



Labor and Employment Law Information Memo

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THE NATIONAL LABOR RELATIONS BOARD HOLDS THAT NON-UNIONIZED EMPLOYEES DO NOT HAVE THE RIGHT TO HAVE A CO-WORKER PRESENT AT INVESTIGATORY INTERVIEWS: THE *IBM CORP.* DECISION

In 1975, the United States Supreme Court held, in *NLRB v. J. Weingarten Inc.*, that employees in unionized workplaces are entitled to union representation during investigatory interviews that might reasonably be expected to lead to disciplinary action, because such a request for representation constitutes protected concerted activity under Section 7 of the National Labor Relations Act ("NLRA"). This right has become known as a *Weingarten* right.

On June 9, 2004, in *IBM Corp.*, 341 N.L.R.B. No. 148, the National Labor Relations Board ("Board") held (by a 3 to 2 margin) that this *Weingarten* right does not extend to employees in non-union settings – in other words, non-unionized employees do not have the right to have a co-worker present at investigatory interviews that might lead to disciplinary action. The *IBM Corp.* decision marks a reversal of the Board's 2000 decision in *Epilepsy Foundation of Northeast Ohio*, and marks the third time in the past 23 years that the Board has changed its position on this issue.

This information memo briefly reviews the Board's prior holdings on this issue, and describes the policy considerations that caused the Board to change its position on this issue once again.

The Board's Prior Holdings

The Board first extended *Weingarten* rights to employees in non-union settings in 1982, in its *Materials Research Corp.* decision. Only a few years later, the Board reversed its initial position, holding in *Sears, Roebuck & Co.* and in *E.I. DuPont & Co.* that non-unionized employees are not entitled to representation at investigatory interviews.

In its 2000 *Epilepsy Foundation* decision, the Board overruled its *Sears* and *DuPont* decisions, and held that non-union employers are obligated to grant an employee's request to have a co-worker present at an investigatory interview that might reasonably be expected to lead to discipline. In the *Epilepsy Foundation* case (which was also decided by a 3 to 2 margin), the Board reasoned that Section 7 of the NLRA protects employees from discharge or other discipline for engaging in concerted activities for their mutual aid or protection. The Board noted that all employees – whether unionized or not – have Section 7 rights, and concluded that non-unionized employees therefore have the same *Weingarten* right as unionized employees.

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The *IBM Corp.* Decision

In *IBM Corp.*, the employer, IBM Corporation (“IBM”), conducted investigatory interviews of three employees who had been accused by another employee of harassment. During the initial investigatory interviews of the three employees, none requested the presence of a co-worker. However, each of the three employees requested the presence of a co-worker during a second set of investigatory interviews conducted approximately one week later. These requests were denied, and each employee was subsequently discharged based on the results of the investigation.

The administrative law judge assigned to the case held, based on the Board’s *Epilepsy Foundation* decision, that IBM had committed an unfair labor practice by denying the three employees their *Weingarten* rights. On review, the Board observed that several factors have caused an increase in the need for investigatory interviews in the workplace, such as the application of discrimination and harassment laws, the increase in instances of workplace violence (including both actual and threatened terrorist attacks), and the increase in the number of incidents of corporate abuse and fiduciary lapses. In light of this growing need for employers to conduct investigatory interviews, the Board believed that its decision in *Epilepsy Foundation* should be reconsidered. The Board examined several policy considerations and held that those policy considerations justified overruling *Epilepsy Foundation* and returning to the holdings in *Sears* and *DuPont*.

First, the Board noted that co-workers do not represent the interests of the entire workforce in the manner that union representatives do. As a result, their interest is only in safeguarding the rights of the employee under investigation, even if the rights of other employees may be compromised. Second, the Board observed that co-workers cannot reduce the imbalance of power between employers and employees in the manner that union representatives can, because union representatives have “official status” under the collective bargaining agreement and typically have knowledge of the employer’s workplace policies. Third, co-workers generally do not have the skills that union representatives have in resolving problems and facilitating workplace investigations. As a result, co-workers whose only connection to the employee under investigation is one of friendship are more likely to frustrate or impede the

employer’s investigation. Fourth, the presence of a co-worker may compromise the employer’s ability to keep certain types of information confidential, such as racial or sexual harassment allegations, issues relating to drug or alcohol addiction, and employee health matters. These problems relating to confidentiality are less likely to occur in unionized settings, because a union representative has an obligation to safeguard the interests of all employees and therefore also has an interest in keeping such matters confidential.

Based on all of these policy considerations, the Board held that employees in non-union settings do not have the same *Weingarten* rights that unionized employees have.

Significance of the *IBM Corp.* Decision

The significance of the Board’s *IBM Corp.* decision for non-union employers is clear. Non-union employers are no longer obligated to grant an employee’s request that a co-worker be present at investigatory interviews, even if those investigatory interviews can reasonably be expected to lead to disciplinary action.

If you have any questions regarding the *IBM Corp.* case or need any assistance or advice regarding workplace investigations, please contact:

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