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Right to Union Representation Applies to Employer Referrals for Drug and Alcohol Tests, NLRB Rules

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The National Labor Relations Board (“Board”), in its July 31, 2014 decision in *Ralph’s Grocery Co.*, 361 NLRB No. 9 (2014), ruled that so-called “*Weingarten* rights”—the general right of a unionized employee to request union representation in connection with an investigatory interview that could lead to discipline—apply when employees request representation after an employer refers them for a workplace drug and alcohol test. Based on this ruling, the Board overturned an employee’s suspension and discharge, finding the actions were inextricably linked to the employee’s request for representation after referral for a drug test, and ordered a make-whole remedy.

The employee refused to submit to a reasonable suspicion drug test after his representation request was denied. Previously, the Board had not directly answered the question of whether referral for a test, in and of itself (and absent an interview or employee questioning), provided an opportunity for the assertion of *Weingarten* rights. The Board answered that question here affirmatively, stating that the “drug and alcohol test, ordered as part of the [employer’s] investigation into [the employee’s] conduct, triggered [the employee’s] right to a *Weingarten* representative.” The Board rejected the employer’s argument that the employee’s refusal constituted insubordination or the equivalent of a positive test result, finding instead that the employer had penalized the employee “for refusing to waive his right to representation.”

Board Member Harry Johnson, who joined in the conclusion that the employer had interfered with protected rights, dissented with respect to the award of a make-whole remedy. Johnson reasoned that the employee’s discharge was based on “information [the employer] already had” apart from the test result. Chairman Mark Pearce and Member Nancy Schiffer disagreed, noting the absence in the termination report of any reference to observed behavior reflecting impairment or any finding beyond the test refusal that the employee was under the influence of intoxicants. This is not surprising as, in the case of issues of proof as to whether an employee is working under the influence of, or impaired by, drugs or alcohol, the best evidence is typically a confirmed positive test result.

What the Case Means for Employers

Under the Board’s decision, employers will be required to treat drug and alcohol tests as investigatory interviews under *Weingarten*. Note, however, unionized employers that refer union-represented employees for a drug or alcohol test need not advise an employee of his/her

Weingarten representational rights unless there is a contractual (labor agreement) obligation to do so. Further, it bears emphasis that the action in *Ralph's* found to be unlawful was not based on a test refusal *per se*. Rather, the employer's actions were overturned because the employee had refused to "take the test because he wished to consult with a union representative beforehand" and the Board found the employer had failed to accord the employee representational rights under *Weingarten*. Where a unionized employer refers an employee for a drug or alcohol test, and a union-represented employee refuses to submit to testing but does not request union representation, adverse employment action is still lawful unless labor agreement language imposes contractual obligations.

It also is important to note that *Weingarten* rights generally do not include a requirement that an employer, absent specific labor agreement language, allow an employee's specific choice of union representative, or permit the employee to unreasonably delay a drug test in the event no union representative is available. By contrast, in the *Ralph's* case, the Board faulted the employer for not "wait[ing] to see if a representative would become available" after the employee requested representation. This is a strange criticism of the employer, as the employer gave the employee more than 15 minutes to try to locate a union representative, and the employee apparently gave no indication of when he might be able to reach a union representative.

The Board's decision also raises the issue of the union representative's role in connection with the administration of a drug and alcohol test. Would the role be accompanying an employee to a collection site to ensure the collection is fair and reasonable? Directing an employee to refuse to test under a policy a union presumably was aware of and possibly even bargained for? Second-guessing the employer's reasonable suspicion determination? The Board's decision in *Ralph's* does not answer these questions.

The *Ralph's* case also does not answer the question of whether other drug and alcohol testing referral circumstances might allow more flexibility. For example, in the wake of the *Ralph's* decision we have seen NLRB Regions receptive to carving out *random* testing from *Weingarten* application, presumably because random testing needs to be unannounced and is not like reasonable suspicion testing, *i.e.*, it is only "investigatory" under *Weingarten* in the broadest sense of the term. In random testing, an employee's observable appearance or conduct does not drive the referral, even though the outcome of the test could be discipline. A random testing referral is simply a matter of employer policy, with no investigatory role in play.

The most difficult scenario for employers to deal with will be one where—as in *Ralph's*—no union representative is readily available, but there is a genuine need to proceed quickly with testing before the suspected drug or alcohol dissipates in the employee's system. In these circumstances, Board precedent generally provides that an employer must either give up requiring the "interview" (here the drug and alcohol test) or give the employee the choice between taking the test without the union representative present or foregoing the test entirely. If the employee chooses to forego the test, the employer may lawfully take disciplinary action based on the information it has obtained from other sources, such as the observations of the employee's appearance or conduct that gave rise to the request that the employee be tested.

The practical problem, however, is that if the employer disciplines the employee based only on the observed appearance or conduct of the employee, the employer may face an uphill battle having a discharge sustained in a subsequent arbitration, where the employer may only be able to rely on the observations of an untrained supervisor.

To avoid such a result, employers may wish to take steps to encourage their unions to have union representatives available during all working time or possibly have an "on-call" union representative who can be readily available for drug and alcohol testing purposes. When union representatives are available, an employee accused of drug or alcohol abuse may choose only between taking the test or refusing to take the test—the latter decision being grounds for termination under most well written drug and alcohol policies.

Employers may also wish to provide their supervisors with enhanced training in being able to observe, identify, and record behaviors reflective of employees under the influence of or impaired by drugs or alcohol in the workplace.

In regulated settings, *e.g.*, under U.S. Department of Transportation requirements that govern drivers of certain commercial motor vehicles, federal labor law presents potential conflicts. Those regulations and requirements mandate referrals for drug and alcohol driver testing in specified circumstances whether or not there is union representation. Given the potential for catastrophic loss in the regulated setting, employers are well advised to make reasonable attempts to allow for union representation, but nevertheless comply with those regulations even if union representation is not available. We are hopeful that the Board would take a sensible and flexible approach with respect to testing mandated for DOT motor carriers, as the stakes are simply too high otherwise.

The *Ralph's* decision is consistent with the current Board's philosophy of broadening employee rights under the Act, as well as NLRB General Counsel Richard Griffin's indication in a GC memorandum earlier this year that he was considering extending *Weingarten* rights to non-union employees. While *Weingarten* rights have not yet been extended to non-union employees, this may soon be on the horizon—returning the law to Board precedent last in effect under the Clinton Board. This change in the law, if it were to occur, would have sweeping ramifications for virtually all private employers.

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