Labor Activity in Health Care

SEMI-ANNUAL REPORT

January 1st, 2015 to December 31st, 2015

46

PRESENTED BY

ASHHRA
THE HUMAN SIDE OF HEALTHCARE

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About This Report

As the authoritative resource for health care industry human resource professionals, ASHHRA provides its members with important and timely information about labor activity.

The *46th Semi-Annual ASHHRA/IRI Labor Activity in Health Care Report* includes the following:

- An analysis of national, regional and state representation petitions and elections (RC, RD and RM) as reported by the National Labor Relations Board (NLRB) during 2014 and 2015.
- The *Labor Law/Activity Update*. Articles written by labor experts about relevant and timely labor issues impacting employers and the workplace.

LETTER FROM JAMES G. TRIVISONNO

Some of the most defining changes for the industry in recent memory were implemented by the National Labor Relations Board (NLRB) in 2015, and already we have experienced the repercussions of these unprecedented rulings.

The expedited election ruling was implemented in April 2015. As predicted, the ruling has reduced the average number of days from petition to election (now 25 days, down 1.6 days from the previous year data). Months later, in August 2015, we witnessed the Board's general counsel approve the immediate use of electronic signatures as an employee's showing of support for union representation.

Employers should be aware of how this change has escalated a union's ability to gather employee signatures, using smartphones or tablets on the unit floors, and/or sending a hyperlink of an electronic authorization card via text, email or social media.

The joint employer standard also has had noticeable effects on the industry in its short, yet impactful, existence (adopted August 27, 2015). The standard already has impacted union organizing, such as Browning-Ferris Industries of California, LLC. The standard currently faces judicial review in a case before the U.S. Court of Appeals for the District of Columbia; although, it is not likely the case will be adjudicated before year-end.

Undoubtedly, actions by the NLRB over the last several years have created an unequal playing field in the labor environment, tipping the scales in favor of a union's ability to organize.[1] However, labor law experts question whether the actions of the last eight years will hold up post-election.

More so, the vacancy left on the Supreme Court by the untimely passing of Justice Antonin Scalia upheld a lower court decision[2] requiring non-members of public employee unions to pay "agency fees." The tied-vote by the Court does not set precedent on the issue, and there is a chance the case may be reheard once the ninth seat is filled, which likely will not occur before the general election this fall.

The next U.S. president will almost certainly be tasked with appointing a new Supreme Court Justice as well as filling two vacancies on the NLRB. The outcome of this election will play a significant role in deciding the future of labor policy.

In the meantime, I encourage employers to consider a proactive approach to their labor relations strategy. Given the present state of the labor environment, your advantage in mitigating union activity is playing offense rather than being caught unprepared if a union files a petition.

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[1] T. Noah, B. Mahoney (2015, September 1); "Obama labor board flexes its muscles" *POLITICO;* *http://www.politico.com/story/2015/09/unions-barack-obama-labor-board-victories-213204*

[2] Friedrichs vs. California Teachers Association

Please contact ASHHRA at ashhra@aha.org or IRI Consultants at bmyers@iriconsultants.com with any questions about this report or how to prepare your organization.

Sincerely,

James G. Trivisonno
President, IRI Consultants
At-Large Member, ASHHRA Advocacy Committee

INTRODUCTION

In comparison to the last 10 years, unions recorded an "above average" year in 2015 for elections that resulted in union representation of health care workers, prevailing in 75 percent of the 257 elections held last year. Inversely, unions were less successful in defending against decertification elections compared to the past decade. The Service Employees International Union (SEIU) again was the most active in organizing employees in the health care sector. It filed 139 petitions and was involved in nearly half of the total health care representation case (RC) elections held in 2015.

The United Food and Commercial Workers (UFCW), the International Brotherhood of Teamsters (IBT), and the International Union of Journeymen and Allied Trades (IUJAT) also were among the top most-active unions in the health care sector. While SEIU and UFCW remained consistent with the number of elections won in 2015 compared to the previous year, IBT was elected in less than half of the employee elections in which they were involved. The Office and Professional Employees International Union (OPEIU) and International Union of Journeyman and Allied Trades (IUJAT) were the two most successful unions in health care with their respective elections.

Despite the quantitative majority of activity from these national unions, the Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) had the largest growth rate of petitions filed between 2014 and 2015 (88 percent increase). PASNAP, a state nurses union that also represents technical and professional employees, disaffiliated from National Nurses United (NNU) in 2015 but appears to have learned many organizing strategies and tactics during its NNU affiliation. Pennsylvania was among the top six states for union activity in 2015. PASNAP continued to be active in the early months of 2016, succeeding in six RC elections that enabled it to organize nearly 3,000 nurses and technical employees, significantly bolstering its annual revenue.

The NLRB's new expedited election rules took effect in April 2015. On average, the number of days from petition to election has dropped to 25 days (a 1.6-day decline from 2014). The fewest number of days to election recorded was 10, while the majority of elections were held 21 to 30 days after a petition was filed.

Another noticeable differential since the expedited election rules took effect was in regard to the volume of petitions filed per unit size. While petitions filed for units of more than 100 employees decreased by 28 percent, for the time period of April 14 to December 31, there was a 20 percent increase in petitions filed for units of 11 to 25 employees, signaling that unions are turning to specialty health care to organize micro-units.

More stability is expected the longer the rules are in effect; however, the outcome of the November 2016 election could have real impact on the future of labor laws and regulation. The next president will be tasked with appointing a Supreme Court Justice to fill the seat left by the untimely passing of Justice Antonin Scalia. In addition, the next administration will need to appoint two board members to fill the soon-to-be two vacancies on the NLRB.

Employers should be privy to the affects of the current rules and stay informed of potential changes in the industry. This report provides data about union organizing for employers to understand the trends and best prepare for future union organizing efforts.

EXECUTIVE SUMMARY

NLRB REPRESENTATION PETITIONS AND ELECTIONS[3,4]

In 2015, there were 257 representation elections held in health care, and unions were elected as a result of 75 percent of these. There were just 31 decertification elections held and unions maintained recognition as a result of just 39 percent of elections held.

The majority of organizing activity in health care occurred in just six states—New York, California, Michigan, Pennsylvania, Washington and New Jersey.

The Service Employees International Union (SEIU) continues to be the dominant organizing union in the health care industry. In 2015, the SEIU accounted for 45 percent of representation petitions filed and 48 percent of representation elections held. They were elected as a result of 79 percent of elections held—above the industry average.

In the past decade, over half of U.S. states have not seen a strike in health care, while California has had more than seven times the number of strikes as the next highest state—Connecticut.

Since the expedited election ruling went into effect, the average number of days from petition to election has decreased to 25 days. In addition, the number of small unit elections (11 to 25 employees) has increased by 20 percent, while the number of large unit elections (more than 100) has decreased by 28 percent.

[3] See Appendix D for detailed definitions of the types of representation petitions and elections.

[4] NLRB election data describes dynamic case activity that is subject to revision and corrections during the course of the year, and all data should be interpreted with that understanding.

UNION MEMBERSHIP NATIONWIDE

According to the Department of Labor (DOL) Bureau of Labor Statistics' *Union Membership 2015* report, the percentage of unionized wage and salary employees remained at 11.1, while the number of unionized workers increased slightly from 14.6 to 14.8 million workers.

Data from the DOL report includes the following highlights:

- The number of *private sector* employees belonging to a union (7.6 million) remains greater than the number of *public sector* employees belonging to a union (7.2 million)
- *Public sector* employees were more than five times as likely as *private sector* workers to be members of a union (35.2 percent vs. 6.7 percent, respectively)
- Black workers continued to have the highest union membership rate in 2015 (13.6 percent), followed by Whites (10.8 percent), Asians (9.8 percent), and Hispanics (9.4 percent)
- The highest union membership rate is among men aged 55 to 64 (14.8 percent), while the lowest is among women aged 16-24 (3.5 percent)
- New York continues to have the highest union membership rates (24.7 percent); South Carolina has the lowest rates (2.1 percent)
- Union membership rates increased in 24 states and the District of Columbia, decreased in 23 states and remained unchanged in three states
- Approximately half of all union members live in just seven states: California, New York, Illinois, Pennsylvania, Michigan, Ohio and New Jersey

UNION MEMBERSHIP RATE SUMMARY

Source: BLS Union Membership 2015

Figure 1

NATIONAL LABOR RELATIONS BOARD PETITION AND ELECTION RESULTS

This section includes the following:

National Summaries

- Comparison of Health Care versus all non-Health Care representation (RC) election results
- Comparison of Health Care versus all non-Health Care decertification (RD & RM) results
- Health Care Sector – Overview of Elections
- Health Care Sector – Union Successes in Representation (RC) Elections

State Summaries

- Most Active States – RC Petitions Filed
- All States – RC Petitions Filed
- Most Active States – RC Election Results
- All States – RC Election Results

Union Summaries

- Most Active Unions – RC Petitions Filed
- Most Active Unions – RC Elections Held
- Union Success Rates – RC Election Results

Regional Summaries

- RC petitions and elections in ASHHRA regions

Strikes in Health Care

- Strikes Held by Year in Health Care

Expedited Elections

- RC Petitions Filed
- RC Elections Held

National Summaries

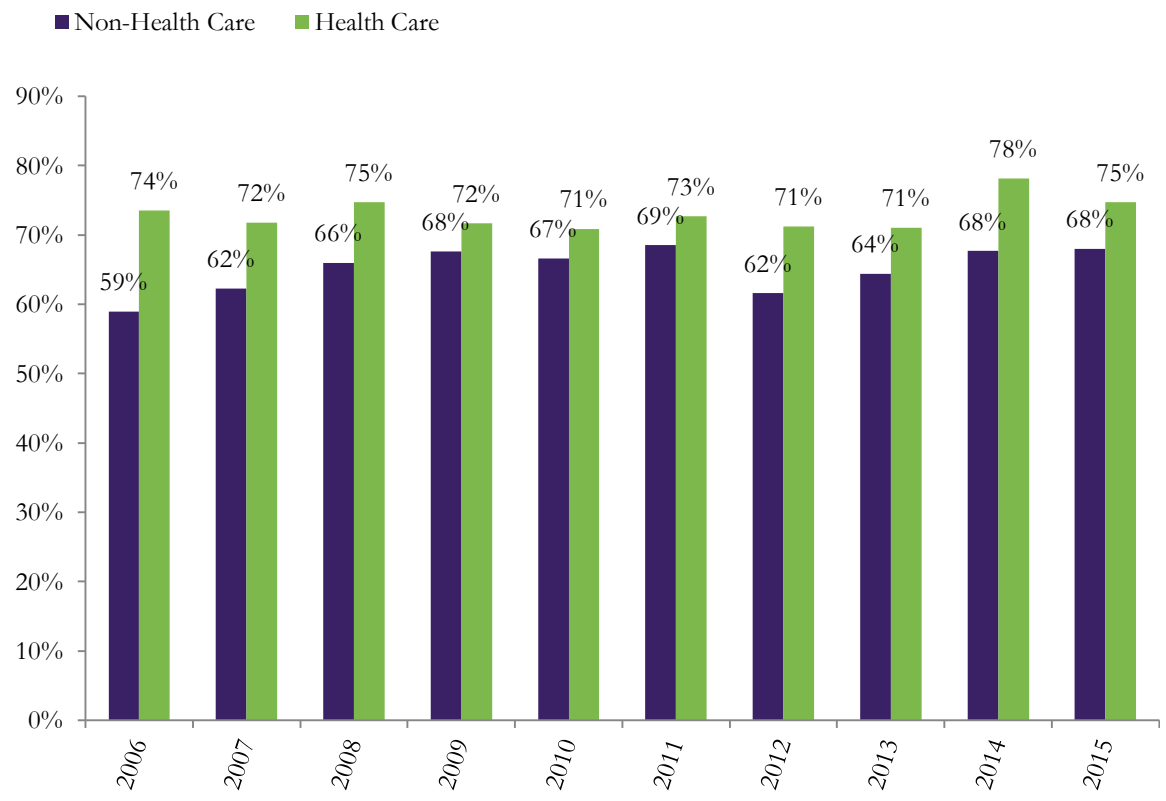
The following information summarizes representation petition activity and elections held during the past decade as reported by the National Labor Relations Board (NLRB).

Health Care vs. All Non-Health Care Sectors Comparison

Unions have experienced consistently higher rates of successful organizing in the health care sector than in other sectors. In 2015, unions were elected in 75 percent of RC elections held in the health care sector compared to 68 percent in non-health care.

Comparison of Union Successes in Representation (RC) Elections

Health Care vs. Non-Health Care Sectors (2006 - 2015)



Source: LRI Management Services, Inc.

Figure 2

Over the past decade, unions have typically been more successful defending against decertification elections in the health care sector vs. other sectors. The gap has decreased the past two years, and in 2015, unions maintained recognition in just 39 percent of decertification elections held-both in the health care sector and in other sectors.

COMPARISON OF UNION PREVENTION OF DECERTIFICATION (RD & RM)

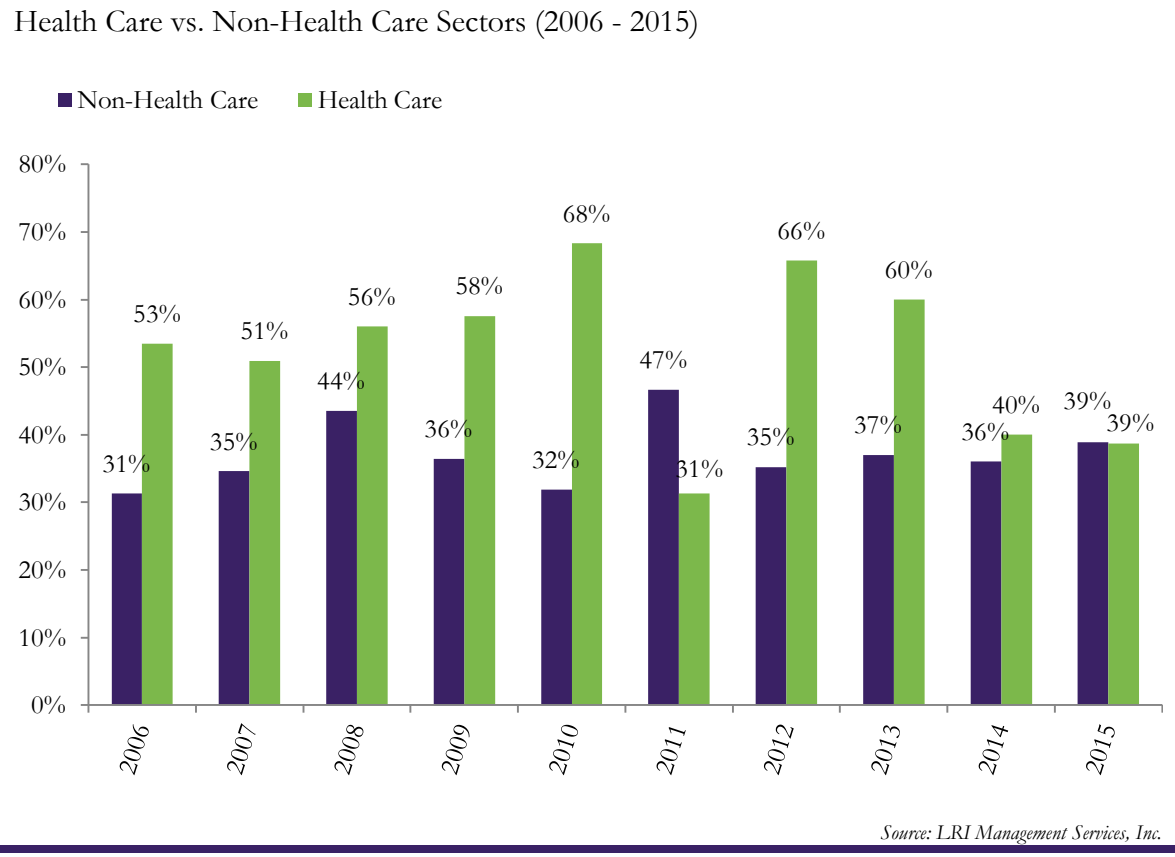
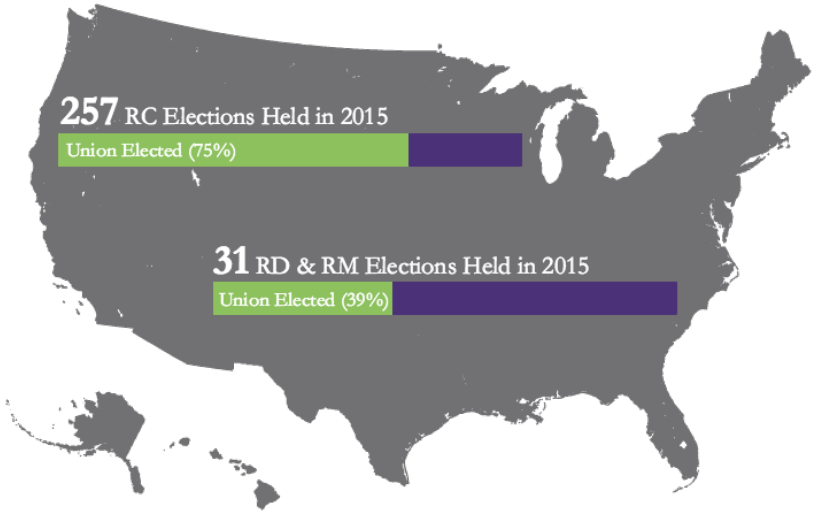


Figure 3

HEALTH CARE SECTOR - ELECTIONS OVERVIEW

In 2015, there were 257 representation (RC) elections held in the health care sector, and unions were elected in 75 percent of these. There also were 31 decertification (RD & RM) elections held during 2015, and unions maintained recognition in 39 percent of these.

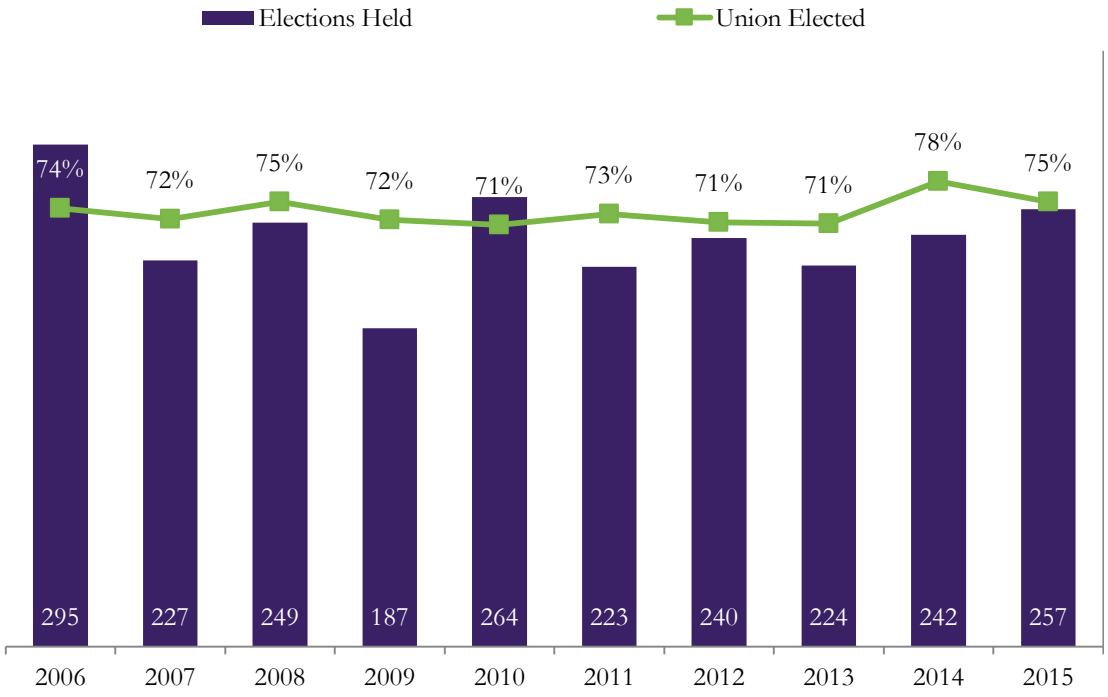


Health Care Sector - Union Successes In Representation (RC) Elections

Unions were elected in 75 percent of the 257 representation elections held in 2015. This is above average for the past decade.

Union Successes in Representation (RC) Elections Compared to Number of Elections Held

Health Care Sector (2006 - 2015)



Source: LRI Management Services, Inc.

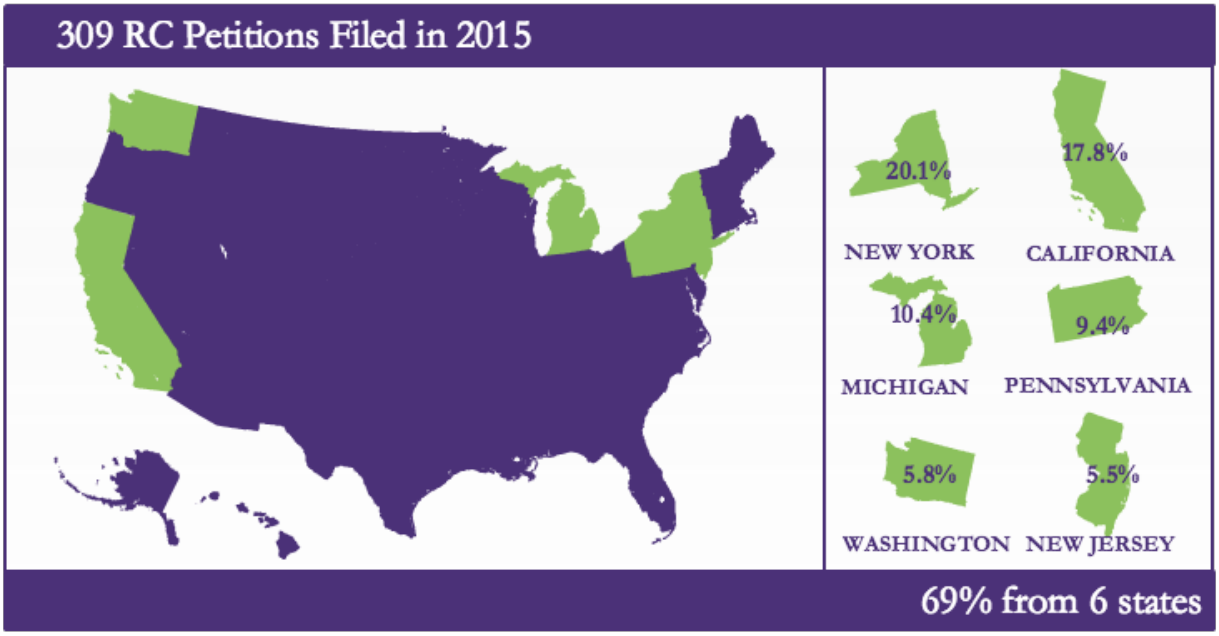
Figure 4

State Summaries

This section provides an analysis of state-level organizing activity in the health care sector and is based on RC petitions filed and RC elections held. The data includes all reported petitions and elections for 2015 at the time of publication.

Most Active States- Representation (RC) Petitions Filed in Health Care

The majority of representation petitions filed in 2015 were filed in just six states. Nearly 70 percent of the representation petitions filed were in New York, California, Michigan, Pennsylvania, Washington and New Jersey.



All States – Representation (RC) Petitions Filed in Health Care

The table below illustrates the number of petitions filed in each state in 2014 and 2015.

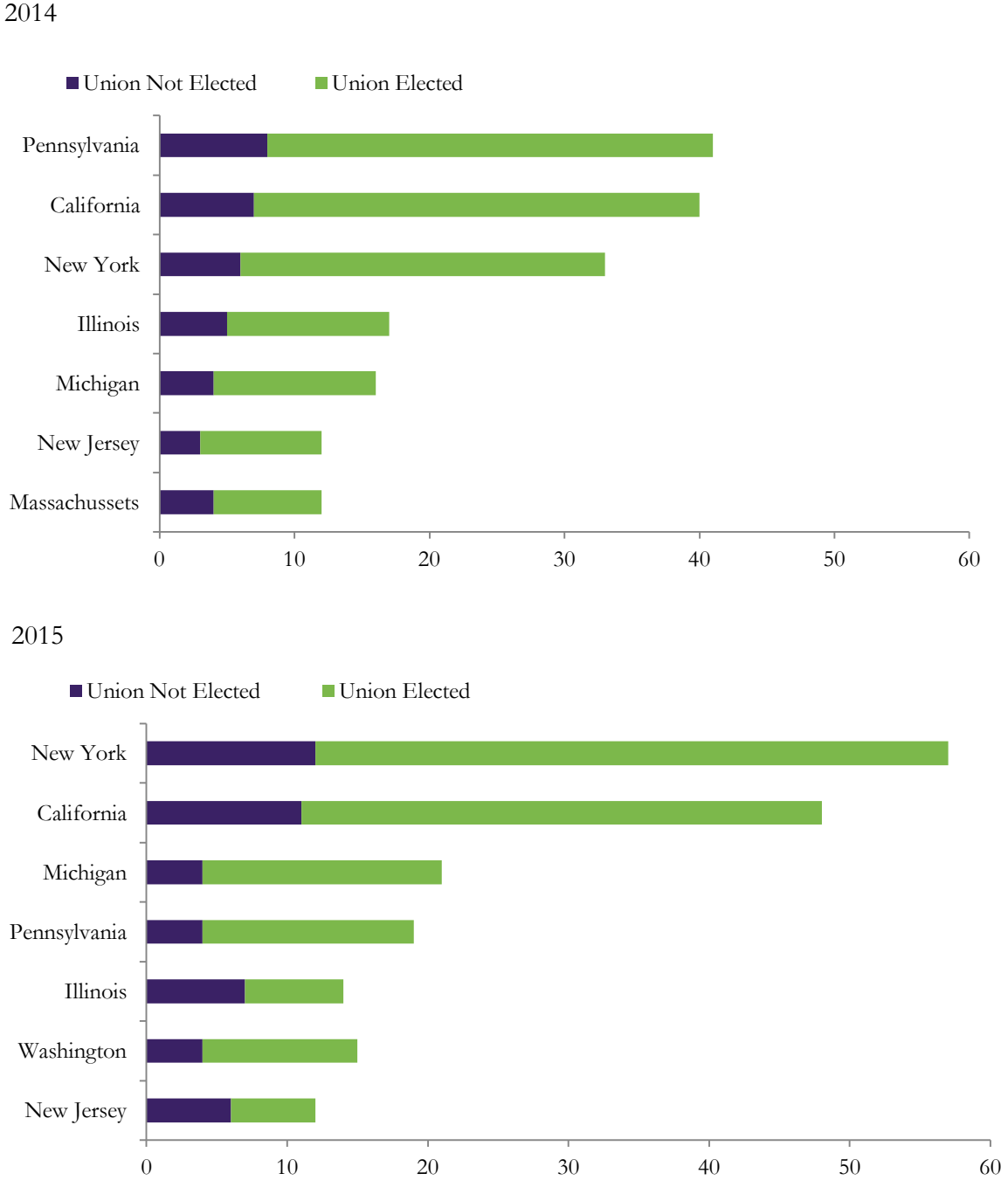
State	2014	2015	State	2014	2015	State	2014	2015
Alabama	4	2	**Iowa**	-	1	**New York**	59	62
Alaska	2	-	**Kansas**	-	1	**Ohio**	6	5
Arizona	2	-	**Kentucky**	2	-	**Oklahoma**	-	1
Arkansas	1	1	**Maine**	1	-	**Oregon**	9	6
California	58	55	**Maryland**	-	5	**Pennsylvania**	50	29
Colorado	1	-	**Massachusetts**	16	8	**Puerto Rico**	7	13
Connecticut	13	11	**Michigan**	23	32	**Rhode Island**	3	2
DC	2	2	**Minnesota**	7	11	**South Carolina**	2	1
Delaware	-	1	**Mississippi**	3	1	**Utah**	1	-
Florida	5	2	**Missouri**	7	3	**Vermont**	1	-
Georgia	-	2	**Montana**	4	1	**Washington**	13	18
Hawaii	3	1	**Nevada**	1	1	**Wisconsin**	1	-
Illinois	31	9	**New Jersey**	14	17	**West Virginia**	-	1
Indiana	5	2	**New Mexico**	1	-	**Wyoming**	-	2
						Total	**358**	**309**

Note: A state is not listed in the table if no RC petitions were filed in 2014 or 2015.

Most Active States- Representation (RC) Election Results in Health Care

In 2014, Pennsylvania, California and New York experienced the most representation elections in health care. In 2015, the top three states were New York, California and Michigan.

Most Active States - RC Election Results in Health Care



Source: LRI Management Services, Inc.

Figure 5

All States - Representation (RC) Election Results in Health Care

The following table depicts the number of representation elections held in each state in the health care sector in 2014 and 2015.

State	2014					2015				
	Total Elections	Union Elected		Union Not Elected		Total Elections	Union Elected		Union Not Elected	
		Total	% of Elections	Total	% of Elections		Total	% of Elections	Total	% of Elections
Alabama	2	1	50%	1	50%	-	-	-	-	-
Alaska	3	1	33%	2	67%	-	-	-	-	-
Arizona	1	1	100%	0	0%	-	-	-	-	-
Arkansas	1	0	0%	1	100%	1	0	0%	1	100%
California	41	34	83%	7	17%	50*	37	74%	11	22%
Colorado	1	0	0%	1	100%	-	-	-	-	-
Connecticut	8	8	100%	0	0%	6	5	83%	1	17%
District of Columbia	1	1	100%	0	0%	2	2	100%	0	0%
Delaware	-	-	-	-	-	1	1	100%	0	0%
Florida	4	4	100%	0	0%	2	2	100%	0	0%
Georgia	-	-	-	-	-	1	1	100%	0	0%
Hawaii	1	1	100%	0	0%	1	1	100%	0	0%
Illinois	16	11	69%	5	31%	15*	7	47%	7	47%
Indiana	3	2	67%	1	33%	3	2	67%	1	33%
Kansas	-	-	-	-	-	1	1	100%	0	0%
Kentucky	3	2	67%	1	33%	-	-	-	-	-
Maine	1	1	100%	0	0%	-	-	-	-	-
Maryland	-	-	-	-	-	4	3	75%	1	25%
Massachusetts	12	8	67%	4	33%	10	10	100%	0	0%
Michigan	16	12	75%	4	25%	21	17	81%	4	19%
Minnesota	5	5	100%	0	0%	9*	7	78%	1	11%
Mississippi	3	3	100%	0	0%	1	1	100%	0	0%
Missouri	3	3	100%	0	0%	2	1	50%	1	50%
Montana	1	1	100%	0	0%	1	1	100%	0	0%
Nevada	1	0	0%	1	100%	-	-	-	-	-
New Jersey	12	9	75%	3	25%	12	6	50%	6	50%
New Mexico	1	1	100%	0	0%	-	-	-	-	-
New York	34*	27	77%	6	17%	57	45	79%	12	21%
Ohio	3	2	67%	1	33%	3	0	0%	3	100%
Oklahoma	-	-	-	-	-	1	1	100%	0	0%
Oregon	9	6	67%	3	33%	5	4	80%	1	20%
Pennsylvania	40	32	80%	8	20%	19	15	79%	4	21%
Puerto Rico	5	3	60%	2	40%	9	8	89%	1	11%
Rhode Island	-	-	-	-	-	2	2	100%	0	0%
South Carolina	1	1	100%	0	0%	1	1	100%	0	0%
Washington	8	7	88%	1	13%	15	11	73%	4	27%
Wisconsin	2	1	50%	1	50%	-	-	-	-	-
Wyoming	-	-	-	-	-	2	0	0%	2	100%
Total	**242**	**188**	78%	**53**	22%	**257**	**192**	75%	**61**	24%

Note: A state is not listed in the table if no RC elections were held in 2014 or 2015.

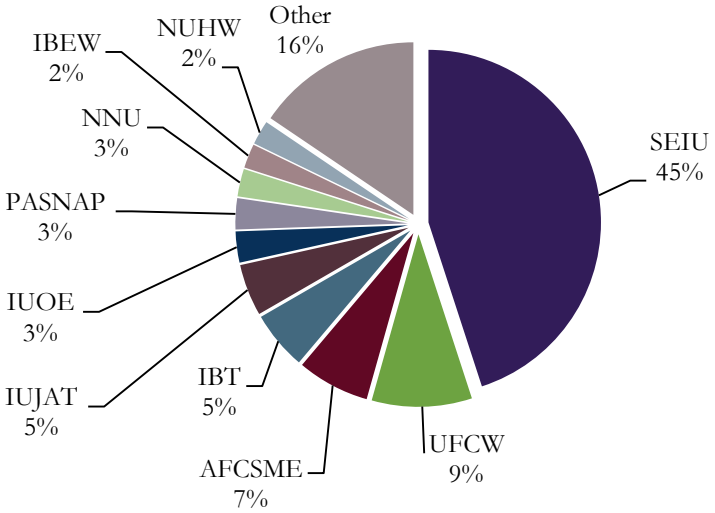
*Results pending for one or more elections at time of publication, therefore results totals do not add up to 100%.

Union Summaries

Most Active Unions - Representation (RC) Petitions Filed in Health Care 2015

The Service Employees International Union (SEIU) has once again filed more representation petitions than any other union in the health care sector—nearly half of all petitions filed in 2015.

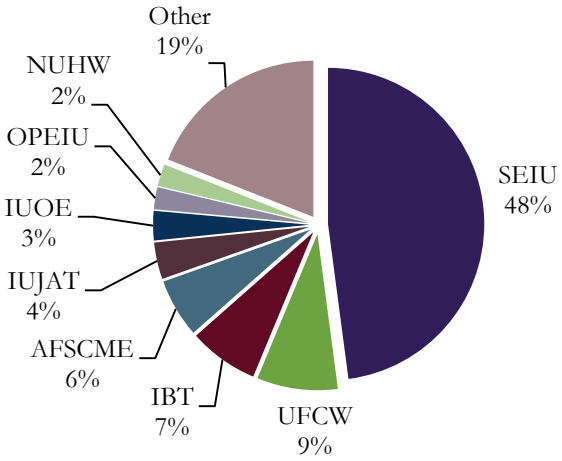
The following table details the number of representation petitions filed by the most active unions in health care in 2015.



Abbreviation	Union Name	RC Petitions Filed	
		2014	2015
SEIU	Service Employees International Union	157	139
UFCW	United Food and Commercial Workers	24	29
IBT	International Brotherhood of Teamsters	37	17
IUJAT	International Union of Journeymen and Allied Trades	12	15
AFSCME	American Federation of State, County and Municipal Employees	35	10
IUOE	International Union of Operating Engineers	6	9
PASNAP	Pennsylvania Association of Staff Nurses and Allied Professionals	1	9
NNU	National Nurses United	10	8
NUHW	National Union of Healthcare Workers	6	7
IBEW	International Brotherhood of Electrical Workers	3	7

Most Active Unions - Representation (RC) Elections Held in Health Care 2015

As expected, SEIU was also involved in more representation elections than any other union in the health care sector. They were involved in 126 elections in 2015 and elected in 79 percent of them.



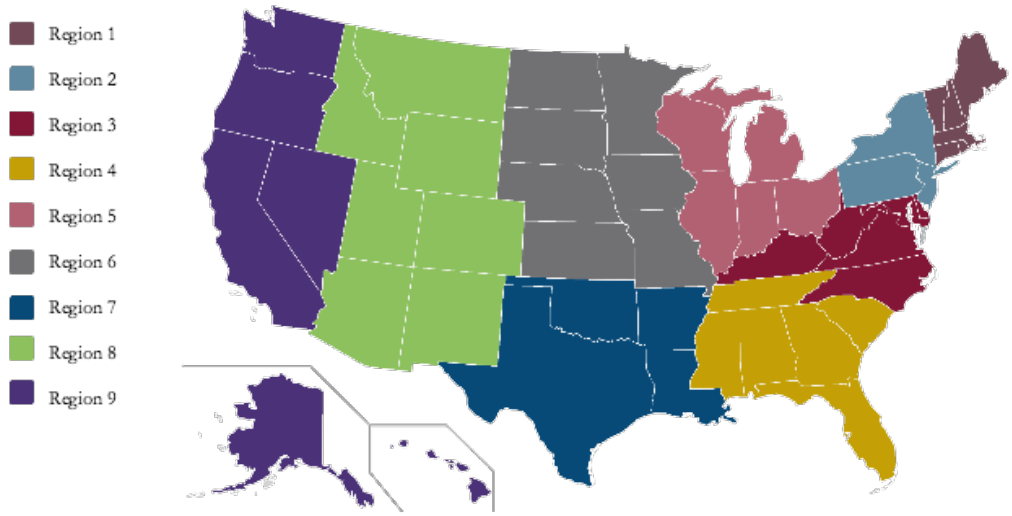
Abbreviation	Union Name	RC Elections Held	
		2014	2015
SEIU	Service Employees International Union	110	126
UFCW	United Food and Commercial Workers	13	22
IBT	International Brotherhood of Teamsters	19	19
AFSCME	American Federation of State, County and Municipal Employees	29	16
IUJAT	Journeymen and Allied Trades	11	10
IUOE	International Union of Operating Engineers	4	8
OPEIU	Office and Professional Employees	3	6
NUHW	National Union of Healthcare Workers	5	6

Most Active Unions- Representation (RC) Election Results

	2014			2015		
	Total Elections	Union Elected %	Union Not Elected %	Total Elections	Union Elected %	Union Not Elected %
SEIU	110	75%	21%	126	79%	19%
UFCW	13	77%	15%	22	77%	14%
IBT	19	74%	26%	19	42%	47%
AFSCME	29	76%	21%	16	63%	31%
IUJAT	11	91%	9%	10	90%	10%
IUOE	4	75%	25%	8	88%	13%
OPEIU	3	67%	33%	6	100%	0%
NUHW	5	80%	20%	6	50%	33%

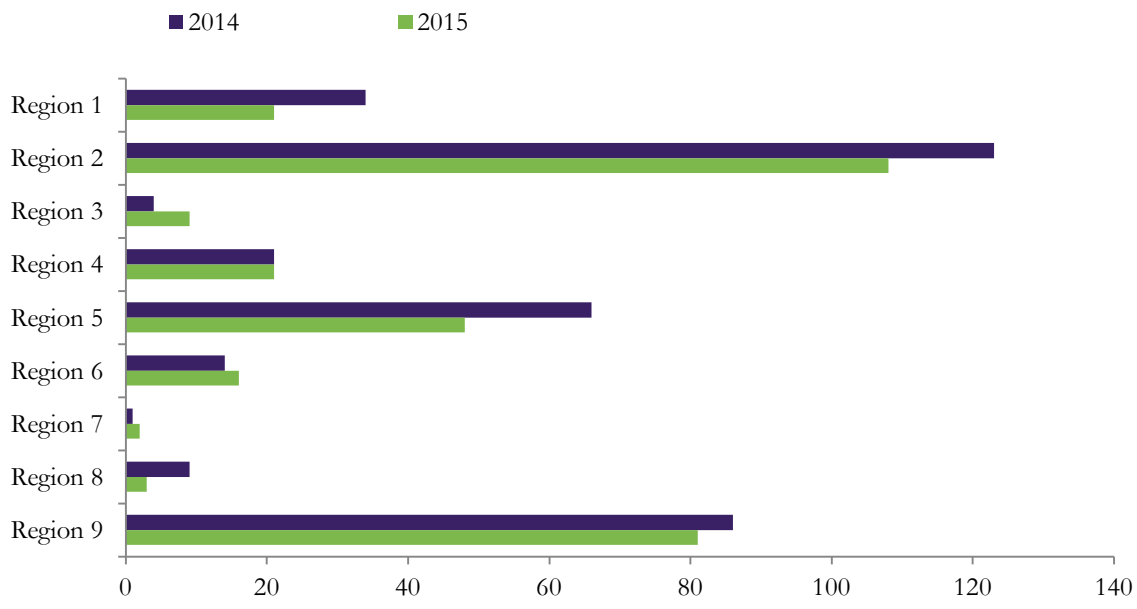
Regional Summaries

ASHHRA has categorized the nation into nine regions as illustrated in the map below:



The number of RC petitions filed in each ASHHRA region is detailed in the chart below. There are wide variations in the level of activity in each region.

Number of RC Petitions Filed in Health Care by ASHHRA Region



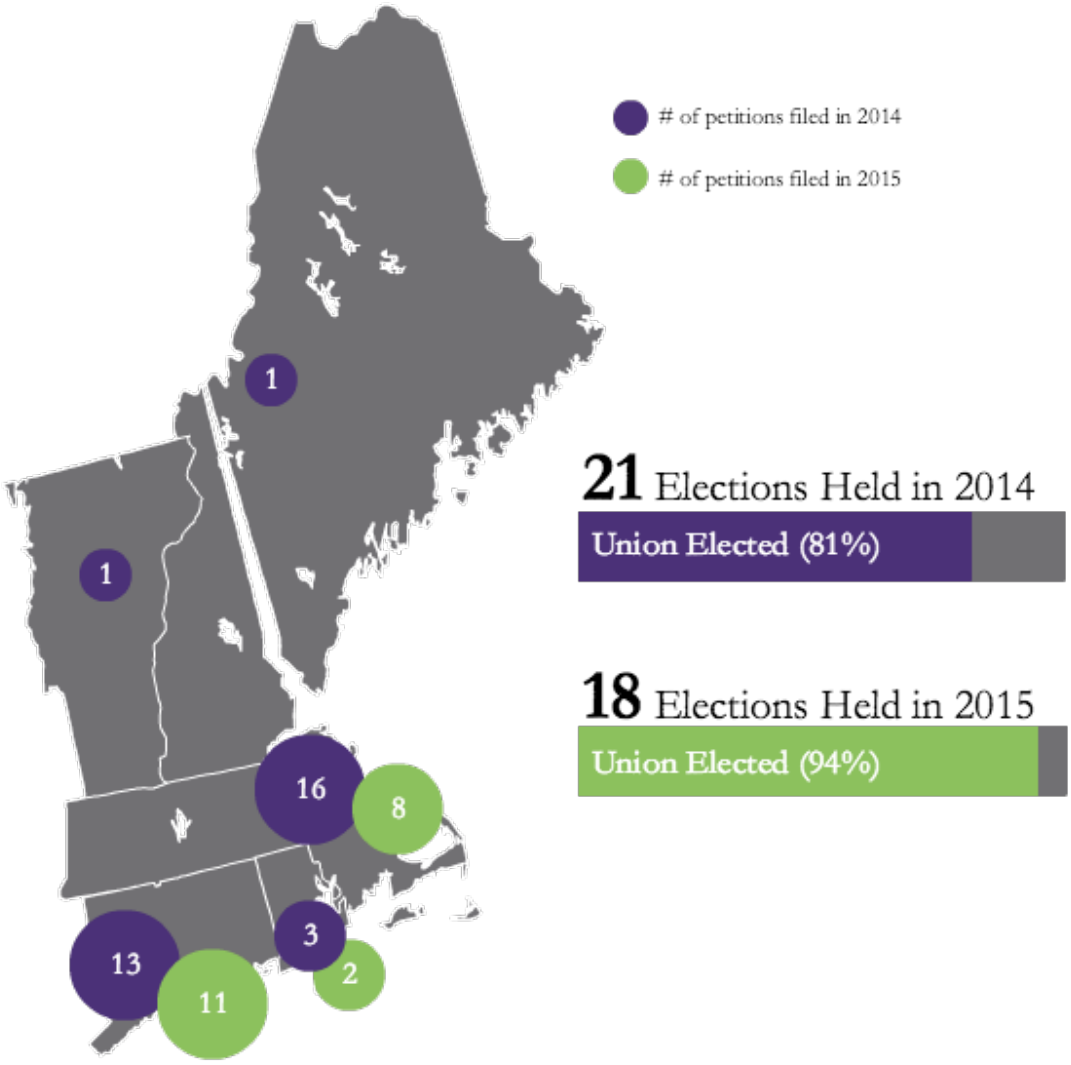
Source: LRI Management Services, Inc.

Figure 6

REGION 1

The majority of activity in Region 1 occurs in Massachusetts and Connecticut. All states in the region saw fewer petitions filed in 2015 than in 2014. There were 18 representation elections held in 2015, and unions were elected in 94 percent of them.

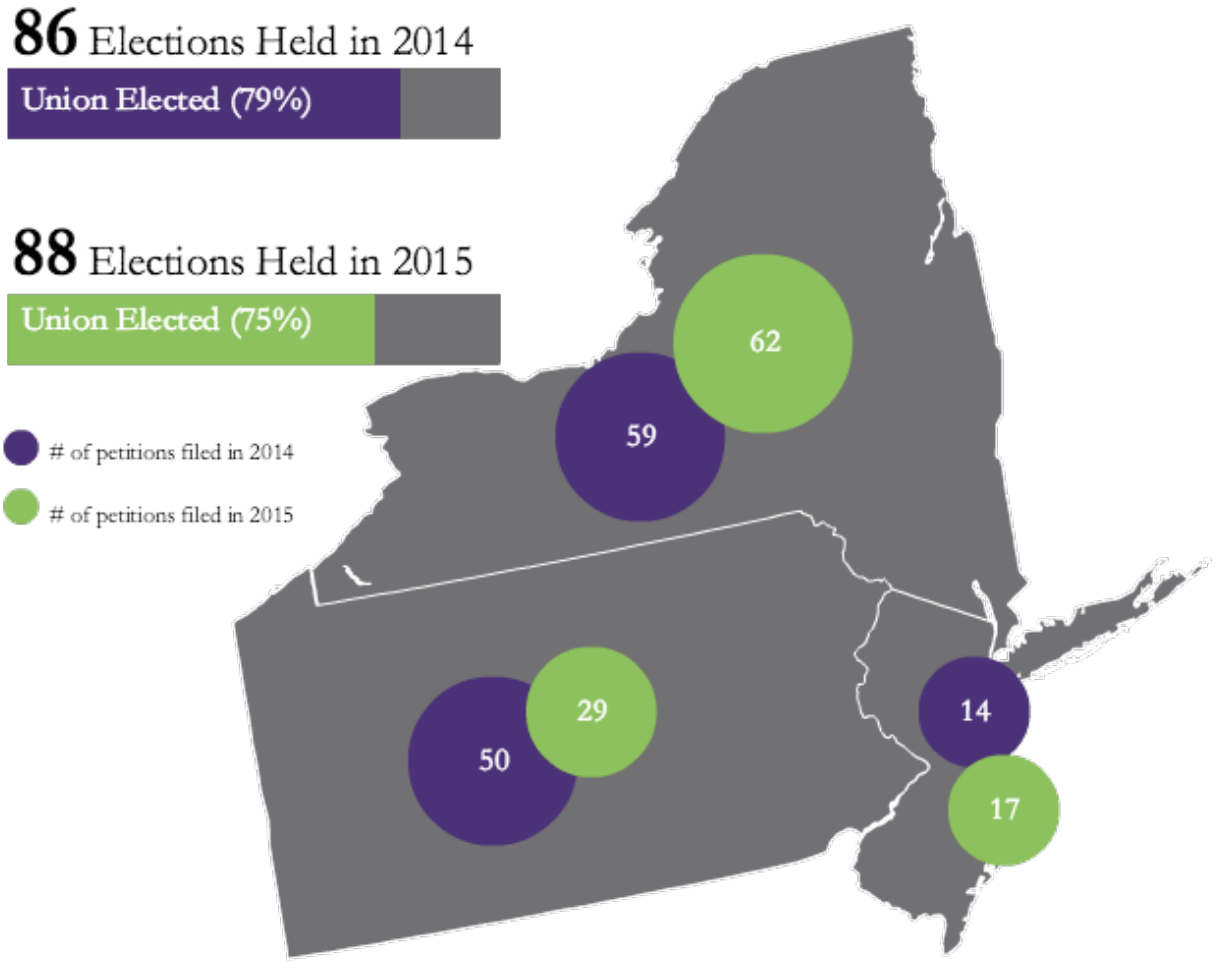
Petitions & Elections



REGION 2

As illustrated in Figure 6, Region 2 is the highest activity region. All three states saw a relatively high level of organizing activity. Both New York and New Jersey saw more representation petitions filed in 2015 than in 2014, while fewer representation petitions were filed in Pennsylvania than in the previous year. There were 88 representation elections held in 2015 in the region, and unions were elected in 75 percent of them.

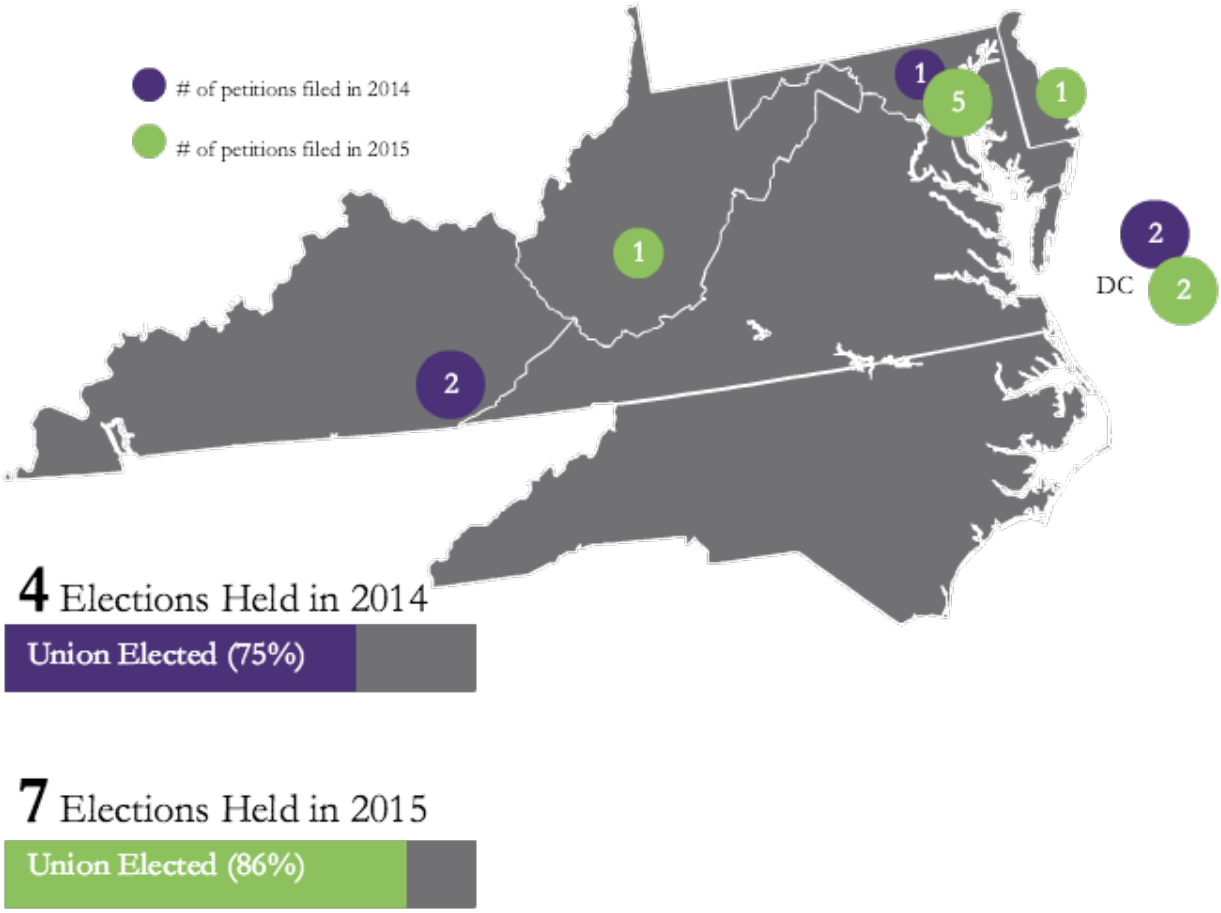
Petitions & Elections



REGION 3

There is limited activity in Region 3, with just nine representation petitions filed in 2015 - up from five petitions in 2014. Seven representation elections were held in 2015, and unions were elected in 86 percent of them.

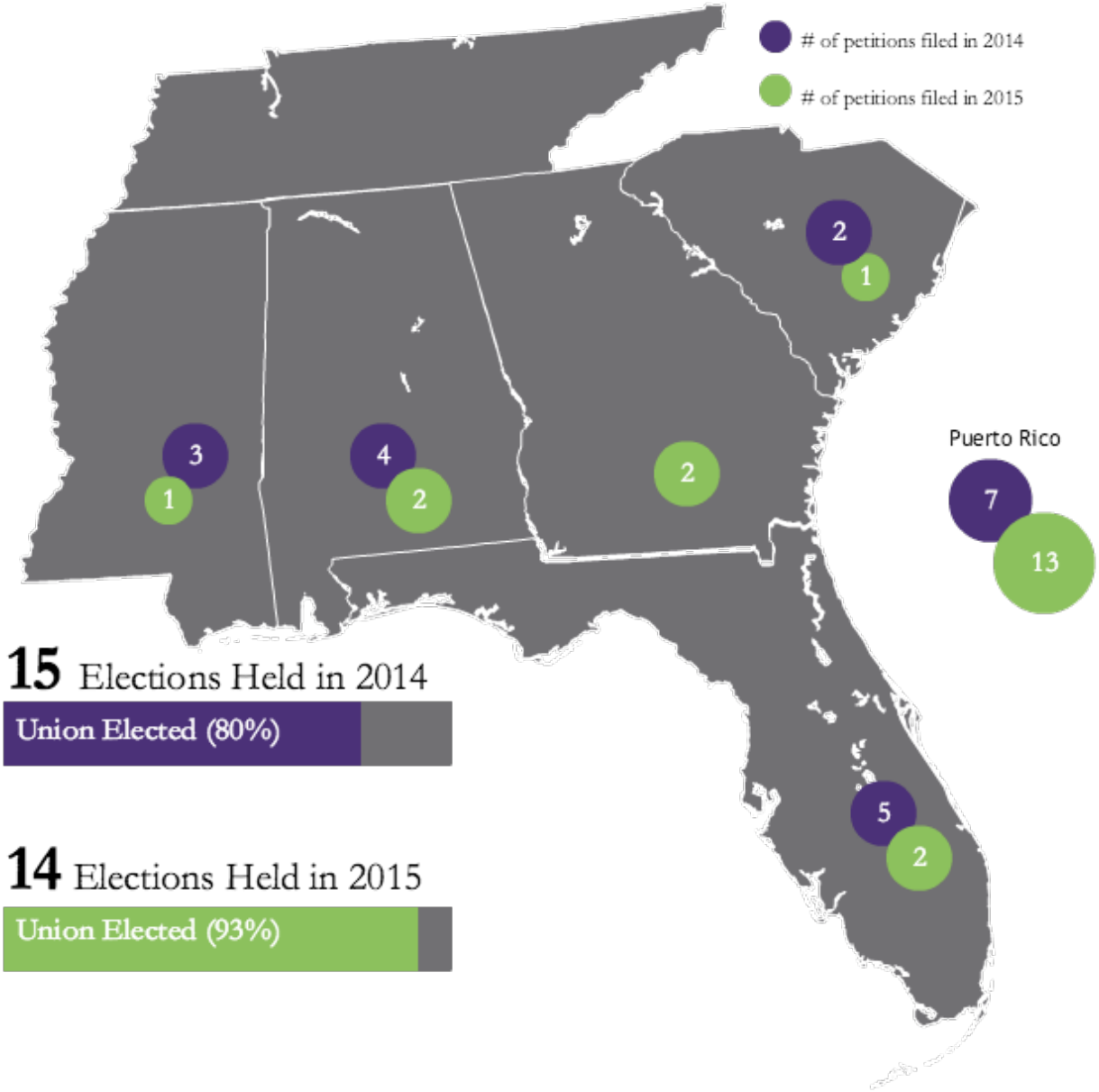
Petitions & Elections



REGION 4

Region 4 saw moderate organizing activity, with 21 representation petitions filed in both 2014 and 2015. The majority of petitions filed in 2015 were in Puerto Rico. Unions were elected in 93 percent of the 14 elections held in 2015.

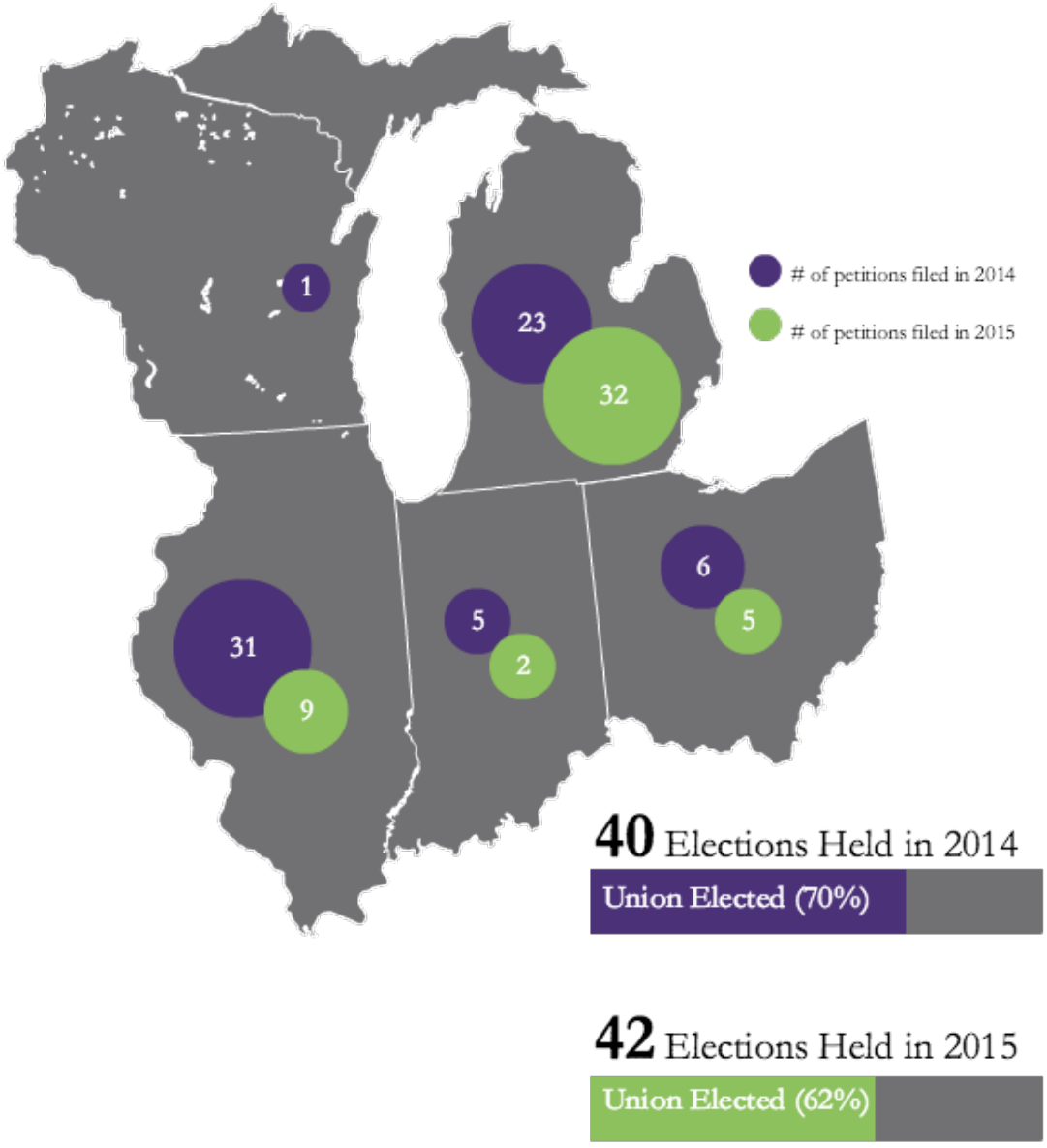
Petitions & Elections



REGION 5

The majority of petitions filed in Region 5 in 2015 were in Michigan. Illinois saw a significant decrease in the number of petitions filed in 2015 compared to 2014. Of the 42 elections held in 2015, just 62 percent resulted in union representation.

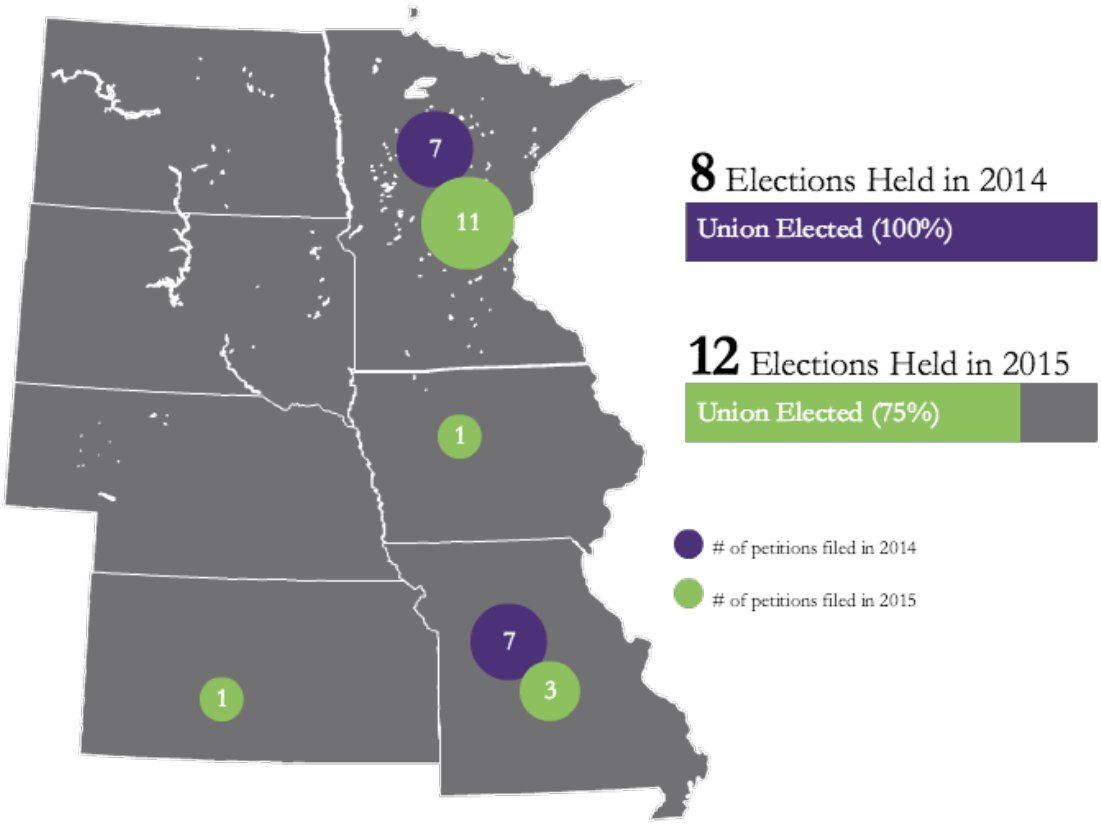
Petitions & Elections



REGION 6

Region 6 saw a slight increase in activity from 2014. There were 16 representation petitions filed in 2015 compared to 14 in 2014. There were 12 representation elections held in 2015, and unions were elected in 75 percent of them.

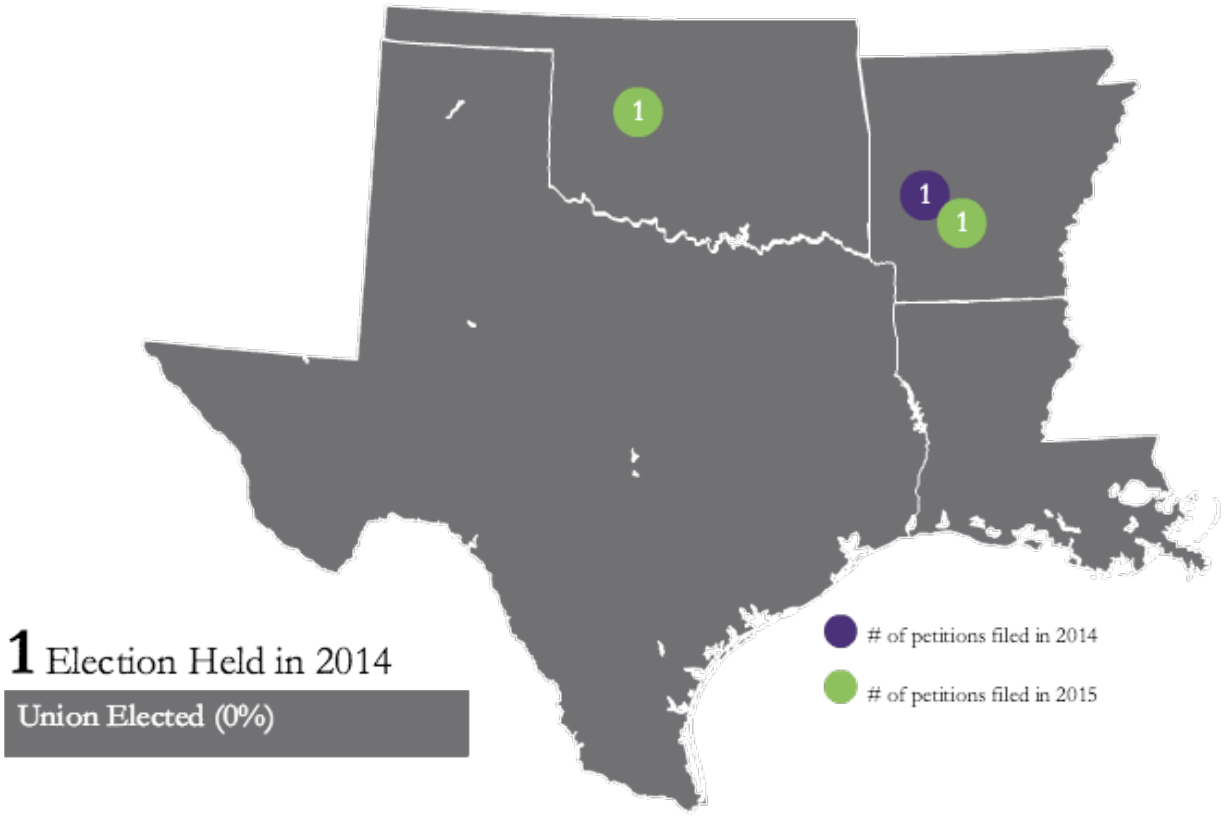
Petitions & Elections



REGION 7

Region 7 experienced the lowest level of organizing activity in the nation. In 2015, there were two representation petitions filed and two elections held. The union was elected as a result of one of the elections.

Petitions & Elections



1 Election Held in 2014

Union Elected (0%)

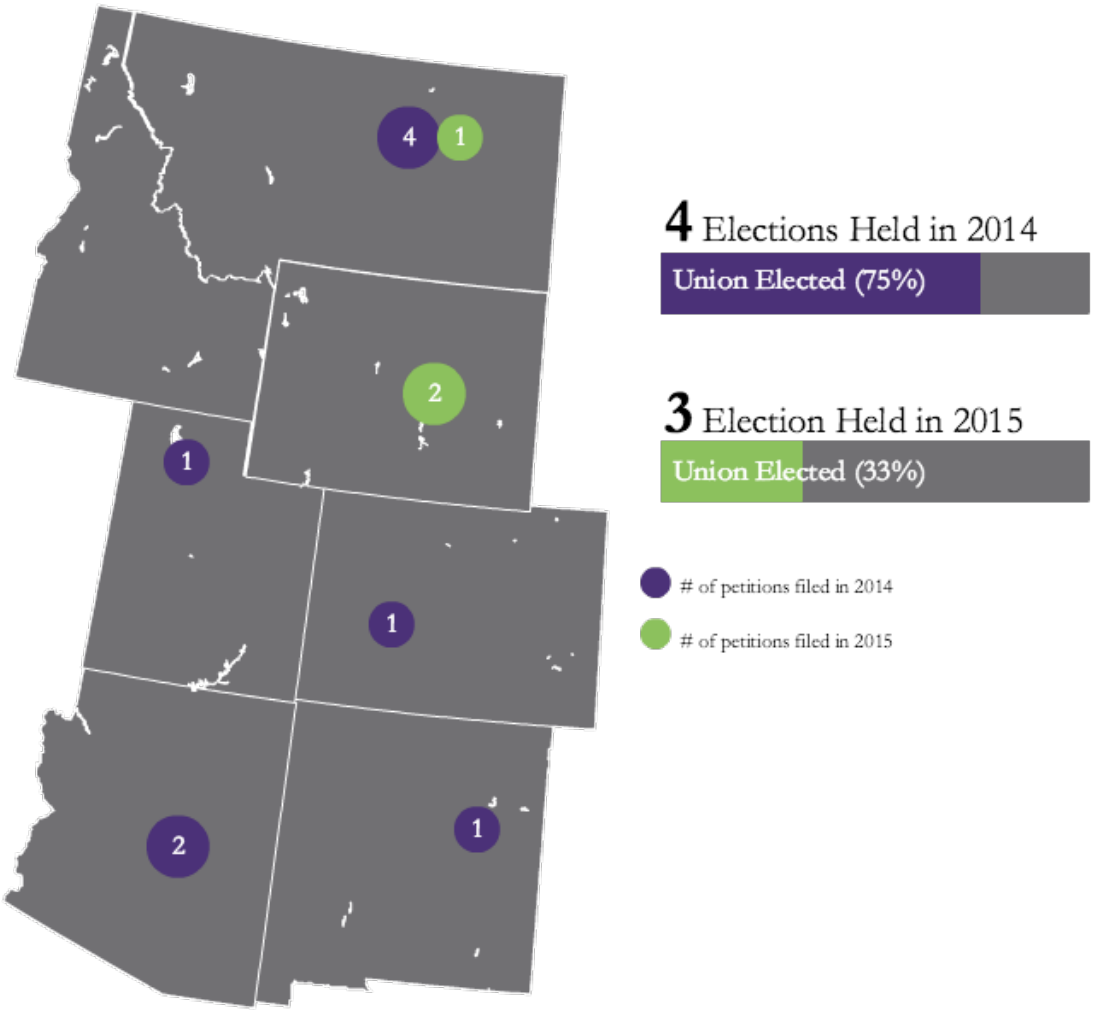
2 Elections Held in 2015

Union Elected (50%)

REGION 8

There were just three representation petitions filed in Region 8 in 2015. Three representation elections were held, and a union was elected as a result of one of them.

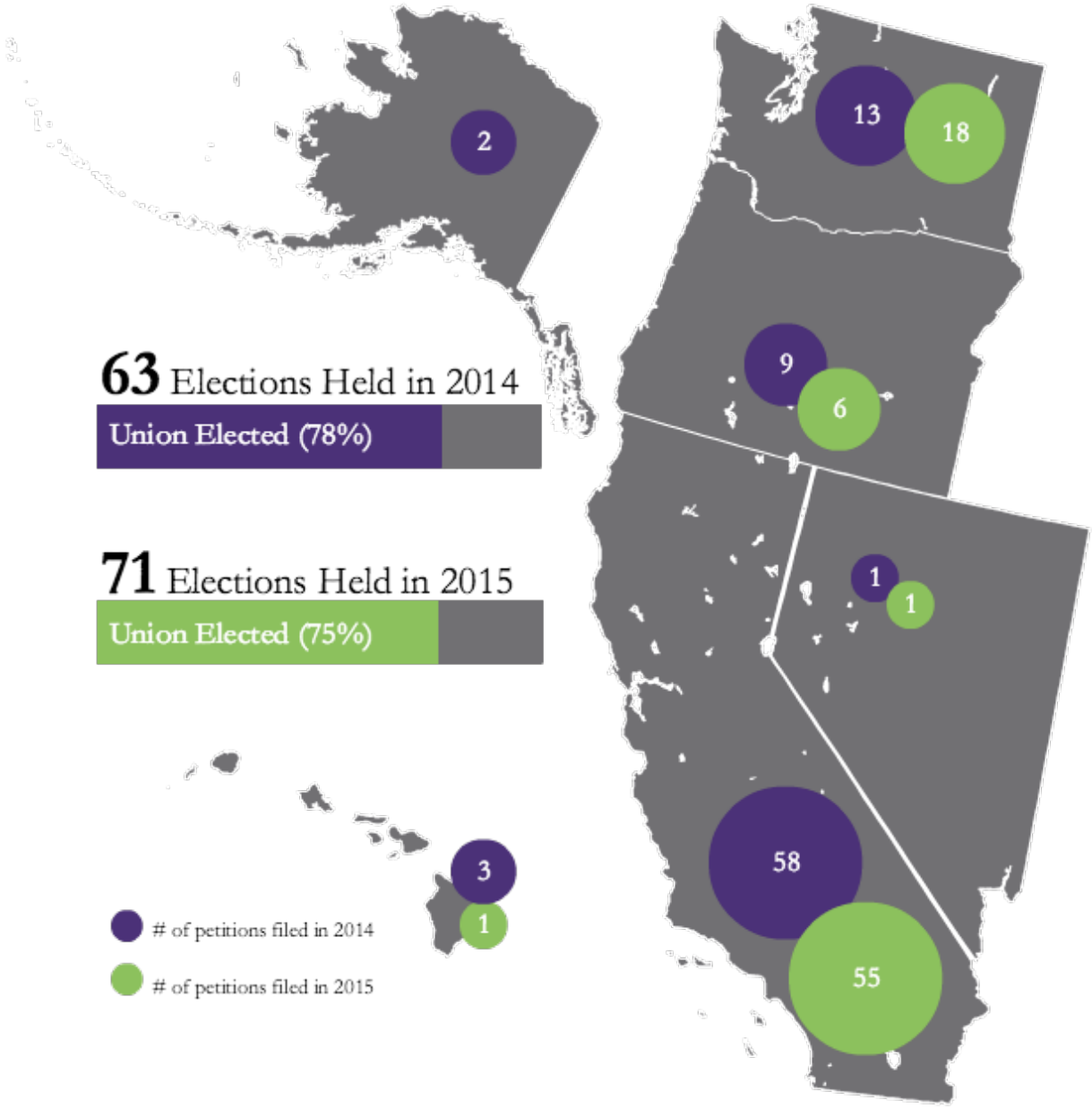
Petitions & Elections



REGION 9

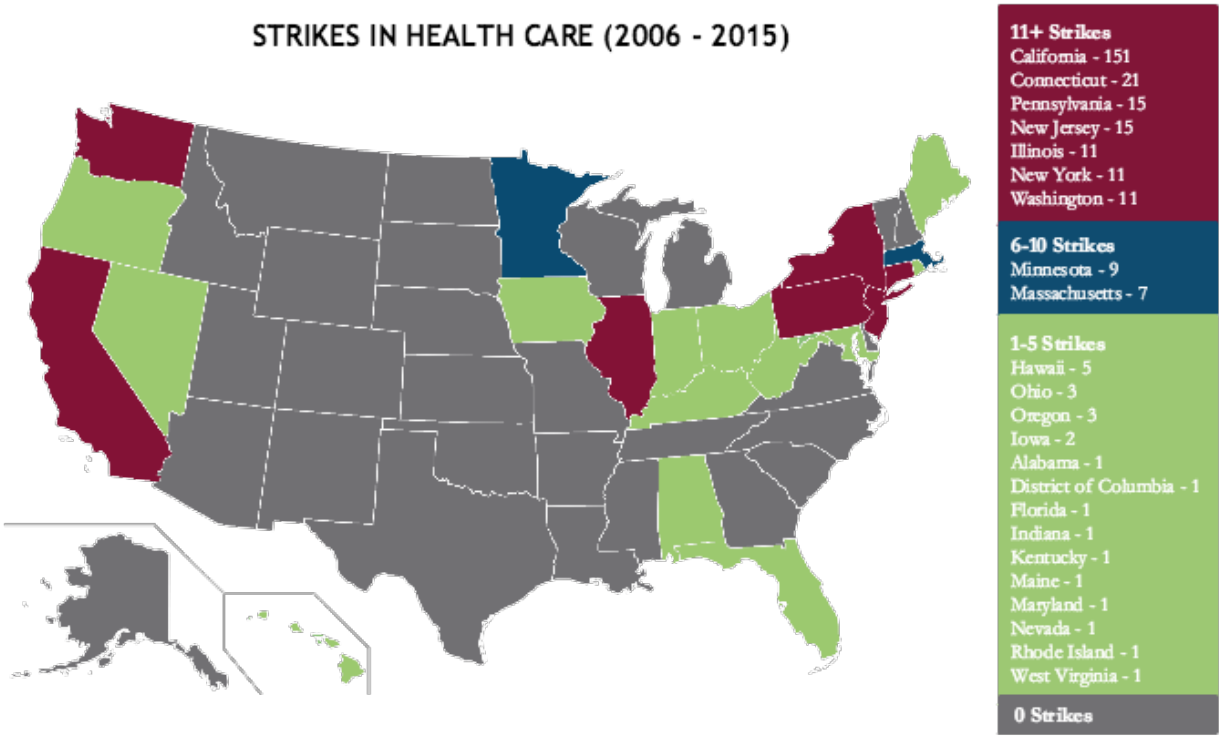
The majority of activity in Region 9 occurred in California, although Washington and Oregon saw higher levels of activity than many other states. There were 71 representation elections held in 2015 and unions were elected in 75 percent of them.

Petitions & Elections



Strikes in Health Care

The map below illustrates the number of strikes in the health care sector in the past decade. Over half of the states have never seen a strike in health care, while California has had more than seven times the number of strikes as the next highest state - Connecticut.



Strikes Held by Year- Health Care

Year	Number of Strikes	Workers Idled	Average Number of Workers per Strike
2015	18	8,378	465
2014	24	26,182	1,091
2013	23	13,328	579
2012	45	24,104	536
2011	40	24,939	623
2010	23	38,397	1,669
2009	12	2,724	227
2008	27	19,054	706
2007	46	31,376	682
2006	19	6,247	329

EXPEDITED ELECTIONS

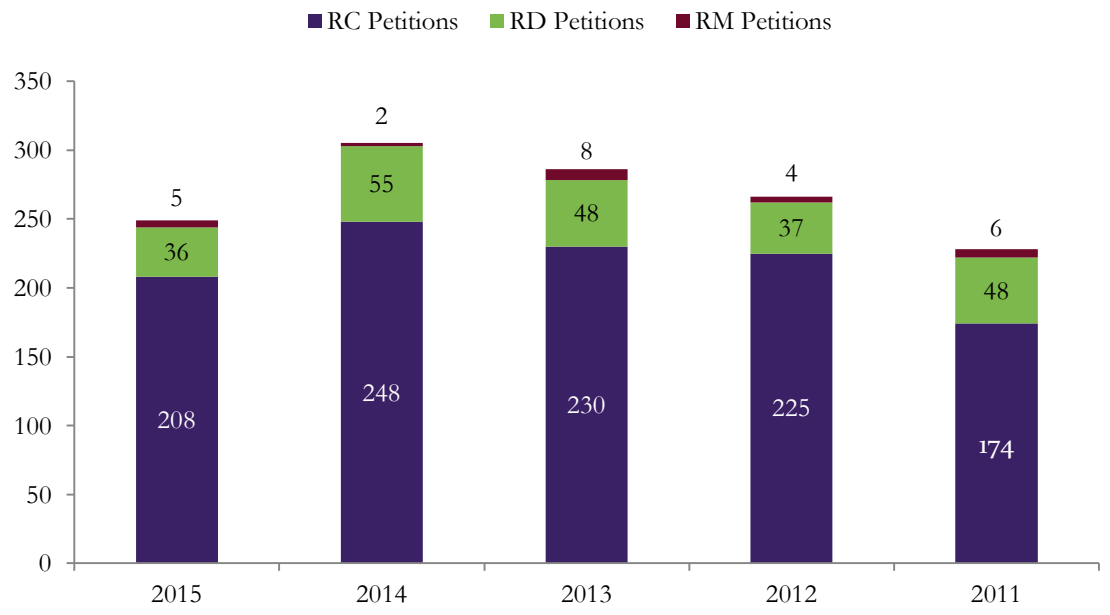
The expedited elections ruling went into effect on April 14, 2015. The charts in this section illustrate changes that have been experienced in the health care sector since that date. The sample size is still relatively small, and more stability is expected the longer the ruling is in effect.

RC PETITIONS FILED

The chart below illustrates the number of representation petitions filed between April 14 and December 31 during each of the past five years. Between April 14 and December 31, 2015, 208 representation petitions were filed in the health care sector. This is a 16 percent decrease in the number of petitions filed during the same time frame in 2014.

NLRB PETITIONS FILED BETWEEN 4/14 TO 12/31 (2011 TO 2015)

Health Care Sector



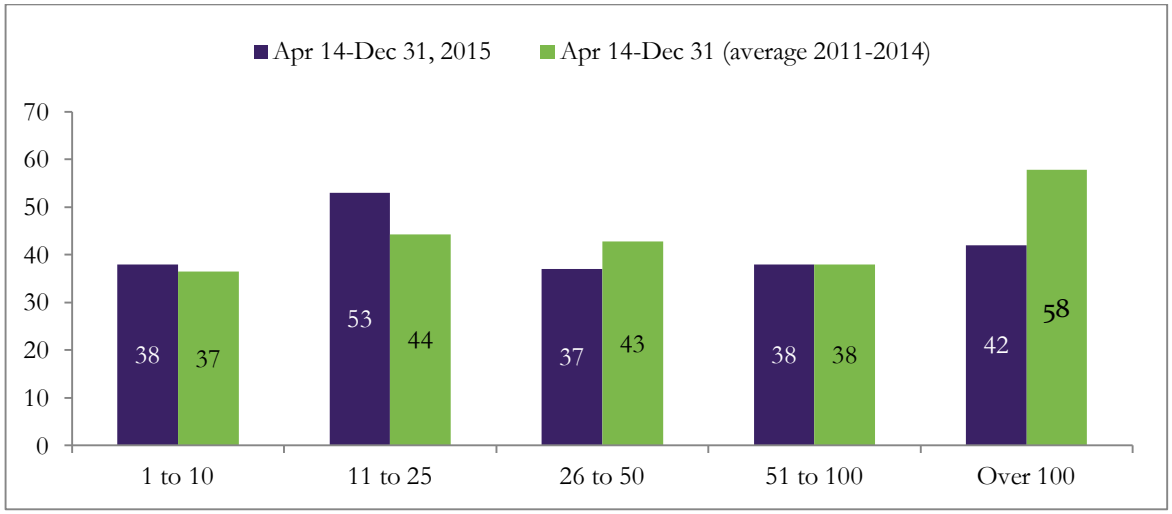
Source: LRI Management Services, Inc.

Figure 7

The chart below illustrates the number of representation petitions filed by unit size from April 14 to December 31, 2015 compared to the average during that same time frame over the previous four years. There was a 20 percent increase in petitions filed for units of 11 to 25 employees and a 28 percent decrease in petitions filed for units of larger than 100.

NLRB Petitions By Unit Size, 4/14 to 12/31 (2011-2015)

Health Care Industry



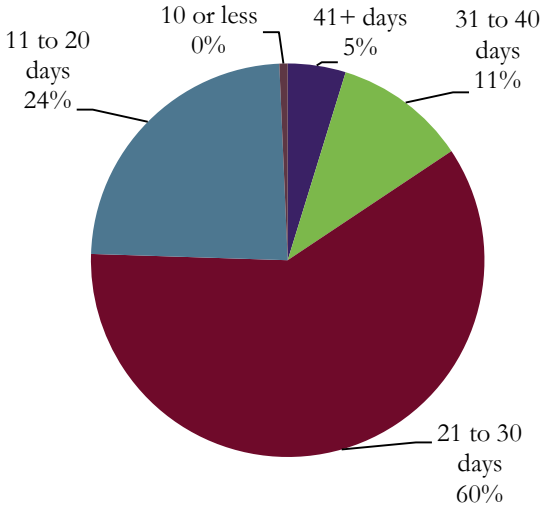
Source: LRI Management Services, Inc.

Figure 8

RC Elections Held

Days from NLRB Petition to Election- Health Care

The average number of days from petition to election held post-ruling is down to 25 days, based on data from April 14 to December 31, 2015 (n=147). The fewest number of days to election was 10, while the greatest was 51. The majority of elections were held between 21 and 30 days after the petition was filed.



LABOR LAW/ACTIVITY UPDATE

This edition of the Labor Law/Activity update contains four articles.

- ***NLRB Key 2015 Decisions – A Year in Review*** by John N. Raudabaugh, former National Labor Relations Board member, provides brief summaries of select 2015 Board decisions about which employers should be aware. At the end of the summaries is a table illustrating published decisions by the Board for fiscal year 2016 to the present.
- ***Should the New Persuader Rule Silence You*** by James G. Trivisonno appeals to employers who may be discouraged from hiring outside legal or educational consulting resources due to the new "Persuader Rule." Though the new rules will present costs and compliance burdens, comparatively, the benefits for hiring outside labor counsel are far greater for employers.
- ***The Intersection of Protected Activity and Patient Privacy: The Impact of Whole Foods on No-Recording Policies in the Health Care Sector*** by Henry F. Warnock examines the December 2015 decision by the National Labor Relations Board in Whole Foods Market, Inc., finding it unlawful for employers to prohibit use of cellular devices for audio or video recording in the workplace, and analyzes the implications for health care providers, who face the unique challenge of balancing employees' rights to engage in protected concerted activity with patients' privacy rights.
- ***Labor and Employment Regulatory Developments in Washington – Are You Ready?*** by G. Roger King reviews important regulatory developments from the last term of President Obama's Administration that have drastically changed the labor and employment relations landscape. In addition to a broad review of the "Washington climate" and the impact on employers, the brief specifically details workplace changes brought on by the new overtime rules, the employer wellness plan regulation and the "Persuader" rules.

Please note that the materials presented in this report should not be construed as legal advice about any specific facts or circumstances. The contents are for general information purposes only.

NLRB KEY 2015 DECISIONS – A YEAR IN REVIEW

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Abstract:
A former National Labor Relations Board (NLRB or Board) member provides brief summaries of select 2015 Board decisions about which employers should be aware. At the end of the summaries is a table illustrating published decisions by the Board for fiscal year 2016 to the present.

RULES OF CONDUCT

An operator of medical clinics unlawfully maintained an overbroad confidentiality policy defining confidential information to include not only patient information but also physician information, personnel information, billing, purchasing and financial information. The Board's decision in *Rocky Mountain Eye Center, P.C.,* 363 NLRB No. 34 (2015) held that the rule would prohibit disclosure of information concerning wages, hours, and working conditions.

In *Advanced Services, Inc.,* 363 NLRB No. 71 (2015) and *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015), the Board held the employers' rules prohibiting discussion of ongoing investigations unlawful. Limitations on discussion of ongoing investigations is lawful only where the employer can show legitimate and substantial business justifications for restricting Section 7 protected, concerted activity.

Employer rules requiring employees to waive their rights to participate in or serve as a class representative in a class or collective action against their employer as a condition of employment have been found unlawful in numerous Board decisions. *San Fernando Post Acute Hospital*, 363 NLRB No. 57 (2015); *Covenant Care California, LLC*, 363 NLRB No. 80, (2015). The Board reasons, in part, that such rules restrict employees' Section 7 rights of protected, concerted activities.

In states other than those prohibiting audio/video recording absent consent of all parties, the Board held employer rules prohibiting workplace recording unlawful where employees are acting in concert for mutual aid and protection. In *Whole Food Market, Inc.,* 363 NLRB No. 87 (2015), the Board distinguished *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), *enfd. in relevant part* 715 F.3d 928 (D.C. Cir. 2013). The lawful *Flagstaff* policy prohibited the use of electronic equipment, including cameras, during work time, as well as "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities."

A lawful policy may be unlawfully applied in a discriminatory manner. In *Marina Del Rey Hospital*, 363 NLRB No. 22 (2015), the employer's off-duty no access policy was lawful but

the Board reasoned that the hospital applied the policy in a discriminatory manner on the basis of union activity.

COLLECTIVE BARGAINING

A hospital's decision to close a unit did not obligate the employer to negotiate with its union regarding the decision to close or require disclosure of the reasons for closure. However, the hospital was required to respond to union information requests regarding the effects of the closure on employees' terms and conditions. *Memorial Hospital of Salem County*, 363 NLRB No. 56 (2015).

In *Olean General Hospital*, 363 NLRB No. 62 (2015), the hospital was found to have unlawfully refused to respond to a union's information request regarding a patient care survey despite state law protecting the hospital from disclosure. The Board acknowledged the applicable state law and the employer's confidentiality interest but concluded that the union's interest for the information for bargaining and related purposes outweighed the state law protection.

A Board majority held that a hospital unilaterally discontinued payments to a union's education fund upon expiration of the parties' collective bargaining agreement. In *Marina Del Rey Hospital*, 363 NLRB No. 22 (2015), the Board reasoned that terms and conditions of mandatory bargaining subjects must be maintained following contract expiration until a new agreement becomes effective or the parties reach an overall bargaining impasse or the applicable terms of the agreement clearly and unmistakably authorize the cessation of payments.

UNION DUES

In *Local Joint Executive Board of Las Vegas*, 363 NLRB No. 33 (2015), the Board held that a union lawfully refused to provide union members responses to telephone requests regarding the dates on which they executed dues-checkoff authorizations, thus requiring such requests be submitted in writing.

NLRB MEMBER PARTICIPATION

(FISCAL YEAR 2016 TO DATE: OCTOBER 1, 2015 – MAY 6, 2016)

Total NLRB Published Decisions (Binding Precedent).....163* (100.0%) Full NLRB Published Decisions (all Members participating).....2 (1.2%) Default/Summary Judgment Decisions.....37 (22.7%) *Includes 153 (93.9%) "C" (complaint) cases; 10 (6.1%) "R" (representation) cases; 0 (0.0%) "C&R" cases.	NLRB Published Decisions CY 2016…….95 FY 2016…..163 CY 2015…..289 FY 2015…..319 CY 2014…..284 FY 2014…..197 CY 2013…..139 FY 2013…..210 CY 2012…..220 FY 2012…..271

Member	Member Decisions/ Total Reported Decisions	Member Dissenting Opinions/ Total Dissenting Opinions
Pearce (P)	146/163 (89.6%)	0/0 (0.0%)
Miscimarra (M)	116/163 (71.2%)	71/72 (98.6%)
Hirozawa (H)	126/163 (77.3%)	1/72 (1.4%)
McFerran (Mc)*	103/163 (63.2 %)	0/0 (0.0%)

NLRB Panel/Member Analysis

NLRB Panel/Full Board	Total NLRB Panel Decisions/ Total Published Decisions	Total Panel Decisions with Dissenting Opinion/Total Panel Decisions	Total Dissenting Opinions by Panel Member
P,M,H	60/163 (36.8%)	37/60 (61.7%)	M (37)
P,M,Mc	37/163 (22.7%)	25/37 (67.6%)	M (25)
P,H,Mc	47/163 (28.8%)	0/47 (0.0%)	
M,H,Mc	17/163 (10.4%)	8/17 (47.1%)	M (7) H(1)
P,M,H,Mc	2/163 (1.2%)	2/2 (100.0%)	M (2)
Totals	**163/163 (100%)**		

Published Decisions by NLRB Region/Subregion Intake

NLRB Region	FY 2016 NLRB Published Decisions	NLRB Region	FY 2016 NLRB Published Decisions
1 - (and former 34) - Boston	1 (0.6%)	15 - (and former 26) - New Orleans	3 (1.8%)
2 - New York	9 (5.5%)	16 - Fort Worth	6 (3.7%)
3 - Buffalo	6 (3.7%)	18 - (and former 30) - Minneapolis	2 (1.2%)
4 - Philadelphia	3 (1.8%)	19 - (and former 36) - Seattle	10 (6.1%)
5 - Baltimore	6 (3.7%)	20 - (and former 37) - San Francisco	7 (4.3%)
6 - Pittsburgh	3 (1.8%)	21 - Los Angeles	11 (6.7%)
7 - Detroit	7 (4.3%)	22 - Newark	7 (4.3%)
8 - Cleveland	6 (3.7%)	25 - (and former 33) - Indianapolis	1 (0.6%)
9 - Cincinnati	3 (1.8%)	27 - Denver	2 (1.2%)
10 - (and former 11) - Atlanta	7 (4.3%)	28 - Phoenix	13 (8.0%)
12 - (and former 24) - Tampa	5 (3.1%)	29 - Brooklyn	11 (6.7%)
13 - Chicago	6 (3.7%)	31 - Los Angeles	15 (9.2%)
14 - (and former 17) - St. Louis	6 (3.7%)	32 - Oakland	7 (4.3%)
		Total FY 2016 NLRB Published Decisions	**163 (100%)**

National Labor Relations Board – Published Decisions – Fiscal Year

Fiscal Year	Oct.	Nov.	Dec.	Jan.	Feb	Mar.	Apr.	May	June	July	Aug.	Sep.	Total
2016	13	19	36	15	36	20	19	5					163
2015	29	28	42	12	14	38	25	18	38	12	47	16	319
2014	4	2	6	19	24	9	29	28	11	15	27	23	197
2013	4	10	21	11	13	18	24	16	19	21	0	5	162
2012	6	20	60	10	13	10	14	10	28	19	25	56	271
2011	30	30	26	18	13	26	22	17	20	24	56	14	296
2010	12	11	9	15	7	8	6	10	10	11	119	55	273
2009	10	12	17	12	16	25	15	14	11	23	11	18	184
2008	4	12	36	7	28	12	13	25	19	18	24	36	234
2007	11	12	15	64	27	44	45	55	27	24	37	61	422
2006	5	12	27	15	11	20	29	34	19	24	48	53	297
2005	24	24	45	6	25	26	16	21	39	22	61	40	349
2004	20	28	25	25	21	32	38	31	44	37	24	78	403
2003	25	37	1	9	9	22	46	35	43	46	49	93	415
2002	41	25	67	0	2	9	7	24	24	40	32	44	315
2001	43	29	28	39	27	30	56	52	34	49	116	76	579
2000	14	51	19	27	30	45	35	41	40	32	80	67	481
1999	31	29	17	30	36	64	48	41	40	31	25	70	462
1998	51	53	9	6	1	4	37	22	37	36	75	80	411
1997	13	35	30	18	44	27	44	44	41	30	35	17	378
1996	49	32	79	14	29	46	40	36	26	39	63	39	492
1995	31	30	60	64	52	67	74	64	43	54	86	58	683
1994	28	102	0	0	75	20	30	43	46	67	57	84	552
1993	40	49	81	45	38	79	49	116	24	33	48	142	744
1992	23	47	52	70	61	97	72	59	42	90	76	112	801
1991	37	27	60	80	79	61	63	78	52	46	81	63	727
1990	47	23	16	29	22	42	27	40	46	42	41	97	472
1989	33	47	35	51	55	54	42	79	125	40	55	66	682
1988	12	48	97	18	28	38	42	47	87	146	36	65	664
1987	15	36	30	40	73	49	47	47	77	71	48	120	653
1986	37	68	64	77	51	63	84	75	92	31	41	115	798
1985	39	70	143	51	106	108	58	37	41	45	43	135	847
1984	24	18	28	34	114	146	128	66	75	123	83	108	947
1983	47	37	130	22	45	50	17	37	12	17	190	37	641
1982	15	42	47	57	79	134	89	97	83	119	104	239	1,105
1981	19	45	66	134	27	120	98	65	113	105	78	227	1,097
1980	49	58	72	100	106	114	94	113	99	104	244	190	1,343

NATIONAL LABOR RELATIONS BOARD – PUBLISHED DECISIONS – CALENDAR YEAR

Calendar Year	Jan.	Feb	Mar.	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.	Total
2016	15	36	20	19	5								95
2015	12	14	38	25	18	38	12	47	16	13	19	36	288
2014	19	24	9	29	28	11	15	27	23	29	28	42	284
2013	11	13	18	24	16	19	21	0	5	4	2	6	139
2012	10	13	10	14	10	28	19	25	56	4	10	21	220
2011	18	13	26	22	17	20	24	56	14	6	20	60	296
2010	15	7	8	6	10	10	11	119	55	30	30	26	327
2009	12	16	25	15	14	11	23	11	18	12	11	9	177
2008	7	28	12	13	25	19	18	24	36	10	12	17	221
2007	64	27	44	45	55	27	24	37	61	4	12	36	436
2006	15	11	20	29	34	19	24	48	53	11	12	15	291
2005	6	25	26	16	21	39	22	61	40	5	12	27	300
2004	25	21	32	38	31	44	37	24	78	24	24	45	423
2003	9	9	22	46	35	43	46	49	93	20	28	25	425
2002	0	2	9	7	24	24	40	32	44	25	37	1	245
2001	39	27	30	56	52	34	49	116	76	41	25	67	612
2000	27	30	45	35	41	40	32	80	67	43	29	28	497
1999	30	36	64	48	41	40	31	25	70	14	51	19	469
1998	6	1	4	37	22	37	36	75	80	31	29	17	375
1997	18	44	27	44	44	41	30	35	17	51	53	9	413
1996	14	29	46	40	36	26	39	63	39	13	35	30	410
1995	64	52	67	74	64	43	54	86	58	49	32	79	722
1994	0	75	20	30	43	46	67	57	84	31	30	60	543
1993	45	38	79	49	116	24	33	48	142	28	102	0	704
1992	70	61	97	72	59	42	90	76	112	40	49	81	849
1991	80	79	61	63	78	52	46	81	63	23	47	52	725
1990	29	22	42	27	40	46	42	41	97	37	27	60	510
1989	51	55	54	42	79	125	40	55	66	47	23	16	653
1988	18	28	38	42	47	87	146	36	65	33	47	35	622
1987	40	73	49	47	47	77	71	48	120	12	48	97	729
1986	77	51	63	84	75	92	31	41	115	15	36	30	710
1985	51	106	108	58	37	41	45	43	135	37	68	64	793
1984	34	114	146	128	66	75	123	83	108	39	70	143	1,129
1983	22	45	50	17	37	12	17	190	37	24	18	28	497
1982	57	79	134	89	97	83	119	104	239	47	37	130	1,215
1981	134	27	120	98	65	113	105	78	227	15	42	47	1,071
1980	100	106	114	94	113	99	104	244	190	19	45	66	1,294

SHOULD THE NEW PERSUADER RULE SILENCE YOU?

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Abstract:
In the weeks since the U.S. Department of Labor issued the final version of its "persuader rule" – the revision of the longstanding proposed rule designed to chill employers' use of labor relations consultants and labor attorneys– the new rule looms as a potential threat for organizations facing union organizing campaigns. It shouldn't.

The Labor Management Reporting and Disclosure Act of 1959 (LMRDA) was designed in part as a vehicle to "expose" the use of external experts by organizations hoping to preserve a direct working relationship between employees and their managers. It requires employers to report to the Department of Labor any work with attorneys or other outside experts on union-related issues involving activities to "persuade" employees regarding their views toward unions. These reports are available to the public on the Department of Labor website. The new rule places additional costs and burdens on employers that are not imposed upon the unions targeting those employers.

By design, the central implication of the new rule is that an employer's efforts to educate employees about unionization are somehow inappropriate if not downright unethical. That, of course, is the union spin. Employers need to be ready to tell a different story.

First, some background:

- The Department of Labor published the final version of the rule on March 23, 2016, which went into effect on April 22.
- The rule requires reporting of any outside work or advice in which the "actions, conduct or communications by a consultant or attorney on behalf of an employer that are undertaken with an object, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively."
- The new rule interprets the LMRDA, by adopting a far broader definition of the kinds of labor relations activities that employers must report to the government.
- The rule applies to union education campaigns when outside help is used to review or develop communications with employees in the bargaining unit with an objective to persuade employees regarding unionization issues. It applies to union organizing campaigns and collective bargaining with existing unions.
- Reporting is required for all "arrangements and agreements as well as payments (including reimbursed expenses) made on or after July 1, 2016."
- As of late April, three major legal challenges have been filed by business and industry groups.

- In addition, Republicans on Capitol Hill are mounting a legislative challenge that kicked off April 27 with a hearing by a House Education and Workforce subcommittee. GOP lawmakers have introduced a joint resolution[1] to block the persuader rule under the Congressional Review Act.

There is little doubt of the administration's political agenda in changing a rule that had been in place for a considerable period of time. In a news conference unveiling the revised rule, U.S. Labor Secretary Thomas E. Perez said it would "pull back the curtain on the activities of consultants who craft the message" during a campaign so that workers "know whether the messages they're hearing are coming directly from their employer or from a paid, third-party consultant."[2] The clear implication is that if an employer seeks outside help, then the message generated with such outside assistance is not authentic or is otherwise suspicious.

In its written interpretation of the rule, the Department of Labor said:

> "In the context of an employer's reliance on a third party to assist it on a matter of central importance, it is possible that an employee may weigh differently any messages characterizing the union as a third party. In these instances, it is important for employees to know that if the employer claims that employees are family -- a relationship will be impaired, if not destroyed, by the intrusion of a third party into family matters – it has brought a third party, the consultant, into the fold to achieve its goals.
>
> Similarly, with knowledge that its employer has hired a consultant, at substantial expense, to persuade them to oppose union representation or the union's position on an economic issue, employees may weigh differently a claim that the employer has no money to deal with a union at the bargaining table."

Critics of the new rule deride its one-sided focus, noting that unions routinely spend significant sums on outside counsel and services to help them "persuade" employees during organizing campaigns that they will not be required to report the way employers targeted in those campaigns will. The new rule now imposes that requirement on businesses but not unions.

In one news article on the new rule, a union leader was quoted as saying that employees would be "shocked and often outraged" by what employers are willing to spend on union-avoidance.[3] But in his comment, Bill Cruice, executive director of the Pennsylvania Association of Staff Nurses and Allied Professionals, did not mention that the union's members are not provided any similar transparency about where their dues go.

It is true that the LMRDA requires unions to file annual LM-2 forms that include their spending. Such reports, however, only require reporting in broad categories like "Representational Activities," "Political Activities and Lobbying" and "General Overhead." Such reports do not, however, have to provide specifics on how the money was used. In addition, current Department of Labor requirements do not distinguish between expenses

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[1] H.J. Res. 87, Rep. Bradley Byrne

[2] https://www.dol.gov/newsroom/releases/olms/olms20160323

[3] *Philadelphia Inquirer, March 24, 2016*

for organizing new members (which can be significant) and expenses related to representing current union members, instead lumping both of these under "Representational Activities."

For example, among the $316 million the Service Employee International Union reported spending in 2014, $1.3 million went to a single New York consulting firm for "organizing research," $478,000 for Facebook ads recorded as "support for organizing" and more than $10 million dollars to various law firms for "legal support for organizing." The union was not required to report any further details.

Are there now risks to employers in hiring outside labor relations consultants and attorneys?

In addition to the additional costs and compliance burdens, the new rule will provide opportunities for the media and/or other public scrutiny of employer spending on labor consultants and attorneys. Such broad reporting requirements can admittedly be uncomfortable. For example, media coverage of executive compensation, company financial information and the results of government audits or inspections is often very negative.

That "risk" must of course be weighed against the benefits of those services and with recognition that a union – if elected to represent employees – would have access to a great deal of an organization's financial and operational information through information requests permitted in collective bargaining.

In our view, there is clear value in the services labor relations experts provide, particularly in arenas governed by the National Labor Relations Act or Railway Labor Act that require expertise and experience many organizations don't maintain in-house. This is particularly true in the era of "quickie" union organizing campaigns that followed new National Labor Relations Board (NLRB) rules designed to fast track NLRB elections from union petition filing to election.

Many labor relations firms and consultants have direct experience in hundreds of campaigns and bring to the table not only guidance regarding compliance with federal labor law, but also extensive knowledge of how to provide manager training in employee rights, labor communications and the common methods and tactics unions employ during organizing campaigns. This kind of training not only helps organizations avoid unfair labor practice charges, but also helps managers acquire confidence in discussing issues related to unions with employees and overall better equip managers with skills to manage their workforce.

Without outside expertise, employers may be at an even greater disadvantage against unions that have built entire operations with professional organizers, technologies and campaign materials designed to influence employees to seek union representation.

Ultimately, employers who decide to use outside support to manage an organizing campaign must include in their campaign planning communications to explain and address the expenses reported under the persuader rule.

How to talk to employees about hiring labor relations support.

Like anyone trying to sell a product or service, union representatives trying to organize a new workplace advertise only the potential benefits of joining a union. Soft drink manufacturers don't tell consumers that their product is bad for their teeth. Real estate agents don't focus

on the property taxes or maintenance costs of the homes they list. And unions don't tell prospective members that they will have little influence on how much they'll pay in dues, whether they'll have to walk a picket line, how difficult the process is to eject the union once it is elected, or how much of their dues money goes to support the union's overhead, political initiatives and organizing efforts at other companies or industries.

Who should tell that story? The employer, through basic, factual information that also educates employees on their rights under the National Labor Relations Act and how unionization works.

The objective is to use the same common-sense employee education approach we advise employers to use in asking employees to attend meetings or read a website or flyers about the union campaign. Whether the goal is to start a conversation or respond to questions, employers can:

- Explain that the company is investing in employee education so that employees can make an informed decision about whether to sign a union authorization card or voting in a representation election.
- Acknowledge the need for special expertise in the same way the organization relies on attorneys, accountants, designers, marketing firms, engineering/construction firms or any other contractor or vendor companies routinely use.
- Position leaders and supervisors as a trusted resource for information in an environment in which the union is spending a great deal of money to "sell" union membership without sharing all of the relevant information about joining a union that may be important to employees.

Leaders of companies and organizations that have strong cultures and a clear philosophy about the benefits of a direct working relationship in the workplace should also be comfortable in challenging the Department of Labor's premise that there is something furtive or manipulative about working with labor consultants to help communicate with employees.

Just as most employers work with HR consultants to help communicate the details of a health or retirement plan, it is similarly appropriate to work with labor experts to help leaders communicate their position and important considerations related to unionization.

What activities must employers now report to the Government under the revised rule?

The new rule expands the definition of "persuader" activity from a consultant or educators ***direct*** *contact with employees, to a wide variety of* ***indirect*** *educational efforts, including:*

- Educating supervisors and managers. This includes offering workshops or seminars designed to help leaders communicate with employees during a union campaign.
- Planning or coordinating the activities of supervisors and managers. Reportable activities include management training and coaching, interviewing managers to assess employee support in their departments, assisting with employee communications related to the union, preparing a campaign plan or calendar and taking part in meetings related to labor issues.

- Reviewing, drafting or implementing HR policies focused on union education. In this case reporting is only required when those policies are designed to influence employee positions about unionization.
- Creating or providing input on communications designed to influence employees. While employers can buy generic union education materials, any service or advice they receive in customizing labor materials for their workplace must be reported if the intent is to persuade employees regarding unions (including during collective bargaining with existing unions).

THE INTERSECTION OF PROTECTED ACTIVITY AND PATIENT PRIVACY: THE IMPACT OF WHOLE FOODS ON NO-RECORDING POLICIES IN THE HEALTH CARE SECTOR

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Abstract:
In December 2015, the National Labor Relations Board (NLRB or "the Board") issued its decision in *Whole Foods Market, Inc.* It found unlawful an employer's broad prohibition on employees' rights to use such devices as cell phones to record audio and video and take pictures in the workplace. This decision has an especially important impact on health care providers, who face the unique challenge of balancing employees' rights to engage in protected concerted activity with patients' privacy rights. This article will analyze the impact *Whole Foods* has on the health care industry and provide guidance on what employers in that field can do to protect their patients and themselves.

BACKGROUND

Section 7 of the National Labor Relations Act (NLRA) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) makes it an unfair labor practice for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

A workplace rule is unlawful if it explicitly restricts Section 7 rights, such as a rule that prohibits employees from joining a union. If the rule does not explicitly restrict protected activities, it will violate the NLRA if: 1) Employees would reasonably construe the language to prohibit Section 7 activity; 2) The rule was promulgated in response to union activity; or 3) The rule has been applied to restrict the exercise of Section 7 rights. The Board construes ambiguities against the drafter, so where a policy is ambiguous and could be read to constrain Section 7 rights, the Board would interpret the policy as unlawful.

THE BOARD'S WHOLE FOODS DECISION

In *Whole Foods*, the Board assessed whether blanket policies that prohibited recording in all areas of every store (without company approval) violated the Act. One policy stated:

> It is a violation of Whole Foods Market policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from [senior management] or unless all parties to the conversation give their consent.

First, the Board noted that audio and video recording, as well as the posting of those recordings to social media sites, constitutes protected activity so long as the employees are acting in concert for their mutual aid and protection and no overriding employer interest is present.

Second, because the rule restricted all forms of recording conversations, the Board found that employees would reasonably interpret this rule as prohibiting employees from engaging in concerted protected activity, such as recording images of picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing terms and conditions of employment, documenting employer work rules, or recording evidence to use in a grievance or unfair labor practice meeting. Therefore, the Board found that Whole Foods' employees would reasonably construe the employer's rule against recording to restrict employees engaged in Section 7 activity.

Whole Foods argued that the rule was necessary to protect its privacy interest, including personal medical information, and confidential business strategy and trade secrets. However, the Board found that these contentions were based on "relatively narrow circumstances" and failed to justify the recording restriction.

The Impact of Whole Foods on Healthcare Providers

Unlike many other industries, health care providers have a unique obligation to prevent the disclosure of protected health information. The Health Insurance Portability and Accountability Act (HIPAA) privacy rule regulates the use and disclosures of a health care provider's patient's health status, provision of health care, or payment for healthcare. Many states also have passed privacy laws that come into play in the health care field. Violations of these laws can be costly and the Board has affirmed that health care providers have a weighty privacy interest in prohibiting the disclosure of private health information.

Four years before *Whole Foods*, the Board issued its decision in *Flagstaff Medical Center, Inc.*, wherein it addressed a recording policy in place at a hospital. In *Flagstaff*, the employer's policy stated that "the use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited." The Board held that employees would interpret this rule as a means of "protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity." Moreover, the Board held that there was no evidence that the hospital applied the rule to prohibit Section 7 activity.

Analysis of the *Whole Foods* decision provides mixed guidance to employers in the health care industry. On one hand, the Board in *Whole Foods* noted that *Flagstaff* is "plainly distinguishable" because of the "weighty patient privacy interests" and HIPAA obligation to prevent the disclosure of protected health information.

On the other hand, the Board has demonstrated recently its intent to pursue cases in which employment policies impact employees Section 7 rights. And given the Board's holding in *Whole Foods*, if the Board faced a blanket policy that prohibited recording in the health care setting today, it is unclear whether the Board would come to the same conclusion as in *Flagstaff*.

If a health care provider's policy were limited to prohibiting the use of cameras for recording images of patients (or patient information), the Board would likely find that the employer's strong interest in prohibiting the disclosure of protected health information justifies the policy. However, it is less clear how the Board would rule with respect to a policy that prohibits generally the recording of equipment, property, or facilities. In *Whole Foods*, it found that the employer's policy prohibiting "record[ing] conversations, phone calls, images or company meetings with any recording device" violated the Act because employees would reasonably interpret this policy to restrict concerted protected activity. There are a number of situations in a hospital or other health care provider's workplace in which recording equipment, property, or facilities would constitute protected activity. For example, recording a dangerous workplace condition, documenting evidence for a grievance, or recording a manager who is speaking about employment policies all implicate Section 7 rights. Unless these recordings also contained protected health information or some other identifiable interest, their creation would be lawful, and the Board could construe a broad prohibition on such recording to restrict this activity.

Health care companies may feel a false sense of security simply because they provide health care, and therefore broad patient confidentiality concerns allow them to maintain policies that prohibit recordings everywhere in their facilities. However, given the broad holding in *Whole Foods*, the Board could find that a blanket prohibition against any and all recordings at the workplace violates the Act.

Employers should consider tailoring their policies in a way that protects their legitimate interest in prohibiting the disclosure of protected health information and other sensitive information but does not otherwise restrict employees from engaging in protected conduct. Employers could achieve this objective by narrowing the scope of prohibited recordings to restrict the recording of protected health information. Another option is to provide examples of conduct prohibited by the policy. Further, an employer could specify that the policy does not prohibit employees from engaging in protected activity (such as recording safety concerns or preparing for a grievance). These measures would reduce the likelihood of an unfair labor practice finding.

CONCLUSION

In *Whole Foods*, the Board expanded the protections for employees who wish to record in the workplace. While health care employers have a legitimate basis to restrict recording protected health and other sensitive information, they should review their policies in light of *Whole Foods* to ensure that their policies are tailored to protect these legitimate interests.

LABOR AND EMPLOYMENT REGULATORY DEVELOPMENTS IN WASHINGTON – ARE YOU READY?

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Abstract:
As expected, during the last year of President Obama's term, the regulatory environment has been incredibly active. The Administration has issued executive orders and new rules in a number of important labor and employment areas. During this time frame regulatory agencies, such as the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB or Board), have also been active. These rules and decisions have included closely watched and heavily reported developments such as a new wage and hour overtime exemption test to lesser known rules such as increased reporting requirements for employers with respect to work place injuries. A review of some of the more important regulatory developments is outlined below.

U.S. DEPARTMENT OF LABOR (DOL) NEW OVERTIME RULES

In May 2016, the DOL issued its long-anticipated new overtime rule. The rule included an important new salary test to determine whether an employee would be exempt from the Fair Labor Standards Act (FLSA) work week overtime requirements. The new rule increases the previous salary test standard for non-exempt workers from $23,660 a year or $455 a week to $47,476 a year or $913 a week. This significant change in the salary test will be particularly challenging for small employers and retail and restaurant employers who have traditionally relied upon exempt assistant managers and other similar managerial employees to run their operations on a salary basis without having to pay for overtime for hours worked in excess of 40 in a work week.

The new rule, which also increases the salary test for highly compensated employees from $100,000 a year to $134,004, implements an indexing approach wherein adjustments will be made to the salary test every three years. Additionally, the final rule amends the salary basis test to allow employers to use non-discretionary bonuses and incentive payments, including commissions, to satisfy up to 10 percent of the new standard salary level or $4,747. Such payments must be made on a quarterly basis with an option for employers to make "catch-up" payments.

In addition to the large number of workers who will now be eligible for overtime, undoubtedly disagreements will arise as to what constitutes work time including when a work day begins and ends. Issues also may arise about how overtime rates are to be established, especially for employees who will continue to receive a salary, but also will be eligible for overtime. Such disputes will increase the already numerous collective action court cases filed under the FLSA.

Employer Wellness Plan Regulation

The Equal Employment Opportunity Commission (EEOC) issued, for the first time, a rule defining the parameters that employers must follow if they desire to implement wellness programs. This new rule, which also issued in May 2016, establishes a formula to determine the maximum amount of financial incentives that may be implemented to influence employees to make certain choices about their health status. The new rule also attempts to provide guidance with respect to what constitutes a "voluntary" program that will be in compliance with not only the Affordable Care Act, but also the Age Discrimination Act, the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act.

Employers that have existing wellness plans or those that are considering introducing a wellness plan into their workplace should carefully review the EEOC's new rule to minimize litigation risks in this area.

DOL "Persuader" Rule

The DOL, in April 2016, implemented a final rule changing the definition of what constituted a reportable persuader activity under the Labor Management Reporting and Disclosure Act (LMRDA). The new rule considerably broadens the type of activities that an employer must report to the federal government with respect to third-party assistance obtained from consultants and attorneys where such activities are directed at influencing employees thinking regarding potential union representation. The new rule restricts the scope of the "advice exemption" under the LMRDA thereby increasing the scope of reportable activities. Finally, and perhaps most importantly, the new rule requires employers and their third-party advisors to report activities which "indirectly" influence employees' thinking with respect to unionization. This is a substantial change from previous DOL interpretations of the LMRDA as, previously, only activities that involved direct interaction by consultants and attorneys with employees regarding the disadvantages of unionization had to be reported.

Three lawsuits have been filed in various federal Unites States district courts challenging the new persuader rule. Such arguments claim that the new rule, not only incorrectly interprets the requirements of the LMRDA, but also violates employer free speech rights. Such litigation is expected to continue for a period of time placing the DOL's new rule in an uncertain state.

Other Pending Purposed Rules

In addition to the above implemented new rules, the Administration also has pending proposed rules to expand employer reporting requirements for EEO-1 reports to include salary data by gender and race. Such proposed new reporting requirements provide a

number of salary ranges, and according to the EEOC, is intended to promote employer initiatives to eliminate pay discrimination in the workplace. This proposal, which is being undertaken by the EEOC in cooperation with the DOL's Office of Federal Contract Compliance Programs, is highly controversial and many employers believe it is ultimately intended to support more government challenges of employer's compensation programs including additional class action litigation.

Another proposed DOL rule would create a new federal bureaucracy to determine whether federal contractors are complying with federal and equivalent state labor and employment laws. This issue has been labeled by the employer community as "contractor blacklisting." The proposed rule would place numerous requirements on not only federal prime contractors, but also on the various sub-contractors that work with a prime contractor to provide goods and services to the federal government. Consequences of this new rule, if it is ultimately implemented, would be the potential disqualification of certain contractors for federal work if they are even charged with violations of federal and equivalent state labor and employment laws. The purposed new rule also includes extensive reporting requirements on federal contractors and sub-contractors including a requirement that such employers notify their employees as to their overtime status and whether individuals working on such contracts are classified as "independent contractors." Various employer trade associations have indicated their strong disagreement with the proposed new rule, and also stated various legal concerns they have regarding this proposal. Such employer groups are expected to file legal challenges to the new rule when it issues later this year.

National Labor Relations Board Activities

In addition to the above outlined regulatory initiatives, the NLRB continues to be active in issuing new decisions impacting the workplace. For example, the Board continues to issue decisions striking down arbitration agreements that prohibit employee class action grievances. The Board also recently issued a landmark decision in the *Browning- Ferris* case considerably broadening the definition of joint employer relationships between two or more employer entities. The Board also continues to actively monitor employer handbooks and other policies, including social media policies. Areas for employers to watch for in this area include the following:

- Overly broad confidentiality provisions
- Restrictions on employees speaking to the media
- Restrictions or prohibitions on employee criticism of employer terms and conditions of employment
- Prohibitions on employee recording conversations and photographing in the workplace except where special circumstances exist (for example, protecting patient privacy and medical information in hospital settings)
- Policies that dictate "positive" relationships among employees
- Polices that strictly prohibit the use of vulgarity in the workplace

Additionally, the Board continues to find appropriate small or micro voting units and fragmented bargaining units being sought by unions thereby increasing the probability of union success in organizing campaigns.

Finally, the NLRB General Counsel continues to have an activist agenda. That agenda includes, for example, recently announcing an intent to issue complaints against employers that allegedly misclassify individuals as independent contractors and thereby deprive such individuals of National Labor Relations Act employee protection in the workplace.

The "Washington Climate" for employers will continue to be a challenge throughout the rest of this year and the impact of the upcoming presidential election will determine whether many of the above initiatives will continue. Employers therefore need to carefully monitor the regulatory climate inside the Beltway to ensure, to the extent possible, they are in compliance with the ever-expanding regulatory initiatives, including NLRB and EEOC decisions and rules.

APPENDIX A: SUMMARY OF PETITIONS FILED AND ELECTIONS HELD

ALL SECTORS - SUMMARY OF PETITIONS FILED & ELECTIONS HELD (2006 - 2015)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total Petitions	3,318	3,083	3,052	2,788	2,896	2,550	2,475	2,554	2,621	2,598
Total Representation (RC) Petitions	2,464	2,339	2,357	2,109	2,353	1,964	1,984	2,033	2,136	2,170
Union Not Elected	622	611	516	352	556	358	501	476	433	480
Union Elected	997	1,067	1,065	759	1,142	808	863	902	985	1,110
Total Decertification Petitions	854	744	694	679	543	586	491	521	485	428
Total RD Petitions	745	644	577	591	490	494	462	464	438	370
Total RM Petitions	109	100	117	88	53	92	29	57	47	58
Union Not Elected	268	248	171	145	156	168	149	131	121	132
Union Elected	141	145	143	94	95	123	99	88	71	84

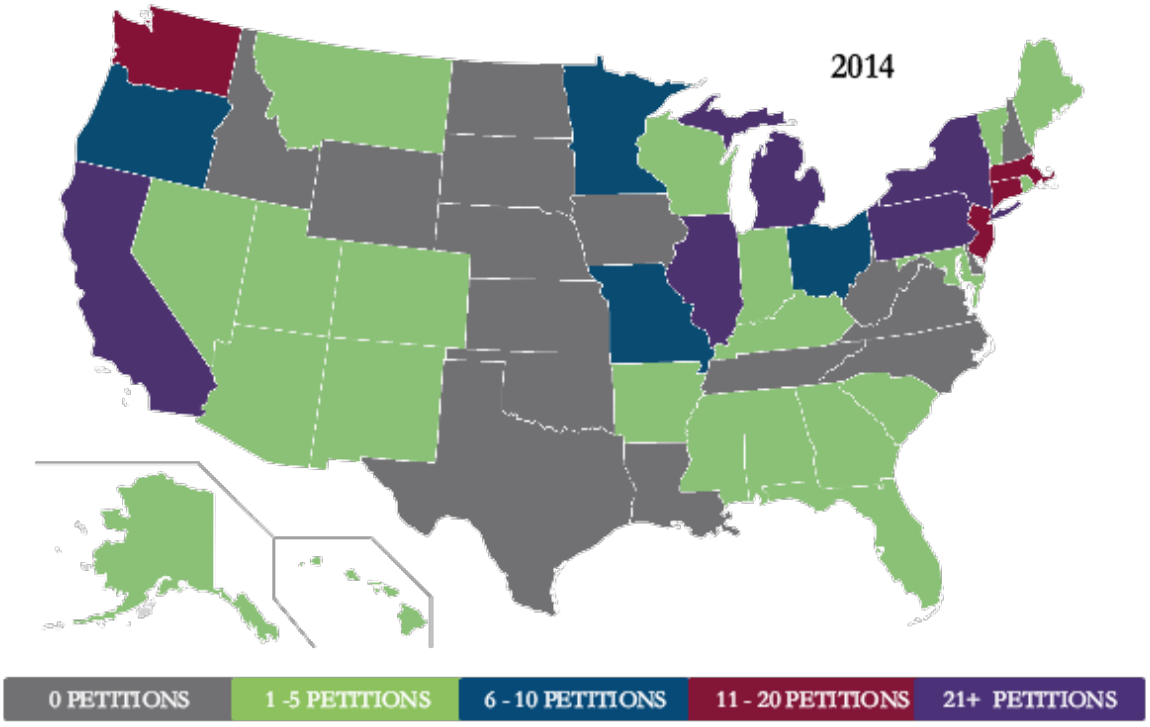
HEALTH CARE - SUMMARY OF PETITIONS FILED & ELECTIONS HELD (2006 - 2015)

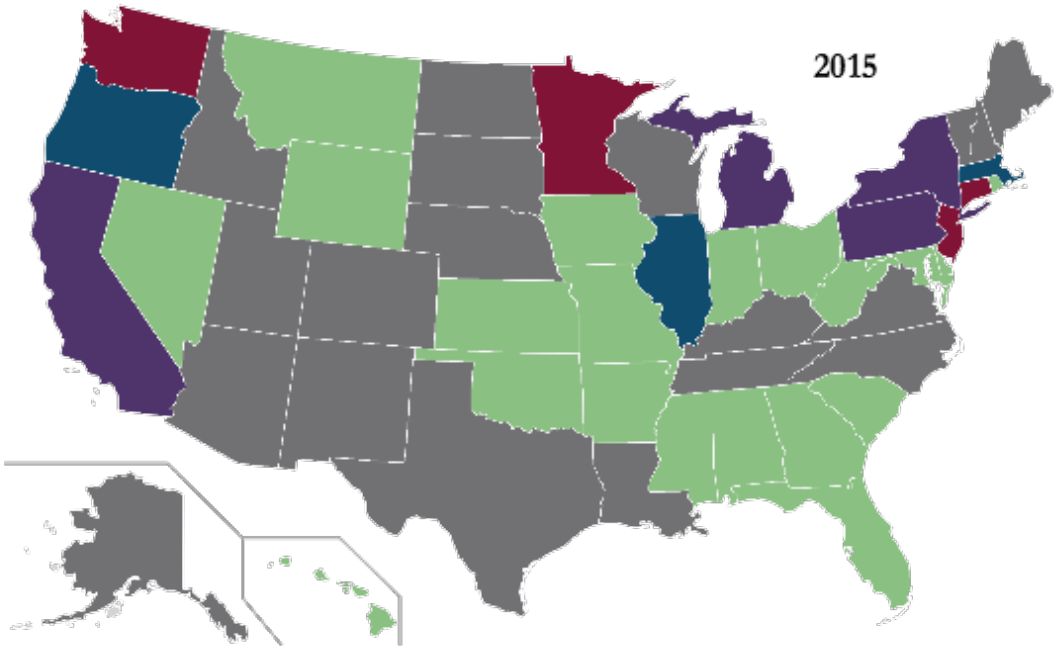
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total Petitions	509	430	445	470	433	410	362	388	446	372
Total Representation (RC) Petitions	394	309	307	361	349	290	296	314	358	309
Union Not Elected	78	64	63	53	77	61	69	65	53	61
Union Elected	217	163	186	134	187	162	171	159	189	191
Total Decertification Petitions	115	121	138	109	84	120	66	74	88	43
Total RD Petitions	108	102	89	102	73	69	59	65	85	55
Total RM Petitions	12	19	49	7	11	51	7	9	3	8
Union Not Elected	27	27	22	14	13	57	13	12	21	19
Union Elected	31	28	28	19	28	26	25	18	14	12

ALL NON-HEALTH CARE SECTORS - SUMMARY OF PETITIONS FILED & ELECTIONS HELD (2006 - 2015)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total Petitions	2,809	2,653	2,607	2,318	2,463	2,140	2,113	2,166	2,175	2,226
Total Representation (RC) Petitions	2,070	2,030	2,050	1,748	2,004	1,674	1,688	1,719	1,778	1.861
Union Not Elected	544	547	453	299	479	297	432	411	380	201
Union Elected	780	904	879	625	955	646	692	743	795	445
Total Decertification Petitions	739	623	556	570	459	466	425	447	397	365
Total RD Petitions	637	542	488	489	417	425	403	399	353	315
Total RM Petitions	97	81	68	81	42	41	22	48	44	50
Union Not Elected	241	221	149	131	143	111	136	119	101	113
Union Elected	110	117	115	75	67	97	74	70	57	72

Appendix B: Maps of Representation Petitions Filed in Health Care





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APPENDIX D: THE NATIONAL LABOR RELATIONS BOARD DEFINITIONS

The following summary from the National Labor Relations Board is reproduced with permission from "The National Labor Relations Board and You" (http://www.nlrb.gov/nlrb/shared_files/ brochures/engrep.asp), which contains additional materials.

WHAT IS THE NATIONAL LABOR RELATIONS BOARD?

We are an independent Federal agency established to enforce the National Labor Relations Act (NLRA). As an independent agency, we are not part of any other government agency—such as the Department of Labor.

Congress has empowered the NLRB to conduct secret-ballot elections so employees may exercise a free choice whether a union should represent them for bargaining purposes. A secret-ballot election will be conducted only when a petition requesting an election is filed. Such a petition should be filed with the Regional Office in the area where the unit of employees is located. All Regional Offices have petition forms that are available on request and without cost.

TYPES OF PETITIONS

1) CERTIFICATION OF REPRESENTATION (RC)

This petition, which is normally filed by a union, seeks an election to determine whether employees wish to be represented by a union. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit being sought. These signatures may be on paper. Generally, this designation or "showing of interest" contains a statement that the employees want to be represented for collective-bargaining purposes by a specific labor organization. The showing of interest must be signed by each employee and each employee's signature must be dated.

2) DECERTIFICATION (RD)

This petition, which can be filed by an individual, seeks an election to determine whether the authority of a union to act as a bargaining representative of employees should continue. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit represented by the union. These signatures may be on separate cards or on a single piece of paper. Generally, this showing of interest contains a statement that the employees do not wish to be represented for collective-bargaining purposes by the existing labor organization. The showing of interest must be signed by each employee and each employee's signature must be dated.

3) WITHDRAWAL OF UNION-SECURITY AUTHORITY (UD)

This petition, which can also be filed by an individual, seeks an election to determine whether to continue the union's contractual authority to require that employees make certain lawful payments to the union in order to retain their jobs. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit covered by the

union-security agreement. These signatures may be on separate cards or on a single piece of paper. Generally, this showing of interest states that the employees no longer want their collective-bargaining agreement to contain a union-security provision. The showing of interest must be signed by each employee and each employee's signature must be dated.

4) Employer Petition (RM)

This petition is filed by an employer for an election when one or more unions claim to represent the employer's employees or when the employer has reasonable grounds for believing that the union, which is the current collective-bargaining representative, no longer represents a majority of employees. In the latter case, the petition must be supported by the evidence or "objective considerations" relied on by the employer for believing that the union no longer represents a majority of its employees.

5) Unit Clarification

This petition seeks to clarify the scope of an existing bargaining unit by, for example, determining whether a new classification is properly a part of that unit. The petition may be filed by either the employer or the union.

6) Amendment of Certification (AC)

This petition seeks the amendment of an outstanding certification of a union to reflect changed circumstances, such as changes in the name or affiliation of the union. This petition may be filed by a union or an employer.

APPENDIX E: EMPLOYEE CATEGORIES AS DEFINED BY THE NATIONAL LABOR RELATIONS BOARD

Registered Nurses (RNs): A nurse who has graduated from a formal program of nursing education (diploma school, associate degree, or baccalaureate program) and is licensed by the appropriate state authority.

Professional Employees: Employees with four-year degrees or beyond (except RNs and physicians). These employees typically work in jobs that are intellectual in character and involve consistent exercise of discretion and judgment (e.g., pharmacists, physical therapists).

Technical Employees: Employees with some significant, distinct, specialized course of training beyond high school. Other factors considered will be length of training (generally more than six months), state or governmental licensing, or formal certification process (e.g., lab techs, respiratory therapists, radiology technicians).

Security Guards: Employees who provide security service to the hospital, its property, grounds, buildings, employees, and patients.

Skilled Maintenance Employees: Employees who provide skilled maintenance and/or engineering services (e.g., sanitary engineers, licensed electricians, plumbers).

Business Office Clerical Employees: Clerical employees who perform business office functions and/or who have a strong working relationship with the business office functions; general clerical should be classified as "service worker."

Physicians: Licensed physicians who are "employees" of the hospital.

Service and Non-Professional Employees: This unit will generally include all service and unskilled maintenance employees. Employees in this category generally perform manual and routine job functions, and are not highly skilled or trained.

Other/Combined Job Classifications: Any jobs not listed above, or units covering more than one of the above categories.