Research

Sectoral Bargaining and Independent Work

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Executive Summary

- As part of President Biden's effort to promote union organizing and collective bargaining, the administration has expressed intent to explore sectoral bargaining, a system of worker organizing that allows unions to represent all workers within an industry.
- While the sectoral bargaining model is not currently used in the United States, a recent New York state legislative proposal would have allowed unions to represent all app-based ride-share and delivery drivers.
- The cost of union representation for independent workers nationwide would be at least $8.5 billion, reflecting employer-side earnings costs; the total cost could be much higher given interactions with other legislation and the effect sectoral bargaining would have on the U.S. labor force.

Introduction

In April 2021, the Biden Administration established the White House Task Force on Worker Organizing and Empowerment intended to "encourage and incentivize unionization and collective bargaining." One way to rapidly increase union representation, membership, and influence would be to institute a system of sectoral bargaining, which the administration has been exploring as an option. Sectoral bargaining is a type of collective bargaining where unions can set industry-wide terms for wages and working conditions. This system has had varying degrees of implementation and success in Europe, South America, and Canada, but is not currently established in the United States. Sectoral bargaining has started to gain traction in the United States, however, as some New York legislators and unions recently attempted to organize independent workers (specifically app-based ride-share and food delivery workers) under a sectoral bargaining framework. Massachusetts and Connecticut legislators have also been exploring sectoral bargaining within the app-based workforce.

On multiple fronts, labor advocates and labor-friendly lawmakers are trying to pull independent workers into the traditional organized labor system, most notably with worker reclassification efforts. Sectoral bargaining would largely accomplish the same goals as reclassification, increasing the number of workers in or represented by unions, but would do so in one fell swoop rather than workplace by workplace. Sectoral bargaining would accomplish this by changing the union election voting thresholds, while reclassification would make more workers eligible. While it is unclear exactly how a sectoral bargaining model would function in the United States, a move in that direction for independent workers would lead to significant costs for businesses, and by extension, their workers. This analysis estimates the cost of sectoral bargaining among independent workers nationwide to be at least $8.5 billion in additional earnings costs for businesses. This analysis does not attempt to calculate the cost of potential spillover effects such as additional benefits that could be provided to workers (health care or unemployment insurance, for example), the effect on business models such as franchises, or what costs could arise through interaction with other legislation.

Sectoral Bargaining

The United States uses a system of labor organizing based on worksite-level or enterprise bargaining. This means that wages and working conditions are negotiated on a workplace-by-workplace basis rather than for an entire industry. Legislation implementing sectoral bargaining, as opposed to enterprise bargaining, would mean labor unions could negotiate on behalf of all workers in an entire industry across employers rather than employer by employer or workplace by workplace. A sectoral bargaining system does not necessarily mean more workers organizing, rather it allows the unions to represent workers without having to persuade them to join as members.

The rationale behind promoting sectoral bargaining is that capturing an entire industry would increase union density, which would presumably give workers access to union-negotiated benefits such as employer sponsored health care and retirement savings plans, unemployment insurance, and higher wages. Proponents of this approach contend that this is a straightforward way to ensure that app-based gig workers, for example, have guaranteed access to benefits like those enjoyed by full-time salaried employees. Further, supporters of sectoral bargaining claim this type of system is the best way to organize workers and rapidly increase wages since it captures the entire industry, eliminating cheaper options for businesses.

Private-sector unionization rates have been steadily dropping in the United States (currently at 6.3 percent from its peak of 16.8 percent in 1983) while the number of independent workers and share of individuals who interact with independent work is rising. Given these trends, mandating union representation for a segment of the workforce that is dynamic, growing in influence, and does not typically fit well in the collective bargaining model would grant unions increased power and control— but likely against worker interests. Independent workers, particularly app-based workers, have a far more flexible work arrangement that allows them to easily enter and exit the workforce; this creates a weaker connection to work relative to the traditional 9-to-5 employee. The transient nature of app-based work paired with a sectoral bargaining agreement would create a situation where the unions are the permanent force and voice in negotiations, rather than the workers themselves, who may float in and out of the business. Notably, potential legal roadblocks to a state-level sectoral bargaining effort include antitrust issues as well as certain National Labor Relations Act authorities that preempt state labor law.

Efforts to implement any form of sectoral bargaining in the United States would clearly be a challenge but doing so with independent workers would be even more complicated and could act as a steppingstone to mass reclassification in addition to increased costs. The reality is that what is best for unions is not necessarily what is best for workers. Sectoral bargaining does not guarantee a better situation for workers and may in fact operate contrary to worker interests, especially when it comes to independent workers who are used to setting their own schedules and controlling their earnings. Further, under a sectoral bargaining system, less than majority support from workers would hand over bargaining authority to unions, which could easily lead to poor or unwanted representation.

New York Sectoral Bargaining

Earlier this year, some lawmakers in the state of New York proposed legislation that would have implemented a sectoral bargaining system. The legislation would have allowed app-based food delivery and ride-share workers to choose union representation. If chosen, the union could engage in sectoral bargaining with a council made up of app-based company representatives. The legislation was in part advanced due to an agreement between New York unions and certain gig-economy businesses that these gig workers would not be classified as full employees, but rather as “network drivers” who would be entitled to certain benefits.

Early on, proponents of the bill faced challenges that are inherent to the independent work sector, including the diversity of work and the difficulty in identifying the scope of the workers in the sector. Even in such a specific part of the independent workforce, New York legislators quickly found that they could not easily combine the interests and needs of ride-share and delivery drivers, so they divided these groups into two industry units. Because independent work, especially app-based work, typically has low barriers to entry, the workforce can be constantly changing; this makes it challenging to have a precise understanding of the workers' views on unionization. In response to this uncertainty, supporters of the sectoral bargaining bill created a low threshold for the bargaining units to exist. Under the New York proposal, workers would not need to be part of a formal vote on unionization. Moreover, the companies in question would be required to provide worker contact information to labor organizers. If at least 10 percent of active workers in the industry submitted letters of support for unionization, then the newly created union could speak for all workers in the industry in the state of New York. Typically, in order for the National Labor Relations Board to conduct a union election, at least 30 percent of workers must sign cards or a petition indicating interest in unionization. In order for a union to be certified, a majority of workers (who vote) must choose to be represented by the union. Only then can the union be allowed to bargain over employment terms with an employer. It is important to note that while the specific New York legislation does not require reclassification and is limited in the scope of industries it affects, its passage could have made reclassification efforts easier in the future and would have affected industries far beyond app-based gig work.

Costs

The New York legislative proposal is one of several examples of unions attempting to gain access to the independent workforce. California's AB5 (which went into effect Jan 1, 2020) and the Protecting the Right to Organize (PRO) Act (under consideration in the U.S. Congress) are legislative efforts that would push independent workers into the traditional system of worker organizing. AB5 focuses on making it harder for workers to be classified as independent workers, while the PRO Act would nationalize this change and add other provisions that would mark an overhaul of established labor law. Among other things, it would make misclassification a standalone unfair labor practice and impose heavy fines for each violation. Those fines would apply even if a company honestly, but mistakenly, classified a worker as an independent contractor. The net effect would be to intimidate companies away from contracting with independent workers.

Previous American Action Forum research found that reclassifying independent workers could cost as much as $57 billion nationwide. Unionization often leads to wage premiums for members or non-members who are represented by the union. Unionization also means increased costs for businesses that may or may not be able to absorb them. In order to estimate the cost to employers of widespread union representation of independent workers imposed by a sectoral bargaining proposal, median earnings of independent workers were identified across industries. The median earnings of independent workers was compared to that of workers in the same industries who are represented by unions. The cost estimate is based on Upwork's Freelancing in America survey, and Bureau of Labor Statistics data on unionization and median earnings. It focuses on the earnings differences of workers represented by unions and earnings of independent workers. The cost was calculated by multiplying the number of independent workers by the difference in earnings between union-represented workers and non-union workers for each industry. In total, the employer-side annual earnings cost of sectoral bargaining would be at least $8.5 billion nationwide.

Industries that would see the greatest increase in earnings-related costs include arts, design and entertainment, construction, and transportation. This is because of the concentration of independent workers in these industries in addition to differences in union represented versus non-represented pay.

Of note, the estimated cost for nationwide adoption of sectoral bargaining in the independent workforce does not account for the cost of additional employer-sponsored benefits such as health or unemployment insurance that could arise due to union negotiations. Therefore, the $8.5 billion estimate is not a comprehensive cost estimate.

Spillover Effects and Additional Costs

The total effect that sectoral bargaining could have on the economy and job market is beyond the scope of this analysis, given that it is a largely unfamiliar system in the United States, and it is unclear how it would interact with other labor-related legislation, and how workers, businesses, and industries would respond to the change.

Beyond earnings costs to hiring entities, sectoral bargaining would have several spillover effects that would likely increase overall costs. This bargaining system could create a mismatch between wages and productivity resulting in higher inflation, negative effects to productivity and innovation, higher prices for consumers, and even potential layoffs (particularly to vulnerable members of the labor force).

Even legislation such as the New York proposal that appears targets a small group of workers could affect additional parts of the labor force and multiple business models and consumers. Instacart, for example, is a relatively small segment of the independent work sector but was responsible for 92 percent of net grocery-related job creation over the pandemic and industry revenue growth of $3.5 billion. Without a flexible independent work model these gains would likely have been largely unrealized.

The potential for unrealized gains as a result of sectoral bargaining should be a serious concern. Sectoral bargaining allows the established union leaders to set wage/earning levels and additional regulations with minimal opposition. These requirements could act as barriers to entry for new companies looking to enter the industry in question, thus driving down competition and disincentivizing innovation.

One key reason that the $8.5 billion cost estimate of sectoral bargaining in the independent workforce is almost certainly an under-estimate involves its interaction with other legislative proposals (specifically those included in the PRO Act that attempt to reclassify independent workers) and the effects that large-scale unionization and reclassification would have on other industries.

The PRO Act contains several different provisions that, if passed, would drive up the costs of sectoral bargaining agreements. Changes to the joint-employer standard would also further complicate compliance and lead to greater costs in addition to threatening the entire franchise business model. The joint-employer rule determines when two or more employers are jointly responsible for the same employees. Take, for example, the relationship between a construction company and a subcontractor. If the construction company is deemed a joint employer, it would be held liable for any National Labor Relations Act violations committed by the subcontractor. This change could affect 44 percent of private-sector employees, cost up to $33.3 billion in lost output a year, and result in hundreds of thousands of job losses. Add on a sectoral bargaining agreement and suddenly contractors not only lose agency, but multiple employers are now responsible for workers they previously would have hired on as contractors. This leads to distancing behavior, meaning less support from management or more likely layoffs in an effort to avoid burdensome compliance costs. Beyond joint-employer and right-to-work there are several other labor related efforts that would drive up costs including secondary strikes (allowing unions to picket and boycott vendors, contractors, and other businesses to put pressure on the primary employer), prohibiting employers from giving workers information on unionization, and not allowing businesses to replace striking workers.

Impact on Workers

The next step beyond some kind of sectoral bargaining agreement with independent workers could be reclassification. California's AB5 provides an example of what can happen with mass reclassification on a state level. This legislation made it much harder to be classified as an independent worker, led to layoffs, individuals leaving the state, and lost flexibility and limits on earning capacity for those who did not lose their jobs. Legislating the independent workforce into nonexistence does not help workers who are voluntarily choosing to enter a rapidly expanding and dynamic segment of the U.S. labor force and have seen greater earnings as independent workers than traditional 9-to-5 workers. Further, the independent workforce brings benefits to the rest of the labor force, creating jobs and relatively easy access to earnings to individuals who need temporal flexibility such as parents of young children or those with other caregiving responsibilities. The cost of bargaining is unlikely to be fully absorbed by the hiring entity. Instead, costs likely will be passed on to both consumers, and the workers these agreements are meant to help.

When assessing the role that sectoral bargaining could play in improving the lives of U.S. workers, it is crucial to understand that the argument for promoting sectoral bargaining relies on the premise that unions consistently behave and make choices that are in the best interest of workers and offer them substantial benefits. This is not the case. Instances of corruption and outsized political activity should give pause to those who want to mandate increased union power. This is not to say that unions cannot be a positive force in the labor market. Unions have previously represented the interests of the U.S. worker; the problem is these organizations have accomplished many of their goals and the federal government now plays the role they once did through the passage of labor-related legislation. To maintain relevancy, unions might consider providing services that workers consider necessary, rather than capturing whole industries for which a traditional union is ill-suited.

Conclusion

President Biden has made clear that a priority of his administration is to incentivize and support union organizing and collective bargaining. As part of that effort, the administration plans to identify if and how the sectoral bargaining model could function in the United States. A recent proposal from New York would have created a sectoral bargaining model for app-based food delivery and ride-share drivers. This legislation follows other efforts such as widespread worker reclassification to bring the independent workforce under union influence. If independent workers across the labor market were to enter a sectoral bargaining system, the earnings differential would cost businesses at least $8.5 billion. This estimate, however, does not capture the entire effect that sectoral bargaining would have on the total costs, independent workers, or the rest of the labor force.