrepreneurial opportunity" for economic gain or loss is a "prism" to analyze the common law factors through.⁴¹

When the NLRB considers entrepreneurial opportunities, it looks for the availability of workers to make additional money outside of working for the employer.⁴² Being restricted from working with other competitors favors employee status because entrepreneurial opportunities are

³⁶ 29 U.S.C. §152. (defining employer as "any person acting as an agent of an employer, directly or indirectly. . .")

³⁷ *Id.* (excluding supervisors, who retain authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees").

³⁸ *Nation-wide Mutual Insurance Co. v. Darden*, 112 S. Ct., at 1348 (1992). (stating "[w]hen Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-relationship as understood by common-law agency doctrine.").

³⁹ Jon O. Shimabukuro, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test Congressional Research Service*, CONG. RSCH. SERV. (Apr. 20, 2020), at 2, <https://crsreports.congress.gov/product/pdf/R/R46765>.

⁴⁰ *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), slip op. at 1 (determining non-exhaustive factors as " (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in the business.").

⁴¹ Shimabukuro, *supra* note 39, at 4.

⁴² *FedEx Home Delivery*, 361 NLRB 624 (2014).

limited.⁴³ Moreover, the court also looks at workers' overall control over their schedule and ability to leverage their available time to pursue other economic activities.⁴⁴

After meeting the definition of employee, there are two ways to establish a union. First, if at least thirty percent of employees sign authorization cards or a petition in support of a union, then the NLRB conducts an election for all employees.⁴⁵ If a majority of the employees vote in favor of a union, the NLRB certifies it for bargaining.⁴⁶ Second, if the employer voluntarily recognizes the unit.⁴⁷

As a certified union, employees need an appropriate bargaining unit, a group of at least two employees who share a common interest, for collective bargaining purposes.⁴⁸ The NLRB determines if the bargaining unit is appropriate and, once deemed appropriate, can become the exclusive bargaining agent for the employees.⁴⁹

After certification and selection of a bargaining unit, the NLRA places duties on both employer and the bargaining unit.⁵⁰ The most significant duty placed on the parties is the duty to bargain in good faith, which, according to the NLRB, requires each side to "participate actively in the deliberations," indicating an intention to find agreement.⁵¹ This intent includes an "open mind and sincere desire" to find commonality.⁵²

⁴³ *Id.*

⁴⁴ Shimabukuro, *supra* note 39, at 5.

⁴⁵ *About NLRB: Conduct elections*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do/conduct-elections> (last visited Apr. 1, 2023).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Basic guide to the National Labor Relations Act - General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, NAT'L LAB. RELS. BD., (1997), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> (last visited Apr. 5, 2023).

⁴⁹ *Id.*

⁵⁰ *About NLRB: Employer/Union Rights and Obligations*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/employer-union-rights-and-obligations> (last visited Apr. 5, 2023).

⁵¹ *Id.*

⁵² *Id.*

The NLRA requires both employer and the bargaining unit to meet at reasonable times and confer in good faith about conditions mandatory to employment, such as wages, hours, safety, and insurance.⁵³ Another mandatory subject is creating grievance procedures, allowing employees to complain if they believe their rights were violated.⁵⁴ However, even if a subject is not mandatory, the employer must bargain about the decision's effects on employees.⁵⁵ Nonmandatory subjects do not relate to wages, hours, and other conditions of employment.⁵⁶

If one party refuses to bargain, it is considered an unfair labor practice, and the aggrieved party may strike.⁵⁷ If an employer believes that the two sides will not come to terms after bargaining, the employer may declare an impasse and present one last final offer to the union.⁵⁸ If the union does not believe it is a true impasse, and the employer did not bargain faithfully, the union may file an unfair labor practice charge.⁵⁹ The NLRB then decides if it is a genuine impasse.⁶⁰

B. Traditional Sports Structure versus Esports Sports Structure

With an understanding of the law that controls unions, it is equally as important to understand the difference in the unique structure of Esports leagues compared to that of traditional sports leagues in North America.

1. Traditional Sports Structures

The North American sports industry has two types of leagues that broadly encompass the traditional sports leagues in the country. The traditional sports landscape has two subgroups: the

⁵³ *Basic guide to the National Labor Relations Act - General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, *supra* note 38.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *About NLRB: Employer/Union Rights and Obligations*, *supra* note 50.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

"Big Four," consisting of the National Football League ("NFL"), National Basketball Association ("NBA"), National Hockey League ("NHL"), and Major League Baseball ("MLB"), and the single-entity leagues, consisting of leagues, such as Major League Soccer ("MLS") and Women's National Basketball Association ("WNBA").⁶¹

The structure for leagues in the Big Four is largely the same, with a set number of teams in each league playing in a regional market across the country.⁶² Regional teams of four or five comprise divisions that cover a broader geographical range.⁶³ A collective bargaining agreement ("CBA") negotiated by players and management guide behavior in the Big Four of players, teams, and owners.⁶⁴ Moreover, the teams in the Big Four are joint ventures with franchises owned privately by individuals or in ownership groups that cooperate to be bound under the league's rules.⁶⁵

A player's association in the Big Four that, although effective, has been criticized as being weaker than other Big Four unions when bargaining for players' rights is the NFLPA.⁶⁶ The terms negotiated between the NFLPA and NFL can provide Esports players some guidance where a union is considered weak but still able to achieve rights for the players.

Unlike the Big Four, single-entity leagues are structured as a single organization that owns all the teams in the league.⁶⁷ This type of organization avoids violations of the Sherman Anti-Trust

⁶¹ See GLENN M. WONG, *ESSENTIALS OF SPORTS LAW 2* (4th ed. 2010).

⁶² See Kelsey Ridenour, *Traditional Sports and Esports: Path to Collective Bargaining*, 105 IOWA L. REV. 1857, 1867 (2020).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Adam Wells, *NFL Agent Blasts NFLPA as the Worst in Sports: 'They Do Not Look Out for the Players'*, Bleacher Report (Aug. 25, 2021), <https://bleacherreport.com/articles/10011016-nfl-agent-blasts-nflpa-as-the-worst-in-sports-they-do-not-look-out-for-the-players>.https://americanfootballdatabase.fandom.com/wiki/National_Football_League_Players_Association.

⁶⁷ Ridenour, *supra* note 62, at 1867.

Act of 1890.⁶⁸ Single-entity leagues do not benefit from the series of court decisions that led to antitrust exemptions in the Big Four.⁶⁹ Single-entity leagues do not have team owners but team operators who provide capital.⁷⁰ The league retains ownership of the team, allowing it to control more than one team.⁷¹

2. Esports Structures

Esports has similarities to the Big Four and single-entity teams but has an additional wrinkle of the game developer and publisher. Like the Big Four, it allows teams to contract with players and has private team ownership groups. Like single-entity leagues, it does not receive any anti-trust exemptions, and the league can exert control over teams.⁷² However, unlike the Big Four, where teams cooperate by setting league rules and appointing a commissioner, Esports leagues are controlled by the game developer and publisher—often the same—who establish the rules of play.⁷³ This difference is a divergence from traditional sports because no one league owns the sport it plays. Yet in Esports, game developers own the intellectual property athletes play on and have accompanying rights to do as they please with that property.⁷⁴

Although Esports leagues center around almost every type of game, the analysis in this paper focuses on the OWL and the League of Legends Championship Series ("LCS"). The OWL and LCS are similar in their overall layout. Both are professional Esports leagues for a multiplayer

⁶⁸ *Id.* at 1869.

⁶⁹ *Id.*

⁷⁰ WONG, *supra* note 61, at 15.

⁷¹ *Id.*

⁷² The structure of Esports potentially violating antitrust laws is beyond the scope of this paper. See Hank Hackney, *The Emerging Role of Antitrust Law in Esports*, SPORTS LAW EXPERT (Sept. 12, 2019), <https://sportslawexpert.com/2019/09/12/the-emerging-role-of-antitrust-law-in-esports/>.

⁷³ Michael Arin, *Competing Competitions: Anticompetitive Conduct by Publisher-Controlled Esports Leagues*, 104 MINN. L. REV. 1585, 1605 (2020).

⁷⁴ Daniel Schnapp & Samuel Cohen, *Intellectual Property Rights and Esports — Sheppard Mullin*, ESPORTS INSIDER (Mar. 18, 2022), <https://esportsinsider.com/2022/03/ip-rights-esports-sheppard-mullin>.

online battle arena game.⁷⁵ Both consist of teams from around the world in North America, Europe, and Asia, which compete for qualification in the Championships for their respective league.⁷⁶ Riot Games and Blizzard Entertainment, the developers of League of Legends and Overwatch, respectively, served as the LCS and OWL publishers.⁷⁷

The OWL and LCS leagues are heavily controlled by their developers.⁷⁸ Publishers exert this control to maximize the profit of their games while their games are still popular.⁷⁹ Video games constantly fluctuate in popularity, and because only the publishers own the rights to who can play the game, those who want to be a part of it must pay the price—literally.⁸⁰ One thing publishers exert control over is tournaments.⁸¹ In the Big Four, teams in the league host games.⁸² In Esports, the publisher hosts games to make it a spectacle, trying to maximize ticket sales and social media impressions to protect the league's longevity.⁸³ The substantial control and direction exerted by the game developers make their respective leagues essentially an alter ego of the corporation.⁸⁴ For this paper, actions by the OWL and LCS can be considered actions done at the discretion of Blizzard Entertainment and Riot Games.

C. The NLRB Joint Employer Proposed Rule

⁷⁵ See Jackson Wong, *More Than Just A Game: The Labor and Employment Issues Within Esports*, 11 UNLV GAMING L. J. 123, 127 (2020).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 128.

⁷⁹ See Kevin He, *eSports Leagues and Game Publishers – Monetization Playbook (Pt. 2)*, ROCKWATER (Sept. 22, 2022), <https://wearerockwater.com/the-esports-league-and-game-publisher-monetization-playbook/>.

⁸⁰ Billy Studholme, *Esports has a money problem. Will publishers be part of the solution?*, DEXERTO (Oct. 21, 2022), <https://www.dexerto.com/esports/esports-has-a-money-problem-will-publishers-be-part-of-the-solution-1963991/> (noting that Blizzard made teams pay more than \$20 million to be part of the OWL in addition to paying for the cost of venues to host games).

⁸¹ He, *supra* note 79.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ WONG, *supra* note 61, at 128.

Unlike the Big Four, where team owners choose a commissioner to operate on behalf of team owners, the game publisher does not work at the whim of the teams in the league.⁸⁵ The game publisher and teams are not necessarily aligned on the same goals.⁸⁶ However, because the two entities are not associated, athletes looking to unionize must find a way to bind both as employers. Fortunately, the NLRB is finalizing a new joint employer rule that may solve that issue. A joint employer rule determines when two entities that control workers are both employers.

The rise in Esports' popularity coincided with the Trump administration's issuance of a joint employer rule that requires an entity to exert "substantial direct and immediate control" over the terms and conditions of another entity's employees to be considered joint.⁸⁷ However, under the current administration, the NLRB has proposed a rule reducing the standard of control to an indirect, reserved standard. Instead of an entity exerting direct or immediate control, the proposed rule considers employers joint if the entities "share or codetermine" matters that govern employee terms and conditions of work. Moreover, the proposed rule allows possessing the authority to control as sufficient to establish status as a joint employer; the entity does not need to exercise the control.⁸⁸ Control is elaborated beyond reserved power, and control exercised through an intermediary may be sufficient to establish joint employer status.⁸⁹

Along with lowering the control standard, the proposed rule also broadens considerations of what type of control meets the standard. The proposed rule considers workplace health, safety, and

⁸⁵ Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 65 MARQ. SPORTS L. J. 65, 71 (1995).

⁸⁶ See Studholme, *supra* note 80.

⁸⁷ Jerrold F. Goldberg & Justin F. Keith, *NLRB Proposes New Joint-Employer Standard*, INSIGHTS | GREENBERG TRAURIG LLP (Sept. 13, 2022), <https://www.gtlaw.com/en/insights/2022/9/nlrb-proposes-new-joint-employer-standard>.

⁸⁸ Allen Smith, *Proposed Joint Employer Rule May Increase Employer Liability*, SHRM (Sept. 6, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nlrb-joint-employer-proposed-rule-2022.aspx>.

⁸⁹ *Id.*

means or methods of work performance, in comparison to the Trump administration's rule, looking only at terms of employment such as wages, hours, benefits, hiring, and firing.⁹⁰ Establishing joint employers means that both entities must negotiate with the union, and it also makes one entity liable for the unlawful practices of the other.⁹¹

D. Issues in Esports

The leading issues in Esports that need addressing through unionization are predatory contract practices and work conditions.

1. Predatory Contracting Practices

The two aspects of contracting practices in Esports are procedural and substantive. Procedural practices are those that involve how the player enters the contract. Substantive practices are the terms the teams include in the contract.

a. Procedural Contracting Practices

Esports teams use their superior bargaining power to coerce players into unfavorable contractual terms and discourage players from using representation to review those terms. In the words of Esports athlete Jeff Tsang, a former player in the OWL, Esports contracting practices are "pretty scummy."⁹²

⁹⁰ *Id.*

⁹¹ Brooke C. Bahlinger & Davis G. Mosmeyer III., *No Lag: Ensuring Compliance with Labor and Employment Law in the Esports Industry*, BLOGS | LABOR & EMPLOYMENT LAW PERSPECTIVES | FOLEY & LARDNER LLP (May 2, 2022), <https://www.foley.com/en/insights/publications/2022/05/ensuring-compliance-labor-employment-law-esports>.

⁹² See Smith, *supra* note 13.

Esports teams implement a three-part strategy to sign athletes to unfavorable terms. Initially, athletes have short time frames to accept the contract, being sent contracts and given as little as four hours to sign before rescission.⁹³ Players receive dense contracts containing nearly thirty to forty pages of terms to sift through, which is a lengthy process even for an agent to go through.⁹⁴ Lastly, with the contract's short offer windows and advanced technical language, teams approach minors without their parent's consent.⁹⁵ Teams capitalize on the player's enthusiasm and passion for the game, getting them to agree to terms they do not fully comprehend.

Esports players usually sign their first contract between the ages of sixteen to eighteen.⁹⁶ For example, teams inundated Tsang with offers when he was only sixteen.⁹⁷

Teams are not doing anything illegal per se by offering these contracts in high-pressure situations, but athletes are in a challenging situation to fight the contracts in court.⁹⁸ Minors can get the contract voided by disaffirming the contract and giving an oral or written declaration of intent not to fulfill the contract.⁹⁹ If the minor agrees to the contract without the parent as the party on the contract, the parent will not be liable for the minor failing to perform.¹⁰⁰ However, a court may consider the contract valid and legally binding if a parent co-signs.¹⁰¹ Many parents of Esports

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Seth Suncho, *What is an eSports Gamer's Career Length? [and Why do Most Retire Early?]*, ESPORTS LANE, <https://esportslane.com/esports-gamer-career-length/> (last visited Apr. 4, 2023).

⁹⁷ See Smith, *supra* note 13.

⁹⁸ Jonathan Israel, *Minor Details: Child Labor Law and Related Legal Considerations in Esports*, JD SUPRA (Jan. 26, 2021), <https://www.jdsupra.com/legalnews/minor-details-child-labor-law-and-5564901/>.

⁹⁹ *Contracts Signed by Minors: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/contracts-signed-by-minors>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

athletes do not readily understand the sport and may co-sign a contract without a full understanding of the terms and their consequences.¹⁰²

Another option is to get the contract voided on the athlete's status as a minor.¹⁰³ Athletes must go to court to void the contract while still considered a minor for this option to be viable.¹⁰⁴ Once they turn eighteen, there is a set amount of time in which the minor can still get the contract void.¹⁰⁵ The duration varies by state, some being six months, but if the athlete does nothing to revoke the contract by that time, a court might not void the contract.¹⁰⁶ The issue is that athletes sign at sixteen or seventeen and only realize how unfair the contract is later down the road after they turn nineteen or twenty.¹⁰⁷ Teams retain the discretion to exercise terms in the contract, and athletes do not realize how unfair their deal is until they exercise those terms. Finally, athletes could plead duress in court under the circumstances they accepted the deal, but it is a difficult burden to prove.¹⁰⁸

Moreover, some states, like California and New York, have statutes directed at the sports and entertainment industry allowing for judicial approval of contracts with minors.¹⁰⁹ So even if an athlete, while a minor, challenged their contract, a court may hold it enforceable.¹¹⁰ Teams are aware of these laws and have specifically chosen forum selection and choice of law clauses in contracts to take advantage of such laws.¹¹¹ Although the court may still find a way to maneuver

¹⁰² See Alex Andrejev, *How the mother of a pro gamer came to understand the world of esports*, POCONO RECORD (Nov. 17, 2019), <https://www.pocorecord.com/story/lifestyle/family/2019/11/17/how-mother-pro-gamer-came/2272709007/>.

¹⁰³ Israel, *supra* note 98.

¹⁰⁴ *Id.*

¹⁰⁵ UPCOUNSEL, *supra* note 99.

¹⁰⁶ *Id.*

¹⁰⁷ Israel, *supra* note 98.

¹⁰⁸ *See Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See Id.*

¹¹¹ See Dayrel Sewell, *Esports Contracts*, LAW FIRM OF DAYREL SEWELL PLLC, LITIGATION, INTELLECTUAL PROPERTY (Dec. 28, 2020), <https://sewellnylaw.com/esports-contracts/>.

these athletes out of the statute's coverage, it gives Esports organizations a fighting chance to hold athletes to fulfill their contracts.¹¹²

Some organizations institute procedural policies for bargaining with players and require mandatory parental involvement when dealing with minors.¹¹³ But this type of policy is far from the norm.¹¹⁴

Procedural practices by teams also include edging agents out of the picture. Teams tell their players they cannot have agents or require them to part ways with their agent after some time on the team.¹¹⁵ Esports teams discourage players from using representation or force them to get rid of their agents to usurp the role for themselves.¹¹⁶ Esports teams eliminate the contractual oversight agents bring and can make extra profits off their athletes.

Some teams have even set themselves up as exclusive agencies for their players.¹¹⁷ The Esports team TSM FTX owns the licensed talent agency ICON and nearly thirty-eight percent of the players represented by ICON sign with TSM FTX. Teams designating themselves as an agent for players raises impartiality issues.¹¹⁸ Organizations will also not pursue deals and sponsorships in the player's interest if it hurts the team.¹¹⁹ Ultimately, the practice leaves athletes in a tough position to choose between the potential of getting released for having an outside agent or signing with the team they play for as their talent agency.¹²⁰

¹¹² See Israel, *supra* note 98.

¹¹³ Brian J. Murphy, *How Esports Contracts Exploit Players*, ENTMT IP LAW (Apr. 11, 2022), <https://entertainmentiplaw.com/?s=exploit%2Besports>.

¹¹⁴ See *Id.*

¹¹⁵ Smith, *supra* note 13. (revealing that “[a] player was woken up at 2 a.m. and told to sign a doctor waiver,” [his former agent said.] “He had hurt his wrist and the doctor he saw told him to rest. The organization told him to either sign the waiver and fire me, or he’s out. I was fired, and the kid played and got injured.”)

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *Id.*

¹²⁰ *Id.*

b. Substantive Contracting Practices

In addition to overwhelming the athlete into signing the contract, the terms are unfavorable. Esports contracts are confidential and not disclosed for public access; however, one contract has come to light that illustrates the problems in Esports contracts.¹²¹

The contract is of professional Esports player Turner Tenney. Tenney signed with FaZe at twenty in 2018.¹²² In 2019, Tenney brought a lawsuit against the organization, pleading that the contract was "grossly oppressive" and "one-sided."¹²³ Not long after, FaZe's owner came out on social media and even admitted that the contract was "horrible" and "trash."¹²⁴ FaZe came out before the issue and declared the contract unfair, acknowledging at least some culpability. Tenney's contract is an average "starter," which includes a common term in all Esports contracts that designate the player as an independent contractor, not an employee.¹²⁵

i. Length

Tenney signed with FaZe in April 2018 on what he believed to be only a six-month contract but unbeknownst to Tenney, that contract automatically extended for another thirty-six months.¹²⁶ A contract meant to end in late 2018 would end in October 2021.¹²⁷ The length provision in his contract stated the Agreement automatically extended if Tenney met specific requirements such as

¹²¹ *See Id.*

¹²² Mike Snider, 'Fortnite' pro Turner 'Tfue' Tenney sues esports team FaZe Clan over 'oppressive' contract, USA TODAY (May 20, 2019), <https://www.usatoday.com/story/tech/news/2019/05/20/fortnite-pro-tfue-sues-esports-team-over-oppressive-contract/3744368002/>.

¹²³ Andy Chalk, Faze owner admits that Tfue's contract is 'trash,' claims better deals were offered, PCGAMER (May 23, 2019), <https://www.pcgamer.com/faze-owner-admits-that-tfues-contract-is-trash-claims-better-deals-were-offered/>.

¹²⁴ *Id.*

¹²⁵ Nathan Grayson, Popular Twitch Streamer Tfue's Contract With FaZe Leaks As Public Dispute Rages On, KOTAKU (May 23, 2019), <https://kotaku.com/popular-twitch-streamer-tfue-contract-with-faze-leaks-1834987080>.

¹²⁶ 'Fortnite' Gamer Tfue's Contract with FaZe Clan Finally Revealed!, THE BLAST (May 23, 2019), <https://theblast.com/58865/esports-gamer-tfue-faze-clan-contract-revealed/>.

¹²⁷ *Id.*

"participating in tournaments and training sessions with the Team and representing the Team."¹²⁸ Participating in tournaments and training sessions with FaZe would be easy to meet, considering the goal for Esports athletes is competing in tournaments and using training sessions to improve and make it there.¹²⁹ Competing in tournaments reflects a skill level to make it there, hinting that maybe the organization's goal in including the term is to trap good players into longer deals.¹³⁰

ii. Non-Compete

The contract also included a non-compete clause, which stated, "[i]n the event of termination. . . Gamer shall be prohibited from playing video games publicly (online or in live tournaments) or professionally for a period of six (6) months from the effective date of such termination."¹³¹ The clause entirely prevented Tenney from competing in his sport for six months if, in their discretion believed, he committed a material breach of the contract.¹³²

In practice, this clause deprives Tenney of any way to make income for six months until he could sign with another team. Tenney's base compensation was \$2,000 per month, which meant he was making only \$24,000 yearly before taxes—and not fully guaranteed.¹³³ Unlike other sports where players are released, they may sign with another club; Tenney's provision would make him jobless for six months.¹³⁴ Esports athletes tailor their skills to one specific game and cannot simply join a different game for six months. If they could not play for any team in that league, they would have to look for work outside competitive Esports.

¹²⁸ *Id.*

¹²⁹ *See Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See Id.*

¹³⁴ *Id.*

iii. Confidentiality

Tenney had a clause in his contract that punished him considerably if he said something the team prohibited.¹³⁵ The clause stated, "in the event Gamer. . . breaches Gamer's confidentiality obligations under the confidentiality provisions of this Agreement, Gamer hereby agrees to pay Company a cash amount equal to one hundred and twenty-five (125%) percent of monthly compensation, plus all travel costs incurred by Company."¹³⁶ The consequence of the clause costs Tenney a month's salary, and he goes into debt an extra 25%.

However, the clause does more than prevent athletes from discussing team information and strategy; it prevents them from discussing the behind-the-scenes behaviors of teams exploiting players.¹³⁷ Confidentiality clauses help to protect teams from players exposing their abusive practices.¹³⁸ For example, one agent shared that a confidentiality clause prevented players from speaking up after a team won prize money in a tournament, and the organization's owner revoked the players' visas and deported them, keeping all the money.¹³⁹

iv. Sponsorship Approval

Tenney's contract also has a provision that only allowed him to gain a sponsor with FaZe's approval.¹⁴⁰ Tenney would not be allowed to "appear in, sponsor or be sponsored by, or otherwise promote or endorse, directly or indirectly" any product without FaZe's written consent.¹⁴¹ On top of that, FaZe reserved the right to negotiate terms it wanted for any offer that Tenney did receive.¹⁴²

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Tim Rizzo, *Ryan Morrison has more esports horror stories than You can imagine.*, INVENGLOBAL (May 7, 2018), <https://www.invenglobal.com/articles/4961/ryan-morrison-has-more-esports-horror-stories-than-you-ca>.

¹³⁸ *See Id.*

¹³⁹ *Id.*

¹⁴⁰ THE BLAST, *supra* note 126.

¹⁴¹ *Id.*

¹⁴² *Id.*

Along with whom Tenney could sign with for a brand deal, there was a term in his contract that set percentage splits between him and FaZe based on who brought the deal.¹⁴³ If Tenney brought a brand deal to FaZe, he and FaZe would each get a 50% payout.¹⁴⁴ Again, FaZe controlled the ability to choose if that brand deal would move forward.¹⁴⁵ Yet, a brand deal brought by FaZe to Tenney would pay the organization 80% and Tenney only 20%.¹⁴⁶ Compared to other agents, 80% dwarfs the 10% Hollywood talent agents get.¹⁴⁷ By choosing what deal to approve and the stark contrast in payouts, FaZe retained the ability to manipulate Tenney's brand deals for their best interest, not their athletes.¹⁴⁸

2. Working Conditions

It is important to understand the types of injuries esports athletes suffer and how the working conditions on teams then compound the issue.

a. Physical Demands of Esports

Although Esports requires athletes to be seated when competing, they tax their bodies just as much as traditional athletes.¹⁴⁹ Esports players perform as many as 400 micromovements per minute.¹⁵⁰ These repeated movements strain the fingers, neck, wrist, eyes, back, and arms, culminating in injuries like tendinopathy and nerve compression.¹⁵¹ Alongside physical exertion,

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Gregory Leporati, *Aching wrists, early retirement and the surprising physical toll of esports*, THE WASH. POST (Mar. 14, 2022), <https://www.washingtonpost.com/video-games/esports/2022/03/14/professional-esports-athlete-injuries/>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

studies show Esports athletes face similar stress, burnout, and anxiety as those competing in physical sports.¹⁵²

Esports injuries are more subtle than in traditional sports. Esports players do not tear large muscles, like an ACL, or break bones but instead deal with injuries such as carpal tunnel, wrist pain, and lower back aches.¹⁵³ The small-scale nature of the injuries increases the likelihood that athletes play through them until the injury is unbearable.¹⁵⁴ A broken leg stops a basketball player because they cannot run, but an Esports athlete continues to push through the wrist pain.¹⁵⁵

Esports athletes also strain their eyes and ears. There are health costs of staring at a screen; health experts recommend looking away every twenty minutes to take a break.¹⁵⁶ Players already do not get that based on the average game time; for example, an average LCS game lasts nearly thirty-four minutes.¹⁵⁷ Most athletes often go games without getting up, walking, and taking that much-needed break.¹⁵⁸ Players' senses are pushed further by teams trying to emulate official game or tournament environments, pumping loud crowd noise into the room to desensitize players.¹⁵⁹

¹⁵² Charlotte Bateman, *Esport athletes face same level of mental stress as athletes in other sports, study finds*, SKY NEWS (Mar. 30, 2022), <https://news.sky.com/story/esport-athletes-face-same-level-of-mental-stress-as-athletes-in-other-sports-study-finds-12578192>.

¹⁵³ Leporati, *supra* note 149.

¹⁵⁴ *Id.*

¹⁵⁵ *See* Baraniuk, *supra* note 1.

¹⁵⁶ Rachel Nall, *20-20-20 rule: How to prevent eye strain*, MED. NEWS TODAY (July 27, 2022), <https://www.medicalnewstoday.com/articles/321536>.

¹⁵⁷ *LCS Spring 2023 stats*, GAMES OF LEGENDS, <https://gol.gg/tournament/tournament-stats/LCS%20Spring%202023/> (last visited Apr. 6, 2023).

¹⁵⁸ Harrison Jacobs, *Here's the insane training schedule of a 20-something professional gamer*, BUS. INSIDER (May 11, 2015), <https://www.businessinsider.com/pro-gamers-explain-the-insane-training-regimen-they-use-to-stay-on-top-2015-5>.

¹⁵⁹ Pavle Marinkovic, *Inside Esports Teams — Training Professional Gaming Stars*, Predict, MEDIUM (May 27, 2020) <https://medium.com/predict/inside-esports-teams-training-professional-gaming-stars-4ab40190e6d1>.

b. Training Demands

Along with the toll gaming alone places on athletes' bodies, current Esports training and scheduling exacerbate the issue of player health.¹⁶⁰ The mentality of teams is to sign them young, work them hard, win, and move on.¹⁶¹

Players spend long hours gaming and have little available free time.¹⁶² In the OWL, one team manager told the media, "[o]ur daily schedule starts at 10.30 a.m. as we leave for training facilities and return to our houses around 10.30 p.m. to 11.00 p.m., with a possible training extension to midnight; we train six days a week with one day off."¹⁶³ That schedule puts training for the week at 72 hours minimum.¹⁶⁴ Some teams might practice less, with at least 50 hours a week.¹⁶⁵ Athletes practice from Tuesday to Friday and then play matches on Saturdays and Sundays. Mondays are supposed to be designated days off, but teams often use that little free time to make players work, filming promotional content with the players.¹⁶⁶ Teams also control the little free time players might possess through mandatory live streaming, requiring them to fulfill a required number of monthly hours.¹⁶⁷ Teams then take a portion of the player's earnings they made during their stream.¹⁶⁸

¹⁶⁰ Westcott & Fang, *supra* note 9.

¹⁶¹ *Id.*

¹⁶² See Wesley Yin-Poole, *Overwatch pro team manager reveals brutal, 72-hours a week training regime*, EUROGAMER (May 23, 2018), <https://www.eurogamer.net/overwatch-pro-team-manager-reveals-brutal-72-hours-a-week-training-regime>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Jacobs, *supra* note 158.

¹⁶⁶ *Id.*

¹⁶⁷ See Siyuan Sun, *Exploring esports professional players' daily routines*, ANNENBERG MEDIA (Mar. 31, 2022), <https://www.uscannenbergmedia.com/2022/03/31/exploring-esports-professional-players-daily-routines/>.

¹⁶⁸ *Id.*

Moreover, athletes face mental fatigue through poor sleep because of their time-consuming and demanding training schedules.¹⁶⁹ One study found that Esports athletes had a median sleep time of 6.8 hours between 3:43 a.m. and 11:24 a.m., well below the eight to ten hours recommended for professional athletes.¹⁷⁰ Some athletes sleep as little as four hours a night.¹⁷¹

In addition to sleep, the study tested the athletes' moods and found a high correlation between depression and training time.¹⁷² A longer training time duration increased the athlete's likelihood they reported feeling depressed.¹⁷³ Working long hours is strongly associated with depressive symptoms, and Esports athletes consistently average between eight to twelve hours of work a day.¹⁷⁴ Esports athletes are often housed in gaming houses where they live, breathe, sleep, and work.¹⁷⁵ Athletes in these gaming houses play for twelve to fourteen hours a day practicing, which, according to research, the lack of clear distinctions between work and life creates a harmful high-pressure environment for athletes.¹⁷⁶

Under pressure to play more, some players have turned to drugs such as Adderall, Vyvanse, and Ritalin.¹⁷⁷ The turn to substances may be an effort to remedy their lack of sleep and fatigue from the day before, resulting in a constant loop where athletes are perpetually tired and rely on substances.¹⁷⁸ Medical professionals have agreed that a twelve-hour-a-day work week, six days a

¹⁶⁹ Sangha Lee et al., *Sleep Characteristics and Mood of Professional Esports Athletes: A Multi-National Study*, INT'L JOURNAL OF ENV'T RSCH AND PUB. HEALTH (Jan. 14, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7830734/>.

¹⁷⁰ *Id.* Ryan Skidmore, *8 Ways to Sleep Like a Pro Athlete*, SIMPLIFASTER, <https://simplifaster.com/articles/athlete-sleep-habits/> (last visited Apr. 7, 2023).

¹⁷¹ Jacobs, *supra* note 158.

¹⁷² Lee, *supra* note 169.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Lee, *supra* note 11.

¹⁷⁶ *Id.*

¹⁷⁷ Coleman Hamstead, *'Nobody talks about it because everyone is on it': Adderall presents esports with an enigma*, THE WASH. POST (Feb. 13, 2020), <https://www.washingtonpost.com/video-games/esports/2020/02/13/esports-adderall-drugs/>.

¹⁷⁸ *See Id.*

week, is not sustainable and takes a significant toll on the body, but in Esports, that type of schedule is the norm.¹⁷⁹

Worsening the issue for athletes injured on teams is the lack of medical personnel to assist them.¹⁸⁰ Not having medical personnel on staff to help players worsens the problem because it forces athletes to go to their pediatrician or general practitioner, who are unfamiliar with Esports injuries.¹⁸¹ Injuries are not inherently evident to general medical professionals, who then recommend that athletes see specialists.¹⁸² The process can take time, and it did in the case of Bright, whose doctor referred her to a hand specialist, and it took months before she got a proper diagnosis.¹⁸³ In response, some Esports organizations have started to bring in personnel to assist athletes in injury prevention and mitigation.¹⁸⁴ However, even with massage therapists and fitness coaches available, athletes need more workday time to see those specialists.¹⁸⁵ One survey revealed that fifty-six percent of Esports athletes said they suffered from eye fatigue, forty-two percent suffered from neck and back pain, and more than thirty percent suffered from wrist and hand.¹⁸⁶ Yet, only two percent actually sought medical attention.¹⁸⁷

Injuries in Esports would not be as bad if players did not push through them, but with the ever-present fear of being replaced, players push their limits. Teams understand the demand to be on a roster and bring in young talent to push older players, creating a chain reaction of stress.¹⁸⁸ The

¹⁷⁹ *Id.*

¹⁸⁰ See Leporati, *supra* note 149. Baraniuk, *supra* note 1.

¹⁸¹ Leporati, *supra* note 149.

¹⁸² *Id.*

¹⁸³ Baraniuk, *supra* note 1.

¹⁸⁴ Leporati, *supra* note 149.

¹⁸⁵ *Id.*

¹⁸⁶ Joanne DiFrancisco-Donoghue et al., *Managing the health of the eSport athlete: an integrated health management model*, *BMJ OPEN SPORT & EXERCISE MED.* (Jan. 1, 2019), <https://bmjopensem.bmj.com/content/5/1/e000467.citation-tools>.

¹⁸⁷ *Id.*

¹⁸⁸ Lee, *supra* note 11.

young push the old, and the old push the young back, until one gives, which usually means an injury. In a highly competitive environment where players are easily replaceable, and teams use non-guaranteed contracts, it is challenging to stop and rest because they risk losing their job.¹⁸⁹

III. The Hurdles: Employee and Joint Employer Status

A. Asserting Employee Status

Esports players must first address whether they are employees or independent contractors.¹⁹⁰ Esports teams designate athletes in their contract as an independent contractor—a term Tenney had included in his as well.¹⁹¹ In the LCS and OWL, players must sign contracts with the independent contractor term; however, the designation alone does not permanently bind players to that status.¹⁹² The true nature of the relationship is what determines their status.¹⁹³

The NLRB uses the common law agency test to determine if Esports athletes are employees under the NLRA.¹⁹⁴ The NLRB evaluates the relationship considering an entrepreneurial opportunity for gain or loss.¹⁹⁵ Applying the common law factors to teams and leagues would find that Esports athletes are employees, not independent contractors.

¹⁸⁹ See Smith, *supra* note 13.

¹⁹⁰ Chandler Martin, *The Costs of Squadding Up: Determining the Employment Status of High-Profile Esports Streamers*, 22 SAN DIEGO INT'L L.J. 151 (2020).

¹⁹¹ See *Id.* THE BLAST, *supra* note 126.

¹⁹² Johnathan Jordan, *Gamer's Lawsuit Highlights Issues in Esport Player Contracts*, THE TEXAS LAWBOOK (Aug. 20, 2019), <https://texaslawbook.net/gamers-lawsuit-highlights-issues-in-esport-player-contracts/>. (“Simply saying in the contract that the player is an independent contractor does not confer independent contractor status on the player.”).

¹⁹³ *Id.*

¹⁹⁴ SuperShuttle DFW (2019) (listing non-exclusive factors as “(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in the business.”).

¹⁹⁵ See Shimabukuro, *supra* note 39, at 4.

1. Teams

Applying the common law factors toward players and teams would find athletes as employees. Initially, teams control training, scrimmage, and break times for athletes.¹⁹⁶ Moreover, athletes are not engaged in any distinct occupation or business for their teams since the business and mission of an Esports team is competitive video gaming.¹⁹⁷ Esports athletes competing for an Esports team is part of the team's regular business as a professional video game franchise.¹⁹⁸ While players have a unique skill set, they must still undergo mandatory additional training that the team coordinates.¹⁹⁹ The training and scrimmaging are supervised and conducted daily by the team through staff and management.²⁰⁰ Teams supply nearly all equipment, considering many teams require players to live in designated gaming houses or facilities; teams provide gaming stations, conference rooms, kitchens, bedrooms, and anything else players need at these facilities.²⁰¹ Esports contracts vary in contractual length, but using Tenney's as an example, they range from a few months to years, which may favor independent contractor status depending on that player's specific term.²⁰² Athletes are not paid a lump sum at once but monthly and can earn payouts depending on tournament prize money.²⁰³ Many athletes sign their contracts at a young age which raises questions as to whether they understand if they are entering into a master-servant

¹⁹⁶ Aid, *Daily Routine of a Pro-Gamer*, ESPORTS INSIDER (Aug. 12, 2020), <https://esportsinsider.com/2023/03/esports-unions-debate>.

¹⁹⁷ See *Our Mission/Vision*, TEAM SINGULARITY, <https://teamsingularity.com/our-mission-vision/> (last visited Apr. 6, 2023).

¹⁹⁸ See *Id.*

¹⁹⁹ See Westcott & Fang, *supra* note 9.

²⁰⁰ *Id.*

²⁰¹ Laura Byrne, *The changing face of gaming houses and esports training facilities*, ESPORTS NEWS UK (Jan. 16, 2019), <https://esports-news.co.uk/2019/01/16/gaming-houses-esports-facilities/>.

²⁰² THE BLAST, *supra* note 126.

²⁰³ Nicolas Lucente, *How Much Money Do Esports Players Make?*, AIKEN HOUSE (Jan. 15, 2021), <https://www.aikenhouse.com/post/how-much-money-do-esports-players-make>.

relationship, but; athletes would probably consider themselves subservient to the team and its demand—based on players listening to coaches and following team schedules.

Esports athletes do not have much entrepreneurial opportunity for gain or loss to be considered independent contractors. As discussed earlier, teams heavily control their athletes' days which limits their free time.²⁰⁴ Because athletes sign non-competes, live streaming is the only work outside playing for their team that athletes could pursue any economic gain.²⁰⁵ However, teams still exert control by contracting to receive money athletes make while streaming.²⁰⁶ Teams monopolize a player's skillset; if he is not practicing or scrimmaging, he is using his time to make the team money through streaming.

2. Leagues

Applying the common law factors to the LCS and OWL would find that players in both leagues would also be considered employees.

a. LCS

Riot Games, through the LCS, exerts enough control on players in the league for players to be considered employees.²⁰⁷ The LCS controls players by establishing mandatory ages and roster restrictions on players.²⁰⁸ In addition, the LCS retains sole and absolute discretion overseeing and deciding multiple issues, including dealing with punishment, venue, game procedures, coaching, and player eligibility.²⁰⁹ The LCS decides payment, benefits, the location of the tournament, and instrumentality used at tournaments.²¹⁰ The league provides necessary instruments for players to

²⁰⁴ See Sun, *supra* note 167.

²⁰⁵ See THE BLAST, *supra* note 126.

²⁰⁶ *Id.*

²⁰⁷ See 2022 LCS Rule Set, RIOT GAMES (Jan. 14, 2021),

[https://assets.contentstack.io/v3/assets/bltad9188aa9a70543a/bltd41c23dd896046ca/62bd1d0f74808b4f7b34a04c/2022_LCS_Rule_Set_\(v22.1\).pdf](https://assets.contentstack.io/v3/assets/bltad9188aa9a70543a/bltd41c23dd896046ca/62bd1d0f74808b4f7b34a04c/2022_LCS_Rule_Set_(v22.1).pdf).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

perform their jobs, such as headsets, monitors, tables, chairs, and even hand warmers.²¹¹ LCS rules state that players must exclusively use equipment provided for competing.²¹² Like with Esports teams, players are not engaged in any distinct occupation for leagues but are carrying out their regular business. League rules also dictate the duration of time the season runs for the athlete and team roster sizes.²¹³ Like teams that designate players as independent contractors, LCS rules state that members on a team roster may not be employees of Riot Games.²¹⁴ The LCS overall supervises Esports athletes through the league rules by providing instructions and procedures on everything players must do in and outside a league game.²¹⁵

b. OWL

Like the LCS, players in the OWL would be considered employees of the OWL and Blizzard Entertainment.²¹⁶ In the OWL, the league dictates a mandatory minimum salary, health insurance requirement, savings plans requirement, and other benefits which players must receive through their teams.²¹⁷ Along with salary, OWL requires teams to pay players for any tournament winnings.²¹⁸ The OWL mandates league-wide training for all players during the season.²¹⁹ Additionally, the OWL also decides eligibility and media obligations.²²⁰ Like the LCS rules, the OWL rules leave disciplinary power in the league's control. The OWL provides exclusive equipment for players that they must use and also restricts clothing players may wear during

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *See Summary of Official Rules and Code of Conduct: 2020 Season, OVERWATCH LEAGUE*, https://bnetcmsus-a.akamaihd.net/cms/page_media/wg/WG2YO9KJ0I5I1587056527743.pdf (last visited Apr. 5, 2023).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

matches.²²¹ Like the LCS, OWL rules state that the players should not be considered league employees.²²² The OWL exerts nearly the same control as the LCS and potentially even more, going as far as overseeing housing for players too.²²³ Teams' and players' behavior is dictated by what the OWL permits or requires them to do.²²⁴

c. Economic Prism View for Leagues

Looking through the prism of entrepreneurial opportunity, from the league perspective, LCS and OWL represent the pinnacle of competition and profit maximization for players of each game. Outside of playing in official league games, players practice with their teams. Furthermore, players cannot leverage their skills in another league in their free time due to the commitment to just one league. Beyond streaming, they do not have room for entrepreneurial gain. Leagues also exert control over player streaming, implementing and requiring players to follow streaming policies.²²⁵ Lastly, because the leagues retain discretion over punishment and own the property rights of the game, if a league decides that a player violated their rules and bans them from the game—the intellectual property itself—then a player's ability for any economic gain outside the league falls to zero.²²⁶

B. Asserting Joint Employer Status

Although athletes can show employee status in the leagues, the leagues may assert they are not the athletes' direct employers and, thus, they are not obligated to negotiate in unionization efforts. The joint employer rule under the NLRA fixes the issue by asserting that the league can also be

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* See *Roster Construction Rules for the 2023 Overwatch League Season*, OVERWATCH LEAGUE (Oct. 11, 2022), <https://overwatchleague.com/en-us/news/roster-construction-rules-for-the-2023-overwatch-league-season>.

²²⁵ See RIOT GAMES, *supra* note 207. See OVERWATCH LEAGUE, *supra* note 216.

²²⁶ See RIOT GAMES, *supra* note 207. See OVERWATCH LEAGUE, *supra* note 216.

considered an employer with the teams. If entities are deemed joint employers, they must bargain with the union, and both become liable for unfair labor practices by the other.²²⁷

Under the proposed rule, the league and teams are joint employers because they codetermine essential terms and conditions of employment. Essential terms include wages, benefits, scheduling, hiring and discharging, supervision, and discipline.²²⁸ The proposed rule also extends terms to include workplace health, safety, and means or methods of work performance.²²⁹ League rules mandate minimum salary and health benefits to players.²³⁰ Teams supervise daily practices and scrimmages, and leagues supervise tournaments and official games. Teams are responsible for deciding whom to sign and release, and leagues decide the protocol for free agency.²³¹ The leagues retain disciplinary authority for violations of the league's code of conduct, but teams also can punish players for misconduct.²³² For example, as seen in the Tenney contract, fining players for violating terms in the contract.²³³ Leagues control means of work performance by dictating official tournament and game conditions for what players can and cannot do and with what equipment.²³⁴ Teams control workplace health and safety by providing gaming houses for players.²³⁵

Moreover, possessing the authority to control is sufficient to establish status as a joint employer; the entity does not need to exercise the control.²³⁶ Here, the league can choose when a

²²⁷ Smith, *supra* note 88.

²²⁸ Jonathan J. Spitz et al., *Browning Ferris Returns: NLRB Again Proposes New Broader Rule for Determining Joint Employer Status*, JACKSON LEWIS (Sept. 7, 2022), <https://www.jacksonlewis.com/publication/browning-ferris-returns-nlr-again-proposes-new-broader-rule-determining-joint-employer-status>.

²²⁹ Goldberg & Keith, *supra* note 87.

²³⁰ 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>.

²³¹ See Poole, *supra* note 162.

²³² See RIOT GAMES, *supra* note 207. See OVERWATCH LEAGUE, *supra* note 216.

²³³ THE BLAST, *supra* note 126.

²³⁴ See RIOT GAMES, *supra* note 207. See OVERWATCH LEAGUE, *supra* note 216.

²³⁵ See Lee, *supra* note 11.

²³⁶ Spitz, *supra* note 228.

player has violated a league rule and when to punish the player.²³⁷ The leagues also use an intermediary entity by exerting control through teams to enforce certain league rules.²³⁸ The game publishers, through their leagues, can be considered joint employers through codetermining essential matters, reserving the authority to control, and using teams as intermediaries to exercise control.²³⁹

IV. The Union Solution

After establishing employee status against teams and leagues, Esports athletes can address the issues in their respective leagues by creating a bargaining unit²⁴⁰ and negotiating a CBA between the leagues, teams, and players. This section examines how athletes can negotiate a CBA to address the issues in Esports compared to what has been proven achievable and feasible by NFLPA through their CBA.²⁴¹

Under the NLRA, the employer and bargaining unit for the union must meet at reasonable times to bargain in good faith over essential terms of employment such as wages, hours, vacation time, and safety practices.²⁴² Parties do not have to reach an agreement or compromise on terms but must bargain in good faith.²⁴³ The duty of good faith bargaining requires them to participate actively in negotiations with a genuine intent to reach an agreement.²⁴⁴

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Comments on the Proposed Rule were due in December 2022. See *Rulemaking Docket: Joint Employer 2022*, REGULATIONS.GOV, (Sept. 7, 2022), <https://www.regulations.gov/docket/NLRB-2022-0001>.

²⁴⁰ The composition of the bargaining unit is beyond the scope of this paper; however, it is possible the current player association officers become members of the unit.

²⁴¹ The scope of this section focuses on the issues facing Esports athletes discussed in this paper. There are many other issues a CBA for Esports players would contain.

²⁴² *Basic guide to the National Labor Relations Act - General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, *supra* note 48.

²⁴³ *Id.*

²⁴⁴ *Id.*

Moreover, refusing to bargain collectively by either party with the other is considered an unfair labor practice.²⁴⁵ If there is no agreement after good faith efforts to reach one, an employer can declare an impasse and present a final offer.²⁴⁶ However, the union does not have to accept that offer and can file an unfair labor practice charge if they do not believe the employer bargained in good faith.²⁴⁷

A. Predatory Contracting Practices

Negotiations for a CBA allow Esports players to address procedural and substantive issues in contract negotiations.

1. Procedural Solutions

The procedural issues the bargaining unit can address are coercive time windows; uniform standard contracts; preventative measures against agents; and safeguards to get parents involved.

Initially, coercive time frames are a tactic used by teams to get young players to enter contracts without fully understanding the ramifications of acceptance. While the NFL CBA does not have any exact provision on time frames for acceptance, Article 7 sets guidelines on rookie contracts and requires teams to use a standard form player contract for rookies.²⁴⁸ Because time frames are used mainly on new players, the bargaining unit should negotiate to include specific terms designated for incoming rookie players. The union can negotiate certain minimums for incoming players offered contracts, such as a specific minimum time before the players must respond. Furthermore, negotiating a required standard contract for incoming Esports players sets expectations and allows players time in advance to review and understand all terms before signing.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Article 7, Section 3, OVER THE CAP*, <https://overthecap.com/collective-bargaining-agreement/article/7/section/3>. (last visited Apr. 5 2023).

Standardized contracts also allow players to negotiate to protect all players simultaneously from coercive substantive terms.

Article 67 of the NFL CBA lists the governing law for the agreement.²⁴⁹ Since teams have been able to take advantage of minor entertainment laws in certain states, players can bargain for all contracts to be interpreted under one state's law. Moreover, because teams throughout the country have different jurisdictional laws, choosing one law to govern the agreement provides expectations for how much time an athlete has after turning eighteen to keep the contract voided.

The bargaining unit can also bargain to stop teams from precluding agent involvement in contract negotiations. Article 48 of the NFL CBA lists that NFLPA will regulate agents and certify them for representation.²⁵⁰ The article also allows players to represent themselves in a contract negotiation.²⁵¹ Esports athletes can similarly adopt a clause allowing athletes to self-represent or sign with an agent, and teams cannot force players to depart with their agents or sign with them. They could include a term allowing a player to sign with a team for representation, but only if the player chooses and is not forced. The bargaining unit can decide if agents need to be specifically certified by the union, like in the NFL, or list minimum requirements in the CBA that an agent must have, but regardless both options set up a mechanism for qualifying agents who deal with players. Allowing players to choose between themselves, an agent, or a team satisfies all parties since teams still retain their ability to sign players, and agents do not have to worry about getting edged out by teams.

²⁴⁹ *Article 67*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/67>. (last visited Apr. 5 2023).

²⁵⁰ *Article 48*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/48>. (last visited Apr. 5 2023).

²⁵¹ *Id.*

Additionally, only a few teams currently choose to get parents involved when teams offer a minor a contract.²⁵² Esports athletes can bargain to ensure that every team must involve parents in the contract process when dealing with minors. While the NFL CBA has no articles about minor involvement, it does have Article 4, which includes a term on notice to different parties.²⁵³ Here, Esports athletes should bargain for mandatory notice to parents when teams offer contracts to minors, and parents must then confirm they received the notice.

2. Substantive Solutions

A bargaining unit can also negotiate specific clauses in the contract to protect players from unfavorable terms.

The bargaining unit can address restrictions on sponsorship. Article 51 of the NFL CBA prohibits a team from unreasonably refusing to allow a player to endorse a product of their choice.²⁵⁴ Esports athletes can include a similar provision in their CBA.

A CBA also lists minimum salaries, bonuses, fines, and penalties. Article 42 of the NFL CBA lists the authority of a club to discipline players and the fine amounts.²⁵⁵ Instead of a 125% fine for confidentiality, the bargaining unit can attempt to negotiate to reduce it and increase the percent fine for each subsequent infraction—working toward a 125% percent on the third or fourth infraction. Ideally, the goal would be to eliminate a confidentiality clause. Still, the issue of confidentiality agreements will be highly contested in the negotiation because of the extensive protections it affords teams. The NFL CBA only discusses confidentiality in terms of arbitration

²⁵² TEAM SINGULARITY, *supra* note 197.

²⁵³ *Article 4, Section 5*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/4/section/5>. (last visited Apr. 5, 2023).

²⁵⁴ *Article 51*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/51>. (last visited Apr. 5, 2023).

²⁵⁵ *Article 42*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/42>. (last visited Apr. 5, 2023).

for disputes.²⁵⁶ While the NFLPA does not guide the issue, the duty to bargain in good faith is leverage for Esports players. Esports players must establish that confidentiality is a mandatory condition of employment and that duty of good faith and desire to reach an agreement is required.²⁵⁷ With this duty, the bargaining unit has a shot at reducing fines and trying to change the language of what is held confidential. If teams refuse and declare an impasse, Esports athletes can file a charge with the NLRB and have them decide how to move forward.

Moreover, if teams feel non-compete clauses are essential to the sport. In that case, the bargaining unit can negotiate for a shorter period, so players are not unemployed for half a year. However, recently, the Federal Trade Commission proposed a new rule which would classify non-competes as an unlawful practice, which means it may be a term the bargaining unit might win on without much pushback.²⁵⁸

B. Working Conditions

CBA negotiations will also allow players to address issues related to their health and working conditions. The rigor of an Esports athlete's training routine requires them to push their bodies daily to an extreme, resulting in burnout, injury, and ultimately short careers.

The bargaining unit can negotiate for more frequent breaks to ensure their eyes can rest. While traditional players do not need to worry about screen time limits, traditional players do have to worry about exhaustion from the heat outside. One example in the NFL CBA is Article 23, which discusses allowances and limitations on training camp practices, including how long players may

²⁵⁶ *Article 15*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/15>. (last visited Apr. 5, 2023).

²⁵⁷ *Basic guide to the National Labor Relations Act - General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, supra note 48.

²⁵⁸ Holly Vedova, *FTC to Host Public Forum Examining Proposed Rule to Ban Noncompete Clauses*, FED. TRADE COMM'N (Feb. 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-host-public-forum-examining-proposed-rule-ban-noncompete-clauses>.

be at the facility and on the field.²⁵⁹ Similarly, Esports athletes should negotiate to impose limits on their practice schedule. Instead of multi-hour gaming blocks without a break, athletes should negotiate to receive a break every two games for five to ten minutes. A standard method to reduce eye strain is the 20-20-20 rule which requires taking a break every twenty minutes to look at something twenty feet away for at least twenty seconds.²⁶⁰ Although a break every twenty minutes is not feasible, providing their eyes and mind a break every two games is reasonable and may even help performance.

Likewise, it may be challenging to negotiate precisely how many hours a day players must train, but they may still be able to negotiate an upper limit over a week. Article 35 in the NFL CBA provides for days off for players, and instead of mandating specific time off for all teams, it simply guarantees a certain number of days off and leaves teams discretion to choose how to give it.²⁶¹ For example, the bargaining unit could negotiate to limit teams to practice at most sixty hours in one week, ten hours in one day, and at least one guaranteed day off a week.

A CBA allows players and management to agree on banned substances, protecting both players from themselves and their teams. The NFL and NFLPA decide what substances players are prohibited from using.²⁶² A way to combat the recent uptick of Esports players abusing substances would be for all the parties to collaborate on a list of prohibited substances, procedures for testing, and punishments for infractions.

²⁵⁹ *Article 23, Section 7*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/23/section/7> (last visited Apr. 6, 2023).

²⁶⁰ *Knowing When To Stop: Being Mindful Of Screen Time When Gaming Online*, THEXBOXHUB (July 28, 2021), <https://www.theboxhub.com/knowning-when-to-stop-being-mindful-of-screen-time-when-gaming-online/>.

²⁶¹ *Article 35*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/35> (last visited Apr. 6, 2023).

²⁶² Marca English, *NFL PES Tests: What substances does the NFL test for?*, MARCA (Jan. 20, 2022), <https://www.marca.com/en/nfl/2022/01/21/61e9e660e2704ef6618b456c.html>.

The NFL CBA can also guide on how to structure medical care for Esports athletes. Article 39 in the NFL CBA lists rights for medical care and treatment for players and requires teams to have at least one board-certified orthopedic surgeon as one of the team physicians.²⁶³ Currently, most Esports athletes go to their general practitioners, who struggle to diagnose their issues, resulting in prolonged recovery periods. Esports athletes should mandate teams to have at least one medical professional on staff to diagnose injuries.

Relatedly, another issue facing athletes is playing through injuries because of the fear of being cut or how long the recovery process might be. Article 45 in the NFL CBA has an injury protection article that provides payouts for players who have suffered an injury and cannot play.²⁶⁴ A similar clause in Esports reassures players that they are still guaranteed some money if they get their injury checked and miss games. It disincentivizes them to worsen injuries by playing through them, fearing being released and without anything.

V. Conclusion

The current environment of Esports is ripe with player exploitation, and a union is the best way for athletes to solve the problem. Esports athletes can prove their teams mislabel them in contracts and rightfully should be considered employees under the common law test used by the NLRB. The proposed joint employer rule makes it mandatory for teams and the league to negotiate with the union. During negotiations, Esports athletes can follow the examples of other NLRB-certified player associations, such as the NFL, and create a CBA that protects them from bad contracts and

²⁶³ *Article 39*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/39> (last visited Apr. 6, 2023).

²⁶⁴ *Article 45*, OVER THE CAP, <https://overthecap.com/collective-bargaining-agreement/article/45> (last visited Apr. 6, 2023).

harsh working conditions. Esports athletes will soon be in the best position they have ever been to fight for unionization.