

**“NOW YOU HAVE IT, NOW YOU DON’T”:  
THE NLRB’S FICKLE AFFAIR WITH THE  
WEINGARTEN RIGHT AND THE NEED FOR  
CONGRESS TO END THE CONTROVERSY**

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**ABSTRACT**

For more than two decades a debate has raged over whether nonunionized employees are entitled to a witness in investigatory interviews that could lead to disciplinary actions. Such a right was determined to exist for unionized employees in the 1975 landmark decision of *National Labor Relations Board v. J. Weingarten, Inc.* Ever since, the National Labor Relations Board (NLRB) has wrestled with the question of whether the so-called “*Weingarten* right” should be extended to all employees, whether unionized or not. After reviewing the important decisions that illustrate the NLRB’s incessant flip-flopping on the issue, we provide a summary of the NLRB’s latest (June 2004) rationale for denying this right to nonunion workers. To prevent the further and inevitable politicization of this issue if left to the whims of an ever-shifting NLRB majority, we suggest that Congress more fully enunciate the applicability of the *Weingarten* right to the nonunion workplace by amending the relevant section of the NLRA.

The most important single piece of federal legislation in the area of labor-management relations is the National Labor Relations Act (NLRA) [1]. Under the NLRA, Congress created public policy that seeks to balance the rights, responsibilities, and bargaining power of employers and employees. Individuals tend to think about the NLRA in terms of a unionized workplace. What many

employers don't realize, however, is that certain critical elements of the NLRA also apply to the nonunionized environment. For more than two decades, a debate has raged over whether nonunionized employees are entitled to a witness in investigatory interviews that could lead to disciplinary actions.

In its 1975 landmark decision in *National Labor Relations Board v. J. Weingarten, Inc.*, the U.S. Supreme Court determined that unionized employees (now only about 8% of the private sector workforce) were entitled to a representative during investigatory interviews that may lead to disciplinary action [2]. Ever since, the National Labor Relations Board (NLRB), an independent administrative agency whose members are appointed by the president subject to Senate approval, has wrestled with the question of whether the so-called "*Weingarten* right" should be extended to nonunion employees as well.

In an earlier article for this *Journal*, we chronicled the flip-flopping of the NLRB's decisions regarding the applicability of the *Weingarten* right to the nonunion workplace [3]. In 2000, the NLRB decided in *Epilepsy Foundation of Northeast Ohio* to grant the *Weingarten* right to nonunion workers [4]. The *Epilepsy Foundation* decision reversed earlier NLRB rulings in *Sears, Roebuck & Co.* (1985) [5] and in *E.I. DuPont de Nemours & Co.* (1988) [6], each of which had held that the *Weingarten* right was applicable only in a unionized environment where an exclusive bargaining agreement existed. These two decisions themselves overruled the NLRB's 1982 ruling in *Materials Research Corp.* [7], which held that a right to be accompanied by a co-worker at an investigatory meeting applies to both unionized and nonunionized settings.

The tortured history of the applicability of the *Weingarten* right recently has taken yet another turn, and once again the politicization of the NLRB and its rulings has caused the NLRB to reverse course. Only four years after being extended the *Weingarten* right, nonunion employees have now again lost that right as a result of the NLRB's June 2004 decision in *IBM Corporation* [8]. Both employers and employees, particularly in the nonunionized environment, have been whipsawed mercilessly by a fickle NLRB that too easily grants workplace rights and then takes them away.

This article briefly updates the ongoing saga of the NLRB's extension and retraction of the *Weingarten* right to nonunionized employees. After reviewing the important decisions that illustrate the NLRB's incessant flip-flopping on this issue, we provide a summary of the NLRB's latest rationale for denying this right. Our position is: 1) nonunion workers and their employers need greater stability and predictability regarding their respective rights and responsibilities, particularly in the area of workplace investigations and interviews that could potentially lead to disciplinary action; and 2) to prevent the further and inevitable politicization of this important workplace right if left to the whims of an ever-shifting NLRB majority, we suggest that Congress more fully enunciate the applicability of the *Weingarten* right to the nonunion workplace by amending the relevant sections of the NLRA.

## THE HISTORICAL FRAMEWORK

The NLRB’s recent decision in *IBM Corporation* can best be understood by considering the historical context surrounding the ongoing debate over whether nonunion employees enjoy certain rights previously thought to apply only to unionized workers. In this section, we identify the relevant sections of the NLRA that give rise to the controversy, and then outline the key decisions interpreting the federal law in this area.

### Relevant Provisions of the NLRA

When Congress enacted the NLRA in 1935, a major public policy goal was to create a better balance between the bargaining power of employers and employees. Congress was fearful that an unequal balance of power that favored employers would undermine economic progress. While the NLRA is often thought of in terms of applying only to unionized environments, and while it did support unionization and collective bargaining as a means of reducing labor strife, crucial sections of the legislation are applicable to all employees, whether unionized or not.

#### *Section 7*

A key provision of the NLRA is Section 7, which contains the following statement of employee rights applicable to *all* employees:

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in *other concerted activities* for the purpose of collective bargaining *or other mutual aid or protection* . . . (emphasis added) [1, § 7].

The phrase “concerted activities,” used in conjunction with “mutual aid or protection,” is typically thought of in terms of group activity, but it is erroneous to believe that concerted activity can only be undertaken by groups of two or more people. Within the context of the NLRA, actions taken by individuals can also be considered “concerted activities” [9]. The Supreme Court, in *NLRB v. City Disposal Systems, Inc.* (1984), for example, ruled that “a lone employee’s invocation of a right grounded in his collective-bargaining agreement is . . . a concerted activity in a very real sense” [10, p. 832] because “the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement” [10, p. 829]. But while an individual may engage in concerted activity, that is not necessarily protected unless it also serves to provide mutual aid and protection beyond the individual—the benefits of the activity must eventually inure to the entire group from which the individual employee derives membership, whether or not a collective bargaining agreement exists.

*Section 9(a)*

This section of the NRLA accords an NLRB-sanctioned union the exclusive right to represent employees. It states in relevant part:

Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment [1, § 9(a)].

An employer's obligation to deal exclusively with union representatives flows directly from this right. Arguably, an employer is not obligated by statute to deal with anyone other than a representative recognized by the employer or certified by the NLRB as an exclusive representative of the employees. In a nonunionized environment, then, where there is no exclusive representative, are employers free to deal with individual employees on matters relating to the terms and conditions of employment?

**The “Weingarten Right”**

In *NLRB v. J. Weingarten, Inc.*, the Supreme Court confronted the issue of whether an employee being interviewed regarding a workplace theft was entitled to the presence of her union representative at the investigatory interview [2]. The Court found that Section 7 of the NRLA gives workers the right (i.e., the “Weingarten right”) to have a union representative at the investigatory interview if the employee reasonably believes that disciplinary action will result from the interview. The Court, however, did not address directly whether the *Weingarten* right applied equally to nonunion workplaces. Justice Powell, writing in dissent, was prescient in noting that “while the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act ‘in concert’ in employer interviews, also exists in the absence of a recognized union” [2, at fn. 1, p. 270].

**Materials Research Corp.**

In 1982, a majority of the NLRB extended the *Weingarten* right to nonunionized employees in the *Materials Research Corp.* decision [7]. According to the majority, “the rationale enunciated in *Weingarten* compels the conclusion that unrepresented employees are entitled to the presence of a co-worker at an investigatory interview” [7, p. 1014]. The majority reasoned that an employee's request to have a witness or representative at a meeting where disciplinary action is anticipated flows from the rights granted under Section 7 of the NLRA. In his dissent, however, then-NLRB Chairman Van de Water focused instead on Section 9(a). Arguing that employers are under no duty to recognize any individual (or group) as the representative of its employees unless the NLRB has

duly recognized them, he reasoned that an employer should not be required to honor an employee’s request to have a co-worker present during an investigatory interview [7].

### **Sears, Roebuck & Co.**

In its 1985 decision in *Sears, Roebuck & Co.*, the NLRB adopted Chairman Van de Water’s view and overruled *Materials Research* [5]. In *Sears*, the board majority found that placing a *Weingarten* representative in a nonunion setting basically requires the employer to recognize and deal with the equivalent of a union representative. The majority agreed that, in unionized settings, the *Weingarten* rule was entirely consistent with established principles of labor-management relations, but that it wreaked havoc with the fundamental provisions of the NLRA in nonunionized settings [11]. While NLRB member Hunter in his concurring opinion entertained the notion that the extension of the *Weingarten* right to nonunion employees was *permissible* under the NLRA, it was *not* a *reasonable* construction of the statute [5].

### **The DuPont Cases**

Contemporaneous with the *Materials Research* and *Sears* decisions, the NLRB revisited the issue no less than three times in a series of decisions involving E.I. DuPont de Nemours & Co. Initially, in what is commonly known as *DuPont I* [12], the NLRB followed the *Materials Research* decision. On appeal to the federal courts, in *E.I. DuPont de Nemours & Co. v. NLRB*, the NLRB’s decision was upheld [13]. Following a turnover of membership on the NLRB, the board successfully requested that the appellate court vacate its opinion and remand the case for reconsideration. Given this freedom to reconsider its earlier decision, the NLRB then followed the *Sears* rationale in *DuPont II* and held in 1985 that the *Weingarten* right was not appropriate in a nonunion setting [14]. To compound the confusion, another appellate court disagreed with the new NLRB majority in *DuPont II* that the NLRA “compels the conclusion” that nonunion employees are not entitled to *Weingarten* rights [15]. Ultimately, in *DuPont III*, the NLRB once again ruled that *Weingarten* rights do not belong in a nonunion setting [16].

### **Epilepsy Foundation of Northeast Ohio**

In 2000, the board majority in *Epilepsy Foundation* determined that *Sears* and *DuPont III* misconstrued the language of *Weingarten* and erroneously limited the *Weingarten* right to unionized settings [4]. The NLRB ruled that the employer had committed an unfair labor practice by interfering with the exercise of an employee’s Section 7 rights allowing concerted activity for the purpose of mutual aid or protection. In supporting the extension of the *Weingarten* right to the nonunion sector, the majority wrote that their rationale was “equally applicable in

circumstances where employees are not represented by a union, for in these circumstances the right to have a co-worker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern "that the employer does not initiate or continue a practice of imposing punishment unjustly" [4, at 678]. On appeal, the District of Columbia Circuit Court affirmed the NLRB's decision, ruling that the NLRB's most recent interpretation of Section 7 was reasonable under the NLRA [17]. The wisdom of the *Epilepsy Foundation* decision was quickly debated by commentators [18].

### **IBM CORPORATION OVERTURNS EPILEPSY FOUNDATION**

It took only four years for the NLRB to once again reverse course on the question of whether the *Weingarten* right applied in nonunion settings. While *Epilepsy Foundation* re-established (first established in *Materials Research*) that nonunion workers should enjoy the right, the NLRB's 2004 decision in *IBM Corporation* disagreed, and took the right away [8]. In a "now you have it, now you don't" reversal of fortune for nonunion employees, the right to have a co-worker present during an investigatory interview where there is a reasonable belief that disciplinary action will result was lost. The *IBM Corporation* ruling merely reinforces the notion that the NLRB is hopelessly politicized and that the rights of nonunion employees under the NLRA can at times be nothing more than bargaining chips in a larger struggle for power.

The facts in *IBM Corporation* are not unusual. Prompted by allegations of harassment against three employees, IBM interviewed the accused, none of whom were represented by a union. Each of the employees interviewed had requested, at one time or another, that a co-worker be present at the investigatory interviews. Their request was denied, and all three employees were discharged shortly after the interviews. The administrative law judge hearing the case applied the NLRB's decision in *Epilepsy Foundation*, and found that IBM had violated the NLRA by denying the requests for the presence of a co-worker. On appeal to the NLRB, a majority of the board reversed the ruling of the administrative law judge and decided instead to revoke the *Weingarten* right for nonunion employees, thus returning to the precedent that had existed before *Epilepsy Foundation*.

#### **The Majority's Rationale**

Writing the principal opinion for the majority, Board Chairman Battista and member Meisburg were forceful in stating what the majority was *not* holding in its ruling. First, the board was *not* saying that a nonunion lacks a Section 7 right to seek mutual aid and assistance from a fellow employee. Second, the board was *not* saying that a nonunion employee is incapable of representing a fellow employee. Third, the board was *not* saying that nonunion employees lack the

legal right to seek to stand up for each other. And, finally, the board was *not* saying that nonunion employees lack the NLRA's protection, or that such protection is endangered. What the board was, in fact, ruling, was simple: *that while nonunion employees have the right to seek such representation (and cannot be disciplined for asserting their rights), the nonunion employer has no obligation to accede to their request* [8, at 7].

To justify their ruling that the *Weingarten* right does not extend to the non-union workplace, Chairman Battista and member Meisburg offered the following four arguments:

*Co-Workers Don't Represent the Interests  
of the Entire Workforce*

In a unionized workplace, union officials have been delegated the authority to act on behalf of the entire bargaining unit under the duty of fair representation. Whatever benefits flow from the union representative's presence inure to the entire unit and not simply to the individual employee. In contrast, in a non-unionized setting there is no legally defined group of employees entitled to representation, and therefore a co-worker is under no obligation to represent the entire workforce. Accordingly, a nonunion co-worker has neither the personal incentive nor legal duty to act in a manner similar to a union representative.

*Co-Workers Cannot Redress Power Imbalances*

A level playing field can be established by the presence of a union representative because the representative is backed by the full force of the collective bargaining unit. With the union representative likely dealing with the employer on an ongoing basis, a consistent set of practices (informed by the collective bargaining agreement) concerning workplace issues is created, thus yielding a quicker and more efficient resolution to most problems. In contrast, nonunion co-workers chosen on a case-by-case basis do not have the full force of any bargaining unit, nor do they have the knowledge and political savvy commonly possessed by union representatives. As a result, a nonunion co-worker is not as capable of leveling the playing field where there is no contract to compromise management prerogatives.

*Co-Workers Lack Critical Skills*

With respect to investigatory interviews, the board argued that union representatives are in a position to make substantial contributions to the interests of both the employer and the employee through their ability to focus on the relevant facts and issues. Based on the union representative's experience and knowledge of "the law of the shop," solutions to workplace issues can be more easily proposed, thus avoiding the need for filing costly grievances. In contrast, a



nonunion co-worker is likely chosen because of a personal connection with the employee being investigated, and not necessarily because of any skills in conflict resolution the co-worker may possess. Moreover, while the co-worker may provide moral and emotional support, it is precisely that emotional connection which could be counterproductive in resolving the conflict. The potential problem is magnified if the co-worker is a “co-conspirator” in the activities being investigated.

#### *Co-Workers Might Compromise Confidentiality*

With a workplace made increasingly complex by a multitude of laws and regulations, compliance requires more employer investigations of employee behavior. An effective investigation requires discretion and confidentiality. Union representatives have a legal, fiduciary duty to provide fair representation and to not act in bad faith, and thus they would be less likely to reveal or misuse information obtained during the interview. In contrast, a nonunion co-worker is under no similar legal constraints—there is no fiduciary duty to either the employee or to the workplace.

The *Weingarten* court decision in 1975 directed the NLRB to assume its duty “to adapt the [NLRA] to changing patterns of industrial life” [2, at 266]. The board noted that the workplace had fundamentally changed to the point that more investigatory interviews had become necessary in the three decades since *Weingarten*. Chairman Battista and member Meisburg based this belief on a growing concern over increased incidents of workplace discrimination, sexual harassment, workplace violence, corporate abuse and fiduciary lapses, and new security concerns raised by terrorist attacks. Thus, they claimed that, “on balance, the right of an employee to a co-worker’s presence in the absence of a union is outweighed by the employer’s right to conduct prompt, efficient, thorough, and confidential workplace investigations. It is our opinion that limiting this right to employees in unionized workplaces strikes the proper balance between the competing interests of the employer and employees” [8, at 7].

Member Schaumber wrote a lengthy concurring opinion, arguing that the earlier *Epilepsy Foundation* decision infringed upon recognized and fundamental management prerogatives in nonunion settings. Indeed, the *Epilepsy Foundation* decision had created a “‘new common law’ of the shop [whereby] a nonunionized employer forfeit[ed] its common law right to deal with its employees on its own terms and on an individual basis” [8, at 12].

#### **The Minority’s Rebuke**

In a scathing dissent, board members Liebman and Walsh strongly criticized the majority for stripping employees of “a right integral to workplace democracy,” and for treating nonunion workers as “second-class citizens.” Arguing



that due process in the nonunion workplace should not be sacrificed, the board’s minority wrote:

Workers without unions can and do successfully stand up for each other on the job—and they have the legal right to try, whether or not they succeed. The majority’s predictions of harm, in turn, are baseless. There is no evidence before the Board that co-worker representatives have interfered with a single employer investigation since *Epilepsy Foundation* issued in 2000. We are told instead that everything has changed in “today’s troubled world,” following “terrorist attacks on our country,” the rise of workplace violence, and an increase in “corporate abuse and fiduciary lapses.” But allowing workers to represent each other has no conceivable connection with workplace violence and precious little with corporate wrongdoing, which in any case seems concentrated in the executive suite, not the employee cubicle or the factory work floor. Finally, we would hope that the American workforce has not yet become a new front in the war on terrorism and that the Board would not be leading the charge, unbidden by other authorities [8, at 18].

For the minority, the *Epilepsy Foundation* decision reflected perfectly the changing patterns of industrial life. Members Liebman and Walsh believed that the arbitrary exercise of power by employers over employees is neither natural nor desirable given evolving norms of fairness and due process in the nonunion workplace.

### A CALL FOR CONGRESSIONAL ACTION

Will the NLRB reverse course yet again on the applicability of the *Weingarten* right to the nonunion workplace when, at some point in the future, a new majority of the board expresses a different ideological opinion? The historical record suggests that this eventuality is a likely possibility. The board’s fickle affair with extending the *Weingarten* right to nonunion employees has its roots in the *Weingarten* decision itself. Inasmuch as the *Weingarten* court was interpreting legislative intent regarding key provisions of the NLRA, and because the NLRB’s numerous conflicting decisions invariably rely heavily on different interpretations of the *Weingarten* decision itself, it seems reasonable that Congress should bear primary responsibility for clarifying its intent concerning the scope of the NLRA [19]. If Congress fails to act, however, a few second-best alternatives exist, including 1) relying on the Supreme Court to decide whether the *Weingarten* right extends to nonunion employees, or 2) relying on the NLRB to adopt administrative agency guidelines (similar to the approach taken by the EEOC) clarifying the meaning of “concerted activities” and “mutual aid and protection,” and specifically defining how these terms apply to nonunion employees. In our opinion, neither of these alternatives are preferable to congressional action.

Congress’s involvement in this effort can be focused broadly or narrowly. If Congress decided to take a broad approach, it would need to clarify the

applicability of the NLRA—particularly Section 7—to the nonunion workplace generally. This would require that Congress: 1) more clearly define what is meant by the terms “concerted activity” and “mutual aid or protection,” and 2) specify how these terms apply to workplaces. Another way of approaching this issue is by asking the question: Has there been a blurring of the distinction between collective labor rights and individual employment rights over the last few decades and, if so, should Congress undertake a revision of the NLRA that reflects this new reality?

If it took a narrow approach, however, Congress would acknowledge the application of the *Weingarten* right to the unionized environment (inasmuch as it has become firmly entrenched in the law of the collective bargaining). Congress would then need to be explicit about whether this particular right should be extended to the vast majority (about 92%) of private-sector workers not currently covered by collective bargaining agreements. Members of Congress would certainly agree that the incessant flip-flopping by the National Labor Relations Board over a relatively short period of time on such a critical issue opens the board to ridicule and criticism. Moreover, the uncertainty created by such lack of consistency impedes economic progress and gives short shrift to evolving notions of workplace justice.

### CONCLUSION

The National Labor Relations Board’s decision in *IBM Corporation* is the most recent reversal of NLRB precedent pertaining to the extension of the *Weingarten* right to nonunion employees. Over the last two decades, this right has been granted twice (in 1982 and 2000) and has been revoked twice (1985 and 2004). Common sense and public policy goals dictate that nonunion workers and their employers have greater stability and predictability regarding their respective rights and responsibilities, particularly in the area of workplace investigations and interviews that could potentially lead to disciplinary action. We therefore call upon Congress to rein in a fickle NLRB by providing specific guidance on this increasingly important workplace issue.

### ENDNOTES

1. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994).
2. *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
3. James F. Morgan, James M. Owens, Glenn M. Gomes, “The NLRB and workplace investigations: a managerial perspective on applying union rules to the nonunion workforce,” *Journal of Individual Employment Rights*, Vol. 9(3), 2000-2001, pp. 173-185.
4. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part, 268 F.3d 1095 (D.C. Cir. 2001), cert. denied, 536 U.S. 904 (2002).
5. *Sears, Roebuck & Co.*, 274 NLRB 230 (1985).
6. *E. I. DuPont de Nemours & Co.*, 289 NLRB 627 (1988).

7. *Materials Research Corp.*, 262 NLRB 1010 (1982).
8. *IBM Corporation and Kenneth Paul Schult, Robert William Bannon, and Steven Parsley*, 341 NLRB No. 148 (2004), pp. 1-19 (opinion subject to final revision before publication in the bound volumes of NLRB decisions).
9. See, generally, Isaac S. Wofford, "Politicization, chaotic policy, and trip wires: problems with Epilepsy Foundation," *University of Illinois Law Review*, Vol. 2002, 2002, pp. 1427-1455, especially pp. 1443-1446.
10. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).
11. See, e.g., Jill D. Flack, "Limiting the *Weingarten* right in the nonunion setting: the implications of *Sears, Roebuck and Co.*," *Catholic University Law Review*, Vol. 35, 1986, pp. 1033-1059.
12. *E. I. DuPont de Nemours & Co.*, 262 NLRB 1028 (1982) [DuPont I].
13. *E. I. DuPont de Nemours & Co. v. NLRB*, 724 F.2d 1061, vacated, 733 F.2d 296 (3d Cir. 1984).
14. *E. I. DuPont de Nemours & Co.*, 274 NLRB 1104 (1985) [DuPont II].
15. *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986).
16. *E. I. DuPont de Nemours & Co.*, 289 NLRB 627 (1988) [DuPont III]. For a more thorough historical account, see Charles J. Morris, "NLRB protection in the non-union workplace: a glimpse at a general theory of section 7 conduct," *University of Pennsylvania Law Review*, Vol. 137, 1989, pp. 1673-1754.
17. *Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board*, 268 F.3d 1095 (D.C. Cir. 2001), cert. denied, 536 U.S. 904 (2002).
18. In support of the decision, see, e.g., Sam Heldman, Hillary E. Ball, and Frederick T. Kuykendall III, "Epilepsy Foundation of Northeast Ohio and the recognition of *Weingarten* rights in the non-organized workplace: a manifestly correct decision and a seed for further progress," *Labor Lawyer*, Vol. 17, 2001, pp. 201-220. In opposition to the decision, see, e.g., M. Jefferson Starling III, "Epilepsy Foundation of Northeast Ohio: a case of questionable reasoning and consequences," *Labor Lawyer*, Vol. 17, 2001, pp. 221-240; and Robyn Wilensky, "Can I get a witness: extension of the *Weingarten* right in the nonunionized workplace—problems of implementation create potential harm for both employers and employees," *Georgia Law Review*, Vol. 36, 2001, pp. 315-351.
19. Compare, e.g., William R. Corbett, "Waiting for the labor law of the twenty-first century: Everything old is new again," *Berkeley Journal of Employment and Labor Law*, Vol. 23, 2002, pp. 259-306.

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