

Labor Activity in Health Care

51

SEMI-ANNUAL REPORT

JANUARY – JUNE 2019

Presented by



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ABOUT THIS REPORT

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

The 51st 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 2018 and the first six months of 2019.¹
- 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 2019 indicates that the data is from the first six months of 2019.

LETTER FROM BOB LONG

As I look back over the first half of 2019, it has been an interesting time of change and activity on both the labor and political fronts. Recently, we have seen a resurgence of strike activity across the country. In September alone, National Nurses United (NNU) led approximately 8,500 nurses on strike at 13 hospitals in Arizona, California, Florida, and Illinois. In Chicago, where we just had our ASHHRA conference, nurses went on strike using union rhetoric many of us have heard before:

“Consistently, our workloads have been getting heavier.”

“We’ve been low on supplies, on equipment, on staff.”

“It’s to the point now where we feel we just can’t take it anymore.”

“We just don’t want to continue to work like this.”

“It’s really hard to come here and give your all day in and day out and not feel appreciated.”

Regardless of whether a hospital is unionized or not, nurses have expressed similar sentiments. Interestingly, nurses who made these comments have been unionized since the 1960’s. Clearly, having a union doesn’t fix issues that frustrate nurses but that doesn’t stop unions – particularly nurses unions like NNU – from consistently using these and other themes like “corporatization of health care,” “profits over patients” and “patient safety” during organizing campaigns and contract negotiations. If unions could really address nurses’ concerns, they wouldn’t be using the same messaging before *and* after unionization.

Other notable trends in the labor movement in health care this year include:

- **An increase in technology driving union campaigns:** Unions are increasingly hiring and deploying digital organizers and leveraging social media to organize employees. Tactics include targeted ads on Facebook, third-party proxy groups, private Facebook pages, webcast/YouTube videos, and other sophisticated technologies to find and reach potential members. Digital and social media is no longer an add-on but the norm and often the core of a campaign.

- **Low pressure informational meetings:** Unions are using informational meetings and not asking potential members to immediately sign cards. Instead, organizers are using more soft selling techniques and implying they are there to listen and provide information. The strategy is to create more grassroots interest instead of deploying a union-driven campaign. Some unions are even holding off on getting signed authorization cards until they get enough momentum, which can make organizing harder to detect.
- **More focused targeting of millennials:** Many of the unions' new tactics are aimed at millennials, the fastest growing segment of the workforce. Millennials are attracted by grassroots efforts and they engage most heavily on digital and social media. A recent Gallup survey showed millennials supports unions by 68%.
- **Aggressive negotiations:** The tone and tenor of many negotiations are becoming much more aggressive and the communication from the unions have been fast paced. Through digital and social media, unions are pushing messaging in real time during negotiations. To counter, employers are having to create detailed communications plans to try and stay head of union messaging.

All of these new developments highlight the need for employers to be prepared with strong digital communications plans, labor education, training, and assessments.

Meanwhile on the political front, President Trump nominated well-known labor lawyer, Eugene Scalia, to be U.S. Secretary of Labor – sparking opposition from labor unions and thrusting the Administration's labor position into the spotlight ahead of the 2020 election.

Scalia could decide critical issues such as rules on overtime pay, changes in safety regulations and a new classification of joint employers that would narrow the scope when an employee is paid by more than one employer.

Beyond Scalia, another major policy issue that developed this year is a ruling by the National Labor Relations Board that overturned a 38-year precedent giving unions broad access to private places on an employer's property.

Labor law Attorney Roger King has an article in this report about that NLRB decision and its impact on the labor landscape.

Also, in this report, former NLRB Board Member Harry I. Johnson, III, and his Morgan Lewis associate Richard J. Marks have an article about recent Board decisions that emphasize employer property rights. FordHarrison attorneys Paul R. Beshears, Corey L. Franklin and Patrick Corley bring us a look at the NLRB's treatment of social media cases. And this report has three more articles on anticipatory withdrawal of recognition, the use of the Boeing case to find the arbitration provision unlawful and a look at how mergers and acquisitions impact culture.

While the labor movement continues to see overall incremental decreases in membership, it continues to remain very active in health care. To help you make sense of the current labor landscape, IRI Consultants is pleased to offer this latest semi-annual report. We look forward to continued partnership with ASHHRA as we work together to help the nation's health care systems and hospitals with labor and employee relations challenges.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bob Long", with a stylized flourish at the end.

Bob Long, Managing Partner

INTRODUCTION

The percentage of unionized wage and salary employees decreased by 0.2 percentage points to 10.5%, while the number of unionized workers decreased slightly to 14.7 million in the first half of 2019.

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).

Unions were elected in 84% of the 89 representation elections in the health care sector during the first six months of the year. In the same time period, unions maintained recognition in 43% of the 14 decertification elections. The total number of elections held trending slightly higher than in 2018, but still well below the average of the last decade, assuming an equal number of elections in the second half of the year.

The majority of representation elections took place within 21 to 30 days from the date of the petition, and the average number of days has increased to 30.1.

The Service Employees International Union (SEIU) continues to be the most active union in the health care sector, accounting for 39% of representation petitions filed in the first six months of 2019 or 52 in total, which is on par for its rate of 99 total petitions in 2018. SEIU's election success rate grew slightly from 83% in 2018 to 86% in the first half of 2019.

The next most active union was the American Federation of State, County and Municipal Employees (AFSCME) with 12% or 16 petitions filed, which is an increase from its pace of 20 total petitions in 2018. AFSCME's success is also up from 75% in 2018 to 82% in the first half of 2019.

EXECUTIVE SUMMARY

NLRB REPRESENTATION PETITIONS & ELECTIONS^{1,2}

During the first six months of 2019, 133 representation case (RC) petitions were filed in the health care sector. This is on pace to be slightly above the 224 petitions filed in 2018.

Over the same period, 89 representation elections were held, and unions were elected as a result of 84% of these. This is the highest election rate unions have experienced in the past decade, albeit with a smaller sample size.

Most of the organizing activity occurred in only five states: California, New York, Pennsylvania, Michigan and Washington. California continues to remain the highest activity state.

The Service Employees International Union (SEIU) continues to dominate health care labor activity, accounting for 39% of petitions filed and 41% of elections held in the first six months of 2019. SEIU was successfully elected as a result of 86% of the 36 elections in which they were involved.

ASHHRA Region 9 (comprising Alaska, California, Nevada, Oregon and Washington) continues to be the most active region in the nation, followed closely by Region 2 (comprising New Jersey, New York and Pennsylvania).

Over the past decade, strike activity has been concentrated in California, with the state experiencing more than five times as many strikes as Florida – the next most active state.

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 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 – 2018* report, the percentage of unionized wage and salary employees decreased by 0.2 percentage points to 10.5%, while the number of unionized workers decreased slightly to 14.7 million in 2018.

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 (33.6% vs. 6.4%, respectively).
- Black workers continued to have the highest union membership rate in 2018 (12.5%), followed by Whites (10.4%), Hispanics (9.1%) and Asians (8.4%).
- The highest union membership rate is among men aged 55 to 64 (13.9%), while the lowest is among women aged 16 to 24 (3.3%).
- Hawaii has surpassed New York to have the highest union membership rate (23.1% vs. 22.3%, respectively); North Carolina and South Carolina have the lowest rates (2.7% each).
- Union membership rates increased in 24 states and the District of Columbia, decreased in 25 states, and remained unchanged in one state.

Over half of all union members live in seven states: California, New York, Illinois, Pennsylvania, Michigan, Ohio and Washington

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

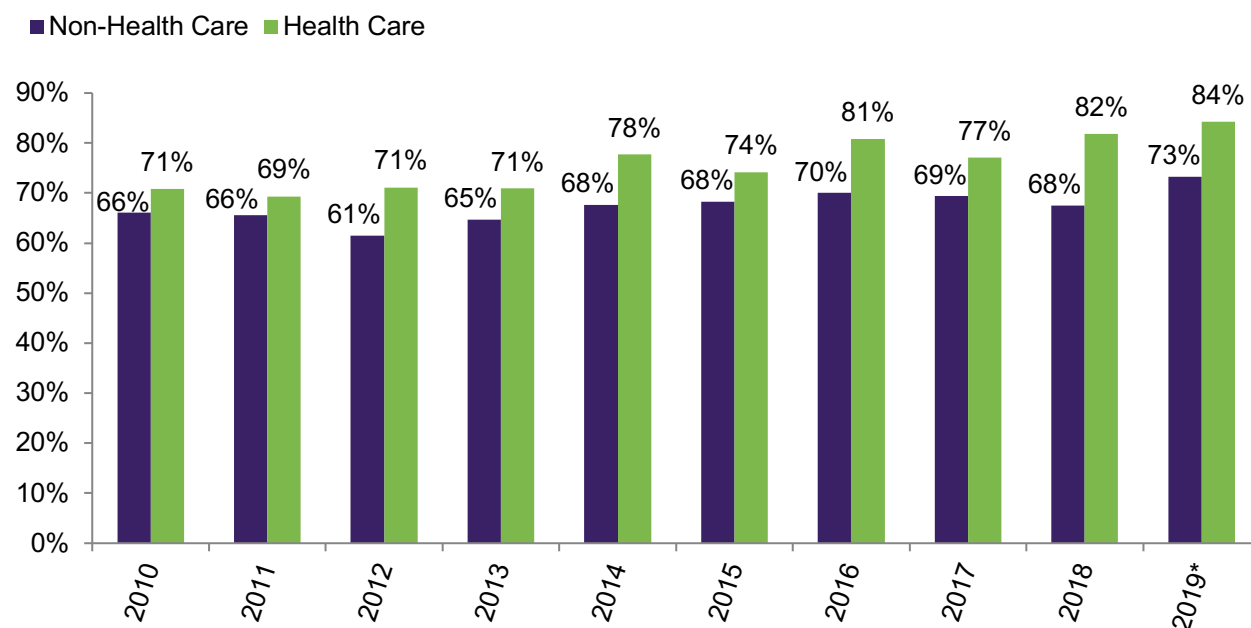
The following information summarizes representation petition activity and elections held during the past decade as reported by the National Labor Relations Board (NLRB).

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 2019, unions were elected as a result of 84% of elections held in the health care sector, compared to just 73% in non-health care sectors.

UNION WINS IN RC ELECTIONS

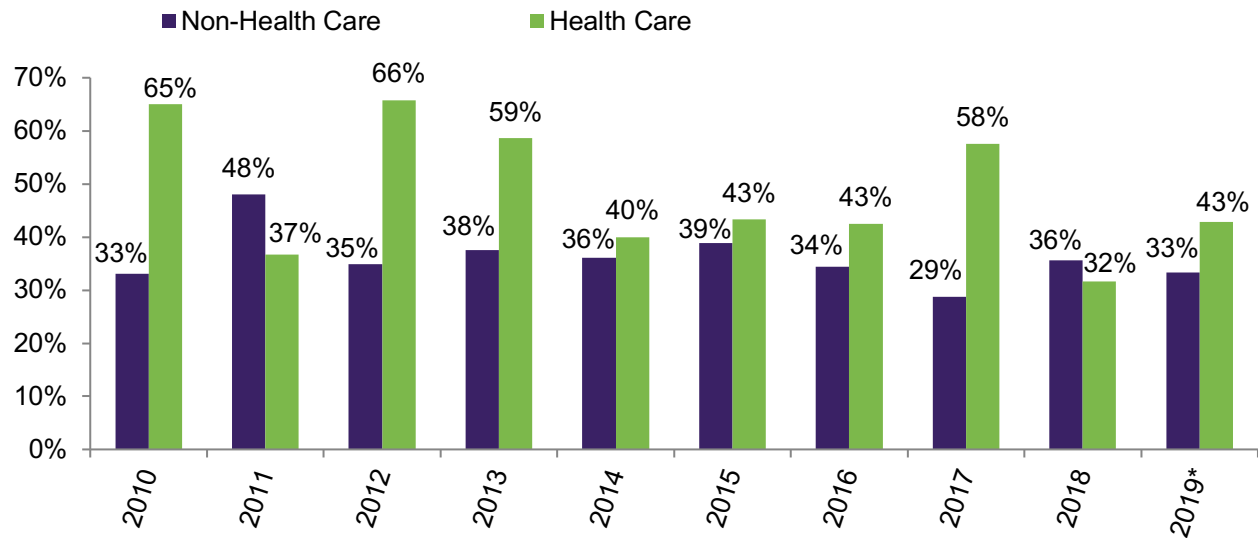
Health Care vs. Non-Health Care Sectors (2010-June 30, 2019)



Unions have typically been more successful defending against decertification elections in the health care sector than in non-health care. During the first six months of 2019, unions maintained recognition in 43% of decertification elections held in health care compared to 33% in non-health care.

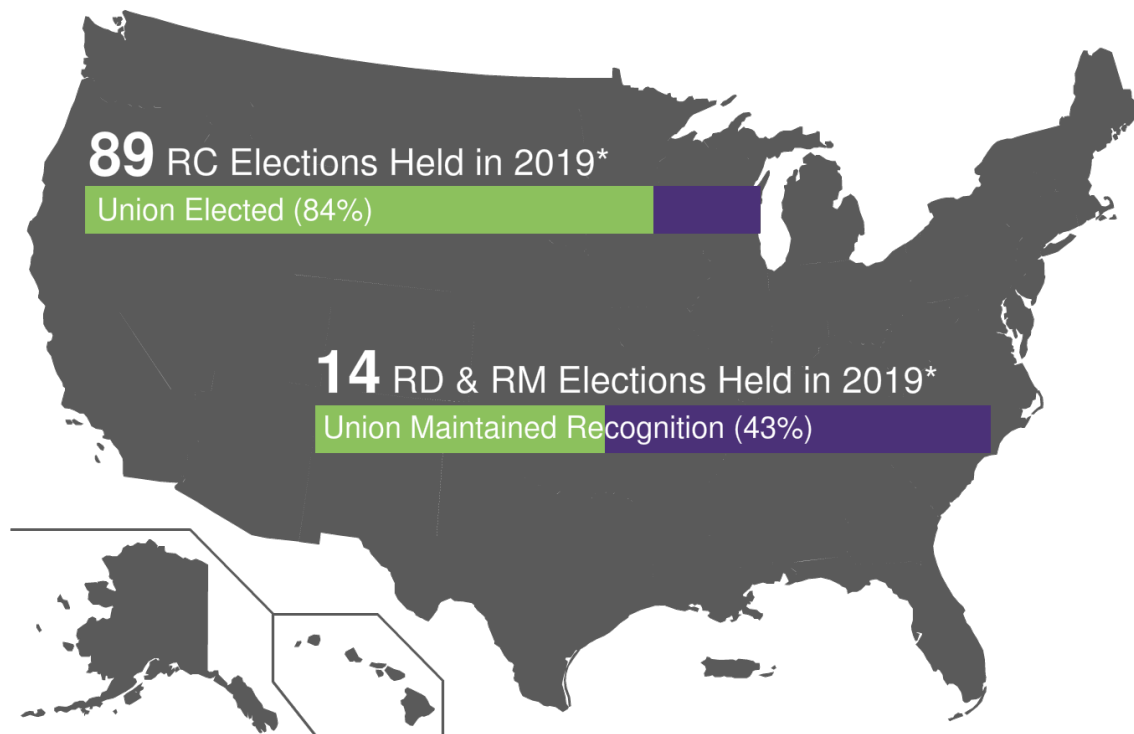
UNION WINS IN RD/RM ELECTIONS

Health Care vs. Non-Health Care Sectors (2010-June 30, 2019)



HEALTH CARE SECTOR – ELECTIONS OVERVIEW

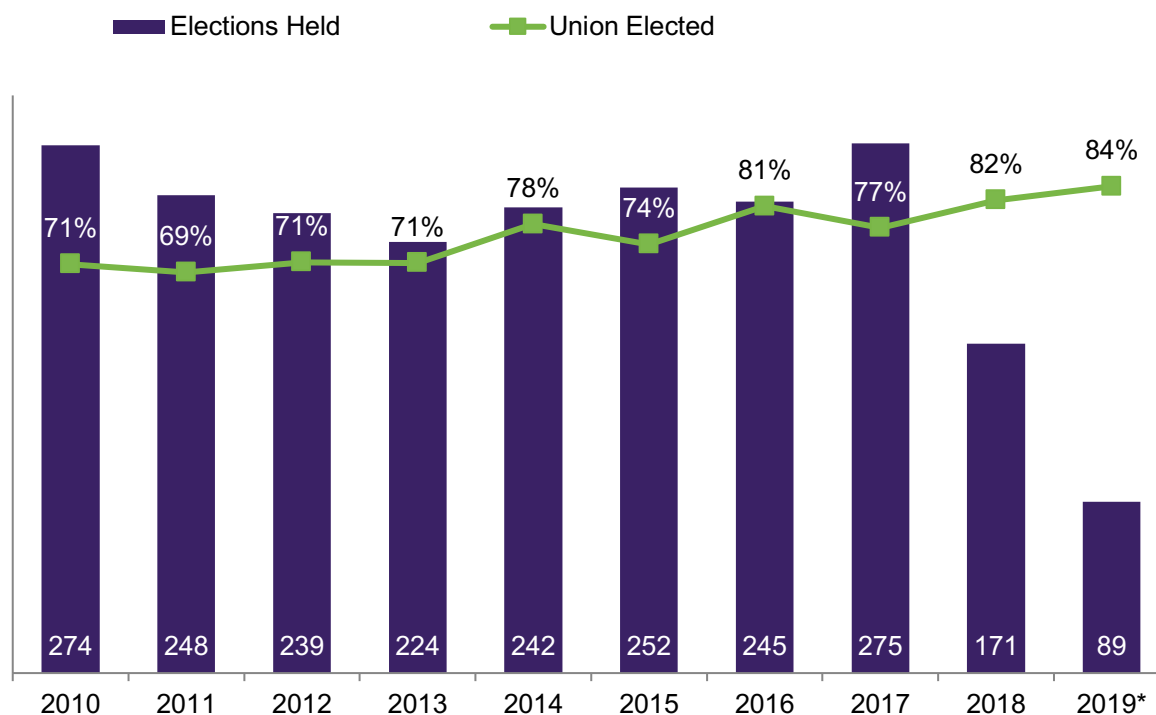
During the first six months of 2019, there were 89 representation elections held in the health care sector, and unions were elected as a result of 84%. In the same time period, 14 decertification elections were held, and unions prevailed to maintain recognition in 43%.



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

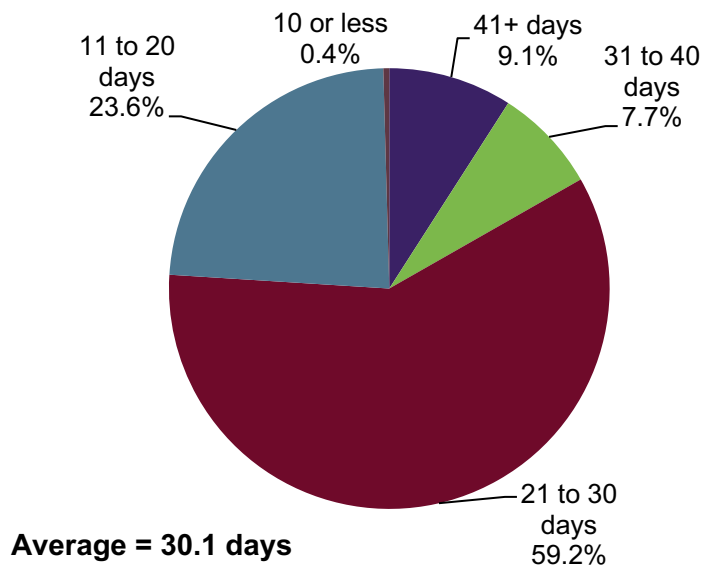
The chart below illustrates the number of representation elections held over the past decade along with the percentage of elections where unions were successful. In the first six months of 2019, unions were elected as a result of 84% of elections held. The total number of elections held is on track to be the slightly higher than in 2018, but still well below the average of the last 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 6/30/2019 (n=925 RC elections) – Health Care Sector



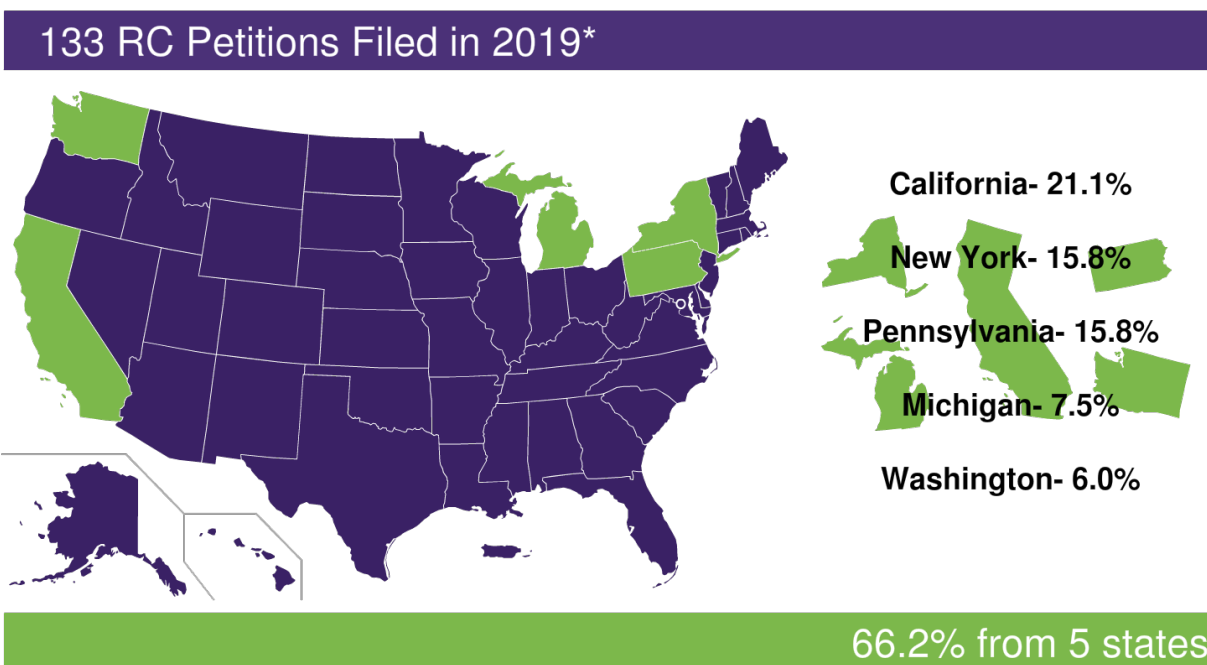
This chart details the number of days from NLRB petition to election since the expedited election ruling went into effect on April 15, 2015. The majority of representation elections take place within 21 to 30 days from the date of the petition, and the average number of days has increased to 30.1.

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 2018 and the first six months of 2019 at the time of publication.

MOST ACTIVE STATES – REPRESENTATION PETITIONS FILED IN HEALTH CARE

Of the 133 representation petitions filed in health care in the first six months of 2019, 66.2% were filed in only five states – California, New York, Pennsylvania, Michigan and Washington.



ALL STATES – REPRESENTATION PETITIONS FILED IN HEALTH CARE

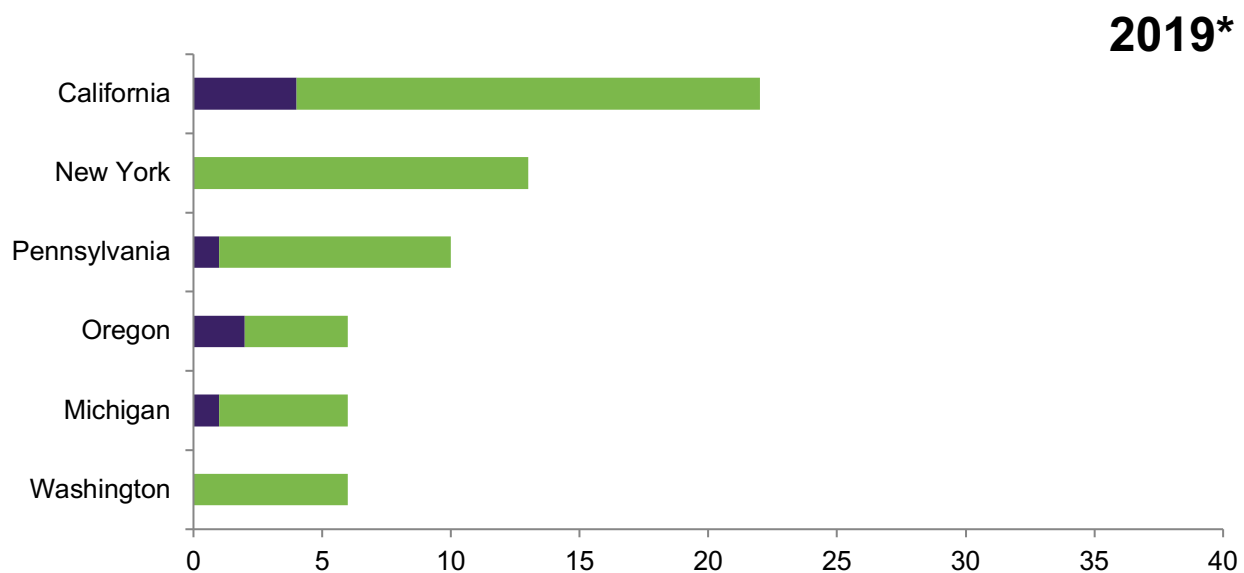
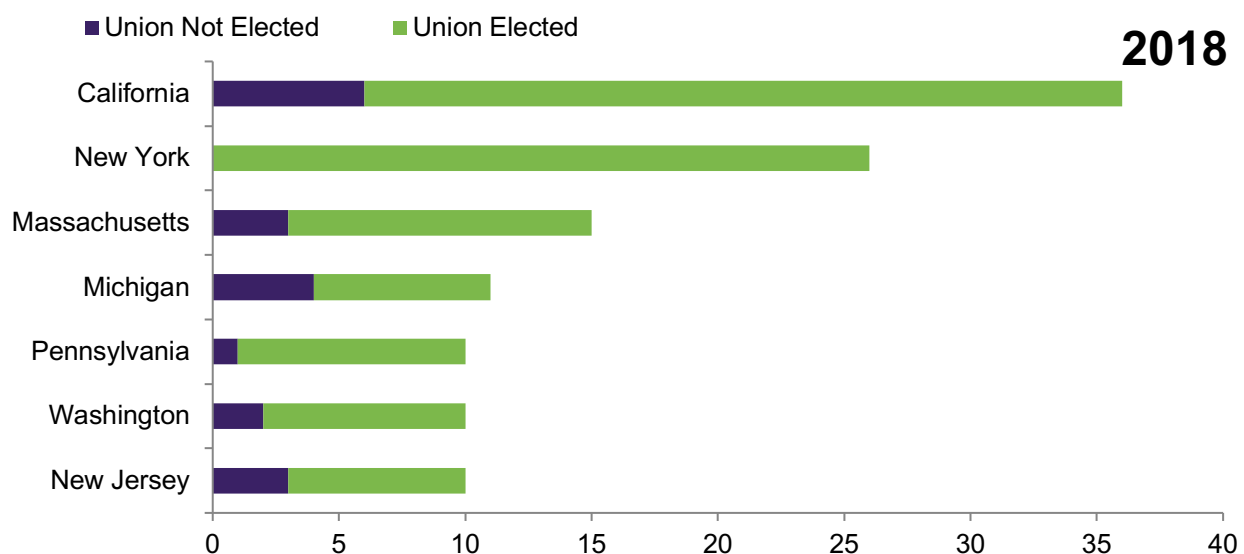
The table below details the number of representation petitions filed in each state in health care during 2018 and the first six months of 2019.

State	2018	2019*	State	2018	2019*	State	2018	2019*
Alaska	-	1	Maryland	2	1	Oregon	6	5
Arizona	2	-	Massachusetts	16	5	Pennsylvania	14	21
California	52	28	Michigan	20	10	Puerto Rico	8	-
Connecticut	9	4	Minnesota	10	3	Rhode Island	-	1
DC	1	-	Missouri	2	-	Texas	1	-
Delaware	2	-	Montana	2	5	Vermont	1	1
Florida	4	-	Nevada	-	1	Virginia	-	1
Hawaii	2	3	New Jersey	8	1	Washington	10	8
Idaho	-	2	New Mexico	-	1	West Virginia	2	2
Illinois	6	4	New York	36	21	Wisconsin	2	-
Iowa	2	-	North Dakota	-	1	Total	324	116
Maine	-	3	Ohio	4	-			

Note: A state is not listed in the table if there were no petitions filed in 2018 or the first six months of 2019.

In 2018 and the first six months of 2019, California and New York were the most active states in terms of the number of representation elections held. Massachusetts was the third most active state in 2018, but has fallen out of the top in the first six months of 2019.

MOST ACTIVE STATES – REPRESENTATION ELECTION RESULTS IN HEALTH CARE



ALL STATES – REPRESENTATION ELECTION RESULTS IN HEALTH CARE

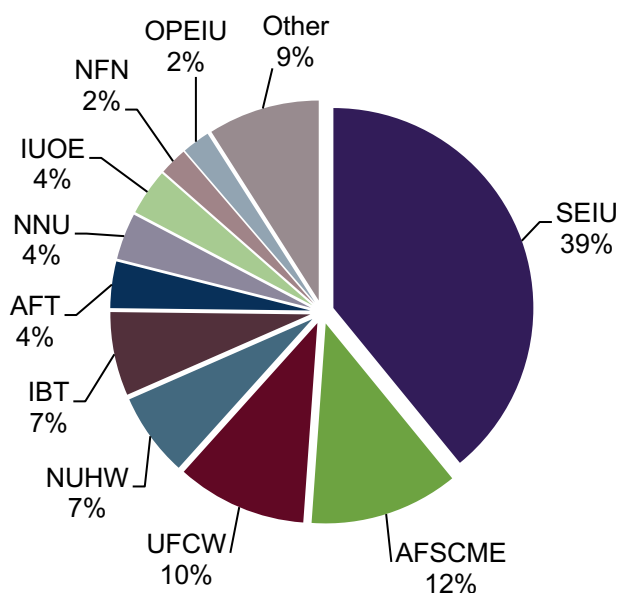
The following table depicts the number of representation elections held in each state in the health care sector in 2018 and the first six months of 2019.

State	2018					2019*				
	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
Alaska	-	-	-	-	-	1	1	100%	0	0%
Arizona	2	2	100%	0	0%	-	-	-	-	-
California	36	30	83%	6	17%	22	18	82%	4	18%
Colorado	1	0	0%	1	100%	-	-	-	-	-
Connecticut	8	6	75%	2	25%	3	3	100%	0	0%
Florida	2	2	100%	0	0%	-	-	-	-	-
Hawaii	2	2	100%	0	0%	2	1	50%	1	50%
Idaho	-	-	-	-	-	1	1	100%	0	0%
Illinois	4	4	100%	0	0%	3	3	100%	0	0%
Iowa	-	-	-	-	-	1	0	0%	1	100%
Maine	-	-	-	-	-	2	1	50%	1	50%
Maryland	1	1	100%	0	0%	-	-	-	-	-
Massachusetts	15	12	80%	3	20%	3	3	100%	0	0%
Michigan	11	7	64%	4	36%	6	5	83%	1	17%
Minnesota	6	3	50%	3	50%	3	3	100%	0	0%
Missouri	1	0	0%	1	100%	-	-	-	-	-
Montana	3	3	100%	0	0%	2	1	50%	1	50%
Nevada	-	-	-	-	-	1	0	0%	1	100%
New Jersey	10	7	70%	3	30%	-	-	-	-	-
New Mexico	1	1	100%	0	0%	1	1	100%	0	0%
New York	26	26	100%	0	0%	13	13	100%	0	0%
North Dakota	-	-	-	-	-	1	1	100%	0	0%
Ohio	2	2	100%	0	0%	-	-	-	-	-
Oregon	6	5	83%	1	17%	6	4	67%	2	33%
Pennsylvania	10	9	90%	1	10%	10	9	90%	1	10%
Puerto Rico	7	6	86%	1	14%	-	-	-	-	-
Texas	1	1	100%	0	0%	-	-	-	-	-
Vermont	1	0	0%	1	100%	1	0	0%	1	100%
Washington	10	8	80%	2	20%	6	6	100%	0	0%
West Virginia	3	2	67%	1	33%	1	1	100%	0	0%
Wisconsin	2	1	50%	1	50%	-	-	-	-	-
Total	171	140	82%	31	18%	89	75	84%	14	16%

Note: A state is not listed in the table if there were no elections held in 2018 or the first six months of 2019.

UNION SUMMARIES

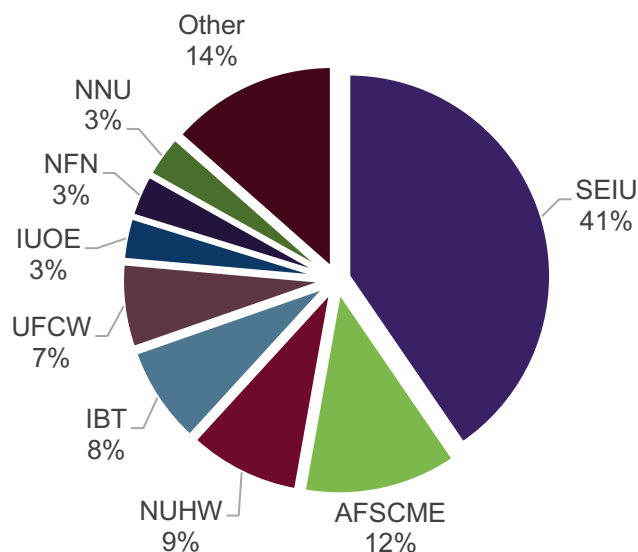
MOST ACTIVE UNIONS – REPRESENTATION PETITIONS HELD IN HEALTH CARE IN THE FIRST SIX MONTHS OF 2019



SEIU continues to be the most active union in the health care sector, accounting for 39% of representation petitions filed in the first six months of 2019. The next most active union was AFSCME.

Abbreviation	Union Name	RC Petitions Filed	
		2018	2019*
SEIU	Service Employees International Union	99	52
AFSCME	American Federation of State, County and Municipal Employees	20	16
UFCW	United Food and Commercial Workers	16	14
NUHW	National Union of Healthcare Workers	11	9
IBT	International Brotherhood of Teamsters	10	9
NNU	National Nurses United	10	5
AFT	American Federation of Teachers	5	5
IUOE	International Union of Operating Engineers	5	5
NFN	National Federation of Nurses	4	3
OPEIU	Office of Professional Employees International Union	3	3

MOST ACTIVE UNIONS – REPRESENTATION ELECTIONS HELD IN HEALTH CARE IN THE FIRST SIX MONTHS OF 2019



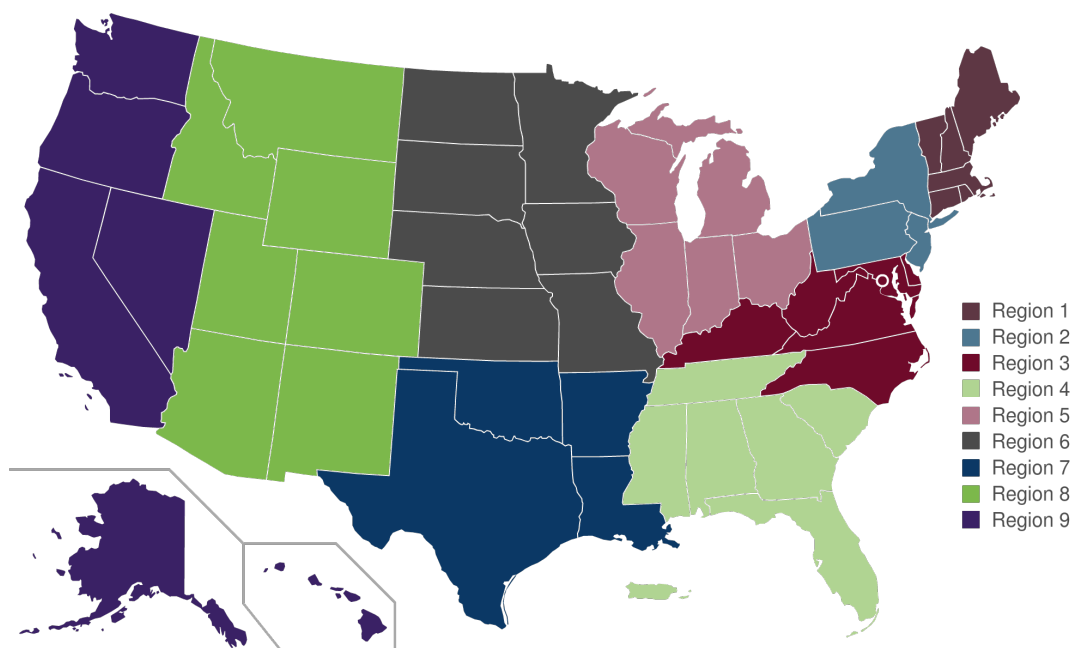
SEIU also accounted for the most representation elections in the first six months of 2019. SEIU was involved in 36 elections and was elected as a result of 86%. The next most active union was AFSCME with 11 representation elections.

MOST ACTIVE UNIONS – REPRESENTATION ELECTION RESULTS

	2018			2019*		
	Total Elections	Union Elected %	Union Not Elected %	Total Elections	Union Elected %	Union Not Elected %
SEIU	78	83%	17%	36	86%	14%
AFSCME	12	75%	25%	11	82%	18%
NUHW	5	60%	40%	8	88%	13%
IBT	9	78%	22%	7	57%	43%
UFCW	14	57%	43%	6	83%	17%
IUOE	5	100%	0%	3	100%	0%
NFN	3	67%	33%	3	100%	0%
NNU	9	100%	0%	3	100%	0%

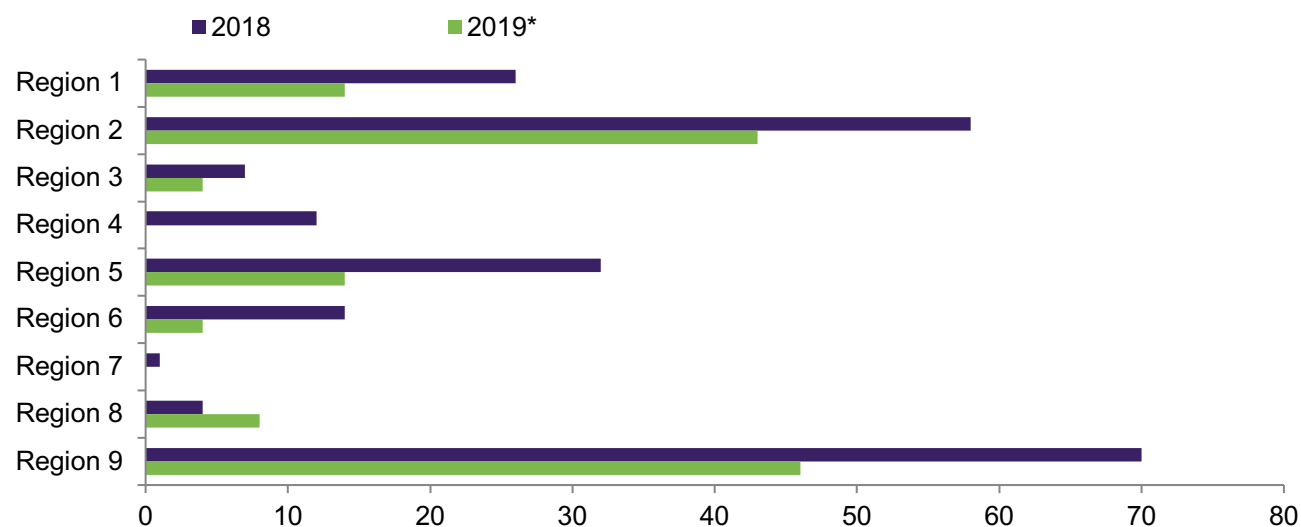
REGIONAL SUMMARIES

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.

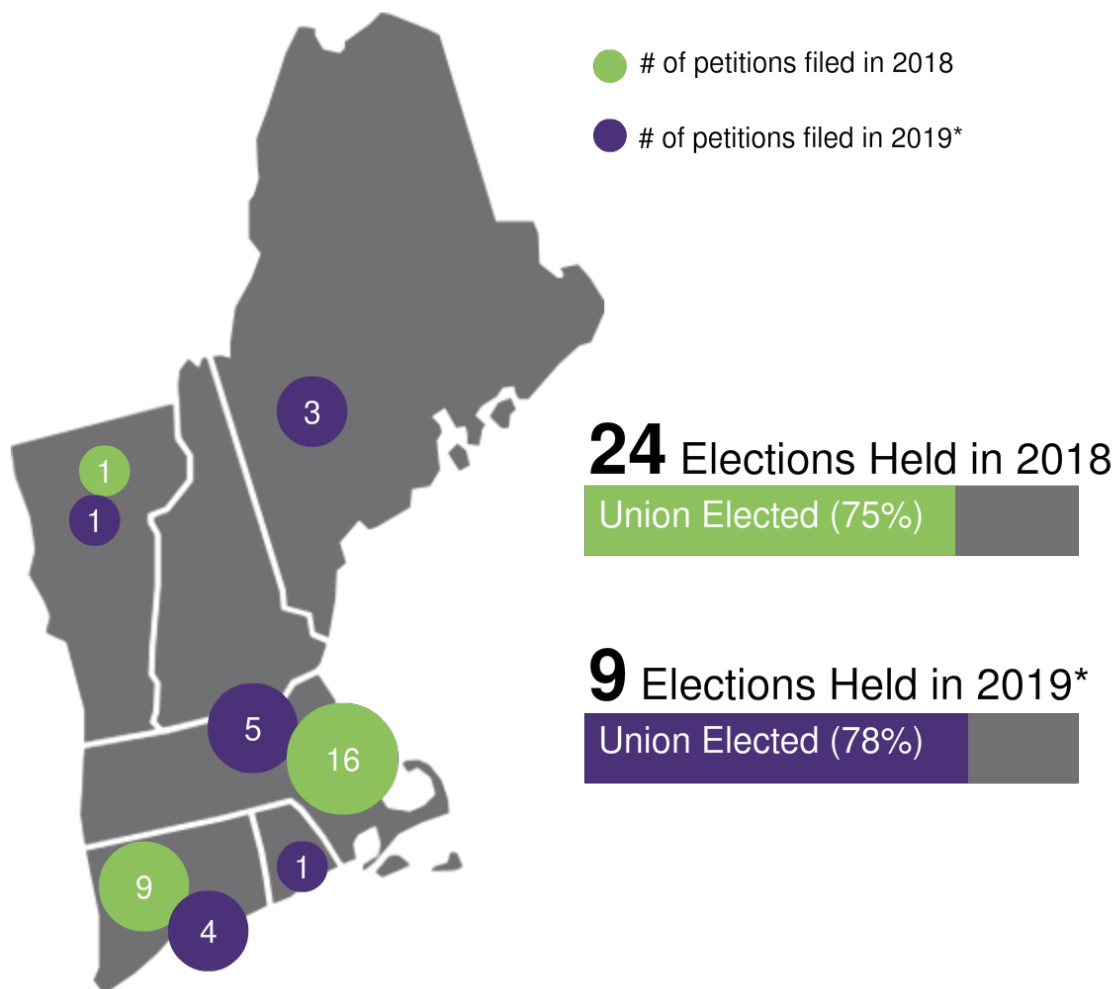
RC PETITIONS FILED IN HEALTH CARE BY ASHHRA REGION



REGION 1

The level of organizing activity in Region 1 remains moderately high, with nearly every state receiving at least one representation petition. Unions were successfully elected as a result of 78% of the nine elections held in the first six months of 2019.

Petitions & Elections



*Indicates data is from the first six months of 2019.

REGION 2

The level of organizing activity in the first six months of 2019 appears to be on pace to exceed the level of activity seen in 2018. Pennsylvania has already seen more petitions filed than in the previous year. Additionally, unions were successfully elected as a result of all but one of the 23 elections held so far.

Petitions & Elections

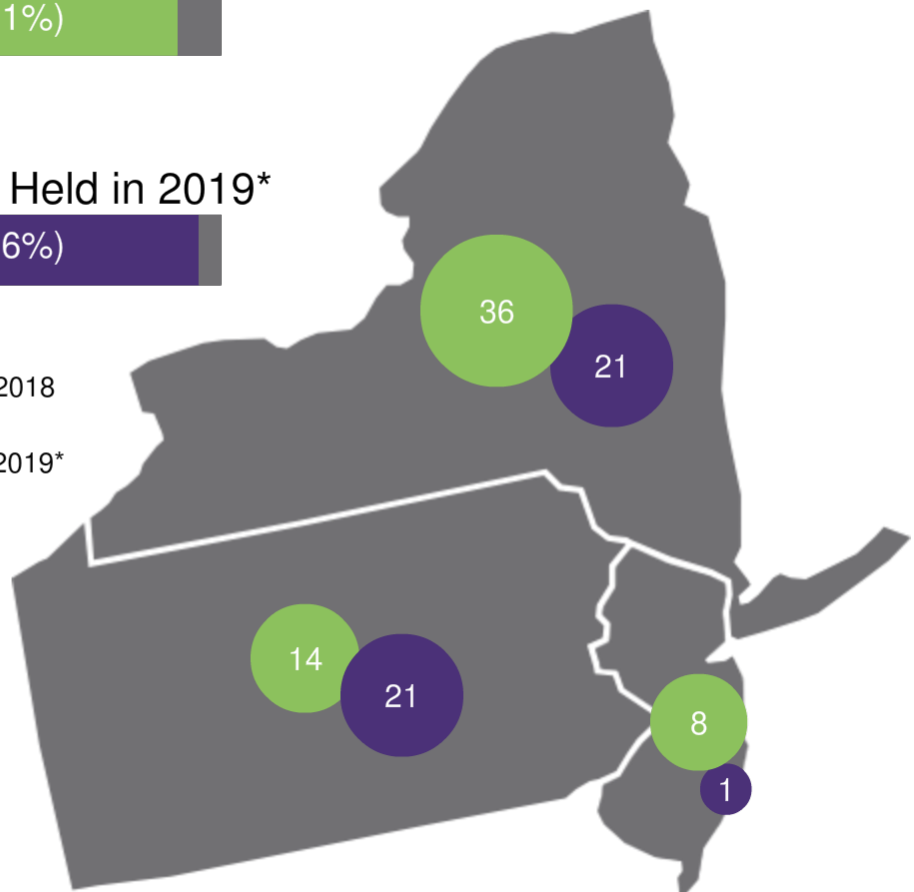
46 Elections Held in 2018

Union Elected (91%)

23 Elections Held in 2019*

Union Elected (96%)

- # of petitions filed in 2018
- # of petitions filed in 2019*

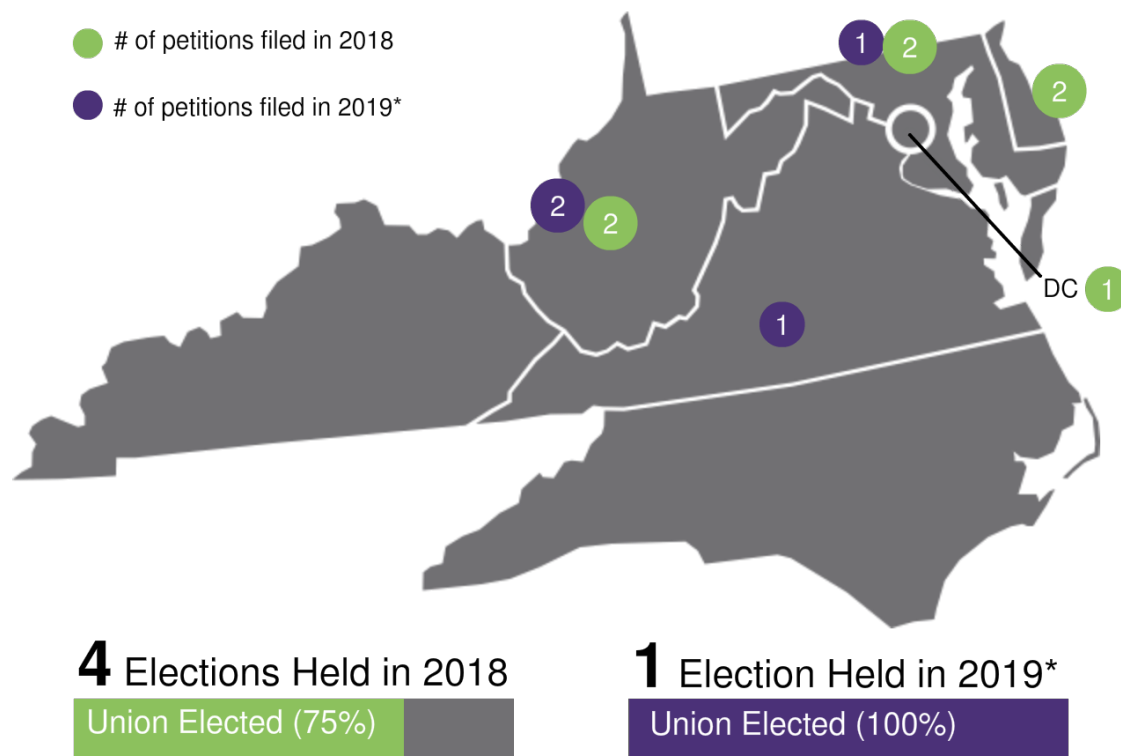


**Indicates data is from the first six months of 2019.*

REGION 3

There is a limited amount of organizing activity in Region 3. Just one election has been held in the first six months of 2019, but the union was successfully elected as a result.

Petitions & Elections

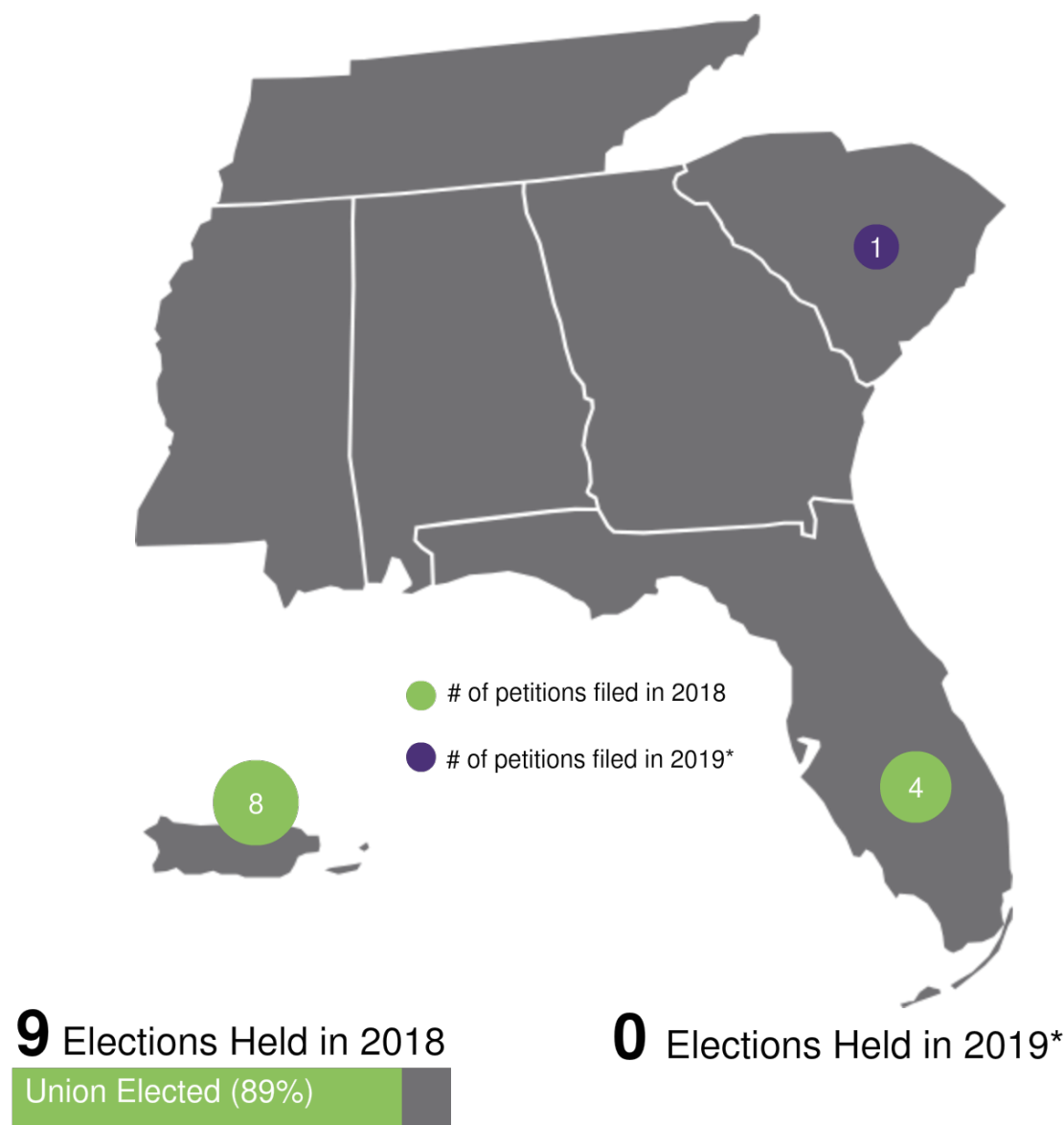


*Indicates data is from the first six months of 2019.

REGION 4

There has only been one representation petition filed in the first six months of 2019, compared to 12 in 2018. Most of the change in this region can be attributed to a decrease in organizing activity in Puerto Rico.

Petitions & Elections

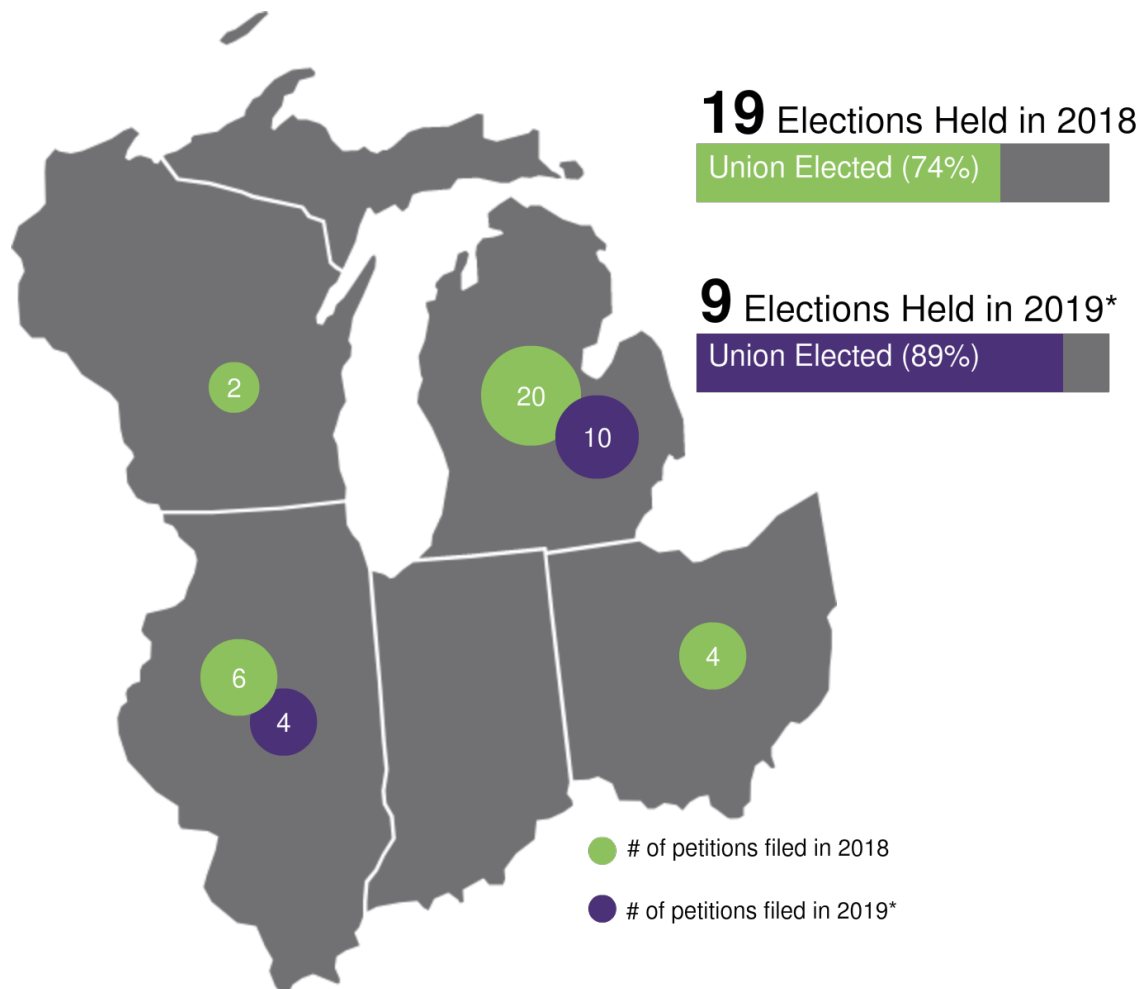


**Indicates data is from the first six months of 2019.*

REGION 5

Michigan continues to see the most organizing activity of any state in Region 5, while activity appears to have decreased in Ohio and Wisconsin. Nine representation elections have been held so far in 2019.

Petitions & Elections

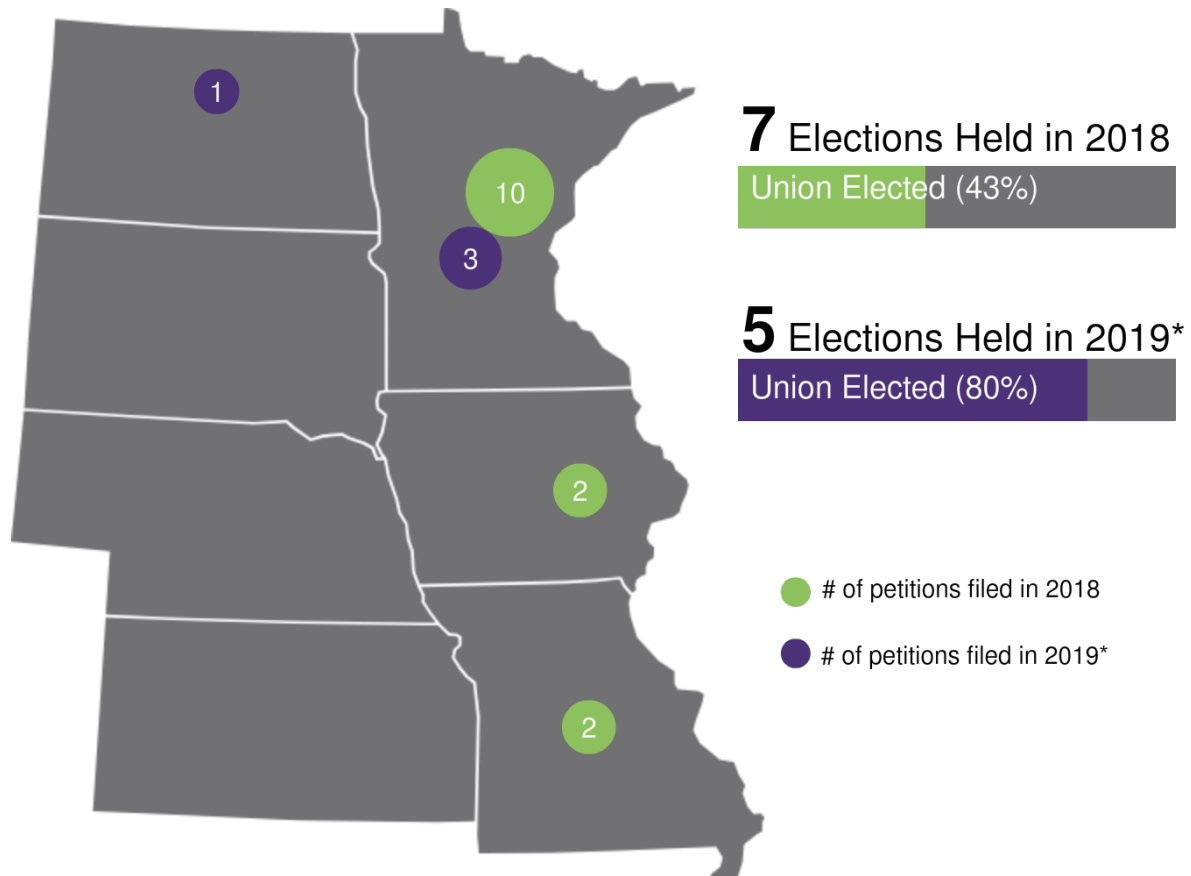


*Indicates data is from the first six months of 2019.

REGION 6

The activity level in Region 6 remains low, however, unions were far more successful in the elections held in the first six months of 2019 compared to 2018.

Petitions & Elections



*Indicates data is from the first six months of 2019.

REGION 7

Union organizing activity remains nearly nonexistent in Region 7, with only one representation petition and election held in the past year and a half.

Petitions & Elections

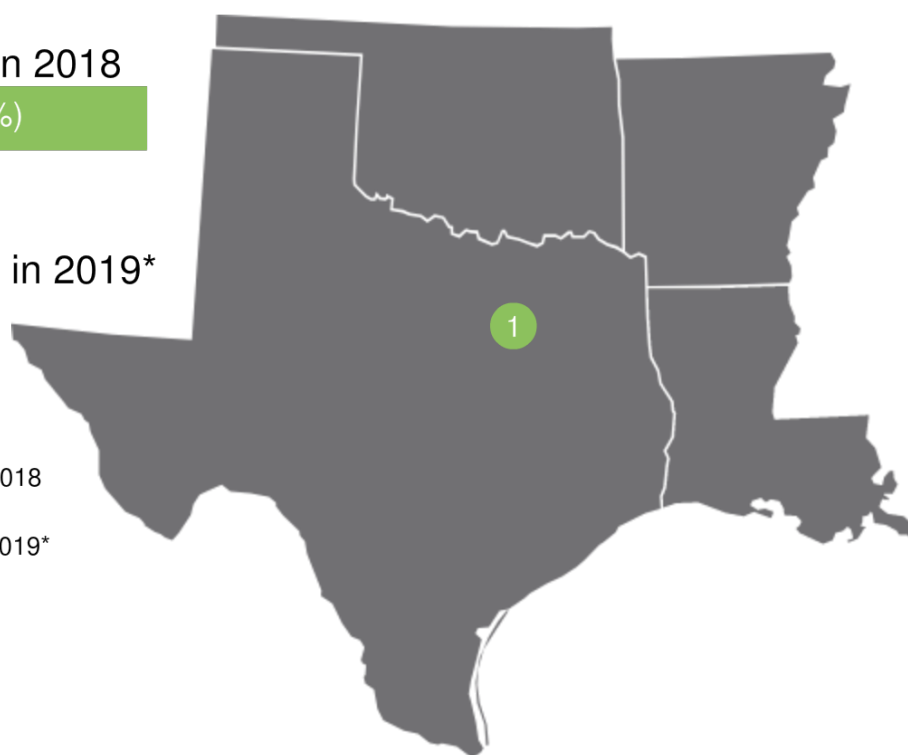
1 Election Held in 2018

Union Elected (100%)

0 Elections Held in 2019*

● # of petitions filed in 2018

● # of petitions filed in 2019*

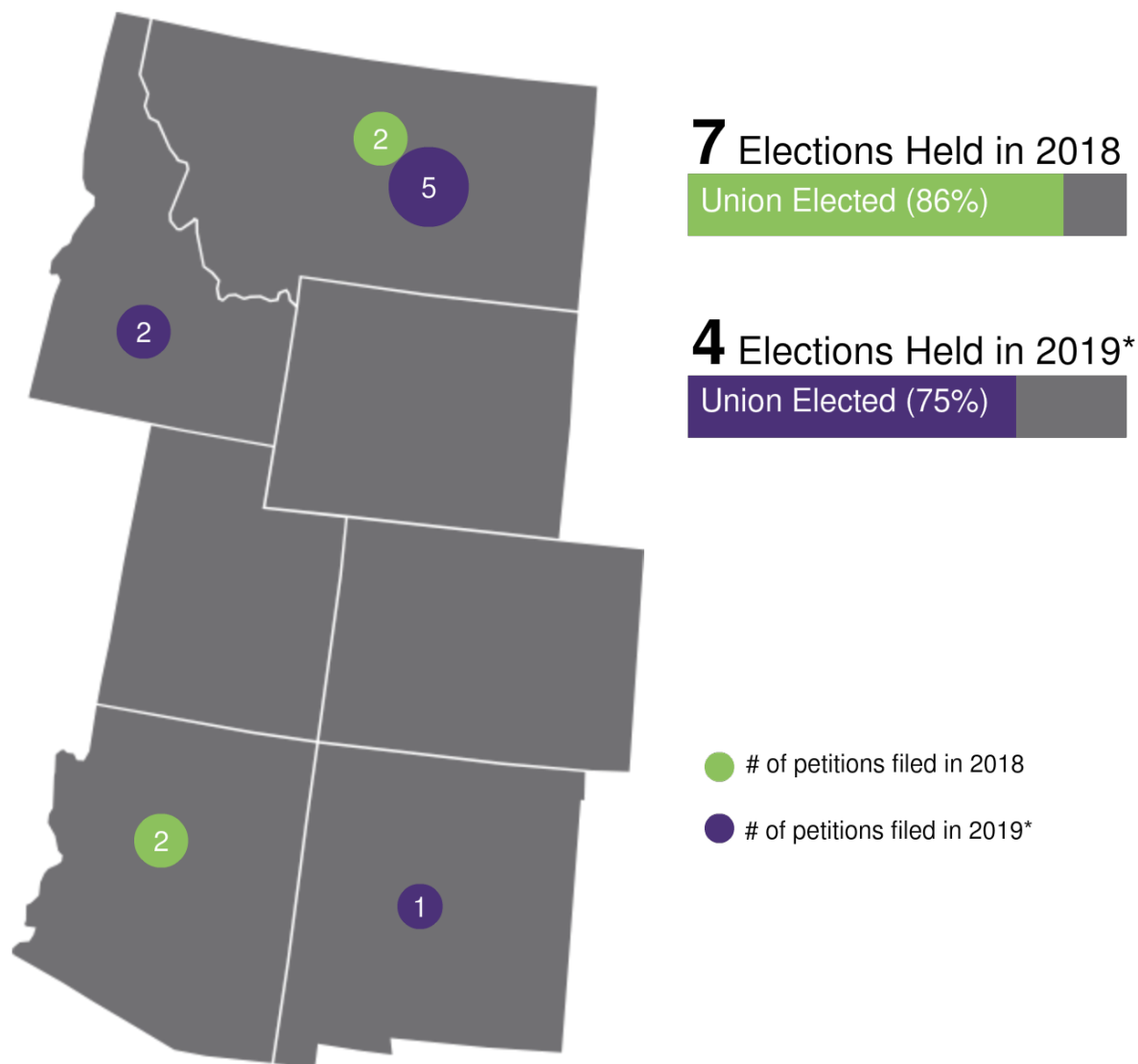


**Indicates data is from the first six months of 2019.*

REGION 8

Organizing activity levels remain fairly low in Region 8. Two representation petitions were filed in Idaho in the first six months of 2019 – the only activity the state has seen in at least the past decade.

Petitions & Elections

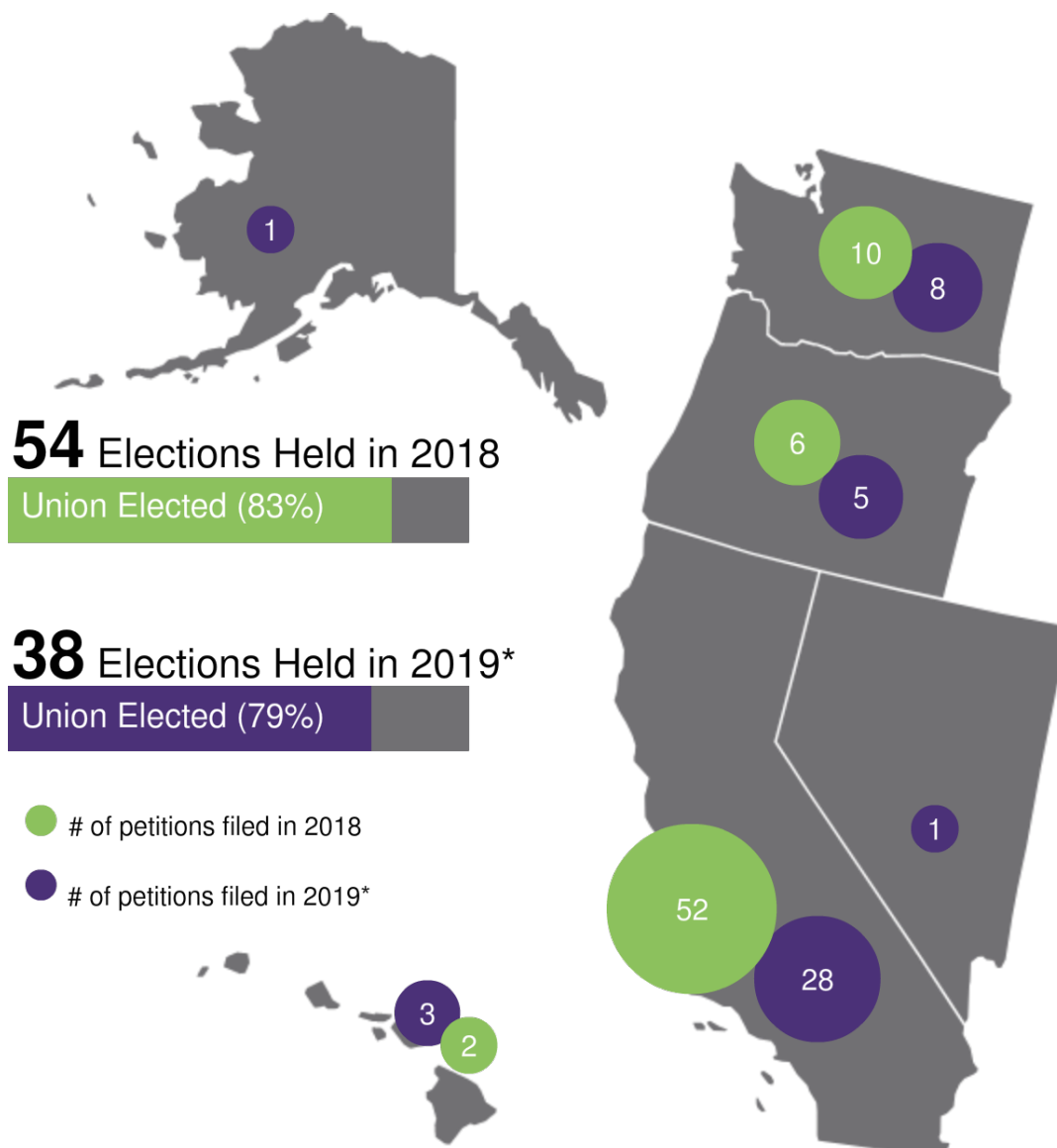


**Indicates data is from the first six months of 2019.*

REGION 9

Region 9 continues to be the most active region in the nation, and every state in the region has received at least one petition in the first six months of 2019. Every state looks to be on track to receive more petitions in 2019 than they did in 2018.

Petitions & Elections



*Indicates data is from the first six months of 2019.

The map below illustrates the number of strikes in the health care sector in each state since 2010. 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.

Map of the United States showing the number of strikes per state. The map is color-coded by the number of strikes:

- 0 Strikes (Dark Gray)
- 1-5 Strikes (Light Green)
- 6-10 Strikes (Dark Blue)
- 11+ Strikes (Dark Red)

Numbers inside the states indicate the count of strikes. For example, California has 113 strikes, Florida has 20, and New York has 16. The map also includes an inset for Alaska and Hawaii.

Year	Number of Strikes	Workers Idled	Average Number of Workers per Strike
2019*	7	2,793	399
2018	23	11,587	504
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

LABOR LAW/ACTIVITY UPDATE

This edition of the ASHHRA Labor Activity Report includes important, timely articles:

- **Recent Board Decisions Emphasize Employer Property Rights** by former NLRB Board Member Harry I. Johnson, III, and his Morgan Lewis associate Richard J. Marks
- **Access Denied? The NLRB overturned a 38-year precedent related to unions accessing employer sites. Learn what that means for you** by G. Roger King of the HR Policy Association
- **The NLRB's Treatment of Social Media Cases** by FordHarrison attorneys Paul R. Beshears, Corey L. Franklin and Patrick Corley
- **NLRB Adopts New Framework For Anticipatory Withdrawal Of Recognition** by Andrew J. Rolfes of Cozen O'Connor
- **Board Applies Boeing To Find Arbitration Provision Unlawful** by Chad M. Horton and Gary L. Simpler of Shawe Rosenthal
- **Mergers and Acquisitions Work When Cultures Combine** by Robert Moll and Jake McConnico of IRI Consultants

RECENT BOARD DECISIONS EMPHASIZE EMPLOYER PROPERTY RIGHTS

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Abstract:

In two recent decisions, the National Labor Relations Board (“NLRB” or the “Board”) has emphasized employer property rights and conversely narrowed the rights of nonemployees to access that property. Historically, federal labor law had given employees broader access rights than nonemployees to the employer’s premises. However, several cases, including some in the Obama administration, had blurred those lines, permitting greater access to nonemployees. These cases created exceptions to the traditional labor law principle that employers have the near complete right to deny non-employees, such as union organizers, property access. In the cases discussed in detail below, the current Board has once again narrowed the standards for nonemployee access.

First, the Board now takes an activity-focused approach to determining whether non-employees can access a public space within an otherwise private property. Second, employers can treat off-duty employees of a contractor or licensee just as non-employee members of the general public and deny access *unless* the contractor employees can meet two narrow exceptions: exclusivity and no alternate, non-trespassory means of communication. Through these decisions, the Board has returned the authority to employers to determine who may access their private property, as well as the scope of permitted use. However, the Board has created specific new standards to evaluate whether the employer acts within its rights, and employers should be aware of these new rules.

UPMC Presbyterian Shadyside, 368 NLRB No. 2 (June 14, 2019)**Background**

UPMC operated the Presbyterian Hospital, located in Pittsburgh, PA. Presbyterian Hospital had a cafeteria on the eleventh floor, which was open to patients, their families and/or visitors, and employees. UPMC maintained a non-solicitation policy, prohibiting solicitation and distribution in or near the cafeteria. While UPMC did not actively monitor the cafeteria, it had historically removed solicitors from the cafeteria after receiving complaints.

Two nonemployee union representatives entered the cafeteria and held a meeting with approximately six hospital employees where they discussed union organizing matters. During the meeting, union flyers and pins were displayed on the table and one off-duty hospital employee distributed flyers to others in the cafeteria. UPMC received two complaints from other employees about the solicitation and distribution, prompting a security officer to approach the table and ask to see employee identification from all present. The security officer then asked the union representatives to leave because they were not employees. The union representatives refused, claiming that a nearby individual was also a nonemployee waiting to eat lunch with her friend, but the hospital was not forcing her to leave. The police later arrived to escort the union representatives out of the cafeteria.

The Board's Decision

Before reaching its decision in this case, the Board first reiterated the general principle under *Babcock*¹ that an employer can deny nonemployees access to its facilities. The *Babcock* standard contained two exceptions to this principle (inaccessibility and discrimination), which the Board stated were narrow and carried a heavy burden of proof. The Board then identified a series of cases that appeared to create an additional exception beyond the narrow *Babcock* exceptions – granting nonemployees access to areas open to the public, including for solicitation and distribution, as long as they were not “disruptive.”² In other words, under prior Board precedent, employers could not lawfully restrict nonemployees from accessing public areas within private property for the purposes of solicitation, as long as the solicitation was not disruptive. The Board,

¹ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

² See, e.g., *Oakwood Hospital*, 305 NLRB 680 (1991), enf. denied 983 F.2d 698 (6th Cir. 1993); *Baptist Medical System*, 288 NLRB 882 (1988), enf. denied 876 F.2d 661 (8th Cir. 1989); *Southern Maryland Hospital Center*, 276 NLRB 1349 (1985), enf. denied in relevant part 801 F.2d 666 (4th Cir. 1986).

citing decisions from numerous circuit courts for support, rejected this “public space” exception. The Board then created a new standard:

“we find that an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizational activity. The fact that a cafeteria located on the employer’s private property is open to the public does not mean that an employer must allow any nonemployee access for any purpose. Absent discrimination between nonemployee union representatives and other nonemployees...the employer may decide what types of activities, if any, it will allow by nonemployees on its property.”

Applying this new activity-focused standard to the facts, the Board overturned the administrative law judge’s decision and held that UPMC lawfully removed the union representatives from its cafeteria. Pointing to the fact that UPMC had removed other solicitors in the past, the Board concluded that enforcing the non-solicitation policy and removing the union representatives was not discriminatory. Both Board Member McFerran (the dissenting member) and the Board’s General Counsel argued that allowing other nonemployees to remain in the cafeteria while removing union representatives was *per se* discrimination. The Board rejected this argument, drawing a distinction between the conduct involved:

“there is a difference between admitting friends or relatives of employees for meals and permitting outside entities to seek money or memberships.”

According to the Board, therefore, the correct comparators for the union representatives were the other solicitors UPMC removed, not the nonemployees using the cafeteria strictly to eat lunch. Emphasizing the activity-focused approach, the Board responded to Member McFerran’s dissent:

“The dissent cannot reasonably argue that union organizers sitting at tables displaying union organizational flyers and union pins, and discussing union organizing with off-duty employees, are using the cafeteria in a manner consistent with the conduct of other cafeteria patrons.”

The upshot for health care employers with interior areas open to the general public (such as the hospital cafeteria here) is that they can now enforce a non-solicitation clause against general “promotional” or organizing activity by nonemployee union

representatives and remove such representatives. The employer may exercise this property right even if there is no actual card solicitation occurring at the time, but assuming the employer does not discriminate against union promotion while permitting other organizations to promote.

Bexar County Performing Arts Center Foundation, 368 NLRB No. 46
(Aug. 23, 2019)

Background

The Bexar County Performing Arts Center Foundation owned and operated the Tobin Center, a theater and performing arts venue in San Antonio, TX. The Tobin Center was set back from the public street and maintained a non-solicitation rule, prohibiting solicitors from distributing materials on Tobin Center property. The San Antonio Symphony had a licensing agreement with the Tobin Center whereby the Symphony could use the theater 22 weeks per year for performances and rehearsals. The Symphony also performed at other venues throughout the year.

Ballet San Antonio, another licensee of the Tobin Center, chose to use recorded music for its performances instead of Symphony performers. The Symphony decided to leaflet before a Ballet San Antonio performance, to raise awareness about the use of recorded music. On that day, approximately 12 to 15 Symphony employees and sympathizers started leafletting on Tobin Center property. Tobin Center security informed them that they could not leaflet on private property and asked that they move to the public sidewalk across the street. The Symphony employees and sympathizers went to the public sidewalk and continued handing out leaflets.

The Board's Decision

The Board held that, unlike employees, a contractor's employees do not have broad off-duty access rights to an employer's property. In this context, the Board held that licensees and contractors are indistinguishable. While noting that employees of a contractor/licensee are not complete strangers to the employer's property, the Board determined that "their diminished contact with the owner and its property should reasonably correspond to lesser rights of access to the property when off duty than the property owner's own employees enjoy."

Prior Board precedent allowed contractors to access an employer's property, including contractors who did not work exclusively on that property, unless the employer could

show that the access interfered with the use of its property.³ In this case, the Board set out a new standard, allowing an employer to deny access to off-duty contractor employees unless:

“(i) those employees work both regularly and exclusively on the property and

(ii) the property owner fails to show that they have one or more reasonable non-trespassory alternative means to communicate.”

According to the Board, “regular and exclusive” work under prong one eliminates contractors that “perform[] services only occasionally, sporadically, or on an ad hoc basis.” Further, examples of alternative non-trespassory means of communication include access to public property, traditional media (e.g., newspapers, radio, television, and billboards), and digital media outlets (e.g., social media, blogs, and websites).

Applying the new standard to the facts in this case, the Board held that the Respondent lawfully prohibited Symphony employees and sympathizers from leafletting on Tobin Center property for several reasons. Most notably, Symphony employees did not regularly work at the Tobin Center because they were only licensed to use the facility for 22 weeks, or less than half of the year. Moreover, the Board found that the Symphony employees had many other alternative non-trespassory means of communicating with the public – as evidenced by the fact that they continued leafletting on public property across the street.

Member McFerran also dissented in this case, taking issue with both elements of the Board’s standard. In response, the Board noted:

“[T]he dissent fails to acknowledge that exclusivity was a traditional consideration in cases involving the access rights of contractor employees until the majority in *New York New York* [an earlier Obama Board case referenced below] deleted it...The dissent also dismisses the possibility that, by using print and online media that focus on cultural events in San Antonio, the Symphony employees might be able to communicate not only with those who happen to be attending one ballet performance but also with prospective patrons and benefactors who may generally be interested in the operations of the San Antonio Ballet and the Symphony. We do not

³ See, e.g., *New York New York Hotel & Casino*, 356 NLRB 907 (2011); *Simon Debartolo Group*, 357 NLRB 1887 (2011).

dismiss that possibility. Indeed, such communication may be more effective than a single day of leafleting.”

The upshot for health care employers is that they can now prohibit employees of irregularly-utilized contractors from entering the employer’s exterior or interior premises to engage in labor protests or leafletting against the contractor or employer.

Summary of Employer Takeaways

- Nonemployees have lesser rights to access an employer’s property than employees.
- Employers can prohibit nonemployees from accessing a public space to engage in promotional conduct that is inconsistent with the space’s intended use – provided that the prohibition is uniformly applied.
- Employees of a contractor/licensee do not have the same access rights as employees, even though the contractor/licensee performs work on the property.
- Acknowledging how technology has changed the way people interact and communicate, the Board has extended “alternative” means of communication to include social media and other digital outlets.
- Although the Board has restricted nonemployee access rights, for example, allowing employers to create “anti-promotion” policies, employers should carefully review current or proposed access restrictions and contact labor counsel for an assessment of same.

ACCESS DENIED? THE NLRB OVERTURNED A 38-YEAR PRECEDENT RELATED TO UNIONS ACCESSING EMPLOYER SITES. LEARN WHAT THAT MEANS FOR YOU

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Abstract:

In June 2019, the National Labor Relations Board (“NLRB” or “the Board”) overturned a 38-year precedent that gave union representatives broad access to private employer sites. The case, *UPMC, 368 NLRB No. 2*, has important consequences for employers, giving them more leeway in prohibiting union organizing activities on their properties. In this piece, King presents a background about the case and practical recommendations for health care employers.

HOW DOES THE NEW NLRB RULING DIFFER FROM PRIOR PRECEDENT?

According to the prior precedent established in *NLRB v. Babcock & Wilcox Co.*, the Supreme Court’s leading union access case, an employer could prevent union representatives from distributing materials on the employer’s private property when:

- The employer had a policy prohibiting it;
- The employer enforced its policies in a consistent and non-discriminatory way; and
- The union had other means of communicating with employees.

The employer could not, however, prevent union representatives from discussing union issues with employees anywhere considered a *public* space on the employer’s property unless the employer could prove that the union representatives were being disruptive. This, of course, is particularly challenging for healthcare facilities that are largely accessible to the public at all times.

In *UPMC*, the NLRB ruled that an employer could prohibit union solicitation in its public spaces as long as there was no evidence of discriminatory enforcement. This decision allows an employer to more freely enforce its policies with regard to union organizing on its property.

SO, WHAT LED TO THE UPMC RULING?

In 2013, two representatives of the Service Employees International Union (SEIU) were meeting in the University of Pittsburgh Medical Center (UPMC) Presbyterian's cafeteria with several hospital employees. The union representatives were sitting at tables with union pins and flyers and discussing union issues with the employees. A security guard asked them to leave, stating that the cafeteria was only to be used by hospital patients, their families and visitors, and employees.

In response, the SEIU representatives pointed out that there was at least one other non-employee in the cafeteria waiting to eat lunch with a friend who worked at the hospital – and that this individual was not asked to leave. On this basis, SEIU filed a lawsuit for unfair labor practice, citing *NLRB v. Babcock & Wilcox Co.*

WHY DID THE NLRB CHANGE ITS POSITION?

Initially, in 2014, an NLRB administrative law judge ruled in favor of SEIU on its charge of unfair labor practice in the UPMC case. However, the University of Pittsburgh Medical Center appealed the decision, and the ruling was ultimately overturned in June of this year.

In the revised ruling, the NLRB held that, because there was no evidence that the medical center permitted any solicitation or promotional activity in its cafeteria – and in fact, had a practice of removing all non-employees engaged in solicitation or promotional activities in or near the cafeteria – the medical center was within its rights to have the union representatives removed.

The NLRB also rejected the argument of discrimination because the non-employee who was not asked to leave was using the cafeteria to eat lunch, not to solicit or distribute information.

...we find that an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizational activity. The fact that a cafeteria located on the employer's private property is open

to the public does not mean that an employer must allow any nonemployee access for any purpose. Absent discrimination between nonemployee union representatives and other nonemployees...the employer may decide what types of activities, if any, it will allow by nonemployees on its property.”– 368 *NLRB No. 2*

WHAT DOES THIS MEAN FOR YOUR HOSPITAL?

Most hospitals are private entities that have a plethora of quasi-public locations, including courtyards, gift shops, waiting rooms and cafeterias. These locations are on a hospital's private property but, at the same time, are largely open to the public. Your hospital can benefit from the new NLRB ruling by taking the following steps:

1. **Confirm that your hospital has an existing solicitation and distribution policy in place.**
2. **Review your hospital's policy with Human Resources and Legal.** Ensure that the policy is in compliance with the new NLRB ruling and that the policy's rules regarding visitor conduct in public spaces are written in broad terms. In other words, the policy should apply to all solicitation and distribution activities by non-employees and should not be written to target union organizing activities specifically.
3. **Take steps to consistently and fairly enforce the policy across your organization.** This includes educating leaders on the policy and how it affects their departments and employees. It also means ensuring all staff, including security personnel, are properly trained on the correct procedures for carrying out the policy.

**THE NLRB'S TREATMENT OF SOCIAL MEDIA CASES:
FROM "NOT SAFE FOR WORK" (NSFW) TO "FIXED THIS FOR YOU" (FTFY)**

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Abstract:

For the better part of the last decade, the National Labor Relations Board ("NLRB" or "Board") viewed employers' efforts to regulate employee social media usage with a tremendous degree of skepticism. The Board broadly interpreted employees' right to engage in "protected concerted activity" under Section 7 of the National Labor Relations Act (the "Act"), generally, and to protect communication on social media platforms that the Board deemed protected concerted activity, specifically.

The Obama Board's expansive view of employees' Section 7 rights brought heightened scrutiny to a variety of personnel policies long deemed lawful, if not benign. This resulted in the application of Kafkaesque legal standards to seemingly straightforward handbook policies. Though the Board permitted policies prohibiting *overtly* unlawful discriminatory, harassing, or retaliatory social medial activity, commonsense policies requiring

employees to be courteous, to act in a professional manner, or prohibiting rude, discourteous, offensive, disrespectful, abusive, or insubordinate conduct – policies that buttress an employer’s corollary obligations to maintain a measure of decorum consistent with its obligation to provide a workplace free from unlawful discrimination, harassment, and retaliation under state and federal fair employment practices statutes – were routinely deemed unlawful.

Technology, social media platforms, online behavior and technologically influenced social mores continued to evolve at a dizzying pace. The Board, guided primarily by its holdings in *Lafayette Park Hotel*, 326 NLRB 824 (1998) and *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), narrowly parsed the language of facially neutral social media policies to assess whether an employee would “reasonably construe” the policy’s language to prohibit Section 7 activity, the rule was developed in response to union activity, or the rule was applied to restrict Section 7 rights. The first and third prongs of this test presented a formidable impediment to developing social media policies that could protect employers from glaringly obvious reputational and operational threats. In the Obama Board’s view, a “reasonable employee” viewed most any policy requiring a measure of employee decorum as impacting the right to organize, engage in mutual aid, or address working conditions. Any legitimate rationale for the challenged policy was viewed as irrelevant.

The Obama Board’s Efforts to Provide Clarity Yield Perplexing Results

The Board’s hyper-technical application of the Act appeared ill-suited to a sociologically and technologically dynamic subject like social media. Well-meaning employers lacked sufficient clarity to develop lawful policies. Confounded employers continually reviewed and modified their policies.

In an effort to elucidate the Board’s thinking, Acting General Counsel Lafe E. Solomon issued three Reports – in August 2011, January 2012, and May 2012 – concerning social media cases. If the intent was to provide a degree of clarity in execution this exercise failed. Instead, the memos offered additional examples of the Board’s increasingly expansive view of protected concerted activity; the limited extent to which employers could regulate employees’ online outbursts; interactions with the media; transmission of non-public, confidential or proprietary information; or engagement with government agencies.

The memoranda also highlighted the increasingly limited circumstances justifying discipline arising from an employee's social media activity. See, *Report of Acting General Counsel Concerning Social Media Cases*, Memorandum OM 11-74 (August 18, 2011)(policy prohibiting the use of offensive language or "rude or discourteous behavior" unlawfully overbroad); *Report of Acting General Counsel Concerning Social Media Cases*, Memorandum OM 12-31 (January 24, 2012) (policy prohibiting hospital employees from engaging in "unprofessional communication that could negatively impact the employer's reputation or interfere with the employer's mission or unprofessional /inappropriate communication regarding members of the employer's community" unlawfully chills Section 7 activity); *Report of Acting General Counsel Concerning Social Media Cases*, Memorandum OM 12-59 (May 30, 2012 ("...we found unlawful the instruction that '[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline'...and...that '[c]ommunications with coworkers...that would be inappropriate in the workplace are also inappropriate online.'").

Perhaps recognizing the Agency's nebulous treatment of this burgeoning issue failed to provide the clarity necessary to develop a lawful social media policy, the Agency released a social media policy it deemed lawful with its May 30, 2012, Report. The policy sets forth a series of "guidelines" to "assist [employees] in making responsible decisions about [the] use of social media." In that vein, it "encourages" employees to "avoid using statements, photographs, video or audio that could reasonably be viewed as malicious, obscene, threatening or intimidating that disparage customers, members, associates, or suppliers, or that might constitute harassment or bullying," but does not overtly prohibit such activity. In addition, the policy directed employees to refrain from using social media on work time or on employer-provided equipment – a concept contrary to the Board's commentary two years later in *Purple Communications*, 361 NLRB 1050 (2014) (questioning rules prohibiting the use of employer equipment for Section 7 purposes) (*c.f.*, *Coastal Showers*, 12-CA-194162, Advice Memorandum (issued August 30, 2018) declining to extend *Purple Communications* to permit working time employee use of personal social media platforms).

The Agency's recommended policy was long on conceptual recommendations and short on clear-cut direction. An employer still acted at its peril when applying the policy to discipline employees for engaging in conduct prescribed by the policy since the Board might conclude the policy's application restricted Section 7 rights. Moreover, just two (2) years after the policy was released to the public, the provisions restricting employees' use of employer-provided equipment for social media activity were likely unlawful.

While better than nothing, the policy failed to clearly and concisely articulate the boundaries of employee social media behavior or provide employers with a degree of certainty when applying such policies.

The End of *Lutheran Heritage*

In December 2017, the Board overturned *Lutheran Heritage*. Under *Lutheran Heritage*, the Board exclusively focused upon whether a rule might chill employees' exercise of their Section 7 rights. The new test articulated in *The Boeing Company*, 365 NLRB No. 154 (2017), balanced a rule's potential impact on protected conduct against the employer's legitimate basis for the rule. The new *Boeing* standard protected employers' common sense work rules against invalidation based on the retrospective conjecture about how a "reasonable" employee might interpret them.

Under *Boeing*, when the Board evaluates a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule. Moreover, in an effort to provide greater clarity, the Board will conduct its analysis in the context of three categories of rules:

Category 1 includes rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. One example of a Category 1 rule is a rule requiring employees to abide by basic standards of civility.

Category 2 includes rules that require individualized scrutiny in each case as to whether the rule prohibits or interferes with employees' rights under the Act, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

Category 3 includes rules the Board designates as unlawful because they prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is *not* outweighed by employer-offered justifications. For example, a rule prohibiting employees from discussing wages or benefits with one another would fall within Category 3.

This new test provides employers with a greater degree of clarity and takes legitimate business justifications into account when assessing the lawfulness of a given social media policy. As with the prior test, however, a policy might be lawful, but an employer's *application* to an employee engaged in protected activity may violate the Act, depending on the circumstances.

Social Media Policy Guidance in the Post-*Boeing* Era

Recent Administrative Law Judge (ALJ) decisions applying *Boeing* have shed some light on the Board's treatment of social media policies under the new standard. In *U.S. Postal Service*, 2018 BL 81347 (N.L.R.B. March 9, 2018), an ALJ examined rules governing employees' official use of social media to communicate with the public or Postal Service employees. The rule included "personnel matters" within the definition of confidential and proprietary information employees were prohibited from posting online. Upholding the Rule, the ALJ ruled "the chance that a reasonable employee would understand this rule to bar them from discussing terms and conditions of employment (i.e., 'personnel issues') via their personal social media accounts to be 'comparatively slight' if not nonexistent."

In *SOS International*, 2018 BL 83066 (N.L.R.B. March 12, 2018), an ALJ invalidated a rule prohibiting employees from using social media to send messages that are "offensive or embarrassing to the Company." The ALJ determined that "[b]ecause the rule prevented employees from using social media to discuss *any* information about company business, regardless of the tone of such discussions, and without any exception for Section 7-protected topics such as wages," the rule constituted an unlawful prohibition under *Boeing*.

Similarly, in *Motor City*, 2018 BL 388301 (October 22, 2018), an ALJ applied *Boeing* to invalidate a rule prohibiting "chatting", "utilizing Facebook and other social networking sites," and "blogging" during working time. The ALJ found the employer's social media rules facially neutral, "as written, and in context," but overly broad and prone to chill Section 7 rights, noting "[c]ommunication with other employees and the public about terms and conditions of employment is a core Section 7 right" and that the employer's claimed interest in protecting information or controlling its image were insufficient to outweigh the potential interference such protected rights. Notably, the ALJ also ruled the employer's updated rule explaining when social media is acceptable did not violate the Act because it clearly stated social media is acceptable when "permitted because of a legal right."

Earlier this summer, in *Bemis Co.*, 2019 NLRB LEXIS 379, *247 (N.L.R.B. July 1, 2019), an ALJ held that a rule requiring employees not to post anything harmful to the employer's reputation constitutes an unlawful attempt to shield the company from criticism by its employees, a protected right.

In addition, the General Counsel's Division of Advice has issued a host of Memoranda addressing social media policies under the *Boeing* standard. The most notable and comprehensive analysis appears in a Memorandum released on August 15, 2019, analyzing CVS Health's policies. *CVS Health*, 31-CA-210099, Advice Memorandum (issued September 5, 2018). The General Counsel deemed policies requiring employees to use their real names when discussing the company and their work online unlawful as it may discourage employee dissent. While the policies' prohibition of disclosing non-confidential "employee information" was unlawful, language in the same provision prohibiting the disclosure of protected health information and personally identifiable information was deemed lawful.

Significantly, the General Counsel deemed a number of critical rules lawful: provisions requiring employees to disclaim status as an "official company representative" when speaking about the company; prohibiting use of the company's name in account names or URLs or using its logos; requiring employees to clarify that opinions are personally-held; prohibiting disrespectful, unlawful, discriminatory, harassing, bullying, threatening, defamatory, or unlawful content; prohibiting content, images, and photos employees do not have the right to use; and prohibiting posting confidential, proprietary, and "internal-only" company information.

Similar assessments in Advice Memoranda issued regarding other cases reinforce the notion that policies requiring employees to include disclaimers on personal social media postings stating their views are their own and not those of the Employer, and prohibiting the use of employer logos and associated intellectual property are lawful. In a marked departure from the Obama Board, the General Counsel also approved rules prohibiting employees from posting statements, video, photos, or audio reasonably viewed as disparaging to employees as such prohibitions are consistent with the lawful workplace civility policies. See, e.g., *Kuhmo Tires*, 10-CA-208153, Advice Memorandum (issued June 11, 2018); *Coastal Showers*, 12-CA-194162, Advice Memorandum (issued August 30, 2018); and *Wilson Health*, 09-CA-210124, Advice Memorandum (issued June 20, 2018).

No Time like the Present to Update Pre-*Boeing* Social Media Policies

Given the Board's recent change of course, it is time for employers to give their social media rules a fresh look. The current state of the law offers greater freedom to regulate employee social media activity, protect employer intellectual property rights, police workplace decorum, and protect employees, customers, and business contacts from caustic behavior. The wider latitude employers enjoy under the *Boeing* standard and, the Supreme Court's narrowing view of what constitutes protected concerted activity as articulated in *Epic Systems*, 138 S. Ct. 1612 (2018), justifies employers making the changes necessary to ensure employee social media use better aligns with core entrepreneurial and managerial interests.

NLRB ADOPTS NEW FRAMEWORK FOR ANTICIPATORY WITHDRAWAL OF RECOGNITION

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Abstract:

On July 3, 2019, the National Labor Relations Board (“NLRB” or “the Board” adopted a new framework for handling withdrawals of recognition when a union acquires new evidence of majority support following an employer’s announcement that it intends to withdraw recognition upon the expiration of the parties’ collective bargaining agreement.

In *Johnson Controls, Inc.*,¹ the Board held that an employer that receives evidence that a majority of bargaining unit employees no longer want to be represented by an incumbent union may announce its intention to withdraw recognition no more than ninety (90) days prior to the expiration date of a current collective bargaining agreement. Within forty-five (45) days after the employer’s announcement, the union may challenge the basis for the employer’s withdrawal of recognition by filing an election petition. The Board will no longer apply a “last in time” rule pursuant to which an employer’s withdrawal of recognition would be held unlawful in an unfair labor practice proceeding if the union obtained new evidence of continued majority support following an employer’s announced intention to withdraw recognition.

Background

The UAW represented a unit of production and maintenance employees at the employer’s automobile parts manufacturing facility in Florence, South Carolina. The parties’ most recent collective bargaining agreement ran from May 7, 2012 through May 7, 2015. On April 20, 2015, the parties began negotiations for a successor agreement.

¹ *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019).

The next day, the employer received a petition signed by 83 of the 160 bargaining unit employees stating that the signatories no longer wished to be represented by the union.

In response, the employer notified the union that it had received the petition and would no longer recognize the union when the parties' agreement expired on May 7. The employer also cancelled a previously scheduled bargaining session and rejected the union's demand to return to the bargaining table. The union then began soliciting signatures on authorization cards from bargaining unit members, and by May 7, 2015, had collected signed authorization cards from 69 bargaining unit employees, including six (6) who had previously signed the disaffection petition. The union notified the employer that it had "credible evidence" that it retained majority support and offered to meet to compare the evidence each had on this issue. The employer declined that offer, and the union did not produce evidence of the signatures it had obtained. The employer withdrew recognition on May 8, 2015, and proceeded to announce a wage increase and a new 401(k) match. The union then filed a charge asserting that the employer's withdrawal of recognition violated Section 8(a)(5) because the additional authorization cards obtained by the union demonstrated that the union had not, in fact, lost majority support at the time the employer withdrew recognition.

The Board's Decision

The Board's decision in this case addressed a recurring problematic fact pattern in withdrawal of recognition cases. Under the Board's seminal decision in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), an employer may lawfully withdraw recognition from an incumbent union only if it can establish that the union actually lacked majority support at the time of withdrawal. As described by the Board in *Johnson Controls*, well-established precedent applying the *Levitz* standard allowed an employer that receives evidence of a loss of majority support (typically in the form of a petition signed by bargaining unit employees) within a "reasonable" period of time before an existing collective bargaining agreement expires to inform the union that it intends to withdraw recognition when the agreement expires and to refuse to bargain for a successor agreement. Such a process is known as an "anticipatory withdrawal" of recognition.

However, as the Board also made clear in *Levitz*, any employer that chooses to withdraw recognition from an incumbent union does so “at its peril.”² If a union challenges the employer’s withdrawal of recognition in an unfair labor practice proceeding, the employer must prove by a preponderance of the evidence that the union had, in fact, lost majority support among bargaining unit members. Failure to meet that burden would mean that the employer’s withdrawal of recognition violated Section 8(a)(5).

In a number of cases following *Levitz*, the Board held that if a union obtained evidence that it had regained majority support (e.g., by obtaining newly signed authorization cards or a counter-petition supporting the union) following the employer’s announcement of its intention to withdraw recognition, the employer’s withdrawal of recognition was unlawful, even if the union chose not to share its new evidence of support with the employer.³ In cases applying this “last in time” rule to hold that an employer unlawfully withdrew recognition, the typical remedy would include an affirmative bargaining order, which would preclude any challenge to the union’s majority status for a minimum of six (6) months. And, as the Board noted in *Johnson Controls*, if the parties reached a new agreement after being ordered to bargain, the “contract bar” doctrine would preclude any challenge to the union’s representative status for the life of the contract up to a maximum of three (3) years.

According to the Board, this framework was problematic for several reasons. First, the Board explained that applying the “last in time” approach failed to account for the fact that employees who are so-called “dual signers” or “cross-overs” have expressed both support for and opposition to union representation in a short period of time, and may not understand that a later signature on an authorization card or union initiated counter-petition revoked their prior signature on the disaffection petition. The Board also emphasized that allowing employees to testify about their actual intentions and representational desires was not a reliable substitute for casting a ballot in a Board-supervised election.

² *Levitz*, 333 NLRB at 725.

³ *Parkwood Developmental Center*, 347 NLRB 974 (2006); *Highlands Regional Medical Center*, 347 NLRB 1404 (2006); *Scoma’s of Sausalito, LLC*, 362 NLRB 1462 (2015).

Second, the Board noted that the existing framework did not promote stability in labor relations. If a union can withhold evidence that it has regained majority support following an employer's announcement that it intends to withdraw recognition, the employer may reasonably act based on the evidence it had on hand and withdraw recognition and make unilateral changes. The employer's actions would then be reversed at some later time following an unfair labor practice proceeding, causing an unnecessary disruption to the parties' bargaining relationship.

Furthermore, the Board noted that the current framework under *Levitz* created an "unjustified asymmetry" in which the Board allowed an employer to prove a union's loss of majority support only by relying on evidence it actually possessed and relied on when it withdrew recognition, but allowed a union to challenge that evidence with "after-acquired evidence the employer did not possess."

The Board's new standard avoids these problems, and provides a clear framework for anticipatory withdrawals of recognition. Under the standard announced in *Johnson Controls*, the reasonable time before a contract expires during which an employer can announce its intention to withdraw recognition is specifically defined as no more than 90 days prior to the contract expiration date. This time period aligns with the start of the 30-day open period during which most employees can file a decertification petition (for health care employees the open period begins 120 days prior to the expiration date). If an incumbent union wants to challenge the employer's decision, it must file an election petition within 45 days after the date the employer announces its anticipatory withdrawal. If no election petition is filed, the employer may rely on the disaffection evidence it received prior to announcing the anticipatory withdrawal of recognition.

If an election petition is filed by the union, the Board noted that an employer would face "considerable risks" if it makes unilateral changes pending the outcome of an election since any changes made during the pre-election "critical period" would risk tainting the outcome of the election.

Concluding Thoughts

The Board's decision in *Johnson Controls* brings some needed clarity to an area where employers faced significant risks if they exercised the right to announce their intention to withdraw recognition prior to the expiration date of an existing collective bargaining agreement. The Board will no longer entertain an unfair labor practice charge based on evidence of continued majority support that a union gathers following the announcement

of an anticipatory withdrawal of recognition. Instead, a union's sole option will be to seek a Board-supervised election to determine the wishes of bargaining unit employees.

Nothing about the *Johnson Controls* decision changes the basic requirement that an employer must have objective evidence that a union actually has lost majority support before it can withdraw recognition. Similarly, nothing about this decision changes the ability of a union to file a charge alleging that an employer initiated the anti-union petition or provided unlawful assistance to employees, that the petition relied upon by the employer did not sufficiently state that employees no longer desired to be represented, that signatures on the petition are not valid, or that the petition was otherwise tainted by the employer's unfair labor practices. Nonetheless, the Board's decision offers a clear standard employers can rely on when presented with evidence that an incumbent union no longer enjoys the support of a majority of unit employees.

BOARD APPLIES BOEING TO FIND ARBITRATION PROVISION UNLAWFUL

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Abstract:

One year after the Supreme Court's decision in *Epic Systems Corp. v. Lewis*,¹ the National Labor Relations Board ("NLRB" or "the Board") issued two decisions addressing issues raised by mandatory arbitration agreements. In the first decision, the Board held that an arbitration agreement provision explicitly restricting employee access to the Board is unlawful. In reaching this decision, the Board had occasion to utilize the analytical framework created by its holding in *Boeing*.² This decision included a recitation of principles to be applied to arbitration provisions by the General Counsel, providing employers with useful guidance. In the second decision, the Board addressed two issues of first impression following the Court's *Epic Systems* holding. The Board held that employers may promulgate mandatory arbitration agreements in response to employees filing a class or collective action. Additionally, employers may inform employees that refusal to execute the arbitration agreement will result in discipline.

¹ 138 S. Ct. 1612 (2018).

² *The Boeing Co.*, 365 NLRB No. 154 (December 14, 2017).

Board Applies *Boeing* To Find Arbitration Provision Unlawful

In a rare unanimous decision reached by the four-member Board, the Board held that an employer's arbitration agreement unlawfully restricted employee access to the NLRB and its processes.

In *Prime Healthcare Paradise Valley*,³ the employer maintained its Mediation and Arbitration Agreement ("MAA"). The MAA provided for binding arbitration as the exclusive forum for resolution of covered claims. Covered claims included "claims for violation of any federal, state, or other government constitution, statute, ordinance regulation, or public policy," and specifically identified several employment statutes. The MAA also specifically excluded certain claims. The MAA exclusions, however, did not exclude charges filed with the NLRB, specifically, or any administrative agency, generally. Employees were required to execute the MAA as a condition of employment.

Because the MAA did not explicitly interfere with employees' rights under Section 7 of the National Labor Relations Act ("NLRA") to file charges with the Board, the Board applied its *Boeing* framework to analyze the facially neutral MAA. Under *Boeing*, the Board evaluates facially neutral policies by examining two factors: (i) the nature and extent of a rule's impact on rights under the Act, and (ii) the employer's legitimate justifications associated with the rule. The Board delineated three categories of work rules. First, Category 1 rules are lawful to maintain, either because (i) a reasonable interpretation of the rule does not prohibit or interfere with employees' NLRA rights, or (ii) the potential adverse impact on employees' NLRA rights is outweighed by the rule's justifications. Next, Category 2 rules warrant individualized scrutiny to determine whether the rule would prohibit or interfere with employee NLRA rights, and, if so, whether any adverse impact on NLRA-protected rights is outweighed by legitimate justifications. Finally, Category 3 rules are those that are unlawful to maintain because they prohibit or limit protected activity, and the adverse impact on employees' Section 7 rights is not outweighed by justifications associated with the rule. These categories represent "a classification of results from the Board's application of the new test...[but] are not part of the test itself."

³ 368 NLRB No. 10 (June 18, 2019).

Applying *Boeing*, the Board first found that the MAA, when reasonably interpreted, restricted employees' statutory right to file charges with the Board. Next, the employer advanced no justification for the rule. But the Board went further, holding that, as a *matter of law*, "there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employee access to the Board or its processes." Accordingly, the Board found that the MAA was a Category 3 rule under the *Boeing* framework.

Importantly, the Board's decision also publicized, without adopting, the General Counsel's principles for analyzing arbitration agreements in light of *Boeing*. Nevertheless, these principles foreshadow how the General Counsel will view arbitration agreements following the Supreme Court's *Epic Systems* decision, particularly the Court's direction that it "will not lightly infer illegality" of arbitration agreements. The General Counsel will place arbitration agreement rules in the following *Boeing* categories:

Category 1

- Agreements with a "savings clause" explicitly permitting employees to utilize administrative proceedings in tandem with arbitral proceedings. The savings clause, however, must be "reasonably proximate" to the mandatory arbitration language so that employees would read the entire agreement to permit access to the NLRB.

Category 2

- Arbitration agreements stating that all employment disputes "shall" or "must" be resolved through arbitration should not be presumed to violate the Act. Exclusivity should not be read into these agreements, absent language indicating exclusivity. These agreements should be read as a while to determine whether they would reasonably tend to interfere with the exercise of NLRA rights.
- Vague savings clauses that require employees to "meticulously determine the state of the law" themselves. The General Counsel posits that this type of savings clause is likely to interfere with the exercise of NLRA rights – though the General Counsel did not explicitly state that such agreements will be placed in Category 2, the "likely to" qualifier suggests there will be instances in which vague savings clauses may ultimately be found lawful. Examples of

these vague savings clauses include those that exclusively require arbitration but limit that requirement to circumstances where a claim “may lawfully be resolved by arbitration.”

- When analyzing the adequacy of savings clauses, the Board should not “require[] a degree of comprehensiveness and precision” in order to find the provision lawful. Thus, such clauses will generally be found lawful and will be placed in Category 2.

Category 3

- Rules like those in Prime Healthcare Paradise Valley that explicitly prohibit the filing of charges with administrative agencies, or state employees must use arbitration “exclusively,” or cannot use any other forum for work-related or statutory claims. Additionally, rules that use language that employees would reasonably understand to prohibit the filing of claims with the NLRB will be found unlawful.
- Arbitration agreements permitting the filing of charges with the Board but precluding or limiting Board remedies. The General Counsel opined that the impact of such a limitation on employees’ right to an effective Board remedy outweighs any legitimate business justification for such a rule.

This case warns employers to ensure that their arbitration agreements do not include provisions explicitly restricting employees’ ability to access the Board (e.g., filing an unfair labor practice charge), or can be reasonably read to do so. But perhaps the more important takeaway from the decision is the prospective guidance provided by the principles that the General Counsel will apply when analyzing arbitration agreements pursuant to the *Boeing* framework.

Employers May Issue Mandatory Arbitration Agreements in Response to Class or Collective Actions, and Threaten Discipline to Those Who Refuse to Sign

In *Cordua Restaurants, Inc.*,⁴ the NLRB addressed two issues of first impression on the heels of the Supreme Court’s holding in *Epic Systems*. In *Epic Systems*, the Supreme Court held that agreements including class and collective action waivers requiring that employment disputes be resolved by individualized arbitration do not violate the NLRA.

⁴ 368 NLRB No. 43 (August 14, 2019).

But *Epic Systems* left unanswered a number of questions relating to arbitration agreements. The Board answered two of these questions in *Cordua Restaurants*. In a 3-1 decision, the Board first held that the employer did not violate Section 8(a)(1) of the Act by promulgating a revised arbitration agreement in response to employees opting into a collective action. Second, the Board concluded that the Act does not prohibit employers from informing employees that failing or refusing to sign mandatory arbitration agreements will result in their discharge.⁵

The employer maintained an arbitration agreement requiring employees to waive their right to file, participate, or proceed in class or collective actions. In January 2015, seven employees who had earlier signed the arbitration agreement filed a collective action against the employer in federal court, alleging violations of the Fair Labor Standards Act and Texas state minimum wage law. Later, additional employees opted into the collective action. In response to the opt-ins, the employer distributed a revised arbitration agreement. The revised arbitration agreement added language explicitly prohibiting employees from opting into collective actions. The employer threatened that any employee who declined to sign the revised agreement would be removed from the schedule.

First, the Board held that the employer's promulgation of the revised agreement, even in response to protected employee activity, does not violate the NLRA. The Board reasoned that *Epic Systems* made clear that an agreement requiring employment disputes to be resolved through individual arbitration does not restrict employee rights under Section 7 of the NLRA. Thus, the Board determined that the *Epic Systems* holding requires the conclusion that an agreement waiving an employee's right to opt into a collective action also does not restrict employees' Section 7 rights. And while the Board will find that rules *restricting* Section 7 activity that are promulgated in response to protected activity violate the NLRA, the implementation of the revised agreement was lawful because no Section 7 right had been restricted.

Second, the Board determined that it was not an unlawful threat for the employer to state that employees who declined to sign the revised agreement would be removed

⁵ The Board also held that, consistent with longstanding precedent, employers are prohibited by Section 8(a)(1) of the Act from taking adverse action against employees for engaging in concerted activity by filing a class or collective action. Thus, the employer violated Section 8(a)(1) of the Act when it terminated an employee, Ramirez, who discussed wages with his coworkers, requesting personnel records from the employer to determine compliance with wage and hour laws, and for filing a collective action against the employer.

from the schedule. The Board noted that *Epic Systems* permits an employer to condition employment on employees entering into agreements containing class- and collective-action waivers. Thus, the Board reasoned that the manager's statement was an "explanation of the lawful consequences of failing to sign the [revised agreement]..."

Member McFerran dissented from the majority opinion. She would have found the issuance of the revised arbitration agreement to be unlawful because it was promulgated in response to employees' protected concerted activity. Additionally, McFerran would have found that the employer violated the NLRA by threatening employees when they protested the employer's imposition of the revised arbitration agreement.

There are several takeaways from the Board's decision in *Cordua Restaurants*.

- This Board will continue to give deference to an employer's promulgation and maintenance of class and collective action waivers, consistent with the policies embodied in the Federal Arbitration Act.
- Employers may issue mandatory arbitration agreements even after employees engage in protected concerted activity by filing a class or collective action.
- If a stubborn employee refuses to execute a mandatory arbitration agreement, the employer may inform the employee that his or her continued employment is conditioned upon execution of the agreement.
- Finally, though *Cordua Restaurants* was not a case where an employee was disciplined for failing to execute a mandatory arbitration agreement, it appears likely that the Board would find such discipline to be lawful under the NLRA.

Conclusion

In these decisions, the Board applied its Boeing framework to an arbitration agreement, and addressed questions left open by the Court's decision in Epic Systems. While the Board will give great deference to these agreements, provisions restricting employee access to the NLRB will be found unlawful. Additionally, the General Counsel made clear that agreements precluding or limiting an employee's ability to obtain a full remedy from the Board will not be viewed favorably by the General Counsel. Finally, in Cordua Restaurants, the Board paved the way for employers to promulgate mandatory arbitration agreements in response to employee protected concerted activity, and to inform employees that they must execute such agreements or face discharge.

MERGERS AND ACQUISITIONS WORK WHEN CULTURES COMBINE: CRUNCH THE NUMBERS, NOT THE PEOPLE

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Abstract:

The record-setting pace of corporate consolidation in 2018 and the first half of 2019 has made it hard to keep up with who owns which major companies in the United States and abroad. This article explores how employers can help manage the communications around partnerships to ensure a smoother transition.

[USA Today reports](#), in the first three quarters of 2018, companies announced deals worth \$3.3 trillion – the most recorded in four decades.

Much of the merger and acquisition (M&A) activity is happening in the United States, and it can be seen across all sectors. In 2018 alone, according to [CNN Money](#) and *USA Today*, Amazon acquired Whole Foods, CVS acquired Aetna, Meredith acquired Time Inc., Albertsons acquired Rite Aid, and T Mobile acquired Sprint.

The healthcare industry also hit [a record high](#) for mergers and acquisitions in 2018, and the pace is expected to continue as declining reimbursements and rising costs squeeze margins. The banking industry is expected to [continue its consolidation](#) push in 2019 as the lending market continues its downturn.

But will all these new marriages be productive? Probably not, according to most M&A experts who agree on three things:

1. Most transactions fail. More than half of all deals – some studies say as high as 80 percent – don't produce the value their architects intended.
2. Most organizations focus primarily on the legal and financial due diligence of the deal, paying little or no attention to cultural issues or even active post-merger integration.
3. Cultural factors are a major reason why transactions fail. A *Wall Street Journal* study cited cultural incompatibility as the leading cause of M&A failures.

Cultural Integration

So, what is culture and what are the cultural factors that should be carefully considered during a merger or acquisition? Culture is comprised of the unconscious, unspoken and strongly held assumptions and beliefs that guide behavior. The components of a company's culture may not be obvious or easy to measure. They often are so ingrained that they easily can be taken for granted, and often difficult to articulate.

When companies merge, executives tend to focus first on the business rationale of scale: volume and capital. Thus, leaders analyze the people for their utility in the new company. Are they redundant? What positions should be eliminated?

While a reduction in force is common during a merger or acquisition, considering human capital only for its usefulness in filling positions is a mistake, [experts say](#). Instead, to increase the chances of success, leaders should manage cultural integration with as much focus as they do financial integration. No matter how strategically solid the plan is on paper, joining two businesses won't work without strong employee buy-in and a robust, well-planned communication strategy and effort. The same rigor applied to financial due diligence is often inadequate or missing altogether from a talent planning/assessment due diligence.

Reducing Resistance to Change

There are several well-defined steps an organization can take to keep from becoming a failed merger or acquisition:

- **Create a Case for Change** – Create a strong, compelling case for change and a shared sense of urgency by carefully presenting the reasons for the transaction. Employees are often a tougher "sell" than boards of directors or shareholders. Some people respond best to facts, others to emotions, and

still others to a combination of both. Focus on what the merger will mean to individual employees whenever possible.

- **Establish a Vision** – Shape a picture of what the organization will look like after the change while addressing fears and inspiring confidence. Most of the workforce, management and non-management alike, feels invested in the status quo. It's essential to move that investment to the new company's culture.
- **Engage Your People** – Involve key stakeholders in critical aspects of the change. When describing the non-negotiables, ensure there are plenty of decisions in which employees can offer input and feel a sense of ownership. The more employees own it, the more they will support it.
- **Align Systems and Processes** – Ensure that all revamped workflow and supporting processes and practices are adjusted to support the vision of the future. Analyze each for possible unintended consequences that could result from misaligned systems. All recognition and reward systems should also be aligned to reinforce the new vision and to support the expected behavior in the new world.
- **Tell Your Story** – Communicate relentlessly. Use consistent messaging to ensure the right information gets to employees, and use communication platforms that make sense to them. Measure the impact of the communications and make adjustments as needed to keep the pressure on positive change. You can't over-inform.
- **Persist** – Keep the energy up. Create and implement early warning mechanisms that let you know if progress is being made or if dangers have just gone underground. Don't let the organization become distracted by the next new thing or by "fire fighting" to the detriment of the new entity's success. Things often look like they are settling down long before they really are.

Communication is Critical

You probably noticed the common thread woven through the steps outlined above: communication.

Having a clear plan for merging culture and talent is the first step. Making the case for the cultural merger is the hardest step; it relies on clear and compelling communication to reduce resistance to change.

During a merger or acquisition, your organization's key communication goal will be to overcome the negative perception of a merger or acquisition. When most employees hear about a deal in the works, they think of facility closings, staff reductions, spending cutbacks and other changes that will negatively – and personally – affect them.

The first message employees hear generally is the one that will most influence their perspective on a merger or acquisition. So, get ahead of the rumor mill with positive and regular communications that provide credible answers to common question, such as:

- Why is this happening?
- What will happen to me?
- How will it work?

Initially, you may be unable to answer some important questions. Help employees understand the process and let them know that you will answer their questions and concerns as best you can. The prudent strategy is to:

- Address what hasn't been decided
- Acknowledge its importance to employees
- Promise to provide the answer as soon as it's available

When Mergers Work...and When They Don't

Companies that successfully merge cultures – and leverage a robust communications plan – are positioned for success.

The merger of [Adidas and Reebok](#) is one such story. The Adidas culture was focused on sports while Reebok was more about lifestyle. Adidas was a German company and Reebok an American company.

Instead of allowing one brand to cannibalize the other, Adidas CEO Herbert Hainer decided each would maintain its own identity. Strong communication of that cultural goal helped the plan succeed. Adidas focused on technology and the international market

and Reebok built its share of the youth market in the U.S. The business grew, and that meant reduction in costs for manufacturing, distribution and marketing. And the two entities were aligned in the vision.

The [Microsoft-Nokia](#) marriage on the other hand, is often used as an example of failure. Microsoft wanted to compete with Apple and Android, so it acquired the mobile phone company. Instead of focusing on a clear cultural and business goal of competing in the mobile phone market, it shifted investment to other parts of Nokia and eventually laid off massive numbers of Nokia workers. It ultimately wrote the entire deal off.

Leaders don't set out on mergers and acquisitions with a plan to fail. Executives are usually great at crunching the numbers. But if the people get crunched in the process, the deal won't work, regardless of how profitable it appears on paper.

Getting the cultural goals right from the start and communicating them nonstop are steps that are just as important to take into consideration as the balance sheet and maximizing the bottom line.

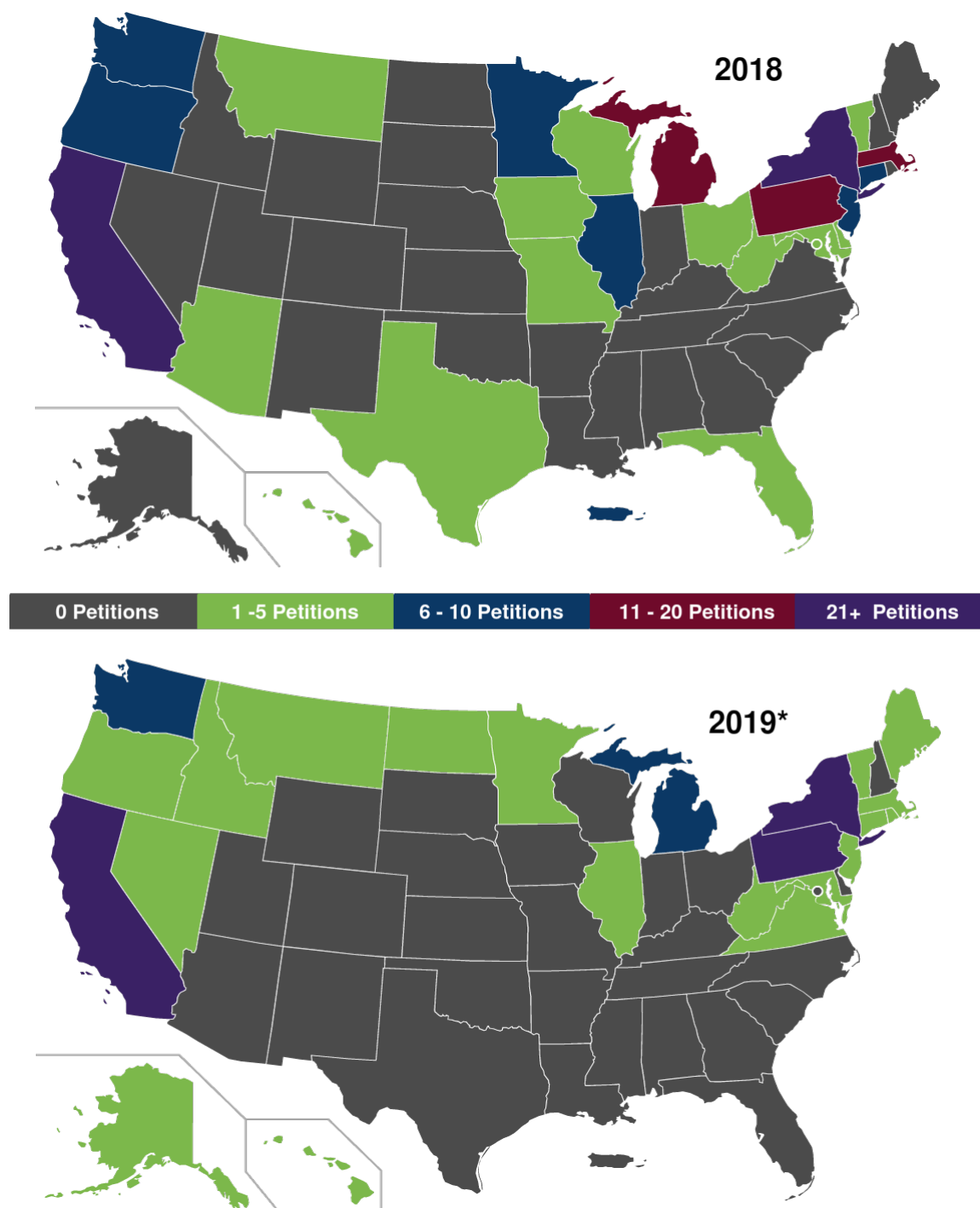
APPENDIX A: SUMMARY OF PETITIONS FILED AND ELECTIONS HELD

All Industries - Summary of Petitions Filed & Elections Held (2010 – 2019*)										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019*
Total Petitions	2,894	2,552	2,474	2,554	2,621	2,809	2,289	2,280	1,922	1,051
Total Representation Petitions	2,351	1,966	1,983	2,033	2,136	2,347	1,920	1,880	1,558	872
Union Not Elected	576	443	501	470	437	491	383	399	330	135
Union Elected	1,162	871	860	902	989	1,105	982	976	761	407
Total Decertification Petitions	543	586	491	521	485	462	369	400	364	179
Total RD Petitions	490	494	462	464	438	397	312	338	333	157
Total RM Petitions	53	92	29	57	47	65	57	62	31	22
Union Not Elected	164	174	149	130	122	130	122	141	113	66
Union Elected	100	141	98	88	71	85	69	73	60	35

Health Care - Summary of Petitions Filed & Elections Held (2010 – 2019*)										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019*
Total Petitions	432	410	364	388	446	394	402	409	292	156
Total Representation Petitions	349	290	298	314	358	327	342	324	224	133
Union Not Elected	80	76	69	65	54	65	47	63	31	14
Union Elected	194	172	170	159	188	187	198	212	140	75
Total Decertification Petitions	83	120	66	74	88	67	60	85	68	23
Total RD Petitions	72	69	59	65	85	57	51	59	63	21
Total RM Petitions	11	51	7	9	3	10	9	26	5	2
Union Not Elected	14	57	13	12	21	17	23	17	26	8
Union Elected	26	33	25	17	14	13	17	23	12	6

All Non-Health Care Industries - Summary of Petitions Filed & Elections Held (2010 – 2019*)										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019*
Total Petitions	2,462	2,142	2,110	2,166	2,175	2,415	1,887	1,871	1,630	895
Total Representation Petitions	2,002	1,676	1,685	1,719	1,778	2,020	1,578	1,556	1,334	739
Union Not Elected	496	367	432	405	383	426	336	336	299	121
Union Elected	968	699	690	743	801	918	784	764	621	332
Total Decertification Petitions	460	466	425	447	397	395	309	315	296	156
Total RD Petitions	418	425	403	399	353	340	261	279	270	136
Total RM Petitions	42	41	22	48	44	55	48	36	26	20
Union Not Elected	150	117	136	118	101	113	99	124	87	58
Union Elected	74	108	73	71	57	72	52	50	48	29

APPENDIX B: MAPS OF REPRESENTATION PETITIONS FILED IN HEALTH CARE



APPENDIX C: ASHHRA ADVOCACY COMMITTEE

CHAIR

Kim Fulcher

Senior Vice President and Chief Human Resources Officer
Halifax Health Medical Center of
Daytona Beach
Daytona, Fl.

Served since 2014

REGION 4

Gail Blanchard Saiger

Vice President, Labor and Employment
California Hospital Association
Sacramento, Calif.

Served since 2007

REGION 9

Chris Callahan

Vice President, Human Resources
Exeter Health Resources
Exeter, N.H.

Served since 2018

REGION 1

Keith Clasen

Senior Director, Human Resources
University of Iowa Health Care
Iowa City, Iowa

Served since 2019

REGION 6

Heather Cloward, MBA-HR, ACMPE

Chief Human Resources and Clinics
Officer

Melissa Memorial Hospital
Merino, Colo.

Served since 2019

REGION 8

Jayne Frasure, MBA, SPHR

Manager, Human Resources
Baylor Scott and White Health
Marble Falls, Texas

Served since 2019

REGION 7

G. Roger King

Senior Labor and Employment Counsel
HR Policy Association
Washington, D.C.

Served since 2005

REGION 3

George Liothake, SPHR, SHRM-SCP, CHHR

Director, Workforce Relations
Atlantic Health System
Summit, N.J.

Served since 2017

Region 2

BOARD LIASON**Barbara Lutz, aPHR, MT(ASCP), OHCC**

Vice President, Human Resources/Officer,
Grievance and Compliance
Heart of the Rockies Regional Medical
Center
Salina, Colo.

Served since 2018

REGION 8

Ricki Ramlo

Chief Operating Officer, Human
Resources
Jamestown Regional Medical Center
Jamestown, N.D.

Served since 2019

REGION 6

Deborah Rubens, CHHR, SPHR-CA, SHRM-SCP

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Shriners Hospitals for Children-Northern
California
Sacramento, Calif.

Served since 2016

REGION 9

Lisa Sartain, MLRHR, SPHR, SHRM-SCP

Vice President, Human Resources
The Bellevue Hospital
Bellevue, Ohio

Served since 2019

REGION 5

James G. Trivisonno

President
IRI Consultants
Troy, Mich.

Served since 2010

REGION 5

Christopher Westbrook, SHRM-SCP, CHHR

Vice President, Human Resources
University Health Care System
Augusta, Ga.

Served since 2019

REGION 4

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

APPENDIX D: THE NATIONAL LABOR RELATIONS BOARD DEFINITIONS

The following summary from the National Labor Relations Board (NLRB) is reproduced with permission from “The National Labor Relations Board and You” at nlrb.gov, 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% 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% 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% 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 technicians, 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.