The NLRB's Recent Decision Lowers the Trigger for Employee Weingarten Rights

Labor & Employment Law Update

By Beverly Alfon on August 2, 2018

Employers have had reason to exhale a bit in the Trump era of the National Labor Relations Board (NLRB). However, as demonstrated in a recent case involving employee *Weingarten* rights, long-standing federal labor principles and facts can nonetheless tilt a decision against the employer.

A Quick Refresher: The term "*Weingarten* rights" refers to the rights of union-represented employees to demand union representation during an employer's investigatory interview that may result in discipline (as opposed to a meeting where discipline is simply being issued to the employee). The U.S. Supreme Court upheld these employee rights in *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975), but made clear that the right to union representation is not automatic, but arises "only in a situation where the employee requests representation." Consistently, for the past 40 years, the NLRB and federal courts have held that the right to representation at an investigatory interview only attaches once the employee has requested representation.

In June, the Board issued a decision addressing what constitutes a "request" for representation. In *Circus Circus Casinos, Inc.*, 366 NLRB 110 (2018), a union-represented employee stated prior to an interview that he had "called the Union three times [and] nobody showed up, I'm here without representation." The Board majority (2 of 3-member panel) found that this was enough to constitute a request for representation under *Weingarten*.

The majority pointed out that statements or inquiries such as – "I would like someone there that could explain to me what was happening" or "Should I have someone here with me, someone from the unions," have been found sufficient to trigger *Weingarten* rights before. However, in *Circus Circus Casinos, Inc.*, the employee did not ask the employer for union representation, tell the employer that he wanted a union representative, or ask the employer whether or not he needed a union representative present. The employee did not attempt to stop the interview. At most, he indicated that he did not have union representation. Nonetheless, the Board ordered the employer to reinstate the employee (who was discharged as a result of the interview) with full back pay from his termination in 2013, and reimburse him for job-search and interim-employment expenses.

Now, it is clear that *Weingarten* rights are triggered even if an employee does not directly address the request for representation to the employer. The inquiry has shifted from the question of whether the employee communicated a request for union representation to the employer – to whether or not the employer is somehow "on notice" of the employee's preference for union representation.

Best Practice: Review and update your policy and procedure related to investigations involving union-represented employees. Review the *Weingarten* standards with your investigators. If the employee makes any comment or suggestion regarding union representation before or during an interview, ask the employee to clarify whether s/he is requesting union representation before proceeding with the interview, or if s/he would like to proceed without representation. If the employee confirms that s/he prefers union representation, either (a) immediately suspend the interview until a union representative is identified and present or (b) immediately end the interview altogether. Remember that a union-represented employee should not be disciplined for requesting union representation at an investigatory interview.

Being knowledgeable about the do's and don'ts during an investigatory interview where a union representative is present is equally important. It is important to consult with experienced labor counsel in order to avoid drawing any unfair labor practice charges.