

HOW AND WHY TO EMPOWER WORKERS IN THE COVID-19 RESPONSE

ISSUE BRIEF BY **SHARON BLOCK, SUZANNE KAHN, BRISHEN ROGERS, BENJAMIN I. SACHS** | APRIL 2020

INTRODUCTION

COVID-19 poses a grave challenge to the American economy and to our democracy. From the lack of paid sick leave to a shortage of hospital beds, the pandemic has exposed glaring problems in our social infrastructure. But while the virus has upended life for the entire nation, its effects are profoundly skewed along income and race lines. Low- and middle-income people, and people of color in particular, are getting infected, suffering complications, and dying in shockingly disproportionate numbers (Buford and Johnson 2020).

Though there are many causes for this disparity in the pandemic's impact—including unequal access to health care, the racial skew in poverty rates, and the overall unequal distribution of wealth and income across the country (Reeves and Rothwell 2020)—this brief focuses on another cause: the dramatically heightened health risks faced by those who must continue to go to work outside of the home. Those who remain on the job in essential industries—especially in health care, retail, food service, transportation, and logistics—risk exposure, and therefore their lives, every day. The threat posed to working people today is both an immediate crisis and also a warning of things to come: As the economy reopens, more and more of us will need to return to work outside of our homes. Thus, the health risk faced by essential workers today is the health threat that the vast majority of us will face one day soon.

Moreover, this crisis is not just a matter of *worker* safety—it is also an acute matter of *public* safety. When work is not safe, and workers face exposure to the virus, the consequences for all of us are severe. Our lives depend—quite literally—on our collective ability to protect workers today. Guaranteeing their safety, and thereby protecting public health, will require a multipronged approach, including vigorous action by federal and state agencies whose mission is to develop and enforce workplace safety and health standards (Michaels 2020). Another key piece of the approach, and the one we focus on here, is providing workers a meaningful role in designing and implementing the safety and health protocols that govern their lives on the job.



Worker voice is essential here for multiple reasons. First, workers have unique insights into the health and safety risks they face on the job and thus are well-positioned to help identify health threats. Second, and relatedly, workers also have unique insights into how to make their jobs safer (Department of Labor n.d.). Workers, that is, are well-positioned to identify solutions. As a result, worker representation can deliver concrete benefits not only for workers themselves but also for companies and the public. Finally, workers—particularly during a public health crisis in which their lives are at risk from their jobs—deserve a voice in shaping the safety and health rules meant to protect them. By giving workers a voice, we can ensure that the pandemic response happens *with* them and not *to* them.

In this brief, we propose several concrete reforms that would give workers a formal role in the shaping of COVID-related workplace safety and health protocols, including workplace rules regarding protective gear and procedures, scheduling approaches that are responsive to health and safety needs testing protocols, and leave policies that are designed to ensure that the workforce can remain healthy. These reforms, which should be included in the next phase of Congress’s response to the COVID-19 crisis, include mechanisms for worker voice across businesses in essential sectors, as well as mechanisms at the workplace and company level.

Recent proposals from members of Congress have begun to acknowledge the need to empower workers in this process. Rep. Ro Khanna (D-CA) and Sen. Elizabeth Warren’s (D-MA) Essential Workers Bill of Rights proposes that “Any time a public health crisis hits, the government should work with employers and workers to craft a response and set safety and compensation standards” (Khanna 2020). Similarly, Rep. Pramila Jayapal’s (D-WA) proposal for a paycheck guarantee program includes a call for oversight by a joint labor-management board established by the Treasury Department (Jayapal 2020).

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Our proposal builds on these ideas, laying out how Congress might design a system for worker input in critical industries’ responses to both phases of the COVID-19 crisis—the immediate health crisis and the economic recession that will almost certainly outlast it.



WHY WE NEED WORKER VOICE AND POWER IN ESSENTIAL INDUSTRIES TODAY

Workers in the United States have no rights to a collective voice in their workplace unless and until they unionize, yet only about 6 percent of workers in the private sector are represented by a union (Shierholz 2020). Notably, this means that the vast majority of workers have no rights to participate in their employers' decisions about how to confront this pandemic. In frontline sectors, such as health care and delivery, unionization rates are slightly better than average but still alarmingly low: Less than 18 percent of workers in the transportation and warehousing industry are represented by a union, and less than 8 percent of workers in health care are unionized. In food service, one of the first sectors to experience deep economic losses, the unionization rate is under 2 percent (Bureau of Labor Statistics 2020).

The results are predictable and unacceptable: Workers across the country—including those who handle and deliver our food and care for sick patients—have been forced to work without gloves, masks, or access to disinfectants (Jones, Stein, and Whoriskey 2020). Nurses and doctors have been told not to wear protective gear (Fadel 2020). Others are being denied paid leave if they are sick or have to care for sick relatives (Samaha 2020), leaving them no option but to work while ill. In response, frontline workers in health care, retail, logistics, and food service have stood up and demanded better protections and responsible scheduling (Eidelson 2020). For example, even as Instacart announced it was hiring 300,000 new shoppers to meet increased demand at the end of March (Staffing Industry Analysts 2020), workers there and at other grocery delivery platforms went on strike to demand protective gear and hazard pay (Greene and Tiku 2020).

Though these efforts will yield some concessions, they are in no way a substitute for guaranteed worker voice in workplace policy. Frontline workers can of course seek to unionize, but our labor law makes it exceedingly difficult for workers to do so. Employers have many lawful tools at their disposal to avoid unionization—and even when they violate the law, for example by terminating workers for union activities, they often face few if any consequences (Lafer et al. 2019). Our labor laws are especially weak for workers in “fissured workplaces” (Weil 2014). For example, workers for app-based companies such as Instacart, and delivery drivers for companies such as Amazon Flex and FedEx, are classified as independent contractors and thus denied any right to unionize. It should come as no surprise that women, people of color, and immigrants are disproportionately represented in such jobs (Block and Sachs 2020, 8).



Moreover, even when US workers successfully unionize, they only gain rights to bargain at the company or the worksite level. As Clean Slate and Roosevelt have shown, such “enterprise” bargaining is simply incapable of delivering a real voice and power to workers today, since it does not enable workers to take wages and benefits out of competition (Block and Sachs 2020; Andrias and Rogers 2018; Barenberg 2015). This is one reason that some employers are keeping labor costs down during the pandemic by skimping on health and safety protections.

Indeed, workers’ institutional weakness in the American political economy and the lack of mechanisms through which workers can collaborate with business and government have hampered our response to COVID-19. Across Europe, worker representatives, employer representatives, and government agencies have come together and developed responses that both protect workers and ensure that essential businesses can operate safely during the pandemic (Block 2020). In Spain, for example, the massive metal sector—which includes industries ranging from automobile, to waste management, to HVAC—has already bargained a sector-wide agreement aimed at facilitating safe operations by specifying, among other things, that:

- Employers will provide all workers with necessary personal protective equipment (PPE);
- Employers will provide all materials necessary for disinfecting shared spaces and equipment and will disinfect surfaces every day;
- The temperature of all employees will be taken each day before anyone enters a workplace;
- Start times will be staggered, and shifts will be scheduled, so as to minimize overcrowding of work spaces; and
- An information collection procedure will be developed and used to identify workers with previous health conditions that may increase their risk level; the company will then evaluate alternatives for job performance or adopt specific measures to protect them (Rubio 2020, 5).

Similar agreements have been bargained across sectors in multiple European countries (ETUC 2020). Those agreements were facilitated by labor market institutions that are common in Europe but which the United States lacks, including high unionization coverage and sectoral bargaining structures. In ordinary times, those institutions deliver clear benefits for employers and the public as well as workers. Employers are able to set certain minimum standards as a group at the sectoral level, preventing a race to



the bottom that benefits nobody, and can learn from one another about best practices. In moments of crisis, those mechanisms also make it far easier for the state to enlist companies and workers as partners in economic governance and planning. In contrast, one reason agencies in the United States have struggled to respond to the crisis is that they have few partners in civil society that operate at a truly national or even regional scale (Konczal 2020).

We can learn from European nations, and from the shortcomings of our response so far, by empowering workers to consult or bargain with their employers over workplace safety and health issues. Doing so will help position businesses to operate safely during the crisis and could be used by others to reopen in a safe and healthy manner when the time comes.

We propose congressional action to guarantee worker representation at two levels:

1. At the sectoral level, Congress should create bodies that bring workers and employers together to meet and confer on recommendations or negotiate binding minimum standards. During the pandemic response, those bodies would focus on workplace health and safety, but their mandate could later expand to address recession-related needs.
 2. At the workplace level, Congress should guarantee workers the right to consult or bargain with employers around health and safety practices, again expanding later to also include wages and other minimum terms.
- We also propose strong anti-retaliation protections for workers who participate in these efforts or who report health and safety issues.

Our focus here is on sectors that have been centrally affected by this crisis and that continue to operate, such as health care, carework, food service, warehousing, and logistics. But the approach we lay out is widely adaptable and—as importantly—could also be used to position other sectors for safe reopening.

PROPOSAL 1: ESTABLISH SYSTEMS FOR SECTOR-WIDE CONSULTATION

Sector-based, labor-management commissions that work together to establish standards for an industry were a good idea prior to our current crisis—but the last month has shown their absolute necessity. In essential sectors of the economy, workers and employers need a space in which they can collaborate on how best to address common challenges. In the near term, these commissions could focus on public health issues, such as measures to prevent virus transmission in the workplace and related training needs, virus testing protocols, paid



sick leave and family leave, hazard pay, and scheduling issues that impact health and safety. In the longer term, they should be tasked with coordinating sector-wide responses to the economic recession.

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The establishment of such commissions would require congressional action—but Congress has taken similar steps when faced with major economic disruption in the past. As originally enacted, the federal Fair Labor Standards Act (FLSA) empowered the Department of Labor (DOL) to create “industry committees” with representatives of labor, employers, and the public to set minimum terms at the sectoral level. Those operated successfully in many industries for a time, helping to stabilize working conditions and prevent a race to the bottom in many sectors (Andrias 2019). The United States has also established sectoral governance mechanisms in times of war. During the Second World War, the War Labor Board was established to resolve industrial disputes and ensure labor peace. Though it did not establish sectoral bargaining, that board did end up establishing basic minimum terms that covered a broad swath of Americans by the end of the war (Lichtenstein 2003).

Legislation should designate the sectors for which the first commissions would be established, including those mentioned above: health care, other carework, logistics, transportation, and grocery. Commissions may also be warranted in education, hospitality, meatpacking and related food-processing industries, and other food-service sectors. To ensure that new commissions are created with the speed that this crisis demands, Congress could charge the Secretary of Labor with appointing representatives of workers and management to serve as commission members within 30 days. Congressional leaders should be engaged to recommend possible commission members.

Employers should be represented in proportion to their share of the sector. In sectors where workers are represented by unions, those unions should be empowered to recommend commission members, as should nonunion worker organizations (defined by legislation as sufficiently independent and worker-controlled) with significant membership among workers in the sectors. Finally, as we discuss further below, states should be allowed to set up a parallel set of sectoral, labor-management commissions, and those that do should designate state officials to join the federal commissions.



The commissions could be granted either of two roles. A first option would charge the commissions with promulgating recommendations and best practices but would not authorize them to come to binding agreements. In shaping these recommendations, worker representatives on the commission would have the right to obtain from management information relevant to the topics that the commission is charged with addressing. This right could be modeled on the “meet and confer” procedures that exist in many states’ labor relations systems (Sanes and Schmitt 2014). This option would both ensure that workers have a voice in designing best practices and add significant transparency to decision-making in fundamental sectors of our economy.

A second option would give commissions the authority to bargain actual agreements on the issues within their purview, which would then be made binding on all companies in the sector. Under this option, once an agreement is reached, it would have to be reviewed, approved, and promulgated by an administrative agency or another government office (likely the DOL). The law should mandate that the DOL only promulgate as regulations the terms of agreements that both ensure workplace and public health and safety during the crisis and provide more stable working conditions, adequate pay, and sufficient rest for workers during the ensuing recession.

Under either option, the legislation creating these commissions should address a number of other basic questions. It should clearly state the issues within the commissions’ purview and clarify at which point those issues would be expanded to address responses to the recession. The legislation should also make clear that standards will be adopted upon approval of a majority of worker representatives and a majority of employer representatives on each commission. Finally, the legislation should protect existing collective bargaining agreements and set forth basic floors for worker safety and protection below which the agreements reached by the commissions cannot go, including applicable state labor standards legislation.

This sort of sector-wide, labor-management coordination could also be beneficial at the state level. Indeed, it is becoming clear that state-level planning is going to play an essential role in the reopening of the economy. Under either of the options described above, Congress should also empower states and localities to set up their own versions of the sectoral commissions created under the legislation. Moreover, even if it determines that the “meet and confer” option makes the most sense at the national level, Congress could still allow state sectoral commissions, subject to oversight by state or local labor departments, to bargain standards enforceable across the sector at a state or local level.



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PROPOSAL 2: CREATE MORE TRANSPARENT, DEMOCRATIC WORKPLACES

Sector-wide planning is essential, but it does not supplant the need for worker voice at the firm level. As noted above, however, only the small percentage of workers who are represented by a union have a formal say in how their companies respond to COVID-19. Operating under the principle that workers are essential partners in planning adequate health and safety measures, Congress should require businesses that receive federal assistance or that are in essential industries to establish mechanisms for worker participation in workplace health and safety measures.

Firms should meet this requirement by establishing worker committees with rights to meet and confer with management on topics related to health and safety, testing, scheduling, and related matters, including implementation of recommendations on these topics issued by the sectoral commissions discussed above. Workers' representatives should be chosen exclusively by workers without any managerial involvement, and worker representatives should be entitled to paid time off for all committee work. For every topic on which the committee has a right to meet and confer with management, it should also have the right to receive information relevant to a full discussion. If a worker organization has members in the workplace, the committee must be allowed to share this information with the organization and consult with the worker organization on questions relevant to its work.

Applicants for federal assistance should be required to certify that they have institutionalized this mechanism of worker representation and consulted with designated worker representatives before receiving federal relief funds. Where an existing labor organization represents workers in the workplace, it should serve this function.

PROPOSAL 3: PROTECT WORKERS AGAINST RETALIATION

Any legislation encouraging new forms of worker participation must include strong anti-retaliation protections. Workers who participate in these new processes—whether at the workplace or sectoral level—or who provide information to worker representatives must be assured that if they are fired as a result, they will have access to protections including expedited reinstatement by district courts. Workers who attempt to enforce the recommendations of any sectoral or workplace committee must be similarly protected.



Without these protections in place—despite Congress’s best intentions—these new institutions will be unable to function effectively.

CONCLUSION

Thus far, workers have had little voice in the response to the COVID-19 crisis. Frontline workers’ strikes and protests have made this clear, and policymakers have begun to listen. As Congress moves forward with the next phase(s) of its response, it is essential that workers be guaranteed a voice in both health and safety and economic planning. Congress can ensure this by establishing new decision-making bodies with real power. As this fast-moving crisis continues, the proposals outlined in this brief would bring workers into decision-making processes at the sectoral and firm level. If adopted, they also suggest a path forward for the American economy more generally.

This crisis has laid bare our economy’s various, deep-rooted weaknesses, which long predated the pandemic. Workers’ health, safety, and dignity on the job were already ignored and discounted in far too many cases—and our antiquated labor law, in fact, encourages employers to act in that way. As a result, we have a natural disaster—the virus—turning into a manmade disaster: the unnecessary deaths and destitution of millions of workers. Sectoral commissions and workplace councils can pave the way toward more democratic workplaces, and a more equal and resilient economy, when this crisis finally ends.



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ABOUT CLEAN SLATE FOR WORKER POWER

Clean Slate for Worker Power is a project of Harvard Law School's Labor and Worklife Program. It is led by Professor Benjamin Sachs, Harvard Law School; and Sharon Block, executive director, Labor and Worklife Program. The Clean Slate for Worker Power participants sought innovation, boldness, and comity to answer to the project's animating question: What would labor law look like if, starting from a clean slate, it was designed to empower working people to build a truly equitable American democracy and a genuinely equitable American economy?



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