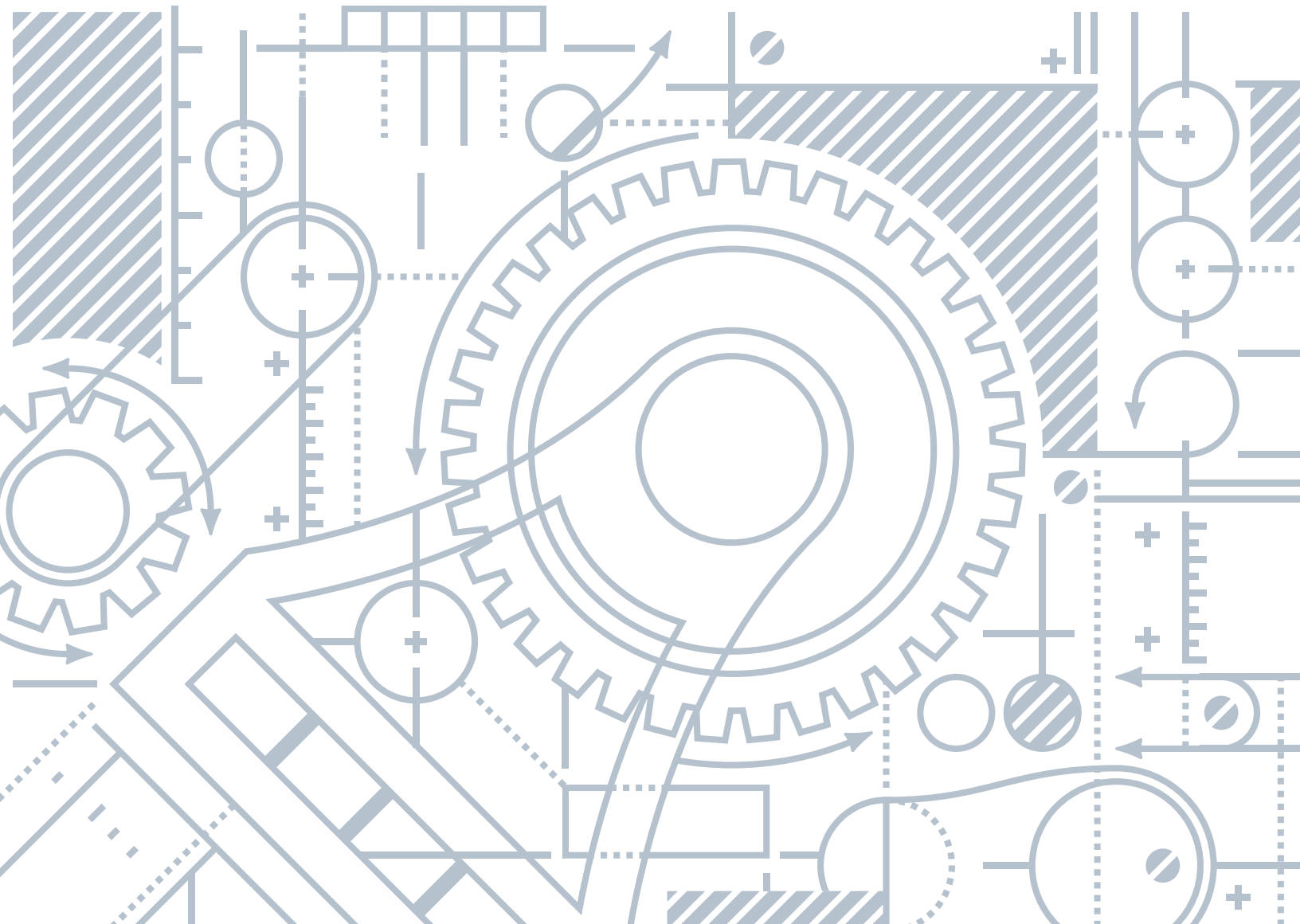


2023

LABOR ACTIVITY MANUFACTURING

ANNUAL REPORT
JANUARY - DECEMBER 2022



ABOUT THIS REPORT

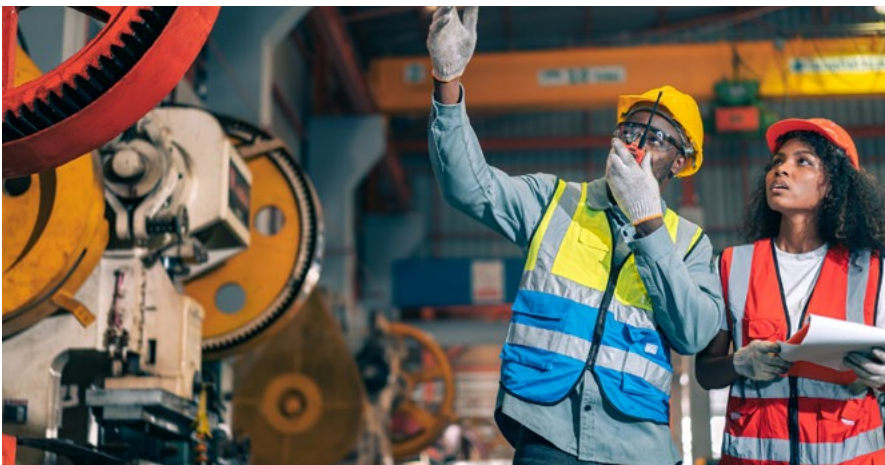
The our first-ever (and planned to be annual) *IRI Labor Activity in Manufacturing Labor Report* contains the following:



An analysis of national, regional, and state petitions and elections, including those for Certification of Representation (RC petitions), Decertification (RD petitions), and Employer Petitions (RM petitions), as reported by the National Labor Relations Board (NLRB) during 2021 and 2022^{1,2}



The Labor Law/Activity Update, which includes articles written by labor experts about relevant and timely labor issues impacting employers and the workplace



¹ See Appendix C for detailed definitions of the types of petitions and elections.

² NLRB election data describes dynamic case activity that is subject to revision and corrections during the year, and all data should be interpreted with that understanding.

Dear Industry Leaders,

In the past year, the manufacturing industry has witnessed its fair share of labor challenges as employers continue to face barriers finding and retaining employees, including hiring entry-level workers, and addressing skill gaps.

Notably, the industry has also been navigating demands for Diversity, Equity & Inclusion (DEI) initiatives, specifically hiring more women in a traditionally male-dominated workforce, and addressing concerns related to workplace flexibility and employee burnout.

As a result, the industry has not been immune to the rising U.S. labor movement, as shown by the 12.5 percent increase in representation case (RC) petitions filed with the National Labor Relations Board (NLRB) in the manufacturing industry from 2021 to 2022. The International Brotherhood of Teamsters (IBT) has led labor organizing activity.

Additionally, the power dynamic between employee and employer has shifted with a tight (albeit cooling) labor market, the Great Resignation, and a pro-union Administration in Washington. The National Labor Relations Board (NLRB) has made changes that will dramatically impact all employers. In recent weeks, the NLRB upended decades of precedent with its *Cemex Construction Materials Pacific, LLC*, decision. This introduces a new framework for petitions and bargaining orders whereby unions' ability to unionize employees without an election is bolstered. As the *Cemex* decision was retroactive, the new procedures already are in effect. Additionally, the Board released its Final Rule that reintroduces expedited ("quickie") elections. You can learn more about these changes in an article later in this report.

Manufacturing organizations must act now by taking proactive measures, assessing vulnerabilities and labor readiness, and retaining expert labor relations consultants to develop and implement preventative strategies.

In the enclosed Labor Activity in Manufacturing Report, you'll find data on union organizing and membership nationwide and timely labor and employee relations articles. We look forward to continuing to support manufacturing organizations across the country and providing you with up-to-date and relevant labor information affecting your industry.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert Moll", with a stylized flourish at the end.

Robert Moll

Managing Director, IRI Consultants

TABLE OF CONTENTS

EXECUTIVE SUMMARY	5
UNION MEMBERSHIP NATIONWIDE	6
NLRB PETITION AND ELECTION RESULTS	8
NATIONAL SUMMARIES	9
STATE SUMMARIES	11
UNION SUMMARIES	13
REGIONAL SUMMARIES	15
STRIKES IN MANUFACTURING	21
LABOR LAW/ACTIVITY UPDATE	22
Expanding Compensatory Damages Remedy Tilts The Negotiating Table Toward The Union	23
Employee Safety Committees - Balancing Risk With Reward	26
Controlling Your Collective Bargaining Narrative	31
Employers Must Prepare Now to Avoid Card Check Recognition and Bargaining Orders	34
APPENDIX A	37
APPENDIX B	38
APPENDIX C	39

EXECUTIVE SUMMARY

NLRB REPRESENTATION (RC) PETITIONS & ELECTIONS

In 2022, there were 153 RC petitions filed in the manufacturing industry compared to 136 RC petitions filed in 2021.

Unions were elected as a result of 47 percent of the 110 RC elections held in 2022. In 2021, unions were elected as a result of 51 percent of the 105 RC elections held.

The IBT is the most active union in the manufacturing industry, accounting for 27 percent of petitions filed and 30 percent of elections held in 2022. IBT won 42 percent of these elections – down from their 50 percent win rate in 2021.

Regional differences in activity levels and active unions are highlighted in the Regional Summaries section of this report. The Pacific region had the most RC elections in 2021 and 2022, with 59 elections being held and unions winning more than half (53 percent) of them.

Strike activity in the past decade has been distributed throughout the nation, with a higher concentration in the Midwest. In 2022, 56 strikes were held in the manufacturing industry, idling 13,484 workers.



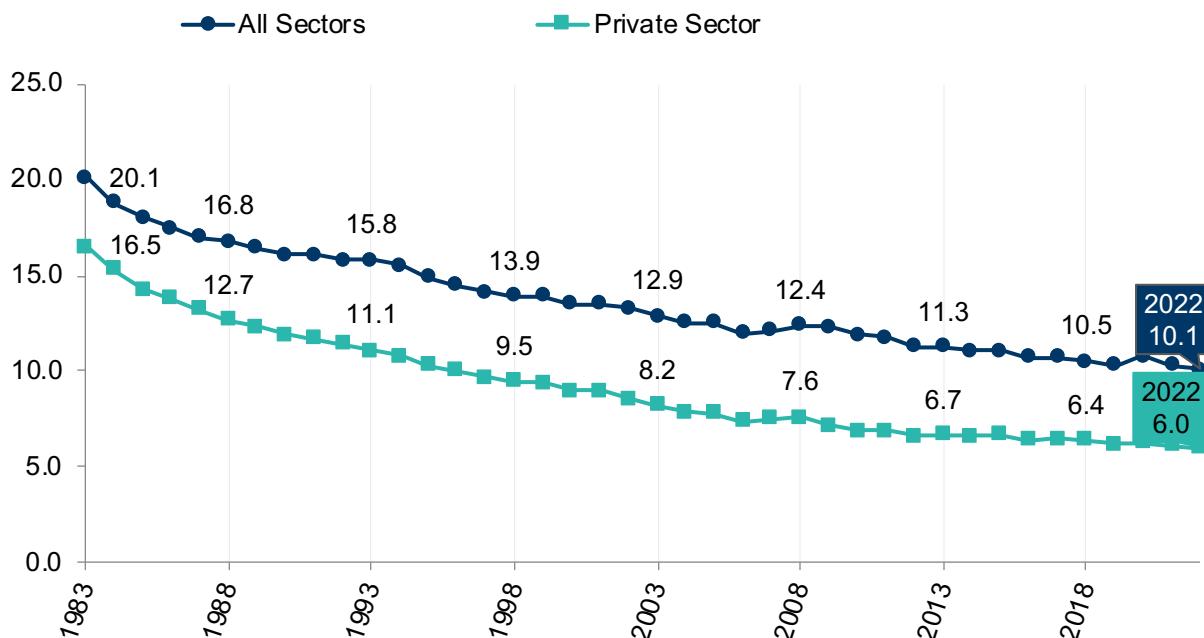
UNION MEMBERSHIP NATIONWIDE

According to the *Department of Labor (DOL) Bureau of Labor Statistics Union Members – 2022* report, the percentage of unionized wage and salary employees decreased to 10.1 percent – the lowest on record. This number is down from 10.3 percent in 2021, although the number of wage and salary workers belonging to unions increased from 2021 to 2022.

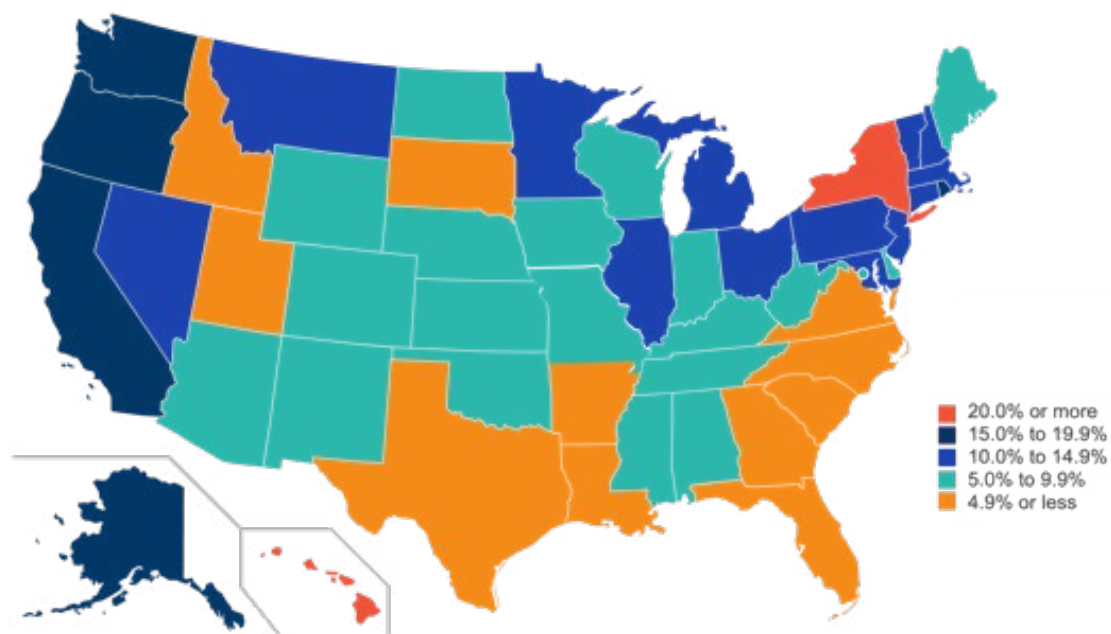
Data from the DOL report include the following highlights:

- The union membership rate was 10.1 percent in 2022 – down from 10.3 percent in 2021
- Public sector employees continue to be more than five times as likely to be members of unions as private sector employees (33.1 percent versus 6.0 percent, respectively)
- Black workers continued to have the highest union membership rate in 2022 (11.6 percent), followed by Whites (10.0 percent), Hispanics (8.8 percent), and Asians (8.3 percent)
- The highest union membership rate is among men aged 45 to 54 (12.7 percent), while the lowest is among women aged 16 to 24 (3.5 percent)
- Among states, Hawaii maintains the highest union membership rate (21.9 percent) and South Carolina has the lowest rate (1.7 percent)
- Union membership rates increased in 22 states and the District of Columbia, decreased in 24 states, and remained unchanged in four (4) states

UNION MEMBERSHIP RATE SUMMARY



UNION MEMBERSHIP RATES BY STATE, 2022



NLRB PETITION AND ELECTION RESULTS

This section includes the following:

NATIONAL SUMMARIES

- Comparison of manufacturing versus all non-manufacturing RC election results
- Comparison of manufacturing versus all non-manufacturing decertification (RD and RM) results
- Manufacturing industry – Overview of elections
- Manufacturing industry – Union successes in RC elections

UNION SUMMARIES

- Most active unions – RC petitions filed
- Most active unions – RC elections held
- Union success rates – RC election results

REGIONAL SUMMARIES

- RC petitions, elections, and most active unions by geographic regions

STATE SUMMARIES

Most active states – RC petitions filed and RC election results

All states – RC petitions filed

All states – RC election results

STRIKES IN TRANSPORTATION

- Strikes held by year in manufacturing



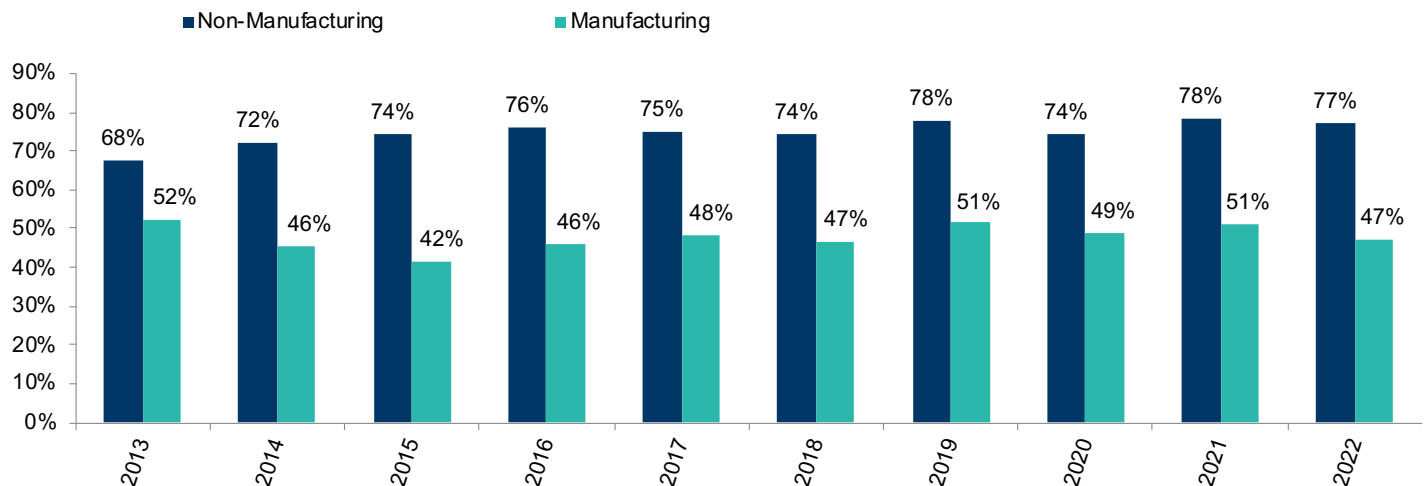
NATIONAL SUMMARIES

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

UNION WINS IN REPRESENTATION (RC) ELECTIONS

In 2022, unions won just 47 percent of all RC elections held in the manufacturing industry – far lower than the 77 percent win rate in all other industries.

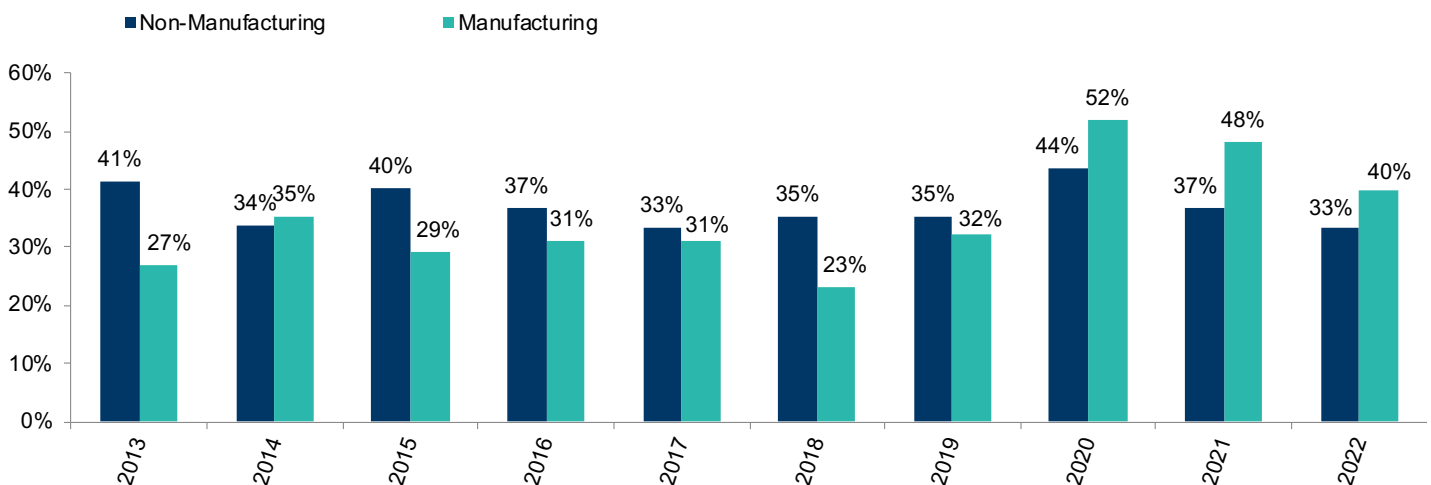
Manufacturing vs. Non-Manufacturing Industries (2013 – 2022)



UNION WINS IN DECERTIFICATION (RD/RM) ELECTIONS

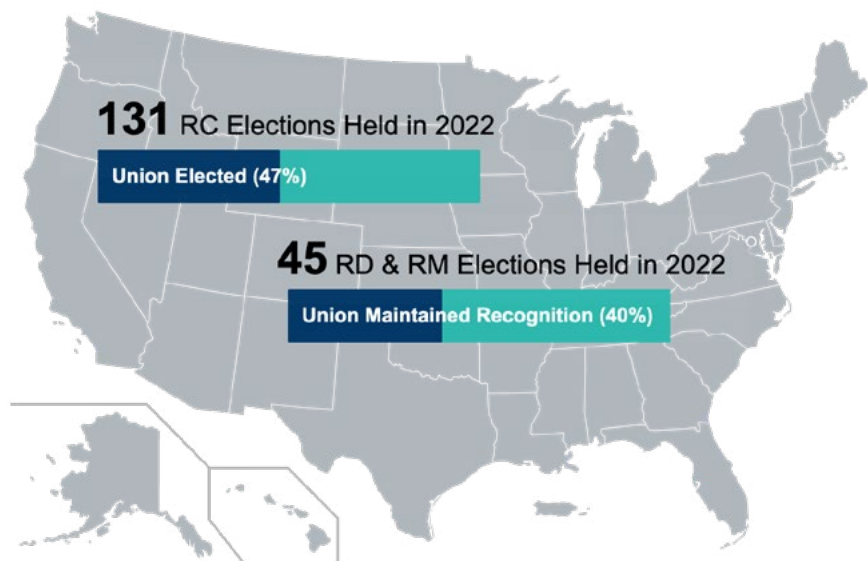
Unions maintained recognition in 40 percent of RD and RM elections held in the manufacturing industry in 2022.

Manufacturing vs. Non-Manufacturing Industries (2013 – 2022)



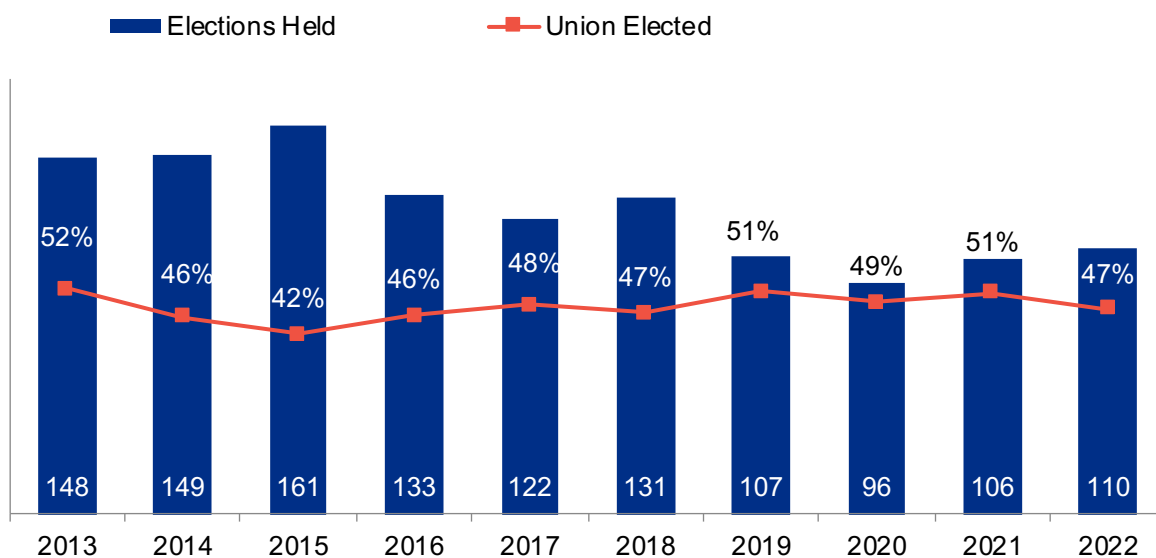
MANUFACTURING INDUSTRY – ELECTIONS OVERVIEW

In 2022, there were 110 RC elections held in the manufacturing industry and unions were elected as a result of 47 percent of them. During the same time period, 45 RD/RM elections were held and unions maintained recognition in only 40 percent.



UNION SUCCESS IN REPRESENTATION (RC) ELECTIONS COMPARED TO NUMBER OF ELECTIONS

The chart below illustrates the number of RC elections held over the past decade, along with the percentage of elections won by unions. Unions were elected as a result of 47 percent of the 110 elections held in the manufacturing industry in 2022.



STATE SUMMARIES

This section provides an overview of state-level organizing activity in the manufacturing industry and is based on RC petitions filed and RC elections held. The data include all reported petitions and elections for 2021 and 2022 at the time of publication.

ALL STATES – REPRESENTATION (RC) PETITIONS IN MANUFACTURING

The table below details the number of RC petitions filed in each state in manufacturing during 2021 and 2022.

State	2021	2022	State	2021	2022	State	2021	2022
Alabama	2	5	Iowa	-	2	Oklahoma	-	2
Alaska	-	1	Kentucky	6	1	Oregon	2	5
Arizona	-	1	Louisiana	-	1	Pennsylvania	9	3
Arkansas	2	-	Maryland	1	-	Puerto Rico	6	1
California	8	30	Michigan	3	7	Rhode Island	-	3
Colorado	1	2	Minnesota	1	3	South Carolina	1	-
Connecticut	-	3	Mississippi	1	2	Tennessee	3	1
DC	-	1	Missouri	1	6	Texas	4	7
Florida	1	2	Nevada	2	3	Utah	1	2
Georgia	2	2	New Jersey	4	6	Virginia	2	4
Guam	1	-	New Mexico	-	4	Washington	18	11
Hawaii	2	-	New York	17	8	West Virginia	4	2
Idaho	-	2	North Carolina	3	2	Wisconsin	1	-
Illinois	12	11	North Dakota	-	1			
Indiana	7	2	Ohio	8	4			
						Total	136	153

Note: States are not included in the table if no petitions were filed in 2021 or 2022.

ALL STATES – REPRESENTATION (RC) ELECTION RESULTS IN TRANSPORTATION

The table below details the number of RC elections held in each state in manufacturing during 2021 and 2022.

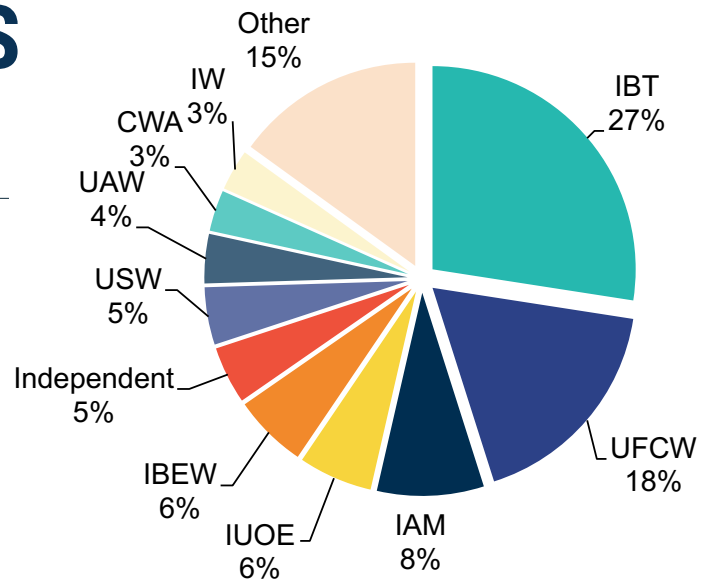
State	2021					2022				
	Total	Union Wins	% of Elections	Union Losses	% of Elections	Total	Union Wins	% of Elections	Union Losses	% of Elections
Alabama	1	0	0%	1	100%	-	-	-	-	-
Alaska	-	-	-	-	-	1	1	100%	0	0%
Arizona	-	-	-	-	-	1	1	100%	0	0%
Arkansas	2	0	0%	2	100%	-	-	-	-	-
California	9	5	56%	4	44%	21	9	43%	12	57%
Colorado	1	1	100%	0	0%	2	2	100%	0	0%
Connecticut	-	-	-	-	-	1	0	0%	1	100%
Delaware	2	0	0%	2	100%	-	-	-	-	-
Florida	2	0	0%	2	100%	2	1	50%	1	50%
Georgia	2	1	50%	1	50%	1	0	0%	1	100%
Hawaii	1	0	0%	1	100%	-	-	-	-	-
Idaho	-	-	-	-	-	1	1	100%	0	0%
Illinois	13	9	69%	4	31%	7	3	43%	4	57%
Indiana	7	1	14%	6	86%	3	2	67%	1	33%
Iowa	1	1	100%	0	0%	2	0	0%	2	100%
Kansas	1	0	0%	1	100%	-	-	-	-	-
Kentucky	4	3	75%	1	25%	1	0	0%	1	100%
Maryland	1	1	100%	0	0%	-	-	-	-	-
Michigan	3	2	67%	1	33%	4	3	75%	1	25%
Minnesota	1	0	0%	1	100%	3	1	33%	2	67%
Mississippi	1	1	100%	0	0%	-	-	-	-	-
Missouri	2	1	50%	1	50%	3	0	0%	3	100%
Nevada	1	0	0%	1	100%	2	2	100%	0	0%
New Jersey	4	3	75%	1	25%	4	2	50%	2	50%
New Mexico	-	-	-	-	-	3	2	67%	1	33%
New York	12	9	75%	3	25%	7	6	86%	1	14%
North Carolina	2	0	0%	2	100%	2	2	100%	0	0%
North Dakota	-	-	-	-	-	1	1	100%	0	0%
Ohio	5	1	20%	4	80%	4	1	25%	3	75%
Oklahoma	-	-	-	-	-	1	1	100%	0	0%
Oregon	1	0	0%	1	100%	5	1	20%	4	80%
Other	1	1	100%	0	0%	-	-	-	-	-
Pennsylvania	3	0	0%	3	100%	5	2	40%	3	60%
Puerto Rico	4	3	75%	1	25%	1	1	100%	0	0%
Tennessee	1	0	0%	1	100%	1	0	0%	1	100%
Texas	2	0	0%	2	100%	3	0	0%	3	100%
Utah	1	0	0%	1	100%	1	0	0%	1	100%
Virginia	2	1	50%	1	50%	4	1	25%	3	75%
Washington	11	10	91%	1	9%	10	5	50%	5	50%
West Virginia	1	0	0%	1	100%	2	1	50%	1	50%
Wisconsin	1	0	0%	1	100%	1	0	0%	1	100%
Total	106	54	51%	52	49%	110	52	47%	58	53%

Note: States are not included in the table if no elections were held in 2021 or 2022.

UNION SUMMARIES

MOST ACTIVE UNIONS – REPRESENTATION (RC) PETITIONS IN MANUFACTURING IN 2022

The IBT is the most active union in the manufacturing industry. In 2022, IBT accounted for 27 percent of RC petitions filed. The next most active union, United Food and Commercial Workers International Union (UFCW) accounted for 18 percent of RC petitions filed.



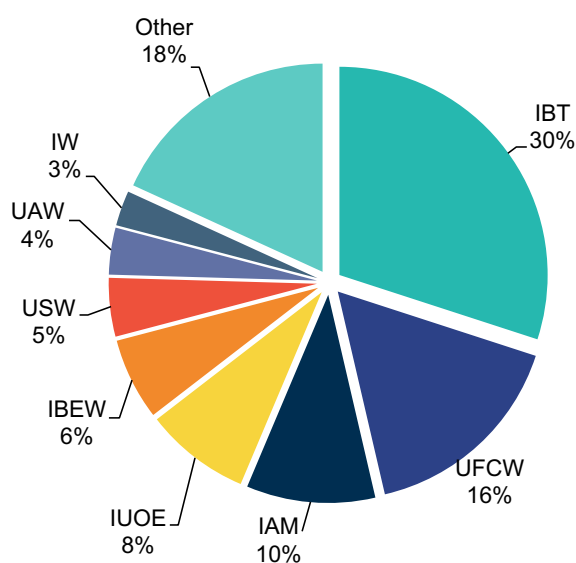
Abbreviation	Union Name	RC Petitions Filed	
		2021	2022
IBT	International Brotherhood of Teamsters	40	42
UFCW	United Food and Commercial Workers International Union	13	27
IAM	International Association of Machinists and Aerospace Workers	14	13
IUOE	International Union of Operating Engineers	5	9
IBEW	International Brotherhood of Electrical Workers	2	9
Independent	Independent labor unions	0	7
USW	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers)	10	7
UAW	International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America	5	6
CWA	Communication Workers of America	2	5
IW	International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Union	4	5

The following table includes unions that are also active in the manufacturing industry and referenced in the following pages.

Abbreviation	Union Name
UA	United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada
ILWU	International Longshore and Warehouse Union
IAFF	International Association of Fire Fighters
LIUNA	Laborers' International Union of North America
NPWU	National Production Workers Union
SMART	International Association of Sheet Metal, Air, Rail and Transportation Workers
SEIU	Service Employees International Union

MOST ACTIVE UNIONS – REPRESENTATION (RC) ELECTIONS HELD IN MANUFACTURING IN 2022

As expected, IBT also accounts for the most RC elections held in the manufacturing industry. In 2022, IBT was involved in 33 RC elections and was elected as a result of 42 percent of them. IBT won 50 percent of the elections in which it was involved in 2021.

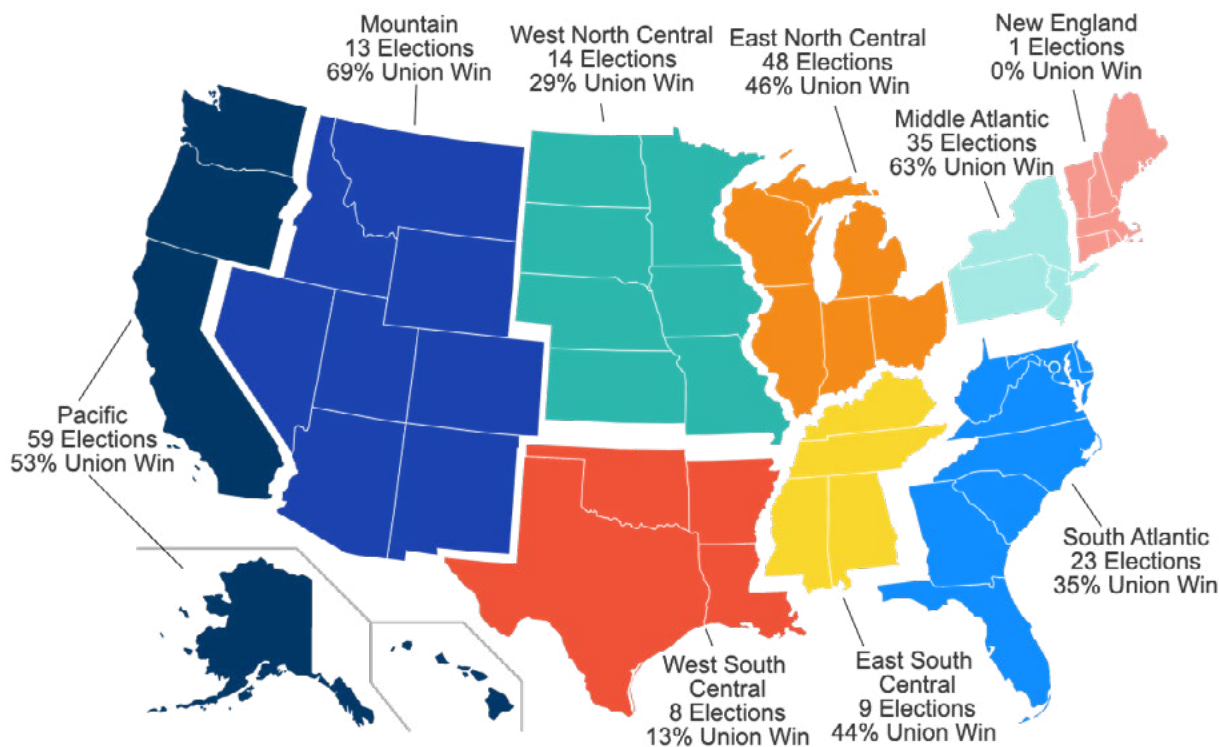


	2021			2022		
	Total Elections	Union Elected %	Union Not Elected %	Total Elections	Union Elected %	Union Not Elected %
IBT	30	50%	50%	33	42%	58%
UFCW	12	50%	50%	18	50%	50%
IAM	11	27%	73%	11	18%	82%
IUOE	4	75%	25%	9	67%	33%
IBEW	2	50%	50%	7	57%	43%
USW	10	40%	60%	5	20%	80%
UAW	6	50%	50%	4	75%	25%
IW	2	50%	50%	3	100%	0%

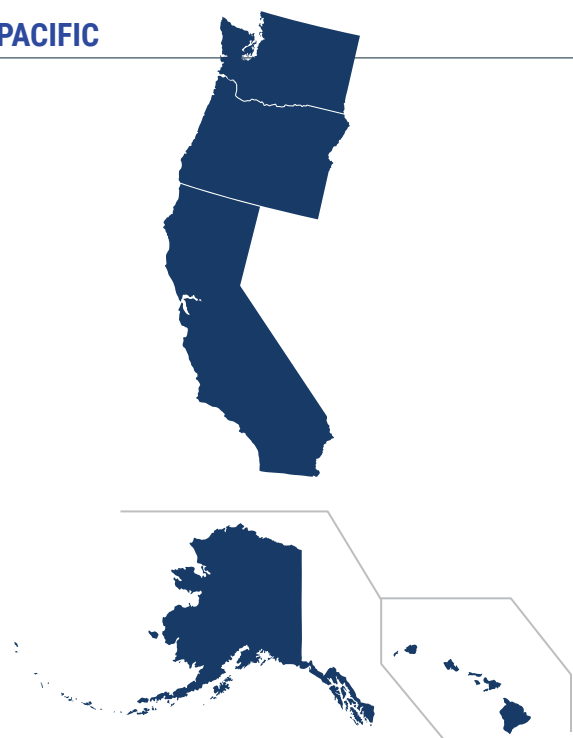
REGIONAL SUMMARIES

For the purposes of this analysis, we have categorized the nation into nine (9) regions as illustrated in the map below. The following sections provide an overview of activity in each region in 2021 and 2022 and a breakdown of the most active unions in the region based on RC petitions filed in the same time period.

The map below shows the number of elections and the union win rate in each region in 2021 and 2022 combined.

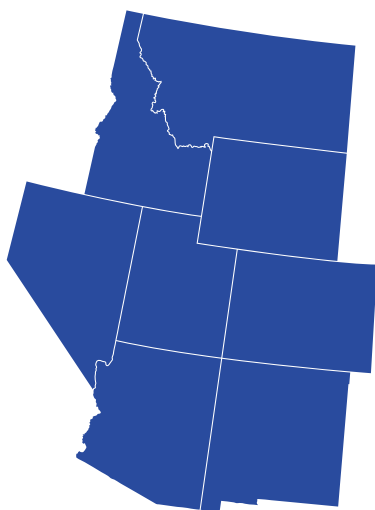


PACIFIC



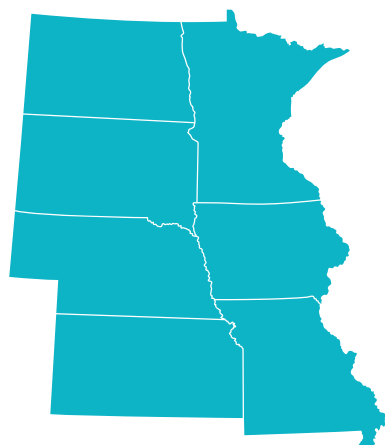
State	2022		
	Petitions Filed	Elections Held	Union Win Rate
Alaska	1	1	100%
California	30	21	43%
Hawaii	0	0	-
Oregon	5	5	20%
Washington	11	10	50%
State	2021		
	Petitions Filed	Elections Held	Union Win Rate
Alaska	0	0	-
California	8	9	56%
Hawaii	2	1	0%
Oregon	2	1	0%
Washington	18	11	91%
Most Active Unions			
IBT, IAM, UFCW, USW, IBEW, UA, IW, ILWU			

MOUNTAIN



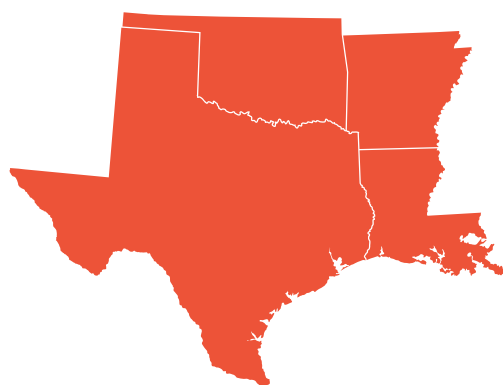
State	2022		
	Petitions Filed	Elections Held	Union Win Rate
Arizona	1	1	100%
Colorado	2	2	100%
Idaho	2	1	100%
Montana	0	0	-
Nevada	3	2	100%
New Mexico	4	3	67%
Utah	2	1	0%
Wyoming	0	0	-
State	2021		
	Petitions Filed	Elections Held	Union Win Rate
Arizona	0	0	-
Colorado	1	1	100%
Idaho	0	0	-
Montana	0	0	-
Nevada	2	1	0%
New Mexico	0	0	-
Utah	1	1	0%
Wyoming	0	0	-
Most Active Unions			
IAFF, LIUNA, IBT, UFCW, IBEW, IUOE			

WEST NORTH CENTRAL



State	2022		
	Petitions Filed	Elections Held	Union Win Rate
Iowa	2	2	0%
Kansas	0	0	-
Minnesota	3	3	33%
Missouri	6	3	0%
Nebraska	0	0	-
North Dakota	1	1	100%
South Dakota	0	0	-
State	2021		
	Petitions Filed	Elections Held	Union Win Rate
Iowa	0	1	100%
Kansas	0	1	0%
Minnesota	1	1	0%
Missouri	1	2	50%
Nebraska	0	0	-
North Dakota	0	0	-
South Dakota	0	0	-
Most Active Unions			
UFCW, IBT, IAM, CWA			

WEST SOUTH CENTRAL



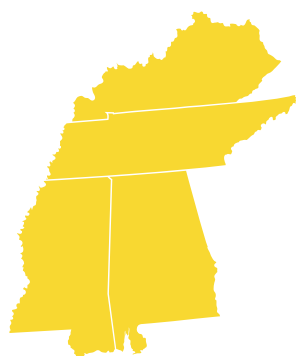
State	2022		
	Petitions Filed	Elections Held	Union Win Rate
Arkansas	0	0	-
Louisiana	1	0	-
Oklahoma	2	1	100%
Texas	7	3	0%
State	2021		
	Petitions Filed	Elections Held	Union Win Rate
Arkansas	2	2	0%
Louisiana	0	0	-
Oklahoma	0	0	-
Texas	4	2	0%
Most Active Unions			
IBT, independent labor unions, IAM, USW, IBEW			

EAST NORTH CENTRAL



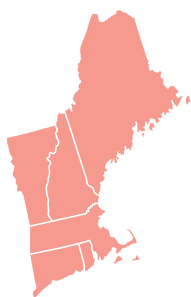
State	2022		
	Petitions Filed	Elections Held	Union Win Rate
Illinois	11	7	43%
Indiana	2	3	67%
Michigan	7	4	75%
Ohio	4	4	25%
Wisconsin	0	1	0%
State	2021		
	Petitions Filed	Elections Held	Union Win Rate
Illinois	12	13	69%
Indiana	7	7	14%
Michigan	3	3	67%
Ohio	8	5	20%
Wisconsin	1	1	0%
Most Active Unions			
IBT, UAW, IAM, IUOE, UFCW, IW, USW			

EAST SOUTH CENTRAL



State	2022		
	Petitions Filed	Elections Held	Union Win Rate
Alabama	5	0	-
Kentucky	1	1	0%
Mississippi	2	0	-
Tennessee	1	1	0%
State	2021		
	Petitions Filed	Elections Held	Union Win Rate
Alabama	2	1	0%
Kentucky	6	4	75%
Mississippi	1	1	100%
Tennessee	3	1	0%
Most Active Unions			
UFCW, IBT, IAM, USW, CWA			

NEW ENGLAND



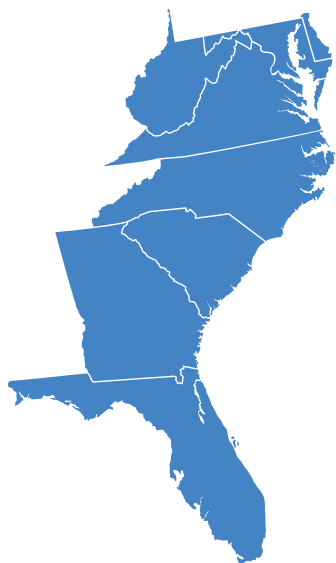
State	2022		
	Petitions Filed	Elections Held	Union Win Rate
Connecticut	3	1	0%
Maine	0	0	-
Massachusetts	0	0	-
New Hampshire	0	0	-
Rhode Island	3	0	-
Vermont	0	0	-
State	2021		
	Petitions Filed	Elections Held	Union Win Rate
Connecticut	0	0	-
Maine	0	0	-
Massachusetts	0	0	-
New Hampshire	0	0	-
Rhode Island	0	0	-
Vermont	0	0	-
Most Active Unions			
UFCW			

MIDDLE ATLANTIC



State	2022		
	Petitions Filed	Elections Held	Union Win Rate
New Jersey	6	4	50%
New York	8	7	86%
Pennsylvania	3	5	40%
State	2021		
	Petitions Filed	Elections Held	Union Win Rate
New Jersey	4	4	75%
New York	17	12	75%
Pennsylvania	9	3	0%
Most Active Unions			
IBT, UFCW, NPWU, USW, IAM, SMART, IUOE, SEIU			

SOUTH ATLANTIC



State	2022		
	Petitions Filed	Elections Held	Union Win Rate
DC	1	0	-
Delaware	0	0	-
Florida	2	2	50%
Georgia	2	1	0%
Maryland	0	0	-
North Carolina	2	2	100%
South Carolina	0	0	-
Virginia	4	4	25%
West Virginia	2	2	50%

State	2021		
	Petitions Filed	Elections Held	Union Win Rate
DC	0	0	-
Delaware	0	2	0%
Florida	1	2	0%
Georgia	2	2	50%
Maryland	1	1	100%
North Carolina	3	2	0%
South Carolina	1	0	-
Virginia	2	2	50%
West Virginia	4	1	0%

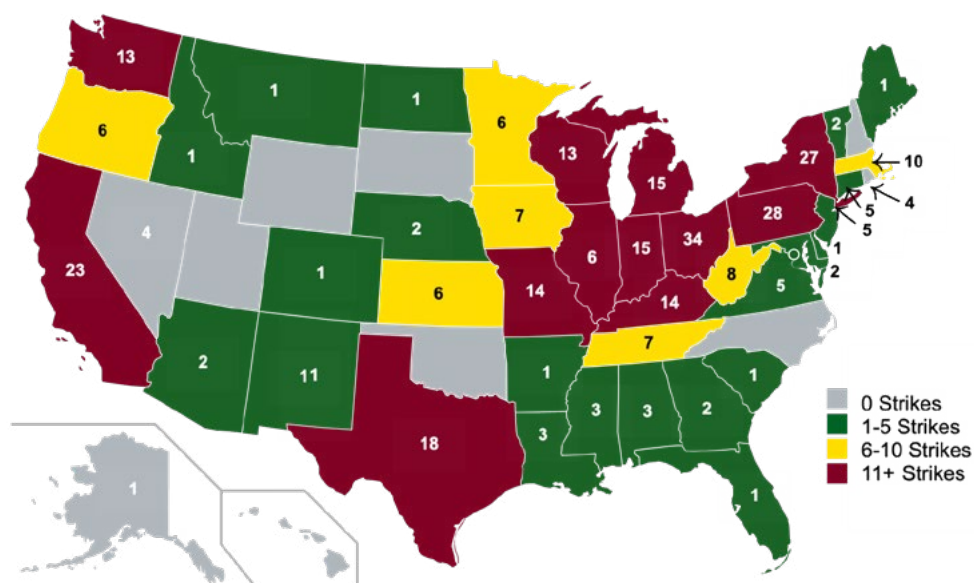
Most Active Unions			
UFCW, IBT, UA, CWA, IW, IBEW			



STRIKES IN MANUFACTURING

The map below illustrates the number of strikes held in manufacturing since 2013³. Strike activity has been fairly well dispersed across the nation with a higher concentration in the Midwest.

STRIKES IN MANUFACTURING BY STATE: 2013 – 2022



Year	Number of Strikes	Workers Idled	Average Number of Workers per Strike
2022	56	13,484	241
2021	54	29,491	546
2020	28	8,042	287
2019	17	51,868	3,051
2018	36	4,676	130
2017	32	3,962	124
2016	24	4,897	204
2015	42	18,349	437
2014	33	8,935	271
2013	28	6,452	230
2012	14	3,109	222

³ 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 to provide the most complete data possible. The data may not be comprehensive.

LABOR LAW/ACTIVITY UPDATE

EXPANDING COMPENSATORY DAMAGES REMEDY TILTS THE NEGOTIATING TABLE TOWARD THE UNION

The National Labor Relations Board and its General Counsel plan to pursue and impose “make-whole” compensatory damages more aggressively and in a much broader context than previous precedent has allowed, giving unions an important piece of leverage at the negotiation table. This article describes the landscape for the Board’s interest in these remedies and provides guidance on how to approach negotiations aggressively while still planting the seeds of a defense to what could be a much more costly bad faith bargaining charge.

EMPLOYEE SAFETY COMMITTEES - BALANCING RISK WITH REWARD

Safety committees are a form of an employee engagement program that help foster and build healthy and safe workplaces in the manufacturing industry. However, even the most effective safety committees can present potential liability. For example, if a safety committee’s characteristics render it a “labor organization,” it could trigger federal labor law liability. This article discusses how to maximize the value of safety committees for workplace safety and employee engagement, while minimizing legal issues under the National Labor Relations Act (NLRA).

CONTROLLING YOUR COLLECTIVE BARGAINING NARRATIVE

The power dynamic between employee and employer has shifted with a tight labor market, the Great Resignation, and a pro-union Administration in Washington, meaning it’s crucial for employers with union-represented workers to begin communicating with their stakeholders before contract negotiations. Robert Moll, a Managing Director at IRI Consultants who specializes in labor communications and issues management, shares five key actions that communicators should take to control their organization’s collective bargaining narrative, avoid a crisis escalation, and build trust with employees.

Employers Must Prepare Now to Avoid Card Check Recognition and Bargaining Orders

The National Labor Relations Board (NLRB) recently overturned decades of federal labor law precedent with its decision in *Cemex Construction Materials Pacific, Inc.*, which announced a dramatic new framework for the union representation process effective immediately. The NLRB also changed the Board’s election process and reinstated expedited or “quickie” elections which will take effect December 26, 2023. The process now in effect puts the onus on the employer to challenge the union’s claim of majority status by filing its own request for an election to decide whether its employees want to unionize. As expected, unions began leveraging this decision within days of the Cemex decision. In response, Jay Kuhns, Vice President of Strategic Planning with IRI Consultants, shares how employers can prioritize immediate steps, as well as short- and long-term strategies, to avoid card check recognition and bargaining orders, and protect their organizations.

Expanding Compensatory Damages Remedy Tilts The Negotiating Table Toward The Union

Justin J. Boron, Partner, Freeman Mathis & Gary LLP
Tel: 215-789-4919, jboron@fmglaw.com

Robert G. Chadwick, Jr., Partner, Freeman Mathis & Gary LLP
Tel: 469-895-3003, Bob.Chadwick@fmglaw.com

ABSTRACT

The National Labor Relations Board and its General Counsel have signaled that they plan to pursue and impose “make-whole,” compensatory damages more aggressively and in a much broader context than previous precedent has allowed. Against the backdrop of the labor unrest arising from contract negotiations and organizing efforts in the last two years, the increasing availability of these damages gives the union an important piece of leverage. This article describes the landscape for the Board’s interest in these remedies and provides guidance on how to approach negotiations aggressively while still planting the seeds of a defense to what could be a much more costly bad faith bargaining charge.

Produce a collective bargaining agreement or risk paying a steep price. That is the message that the National Labor Relations Board and its General Counsel have sent to manufacturers and other companies in the last year by encouraging “make-whole” remedies for alleged bad faith bargaining and refusal to bargain delays.

In April this year, the Board imposed these types of remedies – which include a union’s costs for bargaining and money for employees who were hurt by delays in negotiations – in *Noah’s Ark Processors, LLC d/b/a WR Reserve*,¹ where the Board found that the employer had repeatedly engaged in bad faith bargaining. The broad cease-and-desist order is not unprecedented for repeat offenders. But the Board also took the opinion as an opportunity to issue a “reminder of the remedies that may be particularly appropriate” in egregious cases. It isn’t a stretch to read the opinion as the dissenting board member did: tacitly encouraging the General Counsel to seek broad orders “more frequently” in order to put compensatory damage remedies “in play.”

And given the General Counsel’s recent press for “make-whole” remedies in refusal to bargain cases,² the subtext from the Board’s decision in *Noah’s Ark Processors* – even if not expressly stated – is unmistakable: The Board and General Counsel aim to strengthen unions’ bargaining power with the threat of consequential damages.

Whether these damages can be proven or recovered is probably less important to a union than the ability to threaten them at the negotiating table and pressure employers into a difficult Hobson’s choice: concede on an important and potentially costly bargaining point or risk costly litigation and an award of damages to the union and employees. The increasing availability of damages raises the stakes at the negotiating table. And it will require added diligence from the employer to avoid what could be a costly unfair labor practice charge.

¹ 372 NLRB No. 80 (April 20, 2023).

² *Pathway Vet Alliance, LLC d/b/a Thrive Pet Healthcare*, Case 03-CA-291267, Motion For Summary Judgment; Office of General Counsel Memorandum GC 21-04 at 8.

Labor Unrest in Manufacturing Makes the Threat of ‘Make-Whole’ Remedies Very Real

The Board’s encouragement of “make-whole” remedies for bad faith bargaining comes against the backdrop of rising labor unrest. In terms of strikes in the U.S., last year saw the largest single-year increase in 30 years, according to a study of labor statistics by Cornell University.³ Organizing efforts are up as well.⁴ Although Starbucks and the education space has attracted a lot of attention in the last two years, the manufacturing industry has had its fair share of labor disputes.

“It’s a multifaceted phenomenon, with workers in education, manufacturing, health care, and plenty of other workplaces playing a major part,” wrote Robert Combs, a legal analyst for Bloomberg News, in a review of union work stoppages earlier this year.⁵ What distinguishes manufacturing from other industries, however, is that the strikes against manufacturers tend to be longer and involve more employees than strikes in the food services or education industries.⁶ For example, in 2021, the United Auto Workers took their workers on strike against John Deere, the world’s largest farm equipment manufacturer. The month-long strike involved 10,000 employees across 14 U.S. facilities.⁷

The conclusion to draw is that unions have wielded work stoppages as a powerful tool. But the size and scope of the bargaining units in the manufacturing industry also make strikes complicated to pull off and burdensome on the union and its employees. The Board’s decision on “make-whole” damages gives the union a new tool to extract a concession without forcing workers to bear the burden of going on strike – i.e. potential lapse in pay, replacement, and anxiety. Put bluntly, the union doesn’t necessarily have to go on strike; they just have to threaten bad faith damages under *Noah’s Ark Processors*. And labor’s positioning in the last two years suggests that they will.

What’s At Stake?

Beyond dispute is the basic premise arising out of the U.S. Supreme Court opinion in *H.K. Porter*.⁸ The Board lacks the power to force a party into a contract. Recognizing this rule, the Board historically has limited its remedy for refusal to bargain and bad faith bargaining – absent egregious circumstances – to an order commanding an employer to stop its conduct and to prospectively bargain on a particular issue.⁹ Likewise, the Board has refrained from imposing damages when an employer exercises its right to appeal a bargaining unit decision to the courts of appeal after an election by refusing to recognize the union.¹⁰

This approach has been settled since the 1960s. But under the General Counsel’s approach – as bolstered by the opinion in *Noah’s Ark Processors* – an employer could have to pay for pursuing an impasse or merely seeking the opportunity for judicial review of a bargaining unit decision. Of course, the Board presently is reserving the compensatory damages remedy for the worst offenders who are found to have repeatedly failed to bargain. But General Counsel prosecutors have set their aim on making it a standard remedy.

In 2022, the General Counsel’s office filed a motion that sought to all but overturn the precedent limiting the Board’s remedy and in its place, substitute a complicated compensatory damage remedy that relies on comparing similar contracts to the allegedly bad faith negotiator. The formula would use “the average total compensation or average increase in total compensation employees could have expected to receive under the comparator collective-bargaining agreements.”¹¹ For manufacturers – who tend to employ many employees subject to the same negotiation – the comparator contract method could mean a hefty payment to employees for even a modest increase in compensation under a comparator contract.

³ Cornell University ILR, Labor Action Tracker 2022, 2022 Annual Report, at <https://www.ilr.cornell.edu/faculty-and-research/labor-action-tracker-2022> (accessed May 1, 2023).

⁴ Heidi Shierholz, Margaret Poydock, and Celine McNicholas, Economic Policy Institute at <https://www.epi.org/publication/unionization-2022> (accessed May 1, 2023).

⁵ Robert Combs, Bloomberg News at <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-charts-that-show-unions-picketing-power-in-2022> (accessed May 1, 2023).

⁶ Cornell University, *supra* note 4.

⁷ Archive at <https://web.archive.org/web/20211014165927/https://www.washingtonpost.com/business/2021/10/14/john-deere-workers-strike/>

⁸ *H. K. Porter Co. v. N. L. R. B.*, 397 U.S. 99, 108 (1970).

⁹ *Ex-Cell-O Corp.*, 185 NLRB 107, 110 (1970).

¹⁰ *United Steelworkers of Am., AFL-CIO v. N. L. R. B.*, 430 F.2d 519, 521 (D.C. Cir. 1970).

¹¹ *Pathway Vet*, *supra* note 2 at 55.

Negotiate Hard, But Prepare a Defense

Despite the apparent expansion of compensatory damages as a remedy, management should continue to use the full weight of its leverage in negotiations. But it also should have litigation in mind when making proposals and counteroffers. It will be important to establish a record to defend against surface bargaining and bad faith charges. The Board's recent opinions draw some clear lines about the difference between tough, good-faith negotiating and overly aggressive, bad faith negotiating that should guide management's approach to contract negotiations:

Use regressive proposals strategically and surgically.

In *Noah's Ark Processors*, the Board criticized the employer's "deeply regressive" proposals. Management should be careful about offers that categorically eliminate union and employee rights that existed in previous contracts such as dues checkoff and arbitration and grievance procedures that are relatively standard in most collective bargaining agreements.

That said, the Board has also recently held that it "is not bad-faith bargaining to begin negotiations by presenting a 'wish list' 'throw-in-the-kitchen-sink' kind of proposal that one frequently sees in a party's first proposal."¹² It is also not bad faith to make a specific proposal that would narrow union rights. Management should continue to develop leverage early in the negotiations by making proposals that place the employer in a stronger position than previous contracts. But it should also signal flexibility and a willingness to trade off concessions for gains in other areas of the contract.

Make a record of concessions.

The Board places significant weight toward bad faith on an unwillingness to "consider minor changes."¹³ Management should be open to small changes, especially if they are dug in on more significant issues. Having a record of concessions and a willingness to 'horse-trade' over issues will be essential to defending against a bad faith bargaining charge.

Keep the ball in the union's court.

Management also should try to have the last word or the last proposal, even if it is only a small change. Keeping the ball in the union's court will avoid accusations of delay and strengthen the argument that the employer should not be forced to negotiate against itself.

Express your leverage.

Management should make a record of why it believes it has the leverage to take a tough stance. The Board has expressly held that an employer can stand firm on significant issues if it "reasonably believes" it has sufficient bargaining power to force the union to agree.¹⁴

If It's Good for the Goose, Is It Good for the Gander?

The Board's compensatory damages remedy is clearly aimed at employers. But it has not expressly or categorically absolved a union from bargaining in bad faith. Unions can be in bad faith too.¹⁵ And if it is good for the employer, it should be good for the union as well. If the union is particularly recalcitrant or engaging in unfair tactics, the threat of "make-whole" remedies could pressure them to concede as well.

¹² *District Hospital Partners, L.P.*, 370 NLRB No. 118 (Apr. 30, 2021).

¹³ *Noah's Ark Processors*, 372 NLRB No. 80.

¹⁴ *District Hospital Partners, L.P.*, 370 NLRB No. 118 (Apr. 30, 2021).

¹⁵ *In Re Teamsters Loc. Union No. 122, Int'l Bhd. of Teamsters*, 334 NLRB 1190, 1195 (2001).

Employee Safety Committees - Balancing Risk With Reward

Heather MacDougall, Partner, Morgan Lewis
Tel: 305.415.3311, heather.macdougall@morganlewis.com

David Broderdorf, Partner, Morgan Lewis
Tel: 202.739.5817, david.broderdorf@morganlewis.com

Mark Stolzenburg, Partner, Morgan Lewis
Tel: 312.324.1733, mark.stolzenburg@morganlewis.com

Gwyneth Harrick, Associate, Morgan Lewis
Tel: 202.739.5070, gwyneth.harrick@morganlewis.com

ABSTRACT

Safety committees are a form of an employee engagement program, bringing to the manufacturing industry benefits important to a healthy and safe workplace. While safety committees bring employees from all levels of a company together to improve workplace safety, several factors are fundamental to their performance. However, even effective safety committees can present potential liability. If a safety committee's characteristics render it a "labor organization," it could trigger federal labor law liability. This article discusses how to maximize the value of safety committees for workplace safety and employee engagement, while minimizing legal issues under the National Labor Relations Act (NLRA).

Introduction

Safety is a core value in the manufacturing industry, leading many well-intentioned employers to establish workplace safety committees. These committees have numerous benefits, including increasing awareness of safety at the facility, assessing workplace risks and creating a plan (or making recommendations) to reduce or control risks, integrating safety and health priorities into the corporate culture, communicating safety initiatives, developing and updating policies and procedures, facilitating safety education and training, conducting and evaluating audits, and performing safety inspections. They also help facilitate worker engagement and can increase accountability both on employees' and management's part. Effective safety committees also help employers ensure Occupational Safety and Health Administration (OSHA) and state law compliance and signal employer commitment to improving safety.

But despite the various benefits safety committees bring, they also carry legal risks when a committee too closely mirrors a "labor organization," as broadly defined by federal labor law – the National Labor Relations Act (NLRA). Safety committees risk running afoul of the NLRA if they are considered labor organizations. They also can create incentives for unionization when not effectively managed.

As discussed in greater detail below, safety committees may be considered labor organizations where they are composed of employees, concern workplace conditions, "deal" with their employers, and represent their fellow employees. If labor organization status is established, potential liability arises when safety committees are employer-dominated. This occurs where an employer organized the group, determined the number of members, determined how members would be selected, set the agenda for meetings, established the rules

for the group's operation and/or how the group is organized, or provided facilities for the group and/or pays the organization's expenses.

Employers should proactively and strategically review their safety committees and/or deploy them to a greater extent within legal boundaries.

Effective Safety Committees

Safety committees create spaces for employees to feel heard and signal a united commitment to improving safety. Furthermore, these employee groups can better implement preventive solutions with their unique perspective, allowing for innovative and creative problem-solving, and leading to reduced injuries and incidents. A safety committee, ideally, should be a highly functioning team – supported by top levels of management, activity centered, results driven, and aligned with the company's overall goals and mission. What the safety committee works on will be unique to each company, but some elements of an effective safety committee include:

1. Assessment and Control of Hazards

A safety committee's basic purpose is to "find and fix" workplace hazards, leading to continual improvement even as responsibilities, duties, equipment, and work practices change. Employers committed to workplace safety often seek to address issues before issues arise, and the information they need to find solutions may already be available. Especially in manufacturing industries, the workers themselves often have the best perspective on safety risks and hazards, along with a vested interest in reducing those concerns and making their workplace as safe as possible. Thus, a safety committee involving workers can provide employers with additional information to identify and prepare for potential hazards in the workplace that might otherwise lead to injury. When accidents and incidents occur in the workplace, a safety committee can review them and determine what could be done differently to improve safety.

Safety audits or health and safety inspections are not "one and done" activities. Safety committees can review documented safety processes and procedures as a group to determine if there's a clearer way to communicate safety policies to front-line workers. OSHA recommends and [encourages](#) employers to implement safety committees to receive input from workers for this very reason. OSHA [regards](#) "hazard identification and assessment" as a core element of a safety and health program, and suggests safety and health committees as a potential source of the necessary information for identifying and addressing workplace hazards.

2. Compliance with State Law and Federal Regulations

At least 15 states [require or incentivize](#) the formation of safety committees at some or all workplaces.¹ On a national level, although OSHA does not require safety committees, the agency [lists](#) some of the reasons why employers should be implementing safety and health committees and states that "effective safety and health programs tap into workers' collective experiences, knowledge, and insights in order to find solutions to workplace safety and health challenges." Clearly, a dedicated group focused on safety generally promotes OSHA and regulatory compliance.

3. Worker Engagement: A Seat at the Table

Empowering workers to take control of the health and safety aspects of their jobs is critical to building and sustaining a strong organizational culture. Additionally, workplace [studies](#) have shown that employees want to feel that they have a say in how their workplace operates – in other words, a "voice" at work. Employees also expect meaningful work relationships, a strong sense of community, and purpose-driven work. Labor unions recognize this employee sentiment and [consistently](#) promise employees "a seat at the table," advertising unions as the only way that employees can have a voice at work. However, employee groups such as safety committees can also amplify employee voices without unionization and collective bargaining. Safety committee members can be on-the-job safety advocates and promote safety initiatives. They are additional eyes and ears in their work areas and can help identify and address potential problems for correction before incidents occur.

¹ Often, the state requirements target specific industries or employers with a certain number of employees, but the following states have varying laws addressing safety committees: Alabama, California, Colorado, Connecticut, Hawaii, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oregon, Tennessee, Vermont, Washington, and West Virginia.

Best practices for employee participation include:

- Maintain a reasonable rotation among committee members.
- Regularly communicate with employees about workplace safety and health matters.
- Provide ways for employees to become involved in safety education and training.
- Establish a way for employees to identify hazards and to make recommendations about appropriate ways to control those hazards.
- Provide prompt responses to such reports and recommendations.

Trust between employees and management may improve if a workforce sees that a safety committee is implementing safety measures to keep them healthy.

4. Transparency and Accountability

Safety committees often necessitate increased information sharing between an employer and its employees. As such, committee members often are more informed about the risks and injuries that take place, and exactly what the employer is doing to combat potential hazards. This level of transparency boosts morale and prevents injuries by providing employees with additional context for the procedures in place and what risks the procedures seek to avoid. Further, safety committees also promote employee accountability by making employees accountable to their peers when information about accidents and injuries get reported to the group.

The committee should keep meeting minutes or notes. Some states require safety committees to keep records of meetings. Meeting records should identify the issues discussed, as well as any recommendations or the committee's next actions. Employees who know that their company has an active safety committee, and are kept informed about it, are more likely to feel that the company is committed to safety.

Safety Committees' Potential to Violate the NLRA

Although the benefits associated with safety committees are clear, these groups may risk noncompliance with the NLRA. Safety committees risk running afoul of the NLRA, specifically Section 8(a)(2), if they are considered **labor organizations**, and if they are **employer-dominated**.

1. Safety Committees and "Labor Organization" Status

Under Section 2(5) of the NLRA, safety committees could be considered labor organizations if they meet the following criteria:

- 1) Employees participate; and
- 2) The organization exists, at least in part, for "dealing with" employers; and
- 3) The dealings concern conditions of work or other statutory subjects of bargaining such as grievances, labor disputes, wages, or hours of employment; and
- 4) An employee representation committee or plan is involved and represents the employees.

Safety committees are composed of employees and thus clearly satisfy factor "1." They also clearly implicate "3," as the National Labor Relations Board (NLRB) broadly defines conditions of work.

Less clear is factor "2" – whether such committees exist to "deal with" employers. The NLRB has [explained](#) that "dealing with" concerns a bilateral mechanism involving proposals from the employee committee, paired with real or apparent consideration of those proposals by management. This might look like a safety committee that meets every month and then makes proposals to the employer on points of workplace safety improvement, which could then either be accepted or rejected. An intuitive goal of safety committees would be raising identified shortcomings in safety or OSHA compliance and presenting these ideas to employers. This type of formalized process and bilateral communication would likely constitute "dealing with," thereby satisfying factor "2."

If “dealing” occurs, the focus then turns to whether the group is acting in a representational capacity (factor “4”). The nature of the communications between members of the group and employees at-large is [evidence](#) of whether the group is acting in a representational capacity. A group is acting in a representational capacity when members of the group communicate with employees about issues under consideration, and then report back to the group – such as the safety committee – about employee sentiment on those issues.

One [example](#) is a situation where group members solicited ideas from other employees for the purpose of reaching solutions that would satisfy the employee population. Additionally, polling employees to determine “majority sentiment” is also [evidence](#) of a representational capacity. Further, the group composition can also be evidence of whether the group is acting in a representational capacity. Attempting to secure representation from a broader cross-section of employees, whether across shifts and/or departments, and having members of the group canvass other employees before or after meetings is [evidence](#) of a representational purpose.

It is easy to envision how each of these factors could be triggered in the context of a safety committee. Of course, committees that do not make proposals or otherwise engage in back-and-forth with management, and lack clear representation, have minimal risk of violating Section 8(a)(2). Even robust committees may implicate Section 8(a)(2) and should be reviewed given the legal restrictions.

2. Safety Committees May Be Employer-Dominated

If a safety committee is considered a labor organization, then the next consideration is whether the employer dominates the committee. There are a number of facts that the NLRB [examines](#) to determine whether a group or organization is dominated by an employer, such as whether the employer organized the group, determined the number of members, determined how members would be selected, set the agenda for meetings, established the rules for the group’s operation and/or how the group is organized, and provided facilities for the group and/or pays the organization’s expenses.

Although most safety committees would default to employer “domination” under this framework, employers can attempt to avoid violation of Section 8(a)(2) by not providing additional compensation beyond normal wages to members for their participation, or by avoiding funding the committee generally, and by being employee-driven with little or no management control or involvement. The downside here is the committee may be less structured, less effective, and in some cases, *more* similar to a labor union.

Navigating a Complicated Landscape

In 2022, the NLRB, tasked with enforcing the NLRA, found that T-Mobile violated Section 8(a)(2) because of one of its employee committees. T-Mobile set up a “T-Voice” committee as a vehicle through which customer service reps (CSRs) could report work-related issues. The company paid CSRs to serve as T-Voice representatives for four hours per week to solicit, collect, and report to management concerns submitted by their co-workers. The NLRB found that T-Voice met the representation requirement and “dealt with” the employer, making the committee a labor organization. By paying its representatives and being set up by the employer, the committee was sufficiently employer-dominated to be considered unlawful.

Overall, employers with safety committees in place or considering establishing a safety committee should consider the following:

- Avoiding formal processes where employees offer collective or group proposals or recommendations to the safety committee or management.
- Having managers and supervisors participate to primarily listen and obtain feedback (think suggestion box) and report on safety developments or information.
- Designating a manager or supervisor as the safety committee lead, rather than a member employee.
- Allowing employees to volunteer their participation upon request by management, without formal representational elections or employee selection schemes.

Conclusion

Employee engagement programs, such as safety committees, provide numerous benefits to employers and amplify employee voices. Especially as interest in labor unions and collective bargaining [grows in the United States](#), employers may consider safety committees as an effective tool to promote employees' voices without collective bargaining. Yet, an employee committee that acts like a "labor organization" can violate Section 8(a)(2) if created and controlled by management. Thus, employers should be mindful of the specific characteristics and functions of their committees. In doing so, employers and employees alike can reap the many benefits of safety committees without sacrificing their utility to the potential pitfalls imposed by the NLRA.

Controlling Your Collective Bargaining Narrative

Robert Moll, Managing Director, IRI Consultants
Tel: 313-965-0350, rmoll@iriconsultants.com

ABSTRACT

The power dynamic between employee and employer has shifted with a tight labor market, the Great Resignation, and a pro-union Administration in Washington. Because of this, employers with union-represented workers should take advantage of their right to free speech and develop a strategic plan to begin communicating with their stakeholders before contract negotiations. Robert Moll, a managing director at IRI Consultants who specializes in labor communications and issues management, shares five key actions that communicators should take to control their organization's [collective bargaining narrative](#), avoid a crisis escalation, and build trust with employees.

The employer-employee power dynamic has shifted with a tight labor market, the Great Resignation, and a pro-union Administration in Washington. Almost daily it seems there is news of another labor strike or at least the threat of a union leading workers off the job.

Employers with union-represented workers need to have a well-developed plan and begin communicating with their stakeholders before contract negotiations.

Unions commonly deploy a “corporate” (also known as a “contract”) campaign strategy to compel an employer to agree to demands at the bargaining table or risk the organization’s reputational and financial well-being.

Negotiations – like union organizing campaigns – can quickly escalate into a crisis when the union begins to engage the firm’s executives, board members, customers, suppliers, the media, community and faith-based leaders, politicians, regulatory bodies, and others.

“The corporate campaign is designed to appeal to an underlying distrust of big business. It is perhaps best understood as a morality play in which the union...defines standards of conduct that reflects its own interests, challenges the target company to meet these standards, and then portrays

the company as a social outlaw when it proves unwilling or unable to do so,” wrote Jarol B. Manheim in “Corporate Campaigns: Labor’s Tactics of the “Death of A Thousand Cuts.”

Historically, employers have allowed unions to control the narrative around labor-management relations, primarily because under the National Labor Relations Act (NLRA), employers have limited means to mitigate union activities.

But employers can tell their side of the story, and today, many are choosing to do so. Federal labor law guarantees employers the right of free speech, which includes communicating directly with employees during negotiations about the collective bargaining process and related issues.

Through frequent and timely communications with internal and external stakeholders, employers can put the reality of their situation in context by explaining the rationale for their contract proposals. A clear narrative helps build trust before the employer has to react or respond to union rhetoric.

Employers’ communications, labor, and legal teams must carefully design a communications strategy and develop materials that comply with the NLRA. To ensure compliance, the bargaining team and legal counsel should review all

materials. Generally, the law prohibits:

- Communication intended to bypass the union as the employee's exclusive bargaining representative
- Threats and promises to employees that are intended to erode employee support for the union

Employers should be open in discussing facts, opinions, and examples in support of their contract proposals. It's also essential, even when facing incendiary union rhetoric, to use a balanced tone and focus on presenting facts that minimize the risk of inflaming the situation.

Here are five key actions that communicators should take to control their organization's narrative:

Craft Messages in Advance

Under the pressure and time constraints of negotiations, one of the most significant challenges is researching an issue, developing the message, and getting necessary approvals. Where possible, communicators should conduct a corporate campaign vulnerability assessment to identify hot-button topics, consult with subject matter experts, and prepare proactive and reactive messaging. They also should create a playbook that will provide tailored messages for managers, employees, and outside constituencies to ensure the organization is ready to respond should an issue emerge.

Often, the first to communicate frames the debate. By getting messages and materials distributed quickly, the employer can better control the narrative.

Establish the Channels

Employers' communications teams should honestly assess existing communications channels to determine whether they reach the right audience effectively. These channels may include email, text messaging, in-app content, podcasts, videos, websites, and more. Establishing the communication channels in advance of negotiations provides a reliable platform and trusted source for factual information.

Note that it's important to explore two-way communication channels: ways for employees to share questions and

comments about negotiations and get prompt answers from management.

In preparation, employers' communications teams should review issues raised during past negotiations and research bargaining the union has conducted elsewhere to identify vulnerabilities and predict union messaging. Then, employers can anticipate the union's communications playbook to create a more complete, compelling narrative that could preempt the union's narrative or provide a counterbalance if the union gets ahead of the employer's message.

Demystify the Process

Traditionally, contract negotiations took place behind closed doors, with little transparency beyond the bargaining table. While attorneys, labor relations professionals, and union representatives may understand the contract negotiations process, front-line managers, employees, and the general public may not.

Many managers and employees wonder about informational picketing, worry there may be a strike, and are uncertain about what is fact and what is rumor.

Employers can reduce anxiety by educating managers and employees on the negotiations process and providing periodic updates as appropriate.

Provide Managers with Skills and Tools

Too often, the managers who interact daily with unionized employees are ill-equipped to dispel rumors and respond to questions about bargaining. These managers can end up learning about what's happening from employees rather than leadership.

Studies demonstrate that interactive, face-to-face conversations between a supervisor and employee are the most effective workplace communications channel. Managers can be trained in the "do's and don'ts" of legally and effectively communicating during negotiations. Training can help them preview the issues and scenarios they may face. Regular touch-base meetings between management and front-line leaders also provide a valuable opportunity for communicators to learn

what messages are resonating in the workplace, hear what employees are talking about, and answer managers' questions.

A consistent message, driven by the employer's communications team and reinforced by managers, helps support the employer's bargaining objectives and keep employees focused on the work at hand.

Provide Timely, Fact-Based Information

Employers' communications teams can support the negotiations team by preparing and distributing materials, including factsheets and Q&As, explaining the rationale behind the organization's proposals and respond to anticipated employee questions.

To add legitimacy to messages, draw upon publicly available information from third parties, like trade associations and non-partisan foundations, to explain the rationale for bargaining positions. Employers can build trust by encouraging employees to gather information from sources besides the employer or union.

By establishing communication channels, preparing a playbook, demystifying the process, and offering the knowledge and skills teams need to communicate effectively, employers can be better prepared to control the narrative around the collective bargaining process, and minimize the impacts that can occur if negotiations take a turn for the worse.

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Employers Must Prepare Now to Avoid Card Check Recognition and Bargaining Orders

Mark Codd, Managing Director, IRI Consultants
Tel: 313-965-0350, mcodd@iriconsultants.com

Mike Lake, Managing Director, IRI Consultants
Tel: 313-965-0350, mlake@iriconsultants.com

ABSTRACT

The National Labor Relations Board recently overturned decades of federal labor law precedent with its decision in *Cemex Construction Materials Pacific, Inc.*, which restored a modified version of the Joy Silk doctrine making card recognition and bargaining order procedures a way to unionize employees. The NLRB also changed the Board's election process and reinstated expedited or "quickie" elections. This article includes a detailed summary of these new rules and outlines immediate steps, as well as short- and long-term strategies, employers should consider to avoid card check recognition and bargaining orders, and protect their organizations.

The National Labor Relations Board (NLRB) recently changed the Board's election process and reinstated expedited or "quickie" elections. The Board also overturned decades of federal labor law precedent with its decision in *Cemex Construction Materials Pacific, Inc.*, which restored a modified version of the Joy Silk doctrine making card recognition and bargaining order procedures a way to unionize employees.

Cemex Decision: Key Points

- Unions can use a "card check" process as an alternative to NLRB secret ballot elections
- A union can claim it has support for unionization from a simple majority (50% + 1) of a proposed bargaining unit and demand employer recognition. Employers now have only three options:
 - 1 - Recognize the union and begin the bargaining process
 - 2 - File within two weeks an RM petition for an election
 - 3 - Ignore the union demand and risk a bargaining order without a secret ballot election

- If an employer files a petition opting for an NLRB election for its employees and commits even a single unfair labor practice (ULP), the NLRB could dismiss the RM petition (or overturn an election a union has lost) and require the employer to recognize the union and begin bargaining.

Take Action Now

It is possible the Cemex decision will be challenged in federal court, but that process and a resolution could take years and judges often defer to federal agencies' rulemaking and decisions except under certain circumstances, making it difficult to reverse the Board's new initiatives. In the meantime, unions have already begun leveraging the decision. Within days of the Cemex decision, the union labeled "Trader Joe's United", which lost an election last April, asked the NLRB to issue a bargaining order against Trader Joes under Cemex.

Employers have three immediate actions they can take to get ahead of union activity.

1. **Labor Training for Leaders** – Managers and supervisors must be fully trained on labor organizing fundamentals, know the law, and be prepared to quickly act. Whether new

or refresher training, leaders must know the new rules and focus on compliance As well as prepare for CEMEX scenarios.

2. **Union Vulnerability Assessment (UVA)** – It is imperative that employers know their vulnerabilities and be prepared for new organizing tactics by labor unions. UVAs give leaders a better insight on what to expect.
3. **Labor Relations Readiness Assessment** – Organizations must understand their current state of labor readiness. This assessment will provide recommendations to develop a road map for prioritizing and taking expedited, appropriate action to minimize identified risks.
4. **Digital Media Intelligence** – Along with preparing the internal team, it is equally important to leverage Digital Media Intelligence to understand the external public discourse regarding labor issues in the employer's region.
5. **Petition Proximity Alerts** – Employers must maintain an awareness of NLRB election activity filed by both employers as well as unions in some radius proximity to their facilities.

Consider These Short- and Long-Term Strategies to Protect Your Organization

For the foreseeable future, employers should focus on short- and long-term measures to protect their organizations by educating employees, training managers, and addressing issues. The most effective approach to minimize a union's success in organizing an employer's workforce is ensuring employees have the facts, promoting an engagement mindset to address employee concerns and questions, and prepare your workforce to ask union organizers the details about claims they make in the organizing process. Below are steps employers should take in the short-term (the next 90 days) as well as over the next six (6) to 12 months to prepare for the post-Cemex environment.

Short-Term Steps

- Develop a written philosophy statement regarding your organization's position on unions and distribute in new hire orientation, employee handbooks, newsletters, and websites, etc.

- Prepare a playbook in the event a request for recognition is made by a union.
- Prepare a expedited campaign plan and sample themes and messages for a multi-phase campaign that can be shortened or lengthened for the allotted election period.
- Conduct a supervisory status analysis to determine which individuals, managers, and supervisors are under the National Labor Relations Board's definitions so your organization does not inadvertently violate the NLRA when it conducts training or asks managers and supervisors to help educate employees about your position on unions and their legal rights.
- Train managers and supervisors and role-play how to recognize early warning signs of union activity and to whom to report the activity as well as how to engage in legal, effective conversations with employees about unions.
- Educate employees about union organizing tactics and promises unions may use to try to convince employees to sign physically or electronically a union authorization card or petition for representation and the importance of protecting their signature and other personal information.
- Require every manager and supervisor to develop and practice their personal statement regarding unionization.
- Utilize a Petition Proximity Alert to be alerted of NLRB election petitions being filed near your locations.
- Develop a robust digital media intelligence plan to be informed of union organizing tactics and employee unrest in your industry and area.
- Train security staff on how to legally enforce employer property rights.
- Review all policies and procedures to ensure they will not be construed to violate employees' NLRA Section 7 rights and trigger unfair labor practice charges.

Long-Term Steps

- Conduct employee opinion surveys twice a year along with pulse surveys throughout the year to be aware of low employee satisfaction areas/locations.

- Measure employee satisfaction and tie it to individual managers for promotional consideration.
- Up skill corporate communication staff on how to effectively and legally communicate within the nuances of labor relation laws.
- Develop a readiness response team who can support local management and respond quickly when early warning signs are reported.
- Develop a Statement of Position regarding supervisor status and preferred bargaining unit so you are prepared for expedited election rules.
- Develop and test the employer's ability to generate accurate voter eligibility lists per NLRB requirements.
- Conduct regular market analysis on compensation and benefits to support job evaluation and pay structures.
- Keep management labor skills sharp with regular updates (at least quarterly) and to provide labor and NLRB updates.

Conclusion: Although the NLRB overturned decades of federal labor law precedent with its decision in *Cemex Construction Materials Pacific, Inc.* and announced a new framework for determining when employers are required to bargain with unions without a representation election, employers have options to protect their organization. Educating employees, training managers, and addressing issues helps you get ahead of union activity in the post-Cemex environment. Empowering employees to get the facts and make decisions on what's best for them and their families, while preparing employees to ask union organizers the details about the claims the union makes during the organizing process and to understand the ramifications before even considering to sign a union authorization card.

APPENDIX A

SUMMARY OF PETITIONS FILED AND ELECTIONS HELD

All Industries – Summary of Petitions Filed and Elections Held (2013 - 2022)										
	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total Petitions	2,553	2,616	2,596	2,286	2,280	1,921	2,039	1,556	1,685	2,501
Total Representation (RC) Petitions	2,033	2,129	2,168	1,918	1,880	1,557	1,737	1,309	1,385	2,162
Union Not Elected	461	436	453	354	372	322	299	240	243	403
Union Elected	889	995	1,096	964	981	796	917	596	738	1,206
Total Decertification Petitions (RD and RM)	520	487	428	368	400	364	302	247	300	339
Total RM Petitions	57	48	58	57	62	31	42	46	29	26
Total RD Petitions	463	439	370	311	338	333	260	201	271	313
Union Not Elected	136	130	127	123	144	120	113	61	96	109
Union Elected	86	67	79	69	71	60	60	51	61	59

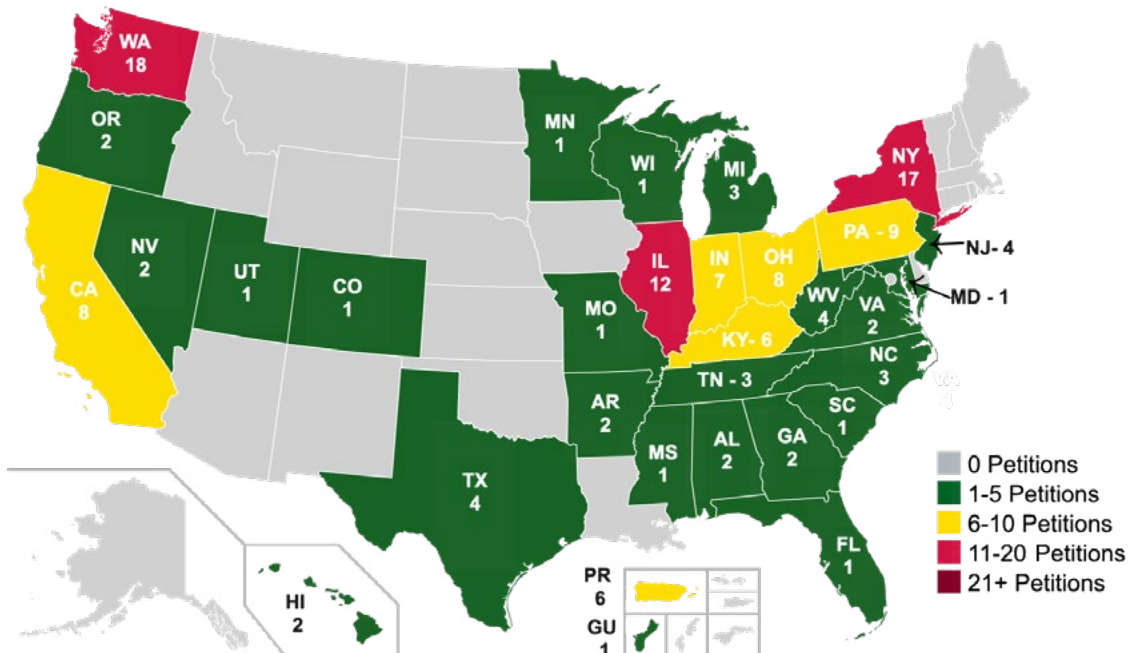
Transportation and Warehousing Industry – Summary of Petitions Filed and Elections Held (2013 - 2022)										
	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total Petitions	282	301	284	232	233	227	206	183	189	235
Total Representation (RC) Petitions	206	217	225	188	181	177	154	143	136	153
Union Not Elected	71	81	94	72	63	70	52	49	52	58
Union Elected	77	68	67	61	59	61	55	47	54	52
Total Decertification Petitions (RD and RM)	76	84	59	44	52	50	52	40	53	82
Total RM Petitions	6	7	6	4	8	8	7	5	7	13
Total RD Petitions	70	77	53	40	44	42	45	35	46	69
Union Not Elected	30	24	24	20	20	23	23	13	14	27
Union Elected	11	13	10	9	9	7	11	14	13	18

All Non-Transportation Industries – Summary of Petitions Filed and Elections Held (2013 - 2022)										
	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total Petitions	2,271	2,315	2,312	2,054	2,047	1,694	1,833	1,373	1,496	2,266
Total Representation (RC) Petitions	1,827	1,912	1,943	1,730	1,699	1,380	1,583	1,166	1,249	2,009
Union Not Elected	390	355	359	282	309	252	247	191	191	345
Union Elected	812	927	1,029	903	922	735	862	549	684	1,154
Total Decertification Petitions (RD and RM)	444	403	369	324	348	314	250	207	247	257
Total RM Petitions	51	41	52	53	54	23	35	41	22	13
Total RD Petitions	393	362	317	271	294	291	215	166	225	244
Union Not Elected	106	106	103	103	124	97	90	48	82	82
Union Elected	75	54	69	60	62	53	49	37	48	41

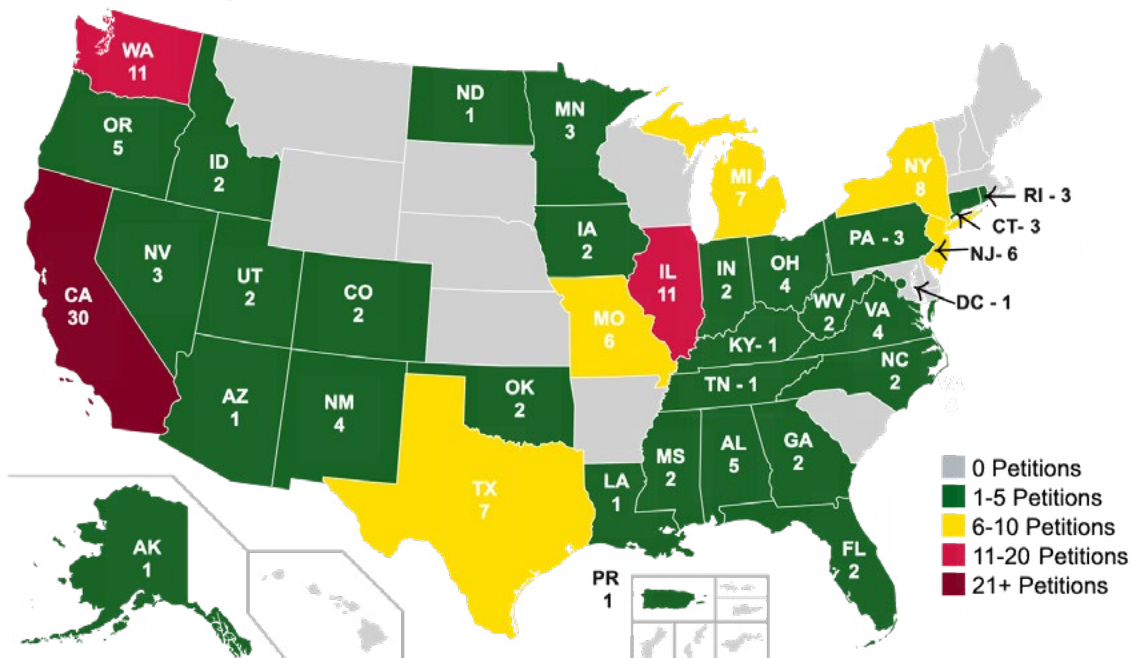
APPENDIX B

MAPS OF REPRESENTATION (RC) PETITIONS FILED IN MANUFACTURING

2021



2022



APPENDIX C

THE NATIONAL LABOR RELATIONS BOARD DEFINITIONS

WHAT IS 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, the NLRB is not part of any other government agency, such as the Department of Labor.

Congress has empowered the NLRB to conduct secret ballot elections so employees may exercise a free choice whether a union should represent them for bargaining purposes. A secret ballot election will be conducted only when a petition requesting an election is filed. Such a petition should be filed with the Regional Office in the area where the unit of employees is located. All Regional Offices have petition forms that are available upon request and without cost.

TYPES OF PETITIONS

1) CERTIFICATION OF REPRESENTATION (RC)

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

2) DECERTIFICATION (RD)

This petition, which can be filed by an individual, seeks an election to determine whether the authority of a union to act as a bargaining representative of employees should continue. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit represented by the union. These signatures may be on separate cards or a single piece of paper. This showing of interest contains a statement that the employees do not wish to be represented for collective-bargaining purposes by the existing labor organization. The showing of interest must be signed by each employee, and each employee’s signature must be dated.

3) WITHDRAWAL OF UNION-SECURITY AUTHORITY (UD)

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

4) EMPLOYER PETITION (RM)

This petition is filed by an employer for an election when one or more unions claim to represent the employer's employees or when the employer has reasonable grounds for believing the union that 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 (UC)

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.



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