**NLRB Restores Non-Union Employers’ Rights in Investigations**

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On June 15, 2004, the National Labor Relations Board (NLRB or Board), by a 3-2 margin in *IBM Corporation*, overruled current precedent that unionized and non-union employees alike have the right to a co-worker present during an investigatory interview that the employee reasonably believes might result in discipline -- otherwise known as Weingarten rights. As the law stands now, only unionized employees have this right. This article briefly discusses the history of Weingarten rights, dissect the holding and pertinent rationale of *IBM Corporation*, and comments on policy and practical considerations that support this decision which expressly overrules *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).

**The Winding Road to Epilepsy Foundation and the Board's Quick Retreat**

An employee's right to have a representative present during an investigatory interview began nearly 30 years ago with the Supreme Court's decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), where the Court held that a unionized employer could not deny an employee's request for representation in an interview that he reasonably believed could result in discipline. The Court based the *Weingarten* decision on Sections 7 and 9 of the Act. Section 9 allows employees to petition for union representation and hold union elections, and prohibits employers from dealing directly with unionized employees regarding the terms and conditions of employment. National Labor Relations Act § 9, 29 U.S.C. § 159(a), (c) (1994). Section 7 of the Act allows employees, whether unionized or not, to engage in "concerted [protected] activities for the [goal] of . . . mutual aid or protection." National Labor Relations Act § 7, 29 U.S.C. § 157 (1994). The rationale underlying the *Weingarten* holding was: (1) the union representative is a safeguard of the interests of the whole group of unionized/represented employees; (2) having a lone employee represent himself or herself perpetuates the inequalities that the Act sought to redress; (3) a knowledgeable union representative can protect the employee and also speed up the investigatory process for the employer; and (4) since most labor agreements already called for such representation, it was consistent with current practice. However, *Weingarten* did not address whether this right of representation extended to non-union workplaces.

Subsequently, the Board had answered (or so it thought) this question three different times before deciding *IBM Corporation* --each time coming to a different conclusion. First, in 1982, the Board extended Weingarten rights to non-unionized employees in *Materials Research Corporation*, 262 NLRB 1010 (1982), taking the position that the right of representation derives from the Section 7 right of employees to engage in concerted activity for mutual aid and protection rather than the Section 9 right of a union to act as an employee's collective bargaining representative. Thus, the Board concluded that the Weingarten right did not depend on whether the employees are represented by a union, but applied to both union represented employees and employees working in a non-union environment.

Three years later, in *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), the Board abandoned the *Materials Research* position completely, and held that Section 7 of the Act could not be interpreted to apply to non-union employers. The Board concluded that to award unrepresented employees the right to the presence
of a co-worker is inconsistent with the statutory right of a non-unionized employer to deal with employees on an individual basis. However, in 1988, the Sears rationale was modified by I.E. DuPont & Co., 289 NLRB 627 (1988), where the Board clarified that its interpretation that Section 7 of the Act did not apply to non-unionized employers was a "permissible" reading, but not a mandatory reading as was stated in Sears. In other words, the language of Section 7 of the Act permitted an interpretation either way. This modification set the stage for the Board's decision in Epilepsy Foundation.

DuPont, though, reaffirmed the Sears conclusion that unrepresented employees do not possess a Section 7 right to a fellow employee in an investigatory interview, and specifically identified at least three factors supporting its decision. First, because an employee representative in a non-union setting has no obligation to represent the entire workforce, he is less likely to "safeguard" the interests of the entire workforce. Second, an employee representative, as compared to a union representative, is less likely to have the skills necessary to effectively represent the employee being interviewed. Third, if an employer decides, as it has the right to do under Weingarten, to dispense with an employee interview and go forward with disciplinary action, the employee loses what is most likely his only chance to tell his version of the incident. In contrast, in a union setting, the employee might have the chance to present his defense in the grievance resolution process under the collective bargaining contract. In sum, the Board concluded that the interests of labor and management were better served by "declining to extend" the Weingarten right to a non-union setting. Id. at 629-630.

DuPont remained the law for 12 years until the Board did an about face in Epilepsy Foundation, and held that non-unionized employees are entitled to representation during investigatory interviews that might reasonably lead to discipline. 331 NLRB 676, 679 (2000) cert. denied, Epilepsy Foundation v. NLRB, 536 U.S. 904. The Board rejected the rationale in DuPont that co-worker representatives in non-union settings do not represent the entire workforce, lack the ability to provide effective representation, and that an employee is left without a chance to tell his story if the employer decides to forego an interview prior to discipline. Further, Epilepsy Foundation erroneously relied upon one of the premises of the Weingarten decision -- that an employee's representational right did not interfere with a legitimate employer's prerogative because an employer could forego an investigatory interview if it decided that it did not wish to allow an employee representative to take part in the interview.

However, in some circumstances, employers are not been free to discipline employees without first conducting an extensive investigation of a workplace incident, including interviewing all individuals potentially involved in the matter. For example, OSHA requires employers to investigate and interview all individuals potentially involved in matters relating to reports of incidents involving release of hazardous chemicals in the workplace. Further, an employer has an affirmative obligation under federal and some state anti-discrimination statutes to prevent and remedy sexual harassment and other forms of discrimination, which imposes a duty on employers upon receiving a report of harassment, to complete a comprehensive investigation.

Despite these apparent conflicts for non-unionized employers between complying with Epilepsy Foundation and other legal obligations, for the past four years, it has been unlawful for a non-unionized employer to refuse to honor the request of an employee to have a co-worker present during an investigatory interview which the employee reasonably believes may lead to discipline. The only two exceptions to this rule were a meeting where the employee will simply be informed of a predetermined disciplinary measure, or a meeting where the employer assured the employee that disciplinary action would not result.

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During the past four years, despite strenuous arguments on behalf of employers advocating that the Board revisit the merits of *Epilepsy Foundation*, the Board has declined. For example, in *Terracon, Inc.* 339 NLRB No. 35 (June 6, 2003), Chairman Battista and Member Acosta noted that "given the posture of this case, we find it unnecessary to pass on the merits of *Epilepsy Foundation*." *Id.* at *2*. Again in *IBEW, Local 236*, 339 NLRB No. 156 (Aug. 21, 2003), the Board noted, "[v]arious amici curiae urge the Board to overrule *Epilepsy Foundation*. In view of the disposition herein, we find it unnecessary to address those contentions." *Id.* at *7*. However, in *IBM Corporation*, the Board reconsidered this issue, this time finding that Weingarten rights do not apply to non-unionized employers.

**Features Of A Contemporary Workplace Make Epilepsy Foundation Untenable Now**

In *IBM Corporation*, three employees were interviewed on two separate occasions by management relating to a sexual harassment complaint received by a former employee. During the first interview, none of the interviewed employees requested to have a co-worker present. However, prior to the second interview, each employee interviewed requested the presence of a co-worker, but the employer denied this request. All three employees, who were terminated approximately a month after the interview, charged the employer with violating their Weingarten rights pursuant to *Epilepsy Foundation*. *Id.* at 4.

The Board accepted IBM Corporation's appeal from the administrative law judge's ruling that IBM had violated the Act by denying the three employees their Weingarten rights, and addressed whether *Epilepsy Foundation* should continue as the law. In reaching its decision to overrule *Epilepsy Foundation*, the Board noted:

> Our reexamination of *Epilepsy Foundation* leads us to conclude that the policy considerations supporting that decision do not warrant, particularly at this time, adherence to the holding in *Epilepsy Foundation*. In recent years, there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence.

> Our 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. This can best be accomplished by permitting an employer in a nonunion setting to investigate an employee without the presence of a coworker.

*Id.* at 12 (emphasis added.). In overruling *Epilepsy Foundation* and returning to its position in *DuPont* that non-unionized employees do not have Weingarten rights, the Board acknowledged that it has a duty to "adapt the Act to changing patterns of industrial life . . . ." *Id.* at 18.

**Both Practical and Policy Considerations Support the IBM Corporation Decision**

Indeed, there are practical and policy reasons to support the Board's decision in *IBM Corporation*, including:

1. Non-unionized employees are aligned or separated on many different sides of the various day-to-day employment issues that arise in a given workplace such that non-biased, effective representation is questionable. Each employee pursues his or her own individual interests to varying degrees and in some cases, an employee representative may benefit from, or be detrimentally effected by, the discipline of another employee. Assuming that a randomly selected employee is going to effectively represent the collective rights of all employees in a single disciplinary interview is without any factual foundation, and indeed, in all likelihood an erroneous conclusion.
2. The goal of delivering mutual aid and protection for employees collectively by a randomly selected co-employee is illusory at best. Instead, it is highly probable that employee representatives will differ among different individual employee interviews in non-unionized setting, providing little or no repository of institutional knowledge about how similar incidents were handled in the past or what type of discipline other employees received. Thus, delivering mutual aid and protection in the interest of other employees in the workplace is unlikely.

3. The lack of confidentiality during investigatory interviews may compromise the integrity of the investigation. For example, when employees are allowed to have a co-worker present, an investigated harasser, a friend of the harasser, or another harasser, may be the representative of the employee being interviewed. During the interview, the objectives and salient issues of the investigation would be revealed to the co-employee representative, allowing such employee to adjust his or her story to maximum advantage.

4. Various privacy statutes also impose considerable burdens on employers facing Weingarten situations. Governmental entities, for example, restrict information that can be shared with co-workers in the substance abuse area and regarding health concerns of employees in light of the HIPPA regulations. The presence of a co-employee representative during any investigatory interview involving such issues may place the employer in serious danger of violating these privacy statutes and regulations.

5. Representational rights also pose a great challenge in the context of wrongful termination. Prior to IBM Corporation, an employer who chose to forego a comprehensive investigation before terminating an employee, in order to avoid having the terminated employee bring a co-worker to the interview, could be subject to a wrongful termination suit with possible compensatory and punitive damages far in excess of the reinstatement and backpay that a bargaining unit member would receive if the discharge was not upheld.

Employees in a non-union workplace no longer have a right to have another employee present for investigatory or counseling interviews in which the employee reasonably believes may result in discipline. This does not mean that non-union employers can now disregard the Act. Employees may still avail themselves of the Act if they engage in other "concerted activities" for "mutual aid and protection." Managers and supervisors should be trained to recognize situations that could involve protected concerted activities and be instructed on how to deal with those situations appropriately. Moreover, employers should not get too comfortable with the Board's new position that nonunionized employees do not possess Weingarten rights. Indeed, the Board has left the door open to change its interpretation of Section 7 of the Act on this issue, and continued changes in the workplace and national climate may lead the Board to repeat history and reverse its view once again in the future.

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NLRB Signals That it Intends to Strictly Enforce Notice Requirements

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Recent decisions of the National Labor Relations Board have signaled that the Board intends to strictly enforce the notice requirements contained in § 8 of the National Labor Relations Act, particularly as they apply to health care employers.

Under the National Labor Relations Act ("NLRA" or "Act"), before a union may terminate or modify a collective bargaining agreement it must give notice to employer at least 60 days prior to the expiration date of the agreement. Under § 8(d)(3) of the Act, within 30 days of the date it gave such notice, the union must give notice of the dispute to the Federal Mediation and Conciliation Service ("FMCS") and the applicable state mediation and conciliation service. If the union fails to give the required notice to the conciliation services, it cannot lawfully engage in an economic strike. Any workers who do go on strike under such circumstances, do so unlawfully, lose their protected status under the Act, and may be terminated by their employer. Additionally, § 8(g) of the Act requires a union representing workers at a health care institution to give 10 days notice to both the employer and the FMCS before engaging in a strike. The notice must indicate both the date and time that the strike will occur.

In the August, 2003 decision in Alexandria Clinic, P.A., 339 NLRB No. 162, the Board overturned its prior precedent, which allowed health care unions to unilaterally extend the 10 day strike notice as long as it gave 12 hours notice, and signaled that in future, § 8(g) would be strictly enforced. Accordingly, the Board upheld a health care employer’s decision to terminate nurses who went on strike four hours after the time stated in the union’s § 8(g) notice.

More recently, the Board extended its rule of strict enforcement to the § 8(d)(3) notice requirements, ruling that when, due to a clerical error, a union inadvertently failed to give notice to the FMCS, the employer could terminate any workers who subsequently went on strike.

In Boghosian Raisin Packing Company, 342 NLRB No. 32 (6/30/04), the collective bargaining agreement between the employer and the union was set to expire. The union gave timely notice to the employer that it intended to terminate the contract. The union also prepared a notice to the FMCS and the state mediation and conciliation service as required by § 8(d)(3). The notice to the state was sent and received. However, due to a clerical error in the union offices, the notice to the FMCS was never sent. The parties continued their negotiations, but it became apparent that a strike was imminent. Anticipating the strike, the employer contacted the FMCS, inquired whether the union had given the required notice, and learned that it had not. The employer chose not to bring this fact to the union’s attention.2

After the bargaining unit voted to reject the employer’s final offer, a group of 42 employees went on strike (leaving raisins in the plant to spoil). The employer immediately contacted the union and informed

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1 The same requirements apply to an employer wishing to terminate/modify a contract. However, this article will assume that the union is the initiating party.

2 The employer representative who contacted the FMCS later testified that he believed that the union’s failure was a sign that it was not serious about going on strike, not that it was about to embark on an unlawful strike.
it that, due to its failure to give §8(d)(3) notice to the FMCS, the strike was illegal. The union soon discovered that the notice had indeed not been sent, but continued the strike, first offering to return to work under the status quo, then offering to return on the basis of the employer’s last, best, and final offer, and finally making an unconditional offer to return to work. Upon receiving this last offer, the employer informed the union that, based on the fact that they had engaged in an illegal strike, all 42 of the strikers would be terminated and replaced by new hires.

The union filed unfair labor practice charges, contending that the employer violated the Act by refusing to reinstate the striking workers. The Board, however, upheld the terminations. It rejected arguments that the strikers should be treated as protected because the failure to give notice was not deliberate, and because the strikers were not responsible for that failure. It held that the requirements of the Act were clear and would be enforced notwithstanding that strict enforcement “may in some instances yield severe consequences.”

Although it found that the employer had not acted in bad faith in not informing the union that it had failed to give notice, the Board stated that the employer’s conduct was irrelevant to the question of whether a strike violates § 8(d)(3) because the penalties associated with failure to give notice are not dependant on who was “at fault” for the omission. The Board held that “[t]he public interest is best served, in our view, by strictly enforcing the requirements of 8(d) . . . and the [employer’s] conduct, even had it been undertaken in bad faith . . . would not justify an exception.” Furthermore, not only was the employer not required to bring the failure to give notice to the union’s attention, once the unlawful strike began, the employer was entitled to use the union’s vulnerable position to press its advantage in negotiations.

The Board’s decisions in Alexandria Clinic and Boghosian Raisin Packing Company, are the latest indications that the Board intends to strictly enforce the notice requirements of § 8 of the Act, particularly in the health care industry. This strict enforcement policy offers potential advantages to health care employers faced with threatened strike action by unions. First, employers should check whether unions have complied with the 8(d) notice requirements by checking with the federal and state conciliation services when a strike seems imminent to see whether the union has given the required notice. If a union has not strictly complied and threatens what would be an unlawful strike, the employer will have significant leverage and the ability to disrupt the union’s plans. It should consider how best to use that leverage, whether by pressing its advantage at the bargaining table or by exercising its right to terminate unprotected strikers, if the union proceeds with its threatened action. Due to the many important implications of these decisions, health care employers should consider working with their labor lawyers to develop a plan of action as a strike become imminent, and as the situation develops.

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