

CLIENT ALERT

Employment, Labor & Immigration

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Employers May Again Refuse Requests Of Non-Union Employees To Have Co-Workers Present At Interviews

The National Labor Relations Board (“NLRB”) has ruled that non-union employees are not entitled to have a co-worker present during an investigatory interview by their employer. In *IBM Corporation*, the NLRB reversed its position on this subject for the third time in nineteen years. Although this decision may be appealed or overturned yet again in the future, at least for now, it is the controlling law in this area.

Factual Background

Kenneth Paul Schult, Robert William Bannon and Steven Parsley (the “Charging Parties”) were non-union employees of IBM. On October 15, 2001, IBM interviewed each of the Charging Parties in connection with its investigation of a former employee’s allegations of harassment. None of the Charging Parties requested that a witness attend the interview. On October 19, 2001, they were all suspended.

IBM interviewed the Charging Parties again on October 23, 2001. Prior to this second set of interviews, each of them requested that a co-worker be present during the interviews. IBM denied their requests and proceeded with the interviews. Approximately one month later, IBM terminated the Charging Parties’ employment.

The Charging Parties filed an unfair labor practice charge with the NLRB, alleging that IBM had violated their right to have a co-worker present during their interviews.

The Administrative Law Judge

Following a hearing, the Administrative Law Judge held that IBM violated Section

8(a)(1) of the National Labor Relations Act (the “Act”) by denying the Charging Parties’ requests that co-workers be present during interviews that they reasonably believed would result in disciplinary action. Section 8(a)(1) prohibits employers from interfering with an employee’s right, among other things, to exercise his or her right under Section 7 of the Act to “engage in ... concerted activities for the purpose of ... mutual aid or protection.” In reaching this holding, the Judge relied upon the 2000 decision in *Epilepsy Foundation of Northeast Ohio*, in which the NLRB held that non-union employees were entitled to have co-workers present during investigative interviews that they had reasonable cause to believe would result in disciplinary action.

The NLRB

In a 3 to 2 decision, the NLRB reversed the Administrative Law Judge’s decision and overturned *Epilepsy Foundation*. The NLRB noted that the Act could be subject to two interpretations – either granting or not granting non-union employees the right to have a co-working present during interviews – and that each would be a permissible reading of the Act. Accordingly, the NLRB considered which interpretation would best effectuate the Act’s goals.

The NLRB indicated that new circumstances required a re-evaluation of *Epilepsy Foundation*. In particular, the NLRB focused on the rise, since the Supreme Court’s 1975 decision in *NLRB v. J. Weingarten*, 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.”

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The NLRB explained that *Epilepsy Foundation* had followed *Weingarten*, which held that a union member had a right to have a union representative present during an investigative interview that he or she reasonably believed might lead to discipline. According to the NLRB, *Weingarten* sought not only to safeguard the employee's interests, but also the interests of the entire bargaining unit – an irrelevant concern in a non-union workplace. The NLRB then considered other reasons why the presence of a co-worker in a non-union workplace does not further the Act's goals in the same way as the presence of a union representative.

The NLRB explained that, in a union setting, a union representative is bound by a duty of fair representation to represent the interests of the entire bargaining unit. In a non-union setting, however, a co-worker has no such obligation. The NLRB further explained that a union representative is accustomed to dealing with the employer, and their relationship aids in the

development of consistent practices regarding workplace issues and contributes to a quicker and more efficient resolution of the problem requiring the investigation. Union representatives, unlike ordinary co-workers, also typically have experience that enables them to propose solutions to workplace issues. In fact, the NLRB explained, a co-worker is unlikely to skillfully assist in facilitating an interview or facilitate in resolving the issues and, because of a personal or emotional connection to the employee, could actually impede or frustrate the investigation. Also, the co-worker may be a co-conspirator or otherwise involved in the incident requiring investigation.

The NLRB also explained that not requiring the employer to include a non-union employee's co-worker in an interview permits the employer to deal with employees on an individualized basis, which is the critical distinction between unionized and non-unionized workplaces. The NLRB also stated that the presence of a non-union employee at interviews might

jeopardize the secrecy of confidential information. Unlike typical co-workers, union representatives have a duty not to reveal or misuse information obtained during an employee interview. A non-union co-worker's presence might also inhibit the employee.

The NLRB concluded that its "examination and analysis of all these factors lead us to conclude that, on balance, the right of an employee to a coworker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations." The NLRB continued, "limiting this right to employees in unionized workplaces strikes the proper balance between the competing interests of the employer and employees."

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

IMMIGRATION NEWSFLASH

Renewing and Replacement of Green Cards

As part of a pilot program, the U.S. Citizenship and Immigration Service recently announced that a pilot program launched in Los Angeles in June 2004 has decreased the waiting time for replacement green cards from an average of 10-12 months to less than one week. By utilizing electronic filing of an Application to Replace a Permanent Resident Card (Forms I-90), a receipt is produced indicating an Application Support Center (ASC) where the individual may go to have digitized photographs and fingerprints taken. The Receipt Notice provides a toll-free number that individuals may call to arrange an appointment at the ASC. Individuals who have previously filed Forms I-90 may elect to refile their applications on line to take advantage of a decrease in processing time.

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