

Labor Activity in Health Care

SEMI-ANNUAL REPORT

52ND

Presented by _____



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ABOUT THIS REPORT

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

The 52nd 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 2019.
- The Labor Law/Activity Update: Articles written by labor experts about relevant and timely labor issues impacting employers and the workplace.

LETTER FROM BOB LONG

As I write this, our world is facing an unprecedented time of uncertainty and upheaval as the COVID-19 pandemic spreads around the globe. This situation is more far-reaching than anything we have experienced in recent decades. It has led to public conversations about preparedness, supply inventories, and appropriate protections for health care workers during a pandemic. In addition, our nation's labor unions have been very vocal in this discussion.

Bonnie Castillo, executive director of National Nurses United (NNU), tweeted on March 18:

We are living through an unprecedented crisis right now. Our society is being forced to temporarily change in many significant ways. But we won't stop organizing – because our lives depend on it. Join your voice with ours as we fight #COVID19.

NNU has been particularly active in conducting weekly live Facebook video chats with nurses about what they're experiencing on the front line and offering union support. "We are the authority on what nurses need and how to treat and protect our patients from this COVID epidemic," an NNU leader said during one of these sessions. The union has produced factsheets illustrating how the measures it recommends for nurse protections are more rigorous than those proposed by the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA).

Efforts like these and others are similar to those unions have used during the Ebola and H1N1 crises. Among them:

- AFL-CIO calling on members to demand that Congress require OSHA to institute emergency temporary standards that would force employers to protect employees from infectious diseases
- Nurses unions using online surveys to show members do not feel employers are protecting them with policies and equipment
- Demands for flexible bargaining about workplace changes resulting from the COVID-19 response.

Regular, personal and transparent communications are an essential part of leadership, especially during a crisis. Employees need to be assured that management is concerned about their health, safety and well-being, and that leaders are visible,

accessible and there to provide support and encourage resilience. Now is a critical time for leadership to position itself as the source of reliable information, empathy for the challenges healthcare workers are facing and providing staff with what they need to protect themselves as they care for patients. As illustrated above, unions already have stepped forward in an attempt to do the same.

Beyond the COVID-19 situation, here are a few trends we are monitoring:

- **Politics at play:** Some of the largest unions have yet to endorse a candidate for the November 2020 elections but they have been spending heavily during this campaign year. AFL-CIO has spent \$880,000 on donations to candidates and \$4.8 million on lobbying. SEIU has spent more than \$4.2 million so far in the 2020 cycle with big donations to political action committees (PACs) like “For Our Future,” a progressive grassroots community activism campaign. NNU, which endorsed Sen. Bernie Sanders, has spent about \$300,000 on donations to candidates and \$1.5 million to PACs including the “Be A Hero” campaign, a political organization that advocates for a more “just society.”
- **Continued focus on millennials:** 64% Americans approve of unions, according to a recent Gallup poll, which is one of the highest ratings in 50 years. The most support is among young people, according to [The New Yorker](#). They’ve been galvanized by the Fight for 15 movement, crushing student debt and low wages in the post-Recession economy. Unions will continue to focus on recruiting millennials as older workers age out of the workforce, using more harder-to-detect digital campaigns and other new approaches to organizing.
- **Strikes on the rise:** Last year, about 425,500 workers participated in 25 major work stoppages, according to [Bloomberg Law](#). It was the highest number of strikes in 18 years. Education workers made up the largest group of strikers, with 270,000 involved in 13 actions. As Bloomberg reported, the numbers indicated unions are becoming more aggressive as the labor market tightened.

The COVID-19 pandemic and the political climate highlight the need for employers to be prepared with communications plans, labor education, training, and assessments – to deflect unions’ efforts to engage employees with their value proposition.

In this report, you'll find the latest data on union organizing and membership across the nation along with an article on the new joint-employer landscape, a Washington insider's view on the labor movement and insights from some of the best-regarded labor and employment attorneys in the business.

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 black ink, appearing to read "Bob Long", with a stylized flourish extending to the right.

Bob Long
Chief Executive Officer
IRI Consultants

INTRODUCTION

The percentage of unionized wage and salary employees decreased to 10.3%, while the number of unionized workers remained little changed at 14.6 million in 2019.

The number of private sector employees belonging to a union (7.5 million) remains greater than the number of public sector employees belonging to a union (7.1 million).

Unions were elected in 84% of the 172 representation elections. Unions maintained recognition in 47% of decertification elections held in health care compared to 32% in non-health care.

The majority of representation elections take place within 21 to 30 days from the date of the petition, and the average number of days is 28.3 days.

Service Employees International Union (SEIU) accounted for the most representation elections in 2019. SEIU was involved in 64 elections and was elected as a result of 86%. The next most active union was United Food and Commercial Workers (UFCW) with 17 representation elections and they were successfully elected in 76% of those elections.

EXECUTIVE SUMMARY

NLRB REPRESENTATION PETITIONS & ELECTIONS^{1,2}

In 2019, 272 representation (RC) petitions were filed in the health care sector, up from 225 RC petitions filed in 2018.

A total of 172 representation elections were held and unions were elected as a result of 84% of them. This was the lowest number of elections held and highest union success rate in the past 10 years.

The majority of organizing activity occurred in six states – California, New York, Pennsylvania, Oregon, Michigan, and Washington. California continues to be the highest activity state.

The Service Employees International Union (SEIU) remains the most active union in the health care sector, accounting for 36% of representation petitions filed and 37% of representation elections held. SEIU experienced an 86% success rate in 2019. There also has been an increase in organizing activity in the health care sector by non-traditional health care unions such as the International Brotherhood of Teamsters (IBT) and United Food and Commercial Workers (UFCW).

ASHHRA Region 9 (comprising Alaska, California, Nevada, Oregon and Washington) continues to be the most active region in the nation, followed closely in 2019 by Region 2 (comprising New Jersey, New York and Pennsylvania).

Over the past decade, strike activity in the health care sector has been heavily concentrated in California, which has seen more than five times as many strikes as any other 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.

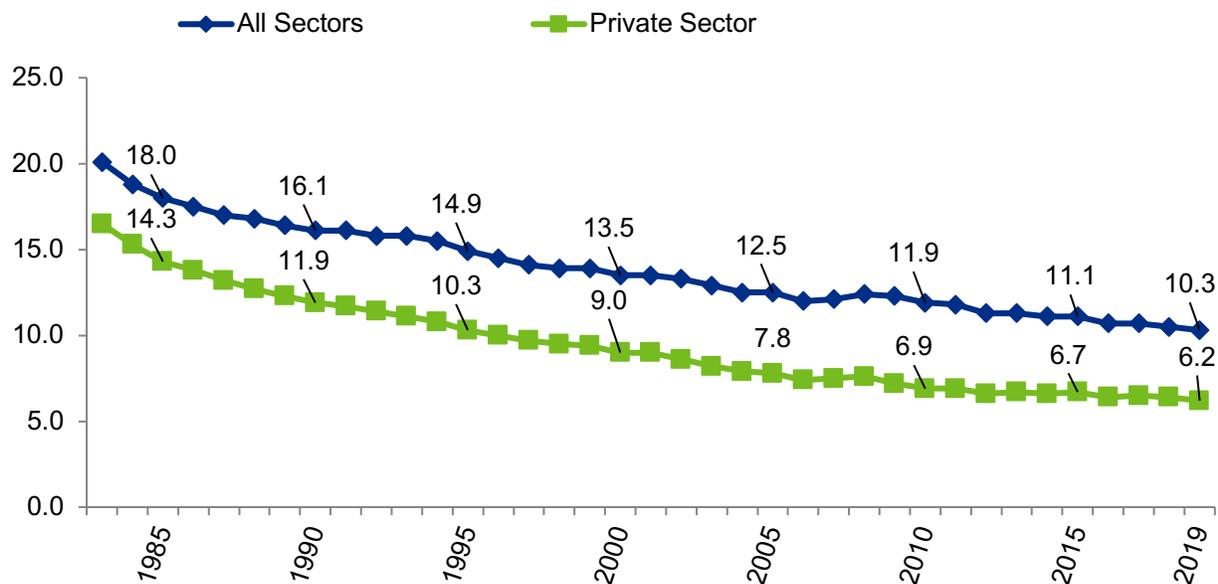
UNION MEMBERSHIP NATIONWIDE

According to the Department of Labor (DOL) Bureau of Labor Statistics' *Union Members – 2019* report, the percentage of unionized wage and salary employees decreased to 10.3%, while the number of unionized workers remained little changed at 14.6 million in 2019.

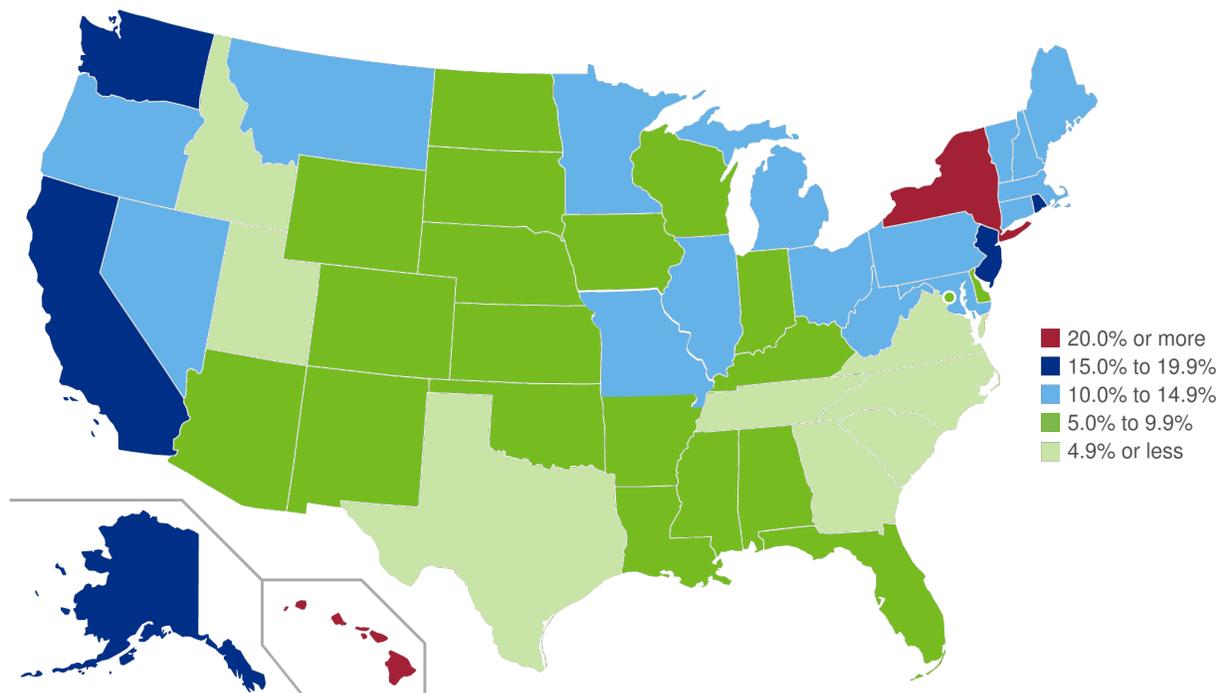
Data from the DOL report include the following highlights:

- The number of *private sector* employees belonging to a union (7.5 million) remains greater than the number of *public sector* employees belonging to a union (7.1 million).
- *Public sector* employees continued to be more than five times as likely as *private sector* workers to be members of a union (33.6% vs. 6.2%, respectively).
- Black workers continued to have the highest union membership rate in 2019 (11.2%), followed by Whites (10.3%), Hispanics (8.9%) and Asians (8.8%).
- The highest union membership rate is among men aged 45 to 54 (13.4%), while the lowest is among women aged 16 to 24 (3.5%).
- Among states, Hawaii has the highest union membership rates (23.5%); South Carolina has the lowest rates (2.2%).
- Union membership rates increased in 23 states, decreased in 24 states and the District of Columbia, and remained unchanged in three states.
- Over half of all union members live in just seven states: California, New York, Illinois, Pennsylvania, New Jersey, Ohio and Washington.

UNION MEMBERSHIP RATE SUMMARY



UNION MEMBERSHIP RATES BY STATE, 2019



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

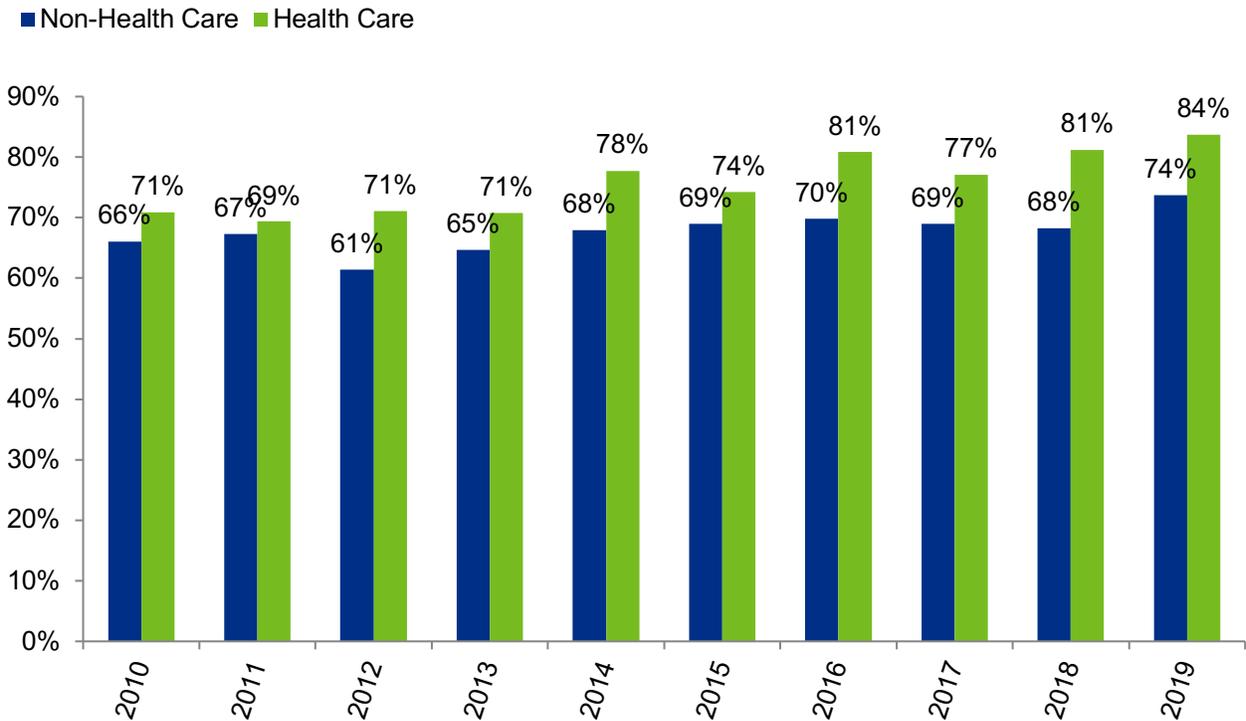
The following information summarizes representation petition activity and elections held during the past decade as reported by the National Labor Relations Board (NLRB).

HEALTH CARE VS. ALL NON-HEALTH CARE SECTORS COMPARISON

Over the past decade, unions have consistently experienced higher success rates in the health care sector than in non-health care sectors. In 2019, unions were elected as a result of 84% of elections held in the health care sector, compared to just 74% in non-health care sectors.

UNION SUCCESSES IN RC ELECTIONS

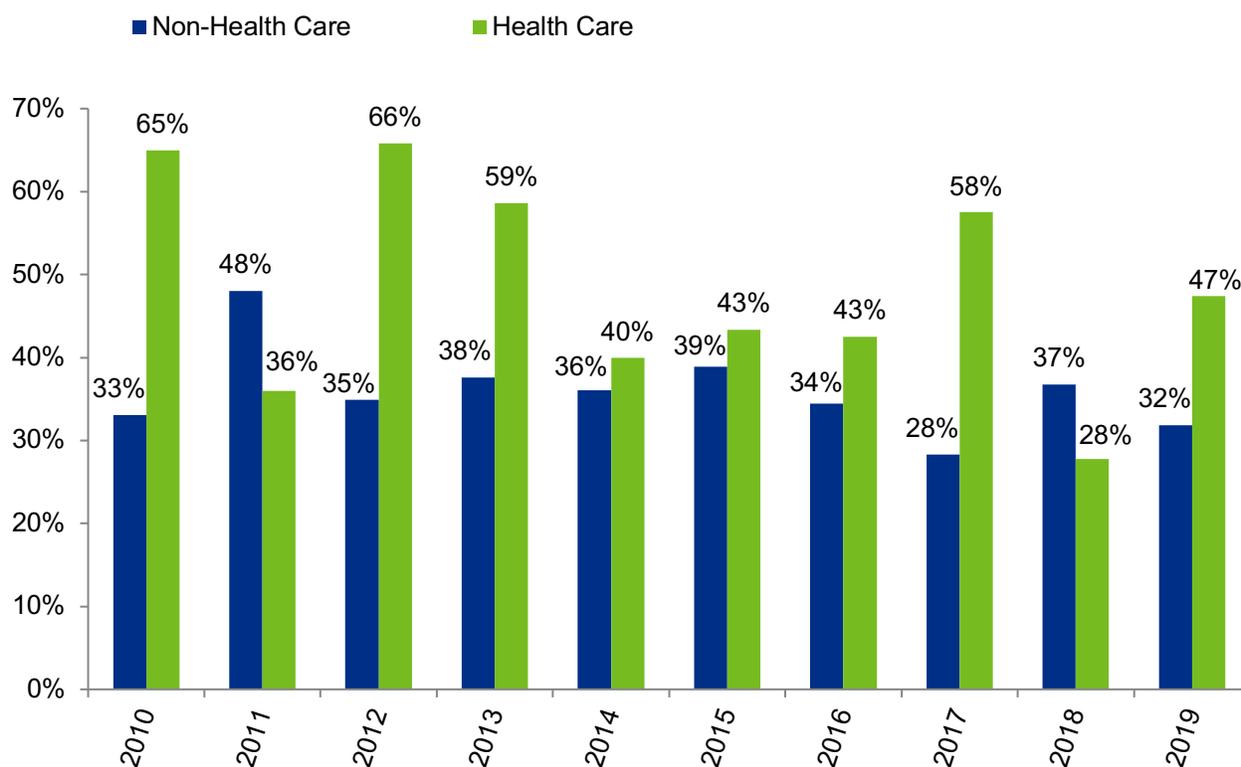
Health Care vs. Non-Health Care Sectors (2010-2019)



Unions have typically been more successful defending against decertification elections in the health care sector than in non-health care. In 2019 unions maintained recognition in 47% of decertification elections held in health care compared to 32% in non-health care.

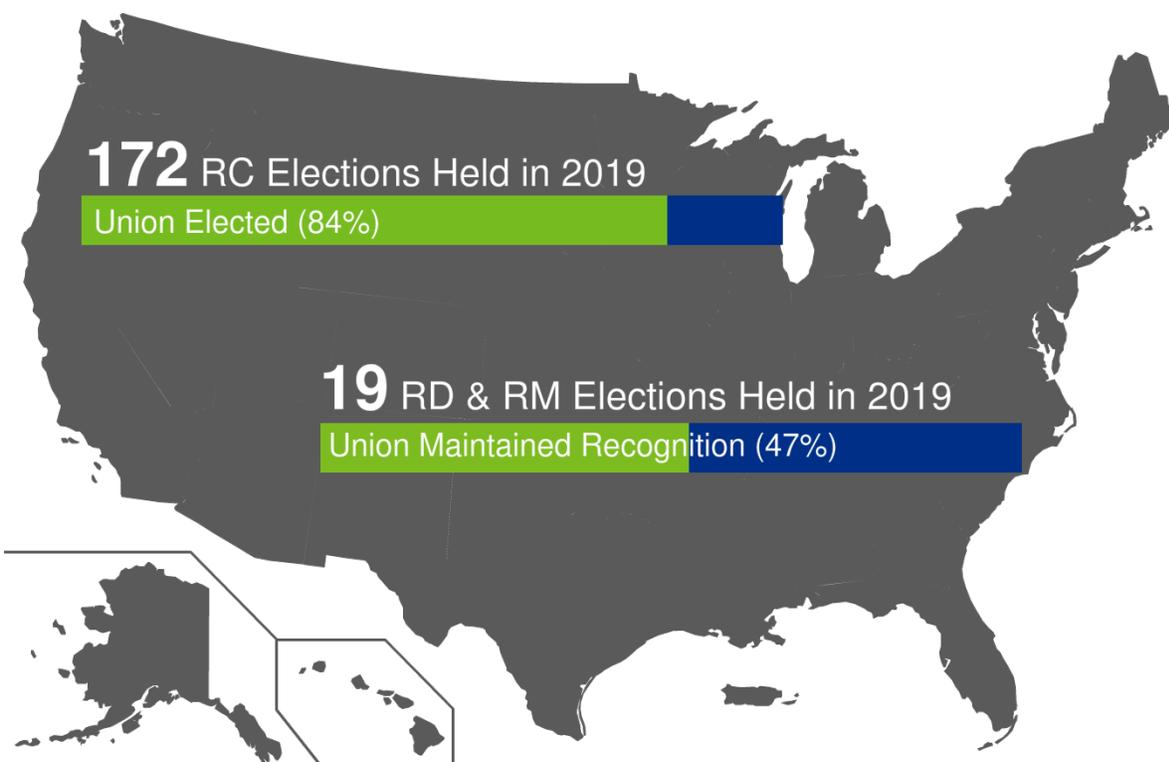
UNION SUCCESSES IN RD/RM ELECTIONS

Health Care vs. Non-Health Care Sectors (2010-2019)



HEALTH CARE SECTOR – ELECTIONS OVERVIEW

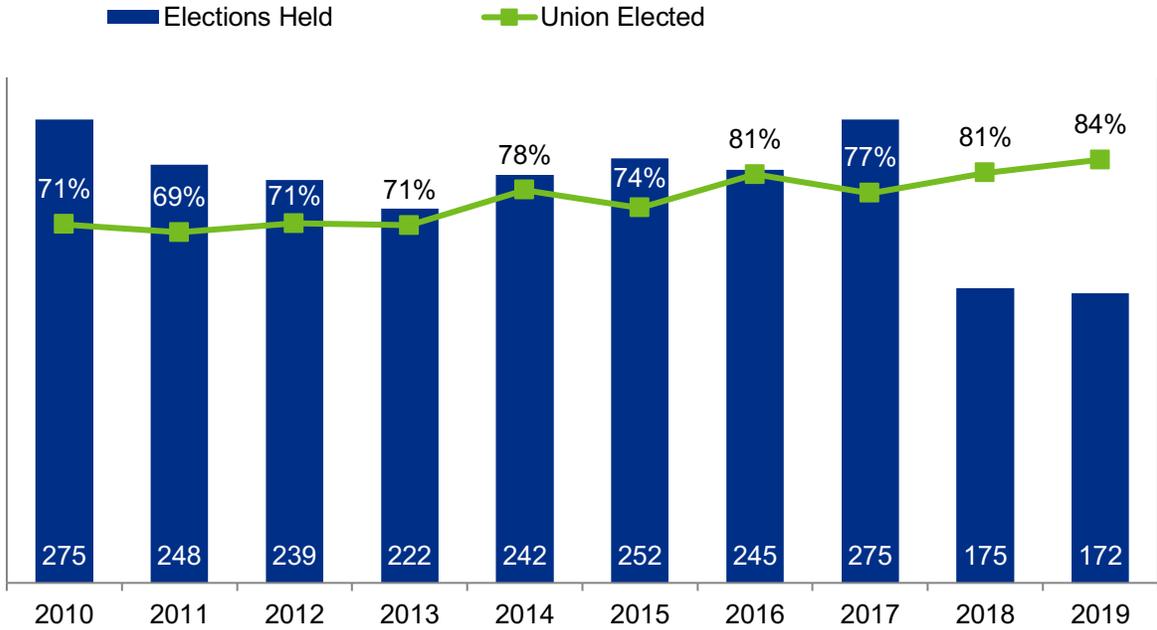
In 2019, there were 172 representation elections held in the health care sector, and unions were elected as a result of 84%. In the same time period, 19 decertification elections were held, and unions maintained recognition in 47%.



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

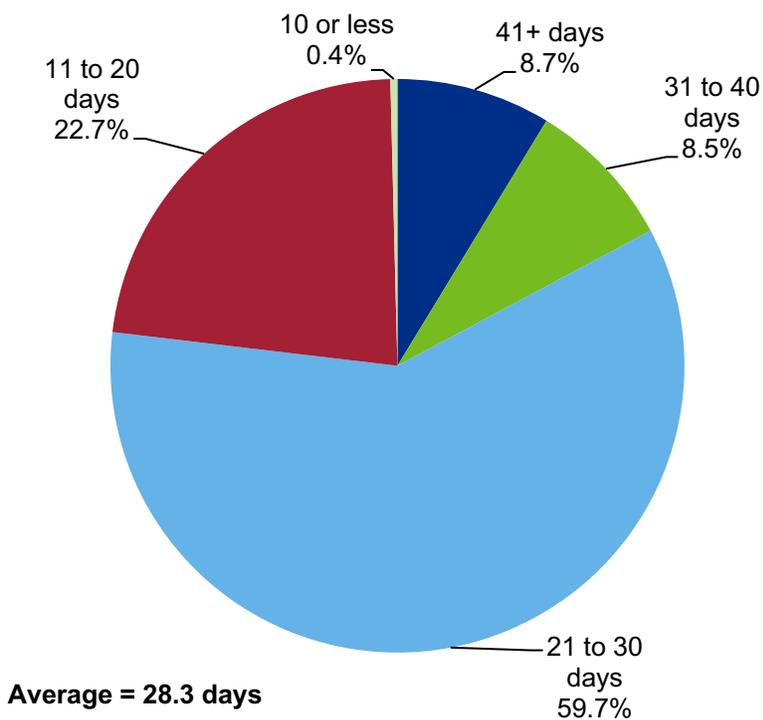
The chart below illustrates the number of representation elections held over the past decade along with the percentage of elections won by unions. The 84% win rate in 2019 is the highest in the decade, however the number of elections held is the lowest in the same period.

UNION SUCCESSES IN RC ELECTIONS COMPARED TO NUMBER OF ELECTIONS HELD



DAYS FROM NLRB PETITION TO ELECTION

4/14/2015 to 12/31/2019 (n=1,011 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 is 28.3 days. This is subject to increase with the implementation of the amendments to the NLRB’s representation case procedures effective April 16, 2020.

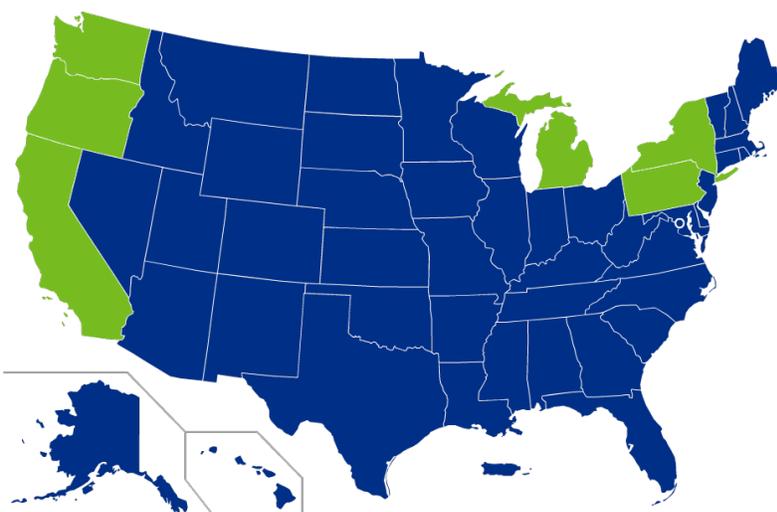
STATE SUMMARIES

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 2019 at the time of publication.

MOST ACTIVE STATES – REPRESENTATION PETITIONS FILED IN HEALTH CARE

Of the 272 representation petitions filed in health care in 2019, 63.2% were filed in just six states – California, New York, Pennsylvania, Oregon, Michigan and Washington.

272 RC Petitions Filed in 2019



California - 19.9%
New York - 16.5%
Pennsylvania - 10.7%
Oregon - 5.1%
Michigan - 5.1%
Washington - 4.8%

63.2% from 6 states

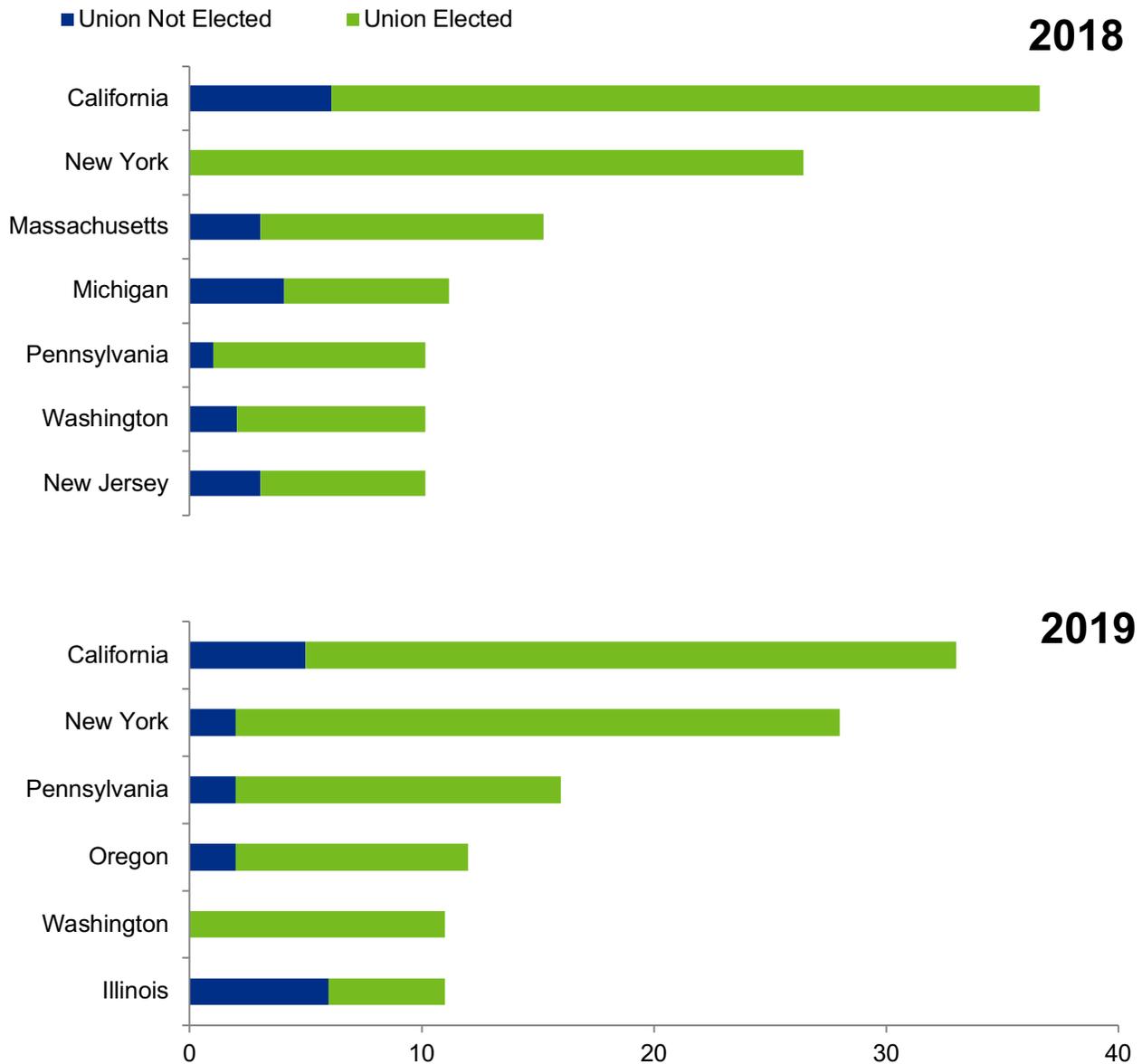
ALL STATES – REPRESENTATION PETITIONS FILED IN HEALTH CARE

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

State	2018	2019	State	2018	2019	State	2018	2019
Alabama	-	1	Kentucky	1	-	North Dakota	-	1
Alaska	-	1	Maine	-	3	Ohio	4	3
Arizona	2	-	Maryland	2	2	Oregon	6	14
California	52	54	Massachusetts	16	11	Pennsylvania	14	29
Colorado	-	1	Michigan	20	14	Puerto Rico	8	8
Connecticut	9	6	Minnesota	10	5	Rhode Island	-	1
District of Columbia	1	-	Missouri	2	2	Texas	1	2
Delaware	2	-	Montana	2	7	Vermont	1	1
Florida	4	1	Nevada	-	2	Virginia	-	1
Georgia	-	1	New Hampshire	-	1	Washington	10	13
Hawaii	2	6	New Jersey	8	11	West Virginia	2	5
Idaho	-	2	New Mexico	-	1	Wisconsin	2	-
Illinois	6	16	New York	36	45	Total	225	272
Iowa	2	-	North Carolina	0	1			

In 2019, California, New York and Pennsylvania were the three most active states in terms of the number of representation elections held. In 2018, it was California, New York and Massachusetts.

MOST ACTIVE STATES – REPRESENTATION ELECTION RESULTS IN HEALTH CARE



ALL STATES – REPRESENTATION ELECTION RESULTS IN HEALTH CARE

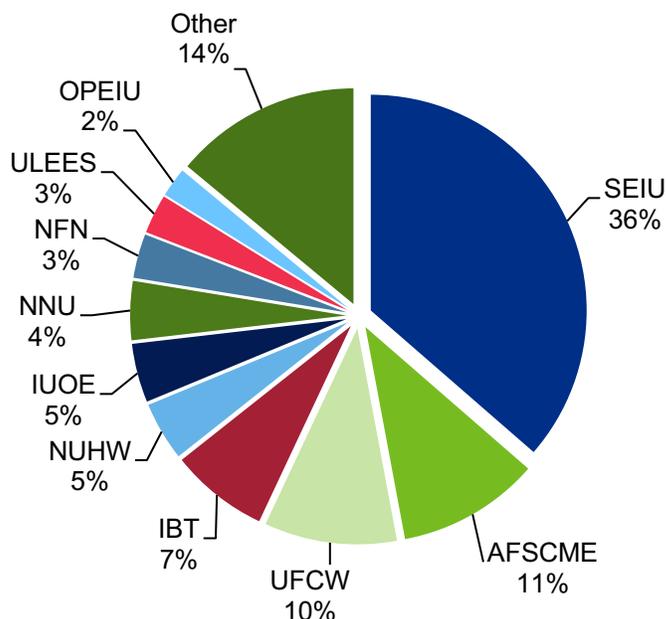
The following table depicts the number of representation elections held in each state in the health care sector in 2018 and 2019.

State	2018					2019				
	Total Elections	Union Successes	% of Elections	Management Successes	% of Elections	Total Elections	Union Successes	% of Elections	Management Successes	% of Elections
Alabama	-	-	-	-	-	1	1	100%	0	0%
Alaska	-	-	-	-	-	1	1	100%	0	0%
Arizona	2	2	100%	0	0%	-	-	-	-	-
California	38	30	79%	8	21%	33	28	85%	5	15%
Colorado	1	0	0%	1	100%	-	-	-	-	-
Connecticut	8	6	75%	2	25%	4	4	100%	0	0%
District of Columbia	1	1	100%	0	0%	-	-	-	-	-
Delaware	1	1	100%	0	0%	1	1	100%	0	0%
Florida	3	2	67%	1	33%	-	-	-	-	-
Hawaii	1	1	100%	0	0%	5	4	80%	1	20%
Idaho	-	-	-	-	-	1	1	100%	0	0%
Illinois	4	4	100%	0	0%	11	5	45%	6	55%
Iowa	-	-	-	-	-	1	0	0%	1	100%
Maine	-	-	-	-	-	2	1	50%	1	50%
Maryland	2	2	100%	0	0%	-	-	-	-	-
Massachusetts	13	11	85%	2	15%	7	6	86%	1	14%
Michigan	13	8	62%	5	38%	11	9	82%	2	18%
Minnesota	6	3	50%	3	50%	4	3	75%	1	25%
Missouri	2	0	0%	2	100%	1	1	100%	0	0%
Montana	3	3	100%	0	0%	4	4	100%	0	0%
Nevada	-	-	-	-	-	1	1	100%	0	0%
New Jersey	9	6	67%	3	33%	3	2	67%	1	33%
New Mexico	1	1	100%	0	0%	1	1	100%	0	0%
New York	27	27	100%	0	0%	28	26	93%	2	7%
North Carolina	-	-	-	-	-	1	1	100%	0	0%
North Dakota	-	-	-	-	-	1	1	100%	0	0%
Ohio	2	2	100%	0	0%	-	-	-	-	-
Oregon	4	4	100%	0	0%	12	10	83%	2	17%
Pennsylvania	10	9	90%	1	10%	16	14	88%	2	13%
Puerto Rico	8	7	88%	1	13%	4	3	75%	1	25%
Texas	1	1	100%	0	0%	2	2	100%	0	0%
Vermont	1	0	0%	1	100%	1	0	0%	1	100%
Washington	10	8	80%	2	20%	11	11	100%	0	0%
West Virginia	3	2	67%	1	33%	4	3	75%	1	25%
Wisconsin	1	1	100%	0	0%	-	-	-	-	-
Total	175	142	81%	33	19%	172	144	84%	28	16%

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

UNION SUMMARIES

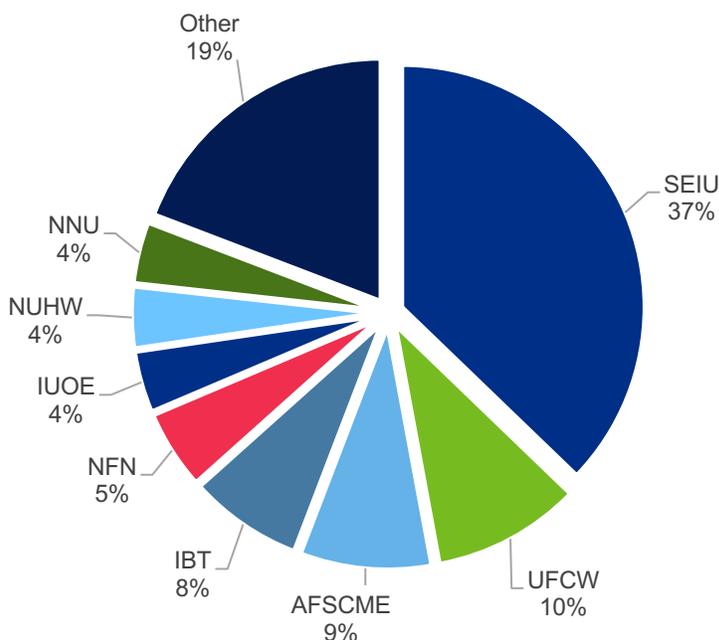
MOST ACTIVE UNIONS – REPRESENTATION PETITIONS HELD IN HEALTH CARE IN 2019



SEIU remains the most active union in the health care sector, accounting for 36% of representation petitions filed in 2019. Notably, there was an increase in activity by less traditional health care unions, specifically the UFCW and IBT.

Abbreviation	Union Name	RC Petitions Filed	
		2018	2019
SEIU	Service Employees International Union	99	99
AFSCME	American Federation of State, County and Municipal Employees	20	29
UFCW	United Food and Commercial Workers	16	27
IBT	International Brotherhood of Teamsters	10	20
NUHW	National Union of Healthcare Workers	11	12
NNU	National Nurses United	10	12
IUOE	International Union of Operating Engineers	5	12
NFN	National Federation of Nurses	4	9
ULEES	Unidad Laboral de Enfermeras(os) y Empleados de la Salud	1	8
OPEIU	Office of Professional Employees International Union	3	6

MOST ACTIVE UNIONS – REPRESENTATION ELECTIONS HELD IN HEALTH CARE IN 2019



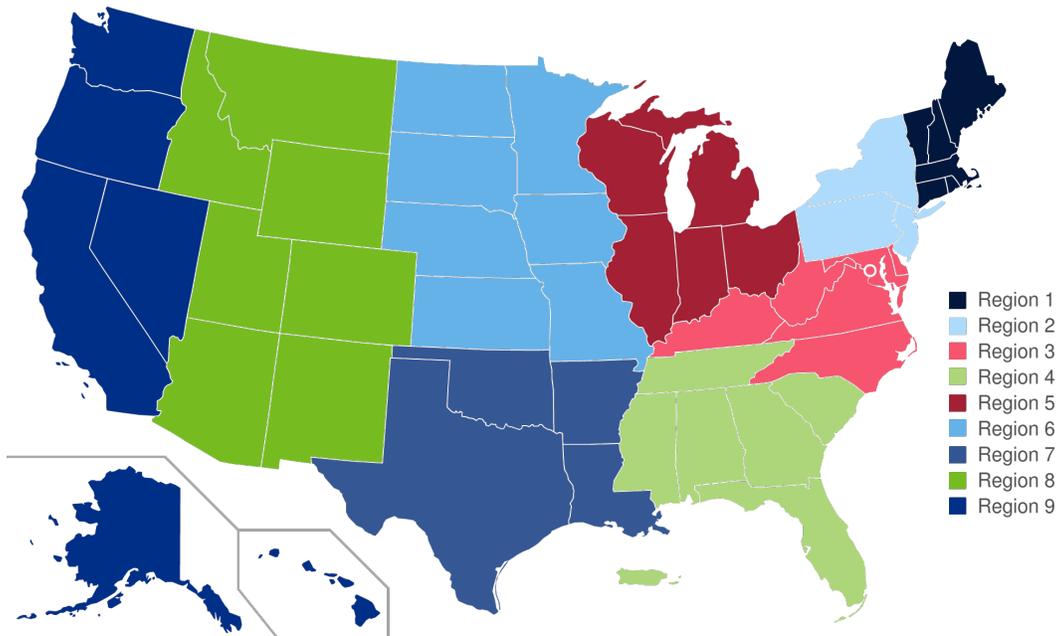
Expectedly, SEIU also accounted for the most representation elections in 2019. SEIU was involved in 64 elections and was elected as a result of 86%. The next most active union was UFCW with 17 representation elections and a success rate of 76%.

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%	64	86%	14%
UFCW	14	57%	43%	17	76%	24%
AFSCME	12	75%	25%	15	87%	13%
IBT	9	78%	22%	13	62%	38%
NFN	3	67%	33%	9	100%	0%
IUOE	5	100%	0%	7	71%	29%
NUHW	5	60%	40%	7	86%	14%
NNU	9	100%	0%	7	100%	0%

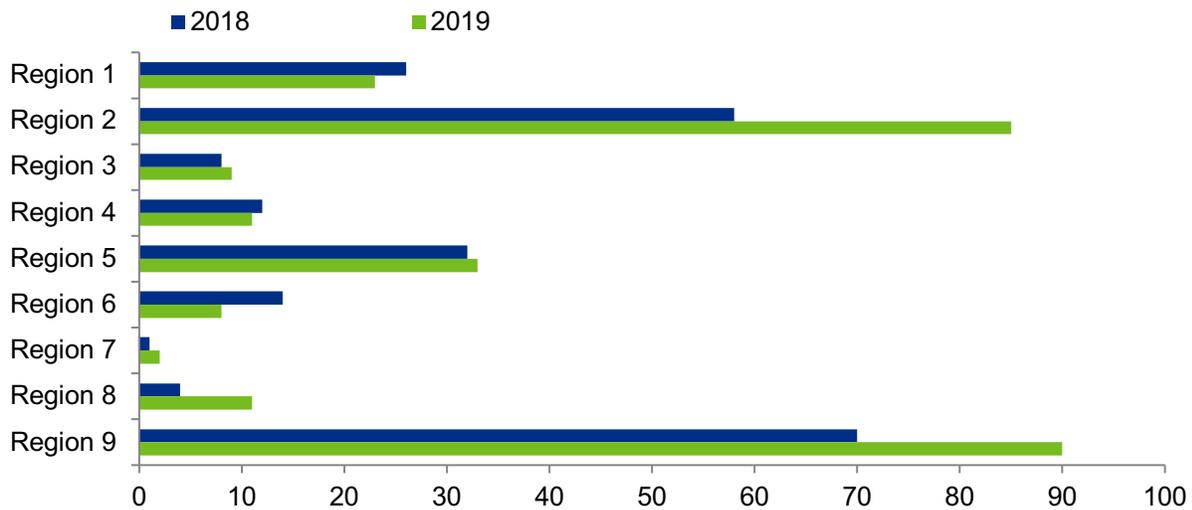
REGIONAL SUMMARIES

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



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

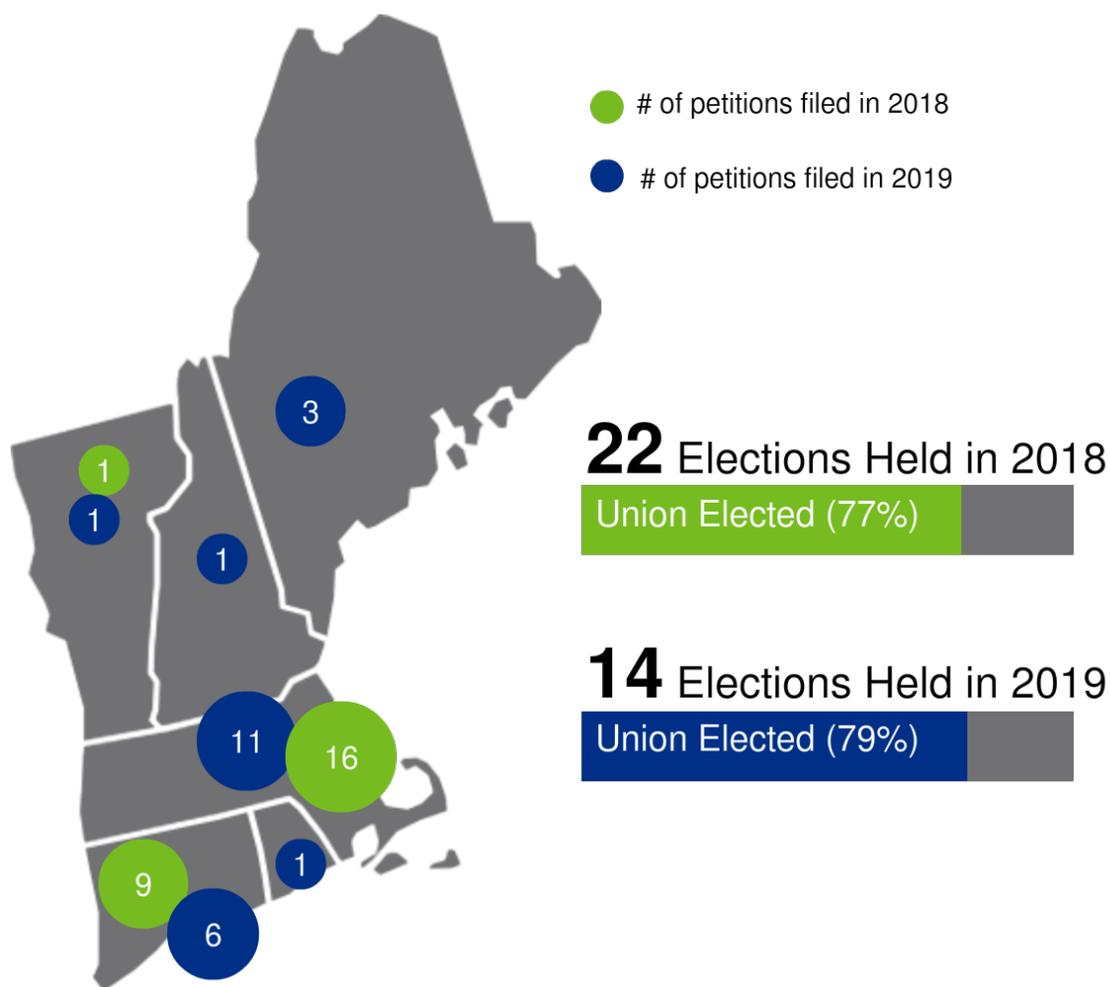
RC PETITIONS FILED IN HEALTH CARE BY ASHHRA REGION



REGION 1

The majority of the activity in Region 1 continues to occur in Massachusetts and Connecticut. 22 representation elections were held in 2018 and 14 in 2019.

Petitions & Elections



REGION 2

The amount of organizing activity has increased in all states in Region 2 in 2019 compared to 2018. All three states in the region have only had one third of the number of petitions filed. The union success rate is higher in this ASHHRA region than the national average.

Petitions & Elections

46 Elections Held in 2018

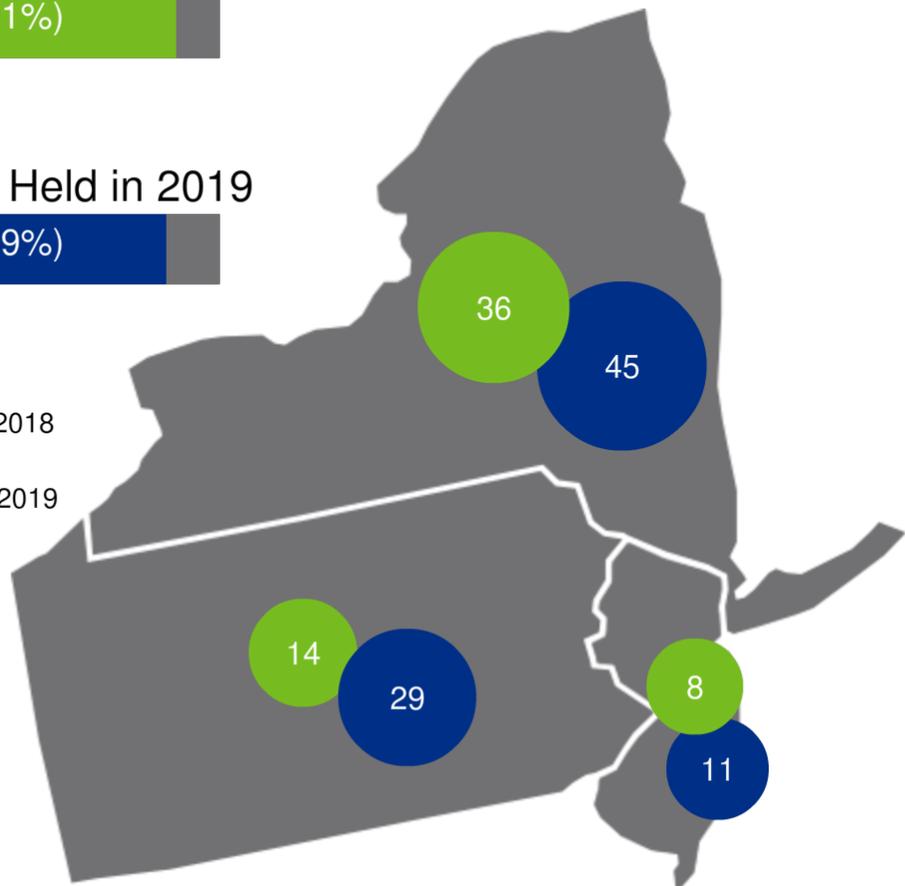


47 Elections Held in 2019



● # of petitions filed in 2018

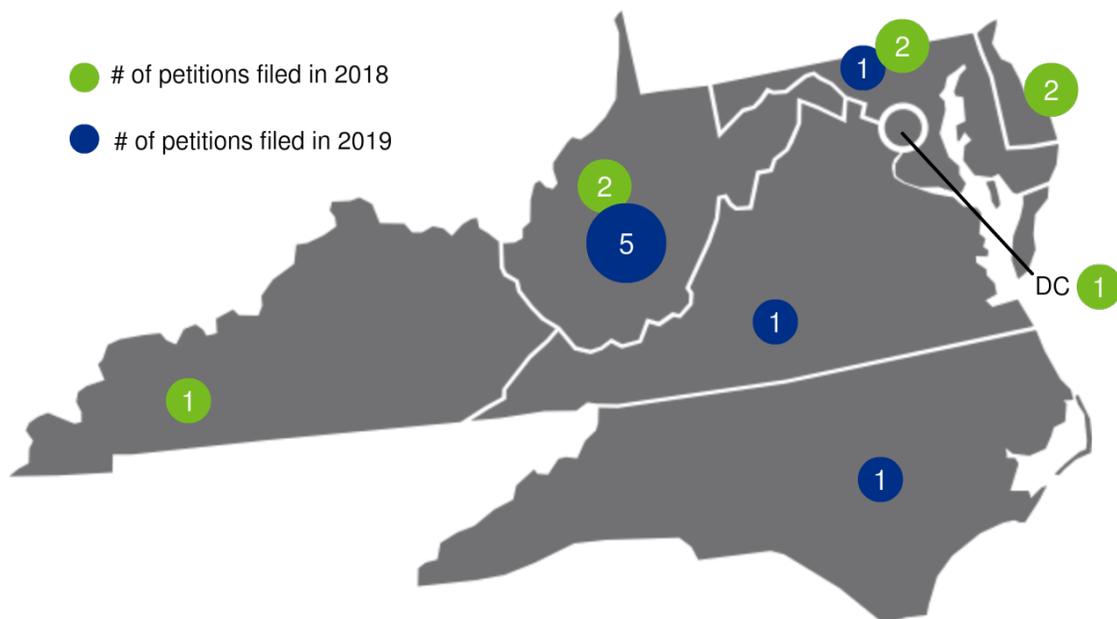
● # of petitions filed in 2019



REGION 3

There has been fairly limited activity in Region 3, however, every state has experienced some activity in the past two years. Seven representation elections were held in 2018 and five were held in 2019.

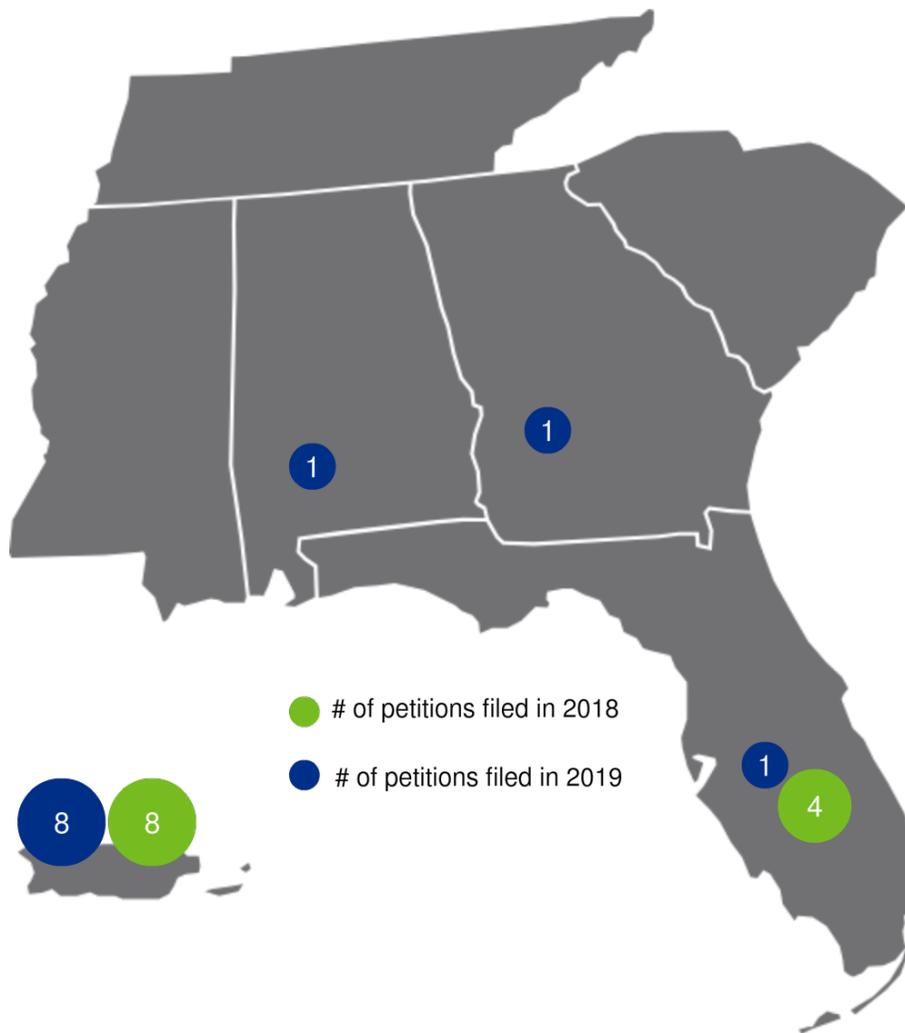
Petitions & Elections



REGION 4

Organizing activity in Region 4 has been primarily concentrated in Puerto Rico and Florida, however, there have been single petitions filed in Georgia and Alabama in 2019. 11 representation elections were conducted in 2018 and six in 2019.

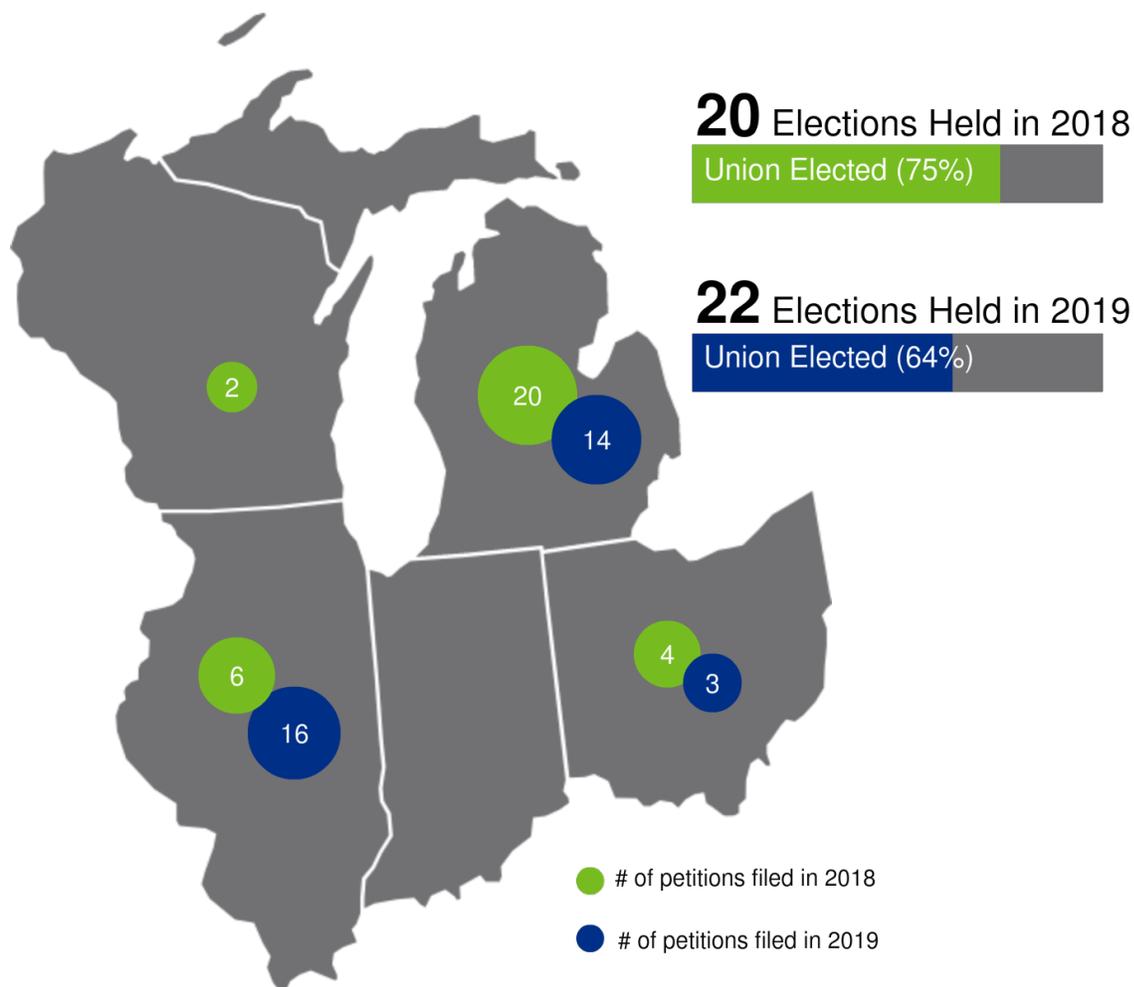
Petitions & Elections



REGION 5

Michigan is typically the most active state in terms of organizing activity in Region 5. However, in 2019 more petitions were filed in Illinois than in any other state in this ASHHRA region. Of the 22 elections held in 2019, unions were elected in 64%.

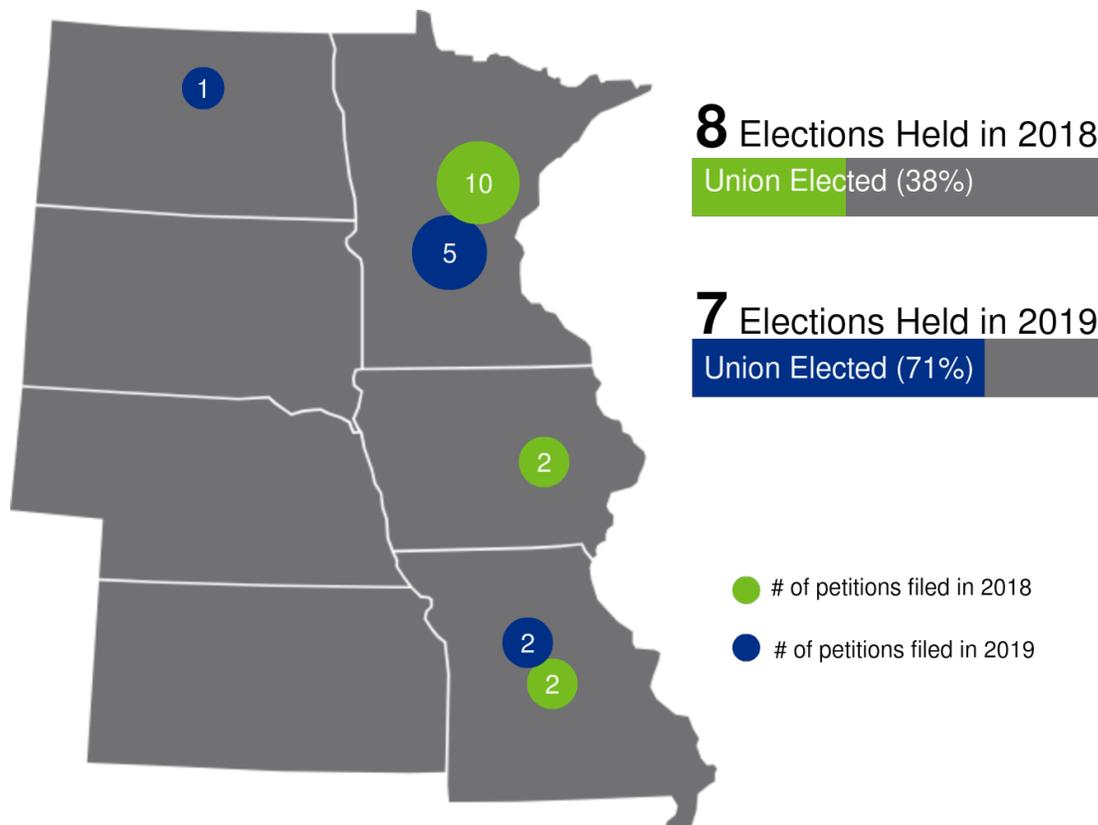
Petitions & Elections



REGION 6

Eight representation elections were held in 2018, but unions were successful only in 38% of them. In 2019, unions nearly doubled their success rate to 71% in seven representation elections.

Petitions & Elections



REGION 7

Region 7 has experienced limited union organizing activity in the past two years. However, a union was successful in all three elections held during this two-year period.

Petitions & Elections

1 Election Held in 2018

Union Elected (100%)

2 Elections Held in 2019

Union Elected (100%)

● # of petitions filed in 2018

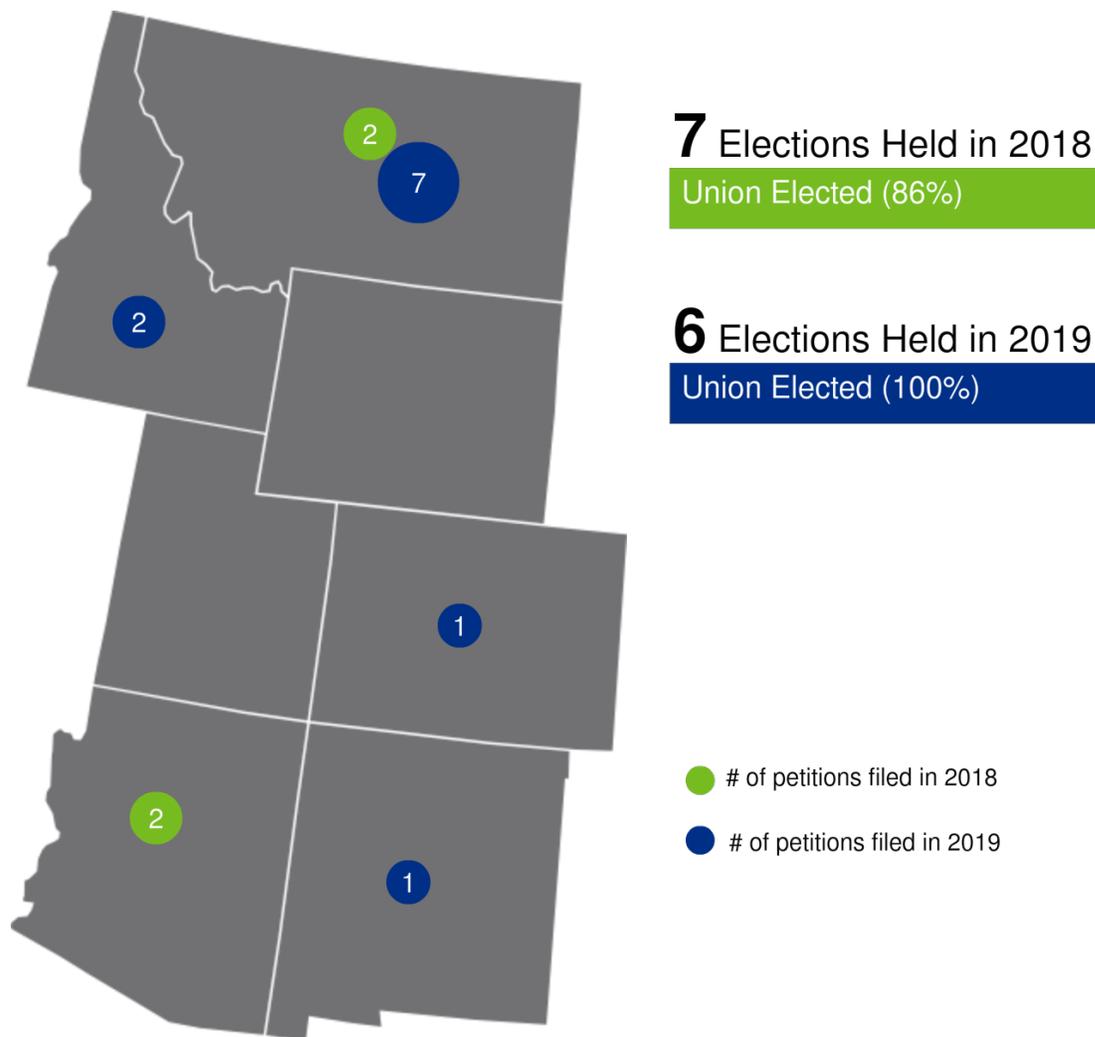
● # of petitions filed in 2019



REGION 8

Representation petitions were filed in three states in 2019 that had experienced no petitions in 2018. Six elections were held in this ASHHRA region in 2019 and unions prevailed in all of them.

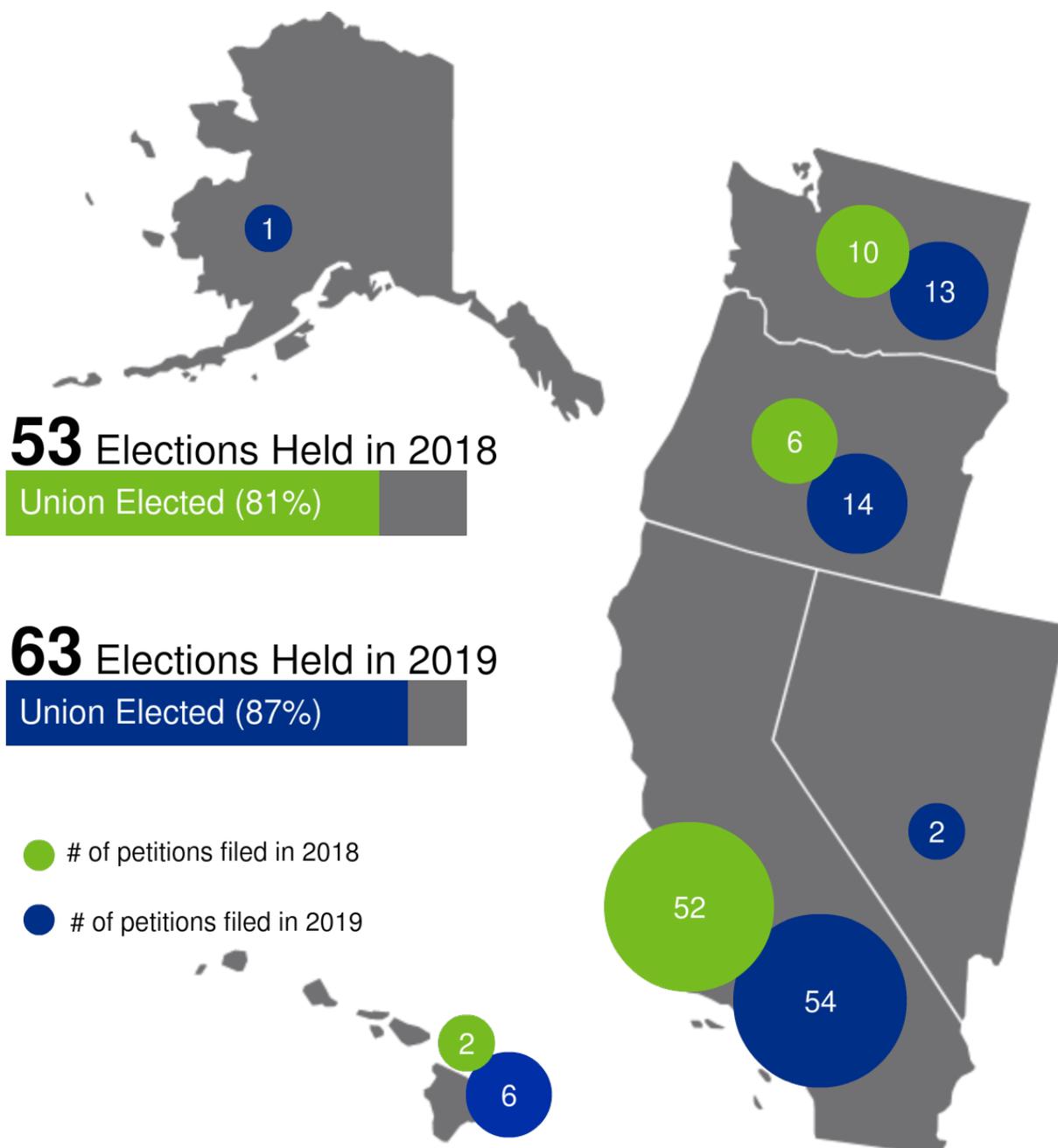
Petitions & Elections



REGION 9

Region 9 continues to be the most active ASHHRA region in the nation. There was an increase in activity in every state in this region in 2019. Unions were successful in 87% of the 63 elections held in 2019.

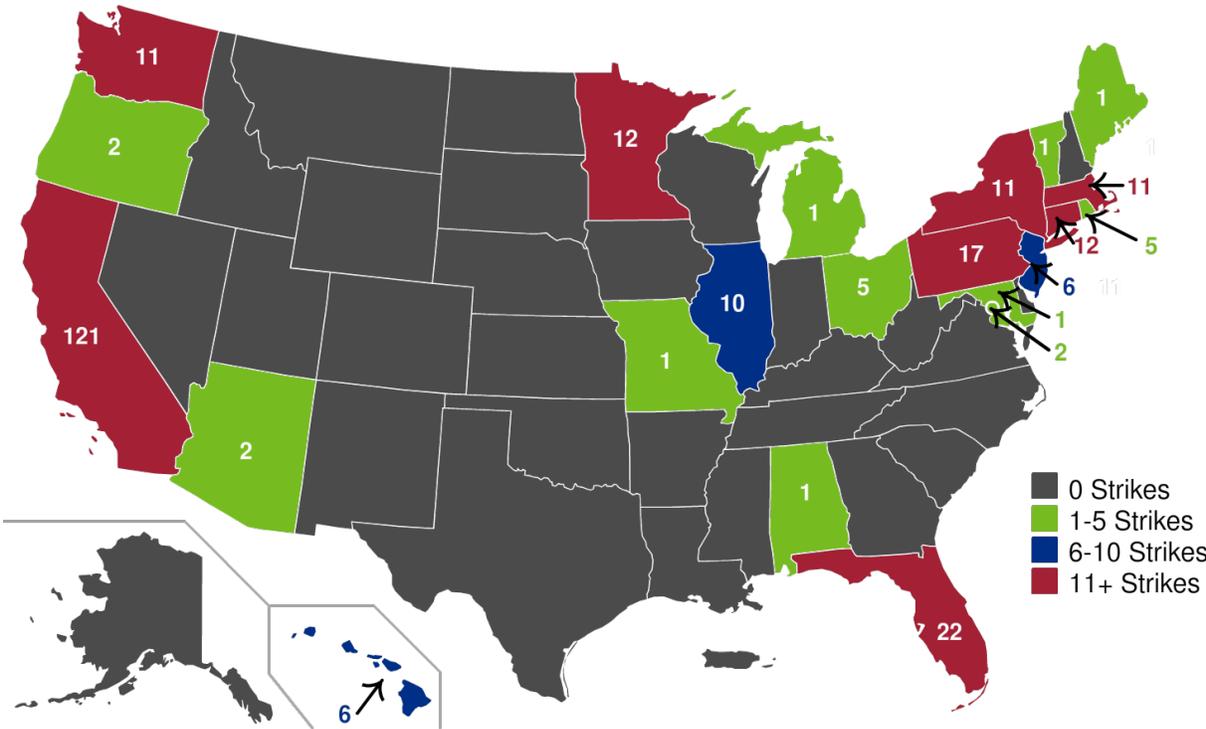
Petitions & Elections



STRIKES IN HEALTH CARE

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 California has experienced the largest concentration of strikes.

STRIKES IN HEALTH CARE BY STATE, 2010 – 2019



Year	Number of Strikes	Workers Idled	Average Number of Workers per Strike
2019	23	17,301	752
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 in Health Care report contains four important, timely articles:

U.S. Labor & Employment Law and COVID-19 by G. Roger King and Gregory Hoff from HR Policy Association examines the need for employers to review and understand their obligations under federal, state, and local employment laws to ensure they are providing a safe work environment with respect to circumstances created by COVID-19.

NLRB's Recent Elevation of Confidentiality Rules a High Point for Employers by Corey L. Franklin and Becky Kalas from FordHarrison examines the National Labor Relations Board's Apogee Retail decision. The case resolved employers' dilemma related to confidentiality in workplace investigations caused by conflicting direction from a previous NLRB ruling and guidance from the Equal Employment Opportunity Commission.

The Wage and Hour Implications of Having All Hands on Deck by Alexander Polishuk from Polsinelli explores how human resources personnel can prepare for potential wage and hour implications caused by emergency staffing surges.

NLRB Issues Sweeping Changes to R-Case Rules with Additional Changes on the Horizon by Chad M. Horton from Shawe Rosenthal reviews forthcoming changes in the NLRB's representation case ("R-case") rules and procedures. The final rule amends several of the most controversial provisions of the Obama Board's union-friendly R-case rule changes.

U.S. LABOR & EMPLOYMENT LAW AND COVID-19

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Abstract:

As the outbreak of COVID-19 (coronavirus) continues to spread within the United States, it is essential employers review their obligations under various federal, state, and local labor laws to ensure they are providing a safe working environment that both mitigates the effects the virus could have in their workplace and is in compliance with the law. Both employers and employees alike have rights and obligations under our nation's labor laws regarding the issues presented by the COVID-19 pandemic.

Under the National Labor Relations Act (NLRA), private sector nonsupervisory employees are protected, even if a union is not present. Such employees have broad rights to refuse to work in an unsafe environment, particularly if they are engaged in concerted activity that is protected by the NLRA. Thus, employees can, individually or as a group, raise workplace safety issues and are generally protected by the NLRA if they have an objective basis to support their safety-related concerns. Employers should be aware that they could be in violation of the NLRA if they retaliate against groups of employees – unionized or otherwise – who refuse to work, if they have an objective basis to consider a work area unsafe. Examples of this within the context of the COVID-19 pandemic include the presence of infected employees in the workplace, the refusal of the employer to furnish gloves or other necessary safety equipment, or a requirement that employees travel to a geographic area with a high rate of infection.

For unionized workplaces, employers should review their obligations under their collective bargaining agreements to ensure compliance associated with the virus outbreak. Further, employers should consider whether their responses to COVID-19 concerns constitute prohibited unilateral changes in existing working conditions – which could trigger unfair labor practice charges and contract violations. Unions could take advantage of these types of situations and inflict reputational damage on an employer. Unions also are filing extensive information requests on employers regarding issues associated with COVID-19, and in some instances requesting effects bargaining regarding such issues.

OCCUPATIONAL SAFETY AND HEALTH ACT

Employers have several obligations under the Occupational Safety and Health Act (“OSHA”) to provide a safe working environment for their employees. OSHA’s general duty clause requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or likely to cause death or serious physical harm.” Thus, employers are obligated to mitigate all recognizable risks of contracting COVID-19 in the workplace. Under OSHA’s Personal Protective Equipment Standards, employers must provide gloves, eye and face protection, and respiratory protection where and when necessary. When respirators are necessary to protect workers, employers must implement a comprehensive protection program in accordance with the Respiratory Protection standard.¹ OSHA also prohibits employers from retaliating against workers for raising concerns about safety and health conditions, but employees are generally only entitled to refuse to work if they believe they are in “imminent danger.”

FAIR LABOR STANDARDS ACT

Under the Fair Labor Standards Act (“FLSA”), an employer is required to continue to pay exempt employees their full salary for each work week irrespective of the amount of work they actually do. There is generally no requirement to pay non-exempt employees except for hours actually worked. Employers should have systems in place to ensure non-exempt employees’ hours worked are accurately tracked in the event they are forced to work from home/remotely. Employers may encourage or require employees to telework as an infection-control or prevention strategy.

¹Guidance recently published by OSHA in the wake of the COVID-19 outbreak has made such standards somewhat less stringent – chiefly, healthcare employers may provide their employees other respirators of equal or higher protection to those required under OSHA, and healthcare providers may change the method of fit testing from a quantitative method to a qualitative method so as to preserve the supply of respirators.

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (“ADA”) is perhaps the most important labor and anti-discrimination law implicated by COVID-19, and employers must be sufficiently apprised of their obligations under the ADA. Under the ADA, it is illegal for employers to discriminate against employees because they have a disability or are perceived as having a disability. Employees that have COVID-19 could be considered disabled under the ADA, and employees who have symptoms associated with COVID-19 could be “perceived as” having a disability under the ADA, and employers could be liable under the ADA for employment actions based on an employee’s contraction of the virus or perceived contraction. However, employees posing a “direct threat” – that is, a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation – are not protected by the ADA. The EEOC has not to date (as of March 20, 2020) stated whether the COVID-19 outbreak rises to the level of a “direct threat.” Recent developments however strongly suggest that the virus does pose a “direct threat.” Regardless, employers should rely on CDC and state or local public health assessments when determining appropriate action to take regarding employees who may have COVID-19 or are displaying symptoms of such.

Relatedly, employers are generally prohibited from asking employees to disclose if they have compromised immune systems or a chronic health condition that would make them more susceptible to COVID-19. Such a prohibition, however, could again be subject to the “direct threat” exception, provided the EEOC considers such to rise to the level of “direct threat” under the ADA. Employers are similarly prohibited from making employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Requiring an employee to take their temperature at work has traditionally been considered a “medical examination” under the ADA and thus prohibited unless job related and consistent with business necessity. However, the EEOC recently announced that for the duration of the COVID-19 pandemic, such temperature taking will not be considered a “medical examination” under the ADA. Further, pursuant to EEOC guidance, employers may:

1. Screen applicants for symptoms of COVID-19
2. Take an applicant’s temperature as part of a post-offer, pre-employment medical exam
3. Delay the start date of an applicant who has COVID-19 or symptoms of it

4. Withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it
5. Require employees to stay home if they have COVID-19 symptoms
6. Ask employees who call in sick if they are experiencing COVID-19 symptoms

All of the above medical information gathered by employers should to the extent possible however be kept confidential.

FAMILY AND MEDICAL LEAVE ACT

Under the Family and Medical Leave Act (“FMLA”), employees have leave rights to care for themselves and family members affected by COVID-19. Generally, employees are not entitled to take FMLA leave to stay at home to avoid getting sick – this point recently has been reaffirmed in guidance recently released by the Wage and Hour Division of the Department of Labor. Under Executive Order 13076, employees of federal contractors accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, up to 56 hours a year. Like FMLA, employees may use this paid sick leave for their own care or to care for a close family member.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Under the Families First Coronavirus Response Act (H.R. 6201), passed by Congress on March 18, 2020, and signed by President Trump the same day, employers with fewer than 500 employees are now required to immediately provide 80 hours of paid sick leave to full-time employees, while part-time employees are entitled to the usual number of hours they work in a typical two-week period. Such paid sick leave taken for personal use is capped at \$511 per day and \$5,110 in total, while such paid leave taken to care for a sick family member is capped at \$200 per day and \$2,000 in total. Further, employers with less than 500 employees must provide 10 weeks of paid family leave, only to care for a child whose school or day care is closed due to the coronavirus. Such paid family leave is capped at \$200 per day and \$10,000 total. A payroll tax credit, up to certain dollar amounts, will help offset the cost of the mandated benefits for small employers. Both leave mandates are effective April 2, 2020 and will sunset on Dec. 31, 2020. To date, it is unclear how “fewer than 500 employees” will be counted for purposes of determining covered employers. Employers should expect further action from Congress and regulatory agencies in the coming days and weeks in the paid and unpaid leave area.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

The Worker Adjustment and Retraining Notification Act (“WARN Act”) imposes a notice requirement on those with 100 or more full-time employees who implement a “plant closing” or “mass layoff.” In general, employers are required to provide at least 60 days’ notice to affected employees. There is an exception under the WARN Act for layoffs that occur due to unforeseeable business circumstances. This exception could potentially apply to the COVID-19 pandemic, but the U.S. Department of Labor has yet to issue any guidance on the issue, and employers should thus take care to ensure they are giving adequate notice under the WARN Act in the event of plant closings or mass layoffs resulting from COVID-19. Many states have their own, often more stringent versions of the federal WARN Act, and thus employers should further ensure they are in compliance with such state and local WARN-Act like laws in those jurisdictions in which they do business. It is fairly likely that WARN Act requirements could be lessened or suspended during the COVID-19 pandemic – California has already temporarily suspended provisions of its own statewide WARN Act. For now, however, employers should ensure they give adequate notice under the WARN Act in the event of mass layoffs and plant closings.

TITLE VII

Under Title VII, employers may not discriminate against employees on the basis of national origin. Employers must take care not to engage in any such discrimination towards employees of national origin associated with the outbreak or origin of COVID-19 and should ensure that their employees are not engaging in any such discrimination as well.

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT

Under the Health Insurance Portability and Accountability Act (“HIPAA”), employers generally have a duty to protect employees’ medical information and keep such informational confidential. Employers should take care to protect any information they gather or receive from employees associated with their health and COVID-19.

ADDITIONAL CONSIDERATIONS

On the state and local front, employers should be apprised of the myriad leave laws in place in the various jurisdictions in which they do business, as they may impose more stringent requirements than their federal counterparts. Further, employees may be eligible for state workers’ compensation if they contract the virus while at work. Finally, a limited number of jurisdictions have predictive scheduling laws in place that could be implicated by schedule disruptions caused by the COVID-19 pandemic.

As employers of all sizes attempt to mitigate the effects of the COVID-19 pandemic in their workplaces, it is essential that they take care to ensure that any actions they take remain in compliance with the wide variety of federal, state, and local labor laws currently in place in the United States.

NLRB'S RECENT ELEVATION OF CONFIDENTIALITY RULES A HIGH POINT FOR EMPLOYERS

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Abstract:

The National Labor Relations Board's *Apogee Retail* decision resolved employers' dilemma related to confidentiality in workplace investigations caused by conflicting direction based on a previous NLRB ruling and guidance from the Equal Employment Opportunity Commission. The new decision leaves employers with a powerful tool in the conduct of internal workplace investigations. And with Board law finally aligned with EEOC guidance, employers with both union and non-union employees can feel safer in administering human resources policies consistently.

On December 16, 2019, the National Labor Relations Board (NLRB or "Board") issued its decision in *Apogee Retail LLC and Kathy Johnson*, 27-CA-191574 and 27-CA-198058, ruling that employer policies requiring confidentiality during open workplace investigations are presumptively lawful. The decision reversed the Board's 2015 holding in *Banner Health System d/b/a Banner Estrella Medical Center and James Navarro* (368 NLRB No. 144, enf. denied on other grounds 851 F.3d 35 (D.C. Cir. 2017), that such rules were presumptively violative of employees' Section 7 rights, absent an employer's ability to show a legitimate and substantial business reason for confidentiality. *Banner Estrella* left employers in a Catch-22: promulgate rules and policies intended to preserve the integrity of investigations, preserve employee privacy and the confidentiality of sensitive information, and protect employees from retaliation but risk violating Section 7; or comply with Section 7, and risk undermining the investigation, violating employee privacy, exposing confidential information, and outing employees

who gave useful information. The EEOC's guidance advising in favor of confidentiality added even greater complexity to the dilemma.

BOARD'S HIGH STANDARDS FOR CONFIDENTIALITY A LOW BLOW FOR EMPLOYERS

The Board's ruling in *Banner Estrella* upended employer rules requiring confidentiality during internal investigations. The decision, which ran contrary to both Supreme Court precedent and prior Board decisions, held that employers could only restrict discussions regarding ongoing disciplinary investigations where the employer showed it had a legitimate and substantial business justification that outweighed employees' Section 7 rights. The determination had to be made on a case-by-case basis. Blanket rules requiring confidentiality in every investigation were unlawful. Employers needed to provide evidence that, "in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up." *Banner Estrella*, 362 NLRB at 1109. Practically speaking, almost any employer effort to require confidentiality during an investigation would have been found unlawful under the *Banner Estrella* rule. See, e.g., *Chip's Wethersfield, LLC d/b/a Chip's Family Restaurant*, No. CA-217597 (2019); *Securitas Security Services USA*, No. CA-176006 (2019); *T-Mobile USA, Inc.*, No. CA-142030 (2015).

APOGEE DECISION LIFTS BURDEN FROM EMPLOYERS

Banner placed employers in an untenable position. It forced employers to choose between the privacy of employees who reported on sensitive matters and the integrity of internal investigations, and the risk of facing an unfair labor practice charge for interfering with Section 7 rights – a burden that *Apogee* removed by overruling *Banner Estrella*.

The Board found *Banner Estrella* contrary to both U.S. Supreme Court and Board precedent that placed the duty of balancing employers' legitimate business justifications for confidentiality against employees' Section 7 rights on the Board itself. Further, the Board ruled *Banner Estrella*'s holding failed to consider the importance of confidentiality to an investigation, and EEOC guidance advising employers to maintain confidentiality in investigations as a way to help prevent retaliation against employees who complained of discrimination or harassment. Rather than the case-by-case determination required by *Banner Estrella*, *Apogee* applies the standard set forth in *Boeing Co*, 365 NLRB No. 154 (2017) to assess whether an employer's maintenance of a facially neutral policy or rule violates the NLRA.

Under *Boeing*, work rules may fall under three categories:

- “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.
- Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA protected conduct is outweighed by legitimate justifications; and
- Category 3 will include rules that the Board will designate as unlawful...because they would prohibit or limit NLRA-protected conduct and the adverse impact...is not outweighed by justifications associated with the rule. *Boeing*, supra, slip op. at 3-4.

CONFIDENTIALITY A PEAK CONCERN IN INVESTIGATIONS

The rules at issue in *Apogee* were found in the company’s Business Code of Conduct and Ethics, and in its Loss Prevention Policy. The Code of Conduct required individuals reporting illegal or unethical behavior or participating in an investigation into reported behavior “to maintain confidentiality regarding these investigations.” The Loss Prevention Policy similarly provided “unauthorized discussion of [an] investigation or interview,” could result in disciplinary action up to and including termination. The employer cited, among its reasons for maintaining the rules, prevention of theft, employee reluctance to cooperate in investigations due to fear of stigma or retaliation, cross-talk among witnesses and leaking of investigative information, better control of investigations, and employee requests that their statements remain confidential. *Apogee* 368 NLRB No. 144 (2019), p. 1-2.

The Board ultimately held that *Apogee*’s rules fit into Category 2 under *Boeing* and remanded the matter for further analysis. The Board’s analysis turned on whether the rules applied only to open investigations. Reasonably interpreted, the lack of a provision limiting the confidentiality requirement to open investigations could be read as requiring confidentiality even after an investigation had concluded. Most of the employer’s bases for the rules applied only while an investigation was in progress. And while the Board was willing to recognize there may be legitimate and compelling reasons to extend confidentiality requirements to closed investigations that would outweigh Section 7 rights, the facts available to the Board were insufficient to make that determination.

The Board also held, however, that as applied to open investigations, rules requiring confidentiality were Category 1 rules under the *Boeing* test, and therefore presumptively lawful under the NLRA. While the confidentiality requirement would no doubt interfere with employees' rights to discuss terms and conditions of employment – a right protected by Section 7 – any possible impact would be slight. The rules did not “broadly prohibit employees from discussing either discipline or incidents that could result in discipline. Rather, they narrowly require[d] that employees not discuss investigations...or interviews conducted in the course of any investigation.” *Apogee* slip op. at 8.

Furthermore, the rules did not place any limits on employees who were not involved in the investigation, and only limited employees who were involved from discussing information they learned because of their involvement. Balancing these relatively narrow limitations against the employer's business justifications, the Board found “that allowing an employer to require confidentiality at the outset of the investigation aids in protecting the integrity of the investigation...[and that] it is beneficial to both the employer and employees to have an established policy of confidentiality during ongoing investigations.” *Apogee* slip op. at 9.

The *Apogee* ruling allows employers to maintain and enforce comprehensive rules requiring confidentiality during the course of an open workplace investigation. With the *Apogee* decision bringing Board law into line with EEOC guidance in this respect, employers may now require both union and non-union employees to refrain from disclosing information learned in the course of an active investigation, but should exercise care that policies are written to make clear that confidentiality is only mandated while the investigation is open. The ruling also provides guidance with respect to crafting rules for mandating confidentiality where needed after an investigation concludes.

Healthcare employers often conduct investigations into matters involving patient care, drug diversion, workplace harassment, and other highly sensitive matters; and confidentiality both during and after an investigation is critical. A rule that requires ongoing confidentiality of investigations where the participant may have learned of or had access to protected health information, patient records, or other private or highly sensitive information may still fall into the first *Boeing* category if the employer: (a) mandates post-investigation confidentiality only where such concerns are present, and (b) explicitly addresses its justifications for requiring ongoing confidentiality in the policy.

A MOUNTAIN OF POSITIVE DEVELOPMENTS

In addition to announcing an important rule for employers, the *Apogee* decision may be seen as part of a trend toward harmonizing Board and EEOC guidance with respect to enforcement of workplace policies. Confidentiality of investigations is not the only policy matter in which employers have faced inconsistency between EEOC and Board rules.

Historically, there has been longstanding tension between employer obligations under anti-discrimination laws and the NLRA. The Board has, under certain circumstances, countenanced the use of racially or sexually motivated language and other misconduct as protected activity. Because of that tension, employers who imposed discipline in an effort to comply with Title VII risked an unfair labor practice; and employers who declined to discipline such behavior risked a charge of discrimination.

In September 2019, however, the Board invited the parties in *General Motors LLC and Charles Robinson* (14-CA-197985 and 14-CA-208242) and amici curiae to submit briefs addressing whether the Board should reconsider its standards and precedent regarding when and whether an employee's use of racially or sexually offensive language results in loss of the protections afforded by the NLRA. Among the non-parties who submitted briefs was the NLRB's General Counsel, who has argued in favor of overturning precedent that protects speech that may violate anti-discrimination statutes. (The American Hospital Association and Federation of American Hospitals filed an amicus brief in this case; it can be retrieved at <https://www.aha.org/2019-11-14-amicus-brief-aha-federation-nlrb-standards-governing-offensive-employee-conduct>.) The Board is currently considering those submissions and a ruling is expected soon.

Another issue that appears to be trending toward consistency between the agencies is joint employment. On February 26, 2020, the NLRB finally issued its joint employer rule. The Rule, which becomes effective April 27, 2020, restores the direct and immediate control standard. Under this standard, a joint employment relationship will only be found to exist where two businesses share or codetermine employees' essential terms and conditions of employment. The list of what constitutes an "essential" term or condition has been defined to include wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction; and the shared control over the essential terms and conditions must be such that both businesses "meaningfully" – in other words, directly and substantially – affect the employment relationship. The EEOC's common-law analysis currently utilizes factors similar to those in the NLRB's final rule. Notably, the EEOC has advised that it too plans to clarify its stance on joint employment, and that clarification may bring the two agencies' rules into still closer alignment.

CONCLUSION

The Board's recent pronouncement on confidentiality rules, on its own, is a valuable tool for employers. Its apparent inclination to foster continuity with other federal agencies that regulate the workplace, most notably the EEOC, will further provide employees with greater clarity regarding the protections and rights provided under federal workplace laws while ensuring employers can consistently administer human resources policies and procedures among all employees, regardless of their employees' union or non-union status.

THE WAGE AND HOUR IMPLICATIONS OF HAVING ALL HANDS ON DECK

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Abstract:

This article looks at how human resource personnel can prepare for these unusual surge staffing situations by: (1) conducting a top-level internal audit of hospital wide policies; (2) speaking with outside labor and employment counsel to become apprised of all recent and emerging wage-and-hour laws; and (3) referring to its emergency preparedness plan for uninterrupted administration of the hospital's timekeeping and payroll practices during an emergency.

During a storm or other emergency, a command from the captain of a vessel for "all hands on deck" means that all crew is to report to the deck immediately and help navigate the ship through the storm. Local and national emergencies have required police, fire, and medical institutions to call on its personnel for "all hands on deck." On April 30, 1992, LAPD began calling all available police officers to respond to the Los Angeles Riots. On September 11, 2001, the City of New York needed all available New York firefighters and first responders, and shortly thereafter, clean-up crew workers, to respond to the attack on the Twin Towers. In 2010, the H1N1 flu pandemic left hundreds of thousands of patients hospitalized in the U.S. and required, during certain stretches, for hospitals to call on all available physicians, nurses, and hospital personnel.

During these types of calamities, medical, fire, and safety institutions frequently see a rapid, substantial, but temporary, increase in their labor force and the number of labor hours. These quick and necessary spikes in workflow sometimes lead to a buildup and slowdown of timekeeping and payroll processing. This, unfortunately, leads to class, collective, or representative wage-and-hour claims. Indeed, the LA Riots, 9/11, and the H1N1 flu pandemic resulted in a heavy number of wage-and-hour class, collective, and representative actions that cost medical, fire, and safety institutions across the U.S. millions of dollars on litigation, judgments, and settlements.

With the ensuing COVID-19 pandemic, medical institutions find themselves in a similar, precarious, all hands on deck position. Understandably, the concern over timekeeping and payroll is rarely at the forefront. However, when the pandemic becomes controlled, as is usually the case, these past payroll issues can form the genesis of class actions, which can cost healthcare institutions millions in wage-and-hour litigation.

This article provides a few helpful tips for medical human resources personnel to handle rapid increases in labor force and labor hours, which can occur during a time of a pandemic.

CONDUCT AN INTERNAL AUDIT OF CURRENT WAGE-AND-HOUR POLICIES AND PRACTICES

President Dwight D. Eisenhower once said, “What is important is seldom urgent and what is urgent is seldom important.” Human resource specialists know that conducting audits of wage-and-hour policies is important, but few would say it is urgent. During a pandemic, however, conducting an internal audit becomes urgent and important for a few reasons.

First, if the hospital is utilizing outdated and non-complaint wage-and-hour policies during instances of temporary personnel increase in dealing with a pandemic, the damages from unlawful policies will be compounded. Second, a predetermining factor in a class or collective action is whether there is a central unlawful policy or practice. Therefore, if the human resources department does not have sufficient time for a comprehensive audit of its wage-and-hour policies, by conducting an expedited, top-level review, the human resources department can minimize potential risk of class-level exposure. Specifically, human resources personnel should review the following areas, which form the bases of the most common wage-and-hour class and collective claims.

Payroll Policies

- **Notices:** Is the hospital complaint in providing notices for all workweeks, workdays, and paydays.
- **Itemized wage statements:** Are employees provided with compliant itemized wage statements? This will vary from state to state. California, for example, requires that an employee’s paid sick leave amount be included on each paycheck.
- **PTO:** Is PTO properly documented and tracked?

- Pay date: Are non-exempt employee paid within the statutory time-period.

Wage Payment Policies

- Regular Rate of Pay: Is the regular rate of pay being calculated based on the most recent federal and state regulations?
- Overtime: Is the overtime computation for non-exempt employees calculated based on the most recent federal and state regulations?
- Business reimbursements: Are employees reimbursed for all business expenses, such as uniforms or required cell phone use?
- Wages and compensation: Are employees receiving all wages and compensation as required under federal and state laws? For example, are employees receiving reporting-time pay (California), predictability-pay (Chicago), rest-shift pay (Oregon)?

Classification Policies

- Review the hospital's classification policies and ensure that workers regularly hired as independent contractors cannot be considered employees under new and emerging legal principles.

Timekeeping

- Reporting time worked: Are employees required to report all time worked? Is there a policy in place for correcting errors or following up regarding unreported off-the-clock work?
- Rounding: Does the hospital's timekeeping system round employee's time? If so, is the rounding policy compliant with the law?

Meal and Rest Break Policies

- Are meal and rest period policies set out in handbook and employees routinely reminded of policies?
- Does the hospital follow state laws regarding meal breaks? For example, for California hospitals, does the hospital pay "premium pay" for missed meal and rest breaks? If so, how is this documented on the employee pay stub?

If the opportunity presents itself, the human resources department should contact their labor and employment counsel to have an in-depth review of the hospital's policies. However, if time is of the essence, a general review of the areas outlined above will

provide the human resource department a good status report of their most important policies.

EDUCATE YOURSELF ON NEW AND EMERGING LAWS

It is difficult to stay ahead of the curve on all developing cases and legislation, federal and state, with respect to wage-and-hour requirements. Without knowing all recent and emerging laws, there is no way to confirm lawful compliance of the hospital's policies. Consultation with your labor and employment counsel is the optimal method to become informed of the most recent legal changes and developments. Because you are likely more aware of your hospital's policies and practices, and your counsel is more aware of emerging law, even a one- or two-hour conference call to be apprised of all new wage-and-hour laws and regulations will make you capable of expeditiously amending outdated policies and practices. Below are a few examples of the most recent substantial changes to the law that will have a ripple effect for hospital employees, particularly during emergency situations, when all hands on deck are required.

OVERTIME IN CALIFORNIA

Overtime pay in California is based on the employee's "regular rate of pay," which is not always an employee's normal hourly wage and must include almost all forms of pay that the employee receives. Recently, the California Supreme Court ruled that an employer must calculate the regular rate of pay by dividing the employee's total compensation by the number of non-overtime hours an employee worked during the pay period, rather than the total number of hours the employee worked, including overtime hours. (*Alvarado v. Dart Container Corporation of California*).

REPORTING TIME PAY IN CALIFORNIA

The California Court of Appeal recently held that where an employer requires an employee to call in or otherwise contact the employer within two hours to find out if he or she needs to report for a given shift, reporting time pay may be owed when the employee is not needed, even though the employee does not have to come in to work. Employers using any sort of "call-in" system for shifts should review their policies and practices. (*Ward v. Tilly's, Inc.*)

FAIR WORK WEEK LEGISLATION IN OREGON AND CHICAGO

Under this act, hospitals and other businesses with more than 500 employees should have started giving workers seven days' notice of their shifts by July 2018 and of two weeks' notice by July 2020. Workers must also receive a minimum of 10 hours of rest between shifts or they will qualify for time-and-a-half pay.

Similarly, the Chicago City Council passed the Chicago Fair Workweek Ordinance, which requires large employers to provide workers with at least two weeks advance notice of their work schedules and compensate workers for last-minute changes. The ordinance requires employers (including hospitals) to give advance notice of work schedules; offer additional shifts of work to its own employees or long-term, temporary employees, if they are qualified to do the work, before offering the work to temporary or seasonal workers; creates a "right to rest" and allows employees to decline to work scheduled hours that begin less than 10 hours after their last shift ended; requires payment of "Predictability Pay" if employees accept shifts that begin less than 10 hours after their last shift ended. Safety-Net Hospitals, as that term is defined in 305 ILCS 5/5-5e.1, does not have to comply with the law until January 1, 2021.

The above list is of course non-exhaustive. Therefore, check with your labor and employment counsel about recent legal decisions and emerging law that effect your facility.

CREATE, MAINTAIN, AND UPDATE AN EMERGENCY PREPAREDNESS PLAN

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires disaster recovery for any HIPAA-covered entity. This plan typically includes (1) a data backup plan; (2) a disaster recovery plan; (3) an emergency mode operation plan; (4) a set of testing and revision procedures; and (5) data criticality analysis and applications.

It is important to remember, however, that the human resources department will remain responsible for processing timekeeping and payroll regardless of the circumstances. Notwithstanding the nature of the emergency, the human resources hand of the hospital must continue to function. Therefore, in addition to what is required under the HIPPA, a robust emergency preparedness plan should include protocols for timekeeping and payroll processing in times of emergencies. The following is a list of topics that should be included in the plan:

- Methods of communications with regular, part-time, on-call, and per-diem employees during emergencies or highly exigent circumstances;
- Methods of obtaining authorization for hiring and contracting temporary staff;
- Hospital policy on hazard pay;
- Methods of dealing with potential technological issues regarding timekeeping and ability to manually record time;
- Methods of dealing with issuing payroll checks in case of technological issues;
- Methods for expeditiously correcting payroll errors;
- Expedited authorization for additional HR resources – temporary employees, laptops, printers, check stock, etc.
- Expedited authorization for manual payroll processes as necessary.

Lastly, human resources personnel should not ignore communication with employees. Hospital employees are not immune to the information (and disinformation) being disseminated about whatever pandemic that is increasing their workload. Employees should know that their hospital has a plan and that it cares about their welfare. The human resources department should try to provide continuous administrative functionality for the hospital as well as a calming effect for the hospital employees. The human resources department can play a great role in assuaging employees' sense of panic by keeping them up to date and having them feel supported. This, in combination with compliance of labor laws, will substantially minimize the hospital's exposure for wage-and-hour class claims.

NLRB ISSUES SWEEPING CHANGES TO R-CASE RULES WITH ADDITIONAL CHANGES ON THE HORIZON

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Abstract:

On December 18, 2019, the National Labor Relations Board (“NLRB” or the “Board”) published a final rule amending its representation case (“R-case”) rules and procedures.¹ The new rule becomes effective on April 16, 2020.² The final rule amends several of the most controversial provisions of the Obama Board’s union-friendly R-case rule changes announced in 2014 (the “2014 rules”).³ Additionally, the Board will continue to engage in rulemaking to better balance Board election procedures. Indeed, the Board is likely to issue another rule later this year that will, in relevant part, replace Board’s blocking-charge policy with a vote-and-impound procedure. More specifically, the likely changes to the blocking-charge policy will allow employees to express their preference on continued representation sooner after a decertification petition is filed, largely blunting the effect of unions’ use of blocking charges to delay decertification elections.

Background

In 2014, the Board implemented a controversial overhaul of the rules governing R-cases. Among the more significant changes, the 2014 rules substantially reduced the time period between a petition – typically filed by unions – and the election date. The 2014 rules also imposed strict timelines on employers to respond to union petitions and often deferred important bargaining unit composition determinations to post-election proceedings. The 2014 rules resulted in what were derisively referred to by the

¹ *Representation-Case Procedures*, 84 FR 69524 (Dec. 18, 2019).

² On March 6, 2020, the AFL-CIO filed a complaint for declaratory and injunctive relief in the U.S. District Court for the District of Columbia. The complaint alleges that the final rule violates both the Administrative Procedure Act (“APA”) and the National Labor Relations Act (“NLRA”). The AFL-CIO also seeks a permanent injunction against the implementation of the final rule.

³ 79 FR 74307 (Dec. 15, 2014).

management bar as “quickie elections” due to the truncated timeline between petition and election.

In December 2017, the newly constituted Republican Board majority published a Request for Information, seeking public input regarding the Obama Board’s 2014 rules.⁴ In summary, the 2017 request asked whether the 2014 rules should be retained without change or rescinded altogether, or if the 2014 rules should be retained with modifications. The Board evidently determined that the 2014 rules should be retained, but with several significant modifications.

THE FINAL RULE

The Board identified several problems with the 2014 rules that its final rule was intended to address:

[V]arious of the Board’s stakeholders have expressed concern that the current default timeframe from the filing of a petition to the pre-election hearing is too short a time in which to meet the various new obligations triggered by the filing of a petition, while also adequately preparing for the hearing; that the current procedures’ encouragement of deferral of disputes concerning unit scope and voter eligibility results in less fair and informed votes; and that parties may only submit post-hearing briefs when the regional director permits them to do so.

In relevant part, the final rule relaxes timeframes to respond to a petition, reinstates the right to litigate unit scope and supervisory issues at the pre-election hearing, and imposes additional obligations on petitioning parties:

1. **Scheduling of Pre-Election Hearings:** Pre-election hearings will be scheduled 14 *business* days from the date of the petition. Currently, Regional offices schedule hearings eight (8) *calendar* days from the date of the petition. Thus, pre-election hearings will soon be scheduled nearly three calendar weeks after the petition is filed. This change substantially lengthens the amount of time between petition filing and the pre-election hearing.
2. **Postponement of Pre-Election Hearings:** Under the new rule, Regional Directors may postpone hearings upon a showing of good cause. Currently, Regional Directors are permitted to grant postponements only upon a showing of

⁴ *Representation-Case Procedures*, 82 FR 58783 (Dec. 14, 2017).

“special circumstances” and the postponement may not exceed two days absent a showing of “extraordinary circumstances.” This change provides the Regional Director with increased flexibility in granting postponements without analyzing whether a request meets the nebulous and ill-defined standards of “special” or “extraordinary” circumstances.

3. **Statements of Position:** Non-petitioning parties (employers, typically) will soon have eight (8) *business* days to file its Statement of Position. Currently, the non-petitioning party must file its Statement of Position at noon on the day preceding the pre-election hearing, which was often seven (7) *calendar* days after the petition is filed. In addition to providing non-petitioning parties with more time to file its Statement of Position, petitioners will soon be required to respond to the Statement of Position within three (3) *business* days. The petitioner has no such obligation under the 2014 rules. This change will allow the non-petitioning party, in advance of the pre-election hearing, to better understand and prepare for the issues that the petitioner intends to litigate at the hearing.
4. **Pre-Election Litigation:** The final rule will permit parties to litigate issues related to bargaining unit scope and supervisory during the pre-election stage. The 2014 rules largely provided for deferral of most unit composition disputes to the post-election period. This aspect of the 2014 rules posed problems for many employers. Employers often train supervisors regarding how to respond to employee union activity. But the deferral of questions concerning supervisory status led to uncertainty concerning who an employer could utilize in responding to union activity. Additionally, in some cases, this uncertainty would lead to unfair labor practice charges where employers advised individuals it believed to be supervisors not to engage in union activity, and one or more of those individuals proved to be employees.
5. **Right to File Briefs Following Pre-Election Hearing:** The final rule reinstates parties’ right to file post-hearing briefs following pre-election hearings. Briefs will be due within five (5) *business* days of the hearing. Under the 2014 rules, post-hearing briefs were permitted only at the discretion of Regional Directors. This frequently led to non-petitioning parties preparing briefs in advance of a hearing, despite not knowing all issues that may be litigated, or providing hastily constructed closing arguments in cases where the Regional Director denied post-hearing briefs. Regional Director decisions will now be aided by written briefs from the parties following a full evidentiary hearing where the issues have been identified and fully litigated.

6. **Regional Director Directions of Election:** Absent agreement by the parties, a Regional Director may not direct an election before the 20th *business day* following a direction of election. In many cases, this requirement will result in elections approximately four (4) weeks after the Regional Director's Decision and Direction of Election.

Viewed together, these modifications will result in an increase in the median and average number days between petition and election. For example, where a hearing occurs 14 business days after a petition is filed, briefs are due five (5) business days after a hearing, and accounting for the required number of days between a Regional Director's direction of election and the election, an election will not occur sooner than 40 business days after a petition where a case proceeds to a hearing. The foregoing hypothetical assumes that a Regional Director will issue his or her decision and direction of election one day after briefs are submitted. In practice, Regional Directors are unlikely to issue a decision so soon after briefs are filed, further increasing the time between petition and election.

In short, the final rule will restore important employer rights curtailed by the Obama Board's 2014 rules. Employers will enjoy additional time to respond to a union petition and will again be able to litigate important unit scope issues during the pre-election stage. Employers are justifiably elated with these modifications that will go into effect in April 2020.

PROPOSED "ELECTION PROTECTION RULE"

The Board appears prepared to provide still more relief to employers in the context of R-case rules and procedures. In August 2019, the Board published its "Election Protection Rule."⁵ In relevant part, the proposed rule would amend the Board's blocking charge policy by establishing a vote-and-impound procedure when a party – i.e., unions – request blocking an election based on a pending unfair labor practice charge ("blocking charges"). Unions not infrequently file blocking charges after an employee files a decertification petition ("RD petition") or the employer files a RM petition to determine whether there is continuing support for an incumbent union. In each instance, a union's representative status is imperiled.

⁵ *Representation-Case Procedures: Election Bars, Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 84 FR 39930 (Aug. 12, 2019).

The Board's current policy permits a party to block an election indefinitely by filing an unfair labor practice charge and requesting that the petition be held in abeyance pending disposition of the charge. Blocking charges cause substantial delay between the RD petition and decertification election. The Board majority cited statistical data establishing that petitions subject to a blocking charge typically took over five times longer before an election was held than an unblocked petition. In fiscal year 2018, unblocked cases had a median of 24 days from petition to election. In stark juxtaposition, blocked petitions had a median of 122 days from petition to election.

The Board's proposed rule would replace the blocking-charge policy with a vote-and-impound procedure. Under the new procedure, the Regional Director would continue processing the petition and will conduct an election even when an unfair labor practice charge has been filed. If the charge is not resolved prior to the election, employees will vote, and their ballots will remain impounded until the Board issues a decision regarding the charge. If the charge is found to be meritless, the count and tally of ballots could occur immediately, rather than after further delay while an election is either negotiated or directed and balloting takes place.

Transition to a vote-and-impound procedure will further employee free choice, a foundational principle of the NLRA. The proposed procedure would ensure that petitions proceed to election in the same timely manner as unblocked petitions. Employees will be able to cast their vote closer in time to when the issues precipitating the petition and the parties' respective arguments are fresh in their minds. Finally, and importantly, the proposed procedure continues address the concern for the potentially coercive effect of unfair labor practices on employee free choice and will allow the Board to assess the effects on the election of any such violation.

CONCLUSION

The Board has used and appears prepared to continue using rulemaking to bring balance to R-Case rules and procedures. The Board's final rule effectively slows the rush to an election created by the Obama Board's 2014 rules. Additionally, the "Election Protection Rule" currently under consideration by the Board will better effectuate employee free choice by allowing RD and RM petitions impaired by an unfair labor practice charge to proceed to an election in a manner similar to unblocked petitions.

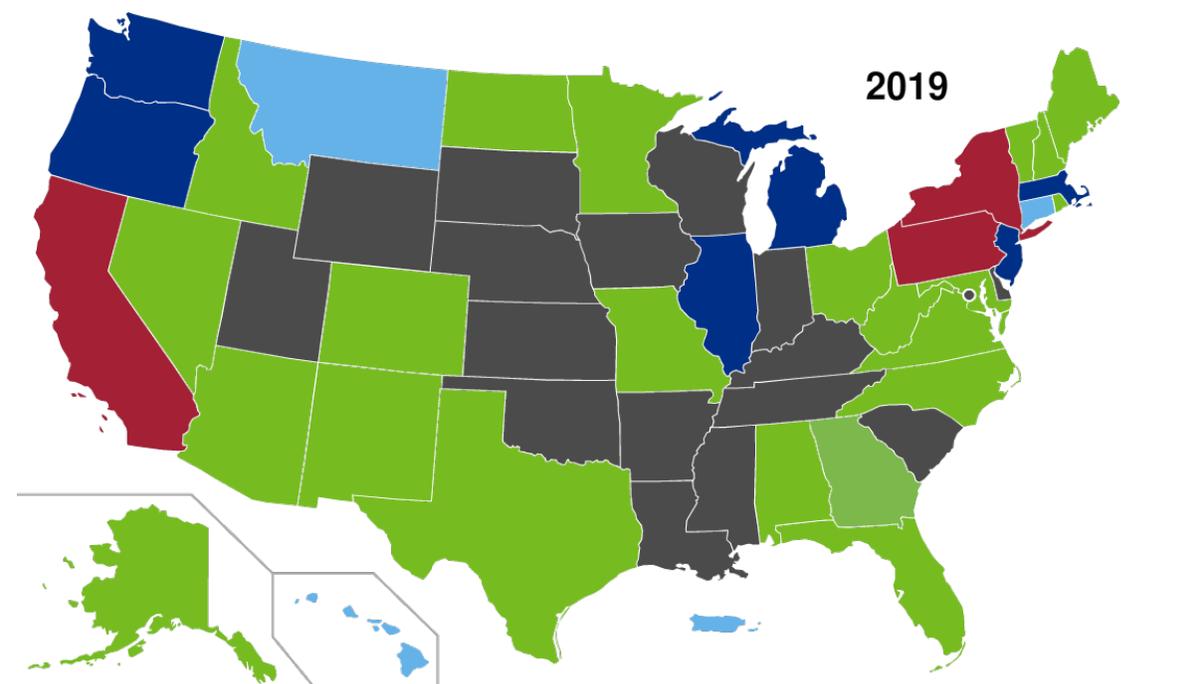
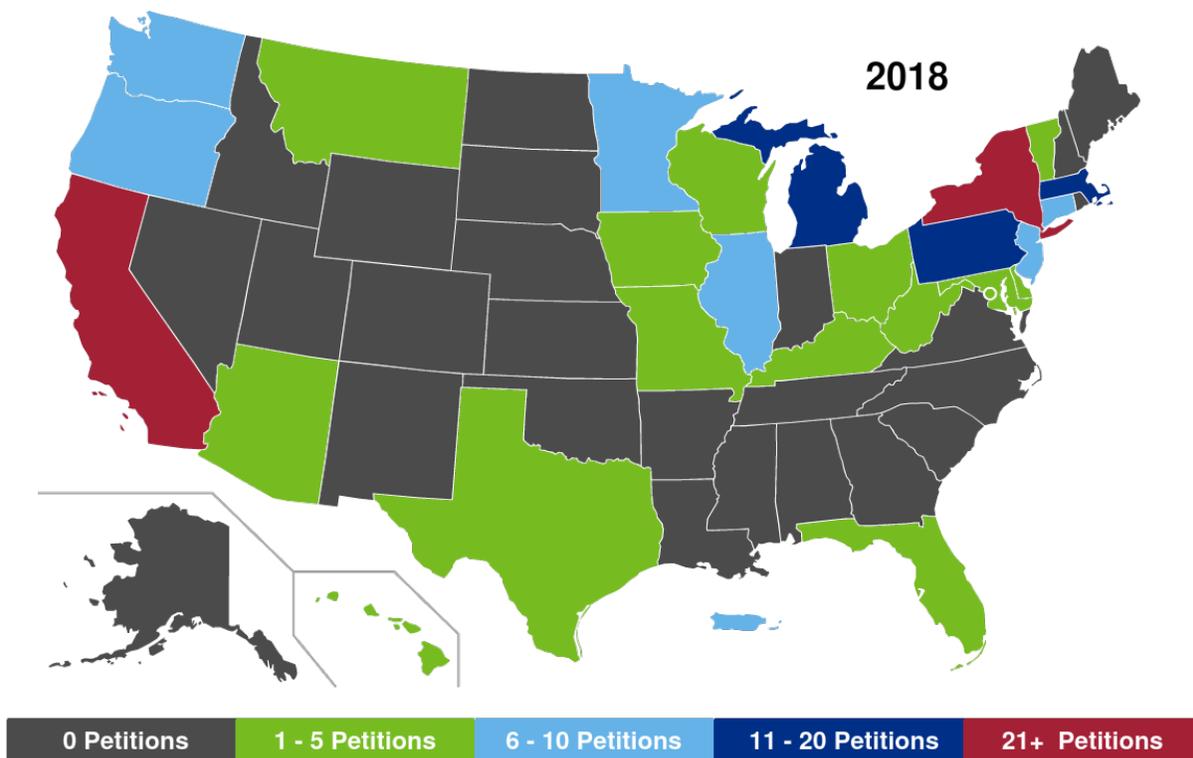
APPENDIX A: SUMMARY OF PETITIONS FILED AND ELECTIONS HELD

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	1,924	2,040
Total Representation Petitions	2,351	1,966	1,983	2,033	2,136	2,347	1,920	1,880	1,560	1,736
Union Not Elected	576	415	501	470	433	478	388	416	335	263
Union Elected	1,160	901	859	900	993	1,120	982	996	792	803
Total Decertification Petitions	543	586	491	521	485	462	369	400	364	304
Total RD Petitions	490	494	462	464	438	397	312	338	333	260
Total RM Petitions	53	92	29	57	47	65	57	62	31	44
Union Not Elected	164	174	149	130	122	130	122	146	112	102
Union Elected	100	140	98	88	71	85	69	74	60	52

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	294	319
Total Representation Petitions	349	290	298	314	358	327	342	324	225	272
Union Not Elected	80	76	69	65	54	65	47	63	33	28
Union Elected	195	172	170	157	188	187	198	212	142	144
Total Decertification Petitions	83	120	66	74	88	67	60	85	69	47
Total RD Petitions	72	69	59	65	85	57	51	59	64	41
Total RM Petitions	11	51	7	9	3	10	9	26	5	6
Union Not Elected	14	57	13	12	21	17	23	17	26	10
Union Elected	26	32	25	17	14	13	17	23	10	9

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	1,721
Total Representation Petitions	2,002	1,676	1,685	1,719	1,778	2,020	1,578	1,556	1,335	1,464
Union Not Elected	496	349	432	405	380	417	340	353	302	235
Union Elected	965	719	689	743	804	929	785	784	650	659
Total Decertification Petitions	460	466	425	447	397	395	309	315	295	257
Total RD Petitions	418	425	403	399	353	340	261	279	269	219
Total RM Petitions	42	41	22	48	44	55	48	36	26	38
Union Not Elected	150	117	136	118	101	113	99	129	86	92

APPENDIX B: MAPS OF REPRESENTATION PETITIONS FILED IN HEALTH CARE



APPENDIX C: ASHHRA ADVOCACY COMMITTEE

CHAIR

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Senior Vice President and Chief Human Resources Officer
Halifax Health Medical Center of Daytona Beach
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BOARD LIAISON

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LABOR EXPERT

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Vice President, Market Management
Optum
San Antonio, Texas
REGION 7

Jennifer Williams, CHHR, SPHR
Director, Human Resources
Western Maryland Health System
Cumberland, Md.
REGION 3

Trasee Whitaker, SPHR, SHRM-SCP
Chief Human Resources Officer and
Senior Vice President, Human
Resources
Masonic Homes of Kentucky, Inc.
Louisville, Ky.
REGION 3

APPENDIX D: A BRIEF PRIMER ABOUT THE NATIONAL LABOR RELATIONS BOARD

THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board (NLRB) is an independent federal agency established by Congress “to safeguard employees’ rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent, and remedy unfair labor practices committed by private sector employers and unions.”¹ An independent agency, the NLRB is headquartered in Washington, DC, and is not part of any other government agency such as the U.S. Department of Labor.

The NLRB conducts secret-ballot elections so employees may exercise a free choice whether or not a union should represent them for collective bargaining purposes. Generally, a secret-ballot election is conducted only when a petition requesting an election is filed. Such a petition should be filed with the NLRB’s Regional Office in the region where the unit of employees is located. The NLRB has 26 regional offices around the country. More information about the NLRB can be found at nlrb.gov.

TYPES OF PETITIONS

1) CERTIFICATION OF REPRESENTATION (RC)

This petition, normally filed by a union, seeks an election to determine whether or not employees want to be represented by a union. It must be supported by the signatures (on paper or collected electronically) of 30 percent or more of the employees in the bargaining unit being sought. This designation or “showing of interest” contains a statement that the employees want to be represented for collective-bargaining purposes by a specific labor organization. The showing of interest must be signed by each employee, and each employee’s signature must be dated.

2) DECERTIFICATION (RD)

This petition, which can be filed by an individual, seeks an election to determine whether the authority of a union to act as a bargaining representative of employees should continue. It must be supported by the signatures of 30 percent

¹ <https://www.nlrb.gov/about-nlrb>

or more of the employees in the bargaining unit represented by the union. This showing of interest contains a statement that the employees do not want to be represented for collective-bargaining purposes by the existing labor organization. The showing of interest must be signed by each employee, and each employee's signature must be dated.

3) WITHDRAWAL OF UNION-SECURITY AUTHORITY (UD)

This petition, which can also be filed by an individual, seeks an election to determine whether to continue the union's contractual authority to require that employees make certain lawful payments to the union to retain their jobs. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit covered by the union-security agreement. These signatures may be on separate cards or a single piece of paper. This showing of interest states that the employees no longer want their collective-bargaining agreement to contain a union-security provision. The showing of interest must be signed by each employee, and each employee's signature must be dated.

4) EMPLOYER PETITION (RM)

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

5) UNIT CLARIFICATION

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

6) AMENDMENT OF CERTIFICATION (AC)

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

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

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

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

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

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

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

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

Physicians: Licensed physicians who are “employees” of the hospital.

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

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