



*Transportation Lawyers
Association*

56th Transportation Law Institute

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THE NLRA: WHY IT MATTERS

- Applies to all private sector companies
- Not just companies with unionized workforces
- Efforts to organize are on the upswing



Union Membership Rates Down Again In 2022, BLS Says

By [Tim Ryan](#) · 2023-01-19 10:21:01 -0500 · [Listen to article](#)

Union membership rates dipped slightly for a second consecutive year in 2022, according to data the [U.S. Department of Labor](#) released Thursday, continuing a historical trend despite the recent success of several high-profile organizing campaigns.



Union membership rates fell slightly for the second consecutive year in 2022, according to data from the Bureau of Labor Statistics. (Photo by Bill Clark/Getty Images)

The [Bureau of Labor Statistics'](#) annual unionization report found 10.1% of workers in the U.S. were members of unions in 2022, down slightly from 10.3% the year before. That marks a [second straight year](#) of declining union density after a slight bump in 2020, though some of that increase was due to job losses in lightly unionized industries early in the COVID-19 pandemic.

The total number of union members rose by 273,000 to about 14.3 million in 2022, but that increase was offset by larger job gains among nonunion workers, according to the BLS.

Organized labor responded to the data by pointing to the raw increase in the number of union members as a success. In a statement, the [AFL-CIO](#) said the drop in density does not reflect workers who have only started organizing and that increased organizing activity means "the labor movement is poised to grow significantly in coming years."

"The momentum of the moment we are in is clear," AFL-CIO President Liz Shuler said in a statement. "Organizing victories are happening in every industry, public and private, and every sector of our economy all across the country. The wave of organizing will continue to gather steam in 2023 and beyond despite broken labor laws that rig the system against workers."

Sara Steffens, secretary-treasurer of the [Communications Workers of America](#), said workers want to join unions and called for legal changes to "give them that chance."

"Workers want a seat at the table, and they understand that the best way to do that is through union representation and union contracts," Steffens told Law360 in an email.

The share of workers represented by unions also declined in 2022 down to 11.3% from 11.6% the year before. Overall, roughly 200,000 more workers were represented by unions in 2022 than in 2021, according to the BLS.

Historical data from the BLS shows a long-term decline in unionization rates in the U.S., with only short periods of increase in the 40 years the agency has been collecting the information. In 1983, the first year for which data is available, the BLS found more than 20% of the workforce were union members.

Michael Lotito, a shareholder at [Littler Mendelson PC](#) who represents employers, said the BLS data shows that unions have not been successful in communicating their value to workers. He said high-profile contract negotiations coming up between the Teamsters and [UPS](#) and the [United Auto Workers](#) and car manufacturers will be ones to watch with organized labor hoping to notch wins they can use to bring in new workers.

"Unions have to be able to demonstrate value, and the value today is longer-term job security," Lotito, who co-chairs the firm's Workplace Policy Institute, said.



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Union membership rate fell by 0.2 percentage point to 10.1 percent in 2022

January 24, 2023

The union membership rate was 10.1 percent in 2022, down from 10.3 percent in 2021. The 2022 unionization rate (10.1 percent) is the lowest on record. In 1983, the first year for which comparable data are available, the union membership rate was 20.1 percent.

[CHART IMAGE](#) [CHART DATA](#)

2000	13.4	15.2	11.4
2001	13.3	15.0	11.6
2002	13.3	14.7	11.6
2003	12.9	14.3	11.4
2004	12.5	13.8	11.1
2005	12.5	13.5	11.3
2006	12.0	13.0	10.9
2007	12.1	13.0	11.1
2008	12.4	13.4	11.4
2009	12.3	13.3	11.3
2010	11.9	12.6	11.1
2011	11.8	12.4	11.2
2012	11.3	12.0	10.5
2013	11.3	11.9	10.5



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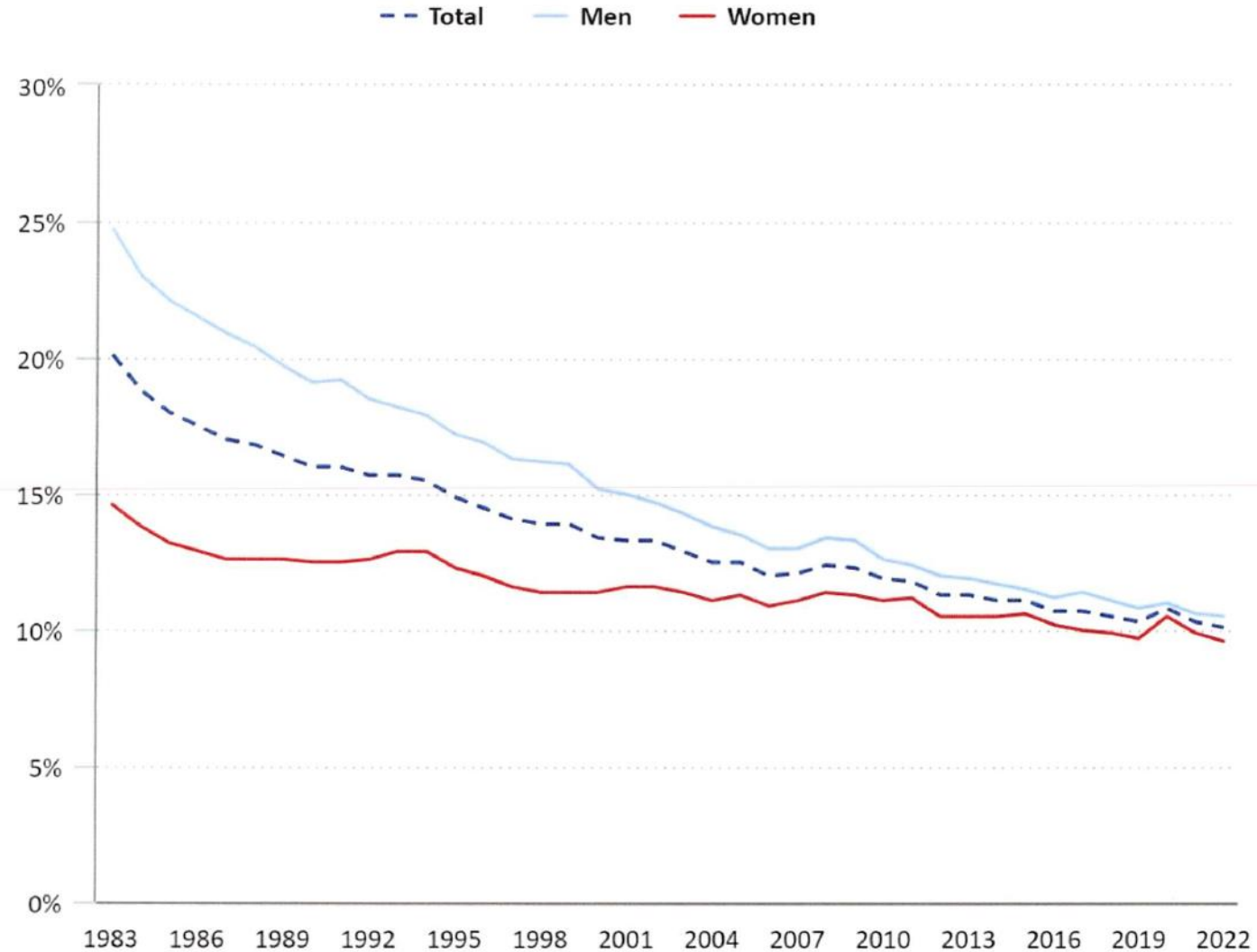
Union membership rate fell by 0.2 percentage point to 10.1 percent in 2022

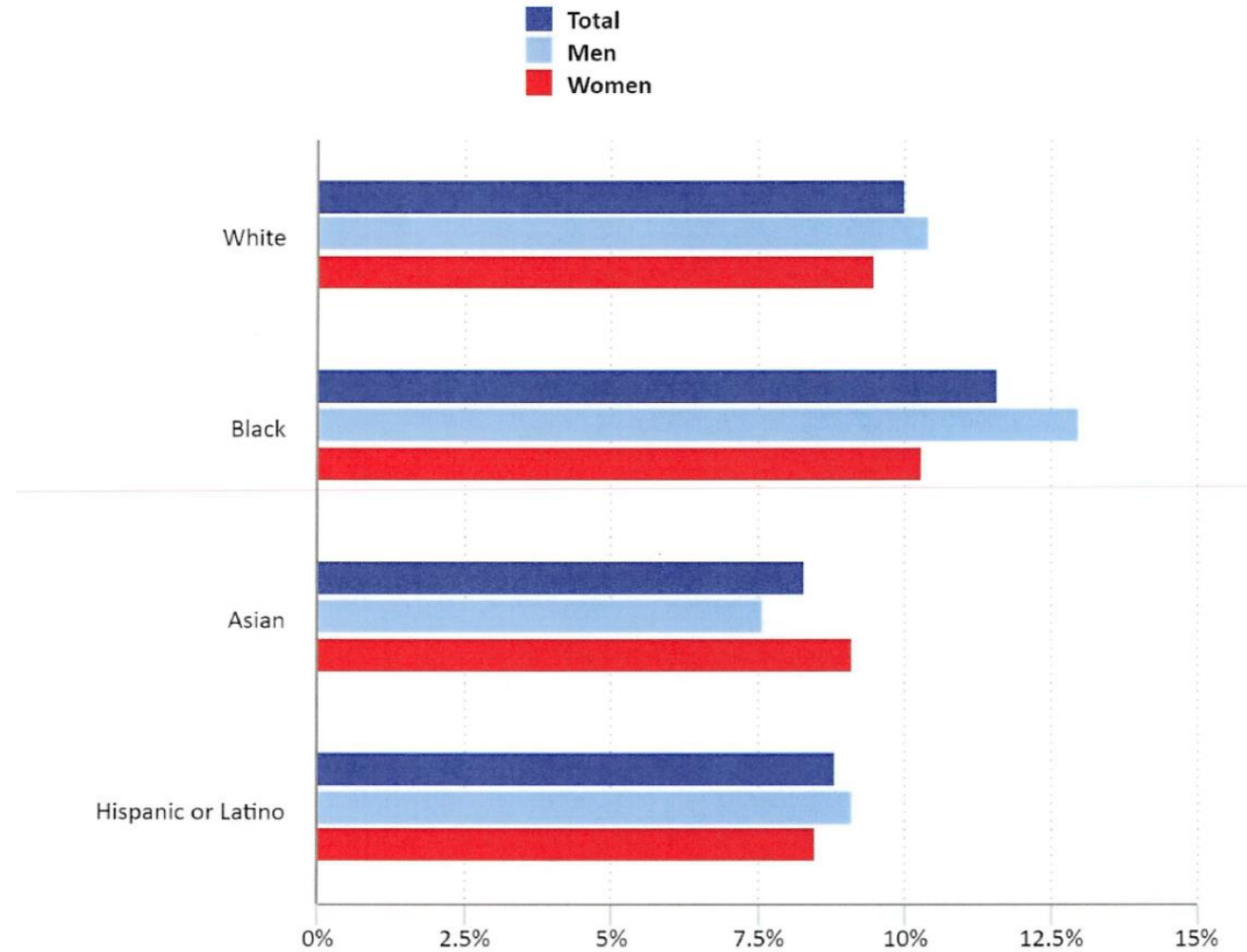
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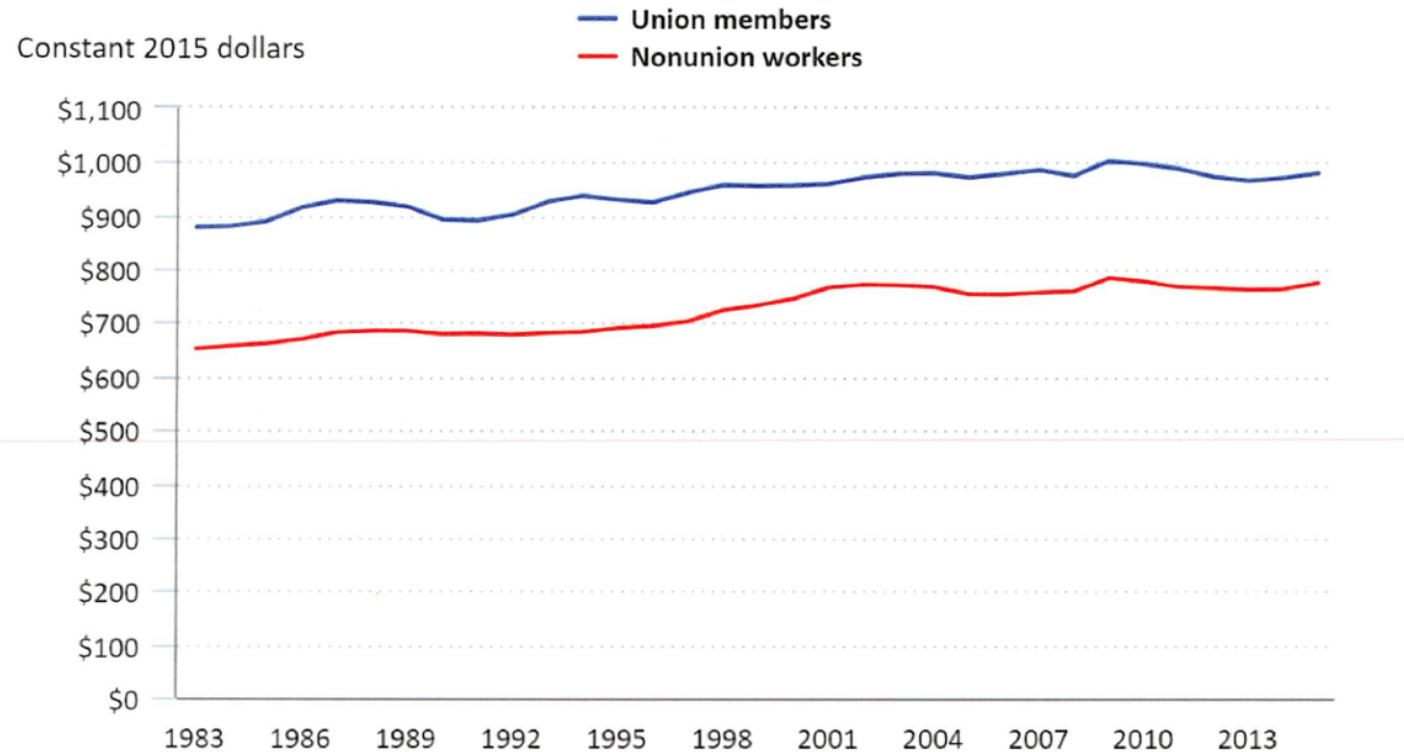
2009	12.3	13.3	11.3
2010	11.9	12.6	11.1
2011	11.8	12.4	11.2
2012	11.3	12.0	10.5
2013	11.3	11.9	10.5
2014	11.1	11.7	10.5
2015	11.1	11.5	10.6
2016	10.7	11.2	10.2
2017	10.7	11.4	10.0
2018	10.5	11.1	9.9
2019	10.3	10.8	9.7
2020	10.8	11.0	10.5
2021	10.3	10.6	9.9
2022	10.1	10.5	9.6







Median weekly earnings by union status, 1983–2015



Click legend items to change data display. Hover over chart to view data.

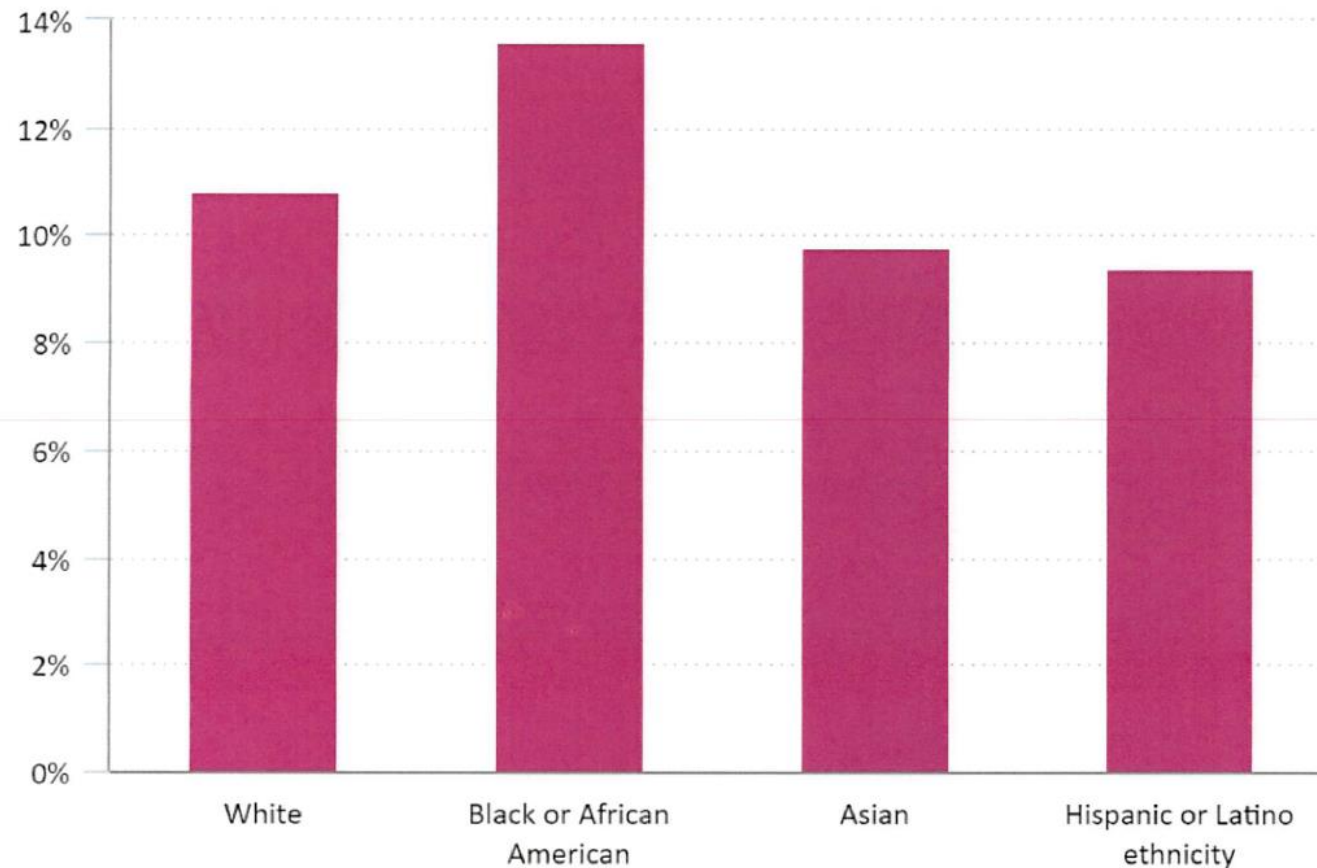
Note: Earnings are median usual weekly earnings of full-time wage and salary workers and have been converted to constant dollars using the Consumer Price Index research series (CPI-U-RS). Nonunion refers to workers who are neither members of a union nor represented by a union on their job.

Source: U.S. Bureau of Labor Statistics.





Union membership rates by race and Hispanic or Latino ethnicity, 2015



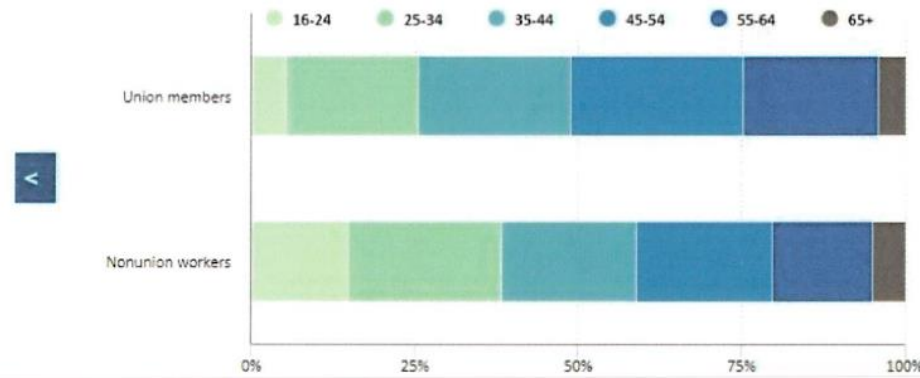
Note: Persons of Hispanic ethnicity may be of any race.
Click legend items to change data display. Hover over chart to view data.
Source: U.S. Bureau of Labor Statistics.



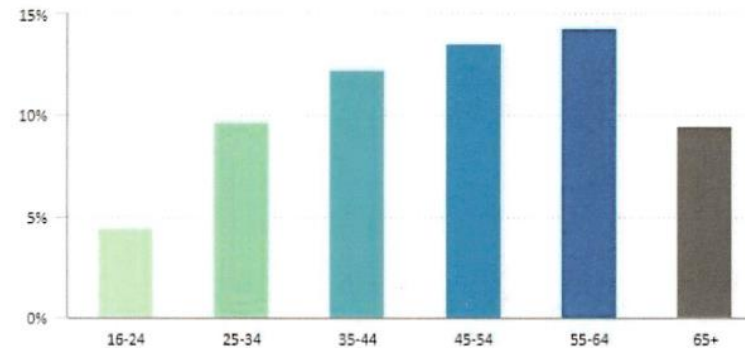


1 2 3 4 5 6 7 8 9 10 11 12

Union members and nonunion workers by age, and membership rates, 2015



Membership rates



Note: Nonunion refers to workers who are neither members of a union nor represented by a union on their job.
Click legend items to change data display. Hover over chart to view data.
Source: U.S. Bureau of Labor Statistics.

[View Chart Data](#)

Workers ages 45 to 64 have highest membership rates

In 2015, union membership rates were highest among workers ages 45 to 64—13.6 percent for those ages 45 to 54 and 14.3 percent for those ages 55 to 64. Nearly half of all union members were between 45 and 64 years old in 2015, but only about one-third of nonunion workers belonged in these age groups. Workers ages 45 to 64 were heavily represented in the manufacturing and transportation industries, which also had relatively high unionization rates.

The lowest union membership rate was among workers ages 16 to 24 (4.4 percent). Workers ages 16 to 24 made up a smaller share of union members than nonunion workers.



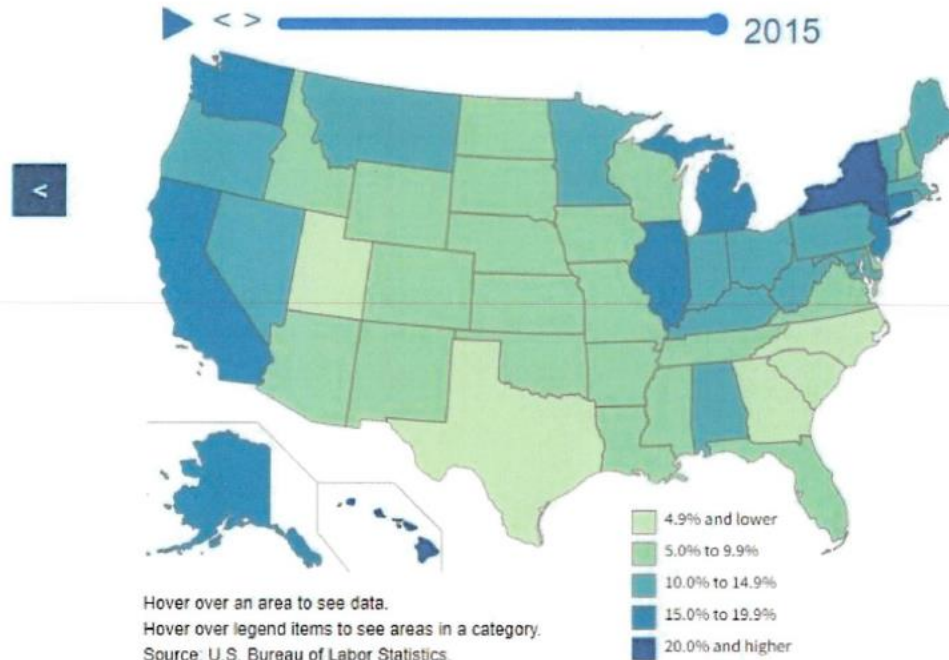


Spotlight on Statistics

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1 2 3 4 5 **6** 7 8 9 10 11 12

Union membership rates by state, 2005–2015

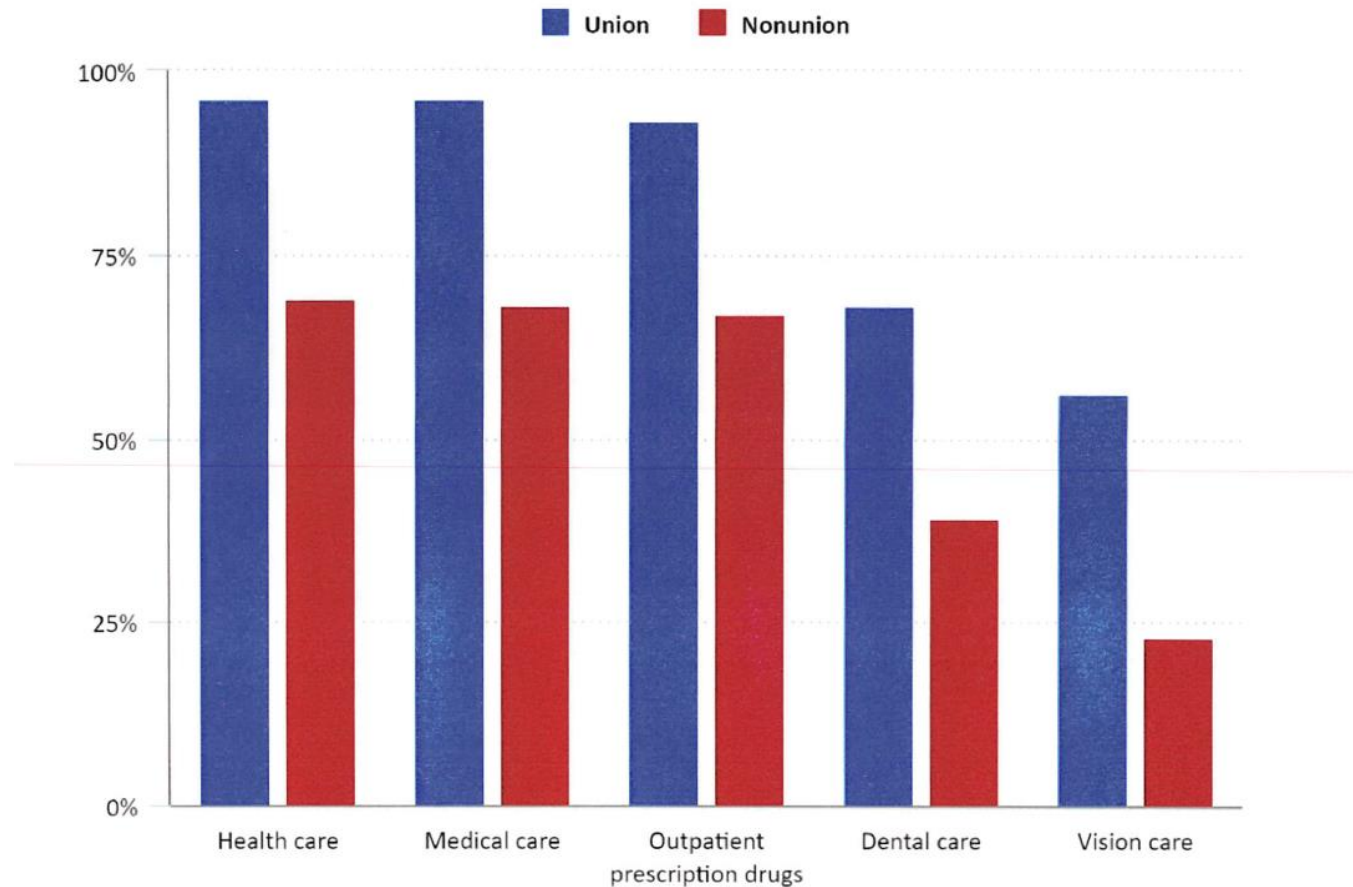
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New York had highest union membership rate, South Carolina lowest, in 2015

Thirty states and the District of Columbia had union membership rates below that of the U.S. average, 11.1 percent, and 20 states had rates above it. In 2015, New York continued to have the highest union membership rate at 24.7 percent; Hawaii was the only other state to have a union membership rate above 20 percent in 2015, at 20.4 percent. Five states had union membership rates below 5.0 percent in 2015, with South Carolina having the lowest rate (2.1 percent). The next lowest rates were in North Carolina (3.0 percent) and Utah (3.9 percent).



Percent of private industry workers with access to health care benefits by bargaining status, 2022

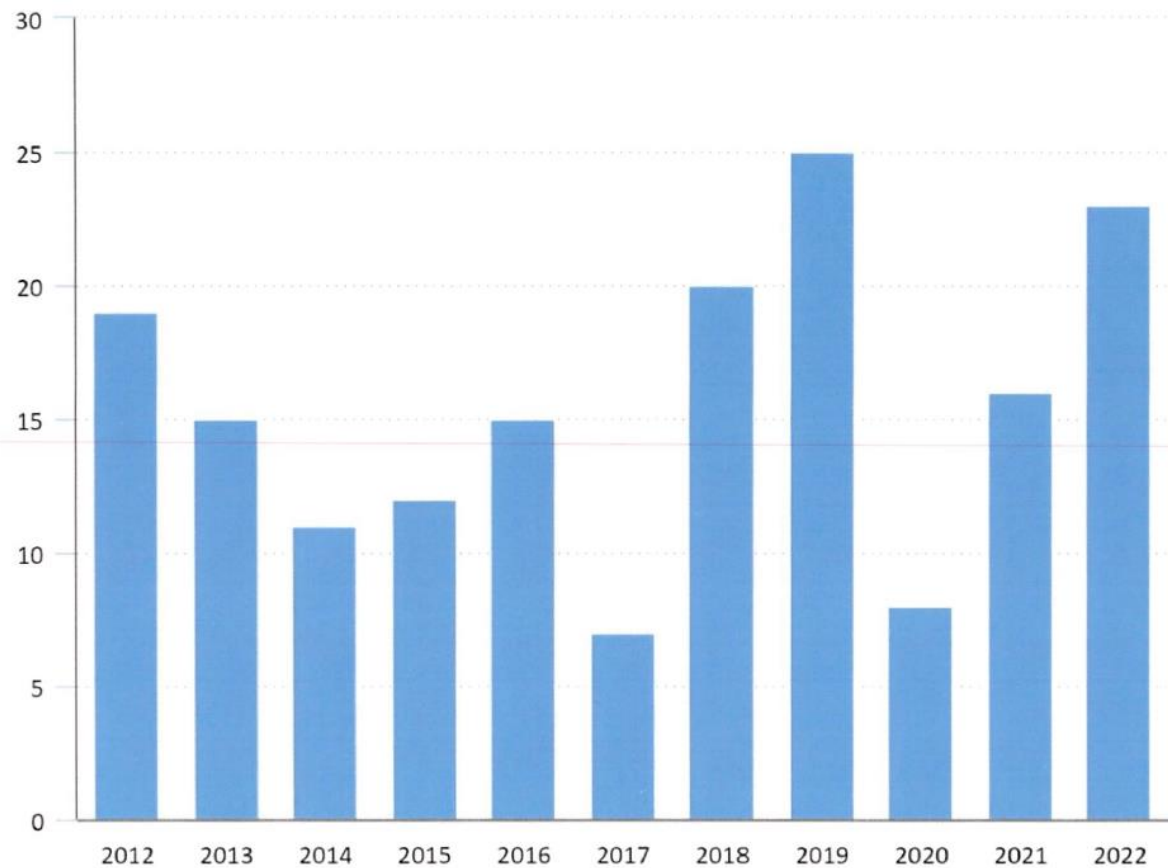


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Source: U.S. Bureau of Labor Statistics.





Number of work stoppages involving 1,000 workers or more beginning during the year, 2012–22

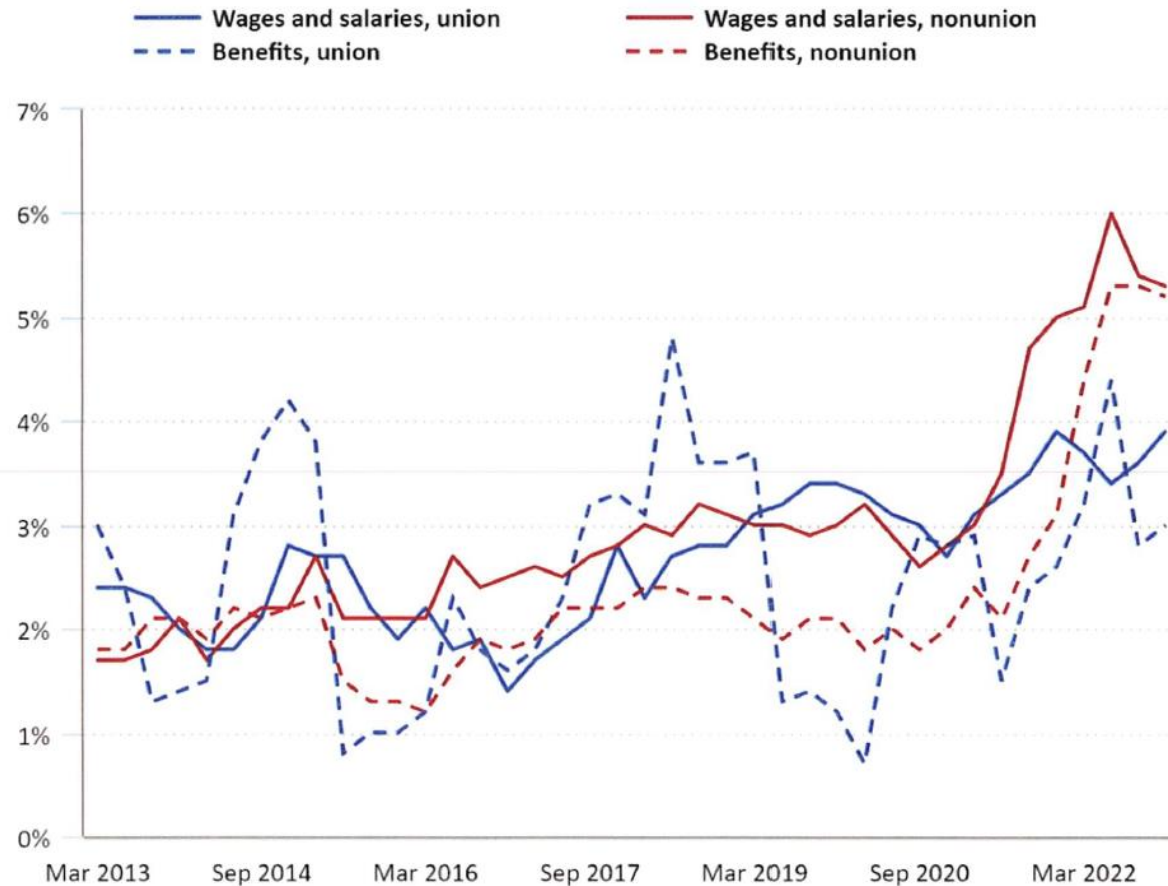


Hover over chart to view data.
Source: U.S. Bureau of Labor Statistics.





12-month percent change, private industry compensation costs, by bargaining status, 2013–2022

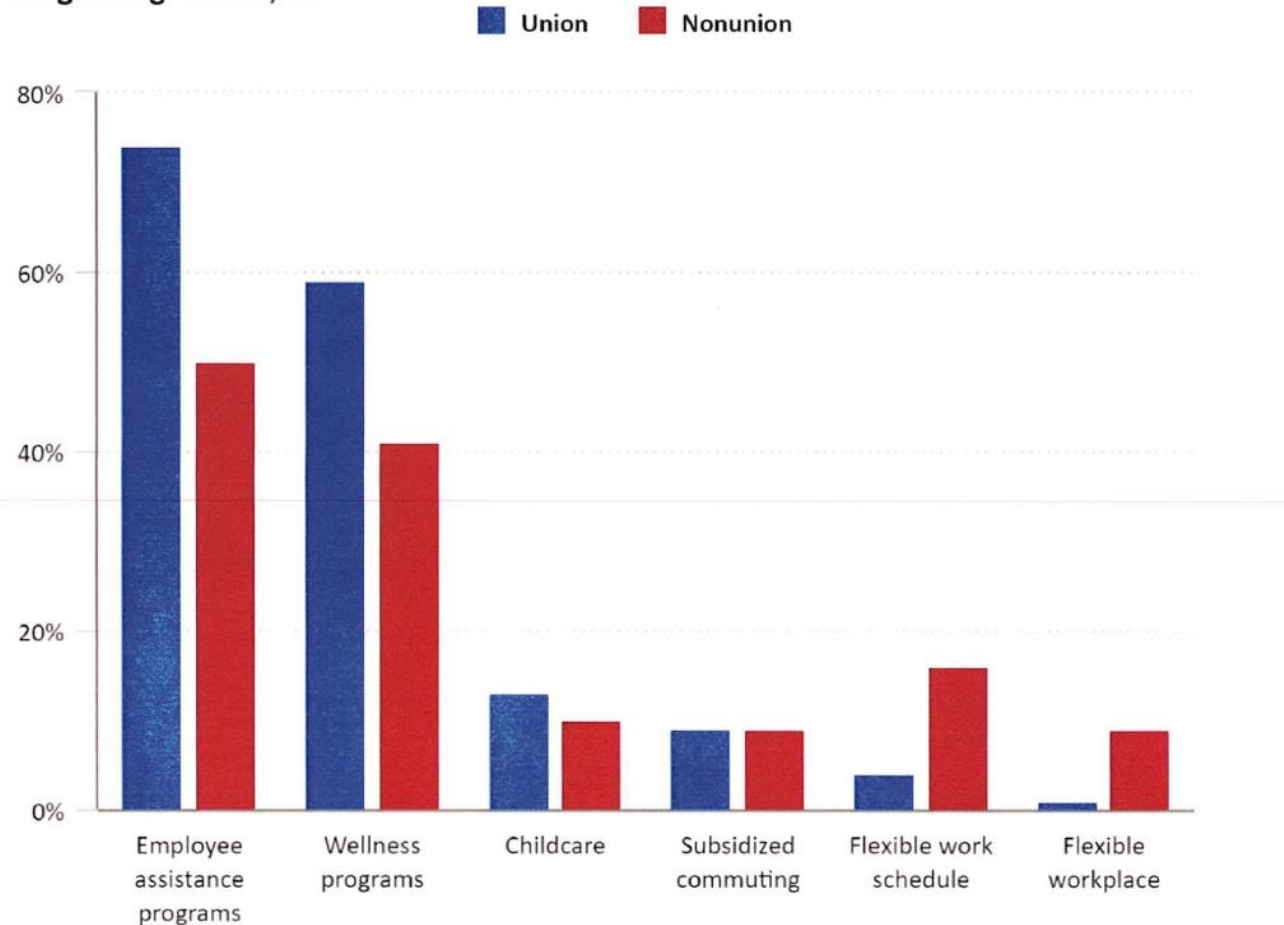


Click legend items to change data display. Hover over chart to view data.
Source: U.S. Bureau of Labor Statistics.





Percent of private industry workers with access to quality of life benefits by bargaining status, 2022



Click legend items to change data display. Hover over chart to view data.
Source: U.S. Bureau of Labor Statistics.





INCREASED UNION PRESENCE

- Increased coverage of unions in media
- Increased union strikes
- Increased talk about unions at work
- Increased unfair labor practice charges
- Increased union organizing



Pro-Union Whitehouse

- *Unions are having a moment. Workers are organizing at a pace not seen in many years. The current level of energy and momentum has shifted. Public support for unions is at a 57-year high.*
- *A tight labor market has increased workers' leverage coming out of the pandemic resulting in demands for better pay and improved working conditions.*
- *The Biden Administration supports the PRO Act, has improved worker leverage by appointing union officials to the NLRB, established a task force to promote labor organizing, and added prevailing wage and apprenticeship requirements to the CHIPs Act and Inflation Reduction Act.*



PRO ACT: What it is, where it stands and its unofficial implementation

- Redefine "employee" and "supervisor" to allow more workers to join unions
- Reclassify independent contractors as employees
- Prohibit "captive audience" meetings
- Permit repeated, intermittent strikes
- Card Check
- Permit company-provided phones and email for union organizing
- Arbitration after 90 days of contract bargaining
- Terminated employees remain employed pending investigation
- Fines for unfair labor practices



CABINET-LEVEL PRO-UNION TASK FORCE

- End-around (or soft-implementation of) the failed PRO Act
- VP, DOL, 20 cabinet members, heads of agencies, professors, unions – note, there are no management or company-side representatives on the task force
- Goal is to “identify policies, practices, and programs that could be used to promote support for worker power, worker organizing, and collective bargaining.”
- Recommend “executive actions the President can perform unilaterally”



NATIONAL LABOR RELATIONS BOARD

- Board Members
- General Counsel
- Enforces the National Labor Relations Act
- Rule Making Authority
- Case Law Precedent



NLRB GC OBJECTIVES AND “ACHIEVEMENTS” TO DATE

- Card Check ✓
- Micro Units ✓
- Govern handbooks of non-union employers ✓
- Limit confidentiality of employee witness statements
- Limit confidentiality / non-disparagement clauses ✓
- Employer-provided electronics may be used for organizing
- Monetary penalties for violations of the NLRA ✓
- Easier to make independent contractors employees ✓



MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS

- Sec. 2(3) of NLRA: the Act covers employees, not independent contractors
- Does not follow ABC tests
- Always looks at common agency factors
- Applies common law agency factors differently: *FedEx I* vs *FedEx II*
- Overrules elevated “entrepreneurial opportunity” (*SuperShuttle DFW*)
- Holding targeted at gig workers (*Uber, Lyft, Door Dash*)
- Misclassification alone is an unfair labor practice *XPO Logistics*



TLA Feature Articles and Case Notes

Comment to Proposed Rulemaking on Independent Contractor Status Recommends A More Streamlined Approach



Frank C. Botta, Esq. and
Todd M. Pappasergi, Esq.*



On September 25, 2020, the Wage and Hour Division of the United States Department of Labor (the "Department") published a Notice of Proposed Rulemaking concerning whether certain workers are employees or independent contractors under the federal Fair Labor Standards Act ("FLSA") at 85 Fed. Reg. 60,600 ("Proposed Rule"), and requested comments. Attorneys Botta and Pappasergi submitted a comment to the Notice of Proposed Rulemaking on October 26, 2020 on behalf of their clients and the transportation and motor carrier industry, in general. This article is a condensed version of that comment. The full comment is available for download at <https://beta.regulations.gov/comment/WH0-2020-0007-1628>.

I. Summary of Comment

The number of independent contractor or owner-operator drivers in the United States has been steadily increasing over the years. In 2019, the U.S. Bureau of Labor Statistics listed approximately 162,400 independent heavy or tractor-truck drivers, about 80,000 independent short-distance or delivery service drivers, and another 240,000 couriers and messengers, the majority of whom are likely independent contractors. According to U.S. Census Bureau economist Andrew Hait, "when you look at growth patterns of

trucking companies or truckers over the last ten years, the growth of independent truck drivers, drivers who own and operate their own vehicle and drive for another company, but receive a 1099, they don't get a regular paycheck from that company, the growth of those self-employed drivers is **three times the rate of the growth** of truck drivers who drive for a regular trucking company." With the number of independent contractors in the American workforce across all industries increasing from 47.8 percent to approximately 53 percent over the next five years, clarity and simplicity must be the driving factors in determining the appropriate classification of workers.

The Proposed Rule and its Preamble recognizes these needs, and through them the Department proposes to promulgate a five-factor "economic reality test" for the determination of whether a worker classifies as an employee or an independent contractor under the FLSA. That test, as codified in proposed regulation 29 CFR § 795.105, would create two "core factors," and three "other factors."

In furtherance, however, of the clear intent of the Proposed Rule – simplifying the classification paradigm for workers and employers – this comment strongly proposes that the new rule should be further simplified into only the two "core factors": (1) the nature and degree of the individual's control over the work, and (2) the individual's opportunity for profit or loss. The remaining three factors – the amount of skill required for the work, the degree of permanence in the relationship between the individual and the employer, and whether the work is part of an integrated unit of production – can easily be used as evidence in determining whether either of the two core factors have been met.

This streamlined, bright-line test would be even simpler in application: an individual would need to meet both core factors by a preponderance of the evidence in order to be classified as an independent contractor. This simplicity would assist employers/principals in budgeting, setting workforce parameters, and other necessary components of the industry that is the lifeblood of interstate commerce, while at the same time providing clear guidance to, and the legal thresholds necessary for, workers who take pride as entrepreneurs and owner-operators of their own business.

Over the last forty years the various Circuit Courts of Appeal have inconsistently utilized multi-factor economic reality tests and other paradigms in making worker classification determinations. The closest of these to the Proposed Rule is the "Common Law Control Test," which is steeped in case law emanating from *Community for Creative Non-Violence v. Reid*. However, the Department is without the authority to adopt it outright without Congressional revision to the FLSA. Accordingly, an Economic Reality Balancing Test has been used in some by the majority of courts today, whether it be in a four-, five-, or six-factor construct. It is this very construct, however, that the Department is seeking to revise to maximize clarity and cost-savings. Finally, the much maligned "ABC Test" adopted under the California Wage and Hour Law has been very restrictive in classifying workers as

independent contractors; and, while "the ABC test is a simpler, more structured test than a multifactor balancing test and would likely lead to more consistent classification outcomes, legal constraints and the disruptive economic effects of adopting such a stringent standard advises against its adoption in the FLSA context."

These varying tests have led courts to erratically choose which factors are relevant in a given case, thereby leading to an inconsistent and confusing body of case law. The Department in the Preamble to the Proposed Rule acknowledges these issues, and uses those inconsistent results as a basis for the creation of the Proposed Rule. However, and respectfully in our view, the Proposed Rule misses the mark for these same reasons. This comment therefore goes further and expounds upon the reasons why the Department should promulgate a simpler, two-factor, economic reality test.

II. Independent Contractors in Today's Motor Carrier Industry

By its very nature, the trucking and motor carrier industry is amorphous, and has become even more so in the past twenty-five years. Brokers and logistics providers, using instantaneous, internet-based technology, have become the norm in the industry, and are now connecting independent contractors with motor carriers for all aspects of shipping, from last-mile, one-hour deliveries to complicated, long-haul jobs, with each delivery likely having its own, specific equipment requirements and unique service expectations. Moreover, the industry has evolved from providing merely delivery services to full-fledged logistics companies, providing assistance with all of the separate segments necessary to deliver products from point A to point B.

The industry, therefore, relies heavily upon the flexibility that independent contractors and owner-operators possess, so that the motor carrier can precisely select the appropriate trucker to handle the job on a one-by-one basis. At the same time, the owner-operator can choose which jobs to seek, loads to haul, and lanes to run. The driver then can accept the same based upon the control he or she has over the project

and the ability to make a profit considering the equipment he or she already possesses along with the skill necessary to achieve financial success.

Additionally, as transportation technology expands, the need for flexibility of drivers will only increase as well. Technological advances such as autonomous vehicles, hyper-loops, and other cutting-edge cargo services, which is where the most flexibility of drivers is needed, so that products may be delivered from warehouses and delivery depots to final destinations without delay and to meet the expected higher demand in expedited services by consumers. **The reality of these economics is the new economic reality in the industry.**

This new economic reality has only been hastened by the coronavirus pandemic. More and more, the industry is concentrating on touchless deliveries, remote internet ordering and shipping technology, and future use of autonomous vehicles and drones to assist in the shipping process. This will drive competition among not just motor carriers, but also among the drivers themselves.

Rather than suppressing the entrepreneurial spirit that breeds from increased competition, the Department should, therefore, make it easier and more simplistic for those who wish to make an income as they see best for themselves and their families. To that end, the focuses in both the Proposed Rule and this comment are meant to allow the individual worker to take a hold of his/her own self-interest and decide whether, on the statutory and regulatory factors set, he or she wants to operate independently.

III. Revising Proposed Regulation 29 CFR § 795.105 into a Two-Factor, Bright-Line Test

In order to fully realize the changing employee/independent contractor atmosphere in today's workforce, both generally and in the trucking and motor carrier industry, this comment therefore proposes that new regulation 29 CFR § 795.105 establish a two-factor, bright-line test. **The two factors would be limited to the two "core factors"**

already identified in the Proposed Rule: (1) the nature and degree of the individual's control over the work, and (2) the individual's opportunity for profit or loss. Merely labeling two of the five factors as "core," while also requiring employers first, and then courts after that, to still examine three other factors with undefined weight will not solve the problem of confusion, costs, and litigation that the Proposed Rule seeks to eliminate. In our view, the insertion of these factors beyond the two "core" factors are duplicative, confusing, and only serves to obscure, rather than clarify, the determinations necessary to classify an individual as an employee or independent contractor.

First and foremost, many court decisions since at least 1975 already concentrate solely on the control an individual has over a job and the individual's ability to turn a profit or loss. Both courts and the Department note that "control and opportunity for profit and loss drive at the heart of what it means to be an independent contractor . . ."

Second, a more simplistic and streamlined approach will result in significant cost and time savings for all parties, in areas such as general employment related costs, employment and income taxes, employee benefits, wages and overtime, and litigation costs. These savings will not be realized solely by an employer. Individuals who classify as independent contractors will be able to choose the medical plan that works best for them and their families, independently negotiate rates based upon particular jobs and services provided, and know ahead of time how they will be classified, so as to avoid unnecessary and protracted litigation. Indeed, the Department estimates that, even by utilizing the Proposed Rule's five-factor economic reality test, nationwide cost savings will reach over \$447 million, with nearly twenty percent of that realized by individuals. A simplified approach of a two-factor, bright-line test will only serve to increase these important savings, provide a clearer framework for companies, and allow for autonomy and entrepreneurial opportunities.

Finally, under this suggested two-factor, bright-line test, the proposed independent contractor would be required to meet both

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TLA Feature Articles and Case Notes

factors by a preponderance of the evidence in order to be classified as an independent contractor. The three "other factors" contained in the Proposed Rule do not disappear, but rather fit into the bright-line test and would be used as evidentiary indicia of whether the prongs are satisfied. For example, in *Herman v. Express Sixty-Minutes*, the U.S. Court of Appeals for the Fifth Circuit examined the profit or loss prong in relation to courier drivers, stating, "a driver's profit or loss is determined largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business. [...] Drivers who made the most money appeared to be the most experienced and most concerned with efficiency, while the less successful drivers tended to be inexperienced and less concerned with efficiency." Similarly, the amount of permanence in the relationship between the individual and the employer, as well as how integrated the individual is into the employer's overall production are key considerations into the overarching factor of the amount of control the individual has over the work being performed.

The trucking, shipping, and motor carrier industries are prime examples as to how a two-factor, bright-line test can achieve more targeted and less litigious results and employment determinations. Concerning, first, the "nature and degree of control" factor, independent contractors have complete control over the manner, methods, and means for any particular job. This control is ultimately regulated by federal and state regulatory requirements and contractual obligations, such as insurance requirements, destination and timing of delivery, and customer expectations. Nevertheless, these are confines in which every operator, whether independent or employed, must follow.

The "profit and loss" factor allows even further independence for the owner-operator. Individual, independent truckers have the ability to control their own costs in various areas: insurances, the hiring of part-time and full-time helpers and workers to assist in the independent contractor's endeavors, the purchasing of technology equipment, assessing the need for the purchase or leasing of tractors, investment in tools and other

equipment necessary for both everyday driving and specific jobs, maintenance of the driver's equipment and tractor(s), and various administrative costs.

In today's trucking industry, the individual trucker needs to be positioned to bid and accept the jobs they want, lanes they drive, and loads they haul, at the contract price that is most appropriate for the type of job, the expenses necessary to complete the job, and the skill, knowledge, and expertise of the individual driver. In turn, this recognizes the new economics of the industry, while concomitantly increasing competition among shippers and truckers alike. This only serves to help the American worker, as increased competition will bring more steady work with higher wages and contract prices.

In speaking to the multi-factor tests used by many courts, the Department stated that "other factors" are duplicative in the analysis, often times "blur[ring] the line" between the applicability of the factors. Many times, multi-factor examinations result in inconsistent and confusing outcomes, leading to more litigation and costs for not just the trucking industry, but **all industries**. This, therefore, begs the question: if the goal of the Proposed Rule is increased clarity for employers and workers, with the simultaneous reduction in costs and legal expenses, why does the Department not just adopt the two core factors as the test?

IV. Revisions to the Proposed Rule

The answer to the question is obvious: the Department should consider streamlining the economic reality test into the two, core factors. We recognize the rule makers' hesitation in "radically transform[ing]" the already existing body of law under the FLSA. Respectfully, however, we believe that revising the proposed rule as submitted in this comment is not radically transforming the already existing body of law. Instead, it frames a workable, easy to understand, and streamlined process, while at the same time keeping the evidentiary considerations that have been utilized for years by courts across the country intact.

This comment therefore proposes that

29 CFR § 795.105(c)-(e) read as follows:

(c) *Determining economic dependence.* The economic reality factors in paragraph (d) of this section shall control the determination of whether the relationship between an individual and a potential employer is one of economic dependence and therefore whether an individual is properly classified as an employee or independent contractor. An individual shall be classified as an independent contractor if both factors contained in paragraph (d) are met by a preponderance of the evidence presented.

(d) *Economic reality factors.* The following two factors shall be determinative of whether the relationship between an individual and a potential employer is one of employee or independent contractor. The individual shall meet both economic reality factors by a preponderance of the evidence, otherwise the individual will be considered an employee as defined by 29 U.S.C. § 203(e)(1). The two economic reality factors shall be –

(i) *The nature and degree of the individual's control over the work.* This factor weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors. In contrast, this factor weighs in favor of the individual being an employee under the Act to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual's schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the potential

employer. Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.

(ii) *The individual's opportunity for profit or loss.* This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to

further his or her work. While the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor. This factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or more efficiently.

(e) *Other considerations.* Other considerations, such as the amount of skill required for the work in question, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production, may be used as indicia or evidence of the economic reality factors in paragraph (d)(i) and

(ii), but shall not be used or considered as factors themselves.

V. Conclusion

The simplicity of the revised, two-factor, bright-line rule cannot be understated. The goal of this Proposed Rule is and should be two-fold: (1) to reduce expenses and costs for individuals and companies alike so that profitability can increase, while at the same time (2) making it easier for individuals and employers to classify themselves/their workers so that interstate commerce can evolve with the Twenty-First Century's workforce. Giving individuals and companies a clear paradigm upon which to make these decisions will lead to more equitable results and less litigation, while furthering and promoting the entrepreneurial opportunities upon which the American workforce was founded. To borrow from one of our fellow commenters in the industry: "Straightforward, clear and transparent federal guidance streamlines otherwise conflicting interpretations of worker status and reduces costly litigation."

Endnotes

- Heavy vehicles are generally defined as those with a gross vehicle weight rating of more than 26,001 pounds. See 49 CFR § 383.5.
- U.S. Bureau of Labor Statistics, *Heavy and Tractor-Trailer Truck Drivers*, found at <https://www.bls.gov/ooht/transportation-and-material-moving/heavy-and-tractor-trailer-truck-drivers.htm> (last visited Oct. 21, 2020). The number referenced is a calculation based upon the number of jobs in the heavy and tractor-trailer truck driving industry, multiplied by the percentage of reported owner-operator or independent drivers.
- Id.*
- Transcript of NAW: United States Department of Commerce Webinar of March 26, 2020*, at pg. 50, found at <https://www2.census.gov/about/training-workshops/2020/2020-03-26-econ-transcript.pdf> (last visited Oct. 22, 2020) (emphasis added).
- See Proposed Rule, 85 Fed. Reg. at 60631-32.
- 490 U.S. 730 (1989).
- Id.* at 60634-35.
- Id.* at 60635.
- Id.*
- Id.* at 60636.
- See Proposed Rule, 85 Fed. Reg. at 60603-04 & 60606-07.
- Id.* at 60620 (citing, e.g., *Razak v. Uber Technologies*, 951 F.3d 137, 145-47 (3d Cir. 2020); *Agerbrink v. Model Service, LLC*, 787 F.App'x 22, 25-27 (2d Cir. 2019); *Karlson v. Action Process Serv. & Private Investigation, LLC*, 860 F.3d 1089 (8th Cir. 2017)).
- 161 F.3d 299, 304 (5th Cir. 1998).
- See Proposed Rule, 85 Fed. Reg. at 60613 (citing, e.g., *Brock v. Mr. W. Fireworks*, 814 F.2d 1042, 1048 (5th Cir. 1987); *Jacobson v. Comcast Corp.*, 740 F.Supp.2d 683 (D. Md. 2010)).
- These include liability insurance, work-accident insurance, vehicle insurance, and unemployment/worker's compensation insurance for those independent contractors who employ helpers or other drivers.
- Technology advances have completely changed the trucking industry, with sophisticated navigation systems, satellite tracking modules, and internet-based brokerages now being the norm in the industry.
- Administrative costs are those similar to any small business, such as legal needs, bookkeeping, accounting, and the obtaining of necessary governmental permits and licenses. These costs also include taxes and expenses attendant to the trade, such as meals and overnight accommodations.
- See Proposed Rule, 85 Fed. Reg. at 60621.
- See id.*
- Id.* at 60636.
- We note that we only propose textual revisions to paragraphs (c) and (d), the deletion of proposed subparagraph (d)(2) in its entirety, and the insertion of a new subparagraph (e).
- See Support for RIN 1235-AA34, submitted by the Intermodal Association of North America, submitted on Oct. 6, 2020.



JOINT EMPLOYERS

- Targets: Gig, franchise, temp and staffing firms, independent contractors
- Was: had to exert direct and immediate control over another's employees
- Now: *if a company could somehow, possibly* exert control over another's employees
 - Avoid setting wages / benefits of contractors
 - Avoid having staff do same thing under same supervisor as contractor's
- *Cognizant Technologies and Google*
 - Google forced to negotiate collective bargaining agreement
 - Google liable for Cognizant's unfair labor practices



NON-COMPETES / NO SOLICITATION CONFIDENTIALITY

- Proffer, maintenance, or enforcement in employment contracts or severance agreements
- NLRB test case: *Berry Green Management, Inc.* (Michigan, settled)
 - No job with another company in same business in Michigan for 2 years
- Violate the Act because they interfere with an employee's ability to:
 - Threaten to resign or resign to seek better working conditions
 - Seek or accept employment with local competitor to obtain better working conditions
 - Encourage co-workers to work for local competitor for better working conditions



NEW HANDBOOK RULES

- Presumptively unlawful if the rule *could be interpreted* to violate Section 7 rights (*Stericycle*)
- Most handbooks violate the Act now

Be kind

Social media (logos)

Confidentiality

No recording

Don't leave the facility

Best interest of employer



OFFENSIVE LANGUAGE

- NLRA protects offensive, profane, disrespectful workplace conduct occurring in connection with otherwise protected concerted activity (*Lion Elastomers II*)
- “Animal exuberance” that momentarily exceeds the boundaries of lawful conduct in connection with union activity is permissible (*Illinois Tool Works*)
- Depending on context, even racist, sexist, profane outbursts are lawful (*Atlantic Steel*)
- Different standards based on the outburst
 - “Outbursts to management in the workplace” considers the place, subject matter, nature of employee’s outburst, and whether it was provided by an unfair labor practice (*Atlantic Steel*)
 - Social media posts “and most conversations among employees in the workplace” are considered under a “totality of the circumstances” analysis



WORKPLACE RECORDINGS

- Potential consequences of employee workplace recordings = ban recordings
- Permitting workplace recordings may violate privacy and wiretapping laws, disclose confidential and trade secret information
- NLRB: employees may record at work while engaging in protected concerted activity
- Discussing wages, benefits, unions, terms and conditions of employment
- *Starbucks* permitted 2 employees to secretly record conversations with management because they were concerned management would retaliate against them for union organizing
- *Starbucks* held NLRA preempts state wiretapping laws
 - Note, at least 11 states require consent of all parties being recorded



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IT ALL STARTS WITH AN AUTHORIZATION CARD



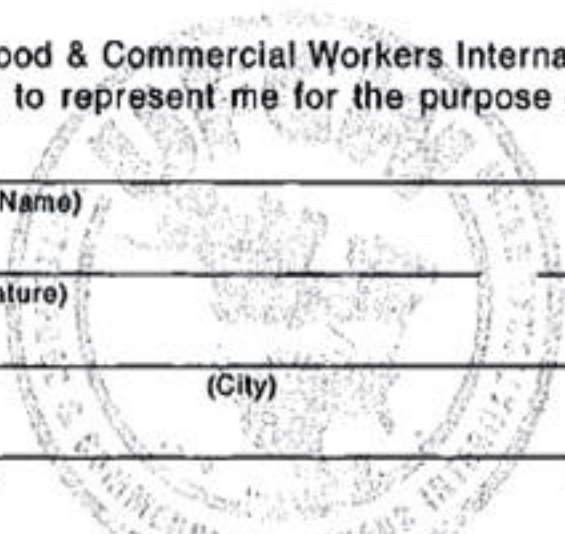
United Food & Commercial Workers International Union

Affiliated with AFL-CIO-CLC

AUTHORIZATION FOR REPRESENTATION

I hereby authorize the United Food & Commercial Workers International Union, AFL-CIO-CLC, or its chartered Local Union(s) to represent me for the purpose of collective bargaining.

_____		_____	
(Print Name)		(Date)	
_____		_____	
(Signature)		(Home Phone)	
_____		_____	
(Home Address)	(City)	(State)	(Zip)
_____		_____	
(Employer's Name)		(Address)	
_____		_____	
(Hire Date)	(Type Work Performed)	(Department)	
_____	_____	_____	
_____	Day Shift _____	Full Time _____	Part-Time _____
_____	Night Shift _____	_____	_____
(Hourly Rate)	(Day Off)		
_____	_____		
Would you participate in an organizing committee?		Yes _____	No _____





IMPORTANCE OF THE CARD

- Authorization Cards – *can't play baseball without a ball*
- Demand for Recognition – *increasing*
- File Petition with NLRB – *standard*
- Secret Ballot Election – *standard*
- Gissel/ Bargaining Order – *no longer because of card check*
- Card Check – *the new standard*



MICRO-UNITS

- Readily identifiable group
- Share a community of interest
- Grocery store can have 12 different units (and imagine loading docks, terminals, warehouses and the like)

Cashier

Stock person

Deli

Meat

Bakery

Floral

Frozen

Produce

Janitorial

Front office

Pharmacy

Other



“MAKE WHOLE” REMEDIES

- Traditionally reinstatement & back pay for lost time
- No “pain / suffering” or punitive damages
- Expansive definition of “make whole”
 - Rent Car Suit Credit Card Debt
 - Moving Utilities Medical Others



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Questions



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