

# PETERS & LYONS, LTD.

ATTORNEYS AT LAW

SUITE 1000

25 EAST WASHINGTON STREET

CHICAGO, ILLINOIS 60602

DONALD F. PETERS JR.  
CHRISTOPHER P. LYONS  
MATTHEW L. ALDEN

TELEPHONE (312) 346-7300  
FACSIMILE (312) 782-6690  
E-MAIL [laborlaw@peterslyons.com](mailto:laborlaw@peterslyons.com)

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## LABOR UPDATE

### *Recent Developments in Labor and Employment Law*

#### **AN EMPLOYEE'S RIGHT TO REPRESENTATION AT AN INVESTIGATIVE INTERVIEW**

The National Labor Relations Board (NLRB) has expanded the right of certain employees to have representation during interviews which the employee reasonably believes might result in disciplinary action. On July 10, 2000, the NLRB issued its decision in *Epilepsy Foundation of Northeast Ohio* and extended the so-called *Weingarten* rights to non-supervisory employees who are not represented by a union. In order to better understand the NLRB's expansion of the right to representation, a brief overview of the *Weingarten* rights may be helpful. The *Weingarten* rights were established by a United States Supreme Court case, *NLRB v. Weingarten*, 420 U.S. 251 (1975). In *Weingarten*, the workers were represented by a union and management decided to interview a worker regarding an allegation that she had stolen food from the employer. The worker asked that she be allowed to have a union representative present during the interview. Management denied her request. Management discovered during the meeting that the employee was not guilty of theft. Still, the Supreme Court held that the denial of the request for union representation during the meeting which the employee reasonably believed could result in disciplinary action against her, violated the National Labor Relations Act (NLRA.) The NLRA offers protection to employees for certain "concerted activities", which is any group action by employees for the legitimate promotion of their common interests.

The most important factor in deciding whether an employee is entitled to representation is whether discipline may reasonably be expected to result from the interview. If the employer merely intends to inform the employee of a disciplinary decision that has already been made, then the employee does not have the right to representation under the *Weingarten* rule. In the years since the *Weingarten* decision was handed down, the NLRB has gone back and forth on the issue of whether non-union employees had *Weingarten* rights.

In a 1982 decision, the NLRB extended *Weingarten* rights to all employees regardless of union representation. The NLRB subsequently backed away from that interpretation. Recently, courts and the NLRB have held that *Weingarten* rights were only available to union employees. Once again, as of July 10, 2000 in the *Epilepsy* decision, the NLRB has changed course.

In *Epilepsy*, two employees of the Epilepsy Foundation of Northeast Ohio were fired for acts of insubordination. Prior to his termination, one employee, Arnis Borgs, was told to attend a meeting with the Executive director of the Foundation and his supervisor. Borgs claimed he would feel intimidated by the presence of his supervisor at the meeting and asked that a co-worker be permitted to attend the meeting with him. The request was denied. Borgs continued to voice his concerns about the fact that his supervisor would be present at the meeting with the Executive Director. Borgs was then told to leave work and report back the following day. The next day, Borgs was told that he was terminated because his refusal to attend the meeting was viewed as gross insubordination.

The NLRB ruled that Borgs's termination violated the NLRA, which guarantees employees the right to engage in "concerted activities for the purpose of ... mutual aid or protection." In the NLRB's view, when two employees attend a meeting during which one of those employees is questioned by management for the purpose of determining whether discipline will be imposed, those employees are acting together, or in concert, to address their common concern that employers do not initiate or further a practice of punishing employees unjustly. An employee may request the presence of a co-worker during an investigatory interview even if the employee is not represented by a union provided that the employer is subject to the NLRA and provided that the employee is not a manager, supervisor, or independent contractor. Employers are subject to the NLRA if, for non-retail businesses, they have a gross inflow or outflow of revenue of at least \$50,000 per year. Retail businesses are subject to the NLRA if they have a gross inflow or outflow of at least \$500,000 per year and substantial direct or indirect interstate business dealings. Non-union businesses covered by the NLRA must abide by the *Epilepsy* decision unless it is overruled by the United States Supreme Court.

The *Weingarten* rights are not like the famous *Miranda* rights which police officers must read to a suspect prior to questioning the suspect. That is, an employer does not have to inform the employee that the employee has the right to representation. Also, the employer does not have to ask the employee if he or she wants to have a representative

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**MORE COURTS ARE PERMITTING AT-WILL EMPLOYEES TO SUE ON THE BASIS OF A "FAILURE TO MAKE A CONTRACT" BECAUSE OF RACE**

Recently, the 2<sup>nd</sup>

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### **ACCESSING WORKPLACE RULES AND REGULATIONS ON-LINE**

The Department of Labor has established a new website at [www.dol.gov/elaws](http://www.dol.gov/elaws) to provide employers with access to the latest information on the myriad rules and regulations affecting the workplace. It's called "*elaws*", which stands for employment laws assistance for workers and small businesses. The site provides guidance on Department of Labor compliance issues, workplace laws, rights, and responsibilities. The site is designed to function as if the visitor were speaking with a Department of Labor representative and asking questions while receiving information and guidance. The purpose is to help workers and small businesses solve problems before they result in the involvement of the Department of Labor. The site currently has 24 "advisors" online, including regulations from the Employment Standards Administration, the Mine Safety and Health Administration, OSHA, and the Pension and Welfare Benefits Administration.

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### **EMPLOYER HELD NOT LIABLE FOR LOSS OF AFFECTIONS**

An Illinois court has ruled that an employer was not responsible for the fact that the president of its board of directors caused the break-up of an employee's marriage. William and Susan were married in 1970. In 1992, Susan began working for Southwestern Electric Cooperative (SEC). Allan was president of SEC's board of directors and took several business trips with Susan, acquiring, in the words of the court, "an improper and undue influence over her." Eventually, Susan and William divorced. William filed suit against Allan and SEC seeking to recover the amount of his former wife's salary as damages. The court ruled for SEC and held that SEC could not be liable for what Allan had done because William had failed to show that Allan's actions in wooing Susan were part of Allan's job duties.

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### **AUTOMATIC RENEWAL OF EMPLOYMENT CONTRACTS IN ILLINOIS**

Recently, the Illinois Legislature passed the "Automatic Contract Renewal Act." The act is effective June 1, 2000 and applies to any written agreement entered into between two or more individuals or other legal entities except for the federal government, the State of Illinois, local government, or school districts. Under the act, if a contract is subject to

automatic renewal, the clause setting forth the automatic renewal provision must appear in the contract in “a clear and conspicuous manner.” The act does not define the phrase “clear and conspicuous.” If a contract’s automatic renewal provisions are not clear and conspicuous, then the contract will not automatically renew. The act does not apply to contracts entered into before June 1, 2000.

Employers will need to review any written employment contracts as well as non-compete and confidentiality agreements for any automatic renewal language. If a contract renews on or after June 1, 2000, then the automatic contract renewal provisions will have to be modified to comply with the act. Until the courts provide guidance about what constitutes “clear and conspicuous” language that satisfies the act, some ways to try to meet the “clear and conspicuous” standard would be the use of bold print for the contract renewal provision in large type along with an acknowledgement line for the employee to sign indicating that he or she understands that the contract is subject to automatic renewal.

### **QUOTABLE**

"I have not failed. I've just found 10,000 ways that won't work."

- Thomas Alva Edison (1847-1931)

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Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by Peters & Lyons attorneys, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

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