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NLRB REVERSES *EPILEPSY FOUNDATION*:

EMPLOYEES IN NONUNION SETTING ARE NO LONGER ENTITLED TO REPRESENTATION IN AN INVESTIGATORY INTERVIEW

The National Labor Relations Board has reversed its 2000 ruling in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), *enfd. in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001) and returned to its pre-*Epilepsy Foundation* precedent holding that the *Weingarten* right does not extend to employees in a nonunionized setting. *IBM Corp.,* 341 NLRB No. 148 (2004).

In *IBM Corp*., an Administrative Law Judge, applying *Epilepsy Foundation*, concluded that the Respondent violated Section 8(a)(1) of the Act by denying the requests of nonunionized employees to have a coworker present during investigatory interviews concerning harassment allegations made by a former employee. Respondent appealed this decision to the Board. By a 3-2 vote, the Board ruled in favor of the Respondent and concluded that policy considerations warranted a reversal of *Epilepsy Foundation*. The Board stated that "[t]he years since the issuance of *Weingarten* have seen a rise 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." *IBM Corp*., 341 NLRB No. 148, slip op. at 4 (2004). The Board observed that in today's workplace employers are often called upon to interview employees on a wide array of charges and issues, including workplace violence, discrimination, sexual harassment, corporate abuse, fiduciary lapses and "real and threatened" terrorist attacks. *Id.* The Board concluded that an employer "must be allowed to conduct its required investigations in a thorough, sensitive and confidential manner" and that this is best accomplished by permitting an employer to investigate an employee without the presence of a coworker. *Id.,* slip op. at 3.

This is not the first time that the Board has reversed its position on the application of *Weingarten* rights to a nonunionized setting. In 1982, the Board considered this issue in *Materials Research Corp*., 262 NLRB 1010 (1982), and extended *Weingarten* rights to employees who request the presence of a coworker in a nonunionized setting. In reaching this conclusion, the Board relied on the "mutual aid or protection" clause contained in Section 7 of the Act. However, just three years later, in *Sears, Roebuck & Co.,* 274 NLRB 230 (1985), the Board reversed *Materials Research Corp*., rejecting its earlier interpretation of Section 7. The Board modified its *Sears, Roebuck & Co.* rationale on remand from the Third Circuit in *E.I. Dupont & Co*., 289 NLRB 627 (1988). In *Dupont*, the Board determined that the view that the Act did not confer *Weingarten* rights in a nonunionized setting was a permissive, and not a mandatory, interpretation of the Act. Nonetheless, the Board declined to return to the rule of *Materials Research Corp.,* concluding that the interests of labor and management were better served by not extending *Weingarten* rights to a nonunionized setting. *Dupont*, 289 NLRB at 629-630. In 2000, the Board revisited this issue in *Epilepsy Foundation*, reversed course yet again and returned to the standard set forth in *Materials Research Corp*.

The *IBM Corp*. decision does not affect unionized employees' *Weingarten* rights. An employee still has the right to request the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action. An employer's options in responding to such a request also have not changed. An employer may: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of continuing the interview without union representation or having no interview at all.