

Labor Activity in Health Care

SEMI-ANNUAL REPORT

JANUARY 1ST, 2016 TO DECEMBER 31ST, 2016

47

PRESENTED BY



THE HUMAN SIDE OF HEALTHCARE

A personal membership group of the
American Hospital Association

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TABLE OF CONTENTS

ABOUT THIS REPORT 1

LETTER FROM JAMES G. TRIVISONNO 2

INTRODUCTION 3

EXECUTIVE SUMMARY 4

 NLRB REPRESENTATION PETITIONS AND ELECTIONS 4

UNION MEMBERSHIP NATIONWIDE 5

NATIONAL LABOR RELATIONS BOARD PETITION AND ELECTION RESULTS 6

 NATIONAL SUMMARIES 7

 STATE SUMMARIES 9

 UNION SUMMARIES 13

 REGIONAL SUMMARIES 15

 STRIKES IN HEALTH CARE 25

LABOR LAW/ACTIVITY UPDATE 26

NLRB CHANGES COURSE ON HEALTH CARE PICKETING: CAN EMPLOYEES PICKET ON HOSPITAL PROPERTY? 27

APPENDIX A: SUMMARY OF PETITIONS FILED AND ELECTIONS HELD 44

APPENDIX B: MAPS OF REPRESENTATION PETITIONS FILED IN HEALTH CARE .. 45

APPENDIX C: 2016 ASHHRA ADVOCACY COMMITTEE 46

APPENDIX D: THE NATIONAL LABOR RELATIONS BOARD DEFINITIONS 48

APPENDIX E: EMPLOYEE CATEGORIES AS DEFINED BY THE NATIONAL LABOR RELATIONS BOARD 50

ABOUT THIS REPORT

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

The *47th 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 2015 and 2016.
- 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

Following several recent years of dramatic shifts in labor, catalyzed by unprecedented rulings from the National Labor Relations Board (NLRB), employers find themselves facing a hopeful, new political environment and the potential for deregulation. However, the defining changes of the last few years have not been without consequence.

In 2016, unions organizing the health care sector experienced the highest election success rate (81 percent) of the last decade. This growing rate of success came just a year after NLRB changes, such as the expedited election rule and acceptance of electronic signatures on union authorization cards and petitions, that contributed to unions' organizing success.

Labor law experts will be closely watching the new administration of President Donald J. Trump and the appointment of Supreme Court Justice Neil Gorsuch, who recently filled the vacancy of the late Justice Antonin Scalia, to determine if overarching regulations of the past will withstand the current political arena.

The appointment of two NLRB board members by President Trump to fill the current vacancies also will have a significant impact on the future of labor policy.

Although the industry is positioned for a potential shift that bodes well for employers, the previous rulings still impact union organizing until action is otherwise taken. I encourage employers to consider a proactive approach to their labor relations strategy. Preparedness is your greatest advantage in mitigating union activity.

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

While the number of 2016 representation case (RC) elections in the health care sector (241) remained near the decade average, the rate at which unions were elected increased to 81 percent, the highest election rate over the past decade. By comparison, unions were elected in 70 percent of RC elections in non-health care industries in 2016.

As expected, the Service Employees International Union (SEIU) was once again the most active in organizing employees in the health care sector. The union filed 144 petitions – more than triple that of any other union – and were involved in nearly half of the total health care RC elections in 2016, prevailing in 87 percent of those elections. The United Food and Commercial Workers (UFCW), the International Brotherhood of Teamsters (IBT) and the American Federation of State and County Municipal Employees (AFSCME) also were among the top most-active unions in the health care sector.

Four of the eight most-active unions in health care – SEIU, AFSCME, IBT and National Nurses United (NNU) saw increased election rates from 2015 to 2016. AFSCME and the International Union of Journeyman and Allied Trades (IUJAT) recorded the highest rates of election successes in 2016, being elected in 91 and 89 percent of their elections, respectively.

Notably, NNU increased their activity from 2015 to 2016, filing nearly triple the number of RC petitions and participating in twice the number of RC elections. NNU was elected in 67 percent of their elections in the health care sector. Also in 2016, California, the home of NNU's largest affiliate, the California Nurses Association, reclaimed their position as the most active organizing state in health care.

New York, Pennsylvania, Michigan, New Jersey and Washington complete the list of the top six most active states, representing more than 70 percent of the total RC petitions filed in the health care sector.

The most dramatic change in 2016 occurred in the national political arena with the election of President Donald J. Trump and a maintained Republican majority in both the Senate and House of Representatives. This political environment suggests that many of the divisive labor regulations set forth during the eight years of President Barack Obama's administration may not survive the current conservative super majority. These will be issues to watch over the next few years.

EXECUTIVE SUMMARY

NLRB REPRESENTATION PETITIONS AND ELECTIONS^{1,2}

In 2016, there were 341 representation petitions filed in health care. A total of 241 representation elections were held, and unions were elected in 81 percent of these – the highest success rate unions have seen in the last decade. In contrast, only 40 decertification elections were held, and unions maintained recognition in 43 percent of these.

The majority of union organizing activity occurs in just six states – California, New York, Pennsylvania, Michigan, New Jersey and Washington.

The Service Employees International Union (SEIU) has maintained its status as the dominant organizing union in the health care field. In 2016, SEIU accounted for 42 percent of representation petitions filed, 47 percent of representation elections held, and were successfully elected in 87 percent of those elections.

Over the past decade, strike activity in the health care field has been limited to less than half the states in the union. The vast majority of strike activity has occurred in California.

¹ See Appendix D for detailed definitions of the types of representation petitions and elections.

² 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.

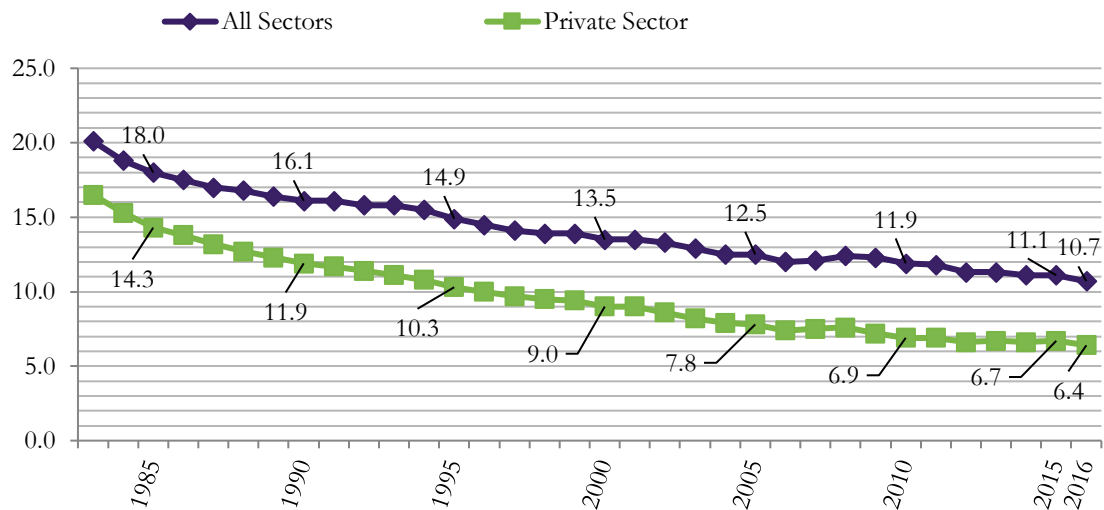
UNION MEMBERSHIP NATIONWIDE

According to the Department of Labor (DOL) Bureau of Labor Statistics' *Union Membership 2016* report, the percentage of unionized wage and salary employees decreased to 10.7, while the number of unionized workers declined by 240,000 from 2015 to 14.6 million in 2016.

Data from the DOL report includes the following highlights:

- The number of *private sector* employees belonging to a union (7.4 million) remains greater than the number of *public sector* employees belonging to a union (7.1 million)
- *Public sector* employees were more than five times as likely than *private sector* workers to be members of a union (34.4 percent vs. 6.4 percent, respectively)
- Black workers continued to have the highest union membership rate in 2015 (13.0 percent), followed by Whites (10.5 percent), Asians (9.0 percent) and Hispanics (8.8 percent)
- The highest union membership rate is among men aged 45 to 54 (13.8 percent), while the lowest is among women aged 16 to 24 (3.6 percent)
- New York continues to have the highest union membership rates (23.6 percent); South Carolina has the lowest rates (1.6 percent)
- Union membership rates increased in 16 states, decreased in 32 states and the District of Columbia, 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 2016

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

NATIONAL SUMMARIES

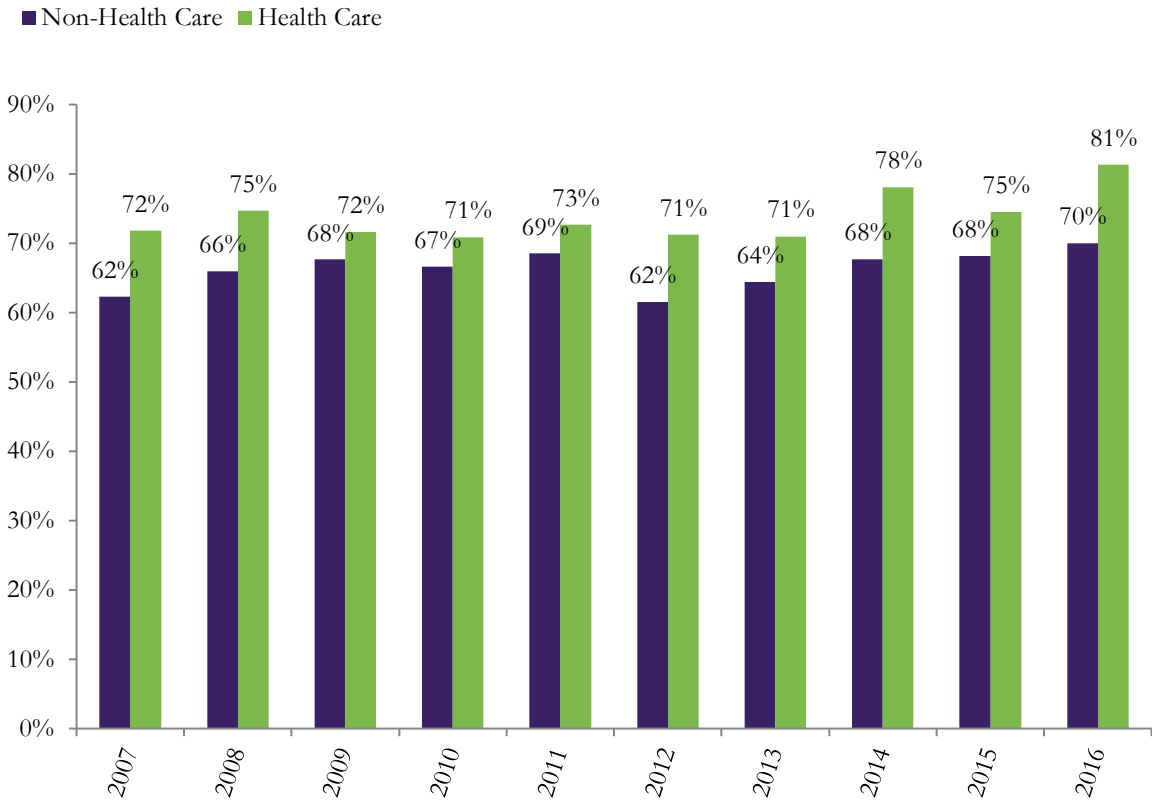
The following information summarizes representation petition activity and elections held during the past decade as reported by the National Labor Relations Board (NLRB).

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 2016, unions were elected in 81 percent of RC elections held in the health care sector compared to 70 percent in non-health care.

COMPARISON OF UNION SUCCESSES IN REPRESENTATION (RC) ELECTIONS

Health Care vs. Non-Health Care Sectors (2007 - 2016)



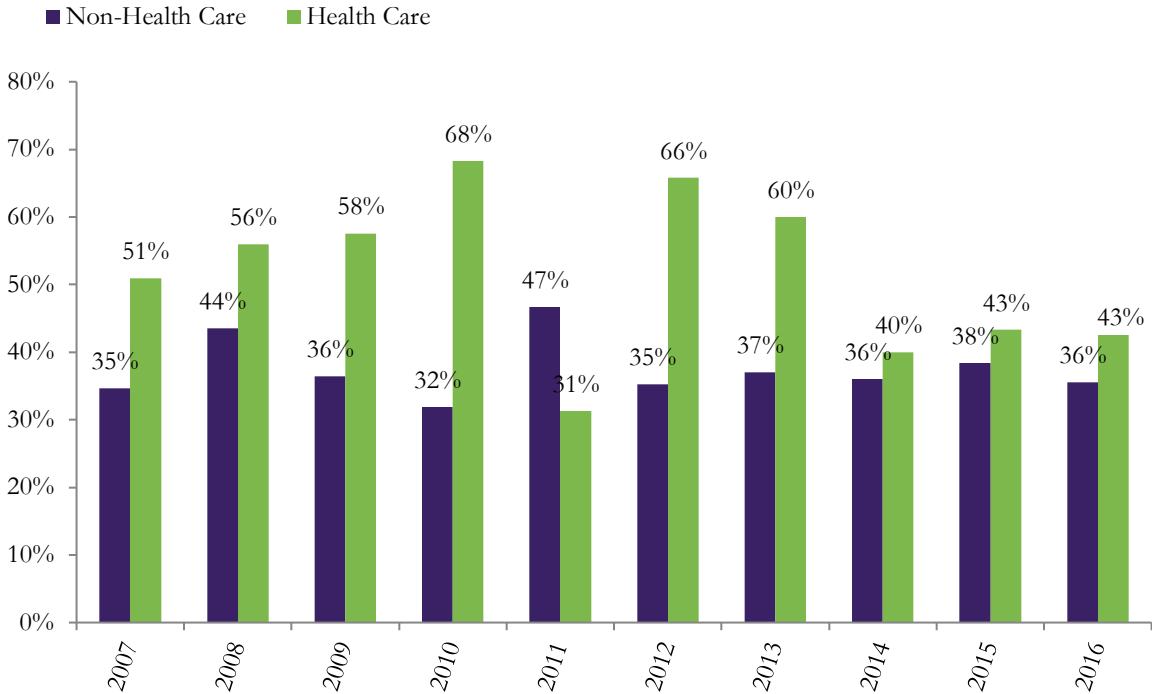
Source: LRI Management Services, Inc.

Figure 2

Over the past decade, unions typically have been more successful defending against decertification elections in the health care sector versus other sectors. The gap has decreased in the past several years, and in 2016, unions maintained recognition in just 43 percent of decertification elections held in the health care sector and 36 percent of elections held in other sectors.

COMPARISON OF UNION PREVENTION OF DECERTIFICATION (RD & RM)

Health Care vs. Non-Health Care Sectors (2007 - 2016)

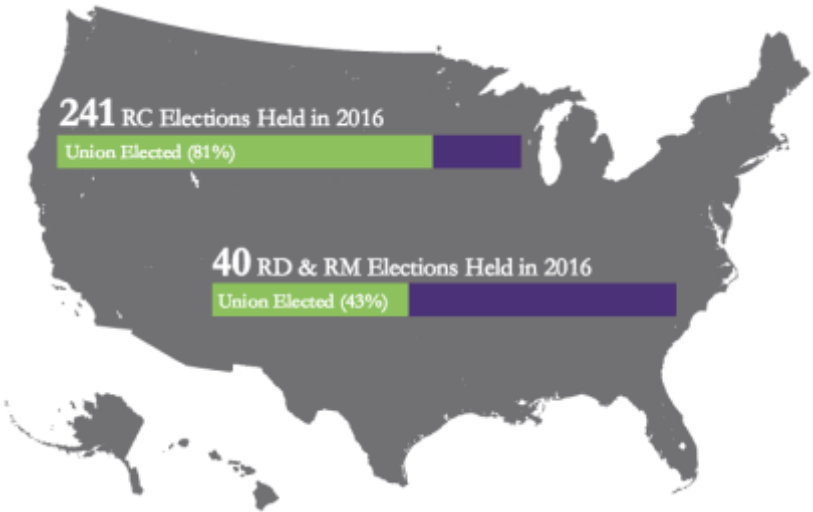


Source: LRI Management Services, Inc.

Figure 3

HEALTH CARE SECTOR - ELECTIONS OVERVIEW

In 2016, there were 241 representation (RC) elections held in the health care sector, and unions were elected in 81 percent of these. There also were 40 decertification (RD & RM) elections held during 2016, and unions maintained recognition in 43 percent of these.

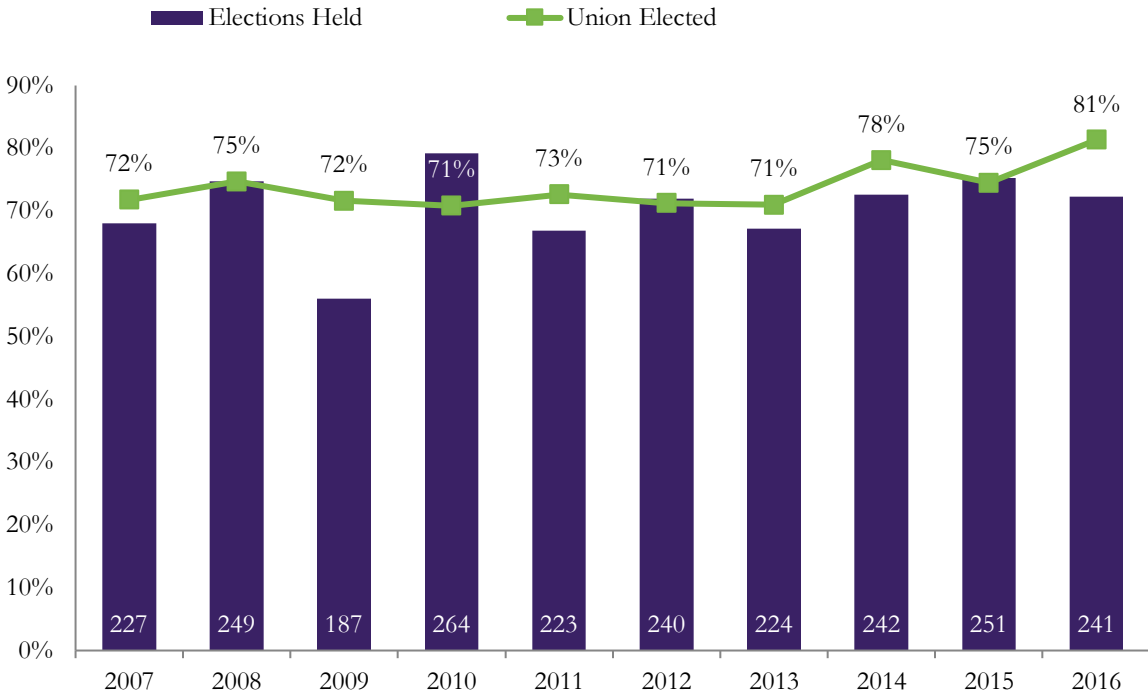


HEALTH CARE SECTOR - UNION SUCCESSES IN REPRESENTATION (RC) ELECTIONS

Unions were elected in 81 percent of the 241 representation elections held in 2016. This is the highest election rate over the past decade.

UNION SUCCESSES IN REPRESENTATION (RC) ELECTIONS COMPARED TO NUMBER OF ELECTIONS HELD

Health Care Sector (2007 - 2016)



Source: LRI Management Services, Inc.

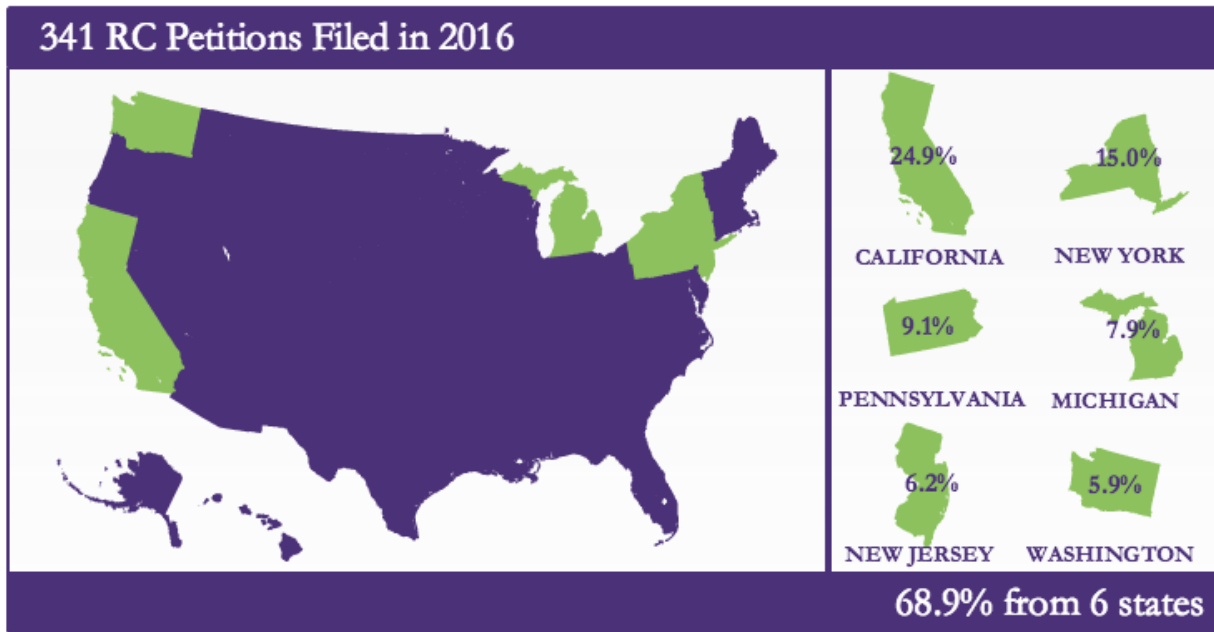
Figure 4

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 2016 at the time of publication.

MOST ACTIVE STATES - REPRESENTATION (RC) PETITIONS FILED IN HEALTH CARE

The majority of representation petitions filed in 2016 were filed in just six states. Nearly 70 percent of the representation petitions filed were in California, New York, Pennsylvania, Michigan, New Jersey and Washington.



ALL STATES - REPRESENTATION (RC) PETITIONS FILED IN HEALTH CARE

The table below illustrates the number of petitions filed in each state in 2015 and 2016.

State	2015	2016	State	2015	2016	State	2015	2016
Alabama	2	7	Iowa	1	1	Oklahoma	1	-
Arizona	-	4	Kansas	1	-	Oregon	6	5
Arkansas	1	-	Kentucky	-	2	Pennsylvania	29	31
California	62	85	Maryland	5	6	Puerto Rico	13	4
Colorado	-	1	Massachusetts	7	10	Rhode Island	2	5
Connecticut	11	6	Michigan	35	27	South Carolina	1	1
DC	2	3	Minnesota	11	8	Texas	-	1
Delaware	2	1	Mississippi	1	-	Virginia	-	2
Florida	2	8	Missouri	5	2	Vermont	-	1
Georgia	3	1	Montana	1	2	Washington	19	20
Hawaii	1	5	New Jersey	17	21	Wisconsin	-	2
Illinois	11	7	New York	65	51	West Virginia	1	-
Indiana	2	4	Ohio	5	7	Wyoming	2	-
Total							327	341

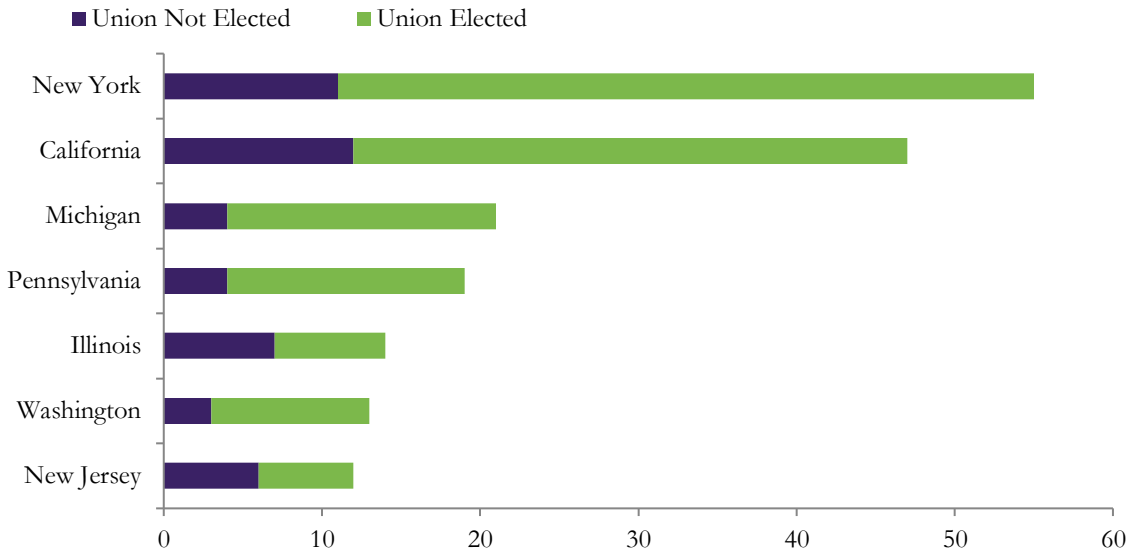
Note: A state is not listed in the table if no RC petitions were filed in 2015 or 2016.

MOST ACTIVE STATES - REPRESENTATION (RC) ELECTION RESULTS IN HEALTH CARE

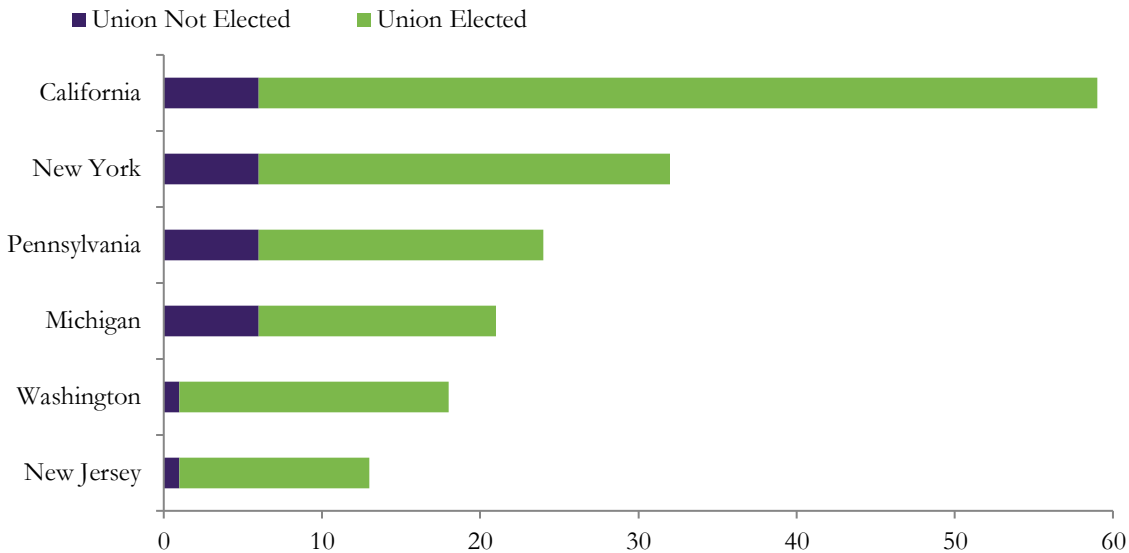
In 2015, New York, California and Michigan experienced the most representation elections in health care. In 2016, the top three states were California, New York and Pennsylvania.

MOST ACTIVE STATES - RC ELECTION RESULTS IN HEALTH CARE

2015



2016



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 2015 and 2016.

State	2015					2016				
	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	-	-	-	-	-	6	4	67%	2	33%
Arizona	-	-	-	-	-	3	2	67%	1	33%
Arkansas	1	0	0%	1	100%	-	-	-	-	-
California	49	35	71%	12	24%	59	53	90%	6	10%
Colorado	-	-	-	-	-	1	0	0%	1	100%
Connecticut	6	5	83%	1	17%	3	3	100%	0	0%
District of Columbia	2	2	100%	0	0%	1	1	100%	0	0%
Delaware	1	1	100%	0	0%	1	0	0%	1	100%
Florida	2	2	100%	0	0%	5	4	80%	1	20%
Georgia	1	1	100%	0	0%	1	1	100%	0	0%
Hawaii	1	1	100%	0	0%	4	2	50%	2	50%
Illinois	15	7	47%	7	47%	6	5	83%	1	17%
Indiana	3	2	67%	1	33%	3	2	67%	1	33%
Iowa	-	-	-	-	-	1	0	0%	1	100%
Kansas	1	1	100%	0	0%	-	-	-	-	-
Kentucky	-	-	-	-	-	2	1	50%	1	50%
Maryland	4	3	75%	1	25%	4	4	100%	0	0%
Massachusetts	9	9	100%	0	0%	8	5	63%	3	38%
Michigan	21	17	81%	4	19%	21	15	71%	6	29%
Minnesota	9	7	78%	1	11%	6	6	100%	0	0%
Mississippi	1	1	100%	0	0%	-	-	-	-	-
Missouri	2	1	50%	1	50%	1	1	100%	0	0%
Montana	1	1	100%	0	0%	1	1	100%	0	0%
New Jersey	12	6	50%	6	50%	13	12	92%	1	8%
New York	55	44	80%	11	20%	32	26	81%	6	19%
Ohio	3	0	0%	3	100%	6	4	67%	2	33%
Oklahoma	1	1	100%	0	0%	-	-	-	-	-
Oregon	5	4	80%	1	20%	2	2	100%	0	0%
Pennsylvania	19	15	79%	4	21%	24	18	75%	6	25%
Puerto Rico	9	8	89%	1	11%	3	1	33%	2	67%
Rhode Island	2	2	100%	0	0%	2	2	100%	0	0%
South Carolina	1	1	100%	0	0%	-	-	-	-	-
Texas	-	-	-	-	-	1	1	100%	0	0%
Vermont	-	-	-	-	-	1	1	100%	0	0%
Virginia	-	-	-	-	-	1	1	100%	0	0%
Washington	13	10	77%	3	23%	18	17	94%	1	6%
Wisconsin	-	-	-	-	-	1	1	100%	0	0%
Wyoming	2	0	0%	2	100%	-	-	-	-	-
Total	251	187	75%	60	24%	241	196	81%	45	19%

Note: A state is not listed in the table if no RC elections were held in 2015 or 2016.

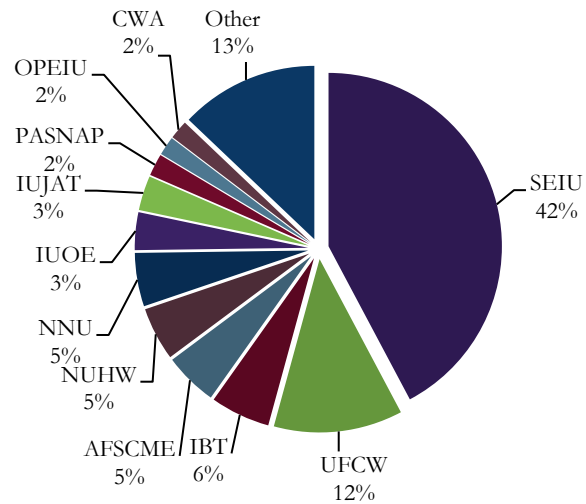
*Results pending for one or more elections at time of publication, therefore results totals do not add up to 100%.

UNION SUMMARIES

MOST ACTIVE UNIONS - REPRESENTATION (RC) PETITIONS FILED IN HEALTH CARE 2016

The Service Employees International Union (SEIU) has once again filed more than triple the number of representation petitions than any other union in the health care sector – 42 percent of all petitions filed in 2016.

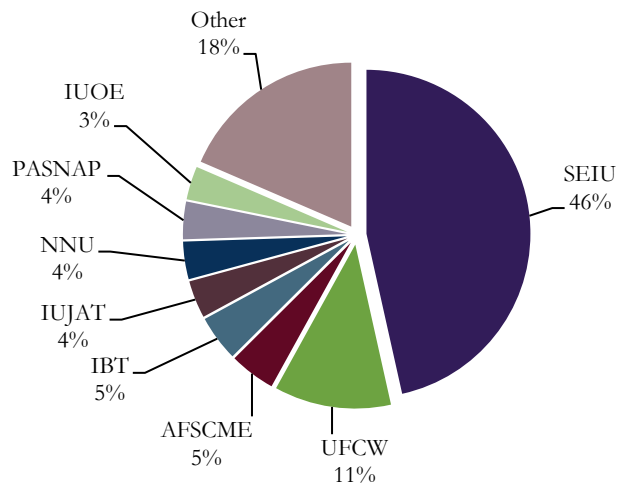
The following table details the number of representation petitions filed by the most active unions in health care in 2016.



Abbreviation	Union Name	RC Petitions Filed	
		2015	2016
SEIU	Service Employees International Union	146	144
UFCW	United Food and Commercial Workers	35	41
IBT	International Brotherhood of Teamsters	18	19
AFSCME	American Federation of State, County and Municipal Employees	20	17
NUHW	National Union of Healthcare Workers	8	17
NNU	National Nurses United	6	17
IUOE	International Union of Operating Engineers	10	12
IUJAT	International Union of Journeymen and Allied Trades	6	11
PASNAP	Pennsylvania Association of Staff Nurses and Allied Professionals	9	7
OPEIU	Office and Professional Employees International Union	3	6

MOST ACTIVE UNIONS - REPRESENTATION (RC) ELECTIONS HELD IN HEALTH CARE 2016

As expected, SEIU also was involved in more representation elections than any other union in the health care sector. It was involved in 113 elections in 2016 and elected in 87 percent of them.



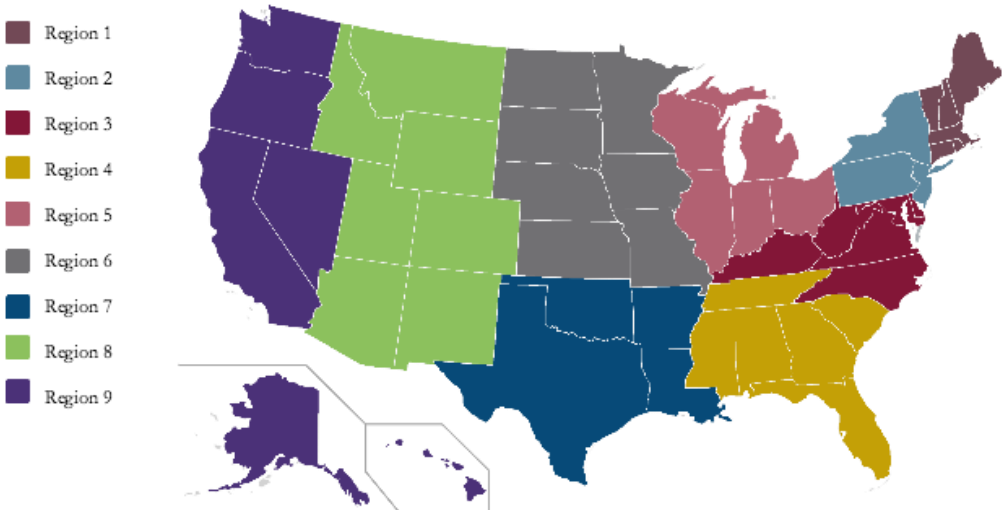
Abbreviation	Union Name	RC Elections Held	
		2015	2016
SEIU	Service Employees International Union	119	113
UFCW	United Food and Commercial Workers	23	28
AFSCME	American Federation of State, County and Municipal Employees	15	11
IBT	International Brotherhood of Teamsters	20	11
IUJAT	International Union of Journeymen and Allied Trades	10	9
NNU	National Nurses United	4	9
IUOE	International Union of Operating Engineers	8	8
PASNAP	Pennsylvania Association of Staff Nurses and Allied Professionals	4	9

MOST ACTIVE UNIONS - REPRESENTATION (RC) ELECTION RESULTS

	2015			2016		
	Total Elections	Union Elected %	Union Not Elected %	Total Elections	Union Elected %	Union Not Elected %
SEIU	119	79%	19%	113	87%	12%
UFCW	23	74%	17%	28	71%	29%
AFSCME	15	60%	33%	11	91%	9%
IBT	20	45%	45%	11	55%	36%
IUJAT	10	90%	10%	9	89%	11%
NNU	4	50%	25%	9	67%	22%
IUOE	8	88%	13%	8	88%	13%
PASNAP	4	100%	0%	9	78%	22%

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.

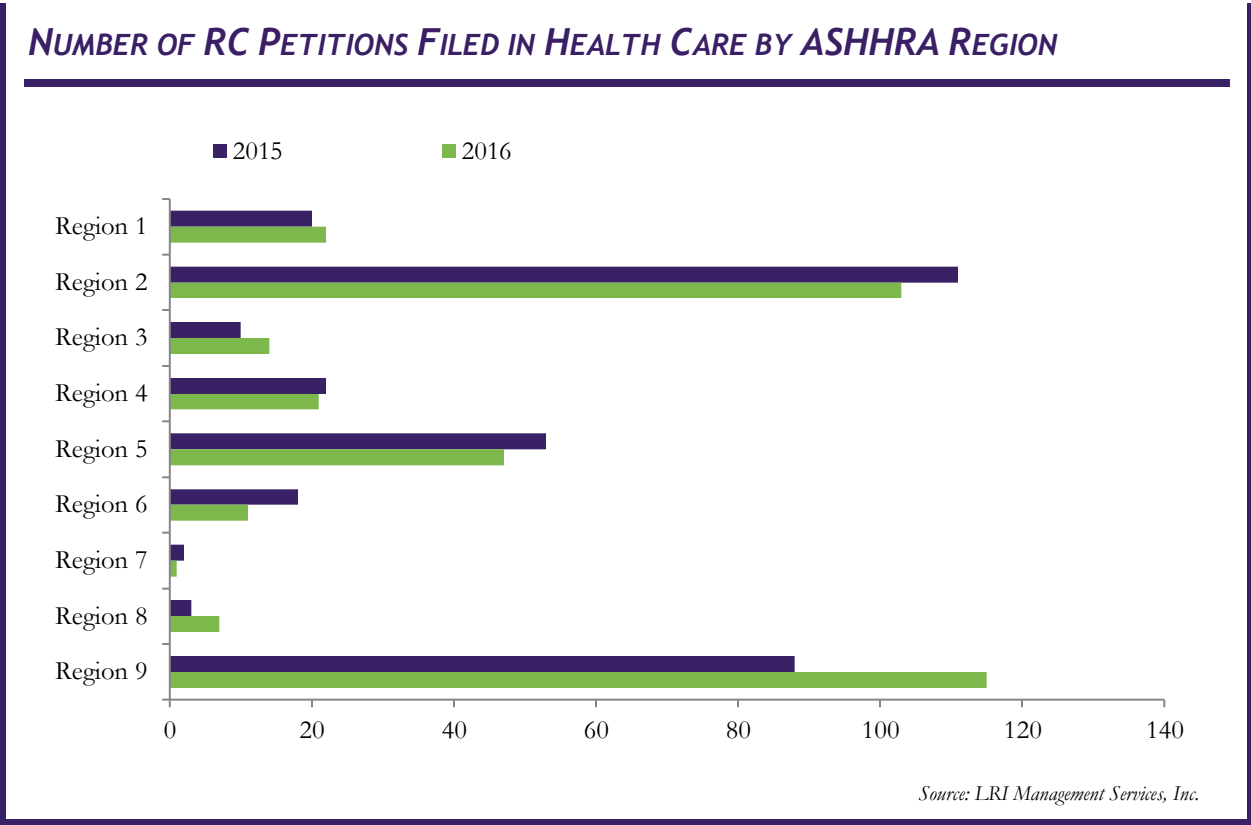
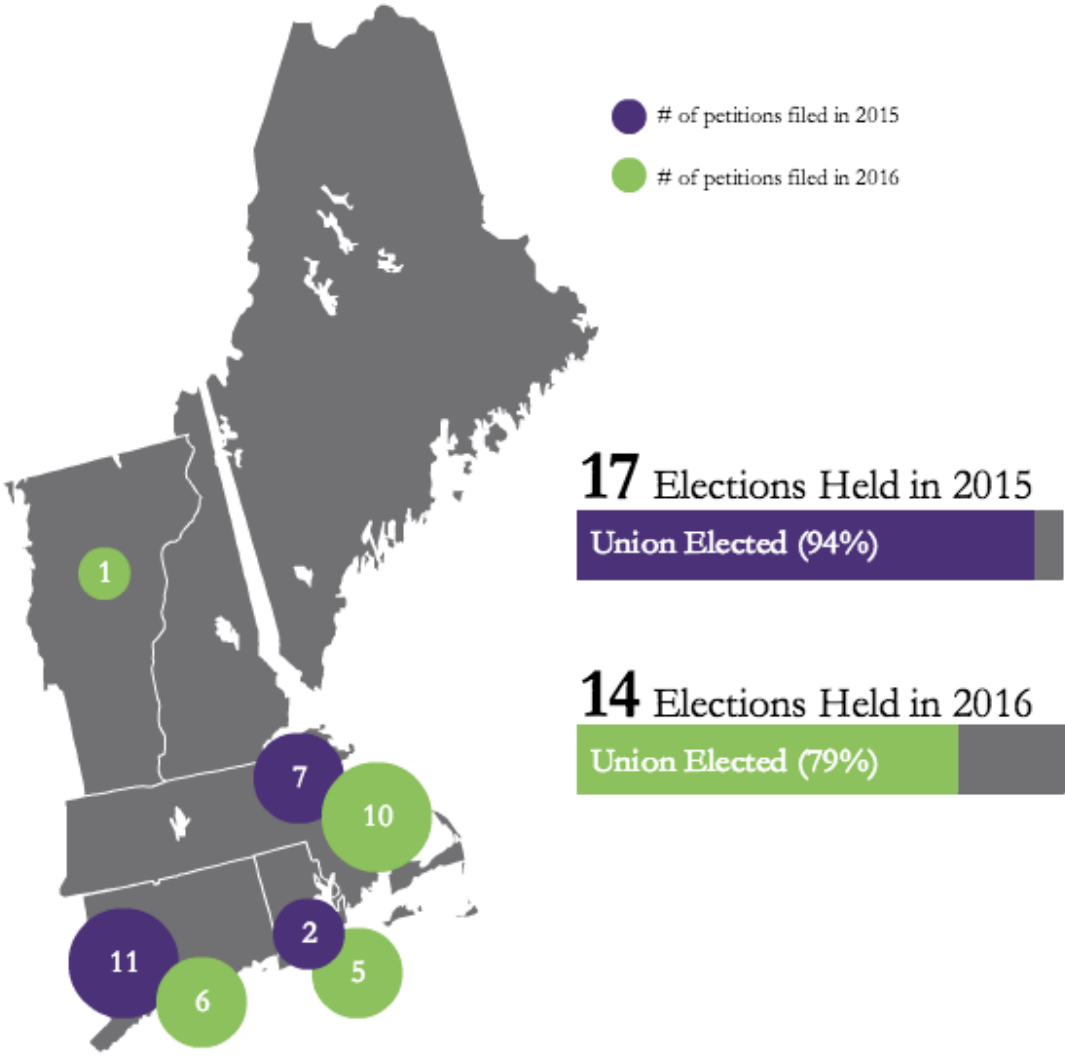


Figure 6

REGION 1

Most of the organizing activity in Region 1 occurs in Massachusetts and Connecticut. There were 14 representation elections held in 2016, and unions were elected in 79 percent of them, down from 94 percent in 2015.

Petitions & Elections

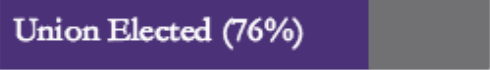


REGION 2

As illustrated below, Region 2 is the highest activity region. All three states saw a high level of organizing activity. There were more petitions filed in all three states in 2016 than in 2015. There were 69 representation elections held in 2016 in the region, and unions were elected in 81 percent of them.

Petitions & Elections

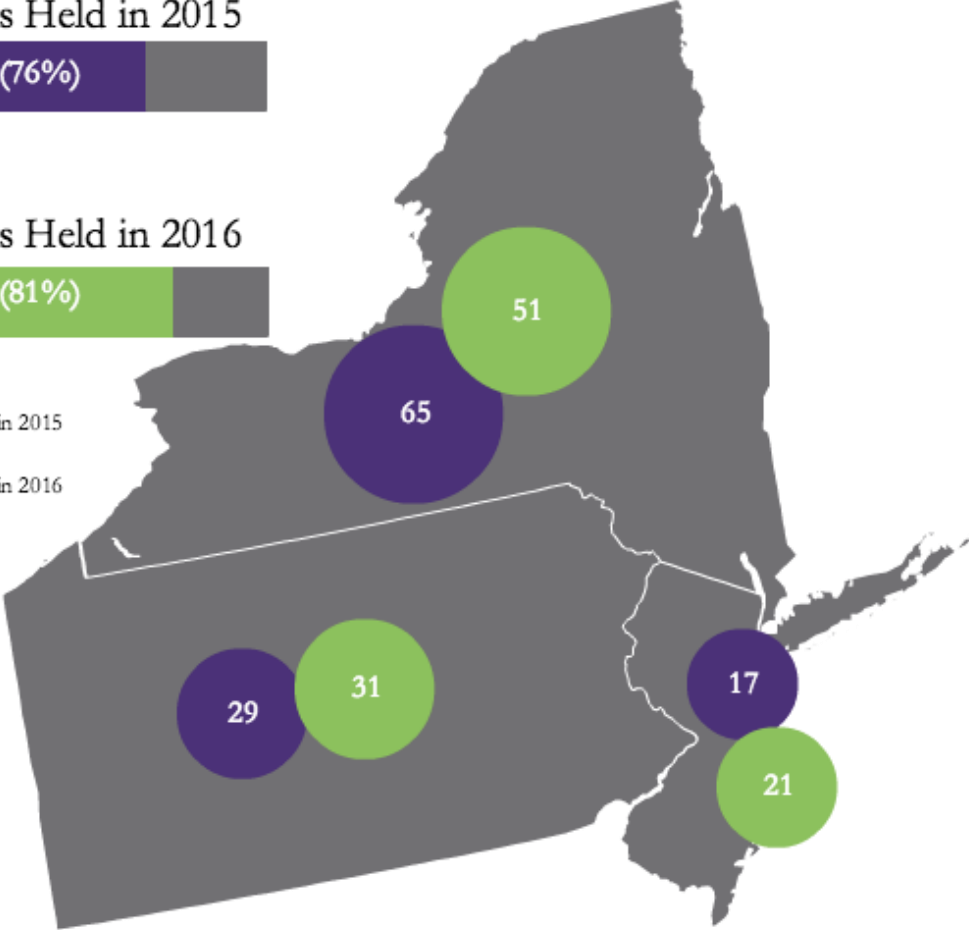
86 Elections Held in 2015



69 Elections Held in 2016



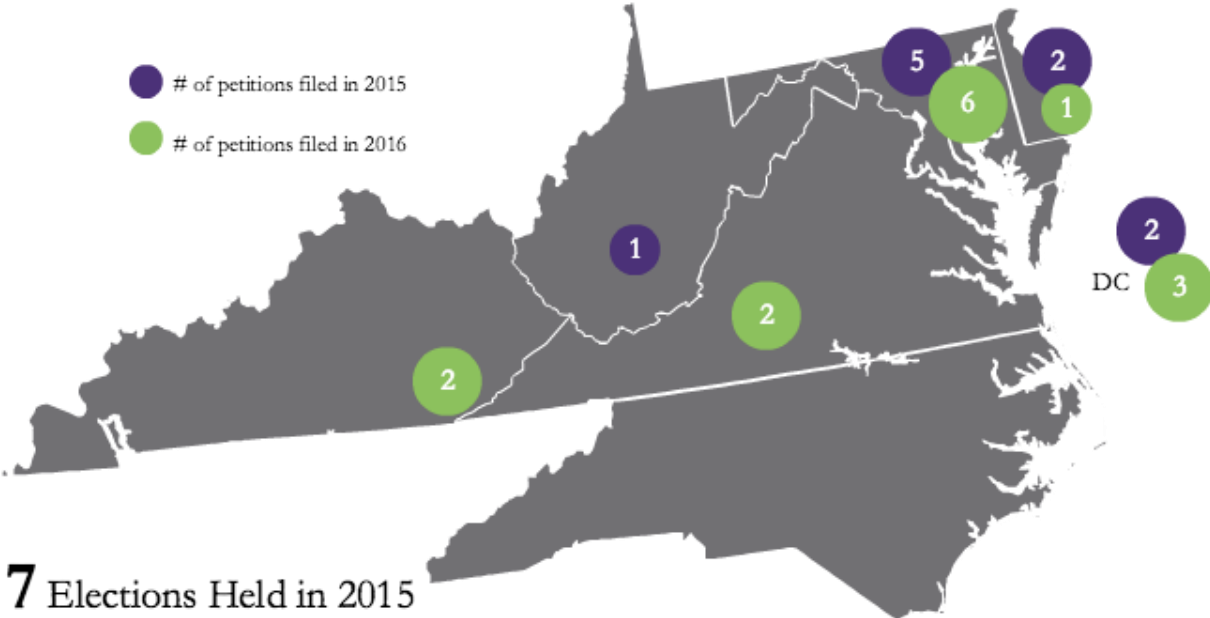
- # of petitions filed in 2015
- # of petitions filed in 2016



REGION 3

In Region 3, there were ten representation petitions filed in 2015 and fourteen petitions filed in 2016. Nine representation elections were held in 2016, and unions were elected in 78 percent of them.

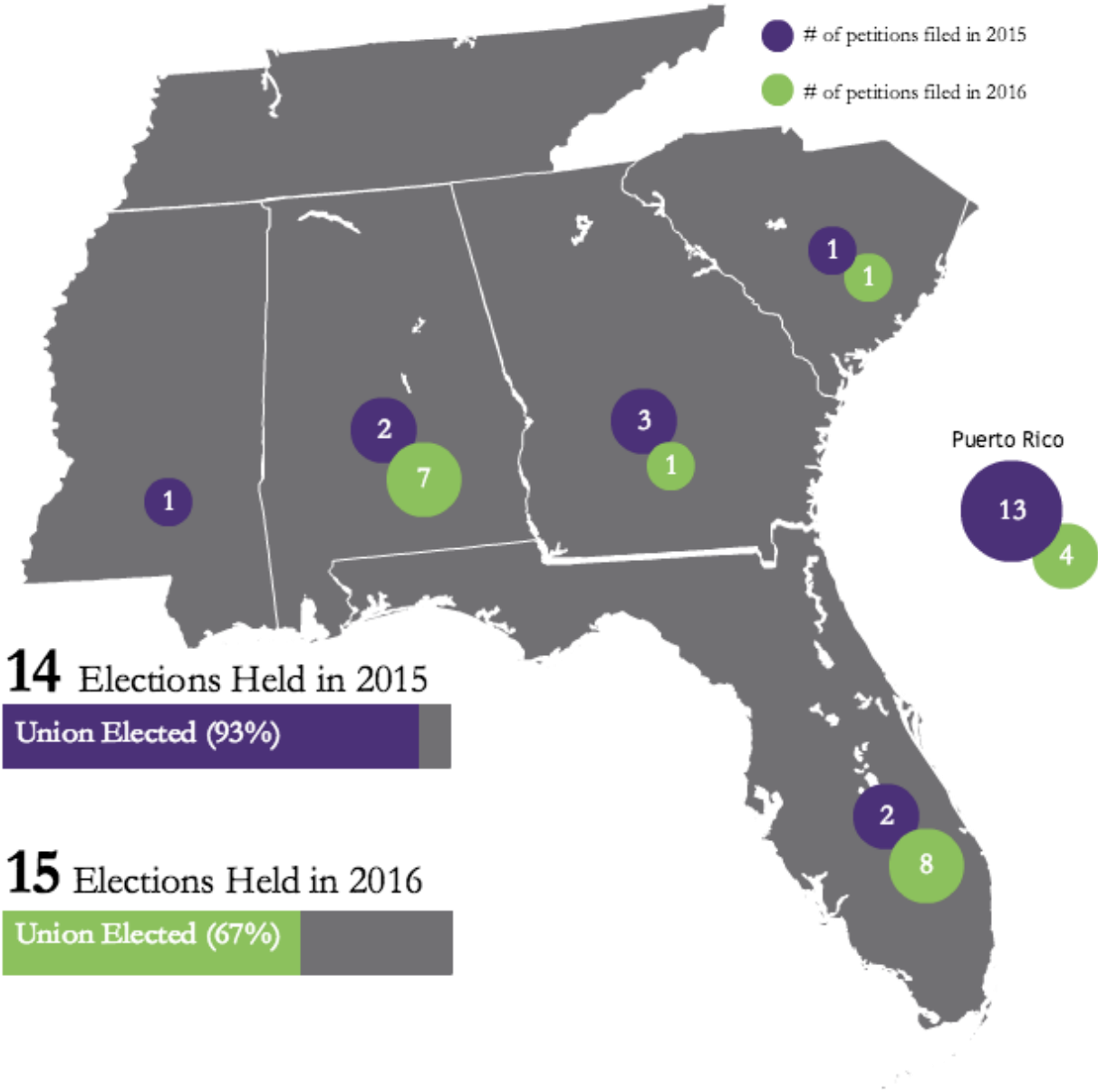
Petitions & Elections



REGION 4

Region 4 saw moderate organizing activity, with 22 representation petitions filed in 2015 and 21 petitions filed in 2016. Unions were elected in 93 percent of the 14 elections held in 2015 and only 67 percent of the 15 elections held in 2016.

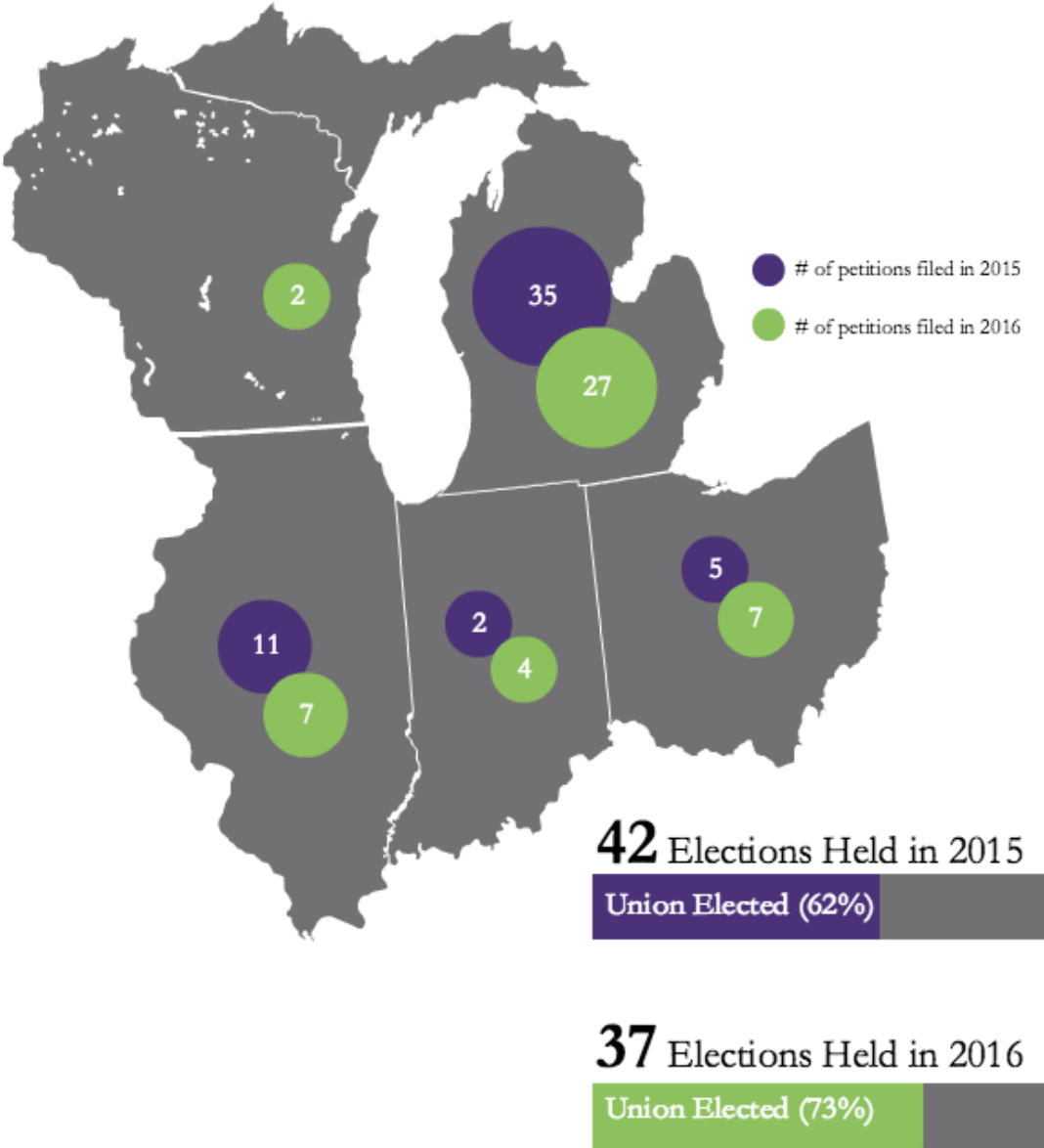
Petitions & Elections



REGION 5

The majority of petitions filed in Region 5 in both 2015 and 2016 were in Michigan. Of the 37 elections held in 2015, 73 percent resulted in union representation.

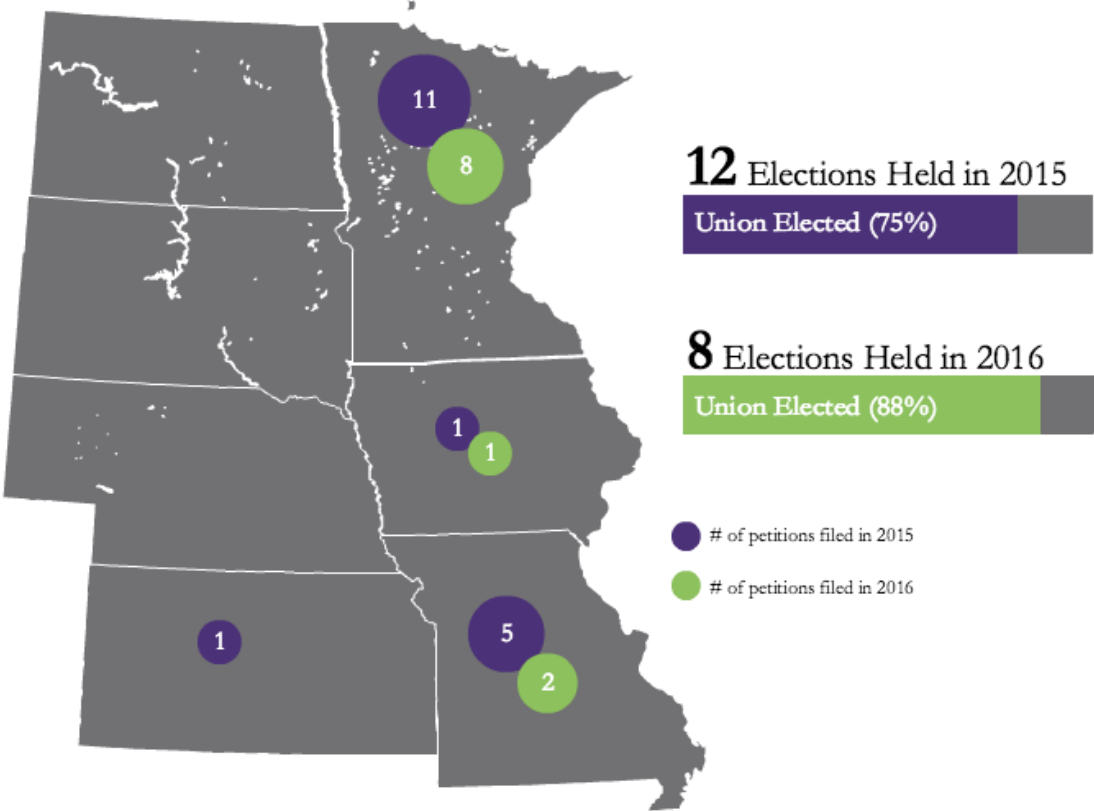
Petitions & Elections



REGION 6

Region 6 saw a slight decrease in activity from 2015. There were 11 representation petitions filed in 2016 compared to 18 in 2015. There were eight representation elections held in 2016, and unions were elected in 88 percent of them.

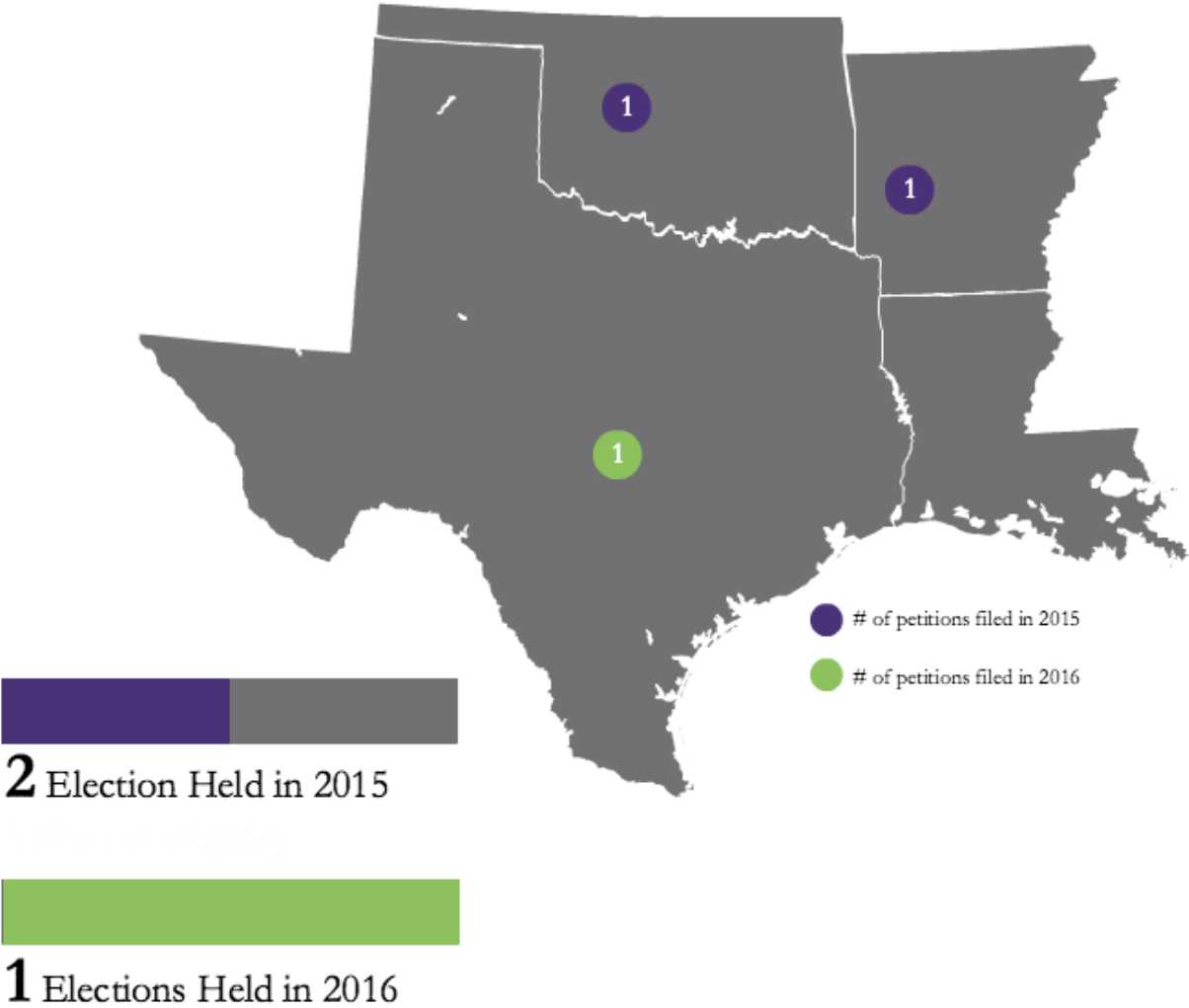
Petitions & Elections



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, and just one petition and one election filed in 2016.

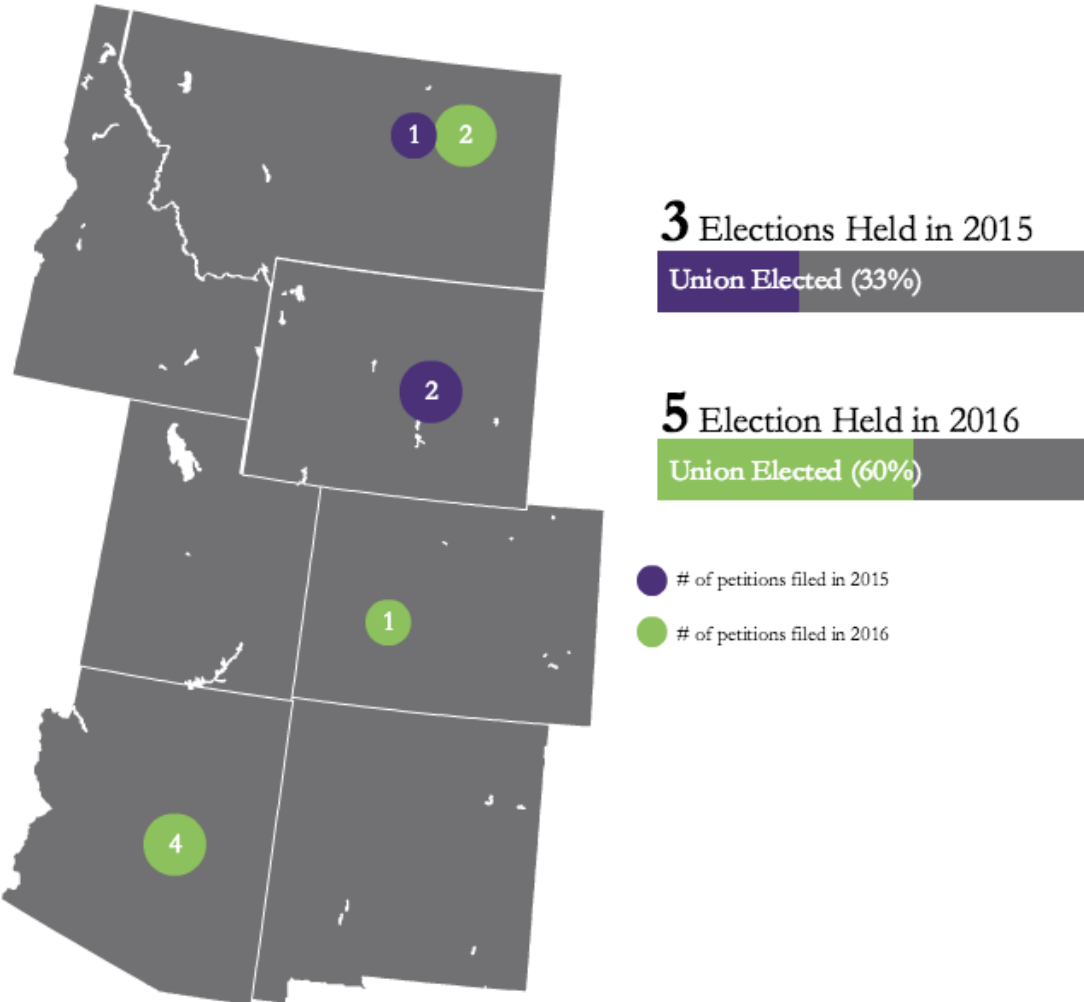
Petitions & Elections



REGION 8

There were just three representation petitions filed in Region 8 in 2015. In 2016, seven petitions were filed and five elections were held. Unions were elected in 60 percent of these elections.

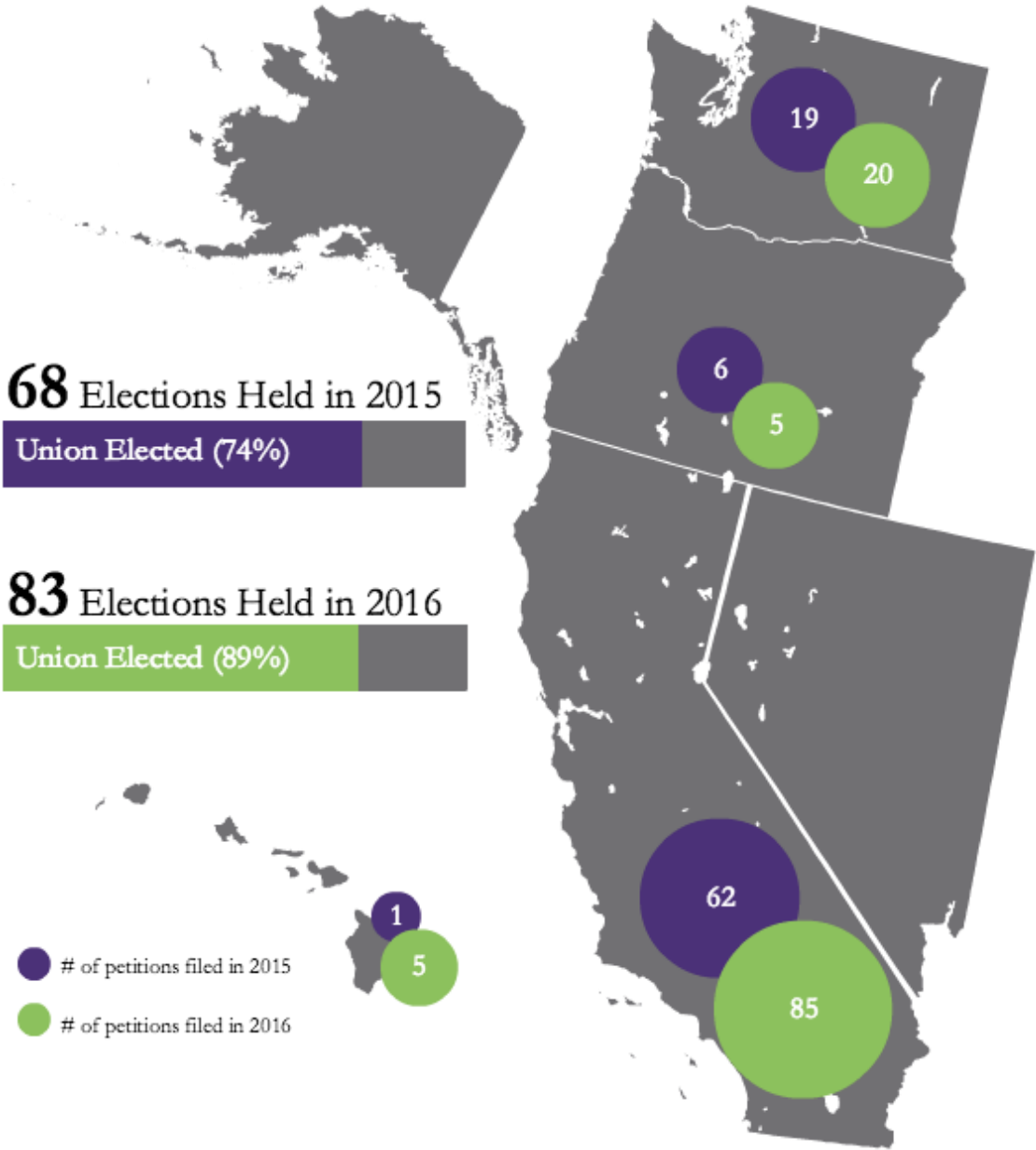
Petitions & Elections



REGION 9

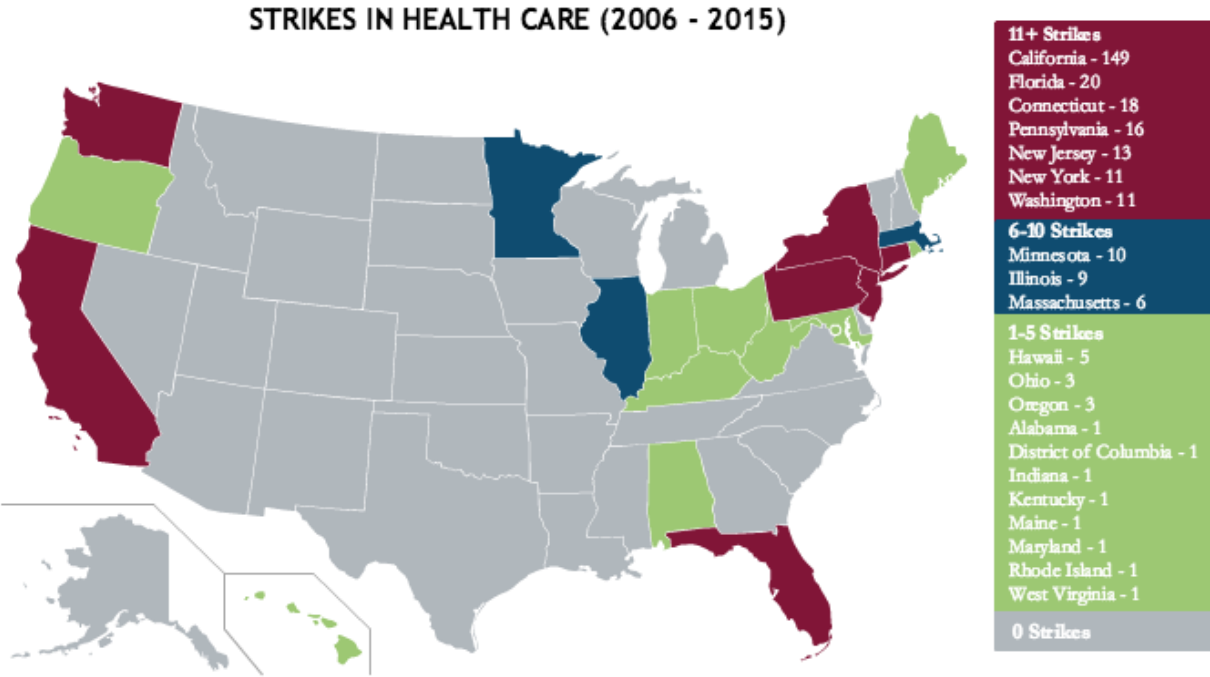
The majority of activity in Region 9 occurred in California, although Washington also saw higher levels of activity than many other states. There were 83 representation elections held in 2016 and unions were elected in 89 percent of them.

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 – Florida.



STRIKES HELD BY YEAR - HEALTH CARE

Year	Number of Strikes	Workers Idled	Average Number of Workers per Strike
2016	27	17,117	634
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

LABOR LAW/ACTIVITY UPDATE

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

- ***NLRB Changes Course on Health Care Picketing: Can Employees Picket on Hospital Property?*** by Katherine A. Roberts at Sidley Austin, LLP
- ***Joint Employer Status and Successor Liability in the Health Care Industry*** by Luis E. Avila and Maureen E. O'Brien at Varnum, LLP
- ***The Future of Class Action Waivers in the Employment Context – Dependent Upon the U.S. Supreme Court Nominee?*** by Julie K. Adams and Allison M. Cotton at Ford Harrison
- ***Workplace Investigations: What You Need to Know*** by Candice T. Zee and Jaclyn W. Hamlin of Seyfarth Shaw

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NLRB CHANGES COURSE ON HEALTH CARE PICKETING: CAN EMPLOYEES PICKET ON HOSPITAL PROPERTY?

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Abstract:

In a departure from precedent, the National Labor Relations Board (NLRB) issued an opinion in August 2016 that gave employees at a Washington hospital the right to picket property near the entrances of the acute-care facility where they worked, ruling that the hospital failed to prove the picketing had disturbed patients or disrupted hospital operations. In a 2-1 decision in *Capital Medical Center and UFCW Local 21*, 364 NLRB No. 69 (Aug. 12, 2016), the Board held that “there was no evidence ... that merely holding a stationary picket sign near the entrance to the hospital was likely to be any more disruptive or disturbing than the distribution of literature, which the [hospital] did not restrict.” Until now, Board decisions generally have held that picketing must be confined to public property surrounding hospitals.

¹This article reviews the case’s facts.

The United Food and Commercial Workers Local 21 began negotiations in September 2012 on a successor collective bargaining agreement for technical employees at Capital Medical Center in Olympia, Washington. By May 2013, no agreement had been reached. On May 9, 2013, the union served the hospital with the required 10-day notice under Section 8(g) of the National Labor Relations Act that it planned to engage in picketing and handbilling on May 20, 2013, from 6 a.m. to 6 p.m. The employees distributed handbills at the main lobby and the physicians’ pavilion entrance. They were instructed not to block entrances and to avoid impeding patient care.

For most of the day, off-duty employees distributed handbills at the two entrances while others picketed on the public sidewalk. For approximately 45 minutes in the late afternoon, 50 to 60 employees picketed and distributed literature on the sidewalk. At around 4 p.m. (two hours before the scheduled end of the job action), two employees took handbills and picket signs to the main lobby entrance. The employee closest to the door was about 10 to 12 feet away. Both stood still near the entrance without patrolling, changing or blocking the entrance. They held signs that said “Respect Our Care” and “Fair Contract Now.”

The hospital’s security manager and several others approached them, and told them they could stay at the door with handbills but that picket signs were not allowed on the property. They asked the employees to leave, but the employees declined. The exchange was civil and

¹ Union have argued that some state laws, such as California’s Moscone Act, afford a greater right to access private property. Those laws are considered separately and are not addressed here.

polite, and was repeated several times during the next hour. The hospital decided not to discipline the employees but said police would be called if the picketers did not leave the entrance. The hospital did call the police, and the responding officer told administrators he could not force the picketers to leave because they were not blocking entrance or egress, nor were they being disruptive. The picketers left shortly before 6 p.m., the scheduled ending time of the picket.

Are Hospitals Different from Other Employers?

For the past several decades, courts and the NLRB has acknowledged a fundamental difference between hospitals and other employers. The Supreme Court said in 1979 that, “Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry ... and where the patient and his family – irrespective of whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.” *NLRB v. Baptist Hospital*, 44 U.S. 773, 783 fn 12 (1979).

In recognition of this difference, acute-care hospital employers have long been permitted to prohibit Section 7 activities in non-patient care areas if the employer can show the prohibition is needed to prevent patient disturbance or disruption of health care operations. *NLRB v. Baptist Hospital*, 442 U.S. 773, 781-87 (1979), *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500 (1978). Most hospitals maintain solicitation and distribution of literature policies that follow settled law holding employees have the right to distribute literature during non-work time, in non-patient care areas. Patient-care areas include operating rooms, treatment rooms and corridors and sitting rooms adjoining or accessible to patient rooms. They do not include cafeterias, gift shops, lobbies or parking areas, which is why, like Capital Medical Center, hospitals likely would not have barred employees from handing out flyers at the entrances (provided they were not impeding the flow of traffic or otherwise disrupting operations).

Actual vs. Potential Disturbances and Disruption

In the case of Capital Medical Center, the Board held that the hospital must show *actual* patient disturbance or disruption of health care rather than the *potential* for it, stripping the hospital of the ability to prevent such actions before they occur. In other words, unions get a free shot at disrupting hospital operations and disrupting patients before hospitals can defend themselves.

During the hearing before the administrative law judge, a hospital official testified that he heard a visitor say he usually did not cross picket lines but that he did in this case to visit a patient. The judge found this insufficient to show actual disturbance/disruption. The two employees by the entrance did not patrol the doorway, march in formation, chant or make noise or block the entry. Had they done so, the administrative law judge may have ruled differently, but by that time, the damage to the hospital would have already been done. These examples leave open the possibility that some actions would be so inherently disruptive that immediate removal could be warranted. As such, hospitals would be well advised to evaluate each potential situation on its own merits.

Shifting the burden onto the hospital to demonstrate actual disruption tips the balance of power further in favor of the unions when it comes to threatened strikes or job actions. In many cases, hospitals can no longer use policies to *prevent* injury, they have to wait until the disruption/disturbance has already occurred and then use that evidence to try to keep it from happening again.

What Now?

This decision puts hospitals in a difficult position by requiring them to introduce evidence that picketing or other labor action disturbs patients or disrupts hospital operations. Arguably, patients and their families may be disturbed by labor actions, but do not complain, and if they do, it is far more likely that they do so to nurses, CNAs or other staff members (who are often bargaining unit employees themselves) rather than someone in management, security or human resources. Therefore, those deciding how to address the labor action may not have access to the information the Board says they must present to prevail. Furthermore, even if there are patients who complain, the chances of hospital officials or counsel tracking them down months or even years later to testify at a hearing are slim. Finally, hospitals are interested in *preventing* disturbances or disruptions and this decision would appear to tie their hands unless and until that occurs.

With all of that said, however, it is worthwhile to highlight the dissenting decision in this opinion by Philip Miscimarra who was named Acting Chair of the Board on January 23, 2017. In his dissent, Miscimarra argues that the majority contradicts Supreme Court precedent that picking and handbilling are qualitatively different, and it minimizes the “especially important interest in preventing the on-premises picketing of patients and visitors.”

Miscimarra’s view is that the rules governing employee solicitation and distribution do not apply to on-premises picketing, and that the majority opinion does not explain why Capital Medical Center’s decision to ban picketing on hospital property was presumptively unlawful. The primary flaw in the decision, he said, is that it is solely based on *Town & Country Supermarkets*, 340 NLRB 1410 (2004) that addressed a rule that prohibited handbilling *and* picketing, and that picketing was never addressed by itself. As a result, the Board in *Town & Country* used too broad a brush when it assumed without explanation that the picketing restriction was unlawful to the same extent as the one on handbilling.

Further, Miscimarra said, the plain language of Section 8(g) limits the protection of picketing, requiring 10-day notice before engaging in any strike, picketing, or other concerted refusal to work at any health care institution. No such notice is required for solicitation or distribution. “[A] prohibition limited to on-premises picketing is entirely consistent with a finding that off-premises picketing of a health care institution cannot be prohibited, provided the notice requirements imposed by Section 8(g) have been complied with.”

Finally, the dissent calls out the majority for failing to consider the availability of alternate means of communication unless and until the hospital has proven that picketing has or will disturb patients or disrupt their care or other hospital operations. This turns existing law on its head, since if a disturbance or disruption has been proven, the hospital may prohibit the

action without considering alternative means at all. Moreover, the facts demonstrate that handbilling was an available alternative, since the employees were already using it in addition to holding the picket signs. The majority, according to Miscimarra, completely disregarding this analysis altogether.

Given that we are a handful of months into a new Republican administration with Miscimarra already serving as Acting Chair, it is widely expected that the Board will retreat from the extraordinarily labor-friendly posture it has adopted in recent years. If that expectation comes to bear, then this decision may turn out to be an outlier with the NLRB returning to its more established position on this issue.

JOINT EMPLOYER STATUS AND SUCCESSOR LIABILITY IN THE HEALTH CARE INDUSTRY

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Abstract:

This article briefly addresses two areas of the law to which health systems should be paying attention: joint employer status and successor liability.

The modern health care industry has become more fragmented where many health care systems offer their patients services by contracting with an integrated network of independent service providers who specialize in specific fields of medicine or otherwise offer highly specialized services. Similarly, mergers between strong regional health care systems—through stock or asset purchases—have become more commonplace to provide patients a wider breadth of services and expertise. In light of the industry's unique nature, health care systems have to be particularly aware of the changing realities of federal labor law and how they impact their daily operations.

Joint Employer Status & Collective Bargaining

Since at least 1984, “joint employer” status has only existed where “two separate entities share or codetermine those matters governing the essential terms and conditions of employment.” *TLI, Inc.*, 271 NLRB 798 (1984); *see also Laercio Transp.*, 269 NLRB 324 (1984). The level of control asserted by the potential joint employer needed to be “direct and immediate” as to employment actions such as hiring, firing, discipline, supervision, and direction. *See, e.g., In re Airborne Freight Co.*, 338 NLRB 597 (2002). Put another way, the putative employer had to possess and exercise authority to immediately and directly control an employee’s essential terms and conditions of employment. *Id.* For decades, both health care systems and service providers have operated with the knowledge that, as long as they did not exercise direct control over the other entities’ employees, they would be treated as separate employers for purposes of federal labor law.

However, on August 27, 2015, a divided Board overturned decades of precedent and effectively redefined the concept of employment in this country. In *Browning-Ferris Industries*

of California, three members of the five-member Board reversed the standard regarding joint employers that had controlled for the past 30 years. 362 NLRB No. 186 (2015). Browning-Ferris Industries of California, Inc. (“BFI”) operated a waste recycling facility and subcontracted employees from Leadpoint Business Services (“Leadpoint”) to sort recyclable items and to perform basic housekeeping functions. *Id.* The Sanitary Truck Drivers and Helpers, Local 350 of the International Brotherhood of Teamsters filed a petition to represent BFI and the subcontracted employees under the theory that BFI and Leadpoint were joint employers. *Id.* BFI countered that its supervision over the subcontracted employees was, at most, indirect and, thus, was not a joint employer. *Id.* The Board disagreed, finding that BFI was a joint employer with Leadpoint and in doing so, overruled the existing joint employer standard and applied the traditional test articulated by the Third Circuit in *Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982). The traditional test holds that two or more entities are joint employers if they both meet the common law definition of employer and “share or codetermine those matters governing the essential terms and conditions of employment.” *Id.*

The *Browning-Ferris* decision transformed the joint employer standard into a two-part test that now considers: (1) whether a common law employment relationship exists and (2) whether the potential joint employer “possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful bargaining.” *Id.* The critical distinction is that “control” can now be direct, indirect, or even a reserved right to control, whether or not that right is ever exercised. *Id.*

Applying this new standard, the Board, in *Retro Environmental, Inc./Green Jobworks, LLC*, held that a construction company and a staffing agency who supplied laborers to the construction company were joint employers. 364 NLRB No. 70 (2016). The Board found that both companies determined essential terms and conditions of employment, such as making hiring decisions and determining screening protocol to hire new employees or one entity administering discipline and termination and the other requesting replacements for underperforming workers. *Id.* The Board found that together, both employers controlled all employment terms and each had influence over the other’s decisions. *Id.*

Moreover, the Board also recently reversed longstanding precedent regarding jointly-employed and separately employed employees in the same collective bargaining unit. In *Miller & Anderson, Inc.*, the Board held that employer consent is not necessary for collective bargaining units that combine jointly employed and separately employed employees of a single employer. 364 NLRB No. 39 (2016). Instead, the Board held that it would apply the traditional community-of-interest factors to decide if such units are appropriate. *Id.* In so holding, the Board overruled 12 years of precedent established by *Oakwood Care Center*, 343 NLRB 659 (2004), which held that multi-employer bargaining units including temporary employees and regular employees required the consent of both the employers in question. The Board essentially returned to the Board’s holding in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), that the community-of-interest test will determine whether multi-employer bargaining units need employer permission. *Id.* Pursuant to *Sturgis, Inc.*, the community-of-interest test requires “that groups of employees in the same bargaining unit ‘share a community of interests sufficient to justify their mutual inclusion of a single bargaining unit.’” *NLRB v. ADT Sec. Servs., Inc.*, 689 F.3d 628, 633 (6th Cir. 2012) (quoting *Bry-Fern Care Ctr., Inc. v. NLRB*, 21 F.3d 706, 709 (6th Cir. 1994)). The test includes consideration of five factors: “(1) similarity in skills, interests, duties and working conditions; (2) functional

integration of the plant, including interchange and contact among the employees; (3) the employer's organization and supervisory structure; (4) the bargaining history; and (5) the extent of union organization among the employees.” *Id.* at 633–34. Thus, the holding in *Miller & Anderson* forces employers to bargain with employees whom they have no direct business relationship with aside from temporary work assignments under a joint employment arrangement.

Practically, this means that hospitals, clinics, nursing homes, or other similar entities may find themselves classified as joint employers with a legally separate and distinct service provider, staffing agency, or even a parent or subsidiary company, for example, so long as they simply reserve the right to exercise some control over the other service provider or staffing agency’s employees, even if those employees have never been on the health system’s payroll, and even if neither of the employers consent to the joint employer arrangement. As joint employers, these hospitals, clinics, nursing homes, or similar entities would then be subject to union election campaigns, collective bargaining, grievances and arbitrations, or unfair labor practices along with their service providers or staffing agencies. Moreover, now that the joint employer status has been expanded by the Board, there is concern that other federal or state agencies will also expand their regulatory authority to areas such as FMLA, WARN, or civil rights protections.

There are a couple of key steps that employers can take to decrease the likelihood of being considered a joint employer with a separate and distinct entity. Employers must consult with employment counsel to ensure they do not meet the common law definition of an “employment relationship” with the workers in question. This particular analysis may be state or federal circuit specific and should be conducted on a case-by-case basis. Additionally, employers must make certain they neither “possess” nor “exercise” sufficient control over the workers’ essential terms and conditions of employment. This will likely mean that employers must take a much more hands-off approach to their contracted or temporary workers than they have in the past. While certainly not ideal, taking this detached approach may help shield hospital systems from being incorrectly considered joint employers.

Inheriting a Union: Successor Liability in Stock or Asset Purchases

Generally, a change in ownership resulting from a transfer of shares, such as a stock purchase, does not extinguish the pre-existing collective bargaining rights of the predecessor's employees. *Esmark, Inc. v. NLRB*, 887 F.2d 739, 751 (7th Cir. 1989) (“the successorship doctrine is simply inapplicable to a stock sale transaction”); *see also United States Can Co. v. NLRB*, 984 F.2d 864, 868 (7th Cir. 1993) (“a sale of stock, like a merger, does not affect the contractual obligations”); *NLRB v. Rockwood Energy & Mineral Corp.*, 942 F.3d 169, 175 (3d Cir. 1991) (agreeing with *Esmark* so long as “a stock transfer does not result in a substantially different enterprise”). The Board has found that a stock transfer involves “the continuing existence of a legal entity, albeit under new ownership.” *TKB*, 240 NLRB 1082, 1084 (1979). Thus, when a unionized hospital, clinic or similar entity is acquired in a stock purchase, and the acquiring health system plans to continue the status quo, the acquired employees remain unionized and the acquiring health system will have to recognize and bargain with that union.

Conversely, in *Fall River Dyeing & Finishing v. NLRB*, the Supreme Court held that, as a general matter, an employer which purchases the assets of another is required to recognize and bargain with a union representing the predecessor's employees only when: (1) there is a "substantial continuity" of operations after the takeover, and (2) if a majority of the new employer's workforce, in an appropriate unit, consists of the predecessor's employees at a time when the successor has reached a "substantial and representative complement." 482 U.S. 27 (1987). This often becomes an issue where a new company is created using the predecessor company's assets, and the new company is unsure whether it can set initial terms and conditions of employment for its employees or whether it must abide by a collective bargaining agreement, to the extent the predecessor company was a signatory to one.

Typically, unless the new company, voluntarily and with union consent, assumes the predecessor's collective bargaining agreement, it has no contractual obligations to the employees or the union. *NLRB v. Burns Sec. Servs., Inc.*, 406 U.S. 272, 284 (1972). This is because the new employer has never had a contractual relationship with the union in the first place and the Board has no authority to impose contractual terms on the parties to a collective bargaining relationship. See *H.K. Porter Co., v. NLRB*, 397 U.S. 99, 101–02 (1970). Thus, under *Burns*, a successor employer is ordinarily free to set the initial terms of employment when it takes over operations. *In Re Cora Realty Co., LLC*, 340 NLRB 366, 379 (2003).

The Court in *Burns* did, however, carve out a limited exception to the above rule. It stated that "although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor there will be instances in which *it is perfectly clear that the new employer plans to retain all of the employees in the unit* and in which it will be appropriate to have him initially consult with the employee's bargaining representative before he fixes terms." *Burns*, 406 U.S. at 294–95 (emphasis added). Subsequent to *Burns*, the Board has held that even where the new employer takes over all of the former employer's employees, it still may establish initial terms and conditions if it announces this intention to the employees at the time they are interviewed and/or hired. *Id.* Thus, in *Spruce Up Corp.*, 209 NLRB 194 (1974), the Board stated that the *Burns* "perfectly clear" caveat should be restricted to circumstances "in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment" or at least to circumstances where the new employer has "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Meyer's Bakeries, Inc. & S. Bakeries, LLC & Chauffers*, 26-CA-21843, 2006 WL 1358752 (May 12, 2006) (quoting *Spruce Up Corp.*, 209 NLRB at 195).

Thus, labor considerations should be one of the factors that any health system should take into account when deciding the appropriate structure for a potential sale or purchase. Considering the labor consequences to the transaction at an early stage will help avoid potential unfair labor practice charges and a combative union once the transaction closes.

THE FUTURE OF CLASS ACTION WAIVERS IN THE EMPLOYMENT CONTEXT - DEPENDENT UPON THE U.S. SUPREME COURT NOMINEE?

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Abstract:

In its 2017-2018 term, the Supreme Court will review whether the employee rights afforded under the National Labor Relations Act override the Federal Arbitration Act. The decision may affect the ability of employees and the plaintiff's bar to bring wage and hour class action suits against health care employers.

Over the past decade, health care employers have been hit by a wave of wage and hour class actions brought by their employees, primarily relying on pay practices common with nurses and other workers. (Bringing actions collectively or as a class is a popular litigation tactic for the plaintiff's bar where the individual claims involve relatively low dollar amounts, like wage claims.) During this same period, the health care industry has faced enormous pressure to cut costs. To mitigate the costs related to litigating employee disputes in state or federal court, large employers, including those in the health care industry, have turned to mandatory, private binding arbitration as an alternative – and arguably more cost-effective and predictable – form of dispute resolution. To manage litigation risks associated with class and collective actions, employers also have included contractual waivers of such group actions in their arbitration agreements.

As part of its recent campaign to police more zealously alleged “protected concerted activity” in the workplace, however, the National Labor Relations Board (NLRB or the Board) has challenged employment agreements that contain class action waivers. The crux of the Board's position is that the rights granted to employees by the National Labor Relations Act (NLRA) override the purpose of the Federal Arbitration Act (FAA), which,

among other things, was intended to enforce the terms of arbitration agreements. More than half of the federal appeals courts that have reviewed the NLRB's decisions regarding this issue have disagreed with the Board. The Supreme Court will take up the issue in the 2017-2018 term. Stakeholders from all sides are now speculating about the outcome, particularly given the sudden death, in April 2016, of Justice Antonin Scalia – a huge champion of arbitration agreements – and President Donald Trump's nomination of Neil Gorsuch to take Justice Scalia's seat on the Court. This article explores how the class action waiver issue made its way to the Supreme Court and how the high court may rule.

The Backdrop of the Issue before the Supreme Court

The FAA, enacted in 1925, requires enforcement of arbitration agreements as written – as with any other contract – and preempts inconsistent state law. It was enacted to address judicial hostility to arbitration agreements. Outside of the employment context, the trend in the courts has been to show deference to the FAA and generally uphold arbitration agreements, including class action waivers. Indeed, in two recent, significant Supreme Court opinions (*American Express v. Italian Colors Restaurant* and *AT&T Mobility LLC v. Conception*), Justice Scalia wrote for the majority and delivered the clear message that the nation's highest court will “rigorously enforce” arbitration agreements according to their terms, including terms governing with whom the parties choose to arbitrate their disputes, unless Congress has clearly expressed a contrary intent.) Although the Supreme Court has consistently enforced class action waiver clauses (albeit primarily in commercial contracts), the NLRB has invalidated such waivers in employment agreements on the grounds that the provisions violate Sections 7 and 8 of the NLRA.

Section 7 of the 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,” as well as the right “to refrain from any or all such activities.” Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” of the Act. According to the NLRB's interpretation, “concerted” activity, as referenced in Section 7, occurs when the employee seeks to initiate, induce or prepare for group action (such as a class or collective action), making class action waivers in the employment context unlawful.

Challenges to the NLRB rulings against class action waivers have been winding their way through the federal court system across the country since 2012, when the NLRB, in *D.R. Horton, Inc.*, initially struck an employment agreement containing such a waiver. Subsequently, in 2013, the U.S. Court of Appeals for the Fifth Circuit – covering Texas, Louisiana and Mississippi – struck down the Board's decision in *D.R. Horton*, finding that the right to file a class action lawsuit is not protected by the NLRA. Between 2013 and 2016, the Second and Eighth Circuits followed suit and held that class action waivers were, in fact, lawful. Departing from the holdings by the Second, Fifth, and Eighth Circuits, the Seventh and Ninth Circuits held, in two 2016 decisions, that class action waivers unlawfully infringed upon employees' right to engage in protected, concerted activity. As a result, there is a split among the federal appeals courts for the Supreme Court to resolve.

On January 23, 2017, the U.S. Supreme Court agreed to hear appeals in both the pro-FAA Fifth Circuit case (*Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015)) and the pro-NLRA Seventh Circuit case (*Lewis v. Epic Systems Corporation*, 823 F.3d 1147 (7th Cir. 2016)). As the Supreme Court recently announced, however, it is postponing oral arguments in the cases to the 2017-2018 term. As a result, oral argument will not take place until October 2017, at the earliest. It is expected that by then, President's Trump's nominee to the Court (Judge Gorsuch) will be confirmed, and the cases will be heard by a full Supreme Court.

How Will President Trump's Nominee Impact the Outcome of the Contentious Class Action Waiver Issue?

Supreme Court commentators have characterized Gorsuch – a Tenth Circuit Judge and George W. Bush appointee – as a natural successor to Justice Scalia, who was known as an originalist (meaning he intends to interpret the Constitution as it was written by its authors); a textualist (meaning he believes in enforcing the text of a statute rather than the perceived intent of the writer); and conservative. Reviewing Gorsuch's past opinions involving federal administrative agencies like the NLRB and the enforcement of arbitration agreements, Gorsuch's nomination to fill Justice Scalia's vacancy likely bodes well for employers.

Gorsuch has repeatedly voiced his opinion that the power of administrative agencies is limited. In 2011, in *Compass Environmental Inc. v. Occupational Safety and Health Review Commission*, 663 F.3d 1164 (10th Cir. 2011), Judge Gorsuch dissented on the premise that the power of administrative agencies is and should be limited. In the case, an employer asked the Tenth Circuit to review an order by the Occupational Safety and Health Review Commission penalizing the company for a serious training violation. The court found no abuse of discretion in the Commission's conclusion, but Gorsuch dissented, siding with the employer. He found that the Commission's "administrative policy options are considerable, even vast," but they did not "lawfully stretch" to allow agencies to "penalize private persons and companies without *some evidence* the law has been violated." *Compass*, 663 F.3d at 1170, 1172 (Gorsuch, J. dissenting) (emphasis in original). Once again, in August 2016, Judge Gorsuch addressed the power of executive agencies, when he wrote a separate concurrence to his own opinion, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016). In that case, the court held the Board of Immigration Appeals could not exercise its legislative authority to overrule a judicial precedent retroactively. In his concurrence, Gorsuch unabashedly criticized the Supreme Court case *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), in which the Court deferred to the EPA to interpret legislative intent with regard to its policy-making decisions. (Gorsuch, J., concurring). Gorsuch also has opined that the NLRB exceeded the scope of its authority when, in 2016, he dissented in *NLRB v. Community Health Services, Inc.*, 812 F.3d 768 (10th Cir. 2016). Gorsuch criticized the NLRB for "mak[ing] new law unlawfully" when it sought to adopt a new rule governing the calculation of backpay in instances where an employer unlawfully reduced the hours of unionized employees. The majority determined that the NLRB had the power to change the longstanding rule, but Gorsuch argued "the proper avenue for addressing any dissatisfaction with congressional limits on agency authority lies in new legislation, not administrative ipse dixit." In the past, Gorsuch has supported the NLRB, however, as long as it is acting within the limits of its authority. In 2014, Gorsuch sided with the NLRB and, effectively, the employer when the employer threatened to permanently replace union employees during a lockout. The NLRB found the conduct unlawful and ordered the employer to desist and

post a notice. The union sought backpay damages despite the employer's compliance with the NLRB's order. Gorsuch upheld the NLRB's ruling.

In cases regarding arbitration agreements, Gorsuch's opinions are characteristically textual and rely on the literal meaning of the agreements and the law. In *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016), defendants attempted to enforce an arbitration agreement. The parties entered into six different agreements, all of which contained conflicting arbitration provisions. The majority affirmed the trial court's decision that the arbitration provisions conflicted to the extent that the parties could not have had a meeting of the minds, making the arbitration agreement unenforceable. Judge Gorsuch dissented, stating he "did not see how [the plaintiff] could seriously claim that he never intended to arbitrate" after he asked for three arbitration clauses and signed three others." Gorsuch also pointed out that the Federal Arbitration Act requires courts to "treat arbitration clauses with no less solicitude than [they] afford to other contractual provisions." In *Genberg v. Porter*, a former employee sued his former employer as well as its managers, board members, and an outside lawyer. The former employer attempted to enforce the arbitration agreement in the employee's employment contract. Gorsuch penned an opinion finding the requirement to arbitrate could not be invoked by the defendants, because they were not signatories to the agreement.

Gorsuch's prior decisions indicate that he may be wary of the NLRB's efforts to reverse 80 years of precedent by banning collective/class action waivers. Gorsuch is a staunch protector of governmental checks and balances and the distribution of power between the legislative, judicial, and executive branches. However, he could side with the NLRB if he finds its actions within its authority as an administrative agency. Further, Gorsuch, in *Ragab v. Howard*, cited the FAA for his position that an arbitration clause should be interpreted like any other contractual provision, which is in some ways contrary to the argument made by the NLRB. Gorsuch, however, is an originalist who considers the text at issue rather than potential policy implications, so his strict interpretation of statutory and regulatory law will most likely lead his decision.

What does this mean for employers?

Until the Supreme Court settles the dispute, the enforceability of class and/or collective action waivers will be determined on a circuit-by-circuit basis, and class and/or collective action waivers are unenforceable in Illinois, Indiana, Wisconsin, Montana, Idaho, Nevada, Arizona, California, Oregon, Washington, and Alaska. The Second, Fifth, Eighth, and Eleventh Circuits are the most likely to enforce class and collective action waivers, and the Fifth Circuit has directly addressed and rejected the NLRB's position in *D.R. Horton* and *Murphy Oil*. Despite the split in judicial authority, the NLRB is consistently rejecting class action waivers citing a policy of "nonacquiescence." While we wait for the Supreme Court to rule, be sure to consult an attorney about whether you should include a class and/or collective action waiver in your employment agreements.

Employers should note that arbitration agreements between employees and employers that do not contain class or collective action waivers are still lawful under *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), and the NLRA only protects the rights of employees, so court decisions on this is

WORKPLACE INVESTIGATIONS: WHAT YOU NEED TO KNOW

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Abstract:

This article outlines important steps for conducting a thorough workplace investigation, and provides thoughts about how properly conducted investigations can contribute to a positive workplace and reduced organization liability.

It is nearly impossible for a human resources professional to go through an entire career without being required to conduct a workplace investigation. In fact, it is highly likely that most human resources professionals will be required to conduct several.

Whether you find yourself looking into a complaint of discrimination or harassment, reviewing a would-be whistleblower's allegations of inadequate patient care, or sifting through concerns about management styles and a stressful hospital work environment, the odds are high that you will find yourself responsible for conducting or overseeing a workplace investigation.

Conducting a thorough investigation will help you get to the bottom of the situation, which will enable you to, for example, remedy a valid claim of sexual harassment, or defend the hospital against unfounded claims of whistleblower retaliation.

Why Bother with Investigations?

Employers do not have the option of taking a "head in the sand" approach and ignoring a problem in the hopes that it will resolve itself on its own. In very few cases, if any, is this the right approach. Investigations are necessary for a number of reasons.

- **The law requires you to investigate.** Many laws related to workplace concerns place an affirmative obligation on an employer, once becoming aware of a potential issue, to conduct an investigation and resolve the issue. Failure to investigate and remedy valid employee complaints ultimately may result in litigation losses or consequences. In some

cases, patient care standards also may require you to look into allegations that procedures or regulations were violated.

- **A properly conducted investigation safeguards your organization.** Despite your best efforts, it is possible that an employee complaint you investigate eventually may turn into litigation against your hospital, and possibly individual managers. A properly conducted investigation can help establish important defenses and help minimize legal liability.
- **Investigations are good for employee morale.** An “open door” policy encouraging staff to bring their concerns to management is only as good as your commitment to follow through and investigate issues that employees raise. Employees will quickly discern a disinclination to investigate their concerns and many will quite reasonably conclude that the organization does not actually value their input. A prompt and thorough investigation sends the message that the employee’s concerns are being taken seriously.
- **Investigations can improve organizational health.** A commitment to investigate employees’ workplace concerns can serve the hospital well. While some employee complaints may ultimately be unsubstantiated, others may raise valid issues of which you would otherwise be unaware - helping you to identify underperforming or otherwise problematic managers, sniff out waste or patient care violations, and confidently ensure legal compliance in many areas - all of which are positive steps that are essential to keeping the organization healthy.

Timeline of an Investigation

From the first knock on an HR professional’s door, or receipt of an email, note, or call to a confidential hotline, most investigations should follow a similar path.

- **Receive employee complaint.** The complaint may come in the form of a written communication, a personal visit, an anonymous call to the hotline, or directly to HR. It is important to remember that the duty to investigate is triggered even when the complaint does not necessarily conform to organizational policy - although if the complaining employee fails to follow procedures, managers should be sure to document the deviation - that failure may form the basis of a defense if the employee later sues the hospital.

Also, it is important to remember that a formal complaint is not always required to trigger the need to investigate. A seasoned HR professional may commence an investigation if, for example, an employee reports that others in a unit are being sexually harassed.

- **Contact your attorney.** Whether in-house or outside counsel, an employment lawyer can help you design your investigation to allow you to get to the bottom of the issue raised while - hopefully - safeguarding the organization from lawsuits.
- **Choose your investigator.** The best investigator will be an individual who is familiar with the employer’s organizational policies and practices, who has a trustworthy demeanor, and who is outside the chain of command of both the complaining employee

and the subject of the investigation. You may want someone in HR to handle the investigation, or you may choose to use the hospital's attorney or retain an experienced outside investigator. If an attorney is used, or your legal counsel retains an outside investigator, a decision needs to be made as to whether the investigation will be treated as privileged.

- **Gather and review documents.** If you have access to relevant documents, ensure that they are preserved - both for your own review and to prevent any employees from discarding relevant evidence. Electronic evidence, including e-mails and text messages, should also be preserved. Often this requires that a formal "litigation hold" be issued, especially if relevant information may be located in several places.
- **Conduct interviews.** The investigator should meet with the complaining employee, the subject of the investigation, and any witnesses. Ideally, these interviews will happen early in the investigation and in person if possible, before witnesses have the opportunity to coordinate their stories or destroy any evidence. It is certainly permissible to admonish witnesses to not destroy evidence and not to manipulate other witnesses.

However, the investigator does need to be mindful of the fact that there are some legal prohibitions against telling employees to maintain confidentiality. Certain government agencies, including the National Labor Relations Board, have in recent years expressed disfavor of confidentiality requests in the context of workplace investigations. For instance, in Piedmont Gardens, the 2012 NLRB found that a continuing care and skilled nursing facility had violated federal law by refusing to turn witness statements over to the union. The NLRB recognized that an employer might have legitimate reasons for wanting to keep investigation materials such as witness statements confidential, but clearly expressed that the employer may not be able to do so. In another recent case, William Beaumont Hospital, an administrative law judge concluded that the hospital had violated federal law by instructing an employee not to discuss with other employees the hospital's investigation into her alleged misconduct. Thus, investigators should be mindful, when meeting with witnesses, not to insist that they keep the investigation confidential or to promise that the employer will do so, other than consistently with its legal obligations.

The investigator should keep detailed notes in writing, and may consider obtaining written statements from the employees who give interviews. In some cases, the investigator may need help from the hospital's IT department to access documents, or from other knowledgeable employees in cases involving concerns about patient care.

- **Perform a walk-through and ask any follow-up questions.** The investigator should perform at least one walk-through of the physical sites identified in the investigation, to confirm employees' accounts of events. Take pictures of the physical site, if necessary. For instance, if an employee claims that she was touched inappropriately near the third-floor water cooler, but there is no third-floor water cooler, the investigator should take note of the discrepancy. This also is a good time to check employees' statements against the documents and, if necessary, call witnesses back to answer follow-up questions.
- **Prepare the investigator's report.** After reviewing all relevant documents, completing witness interviews, and performing a walk-through, the investigator should draft a report containing factual conclusions only - with no legal analysis - and including copies of any

particularly relevant documents.

- **Decision-makers' review.** The organizational decision-makers should review the investigator's report and decide what, if any, action should be taken.
- **Conclude the investigation.** At the conclusion of the investigation, you will likely want to meet with both the complaining employee and the subject of the investigation. If the subject of the investigation is disciplined, the complaining employee should be advised that his or her complaints were substantiated, that appropriate action was taken, and that the organization expects the behavior will not recur. Many complaining employees want to know the discipline imposed on the subject of the investigation - but you are under no obligation to impart detail, and information about discipline should be kept in confidence. During these meetings, you should also remind both the complaining employee and the subject of the investigation, as well as any witnesses, that the organization prohibits retaliation against any individual who participates in a workplace investigation, and that incidents of suspected retaliation should be promptly reported.

The Importance of Documentation

The quality of the documentation throughout the investigation is vital to the determination that the employer conducted a fair and thorough investigation. Such documentation includes interview notes, relevant key documents, signed witness statements, and documentation kept during the investigation and the associated documents before and after. The investigator should take care to keep clean copies of all documents; if the investigator plans to take notes on the supporting documents, they should write on copies and maintain the originals in the file. Separate from the documents, the investigator should keep detailed notes and should consider obtaining signed statements from the employees as well.

After the investigation concludes - no matter the result - the entire file should be compiled and kept in a secure separate location, and not combined with any employees' personnel files. Any documents that are generated during the investigation, or kept in the course of the investigation, may be turned over in discovery if the matter gives rise to later litigation.

Workplace Investigations in Litigation

While the goal of a workplace investigation is to reach a resolution that will be acceptable to all of the involved parties, allowing everyone to move on and the organization to resume its important work, things do not always work out so neatly. If your organization is sued over a workplace issue that you investigated, be prepared for the plaintiff to scrutinize and question you and your investigative file, because both will almost certainly be subject to discovery.

A well-conducted investigation can form the basis of an administrative defense that allows you to attack a sexual harassment claim; it can support your other defenses by showcasing evidence that favors you; and it can convince a jury that your version of the facts is the right one. A poorly conducted investigation can hand arguments to the plaintiff and undermine your case. A common argument made against employers in litigation or arbitration is that the employer's investigation was not thorough enough or good enough. Your employment

counsel can assist you in designing a workplace investigation that will support your position in court if the worst-case scenario comes to pass and you find yourself facing a judge or jury.

Conclusion

Workplace investigations can be a time-consuming and stressful process. If conducted promptly upon receipt of a complaint, and in a careful and thorough matter, however, they can be a valuable tool for an HR manager to assess and improve the health of the organization, and to safeguard against possible litigation losses. A thoughtful approach to investigating employee concerns - whether they refer to alleged discrimination or harassment, to suspected fraud, waste or abuse, or to the more mundane managerial concerns to which no organization is immune - can go a long way toward ensuring a positive work environment and a better chance of succeeding in the event that employment litigation does occur.

APPENDIX A: SUMMARY OF PETITIONS FILED AND ELECTIONS HELD

ALL SECTORS - SUMMARY OF PETITIONS FILED & ELECTIONS HELD (2007 - 2016)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Total Petitions	3,083	3,052	2,788	2,896	2,550	2,475	2,554	2,621	2,809	2,289
Total Representation (RC) Petitions	2,339	2,357	2,109	2,353	1,964	1,984	2,033	2,136	2,347	1,920
Union Not Elected	611	516	352	556	358	501	476	433	477	374
Union Elected	1,067	1,065	759	1,142	808	863	902	985	1,104	964
Total Decertification Petitions	744	694	679	543	586	491	521	485	462	369
Total RD Petitions	644	577	591	490	494	462	464	438	397	312
Total RM Petitions	100	117	88	53	92	29	57	47	65	57
Union Decertified	248	171	145	156	168	149	131	122	130	119
Union Retained	145	143	94	95	123	99	88	71	83	70

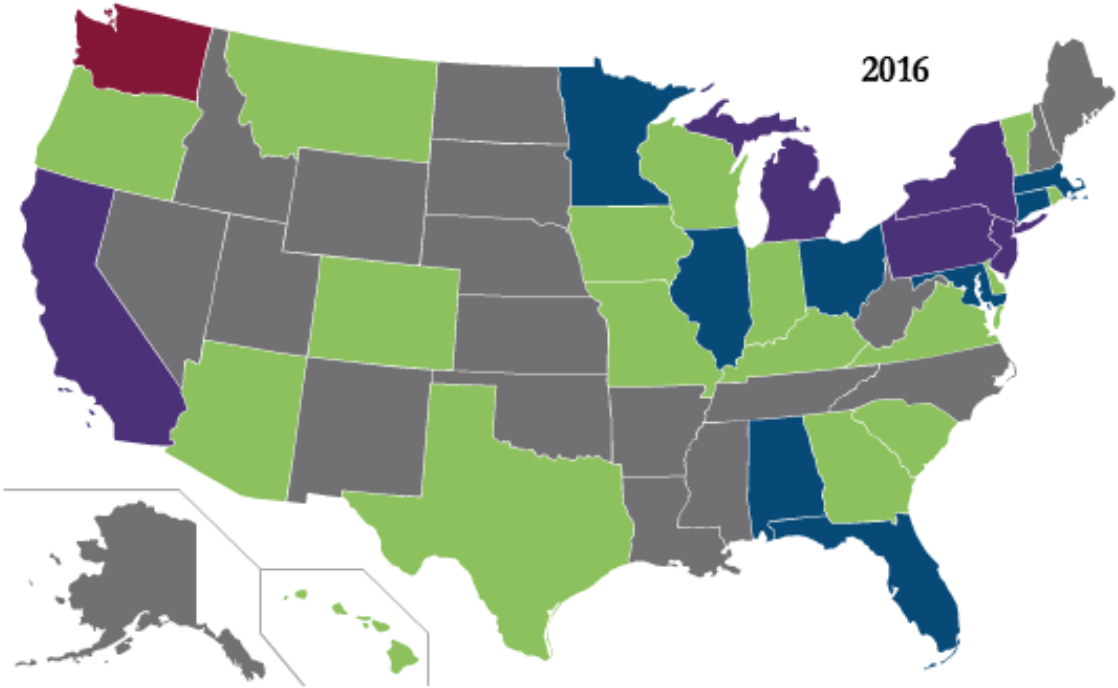
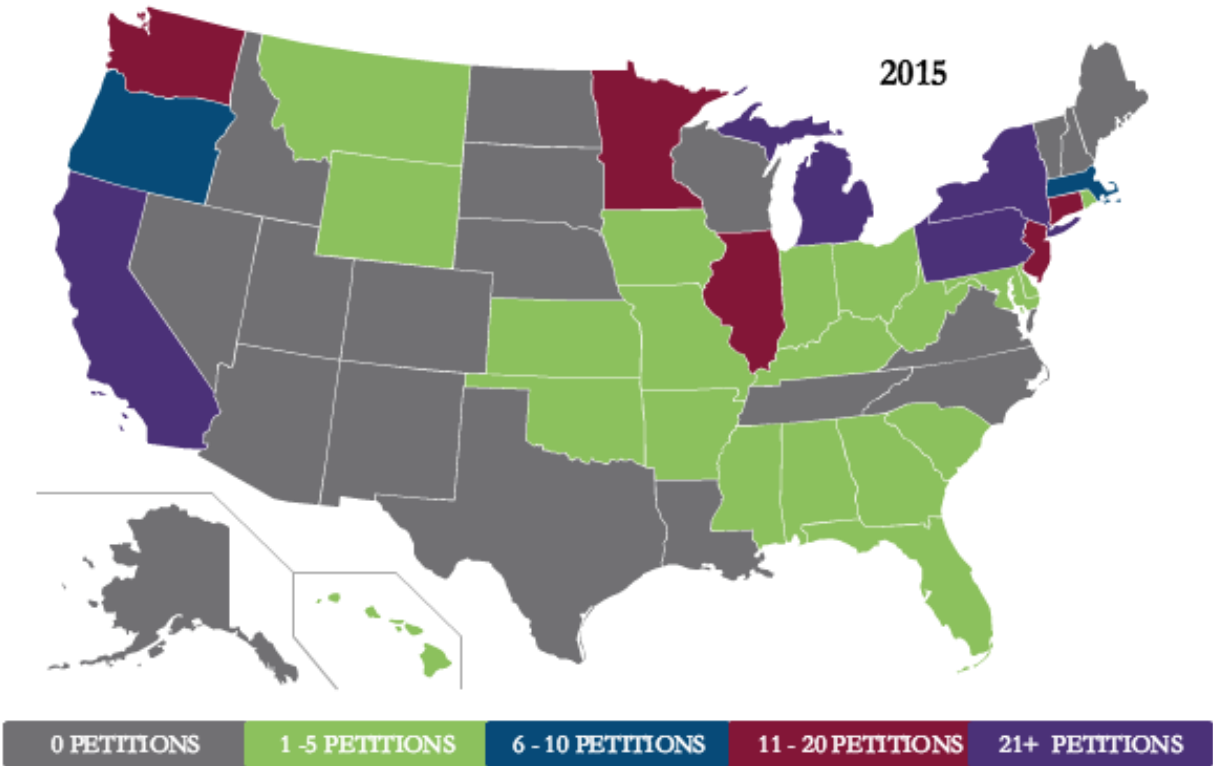
HEALTH CARE - SUMMARY OF PETITIONS FILED & ELECTIONS HELD (2007 - 2016)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Total Petitions	430	445	470	433	410	362	388	446	394	401
Total Representation (RC) Petitions	309	307	361	349	290	296	314	358	327	341
Union Not Elected	64	63	53	77	61	69	65	53	60	45
Union Elected	163	186	134	187	162	171	159	189	187	196
Total Decertification Petitions	121	138	109	84	120	66	74	88	67	60
Total RD Petitions	102	89	102	73	69	59	65	85	57	51
Total RM Petitions	19	49	7	11	51	7	9	3	10	9
Union Decertified	27	22	14	13	57	13	12	21	17	23
Union Retained	28	28	19	28	26	25	18	14	13	17

ALL NON-HEALTH CARE SECTORS - SUMMARY OF PETITIONS FILED & ELECTIONS HELD (2007 - 2016)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Total Petitions	2,653	2,607	2,318	2,463	2,140	2,113	2,166	2,175	2,415	1,888
Total Representation (RC) Petitions	2,030	2,050	1,748	2,004	1,674	1,688	1,719	1,778	2,020	1,579
Union Not Elected	547	453	299	479	297	432	411	380	417	329
Union Elected	904	879	625	955	646	692	743	795	918	768
Total Decertification Petitions	623	556	570	459	466	425	447	397	395	309
Total RD Petitions	542	488	489	417	425	403	399	353	340	261
Total RM Petitions	81	68	81	42	41	22	48	44	55	48
Union Decertified	221	149	131	143	111	136	119	101	113	96
Union Retained	117	115	75	67	97	74	70	57	71	53

APPENDIX B: MAPS OF REPRESENTATION PETITIONS FILED IN HEALTH CARE



APPENDIX C: 2016 ASHHRA ADVOCACY COMMITTEE

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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.nlr.gov/nlr/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 (UC)

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.