NLRB Rules Nonunion Employees Have No Right to Representation During an Investigatory Interview

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In a decision which impacts the workplace investigation practices of all employers, the National Labor Relations Board has ruled that nonunion employees do not have the right to have a representative present during an interview that might reasonably lead to disciplinary action. In a 3-2 decision released on June 15, 2004 (IBM Corp., 341 NLRB No. 148), the Board found that the so-called Weingarten rights of unionized employees do not apply to employees not represented by a union. The IBM Corp. decision overrules the Labor Board’s 2000 decision in Epilepsy Foundation of Northeast Ohio 331 NLRB 676, which extended Weingarten rights to nonunionized employees. The IBM Corp. ruling marks the fourth time in the past 23 years the Board has changed its position on this issue.

What are Weingarten rights?

In 1975, the United States Supreme Court upheld a decision by the Board that unionized employees have a right, protected by Section 7 of the National Labor Relations Act, to insist upon union representation during an investigatory interview conducted by their employer, provided the employee “reasonably believes” the interview “might result in disciplinary action.” NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975). The Supreme Court explained that this right arises from the Act’s “guarantee of the right of employees to act in concert for mutual aid and protection.” The right to representation is limited to situations in which an employee specifically requests representation. An employer is not required to advise the employee of this right in advance, and this right is triggered only in the case of investigatory meetings which may result in disciplinary action and not to meetings when, for example, the employer communicates a decision regarding a disciplinary matter.

The Weingarten Progeny

Since the Supreme Court’s 1975 decision, the Board has changed directions on whether Weingarten rights apply to employees who are not unionized. In 1982, the Board decided Materials Research Corporation 262 NLRB 1010, and held that Weingarten rights applied to nonunion employees. Two years later, in Sears Roebuck & Co. 274 NLRB 230, the Board reversed its position and held nonunion employees were not entitled to Weingarten rights. In its Epilepsy Foundation decision in 2000, the Labor Board concluded that its earlier rulings were inconsistent with the Supreme Court’s rationale in Weingarten and reasoned that Weingarten rights should be granted to all employees regardless of whether they are represented by a union.

The IBM Corp. Decision

IBM Corp. involved three nonunion employees who alleged they requested and were denied co-worker representation during investigatory interviews which stemmed from a complaint regarding harassment in the workplace. The employees were subsequently terminated from employment. The employees filed unfair labor practice charges against IBM alleging that the denial of representation during the investigatory interviews was unlawful. The administrative law judge who heard their case ruled that IBM violated the Act in denying the requested coworker representation.

In reversing Epilepsy Foundation, the Board found the employees did not have a right to have a co-worker present at an investigatory interview that might lead to discipline. The Board’s decision largely was based on policy issues underlying an employer’s need to conduct confidential and discreet investigatory interviews in the workplace. The Board noted: “some employers, faced with security concerns that are an out-growth of the troubled times in which we live, may seek to question employees on a private basis.” The Board specifically recognized that employers must be able to conduct fact finding interviews in “sensitive situations” and that the confidentiality of such interviews...
cannot be compromised. The Board concluded: “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 non-union setting to investigate an employee without the presence of a co-worker.”

In addition to policy considerations regarding the contemporary workplace, the Board held that the extension of Weingarten rights to nonunion employees is inappropriate due to the dissimilarities between unionized and nonunionized workforces. For example, in Weingarten, the Court held that the presence of a union representative at an investigatory interview is essential to the protection of the interests of the bargaining unit as a whole, and the presence of a union representative and such interviews helps redress the imbalance of power between employers and employees. In IBM Corp., the Board indicated the same rationale does not hold true for a nonunion workforce, where co-workers do not have an obligation to represent the interests of the entire workforce. Moreover, co-workers in a nonunion setting are less able to redress an “imbalance of power” due to the fact that that he or she has no collective bargaining agreement or bargaining unit from which to derive authority.

Furthermore, the Board found that nonunion co-workers lack the same level of skill that experienced union representatives have to elicit facts and facilitate investigatory interviews, and thus are unlikely to achieve the purpose and goals of a representative as contemplated in Weingarten.

The Board clarified that nonunion employees do have the right to request the presence of a co-worker at an investigatory interview, and that an employee cannot be disciplined for making such a request. The Board’s holding is that where employees are not represented by a union, employers have no obligation to accede to the request for a co-worker representative to be present during an investigatory interview which might result in disciplinary action.

In light of the NLRB’s IBM Corp. decision, employers should reexamine how they conduct their investigatory interviews.

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