

A LITTLER PRESENTATION

HR Virginia Annual Conference

**A Winning Strategy for All Employers –
Whether Union-Free or Organized**

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Littler[®]



Presented By



THOMAS LUCAS

Tysons Corner, VA
Senior Counsel
Traditional Group
Labor Practice
tlucas@littler.com
703.286.3116



SHAUN BENNETT

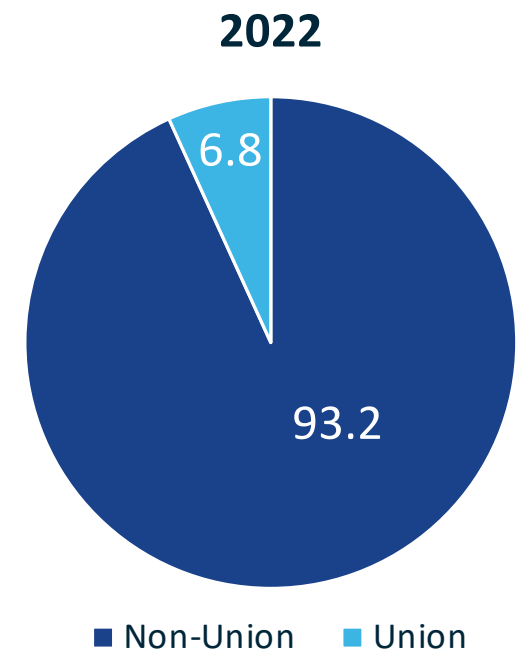
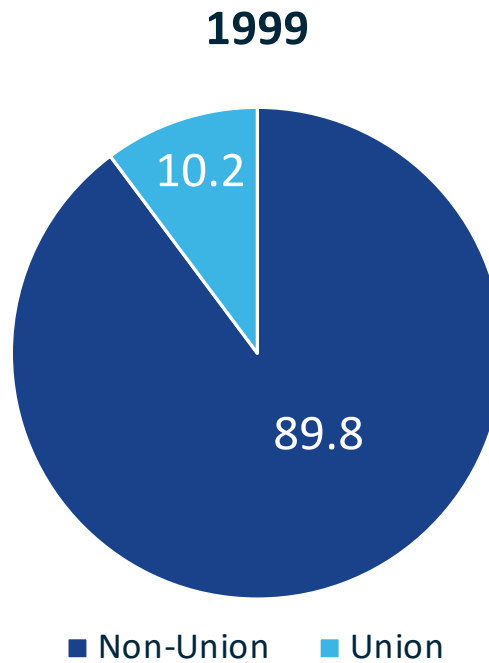
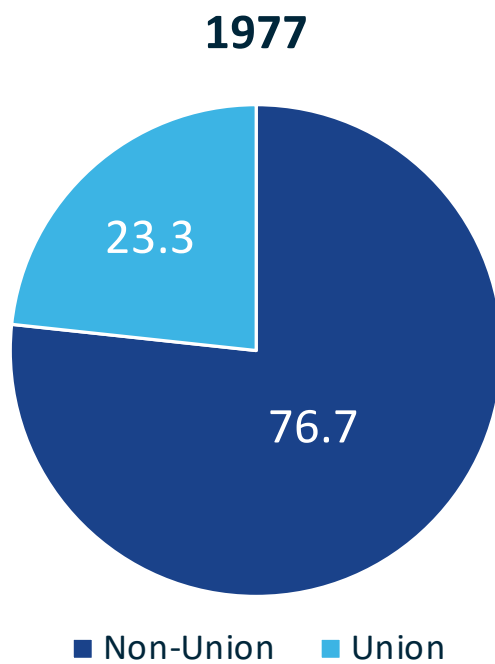
Tysons Corner, VA
Senior Associate
Traditional Group
Labor Practice
smbennett@littler.com
703.286.3103

Agenda

- Identify new theories and litigation tactics the NLRB is pursuing against employers
- Review case law to avoid traps and achieve more favorable outcomes



Private Sector Union Representation % Continues to Decline



Source: U.S. Bureau of Labor Statistics

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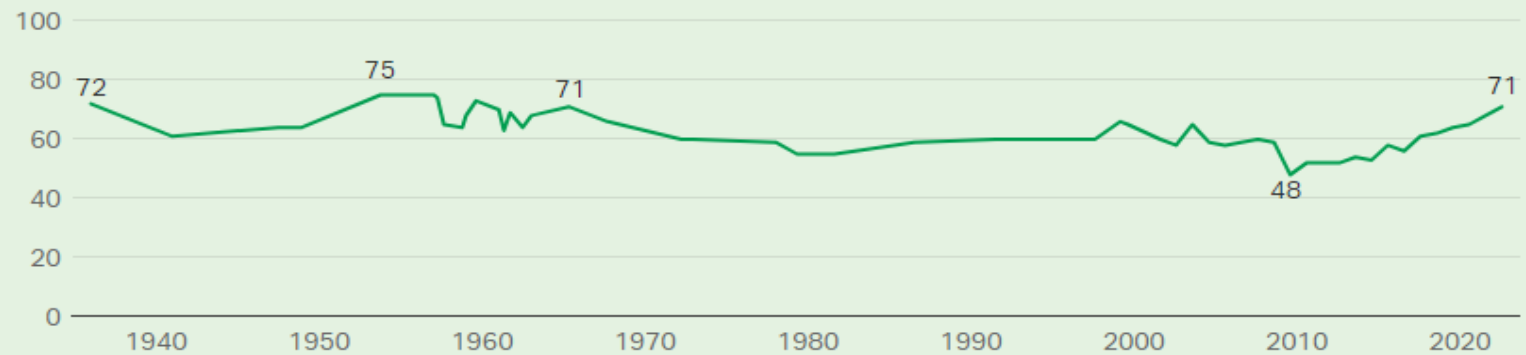
Proprietary and Confidential

But...Public Support for Labor Unions at Historic Levels

Americans' Approval of Labor Unions, 1936-2022

Do you approve or disapprove of labor unions?

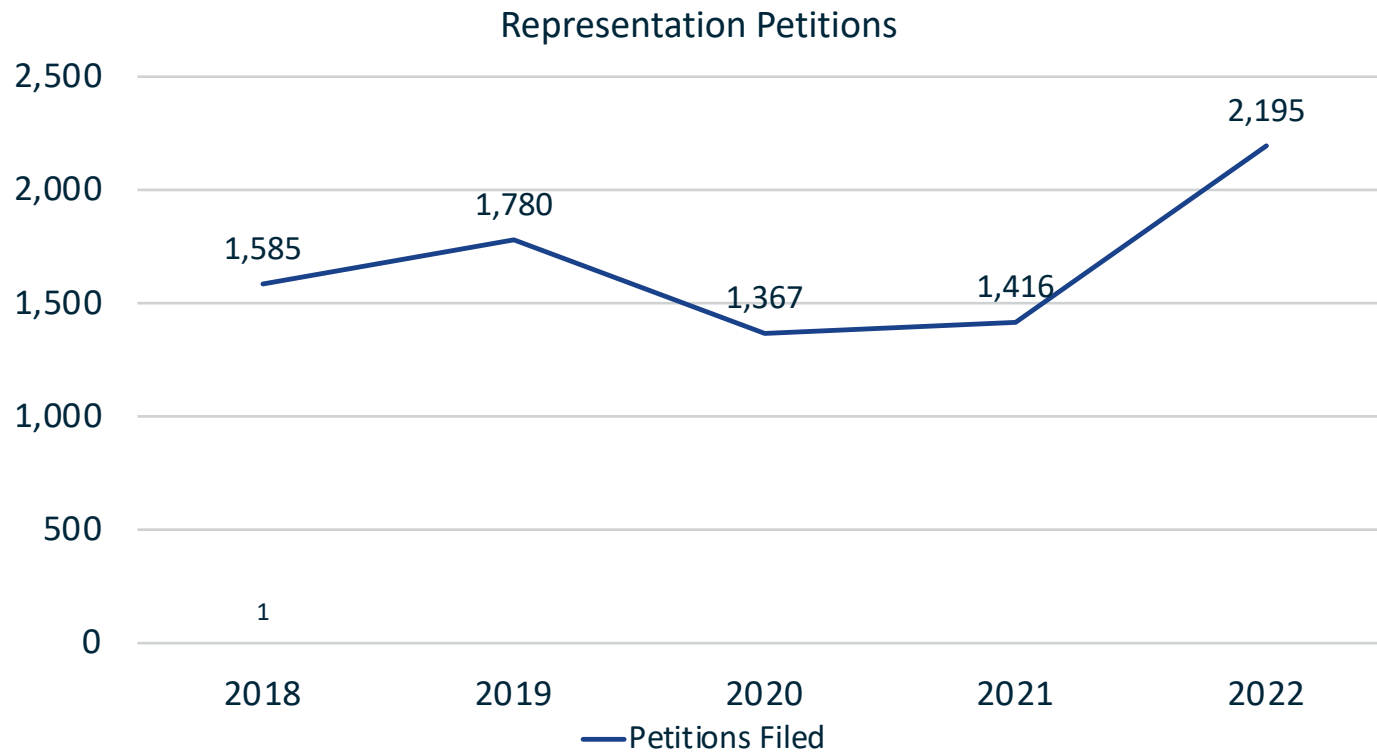
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GALLUP

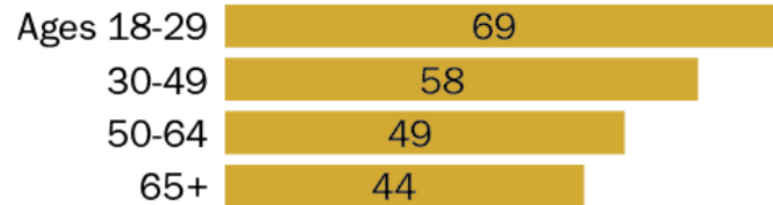
NLRB Union Representation Petitions – On The Rise



Younger Workers – A Positive View of Unions?

Demographic differences in Americans' views of labor unions

*% who say labor unions have a **positive effect** on the way things are going in the country*



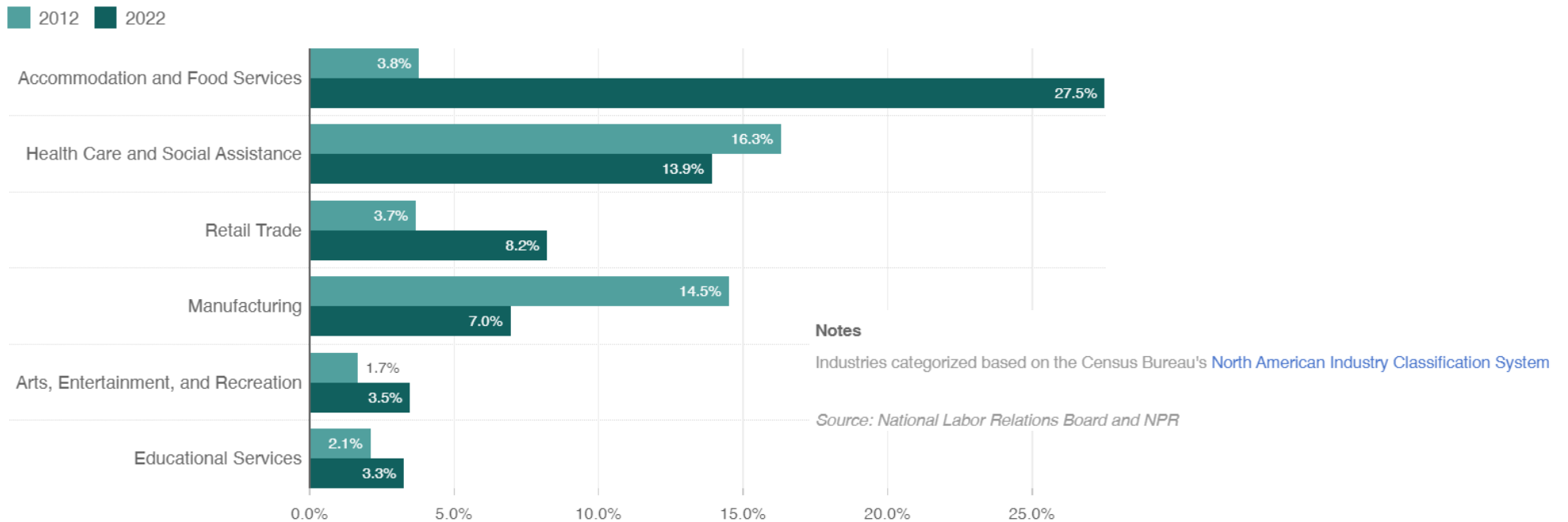
Source: Survey of U.S. adults conducted July 8-18, 2021.

PEW RESEARCH CENTER

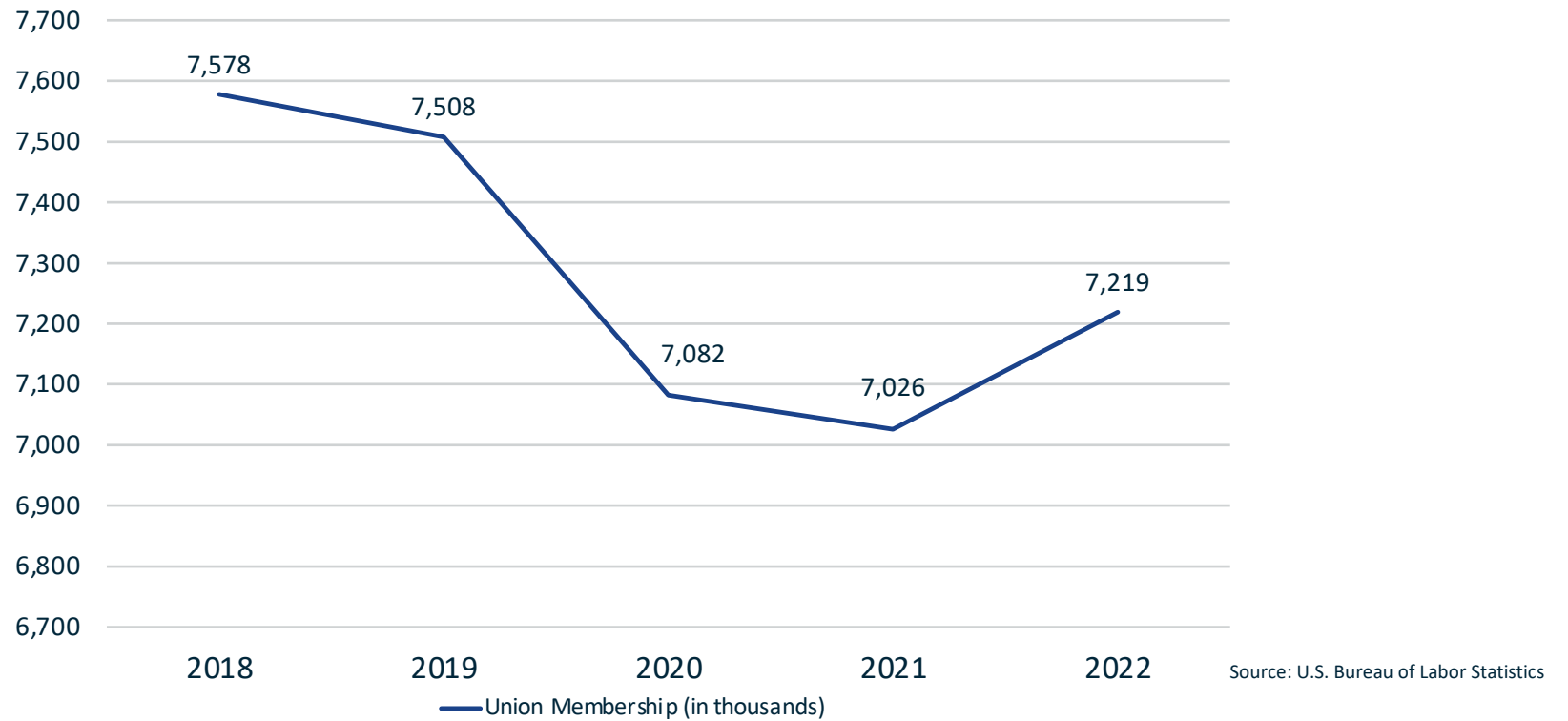
Unions Active in New Industries and Sectors

Who's seeking union elections in 2022? A comparison with 2012

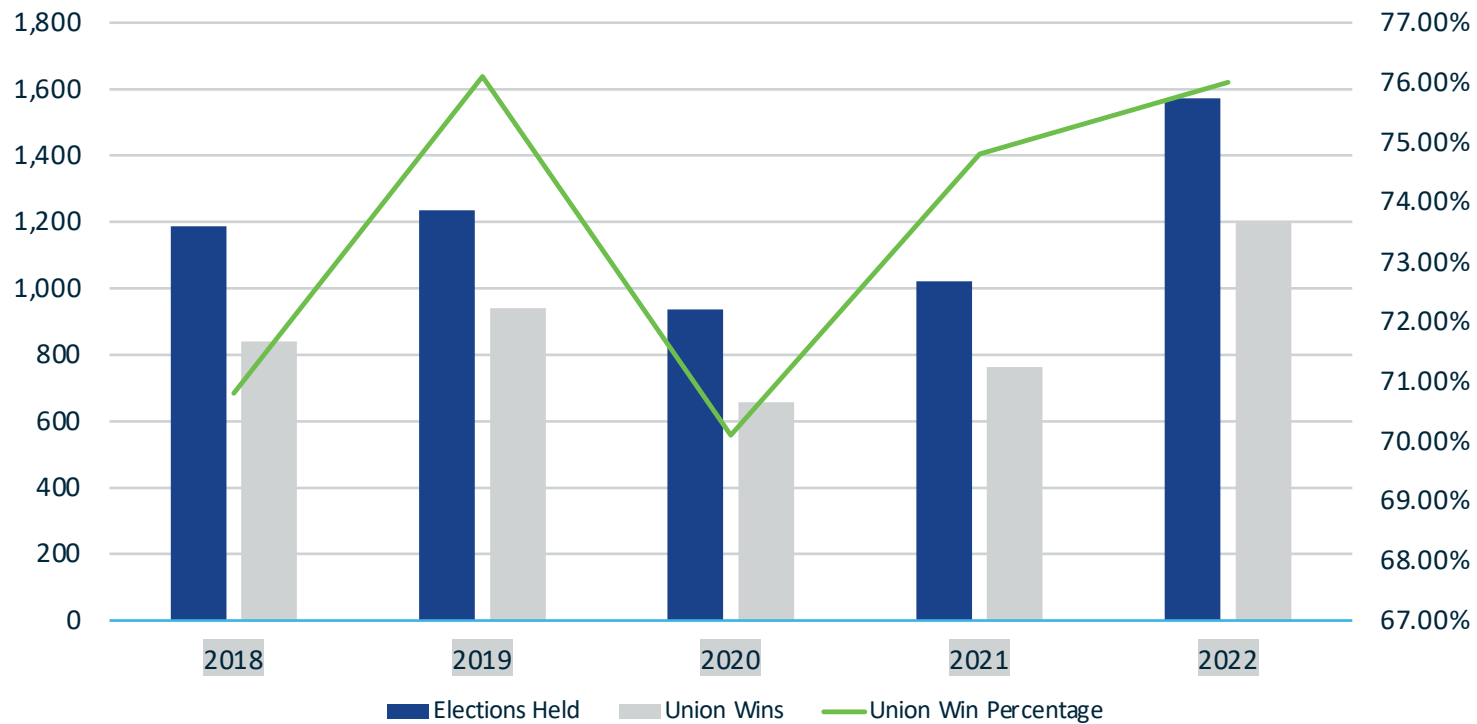
Share of union election petitions filed with the National Labor Relations Board between January and April.



Union Membership – On The Rise



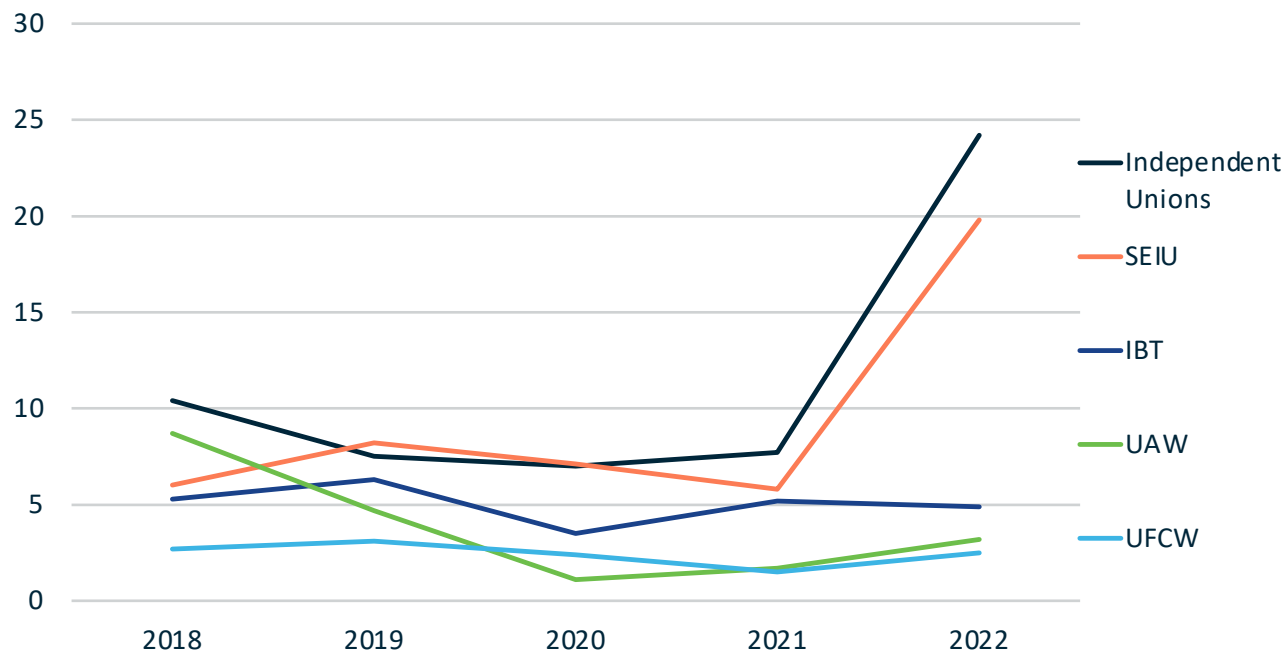
Union Election Win Rate Has Been Static – But High!



Source: Bloomberg Law, *NLRB Election Statistics, Year-End 2022 Report* (January 2023)

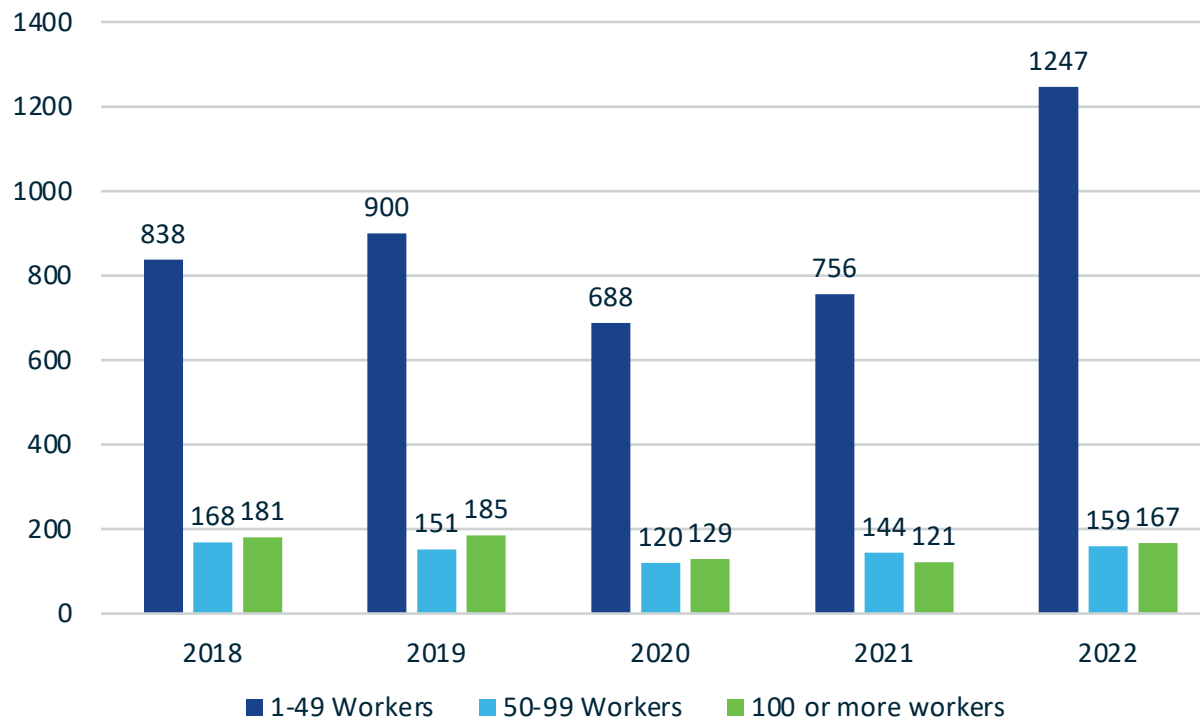
Different Unions Are Organizing

New Members Brought in Through Organizing (in thousands)



Source: Bloomberg Law, *NLRB Election Statistics, Year-End 2022 Report* (January 2023)

Union Elections – Up in Small Voting (Bargaining) Units

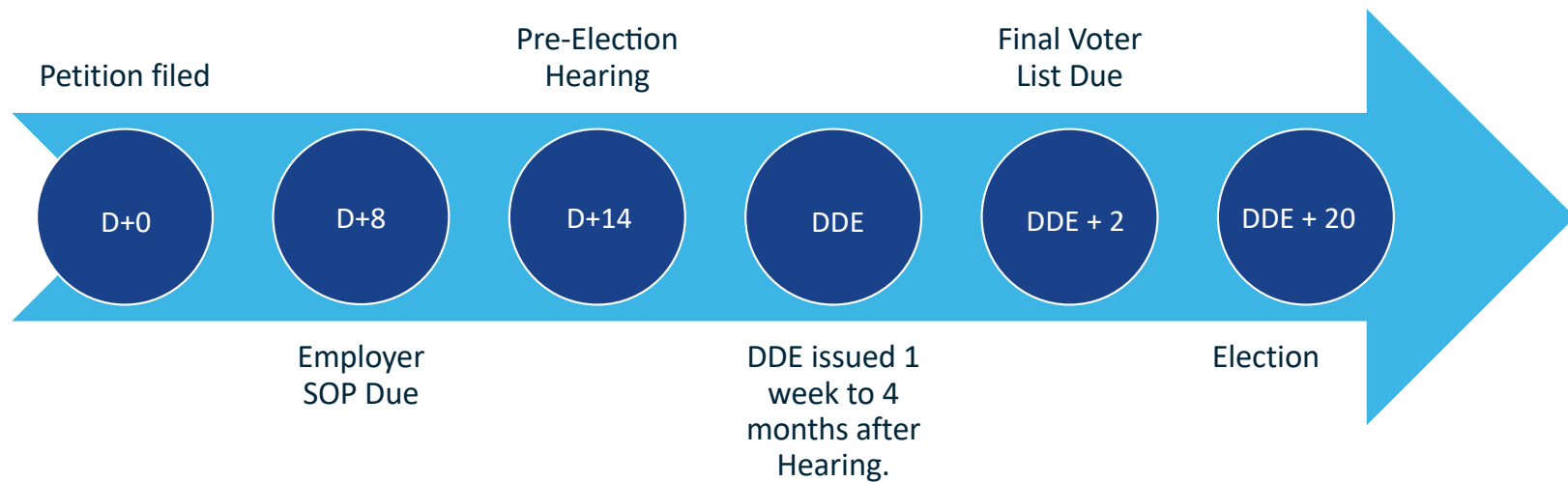


Source: Bloomberg Law, *NLRB Election Statistics, Year-End 2022 Report* (January 2023)

Return to 'Quickie' Elections!

- NLRB's Return to "Quickie" Elections – 12.26.23!
- Return to 2014 Procedures for Quick Elections
- Final Rule issued w/o opportunity for public comment/input
- 8 Days to Hearing following petition filing
- Truncated deadlines for hearings on unit composition/eligibility
- Regions to schedule elections on "earliest date practicable"

NLRB Elections Happen (Very) Quickly



Not Exactly A Card Check But...

- *Cemex Construction* – 8.22.23
- Reinstates modified “*Joy Silk*” Doctrine
- Lowers threshold for Board to issue a bargaining order!
- *Joy Silk* – 1948 – recognize, absent good-faith doubt.
- *Linden Lumber* overruled.
- Union makes a demand based on claim of majority status
- Employer must: recognize and bargain; or
- File an RM Petition within 2 weeks
- If not, bargaining order!
- Any ULP’s during critical period, no more rerun elections – bargaining order!

Cemex, 372 NLRB No. 130 (Aug. 25, 2023)

Pre-*Cemex*

- Obligation of employer upon Union's demand of recognition as bargaining representative of employees:
 - The employer could tell the union “no.”
 - The onus was on the Union to seek a NLRB-run secret ballot election.
- Consequences of ULP's by employer which “prevented a fair election”:
 - Old rule: NLRB would order a “re-run” election. (Union might not win, again)
 - Issuance of a *bargaining order* requiring the employer to bargain without the union winning an election was an extraordinary remedy and rare.

Cemex – New Obligations Upon Recognition Demand

- When a Union demands recognition with a majority of employee-signed cards, the employer must now either:
 - Recognize and bargain with the Union

or

 - Within 2 weeks, file a petition to "test" the employees' support for the Union with an election



Cemex – Impact of ULPs

- If the Employer commits a single Unfair Labor Practice during the “critical period”, the Board may issue a bargaining order
- ULP’s committed before, during and after the critical period will be considered capable of preventing a fair election, resulting in a bargaining order.



Cemex Flowchart





**New Unfair
Labor Practice
Charges:
“Piling On”?**

ULP's On the Rise

R cases up 14% in first half
FY 2023; 53% in FY 2022



Unfair Labor Practices Charge Filings Up 16%, Union Petitions Remain Up in Fiscal Year 2023

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

ULP charges up 16% in
first half FY 2023

April 07, 2023

During the first six months of Fiscal Year 2023 (October 1–March 31), unfair labor practice (ULP) charges filed across the NLRB's 48 field offices have increased 16%—from 8,275 to 9,592. After a substantial increase last Fiscal Year, union representation petitions filed at the NLRB for the first six months of Fiscal Year 2023 continue to increase—up to 1,200 from 1,174. In total, 10,792 cases have been filed with the NLRB's 48 field offices across the country, up 14% over the same period in Fiscal Year 2022.

This increase in filings continues last year's surge in NLRB caseload. In [Fiscal Year 2022](#), 2,510 union representation petitions were filed—a 53% increase from the 1,638 petitions filed in Fiscal Year 2021. This was the highest number of union representation petitions filed since Fiscal Year 2016. Unfair labor practice charges filed with NLRB Field Offices also increased 19% in Fiscal Year 2022, from 15,082 charges in Fiscal Year 2021 to 17,988 charges in Fiscal Year 2022.

Accounting for both ULP and representation petitions, total case intake at the Field Offices increased 23% in Fiscal Year 2022—from 16,720 cases in Fiscal Year 2021 to 20,498 cases in Fiscal Year 2022. This increase of 3,778 cases is the largest single-year increase since Fiscal Year 1976 and the largest percentage increase since Fiscal Year 1959. If the pace continues, Fiscal Year 2023 would have the second-largest percentage increase in NLRB filings since Fiscal Year 1959.

What Activities Are “Protected Concerted”?

- Historically, the baseline activity under the NLRA – PCA!
- Actions by multiple employees.
- Protests, petitions, requests re: workplace and safety issues.
- Limited basis when one employee acts alone, and/or on their own behalf.



Miller Plastic Products

- In *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023), Board reestablished fact-sensitive “totality of the evidence” test to determine whether protests by single worker constitute PCA under Section 7 of the NLRA. This decision suggests that single employee conduct will be considered PCA by NLRB.



Protected Concerted Activities?

- Re: PCA claims, the NLRB requires fact-specific examination of **totality of all record evidence** to determine if an employee acting alone constitutes “concerted activity”.
- Individual actions must merely have some relation to (potential) group activity, even if such activity follows the individual action. Under the “totality of the evidence” test, after-the-fact events may be relevant evidence of whether an employee’s conduct sought to initiate, induce, or prepare for group action.

Miller Plastic Products (cont'd)

- In March 2020, Miller remained open following Pennsylvania governor's business closure order that excepted only “life-sustaining businesses.”
- Employee Vincer told fellow employees that he did not believe Miller Plastic was a life-sustaining business which should be permitted to remain open and in employee meeting, yelled out that Miller Plastics should not be open and they “shouldn’t be working” because it didn’t provide workers with sufficient COVID-19 protection. Later, Vincer expressed concerns about workplace safety to managers.

Miller Plastic Products (cont'd)

- Miller terminated Vincer for poor attitude and excessive talking in violation of company policy.
- NLRB found Vincer's conduct was PCA because his COVID-related concerns were concerted activity under the "totality of the circumstances" because they sought to bring "truly group complaints to the attention of management."
- NLRB rejected Miller's argument that Vincer's complaints were merely "individual griping."

American Federation for Children (2023)

- Raybon enlisted support from her colleagues for a former employee, Ascencio, whose position was being held open while undergoing visa sponsorship, and to be reemployed by the Federation.
- In meetings with a new Manager, Raybon expressed Ascencio's importance to organization, and contacted Hermie, a national-level official, expressed concern to about Smith's management style and her view that Smith was not committed to rehire Ascencio.
- Subsequently, Smith instructed Raybon to cease bringing her issues to the national staff; instead bring them directly to him. However, at annual conference, Raybon raised complaints about Smith's management practices to her colleagues and sought their support to ensure Ascencio's rehire. In those conversations, Raybon asserted that Smith was "racist."
- Federation terminated Raybon for creating a "toxic atmosphere" by making the "incendiary" accusation that Smith was racist.

American Federation of Children (cont'd)

- NLRB held Ascencio qualified as "employee" under NLRA, as an "applicant". The Board concluded Raybon's efforts to rally support for Ascencio's rehire were "clearly for the mutual aid and protection of employees" under Section 7.
- Alternatively, the NLRB held that Raybon acted for mutual aid and protection even if Ascencio was *not* a statutory employee.
- Test – "The question is simply whether in helping those persons, employees potentially aid & protect themselves, whether by directly improving their own terms and conditions of employment or by creating the possibility of future reciprocal support from others in their efforts to better working conditions."

Kaiser Permanente Tyson School of Medicine

- NLRB Advice Section found Professor's classroom conversation was inherently concerted because it included discussion of race issues of Black faculty and students as well as systemic racism in medicine;
- Professor's tweets were PCA because they discussed terms and conditions of employment regarding racial disparities in medicine faced by medical professionals, sought the assistance of others to improve working conditions in medicine, and encouraged others to fight for racial equality and workplace justice. Such tweets were viewed as a logical outgrowth of the classroom discussion.



Return to War on Handbooks

Ohr Memo GC 21-03 on “Vigorous Enforcement” of PCA

NLRB “reconsidered” the GC’s request to revise the standard for evaluating lawfulness of employer policies, leading to rescission of Boeing (Stericycle)

Handbook ULP charges tacked onto complaints or standalone

Policies most at risk

- Solicitation/distribution
- Dress code
- Use of electronic equipment
- Social media

Standard for Ruling On Lawfulness of Handbook Work Rules

- *Stericycle, Inc.* – 8.2.23
- H: old *Boeing* standard permitted overbroad rules (nondisparagement, corporate confidentiality)
- “Chill” employees exercise of Section 7 rights
- Revised test for legality of any work rules
- GC – must prove rule has chilling effect – if so, unlawful!
- Employer may rebut presumption with “legitimate and substantial business interest” and
- A showing that its unable to advance that interest with a narrower rule

Unlawful Provisions in Separation Agreements

- In *McLaren Macomb*, NLRB overturned two decisions that had permitted employers to include confidentiality and non-disparagement provisions in *severance* agreements
- “Mere proffer” of a severance agreement that conditions receipt of benefits on the “forfeiture of statutory rights” violates NLRA
- Severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights
- Guidance in GC 23-05 says McLaren is retroactive, not limited to separation agreements

GC Guidance on McLaren McComb

- GC Memo 3.22.23
- Retroactive – 6 mo. SOL
- Applies to non-competes, non-solicitation clauses, no-poaching clauses
- Supervisors could be covered!
- “Savings Clause” – Onerous!



Employee Monitoring and Electronic Management

- In GC Memo 23-02, GC Abruzzo announced she will urge the Board to crack down on “omnipresent surveillance and other algorithmic-management tools” if they tend to interfere with Section 7 rights
- Ex: tracking devices, cameras, wearable devices, radio-frequency ID badges, keyloggers, monitoring software, AI decision-making tools
- Burden to justify would fall to employers
- Already seeing ULPs



Revised Test – Duty to Bargain Before Making Changes

- *Wendt Corporation and Tecnocap LLC* – issued 8.26.23
- *Raytheon* (2017) – latitude to make changes during contract hiatus/negotiations for 1st CBA
- Based on ‘past practice’
- *Wendt*: employer may never rely on past practice to make unilateral change during hiatus or new bargaining.
- *Tecnocap* – past practice of unilateral changes under mgt. rights clause will not permit changes post-expiration during bargaining for a new CBA.
- Why: forces union to ‘regain’ terms lost in unilateral changes, and
- Discourages unions to agree to mgt rights clause in CBA



Weaponizing Litigation

10(j) Injunctions – GC Memos 21-05 & 22-02

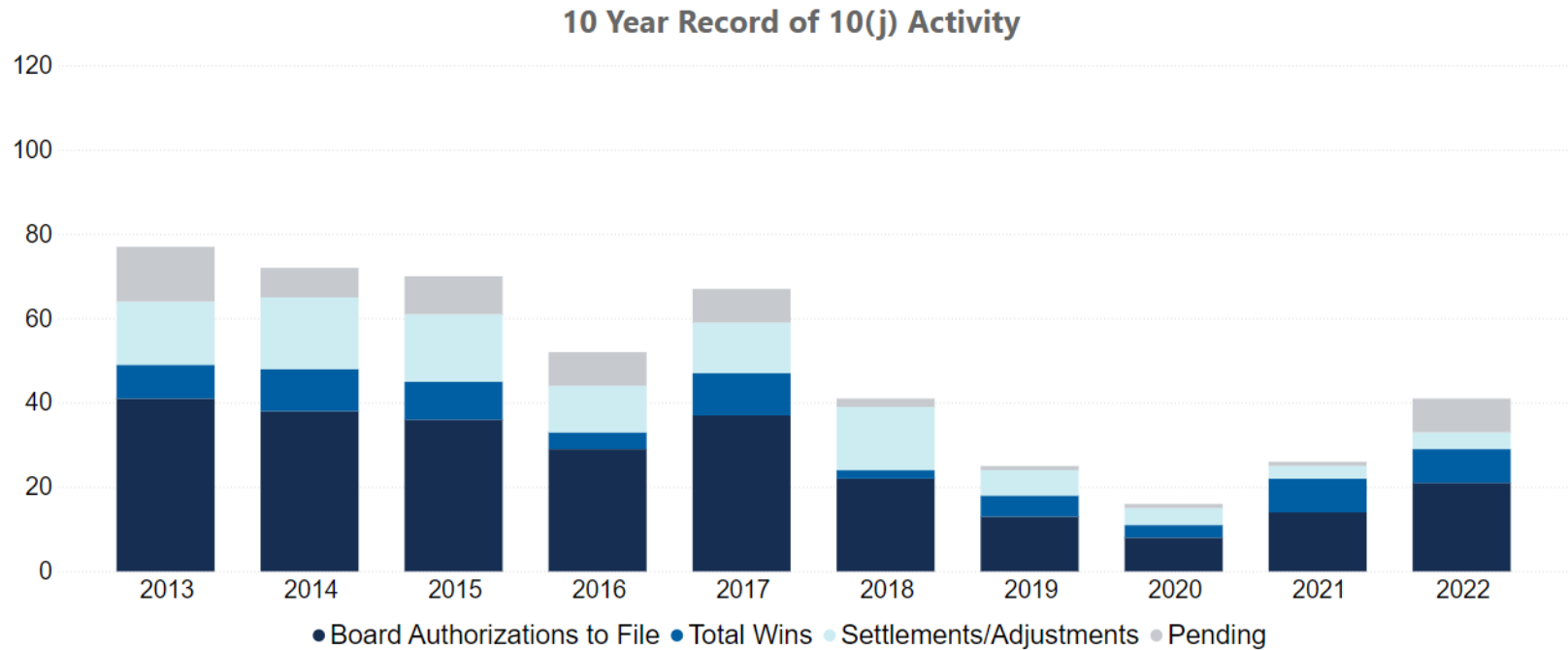
“one of the most important tools available”

“intend to aggressively seek Section 10(j) relief”

“consider all contextual circumstances to determine whether it may be appropriate to recommend pursuit of an injunction in cases involving threats or other coercion”

10(j) Injunctions

10 Year Record of 10(j) Activity



Other Agency Litigation Tactics

- Issuing Complaint Before Full Investigation
- Unreasonable settlement terms
- Aggressive Trial Subpoenas
 - E-Discovery
 - Short time to respond
 - Discovery on discovery
 - Avoiding federal court review
- Attack on defense tactics
 - Company-issued subpoenas, interviews of bargaining unit employees





New & Alternative Remedies

The GC's Directives on Remedies

- GC 21-06 – Regions should “avail themselves of all remedial tools” and seek the “full panoply” of remedies
- Regions “should seek compensation for consequential damages”
- GC 21-07 – Regions should seek “no less than 100% of backpay” and consequential damages in settlement
- No compromise, full admission, full liability approach to settlements

But what role does the GC play in determining appropriate remedies in Board cases?



Expanded “Make Whole” Remedies

- *Thryv, Inc.* – December 3, 2022
- Make whole relief includes “all direct or foreseeable pecuniary harms suffered”
- Consequential damages not considered “extraordinary relief” and not limited to “egregious cases”
- GC Memos and *Thryv* together provide: 1) expanded traditional remedies; 2) new types of remedies; 3) new make-whole relief damages



Noah's Ark Processors – April 20, 2023

- CEO must sign an “explanation of rights” document for employees
- Notice reading by the CEO
- Notice reading and explanation of rights mailed to employees, and Notice published in “local publication of broad circulation and local appeal”
- Board visitation requirement to ensure Company compliance
- Reimbursement of Union’s bargaining expenses, including making whole any employees who lost wages by attending bargaining sessions.

“There is no First Amendment concern in requiring the Respondent’s chief agent to commit to honoring the Respondent’s legal obligations.”

Alternative Expanded Remedies

GC 21-06 and 21-07

- Reimbursement of union's collective bargaining expenses
- Compulsory "letter of apology" and expanded types of notice reading
- Mandatory union access
- Expanded notice posting obligations to social media
- Loss of a home or car suffered by an unlawfully fired employee
- Interest or late fees on credit cards incurred by unlawfully fired employee
- Compensation for damages caused to an employee's credit rating
- Cost of training to recover licensure

Member Kaplan's Dissent in Noah's Ark Processors:

- Remedies raise a "compelled speech issue"
- Compelled access remedy "may violate the Takings Clause of the Constitution"
- "It bears watching whether my colleagues' deployment of such remedies becomes punitive and thus exceeds the powers granted them under Sec. 10(c)."
- "The fact of the matter is that my colleagues are advising the General Counsel regarding extraordinary remedies she might seek in future cases and (implicitly but unmistakably) even encouraging her to seek them. My colleagues clearly believe that it is appropriate to provide litigation advice to the General Counsel. I do not."

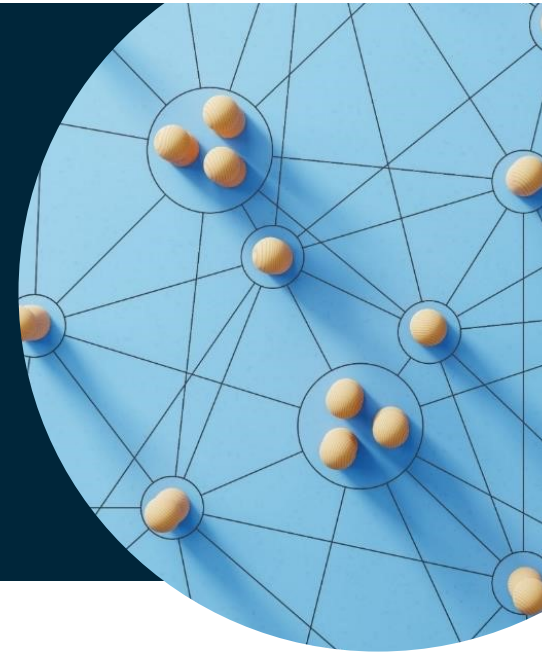
“It Wasn’t Us!” – Final Joint Employer Rule

- Board issued Final Rule effective Dec. 26, 2023.
- Indirect or reserved right of control is enough for joint-employer status, even if not exercised
- Be mindful of contract wording!



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