Sectoral Bargaining: Principles for Reform

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We are a group of academics who seek to increase worker bargaining power 2 mars 2021

An assortment of scholars, think tanks, nonprofit organizations, worker centers, and some unions have recently proposed sectoral bargaining as a means of counteracting decades-long de-unionization and the disempowerment of American workers. Prominent examples of such proposals are the Clean Slate Report and a series of proposals originated by American Compass.

The essential idea of sectoral bargaining is that workers in a sector have their terms and conditions of work set through a collective bargaining process, regardless of which employer or job site they happen to work at, partially erasing the distinction between union and non-union employers. In turn, a union could represent workers in a sector with less than a showing of majority support in a designated bargaining unit. The sound idea behind sectoral bargaining is that it prevents a race to the bottom on wages and working conditions between atomized employers.

While sectoral bargaining has historically enjoyed success in a number of countries, and even in some sectors in the United States as a means of raising the floor for labor standards, that success has usually been predicated upon an underlying foundation of worker empowerment. That power has been based on some mix of workers' own organizing and strength, strategic placement in production or distribution chains, and robust underlying legal protections. While the legal standard in the US in most sectors is enterprise bargaining, in practice, sectors with high union penetration are de facto sectorally bargained, to workers' benefit.

The basic idea of sectoral bargaining is particularly attractive in light of what Professor David Weil has called the "fissured workplace." In the fissured business structures that are pervasive today, "lead firms" have maintained or strengthened their control over smaller actors in their orbits while disclaiming any responsibility for them, their activities, and operations. Importantly, this set of conditions is only possible through a combination of lax antitrust law — which traditionally policed the control of putatively independent market actors by dominant firms — and the absence of a strong joint employer standard under labor and employment law. To put it another way, fissuring relies upon an inconsistent application of firm boundaries across areas of law: permitting powerful firms to draw *narrow* firm boundaries for labor, employment, tort, and regulatory purposes, while drawing *broad* firm boundaries for antitrust purposes. This inconsistent drawing of firm boundaries across areas of law grants to lead firms all the powers of economic decision-making without the consequences and also deprives smaller market actors and workers of any economic decision-making power whatsoever.

Sectoral bargaining is posed, in part, as a solution to this underlying problem. It gives workers a forum to face the powerful bosses who have de facto control over the terms and conditions of work. Importantly, however, reforms to antitrust law (in terms of reviving vertical restraints enforcement, and in terms of liberalizing the rules preventing coordination among smaller players in the orbits of lead firms) and to labor law (in terms of strengthening the joint employer standard as well as the standard for determining employee status) would solve this underlying problem *directly*. Together, these reforms would ensure that the control that lead firms currently exercise would entail responsibility for that control, as well as the basic coordination rights of workers in all operations within lead firms' direct or indirect control. Sectoral bargaining then may be one device by which to realize broad, democratic economic coordination that gives workers a true seat at the table.

However, divorced from a diagnosis of the underlying problem, some sectoral bargaining reform proposals may serve precisely to reinforce it.

Indeed, some sectoral bargaining schemes, by themselves, could create a mechanism by which employers can further erode or undermine universal or near-universal labor standards embodied in both statute and existing collective bargaining agreements. Proponents of sectoral bargaining are, in many instances, forthright about their aim in that regard: the point is for empowered employers to bargain down labor standards below statutory levels. For example, executives of gig economy labor platforms like Uber and Lyft have promoted sectoral bargaining as an alternative to employment classification and NLRA unionization, and as a component of the "Third Category" they've long lobbied for and now achieved with California's Proposition 22. Sectoral bargaining is not promising for workers in this context.

The context in which sectoral bargaining (or "multi-employer bargaining") makes sense is one in which employers are atomized and bringing any one of them to the table is irrelevant to the status of workers when any one employer has relatively little influence over labor standards. But that is not a factual interpretation of the ride-hailing or food delivery markets. Instead of atomized sub-contractors or suppliers, there are a few, dominant employers with a great deal of unilateral power over labor standards.

In fact, where nascent worker representation has existed in the so-called "gig economy," the companies have done everything they can to stamp it out in favor of company unions. Moreover, the model the gig platforms have succeeded in carving out for themselves threatens to extend into other sectors and states, undermining employment status, statutory entitlements, NLRA unions, and wages and worker standards well beyond what we now understand as the gig economy. **The crucial point is that the gig economy is not a sector so much as a segment of the labor market carved out of pro-worker regulation. What is at issue is how large law and regulation permits that segment to be**.

Proponents of sectoral bargaining have also portrayed it as a remedy for the historical impacts of the exclusion of female- and minority-dominated occupations from the NLRA and FLSA in the 1930s. The claim is that such occupations could, under a sectoral

bargaining system, at long last be unionized. But what enlarging the gig economy and the reach of the Third Category would mean is re-enacting that exact exclusion, by designating lower labor standards for occupations in which workers are majority people of color and immigrants.

Reform to the existing structure of labor law is sorely needed given the long-term decline in worker power in the US. Here, we enunciate a set of principles that should structure the policy debate around sectoral bargaining and determine whether any given proposal does genuinely serve the interests of workers — especially the least advantaged.

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1. ABC Test. Sectoral bargaining should not substitute for employment status, but instead, be built upon it. In the countries with successful sectoral bargaining regimes, that is precisely what legal employment status signifies: that a worker qualifies for the sectoral bargain in whichever sector he or she is employed. Therefore, **any policy reform that furthers sectoral bargaining must also insist on the ABC test for employment status** — exactly the standard which Prop 22 overturned in California and which is embodied in proposed federal legislation such as the PRO Act.

2. New Deal Portable Benefits. Social insurance — social security, unemployment insurance, and workers' compensation — are extremely effective forms of portable benefits, which is to say, while employers are obligated to contribute on behalf of their workers, workers' entitlement is independent of their specific employer. These programs solve the problem of short job tenure and temporary employment, and they are essential in a labor market where the job security standard for most workers is employment-at-will. The many existing proposals for "portable benefits" outside these existing social insurance programs are strictly inferior to them — seemingly proffered as a means by which employers can escape their obligations.

Thus, **any proposal for sectoral bargaining must not reduce workers' entitlements or employers' obligations below that of existing social insurance systems.** Prop 22 shows the dangers of doing so: the gig companies offered a health insurance subsidy that is only available to a small minority of its workforce, and even then isn't nearly sufficient to purchase comprehensive health insurance on the individual market.

The fact that, by contrast with other forms of social insurance, health insurance is not independent of a worker's particular employer is a major problem of the current system, made all the more obvious by the pandemic, which in addition to dis-employing a huge swathe of the workforce, left millions of workers without health insurance when they need it the most. But inadequate discretionary contributions to individually-purchased health insurance premiums is not remotely an adequate solution to that problem.

Funds for worker training are also not a suitable candidate for inclusion in proposals for portable benefits. The benefit to employers is clear: obtain a better-trained workforce which is nonetheless not employed and for which the employer does not owe social

insurance contributions. Companies that utilize independent contractors would dearly love to have access to a trained workforce for which they don't bear the costs, either directly in terms of the costs of training or indirectly in the form of imputed misclassification liability that providing that training might entail. We have plenty of experience shifting the costs of job training from employers to workers — in fact, that exact dynamic is at the heart of the student debt crisis. Portable benefits used for training would make that situation worse.

In summary: a number of prominent portable benefits proposals attached to the Third Category amount to reducing workers' benefits to the level that matches the poor quality of the jobs that have been created in the low-wage labor market and in particular in the gig economy. It fissures the benefits to match the fissuring of work. It is not a remedy for that fissuring, but rather, exacerbates its effects.

3. **Worker Power**. Any system of sectoral bargaining must be built on a bedrock of worker power and worker democracy. That means that **any sectoral bargaining must have, as a prerequisite, organized and democratic worker organizations in place to serve as the bargaining representative**. The examples of sectoral bargaining that proponents most often point to, those in European countries like Germany and Belgium, are dependent on century-old robust, large, democratic labor unions. The creation of their sectoral bargaining systems was the result of decades of intense organizing and collective struggle, and was meant to contain, systematize, and tame that struggle. Whatever the other benefits and drawbacks of that may be, that has meant that employers always understand that at the bargaining table they face the credible threat of mass worker action, up to and including mass strikes. Without that power, sectoral bargaining is reduced to sectoral begging by workers, with terms dictated by employers.

4. **Worker Democracy.** Relatedly, **there can be no sectoral bargaining without the affected workers getting to meaningfully decide, as a group, whether to accept or reject the bargain.** This is not only a matter of ensuring both the procedural fairness of any such bargain and that any bargain is substantively good for the workers affected. Democracy is power. Ensuring that sectoral bargaining involves the active, democratic participation and assent of the workers in a given sector makes it far more likely that those workers get involved in the worker organization representing them in bargaining, more likely that the organization bargains for what those members actually want, and more likely that the organization has the strength of those collective workers to convince management to accede to those demands. The alternative, in which workers have no say over the bargain struck on their behalf, risks turning any collective representation into an arm of management and an instrument for its control over a captive workforce.

5. **Ban on Company Unions**. The foregoing principles of democratic accountability mean that **sectoral bargaining should not deviate from established US labor law prohibiting company unions**, i.e. a labor organization that employers fund or provide in-kind benefits to. The claim that company unions should be allowed because they're better than no union fundamentally mis-conceives why the prohibition is in place:

our economy creates a structural imbalance of power between the owners of capital and the suppliers of labor and that imbalance is partially mitigated by independent collective worker organizations. If worker organizations are subservient or deferential to associations of owners, then that diminishes rather than enhances the standing of workers in our larger political economy.

6. **Antitrust Liability for Lead Firms**. Workers who are not treated as employees have been prevented from collective bargaining and joint agency through the selective application of antitrust laws against horizontal coordination. For that reason, proponents of sectoral bargaining outside the legal boundaries of employment have tied that proposal to an exemption from antitrust liability for collective bargaining by non-employees.

Any expanded **antitrust exemption should not exempt lead firms, including the powerful gig platforms, from antitrust liability for the control they exercise over workers, or any other smaller actors in their orbits, unless an employment relationship with all workers involved in those operations is recognized**.

In fact, "expanding" antitrust's existing labor exemption to cover *only* a sectoral bargain would further put workers at the mercy of the very lead firms that currently benefit from the selective application of such exemptions. In theory, antitrust liability could attach to the collective activity of independent workers' organizations that are not controlled by employers while selectively exempting them only if they come to the table under certain, predetermined conditions. This would further reduce any leverage workers might be able to bring to that table.

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We, the undersigned scholars of law, history, economics, political science, geography, sociology, and anthropology, endorse these six principles as non-exhaustive starting points from which to consider sectoral bargaining reforms. As U.S. workers face record levels of inequality, any labor law reforms must grow, and not shrink, the available wages, safety net protections, and power of low-income and minority workforces.

If you would like to add your name to this statement of principles, email sectoral.bargaining.principles@gmail.com with your name and the affiliation you would like to have given, if any. All affiliations given here are for identification purposes only and do not signify institutional endorsements of these principles.

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