



Worker Power and Voice in the Pandemic Response

clean slate for
worker power 



WORKER POWER AND VOICE IN THE PANDEMIC RESPONSE

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

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INTRODUCTION

Our country is racked by two urgent crises – the COVID-19 pandemic and the plague of systemic racism, the latter of which has manifested in the continued killing of Black men by police. These dual crises may seem distinct: one is the product of an inhuman virus; the other of a human one. But the crises are linked by the structural racism that continues to haunt America. COVID-19 is disproportionately killing people of color because of the profound inequities that shape all aspects of our society, our economy, and our politics. The police killings and violence in Black and brown communities reflect these same intolerable inequities. Addressing the structural racism that defines both these crises will require – among other things – a breadth of comprehensive policy interventions, many of which extend far beyond even the broadest definition of labor law. However, labor law must make a contribution to this critical effort. And a central premise of the *Clean Slate for Worker Power* project is that any attempt to empower workers must begin with the effort to make labor law, and the labor movement, fully inclusive of workers of color – workers who have faced exclusion from the start.

This premise also animates this report. COVID-19 presents grave challenges to all of us, but it poses particular – and, in many cases, life-threatening – challenges to working people. As has become painfully obvious, moreover, the costs of the pandemic are being borne disproportionately by low-wage workers, a population made up primarily of women and workers of color. Recent research shows that Black essential workers are nearly twice as likely as white essential workers to be concerned about the risk of infection.¹ As they work to keep the economy moving despite the pandemic, these workers are being asked to put their lives on the line in ways that are both unacceptable and unnecessary.

Indeed, as the economy reopens, more and more workers will be put in harm's way. Unless, that is, something fundamental changes about the way we approach worker voice and power. In this issue brief, we offer a set of recommendations designed to empower workers so that they are better positioned to cope with the ravages of COVID-19, keep themselves and their families safe, and build a more equitable economy than the one the pandemic shut down. The risks posed to workers by COVID-19 are inspiring workers to act; for example, essential workers concerned about the risk of infection are more likely than other workers to want to take part in collective action.² We know that collective action works to protect workers. Research shows that workers in unions are more likely to be covered by the policies that will keep them safe, such as access to personal protective equipment.³

As with the *Clean Slate* report, the recommendations here are designed so that they apply to all workers regardless of whether the law classifies them as employees, independent contractors, or otherwise outside of traditional labor law's protection. The recommendations aim to build structures that include everyone who works, intentionally seeking to reverse the insidious, decades-long exclusions of women and workers of color. The animating theory of these recommendations is simple: When law empowers

all workers to demand equitable treatment – including safe and healthy working conditions – workers can build the kind of nation we all deserve.

COVID poses a series of distinct threats to working people, and this issue brief is organized to reflect these different threats. First, COVID constitutes a massive threat to the health and safety of working Americans, most obviously to those who are – or will soon be – required to work outside of their homes. It is clear that we cannot rely on the

Trump administration to ensure worker safety and health; after all, this administration's Occupational Safety and Health Administration (OSHA) has failed even to take the elementary step of issuing a standard for dealing with infectious diseases, and it is quite literally abandoning workers to the ravages of the virus. Accordingly, in the first part of the issue brief, we offer a series of recommendations designed to empower working people to identify the safety and health problems that they confront at work and to demand – free from retaliation – that their employers take the necessary steps to ensure safe and healthy workplaces.



COVID poses a series of distinct threats to working people."

Second, COVID changes some fundamental features of worker organizing and collective action. Because, for example, COVID requires social distancing, it has altered the nature of the American workplace, making in-person communication between workers far more difficult – and dangerous – than it was prior to the pandemic. This means the processes for organizing unions, holding union elections, and engaging in collective activity – terribly difficult before the pandemic – have become essentially impossible under current rules. In the second part of the issue brief, we recommend a series of legal reforms designed to enable workers to organize and strike effectively in the context of the pandemic.

Third, COVID threatens to initiate a period of sustained unemployment – the likes of which we have not seen since the Great Depression. Black workers have been hit hard during the COVID-19 recession with the Black unemployment rate rising to 16.8 percent.⁴ It rose even in May when the overall unemployment rate inched lower. Today's unemployment demands a series of legislative responses, many of which – though absolutely critical – are beyond the scope of this issue brief. Here, we focus on the potential for a federal or state-funded jobs program and recommend how such a jobs program could ensure quality work and worker voice, and thereby stand as a model for the private sector.

Fourth, and finally, COVID exacerbates the intense difficulties that working people – and particularly low-wage workers – face in trying to exercise the right to vote and to have a voice in the political process. Like the union election process, the political election process has become even more ridden

with obstacles for workers. Thus, in the final part of the issue brief, we recommend ways of easing the process of voting so as to ensure that all working people who want to vote are able to do so. Reducing these obstacles would also contribute to workers' ability to demand a more equitable and safe work life.

Of course, the economic devastation being wrought by COVID will require us to do even more than ensure safety and health; it will require that we build a new equitable economy and new labor market that guarantee opportunities for *all* workers. Doing so would empower communities to not only deal with COVID-19 but to also address systemic racism in the workplace and beyond it. Constructing an economic order more equitable than the one that COVID shut down will require labor law reforms even broader and bolder than those set out here. We have outlined our thinking on such a set of reforms in the original [*Clean Slate for Worker Power*](#) report.

SECTION 2

EMPOWER WORKERS TO DEMAND SAFE AND HEALTHY WORK

When it comes to workplace safety and health, legal reforms to ensure worker power and voice are critical. Worker power and voice are essential for two reasons: workers know, better than anyone, the health and safety risks they face on the job, and workers know, better than anyone, how to make their jobs safer. Thus, when we deprive workers of a voice, we lose our best mechanism for ensuring that work is healthy and safe. And – as the current crisis makes painfully clear – when work is not safe, the consequences for all of us are severe.

Unions offer workers a real voice in the shaping of their work lives and some real power over the safety and health of their workplaces. But, as of the start of the pandemic, only about 10 percent of workers were in unions, leaving the vast majority of American workers without a voice in the life-and-death decisions being made about how their work is carried out and the protections that they have in the workplace. Without unions, employers are making decisions without the agreement of – or even input from – most workers. The results are predictable:

Workers across the country are being forced to work without gloves, masks, or access to disinfectants; others are being denied paid leave if they are sick or have to care for sick relatives, leaving them no option but to work while ill.

It is also becoming clear that we may experience an extended period of intermittent social distancing and business closures, rather than a single crisis followed by a “return to normal.” In several of our most at-risk and essential industries – including logistics and warehousing, food service, and carework – the fragmented nature of the workforces and shifting conditions has made it difficult for even well-intended policymakers to act quickly and efficiently in ways that are responsive to these changing conditions. Creating an infrastructure that provides flexible, real-time, sector- and workplace-specific rules would help to ensure that our institutions can meet the needs of businesses and essential workers as this crisis unfolds.



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Over the last several months, many frontline workers have exercised their right to strike in order to demand better safety and health protections at work. Though these efforts are heroic, they are not a substitute for an institutionalized role for workers. Moreover, if they do not yield meaningful concessions, these work actions may be a harbinger of a more militant and chaotic response, borne out of increasing desperation on the part of workers who have no other means to demand safe working conditions.

Our current labor law does not provide a workable approach. Even in the best of times, existing labor law makes it exceedingly difficult for workers to translate their powerful desire for voice into actual representation. Thus, 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 of a minimum size, where there is no union representation, a workplace safety and health committee should be elected by workers and charged with adapting and implementing safety and health rules for that workplace, including rules established by sectoral commissions; in workplaces with unions, the union should have the discretion to request the formation of such a committee; 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; 4) where possible, sectoral commissions should involve community representatives to address community impacts of workplace safety and health issues; and 5) to ensure that all workers feel secure enough to participate in these representative structures, we must adopt a just cause dismissal policy.

A. Safety Stewards

Recommendations:

- Mandate elected safety stewards in every workplace;
- Empower safety stewards to provide information, assist in enforcement, and support workers’ collective action related to safety;
- Create sector-wide network of safety stewards;
- Require safety stewards to report anonymized data regarding safety complaints to a government agency; and
- Require disclosure of safety steward reports.

In the *Clean Slate* report, we recommended that workers in every workplace be empowered to elect a workplace monitor, who would ensure the workplace's compliance with all state, federal, and local employment and labor laws. In the context of the pandemic, the need for workplace monitors is more urgent than ever. Indeed, in its economic reopening plan, the State of Pennsylvania has recommended that each workplace designate a "[Pandemic Safety Officer](#)." We thus recommend an immediate mandate requiring the election of a "safety steward" in every US workplace.

The basic idea of the safety steward is to make sure that workers in every workplace in the country have access to a knowledgeable person who can give accurate information about substantive safety issues and legal rights; help with worker reporting/whistleblowing on health and safety issues; and become an information hub for workers, regulators, and the public.

The steward would be elected by workers and could but need not be a coworker. (In workplaces where workers are represented by a union, the steward should be elected according to procedures adopted by the union.) Workers might, for example, elect a steward who is employed by an occupational safety and health organization or by a union or workers center. The steward would be entitled to receive paid time for training by qualified providers including the OSHA, state and local safety and health administrations, safety and health commissions, labor unions, and worker centers. Employers could recoup the costs of paid time through a tax credit. Stewards would also be entitled to have access to workers and safety records, to train coworkers and employers on the most recent COVID-19 guidance, to educate workers about their rights, and to promote compliance with relevant safety and health standards – including those standards developed by the sectoral health and safety commissions (described below).

The safety steward's role would be to provide support and advice to workers who have safety concerns; to liaise with workers, worker safety committees, and government regulators; and to aggregate and report anonymized data about both worker concerns and responses. For example, if a worker goes to a safety steward because they believe that they were asked to do something unsafe, the steward might take any or all of the following steps: 1) Give the worker information about the scope of the National Labor Relations Act (NLRA)/OSHA rights to refuse dangerous work; 2) help the worker make a report to OSHA or to a state agency via an online portal;⁵ 3) contact other workers by text or email to see if they have encountered similar problems; 4) accompany the worker to try to resolve the problem with the employer; 5) support workers as they plan other collective action aimed at resolving the problem; or 6) contact via listserv a network of safety stewards working in the same industry to learn whether their workers have encountered the same problem and how they have responded.



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In addition, the safety steward should maintain information about workers' safety complaints, including complaints about a firm's failure to comply with sectoral standards (described below), how workers responded, and if/how the complaints were ultimately resolved. They should submit that information in an aggregated/anonymized format to regulators on a regular basis. In turn, regulators should be required to make this information available to the public – including information about where workers have refused to work because of safety threats. Regulators can then use this information to plan their own work, including safety inspections/audits, rulemaking, and legislation; and the public can choose not to patronize businesses where workers are striking over safety problems or where there is a pattern of disregarding workers' safety.⁶

B. Workplace Safety and Health Committees

Recommendations:

- Require the creation of workplace safety and health committees with elected members;
- Empower workplace committees to adapt and implement safety and health standards and to have the discretion to request negotiations over new standards;
- Empower workplace committees to file safety complaints internally and with government agencies; and
- Protect workers from retaliation for participating in committee activities.

In addition to the individual safety steward, we also recommend that the law mandate the creation of a workplace safety and health committee in every workplace of a minimum size. In workplaces with union representation, it should be in the union's discretion whether to request the creation of such a committee. Numerous laws – including federal and state Occupational Safety and Health Acts, the federal Mine Safety and Health Act, and state laws regulating health care institutions – already allow enterprises to have workplace-based committees with worker representatives to address health and safety. Federal law should expand on this precedent and mandate safety and health committees.⁷

To ensure that the committees fulfill their mission of ensuring genuine worker voice in safety and health matters, we recommend that the law:

- Provide for worker election of all workplace safety and health committee members. Elections should be conducted under circumstances that protect employee freedom of choice. Where workers are represented by a union, committee members would be selected according to procedures determined by the union;

- Require employers to provide requested information to workplace safety committees;
- Define “worker” to include any person whom an employer suffers or permits to work and include independent contractors and persons performing work through a temporary-services or staffing agency. “Employer” must be defined as an individual or entity that suffers or permits a person to work and include contracting for the services of a person. More than one entity may be an employer with responsibilities at a workplace;
- Protect workers from discipline or discharge or any adverse employment action on the basis of forming, joining, or assisting workplace safety and health committees; for reporting any suspected safety issue to the committee or to the public; or for supporting or opposing any practice related to workplace safety or the committee; and
- Permit participation of workplace safety and health committee members in any inspections and audits of workplace safety by a government agency.

As to the substance of the committees’ functions, we recommend that the law grant committees the power and the authority to carry out the following functions:

- *Adapt and implement safety and health standards.* Committees must have the power to adapt and implement applicable safety and health standards – including those promulgated by OSHA, state agencies, and sectoral safety and health commissions – to address local conditions. In addition to basic safety and health protocols, safety and health standards should include sick leave policies, scheduling and staffing policies, and hazard pay;
- *Request negotiations.* Committees should have the discretion to request binding negotiations with the employer over the development of new safety and health standards that are consistent with those promulgated by government agencies and sectoral commissions. Where a committee requests negotiations, the employer would have the duty to bargain in good faith, and, if agreement is not reached, the committee would have the discretion to invoke binding arbitration;
- *Identify hazards and recommend remediation.* Committees should have the power to identify workplace hazards and develop remediation plans. Employers must meet and confer with the committees with regard to these plans;
- *Participate in testing and tracing plans.* As workplaces reopen and rely on testing and contact tracing to prevent the spread of disease, workplace safety committees should be empowered to review and assist with testing and contact tracing in a way that balances privacy concerns with public health concerns and ensures that workers are compensated for time spent participating in these programs. Costs incurred by employers could be recouped through a system of tax credits;

- *Provide or demand training and access outside expertise.* Committees should be empowered to consult with unions, worker centers, and other experts in health and safety. The right to consultation must include the right to grant access to the worksite. The training in safety measures must include training in how to de-escalate conflict with coworkers, management, suppliers, and customers over refusal to observe safety measures;
- *Review safety records.* The review of employer records is important to ensure that they are complete and accurate. It is also a source of information from which hidden hazards can be identified, patterns spotted, and future incidents prevented. The review and verification of employer abatement actions are also essential. Although the review of health records raises Health Insurance Portability and Accountability Act (HIPAA) privacy issues, workplace safety and health committees should have the right, consistent with applicable state and federal privacy laws, to access information that the employer has about safety and health situations or incidents to determine whether COVID infections exist in the workplace;
- *Field safety concerns and suggestions from other workers.* A workplace safety and health committee can operate as an ombudsman (ombuds) that will establish the ongoing education of managers and workers, provide information to workers concerned about hazards, and convey information from workers to those who can act on it. The committees should coordinate their activities with the safety stewards (discussed above);
- *Mandate enforcement.* A workplace safety and health committee should be given authority and standing to take all appropriate enforcement actions, including filing and pursuing complaints over workplace safety concerns via the employer's internal system as well as through the applicable government agencies or courts;

C. Sectoral Commissions

Recommendations:

- Create sectoral safety and health commissions to negotiate baseline safety and health standards;
- Alternatively, give sectoral commissions “meet and confer” rights to request information and discussion safety standards; and
- Allow states to create their own sectoral commissions and send representatives to the national sectoral commissions.

In addition to the safety stewards and the workplace safety and health committees, both of which will operate at the level of the workplace, we also recommend the creation of sectoral commissions, consisting of representatives of labor and management, that would negotiate baseline safety and health standards for all firms in the sector. These baseline standards will be *minimum* standards for all firms in the sector and will be enforced through the operation of the safety stewards and workplace safety and health committees. Where workplace committees request negotiation authority, pursuant to the discussion above, they will have the right to negotiate improvements over sectoral baselines but will not have the authority to negotiate lesser protections than those afforded at the sectoral level.

We recommend a sectoral approach, as a complement to the workplace level reforms, for three related reasons. One, many safety and health issues will be common across all firms in a sector; for example, all grocery stores will face a set of common safety and health challenges, as do all delivery companies, hospitals, and schools. Two, addressing these common issues at a sectoral table will result in significant savings of time and money as compared with a system in which every common issue has to be resolved by every individual firm. Third, by setting baseline safety and health standards at the sectoral level, sectoral commissions will take much of the cost of safety and health provision out of competition. Because all firms in a sector will be governed by the baselines established by the sectoral commission, no firm's adoption of those baselines will place it at a competitive disadvantage vis-à-vis any other firm in the sector.



We recommend that the commissions have the authority to bargain agreements, on the issues within their purview, that would become binding rules for the sector as a whole. Given constitutional non-delegation concerns, this would require that the agreements be reviewed, approved, and promulgated by a government office, most likely the Department of Labor (DOL). If the commissions were given the lesser authority to facilitate information exchange and the promulgation of recommended best practices on the issues within their purview – an option that would resemble “meet and confer” procedures that now exist in many state labor relations systems – DOL review would not be necessary.

In any case, the new legislation should designate the sectors in which the first commissions should be convened – including those deemed essential, such as health care, logistics, transportation, and grocery. The legislation should give the secretary of labor responsibility – to be exercised within 30 days – of appointing representatives of workers and management to serve as commission members. In sectors

where workers are represented by unions, those unions would serve on the commissions, as would worker organizations with significant membership among workers in the sector. Management representatives of individual firms in the sector that meet a certain threshold for market share would also serve on the commissions. Finally, additional appointments would come from recommendations made by the speaker of the House, the Senate majority leader, the House minority leader, the Senate minority leader, the chair, and ranking members of the committees of jurisdiction for each sector and the Senate Health, Education, Labor, and Pensions (HELP) and House Education and Labor committees.

Congress should also empower states and localities to establish their own sectoral commissions, consistent with the model established at the federal level. These state commissions, if subject to oversight by state or local labor departments, could bargain enforceable standards that would apply across sectors in those states or localities. We recommend that these state-level commissions should also cover workers in the public sector deemed essential, such as teachers, health care workers in public hospitals, and others on the frontline of delivering government services during the pandemic. States that adopt commissions also should be permitted to designate state officials to participate as members of the federal commissions.

D. Community Committees

Recommendation:

- Include community organizations in sectoral safety and health commissions.

Legislation should also empower states and localities to facilitate the involvement of community groups in sectoral commissions, perhaps at the invitation of workers' representatives. Given the profound impact that workplace safety and health has on public health during a pandemic, such community involvement is important. As a model, Congress might look to Oregon's [proposed](#) long-term care wage board act. At a minimum, community groups should have the right to attend and receive information about the sectoral commissions' meetings.

E. Just Cause

Recommendations:

- Require employers to have a good cause for firing workers in order to better protect workers from retaliation for exercising their rights;
- Ensure that layoffs for bona fide economic reasons are well documented to prevent abuse; and
- Provide strong remedies and a mechanism for quick reinstatement.

In our view, these three mechanisms for worker voice will function to empower workers to demand safe and healthy workplaces and thereby to improve not only worker health but public health as well. But none of these mechanisms can function unless workers feel confident that they can participate in their operation free of employer retaliation. Of course, the current context is one in which employers are retaliating with near impunity against workers who fight for safety and health improvements. As we have seen, health professionals have been [threatened with termination](#) for talking about their lack of personal protective equipment. And infamously, Amazon has fired workers for [protesting working conditions in warehouses](#) and for [supporting those workers \(and again\)](#) – actions that [recently drove a high-profile company vice president to quit in protest](#).

Taking a lesson from the history of both labor and occupational safety and health law, we are convinced that simply adding an anti-retaliation clause to the legislation will be insufficient. Far better from the perspective of empowering worker participation in the new safety and health regime is to move from our current system of at-will employment to a rule of just-cause dismissal.

While just-cause models vary, the basic requirement is that employers demonstrate one of an enumerated set of legitimate reasons for terminating workers or reducing their hours. This sort of protection is far from novel. Over [three-quarters of countries tracked by the International Labour Organization](#) (ILO) already have some form of this requirement, and it has long been a common provision in collective bargaining agreements in the US. Moreover, cities around the country have been considering targeted local just-cause ordinances. Philadelphia became the first city in the nation to pass an [industry-wide just-cause ordinance](#) last year for parking lot attendants, and there are strong campaigns to bring just cause to New York City both for [fast food workers](#) and more recently for [essential workers more broadly](#). [Momentum for just cause](#) is also growing at the federal level as well, where Sen. Bernie Sanders (I-VT) [included just cause](#) as a key plank in his expansive labor policy agenda in the 2020 Democratic primary presidential campaign. Indeed, a recent [2019 Data for Progress public opinion poll](#) commissioned by the Omidyar Network found that 67 percent of American voters support a federal just-cause law, with only 30 percent of voters opposing the concept.

Accordingly, we recommend a statutory requirement that employers demonstrate just cause in order to discharge a non-probationary employee. The new statute should set out both substantive and procedural standards related to the new rule. In developing these standards, drafters of the new statute should learn from the extensive experience with just-cause policies that is reflected in collective bargaining agreements. At a minimum, such a just-cause system should:

- Apply to workers across occupations and industries, including so-called independent contractors who are economically dependent on a single client;
- Protect against “discharge” broadly construed, to apply to termination, constructive discharge, reductions in hours (15 percent or more), and indefinite suspensions;

- Define “just cause” to be limited to misconduct or performance problems and explicitly provide that a) refusing to work due to health concerns and b) exercising rights to protected concerted activity are never just cause for discharge;
- Ensure that layoffs for bona fide economic reasons are well documented to avoid abuse, including by listing alternatives to layoffs that were considered and requiring that workers laid off for economic reasons be offered their jobs back before new workers are hired;
- Use a progressive disciplinary system (e.g., warnings or suspensions) with graduated responses to failure to perform job duties;
- Mandate a fair and objective investigation prior to discharge;
- Require a written explanation for the termination within one week, including a full recounting of all non-hearsay evidence on which the decision to terminate was based;
- Build in a strong burden-shifting regime, including a rebuttable presumption of retaliation for a period after a worker pursues concerted activity;
- Empower a public agency to enforce the law for quick reinstatement (generally with a dedicated enforcement unit) but also implement a private right of action and a fair, cost-effective, and voluntary arbitration system to resolve disputed terminations; and
- Provide strong options for relief, including compensatory damages (lost wages, interest, and opportunity costs), injunctive and declaratory relief (including reinstatement), and the option of additional compensatory and/or punitive damages in lieu of reinstatement (at the employee’s sole option, unless an employer can show proof of a broad effort to update business practices to improve compliance across all business areas, including tax).

SECTION 3

RESHAPE ORGANIZING RIGHTS TO MEET THE COVID-19 CHALLENGE

The most urgent challenges for workers posed by the pandemic are the direct threats to their safety and health. However, there is another category of challenges: The disruptions caused by the pandemic have also made it harder for workers to organize and engage in collective action – both to address safety and health concerns themselves and to demand a more equitable and inclusive economy. In this section, we make recommendations geared toward adapting and strengthening organizing and collective action rights in the pandemic context.

A. Enhance Digital Communication and Organizing

Recommendations:

- Require that employers create a digital meeting space for employees to communicate outside of employers' surveillance;
- Require the government to maintain and publicly post a list of labor disputes and safety complaints;
- Make available a browser extension that would allow consumers to be notified of labor disputes and safety complaints when visiting a company's website; and
- Prohibit employer surveillance of workers' digital organizing by certifying or creating secure platforms.

The COVID-19 crisis has – at least for the moment – changed the nature of the American workplace. For millions of Americans who have the ability to work from home, the pandemic has shifted the workplace from a shared physical location to a remote environment. For millions of others who cannot work from home, and whose work has been deemed “essential” during the crisis, it has made the workplace a potentially deadly vector for infection. And with tens of millions of Americans finding themselves newly out of work, most workers – whether employed, jobless, or somewhere in between – are navigating this crisis at a moment of deep economic insecurity that threatens to further disempower workers.

For workers in any of these categories, digital and online communications have taken on new importance – and in some cases, present new risks or challenges. For workers who are working remotely, the imperative for digital organizing has become more urgent. The need to communicate workers’ rights in a way that actually reaches workers – and establish means for workers to avail themselves of those rights – has become especially important in an environment where unsafe workplaces risk spreading COVID-19. Tools such as cyber picket lines – already important in an economy where commerce has increasingly shifted online and where the effectiveness of traditional, in-person picket lines have been limited by regressive labor law decisions – have become especially salient when online deliveries become the default approach for many consumers. Issues surrounding online surveillance by employers have become an even greater cause for concern, as organizing is increasingly shifted online and as employers increase the attention they are paying to their workers’ digital communications.

Below, we offer some examples of how these issues have manifested themselves:

- On May 1, [workers at Amazon, Instacart, Target, and Whole Foods](#) staged a walkout over pay, benefits, and protections amidst the COVID-19 crisis that was largely organized online, and these workers engaged in online efforts to encourage consumers to boycott those businesses during the walkout.
- Workers at companies such as [the Target-owned delivery company Shipt](#) have reported efforts by management to surveil or shut down posts on company Facebook pages, with organizers responding by creating private communications channels.
- At Amazon, workers reported [increased limitations](#) on the use of large internal listserves and that invitations to a sick-out were “[removed](#)” from employee calendars.
- More than 300,000 workers have [joined campaigns](#) on Coworker.org in the last month, as efforts have become particularly focused on hazard pay and improved worker conditions.
- Recent legislation has expanded the right to paid leave during the pandemic – but the DOL has [only required](#) that employers notify workers of this right via notifications at the physical workplace location, even as workers may be teleworking.
- Proposals for contact tracing to control the spread of the disease creates the risk that – without proper privacy protections – employers might be able to engage in increased surveillance of workers.
- Employers like [Whole Foods](#) have already been experimenting with approaches like the “heat maps” used to track which store locations are at greatest “risk” of unionizing.

In this section, we recommend ways to better protect workers against efforts to limit or discourage organizing, as well as to ensure that workers are made aware of their rights even when they are not congregating at a physical location due to social distancing measures. We offer approaches to strengthen digital organizing that would build on innovative efforts workers are already taking during the crisis, while better protecting them from digital surveillance.

1. Promote and Protect Online Organizing

In our initial *Clean Slate* report, we recommended requiring companies to provide the tools to enable workers to organize online. Specifically, we recommended ensuring that whatever technology the employer uses to communicate with workers be made available to workers for their own organizing activities. That recommendation is even more relevant now. In addition, we recommended that the law require employers to establish digital meeting spaces (i.e., private forums for online communications).

In the initial *Clean Slate* report, we framed the importance of this recommendation around the increasing prevalence of workers who do not share a physical workspace with each other. Now, with workplaces being transformed to accommodate social distancing, effectively no workers will share a physical workspace such that they can engage in private, in-person communications; breakrooms, cafeterias, and other common spaces are being excised from all kinds of workplaces. Thus, our recommendation for the creation of digital meeting spaces is more urgent than ever. Employers should also be required to share information about workers' rights digitally and not just physically if workers are working remotely.



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2. Facilitate Virtual Picket Lines

Another recommendation in our initial Clean Slate report was for the law to enable virtual picket lines so that the public could be aware of workers' collective action that takes place outside of their view. While we continue to support that recommendation, in this issue brief we offer additional mechanisms that could expeditiously provide the public with more information about pandemic-related collective action. As more evidence mounts that the public has a new awareness of and appreciation for essential workers, we believe it is imperative that these workers have access to means to communicate with the public.

We recommend that the government maintain and publish online and in real time a list of all ongoing collective actions and strikes, as documented and reported by unions, worker organizations, or groups of workers. The same should be done for safety complaints, as described above in our discussion of the safety

stewards proposal. Making disputes and complaints publicly available reinvigorates the power picket lines once had by empowering consumers with information. Most strikes today go unseen because:

- [More consumers are shopping online](#), rather than in stores, a trend exacerbated by stay-at-home requirements;
- Consumers rarely see issues behind the storefront; picket lines in front of manufacturing plants and factories, or elsewhere in an increasingly complex supply chain, go unseen; and
- A more networked economy, domestically and globalized, gives consumers choice; however, consumers too often brush off delays in the supply chain as inconveniences and choose to buy elsewhere – a choice that they might rethink if they were aware of existing labor disputes.

To bring this concept closer to a digital picket line, we recommend that the government be required to make browser extensions available to consumers that would link to information from the online database of labor disputes. This way, the extension could notify consumers whenever they visited the website of an employer on the list that a labor dispute had taken place or was ongoing, allowing consumers to easily make more informed decisions about their interactions with corporations.

3. Prohibit Employer Surveillance

Section 7 of the NLRA not only affords affirmative protection for workers' organizing and collective activity, but it also gives workers the right to be free from employer surveillance and interrogation regarding concerted activities. Employees need protection from surveillance of their organizing activities because of the coercive impact of employees being "watched" by the employer.⁸ As more organizing and collective activities move online, the threat of surveillance expands exponentially. Indeed, employers are already exploring a variety of technologies to track workers' exposure to the coronavirus,⁹ and these technological tools can also be used to track the relationships and movements of workers.¹⁰ The National Labor Relations Board (NLRB) must be required to ensure that such tools are not being used to engage in unlawful surveillance and interrogation about protected concerted activities.

The penalties for surveillance or other violations of the NLRA have traditionally been thin; an employer found to have violated the NLRA is required to post a notice in the workplace promising not to do it again. This fails to deter almost all employer violations because employers will reason that there is more to be gained by knowing who is organizing than the possibility of posting a notice, particularly post COVID-19 when workplaces and break rooms where these notices would be posted are going to be much more sparsely populated. The law should require the NLRB to be much more creative in enforcing these rules under their current authority, such as by requiring remedial notices by email or on company websites. Penalties for employer surveillance should also be greatly enhanced.

As we noted in the full *Clean Slate* report, the creation of digital meeting spaces – which we recommend – presents privacy and security challenges, particularly if those spaces are administered by employers. These challenges should not prevent a mandate for a digital meeting space but do compel careful consideration of the mechanisms for creating these spaces. For example, workers cannot rely on access to Facebook Workplace as a platform for organizing. In a recent presentation to employers promoting the platform, Facebook highlighted the fact that employers using Workplace could block the word “unionize” in order to limit workers’ organizing efforts.¹¹ To protect the right for all workers to privately organize, legislators should consider both a system of private vendor certification and a government-developed and -administered platform – i.e., “organizing.gov.”



One constraint that limits the full potential of online organizing is workers’ unequal ability to participate; too many lack internet-enabled devices, incur data usage costs, and live without basic internet access in their homes and neighborhoods. Rather than developing complex and burdensome work-arounds for offline participation, we recommend taking steps to alleviate the digital divide that deeply hampers the inclusivity of online organizing.

B. Adapt NLRB Election Rules for Remote Work and Social Distancing

Recommendation:

- Allow workers to demonstrate support for union representation by means of digital petitions or ballots or mail ballots.

In the full *Clean Slate* report, we recommended a number of changes to the mechanisms by which workers register their choice of whether to be represented by a union or not. We noted that even under normal circumstances, the Board’s cumbersome election machinery made it unreasonably difficult for workers to register their support for union representation. Now that we find ourselves in the circumstances created by the pandemic, the Board’s election machinery is worse than cumbersome – it is incapable of allowing workers access to free and fair choice.

The Board's election procedures pose direct challenges and hazards for workers. First, they require workers to gather physical cards from coworkers in order to request an election. Card collection is likely impossible because workers are not in physical contact with each other, because they are teleworking or because of the need to maintain social distancing. In-person voting poses similar challenges.

Accordingly, we renew our recommendations that workers be allowed to demonstrate their support for union representation through means of majority support demonstrated by a digital petition or ballot without the requirement of an election. If elections are required, we recommend that the law provide workers the right to use digital and mail ballots.

C. Protect Workers' Safety and Access to Economic Security Programs

Recommendation:

- Require states to allow striking workers to collect unemployment insurance, SNAP, TANF, and WIC benefits.

In addition to adapting organizing and election rules, the pandemic necessitates a change to the rules of benefit access during strikes. During the COVID crisis, many frontline workers have [exercised](#) their rights to strike and stage walkouts for better working conditions to protect their health. These workers are disproportionately [low-wage](#) workers, for whom the loss of even a single paycheck can be economically devastating. And yet, many of our economic security programs have restrictions on eligibility if a household member is striking, which can force workers to have to choose between their right to organize and their families' economic security.

As we noted in the full Clean Slate report, the unemployment insurance laws of all 50 states and DC disqualify, to some extent, striking workers. We recommended that federal law mandate that all states pay unemployment benefits to striking workers, a recommendation that is more urgent in the pandemic era. We also note that, under current law, workers can be excluded from receiving SNAP, TANF, and WIC benefits if they go out on strike. At a time when workers are striking because of threats to their health, their access to nutrition for themselves and their families should not be put in jeopardy, and thus these benefits should be available to striking workers.

D. Rationalize the Joint Employment Doctrine

Recommendations:

- Define employee and employer broadly to ensure that all workers at a worksite are protected

by the Occupational Safety and Health (OSH) Act and that all employers present are accountable for maintaining a safe workplace; and

- Allow control of safety and health matters to be considered in assessing joint-employer status under the NLRA.

Essential workers providing a diverse range of services are doing their jobs in environments characterized both by grave risks to their health and safety and by grossly inadequate federal protections. For many, the risks are exacerbated by the dual nature of their employment status: Although they are direct employees of contract firms or similar labor market intermediaries (“supplier employers”), they provide services to or on behalf of other businesses and employers (“user employers”) that control essential terms and conditions of their employment. Legal confusion over who is the “employer” in these situations, compounded by the Trump administration’s new joint employer rules that insulate user employers, threatens to leave many workers without meaningful federal remedies.

Accordingly, Congress should amend the OSH Act to make clear that it protects all workers present in the workplace by defining an employee for purposes of the OSH Act as “any person whom an employer suffers or permits to work, including (so-called) “independent contractors” and “persons performing work for an employer through a temporary services or staffing agency.” Likewise, Congress should amend the OSH Act to define an “employer” as “any individual or entity that suffers or permits a person to work,” including “contracting for the services of a person” and specify that “[m]ore than one entity may be the employer.”

We also recommend that Congress direct the NLRB to reconsider and delay the implementation of its rule on joint-employer status. In that rule, the NLRB failed to include joint control of safety and health matters as a factor in determining joint employer status. As the April 20, 2020 letter from the AFL-CIO and Services Employees International Union (SEIU) to the Board noted, “[t]he [c]oronavirus pandemic has ... confirmed the centrality and materiality to employees and employers of safety and health matters.”

SECTION 4

SET HIGH STANDARDS FOR NEW GOVERNMENT-FUNDED, PANDEMIC-RELATED JOBS

Recommendations:

- Allow all new contact tracers to be represented by unions by defaulting newly created contact-tracer jobs into existing collective bargaining units and collective bargaining agreements; and
- Ensure that newly created contact-tracer jobs are good-quality jobs by setting high labor standards.

With more than 40 million Americans having filed unemployment claims as of May 2020, it is more than apparent that a federal jobs program will be a necessary part of any robust recovery effort. Across the country, states are already gearing up to employ large numbers of workers to do the essential work of tracing the contacts of those who have contracted coronavirus. Contact tracing alone has the potential to create a massive new workforce. California has said it plans to recruit a contact-tracing team of 20,000 people, and New York State [plans to hire](#) between 6,400 to 17,000 contact tracers in the coming months. Estimates suggest that the US [needs a workforce](#) of more than 100,000 contact tracers to effectively track, trace, and ultimately quell this pandemic. Sen. Elizabeth Warren (D-MA) and Rep. Andy Levin (D-MI) have introduced [legislation](#) to create a federally funded “containment corps” of contact tracers employed by state and local public health agencies.

The demographics of a contact-tracing workforce will likely mirror that of [community health workers](#) or Census workers, both of which tend to be predominantly people of color, women, and immigrant workers – in large part because they represent and have the trust of the communities that are undercounted and have the greatest health care needs. These are populations that often hold low-paying jobs with few workplace rights and are now experiencing unprecedented job losses – making it all the more urgent to ensure that contact-tracing jobs are high quality. By creating a high-quality public jobs program, moreover, Congress could incentivize private companies that are bringing their workers back to work to meet similar standards.

To accomplish this goal, we recommend that all publicly funded contact tracers be represented by unions by default. That is, unless workers elect to opt out of union representation, they will be represented by a union for collective bargaining purposes. Where feasible, the contact tracers should be covered by existing collective bargaining agreements currently in effect in the community health or public health sector.

Where it is not feasible for workers to default into existing union representation and collective bargaining coverage, we recommend that the following minimum standards be applied:

- *Pay workers a minimum of \$15 an hour, plus hazard pay.* Paying contact tracers a minimum of \$15 an hour, as well as hazard pay on top of that, will help these workers earn a living wage and will also contribute to the national movement for a fair minimum wage;
- *Provide health insurance.* In the midst of a pandemic, approximately [27 million people](#) have lost their employer-sponsored health insurance thus far. Especially for workers who come into close contact with infected or potentially infected people, having access to health insurance is a baseline necessity;
- *Offer access to child and dependent care.* For women who bear the brunt of caregiving responsibilities, the lack of affordable, quality childcare is a significant barrier to the labor market. Given the disproportionate job losses among women in this crisis, access to childcare is crucial in ensuring that women are able to access publicly funded jobs;
- *Offer workers paid sick days.* This crisis has highlighted the essential need for paid sick days to take time off when a worker or a worker's dependent becomes sick. [Seven in ten](#) of the lowest-wage workers lack access to this basic workplace benefit. Contact tracers are at high risk of exposure, and, if they become sick, they are likely to spread the disease further unless they have adequate paid time off;
- *Ensure adequate personal protective equipment (PPE).* Workers need personal protective equipment to keep themselves and those around them safe. Without adequate PPE, contact tracers risk becoming a conduit for the spread of the disease;

SECTION 5

PROTECT DEMOCRATIC PARTICIPATION

Recommendations:

- Make it easier for workers to register to vote and to vote by allowing same-day voter registration, online registration, and automatic voter registration;
- Allow vote by mail by any workers who want it;
- Ensure that workers can vote safely in person, including by allowing early voting; and
- Fund the US Postal Service (USPS).

Every election cycle, millions of American working people face barriers to voting. Because of the time it takes to register to vote and to cast a ballot, work schedules often make voting impossible. By making in-person voting riskier and by increasing the demands of work on many, the pandemic has heightened these barriers. To ensure that all working people, including the “essential workers” now rightly recognized as heroes, can exercise the right to vote, we recommend the following:

- *Permit same-day registration (SDR).* Allowing voters to register to vote and cast their ballot at the same time works effectively and significantly increases voter turnout. It is especially helpful for workers constrained by demanding work schedules. And, contrary to completely spurious claims, SDR does not increase “fraud.”
- *Allow online registration.* Allowing citizens to register online has proven popular, and every state ought to provide this option, including taking steps to publicize the availability of the option. Importantly, online voter registration systems must be made accessible to all Americans, which means providing an alternative for people without driver’s licenses; ensuring online registration is provided in all of the languages required by the Voting Rights Act (VRA); and making it accessible to people with disabilities.
- *Implement automatic voter registration (AVR).* AVR results in eligible Americans being registered to vote when they get or renew a driver’s license at the Department of Motor Vehicles (DMV), and in some states, when they apply for benefits at other government

agencies. This takes a huge burden off of working people who may not have the time to register otherwise. AVR is critical and would be especially effective in a year when nonprofit organizations are not able to implement their in-person registration campaigns, and it ought to be available in every state.

- *Provide voting by mail.* Experts agree that, given the pandemic, every voter should have the ability to receive and cast a ballot by mail or to deposit their ballot in a conveniently located drop box intentionally placed to guarantee inclusion of all communities.

At the very least, if a state refuses to make voting by mail available to all voters and requires an enumerated excuse, the fear of the contagion should be an acceptable excuse for voting by mail. There are a few states that actually require witnesses to an absentee ballot or notarization. For a worker under enormous pressure and anyone trying to observe social distancing, that is an unnecessary and possibly dangerous condition.

Finally, it is essential that states comply with Sections 203 and 4 of the VRA and provide all materials and the ballots in required languages other than English.

Ensuring that vote by mail systems can run effectively and not disenfranchise voters, more federal money should be made available to the states and to the USPS. It is by design that the USPS delivers mail to every corner of the US – and is the only carrier to do so. Thus, adequately funding the postal service is a critical piece of protecting our democracy during the pandemic.¹²

- *Ensure safe in-person voting.* There are, in certain circumstances, legitimate problems with vote by mail. For example, mail service may be inadequate, especially for those who live in low-income neighborhoods and for Native Americans who live on a reservation where they may not have a residential address. And, for many Americans, the act of voting in person is an important act of democratic participation, one that honors the long fight for civil rights. For these reasons, it is essential that in-person voting be available and safe. To ensure the possibility of safe, socially distanced voting, states must provide significant early voting periods with hours at night and on weekends. And in all of these in-person sites, there must be language translation where it is required.

SECTION 6

FOCUS ON THE ROLE OF STATE AND LOCAL LAW IN THE ABSENCE OF FEDERAL ACTION

A. Adapt Clean Slate Recommendations for State and Local Law Implementation

There is no part of this country that has been untouched by the pandemic. Workers in every state are suffering – a suffering that could be alleviated if they had more say in how their employers were responding to the pandemic. The best way to ensure that all the workers who need to build power are able to is to enact new federal laws that would accomplish the measures that we have outlined here.

Sadly, the urgency of the need for reform is greater than the political will to enact needed legislation in Congress. Though we hope that some of the measures in the relief legislation passed so far – including a federal paid leave plan and unemployment insurance benefits for gig workers – signal the beginning of change, workers cannot wait for Congress to act at the scale needed. And though we continue to believe that the best answer is federal labor law reform, we recommend consideration of enacting the measures outlined here at the state level.

For the vast majority of the reforms we recommend, states have unquestionable authority to act. However, with respect to our recommendations for workplace safety and health committees and for sectoral commissions, federal preemption questions might arise. As we discussed in the full Clean Slate report, the NLRA has been interpreted by the Supreme Court to have a broad preemptive effect, blocking state regulation of collective bargaining and collective action. States, however, have broad powers to protect the safety and health of their citizens. In fact, the federal OSH Act allows states to take complete control of regulating occupational safety and health, under the supervision of the federal OSHA. Several states have used these authorities to require workplace safety and health committees in some or all workplaces in their states, not unlike the workplace committees we recommend above.

The interaction between the preemptive effect of the NLRA and the power of states to protect the safety and health of their citizens is a complex and little litigated area of the law. There are many factors that would play into the resolution of that interaction, including how directly the state safety and health law trenched upon the collective bargaining process, how closely the state law hewed to matters of safety and health, who committee members are and how they are selected, and whether state funds are involved.

With that doctrinal backdrop, we encourage states to consider enacting the following recommendations in some form:

- Mandate safety stewards;
- Establish sectoral, workplace, and community safety committees;
- Implement just-cause dismissal standards;
- Provide digital disclosure of safety violations with a browser extension;
- Protect striking workers access to economic security programs;
- Protect workers from employer misuse of testing and contact-tracing information;
- Create high-quality, publicly funded jobs, including contact-tracing jobs;
- Allow same-day voter registration, online registration, and automatic voter registration;
- Permit vote by mail for any workers who want it; and
- Ensure safe in-person voting, including early voting.

B. Protect the State and Local Public-Sector Workforce

The economic crisis occasioned by the pandemic is ravaging state and local government budgets. Tax receipts have plummeted as people are earning less and spending less. In addition, state and local government expenditures are going in the opposite direction as they take on the unexpected expense of caring for millions of sick and destitute citizens. One inevitable result of state and local government deficits will be threats to the jobs of public-sector workers. These threats are a matter of concern from the perspective of labor law and building worker power. In addition to providing critical services for our communities, public-sector workers make up approximately half of all unionized workers in the country. Since the civil rights movement, women and workers of color have been employed at high rates in the public sector, and those public-sector jobs have created critical opportunities.¹³ Any weakening of public-sector unions weakens the economic viability of these communities and the labor movement overall. As we discussed in the initial Clean Slate report, the viability of the labor movement is a matter of concern for the continuing viability of our democracy. It is also a matter of concern for our increasingly urgent need to address our racial justice crisis. Thus, it is not an exaggeration to say that in this time of economic and political stress, all of us other than those at the very top have a stake in maintaining a vibrant public-sector labor movement.

CONCLUSION

Addressing the dual ravages of the pandemic and systemic racism will require sustained activism and continuous, long-term attention from policymakers. In this issue brief, we propose a set of changes to labor law that would empower workers and their communities to better address both crises. These changes are of necessity deep and broad: They would provide workers with diverse forms of voice in the workplace, new representation at the level of economic sectors, a role in how we confront unemployment, and a louder and more representative voice in our democracy. By giving workers these forms of voice and power, these legal changes would go a good distance toward ensuring that workplaces are safer and healthier; and thus that working people – and their communities – are best protected from COVID-19 as the economy reopens. They would also empower workers to demand a more equitable labor market, and a more just economy, when work resumes.

But the kind of power that these reforms aim to enable will not be limited to the workplace: As workers build power across the many contexts of their lives – from the workplace to the political system – the power they build can and will be brought to bear on broader issues as well. Primary among these are the pernicious effects of structural racism, around which the nation is finally having a reckoning.

ACKNOWLEDGEMENTS

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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END NOTES

¹ See Alexander Hertel-Fernandez et al., *Understanding the COVID-19 Workplace: Evidence From a Survey of Essential Workers*, Roosevelt Institute, 2020, <https://rooseveltinstitute.org/understanding-covid-19-workplace-survey-essential-workers-coronavirus/>.

² *Ibid.*

³ *Ibid.*

⁴ See Katelyn Burns, "The Unemployment Rate Improved in May, but Left Black Workers Behind," Vox, June 6, 2020, <https://www.vox.com/policy-and-politics/2020/6/6/21282611/black-workers-left-behind-unemployment>.

⁵ OSHA agencies might also develop streamlined reporting apps. This idea could work alongside the safety steward, with the steward helping workers make the report via the app, or by using any app as a checklist when gathering information about a problem from workers. For an example of an app in use in Washington state, called WA-HSEQ, see <http://www.lni.wa.gov/safety/GrantsPartnerships/SHIP>.

⁶ As discussed in greater detail below, to make this information as user-friendly as possible, states should also create apps or chrome extensions to notify consumers about ongoing safety strikes at businesses that they visit in real life or online.

⁷ If a mandate of this scope proves infeasible, Congress could instead require firms that receive federal assistance to establish committees.

⁸ See, e.g., *Caterpillar, Inc.*, 322 NLRB 674 (1996).

⁹ See Natasha Singer, "Employers Rush to Adopt Virus Screening," *New York Times*, May 11, 2020, <https://www.nytimes.com/2020/05/11/technology/coronavirus-worker-testing-privacy.html>; (symptom checking apps and fever screening apps may be inaccurate and violate privacy).

¹⁰ See Chris Stokel-Walker, "If You're a Remote Worker, You're Going to Be Surveilled. A Lot," Medium, April 23, 2020, <https://onezero.medium.com/if-youre-a-remote-worker-you-re-going-to-be-surveilled-a-lot-f3f8d4308ee>.

¹¹ Lee Fang, "Facebook Pitched New Tool Allowing Employers to Suppress Words Like 'Unionize' in Workplace Chat Product," *The Intercept*, June 11, 2020.

¹² We also note that the postal service employs a significant number of women and workers of color in middle-class jobs with union representation. As women and workers of color have been hit particularly hard by the economic consequences of the pandemic, preserving these jobs is a critical step in buoying these communities across the country.