In a victory for non-unionized employers, on June 9, 2004, the National Labor Relations Board (“NLRB”) overruled its decision in Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000), and held that a non-union employee does not have the right to have a co-worker present at an investigatory interview that the employee reasonably believes might result in discipline. The decision, IBM Corp., 341 NLRB No. 148 (2004), marks the fourth time in the past 23 years that the Board has changed its position concerning whether non-union employees have the right to have a co-worker present during an investigatory interview (“Weingarten rights”).

Weingarten rights stem from the Supreme Court’s decision in NLRB v. J. Weingarten, 420 U.S. 251 (1975). In that case, the Court determined that an employer violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”) by denying a unionized employee’s request to have a union representative present at an investigatory interview which the employee reasonably believed might result in disciplinary action. The Court stated that the union representative “safeguard[s] not only the particular employee’s interest, but also the interests of the entire bargaining unit. . . .” Weingarten, 420 U.S. at 260.

Most recently, in Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000), the NLRB extended Weingarten rights to non-union employees. The NLRB maintained that “Section 7 [of the NLRA] rights are enjoyed by all employees and are in no way dependent on union representation for their supplementation.” Epilepsy Foundation, 331 NLRB at 678. The Epilepsy Foundation decision required all employers – union and non-union – to provide Weingarten rights to their employees.

The NLRB’s decision in IBM reverses the Epilepsy Foundation decision and restricts Weingarten rights to unionized employees. In this case, IBM, whose employees are not represented by a union, denied three employees’ requests to have a co-worker present during investigatory interviews about a former employee’s allegations that they had engaged in harassment. An NLRB administrative law judge, applying Epilepsy Foundation, had found that IBM violated Section 8(a)(1) of the Act by denying the employees’ requests for the presence of a co-worker. By a vote of 3-2, the NLRB ruled that Weingarten rights do not apply in a non-union setting.

The NLRB recognized that changes in employment laws and recent security concerns require that investigations into matters like substance abuse, improper Internet use, dishonesty, threats, harassment and discrimination be conducted “in a thorough, sensitive, and confidential manner.” Indeed, failure to do so can expose an employer to charges that it did not conduct a fair investigation or that unfair discipline was imposed based on incomplete information.

According to the NLRB, the presence of a co-worker increases the possibility that information will not be kept confidential, reduces the chance that the employer will get the whole truth, and increases the likelihood that employees with information about sensitive subjects will not come forward. The NLRB held that the right of a non-union employee to a co-worker’s presence is “outweighed by an employer’s right to conduct prompt, efficient, thorough, and confidential workplace investigations.”
Therefore, a non-union employer is not required to provide *Weingarten* rights. However, it is important to note that the NLRB’s decision in *IBM* does not change the rules for unionized employees. A unionized employer violates Section 8(a)(1) by denying an employee’s request to have a union representative present at an investigatory interview which the employee reasonably believes might result in disciplinary action.

*For more information about the matters discussed in this alert, please contact Merritt J. Green, by email at mjgreen@venable.com or by phone at 703.760.1638*

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