Nonunion Employers Face Broadened NLRB Jurisdiction

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Over the past year, the National Labor Relations Board has extended collective bargaining rights to groups of employees previously prevented from organizing and expanded its regulatory grasp over nonunion employers. This article provides a brief overview of key cases from the past year that will affect both union and nonunion workplaces.

WEINGARTEN RIGHTS EXTENDED TO UNREPRESENTED EMPLOYEES

In *Epilepsy Foundation of Northeast Ohio,* 331 NLRB No. 92 (July 10, 2000), the Board extended to nonunion workplaces the so-called Weingarten right to have a representative present at an investigatory interview that could lead to discipline.

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court held that an employer violated Section 8(a)(1) of the National Labor Relations Act by denying an employee's request to have a union representative present at an investigatory interview which the employee reasonably believed might result in disciplinary action. The Court held that an employee who seeks representation in such a scenario is exercising his or her Section 7 right to organize under the Act. Until recently, Weingarten rights have been limited to employees who are represented by a union.

However, *Epilepsy Foundation* expands *Weingarten* rights to nonunion employees.The facts involved two nonunion employees who wrote a memo discussing problems they were having with a supervisor. After writing the memo, the executive director of the foundation directed one of the employees to meet with him alone. The employee requested his co-employee's presence at the meeting. The employer fired the employee for his persistent refusal to comply with the request to meet alone.

The Board found the employer violated the Act by terminating the employee for refusing to attend a meeting he believed could lead to discipline without the presence of a coemployee. In extending Weingarten rights to nonunion employees, the Board found it was upholding the policy that Section 7 rights are enjoyed by all employees, whether represented or not. Although nonunion employers are free to bargain with employees individually, the Board held, the right to have a co-worker present during a meeting does not require the nonunion employer to bargain collectively with employees.

Although *Weingarten* has now been extended to all employees, nonunionized and unionized employers alike should know the following rules and limitations regarding *Weingarten* rights:

• **The employee must ask.** *Weingarten* rights only applywhere the employee asks for the co-employee or union representative to attend. The employer is not required to inform the employee of his or her "right" to have someone present.

• **"Bad news" meetings do not allow for *Weingarten* rights.** No *Weingarten* rights exist where the purpose of the meeting is simply to inform the employee they are to be disciplined or discharged. Unless there is going to be some sort of investigation at the meeting, where the employee's responses to certain questions could affect the employer's decision, the employee does not have the right to have a representative.

• **Employer may carry on inquiry without a meeting.** If the employee facing an investigatory interview requests a representative, the supervisor has the option to tell the employee that the investigation will be carried on without the benefit of the meeting. Thus, the employee has the choice between going on with the meeting without a representative or co-employee, or having no meeting at all.

• **Not on company time.** The employer is under no *Weingarten* to give the employee time to consult with the co-employee or union representative during company time if the interview date otherwise provides the employee adequate opportunity to consult.

• **Participation, not interference.** The co-employee or union representative may participate in the meeting, but may not interfere. The employee can speak with the representative, but the employee must always answer each question.

• **No outside attorneys.** *Weingarten* and *Epilepsy Foundation* do not allow nonunion employees to have their attorneys present at investigatory meetings. Only the request to have a co-employee present implicates Section 7 rights to organize.

TEMPORARY EMPLOYEES MAY NOW JOIN BARGAINING UNITS WITH REGULAR EMPLOYEES

The Board's recent decision in *M.B. Sturgis/Jeffboat Division* 331 NLRB No. 173 (Aug. 25, 2000), allows temporary employees to join a collective bargaining unit with regular employees if they share similar wages, hours, and working conditions, even over the objection of both the temporary agency employer and the employer to which they are assigned. The decision overturns the Board's previous rule that temporary employees could not join a bargaining unit unless both employers approved. Under the new decision, both temporary agencies and employers who use them could be compelled to negotiate with the union over joint employees to the extent that they each control conditions of employment.

In overturning its own precedent, the Board noted that earlier cases were decided before the massive growth in the use of the contingent workforce. The Bureau of Labor Statistics reports that "alternative employment arrangements" accounted for as much as 4.3 percent of all employment in February 1999, or 5.6 million employees. The Board stated that previous precedent denied "numerous affected employees the same Section 7 rights to selforganization accorded to other employees…"

According to the Board's decision, for temporary employees to join a bargaining unit at an assigned employer workplace, there must be a joint employer relationship between the supplier employer and the user employer, and a sufficient "community of interest" between the temporary and permanent workers. If only one employer determines matters of wages and conditions of employment for the temporary employees, the decision may not apply. Further, in order to prove a sufficient community of interest, temporary employees must have, among other things, a reasonable expectation of continued employment. The Board has typically found that temporary employees assigned to employers for short, finite periods of time do not have a reasonable expectation of continued employment.

Although the new decision will allow union organizers to target temporary employees, it may favor management in the long run. Temporary employees have not historically been pro-union, and adding them to the numbers of regular employees may dilute union support.

INTERNS, RESIDENTS AND OTHERS NOW ELIGIBLE TO ORGANIZE

In 1999, the Board ruled new groups of previously excluded employees eligible to organize. In *Mississippi Power & Light Co*., 328 NLRB No. 146 (July 26, 1999), the Board held that power dispatchers are nonsupervisors and are allowed to organize. In *Boston Medical Center*, 330 NLRB No. 30 (Nov. 26, 1999), the Board overturned precedent more than 20 years old by finding a medical center's house staff of interns, residents, and fellows were employees within the meaning of the Act, even though they were students. In so holding, the Board noted that house staff receive compensation in the form of a stipend from which taxes are withheld as well as fringe benefits reflective of employment status, including various forms of paid leave.

Students are typically excluded from coverage under the Act to avoid the intrusion of collective bargaining into areas involving academic freedom. However, the Board noted that house staff are not typical students because they provide patient care for the hospital and do not pay tuition, register for classes, or take examinations. Rather, residents and interns are at the hospital to gain sufficient experience and knowledge to become board-certified in a specialty. The Board further noted that it cannot be assumed that unions representing interns and residents will made demands upon employers that will interfere with the educational mission of the institution. Finally, the Board rejected arguments that house staff were supervisory employees, since they lacked the authority to recommend discipline of other staff.
