

## State and Local Labor Policy Working Paper Series

### SECTORAL MODELS

## Expanding Sectoral Standard Setting Under NLRA Preemption: Bringing Workers Together to Build Power and Set Standards in Tripartite Sectoral Models

**Summary:** Sectoral strategies—systems in which wages and working conditions are set across an entire industry rather than at the individual enterprise level—have long been recognized as a powerful tool for raising labor standards. While these models have typically focused on improving pay and baseline employment conditions, they also hold significant potential to empower workers, promote democratic participation, and strengthen organizing. This paper argues that to fully realize that potential, sectoral systems must be designed not only to elevate industry-wide standards, but also to actively engage workers in the process, expand the scope of covered issues, and support worker engagement. To achieve these goals, expansion of sectoral models should incorporate key concepts that center on worker empowerment, democratic participation, strategic board authority, and multi-pronged organizing strategies. Although sectoral bargaining cannot currently be implemented at the state level because of NLRA preemption, states and localities can adopt sectoral standard setting through worker standards boards—tripartite administrative structures whose recommendations are subject to governmental approval. This paper highlights key design elements for such worker standards boards.

**The Problem:** Income inequality in the United States is among the highest in the developed world, while union density is alarmingly low. As of 2024, union membership is just 5.9% of private sector workers and collective bargaining coverage is only 6.7% of private sector workers, placing the U.S. 32nd out of 38 OECD countries—far below nations like Sweden and Denmark, where collective bargaining coverage exceeds 60%. The U.S. relies almost exclusively on decentralized, employer-level bargaining, usually at a single workplace, largely based on majority-based union representation. This structure struggles to address the realities of today's fragmented, globalized, and franchised economy. But the National Labor Relations Act (NLRA) provides no framework to guarantee sectoral bargaining, that is, bargaining that takes place at the industry level between worker representatives and employers and that can complement enterprise- or worksite-level bargaining.

Pure sectoral bargaining models at the state level—ones that involve full bargaining between workers representatives and employer representatives in an industry and are self-implemented with little government involvement—are likely preempted by the NLRA. As a general matter, the NLRA preempts state laws that displace the process of collective bargaining between private employers and workers over terms and conditions of employment. But states do have authority to set general employment standards throughout industries without running afoul of NLRA preemption. Thus, sectoral standard-setting models that are tripartite—with the government taking certain actions to implement and oversee negotiated provisions through a regulatory process—are generally not preempted. In recent years, states have expanded on sectoral tripartite models, models for setting or recommending wages and other terms and conditions of employment across an industry that involve worker representatives, employers, and the government.

This kind of sectoral standard setting—sometimes referred to as sectoral co-regulation—is not preempted by the NLRA because it constitutes general employment regulation, not collective bargaining; it occurs through an administrative body established by statute, and that body's recommendations are typically reviewed by a state official before being adopted as regulation. Thus, the standards have the force and effect of law, not contractual obligations. These models now include, for instance, California's Fast Food Council (establishing minimum wage and working conditions for national fast food chains with more than 60 establishments nationally sharing a brand); Minnesota's Nursing Home Workforce Standards Board (establishing a board to set minimum employment standards for nursing home workers, including wages, benefits, and working conditions); and Nevada's Home Care Employment Standards Board (establishing a board to issue recommendations regarding home care workers). At the local level, cities have also created tripartite worker standards boards, including Seattle's Domestic Workers Standards Board (creating a board appointed by the mayor and city council to produce recommendations on possible legislation or policy changes); and Detroit's Industry Standard Board (providing for the city council to establish an industry standards board under the mayor or city council's discretion or upon a petition of 150 workers in an "industry").

While sectoral boards represent an important step toward addressing wage stagnation and inequality across industries and are not, if structured correctly, preempted by the NLRA, their design and implementation can fall short of advancing worker power and engaging workers fully. Most boards were historically not structured to spur worker participation, power, and organizing, and many have been narrowly focused on wages, rather than broader standards.

**The Proposal:** To fulfill their potential, sectoral systems should be designed not only to raise employment standards across an industry, but also to empower and engage workers and promote institutionalized democracy, even within the confines of NLRA preemption. In expanding or creating new worker standards boards, legislators should consider four key design choices. First, legislation should foster democratic participation by promoting worker engagement at all stages of the process, from petition to compliance. This can be achieved by ensuring, for example, that workers are able to petition for boards to be created, workers have

robust participation rights, representatives on boards are provided access to workers, workers are involved in training other workers on their rights, and workers receive paid time off for their participation. Second, legislation should empower boards not only to raise wages, but also to set broader employment standards, addressing the wide range of problems facing workers in a particular sector. Third, states and localities should experiment with prevailing standard models, where employment standards are derived from high-road employers and extended throughout a sector to avoid downward pressure on wages and working conditions. Finally, to raise standards for and increase democratic participation among the greatest numbers of workers, tripartite standards boards should focus both on sectors where union density is high (and should allow for sectoral bargaining across those parts of the publicly-funded private sector where NLRA preemption does not apply), as well as low-density, highly fissured sectors. Other keys to success include funding and authority for the boards to hire staff, easy processes for board recommendations to become law, and worker-led compliance provisions.

### **About the Proposal**

The following framework could serve as a basis for states to expand sectoral tripartite models now, even with NLRA preemption:

#### **1. Sectoral tripartite legislation should promote workplace democracy and worker participation at all stages of the process, from petition to compliance.**

- Most existing sectoral tripartite standard setting involves legislation that governs a specific industry, such as nursing home workers, fast food workers, or home care. In order to embrace a more expansive and worker-driven process, states or localities could instead enact broad enabling legislation to allow for sectoral standard setting in industries defined by petitions brought by workers.
- This model was recently passed in Detroit, providing for the city council to establish an industry standards board under the mayor or city council's discretion or upon a petition of 150 workers in an "industry," as defined by the petitioners.
- The number of workers needed to trigger a sectoral standards board should be kept low, regardless of the size of the sector, and should focus on numbers rather than percentage of workers in a certain sector to avoid disputes about whether the labor organization or petitioning organization has a sufficient number of workers supporting the petition in the sector.
- Models should bring as much democracy and worker engagement into the process as possible, including access to workers and information for the purpose of facilitating and enforcing the sectoral standard setting upon obtaining support from a certain number of workers in the petitioned-for industry. Under the Massachusetts Rideshare Model, for instance, organizers gain access to contact information after obtaining signed authorizations from 5% of drivers. And, under the Minnesota Nursing Home Care Model, unions gain access to employees as certified trainers.

- To maximize worker input, the process should make it easy for board recommendations to become law (as in Minnesota, California, Nevada, and New York), minimizing the extent to which state officials can change or reject board recommendations.
- Models should consider how unions and other worker representatives could partner with the state on compliance and incorporate worker-led compliance provisions.
- Models should offer a private right of action, as in Minnesota, California and Seattle, so that workers and their representatives have a cause of action and can directly enforce standards that emerge from the boards.
- Sectoral approaches at the state level can be more effective in some industries than others, recognizing that capital is mobile, but acknowledging that these limitations do not preclude initiative and innovation.
- Multiple organizations or individuals with potentially varying interests should serve terms, and the board should maintain a consultative role with final governmental review and oversight (this is important for antitrust purposes as well as potential separation-of-powers/non-delegation challenges).

**2. Sectoral tripartite legislation should expand beyond recommending wage levels and focus also on other terms and conditions of employment and rights that promote democracy.**

- Model sectoral legislation should move beyond the limited framework of wage boards. Boards are important in setting minimum wage standards, but some boards cover wages exclusively, often lacking the authority and structure to address the broader range of workplace issues that directly affect workers' quality of life and the sustainability of the sector.
- Minnesota's nursing home care law is a model for comprehensive sectoral standard setting that allows workers, employers, and public stakeholders to set standards on not only wages, but also benefits, staffing ratios, training, and working conditions in a coordinated, sector-wide manner. It further enables the board to certify unions as trainers of nursing home workers. This approach promotes union access, as well as equity, stability, and predictability across the industry, ensuring that improvements are not isolated to individual employers, but benefit all workers and recipients of care. Minimum standards on these key topics can create more favorable conditions for enterprise-level bargaining, which occurs above any standards set at the industry level.
- Tripartite models could focus on other key provisions that promote democratic engagement, such as:
  - Requiring employers in key industries to share workforce data on wages, job quality metrics, and employment structures so that workers and their representatives can determine whether an industry is ripe for sectoral standard-setting approaches.

- Having elections of representatives to the standard setting board, or requiring representatives to be from the most representative organizations—i.e., existing unions and worker centers.
- Funding worker organizations to engage in Know Your Rights and other training upon a showing of a certain amount of interest by those workers.

**3. States should experiment with prevailing standard models, where employment standards are derived from high-road employers and extended throughout a sector to avoid downward pressure on wages and working conditions.**

- The state could create a process for expanding prevailing wages at the sectoral level based on what high road employers are paying in certain industries. This could be accomplished, for instance, by a regime where the state sets a prevailing wage based on the rate paid to the highest number of workers in a classification. In this manner, individual employers who reach seminal agreements with their unions will not be disadvantaged, with the process serving as a method of extending a prevailing wage in an industry.
- For example, if Acme Corporation and Union reach a CBA that provides for a \$22 wage in their industry, with 3 percentage wage increases per year, an annual cap on health insurance premium payments, annual joint apprenticeship/certification training, and 10-day advance notification of weekly schedules, over the life of the contract, the parties can ask that the state extend base standards to the industry. The state body could develop criteria, such as whether the extended terms are economically feasible for the industry, promote competition, and promote the health and welfare of workers, and could then promulgate the rules consistent with state administrative law.

**4. Tripartite sectoral models should focus on both high union density industries and low union density industries, as sectoral standard setting can increase worker power and enable greater democratic participation by workers in both contexts.**

- Sectoral tripartite models should focus on both high and low union density industries, and work to creatively build worker power across public and private sectors.
- In low-density industries, sectoral standard setting models can help workers engage in a collective effort to improve their industries, while building new worker organizations. The California Fast Food board is an example of this.
- In higher density industries, sectoral standard-setting models can help unionized workers maintain their standards, while also engaging nonunion workers in a shared effort to improve conditions. For example, the nursing home industry in Minnesota had 20-30% collective bargaining coverage when the sectoral standard-setting legislation was passed.

- In sectors that include both public and private sector work, sectoral standard-setting models can help ensure that privatized public jobs (like charter schools and private health care) do not degrade public sector standards, while simultaneously bringing public and private sector workers together in a common endeavor to improve their work.
- This sort of hybrid sectoral model would enable public sector unions and employers to set standards alongside private sector representatives, creating coordinated standards for wages, benefits, staffing ratios, and training across the entire sector. This approach ensures that improvements are consistent and enforceable, benefiting workers and service recipients alike.