Workplace Monitors: A Model for Worker Safety, Rights, and Representation

REPORT BY **LINDSAY OWENS**

MAY 2021

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ABOUT CLEAN SLATE FOR WORKER POWER

Clean Slate for Worker Power is a project of Harvard Law School's Labor and Worklife Program. It is led by Professor Benjamin Sachs, Kestnbaum Professor of Labor and Industry, Harvard Law School, and Sharon Block, Executive Director, Labor and Worklife Program.

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ACKNOWLEDGMENTS

The author thanks Sharon Block and Ben Sachs for their comments and insight. The Roosevelt Institute's Sonya Gurwitt, Matt Hughes, Suzanne Kahn, and Anna N. Smith all contributed to this project.

Introduction

The negative consequences of declining unionization have been documented for some time: Workers have captured a smaller share of their productivity (Rosenfeld et al. 2016), inequality has soared (Shierholz 2020b), outsourcing has quickened, and misclassification is rampant. The data tells a clear story about the association between deunionization and economic indicators (Card et al. 2004), but doesn't tell as much about the experience of being in a workplace without representation.

When workers don't have power in their workplaces, injustices mount—injustices like finding a few dollars missing from their tips at the end of a shift, or being burned (again) by a rickety deep fryer. Last year, COVID-19 highlighted these injustices as nurses, sanitation workers, food service workers, teachers, flight attendants, and others were forced to choose between their health and their paychecks. Those who went to work frequently showed up to find that their employers had failed to provide adequate personal protective equipment, ventilation, or other protective measures needed to prevent transmission of the virus. Predictably, tens of thousands of workers have contracted COVID-19 on the job. Many of these workers have become severely ill, and thousands have died (Van Buesekom 2020; Jones 2020).

Workers' lack of voice, power, or representation in the workplace makes it difficult for them to speak out against these injustices, let alone remedy them. With only about 6 percent of private-sector workers unionized, the number of workers represented by unions must be expanded urgently (Shierholz 2020a). The current all-or-nothing approach, in which workers cannot demand safer working conditions without fear of retaliation until they first successfully navigate the National Labor Relations Act's processes to demonstrate support from a majority of their coworkers, isn't working for enough workers.

Every worker should have some form of voice or representation on the job. Although this is best achieved through participation in a union, this option won't be available to all workers in the near term. However, a range of representational structures can still facilitate democratic representation at work.

That is why Clean Slate has proposed a system of graduated rights to ensure that every worker has some form of voice or representation at work and to give workers more easily achievable steps toward building majority power (Block and Sachs n.d.). As

part of this proposal, Clean Slate has suggested creating works councils and minority unions as additional steps between workplace monitors and exclusive bargaining representatives, with the vision that each of these non-majority types of representation would allow workers to create the momentum required to eventually achieve majority status step-by-step.[1]

This paper builds out the policy details of one of Clean Slate's proposed rights—the right of workers at every single workplace in America, no matter its size, to a democratically elected workplace monitor. Already, there are successful monitor models being used in workplaces and industries throughout the country, and there is legal precedent for expanding them.

This paper will discuss existing monitor models, build out the policy design details for a universal monitor program, and consider some of the possible objections to a monitoring system. The paper concludes that this system, while no substitute for a union, would be an improvement on the status quo for workers.

[1] Clean Slate plans to address these forms of representation in future papers.

Background

Labor law reformers and policymakers in Congress should consider a system of graduated rights to lower the threshold above which workers gain voice in the workplace. Entitling workers at every single workplace—no matter the size—to a workplace monitor is a good place to start. This person would help to ensure that the workplace is in compliance with all local, state, and federal labor and employment laws.

HISTORY

The concept of workplace monitors in American labor law is not new. According to a paper by Matthew Finkin, the first monitoring legislation was enacted in 1901 in West Virginia (Finkin 2014), where the coal mining industry of the late 19th and early 20th century was rife with wage theft. Miners were commonly paid by the carload or ton of coal produced, which left ample room for companies to underpay workers by under-weighing the car.

So-called "checkweighman laws" provided miners, and any other worker whose pay was determined based on weight or measure, with a legal right to an independent monitor. The monitor, or "weighman," could check the scales and observe the coal as it was weighed. The "weighman" was paid for by the workers and appointed by a majority vote of the workers. Seventeen states still retain some form of checkweighman laws today.

CURRENT EXAMPLES

In addition to being successful throughout history, a model of workplace monitors already successfully operates in workplaces throughout the country (albeit sporadically). For example, the Coalition of Immokalee Workers (CIW), a worker-based human rights organization in Florida, has established an effective workplace monitoring system to resolve safety and pay issues for its Florida-based farmworkers. Workers have developed standards for their sector and use a system of independent monitors to enforce safety and wage theft concerns, paid for by participating retailers who purchase from CIW workers (such as Walmart, McDonald's, and Yum Brands—owner of Pizza Hut, KFC, and Taco Bell). The monitors conduct in-depth interviews with workers and managers, audit payroll and supplier records, and provide training for leaders among the crew (Greenhouse 2014). Participating suppliers also pay for a portion of the costs of training the monitors.

Health and safety standards have dramatically improved for CIW workers as a result. For example, the CIW's inspection program has ensured that each farm has a health and safety committee with worker representatives, and that there are shade tents and clean drinking water. There is also a 24-hour, bilingual hotline for workers to call if they experience labor law violations (the hotline number is printed on workers' pay stubs).

In the construction industry, the Texas-based Workers Defense Project (WDP) uses a similar model. Developers in the Better Builders program help pay the cost of on-site, independent monitors who provide safeguards for construction workers, enforce worker-developed standards, resolve wage and safety issues, and protect workers from retaliation when reporting issues.

LEGAL PRECEDENT

There is also legal precedent for workplace monitors to ensure workplace safety, and many states provide inspectors with the ability to access workplaces (Newman 2014). The federal Occupational Safety and Health Act authorizes a worker "representative" to participate in safety inspections (OSHA 2013). In the wake of COVID-19, several states and municipalities have expanded these rights; for example, Illinois has suggested employers consider designating one or more employees to be a point of contact for employees with health and safety concerns, and in Los Angeles County, workers in certain high-risk industries have been permitted to monitor their workplaces for compliance with public health orders free from retaliation (Illinois Department of Public Health n.d.; Los Angeles Daily News 2020; Coalition for Public Health Councils in LA n.d.).

Developing a workable system of workplace monitors is therefore ultimately a question of political will rather than of overcoming legal hurdles. However, there are several policy design elements that must be considered to ensure that a system of workplace monitors is workable. The design of the policy should also ensure that monitors are a stepping-stone, rather than a stumbling block, on the path to unionization.

Policy Considerations

There are several important considerations in designing a system of workplace monitors. First, the system should ensure that workers begin—and continue—to build enhanced voice on the job over time such that workplace monitors represent an initial representational structure on the way to unionization, rather than a substitute for union membership. This can be achieved, in part, through mere exposure to a more democratic form of workplace decision-making, something electing workplace monitors would represent. It is furthered by a successful monitor—someone who demonstrates leadership skills and delivers material benefits for workers. The following design details for a workplace monitors model prioritize both democratic representation and material benefits.

PURPOSE OF A MONITOR

A workplace monitor is an individual who ensures that the workplace is in compliance with all local, state, and federal employment laws. They may do this by educating workers about their rights under the law, by inspecting all areas of the workplace and pertinent company records, and by interviewing or talking to workers in a given workplace.

MONITOR SELECTION

Workplace monitors will be chosen from either inside or outside the workplace and elected by workers. There are advantages and disadvantages to internal vs. external monitors. Workplace monitors who are "home grown" and elected from within the rank-and-file would be more likely to have the trust of their fellow workers. They also would have an information advantage, since they would have workplace-specific knowledge resulting from their firsthand experience with a particular employer or workplace. However, as employees, they would also be at a disadvantage because they would be more likely to be retaliated against or even co-opted by their employer. They might also face a steeper learning curve than external monitors when getting up to speed on the rights of workers under the law.

As in the systems used by the Workers Defense Project in Texas and the Coalition of Immokalee Workers in Florida, workplace monitors chosen from outside the workplace

could be selected from worker organizations, community organizations, or other nonprofit groups. External workplace monitors could also be affiliated with traditional unions. It is critical that outside monitors have no financial relationship with the employer, as their duty would be to help protect workers. A legal right to a workplace monitor in each workplace might also create enough demand for a professionalized class of workplace monitors—similar to the burgeoning class of diversity, equity, and inclusion (DEI) consultants and professionals.

Workplace monitors from outside of organizations would be able to monitor multiple workplaces, eventually giving them a stored knowledge of common problems and the ability to spot problems quickly. Employers might view external monitors as more objective, but might also view them with mistrust (for example, as more akin to an IRS auditor). However, external monitors would be less likely to face retaliation, since the employer would have no power over the monitor, financial or otherwise.

The chart below highlights a few of the differences—including advantages and disadvantages—of both models.

Considerations for Internal vs. External Monitors

	Internal Monitor	External Monitor
Reporting	Workers may find it easier to report concerns to a monitor they already know and trust	Workers may find it easier to report sensitive information to a "third party" (more akin to a whistleblower complaint)
Objectivity	Management may regard a workplace monitor from their staff as oppositional, and therefore not objective	Management and the courts may be more likely to view an external monitor as objective
Access	Workers have de facto access to relevant information about the practices in the workplace by virtue of their firsthand experience, but would still need guaranteed access to pertinent documents	Monitor would need legally guaranteed access to pertinent information in the workplace
Retaliation	Likelihood of retaliation by employer is high	No real potential for retaliation by employer given that the monitor has no relationship to the employer
Expertise	Monitors would have tacit, specific, and firsthand expertise	Monitors would have general and professional expertise
Cost	Paid time off for training and monitoring	Wages for the monitor

MONITOR TRAINING

In order to be successful, monitors would need to be trained in local, state, and federal labor and employment law. Employers would be required to provide paid time off for training for internal monitors. External monitors would not require time off from the employer, but would still need extensive training.

To ensure that training is adequate and successful, the Department of Labor would publish guidance outlining training requirements for monitors upon enactment of the requirement that workplaces elect workplace monitors.

GUIDELINES FOR SUCCESS

Any successful workplace monitor model must do two things: increase democratic participation for workers and deliver material benefits. The following policy suggestions are designed with those twin goals in mind.

Facilitating Democratic Representation

Employees of every workplace should have the right to democratically elect a workplace monitor, using a simple majority election, to assist in enforcing existing labor standards. If workers choose to elect an external monitor, the organization representing the monitor (union, worker organization, community center, or other nonprofit) should be granted access to a list of employees (their email addresses, cell phone numbers, work schedules, and locations) in the workplace to facilitate a speedy election and to minimize interference on the part of the employer in the election proceedings.

The election of a workplace monitor will ensure that all workers who care to participate in an election have a say in who will represent their interests as a monitor. To the extent that the monitor is able to improve their working conditions or protect them from labor violations, they will have played a role in procuring this benefit through their participation in the election. The election of a workplace monitor may also help to demonstrate the benefits of collective action in the workplace.

Monitors should have term limits and be elected annually, giving workers an opportunity to choose a new monitor if the current monitor is not effective. This would also give workers the opportunity to swap an internal monitor for an external monitor, and vice versa.

Delivering Material Benefits

While negotiating a contract for wages, benefits, and working conditions is a core part of what unions do for their members, they also help workers with a host of "everyday" tasks such as enforcing labor and employment laws. As unions have declined, workplaces have fissured and issues like wage theft and other forms of employer exploitation have proliferated.

At minimum, an adequately resourced system of workplace monitors could identify and document illegal actions by employers. If workplace monitors have access to the worksite and key financial documents, or are able to secure other information about the employer's practices, they could facilitate the identification of wage and hour violations, pay disparities, workplace health or safety violations, and other labor and employment issues directly. They could also assist workers in filing complaints with governmental and nongovernmental enforcement entities.

Monitors could also facilitate the discovery of labor law violations indirectly—for example, if workers learn from monitors about their legal rights and then file complaints with formal governing bodies at the local, state, or federal level, or raise complaints with unions, worker organizations, or nongovernmental entities that may be able to pursue formal remedies on the workers' behalf.

To ensure that workplace monitors are successful in their role, the law should grant workplace monitors access to:

- The worksite;
- Workers, for interviews and to receive complaints;
- Managers and supervisors, for interviews;
- The contact information for all workers at the worksite, for elections and other communication;
- Workplace safety records and any company documentation of compliance with safety laws;
- Aggregate or de-identified salary and wage documents; and
- Company financial disclosures.

Once a monitor has access to these documents, facilities, and individuals, they may uncover problems. As they work to resolve these problems, they may worry about retaliation from the employer—this is particularly true for internal monitors. Therefore, the law should also grant workplace monitors the right to:

- Accompany any government inspector entering the workplace (the government inspector must contact the workplace monitor and allow the monitor to accompany the inspector on their rounds);
- Have a union or worker organization representative accompany them in their workplace investigations;
- Have a union or worker organization representative accompany them to meetings with the employer to resolve any perceived problems;
- Work alongside or seek counsel from a union, worker organization, or other entity that can help the monitor carry out their work; and
- Seek assistance from state, local, and federal government agencies who may be able to assist them in carrying out their work.

Additionally, to ensure that monitors do not face retaliation, they should be granted the following key protections.

Protection for Monitors

Monitors should be protected from employer retaliation through the implementation of:

- A just cause standard for all dismissals;
- A private right of action;
- The right to a quick reinstatement pending the outcome of a challenge of discharge; and
- A fast adjudication process, with a possible labor court.[2]

[2] For more information, see: Block, Sharon, and Benjamin Sachs. n.d. *Clean Slate for Worker Power: Building a Just Economy and Democracy*. Cambridge, MA: Clean Slate for Worker Power. https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984ea6a72a806b_CleanSlate_SinglePages_ForWeb_noemptyspace.pdf.

Relationship to Unions with Exclusive Representation Rights

To ensure that a system of workplace monitors can facilitate unionization, workplace monitors should be connected to existing unions, where possible. Partnering with unions will both allow monitors to bring union experience and expertise to a monitoring program and buttress them with some of the weight of a larger organization.

Ensuring that monitors can be integrated into or affiliated with unions right out of the gate will help facilitate Clean Slate's vision of non-majority types of representation, like workplace monitors, enabling workers to create the momentum needed to ultimately achieve majority status. At worksites where there is no existing exclusive bargaining union, this may mean having external monitors hail from unions or having internal monitors trained and supported by them.

Once an exclusive bargaining union is in place at a worksite, the union would take on the role of workplace representative or monitor. At that point, the union could decide to maintain an official monitor position, charged with monitoring compliance with employment and labor law, alongside a union representative or steward who monitors contract compliance enforcement and handles disputes. Alternatively, the union could replace the monitor with a single representative who oversees contract compliance, handles disputes, and monitors employment and labor law.

Possible Objections

A graduated system of labor rights, beginning with an automatic right to a workplace monitor at workplaces of all sizes, could be a significant benefit to the millions of workplaces nationwide with no formal representational structures of any kind. If monitors are successful, they may well be a first step toward building the political will among workers to form a union. They will be proof of the benefits a union could provide—no small feat in an environment where unions are incredibly rare.

That said, monitors are no replacement for unions, whose structure, organization, and legal standing provide a much more robust platform for advocating for wages, benefits, working conditions, and protections on behalf of workers. Critics may worry that the presence of workplace monitors may crowd out or diminish enthusiasm for larger union drives. This is unlikely given that a monitor's influence will be relatively limited—both by their manpower (most workplaces would only have one monitor and many workplaces will have only a part-time, external monitor) as well as by their reach (they would not have the full suite of rights conferred to unions). A very effective monitor is therefore more likely to lay the groundwork for a union rather than crowd one out. Further, monitors will and should exist within a larger system of works councils, public- and private-sector unions, enterprise-level bargaining units, and sectoral-level bargaining, as proposed by the Clean Slate Initiative.

Another concern about monitors is that they will not have enough power to make real change and therefore may look (or be) weak or ineffective. This is a valid concern, and internal workplace monitors in particular would be vulnerable to capture or retaliation. The best guard against this, short of using external monitors, is to ensure that internal workplace monitors are well-connected to support from unions, worker organizations, and other nonprofit or community groups that can assist them with their work. Another guard against an ineffective monitor is a robust training program, as referenced earlier in this paper. Strong protections from retaliation, including protection from dismissal, will also ensure that internal monitors are effective.

A final concern is that monitors will be too easily co-opted by management, effectively becoming just another human resources department employee who purports to work on behalf of employees but still ultimately reports to management. This is a concern for both internal and external monitors. To avoid this issue, external monitors should

have no financial relationship with employers or workplaces of any kind. They should be funded by the employees themselves, through an external entity like a worker organization, or through some combination thereof. There should be no conflicts of interest that provide the existence or appearance of an external monitor working on behalf of an employer.

Democratic elections are also a strong accountability mechanism for monitors and one way to protect against capture. If an internal monitor is determined to be working more for an employer than for their fellow workers, they should be voted out in the subsequent election.

A system of monitors will come with challenges, but even an imperfect monitoring system that provides benefits to workers nationwide—even if unevenly—is still an improvement upon the status quo. The perfect should not be the enemy of the good when constructing labor law reforms. Building worker power, even if brick by brick, monitor by monitor, has to start somewhere. For some workplaces, a union may simply be too high a threshold at the current moment, while a system of workplace monitors is more feasible.

Conclusion

West Virginian coal miners at the turn of the 20th century demonstrated the benefits of implementing a system of "proto" workplace monitors to ensure that they were being paid fairly for their work. This early system of checkweighmen provided for democratically elected external monitors who could curtail wage theft. This elegant historical model is a blueprint for a nationwide system of monitors for all industries.

Workplace monitors will not be a panacea. However, they will enhance the job quality and livelihoods of some of the tens of millions of workers with no voice on the job. Entitling all workplaces, no matter the size, to a workplace monitor will provide an initial form of representation for workers. For many workers, an elected workplace monitor may be their first encounter with a form of democracy in the workplace or the first time they have any say about their working conditions. In this way, monitors can serve as a stepping-stone to additional forms of democratic workplace systems, such as unions.

The benefits of enhanced voice and democratic representation will be clearest if monitors are able to deliver tangible and immediate material benefits. If workers can see how these forms of representation benefit them, they will be more likely to fight for greater forms of representation, including unions, going forward. In this way, monitors can facilitate worker engagement and empower workers to participate in democratic decision-making at lower thresholds, building toward a more robust system of representation rights over time.

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