

## **HOMELAND SECURITY**

September 24, 2001



We at Creative Services, Inc. wish to extend our heartfelt sympathy to the families, friends and co-workers of the victims of the unspeakable and devastating acts of terrorism perpetrated on our country on September 11, 2001. We also extend our thanks and support to the countless individuals involved in the rescue and relief efforts and join our fellow citizens in demonstrating our resilience and determination to look forward and learn from, but never forget, these tragic events.

For better or worse, the recent events have once again spotlighted the importance of adequate security measures. Despite the fact that the acts demonstrated sophistication in terms of their planning and coordination, the actual execution was disarmingly simple. And though the suspected mastermind is bunkered abroad, the actual perpetrators were living, training and working among us. They utilized our own resources and penetrated our own security systems to carry out these heinous acts.

It is important to thwart the growing hysteria and curtail unwarranted racial, ethnic and religious profiling. Towards this end, we recognize the need for rational, consistent, non-discriminatory security programs and procedures. It is everyone's obligation to understand and participate in their implementation.

If you have any concerns or questions about your current screening and security programs or are considering improved procedures, please do not hesitate to consult us. We will be pleased to offer our professionalism and expertise in helping to maintain and enhance confidence and safety in your company.

**Wishing you peace in the coming months.**

Alan T. Sklar & The Staff of Creative Services, Inc.

**In the Wake of Wakefield:  
Strategies to Combat Workplace Violence  
By Alan T. Sklar and Lisa J. Crowley**

February 2001

In the wake of the recent tragedy in Wakefield, attention has once again been focused on the issue of workplace violence. Each year for at least the past decade, there have been several such incidents that prompt intense national, or even international, scrutiny. What should not be overlooked, however, is the fact that workplace violence has become an escalating, pervasive occurrence, far greater than the few cases that capture media recognition would indicate.

Between 1992 and 1994, there were over 1,000 deaths each year due to workplace violence, at one time making homicide the leading cause of workplace death. In the last five years, the number of workplace fatalities has decreased, however homicide is only one form of workplace violence. Add to this two million victims of non-fatal workplace attacks, six million threatened and 16 million experiencing some form of harassment, not to mention the countless other indirect victims of the aftermath of these events, such as co-workers, friends and family members.

Aside from any moral obligation, employers are legally bound to provide a safe and healthful workplace for their employees. The Occupational Safety and Health Act of 1970 mandates that employers have a general duty to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. **Furthermore, over three-quarters of the states recognize a "negligent hiring doctrine" which holds an employer responsible, and potentially financially liable, for the actions of an employee, if the likelihood of such actions could have been determined through the reasonable background investigation of the applicant prior to hiring.** Negligent retention can also be claimed if an employer fails to remove an employee known to have behaved violently in the past. A number of multi-million dollar lawsuits have been successfully advanced in recent years based on these arguments.

Fortunately, there are many strategies employers can undertake in their efforts to prevent violence in the workplace. They require an integrated approach involving all segments of the employee population as well as guidance from skilled and reputable professionals in the

areas of background screening, security consulting, human resources, labor law and mental health.

**Hiring right is a company's first and best defense against potential disaster.** This begins with a well designed employment application package (application, release, authorization and consent forms) which adheres to government regulations yet solicits the information necessary to conduct meaningful background screening. Components of a thorough background investigation include verification of, or obtaining information on, an applicant's criminal and civil history, employment, education, credit, motor vehicle record, professional licensing, and personal and developed references. The investigation should be supplemented with a personal interview of the applicant and possibly psychological assessment and drug and alcohol testing. Numerous guidelines as to the propriety of job applications, interviews, investigations and assessments are set forth by the Americans with Disabilities Act (ADA), the Equal Employment Opportunities Commission (EEOC) and the Fair Credit Reporting Act (FCRA). Familiarization with and adherence to these guidelines is of utmost importance.

The next step in identifying and preventing workplace violence lies in understanding the characteristics of an at-risk work environment and in creating the proper workplace climate. This revolves around threat management, the development of effective policies regarding fair treatment, sexual/verbal/physical harassment, fitness for duty, substance abuse and possession of firearms and establishing procedures for reporting, evaluating and responding to complaints and reports. **A policy of zero-tolerance should be in place for behaviors that can lead to workplace violence.** Encompassed within this is training employees to recognize behavioral changes in a co-worker which might indicate a propensity to violence and training to recognize and deflect outbursts after a potential trigger such as a lay-off or termination. In a broader application, attention in general must be devoted to a range of employee awareness programs, seminars, grievance procedures and counseling opportunities. A recent insurance company study concluded that companies with effective programs and procedures reported lower rates of workplace violence.

The third consideration towards minimizing workplace violence is physical security. Traditional security measures developed for outside threats may be of limited use against inside threats, however a large percentage of workplace violence incidents are, in fact, perpetrated by outsiders. **The establishment and enforcement of physical**

**security procedures can mitigate even threats from within.** The areas to be examined here include access control, crime-preventive property layout, security escorts, lighting, CCTV, alarm systems, metal detectors, and employee training and guidelines. **Since every physical facility presents different variables, a professional security survey should be undertaken to assess vulnerabilities and implement effective countermeasures.**

Regardless of the law and financial considerations, companies should stop focusing on "Band-Aid" approaches when faced with a casualty. They must recognize their obligation to their employees, the public and to their own success by making a commitment to long-term, company-wide planning with strong programs and procedures designed to enhance the workplace climate and employee morale.

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## **UNIONIZED EMPLOYEES' RIGHT TO REPRESENTATION DURING INVESTIGATORY INTERVIEW IS EXPANDED TO NONUNION EMPLOYEES**

In a decision with the potential to impact the workplace investigation practices of all nonunionized employers, the National Labor Relations Board has ruled that nonunion employees have the right to a representative during an interview that might reasonably lead to disciplinary action. In a close decision issued July 10, 2000 (*Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92), the Labor Board found that the so-called Weingarten rights of unionized employees also apply to employees not represented by a union. Given the scope of this decision, all employers should be advised about what it means and how it will affect the way they conduct employee investigations. (1)

### **What are Weingarten rights?**

In 1975, the United States Supreme Court upheld a decision by the Labor Board that employees have a right, protected by Section 7 of the National Labor Relations Act, to insist upon union representation during an investigatory interview by the employer, provided the employee "reasonably believes" the interview "might result in disciplinary action," (**NLRB v. J. Weingarten Inc.**, 420 U.S. 251 1975). The Supreme Court explained that this right arises from Section 7's "guarantee of the right of employees to act in concert for mutual aid and protection." The right has been applied to unionized workforces and is limited to situations in which an employee specifically requests representation. An employer is not required to advise the employee of this right in advance, and it applies only to investigatory meetings and not to meetings when, for example, the employer communicates a decision regarding a disciplinary matter.

Whether the belief that discipline might result from the interview is reasonable is based on "objective standards" and upon an evaluation of all the circumstances. If the employee does have a reasonable belief that discipline may result from the interview, the employer must either grant the request, dispense with the interview, or offer the employee the option of continuing the interview unrepresented or not having an interview. If an employer refuses to allow union representation but goes ahead with the interview, or if the employer disciplines the employee for refusing to participate in the interview after denying the employee union representation, the employer has committed an unfair labor practice in violation of the NLRA.

Since the Supreme Court's 1975 decision, the Labor Board has changed directions on whether **Weingarten** rights apply to employees who are not unionized. In 1982, the Board decided the case **Materials Research Corporation**, 262 NLRB 1010, and held that **Weingarten** rights applied to nonunion employees. Then, in the 1984 decision, **Sears Roebuck & Co.** 274 NLRB 230, the Board reversed its position and held nonunion employees were not entitled to **Weingarten rights**. In 1988, the Labor Board reiterated its holding that **Weingarten** rights are confined to unionized employees only in the case **E.I. du Pont de Nemours & Co.**, 289 NLRB 627.

### **The Decision in the Epilepsy Foundation Case**

In the July 10th **Epilepsy Foundation** decision, the Labor Board concluded that its

earlier rulings in the **du Pont** and **Sears** cases were inconsistent with the Supreme Court's rationale in the **Weingarten** case and with the purposes of Section 7 of the NLRA to guarantee employees the right to engage in concerted activity for their mutual aid and protection.

The charging party in the **Epilepsy Foundation** case, Arnis Borgs, was an employee working on a research project concerning the school-to-work transition for teenagers with epilepsy. Borgs was not represented by a union. In early 1996, Borgs and a co-worker, Ashraful Hasan, prepared a memorandum to the foundation's Executive Director. The memorandum was critical of their supervisor, Rick Berger, explaining why they felt his supervision was no longer needed on the project. The Executive Director directed Borgs to meet with her and Berger about the memo. Borgs told the Executive Director that he felt intimidated by the prospect of meeting alone with Berger and the Executive Director because in a prior meeting, they had interrogated and reprimanded him for discussing salary information with co-workers. He requested meeting with the Executive Director only. Upon refusal of this request, he asked that Hasan be present at the meeting, which was also refused. After persisting to express opposition to meeting alone with Berger and the Executive Director, Borgs was sent home for the rest of the day. The next day he was dismissed for his refusal to meet the previous day, which the Executive Director characterized as gross insubordination.

Following existing case law precedent, the Administrative Law Judge hearing Borgs' case found the discharge did not violate the NLRA because the **Weingarten** right to representation did not apply to nonunionized employees. However, the Labor Board subsequently reversed the ALJ's opinion and overruled the **E.I. du Pont** decision, finding the termination of Borgs for insisting on having a co-worker present at the meeting was unlawful. As a result, the employer was ordered to offer Borgs reinstatement and back pay.

The Labor Board explained that the right to representation recognized in the **Weingarten** case was grounded in Section 7 of the NLRA, which guarantees the right of employees to engage in concerted activity for purposes of mutual aid and protection. Flowing from this is the right to act together to address the imposition of unjust discipline. This right to representation did not arise from Section 9 of the Act, which recognizes the union's right to act as the employees' exclusive bargaining representative. Since Section 7 rights apply to all employees, whether unionized or not, the **Weingarten** rights to representation should apply to nonunionized employees as well.

Although employers traditionally have had the right to deal individually with unrepresented employees, the Labor Board was not persuaded that nonunion employers would be forced to deal with the equivalent of a labor organization. According to the Board, an employer will not be forced to "collectively bargain" with the employee's representative, and the employer is free to forego the interview altogether.

Nor was the Board swayed by the contention of one of the dissenting Labor Board members that the ruling would present an "unknown trip wire" for nonunionized employers unaware of an employee's right to representation under the **Weingarten** principle. The Board majority said this concern was based on speculation that employers would be ignorant of the right, and in any event, ignorance cannot justify a violation of the NLRA.

## **Applying the Decision to the Nonunion Workplace**

In the dissenting opinion, Board Member Hurtgen correctly noted that managers and supervisors at nonunionized companies will not realize that their employees have the right to representation. **Weingarten** rights are part of the fabric of the unionized workplace, but they likely are unfamiliar to the nonunion employer. As a result, employers must be alerted to this decision and the impact it will have on current employment practices concerning investigations and the imposition of disciplinary action.

## **The Implications for Employers**

The **Epilepsy Foundation** decision will impact employer activities with respect to investigations of employee misconduct. Specifically, employers should consider the following issues in developing a policy for handling **Weingarten** requests for representation.

The **Weingarten** rule applies to any employee interview which may reasonably be believed will give rise to discipline, including interviews in connection with:

- sexual harassment complaints or allegations of unlawful discrimination;
- suspicion of violation of workplace policies;
- investigation of insubordinate conduct, workplace violence, or other inappropriate behavior;
- inquiries into theft or misappropriation of goods or funds;
- investigations of suspected violations of substance abuse policies; etc.

The right to have a representative present comes into play when an employer brings an employee into a situation that could reasonably be construed as an investigatory interview regarding conduct that could implicate the employee and result in discipline against him or her.

There is no right to representation if there is no possibility that the employee being interviewed will be disciplined as a result of the interview, or if the meeting does not constitute an investigatory interview (e.g., if the employee is simply being told the results of an investigation and the employer's decision). In other words, if the meeting is to actually execute disciplinary action (provide the warning, discharge the employee, etc.), there is no right to representation.

The employer need not affirmatively inform the employee of any right to representation before beginning the interview. There is no "Miranda" requirement to read the employee his or her rights.

If the employee requests the presence of a co-worker, the employer should either: 1) forego the interview, 2) grant the employee's request, or 3) offer the employee the choice of continuing without representation or not being interviewed.

An employer must allow the employee a reasonable opportunity to speak with a co-worker representative prior to the investigative interview.

The right to representation by a co-worker flows from the right of employees to

engage in concerted activity for purposes of mutual aid and protection under Section 7 of the NLRA. By definition, this right involves employee activity, thus precluding a request for representation by an outside attorney, government agent, or union official.

At the interview, the representative may seek to ameliorate any culpability of the employee or may suggest alternative inquiries or solutions. However, the employer is not required to bargain with the representative, nor is the employer required to make concessions or compromise with the representative.

If the co-worker specifically requested by the employee is not available at the time of the interview, the employee may be given the opportunity to have another, available co-worker present. If, at that point, the employee refuses the available co-worker, the employer is not required to delay the interview and may proceed without violating the Act.

Failure to grant **Weingarten** rights is a violation of the National Labor Relations Act. The National Labor Relations Board has exclusive jurisdiction over enforcement of the Act. The sole remedy is an unfair labor practice proceeding filed with the Board. The Board is empowered to order make-whole remedies, including reinstatement, back pay, and cease-and-desist orders.

The **Weingarten-Epilepsy Foundation** rule may have its most profound implications in an employer's investigation of highly sensitive workplace matters, such as sexual harassment allegations. The dilemma for employers is that they must conduct full, complete, and confidential investigations of any such claims. Now, the employee who is the subject of the investigation may be entitled to bring in another employee with whom the employer may not feel comfortable discussing the sensitive nature of the incident and breaching the shield of confidentiality.

How employers can balance these and other competing rights and interests implicated in this pronouncement will require an assessment of current workplace investigation policies and practices, as well as other laws and regulations which may govern the investigation, discipline and termination processes. Employers should seek the advice of employment counsel in any such policy review and development, or when confronted with a request for representation in which the employer is unsure of its rights and obligations.

The decision leaves open unanswered questions. For example, must the employer pay the co-worker for his/her time at the interview? We think not, but these and other questions must be answered.

**(1) The Right to representation applies to "employees." This does not include "supervisors" or other management personnel as defined by the National Labor Relations Act, Section 2(11).**