

Alt Text: New Characters and Labor Unions

By Laura A. Pierson-Scheinberg & Conor J. Dale

March 7, 2023

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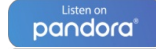
Technology

Details

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Union organizing in the technology industry—particularly in the video gaming industry is increasing—and diversifying. Labor unions now have a new target: developers and testers.

Jackson Lewis P.C. · Alt Text: New Characters and Labor Unions



Transcript

Alitia Faccone:

Welcome to Jackson Lewis' podcast, We Get Work. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate an engaged, stable and inclusive workforce.

Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind, how will my business be impacted? Union organizing in the technology industry, particularly in the video gaming industry, is increasing and diversifying. Labor Unions now have a new target, developers and testers. On this episode of We Get Work, we discuss union organizing in the video gaming industry as indicative of trends in technology, and what employers should do in response to organizing behavior.

Our host today are Laura Pierson-Scheinberg, a Principal in Jackson Lewis's San Francisco and Baltimore offices, and Conor Dale, a principal in the San Francisco office.

Laura is a member of the firm's labor group and leader of the retail industry group. She also spearheads the Jackson Lewis Caffeinated Organizing Initiative, which advises on the recent uptick of union activity

in the retail and restaurant industries. Laura is called on frequently to speak on this topic by numerous professional associations, including most recently, the Retail Industry Leadership Association's, Retail Law Conference, the National Retail Federation, and the National Restaurant Association's sixth Annual Law Summit.

Conor's experience focuses on contractual arbitration and representing employers in the technology industry, including defending companies and boards of directors from claims filed by current and former C-suite executives. Conor also has experience advising and counseling employers on all aspects of California and federal employment law.

Laura and Conor, the question on everyone's mind today is, what do I need to know, but never thought to ask about union organizing in the technology industry, particularly in the video gaming industry, and how will that impact my business?

Laura A. Pierson-Scheinberg:

I recently was reading a New York Times article that talked about organizing in the video game industry specifically, and in that article... I'm a labor lawyer, so I follow what unions are doing all the time, and we've been really seeing a labor renaissance here. And it's a social movement, it's a movement where the employees are interested in it and really do it on a grassroots basis, particularly the generation Z is very, very interested in unions. If you just look at just basic statistics right now, year over year petitions from just 2022 were up 60% over the year prior, and this year we're seeing a similar trend, so we don't think this is just kind of an anomaly. We think it's a trend and a renaissance.

Unions are winning. They're organizing at 75%. So if you get to an election standpoint, unions are winning those elections by 75%. And as we are looking at it, it's in really non-traditional unionized industries. So historically it's been industries such as the service industry or manufacturing, transportation, those sorts of things. But we've really seen a renaissance in tech in particular, where the employees are actually interested in it. I know, Conor, you do a lot of work in the video game industry with clients of yours. Can you tell us why you think that is, that there's a focus there?

Conor J. Dale:

Well, Laura, thanks for bringing that point up. I can tell you there is a focus in technology in general, in video games in particular, for a few reasons. The electronic entertainment industry can be subject to employee unionization drives in particular because it is a demanding industry on a lot of people. Employees working in that industry are expected to work very long hours, often at a discounted pay rate as compared to other industries for the work they're doing. There can be immediate deadlines to get a project off the ground, to get a game development working on time, to make launch windows or anything like that. There are rapid changes in

that industry constantly, where if you're a just employee at a video game developer, once you submit the game and it's all done, they have to conduct layoffs, right? There has to be rapid changes in the company once a project is complete.

And so it can be, for some employees, a pretty unstable working environment that has long hours, long demands, and at lower pay. And under those circumstances, you can see a wide variety of employment claims. Could be wage and hour claims, could be class action wage and hour claims, could be standard wrongful termination or discrimination claims, or it could be employees just simply more willing to be open to union organization. Laura, can you let us know what some of the issues that unions are organizing around in the technology industry in general with this updated organization drive for tech industry clients?

Laura A. Pierson-Scheinberg:

Oh, of course. So it's really the same. It's really the same that we're seeing among the Gen Z population, which is the employees that are 18 to 29, this is what we mean by Gen Z, that group has a different mindset of how they approach work. They want different things out of work than generations that I'm in, for example, or my parents were in. And it's not bad and it's not good, it's just different. And so employees want something different and the workforce hasn't quite figured out how to quite adjust to that. And the unions are capitalizing on that because they're asking issues and focusing on the social issues.

So my view of this is that we first actually noticed this during COVID. Our partner, Scott Jang, did a podcast similar to this one where we talked about, hey, this is not something we would expect to see. Tech and labor, so weird. And ever since then, it's kind of grown and grown and kind of built. And it's really the focus is on, Me Too, equal pay, anything socially justice related, Black Lives Matter, in a lot of the things that you were talking about, but just generally.

And then there's sort of the remote work issue because I know a lot of the gaming industry and tech industry is remote work. So the idea of moving away from that, and it's really the employees that are watching this as an issue. So when I look at, what, five years ago, for example, if you asked anyone on the street what unions do or what do I do for a living, the general population wouldn't know. It was not in mainstream the way it was in the past. When you think of unions, you thought, oh yeah, that's teachers, or, oh yeah, that's manufacturing. But really the whole media space, social media and generally media are covering unionization union drives that have been going on for decades at a very more hyper-focused pace.

So if you saw sort of the news, you might get the sense that, oh my gosh, all of the United States is organizing, when actually the representation in the private sector industry is hovering around 6% in the private industry. So it's still very a small part of the workforce, but it's growing at a rate right now that might push that number up, but the total workforce is huge. So

oftentimes employees are like, ah, what's this? Companies are like, what's going on here? It's not a big deal. But this industry is getting hit, and I think what we're seeing is a lot of the industries have to pay attention.

Conor J. Dale:

Laura, if I could just jump off on that point. The thing to appreciate about employees in the technology space and in the electronic entertainment space is that these are relatively young industries. They just simply don't have the same level of experience in dealing with unionization drives, traditional wage and hour class action lawsuits, things like that. So when I'm speaking to clients sometimes on these issues, and I will ask them, why are you doing it this way? Why is John Smith getting paid X and Jane Doe is getting paid Y? And the response often is, we don't know, that's the way we do it, it's always been that way. They just simply lack the experience or even the perspective in thinking about some of these issues in a holistic way.

I mean, just to address the topic of pay transparency, a lot of employers, particularly in this space, are just catching up to the legal regimes and the laws that have been passed in the past five, six years. Where a lot of employers are beginning to grasp the fact that laws like equal pay laws, pay transparency laws, legal protections for employees to discuss wage rates in the workplace. It is all designed to impose on employers, to empower employees to begin discussing these issues in the workplace and for employers to permit that to happen. And so discussions that would be completely inappropriate, say a decade ago, just based on the norms of a particular industry, are now highly, highly encouraged by the law itself.

And so in my experience working on, say, a standard discrimination claim for a video game industry client, in the complaint itself will be a long and drawn out discussion about how our plaintiff was a fantastic employee, but she got paid 75 cents on the dollar as compared to all of these other executives. And that stems directly from the legal regime that encourages those types of discussions, and then the change in culture where that's much more of a focus day-to-day.

Kind of the same thing when it comes to wage and hour compliance issues where the video game industry in particular, they never even thought about these things. Just in my anecdotal experience, there can be wide scale employee misclassification, or independent contractor misclassification. And again, when you speak to clients about this, the explanation is, "Gee, that's just the way we've always done it". And they haven't really thought any more deeply than that. For example, people in the technology industry, they get paid on a salary basis for jobs in other industries where it should be hourly. And employers in this space just simply haven't thought about it because they haven't had to think about it because no one has really blocked these claims before.

Laura, what type of union and union work are working in the technology space now, that you've observed?

Laura A. Pierson-Scheinberg:

I do want to talk for a second about protected concerted activity because the National Labor Relations Act does apply to the tech industry right now. It always has. But the focus by the National Labor Relations Board is to focus on non-unionized employers right now and unionized employers alike. And what you were talking about is that talking about your wages and that kind of thing, that rule has always been the case, but you're seeing it come more into the forefront through the pay transparency laws. And the other thing, where you actually have violations of the National Labor Relations Act too, that probably were already there but weren't a focus of plaintiff's counsel, and they've gotten smarter to include those claims as well because of the damages with the National Labor Relations Act includes reinstatement and back pay, in addition to some notice postings.

And more recently, the board is trying to expand the damages that are offered under the act to include things that aren't available in employment litigation, such as consequential damages. That would include things like lost rent, having to pay credit card bills, really kind of out there sort of stretching the bounds of damages that you don't typically see.

So I do see an uptick in capitalizing on this protected concerted activity movement. You hear a lot about work stoppages where there's no union involved at all, where employees just band together and say, "Hey, I've had enough. I'm walking out". There's been a huge uptick in that, and I think it just really kind of sets the stage really nicely for the unions to come in. There is the Communication Workers of America have a offshoot called CODE, and they've been focused on the video game industry for some time now, and they are really well poised to be the main player in this space, and it continues to be.

So I really just want everybody to understand, this isn't your grandparents' union. These employees and the unions align very nicely. They look like the people they're trying to organize. They speak their language. They're generally well-matched according to age, gender, those sorts of things, because it capitalizes on the ability to organize them. And union busting is disgusting. It really is a view of Gen Z. And so as we think about this, how do you think best to introduce this topic to your clients, Conor?

Conor J. Dale:

Laura, it's a funny thing. The one thing I always say to clients is, doesn't matter how you comply with the law, doesn't matter if you're dotting your Is and crossing your Ts. Do you treat your employees well? Are employees happy? That's the number one shield to all employment claims. Doesn't matter what it is.

If you have employees who really do not like the culture, if you have employees who are just genuinely expressing unhappiness day-to-day, you will get sued. It doesn't matter for what. If you think that your workforce is deeply unhappy with the work they are doing or the culture of the

company, that's the number one sign that you might be facing either unionization drive or a class action lawsuit, or a standard wrongful termination claim, whatever it is. If you think your workforce is unhappy, that's the number one sign that you should be concerned about these things.

And frankly, the way that at least I recommend people begin to mitigate the risk of any sort of legal claim is think about these issues. Have you examined whether your workforce is properly classified? Have you examined whether you're paying people overtime appropriately? Can you explain why John Smith is making more than Jane Doe? If you can't have explanations to those things, if you've never examined them before, you're vulnerable.

In this business, a pinch of prevention is absolutely worth a pound of cure. And so if you begin to get the sense that your workforce is unhappy, and it might have to do with pay transparency, it might have to do with employee classification, it might have to do with just simply bad culture. You should be concerned about these things. And Laura, let's use the example of you have a workforce that is genuinely unhappy, where they're politically progressive, where they're open to these issues. How do you recommend an employer begin to think about how to begin to broach the topic or address potential unionization drives in the workspace?

Laura A. Pierson-Scheinberg:

I think it's important to note that the employee bent on unions are very positive. You mentioned progressive, and both of us sit in California, not all of the gaming is in California, not all of tech, but there's certainly a concentration geographically on the West coast, but not solely. And then just the progressive, like any blue state.

But the real issue, and you really hit on it nicely, is that it's more about doing the right thing as an employer and focusing on your organizational wellness. Are you doing the right things? Are you giving the why and because behind the decisions that you're making? Are you being transparent? If we look at the issues that are commonly coming out, it's lack of voice. So what avenues are you thinking about to give your employees a voice, a legitimate voice in their work life?

Because as I said when we started, I don't think that it's good, bad, or indifferent as to how this generation is approaching work. It just is different than it has been in the past. This generation focuses on work differently. We have to meet them where they are as employers, and we have to make sure that they're engaged. And that level of engagement has to have some kind of loyalty and sense of belonging within the organization, so they don't seek that sense of belonging externally. And that union, the union is providing that sense of belonging where the employers aren't. That sense of giving them a voice, when it's our job as employers to ensure that the employees have a voice.

Another thing that we're hearing on top of this concept of a voice is the concept of corporate greed. Corporate greed is a hot topic that unions capitalize on, and we really have to, as an industry figure out and as labor professionals figure out how to address sort of the anti-capitalistic view while still making employees feel like they're heard, make them feel like they're fairly paid. And I think a lot of that is in the why and the because discussion over compensation and not to shy away from issues. And as you said, not to be skimpy when you don't have to be. If we just focus on doing the right thing, a lot of this stuff takes care of itself.

But irrespective the most perfect employer, the most grade A employers out there are getting hit and are getting organized. And so it's not good enough to be doing no harm. You have to be doing stuff in the community, and you have to be socially conscious. So really it's about, I think, when I start with new clients that are kind of figuring out where to start, is to just come up with a strategy and do a vulnerability assessment of, okay, let's see, how do you talk to your employees? Let's just do an audit, as you were saying, across the board, and look at how we communicate, what mechanisms employees have to complain, whether there's an uptick in complaints.

Conor J. Dale:

I think that's a fantastic idea, because I can guarantee you every single employer that I work with where there is a truly viable sort of wrongful termination claim or a harassment claim, someone complained at some point about something. It is a very, very rare situation where someone just bottles everything in and then files a lawsuit as their first remedied step. I can guarantee you someone complained to their manager or to HR somewhere down the line, and either it was ignored or the employee felt it was ignored. And so if you think that your workforce is raising genuine issues to management or to HR and it's not being heard, that exponentially exposes the employer to any sort of legal claim or unionization drive.

Just to hit on one additional point as to best practices for employees communication, explaining the why for decisions, nowadays, increasingly that's simply a legal requirement. For pay transparency laws and equal pay laws you have to be able to articulate, again, why Jane Smith is making X and John Doe is making Y. If you can't, then you are subject to some sort of pay transparency claim or pay equity claim or something like that. And it's always a good practice, particularly for the beginning of the year, we're in the new year, 2023, a lot of employers are now, with some of the pay transparency laws on the books, examining their own pay practices to review to see if we can genuinely articulate why people are getting paid what they are. And if we can't, let's see if we can do right by our employees. Boy, giving an employee an unexpected pay boost, even if it's only 2%, that's going to make them feel better. And it helps you be in compliance with the law.

Laura A. Pierson-Scheinberg:

It's funny because you mentioned pay a lot, and I think pay oftentimes

becomes a front-runner in campaigns, but traditionally it's like number three. Number one is always about respect, and we're hearing respect, respect take on many hats based on the particular movements that might be relevant. So the Me Too, equal pay, Black Lives Matter, diversity initiatives, et cetera. But just basic respect and having a voice is number one, and those communication channels that you were talking about.

So when I'm looking at a client, I'm making sure that they have robust communication channels so that when people complain and people are encouraged to complain, that you do something about it. And then when you do something about it, you tell the employee, do the follow-up to explain, because sometimes people think that their complaint went unanswered when in fact it was, but the supervisor got too busy to report back what they actually did to remedy the issue. So you only get credit for those things that you follow-up on so that the employees understand what you're doing.

So if you're thinking about some takeaways that you want to give our listeners out there, Conor, what would you tell them a good takeaway from? And then maybe I'll give you my thoughts, too.

Conor J. Dale:

Ask yourself genuinely, is my workforce happy? Is my workforce, as a technology employer, as a video game employer, are they happy? And if they're not, can we come up with three things that would assist in that experience? That's number one.

Number two, genuinely ask yourself, have there been employee complaints in the last year that we did everything that Laura and I were just talking about. One, it was received, two, it was acted upon, and three, it was reported out about what we did. If things have slipped through the cracks as well, that's an area of vulnerability.

So again, think about is my workforce happy or not, what can we do in response to that? And two, have we, in good faith, in appropriately addressed employee complaints that we've actually received? If employers begin to think and work on just those basic routine things, the risk of a lot of different employment claims goes down because the workforce is going to be happier, they'll feel heard and they'll feel like they're being treated with respect.

Laura A. Pierson-Scheinberg:

Just to piggyback on some of those things, I think that's great points. I want you to remember that from the employee's perspective, union busting is disgusting. Fight the urge to go negative and be negative about unions generally. It's not warranted and it won't get you anywhere. Instead, focus on your labor relations structure. Do you even have a labor relations and HR function? I know many companies are so small and growing so fast, a lot of my tech companies don't. So do you have a HR and labor relations

function? Who is your team in the event that an issue like this hits? What is your messaging going to be? Zoom out, again, and see what's working, what's not working? And we do that through a series of training. We train and then we do a vulnerability assessment just on organizational wellness topics that really cut and focus on the drivers, that are flags for people who are interested or issues around people that drive people to unions. You want a heat map within that assessment to just figure out what are your opportunities and what's your plan?

And then I always ask clients, what was your worst moment, and what's your answer for that? Because oftentimes you have to have an answer for what your worst moment is or what your biggest opportunity is and have a plan to address those. But when we leave our vulnerability assessments, we come up with an action plan of those items to focus on. You said three things, same concept, and it can be tailored to whatever the client needs, whether you're getting a bunch of aspects with respect to pay, then obviously we would pull in your team and folks to look on pay inequity issues. If they're more HR and labor relations related topics, then obviously we would be collaborating.

So I always say that unionization generally is a symptom of something that isn't working well within your organization, and we find that when you proactively address them, in the end, it will absolutely make your organization stronger. So Conor, anything to add?

Conor J. Dale:

2023 is a new year, it's a really good opportunity to address these issues with your employees, and I think they're going to appreciate that as well. So if you have time and want to see if you can improve your workforce and your work experience for your employees on all sorts of topics, not just compliance with the law or concerns about potential union organization, take these routine steps because it's going to help for the rest of the year.

Laura A. Pierson-Scheinberg:

I can't agree more, and I don't think this is going away. So if you at all have any ability to take a look at this, once it gets started, as I rattled off those statistics in the beginning, once it gets started, it's really hard to put the toothpaste back in the tube. We want to be proactive and really just focus on making our organization the best that it can be. Thank you so much for your time today.

Conor J. Dale:

Thanks everyone.

Alitia Faccone:

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