

Labor Activity in Health Care

SEMI-ANNUAL REPORT

JANUARY 1ST, 2015 TO JUNE 30TH, 2015



PRESENTED BY



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ABOUT THIS REPORT

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

The *45th Semi-Annual ASHHRA/IRI Labor Activity in Health Care Report* includes the following:

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

* Throughout the report, asterisks indicate that the data is from the first six months of 2015.

LETTER FROM JAMES G. TRIVISONNO

On April 14, 2015, the National Labor Relations Board (NLRB) introduced expedited elections. From April 14 through August 30, there was a 9.6 percent increase over 2014 in the number of petitions filed; 365 elections were conducted in all industries under the new rules. The vast majority of elections are held within 24 days, besting the NLRB's previous average timetable of 38 days. (The quickest petition-to-election timeframe has been eight days.) Unions were successful in 76 percent of the 153 representation case elections held in health care through June 30, 2015.

There also have been several decisions that have overturned decades of precedent. Articles later in this report cover many of these decisions. For instance, in *Browning-Ferris (Browning-Ferris Indus., 326 NLRB No. 186 (2015))*, the Board imposed a new standard whereby "indirect control" – even potential control – can be sufficient for determining a joint employer relationship. The expanded scope of employment terms and conditions can be based on whether the contracting employer determines the number of workers to be supplied, maintains control over scheduling and overtime and assigns work, decides how work will be conducted and determines performance. This decision, which likely will be appealed, is of significance for health care systems who subcontract for various services, including environmental, nutrition, nurse staffing agencies and more.

Another recent NLRB decision, *Lincoln Lutheran of Racine (No. 30-CA-111099, 2015)*, now requires that employers continue to collect on behalf of the union even after a labor contract has expired if the contract includes dues check-off language.

Meanwhile, the Board's general counsel adopted a policy that permits employees to electronically authorize union representation. Some unions – like the United Food and Commercial Workers (UFCW) – have been quick to adopt electronic signatures for collecting employee signatures on union authorization cards. Pursuant to the new policy, e-cards are valid if they include the employee's name, email address or social media account, phone number, authorization language to which the employee agreed, date, employer name and employee signature.

Americans' approval of labor unions has climbed to 58 percent, its highest approval rating in years according to a recent Gallup survey.¹ Delving deeper into the data, young adults ages 18 to 34 are most supportive of unions (66 percent approval rating), and 44 percent want unions to have more influence. Considering that young adults are among the highest users of social media, that employees (through *Purple Communications, Inc., 361 NLRB No. 126 (2014)*) are entitled to engage in protected, concerted activities using company email during non-work time, and that the NLRB now accepts electronic signatures, a union campaign can remain "underground" or in "stealth mode" long before an employer learns of the campaign.

Now more than ever, employers need to take proactive steps to prepare their organizations for a union organizing effort. Since the new election rules have taken effect, our experience has been that there simply isn't enough time to react unless the employer has taken steps to

¹ Gallup 2015 Work and Education Survey. <http://www.gallup.com/poll/184622/americans-support-labor-unions-continues-recover.aspx>.

think through a comprehensive, detailed prevention strategy and counter campaign. When the union begins to solicit employees, executive management will look to human resources for leadership and guidance. Don't get caught unprepared.

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

INTRODUCTION

Unions continued their multi-year trend of election success in the first six months of 2015, prevailing in 76 percent of 153 representation case (RC) elections. The Service Employees International Union (SEIU) continues to be the most active union in health care. In the first six months of 2015, SEIU filed 50 percent of the RC petitions in health care and was involved in 45 percent of elections; SEIU was elected in 82 percent of those elections.

Despite that level of SEIU activity, the International Union of Operating Engineers (IUOE) and the Office and Professional Employees International Union (OPEIU) had the highest success rates in health care elections during the first six months (100 percent success for both of them). Notably, both IUOE and OPEIU participated in nearly twice as many elections in the first six months of 2015 compared to 2014. National Nurses United (NNU) has been involved in fewer elections for the first six months of 2015. Of the three it's been involved in, it succeeded in one, lost another and has appealed the initial result of the third.

Six states – New York, California, Michigan, Pennsylvania, Washington and New Jersey – experienced the majority of petitions through June 2015, with New York (20.5 percent), California (15.3 percent) and Michigan (11.4 percent) representing the most active three states, respectively. Although there were more elections held in Pennsylvania (41) than any other state in 2014, only 11 elections were held in the first six months of 2015. Comparatively, New York experienced nearly the same amount of election activity in the first six months of the year as it did in the entirety of 2014.

Between April 14, 2015, when the expedited election ruling went into effect and August 30, 2015, there was a 9.6 percent increase in the number of petitions filed versus the number of petitions filed during the same time period in 2014. Between April 14 and August 30, the National Labor Relations Board conducted 365 representation elections. The vast majority (63 percent) were held in 21 to 30 days while the shortest petition-to-election timeframe was eight days. After April 14, the average number of days from petition to election was down to 25 days from the previous 38-day average. Unions' success rates were virtually unchanged (75 percent) compared to 76 percent for the first six months of 2015.

Mounting success along with precedent-setting standards that ease a union's ability to organize will contribute to a continued focus by unions on organizing hospitals and health care providers, further challenging employers. Employers will need to focus efforts to maintain positive employee relations and responsiveness to employee concerns.

This report contains information to help health care organizations better understand where unions are focusing efforts and how to be prepared to address them.

EXECUTIVE SUMMARY

NLRB REPRESENTATION PETITIONS AND ELECTIONS^{1,2}

In the first six months of 2015, there were 153 representation (RC) elections held in the health care sector. Unions were elected as a result of 76 percent of these. If the rate of organizing continues, unions are on pace to file a record number of RC petitions in the health care industry this year.

The vast majority of organizing activity in the first six months of 2015 occurred in New York, California and Michigan, with these three states experiencing nearly half of all petitions filed in the country.

Once again, the Service Employees International Union (SEIU) filed more petitions and held more elections than any other union in the health care industry. SEIU accounted for half of all petitions filed and 45 percent of elections held.

Since the expedited elections ruling went into effect on April 14, 2015, several changes have occurred in terms of organizing activity in the health care industry. The number of representation petitions filed has decreased slightly from the previous year in the same time period, but is within the expected range. The number of small unit elections (0 to 10 people in the bargaining unit) has increased 41 percent over the average of the previous four years. In addition, the average number of days from petition filed to election is now 26.6 days, with the majority of elections being held 21 to 30 days after the petition is filed.

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 Members - 2014* report, the percentage of unionized wage and salary employees decreased 0.2 percentage points to 11.1 in 2014 from 11.3 in 2013 while the number of unionized workers increased slightly to 14.6 million.

Data from the DOL report include the following:

- Union membership increased by 100,000 to a total of 14.6 million
- The number of *private sector* employees (7.4 million) remains greater than the number of *public sector* employees belonging to a union (7.2 million)
- *Public sector* employees were nearly five times as likely to be unionized than private sector employees (35.7 percent versus 6.6 percent, respectively)
- African American workers had the highest union membership rate (13.2 percent) followed by Caucasian workers (10.8 percent), Asian workers (10.4 percent) and Hispanic/Latino workers (9.2 percent)
- The highest union membership rate is among men aged 55 to 64 (14.9 percent), while the lowest is among women aged 16 to 24 (3.8 percent)
- New York continues to have the highest union membership rate (24.6 percent) and North Carolina remains the lowest (1.9 percent)
- Union membership rates declined in 27 states, increased in 18 states and remained unchanged in five states.

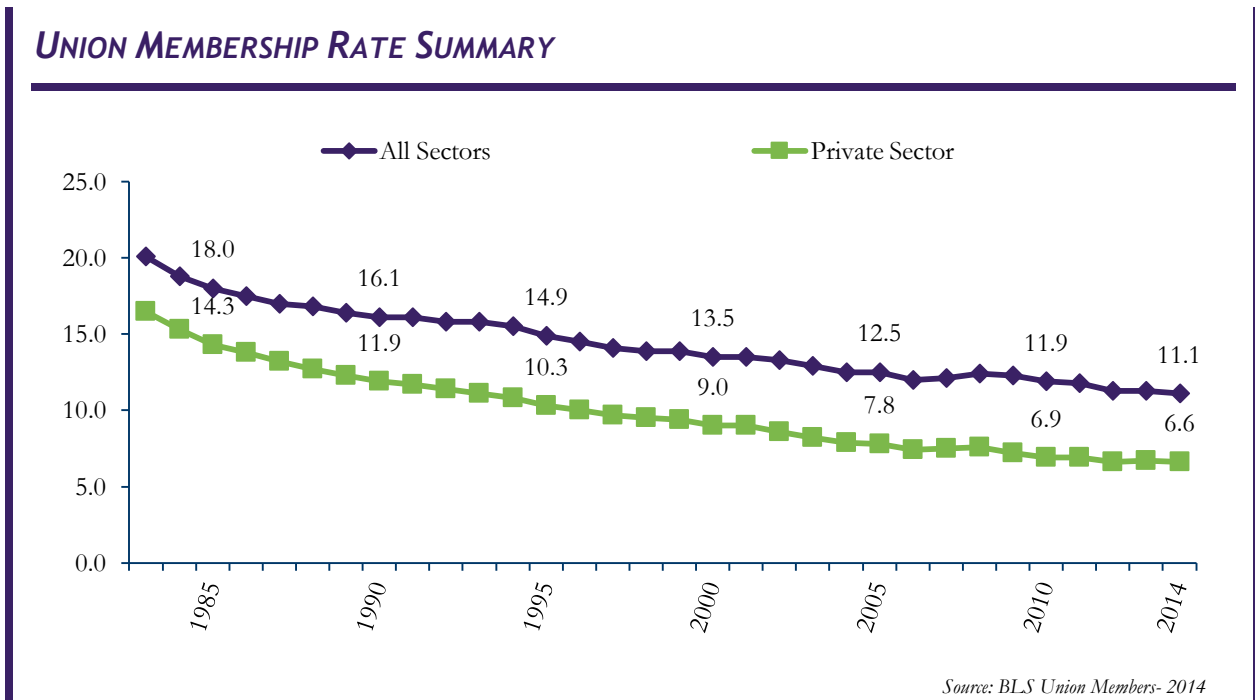


Figure 1

NATIONAL LABOR RELATIONS BOARD (NLRB) PETITION AND ELECTION RESULTS

This section includes the following:

National Summaries

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

State Summaries

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

Union Summaries

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

Regional Summaries

- RC petitions and elections in ASHHRA regions

Strikes in Health Care

- Strikes Held by Year in Health Care

Expedited Elections

- RC Petitions Filed
- RC Elections Held

NATIONAL SUMMARIES

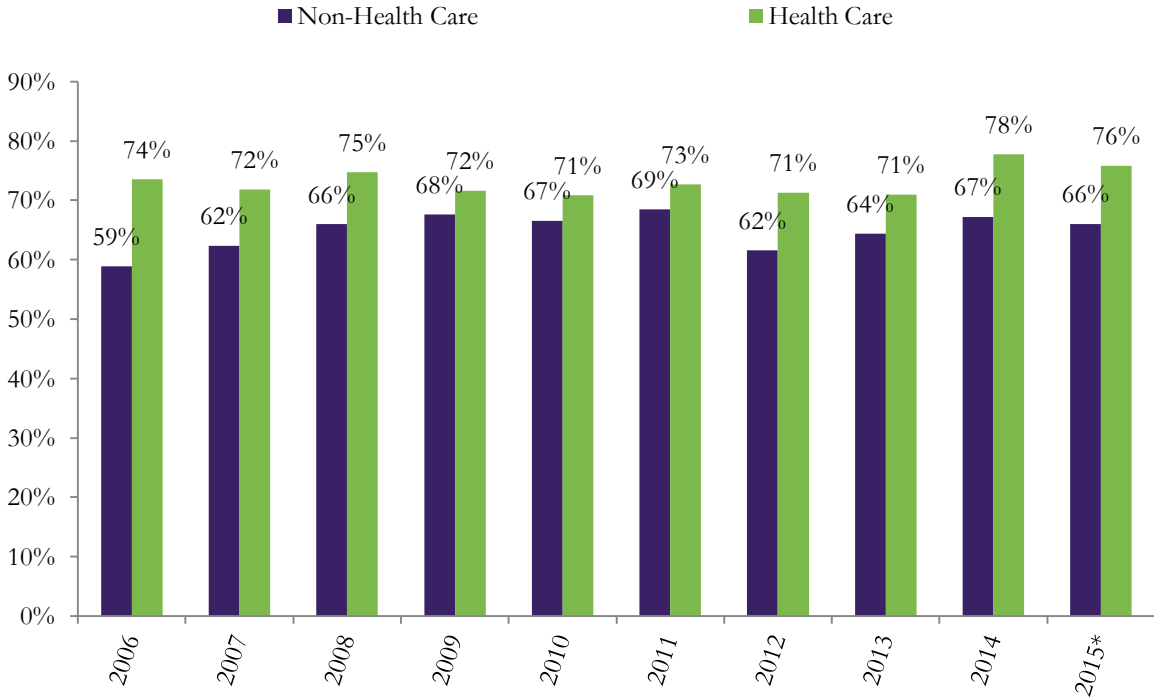
The following information summarizes representation petition activity and elections held during the past decade as reported by the National Labor Relations Board (NLRB).

HEALTH CARE VS. ALL NON-HEALTH CARE SECTORS COMPARISON

Unions have consistently experienced higher rates of successful organizing in the health care sector than in other sectors. In the first six months of 2015, unions were successfully elected in 76 percent of elections held—ten percentage points higher than in other sectors.

COMPARISON OF UNION SUCCESSES IN REPRESENTATION (RC) ELECTIONS

Health Care vs. Non-Health Care Sectors (2006-June 30, 2015)



Source: LRI Management Services, Inc.

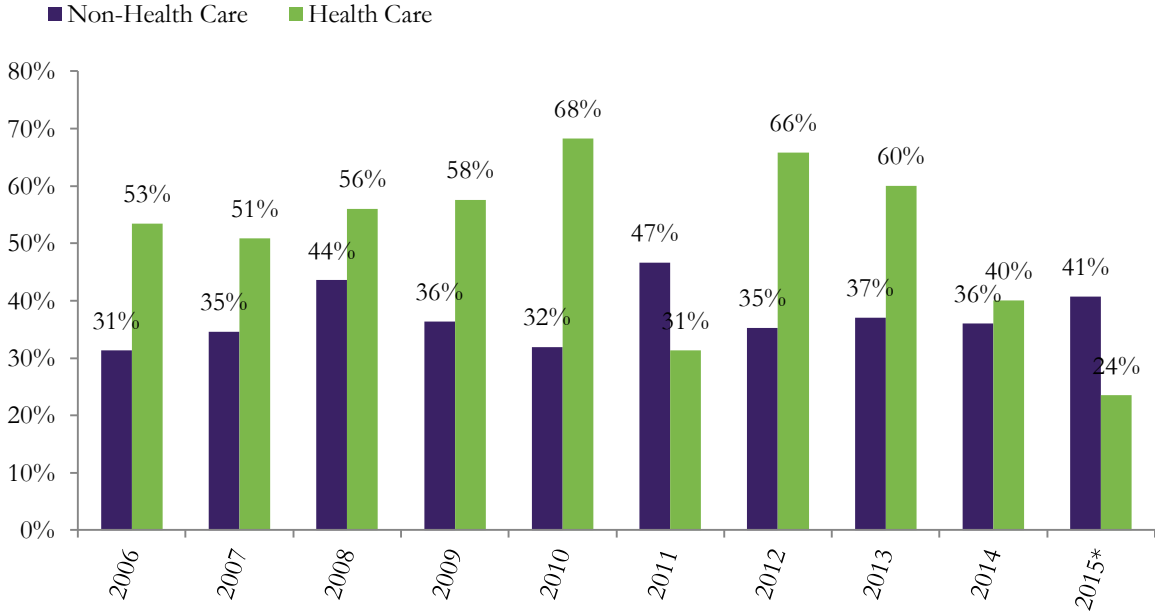
Figure 2

HEALTH CARE SECTOR - ELECTIONS OVERVIEW

Over the past decade, unions have been more successful defending against decertification elections in the health care sector than in other sectors. However, in the first six months of 2015, unions maintained recognition in just 24 percent of decertification elections held in the health care sector—the lowest rate in the past decade.

COMPARISON OF UNION PREVENTION OF DECERTIFICATION (RD & RM)

Health Care vs. Non-Health Care Sectors (2006-June 30, 2015)

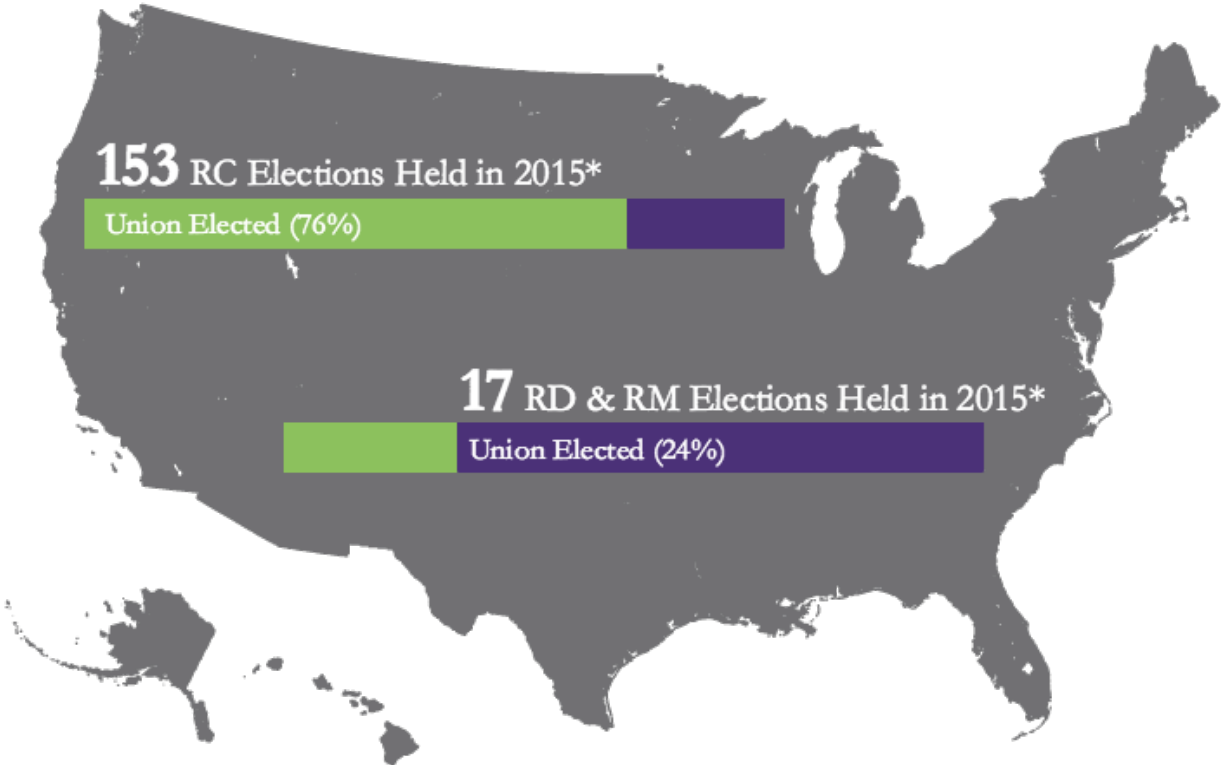


Source: LRI Management Services, Inc.

Figure 3

HEALTH CARE SECTOR - OVERVIEW OF ELECTIONS

In the first six months of 2015, there were 153 representation (RC) elections held in the health care sector, and unions were elected as a result of 76 percent of these. There were also 17 decertification (RD & RM) elections held in the same time period, and unions maintained recognition in only 24 percent of these elections.

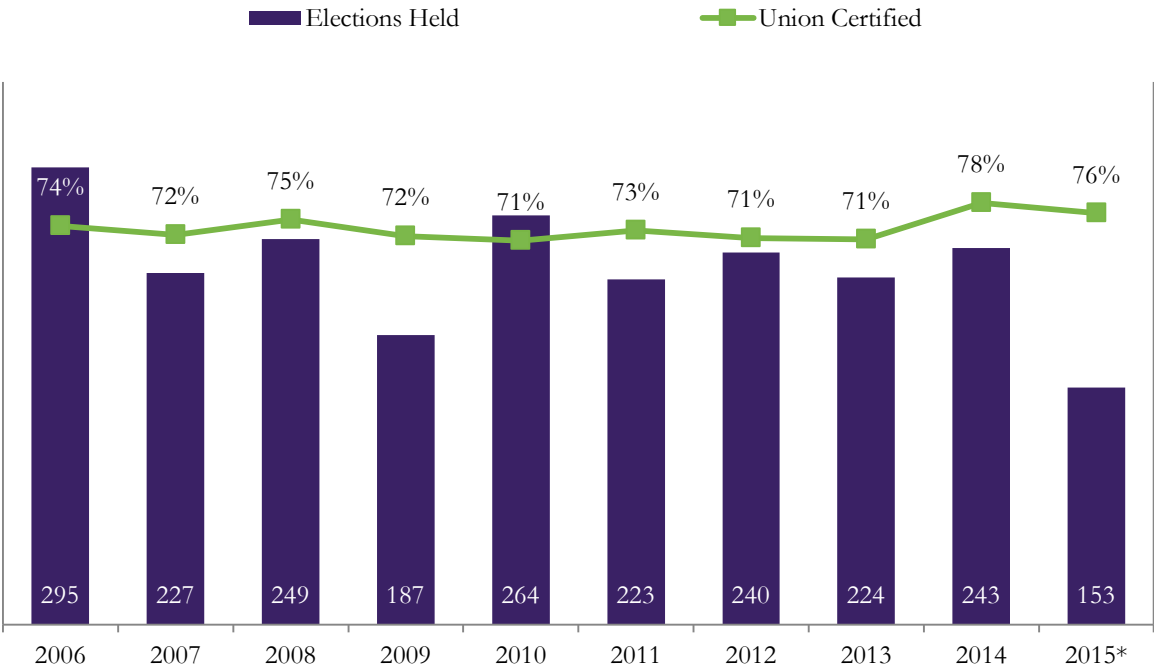


HEALTH CARE SECTOR - UNION SUCCESSES IN REPRESENTATION (RC) ELECTIONS

Unions were elected in 76 percent of representation elections held in the first six months of 2015. This is two percentage points lower than in 2014, but above the average over the past decade.

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

Health Care Sector (2006-June 30, 2015)



Source: LRI Management Services, Inc.

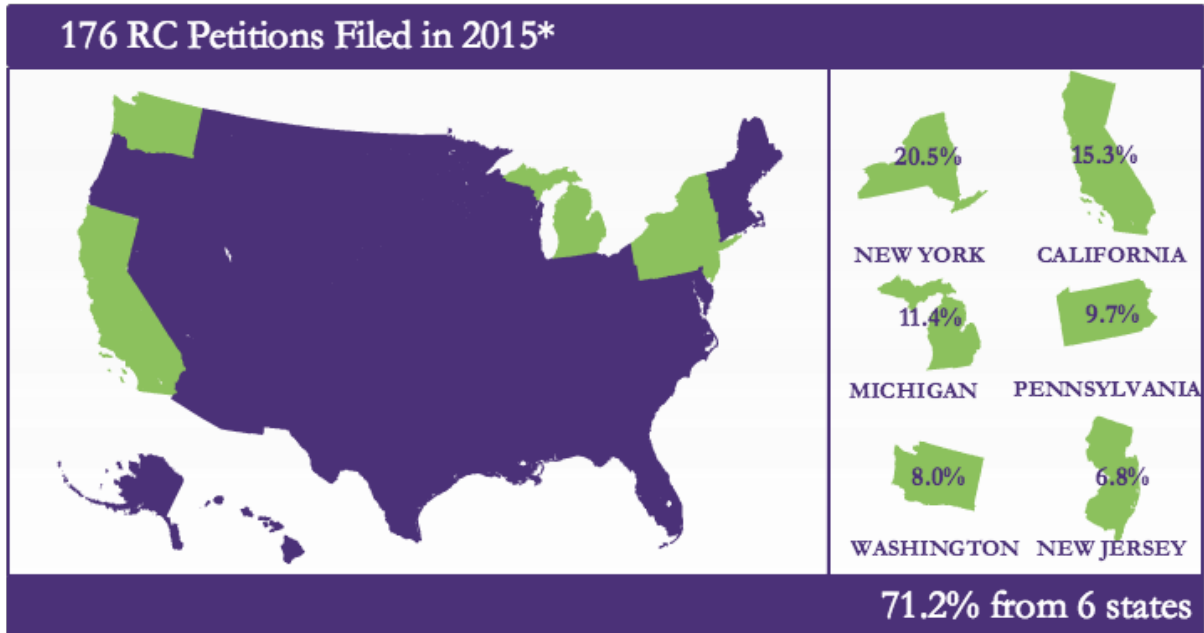
Figure 4

STATE SUMMARIES

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

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

The majority of representation petitions filed in the health care sector in the first six months of 2015 were filed in just six states. New York alone accounted for more than 20 percent of petitions filed, California for more than 15 percent, and Michigan, Pennsylvania, Washington and New Jersey make up the remaining states in the top six.



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

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

State	2014	2015*	State	2014	2015*	State	2014	2015*
Alabama	4	0	Kansas	-	1	New York	59	36
Alaska	2	0	Kentucky	2	0	Ohio	6	2
Arizona	2	0	Maine	1	-	Oregon	9	3
Arkansas	1	0	Maryland	1	2	Pennsylvania	50	17
California	58	27	Massachusetts	16	7	Puerto Rico	7	8
Colorado	1	0	Michigan	23	20	Rhode Island	3	1
Connecticut	13	6	Minnesota	7	5	South Carolina	2	1
DC	2	1	Mississippi	3	1	Utah	1	0
Florida	5	1	Missouri	7	0	Vermont	1	0
Iowa	-	1	Montana	4	1	Washington	13	14
Hawaii	3	1	Nevada	1	0	Wisconsin	1	0
Illinois	31	7	New Jersey	14	12	West Virginia	-	1
Indiana	5	0	New Mexico	1	0	Total	359	176

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

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

In 2014, Pennsylvania, California and New York experienced the most representation elections in health care. In the first six months of 2015, New York, California and Michigan took the top three spots respectively. Notably, New York has experienced nearly the same amount of activity in the first six months of the year as it had in the entirety of 2014.

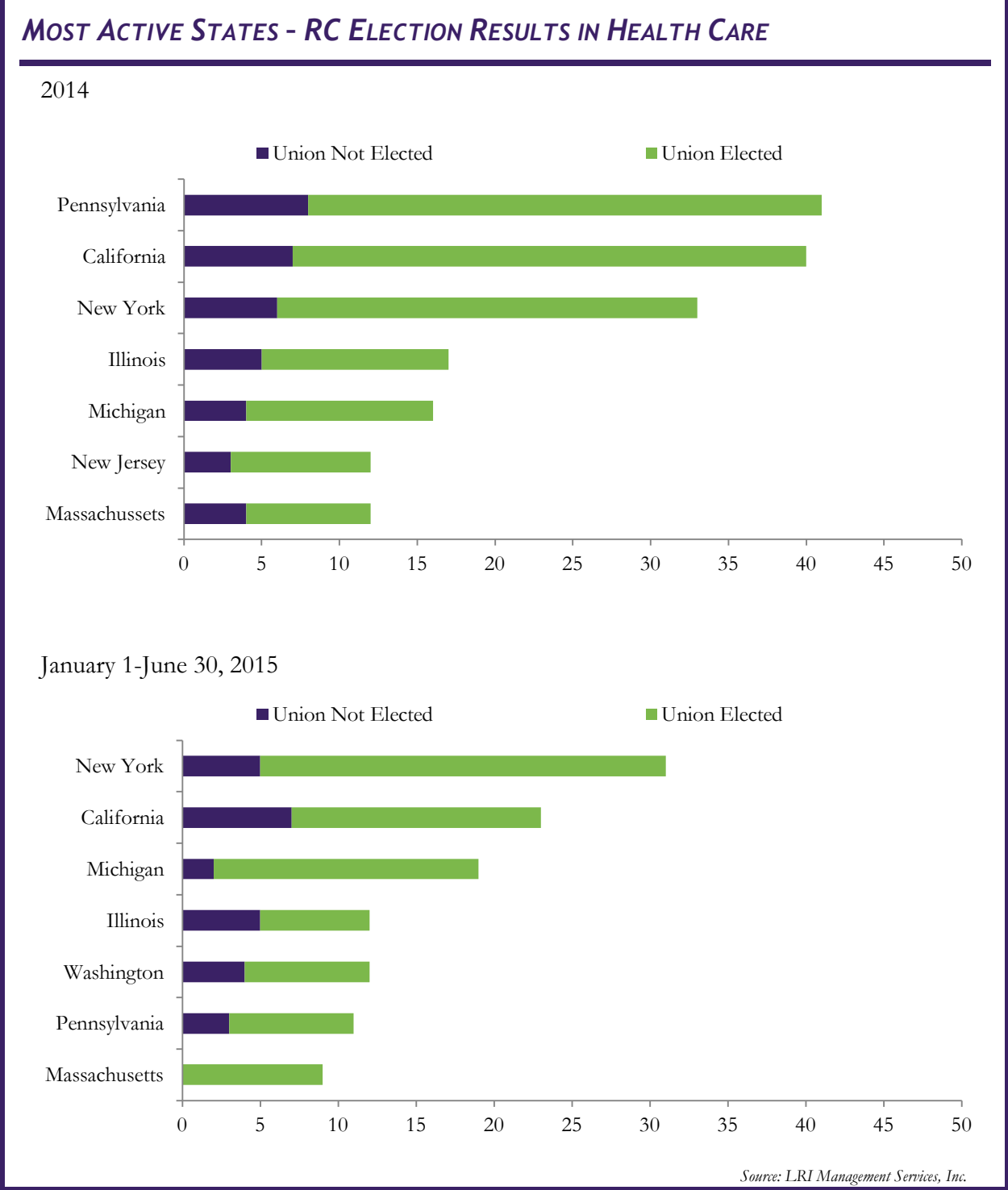


Figure 5

ALL STATES - REPRESENTATION (RC) ELECTION RESULTS IN HEALTH CARE

The following table depicts the number of representation elections held in each state in the health care sector in 2014 and the first six months of 2015. Unions were elected in 78 percent of elections held in 2014 and 76 percent of elections held in the first six months of 2015.

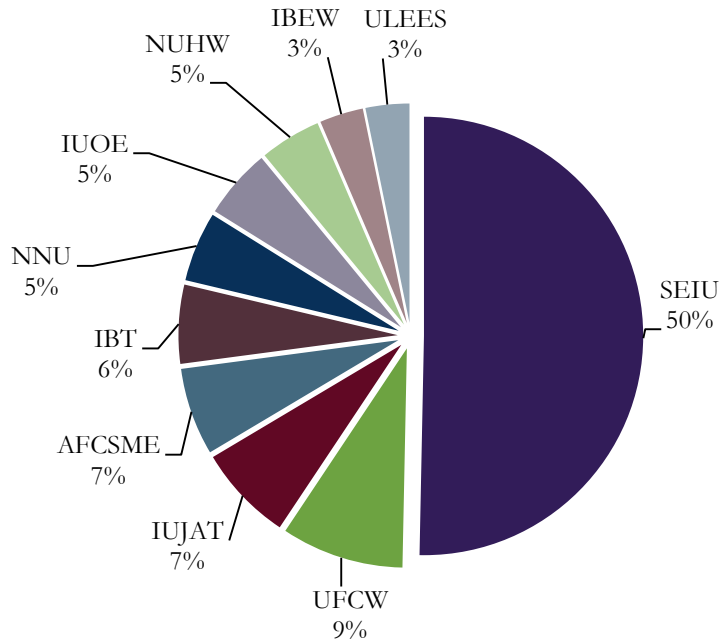
State	2014					2015*				
	Total Elections	Union Elected		Union Not Elected		Total Elections	Union Elected		Union Not Elected	
		Total	% of Elections	Total	% of Elections		Total	% of Elections	Total	% of Elections
Alabama	2	1	50%	1	50%	-	-	-	-	-
Alaska	3	1	33%	2	67%	-	-	-	-	-
Arizona	1	1	100%	0	0%	-	-	-	-	-
Arkansas	1	0	0%	1	100%	-	-	-	-	-
California	40	34	85%	7	18%	26	16	62%	7	27%
Colorado	1	0	0%	1	100%	-	-	-	-	-
Connecticut	8	8	100%	0	0%	2	2	100%	0	0%
District of Columbia	1	1	100%	0	0%	2	2	100%	0	0%
Florida	4	4	100%	0	0%	1	1	100%	0	0%
Hawaii	1	1	100%	0	0%	1	1	100%	0	0%
Illinois	17	12	71%	5	29%	12	7	58%	5	42%
Indiana	3	2	67%	1	33%	1	0	0%	1	100%
Kansas	-	-	-	-	-	1	1	100%	0	0%
Kentucky	3	2	67%	1	33%	-	-	-	-	-
Maine	1	1	100%	0	0%	-	-	-	-	-
Maryland	-	-	-	-	-	2	2	100%	0	0%
Massachusetts	12	8	67%	4	33%	9	9	100%	0	0%
Michigan	16	12	75%	4	25%	19	17	89%	2	11%
Minnesota	5	5	100%	0	0%	3	2	67%	0	0%
Mississippi	3	3	100%	0	0%	1	1	100%	0	0%
Missouri	3	3	100%	0	0%	-	-	-	-	-
Montana	1	1	100%	0	0%	1	1	100%	0	0%
Nevada	1	0	0%	1	100%	-	-	-	-	-
New Jersey	12	9	75%	3	25%	7	4	57%	3	43%
New Mexico	1	1	100%	0	0%	-	-	-	-	-
New York	35	27	77%	6	17%	31	26	84%	5	16%
Ohio	3	2	67%	1	33%	2	0	0%	2	100%
Oregon	9	6	67%	3	33%	3	3	100%	0	0%
Pennsylvania	41	33	80%	8	20%	11	8	73%	3	27%
Puerto Rico	5	3	60%	2	40%	4	3	75%	1	25%
Rhode Island	-	-	-	-	-	1	1	100%	0	0%
South Carolina	1	1	100%	0	0%	1	1	100%	0	0%
Washington	8	7	88%	1	13%	12	8	67%	4	33%
Wisconsin	2	1	50%	1	50%	-	-	-	-	-
Total	243	189	78%	53	22%	153	116	76%	33	22%

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

UNION SUMMARIES

MOST ACTIVE UNIONS - REPRESENTATION (RC) PETITIONS FILED IN HEALTH CARE 2015*

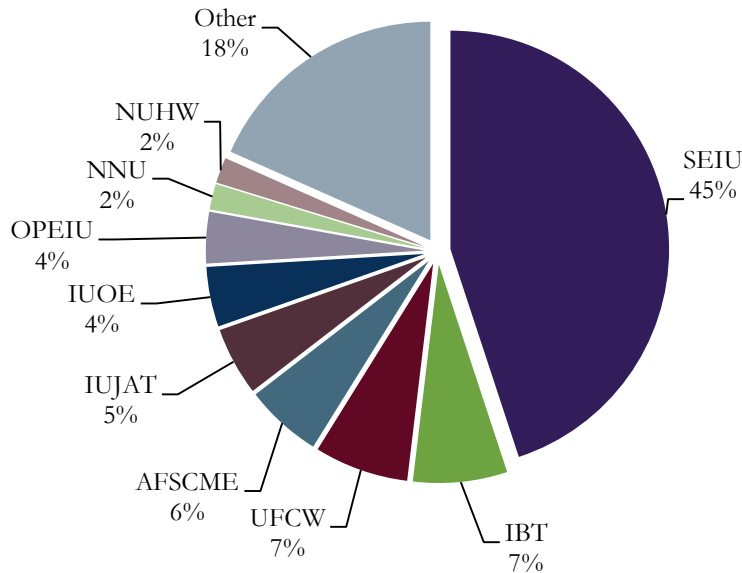
Once again the Service Employees International Union (SEIU) has filed far more representation petitions than any other union in the health care sector. In the first six months of 2015, SEIU filed half of all representation petitions.



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

Abbreviation	Union Name	RC Petitions Filed	
		2014	2015*
SEIU	Service Employees International Union	157	78
UFCW	United Food and Commercial Workers	24	14
IUJAT	International Union of Journeymen and Allied Trades	12	11
AFSCME	State County and Municipal Employees	34	10
IBT	International Brotherhood of Teamsters	37	9
NNU	National Nurses United	11	8
IUOE	International Union of Operating Engineers	6	8
NUHW	National Union of Healthcare Workers	6	7
IBEW	International Brotherhood of Electrical Workers	3	5
ULEES	Unidad Laboral de Enfermeras(os) y Empleados de la Salud	2	5

MOST ACTIVE UNIONS - REPRESENTATION (RC) ELECTIONS HELD IN HEALTH CARE 2015*



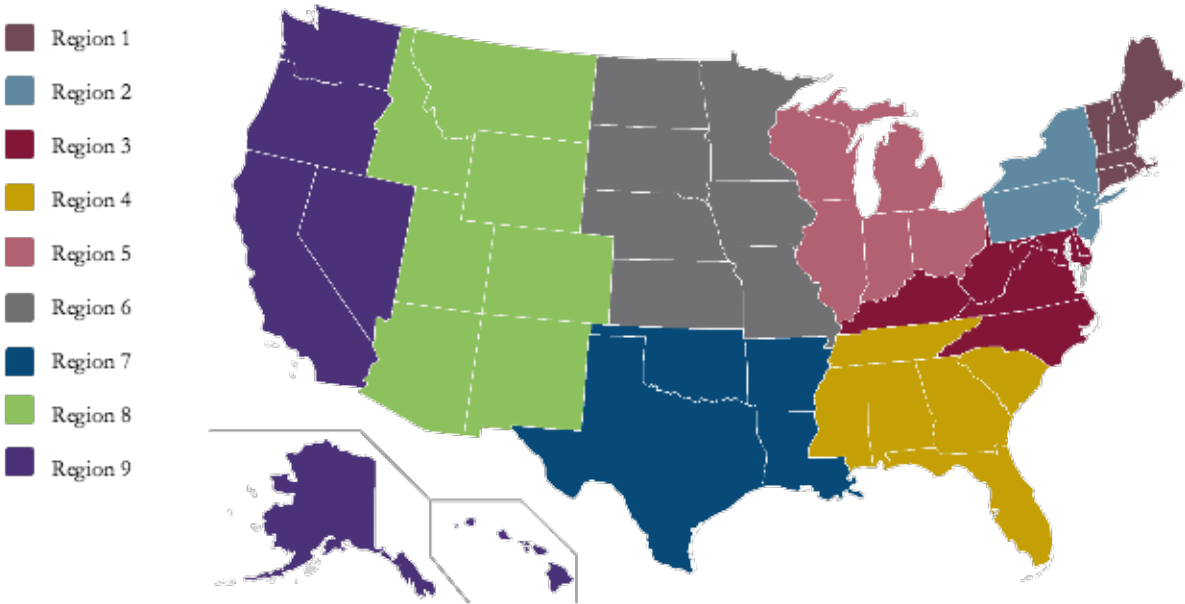
As would be expected, the SEIU was also involved in more RC elections than any other union in the health care sector. In the first six months of 2015, SEIU was involved in 71 representation elections and was elected in 82 percent of them.

Abbreviation	Union Name	RC Elections Held	
		2014	2015*
SEIU	Service Employees International Union	110	71
IBT	International Brotherhood of Teamsters	19	11
UFCW	United Food and Commercial Workers	13	11
AFSCME	State County and Municipal Employees	29	9
IUJAT	Journeyman and Allied Trades	11	8
IUOE	International Union of Operating Engineers	4	7
OPEIU	Office and Professional Employees	3	6
NNU	National Nurses United	11	3
NUHW	National Union of Healthcare Workers	4	3

	2014			January 1 – June 30, 2015		
	Total Elections	Union Elected %	Union Not Elected %	Total Elections	Union Elected %	Union Not Elected %
SEIU	110	75%	21%	71	82%	17%
IBT	19	74%	26%	11	50%	50%
UFCW	13	77%	15%	11	91%	0%
AFSCME	29	76%	21%	9	56%	33%
IUJAT	11	91%	9%	8	88%	14%
IUOE	4	75%	25%	7	100%	0%
OPEIU	3	67%	33%	6	100%	0%
NNU	11	91%	9%	3	33%	33%

REGIONAL SUMMARIES

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



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

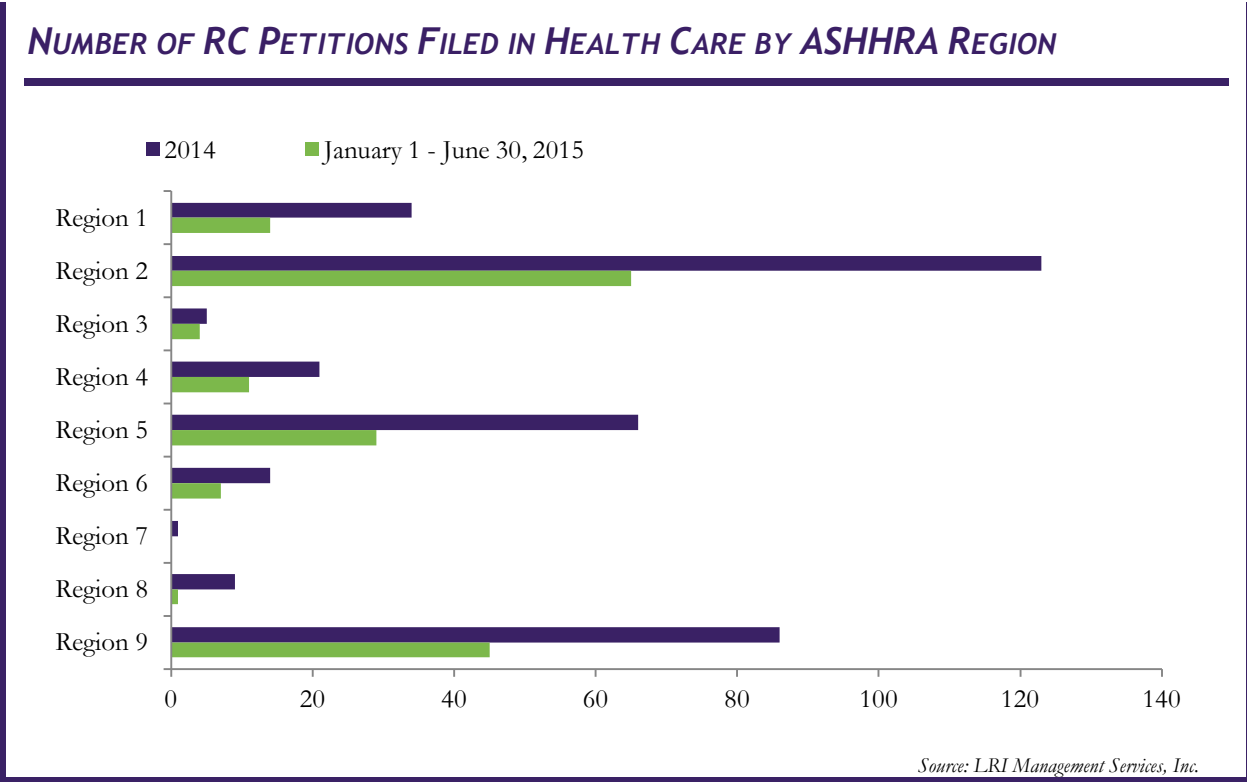
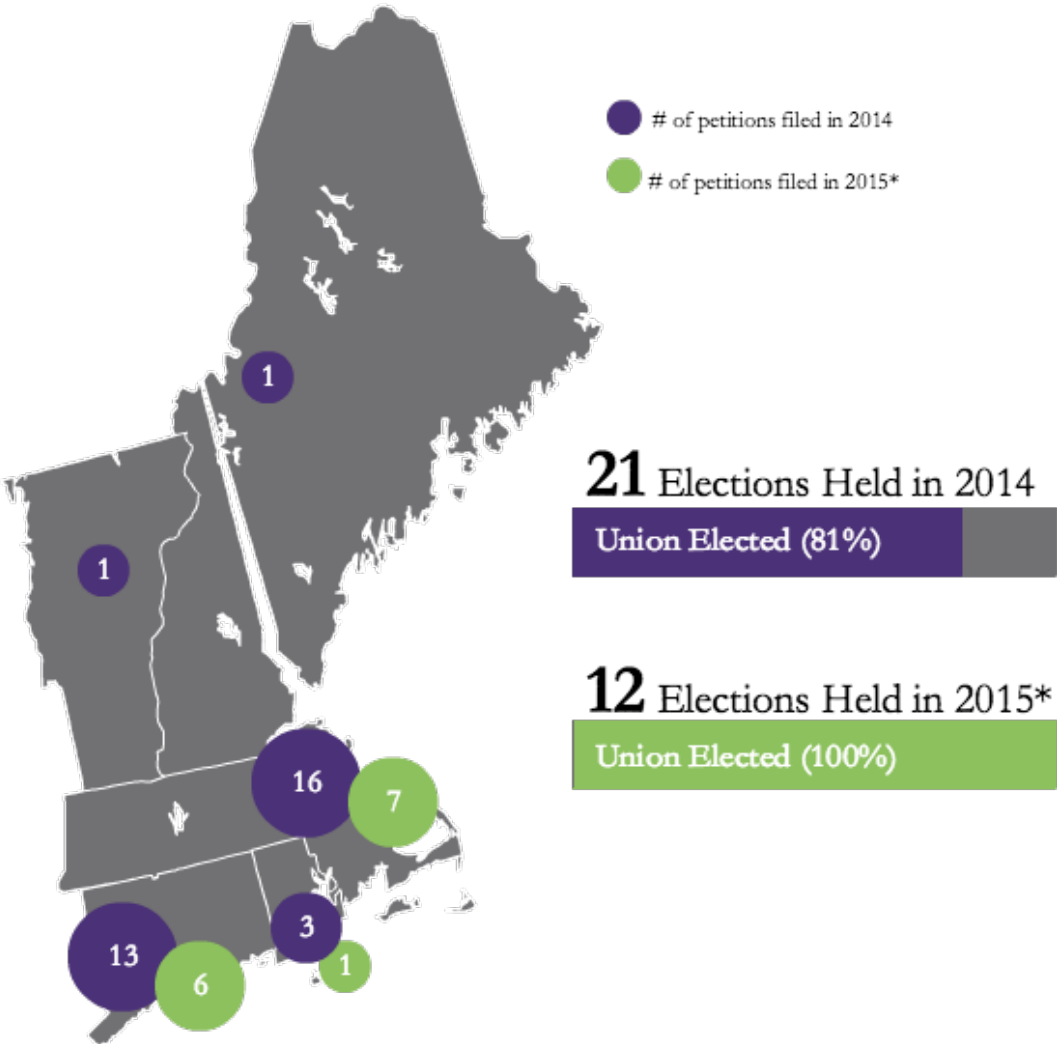


Figure 6

REGION 1

Most of the activity in Region 1 occurs in Massachusetts and Connecticut. Unions were elected in all twelve of the representation elections that have occurred in the first six months of 2015.

Petitions & Elections

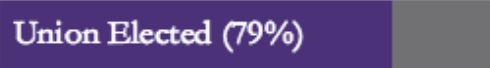


REGION 2

Region 2 experiences the most organizing activity of all the ASHHRA regions. New Jersey has had almost as many petitions filed in the first six months of the year than it did in the entirety of 2014. In the first six months of 2015, there were 49 representation elections held, putting the region on pace to exceed activity in 2014.

Petitions & Elections

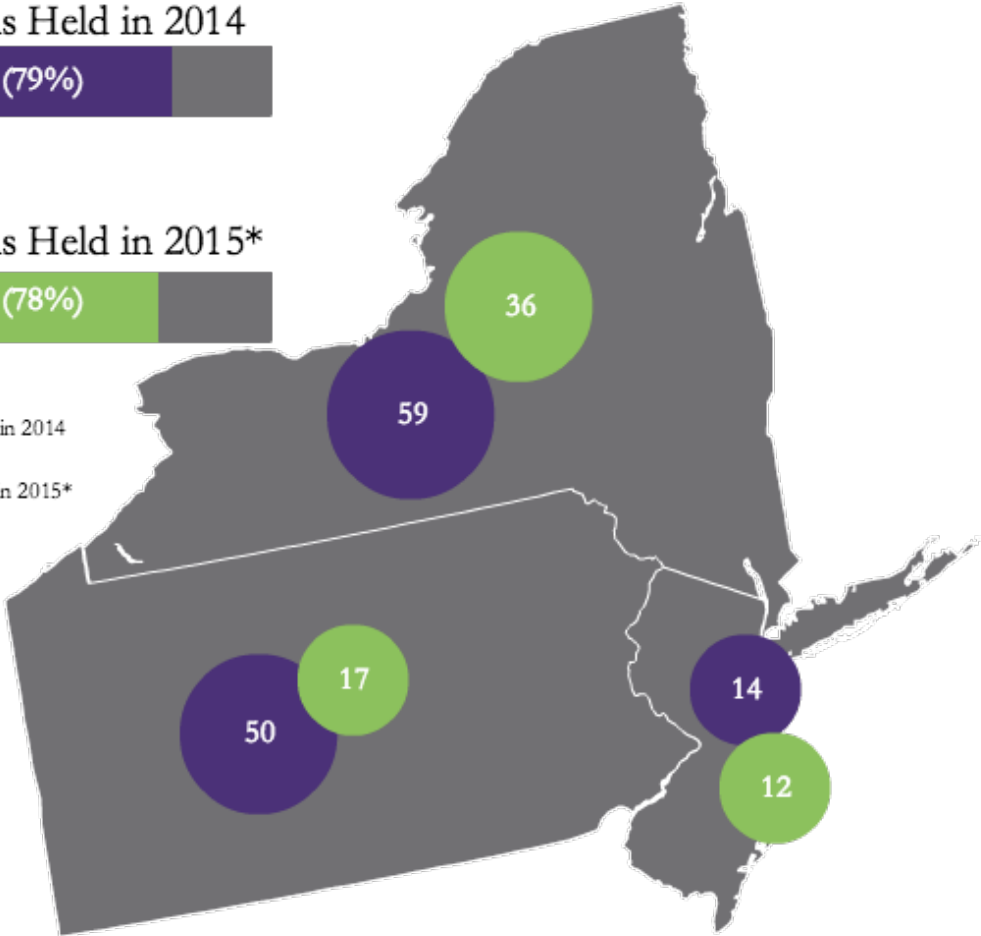
87 Elections Held in 2014



49 Elections Held in 2015*



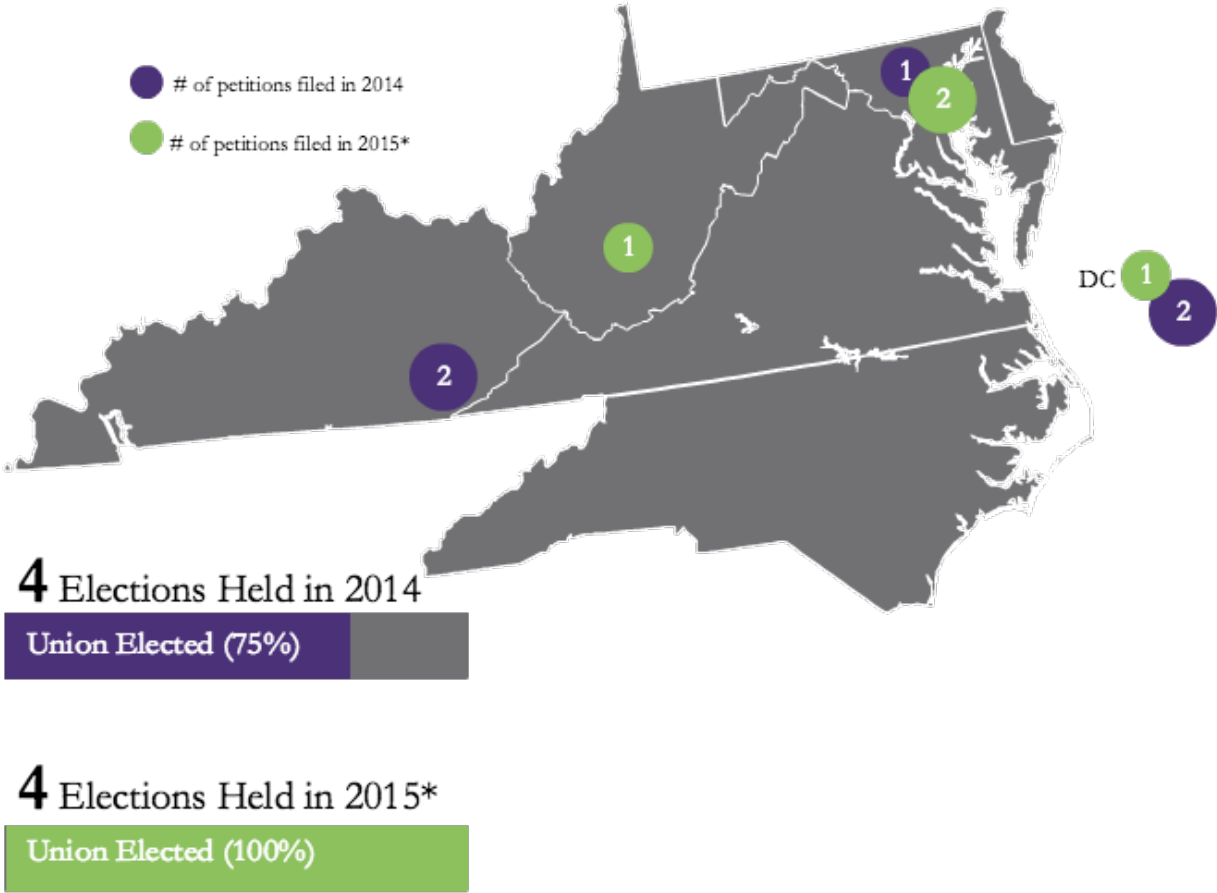
- # of petitions filed in 2014
- # of petitions filed in 2015*



REGION 3

Region 3 sees limited organizing activity; however, of the four petitions filed in the first six months of the year, all four have gone to election, and unions were elected in all of them.

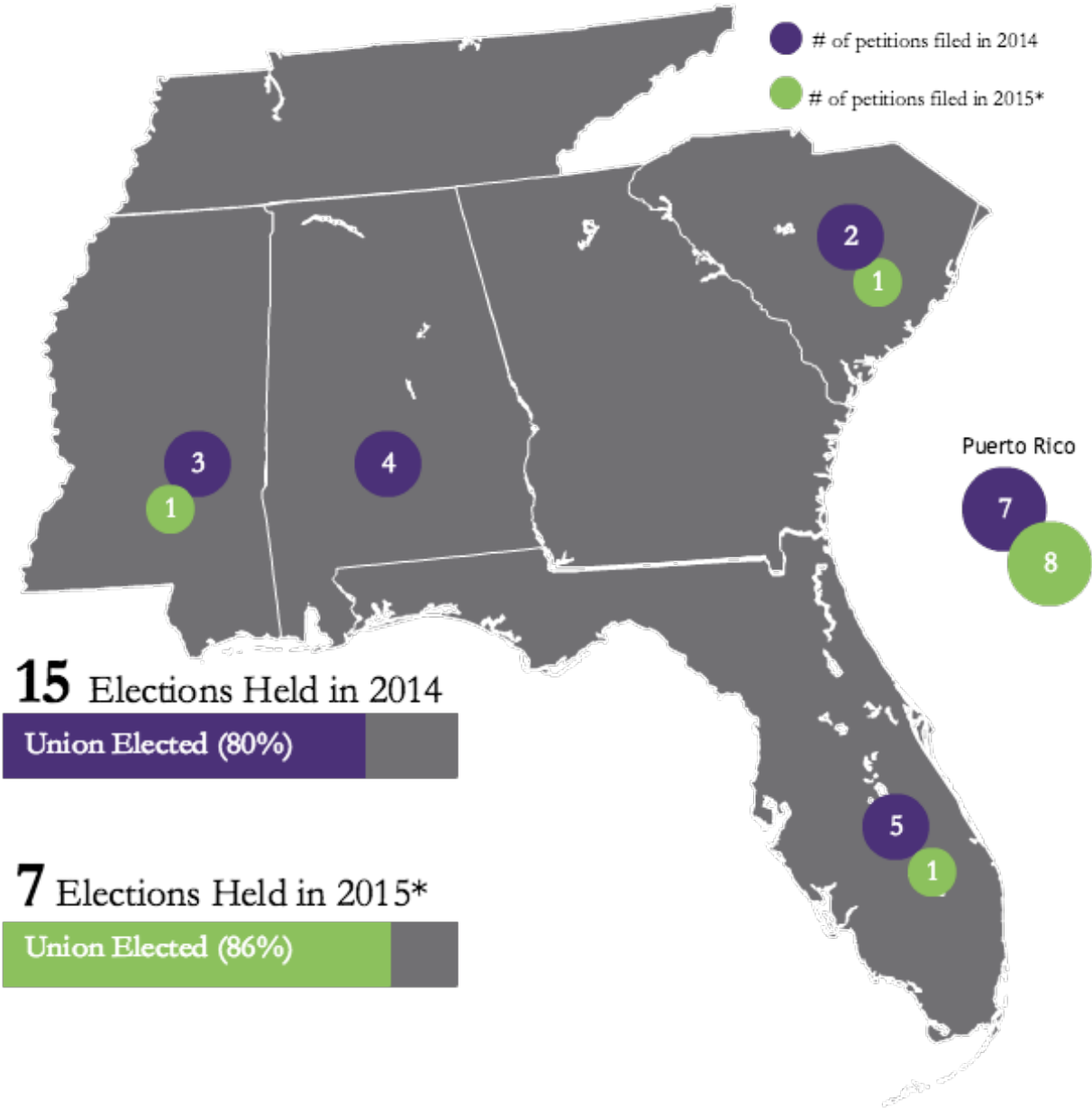
Petitions & Elections



REGION 4

There have been more RC petitions filed in Puerto Rico in the first six months of 2015 than in the entirety of 2014. Of the seven elections held thus far in 2015, unions were elected in 86 percent of them.

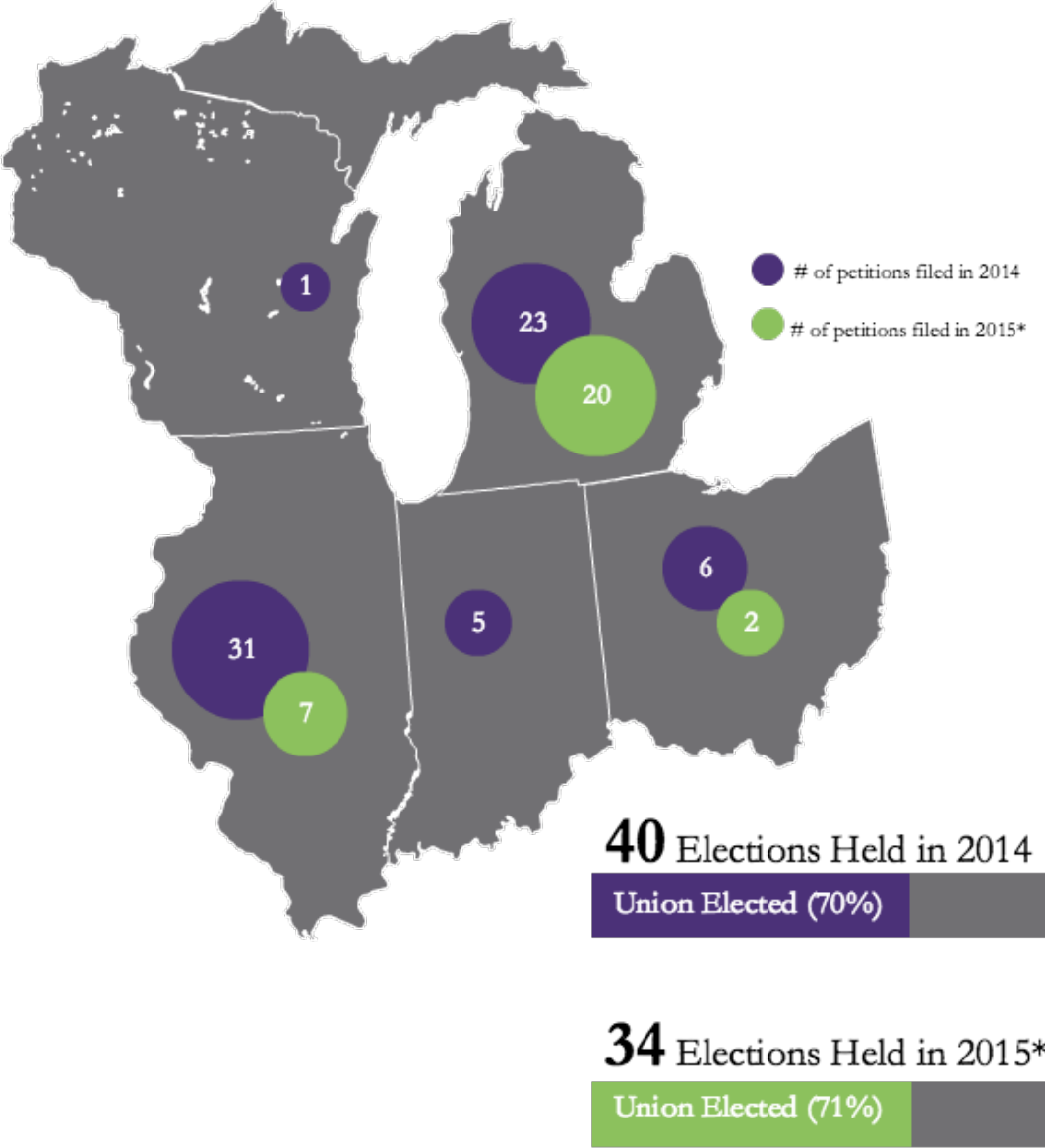
Petitions & Elections



REGION 5

In Region 5, Michigan is on pace to far exceed the number of petitions filed in 2014, while Illinois is on pace to see a significant decrease in the number of petitions. In the first six months of 2015, there were 34 representation elections held, compared to 40 in 2014.

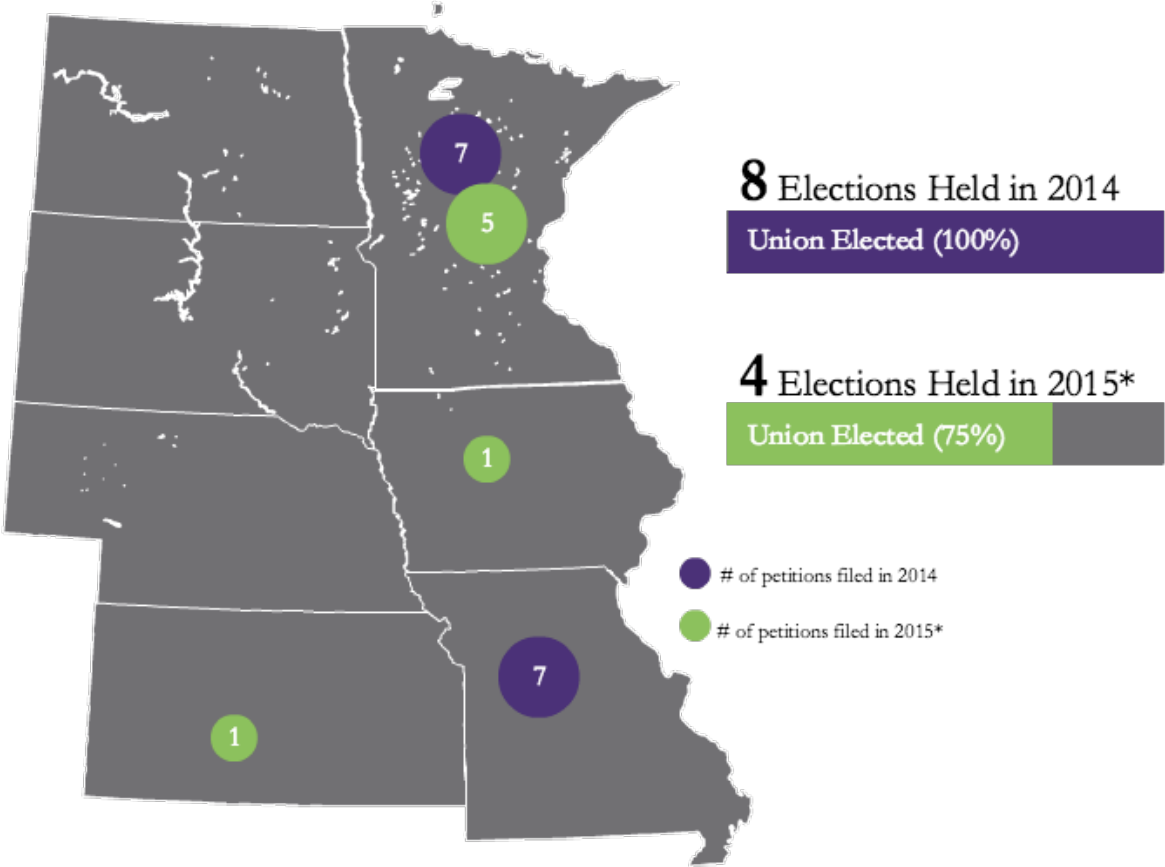
Petitions & Elections



REGION 6

Region 6 is another lower activity region with just four elections held in the first six months of 2015. Unions were elected in 75 percent of those elections.

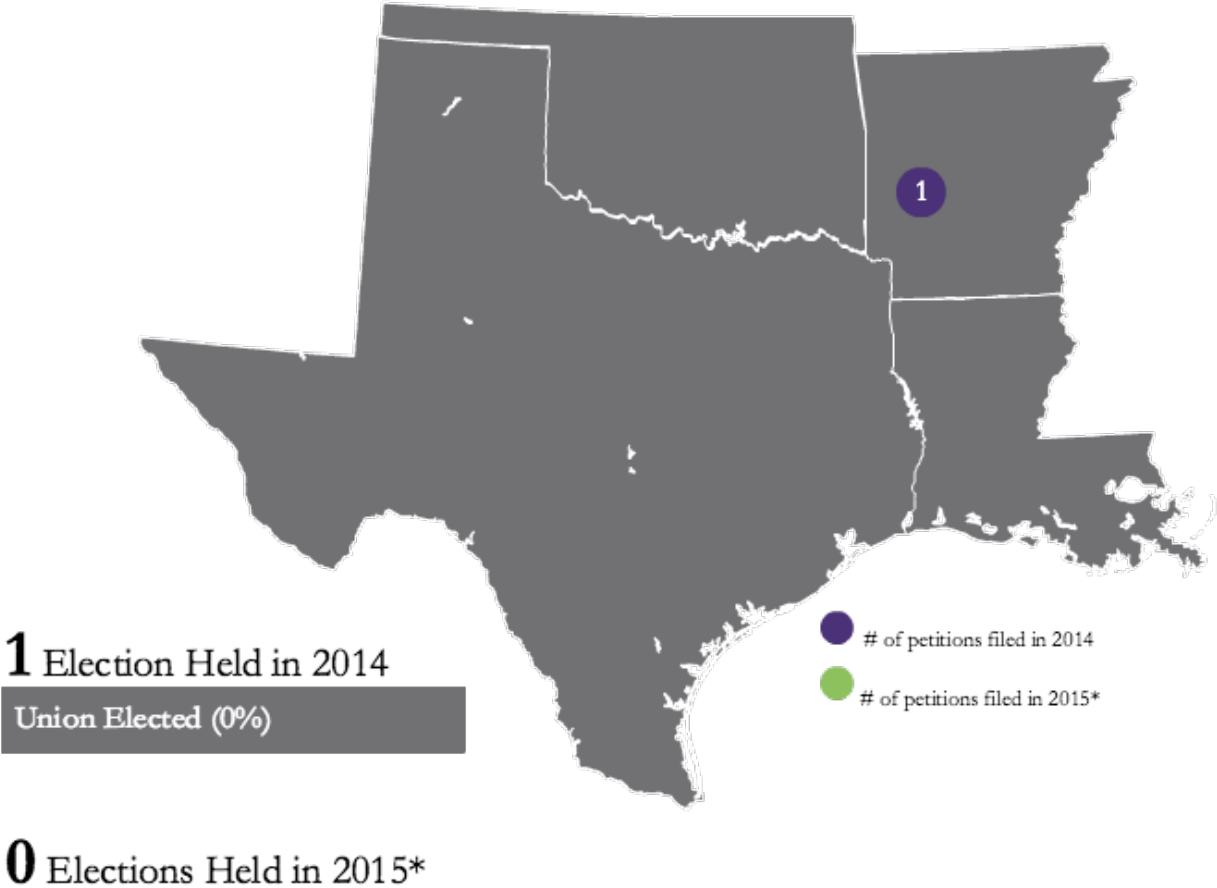
Petitions & Elections



REGION 7

In 2014 and the first six months of 2015 combined, just one representation petition has been filed and one election held, with the union not elected in said election.

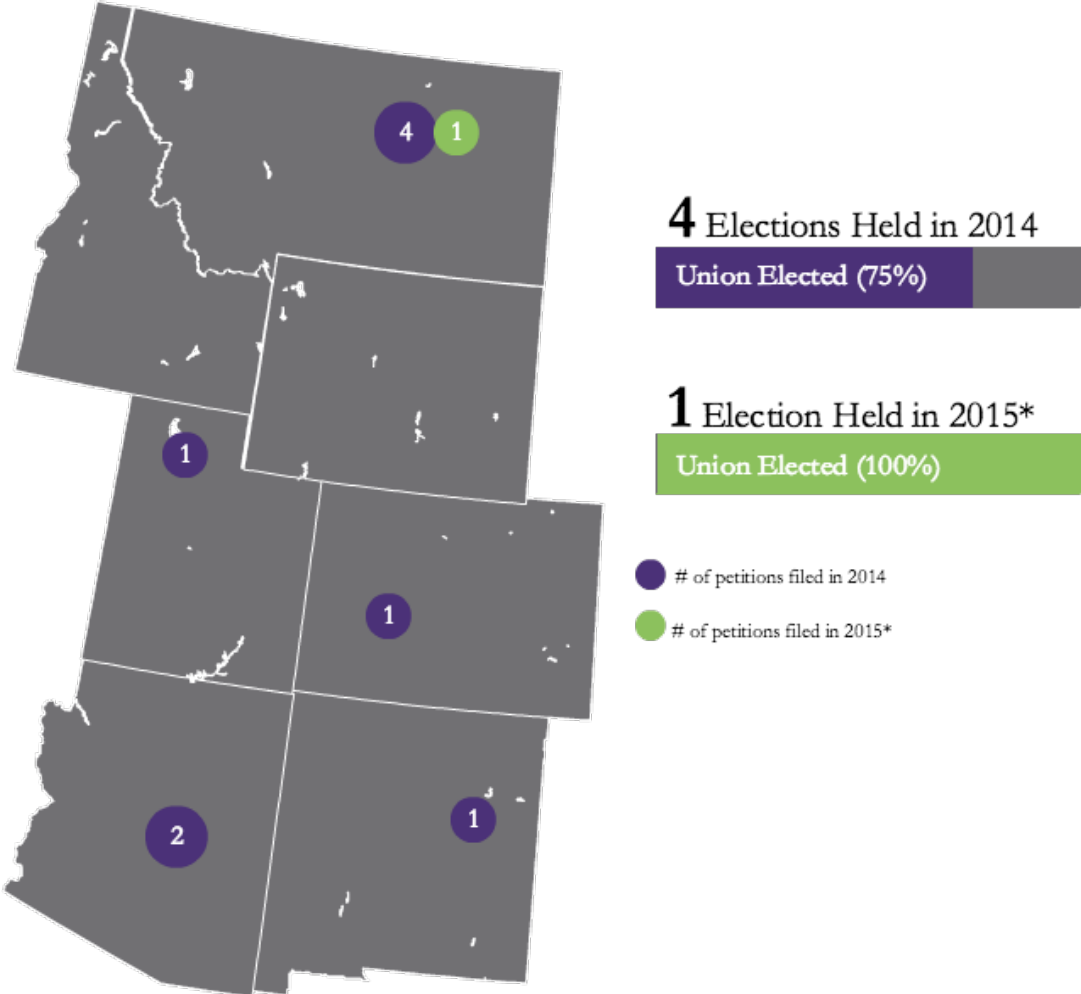
Petitions & Elections



REGION 8

Just one representation petition and one election have been held in the first six months of 2015 in Region 8.

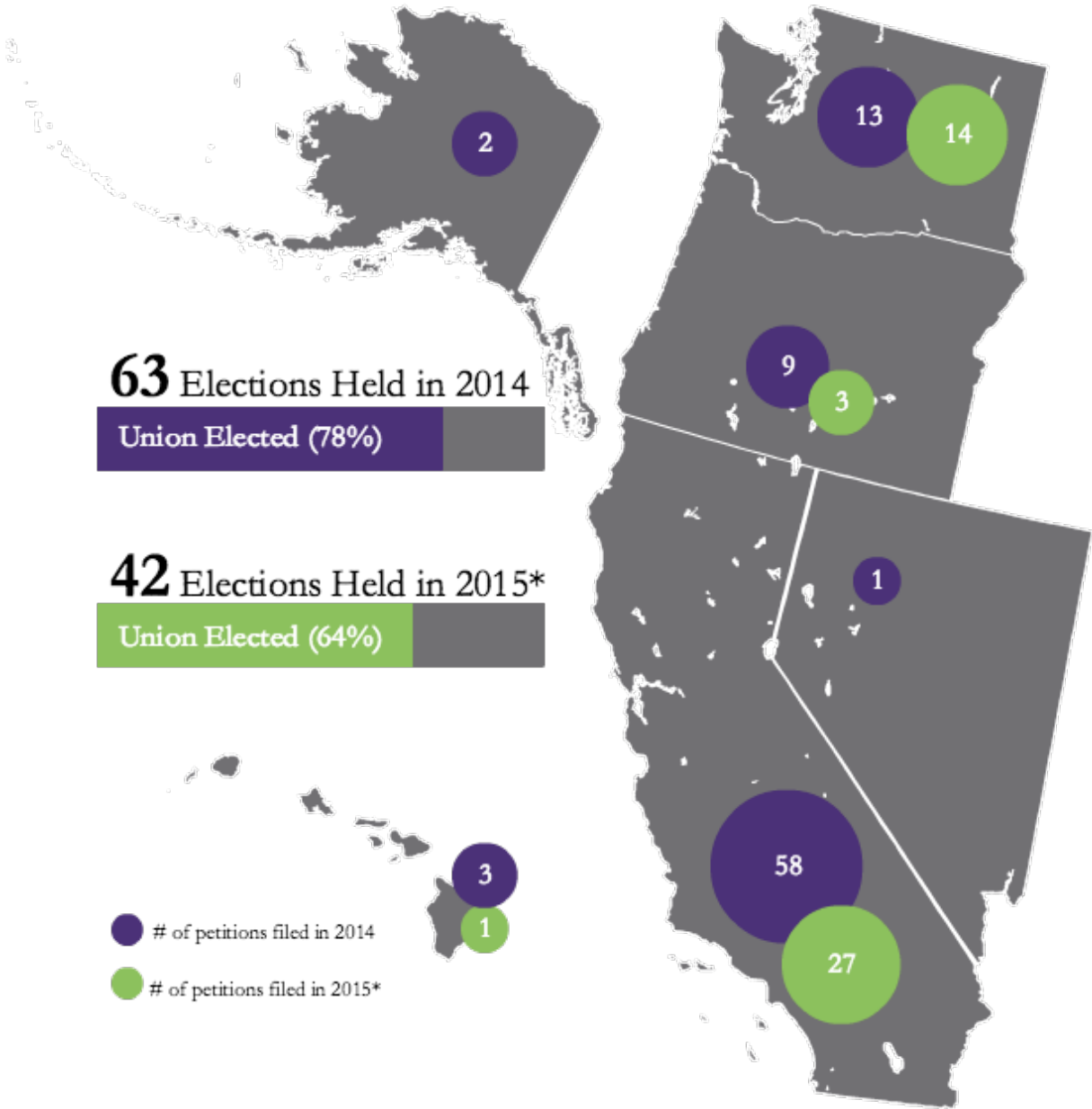
Petitions & Elections



REGION 9

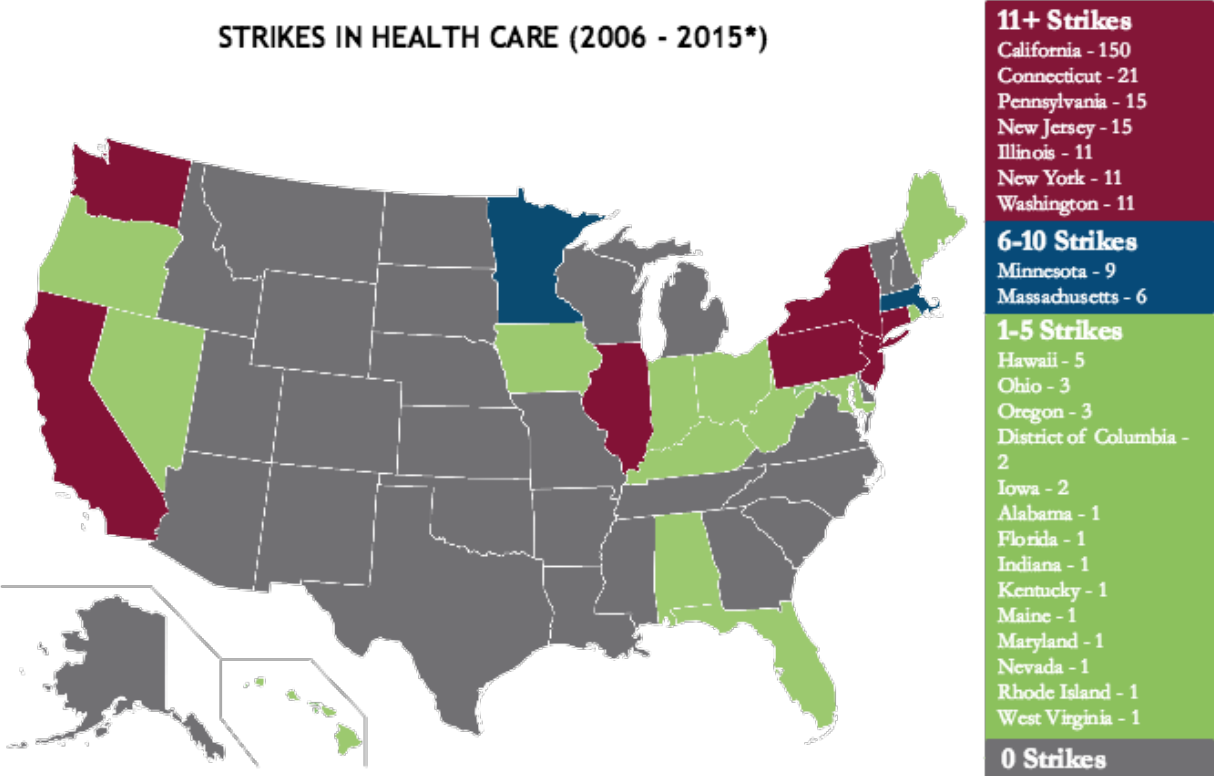
Region 9 is a higher activity region. California typically experiences the largest number of petitions filed. Notably, Washington has had more petitions filed in the first six months of 2015 than in the entirety of 2014.

Petitions & Elections



STRIKES IN HEALTH CARE

The map below illustrates the number of strikes in health care in the United States. Over the past decade there are many states that have never experienced a strike, while others, particularly California, are hot beds for strikes.



STRIKES HELD BY YEAR IN HEALTH CARE

Year	Number of Strikes	Workers Idled	Average Number of Workers per Strike
2015*	14	8,133	581
2014	24	26,182	1,091
2013	23	13,328	579
2012	45	24,104	536
2011	40	24,939	623
2010	23	38,397	1,669
2009	12	2,724	227
2008	27	19,054	706
2007	46	31,376	682
2006	19	6,247	329
2005	30	7,345	245

EXPEDITED ELECTIONS

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

RC PETITIONS FILED

Between April 14 and August 30, 114 RC petitions were filed in the health care industry. This is a 6.6 percent decrease in the number of petitions filed compared to the same time period in 2014.

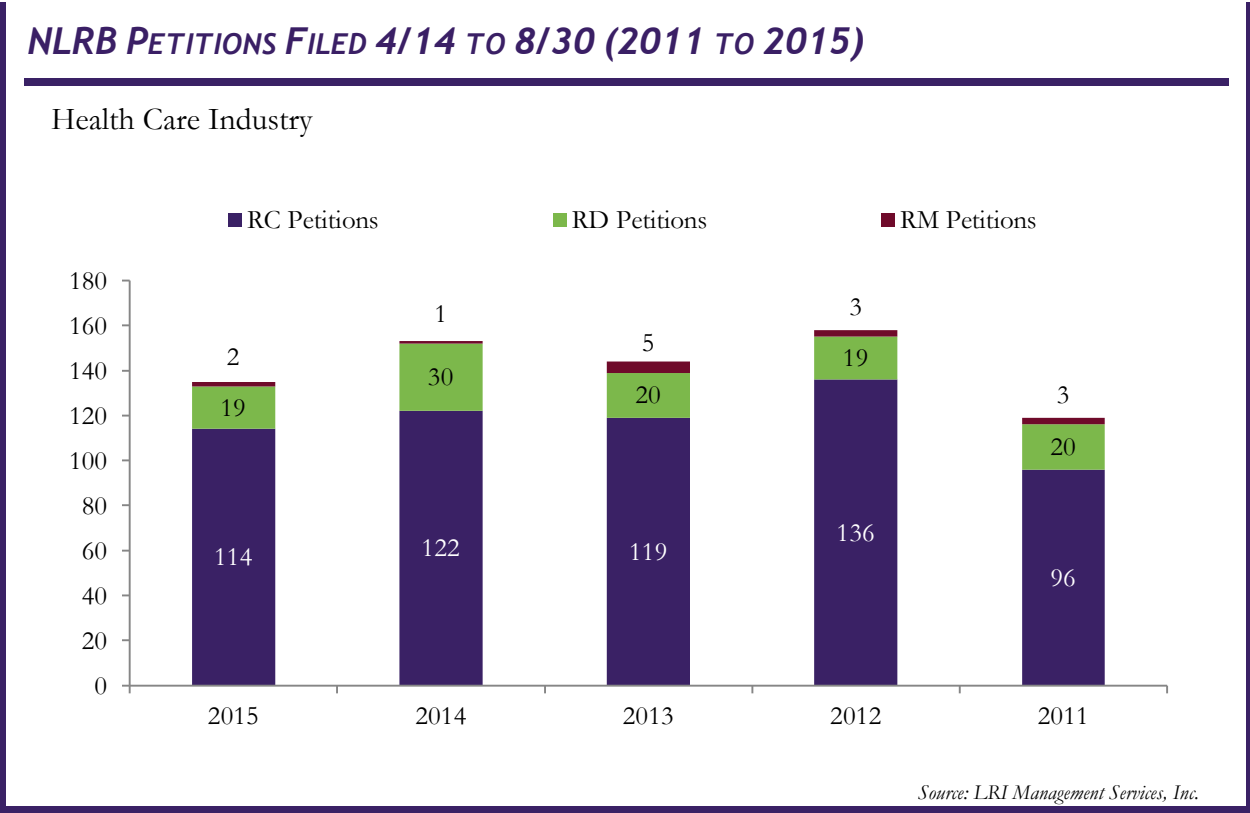
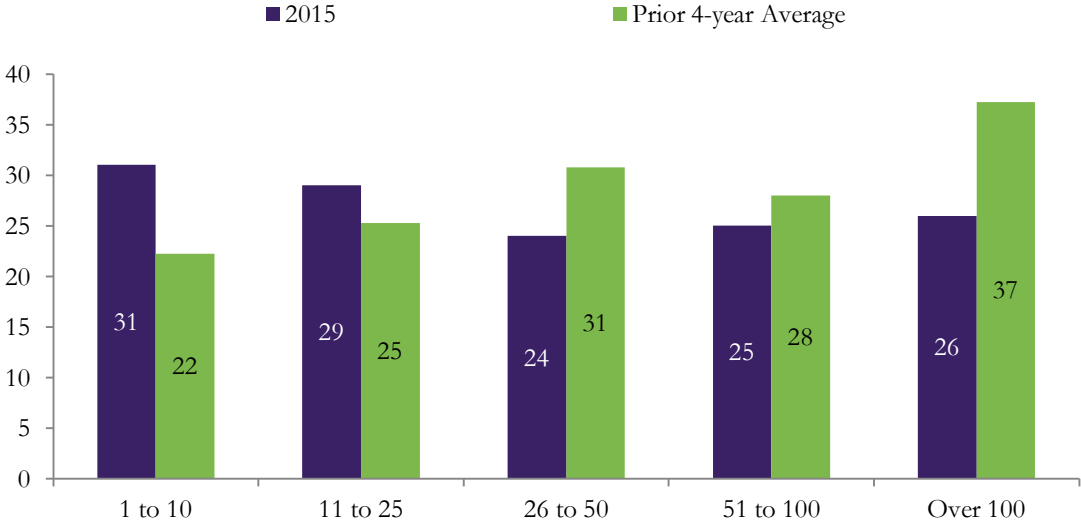


Figure 7

As many expected, the number of small unit elections has increased 41 percent between the ruling and August 30, 2015 compared to the average over the previous four years during the same time frame.

NLRB PETITIONS BY UNIT SIZE, 4/14 TO 8/30 (2011-2015)

Health Care Industry



Source: LRI Management Services, Inc.

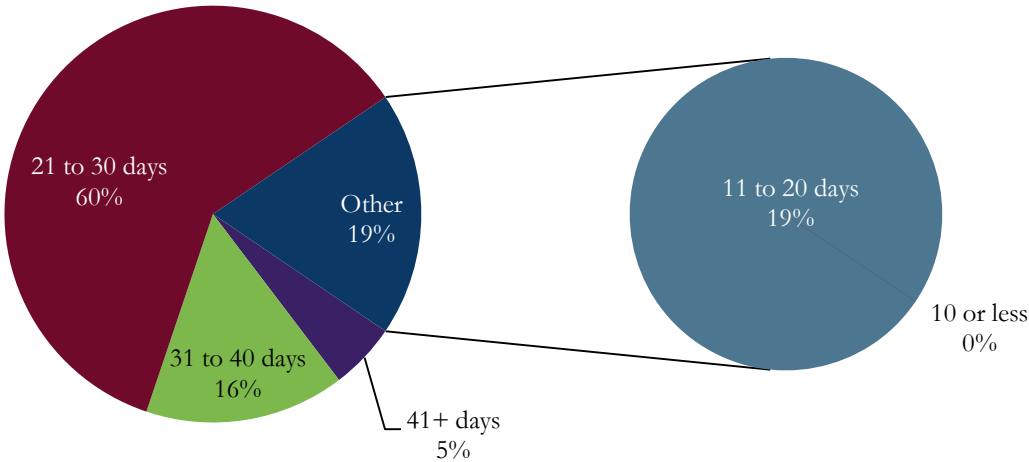
Figure 8

RC ELECTIONS HELD

The average number of days from petition to election post-ruling was down to 26.6 days. The majority of elections were held 21 to 30 days after petition. No elections were held in under 10 days from the date of petition during this period. The rate that unions were elected in RC elections post ruling was 75 percent, compared to 76 percent for the first six months of 2015 and 78 percent in all of 2014.

DAYS FROM NLRB PETITION TO ELECTION

4/14 to 8/30/2015 (n=59 elections) – Health Care Industry



Source: LRI Management Services, Inc.

Figure 9

LABOR LAW/ACTIVITY UPDATE

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

- ***Obama NLRB Redefines “Joint Employer;” General Counsel Approves Electronic Signatures*** by G. Roger King and Robert Moll
- ***The NLRB Establishes a New Standard for Joint-Employer Status: Health Care Providers Beware*** by Mark D. Nelson and W. Andrew Douglass
- ***Will the NLRB Require you to Bargain with Somebody Else’s Employees*** by Frederick L. Warren and Henry F. Warnock
- ***Off-Duty Access and Insignia Policies: What are the Standards Now?*** by Kim Ebert and Sarah Rain

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

OBAMA NLRB REDEFINES “JOINT EMPLOYER;” GENERAL COUNSEL APPROVES ELECTRONIC SIGNATURES

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Abstract:

During the Obama presidency, the National Labor Relations Board and its general counsel have overturned decades of labor precedent and introduced onerous new rules. This article addresses two recent changes that will impact employers and presents recommendations for dealing with them.

NEW JOINT-EMPLOYER STANDARD

The National Labor Relations Board (NLRB) on August 27, 2015, adopted a new standard for determining joint-employer status. The new definition finds that two or more entities are joint employers of a single workforce if:

1. They are both employers within the meaning of the common law;
2. They share or codetermine those matters governing the essential terms and conditions of employment.

The Board’s decision, which was issued on the final day of Republican Member Harry I. Johnson’s term, related to the Browning-Ferris Industries of California, Inc., case. In the decision, the Board states:

We will no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but also exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.

Under the previous decades-old standard, an entity was determined to be joint employer only when it “meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.” In other words, an entity was not

considered a joint employer unless it exerted “direct and immediate” control over working conditions for contract employees.

Under the new test, an entity can be considered a joint employer even if it has only indirect control over working conditions or if it has the right to control certain conditions even if it doesn’t exercise that right.

The 3-2 decision was split along party lines, with Republican Members Johnson and Philip A. Miscimarra dissenting. In their dissent, Johnson and Miscimarra wrote, “The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships.”

The Board majority of three Democrats, however, responded by stating, “Our aim today is to put the Board’s joint-employer standard on a clearer and stronger analytical foundation, and within the limits set out by the National Labor Relations Act, to best serve the federal policy of ‘encouraging the practice and procedure of collective bargaining.’”

EMPLOYER IMPACT

The new joint-employer definition could lead to sweeping changes. For instance, if a union wins an election among employees, the union now has the right to bargain not only with the contractor, but with the employer who engaged the contractor even if it does not actively supervise the contractor’s employees. Additionally, they will share joint liability for any unfair labor practices committed by either company involving those employees.

Health systems and hospitals that engage contractors for nurses, environmental services, food and nutrition services, lab work and other services, could be considered joint employers under the new standard. No longer can they consider themselves removed from contractors’ labor disputes that involve employees who work on their behalf.

This means that if a contractor, such as a staffing agency, that supplies nurses to the “user” hospital becomes unionized, the hospital may have to negotiate with the union that represents the staffing agency’s nurses as would the agency. (The hospital also would have to negotiate its contract with the staffing agency.) Further, unions may now turn their attention to organizing temporary agencies and other contractors as a way to place unionized employees in non-union facilities. What may further complicate matters is if a hospital is unionized and managers have to follow two sets of rules: one set of rules for the hospital’s unionized workforce and a second set for the hospital’s unionized contingent workforce represented perhaps by another union or covered by a different collective bargaining agreement.

Unions see this long-awaited change as an opportunity to grow their member rolls; the new joint-employer standard may make union organizing easier. For instance, during a union campaign to organize contract employees, employers previously could legally terminate the contractor to avoid unionization. (The contractor could not shut down for this reason.) As a joint employer, entities no longer have this option without liability.

During the Obama presidency, the Labor Department and related agencies, including the Occupational Safety and Health Administration (OSHA) and the Wage and Hour Division, have been more closely reviewing employer-employee relationships, and more rigorously

regulating independent contractor classifications. The Board decision also may lead OSHA to expand liability for workplace safety under the Occupational Safety and Health Act and for the Equal Employment Opportunity Commission (EEOC) to assert jurisdiction over user employers in class action suits.

LEGAL CHALLENGES

This decision emanated from an NLRB election, meaning that it only can be reviewed by the federal courts if the union wins the election and the employer refuses to bargain. So even if a union prevails in the NLRA election, it may be some time before a court even reviews this decision. If the union does not prevail, the Browning-Ferris decision will continue to be “the law of the land” until such time as the composition of the Board changes or Congress intervenes legislatively. The International Franchise Association and other trade associations representing employers, including the AHA, are urging Congress to overrule the Board’s decision and convince Congress not to appropriate funds for the Board to apply its new joint-employer doctrine. On October 28, 2015, the House Committee on Education and the Workforce voted to advance a bill (the Protecting Local Business Opportunity Act (H.R. 3459)) that would reverse the Board’s action in the Browning-Ferris decision. Similar legislation has been introduced in the Senate (S.2015).

The NLRB framed its decision in part on broad policy reasons, including the proposition that federal labor law has not kept up with changes in the labor market, which increasingly relies on contingent employees. The Board wrote, “If the current joint-employer standard is narrower than statutorily necessary and if joint-employment arrangements are increasing, the risk is increased that the board is failing in what the Supreme Court has described as the board’s ‘responsibility to adapt the (National Labor Relations Act) to the changing patterns of industrial life.’”

The NLRB majority cited a “dramatic growth in contingent employment relationships (that) potentially undermines the core protections of the (National Labor Relations Act) for the employees impacted by these economic changes.” Employers increasingly have been using temporary contract workers to provide staffing flexibility and for non-core services that can be more effectively and efficiently operated by subcontractors that specialize in those service lines.

More than 2.87 million American workers were employed through temporary staffing agencies through August 2014, according to the NLRB, and nine percent (9%) of them worked in health care.

RECOMMENDATIONS

The NLRB will look closely at the relationship between the primary employer and contractor to determine whether the user and supplier employers “share or codetermine those matters governing the essential terms and conditions of employment.” The Board will consider three points: direct control, indirect control and potential future control.

With this in mind, employers should consider the following options:

1. User employers should write a “hold harmless clause” into contracts with supplier employers related to NLRB unfair labor practice or representation issues requiring that

the supplier employer reimburse the user employer for all expenses related to NLRB issues.

2. User employers also should verify that their supplier employers have established separate employment terms and conditions for employees and have separate employment policies and a separate employee handbook.
3. User employers should develop and document a distinction between the work and payment structure its employees perform versus that of the supplier employer's employees who are assigned to the user employer's workplace.
4. User employers should take a census of what supplier contractors they are currently engaged with to determine whether they have a unionized workforce and to assess risk as to whether they, as a user employer, could become embroiled in any labor issues between the supplier contractor and the unions that represent its employees.
5. User employers should regularly monitor the supplier employer to learn whether any organizing activity is occurring among its employees and whether those employees are working for the user employer.
6. User employers should regularly review all so-called independent contractor relationships to examine the terms and conditions of those relationships in light of this new decision and where necessary modify the contractual arrangements with suppliers to avoid to the extent possible being found to be a joint employer.

ELECTRONIC SIGNATURES

A week after the Board announced an updated joint-employer standard, the NLRB's General Counsel Richard Griffin issued a guidance memorandum approving the immediate use of electronic signatures to support a showing of interest.

"The Board's traditional procedures have met the test of time and applying them to electronic signatures will not pose either significant costs or risks to the public or to the Agency," the general counsel wrote. The memo outlines "Requirements for Acceptance of Electronic Signatures," which include the signer's name, email address or social media account, telephone number, the language to which the signer has agreed, the date of the electronic signature and the name of the signatory's employer.

The petitioner must declare what electronic signature technology was used and the controls it used to ensure the signature is valid and that the signatory's saw the language to which he/she has agreed.

Certainly, there will be legitimate concerns about fraudulent signatures or employees being coerced or harassed to sign – just as there are today with union authorization cards and petitions. The general counsel does not directly address these concerns, but does state in the memo that he thinks the new requirements for electronic signatures are "more stringent than what is currently required for non-electronic signatures." He also noted that parties will not be required to submit electronic signatures in support of their showing of interest and are permitted to submit paper-based signatures. Alarming, the new process permits parties to collect signatures through email and websites.

Coupled with the NLRB's Purple Communications decision allowing employees to organize using employers' email systems and new expedited election rules, it is even more important for employers to quickly address early warning signs of union activity and prepare proactive readiness plans should a union file a petition to represent their employees.

THE NLRB ESTABLISHES A NEW STANDARD FOR JOINT-EMPLOYER STATUS: HEALTH CARE PROVIDERS BEWARE

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Abstract:

This article discusses the National Labor Relations Board's recent joint employer decision. It also provides suggestions for health care employers about how to assess and mitigate the risk of becoming entangled in contractors' labor matters and the associated costs.

Once again, the National Labor Relations Board (NLRB) has reversed decades of well-settled law in a ruling that will not be favorable to employers – particularly those employers that depend on flexibility for labor and employment support through their contractual arrangements with staffing companies. In *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), the Board majority (a 3-2 decision) changes and expands the definition of whether a company is considered a joint employer.

This decision burdens countless employers with new labor and benefit plan obligations and liability exposure that did not previously exist. There is little doubt that it will impact many arrangements in which one entity contracts with another entity to perform certain work, such as a hospital contracting for its food service or environmental service operations. It may also affect arrangements between two separately operated entities that are part of a broader corporate structure. Because staffing employees will now be emboldened to seek additional rights from joint employers (including additional compensation and benefits), health care employers should review and revise their policies and procedures to mitigate the negative impact of the *Browning-Ferris* decision.

THE STANDARD BEFORE BROWNING-FERRIS

Before *Browning-Ferris*, a joint employer relationship existed when one employer contracted with an independent entity, and retained control over the “essential terms and conditions of employment.” The focus was on whether the alleged joint employer “meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision

and direction.” Subsequently, the Board refined the test to examine whether the alleged joint employer had “direct and immediate” control over employment matters and actually exercised control.

THE NEW STANDARD

The Board majority created a new standard that differs from the prior standard in two significant ways. First, the majority abandoned the requirement that the alleged joint employer possesses and directly and immediately exercises its authority over essential terms and conditions of employment. Second, the new standard allows the Board to consider an extensive list of factors to find that a joint employment relationship exists. Shared decision-making, where both entities confer or collaborate to set a term or condition of employment (multiple entities are possible under the new standard), can create a joint employer relationship. In another situation, two entities could be joint employers because they exercise comprehensive control over separate terms and conditions – one employer sets wages and hours and the other assigns and supervises the work. In still another structure, two employers may affect different components of the same term, such as where one employer defines and assigns tasks while the other supervises how the tasks are carried out. Under the new standard, it is enough if one entity retains the contractual right to set a term or condition of employment even if it never exercises that right.

THE IMPACT ON HEALTH CARE EMPLOYERS

The majority’s decision reveals its dislike of the use of staffing and subcontracting arrangements, as well as for contingent workforces. The new standard, which is both broad and vague, is destined to result in unpredictable outcomes, which employers loath. Now, entities that use another independent business to get work done face the very real risk that they will be deemed to be a joint employer of the independent business’ workers.

Health care employers that use outside workers to get certain jobs done – information technology, billing, help desk, maintenance, food service, security, environmental services, third-party benefits administration, etc. – might now be joint employers of the supplied workers. It is not uncommon in these types of arrangements for the employer to reserve certain rights with respect to the work being done and/or the site where it is being done. Now, however, that reservation of control over some aspect of the work or of its property can be enough to make it a joint employer, regardless of whether it has or likely will exercise the control.

The two dissenting Board members observed that this new standard will lead to unstable bargaining relationships; imagine a contract negotiation with multiple joint employers at the negotiating table with each one bargaining over the term(s) and condition(s) that it could control.

Another disruptive effect of the new standard is that joint employers can become enmeshed in labor disputes of the other joint employer. Previously, a primary employer was protected from secondary picketing and other threats, coercion, or restraints aimed at forcing it to quit doing business with its contracted service provider. If the primary employer is a joint employer under the new standard, it loses its protection against these types of labor tactics. The Browning-Ferris decision will also require a detailed review of the various employee

benefit arrangements that health care employers offer to their employees. While many plan documents are drafted to include specific language that limits the retroactive impact of providing benefits to an individual later classified as an “employee” of the employer, the prospective impact of the Browning-Ferris decision could still be severe. If a health care employer is held to be a joint employer, the staffing employees may seek eligibility under the benefit plans offered by the health care system, which are likely to be far more generous than those offered by the staffing company. As a result, an employer may face increased compensation and benefit costs for these employees, as well as additional tax and other government reporting obligations.

Specifically, the inclusion of staffing employees under the employer’s benefit plans may impact the employer’s compliance strategies for providing health care benefits to its employees under the Affordable Care Act, as well as its discrimination testing methods used for any 401(k) and other tax-qualified retirement plans offered to its employees. In light of the magnitudes of potential penalties and negative tax outcomes associated with these IRS rules, employers would be well served to review their benefit and compensation plans now to address any significant compliance risks.

What should health care employers do? An analysis of all contracted service agreements is imperative to determine whether the right to control or influence the employment terms and conditions of the service employees has been reserved. In addition, if corporately related entities have an arrangement to share or use employees between them, such as IT support, a joint employer relationship may exist. If joint employer relationships are identified, a comprehensive assessment of the strategies for and feasibility of eliminating the joint employer relationship should be developed. Employers may also want to assess the union vulnerability of entities that it selects to provide contracted services. Finally, health care employers should review the terms of their employee benefit arrangements and consider modifications to limit any negative impact that the inclusion of any staffing employees may have on their plans.

WILL THE NLRB REQUIRE YOU TO BARGAIN WITH SOMEBODY ELSE'S EMPLOYEES?

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Abstract:

The National Labor Relations Board decision in *Browning-Ferris Industries* on August 27, 2015, substantially changed and expanded the joint-employer standard under the National Labor Relations Act. This article analyzes the decision and its potential impact on business relationships.

On August 27, 2015, the National Labor Relations Board (NLRB or Board) issued its long-awaited decision in *Browning-Ferris Industries (BFI)*.¹ The Board's decision substantially changes and expands the standard for finding that a joint-employer relationship exists under the National Labor Relations Act (NLRA). Under the new standard, a joint-employer relationship will be found if the alleged joint employer possesses, exercises or simply retains the right, directly or indirectly, to control essential terms and conditions of employment, even if that control is not exercised.

Health care companies, like many other businesses, often contract with other companies to provide labor. Common examples include outsourcing billing and administrative support, subcontracting housekeeping services, contract nursing and using a third party to provide laboratory services. In light of the *BFI* decision, healthcare companies that rely upon other entities to provide workers should evaluate their relationship with those businesses.

¹ *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recycling, and FPR-II, LCC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner*, 362 NLRB No. 186 (August 27, 2015).

CONTEXT OF BFI DECISION

Although *BFI* included complex legal analysis, the case was decided along political lines. Three Democrats supported the new standard. Two Republicans opposed the new standard and accused the majority of overstepping the Board's authority. The decision can be viewed as part of a larger effort by the Obama administration to raise wages and create conditions to promote increased unionization. The decision is only the most recent move by the NLRB to advance these objectives.

The NLRB recently implemented changes in union election rules that will make it easier for unions to win elections. The Department of Labor's Wage and Hour Division has proposed new regulations for the white-collar exemption from overtime requirements under the Fair Labor Standards Act (FLSA) to make more people eligible for overtime. The Wage and Hour Division also issued a new guidance on independent contractors, arguing that most workers are employees under the FLSA's broad definitions.

BACKGROUND

BFI owns and operates the Newby Island recycling facility. The facility receives and processes approximately 1,200 tons of materials each day. An essential part of operations is sorting these materials into separate commodities that are sold to other businesses at the end of the recycling process.

BFI directly employed 60 people at the facility in positions such as loader and forklift operators. These individuals mainly worked outside the facility and were responsible for moving materials outside the facility so that they could be sorted inside the facility. These employees were part of an existing unit represented by a local chapter of the International Brotherhood of Teamsters union.

The interior of the Newby Island facility has four conveyer belts called "streams," which run one of four materials: residential mixed recyclables, commercial mixed recyclables, dry waste products or wet waste products. Workers stand on platforms beside these streams and sort through the materials. Pursuant to a temporary services agreement between BFI and Leadpoint Business Services, Leadpoint provides approximately 240 workers to the Newby Island facility. Those workers were employed as sorters, screen cleaners and housekeepers. The Teamsters union filed a petition to represent the 240 Leadpoint employees. In this petition the union alleged that BFI was a joint employer of these workers.

NEW STANDARD ANNOUNCED

The previous test had been whether two entities share the ability to *directly and immediately* control or determine essential terms and conditions of employment such as hiring, discipline, termination, suspension and direction.

Citing the significant expansion in the diversity of workplace arrangements in today's economy and that the Board's joint-employer jurisprudence is increasingly out of step with changing economic circumstances, the NLRB created a new standard. The new standard is: Two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating whether an

employee possesses sufficient control over employees to qualify as a joint employer, the Board will – among other factors – consider whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so.

APPLICATION OF NEW STANDARD

After announcing the new standard, the Board analyzed whether BFI possessed, exercised or *simply retained* the right, directly or *indirectly*, to control essential terms and conditions of employment for Leadpoint employees. Essential terms and conditions include well-known factors such as hiring, firing, issuing discipline, supervising and directing employees. However, the Board also stressed the importance of analyzing other terms and conditions such as determining the number of workers to be supplied, controlling scheduling, determining seniority, setting overtime, assigning work, and determining manner and method of performance.

Applying the new standard, the NLRB ruled that BFI is an employer under common-law principles and that it shares or codetermines matters governing the essential terms and conditions of employment for Leadpoint’s employees, stating: “In many relevant respects, [BFI]’s right to control is indisputable. Moreover, it has exercised that control, both directly and indirectly.”

In reaching this decision, the Board noted that BFI imposed conditions on hiring and firing employees. While BFI was not involved in day-to-day decisions regarding hiring, firing and discipline, the temporary services agreement required Leadpoint workers to “meet or exceed” BFI’s own selection standards and tests, required drug testing, and prohibited Leadpoint from assigning workers to BFI who were previously employed by BFI and ineligible for rehire by BFI. The agreement further specified that BFI retained the right to reject any worker “for any or no reason” and to “discontinue the use of any personnel.”

The Board also found that BFI was involved, directly and indirectly, in assigning work to Leadpoint employees. BFI directly controlled the speed for the stream of materials that were sorted by Leadpoint workers and BFI supervisors spoke with Leadpoint workers about productivity, customer complaints, business objectives and preferred work practices. The Board found that BFI indirectly assigned Leadpoint employees specific tasks that needed completing, such as which machines to clean on a specified shift, and dictated where workers should be located along the streams. Further, the agreement required Leadpoint employees to comply with BFI’s safety policy.

The Board also found that BFI indirectly controlled the shifts worked by Leadpoint employees. Although BFI did not determine which employees worked which shifts, the streams to which each employee was assigned, or which employees worked overtime, BFI determined the number of employees assigned to each stream, the starting and ending time of shifts and when overtime was necessary.

The Board also relied upon BFI’s involvement in setting wages for Leadpoint employees. BFI set wage limits by prohibiting Leadpoint from paying employees more than BFI employees performing similar tasks. BFI also paid Leadpoint based on a “cost-plus” model in which it paid Leadpoint for each hour that a Leadpoint employee worked, plus a

premium. However, Leadpoint determined employees' pay rates, administered all payments, retained payroll records and administered benefits.

IMPLICATIONS FOR BFI AND OTHER EMPLOYERS

As a result of the Board's decision, BFI was considered a joint employer of the Leadpoint workers at its Newby Island facility. A majority of the employees in that unit voted to be represented by the union and BFI (and Leadpoint) will be required to bargain with the union over the terms and conditions of employment for the Leadpoint workers. BFI cannot immediately appeal the Board's decision. However, BFI may refuse to bargain, have the NLRB find that it has committed an unfair labor practice and then appeal that decision to a federal court of appeals. The appeals process could take a year or longer.

By its terms, *BFI* is limited to the specific user-supplier relationship presented before the Board. However, as noted by the dissent in *BFI*, the NLRB has maintained a uniform joint-employer test for all types of employer relationships, and predicts that "the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor and contractor-consumer business relationships" under the NLRA.

The majority rejected the dissenters' criticism that the new standard fundamentally alters the law regarding various legal relationships between different entities. The majority said that all of those situations were not before the NLRB. In particular, the Board stated that none of the particularized features of franchisor/franchisee relationships were present in the case. Only the specific user-supplier relationship between BFI and Leadpoint was at issue. Further, the majority noted that joint-employer determinations are fact specific and must be determined on a case-by-case basis. There is now a single new test, and it likely will be applied to all the business relationships listed by the dissent.

On September 9, 2015, legislation was introduced in the House and Senate to undo the *BFI* decision. Under the proposed Protecting Local Business Opportunity Act, the NLRA would be amended to state: "two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct and immediate." The legislation faces an uncertain future in the Senate where Democrats likely will filibuster it. If Congress passes the legislation, it would face a near certain veto by President Obama.

Unless and until the *BFI* decision is overturned, the NLRB will apply this new test to joint-employer issues in matters before the NLRB such as union elections and unfair labor practice charges. Furthermore, the NLRB has applied the *BFI* decision retroactively, which means it is applicable to all charges and cases currently before the Board. In the meantime, companies with workforce arrangements would be wise to analyze those agreements to assess not only whether a company directly controls workers employed by another entity, but whether the company *retains* the ability to directly *or indirectly* control those individuals' terms and conditions of employment. The Board can and will analyze documents such as service agreements, handbooks, employment policies, and labor budgets to determine whether a company exercises control over terms and conditions of employment.

EMPLOYERS' BOTTOM LINE

The outer limits of the expansiveness of the NLRB's new joint-employer standard will be determined on a case-by-case basis. Businesses should evaluate their other business relationships and review related documents. Employers that want to avoid a joint-employer finding should ensure that they do not directly or indirectly control or have the right to control essential terms and conditions of employment.

OFF-DUTY ACCESS AND INSIGNIA POLICIES: WHAT ARE THE STANDARDS NOW?

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Abstract:

Given the National Labor Relations Board's ever-changing position on employer policies, it can be difficult for employers to keep up with what's permissible. This article addresses pitfalls to avoid when creating and enforcing policies related to insignia in patient care areas and off-duty access.

In its increasing push to aid unions with their organizing efforts, the National Labor Relations Board ("the Board") has permitted union campaigns in hospitals to become more visible and has given unions greater access to employees. While previously union campaigns took place in non-patient areas, the line between permissible action in patient care areas and non-patient care areas is blurring. In recent decisions, the Board has departed from its established precedent in an effort to ease the organizing process for unions while increasing the challenges faced by employers. As discussed below, while the Board's efforts to increase union visibility in hospitals may have backfired by encouraging bans of all insignia, it has recently eased, or perhaps just confused, what is acceptable with respect to an employer's right to restrict off-duty access to employees (including those engaged in union organizing activities).

UNION INSIGNIA

The previous, long-standing standard for restricting union insignia in hospitals was fairly simple – a restriction on wearing union insignia was presumptively valid in patient care areas, and presumptively invalid in non-patient care areas absent an employer establishing special circumstances justifying such a ban.

With its decision in *HealthBridge Management, LLC*, 360 NLRB No. 118 (2014), the Board expanded the presumption of *invalidity* to encompass those instances in which an employer has a selective ban that encompasses only certain union insignia in patient care areas. If an

employer bans only certain (and perhaps more distracting) insignia, an employer must establish special circumstances warranting such a ban.

In *HealthBridge*, the hospital prohibited employees from wearing stickers decrying the hospital had been “busted” by the Board for committing unfair labor practices in patient care areas while permitting other types of insignia. In support of its “special circumstances” to justify a ban, the hospital argued that the “busted” stickers would upset patients. The Board rejected this assertion, finding that the hospital’s “generalized speculation or subjective belief about the potential disturbance of patients or disruption of operations fails to establish special circumstances.” Instead, the Board indicated that a hospital should demonstrate specific experiences with a patient, family member or employee necessitating a ban or specific evidence of harm or likelihood of harm to patients.

Under these standards, if an employer prohibits only specific types of union insignia that may be more distracting or disruptive, it will have to demonstrate that this ban was necessary to avoid disruption of its operations or disturbance to patients. Based on this flawed rationale, an employer may be better served by prohibiting all insignia in patient care areas, regardless of how disruptive the insignia may be or the nature of the insignia. If an employer instead decides to permit *some* but not all insignia, it would be held to stringent standards for justifying actions. To establish a special circumstance, the employer would then have to show specific evidence of harm or a likelihood of future harm caused by the insignia. On the other hand, if it bans *all* insignia, such a ban is presumptively valid and an employer does not need to establish any justification for such ban.

In its efforts to pave the way for easier union organizing, the Board may have mis-stepped as now hospitals may be more likely to prohibit all union (and non-union) insignia in patient care areas rather than only insignia that may cause a greater disturbance to patients and staff. Because a hospital does not have to justify a total ban, it may make hospital employers less accommodating in their rules regarding union insignia including pins, buttons and lanyards in patient care areas.

This is likely not the Board’s intended consequence; however, due to the practicalities involved in establishing “special circumstances,” it may be more feasible to merely prohibit all insignia – even if this means banning hospital-related insignia or insignia received from vendors. If a total ban is implemented, hospitals must then ensure that the ban is uniformly enforced and that employees are not permitted to wear non-union insignia (i.e. sports team lanyards) in violation of policy. Inconsistent enforcement of the policy may result in an unfair labor practice charge alleging disparate enforcement of the policy.

OFF-DUTY ACCESS

In another move to ease union organizing in hospitals, the Board has increasingly lessened a hospital’s ability to restrict employees’ off-duty access to interior areas of the hospital. In recent years, the Board repeatedly has subjected employers’ policies on off-duty access to close scrutiny and hospitals have been no exception. Hospitals have a variety of reasons for permitting employees to have off-duty access that do not exist in a traditional manufacturing environment. The nature of the hospital business is that employees may be on the premises for reasons other than work such as receiving medical care or visiting a patient. For these reasons, hospitals cannot prohibit all off-duty access but still must maintain some control

over the activities taking place in interior spaces. Given these considerations, recent Board decisions address what limitation is permissible in the hospital context.

Under established Board precedent, an employer can deny off-duty access if: (1) the restriction is limited to the interior of the employer's premises; (2) the rule is clearly disseminated to all employees; and (3) it applies to off-duty employees seeking access for any purpose, not just union activity. If an employer prohibits off-duty access to outside working areas, an employer must demonstrate a business reason justification.

In 2011, in *St. John's Health Center*, 357 NLRB No. 170 (2011), the Board invalidated a hospital's off-duty access policy that permitted employees to come onto hospital property "to attend Health center [sic] sponsored events, such as retirement parties and baby showers." While the hospital was attempting to allow employees to participate in social activities with their colleagues, even while off-duty, the Board found that the exception for employer-sponsored activities was not narrowly tailored as to justify "special circumstances." Such an exception was equated to the hospital "telling its employees, you may not enter the premises after your shift except when we say you can." The Board then noted that the hospital would have been better off banning off-duty access in its entirety rather than permitting some access. In light of this rationale, employers who were attempting to balance employee interests with their own needs may have been placed in a precarious spot as they were required to take an all or nothing approach to access.

Recently, in its decision in *Sodexo America*, 361 NLRB No. 97 (2014), the Board found lawful a hospital's off-duty access policy that prohibited all off-duty access to the interior of the hospital "except to visit a patient, receive medical treatment or to conduct hospital-related business. . . . Hospital-related business is defined as the pursuit of the employee's normal duties as specifically directed by management." The Board's rationale permitting access for patient visits and medical treatment was straight-forward:

Off-duty employees entering the hospital under either of these circumstances must do so using public entrances, and must sign in like any other visitor or undergo the admitting process like any other patient. Their purposes for entering the hospital are unrelated to their employment; they seek access not as employees, but as members of the public, and access is granted or denied on the same basis and under the same procedures as for the public. We decline as a matter of policy to require that health care employers limit their employees' access to medical care, or to friends and family members receiving medical care, in order to comply with [the Board's] requirements.

With respect to the policy provision allowing access "to conduct hospital-related business," the Board held that "this provision is not really an exception at all, but a clarification that employees who are not on their regular shifts, but are nevertheless performing their duties as employees under the direction of management, may access the facility." The Board clarified that while the employees were off-duty as defined by the policy, they are on duty under the term's ordinary meaning.

Trying to balance the holdings of *St. John's Health Center* and *Sodexo America* may seem difficult as both policies appear to allow non-care related access only as management directs; however, under the rationale of *Sodexo America*, the Board relied on the definition of

“hospital-related business” to find that this was narrowly tailored to in fact include only work, unlike the company sponsored events at issue in *St. John’s* that could have run the gamut on activity type. In *Sodexo America*, the Board even opined that the lawful policy differed from that in *St. John’s Hospital Center* because under the policy in *Sodexo America*, employees would consider themselves to be on duty.

Hospitals must be careful in drafting any access policies to protect both their interests in maintaining order and control and employees’ rights to access the facility while not discriminating against union activity. Under the rationale in *Sodexo America*, if an employer permits employees to return while off-duty, but otherwise completing work as directed by management, a hospital may not run afoul of the National Labor Relations Act to the extent these activities are “on-duty” under the term’s normal meaning. Including in the policy the carefully-drafted definition of “hospital-related business” would aid the defense of any challenge to an off-duty access policy.

APPENDIX A: SUMMARY OF PETITIONS FILED & ELECTIONS HELD

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

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015*
Total Petitions	3,318	3,083	3,052	2,788	2,896	2,550	2,475	2,554	2,622	1,388
Total Representation (RC) Petitions	2,464	2,339	2,357	2,109	2,353	1,964	1,984	2,033	2,137	1,148
Union Not Elected	622	611	516	352	556	358	501	476	432	234
Union Elected	997	1,067	1,065	759	1,142	808	863	902	976	561
Total Decertification Petitions	854	744	694	679	543	586	491	521	485	240
Total RD Petitions	745	644	577	591	490	494	462	464	438	203
Total RM Petitions	109	100	117	88	53	92	29	57	47	37
Union Not Elected	268	248	171	145	156	168	149	131	121	58
Union Elected	141	145	143	94	95	123	99	88	70	35

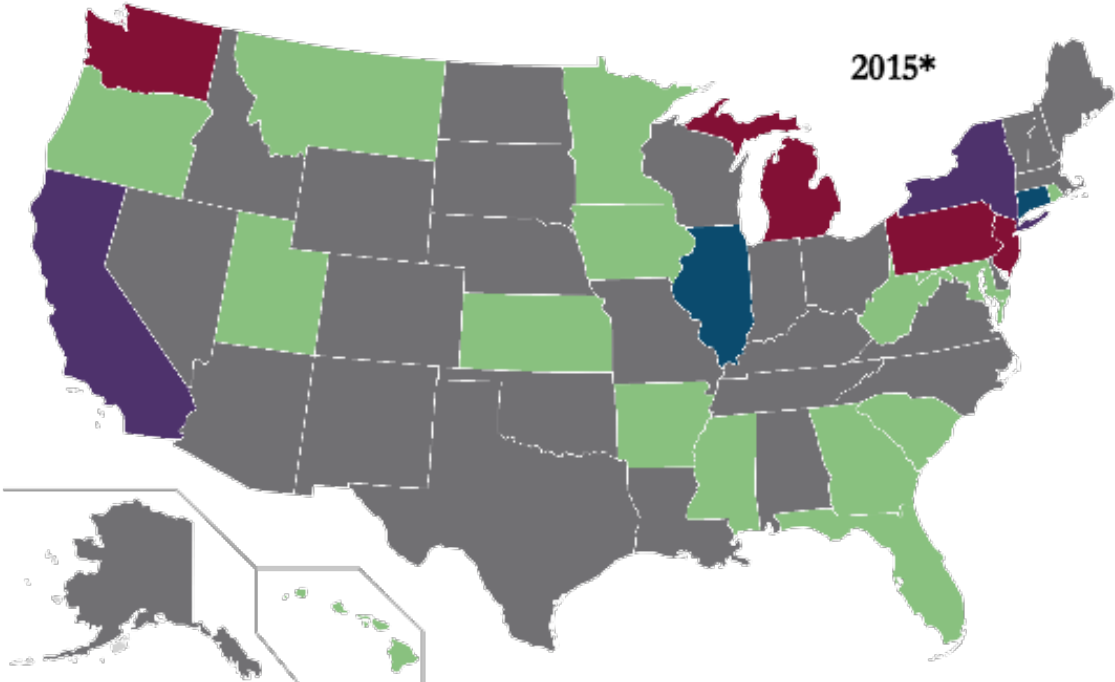
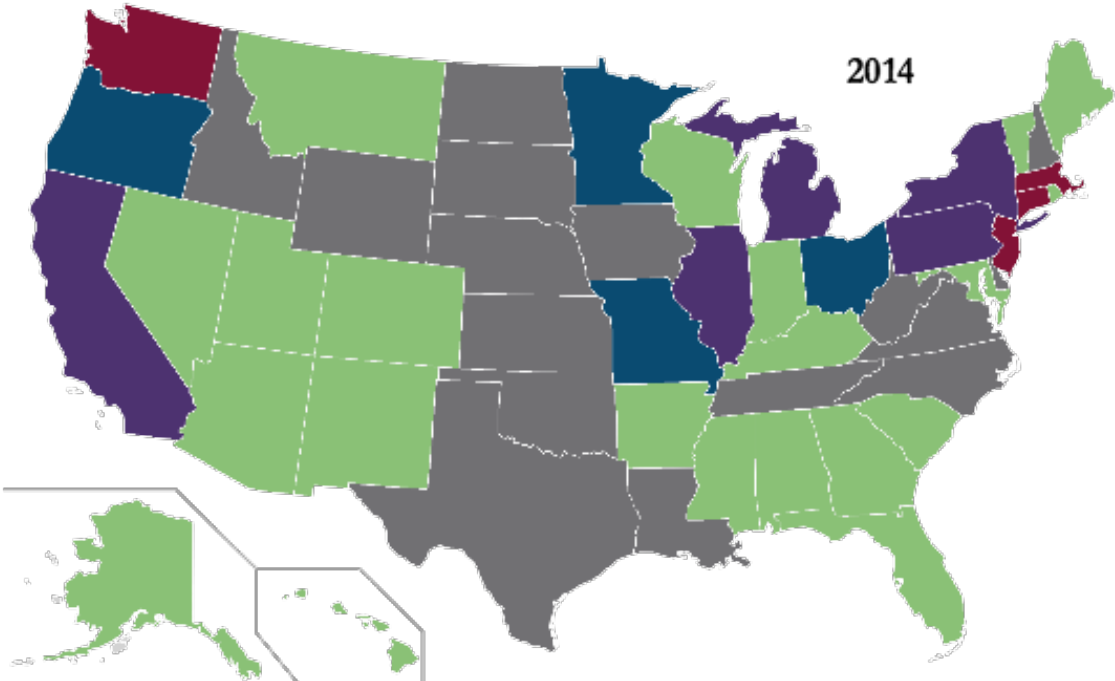
HEALTH CARE - SUMMARY OF PETITIONS FILED & ELECTIONS HELD (2006 - 2015*)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015*
Total Petitions	509	430	445	470	433	410	362	388	447	208
Total Representation (RC) Petitions	394	309	307	361	349	290	296	314	359	176
Union Not Elected	78	64	63	53	77	61	69	65	53	33
Union Elected	217	163	186	134	187	162	171	159	189	116
Total Decertification Petitions	115	121	138	109	84	120	66	74	88	32
Total RD Petitions	108	102	89	102	73	69	59	65	85	27
Total RM Petitions	12	19	49	7	11	51	7	9	3	5
Union Not Elected	27	27	22	14	13	57	13	12	21	12
Union Elected	31	28	28	19	28	26	25	18	14	4

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

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015*
Total Petitions	2,809	2,653	2,607	2,318	2,463	2,140	2,113	2,166	2,175	1,180
Total Representation (RC) Petitions	2,070	2,030	2,050	1,748	2,004	1,674	1,688	1,719	1,778	972
Union Not Elected	544	547	453	299	479	297	432	411	379	201
Union Elected	780	904	879	625	955	646	692	743	787	445
Total Decertification Petitions	739	623	556	570	459	466	425	447	397	208
Total RD Petitions	637	542	488	489	417	425	403	399	353	176
Total RM Petitions	97	81	68	81	42	41	22	48	44	32
Union Not Elected	241	221	149	131	143	111	136	119	100	46
Union Elected	110	117	115	75	67	97	74	70	56	33

APPENDIX B: MAPS OF REPRESENTATION (RC) PETITIONS FILED IN HEALTH CARE



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APPENDIX D: THE NATIONAL LABOR RELATIONS BOARD DEFINITIONS

The following summary from the National Labor Relations Board is reproduced with permission from “The National Labor Relations Board and You” (http://www.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

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.