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June 17, 2004 – An Update For Employers
National Labor Relations Board Overrules Epilepsy Foundation

The National Labor Relations Board (“NLRB”) publicly announced yesterday its ruling in IBM Corp., 341 NLRB No. 148 (June 9, 2004), that employees who work in a non-union workplace are not entitled to have a co-worker accompany them to an interview with their employer, even if the affected employee reasonably believes that the interview might result in discipline.

In NLRB v. Weingarten, 420 U.S. 251 (1975), the United States Supreme Court held that union-represented employees may have a co-worker accompany them to a disciplinary interview. In E. I. DuPont & Co., 289 NLRB 627 (1988), the NLRB limited this Weingarten right to union-represented employees. On June 10, 2000, however, in Epilepsy Foundation, 331 NLRB 676 (2000), the Clinton-era NLRB reversed DuPont and extended the Weingarten right to non-union employees. Consequently, prior to last week’s IBM decision, all non-supervisory employees, union and non-union alike, had the right to have a co-worker accompany them to disciplinary interviews with their employers.

In IBM, a non-union employee argued that IBM violated the National Labor Relations Act (“NLRA”) by denying him his right to have a co-worker present during a harassment investigation interview. Following an administrative law judge’s decision that, based on Epilepsy Foundation, IBM violated the NLRA, the NLRB reexamined Epilepsy Foundation’s holding. The NLRB recognized that a co-worker in a non-union setting is significantly different from a co-worker/union representative in a union setting. Specifically, a non-union co-worker does not represent the interests of the entire union workforce, as does a union representative. A union representative also has the “force of the bargaining unit behind him,” which may redress some of the imbalance of power between the employee and employer. Moreover, a non-union co-worker does not have the same negotiating skills as a “knowledgeable” union representative who can elicit favorable facts, clarify issues, and propose solutions to avoid a union grievance. Finally, the NLRB recognized that a union representative in a disciplinary interview has a fiduciary duty not (in bad faith) to reveal or misuse information obtained in an employee interview. The co-worker in the non-union setting, however, has no such restraint. Based on this analysis, in a 3-2 vote, the NLRB expressly overruled Epilepsy Foundation.

In light of this decision, employers should inform their supervisory staff that they do not need to permit non-union employees to bring co-workers into disciplinary interviews as “witnesses,” for “moral support,” or for any other reason. We encourage

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you, should you have any questions, to call your SFSSW attorney at (310) 288-3980 to discuss this decision and its impact on your Company's operations.

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