NLRB WATCH:Key NLRB Precedents Likely to Fall Under Liebman Board

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Earlier this year we created "e-mail alerts" to keep you better informed of legislative changes and related legal developments in labor and employment law that will significantly impact both union and non-union employers during 2009. We are gratified with the positive feedback we have received from many of our clients and friends on this series of e-alerts. Based on suggestions we received and encouragement from many in our firm, we are expanding the original framework to address the myriad of potential changes in labor law that we will likely see over the next few years from the National Labor Relations Board (NLRB or Board), the federal agency which administers the National Labor Relations Act (NLRA). By virtue of new appointments made by the Obama administration, the composition of the NLRB is undergoing significant change. With the transition from the Bush-appointed NLRB chaired by conservative Robert Battista, to a Board composed of Obama appointees chaired by former union attorney Wilma Liebman, a number of significant decisions issued by the Board between 2000 and 2008 will likely be reconsidered and overturned over the next few years. In most of the critical Bush-era decisions that favored employers, then Board Member Liebman wrote dissenting opinions challenging the reasoning and conclusions reached by the majority. Careful analysis of the dissenting opinions in these major decisions provides a legal roadmap – charting the likely course the Liebman Board will take if it is able to reconsider these issues under the Board's current configuration. Consequently, we can expect significant changes in certain policy areas going forward. We have identified 10 key policy areas which we believe will be reconsidered and possibly overturned. In order to fully discuss each of these 10 changes, we will select one each week for discussion over the next 10 weeks and conclude this 10-part series by Labor Day 2009. We want to be faithful to our Client Promise "to keep you informed."

NLRB WATCH PART I: REPRESENTATION RIGHTS OF NON-UNION EMPLOYEES One of the most important decisions issued under the Bush-appointed Battista Board concerned whether non-union employees are entitled to have a co-worker present during an investigatory interview – similar to the right afforded unionized employees by the United States Supreme Court in *NLRB v. Weingarten*, 420 U.S. 251 (1975). In the 23 years since the Supreme Court first extended the right to representation to union employees in *Weingarten*, the NLRB has changed its position four times on whether so-called "*Weingarten* rights" extend to non-union employees. More recently, in *IBM Corp.*, 341 NLRB 1288 (2004), the Board ruled that non-union employees do not have the right to have a co-worker present during an investigatory interview that might lead to discipline. The majority opinion acknowledged that extending *Weingarten* rights to non-union employees and

restricting them solely to union-represented employees are both legitimate interpretations of the NLRA. However, the majority looked to "policy considerations" to overturn prior Board precedent to hold that non-union employees did not have *Weingarten* rights. According to the majority opinion: In recent years there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence. Our consideration of these features of the contemporary workplace leads us to conclude that an employer must be allowed to conduct its required investigations in a thorough, sensitive, and confidential manner. This can best be accomplished by permitting an employer in a nonunion setting to investigate an employee without the presence of a coworker. In reaching this conclusion, the Board in *IBM* overruled its prior decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, issued four years earlier by a Board composed of Clinton Administration appointees. *Epilepsy Foundation* held that the protections of the concerted employee activity guarantee under the NLRA extend to non-union employees – including the right to representation during an investigatory interview that could lead to disciplinary action by the employer. Notably, the Board's decision in *Epilepsy Foundation* overturned earlier decisions in *Sears, Roebuck, & Co.*, 274 NLRB 230 (1985), and *E.I. DuPont & Co.*, 289 NLRB 627 (1988), which held that *Weingarten* rights do not extend to non-union employees. In turn, the decisions in *Sears* and *E.I. DuPont* overturned *Materials Research Corp.*, 262 NLRB 1010 (1982), where the Board first extended *Weingarten* rights to employees in a non-union workforce. **Current Status of Board Law**: Currently, the Board follows the majority opinion in *IBM*: non-union employees are not entitled to representation during investigatory interviews and the employer can deny an employee's request to have a co-worker present even where the investigatory interview may lead to disciplinary action. Based on the change in the composition of the NLRB, however, we can expect the Board to reverse its position yet again when a case comes before the NLRB concerning this issue. **Liebman Dissent in *IBM***: Board Chairperson Wilma Liebman wrote a strong dissenting opinion opposing the majority in *IBM* – which provides a compelling indication of how the Liebman Board would decide the issue of whether non-union employees are entitled to *Weingarten* rights if the issue comes before it. In her dissent, Liebman criticized the majority for overturning *Epilepsy Foundation*, noting that the U.S. Court of Appeals for the District of Columbia upheld the Board's decision in that case, specifically finding the Board's rationale in *Epilepsy Foundation* to be "both clear and reasonable." *See NLRB v. Epilepsy Foundation of Northeast Ohio*, 268 F.3d 1095 (D.C. Cir. 2001). Liebman's dissent further stated that the Board's decision to deny non-union employees the right of representation stripped "the over-whelming majority of employees" of a right "integral to workplace democracy." According to the dissent, Section 7 of the NLRA provides "all workers, union-represented or not," the right to engage in concerted activities for the purpose of mutual aid or protection. Moreover, the dissent stated: It is hard to imagine an act more basic to "mutual aid or protection" than turning to a coworker for help when faced with an interview that might end with the employee fired. Notably, the dissent calls for a return to the Board's rationale in *Materials Research Corp.*, noting that, "[i]t is by now axiomatic that, with only very limited exceptions, the protection afforded by Section 7 does not vary depending on whether or not the employees involved are represented by a union, or whether the conduct is related, directly or indirectly, to union activity or collective bargaining." **Potential Shift in Board Approach**: At the first opportunity, the Liebman Board will likely reverse *IBM Corp*. and extend representation rights to non-union employees

– returning to the Board's prior position in *Epilepsy Foundation* and *Materials Research Corp*. Under *Epilepsy Foundation* and *Materials Research Corp.*, an employee had the right to request to have a co-worker present during any investigatory interview that might lead to disciplinary action by the employer. As with *Weingarten*, the right to representation did not require that the employer issue a "Miranda" type warning – in other words, there was no affirmative obligation for an employer to inform the employee of the right to representation. As with *Weingarten*, the right attached only when the employee requested it. However, if an employer unlawfully denied representation during an investigatory interview, any subsequent discipline of that employee could be overturned. For more information concerning the Ford & Harrison *NLRB Watch* and the Board precedents likely to be overturned under the Liebman Board, contact the Ford & Harrison attorney with whom you usually work, or the author of this Alert, John Bowen, a partner in our Minneapolis office at jbowen@fordharrison.com or 612-486-1703. **Look for the next installment of NLRB Watch next Monday**