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LABOR AND EMPLOYMENT NOTES

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NON-UNION EMPLOYEE RIGHTS CHANGE AGAIN

Does a non-union employee have the right to have a co-worker present during an investigatory interview by his employer, which the employee reasonably believes may result in disciplinary action, pursuant to the National Labor Relations Act? Dating from 1975, the answer has clearly been yes for **unionized** workers, and has been called the "Weingarten Right." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The answer for **non-unionized** workers, however, has changed over time from yes (*Materials Research Corp.*, 262 N.L.R.B. 1010 (1982)), to no (*Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985)), to maybe (*E.I. Dupont de Nemours*, 289 N.L.R.B. 627 (1988)), to yes (*Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676 (2000)).

The National Labor Relations Board has reversed course once again, ruling that non-union workers no longer have the Weingarten Right. *IBM Corp.*, 341 N.L.R.B. No. 148 (June 9, 2004). In its three-to-two decision, the Board overruled *Epilepsy Foundation*, concluding that policy considerations, such as employers' increasing need to conduct workplace investigations in sensitive areas such as harassment and discrimination, supported limiting the Weingarten Right to unionized settings. Until reversed or modified through federal court review or a subsequent Board decision on the topic, the law now stands that non-unionized workers no longer have the Weingarten Right in investigatory interviews by their employer.

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RELIGIOUS DISCRIMINATION

With the increasing trend of race and sex discrimination cases in the employment arena, many employers may shift their focus from the fact that Title VII prohibits discrimination on the basis of religion as well. It is important to remember that religious discrimination can exist in two forms: (1) disparate treatment against an individual because of his religion (including harassment), and (2) refusing to accommodate a sincerely held religious belief or practice, unless such accommodation would cause the employer undue hardship. This second type of religious discrimination arises more often in the workplace. If an employee requests a reasonable accommodation based on a sincerely held religious belief or practice, the employer must provide this accommodation, unless it would cause undue hardship to the employer's business. A common example of an employee's request for accommodation is to be off work on Saturdays because his religion's practice is that Saturday is a day of rest. Whether or not this request for accommodation is reasonable and based on a sincerely held religious belief is a fact-intensive inquiry. Furthermore, whether or not such accommodation would pose an undue hardship for the employer is based on the facts and circumstances particular to that employer. If an employer is presented with this type of situation, it may be wise to seek legal advice regarding how to proceed.

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