



# Clean Slate for Worker Power:

Building a Just Economy and Democracy

**EXECUTIVE SUMMARY**

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*A project of the Labor and Worklife Program, Harvard Law School*

# EXECUTIVE SUMMARY

Since the founding of the country, concentration of power in the hands of a small minority has been recognized as a threat—perhaps the primary threat—to the viability of American democracy. Today, the struggle to preserve democracy in the face of extreme wealth concentration is acute because we live in a historical moment when vast disparities of economic power have been translated into equally shocking disparities in political power. With this *Clean Slate* report, we offer an intervention that promises to help stop the vicious, self-reinforcing cycle of economic and political inequality. By proposing a fundamental redesign of labor law, we aspire to enable working people to create the collective economic and political power necessary to build an equitable economy and politics.

Our goal is not restoring the labor movement—nor the economy and the politics—of yesterday. This cannot be our objective because although American democracy and the American economy were more balanced when the labor movement was at its historic peak, our society has always been profoundly exclusionary. Across our entire history, access to economic and political power has been unforgivably shaped by racial and gender discrimination, as well as by discrimination based on immigration status, by sexual orientation and gender identity discrimination, and by ableism. And, truth be told, the American labor movement has itself often failed to insist upon a genuinely inclusive and equitable America.

What we need, then, is a new labor law that is capable of empowering all workers to demand a truly equitable American democracy and a genuinely equitable American economy. This report contains many recommendations for how to construct such a labor law, but all of the recommendations are geared toward achieving this overarching goal. In fact, while the policy recommendations are detailed and at times complex, the theory of *Clean Slate* is simple: When labor law enables working people to build organizations of countervailing power, the people can demand for themselves a more equitable nation.

## Process

The recommendations in this report are the product of a nearly two-year effort to elicit the best ideas from a broad array of participants. The project engaged more than 70 advocates, activists, union leaders, labor law professors, economists, sociologists, technologists, futurists, practitioners, workers, and students from around the world. Our thinking was facilitated by the amazing effort of eight working groups that engaged in deep research and learning and provided preliminary recommendations. These groups sought innovation, boldness, and comity but not consensus. Accordingly, they are due credit for making the project possible but are not responsible for the particular recommendations included.

## Recommendations

**Labor law reform must start with inclusion to ensure that all workers can build power and to address systemic racial and gender oppression.** The first step in achieving the project’s goals—the first step in the process of rebalancing power—is *inclusion*. Our nation’s labor laws have long excluded too many workers. When Congress passed the Wagner Act, it carved large categories of workers out of the statute’s coverage in order to secure the votes of Southern Democrats. The result was that labor law excluded huge swaths of Black workers, women, and immigrant workers, not to mention entire industries dominated by women and people of color. The legacy of these exclusions is with us today. More recently, the increasingly “fissured workplace” has exacerbated the longstanding impacts of excluding “independent contractors” from the reach of these protective laws. To build an inclusive economy and democracy, we recommend that the new labor law:

- Extend coverage to domestic, agricultural, and undocumented workers, workers who are incarcerated and workers with disabilities;
- Adopt the far more protective ABC test for defining independent contractor status; and
- Extend coverage to independent contractors.

**Pathways to worker power must track corporate power and be universal.** For all workers to have the potential to build effective countervailing power, labor law must create pathways to collective power everywhere that corporate power impacts their lives: in the workplace and across industries, in the boardroom, and in our political system. Our recommendations would fundamentally transform mechanisms of worker representation at all of these levels. Among other key features of the new labor law, our recommendations aspire to guarantee that every worker in the U.S. labor force will enjoy some form of voice and representation and that the vast majority of workers will enjoy multiple forms of voice and representation.

**Democracy at work should be a right, not a fight.** For too long, securing power and voice at work has required workers to fight herculean battles against nearly impossible odds. Workers have only had a binary choice for collective representation—either no representation or an exclusive representative collective bargaining union (and the option of exclusive representation is too often out of reach). To make democracy at work a right, and not a fight, we recommend that the new labor law provide for a range of representational structures made available to workers according to a system of graduated rights. These will include workplace monitors, works councils, non-exclusive collective bargaining representation, and exclusive collective bargaining representation. In sum, as more workers express support for collective representation, the more robust the structure of collective representation will be. Specifically, we recommend that the law:

- Provide graduated rights, starting with workplace monitors and disciplinary representation in every workplace;
- Provide a works council in any workplace where at least three workers request one;
- Give unions the discretion to decide which workers they want to organize—either within the worksite, across the worksite or throughout the enterprise;
- Allow non-exclusive bargaining rights; and
- Allow exclusive representation upon majority showing.

**We need to enable collective bargaining between unions and industries, not just unions and firms, and to help take wages out of competition by applying resulting agreements to all employers in the sector.** Our current system of decentralized bargaining—what is often referred to as “enterprise bargaining”—has resulted in important gains for workers but also has three profound shortcomings. First, it has left tens of millions of workers without the protection of collective bargaining, exacerbating racial and gender exclusion. Second, it creates an incentive for employers to fight unionization in order to avoid any competitive disadvantage with non-union competitors. Third, it is structurally incapable of addressing the problems posed by the fissured workplace. By empowering workers to bargain at the level of an industry or sector—rather than just at the level of an individual enterprise—we can address these shortcomings. Moreover, because sectoral bargaining results in higher levels of collective bargaining coverage, it is more effective than enterprise bargaining at reducing income inequality and notably more effective than enterprise bargaining at addressing racial and gender pay gaps.

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.

**Workers should be able to organize without interference from their employers.** A new system for building worker power will depend on workers’ ability to *organize*. Given the profound failures of the current law’s protection for worker organizing activity, the new statute must provide far more robust insulation for worker organizing. Accordingly, all workers in the country must be protected by a just-cause dismissal standard. The new statute must also set out (1) new rules for union organizers that

facilitate contact between organizers and workers, (2) new rules for employer conduct that minimize employer interference with workers' organizational activity, and (3) new ways for workers to voice their support for collective representation so that their choices can be expressed freely and easily. These new rules must take into account mechanisms for organizing that will be effective in the modern workplace, including creating digital access. Specifically, to facilitate greater organizing, we recommend that the new labor law:

- Require employers to have a good cause for firing workers in order to better protect workers from retaliation for exercising their rights;
- Allow union organizers access to workplaces and email systems upon showing of 25 percent support;
- Greatly increase employer penalties for intervening in organizing campaigns, including making punitive damages available;
- Ban employers from requiring workers to listen to anti-union speeches;
- Give workers the right to bargain when employers interfere with the fairness of organizing efforts;
- Allow demonstration of support for worker organizations based on cards or petitions, either physical or digital; and
- Allow workers digital access to each other through access to email systems and creation of digital meeting spaces

**Workers need more effective ways to act collectively in order to advance their interests, especially when they choose to strike or walk out.** The law should protect workers' collective advocacy for workplace and broader social change, both free from employer interference and through means that are effective and accessible. Workers increasingly find that their working conditions are determined by an entity other than the one that signs their paychecks, but the law now precludes workers from exercising their power strategically to influence anyone other than their primary employer. Workers should be able to choose, as the object of their collective action, the entity that they believe is exercising real power over their lives. Moreover, the exercise of collective action rights should not end in financial ruin. All workers need protection for shorter strikes and from permanent replacements, and all workers need access to robust strike funds. Finally, the law needs to be updated to support digital organizing, including cyber picket lines. Accordingly, we recommend that the new labor law:

- Allow workers to strategically choose whom to strike based on which companies have power over their working conditions, not who signs their paychecks;

- Allow workers to choose what kinds of strikes that they think are best, including short-term and partial strikes;
- Require employers to disclose strategic business relationships;
- Ban employers from permanently replacing workers who go out on strike;
- Create more support for strikers, including establishing tax-deductible status for strike funds and extending unemployment insurance for strikers;
- Require employers to create digital meeting spaces; and
- Create digital picket lines.

**Workers deserve a voice in the issues that are important to them and their communities.** The collective bargaining obligation under current law is far too narrow. It places collective bargaining off-limits for many of the issues with the greatest and most direct impact on workers' lives—so-called entrepreneurial and managerial decisions. Current law also excises from the bargaining obligation the issues related to the ethics of employers' business practices; the consequences that their firms have on our shared environment; and the ways in which employers' decisions impact broader community conditions, such as the availability of affordable housing. To ensure that workers can bargain over the corporate decisions that impact their lives, *Clean Slate* recommends that the new labor law:

- Expand the range of collective bargaining subjects to include any subjects that are important to workers and over which employers have control, including decisions about the basic direction of the firm and employers' impact on communities and our shared environment;
- Empower workers to bring community groups to the bargaining table; and
- Bar employers from unilaterally imposing contract terms on workers and allow workers to opt for interest arbitration when bargaining is at an impasse.

Workers need a meaningful voice in the corporate boardroom. Because corporate decisions that shape workers' lives are often made at the corporate-board level, rebalancing power requires that workers have a meaningful voice in how corporations make decisions. Therefore, workers must have a sufficient number of seats on corporate boards so that they can actually influence corporate decision-making. Placing workers on boards is not enough, however, because corporate decision-making is handcuffed by a commitment to shareholder primacy. Thus, to empower corporate boards to heed worker voice, corporations should be required to attend to the interests of workers and not just the interests of shareholders. Thus, we recommend that the new labor law:

- Require 40 percent worker-chosen representatives on corporate boards;
- Require a supermajority board vote for decisions with the greatest impact on workers;
- Expand corporations' fiduciary duties to include a duty to workers; and
- Make managerial and entrepreneurial decisions mandatory subjects of bargaining.

**Political equality and a robust democracy depend on workers' full participation in our political system.** Rebalancing power requires that the law give workers a voice in our democracy. Therefore, we need to remove the barriers that would block even newly revitalized worker organizations and newly empowered workers from fully participating in our political system. Voting and other civic activities, for example, are too often off-limits for workers—especially low-wage workers, who are more likely to be women and people of color—who cannot get time off of work, cannot find or afford adequate childcare, and who lack access to public transportation. Changing voting and voter registration laws so as to eliminate structural barriers that keep workers from voting is thus central to the political empowerment of working people. So too are changes aimed at facilitating civic participation by workers. Finally, workers also deserve protection against employers who would impose their own political agendas on them. Thus, we recommend that the new labor law:

- Mandate same-day voter registration, early voting, and vote by mail;
- Mandate paid time off for workers to engage in civic activities, including voting; and
- Prohibit coercion of employees by employers in the political process.

**Labor law needs mechanisms for innovation.** We need to encourage innovation in organizing and bargaining by setting federal labor law as a floor and allowing states to adopt reforms that build up from it. Accordingly, we recommend that the new labor law:

- Make federal labor law a federal floor and allow experimentation at the state and local level, provided that such experimentation expands or better protects the right to engage in collective bargaining and concerted activity;
- Require the Secretary of Labor to certify that state or local laws meet the standard of expanding or enhancing collective rights; and
- Make presumptively compliant certain state or local laws that further collective bargaining or concerted activity.

## **Further Clean Slate Recommendations**

### **Build Power Through New and Enhanced Mechanisms for Generating Revenue**

- Extend the right to dues checkoff to all worker organizations;
- Give employers tax credits for providing paid time off for participation in collective bargaining, works councils, corporation board duties, and other collective representation activities;
- Ban right-to-work laws and allow fair share agreements; and
- Allow worker organizations to contract to provide workforce training programs.

### **Build Power Through Labor Standards Enforcement**

- Give worker organizations greater standing in and access to various stages of government enforcement actions, including giving them full-party status in administrative proceedings;
- Give worker organizations a formal advisory role informing enforcement agencies' operations and strategic priorities;
- Create incentives and mandates for employers to participate in worker-driven standards-setting and enforcement programs through licensing and permitting authority;
- Establish a private right of action for labor rights; and
- Ban forced arbitration and class-action waiver agreements.

### **Set Conditions on Use of Taxpayer Money**

- Require all federal contractors and recipients of federal funds and their subcontractors to comply with policies that support worker voice and create decent jobs; and
- Prohibit employers who have a record of noncompliance with labor laws from receiving federal funds.

### **Ensure Broader Inclusion in the Definition of Employee**

- Only exclude supervisors and managers whose duties predominately involve exercising supervisory or managerial power; and

- Include graduate student teaching assistants (TAs) and research assistants (RAs), volunteers who are covered by the Fair Labor Standards Act (FLSA), and student athletes.

### **Utilize New and Enhanced Mechanisms for Organization-Building**

- Create a Worker Organization Administration (WOA);
- Facilitate the growth of worker-controlled hiring halls;
- Give worker organizations a greater role in providing benefits to workers, such as by serving as health care navigators or administrators of portable benefits systems; and
- Require that the federal workforce training system involve worker organizations.

## **Topics for Further Consideration**

### **Creation of Labor Courts**

- Create specialized courts to adjudicate labor and employment cases, which could result in speedier and better enforcement.

### **Promotion of Competition in the Labor Market**

- Ban noncompete, no-hire, and no-poach agreements; and
- Reform antitrust law to account for labor market consequences of firm coordination and mergers.

### **Reform of the Campaign Finance System**

- Restructure the public campaign finance system in order to limit corporate influence and allow greater participation by workers and their organizations; and
- Create a federal democracy voucher program.

# ACKNOWLEDGEMENTS

The Clean Slate for Worker Power report would not have been possible without the leadership, collaboration, and dedication of the Clean Slate working group members and their Harvard Law School student research assistants. The working group members are the heart of the project, and they contributed their valuable time, expertise, and insights. Even more importantly, they brought to this project the stories and experiences of the countless workers they have represented, who inspired and informed the ideas put forth in our recommendations.

We also give tremendous thanks to our Clean Slate national and international advisory groups, who helped us craft the vision for the project from the beginning. We offer a special thanks to the members of the Clean Slate equity working group, which—with the remarkable leadership of Sarita Gupta and Eugene Kim—developed a dynamic process to ensure that our recommendations were as inclusive as possible. Thanks also to those who contributed to the drafting of this report—especially to Rebecca Dixon and Rakeen Mabud, who provided significant help in drafting the section on systemic racial and gender oppression and its relationship to labor law.

We would also like to acknowledge the considerable contributions of Jenny Lau and Christine Blumauer, who acted as Clean Slate project managers; Gali Racabi, who acted as the international advisory group coordinator; and to the rest of the team at the Harvard Law School Labor and Worklife Program, who worked hard to ensure that our many Clean Slate convenings ran smoothly so that all of our participants could do their best work.

Special thanks to our copy editor, Kendra Bozarth, and layout designer, Ashley Tebbe, both of whom worked tirelessly to meet ambitious deadlines, and to the whole team at BerlinRosen. Great thanks also to Nate Butki, Root Inc., who was our muse for how to design engaging convenings that would inspire innovative thinking.

We are grateful for the financial support of our funders, the Ford Foundation, the W.K. Kellogg Foundation, the William and Flora Hewlett Foundation, and the Public Welfare Foundation; as well as the true partnership of the program leaders there, including Zavier Briggs, Maria Torres Springer, Anna Wadia, Jose Garcia, Marissa Guaranja, Jonathan Njus, Jen Harris, and Robert Shull. We are also grateful to the institutions for which our Clean Slate partners work and the support they gave our working group members to participate in the project—support that represents an incalculable investment in Clean Slate.

Please note: The listing of the individuals below only conveys the fact of their participation; it is not an endorsement of the recommendations by them personally or by the institutions with which they are affiliated. Institutions are listed for identification purposes. The individuals are entitled to great credit for making the project possible but are not responsible for the resulting recommendations.

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*\*Through June 2019*

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