

NLRB Offices Pursue Charges At Varying Rates, Data Show

By **Braden Campbell**

Law360 (September 12, 2022, 7:06 PM EDT) -- The National Labor Relations Board's regional offices have had starkly different appraisals of unfair labor practice allegations against employers over the last decade, with some offices finding merit to charges at double the rates of others, according to a Law360 analysis.

An analysis of data obtained through a Freedom of Information Act request revealed vast differences in the rates at which the agency's 26 regional offices found merit to claims of National Labor Relations Act violations filed against employers over the period. Such findings are pivotal because agency prosecutors typically only pursue cases when regions find merit following preliminary investigations.



A data analysis revealed vast differences in the rates at which the NLRB's 26 regional offices found merit to claims of labor law violations filed against employers. (Andrew Harrer/Bloomberg via Getty Images)

As a whole, the regional offices found merit at a close to 37% clip, though some regional offices notched numbers well above and below the mean rate.

The data show Region 28's reputation as the agency's most aggressive hub is well-earned, revealing the Phoenix, Arizona-based office found merit to nearly 55% of the charges it fully investigated over this period. The agency's Philadelphia office, Region 4, was the only other region to find merit more than half the time.

On the other end of the range, Atlanta-based Region 10 and Detroit-based Region 7 found merit following a little more than a quarter of their completed investigations, with merits rates in the other offices spread between the extremes.

"That merit-no merit determination is critical," said Michael Duff, a labor law professor at Saint Louis University School of Law who spent a decade between the NLRB's Philadelphia and Minneapolis offices. "If the NLRB says we're not going to pursue something, a court will not change that."

Parties such as unions and employers begin NLRB litigation by filing accusations of labor violations, known as unfair labor practice charges, with the NLRB's regional offices, each of which covers a certain geographical area.

Staff in the regional offices investigate charges, prosecuting cases when the lead official, known as the regional director, determines that the allegations have merit. A party whose claim is determined not to have merit can appeal to agency headquarters for a second opinion, but reversals of regional decisions are rare.

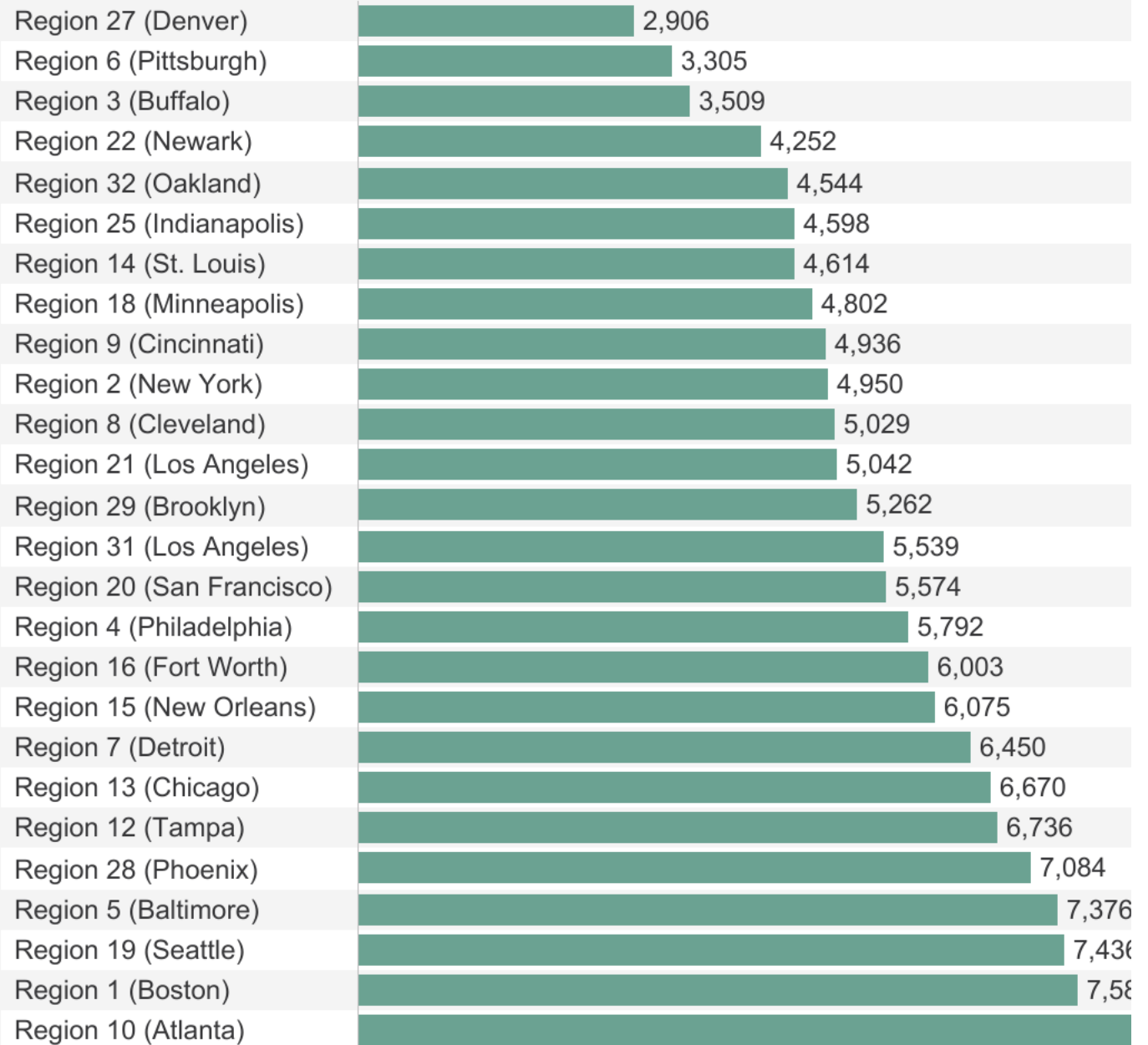
Law360 obtained a data set tracking every charge the agency received dating back to Jan. 1, 2012, and analyzed a subset comprising all "CA" cases — cases in which the charging party accuses an employer of breaking the law — filed through December 31, 2021.

The 26 offices that operated continuously received 145,401 charges over this period, according to Law360's analysis. Some regions handled more than others.

CA Cases Received by Region

Law360's analysis found some regions received vastly more charges against than others between 2012 and 2021, with some regions fielding more than two accusations as others.

■ CA cases by region



Source: National Labor Relations Board

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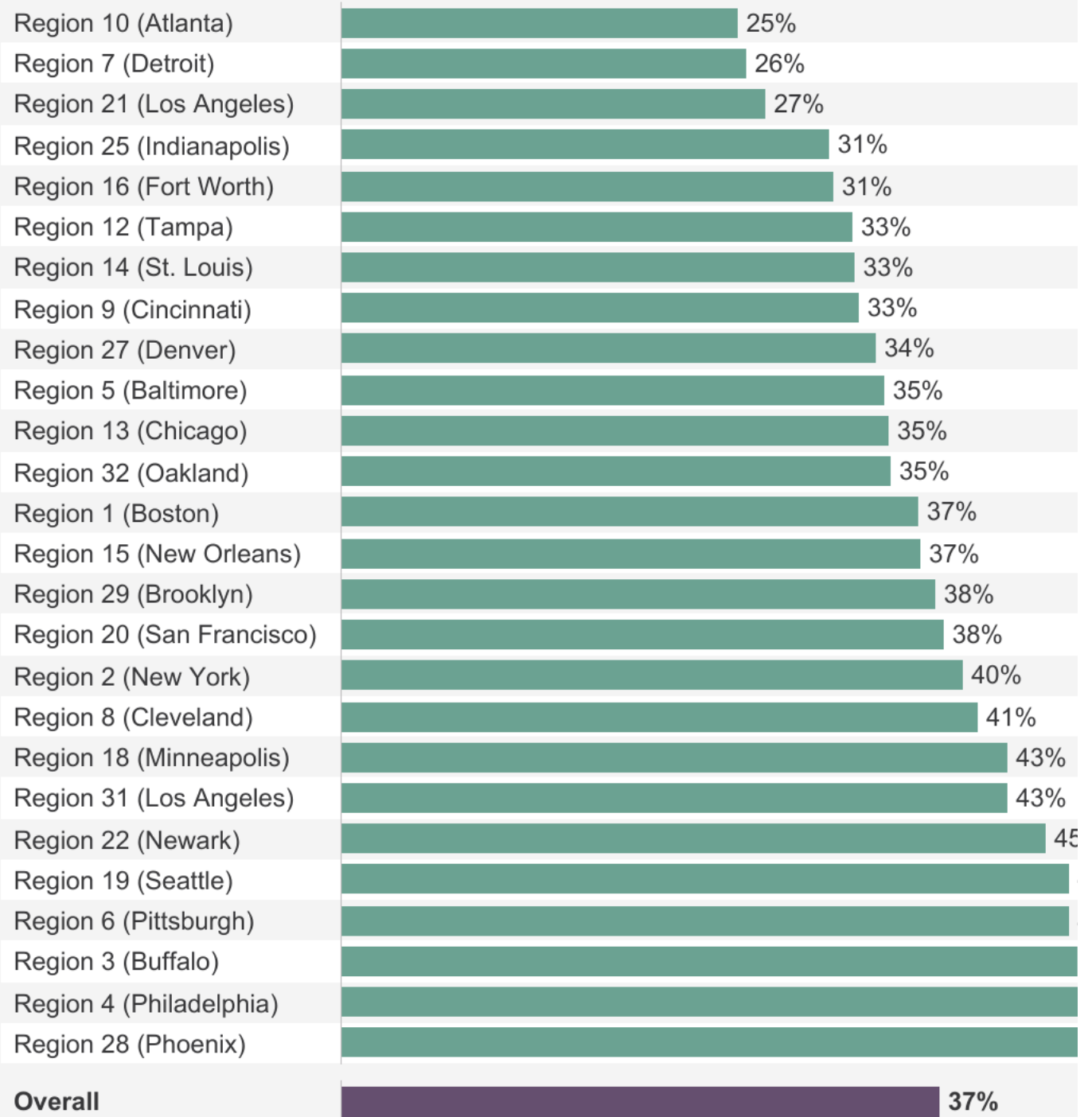
Region 10, which covers a large chunk of the southeast including Georgia, South Carolina and North Carolina, received by far the most charges in this period, with 9,329. Four other regions received more than 7,000 charges: Boston-based Region 1, Baltimore-based Region 5, Seattle-based Region 19 and the Phoenix office, Region 28. Denver-based Region 27 and Pittsburgh-based Region 6 received the fewest, with 2,906 and 3,305, respectively.

Law360 analyzed the rates at which different regions found merit to charges, based on the number of charges each region deemed to have full, partial or no merit following investigations. This analysis excludes charges in which the agency deferred to private arbitration, which represent a tiny sliver of overall post-investigation determinations, and those on which the region did not reach a merits finding because the charge was withdrawn or settled.

Merits Rates Vary Widely

The NLRB's regions found merit to unfair labor practice charges against vastly different rates, with some finding merit more than twice as often as

Merit rate by region



Source: National Labor Relations Board

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Region 28 paced the agency. The region, which covers New Mexico, Arizona and parts of Texas and Nevada, found merit to 54.7% of non-deferred charges. Region 4, which covers parts of Delaware, New Jersey and Pennsylvania, was a close second, at 51%.

Region 10 found merit to non-deferred charges at a 25.3% rate, the lowest of any region. Region 7, which covers most of Michigan, found merit 25.9% of the time, the second lowest rate. Region 21, which covers the southern tip of California, found merit to 27.1% of charges as the only other region with a sub-30% merits determination rate.

This variance is a "reflection of how much power and discretion regional directors have in these matters," said Daniel Rojas, a partner at union-side Rothner, Segall & Greenstone and a former attorney in the NLRB's Phoenix office.

Different regional directors approach their jobs differently, he said. For example, some regional directors may take employers' position statements — their initial defense to the charge — at close to face value, trusting the accused's counsel to accurately describe the facts and the relevant law, he said. Others may more carefully scrutinize what they see as a one-sided account of the events.

Regional directors must weigh these statements against dossiers compiled on a tight turnaround by investigators tasked with sussing out evidence on often tricky questions, like whether an employer fired a worker because of anti-union bias or misconduct. This means merits findings are often something of a leap of faith, Rojas said.

"There are regional directors who are very averse to taking risks," he said. "I think you can justify any adverse employment action with documentation ... but it's really only with a full hearing that often you can get a little closer to what the truth actually is."

Other regional directors are more apt to roll the dice on shakier charges. Region 28, helmed by long-serving regional director Cornele Overstreet, has a reputation for taking on more cases than others, and the data bears out that perception.

Rojas opted to take a job in Region 28 because of this reputation. He recalled being encouraged to approach his investigations as though he was a police officer investigating a crime, making house calls to ask probing questions of witnesses who weren't exactly lining up at the board's office to offer their statements.

This vigor is uncommon at the agency, in part due to a chronic lack of resources, Rojas said.

"[Overstreet] loves his job," Rojas said. "[For him] it's not about being pro-union or being pro-employer, it's really about being pro-employee."

Dennis Boren, who was the regional attorney in the NLRB's Detroit office for 15 years before joining management-side Dinsmore & Shohl as of counsel earlier this year, acknowledged that his office was relatively conservative.

Regional offices assess the merits of charges at meetings called "agendas," which can vary in makeup from region to region but typically include the regional director, the investigator and other officials, such as the regional attorney. As the top lawyer in Detroit, Boren made sure to draw out "the good, the bad, and the ugly" of the case so his attorneys wouldn't be blindsided should the case go to trial, he said.

"It's interesting, because [Region 7 is] very low in terms of merit determinations, but ... I know we didn't have a bias one way or the other," Boren said.

A number of factors play into whether a region finds merit to a charge, including the regional director's aggressiveness regarding borderline cases, the nature of the allegation, and the relative strengths of the charging party's evidence and the charged party's defense, he added.

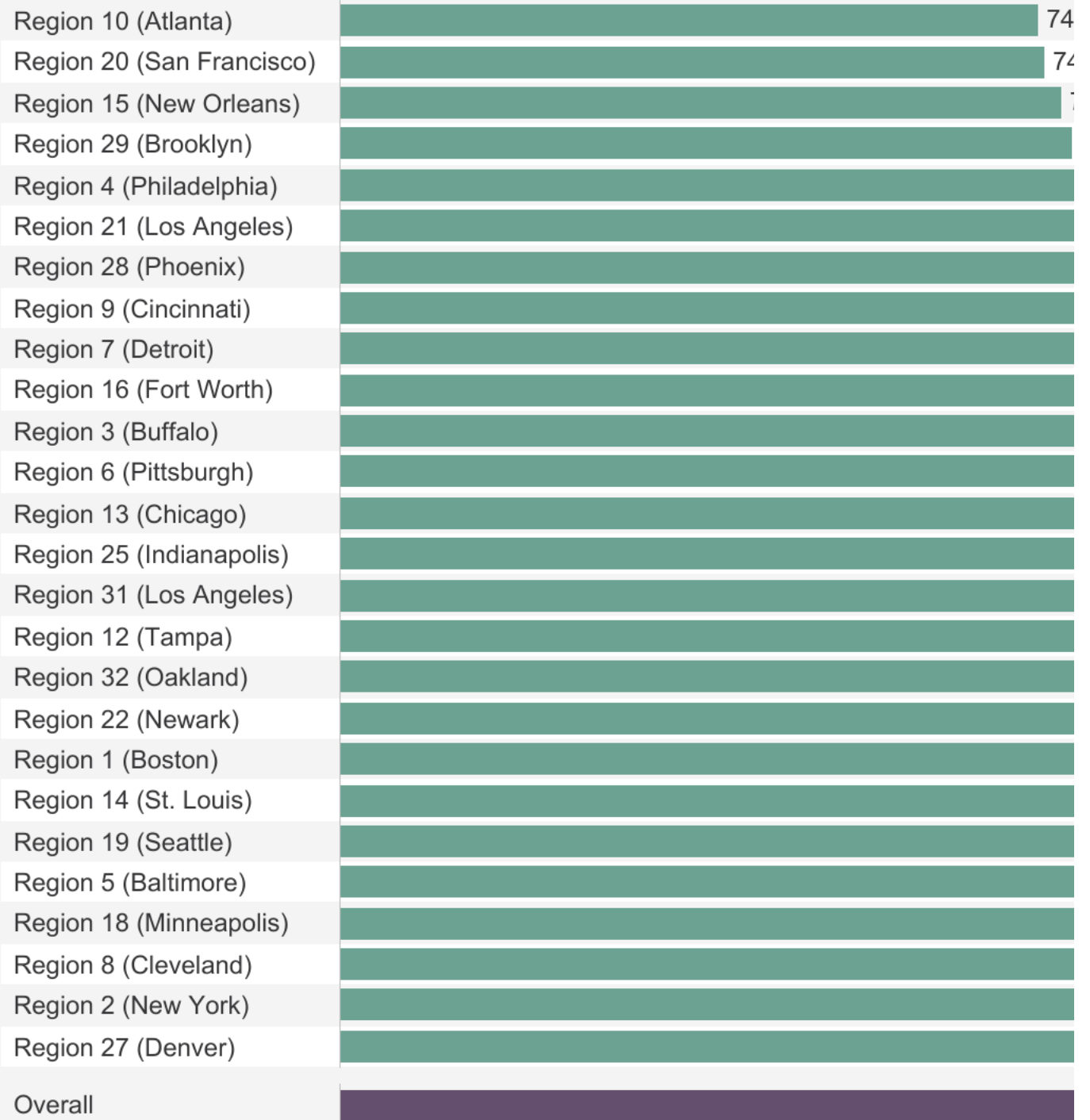
"Like most things in life that are complex, there's no easy explanation," Boren said.

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Settlements High Across Regions

While the regions differed widely in the rates at which they found merit to charges, they had one thing in common: When they opted to take a case, they typically got results.

Merit settlement by region



Source: National Labor Relations Board

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A little more than 82% of the meritorious cases the NLRB closed over this period ended in settlements, according to the analysis. This includes both deals brokered by agency prosecutors and reached by the parties outside the board's auspices, so the rate is largely outside the region's control.

The regions showed some variation in settlement rates, from about 74% on the low end to north of 90% in the high end, but overall their figures were close to the mean.

The regions saw even greater success when cases reached the complaint stage. When cases don't settle following a merits finding, the regions file formal complaints that begin litigation in the agency's administrative courts and end with the titular board, pending appeals to the federal circuit courts.

Agency wide, prosecutors settled or won before the board more than 95% of the time they filed complaints, with little variation across regions, according to the data. This omits a small portion of cases in which prosecutors withdrew complaints without settling.

That the regions took up cases at such varying rates but arrived at similar results when they found merit to charges is striking, said Peter Finch, a former NLRB staff attorney who now advises employers as a partner at Davis Wright Tremaine.

"In a way it all comes out in the wash," Finch observed. "It's not necessarily the more cases we issue the lower our win rate ... it's like everybody is picking the right cases and making the right moves [as shown by] settlements and wins."

--Editing by Nick Petrucio.

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