



INSTITUTE FOR THE  
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# SECTORAL BARGAINING:

One-Size-Fits-All Collective  
Bargaining For Entire Industries

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# SECTORAL BARGAINING:

## One-Size-Fits-All Collective Bargaining For Entire Industries

The latest push by organized labor and its allies in academia and Congress is an idea imported from Europe called “sectoral bargaining.” No clear consensus has been reached in the United States on exactly what it would look like here. Many American advocates view sectoral bargaining as something that they want it to be, rather than what it actually is. What they want it to be is something that will enhance union power and finances at the expense of workers and job creators.

However, we know what American sectoral bargaining will include in broad strokes: sectoral bargaining will give union-controlled boards the power to set wages and benefits for entire industries or regions. We also know from the presidential primaries – where all of the major Democratic candidates including Joe Biden endorsed it – that those in power are eager to impose this scheme upon American businesses and workers, limiting their freedoms.

## **LEADING DEMOCRATS ENDORSE SECTORAL BARGAINING**

Allowing unions to set wages, working conditions, and benefits for entire industries, even for those companies whose workers have rejected unionization, may sound like a fringe idea in America. But, it has gained advocacy among top Democrats, including President Joe Biden.

In his “Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions” Biden pledged to create a cabinet level working group to promote union organizing and collective bargaining. The working group, which will include “representatives from labor,” will be tasked with “working with unions and trade associations to further explore the expansion of sectoral bargaining, where all competitors in an industry are engaged in collective bargaining with a single or multiple union.”<sup>1</sup> Sectoral Bargaining was supported by every major Democrat running for president in 2020.

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Here are a few examples:

**Sen. Elizabeth Warren included the following in her platform:** “A Warren administration will amend federal labor law to promote sectoral bargaining so that workers across industries – fast food workers at McDonald’s, Burger King, and Taco Bell, or child care workers across different employers – can band together and bargain alongside labor organizations to improve wages, hours, and working conditions on an industry-wide basis.”<sup>2</sup>

**Sen. Bernie Sanders’ pledge included creating a “sectoral collective bargaining system with wage boards to set minimum standards across industries.”** It continued: “[Sanders] will work with the trade union movement to establish a sectoral collective bargaining system that will work to set wages, benefits, and hours across entire industries, not just employer-by-employer. In addition, under this plan all cities, counties, and other local jurisdictions would have the freedom to establish their own minimum wage laws and guarantee other minimum standards for workers.”<sup>3</sup>

Many House Democrats are also enthusiastic about sectoral bargaining:

**It wasn’t just Democratic candidates for president who took a public position on the issue.** During an October 2019 House Education and Labor hearing, Rep. Andy Levin (D-MI-09) showed his impatience to implement sectoral bargaining in the United States. “How can we do this most expeditiously?” he asked a witness, then instructed, “Don’t put on an incrementalist hat. We’re not Eeyore here. We’re thinking big.”<sup>4</sup>

**In December 2020, the Democrat-controlled House Education and Labor Committee issued a report titled “The Future of Work” that recommended sectoral bargaining as a way of “eliminating the perceived competitive disadvantage from unionization.”**<sup>5</sup> The report touted sectoral bargaining as a way to help organize the gig economy and explored turning over the administration of unemployment insurance to unions.<sup>6</sup> “[C]entralized bargaining takes wages out of competition. This inherently strengthens unions, since they are not constantly fighting to protect their gains,” the committee wrote.<sup>7</sup> In other words, the committee members don’t want companies to be able to compete over wages any longer because it doesn’t benefit unions. This could have a detrimental effect on workers meaning that employers could not entice workers away from their competitors by offering higher salaries.

**Rep. Haley Stevens (D-MI-11) included an amendment in the Protecting the Right to Organize Act<sup>8</sup> which directed the Government Accountability Office to produce a report on sectoral bargaining that the House Education and Labor committee would then use to “make recommendations with respect to actions of Congress to address the findings of such report.”** That version of the PRO Act with Stevens’ amendment passed the U.S. House of Representatives in February 2020 but died in the Senate.<sup>9</sup> A similar amendment was added to the 2021 PRO Act and passed the House with the bill in March 2021.<sup>10</sup>

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Wall Street Journal notes, “[s]ectoral contracts **discourage employee movement between firms** because they are unlikely to receive a raise by taking a job at a competitor.”

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## **SECTORAL BARGAINING IN OTHER COUNTRIES**

The following is a brief overview of what is classified as sectoral bargaining outside the United States which shows that its implementation and impact vary considerably from country to country. It also makes clear that these other countries’ economic and labor models would not be an easy or productive fit in America.



### **THE GERMAN MODEL**

Sectoral bargaining in Germany is considerably more flexible than what Democrats are calling for. Unions and employer associations negotiate pay and working conditions at an industry level. Often these agreements are negotiated at a regional rather than national level.<sup>11</sup> Crucially, most German companies do not need to be bound by the sectoral agreements. The agreement is binding on all the employers in an association, but employers can refuse to join. Except in rare instances where the government mandates sector-wide agreements, employers who are not in an association are free to create their own contracts with their employees.<sup>12</sup>

In practice, a recent US Chamber of Commerce study noted 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.”<sup>13</sup>

According to the European Trade Union Institute’s website, this type of sectoral bargaining “keeps conflicts on pay and conditions at industry level, between the unions and the employers’ associations, while at workplace level, individual employers and workplace employee representatives – the works councils – can develop more cooperative relations.”<sup>14</sup>

Companies can minimize conflict by participating in industry-level bargaining on wages, but this can also harm competition and employee earning power. An October 2019 article in the *Wall Street Journal* notes, “[s]ectoral contracts discourage employee movement between firms because they are unlikely to receive a raise by taking a job at a competitor.”<sup>15</sup>

Since moving (or threatening to move) from one company to a competitor is an effective method that American workers regularly use to better their situation and increase their pay, sectoral bargaining along these lines would significantly limit new work opportunities for U.S. employees.



## THE CANADIAN MODEL

Canada's laws that boost unions are more exhaustive than America's, and the private sector unionization rate is higher there. Yet Canada's private sector unionization has been falling along with America's.<sup>16</sup>

Baigent-Ready is one Canadian approach of how to do sectoral bargaining. Named after two labor lawyers, John Baigent and Vince Ready, the Center for American Progress Action Fund characterizes it as "a master contract on steroids."<sup>17</sup> A master contract is "a contract that spells out most but not all of the terms between the signing parties," according to the *Houston Chronicle*, which also notes that these agreements "can affect a wide area such as the country or a state."<sup>18</sup>

The proposal of Baigent-Ready is that if a union can negotiate roughly the same contract in two different, nearby workplaces in the same industry, unions don't have to negotiate anymore in that industry as they unionize new companies. In saying yes to unionization, workers are also imposing that larger contract on their employers.<sup>19</sup>

One problem with this proposal, like many other types of sectoral bargaining, is that it can stifle competition. Of course, as noted above, proponents of sectoral bargaining see this as a feature as opposed to a defect. Another problem is that it goes completely against the grain of US labor law in this way: under current law, a company has a duty to "bargain in good faith" with the union that has been elected by a majority of its employees to represent them. The Baigent-Ready proposal allows only a few companies to bargain and then the terms and conditions that are negotiated are imposed on a myriad of other workplaces, whether that makes sense for those employers or not.

These examples should demonstrate that sectoral bargaining is not one thing, but a category. It might be said to have enjoyed some success in the German economy, where unemployment numbers rival those in the United States. Yet most German firms can opt out of sectoral bargaining if they choose, or they can use it to hold wages down. Median German incomes are well below American incomes.<sup>20</sup>

Alternatively, the Canadian system is not a national system but more of a proposal that has been tried intermittently.

What is interesting is that the nuance in each of these models which unions, politicians, and academics point to as examples of sectoral bargaining are different than their vision for what it would look like in America. There is no mistake they are taking inspiration from these models but their vision instead is a far-flung version that exists to make unionization more widespread, give organized labor more power, and reduce opportunities for workers. Even if one or two of these sectoral bargaining models were imported to America, it would result in less feasibility for job creators and wage stagnation for workers.

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## **STEPS TO AMERICAN SECTORAL BARGAINING**

Though these are not all strictly sectoral bargaining, all of the proposals below are related to sectoral bargaining, including schemes to pay American union leadership to make a new system possible.



### **WAGE BOARDS**

Wage boards are one mechanism for sectoral bargaining by government-imposed mandates. New York<sup>21</sup> and several other states<sup>22</sup> already have such boards, or at least allow the possibility of establishing such boards. Wage boards hold hearings and submit findings to higher authorities such as a state labor commissioner or secretary who then has the authority to mandate higher industry specific minimum wages than the standard minimum wage. Wage boards usually have representatives from unions, employers, and others, but can be easily swayed in the unions' direction, as is demonstrated in a recent New York example detailed below.

The Center for American Progress Action Fund argues that wage boards are best used for workers who are difficult to organize. “There will still be regions and sectors in which traditional or even Baigent-Ready-style collective bargaining would not be able to gain a strong foothold. Examples include heavily fragmented industries such as domestic work, where worksites are in people’s homes, and in the gig economy,” writes the Center’s David Madland, who has been developing strategies to establish wage boards not just at the state level but nationally.<sup>23</sup> They also leave out the fact that many of these workers operate independently and may not want to be organized at all.

Madland would like the Secretary of Labor to establish national boards for each industry, with an equal number of industry and labor representatives, and one representative from the Department of Labor acting as the tie-breaker, much as the vice president acts as the tie-breaker when the US Senate is evenly divided along party lines.



### **THE NEW YORK WAGE BOARD**

The example most often cited in support of wage boards are the New York Wage Boards. Dylan Matthews of Vox.com has gone so far as to argue that “the recent victorious fight for a \$15 minimum wage in New York offers a path to sectoral bargaining at the state level.”<sup>24</sup>

The Vox writer believed it was a significant victory because of the words “wage board.” Matthews wrote, “Wage boards have the authority to mandate pay scales and benefits for whole industries, after consultation with businesses and unions. That’s an awful lot like how European countries implement sectoral bargaining.”<sup>25</sup> On a technical note, as mentioned above, it is not actually the wage board that mandates the pay scales but rather the New York State Labor Commissioner who imposes a final determination.<sup>26</sup>

However, the New York fast-food wage board can be seen as an executive and political power play by Governor Andrew Cuomo. In the *Yale Law Journal*, law professor Kate Andrias reports, “After growing protests and strikes in New York organized by the Fight for \$15, Governor Andrew Cuomo announced that he would take executive action to raise wages.”<sup>27</sup>

Cuomo’s office of labor commissioner had set up a three-member board to make recommendations and Cuomo tried to use that to move the minimum wage.<sup>28</sup> Even with some back and forth with the state legislature, Cuomo’s move was a clear message that they needed to start working on a larger scale minimum wage hike for the state. The move was ultimately politically successful and the FY 2016 – 2017 New York State budget included a minimum wage hike which increased wages across the state.<sup>29</sup>



## WORKERS’ BOARDS

Madland describes Workers’ Boards as a “more robust versions of wage boards.”<sup>30</sup> His idea for workers’ boards is that they would be able to set minimum wages, benefits, pay scales, skills bonuses, and address other workplace issues for all workers, unionized or not, across an industry.

He specifies that “[a]ll workers in an industry would be covered, regardless of whether they are employees or independent contractors and whether or not they are unionized.”<sup>31</sup> Madland envisions incentives “to encourage workers to join unions” and that “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.”<sup>32</sup>



## WORKS COUNCILS

Workers’ Boards should not be confused with works councils.<sup>33</sup> In the German system, sectoral bargaining is conducted at the industry level but more individualized workplace issues (not in a sectoral or companywide agreement) are covered by employee committees called works councils.

German participation in works councils is on the decline. According to the previously mentioned Chamber report, works council participation of private sector companies in Germany dropped from 17 percent in the mid-1990s to 12 percent by 2015.<sup>34</sup>

Initially unions and Democrats were against works councils. In 1996, Congressional Republicans passed the “Teamwork for Employees and Managers Act” or TEAM Act.<sup>35</sup> At the urging of organized labor, President Clinton vetoed the Act saying, “This legislation, rather than promoting genuine teamwork, would undermine the system of collective bargaining...”<sup>36</sup>

The TEAM Act was in response to the National Labor Relations Board's (NLRB) attacks on employee involvement committees, where the Board claimed these committees violated Section 8(a)(2) of the National Labor Relations Act which prohibits a company "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."<sup>37</sup> This is the section of labor law that forbids "company unions."

NLRB's broad reading of the statute prevented companies from creating committees where employees could constructively offer feedback to their employers on issues such as workplace safety.

However, recently unions such as the United Auto Workers have attempted to institute works councils in a precursor to traditional union organizing.<sup>38</sup> Similarly, labor leaders such as Service Employees International Union (SEIU) former international vice president David Rolf and left-leaning academics have argued for works councils if they are married with sectoral bargaining or unionization.<sup>39</sup>



## **GHENT SYSTEM**

To address the problem of how to compensate unions for bargaining on behalf of a huge number of non-members or non-payers, one flawed idea has been floated. "[T]here's a surprisingly simple plan to get around this, proposed by [Matthew] Dimick, the professor at the University at Buffalo School of Law. Unions could run the unemployment insurance system, using subsidies from the government," writes Dylan Matthews in Vox.com.<sup>40</sup>

This is called the "Ghent System," after the Belgian town of Ghent, and it would not translate well to American labor law. Many unions in America are not good at managing benefit money, as shown by the looming insolvency of many multi-employer pension funds, which are largely union controlled.<sup>41</sup> Furthermore, these pension funds received an \$86 billion bailout from Congress in one of the Covid relief bills.<sup>42</sup> Allowing unions to manage other benefits such as unemployment insurance could increase risks for workers who may need to rely on these programs.

A Ghent system may not need to be applied at the federal level in America, but it may need federal permission at the state level. According to Professor Dimick, the Department of Labor could sign off on states such as California experimenting with Ghent-style schemes.<sup>43</sup> This could be something the Biden administration explores to further its support of sectoral bargaining.



## **EXTENSION CONTRACTS**

Extension contracts in the sectoral bargaining context are similar to how they sound; they extend already negotiated contract provisions to similar types of employees at other companies. The Center for American Progress' David Madland and Malkie Wall argue that those in power "should promote collective bargaining and allow the gains of union contracts to be spread to similarly placed workers, regardless of whether those workers belong to a union."<sup>44</sup> Essentially extension contracts act as employment law in the area or industry where they are spread.

They argue that one way the US government could inch up to this is by expanding prevailing wage laws. Other ideas that would have a similar effect are expanding wage boards or having industry specific minimum wages.

## **SECTORAL BARGAINING COULD BE ANOTHER ATTEMPT TO ORGANIZE THE GIG ECONOMY**

Unions want to organize gig workers, and have been trying to use union-funded organizations called “worker centers” to further these efforts.<sup>45</sup> Right now, that’s not easy to do as independent gig workers are their own boss. They are not employees, nor do they act like typical employees. For instance, many drivers for Uber will often drive with Lyft as well, or other ride share services, and shift between those platforms multiple times a day to maximize pay.

“Even some who feel that independent contractors are sometimes treated unfairly in the gig economy see how applying the laws of traditional labor to them could be awkward: How do you apply concepts like minimum wage and overtime to gig economy workers who log on sporadically throughout the day or who work for several platforms at a time?” asked *Fast Company Magazine*.<sup>46</sup>

Unions have been some of the chief opponents to independent workers. They are key supporters behind California’s Assembly Bill 5, which decimated the ability of independent workers to earn a living in the state. However, efforts to classify all of these entrepreneurs as employees is proving difficult across the country – in no small part because nine out of 10 independent contractors prefer their work arrangement to a traditional job.<sup>47</sup> Even in California after AB 5 took effect, voters protected the independent worker status of some gig economy workers by voting for Proposition 22 during the 2020 election.<sup>48</sup>

However, unions could get over the hurdle of not being able to organize independent workers with sectoral bargaining. If unions could set wages and benefits for all rideshare drivers regardless of platform through wage boards, workers’ boards, or extension contracts, they would not need to worry about calling Uber drivers employees and organizing them in the traditional manner.

Add in bargained requirements for certain benefits that unions would provide and the result is the potential for massive amounts of dues money for organized labor.

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“A Ghent system anywhere will likely increase unionization in the workforce **by about 20 percent**. In the United States this could take the union membership rate from **6.3 percent** in the private sector to **26.3 percent or adding over 22 million new union members.**”

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## **AMERICAN UNIONS’ SECTORAL BARGAINING DILEMMA – THE FREE RIDER ISSUE**

In America, unions are authorized by the NLRA to represent most private sector employees of an employer at an enterprise-level (individual business level) provided the union possesses the majority support of such employees. This is determined in various ways at the outset of union organizing, but most often through secret ballot representation elections where unions need a majority of those voting to say they want the union, or by cards signed by a majority of workers in a unit then voluntarily recognized by the employer.

However, many workers do not want union representation. Unionization in the private sector has fallen to 6.3 percent, according to the Bureau of Labor Statistics.<sup>49</sup> If American labor law introduced sectoral bargaining, but still required majority representation before bargaining commenced, this would be a problem for American organized labor.

In a House Labor Committee hearing, Brishen Rogers, a law professor at Temple School of Law and a fellow at the Roosevelt Institute, noted this difficulty. He suggested something similar to a sectoral bargaining model used in France: “In terms of sectoral bargaining, the challenge is that if we all of a sudden convert to a sectoral bargaining model but still require unions to have majority support before they can bargain, in very few sectors are you going to be able to bargain.... If you want to act very quickly, you could say well in any industry in which unions have 5 percent density the union has rights to at least bargain over some topics.”<sup>50</sup>

Union leaders already complain about the “free rider” problem of having to represent some workers who refuse to join the union or pay dues or the equivalent. They may be reluctant to represent many more workers without getting paid by those workers.

Currently in a majority of states, private sector workers have right-to-work protections.<sup>51</sup> Right-to-work prevents unions from getting workers fired for not paying union fees; it forbids requiring union payment as a condition of employment. The Supreme Court ruled in the 2018 case *Janus v. AFSCME* that all public employees have a First Amendment right to not pay union fees, essentially extending right-to-work to all public employees in all states.<sup>52</sup>

Democrats in Congress are attempting to take away right-to-work protections for private sector workers with the Protecting the Right to Organize Act which would eliminate state right-to-work laws. Public sector protections would still exist because they are protected by the U.S. Constitution.

However, the Ghent system could be another way unions may try to push back against sectoral bargaining creating free riders. Ghent could significantly increase union membership. Bo Rothstein, a political scientist at Oxford, argues that a Ghent system anywhere will likely increase unionization in the workforce by about 20 percent. In the United States this could take the union membership rate from 6.3 percent in the private sector to 26.3 percent or adding over 22 million new union members.<sup>53</sup>

## **WHY SECTORAL BARGAINING IS BAD FOR AMERICA**

American advocates of sectoral bargaining are going to have significant hurdles in their way for the foreseeable future. Sectoral bargaining is implemented differently in different countries. It appears most successful in Germany. However that version of sectoral bargaining has significant flexibility built into it but can also be used by companies to flatten wages. That, presumably, is a feature that American workers would rather not import.

In America the requirement that companies negotiate in good faith doesn't compel them to agree to the union's demands; workers are free to strike if those demands are not met and for the most part these decisions and compromises stay within a company.

More fundamentally, elements of democracy and consent are baked into how Americans think about unions. It's not an accident that if a worker is represented by a union here, that usually means an election has taken place and that a majority of workers at some time has invited the union to represent them. In many cases this election has taken place in the distant past; 93 percent of private sector workers were not employed when the union organized their employer and they simply inherited the union.<sup>54</sup>

Here are some other problems with sectoral bargaining for Americans:

**Sectoral bargaining harms employees' ability to get higher wages.** One of the key selling points in the House Education and Labor Committee's "Future of Work" report is that it strips wage competition out of the industry. That means employees cannot get a raise by going from one employer to the other. It also stops employers from trying to attract top talent by outbidding their competition. This would be a huge problem as American employees typically see larger raises by switching jobs rather than simply waiting for a salary increase at their current workplace.<sup>55</sup>

**Sectoral bargaining harms small businesses.** Most of the proposals being floated say that market share will affect how much of a say a company gets in negotiations with unions. The larger players will thus have much more say in those negotiations by design. Many of the academic plans call for businesses negotiating with sectoral unions to have a percentage say determined by how many workers they represent. This means that small business interests will be subordinate to larger business with more market share.

**Sectoral bargaining takes away choice from workers.** Because many of the plans call for unions representing a few thousand workers or 10 percent of an industry, this means that a minority of workers could select representation for everyone else. The United Auto Workers, which has suffered from multiple corruption scandals<sup>56</sup> recently, could represent non-union southern autoworkers that have repeatedly said no to the UAW.<sup>57</sup>

**Costs of less competition will mean higher prices for consumers.** Harvard Law professors Sharon Block and Benjamin Sachs, in calling for sectoral bargaining, try to circumvent around this fact. “Because firms in a sectoral bargaining system do not—and indeed, generally cannot— secure a competitive advantage by lowering wages, they are forced to compete based on the quality of the products that they produce or the services that they provide,” they write in a “Clean Slate for Worker Power” report.<sup>58</sup> These firms compete on product quality or services because they can no longer compete on price, and consumers pay for that lack of competition.

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Sectoral bargaining would completely cut against the democratic grain of unionization in America. It would make unions represent people at companies where the workers have never asked for (or even rejected) unionization and who may not want that representation. It could force industry agreements that make the American economy less nimble.

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