

NLRB Rules that Nonunion Employees Have No Right to Representation at Investigatory Interviews

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The National Labor Relations Board (NLRB) recently held that nonunion employees do not have the right under the National Labor Relations Act (NLRA) to have a coworker present during investigatory interviews that could lead to disciplinary action. The NLRB's decision in *IBM Corp.* overturns its 2001 decision in *Epilepsy Foundation of Northeast Ohio* and marks a return to earlier precedent.

Following the Supreme Court's decision in *NLRB v. J. Weingarten Inc.*, which held that unionized employees are entitled to representation during investigatory interviews, the NLRB found in 1982 that the same right applied to nonunionized employees. A few years later, however, the board reversed itself, finding that no such right applied in a nonunion workplace. In the *Epilepsy Foundation* case the board again reversed itself, returning to its earlier position that nonunion employees were, in fact, entitled to the rights outlined in *Weingarten*. On June 9th, the board returned to its initial position, finding that nonunion employees do not have the right to have a co-worker or other representative present during investigatory interviews, even if the interview may lead to discipline.

In explaining its return to earlier precedent the board quoted from the Supreme Court's *Weingarten* decision, noting that it has a duty

"to adapt the Act to changing patterns of industrial life," and finding that "[t]he years since the issuance of *Weingarten* have seen a rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks on our country." The board examined the *Epilepsy Foundation* decision and concluded that for the following policy reasons the *Weingarten* right to representation should not extend to nonunion employees: [1] the representative of a union employee has the duty to protect the entire union, while a representative of a nonunion employee has no such obligation to other workers; [2] a union representative has the power to level the bargaining field, whereas a colleague does not have the power of a bargaining unit behind him or her and does not have a union representative's knowledge of the workplace; [3] union representatives act as facilitators, explaining the facts and issues in a manner that may avoid the filing of a grievance, while an untrained coworker, chosen by the subject of the investigation for personal reasons, could actually impede the process; and [4] while a union representative is bound to the concepts of discretion and confidentiality that are essential to most workplace investigations, a coworker is not. For all these reasons, the board concluded that "on balance, the right of an employee to a coworker's

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presence in the absence of a union is outweighed by the employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations."

After *IBM*, a nonunion employee can still ask to have a colleague present during an investigatory interview that might lead to discipline, but the request does not need to be granted. An employer, however, cannot discipline an employee for making the request, and *IBM* does not, of course, affect a unionized employee's right to have a representative present at investigatory interviews.

For further information on this decision, or any employment related issue, please contact John Zandy, Peter Lefebvre or Steve Harris at 203.498.4400, Marcia Keegan at 860.297.3733, or Larry Peikes at 203.363.7609.

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