



LABOR ACTIVITY IN RETAIL

ANNUAL REPORT
Spring 2022

ABOUT THIS REPORT

The 2nd annual Retail Industry Leaders Association (RILA) Labor Activity in Retail Report includes the following:



An analysis of national and state representation petitions and elections (RC, RD, and RM) as reported by the National Labor Relations Board (NLRB) during 2020 and 2021



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

A LETTER FROM OUR CEO

The retail sector continues to face incredible challenges as supply chain issues worsen, and many employees have chosen not to return to work or have left the workforce altogether. This comes at a time when leaders at the National Labor Relations Board (NLRB) and the White House seem determined to make an incredible shift to pro-union policies that harm the retail industry.

In this report, you'll find the latest data on union organizing and membership across the nation, as well as four articles about timely labor and employee relations topics.

In April, NLRB General Counsel Jennifer Abruzzo, a 2021 nominee of President Joe Biden, issued a memo stating that she will ask the board to find that it is an unfair labor practice for employers to require workers to attend pro-company meetings, referred to by union supporters as "captive audience meetings," during union organizing efforts. The memo also states that Abruzzo plans to make it a violation if employees are

"cornered by management" while performing their jobs to talk to them about unionization.

The new opinion comes despite more than 75 years of precedent in which the NLRB has allowed these types of employee engagements.

Abruzzo argues that these types of mandatory meetings, during which employers present arguments against forming a union, "inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech."

The memo doesn't change current rules, but it is a signal that the NLRB will begin looking to issue unfair labor practice charges and look for test cases to use in order to issue rulings that set new precedents. Abruzzo stated she plans to issue a formal brief for board members to consider.

In addition to the recent NLRB general counsel ruling, the White House Task Force on Worker Organizing and Empowerment released a strikingly pro-union report in February that includes 70 recommendations "that, when implemented, will promote worker organizing and collective bargaining for federal employees and for workers employed by public and private-sector employers."

The Task Force, which was chaired by Vice President Kamala Harris and U.S. Secretary of Labor Martin Walsh, was created by President Biden in April 2021. Its members include more than 20 Cabinet members and heads of other federal agencies.

The stated goal of the report is to "remove longstanding barriers to (union) organizing." Report recommendations are designed to do three things:

- Position the federal government as a model-actor.
- Use the federal government's authority to support worker empowerment by providing information, improving transparency, and making sure existing pro-worker services are delivered in a timely and helpful manner.
- Use longstanding authority to leverage the federal government's purchasing and spending power to support workers who are organizing and pro-worker employers.



"... employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech."

- NLRB General Counsel Jennifer Abruzzo

Whether you are an employer who provides federal contract services and interacts with state and federal agencies, or you are operating in the private sector with no government interaction, the sweeping recommendations included in this new report have the potential to impact you, your employees, your customers, and your vendors.

This effort by the Biden administration is an effort to support and strengthen unions and union organizing in the U.S. These policy recommendations are an alternative to already proposed legislative measures like the PRO (Protecting the Right to Organize), which was passed by the House of Representatives on March 9, 2021.

Retail leaders know all too well the challenges they have been facing with short supplies of goods and labor, as well as disruptions created by the ongoing shift to online shopping. The conditions, which have a negative impact on employees at all levels, have emboldened unions, as evidenced by 133 representation (RC) petitions filed in the retail industry in 2021 compared to 75 petitions in 2020. Unions also won 67 percent of representation elections held in 2021.


Efforts to increase staff and attract talented employees often serve to exhaust the problems of retaining qualified employees because increases in starting pay and sign-on bonuses can be negatively viewed by current employees.

Union organizers have seized these opportunities to increase their focus on exploiting the challenges and preying on the retail industry.

As an organization, there are some specific things you should be doing now to prepare for this new era of union organizing and potential wide sweeping pro-labor changes:

- Reassessing Your Labor Readiness and Preventative Strategies
- Building Robust Communication, Social Media and Digital Strategies
- Educating Your Executive Team, Board Members, and Other Stakeholders
- Engaging Your Public Affairs, Communications, and Government Relations Staff
- Providing Current and updated Labor Relations Training

IRI Consultants and RILA look forward to continuing to support the retail industry as we face the challenges ahead together.



Bob Long
CEO
IRI Consultants



TABLE OF CONTENTS

EXECUTIVE SUMMARY	5
UNION MEMBERSHIP NATIONWIDE	6
NATIONAL LABOR RELATIONS BOARD PETITION AND ELECTION RESULTS	8
NATIONAL SUMMARIES	9
STATE SUMMARIES	11
UNION SUMMARIES	14
STRIKES IN RETAIL	16
LABOR LAW/ACTIVITY UPDATE	17
The Age of Affiliation: 2022 Labor Relations in the Retail Industry	18
The Shifting Focus of the NLRB	22
Multi-Agency Enforcement, Employer Speech Restrictions, and Card Check Elections: NLRB General Counsel's Growing Crusade Against Employers	26
The Value of Employee Voice In Retail	30
APPENDIX A	36
APPENDIX B	37
APPENDIX C	38

EXECUTIVE SUMMARY

NLRB REPRESENTATION PETITIONS AND ELECTIONS^{1,2}

There were 133 representation (RC) petitions filed in the retail industry in 2021 compared to 75 petitions in 2020.

A decade-high 85 representation elections were held in the retail industry in 2021. This was more than double the 40 elections held in 2020. Unions were elected as a result of 67% of representation elections held in 2021. The number of representation elections held in 2020 was affected by the NLRB's decision on March 19, 2020, to suspend all elections in light of the COVID-19 pandemic. The NLRB officially resumed conducting elections on April 3, 2020, albeit the majority of elections have continued to be held by mail. Mail ballots typically result in longer time frames between the petition date and the tally of ballots.

The majority of organizing activity in the industry occurred in just six states – Illinois, California, Oregon, New York, Washington, and Massachusetts. They accounted for 72% of all petitions filed and 74% of all elections held.

The United Food and Commercial Workers (UFCW) remains the most active union in the retail industry accounting for 56% of all petitions filed and 51% of all elections held. UFCW was elected as a result of 74% of the 43 elections they were involved in. The next most active unions in the industry were the International Brotherhood of Teamsters (IBT) and the International Association of Machinists and Aerospace Workers (IAM).

Over the past decade, the most strikes in the retail industry were held in Illinois, California, and New York. In 2021, there were ten strikes held idling a total of 8,655 workers.



The majority of organizing activity in the retail industry occurred in just six states – Illinois, California, Oregon, New York, Washington, and Massachusetts. They accounted for 72% of all petitions filed and 74% of all elections held.

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

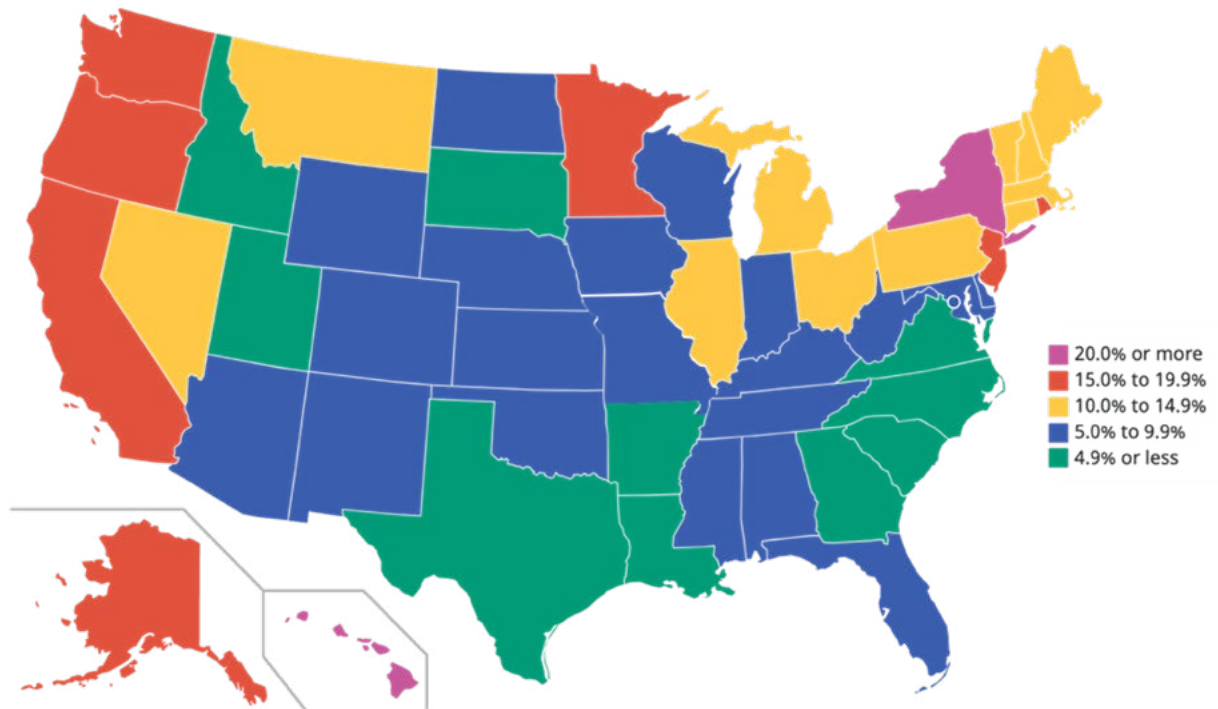
² NLRB election data describes dynamic case activity that is subject to revision and corrections during the year, and all data should be interpreted with that understanding.

UNION MEMBERSHIP NATIONWIDE

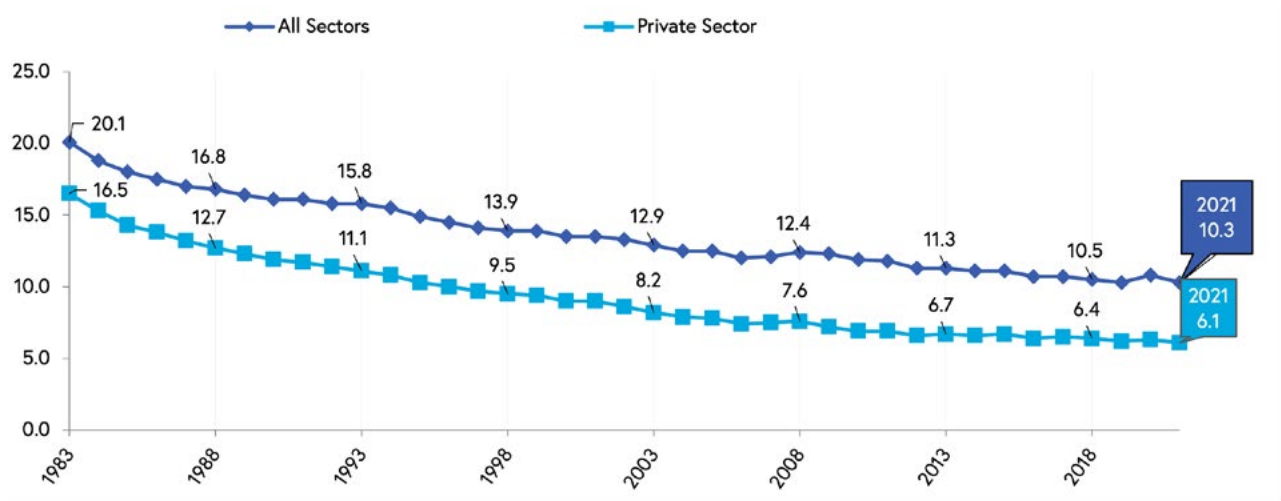
According to the Department of Labor (DOL) Bureau of Labor Statistics' Union Members – 2021 report, the percentage of unionized wage and salary employees decreased to 10.3%. This number is the same as 2019, reverting back from an increased rate of 10.8% in 2020 due to a disproportionate drop in the number of non-union workers compared to union workers during the pandemic.

Data from the DOL report include the following highlights:

- The union membership rate was 10.3% in 2021 – down from 10.8% in 2020
- Public sector employees continue to be more than five times as likely to be members of unions than private sector employees (33.9% vs. 6.1%, respectively)
- Black workers continued to have the highest union membership rate in 2021 (11.5%), followed by Whites (10.3%), Hispanics (9.0%), and Asians (7.7%)
- The highest union membership rate is tied among men and women aged 45 to 54 (13.1%), while the lowest is among women aged 16 to 24 (3.2%)
- Among states, Hawaii maintains the highest union membership rate (22.4%), and South Carolina has the lowest rate (1.7%)
- Union membership rates increased in 15 states and the District of Columbia, decreased in 34 states, and remained unchanged in one state



UNION MEMBERSHIP RATE SUMMARY



NATIONAL LABOR RELATIONS BOARD PETITION AND ELECTION RESULTS

This section includes the following:

NATIONAL SUMMARIES

- Comparison of retail versus all non-retail representation (RC) election results
- Comparison of retail versus all non-retail decertification (RD & RM) results
- Retail industry – Overview of elections

UNION SUMMARIES

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

STRIKES IN RETAIL

- Strikes held by year in retail

STATE SUMMARIES

- Most active states – RC petitions filed & RC election results
- All states – RC petitions filed
- All states – RC election results

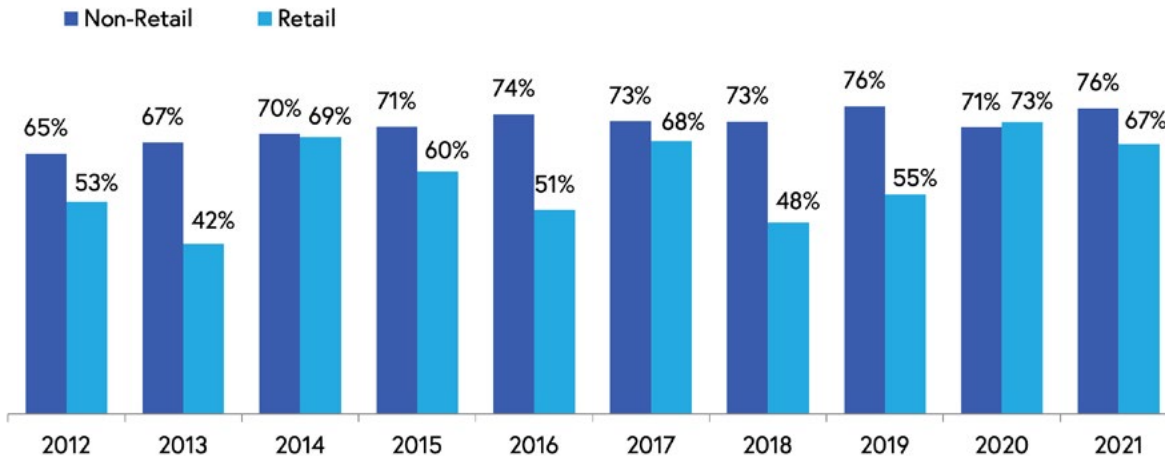


NATIONAL SUMMARIES

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

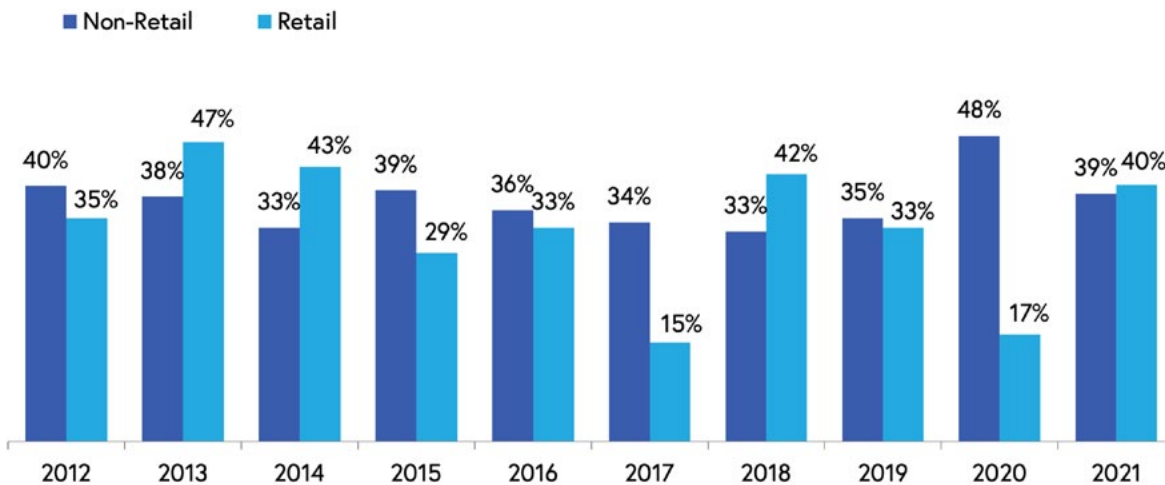
UNION WINS IN REPRESENTATION ELECTIONS

Unions were elected as a result of 67% of representation elections held in the retail industry in 2021. In non-retail industries, unions were elected in 76% of elections.



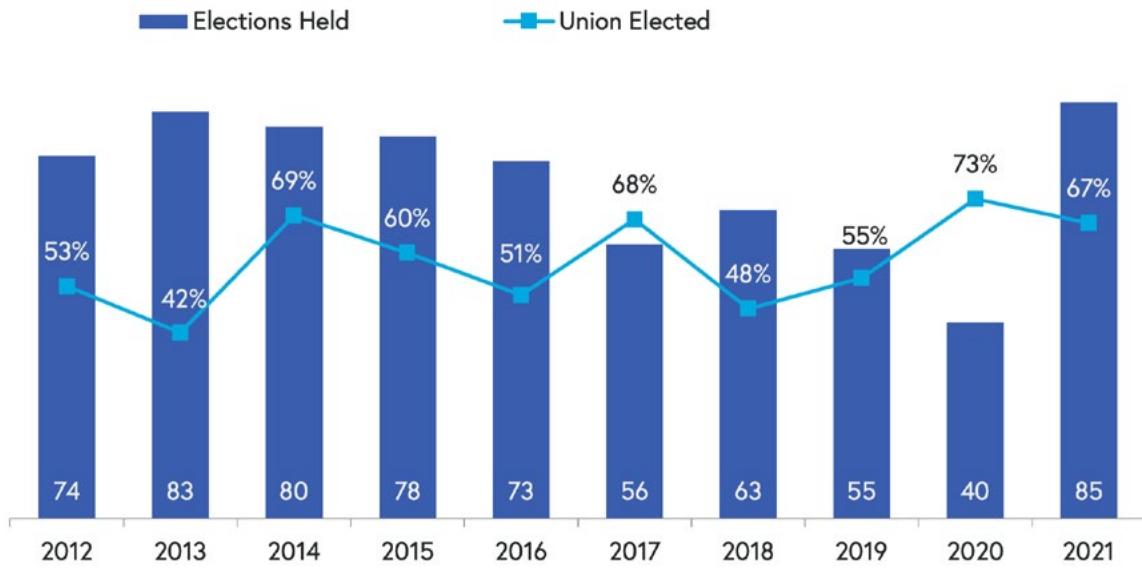
UNION WINS IN DECERTIFICATION ELECTIONS

In decertification elections, unions maintained recognition as a result of 40% of elections held in retail compared to 39% in non-retail industries.



RETAIL INDUSTRY – ELECTIONS OVERVIEW

A record-high 85 representation elections were held in the retail industry in 2021. This was more than double the number of elections held in 2020. Unions were elected as a result of 67% of the elections held in 2021, compared to 73% in 2020.

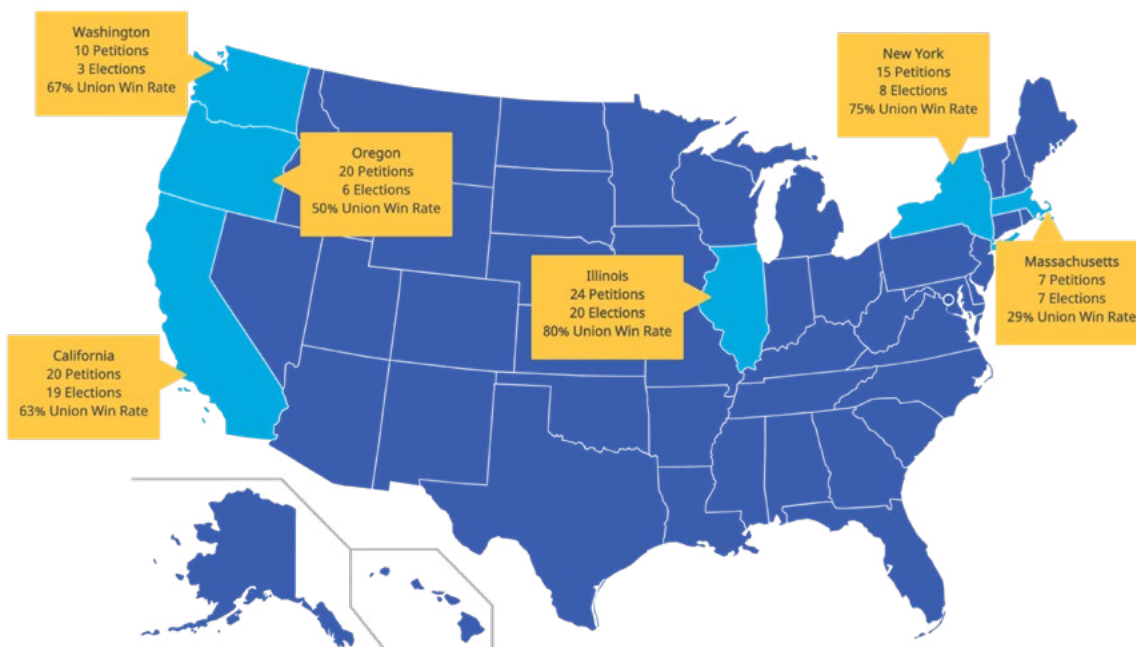


STATE SUMMARIES

This section provides an analysis of state-level organizing activity in the retail industry and is based on RC petitions filed and RC elections held. The data includes all reported petitions and elections for 2020 and 2021 at the time of publication.

MOST ACTIVE STATES – PETITIONS FILED & ELECTIONS HELD

In 2021, 72% of all petitions filed in the retail industry were filed in just six states – Illinois, California, Oregon, New York, Washington, and Massachusetts. Illinois had the most petitions filed and the highest union win rate of any state. The lowest union win rate was in Massachusetts – unions were elected in just 29% of the seven representation elections held. Details about petitions filed and elections held in other states can be found in the tables on the next page.



ALL STATES – REPRESENTATION PETITIONS FILED IN RETAIL

The table below details the number of representation petitions filed in each state during 2020 and 2021. States are not included in the table if no petitions were filed in either year. There were significantly more petitions filed in 2021 than in 2020.

State	2020	2021	State	2020	2021	State	2020	2021
California	14	20	Maryland	1	-	Ohio	1	3
Colorado	4	5	Massachusetts	6	7	Oregon	2	20
Connecticut	1	1	Michigan	3	1	Pennsylvania	2	1
District of Columbia	-	1	Minnesota	1	5	Rhode Island	-	2
Hawaii	-	1	Missouri	1	4	Tennessee	-	1
Idaho	1	2	New Hampshire	-	2	Texas	2	1
Illinois	14	24	New Jersey	3	3	Washington	3	10
Indiana	4	-	New Mexico	-	1	Wyoming	3	1
Kansas	1	2	New York	6	15	Total	75	133
Kentucky	1	-	North Carolina	1	-			



ALL STATES – REPRESENTATION ELECTION RESULTS IN RETAIL

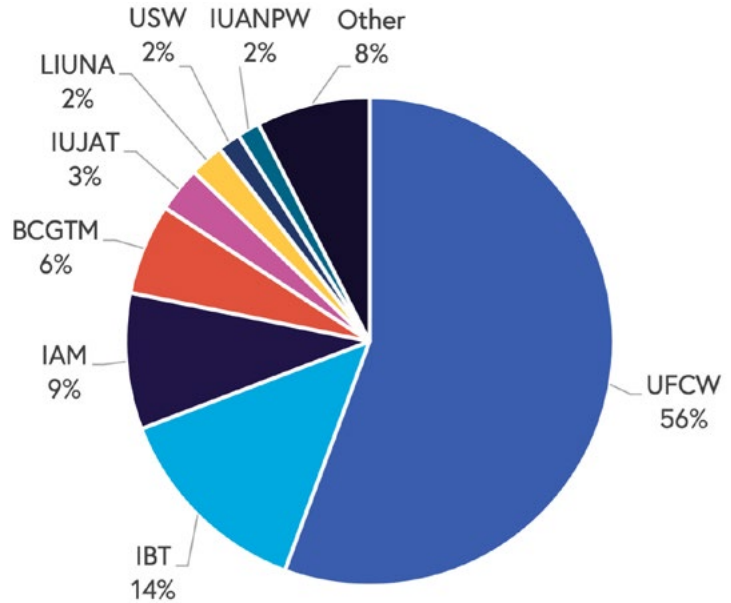
The following table depicts the number of representation elections held in each state in the retail industry in 2020 and 2021. States are not included in the table if no elections were held in either year.

State	2020					2021				
	Total Elections	Union Elected		Union Not Elected		Total Elections	Union Elected		Union Not Elected	
		Count	Win Rate	Count	Win Rate		Count	Win Rate	Count	Win Rate
California	8	8	100%	0	0%	19	12	63%	7	37%
Colorado	2	-	-	2	100%	4	4	100%	0	0%
Connecticut	-	-	-	-	-	1	0	0%	1	100%
Hawaii	-	-	-	-	-	1	1	100%	0	0%
Idaho	1	1	100%	0	0%	-	-	-	-	-
Illinois	6	4	67%	2	33%	20	16	80%	4	20%
Indiana	2	2	100%	0	0%	1	0	0%	1	100%
Kansas	1	-	-	1	100%	1	1	100%	0	0%
Kentucky	-	-	-	-	-	1	1	100%	0	0%
Massachusetts	2	1	50%	1	50%	7	2	29%	5	71%
Michigan	-	-	-	-	-	1	0	0%	1	100%
Minnesota	1	1	100%	0	0%	3	3	100%	0	0%
Missouri	1	1	100%	0	0%	1	1	100%	0	0%
New Hampshire	-	-	-	-	-	2	1	50%	1	50%
New Jersey	2	2	100%	0	0%	1	1	100%	0	0%
New Mexico	-	-	-	-	-	1	0	0%	1	100%
New York	6	5	83%	1	17%	8	6	75%	2	25%
Ohio	-	-	-	-	-	1	0	0%	1	100%
Oregon	2	2	100%	0	0%	6	3	50%	3	50%
Pennsylvania	-	-	-	-	-	1	1	100%	0	0%
Rhode Island	-	-	-	-	-	1	1	100%	0	0%
Texas	2	1	50%	1	50%	1	1	100%	0	0%
Washington	1	0	0%	1	100%	3	2	67%	1	33%
Wyoming	3	1	33%	2	67%	-	-	-	-	-
Total	40	29	73%	11	28%	85	57	67%	28	33%

UNION SUMMARIES

MOST ACTIVE UNIONS – REPRESENTATION PETITIONS FILED IN RETAIL IN 2021

The United Food and Commercial Workers remained the most active union in the retail industry in 2021. They accounted for more than half of all petitions filed in 2021. The 74 petitions filed by UFCW were more than four times as many petitions as the next most active union, the Teamsters.

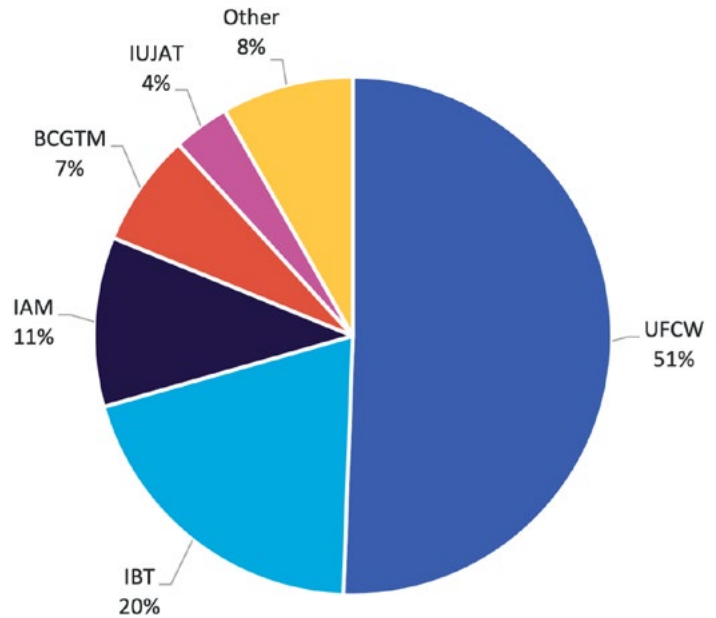


MOST ACTIVE UNIONS – REPRESENTATION PETITIONS FILED

Abbreviation	Union Name	RC Petitions Filed	
		2020	2021
UFCW	United Food and Commercial Workers	41	74
IBT	International Brotherhood of Teamsters	17	18
IAM	International Association of Machinists	10	12
BCGTM	Bakery, Confectionery, Tobacco Workers, and Grain Millers' International Union	0	8
IUJAT	International Union of Journeymen and Allied Trades	3	4
LIUNA	Laborers' International Union of North America	0	3
USW	United Steelworkers	0	2
IUANPW	International Union of Allied Novelty and Production Workers	0	2

MOST ACTIVE UNIONS – REPRESENTATION ELECTIONS HELD IN RETAIL IN 2021

The UFCW also accounted for more than half of the representation elections held in the retail industry in 2021. They were elected as a result of 74% of the 43 elections they were involved with in 2021 – this was much higher than the 53% success rate they experienced in 2020.

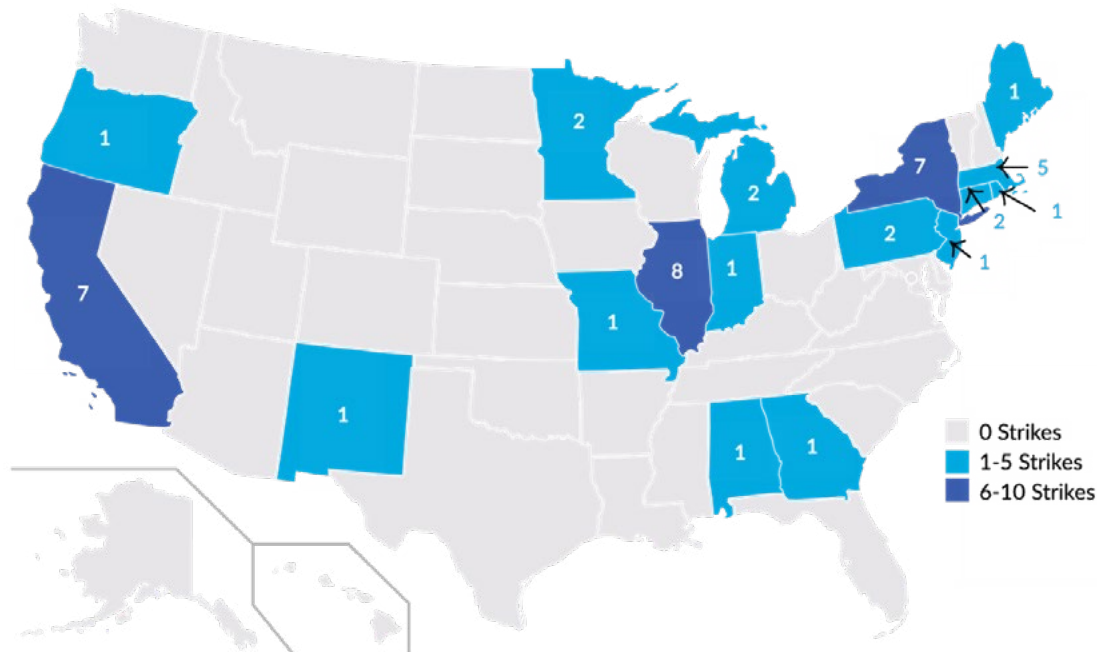


MOST ACTIVE UNIONS – REPRESENTATION ELECTION RESULTS

	2020			2021		
	Total Elections	Union Elected %	Union Not Elected %	Total Elections	Union Elected %	Union Not Elected %
UFCW	19	53%	42%	43	74%	26%
IBT	7	71%	29%	17	65%	35%
IAM	8	75%	25%	9	67%	33%
BCTGM	0	0%	0%	6	67%	33%
IUJAT	3	100%	0%	3	100%	0%

STRIKES IN RETAIL

The map below illustrates the number of strikes in the retail industry in each state since 2012.³ Strike activity is heavily concentrated in a handful of states.



STRIKES IN RETAIL BY STATE, 2012 – 2021

Year	Number of Strikes	Workers Idled	Average Number of Workers per Strike
2021	10	8,655	866
2020	4	568	142
2019	11	37,110	3,374
2018	-	-	-
2017	3	336	112
2016	2	106	53
2015	2	44	22
2014	4	430	108
2013	4	163	41
2012	4	18,418	4,605

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 completest data possible. The data may not be comprehensive.

LABOR LAW/ACTIVITY UPDATE

A labor-friendly White House and the shifting demands of retail employees have conspired to make this one of the most active times in history for labor organizing in the retail industry. National Labor Relations Board (NLRB) leaders continue an unprecedented shift to pro-union policies that harm the retail industry, even while retailers are struggling to fill open positions. NLRB General Counsel Jennifer Abruzzo, a 2021 nominee of President Joe Biden, has launched a multi-pronged attack on employers that includes coordinating enforcement between the NLRB, EEOC, OFCCP, and the Department of Labor's Wage and Hour Division, severely curtailing employer speech, making extensive use of injunctive authority, and authorizing union representation on the basis of card check alone. Understanding the shifting needs of employees and the changing rules and regulations supported by the federal government are of the utmost importance to employers now. This edition of the Labor Activity in RILA contains four articles to provide important and timely insight into these shifts and other labor issues significant to retailers:

The Age of Affiliation: 2022 Labor Relations in the Retail Industry by Mark Codd provides a look at the unprecedented challenges facing retail employers as they look to meet the needs of a shifting workforce that is more interested in affiliation and belonging.

The Shifting Focus of the NLRB by John Telford and Jack Lambremont, and Chuck Guzak provides insights for retail employers regarding the shifting approach and focus of the NLRB and its General Counsel relating to workplace protests pertaining to social justice, political or social justice slogans on apparel, and interaction with customers.

Multi-Agency Enforcement, Employer Speech Restrictions, and Card Check Elections: NLRB General Counsel's Growing Crusade Against Employers by G. Roger King and Gregory Hoff provides a detailed overview of several recent multi-pronged attacks launched by the General Counsel of the NLRB that together represent a coordinated and unprecedented campaign against employers, and could result in an increase in unfair labor practice charges and increased unionization efforts, transforming federal labor law in a manner detrimental for all employers.

The Value of Employee Voice in Retail by Scott Purvis discusses the importance of the voice of the employee to employee engagement and presents ideas on developing and implementing employee listening and feedback systems for getting and giving employee feedback to achieve goals like staying union-free.

The Age of Affiliation: 2022 Labor Relations in the Retail Industry

Mark Codd, Ph.D, SHRM-SCP | Director, Labor Relations | Publix Supermarkets, Inc.

mark.codd@publix.com

ABSTRACT

This article presents the idea that the state of labor relations in 2022 is one of increasing change and unprecedented challenges. From the employer's perspective, the situation can negatively impact recruitment, retention, operations, and public sentiment as well as the bottom line. To address these concerns, this article examines the impact of generational diversity, the historical context of the issue, sources of job satisfaction and today's employees' need for affiliation. The results of this analysis find that mitigating workforce dissension in the retail industry today begins with employee belonging.



Right now, there is a surge in labor activity nationwide, with workers organizing and filing petitions for more union elections than they have in the last ten years.”

- NLRB General Counsel Jennifer Abruzzo

Today's environment challenges retail employers to not only staff their operations but also recruit and retain applicants and employees who share the retailer's values and who will contribute to the organization's success. If we remember 2021 for the Pandemic, the Great Resignation, or even for Striketober, we may remember 2022 as the Age of Affiliation - specifically with organized labor. Increasingly, however, the news is filled with images of retail employees picketing, protesting, boycotting, and overall attempting to change the organization's values- an environment not unlike what the country faced in the turbulent 1970s.

In the 1970s, Southwest Airlines became well known for its different approach to selections. The airline utilized a behavioral needs theorists' approach to hiring, focusing on sorting applicants by their motivational needs while ensuring

Southwest offered good pay, benefits, and the opportunity to advance. Southwest continues to invest heavily in screening for those whose values are in sync with the organization's, resulting in it hiring less than 2% of its applicants.

Southwest applicant screens focus on three attributes: a need to excel, a servant's heart, and a fun-loving attitude. Some jobs, such as a pilot, require advanced skills, but when possible, the focus is on the behavioral needs of the applicants. The challenges that retailers face in this age of affiliation may prompt them to similarly make selections based upon personality, motivation, and the individual's needs. Skeptics might suggest that the quality and quantity of applicant flow would inhibit a retailer's ability to screen so selectively; however, this age of affiliation vividly illustrates the ramifications of selections incongruent with organizational

The Age of Affiliation: 2022 Labor Relations in the Retail Industry

values. Some even suggest that the organizational values themselves and not pay, benefits, and relationship with their management are at the heart of the prominent organizing activity.

And prominent it is. As referenced by GC Abruzzo, the current surge in NLRB petitions represents a 57% increase in NLRB election petitions over the same period in 2022. This increase likely surprised even the most active union organizers, and unfortunately for retailers, the retail industry is the primary target for organizing activity. Furthermore, these elections' dramatically high win rate further motivates retail employee-organizers to target their other locations. Surprisingly, during the spring of 2022, the most prominent elections occurred amongst companies with no union histories and known for providing class-leading compensation and benefits.

One common thread among retailers experiencing high levels of organizing activity was their tendency and reputation for focusing on Generation Z as the primary pool of applicants. Pew Research notes that, unlike Millennials who grew up during the Great Recession and for whom finding a job was a plus, Gen Z finds itself confronted with a very turbulent and uncertain employment environment. This unique experience may have shaped Gen Z's behavioral need to wrest control of their employment future away from the company, take as much control over their employment as possible, and in many cases, organize union representation.

Both Gen Z and Millennials are characterized as having more progressive needs and values than other workplace cohorts. An example would be their level of support for same-sex marriage, which is noticeably different than other cohorts.

With this in mind, it shouldn't be surprising that today's Gen Z and Millennials seek to unionize and create what they see as an institutional manifestation of social justice in the workplace. Those voting for unionization in recent months indicate that they are primarily frustrated by their inability to influence their employer on the social issues of today. Their concerns include climate change, immigration, rights for transgender people, and a host of other issues that fall outside the definition of mandatory terms of negotiation for collective bargaining. Much of the organizing activity has been directed at retailers in California and the West Coast. Those corresponding applicant populations of Gen Z and Millennials

are demanding control or power over their employers, specifically, for them to have a voice in the workplace.

After analyzing Economic Policy Institute data nearly six years ago, IRI Consultants forecasted the rise in unionization among Millennials and Gen Z workers noting that three-quarters of the growth in union membership in 2017 came from people younger than 35. IRI Consultants at the time recommended reviewing compensation strategies and, most importantly, advised clients to "develop and use true leadership skills instead of relying on the old notion of simply being the boss."

However, addressing workplace dissension with higher wages alone is a temporary fix. Many retailers will respond to the organizing efforts with increases in compensation and benefits to prompt greater employee retention and satisfaction. Such increases likely encourage others to respond similarly in what is often referred to as the spillover effect.

The best retailers are again investing in leadership development, embracing servant leadership principles, and investing in understanding the needs of the employees and their applicant base.

These current employer challenges are not unlike what Southwest Airlines and other employers faced during the turbulent 1970s. Retailers then, as now, faced a changing collective set of values among the younger generation. America's employers attempted to maintain productivity while simultaneously hiring amongst a population committed to collective action. In the turbulent 70s, young workers protested in the streets against the Nixon administration, the war in Vietnam, and later their frustrations with wages in the face of escalating inflation.

In response, HR professionals, known as personnel or industrial relations professionals, rallied around academic and motivational theorists to identify what the young workers needed from their employers. Several academic theories emerged, addressing human needs as either motivators or maintainers. Retailers embraced these theories as the means to screen, hire and retain the new workers, and incorporate them into the developmental plans for their leaders.

While there are many motivational theories, some of the most prominent which address human needs include:

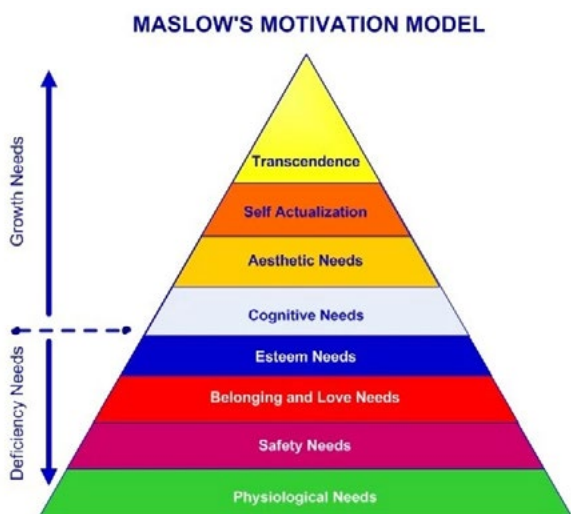
The Age of Affiliation: 2022 Labor Relations in the Retail Industry

Herzberg’s motivation-hygiene theory



Herzberg’s motivation-hygiene theory addressed employee motivation and recognized two sources of job satisfaction. He argued that workers are motivated by their need for recognition, career advancement, and self-development. On the other hand, hygiene factors lead simply to satisfaction when in place, but when lacking, it can make individuals dissatisfied with their employment. The theory is that employers should be sufficiently attentive to hygiene factors to prevent a worker from becoming dissatisfied. Critical hygiene factors include pay, relationship with supervision, the physical work environment, and the extent to which workers have interpersonal relationships with their work peers. Many would suggest the significant increase in Spring 2022 organizing activity is a result of unsatisfied hygiene factors rather than an absence of job satisfaction.

Abraham Maslow’s hierarchy of needs theory

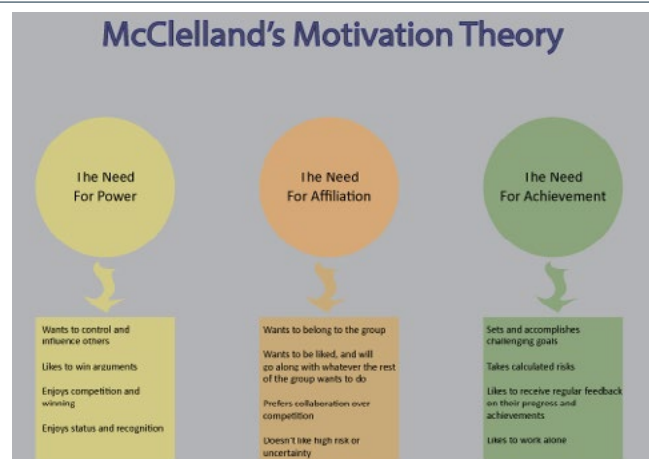


Most retailers are familiar with the most well-known behavioral needs theorists- Abraham Maslow and his hierarchy of needs theory. This theory established a hierarchy of needs that individuals seek to satisfy, from safety and security to self-actualization and transcendence sequentially. Despite its popularity, Maslow’s hierarchy of needs theory is amongst the most controversial, namely for his methodology in studying the self-actualized population. Additionally, some criticize the very premise of the sequential nature of Maslow’s needs hierarchy.

However, the needs hierarchy provides a guide that enables a retailer to identify its business strategy and the needs of its customers and employees to design and reinforce the business strategy and human resources decisions.

It should be noted that recognizing applicant “fit” is not a complete panacea. Of the retailers experiencing a great deal of union organizing presently is one known for selection decisions that seek to assess the applicant’s fit in the context of the workplace team. This organization also has a reputation for hiring Gen Z and millennial workers with progressive leanings. Author Jas Singh detailed Starbucks’ employment screening process, characterized in his article [How Starbucks Hires: It’s All About Fun](#).

McClelland’s Three Needs Theory



David McClellan believed we all have a dominant need amongst one of three primary needs- the need for achievement, the need for affiliation, or the need for power. His theory states that the drivers of behavior are attributed to only one of these three dominant needs. McClellan argued that these needs are learned from interactions with others and are reinforced through behavior and feedback.

The Age of Affiliation: 2022 Labor Relations in the Retail Industry

Those with high needs for power fall into one of two groups, the need for personal power or the need for institutional power. Those with a high need for personal power seek to control others, while those with a high need for institutional power need to organize the efforts of others to accomplish company goals.

Those with a high need for achievement seek to accomplish challenging tasks. They require regular feedback on their progress and often like to work alone.

Those with a high need for affiliation want to belong to a group. They want to be liked and will often favor collaboration over competition. These workers work best in a group environment and are ideal for project or team assignments.

Individuals with high needs for affiliation have a natural propensity to accept and support unionization. However, for retailers with solid and cohesive cultures, hiring applicants with an increased need for affiliation may reinforce the existing culture rather than increase dissent.

McClellan's three needs theory has ramifications far beyond compensation. Identifying the prominent needs of its workforce enables the retailer to design recognition and reward systems, communication strategies, job design, selection decisions, and many other important human resources decisions. Given the current climate of dissension, retailers comprised of workers whose primary need is affiliation should consider recognition and reward systems that reinforce group achievement rather than individual accomplishment.

There are many other human needs theories and substantially more theories of motivation. Retailers should use whichever needs theory works best to satisfy the prominent needs of their workforce while achieving and aligning their business strategy with its human resources policies and practices.

The current environment demands action from retailers' leadership. The human resources function of the nation's most sophisticated retailers is increasingly focused on identifying the catalyst for the increased workforce dissension and prioritizing solutions to minimize disruption. Once the most challenging aspect of HR, talent acquisition has been replaced by the need to respond to or prevent picketing, protests, organizing, or other protected concerted activity.

Much of the content of The Labor Report details the challenges that retailers face with the federal government, organized labor, and emerging independent unions or worker centers. While important, some would suggest that the wave of current workplace dissension is an essential and direct result of the unmet needs of the workforce. While organizations develop strategies to address unionization and dissension in the workplace from external sources, it is vital to remain vigilant regarding the prominent needs of its workforce.

As a result, retailers should assess the academic theories addressing human needs in their own organization's business strategy. Doing so may enable the retailer to avoid the damaging public relations and productivity losses associated with widespread workforce dissension.

REFERENCES

IRI Consultants (Feb 2018) Intelligence Briefing

Motivation Hygiene Hertzberg chart sourced from xxJules101xx on youtube.com

NLRB (April 2022) Union Election Petitions Increase 57% In First Half of Fiscal Year 2022. [Union Election Petitions Increase 57% In First Half of Fiscal Year 2022 | National Labor Relations Board \(nlrb.gov\)](https://www.nlr.gov/newsroom/press-releases/2022-04-22-union-election-petitions-increase-57-percent-in-first-half-of-fiscal-year-2022)

NLRB (April 2022) Bar Chart of Representation Cases by Year [Representation Petitions - RC | National Labor Relations Board \(nlrb.gov\)](https://www.nlr.gov/newsroom/press-releases/2022-04-22-representation-cases-by-year)

Parker and Igielnik (May 2020). *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z So Far*. <https://www.pewresearch.org/social-trends/2020/05/14/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far-2/>

Singh, J. (October 2015) *How Starbucks Hires: It's All About Fun*. <https://www.linkedin.com/pulse/20141022165640-10432781-how-starbucks-hires-it-s-all-about-fun/?msclkid=cd6eb330b82011ec81798e25648e9502>

Weber J. (December 2015). How Southwest Airlines Hires Such Dedicated People. Harvard Business Review. [How Southwest Airlines Hires Such Dedicated People \(hbr.org\)](https://hbr.org/2015/12/how-southwest-airlines-hires-such-dedicated-people)

The Shifting Focus of the NLRB

John Telford | Partner | [Seyfarth Shaw LLP](#)

Tel: 202-828-3528 | jtelford@seyfarth.com

Jack Lambremont | Partner | [Seyfarth Shaw LLP](#)

Tel: 404-885-6694 | jlambremont@seyfarth.com

Chuck Guzak | Associate | [Seyfarth Shaw LLP](#)

Tel: 202-828-3528 | cguzak@seyfarth.com

ABSTRACT

This article provides insights for retail employers regarding the shifting approach and focus of the National Labor Relations Board (“NLRB”) and its General Counsel relating to workplace protests pertaining to social justice, political or social justice slogans on apparel, and interaction with customers. The National Labor Relations Board’s Office of the General Counsel (under former Acting General Counsel Peter Ohr and current General Counsel Jennifer Abruzzo) has announced in guidance memoranda that it intends to expand the scope of what constitutes protected concerted activity under federal labor law, including social justice activism and interactions with or comments about customers that would likely violate a normal code of conduct. Current General Counsel Abruzzo has also signaled in complaints against national retailers her belief that wearing political/social justice-related slogans on employee attire is protected. This dramatic shift to extend the protection of the Act means that certain categories of activity that have been unprotected under existing NLRB authority will be acted on by the General Counsel in prosecuting employers. As a result, retail employers should consider whether to recalibrate their responses to certain employee activities that may not have previously been protected. And they should be particularly aware of the General Counsel’s position that employees should be allowed to wear political or social-justice-related attire or insignia while on the job, and that walking off the job in protest tied to social justice issues is protected. In addition to miring employers in costly and time-consuming litigation, such activity could serve as a foothold for union organizing. By conjuring up conflicts with employers regarding social justice and political advocacy, unions may convince employees that they need representation, despite the absence of traditional economic organizing issues. In sum, retail employers who remember the Obama NLRB era should expect that, at the very least, the current NLRB and General Counsel will seek a return to the standard as it existed then regarding protected concerted activity, and that the expanded scope of protected concerted activity is likely to lead to an increase in litigation and increased union organizing.

The Shifting Focus of the NLRB

Protected Concerted Activity

The National Labor Relations Act (“NLRA”) encourages and protects the process of collective bargaining between employees and labor organizations designated by their employees. Section 7 of the NLRA equally protects the rights of employees in non-union work environments to engage in certain forms of concerted activity to enhance their working conditions. To be protected under Section 7, employees’ activity must be both “concerted” and “protected”—i.e., for the purpose of collective bargaining or for “other mutual aid or protection.” Generally, whether activities are protected and thus constitute “protected concerted activity” or “PCA” depends on “whether [there] is a link between the activity and matters concerning the workplace or employees’ interests as employees.” Mutual protection includes efforts by employees “to improve their lot as employees through channels outside the immediate employer-employee relationship,” as well as activities “in support of employees of employers other than their own.” In other words, the law protects concerted action among employees that goes far beyond only their own wages, hours and terms and conditions of employment.

Since President Biden’s inauguration and his removal of former NLRB General Counsel Peter Robb¹, the Office of the NLRB’s General Counsel has taken steps to make clear to employers and unions alike what the Agency’s agenda will be in the coming years. After GC Robb’s removal but before the appointment of current GC Abruzzo, then-Acting GC Peter Ohr issued General Counsel Memorandum 21-03, entitled “Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines”. As its title clearly indicates, that memorandum announced the Acting General Counsel’s intention to “robustly enforc[e] the Act’s provisions that protect employees’ Section 7 rights with full knowledge that recent decisions issued by the [Trump] Board have restricted those provisions. After GC Abruzzo was confirmed, she adopted GC Memo 21-03 and subsequently issued a separate memorandum (GC Memorandum 21-04) instructing NLRB field agents and attorneys to submit to the Division of Advice cases that might serve as vehicles for the current NLRB to expand the

scope of protected concerted activity, among other employee-friendly changes to the law. Employers should expect that the NLRB (comprised of a majority of Democratic appointees since August 28, 2021) will largely support GC Abruzzo’s priorities, including the expansion of the scope of PCA. Retail employers can anticipate aggressive prosecution of previously unprotected activity and an NLRB that will rule that employers that take disciplinary action against employees who are engaging in activities that were previously deemed unprotected are now, in fact, violating the NLRA.

Interaction with Customers

In GC Memorandum 21-04, GC Abruzzo identified cases involving customer interactions as one of her priorities in seeking to change federal labor law. She specifically sought cases involving the applicability of a Trump NLRB decision called *Quicken Loans*, in which the Board found that an employee’s comments to a coworker that handling a customer call was “a waste of time” were unprotected. She also sought cases involving the applicability of a case called *Alstate Maintenance*, in which the Republican-majority Board under President Trump found that an airport skycap’s complaint about not receiving a tip in the past for performing certain work and his subsequent refusal (among other skycaps) to perform the work was unprotected because customers’ tipping habits did not relate to wages, hours, and terms and conditions of employment and thus did not constitute PCA under the law.

These are just examples of the forms of employee activity that have historically fallen outside of the scope of Section 7’s protection but that will likely become protected by the new NLRB. It is almost a foregone conclusion that the Biden NLRB will agree with GC Abruzzo’s theories and find such activity to be PCA under the law. And while a Circuit Court of Appeals might ultimately find such activity to be unprotected because it does not appear to have any relation to terms and conditions of employment and because it relates to managerial policies, that does not reduce the burden on retail employers to fight such cases at the trial before an administrative law judge and again before the NLRB before arriving at the Circuit Court, which is rarely practical.

¹ President Biden’s decision to remove NLRB General Counsel Robb was unprecedented. Prior presidents have always allowed General Counsels of the opposing party to finish out their terms following a presidential election. By taking the unusual step of terminating Robb early, President Biden paved the way to accelerate changes to the law and NLRB policy.

The Shifting Focus of the NLRB

NLRB General Counsel's Return to Obama Era Priorities, Including Protecting Walkouts Relating to Social Justice Activity

In GC Memorandum 21-03, discussed above, the Office of the General Counsel further telegraphed its prosecutorial agenda by citing to three Obama NLRB-era memoranda issued by the Division of Advice² in support of then Acting GC Ohr and current GC Abruzzo's theory that the NLRA's protection applies to political and social justice advocacy whenever it has a direct nexus to employees' interests as employees, including cases involving social justice-related walkouts. Although those Advice memoranda are non-binding and non-precedential, they give a clear indication of how the current General Counsel will proceed in cases like these.

In a 2017 Advice memorandum entitled *Papa John's Pizza*, the employer discharged an employee for failing to give sufficient notice of her absence in order to participate in a two-day "Fight for \$15" convention. The General Counsel concluded that the employee was engaged in a protected solo strike to assist a labor union and that the employer violated the law by discharging the employee for that activity. The General Counsel considered the employee's solo strike to be concerted because its objective was to assist a labor union with its organizing campaign. It also was for mutual aid and protection because the employee's strike notice made clear that the employee was striking to demand a higher wage and union rights for the employee and co-workers.

In two other 2017 Advice memoranda entitled *JVS Masonry, Inc. and EZ Industrial Solutions, LLC*, the General Counsel concluded that employees' participation in the 2017 "Day Without Immigrants" was protected by the NLRA and constituted activity for employees' mutual aid or protection. According to the General Counsel, the employer violated the law by discharging employee-participants, purportedly for missing work. The theory was that the "mutual aid or protection" clause was deemed to cover employee efforts to "improve their lot as employees through channels outside the immediate employee-employer relationship," as well as activities "in support of employees of employers other than their own." The General Counsel based this conclusion on the notion that the NLRB purportedly has long recognized that

the law's protection extends to concerted political advocacy when the subject matter of that advocacy has a direct nexus to employees' "interests as employees," based on a totality of the circumstances. Although that is certainly disputable, retail employer can anticipate the current General Counsel will agree with this theory.

Based on the Office of the General Counsel's reference to these guidance documents in outlining its prosecutorial agenda in GC Memorandum 21-03, retail employers should be wary that employee walkouts even tenuously connected to social justice issues will likely be deemed protected by this NLRB.

GC Memorandum 21-04 also identified intermittent strikes as a priority area in which GC Abruzzo will be seeking to change the law. Intermittent strikes are a series of related concerted refusals to work during a short period of time, followed by a resumption of work, and they are not protected under the NLRA. Specifically, GC Abruzzo ordered NLRB field employees to submit to the Division of Advice any cases involving the applicability of a case entitled *Wal-Mart Stores*. In that case, in a twelve month period from October 2012 to November 2013, a national labor group called OUR Walmart called for four separate strikes, inviting employees to leave work to participate. In May of 2013, the third strike of the campaign involved 100 to 130 employees leaving work and protesting at the employer's annual shareholders' meeting; 54 were disciplined for attendance violations. The NLRB held that employees had participated in unprotected intermittent strikes because they had a strategy to strike, return to work, and strike again in support of the same goals of broadly improving the employees' wages, hours, benefits, and other working conditions. As a result, the NLRB found that the employer lawfully disciplined participating employees pursuant to its attendance policy, including the employees who struck only once. Under the Biden NLRB, establishing an intermittent strike will become more difficult. Latitude will likely be given to the striking parties to claim that multiple events are not sufficiently related to constitute intermittent strikes.

² These memoranda are generally referred to as "Advice Memoranda" and they serve as non-precedential advisory opinions from the Office of the General Counsel.

The Shifting Focus of the NLRB

Next Up: Limiting Employers' Ability to Restrict On-The-Job Social Justice Messaging

Although most of what is known about the current General Counsel's expansive view of protected concerted activity comes from guidance memoranda and press releases because the cases under consideration have not yet proceeded to trial, a series of recent ongoing cases indicates that her office is going to step up prosecution of employers who attempt to prevent employees from engaging in on-the-job social justice messaging.

For example, in Home Depot, Region 18 of the NLRB issued a complaint, alleging, among other things, that the company unlawfully enforced its otherwise lawful dress code and apron policies to discourage employees from displaying a Black Lives Matter slogan on their attire. The NLRB alleged that one employee was constructively discharged when the company prohibited the employee from wearing an apron with a Black Lives Matter slogan and threatened to retaliate against the employee for voicing concerns regarding racial harassment. After being told not wear the Black Lives Matter slogan and that that the manner of reporting the alleged racial harassment was inappropriate, the employee resigned in protest. The NLRB's theory is that both wearing the slogan and complaining about racial harassment constituted protected concerted activity because the employee was engaged in discussions regarding both with co-workers and management. Notably, the complaint did not allege disparate treatment. That case was heard by an administrative law judge late last year, but a decision has not yet been issued.

Similarly, in a case called *Fred Meyer Stores, Inc.*, Region 19 of the NLRB issued a complaint in November 2021 alleging that the company unlawfully forbade employees from wearing Black Lives Matter buttons and attire while on the job. In that case, employees were allegedly engaged in PCA by protesting against racial discrimination generally, including that the employer had not adequately responded to reports of racist treatment from customers and co-workers. The employer sent some employees home without pay for refusing to remove the Black Lives Matter buttons and approval. That case has not yet gone to trial, but absent settlement it likely will in the next few months.

We expect that these are just the first of many cases involving the General Counsel's newly expansive view of what constitutes protected concerted activity on the job and what restrictions employers may or may not place on social justice activism on the clock. Retail employers should anticipate that administrative law judges will likely agree with the General Counsel in finding that these policies violate the law, but if they do not, the NLRB with its new Democratic majority almost certainly will.

Conclusion

General Counsel Abruzzo's view of protected concerted activity under the law is as expansive as that of the Obama era, and it may ultimately go even further. Retail employers should expect that cases will be prosecuted even where the connection between employees' activities and terms and conditions of employment is attenuated. Broadening the scope of PCA in such a manner will make it easier for unions to organize employees in retail environments because by taking up the mantle of social justice/political activism on the clock, unions may be able to diminish an employer's reputation in the eyes of customers and employees alike for merely enforcing policies aimed to keep politics out of the workplace and reduce disruptions. This could also pique the interest of employees who are content with their working conditions and might not otherwise have been interested in union organizing. Ultimately, employers could end up in the unenviable position of weighing the risk of courting unfair labor practice charges against enforcing policies aimed at fostering workplace productivity and an enhanced customer experience. Retail employers should review their policies and procedures to ensure that they are in compliance with the General Counsel's interpretation of the law if they wish to avoid litigation before the NLRB. In addition, retail employers should be prepared for increased employee activity on the job regarding social justice and political issues, including walkouts and demonstration, and they should carefully plan how to respond to such activity.

Multi-Agency Enforcement, Employer Speech Restrictions, and Card Check Elections: NLRB General Counsel's Growing Crusade Against Employers

G. Roger King | Senior Labor and Employment Counsel | HR Policy Association

Tel: 202-789-8670 | rking@HRPolicy.org

Gregory Hoff | Associate Counsel | HR Policy Association

Tel: 202-375-2795 | ghoff@HRPolicy.org

ABSTRACT

This article highlights and details several recent initiatives launched by the General Counsel of the National Labor Relations Board ("NLRB") that together represent a coordinated and unprecedented campaign against employers. General Counsel Jennifer Abruzzo's multi-pronged attack includes coordinating enforcement between the NLRB, EEOC, OFCCP, and the Department of Labor's Wage and Hour Division, severely curtailing employer speech, making extensive use of injunctive authority, and authorizing union representation on the basis of card check alone. The success of any one of these initiatives will result in an increase in unfair labor practice charges and increased unionization efforts; together, they could drastically transform federal labor law in a manner detrimental for all employers.

Card Check Union Elections

Almost immediately after being sworn in as the Board's General Counsel, Jennifer Abruzzo indicated a desire to resurrect a decades old precedent and empower the Board to compel employers to recognize and bargain with a union based on signed authorization cards from a majority of workers (card check), rather than through a traditional secret ballot election. Now, General Counsel Abruzzo has formally called on the Board to reestablish card check elections in federal labor law. Doing so would make unionization a much easier and quicker process, particularly in smaller single-facility organizing efforts, and would represent the most significant transformation of federal labor law out of any action the current Board might take during its tenure.

Current Law

The secret ballot election is currently the typical path for a union to gain recognition as the exclusive bargaining representative of a private sector workforce. The NLRB orders an election if the union shows that 30% of employees in a potential bargaining unit have signed authorization cards expressing interest in union representation. If more than 50% have signed cards, the employer may lawfully recognize the union. Far more often, the employer insists instead on a secret ballot election conducted by the NLRB – generally a weeks or months-long process. Under certain limited circumstances, the Board will issue bargaining orders (Gissel bargaining orders) where a union has obtained a majority of employees in the proposed unit's signed union authorization cards and an employer has committed unfair labor practices that are so egregious as to thoroughly destroy any possibility of a fair election.

Multi-Agency Enforcement, Employer Speech Restrictions, and Card Check Elections: NLRB General Counsel's Growing Crusade Against Employers

The *Joy Silk* Precedent

General Counsel Abruzzo seeks to return to a 71-year-old NLRB case that originally authorized the Board to issue bargaining orders in a wider range of circumstances, and argues that the Board should expand those circumstances even beyond that case.

In *Joy Silk Mills, Inc.* 85 NLRB 1263 (1949), the Board established that a union could obtain a bargaining order from the Board if it had authorization cards from a majority of employees and the employer, after refusing recognition, had committed unfair labor practices before the election had begun. The Board abandoned *Joy Silk* after the Supreme Court decided *NLRB v. Gissel Packing Co.* 395 U.S. 575 (1969), under which, as mentioned above, a bargaining order will only be issued if the unfair labor practices in question prevent any chance of a fair election.

The departure from *Joy Silk* was confirmed in the Board's decision in *Linden Lumber Div.*, 190 NLRB 719 (1971), where it made it clear that an employer has no obligation to file a petition for an election even where it refused to recognize and/or bargain with a union that has presented evidence of majority support. The Supreme Court subsequently affirmed the Board's position in *Linden Lumber*. Accordingly, Democrat and Republican Boards have not used the *Joy Silk* standard in more than 50 years, and *Gissel* bargaining orders themselves are fairly rare.

The Approach Sought by Abruzzo

General Counsel Abruzzo would revive the long-abandoned *Joy Silk* standard, and even expand it beyond the scope of the original decision. Specifically, while *Joy Silk*, as mentioned above, is traditionally understood to allow Board bargaining orders where an employer presented with card check has engaged in unfair labor practices and is unable to explain its reason for doubting majority status, Abruzzo would apparently allow for bargaining orders in either of these circumstances. Under General Counsel Abruzzo's approach, an employer could be forced to recognize and bargain with a union that has obtained signed authorization cards from a majority of the employees it seeks to represent. If a company refused to bargain with a union that presented it with evidence of majority

support, and it could not show any good faith reason to doubt that majority status, the Board could compel the employer to recognize and bargain with the union even if the company had not committed an unfair labor practice or objectionable election conduct during the representation process.

Implications and Outlook

If the Board adopts General Counsel Abruzzo's approach, it would represent a monumental change to federal labor law and make it much easier for unions to organize workers. Organized labor and its legislative allies have spent years attempting to legalize mandatory card checks by amending the NLRA – the Employee Free Choice Act of 2009 and the current PRO Act were two such attempts – without success, even where Democrats controlled the U.S. Senate, House, and White House. General Counsel Abruzzo's approach would allow the Board to bypass the legislative route and implement card check authorization through Board decision-making. It remains to be seen whether the Board will adopt Abruzzo's approach in full or in part, with a decision expected sometime in the coming months, at the earliest. Employers should follow Board developments closely and remain especially vigilant to unionization attempts within their workplaces, particularly those involving signed authorization cards.

"Captive Audience" Meetings

General Counsel Abruzzo is also targeting employer speech in union campaign settings and beyond. Employers, including nonunionized employers, could be found to have committed an unfair labor practice by holding a wide variety of mandatory employee meetings or "cornering" employees "while performing their job duties," if the National Labor Relations Board pursues an approach recently pushed for by Abruzzo.

Mandatory meetings involving employees' protected rights "inherently involve an unlawful threat" of discipline against employees "if they exercise their protected right not to listen to such speech," GC Abruzzo claims in a new [memo](#). Specifically, she urges the Board to establish that any time employees "are forced to convene on paid time" or are "cornered by management while performing their job duties" in relation to their right to protected concerted activity, it is an unfair labor practice.

Multi-Agency Enforcement, Employer Speech Restrictions, and Card Check Elections: NLRB General Counsel's Growing Crusade Against Employers

Although the Board was expected to take a hard look at what it deems “captive audience meetings” – mandatory meetings held by employers during union election campaigns to urge employees not to unionize – the approach sketched out by Abruzzo here goes well beyond this narrow target. Under Abruzzo’s reasoning, seemingly any employer-held mandatory meeting could be deemed unlawful, as long it touches upon employees’ rights to protected concerted activity. Given that the current Board is expected to take a broad view of what constitutes “protected concerted activity” to include a wide range of employee actions only tangentially related to terms and conditions of employment – social and political protests, for example – it is difficult to imagine any mandatory meeting that would not fall into Abruzzo’s net.

Abruzzo’s approach, if adopted by the Board, would constitute another radical change to federal labor law. Meetings involving diversity and inclusion workplace policies, harassment in the workplace, or even simply conversations between management and an employee regarding an employee’s behavior could potentially become unlawful under Abruzzo’s line of reasoning. Employers would be hamstrung from managing day-to-day operations and enforcing even garden variety workplace protocols, due to a “right to not listen” to employer speech that is not articulated in the National Labor Relations Act and dubiously present in established federal labor law and policy, if at all.

As with card check elections, Abruzzo’s opinion alone cannot change federal labor law or policy, and it again remains to be seen whether the Board will adopt her approach in full or in part. The General Counsel will likely bring a case to the Board on this issue soon, and employers can expect a decision in the coming months. Regardless of the outcome, employers can expect increased scrutiny by the Board and General Counsel Abruzzo of employer communications to employees in union campaign settings and beyond.

Injunctive Relief Campaign

As outlined in a memo released in February 2022, General Counsel Abruzzo has also launched an initiative placing a renewed emphasis on the use of injunctive relief against employers. Specifically, Abruzzo is urging staff lawyers to aggressively seek injunctive relief against employers for their alleged misconduct during union organizing campaigns.

Under Section 10(j) of the NLRA, the Board and its General Counsel are empowered to obtain court orders against employers to put a halt to alleged unfair labor practices as they are happening, rather than waiting for a filed complaint and a formal adjudication by the Board, a process which often takes months or years. 10(j) injunctive relief has been used increasingly sparingly by the Board in recent years – in the last three years combined, the Trump Board sought injunctive relief less often than the Obama Board did during a single year (2012).

General Counsel Abruzzo’s memo serves as notice that Abruzzo and the Board will be particularly aggressive in seeking court orders against employers for conduct they deem to have infringed upon employees’ rights to protected concerted activity during union organizing campaigns. The effects of this campaign are already being felt by employers: Starbucks was [recently the target of several injunctions filed by the NLRB](#), and similar injunctions were also recently pursued against Amazon. Employers will need to tread carefully in communications with employees during such campaigns or risk being dragged into federal court by the Board, where historically it has been successful in obtaining injunctive relief and/or a settlement to a similar effect.

Interagency Collaboration and Enforcement

Finally, General Counsel Abruzzo is also coordinating enforcement actions against employers with several other government agencies. Specifically, General Counsel Abruzzo issued a memo in February 2022 (separate from the memo mentioned above) detailing the General Counsel’s emphasis on strengthening coordination between her office, the Board, the EEOC, the Department of Labor’s Wage and Hour Division, OSHA, OFCCP, and other agencies for the purposes of more comprehensive enforcement and regulation of employers. According to the memo, “Stronger collaboration and networked enforcement will particularly assist those most vulnerable and will help secure...union representation.” Retaliation, discrimination, and misclassification were identified as particular targets of the collaborative enforcement efforts.

This collaborative approach is part of the Biden administration’s overall strategy of maximizing all executive branch and agency resources towards increasing union density

Multi-Agency Enforcement, Employer Speech Restrictions, and Card Check Elections: NLRB General Counsel's Growing Crusade Against Employers

and comprehensive regulation of employers. As a practical matter, this means that unfair labor practice charges against employers could result in more than just a slap on the wrist by the Board. Instead, an employer could find itself facing enforcement actions from several different agencies for the same alleged conduct.

Each of the above initiatives are parts of a comprehensive campaign against employers undertaken by NLRB General Counsel Abruzzo that could potentially radically change federal labor law and tip the scales against employers and towards organized labor. Employers should note that these initiatives – particularly with card check elections and curtailment of employer speech – are not merely repeats of previous Democratic Boards that the regulated community has come to expect, but unprecedented breaks from established federal labor law. It remains to be seen whether the current Board will fully implement the changes sought by its General Counsel, or instead find a middle ground. Regardless, either outcome will leave employers under the microscope.

The Value of Employee Voice In Retail

Scott Purvis | Chief Operating Officer | [IRI Consultants](#)

Tel: 313-965-0350 | spurvis@iriconsultants.com

ABSTRACT

Unionization efforts in the retail industry, currently one of the least-unionized industries, are increasing. The common workforce issue is the lack of employee voice in the workplace. Retail industry employees have historically been excluded from organizational communication systems so are unable to access opportunities to express their opinions, perspectives, and ideas and not allowed input into decision-making, despite their importance to business success. Now retail workers are raising their voices publicly and in unison through national and independent labor unions to address issues like health and safety, pay, and participation in management decisions. There is a transformation going on in the retail workforce because workers are seeing the power of employee voice to bring change. This article discusses the importance of the voice of the employee to employee engagement. It presents ideas on developing and implementing employee listening & feedback systems for getting and giving employee feedback to achieve goals like [staying union-free](#).

A large number of studies have already demonstrated the value of employee voice and its positive relationship to employee engagement. That makes it surprising that so many employees across industries are joining and forming unions, joining the [Great Resignation](#), or holding protests because their employee voice in the workplace is muffled or non-existent. It is not so surprising in the retail industry because retail workers are usually not included in decision-making due to so many being low-paid frontline workers with a high turnover rate. There is also likely an element of bias in the lack of employee voice. The [Bureau of Labor Statistics](#) reports retail industry employees are 48.6% women, 13.3% Black or African-American, 5.8% Asian, and 18.5% Latin.

Retail is an industry marked with a high turnover rate, but those staying - and leaving - are frequently joining forces now to demand an employee voice. Much of the negative sentiment and impetus to unionize came from retail employees being called “nonessential” during the pandemic and furloughed without pay or benefits. Others were deemed “essential” and went to work worried about their health and safety and the health and safety of family members. Without consulting with the workforce, employers made decisions that often negatively impacted the personal and work lives of retail employees.

It is vital to provide a give-and-take communication system in the modern workforce. It has never been easier for employees to unionize than it is today because of accessibility to communication technologies. A dedication to a two-way feedback system can help overcome a labor shortage, pro-union government, and new forms of unionizing coupled with reinvigorated labor unions supported by the National Labor Relations Board rigorously pushing for an increase in union membership.

The value of the voice of the employee goes both ways. Employees express their perspectives, thoughts, and ideas in various ways, and the employer listens, learns, and provides feedback. From these intentional exchanges, the employer gets access to business intelligence that would not be available otherwise, and employees feel more engaged in a participative workplace. Many business leaders have no idea what their frontline retail employees experience each day as they sell clothes, coffee, pet supplies, household items, and other consumer goods and services. It is a missed opportunity to better understand employee and customer needs and improve operations.

The Value of Employee Voice In Retail

What is Employee Voice?

[Joe Dromey](#) with The Involvement and Participation Association defined employee voice as “the ability of employees to express their views, opinions, concerns, and suggestions, and for these to influence decisions at work.” Employee voice is not a simple one-way question-and-answer process. Giving people opportunities to have a say about their work and the business means management:

- [Proactively](#) seeks out the opinions and perspectives of employees
- Actively listens through various communication platforms
- Utilizes the information gained through listening for better decision-making concerning the workforce and the business in general.

An essential aspect of [employee voice](#) not built into the basic definition is that team members believe they can express themselves without fear of negative consequences, creating a feeling of psychological safety. Employees turn to labor unions due to fear of consequences in the workplace should they speak up. The labor union becomes a haven - a path to public expression with the knowledge the union will provide protection through social pressures. Labor unions are always ready to help current and potential members and back many [independent worker unions](#).

The Starbucks Workers United union is a good example. From one store, there are now more than 140 stores across the country announcing union campaigns. With 350,000 employees, Starbucks is a bellwether movement for retail workers. One store at a time can quickly lead to thousands of new union members, and it is a pattern repeating itself in retail companies.

In their own voice, [Starbucks Workers United](#) says, “We know what it takes to make this company run, and we know best what we need to be able to do our jobs to the fullest. We are organizing because we know that Starbucks partners have the ability to improve this company, transform this industry, and form a collaborative, creative, forward-thinking, justice-seeking, independent organization that will allow us to advocate for ourselves.”

These are frontline retail workers saying they can transform an industry and improve the workplace and the business by speaking for themselves. The implications for employers in this shift in retail employee perspective are enormous.

Valuing Employee Voice

The value of employee voice is measurable in several ways, but the connection between employee voice and [employee engagement](#) creates the greatest value. The level of employee engagement determines critical aspects of business success, including [turnover rates](#), productivity, collaboration among peers and management, [inclusion and belonging](#), and [happiness](#) with work and the workplace.

The value of employee voice is also found in its ability to increase employee engagement by promoting:

- A culture of [respect](#)
- [Shared purpose](#)
- Positive employee relations
- A sense of inclusion
- Organizational transparency
- Innovation
- [Human-centered leadership](#)
- Employee well-being
- Improved customer service

Retail employees are more aware than they have ever been about what they want from their employer in the way of an [employee experience](#). One of the top expectations in the modern workforce is having a say in how the organization achieves results. The “how” includes how companies:

- Develop employee policies and procedures
- Design organizational processes and systems
- Make management decisions

The principle of employee voice includes sharing problems or concerns, ideas for improving work processes, negative customer comments offering opportunities for business improvement, personal needs like work-life balance, and diverse perspectives and opinions.

The Value of Employee Voice In Retail

Making Room for Expression of Views

The path towards identifying and getting actionable feedback from a diverse workforce is not always easy to maneuver. Some team members may refuse to speak up because they fear repercussions. Some diverse employees avoid speaking up due to different life experiences and fear exclusion based on those differences. In a [hybrid retail workforce](#), remote or online employees may feel disengaged from the onsite workforce.

How does an organization create a “safe space” for the expression of views? A safe space is a system of communication channels that regularly present and welcome opportunities for contributing ideas and concerns. The listening & feedback communication system must be inclusive, meaning accessible by all employees. As is true for many industries, the workforce model is transforming in the retail industry. Employers must be careful to include all retail employees when making room for the expression of views.

One of the emerging trends in retail is the use of gig workers, or independent contractors, who are [on-demand workers](#). This trend will impact how employers engage all workers in the future and is another signal the retail industry is constantly changing in ways that affect its workers. Companies using a contingent retail workforce include Walmart, Meijer, Faherty, and Target, to name a few.

The [hybrid workforce](#) is also becoming entrenched in the retail industry. The traditional image of the retail worker is of someone behind a counter, but the pandemic has led to a new group of employees called “omni-associates.” These are people who work in retail stores and also manage e-commerce tasks remotely.

Yet another growing segment of retail workers consists of casual workers who have no set hours or schedule. They work when called in to work. A survey by [Herbert Smith Freehills](#) of 400 cross-sector CEOs produced some revealing results. Approximately 54-57 percent of large companies see pay and benefits and the status of casual workers as significant activism triggers. Of the executives surveyed, 83 percent foresee an increase in activism among casual workers, and 95 percent see a rise in employees making their voices heard via [social media](#) over the next five years. The top five triggers

for activism were automation and AI, surveillance, pay and benefits, CSR, and diversity.

Developing a successful communication system in the retail industry now means ensuring no one is excluded from opportunities to express their voice – regular employees, hybrid workers, remote workers, on-demand workers, omni-associates, casual workers, and diverse workers. Leaders must be willing to listen, be challenged, and provide feedback.

Today’s “Activist” Worker Needs to be Heard More than Ever

In the article “[Leading in an Age of Employee Activism](#),” employee activism is defined as the “voices of difference, on issues of wider social and environmental concern, that seek to influence company action and that challenge existing patterns of power.” [The Society for Human Resources](#) says, “Employee activism is often associated with actions that employees take in response to specific societal events or company policies and practices. These actions often take the form of public protests, social media campaigns, information distribution to fellow employees, and more.”

Employers need to hear retail employee activists because the employees are wary of companies that make statements with no follow-through, whether on corporate social responsibility or workplace issues. A global research study conducted by [The Workforce Institute of UKG](#) found a large gap between employee voice and employer action, leading to disengaged workers, higher turnover, and hindered business performance. The study found that employees with a heightened sense of engagement (92 percent) are much more likely to feel heard than highly disengaged employees (30 percent). Activist employees embrace social and work issues and are willing to take action to be heard, like forming a union.

Managers at the Alvarez and Marsal consumer and retail group wrote in [Why raising the minimum wage is no longer enough to draw in retail workers](#), “In a world where [Gen Z and millennials](#) comprise nearly 50% of the full-time U.S. workforce, it is becoming increasingly clear...that retailers don’t understand the nuanced motivations of their younger employees. In a Gallup survey, Gen Z and [millennials](#) revealed that they most value employers who care [about employees’ well-being](#). Furthermore,

The Value of Employee Voice In Retail

younger generations want to be “appreciated for their unique contributions” and expect to be coached and developed in the workplace.”

Many retailers are increasing wages but remain vulnerable to unions because pay rates are only one issue that retail employee activists care about. This disconnection leads to employees starting corporate campaigns, forming or joining a union, staging strikes and walkouts, and taking other negative actions to get attention.

How Valuing Employee Voice helps Companies Maintain a Direct Connection

Traditionally, retail companies expressed mission and [values](#) as statements of fact without engaging employees. Unfortunately, there is often a gap between company values and what employees experience in the workplace. When organizational leaders do not recognize the authentic or real culture, they cannot take steps to change it. When employees do not internalize the values, they do not develop a direct connection to the workplace. It is one reason so many retail employees are willing to take their grievances public, join the Resignation Nation or start a [union organizing campaign](#). The employees are not worried about consequences because they lack a connection to the workplace.

Employee listening & feedback systems are communication systems that capture the employee experience - the real one and not the one management believes exists. They:

- They provide the opportunities to receive and deliver feedback in real-time, so crucial in a business environment in which change is swift
- Develop a strong employee voice and gather employee feedback to build direct connections between employees and management, negating the employee’s need for outside assistance from a labor union
- Deliver data and information that Human Resources can utilize across the talent management spectrum: recruiting, hiring, training and development, job design, workplace safety protocols, compensation schedules, benefits, [recognition and reward systems](#), incentive programs, and so on.

- Equip retail employees with a voice that makes them better able to handle company changes, periods of high activity during the holidays, supply chain shortages, and even customer aggression because they know they have communication channels for expressing workplace concerns

Retail Industry: Are Your Listening Systems Working?

On Project HR, [Karin Hurt and David Dye](#), authors of *Courageous Cultures*, discuss the common barriers to workplace courage (willingness to speak up) that people experience.

- Past negative experiences like being punished for speaking up
- A belief contributions and ideas are not considered valuable
- An open-door policy that always requires the employee to bravely approach the leader rather than the leader approaching the employee
- A belief that not speaking up will avoid trouble

Hurt and Dye recommend building a courageous culture by [training leaders](#) in communication to ask straightforward, targeted questions and invite new ideas. Managers and supervisors provide the paths for expression. For example, instead of asking for ideas, ask a courageous specific question, like “What is the number one thing that is frustrating our customers right now?” The idea is to develop a culture in which everyone feels free to answer questions, advocate for customers, and contribute to problem-solving.

The listening & feedback systems in the retail industry need improvement, as evidenced by the frequent union elections and protests taking place. There are growing numbers of instances in which workers at large retailers walk off the job. Listen to the employee [Adam Ryan](#), a Target worker and liaison for the independent employee coalition Target Workers Unite. He said during an interview on CNBC, “We were constantly told before the pandemic that we don’t have real jobs. We’re not real workers. We shouldn’t expect things like health care – or even respect or dignity.”

The Value of Employee Voice In Retail

The common refrain of retail employees is always “management does not listen to us” and “management does not understand our jobs.” [Kate Harris](#), a retail sales specialist at the recently unionized REI Co-Op in Manhattan, says she wants more understanding from leaders. “Our managers and higher management throughout the rest of the co-op don’t necessarily understand what it is to actually be on the floor for 8½ hours a day for 32 or 40 hours a week.” In other words, management does not understand the real employee experience because they do not listen and get feedback.

Retail employees want a say in company day-to-day operations because policies and procedures most impact them.

How to Implement Effective Employee Listening & Feedback Systems for Your Organization

Understanding the importance of listening & feedback to employee engagement, what is the next step? Giving employees a voice in a structured manner is key to a successful system. Without structure, it is not likely much will change.

- Identify the points in the employee lifecycle where feedback is obtainable on a consistent basis, including recruitment, hiring, training, and exit interviews
- Conduct an employee survey for fact-finding that helps with the selection of listening and feedback channels
- Select the listening channels and tools appropriate for the company and its workforce
- Select the feedback channels, like surveys, productivity apps like Slack, face-to-face meetings, etc. to implement
- Train leaders on utilization of the listening & feedback channels and on engaging employees in-person, i.e., retail floor chats, meetings, etc.
- Collect feedback data from listening platforms and utilize technologies for data analysis that drives well-informed business decisions
- Determine the appropriate actions based on the feedback and data analysis
- Utilize a feedback loop

People expect variety in the ways they can share their opinions and perspectives, and there is a wide variety. Some of the employee listening & [feedback](#) system tools and actions include:

- Team feedback sessions
- Digital focus groups
- Townhall meetings (virtual if necessary)
- Suggestion boxes
- [Periodic surveys](#), annual, periodic, employee lifecycle event-based surveys, 360 surveys, etc.
- Polls
- Online conversations (group and one-on-one)
- Online employee-focused communication platforms, like an online suggestion box, website, etc.
- [Social media listening](#)
- Meetings in which everyone is encouraged to speak up
- Stop and chat sessions with employees at their work location or via online visits
- Periodic 1-to-1 check-ins with each employee
- Team collaboration platforms
- [Employee apps](#)
- Crowdsourcing (cross-functional [employee advisory group](#)) in which a group of employees offers opinions, perspectives, and information on the workplace in general or in response to an issue uncovered through employee feedback, like survey results
- Reverse mentoring, in which frontline workers mentor senior leaders
- [Employee Resource Groups](#)

Upon implementation of the system, explain the reasoning for the tools to employees and the goals. This approach improves [leadership transparency](#) and sends a message that management values every employee’s voice. Moving from feedback to action is as crucial as collecting feedback.

Apple store workers are a good example. Apple pays a competitive wage of \$17-\$30 per hour, an above-average

The Value of Employee Voice In Retail

rate in the retail industry. Yet, workers formed the Apple Together group, which includes any Apple employee. The employees sent a [letter](#) to the CEO, stating, “Hundreds of us have documented our stories of abuse, discrimination, and harassment. Hundreds of us have documented reporting our stories through internal channels and receiving no relief.” Now workers at eight Apple stores are trying to unionize, and at least two of the store employee groups are backed by national labor unions.

The one-and-done annual survey is inadequate in the [proactive era](#) of positive employee relations and the volatile retail industry. Labor unions are always ready to find new issues - whatever it takes to engage employees. A company is not likely to meet every expectation that employees have, but explaining why is crucial. There is no guarantee every employee will accept the explanation, but transparency builds a culture of trust, improves job satisfaction, and improves employee retention. Leaders need to be willing to listen to retail employee concerns and take a position on them, even if they see them as beyond a workplace concern.

APPENDIX A

SUMMARY OF PETITIONS FILED AND ELECTIONS HELD

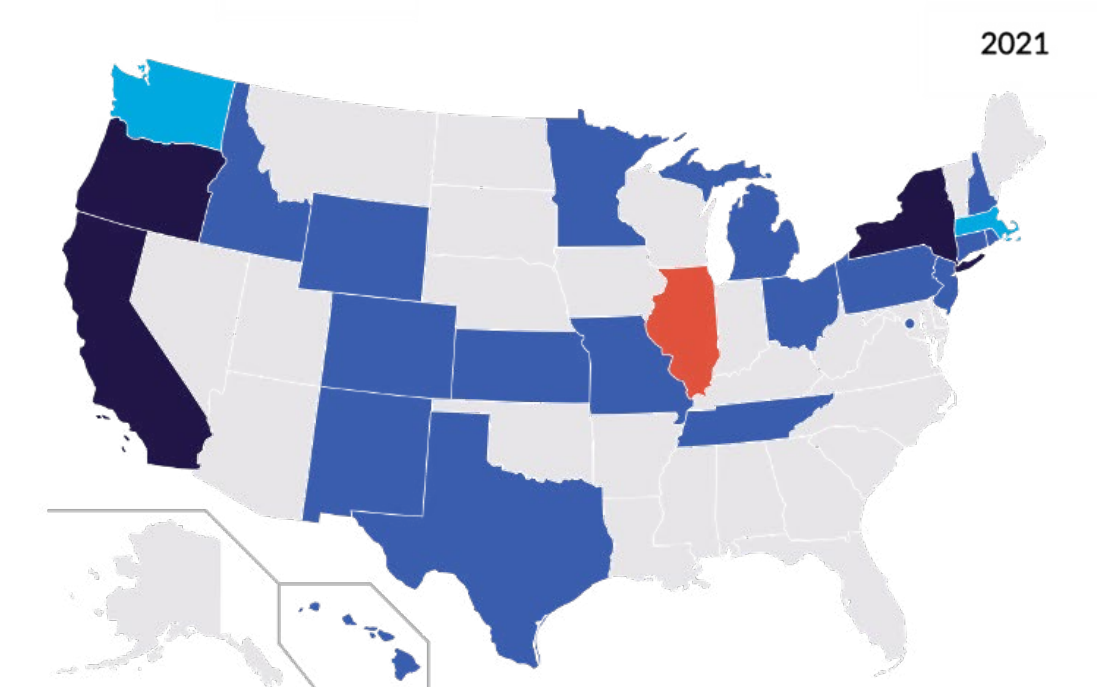
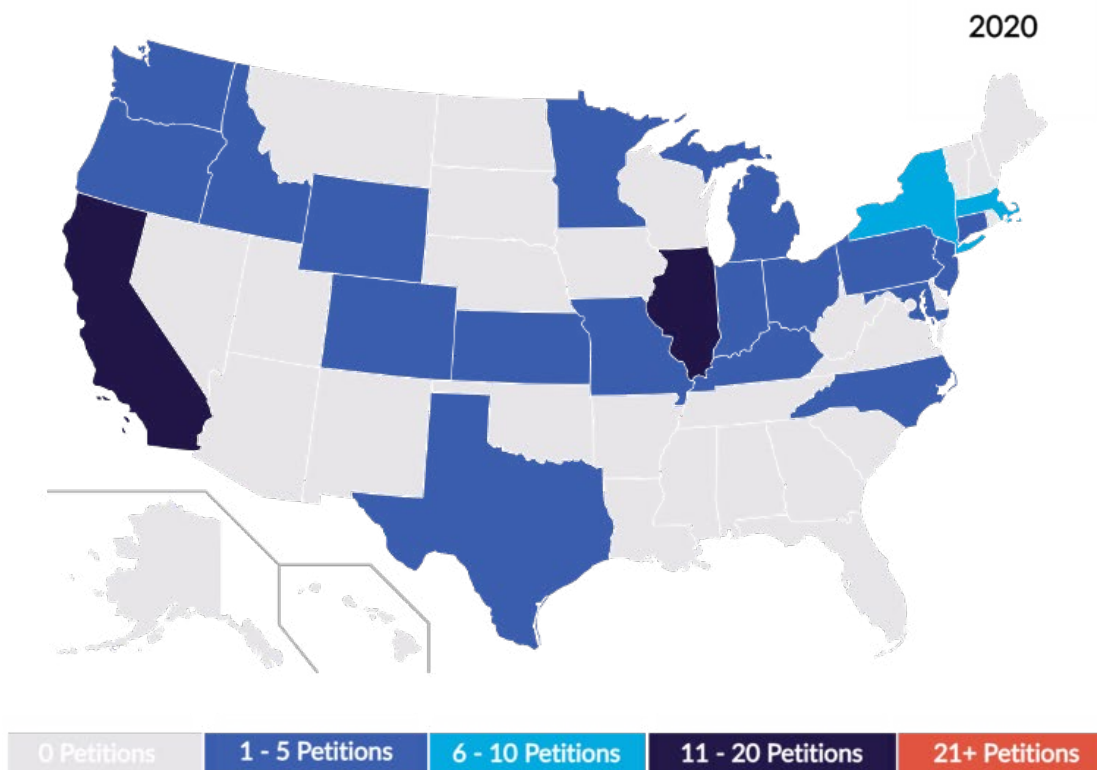
All Industries - Summary of Petitions Filed & Elections Held (2012 - 2021)										
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Total Petitions	2,467	2,553	2,616	2,596	2,287	2,280	1,923	2,039	1,556	1,685
Total Representation (RC) Petitions	1,979	2,033	2,129	2,168	1,918	1,880	1,559	1,737	1,309	1,385
Union Not Elected	483	461	436	453	354	372	322	299	241	244
Union Elected	861	889	995	1,096	964	981	796	917	596	737
Total Decertification Petitions	488	520	487	428	369	400	364	302	247	300
Total RD Petitions	459	463	439	370	312	338	333	260	201	271
Total RM Petitions	29	57	48	58	57	62	31	42	46	29
Union Not Elected	148	136	130	127	123	144	120	113	61	95
Union Elected	96	86	67	79	69	71	60	60	52	60

Retail - Summary of Petitions Filed & Elections Held (2012 - 2021)										
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Total Petitions	158	156	151	158	139	124	108	115	91	158
Total Representation (RC) Petitions	120	122	107	114	105	89	81	92	75	133
Union Not Elected	35	48	25	31	36	18	33	25	11	28
Union Elected	39	35	55	47	37	38	30	30	29	57
Total Decertification Petitions	38	34	44	44	34	35	27	23	16	25
Total RD Petitions	34	28	34	35	29	28	23	17	12	18
Total RM Petitions	4	6	10	9	5	7	4	6	4	7
Union Not Elected	15	8	8	12	6	11	7	8	5	6
Union Elected	8	7	6	5	3	2	5	4	1	4

All Non-Retail Industries - Summary of Petitions Filed & Elections Held (2012 - 2021)										
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Total Petitions	2,309	2,397	2,465	2,438	2,148	2,156	1,815	1,924	1,465	1,527
Total Representation (RC) Petitions	1,859	1,911	2,022	2,054	1,813	1,791	1,478	1,645	1,234	1,252
Union Not Elected	448	413	411	422	318	354	289	274	230	216
Union Elected	822	854	940	1,049	927	943	766	887	567	680
Total Decertification Petitions	450	486	443	384	335	365	337	279	231	275
Total RD Petitions	425	435	405	335	283	310	310	243	189	253
Total RM Petitions	25	51	38	49	52	55	27	36	42	22
Union Not Elected	133	128	122	115	117	133	113	105	56	89
Union Elected	88	79	61	74	66	69	55	56	51	56

APPENDIX B

MAPS OF REPRESENTATION PETITIONS FILED IN RETAIL



APPENDIX C

THE NATIONAL LABOR RELATIONS BOARD DEFINITION

WHAT IS THE NATIONAL LABOR RELATIONS BOARD?

We are an independent Federal agency established to enforce the National Labor Relations Act (NLRA). As an independent agency, we are not part of any other government agency—such as the Department of Labor.

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

TYPES OF PETITIONS

1) CERTIFICATION OF REPRESENTATION (RC)

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

2) DECERTIFICATION (RD)

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

3) WITHDRAWAL OF UNION-SECURITY AUTHORITY (UD)

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

4) EMPLOYER PETITION (RM)

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

5) UNIT CLARIFICATION

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

6) AMENDMENT OF CERTIFICATION (AC)

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