
Fall 5-27-2020

Workers of the Gaming World, Unite! The Uncertain Future of the Video Game Industry in the Aftermath of AB 5

Natalie Kalbakian

LMU Loyola Law School, Los Angeles, natalie.kalbakian@lls.edu

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Natalie Kalbakian, *Workers of the Gaming World, Unite! The Uncertain Future of the Video Game Industry in the Aftermath of AB 5*, 40 Loy. L.A. Ent. L. Rev. 351 (2020).

Available at: <https://digitalcommons.lmu.edu/elr/vol40/iss3/2>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

WORKERS OF THE GAMING WORLD, UNITE! THE UNCERTAIN FUTURE OF THE VIDEO GAME INDUSTRY IN THE AFTERMATH OF AB 5

*Natalie Kalbakian**

The video game industry is a rapidly growing and lucrative entertainment market. It has played an immense role in shaping the consumption of media. However, the reality of working conditions for the industry labor force largely behind these innovations is much less impressive. This Note examines the video game industry as a case study for the potential impact of California Assembly Bill 5 (“AB 5”) on industries that heavily rely on independent contractors with specialized skill sets.

First, this Note advances the argument that the video game industry has engaged in regulatory arbitrage by capitalizing on the loopholes created as a result of ambiguities in California employment classification laws. Since the three-prong “ABC” test from *Dynamex Operations West, Incorporated v. Superior Court of Los Angeles* introduces a stronger presumption of employee status, AB 5 will compel video game companies to adjust their policies to avoid misclassification penalties. Next, this Note predicts that widespread reclassification will bolster the movement to unionize industry workers. Lastly, this Note contends that the social and political costs of misclassification will soon outweigh its short-term gains for companies that could better serve their shareholders’ interests by operating under the theory of corporate social responsibility (“CSR”). As such, it is no longer sustainable for companies to tolerate strikes over mass layoffs, unflattering press coverage over “crunch” periods, worker burnout, and high turnover rates.

* J.D. Candidate at Loyola Law School, Los Angeles, Class of 2021. The author wishes to thank Dean Michael Waterstone for helping develop the topic and offering his feedback. She would like to express her gratitude to Professor Elizabeth Pollman, Professor Cornelia Dai, Professor Brian Walton, and Professor Robert Brain for sharing expertise in their respective fields. She would also like to thank her parents, Mesrob and Melina Kalbakian, sister, Arminé Kalbakian, and friends for their love, support, and unwillingness to read earlier drafts. Lastly, she would like to acknowledge her friend Eda Haroutounian for introducing her to the world of video game crunch and the *Loyola of Los Angeles Entertainment Law Review* editorial board and staff for their efforts.

I. INTRODUCTION

A newly hired worker at Sledgehammer Games receives a symbolic challenge coin to memorialize his place in the company as a new team member.¹ The token represents the company's appreciation for the worker's creative contributions and is an investment in the worker's career development.² While Sledgehammer Games has a positive reputation in the video game industry for fostering a healthy work environment and a low turnover rate, this experience is uncommon among the industry's workers.³ Often dissatisfied with their working conditions, most workers for other companies receive no more than token concessions.⁴ The video game industry presently ranks as one of the most profitable sectors of entertainment at approximately \$131 billion, and is estimated to potentially generate up to \$300 billion in profits in the near future.⁵ The industry has found a home in California, where up to \$32 billion of its gross domestic product is apportioned.⁶

The adoption of the video game industry into the mainstream and its expansion into new avenues of revenue has been shouldered by company workers whose skills are paramount to the production of quality games.⁷

1. Ryan Fleming, *Inside Sledgehammer Games and the Biggest Gamble You Never Knew About*, DIGITAL TRENDS (Feb. 16, 2013, 1:00 PM), <https://www.digitaltrends.com/gaming/inside-sledgehammer-games-and-the-biggest-gamble-you-never-heard-of/> [https://perma.cc/CJ4X-VZJ7].

2. *Id.*

3. *Id.*; Alana Semuels, 'Every Game You Like Is Built on the Backs of Workers.' *Video Game Creators Are Burned Out and Desperate for Change*, TIME (June 11, 2019), <https://time.com/5603329/e3-video-game-creators-union/> [https://perma.cc/N6ZM-JXFG].

4. Semuels, *supra* note 3.

5. Liz Lanier, *Video Games Could Be a \$300 Billion Industry by 2025 (Report)*, VARIETY (May 1, 2019, 2:00 PM), <https://variety.com/2019/gaming/news/video-games-300-billion-industry-2025-report-1203202672/> [https://perma.cc/28QX-A6FC]; *Investing in the Soaring Popularity of Gaming*, REUTERS (June 13, 2018, 7:33 AM), https://www.reuters.com/sponsored/article/popularity-of-gaming?utm_source=reddit.com [https://perma.cc/RLA2-D699].

6. These estimates are based on reports in 2018. Matt Fernandez, *California Risks Losing Its Lead in the Video Game Industry*, VARIETY (Feb. 13, 2018, 5:26 PM), <https://variety.com/2018/digital/news/milken-institute-california-video-game-1202697483/> [https://perma.cc/9VKR-QYT8].

7. Ben Gilbert, *Grueling, 100-hour Work Weeks and 'Crunch Culture' Are Pushing the Video Game Industry to a Breaking Point. Here's What's Going On.*, BUSINESS INSIDER (May 9,

Behind the quick turnaround for every new change or in-game item ordered by executives are developers who suffer the physical, mental, and social strains induced by perpetual periods of overtime, referred to as “crunch.”⁸ During these periods of “crunch,” workers are required to complete additional, unpaid hours—sometimes up to eighty hours per week—to finish work or improvements on a game by publishers’ deadlines.⁹ Before the latest “shift in revenue sources,”¹⁰ “crunch” periods only impacted employees in the weeks leading up to a game’s release date.¹¹ But the increased demands for improvements delay release dates and extend “crunch” periods throughout the year.¹² While executives are best positioned to reap the profits from this labor, the current gaming business model is structured such that video game workers are treated as essentially disposable.¹³ Even after contributing countless “crunch” hours, they are vulnerable to periodic layoffs.¹⁴

Part II of this Note examines the impact of the “ABC” employment classification test formulated by the California Supreme Court in

2019, 7:13 AM). <https://www.businessinsider.com/video-game-development-problems-crunch-culture-qa-rockstar-epic-explained-2019-5> [<https://perma.cc/2U93-77W8>].

8. Ilker Koksak, *Video Gaming Industry & Its Revenue Shift*, FORBES (Nov. 8, 2019, 5:50 PM), <https://www.forbes.com/sites/ilkerkoksak/2019/11/08/video-gaming-industry—its-revenue-shift/#369c5ed3663e> [<https://perma.cc/YER2-5ZJX>]; Semuels, *supra* note 3. The release of the game Red Dead Redemption 2 reportedly required Rockstar Games employees to work 100 hours a week. Leila McNeill, *Video Game Workers See Power in a Union*, THE NEW REPUBLIC (May 15, 2019), <https://newrepublic.com/article/153892/riot-game-workers-union> [<https://perma.cc/D2AR-DYXU>].

9. Semuels, *supra* note 3; McNeill, *supra* note 8.

10. The industry has employed new strategies to monetize the gaming experience including in-game purchases for free online games and constant updates. Koksak, *supra* note 8.

11. Semuels, *supra* note 3.

12. *Id.*; Jason Schreier, *Video Game Delays Cause More Crunch*, KOTAKU (Jan. 17, 2020, 12:45 PM), <https://kotaku.com/game-delays-cause-more-crunch-1841065204> [[HTTPS://PERMA.CC/B9ML-9Z7L](https://perma.cc/B9ML-9Z7L)].

13. *See, e.g.*, Gary Putka, *Company Insiders Are Selling Stock During Buyback Programs and Making Additional Profits When Stock Prices Jump. And It’s legal.*, WASHINGTON POST (Nov. 6, 2019, 10:00 AM), https://www.washingtonpost.com/business/economy/company-insiders-are-selling-stock-during-buyback-programs-and-making-additional-profits-when-stock-prices-jump-and-its-legal/2019/11/06/fc592f58-e493-11e9-a331-2df12d56a80b_story.html [<https://perma.cc/X338-R9CY>]; Semuels, *supra* note 3.

14. Semuels, *supra* note 3.

Dynamex Operations West, Incorporated v. Superior Court of Los Angeles and adopted in California Assembly Bill 5 (“AB 5”) on the gaming business model for California-based companies.¹⁵ Part II also addresses the limitation imposed by the “ABC” test on the video game industry’s ability to use “regulatory arbitrage,” a “planning technique” that “exploits the gap between the economic substance of a transaction and its legal or regulatory treatment,” as a cost-saving mechanism.¹⁶ Part III conceptualizes the unionization process for re-classified video game industry employees by using examples of Hollywood guilds, and outlines the potential stabilizing benefits of unionization for both employees and employers. While the future for organized independent contractor efforts is less certain, this Note offers potential options for video game workers that remain independent contractors even under the new classification.¹⁷ Part IV applies the stakeholder theory of corporate social responsibility (“CSR”) to the video game industry and offers the potential loss of social license in California as a compelling motivation for corporate shareholders to advocate for compliance with AB 5.¹⁸

II. THE VIDEO GAME INDUSTRY’S ROLE IN THE GIG ECONOMY

Employee reclassification will have immense financial ramifications for video game companies.¹⁹ Apart from the direct impact on profitability, widespread cases of misclassification in a single industry will further accentuate the problems impacting the employee workforce. Specifically, a larger pool of employees will lead to higher scrutiny over “crunch” development periods and other prevalent workplace issues in the video game

15. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 8 (Cal. 2018); Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019).

16. See generally *Dynamex*, 416 P.3d 1; Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010); Elizabeth Pollman, *Tech, Regulatory Arbitrage, and Limits*, 20 EUR. BUS. ORG. L. REV., 567 (2019).

17. Naomi B. Sunshine, *Labor Rights for Platform Workers: A Response to Social Change’s 2016 Symposium*, 41 HARBINGER 241, 242–244 (2016) (outlining the challenges for independent contractors).

18. Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 BUS. LAW. 337, 348 (2018); see generally Pollman, *supra* note 16, at 567–68.

19. Alison Griswold, *How Much It Would Cost Uber and Lyft If Drivers Were Employees*, QUARTZ (June 14, 2019), <https://qz.com/1643263/the-cost-to-uber-and-lyft-if-drivers-were-employees/> [<https://perma.cc/2337-SVKV>].

industry. The way in which tests for the legal designation of employee status will apply to video game workers must be resolved as a preliminary issue.

A. Impact of the Dynamex “ABC” Test on Video Game Worker Classification

The California Supreme Court articulated the most recent iteration of an employee classification test in *Dynamex*.²⁰ The court emphasized the implications of its decision for workers, competitor businesses, and the general public.²¹ While the label assigned to a particular worker is certainly relevant to the classification analysis insofar as it relates to party expectations, classification tests have long treated employer behavior and the nature of the relationship as more determinative factors.²²

The court in *Dynamex* sought to reach a “resolution of the employee or independent contractor question” for the purposes of California wage orders.²³ A class of courier and delivery drivers claimed that their employer, Dynamex Operations West, Incorporated, had misclassified them as independent contractors.²⁴ The defendant company originally classified its workers as employees, but “converted all of its drivers to independent contractors after management concluded that such a conversion would generate economic savings for the company” after 2004.²⁵ The plaintiff class alleged that the defendant violated the Industrial Welfare Commission Wage Order No. 9, which applied to their industry and provisions of the Labor Code.²⁶ The court discussed definitions of key terms in dispute. Wage Order No. 9

20. *Dynamex*, 416 P.3d at 4.

21. *Id.*

22. See Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 365 (2016).

23. *Dynamex*, 416 P.3d at 5 (stating that wage orders “impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees.”).

24. *Id.*

25. *Id.* at 8.

26. *Id.* at 5.

defines the term “employ” to mean “to engage, suffer, or permit to work.”²⁷ According to the order, an employer is an individual who “directly or indirectly . . . employs or exercises control over the wages, hours, or working conditions of a person.”²⁸ The order did not provide guidance for the definition of an “independent contractor,” but the language indicates that only employees are covered.²⁹

The “suffer or permit to work” definition of “employ” was directly addressed in *Martinez v. Combs*.³⁰ The court traced back the meaning of the “employ, suffer or permit” to child labor laws.³¹ According to the court, the definition was meant to capture “irregular working arrangements the proprietor of a business might otherwise disavow with impunity” in order to avoid liability.³² The *Martinez* court concluded that there were “three alternative definitions of employment for purposes of the wage order: ‘(a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship.’”³³ The *Dynamex* court sought to answer the classification question under the “‘suffer or permit to work’ definition of ‘employ’” in the applicable wage order.³⁴

Prior to the court’s decision in *S. G. Borello & Sons, Incorporated v. Department of Industrial Relations*, courts relied on a common law “control of details” test and used factors lifted from the Restatement Second of Agency to resolve the employee or independent contractor question.³⁵ In

27. *Id.* at 13.

28. *Id.*

29. *Id.* at 14.

30. 231 P.3d 259, 278 (Cal. 2010).

31. *Dynamex*, 416 P.3d at 21.

32. *Id.*

33. *Id.* at 23 (quoting *Martinez*, 231 P.3d at 278).

34. *Id.* at 7.

35. *Id.* at 15 (listing the following Restatement factors: “(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the

Borello, the employer, a cucumber grower, alleged that his hired farmworkers were independent contractors because they “(1) were free to manage their own labor . . . , (2) shared the profit or loss from the crop, and (3) agreed in writing that they were not employees.”³⁶ The court found that the lack of direct supervision was not dispositive since the employer “retain[ed] all necessary control over a job which can be done only one way.”³⁷ The assertion that the farmworkers engaged in an entrepreneurial venture was rejected.³⁸ The court concluded that the farmworkers were “employees as a matter of law” under the Workers’ Compensation Act.³⁹ The 1989 *Borello* decision retains its significance in resolving certain classification questions.⁴⁰

The *Dynamex* court acknowledged the advantages of a multifactor standard such as the economic realities test or the *Borello* factors.⁴¹ A multifactor standard “calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis”⁴² However, because of the opportunities for businesses to “evade . . . fundamental responsibilities under wage and hour law,” the California Supreme Court ultimately decided to adopt a test “most consistent with the history and purpose of the suffer or permit to work standard.”⁴³ The court opted for a “simpler, more structured test for distinguishing between employees and independent contractors.”⁴⁴ The adopted “ABC” test includes the following factors:

method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.”).

36. *Id.*

37. *Id.* at 16.

38. *Id.*

39. *Id.* at 18.

40. *Id.* at 20.

41. *Id.* at 34.

42. *Id.*

43. *Id.* at 34–35.

44. *Id.* at 34.

(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.⁴⁵

Under the ABC test, an employer has the burden of rebutting the presumption that a worker is an employee and must prove each factor to do so.⁴⁶ Although employer advocates have expressed concerns over the supposed novelty of the ABC test, it evokes familiar factors that were already part of established California law.⁴⁷ Nonetheless, the test introduced a more formidable presumption of employee status for which employers may not have sufficient notice.⁴⁸

The ABC test allows for more uniform decisions to be made across different job titles in the video game industry. The classification of workers, including level designers, content designers, art and animation game designers, creative directors, writers, engineers/programmers, visual artists, audio artists, and testers will need to be reevaluated based on work conditions. The previously used multifactor test under which factors were weighed differently by each court lent itself to less certain outcomes.⁴⁹ In contrast, the ABC test promises "greater clarity and consistency" for an industry workforce with such a diverse range of talent and responsibility.⁵⁰ For example, in *Lawson v. Grubhub*, the plaintiff's attorneys argued that although the

45. *Id.* at 7.

46. Cornelia Dai, *Dynamex Operations West, Inc. v. Superior Court: Employees' Perspective*, 32 CAL. LAB. & EMP. L. REV. 2, 4 (2018).

47. See, e.g., John Skousen, *New ABC Test For Independent Contractors Sends California Employers Reeling*, FISHER PHILLIPS (July 2, 2018), <https://www.fisherphillips.com/resources-newsletters-article-new-abc-test-for-independent-contractors-sends> [https://perma.cc/2CLC-5XBX]; Dai, *supra* note 46, at 3.

48. *Dynamex*, 416 P.3d at 40 (stating that the court's interpretation is "faithful to its history and to the fundamental purpose of the wage orders.").

49. Dai, *supra* note 46, at 2; *Dynamex*, 416 P.3d at 40.

50. Dai, *supra* note 46, at 2; *Dynamex*, 416 P.3d at 40.

plaintiff was found to have been properly classified as an independent contractor under the *Borello* test, the Grubhub company would have failed to establish the final prong of the *Dynamex* test.⁵¹ A similar failure by employers to prove even a single prong of the test would yield favorable outcomes for video game workers seeking employee status in the future.

1. Prong A: The Familiar Element of Control

The first prong of the test to prove that a video game worker is in fact an independent contractor essentially adopts the “control” factor from the *Borello* standard.⁵² Video game companies will need to demonstrate that the worker is “free from [their] control and direction . . . in connection with the performance of the work.”⁵³ Courts often consider the source of the tools used, whether there was a requirement to work in the office, and the level of control over the manner in which tasks are completed.⁵⁴ This prong is often misinterpreted as a requirement that the hiring entity not only control the end product, but also the ongoing process of writing, designing, or programming.⁵⁵ However, courts in California have established that control does not require literal supervision, but rather the right or opportunity to do so.⁵⁶ The opinion in *Borello* demonstrated that courts were unwilling to accept an employer’s thinly veiled claims that they did not literally supervise their agricultural workers. A company should therefore still be subject to scrutiny

51. Plaintiff-Appellant’s Reply Brief at *16–18, *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018) (No. 18-15386), 2019 WL 1096489. The plaintiff’s attorneys maintain that Grubhub could not satisfy Prong C because the plaintiff was not running his own delivery service “catering to his own customers, negotiating rates of pay, and deciding which jobs to accept from which customers.” Richard Meneghello, 3 *Takeaways From Grubhub Plaintiff’s Opening Appeals Brief*, FISHER PHILLIPS (Nov. 12, 2018), <https://www.fisherphillips.com/gig-employer/3-takeaways-from-grubhub-plaintiffs-opening-appeals> [<https://perma.cc/B4SB-H6BJ>].

52. Dai, *supra* note 46, at 2.

53. *Dynamex*, 416 P.3d at 7.

54. *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (“The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”).

55. *Id.* at 407.

56. *Id.* at 401 (arguing that an employer retained control even in the absence of direct supervision).

even if, for example, a concept artist is offered a fixed amount for images and is not supervised during every step of her work.⁵⁷

The context of the specific industry should be taken into consideration in the analysis of this first prong. Since worker progress is often monitored at the office and workers are expected to attend company meetings, they do not seem free to make independent decisions about the direction of the game.⁵⁸ Even in cases where the work is completed remotely, workers do not have the “final say on anything that happens in the company, sometimes even down to the finest detail,” which does not give them much discretion.⁵⁹ Some companies have required that contractors wear different colored badges and even hired “contingent workforce management” agencies to oversee them.⁶⁰ But a policy utilized to internally distinguish between employees and contractors through use of different uniforms or badges does little to change their actual legal classification as an employee or contractor. Such policies do not cure cases of misclassification. Companies would ultimately lose on this front for jobs related to development, production, and promotion of their product. They have the opportunity, which they certainly exercise, to control the manner in which the work is done through supervision and make decisions about the final product.

2. Prong B: Usual Course of Business

To prove that their workers are independent contractors, the second prong of the test requires that companies indicate that the worker “performs work outside the usual course of [their] business.”⁶¹ Since a programmer, writer, or designer’s “role within the hiring entity’s usual business operation align[] with the work of the employee,” the employers would fail to prove

57. *Id.* at 407 (outlining factors in favor of employee classification such as special skill).

58. Colin Campbell, *The Game Industry’s Disposable Workers*, POLYGON (Dec. 19, 2016, 9:00 AM), <https://www.polygon.com/features/2016/12/19/13878484/game-industry-worker-misclassification> [<https://perma.cc/LSG9-UMS3>].

59. Sam Matthews, *25 Crazy Guidelines Nintendo Employees Need To Follow*, THEGAMER (Oct. 19, 2018), <https://www.thegamer.com/nintendo-guidelines-employees-follow/> [<https://perma.cc/SW2Q-96A3>].

60. Campbell, *supra* note 58.

61. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 7 (Cal. 2018).

this prong.⁶² Companies would face a challenge in arguing, for instance, that a video game programmer's role was not at the core of the business. A computer technician fixing the receptionist's computer at a nail salon, for instance, does not carry out a role within the employer's usual business operation.⁶³ Conversely, a content designer or graphics programmer working on a game set to be released in a few months works on projects that align with the business of the hiring entity: developing and publishing video games. The contributions of the aforementioned workers are not merely incidental to the business, but rather necessary for publishing companies to produce their source of revenue. Without the ongoing work of engineers, developers, designers, and programmers, a company's game might lose popularity with gamers and the company could lose revenue from in-game purchases.

3. Prong C: Independently Established Business

Employers hoping to maintain the independent contractor status of their workers must also prove the third and final prong, that the worker is "customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."⁶⁴ The materials required for many industry jobs may not be accessible to workers. Engineers, designers, testers, and artists require "high-powered computer[s] and specialized software" that may be too expensive for a worker to purchase and operate at home.⁶⁵ In the case of video game development, hiring entities dedicate a considerable percentage of their budgets to furnish their facilities with the proper equipment required.⁶⁶ In fact, updates and ongoing issues require recurrent budget allocations to hardware and software replacements.⁶⁷ This part of the test could also be determined in favor of employee

62. *Id.* at 37.

63. *Id.* (providing an analogy about a plumber hired at a retail store to clarify the application of the first prong of the "ABC" test).

64. *Id.* at 14.

65. *How to Start a Video Game Company*, TRUIC, <https://howtostartanllc.com/business-ideas/video-game-company> [<https://perma.cc/9LBU-T4V2>].

66. *Id.*

67. *Id.*

status because of the time restraint imposed on programmers.⁶⁸ Even if individuals with strenuous workdays producing game updates obtained side jobs as a means to supplement their income, they would experience great difficulty maintaining another job in the area of programming. In this case, it is the side job that would be more aptly characterized as the “gig.”⁶⁹

Courts often look for indications of “licensure, advertising, routine offerings to the public to perform the work, his own clientele[, and] . . . maintaining separate places of business” to prove this prong.⁷⁰ Employers may prevail under this prong if their workers knowingly held themselves out as contractors in the same field.⁷¹ For example, an employer might produce evidence that a given video game writer simultaneously works for another company to create game storylines and dialogue and does so with his personal laptop.

A less generous interpretation of the final prong for employers is that it is insufficient to merely prove that the worker has not been prevented from pursuing other business opportunities.⁷² This was illustrated in *Garcia v. Border Transportation Group LLC*, where the court considered whether there was an “existing, not potential, showing of independent business operation.”⁷³ If video game workers are not “tak[ing] the usual steps to establish and promote” a business, then the final prong should not be satisfied.⁷⁴ This would require that the worker “hold[] himself out to be in business for

68. Sam Dean, *As Video Games Make Billions, the Workers Behind Them Say It's Time to Unionize*, L.A. TIMES (Apr. 12, 2019, 3:00 AM), <https://www.latimes.com/business/technology/la-fi-tn-video-game-union-movement-20190412-story.html> [<https://perma.cc/T58E-DMJ9>].

69. Jim Chappelow, *Gig Economy*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/terms/g/gig-economy.asp> [<https://perma.cc/CZ28-QCTF>] (stating that gig workers retain flexible, “part-time or temporary positions”).

70. Meneghello, *supra* note 51.

71. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 39 (Cal. 2018).

72. *Id.*

73. *Garcia v. Border Transp. Grp., LLC*, 239 Cal. Rptr. 3d 360, 373 (Cal. Ct. App. 2018) (*modified*, Nov. 13, 2018).

74. *Id.* at 369.

oneself” as an independent business owner, which may be difficult for employers to prove in every case.⁷⁵

The adopted California test reveals that many workers across different titles in the video game industry may have been misclassified as independent contractors.⁷⁶ In fact, heightened scrutiny may further reveal that these workers were misclassified even under the *Borello* test, which emphasized a focus on “statutory purpose.”⁷⁷ Programmers, writers, artists, and designers each have specialized contributions that are equally necessary to the creation of the final product, and are therefore central to the business. Ultimately, employers could not avoid the liabilities of misclassification if a worker’s argument for only one or two prongs is insubstantial.⁷⁸ Although the ruling only controls in California, it was not the first jurisdiction to adopt this employee-friendly standard.⁷⁹ The test followed a similar standard used in Massachusetts, indicating a growing trend towards targeting gig economies.⁸⁰ Since California courts are notable for setting the trend in the areas of labor and employment law, the influence of the ABC test might be far-reaching, even as gig employers push back against its expansive application and threaten to relocate.⁸¹

75. *Dynamex*, 416 P.3d at 37 n.11.

76. Campbell, *supra* note 58; Michael Arin, *Esports & Employment After Dynamex*, ESPORTS BAR ASS’N, <https://esportsbar.org/journals/2019/10/esports-and-employment-after-dynamex> [<https://perma.cc/U2T9-REQB>] (addressing the risks of misclassification in the video game industry as it pertains to esports players).

77. *Dynamex*, 416 P.3d at 16; Dai, *supra* note 46, at 3 (stating that *Borello* “requires an analysis that takes into account the public policy reasons for the legislation, which means a view toward protecting the rights of employees.”).

78. *See* Dai, *supra* note 46, at 1.

79. *Id.*

80. *Id.*; *Dynamex*, 416 P.3d at 7.

81. Susan Nikdel, *What You Need to Know About New California Employment Law Going Into Effect in 2020*, NAT’L L. REV. (Dec. 30, 2019), <https://www.natlawreview.com/article/what-you-need-to-know-about-new-california-employment-law-going-effect-2020> [<https://perma.cc/UCZ3-KWLK>].

B. California AB 5: The Key to Gaming Industry Workforce Reclassification

The California State Legislature passed AB 5, a law that adopts the *Dynamex* ABC test, to determine an employee or independent contractor status in 2019.⁸² The Bill was passed in an effort to support gig-economy workers and recoup state taxes from businesses that derive unfair advantages through misclassification.⁸³ Legislators argued that worker misclassification played a “significant factor in the erosion of the middle class and the rise in income inequality.”⁸⁴ AB 5 was subsequently added as section 2750.3 of the California Labor Code.⁸⁵ Section 2750.3 affirmed the existing presumption that “a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission.”⁸⁶ It also expanded the coverage of the narrow *Dynamex* decision by encompassing the entire Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission.⁸⁷ Since AB 5 is not limited to wage orders, it functions as a broader safety net for workers.⁸⁸ For example, in *Garcia*, the court did not apply *Dynamex* to a non-wage claim.⁸⁹ However, upon the codification of the ABC test, the fact that a dispute does not arise under a wage order no

82. See generally Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019).

83. See generally *id.*; Nellie Bowles & Noam Scheiber, *California Wanted to Protect Uber Drivers. Now It May Hurt Freelancers*, N.Y. TIMES (Dec. 31, 2019), <https://www.nytimes.com/2019/12/31/technology/california-freelance-gig-workers.html> [<https://perma.cc/HMF5-NKZP>].

84. CAL. LAB. CODE § 2750.3 (West 2019).

85. *Id.*

86. Cal. Assemb. B. 5.

87. See *id.* The court’s holding in *Dynamex* was limited to wage claims.

88. Tony Marks, *How Do You Spell Trouble? California AB5*, FORBES (Sept. 11, 2019, 11:52 PM), <https://www.forbes.com/sites/tonymarks/2019/09/11/how-do-you-spell-trouble-california-ab-5/#311b06d47e29> [<https://perma.cc/WCD3-8DGU>].

89. *Garcia v. Border Transp. Grp., LLC*, 239 Cal. Rptr. 3d 360, 362 (Cal. Ct. App. 2018) (*modified*, Nov. 13, 2018).

longer shields employers from the *Dynamex* standard.⁹⁰ The two unresolved issues regarding AB 5 are related to its retroactive impact and the list of exempt occupations.

1. Retroactive Application

The first crucial issue that would impact the video game industry along with other gig employers is AB 5's potential retroactive impact on claims against companies.⁹¹ A common criticism of AB 5 is that, in an attempt to facilitate more predictable outcomes, the language creates newer ambiguities.⁹² As previously detailed, under the *Dynamex* test, misclassified contractors must be reclassified as employees, but the possibility for workers to obtain relief for past misclassification is not as straightforward. The Ninth Circuit decided that the ABC test should be applied retroactively in *Vazquez v. Jan-Pro Franchising International, Incorporated*, because the test was consistent with the "history of California's employment classification law."⁹³ However, that decision was later withdrawn and the question of retroactive application was certified to the California Supreme Court.⁹⁴ Before the enactment of AB 5, this open question served as a roadblock for cases that were decided under the *Borello* standard prior to the *Dynamex* decision.⁹⁵ Some plaintiffs sought appeals based on this newly developed

90. Cal. Assemb. B. 5 (Assemblywoman Lorena Gonzalez states that the Bill shall be applied to the Labor Code, Unemployment Insurance Code, and the Industrial Welfare Commission's wage orders).

91. Dai, *supra* note 46, at 3; Catherine Shu, *Uber and Postmates Claim Gig Worker Bill AB-5 Is Unconstitutional in New Lawsuit*, TECHCRUNCH (Dec. 30, 2019, 8:53 PM), <https://techcrunch.com/2019/12/30/uber-and-postmates-claim-gig-worker-bill-ab-5-is-unconstitutional-in-new-lawsuit/> [<https://perma.cc/28ZU-SAL2>].

92. Bowles & Scheiber, *supra* note 83.

93. *Vazquez v. Jan-Pro Franchising International, Inc.*, 923 F.3d 575, 589 (9th Cir. 2019); *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 40 (Cal. 2018).

94. *Vazquez*, 939 F.3d at 1048 (stating that the novel question should be decided in light of public policy implications).

95. *See generally* *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1072 (N.D. Cal. 2018) (finding that a Grubhub driver was an independent contractor and not an employee because the defendant did not exercise sufficient control).

standard.⁹⁶ In response to the motion for relief filed by the plaintiff in *Lawson v. Grubhub*, the defense argued against retrofitting the new ABC framework to analyze the employment classification in dispute.⁹⁷ They argued it would be unduly burdensome on businesses to not only absorb the costs of reclassification to avoid further litigation under the new standard, but also incur financial burdens of retroactive claims.⁹⁸

The threat of losing companies to other states due to overburdensome laws in California might persuade the California Supreme Court to limit retroactivity.⁹⁹ It may further be argued that retroactive application would introduce perverse incentives for employers not to immediately comply with the law in order to avoid conceding that they had previously misclassified employees. Since the legislative purpose of AB 5 was to protect workers from the harms of misclassification, the public policy rationale against retroactive enforcement may be the most compelling argument for courts. Those opposed to retroactive application could argue that retroactive enforcement of this supposedly new test is less about the welfare of workers and more aimed at penalizing companies.

The argument that retroactive enforcement is unduly burdensome is based on the assumption that the legal standard relied on by businesses when initially classifying their employees was considerably different from the *Dynamex* approach.¹⁰⁰ However, the California Second District Court of Appeals in *Gonzales v. San Gabriel Transit, Incorporated* undermined the argument for the test to be enforced only prospectively.¹⁰¹ The court stated

96. See, e.g., *Lawson v. Grubhub, Inc.*, No.15-cv-05128-JSC, 2018 WL 6190316, at *6 (N.D. Cal. Nov. 28, 2018) (stating that the plaintiff filed a motion for relief merely four months after the *Dynamex* decision).

97. *Id.* at *7.

98. The defense argues that retroactive application might violate constitutional due process rights. *Id.*

99. Louis Hyman, *California's New Gig Economy Law Was Meant to Help Workers. But it Will Likely Hurt Them Instead*, CNN BUS. (Jan. 9, 2020, 8:33 AM), <https://www.cnn.com/2020/01/09/perspectives/california-ab5/index.html> [<https://perma.cc/D7A6-P8U5>]; Bruce Sarchet et al., *AB 5: The Great California Employment Experiment—A Littler Workplace Policy Institute Report*, LITTLER (Aug. 8, 2019), <https://www.littler.com/publication-press/publication/ab-5-great-california-employment-experiment-littler-workplace-policy> [<https://perma.cc/9YAB-8Q6X>].

100. Bruce Sarchet et al., *supra* note 99.

101. See *Gonzales v. San Gabriel Transit, Inc.*, 253 Cal. Rptr. 3d, 681, 687–88 (Cal. Ct. App).

that the *Dynamex* decision “merely clarified and streamlined” existing law on the matter and was thus not unduly burdensome.¹⁰² If the California Supreme Court accepts the *Gonzales* court’s characterization of the *Dynamex* decision, namely that it was not transformative, they could decide that businesses had sufficient notice about the existing *Borello* test. It is difficult, however, to reconcile this inference with the fact that the *Dynamex* test not only introduced a stronger presumption in favor of employee status, but also imposed strict factors that must each be met instead of weighed against one another.

Although fairness and due process are compelling grounds to rule against constitutionality, the Ninth Circuit Court in *Vazquez* stated that the California Supreme Court’s rejection of the request for clarification on *Dynamex* for retroactivity revealed the court’s views on the matter.¹⁰³ The court’s view was that the new rule in *Dynamex* should be given “usual retroactive application” rather than an exception.¹⁰⁴ Even though that opinion was withdrawn, the court maintained that retroactive application would not violate an employer’s due process rights.¹⁰⁵

While companies are justifiably concerned about the potential financial burdens of retroactive application, its impact would still be restrained so as to prevent a “blanket pronouncement” of retroactivity.¹⁰⁶ The retroactive effect seems reasonably limited to wage claims. AB 5 also does not include language that allows for the revival of lapsed claims.¹⁰⁷ It only applies if the underlying claim has not lapsed by January of 2020 when it became effective.¹⁰⁸ Even so, continued conduct could still be argued in order to

102. *Id.* at 708 n.13.

103. *See, e.g., Vazquez v. Jan-Pro Franchising International, Inc.*, 923 F.3d 575, 587 (9th Cir. 2019).

104. *Id.*

105. *Id.* at 1048.

106. Harrison M. Thorne, *Retroactive Application of Dynamex*, L.A. LAW, March 2019, at 19–20.

107. CAL. LAB. CODE § 2750.3 (West 2019).

108. *Id.*; Assemb. B. 51, 2019–2020 Reg. Sess. (Cal. 2019).

overcome an alleged lapse of a claim.¹⁰⁹ Notwithstanding the supposed novelty of the test, companies were ultimately provided sufficient notice to review their policies and resolve issues before the effective date of AB 5.

California AB 5 will work in conjunction with AB 51 to further subdue employers if the latter is upheld.¹¹⁰ AB 51 is a prohibition on certain mandatory arbitration agreements.¹¹¹ It is very restrictive from the perspective of employers since it does not allow them to condition employment or any employment benefits on the signing of an arbitration agreement for Fair Employment and Housing Act (“FEHA”) or Labor Code violation claims.¹¹² AB 5 classification is important because AB 51 only applies to employees.¹¹³ While the future of AB 51 is uncertain in light of the Federal Arbitration Act, it would be helpful to industry workers. Most video game company workers sign mandatory arbitration agreements which restrict their access to courts.¹¹⁴ While some companies like Riot Games have, after facing tremendous backlash, agreed to carve out exceptions to their arbitration agreements for incidents of sexual harassment, AB 51 would allow employees to pursue a claim for any employment or labor-related issues.¹¹⁵

2. AB 5 Exemptions

The second relevant issue is whether video game workers are included in AB 5’s list of exemptions.¹¹⁶ Occupations that are exempt from the

109. JUSTICE KATHLEEN M. BANKE & JUSTICE JOHN L. SEGAL, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL, STATUTE OF LIMITATIONS, Ch. 4 (2019).

110. Cal. Assemb. B. 51.; CAL. LAB. CODE § 432.6 (West 2019).

111. Cal. Assemb. B. 51.

112. Thomas H. Petrides, *Federal Court Preliminary Enjoins Enforcement of New California Arbitration Law AB 51*, NAT’L L. REV. (Feb. 7, 2020), <https://www.natlawreview.com/article/federal-court-preliminarily-enjoins-enforcement-new-california-arbitration-law-ab-51> [https://perma.cc/ULQ3-RF8W].

113. Cal. Assemb. B. 51.

114. Josh Eidelson et al., *Riot Games Keeps Arbitration Clause Despite Employee Protest*, BLOOMBERG (May 16, 2019, 7:39 PM), <https://www.bloomberg.com/news/articles/2019-05-17/riot-games-to-keep-arbitration-clause-despite-employee-protest> [https://perma.cc/7S5P-77DS].

115. *Id.*; Cal. Assemb. B. 51.; LAB. § 432.6.

116. Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019).

Dynamex test that will instead be judged under the *Borello* test are expressly listed in the statute.¹¹⁷ Job titles in video game development do not fall under AB 5’s list of industry exemptions to the *Dynamex* test.¹¹⁸ These titles are also not listed as specific occupations exempt from the test.¹¹⁹ Employers could feasibly argue that some of their workers fall under the “professional services” exemptions.¹²⁰ Professional services include marketing, human resources administration, graphic design, fine art work, and freelance writing.¹²¹ It is unclear whether video game artists would be considered “fine” artists since “fine art” is not clearly defined and the language of AB 5 does not offer guidance on that matter. It is nevertheless increasingly difficult for employers to satisfy the legislation’s stringent requirements for the specific occupations. Moreover, even if an exemption applies, the worker may still be reclassified as an employee under the older *Borello* test. This indicates that in-house human resources representatives or marketing workers may still be reclassified on a case-by-case basis.

The question of whether video game writers should be exempt if the nature of their work is considered freelance is also unsettled. Freelance writing is considered work that involves less than thirty-five submissions to an employer.¹²² But AB 5 uses language that specifically refer to journalists, so it is unlikely that legislators intended to encompass workers who write scripts for video games.¹²³ While narrative designers exercise some level of control in shaping the plot of a game, a game writer “has to bow to the requirements of gameplay and level design, as well as to the limitations of both

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* The California Labor Federation’s legislative director and labor reporters have also only addressed the impact on freelance journalists. Zoie Matthew, *What Does AB 5 Mean for California’s Freelance Writers?*, L.A. MAG. (Oct. 23, 2019), <https://www.lamag.com/citythink-blog/ab-5-freelance-writers/> [<https://perma.cc/5BHY-5S6H>].

technology and the schedule.”¹²⁴ These writers would be considered subject to the control of their employers even under the *Borello* standard. As a consequence, the aforementioned titles should be reclassified as employees.

C. Consequences of Restraining Regulatory Arbitrage in the Video Game Industry

Mass reclassification of workers in California will likely disrupt the existing business model of the video game industry. The practice of hiring independent contractors that work side-by-side with employees and carry out some of the same work as their colleagues is a form of “regulatory arbitrage.”¹²⁵ The financial incentive to rely heavily on contractor labor and misclassify workers has been made clear by the leading opposition to AB 5.¹²⁶ Proper classification of workers as employees will be costly since the industry “critically . . . hinges on regulatory arbitrage.”¹²⁷ Companies have protested that they would “incur significant additional expenses for compensating [workers], potentially including expenses associated with the application of wage and hour laws (including minimum wage, overtime, and meal and rest period requirements), employee benefits, social security contributions, taxes and penalties.”¹²⁸ Employers are also obligated to pay “federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes” for their employees and abide by anti-retaliation and discrimination laws.¹²⁹ But the risk of litigation over continued misclassification will

124. David Gaider, *Do You Want to Write Video Games?*, POLYGON (Aug. 15, 2016, 1:30 PM), <https://www.polygon.com/2016/8/15/12455728/how-to-get-a-job-writing-games-maybe> [<https://perma.cc/9G3R-G7GK>].

125. Pollman, *supra* note 16, at 568 (defining “regulatory arbitrage” as a business planning technique used when there are “gap or differences in regulations or laws”).

126. See Alexia Fernández Campbell, *Uber and Lyft Just Lost Another Battle in California*, VOX (Aug. 30, 2019, 4:20 PM), <https://www.vox.com/policy-and-politics/2019/8/30/20840563/ab-5-uber-lyft-senate-vote-california> [<https://perma.cc/X46L-46Q6>].

127. Pollman, *supra* note 16, at 574.

128. *Uber and Lyft Just Lost Another Battle in California*, *supra* note 126.

129. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 5 (Cal. 2018); *Independent Contractor Versus Employee*, CAL. DEP’T OF INDUS. REL., https://www.dir.ca.gov/dlse/faq_independentcontractor.htm [<https://perma.cc/MFP2-3KUT>].

impact how corporate managements assess whether the current structure is still a “valuable course of action to pursue or continue.”¹³⁰

Because of the overlap in employment classification practices between the video game industry and traditional gig companies, AB 5 may capture a broader swath of the state’s economy than the legislature expressly intended.¹³¹ The video game industry, like gig companies, must reevaluate its policies by weighing the different costs of reclassification and risks of litigation.¹³² Once workers are properly classified upon application of the more employee-friendly test, they will finally become entitled to federal labor protections that they were previously not afforded.¹³³ Federal protections include family or medical leave, unemployment or worker’s compensation benefits, healthcare or retirement benefits, severance, overtime pay, and disability accommodations.¹³⁴ Reclassification will also invariably expose video game publishers to more wage and hour litigation by expanding their pool of employees.¹³⁵ The many options that reclassified employees have for legal recourse will be evaluated by employers.¹³⁶ Lastly, there is increasing support for competitors that employ more ethical and costly employment policies to use misclassification as a basis for unfair competition claims.¹³⁷

130. Pollman, *supra* note 16, at 570.

131. Audrey Winn, *League of Legends Gamers Could Become California’s Newest Workforce*, QUARTZ (Jan. 9, 2020), <https://qz.com/1781797/californias-ab5-protects-league-of-legends-gamer-work-rights/> [<https://perma.cc/EW6T-NU5H>].

132. *Id.*

133. Assemb. B. 5, 2019–2020 Reg. Sess. (Cal. 2019).

134. *Id.*

135. Sarchet et al., *supra* note 99.

136. *Independent Contractor Versus Employee*, *supra* note 129 (explaining the right of employees to pursue their claims through litigation or a state agency such as the Division of Labor Standards Enforcement). The Attorney General or city attorney can also pursue a claim of continued misclassification against employers. CAL. LAB. CODE § 2750.3 (West 2019); *see generally id.* §§ 2698–2699.5 (listing Private Attorney General Act claims as an additional option for workers to pursue limited damages even if subject to arbitration agreements).

137. Richard Reibstein, *New Type of Independent Contractor Misclassification Lawsuit: Business Vs. Business*, JDSUPRA (Oct. 1, 2018), <https://www.jdsupra.com/legalnews/new-type-of-independent-contractor-80472/> [<https://perma.cc/5B2H-65P7>].

Game developer companies failed to preempt such consequences after the forced reclassification of Electronic Artists' workers in 2004, well before AB 5 was even discussed by the California legislature.¹³⁸ The company settled a \$15.6 million lawsuit for misclassifying workers and withholding overtime wages.¹³⁹ They were then compelled to reclassify approximately 200 employees after a second lawsuit.¹⁴⁰ It would therefore be prudent for employers to voluntarily review the status of each of their workers in light of the new standard even if they hope to lobby for an exemption or insist that retroactive application is unconstitutional.¹⁴¹ AB 5 will serve as an effective tool to restrain the ability of companies to evade justice.

Once the constraints to regulatory arbitrage in the industry take effect, video game companies, now considerably less able to "reduce overall costs in [their] business affairs," will be forced to reconsider their place in the gig economy and their ability to continue operating in California.¹⁴² Companies may argue that they can no longer remain competitive in the state without the cost-saving mechanism of hiring workers as contractors.¹⁴³ To that end, these companies may also attempt to lobby for an exemption or launch a public campaign. Uber, Lyft, and DoorDash have been trailblazers in that respect. The companies collectively introduced a ballot measure that would exempt them from the *Dynamex* standard.¹⁴⁴ It is presently unclear whether the \$90 million spent on the measure will yield success.¹⁴⁵ If the video game industry is unable to secure an exemption, they may decide that relocation is their only viable option. However, the threat that video game companies will

138. Tim Surette, *EA Settles OT Dispute, Disgruntled "Spouse" Outed*, GAMESPOT (April 26, 2006, 11:59 AM), <https://www.gamespot.com/articles/ea-settles-ot-dispute-disgruntled-spouse-outed/1100-6148369/> [<https://perma.cc/48LE-AP3L>].

139. *Id.*

140. *Id.*

141. Thorne, *supra* note 106, at 20–21.

142. Pollman, *supra* note 16, at 574.

143. Campbell, *supra* note 58.

144. John Myers, *Uber, Lyft, DoorDash Launch a \$90-million Fight Against California Labor Law*, L.A. TIMES (Oct. 29, 2019, 3:08 PM), <https://www.latimes.com/california/story/2019-10-29/uber-lyft-doordash-fight-california-labor-law-ab5> [<https://perma.cc/4X33-XCSJ>].

145. *Id.*

relocate away from California due to the higher tax rate and costs of operation rings hollow since other technology companies have “flourished in California with its particular mix of laws, including labor law that encourages ‘knowledge spillovers’ and facilitates employee mobility.”¹⁴⁶ California is a hub of creativity in the field of technology, so it is unlikely that companies will abandon the state. Additionally, if the *Dynamex* framework is eventually adopted by other states, this plan might prove to be short-sighted and futile.¹⁴⁷

Critics of AB 5 characterize it as a misguided attempt to help workers that may actually end up harming them.¹⁴⁸ For example, many gig workers have chosen to partake in a ridesharing venture because of the flexibility of hours.¹⁴⁹ It follows that many ridesharing company drivers themselves are reluctant to be reclassified as employees.¹⁵⁰ Once these workers are reclassified, their employers will be able and more willing to exercise heightened control over their schedules.¹⁵¹ But in spite of these drawbacks, the workers will then be able to unionize and will be afforded federal labor protections that only cover employees.¹⁵² Furthermore, the California Supreme Court has clarified that “flexibility” is not impossible for employers to offer once a worker is properly classified.¹⁵³ While independent contractors are often

146. Pollman, *supra* note 16, at 583.

147. Jeff Daniels, *California Gig Economy Legislation Advances, Could Shape Battle in Other States*, CNBC (June 4, 2019, 12:05 PM), <https://www.cnn.com/2019/06/04/gig-economy-bill-advances-in-calif-could-shape-battle-in-other-states.html> [<https://perma.cc/BH9X-ABP4>].

148. Bowles & Scheiber, *supra* note 83.

149. Shirin Ghaffary, *Some Uber and Lyft Drivers Say They Were Misled Into Petitioning Against Their Own Worker Rights*, VOX (June 27, 2019, 4:00 PM), <https://www.vox.com/recode/2019/6/27/18759387/uber-lyft-drivers-misled-companies-political-campaign> [<https://perma.cc/38GB-RAN6>].

150. Graham Rapier, *Uber Scored a Major Victory When the US Government Ruled Drivers Aren't Employees, but Not Everyone Is Happy*, BUS. INSIDER (May 16, 2019, 10:08 AM), <https://www.businessinsider.com/uber-drivers-disappointed-ruling-not-employees-2019-5> [<https://perma.cc/3HB4-BEK7>].

151. Ghaffary, *supra* note 149.

152. National Labor Rights Act of 1935 § 7, 29 U.S.C. § 157 (2012); Fair Labor Standards Act of 1938 § 3, 29 U.S.C. § 203 (2019).

153. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 38 n.28 (Cal. 2018); Dai, *supra* note 46, at 3.

characterized as those who share the risks and the benefits of a business endeavor, gig workers in the video game industry are not “more like entrepreneurs than traditional workers.”¹⁵⁴ They share a disproportionate amount of the market risks, such as mass layoffs during mergers, over the benefits of the venture in the form of stock options in some cases.¹⁵⁵

There is also a difference between the workforces of these gig companies and the video game industry. Unlike many Lyft drivers, for instance, a video game engineer does not intend to engage in temporary or “gig” work.¹⁵⁶ Although many independent contractors in the video industry are treated as seasonal workers and may freelance, they do not take on such jobs to supplement their income as do many food delivery or ridesharing company workers.¹⁵⁷ Allowing for video game workers to continue to be classified as independent contractors thus “undermines the traditional economy of full-time workers who rarely change positions and instead focus on a lifetime career.”¹⁵⁸ While the adaptability of temporary jobs may help those working for some gig businesses, the “erosion of traditional economic relationships between workers” and businesses should not be dismissed.¹⁵⁹

AB 5 itself appears better tailored to correct the practices of industries like gaming that have long operated in the grey areas of employment law rather than platform companies such as Uber and Lyft that were borne purely out of the gig economy movement.¹⁶⁰ Many video game company workers

154. Chappelow, *supra* note 69.

155. Patrick Klepek, *Video Game Layoffs Are so Common, This Person Built a Website to Track Them*, VICE (Jan. 15, 2020, 12:16 PM), https://www.vice.com/en_us/article/dygp3a/video-game-layoffs-are-so-common-this-person-built-a-website-to-track-them [https://perma.cc/3APQ-LPHL]; Putka, *supra* note 13.

156. Rapier, *supra* note 150; *see, e.g., Uber and Lyft Just Lost Another Battle in California*, *supra* note 126.

157. *See, e.g.,* Jonathan Rothwell, *Earning Income on the Side Is a Large and Growing Slice of American Life*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/2019/12/18/upshot/multiple-jobs-united-states.html> [https://perma.cc/S9DT-KRHR].

158. Chappelow, *supra* note 69.

159. *Id.*

160. Ben Z. Steinberger, *Redefining ‘Employee’ in the Gig Economy: Shielding Workers from the Uber Model*, 23 FORDHAM J. CORP. & FIN. L. 577, 579 (2018). A platform business “creates its own marketplace” by “matchmaking between vendors and customers.” John Herman, *Platform Companies Are Becoming More Powerful — but What Exactly Do They Want?*, N.Y.

join these companies with hopes of establishing lifelong careers doing work they are passionate about.¹⁶¹ Workers whose jobs are more technical have received either formal or informal training.¹⁶² While the gig model might benefit some workers, it only serves as a tool for employers in other industries to avoid correctly classifying workers who do the same work as employees.¹⁶³ Even if Lyft and Uber succeed in passing their ballot measure after galvanizing the support of a contingent of their workers and offer limited concessions, video game companies should attempt to find solutions particular to their industry.¹⁶⁴

III. THE PROSPECT OF A UNIONIZED VIDEO GAME LABOR FORCE

In addition to its contribution to employment law, AB 5 will also provide more workers with labor protections. Video game employees in California will have several options to unionize. In order to grow video game union membership, leaders must first examine the history of entertainment trade unions to learn how other industry leaders overcame the resistance of companies. These collective bargaining efforts will increase the leverage of employees and allow for them to negotiate for better wages and working conditions.

A. *Following the Hollywood Guild Paradigm*

“Plumbers may need unions . . . but not artists.”¹⁶⁵ AB 5 will impact labor relations in California by mobilizing an entirely new group of artists, a development that would surprise Metro-Goldwyn-Mayer’s Irving Thalberg.¹⁶⁶ In the early 20th century, Thalberg captured the still prevalent,

TIMES (Mar. 21, 2017), <https://www.nytimes.com/2017/03/21/magazine/platform-companies-are-becoming-more-powerful-but-what-exactly-do-they-want.html> [<https://perma.cc/VC5M-W8MU>].

161. Campbell, *supra* note 58.

162. *Id.*

163. Rapier, *supra* note 150.

164. Myers, *supra* note 144.

165. STEVEN J. ROSS, WORKING-CLASS HOLLYWOOD: SILENT FILM AND THE SHAPING OF CLASS IN AMERICA 247 (1998).

166. *Id.*

misguided view that unions can only benefit the needs of a blue-collar workforce.¹⁶⁷ A labor union is “any association of workers which exists for the purpose, in whole or in part, of bargaining on behalf of workers with employers about the terms or conditions of employment.”¹⁶⁸ The Writers Guild West and East, Screen Actors Guild-AFTRA, the Director’s Guild of America, International Alliance of Theatrical Stage Employee, Alliance of Motion Picture and Television Producers, and the Teamsters Union are notable entertainment unions.¹⁶⁹ Despite the fact that the video game industry currently ranks as one of the most profitable sectors in the entertainment industry, video game workers remain the most neglected among the entertainment labor pool.¹⁷⁰

Hollywood film and television industry workers have a long legacy of participating in labor advocacy movements to improve labor conditions.¹⁷¹ But the video game industry has not kept pace with other entertainment industries partly because of the misconception that an organized labor movement “might slow down a company’s ability to adapt to a changing market.”¹⁷² A parallel workplace atmosphere existed in the early years of the film and television industry when vulnerable workers grew discontent over “frequent layoffs, one-sided contracts, and creative control exerted by the studios.”¹⁷³ These individuals held “short-term jobs with little supervision [and] might theoretically be deemed independent contractors even though the most important aspect of their work—its content—[was] subject to control by network and studio executives.”¹⁷⁴ The organized labor efforts of

167. ROSS, *supra* note 165, at 247; Semuels, *supra* note 3.

168. RESTATEMENT (FIRST) OF TORTS § 778 (AM. LAW INST. 1939).

169. *Entertainment Industry Associations, Guilds, and Unions*, CAL. FILM COMMISSION (2019), <http://film.ca.gov/production/associations-guilds/> [<https://perma.cc/SRQ3-MU6N>].

170. Angelo M. D’Argenio, *Statistically, Video Games Are Now the Most Popular and Profitable Form of Entertainment*, GAMERCRATE (July 10, 2018), <https://www.gamecrate.com/statistically-video-games-are-now-most-popular-and-profitable-form-entertainment/20087> [<https://perma.cc/7GGQ-EGHB>].

171. *See generally* ROSS, *supra* note 165.

172. Dean, *supra* note 68.

173. *Id.*

174. Catherine Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. 177, 202 (2017).

entertainment workers following a period of unrest overcame years of anti-union attitudes in the United States.¹⁷⁵ In doing so, they were able to preserve job stability and improve working conditions for these employees with “niche specializations whose services are not in consistent demand.”¹⁷⁶ These artists were “tired of being worked to the bone so studio heads could reap the spoils of their creative output,” and decided that their grievances were best addressed collectively.¹⁷⁷ It was only after organized strikes that these specialized workers were able to gain any leverage.¹⁷⁸

Gaming studios hire seasoned gamers who are so enveloped in their love for the artform that they neglect to realize the value of their exploited labor.¹⁷⁹ Those who are actual employees are often young creative professionals willing to undertake roles under less than favorable circumstances in hopes of eventually being rewarded with stable careers. These workers are overburdened and then discarded as companies resort to massive layoffs in times of financial turmoil.¹⁸⁰ To illustrate, Activision Blizzard, one of the largest video game companies in the world, discharged eight percent of its workforce in early 2019.¹⁸¹ Without union representation, this workforce will remain vulnerable to unfair practices.

California’s new worker classification test can finally pave the way for unionization efforts in the video game industry.¹⁸² The legal classification

175. W. Harry Fortuna, *The Gig Economy Is a Disaster for Workers. Hollywood’s Unions Can Help Them to Learn to Fight Back*, QUARTZ (Sept. 1, 2017), <https://qz.com/1052310/hollywood-unions-offer-the-perfect-model-for-the-beaten-down-workers-of-todays-gig-economy/> [<https://perma.cc/45VK-U32Y>].

176. *Id.*

177. *Id.*

178. *Id.*

179. Dean, *supra* note 68.

180. Semuels, *supra* note 3; Klepek, *supra* note 155.

181. Michael Futter, *Game Industry Layoffs Driven by Past Mistakes, Uncertain Future (Analysts)*, VARIETY (March 26, 2019, 2:48 PM), <https://variety.com/2019/gaming/news/game-industry-layoffs-driven-by-past-mistakes-uncertain-future-analysts-1203173120/> [<https://perma.cc/649R-VMN6>].

182. See Sam Dean, *Major Union Launches Campaign to Organize Video Game and Tech Workers*, L.A. TIMES (Jan. 7, 2020, 5:00 AM), <https://www.latimes.com/business/technology/story>

of employee status confers rights on workers that many—as independent contractors—have not received since such workers are not typically entitled to applicable labor law protections and cannot be represented by unions.¹⁸³ Since the National Labor Relations Act (“NLRA”) only protects employees and omits independent contractors from its language, contractors are effectively barred from unionizing.¹⁸⁴ While film and television screenwriters perform work that might typically be classified as freelance, the National Labor Rights Board (“NLRB”) decided that they were employees because there was “no essential difference between a free-lance writer and a writer working under contract for a term in the manner in which they performed their work.”¹⁸⁵ The NLRB’s determination has not been extended to cover the video game industry, so there is no present guarantee that similarly situated video game writers will be treated as employees.

The *Dynamex* decision may help video game writers overcome some of the same obstacles screenwriters and animation writers once faced to secure employee status.¹⁸⁶ Since the legislature likely intended to cover journalists under the “freelance writer” professional services exemption, the exception will likely not impact video game writers.¹⁸⁷ While the NLRB has issued contradictory rulings on the status of animation writers, screenwriters overcame that challenge in 1938 when the Board definitively ruled that they were employees “because producers had the power (even if it was not always exercised) to dictate the content of the writer’s work, to assign parts of

/2020-01-07/major-union-launches-campaign-to-organize-video-game-and-tech-workers [https://perma.cc/5TXF-3ZU6].

183. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 5 (Cal. 2018).

184. Jonathan Stoler & Daniel Masakayan, *10 Labor and Employment Considerations in Esports*, LAW360 (June 6, 2019, 3:39 PM), <https://www.law360.com/articles/1164984/10-labor-and-employment-considerations-in-esports> [https://perma.cc/VX25-KANJ].

185. Fisk, *supra* note 174, at 186.

186. *See Metro-Goldwyn-Mayer Studios*, 7 N.L.R.B. 662, 669, 686–87 (1938) (relating studio writers’ contract terms in the 1930s); *see generally* BKN Inc., 333 N.L.R.B. 143 (2001) (affirming the “Regional Director’s findings that the individuals in dispute are employees under the Act.”); *see generally* DIC Animation City, Inc., 295 N.L.R.B. 107 (1989) (striking down the NLRB Regional Director’s determination that the freelance animation writers in dispute were employees).

187. Suhauna Hussain, *Freelance Journalists File Suit Alleging AB5 Is Unconstitutional*, L.A. TIMES (Dec. 17, 2019, 6:07 PM), <https://www.latimes.com/business/story/2019-12-17/freelance-journalist-ab5-lawsuit> [https://perma.cc/92FJ-KRPE].

stories, and to stipulate where writers were to write.”¹⁸⁸ The Board in *Metro-Goldwyn Mayer Studios* did not think that the freelance nature of their work precluded them from employee status because the “only difference between [a freelance writer and a writer working under contract for a term] is one of length and tenure of employment.”¹⁸⁹ The greater flexibility in the multifactor test allowed for courts in the 1930s to reach widely different conclusions regarding animation writers.¹⁹⁰ Some animation writers were found to be employees and others were independent contractors under a different set of facts.¹⁹¹ In contrast, the employers of video game writers will likely fail to satisfy the more predictable *Dynamex* test.

The next obstacle that developers and other workers need to overcome is the task of persuading the masses of the value of unions and collective-bargaining power. Film and television writers did not view the status of labor as beneath them or at odds with their “demands of entrepreneurial self-promotion.”¹⁹² Without union representation, writers would still “feel vulnerable to studio cost-cutting and to being fired” which would leave them without health insurance or other pertinent benefits.¹⁹³ That message needs to be effectively communicated to video game workers so that they can willingly join a movement and feel properly represented. The support of political leaders on the national stage might also motivate video game workers to pursue their collective bargaining rights.¹⁹⁴

188. Fisk, *supra* note 174, at 186; see *Metro-Goldwyn-Mayer Studios*, 7 N.L.R.B. at 669, 686–87; see generally *BKN, Inc.*, 333 N.L.R.B. 143; see generally *DIC Animation City, Inc.*, 295 N.L.R.B. 107.

189. Fisk, *supra* note 174, at 186; *Metro-Goldwyn-Mayer Studios*, 7 N.L.R.B. at 669, 686–87.

190. See generally *Metro-Goldwyn-Mayer Studios*, 7 N.L.R.B. at 669, 686–87.

191. See *id.*; see generally *BKN, Inc.*, 333 N.L.R.B. 143; see generally *DIC Animation City, Inc.*, 295 N.L.R.B. 107.

192. Fisk, *supra* note 174, at 193.

193. *Id.*

194. Makena Kelly, *Bernie Sanders Applauds the Gaming Industry's Push for Unionization*, THE VERGE (June 18, 2019, 11:59 AM), <https://www.theverge.com/2019/6/18/18683690/bernie-sanders-video-game-industry-union-riot-games-electronic-arts-ea-blizzard-activision> [<https://perma.cc/EG3N-S4XL>].

B. *The Stabilizing Benefits of Unionization in the Industry*

Video game industry unionization has the potential to repair a dysfunctional system, install a discipline of civility, and provide leverage to employees that the current development in law does not afford.¹⁹⁵ The industry's current state of chaos leaves employers in a position of uncertainty. The traditional pattern observed by video game companies includes a lengthy development process followed by the possibility of cancellations, massive layoffs, and constant mergers while executives remain unaffected.¹⁹⁶ In addition to rampant job insecurity, workers are typically forced to sign mandatory arbitration agreements, class action agreements, and non-disclosure agreements as a condition of their employment or contractual work.¹⁹⁷ In a recent incident involving claims of sexual harassment and workplace discrimination at Riot Games, the company allowed new employees to opt out of an arbitration provision for sexual harassment claims only after workers staged a huge walkout.¹⁹⁸ The carve-out did not apply to existing employee agreements, but it was nonetheless a prime example of a concession made after a worker strike.¹⁹⁹ After facing public backlash, the company finally settled the class action suit.²⁰⁰ On the other hand, the dispute over mass layoffs at Tell-Tale Games in 2018 ended with employees on the losing end of a legal battle because they had signed mandatory arbitration agreements

195. Roshan Patel, *Esports, Player Positions, and the Benefits of Unionization*, 18 DUKE L. & TECH. REV. 232, 247–48 (2020).

196. Klepek, *supra* note 155.

197. McNeill, *supra* note 8.

198. Samantha Musanaga, *Riot Games Keeps Requiring Arbitration in Sexual Harassment Cases, Despite Protest*, L.A. TIMES (May 17, 2019, 11:42 AM), <https://www.latimes.com/business/la-fi-tn-riot-games-arbitration-sexual-harassment-discrimination-20190517-story.html> [https://perma.cc/MNJ2-D2AY].

199. *Id.*

200. Patrick Shanley, *Riot Games Settles Lawsuit Over Discrimination, Sexual Harassment*, HOLLYWOOD REP. (Aug. 22, 2019, 5:47 PM), <https://www.hollywoodreporter.com/news/riot-games-settles-lawsuit-discrimination-sexual-harassment-1234018> [https://perma.cc/5JM6-FYYT/].

as a condition to their employment.²⁰¹ They were thus not permitted to proceed with their complaint alleging a violation of the federal Worker Adjustment and Retraining Notification (“WARN”) Act.²⁰² These cyclical public scandals and protests are not a sustainable pattern for businesses to tolerate as they will only escalate in the years to come.

While the potential for collective bargaining has been contemplated by video industry workers for years, AB 5 has incidentally revived the dialogue over the benefits of unionization and encouraged serious organizing efforts.²⁰³ Even if workers are reclassified, employees in the industry lack the leverage required to fairly negotiate the terms of their contracts on their own. Union representation can help employees improve their chances of prevailing if they take action based on a workplace incident.²⁰⁴ Unionization would allow employees to “overcome the extreme imbalance in power found in their individual relationships with [employers] by combining their leverage.”²⁰⁵ Both parties would be able to negotiate without the exploitation of employees with far less bargaining power.²⁰⁶ To illustrate the material benefits of union representation, employees are less likely to prevail under the mandatory arbitration system than in a labor arbitration system in which union representatives deal with employers.²⁰⁷ Even though most arbitration provisions allow for employees to hire their own legal representation, employees often drop their complaints because attorneys are less likely to take

201. Will Houston, *San Rafael-based Telltale Games Class-action Suit Over Layoffs Dismissed*, MARIN INDEP. J. (Feb. 7, 2019, 5:37 PM), <https://www.marinij.com/2019/02/07/telltale-games-class-action-dismissed-but-may-move-to-new-forum/> [<https://perma.cc/5VK3-GY6C>].

202. *Id.*

203. Patrick L. Egan & Jonathan J. Spitz, *Union Launches National Organizing Effort in Gaming and Tech Industries*, NAT’L L. REV. (Jan. 21, 2020), <https://www.natlawreview.com/article/union-launches-national-organizing-effort-gaming-and-tech-industries> [<https://perma.cc/TJ5K-FE26>].

204. Patel, *supra* note 195, at 237.

205. John T. Holden & Thomas A. Baker III, *The Econtractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L.J. 391 (2019).

206. Patel, *supra* note 195, at 242.

207. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POLICY INST. (April 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/> [<https://perma.cc/8WV5-8TYD>].

on mandatory arbitration cases.²⁰⁸ AB 51 could resolve this matter since it prohibits businesses from requiring “any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit.”²⁰⁹ But if the law is soon preempted by the Federal Arbitration Act, employees would once again be left defenseless without the strength of a union behind them.²¹⁰

C. *The Path to Forming a Video Game Guild*

There are different ways in which workers can obtain union protection. The first option is to join existing unions.²¹¹ Their second option is to organize their own unions. The only alternative for independent contractors is to join a non-trade union. In order for a union to serve as an employee’s “exclusive representative” for wage, hour, and employment condition issues, employers need to be signatories of the proposed guild’s collective bargaining agreement.²¹² For instance, in the case of the Writers Guild of America West (“WGAW”), a company must agree to their Minimum Basic Agreement (“MBA”).²¹³ If the video game company in dispute becomes a signatory, the union can negotiate on behalf of the company’s employees.²¹⁴ Signatory companies will then need to ensure that their conduct complies with

208. *Our Commitments on Arbitration and Next Steps for D&I*, RIOT GAMES (May 3, 2019), <https://www.riotgames.com/en/news/commitments-on-arbitration-and-cultural-transformation> [https://perma.cc/9TZA-ZGGU].

209. Assemb. B. 51, 2019–2020 Reg. Sess. (Cal. 2019).

210. Petrides, *supra* note 116.

211. Dean, *supra* note 68.

212. *Union Representation Frequently Asked Questions*, U.C. MERCED HUMAN RESOURCES, <https://hr.ucmerced.edu/employeeelabor-relations/union-representation-faqs> [https://perma.cc/R7VF-DXHX].

213. *What Every Writer Needs to Know*, WRITERS GUILD OF AM. WEST, <https://www.wga.org/contracts/know-your-rights/writers-need-to-know> [https://perma.cc/ST8A-LHH7].

214. *Id.*

the terms of the union agreement.²¹⁵ A major consequence of union membership with the WGA, for instance, is that the member will then only be permitted to work on projects for signatory companies.²¹⁶ That might substantially limit the options for newer artists seeking to gain access to industry jobs, but union representation will at the very least be an option.

In the case of video game writers, employees could greatly benefit from union membership or involvement with an established, “militant”²¹⁷ entertainment union, such as the WGA. The guild collects copies of writers’ employment agreements to enforce its rules.²¹⁸ Video game writers would be expected to do the same. An additional benefit is that a multitude of WGA departments help accommodate different grievances regarding failed pay, contract provisions, creative rights, and pension and healthcare benefits.²¹⁹ The WGAW has spearheaded efforts to include video game writers by establishing a Videogame Writers Caucus.²²⁰ The express mission of the Caucus is to promote the “professional and artistic interests of interactive writers” and “raise the writers’ status and influence within the industry, build a community of professional videogame writers within the WGAW, and expand the coverage of videogame writing under WGA contracts.”²²¹ WGAW caucuses are “open to both WGA members and non-members” in animation, independent film, nonfiction, and video games.²²² Caucus membership offers educational programs for professional writers, the opportunity to receive

215. *Signatory*, THE TEAM COMPANIES, <https://theteamcompanies.com/signatory/> [<https://perma.cc/LVR7-N339>].

216. *What Every Writer Needs to Know*, *supra* note 213.

217. TV ON STRIKE: WHY HOLLYWOOD WENT TO WAR OVER THE INTERNET 49 (2013).

218. *Writers Guild of America, West (WGAW) Signatory Process*, https://www.wga.org/uploadedfiles/employers_agents/signatories/2017sigapp.pdf [<https://perma.cc/46WF-GWVR>].

219. *What Every Writer Needs to Know*, *supra* note 213.

220. *Videogame Writers Caucus*, WRITERS GUILD OF AM. WEST, <https://www.wga.org/the-guild/going-guild/caucuses/videogame-writers-caucus> [<https://perma.cc/Z3QA-G2F8>].

221. *Id.*

222. *Caucuses*, WRITERS GUILD OF AM. WEST, <https://www.wga.org/the-guild/going-guild/caucuses> [<https://perma.cc/5BBU-VBW2>].

a Videogame Writing Award, network with other writers and guilds, and “expand WGA coverage to writers working in the videogame industry.”²²³

It is important to note that as it stands, WGA Caucus membership does not necessarily afford members traditional union protections and rights since video game companies are not signatories.²²⁴ Those that qualify are not all technically union members. Caucus membership itself does not confer voting rights on writers.²²⁵ The WGAW Script Registration Service only requires one writing credit or past employment under a WGA contract for a video game.²²⁶ That requirement is also relatively lax compared to the process of obtaining actual guild membership.²²⁷ But the guild’s willingness to involve non-union signatory company writers may have recently declined. After 10 years of offering a WGA award for exceptional Videogame Writing, the guild decided that it would not honor a recipient in 2020.²²⁸ A spokesperson suggested that a decision could not be made because presently since there is not a “critical mass of video games covered by the WGA” from which to select.²²⁹ In the past, qualifying video game scripts have included submissions that were not under guild jurisdiction.²³⁰ For instance, writers for TellTale Games, Sony Interactive Entertainment, Insomniac Games, and Obsidian Entertainment were nominated in 2019, but none of the companies

223. *Videogame Writers Caucus*, *supra* note 220.

224. *Application for VWC Membership*, WGA, https://www.wga.org/uploadedfiles/writers_resources/VWC_Application.pdf [<https://perma.cc/SL8Y-7XSM>].

225. *Id.*

226. *Videogame Writers Caucus*, *supra* note 220.

227. *Id.*

228. Patrick Shanley, *WGA Awards Scrap Video Game Writing Honor*, THE HOLLYWOOD REP. (Oct. 3, 2019, 10:50 AM), <https://www.hollywoodreporter.com/news/wga-awards-scrap-video-game-writing-honor-1245200> [<https://perma.cc/3CDU-U4CN>].

229. *Id.*

230. *2019 Writers Guild Awards Screenplay and Videogame Writing Nominations Announced*, WRITERS GUILD OF AM. WEST (Jan. 7, 2019), <https://www.wga.org/news-events/news/press/2019/writers-guild-awards-screenplay-and-videogame-writing-nominations-announced> [<https://perma.cc/9LFW-QPD5>].

are listed as WGA signatories.²³¹ The guild's statement suggests that they intend to cease supporting non-signatories since such companies have not agreed to the WGA's conditions. Mass reclassification may compel employers to reconsider becoming signatories in order to regulate their business and gain prestigious recognition.

Video game workers also have the more desirable option to instead form their own unions that could model the WGA's process. In the event that there is a huge shift in the video game workforce after the advent of AB 5, notwithstanding any simultaneous employer efforts to curb this reclassification by threatening to relocate, employees have the right to form unions.²³² In order to form a bargaining unit, workers could organize across titles or employers as long as they form a "sufficient 'community of interest' that a union can reasonably represent those employees."²³³ Under the NLRA, at least thirty percent of the employees would need to support unionization in a petition order to proceed to an NLRB election.²³⁴

Once a union has been established, video game companies could then apply to become signatories to their collective bargaining agreements.²³⁵ The agreement should address payment minimums, limitations on span of work, health care plans, options, training programs, parental leave, and other relevant topics that video game union leaders would negotiate.²³⁶ If video game union membership becomes more prevalent, the union could create its own strike or unfair lists to publicize forms of unfair conduct of video companies.²³⁷ To illustrate, the Writers Guild uses its influence to document a

231. *Signatory Company Confirmation Lookup*, WRITERS GUILD OF AM. WEST, <https://apps.wga.org/signatorycompanies/> [<https://perma.cc/UJW2-VPQF>].

232. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2020)).

233. *Frequently Asked Questions*, UCNET, https://ucnet.universityofcalifornia.edu/labor/faq.html#2_9 [<https://perma.cc/JCR8-78WH>].

234. *Conduct Elections*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/about-nlr/what-we-do/conduct-elections> [<https://perma.cc/A55H-YFQK>].

235. *Become a Signatory*, WRITERS GUILD OF AM. WEST, <https://www.wga.org/employers/signatories/become-a-signatory> [<https://perma.cc/DG4W-ALW8>].

236. *Summary of the 2017 MBA*, WRITERS GUILD OF AM. WEST, <https://www.wga.org/contracts/contracts/mba/2017-mba-summary> [<https://perma.cc/T3M2-T6RK>].

237. *Strike List/Unfair List*, WRITERS GUILD OF AM. WEST, <https://www.wga.org/employers/signatories/strike-unfair-list-intro> [<https://perma.cc/TY88-EV7J>].

list of companies that have refused to sign their MBA, wrongfully failed to “participate in grievance and arbitration procedures,” or violated the NLRA in any manner.²³⁸ This would help inexperienced professionals hoping to join the gaming workforce select a company that was deemed friendly to employees by the union. In order to police its members, the union could bind its members to a rule that prohibits them from entering into a contract with any company on the unfair list.²³⁹ This would all serve as pressure on video game companies.

Another benefit to forming separate unions for video game employees is that these unions can address issues unique to the industry. Video game writers will not need to shoehorn their particular issues into a discussion normally centered on film and television employees. The ability to center the discussion on video game employees will allow leaders to more precisely define these jobs and standardize the conditions across different companies. Such an agreement can clearly delineate publishing and developer companies as well as first, second, and third-party developers. It can also define certain patterns found in the video game industry, like “crunch” periods, after union leaders and employers negotiate an agreeable outcome on overtime payment. In the case of the Writers Guild’s 2017 MBA, the document clearly outlines different stages of the writing process, intellectual property rights, and job titles that would be applied to video game contracts.²⁴⁰

It is vital for these new unions to gain established signatories like Nintendo, one of the largest international development companies, which purports to ensure “employee welfare and well-being” as a part of their obligation to stakeholders on their company website.²⁴¹ These measures include diversity and inclusion efforts, ergonomic workstations, paid childcare, and employee assistance programs.²⁴² But the reality on the ground is different for employees who report receiving low pay for high-stress work and an

238. *Id.*

239. *Id.*

240. *2017 Basic Agreement Between Writers Guild of America and Alliance of Motion Picture and Television Producers*, WGA, <https://www.wga.org/uploadedfiles/contracts/mba17.pdf> [<https://perma.cc/4A8L-9KVJ>].

241. *Corporate Social Responsibility at Nintendo*, NINTENDO, <https://www.nintendo.com/corp/csr/index.jsp> [<https://perma.cc/K8W8-QDSS>].

242. *Id.*

alleged bias towards younger recruits who can be molded by the company over the years.²⁴³ This is the sort of activity that should be monitored by unions.

Video game union leadership will have the power and responsibility to shape the narrative around the industry if they gain enough resources. Over time, non-signatory companies might eventually adjust their own employment agreements to resemble the standard that is established once unions gain enough leverage. Even so, video game company executive boards will likely have the resources to outspend union leaders and push back against organizing efforts. These companies might decide to follow the example of leaders in the gig economy who are lobbying for exemptions. It will be the responsibility of future video game union leaders to distinguish video game industry jobs from other gig industry jobs like rideshare and food delivery driving.

While independent contractors do not presently have the rights to collectively bargain, the unionization of employees may still indirectly benefit them and incidentally improve their workplace conditions.²⁴⁴ These independent contractors still have traditional contractual remedies and even remedies for discrimination disputes under the Unruh Civil Rights Act in California.²⁴⁵ Some freelancers can also join a non-profit organization, such as the Freelancers Union that provides different types of insurance for independent contractors.²⁴⁶ The organization is limited because it is not a trade union, so it does not have the legal jurisdiction to negotiate on behalf of these contractors.²⁴⁷ It has nonetheless been influential in raising concerns about

243. Matthews, *supra* note 59.

244. Holden & Baker, *supra* note 205, at 437. The increase of contractors in the workforce has revived a discussion about the problems associated with excluding independent contractors from NLRA protection and the potential need for reforms. Sunshine, *supra* note 17.

245. CAL. CIVIL CODE § 51.5 (West 1982); Jack Holcomb, *Discrimination and Harassment Recovery for Independent Contractors*, KRAMER HOLCOMB SHEIK, LLP, <https://www.khslaw.com/insights/discrimination-harassment-recovery-independent-contractors/> [<https://perma.cc/TFN7-R5B8>].

246. *About Freelancers Union*, FREELANCERS UNION, <https://www.freelancersunion.org/about/> [<https://perma.cc/U7FU-B76X>].

247. Ari Paul, *A Union of One*, JACOBIN, <https://www.jacobinmag.com/2014/10/freelancers-union/> [<https://perma.cc/KZ29-964P>].

the treatment of alt-labor workers and could therefore provide a platform for video game contractors.²⁴⁸

IV. THE ROLE OF STRATEGIC CORPORATE SOCIAL RESPONSIBILITY IN FACILITATING LEGAL COMPLIANCE

Under the stakeholder theory of Corporate Social Responsibility (“CSR”), corporations such as video game companies have the ethical responsibility to prevent or mitigate societal harms they cause and pursue social betterment in their “ordinary course of business.”²⁴⁹ CSR is a “self-regulating business model that helps a company be socially accountable—to itself, its stakeholders, and the public.”²⁵⁰ This responsible behavior includes ensuring legal compliance.²⁵¹ It would also entail the implementation of appropriate health and wellness measures, environmental policies, and “ethical labor practices.”²⁵² While profitability is still a foundational motivation, an approach like “strategic CSR” emphasizes long-term benefits derived from “positive publicity and goodwill.”²⁵³

The most relevant question on the topic of corporate purpose is “whether the law should encourage corporations” to act as “socially responsible” entities.²⁵⁴ Such a directive would imply that companies “sacrifice . . . some profit to achieve some social good”²⁵⁵ A company’s lower

248. *Id.*

249. Manuel Castelo Branco & Lúcia Lima Rodrigues, *Positioning Stakeholder Theory Within the Debate on Corporate Social Responsibility*, 12 ELECTRONIC J. OF BUS. ETHICS AND ORG. STUD. 5, 7 (2007); James Chen, *Corporate Social Responsibility (CSR)*, INVESTOPEdia (Feb. 22, 2020), <https://www.investopedia.com/terms/c/corp-social-responsibility.asp> [<https://perma.cc/N3UH-BWAN>].

250. Chen, *supra* note 249.

251. Branco & Rodrigues, *supra* note 249, at 12.

252. Olivia Vande Griek, *6 Ways Corporate Social Responsibility Benefits Your Employees*, CONSCIOUS COMPANY (Aug. 24, 2017), <https://consciouscompanymedia.com/workplace-culture/hr-innovations/6-ways-corporate-social-responsibility-benefits-employees/> [<https://perma.cc/FJ8W-LW3X>].

253. Branco & Rodrigues, *supra* note 249, at 12.

254. Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1007 (2013).

255. *Id.*

employee turnover rate and loyal employee base could contribute to the maximization of revenue. Employees who are disillusioned with the larger studios they once revered are now turning to independent outlets in order to take more creative risks.²⁵⁶ Although this option does not necessarily enhance job security due to the inherent financial risks of embarking on an independent project, this may become a growing problem as industry veterans exit big studios looking for viable alternatives. Employees are realizing that the idea of “corporate job security” may be overrated and a myth altogether.²⁵⁷ While employee training can be costly, investing in employees over the years can foster a positive work environment that helps avoid burnout and creative stagnation. A healthy work environment would therefore do more than just foster positive morale among employees. It would offer stability to employers who would then be responsible for creating and implementing “policies, procedures, strategies, and employment terms that minimize the risk of union organizations” with the help of their legal counsel.²⁵⁸

The video game industry’s opportunism in employing “aggressive regulatory arbitrage can erode social license and create a more costly environment for sustainable operation.”²⁵⁹ Social license is derived from the “permission from communities and stakeholders” for a particular business to exist and be held accountable.²⁶⁰ Businesses suffer an audience cost if they engage in activities that are frowned upon in both legal and non-legal circles alike.²⁶¹ For instance, news that Uber had engaged in aggressive regulatory arbitrage through misclassification resulted in strikes, boycotts, and negative social media campaigns that damaged the company’s public image.²⁶² The video game industry’s longstanding reputation of “dangling the carrot” for

256. Ben Kuchera, *Feral Developers: Why Game Industry Talent Is Going Indie*, ARS TECHNICA (Aug. 23, 2011, 7:00 PM), <https://arstechnica.com/gaming/2011/08/experience-going-indie/3/> [<https://perma.cc/UE8Q-PDRM>].

257. *Id.*

258. *How Can We Prevent a Union From Organizing in Our Company*, SOC’Y FOR HUM. RES. MGMT., <https://www.shrm.org/about-shrm/Pages/default.aspx> [<https://perma.cc/S5JJ-83MY>].

259. Pollman, *supra* note 16, at 570.

260. *Id.* at 576.

261. Hillary A. Sale, *The Corporate Purpose of Social License*, GEO. L.J., 2019, at 1, 8.

262. Pollman, *supra* note 16, at 576.

independent contractors who hope to become full-time employees is against federal regulations.²⁶³ The practice of hiring contractors as part of a “trial run” is not permitted because worker classifications are not meaningless titles that can be utilized by employers wishing to test the waters.²⁶⁴ Classifications have legal implications for labor, employment, and tax law purposes.²⁶⁵ Thus, if a worker strung along as an independent contractor has been acting as an employee under even the previous, more employer-friendly common law test, then an auditor can subject the employer to fines and penalties.²⁶⁶ In addition, the current approach used by some video game companies of hiring contractors for nine months and then asking them to take time off before rehiring them is transparently illegal.²⁶⁷ As stakeholders continue to invest in the industry, misclassification could lead to actual liability. While having a workforce comprised of more employees invariably exposes them to more litigation, the risks of resisting legal compliance should not be understated or underestimated by investors.

Since the video game industry is not immune to public and stakeholder pressure, it is in the best interest of stockholders to force legal compliance because of their optimal position in the corporation and the potential adverse impact of ongoing gaming industry scandals on their investments. Stockholders have every right to rebuke corporate managers for allowing misclassification to have prevailed, since it could cost the company up to seventy cents for every dollar paid to the contractor to rectify the situation.²⁶⁸ Public relations scandals are also costly. Among countless other anecdotes from workers, the CEO of the game developer and publisher, Nicalis, recently

263. Campbell, *supra* note 58.

264. *Id.*

265. *See id.*

266. *Id.*

267. *7 Legal Pitfalls To Avoid When Hiring Seasonal Employees*, FISHER PHILLIPS (Jan. 1, 2017), <https://www.fisherphillips.com/resources-newsletters-article-web-exclusive-7-legal-pitfalls-to-avoid> [<https://perma.cc/88FK-36G3>]; *Can An Employer Terminate and Rehire an Employee as an Independent Contractor Doing The Same Job?*, SOC'Y FOR HUM. RESOURCES MGMT., <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/cananemployertermine-andrehireanemployeeasanindependentcontractorddoingthesamejob.aspx> [<https://perma.cc/9N7U-ZVS6>].

268. Campbell, *supra* note 58.

faced allegations of racism in the workplace.²⁶⁹ The CEO eventually conceded that his comments to employees were “indefensible and unacceptable,” but not before public pressure was exerted.²⁷⁰ The corporation was eventually forced to issue a statement to assure the public that they did not tolerate “abusive workplace environments or discrimination” after complaints surfaced.²⁷¹ In the case of the Riot Games walkout, it was once again public pressure that compelled the company to reconfigure their arbitration agreements to allow a carveout for sexual harassment claims.²⁷² These notable examples reveal a willingness to appease the public within certain bounds. Further, these examples indicate that video game companies are struggling to deal with public backlash.

The current video game industry model presents not only ethical liabilities but will soon reveal itself to be a strategic failure as well. Supporters of CSR would argue that any given company’s “moral responsibility to any individual or groups where it might inflict actual or potential injury (physical, mental, economic, spiritual, and emotional) from a particular course of action,” supplants the goal to maximize the company’s profitability.²⁷³ Potential wage theft claims arising out of unpaid overtime during crunch periods and widespread misclassification are amalgams of such harms. When development companies choose to hire independent contractors to fulfill the responsibilities of employees, their cost-saving mechanism costs the state millions in tax revenue.²⁷⁴ In addition to its actual workforce, these companies owe a duty to the taxpayers of the states in which they operate. While smaller, still-emerging companies may have financial limitations that inhibit them from offering more full-time employee positions, larger, more established companies have the resources to properly classify their employees.

269. Jason Schreier, *Inside the Ghosting, Racism, And Exploitation At Game Publisher Niccalis*, KOTAKU (Sept. 12, 2019, 12:00 PM), <https://kotaku.com/inside-the-ghosting-racism-and-exploitation-at-game-p-1838068522> [<https://perma.cc/W6B3-JQLS>].

270. *Id.*

271. *Id.*

272. Eidelson et al., *supra* note 114.

273. Branco & Rodrigues, *supra* note 249, at 12.

274. Jack Kelly, *Big Changes to Come As Uber Tries to Safeguard Its Business Against California’s Gig-economy Law*, FORBES (Jan. 22, 2020, 10:23 AM), <https://www.forbes.com/sites/jackkelly/2020/01/22/big-changes-to-come-as-uber-tries-to-save-its-business-from-crashing/#d665ff13b13a> [<https://perma.cc/42TU-NL46>].

However, they forgo doing so because they have not yet been compelled by the state to absorb these costs.

Although some gig companies have chosen to take a more combative approach with the legislature over the scope of AB 5, video game industry boards would benefit from getting ahead of the bad press by adjusting their practices to avoid losing political capital.²⁷⁵ Ride-sharing companies like Lyft and Uber—the intended targets of AB 5—introduced a ballot measure to become exempt after they were unable to implement the language in the actual Bill.²⁷⁶ Like those companies, video game companies certainly save taxation and employee benefit costs and can more easily lay off workers when the workload is less demanding by classifying them as contractors. But in doing so, they have also become vulnerable to the “risk of government scrutiny” and may lack a loyal, consistent workforce to support them should a ballot measure be introduced.²⁷⁷ Open defiance towards the California Legislature’s intentions would not help the industry gain favor in the political process.²⁷⁸ To illustrate, in 2018, the New York City Council passed a minimum wage law for drivers in order to thwart Uber’s efforts to benefit from engaging in regulatory arbitrage through misclassification.²⁷⁹ Local California political bodies can do the same in order to punish video game companies for noncompliance.

The potential improvement in brand value for video game companies from its currently held unflattering reputation can also encourage them to develop a more “sustainable or profitable business model.”²⁸⁰ CSR is no longer considered a hindrance to company success, but rather a sound business decision to look beyond profit-maximization of shareholders. In fact, as previously delineated, legal compliance could actually help increase a company’s bottom line or, at the very least, avoid costly repercussions. While gaming companies have raised money for worthy causes and

275. Myers, *supra* note 144; Fleischer, *supra* note 16, at 272.

276. Myers, *supra* note 144.

277. Jiah Kim, *Entrepreneur’s Dilemma: Independent Contractors or Employees?*, JIAH KIM & ASSOCIATES (Mar. 16, 2017), <https://jiahkimlaw.com/business-planning/entrepreneurs-dilemma-independent-contractors-employees> [<https://perma.cc/U5X5-8G8H>].

278. Pollman, *supra* note 16, at 575.

279. *Id.* at 578.

280. Sale, *supra* note 261, at 23–24.

scholarships, in accepting that “economic viability is something business does for society as well,” their generosity should start with regard to their own workforce.²⁸¹

V. CONCLUSION

Although much is yet to be determined until after gig industries present their ballot measure in California, AB 5 will likely compel the video game companies to restructure their workforce. This would undo years of companies maneuvering around ambiguous legal precedents in employee classification to avoid classifying their workers as employees.²⁸² Since employers will not be able to overcome the ABC test and most industry job titles do not fall under the legislation’s stated exceptions, these workers will need to be reclassified as employees. The cumulative effect of reclassification will allow for the state to recoup tax revenue and relieve the public that has been unjustly required to “assume additional financial burdens with respect to such workers”²⁸³ Reclassification cases will reveal that the industry’s “harmful maneuvering” not only shifted costs onto workers and taxpayers, but also placed companies that properly classified their workers at a competitive disadvantage.²⁸⁴ The threat of reclassification will also require businesses to apply safeguards to avoid wage and hour litigation arising out of perpetual crunch periods. After reclassification, the larger employee workforce can then begin to unionize in order to advocate for better work conditions so that Sledgehammer Games is no longer an exceptional example. Alleviating the uncertainties that burden the current workforce through legal compliance will ultimately improve employee morale, retention rates, company culture, and workplace creativity.²⁸⁵

281. Scott Williams, *8 Gaming Brands With High Scores in Social Impact*, GLOBALGIVING (Oct. 8, 2019), <https://www.globalgiving.org/learn/listicle/7-gaming-industry-social-impact-initiatives/> [<https://perma.cc/4JWX-QVM6>]; Branco & Rodrigues, *supra* note 249, at 12.

282. Pollman, *supra* note 16, at 570.

283. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1 (Cal. 2018).

284. Pollman, *supra* note 16, at 586.

285. Griek, *supra* note 252.