

Jan. 1, 2015 – Dec. 31, 2015

CUE MEMBER SURVEY & LABOR ACTIVITY REPORT

Submitted by:



CUE Inc.
900 NE Loop 410 Suite D-103
San Antonio, TX 78209
Tel: 866.409.4283
Fax: 210.545.4284
www.cueinc.com

CUE MEMBER SURVEY AND LABOR ACTIVITY REPORT

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In cooperation with the CUE Consultant Advisory Committee, IRI Consultants annually produces the *CUE Member Survey and Labor Activity Report*. For additional information about the data and/or contents of this report, please contact:

James G. Trivisonno, President
IRI Consultants
3290 West Big Beaver Road, Ste. 142 • Troy, MI 48084
Tel: 313.965.0350, ext. 422 • Fax: 313.447.2128
www.iriconsultants.com
Email: jtrivisonno@iriconsultants.com

National Labor Relations Board election and petition data provided by:
Philip B. Wilson, President
Labor Relations Institute, Inc.
7850 South Elm Place, Ste. Ste E • Broken Arrow, OK 74011
Tel: 800.888.9115 • Fax: 918.455.9998
www.LRIonline.com
pbwilson@LRIonline.com

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ABOUT THIS REPORT

This sixth annual *CUE Member Survey and Labor Activity Report* was developed by CUE in collaboration with IRI Consultants and the Labor Relations Institute, both members of the CUE Consultant Advisory Committee. The *Report* includes:

- Results and analysis of the CUE member survey about labor activity in their organizations. The survey was administered to members in late 2015.
- An analysis of national representation (RC) petitions and elections by industry as reported by the National Labor Relations Board (NLRB) during 2015.
- A *Labor Update*, which is comprised of articles written by members of the CUE Labor Lawyers Advisory Committee and CUE Consultants Advisory Committee, about relevant and timely labor issues affecting employers and the workplace.

CUE'S PURPOSE

At CUE, our mission is to assist employers in creating and maintaining a strong and independent workplace culture through positive employee relations. CUE is a non-profit, member run organization dedicated to assisting companies that believe that their employees deserve a workplace that built around flexibility, productivity, quality of work life, fairness, the opportunity to participate in decisions affecting ones future and the opportunity to succeed.

We believe in employee relations practices which foster these objectives, which value individual workers and are fundamentally pro-employee. We have encouraged union-free work environments by eliminating the need for unions through such practices. Whether conducting research, disseminating information, sharing experiences, or educating members on union-free environments, CUE has consistently promoted the values of positive employee relations.

CUE seeks to educate its member companies in these positive practices through a wide variety of resource offerings including two annual conferences, educational workshops, member to member networking, our annual labor relations survey, case studies, videos and other publications.

The core of our success lies with our Member companies, both union and union-free, representing a cross-section of business and industry, from small firms to Fortune 50 companies willing to share best practices in labor and employee relations.

INTRODUCTION

The past year has been a demanding one in the labor world. Years of precedent have been overturned by the National Labor Relations Board which, coupled with the implementation of expedited elections, tilts the playing field in the direction of organized labor. The White House itself has promoted union organizing, launching a national ad touting that improvements in the workplace all begin with a conversation.

In line with this, the NLRB has been actively expanding its definition of protected concerted activity, particularly in the social media realm. In certain cases, a “Like” on Facebook was deemed enough to make an employee’s statement fall under protected concerted activity. Employers would do well to pay attention to case law on the issue. *Pier Sixty LLC* is a great example in which an employer was ruled to have violated the Section 7 rights of an employee for terminating him for directing profanity towards a supervisor via a Facebook posting. The Board ruled that his activity was protected because profanity was regularly tolerated at the workplace. The posting encouraged others to vote for the union in an upcoming election.

The biggest change of the year occurred on April 14, 2015, when the NLRB’s expedited elections ruling went into effect. The final rule contains major changes to election proceedings, with the ultimate goal of shortening the timeframe in which an election occurs. Since the ruling went into effect, the median number of days to election has dropped to 26.5 days with an average of 24 days (as of 10/15/15). This shortened time frame makes it much more challenging for employers who are not prepared to get their message out to employees ahead of a union election.

One of the important aspects of the expedited election ruling is the high burden on employers to provide employee information to the union within two days of the decision and direction of election, or stipulated election agreement. Employers are required to provide all available personal email addresses and phone numbers of employees. In one particular case this year, the NLRB overturned an election that a company won because the Board felt that the company did not meet the requirement of exercising all possible options to provide employee information to the union. Despite the fact that 94 percent of employee phone numbers were provided, the Board determined that the employer did not exhaustively search all potential sources for the missing phone numbers.

Further precedent-setting action occurred in the joint employer decision handed down in *Browning Ferris*, which overturned decades of established practice for the indirect control test for employers. The decision potentially exposes employers to collective bargaining obligations for employees supplied by staffing agencies, and companies could be held responsible for labor violations committed by their labor contractors if a joint employer relationship is found. Based on this, it is critical for employers to examine their current contracts and relationships in order to reduce their liability as joint employers.

In September, the National Labor Relations Board issued a guidance memo indicating that it would accept electronic signatures as an acceptable form of showing of interest. There are some guidelines attached, but serious concerns about fraud and authenticity remain. Allowing electronic signatures could make it easier for unions to maintain a lower profile

in organizing efforts thus springing elections on less observant employers. There is also the potential for an increase in organizing via social media and, perhaps, the development of union organizing apps for smartphones that would allow union organizers deeper penetration into an organization while remaining undetected by management. It remains to be seen whether this will play out as an effective organizing strategy or not.

All eyes are now on the Supreme Court, whose decision in *Friedrichs v. California Teachers Association* could overturn decades of precedent and affect 7.2 million public sector employees. At issue here is whether requiring employees to pay mandatory union fees violates their first amendment rights. Unions across the nation have thrown their support and dollars behind the California Teachers Association to try and fight this decision, as billions of dollars are at risk for unions if employees are no longer forced to pay.

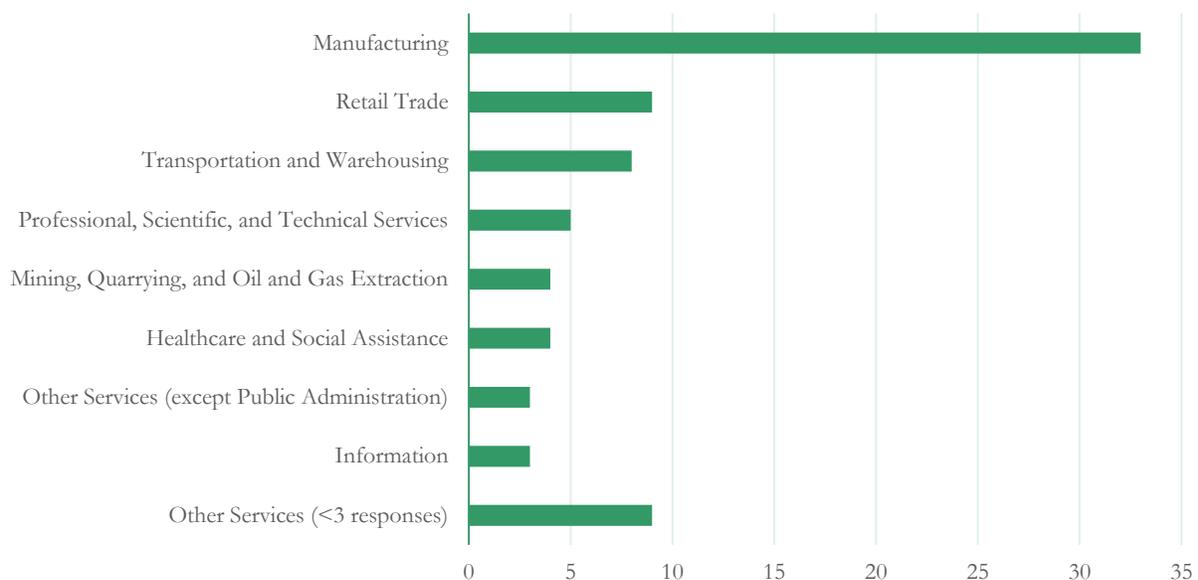
The decisions of the Board this past year have upended several long-established standards for the labor world. As such, it is essential for employers to ensure their organizations are adequately equipped to manage possible future challenges and reduce their liability under the new precedent.

MEMBER SURVEY

The sixth annual *CUE Labor Activity Survey* was administered to CUE members in late 2015. A total of 61 members completed the survey. (Members completed and submitted their survey responses by mail or completed the survey online).

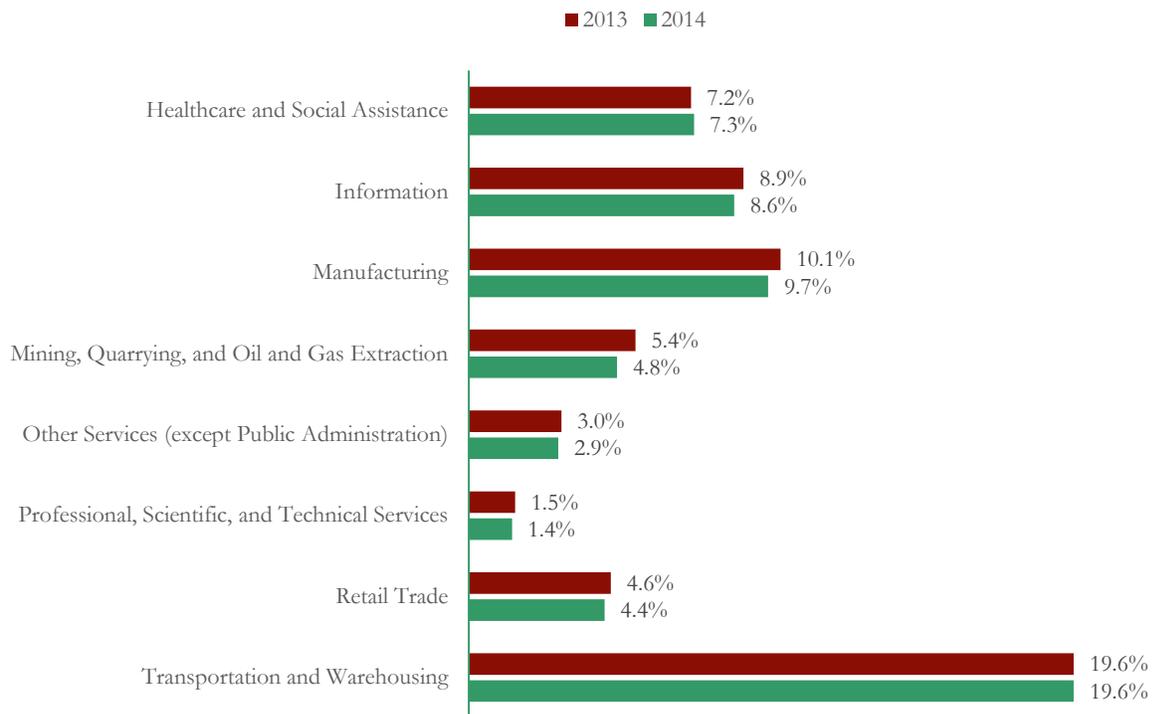
The first survey question established which industries respondents represented. Respondents could choose from 19 specific industries; there were eight unique industries for which there were three or more responses. Survey respondents were able to select more than one industry. The vast majority of CUE member organizations work in manufacturing. CUE member organizations have facilities in every U.S. state.

INDUSTRIES REPRESENTED IN SURVEY DATA



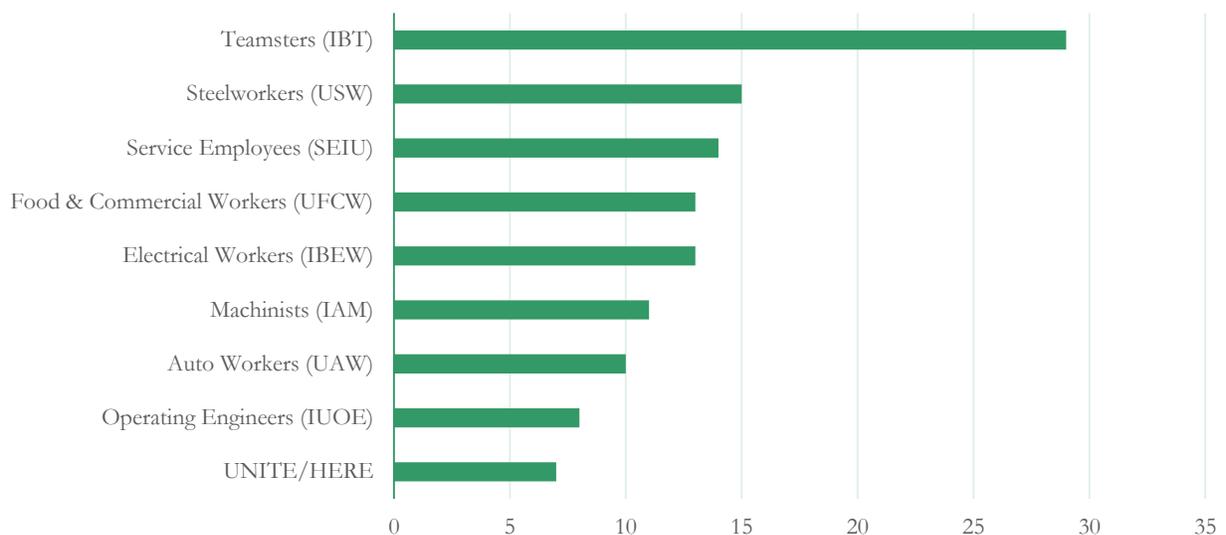
The following chart on the next page illustrates the change in union membership as reported by the Bureau of Labor Statistics (BLS) during the last two years in the eight most prevalent industries represented by survey respondents. The percentage of union membership decreased slightly in all industries between 2013 and 2014, with the exception of Transportation and Warehousing, which remained constant at 19.6 percent, and Healthcare and Social Assistance, which increased to 7.3 percent.

UNION MEMBERSHIP OF EMPLOYEES IN SELECTED INDUSTRIES



Respondents reported that the most active unions where their company has facilities were the Teamsters (IBT), United Steelworkers (USW), and Service Employees International Union (SEIU). The nine most active unions, as reported by respondents, are listed in the chart below.

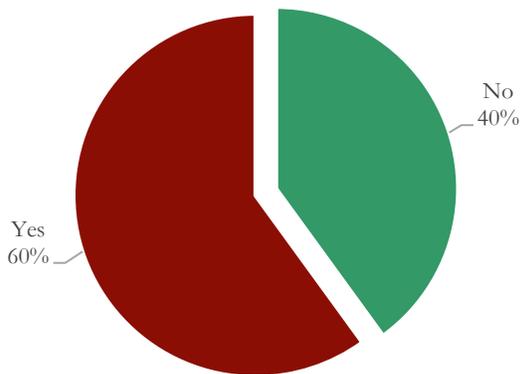
MOST ACTIVE UNIONS IN MEMBER RESPONDENT AREAS



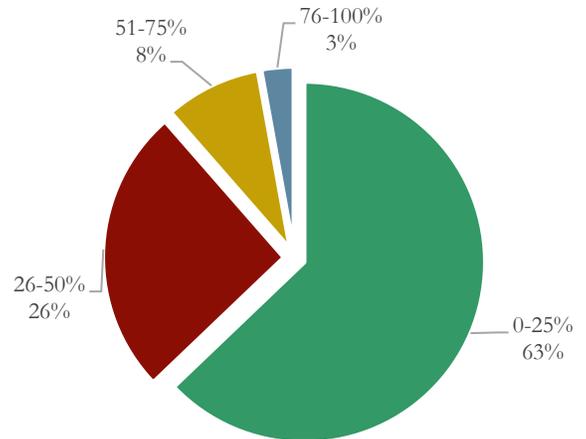
UNION REPRESENTATION OF EMPLOYEES

Respondents were asked if they have any employees currently represented by a union. Sixty percent of respondents said yes. Of those, the majority said just 0-25% of their employee were represented.

Does your organization have employees that are currently represented by a union?

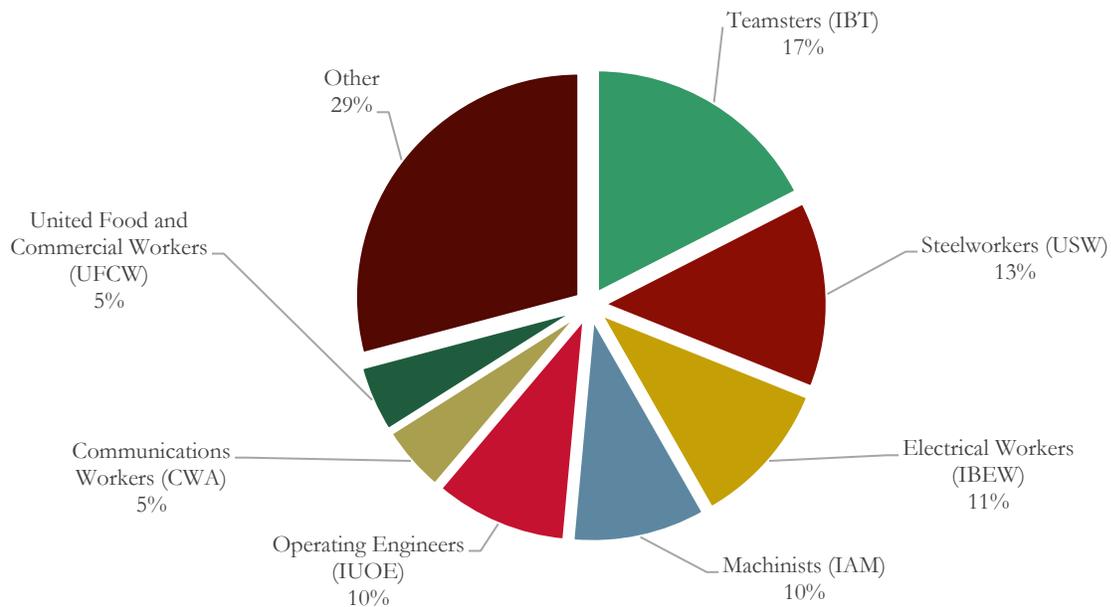


If yes, approximately what percentage of your employees is represented?



The chart on the next page illustrates which unions currently represent respondent employees. The Teamsters, Steelworkers and Electrical Workers were the most commonly mentioned unions.

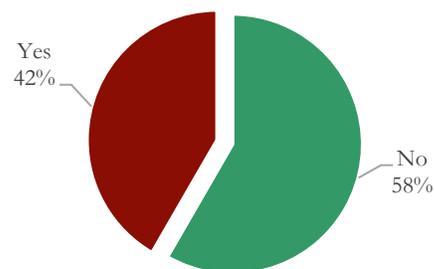
UNIONS THAT CURRENTLY REPRESENT EMPLOYEES



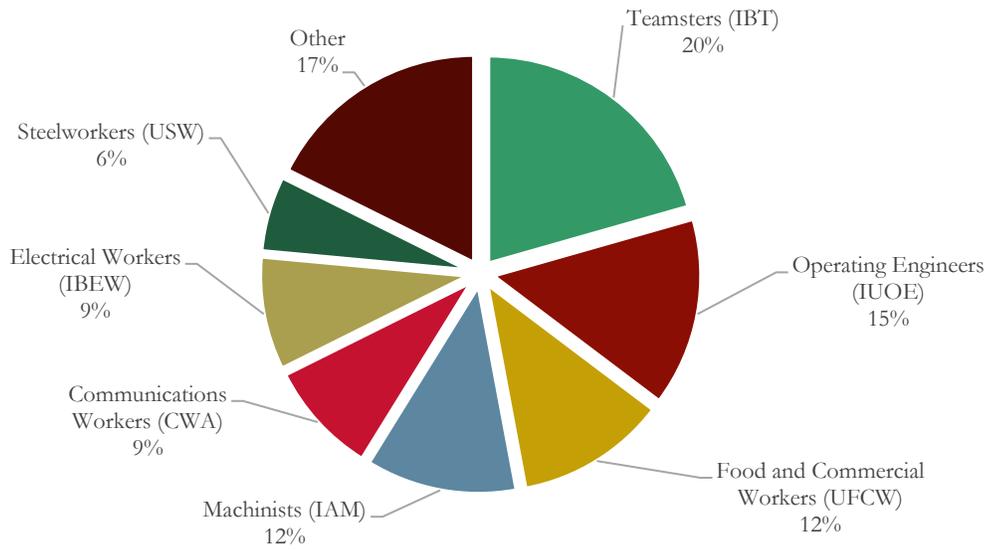
RECENT ORGANIZING

Respondents were asked if a union had actively attempted to organize employees at one or more facilities in the last 12 months. Nearly half of respondents indicated that their organization had experienced an organizing attempt. The remaining questions in this section illustrate the unions involved in the organizing attempts, traditional tactics used by said unions, and the top issues the unions focused on.

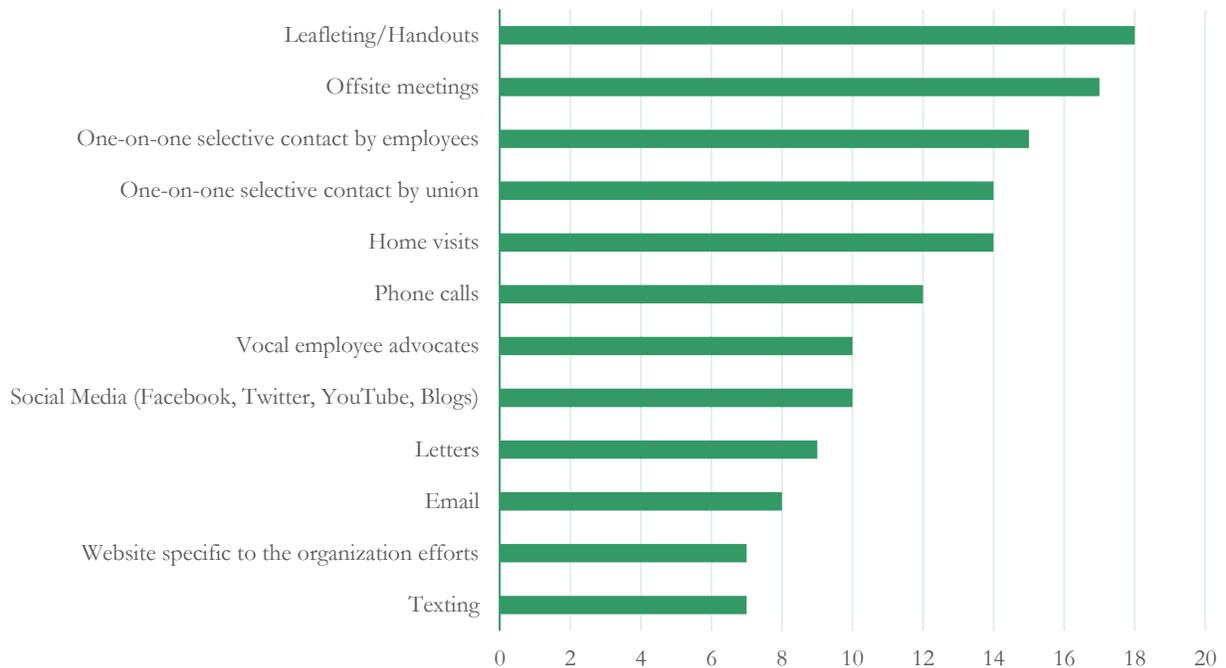
Has a union actively attempted to organize employees at one or more of your facilities in the last 12 months?



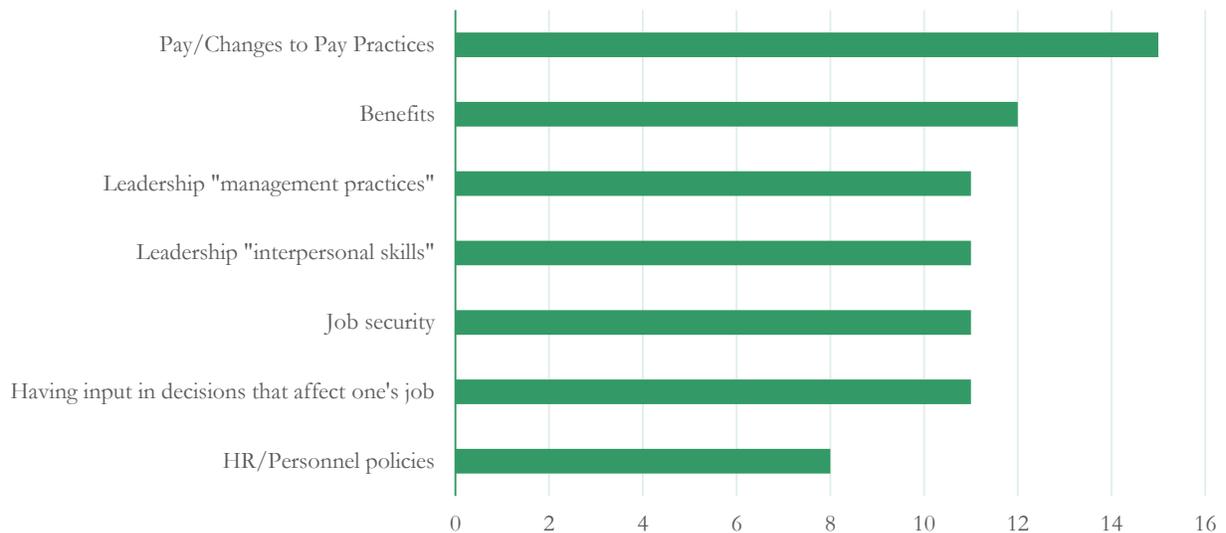
UNIONS INVOLVED IN ACTIVE ORGANIZING



TRADITIONAL ORGANIZING TACTICS USED



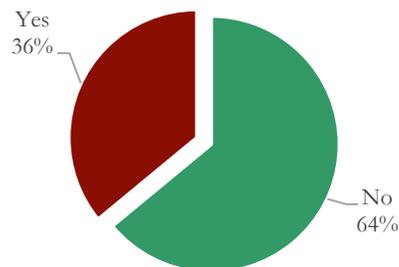
TOP ISSUES TARGETED



RECENT ORGANIZING- EXPEDITED ELECTIONS

On April 14, 2015 the NLRB’s expedited election ruling went into effect. Respondents were asked whether their organization experienced an election since the ruling went into effect.

Has your organization experienced an expedited election since the rule went into effect on April 14?



Of those that have experienced an expedited election since the ruling went into effect on April 14th, the biggest difference respondents noticed include the following:

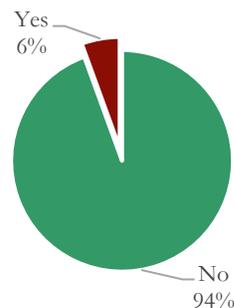
- 21 day campaign. Email petition to mgr. Region Director position on issues
- Decertification election in a small workforce where the biggest difference turned out to be the union’s ability to show up and spend minimal time with our associates and turn them around by promising greater union

input from everyone, not just a select group, which is why the effort was started in the first place. Doesn't matter how much time you have with a small group, they are still easily swayed! Due to constraints of the business we only had two weekends to hold educational group meetings

- It was the second week of the law, so not many
- Less time and opportunity to hold meetings with employees. Difficulty in scheduling things especially if vacations or Holidays were involved. In some ways it was much better not having it drag out for 42 days. This surprised us a lot
- Less time to educate group. Union initially asked for 13-day campaign then shortened that to 10 days. NLRB gave us the full 24 days. If our group hadn't already been educated, we would not have had time to educate them. As it was, it was mostly a review for the majority of the group
- Only 22 days from date of petition to date of election
- The pace of employee education meeting had to be fast tracked. Very little union propaganda. Solidarity of employees was difficult to breach

More specifically, respondents were asked if a micro unit or Specialty Healthcare unit was involved in the expedited election. Just six percent said yes.

Was a micro unit or Specialty Healthcare unit involved?



If yes, respondents were asked to describe the nature and size of the unit.

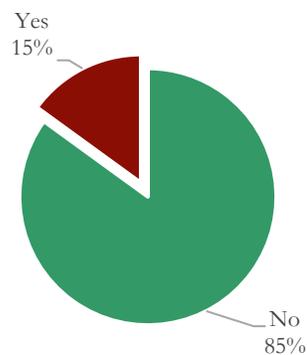
- Accretion and about 6 employees at one site and 75 at another
- Not a micro unit (that is to say not a subset of a larger unit) ...simply a small unit - two employees
- Production, maintenance, warehouse and sanitation (FT and PT). 130

RECENT ORGANIZING- CORPORATE CAMPAIGN

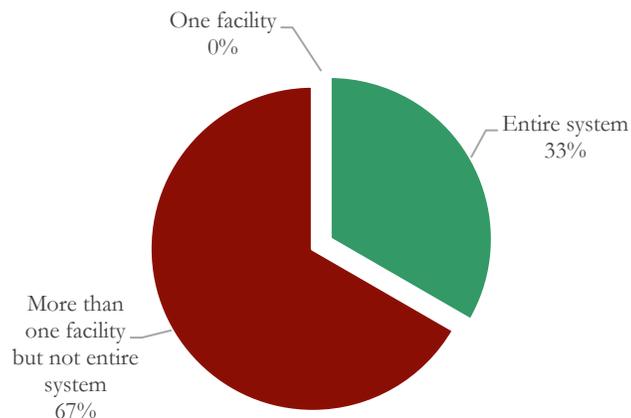
Respondents were asked a series of questions about corporate campaigns. Only 15% of respondents said their organizations had experienced a corporate campaign. Of those, the corporate campaign was focused on multiple facilities within a system or the entire system.

A corporate campaign is a multi-faceted, coordinated strategy designed to compel an organization’s management into agreeing to demands – the change of corporate policy to strengthen a bargaining position or ease organizing employees – or risk the target’s financial and reputational well-being.

Has a Corporate Campaign been used against your company, either at one of your facilities or, if you are part of a larger organization, against your parent company?

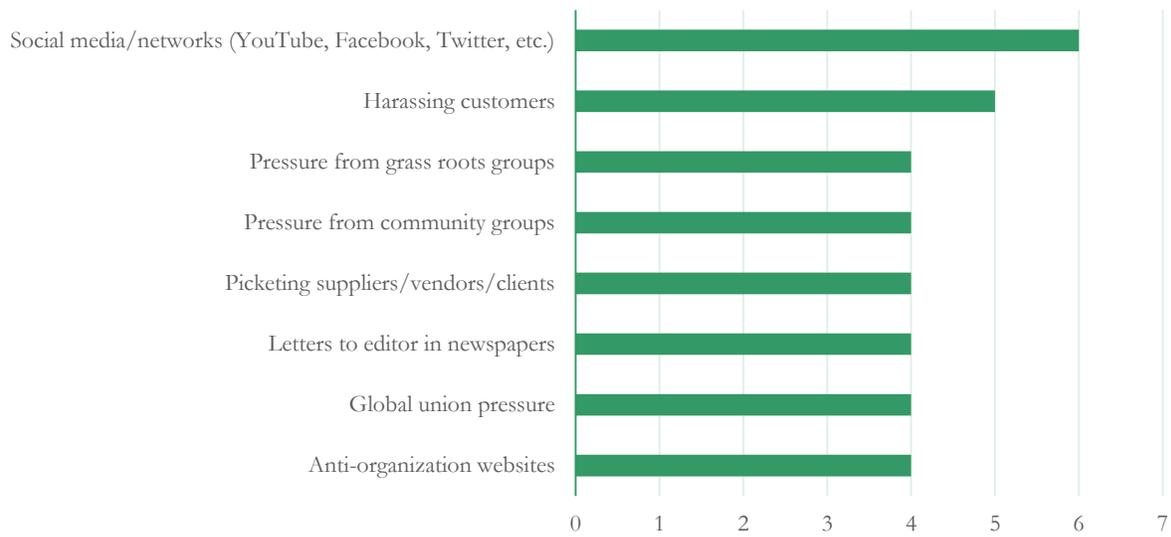


Is the Corporate Campaign focused on one facility or the entire organization?

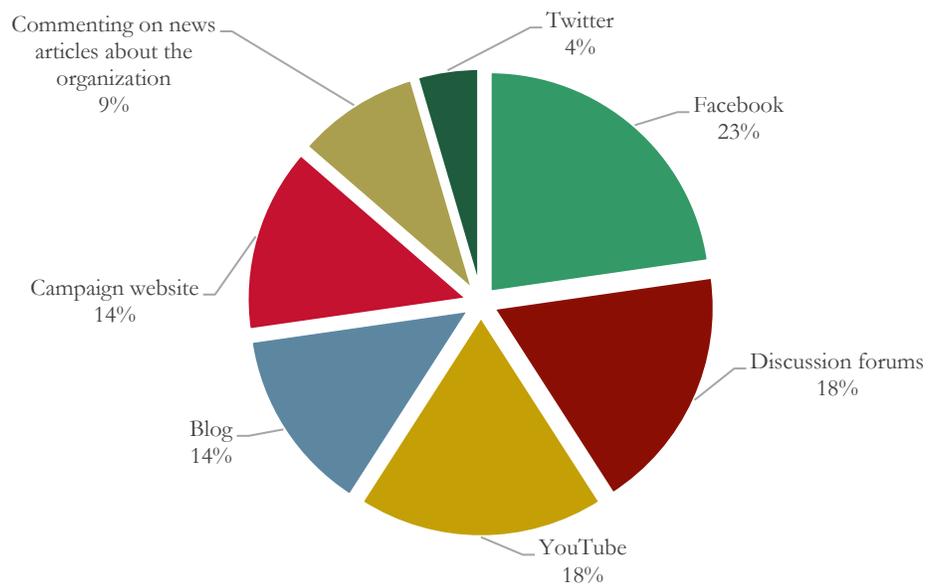


Respondents whose organizations experienced corporate campaigns were asked to detail the tactics that the unions used in the campaigns, which (if any) social media tools were used and how they were used. They were also asked where pressure from external organizations (if any) came from. Finally, respondents were asked if the corporate campaign was still active, and, if not, if it resulted in recognition of the union.

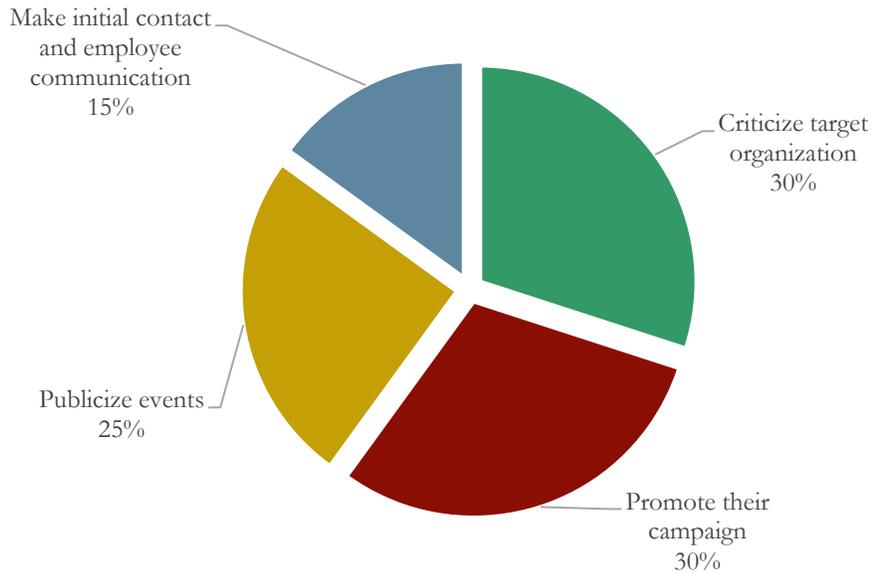
TACTICS USED



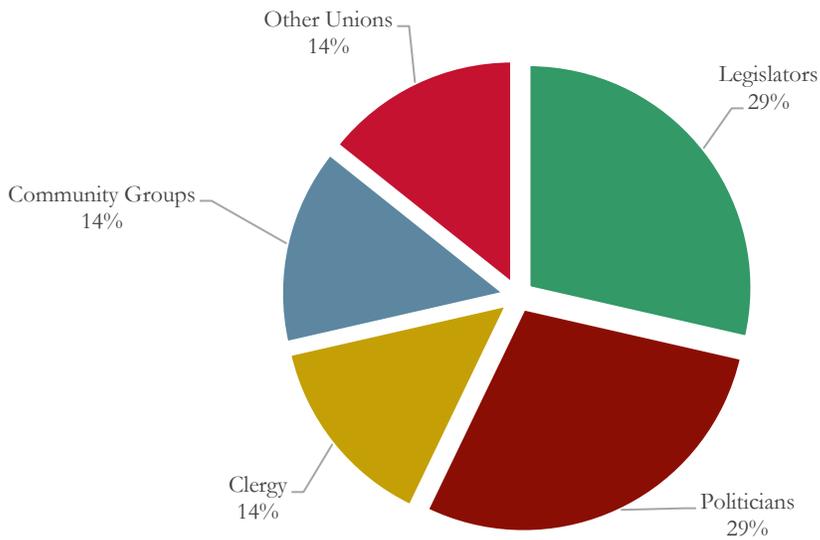
SOCIAL MEDIA TOOLS USED



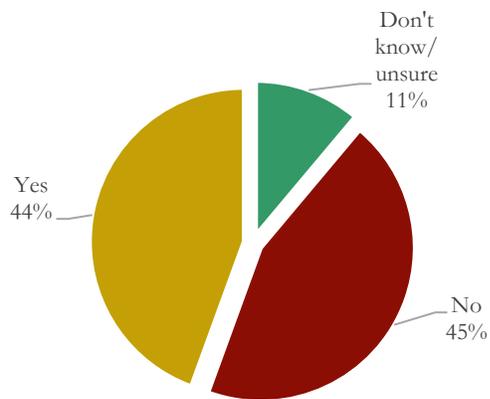
PURPOSE OF SOCIAL MEDIA TOOLS



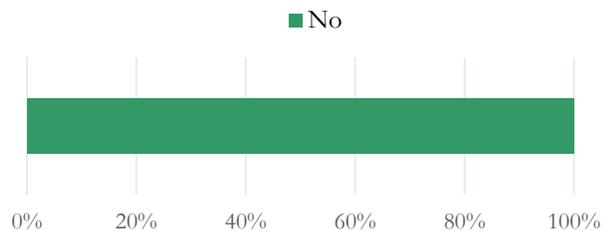
PRESSURE FROM EXTERNAL ORGANIZATIONS



Is the Corporate Campaign still in progress?



If the Corporate Campaign is no longer active, did it result in recognition of a union?



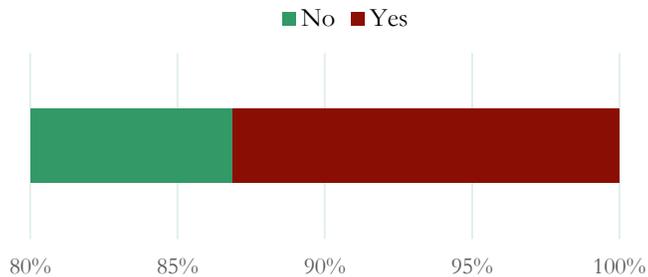
NEUTRALITY AGREEMENT/CARD CHECK/FAIR ELECTION AGREEMENT

A neutrality agreement is a legally enforceable contract between an employer and a union in which the employer agrees to refrain from resisting union organizing through speech and conduct that it otherwise would be entitled to engage in under the National Labor Relations Act.

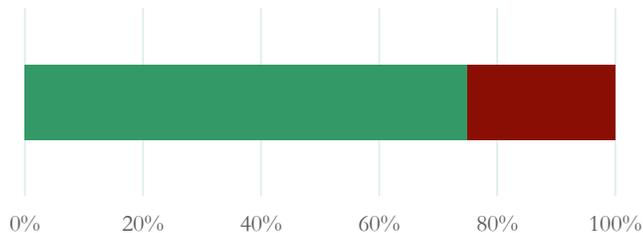
Card check agreements enable employees to sign cards expressing their desire to be represented rather than voting in a secret ballot election supervised by the NLRB.

Survey respondents were asked if their organization had been pressured to enter into a Neutrality Agreement, Card Check or Fair Election Agreement. While eight respondents said they had, only two respondent organizations actually entered into an agreement.

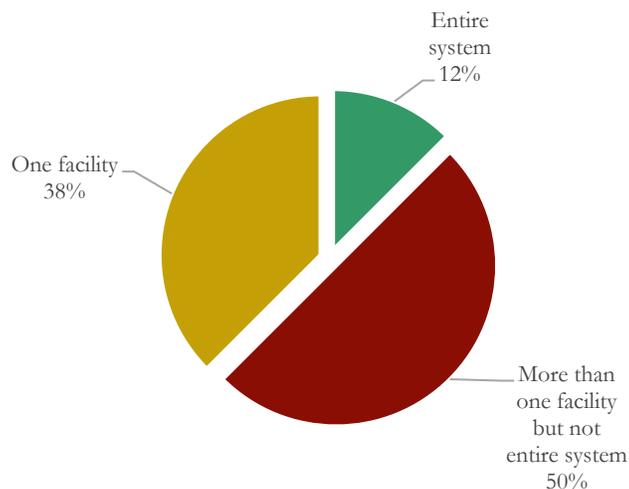
Has there been pressure to enter into a Neutrality Agreement/Card Check/Fair Election Agreement (or has one already been entered)?



Has an actual Neutrality Agreement/Card Check/Fair Election Agreement been agreed to?



Is the Neutrality Agreement/Card Check/Fair Election Agreement focused on one facility or an entire system?



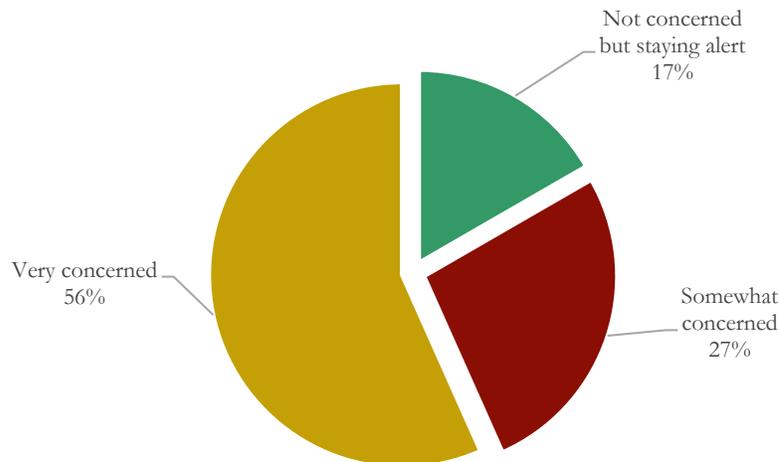
Respondents were asked which union or unions were involved. Their answers are listed below:

- Communications Workers (CWA) [mentioned twice]
- Teamsters (IBT) [mentioned twice]
- Bakery, Confectionery, Tobacco Workers and Grain Millers (BCTGM)
- Electrical Workers (IBEW)
- Operating Engineers (IUOE)
- Service Employees (SEIU)
- Steelworkers (USW)
- United Electrical Workers (UE)

POTENTIAL ORGANIZING

When asked about their level of concern about potential organizing, more than half of respondents said they were very concerned.

LEVEL OF CONCERN ABOUT POTENTIAL ORGANIZING

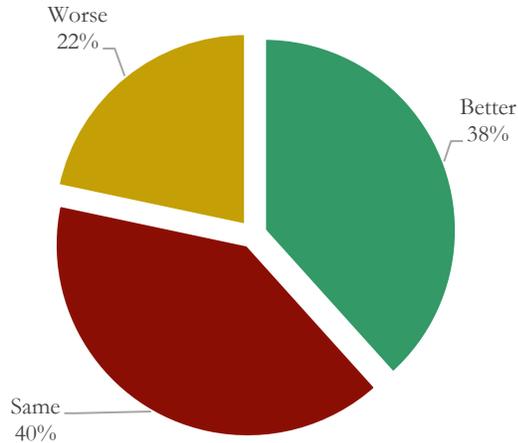


Respondents were asked to list their three most significant strengths that serve as deterrents to employees voting for representation as well as their three most significant vulnerabilities that serves as a reason for employees voting for union representation. Some of the most common responses are listed in the table below:

Strengths	Vulnerabilities
<ul style="list-style-type: none"> ■ Leadership Training ■ Pay & Benefits ■ Open Door Policy ■ Open and Effective Communication ■ Employee Engagement Strategies ■ Job Security ■ Positive Work Environment ■ Employee Education ■ Culture ■ Strong Leadership Teams ■ Good Relationships 	<ul style="list-style-type: none"> ■ Weak Leaders ■ Changes to Pay/Benefits ■ Union Activity in Local Area ■ Policy Changes ■ New/Young Employees ■ Structure of Organization ■ Poor Communication ■ Small/Micro Units ■ Existing Unions ■ Workload/Mandatory Overtime

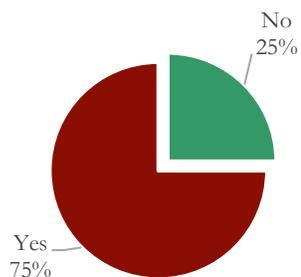
Morale among employees overall is the same or better among the majority of respondent organizations.

OVERALL MORALE

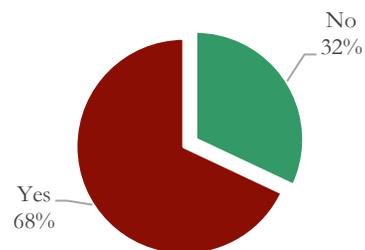


The NLRB decisions in the *Browning-Ferris* case has wide implications for employers across all industries. The ruling effectively states that companies can be held liable for labor violations of their contractors and be pulled into collective bargaining with them. Respondents were asked if this decision affects their organization. Three-quarters of respondents said it does, and 68 percent of them are taking proactive steps to address it.

Does the recent joint employer issue affect your organization?



If yes, are you taking proactive steps to address it?



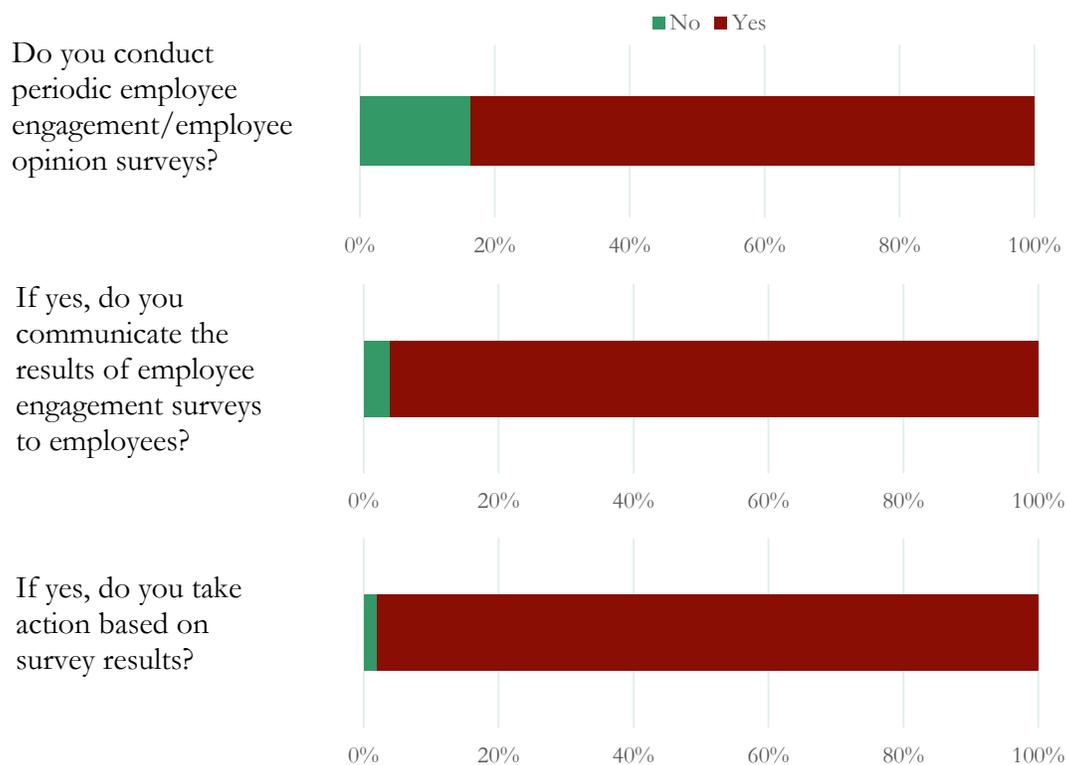
Respondents were asked to identify the steps they were taking to address the joint employer issue. Below are their responses.

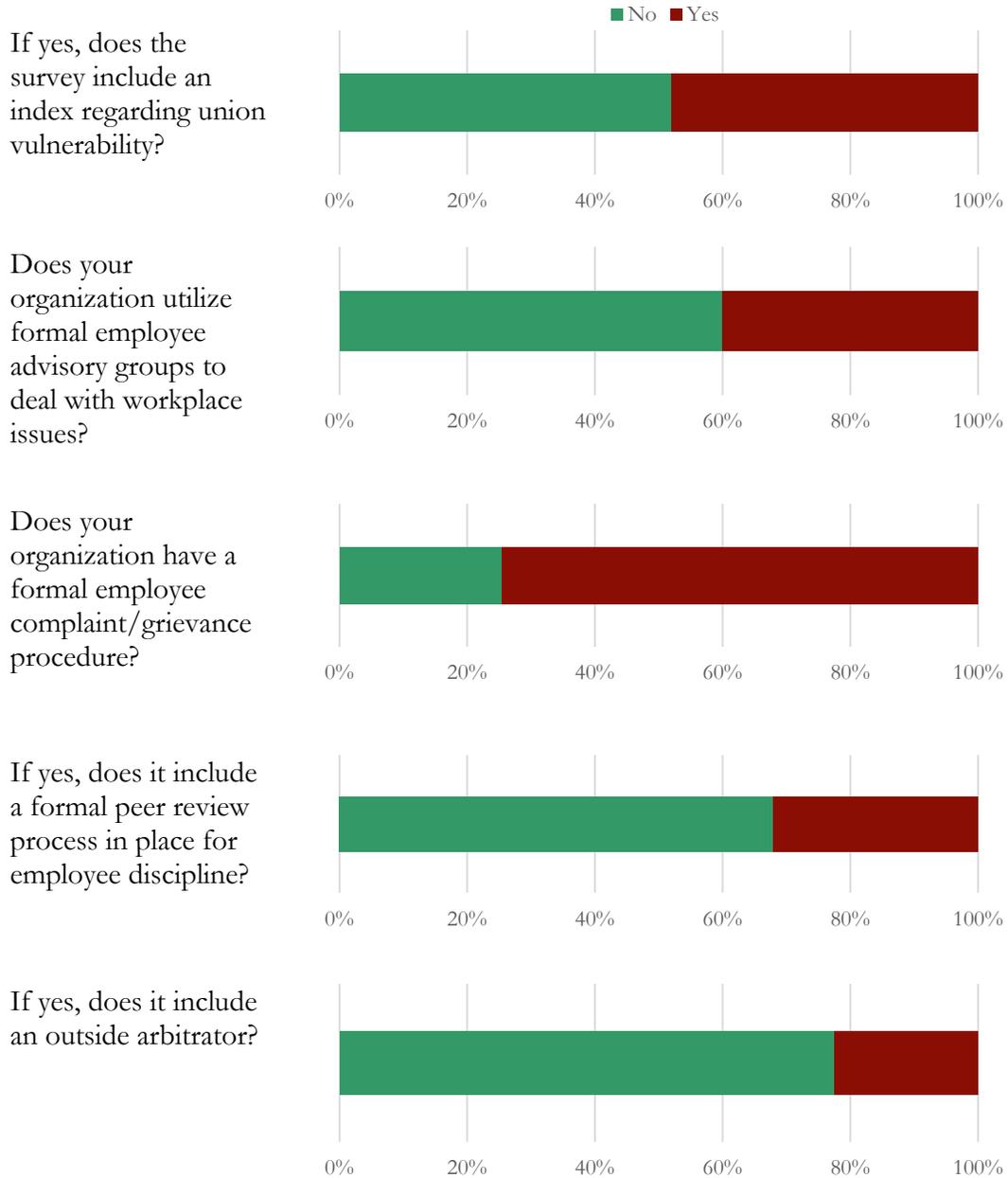
- Analyzing current vendor relationships for risk. Partnering with business operators to understand risk/decisions to minimize
- Beginning stages of evaluating risk and then determining path forward
- Contract review of vendor arrangements. Advising internal clients of risks of indirect and potential control
- Currently use a temp agency which could be considered a joint venture. Have not taken any steps regarding this
- Educating those business units leadership on the maintaining an absolute clear divide when it comes to working with contingent workforces
- Education of key leaders
- Education/training
- Ensuring the separation of companies to the extent possible.
- Keeping operations separate as much as possible
- Legal Dept. evaluating contracts etc., of contract employees, temps, vendors
- Mgt. awareness training
- Reducing the number of temporary workers significantly
- Research and better understanding of our sub-contractor engagements
- Review of all relationships and training for Leadership
- Review of contract TC's with legal and contract proposal groups
- Reviewing all existing contracts
- Reviewing all of our current staffing agreement language as well as identifying how many temp workers we have through agencies across the company on a regular basis. We will be assessing the risk associated to maintaining temporary staff vs. full or part-time associates. Ultimately once we have concluded our analysis we will also be educating site leaders about how to best maintain work with staffing agencies to get work performed. Finally we are supporting the fight through the US chamber of Commerce against this latest decision by the NLRB and other agencies that are following the new Joint Employer view
- Reviewing current practices and assessing risks
- Reviewing third party agreements
- Reviewing where we may be vulnerable

- Revisiting staffing arguments. Legal counsel
- Round table meeting
- Still uncertain at this point. Just not looking into it
- Supervisor training
- Training
- Try to use temp service less
- Understanding new reg. identifying & minimizing risk mitigation
- We are reducing the number of FT perm temps in certain locations to reduce exposure
- We are uncertain what impact this will have on our organization. To this point, all we have done is educate our leadership teams to ensure they maintain separation between contract workers and employees
- Working closely with business leaders and our legal team to make sure facilities understand the new and changing landscape

EMPLOYEE ENGAGEMENT

This section contains a series of questions respondents were asked to answer around employee engagement.

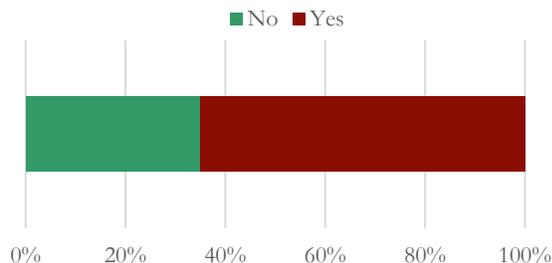




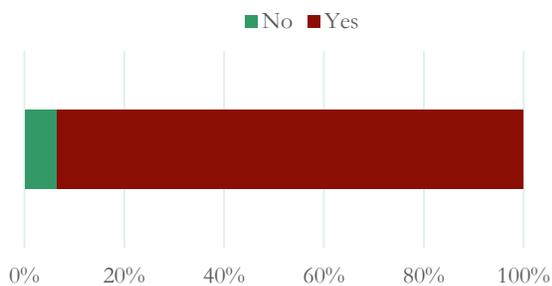
LABOR PREPAREDNESS

With the implementation of the expedited election ruling this year, it is more important than ever for employers to be proactively prepared to address labor issues and union activity before they arise. With that in mind, respondents were asked a series of questions about their organization’s preparedness for labor activity.

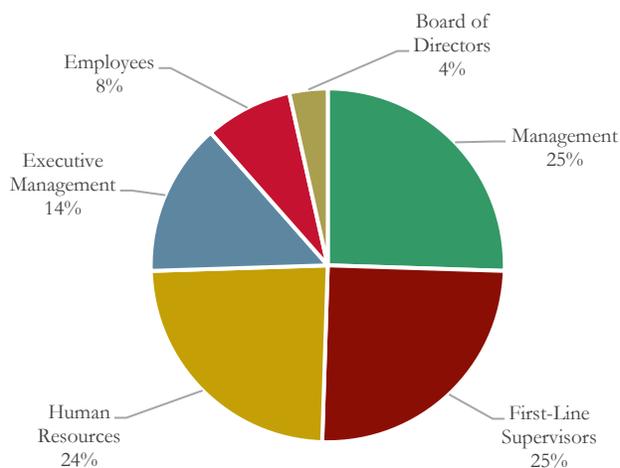
Has your organization developed an expedited election plan that could be utilized in the event of a petition?



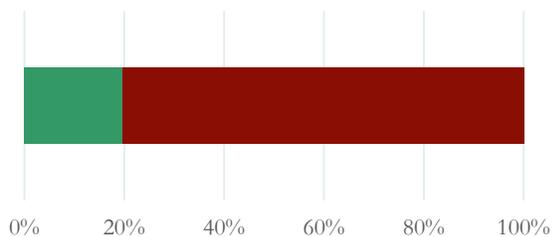
Do you currently provide education and training with stakeholders regarding unions, unionization and the implications for the organization?



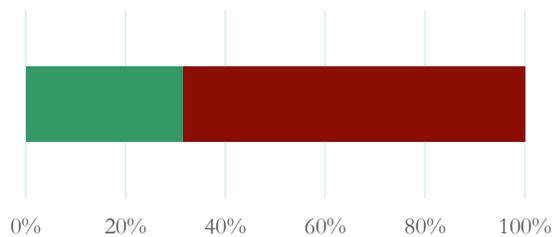
If yes, which groups receive this training?



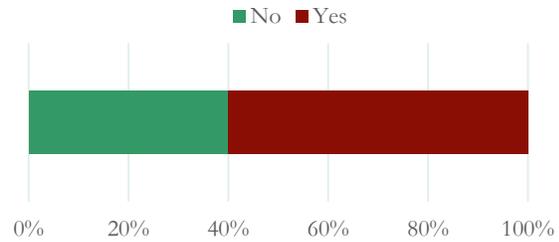
Has your organization developed a philosophy statement around unions and unionization?



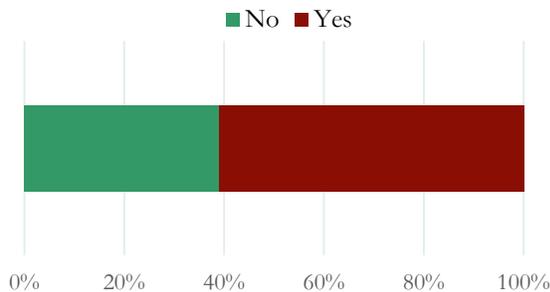
If yes, is it discussed during new hire orientation?



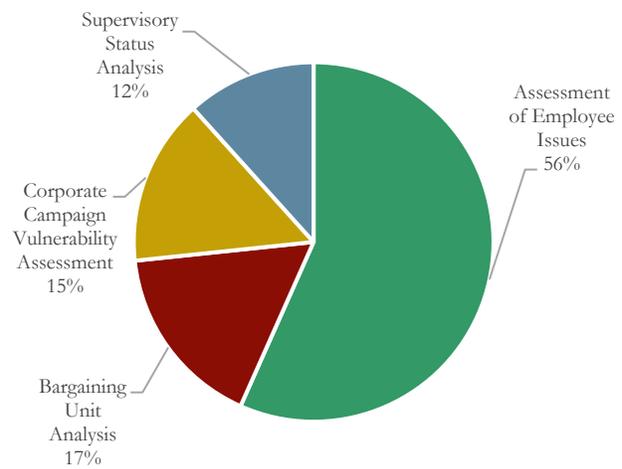
Has your organization designated and trained a “union organizing rapid response team” that has more in-depth training to respond to union organizing?



Has your organization conducted a union vulnerability assessment in the last 12 months?



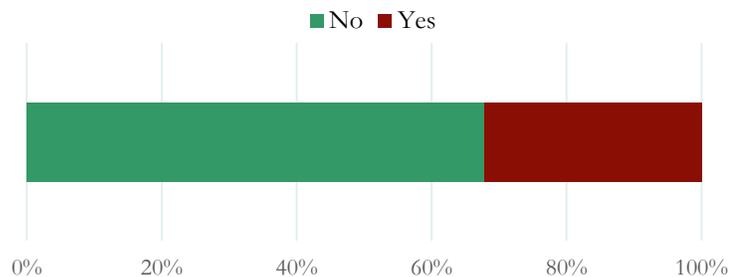
If yes, what types of assessments were used?



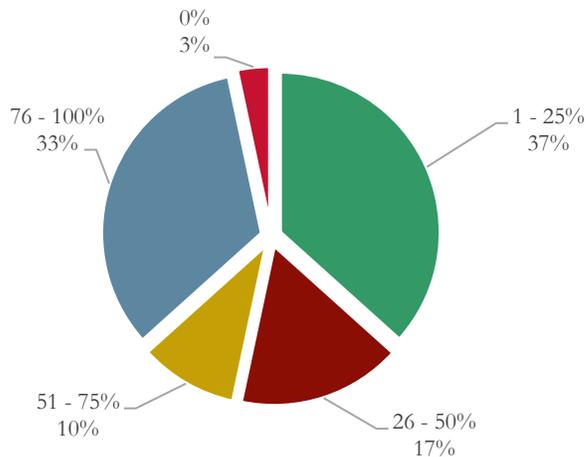
COMMUNICATIONS/CAMPAIGN READINESS

Communications is a crucial component of any successful campaign. This series of questions asks about communication channels and preapproved materials and strategies that can be deployed in the event of a union organizing campaign.

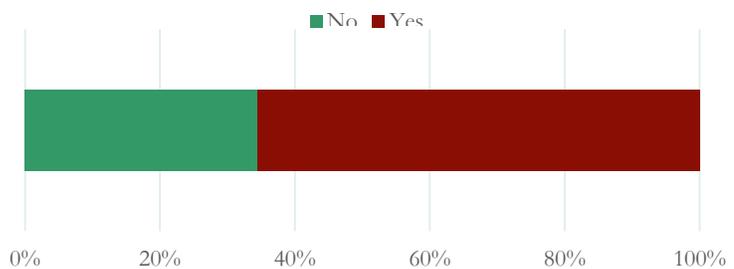
Has your organization conducted a communications audit to assess the effectiveness of internal communications in the organization?



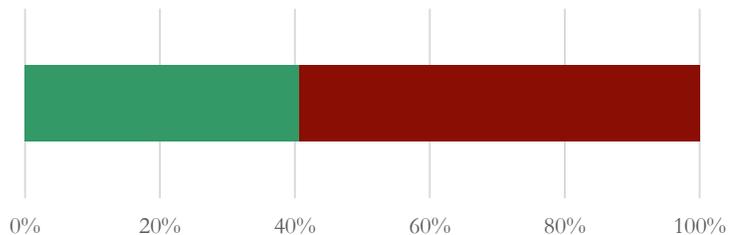
What percentage of (non-management) employees have access to company email?



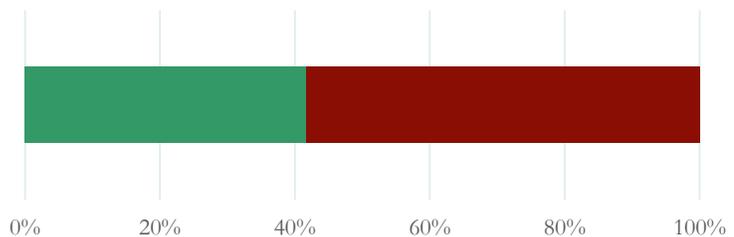
Does your organization monitor social media sites (Facebook, Twitter, YouTube, etc.)?



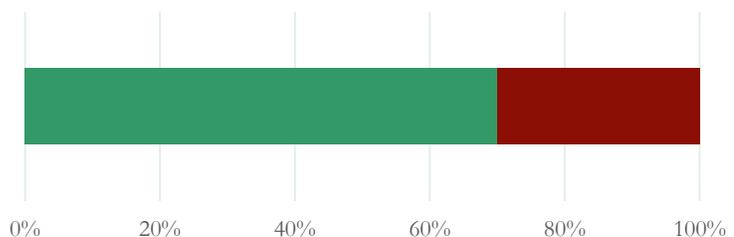
Does your organization have a pre-approved union campaign strategy, calendar and communications schedule that can be immediately used in a union election period?



Does your organization have pre-approved communications materials that can be utilized in a union election period?



Has your organization developed a website with facts about unions and unionization that can be deployed immediately for a union election?



LEADERSHIP DEVELOPMENT

The below chart illustrates areas in which respondent organizations conduct leadership development training. The most common areas are in how to provide effective feedback, how to manage conflict and how to manage change.

ORGANIZATION CONDUCTS LEADERSHIP DEVELOPMENT IN THESE AREAS



UNIONIZED ORGANIZATION- COLLECTIVE BARGAINING

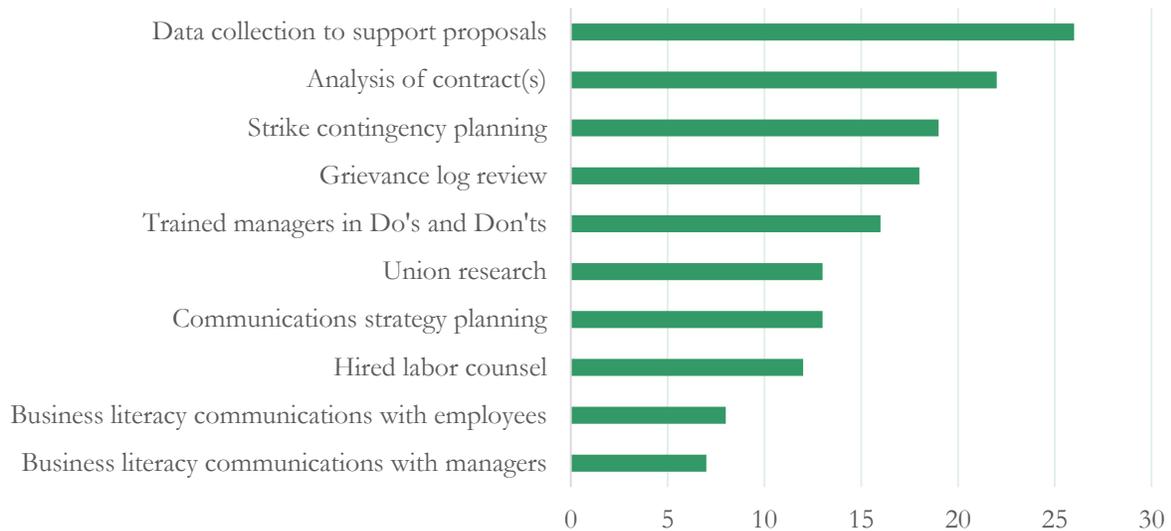
The final section of the labor activity survey asked unionized organizations how they prepared for collective bargaining. The following chart illustrates the most common actions organizations took.

Of the respondents whose organizations were unionized, just one was participating in the organization's first contract negotiations, all others had been through negotiations at least once before. In fact, the vast majority of organizations had been unionized for 21 years or more.

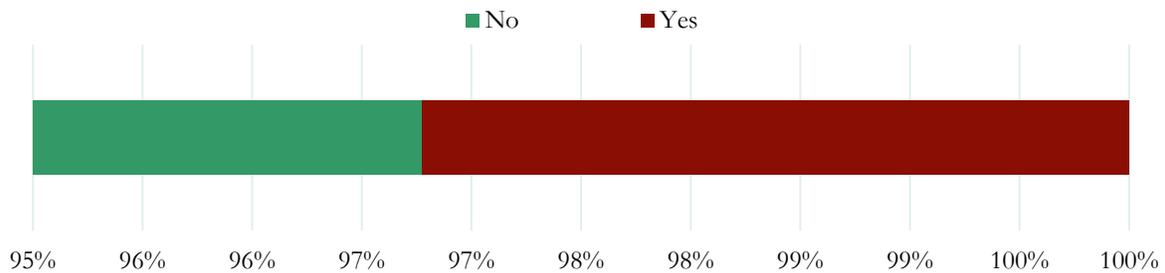
Not surprisingly, healthcare benefits and pay were the biggest issues during contract negotiations.

Respondents were also asked what tactics the union used during negotiations and how their organization communicated updates to managers and employees.

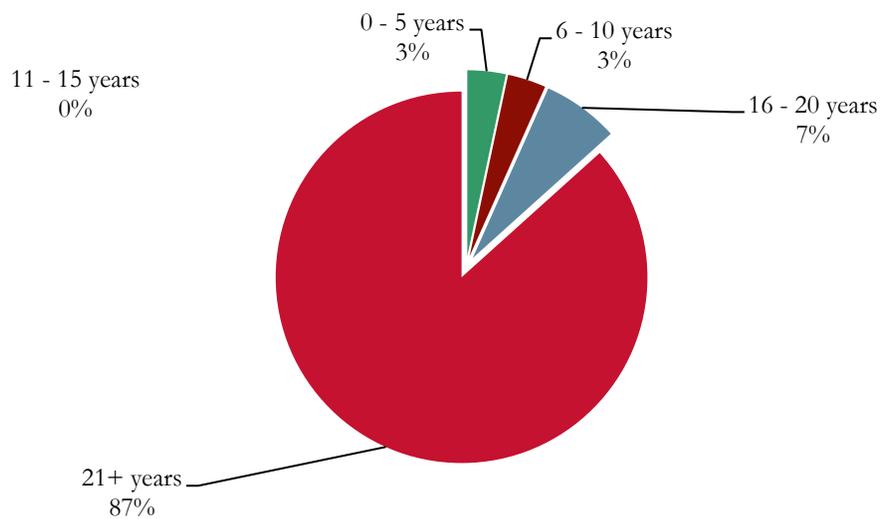
HOW ORGANIZATION PREPARED FOR COLLECTIVE BARGAINING



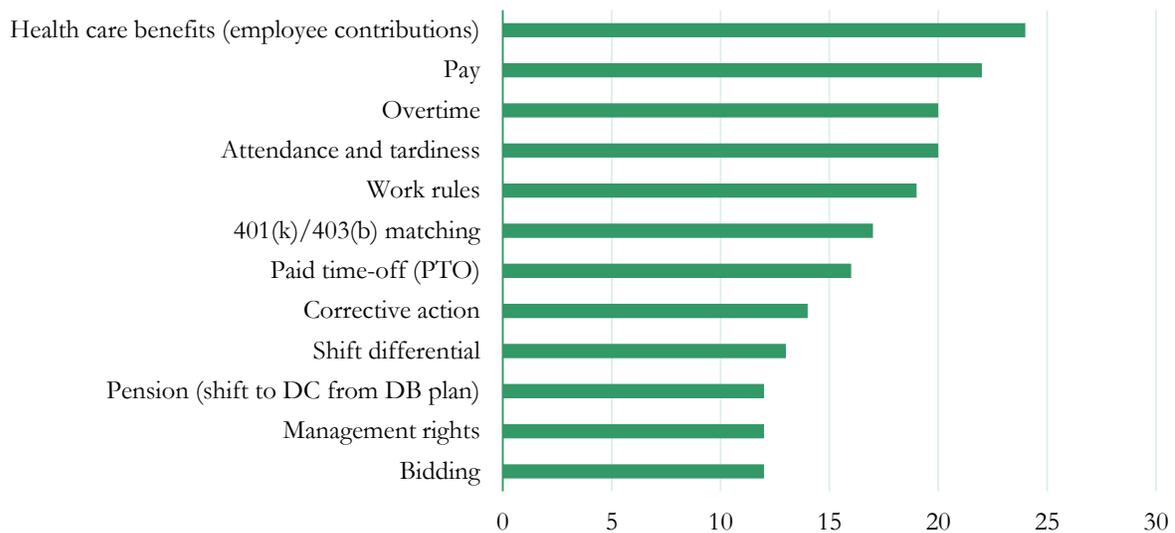
ORGANIZATION'S FIRST CONTRACT NEGOTIATIONS



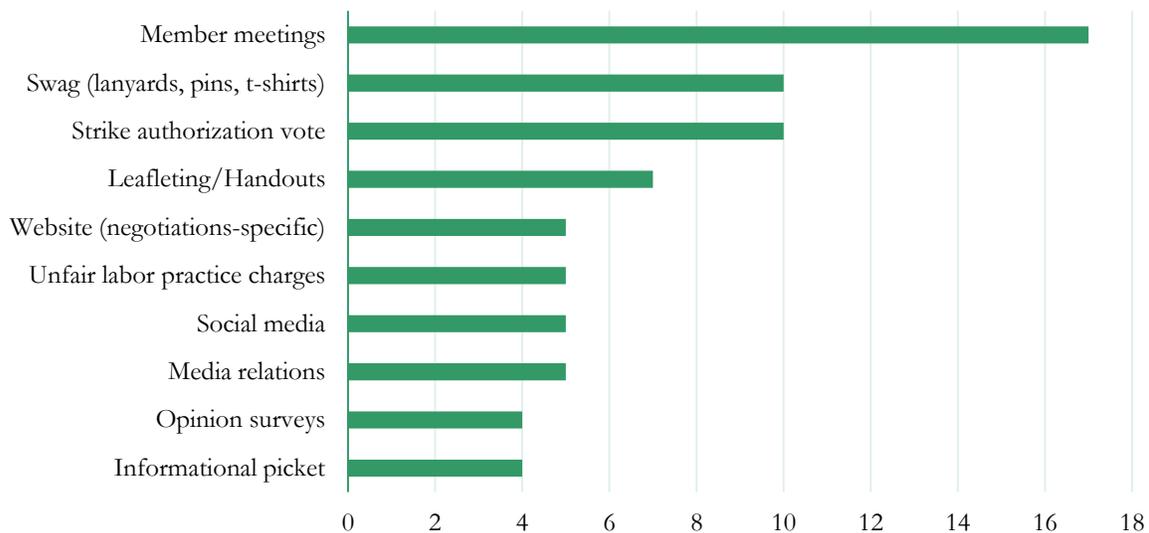
LENGTH OF TIME ORGANIZATION HAS BEEN UNIONIZED



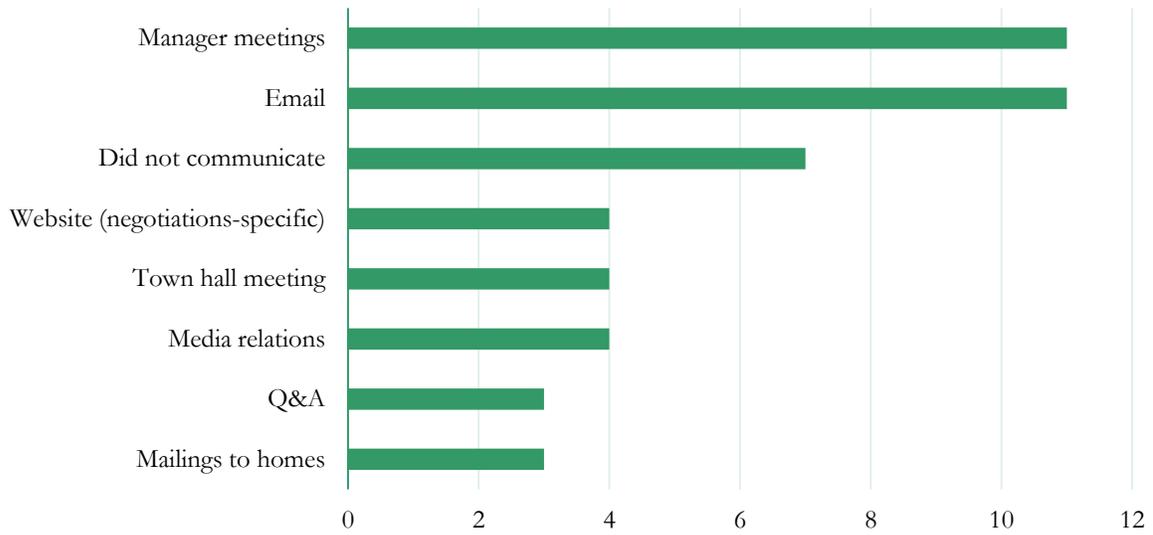
ISSUES DISCUSSED DURING NEGOTIATIONS



UNION TACTICS DURING CONTRACT NEGOTIATIONS



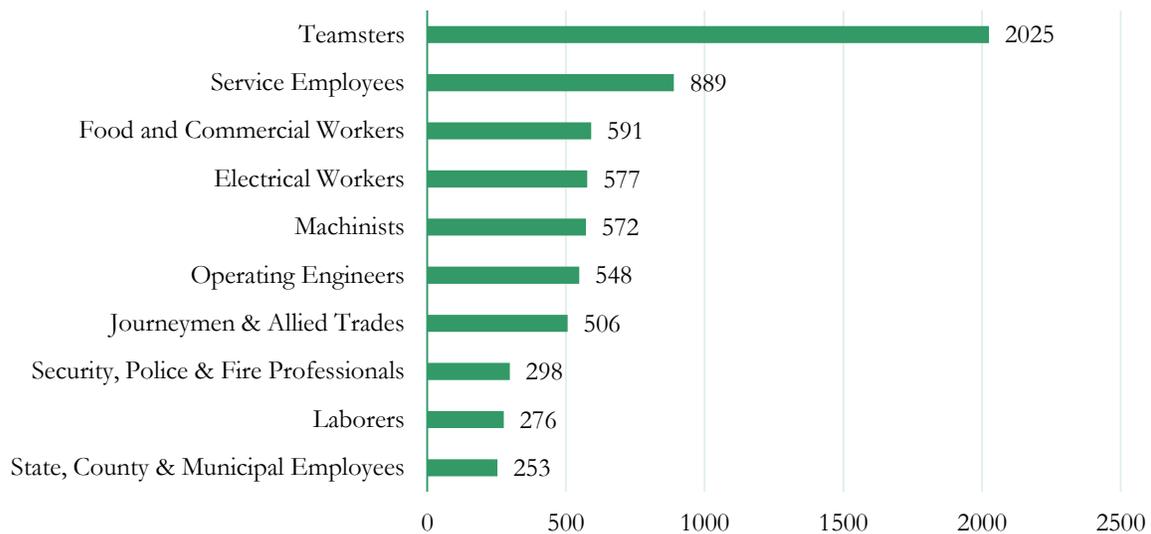
BARGAINING UPDATES SHARED WITH MANAGERS AND EMPLOYEES



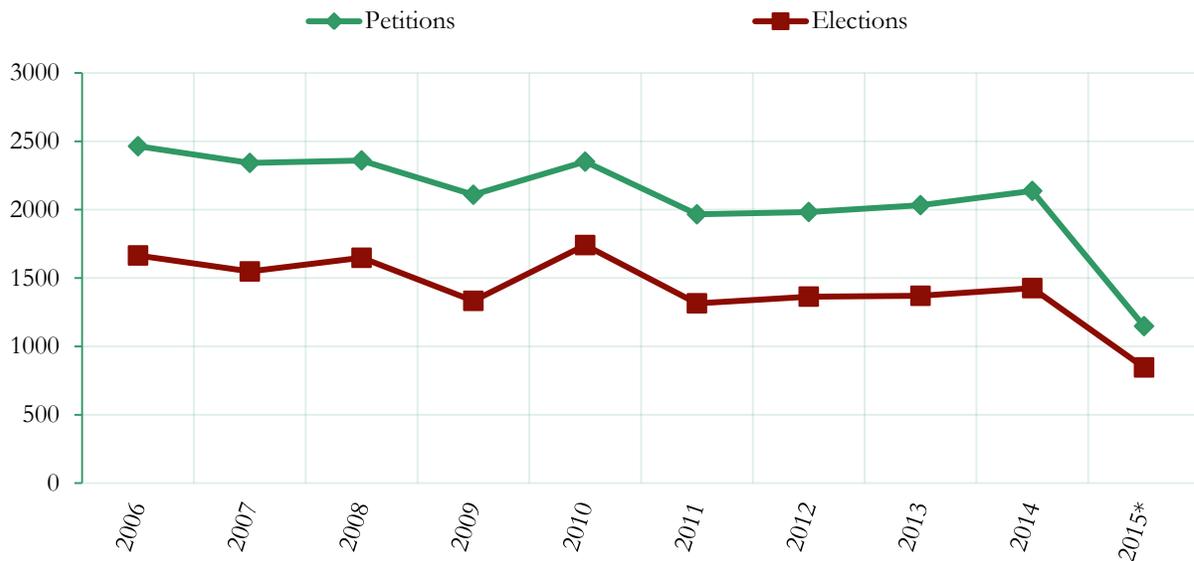
ORGANIZING DATA FROM NATIONAL LABOR RELATIONS BOARD

In the past five years, the Teamsters have filed more representation petitions than any other union - more than double the next union.

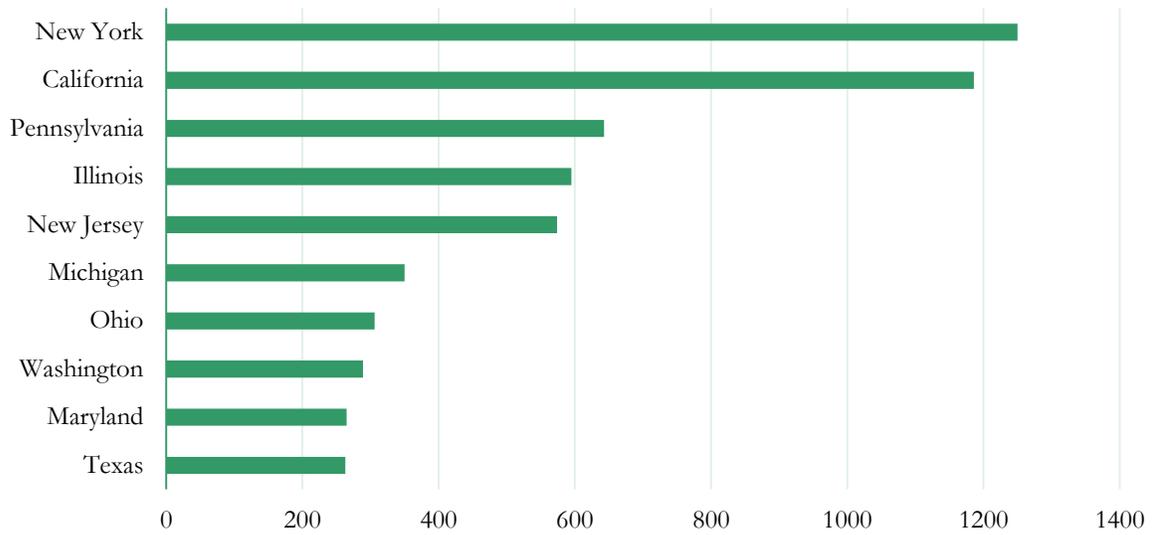
TOP UNIONS BY NUMBER OF RC PETITIONS FILED - ALL INDUSTRIES (2011-2015*)



RC PETITIONS AND ELECTIONS BY YEAR - ALL INDUSTRIES



RC PETITIONS FILED BY STATE (2011-2015*)



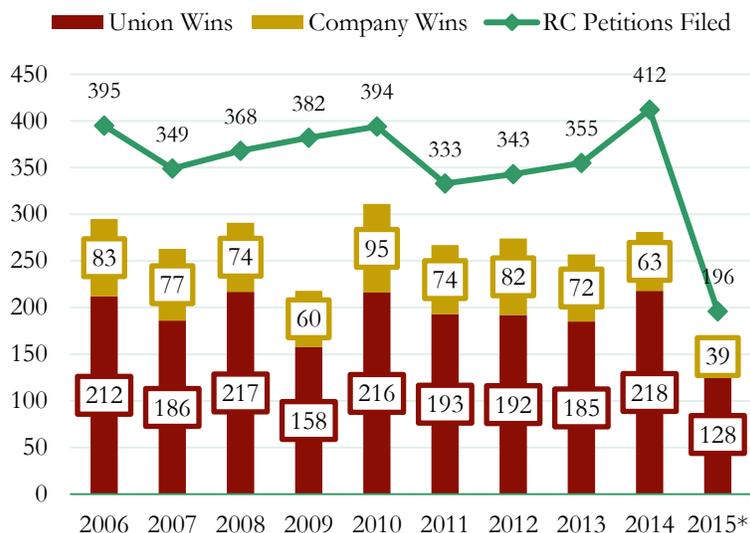
On the following pages, this report more closely examines union activity in select industries represented by CUE members.

HEALTHCARE AND SOCIAL ASSISTANCE

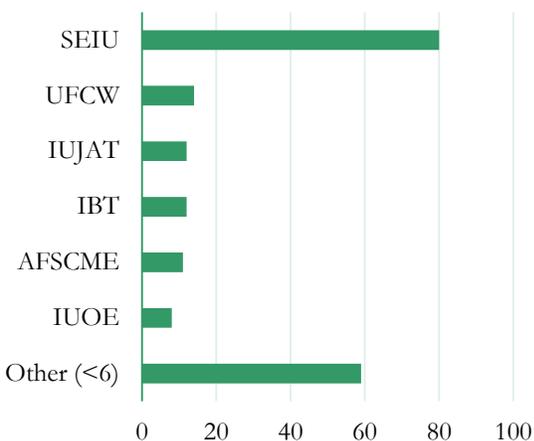
There was a spike in representation petitions in 2014. In the first six months of 2015, there were 196 petitions filed.

The Service Employees International Union filed more petitions and held more elections than any other union in the industry. They were successful in 80 percent of elections.

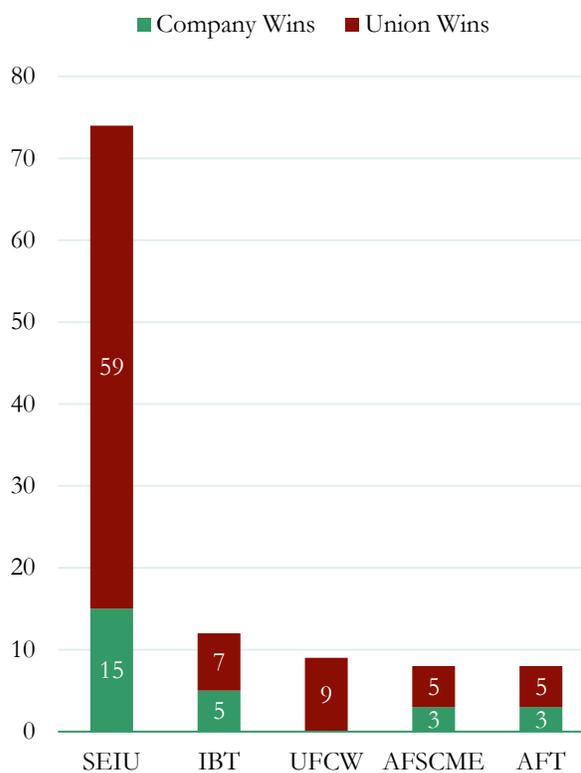
RC PETITIONS & ELECTIONS BY YEAR



RC PETITIONS FILED BY UNION (2015)



RC ELECTIONS BY UNION (2015)

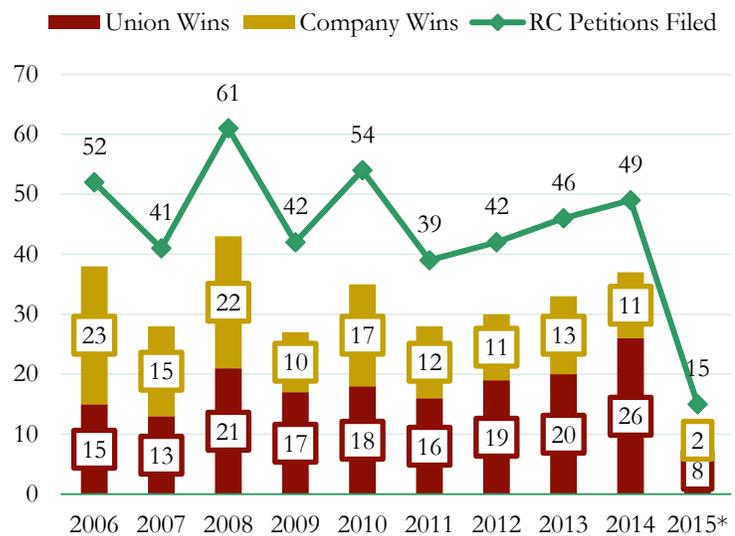


INFORMATION

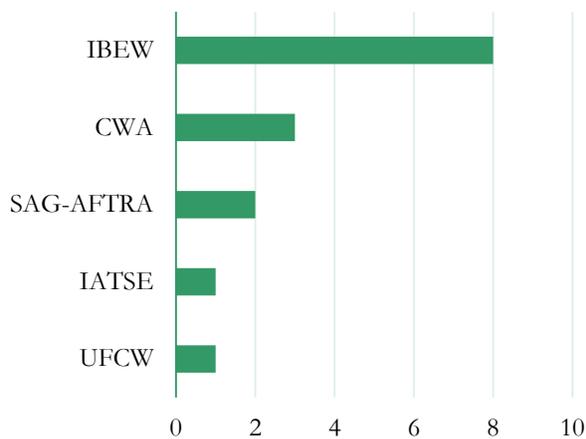
The number of petitions filed in the information industry reached a peak with 61 representation petitions filed in 2008. In the first six months of 2015, there were 15 petitions filed.

In the first six months of the year, the Electrical Workers filed more petitions than any other union. They held five elections and won three of them.

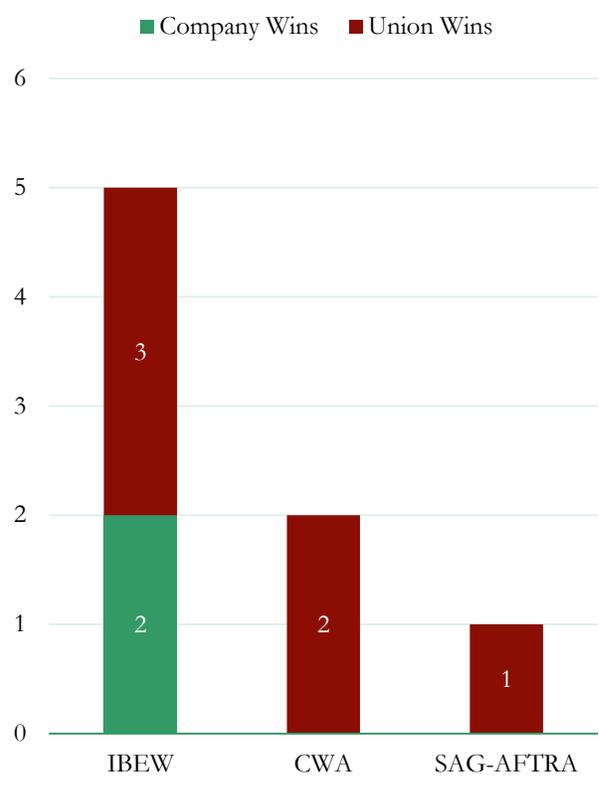
RC PETITIONS & ELECTIONS BY YEAR



RC PETITIONS FILED BY UNION (2015)



RC ELECTIONS BY UNION (2015)

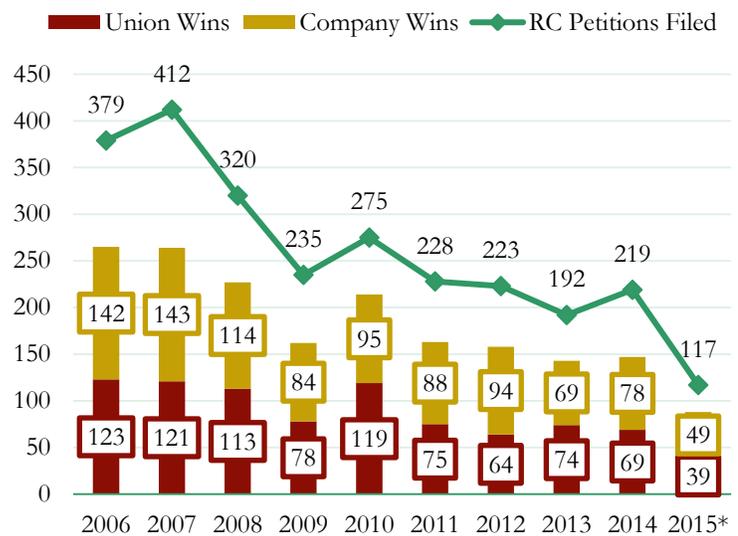


MANUFACTURING

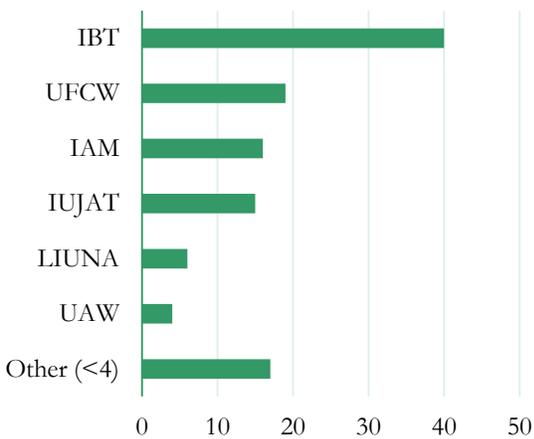
The number of representation petitions filed in the manufacturing industry has been on the decline over the past decade. In the first six months of 2015, there were 117 petitions filed.

The Teamsters is the most active union in the manufacturing industry, filing more than double the number of petitions as the next union. Their success rate is just above 50 percent.

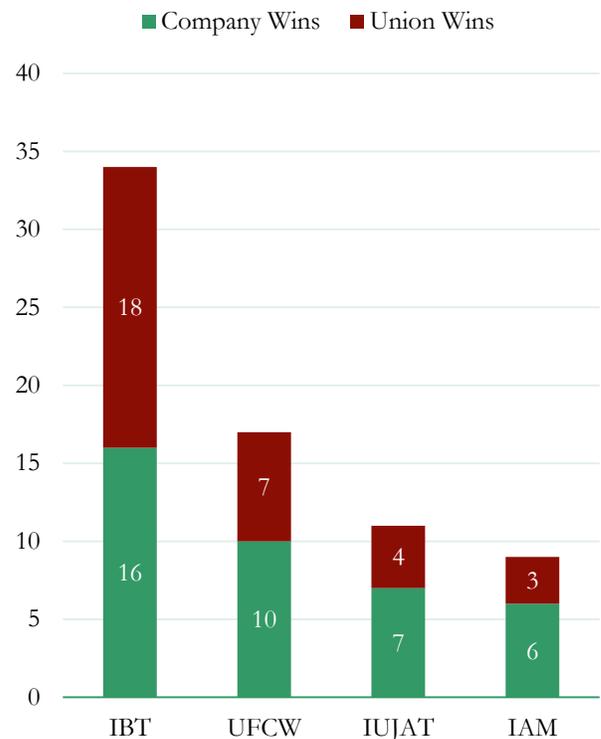
RC PETITIONS & ELECTIONS BY YEAR



RC PETITIONS FILED BY UNION (2015)



RC ELECTIONS BY UNION (2015)

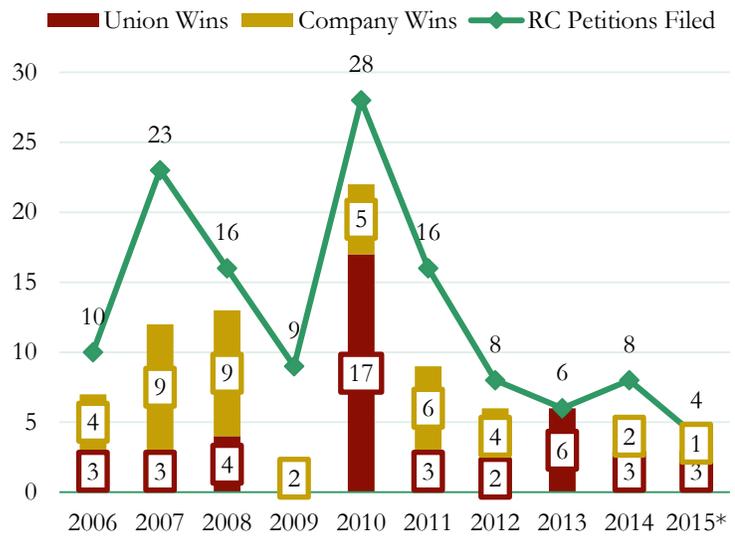


MINING, QUARRYING, AND OIL AND GAS EXTRACTION

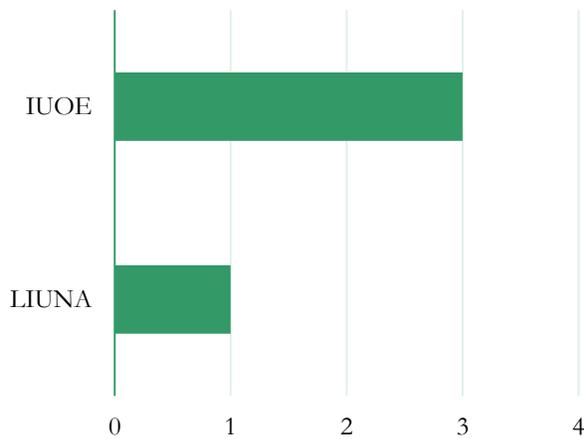
Mining, quarrying, and oil and gas extraction is a lower activity industry. In the first six months of 2015, there were just four representation petitions filed.

The Operating Engineers filed three of the petitions and the Laborers filed one.

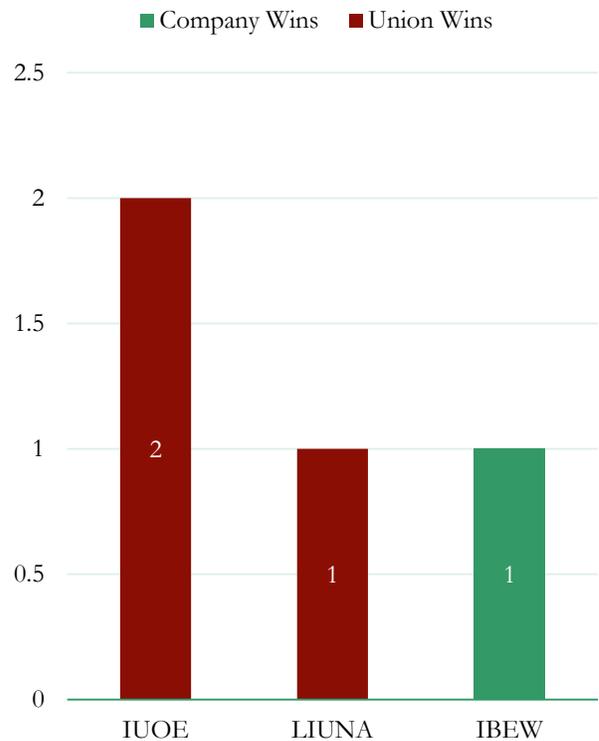
RC PETITIONS & ELECTIONS BY YEAR



RC PETITIONS FILED BY UNION (2015)



RC ELECTIONS BY UNION (2015)

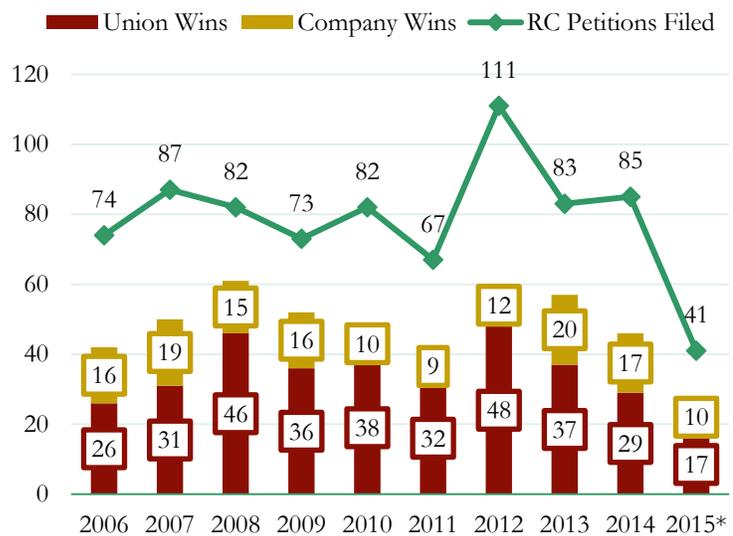


OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION)

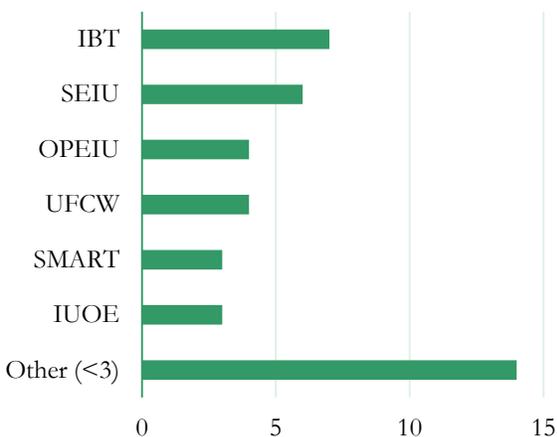
In the first six months of 2015, there were 41 petitions filed in the other services (except public administration) industry.

There are numerous unions that are active in this industry, including the Teamsters, Service Employees, and Office and Professional Employees.

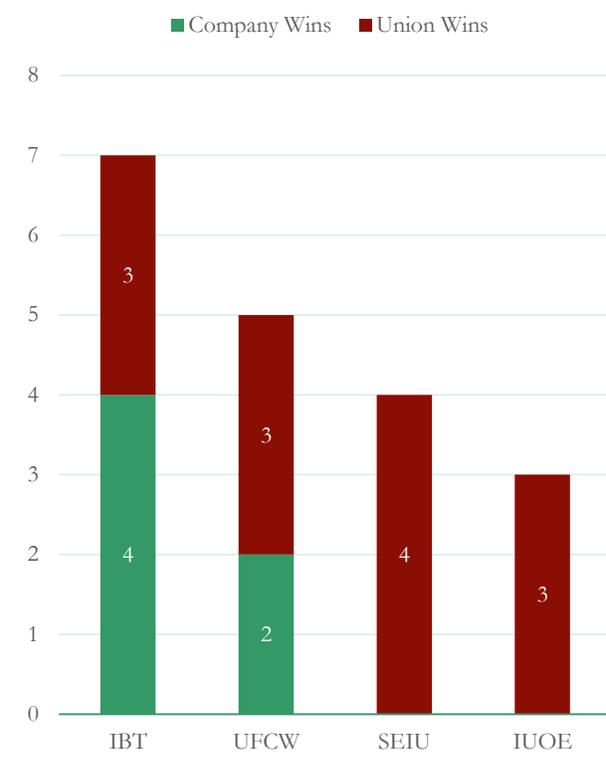
RC PETITIONS & ELECTIONS BY YEAR



RC PETITIONS FILED BY UNION (2015)



RC ELECTIONS BY UNION (2015)

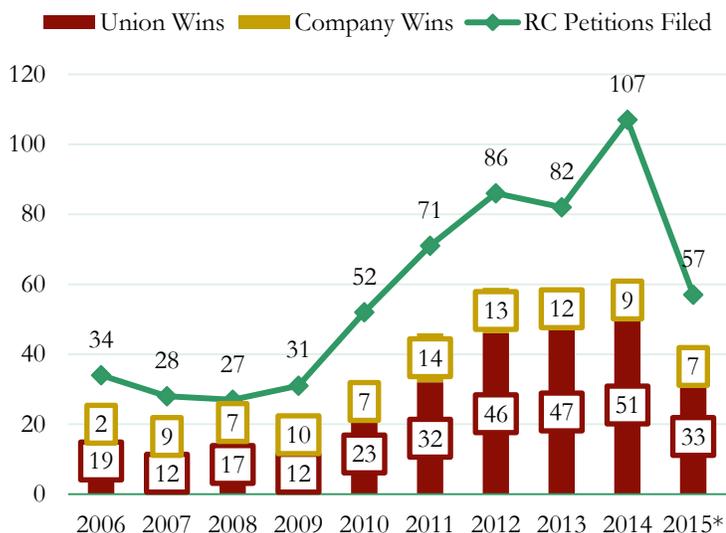


PROFESSIONAL, SCIENTIFIC AND TECHNICAL SERVICES

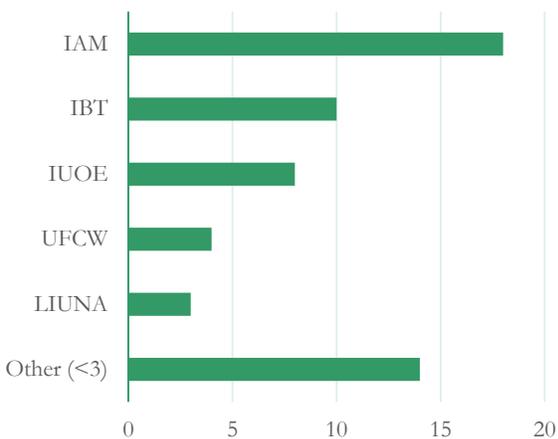
The number of representation petitions filed in the professional, scientific and technical services industry has been increasing over the past decade. With 57 petitions filed in the first six months of the year, that trend looks to continue in 2015.

Unions experienced an 82 percent win rate in the first six months of 2015, with the Machinists, Auto Workers and Operating Engineers winning all of their elections.

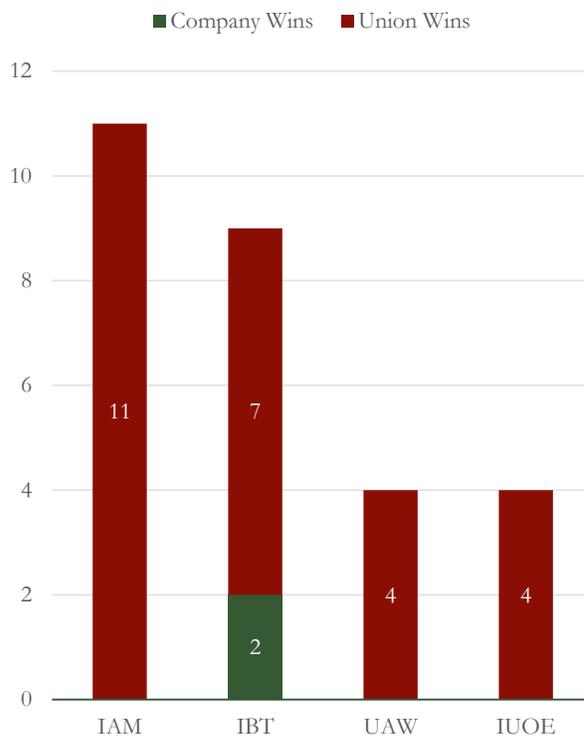
RC PETITIONS & ELECTIONS BY YEAR



RC PETITIONS FILED BY UNION (2015)



RC ELECTIONS BY UNION (2015)

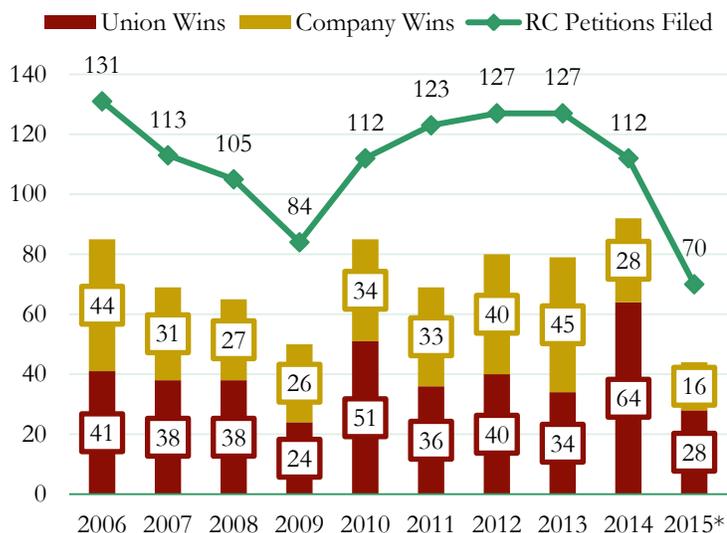


RETAIL TRADE

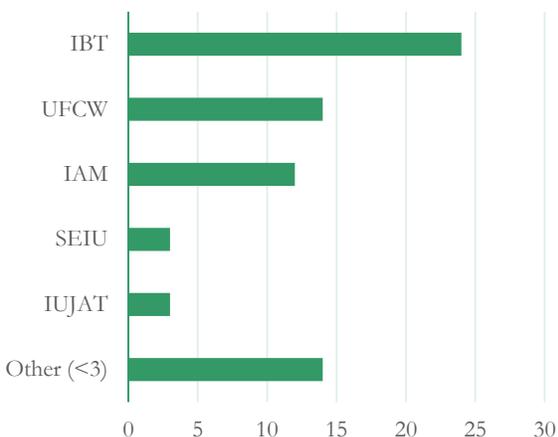
The retail trade industry saw a decline in petitions filed in the first part of the decade, reaching a low point in 2009. In the first six months of 2015, there were 70 representation petitions filed, putting the industry on track to see the most petitions in the last 10 years.

The Teamsters, Food and Commercial Workers and Machinists are the most active unions in the retail trades industry.

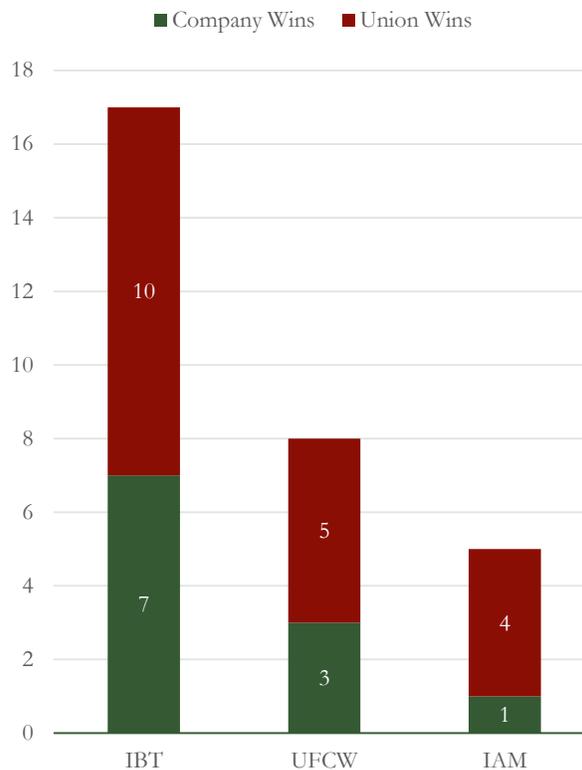
RC PETITIONS & ELECTIONS BY YEAR



RC PETITIONS FILED BY UNION (2015)



RC ELECTIONS BY UNION (2015)

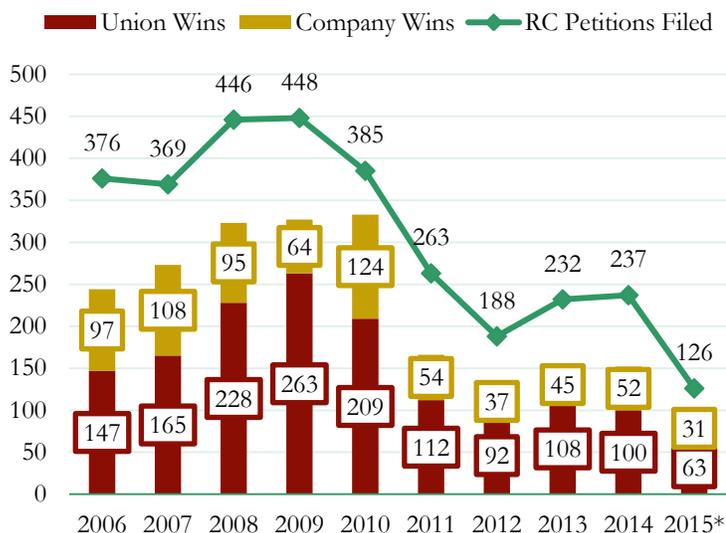


TRANSPORTATION AND WAREHOUSING

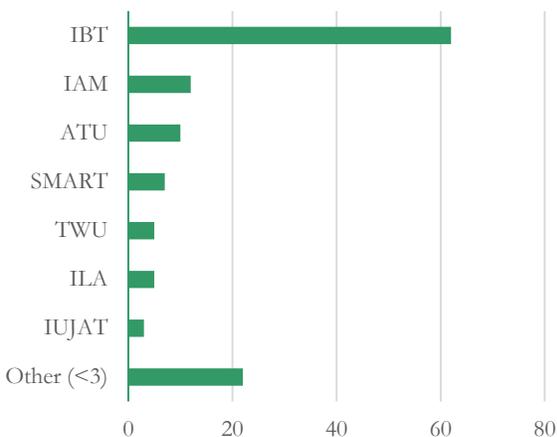
The number of representation petitions filed in the transportation and warehousing industry has been on an overall decline since its peak in 2009.

The Teamsters is by far the most active union in the transportation and warehousing industry, filing more than five times the next most active union in the first six months of 2015.

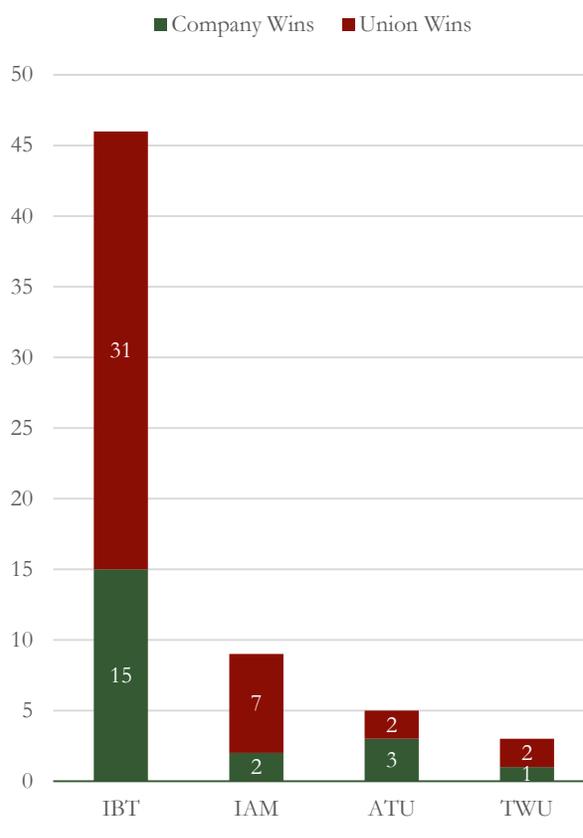
RC PETITIONS & ELECTIONS BY YEAR



RC PETITIONS FILED BY UNION (2015)



RC ELECTIONS BY UNION (2015)



CUE LEGAL UPDATE

David A. Wimmer, Esq. and Emily G. Camastra, Esq

The CUE Legal Alert is published to communicate legal developments in the labor relations field to its members. It is for general information purposes only and is not intended to provide legal advice relative to any particular factual situation or labor dispute. Questions or requests for advice concerning specific problems should be directed to your legal counsel. Legal Alert is intended for management's use only and any reproduction, distribution or circulation thereof beyond management is strictly prohibited.

As we enter the new calendar year, employers should be mindful of several important labor developments that occurred in 2015 that will shape the legal landscape in 2016.

CHANGE IN PERSUADER RULES

On December 7, 2015, the DOL forwarded the long-anticipated revisions to the “persuader rules” to the Office of Management and Budget – an important final step before the new rules can take effect. Because the DOL has set March 2016 as the target date for implementation, employers should begin to prepare for the impending publication.

Currently, the Labor-Management Reporting Disclosure Act (LMRDA) requires an employer to report each time it engages a consultant to persuade employees (directly or indirectly) regarding their right to bargain collectively or organize. Failing to report such “persuader activity” could result in jail time and a fine of \$10,000. An exception to this requirement, however, is that employers are currently free to avoid disclosing the engagement of an attorney to give advice about organizing campaigns as long as the attorney does not have contact with the employees and as long as the employer is free to accept or reject the attorney’s advice. This long-standing exception to the LMRDA reporting requirements is called the “advice exception.”

The soon-to-be-final rules, however, would narrow the advice exception and would require employers to now report a great deal of information regarding the legal advice they receive in organizing campaigns. Critics of the proposed rule, including the American Bar Association, contend that such a change would interfere with the attorney-client relationship and would have a chilling effect on the employer’s free speech during union campaigns. Although legal challenges to the final rules are expected once they are published, employers should be aware that these changes to the LMRDA reporting requirements are right around the corner.

EXPEDITED UNION ELECTION RULES

On April 14, 2015, the expedited union election rules of the National Labor Relations Board (the “NLRB” or “Board”) took effect, marking dramatic changes in the conduct and timing of union elections. The new rules (often referred to as the “ambush” or “quickie” election rules) reduce time it takes a union to get an election and, thereby, make it harder for employers to effectively communicate with employees regarding upcoming union elections. Specifically, the new rules make the following changes:

- Petitions for union representation and related documents may now be filed electronically.

- Any necessary representation hearing is now scheduled within 8 days of the filing of the petition, as opposed to 14 days under the former rules. The representation hearing resolves any representational issues related to the propriety of the petition and any legal issues raised by the employer.
- Employers must submit a “Statement of Position” by noon on the day before the representation hearing that identifies any legal issues the employer believes exist with respect to the petition. Employers must identify any classifications, locations, or employee groupings that they contend should be added to or excluded from the proposed unit, and the grounds for such arguments. Any arguments not raised in the Statement of Position will be deemed waived.
- As part of its Statement of Position, employers must provide a preliminary list of employees who will participate in the election, along with their job titles, shifts, and work locations. Under the former rules, employers were required to provide this information only after the Board directed an election or approved an election agreement.
- Pre-election rulings at representation hearings are no longer reviewable prior to the election.
- Within 2 business days of the approval of an election agreement or decision directing an election, the employer is required to provide the Board and union with an expanded Excelsior list. This new document must contain, among other factors, a list of the home addresses, home telephone numbers and personal email addresses (if available) of all employees eligible to vote in the union election. Under the former rules, such a list was required within 7 days of the approval of an election or election agreement, and personal email addresses and telephone numbers were not required.
- The new rules eliminate the 25-day period between the date an election is ordered and the date the election is held. Elections now will be held “as soon as practical.”
- The NLRB’s review of any post- election dispute is now discretionary.

While there is no specified deadline by which an election must take place, the Board has indicated that the expedited election process would result in elections taking place between 10 and 21 days after the filing of a petition, in contrast with the previous 38 to 45 day time frame. In reality, experience shows that elections are occurring about 23-28 days after petition filing.

This shortened time frame limits the communications that employers can have with employees about the election and, thus, seriously hampers an employer’s ability to respond to a petition. A union can campaign for months, or even years, file a petition with the NLRB any time it chooses (after achieving an adequate showing of interest), and have an election within three to four weeks after the petition is filed.

This is why, more than ever, employers should try to minimize the risk of receiving a union-organizing petition. To achieve this end, employers are advised to openly communicate with employees about why a union is not necessary and would be detrimental to their interests.

TEMPORARY EMPLOYEES AND JOINT EMPLOYMENT

In the recent Browning-Ferris Industries decision, the NLRB broadly expanded who may be considered a joint employer under the National Labor Relations Act (NLRA). Prior to this decision, the standard for establishing joint employment was that both entities had to share the ability to control essential terms and conditions of employment (i.e. hiring, firing, supervising, and directing employees.) In Browning-Ferris, the Board departed from decades of established precedent and held that a company's indirect and reserved control – even if not exercised – is sufficient to establish an employment relationship.

The case involved a BFI recycling facility, which contracted with a staffing agency, Leadpoint Business Services, to provide workers at its facility. During a unionizing effort, Teamsters Local 350 sought a ruling from the NLRB as to whether both companies could be considered employers of those workers, and could thus be required to bargain if the union ever became certified as their representative.

Leadpoint set its employees' schedules, engaged its own HR manager to work at the recycling facility, and had the sole responsibility to discipline, review, evaluate, and terminate its employees. Leadpoint also employed managers to oversee the Leadpoint employees working at the facility.

Despite these facts, the NLRB held that BFI was a joint employer with Leadpoint because BFI maintained indirect control and reserved authority to control certain aspects of the work, even if BFI did not actually exert control over such aspects. For example, BFI set some conditions on hiring that Leadpoint was obligated to follow; BFI had the authority to discontinue the use of Leadpoint employees; and BFI's contract with Leadpoint prohibited Leadpoint from paying its employees more than BFI paid its own employees who performed comparable work.

This decision is significant because it expands potential liability under the NLRA for companies who utilize staffing agencies as well as for franchisors. Such entities may now be subjected to joint bargaining obligations and potential joint liability for unfair labor practices or breaches of collective bargaining agreements. For this reason, employers should review applicable contracts to determine whether the control over the terms and conditions of employment truly rests with the contractor. Such contracts should avoid language that directs the work of the contractor and should avoid exerting any control in hiring, firing, and wages of the contractor's workers.

POST-CONTRACT UNION DUES CHECKOFF

In Lincoln Lutheran of Racine, the Board held that an employer's obligation to check off union dues continues after expiration of a collective bargaining agreement. In so holding, the Board reversed its decision in Bethlehem Steel, which for more than 50 years had held that dues check-off provisions that provide for the automatic deduction of union dues may be cancelled by employers upon contract expiration. In Lincoln Lutheran of Racine, the NLRB reasoned that the issue of dues check-off is a matter related to wages, hours, and other terms and conditions of employment and, therefore, a mandatory subject of bargaining. Accordingly, the NLRB held that an employer's unilateral change to dues check-off impermissibly undermined collective bargaining.

The decision, which was issued on August 27, 2015, is not retroactive, but applies to all cases going forward. Thus, employers should now be aware that unilaterally ceasing the deduction of union dues from employee paychecks following the expiration of a collective bargaining agreement would violate the NLRA. Unless a CBA with a dues-check-off provision clearly provides otherwise, the only way a union now will cease receiving dues after contract expiration is if the employee timely revokes the check-off authorization or if there are no wages from which dues can be withheld due to a strike or lockout. Therefore, employers should consider proposing language specifically disabling dues check-off at contract termination.

PROPOSED NEW SALARY REQUIREMENT FOR EXEMPT EMPLOYEES UNDER FAIR LABOR STANDARDS ACT

On June 30, 2015, the U.S. Department of Labor (“DOL”) issued proposed regulations which, if ultimately adopted, will dramatically increase the number of executive, administrative and professional (white collar) workers eligible to earn overtime compensation under the federal Fair Labor Standards Act (“FLSA”). The proposed rules more than double the salary-basis requirement for the white-collar exemptions to the FLSA’s minimum-wage and overtime requirements and likely would require millions of employees to be reclassified as non-exempt and entitled to overtime.

Currently, in order to be exempt from overtime requirements under the FLSA, an employee must meet the following three criteria: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed; (2) the amount of salary paid must meet a minimum specified amount (currently \$455 per week or \$23,660 annually); and (3) the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations.

Under the DOL’s proposed rule, the salary threshold would increase to \$970 per week, or \$50,440 annually. Although the proposed regulations are not likely to be final until later in 2016, employers are advised to prepare for the proposed changes now by evaluating which employees, if any, would be impacted by the new regulations. If an employee currently classified as exempt currently earns less than \$50,440 per year, employers should decide whether to raise their salary to preserve the exemption or whether to keep them at their current wage rate, reclassify them as non-exempt, manage their work hours and possibly owe overtime.

DEPARTMENT OF LABOR GUIDANCE ON INDEPENDENT CONTRACTORS

On July 15, 2015, the DOL issued guidance addressing the misclassification of employees as independent contractors, and summarily concluded that “most workers are employees” under the FLSA.

The DOL guidance adopts the “economic realities” test in assessing whether a worker qualifies as an independent contractor. The economic realities test is intended to determine whether a worker is economically dependent on the employer (and therefore an employee) or whether a worker is actually in business for himself or herself (and therefore an independent contractor). The test requires that the following factors be considered on a case-by-case basis to determine whether a worker is economically dependent on the employer:

- Is the work an integral part of the employer's business? If so, this weighs in favor of employee status.
- Does the worker's managerial skill affect the worker's opportunity for profit and loss? If so, this weighs in favor of independent contractor status. By contrast, if the worker is paid an hourly wage, this weighs in favor of employee status.
- How does the worker's relative investment compare to the employer's investment? If the worker has a comparable investment, this weighs in favor of independent contractor status.
- Does the work performed require special skill and initiative? If so, this weighs in favor of independent contractor status.
- Is the relationship between the worker and the employer permanent/indefinite? If so, this weighs in favor of employee status.
- What is the nature and degree of the employer's control? Control favors employee status.

Although not binding, employers should take note of this guidance because it demonstrates that the DOL's default assumption is that most workers should be classified as employees rather than independent contractors. Employers should review any independent contractor agreements against the "economic realities" factors as clarified by the new DOL guidance.

DAVID A. WIMMER

David Wimmer is a Shareholder with Swerdlow Florence Sanchez Swerdlow & Wimmer, a management-side, labor- and-employment law firm based in Beverly Hills, CA. David has been honored as one of "The Best Lawyers in America" in the specialty of Labor and Employment Law, a "Southern California Super Lawyer," and was featured as being one of "L.A.'s Top 100 Lawyers" by the Los Angeles Business Journal. David also has received Martindale-Hubbell's highest rating.

David has extensive experience advising management how to establish effective human-resource policies, maintain a union-free workplace, and comply with federal, state, and local laws. On the traditional labor-law front, he represents companies throughout the country in labor-relations matters, including union- avoidance strategies, supervisory training, election campaigns, proceedings before the National Labor Relations Board, collective bargaining, arbitrations, and federal-court litigation. In this regard, David is the past Chair, and the only California member of the Labor Lawyers Advisory Committee.

David, his wife (Leslie), and two sons (Sam and Max) live in West Los Angeles.

* Mr. Wimmer thanks Emily G. Camastra, an attorney in his firm, for her invaluable assistance in researching and drafting this article. Without her help, these pages would be blank. Ms. Camastra is a 2008 graduate of Georgetown University Law Center, where she served as Senior Editor of the Georgetown Journal of Poverty Law and Policy. She received her B.A. degree, summa cum laude, in Political Science and English Literature from UCLA.
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