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. . . And Around We Go Again: Non-Union Employers Are No Longer Required To Allow Co-Workers To Be Present During Workplace Investigation Interviews

On June 9, 2004, the National Labor Relations Board ("NLRB") reversed itself again and determined that an employer is not required to allow employees who are not represented by a union to have a co-worker or other representative present during investigatory interviews. *IBM Corp.*, 341 NLRB No. 148 (June 9, 2004). The right to request a co-worker's presence at an investigatory interview is referred to as the *Weingarten* right, after the Supreme Court's decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), which granted this right to union employees. The Board's decision in *IBM Corp.* is a rare bit of welcome news to employers with non-union employees, especially in light of employers' ever-expanding obligations to police their workforces and to investigate claims ranging from sexual harassment to workplace violence.

Highlighting the volatile political nature of NLRB appointments, the Board's decision in *IBM Corp.* represents a complete about-face from its 2000 decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), *enfd in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001). The Board, in *Epilepsy Foundation*, itself had reversed fifteen years of Board precedent in holding that employers were required to grant a non-union employee's request to be represented by a co-worker during investigatory interviews.

The Board's *IBM Corp.* decision determined that, on balance, the realities of the modern workplace supported its view that *Weingarten* rights should not extend to the non-union workplace. The Board

relied on that fact that, in a non-union workplace, there is no majority representative with any legal duty to represent more than the narrow interest of the particular employee at issue. Further, in a non-union workplace, the selection of a co-worker representative was unlikely to assist by bringing to the interview process any specialized skill in labor-management relations. Rather, the Board concluded such a co-worker would more likely be an impediment to an employer's obligation to conduct a full and fair investigation.

The Board's decision was also based on its view that, outside of the union environment, *Weingarten* rights often placed employers in a quandary with respect to fulfilling their duty to conduct workplace investigations in a thorough and confidential manner. First, the presence of a co-worker could hinder the investigation by dissuading the target employee from fully and honestly responding to the inquiry. Second, the employer may have a strong interest in keeping the nature of the interview confidential, especially during the pendency of the investigation. Third, the presence of a co-worker not bound by any confidentiality restrictions could inhibit both the target and the employer with respect to the completeness of the investigation. The Board also recognized that the employer's only other option, to forego the interview rather than allow the presence of a co-worker representative, was illusory, because it forced the employer to make critical determinations based on incomplete information and could even subject it to liability for

wrongful discharge claims based on a flawed investigation.

The Board's decision in *IBM Corp.* allows employers to discipline any non-union employee who refuses to participate in interviews without a co-worker or other representative present. This is welcome news to employers, since complex workplace investigations, which are becoming the norm in today's environment, can easily be stymied by an employee seeking to derail the investigation to avoid responsibility for his or her actions.

One cautionary note: because both the Board and Courts have recognized that either interpretation of *Weingarten* is permissible, this issue can and probably will be revisited at some point in the future, especially if the political make-up of the currently conservative NLRB changes. Still, you can rely on the new decision until it is formally changed, since any future reversal should not be retroactive to an employer action taken before any such decision is announced. Also, for employers with unionized employees, the *IBM Corp.* decision does not alter the obligation to allow these employees to have a co-worker present if it appears discipline could result from the investigatory interview.

If you have any questions about this issue or any other labor and employment topic, please contact a member of Archer & Greiner's Labor and Employment Department at (856) 795-2121 or visit our website at www.archerlaw.com.