IRI
CONSULTANTS

RETAIL INDUSTRY
LEADERS ASSOCIATION

LABOR ACTIVITY IN RETAIL

ANNUAL REPORT

Spring 2023

ABOUT THIS REPORT

In partnership with the Retail Industry Leaders Association (RILA), the 2023 IRI Consultants Labor Activity in Retail Annual Report includes the following:

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

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

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

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

A LETTER FROM OUR CEO

Dear Industry Colleagues,

Throughout 2022, retailers faced an uphill battle in keeping their workforce engaged and efficient. High turnover rates perpetuated demand for seasonal workers, and managing global staff simultaneously was a struggle for multinational retailers – particularly when it came to onboarding new personnel. With intense competition driving down market share and profitability every day, such difficulties are especially taxing on retail businesses attempting to remain competitive.

The year ahead looks to continue these challenges and more – including the beginnings of pay transparency, new leave requirements, and even the exploration of a four-day workweek.

We're also seeing a dramatic increase in the number of union organizing attempts, particularly among younger workers. Traditional campaign messaging has shifted to include far broader demands than wages and working conditions. Add to that the rise of "Independent Unions," … and preparing for an organizing attempt will now become a necessity in 2023.

Other important developments you should be watching:

- A push to reinstate the Joy Silk doctrine to make it easier for unions to be elected without an election. NLRB General Counsel Jennifer Abruzzo released a memo (GC 21-04) stating she wants to revive the Joy Silk doctrine for bargaining orders. Abruzzo wants Joy Silk reinstated because it requires employers to demonstrate a good reason as to why the union shouldn't be recognized when a majority of union authorization cards are submitted.
- Possible adoption by the NLRB of stricter standards for independent contractors. The NLRB is considering a reversal of SuperShuttle DFW, using The Atlanta Opera, Inc. case to return to the prior standard. The effect of that would be to make it more likely for workers to be found to be employees rather than independent contractors. If this happens, it could mean thousands of independent contractors could be considered employees under the National Labor Relations Act (NLRA) and thus eligible to be unionized.
- Expansion of Board remedies to include consequential damages. Based on the Thryv, Inc. decision (12/13/2022), in addition to traditional make-whole remedies, employers may also be on the hook for all direct or foreseeable economic consequences that arise from a violation of labor laws.
- Return of micro units and fractured workplaces. In the wake of the return to 2011's Specialty Healthcare standard, expect the NLRB to allow unions to carve out smaller groups of employees within a distribution center, production line, plant, or facility, which could result in employers having multiple contracts with different bargaining units all under the same roof. This will not only be disruptive but very costly for employers.

I think John Ring, former member of the NLRB, recently said it best about what we can expect in 2023, "It's going to be tough sledding ahead." Expect a wave of pro-labor NLRB rulings, rulemaking, and overturning of long-established precedent as the Democratic Board majority rolls into the New Year. Don't forget General Counsel Abruzzo who will continue to push the Board to remove employer rights and make it easier for unions to organize.

In the enclosed Labor Activity in Retail report, you'll find the latest data on union organizing and membership across the nation, as well as five timely labor and employee relations articles. In continued partnership with the Retail Industry Leaders Association (RILA), IRI Consultants will be there with you as the retail industry continues to adapt over the coming year. We look forward to supporting your organization in building the strongest workforce in any industry.

Sincerely,

Bob Long
CEO
IRI Consultants

TABLE OF CONTENTS

EXECUTIVE SUMMARY

NLRB REPRESENTATION (RC) PETITIONS AND ELECTIONS

There were 223 RC petitions filed in the retail industry in 2022, up from 135 petitions filed in 2021.

A decade-high 165 RC elections were held in the retail industry in 2022 and unions were elected as a result of 74 percent of these. This was nearly double the number of elections held in 2021 when unions won 68 percent of the 87 elections held.

More than half of all the RC petitions filed in in 2022 were in just six states – Oregon, California, Illinois, New York, Washington, and Massachusetts. These same six states accounted for 72 percent of petitions filed in 2021.

The United Food and Commercial Workers (UFCW) remains the most active union in the retail industry, accounting for 60 percent of all petitions filed and 62 percent of all elections held in 2022. UFCW was elected as a result of 72 percent of the 102 elections in which it was involved.

Over the past decade, the most strikes in the retail industry were held in Illinois, California, and New York. In 2022, there were 13 strikes held, idling a total of 10,447 workers.

The last 12 months brought the retail industry a 65 percent year-over-year increase in the number of representation petitions filed. Retailers faced a number of heightened concerns around employee pickets and protests, as well as an increased number of independent, employee-led organizing drives.

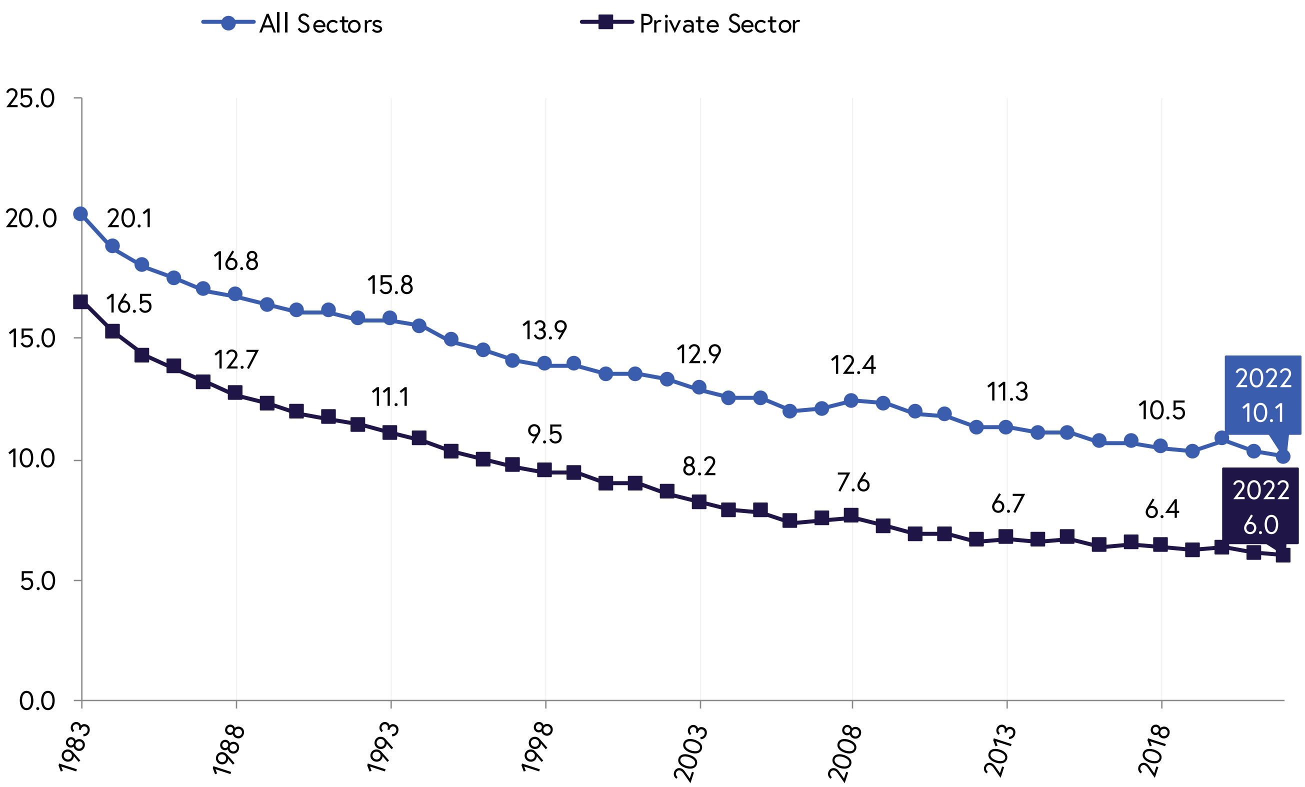
UNION MEMBERSHIP NATIONWIDE

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

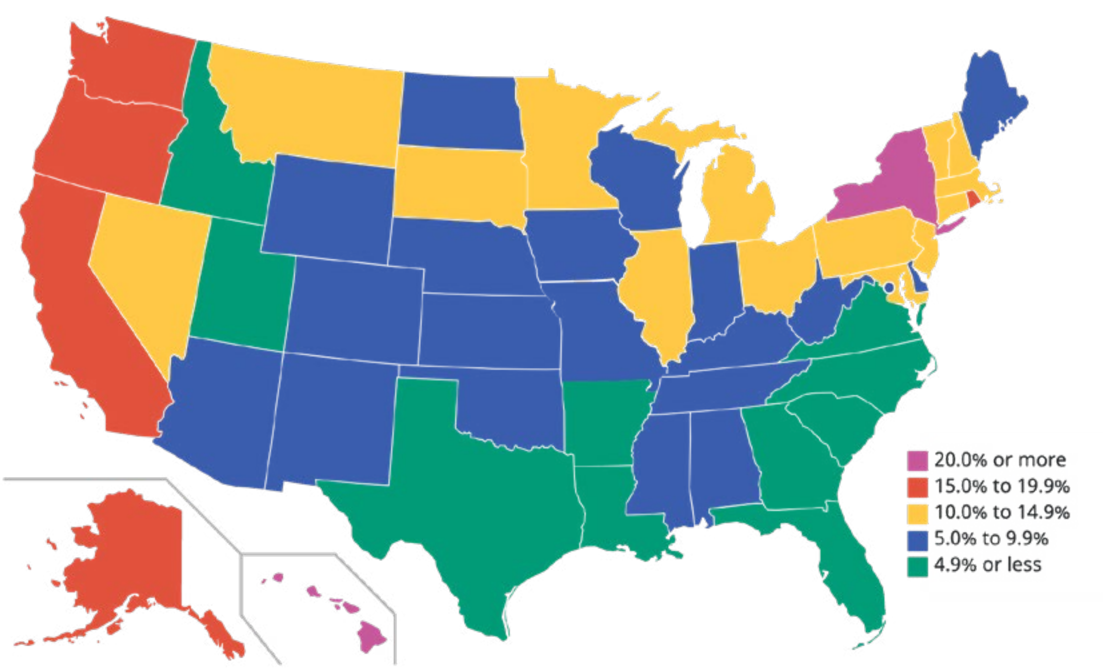
Data from the DOL report include the following highlights:

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

UNION MEMBERSHIP RATE SUMMARY



UNION MEMBERSHIP RATES BY STATE, 2022



NLRB PETITION AND ELECTION RESULTS

This section includes the following:

NATIONAL SUMMARIES

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

STATE SUMMARIES

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

UNION SUMMARIES

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

STRIKES IN RETAIL

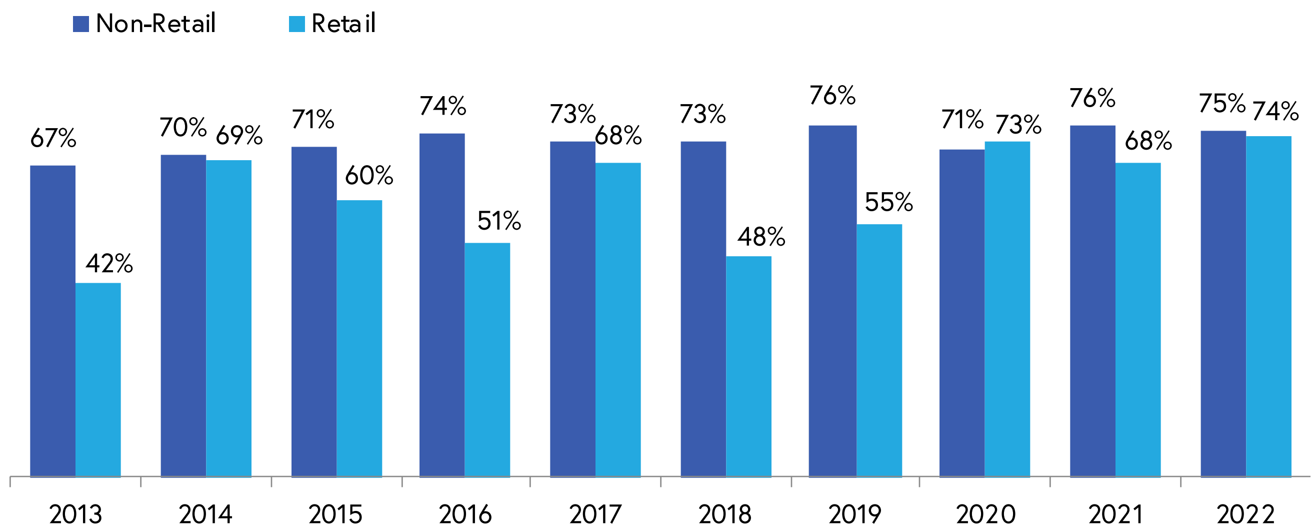
- Strikes held by year in retail

NATIONAL SUMMARIES

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

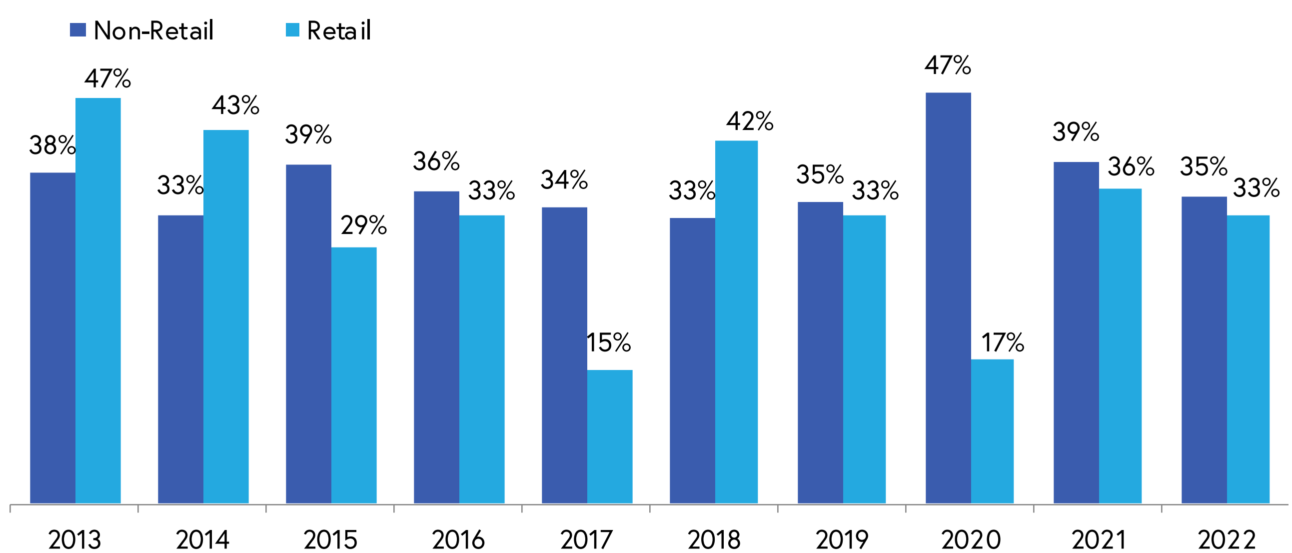
UNION WINS IN REPRESENTATION (RC) ELECTIONS

Unions were elected as a result of 74 percent of all RC elections held in the retail industry in 2022 – similar to the 75 percent win rate in non-retail industries.



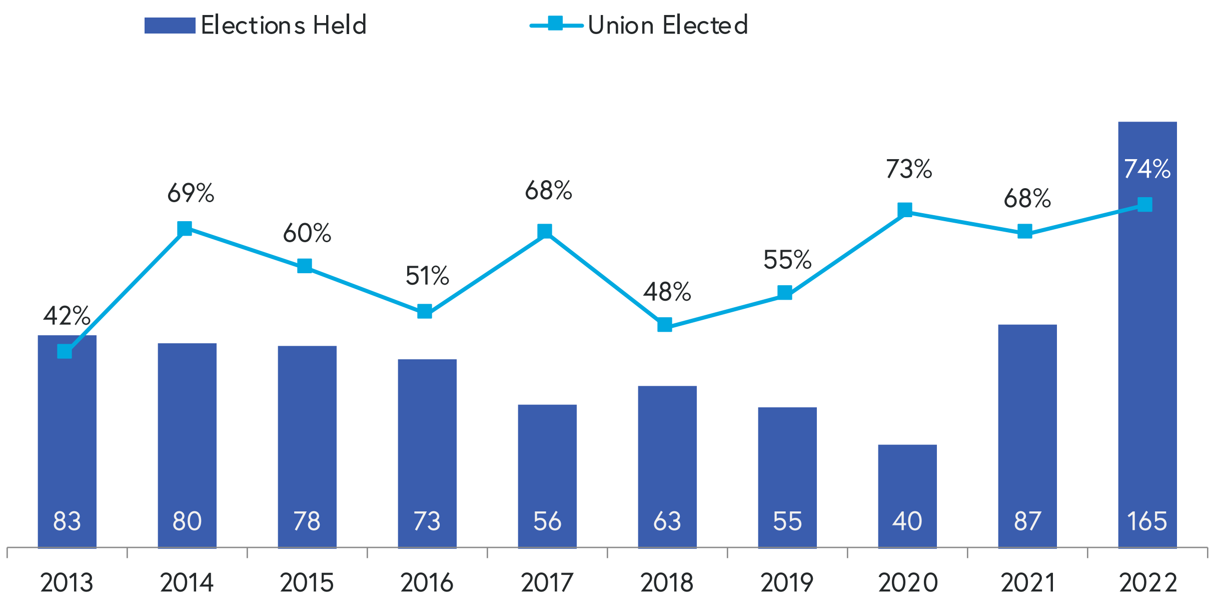
UNION WINS IN DECERTIFICATION (RD/RM) ELECTIONS

Unions maintained recognition in one-third of RD and RM elections held in the retail industry in 2022.



RETAIL INDUSTRY – ELECTIONS OVERVIEW

A record-high 165 RC elections were held in the retail industry in 2022. This was nearly double the number of elections held in 2021. Unions were elected as a result of 74 percent of elections held in 2022 compared to 68 percent the previous year.

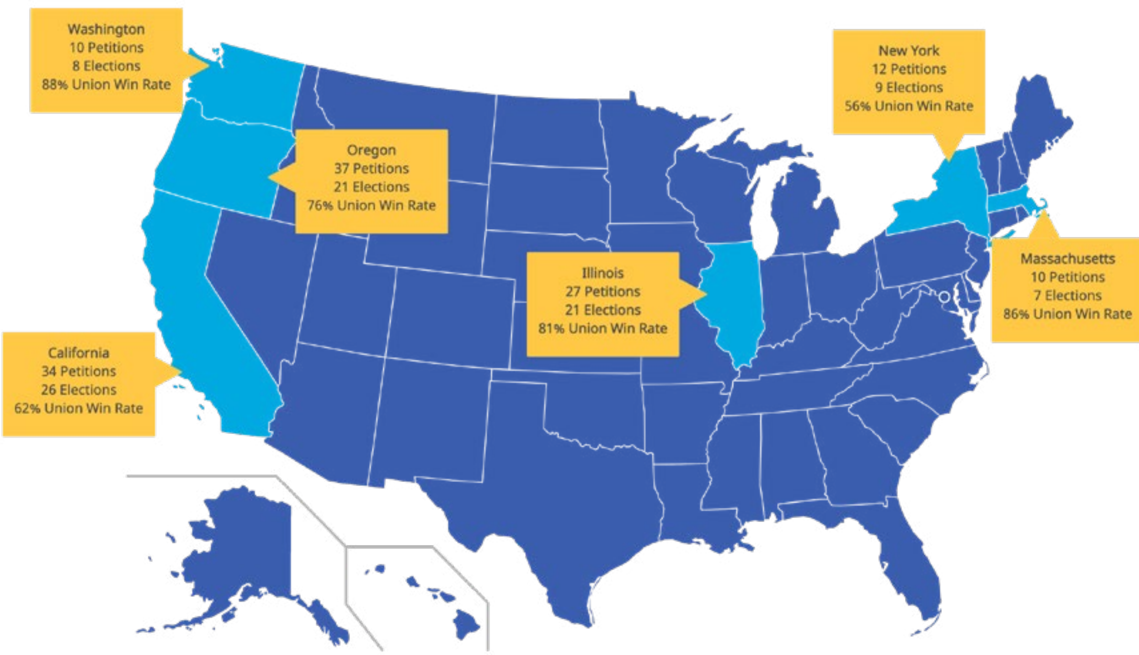


STATE SUMMARIES

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 2021 and 2022 at the time of publication.

MOST ACTIVE STATES – REPRESENTATION (RC) PETITIONS FILED IN RETAIL

In 2022, 58 percent of all the RC petitions filed in the retail industry were in just six states – Oregon, California, Illinois, New York, Washington, and Massachusetts. These same six states accounted for 72 percent of RC petitions filed in 2021.



ALL STATES – REPRESENTATION (RC) PETITIONS FILED IN RETAIL

The table below details the number of RC petitions filed in the retail industry in each state during 2021 and 2022. States are not included in the table if no petitions were filed in either year. There were significantly more petitions filed in 2022 than in 2021.

State	2021	2022	State	2021	2022	State	2021	2022
Alaska	-	2	Kentucky	-	4	Ohio	3	4
Arizona	-	9	Maryland	-	6	Oregon	20	37
California	21	34	Massachusetts	7	10	Pennsylvania	1	7
Colorado	5	5	Michigan	1	8	Rhode Island	2	1
Connecticut	1	-	Minnesota	5	4	Tennessee	1	2
District of Columbia	1	4	Missouri	4	9	Texas	1	2
Florida	1	1	Montana	-	1	Vermont	-	1
Hawaii	1	2	Nevada	-	2	Virginia	-	4
Idaho	2	3	New Hampshire	2	-	Washington	10	10
Illinois	24	27	New Jersey	3	4	West Virginia	-	1
Indiana	-	3	New Mexico	1	1	Wisconsin	-	2
Kansas	2	1	New York	15	12	Wyoming	1	-
						Total	**135**	**223**

ALL STATES – REPRESENTATION (RC) ELECTION RESULTS IN RETAIL

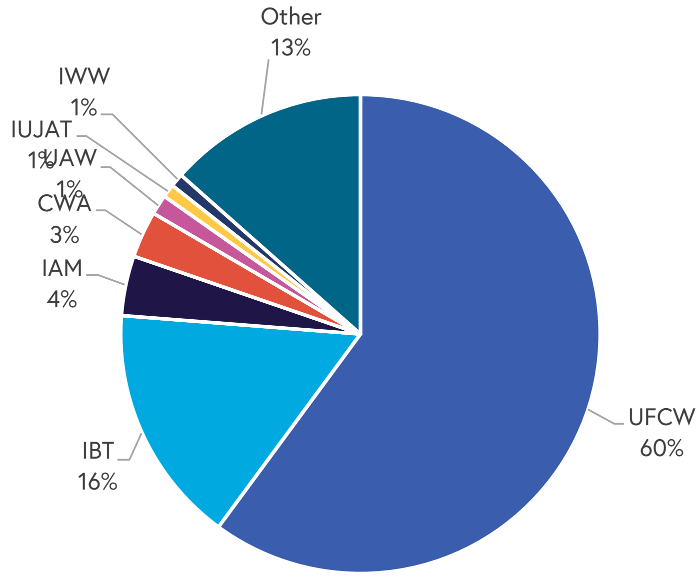
The following table depicts the number of RC elections held in each state in the retail industry in 2021 and 2022. States are not included in the table if no elections were held in either year.

State	2021					2022				
	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
Alaska	-	-	-	-	-	1	1	100%	0	0%
Arizona	-	-	-	-	-	9	6	67%	3	33%
California	20	13	65%	7	35%	26	16	62%	10	38%
Colorado	4	4	100%	0	0%	3	1	33%	2	67%
Connecticut	1	0	0%	1	100%	-	-	-	-	-
District of Columbia	-	-	-	-	-	1	1	100%	0	0%
Florida	1	1	100%	0	0%	1	1	100%	0	0%
Hawaii	1	1	100%	0	0%	-	-	-	-	-
Idaho	-	-	-	-	-	3	3	100%		0%
Illinois	20	16	80%	4	20%	26	21	81%	5	19%
Indiana	1	0	0%	1	100%	3	3	100%	0	0%
Kansas	1	1	100%	0	0%	1	1	100%	0	0%
Kentucky	1	1	100%	0	0%	2	2	100%	0	0%
Maryland	-	-	-	-	-	5	4	80%	1	20%
Massachusetts	7	2	29%	5	71%	7	6	86%	1	14%
Michigan	1	0	0%	1	100%	3	1	33%	2	67%
Minnesota	3	3	100%	0	0%	4	3	75%	1	25%
Missouri	1	1	100%	0	0%	8	6	75%	2	25%
Montana	-	-	-	-	-	1	0	0%	1	100%
Nevada	-	-	-	-	-	2	2	100%	0	0%
New Hampshire	2	1	50%	1	50%	-	-	-	-	-
New Jersey	1	1	100%	0	0%	4	4	100%	0	0%
New Mexico	1	0	0%	1	100%	1	1	100%	0	0%
New York	8	6	75%	2	25%	9	5	56%	4	44%
Ohio	1	0	0%	1	100%	4	4	100%	0	0%
Oregon	6	3	50%	3	50%	21	16	76%	5	24%
Pennsylvania	1	1	100%	0	0%	4	3	75%	1	25%
Rhode Island	1	1	100%	0	0%	-	-	-	-	-
Tennessee	-	-	-	-	-	2	1	50%	1	50%
Texas	1	1	100%	0	0%	2	0	0%	2	100%
Vermont	-	-	-	-	-	1	1	100%	0	0%
Washington	3	2	67%	1	33%	8	7	88%	1	13%
West Virginia	-	-	-	-	-	1	1	100%	0	0%
Wisconsin	-	-	-	-	-	1	1	100%	0	0%
Wyoming	-	-	-	-	-	1	0	0%	1	100%
Total	**87**	**59**	**68%**	**28**	**32%**	**165**	**122**	**74%**	**43**	**26%**

UNION SUMMARIES

MOST ACTIVE UNIONS – REPRESENTATION (RC) PETITIONS FILED IN RETAIL IN 2022

UFCW remained the most active union in the retail industry in 2022. It accounted for 60 percent of the RC petitions filed in 2022. The 134 petitions filed by UFCW accounted for nearly as many petitions filed by all unions in 2021, and this number is nearly double the number of petitions UFCW filed in 2021.



MOST ACTIVE UNIONS – REPRESENTATION (RC) PETITIONS FILED

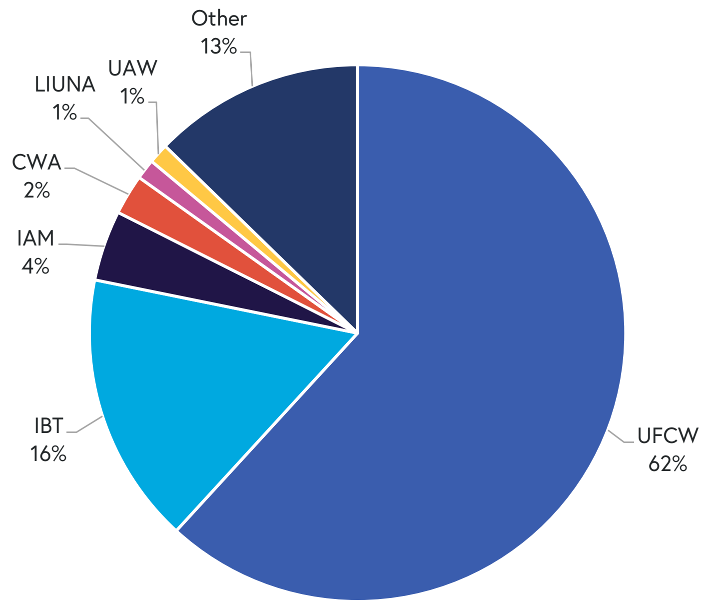
Abbreviation	Union Name	RC Petitions Filed	
		2021	2022
UFCW	United Food and Commercial Workers	75	134
IBT	International Brotherhood of Teamsters	19	36
IAM	International Association of Machinists	12	9
CWA	Communication Workers of America	1	7
UAW	United Automobile, Aerospace and Agricultural Implement Workers of America	0	3
IUJAT	International Union of Journeymen and Allied Trades	3	2
IWW	Industrial Workers of the World	1	2

Also active in the retail industry and referenced on the next page is the following union.

Abbreviation	Union Name
LIUNA	Laborers' International Union of North America

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

As expected, UFCW was involved in over 60 percent of the RC elections held in the retail industry in 2022. They were elected as a result of 72 percent of the 102 elections held.



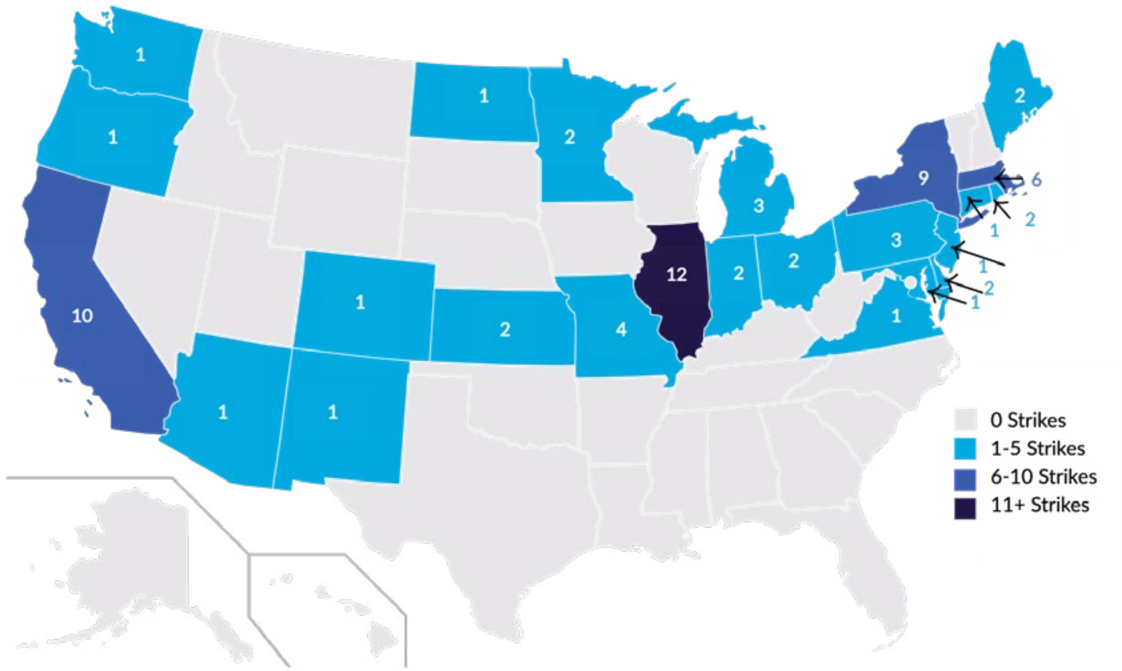
MOST ACTIVE UNIONS – REPRESENTATION (RC) ELECTION RESULTS

	2021			2022		
	Total Elections	Union Elected %	Union Not Elected %	Total Elections	Union Elected %	Union Not Elected %
UFCW	**44**	75%	25%	**102**	72%	28%
IBT	**18**	67%	33%	**27**	85%	15%
IAM	**9**	33%	67%	**7**	43%	57%
CWA	**1**	100%	0%	**4**	100%	0%
LIUNA	**0**	-	-	**2**	100%	0%
UAW	**0**	-	-	**2**	100%	0%

STRIKES IN RETAIL

STRIKES IN RETAIL BY STATE, 2013 – 2022

The map below illustrates the number of strikes in the retail industry in each state since 2013[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
2022	13	10,447	804
2021	12	9,766	814
2020	9	1,144	127
2019	9	32,157	3,573
2018	3	297	99
2017	11	2,531	230
2016	3	100	33
2015	5	668	134
2014	3	350	117
2013	3	227	76

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

LABOR LAW/ACTIVITY UPDATE

How To Quiet Five Common Retail and QSR Jitters

The retail and quick service restaurant (QSR) sectors are particularly vulnerable to union organizing in 2023 for reasons that include a workforce feeling like it was used during the pandemic with little regard for health and safety, younger workers who see employment as having a larger purpose than earning a paycheck, technology significantly changing consumer buying patterns, an uncertain 2023 economy, and recognition that independent organizing keeps control of the process in the hands of employees. Employers must recognize the mix of issues impacting the workforce and labor market to successfully recruit, retain, and engage workers and maintain a direct connection to employees in 2023.

Contemporary Approaches to Connecting With Younger Retail Workers

Younger millennials and Gen Z make up a large portion of today's retail workforce. The turnover rate in the retail industry has always been high, but it is worse today because of a change in associate attitudes and perspectives about employment. Younger workers have new perspectives about the purpose of work and employer responsibilities for health and safety and career development. To strengthen associate engagement, Ulta Beauty identified associate needs and responded accordingly by developing an effective communications system, a positive workplace culture, and benefits that match the needs of younger people, among other strategies.

Retailers Control Their Destiny With Workers by Focusing on Well-being, Community Engagement, and Communication

Today's retailers face a myriad of hurdles they must clear to succeed, including but not limited to external and societal influences, legal and regulatory changes, a labor-friendly administration, and a changing workforce. Add to those the ever-present factor of high turnover, keeping up with competitive wage and benefit structures, and caring for employees' mental and physical health, retailers find they need a comprehensive, strategic approach to their workforce needs. Here, we discuss the challenges, solutions, and ways in which the Retail Industry Leaders Association (RILA) continues to support this industry with knowledge, resources, and connections that help retailers succeed.

Addressing Workplace Violence Liabilities in Retail

In 2023, retail employers need a heightened awareness of the potential legal liabilities associated with theft, threats, assaults, protests, and mass shootings. This includes a need to address workplace violence, including under current and anticipated laws. Employers should evaluate practical considerations to develop and update their workplace violence policies to best protect employees, customers, and visitors. Doing so will help mitigate risks from common challenges, such as responding to customer/visitor threats, safety concerns from employees, and individuals using retail locations for shelter.

State and Local Legislators Are the 'Tail Wagging the Dog' When It Comes to Federal Employment Litigation Impacting Retailers

Bolstered and emboldened by more homogenous groups of elected officials in the political arenas of state and local government, lawmakers have proposed initiatives and begun implementing new laws that will require retailers to change the way they operate. In this article, we explore the trend of aggressive state and local legislatures implementing increasingly employee-friendly laws through an examination of three of the most impactful of such laws. For each, we dive into the respective growth patterns at the state and local levels, explore the impact on retailers, and discuss how federal legislatures are piggybacking on the momentum created by state and local policy makers.

How to Quiet Five Common Retail and QSR Jitters in 2023

Scott Purvis | IRI Consultants
Tel: (313) 965-0360 | spurvis@iriconsultants.com

ABSTRACT

The retail and Quick Serve Restaurant (QSR) Sectors are faced with continued turbulence in 2023 due to technology-driven changes, organizing on social media, forming of independent unions by younger workers, increasing willingness to strike or walk off the job, and high turnover. Employers are struggling to balance so many disruptive challenges occurring at the same time. Add an uncertain 2023 economy and traditional labor unions getting new leadership promising to increase union organizing, and the challenges are even more intense. This article explains five common retail and QSR challenges in 2023 and offers guidance on anticipating and responding to them within your organization.

All industries have gone through disruption and turmoil due to the pandemic and are still resettling into a new, post-pandemic normal. Due to 2022 organizing successes, labor unions are preparing to take advantage of the turmoil because that is when employees are most likely to feel disengaged and troubled. The retail and QSR sectors are particularly vulnerable to union organizing in 2023 for reasons that include a workforce feeling like it was used during the pandemic with little regard for health and safety, younger workers who see employment as having a larger purpose than earning a paycheck, technology significantly changing consumer buying patterns, an uncertain 2023 economy, and recognition that worker-driven unionizing keeps control of the process in the hands of employees. Employers must recognize the mix of issues impacting the workforce and labor market to successfully recruit, retain, and engage workers and prevent union organizing.

The Bureau of Labor Statistics reports that the second largest increase in job openings as of the end of December 2022 was in the retail trade at 134,000 jobs. The number of job openings was 1,017,000, with new hires totaling 774,000, which left a new gap of 243,000 unfilled jobs. The retail industry is in the most unsettled state it has experienced over the last year as many struggle to remain open due to a labor shortage and changing consumer buying patterns. This means the workforce is unsettled, too. Due to the combination of an industry coping with various challenges that developed during the pandemic and employees inspired by Starbucks employees who are unionizing, retail workers feel empowered. The following outlines five of the major retail sector challenges impacting employees.

Problem 1: Technology Leads to Increasing Online Sales

Technology impacts the retail sector in several ways, though how it will all unfold over the next few years remains to be seen. This creates uncertainty for employers and employees. This section discusses the tech transformation in retail and QSR because technology increasingly influences employee engagement and retention.

The pandemic forced more people to shop online, so e-commerce accounts for a larger share of retail sales than it did in the past. In 2021, the online retail market share was 18.8 percent. In 2022, it grew to 19.7 percent and is projected to grow to 20.8 percent in 2023 and 24 percent by 2026. What does this mean for retail employees?

- The **sales and distribution model** will change due to a need for more warehousing space, shifting some employees off the retail floor and requiring them to learn new job responsibilities and technologies
- **Fewer brick-and-mortar sales** mean fewer retail employees are needed in house and more employees are required to work remote customer service
- Retail employees may face **unexpected layoffs**, like what happened at Amazon when the company recently closed its brick-and-mortar retail stores
- An increase in the use of **self-serve technologies**, like self-checkout kiosks and computer screens for customers to look up product availability and information, leads to a reduced need for retail workers

Researchers studied the relationship between technology, work stress, and job insecurity in retail organizations. One of the findings was that "…many technological changes cause high levels of job insecurity because employees fear that they will be unable to cope with the changing environment." At the same time, retailers will need employees with tech skills.

Walmart is a good example. The grocery stores are primarily self-checkout, but the company also created Walmart Global Tech, which has a team of 15,000 employees: software engineers, data scientists, cybersecurity experts, and enterprise service professionals. The company is also working on using drones for the delivery of goods, groceries, and pharmacy items. There were 6,000 drone drops in 2022 at 36 markets in seven states, with 20,000 items eligible. As the drone delivery program expands, the need for delivery employees will decrease.

McKinsey & Company anticipates retail companies moving along the tech transformation spectrum will go from less than 30 percent tech to non-tech staff to 50, 60 and eventually 70 percent tech to non-tech staff. In some situations, technology will displace employees, hindering efforts to engage the workforce.

Technology also impacts the workforce in the QSR sector, and there are many similarities between retail and QSR. For example, fast food managers of technology and customer engagement were asked about the next significant trends. They mention back-of-house technology like automated food prep and order fulfillment, but some went far beyond those innovations.

- Angela Diffly, co-founder of Restaurant Technology Network, said, "Think AI-centric hyper-automation, whereby people are not present at all to serve, and also via newly imagined drive-thru experiences."
- Meredith Sandland, CEO of Empower Delivery, believes automation is the most significant trend. "Automation, but not in the sense of robots replacing humans. As we've seen in cars, electrification and smart augmentation of human operators are pre-conditions to automation." Employees must have the right skills for automation to work.
- Raj Suri, Founder and CEO of Presto Automation, says, "Japan and other parts of the world have been dealing with a labor shortage much longer than we have and determined long ago that automation helps. By now, restaurants have realized that hiring incentives and other traditional solutions are not helping…We expect to see reallocation of existing staff to higher value tasks."

Solution: Invest in employee training and upskilling where appropriate. Employees should be well trained in all areas, including brick-and-mortar locations, warehouses, distribution centers, corporate offices, and online sales operations. Most retail businesses now utilize sophisticated technologies that include point-of-sale and inventory platforms. Not only are well-trained employees better able to provide high-quality customer service and higher productivity, but they will also experience higher employee engagement. Employee training is also a form of recognition.

Problem 2: Digital Technologies Being Used to Challenge Brands and to Organize

Social commerce is different from commerce. Shopify defines social commerce as "the use of social media platforms like Facebook and Instagram to market and sell products and services." Approximately $992 million in global retail sales were on social media platforms in 2022; by 2026, social commerce retail sales are projected to reach $2.9 trillion. What does this have to do with unionization in the retail industry?

Each year, more consumers are shopping online via various social media accounts and using social media to discuss brands and their products and services, including customer service. Social media influencers impact people's impressions of brands, which can influence the labor market. For example, social media brand followers mention rude employees with a chip on their shoulders or brands that violate their corporate social responsibility values by underpaying workers.

A good example is the TikTok influencers who used the video platform to encourage other influencers and followers to blacklist Amazon. Gen-Z for Change led the "People over Prime" campaign with 70 participants and 51 million followers on TikTok. They demanded a $30 minimum wage at Amazon warehouses, no more productivity quotas, and a halt to Amazon's anti-union efforts. Of note is that the TikTokers were also expressing concerns about Amazon's environmental impact.

Amazon started an Amazon Influencer Program in which popular social media accounts can earn commission on their recommended products. The "People over Prime" TikTokers published videos that said things like Amazon refuses to pay workers fairly but will pay influencers. If you visit Gen Z for Change on TikTok, you will find one common thread that says, if you want to attract and retain the younger workers, you have to offer Gen Z things that benefit them now and not years from now.

Solution: Developing a process for digital media intelligence is crucial in today's tech-based environment. Digital media intelligence is the collection and analysis of any digital media that includes text, audio, and video transmitted on the internet or a computer network. Social media intelligence is the collecting and analyzing of data from social media. Social media sentiment monitoring focuses explicitly on collecting and analyzing how people talk about your brand on social media.

Digital media intelligence, in general, and social media intelligence, in particular, can deliver critical insights about the perspectives of customers and employees on business practices and workforce issues.

Problem 3: Worker Strikes and Protests in the Retail Trade Will Accelerate

In 2022, there were 374 worker strikes, a 39 percent increase from the previous year. When filtering the strikes for 2021-2022 for retail trade on the Cornell Strike Tracker, there were 22 labor actions in 2022 for retail trade at companies that included REI, Dollar General, Trader Joe's, Macy's, Union Kitchen, King Soopers-Kroger, Apple, Fred Meyer, GoPuff, Diversity Thrift, Fleishers Craft Butchery, Fullerton Auto Group, Shaw's Supermarkets – Albertsons, and many others. Notice that all types of retailers experienced strikes and protests.

Bloomberg also tracks labor activity and says there were 125 retail industry work stoppages in 2022 out of 314 total work stoppages. It was a record-setting year, and labor activity will increase in 2023.

The things to note are:

- All types of retail establishments are subject to strikes and protests
- All types of labor unions and employee groups were involved in strikes or walked off the job in protest

  - **Large labor unions** are involved, including the United Food and Commercial Workers, International Association of Machinists, Teamsters, Industrial Workers of the World, etc.
  - **Independent labor unions** became active, including Trader Joe's United, Raise Up–Fight for 15, Apple Together, Working Washington, etc.
  - **Affiliated independent labor unions** are involved, like the Fight for 15 – SEIU and Starbucks Workers United supported by the SEIU
- Workers as a group with no union or union affiliation also walked off the job
- Some strikes and protests included multiple employer locations (per Cornell, 2021-2022 saw 22 labor actions in 40 locations)
- The reasons for striking and protesting include the following traditional and social issues:
  - Scheduling
  - Pay
  - Staffing
  - End to anti-union retaliation
  - Healthcare
  - Health and safety
  - Union recognition
  - Retirement benefits
  - Paid sick leave
  - More hours
  - End to sexual harassment
  - Mandatory training
  - Racial and social justice
  - Signing a previously agreed-on contract
  - End to unjust discipline
  - Abiding by a union contract
  - Job security
  - Reinstatement of fired union activist
- The QRS sector, often included with retail, saw strikes and protests at Taco Bell, Starbucks, McDonald's, Papa John's, Burger King, Chipotle, Dining Hall at Pomona College, Chick-Fil-A, Food Services at the San Francisco International Airport, Homegrown, and more; no business is exempt from employee activism
- Workers United, UNITE HERE, and Fight for 15 and its branch Raise Up the South are very active in the QSR sector

Tracking the real union wave is challenging because the numbers don't always capture the early stages of organizing and the organizing of newer unions like the Union of Southern Service Workers. There are other complexities to understanding union organizing in retail in 2023. For example, one of the reasons there is a wave of unionization and activism in retail and QSR is that highly educated people are getting jobs as baristas and retail clerks to pay for their education or because of economic conditions leading to layoffs in higher-paying jobs.

The retail and QSR sectors have often been a fallback sector for job hunters, and college-educated workers are becoming the leaders in unionization. They form alliances with those who did not attend college, creating a movement that embraces people across class and education lines. Author Noam Scheiber, a researcher on workers and workplaces, summarized the economic research by saying young college-educated workers have two core beliefs: "They have a sense that the economic grand bargain available to their parents – go to college, work hard, enjoy a comfortable lifestyle – has broken down. And they see unionizing as a way to resurrect it."

Solution: Each employer should benchmark employee engagement and determine employee issues to address. This is done via pulse surveys, longer engagement surveys, leader rounding, face-to-face conversations, and in-person and virtual meetings. However, asking for feedback is only a first step. Leaders should develop strategies for change where appropriate but respond to all employee feedback and explain the reason for decisions or changes made. Failing to respond to employee feedback leads to employee disengagement.

Problem 4: Exceptionally High Turnover Rate in the Retail Industry

Some of the issues all employers must manage are technology-driven changes, strikes, and employee activism on new levels. But the retail industry experiences an exceptionally high turnover rate compared to other industries. Korn Ferry's survey of retailers found that turnover is increasing. By November 2022, there was a 75.8 percent turnover for all hourly positions and 85 percent for part-time hourly workers. With a labor shortage still going strong, employees in lower-paying jobs know they can job hop easily.

Solution: Developing a high level of employee engagement in a positive workplace culture is the best route to reduce high turnover. Increasing employee engagement takes time and a mix of solutions. To decrease turnover rates, employers need to address specific reasons employees leave, like giving employees clear career paths and training. The retail business should use data from exit interviews to determine the particular reasons employees voluntarily leave and address those. As Starbucks has discovered, raising the average barista's pay to $17.50 an hour has not stopped union organizing.

Add development opportunities, especially for younger staff. These can take many forms, including workshops, mentorship, and educational assistance programs. Development is associated with career planning, which is sorely lacking in the retail industry except for corporate employees. These opportunities signal that employees are viewed as long-term assets to the company, not just hourly workers who come and go.

Share the company's corporate environmental and social responsibility policy and actions, and include employees in selecting and implementing initiatives. This strategy serves several purposes: attracting the best talent in a tight labor market, amplifying employee voice, increasing inclusion and belonging, and giving employees a foundation of values they can support and share with customers and on social media. Younger employees want more than a $15-an-hour wage. They want to work for companies that live and breathe responsibility to people and the environment. One of the most difficult challenges for retail and QSR companies to overcome is the image that they are primarily interested in profit.

Problem 5: Increase in Independent Union Organizing

As advisory firm Brunswick notes, there is an increase in petitions filed with the NLRB for independent employee unions because employees feel like they have more control over negotiations with employers. The past year saw a significant increase in independent union organizing like the Amazon Labor Union, Trader Joe's United, Apple Together, Working Washington, and many more. Because some of these independent unions represent a small number of employees, they do not get the attention large labor unions get and are not included in the NLRB strike counts. In addition, not all independent unions decide to file petitions with the NLRB, so they stay under the radar. But do not think they are less influential in the workplace once employees organize.

Many independent unions are still affiliated with or supported by traditional labor unions. Some employers are seeing a combination of independent union organizing and traditional labor union organizing at the same time. One of the issues for independent unions is that they need the resources that the national labor unions can provide. This equates to a high risk of some independent unions joining a major labor union in 2023 during or after organizing.

Solution: Recognize the increased likelihood of union organizing in retail and QSR establishments. Amplify employee voice to create a culture of respect and inclusion. The new labor movement has added more reasons for retail workers to organize and strike. Workers without an internal platform for expressing their voice will find many external platforms to advocate on and to use for virtual union organizing. Amplifying voice in retail and QSR requires more than adding a digital feedback channel. For example, you can create an Employee Resource Group or form a management advisory committee with worker representatives.

Communicating directly with employees is important. Personal communication is sometimes forgotten due to easy access to technology. Still, employers need to receive and respond to feedback and explain changes management makes due to employee input. It is a powerful engagement process. Track employee use of "voice" technologies, like internal social media or internal websites. Silence is not golden. You want employees regularly communicating. If they aren't using these communication channels, it's an alarm bell. You should find out why.

Prepare for More Aggressive Unionization in the Retail and QSR Sectors

Across the board, industry experts agree that the retail and QSR sectors will experience more union organizing in 2023 and probably 2024. This only adds to the turmoil retail and QSR employers already face due to changing consumer buying patterns, technology, an uncertain economy, a pro-union NLRB and Biden administration, and labor unions fomenting dissent among employees. Employees are emboldened to take action. It is also clear that it will take more than concentrating on pay and benefits to engage employees in the current environment.

Conduct a union vulnerability assessment and proactively address weak areas. The vulnerability assessment identifies areas that could lead to a union organizing drive, strike, or walkout. Also, develop a union organizing response strategy so no time is wasted responding should employees begin the unionizing process. The company's perspective on unionization should be shared with all employees at the time of hire and reinforced on an employee-facing website. However, should employees choose to organize, be prepared to dive deeper into explaining why a union is unnecessary.

Employees across industries are restless as Gen Z takes its place in the workforce, feeling empowered to bring change. Quite honestly, younger employees believe they are the ones who can drive change and not just talk about it. They believe they are the ones who, through activism, can get hard-working employees in the lower levels a living wage, training, career opportunities, personal time to care for family members, and a safe and just workplace. They are the new face of unionization.

Contemporary Approaches to Connecting With Younger Retail Workers

Devon Byrne | Ulta Beauty, Inc.
Tel: (630) 410-4800 | dbyrne@ulta.com

ABSTRACT

The retail industry has various workforce challenges as triggered by the impact of the pandemic and the influence of labor unions creating unrest. One of the biggest challenges the industry faces is high turnover in a tight labor market, making it easy for employees to switch jobs. Notably, employees aged 16-35 account for approximately 45 percent of the retail workforce; addressing their concerns is essential to reducing turnover.

Younger workers have new perspectives on the purpose of work and employer responsibilities for health and safety and career development. To strengthen associate engagement, Ulta Beauty identified specific associate needs and responded accordingly by developing a more effective communications system, nurturing a positive workplace culture, and offering benefits that match the needs of younger people, among other strategies. Ulta Beauty also leverages digital media intelligence to inform decision making based on insights from data across the digital sphere. Through these efforts, Ulta Beauty has maintained a direct connection with team members at all levels.

Shifting From Job to Job

The younger millennials and Gen Z make up a large portion of the retail industry workforce. For this discussion, younger workers are 16-34 years old. As of 2022, the Bureau of Labor Statistics (BLS) accounted for 1.3 million people aged 16-19, 2.4 million people aged 20-24, and 3.6 million people aged 24-34 years old working in the retail industry. The industry includes grocery stores, automotive dealers, electronics stores, convenience stores, health and personal care, clothing stores, shoe stores, general merchandise stores, and more.

Every retail operation faces a common challenge: high turnover. The seasonally adjusted December 2022 retail quit rate was 3.9 percent of total employment, with accommodation and food services slightly higher at 5.4 percent. There is significant crossover between these two industries and across the different types of retail operations as employees easily move between jobs, sometimes for as little as 25-50 cents more an hour. For comparison, and to better understand the severity of this issue in retail, the total quit rate for all industries was 2.7 percent. In 2022, 617,000 people quit their retail jobs, and 745,000 quit in their job in accommodations and food services. These are also seasonally adjusted numbers, so they are statistically smoothed.

High turnover creates large costs for retailers. According to the National Bureau of Economic Research, a 10 percent higher turnover is approximately equal to a .6 percent wage increase. A 60 percent turnover rate in the retail industry equates to a 3.6 percent wage increase! Lowering turnover creates more resources for current employees and improves guest services, creating a win-win strategy.

Why Are Younger Employees Leaving Their Jobs?

The turnover rate in retail has always been high, but it is worse today because of a change in associate perspectives on employment. Three major trends have fueled this:

1. During the COVID-19 pandemic, retail workers were either laid off or terminated as retail sales declined and roles were considered essential with expectations to show up for work in conditions they considered a risk to their health and safety.
2. Technology continues to have a significant impact on job skills needed and the training and development required.
3. Union organizing among a variety of retailers has inspired employees throughout the industry to demand an associate voice in the workplace, promoting general dissatisfaction among the workforce. If associates do not stay and organize, they leave.

McKinsey & Company took a deep dive into attrition within the retail industry. The quit rate is nearly twice the national average in other sectors. A survey of 1,000 frontline retail employees in grocery, big box retailers, restaurants, and apparel stores found that flexibility was the top driver of attrition. Associates want more control over their work schedules in addition to seeking more opportunities for career development as well as greater health and well-being support. Compensation was the fourth driver, and meaningful work the fifth.

A key point here is to recognize that only focusing on pay will not improve retention. Retail associates' perspectives and attitudes about work's place in their lives have changed. Employers are only rewarded with loyalty when they meet associate needs, including offering more control over their work environment. Employees want a voice in work hours and schedules, independence, and control over their work.

Following is a list of what retail employees have said they want and need:

- Attention to the things that matter in a work environment to associates
- Safety and security
- A positive culture
- Transparent communication from leadership
- Strong associate voice
- Relevant benefits
- Career planning and development
- Control over work and work schedules
- Training on new customer service technologies
- Understanding purpose relative to the company's mission, vision, and values, which embrace social justice

Though guest service representatives and some other retail positions can work remotely, many retail workers cannot. PwC's Global Workforce Hopes and Fears Survey found that "Workers who can't work remotely are also far less likely than others to say they find their job fulfilling, believe that their team cares about their wellbeing, feel that they're fairly rewarded financially or feel they can be creative in their work. As companies revisit workforce strategies, they must take into greater account these disaffected—and likely disempowered—employees."

The PwC data also analyzed input from associates aged 18-24 who joined the workforce during the pandemic and therefore have unique perspectives. They are concerned about being overlooked for opportunities and the impact of technology and are more likely to change aspects of their working life, such as shifting employers or working hours or leaving the workforce. This survey collected responses from 52,000 workers in 44 countries and territories. Eleven percent of the respondents were Gen Zers aged 18-24, and 46 percent were Millennials aged 25-41.

Gallup's employee engagement poll found that younger workers under 35 decreased in engagement more than others. They experienced reported declines in feeling cared about, having someone who encourages development, having opportunities to learn and grow, having opinions count, and having a best friend at work.

Tackling High Turnover With a Focus on Highest Concerns

The list of reasons associates leave for other jobs, often within a year of employment, is long, and it is difficult to address every issue at the same time. Hence, a good strategy is to focus on four major areas of highest concern for retail associates, which are the work environment, safety and security, organizational culture, which includes associate voice and leadership communication, and benefits.

Work Environment

The work environment, in general, is a broad category. It includes learning and development opportunities and career progression planning. These are spaces where retail associates feel excluded, leading to assumptions that employers do not care if they stay. The work environment also includes management's attention to things that matter most to associates, with facility maintenance topping the list. If things are broken in stores and not prioritized, it indicates that the company doesn't care. One prominent coffee retailers' employees were particularly upset about in-store ice makers that broke often, forcing workers to buy ice locally. It wasn't that they were broken; it was that they would STAY broken for weeks, months, or even years.

Safety and Security

The emphasis on safety and security accelerated during COVID and was a major reason some retail associates started organizing union efforts. Companies were caught off guard by the pandemic with poor or no protocols in place and slow responses, yet expectations for retail associates to come to work remained. Safety and security needed strengthening and that need continues today. Most retailers have experienced outside influences, including rioting and mass shootings, leading to the need for new measures to ensure workers feel safe. At Ulta Beauty, that includes cameras in stores that record 24/7/365, a guard presence in high-risk stores, and off-duty law enforcement where and when necessary.

Most think these are just loss prevention efforts, and while Organized Retail Crime (ORC) is a growing challenge both in the retail industry and at large, at Ulta Beauty, we are actually working to keep our people safe. Ulta Beauty also has a workplace violence team that is prepared to make decisions in the moment, as needed, to protect workers.

Workplace Culture

When the legendary management consultant Peter Drucker famously said, "Culture eats strategy for breakfast," he was not saying to ignore strategy. He was underscoring the importance of an empowering culture for success. Empowering younger retail workers by paying attention to their perspective is crucial to reduce turnover and, thus, fuel organizational success. The voice of the associate is intricately tied to the effectiveness of communications.

There are different ways to approach giving associates a strong voice. Ulta Beauty has a "We Care, Let's Talk" line, a dedicated call center where workers can express needs and challenges. Ulta Beauty's management also conducts associate opinion surveys and develops communication action plans to address the biggest challenges faced. In our work, the most critical barrier is how associate input and the subsequent management actions are communicated to the 10-hour-a-week associate. This vital element is often neglected in retail as it is easy to assume frontline employees will recognize the changes and further explanation is not necessary. This leads to a wide communications gap, which results in low associate engagement.

Ulta Beauty hosts regular coffee chats and listening sessions. Another vital element of connecting with associates is seen in the presence of leaders in the stores. Accessibility to leadership is a key differentiator, and every member of the Ulta Beauty leadership team is approachable. Executive visits are regular and visibility is high, with executives actively working to connect with each associate during store visits. After these visits, the executives share feedback and delegate for action across departments (e.g., Operations, People Success).

Our teams conduct weekly feedback sessions that cascade from bottom to top and then top to bottom to ensure the organization is responding appropriately.

Connecting internally is often a matter of the right message for the right audience with the right digital engagement tools. Ulta Beauty has dedicated teams to communicate with store associates, corporate teams, and distribution center (DC) associates. Our intranet serves as a hub for reference, and the WorkJam app engages associates in stores and DCs. WorkJam is designed to be a way to swap shifts, etc., but when associates arrive, a world of content opens up in the app – diversity, equity, and inclusion (DE&I) efforts, associate surveys, and even micro-trainings on new products.

Two-way feedback is of the utmost importance to all associates, and even more so for younger associates. Every company should conduct a communications assessment to ensure the current channels used to engage associates are meeting associates' needs. There should be a top-down flow of information to the frontline. And, in reverse, in-store, DC, and remote associates need to be able to initiate and provide feedback. Importantly, associate feedback requires definitive responses. It shouldn't go into a "black hole" where it gets lost in the noise. Your leaders should always respond to associate feedback and explain the "why" of decisions, even when unable to meet associate suggestions.

Feedback should be regular, too. Gallup data show that employees who received "meaningful feedback" in the past week were four times more likely to be engaged than other employees. The key word is "meaningful," implying it's relevant to the moment of associate performance and not a lengthy performance review focused solely on the past. Ulta Beauty executives, managers, and frontline supervisors hold regular conversations with associates and maintain the chat line, so continuous and meaningful feedback is embedded in the organizational culture. Feedback celebrates associate successes, provides individualized information, and motivates. Feedback is also leveraged to help associates learn and grow in their jobs, supporting career development.

Benefits

Retailers can leverage benefits programs to improve associate engagement. Many offer what could be considered outdated benefits like 401(k) plans, but a younger worker might appreciate a student loan payment match more than a 401(k) match. The retailers that have experienced union organizing, like Starbucks, Amazon, and REI, were all considered "employers of choice," but not because employees said so. The company said so. By offering what they thought workers wanted, they defined the rules of an engagement that employees were less excited about. Retailers need to ask associates which benefits matter and what challenges they are having. Don't assume you know what associates are currently thinking or what they consider important needs.

Importance of Digital Media Intelligence

Employers should supplement direct associate-leadership communication and relationships with digital media intelligence to increase associate engagement and decrease turnover. There is a wealth of intelligence online, especially on social media accounts and employer review sites. Digital media intelligence systems and processes enable employers to listen to what associates and the public say online and take informed action as needed. This includes looking for trends, feedback, sentiment, and more.

Shopify research names the top social media platforms as Instagram, Facebook, YouTube, WhatsApp, and WeChat. However, the YPulse "TikTok Effect" trend report surveyed 13-39 year olds about social media usage and found they are obsessed with TikTok. The attraction is the short, entertaining videos that constantly change. Employers must accept that this is another forum for the associate's voice. Dismissing it because they don't understand or don't like it will only leave them further disconnected from the workforce.

Ulta Beauty regards digital media intelligence as another element of the associate voice. Today's younger workers take what they see on social media as truth. There is an element of trust in seeing a "friend" in a video, telling them to buy or to believe in something. These employees are often less trusting of a company delivering education or information, as a company is often a faceless entity.

There is much to learn through digital media intelligence, which listens across the internet, not just on social media platforms. This insight from multiple media channels works to determine the voice of stakeholders, media attention, guest experience, brand reputation, industry knowledge, competitor insights, and more. When sentiment analysis is added, organizations can monitor guest and associate feedback to understand needs better.

Younger associates use social media for union organizing, especially worker-led independent union organizing. The possibility of unionization grows stronger when younger associates believe leadership roles are theirs for the taking. When they cannot achieve that status within the workplace, the idea of forming a union gives them something to lead. The desire to be part of something, to lead a movement, is strong amongst today's 18- to 30-year-old workers. Without a strong employee voice, employees go online to express that voice and to feel empowered. TikTok users have posted videos to support unionizing at other businesses, organizing in their own workplace and calling for product boycotts. Digital media intelligence can help detect these, helping companies meet associate needs proactively.

Engaging Associates and Lowering Turnover in the Here and Now

Like the internal associate feedback system, data collection and analysis are only effective when informed action is taken. Retailers are struggling to retain associates, and reducing turnover is challenging. It takes a coordinated, well-planned communications system to empower the associate voice and ensure safe workplaces, with Human Resources (HR) programs that support current associate needs and a culture that generates positive associate relations. There are many ways to connect with younger associates that include using technology-like apps, but don't forget the humanizing aspect of face-to-face conversations. Ulta Beauty has found enormous success in lowering turnover rates by implementing various practices geared toward younger associates.

In retail, the trends of the workforce experience are reflected in high turnover based on a belief there is a better job always available in a tight labor market. There is no arguing that the pandemic led to changes in how retail workers view their jobs, the value of work, and the role of employers in meeting needs to gain their loyalty.

Today, the empowerment retail workers feel is supported by the trust placed in social media and a belief that independent unionizing is an option to gain a stronger voice in the workplace. Employers that maintain a direct connection with employees and lower turnover through positive associate relations recognize the environment of the retail workplace experience has changed. It is imperative to address the work environment from the perspective of the younger workers who are not interested in just trading time for money. They want safety and security, a culture of inclusion where their voices are easily expressed, career path development opportunities, benefits that are better suited for their age, and a high-quality communications system embedded with two-way feedback across communication channels.

Retailers Control Their Destiny With Workers by Focusing on Well-being, Community Engagement, and Communication

Evan Armstrong | Retail Industry Leaders Association (RILA)
Tel: (571) 835-0098 | evan.armstrong@rila.org

ABSTRACT

Today's retailers face a myriad of hurdles they must clear to succeed, including but not limited to external and societal influences, legal and regulatory changes, a labor-friendly administration, and a changing workforce. Add to those the ever-present factor of high turnover, keeping up with competitive wage and benefit structures, and caring for employees' mental and physical health, and retailers find they need a comprehensive, strategic approach to their workforce needs. Here, we discuss the challenges, solutions, and ways in which the Retail Industry Leaders Association (RILA) continues to support this industry with knowledge, resources, and connections that help retailers succeed.

The Challenge

Over the last few years, the country has faced several challenges stemming largely from the impact of COVID-19: supply chain disruptions, inflation, and political turmoil to name just a few. While some of these challenges will dissipate in intensity with the pandemic in the rear-view mirror, employers face a workforce with needs and expectations that have permanently shifted. The result is a rapidly evolving talent marketplace marked by worker shortages and unionization risks. Unfortunately, the Biden-Harris administration is piling on additional challenges by trying to imprint a 1930s labor model that, ironically, employees no longer even want. If not thwarted, these policy changes will end any chance to build a modern, collaborative, and flexible 21st century workforce.

RILA has been at the forefront of working on behalf of leading retailers to overcome these challenges. In fact, retailers have been enormously successful combatting COVID and mitigating supply chain risks by implementing innovative operational changes to meet the needs of their employees and customers. However, the approach by President Biden and his regulatory allies in the Department of Labor (DOL) and the National Labor Relations Board (NLRB) are threatening to make retail operations more difficult by elevating the interests of organized labor over all other stakeholders, including workers, employers, and the broader U.S. economy.[1]

The risks associated with this whole-of-government approach include decreased worker rights in the organizing process, weakening of privacy protections, and economic disruption through strikes[2], boycotts, and other aggressive union activities that are unpopular and dangerous. Over 70 years ago when Congress passed the Taft-Hartley Act, lawmakers rightly prohibited certain kinds of intimidation campaigns involving union "threats," "coercion," and "restraints" against

[1] https://www.rila.org/blog/2023/01/workforce-policy-trends-to-watch-in-2023

[2] https://www.axios.com/2023/02/22/major-worker-strikes-increased-nearly-50-last-year-as-union-popularity-grew

businesses. The Protecting the Right to Organize Act (PRO Act) would reinstate these harmful tactics, negatively impacting employees, customers, and the local and national economy. Most Americans would be appalled at an administration and Congress that allows these types of anti-workplace antics to be reinstituted in today's workforce that were outlawed in the early 20th century.

While the PRO Act faces significant legislative opposition, the Biden-Harris administration is marching forward on regulatory policy changes designed to mimic what they are currently unable to pass through Congress. These executive actions will likely receive significant pushback from policymakers, advocacy organizations, and the courts, and RILA will be actively engaged in all these efforts on behalf of our members. However, retailers will continue to have to adapt and implement proactive strategies to ensure their organizations are insulated from any dramatic policy shifts, staying ahead of the administration as well as union organizers' attempts to undermine worker rights and re-orient workforce relationships.

Recent research suggests that health and safety are key drivers of worker concerns.[3] This is not a surprise as we have all lived through a devastating pandemic that began in 2020[4]. More specifically, Gen-Z workers are registering as the most stressed and are seeking security and stability at work.[5] These changes are unlikely to recede with the pandemic, and as younger workers grow their share of the total workforce, we can expect these views and expectations to calcify.

Labor unions are exploiting these concerns in organizing efforts, promoting union membership as the tonic to whatever issues may be of concern for a worker. No longer simply focused on wages and benefits, today's union organizers openly seek to exploit social justice issues, local crime, and other community challenges as rationale for an organizing campaign. Leading retailers are at the forefront and seeking solutions on many of these challenging societal issues, but opportunistic labor organizers and activists will continue to pursue workers and try to persuade them that a one-size-fits-all union campaign is the answer to these challenges.

Meeting Needs for Safety, Security, and Well-being

In recent years, retail workers have faced personal security challenges stemming from customers' violent responses to masking policies during COVID and organized and aggressive criminal rings targeting stores for mass theft.[6] These challenges have eroded the sense of health and well-being of retail workers and make recruitment and retention even more difficult.

Fortunately, leading retailers are meeting the moment to ensure their workers feel secure at work. RILA, along with its members, has advocated for better organized crime prevention policies at all levels of government. Recently, the U.S. Congress passed the INFORM Consumers Act[7], which establishes transparency and accountability for online marketplaces and third-party sellers, making it more difficult for con artists and criminal enterprises to hide behind fake screennames to sell stolen products, reducing the occurrence of ORC. In addition, retailers are working with local and state governments to create task forces and increase budget allocations to coordinate the prosecution of organized retail crime rings.[8] It is paramount that federal, state, and local law enforcement work with retailers to continue these efforts to mitigate the risks of violence and criminality in their stores and the communities they serve.

In addition to these prevention methods, employees are seeking better tools to deal with stress and trauma. Demand for mental health services has risen dramatically in recent years across every sector in the economy, including retail[9]. Specifically, Best Buy Chief Executive Officer and RILA Board of Directors Chair Corie Barry, recently emphasized mental health

[3] https://www.retaildive.com/spons/psychological-safety-is-key-to-retail-employee-retention/625834/

[4] https://justcapital.com/news/corporate-america-the-public-expects-you-to-prioritize-the-health-safety-of-your-workers/

[5] https://www.forbes.com/sites/michaelstone/2021/05/18/gen-z-they-crave-stability-and-trust-so-give-it-to-them/?sh=b3619a9594af

[6] https://www.businessinsider.com/organized-retail-crime-theft-walmart-target-2022-12

[7] https://www.rila.org/focus-areas/public-policy/retailers-celebrate-signage-of-inform-consumers-ac

[8] https://www.rila.org/retail-works-for-all-of-us/ensuring-a-safe-sustainable-future/organized-retail-crime-counterfeits-marketplaces

[9] https://theharrispoll.com/briefs/workplace-mental-health-awareness-week/

for employees by saying, “My personal point of view is there is still a backdrop of mental health issues, anxiety, and a need to leverage resources. And we actually see it. We offer a really large array of benefits that are geared toward help around mental wellness, and the usage of those benefits is as high as we’ve ever seen.”

Again, employers are offering their workers options to meet their need for security, safety, and well-being at work, and despite this, organized labor continues to drive a wedge between employees and retailers. As employers make strides in these areas, the challenges of leading retailers do not stop at their workforce.

Community Engagement

Homelessness, drug use, and crime have been consistent concerns throughout the country, particularly in major metropolitan areas. These issues put the entire community at risk, including our workers and customers. These disturbing societal trends put major retailers in a difficult position of taking on challenges that are traditionally relegated to elected officials and public services. Whereas organized retail crime is squarely within the retail operational purview, homelessness and surrounding crime, sometimes violent, is beyond the traditional scope of the retail business model. These societal challenges are having an impact on employee morale.

While labor organizers have no qualms exploiting societal challenges, retailers are often caught between a rock and a hard place. Locking restrooms, for example, has drawn the ire of local activists and, at times, created tensions between employees and would-be customers. However, unlocking restrooms has also created problems for employees, particularly when the facilities are used for drug use or other criminal activity.

As issues around health, safety, and security continue to percolate, RILA and its members are looking at innovative approaches to tackle community issues to ultimately create a better environment for all retail stakeholders – especially employees.

Conversations about the open bathroom policies are on-going, but Starbucks has committed to bringing social workers to certain cafes to assist at-risk individuals. And other retailers such as CVS, Walgreens, and Dollar General are building out similar capabilities to bring vital services to their communities. All these efforts will be needed to ensure retail operations, workers, and consumers can be safe and secure—but it also demonstrates the lengths retailers are going to be a force for good in the community. Ultimately, to cultivate continued positive employee relations and provide a remedy to organized labor threats, retailers must be intentional, transparent, and communicative about efforts to keep workers and communities safe.

Communication

In politics, candidates spend vast sums of money to define themselves before they are defined by an opponent. Former President Obama successfully won reelection in part because of his campaign’s vigorous effort to cast challenger, now Senator Mitt Romney, as an out-of-touch, wealthy industrialist from the gilded age. It worked. Voters believed they knew Romney before he could convince them otherwise.[10] In corporate America, in the battle for the hearts and minds of its workforce, the same principle applies. Corporations must tell their story or activists and union organizers will sell an alternative story in an attempt to unionize a store or warehouse.

Many employers and leading retailers probably believe they are doing this work. But, to use another political adage, if you are explaining, you are losing. Communication campaigns, both internally and externally, must be consistent and ubiquitous to ensure the message lands effectively with the targeted audiences. As IRI has noted in previous reports, “When employees do not internalize the values, they do not develop a direct connection to the workplace. It is one reason so many

[10] https://jp.reuters.com/article/us-usa-campaign-obama-strategy-idINBRE8A62A520121108

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."[11]

One area where employees are demanding more accountability from organizations is that of Environmental, Sustainability, and Governance (ESG) metrics. Generally, these metrics are an attempt to showcase efforts by organizations to develop strategies around climate change, diversity and inclusion, and employee investments. Outside investors, employee resource groups, and governments are continuing to mount pressure on companies. Some see this as a risk – especially as organized labor again drafts behind these issues to divide employees from employers. However, proactive retailers can and should "flip the script" and utilize the ESG movement in their favor.[12]

Companies should be intentional and transparent about their efforts in these spaces and communicate their efforts effectively. It is not enough to have an ESG or Corporate Social Responsibility (CSR) strategy – an organization's commitment should be embedded throughout their corporate marketing, internal communications, and government reporting.

As employees, especially younger workers, crave stability and security in their lives, hearing from employers about their efforts to mitigate risks around climate change, as well as social and political disharmony, ranks as increasingly important.[13] In an Amnesty International survey of over 10,000 participants aged 18-25 across 22 countries, 40 percent ranked climate change as the most important issue facing our world today. The issue that ranked second: pollution, with 36 percent of participants voting for it.

Leaning in on ESG could ultimately be the best preventative measure against a lurking labor organizing effort. Jackson Lewis attorney Laura Pierson Scheinberg notes that, "engaging employees in 'ESG' activities might make them less likely to unionize, or at least give companies positive items to talk about in a union avoidance campaign. Messaging on topics like ESG can help companies argue, in the case of a union campaign, that 'we have all these programs in place, we are doing all these things that the union is claiming [we] aren't.'"

Unfortunately, the NLRB and its general counsel, Jennifer Abruzzo, are looking to muzzle employers from talking with employees. General Counsel Abruzzo believes most, if not all, employer attempts to discuss issues about organizing are inherently coercive.[14] The legal dubiousness of this position is obvious when the National Labor Relations Act explicitly gives employers the right to "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, [which] shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 USC § 158(c). The NLRB's unfortunate position is at odds with workers. In fact, the vast majority of employees want to hear from employers about their work, the direction of the company, and the impact of unionization.[15] This should reinforce employers' intentions to be active and intentional in their communications to employees. Companies must communicate directly with their employees, whether it is in emails, social media, or in-person meetings. If they don't, they risk being defined by their opponent in the hearts and minds of their workers.

Conclusion

Retailers constantly look at threats and opportunities for their organizations. The known threat of an aggressive administration focused on shifting workforce policies in favor of organized labor is well established. Employers must seize the opportunity to continue to invest in and engage with their workforces. Ensuring employee health and well-being, strong community engagement, and effective communications are all areas under the control of the retailer. And, when done well, proactive policies and communications will offer ample protection against undue outside influences seeking to drive a wedge between employers and their workforce.

[11] Labor Activity in Retail Report, May 2022

[12] https://www.levernews.com/fear-and-loathing-among-the-union-busters/

[13] https://thepavlovictoday.com/gen-z-is-terrified-of-the-future/

[14] https://www.rila.org/blog/2022/06/american-workers-deserve-better-from-nlrb

[15] https://i4aw.org/resources/polling-results-for-employer-meetings-on-unionization/

Addressing Workplace Violence Liabilities in Retail

Adam R. Young | Seyfarth Shaw LLP
Tel: (312) 460-5538 | ayoung@seyfarth.com

A. Scott Hecker | Seyfarth Shaw LLP
Tel: (202) 828-3588 | shecker@seyfarth.com

ABSTRACT

Employers face growing concerns with retail theft, threats, assaults, sexual violence, and mass shootings. Employers should be aware of the potential legal liabilities associated with workplace violence, including under current and anticipated laws. Employers should evaluate practical considerations to develop and update their workplace violence policies to best protect employees, customers, and visitors. Doing so will help mitigate risks from common challenges, such as responding to customer/visitor threats, safety concerns from employees, and individuals using retail locations for shelter.

Workplace Violence in Retail Defined

The Occupational Safety and Health Administration (OSHA) defines workplace violence as any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide. The Centers for Disease Control and Prevention (CDC) identify four types of actors in workplace violence situations:

1. Individuals unconnected to workplaces who commit crimes (e.g., robberies, gang activities, mass shootings)
2. Individuals (e.g., customers, clients) directing violence at workplace employees
3. Current or former employees directing violence at another employee (e.g., terminations, sexual harassment)
4. Individuals committing violent acts in workplaces at which they have a relationship with employees (e.g., domestic violence spilling into work)

Workplace Violence Statistics

Unfortunately, recent examples of workplace violence in retail are not hard to come by. These include shootings resulting in multiple fatalities in Buffalo, NY (May 2022); Chesapeake, VA (November 2022); and Boulder, CO (March 2021). According to OSHA, nearly 2 million employees suffer from workplace violence each year, and acts of violence are the third-leading cause of fatal occupational injuries in the United States. While women made up 8.6 percent of all workplace fatalities in 2021, they represented 14.5 percent of intentional injuries.

The Federal Bureau of Investigation (FBI) noted a 42 percent increase in assaults reported to law enforcement from 2018-2020, with a 63 percent increase in convenience stores and a 75 percent increase in grocery stores; 21 percent of workplace homicides occur in sales and related occupations. Non-fatal workplace violence is likely significantly underreported, and frontline retail workers' new enforcement responsibilities during COVID-19, e.g., concerning masking, led to numerous violent encounters.

Minimizing OSHA Liability for Workplace Violence

Under the Occupational Safety and Health Act's General Duty Clause at section 5(a)(1), employers must furnish to their employees "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." OSHA can cite employers under this statutory section where it proves there was a recognized hazard likely to cause death or serious physical harm, as well as a feasible means to abate the hazard. OSHA may initiate a workplace violence inspection based on a complaint, reported injury, referral, or a programmed inspection. Recent case law demonstrates successful enforcement efforts by OSHA against employers in both retail and healthcare, i.e., sectors with public-facing employees.

To address potential OSHA enforcement exposure, employees should strongly consider implementing workplace violence prevention plans. Such programs should include:

- **Management Commitment and Worker Involvement**
  This section should demonstrate the company's commitment to protecting employees, with an equal commitment to the safety and health of both workers and store patrons. Employers should assign responsibility, allocate authority and resources, maintain a system of accountability, communicate with relevant third parties, and ensure worker participation in safety and health processes.
- **Worksite Analysis**
  Employers should evaluate potential hazards in their workplaces and endeavor to prevent them by analyzing and tracking records, conducting screening surveys, and analyzing workplace security. This should include inspecting relevant buildings and the surrounding area to, for example, identify features and limitations, lighting needs, and access points.
- **Hazard Prevention and Control**
  Employers should consider engineering, administrative, and workplace controls, as well as how to respond to incidents, in developing means to prevent and control workplace violence. Such methods can include mandatory safety concern reporting via a hotline, mandatory injury reporting as soon as relevant personnel become reasonably aware of an occurrence, clear policies to respond to employee complaints, assigning analysis of an incident to a team and/or investigator, and alerting security or law enforcement about concerns by providing facts and documentation.
- **Safety and Health Training**
  Training on hazards, site-specific procedures, and general workplace violence guidance should be provided to all employees, while supervisors/managers should understand high-risk situations, how to assist other employees, and de-escalation techniques.
- **Recordkeeping and Program Evaluations**
  Employers should periodically evaluate – and update, as needed – their violence prevention programs and keep appropriate records, such as OSHA logs recording injuries and illnesses, medical reports, documentation of abuse and verbal/physical attacks, safety meeting minutes, and training.

  Employers should consider whether to include firearms policies in their workplace violence prevention programs, and states may have specific requirements regarding required signage or other limitations that businesses must evaluate.

  Other options to think about include whether to employ armed or unarmed security personnel and whether to seek temporary restraining or stay away orders, which must be used only when they can reduce – not exacerbate – potential risks.

Systematizing Threat Assessments and Response Plans

Safety and security professionals assess four types of workplace violence incidents in their workplaces. Each of these threat levels must be determined on a fact-specific basis, taking into account the context of any potential violence or threatening acts. Each threat level should be associated with response options:

1. **Lower Threat**, including insubordination; causes turmoil; verbal disagreements; use of crude and/or aggressive language; non-consensual advances.

   Employers may follow normal human resources policies and protocols to address a lower threat situation.

2. **Moderate Threat**, including verbal arguments; repeated insubordination; consistent failure to follow company policies; expressed concerns about potential violence; high stress from multiple sources; sees company as aggressor; self-victimization.

   Moderate threat levels raise some concern for violence, that should trigger fact gathering and triaging by the workplace violence support team.

3. **High Threat, but Unclear**, including reports about potential violent incidents; theft; threats; and references to weapons.

   High threat levels require an immediate response and investigation. Typically, the employer removes the employee from the worksite pending an investigation into the issues and risks.

4. **Hight Threat, and Urgent**, including physical aggression; property damage; weapons; suicide attempts; homicides, aggravated sexual assaults, arson, etc.

   These urgent threats require immediate intervention with onsite security and/or emergency responders.

Additional Tips for Responses to Moderate and High Threat Incidents

Tailored approaches, such as maintaining distance, projecting calmness and empathy, asking questions, focusing on the agitated individual's concerns and acknowledging their feelings, and staying near an exit, can help reduce the threat level in workplace violence situations. You can also use delaying tactics, like offering water, reassure the individual, ask for their recommendations, and calmly explain the consequences of violent behavior.

In case an incident occurs, particularly involving an active shooter, employers should train employees to evacuate whenever possible. If there is no means to leave, they should hide. As a last resort, they can engage in self-defense by taking aggressive action against the assailant.

Other Employment Liabilities

Beyond OSHA and more safety-specific concerns, employers may have to navigate conflicting legal obligations under the Americans With Disabilities Act (ADA), for example, how to balance threats from employees with protected mental health issues against obligations to other employees. Threats or occurrences of workplace violence can also lead to tort liability. To mitigate risks under the ADA, employers should: apply policies uniformly; investigate, but move quickly and decisively; and document and take actions based on the evidence. At common law, employers should ensure they: establish policies for raising concerns about employees and customers, develop plans and respond to employee concerns, and train employees about how to handle difficult customers.

Conclusion

Workplace violence is – unfortunately – a real and ongoing threat to employee, customer, and visitor safety. The retail industry should consider all options to mitigate the risks and respond to incidents of workplace violence. OSHA and other enforcement agencies are focused on workplace violence, so employers should expect enforcement activities to specifically address prevention of and response to such incidents. The authors and their Seyfarth colleagues stand ready to assist and support in developing plans and protocols to protect retail stakeholders.

State and Local Legislators Are the 'Tail Wagging the Dog' When It Comes to Federal Employment Litigation Impacting Retailers

Michael C. Schmidt | Cozen O'Connor
Tel: (212) 453-3937 | mschmidt@cozen.com

Steven D. Millman | Cozen O'Connor
Tel: (215) 446-0031 | smillman@cozen.com

Austin G. Dieter | Cozen O'Connor
Tel: (312) 474-4478 | adieter@cozen.com

ABSTRACT

Perhaps as a result of the ever-broadening political divide, the #MeToo era and social justice movements, the rise of the gig-based economy, the COVID-19 pandemic, or a combination of all or some of these factors, retail employers are facing an unprecedented number of state and local laws that increase the burden on management, decrease employer autonomy, and raise the cost of doing business. Bolstered and emboldened by more homogenous groups of elected officials in these smaller political arenas, federal, state, and local lawmakers have proposed initiatives and begun implementing new laws that will require retailers to change the way they operate. In this article, we explore the trend of aggressive state and local legislatures implementing increasingly employee-friendly laws through an examination of three of the most impactful of such laws. For each, we dive into the respective growth patterns at the state and local levels, explore the impact on retailers, and discuss how federal legislatures are piggybacking on the momentum created by state and local policy makers.

Fair Workweek Laws

Fair workweek laws, also known as predictive scheduling laws, first burst onto the scene in 2015, and the ensuing proliferation of such laws at the state and local levels has significantly impacted retailers ever since. Generally, fair workweek laws seek to create predictable work schedules for employees by, among other things, prescribing how far in advance employers must provide work schedules to employees (e.g., two weeks before a shift) and, further, by limiting an employer's ability to make schedule changes within a particular period of time (e.g., requiring that no schedule changes be made for up to seven days prior to an employee's scheduled shift and by requiring employers to provide "on-call pay" to employees in the event they are on-call but not called into work). While the goal may be laudable when it comes to eradicating abusive employee scheduling tactics, the concern is over the over-reaching and counter-productive impact of these initiatives in many cases.

According to the Washington Center for Equitable Growth, these laws "aim to improve the quality of work schedules that employers offer to their workforce." Proponents of such legislation argue that "[u]nstable and unpredictable work hours yield unstable and unpredictable incomes and make it extremely challenging for working people to manage responsibilities like caregiving, pursuing higher education, or holding down a second job."[1]

However, research returns show that fair workweek laws may not benefit retail employees the way legislatures had hoped. In 2022, a University of Kentucky economist found that, instead of increasing the proportion of employees working full time, which is one of the intended aims of fair workweek laws, the proportion of part-time employees actually increased by 9.2 percent after such scheduling laws were implemented in San Francisco, New York, Seattle, and Oregon.[2] Nearly two-thirds of the interviewed employees reported that the drop to part-time hours was involuntary.

Similarly, a study from researchers at the University of Illinois concluded that there was "limited evidence" that fair workweek laws in Oregon had any impact on improving workers' schedules.[3]

As retailers well know, the ability to enjoy a flexible work schedule is one of the primary benefits for many young workers when deciding to build a career in the retail space. Indeed, a recent survey of U.S. retail workers concluded that, unlike other industries where compensation is ranked as the top motivator, retail candidates rank type of work and schedule flexibility as the top two reasons they seek retail employment.[4] These same retail workers are also nearly twice as likely to prefer to choose their own shifts over workers in other industries. Given the impact these laws have on retail employers and the distaste for them shared by retail workers, the spread of these laws is troubling.

Unsurprisingly, in 2015, the City of San Francisco became the first locality in the country to enact fair workweek legislation. Since then, seven more major local governments have passed similar laws across the country. These include New York City, Los Angeles, Seattle, Philadelphia, Chicago, Emeryville, and Berkeley. The state of Oregon became the first state to enact statewide fair workweek laws in 2017.

Undoubtedly noticing the state and local trends, U.S. Congresswoman Rosa DeLauro (D-CT-03) and Senator Elizabeth Warren (D-MA) introduced a bill, H.R. 6670, the Schedules that Work Act, to the U.S. House of Representatives on February 9, 2022. This marked the federal government's first attempt to pass fair workweek legislation nationwide. The bill has not yet been presented to a vote, but it looms large over our nation's largest retailers as it would increase management's burden, decrease work schedule flexibility, and ultimately drive up working costs.

While Democratic members of Congress and state and local legislators ramp up their attempts to enact fair workweek laws, the states of Arkansas, Georgia, Iowa, and Tennessee have fought back by passing legislation that prohibits local governments from enacting such laws.

It is clear that state and local legislatures are driving the bus when it comes to fair workweek laws that are curbing retail employers' ability to freely create employee schedules based on the nuances and unique aspects of their businesses and workforces. Retail employers across the country should remain keenly aware of the proliferation of these laws and take aim at stopping them where they count, at the state and local levels.

[1] Equitable Growth (April 15, 2022) "Factsheet: Six Frequently Asked Questions About Schedule Quality and Fair Workweek Laws Across the United States", https://equitablegrowth.org/factsheet-six-frequently-asked-questions-about-schedule-quality-and-fair-workweek-laws-across-the-united-states/#footnote-1

[2] Yelowitz, Aaron, Institute for the Study of Free Enterprise (January 2022), *Predictive Scheduling Laws Do Not Promote Full-Time Work*, https://isfe.uky.edu/sites/ISFE/files/research-pdfs/Predictive%20Scheduling%20Laws%20Do%20Not%20Promote%20Full-Time%20Work.pdf

[3] Petucci, Larissa, et al., IRL Review, Vol. 75, Iss. 5 (Dec. 14, 2021), *Persistent Unpredictability: Analyzing Experiences with the First Statewide Scheduling Legislation in Oregon*, full article available at https://journals.sagepub.com/doi/abs/10.1177/00197939211064902?journalCode=ilra#tab-contributors

[4] *U.S. Retail Workers Want Flexible Work Twice as Much as any Other Industry* (October 18, 2015), https://www.prnewswire.com/news-releases/us-retail-workers-want-flexible-work-twice-as-much-as-any-other-industry-300538569.html

Biometric Privacy Laws

With the increasing use of fingerprint scan punch clocks and fingerprint or face scan accessible laptop computers, states and localities have acted where the federal government has not by enacting biometric information privacy laws. These laws require employers that use and store biometric identifiers (in part defined as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry") to comply with requirements that often impose administrative burdens, or else incur heavy penalties. Among the requirements that employers must meet are to:

- Inform all employees that their information is being collected and stored
- Inform all employees of the duration of the storage and the specific purpose for which the biometric data is being collected or stored
- Receive affirmative consent by employees to collect and store their biometric data
- Draft biometric information policies that are made available to the public
- Refrain from selling any biometric data

To date, only three states have enacted statewide biometric privacy laws – Illinois, Texas, and Washington – however, another ten states[5] are actively seeking to enact similar legislation. Such proposed legislation has been offered by both Democrats and Republicans, signaling that both sides of the political divide are focused on the issue. These state laws have led to more localities enacting similar legislation, with New York City and Portland recently enacting biometric privacy laws. Of the three states with active biometric privacy laws, Illinois has the strictest law in the nation, which includes a private right of action permitting employees to sue their employers for violations of the law. And sue they have. In 2020, a class of plaintiffs brought suit alleging that Facebook violated the Illinois law by not obtaining employee consent for the collection of biometric data. Facebook thereafter settled the matter for $650 million, a figure that should reverberate throughout the retail employer landscape and illustrate the potential perils of biometric privacy laws. As such laws continue to proliferate, retail employers are, and will continue to be, left navigating a patchwork landscape of state-specific biometric requirements that require them to reevaluate their employment policies and compliance programs.[6]

Just as with fair workweek legislation, it seems that state and local legislation in the absence of federal action has emboldened Congress to draft its own proposed bill. In 2020, Oregon Senator Jeff Merkley introduced Senate Bill S.4400, the National Biometric Information Privacy Act of 2020, which includes a private right of action for employees to sue employers on behalf of all aggrieved employees. While the bill has not yet been voted on, it further illustrates that increasing activity on the state and local levels has once again foreshadowed a potential new federal law that will have a significant nationwide impact on retail employers.

Limitations on Independent Contractor Relationships

One of the most high-profile examples of state legislation prompting federal legislative action is related to the classification of employees as independent contractors versus employees. For decades, the federal courts have employed an "economic realities" test to determine if a worker is an employee or independent contractor. The test considers factors such as the level of control by the employer over the worker and the permanency of the relationship.

In a drastic move to implement employee-friendly policy driven by the rise of the gig economy, the California legislature, following on the heels of a California Supreme Court decision, formally abandoned the economic realities test in 2020 through the passage of AB5, which implements the "ABC test"

[5] Including Arizona, Minnesota, Missouri, Tennessee, Kentucky, Maryland, New York, Massachusetts, Vermont, and Hawaii.

[6] Strict compliance is also imperative, particularly in Illinois, where biometric privacy laws have recently been ruled to have a five year statute of limitations. See *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801 (Ill. 2023). Such a prolonged statute of limitations creates long exposure periods that can lead to high dollar value litigation and also provides plaintiff's attorneys plenty of time to shop for cases that they believe have a high possibility of reaching a favorable result.

for determining independent contractor status. The ABC test starts with a presumption that every worker is an employee, and an employer may only overcome the presumption by showing that:

(a) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(b) The person performs work that is outside the usual course of the hiring entity's business; **and**

(c) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

AB5, as it was originally drafted, all but eliminated most employers' ability to independently contract and effectively converts the majority of workers to employee status, bringing with it the obligation to pay unemployment taxes, payroll taxes, overtime pay, workers' compensation insurance liability, and benefits costs – all expenses that are traditionally borne by employers. Since its enactment, the voters of California voted in favor of Proposition 22, a ballot initiative to add a carve-out to AB5 by allowing rideshare and delivery drivers to be classified as independent contractors regardless of the ABC test. Prop 22 has been heavily contested in the courts, but a California appeals court recently upheld the majority of Prop 22, meaning that rideshare and delivery drivers will continue to be excluded from the ABC test in California.

Democratic federal legislators quickly took notice and have since made multiple efforts to implement the ABC test nationwide. The first attempt came with the introduction of a House Bill in early 2020 known as the PRO Act (the Protecting the Right to Organize Act), which, among other things, employs an ABC test in an effort to widen National Labor Relations Act (NLRA) protections to workers that were previously classified as independent contractors and, thus, not protected under the NLRA. Given this, the PRO Act, which passed in the House of Representatives but now faces heavy Republican opposition in the Senate, is being championed heavily by unions and would represent one of the most dramatic shifts in U.S. labor and employment law in decades.

Why Are We Seeing These Trends and What Do They Mean for Retailers?

So, what is driving the surge of this aggressive legislation? While the answer is likely not due to any one factor, at least part of the equation seems to be the political makeup of state and local legislatures around the country. In 2018, for the first time in over a century, all but one state legislature was dominated by a single political party.[7] Even today, every state except for Pennsylvania and Virginia has a legislature where both chambers of the legislative body are politically aligned.[8] In this environment, state legislators are emboldened to propose heavily partisan legislation knowing they have the majority support in both chambers. The natural consequence is that legislation is more polarizing and quicker to be enacted. A side effect of overpowered state legislatures is that it has created an even further political divide among their constituents, as "lopsided party dominance has not brought resignation; instead of minority parties conceding that they lack the numbers to effectively fight back, the mood has grown more tense and vitriolic."[9] Accordingly, as the political divide continues to widen, the number of strongly partisan bills and other legislation will inevitably increase.

In an atmosphere where federal legislation is slow and disjointed due to a split in the House and Senate, galvanized state and local legislatures are, more than ever, in a position to create employment law legislation that impacts retailers. In right-leaning states with majority conservative lawmakers, this traditionally benefits retailers, as legislatures in such states are less focused on employee-friendly, progressive policies and may even enact legislation forbidding such measures,

[7] Williams, Timothy, New York Times (June 11, 2019), *With Most States Under One Party's Control, America Grows More Divided*, https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html

[8] National Conference of State Legislatures (Updated February 28, 2023) State Partisan Composition, https://www.ncsl.org/about-state-legislatures/state-partisan-composition

[9] See, *infra*, n. 6.

similar to how state legislatures in Iowa and Georgia managed to pass prohibitions on fair workweek laws. However, some of these neoteric laws, such as biometric privacy laws, are being pushed by both sides of the aisle, and retailers must simply learn to adapt to this changing landscape or invest more heavily in research and lobbying efforts.

What is clear is that retail employers' ability to manage their operations and payroll and to define their policies and practices continue to be impacted not only by the patchwork and ever-evolving landscape of state and local laws, but by the prospect of copycat federal legislation imposing national standards and requirements. Retailers that value and are focused on investing in lobbying activities should keep a finger on the pulse of these state and local trends as they continue to proliferate, and they should focus their political efforts and resources on stemming the spread of such business-second employment laws and policies at the state and local levels.

Additional Citations

National Women's Law Center (October 2019), *State and Local Laws Advancing Fair Work Schedules*, https://nwlc.org/wp-content/uploads/2019/10/Fair-Schedules-Factsheet-v2.pdf

Hussain, Suhauna, Los Angeles Times (March 13, 2022), *California appeals court reverses most of ruling deeming Prop. 22 invalid*, https://www.latimes.com/business/story/2023-03-13/prop-22-upheld-california-appeals-court

HRDive, (Updated Feb. 13, 2023) *Predictive scheduling laws, A running list of states and localities that have adopted predictive scheduling requirements*, https://www.hrdive.com/news/a-running-list-of-states-and-localities-with-predictive-scheduling-mandates/540835/

H.R. 6670 - Schedules That Work Act Legislative History, https://www.congress.gov/bill/117th-congress/house-bill/6670/actions?s=1&r=4

Alonzo, Julia; Gottlieb, Brooke, The National Law Review (March 18, 2021), Litigation *Breeding Ground: Illinois' Biometric Information Privacy Act*, available at https://www.natlawreview.com/article/litigation-breeding-ground-illinois-biometric-information-privacy-act

In re Facebook Biometric Info. Privacy Litig., No. 15-cv-03747-JD, 2020 BL 317637 (N.D. Cal. Aug. 19, 2020)

A Comprehensive Resource for Tracking U.S. State Biometric Privacy Legislation (Last updated March 6, 2023), https://www.huschblackwell.com/2023-state-biometric-privacy-law-tracker

S. 4400 - National Biometric Information Privacy Act of 2020 Legislative History, https://www.congress.gov/bill/116th-congress/senate-bill/4400/text

Bloomberg Law (January 25, 2023), *The evolution of biometric data privacy laws*, https://pro.bloomberglaw.com/brief/biometric-data-privacy-laws-and-lawsuits/

Cal Legislature, Assembly Bill No. 5, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5

H.R. 2474 - Protecting the Right to Organize Act of 2019 Legislative History, https://www.congress.gov/bill/116th-congress/house-bill/2474/text

Redmon, Sean P. (March 19, 2021), *The PRO Act's Attack on Independent Contracting*, U.S. Chamber of Commerce, https://www.uschamber.com/workforce/independent-contractors/the-pro-act-s-attack-independent-contracting

APPENDIX A

SUMMARY OF PETITIONS FILED AND ELECTIONS HELD

All Industries – Summary of Petitions Filed and Elections Held (2013 - 2022)

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total Petitions	2,553	2,616	2,596	2,286	2,280	1,921	2,039	1,556	1,685	2,501
Total Representation (RC) Petitions	2,033	2,129	2,168	1,918	1,880	1,557	1,737	1,309	1,385	2,162
Union Not Elected	**461**	**436**	**453**	**354**	**372**	**322**	**299**	**240**	**243**	**402**
Union Elected	**889**	**995**	**1,096**	**964**	**981**	**796**	**917**	**596**	**738**	**1,209**
Total Decertification Petitions	520	487	428	368	400	364	302	247	300	339
Total RD Petitions	463	439	370	311	338	333	260	201	271	313
Total RM Petitions	57	48	58	57	62	31	42	46	29	26
Union Not Elected	**136**	**130**	**127**	**123**	**144**	**120**	**113**	**61**	**96**	**109**
Union Elected	**86**	**67**	**79**	**69**	**71**	**60**	**60**	**51**	**62**	**60**

Retail – Summary of Petitions Filed and Elections Held (2013 - 2022)

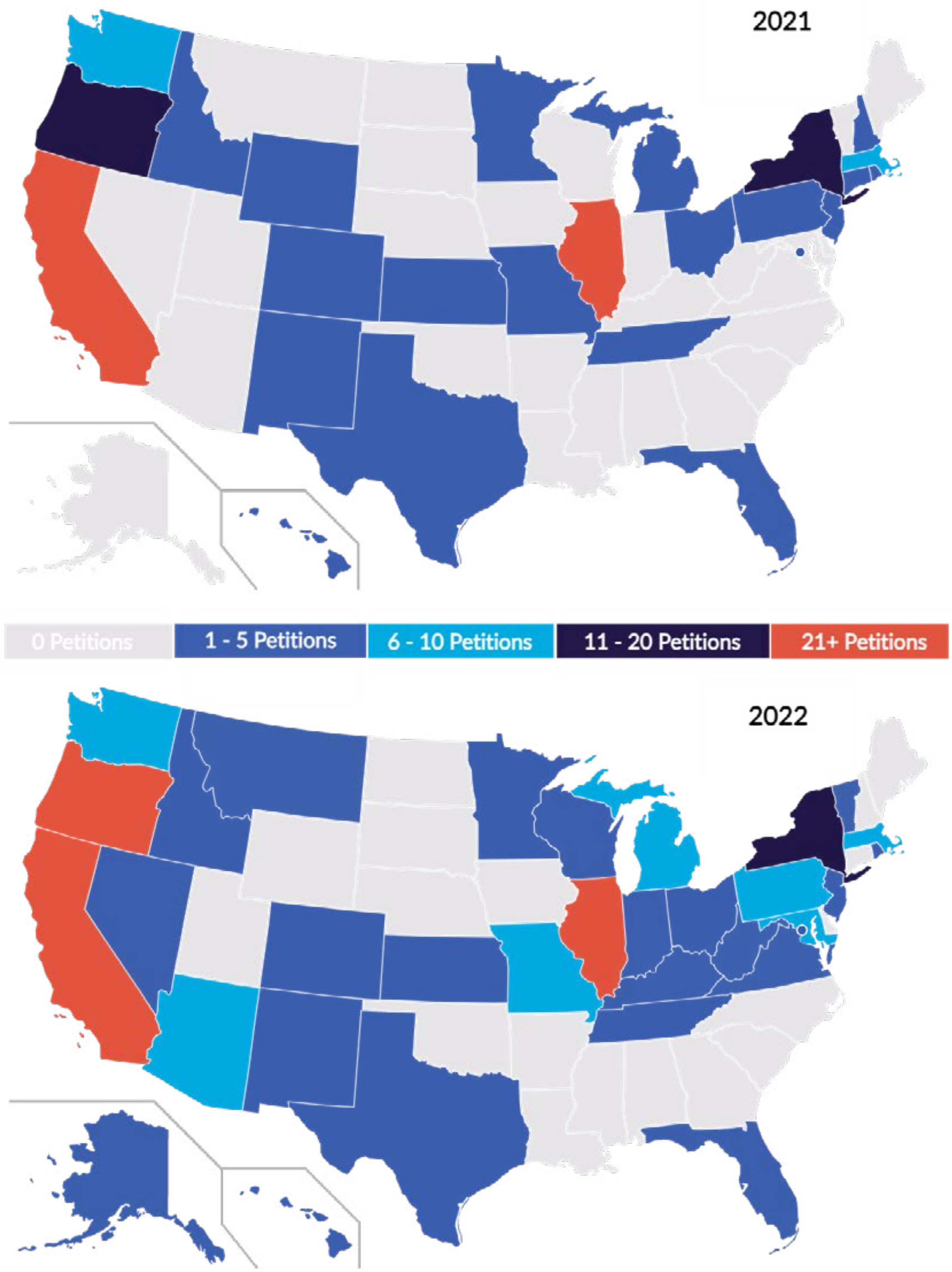
	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total Petitions	156	151	158	139	124	108	115	91	160	242
Total Representation (RC) Petitions	122	107	114	105	89	81	92	75	135	223
Union Not Elected	**48**	**25**	**31**	**36**	**18**	**33**	**25**	**11**	**28**	**43**
Union Elected	**35**	**55**	**47**	**37**	**38**	**30**	**30**	**29**	**59**	**122**
Total Decertification Petitions	34	44	44	34	35	27	23	16	25	19
Total RD Petitions	28	34	35	29	28	23	17	12	18	17
Total RM Petitions	6	10	9	5	7	4	6	4	7	2
Union Not Elected	**8**	**8**	**12**	**6**	**11**	**7**	**8**	**5**	**7**	**8**
Union Elected	**7**	**6**	**5**	**3**	**2**	**5**	**4**	**1**	**4**	**4**

All Non-Retail Industries – Summary of Petitions Filed and Elections Held (2013 - 2022)

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total Petitions	2,397	2,465	2,438	2,147	2,156	1,813	1,924	1,465	1,525	2,259
Total Representation (RC) Petitions	1,911	2,022	2,054	1,813	1,791	1,476	1,645	1,234	1,250	1,939
Union Not Elected	**413**	**411**	**422**	**318**	**354**	**289**	**274**	**229**	**215**	**359**
Union Elected	**854**	**940**	**1,049**	**927**	**943**	**766**	**887**	**567**	**679**	**1,087**
Total Decertification Petitions	486	443	384	334	365	337	279	231	275	320
Total RD Petitions	435	405	335	282	310	310	243	189	253	296
Total RM Petitions	51	38	49	52	55	27	36	42	22	24
Union Not Elected	**128**	**122**	**115**	**117**	**133**	**113**	**105**	**56**	**89**	**101**
Union Elected	**79**	**61**	**74**	**66**	**69**	**55**	**56**	**50**	**58**	**56**

APPENDIX B

MAPS OF REPRESENTATION (RC) PETITIONS FILED IN RETAIL



APPENDIX C

THE NATIONAL LABOR RELATIONS BOARD DEFINITIONS

WHAT IS THE NATIONAL LABOR RELATIONS BOARD?

The National Labor Relations Board (NLRB) is an independent federal agency established to enforce the National Labor Relations Act (NLRA). As an independent agency, the NLRB is not part of any other government agency, such as the Department of Labor.

Congress has empowered the NLRB to conduct secret ballot elections so employees may exercise a free choice whether a union should represent them for bargaining purposes. A secret ballot election will be conducted only when a petition requesting an election is filed. Such a petition should be filed with the Regional Office in the area where the unit of employees is located. All Regional Offices have petition forms that are available upon request.

TYPES OF PETITIONS

1) CERTIFICATION OF REPRESENTATION (RC)

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

2) DECERTIFICATION (RD)

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

3) WITHDRAWAL OF UNION-SECURITY AUTHORITY (UD)

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

4) EMPLOYER PETITION (RM)

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

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

6) AMENDMENT OF CERTIFICATION (AC)

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