

NLRB Returns to Earlier Precedent Holding That *Weingarten* Right Does Not Apply in Nonunion Workplaces

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On June 9, 2004, the National Labor Relations Board held that employees who are not represented by a union do not have the right, under the National Labor Relations Act (the “Act”), to have a coworker present during an investigatory interview. *IBM Corp.*, 341 NLRB No. 148 (June 9, 2004). This right is known as the *Weingarten* right, based on the Supreme Court’s decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). The Board’s decision in *IBM Corp.* marks a return to earlier precedent holding that the *Weingarten* right does not apply in a nonunion workplace. The decision eliminates this obligation for the more than 90 percent of private sector employers whose employees are not represented by a union.

The Supreme Court in *Weingarten* held that it is a violation of Section 8(a)(1) of the Act to deny an employee’s request to have a union representative present during an investigatory interview that the employee reasonably believes will result in disciplinary action. As the Board in *IBM Corp.* acknowledged, the Supreme Court in *Weingarten* did not address whether this right applies in a nonunion workplace.

Until the NLRB’s decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), *enf’d in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), the Board had held that the *Weingarten* right does not apply in nonunion workplaces. Given that unions today represent less than 10 percent of the private sector workforce, *Epilepsy Foundation* dramatically expanded the availability of the *Weingarten* right.

The Board majority in *IBM Corp.* reexamined the *Epilepsy Foundation* decision and held that policy considerations do not support application of the *Weingarten* right in nonunion workplaces. In particular, the Board noted the increasing need for employers to conduct investigatory interviews in response to complaints of discrimination or sexual harassment, incidents of workplace violence, security concerns in the aftermath of September 11, and various other allegations of criminal activity or violations of company policy. The Board found that employers must be allowed to conduct such investigations in a “thorough, sensitive, and confidential manner.” The Board concluded that “[t]his can best be accomplished by permitting an employer in a nonunion setting to investigate an employee without the presence of a coworker.”

Member Schaumber concurred in the Board majority’s finding that policy considerations support limiting the *Weingarten* right to employees who are represented by a union. Members Liebman and Walsh dissented from the Board’s decision in *IBM Corp.*

Morgan Lewis represented IBM in connection with the trial and the exceptions to the Board in this case. If you would like further information regarding the issues raised in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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