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Employee monitoring and privacy in unionized workplaces and bargaining trends

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Labour Spotlight Series

Grow | Protect | Operate | Finance

Speakers



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About the Labour Spotlight Series

The Labour Spotlight Series is a new webinar series aimed at providing unionized employers across Canada with regular updates on the latest developments in labour law while creating a space to discuss practical issues that frequently arise in unionized workplaces such as bargaining, grievances, strikes, and other hot topics.

Agenda

1. Employee Privacy & Surveillance in the Unionized Workplace
2. Bargaining Trends in 2022
3. Q & A

Employee Monitoring & Privacy



A balance of interests: employee privacy in unionized workplaces

What impacts privacy in unionized workplaces?

- (i) Section 41.1.1 of the *Employment Standards Act*
- (ii) Collective agreements
- (iii) Arbitral case law

Bill 88 – What is it?

New electronic monitoring legislation in Ontario

- Bill 88 is the most recent advance in provincial privacy law with respect to employment.
- Bill 88 introduced a new section of the ESA entitled “Written policy on electronic monitoring,”, requiring employers (with 25+ employees) to have a written policy in place for all employees with respect to electronic monitoring of employees.
- Employers must provide employees with a copy of this policy.

Section 41.1.1 of the *ESA*

New electronic monitoring legislation in Ontario

- Required information
 - Whether the employer electronically monitors employees;
 - A description of how and in what circumstances the employer electronically monitors employees;
 - The purpose for which information obtained via electronic monitoring will be used; and
 - The date the policy was prepared.

Bill 88 - Application

New electronic monitoring legislation in Ontario

- No definition of “electronic monitoring” yet
- No limitations on the use of electronic monitoring
- The deadline for this policy is October 11th, 2022

The Collective Agreement

What rights do Employers have with respect to employee surveillance?

- The first place management should look to determine privacy rights is the collective agreement.
- Is electronic monitoring included within standard management rights?
- Ontario arbitrators have recognized a common law right to privacy in the workplace meaning that a right to privacy may be “read-in” to the collective agreement.
- This makes the addition of clear language with respect to privacy and/or electronic monitoring in the collective bargaining agreement even more important, as this may help resolve issues prior to a union seeking grievance arbitration.

Established privacy principles

What does the case law say about employee privacy?

- Searches of a worker's person and personal property
- Medical privacy – drug & alcohol testing, vaccination, provision of medical information, virus testing, polygraph testing, fingerprinting/scanning, criminal records check
- Electronic surveillance devices
- Security checks

Established privacy principles

What are employers generally permitted to do?

- Inspect employees' lockers;
- Monitor odometer readings in company vehicles;
- Scrutinize use of its email system; and
- Contacting third-party employers

All where the invasion of privacy was relatively insignificant.

Electronic Monitoring in the Workplace

IUOE, Local 793 and Earth Boring Co., Re

The Facts

- In this case, the union brought a grievance challenging the employer's introduction of third-party software called "ExakTime".
- Purpose of the software: to take the place of paper timesheets and records.
- ExakTime software required employees to download a mobile phone application (an "App") onto their personal cell phones.
- Employees were then expected to use the App to clock in and clock out by taking a photo of themselves onsite and uploading it to ExakTime, which indicated the time and the geolocation at the time the employee clocked in or out.

Electronic Monitoring in the Workplace

IUOE, Local 793 and Earth Boring Co., Re

The Union's Concerns

- The ExakTime App made use of a “Geo Fence”, which allowed the employer to track the movements of employees within the specific boundaries of a worksite. The union was concerned about the App’s ability to track employees even when outside the Geo Fence;
- Data uploaded to ExakTime was retained by the employer indefinitely; and
- Data uploaded to ExakTime was stored on cloud servers and shared with third-parties.

Electronic Monitoring in the Workplace

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The Employer's Concerns

- The employer used ExakTime to prevent “buddy punching”, a practice whereby an employee punches in another employee’s time card when they are running late, resulting in time theft.
- The employer also argued that the use of ExakTime significantly reduced its administration costs by hundreds of thousands of dollars.

Electronic Monitoring in the Workplace

IUOE, Local 793 and Earth Boring Co., Re

The Law

- A balance of interests between employee privacy and management rights.
- “Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.” - *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* 2013 SCC 34

Electronic Monitoring in the Workplace

IUOE, Local 793 and Earth Boring Co., Re

The Arbitrator's Conclusions

- An employer must demonstrate the presence of real security issues with appropriate evidence before implementing electronic monitoring or surveillance software;
- Security measures such as two-factor authentication and encryption of data in transit and in storage may reduce the severity a software technology's intrusion into employee privacy;
- The length of time for which data is stored may either reduce or increase a software technology's intrusion into employee privacy; and
- Whether or not the data is a) shared with third-parties and b) stored by third-parties may factor into how intrusive the technology is determined to be.

Electronic Monitoring in the Workplace

IUOE, Local 793 and Earth Boring Co., Re

The Outcome

- At arbitration, the employer could not present any evidence of “buddy punching” occurring in its workplace
- As a result, the employer was ordered to halt the use of ExakTime in its “current form”.
- The Arbitrator was not swayed that the employer actually had a problem that needed to be addressed due to the lack of evidence presented at arbitration and had serious concerns about ExakTime retaining employee data (including facial images) indefinitely, storing data on third-party servers, sharing data with third-parties, and tracking employees’ location outside of working hours.

Electronic Monitoring in the Workplace

Agropur Division Natrel v. Teamsters, Local 647

- *Earth Boring* may be contrasted with *Agropur*
- In *Agropur*, the Arbitrator found that some evidence of “buddy punching” was good enough to justify the implementation of finger scanning technology.
- In *Agropur* the finger-scanning technology was minimally intrusive because the scan only captured “less than half a fingertip”, the scan was converted into a “template” and the template data was stored on a secure server owned by the employer.
- The differences between this case and *Earth Boring* are vast, and employers should note in particular that only minimal evidence was required in this case due to the strength of the privacy and security measures implemented in tandem with the finger-scanning technology.

Some final take-aways

Privacy & electronic monitoring in the workplace

- Employers with 25 or more employees in Ontario require a policy with respect to electronic monitoring by October 11, 2022.
- Before implementing any electronic monitoring or surveillance software, employers should review the collective bargaining agreement for any sections pertinent to employee privacy.
- Prior to investing in electronic monitoring/surveillance technology, employers should seek to understand the technology's data practices.
- Employers should gather evidence of any workplace issue requiring the use of electronic monitoring/surveillance technology.
- Employers should seek a balance between mitigating a workplace issue and employee privacy and seek out the least intrusive solution to the issue at hand.

Bargaining Trends



Bargaining Trends for 2022

What employers need to know

(1) Wage trends by:

- Sector
- Industry

(2) Trends in how settlements are reached in 2022

(3) Trends in work disruptions

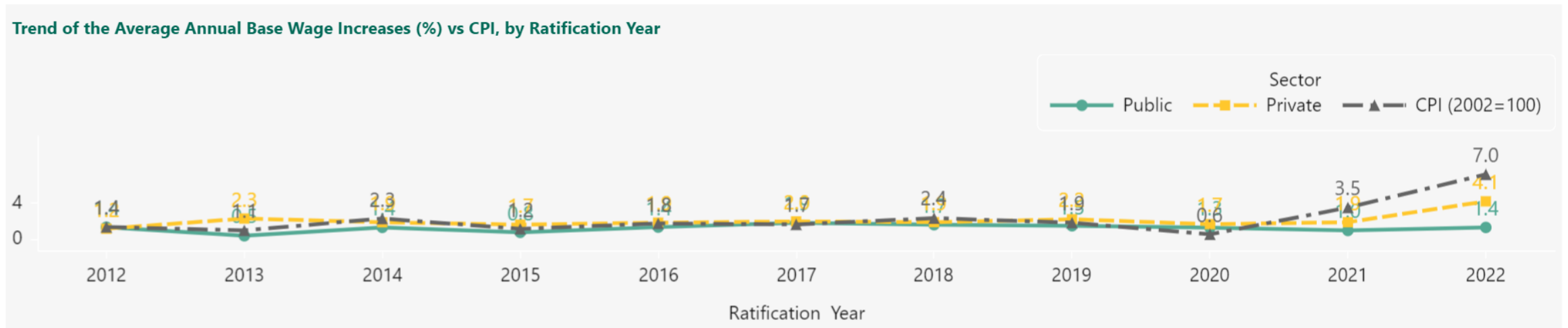
Wages

Wage trends in times of inflation

- Average annual base wage increases over the past 12 months:
 - **Public Sector**
 - Q3 2021: 0.9% Q4 2021: 1.6% Q1 2022: 1.3% Q2 2022: 1.9% Q3 2022: 1.2%
 - **Private Sector**
 - Q3 2021: 1.8% Q4 2021: 2.5% Q1 2022: 3.2% Q2 2022: 4.4% Q3 2022: 3.1%
- A noticeable uptick in wage increases in Q2 2022, perhaps in response to heightened fears over inflation and the Canadian economy.
- Average annual base wage increases by sector
 - Provincial BPS: 1.1%
 - Municipal: 2.0%
 - Private: 4.1%

Wage trends

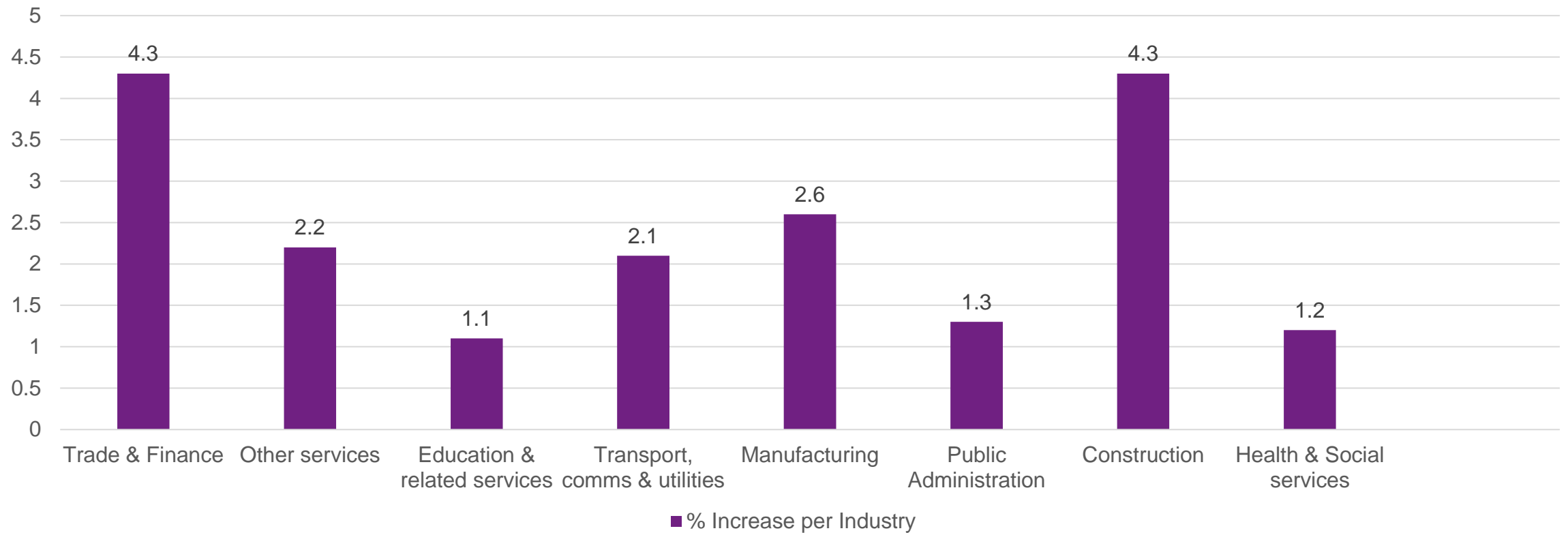
Average Annual Wage Increase (2012-2022)



Wages

2022 Wage trends by industry (Q1 – Q3)

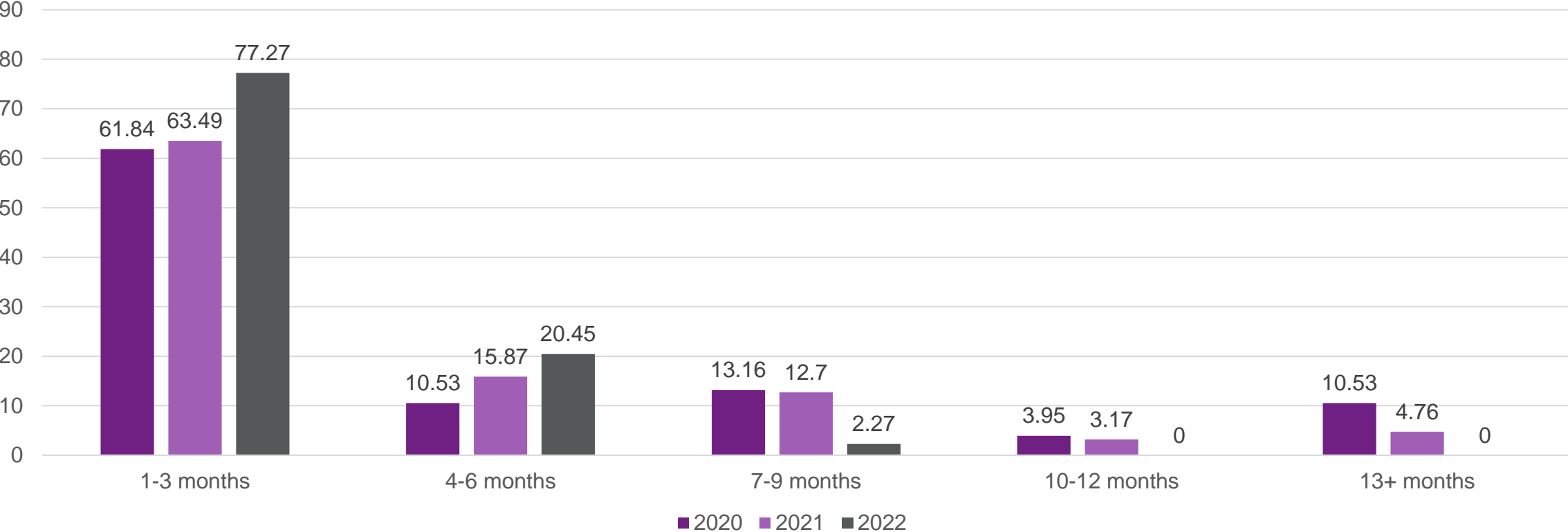
Average Annual Base Wage Increases (%) by Industry in 2022



Resolution Trends – duration of negotiations

Duration of negotiations in the Private Sector – 2020, 2021 and 2022

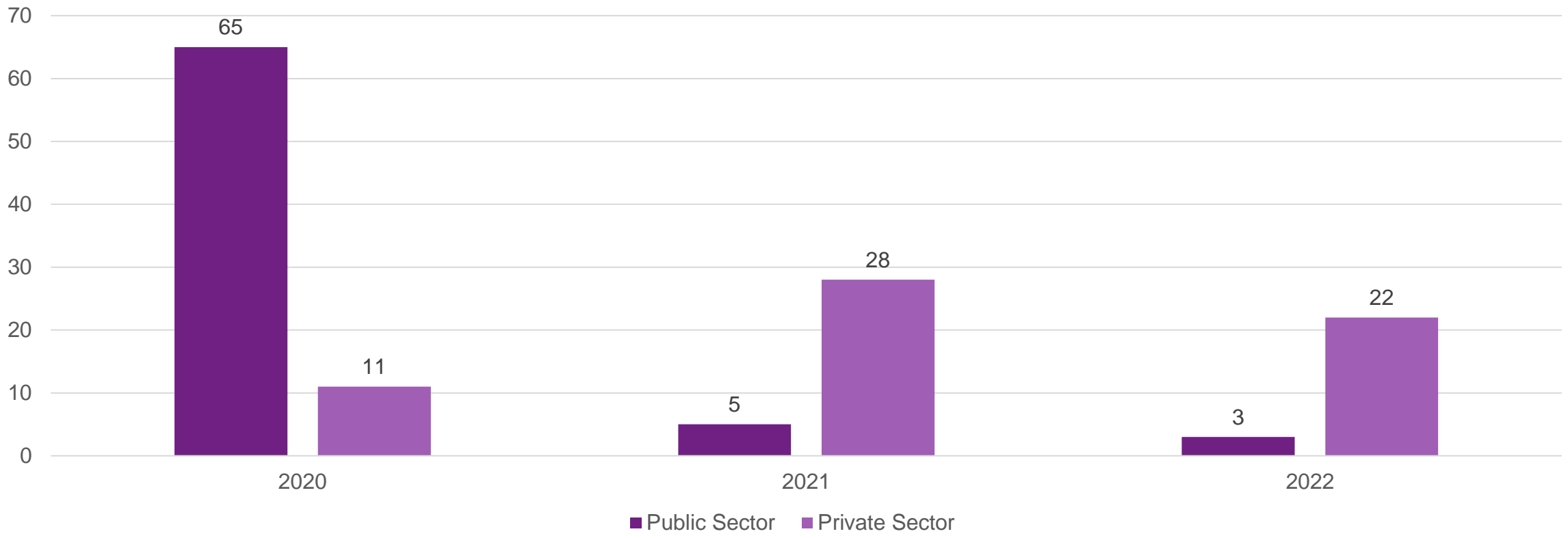
Duration of negotiation trends, 2020 – 2022 (Private Sector)



Disruption trends

Number of work disruptions, 2020 - 2022

Number of work disruptions 2020 - 2022



Conclusions

- Wage trends
- Resolution trends
- Disruption trends



The image shows a close-up of a rock surface with several fossilized tracks. The tracks are dark, almost black, and show distinct, parallel ridges, characteristic of a trilobite. The rock is light-colored, possibly limestone or sandstone, with some texture and small pits. A large, semi-transparent purple shape is overlaid on the left and center of the image, partially covering the tracks. The word "Questions?" is written in white, bold, sans-serif font on the purple background.

Questions?



What do you want to hear from us next?

Upcoming dates:

December 2022 – Issuing discipline in unionized workplaces

March 2022 – Using replacement workers during a strike (Cross Canada)

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