# Labor Activity in Health Care 49

## SEMI-ANNUAL REPORT

JANUARY – JUNE 2018

Presented by

ASHHRA
THE HUMAN SIDE OF HEALTHCARE
A professional membership group of the American Hospital Association

IRI CONSULTANTS

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# ABOUT THIS REPORT

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

The 49th 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 2017 and the first six months of 2018.[1]
- The Labor Law/Activity Update: Articles written by labor experts about relevant and timely labor issues impacting employers and the workplace.

[1] Throughout the report, an asterisk (*) after 2018 indicates that the data is from the first six months of 2018.

# LETTER FROM JAMES G. TRIVISONNO

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There is no question that the labor movement is experiencing a significant course correction.

The Supreme Court's long-awaited June 2018 ruling on *Janus v. American Federation of State, County, and Municipal Employees (AFSCME)* has shaken unions to their core, essentially creating 50 right-to-work states for public sector employees. Unions also are concerned that their power over private sector employees may be eroded as the Trump Administration continues to reconstitute membership of the Supreme Court and the National Labor Relations Board (NLRB).

For instance, the recent retirement of Supreme Court Justice Anthony Kennedy, announced shortly after the *Janus* decision, paved the way for President Trump's nomination of Brett Kavanaugh to the Court. Kavanaugh has a strong pro-employer record in labor cases.

Meanwhile, at the NLRB, we have a Republican majority for the first time in more than a decade. In late 2017, the Board issued a number of business-friendly decisions that reversed previous decisions supported by labor organizations and the Obama Administration. In other promising NLRB developments, management-side attorney John Ring joined the Board. Mark Gaston Pearce, one of two remaining Democrats, term expired in late August but he has been nominated for another term.

While the impact of the *Janus* decision on private-sector unions remains unclear, we have experienced and should anticipate new and unorthodox organizing efforts for the foreseeable future. Unions know their survival depends on it.

Unions are focusing on different types of workers – adjunct faculty members, graduate teaching assistants, journalists, tech workers and service jobs employed by private contractors. In a recent *Wall Street Journal* op-ed about this very matter, Richard Trumpka, president of the AFL-CIO, wrote, "unions are on the rise….Working people are just getting started." And, of course, we're seeing unions continue their campaigns to organize health care workers.

Their tactics include community organizing through which they're convincing individuals to become members without receiving any collective bargaining rights. In Pennsylvania, SEIU Healthcare Pennsylvania has launched "Nurses of Pennsylvania." Through this group, the union has conducted online staffing surveys, is advocating for nurse-to-patient staffing ratios and has coordinated meetings during which front-line nurses are engaging state legislators about staffing concerns. SEIU's proxy group claims that 90 percent of its membership are non-union nurses. Another group focused on collecting on nurses' concerns is floswhistle.org. It's billed as a "secure, anonymous platform where direct care nurses can log instances of compromised patient safety due to inadequate staffing."

Unions also have pushed for automatic renewals and the creation of hurdles for public-sector employees to end their dues/fees payments via state-level legislation and executive orders.

In more news from Washington, the U.S. Department of Labor this summer rescinded the 2016 Persuader Rule, which, if enacted, would have required employers to disclose interactions with consultants hired to advise them on addressing organization efforts. This is a major victory for employers.

We are at a turning point, and to seize this momentum, we have to be both attentive and nimble. I am confident we can set the course for the future, if we remain focused, proactive and prepared.

# INTRODUCTION

Since our last report, the percentage of unionized employees has remained unchanged at 10.7 percent, while the number of unionized workers increased by 262,000 to 14.8 million in 2017. This increase, while a reflection of the increase in employed workers, reverses what has been a downward trend.

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).

While we have seen a significant drop in elections in the health care sector in 2018 (87 versus 138 at this point last year), unions have maintained their impressive victory percentage of 77 percent, compared to 67 percent in non-health care sectors. Over the same time period, 19 decertification elections were held and unions maintained recognition in 26 percent.

Since the expedited election ruling went into effect on April 15, 2015, the majority of elections took place within 21 to 30 days from the date of the petition, and the average number of days is 27.8.

Service Employees International Union (SEIU) remained the most active in organizing workers in the health care field, and was responsible for 52 percent of representation petitions filed in the first six months of the year. The American Federation of State, County and Municipal Employees (AFSCME), the United Food and Commercial Workers (UFCW), the National Federation of Nurses (NFN), the International Union of Operating Engineers (IUOE) and the National Union of Health Care Workers (NUHW) were also among the most active unions in health care.

Of note, SEIU's election success rate grew from 80 percent in 2017 to 83 percent in 2018. AFSCME, NFN, and IUOE were also up year-over-year. Pay close attention to National Nurses United (NNU), which was successful in 88 percent of its elections in 2017 and 100 percent of elections so far in 2018.

Many of the most active unions are experiencing overall declines in representation petitions. SEIU went from 151 petitions filed last year to 61 in the first half of 2018. UFCW and NUHW also posted big declines, going to 6 from 27 and to 4 from 26, respectively. NNU, which was highly active in 2017 (14 petitions), only had 3 thus far in 2018.

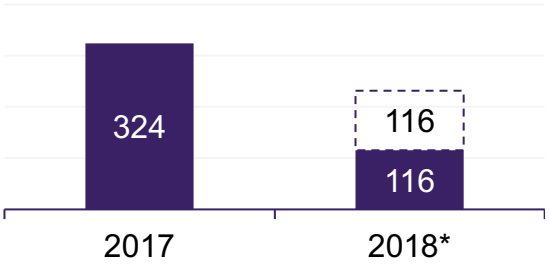
Unions have typically been more successful defending against decertification elections in the health care sector than in non-health care, but during the first six months of 2018 unions only maintained recognition in 26 percent of decertification elections held in health care compared to 41 percent in non-health care.

Politically, 2018 has been a groundbreaking year. The National Labor Relations Board (NLRB) is under Republican control and has reversed a number of Obama-era decisions. The Supreme Court this summer issued its landmark *Janus* ruling that essentially creates 50 right-to-work states for public employees. President Trump's appointment to the Supreme Court, if confirmed, also may benefit employers' interests. We have to be prepared to navigate this changing environment.

# EXECUTIVE SUMMARY

## NLRB REPRESENTATION PETITIONS & ELECTIONS[2,3]

In the first six months of 2018, there were 116 representation (RC) petitions filed in the health care sector. Assuming that unions file RC petitions at the same rate in the second half of the year as they did in the first, this would be the lowest number of petitions filed in at least the last 15 years. During this same time period, 87 representation elections were held, and unions were elected as a result of 77 percent of these.




The majority of organizing activity occurred in just six states: California, New York, Michigan, Pennsylvania, Massachusetts and Washington.

The Service Employees International Union (SEIU) continues to be the most dominant union in the health care sector, accounting for 52 percent of representation petitions filed and 56 percent of representation elections held in the first six months of 2018. Not only do they file a large number petitions, but they have been elected as a result of 83 percent of elections held in the first six months of 2018.

ASHHRA Region 9 continues to be the most active region in the nation, with 41 RC petitions filed in the first six months of 2018, compared to 30 in the next most active region.

Over the past decade, strike activity has continued to be concentrated in California, with the state experiencing five times as many strikes as Florida—the next most active state. The majority of states have not seen a strike in health care in the past decade, but there are concentrated geographic pockets of strike activity.

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

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

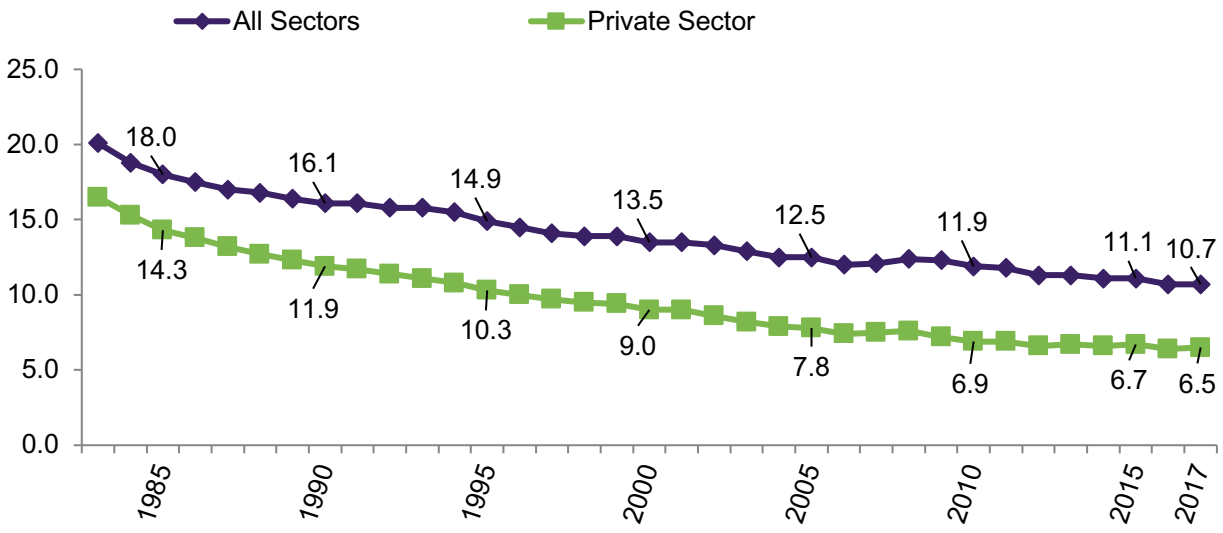
# UNION MEMBERSHIP NATIONWIDE

According to the Department of Labor (DOL) Bureau of Labor Statistics' *Union Membership 2017* report, the percentage of unionized wage and salary employees remained unchanged at 10.7 percent, while the number of unionized workers increased by 262,000 to 14.8 million in 2017.

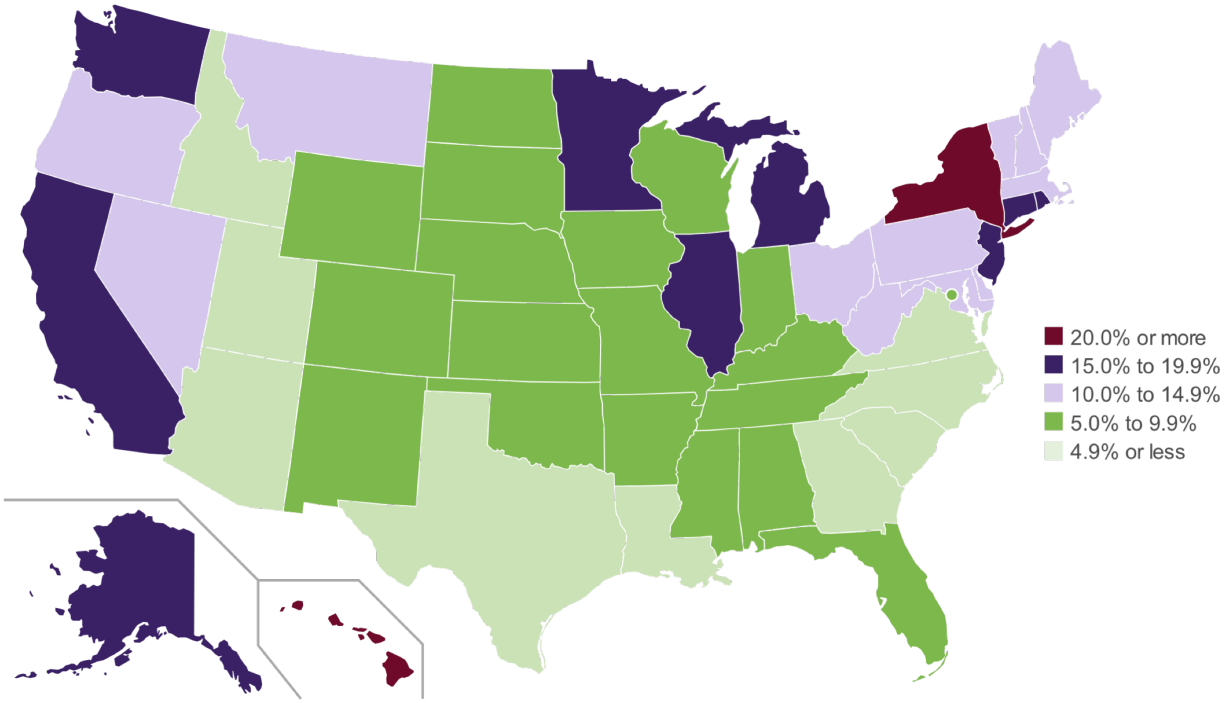
Data from the DOL report include the following highlights:

- 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 than *private sector* workers to be members of a union (34.4 percent vs. 6.5 percent, respectively)
- Black workers continued to have the highest union membership rate in 2017 (12.6 percent), followed by Whites (10.6 percent), Hispanics (9.3 percent) and Asians (8.9 percent)
- The highest union membership rate is among men aged 55 to 64 (14.3 percent), while the lowest is among women aged 16 to 24 (3.8 percent)
- New York continues to have the highest union membership rates (23.8 percent); South Carolina has the lowest rates (2.6 percent)
- Union membership rates increased in 26 states and the District of Columbia, decreased in 21 states and remained unchanged in four states
- Approximately half of all union members live in just seven states: California, New York, Illinois, Michigan, Pennsylvania, New Jersey and Ohio

## UNION MEMBERSHIP RATE SUMMARY




## UNION MEMBERSHIP RATES BY STATE, 2017



# 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
- Health care sector – Days from petition to election

### *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

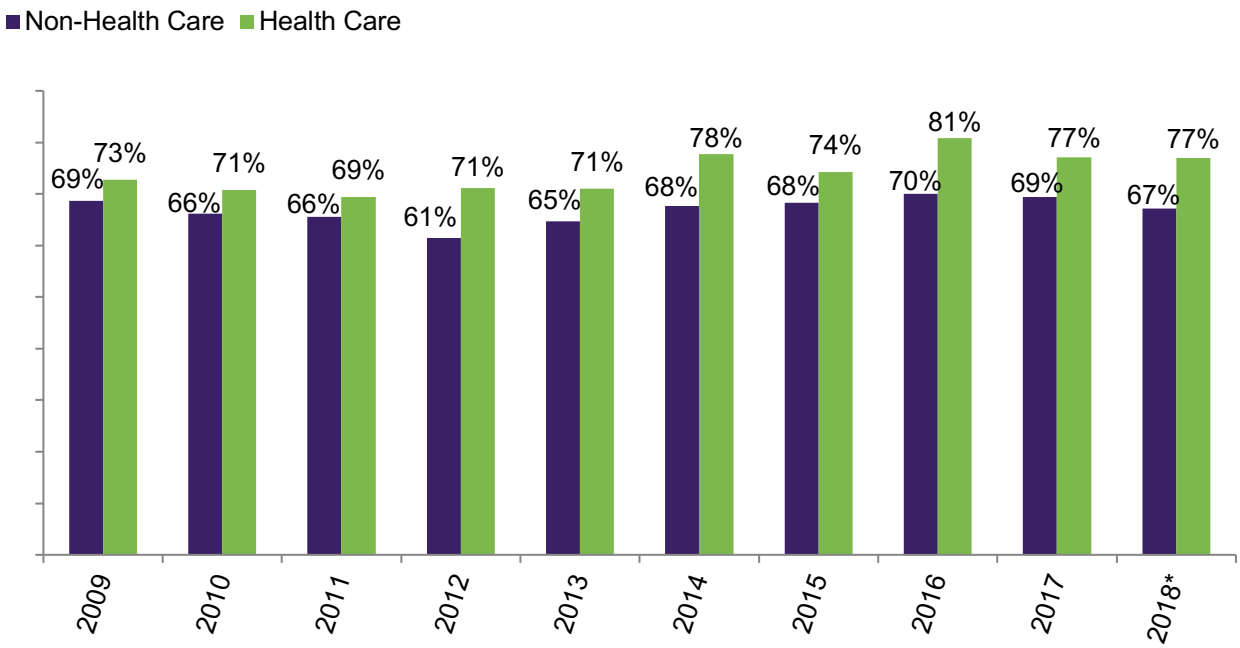
The following information summarizes representation petition activity and elections held during the past decade as reported by the NLRB.

### HEALTH CARE VS. ALL NON-HEALTH CARE SECTORS COMPARISON

Over the past decade, unions have experienced higher success rates in the health care sector than in non-health care sectors. During the first six months of 2018, unions were elected as a result of 77 percent of elections held in the health care sector, compared to just 67 percent in non-health care sectors.

## UNION WINS IN RC ELECTIONS

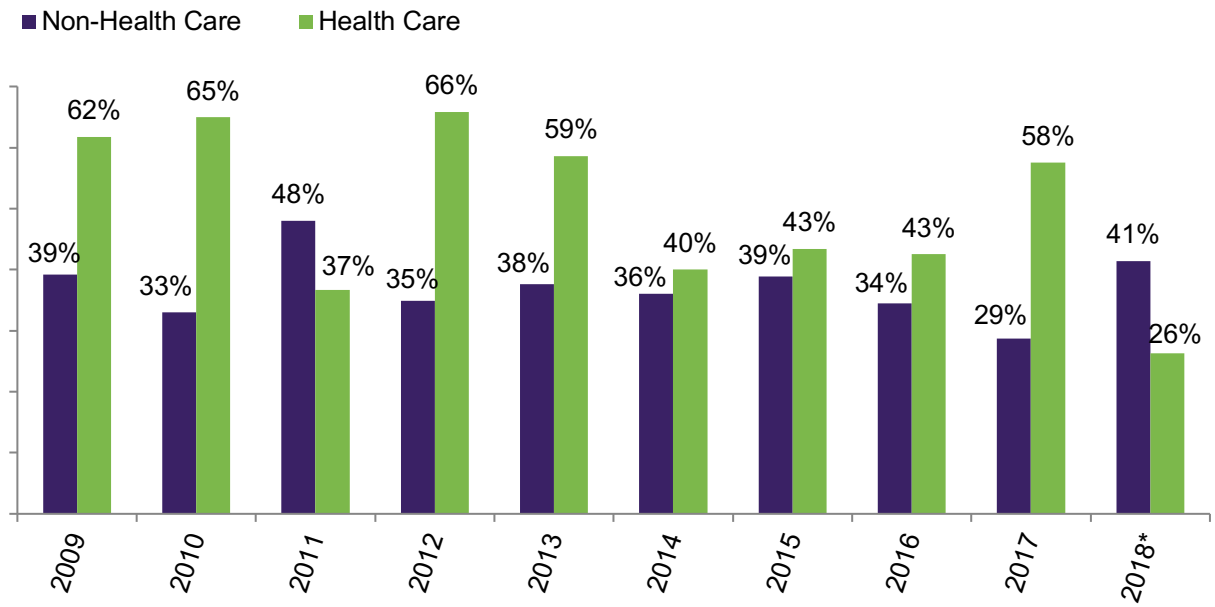
Health Care vs. Non-Health Care Sectors (2009-June 30, 2018)



Unions have typically been more successful defending against decertification elections in the health care sector than in non-health care, but during the first six months of 2018 unions only maintained recognition in 26 percent of decertification elections held in health care compared to 41 percent in non-health care.

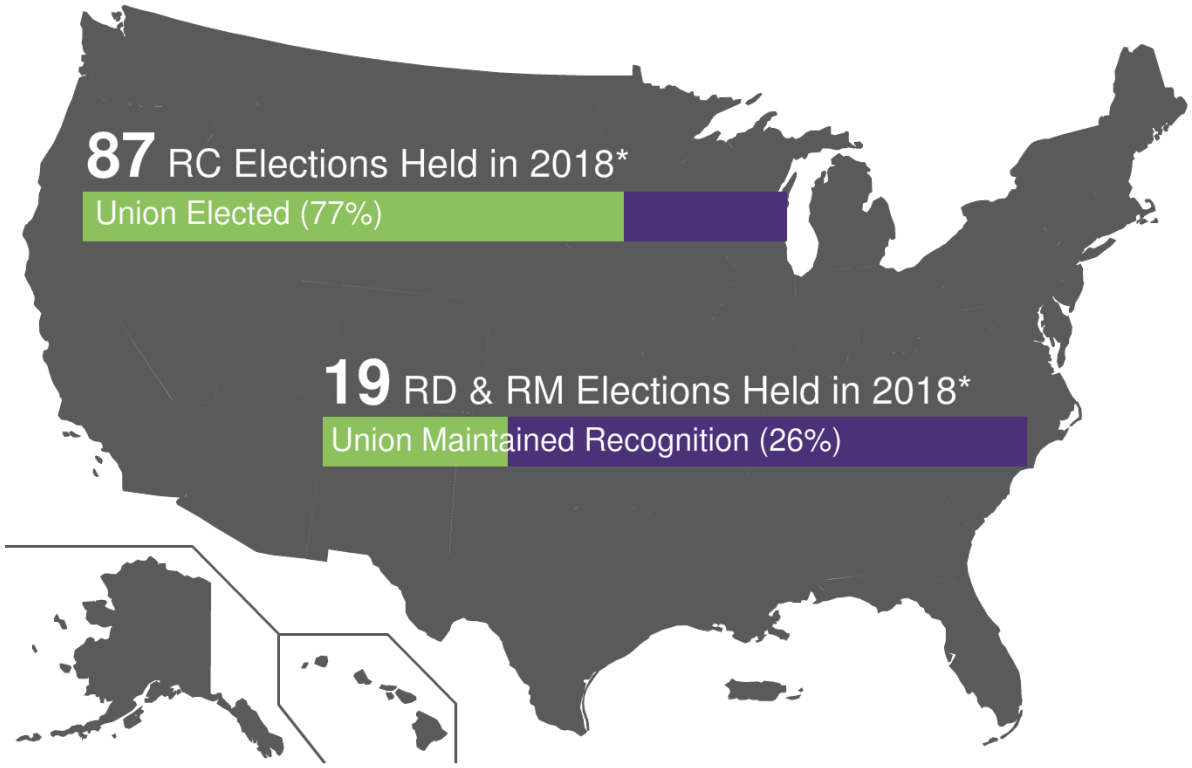
## UNION WINS IN RD/RM ELECTIONS

Health Care vs. Non-Health Care Sectors (2009-June 30, 2018)



## HEALTH CARE SECTOR – ELECTIONS OVERVIEW

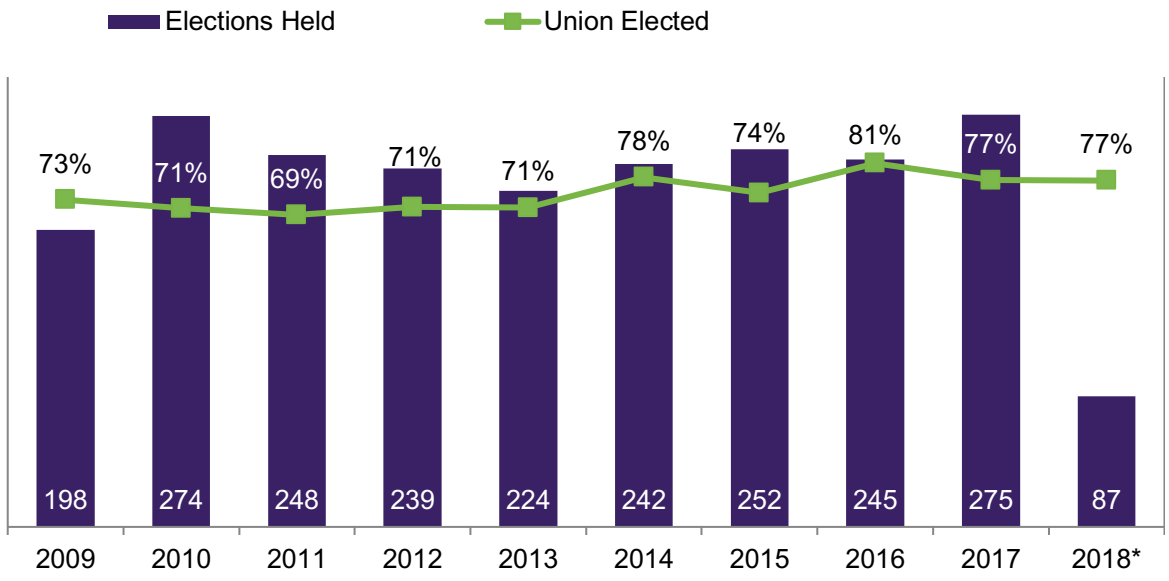
During the first six months of 2018, there were 87 representation elections held in the health care sector, and unions were elected as a result of 77 percent. Over the same time period, 19 decertification elections were held and unions maintained recognition in 26 percent.



## HEALTH CARE SECTOR – UNION SUCCESSES IN REPRESENTATION (RC) ELECTIONS

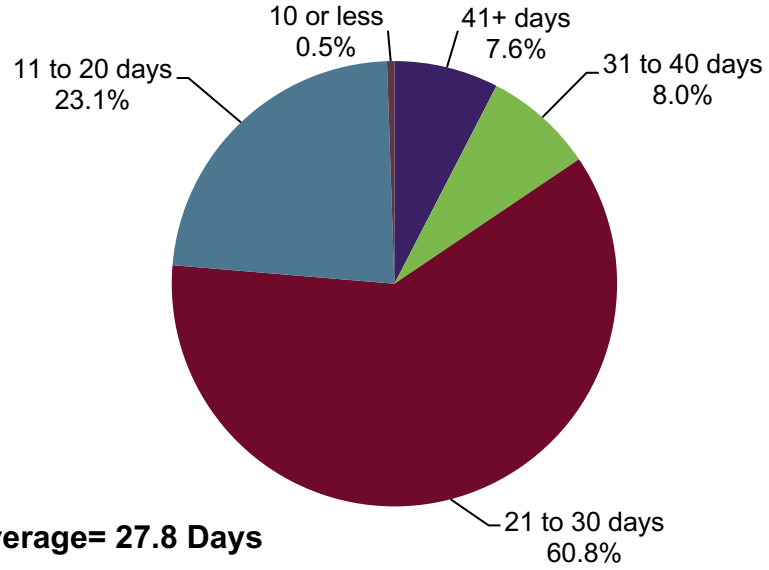
The chart below illustrates the number of representation elections held over the past decade, along with the percentage of elections won by unions. While the 77 percent win rate in the first six months of 2018 is the same as in 2017, the total number of elections held is on track to be the lowest in the past decade, assuming an equal number of elections in the second half of the year.

## UNION SUCCESSES IN RC ELECTIONS COMPARED TO NUMBER OF ELECTIONS HELD



## DAYS FROM NLRB PETITION TO ELECTION

4/14/2015 to 6/30/2018 (n=752 RC elections) – Health Care Sector




**Average= 27.8 Days**

This chart details the number of days from NLRB petition to election since the expedited election ruling went into effect on April 15, 2015. The majority of RC elections took place within 21 to 30 days from the date of the petition, and the average number of days is 27.8.

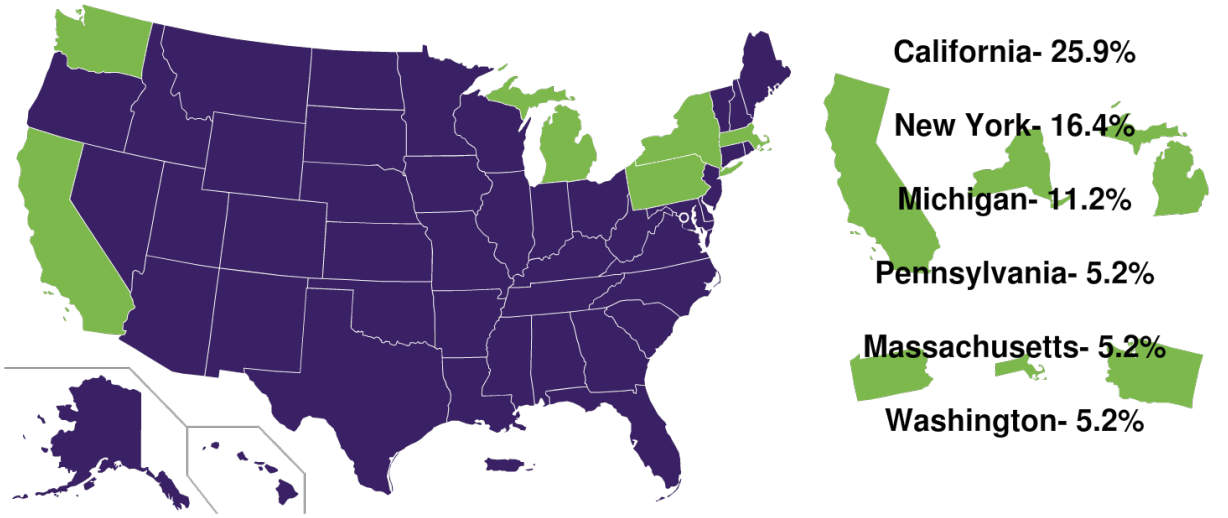
## STATE SUMMARIES

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 2017 and the first six months of 2018 at the time of publication.

### MOST ACTIVE STATES – REPRESENTATION PETITIONS FILED IN HEALTH CARE

Of the 116 RC petitions filed in health care in the first six months of 2018, 69 percent were filed in just six states, and over a quarter were filed in just one state – California. New York, Michigan, Pennsylvania, Massachusetts and Washington round out the top six states and each account for more than 5 percent of petitions filed.

## 116 RC Petitions Filed in 2018*




69.0% from 6 states

## ALL STATES – REPRESENTATION PETITIONS FILED IN HEALTH CARE

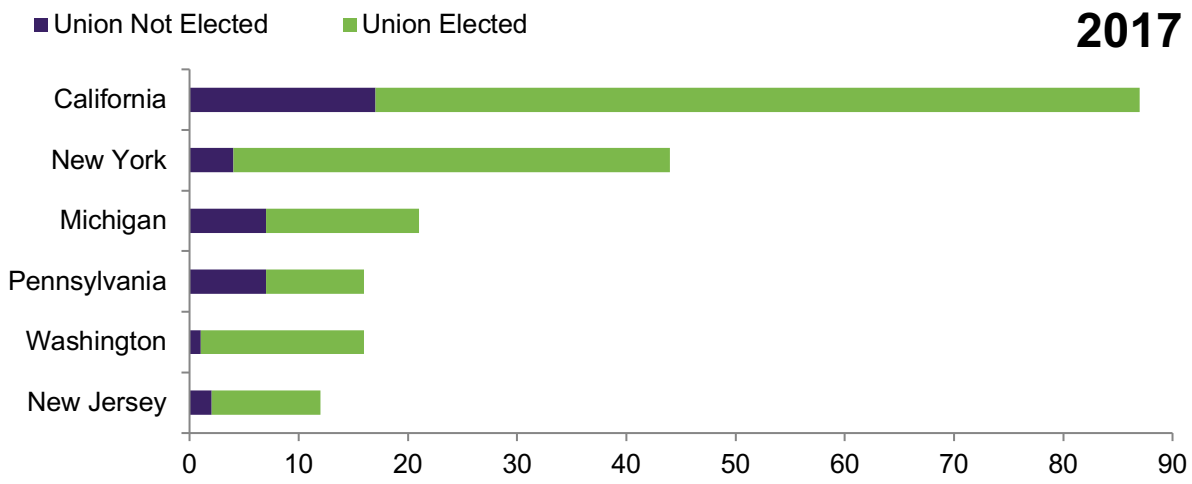
The table below details the number of representation petitions filed in each state in health care during 2017 and the first six months of 2018.

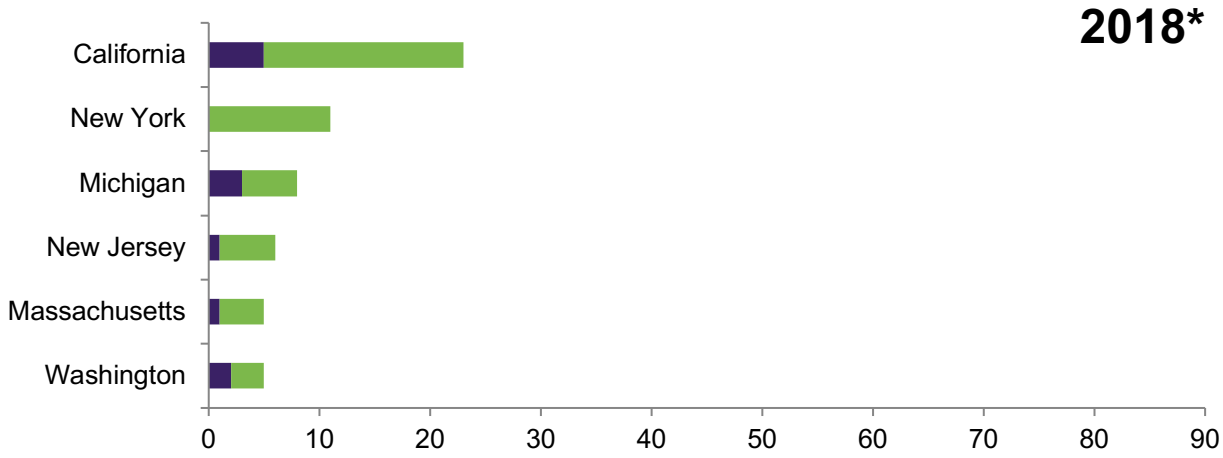
| State | 2017 | 2018* | State | 2017 | 2018* | State | 2017 | 2018* |
|---|---|---|---|---|---|---|---|---|
| **Alabama** | 9 | - | **Iowa** | 1 | - | **North Dakota** | 1 | - |
| **Arizona** | 2 | - | **Kentucky** | 1 | - | **Ohio** | 10 | 1 |
| **California** | 90 | 30 | **Maine** | 2 | - | **Oregon** | 9 | 5 |
| **Colorado** | 2 | - | **Maryland** | 3 | 2 | **Pennsylvania** | 18 | 6 |
| **Connecticut** | 7 | 3 | **Massachusetts** | 15 | 6 | **Puerto Rico** | 1 | 5 |
| **DC** | 3 | 1 | **Michigan** | 29 | 13 | **Rhode Island** | 4 | - |
| **Delaware** | 2 | - | **Minnesota** | 6 | 4 | **South Carolina** | 1 | - |
| **Florida** | - | 2 | **Missouri** | 2 | 1 | **Texas** | - | 1 |
| **Georgia** | 1 | - | **Montana** | 4 | - | **Washington** | 15 | 6 |
| **Hawaii** | 4 | - | **New Jersey** | 15 | 5 | **West Virginia** | 2 | 2 |
| **Illinois** | 6 | 3 | **New Mexico** | 1 | - | **Wisconsin** | - | 1 |
| **Indiana** | 1 | - | **New York** | 57 | 19 | **Total** | **324** | **116** |

*Note: A state is not listed in the table if there were no petitions filed in 2017 or the first six months of 2018.*

In both 2017 and the first six months of 2018, California, New York and Michigan were the three most active states in terms of the number of RC elections held.

## MOST ACTIVE STATES – REPRESENTATION ELECTION RESULTS IN HEALTH CARE



## ALL STATES – REPRESENTATION ELECTION RESULTS IN HEALTH CARE

The following table depicts the number of representation elections held in each state in the health care sector in 2017 and the first six months of 2018.

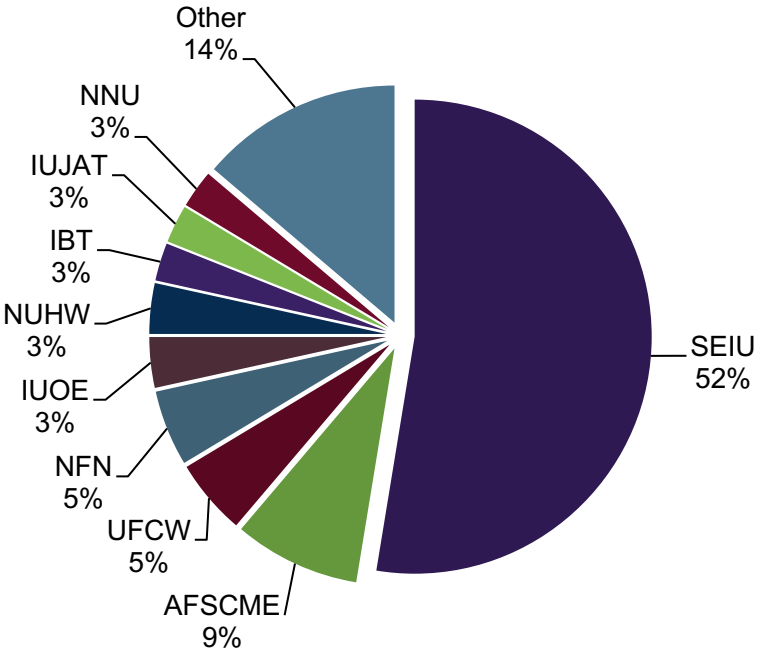
| State | 2017 | | | | | 2018* | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Total Elections | Union Elected | | Union Not Elected | | Total Elections | Union Elected | | Union Not Elected | |
| | | Total Successes | % of Elections | Total Successes | % of Elections | | Total Successes | % of Elections | Total Successes | % of Elections |
| Alabama | 6 | 3 | 50% | 3 | 50% | - | - | - | - | - |
| Arizona | 2 | 2 | 100% | 0 | 0% | - | - | - | - | - |
| California | 87 | 70 | 80% | 17 | 20% | 23 | 18 | 78% | 5 | 22% |
| Colorado | 1 | 1 | 100% | 0 | 0% | 1 | 0 | 0% | 1 | 100% |
| Connecticut | 7 | 5 | 71% | 2 | 29% | 3 | 2 | 67% | 1 | 33% |
| District of Columbia | 2 | 1 | 50% | 1 | 50% | - | - | - | - | - |
| Delaware | 2 | 2 | 100% | 0 | 0% | - | - | - | - | - |
| Florida | 1 | 1 | 100% | 0 | 0% | 2 | 2 | 100% | 0 | 0% |
| Georgia | 1 | 0 | 0% | 1 | 100% | - | - | - | - | - |
| Hawaii | 2 | 1 | 50% | 1 | 50% | - | - | - | - | - |
| Illinois | 4 | 2 | 50% | 2 | 50% | 2 | 2 | 100% | 0 | 0% |
| Indiana | 1 | 1 | 100% | 0 | 0% | - | - | - | - | - |
| Iowa | 1 | 0 | 0% | 1 | 100% | - | - | - | - | - |
| Kentucky | 1 | 1 | 100% | 0 | 0% | - | - | - | - | - |
| Maine | 2 | 2 | 100% | 0 | 0% | - | - | - | - | - |
| Maryland | 4 | 3 | 75% | 1 | 25% | 1 | 1 | 100% | 0 | 0% |
| Massachusetts | 11 | 9 | 82% | 2 | 18% | 5 | 4 | 80% | 1 | 20% |
| Michigan | 21 | 14 | 67% | 7 | 33% | 8 | 5 | 63% | 3 | 38% |
| Minnesota | 5 | 4 | 80% | 1 | 20% | 3 | 2 | 67% | 1 | 33% |
| Missouri | 2 | 1 | 50% | 1 | 50% | 1 | 0 | 0% | 1 | 100% |
| Montana | 3 | 2 | 67% | 1 | 33% | 1 | 1 | 100% | 0 | 0% |
| New Mexico | - | - | - | - | - | 1 | 1 | 100% | 0 | 0% |
| New Jersey | 12 | 10 | 83% | 2 | 17% | 6 | 5 | 83% | 1 | 17% |
| New York | 44 | 40 | 91% | 4 | 9% | 11 | 11 | 100% | 0 | 0% |
| North Dakota | 1 | 0 | 0% | 1 | 100% | - | - | - | - | - |
| Ohio | 5 | 2 | 40% | 3 | 60% | 1 | 1 | 100% | 0 | 0% |
| Oregon | 9 | 7 | 78% | 2 | 22% | 3 | 3 | 100% | 0 | 0% |
| Pennsylvania | 16 | 9 | 56% | 7 | 44% | 4 | 3 | 75% | 1 | 25% |
| Puerto Rico | - | - | - | - | - | 1 | 0 | 0% | 1 | 100% |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Rhode Island | 3 | 2 | 67% | 1 | 33% | - | - | - | - | - |
| South Carolina | 1 | 1 | 100% | 0 | 0% | - | - | - | - | - |
| Texas | - | - | - | - | - | 1 | 1 | 100% | 0 | 0% |
| Vermont | - | - | - | - | - | - | - | - | - | - |
| Virgina | 1 | 0 | 0% | 1 | 100% | - | - | - | - | - |
| Washington | 16 | 15 | 94% | 1 | 6% | 5 | 3 | 60% | 2 | 40% |
| West Virginia | 1 | 1 | 100% | 0 | 0% | 3 | 2 | 67% | 1 | 33% |
| Wisconsin | - | - | - | - | - | 1 | 0 | 0% | 1 | 100% |
| **Total** | **275** | **212** | 77% | **63** | 23% | **87** | **67** | 77% | **20** | 23% |

*Note: A state is not listed in the table if there were no elections held in 2017 or the first six months of 2018.*

## UNION SUMMARIES

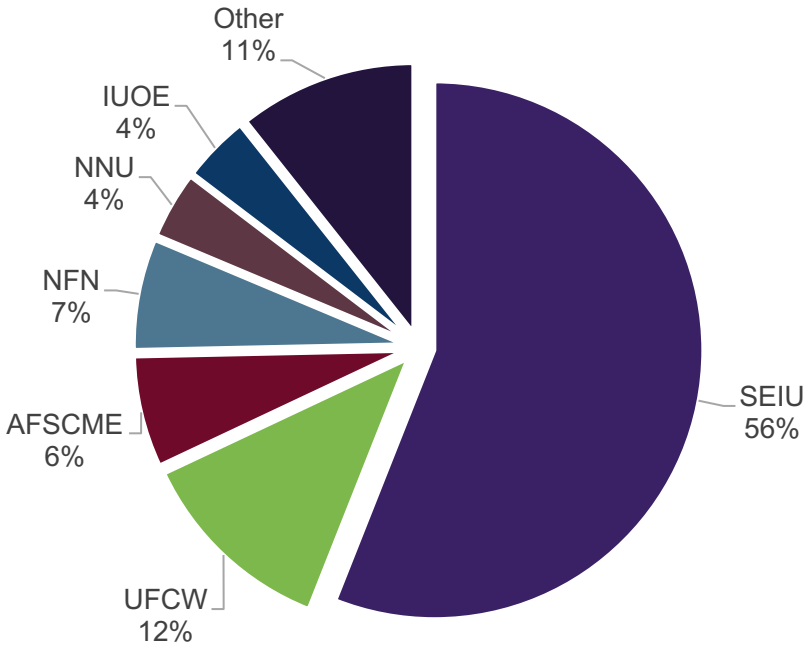
## MOST ACTIVE UNIONS – REPRESENTATION PETITIONS HELD IN HEALTH CARE IN THE FIRST SIX MONTHS OF 2018




As per usual, SEIU is the most active union in the health care sector, accounting for 52 percent of RC petitions filed in the first six months of 2018. The next most active union was AFSCME.

| Abbreviation | Union Name | RC Petitions Filed | |
|---|---|---|---|
| | | 2017 | 2018* |
| SEIU | Service Employees International Union | 151 | 61 |
| AFSCME | State County and Municipal Employees | 16 | 10 |
| UFCW | United Food and Commercial Workers | 27 | 6 |
| NFN | National Federation of Nurses | 4 | 6 |
| IUOE | International Union of Operating Engineers | 7 | 4 |
| NUHW | National Union of Healthcare Workers | 26 | 4 |
| IBT | International Brotherhood of Teamsters | 19 | 3 |
| IUJAT | International Union of Journeymen and Allied Trades | 0 | 3 |
| NNU | National Nurses United | 14 | 3 |

## MOST ACTIVE UNIONS – REPRESENTATION ELECTIONS HELD IN HEALTH CARE IN THE FIRST SIX MONTHS OF 2018



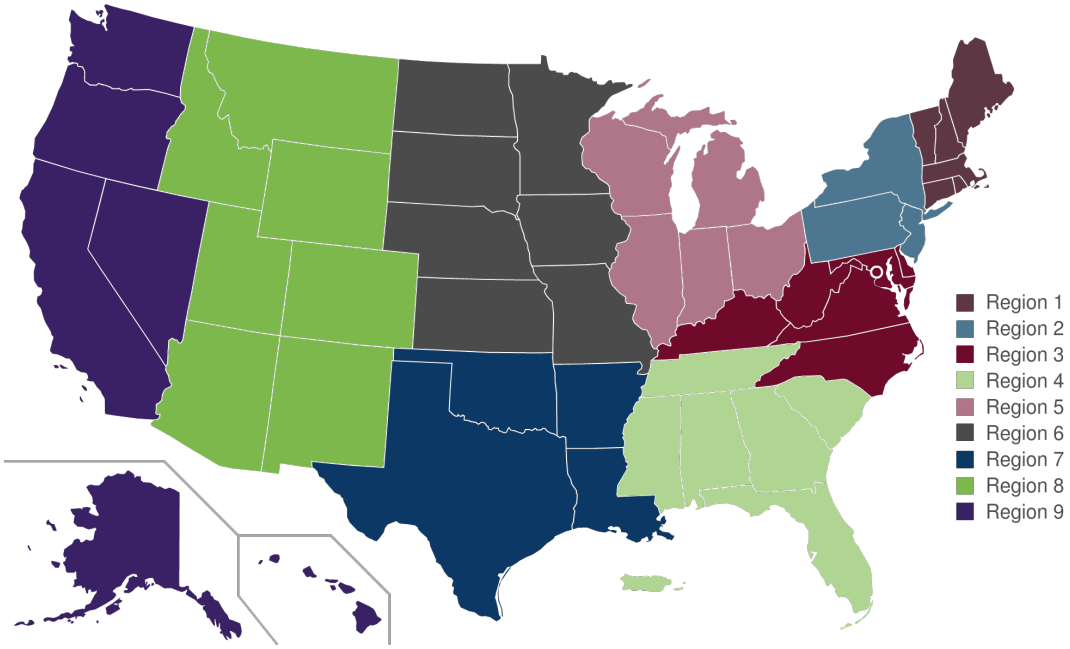

SEIU also accounted for the most RC elections in the first six months of 2018. SEIU was involved in 42 elections and was elected as a result of 83 percent. The next most active union was UFCW with 9 RC elections

## MOST ACTIVE UNIONS – REPRESENTATION ELECTION RESULTS

| | 2017 | | | 2018* | | |
|---|---|---|---|---|---|---|
| | Total Elections | Union Elected % | Union Not Elected % | Total Elections | Union Elected % | Union Not Elected % |
| SEIU | **126** | 80% | 20% | **42** | 83% | 17% |
| UFCW | **22** | 73% | 27% | **9** | 56% | 44% |
| AFSCME | **15** | 60% | 40% | **5** | 80% | 20% |
| NFN | **4** | 75% | 25% | **5** | 80% | 20% |
| NNU | **16** | 88% | 13% | **3** | 100% | 0% |
| IUOE | **8** | 63% | 38% | **3** | 100% | 0% |

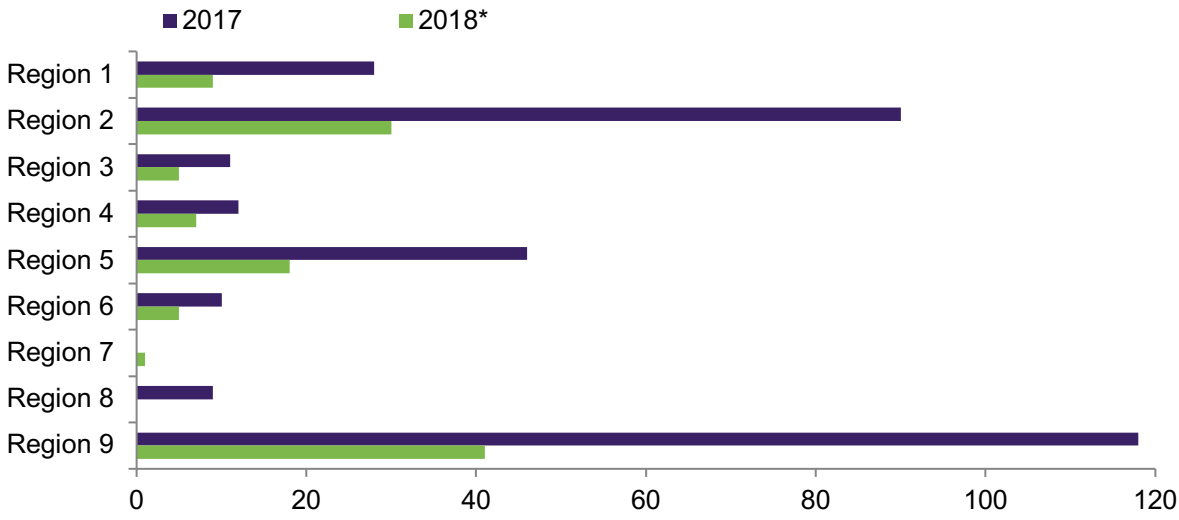
## REGIONAL SUMMARIES

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.

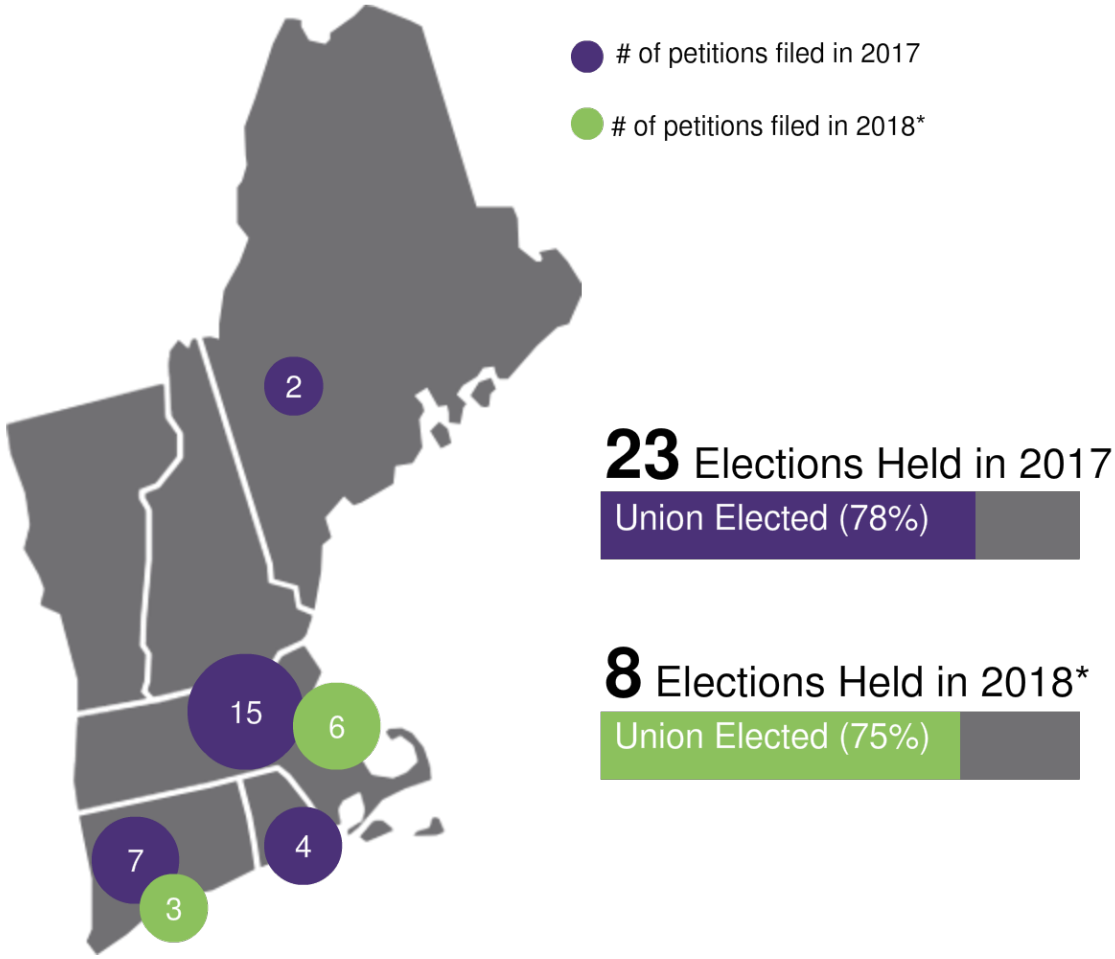
## RC PETITIONS FILED IN HEALTH CARE BY ASHHRA REGION



## REGION 1

The majority of the activity in Region 1 continues to occur in Massachusetts and Connecticut. There were 23 RC elections held in 2017, but just eight in the first six months of 2018.

*Petitions & Elections*

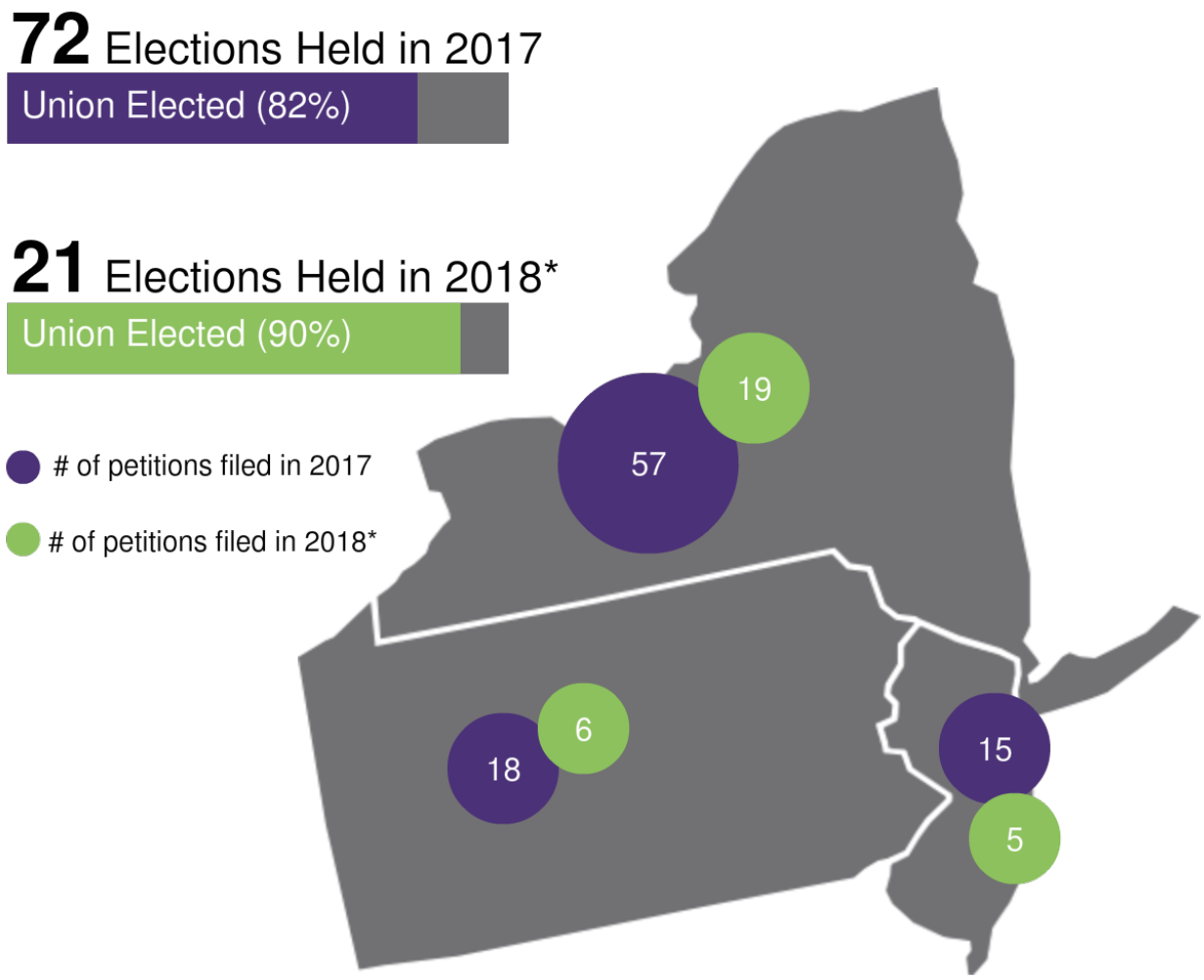



**Indicates data is from the first six months of 2018.*

## REGION 2

The amount of organizing activity appears to be trending downward in Region 2 in the first six months of 2018 compared to 2017. All three states in the Region have only had a third of the number of petitions filed. However, of the 21 elections held, unions have been successful in 90 percent, which is greater than in 2017.

*Petitions & Elections*

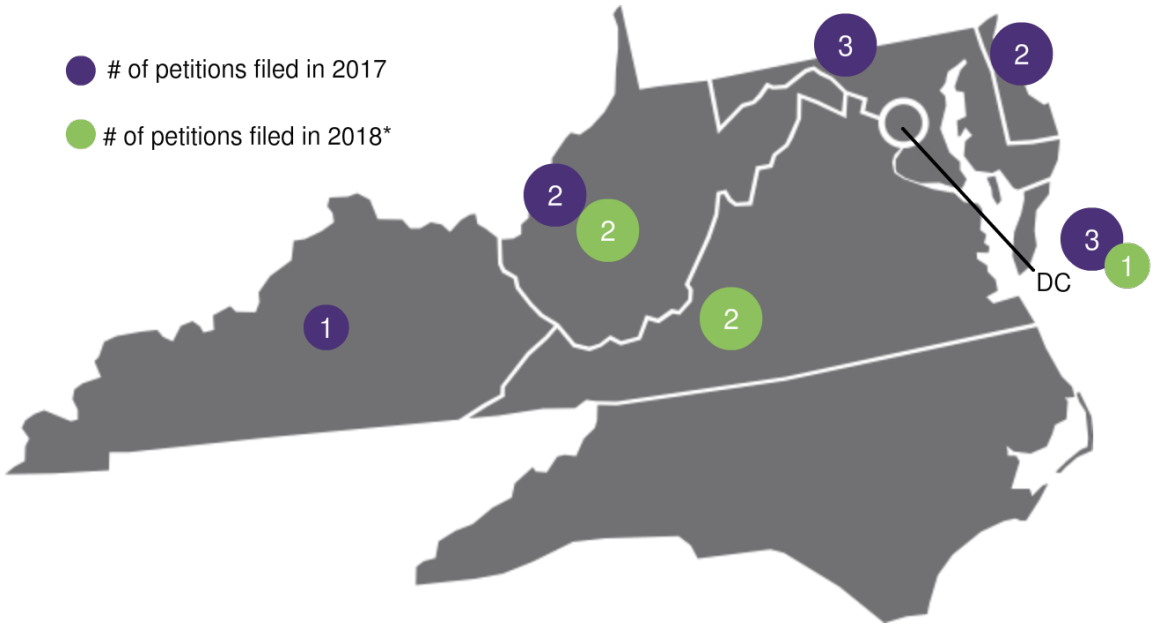



**Indicates data is from the first six months of 2018.*

## REGION 3

There is a limited amount of organizing activity in Region 3, however, nearly every state has experienced some activity in either 2017 or the first six months of 2018. There have been four RC elections held in the first six months of 2018, and unions were elected as a result of three of them.

*Petitions & Elections*




**11** Elections Held in 2017

Union Elected (73%)

**4** Elections Held in 2018*

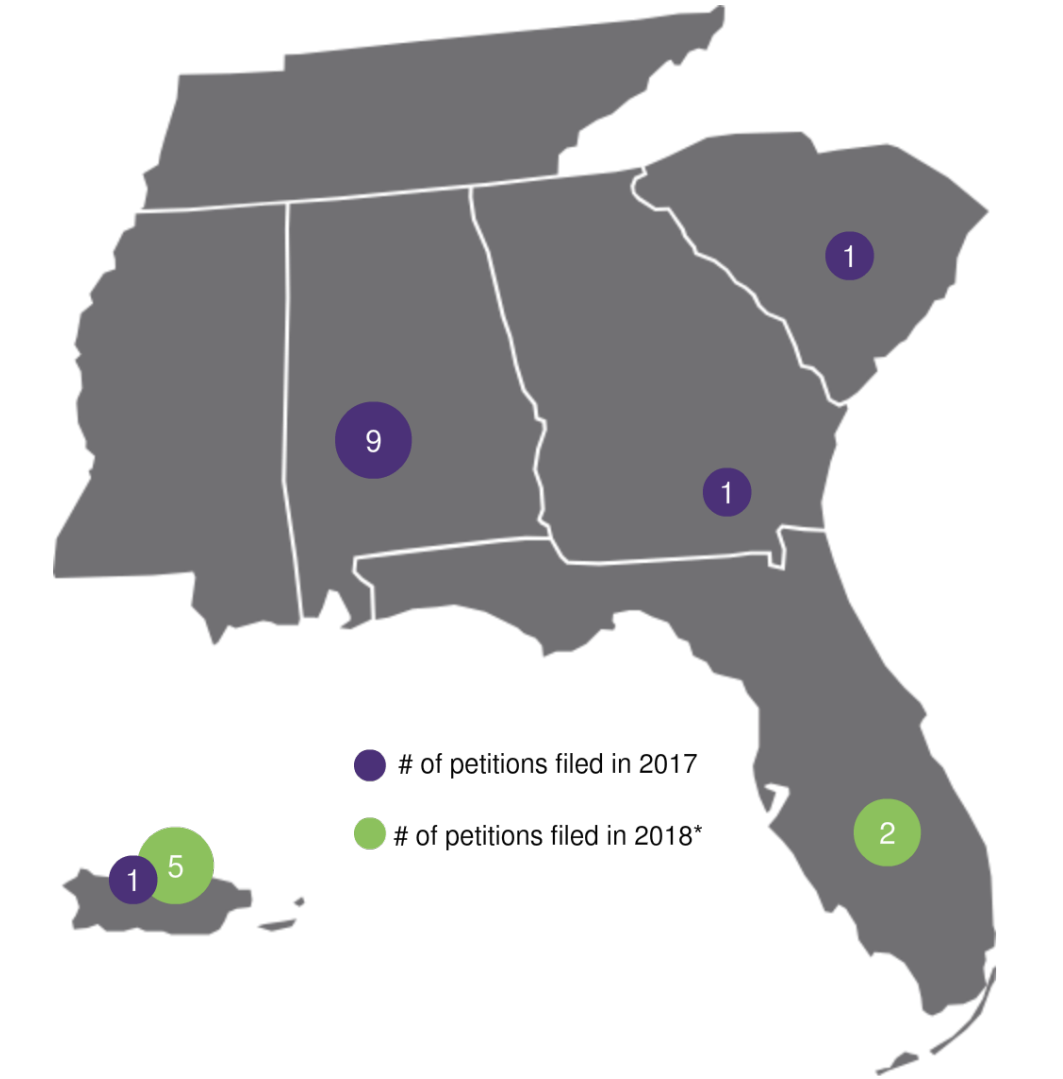
Union Elected (75%)

**Indicates data is from the first six months of 2018.*

## REGION 4

Organizing activity in Region 4 has been concentrated in Puerto Rico and Florida in the first six months of 2018, as opposed to Alabama in 2017.

*Petitions & Elections*




**9** Elections Held in 2017

Union Elected (56%)

**3** Elections Held in 2018*

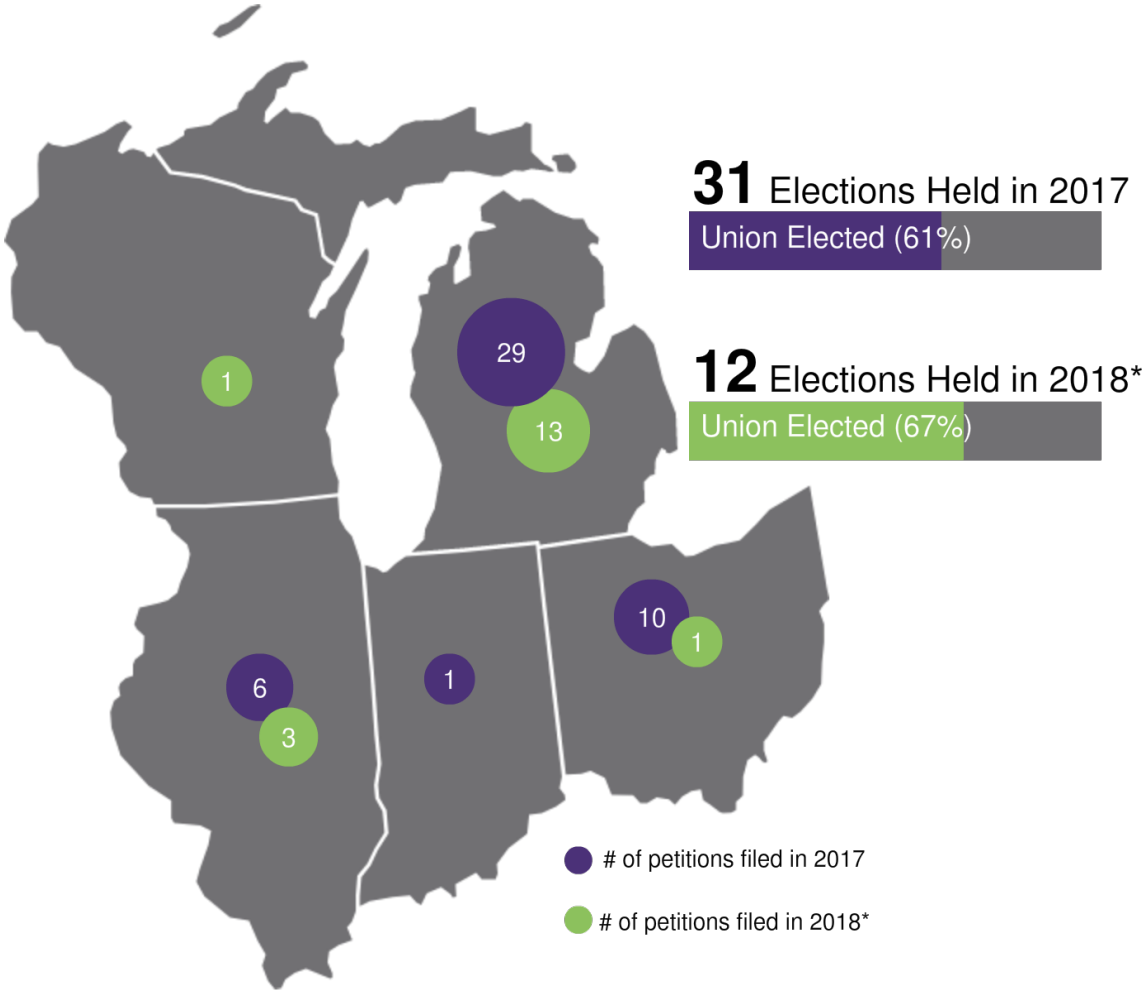
Union Elected (67%)

**Indicates data is from the first six months of 2018.*

## REGION 5

Michigan is the most active state in terms of organizing activity in Region 5. In 2017, there were 29 RC petitions filed, and 13 in the first six months of 2018. The union election rate in this region has been lower than the national average.

*Petitions & Elections*

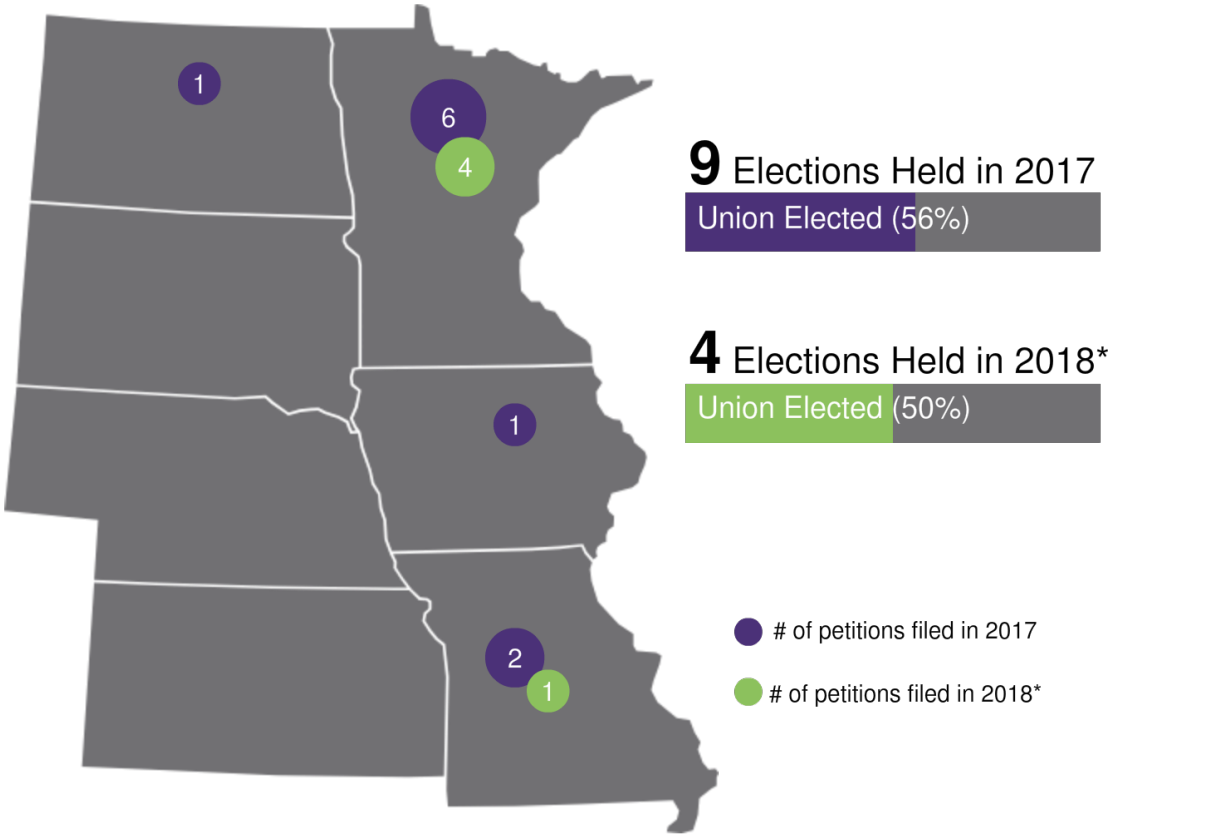



**Indicates data is from the first six months of 2018.*

## REGION 6

While the activity level in Region 6 is moderate to low, the union election rate has been well below average at 56 percent in 2017 and just 50 percent in the first six months of 2018.

*Petitions & Elections*

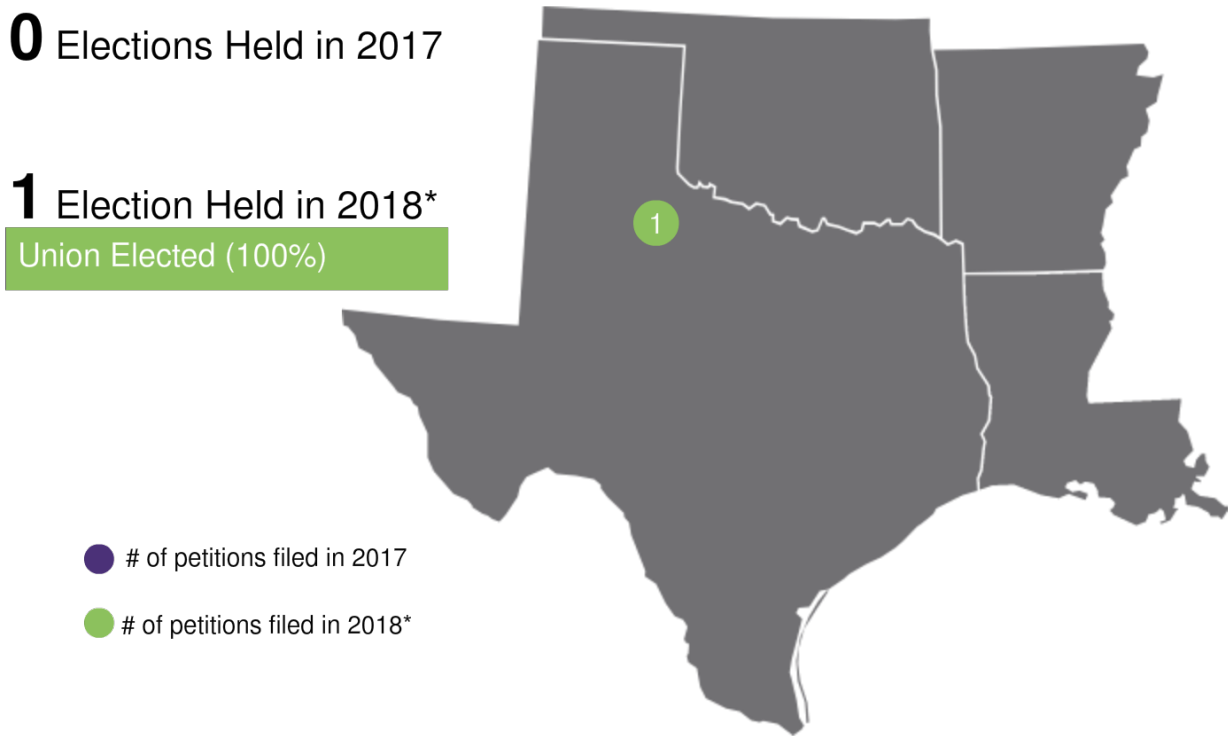



**Indicates data is from the first six months of 2018.*

## REGION 7

There has been almost no activity in Region 7 in the past year and a half. Just one representation petition has been filed in Texas in the first six months of 2018 and that resulted in the union being elected.

*Petitions & Elections*

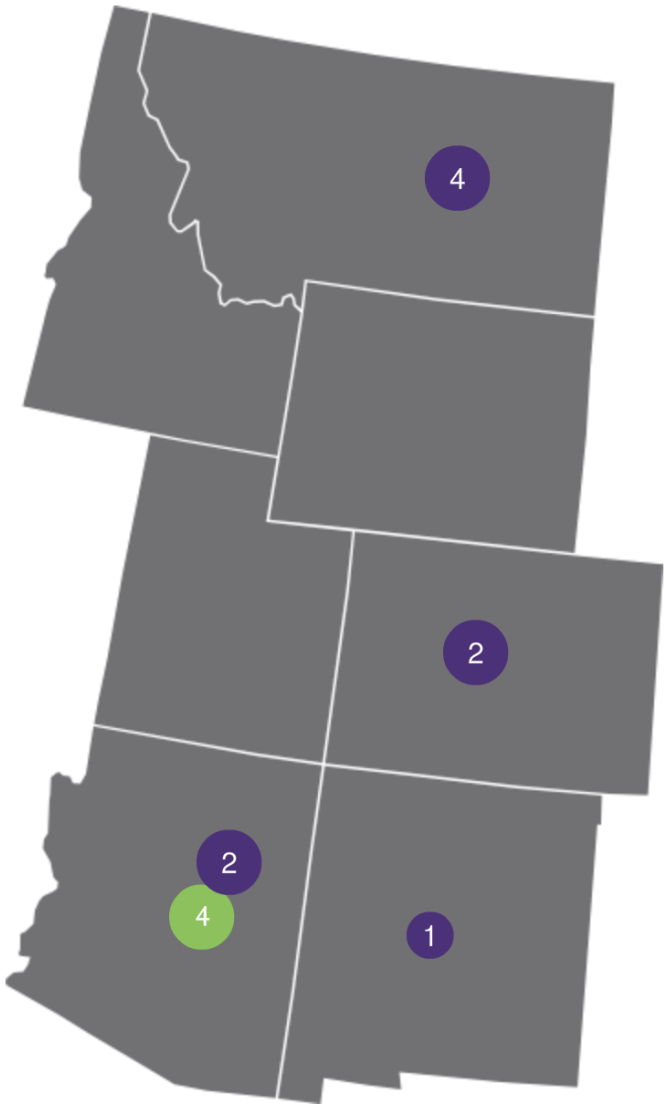



**Indicates data is from the first six months of 2018.*

## REGION 8

While organizing activity was spread out throughout the region in 2017, all of the petitions filed in the first six months of 2018 have been in Arizona. Three elections have been held and unions were elected as a result of two of them.

*Petitions & Elections*




**6** Elections Held in 2017

Union Elected (83%)

**3** Elections Held in 2018*

Union Elected (67%)

# of petitions filed in 2017

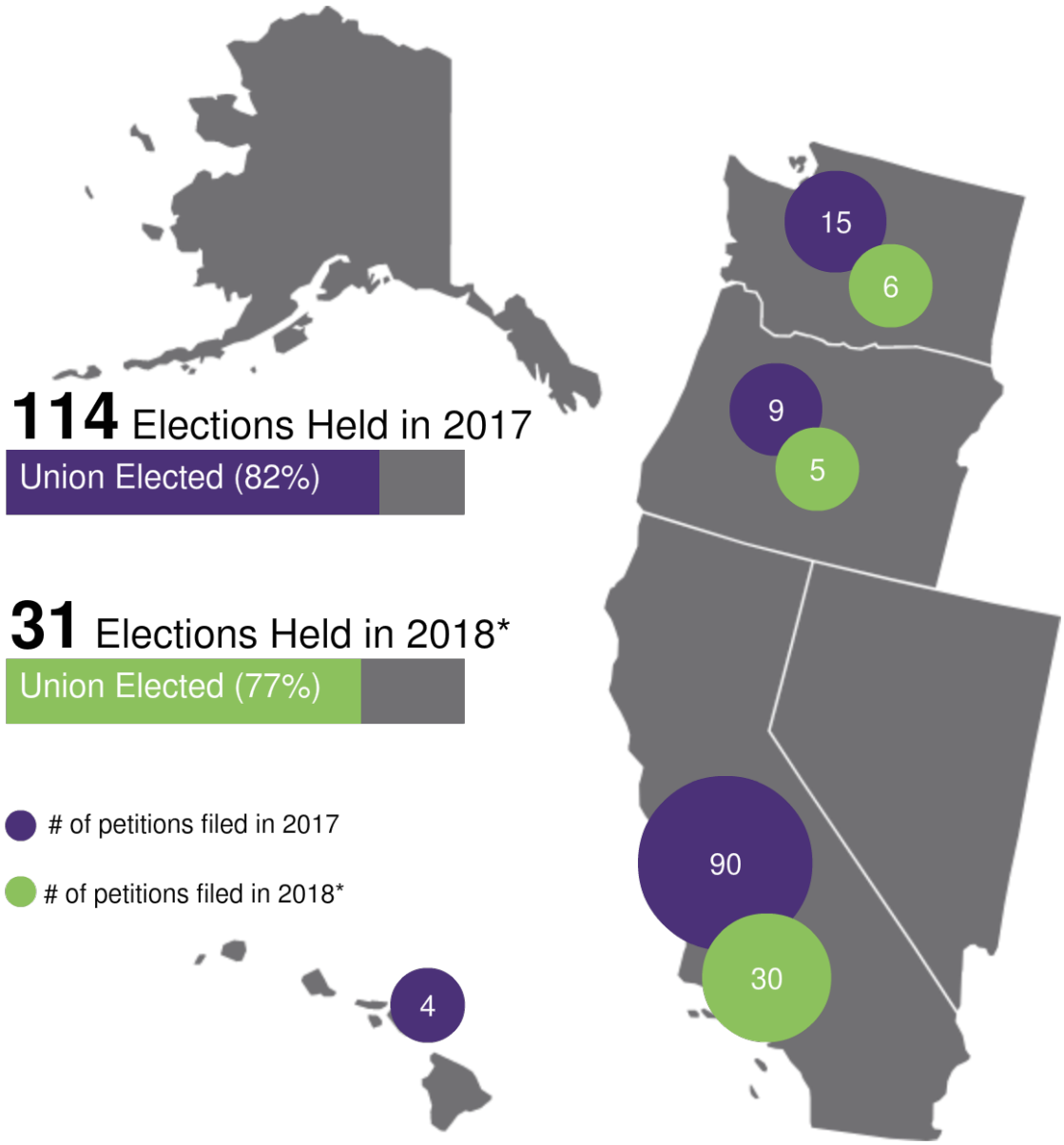
# of petitions filed in 2018*

**Indicates data is from the first six months of 2018.*

## REGION 9

Region 9 continues to be the most active region in the nation. The majority of the activity in the region occurs in California, however, Washington and Oregon both experience more activity than most other states.

*Petitions & Elections*

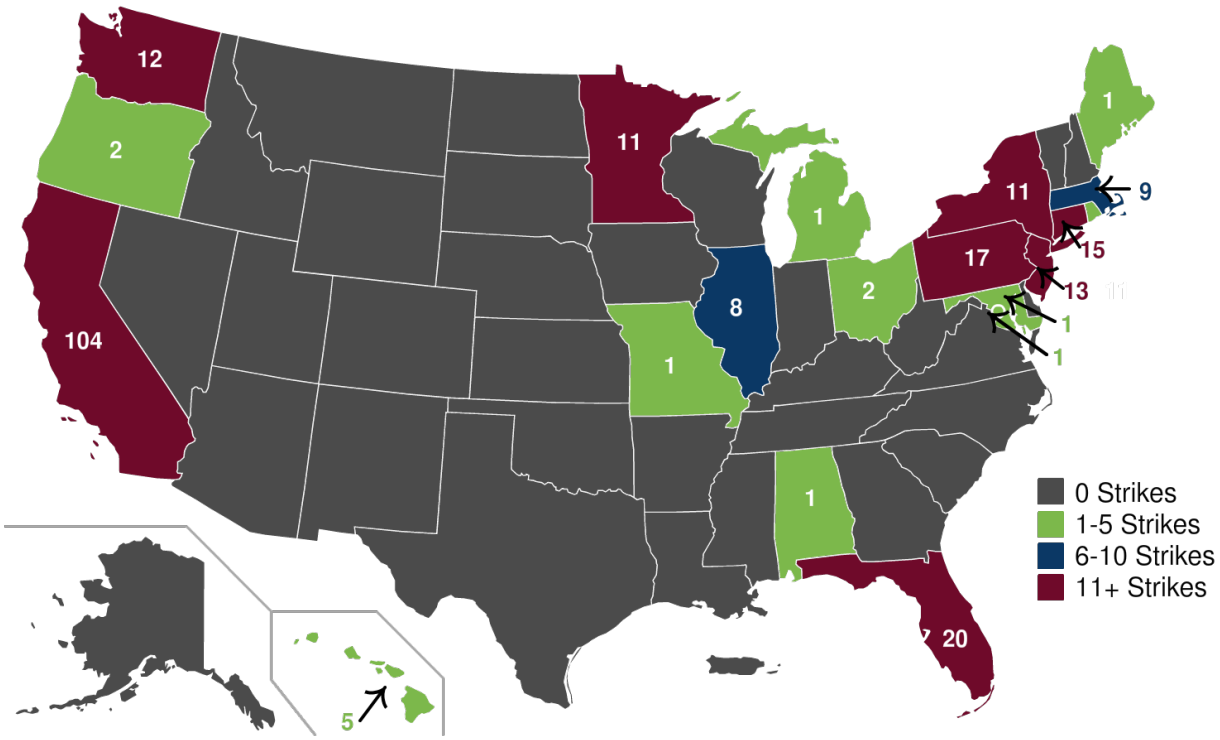



**Indicates data is from the first six months of 2018.*

## STRIKES IN HEALTH CARE

The map below illustrates the number of strikes in the health care sector in each state since 2009. The majority of states have not seen a strike in health care in the past decade, while there is a large concentration of strikes in California.

## STRIKES IN HEALTH CARE BY STATE, 2009 – 2018*




| Year | Number of Strikes | Workers Idled | Average Number of Workers per Strike |
|---|---|---|---|
| 2018* | 9 | 1,608 | 179 |
| 2017 | 18 | 2,931 | 163 |
| 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 |

# LABOR LAW/ACTIVITY UPDATE

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

- **On-Premise Picketing—Is The Line Moving?** by Joseph Ragaglia and Crystal S. Carey examines the D.C. Circuit ruling affirming a 2016 National Labor Relations Board decision permitting a substantial expansion of employee and union picketing rights.
- **Employee Non-Work Use of Employer Email Systems: Will the *Purple Communications* Standard be Changed?** by G. Roger King takes a close look at the issue of employee use of employer email systems for non-work activity, which has once again come before the NLRB. The Board has invited briefs in the case of *Caesars Entertainment Corporation*.
- **Contingent Workers and Independent Contractors: Legal Risks in the Health Care Industry** by Shannon D. Farmer, Meredith Dante and Michael Greenfield examines the classification of employees vs. independent contractors in the rapidly expanding health care industry. Not only can the misclassification lead to liability lawsuits, but can also result in billions of dollars of lost tax revenue.
- **NLRB Finds Health Care System's Solicitation and Distribution Policy Unlawful, Federal Court Upholds NLRB Ruling that Hospital's Ban on Picketing Illegal** by Mark D. Nelson reviews the ruling by NLRB that University of Pittsburgh Medical Center unlawfully prohibited off-duty employees from distributing literature in non-patient care areas of its hospitals. The U.S. Court of Appeals also upheld the ruling that off-duty picketing by employees could not be confined to non-hospital property.
- **Don't Fear Change…Embrace It!** by Paul Cummins explains how implementing a strategic communication strategy during times of organizational change can have a positive impact on employee satisfaction. Change is better received when employees feel their voice is heard and their suggestions are

taken seriously. With rapid growth and changes in the health care sector, the right communications plan can have a tremendous impact.

## ON-PREMISES PICKETING – IS THE LINE MOVING?

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**Abstract:**

Off-duty employee picketers can now enter hospital private property, holds the D.C. Circuit, affirming a 2016 National Labor Relations Board decision permitting a substantial expansion of employee and union picketing rights.

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### Background

On August 12, 2016, the National Labor Relations Board issued a groundbreaking decision in *Capital Medical Center* 364 NLRB No. 69 (2016). The hospital, located in Olympia, Washington, operates a 110-bed community hospital that opened in 1985. The incumbent union had been the certified collective-bargaining representative of the hospital's technical employees for approximately 14 years. The parties' contract expired on September 30, 2012, and as of May 2013, a new agreement had not been reached.

The union proceeded to plan an informational picketing and handbilling session. About 20 employees initially participated in picketing on the public sidewalk near the hospital. However, two employees later took their handbills and picket signs onto hospital property. The employees did not block the sidewalk or entrance, did not chant or make noises, and stood still while holding the picket signs which stated "Respect Our Care" and "Fair Contract Now." Hospital personnel informed the employees that they could

continue to leaflet on the hospital property but could not stand on the property holding their picket signs. The employees refused to leave and the police were eventually called. However, the police refused to force the employees to move, as they were not blocking access to the facility. Just as s the public sidewalk picket line activity was wrapping up, the employees left voluntarily.

Shortly thereafter, the union filed an unfair labor practice charge alleging that the hospital unlawfully interfered with off-duty employees' rights to engage in informational picketing at the hospital's non-emergency entrances (under longstanding Board law employers may lawfully prohibit non-employee union organizers access to their property as long as the union has other means to access employees, and the employer also prohibits all nonemployee activity. See *Lechmere, Inc. v NLRB* 502 U.S., 527 (1992)). The Administrative Law Judge found that the hospital had committed an unfair labor practice and the Board affirmed the decision. In doing so, the Board assumed that the employees' holding of picketing signs while stationary amounted to "picketing within the meaning of the Act."

The Board then assessed whether the presumption recognized *in Republic Aviation*, 324 U.S. 793 (1945), and tailored in consideration of a hospital setting, that an employer may prohibit Section 7 activities in non-patient care areas if it shows that the prohibition is needed to prevent patient disturbance or disruption of health care operations had been met. See *NLRB v. Baptist Hospital*, 442 U.S. 773, 781–787 (1979). In doing so, the Board decided that the *Republic Aviation/Baptist Hospital* standard should apply in cases involving picketing on company property and rejected the hospital's argument that picketing is inherently more disruptive than other permissible on-premises Section 7 activity. In applying this framework, the Board found that the type of peaceful picketing involved here, specifically with no "patrolling, chanting or obstruction of entrance," was unlikely to interfere with patient care and that the hospital had failed to meet its burden of showing that it needed to bar the on-premises picketing in order to "prevent patient disturbance or disruption of health care operations." Then-Member Miscimarra dissented noting that picketing is qualitatively different from handbilling and that, "Nothing in *Republic Aviation* or any other Supreme Court case suggests that picketing on an employer's premises is entitled to the same protection as solicitation and distribution." Then-Member Miscimarra would have found in this groundbreaking case, that the on-premises picketing by employees was unprotected.

The hospital petitioned the DC Circuit for review of the Board's decision and on August 10, 2018, the Court enforced the Board's decision. The Court agreed with the *Capital Medical Center* Board majority and found that the Board was "not compelled to adopt a categorical rule that picketing of any kind – including the stationary, nonobstructive holding of a picket sign at issue here—is necessarily more disruptive, and less entitled to the NLRA's protections, than distribution of union literature."

**Issues Raised by the Capital Medical Center Decision**

The *Capital Medical Center* decision sounds the alarm for any hospital or health care institution. While ostensibly limited to informational picketing, the Board's decision to allow picketing on the employer's property sets up hospitals for potentially disastrous access and patient care concerns. As the Supreme Court observed in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 580 (1988), "picketing is qualitatively different from other modes of communication…. [T]he very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication."

Many patients and visitors will be dissuaded from entering a hospital surrounded by picketers, regardless of the message. Most patients entering a hospital are there by necessity and not by choice, and, if the first thing they encounter upon arriving a facility is a confrontational scene of picket signs, they may go elsewhere for care or simply forgo care, both of which outcomes are detrimental to their individual health. Likewise, if a union crosses the purported line and begins blocking entrances or harassing patients, it could deter patients and result in a situation that cannot be remedied. Further, while most patients arriving at a hospital in an emergency situation proceed to the emergency room (not an area picketed in this case), there are undoubtedly times where patients are dropped off at another entrance, and if that door is lined by picketers obstructing access, patient care *will be* directly affected. In *Capital Medical Center*, the number of picketers was low, and their message relatively non-confrontational, but the decision itself opens the door for more aggressive action by employees – acting independently or at the behest of unions – during on-premises picketing. If a situation arises where you are faced with on-premises picketing, please contact labor counsel for an assessment of the facts of your situation and guidance in line with the Board's decision in *Capital Medical Center*.

**The NLRB General Counsel Intends to Keep Picketers *Outside***

There is some good news! Based on a recently released Advice Memorandum (Providence Hospice, Dated March 30, 2018 – Released August 15, 2018), it appears the General Counsel, who is responsible for the investigation and prosecution of unfair labor practices, intends to keep employee picketers from entering the *inside* of the facility. In *Providence Hospice*, the Division of Advice concluded that the appearance of picketers in the lobby of a hospice center, located on the upper level of a hospital, caused a sufficient disturbance as to violate Section 8(b)(1)(A) of the Act, and that the Region should issue complaint (the case was subsequently settled). Obviously, this provides some solace to hospital administrators in that picketers will likely not be allowed inside a hospital. Again, if ever presented with indoor picketing, please contact labor counsel immediately for an assessment. As evident from these cases, the Board analyzes the facts of each case on a granular level, so not only will it take into account the activity generally, but also the specific facts surrounding the activity (location, interference, noise level, patient contact, etc.). While the picket line has moved much closer, at least for the time being, it is still outside.

**Takeaways**

- If handbilling or picketing *inside* the facility occurs, contact labor counsel for an assessment based on employee status, action, and current Board law.
- If on-premises picketing becomes disruptive or blocks access, contact labor counsel immediately for an assessment based on the above-mentioned cases.
- These cases do not affect the rights of nonemployees – such as non-employee union organizers – to seek access to the employer's property – nonemployees are still not permitted to engage in handbilling, solicitation or picketing on employer property.
- Off-site employees may have access rights too - In *ITT Industries*, 341 NLRB 937 (2004), the Board held that the Section 7 organizational rights of off-site employees (employees of the employer from another location) entitled them to access to the outside, nonworking areas of the employer's property. Ultimately, the Board held that because the employees from other locations were not strangers to the employer (and could be subject to discipline if they engage in bad behavior), their access rights are equivalent to those of off-duty employees.

# EMPLOYEE NON-WORK USE OF EMPLOYER EMAIL SYSTEMS: WILL THE PURPLE COMMUNICATIONS STANDARD BE CHANGED?

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**Abstract:**

The NLRB is again considering the issue of employee use of employer email systems for non-work activity. In 2016, an NLRB Administrative Law Judge applied the new *Purple Communications* standard to the *Caesars Entertainment* case, finding that the employer violated the NLRA by maintaining a policy prohibiting the use of its computers for non-business information. The employer in the *Caesars* case appealed the ALJ decision, and requested that the Board overrule *Purple Communications* and return to the *Register Guard* standard, prompting the Board to invite the filing of briefs addressing whether *Purple Communications* should be overturned.

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The issue of employee use of employer email systems for non-work activity has once again come before the National Labor Relations Board. The Board has invited briefs in the case of *Caesars Entertainment Corporation*. The Board in this case has asked the following questions for interested parties to respond to:

1. Should the Board adhere to, modify, or overrule the *Purple Communications* standard, which gives employees the presumptive right to use employer email systems for communications protected by Section 7 of the National Labor Relations Act;
2. Should the Board carve out exceptions for circumstances that limit employees' ability to communicate with each other than their employer's email system; and
3. Should the Board apply a different standard to the use of computer resources other than email?

In a variety of decisions spanning three decades, Democrat- and Republican-controlled Boards have recognized the right of employers to enforce nondiscriminatory rules limiting use of company property, most recently articulating the historical standard in *Register Guard* 351 NLRB 1110, decided in 2007. In *Register Guard* specifically, the Board held that an employer may completely prohibit employees from using the employer's email system for union activity protected by Section 7 of the NLRA, without demonstrating any business justification, so long as the employer's ban is not applied discriminatorily.[4]

In 2014, the Board flipped this decades-long precedent on its head with its decision in *Purple Communications*.[5] Purple Communications, Inc., had an electronic communications policy requiring that company computers, Internet, and email be used for "business purposes only," a policy that is extremely common among all different kinds of employers. More specifically, Purple Communications strictly prohibited employees from using email systems for "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company."

The Board during the Obama administration found this policy to be in violation of the NLRA and in the process overturned the *Register Guard* standard. The Board held that *Register Guard* gave too much weight to employer's property rights and too little to employees' Section 7 rights to communicate in the workplace about the terms and conditions of their employment. Under the new *Purple Communications* standard, the Board will presume that employees who have access to their employer's email system in the course of their work have a right to use the email system in Section 7-protected communications on nonworking time, while limitations on employee communications should not be more restrictive than necessary to protect the employer's interests.

In 2016, an NLRB Administrative Law Judge applied the new *Purple Communications* standard to the *Caesars Entertainment* case, finding that the employer violated the NLRA by maintaining a policy prohibiting the use of its computers for non-business information. The employer in the *Caesars* case appealed the ALJ decision, and requested that the Board overrule *Purple Communications* and return to the *Register*

[4] Register Guard, 351 NLRB 1110 (2007).
[5] Purple Comms. Inc., 361 NLRB No. 126 (2014).

*Guard* standard, prompting the Board to invite the filing of briefs addressing whether *Purple Communications* should be overturned.

The *Purple Communications* standard was an unprecedented expansion of employee rights at the expense of the employer. The practical implications of such a standard are particularly alarming for employers' interests in maintaining productivity and network security. *Purple Communications* allows for extensive email traffic on workplace issues and unionization efforts, undoubtedly creating distractions in the workplace that employers are forbidden from managing. Reviewing, deleting, and responding to emails is a time-consuming endeavor that can often slow productivity; by allowing employees to send and receive non-work emails on company email systems, this risk is increased significantly. Union activity, for example, often involves passionate and lengthy discussion. Allowing this kind of discussion to take place over company email results in a major burden on employee productivity at significant cost to the employer.

The standard articulated in *Purple Communications* also presents serious constitutional issues. By forcing employers to subsidize speech and views it does not endorse or even condone through publication on its own email systems, the *Purple Communications* standard is violative of First Amendment rights. The Supreme Court has ruled on multiple occasions that the First Amendment prevents the government from requiring an employer to directly or indirectly promote views with which it disagrees.[6] This compelled speech doctrine prohibits the government from requiring companies to publish or to facilitate unwanted messages that may be attributed to the company.[7] In general, the Supreme Court has refused to enforce laws requiring companies to facilitate the communication of opinions against their interests, a stance most recently emphasized this past May in *Janus v. AFSCME*. Thus, by requiring employers to allow use of their email systems for non-work use, *Purple Communications* compels speech in the same manner recognized by the Supreme Court as violative of the First Amendment.

In addition to First Amendment issues, the *Purple Communications* standard implicates significant Fifth Amendment questions in that its imposition on employers likely amounts to a taking in violation of the Fifth Amendment that guarantees private property cannot

[6] *See* U.S. v. United Foods, 533 U.S. 405 (2001).
[7] *See*, *e.g.*, Wooley v. Maynard, 430 U.S. 705 (1976).

be taken by the government for third party use without just compensation. This "Takings Clause" has been shaped by several Supreme Court cases over the last few decades with the result that any permanent occupation of land, regardless of how in consequential it may seem, constitutes a *per se* taking requiring just compensation. The *Purple Communications* standard represents a government-mandated employee right to physically invade company computers, which are protected under the Takings Clause on equal terms with real property.[8] This imposition is permanent in nature because the Board's conferred right to physically occupy company servers is ongoing – as would be an imposed easement for the public to traverse across private property. Accordingly, *Purple Communications* imposes an effective easement for third party use of the employer's email systems and thus recognizable as a per se taking.[9]

It remains to be seen whether the new Board will take the opportunity presented in *Caesars Entertainment* to overturn the problematic standard articulated in *Purple Communications*. Briefs are not due until early October, with Board deliberations to follow. The decision in *Purple Communications* drastically augmented employee rights at great expense to employers and represented a rejection of decades long precedent. Both the practical consequences for employers of such a standard as well as the constitutional questions it implicates provide ample reason to return to the historical precedent established in *Register Guard*.

[8] *See* Horne v. USDA, 133 S.Ct. 2053 (2013) (emphasizing that the same *per se* rules apply to personal property).
[9] *See* Causby v. United States, 328 U.S. 256 (1946).

# CONTINGENT WORKERS AND INDEPENDENT CONTRACTORS: LEGAL RISKS IN THE HEALTH CARE INDUSTRY

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**Abstract:**

The rapid growth of the health care industry has resulted in many doctors and nurses who work in multiple hospitals, yet are employed by one physician's office. Known as *locum tenens*, they can easily be misclassified as independent contactors, which can lead to issues such as unpaid overtime, liability claims, and tax ramifications. While it can be difficult to distinguish employees from independent contractors, the Department of Labor, Equal Employment Opportunity Commission, and IRS have implemented variations of a common law test which defines the employer/employee relationship. Employers in the health care industry must do their due diligence in understanding the potential damages that can occur when engaging in joint employment, as illustrated by multiple lawsuits in the past several years. Since 2017, 17 states have enacted laws that restrict franchises such as urgent care facilities to have joint employer status.

In 2018, health care surpassed manufacturing and retail to become the largest source of jobs in the United States for the first time. As the industry has rapidly expanded, the labor market has changed dramatically, creating both opportunity and uncertainty. Doctors, for example, are often employed by independent physician practices, not the hospitals where they practice. Temporary physicians and nurses, or *locum tenens* as they are sometimes known, are very common in health care settings, as is the practice of providers "leasing" nurses to others. While alternatives to traditional employment create flexibility to meet variations in staffing needs, and save money on employment costs, they can also create liability issues that span the entire health care industry from metropolitan hospitals staffing thousands of positions to local home health care providers who may face a greater risk for employee misclassification claims.

**Employees Disguised as Independent Contractors**

The demand for highly skilled personnel and the unique staffing practices of the health care industry make the use of independent contractors commonplace. Many of these workers, however, may be misclassified employees. As the United States Supreme Court stated more than 70 years ago: "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship, and what is clearly one of independent entrepreneurial dealing." *NLRB v. Hearst Publications*, 32 U.S. 111, 121 (1944).

The proper classification of independent contractors can have far-reaching consequences. The damage caused by misclassification can involve not only unpaid overtime, but also tax ramifications and liability for torts and under anti-discrimination statutes to name a few.

Misclassification may give rise to liability under benefit plans as well, including retirement plans, health care expenses, disability benefits, unemployment and workers compensation. *See Hillstrom v. Kenefick,* 484 F.3d 519 (8th Cir. 2007) (claim by physician for long-term disability benefits against rehabilitation center for whom the physician was consulting).

Distinguishing independent contractors from employees is complicated. There is no single rule or test to define whether an individual is an independent contractor or an employee for all purposes. Rather, the Internal Revenue Service (IRS), the courts and various federal and state agencies have all developed different tests to evaluate an

individual's status as an independent contractor or employee. As a result, an individual may be classified as an "employee" for one purpose, and as an "independent contractor" for another. However, control over the worker's duties will always be a crucial, if not the deciding factor in any independent contractor analysis.

Many of the legal standards for defining independent contractor status have been derived from the so-called "common law" test," which finds an employment relationship exists if the employer exercises "control" or has the "right of control" over the individual's performance of the job. In *Hill–Keyes v. Comm'r of The United States Soc. Sec. Admin*, 658 F. App'x 86 (3d Cir. 2016), for example, the court found that a medical consultant was properly classified as an independent contractor, and thus not able to maintain her discrimination claims, because she: (1) controlled her day-to-day work schedule and work product; (2) submitted invoices for her services; and (3) was not provided with benefits.

The Department of Labor (DOL) uses the so-called "economic realities" test for wage and hours issues, while the Equal Employment Opportunity Commission (EEOC) uses the common law control test. The IRS employs its own variation of the common law test in pursuing the estimated $2.7 billion in annual tax revenue lost due to independent contractor misclassification. Under all the tests, the parties' agreement to treat the worker as an independent contractor will not carry the day if the facts do not support the independent contractor status. In *Fabian v. Hosp. of Cent. Conn*., 172 F.Supp. 3d 509 (D.Conn. 2016), for example, the court did not rely on the hospital's designation of the doctor as an independent contractor in assessing whether he could pursue a Title VII claim, but, instead looked at whether the hospital exercised sufficient control over the location of the work, supplying of tools, scheduling, compensation and supervision.

Further complicating this area, is how courts and the DOL view independent contractors under the FLSA is in flux. In 2015, the DOL issued an Administrator's Interpretation concluding that "most workers are employees under the FLSA's broad definitions." The DOL's expanded definition led to a wave of lawsuits challenging independent contractor status. In 2017, the DOL withdrew the guidance and, in July 2018, issued guidance limited to the home health care industry which takes a more expansive view of what level of control can be consistent with treating someone as an independent contractor. In the latest guidance, the DOL noted that things like doing background checks or basic training would not make someone an independent contractor, but actions such as evaluating someone's work, telling them which assignments they had to accept, telling

them how to do the work and approving their time off would all be inconsistent with independent contractor status.

Even if the DOL relaxes its scrutiny, court decisions demonstrate that health care employers must be wary in structuring their independent contractor arrangements. In *Gayle v. Harry's Nurses Registry, Inc.*, 594 Fed. Appx. 714 (2d Cir. 2014), for example, a nurse staffing company was found liable for unpaid overtime, even though the nurses were a transient work force and supervisory visits to job sites were infrequent, because the nurses had no opportunity for profit or loss, their investment in business was negligible, they provided an integral part of the company's operations, their hourly rate was fixed, and the company exercised substantial control over the manner and conditions of their work. Similarly, the court in *Chapman v. A.S.U.I. Healthcare and Development*, 562 Fed. Appx. 182 (5th Cir. 2014), found caregivers in group home were employees, notwithstanding the fact that they signed an agreement that they were independent contractors, because the evidence showed the company controlled all meaningful aspects of the employment relationship: "[A]ny lack of supervision as to how [employees] should go about cooking and cleaning does not transform the plaintiffs into independent contractors." The court in *Hughes v. Family Life Care, Inc.,* 117 F.Supp.3d 1365 (N.D. FL. 2015), similarly found a certified nursing assistant who worked for a nurse registry that assigned her to patients' homes an employee because the registry exercised persistent oversight, made her sign a non-compete agreement, and used progressive discipline.

States have also taken their own approaches to analyzing the classification of employees, and they too have developed and implemented various multi-factor tests, further complicating this issue for employers. The so-called ABC test, which is used in many states for unemployment benefit determinations, and which California has now adopted for state wage claims, can be particularly problematic as it bars an independent contractor from performing the service the company provides or providing services at the company's place of business:

a. The individual is **free from control or direction** over the performance of such service, both under his contract of service and in fact;
b. The service is either **outside the usual course of the business** for which such service is performed, or that such service is performed **outside of all the places of business** of the enterprise for which such service is performed; and

c. The individual is **customarily engaged** in an independently established trade, occupation, profession or business.

*Dynamex Operations West Inc. v. The Superior Court of Los Angeles*, S222732 (Cal. Apr. 30, 2018).

With so many health care industry employers utilizing what they believe are independent contractors, and with the wide-ranging and expensive consequences of misclassification, employers should review their staffing policies and arrangements, and take steps to ensure compliance with their legal obligations.

**When Their Employee is Actually Our Employee**

In addition, many common staffing arrangements in the health care industry may make companies "joint employers" that share liability for compliance with all labor and employment laws. If entities are joint employers under the FLSA, time worked for all employers must be totaled for purposes of calculating overtime.

A joint employment relationship can exist in a number of situations including when: an arrangement exists between the employers to share the employee's services, such as an employee who is leased between two companies and does work for both; one employer is acting directly or indirectly in the interest of the other employer in relation to the employee, such as a staffing agency or labor supplier arrangement; or one employer controls or is under common control with the other employer, such as subsidiaries in a health system.

In 2017, the Fourth Circuit suggested six, non-exhaustive factors to determine whether both entities are involved in setting the terms of the employee's work sufficient to make them joint employers under the FLSA: (1) do they jointly control or supervise the worker; (2) do they both have the power to hire, fire or change employment terms; (3) the duration of the relationship; (4) the relationship between the entities (e.g., parent and subsidiary, common control); (5) where the work occurs; and (6) how the entities allocate typical employer responsibilities like payroll, benefits, supervision, etc. *Salinas v. Commercial Interiors, Inc.*, 2017 WL 360542 (4th Cir. 2017).

Understanding the potential for joint employment liability is critical, as health care employers rely more and more on staffing agencies and physician groups. With employees working multiple shifts for multiple employers, potential damages can add up quickly. *See, e.g., Barfield v. N.Y. City Health and Hosp.*, 537 F.3d 132 (2d Cir. 2008)

(nurse was found to be employed by three different health care agencies who referred her to temporary nursing assignments at hospital; the hospital so controlled her work that the hospital was also her joint employer liable under the FLSA for overtime). Avoiding the appearance of retaliation for wage complaints is also critical. In *Flannigan v. Vulcan Power Group, LLC*, 642 Fed. Appx. 46 (2d Cir. 2016), for example, the court not only found the company liable for an earned but unpaid commission as a joint employer, but also found that the company retaliated against the plaintiff for seeking the claimed commission, resulting in a verdict in excess of $2 million.

In addition to FLSA liability, joint employers are also potentially liable under anti-discrimination statutes. The EEOC issued guidance in 1997 and 2000 explaining that workers from staffing firms are "employees" of the staffing firm, and whether the worker is also the "employee" of the staffing firm's client will depend on who has the right to exercise control over the worker based on a number of factors, similar to those used under the common law test to determine whether someone is an employee. Beyond Title VII, joint employer liability has been applied to statutes such as the Americans with Disabilities Act (ADA) as well. In *Crump v. TCoombs & Associ., LLC,* 2015 U.S. Dist. Lexis 128160 (E.D. Va. 2015), a hearing impaired physician won the right to sue the United States Navy and a Navy contractor as joint employers based on the Navy's day to day supervision of the physician and the furnishing the equipment used by the physician.

On a positive note for employers who use these types of staffing arrangements, a number of states have enacted laws to protect against joint liability status. In 2017, Alabama became the 17th state since 2015 to enact a law restricting the joint employer status of franchisers. This could become a key factor in health care as urgent care facilities are beginning to dip their toe in the franchising waters.

While the legal landscape addressing independent contractors and joint employment is evolving in real time, the crux of those issues has remained consistent. Control of the assignment of duties and control of the means by which those duties are executed, is the hallmark of independent contractor and joint employer determinations. The untraditional nature and rapid expansion of the health care industry may make identifying and regulating that control difficult, but it is a critical aspect for the country's largest employment sector and should not be left unaddressed.

# NLRB FINDS HEALTH CARE SYSTEM'S SOLICITATION AND DISTRIBUTION POLICY UNLAWFUL, FEDERAL COURT UPHOLDS NLRB RULING THAT HOSPITAL'S BAN ON PICKETING ILLEGAL

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**Abstract:**

Managers at multiple University of Pittsburgh Medical Centers (UPMC) facilities allegedly threatened off-duty employees with disciplinary action because they were found distributing union materials in outdoor areas and cafeterias. The employees were told that any materials that did not directly relate to "hospital business" could not be left behind and then managers disposed of the flyers by throwing them in the garbage. The union interceded by filing a motion claiming that the Solicitation and Distribution policy upheld by UPMC was against the law. The Administrative Law Judge and the NLRB both agreed that UPMC's Solicitation and Distribution Policy and the disposing of flyers was unlawful.

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Recently, a three-member panel of the National Labor Relations Board ("NLRB" or "Board") ruled that the University of Pittsburgh Medical Center ("UPMC") unlawfully prohibited off-duty employees from distributing literature in non-patient care areas of its hospitals. (*UPMC,* 366 NLRB No. 142 (2018))

## Case Background

During a 2016 union organizing campaign at multiple UPMC facilities, hospital managers allegedly threatened off-duty employees with discipline for distributing union materials in cafeterias and outdoor areas of the facilities. Additionally, a manager found union flyers in a break room. The manager warned employees not to leave materials there that were not directly related to hospital business, then threw the flyers in the garbage. The union subsequently filed unfair labor practice charges against UPMC, contending, among other things, that UPMC's Solicitation and Distribution Policy was unlawful.

UPMC's Solicitation and Distribution Policy defined "off duty" as "any period during which a staff member is not scheduled to work" and "non-working time" as time during a "workday when a staff member is on duty but is not expected to be performing work tasks (i.e., meal periods or breaks)." The policy lawfully banned solicitation during working time anywhere in a facility, and at any time in patient-care areas.

Regarding off-duty employees, the policy stated that "off-duty staff members may not enter or re-enter the interior of their work areas or other work areas within their workplace facility aside from the cafeteria, exercise facility, human resources building, for an purpose (including solicitation or distribution) except to visit patients, receive medical treatment, or for other purposes such as are available to the general public."

**The Board's Decision**

The Board agreed with the Administrative Law Judge's determination that the Solicitation and Distribution Policy was unlawful because it prohibited off-duty employees, who were permissibly on hospital property, from engaging in solicitation and distribution of union literature. The Board found that the policy "allowed off-duty employees to access the cafeteria but it prohibited them from soliciting (or being solicited by) employees on non-working time, both in the cafeteria and in other nonworking and non-patient care areas of the hospitals." Additionally, UPMC was unable to show that the ban on off-duty solicitation was necessary to avoid disruption of health care operations or disturbing patients, which could have justified the policy.

Moreover, the Board held that UPMC's unwritten ban on union materials in non-working areas, such as break rooms, was unlawful, as was the collection and removal of the flyers.

**Federal Appeals Court Backs NLRB's Expansion of Picketing Rights at Hospitals**

The U.S. Court of Appeals for the D.C. Circuit has upheld a ruling by the Board that a hospital cannot confine picketing by off-duty employees to non-hospital property such as sidewalks. In 2016, the Board abandoned prior law that permitted hospitals to ban picketing on its property. Instead, the Board in Capital Medical Center, ruled that picketing can occur near the hospital entrance or elsewhere on its property unless the hospital can prove there was a "likelihood of a disturbance or disruption" to patient care or hospital operations, or that restricting picketing was required to maintain discipline and production. The Court of Appeals affirmed, holding that the Board's new interpretation of employees' right to picket on hospital premises was a reasonable rebalancing "of employees' rights to organize against an employer's interests in controlling its property."

**Employer Takeaways**

Hospital policies regarding distribution of literature and solicitation by employees require careful drafting, and consistent, non-discriminatory enforcement. Hospitals may, and should, maintain lawful restrictions on solicitation and distribution activity including: 1) when and where solicitation and distribution can, and cannot, occur; 2) the rights of on-duty and off-duty employees to solicit or distribute literature; and 3) a ban on solicitation and distribution by non-employees. Furthermore, Access to Premises policies should dovetail with Solicitation and Distribution policies to ensure limitations on off-duty employees and non-employees will pass NLRB muster.

A hospital confronted with picketing on its property must assess whether it can demonstrate that the picketing will interfere with patient care or hospital operations. Quiet and peaceful picketing by a main entrance or an emergency room entrance—that does not prevent ingress and egress—would likely be lawful under current Board law.

Employers with questions regarding implementing such policies – or that wish to review their current policies – would do well to consult with competent counsel.

## DON'T FEAR CHANGE…EMBRACE IT!

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**Abstract:**

Employee engagement is currently at an all-time high. But change within an organization can often affect employee sentiment. Companies should embrace change by using it as an opportunity to ramp up communication efforts between management and employees and utilizing strategic communications to show how they are playing a positive, active role in moving the company forward.

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Broadly speaking, employees are more engaged today than ever before.

According to a recent Gallup poll, the percentage of "engaged" employees has reached 34 percent, the highest level since the polling experts started tracking this national figure in 2000. By contrast, 13 percent called themselves "actively disengaged" and the remaining 53 percent are simply in the middle.

Organizations strive to promote engaged employees, and reward their behavior, while simultaneously working to foster an environment where even more employees can move into the "engaged" category.

Unfortunately, employee sentiment can drop all too quickly, particularly during a time of change. Change is often feared from the onset – by employees and leaders alike – as potentially driving discontent and undermining the "engaged" employee environment for which we all strive.

Organizations should approach change with a different approach: change should be embraced as an opportunity to further engage employees, and to reinforce the critical

connection between management and employees. A key component to this is control of the narrative through structured, strategic and proactive communications.

Consider an increasingly commonplace change within the health care sector. With greater industry consolidation, health care systems seek to align and harmonize key business components, including scheduling systems, benefit offerings, pay, policies and procedures. To the organization, it's a critical undertaking that replaces potentially hundreds of smaller, inefficient and antiquated systems. But to many employees, it can be seen as "change" at its worst, as they will likely focus on the perceived "losses."

Issues related to pay, benefits and policies are important and sensitive to all employees. This can become particularly acute in an environment where unions are actively promoting narratives of "profits over patients" or similar "corporate greed" themes.

Ultimately, no matter the employee's, or leader's, connection and commitment to an organization, at some point the concept of "What's In It For Me?" – or the more common acronym WIIFM – will naturally come into play.

And, when an organization is expecting its leaders to own and cascade changes that may have personal implications, that, too, needs to be taken into account.

Engaging with numerous stakeholders – from the executive suite to benefit providers to employee groups – a communications plan can help educate people to the nuances of the change, particularly if an organization is able to frame it in a "total rewards" context. Doing so helps employees recognize that changes shouldn't be seen in isolation but rather in aggregate.

Above all, employees' voices matter, and they need to know that their employer respects their opinion and shows a willingness to take their concerns, and suggestions, seriously. At a time when technology allows us to be "always on" and " connected," rumors and misinformation take on a whole new life. Thus, a willingness not only to watch the social media space, but also to be active in it, has great value to the success of your communications effort.

Lastly, there's an important reality that cannot be ignored: no matter the success of the communications program, there will always be agitators willing to try and hijack an effort for their own gain.

But by embracing change and implementing a proactive, thoughtful communication effort that recognizes the importance of employees' feelings, organizations are in a much better position to avoid a "triggering event" – ranging from the first steps of an organizing effort to a strike.

These are challenging, transformational times for the health care sector. The role for proactive communications and employee engagement has never been greater.

**Elements of a Successful Communication Effort**

- **Identify Your Audience(s)** and tailor your message to their unique viewpoints and needs
- **Recognize the "pain points"** and be ready to discuss, and reframe, them
- **Empower your leaders** by informing them early and often, giving them the tools and support that will enable them to be successful advocates
- **Enhance your credibility** by telling the whole story – if there will be perceived "losses" don't ignore or hide them; rather, frame them in the larger picture
- **Support your employees** with concise, and relevant, communications that they can absorb and understand
- **Leverage technology** and tactics such as digital distribution channels and video
- **Welcome questions and feedback**, and give employees opportunities and outlets to get more information and answers to questions that will likely be very personal…and make certain that you have a mechanism in place to respond in a timely manner
- **Keep content fresh and updated** throughout the process, and even beyond a set timeframe (open enrollment, for example), to build on the engagement and goodwill you've developed

**Communications Tactics At-A-Glance**

- An **employee-specific website** can serve as the information clearinghouse for all policy and benefit-related information as well as providing two-way communication (anonymous or by name) for questions. Consider making all or parts of this site external, or accessible via login outside of your organization's network, to allow employees to discuss and share it with family members. Don't forget – make it mobile-friendly, too!
- **Leader-specific content**, ranging from talking points to a password-protected area of the website, can ensure that your leaders have the information they need to be successful
- **Short videos** – live and animated – can tell your story in concise, digestible snippets that not only highlight key details of any changes but also amplify the overall message and intent
- **Simplified graphic storyboards and/or infographics** can be used online, in handouts and posters throughout campuses/offices
- **Social media advertising**, targeted and tailored to key audiences, with specific strategies to monitor and measure interaction
- **Company-sponsored events** for both employees and family members – including town hall-type forums, leadership rounding, or in-depth briefings on key topics – help build employees understanding and enables them to more readily embrace the change

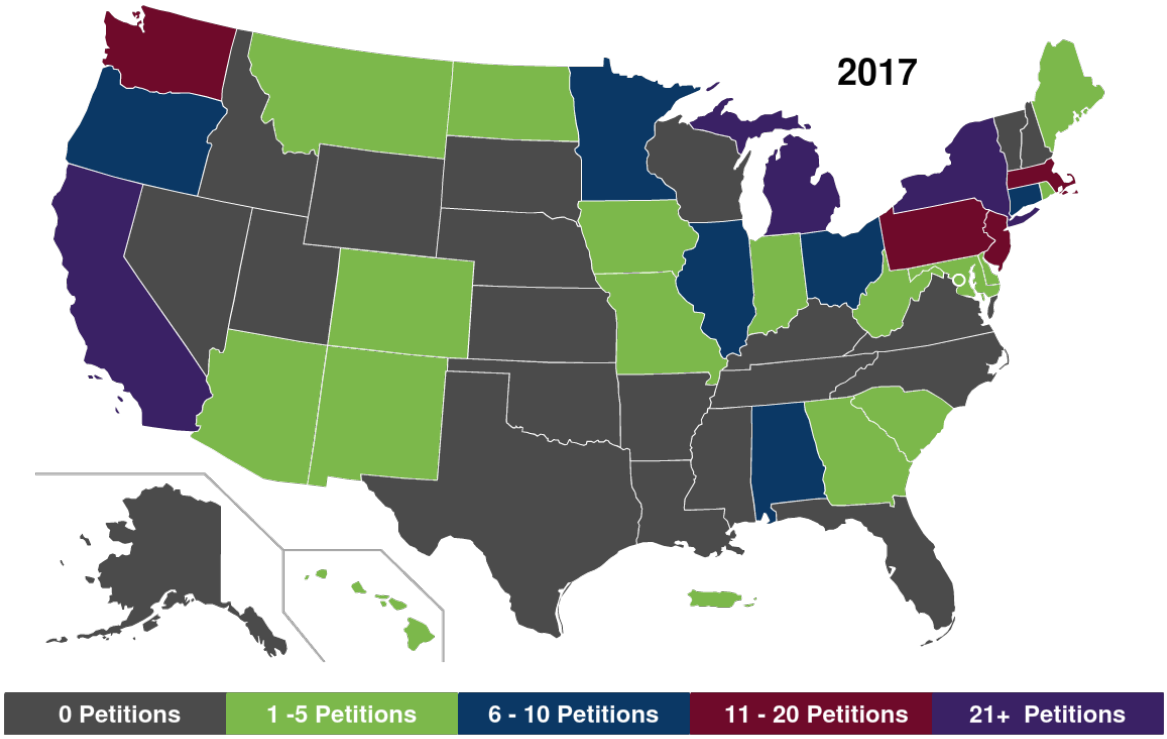
# APPENDIX A: SUMMARY OF PETITIONS FILED AND ELECTIONS HELD

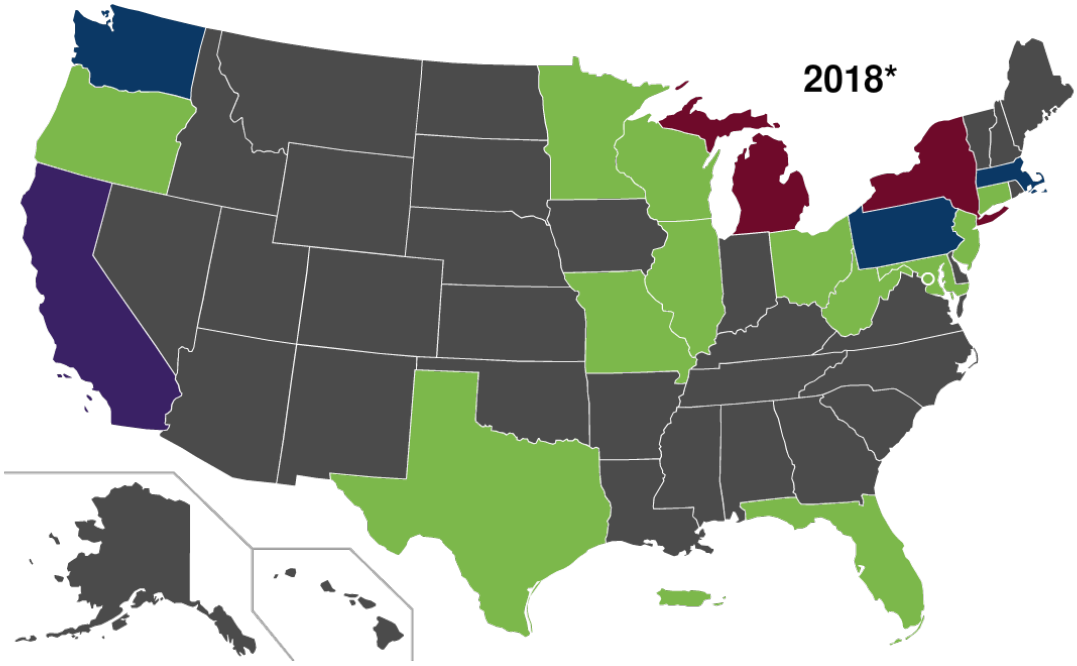
| All Industries - Summary of Petitions Filed & Elections Held (2009 - 2018*) | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018* |
| Total Petitions | 2,789 | 2,894 | 2,552 | 2,474 | 2,554 | 2,621 | 2,809 | 2,289 | 2,280 | 1,027 |
| Total Representation (RC) Petitions | 2,109 | 2,351 | 1,966 | 1,983 | 2,033 | 2,136 | 2,347 | 1,920 | 1,880 | 838 |
| Union Not Elected | 409 | 575 | 443 | 501 | 470 | 437 | 491 | 383 | 399 | 187 |
| Union Elected | 923 | 1,162 | 871 | 860 | 902 | 989 | 1,105 | 982 | 976 | 408 |
| Total Decertification Petitions | 680 | 543 | 586 | 491 | 521 | 485 | 462 | 369 | 400 | 189 |
| Total RD Petitions | 592 | 490 | 494 | 462 | 464 | 438 | 397 | 312 | 338 | 171 |
| Total RM Petitions | 88 | 53 | 92 | 29 | 57 | 47 | 65 | 57 | 62 | 18 |
| Union Not Elected | 159 | 164 | 174 | 149 | 130 | 122 | 130 | 122 | 141 | 55 |
| Union Elected | 115 | 100 | 141 | 98 | 88 | 71 | 85 | 69 | 73 | 34 |

| Health Care - Summary of Petitions Filed & Elections Held (2009 - 2018*) | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018* |
| Total Petitions | 467 | 432 | 410 | 364 | 388 | 446 | 394 | 402 | 409 | 146 |
| Total Representation (RC) Petitions | 357 | 349 | 290 | 298 | 314 | 358 | 327 | 342 | 324 | 116 |
| Union Not Elected | 54 | 80 | 76 | 69 | 65 | 54 | 65 | 47 | 63 | 20 |
| Union Elected | 144 | 194 | 172 | 170 | 159 | 188 | 187 | 198 | 212 | 67 |
| Total Decertification Petitions | 110 | 83 | 120 | 66 | 74 | 88 | 67 | 60 | 85 | 30 |
| Total RD Petitions | 103 | 72 | 69 | 59 | 65 | 85 | 57 | 51 | 59 | 26 |
| Total RM Petitions | 7 | 11 | 51 | 7 | 9 | 3 | 10 | 9 | 26 | 4 |
| Union Not Elected | 13 | 14 | 57 | 13 | 12 | 21 | 17 | 23 | 17 | 14 |
| Union Elected | 21 | 26 | 33 | 25 | 17 | 14 | 13 | 17 | 23 | 5 |

| All Non-Health Care Industries - Summary of Petitions Filed & Elections Held (2009 - 2018*) | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018* |
| Total Petitions | 2,322 | 2,462 | 2,142 | 2,110 | 2,166 | 2,175 | 2,415 | 1,887 | 1,871 | 881 |
| Total Representation (RC) Petitions | 1,752 | 2,002 | 1,676 | 1,685 | 1,719 | 1,778 | 2,020 | 1,578 | 1,556 | 722 |
| Union Not Elected | 355 | 495 | 349 | 431 | 405 | 383 | 426 | 336 | 336 | 167 |
| Union Elected | 779 | 968 | 699 | 690 | 743 | 801 | 918 | 784 | 764 | 341 |
| Total Decertification Petitions | 570 | 460 | 466 | 425 | 447 | 397 | 395 | 309 | 315 | 159 |
| Total RD Petitions | 489 | 418 | 425 | 403 | 399 | 353 | 340 | 261 | 279 | 145 |
| Total RM Petitions | 81 | 42 | 41 | 22 | 48 | 44 | 55 | 48 | 36 | 14 |
| Union Not Elected | 146 | 150 | 117 | 136 | 118 | 101 | 113 | 99 | 124 | 41 |
| Union Elected | 94 | 74 | 108 | 73 | 71 | 57 | 72 | 52 | 50 | 29 |

# APPENDIX B: MAPS OF REPRESENTATION PETITIONS FILED IN HEALTH CARE



# APPENDIX C: 2018 ASHHRA ADVOCACY COMMITTEE

## CHAIR

**Brenda Reinert**
Director, Human Resources
Tomah Memorial Hospital
Tomah, Wisc.
*Served since 2013*
*REGION 5: CAN, IL, IN, MI, OH, WI*

## IMMEDIATE PAST CHAIR

**Darrin Smith**
Vice President, Human Resources
Parkview Medical Center
Pueblo, Colo.
*Served since 2013*
*Region 8: AZ, CO, ID, MT, NM, UT, WY*

## BOARD LIASION

**Brian Silva**
Chief Human Resources Officer and
Senior Vice President, Administration
Fresenius Medical Care Services
Waltham, Mass.
*Served since 2018*

**Gail Blanchard Saiger**
Vice President, Labor and Employment
California Hospital Association
Sacramento, Calif.
*Served since 2007*
*REGION 9: AK, CA, HI, NV, OR, WA*

**Chris Callahan**
Vice President, Human Resources
Exeter Health Resources
Exeter, N.H.
Served since 2018
REGION 1: CT, ME, MA, NH, RI, VT

**James Frain, SPHR, CEBS, CHHR**
Vice President, Human Resources
South Bend Medical Foundation
South Bend, Ind.
*Served* since *2016*
*REGION 5: CAN, IL, IN, MI, OH, WI*

**Kimberly Fulcher**
Vice President and Chief Human
Resources Officer
Halifax Health Medical Center of Daytona
Beach
Daytona Beach, Fla.
*Served since 2014*
*REGION 4: AL, FL, GA, MS, PR, SC, TN*

**Lori Hoekstra**
Manager, Human Resources
Riverside Healthcare
Kankakee, Ill.
*Served since 2018*
*REGION 5: CAN, IL, IN, MI, OH, WI*

**G. Roger King**
Senior Labor and Employment Counsel
HR Policy Association
Washington, D.C.
Served since 2005
REGION 3: DE, DC, KY, MD, NC, VA, WV

**George Liothake, CHHR**
Director, Human Resources
Atlantic Health System
Summit, N.J.
*Served since 2017*
*Region 2: NJ, NY, PA*

**Deborah Rubens, CHHR, SPHR-CA, SHRM-SCP**
Director, Human Resources
Shriners Hospitals for Children-Northern California
Sacramento, Calif.
*Served since 2016*
*REGION 9: AK, CA, HI, NV, OR, WA*

**James Trivisonno**
President, IRI Consultants to Management
Troy, Mich.
*Served since 2010*
*REGION 5: CAN, IL, IN, MI, OH, WI*

**Trasee Whitaker, SPHR, SHRM-SCP**
Chief Human Resources Officer and
Senior Vice President, Human Resources
Masonic Homes of Kentucky, Inc.
Louisville, Ky.
*Served since 2014*
*REGION 3: DE, DC, KY, MD, NC, VA, WV*

**REGION 6: IA, KS, MN, MO, NE, ND, SD**
***OPEN***

# APPENDIX D: THE NATIONAL LABOR RELATIONS BOARD DEFINITIONS

The following summary from the NLRB 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. 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 a single piece of paper. 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 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 a single piece of paper. 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 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 typically 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.