

VEDDER PRICE

Labor & Employment Bulletin

A bulletin designed to keep clients and other friends informed on labor and employment law matters

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NLRB: NONUNION EMPLOYEES MAY INSIST ON COWORKER PRESENCE DURING INVESTIGATORY INTERVIEW

In an abrupt reversal of precedent, a majority of the National Labor Relations Board finds that employees in nonunion facilities have the right, upon request, to have a coworker present during investigatory interviews that may lead to discipline. The July 10 decision, *Epilepsy Foundation of N.E. Ohio*, orders reinstatement with back pay of a nonunion employee terminated for refusing to attend an investigatory interview unless a fellow employee was present.

History of "Weingarten Right"

In unionized settings, a represented employee has the right to have a union representative present, upon request, during an investigatory interview which the employee reasonably believes may result in discipline. This right is known as the *Weingarten* right because it stems from the United States Supreme Court's 1975 decision in *NLRB v. Weingarten Inc.* There, the Court accepted the Board's position that the right to union representation during such interviews falls within the National Labor Relations Act's (the "Act") guarantee that employees may engage in "concerted activities for the purpose of mutual aid or protection."

In a 1982 decision, *Materials Research Corp.*, the Board expanded the *Weingarten* right to include the right to request the presence of a coworker at an investigatory interview held in a nonunion setting. Three years later, however, in *Sears, Roebuck & Co.*, the Board overruled *Materials Research Corp.*, holding that extending

Weingarten to unrepresented employees infringes on an employer's right to deal with employees on an individual basis when no union is present. The Board affirmed this position in *E.I. DuPont & Co.*, a case decided in 1988, but noted cryptically that the National Labor Relations Act "might be amenable to other interpretations."

The *Epilepsy Foundation* Decision

In *Epilepsy Foundation*, two employees (Borgs and Hasan) of the nonunion Epilepsy Foundation of Northeast Ohio prepared a memorandum critical of their supervisor. After receiving the memo, the Foundation's Executive Director asked Borgs to meet with him and the criticized supervisor. Borgs refused to meet unless Hasan also was present. The Executive Director declined Borgs' request and subsequently fired him for insubordination based on his refusal to participate in the meeting. Borgs filed an unfair labor practice charge with the Board, claiming, among other things, that his discharge was unlawful because he was denied the right to be represented by a fellow employee at an investigatory interview he believed could result in discipline.

An Administrative Law Judge for the Board held that the employer did not violate the Act by discharging Borgs because, under current Board law, the *Weingarten* right to representation in investigatory interviews is limited to "employees in unionized workplaces who request the presence of a union representative." The Judge noted that it was his duty to "apply established Board precedent."

In a 3-2 decision, the Board reversed the Judge and ruled that nonunion employees *are* entitled to have a coworker present during investigatory interviews. As to its own precedent, the majority stated that "*Sears* and *DuPont* misconstrue the language in *Weingarten* and erroneously limit its applicability to the unionized workplace." The majority reasoned that, on its face, the Act does not limit the right to engage in "concerted activities for the purpose of mutual aid or protection" to unionized employees.

Dissenting Board Member Brame argued that the majority's decision "wreaks havoc" with the scheme of the National Labor Relations Act and wrongly forces nonunion employers to deal with the equivalent of a labor organization where the employees have not collectively made the choice to be represented. The majority dismissed

Brame's position, saying "the employer is completely free to forego the investigatory interview and pursue other means of resolving the matter." In a separate dissent, Member Hurtgen expressed concern that employers in a nonunion setting now face an "unknown trip-wire" because they will generally be unaware that *Weingarten* extends to their employees. Labeling this concern "speculation," the majority disagreed that an employer's ignorance of employee rights justifies denying those rights to employees.

What Should Nonunion Employers Do In Light Of *Epilepsy Foundation*?

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As a practical matter, most nonunion employees probably will be unaware that the Board has granted them the *Weingarten* right. Further, employers are not obligated to inform their employees of this right. It is up to the employee to request that a representative be present at an investigatory interview.

Nevertheless, the nonunion employer faced with a request for coworker representation at an investigatory interview risks an unfair labor practice charge if it declines the request and disciplines an employee for refusing to participate without representation, or takes disciplinary action based on an interview where the employee was denied his request for representation. The alternatives are to forego the interview or grant the request. Further, if granted, *Weingarten* has been interpreted to require only coworker representation – not representation by an employee's personal attorney, and to restrict the coworker representative from engaging in disruptive conduct during the interview. Where the matter under investigation is particularly serious, for example, workplace violence or sexual harassment, the employer may wish to obtain legal counsel on how best to proceed.

Epilepsy Foundation may be challenged on appeal before the United States Court of Appeals for the Sixth Circuit, which has jurisdiction over Ohio, Michigan, Kentucky and Tennessee. However, even if the Sixth Circuit disagrees with the Board, unless the United States Supreme Court rules on the issue, the Board likely will apply *Epilepsy Foundation* in other jurisdictions.

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