

WORKPLACE INVESTIGATION LAW 2004 Year in Review

As 2004 fades from memory, please take note of these two significant developments in workplace investigation law:

NATIONAL LABOR RELATIONS BOARD RULES *WEINGARTEN* RULE DOES NOT EXTEND TO NON-UNION COMPANIES

Although for the past four years the National Labor Relations Board (NLRB) held that all employees, *unionized or not*, had the same right to request a coworker be present during any investigatory interview that the employees reasonably believed might result in discipline, the NLRB recently ruled that employees at non-union companies do not have *Weingarten* rights (*IBM Corporation, 341 NLRB No. 148 June 9, 2004*). The Board based its decision, in part, on the following factors:

- Coworkers do not represent the interests of the entire work force.
- Coworkers cannot redress the imbalance of power between employers and employees.
- Coworkers do not have the same skills as a union representative.
- The presence of a coworker may compromise the confidentiality of information.

The NLRB's decision is the fourth time in twenty years that the NLRB has changed its policy regarding *Weingarten* rights at non-union companies. Stay tuned.

FACT ACT PROVIDES RELIEF TO EMPLOYERS USING THIRD PARTIES TO CONDUCT WORKPLACE INVESTIGATIONS

Effective March 31, 2004, the Fair and Accurate Credit Transactions Act (FACT Act) laid to rest the most significant concerns raised by the Federal Trade Commission's 1999 "Vail Letter," which required employers using third-party investigators to: (1) notify alleged offenders before conducting an investigation; (2) obtain the alleged offender's consent before beginning the investigation; and (3) fully disclose investigative reports before taking any adverse action against the alleged offender.

The FACT Act (section 611) allows employers to hire third-party investigators to conduct workplace investigations without giving notice to the alleged offender and without obtaining the alleged offender's consent to begin an investigation. This will reduce the risk the alleged offender will not consent to an investigation, tamper with evidence, influence witnesses, or otherwise impair an investigation. The FACT Act also provides that the investigative report need not be disclosed to the alleged offender or the complainant. However, if an employer takes any adverse action based on the report, it must disclose a summary of the report to the offender. Although the summary must include the nature and substance of the report, it does not need to identify witnesses. This will reduce the risk witnesses may refuse to participate in investigations.

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