

Client Alert

A report
for clients
and friends
of the firm June 2004

NLRB Denies Non-Union Employees Representation During Investigatory Interviews.

In a decision of major importance affecting all private sector non-union employers, the National Labor Relations Board has reconsidered whether unrepresented employees have the right to a coworker's presence during an investigatory interview and has concluded that they do not. *IBM Corporation*, 341 NLRB No.148 (6/9/04). The decision frees non-union employers once again to conduct private investigations of sexual harassment and all other forms of workplace misconduct without risking an unfair labor practice.

The *IBM* decision reverses the Board's ruling in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), *enfd in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), issued just four years ago, extending the right to representation to non-union employees, a right that employees in unionized workplaces have enjoyed since the U.S. Supreme Court's decision nearly 30 years ago in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). Although heralded by organized labor as an important extension of the right of representation, the ruling was a nightmare for employers. *Epilepsy Foundation* added, to an already confusing area of the law, a host of complicated issues for the non-union employer to resolve when faced with a request for coworker representation during an investigation. For example, employers were forced to decide, often with very little time to reflect, whether the interview was investigatory (where there was a right to have a coworker present) or merely disciplinary (where there

was no such right); whether the designated coworker (who might have been involved in the incident under investigation) was an appropriate representative at the interview; and whether and to what extent the coworker had rights to participate actively in the interview? In addition, although the ruling extended to non-union employees the same rights as their unionized counterparts, it was nevertheless effectively used by many unions as an organizing tool, as it offered an opportunity to educate employees about their rights in the workplace, rights that employers may have been hesitant to advertise. The *IBM* case marks a return to a more practical interpretation of the National Labor Relations Act, limiting *Weingarten* rights to unionized employees. Since 1975, the Board has changed its position on this issue no less than four times.

The facts of the case were very simple. Prompted by allegations of harassment contained in a letter received from a former employee, *IBM* interviewed three non-union staff members. During their initial interviews, none of them requested representation. However, when the interviewing resumed a week later, the employees requested the presence of a coworker. Their request was denied by *IBM* and the interviews continued. A few weeks later, all three employees were terminated and unfair labor practice charges were filed with the NLRB. Applying *Epilepsy Foundation*, an administrative law judge found that the employees were entitled, upon request, to the presence of a coworker during the investigatory interviews, as they had a reasonable apprehension that disciplinary action might follow. Although the denial of representation was determined to be an unfair labor practice, no illegality was found in the terminations. On review, a divided Board overruled *Epilepsy Foundation* and reversed the ALJ.

Relying on the Supreme Court's teaching in *Weingarten* that the NLRB has a duty "to adapt the Act to changing patterns in industrial life," and emphasizing that there have been many changes in the workplace since its *Epilepsy Foundation* decision

just a few years earlier -- including ever-increasing requirements to conduct workplace investigations pursuant to federal, state and local employment discrimination laws; the rise in workplace violence; the increased incidence of corporate abuse/breach of fiduciary responsibility; and the presence of both real and threatened terrorist attacks in the aftermath of 9/11-- the current Board held that national labor policy would be best served by overruling *Epilepsy Foundation* and limiting the right to a representative in an investigatory interview to unionized employees, as it has been for most of the last 30 years. The Board explained that "consideration of these features of the contemporary workplace leads us to conclude that an employer must be allowed to conduct its required investigations in a thorough, sensitive, and confidential manner," and that "[t]his can best be accomplished by permitting an employer in a non-union setting to investigate an employee without the presence of a coworker."

Noting that coworkers, unlike labor organizations, (i) do not represent the interest of the entire workforce, (ii) cannot redress the imbalance of power between employers and employees, (iii) do not have the same skills as union representatives, and (iv) are not subject to any fiduciary duty, the NLRB concluded that "the right of an employee to a coworker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough and confidential workplace investigations." In its view, "limiting this right to employees in unionized workplaces strikes the proper balance between the competing interests of the employer and employees."

The majority rejected the case-by-case approach advocated by the dissenters, where the existence of a right to representation would depend on an individualized balancing of the employer's need for private investigation against the employee's need for assistance, on the ground such an approach would lead to "extensive litigation, uncertainty on the shop floor, and a general lack of federal guidance as to when the request can be granted and when it can be denied." Instead, the Board adopted a "bright line" approach under which the existence of *Weingarten* rights turns on whether or not the employees are unionized.

The effects of the NLRB's decision in the *IBM* case are clear and immediate. Non-union employers now have no obligation to grant requests by unrepresented employees to have a coworker present during any type of interview, whether investigatory or not.

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