

Labor Activity in Health Care

SEMI-ANNUAL REPORT
JANUARY-JUNE 2020

53RD

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 53rd 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 2019 and the first six months of 2020¹.
- 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 2020 indicates that the data is from the first six months of 2020.

LETTER FROM BOB LONG

The health care sector has experienced an unprecedented amount of disruption this year with the ongoing COVID-19 response combined with widespread social and political unrest across our country.

Almost every major city has seen some form of protest during these difficult times – from peaceful demonstrations to destructive riots. Labor unions are using this crisis of employee unrest to draw attention to themselves and rally support for organizing by positioning themselves as the advocate for greater safety regulations and racial and social inequities.

“Only Solidarity Can Save Us: Xenophobia and COVID-19,” reads the description of one training course offered by National Nurses United (NNU).

“COVID-19 is a public health crisis, yet the federal government and our employers still aren’t doing enough,” according to a text message from an NNU organizer.

Labor unions are demanding that nurses and other frontline workers speak out, file complaints with the Occupational Safety and Health Administration (OSHA), demand paid sick leave, more personal protective equipment, and hero or hazard pay.

Employers can lead through this crisis by seizing this opportunity to demonstrate their commitment to employees and remind them about how the value proposition they offer is better than the uncertainties of collective bargaining and the costs associated with labor unions. Sound precautionary measures to maintain positive employee relations include proactively engaging with employees about their concerns, educating employees about the “whys” behind business and operational decisions, keeping leadership briefed about emerging issues, training managers to recognize early warning signs of activity and to have effective, legal conversations, and ensuring human resources staff are ready to support management should activity occur.

Beyond COVID-19 and the nation’s social unrest, here are a few trends we are monitoring:

- NLRB elections resume: The NLRB halted elections in March but restarted about a month later. The NLRB’s Regional Directors have broad discretion in how to conduct elections. Historically, the NLRB has favored in-person elections over mail-ballot elections. Such elections provide the best conditions for fairness and higher voter participation. However, Regional Directors across

the country have been revoking stipulated election agreements and ordering mail-ballot elections; the Board has been denying employer appeals for manual ballot elections, ruling that Regional Directors have the ability to consider “other relevant factors” and that “extraordinary circumstances” permits Regional Directors to exercise their discretion outside established guidelines. This leaves employers to work harder to educate employees and encourage them to vote by mail to make sure their voices are heard.

- PRO Act: Protecting the Right to Organize (aka, the PRO Act) has 200 cosponsors in the House and 40 more in the Senate. Passage of the PRO Act would mean some big changes in labor law such as resurrecting “card check,” expediting first contracts and if no agreement binding arbitration, legalizing secondary boycotts, overturning right to work laws, making it harder to classify some workers as contractors, and expanding the definition of joint employer.
- OSHA investigations: The number of OSHA complaints have skyrocketed during the pandemic as labor unions and other groups file complaints about PPE and a host of workplace safety issues. Employers have been dealing with the financial, regulatory and reputational fallout. Unions and others will likely continue to use the OSHA process to pressure employers. Leaders can prepare by understanding current OSHA complaints before they are made public and proactively crafting media statements and internal communications to explain the complaints to internal and external stakeholders.

In this report, you’ll find the latest data on union organizing and membership across the nation as well as five articles about timely labor and employee relations topics. They address mandatory vaccinations, reviews of recent NLRB decisions, and union organizing trends and mitigation strategies.

IRI Consultants looks 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,



Bob Long
Chief Executive Officer
IRI Consultants

EXECUTIVE SUMMARY

NLRB REPRESENTATION PETITIONS & ELECTIONS^{2,3}

During the first six months of 2020, 124 representation (RC) petitions were filed in the health care sector. In all of 2019, 272 RC petitions were filed. This suggests that while unions have been leveraging the COVID-19 pandemic and broader social unrest in our country to facilitate organizing, access restrictions at hospitals and physical distancing caused by the pandemic may negatively impact the number of petitions unions file in 2020; NLRB data for the second half of 2020 will be available in the first quarter of 2021.

There were 72 representation elections held in the first six months of 2020. This number was affected by the NLRB's decision on March 19, 2020, to suspend all elections in light of the COVID-19 pandemic. While the NLRB officially resumed conducting elections on April 3, 2020, only nine elections were held in April and none in health care. Of the elections held, unions were elected in 88% of them.

The majority of organizing activity occurred in six states – New York, California, Pennsylvania, Washington, Michigan and Illinois. New York unseated California after years of being the state with the highest activity.

The Service Employees International Union (SEIU) continues to be the most active union in the health care sector, accounting for 44% of representation petitions filed and 37% of representation elections held. The United Food and Commercial Workers (UFCW), International Brotherhood of Teamsters (IBT), and International Union of Operating Engineers (IUOE), while not traditional health care unions, make up some of the most active unions in the health care sector.

ASHHRA Region 2 (comprising New Jersey, New York, and Pennsylvania) has overtaken Region 9 (comprising Alaska, California, Nevada, Oregon and Washington) as the most active in the nation. This shift was largely driven by a significant decrease in organizing activity in California and Oregon.

Over the past decade, strike activity in the health care sector has been heavily concentrated in California. In the first six months of 2020, only one strike was held in the health care sector.

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

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

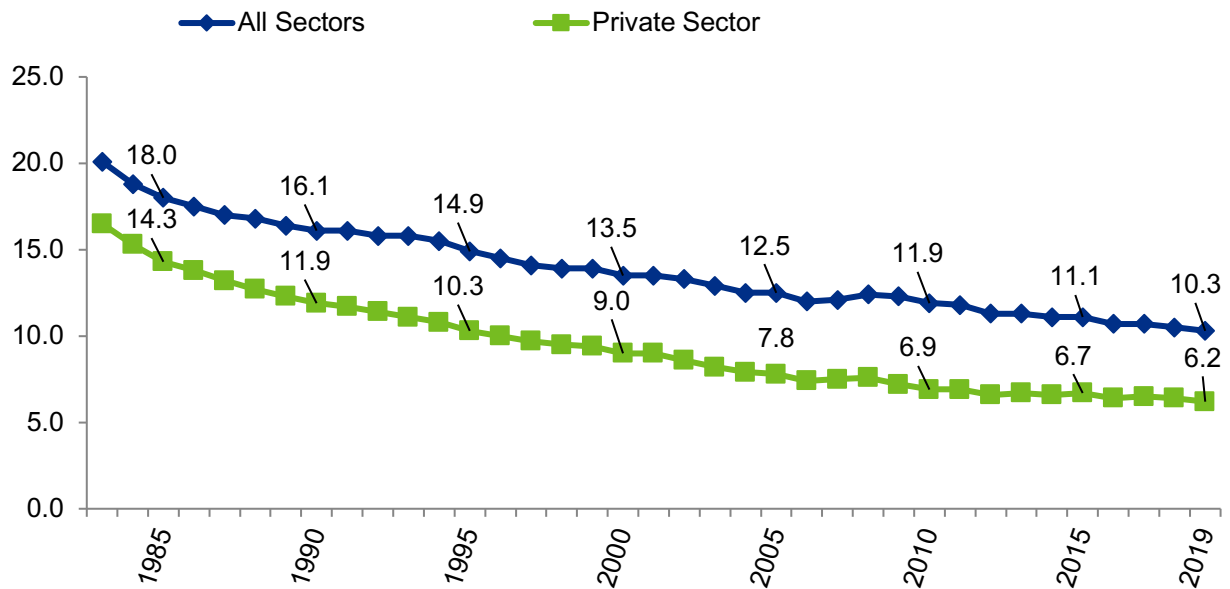
UNION MEMBERSHIP NATIONWIDE

According to the Department of Labor (DOL) Bureau of Labor Statistics' *Union 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.

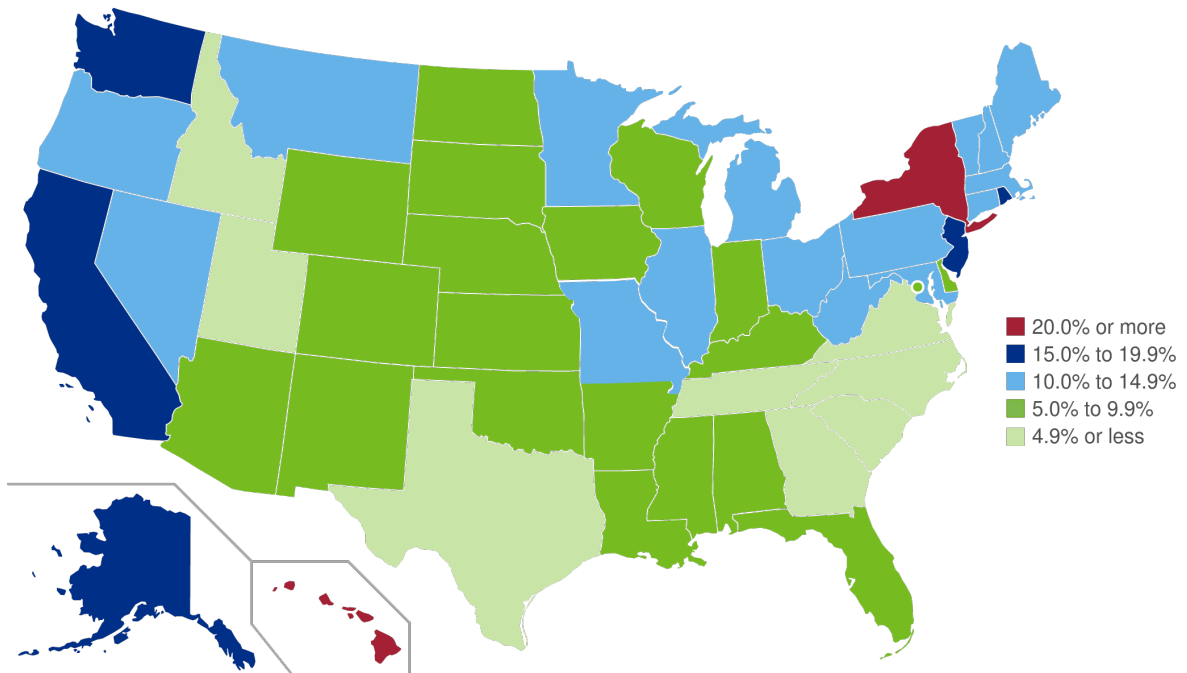
Data from the DOL report include the following highlights:

- 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 than *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

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

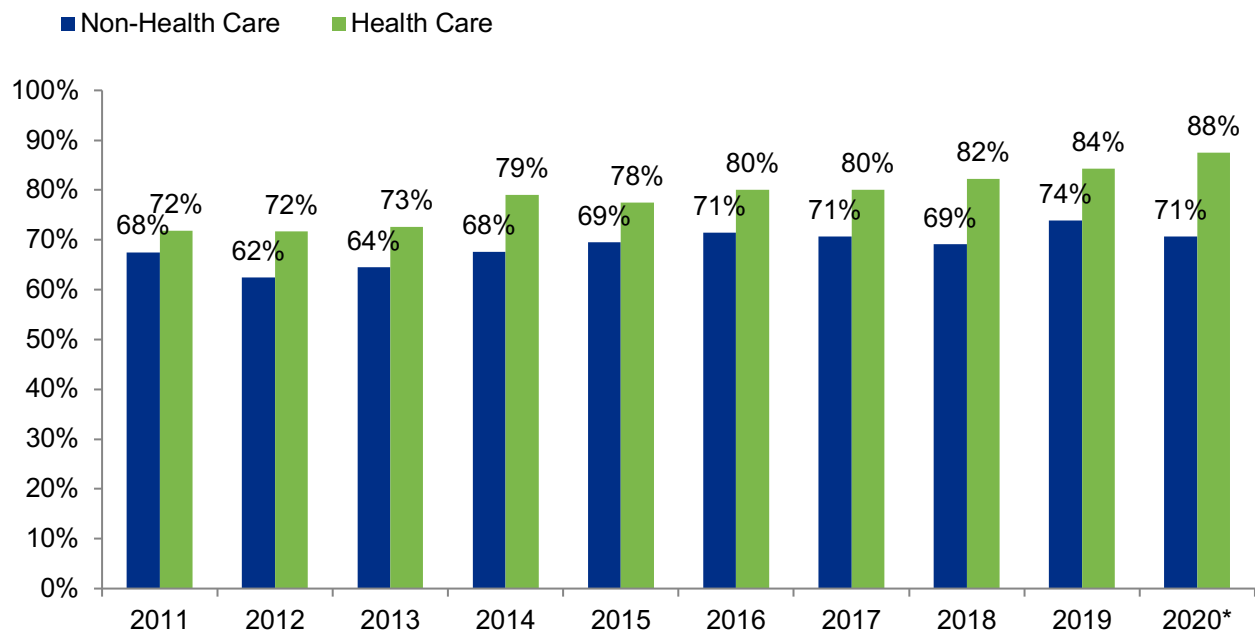
NATIONAL SUMMARIES

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

UNION WINS IN RC ELECTIONS

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 2020, unions were elected as a result of 88% of elections held in the health care sector, compared to just 71% in non-health care sectors.

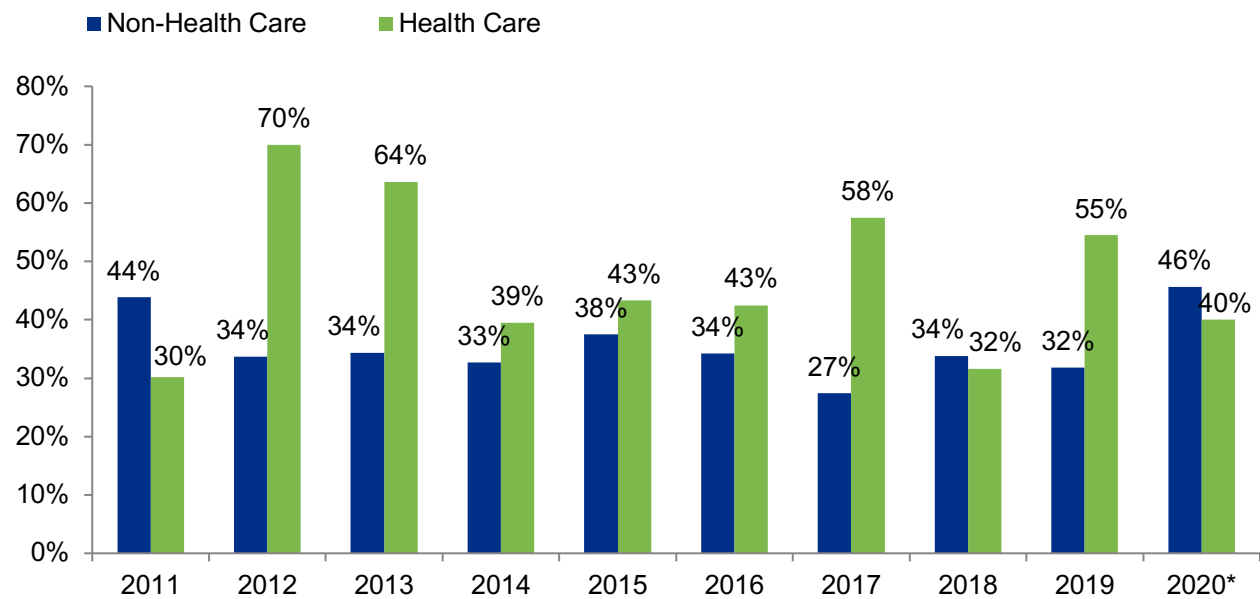
Health Care vs. Non-Health Care Sectors (2011 - June 30, 2020)



UNION WINS IN RD/RM ELECTIONS

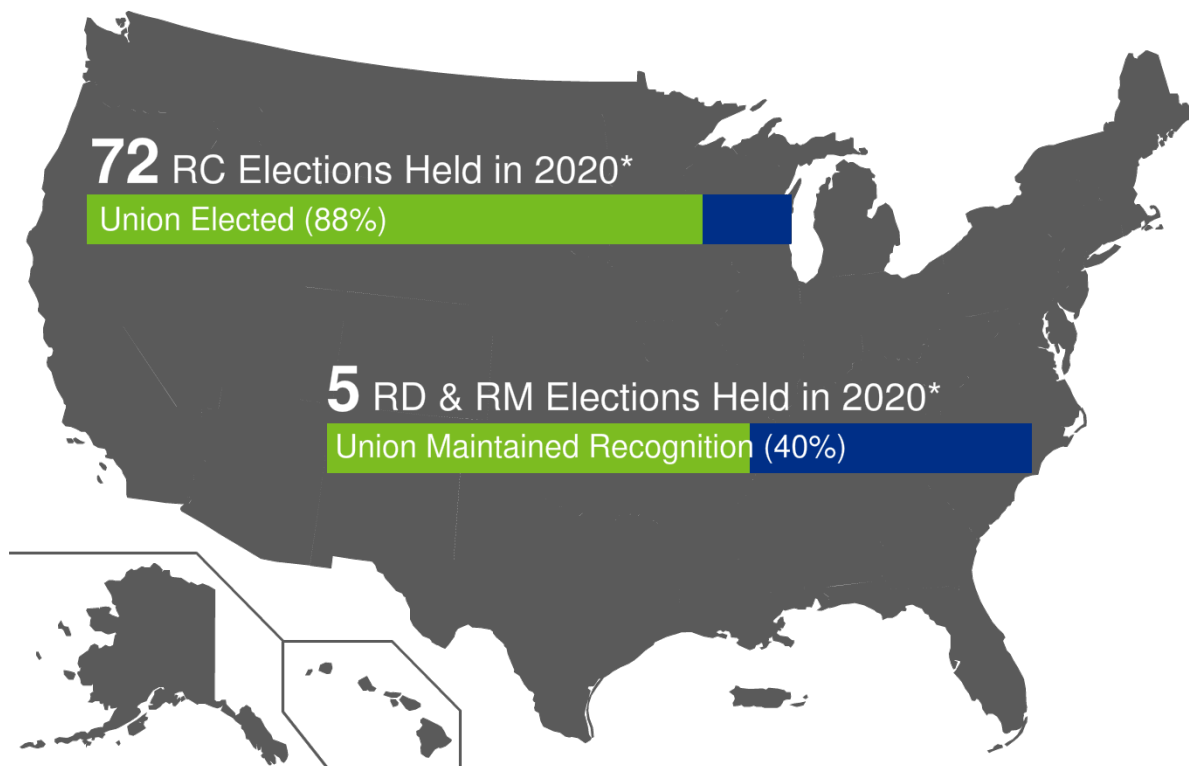
Unions have typically been more successful defending against decertification elections in the health care sector than in non-health care, but during the first six months of 2020, unions only maintained recognition in 40% of decertification elections held in health care compared to 46% in non-health care.

Health Care vs. Non-Health Care Sectors (2011 - June 30, 2020)



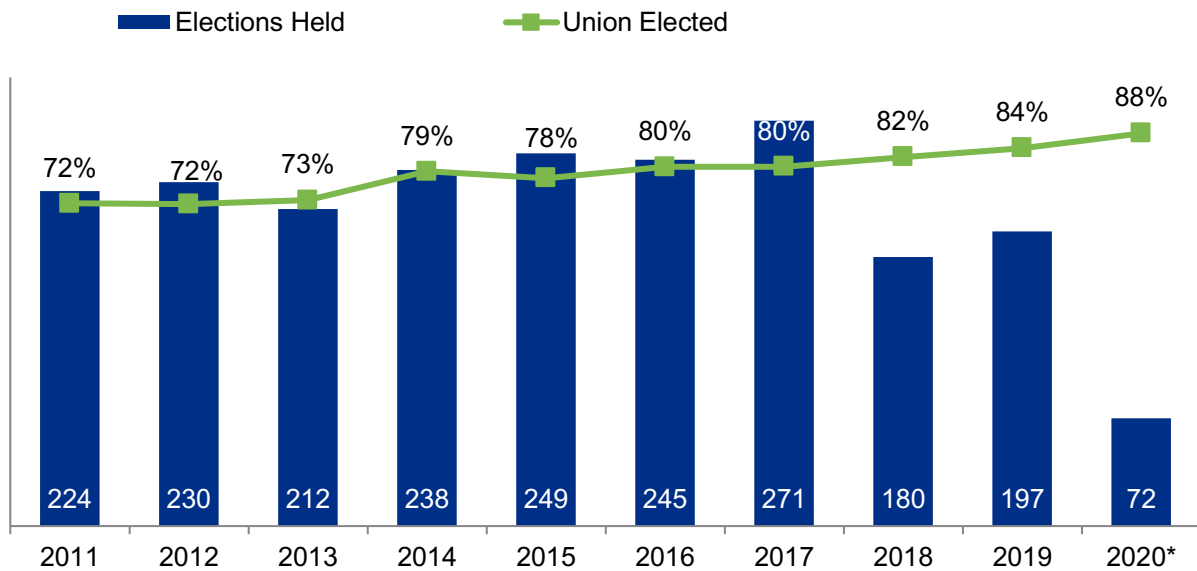
HEALTH CARE SECTOR – ELECTIONS OVERVIEW

During the first six months of 2020, there were 72 representation elections held in the health care sector, and unions were elected as a result of 88%. In the same time period, five decertification elections were held, and unions maintained recognition in 40%.



UNION SUCCESSES IN RC ELECTIONS COMPARED TO NUMBER OF ELECTIONS HELD

The chart below illustrates the number of representation elections held over the past decade along with the percentage of elections won by unions. The 88% win rate in the first six months of 2020 is the highest in the past decade. However, the number of elections held has been lower than expected in part due to the postponement of elections because of the COVID-19 pandemic.

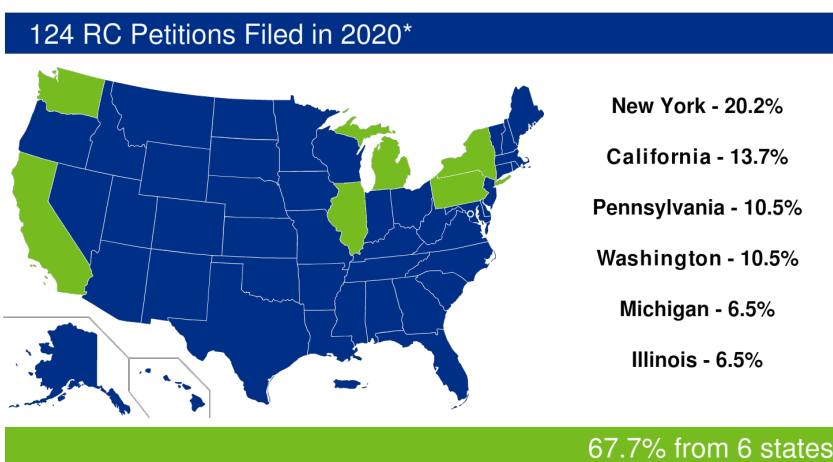


STATE SUMMARIES

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 2019 and the first six months of 2020 at the time of publication.

MOST ACTIVE STATES – REPRESENTATION PETITIONS FILED IN HEALTH CARE

Of the 124 representation petitions filed in health care in the first six months of 2020, 68% were filed in just six states, and more than one quarter were filed in one state – New York. California, Pennsylvania, Washington, Michigan and Illinois round out the top six states and each account for more than 6% of petitions filed.



ALL STATES – REPRESENTATION PETITIONS FILED IN HEALTH CARE

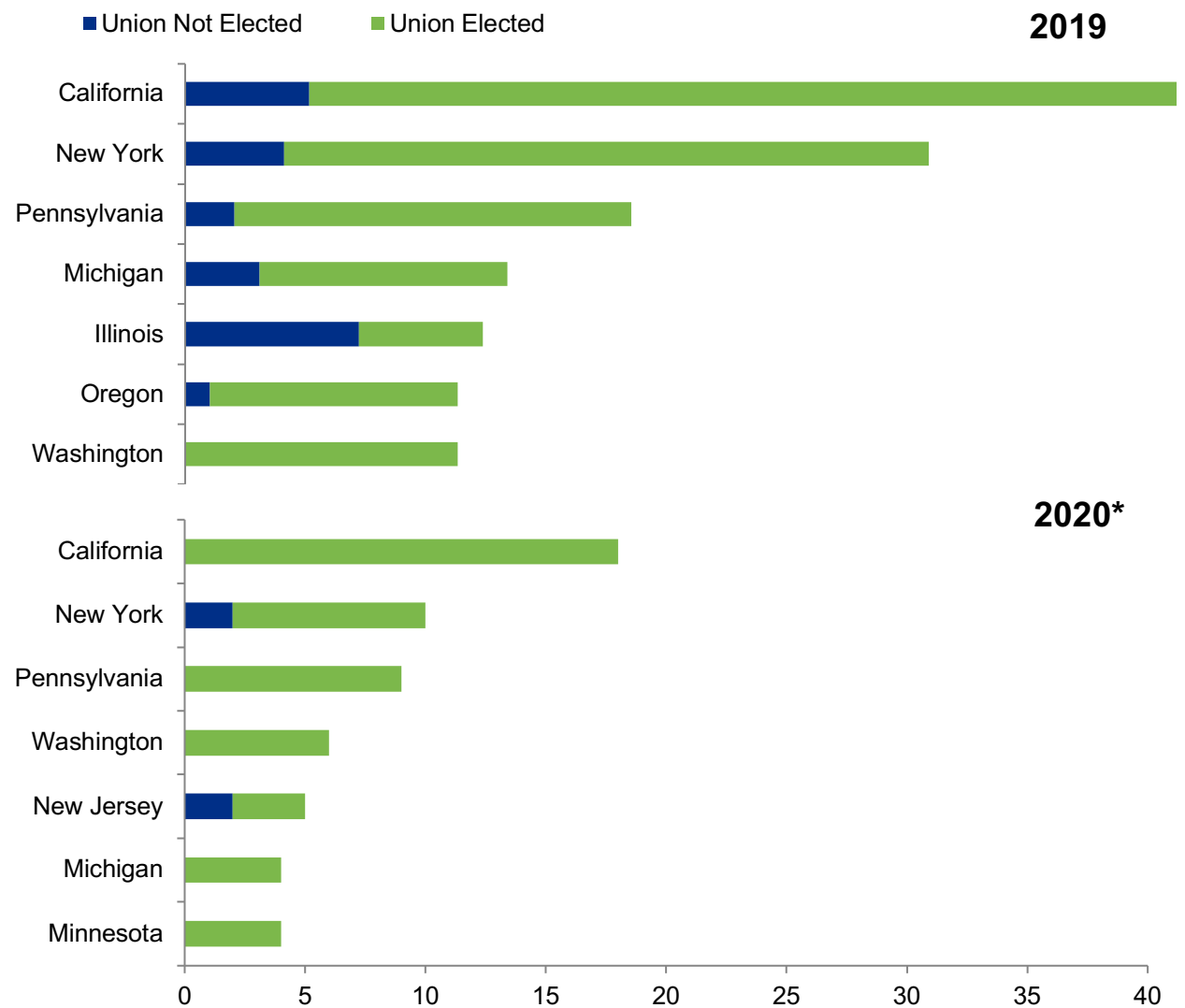
The table below details the number of representation petitions filed in each state in health care during 2019 and the first six months of 2020.

State	2019	2020*	State	2019	2020*	State	2019	2020*
Alabama	1	-	Maine	3	1	North Carolina	1	1
Alaska	1	-	Maryland	2	-	North Dakota	1	-
Arkansas	-	1	Massachusetts	11	3	Ohio	3	2
California	54	17	Michigan	14	8	Oregon	14	1
Colorado	1	-	Minnesota	5	5	Pennsylvania	29	13
Connecticut	6	3	Missouri	2	7	Puerto Rico	8	-
Delaware	-	1	Montana	7	4	Rhode Island	1	3
Florida	1	-	Nevada	2	1	Texas	2	-
Georgia	1	-	New Hampshire	1	-	Vermont	1	-
Hawaii	6	2	New Jersey	11	4	Virginia	1	-
Idaho	2	-	New Mexico	1	-	Washington	13	13
Illinois	16	8	New York	45	25	West Virginia	5	1
						Total	272	124

Note: A state is not listed in the table if there were no petitions filed in 2019 or the first six months of 2020.

MOST ACTIVE STATES – REPRESENTATION ELECTION RESULTS IN HEALTH CARE

In both 2019 and the first six months of 2020, California, New York and Michigan were the three most active states in terms of the number of representation elections held.



ALL STATES – REPRESENTATION ELECTION RESULTS IN HEALTH CARE

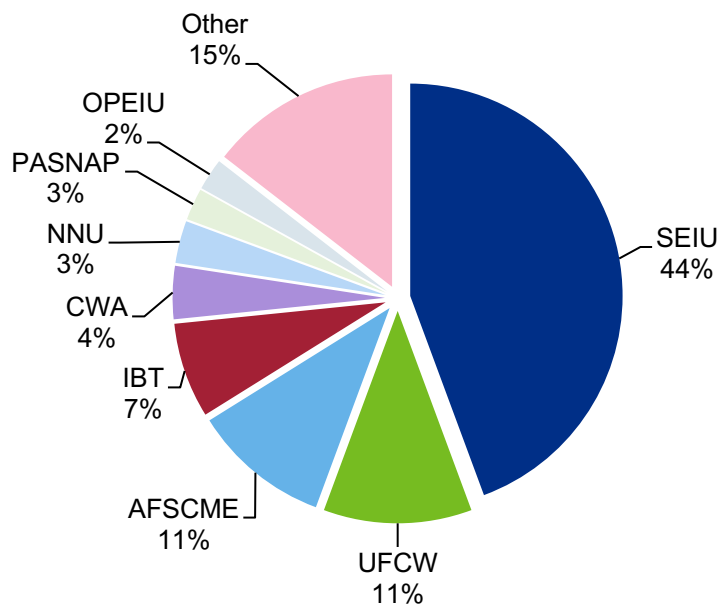
The following table depicts the number of representation elections held in each state in the health care sector in 2019 and the first six months of 2020.

State	2019					2020*				
	Total Elections	Union Elected		Union Not Elected		Total Elections	Union Elected		Union Not Elected	
		Total Successes	% of Elections	Total Successes	% of Elections		Total Successes	% of Elections	Total Successes	% of Elections
Alabama	1	1	100%	0	0%	-	-	-	-	-
Alaska	1	1	100%	0	0%	-	-	-	-	-
Arkansas	-	-	-	-	-	1	0	0%	1	100%
California	41	36	88%	5	12%	18	18	100%	0	0%
Colorado	1	1	100%	0	0%	-	-	-	-	-
Connecticut	6	6	100%	0	0%	2	1	50%	1	50%
District of Columbia	-	-	-	-	-	-	-	-	-	-
Florida	1	1	100%	0	0%	-	-	-	-	-
Hawaii	6	6	100%	0	0%	1	0	0%	1	100%
Idaho	1	1	100%	0	0%	-	-	-	-	-
Illinois	12	5	42%	7	58%	2	1	50%	1	50%
Iowa	1	0	0%	1	100%	-	-	-	-	-
Maine	2	1	50%	1	50%	-	-	-	-	-
Maryland	1	1	100%	0	0%	-	-	-	-	-
Massachusetts	8	7	88%	1	13%	2	2	100%	0	0%
Michigan	13	10	77%	3	23%	4	4	100%	0	0%
Minnesota	4	3	75%	1	25%	4	4	100%	0	0%
Missouri	1	1	100%	0	0%	1	1	100%	0	0%
Montana	5	4	80%	1	20%	2	2	100%	0	0%
Nevada	2	1	50%	1	50%	-	-	-	-	-
New Jersey	5	4	80%	1	20%	5	3	60%	2	40%
New Mexico	1	1	100%	0	0%	-	-	-	-	-
New York	30	26	87%	4	13%	10	8	80%	2	20%
North Carolina	1	1	100%	0	0%	-	-	-	-	-
North Dakota	1	1	100%	0	0%	-	-	-	-	-
Ohio	-	-	-	-	-	1	1	100%	0	0%
Oregon	11	10	91%	1	9%	3	2	67%	1	33%
Pennsylvania	4	3	75%	1	25%	9	9	100%	0	0%
Puerto Rico	4	3	75%	1	25%	-	-	-	-	-
Texas	2	2	100%	0	0%	-	-	-	-	-
Vermont	1	1	100%	0	0%	-	-	-	-	-
Washington	11	11	100%	0	0%	6	6	100%	0	0%
West Virginia	4	3	75%	1	25%	1	1	100%	0	0%
Total	275	212	77%	63	23%	87	67	77%	20	23%

Note: A state is not listed in the table if there were no elections held in 2019 or the first six months of 2020.

UNION SUMMARIES

MOST ACTIVE UNIONS – REPRESENTATION PETITIONS HELD IN HEALTH CARE IN THE FIRST SIX MONTHS OF 2020

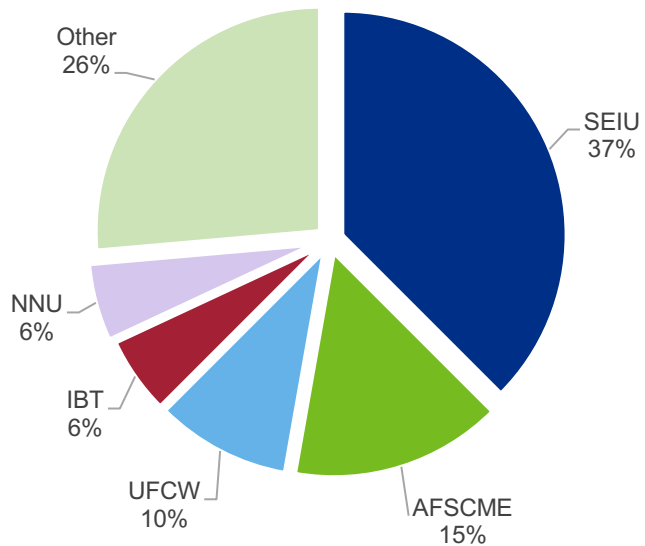


SEIU remains the most active union in the health care sector, accounting for 44% of representation petitions filed in the first six months of 2020. UFCW and AFSCME were tied as the next most active union.

Abbreviation	Union Name	RC Petitions Filed	
		2019	2020*
SEIU	Service Employees International Union	98	55
UFCW	United Food and Commercial Workers	27	14
AFSCME	American Federation of State, County and Municipal Employees	29	13
IBT	International Brotherhood of Teamsters	20	9
CWA	Communication Workers of America	1	5
NNU	National Nurses United	10	4
PASNAP	Pennsylvania Association of Staff Nurses and Allied Professionals	1	3
OPEIU	Office of Professional Employees International Union	6	3

MOST ACTIVE UNIONS – REPRESENTATION ELECTIONS HELD IN HEALTH CARE IN THE FIRST SIX MONTHS OF 2020

SEIU also accounted for the most representation elections in the first six months of 2020. SEIU was involved in 27 elections and was elected as a result of 89%. The next most active union was AFSCME, with 11 representation elections

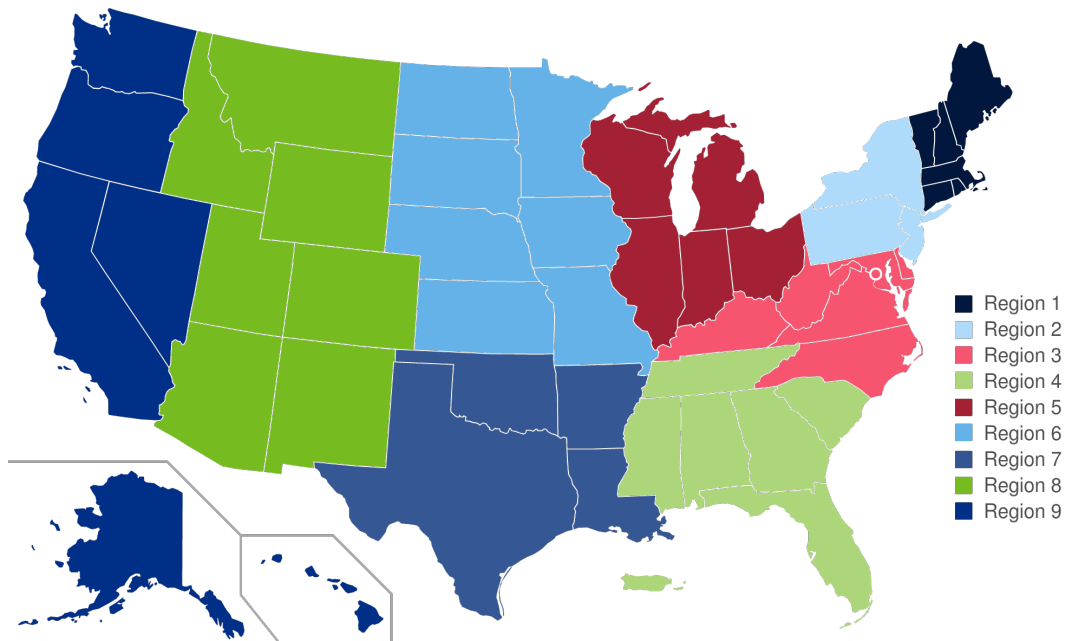


MOST ACTIVE UNIONS – REPRESENTATION ELECTION RESULTS

	2019			2020*		
	Total Elections	Union Elected %	Union Not Elected %	Total Elections	Union Elected %	Union Not Elected %
SEIU	72	82%	18%	27	89%	11%
AFSCME	18	83%	17%	11	82%	18%
UFCW	22	82%	18%	7	86%	14%
IBT	15	67%	33%	4	100%	0%
NNU	7	100%	0%	4	100%	0%
IUOE	8	63%	38%	3	100%	0%

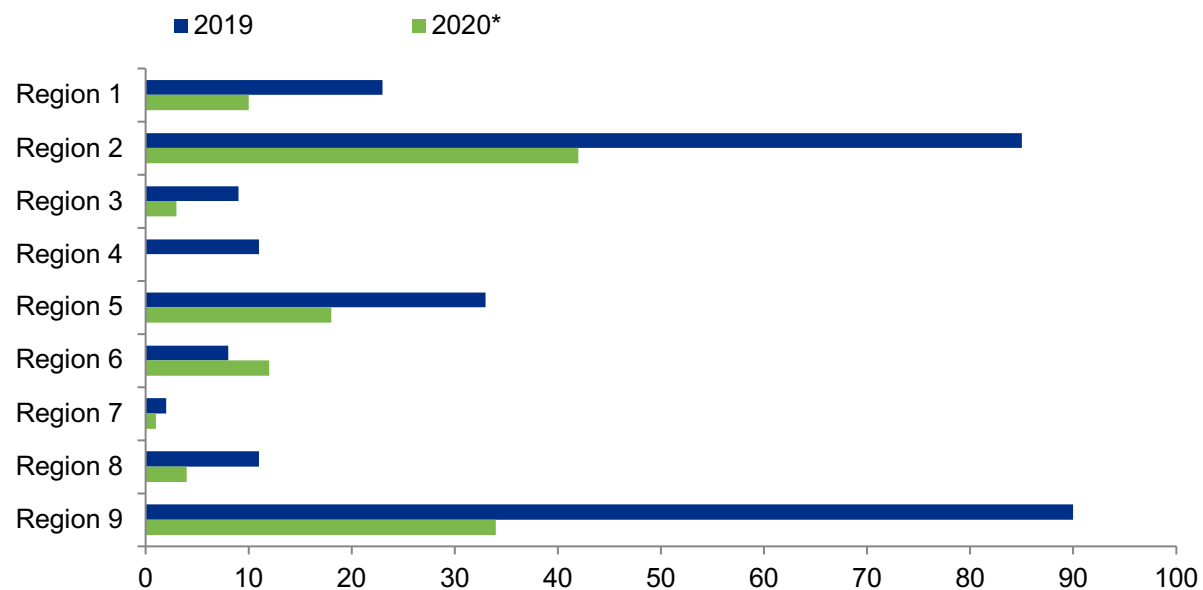
REGIONAL SUMMARIES

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



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

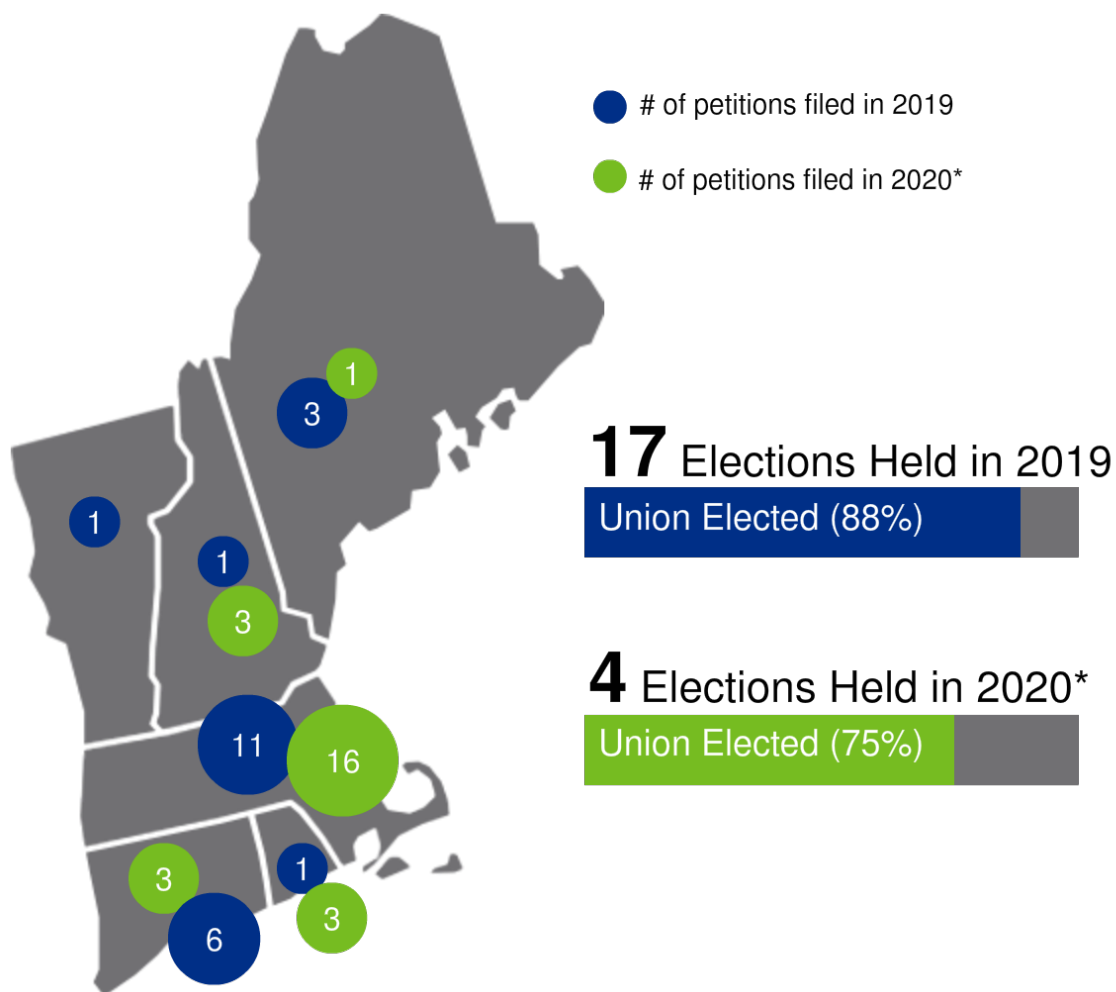
RC PETITIONS FILED IN HEALTH CARE BY ASHHRA REGION



REGION 1

Every state in Region 1 has experienced some union organizing activity in the past 18 months. Most of the activity has been concentrated in Massachusetts. Not many elections have been held yet this year despite a higher number of representation petitions being filed.

Petitions & Elections



*Indicates data is from the first six months of 2020.

REGION 2

The three states in Region 2 are traditionally highly active union organizing states and the first six months of 2020 proved no exception. There have already been 24 elections held in the region in the first six months of 2020 and unions were elected as a result of 83%.

Petitions & Elections

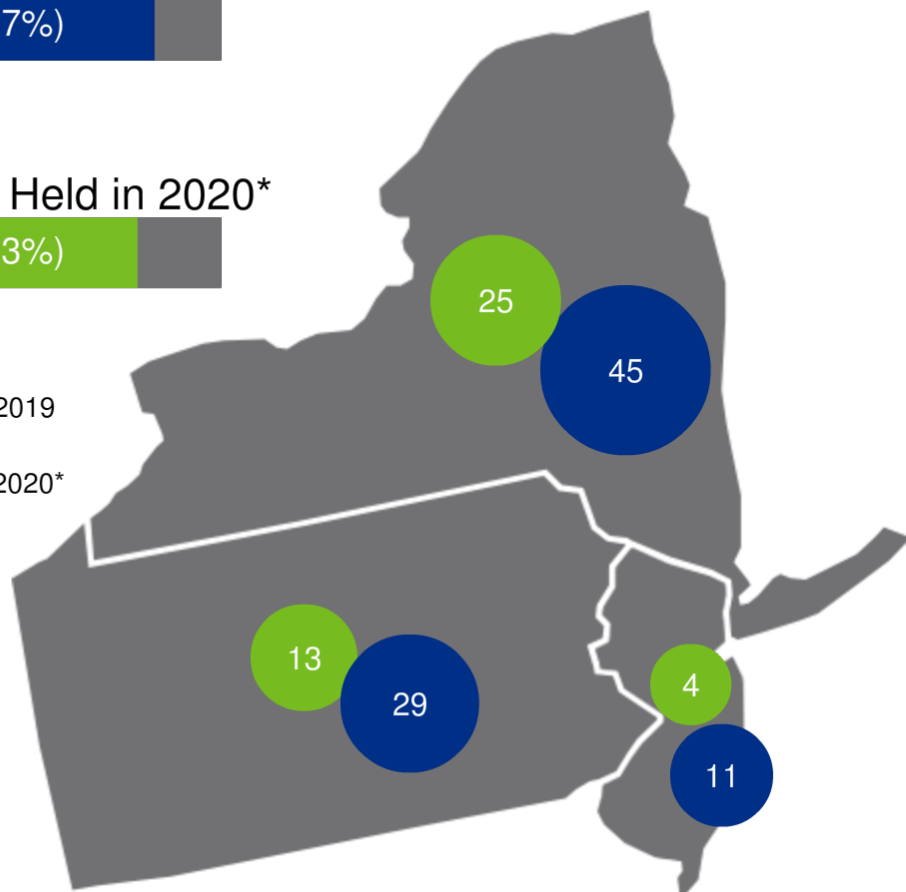
53 Elections Held in 2019



24 Elections Held in 2020*



- # of petitions filed in 2019
- # of petitions filed in 2020*

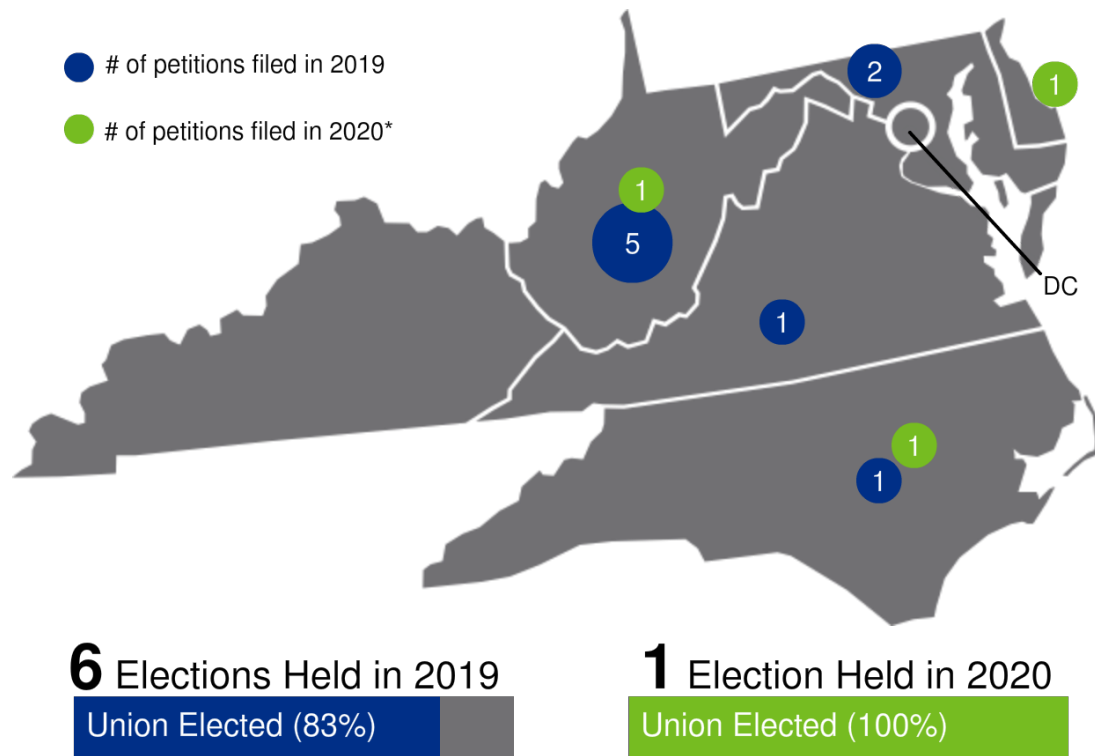


*Indicates data is from the first six months of 2020.

REGION 3

There is limited activity in Region 3. However, states that traditionally experienced almost no organizing activity are now being targeted as well. Continued success in this region may lead to additional organizing activity.

Petitions & Elections

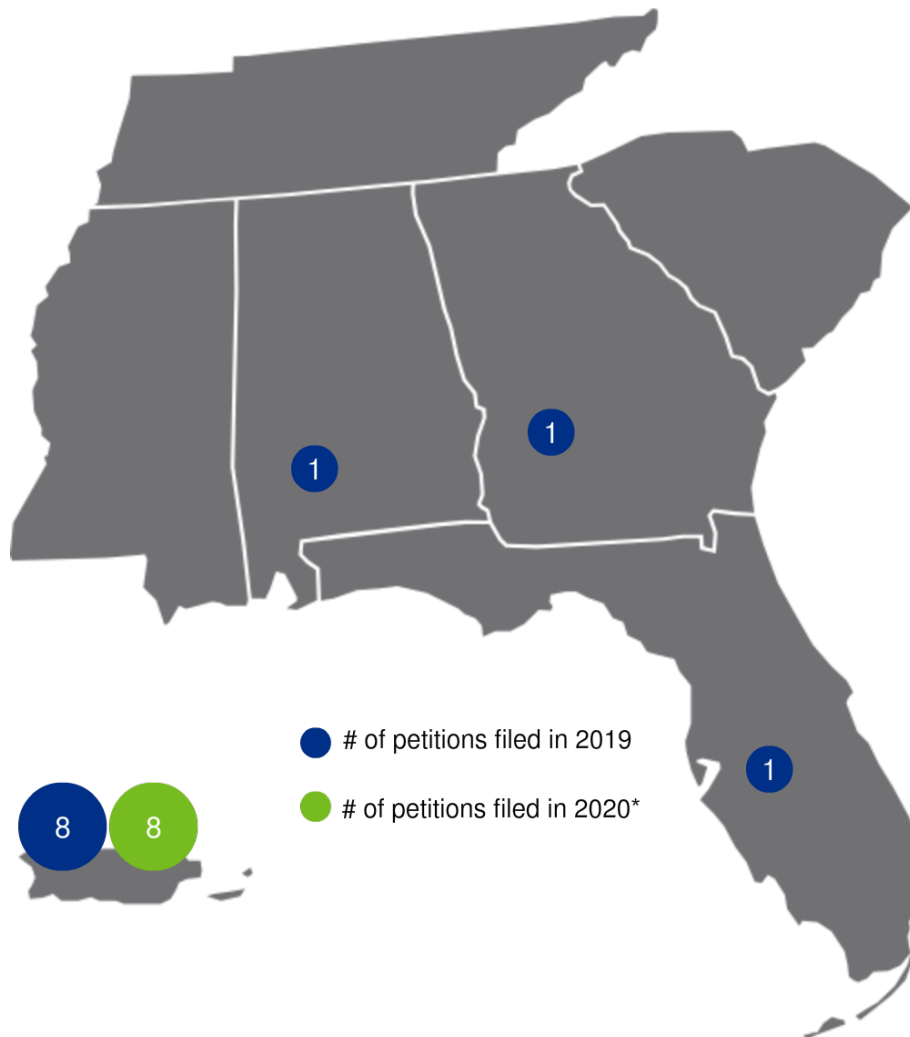


*Indicates data is from the first six months of 2020.

REGION 4

There has been minimal organizing activity in Region 4. No petitions have been filed in the region in the first six months of 2020.

Petitions & Elections



7 Elections Held in 2019
Union Elected (86%)

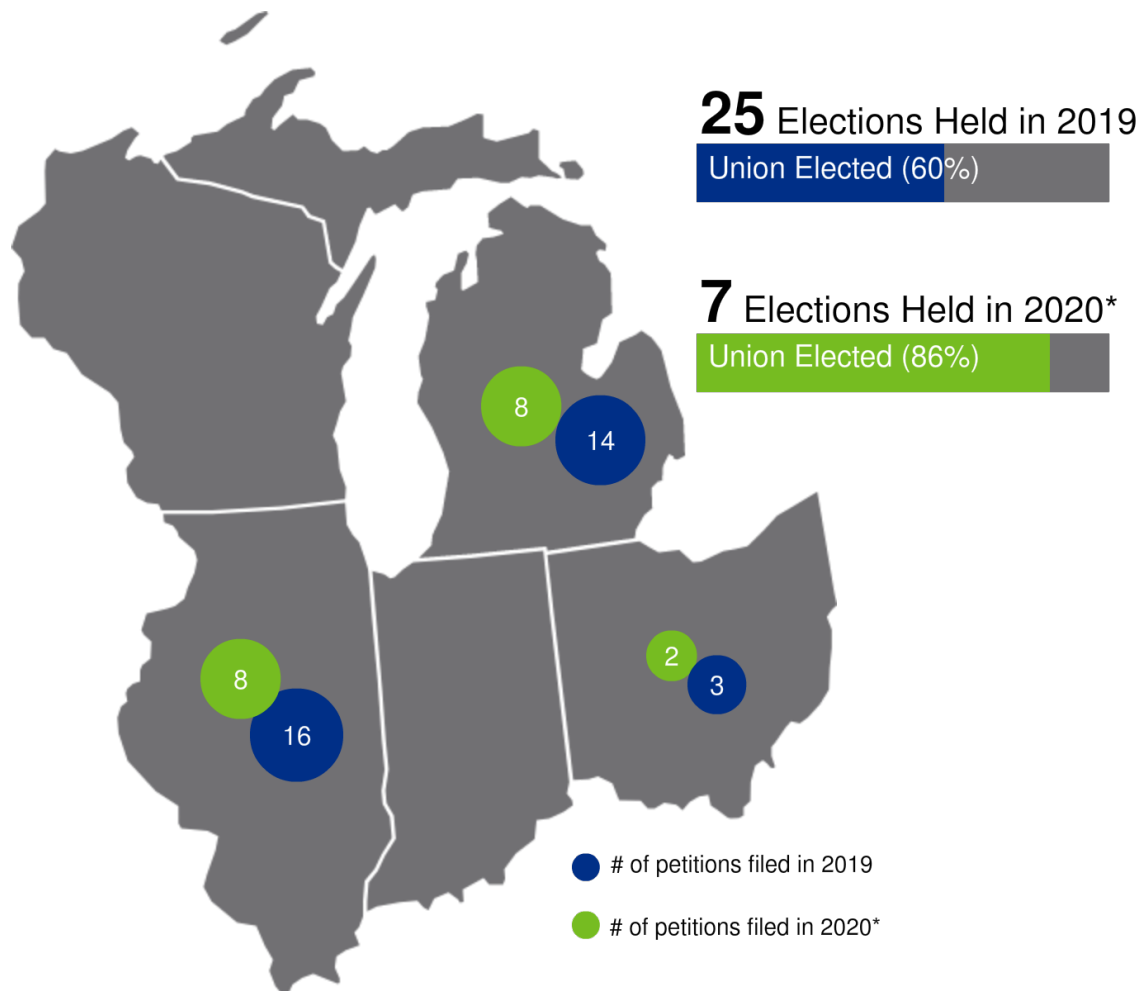
0 Elections Held in 2020*
Union Elected (83%)

**Indicates data is from the first six months of 2020.*

REGION 5

The activity in Region 5 has been primarily concentrated in Michigan and Illinois. The union election rate in 2019 was far lower than the national average, but in the first six months of 2020, that rate increased.

Petitions & Elections

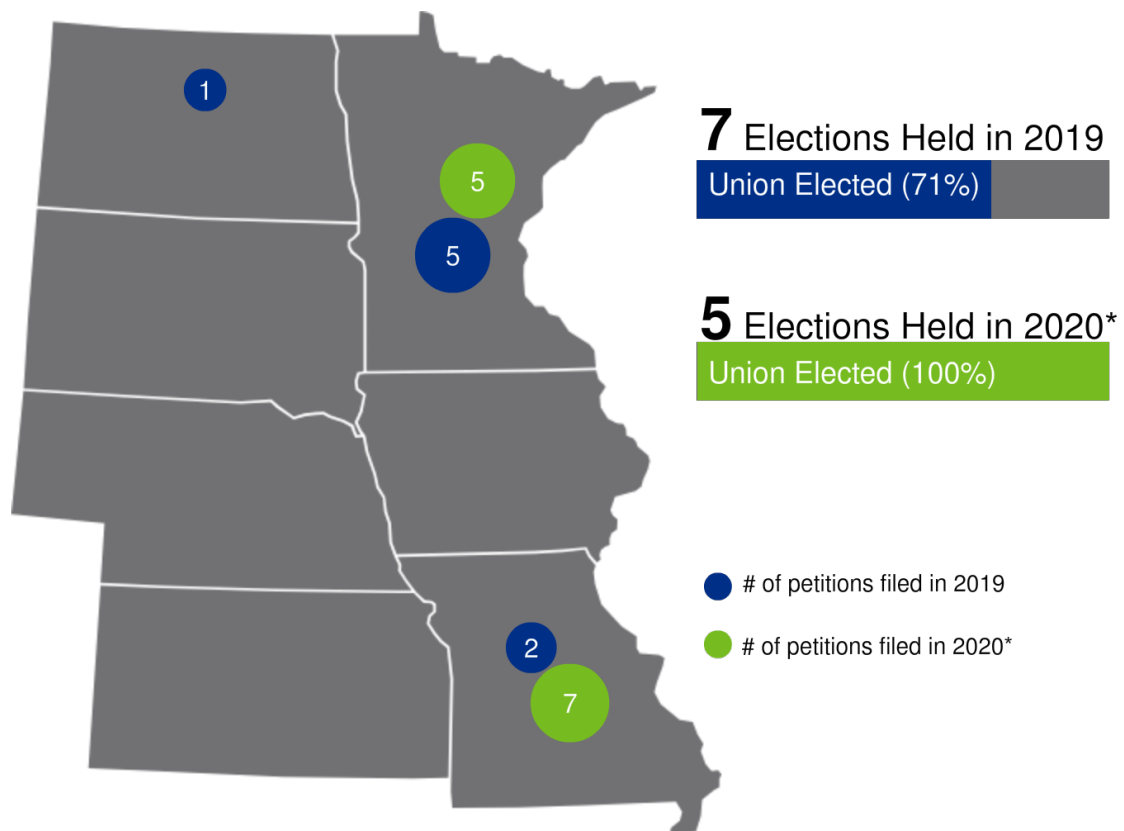


**Indicates data is from the first six months of 2020.*

REGION 6

Overall, organizing activity remains fairly limited in Region 6. Minnesota is experiencing sustained organizing activity and there has been a threefold increase in the number of petitions filed in Missouri in the first six months of 2020 compared to the full year in 2019.

Petitions & Elections



*Indicates data is from the first six months of 2020.

REGION 7

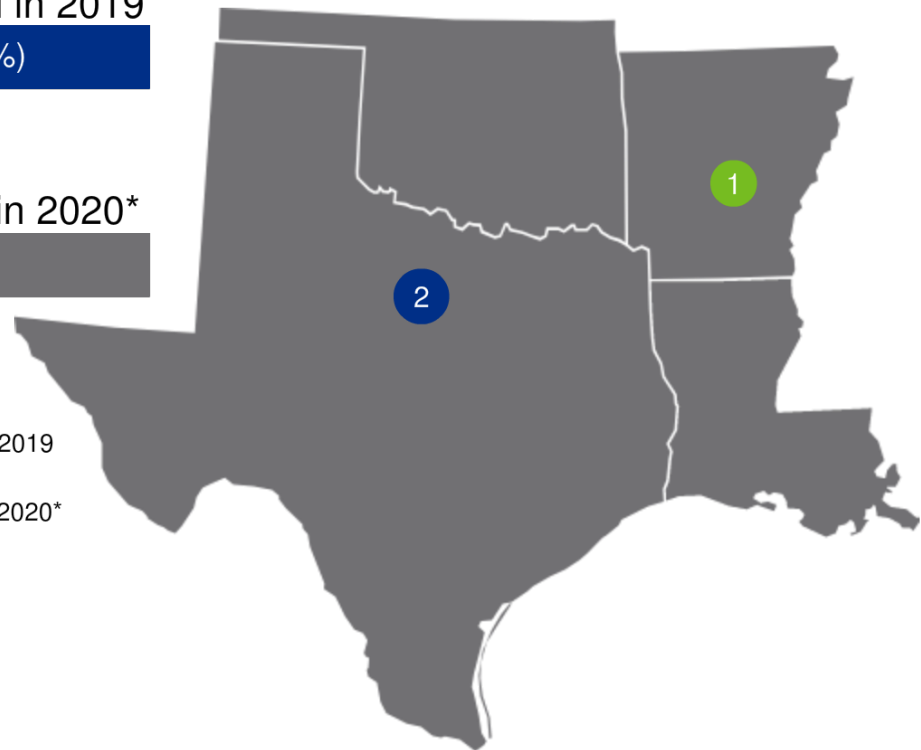
Only two representation petitions filed in Texas in 2019, both of which resulted in the union being elected. One petition has been filed in the first six months of 2020 and the union was not successful in that election.

Petitions & Elections

2 Elections Held in 2019
 Union Elected (100%)

1 Election Held in 2020*
 Union Elected (0%)

- # of petitions filed in 2019
- # of petitions filed in 2020*

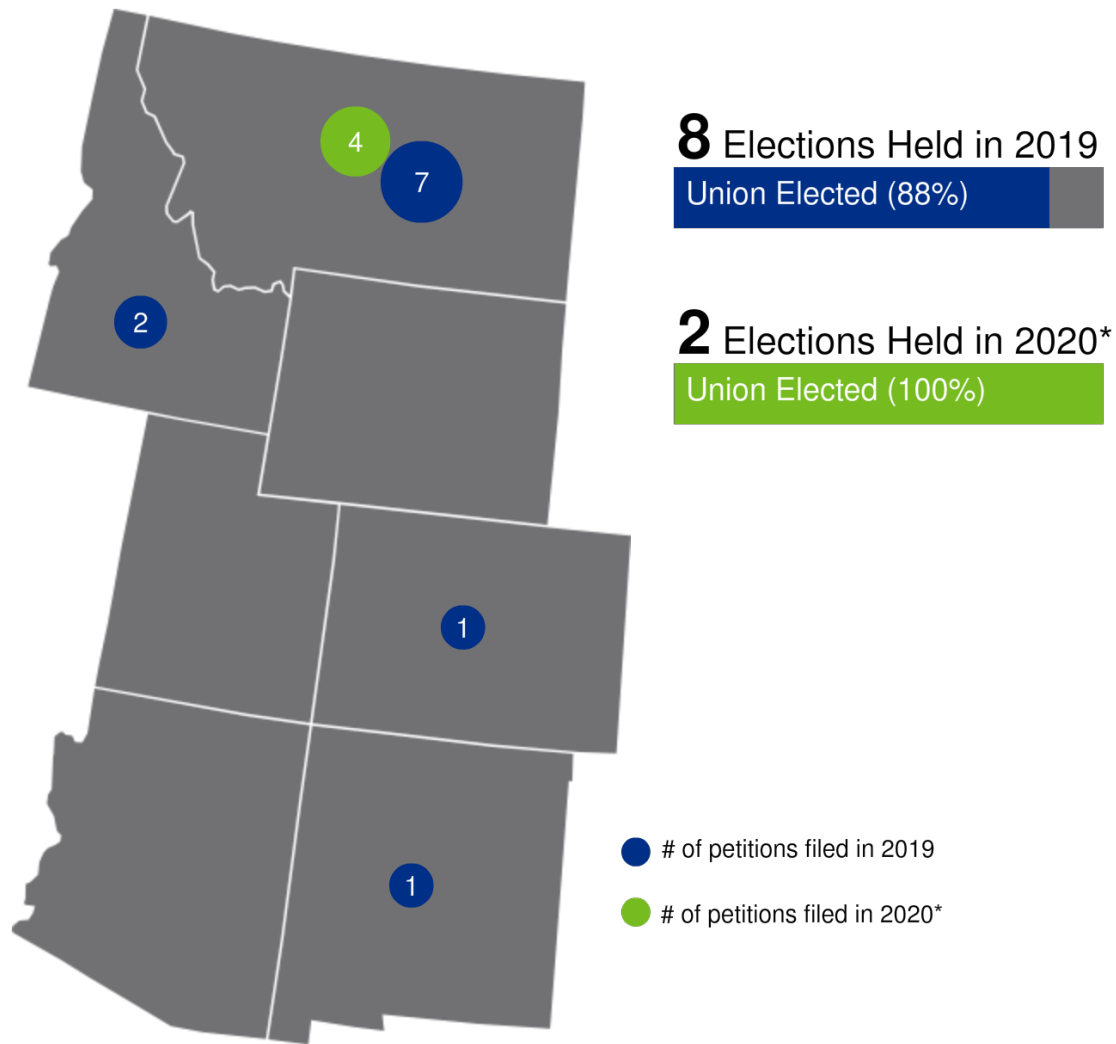


**Indicates data is from the first six months of 2020.*

REGION 8

Petitions were filed in multiple states across Region 8 in 2019 that do not typically experience much union organizing activity. This has not carried over to the first six months of 2020, but unions were elected in both of the two elections held.

Petitions & Elections

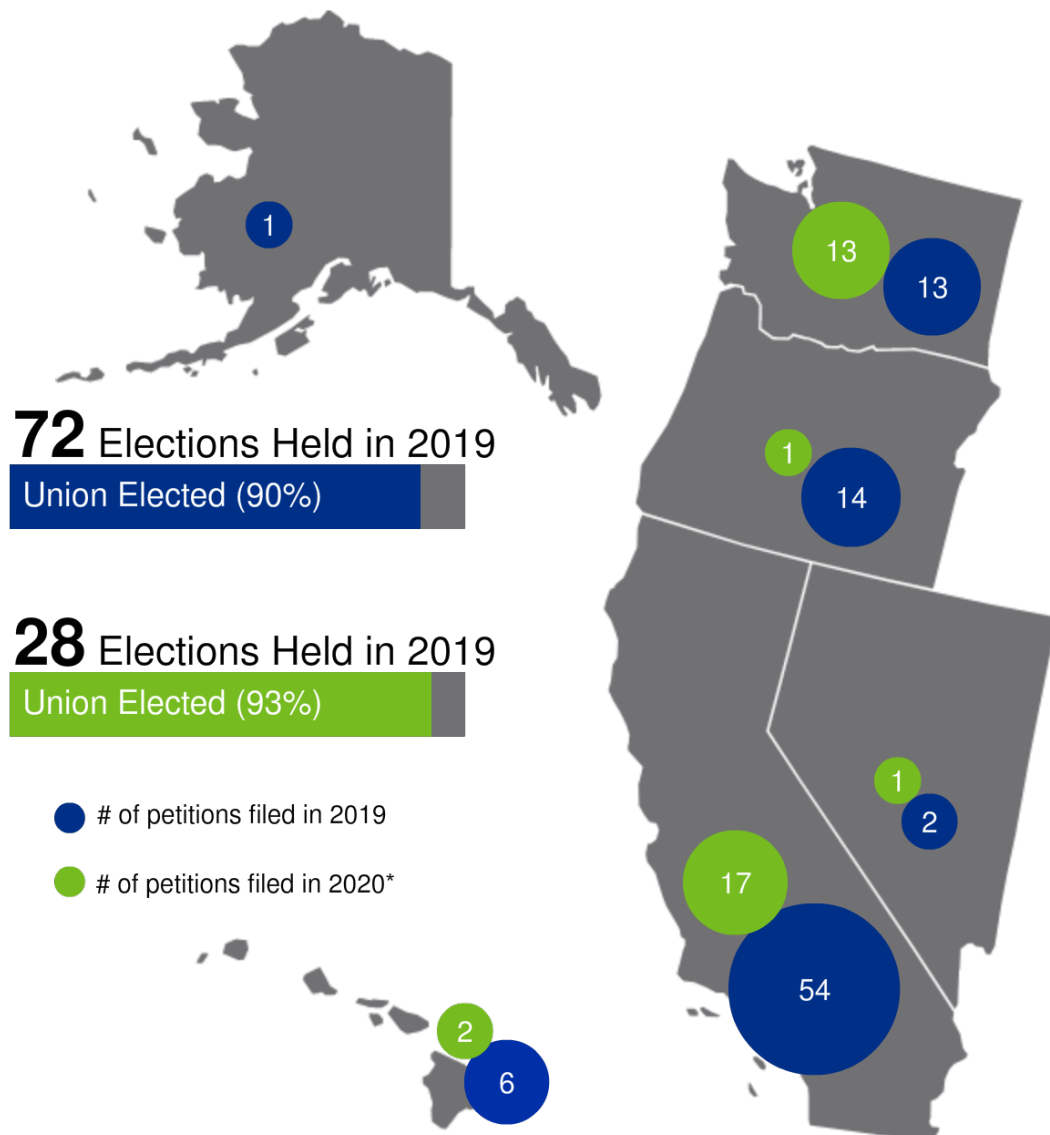


*Indicates data is from the first six months of 2020.

REGION 9

Region 9 continues to be the most active region in the nation. However, California and Oregon have seen a marked decrease in the number of representation petitions filed in the first six months of 2020. In the first six months of 2020, Washington already had as many petitions as were filed in full year 2019. Unions achieve a higher than average success rate in elections in this region.

Petitions & Elections

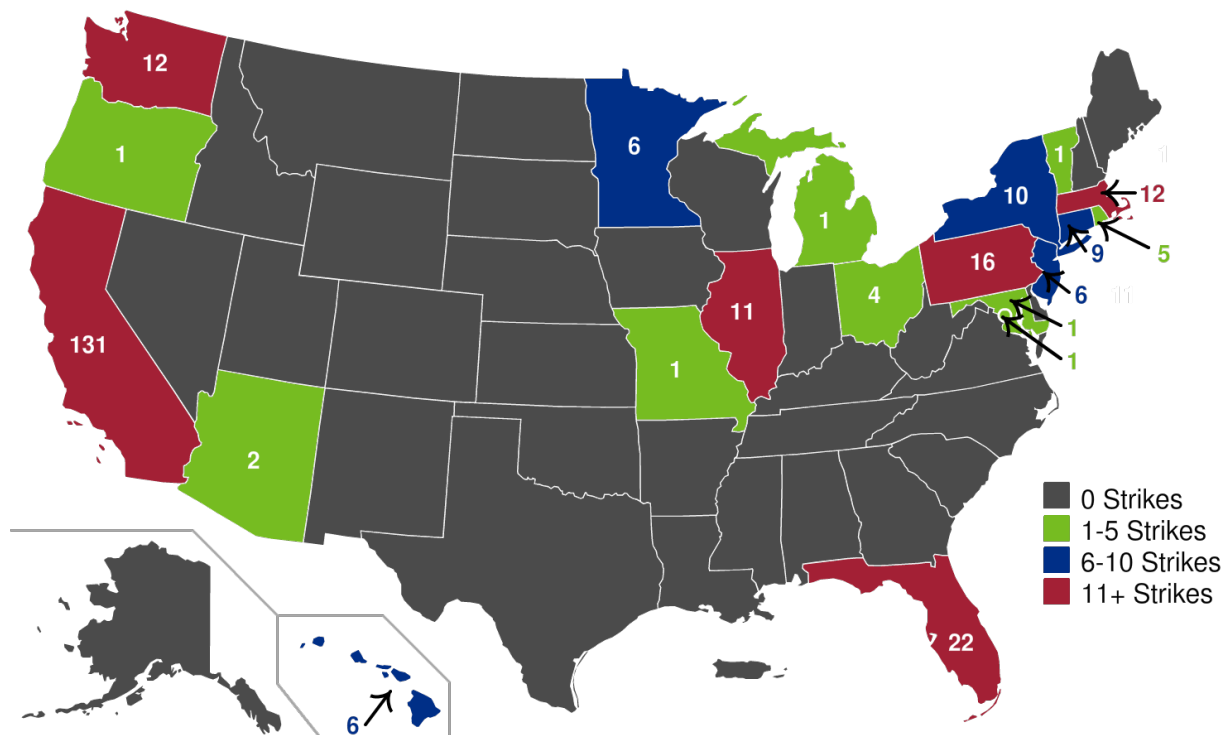


*Indicates data is from the first six months of 2020.

STRIKES IN HEALTH CARE

The map below illustrates the number of strikes in the health care sector in each state since 2011⁴. The majority of states have not seen a strike in health care in the past decade, while there is a large concentration of strikes in California.

STRIKES IN HEALTH CARE BY STATE, 2011 – 2020*



Year	Number of Strikes	Workers Idled	Average Number of Workers per Strike
2020*	3	16,836	5,612
2019	34	121,801	3,582
2018	28	103,162	3,684
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	38	22,679	597

⁴ Strike data is compiled from a combination of Federal Mediation and Conciliation Services Work Stoppage Data, U.S. Bureau of Labor Statistics Major Work Stoppages Data, and media coverage of strikes in order to provide the completest data possible. The data may not be comprehensive.

LABOR LAW/ACTIVITY UPDATE

The one-two punch of the COVID-19 pandemic and social unrest nationally has led to complex labor and employment challenges that employers are navigating while labor unions are attempting to capitalize on employees' concerns and anxieties. This edition of the ASHHRA Labor Activity in Health Care report contains five important and timely articles:

NLRB Limits Protection Given to Abusive, Profane or Offensive Workplace Conduct

by former NLRB Member and Morgan Lewis partner Harry I. Johnson and his law partner Joseph Ragaglia discusses the recent General Motors case and how employers now have greater ability to discipline and discharge employees who engage in abusive conduct in connection with protected concerted activity.

Employer Mandatory Vaccination Policies in the Time of COVID-19: Practical

Considerations for Health Care Employers by Shawe Rosenthal's Parker E. Thoeni, Lindsey A. White, Chad Horton, and Amelia Green discusses the legal framework related to mandatory vaccinations related to an eventual COVID-19 treatment.

COVID-19/Social Unrest Labor Issues – Are You Prepared?

by G. Roger King and Gregory Hoff from the HR Policy Association explores recent cases that better define legal parameters for employee relations matters stemming from the pandemic and the political and social activism within and outside of the workplace.

The Changing Nature of Work

by Littler's Michael Lotito and James Paretti reviews the legal complexities related to workplace issues, from remote work to changes in on-site work, resulting from the pandemic.

Managing Change and Communicating Effectively to Ensure Employees Believe

Your Message, Not the Union's by IRI Consultants' Tami Denney, Deborah Porter and Candice Battles, covers the challenges health care employers have faced in 2020, explores how unions are attempting to leverage the pandemic and social unrest, and presents recommendations for keeping employees focused on their work and their employer's message.

NLRB LIMITS PROTECTION GIVEN TO ABUSIVE, PROFANE, OR OFFENSIVE WORKPLACE CONDUCT

Harry I. Johnson, III
Partner
Morgan Lewis
2049 Century Park East, Ste. 700
Los Angeles, CA 90067
Tel: 301-255-9005; harry.johnson@morganlewis.com

Joseph Ragaglia
Associate
Morgan Lewis
1701 Market St.
Philadelphia, PA 19103
Tel: 215-963-5365; joseph.ragaglia@morganlewis.com

ABSTRACT

The National Labor Relations Board (NLRB or Board) has finally abandoned its problematic standard around the discipline and discharge of employees who engage in abusive conduct in connection with protected concerted activity. On July 21, 2020, the Board issued its long-awaited decision in *General Motors LLC*.

Prior to *General Motors*,¹ employees were often protected from discipline or discharge – even in circumstances involving racist, profane, and/or vitriol-filled attacks – so long as those attacks occurred simultaneously with conduct otherwise protected by the National Labor Relations Act (NLRA). As outlined in a detailed analysis by the National Labor Relations Board (NLRB or Board), this prior standard led to a flood of cases protecting offensive, abusive conduct. Whether an employer could discharge an employee for using a racist slur or calling a company vice president a “stupid f***ing moron” was questionable and turned on a context-specific multifactor test, which often resulted in the conduct being protected and immune from discipline.

The prior NLRB standards governing offensive workplace conduct and workplace civility requirements were criticized by two former NLRB members, Harry Johnson and Philip

¹ 369 NLRB No. 127, slip op. at 1 (July 21, 2020).

Miscimarra, both now labor and employment partners at Morgan Lewis. The Board's recent *General Motors* decision relied on Johnson's dissenting opinion in *Pier Sixty, LLC*, 362 NLRB 505 (2015). The Board also now broadly permits workplace civility requirements (previously deemed unlawful) based on *The Boeing Co.*, 365 NLRB No. 154 (2017), decided in part by former NLRB Chairman Phil Miscimarra.

Morgan Lewis labor and employment partners also include Chai Feldblum, a former commissioner of the Equal Employment Opportunity Commission (EEOC), and Sharon Masling, who served as the EEOC chief of staff to then Commissioner Feldblum. The EEOC filed its own amicus brief in the NLRB *General Motors* case and first called attention to the tension between the EEOC's and NLRB's positions in a report co-authored by Chai Feldblum in 2016.

BACKGROUND

The Board's Duty to Protect Employees from Interference in the Exercise of Their Section 7 Rights

The NLRA protects certain employee rights, including the right to work together to raise concerns about terms and conditions of employment. In addition to being concerted activity, the activity must also be for mutual aid or protection to be legally protected under the NLRA. The Board has long recognized that disputes regarding wages, hours, and working conditions can "engender ill feelings" and solicit strong responses. The *General Motors* opinion, however, recognizes that for too long the Board permitted this explanation to overreach and infringe on an employer's legitimate need to maintain order and a discrimination-free workplace.

NEW RULING

In a welcome return to common sense, the Board has finally recognized that its prior standards failed to properly consider employers' legal obligations to prevent harassment and a hostile work environment, as well as to maintain order and respect at work.

Employers must meet the NLRA's protections, the Board held, while also complying with the duty under US antidiscrimination laws that may require investigation, discipline, discharge, or other prompt action against an employee engaged in workplace misconduct.

Following the Board's September 5, 2019, request for amicus briefing in *General Motors*, for example, the EEOC filed an amicus brief highlighting the employer's obligations in this regard:

[W]hen an employee creates a hostile work environment—by engaging in objectively and subjectively severe or pervasive harassment based on a protected characteristic—the employer is liable so long as it knew or should have known about the offending conduct and failed to take prompt and appropriate corrective action.²

The Board noted the inherent conflict employers face when deciding whether to discipline an employee who was clearly engaged in protected activity, while also engaging in profane and offensive behavior. The NLRB chastised the prior precedent as “wholly indifferent” to such legal obligations. Quoting former NLRB member (and current Morgan Lewis partner) Harry Johnson, the Board stated:

We live and work in a civilized society, or at least that is our claimed aspiration. The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances. Reflecting this underlying truth, moreover, legal and ethical obligations make employers responsible for maintaining safe work environments that are free of unlawful harassment. Given all this, employers are entitled to expect that employees will coexist, treating each other with some minimum level of common decency.³

The Board's New (and Also Old) Standard

Thus, the NLRB overturned four decades of precedent establishing various multifactor tests and applying it to abusive conduct, including *Atlantic Steel*,⁴ *Pier Sixty, LLC*⁵ (and other cases involving the “totality of the circumstances” test for social media cases), and *Clear Pine Mouldings*.⁶ In determining that a new, clearer standard was needed, the Board explained:

² Slip op. at 7.

³ *Pier Sixty*, 362 NLRB at 510.

⁴ 245 NLRB 814, 816 (1979).

⁵ 362 NLRB 505, 506-508 (2015).

⁶ 268 NLRB 1044, 1046 (1984).

Absent evidence of discrimination against Section 7 activity, we fail to see the merit of finding violations of federal labor law against employers that act in good faith to maintain civil, inclusive, and healthy workplaces for their employees. These results simply do not advance the Board's mission of promoting labor peace or any of the other principles animating the Act.⁷

Instead, the *Wright Line* framework is the single test that now applies when analyzing whether discipline or discharge based on abusive, profane, and harassing employee actions and statements is lawful.⁸ Under *Wright Line*, the general counsel must prove that (1) the employee engaged in protected concerted activity; (2) the employer had knowledge of that activity; and (3) the employer had animus against the protected activity – in other words, was the activity a motivating factor behind the employer's discipline?

This final step requires that the general counsel prove, with sufficient evidence, that there was a causal nexus or relationship between the protected activity and the discipline.⁹ Once the general counsel makes out his initial case, the burden shifts to the employer to show that it would have taken the same action in the absence of protected activity. Importantly, the Board noted that pretext is still alive and well and will defeat the employer's defense here if proven. In doing so, the Board specified that, if the evidence as a whole “establishes that the reasons given for the [employer's] action are pretextual – that is, either false or not in fact relied upon the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to [evaluate whether the employer would have taken the same action in the absence of protected activity].” Slip op. at 10 (quoting *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)).

EMPLOYER TAKEAWAYS

- The *General Motors* decision is a welcome change for employers, recognizing both the ability and the obligation to maintain safe and respectful work environments. The Board now acknowledges that employers can have a legitimate, nondiscriminatory interest in disciplining or discharging employees for abusive, profane, and/or discriminatory behavior, even if related to other Section 7 protected activity.

⁷ 369 NLRB No. 127, slip op. at 8.

⁸ 251 NLRB 1083 (1980). The Board's *General Motors* decision also was retroactive and applies to any pending cases.

⁹ See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7-8 (2019).

- The Board overruled all of its prior doctrine relating to the NLRA protection of abusive conduct. It is unclear whether any of this doctrine remains if an employer chooses to discipline for conduct tied into protected activity that is problematic but not “abusive.” However, the “disloyalty doctrine” – which applies specifically to attacks on an employer’s product or service during labor disputes and whether such attacks remain protected under the NLRA – still remains.
- The Board did not provide a single definition of “abusive conduct” but rather provided examples of actions from past cases that it would consider abusive conduct. Generally, it appears that the Board considers “abusive conduct” as covering behavior that violates or risks violation of antidiscrimination and antiharassment laws that constitutes personally directed (“ad hominem”) profane attacks, and that potentially even extends to modern definitions of “bullying.”
- An employer should clearly characterize problem conduct in its disciplinary documents as abusive under the Board’s conception, if consistent with the facts, to help avail itself of the new standard.
- *General Motors* also demonstrates that this Board takes seriously the general counsel’s need to prove legally protected conduct as a motivating factor for the discipline, treating the protected concerted activity and the baseline abusive conduct as analytically distinct. Employers will have more of a chance to prove a causation defense, and the mere proximity in timing where abusive conduct and protected conduct occur during the same event – without more – will no longer be sufficient to support a claim of pretext in abusive conduct cases.
- Although a familiar test, employers should remain aware that the *Wright Line* analysis can be expansive and difficult to confront when employer discipline is challenged. For example, employers should carefully review any potential comparator situations to ensure consistent enforcement of workplace standards and policies. Any evidence of discriminatory intent against unions or protected activity and evidence of pretext will also be a critical part of the analysis.
- Finally, employers with currently pending proceedings involving abusive conduct should evaluate the potential application of *General Motors* to their cases.

EMPLOYER MANDATORY VACCINATION POLICIES IN THE TIME OF COVID-19: PRACTICAL CONSIDERATIONS FOR HEALTH CARE EMPLOYERS

Parker E. Thoeni
Partner
Shawe Rosenthal
One South Street, Ste. 1800
Baltimore, MD 21202
Tel: 410-752-8861; thoeni@shawe.com

Lindsey A. White
Partner
Shawe Rosenthal
One South Street, Ste. 1800
Baltimore, MD 21202
Tel: 410-843-3472; white@shawe.com

Chad Horton
Associate
Shawe Rosenthal
One South Street, Ste. 1800
Baltimore, MD 21202
Tel: 410-843-3480; horton@shawe.com

Amelia Green
Law Clerk
Shawe Rosenthal
One South Street, Ste. 1800
Baltimore, MD 21202
Tel: 410-752-1040

ABSTRACT

This article discusses the legal considerations for employers implementing a mandatory COVID-19 vaccination program in the health care setting, including the ADA, Title VII, OSHA's General Duty clause, state law considerations, and special considerations for unionized employers.

The Trump Administration and the Centers for Disease Control and Prevention (CDC) have recently announced that states should be ready to administer Coronavirus 2019 (COVID-19) vaccinations as early as late October or early November of this year.¹ A vaccine for COVID-19 is expected to be an important step in controlling the pandemic, and many employers – particularly those in healthcare – are likely to consider whether they should implement a mandatory vaccine requirement for employees. Weighing heavily in that decision will be the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act, both of which require covered employers to provide reasonable accommodations to employees absent undue hardship on the employer.

The legal framework applicable to employer-mandated influenza vaccines must be considered in determining whether employers will be able to require a COVID-19 vaccine. State and local governments have long held the authority to implement mandatory vaccination requirements.² Private employers, healthcare institutions in particular, have historically implemented mandatory vaccination requirements for employees with direct patient contact to prevent the spread of infectious disease, including the flu.³

REASONABLE ACCOMMODATIONS PURSUANT TO THE ADA

The Equal Employment Opportunity Commission's (EEOC) guidance during the H1N1 pandemic in 2009 provides insight into its possible position on mandatory COVID-19 vaccine programs. The H1N1 pandemic prompted an increased focus on mandatory vaccination requirements in the workplace, and the EEOC first addressed these concerns in its 2009 Pandemic Preparedness Guidelines.⁴ The 2009 guidance concluded that employers cannot compel employees to be vaccinated for influenza without allowing for medical and religious accommodations, even during a pandemic. The EEOC has not taken a position that mandatory vaccination policies are prohibited (so long as they allow for accommodations for disabilities and religion), but counsels employers that “[g]enerally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.”⁵

¹ Kaplan, S., Wu, and Thomas. “C.D.C. Tells States How to Prepare for Covid-19 Vaccine by Early November.” *The New York Times*. 2 Sept. 2020. <https://www.nytimes.com/2020/09/02/health/covid-19-vaccine-cdc-plans.html>.

² *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

³ CDC Office for State, Tribal, Local and Territorial Support, Menu of State Hospital Influenza Vaccination Laws, at 1 (last visited Sept. 4, 2020), available at <https://www.cdc.gov/phlp/docs/menu-shfluvacclaws.pdf>.

⁴ EEOC, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, (issued Oct. 9, 2009, updated March 21, 2020), available at <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

⁵ EEOC Informal Discussion Letter (Mar. 5, 2012), available at <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-250>.

The ADA requires that employers provide reasonable accommodations to employees with disabilities. A “reasonable accommodation” is any change to the application or hiring process, to the job, to the way the job is done, or the work environment that allows a person with a disability to perform the essential functions of that job. When employees object to a vaccine due to a disability, employers must engage in the interactive process with the employee to determine whether they are qualified individuals with a disability and whether reasonable accommodation will be feasible.

Employers facing this scenario, as with all reasonable accommodation interactions, have the right to request medical documentation to determine whether the employee’s condition necessitates accommodation. EEOC’s conclusion that COVID-19 poses a “direct threat” to individuals with the disease and to those they come in contact with expands employers’ ability to inquire into employees’ health and perform medical exams (e.g. taking an employee’s temperature) beyond what is usually permitted by the ADA.⁶ If employees cannot demonstrate that they have a disability that requires accommodation or an employer shows that a reasonable accommodation will result in an undue hardship, employers have the right to terminate employment if the employee is unwilling to comply with the vaccination policy.

In the context of flu vaccines, the EEOC has accepted face masks, working from home, and moving an employee’s workstation away from others as acceptable accommodations. Although the use of masks is widespread, it is likely reasonable to require a vaccine once one becomes available, given the potential for human error, shortfalls of cloth and surgical masks, the shortage of N95 masks and the pitfalls of reuse, and the (presumably) higher efficacy rate of a vaccine.⁷ These facts, in conjunction with the financial hardships caused by the pandemic, will also alter the assessment of whether the use of masks can be considered a reasonable accommodation in the current context. Moreover, should an employee reject a mask as a reasonable accommodation for political reasons or ideology (e.g., the belief that masks do not work and the government is trying to control people), these reasons are not valid, and an employer could terminate the employee for refusing the reasonable accommodation.

Of course, not all of the EEOC’s accepted accommodations are possible for employees who must be physically present to perform their work. It is unclear whether the EEOC

⁶ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (updated June 17, 2020), available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eco-laws>.

⁷ *But see* Aila Slisco. *CDC Indicates Face Masks May Be Better Covid Protection Than a Vaccine That’s 70% Effective*. *Newsweek*. 16 Sept. 2020. <https://www.newsweek.com/cdc-indicates-face-masks-may-better-covid-protection-vaccine-thats-70-effective-1532474>.

would take the same position for accommodations to a COVID-19 vaccine, given the Agency's conclusion that the virus poses a "direct threat" – a determination which the Commission did not make regarding the seasonal flu or H1N1.

Particularly in the health care context, the Commission may well take the position that because COVID-19 poses a direct threat, accommodations for individuals who must be physically present in the workplace would present an undue burden. Indeed, health care employers may conclude both a vaccine and a mask are required. However, considering a reasonable accommodation always requires an individualized assessment, and employers should consider other possible accommodations, such as whether the employee can socially distance, whether the employee can be behind plexiglass, etc. What is a reasonable accommodation/poses an undue burden to the employer for a direct care provider is likely to be different than a health care employee who is a receptionist, for example. A health care provider may well be unable to accommodate the former without an undue burden, while the latter could be placed behind plexiglass.

However, if there is a safe and effective vaccine, the Commission would likely eventually, as the vaccine became widely available, revise its conclusion that COVID-19 poses a direct threat. When that happens, the Commission would likely revert back to the analysis it uses for the seasonal flu (and used for H1N1) and require reasonable accommodations for qualified individuals with disabilities. At that point, the EEOC would likely accept the use of masks as an accommodation to a COVID-19 vaccine in the workplace.

RELIGIOUS ACCOMMODATIONS PURSUANT TO TITLE VII

Title VII of the Civil Rights Act requires employers to provide a reasonable accommodation to employees who object to a mandatory vaccination policy based on religious beliefs, absent an "undue hardship" on employers. Unlike under the ADA, to prove undue hardship in the context of religious accommodations, an employer must show only that the accommodation would pose more than a *de minimis* cost. A religious practice or belief is defined by federal regulation as "moral or ethical beliefs as to what is right and wrong, which are sincerely held with the strength of traditional religious views."⁸

⁸ [29 C.F.R. §1605.1.](#)

Face masks, which are now highly encouraged by the CDC⁹ and required by a number of states and cities in response to COVID-19,¹⁰ have been accepted by the EEOC as a reasonable accommodation to religious as well as medical objections to vaccines.¹¹

Exemplifying the EEOC's perspective on religious accommodations in this context is the case of *Saint Vincent Health Center*, in which the EEOC announced a \$300,000 settlement following allegations that the employer implemented a mandatory flu vaccination policy that permitted exemptions for medical and religious reasons, with exempted employees required to wear masks. The EEOC alleged that the employees seeking medical exemptions had their requests granted while the employees seeking religious exemptions were fired after they refused the vaccine.¹² More recently, the EEOC announced a settlement for \$89,000 to resolve a claim of religious discrimination in connection with a policy that allegedly required employees to request religious exemptions from a mandatory flu vaccination policy by a date certain or the request would be denied.¹³

Not every belief, however, is sufficient to garner protection under Title VII. In *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, the court rejected an employee's claim that his belief that one should not harm their own body and that the vaccine did more harm than good were religious beliefs, finding them to be more medical than religious beliefs, which did not address fundamental and ultimate questions having to do with deep and imponderable matters, were not comprehensive in nature, and were not expressed in

⁹ CDC Press Release (July 14, 2020), available at <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html>.

¹⁰ The following is a list of executive orders of states currently requiring citizens to wear facial coverings in public: Ala. Order of the State Health Officer, (Aug. 27, 2020); Ark. Exec. Order 20-43 (July 16, 2020); Cal. Exec. Order No. N-71-20 (June 30, 2020); Colo. Exec. Order No. D 2020 190 (Sept. 12, 2020); Conn. Exec. Order No. 7NNN (Aug. 14, 2020); Del. Thirteenth Modification to the Declaration of a State of Emergency, (April 25, 2020); D.C. Mayor's Order No. 2020-080 (July 22, 2020); Haw. Ninth Supp. Proclamation Re. COVID-19 Emergency (April 16, 2020); Ill. Exec. Order 2020-52, (Aug. 21, 2020); Ind. Exec. Order No. 20-37, (July 24, 2020); Kan. Exec. Order No. 2052 (July 2, 2020); Ky. Exec. Order No. 2020-750 (Sept. 4, 2020); La. Exec. Proclamation No. 110 JBE 2020 (Aug. 28, 2020); Me. Exec. Order No. 2 FY 20/21 (July 8, 2020); Md. Exec. Order 20-09-01-01 (Sept. 1, 2020); Mass. COVID-19 Order No. 31 (May 1, 2020); Mich. Exec. Order No. 2020-145 (July 9, 2020); Minn. Exec. Order 20-81 (July 22, 2020); Miss. Exec. Order No. 1517 (Aug. 4, 2020); Mont. Directive for Exec. Orders No. 2-2020 & No. 3-2020 (July 15, 2020); Nev. Exec. Directive No. 024 (June 24, 2020); N.J. Exec. Order No. 163 (July 8, 2020); N.M. Public Health Order, (May 15, 2020) (ext. by N.M. Exec. Order No. 2020-059, (Aug. 28, 2020)); N.Y. Exec. Order No. 202.17 (April 15, 2020) (ext. by New York Exec. Order No. 202.63 (Sept. 11, 2020); N.C. Exec. Order No. 163 (Sept. 4, 2020); Ohio Director's Order (July 23, 2020); Or. Exec. Order No. 20-27 (June 5, 2020); Pa. Dept. of Health Order (July 1, 2020); P.R. Exec. Order No. 2020-026 (Sept. 11, 2020); R.I. Exec. Order No. 20-69 (Sept. 2, 2020); Tex. Exec. Order No. GA-29 (July 2, 2020); Vt. Exec. Order No. 01-20, addendum 5 (Sept. 11, 2020); Va. Exec. Order No. 63 (May 26, 2020); W. Va. Exec. Order No. 50-20 (July 6, 2020); Wis. Emergency Order No. 1 (July 30, 2020).

¹¹ See EEOC Press Release, (June 6, 2019), available at <https://www.eeoc.gov/newsroom/memorial-healthcare-pay-74418-settle-eeoc-religious-discrimination-lawsuit> (recognizing that wearing a mask is an acceptable reasonable accommodation for those with religious objections to flu vaccines).

¹² EEOC Press Release (Dec. 23, 2016), available at ([https://www.eeoc.gov/newsroom/saint-vincent-health-center-pay-300000-settle-eeoc-religious-accommodation-lawsuit#:~:text=%2D%20Saint%20Vincent%20Health%20Center%20will,\(EEOC\)%2C%20the%20federal%20agency](https://www.eeoc.gov/newsroom/saint-vincent-health-center-pay-300000-settle-eeoc-religious-accommodation-lawsuit#:~:text=%2D%20Saint%20Vincent%20Health%20Center%20will,(EEOC)%2C%20the%20federal%20agency))

¹³ EEOC Press Release (Jan. 12, 2018), available at (<https://www.eeoc.gov/newsroom/mission-hospital-agrees-pay-89000-settle-eeoc-religious-discrimination-lawsuit>).

formal and external manifestations associated with traditional religions, such as formal services, efforts at propagation, and ceremonial functions.¹⁴

OSHA GENERAL DUTY CLAUSE, SAFETY CONCERNS OF MANDATORY VACCINES, AND POTENTIAL LIABILITY TO EMPLOYERS

Another consideration for employers when evaluating mandatory vaccination policies is OSHA's General Duty clause. The General Duty clause requires employers to "furnish to each of his employees' employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."¹⁵ This requirement applies to preventing occupational exposure to COVID-19; therefore, each employer should be cognizant of its relative risk level for the spread of COVID-19 when deciding whether to implement a mandatory vaccination requirement.

Traditional flu vaccines, including vaccines for H1N1, present very few safety concerns for recipients, despite anti-vaxxers' belief otherwise. The biggest safety issue presented is to people with an allergy to eggs, which has historically been the medium used to incubate vaccinations.¹⁶ However, new cell-based approaches to vaccine development obviate the need for eggs, and in fact, scientists have stated that the egg incubation method is unlikely to work for the COVID-19 vaccine at all, nullifying the risk for those with egg allergies.¹⁷

In the case of COVID-19 vaccines, people are also likely to take issue with the timeline of its development, given that if the vaccine is available by late October or early November, it will be the fastest developed vaccine yet, which has raised concerns about its safety and efficacy given the timing of the presidential election.¹⁸ On September 8, nine drug companies issued a joint pledge not to file for regulatory approval or

¹⁴ 877 F.3d 487, 492 (3d Cir. 2017).

¹⁵ 29 U.S.C. 654 § 5(a).

¹⁶ See Robert I. Field, Mandatory Vaccination of Health Care Workers, 34(11) Pharmacy & Therapeutics 615 (Nov. 2009), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2810172/>.

¹⁷ Jessie Yeung, *The US keeps millions of chickens in secret farms to make flu vaccines. But their eggs won't work for coronavirus*, CNN (March 29, 2020), available at <https://www.cnn.com/2020/03/27/health/chicken-egg-flu-vaccine-intl-hnk-scli/index.html>.

¹⁸ Andrew Joseph, *'A huge experiment': How the world made so much progress on a Covid-19 vaccine so fast*, STAT (July 30, 2020), available at <https://www.statnews.com/2020/07/30/a-huge-experiment-how-the-world-made-so-much-progress-on-a-covid-19-vaccine-so-fast/>; Sharon LaFraniere, Katie Thomas, Noah Weiland, Peter Baker and Annie Karni, *Scientists Worry About Political Influence Over Coronavirus Vaccine Project*, NY TIMES (Aug. 2, 2020, updated Sept. 1, 2020), available at <https://www.nytimes.com/2020/08/02/us/politics/coronavirus-vaccine.htm>.

authorization of a COVID-19 vaccine until their vaccines had shown to be safe in late-stage clinical testing.¹⁹

During the COVID-19 pandemic, many employees have raised concerns about the safety of their workplaces. Employees who raise such concerns, when reasonable, are protected from retaliation. Employees who raise generalized concerns about the safety of vaccines, without identifying specifics, will likely not meet this threshold. Employers should consider concerns from employees that identify particular evidence to suggest that a mandatory vaccination policy is unsafe. On the other hand, although the authors do not believe the General Duty clause will require employers to implement mandatory vaccination policies, employers should consider the likelihood that their workplaces will be safer with such policies in effect.

As to the efficacy of a potential vaccine, employers should continue to follow guidance from the CDC and state/local officials regarding masking and social distancing rather than assuming that a mandatory vaccination policy relieves them of other obligations regarding workplace safety.

EMPLOYERS MUST ALSO CONSIDER APPLICABLE STATE LAWS

States' police powers to promote public health and safety encompasses the authority to require mandatory vaccinations. Mandatory vaccination laws generally apply to specific populations like school children and healthcare workers.²⁰ Currently, 18 states have laws establishing flu vaccination requirements for hospital healthcare workers, and some allow for vaccination exemptions under certain circumstances.²¹ Some of these laws require hospitals to simply assess the vaccination status of healthcare workers, some require hospitals to *offer* flu vaccinations to healthcare workers, and some states require hospitals to *ensure* that healthcare workers are vaccinated against influenza unless they qualify for an exemption.²²

A majority of the states with immunization requirements for healthcare workers include a specific exemption for medical, religious,²³ or philosophical objections, mirroring the

¹⁹ Jared S. Hopkins and Peter Loftus, *Drug-Company CEOs Sign Pledge On COVID-19 Vaccine*, WALL ST. J. (Sept. 8, 2020), available at <https://www.wsj.com/articles/nine-drug-company-ceos-sign-pledge-on-covid-19-vaccine-11599572714>.

²⁰ Congressional Research Service, *An Overview of State and Federal Authority to Impose Vaccination Requirements* (May 22, 2019), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10300>.

²¹ CDC Office for State, Tribal, Local and Territorial Support, at 2, *supra* note 4.

²² *Id.*

²³ Unless a state has enacted some version of the Religious Freedom of Restoration Act of 1993 (RFRA), states have broad authority to impose mandatory vaccination requirements without providing a religious exemption. *See* Congressional Research Service, at 3, *supra* note 21.

ADA and Title VII. Only Georgia, Nevada, Ohio, South Carolina, New York,²⁴ and Utah lack any specific exemption in their vaccine legislation, although of course employers in those states are still governed by the ADA and Title VII.

No Exemptions	Medical Exemptions	Philosophical Exemptions	Religious Exemptions
Georgia	California	California	Illinois
Nevada	Colorado	Illinois	Maine
Ohio	Illinois	Maine	Massachusetts
South Carolina	Maine	Maryland	New Hampshire
New York	Massachusetts	Massachusetts	
	Nebraska	Nebraska	
	New Hampshire	Oklahoma	
	Oklahoma	Oregon	
	Oregon	Rhode Island	
	Rhode Island	Tennessee	
	Tennessee		

SPECIAL CONSIDERATIONS FOR UNIONIZED EMPLOYERS

Vaccination policies are mandatory subjects of bargaining. Accordingly, absent contractual authority granting unilateral employer implementation or extra-contractual evidence of a union waiver of its right to bargain over the policy, unionized employers must provide the union representing its employees with notice and an opportunity to bargain over a mandatory vaccination program prior to implementation.

First, a unionized employer should review its collective-bargaining agreement (“CBA”) to determine if it is privileged to act unilaterally. Typically, a CBA contains a management rights clause vesting in the employer the right to act unilaterally concerning delineated subjects. Recently, the National Labor Relations Board (NLRB) adopted the “contract coverage” standard when analyzing whether an employer’s unilateral action violates the National Labor Relations Act (NLRA). Under the “contract coverage” standard, an employer will not violate the NLRA if the change is “within the compass” or “scope” of the contract provision granting the right to act unilaterally.²⁵ For example, where a management rights clause permits an employer to establish and revise rules relating to

²⁴ New York law does require unvaccinated healthcare workers to wear surgical masks, which indicates that there is likely some sort of exemption or declination allowance that is not explicitly listed in these provisions. *Id.* at 14-15, note 77, 79.

²⁵ *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 1 (2019).

patient and employee safety, implementing a mandatory vaccination policy may be considered “within the compass” or “scope” of such a provision.

An employer should also examine its past practice, if any, concerning the implementation of mandatory vaccination programs. If the unionized employer has previously required mandatory vaccinations, and implemented such a program without bargaining with the union, the NLRB will analyze whether the employer’s action varies in kind and degree from what had been customary in the past.²⁶ Accordingly, if an employer’s unilaterally-implemented mandatory flu vaccination program is determined not to vary in kind or degree to its mandatory COVID-19 vaccination regime, unilateral action will be permitted.

But even if the employer may act unilaterally, and thus does not have an obligation to bargain over the decision to implement a mandatory vaccination policy, it will still have an obligation to bargain the effects of the decision should the union request effects bargaining. Examples of possible effects bargaining subjects include the cost, if any, to employees in obtaining the vaccination, the frequency with which employees must obtain the vaccination, and whether employees may use working time to obtain the vaccination.

In summary, a unionized employer should first look to its CBA to determine whether it may unilaterally implement the mandatory vaccination program without first notifying and bargaining with the union. If no contractual authority exists, the employer should review any past practice of implementing or altering vaccination programs. If the employer is privileged to act unilaterally, either via an expansive management rights clause or waiver-by-inaction on the union’s part, the employer must remain mindful of its obligation to bargain the effects of its decision to implement the mandatory vaccination program, if requested to do so by the union.

CONCLUSION

Mandatory COVID-19 vaccination programs will almost certainly be permissible when a vaccination is made available, but employers must remain cognizant of their legal obligations when employees refuse to become vaccinated, considering each objection individually to determine its merit and whether any accommodation must be made. Additionally, unionized employers must consider bargaining obligations as they relate to mandatory vaccination programs.

²⁶ See *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 16 (2017).

COVID-19/SOCIAL UNREST LABOR ISSUES – ARE YOU PREPARED?

G. Roger King
Senior Labor and Employment Counsel
HR Policy Association
1001 19th Street North, Ste. 1002
Arlington, VA 22209
Tel: 202-789-8670; rking@HRPolicy.org

Gregory Hoff
Legal Research Associate
HR Policy Association
1001 19th Street North, Ste. 1002
Arlington, VA 22209
Tel: 202-789-8670; ghoff@HRPolicy.org

ABSTRACT

As employers around the country continue to grapple with the effects of COVID-19 on their workplaces, they also have to deal with worker unrest and social activism issues. For example, earlier this year, thousands of workers engaged in walkouts as part of the nationwide Black Lives Matter movement. Union leaders and plaintiffs' attorneys are capitalizing on the current emotionally charged landscape to leverage demands against employers. It is essential that employers are aware of how such activity implicates various labor and employment laws and the rights of both employers and employees.

NATIONAL LABOR RELATIONS ACT AND PROTECTED CONCERTED ACTIVITY

The National Labor Relations Act ("NLRA" or "the Act") is an important starting point to examine employee rights and employer obligations in the current workplace environment. The NLRA provides both unionized and nonunion employees broad protections for concerted activity, arguably ranging from social justice-motivated protests and walkouts to strikes over health and safety issues. Section 7 of the NLRA is the foundation of such rights. This section of the Act provides employees the right to:

Self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining in other mutual aid or protection.¹

The Supreme Court has broadly interpreted the reach of Section 7 and held that concerted activity occurs when two or more employees act together to raise issues associated with their terms and conditions of employment.² For Section 7 rights to be implicated, however, there must be a nexus or link between the concerted activity and the employees' terms and conditions of employment to garner the protection of the Act.

POLITICAL ACTION AS PROTECTED CONCERTED ACTIVITY

Within the context of political activity – such as participation in the Black Lives Matters protests or other similar demonstrations – the Board has specifically recognized that Section 7 protection extends to concerted political activity when the subject matter of that advocacy has a direct nexus to employees' "interests as employees" based on the totality of the circumstances.³

Whether employee walkouts as part of Black Lives Matter protests and/or other related social justice activity currently occurring are protected under the NLRA thus turns on whether employees can show a direct link between such activity and their own terms and conditions of employment and will certainly depend on the factual circumstances of each case. While there are no National Labor Relations Board ("NLRB" or "Board") decisions directly on point, in 2017, however, the Board's Associate General Counsel issued an advisory opinion and found employees' participation in the Day Without Immigrants protest – the employees walked out of work for a full day – to be concerted activity protected by the Act.⁴ The Associate General Counsel found that the employees' participation was largely motivated by workplace issues, with demands including higher wages and other disputes over working conditions.⁵ The Associate General Counsel thus concluded that there was a sufficient link between the participation in the Day Without Immigrants walkouts and workplace issues, and therefore, such activity was protected by the NLRA.⁶

¹ 29 U.S.C § 157.

² *Eastex, Inc. v. NLRB* 437 U.S. 556, 565 (1978).

³ *Id.* at 565-67.

⁴ Office of the General Counsel, *Advice Memo* 29-CA-197057 (2017).

⁵ *Id.*

⁶ *Id.*

Conversely, in a recently released advice memo, an NLRB Division of Advice attorney concluded that workers who advocate for political causes not directly tied to the workplace are not protected by the Act.⁷ In the case in question, a union fired one of its employees who testified in support of police reform in his capacity as a Maryland state delegate.⁸ The Board's advisory attorney found that "the evidence showed that the advocacy had no connection to any employment concern of any employee...[the employee] acted in the interest of the community at large and in furtherance of their own political agenda."⁹ Accordingly, the advisory attorney concluded that the employee's termination did not violate the Act because "the Act does not protect employee political advocacy that has no nexus to a specifically identified employment concern."¹⁰

While these two decisions of the Board's Office of General Counsel are not controlling precedent and are not official decisions of the NLRB, the circumstances of these cases are helpful to analyze the ongoing social justice walkouts proliferating around the country. As outlined above, these two advisory memos emphasize the point that whether an employee's political activity is protected by the Act largely depends on whether the evidence shows a clear nexus between the political activity and the employee's terms and conditions of employment.

SAFETY-RELATED WALKOUTS AND STRIKES

As the COVID-19 pandemic continues to spread in the United States, virtually all employers are undertaking comprehensive efforts to ensure the safety of their workplaces. Nevertheless, workers around the country may be understandably hesitant to reenter the workplace. The extent to which employee walkouts and strikes over health and safety conditions in the workplace are protected by the NLRA depends, in part, on whether the workforce is unionized or nonunion. For unionized employees, under Section 502 of the Labor Management Relations Act ("LMRA"), strikes and work stoppages over safety conditions must be based on a good faith belief that working conditions are "abnormally dangerous" supported by ascertainable, objective evidence, and that the perceived danger poses an immediate threat of harm to employee health or safety.¹¹ This standard is often a difficult bar to clear for unionized employees walking off the job due to safety concerns. Work stoppages, however, that meet this threshold

⁷ Office of the General Counsel, *Advice Memo* 05-CA-261825 (2020).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 29 U.S.C. § 143; *See TNS, Inc., v. NLRB* 296 F.3d 384 (6th Circ. 2002).

generally will not violate a no-strike clause in a union contract, and employers may not terminate or permanently replace employees participating in such stoppages.

For nonunion employees, work stoppages related to safety conditions are also protected and are evaluated under Section 7 of the NLRA. Nonunion employees have a right to refuse to work in conditions they believe to be unsafe. The refusal to work must be based on a “reasonable, good faith belief” that conditions are too unsafe to work. Additionally, individual refusals to work may not be protected unless the individual is raising such concerns on behalf of other employees. Accordingly, as a general rule, the work stoppages must be a part of concerted activity, i.e., involving at least two or more employees. Nonunion employees engaging in work stoppages over safety concerns may not be terminated or permanently replaced but may be temporarily replaced for the duration of the stoppage.

While it is as of yet unclear to what extent safety strikes due to COVID-19 risks in the workplace are protected by either the NLRA or the LMRA, employers should nevertheless exercise extreme caution in terminating or replacing workers refusing to work due to COVID-19-related workplace safety concerns.

DRESS CODES AND POLICIES

The widespread protest activity related to social justice issues and the current contentious political climate heading into the November election increases the likelihood that employers may encounter employees wearing clothing or other items with controversial messages in the workplace. This is particularly true as mandated mask-wearing gives even more space for expression and protest. It is, therefore, essential that employers review their workplace dress policies and ensure they are compliant under federal labor law.

As a starting point, employers should ensure that their dress code and uniform policies are clearly stated and readily available to employees. Additionally, such policies must be enforced in a uniform, nondiscriminatory manner. An employer may not ban pro-union pins or insignia, for example, but allow the wearing of pins unrelated to union activity. Indeed, under established NLRB case law, employees have a protected right to make known their concerns and grievances pertaining to the employment relationship, which includes the wearing of certain apparel.

When evaluating an employer’s dress code and appearance policies, employee rights are balanced against the employer’s legitimate business interests. Under the “special circumstances” doctrine, an employer may lawfully prohibit its employees from

displaying messages on the job that the employer reasonably believes may harm its relationship with its customers or its public image.¹² An employer may also ban certain items if it can establish that wearing such items creates a disruption in the workplace and interference with employees' work activities. Employers should be aware that there are NLRB and court decisions going in different directions on these issues, and the application of the above-described balancing test can result in favorable decisions for both employees and employers.

Employers, however, do have certain rights to regulate the size, content, and amount of wording with respect to buttons, badges, and insignia worn by customer-facing employees.¹³ Within the healthcare context, the general rule is that hospitals can prevent controversial badges and buttons and other apparel from being worn in patient care areas but would have to show actual disruption in the workplace to prohibit such apparel in nonpatient care areas.¹⁴

OFFENSIVE SPEECH IN THE WORKPLACE

The current conditions, as described above, also give rise to more heated discussions in the workplace and a greater potential for offensive speech to occur. Initially, it should be noted that the First Amendment generally only pertains to governmental entities' actions. Accordingly, private sector employee speech generally is not protected by the First Amendment. However, employee speech can be protected under the NLRA, which gives employees the right to protest the terms and conditions of their employment. Previous Board decisions have given a wide latitude of protection to employees to engage in controversial speech in the workplace and on the picket line. Under the Obama-era Board, several instances of employee racially and sexually harassing speech – among other forms of obscenities and offensive speech – were found to be protected under the Act, and the employers were found to have violated the NLRA by disciplining the employees over such speech.¹⁵ These decisions left employers in the difficult position of being unable to discipline employees for particularly offensive and harassing speech that the employer could then be held liable for under federal antidiscrimination laws such as Title VII.

¹² Republic Aviation Corp. v. NLRB 324 U.S. 493 (1945).

¹³ See, e.g. NLRB v. Starbucks Corp. 679 F.3d 70 (2nd Cir. 2011).

¹⁴ See, e.g. Long Beach Memorial Med. Ctr., 366 NLRB No. 66 (2018).

¹⁵ See, e.g. Cooper Tire & Rubber Co., 363 NLRB No. 194 (2016); *Pier Sixty, LLC*, 362 NLRB 505 (2015); *Plaza Auto Ctr., Inc.*, 360 NLRB 972 (2014).

In its recently issued decision in the *General Motors* case, however, the current Board returned to a prior standard that significantly curtails the protections harassing and offensive workplace speech is given under the Act.¹⁶ The reinstated standard requires the NLRB General Counsel to prove the employee's concerted protected activity was a motivating factor in his or her discipline. If this prima facie standard is met, the employer is then required to prove he or she would have taken the same action if the employee had not been engaged in the protected activity. The decision enables employers to discipline employees for highly offensive speech without fear of incurring liability under the NLRA and empowers employers to keep their workplaces free of harassing speech in compliance with antidiscrimination laws.

ADDITIONAL FEDERAL LAW CONCERNS

There are a number of other federal labor and employment laws in addition to the NLRA and the LRMA that should be consulted in light of COVID-19 and social unrest developing issues in the workplace. For example, the Occupational Safety and Health Act, the WARN Act, the Americans with Disabilities Act, among other federal statutes, could be applicable to emerging workplace issues.

CONCLUDING THOUGHTS

Given the expansive nature of federal labor law and the proliferation of labor and employment regulation on the state and local level, employers already faced significant compliance challenges even before the emergence of the COVID-19 pandemic and the emergence of social unrest issues. Human resource departments and compliance officers should work closely together to ensure employer obligations are being met under these laws that regulate the workplace and experienced outside counsel should be regularly involved to ensure appropriate employer actions are being taken.

¹⁶ General Motors LLC, 369 NLRB No. 127 (2020).

THE CHANGING NATURE OF WORK

Michael J. Lotito
Shareholder, Co-Chair, Workplace Policy Institute
Littler
333 Bush Street, 34th Floor
San Francisco, CA 94104
Tel: 415-677-3135; mlotito@littler.com

James A. Paretti, Jr.
Shareholder
Littler
815 Connecticut Avenue, NW, Ste. 400
Washington, DC 20006
Tel: 202-789-3422; jparetti@littler.com

ABSTRACT

The COVID-19 pandemic has fundamentally changed employment. The unemployment rate reached historic levels in recent months. Those able to work are juggling family care obligations, new safety protocols, and work environments – whether remote or on-site – that bear little resemblance to their prior workspaces. Employers, meanwhile, are struggling to remain in business and/or resume operations amid varying shutdown orders, significant decreased demand for goods and services, new leave and accommodation requirements, stringent reopening guidelines, and potential liability stemming from coronavirus-related claims. Many businesses have shut their doors for good.

Fundamental changes in how work is performed had already begun prior to the pandemic. The on-demand economy expanded when and how services are performed. Virtual offices and online platforms replaced some brick-and-mortar operations. COVID-19 has merely highlighted this transformation, as well as created new disruptions.

TELEWORK IS THE NEW NORMAL

Working from home took on new meaning in 2020. Some state stay-at-home orders and reopening guidelines stipulated that if work *could* be done from home, employers *had* to allow employees to work from home, at least until emergency orders were lifted. Many

state reopening guidelines encourage employers to continue to allow employees to work remotely, particularly for those employees considered more vulnerable to the virus.¹ As the virus shows no sign of abating, teleworking – at least to some degree – is here to stay.

In May 2020, the US Bureau of Labor Statistics added five questions to the Current Population Survey (CPS) to help measure the coronavirus' impact on the labor market. One of those questions asked whether people teleworked or worked from home because of the pandemic. According to the BLS survey, 31 percent of workers in June 2020, and 26.4 percent in July, teleworked, or worked from home for pay because of the coronavirus pandemic.² This figure represents employed people who teleworked or worked at home for pay at some point in the previous four weeks, specifically because of the pandemic. In other words, it did not take into account those already teleworking as part of their normal, pre-pandemic job activities. Other notable findings from this survey include:

- Education levels contributed to who was more likely to telework due to the virus. For workers age 25 and over, only 4 percent of those with less than a high school diploma teleworked in July, compared with 47 percent of those with a bachelor's degree or higher.
- Occupational type mattered. In July, employed people most likely to telework because of the pandemic worked in management, business, and financial operations occupations (46%) and professional and related occupations (44%). In contrast, relatively few people teleworked in service occupations (5%); natural resources, construction, and maintenance occupations (5%); and production, transportation, and material moving occupations (4%).³
- By industry, 58 percent in finance and insurance, and 57 percent in professional and technical services teleworked in July 2020 because of the pandemic. In contrast, only 7 percent of those working in accommodations and food services and 6 percent in agriculture teleworked.⁴

¹ According to CDC guidance, people at increased risk of the coronavirus include older adults and those with certain underlying medical conditions, among others. See Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), [People at Increased Risk](#), updated Aug. 10, 2020. Many state orders encourage or require employers to allow telework as an accommodation for those workers considered particularly vulnerable.

² U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, [Supplemental data measuring the effects of the coronavirus \(COVID-19\) pandemic on the labor market](#), Table 1: Employed persons who teleworked or worked at home for pay at any time in the last 4 weeks because of the coronavirus pandemic by selected characteristics, [June 2020 \(XLSX\)](#) and [July 2020 \(XLSX\)](#).

³ *Id.* at Table 2: Employed persons who teleworked or worked at home for pay at any time in the last 4 weeks because of the coronavirus pandemic by usual full- or part-time status, occupation, industry, and class of worker, [July 2020 \(XLSX\)](#).

⁴ *Id.*

The pivot to home offices will likely remain in some sectors. According to one survey of executives and office workers (essential workers were excluded), 85 percent of employees reported they want to continue working from home at least one day per week, and over half of employers (55%) anticipate that most of their workers will do so post-COVID.⁵ Nearly one-third of executives (30%) reported they would require less office space in three years, mainly due to the switch to remote work.⁶

The move to remote work, however, has brought with it a host of employment concerns some employers had never before encountered. For example, employers have had to consider how to capture and account for time non-exempt employees work, determine whether the time an employee spends traveling from the home office to other work locations is compensable, and enforce meal and rest breaks where applicable.

Employers must also contend with a patchwork of state laws governing expense reimbursement, which comes into play for things like home office equipment, supplies, and internet use. Additionally, employees working from home in states other than the employer's home base raises payroll and income tax considerations and may impact the enforceability of various common workplace agreements, which vary by state.

How workers' compensation laws apply and how employers can maintain data security for remote employees are other questions employers are addressing. These are just a handful of the issues employers have confronted with the switch to remote work.

CHANGES TO ON-SITE WORK

Those employers that are able to or must continue on-site operations have their own issues with which to contend. Employers are juggling a host of legal and public health issues while ensuring the safety and health of employees as they return to work. In addition to federal guidance and recommendations, employers are taking into account the ever-evolving orders and guidance from state and local authorities. State reopening plans typically include specific guidelines and safety plans that vary by industry.⁷ Thus, there is no one-size-fits-all set of instructions for any one employer.

A return-to-work plan necessarily includes a number of physical changes to the worksite as well as procedural changes. Most plans include new routine cleaning processes, enhanced protocols in case of contamination, as well as the implementation of new

⁵ PwC's [US Remote Work Survey – June 25, 2020](#).

⁶ *Id.*

⁷ Littler maintains a list of statewide chart of return-to-work protocols, available at <https://www.littler.com/publication-press/publication/bouncing-back-list-statewide-return-work-protocols>.

engineering and administrative controls. Notably, face coverings are required in most workplaces,⁸ as are certain social distancing protocols. Many employers are implementing temperature checks and health screenings as part of the daily return-to-work process.⁹ Several workspaces include markers to encourage six-foot spacing, Plexiglas barriers, and staggered shifts and meal/rest breaks to limit congregating. The physical workplace looks much different than it did a year ago.

ON-DEMAND ECONOMY

Pre-COVID, non-traditional “gig” work had been on the rise. One study estimated that from 2002 to 2014, while total employment increased 7.5 percent, gig economy workers increased by between 9.4 percent and 15 percent, depending on how such workers were defined.¹⁰ Between 2010 and 2014, growth in independent contractors alone accounted for 29.2 percent of all jobs added during that period.¹¹ Another study estimated that gig and freelance work has accounted for 85 percent of new work opportunities since the Great Recession.¹² Still, another study indicates those workers participating in the 1099 workforce grew by 1.9 percentage points from 2000 to 2016 and accounts for nearly 12 percent of the total workforce.¹³

During the pandemic, the demand for certain gig economy services – for example, food service delivery – increased significantly.¹⁴ Facing mass unemployment and a shift toward on-demand delivery services, many are turning to gig work for the first time. This move is not unexpected, as many jobs lost in 2020 will never return.

The IRS recently examined withholding documents for 2019 and made predictions on the number of filings expected through the year 2028.¹⁵ While it is unclear how accurate such a projection eight years into the future is, especially given the unprecedented nature of the pandemic and its impact on the economy, the numbers are sobering. For example, Form W-2 filings,¹⁶ which most employers file for each employee, are

⁸ Littler maintains a list of statewide face covering requirements, available at <https://www.littler.com/publication-press/publication/facing-your-face-mask-duties-list-statewide-orders>.

⁹ Littler maintains a list of statewide temperature and health screening requirements, available at <https://www.littler.com/publication-press/publication/wont-hurt-bit-employee-temperature-and-health-screenings-list>.

¹⁰ Douglas Holtz-Eakin et al., [The Gig Economy-Research and Policy Implications of Regional, Economic, and Demographic Trends](#), Future of Work Initiative and American Action Forum (Jan. 2017). 2.

¹¹ *Id.*

¹² Gerald Friedman, [Workers without employers: shadow corporations and the rise of the gig economy](#), *Review of Keynesian Economics*, Vol. 2 No. 2, Summer 2014, 171-188.

¹³ Brett Collins et al., [Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns](#), IRS SOI Joint Statistical Research Program, Mar. 25, 2019.

¹⁴ [Analysis on Impact of Covid-19- Online On-Demand Food Delivery Services Market 2019-2023](#), Businesswire.com (Apr. 20, 2020).

¹⁵ IRS, [Publication 6961](#), Calendar Year Projections of Information and Withholding Documents for the United States and IRS Campuses, 2020 Update.

¹⁶ See IRS, [About Form W-2, Wage and Tax Statement](#).

estimated to fall by nearly 14 percent, or 37.2 million fewer filings, in 2021.¹⁷ More troubling, the projected W-2 filings are not expected to reach pre-pandemic levels though at least the year 2028.¹⁸

At the same time, Form 1099-MISC, which are typically filed by independent contractors, are expected to rise steadily over the same period.¹⁹ According to the report, the number of Form 1099-MISC filings for 2021 is projected to rise by 1.6 million over prior year estimates.²⁰ By the year 2028, the IRS predicts more than 20 million Form 1099-MISC will be filed compared to the number filed in 2019.²¹ As more traditional jobs decline, the need for individuals to earn a living through independent contract work becomes more urgent.

Yet, certain legislative efforts could affect the viability of the sector. Prior to the pandemic, a state-led effort to address so-called worker “misclassification” had begun to take hold. California led the way with the enactment of AB 5, which codified the so-called “ABC test” to determine whether workers should be classified as employees or independent contractors under the state’s wage orders and other labor and employment laws. The practical impact of this law, which applies to virtually every business in the state, is that thousands of workers have been reclassified as employees, and many employers are still grappling with how the new law affects their business model and operations.²²

Although most state legislatures have been focusing on pandemic relief measures, when regular legislative sessions resume in early 2021, other states are expected to follow California’s lead and introduce bills to address independent contractor classification.²³

It is unclear whether federal guidance on the issue will be forthcoming. In its spring regulatory agenda, the US DOL indicated an intent to develop regulations for determining independent contractor status under the federal Fair Labor Standards Act.²⁴

¹⁷ *Id.* at Table 1.

¹⁸ *Id.* at Table 2.

¹⁹ *Id.* at Table 1.

²⁰ *Id.*

²¹ *Id.* at Table 2.

²² For a more in-depth discussion of AB 5’s impact, please see Bruce Sarchet, Jim Paretti and Michael Lotito, *Independent Contractor Issues In California: Summer 2020 Update*, Littler Insight (August 2020).

²³ In 2020 alone, Colorado, New Jersey, Vermont, and Virginia all enacted laws or regulations to strengthen enforcement against worker misclassification under various state laws. Legislation similar to AB 5 has been discussed in New York along with alternatives that would provide bargaining rights for independent contractors in the form of sectoral bargaining.

²⁴ U.S. DOL, Independent Contractor Status Under the Fair Labor Standards Act, [RIN: 1235-AA34](#), Spring 2020.

In Congress, one bill –the PRO Act (HR 2474) – cleared the US House of Representatives on a mostly party-line vote.²⁵ This bill would dramatically amend the National Labor Relations Act by expressly adopting the ABC test. The Senate is not expected to take the bill up this session, but it could resurface post-election.

CONCLUSION

These fundamental changes to the workplace are being felt at all levels of the economy, creating great economic uncertainty for many employers and workers. Indeed, the only certainty is that the speed and pace of these disruptions will continue to increase as the economy attempts to recover.

²⁵ H.R. 2474, Protecting the Right to Organize Act of 2019, 116th Cong., 2d Sess.

MANAGING CHANGE AND COMMUNICATING EFFECTIVELY TO ENSURE EMPLOYEES BELIEVE YOUR MESSAGE, NOT THE UNION'S

Tami Denney
Senior Consultant
IRI Consultants
3290 W. Big Beaver, Ste. 142
Troy, MI 48084
Tel: 619-573-7530; tdenney@iriconsultants.com

Deborah Porter
Senior Consultant
IRI Consultants
3290 W. Big Beaver, Ste. 142
Troy, MI 48084
Tel: 630-901-3365; dporter@iriconsultants.com

Candice Battles
Senior Consultant
IRI Consultants
3290 W. Big Beaver, Ste. 142
Troy, MI 48084
Tel: 303-594-1594; cbattles@iriconsultants.com

ABSTRACT

The events of 2020 created unprecedented unrest among the nation's workforce. Employee concerns about personal safety, respect, static wages, and job security have created organizing opportunities that labor unions are trying to seize. IRI's team presents proven ideas to help healthcare employers keep employees engaged and mitigate the risk of unionization.

To say 2020 has tested the limits of healthcare organizations, their leaders, and employees may be the understatement of our time. Healthcare organizations have been pushed to the limit and forced to move faster than ever with little, conflicting, and ever-changing guidance about effectively caring for patients and keeping employees safe. They worked to develop and implement plans to keep their organizations operational and financially viable after closing elective and other services to make resources available to care for the surge of COVID-19 patients. They also worked to secure the

personal protective equipment (PPE) supply chain and manage an “essential workforce” fearful of coming to work in a way that hasn’t been experienced since the AIDS epidemic of the 1980s.

Their employees, meanwhile, have been affected by countless uncertainties and stressors related to their safety at work, the emotional toll of an unprecedented number of patients and colleagues getting sick and dying, fear among families that front-line employees may bring the virus home from work, childcare arrangements, and what to do about shortages of everything from toilet paper to rice in the local supermarkets. Then came the civil unrest that rocked the country following the death of George Floyd. Demands for social justice targeted law enforcement, Corporate America, and even healthcare organizations. In the midst of a global pandemic and nationwide economic shutdown, healthcare leaders next had to decide how to have conversations about race with their workforce and wrestled with how to show the community and their workforce that they support diversity and inclusion. If that weren’t enough, then came the wildfires, floods, and hurricanes.

Bonnie Castillo, executive director of National Nurses United, reached out to nurses across the nation through Twitter:

“We are living through an unprecedented crisis right now. Our society is being forced to temporarily change in many significant ways. But we don’t stop organizing – because our lives depend on it. Join your voice with ours.”

The Labor Movement has been waiting for such a moment as this to reverse decades of year-over-year declines in union membership. A “*crisi-tunity*” is exactly what unions believe they needed to convince the American people that strong unions are a *necessary* mechanism for holding corporations, healthcare organizations, and government accountable to the people. The creation of the “Essential Worker” concept has garnered an unprecedented level of community support for what has been portrayed as the plight of front-line individuals who are credited with keeping the rest of America safe, fed, and healthy. One healthcare union local president explained her union’s position to the media, “The conditions we had to work under forced us to experience moral injury daily for months on end.”¹

¹ Washburn, L. and A. Shanes. “‘We feel disposable’: NJ nurses’ union cites lack of protection during coronavirus pandemic.” Northjersey.com. 20 July 2020.

To its credit, the Labor Movement came prepared for this crisis. In recent years, union organizing has shifted to private Facebook pages, blast texts, and Zoom meetings and away from organizers leafletting and soliciting in parking lots during shift changes or lingering in hospital cafeterias in hopes of meeting employees who may be open to union promises. Job postings for union positions reflect this change with a steady rise in the hiring of digital organizers. These organizers are tasked with strategically leading online organizing efforts as well as corporate campaigns and community coalitions.

Many new organizers have college and even graduate degrees in political science, sociology, or gender studies and join unions after roles as grassroots and/or community organizers with progressive and social justice groups. The new generation of organizers have been taught that values should be at the heart of their organizing campaigns because workers will be attracted to people and a cause with values similar to their own. One book about this approach to unionizing points out that the internal committee of employees the union coaches to organize their co-workers “must reflect the diversity of the workplace. It must be representative of gender, language, ethnicity, and nationality to gain a variety of perspectives and have complete information to run your organizing campaign.”² Some unions also are training organizers in “reflective engagement” and other strategies to improve their listening skills to identify employees’ concerns and communicate how union beliefs align with employees’.

Since the COVID pandemic and the national unrest began, unions have increased their outreach and continue their attempts to raise employees’ and our broader society’s expectations about the employer-employee relationship. This is a far cry from just convincing someone to sign a union authorization card. Organizers today are tapping into social justice and human rights themes (e.g. proper treatment, safety, and respect) rather than focusing exclusively on unionizing as a vehicle for economic bargaining.

Their tactics and tools reflect broader societal trends with social media, analytics, and remote learning. Unions have been engaging with workers through:

- Blasting personalized texts to healthcare workers asking whether they feel safe with the PPE their employers have provided and other management measures
- Online surveys to gather “first-hand” anecdotal data about work from front-line workers

² Mann, Jason. *Win More Union Organizing Drives*. CreateSpace. 2012.

- Remote continuing education courses about PPE, xenophobia, and other topics
- Organizing-oriented webinars and Zoom calls

Other new tools organizers are using include apps to communicate with internal organizing committees and targeted employees, customer relationship management (CRM) software to manage campaigns, and cloud-based file-sharing to upload management communications and distribute union campaign materials.

This shift in union strategy wasn't serendipitous. It's a strategic shift years in the making. The American Federation of Teachers (AFT) President [Randi Weingarten](#), in a 2015 American Labor Movement at a Crossroads speech, stressed how unions needed to rethink their approach to engaging with the community, internal organizing, and member mobilization and the external organizing of new members. The common thread in each of these areas was to move from transactional union relationships to transformational activism through social media, mobilization of the millennial workforce, and a mix of single and multiemployer organizing campaigns. Michael Bride of the United Food and Commercial Workers (UFCW) may have explained the shift the best when he said that the question to people changes from "What do you want out of a contract?" to "What do you want out of life?" Both the AFT and the UFCW represent hundreds of thousands of healthcare workers in the healthcare divisions of their unions.

Not surprisingly, Facebook, Instagram, and Twitter continue to be powerful channels for union organizing. Moving beyond the closed Facebook groups unions have used for years to organize in secret, unions are investing more dollars in advertising on these platforms targeting [industries](#) as a whole, specific employers, and job classifications. SEIU-UHW increased spending from \$9,183 in 2018 to \$155,000 in 2019 with targeted ads attacking Kaiser, Dignity, Hospital Centers of America, and the dialysis industry. Other than the dialysis industry, this money was spent to attack organizations they had already unionized.

These [ads](#) aren't just targeting the workforce, they are also appealing to [retired](#) healthcare workers, [non-represented nurses](#), [patients](#), and [community](#) members. These community union groups of voluntary patients and community members serve as an extension of the union's organizing workforce. They become compelling voices at union events, in clinics and hospitals, and during media campaigns. They help to portray the union as a force for healthcare justice and a provider of [solutions](#) to poor quality of care concerns. Tragically when a [health care worker](#) or [patient](#) ultimately passes away, the unions exploit this death as proof that healthcare organizations are to blame.

Expanding on support to the community, unions are growing their community organizing resources through members who [volunteer](#) to respond to natural disasters, man food drives, and fill the demand for more healthcare workers in areas hardest hit by COVID. These volunteers build loyalty in the communities they are deployed, which in turn opens the door to union organizing. Unions have directly contacted healthcare employers offering to supply [PPE](#) and to create care packages for employees and patients.

Creating another nexus to the community through a win at the bargaining table in 2019, SEIU-UHW launched [Futuro Health](#) as part of a four-year contract agreement between the union and Kaiser Permanente. The nonprofit organization, funded by a \$130 million payment from Kaiser, seeks to bridge the need for 10,000 allied healthcare workers in California by 2024. Futuro Health boasts of the creation of a workforce recruited and trained by union members, ostensibly increasing pro-union sentiment in the employers where these healthcare workers are ultimately hired.

PREPARING YOUR ORGANIZATION

Your workforce, patients, and key community stakeholders are being inundated with messaging that workers are unsafe, underpaid, overworked, and discriminated against – all so you can turn a [profit and pay executive salaries](#). Some of this messaging is overtly from the union, but most of it comes in a much more innocuous way, such as legislative initiatives. TV storylines, news media, and influencers are all bought into the idea that employers are riding out the pandemic on the backs of workers, further contributing to the negative narrative about healthcare organizations.

There are four key actions you should take to help insulate your organization from the unions: 1. develop leaders; 2. implement effective change management processes; 3. ensure employees understand the employer's value proposition and work to engage employees in the brand, and 4. recognize that unions' organizing tactics are ever-changing and will not necessarily be obvious to managers unless they know what to look and listen for.

LEADERSHIP DEVELOPMENT

Your leaders are faced with new complexities that few have the skills to lead their teams through. These gaps increase your risk that leaders may say or do something to trigger support for the union or make hiring decisions that weaken instead of strengthen your culture. Closing these gaps means looking at leadership in a substantively different manner.

Do your leaders have the competency and capacity to lead in a manner that not only gets results on your business objectives but also invests in their relationship with the workforce? Leaders who are skilled in positively tackling difficult situations are more likely to resolve issues before employees feel that they need union representation. Communicating with each employee as an individual and partnering to find a solution that works for everyone empowers both the employee and their leader. This is the foundation of a strong culture that makes the workforce feel important, needed, and cared for. If not, the unions will be happy to step in and fill that void, which now makes it imperative that you invest differentially in the caliber and development of your leaders.

Do your leaders have the skills to recruit and retain talent that is a positive fit for your organizational culture? All too often, especially in healthcare, recruitment and hiring are focused on filling holes with technically experienced applicants. A nurse with five years of experience is preferred to one with only two years. But how much attention is given to which of these nurses would have a positive impact on your organizational culture? Do your leaders know what to ask in an interview that would help you determine which one may struggle with your compensation philosophy, working as a team, or taking constructive feedback? Leaders with these skills not only hire the right people but also retain them – decreasing turnover and avoid lengthy and costly performance management.

TELL YOUR STORY

It is now more important than ever for you to tell your story of the great care you provide and the positive culture you strive to create. You need to tell this story consistently and repeatedly to your workforce, physician, patient, and community stakeholders. The adage that people need to hear a message ten times ten different ways to retain it no longer hits the mark. In the age of COVID and incessant social media political communication, today's communication strategy must be comprehensive and integrated across all internal and external platforms. This includes leaders who can carry the message and field questions from the workforce.

A contemporary employer brand strategy is focused on telling your story as an employer before anyone else does and includes three key components:

1. A dynamic, multi-page people site focused exclusively on your employees (not buildings, innovation, or services provided);

2. Regularly updated content: One to two blog post interviews of your employees each week plus one short video clip of an employee focusing on their experience as an employee; and
3. Dedicated social media channels to effectively distribute your content.

EFFECTIVE CHANGE MANAGEMENT

To have a great story to tell and a great culture, there must be an effective change management process that can correctly identify the key stakeholders in the change and allow them appropriate involvement in the process. This is not an easy task – it requires intentional leadership, but it will help insulate your organization from events that trigger union support and attacks from within by those caught off guard and upset by the change.

CHANGE YOUR PERSPECTIVES ON UNION ACTIVITY

Relying on traditional clues of flyers, union organizers in parking lots, and silence when management walks in the room to determine if you have union activity is likely to result in being caught off guard with a petition or a corporate campaign that is well underway. Shifting your perceptions of what union activity looks like and what it takes to get in front of it (it's not as expensive as you may think) makes it possible to resolve the issues before the union has made inroads into your organization. Waiting until the unions have momentum will be a significantly larger investment with a more uncertain outcome.

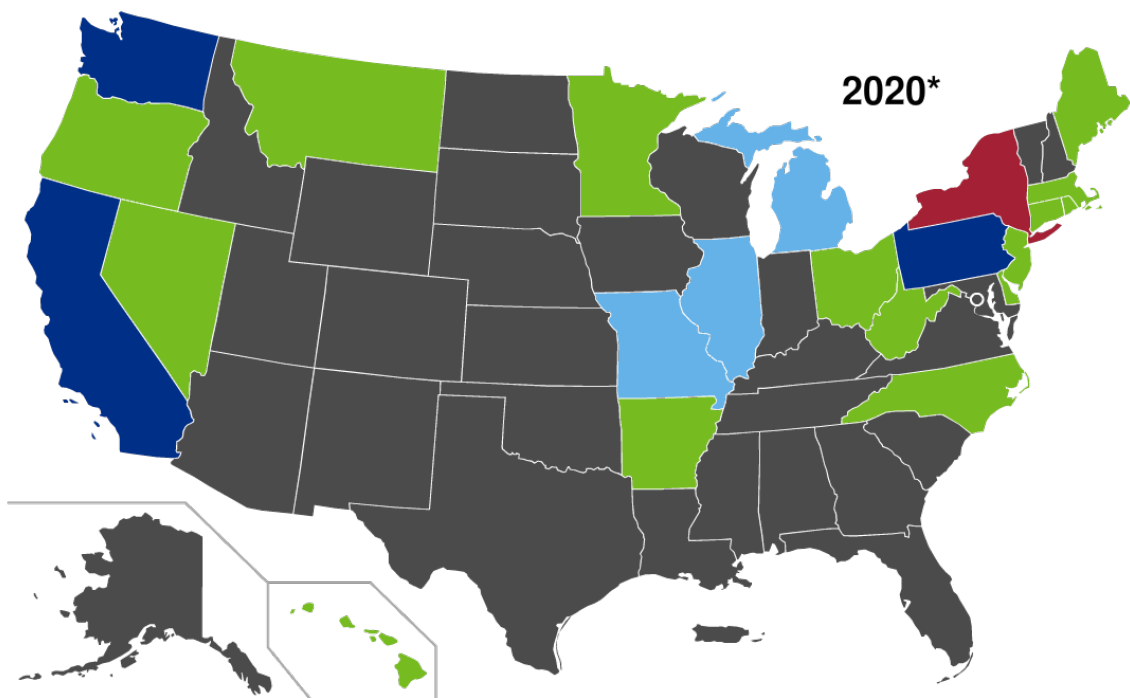
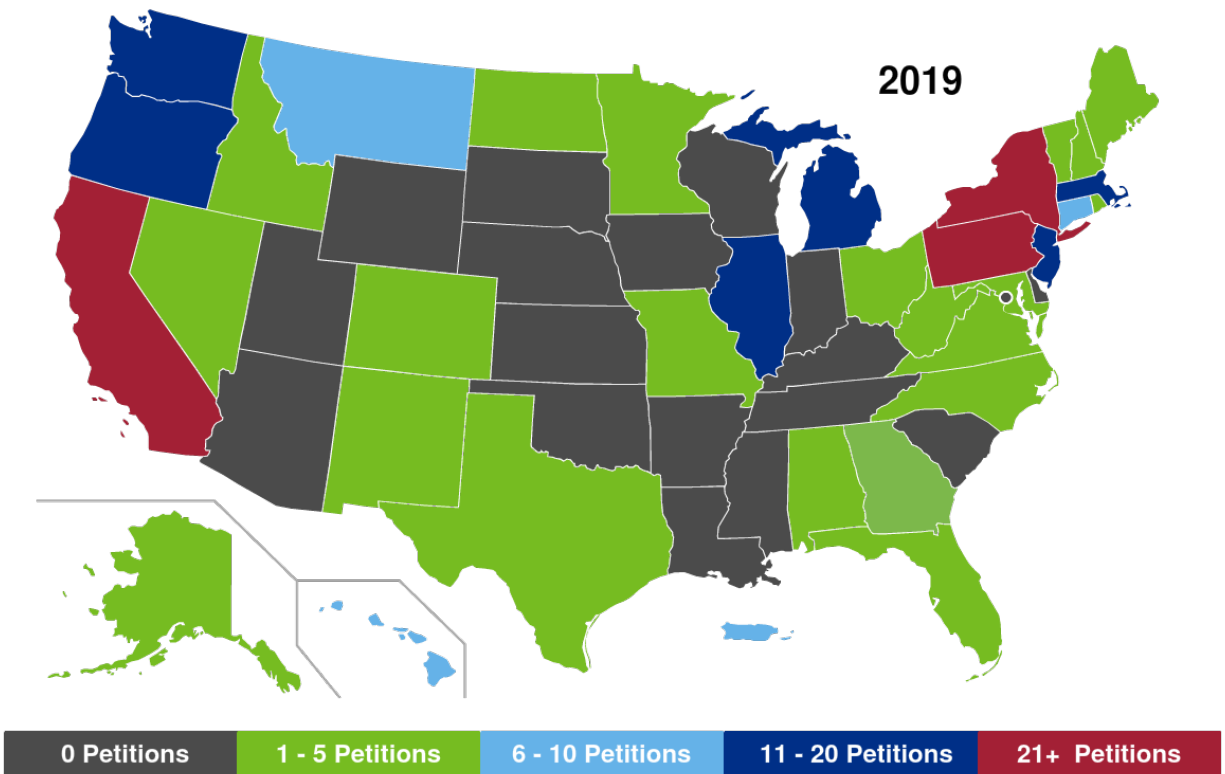
APPENDIX A: SUMMARY OF PETITIONS FILED AND ELECTIONS HELD

All Industries - Summary of Petitions Filed & Elections Held (2011 - 2020*)										
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020*
Total Petitions	2,540	2,467	2,553	2,616	2,597	2,289	2,280	1,923	2,039	798
Total Representation (RC) Petitions	1,955	1,979	2,033	2,129	2,169	1,920	1,880	1,559	1,737	681
Union Not Elected	399	484	461	436	453	355	372	322	298	94
Union Elected	859	861	888	995	1,096	964	981	796	919	268
Total Decertification Petitions	585	488	520	487	428	369	400	364	302	117
Total RD Petitions	493	459	463	439	370	312	338	333	260	96
Total RM Petitions	92	29	57	48	58	57	62	31	42	21
Union Not Elected	180	148	136	130	127	123	144	120	113	28
Union Elected	122	97	86	67	79	69	71	60	60	23

Health Care - Summary of Petitions Filed & Elections Held (2011 - 2020*)										
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020*
Total Petitions	421	372	391	447	379	405	411	294	318	138
Total Representation (RC) Petitions	301	305	315	358	316	345	325	225	272	124
Union Not Elected	63	65	58	50	56	49	54	32	31	9
Union Elected	161	165	154	188	193	196	217	148	166	63
Total Decertification Petitions	120	67	76	89	63	60	86	69	46	14
Total RD Petitions	69	60	67	86	55	51	60	64	41	11
Total RM Petitions	51	7	9	3	8	9	26	5	5	3
Union Not Elected	58	12	12	23	17	23	17	26	10	3
Union Elected	25	28	21	15	13	17	23	12	12	2

All Non-Health Care Industries - Summary of Petitions Filed & Elections Held (2011 - 2020*)										
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020*
Total Petitions	2,119	2,095	2,162	2,169	2,218	1,884	1,869	1,629	1,721	660
Total Representation (RC) Petitions	1,654	1,674	1,718	1,771	1,853	1,575	1,555	1,334	1,465	557
Union Not Elected	336	419	403	386	397	306	318	290	267	85
Union Elected	698	696	734	807	903	768	764	648	753	205
Total Decertification Petitions	465	421	444	398	365	309	314	295	256	103
Total RD Petitions	424	399	396	353	315	261	278	269	219	85
Total RM Petitions	41	22	48	45	50	48	36	26	37	18
Union Not Elected	122	136	124	107	110	100	127	94	103	25
Union Elected	97	69	65	52	66	52	48	48	48	21

APPENDIX B: MAPS OF REPRESENTATION PETITIONS FILED IN HEALTH CARE



APPENDIX C: ASHHRA ADVOCACY COMMITTEE

CHAIR

Chris Callahan

Vice President, Human Resources
Exeter Health Resources
Exeter, N.H.
REGION 1

BOARD LIAISON

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

Vice President, Human Resources /
Officer, Grievance and Compliance
Heart of the Rockies Regional Medical
Center
Salina, Colo.
REGION 8

Gail Blanchard Saiger

Vice President, Labor and Employment
California Hospital Association
Sacramento, Calif.
REGION 9

Kim Fulcher

Senior Vice President and Chief Human
Resources Officer
Halifax Health Medical Center of
Daytona Beach
Daytona Beach, Fla.
REGION 4

**Lisa Sartain, MLRHR, SPHR, SHRM-
SCP**

Vice President, Human Resources
The Bellevue Hospital
Bellevue, Ohio
REGION 5

Heather Cloward, MBA-HR, ACMPE

Chief Human Resources and Clinics
Officer
Melissa Memorial Hospital
Merino, Colo.
REGION 8

NLRB EXPERT

G. Roger King

Senior Labor and Employment Counsel
HR Policy Association
Washington, D.C.
REGION 3

LABOR EXPERT

Robert Moll

Senior Consultant
IRI Consultants
Troy, Mich.
REGION 5

**George Liothake, SPHR, SHRM-SCP,
CHHR**

Director, Workforce Relations
Atlantic Health System
Summit, N.J.
REGION 2

Ricki Ramlo

Chief Operating Officer, Human
Resources
Jamestown Regional Medical Center
Jamestown, N.D.
REGION 6

Deborah Rubens, CHHR, SPHR-CA, SHRM-SCP
Director, Human Resources
Shriners Hospitals for Children-Northern California
Sacramento, Calif.
REGION 9

Sharon Blessing-Snell, CHHR, SPHR, SCP, PI
HR Business Partner/Manager
Overlake Medical Center
Bellevue, Wash.
REGION 9

Georgina Gatewood-Shaw, PHR, SHRM-CP, CHHR
Director, Employee & Labor Relations
CommonSpirit Health
Long Beach, Calif.
REGION 9

Alex Hayman, FACHE, CHHR, LSSBB
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

Christopher Westbrook
Burn & Reconstructive Center of America
Augusta, Ga.
REGION 4

APPENDIX D: THE NATIONAL LABOR RELATIONS BOARD DEFINITIONS

THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board (NLRB) is an independent Federal agency established to enforce the National Labor Relations Act (NLRA). As an independent agency, it is not part of any other government agency – such as the Department of Labor. For more information, visit nlrb.gov.

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)

Normally filed by a union, this petition seeks an election to determine whether employees wish to be represented by a union. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit being sought. These signatures may be on paper. This designation or “showing of interest” contains a statement that the employees want to be represented for collective-bargaining purposes by a specific labor organization. The showing of interest must be signed by each employee, and each employee’s signature must be dated.

2) DECERTIFICATION (RD)

This petition, which can be filed by an individual, seeks an election to determine whether the authority of a union to act as a bargaining representative of employees should continue. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit represented by the union. These signatures may be on separate cards or a single piece of paper. This showing of interest contains a statement that the employees do not wish to be represented

for collective-bargaining purposes by the existing labor organization. The showing of interest must be signed by each employee, and each employee's signature must be dated.

3) WITHDRAWAL OF UNION-SECURITY AUTHORITY (UD)

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

4) EMPLOYER PETITION (RM)

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

5) UNIT CLARIFICATION

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

6) AMENDMENT OF CERTIFICATION (AC)

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

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

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

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

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

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

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

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

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

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

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