

PRINCIPLES OF SECTORAL BARGAINING:

A Reference Guide for Designing Federal,
State, and Local Laws in the U.S.

MAY 2021

INTRODUCTION

In January 2020, the Clean Slate for Worker Power project (referred to as “Clean Slate” throughout) released a report of the same name outlining a series of potential reforms to empower workers and restore our democracy and our economy.¹ Among the recommendations in Clean Slate’s report was a core proposal to develop a system of sectoral bargaining. As the report detailed, “[D]ecentralized bargaining—what is often referred to as ‘enterprise bargaining’—has resulted in important gains for workers but also has three profound shortcomings. First, it has left tens of millions of workers without the protection of collective bargaining, exacerbating racial and gender exclusion. Second, it creates an incentive for employers to fight unionization in order to avoid any competitive disadvantage with non-union competitors. Third, it is structurally incapable of addressing the problems posed by the fissured workplace. By empowering workers to bargain at the level of an industry or sector—rather than just at the level of an individual enterprise—we can address these shortcomings. Moreover, because sectoral bargaining results in higher levels of collective bargaining coverage, it is more effective than enterprise bargaining at reducing income inequality and notably more effective than enterprise bargaining at addressing racial and gender pay gaps.”

The Clean Slate report proposed an integrated and holistic vision for labor law reform in the United States, including a series of general recommendations for how sectoral bargaining might occur. But even before that sort of sweeping labor law reform is enacted at the federal level, there are opportunities to incorporate sectoral approaches in other federal, state, and even local legislation to address problems in the workforce and/or in the broader economy.

Since the report was published, the COVID-19 crisis has, if anything, further exposed existing fissures in our economy. Our labor market and our social insurance programs have always left too many workers in low-wage industries behind, but the gaps have now become gaping holes.²

¹ See Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, LAB. & WORKLIFE PROGRAM, HARV. L. SCH. 1-125 (2020), https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf.

² See, e.g., Molly Kinder and Martha Ross, *Low-wage workers have suffered badly from COVID-19 so policymakers should focus on equity*, in *REOPENING AMERICA: HOW TO SAVE LIVES AND LIVELIHOODS* 92-97 (John R. Allen & Darrell M. West, Brookings Inst. eds., 2020), <https://www.brookings.edu/research/reopening-america-low-wage-workers-have-suffered-badly-from-covid-19-so-policymakers-should-focus-on-equity/>.

Grocery store clerks and line cooks became the indispensable heroes of our workforce, and food and retail delivery workers became the pipelines to keep the rest of the country safe—and a lifeline for those who are most at risk. Still today, however, those workers lack adequate personal protective equipment (PPE),³ childcare,⁴ and paid sick-day protections under many state laws (although many gig workers did get protections for the first time under the bipartisan coronavirus paid leave bill).⁵ Moreover, Black and brown workers and others who have been historically marginalized are getting sick and dying of COVID-19 at dramatically higher rates than other people—and increasing evidence suggests that one driver of this disproportionate outcome is that Black workers are more likely to work in frontline “essential” jobs, which puts them and their families at greater risk.⁶

Given that, Clean Slate released a second report in June 2020, applying a variety of Clean Slate principles to the question of how to safely reopen the economy in the wake of the COVID-19 pandemic.⁷ Among the recommendations was launching sectoral commissions that could negotiate safety-and-health standards across the economy.⁸ This proposal would not require full-scale labor law reform but instead suggested a targeted strategy for harnessing sectoral bargaining approaches to deal with a concrete problem in a challenging system.

Yet health and safety are not the only areas of labor law that could be reformed in this manner. In the short run, there are a number of similar interim steps that the U.S. could take toward sectoral bargaining. In particular, bargaining could be implemented vertically, horizontally, or by state. In a vertical approach, a single sector would adopt sectoral bargaining (e.g., in the fast food, home care/domestic work, and/or clean energy industries). This would still likely require legislation at the federal level, but it would allow for an experiment with sectoral bargaining at a smaller level. A horizontal approach would entail legislation mandating sectoral bargaining

³ See Spencer Soper & Matt Day, *Amazon Drivers Received Single Wipe to Clean Vans Before Shifts*, BLOOMBERG (Mar. 18, 2020, 3:14 PM), <https://www.bloomberg.com/news/articles/2020-03-18/amazon-drivers-received-single-wipe-to-clean-vans-before-shifts>.

⁴ See Becky Z. Dernbach, *Minnesota and Vermont Just Classified Grocery Clerks as Emergency Workers*, MOTHER JONES (Mar. 18, 2020), <https://www.motherjones.com/coronavirus-updates/2020/03/minnesota-and-vermont-just-classified-grocery-clerks-as-emergency-workers/>.

⁵ See Claire Cain Miller, *Who Qualifies for Paid Leave Under the New Coronavirus Law*, N.Y. TIMES (Mar. 19, 2020, updated Apr. 3, 2020), <https://www.nytimes.com/2020/03/19/upshot/coronavirus-paid-leave-guide.html>.

⁶ See Elisa Gould & Valeria Wilson, *Black workers face two of the most lethal preexisting conditions for coronavirus—racism and economic inequality*, ECON. POL’Y INST. (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/>.

⁷ See Block & Sachs, *supra* note 1, at 1–29.

⁸ *Id.* at 9–11.

across the entire economy but would limit the topics subject to bargaining to a narrow range or single topic (e.g., safety and health—as in Clean Slate’s COVID-19 proposal—wages, automation, or scheduling). Finally, a state approach would require legislation expressly lifting federal preemption for state laws that mandate sectoral bargaining. States would then be free to experiment with sectoral bargaining approaches, allowing a range of learnings about how sectoral bargaining could work.

This paper is intended to be used as a reference guide and a toolkit for those seeking to develop sectoral bargaining systems, whether at the state/local level or the federal level. The paper will further discuss these vertical and horizontal approaches before offering a more in-depth exploration of eight key questions that may need to be answered to design an effective sectoral bargaining system and help to heal the fissures within and throughout our economy. These questions will help to illuminate the decisions that would need to be made in order to implement a comprehensive reform proposal in the longer run or the shorter-term vertical or horizontal approaches:

1. How should sectors be defined?
2. What should trigger sectoral bargaining?
3. How should representatives for sectoral bargaining panels be designated?
4. How should bargaining be conducted?
5. What is the scope of the bargaining?
6. What happens if there is an impasse?
7. How and when should contracts get extended to those other than the representatives of the bargaining panels?
8. How should contracts be enforced?

For each of the questions, we seek to examine a variety of answers, as well as their pluses and minuses, but we do not necessarily assert one correct answer in every case. Our hope is that this exploration will help to lay out a menu of options that advocates can choose from when designing possible sectoral bargaining approaches, whether federal, vertical, horizontal, or state-based. Throughout the paper, when referring to a government agency, we refer to the U.S.

Department of Labor as the anchor for a federal sectoral proposal, but it could be a stand-in for a state or local labor department, human rights commission, or other regulatory agency in a non-federal sectoral bargaining approach.

Note that whether a sectoral bargaining approach is federal, vertical, or horizontal, sectoral agreements cannot replace enterprise bargaining. In part, this is a reflection of the importance of engaging in workplace-level organizing for workers to be able to have power as well as workplace democracy. Many countries where sectoral bargaining has existed for centuries have workplace-level organizing as well; indeed, in discussions with labor organizers and employers alike in countries with long histories of sectoral bargaining, the importance of strong workplace organizing was a common refrain, including the possibility of work stoppages. Having a shop-steward system at the local level allows workers an opportunity to make their voices heard in their actual workplaces and provides an opportunity to tailor agreements to the needs of workers.

TRANSITIONING TO SECTORAL BARGAINING IN THE U.S.

As explained above, we propose three distinct approaches to incorporate sectoral bargaining principles into cutting-edge policy reforms at the federal, state, or local levels: vertical, horizontal, and state-level; each of which is described more fully below. Not only can these sectoral bargaining approaches enhance worker power in policy in the short term, but they can provide an important space to measure, evaluate, and prove the value of sectoral bargaining to workers, policymakers, and even employers.

Vertical Approaches

First, a “vertical” sectoral bargaining approach involves legislation mandating broad-based sectoral bargaining, as outlined in the Clean Slate report, in a single sector. For example, a sectoral bargaining system could be adopted to raise labor standards in an industry such as fast food, the green energy economy, or even domestic work (including home care). Indeed, the federal Domestic Workers Bill of Rights⁹—introduced by then-Senator Kamala Harris and backed by the National Domestic Workers Alliance—itself adopted some key sectoral principles.

There are distinct advantages to adopting a vertical sectoral approach. First, doing so would enact a pilot of this sort of system on a more manageable scale, enabling greater measurement, evaluation, and iteration prior to deploying this model across the economy. This approach also allows the strategic selection of a sector where the worker organization representing (or seeking to represent) the workers supports experimenting with sectoral approaches, rather than sectors where worker organizations are seeking more data to assess the strategy.

On the other hand, there are disadvantages to adopting vertical sectoral approaches, chiefly, that the impact is (by definition) smaller at first. Likewise, the politics can be difficult, given that established industry groups might oppose sectoral bargaining in any industry on principle, while only a subset of worker organizations are likely to support such a proposal.

⁹ National Domestic Workers Bill of Rights, H.R. 3760, 116th Cong. (2019).

Importantly, vertical sectoral approaches present other opportunities for reform as well. They could be paired with mandates to implement other Clean Slate recommendations in the same sector, such as works councils and workplace monitors. As a practical matter, they would likely require the adoption of at least some of the Clean Slate recommendations regarding demonstrations of support, such as electronic petitions and unions' access to workers both on-line and in-person.

Horizontal Approaches

Another avenue for incorporating sectoral principles involves “horizontal” approaches to sectoral bargaining. In horizontal approaches, legislation would mandate sectoral bargaining across the entire economy, but it would limit the topics subject to bargaining to a narrow range or single topic, such as wages, automation and artificial intelligence (AI), scheduling flexibility, or even basic safety-and-health requirements. Clean Slate’s pandemic response proposal, discussed above, is a prime example of a horizontal approach.

Horizontal approaches to sectoral bargaining have some distinct benefits. For one thing, while their protections are (by definition) limited, those protections may still apply to most if not all workers, giving workers and worker organizations more experience with (and comfort about) sectoral approaches in general. At the same time, the narrow scope of bargaining subjects may draw less intense opposition from the employer community, especially if bargaining is limited to an area like safety and health, where some employers have a longer history of cooperation with workers in finding solutions and where employers may be driven by the pandemic to seek more collaborative approaches.

On the other hand, horizontal approaches have some drawbacks. In contrast to employers finding limited bargaining subjects—especially safety and health—less charged, some workers may likewise see bargaining on non-economic topics as less consequential. Still, implementing a horizontal approach requires answering some of the most difficult questions about implementation of a sectoral approach, including how to define sectors, so that the startup “cost” may approach that for a broader set of sectoral reforms.

Like their vertical counterparts, horizontal sectoral bargaining approaches likewise lend themselves to the adoption of other Clean Slate reforms. For example, horizontal approaches

could be accompanied by works councils or monitors that deal with the same topic or range of topics as the sectoral bargaining table.

State Approaches

A third avenue for transitioning to sectoral approaches would be to do so rather broadly at the state level. Of course, some state-level approaches would require comprehensively lifting federal preemption for state laws that mandate sectoral bargaining—a heavy lift.¹⁰ Alternatively, federal legislation could more narrowly limit the preemption exemption to vertical or horizontal approaches described above.

Either way, state approaches have the advantage of serving as more manageable experiments in thinking through the logistics of sectoral bargaining. For one thing, worker organizations could target a state where the political environment is more favorable to test this approach. State-level sectoral bargaining would yield important insights to facilitate implementation at the federal level, not to mention data and experiences that could support the passage of such a program.

On the other hand, state-level approaches doubtless have downsides as well. They threaten to continue to perpetuate the divide in labor standards and union strength between workers in “blue” and “red” states, respectively. Beyond that, few states would have the expertise or experience to tackle the very complicated issues that would need to be resolved.

State approaches may be more effective if paired with other Clean Slate reforms. For example, the Clean Slate reforms point to certain topics that would presumptively not be preempted by federal law, including:

increases in penalties for employers that violate workers’ collective rights, the expansion of coverage, the use of new electronic means of demonstrating support for union representation, and the expansion of the percentage of workers on corporate boards.¹¹

All told, pursuing any of these transitional approaches in the short term will prove extraordinarily helpful in advancing the broader Clean Slate reform agenda in the future.

¹⁰ See CLEAN SLATE FOR WORKER POWER, *Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level*, LAB. & WORKLIFE PROGRAM, HARV. L. SCH. 1-27 (2021), <https://www.cleanslateworkerpower.org/clean-slate-policy>.

¹¹ See Block & Sachs, *supra* note 1, at 81.

QUESTION 1: HOW SHOULD SECTORS BE DEFINED?

The first step in establishing sectoral bargaining is, of course, the same regardless of whether the sectoral system is a transitional one or a complete overhaul of labor law; the law must first define what the “sector” or “sectors” are. In many countries ranging from Denmark to South Africa, sectoral agreements themselves define the scope of sectors, which creates a heavy reliance on historical definitions. But in Argentina, the state itself defines the scope of sectors. One benefit to this approach is that the state can create sectoral boundaries that avoid gaps between sectors and minimize overlap between agreements.

As a result, the Clean Slate report adopts a model closer to Argentina’s, including a two-step process for defining sectors:

Step 1: Set statutory guidelines for sector definitions; and

Step 2: Implement statutory guidelines.

Setting statutory guidelines for sectoral definition(s) may be a fairly technical process, and it requires consulting with labor economists, worker organizations, employers, and other stakeholders. One simple way to define sectors is to simply adopt pre-existing industry codes (e.g., a North American Industry Classification System, or NAICS, code or a Standard Industry Classification, or SIC, code.) Doing so, however, has all the limitations inherent in the code used. Sectors could also be defined by geography—by using DUNS numbers¹²—by identifier codes for businesses that are arranged by geography (but not easily broken down by industry), by defining a specific geographic region (national, regional, subregional, e.g., metropolitan statistical area (MSA)), or by something more varied.

One important question is whether the definition of the sector should allow for variation over time. The benefit of doing so is that it might allow for changes in the industry or in behavior over time, including changes that are intentional efforts to avoid unionization. On the other

¹² DUN & BRADSTREET D-U-N-S NUMBER, <https://www.dnb.com/duns-number.html> (last visited Feb. 23, 2021).

hand, a process to redefine sectors could itself be used to undermine the sectoral bargaining system, under certain administrations.

Fissured industries—industries reliant on subcontracted or temporary employees, such as logistics companies like Amazon that use subcontractors to deliver packages or janitors in major industries like hotel chains—pose a particularly difficult problem for sector definition.

In countries with a strong history of sectoral bargaining like Denmark and Sweden, strong worksite organizing efforts—and the threat of labor action (including secondary boycotts)—can be leveraged to ensure that fissuring cannot be used to interfere with organizing rights. In those countries, strong unions can evade efforts to undermine labor standards through fissured industries.

In the U.S., sectoral bargaining can be leveraged to try to ensure that fissuring is not used to evade coverage of labor laws. But in any event, it will be important for any sectoral approaches to place fissured work in one sector or another. One option is to treat fissured industries as part of a broader sector in which they work. For example, hotels and hotel workers could bargain as a sector, but their worker representatives would include both unions representing hotel workers and also someone from an organization representing janitors at hotels.

The benefit of this approach is that it is organized around the core employers whose economics drive an industry, which may lead to stronger bargaining power for service workers in higher-wage industries like health care and tech. In addition, this approach may create less of an incentive to fissure workplaces. On the other hand, it is more complicated for those organizing informal workers, since they may have to represent workers at numerous bargaining tables in several sectors.

Another option is to treat fissured industries as their own sectors, bringing a “representative” set of employers to the bargaining table, which would allow for more standardized wages and working conditions across industries. Given the diversity in employers who would be involved, it might make more sense to negotiate a basic rate in addition to sector-by-sector or even employer-by-employer rates, somewhat akin to the California maintenance master contract approach.¹³

¹³ See, e.g., NORTHERN CALIFORNIA MAINTENANCE CONTRACTORS AGREEMENT WITH UNITED SERVICE WORKERS WEST, SERVICE EMPLOYEES INTERNATIONAL UNION (2008-2012), https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/cba/private/_cbrp_2458_pri.pdf.

Implementing Statutory Guidelines

Before finalizing any statutory definitions of sectors, however, it will be important to get input from both worker organizations and employers. Drawing on other mechanisms that the U.S. government uses to get input from stakeholders, a few of the options for getting input include notice and comment, negotiations/negotiated rulemaking, federal advisory committees, and informal input. This subsection will go through each of those in turn and explore the strengths and weaknesses of each approach. For any of these mechanisms, it will be important for the Department of Labor (DOL, or “the Department”) to explain how it plans to weight feedback it receives from stakeholders as compared to more technical information it receives from economists, academics, and others from similar fields.

Notice and Comment

When most agency regulations are published, the Administrative Procedure Act requires a period of notice and comment, giving stakeholders an opportunity to comment in writing on the strengths and weaknesses of a proposal. Similarly, the Small Business Administration uses the notice-and-comment process to seek input on small business size standards¹⁴—the agency’s definition of what constitutes a “small” business, which can vary from industry to industry, based on either average annual receipts or average employment of a firm.¹⁵ For example, a retail bakery qualifies as a small business if it has fewer than 500 employees, but a tortilla manufacturer need only have fewer than 1,250.¹⁶ Those thresholds are established through a notice-and-comment rulemaking process.¹⁷

One could imagine the DOL using this process to seek input on statutory definitions of sectors, describing a potential statutory definition in detail (including the agency’s rationale for defining it that way) and soliciting input on what it got right and got wrong. The notice-and-comment process is a well-established process with a lot of legitimacy, a clear process that is at least theoretically accessible to groups of all kinds, and a built in process for appeals.

¹⁴ See ROBERT JAY DILGER, CONG. RESEARCH SERV., R40860, SMALL BUSINESS SIZE STANDARDS: A HISTORICAL ANALYSIS OF CONTEMPORARY ISSUES 1-39 (last updated Aug. 28, 2020), <https://fas.org/sgp/crs/misc/R40860.pdf>.

¹⁵ See 13 C.F.R. § 121.103(a)(6) (1996).

¹⁶ See 13 C.F.R. § 121.201 (2000).

¹⁷ See, e.g., U.S. SMALL BUS. ADMIN., SMALL BUSINESS SIZE STANDARDS: REVISED SIZE STANDARDS METHODOLOGY, 84 Fed. Reg. 14,587 (Apr. 19, 2019) (to be codified at 13 C.F.R. § 131), <https://www.federalregister.gov/documents/2019/04/11/2019-07130/small-business-size-standards-revised-size-standards-methodology>.

That said, the notice-and-comment process has come under a fair amount of criticism over the past years, especially for being more accessible to wealthy industry groups than to public interest groups, who do not have the resources or technical expertise to write detailed comment letters.¹⁸ Should the Department choose to use notice and comment to seek input on statutory definitions, it might want to adopt some of the regulatory reform proposals to ensure full access, including a “public advocate” (or worker advocate, in this case) to help worker groups participate fully.¹⁹ Additionally, it is worth noting that the Administrative Procedures Act would also constrain various aspects of the process, including any input groups give, and make it cumbersome and/or time-consuming to change the sector definitions in the future.

Negotiations/Negotiated Rulemaking

Negotiated rulemaking (“neg-reg”) is a formal process in which rulemaking is negotiated, via a mediator, between interest groups and the government. The process has been used by a number of federal agencies but is currently required by the Higher Education Act and the Native American Housing Assistance and Self-Determination Act. It shares some of the benefits of rulemaking under the Administrative Procedures Act, including its ability to incorporate multiple stakeholders, and the fact that it is a well-established procedure with legitimacy and a clear appeals process. That said, those who use neg-reg the most, particularly at the Department of Education, find the process unhelpful and slow. Though the process of getting interest groups and the government to come to agreement sounds promising, it can require elaborate and lengthy negotiations and does not necessarily decrease litigation risk.²⁰

Federal Advisory Committees

The Federal Advisory Committee Act (FACA) outlines an explicit process for setting up a federal advisory committee (FAC) and soliciting input from it. The Occupational Safety and Health Administration (OSHA) at the DOL, for example, has a FAC that it consults with regularly on

¹⁸ See Ganesh Sitaraman, *Reforming Regulation: Policies to Counteract Capture and Improve the Regulatory Process*, 1-13 (Ctr. for Am. Progress, Vanderbilt Public Law Working Paper No. 17-8, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891498.

¹⁹ See *id.*

²⁰ See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1255-1349 (1997).

construction standards, made up of employers, workers, representatives from state safety and health agencies, and others.²¹ Again, setting up a FAC is a well-established process and enables fairly deep engagement from constituency groups. That said, it is difficult to get the full range of stakeholders from across relevant sources onto one FAC, so the Department would need to supplement with additional input from other sources. In addition, while the FACA provides a process for soliciting input, there would still need to be a process for adopting any standards.

Informal Processes

Finally, the Department could choose to conduct a series of informal processes—whether posting information on a website, conducting listening sessions throughout the country, or any other informal method—to get feedback on proposals. This is the most flexible process, and it would allow the type of input to be tailored to the constituency group (avoiding, for example, the problems that notice-and-comment rulemaking has with being accessible to grassroots groups).

Of course, these processes could be combined to develop a more robust overall process. For instance, a FAC could develop the basic outlines of a proposal that is released as a rule through the notice-and-comment process.

²¹ See *Advisory Committee on Construction Safety and Health (ACCSH) Background, History and Character*, U.S. DEPT OF LABOR, <https://www.osha.gov/advisorycommittee/acsh/about> (last visited Feb. 23, 2021).

QUESTION 2: WHAT SHOULD TRIGGER SECTORAL BARGAINING?

The original Clean Slate report recommends that sectoral bargaining panels be established by the labor department upon the request of a worker organization when that organization has a membership of at least 5,000 workers in the sector or 10 percent of all of the workers in the sector, whichever number is lower. This raises a few interrelated design questions.

First, who has the authority to ask the labor department to verify whether the threshold has been reached? There are many possible options here, ranging from very low burden options (e.g., allowing any worker or employer organization to call for an election) to much higher burden options (e.g., requiring an organization to produce a certain number of cards or petitions, perhaps 5000 cards, or 30 percent, like the threshold in the National Labor Relations Act).²² An organization could even be asked to produce polling (within a margin of error), or certain international unions or companies that are quite representative could have the default right to call for an election in an industry.

Next, how will the labor department verify that the membership threshold has been reached? The processes involved could be similar to those used to certify unions in our current enterprise bargaining system. For example, one could use a card-check process or authorization cards, either paper or electronic. This has the obvious advantage of being a known and well-utilized process with a clear method of verification. On the other hand, as with current card-check processes, it requires individuals to declare their interests in being part of a union individually, thereby potentially subjecting them to retaliation. It may also be hard to get individual cards from 10 percent of workers in a large sector. On the other hand, the Department could hold an election to trigger sectoral bargaining. This is a more anonymous process, but because it would occur on a specific day, is subject to all the same anti-union tactics as elections for enterprise bargaining union drives.

²² See *Frequently Asked Questions*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/resources/fag/nlrb> (last visited Feb. 23, 2021).

Triggering Subsequent Rounds of Bargaining

Once a sectoral approach has been established, and an agreement is reached, the question remains of how subsequent rounds of negotiations are triggered. The key underlying question is whether initial agreements expire or simply persist until subsequent negotiations are triggered once again.

In some sectoral models, agreements are entered into for a set number of years (e.g., generally two-to-three years in Denmark).²³ Time-bound agreements have benefits, in that they force a renegotiation of wages and benefits on a regular basis without forcing a triggering event or subjecting either side to questions about their representativeness. They also allow the duration of contracts as a bargaining chip in negotiations, allowing employers and workers to agree to a riskier, short-term contract or a safer, longer-term option. On the other hand, having contracts that expire risks greater uncertainty, work stoppages, or worse, the loss of labor standards across a sector if an agreement that was previously extended lapses.

Alternatively, a sectoral approach could simply provide that agreements remain in place until a second triggering event occurs. That could be the same trigger for initial bargaining or perhaps similar triggers setting a lower bar given that bargaining has been triggered once before. The trigger could also be negotiated on a sector-by-sector basis according to the contract. In our discussions of Argentina, experts suggested that having contracts that do not expire absent a triggering event helped contribute toward a remarkably stable sectoral bargaining system despite massive changes in the underlying political economy of the nation.

Either way, these triggers—whether time-based or otherwise—provide an opportunity for coordination among worker organizations and across sectors to build power or simply to align agreements. In countries like Denmark, the collective agreement struck in the industrial sector generally sets the benchmark for all further agreements.²⁴

²³ See *National Industrial Relations: Denmark Collective Bargaining*, EUROPEAN TRADE UNION INST., <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Denmark/Collective-Bargaining> (last visited Feb. 23, 2021).

²⁴ See Søren Kaj Andersen et al., *Employment Relations in Denmark*, in INTERNATIONAL AND COMPARATIVE EMPLOYMENT RELATIONS: GLOBAL CRISES AND INSTITUTIONAL RESPONSES (Greg J. Bamber et al., eds., 7th ed.) (forthcoming 2021) (manuscript at 9) (on file with authors).

QUESTION 3: HOW SHOULD REPRESENTATIVES FOR SECTORAL BARGAINING PANELS BE DESIGNATED?

Who sits at the bargaining table is a crucial question in any sectoral approach. It implicates core questions about representation, equity, and the role of the state. In this section, we explore various options for structuring representation of employees and employers alike in any system drawing upon sectoral approaches.

The original Clean Slate report staked out some basic building blocks of bargaining panels in a sectoral approach, drawing from the triggers outlined in the prior section. In short, the report suggested that employers and workers alike would be represented on panels on a proportional basis to their share of the sector. Importantly, this proposal has already rejected the winner-take-all, “most representative union” or “most representative employer” approach seen in some other countries.²⁵ Instead, the Clean Slate proposal relies upon a process through which both employers and workers may be represented by multiple different groups at the same table, so long as they meet these basic thresholds: for workers, for example, any group with 5,000 members or 10 percent of the sector (whichever is lower) would be entitled to its proportional share of seats and votes on the council. The Clean Slate proposal likewise provided that any employer or employers’ association in the sector that represents employers with 5,000 workers in the sector or 10 percent of the workers in the sector, whichever is lower, would be entitled to proportional representation on the employers’ bargaining council. But even these broad concepts leave open questions that are explored further in this section.

²⁵ In particular, Argentine labor law has a concept of *personería gremial*, which involves exclusive government recognition of a particular trade union in a sector. See Law No. 23551, Apr. 14, 1988, A.D.L.A. Art. 31 (Arg.), <http://ilo.org/dyn/natlex/docs/ELECTRONIC/4984/109160/F-2131988583/ARG4984.pdf> (establishing exclusive rights for unions with *personería gremial*, including participating in collective bargaining).

Worker Representatives

Perhaps the most central question of any sectoral approach is to decide who can appear at the bargaining table on behalf of workers. The Clean Slate proposal lays out a system of proportional representation that clearly envisions the possibility of multiple worker organizations around the table at once.²⁶ But questions remain about how those organizations are chosen.

Choosing Organizations

To begin, it seems clear that any worker organization triggering the sectoral bargaining panel should receive at least one representative on that panel. Such an arrangement creates a clear incentive to organize new sectors, and it clearly makes sense that any organization that can meet this threshold should be represented. While this arrangement could establish a race to the threshold, that may not be a bad thing to spur organizing efforts.

Beyond that, the question remains how other worker organizations may reach the bargaining table. One option could simply be to suggest that any other organization reaching the same threshold—whether at the start or anytime later—gets membership on the panel proportionate to their own reach in the workforce. This variation could ensure that “runner-up” worker organizations—and even new worker organizations down the road—can still be involved in the process if they can generate sufficient interest.

Another option involves lowering the threshold for subsequent worker organizations to get a seat at the table. While this approach has the benefit of adding more workers to the conversation, it could be seen as diluting the voice of the lead labor union that organized the sector, even if the union with fewer members gets less representation.

Regardless of the choices above, another (potentially additional) approach would be giving certain international unions default membership on the bargaining panel, for example, one or more representing a threshold number of workers across various industries or even a certain size threshold of affiliates. Doing this would ensure that each panel has the strongest

²⁶ While the *Clean Slate* proposal focuses on bringing unions to the bargaining table, the proposal is not limited to unions as the only form of worker organizations, though they are currently (and likely long will be) the primary form. See Block & Sachs, *supra* note 2, at 31.

institutional grounding possible, though it would also involve carefully choosing how much of the proportionate vote these internationals receive—likely not a controlling stake, unless they are the unions that trigger the bargaining panels.

Likewise, if sectoral panels represent frequently fissured occupations like janitorial and transportation (see defining sectors above), it may be useful to give unions representing fissured occupations default membership on the appropriate panels, regardless of thresholds. This would ensure that fissured workers' interests are well represented when they arise in sectoral bargaining. This may require a separate process to assess which union (or unions) best represents fissured workers' interests, not to mention careful allocation of voting rights.

Decisionmaking: Proportional Voting Rights

Regardless of who is at the bargaining table, the question of exactly how proportional voting rights are allocated among the various worker organizations remains. One option would involve allocating to each worker organization in proportion to the number of members who triggered the panel or who otherwise triggered their participation (for non-default participants). It should be relatively straightforward to allocate representation on these terms, but it's a point-in-time measurement that may not reflect changes in power-building over time.

Instead, proportional voting rights could be allocated to worker organizations based on their total membership in the sector. This too should be easy to measure, but it could be administratively cumbersome (and politically worrisome) to force worker organizations to produce membership lists or otherwise document their membership to, for example, government actors. And realistically, at least during transitions to sectoral approaches, most worker organizations will realistically only formally represent a small fraction of the industry in question.

An even thornier issue arises if workers may be members of more than one worker organization. One option would be to do nothing. But another would involve each worker designating that their (individual) votes must be allocated to one group or the other—which could be an administrative nightmare. Either way, it is important to ensure that each individual worker's voice is heard only once, lest the system creates incentives to join multiple worker organizations to get additional votes, causing the number of worker organizations to balloon.

Alternatively, a sectoral approach could set out a proportional voting system that gives each worker some number of proxies to be split across any groups of which they are members. For most workers, this could mean, e.g., giving three proxies to a union. For others, it could involve giving two proxies to a union and one to a worker center. This kind of system would be harder to administer, but it would allow any individual worker to join multiple worker organizations as desired.

Employer Representatives

Any sectoral approach relies on having employers represented at the bargaining table, but deciding which employer groups to recognize can be even more complicated than choosing employees. As explained above, the Clean Slate proposal envisions establishing a threshold for the employers who would be recognized at the bargaining table, or any employer or employers' association in the sector that represents employers with 5,000 workers in the sector or 10 percent of the workers in the sector, whichever is lower. In some sectors, a large employer may be able to seek representation on their own. But for other employers—or sectors without employers that large—this system relies upon employers' organizations to exist and bargain with employees.

Some countries with existing sectoral bargaining systems have longstanding employer organizations that have long represented employers at the bargaining table. For example, the Danish Employers' Confederation launched in 1896; over time, it has developed a centralized structure.²⁷

But the U.S. has limited preexisting infrastructure to represent members in bargaining in most industries.²⁸ Industry groups like the U.S. Chamber of Commerce and National Federation of Independent Businesses, respectively, self-report hundreds of thousands of members.²⁹ Those groups purport to speak on behalf of their members on policy initiatives, but even that is

²⁷ See Andersen et al., *supra* note 25 (manuscript at 3) (on file with authors).

²⁸ There are certain industries where there is a history of bargaining across employers, including industries like trucking, telecommunications, paper, and railroads; coordinated national bargaining; pattern bargaining; master contracts; and other multi-employer bargaining initiatives. See, e.g., Lynn Rhinehart & Celine McNicholas, *Collective bargaining beyond the worksite: How workers and their unions build power and set standards for their industries*, ECON. POL'Y INST. (May 4, 2020), <https://www.epi.org/publication/collective-bargaining-beyond-the-worksite-how-workers-and-their-unions-build-power-and-set-standards-for-their-industries/> (providing a comprehensive list of these models). But in the U.S., as MIT economist Kathleen Thelen has explored, antitrust-related legal interventions in the mid-20th century diverted similar efforts in the U.S. See Kathleen Thelen, *Employer Organization in the United States: Historical Legacies and the Long Shadow of the American Courts*, ECON. POL'Y INST. (forthcoming 2021) (on file with authors).

²⁹ See, e.g., Amanda Terkel, *Chamber of Commerce Goes from 3 Million Members to Just 300,000 in one Day*, THINK PROGRESS (Oct. 14, 2009), <https://archive.thinkprogress.org/chamber-of-commerce-goes-from-3-million-members-to-just-300-000-in-one-day-8d8007348546/>.

substantially questionable.³⁰ Regardless, they are not organized to bargain on behalf of their members.³¹ In most industries, the U.S. lacks a strong infrastructure of existing industry groups to represent multiple employers at the bargaining table and to hold those firms accountable to their agreements.

Any such system is likely to result in the creation of new employer groups—or the evolution of existing employer groups to perform a function that is quite different than what they do now in most cases. Indeed, industry groups today have no formal mechanisms for accountability to their members save, perhaps, losing paid memberships.³² The Danish model shows that strong labor-management relationships can be beneficial for labor harmony and productivity, creating incentives for employers to take part in the system.

Registration System

But the question remains about which of these groups sits at sectoral bargaining tables. One way to address this is to create a formal registration system for employer representatives, much like how labor law regulates labor unions.³³ South Africa has such a model, giving employers the statutory right to form employer organizations that are recognized by the state.³⁴ The state could, in turn, allow employers to show that they represent some threshold number of percentage of employers in the industry, much like the representivity question on the workers' side. Alternatively, sales, revenue, profit, or production could be even more effective measures of representativeness.

In turn, as the original Clean Slate proposal set out, multiple employer groups could be given seats at the bargaining table. There are advantages to allowing multiple employer groups at

³⁰ See, e.g., ALYSSA KATZ, *THE INFLUENCE MACHINE: THE US CHAMBER OF COMMERCE AND THE CORPORATE CAPTURE OF AMERICAN LIFE* (2015); see also Dan Froomkin, *NFIB Exposed: 'Voice Of Small Business' Is A Front, Group Charges*, HUFFINGTON POST (Sept. 26, 2012), https://www.huffpost.com/entry/nfib-exposed_n_1917262.

³¹ See generally CATHIE JO MARTIN, *STUCK IN NEUTRAL: BUSINESS AND THE POLITICS OF HUMAN CAPITAL INVESTMENT POLICY* (1999) (explaining that the Chamber focuses on least-common denominator policies and less about practices that lend themselves to bargaining).

³² At times, employers may decide to leave industry-backed advocacy groups when press attention makes their membership a liability. The American Legislative Exchange Council lost high-profile members like Wal-Mart in 2012 in the wake of the murder of Trayvon Martin, with increased public attention on ALEC's defense of so-called "Stand Your Ground" laws. See, e.g., Associated Press, *Wal-Mart withdraws from conservative group ALEC*, POLITICO (May 31, 2012, 12:55 PM), <https://www.politico.com/story/2012/05/wal-mart-withdraws-from-conservative-group-alec-076915>.

³³ 29 U.S.C. § 401 *et seq.*; see also I.R.C. § 501(c)(6) (establishing business leagues as associations of persons having common business interests, including trade association and professional associations).

³⁴ See Labour Relations Act 66 of 1995 § 6 (S. Afr.).

the bargaining table—chiefly, that a diversity of employers’ voices is represented. There is also a benefit to having a parallel structure with workers. On the other hand, this arrangement can make it more difficult to reach consensus and build stable bargaining relationships. In our explorations of sectoral bargaining in countries like Denmark and Sweden in particular, the consolidation of employer organizations has been identified as a key factor in promoting broad-based labor standards.³⁵

One way to resolve these competing considerations is to create opportunities to improve coordination among worker and employer organizations alike. For example, a sectoral approach could create a default role for broader international unions and employer organizations to be involved in bargaining in each sector or agreement, even if they have no ultimate role in decisionmaking. The AFL-CIO could have a default seat at the table for a sectoral agreement in the manufacturing sector, for example, whether or not they have a vote in the particular agreement. This would facilitate cross-sector coordination in bargaining and could even bring about some of the advantages of consolidation of employer organizations that the U.S. does not yet have.

Ensuring Employer Participation

Unlike countries that have a long tradition of robust employer organizations, it is important to consider a default in the U.S. if no employers participate in the bargaining process, for example, in an effort to evade bargaining that has been triggered appropriately. In such cases, the law could allow the Secretary of Labor to designate an employer representative to stand in for the employer in bargaining. No employers would be directly bound by any such agreement, given that they are not parties to the agreement. But on the other hand, that agreement could be submitted to the Secretary for potential extension throughout the industry.³⁶ Indeed, the possibility of extension creates an incentive for employers to take part in bargaining themselves, rather than risk having an unfavorable or unrepresentative agreement extended.

³⁵ See generally PETER A. SWENSON, CAPITALISTS AGAINST MARKETS: THE MAKING OF LABOR MARKETS AND WELFARE STATES IN THE UNITED STATES AND SWEDEN (2002) (describing how Swedish employers in the 1940s banded together across industries to negotiate “solidaristic regulation of social benefits” rather than see members fall into what was essentially an arms race using “company benefits to cope with acute labor shortages”).

³⁶ See *Extension*, *infra* at 29.

Alternatively, the Secretary of Labor could be empowered to extend based on a proposal from the workers' representatives alone, if it meets the requirements for extension. This scenario would create a significant incentive for employers to take place in the bargaining process as well.

Incentives for Participation

Another option—which could be layered atop any of the others—would be to create incentives for employer organizations to seek recognition or otherwise take part in sectoral bargaining situations. If employer organizations in a sectoral system can bargain for flexibilities in (or even exemptions from) broadly applicable laws, they may be more likely to participate in a system of sectoral bargaining.³⁷ Implementing legislation can create a grant program to help employer organizations—just like worker organizations—develop sectoral approaches. Or employer organizations that participate in sectoral bargaining approaches could be prioritized for participation in training programs, which would be in line with historical labor-management partnerships from the apprenticeships field, for example.³⁸

Decisionmaking at the Bargaining Table

Given that there would be multiple employer representatives at the bargaining table, another question is how the panel makes decisions at the table, especially when consensus is difficult or impossible to reach. The Clean Slate proposal has embraced a proportionate voting scheme, but that can be arranged proportionate to the number of workers employed by each employer or organization, or alternatively, proportionately by their wages or even revenues, each at any given point in time. In this arrangement, the employer or organization with the greatest share of employees, wages, or revenues would have the greatest voice at the bargaining table. One downside to such a system is that larger industry groups could swamp the interests of smaller ones. And such a system has additional challenges, especially when the same employer may be

³⁷ See *Derogation*, *infra* at 27. See also Oren Cass, *Sectoral Bargaining's Promise and Peril*, AM. COMPASS (Sept. 14, 2020), <https://americancompass.org/discussions/sectoral-bargainings-promise-and-peril/#top> (outlining the regulatory flexibility that could accompany sectoral bargaining).

³⁸ See Angela Hanks & David Madland, *Better Training and Better Jobs: A New Partnership for Sectoral Training*, CTR. FOR AM. PROGRESS (Feb. 22, 2018, 12:01 AM), <https://www.americanprogress.org/issues/economy/reports/2018/02/22/447115/better-training-better-jobs/>.

represented by two or more employer organizations. If the system does not somehow account for employers represented by multiple organizations, employers may elect to join ballooning numbers of allied (or even splintering) industry groups to earn more seats at the table, in effect.³⁹

Alternatively, the law could simply provide that employer organizations work this out among themselves. South Africa requires that each bargaining council establishes a constitution setting out these sorts of parameters. For example, the 2017 Constitution for the National Bargaining Council for the Clothing Manufacturing Industry provides that employer associations who are founding parties each receive one vote, after which votes are allocated proportionally among remaining employer organizations according to the proportionate share of employees it employs.⁴⁰ On the other hand, the National Bargaining Council for the Road Freight and Logistics Industry provides a simpler proportional bargaining formula where each employer organization has representatives in direct proportion to their share of employers represented across all employers that are party to the agreement.⁴¹ In the event that no decision is reached, the law could nonetheless set a default. And certain agreements (e.g., those that disadvantage a certain racial group) should be prohibited.

Subsequent Bargaining Panels

The options above address which employers and workers are at the bargaining table for initial rounds of negotiations, but a second question involves who is at the bargaining table for renegotiations of any sectoral agreements. This question is deeply intertwined with the related question of how subsequent negotiations are triggered, discussed in the “Triggering Subsequent Rounds of Bargaining” subsection, above.

If sectoral bargaining agreements have an indefinite term, as they do in Argentina, then the bargaining process only begins anew when one party triggers the negotiations. In that case, then any party successfully triggering negotiations is a natural anchor for the subsequent rounds. Other parties may be added according to the recognition rules listed above.

³⁹ Another option may involve employers formally splitting their proxies across multiple groups, such that any one employer's voice is not double-counted.

⁴⁰ See CONSTITUTION OF THE NATIONAL BARGAINING COUNCIL FOR THE CLOTHING MANUFACTURING INDUSTRY § 13.12.1 (Sept. 20, 2016), <https://nbc.org.za/wp-content/uploads/2019/10/CONSTITUTION-as-amended-on-20-Sep-2016.pdf> (S. Afr.).

⁴¹ See CONSTITUTION OF THE NATIONAL BARGAINING COUNCIL FOR THE CLOTHING MANUFACTURING INDUSTRY § 6.5 (May 4, 2018), <http://www.nbcrfli.org.za/Constitution/Consolidated%20Constitution%20-04-05-2018.pdf> (S. Afr.).

If agreements expire after a set number of years, then the simplest option is to begin with the parties at the table in prior negotiations. Panels could be adjusted, for example, to include any parties that newly meet the thresholds listed above.

Under either scenario, a more difficult question is whether and how an employer or worker organization may *lose* recognition for being insufficiently representative. In Argentina, where worker organizations have exclusive bargaining rights, there is no mechanism to cancel or challenge such recognition. In a Clean Slate approach, either employers or competing worker organizations should have the burden of showing that the worker organization previously at the bargaining table is insufficiently representative, for example, in that it cannot meet the trigger thresholds.

Qualifications and Training

Another question involves what qualifications should be required of worker and employer representatives alike at the bargaining table. Of course, the default is that worker and employer organizations, respectively, simply decide who they send to the bargaining table without any minimal qualifications or training. But requiring (or at least encouraging) some baseline qualifications or training may lead to better outcomes, especially in the initial implementation of sectoral approaches.

On the one hand, sectoral approaches could establish qualifications or at least guidelines for who should be at the bargaining table, especially to promote race and gender diversity, equity, and inclusion, and to ensure that worker organizations are able to build power. For example, guidelines could encourage worker and employer representatives to generally reflect the underlying demographics and experiences of the workers and employers they represent. Such guidelines could lead to greater diversity at the bargaining table, and as a result, stronger outcomes for both workers and employers alike. But the stricter or more enforceable such guidelines are, they could lead to constitutional concerns. Admittedly, employer and worker organizations alike may have concerns about guidelines for who they decide to bring to the bargaining table, even if the underlying goals are desirable.

Alternatively, any system of sectoral approaches should require, or at least create incentives to undertake, training for everyone involved on these concepts. For example, participants at the

bargaining table could be mandated to have real training on diversity, equity, and inclusion. In fact, this sort of shared training could be less charged, while still giving both sides a common vocabulary and toolkit for incorporating these important principles and analyses into any agreement. Any such training must be conducted by skilled experts who can ensure that it has an impact. Ideally, the ultimate training would have buy-in from both workers and employers, too, perhaps as a joint production.

Governments also have a role in creating incentives for this sort of training. For example, they could provide funding to support this sort of robust training. Or the labor department could expedite applications for extension if they are negotiated by more representative negotiators.

Likewise, a system can create joint training materials for explaining the importance of sectoral approaches. For example, Denmark's main employer and worker organizations teamed up to produce an animated video on the country's sectoral bargaining system.⁴² The video suggests that jointly bargained sectoral agreements are more desirable than labor standards established by lawmakers without the same level of input from employers and workers alike. A sectoral system can generate buy-in through this sort of jointly developed training.

Finally, a system could simply provide staff to support either side in the negotiation. Mediation is one model for this sort of structure, but it could look less neutral as well.

⁴² See Fagbevægelsens Hovedorganisation [Danish Trade Union Confederation] & Dansk Arbejdsgiverforening [Danish Employers' Association], *The Danish Model - works for you*, YouTube (Jan. 21, 2020), <https://youtu.be/aWmNSAK--lc>.

QUESTION 4: HOW SHOULD BARGAINING BE CONDUCTED?

In order to make participation on a bargaining council truly accessible to rank-and-file workers who participate at the bargaining table, those workers must be paid for the time they spend bargaining—which can be a considerable amount. Depending on the sector, industry, or panel, employers could be required to provide these workers with paid time off to participate in bargaining, which may in turn be reimbursed by employers’ organizations. Asking employers to pay for this time makes sense in that workers are participating in important management decisions and should be compensated accordingly. Along these lines, the U.S. federal government recognizes “official time” for employee representatives participating in collective bargaining.⁴³ The main drawback of this approach is that employers are likely to oppose the use of official time (either in general or in particular instances), which could create regular obstacles to workers’ full involvement in bargaining councils or other sorts of mechanisms established under sectoral approaches.⁴⁴

Worker organizations could also compensate rank-and-file workers for the time they spend bargaining. While this arrangement is less likely to trigger opposition than requiring employers to pay, it does depend on well-financed worker organizations. Those with fewer resources will not be able to bargain as effectively.

A third option involves leveraging federal funds to support rank-and-file workers’ participation in bargaining. Federal funds could be provided directly to workers, but likely makes more sense coming either through reimbursements to employers or pass-through grants to worker organizations (along with administrative support to those organizations to manage the payments). This sort of arrangement can ensure adequate resources for engaging rank-and-file workers, and protects them from at least one aspect of employer opposition. It also ensures that a worker organization’s relative resources do not block its rank-and-file workers from taking part in the process.

⁴³ See 5 U.S.C. § 7131 (1978).

⁴⁴ Even the federal government has taken aim at the official time guaranteed by statute. President Trump signed Executive Order 13837, limiting union representatives’ use of official time. See Exec. Order No. 13,837, 83 Fed. Reg. 106 (June 1, 2018).

Engaging Workers and Employers

Any sectoral bargaining approach also needs to consider how rank-and-file workers and employers are engaged in the bargaining process—those who are at the bargaining table, those who are represented at the bargaining table, and (due to extension) those who are in the sector but not actually represented at the table. Each of these building blocks implicates key questions of equity and power-building central to the Clean Slate agenda.

Negotiating Agreements

Sectoral approaches require impacted workers and employers to have the chance to weigh in on the shaping of agreements prior to the ultimate up-or-down vote at ratification. Unions especially have decades of experience at engaging their members in negotiations, and need no additional structures to do so effectively. But newly formed (or refocused) employer organizations lack the same history, and very well may need more guidelines for engaging their membership. And given the possibility of extension to non-members, discussed below, it would be ideal for workers and employers alike to have some basic input into the shaping of proposals even if they are not represented.⁴⁵

Some worker or employer organizations may bring members to the bargaining table in some form, which is perhaps the most direct way to engage them in the development of proposals, but doing so is challenging for all of the reasons discussed above. Moreover, such an approach does not likely engage employers or workers who are non-members. Sectoral approaches should consider incorporating additional mechanisms for seeking feedback from impacted workers and employers, respectively, in shaping negotiations prior to final ratification.

One option for incorporating workers' and employers' voices in the negotiation process involves simply directing worker and employer organizations, respectively, to do so. This would be the most administratively straightforward way to do so, but it leaves significant discretion to these organizations to carry the commitment through. But creating only general or vague standards for engaging workers could provide avenues for attacking or harassing these organizations, much as the duty of fair representation has been so used.⁴⁶

⁴⁵ As an aside, creating channels for input may provide another opportunity for employer and worker organizations to recruit new members who seek to play a more central and durable role in bargaining.

⁴⁶ See generally Andrew P. Marks, *Fair Representation by a Union: A Federal Right in Need of a Federal Statute of Limitations*, 51 *FORDHAM L. REV.* 896, 896-918 (1983).

Instead, a sectoral approach could dictate certain baseline standards for engaging rank-and-file workers and employers alike, essentially creating a baseline (or safe harbor) minimum level of engagement that would ensure that worker and employer organizations met their duties. For example, a sectoral approach could require worker or employer organizations to hold structured listening sessions with their membership. They could be required to conduct an initial survey of bargaining priorities. Or they could be required to more transparently report publicly on the bargaining process at specified intervals.⁴⁷ Labor departments could also consider the quality of outreach in deciding whether to extend an agreement sector-wide.⁴⁸

Ratifying Agreements

Regardless of whether sectoral systems engage individual workers and employers in negotiations, they could also include a step whereby members of organizations involved ratify the ultimate agreements. Once ratified, the contract would apply to all parties represented at the bargaining table, and presumably the contract could be considered for extension to non-parties, as discussed further below.

Under the National Labor Relations Act (NLRA), unions may decide whether members need to ratify completed agreements.⁴⁹ Unions can further decide how any such ratification may occur.⁵⁰ Sectoral agreements could similarly delegate this decision to unions.

If ratification is required, it should require agreement of a majority (50 percent plus one vote) of the workers and employers, respectively, represented at the bargaining table. This can be a more straightforward calculation for employees. In terms of employers, the calculation should be based upon the same metric used to assess proportional vote, whether it be by wages or revenues.

As a practical matter, an agency will have to be empowered to oversee the ratification vote. At the federal level, the National Labor Relations Board (NLRB) would be the right agency, but a state or local labor department or human rights commission could do the same. Voting could

⁴⁹ See *North Country Motors Ltd.*, 146 N.L.R.B. 671, 674 (1964).

⁵⁰ See *Int'l Longshoreman's Ass'n, Local 1575*, 332 N.L.R.B. 1336 (2000); *Childers Prods. Co.*, 276 N.L.R.B. 709, 711 (1985); see also *Nat'l Ass'n of Law Enf't Officers*, No. 05-CB-186306 N.L.R.B. (Region 5 Dismissal Letter) (Feb. 7, 2017), https://www.nlr.gov/sites/default/files/region_monthly_uploads/Region%2005/Dismissal%20Letters/Region%205%20Dismissals%20February%202017%20Final.pdf.

involve a point-in-time vote after an agreement in principle is reached or even a proxy voting scheme. Sectoral approaches should consider the impacts of pre-authorization proxies—essentially delegating authority to those who are at the table conducting the bargaining—which could be administratively more straightforward but may be less helpful for ensuring engagement and building power for workers and individual employers alike.

QUESTION 5: WHAT IS THE SCOPE OF THE BARGAINING?

In terms of the subjects that can and should be bargained, the original Clean Slate proposal calls for distinguishing between high- and low-density sectors. The basic principle is that the scope of bargaining should be broader and more comprehensive in sectors with greater numbers of workers represented by worker organizations than it is in sectors with fewer workers who are represented. Beyond that, the report recommends that if an industry has a particularly high percentage of workers covered by collective bargaining agreements, a majority of the worker organizations involved could invoke a prevailing wage option that would require the DOL to set basic economic terms for the sector—including, but not limited to, wages and benefits—based on the terms contained in the workplace collective bargaining agreements in the sector.

In envisioning a nationwide sectoral bargaining system, for example, the Clean Slate report proposed that in lower-density sectors, bargaining at the sectoral level would establish minimum workplace standards for wages, benefits, scheduling (including flexible working arrangements), leave time, and workplace health and safety. The sectoral bargaining panels in low-density sectors would also be required to address gender and racial equity—including, but not limited to, pay equity. In higher-density sectors, bargaining could address a broader range of subjects and could potentially reach a much wider range of mandatory subjects of bargaining, including a more comprehensive system of wage scales, benefits, and other terms and conditions of employment, and even provisions for grappling with climate change. As in lower-density sectors, high-density sectoral bargaining would be required to address gender and racial equity.

For reference, South Africa’s labor law employs similar distinctions, where “statutory councils” can be established on application by a representative trade union or employers’ organization unilaterally, but it then has a limited bargaining agenda. Their representivity threshold—trade

union or employers alike must represent 30 percent of the employees in the sector—is well below the 50 percent threshold required for extension of a bargaining council agreement.⁵¹

In practice, the Clean Slate report leaves open several questions, including where to draw the lines around sectoral density, which subjects should be bargained, and whether to allow worker organizations to bargain away statutory rights. Each of these questions is addressed below.

Sectoral Density

If a sectoral approach differentiates allowable subjects of bargaining based on sectoral density, one key question is how to set thresholds for high-density and low-density sectors, respectively. Depending on the particular type of sectoral approach, these thresholds could simply be set at a fixed percentage of union membership regardless of sector, or they could be drawn differently for each sector. Considerations include:

- For establishing a minimum for “low-density” sectors, what is the minimum density required to ensure that there is no capital flight that would cause jobs and economic production in that industry to be shifted to other geographical areas, whether countries, regions, states, or localities, depending on the level of policymaking involved?
- For establishing a minimum for “high-density” sectors, how much density is necessary to ensure that workers have sufficient power to bargain over a broad set of terms and conditions of employment? (We discuss this further below.)

Given these questions, it is important to engage labor economists, worker organizations, and other stakeholders in deciding where to draw these lines for low- and high-density sectors alike.

Likewise, if any sectoral approach involves sectors with large percentages of workers covered by collective bargaining agreements, it should consider implementing a prevailing wage option

⁵¹ At least some commentators have argued that 30 percent is still too high to present a viable alternative to bargaining councils, in part because only two councils have actually succeeded in being set up and registered. See Shane Godfrer et al., *The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining 5* (Univ. of Cape Town Dev. Policy Research Grp., Working Paper 07/130, Nov. 2007), http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP07-130.pdf (“Only two statutory councils have been set up and registered... neither has accomplished much so far in terms of collective bargaining.”). Others have been established but never registered.

where a government agency establishes the basic terms and conditions of employment based on those agreements. In that case, the key question is of course what percentage of need be covered by enterprise-level collective bargaining agreements in order to trigger this option. As with drawing a line between high- and low-density industries, it is equally important to engage labor economists, worker organizations, and other stakeholders in deciding which industries can support prevailing wages.

Either way, it is important to fashion any federal-level prevailing wage options with the nondelegation doctrine in mind, ensuring that the executive agency charged with setting the wages is guided by an intelligible principle cabining its discretion, and that the agency is not simply acting as a rubber stamp for the decisions of private parties. In other words, while the agency should be guided by prevailing wage agreements, the law must establish rules according to which it makes an independent judgment about the right prevailing wage.

Subjects of Bargaining

Any sectoral approach also needs to establish the appropriate subjects of bargaining. As described previously, the Clean Slate report suggests that low-density sectors should have a more limited subset of bargaining subjects, while higher-density sectors can support a much wider set of rights.⁵² For either, one important (related) question, discussed below, is whether (or which) statutory protections can be traded off in bargaining.

For low-density sectors, the Clean Slate report proposed various options ranging from bedrock employment rights like minimum wages, workplace health and safety, and pay equity, to more commonly bargained subjects like benefits, paid leave, and flexible scheduling, all of which should be implemented with a commitment to gender and race equity.

While any of these would be reasonable to include in low-density sectors, taken together, they present a relatively expansive agenda. A sectoral approach could instead either establish a hard-and-fast set of bargaining subjects, or it could allow parties to choose a subset that is appropriate to the particular situation. For example, for a state-level law incorporating vertical sectoral

⁵² See CLEAN SLATE FOR WORKER POWER, *supra* note 10.

approaches, it could allow bargaining over wages, some types of benefits, and paid leave. A local law incorporating a horizontal sectoral approach may focus exclusively on workplace health and safety and flexible scheduling, for example, in pandemic response.⁵³ Or it could simply allow parties to choose from all of the terms and conditions outlined above, but it must have guardrails (e.g., minimum scope) to ensure that employers do not bargain over only the most minimal range of subjects.

In high-density sectors, the Clean Slate report suggests an even more expansive set of bargaining subjects, including subjects that transcend the workplace, such as climate change. Sectoral approaches could lay out an expansive series of bargaining subjects for high-density industries, or they could simply leave the subjects of bargaining open-ended and allow the parties to make decisions as appropriate—ideally, in a clear enough manner that courts cannot artificially constrain those subjects. Either way, they should direct parties to prioritize race and gender equity.

Variation

Another key issue is whether sectoral bargaining approaches can allow for variation by occupation or geographical area, and if so, how. For some closely targeted sectoral approaches, this is not relevant. But for a nationwide or statewide sectoral bargaining approach, occupational or regional variation might be appropriate. The authorizing law could expressly provide for such variation (e.g., directing the parties to establish different wages for different occupations delineated by a government agency), determining which approach is especially relevant for low-density sectors, and where capital flight is a key issue. Alternatively, the law could simply authorize the bargaining parties to agree to such variation as they see fit—which would be most appropriate for higher-density sectors. Further, any variation could be bargained by the main parties to a bargaining agreement, or they could designate separate occupational or geographical tables to lead that bargaining. The law itself could designate how particular occupational or regional terms are negotiated, or that decision could be left to the parties to decide.

⁵³ See generally Block & Sachs, *supra* note 8.

Derogation

A final question involves whether sectoral approaches might allow the parties to bargain away core labor standards provided elsewhere in the relevant federal, state, or local law, in exchange for other rights; this is often called “derogation.” While core employment laws in the U.S. generally disfavor derogation,⁵⁴ at least some laws do allow for such waivers in very limited circumstances when workers are subject to collective bargaining agreements.⁵⁵

The Swedish model underscores the potential power of derogation. Swedish law allows collective bargaining agreements to derogate below certain labor standards, including wage and benefits. Swedish labor unions suggest that the possibility of derogation provides significant room for them to maneuver in negotiations with employers.

Nonetheless, creating incentives for derogation (or even allowing it) is controversial, and for good reasons, especially when workers lack bargaining power or strong information or when derogation can impact others who have less bargaining power.⁵⁶ But in the context of strong unions—perhaps in high-density industries only—providing for derogation could allow for strong worker organizations to capture more of their highest priorities.

⁵⁴ See, e.g., 29 C.F.R. § 541.4 (2012) (“The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced.”); see also *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697 (1945) (holding that an employee may not enter into a private agreement waiving minimum wage claims under the Fair Labor Standards Act); and *Boaz v. FedEx*, 725 F.3d 603 (6th Cir. 2013) (extending this ruling to the Equal Pay Act).

⁵⁵ See, e.g., 29 U.S.C. § 207(b) (providing a narrow overtime exemption for employees of independently owned and controlled local petroleum enterprises); see also L.A. CHARTER AND ADMIN. CODE § 10.37.12 (providing that the non-wage terms of the Los Angeles Living Wage may be expressly superseded by a collective bargaining agreement).

⁵⁶ See generally Guy Davidov, *Non-waivability in Labour Law*, 40 OXFORD J. LEGAL STUD. 482 (2020) (providing an exhaustive discussion of the philosophical and practical reasons to disallow derogation from labor laws).

QUESTION 6: WHAT HAPPENS IF THERE IS AN IMPASSE?

At some point during a negotiation over the formation of a union, the negotiation may break down. At that point, the workers must have the right to strike, or else there needs to be a mediation. Other countries with sectoral bargaining regimes provide for such mediation, including Denmark and Sweden (which have public officials dedicated to mediating when the parties cannot reach a national agreement). In South Africa, bargaining council constitutions provide for dispute resolution terms, including the possibility of impasse.

Designing a new sectoral approach that embraces mediation raises two interrelated questions:

1. What triggers the mediation?

The mediation likely needs to be triggered by a formal request, which could be from a majority of panel members on one side (employer or worker), from a supermajority of panel members on one side, or from a supermajority of the panel in its entirety. Alternatively, if existing contracts do expire, mediation could be triggered by a certain interval prior to that expiration.

2. Who conducts the mediation, and who pays?

The mediation could be conducted either by a government agency or by a private mediator. Other countries have government agencies for this, like Denmark's *Statens Forligsinstitution* and Sweden's National Mediation Office.⁵⁷ The government agency, which could be an agency like the Federal Mediation and Conciliation Service (FMCS) in the U.S., would enable free or low-cost mediation services, and this presumably reduces the risk that the incentive to get rehired could affect the mediator's result. That said, the quality of government mediators obviously depends on the quality of the agency at that time and may be limited in quantity. A private mediator, on

⁵⁷ See STATENS FORLIGINSTITUTION, <http://www.forligsinstitutionen.dk/> (last visited Feb. 23, 2021) (Den.); see *Information in English*, MEDLINGINSTITUTET [SWEDISH NATIONAL MEDIATION OFFICE], <https://www.mi.se/other-languages/about-the-mediation-office-the-swedish-model-and-wage-statistics-in-english/> (last visited Feb. 23, 2021) (Swed.); see also Hans-Juergen Zahorka, *Mediation in Labour Relations: What Can Be Learned From the North American and EU Example*, EUROPÄISCHES INSTITUT GMBH [LIBERTAS EUROPEAN INST.] 1, 6, <https://www.libertas-institut.com/de/PDF/Mediation> (last visited Feb. 23, 2021).

the other hand, would provide for a wider selection (even if chosen off an approved list), but this presents its own logistical difficulties (e.g., there needs to be a process for choosing the mediator, and the mediator would need to get paid separately).

Of course, negotiating the first contract is often just as hard as forming a union in the first place. As noted in the initial report, Clean Slate favors the approach taken in the Protecting the Right to Organize (PRO) Act; namely, interest arbitration for first contracts.⁵⁸ Under the new statute, once a union requested collective bargaining, the employer would have 10 days to commence bargaining. If, after 90 days of bargaining (or for an additional period of time if the parties mutually agreed to such an extension), no agreement is reached, then either party would have the right to request mediation conducted by the FMCS. If the parties did not reach agreement within 30 days of the mediation request, then the dispute would be referred to a tripartite arbitration panel. One member of the panel would be selected by the union, one by the employer, and one neutral member mutually agreed to by both parties. A majority of the panel would be empowered to render a decision, determining the terms of the agreement, which would be binding on the parties for two years, unless amended by mutual agreement. The panel's decision would be based on the employer's financial status, the size and type of the employer's business, the employees' cost of living, the employees' ability to sustain themselves and their dependents, and the wages and benefits provided by other employers in the same business.

Similar questions to the ones asked above need to be answered about first-contract arbitration as well, however. First, how does a worker organization trigger first-contract arbitration? Does it require that certain statutory criteria are met, or can it happen at any time? Does it require a formal request from a majority or supermajority of worker panel members?

Second, who constitutes tripartite panel of arbitrators, and who pays for them? They could be chosen from the ranks of an agency like FMCS, which has similar pluses and minuses to using FMCS as a mediator for the initial formation of a union. To the extent that the tripartite panel is chosen from private arbitrators, there might be one chosen by the union, one chosen by the employer, and one mutually agreed upon. Again, private arbitrators would need to be paid separately.

⁵⁸ See Block & Sachs, *supra* note 8, at 70; PRO Act, S.1306, 116th Cong. (2019).

Finally, what topics are subject to arbitration? One could imagine the parties focusing solely on the open items from the negotiation that broke down, to lock in existing agreements. That said, focusing on only the open items (rather than all items) limits the options for agreement at that stage, and it risks the arbitrator making decisions that ultimately make one party very unhappy.

QUESTION 7: HOW AND WHEN SHOULD CONTRACTS GET EXTENDED TO THOSE OTHER THAN THE REPRESENTATIVES OF THE BARGAINING PANELS?

Sectoral bargaining provides a key opportunity for contract extension, or a mechanism by which a contract negotiated by a critical mass of workers and employers in an industry can be extended to all employers and workers through the industry. Generally, this allows non-parties across a sector to benefit from the agreements reached by the parties at the bargaining table.

To be sure, not all countries with sectoral bargaining systems have a formal process for extension to non-parties. In Denmark and Sweden alike, there is no statutory provision for extension, and labor unions report little activism seeking concepts of extension in most industries. But those countries are starting from a place of significant union density and involvement.

Standards for Extension

The Clean Slate report fully embraces contract extension, but it nonetheless recommends a key guardrail: Sectoral agreements may only be extended if the Secretary of Labor determines that it meets certain standards. The key elements of this standard include that the agreement must:

- advance gender and racial equity;
- improve the standard of living for a majority of workers in the sector; and
- provide all workers in the sector with a living wage; an adequate amount of paid sick, family, and vacation time; access to a secure retirement program; and a safe, secure, and healthy workplace.

Not all countries establish searching standards for extension. In Argentina, the Labor Minister may validate an agreement for extension, or *erga omnes*, simply by determining if it is consistent with law and some broad consideration of the public interest. In practice, this is not a particularly searching inquiry once parties have agreed to the basic terms of a contract.

In South Africa, the Labor Minister has no discretion and *must* extend an agreement if the parties meet the (numerical) standards for representivity: if more than 50 percent of the employees in the sector are covered by the worker organization that is party to the agreement or are employed by employers that are party to the bargaining council.⁵⁹ On the other hand, if the parties fail to meet these standards, the Labor Minister may (as a discretionary matter) also extend agreements under three conditions: if they find the parties are “sufficiently representative,” if that failure to extend the agreement would threaten sector-level bargaining, if the council has established an independent body to hear non-party appeals for exemptions to extension, and if the agreement has fair criteria for considering those appeals. In these situations, South Africa has a system for gathering input on the agreements, much as France does for its extension decisions, both of which systems are described further below.

In all, setting a standard has substantive benefits, ensuring that overly weak agreements cannot be inappropriately extended, not to mention empowering worker organizations to demand these minimum standards in sectoral agreements. But setting standards for extension also has benefits in terms of addressing concerns related to the nondelegation doctrine at the federal level, empowering an agency head (e.g., the Secretary of Labor) with clear standards for whether or not to extend.

⁵⁹ See Labour Relations Act 66 of 1995 § 32(1) (S. Afr.). Indeed, it was reported to us that the 1995 Labour Relations Act intentionally limited the Labour Minister’s discretion not to extend in reaction to Apartheid-era Labour Ministers who refused to extend agreements for political reasons, for example, recognizing a May 1 holiday for workers. As a result, lawmakers decided to severely limit discretion in the post-Apartheid era, though there have been (controversial) proposals to allow more searching inquiries into agreements.

The Extension Process

For any sectoral approach that allows extension, the law must establish a process for seeking to have agreements extended by, for example, the DOL.⁶⁰ That raises questions about what should be submitted by the parties, whether and how to seek input on whether the agreement meets the standards for extension, how those decisions could be appealed, and whether and how employers or workers could opt out from extension.

In terms of what to submit, the parties seeking extension clearly must submit the ratified agreement to the decisionmaking agency, along with proof of successful ratification. In addition, they should provide information that helps the agency assess whether the agreement meets any standards required for extension. Under the Clean Slate proposal, the parties would be required to submit evidence that the agreement advances gender and racial equity; improves the standard of living for a majority of workers in the sector; and provides all workers in the sector with a living wage, an adequate amount of paid sick, family, and vacation time, access to a secure retirement program, and a safe, secure, and healthy workplace. This could include quantitative metrics, qualitative analysis, or even testimony of individuals, for example, outlining and assessing the impact of proposals on marginalized groups within an industry.

The agency could further seek input from workers, employers, and other experts to assess more broadly whether the agreement meets the statutory standards for extension. This could provide greater legitimacy in terms of seeking input and potentially in engaging previously unengaged workers, though it does create an opportunity to derail hard-fought victories.

Some other countries have created mechanisms to seek input on extension. In South Africa, in cases where the representivity threshold for automatic extension is not met, the Labor Minister must publish an invitation to comment on proposed agreements in the *Government Gazette* (like the *Federal Register* in the U.S.).⁶¹ In France, though the process has been used sparingly over the

⁶⁰ The federal Labor Department does not currently have a subagency that is well positioned to assess the sorts of standards in these agreements. If the Labor Department is charged with overseeing these sorts of extension requests, the law should create a new Worker Power Administration to handle a variety of important roles related to this system. Alternatively, a fully independent agency could be created to consider extension requests. Not only would this sort of structure (somewhat) insulate extension decisions from partisan attacks or simply inaction during, especially if they do not have indefinite terms.

⁶¹ See Labour Relations Act 66 of 1995 § 32(5) (S. Afr.).

nearly three years since it was created, the Labor Ministry can take a further step to send the agreement to a group of experts for an opinion, beyond what is legal or not, but to assess the economic and social effects of the agreement.⁶²

Agencies could use similar efforts to gather input on whether to extend in this context. They could also use public hearings or informal listening sessions, both of which could allow more voices to be considered. Regardless of the particular format, it is important that the focus of the inquiry remain about compliance with the standard for extension, not general comments on the agreement itself.

Any extension process must include some provisions for interested parties (on either side) to appeal the agency's decision. Ideally, the agency will create a multi-step process whereby an initial decision may be appealed (or reconsideration may be sought) within an administrative fact-finding process, thereby creating a streamlined administrative record for expedited appeal under existing administrative law (e.g., federal or state administrative procedures acts). If the agency refuses to extend an agreement, it should nonetheless apply to any employers or organizations bound by its ratification. In addition, the law could provide an opportunity for the parties to return to the bargaining table expeditiously to improve the agreement and resubmit it for extension.

Finally, sectoral approaches considering extension should also consider whether to create a system whereby certain employers can seek exemptions. For example, in South Africa, non-parties to the agreement (including small enterprises) may seek an exemption from the Labor Ministry if they can show that they cannot meet the requirements of the agreement extended through the sector.⁶³ Providing a mechanism for exemptions raises substantial opportunities for abuse. At the same time, it could ease the path to enacting sectoral approaches and could even help raise standards for employees of more profitable businesses in a sector by blunting a source of opposition to strong standards.

⁶² See Ordonnance n° 2017-1388 du 22 septembre 2017 portant diverses mesures relatives au cadre de la négociation collective [Ordonnance No. 2017-1388 of September 22, 2017 on various measures relating to the framework of collective bargaining], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 23, 2017, Article 1 (création du mécanisme de consultation du groupe d'experts préalablement à la décision d'extension du Ministre du travail [creation of the consultation mechanism of the expert group prior to the Minister of Labor's extension decision]).

⁶³ See Labour Relations Act 66 of 1995 § 32(3)(dA) (S. Afr.).

QUESTION 8: HOW SHOULD CONTRACTS BE ENFORCED?

Any sectoral system needs to establish mechanisms for parties to assert their rights under the agreement. Workers and even employers may have access to different mechanisms depending on whether they are members of worker or employer organizations that are parties to the bargaining agreements, versus those covered only due to extension of the ratified agreement.

Any members of an organization that is a party to the bargaining agreement should have access to any grievance procedures established by that agreement. Workers should clearly be able to bring claims—supported by their worker organizations—against their employers (bound directly or through worker organizations) through this mechanism. These agreements could presumably be written to allow (signatory) employers to bring claims against (signatory) competitors if they are not abiding by the terms of the agreement.

Regardless, sectoral approaches should, whenever possible, also create opportunities for all employees to pursue their claims—whether or not they are members of signatory worker organizations. In South Africa, for example, bargaining councils can enforce claims. Alternatively, workers could be empowered to file their claims both with administrative agencies and in courts of appropriate jurisdiction, if desired, either directly or on appeal from the bargaining council's decision.

CONCLUSION

Sectoral bargaining, whether federal or an intermediate approach, can be an important step on the road to improving conditions for working people—perhaps now more than ever. This report aims to serve as a reference for those looking to design sectoral approaches, elucidating the types of decisions that need to be made. By continuing to experiment with different types of sectoral design and sectoral approaches, the U.S. may someday hope to reduce the gaping holes in its labor law system that leave so many workers adrift.

CLEAN SLATE FOR WORKER POWER is a project of Harvard Law School's Labor and Worklife Program.

ACKNOWLEDGMENTS

The Clean Slate for Worker Power project gives a special thanks to Sharon Block, Kendra Bozarth, Alex Hertel-Fernandez, Jenny Lau, Celine McNicholas, Seema Nanda, Raj Nayak, Erica Rubinstein, Nikita Rumsey, Benjamin Sachs, Shayna Strom, and the individuals from around the world who generously participated in convenings about sectoral bargaining in countries outside the United States.

clean slate for
worker power 



WWW.CLEANSLATEWORKERPOWER.ORG