GOLDBERG KOHN

Client Alert

From the Labor and Employment Group

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Non-Union Employees No Longer Entitled To Representation During Investigatory Interviews

It's hard enough for employers to keep track of their legal obligations under the National Labor Relations Act (NLRA) without the National Labor Relations Board (NLRB) changing its mind every few years. Adding to the confusion is a misconception by many private, non-union employers that the NLRA only applies to "union" companies. In a recent decision, however, the NLRB backtracked by relaxing the NLRA's coverage in one area of importance to non-union employers.

The right to representation at investigatory interviews has its origin in a 1975 Supreme Court case titled NLRB v. J. Weingarten, 420 U.S. 251 (1975). In that case, the Supreme Court decided that union workers have a right (hence, the "Weingarten Right") to co-worker representation during any investigatory meeting with the company in which the employees may be subject to discipline. For many years, the NLRB held this right did not apply to interviews with non-union employees.

In 2000, however, the NLRB broke with established precedent by determining that non-union employees are also entitled to Weingarten Rights. Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000). For the last four years, Epilepsy Foundation was the law and employers were required, upon request of even a non-union employee, to allow the employee to have a witness during such interviews. This decision caused a great deal of confusion and distress for some employers who saw this rule as an impediment in the non-union setting. For example, employers who wanted to conduct private investigatory interviews in sensitive allegations such as discrimination and harassment were required to allow another employee in the room.

Fortunately for employers, the NLRB has flip-flopped again. Recently, the NLRB overturned Epilepsy Foundation by holding that non-union employees are not entitled to have representation at disciplinary meetings. IBM Corp., 341 NLRB No. 148 (2004). Two of the five Board members that decided IBM Corp. dissented and would have upheld application of Weingarten Rights in the non-union setting.

The IBM Corp. decision only changes the law with respect to non-union employees; for union employers, Weingarten Rights will still be enforced. Accordingly, certain employee interviews that may lead to discipline for union employees still require an employer to allow a witness when the employee requests one.

As is apparent from the NLRB's recent decision, the laws surrounding labor and management relations in this country continue to be very fluid. Based on the dissent in IBM Corp., it would not be surprising if a Labor Board under another presidential administration changed the law again. Employers should check any written manuals and procedures to ensure they are in compliance with the current state of the law. We will continue to monitor this and other developments at the NLRB so we can keep you apprised of your ever-changing obligations under the NLRA.

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