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NLRB overturns non-union employees' rights to representation during investigative interviews and restores employers' rights to deal directly with their employees during investigations.

NLRB Rules that Weingarten Rights No Longer Apply to Non-Union Workforces

By Mark Jodon

On June 9, 2004, the National Labor Relations Board ("NLRB") in *IBM Corp.*, 341 NLRB No. 148, overruled its *Epilepsy Foundation* decision, which had granted non-union employees the right to be represented by a co-worker at an investigatory interview that could result in disciplinary action. This right to representation was originally derived from the U.S. Supreme Court's 1975 *Weingarten* decision in which the Court recognized that unionized employees had a right to representation at investigatory interviews. Prior to the *Epilepsy Foundation* decision issued in 2000, the Board limited the right to representation at investigatory interviews to union-represented employees.

Compelling Policy Considerations

The Board relied on compelling policy considerations to overrule its *Epilepsy Foundation* decision and limit employee representation during investigations to unionized workforces. The Board reasoned that recent changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations and new security concerns raised by incidents of national and workplace violence, warranted a departure from the *Epilepsy Foundation* decision. The Board explained: "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." The Board recognized the possibility that a co-worker could actually frustrate or impede the

employer's investigation, as well as compromise the confidentiality of the information disclosed during the investigative interview. Additionally, the Board considered the significant difference between a unionized workforce and non-union workforce with respect to the company's ability and right to deal individually with employees. The Board in *Epilepsy Foundation* had not considered this significant distinction. For these reasons, the Board chose not to follow the *Epilepsy Foundation* decision, and instead concluded that on balance the right of an employee to have representation at an investigatory interview in the absence of representation was outweighed by the employer's right to conduct prompt, efficient, thorough and confidential workplace investigations. The Board found that limiting the right to representation to unionized settings struck the proper balance between the competing interest of the employer and the employees.

Practical Implications of NLRB's Decision

The *IBM* decision was decided by a narrow margin, on a three to two vote. The Board indicated that a reasonable interpretation of the National Labor Relations Act supports either position regarding the right to representation at investigatory interviews. A change in the current Board's composition could result in further review of the *IBM* decision.

For the time being, however, the Board has relieved human resource professionals, managers and supervisors of the burden of determining whether a non-union employee's request for representation during an investigation must be granted. Employers are no longer faced with the *Hobson's* choice of granting the request for

representation at the risk of compromising the confidentiality of the investigation on one hand or declining to interview the Employee requesting representation at the risk of compromising the thoroughness of the investigation. This decision frees employers to deal directly with its non-union employees in disciplinary matters without exposing the company to potential liability for tort claims, such as defamation or negligence, as a result of interjecting third party employees into the investigation.

Mark Jodon is a Shareholder with Littler Mendelson's Houston, Texas office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com; Mr. Jodon can be reached at (713) 652-4739 or MJodon@littler.com.
