

Bait AND Switch

THE FALSE PROMISE OF NEW "REPRESENTATION" MODELS



U.S. CHAMBER OF COMMERCE
Employment Policy Division

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**United States Chamber of Commerce
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Executive Summary: The False Promise of New Representation Models

Over the past 40 years, labor unions have suffered a significant decline in membership, from representing 20 percent of all private sector workers in 1983 to just 6.3 percent in 2020, according to the Bureau of Labor Statistics.¹

Unions often blame this decline on labor laws that make it difficult for workers to organize and have proposed dramatic changes to those laws to improve their fortunes. For their part, employers argue that workers have little interest in unions and paying union dues.

Several prominent politicians and unions have suggested an altogether different approach to resolving this argument: sectoral bargaining.

Unlike the present enterprise bargaining system, a sectoral system—which is common in Europe but not the United States—would empower unions to negotiate wages and working conditions for entire industries, with the same binding power as federal law. This sectoral approach could be a boon for unions focused on hard-to-organize industries (e.g., quick-service restaurants) and unions focused on workers not eligible to organize under the National Labor Relations Act (NLRA).

The wisdom of sectoral bargaining is widely accepted by left-of-center policymakers, as Section 1 of this paper presents. Unions, however, are split: While the Service Employees International Union (SEIU) strongly supports sectoral bargaining, the AFL-CIO—a 55-union federation of which the SEIU is not a member—has been less enthusiastic.

Unions interested in the concept and allied think tanks promote sectoral bargaining as an opportunity to bring enlightened European labor relations to the United States. However, a careful reading of their proposals suggests that what they have in mind is less akin to the European model and more closely resembles the highly politicized wage boards that exist domestically in a handful of states.

- **The European Model:** Section 2 describes the European experience with sectoral bargaining, with a particular focus on Germany, where the model seems to work best. There, sectoral agreements exist between unions and employer associations, but employers have the freedom to opt out of these associations—and in most cases to not be bound by the agreement. Even in Germany, this model is on the decline: More companies and workers are choosing not to be part of a sectoral agreement, which many find unresponsive to modern workplace needs.

¹ Bureau of Labor Statistics. "UNION MEMBERS—2020." News Release. January 22, 2021. Accessed February 25, 2021. <https://www.bls.gov/news.release/pdf/union2.pdf>.



- **Domestic Examples:** Section 3 demonstrates that the various “sectoral” models labor unions have in mind for the United States look very little like Germany. Instead, the proposed arrangements more resemble existing domestic models that have often been found to be legally questionable and/or at odds with the desires of workers. In New York, the state’s system of wage boards allows politically connected special interests to lobby for costly and potentially harmful workplace mandates with little recourse for affected companies or workers. This top-down approach strips employees of their voice. Nationwide, proponents also want wage boards to create “incentives to encourage workers to join unions and other worker organizations that represent them on the boards.”²
- **The Legal Peril of Sectoral Proposals:** As Section 4 describes, another problem in moving sectoral bargaining from hypothetical to reality are legal concerns under the First Amendment, antitrust laws, and the NLRA preemption doctrine. Moreover, potential legislation would raise a myriad of issues that strip workers and businesses of their rights under existing laws.

Given the potential for unintended consequences, it is useful to ask which problems sectoral bargaining is meant to solve—and whether there are more targeted ways to solve them. The paper concludes with a framework for forward-looking solutions.

For instance, policymakers and labor advocates suggest that gig workers need a base wage guarantee and portable benefits. These rights were provided to gig workers through a California ballot measure (Proposition 22) passed in November 2020, which also preserved their independent status and did not force them into a union-negotiated agreement.

Providing expanded workplace protections is possible without rewriting the country’s labor laws. Rather than embracing a declining 20th century European model or a wage board system that strips workers of their voice, policymakers should look to 21st century solutions that are responsive to the needs of the modern workplace.

² Madland, David. “How to Promote Sectoral Bargaining in the United States.” Center for American Progress Fund. Accessed February 25, 2021. <https://www.americanprogressaction.org/issues/economy/reports/2019/07/10/174385/promote-sectoral-bargaining-united-states>.



Section One: New Proposed Models for Workplace “Representation”

Faced with an ongoing decline in union membership, some unions have backed legislative policies that represent a significant departure from the representation structure in place in the United States for more than eighty years, as embodied in the NLRA. For instance, several major pieces of union-backed legislation focus on reclassifying independent contractors as employees. Unions support this legislation because independent contractors are not presently allowed to organize under the NLRA. This position has been affirmed in the courts, where organization among independent contractors was found to violate antitrust laws.³

The Protecting the Right to Organize Act (PRO Act) is one such piece of legislation.⁴ The policy, which passed the Democratic-controlled House in February 2020 and has been reintroduced, would allow most independent contractors to organize and collectively bargain. The PRO Act would open the door to organizing many major industries, including the gig economy. The PRO Act has been opposed by many businesses and Republicans, along with a handful of moderate Democrats.⁵ One aspect of the PRO Act as it was introduced in 2020 was to require a government agency to analyze and report to Congress regarding the effects of sectoral bargaining on the U.S. workforce and the technology sector. That provision, Section 6, was removed when the bill was reintroduced in 2021.⁶

While the PRO Act would significantly change who is eligible to bargain collectively, there are more aggressive alternatives on the table. Many unions, liberal lawmakers, and pro-union academics have promoted the idea of sectoral bargaining—a policy that would overhaul the current system of unionizing individual workplaces and allow unions to set workplace standards that cover entire industries.⁷

³ Paul, Sanjukta M. “The Enduring Ambiguities of Antitrust Liability for Worker Collective Action.” Accessed February 25, 2021. <https://docs.house.gov/meetings/JU/JU05/20191029/110152/HHRG-116-JU05-Wstate-PaulS-20191029-SD002.pdf>.

⁴ 117th Congress (2021-2022). S.420—“A bill to amend the National Labor Relations Act, the Labor Management Relations Act, 1947, and the Labor-Management Reporting and Disclosure Act of 1959, and for other purposes” and H.R. 842—“Protecting the Right to Organize Act of 2021.”

⁵ Buchwald, Elisabeth. “Joe Biden has big plans to help protect gig workers - but will he be able to enact them?” Accessed December 7, 2020. <https://www.marketwatch.com/story/joe-biden-has-big-plans-to-help-protect-gig-workers-but-will-he-be-able-to-enact-them-11605179235>.

⁶ 116th Congress (2019-2020). “H.R. 2474 - Protecting the Right to Organize Act of 2019.” Accessed February 9, 2021. <https://www.congress.gov/bills/116/2474/text>.

⁷ Center for American Progress Action Fund. “What Is Sectoral Bargaining.” Accessed February 25, 2021. <https://www.americanprogressaction.org/issues/economy/news/2020/03/02/176857/what-is-sectoral-bargaining>.



What is Sectoral Bargaining?

Sectoral bargaining comes in a variety of forms, but most commonly it is a labor policy under which a union negotiates on behalf of and sets work standards for all or almost all workers in a specific industry.⁸

Sectoral bargaining is used in several European countries, but it is not currently used in the United States. Instead, U.S. workers and companies can bargain at the workplace level under the NLRA. There are, however, aspects of sectoral bargaining that already exist in the United States. For example, New York has a longstanding practice of establishing wage boards that determine the pay of entire industries. There, a wage board required an increase in the minimum wage to \$15/hour for the fast-food industry in 2015.⁹

Advocates of sectoral bargaining seek to nationalize some of the labor policies from New York. This version of sectoral bargaining places an emphasis on the establishment of wage boards, which would mandate wage floors for all workers in an industry regardless of whether the employer or employee wants to opt out of the wage board's ruling. The boards would also establish policies to incentivize collective bargaining. Workers and employers would not have the option to choose to join or leave the industry agreement, as they are more-often allowed to do in countries like Germany.¹⁰ Wage boards would also set conditions across the industry in a geographic area (e.g., a state).

This top-down approach is meant to ensure that non-union workplaces do not have a competitive advantage over unionized workplaces because all workers and employers would be mandated to comply with the wage board's determination.¹¹ Because unions would also play a role in enforcing the wage board's edict, this form of sectoral bargaining would incentivize union membership.¹²

During his campaign, now-President Joe Biden vowed to establish a cabinet-level working group to consider options for expanding union membership in the United States, including consideration for sectoral bargaining.¹³ It remains to be seen what impact such a working group will have on laws related to collective bargaining.

⁸ *In These Times*. "How to Boost Unions' Power? Sectoral Bargaining." Accessed February 26, 2021. <https://inthesetimes.com/article/the-big-idea-sectoral-bargaining-labor-workers-rights-unions>.

⁹ Rolf, David. *The Fight for \$15: The Right Wage for a Working America*. 2016. Page 256.

¹⁰ Spross, Jeff. "Can Democrats change the game for labor organizing in America." Accessed February 25, 2021. <https://theweek.com/articles/866337/democrats-change-game-labor-organizing-america>.

¹¹ Matthews, Dylan. "'Unions for all': the new plan to save the American labor movement." Accessed February 25, 2021. <https://www.vox.com/policy-and-politics/2019/9/2/20838782/unions-for-all-seiu-sectoral-bargaining-labor-unions>.

¹² "How to Promote Sectoral Bargaining in the United States," Note 2, *supra*.

¹³ *Biden for President*. "The Biden Plan on Strengthening Worker Organizing, Collective Bargaining, and Unions." Accessed February 25, 2021. <https://joebiden.com/empowerworkers>.



Perspectives on Sectoral Bargaining

Congress

In December 2020, the Democratic-controlled House Committee on Education and Labor released an 87 page report titled *The Future of Work: How Congress Can Support Workers in the Modern Economy* in which it endorsed sectoral bargaining.¹⁴ The committee issued a recommendation that Congress study a sectoral bargaining system in the United States.

“To promote collective bargaining beyond the firm level, Congress should explore policy options for encouraging and promoting sectoral bargaining,” the report states.¹⁵

The committee also endorsed the passage of the PRO Act and the implementation of the so-called ABC-Plus Test for classifying workers.¹⁶ Moreover, as noted above, under the PRO Act of 2019, this committee along with its counterpart in the Senate would have recommended to Congress the feasibility of sectoral bargaining. That section was removed when the bill was reintroduced in 2021. *The Future of Work* report is likely a preview of the committee’s recommendations to Congress.

Unions

AFL-CIO

The AFL-CIO, which is a federation of 55 separate unions, has warned that sectoral bargaining could diminish the relationships individual unions have with management for specific workplaces.

Bill Samuel, the director of government affairs for the AFL-CIO, said in 2018 that sectoral bargaining could be a step backward for workers in the federation’s member unions. Samuel warned that sectoral bargaining could backfire if conservative, pro-business administrations were in place to oversee negotiations.

¹⁴ House Committee on Education and Labor. “The Future of Work: How Congress Can Support Workers in the Modern Economy.” Accessed February 25, 2021. [https://edlabor.house.gov/imo/media/doc/Future%20of%20Work%20Report%20\(FINAL\).pdf](https://edlabor.house.gov/imo/media/doc/Future%20of%20Work%20Report%20(FINAL).pdf).

¹⁵ *Id.*

¹⁶ *Id.*



"We want to first do no harm and we don't want to undermine workers' existing rights," Samuel said of the future of bargaining in the United States.¹⁷

While Samuel was hesitant to support sectoral bargaining, some within the AFL-CIO have endorsed the idea. Matt Ginsburg, an associate general counsel of the AFL-CIO, Craig Becker, the general counsel of the AFL-CIO, and Lynn Rhinehart, a former general counsel for the AFL-CIO, participated in the Clean Slate for Worker Power project, a labor-backed report that recommended sectoral bargaining as a template for the United States.¹⁸

In a memorandum to Congress on the PRO Act of 2019, the AFL-CIO issued "no recommendation" on an amendment to require a sectoral bargaining report from the Government Accountability Office (GAO).¹⁹ The PRO Act, as it was introduced in 2021, did not include a provision to have the GAO create a report on sectoral bargaining, perhaps easing the AFL-CIO's concerns about sectoral bargaining. The AFL-CIO has been aggressively advocating for the passage of the PRO Act in 2021.²⁰

Service Employees International Union

The SEIU—which is a member of the Change to Win federation rather than the AFL-CIO—has supported sectoral bargaining efforts. David Rolf, an international vice president for the SEIU, listed sectoral bargaining as one method labor activists should pursue to expand their power if the current system in the United States is too slow.

"But workers still need mechanisms to exercise power and to do so at a scale that improves the lives of millions of workers, as well as build organizations that can sustain worker bargaining power for the long haul. If twentieth-century style unions as we knew them aren't going to play that role, we'll need to invent new forms of powerful, scalable sustainable worker organizations if we want any effort to rebuild the middle class to succeed."²¹

¹⁷ Opfer, Chris. "White House Hopefuls Find Labor Reform Pickle." Bloomberg Law—*Daily Labor Report*. September 12, 2018. Accessed February 25, 2021. <https://news.bloomberglaw.com/daily-labor-report/white-house-hopefuls-find-labor-reform-pickle>.

¹⁸ Block, Sharon and Benjamin Sachs. "Clean Slate for Worker Power." Accessed February 25, 2021. https://lwp.law.harvard.edu/files/lwp/files/executive_summary_clean_slate_for_worker_power.pdf.

¹⁹ AFL-CIO. "PRO Act H.R. 2474 Amendment Final." Accessed February 9, 2021. <https://aflcio.org/sites/default/files/2020-02/PRO%20Act%20H.R.%202474%20Amendment%20Final.pdf>.

²⁰ Trumka, Richard. "Trumka: When We Make PRO Act the Law, We Will Need to Make Millions of New Union Cards." Accessed February 9, 2021. <https://aflcio.org/speeches/trumka-when-we-make-pro-act-law-we-will-need-make-millions-new-union-cards>.

²¹ *The Fight for \$15: The Right Wage for a Working America*, Page 255. Note 9, *supra*.



Mary Kay Henry, the international president of the SEIU, has also endorsed sectoral bargaining. She urged the Democratic presidential candidates in 2020 to “think even bigger” and support sectoral bargaining if they wanted to “truly improve the lives of working people.” She continued:

“Bargaining by industry, where workers from multiple companies sit across a table from the largest employers in their industry to negotiate for wages and benefits, is standard practice in almost every developed country in the world. It should happen here too.”²²

The SEIU’s tactics in its minimum-wage battle, Fight for \$15, have been compared to sectoral bargaining. The union successfully pushed New York to raise the minimum wage for fast-food workers by demanding a wage board to establish wages across the industry, rather than through independent negotiations for individual workplaces.²³

Think Tanks and Academics

Center for American Progress

The Center for American Progress, a nonprofit think tank funded by unions and many liberal foundations, has endorsed sectoral bargaining and published a “how-to” guide to encourage its supporters to promote the idea. The center argued that sectoral bargaining in the form of wage boards or workers’ boards could be used to strengthen unions, especially if unions are given an enforcement role in the wage board’s decisions.

“The workers’ board process would provide strong legal protections for participating workers, as well as incentives to encourage workers to join unions and other worker organizations that represent them on the boards. These incentives would include involving unions in the enforcement of the wage-board standards and enabling worker organizations to help deliver benefits or navigate workers through the process. These essential wage-board elements would help build union strength and potentially lead to more direct bargaining, especially because workers and employers would create a history of negotiating.”²⁴

²² Henry, Mary Kay. “Unions for All.” Accessed February 25, 2021. <https://www.facebook.com/SEIU/videos/392400058081142>.

²³ Matthews, Dylan. “The big new plan to save unions endorsed by Bernie Sanders and Pete Buttigieg, explained.” *Vox*. August 22, 2019. Accessed February 25, 2021. <https://www.vox.com/policy-and-politics/2019/8/22/20826642/mary-kay-henry-seiu-sectoral-bargaining>.

²⁴ “How to Promote Sectoral Bargaining in the United States,” Note 2, *supra*.



The group urged supporters of sectoral bargaining to encourage the passage of the PRO Act to expand and strengthen existing unions in the United States. It also encouraged the development of wage boards and worker boards throughout the country to establish citywide or statewide minimum wages for industry workers.²⁵

Sharon Block

Sharon Block, a former Obama-appointed NLRB member and then-Executive Director of the Labor and Worklife Program at Harvard Law School until January 2021, organized a study that included several union officials, including members of the AFL-CIO, the SEIU, the International Brotherhood of Teamsters, and the Center for American Progress, to review the future of labor in a project called the “Clean Slate for Worker Power.” The group concluded that sectoral bargaining was key to the future of organizing workers in the United States. As envisioned by Block and her allies, sectoral bargaining would take effect whenever a small minority of workers—as few as one in ten—voted for union representation:

“Therefore, we recommend a system of sectoral bargaining. When a worker organization has a membership of 5000 workers in a sector or 10 percent of the workers in a sector (whichever number is lower), the Secretary of Labor will—upon request of the worker organization—establish a sectoral bargaining panel for the sector. At the panel, employers will be represented in proportion to their share of the sector. Sectoral bargaining agreements will become binding on all firms and all workers in the sector, subject to review and approval by the Secretary of Labor. We also recommend an optional, complementary model based on an expanded conception of prevailing wage law for sectors where workplace collective bargaining is prevalent.”²⁶

Kate Andrias

Kate Andrias, a professor at the University of Michigan Law School, used the SEIU’s Fight for \$15 campaign as a template of how to reform the union system in the United States in her *Yale Law*

²⁵ Center for American Progress Action Fund. “What Is Sectoral Bargaining.” Accessed February 25, 2021. <https://www.americanprogressaction.org/issues/economy/news/2020/03/02/176857/what-is-sectoral-bargaining>. There is limited bipartisan support for sectoral bargaining. Oren Cass, founder of the think tank American Compass, expressed conditional support for a sectoral approach in the United States. Cass expands on his concerns in conversation with past SEIU 775 President David Rolf. <https://americancompass.org/discussions/sectoral-bargainings-promise-and-peril>.

²⁶ “Clean Slate for Worker Power,” Note 18, *supra*.



Journal report titled “The New Labor Law.” She noted that the SEIU side-stepped the standard process of unionizing one restaurant and instead launched a public campaign to have wages raised at all McDonalds and eventually all fast-food restaurants in New York City. She noted that the Fight for \$15 campaign worked to “engage the state directly in bargaining over workers’ conditions” rather than working with employers.²⁷ Andrias found that workers were effective in negotiating with government actors in New York in concert with their efforts to steer employers via strikes and other protests. She argued that the Fight for \$15 model was successful because the government of New York became a moderator in disputes between workers and employers with unions advocating for public policy, rather than workplace-focused advocacy.

“The Fight for \$15 is making demands on state actors, as well as employers. It has systematically engaged regulatory and legislative structures, through testimony, strikes, and protests. In so doing, the campaign has positioned government as a co-negotiator in determining workers’ material conditions; it has pushed government actors away from the role they have occupied since Taft-Hartley, while moving labor unions more squarely into the public policy space.”²⁸

Progressive Democrats

Several of the 2020 Democratic presidential contenders, including Vermont Senator Bernie Sanders and Massachusetts Senator Elizabeth Warren, endorsed sectoral bargaining as the way forward for unionizing American workers.

Sanders vowed to create a sectoral bargaining system via wage boards. He argued that wage boards could establish wages, benefits, and hours across the industry while cities, counties, and other local jurisdictions would be able to maintain the power to guarantee “their own minimum wage laws and other minimum standards for workers.”²⁹

Warren similarly promised to establish a sectoral bargaining system by changing federal law to make sectoral bargaining easier to develop. She specifically listed fast-food as the first industry for which she would want to establish a sectoral bargaining system.³⁰

The following sections will analyze how sectoral bargaining has worked in Europe and what steps are being taken in the United States to test alternative forms of bargaining.

²⁷ Andrias, Kate. “The New Labor Law.” *The Yale Law Journal*. Vol. 126, No. 1. October 2016. Accessed February 25, 2021. https://www.yalelawjournal.org/article/the-new-labor-law#_ftnref297.

²⁸ *Id.*

²⁹ Sanders, Bernie. “The Workplace Democracy Plan.” Accessed March 1, 2021. <https://berniesanders.com/issues/workplace-democracy>.

³⁰ Warren, Elizabeth. “Empowering American Workers and Raising Wages.” Accessed February 25, 2021. <https://elizabethwarren.com/plans/empowering-american-workers>.



Section Two: The International Experience with Sectoral Bargaining

European Countries' Labor Laws

Sectoral bargaining is prevalent in much of Europe.³¹ In Denmark, Italy, France, Germany, and the Netherlands, for example, collective bargaining predominantly takes place at the sectoral level. Although the specific sectoral bargaining systems in these countries vary, the common experiences of workers and companies subject to sectoral bargaining agreements provide valuable insight into the system's shortcomings.

The various sectoral bargaining systems in place in Europe share common characteristics.

- First, these systems typically do not require workers to join a union.
- Second, with a few exceptions, the government plays no role in the bargaining process.
- Third, a sectoral bargaining agreement does not prevent enterprise, workplace-level bargaining to supplement or supersede the sectoral agreement.

Unless otherwise cited, the information in this chapter was sourced from dozens of conversations with international labor and employment lawyers with experience working with sectoral bargaining systems in Denmark, Italy, France, Germany, the Netherlands and Norway.

Review of Empirical Research and OECD Findings

Sectoral bargaining is on the decline in Europe as employers and workers transition to more flexible arrangements. According to data from the Organization for Economic Co-operation and Development (OECD), "[o]n average across OECD countries, the share of workers covered by a collective agreement has shrunk to 33% in 2015 from 45% in 1985."³² Furthermore, only "17% of employees are members of trade unions, down from 30% in 1985, with slight increases in membership rates found only in Iceland, Belgium and Spain."³³

³¹ OECD Employment Outlook 2017, Ch. 4. "Collective Bargaining in a Changing World of Work." Accessed March 1, 2021. https://www.oecd-ilibrary.org/sites/empl_outlook-2017-8-en/index.html?itemId=/content/component/empl_outlook-2017-8-en (reporting that "[s]ector or industry level bargaining continues to dominate in most continental Western European countries").

³² *Id.*

³³ *Id.*



This decline in union membership rates coupled with the changing nature of employment relationships, among other things, has “severely tested the relevance and methods of functioning of collective bargaining systems.”³⁴ There is perhaps no better example of this trend than Germany.

Case Study: Germany

The German Model

The German model for labor relations illustrates the broader decline of sectoral bargaining and union participation in Europe. The German model consists of two distinct pillars of representation: sectoral agreements and works councils.³⁵

Article 9 of the German constitution provides a right to collectively bargain. Employees have the right to join a union, and employers have the right to join an employer association to negotiate with unions. Sectoral agreements are negotiated by trade unions and employer associations to establish wages and working conditions for an industry.

Once an employer association and a union have negotiated a sectoral agreement, the agreement is typically binding only on the employers in the association and the employees who are members of the union. Unions can also negotiate company-specific agreements with employers in the association. Employers can avoid being bound by a sectoral agreement by refusing to join the employer association, and employees can avoid the agreement by refusing to join the union.³⁶

Works councils are generally limited to establishing working conditions at the workplace level on matters not covered in a sectoral agreement or company-specific agreement.³⁷ The decision to establish a works council rests solely with employees.³⁸ Although works councils are “formally independent of unions,” unions exert significant influence over the election of works councilors, who typically are union members.³⁹

³⁴ *Id.*

³⁵ Addison, John T. and Andre Pahnke. “The demise of a model? The state of collective bargaining and worker representation in Germany.” *Economic and Industrial Democracy*, 38 (2). pp. 193-234.

³⁶ There are a range of potential scenarios that can occur in Germany. For instance, an employer can agree that, if an employee is not a member of the union, the sectoral agreement will still apply. An employer would take this step if it wanted to standardize working conditions for all employees at the company. There are also scenarios where the German government can declare a sectoral agreement relevant for all companies in an industry, regardless of whether they are part of the employer association.

³⁷ “The demise of a model? The state of collective bargaining and worker representation in Germany.” Note 35, *supra*.

³⁸ *Id.*

³⁹ *Id.*



German Employers' Experiences with Sectoral Bargaining

Employers in Germany share many of the same complaints as those in other European countries, including that sectoral agreements impose one-size-fits-all solutions that ignore the employer's economic realities such as whether they are profitable or have unique operational needs.

The experience of employers in Germany's metals industry is revealing. In a survey of 1,550 companies, two-thirds of the employers in this industry reported being satisfied with the sectoral bargaining agreement covering their industry. The same number, however, are dissatisfied with the limitations on employee working time the agreement imposes and believe that the agreement imposes wages that are too high for simple jobs.⁴⁰ Seventy percent of companies that have only a firm-wide bargaining agreement cite the work-time limitation as their primary motivation for avoiding the sectoral bargaining agreement.⁴¹ The existence of these and other unpopular regulations has led some researchers to question whether uniform sectoral agreements for the metals industry are sustainable.⁴²

Empirical Evidence Shows the German Model is Declining

Empirical evidence shows that the sustainability of the German model is in doubt. In a recent study, the IZA Institute of Labor Economics found collective bargaining coverage and participation in works councils have declined dramatically in the German private sector over the last 20 years.⁴³ As late as 1996, two-thirds of German private sector companies were covered by collective bargaining agreements.⁴⁴ That number fell to just over one-third by 2015. During the same period, works council participation declined from 17% to 12%.⁴⁵ By 2015, only 9% of private sector companies with five or more employees were both covered by a collective bargaining agreement and participated in works councils.⁴⁶

⁴⁰ Creutzburg, Dietrich. "Criticism on Collective Agreements: What Causes Companies to 'Tariff Escape.'" *Frankfurter Allgemeine*. Accessed February 25, 2021. <https://www.faz.net/aktuell/wirtschaft/arbeitnehmer-und-arbeitgeber-was-unternehmen-zur-tariffucht-treibt-16097635.html>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Oberfichtner, Michael and Claus Schnabel. "The German Model of Industrial Relations: (Where) Does it Still Exist." Accessed February 25, 2021. <http://ftp.iza.org/dp11064.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*



This lack of coverage and participation is particularly evident in the service sector where two-thirds of workplaces have no works council participation and are not covered by a collective bargaining agreement.⁴⁷ Larger companies, in contrast, tend to have significantly higher levels of coverage and participation while for small companies and younger companies these levels are low.

The IZA study argues that part of the explanation for the decline in coverage and participation stems from increased international competition and advances in technology that increase the value of flexibility while reducing the transaction-cost advantage of collective bargaining agreements and works councils.⁴⁸ The IZA study concludes that the German model “is clearly on the retreat and the outlook is rather bleak.”⁴⁹

Given that Germany’s economy is one of the strongest in Europe and its model has historically worked better than those of other European countries, this decline casts doubt on whether a similar model would fare any better in the United States.

Other Country-Specific Concerns

Italy

In Italy, national “umbrella” agreements cover most employers across roughly 100 sectors. Within these individual sectors, employers may be covered by a national agreement, a territorial agreement, or a workplace agreement. Commonly, these agreements are negotiated by major labor unions and large employers, particularly the national “umbrella” agreements.

Italian employers find that they are poorly represented in sectoral bargaining and complain that sectoral agreements often fail to appreciate the differences among employers and fail to account for the differences between the strength of the Italian economy in the north and the relatively weaker economic conditions in the south. Italian employers additionally find that sectoral agreements drafted by non-lawyers often contain confusing language that impedes the implementation of the agreements in an individual workplace and contain outdated and hard-to-apply provisions.

Despite these issues, Italian employers tend to adopt sectoral agreements voluntarily because employees expect them, and the employers fear that if they set different terms and conditions of employment, they will have difficulty recruiting and retaining workers.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*



France

Most collective bargaining agreements in France are negotiated at the sectoral level with labor unions negotiating with various employer associations. Enterprise-level agreements are common and address topics not included in the sectoral agreement.

As in Italy, French employers find that sectoral agreements often contain outdated provisions and restrictions. Employers also find that the relationship between employer associations and unions tend to be unproductive. Thus, French employers tend to view sectoral agreements as second-best compromises rather than forward-looking solutions.

Denmark

Sector-wide bargaining agreements in Denmark are typically negotiated by employer federations and unions covering certain work functions. The two sides are usually represented by employees of the relevant employer federation and the relevant union. The government rarely participates directly in sectoral bargaining. In exceptional circumstances where an industrial dispute substantially affects crucial sectors in Danish society, the Danish government may impose an agreement on the relevant parties via legislation.

Danish employers complain that sectoral agreements are overly restrictive and provide little room for the employer to accommodate company-specific circumstances. Employers also find that the employer federations often prioritize their political agenda over the interest of the individual employer. These priorities most commonly manifest in the federation's providing politically motivated employment advice that favors unions when disputes arise.

Danish employees share many of the same concerns. They frequently find that the sectoral agreements reduce flexibility and prevent them from making agreements with their employer to respond to local circumstances. They, too, find that unions provide politically motivated advice.

A broader consequence of sectoral agreements is to discourage innovation. Collective-bargaining agreements tend to be very rigid without leeway to enable a "new" approach, such as personal transportation or running retail stores. Adapting collective bargaining agreements to new business models tends to take a long time.



Key Conclusions

The European sectoral model is on the decline. European employers find the sectoral agreements contain overly restrictive workplace rules, while employees often feel poorly represented in this system. Thus, it is unsurprising that union participation in Europe continues to drop. Given the dramatic shift in American labor law that would be required to implement such a system in the United States, policymakers should view cautiously proposals to move the United States in this direction.



Section Three: Domestic Examples of New Representation Models

While European models are often cited as inspiration for bringing sectoral bargaining to the United States, domestic examples of new representation models have some key differences from the European system. In Germany, for instance, the government is minimally involved with sectoral agreements, and employers have the freedom to opt out of them. In the United States, some labor groups have favored top-down arrangements where the government is closely involved in designing a one-size-fits-all policy solution. New York's use of wage boards for the government to dictate terms for workers is representative of this approach.

This section presents evidence on how these models have worked—or not worked—for affected workers.

Multi-Employer Bargaining

Sectoral bargaining does not exist in the United States as it does in Europe because of the NLRA. Under the NLRA, employees have the right to unionize their workplace, but they do not have the right to unionize beyond their workplace, especially for an entire industry.⁵⁰

For most industries, there is a "single location presumption" under the NLRA, as interpreted and enforced by the National Labor Rights Board (NLRB). The NLRA does, however, allow for multi-employer bargaining, where several employers in one industry consent to form an association to bargain together with a union that represents the employers' workforces. This type of bargaining is common in the construction industry where individual companies sign on to master agreements negotiated between an employer association and building and construction trades unions. These bargaining agreements are often regional or local, although the AFL-CIO has negotiated much larger national agreements, including one agreement between construction firms and workers that spans 34 states and involves 118 employers.⁵¹

The NLRB can enforce a collective bargaining agreement reached between a multi-employer association and union(s) because those parties consented to this arrangement. However, the NLRB

⁵⁰ Madland, David and Malkie Wall. "What Is Sectoral Bargaining?" Center for American Progress Fund. March 2, 2020. Accessed February 25, 2021. <https://www.americanprogressaction.org/issues/economy/news/2020/03/02/176857/what-is-sectoral-bargaining>.

⁵¹ Rhinehart, Lynn and Celine McNicholas. "Collective Bargaining Beyond the Worksite." Economic Policy Institute. May 4, 2020. Accessed February 25, 2021. <https://www.epi.org/publication/collective-bargaining-beyond-the-worksite-how-workers-and-their-unions-build-power-and-set-standards-for-their-industries>.



cannot compel multiple employers to bargain together or agree to the terms of the same labor agreement at the insistence of a union.⁵²

Sidebar: The TEAM Act and Company Unions

The Teamwork for Employers And Managers Act of 1995 (TEAM Act) was a bill that aimed to change Section 8(a)(2) of the NLRA, which forbids the formation of company unions.⁵³ Such company unions form when employers recognize a group of employees as an in-house union. At the time that Congress passed the NLRA in 1935, some workers were critical of company unions because they believed employers were only recognizing like-minded employees to dominate the rest of the workers, and the NLRA outlawed them and broadly prohibited employers from “dominating” a union or selecting a group of employees to recognize.⁵⁴

While company unions were outlawed, the NLRB left employers with little guidance as to how employers could cooperate with employees in non-union workplaces. The NLRB did not address the issue until 1991 when an Indiana-based company was hit with a complaint for attempting to form an employee-involvement committee in which workers could give feedback to managers about the workplace, including safety issues. The NLRB ruled that this group violated Section 8(a)(2) because the employer had selected a group of employees to discuss workplace safety in “employer-dominated” meetings.⁵⁵

The Republican-backed TEAM Act set out to change Section 8(a)(2) to allow employers and employees to communicate about safety issues without being considered a company union. Many unions, including the AFL-CIO, opposed the legislation.⁵⁶ The TEAM Act passed the Republican-controlled House and Senate in 1996, but it was vetoed by President Bill Clinton. There was no attempt to overturn the veto, and it remains illegal for employers to form most types of employee-involvement committees.⁵⁷

⁵² *Id.*

⁵³ The 104th Congress (1995-1996). “H.R. 743 - Teamwork for Employees and Managers Act of 1995.” Accessed February 25, 2021. <https://www.congress.gov/bill/104th-congress/house-bill/743>.

⁵⁴ Flynn, Gillian. “TEAM Act: What It Is and What It Can Do for You.” Accessed February 25, 2021. <https://www.workforce.com/news/team-act-what-it-is-and-what-it-can-do-for-you>.

⁵⁵ Germond, Jack W. and Jules Witcover. “The maneuvering around the TEAM Act.” Accessed February 25, 2021. <https://www.baltimoresun.com/news/bs-xpm-1996-05-22-1996143053-story.html>.

⁵⁶ AFL-CIO. “Company Unions.” Executive Council Statement. February 22, 1995. Accessed February 25, 2021. <https://aflcio.org/about/leadership/statements/company-unions>.

⁵⁷ United States Senate. “Vetoed by President William J. Clinton.” Accessed February 25, 2021. <https://www.senate.gov/legislative/vetoed/ClintonWJ.htm>.



While unions are typically isolated to one workplace in the United States, certain industries are allowed to unionize nationwide with their employer under the Railway Labor Act (RLA).⁵⁸ Workers for airlines, railroad companies, and trucking companies are permitted to organize nationwide with their employer because their work often takes place beyond a single “workplace.” Accordingly, policies and procedures under the NLRA and RLA differ.⁵⁹

States and Experimentation with New Models

As membership has declined in the United States, unions have turned to other methods of organizing workers beyond the typical union structure. This includes funding non-profit organizations that operate in much the same way as a union and establishing regulatory bodies, such as wage boards, to set working standards through government action.

New York State

New York State has several long-standing policies that have recently been used by unions to change labor standards, including pay and access to benefits, for entire industries without needing to involve the state legislature. Some of these efforts have been focused exclusively in New York City while some of the changes have taken effect statewide.

New York State Minimum Wage Boards

Minimum-wage boards have existed in New York since the 1930s. Wage boards are convened by the state’s governor-appointed labor secretary to decide the wages of specific industries. The board today consists of three members: One representative of labor, one representative of business, and one representative of the public. The board oversees hearings during which the public can make the case as to why wages or work conditions should be changed or maintained. Following the hearings, the board submits recommendations to the labor secretary who can make the recommendations law. Wage boards have established minimum wages for several industries, including hospitality, laundry, retail, and restaurants.⁶⁰

⁵⁸ Office of Rail Policy and Development. “Highlights of the Railway Labor Act.” Accessed February 25, 2021. https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1647/Railway%20Labor%20Act%20Overview.pdf.

⁵⁹ “Collective Bargaining Beyond the Worksite” Note 51, *supra*.

⁶⁰ New York State Department of Labor. “Minimum Wage Board Records.” Accessed February 25, 2021. <https://rmc.library.cornell.edu/EAD/htmldocs/KCL05381.html>.



The use of wage boards has drawn criticism from both lawmakers and employers because of the significant authority it gives the governor to change policy without the consent of the legislature.⁶¹ This significant power was demonstrated in 2015 when New York Governor Andrew Cuomo ordered his labor secretary to impanel a wage board to review the minimum wage for fast-food workers. Governor Cuomo noted that he chose to use a wage board to change the minimum wage because he did not believe that the legislature, which was debating the issue, would move fast enough.

"In 2013, I raised New York State's minimum wage; it is now \$8.75, up from \$7.25 (and will rise to \$9 at the end of the year). In my latest budget, I proposed raising it again, to \$11.50 in New York City and \$10.50 elsewhere in the state. But the Legislature rejected that proposal. So, I am continuing the fight. While lawmakers delay, I am taking action.

State law empowers the labor commissioner to investigate whether wages paid in a specific industry or job classification are sufficient to provide for the life and health of those workers — and, if not, to impanel a Wage Board to recommend what adequate wages should be.

On Thursday, I am directing the commissioner to impanel such a board, to examine the minimum wage in the fast-food industry. The board will return in about three months with its recommendations, which do not require legislative approval."⁶²

Unions have widely supported wage boards, which often favor groups that can organize high turnout for the public comment hearings.⁶³ The SEIU encouraged Governor Cuomo's decision to implement a fast-food wage board in 2015,⁶⁴ and the board ultimately approved the fast-food minimum-wage increase.⁶⁵

Some of the union-supported wage boards have been opposed by workers who do not wish to have their pay regulated. In January 2020, tipped restaurant workers fought to be excluded from a union-backed minimum-wage board decision that applied to all other tipped workers, including hairstylists,

⁶¹ Moss, J. Jennings. "Cuomo: If lawmakers won't boost fast-food workers pay, I will." *New York Business Journal*. May 7, 2015. Accessed February 25, 2021. <https://www.bizjournals.com/newyork/news/2015/05/07/cuomo-bypass-legislature-fast-food-minimum-wage.html>.

⁶² Cuomo, Andrew. "Fast-Food Workers Deserve a Raise." Accessed February 25, 2021. <https://www.nytimes.com/2015/05/07/opinion/andrew-m-cuomo-fast-food-workers-deserve-a-raise.html>

⁶³ McGeehan, Patrick. "Board Hears Support for Raising Food Workers' Minimum Wage." *The New York Times*. June 16, 2015. Accessed February 25, 2021. <https://www.nytimes.com/2015/06/16/nyregion/board-hears-support-for-raising-food-workers-minimum-wage.html>.

⁶⁴ Fight for \$15. "Breaking Now: NY Fast-Food Workers Poised to Make History." Accessed February 25, 2021. <https://fightfor15.org/wageboard/>

⁶⁵ Harding, Robert. "NY fast-food workers get latest minimum wage increase." *Auburnpub.com*. January 1, 2018. Accessed February 25, 2021. <https://bit.ly/3aTkCWk>.



valets, and tour guides.⁶⁶ Restaurant workers feared that their tips, which often left them with pay greater than the proposed minimum wage, would decrease if they were included in the minimum-wage policy the board approved.⁶⁷

New York City and the Fast Food Workers Union

In New York City, unions effectively lobbied Mayor Bill de Blasio and the New York City Council to establish a funding mechanism for nonprofit, alternative labor organizations.⁶⁸ De Blasio signed a bill in 2017 mandating that fast-food employers allow workers to opt to have a portion of their pay deducted to pay for nonprofit organizations that lobbied on behalf of fast-food workers. According to news sources, the legislation was “drafted, edited, and dictated” by officials from SEIU Local 32BJ.⁶⁹

While the nonprofit organizations authorized to accept donations under this bill could not negotiate wages or workplace conditions directly with employers, they could lobby for policy, including a higher minimum wage. The first nonprofit to qualify for the deduction funding was Fast Food Justice, a so-called worker center funded by the SEIU.⁷⁰

The worker center nonprofits like Fast Food Justice and Fast Food Forward, the latter of which largely replaced the former, are nonprofits, not unions. But prominent labor organizations are still working to establish fast-food workers’ unions. The SEIU established the National Fast Food Workers Union (NFFWU) as the organizing arm of its Fight for \$15 campaign. The NFFWU is funded by the SEIU and it has no formal members.⁷¹ While the NFFWU has yet to develop into a union with members, Local 32BJ has attempted to unionize a few fast-food restaurants in New York City, including Chipotle

⁶⁶ Center for the Popular Democracy. “New York State Minimum Wage Coalition comments on Agreement to Raise new York’s Minimum Wage.” Accessed February 25, 2021. <https://populardemocracy.org/news/new-york-state-minimum-wage-coalition-comments-agreement-raise-new-york-s-minimum-wage>.

⁶⁷ Spector, Joseph. “These tipped workers in NY will get a full minimum wage. Why wait staff isn’t among them.” *Democrat & Chronicle*. January 2, 2020. Accessed February 25, 2021. <https://www.democratandchronicle.com/story/news/politics/albany/2020/01/02/ny-tipped-workers-but-not-restaurants-new-york-minimum-wage-2020/2793230001>.

⁶⁸ The City of New York. “Fast Food Deductions Law.” Accessed February 25, 2021. <https://portal.311.nyc.gov/article/?kanumber=KA-02724>.

⁶⁹ Nahmias, Laura and Sally Goldenberg. “Powerful unions drafted, edited fast-food worker bills.” *Politico*. February 1, 2018. Accessed February 25, 2021. <https://www.politico.com/states/new-york/albany/story/2018/02/01/powerful-union-drafted-edited-fast-food-worker-bills-228603>.

⁷⁰ United States Department of Labor. “Form LM-2 Labor Organization Annual Report.” Service Employees International Union. Accessed February 25, 2021. https://www.mackinac.org/media/images/2019/SEIU_LM2_2018.pdf.

⁷¹ *Id.*



and McDonalds.⁷² Local 32BJ assisted workers in filing Fair Workweek Law complaints against Chipotle, but it has not successfully unionized any fast-food workplaces in the city.⁷³

There was an unsuccessful attempt to push back on the policies in New York City. The Restaurant Law Center, the legal arm of the National Restaurant Association, filed a lawsuit to overturn de Blasio's policy requiring a deduction option for employee paychecks.⁷⁴ The Restaurant Law Center argued that it violated the free speech rights of employers by mandating they provide a deduction option for a nonprofit operating in opposition to employers. Fast Food Justice argued that the law did not violate the free-speech rights of employers because the money belonged to the workers at the point the deduction is made. The courts ruled in favor of Fast Food Justice, and the law remains in place.⁷⁵

The Black Car Fund and the Independent Drivers Guild

The New York Black Car Fund—technically, the New York Black Car Operators' Injury Compensation Fund, Inc.—was created by statute after Governor George Pataki was convinced by advocates from District Lodge 15 of the International Association of Machinists to create a fund to pay black car drivers who were injured or died on the job in 1999.⁷⁶ The fund is funded by a 3% passenger surcharge on all chauffeured trips, including trips with rideshare platforms. The surcharge was originally 2.5%, but it was increased in November 2020 to allow the fund to provide additional benefits to drivers. The member companies collect the fee and pay it to the fund directly.⁷⁷

All black-car companies that operate in New York are required to be members of the fund, even if they are headquartered outside the state.⁷⁸ Ridesharing companies were deemed to be black-car

⁷² Greenhouse, Steven. "We're organizing to improve lives': New York fast-food workers push to unionize." *The Guardian*. September 30, 2019. Accessed February 25, 2021. <https://www.theguardian.com/us-news/2019/sep/30/new-york-chipotle-mcdonalds-union-fight-for-15>.

⁷³ SEIU 32BJ. "NY Fast-Food Workers Rally and March, Calling on Employers to Obey the Law." Accessed March 1, 2021. <https://www.seiu32bj.org/press-release/ny-fast-food-workers-rally-and-march-calling-on-employers-to-obey-the-law>.

⁷⁴ Greenhouse, Steven. "Fast-Food Workers Claim Victory in a New York Labor Effort." Accessed March 1, 2021. <https://www.nytimes.com/2018/01/09/business/economy/fast-food-labor.html>.

⁷⁵ Stempel, Jonathan. "New York fast-food workers' payroll law survives free speech challenge." Accessed March 1, 2021. <https://www.reuters.com/article/us-new-york-fastfood/new-york-fast-food-workers-payroll-law-survives-free-speech-challenge-idUSKCN1PV2U3>.

⁷⁶ Black Car Fund. "History." Accessed March 3, 2021. <https://www.nybcf.org/history>.

⁷⁷ Hallum, Mark. "Black Car Fund looks to expand benefits for NYC for-hire drivers as increased surcharge takes effect." Accessed December 7, 2020. <https://www.amny.com/transit/black-car-fund-looks-to-expand-benefits-for-nyc-for-hire-drivers-as-increased-surcharge-takes-effect>.

⁷⁸ New York State. "Workers' Compensation Coverage: Black Car Operators." Accessed March 2, 2021. <http://www.wcb.ny.gov/content/main/coverage-requirements-wc/black-car-oper.jsp>.



companies by the New York City Taxi and Limousine Commission (TLC). The black-car classification allowed those firms to avoid registering for medallions as yellow cabs are required to do.⁷⁹

The Independent Drivers Guild (IDG) is a nonprofit organization that advocates for policy changes on behalf of “all” rideshare drivers.⁸⁰ While the IDG is not a union, it is affiliated with the International Association of Machinists (IAM) and the New York State AFL-CIO and does offer paid membership opportunities to all drivers in New York City.⁸¹

At least one company formally recognized IDG in May 2016. As part of that recognition, the IDG agreed to “refrain from trying to unionize drivers, from encouraging them to strike and from waging campaigns to have them recognized as employees rather than independent contractors.” The five-year agreement, which was announced in 2016, will expire in Spring 2021.⁸²

Since forming, the IDG has successfully advocated for several policy changes, including a law requiring an option to tip in rideshare apps and a law establishing a minimum-earnings standards for drivers.^{83 84} The Black Car Fund and several major unions were key in helping to establish the IDG. The IDG’s founder, Jim Coniglairo Jr., is a formal official with the IAM who was appointed to sit on the board of the Black Car Fund by Governor Andrew Cuomo.⁸⁵ The Workers Benefit Fund, which manages the benefits for IDG, was founded by Andy Stern, the former president of the SEIU.⁸⁶

The IDG and the Black Car Fund remain tightly connected and collaborate on most of their member campaigns and advocacy work. The IDG, seeking to advocate for drivers through chapters in New York, Connecticut, and New Jersey, is an affiliate of IAM District 15.

⁷⁹ Trangle, Sarina. “Best Color for Business: Is Uber a Black Car, a Yellow Taxi or Something Else?” Accessed December 7, 2020. <https://www.cityandstateny.com/articles/politics/new-york-city/best-color-for-business-is-uber-a-black-car%2C-a-yellow-taxi-or-something-else.html>.

⁸⁰ Independent Drivers Guild. “About the IDG.” Accessed March 2, 2021. <https://drivingguild.org>.

⁸¹ Independent Drivers Guild. “This Driver’s Experience Is All of Us.” Press release. July 29, 2020. Accessed March 1, 2021. <https://drivingguild.org/category/press-releases>.

⁸² Scheiber, Noam and Mike Isaac. “Uber Recognizes New York Drivers’ Group, Short of a Union.” *The New York Times*. May 11, 2016. <https://www.nytimes.com/2016/05/11/technology/uber-agrees-to-union-deal-in-new-york.html>.

⁸³ International Association of Machinists and Aerospace Workers. “Machinists-Led Independent Drivers Guild Wins In-App Tipping for NYC Uber Drivers.” Online statement. April 18, 2017. Accessed March 1, 2021. <https://www.goiam.org/news/machinists-led-independent-drives-guild-wins-app-tipping-nyc-uber-drivers>.

⁸⁴ International Association of Machinists and Aerospace Workers. “IAM’s Independent Drivers Guild Wins Historic Victory for New York Drivers.” Online statement. December 6, 2018. Accessed March 1, 2021. <https://www.goiam.org/news/iams-independent-drivers-guild-wins-historic-victory-for-new-york-drivers>.

⁸⁵ Black Car Fund. “Our Board.” Accessed March 1, 2021. <https://www.nybcf.org/our-board>.

⁸⁶ Workers Benefit Fund. “Team.” Accessed March 1, 2021. <https://workersbenefitfund.com>.



These organizations have not been without incident. The Black Car Fund was accused of misusing funds to donate to politicians, fund elaborate board meetings, and to make real-estate investments in unused buildings. The real-estate investments allegedly were used to establish an LLC through which political donations were made to many candidates.⁸⁷ In response to the reports of this alleged malfeasance, the Black Car Fund asked to be able to prevent the public from accessing its financial records.⁸⁸

The legislative policies pushed by the IDG and its associated groups have been criticized by drivers for leaving them less flexibility to select shifts. The minimum-wage policy in New York resulted in fewer rides given by rideshare companies because of the higher prices required for each ride.^{89 90}

The New York Taxi and Limousine Commission and Pay Standards

The New York Taxi and Limousine Commission classified rideshare drivers as black car drivers, mandating that they participate in the Black Car Fund in 2011. The classification caused the Black Car Fund's revenue to skyrocket.⁹¹ In 2018, the New York City Council authorized the Taxi and Limousine Commission to set pay standards for drivers in the city in the same piece of legislation that capped the number of drivers in the city. The commission established a pay structure that gave drivers roughly \$17.22 per hour.⁹² The Independent Drivers Guild urged the city to have the commission set pay standards for two years and celebrated the commission's decision.⁹³

The increased wages were set by the commission with the intention of reducing congestion by reducing the number of rideshare drivers on the road. The policy increased wait times for riders and cut the number of rideshare drivers in the city leading to fewer jobs and fewer rides given in the city. The commission's Chairwoman Meera Joshi said the pay increase was

⁸⁷ Bredderman, Will. "The Black Car Fund may have swerved out of its lane." Crain's New York Business. Accessed March 1, 2021. <https://www.craigslist.com/features/black-car-fund-may-have-swerved-out-of-its-lane>.

⁸⁸ Bredderman, Will. "After expose, Black Car Fund asks that finances be kept from public." Crain's New York Business. Accessed March 1, 2021. <https://www.craigslist.com/transportation/after-expose-black-car-fund-asks-finances-be-kept-public>

⁸⁹ Rapier, Graham. "Uber has proposed a new minimum wage for drivers after years of protest, but it comes with a catch." Business Insider. August 29, 2019. Accessed March 1, 2021. <https://www.businessinsider.com/uber-minimum-wage-proposal-for-drivers-california-ab5-2019-8>

⁹⁰ Rapier, Graham. "Uber and Lyft rides are down in New York City thanks to a minimum-wage rule that drove up prices. Analysts say it could have been even worse." Business Insider. July 16, 2019. Accessed March 1, 2021. <https://www.businessinsider.com/uber-lyft-rides-decline-after-new-york-minimum-wage-2019-7>.

⁹¹ "The Black Car Fund may have swerved out of its lane." Note 87, *supra*.

⁹² Matthews, Karen. "NY taxi board sets minimum pay standards for ride-hail drivers." SFGATE. December 4, 2018. Accessed March 1, 2021. <https://www.sfgate.com/business/article/NY-taxi-board-sets-minimum-pay-standards-for-13443343.php>

⁹³ Independent Drivers Guild. "NYC Sets Nation's First Minimum Wage for App-Based Drivers." Online statement. December 4, 2018. Accessed March 1, 2021. <https://drivingguild.org/nyc-sets-nations-first-minimum-wage-for-app-based-drivers>.



reasonable because New Yorkers “are willing to pay a little more and wait a little longer so the people transporting them are able to provide for themselves and their families.”⁹⁴

The mandated wage increases led to 8% fewer rideshare trips, according to data from the commission,⁹⁵ and fares were raised in New York City to pay for the wage increases.⁹⁶ Legal challenges were also raised against the wage standard, but a case was subsequently rejected by state trial and appellate courts.⁹⁷

Washington State

The city of Seattle, Washington, has been a testing ground for alternative organization structures on behalf of union interests. While the Seattle City Council has been willing to pass legislation to establish alternative labor organizations, it has hit several legal barriers that have limited the implementation of such projects.

In 2015, Seattle passed a bill that allowed rideshare drivers to unionize, despite their classification as independent contractors who are not covered by the NLRA. Seattle’s legislation created a formula to determine whether a driver was working “near full-time” and allowed those drivers to vote to join a union. The legislation was pushed by several unions and union-backed worker centers.⁹⁸

While Seattle’s law to unionize rideshare drivers had the support of unions and the city council, its legal standing was faulty and it was challenged in the courts by the United States Chamber of Commerce on the grounds that it violated federal antitrust laws and preemption grounds under the NLRA. The United States Justice Department and the Federal Trade Commission filed briefs in support of the Chamber’s claim that Seattle’s law violated antitrust laws.⁹⁹ The law was put on hold

⁹⁴ “NY taxi board sets minimum pay standards for ride-hail drivers.” Note 92, *supra*.

⁹⁵ “Uber and Lyft rides are down in New York City thanks to a minimum-wage rule that drove up prices. Analysts say it could have been even worse.” Note 90, *supra*.

⁹⁶ O’Brien, Sara Ashley. “Uber, Lyft prices go up in NYC as new driver minimum wage law takes effect.” Accessed March 2, 2021. <https://www.cnn.com/2019/02/01/tech/uber-nyc-rates/index.html>

⁹⁷ Guse, Clayton. “Lyft loses effort to sink NYC’s minimum wage law for e-hail drivers.” Accessed December 23rd, 2020. <https://www.nydailynews.com/new-york/ny-lyft-minimum-wage-lawsuit-appeal-20201222-c5yaaxk4dfd5gptcrpcw32jre-story.html>

⁹⁸ On Labor. “Gig News: Seattle Passes Historic Bill Giving Uber & Lyft Drivers Right to Unionize.” Accessed December 4, 2020. <https://www.onlabor.org/gig-news-seattle-passes-historic-bill-giving-uber-lyft-drivers-right-to-unionize/>

⁹⁹ Jeremais, Sofia. “Gig workers want a seat at the bargaining table. The feds say not so fast.” *Deseret News*. January 12, 2020. Accessed March 1, 2021. <https://www.deseret.com/indepth/2020/1/12/21012702/uber-lyft-drivers-collective-bargaining-hollywood-writers-union-big-tech-minimum-wage>.



following the Chamber's lawsuit. A federal judge in Seattle first ruled in favor of the city, but the Ninth Circuit Court of Appeals overturned that decision and sided with the Chamber on antitrust grounds.¹⁰⁰

The city ultimately decided to walk away from the legislation in 2020 as part of an agreement with the plaintiffs to drop the plans to unionize drivers in exchange for other legislation. The city extended its \$15 minimum wage to rideshare drivers and established a Driver Resolution Center for drivers to settle disputes between the rideshare companies and drivers who had their accounts deactivated.¹⁰¹

Sidebar: Worker Centers

Worker centers are union front organizations (UFOs) that offer services to workers who cannot be traditionally organized, such as independent contractors. These centers operate as nonprofit 501(c)(3) or 501(c)(4) organizations. This classification has been criticized by many labor experts who believe that worker centers are functioning as labor unions outside the bounds of the NLRA, which requires levels of accountability. Labor attorney Stefan Marculewicz detailed the following criticism of worker centers:

"Today there are hundreds of these organizations. Their structure and composition vary. They go by many different names. Typically, they are non-profit organizations that receive funding from foundations, grants — including from government, membership fees and other donations. Some are funded by other labor organizations.

These groups offer many different services to their members, including education, training, employment services and legal advice. Increasingly, however, these organizations directly engage employers or groups of employers to effectuate change in the wages, hours and terms and conditions of workers they claim to represent. When it comes to such direct engagement, these worker centers often act no differently than traditional labor organizations."¹⁰²

¹⁰⁰ Wiessner, Daniel. "United States court revives challenge to Seattle's Uber, Lyft union law." *Reuters*. May 18, 2018. Accessed March 1, 2021. <https://www.reuters.com/article/us-uber-seattle-unions/u-s-court-revives-challenge-to-seattles-uber-lyft-union-law-idUnitedStatesKBN1IC27C>

¹⁰¹ Nickelsburg, Monica. "Uber, Seattle, and United States Chamber end dispute over union law as city plans minimum wage for drivers." *Geek Wire*. April 13, 2020. Accessed March 1, 2021. <https://www.geekwire.com/2020/uber-seattle-u-s-chamber-end-legal-dispute-union-law-city-plans-minimum-wage-drivers>.

¹⁰² Marculewicz, Stefan. Testimony of before the U.S. House of Representatives Subcommittee on Health, Employment, Labor, and Pensions hearing, "Worker-Management Relations: Examining the Need to Modernize Federal Labor Law." April 26, 2018.



Working Washington and Gig Worker Hazard Pay

Working Washington is a 501(c)(4) worker center that was founded in 2011 with the assistance of the SEIU. The group was formed as part of the SEIU's "Fight for a Fair Economy" and it is funded by "support from foundations, unions, and individual contributions."¹⁰³ Working Washington has been advocating for a minimum wage and pandemic hazard pay for rideshare drivers.¹⁰⁴

Working Washington has faced scrutiny for its classification as a 501(c)(4). In July 2020, the Freedom Foundation and the Center for Union Facts filed a complaint with the Office of Labor-Management Standards against Working Washington over its failure to disclose required information under the Labor-Management Reporting and Disclosure Act (LMRDA).¹⁰⁵ The two organizations argued that Working Washington met the legal threshold to be considered a "labor organization" under the description established in 29 U.S.C. § 402(i), which defined a labor organization as:

"...a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment..."¹⁰⁶

The complaint detailed several occasions on which Working Washington advocated directly with employers to affect wages or working conditions on behalf of employees. Most recently, Working Washington advocated for an ordinance in Seattle mandating that delivery drivers be paid premium pay during the coronavirus pandemic at a rate of \$2.50 per delivery.¹⁰⁷ The law passed and delivery-network platforms, paid out hundreds of thousands to drivers in additional premiums. Working Washington represented drivers in the negotiation with employers and the city when the legislation was being finalized, and lawmakers publicly credited Working Washington as a major driving force behind the ordinance.¹⁰⁸

¹⁰³ Working Washington. "History & Leadership." Accessed March 1, 2021. <http://www.workingwa.org/about/leadership>.

¹⁰⁴ Working Washington. "Making the gig economy #payup." Accessed March 1, 2021. <http://www.workingwa.org/gig>

¹⁰⁵ Freedom Foundation and the Center for Union Facts. "Application of the LMRDA to Working Washington." Accessed March 1, 2021. <https://www.freedomfoundation.com/wp-content/uploads/2020/08/OLMS-complaint-Working-Washington-FINAL.pdf>

¹⁰⁶ Legal Information Institute. "29 United States Code § 402. Definitions." Accessed March 1, 2021. <https://www.law.cornell.edu/uscode/text/29/402>.

¹⁰⁷ Nickelsburg, Monica. "Seattle considers mandating hazard pay for gig workers during the pandemic." *Geek Wire*. May 22, 2020. Accessed March 1, 2021. <https://www.geekwire.com/2020/seattle-considers-mandating-hazard-pay-gig-workers-pandemic/>

¹⁰⁸ Guarente, Gabe. "DoorDash and Postmates Pay Out More Than \$350,000 to Seattle Gig Workers Due to Hazard Pay Law." *Eater.com*. September 21, 2020. Accessed March 1, 2021. <https://seattle.eater.com/2020/9/21/21449883/doordash-postmates-pay-more-than-350000-to-seattle-gig-workers-hazard-pay>.



Key Conclusions

The alternative forms of organization that have been pursued by the unions in the United States have been found, in some cases, to be legally questionable, and at times at odds with the desires of workers.

Union-backed campaigns to raise the minimum wage in New York via wage boards and other campaigns left some restaurant workers scrambling to find themselves a loophole to be excluded from the policy they believed would result in lower pay. Workers who were included in the minimum wage increases were left with less work, including the rideshare drivers who saw rides decrease after wage mandates were enacted.

Seattle's attempt to organize gig workers via legislation was abandoned in large part because it could not overcome the legal hurdles. The city attempted to ignore the fact that independent contractors cannot form unions without violating antitrust laws. After the Ninth Circuit Court affirmed that fact, they stepped away from the legislation.

Worker centers, including Working Washington, have established themselves as nonprofit organizations despite acting, in many ways, as unions. This allows them to skirt disclosures that are typically required to ensure transparency in organized labor.

Whatever one may think of these efforts, they have not resembled true sectoral bargaining. Such a model will require passage of more sweeping legislative changes.



Section Four: The Promise and Peril of New Proposals

Legal Concerns With Potential Sectoral Bargaining Legislation

Proponents of sectoral bargaining are likely to draft legislation under the premise of mandating a floor of legal protections on an industry-wide basis. This could occur at both the state and federal level, although a closely divided Congress in Washington, DC, makes passage of such legislation less likely.

The performance of sectoral bargaining in other countries, and the drawbacks of existing new models of representation domestically, has been covered in prior sections of this paper. A perhaps more serious concern in moving sectoral bargaining from the hypothetical to reality are legal challenges and concerns under the First Amendment and antitrust laws. Moreover, potential legislation will raise a myriad of issues that strip workers and businesses of their rights under existing laws.

- **Freedom of speech concerns:** Sectoral bargaining statutes may violate the First Amendment freedoms of speech and association in light of the United States Supreme Court's decision in *Janus v. American State, County & Municipal Employees, Council 31*.¹⁰⁹ The constitutional underpinnings of *Janus* show that it provides the proper framework for analyzing a sectoral bargaining statute that requires companies to join together to negotiate with unions in industry or work councils, and by requiring that they pay fees toward the unions' representation and services provided to covered workers.
 - Both public sector agency fee cases (*Janus*) and private sector advertising cases involve situations where a governmental entity requires that persons (be they individuals or corporations) associate with one another and pay a fee to subsidize a third party's speech.¹¹⁰
 - Litigation would focus on whether the sectoral bargaining statute is a comprehensive regulatory scheme justifying the government's interest in compelling speech, and whether the statute mandates association among those required to pay a speech subsidy.
 - Relatedly, the unconstitutional conditions doctrine prohibits the government from conditioning a benefit on a person's willingness to give up a constitutional right.¹¹¹

¹⁰⁹ *Janus v. American State, County & Municipal Employees, Council 31*, 138 S.Ct. 2463 (2018).

¹¹⁰ See *United States v. United Foods, Inc.*, 533 United States 409 (2001); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 United States 457 (1997).

¹¹¹ See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 United States 595, 604 (2013) (citing *Regan v. Taxation With Representation of Wash.*, 461 United States 540, 545 (1983)) ("We have said in a variety of contexts that 'the government may not deny a benefit to a person because he exercises a constitutional right'").



For example, a professor's right of free speech would be violated if a public college declined to renew his contract because he was an outspoken critic of the college's administration.¹¹² This is exactly the sort of thing the sectoral bargaining statutes may do—they condition a company's business practices on their willingness to give up their First Amendment rights not to associate with one another and not to pay for unions' speech. Statutes that require a company to collect or pay a fee and pass that fee on to the unions so the unions can engage in speech are legally vulnerable.

- **Other constitutional concerns:** Workers covered by sectoral bargaining statutes also may have First Amendment arguments that the statutes unconstitutionally impinge their freedom of association.¹¹³ This is because the statutes could force workers to become covered by a collective bargaining agreement when only a small percentage actually voice support for the union. The United States Supreme Court has recognized that exclusive representation of employees by a union results in a "corresponding reduction in the individual rights of the employees so represented." Courts have thus recognized that allowing a union to supersede an employee's direct bargaining relationship amounts to compulsory association.¹¹⁴ Also, to the extent the bargaining statutes require workers to fund the bargaining representative through payment of fair share (agency) fees, the workers would have claims similar to those in *Janus*.
- **Antitrust concerns:** Sectoral bargaining legislation mandating that businesses collectively bargain with unions over fees and other contractual terms regarding their engagement with independent contractors (e.g., drivers and delivery persons) may face an antitrust challenge under the federal Sherman Act.¹¹⁵ Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." Horizontal price-fixing agreements between multiple competitors is per se unlawful.
 - In May 2018, the United States Court of Appeals for the Ninth Circuit in *United States Chamber of Commerce v. City of Seattle* held that Seattle's ordinance that permitted independent contractors to unionize and bargain through their union over the fees and

¹¹² *Id.* (citing *Perry v. Sindermann*, 408 United States 593 (1972)).

¹¹³ See *Roberts*, 468 U.S. at 623 (the freedom of association presupposes a freedom not to associate).

¹¹⁴ See *Mulhall v. UNITE HERE*, 618 F.3d 1279, 1286-87 (11th Cir. 2010).

¹¹⁵ 15 U.S.C. § 1.



other terms of engagement with ride-sharing companies violated federal antitrust law.¹¹⁶ The Ninth Circuit accepted that the ordinance violated the Sherman Act as a *per se* antitrust violation and was not saved from federal antitrust preemption by the state-action immunity doctrine. The Court held that the State of Washington's statutes relied upon by Seattle to enact the challenged ordinance did not clearly articulate and affirmatively express "allowing for-hire drivers to price-fix their compensation."

- **NLRA Preemption:** State or city legislation may be susceptible to legal challenges under two types of NLRA preemption.
 - **Garmon preemption** is intended to preclude state interference with the NLRB's interpretation and active enforcement of the NLRA's regulatory scheme.¹¹⁷ When an activity is arguably subject to NLRA protection, states and federal courts must defer to the exclusive competence of the NLRB to avoid the danger of interference with national labor policy.¹¹⁸ Thus, states are forbidden from regulating activity that the NLRA arguably protects or prohibits.¹¹⁹ Companies subject to the bargaining statutes or workers may contend that workers covered by the bargaining statutes are "employees" under the NLRA or that their status as employees versus independent contractors has not yet been determined. Implementation of the PRO Act's "ABC test" would likely result in more workers being classified as "employees" and bolster *Garmon* preemption arguments. Workers subject to the bargaining statutes may have stronger claims that they are denied protections of the NLRA.
 - **Machinists preemption** applies where the NLRA neither protects nor prohibits the activity in question, but national labor policy requires that the activity should be wholly unregulated and left to the free play of economic forces.¹²⁰ By excluding independent contractors in NLRA, Congress made a deliberate choice to exclude them from the field of collective bargaining and treat independent contractors as businesses governed by market forces, rather than as employees able to collectively bargain. Any bargaining statute that provides a right for independent contractors to organize, thus, is likely *Machinists* preempted.

¹¹⁶ *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 779–80 (9th Cir. 2018).

¹¹⁷ *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

¹¹⁸ *Garmon*, 359 U.S. at 245. Note 117, *supra*.

¹¹⁹ See *Brown*, 554 U.S. at 65. Note 117, *supra*.

¹²⁰ *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976).



Even if a sectoral bargaining statute is drafted to survive First Amendment, antitrust and NLRA preemption litigation, the statute will nonetheless limit industry competition, lead to higher prices, and harm consumers. Thus, proponents of sectoral bargaining who claim that sectoral bargaining will “remov[e] wages from competition, enabling employers to compete over the quality of their products and services,” overlook the practical anti-competitive concerns sectoral bargaining raises.

Consider:

- Sectoral bargaining requires that competitive businesses share confidential and proprietary information. Then, after divulging their information, the competing businesses negotiate against one another to reach a consensus on what they propose to the designated union(s); thus, each company loses its ability to negotiate its own deal for what works for its business.
- Further, depending on the enabling legislation’s structure, the larger, more influential/sophisticated/well-funded businesses will dominate the lesser businesses and thwart industry competition. Stated simply, the big industry players can exert their will to set conditions to ensure their businesses can survive, while smaller businesses will be unable to compete and start-ups will be unable to pay the entrance fee.

Once legislation is proposed, there are many “red flags” that may concern workers and businesses alike.

Structure

Legislating sectoral bargaining units calls into question the ability to address the varying concerns and interests of workers’ and businesses. Would all companies that could be considered within a general industry bargain together for all workers in that industry or would the legislation seek to separate such firms based on their core businesses?

Union Selection

Which union earns the right to represent a sector’s workers may depend on the internal politics of the AFL-CIO or Change to Win and may also turn on which unions carry political sway at the state capital or in Washington, DC. A bedrock principle of the NLRA is that a majority of workers who share a community of interest chose union representation in a secret ballot election. Sectoral bargaining legislation that permits union representation on less than majority support foists union representation



on workers across an entire industry. Furthermore, any legislation that compels union representation without workers having the ability to cast their votes on union representation is concerning.¹²¹

Labor Peace Agreements

Proposed sectoral bargaining legislation could include a requirement that businesses enter into labor peace agreements (LPA). As seen in other legislative contexts, legislation referencing LPAs oftentimes does not clearly define the terms to be included in an LPA.¹²² The main components of LPAs are scope and composition, neutrality, union access, card check recognition, dispute resolution, and binding arbitration. While each of these terms carries significance, warrants scrutiny, and contains areas in which to negotiate, the central tenet is that the LPA is intended to promote unionization.

Government Agency/Board

Legislation could also establish a governing board of members to administer the law, including the implementing of rules and procedures. The use of a board serves two main purposes. At the state level, the government's involvement could help defend the legislation under the state-action immunity defense to federal antitrust preemption. The state's governor could also appoint the board's members, who would then act at the behest of the governor to further his/her political goals. The board may be empowered to exercise its discretion to approve or reject a collective bargaining agreement negotiated by the sector's businesses and unions.

If the board rejects the negotiated deal, it can require the parties to return to the bargaining table or be subjected to binding interest arbitration. What's more, the board would retain the ongoing authority to administer the relationship between the sector's businesses and unions and rescind approval for a previously approved collective bargaining agreement. Under such a structure, a government agency would have ultimate authority to dictate the terms and conditions of employment in private sector workplaces.

¹²¹ Center for Union Facts. "When Voting Isn't Private." Last accessed March 1, 2021.
<https://www.unionfacts.com/downloads/report.cardCheck.pdf>

¹²² Fisher Phillips. "Union Organizing In the Cannabis Industry." May 29, 2020. Last accessed March 1, 2021.
<https://www.fisherphillips.com/resources-alerts-union-organizing-in-the-cannabis-industry-what>.



Binding Arbitration

Under the NLRA, there is no time limit within which parties are required to reach agreement. Fewer than 40% of unions certified through the NLRB secure a contract in the first year—and fewer than 60% ever secure a contract.¹²³

To avoid the hollow victory of gaining union representation but not achieving a collective bargaining agreement, legislation could impose time limitations to bargaining coupled with the looming threat of binding interest arbitration (see the example of the PRO Act). If the parties do not reach agreement in that predetermined time, their dispute would be submitted to binding interest arbitration before an arbitrator or panel of arbitrations (likely appointed by the board). Under interest arbitration, the parties submit their positions on what should be in the labor agreement, and the arbitrator(s) will determine what terms and conditions should govern and order the parties to adhere to a resulting collective bargaining agreement.

Contract arbitration is problematic for many reasons. First, it takes decision-making away from the parties with a direct interest in the outcome. Second, it could force a contract on employers that is not financially sustainable. Third, it removes choice from workers. Workers often vote on whatever contract their union has negotiated for them. Under binding first contract arbitration, there can be no vote because the contract is mandatory. Workers who dislike the contract terms simply must live with it.

¹²³ Madland, David and Karla Walter. "The Employee Free Choice Act 101." March 11, 2019. Last accessed March 1, 2021. <https://www.americanprogressaction.org/issues/economy/news/2009/03/11/5814/the-employee-free-choice-act-101>.



Conclusion: A “Third Way” For Workplace Protections

The title of this paper refers to the “false promise” of new representation models—models which threaten to force workers into rigid one-size-fits-all workplace agreements. Policymakers should be rightfully skeptical of rewriting the country’s labor laws or granting new powers to unelected wage boards or to impose a dramatic change like sectoral bargaining. But that doesn’t mean compromise is impossible.

For instance, labor advocates’ proposals are motivated at least in part by a desire to provide basic workplace benefits for independent contractors. There are policy proposals that could accomplish this goal without a radical overhaul of our current legal framework.

- ***Portable Benefits for Independent Workers Pilot Program Act:*** In 2017, Sen. Mark Warner (D-VA) and US. Rep Suzan DelBene (D-WA) introduced this legislation, which provided grants for states and nonprofits to experiment with the provision of portable benefits for independent contractors. Last year, Sen. Warner and Sen. Steve Daines (R-MT) introduced the Emergency Portable Benefits for Independent Workers Act, a \$500 million fund for states to update their unemployment insurance systems and “experiment with innovative proposals for portable benefits.”¹²⁴
- ***New GIG Act:*** The New Economy Works to Guarantee Independence and Growth Act (New GIG) was introduced by Sen. John Thune (R-SD). The legislation ensures the gig workers are treated as independent contractors, rather than employees, for tax purposes. In a recent speech, Thune pointed out that his proposal was particularly important during a pandemic: “My bill will allow companies to provide support to workers to help them stay safe during the pandemic without jeopardizing these individuals’ status as independent contractors.”¹²⁵

The goal of this paper is not to detail every alternative or exhaust all avenues of compromise. It is instead to highlight the folly of plunging whole sectors of the American economy into unprecedented and untested bargaining schemes. Lawmakers have no evidence that sectoral bargaining could work in this country, and evidence from other countries shows that it is falling out of favor.

¹²⁴ Senator Mark Warner. Press Release. Last accessed March 1, 2021.

<https://www.warner.senate.gov/public/index.cfm/2020/7/warner-daines-introduce-legislation-to-establish-an-emergency-portable-benefits-fund#:~:text=Warner%20has%20led%20the%20bipartisan,for%20the%20growing%20independent%20workforce>.

¹²⁵ Senator John Thune. “Thune Reintroduces Bill to Add Certainty to Worker Classification Rules.” Press release. March 7, 2019. Last accessed March 1, 2021. <https://www.thune.senate.gov/public/index.cfm/2019/3/thune-reintroduces-bill-to-add-certainty-to-worker-classification-rules>.



Indeed, we have already seen what happens when legislators overreach and push for wholesale change, contrary to workers' wishes. In 2019, the California legislature enacted AB 5 to restrict the use of independent contractors in certain industries.¹²⁶ A responsive ballot measure, Proposition 22, established a new classification test for app-based drivers and delivery workers and thereby allowed them to remain independent contractors. The initiative, which passed with nearly 60% support, provided basic workplace protections for app-based workers, including a minimum earnings standard and certain benefit requirements.¹²⁷

Several surveys released prior to and during the Proposition 22 debate suggested overwhelming support among app-based workers for retaining independent-contractor status:

"A new poll conducted jointly by the left-leaning Benenson Strategy Group and right-leaning GS Strategy Group asked 1,000 on-demand drivers whether they would prefer to be full-time employees instead of contractors. Only 15% of respondents said they'd prefer full-time. A similar Global Strategy Group survey commissioned by Lyft found that 71% of the 1,092 independent contractors polled in August preferred their current status over full-time employment. ... A 2019 study by Edelman Intelligence, Upwork and the Freelancers Union found that nearly half of the 6,000 respondents chose freelancing because their personal circumstances made traditional full-time employment impossible. More than 70% said they freelance because of the flexible scheduling."¹²⁸

There need be no conflict between preserving workers' independence and providing workplace protections—and it is possible without rewriting the country's labor laws. Rather than embracing a declining 20th century European model, or a wage board system that strips workers of their voice, policymakers should look to 21st century solutions that are responsive to the needs of the modern workplace.

¹²⁶ AB 5, codified at Cal. Labor Code § 2750.3, et seq. See also, *Dynamex Operations W. v. Superior Court*, 4 Cal.5th 903, 416 P.3d 1, 232 Cal.Rptr.3d 1.

¹²⁷ Ballotpedia. "California Proposition 22." Last accessed December 14th, 2020. [https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)).

¹²⁸ Saltsman, Michael. "Unions Seek to Liberate Gig Workers from Flexibility." Accessed March 2, 2021. <https://www.wsj.com/articles/unions-seek-to-liberate-gig-workers-from-flexibility-11599246887>.

