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NEW YORK HIGH COURT RULES NO WEINGARTEN RIGHT FOR PUBLIC EMPLOYEES

In a decision dated February 20, 2007, the New York State Court of Appeals held that the Taylor Law does not give public employees a so-called "*Weingarten* right" to union representation at an investigatory interview where the employee reasonably believes the interview may result in disciplinary action. *New York City Transit Authority v. New York State Public Employment Relations Board*, 2007 N.Y. LEXIS 163 (Feb. 20, 2007). This ruling overturns a long-standing position by the New York Public Employment Relations Board (PERB) that the Taylor Law provided such a *Weingarten* right to public sector employees. *See Transport Workers Union, Local 100*, 35 PERB 3029 (Oct. 2, 2002). The term "*Weingarten* right" is derived from a decision of the United States Supreme Court interpreting the application and protection of the National Labor Relations Act (NLRA). *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

The Court of Appeals' case involved the New York City Transit Authority's interview of one of its employees, Igor Komarnitskiy. According to the court, Komarnitskiy, a car inspector, became angry when he was asked to show a pass before entering a train yard and, in objecting to that request, used a racial slur in reference to employees he thought were treated less strictly. When the Authority learned of the incident, it asked Kormarnitskiy to provide a written response, which he prepared with the assistance of his union representative. Suspicious that the union had influenced or dictated the contents of Kormarnitskiy's response, the Authority ordered him to come to a supervisor's office to prepare a new response and refused to allow a union representative to accompany him.

The union filed an improper practice charge with PERB against the Authority, claiming that its exclusion of Kormarnitskiy's union representative violated his *Weingarten* right, as impliedly protected by the Taylor Law. PERB upheld the charge, and the Authority commenced an Article 78 proceeding to annul the decision. The Court of Appeals concluded that while, under the NLRA, Komarnitsky would have been entitled to union representation at the meeting with his supervisor, in New York, the Taylor Law gives no such right to public employees.

The Court of Appeals distinguished the rights conferred upon private employees by the NLRA from the more limited rights of public employees under New York's Taylor Law. In addition to the right to form, join or assist labor unions and to bargain collectively, Section 7 of the NLRA provides that employees have the right to "engage in other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. In *Weingarten*, the Supreme Court held that this language encompasses the right to union representation at disciplinary interviews. The "mutual aid and protection" language is absent from the Taylor Law - an omission which, according to the Court of Appeals, demonstrates a legislative intent to exclude from public sector employment certain rights and privileges bestowed upon the private sector, including a so-called *Weingarten* right.

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It should be noted that Section 75 of the Civil Service Law provides covered employees a *Weingarten*-type right to representation by a union or an attorney in investigatory interviews. Section 75 provides that "[a]n employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization . . . ." Civil Service Law §75(2). However, this section differs from the right recognized in *Weingarten* in two key respects. First, Section 75(2) violations are addressed, not in an improper practice proceeding before PERB, but by the exclusion from a disciplinary hearing of statements made at the interview and any evidence obtained as a result. Second, and perhaps more significantly, the right created by Section 75, unlike the NLRA's *Weingarten* right, may be relinquished in collective bargaining. As such, a collective bargaining agreement may properly exclude such representation under Section 75.

While the Court's decision may be viewed as a victory for public employers, it does not give public employers unfettered rights in questioning employees in disciplinary investigations. The ruling establishes that the Taylor Law does not furnish a "*Weingarten* right" to all public sector employees, but there may be other sources of that right, including Section 75 of the Civil Service Law and collective bargaining agreements. In the wake of the ruling, public sector employers should review their collective bargaining agreements, as some union contracts may require union representation during investigatory interviews. In addition, public employers should be aware that investigatory interviews may trigger due process considerations, and other obligations may arise if criminal charges are contemplated or expected.

Finally, there is a strong possibility that the New York State legislature will address this ruling, as it has in response to prior judicial decisions that are adverse to labor organizations.

If you have any questions regarding the impact of this ruling or any other labor or employment law topics, please contact Matthew C. Van Vessem at 716.843.3842 or mvanvessem@jaeckle.com or Elizabeth Fox-Solomon at 716.843.3936 or efoxsolomon@jaeckle.com.

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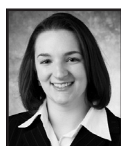

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