

DENTONS

Risks of engaging dependent contractors and temp employees (and an update on bargaining trends)

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Labour Spotlight Series

Grow | Protect | Operate | Finance

Speakers



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Agenda

1. Contracting out work and using temp workers (30 min)
2. Bargaining trends (15 min)
3. Questions (10 min)

**Labour risks associated with using
contractors and temporary help
agency workers**

Why it's important

- Common misconception is that contracting out work and using temp workers can reduce an employer's labour exposure
 - Case law is eroding strategies for organizing the workplace to reduce labour relations risks
- Impacts non-union and unionized employers
- Potential for significant financial and operational consequences
- Get ahead of the issue before it becomes a problem

**Risk 1: “Independent”
contractors who are dependent
on the organization**

Relationship, not classification, is what matters

- *Canadian Labor Congress (Canadian Association of Burlesque Entertainers, Local Union No. 1689) v Algonquin Tavern* (1981 CanLII 812)
 - Applications for certification involving burlesque entertainers working at hotels / taverns
 - Question arose regarding the status of the dancers and whether they were employees/dependent contractors or “self-employed” independent contractors
 - Dancers were not “part and parcel of” or “integrated into” the business of the hotels / taverns, but were an “accessory”
 - Applications for certification in respect of three of the hotels / taverns were dismissed because the dancers were “self employed” independent contractors
 - Application allowed against fourth hotel as their “house dancers” were employees
- Seminal case identifying the factors to be considered when assessing whether an individual is truly an independent contractor

Background: Three categories of workers

- **Category #1 - Employees**

- Employer determines when / where work is performed and remuneration
- Employer provides necessary tools, equipment and materials
- Work cannot be subcontracted or assigned to someone else
- Employer has right to discipline and dismiss the individual

Background: Three categories of workers

- **Category #2 - Independent contractors**
 - In business for themselves on their own account
 - Determine how, when and where work is performed
 - Provide their own tools
 - Can subcontract the work to others
 - Opportunity to make profit and risk of losing money
 - Not subject to discipline by entity engaging them
 - **No right to unionize**

Background: Three categories of workers

- **Category #3 - Dependent contractors**

- Performs work or services for another person in a manner that closely resembles relationship of independent contractor, HOWEVER:
 - Individual is in a position of **economic dependence** upon the business
 - Individual is under an **obligation to perform duties** for the other person or business
- Status determined by application of common law tests
- **Right to unionize**

Background: Three categories of workers

Personal
Chauffeur



Employee

Taxi Driver



Independent Contractor

Dedicated
Taxi Driver



Dependent Contractor

Intention of the parties does not matter

- *Motor Express Toronto* (2019 CanLII 78509)
 - Motor Express argued that specific emphasis should be placed on parties' intention to create an independent contractor relationship
 - Submitted that the Board has been “too mesmerized by economic dependence”
 - Board declined to consider the perceived intention of the parties
 - Test established under the *Labour Relations Act, 1995* does not rely upon determination of the parties' intention
 - Workers were serving as “middleman”, which underscores degree to which workers were integrated into the business of Motor Express
- **Economic dependence** remains a key consideration in the analysis

**Risk 2: *Bona fide* independent
contractors who are functionally
economically dependent**

Related employers: an expanding concept cont'd

- *Enercare Home & Commercial Services Limited Partnership v UNIFOR Local 975* (2022 ONCA 779)
 - Longstanding practice of using independent contractors
 - In application for certification, UNIFOR asserted independent contractors were related employers
 - Board concluded that two contractors did share common control and direction with Enercare
 - Contractors were **functionally economically dependent** on Enercare
 - Enercare had significant role in managing work sent to contractors
- Divisional Court overturned the Board's decision
- Ontario Court of Appeal restored the Board's original decision
 - Reasoning of the Board was internally coherent, rational and logical

Related employer: an expanding concept

- Section 1(4) of the *Labour Relations Act, 1995*:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Risk 3: Engaging temporary help agencies to provide workers rather than hiring them directly

Temporary help agencies

- The use of temporary help agencies does not automatically shield an employer from unionization
- Temp agency workers can be found to be employees of the client
- Central to analysis: who is the “true” employer of the temporary workers?

Temporary help agencies cont'd

- *Teamsters Local Union No. 419 v Lantic Sugar Ltd.* (2004 CanLII 23668)
 - Confirmed factors relevant to determining whether workers are actually employees for the purpose of a certification application:
 1. The party exercising direction and control over the employees performing the work.
 2. The party bearing the burden of remuneration.
 3. The party imposing the discipline.
 4. The party hiring the employees.
 5. The party with the authority to dismiss the employees.
 6. The party who is perceived to be the employer by the employees.
 7. The existence of an intention to create the relationship of employer and employees.

**Dependent contractors and
temporary employees:
Recommendations**

Key things to consider about the current labour landscape

- Classification of workers is extremely fact specific
- Broader trend towards extending employment-like rights to different groups of workers
 - E.g. gig economy workers
- Expansion of related employer concept

How can employers minimize their risk?

- Considerations for use of contractors:
 - Review agreements, practices and policies
 - Monitor the amount of work being provided to contractors
 - Ensure contractors use their own tools and equipment
 - Exclude contractors from company systems and operating procedures
 - Ensure contractors are not dependent on employer

How can employers minimize their risk?

- Considerations for use of temporary agency workers:
 - Avoid controlling or directing the performance of work to maximum extent possible
 - Do not discipline or otherwise subject them to policies that apply to employees
 - Avoid becoming involved in hiring and training processes or with payroll
 - Require agency to cycle staff and/or limit terms of specific individuals

Bargaining Trends



Bargaining trends (so far) for 2023

What employers need to know

(1) Wage trends by:

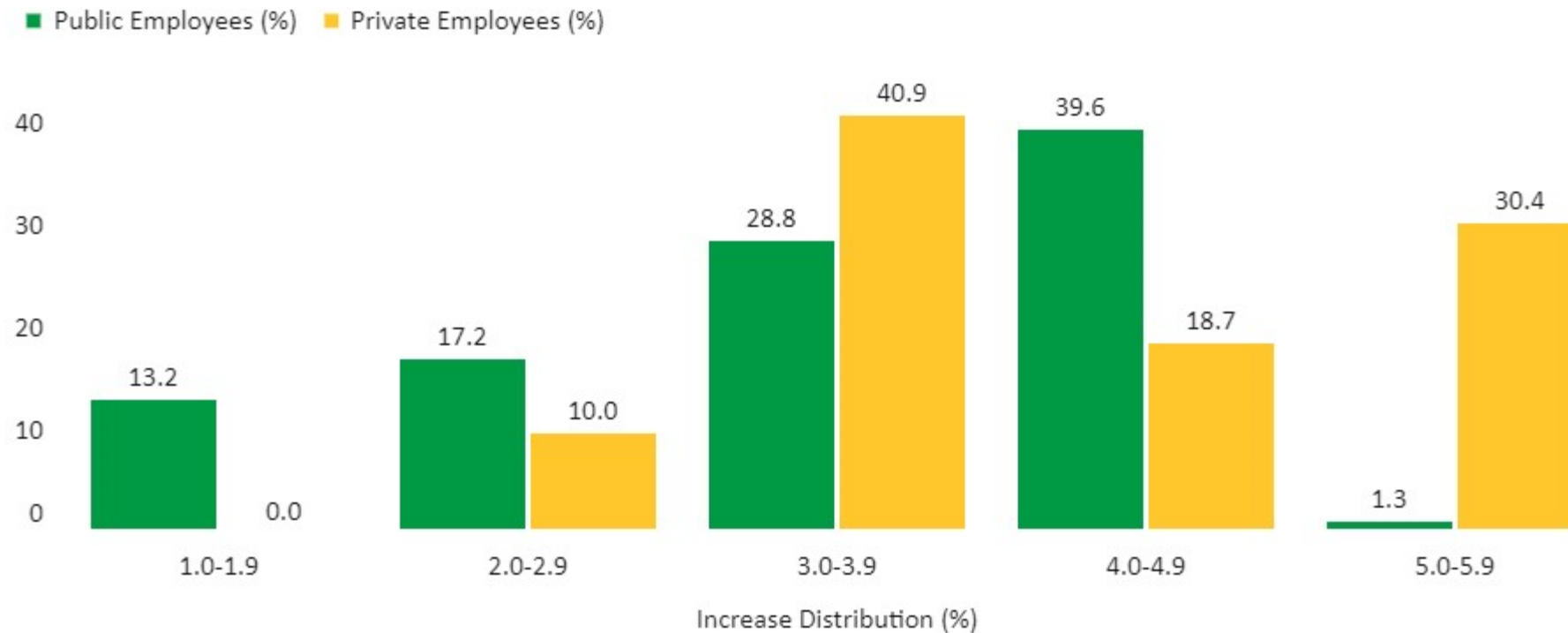
- Sector
- Industry

(2) Trends in how resolutions are being reached in 2023 (compared to 2022 and pre-pandemic [2019])

Wages – by sector

Wage trends in times of inflation

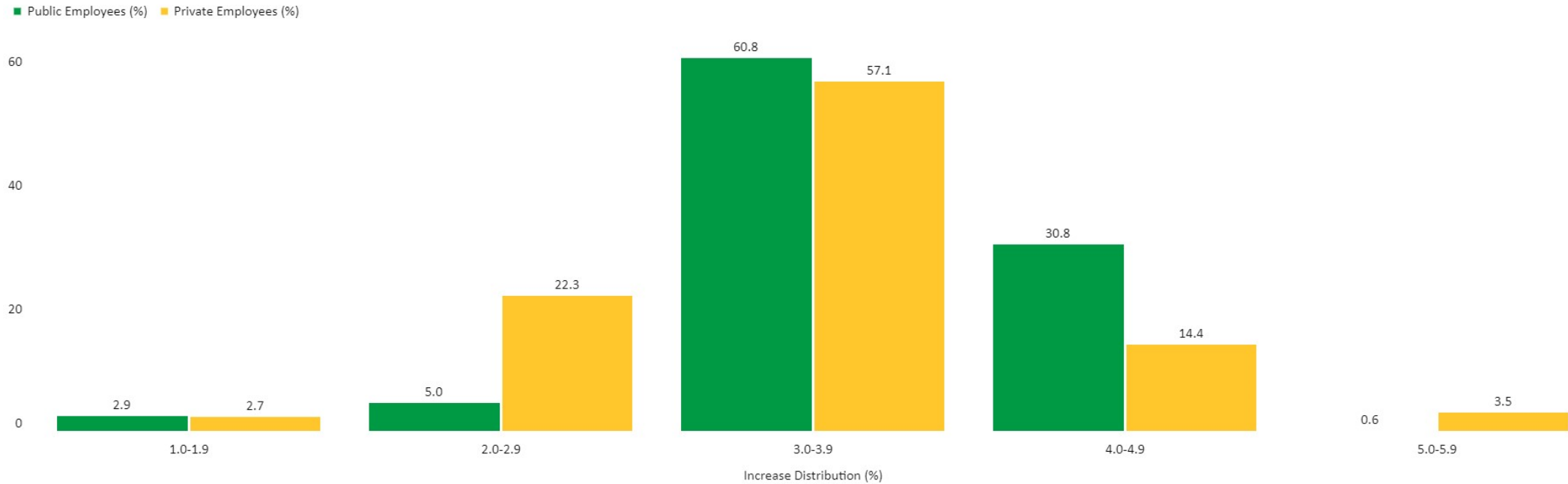
- 2023 – Q1



Wages – by sector

Wage trends in times of inflation

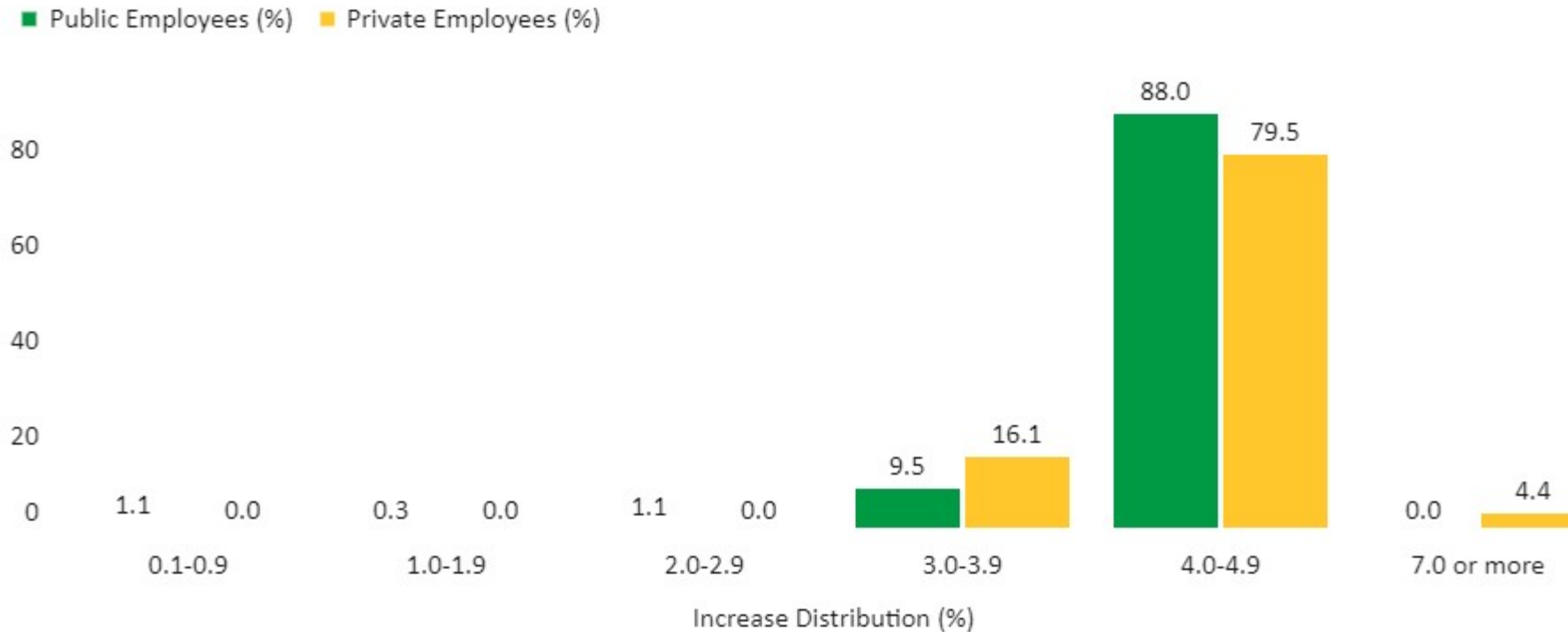
- 2023 – Q2



Wages – by sector

Wage trends in times of inflation

- 2023 – Q3



Wages – by sector

Let's compare the overall wage increases in 2022 to 2023:

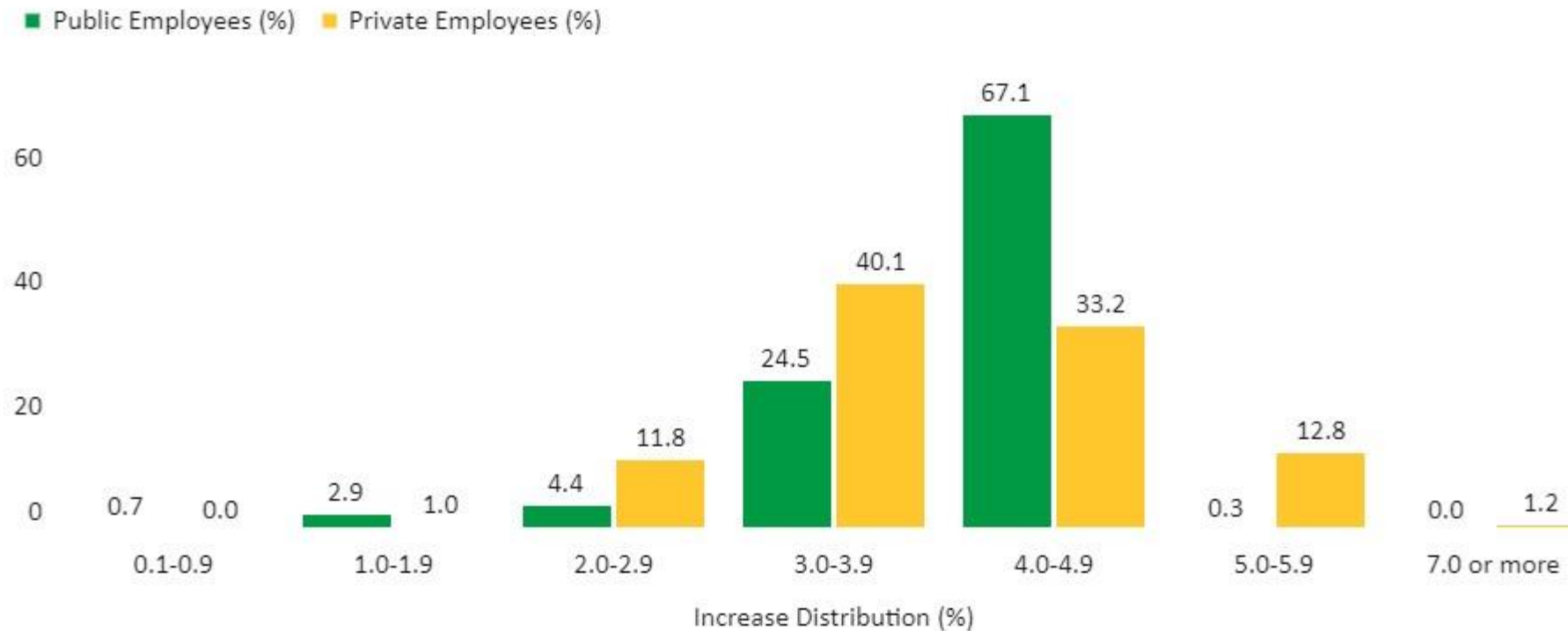
- 2022:



Wages – by sector

Let's compare the overall wage increases in 2022 to 2023:

- **2023:**



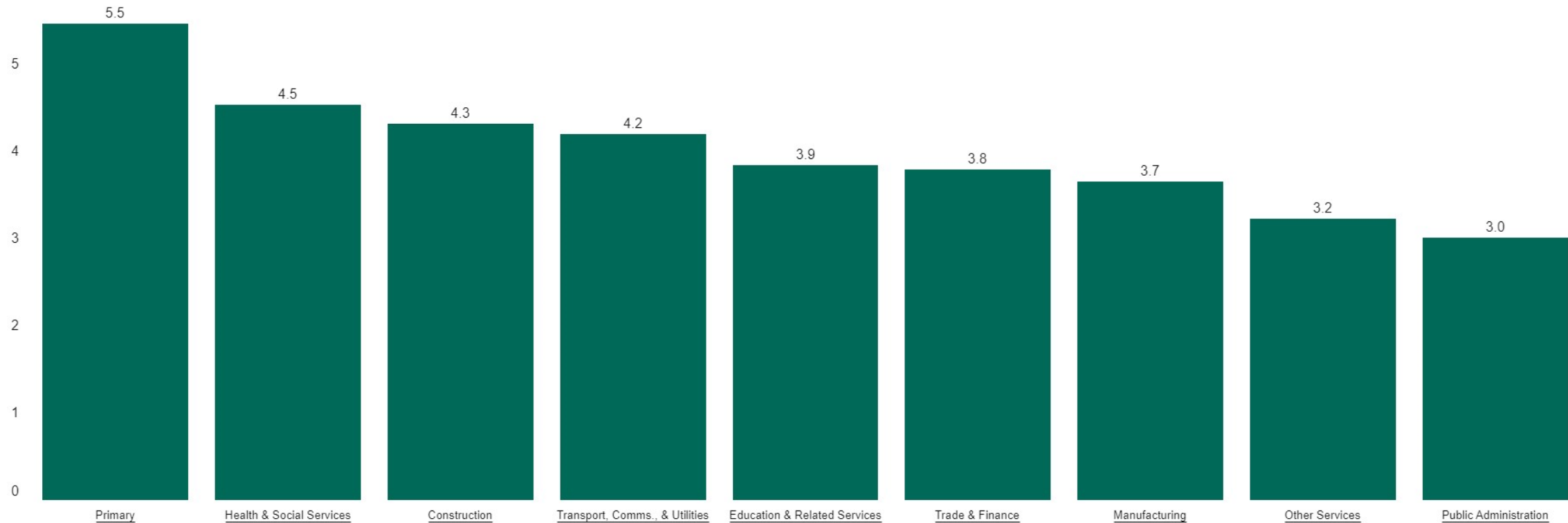
Wage trends – by sector

Average Annual Wage Increases Compared to the Consumer Price Index, 2011 - 2023



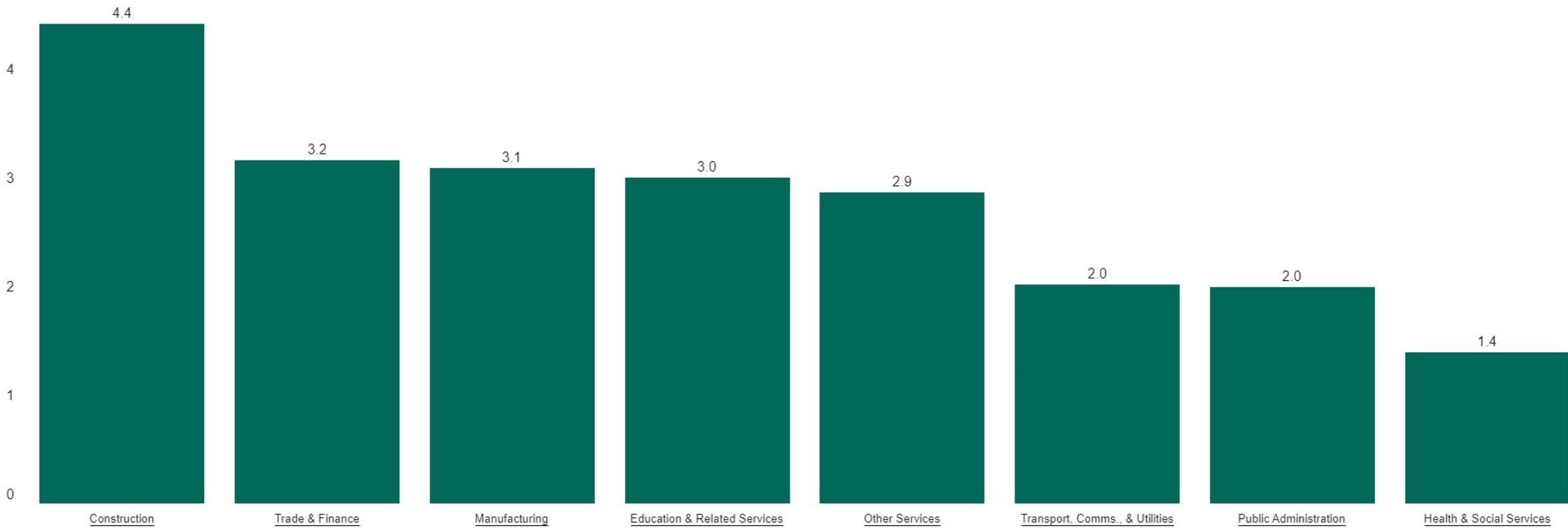
Wage trends – by industry

2023



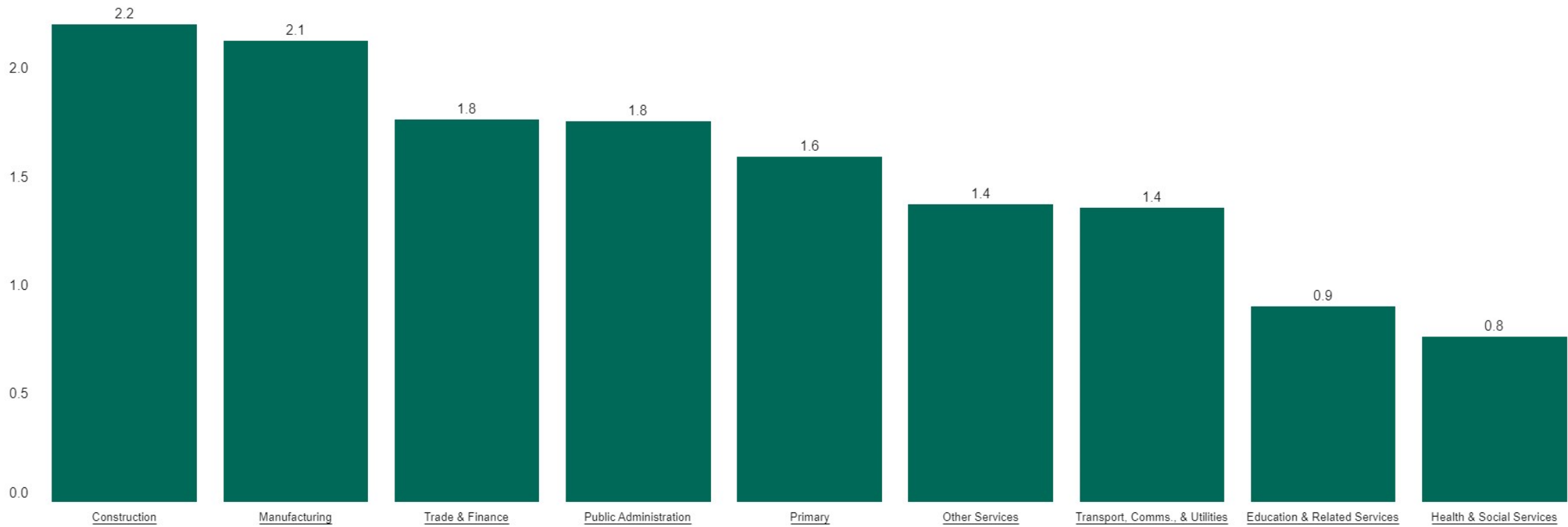
Wage trends – by industry

2022



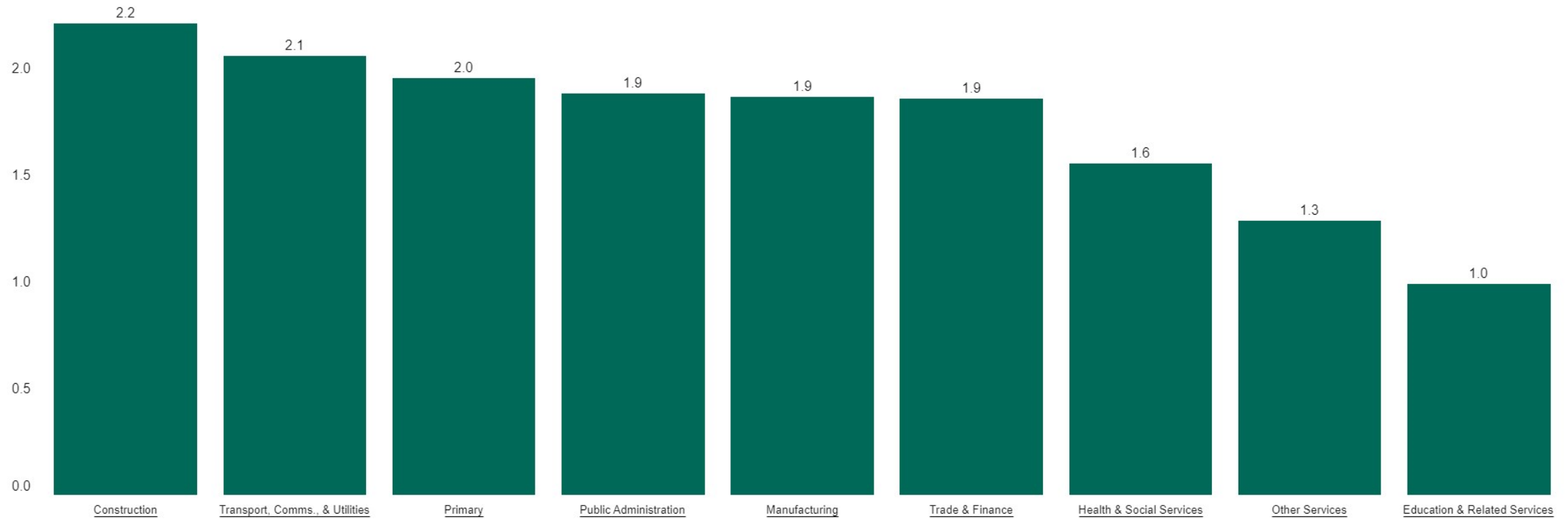
Wage trends – by industry

2021

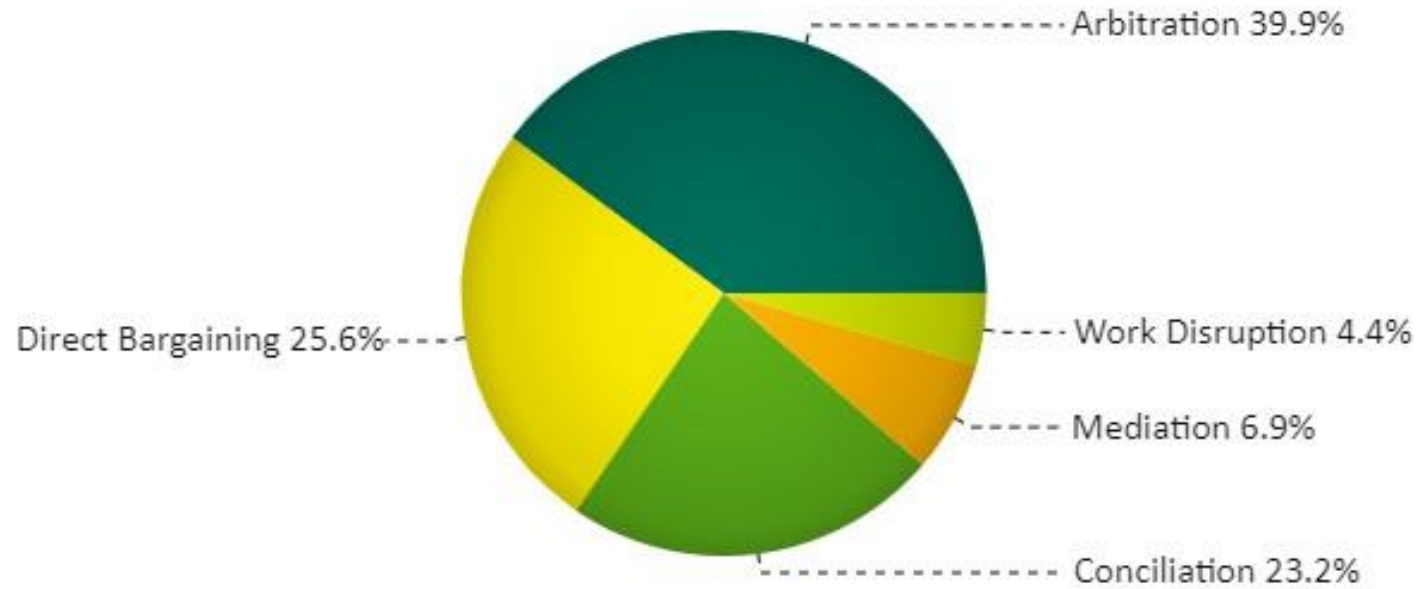


Wage trends – by industry

2020



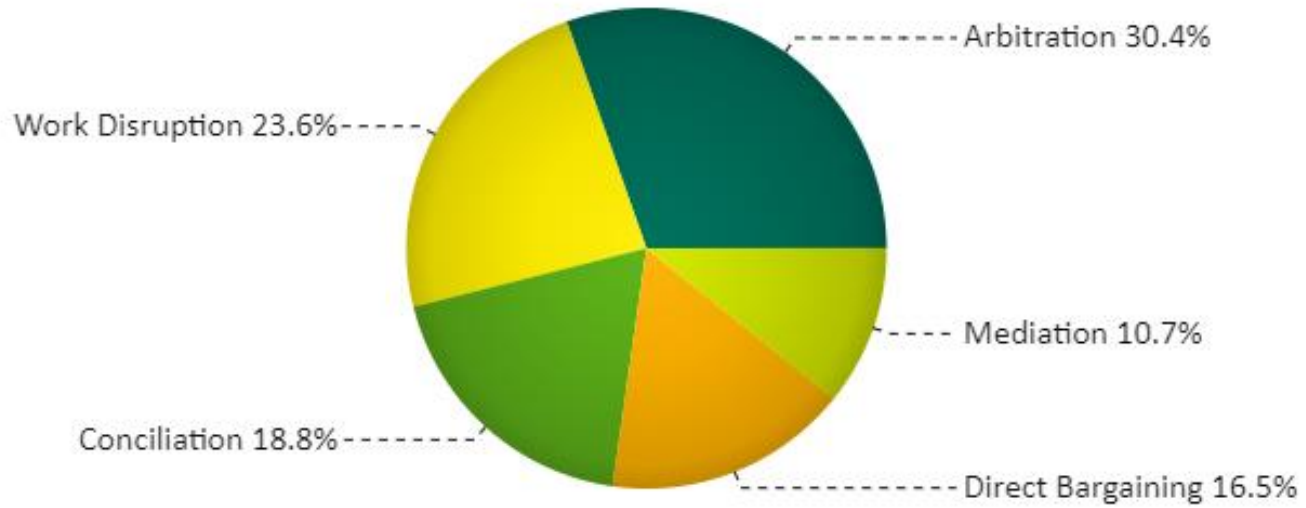
How resolutions are being reached in 2023 (so far)



Compared to 2022

Stage of Settlement (% of All Settlements)

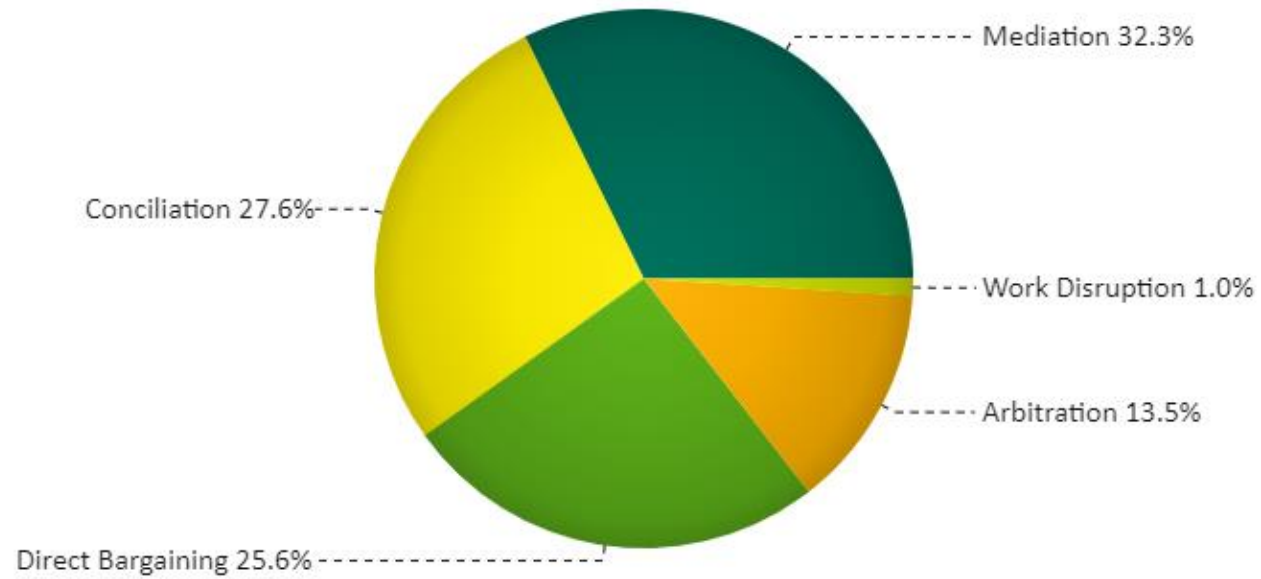
< [Chart](#) [Table](#) >



And Compared to 2019 (pre-pandemic)

Stage of Settlement (% of All Settlements)

< [Chart](#) [Table](#) >



Thank you



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