

# PETERS & LYONS, LTD.

ATTORNEYS AT LAW

SUITE 1000  
25 EAST WASHINGTON STREET  
CHICAGO, ILLINOIS 60602

DONALD F. PETERS JR  
CHRISTOPHER P. LYONS  
PATRICK F. MORAN

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

## LABOR UPDATE – FOURTH QUARTER 2006

*RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW*

### **“LAWYERING UP” IN THE WORKPLACE: A BRIEF REVIEW OF AN EMPLOYEE’S RIGHT TO COUNSEL**

The right to an attorney during police investigations is a well-known constitutional protection, and the invocation of this right is often dramatized in popular shows like “Law and Order” and “NYPD Blue.” Although most employers therefore understand a person’s right to “lawyer up” when facing interrogation by a gruff, hard-bitten, television detective, many are unsure what to do when an employee asks for similar assistance in a work related matter, an increasingly common practice.

Generally, employees lack an absolute right to representation by legal counsel during an employer’s investigation into potential misconduct. Indeed, in certain circumstances, an employee’s insistence upon the presence of a lawyer and refusal to participate in an investigation without one can constitute insubordination justifying discipline or discharge in and of itself. However, in other situations, such as when an investigation touches upon discrimination, harassment, or other protected complaints, an employer’s adverse action against an employee who refuses to proceed without consulting a lawyer can be deemed unlawful retaliation. Therefore, because blanket denials of employee requests for legal assistance can expose employers to potential retaliation claims under applicable anti-discrimination or whistleblower laws, employers need to closely examine the nature and basis of requests for legal assistance before automatically rejecting them.

Factors to be weighed by employers when considering employee requests for legal assistance should include the subject matter being investigated, the time frame involved and the extent of assistance requested. An investigation into matters concerning “protected activities” will require greater discretion than one involving generic work rules. In the former situation, where a brief postponement will not unduly prejudice or delay an investigation, an employer’s denial of a request for assistance may be deemed retaliatory, if, for example, an employee has merely asked to consult with an attorney prior to an interview, instead of refusing to submit to one without a lawyer present.

Employers should also remember that even if the right to an attorney does not exist, unionized employees still enjoy *Weingarten* rights to non-attorney assistance and counsel during investigations. Named for the National Labor Relations Board (NLRB) case that conferred them, *Weingarten* rights allow union employees to request the

presence of a union representative during investigative interviews by their employer that the employee reasonably believes may result in discipline. However, unlike “the right to remain silent,” “the right to have an attorney present during questioning,” or the other *Miranda* rights habitually droned by both real and TV cops alike, employers need not advise employees of their *Weingarten* rights in advance of questioning, and such rights only apply if they are affirmatively invoked by the employee.

Confounding and confusing many employers, the NLRB has gone back and forth in recent years deciding whether *Weingarten* rights also apply to non-union workers. At times, the NLRB has permitted employees to insist upon the presence of a co-worker during investigative interviews. However, the Board’s current position (at least for now) is that such rights do not exist in a non-union setting.

Given the change and confusion that often surround this issue, employers would be wise to consult with their own attorneys and representatives, before deciding whether employees can consult with theirs.

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#### **ARE YOU FUNDED? CONGRESS AND THE SUPREME COURT VISIT PENSION ISSUES IN 2006**

Year after year, the aging of America continues. With the baby boomers retiring in mass numbers in the very near future, retirement savings have become a vital issue for employers and employees alike. One of the most common retirement savings vehicles, the employer funded pension, has recently drawn the attention of both the United States Congress and the Supreme Court.

Passed by Congress and signed into law this year was the Pension Protection Act of 2006 (“PPA”). The PPA is a response to the federal government’s assumption of billions of dollars worth of private pensions over the last few decades through the Pension Benefit Guaranty Corporation. The PBGC, a corporation wholly-owned by the federal government, has acted as a bailout for major private companies that have been unable to meet pension obligations. The PPA puts the burden back on employers to keep funding pension plans in accordance with the promises made to employees. If pension plans become significantly underfunded, employers face substantial accelerated contribution requirements. The PPA also requires employers who contribute to multi-employer pension plans to contribute higher amounts to the PBGC per employee over the next few years. If a multi-employer pension plan is severely underfunded, the PPA establishes a procedure for the plan to catch up, which may effect new collective bargaining agreements between employers and unions.

While Congress was working on pension plans in the future, the Supreme Court may agree to hear a case about the effect of an employer’s decision to switch pension plans. For years, IBM’s pension plan calculated an employee’s pension by her closing salary multiplied by her years of service. Because salaries typically rise with seniority, the longer one worked for IBM, the larger the pension amount. However, IBM switched pension plans to what is known as a “cash-balance” plan. Under the cash balance plan,

individual employees are given “credits” for salary and accrued interest, and the pension funds are kept in trust by IBM. At the time of the transition, older employees at IBM, who were expecting pensions that factored in their years of service, lost value on their expected pensions. They sued in federal court, alleging age discrimination.

After the older workers won in the trial court, the Seventh Circuit Court of Appeals in Chicago. The appeals court ruled that IBM did not discriminate against older employees when it switched to the “cash-balance” plan. It wrote: “...removing a feature that gave extra benefits to the old differs from discriminating against them. Replacing a plan that discriminates against the young with one that is age-neutral does not discriminate against the old.” The older workers are currently appealing the ruling to the Supreme Court, which will decide in the near future whether to hear the case.

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**“ARE YOU SURE YOU WANT TO DELETE?”  
DEPARTING EMPLOYEE MAY BE SUED FOR ERASING COMPANY DATA**

While Jacob Citrin worked for International Airport Centers, he was given a company laptop to use in connection with his duties. When he decided to quit his job, Citrin used a special program to erase from the laptop the data that he had collected in the course of his employment with the company.

The company sued Citrin in federal court, alleging a violation of the Computer Fraud and Abuse Act, which provides for both criminal and civil sanctions for the knowing transmission of a program, information, code, or command which intentionally causes damage to a computer. Citrin argued that the case should be dismissed on the basis that there had been no “transmission” under the meaning of that statute.

The federal appeals court in Chicago ruled that the case could go forward. The court said that if the case merely involved pressing the delete key, the statute might not be violated. But here, the departing employee had taken the deliberate steps to introduce a new program into the laptop to “scrub” the data off its hard drive so that it could not be recovered. The court found this to be the kind of “transmission” of a program or command contemplated by the statute.

In drafting computer use policies, employers are well served to not only point out that data is the property of the company, but that federal law prohibits the intentional damage to a computer or its data. Such a warning might serve to protect an employer’s property, especially by deterring a disgruntled, departing employee from engaging in mischief. *International Airport Centers, LLC v. Jacob Citrin*, 440 F. 3d 418 (7<sup>th</sup> Cir. 2006).

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## **FEEL LIKE THE UNION'S PUNCHING BAG? AN ILLINOIS HOMEBUILDER SWINGS BACK**

An Illinois homebuilder recently sued a local carpenters union for defamation and won a substantial jury verdict. John Maki, of J. Maki Construction, employed roughly thirty carpenters in his home building business. In 2004, a local carpenters union sought to represent Maki's carpenters, but the employees voted down the request. After the union lost the vote, members of the local union began picketing Maki's jobsites, trailing him to business meetings, and handing out flyers which attributed false statements to Maki, stating that he admitted that he built "crappy" homes. A jury in Lake County awarded Maki and his company \$2.3 million dollars on the defamation claim.

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## **BITS AND PIECES**

A federal appeals court upheld a ruling by the National Labor Relations Board that a pork processor employer had gone too far in campaigning for a "No" vote in an NLRB election with the United Food and Commercial Workers Union. Smithfield Packing Company was found to have improperly coerced voters by ordering workers to stamp the hogs with a "Vote No" stamp as the carcasses moved down the processing line. *UFCW, Local 204 v. NLRB*, 447 F.3d 821 (D.C. Cir. 2006)

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In an abundance of tact, Radio Shack recently notified 400 workers of their termination—via email! The company used this medium to notify its workers of the cutback, present a severance package and ask if they had any questions.

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## **QUOTABLE**

*"Drive thy business or it will drive thee."*  
-Benjamin Franklin-

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