



Labor Law Reform Opportunities 2020

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The diminishing strength of the labor movement has led to significant erosion of the economic well-being of millions of American workers for decades. As the rate of unionization has dropped, wages have stagnated and our political system has become less and less responsive to the interests of anyone but the wealthiest. The pandemic and recession have made this ebbing power a threat to workers' physical well-being in a very real sense—too many face a stark choice between continuing to draw a paycheck and entering an unsafe workplace with no effective way to have a voice in their employer's—or the nation's—pandemic response. As we have seen all too clearly, the threat is most acute for low-wage workers who are disproportionately women and workers of color.

While workers' frustration and fear has led, by some accounts, to an upswing in collective action, these actions are unlikely to significantly change the power dynamic in our economy or political system. Our federal labor law is simply incapable of translating this activity into the kind of collective power necessary to address these threats. That's why we have put forth recommendations to fundamentally rewrite American labor law in a project we call, Clean Slate for Worker Power.¹

Sadly, the urgency of the need for reform may be greater than the political will to enact needed legislation in Congress. Workers cannot wait for Congress to act at the scale needed. And though we continue to believe that the best answer is federal

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¹ CLEAN SLATE FOR WORKER POWER, cleanslateforworkerpower.org (last visited Nov. 30, 2020).

labor law reform, we recommend consideration of the following administrative measures and state law reforms in the interim.

We note, however, that even this second-best pathway is risky. The NLRA has been interpreted by the Supreme Court to have a broad preemptive effect, blocking some executive action and state regulation of collective bargaining and collective action. Considering the urgency of the project of building worker power, we would encourage a new administration and state policymakers to consider the risk but to act.

Federal Agency Actions

Conditioning Procurement and Federal Financial Assistance

Even before the massive pandemic relief legislation, the federal government spent approximately \$1 trillion per year on federal goods and services. Even more federal funds are spent on other types of federal financial assistance, such as grants, subsidized healthcare and federally backed loans. Receipt of these forms of assistance is a privilege for corporations. That privilege should come with responsibilities to create decent jobs, and any true definition of a decent job must include respect for the right to engage in collective bargaining. Executive orders that set high standards for recipients of federal funds should accompany any new pandemic relief legislation that subsidizes creation of contact tracing, green energy and care economy jobs. At a minimum, employers who have a record of violating workers' right to collective bargaining should be precluded from receiving federal financial assistance, and recipients of such assistance should be required to maintain neutrality if their employees choose to unionize. Consideration also should be given to a requirement that recipients of federal financial assistance provide for workplace safety stewards and establish workplace safety committees.

Labor Standards Enforcement Partnership

We are coming through a time when federal labor standards enforcement agencies have failed profoundly at their responsibility to protect American workers. During the pandemic, as thousands of workers were sickened and died as a result of exposure to COVID on the job, the Occupational Safety and Health Administration sat on the sidelines, refusing to hold employers accountable for these dangerous conditions. Similarly, the Wage and Hour Division spent most of the pandemic fighting for the narrowest possible interpretation of lifesaving paid leave provisions. And the NLRB has refused to issue complaints when workers tried to stand up for themselves. A new administration could rebuild trust with workers by adopting partnerships with worker organizations as a key feature of a new enforcement strategy. These partnerships provide several power-building advantages for worker organizations: they can offer resources that facilitate organizing and give workers the courage to stand up for their rights.

Restore NLRB and Optimize Processes for Pandemic Conditions

The Trump NLRB has wrought an extreme rollback of workers' collective bargaining rights. A new administration must start re-empowering workers by appointing members of the NLRB who will be true to the purpose of the Act: "to encourage[e] the practice and procedure of collective bargaining." In addition to undoing the damage done by the Trump NLRB leadership, a new Board must also address the ways that the pandemic has made traditional modes of organizing exceedingly difficult if not impossible. We would encourage a new NLRB to adopt new rules for holding representation elections virtually, ensuring workers access to digital means of communication, and allowing on-line expressions of support for union representation.

State and Local Actions

Just Cause Dismissal Standards

A powerful way to protect worker organizing is to end at-will employment and adopt just-cause protections for all workers. Although the NLRA protects workers from retaliation for exercising their rights under the statute, at-will employment makes it far too easy for employers to provide pretextual reasons for dismissals.

Enable Collective Bargaining for Workers Outside the NLRB

The one area where it is pretty clear that states can legislate collective bargaining rights is for workers outside the protection of the NLRA. Until federal law clears up the massive misclassification of gig workers, states can fill in the void by enacting collective bargaining rights for ride hail drivers, food app delivery drivers, and others now treated as independent contractors. In addition, more states can enact Domestic Workers Bills of Rights and farmworker bargaining bills.

Mandate Safety Stewards and Sectoral and Workplace Safety Committees

When it comes to workplace safety and health, legal reforms to ensure worker power and voice are critical. To ensure that workers have the power they need to demand safe and healthy workplaces, and to ensure that there are mechanisms in place to channel this voice into meaningful change, we recommend the following reforms: 1) All workplaces should have a "safety steward" elected by workers and charged with ensuring compliance with safety and health rules; 2) in all workplaces, a workplace safety and health committee should be elected by workers and charged with adapting and implementing safety and health rules for that workplace; and 3) all sectors of the economy should have a safety and health commission charged with negotiating baseline health and safety rules for all firms in the sector.