

# Larkin Hoffman

ATTORNEYS



## 2023 Construction Summit Labor Update

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## Agenda

- Trends and change: Increasing Support of Unions
- NLRB Decisions, Rules, and Comings
- Construction Trades Negotiations: Update & Insights
- Marijuana

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# Labor Trends & Changes

Increasing Support of Unionized Labor

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## Gallup Poll

Union Approval at highest since 1965

### Americans' Approval of Labor Unions, 1936-2021

Do you approve or disapprove of labor unions?

— % Approve

Year	% Approve
1937	72
1943	61
1949	64
1955	75
1961	64
1967	71
1973	60
1979	55
1985	58
1991	60
1997	66
2003	65
2009	48
2015	56
2021	68

GALLUP  
<https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx>

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## Federal Growing Support



I will "be the most pro-union president you've ever seen"

### Federal Money

- American Rescue Plan Act
  - \$1.9T COVID relief
  - 350B to state, local & territorial governments
- Special Financial Assistance Program
  - Rescue distressed MEP plans
- 90+B for distressed multiemployer pensions
- Bipartisan Infrastructure Law
- \$1.2T for infrastructure and social spending
- Build America, Buy America
- CHIPS Act
  - Semiconductor manufacturing
- Inflation Reduction Act

### Strings

- PLAs
  - ARPA: grants *encourages* use of PLAs
  - IRA— requires on green energy projects (not broadband) receiving funds. Private work.
- Prevailing Wage on energy projects
- Local Hire
  - ARPA: grants *encourages*
- Definition of worksite
- Apprenticeship
  - ARPA encourages
  - BIL requires

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## Ideas left on the table (federal)

### Proposed 2022

- Increased penalties for labor & safety violations
- Personal liability to officers & directors
- Funding for enforcements
- Above-the-line deduction for union dues
- EV tax credit for autos make by union plants

### Other ideas discussed





- Worker protection / wage theft
  - Strict liability (civil) for upstream contractors
- Joint employer
- Independent contractor
- Withdrawal liability rules
- Davis-Bacon revisions
  - Worksite
  - Prevailing wage
- OSHA heat standard (80 degree trigger)

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# Minnesota Legislative Issues

- From DFL leadership
- Important items
  - Paid leave
  - Housing affordability
  - Worker protections
  - Infrastructure
- Other
  - Marijuana (later in presentation)

 <b>Reproductive freedom</b> Put into state law the fundamental right to make reproductive health care decisions without interference from politicians.	 <b>Paid Family Leave and Earned Sick Time</b> Ensure that no Minnesotan is forced to choose between earning a paycheck and caring for a family member or themselves.
 <b>Climate and clean energy</b> Tackle the climate crisis and create good jobs by transitioning to 100% safe, clean, carbon-free sources of energy by 2040.	 <b>Prescription drugs</b> Prohibit big pharmaceutical companies from price gouging for life-saving medication like insulin, asthma inhalers, and EpiPens.
 <b>Early care and learning</b> Help families pay for childcare so parents can pursue employment or education, and make sure children are well cared for and prepared to enter school.	 <b>Public safety</b> Give law enforcement and communities the resources they need for safety, expedite criminal investigations, and prevent gun violence.
 <b>Education</b> Close funding shortfalls, expand access to mental health services, and eliminate student food insecurity.	 <b>Housing affordability</b> Grow homeownership and reduce the cost of housing for Minnesotans who rely on the private rental market.
 <b>Worker protections</b> Ensure workers are safe on the job and receive the wages and benefits they deserve and need to support themselves and their families.	 <b>Infrastructure</b> Leverage federal funding to improve roads, bridges, transit, broadband internet access, water treatment facilities, and lead pipe replacement.
 <b>Democracy</b> Improve access, increase participation, and close dark money campaign finance loopholes.	 <b>Health care</b> Establish MinnesotaCare Buy-In coverage and expand access to high-quality, affordable care.

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# Top Takeaways

- Extension of prevailing wage
  - Which wage applies
  - Setting prevailing wage
- Definition of worksite
- Broadening liability (for things outside of company's control)
  - Joint employer
  - Wage theft
- Also watch for overextension that could lead to backlash

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# NLRB

What Came and What's Coming

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## NLRB's General Counsel

I want to make it easier  
for American workers to  
unionize

*Jennifer Abruzzo, General  
Counsel, National Labor  
Relations Board*

Seek to make unlawful:

- Captive audience meetings
- Limit an employer's right to use technology to monitor or manage employees
- More aggressive seeking of injunctions in federal court under Section 10(j) of the NLRA
- Increasing the types of remedies that regions should seek in settlement agreements for unfair labor practice charges



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## Thryv Inc. Case

- On December 13, 2022, the NLRB decided a case involving Thryv Inc
- Issue: Whether to expand the traditional make-whole remedy required to resolve unfair labor practice charges.
- The Thryv case involved an unfair labor practice charge related to the company's bargaining over a reduction in force.
- The NLRB held that in addition to back wages and reinstatement, employees can recover "for all direct or foreseeable pecuniary harms" resulting from the company's unfair labor practices.

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## Thryv Inc. Case Decision

The NLRB set forth a new standard – proof that the alleged loss was “either (a) directly caused by the unfair labor practice; or (b) was foreseeable at the time of the unfair labor practice and was incurred as a result of the unfair labor practice.”

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## Section 8(f) & 9(a) Conversions

- Employers are often asked by a union in a Section 8(f) relationship to agree to a provision which states that a majority of the employees voted to recognize the union and that the relationship is a Section 9(a) relationship.
- This sentence was not considered sufficient to convert an 8(f) relationship to a 9(a) relationship. Positive evidence that a majority of employees actually support the union would be required to convert an 8(f) relationship to a 9(a) relationship.
- The NLRB has issued proposed rules which state that a union's representation status can be converted to a 9(a) relationship solely on contract language.

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## Contractor's Off-Duty Employees Can Enter Private Property

- The NLRB has reversed a 2019 decision regarding the right of off-duty employees to enter an owner's private property
- Held that off-duty contractor employees can engage in picketing and leafleting on an owner's private property.
- NLRB applied a standard that considered the competing interests of a property owner's right to protect its property and the contractor employees' Section 7 rights.

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## Sue Union for Tortious Damages *Glacier Northwest Inc v Teamsters*

- Contract expired and Teamsters struck
- Left job after concrete was loaded into trucks causing significant damage (over 100k)
- The Washington Supreme Court ruled the loss was “incidental to a strike arguably protected by federal law.”
- Certiorari granted by U.S. Supreme Court
- Argued 10 January 2023

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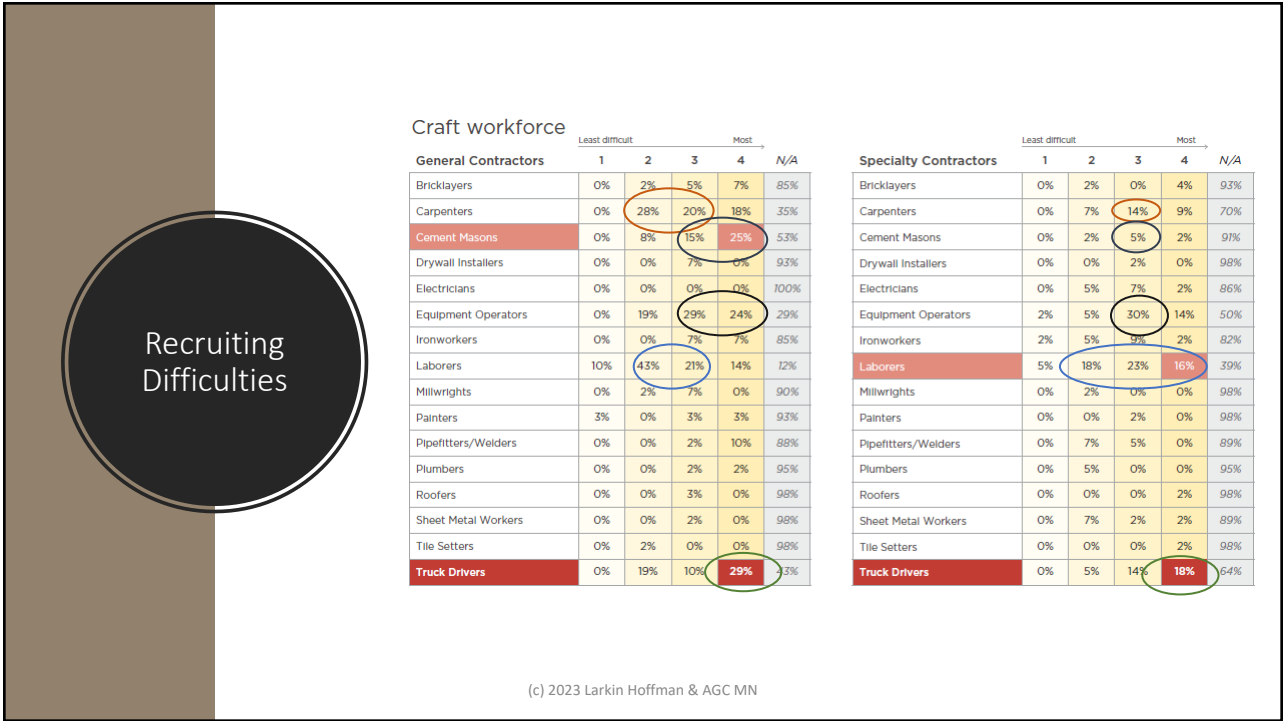
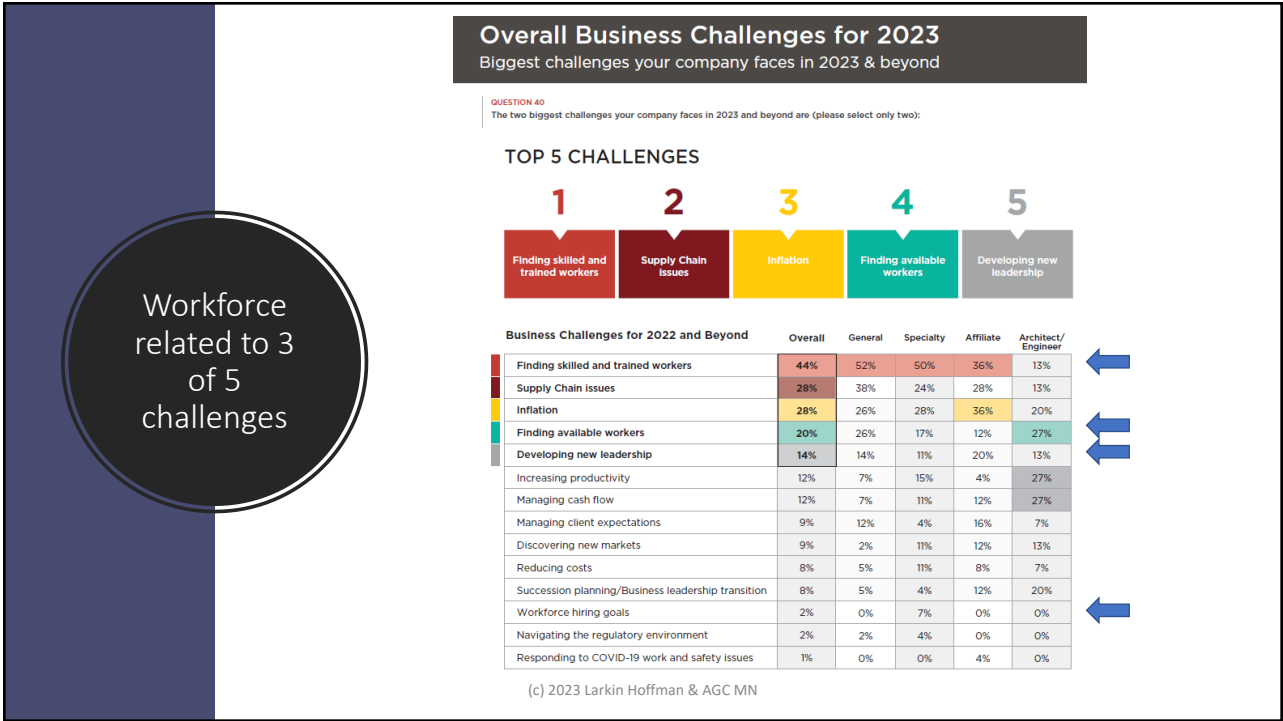
## Labor negotiations

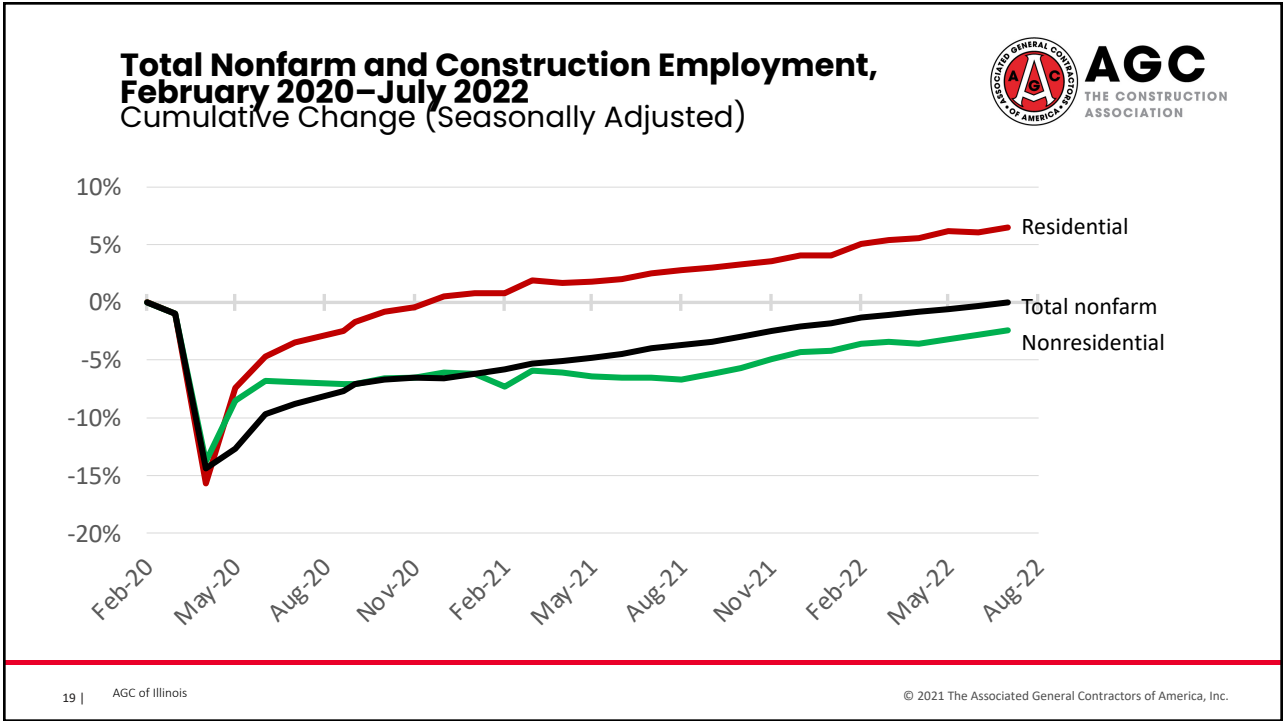
Wage Elasticity

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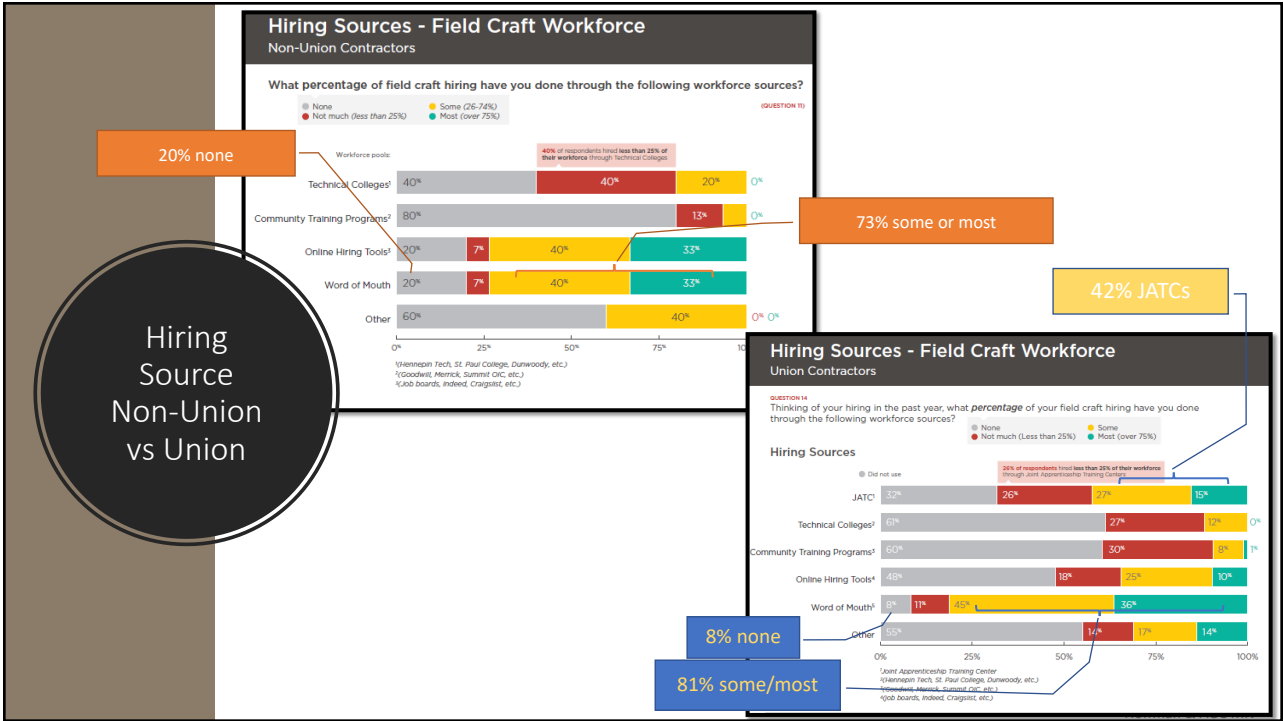
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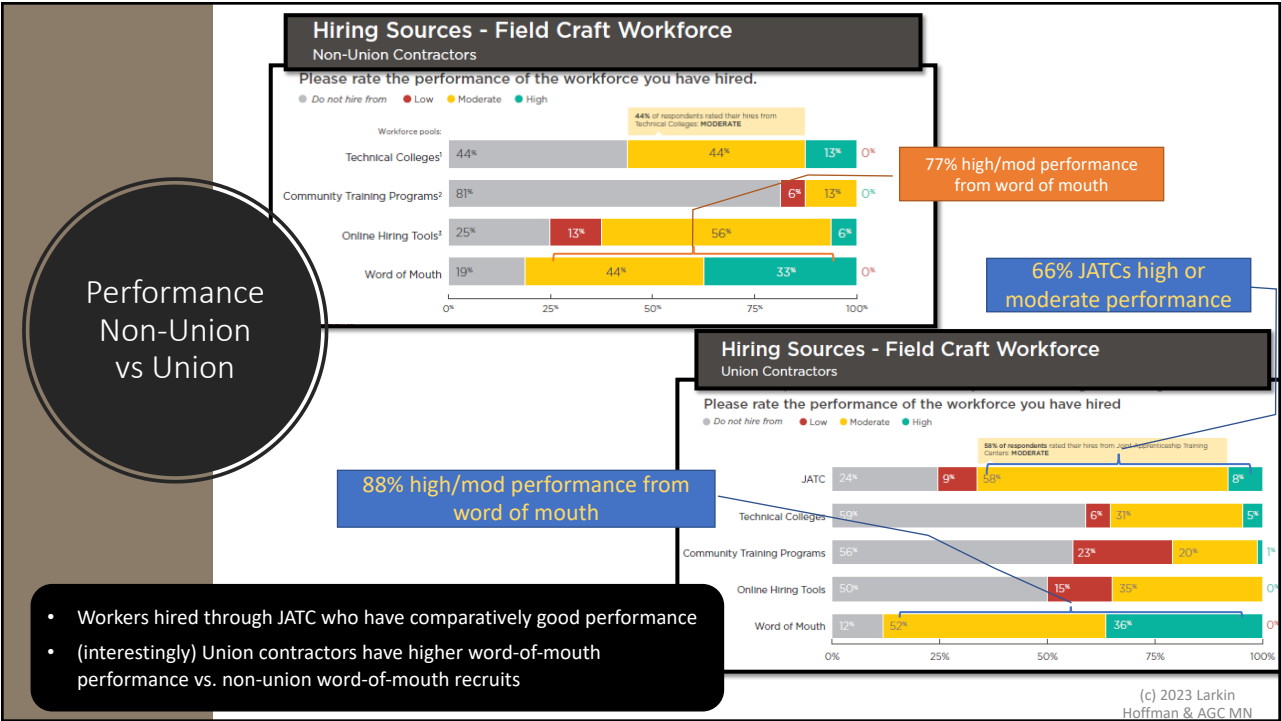




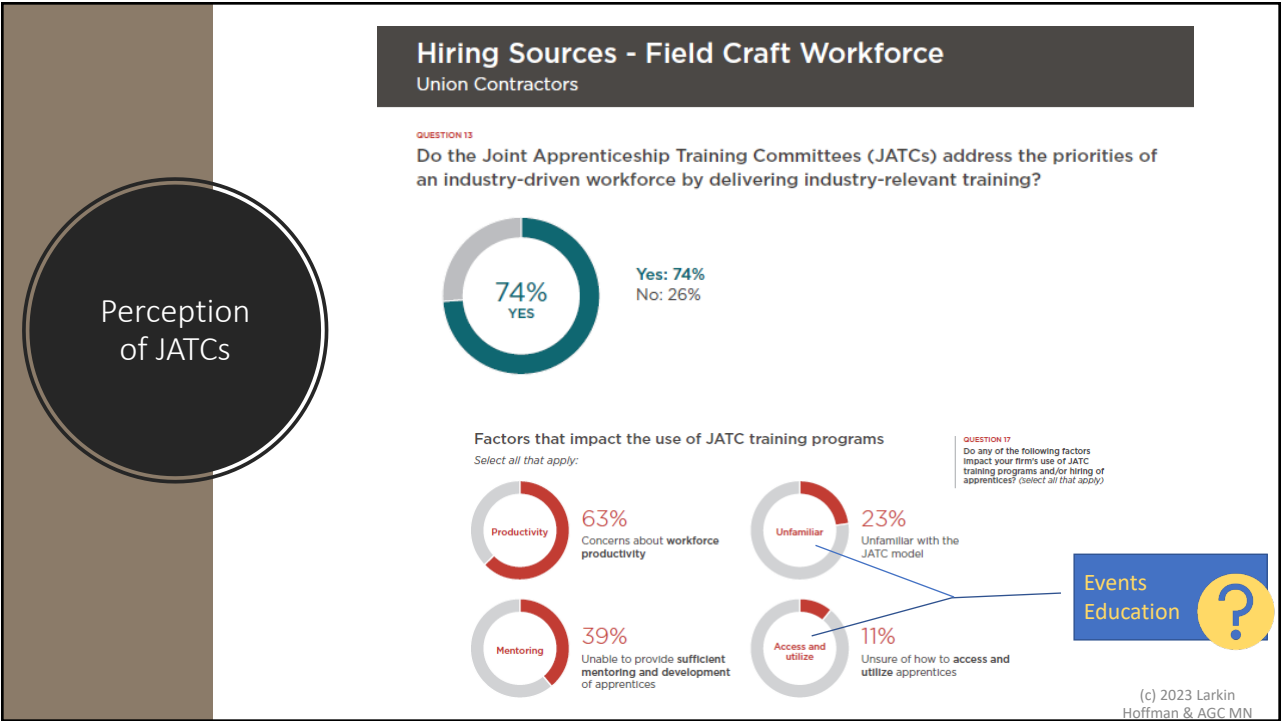
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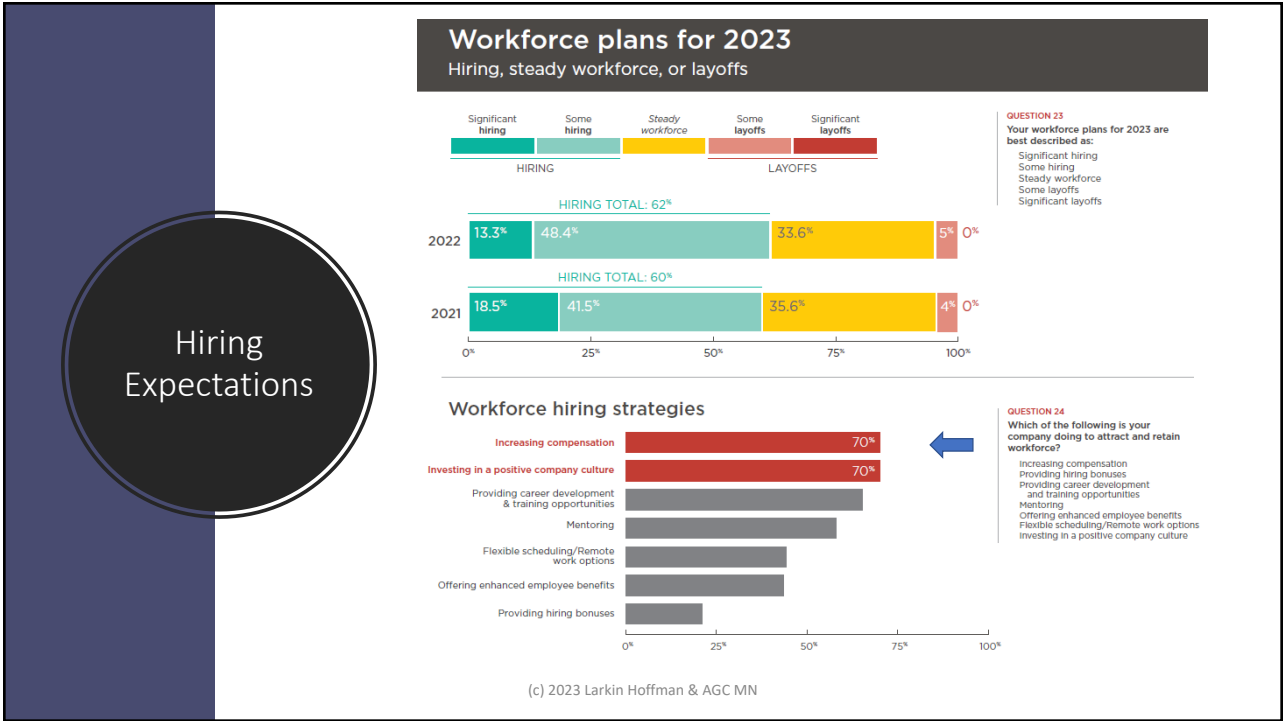
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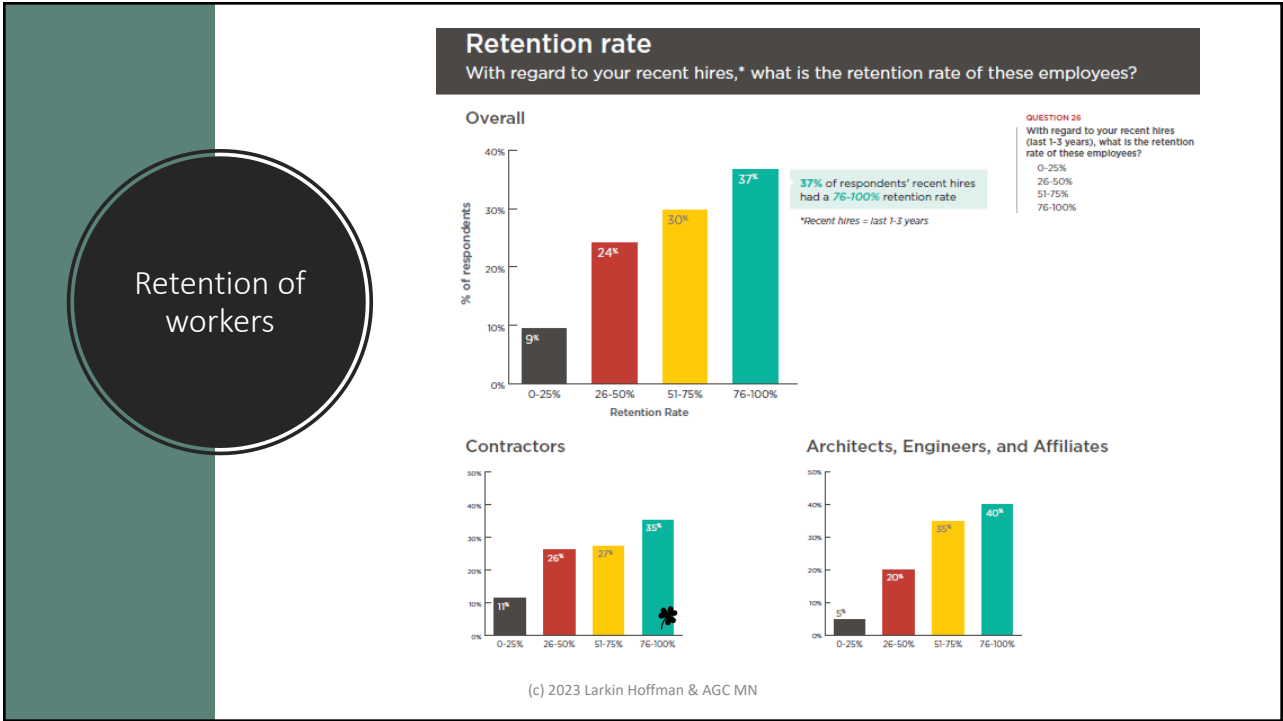
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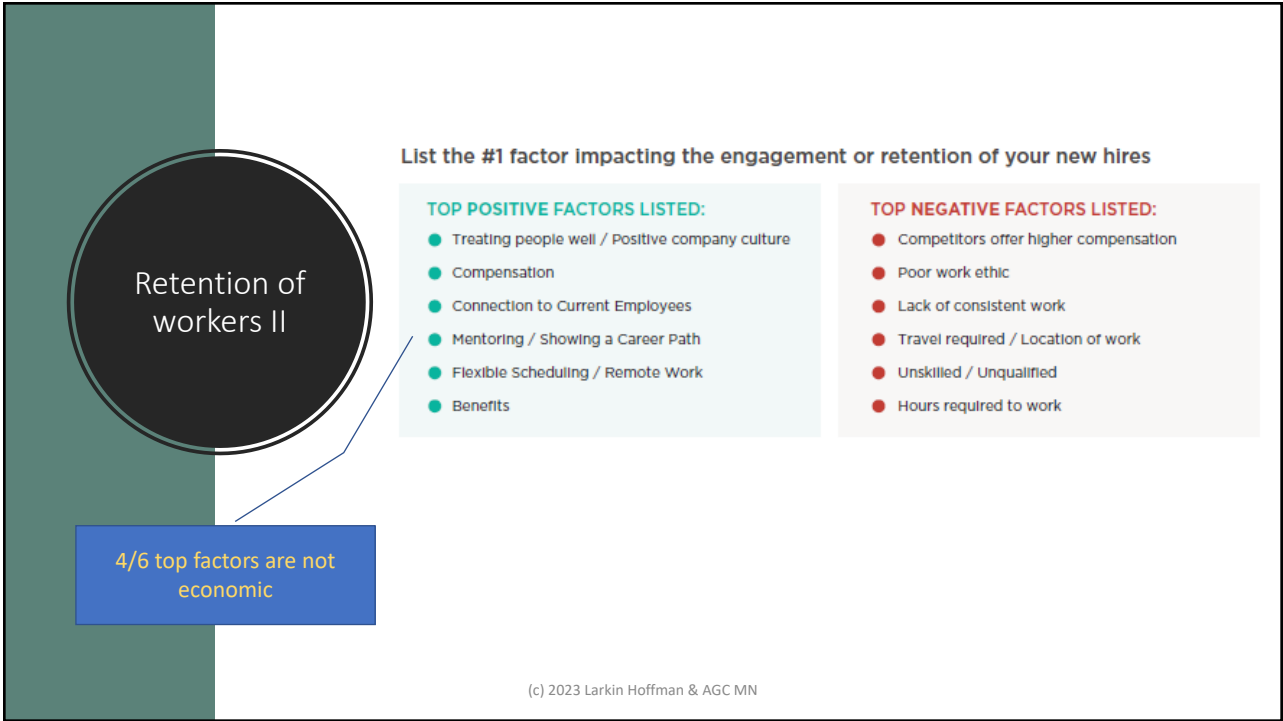


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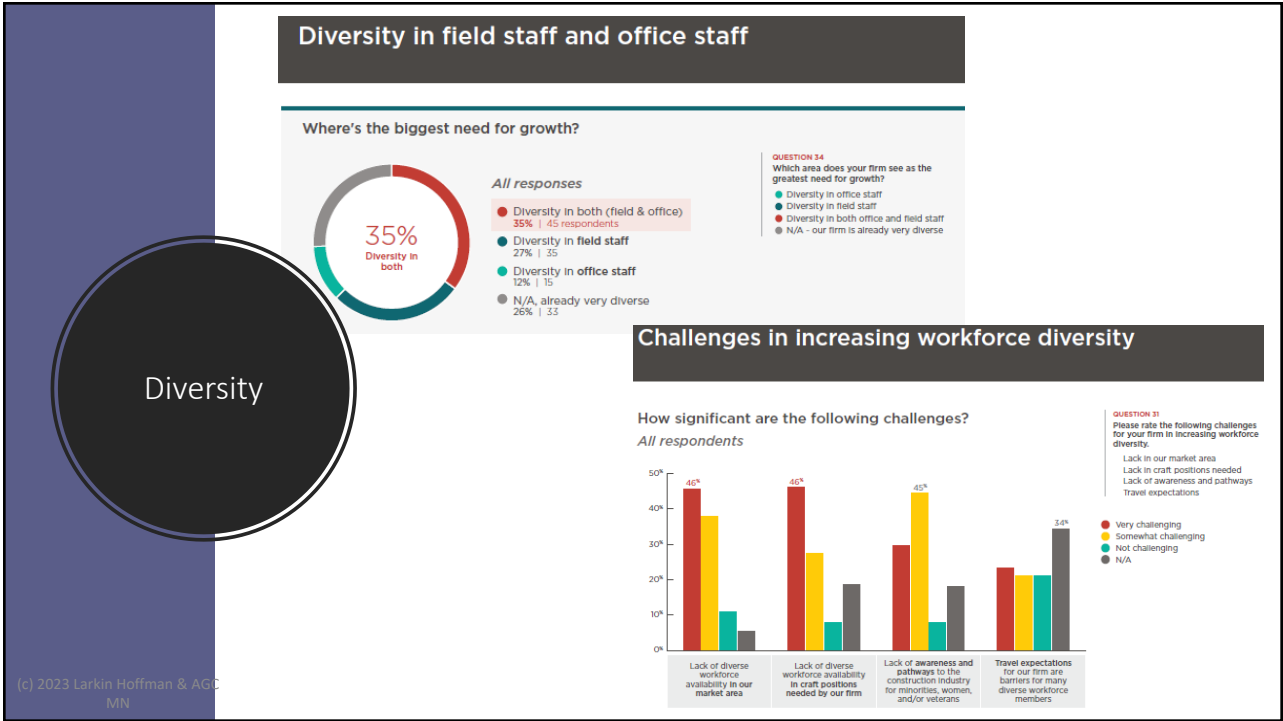


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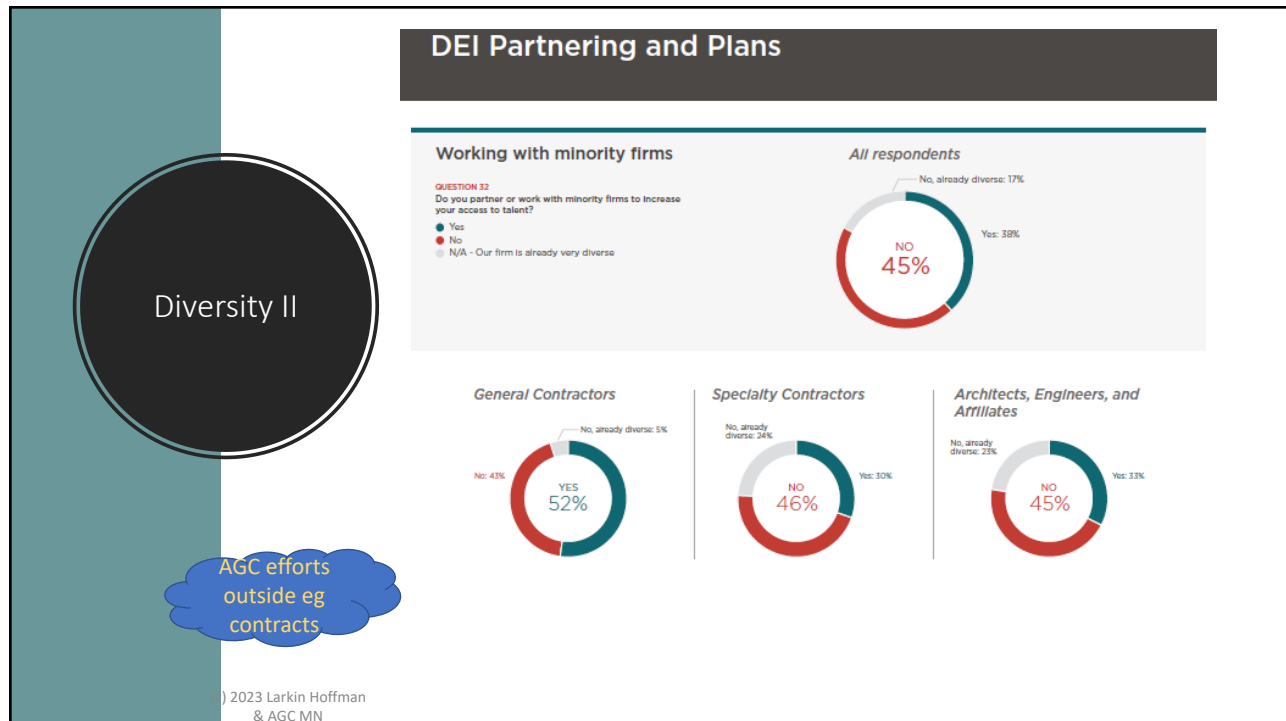




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# 2022 MN Building Settlements

AGC BUILDING NEGOTIATIONS SUMMARY OF SETTLEMENTS AS OF 1 MAY 2022						
	May 2022	May 2023	May 2024	Avg	Sum	Notes (partial)
<b>Average Billed:</b>	4.23%	4.39%	3.75%	4.12%	\$8.49	
<b>Bricklayers</b>	4.00%	4.50%	4.25%	4.25%	\$8.49	Settled first and confidentially Updated favored nations clause Remove notification of 4-10s
<b>Bricklayers Duluth</b>	\$8.00	\$8.25	\$8.50	\$8.25	\$9.75	
<b>Bricklayers St Cloud</b>	4.50%	5.00%	5.50%	5.00%	9.17	9.50
<b>Carpenters</b>	4.56%	4.36%	3.55%	4.15%		Revised apprenticeship schedule & rates Foreperson increase .25 y1 & .25 y2 General FF increase .50 y1 and .50 y2
<b>Cement Masons Metro</b>	\$8.00	\$8.00	\$2.55	\$2.85	\$8.55	
<b>Cement Masons Rochester</b>	4.20%	4.48%	3.39%	4.02%		Foreperson increase .25 y1 & y2 Parking increase \$1 y2 and \$1 y3 Revised call-in pay language 4-10s limited to polishing/grinding Update favored nations
<b>Drywall Metro</b>	\$2.70	\$3.00	\$2.75	\$2.82	\$8.45	
<b>Paint-Metro</b>	4.75%	5.04%	4.40%	4.73%		Add counties Update agreement language closer to Metro Remove 4-10s Increase foreperson .25 y3 CPI dissolution return to Union & Contractor
<b>Paint-Drywall Rochester</b>	\$2.70	\$2.80	\$2.90	\$2.87	\$7.10	

AGC BUILDING NEGOTIATIONS SUMMARY OF SETTLEMENTS AS OF 1 MAY 2022						
	May 2022	May 2023	May 2024	Avg	Sum	Notes (partial)
<b>Ironworkers</b>	4.20%	4.03%	3.88%	4.04%		Update language Revise workday hours Update conflicting agreements language foreperson add .50 y1 & y2 eliminate lead foreperson Revise subsistence 20 increase Region 8 per year
<b>Laborers Metro</b>	\$8.00	\$8.00	\$8.00	\$8.00	\$9.00	30 to foreperson on third year 2x OT after 11th for 4-10s, remove notification Evergreen clause Sub: hotel if overnight Update favored nations LUC drug policy & no pay if fail
<b>Laborers Mankato</b>	\$2.30	\$3.00	\$2.25	\$2.58	\$7.75	
<b>Laborers Rochester</b>	4.96%	5.01%	4.96%	4.98%		Update Agent Sub: hotel if overnight LUC drug policy & no pay if fail Update favored nations
<b>Laborers St Cloud</b>	\$2.45	\$2.60	\$2.70	\$2.58	\$7.75	
<b>Millwrights</b>	4.63%	5.31%	3.78%	4.57%		LUC drug policy & no pay if fail Sub: hotel if overnight Update favored nations Merge county rates CPI dissolution: 5c to Union & Contractor 25 to foreperson on third year

AGC BUILDING NEGOTIATIONS SUMMARY OF SETTLEMENTS AS OF 1 MAY 2022						
	May 2022	May 2023	May 2024	Avg	Sum	Notes (partial)
<b>Operating Engineers</b>	4.25%	4.15%	4.0%	4.13%		Parking \$1 y2 & y3 .50 premium for NCCO license Second shift differential increase Update favored nations clause with sunset Sub: 80-100 miles: \$50 Reduce notification 4-10s to 5 days
<b>Pipefitters Metro</b>	\$3.50	\$3.80	\$3.20		\$3.50	ff .25 y1, ff .50 y2 foreperson 20 y1-3, general foreperson .30 y1-3
<b>Pipefitters Rochester</b>	\$3.00	\$3.00	\$3.00			
<b>Sheetmetal Duluth</b>	\$2.75	\$2.65	\$2.65	\$2.60	\$8.05	
<b>Sheetmetal Metro Resid</b>	4.76%	4.21%	4.04%	4.34%		
<b>Sheetmetal Winona</b>	\$2.75	\$2.55	\$2.55	\$2.62	\$7.85	
<b>Tilesetter Metro</b>	3.80%	3.80%	3.70%	3.77%		
<b>Tilesetter Rochester</b>	\$2.50	\$2.60	\$2.60	\$2.57	\$7.70	

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## 2022 Settlements takeaways

- Focused on percentages
  - Strong emphasis on
    - Comparison among trades
    - Narrowed gap among trades
- Settlements about 4.15%

What does this mean for 2023?

- Dollar increases not represent total cost of contract
  - Per Diem
  - Parking
  - Overtime
  - Classification bumps
  - Supervisor bumps

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## Expected Issues from Labor: 2023 Negotiations

### Topics

1. Recruit & retain workers
2. Economic terms
  - a) Wage
  - b) Per diem
  - c) Overtime
3. Groups
  - a) Which group (wages)
  - b) New scopes
4. Safety
5. Drug testing
6. Term

### Discussion points

- Wages
- Use of JATCs
- Work hours
  - Safety & wages
- Separate agreements or addenda
  - Impact of IRAP
- Contractor Issue: Jurisdiction and Dispute Resolution

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## Tight labor market driving higher wages (Dec 2022)

- Economy added 20,000 jobs in November 2022
  - Unemployment dropped 0.8% (from 4.7% Nov 2021 to 3.9% Nov 2022)
- Hourly pay rose 6.1% from November 2021 to November 2022
  - Higher than 5.8% average pay for all private sector production workers
  - Construction 17.2% > overall private sector



FOR IMMEDIATE RELEASE  
Friday, December 2, 2022

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**CONSTRUCTION ADDS 20,000 EMPLOYEES IN NOVEMBER AS AVERAGE HOURLY PAY JUMPS MORE THAN 6 PERCENT, OUTPACING OVERALL PRIVATE SECTOR INCREASE**  
*But Record-Tying Low Unemployment Rate of 3.9 Percent and Elevated Number of Job Openings Suggest Construction Industry Continues to Fall Short of Hiring as Many Workers as It Needs*

Construction companies added 20,000 employees in November and continued to raise wages for hourly workers more steeply than other sectors as the industry's unemployment rate tumbled, according to an analysis by the Associated General Contractors of America of new government data. Association officials said the data shows that firms would have added significantly more workers if they could find more people to hire.

"It is heartening that both residential and nonresidential construction firms were able to add employees in November," said. "But the number of job openings continues to outpace hiring, suggesting employers wanted to bring on many more workers than they are able to find."

Construction employment totaled a record-high 7,750,000 in November, an increase of 20,000 for the month and 248,000 or 3.3 percent from a year earlier. Nonresidential firms—comprising nonresidential building and specialty trade contractors along with heavy and civil engineering construction firms—added 16,300 employees in November. Residential building and specialty trade contractors together added 3,900 employees.

Pay levels in the construction industry continued to increase in November at a faster pace than in the overall private sector. Average hourly earnings for production and nonsupervisory workers in construction—mostly hourly craft workers—climbed by 6.1 percent, from \$31.04 in November 2021 to \$32.94 last month. That increase exceeded the 5.8 percent rise in average pay for all private sector production workers. Such workers in construction now earn an average of 17.2 percent more per hour than in the private sector as a whole.

The unemployment rate among jobseekers with construction experience decreased from 4.7 percent in November 2021 to 3.9 percent last month, tying the 2018 rate for the lowest ever for November. The number of unemployed construction workers fell by 16 percent, from 469,000 in November 2021 to 393,000 in November of 2022.

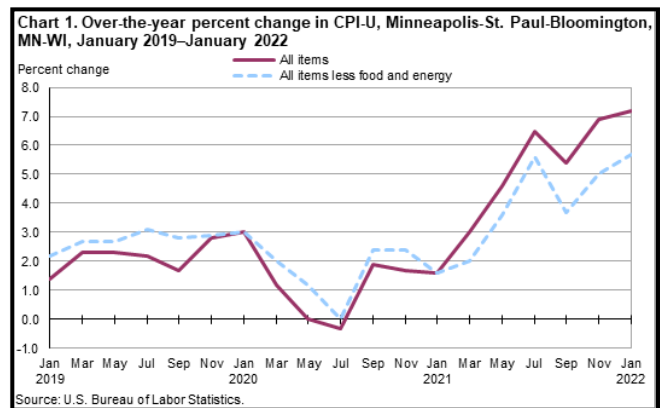
A separate government report on Wednesday showed there were 377,000 job openings in construction at the end of October, which exceeded the number of employees—341,000—hired during that month. The excess of job openings over hires indicated the industry wanted to hire more than twice as many workers as it was able to find in the current low-unemployment environment, Simonson said.

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## Inflation overall

	2017	2018	2019	2020	2021
CPI	2.20%	1.90%	2.30%	1.40%	7.50%
ECI	2.33%	2.50%	3.10%	2.40%	3.80%
Twin Cities CPI (Nov)		1.3%	2.8%	1.7%	6.9%
Avg All Trades	3.40%	3.28%	3.44%	3.23%	3.06%



Mpls-St Paul-Bloomington 12 Mo CPI, not seasonally adjusted, not annualized 7.2%

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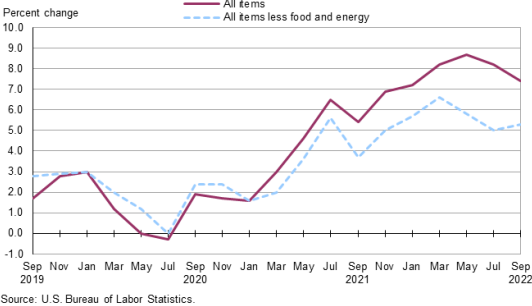
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# Inflation Latest

	2021	2022
CPI	7%	7.7% through Oct
ECI (all construction)	3.8%	4.7% through Sept

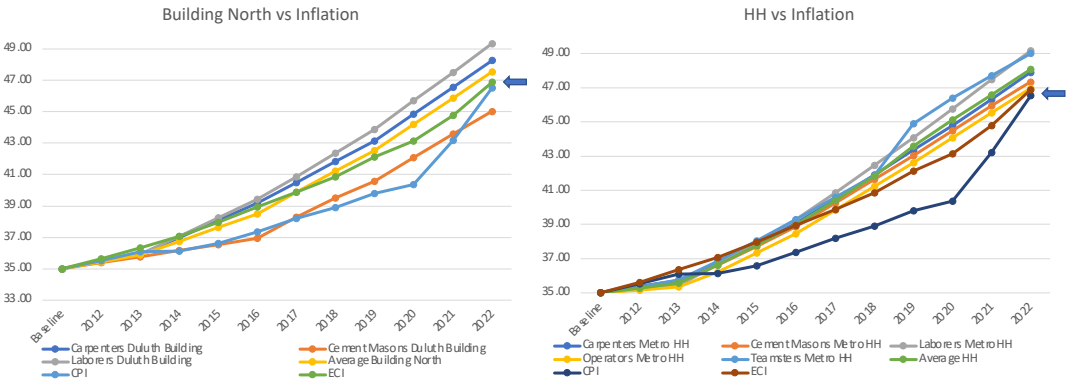
Chart 1. Over-the-year percent change in CPI-U, Minneapolis-St. Paul-Bloomington, MN-WI, September 2019–September 2022



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# Wages versus Inflation

Assume a baseline of \$35 in 2011 and track percentage increases over ten years



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# Marijuana

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## Current law

### Minnesota

- *Prescription:*
  - Use of cannabis is lawful if the employee is enrolled on the Minnesota Department of Health's Patient Registry Program
  - Unless the employee used, possessed or was impaired by medical cannabis on the premises or the place of employment or during the hours of employment.
- *Non-prescription:*
  - Effective July 1, 2022, Minnesotans can lawfully purchase and consume edible and drinkable products containing hemp derived THC.
  - Up to 5 mg of THC per serving and a limit of 50 mg per package.

### Federal

- Illegal



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## More issues

THC dosages and packaging are unregulated.

No requirement that manufacturers be licensed.

No requirement that hemp THC products be tested for other substances.

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## Conflicting laws

- Testing
  - Tests exist only for use, not intoxication.
    - If used days before test (not intoxicated), will test positive
    - Hemp marijuana will test positive
- Lawful Consumable Products Act
  - Illegal to take adverse employment action against employee who uses or enjoys lawful consumable products outside of the workplace and non-working hours.
    - Exceptions if use is related to bona fide employment duties
- Drug & Alcohol Testing in the Workplace Act
  - Specific statutory protocols when and how to test employees for drug use

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## What to do

### Allow marijuana use

- Some employers have decided to disregard a positive test for marijuana, or limit marijuana tests for employees in safety sensitive positions.
- Harder to ignore where federal law covers employee's work (e.g. CDL) or safety sensitive (e.g. heavy equipment involved)

### Testing

- Brewer & Shipley Dilemma
- Impairment testing entails
  - training
  - protections against perceived misuse including pretext for other motive

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## Rolling in the deep

The Minnesota legislature is poised to legalize marijuana.

- No impairment test has been found
- Watch for exceptions for construction work
- Types of work may make a difference
- Solutions *may* need to be collectively bargained

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## Thank you!

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