Union Rules in Nonunion Settings: The NLRB and Workplace Investigations

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Introduction
Employers increasingly have come to understand the importance of promptly investigating claims of wrongdoing by employees, especially in the area of sexual harassment. Recent developments in employment law, however, have created numerous new obstacles around which management must navigate when conducting workplace investigations. For example, firms using outside investigators must now comply with the disclosure provisions of the Fair Credit Reporting Act (Morgan, Owens & Gomes, 2000).

Even more surprising, the National Labor Relations Board (NLRB) ruled in July 2000 that nonunion workers are now entitled to have a coworker present at an investigatory interview that the employee reasonably believes might result in disciplinary action, a right heretofore reserved exclusively for unionized employees (Epilepsy Foundation, 2000). For employers contemplating (or actually conducting) workplace investigations, compliance with these new rulings will require an intimate understanding of the changes in the law and their implications for managing the investigatory process. Of course, noncompliance unnecessarily exposes employers to substantial risks and penalties.

This article first briefly reviews the heightened importance of conducting workplace investigations. We then focus on the latest development in the investigatory process, the reach of the NLRB into the nonunion workforce, and present suggestions to employers for dealing with the extension of certain rights heretofore reserved for union workers. In the final section, we discuss the need for changes in public policy in this area of employer-employee relations.

The Growing Importance of Workplace Investigations
Investigations of allegations of sexual harassment and other forms of workplace discrimination have received considerable attention recently (see, e.g., Morgan, Gomes & Owens, 2001; Gardner & Lewis, 2000). Moreover, in addition to reaffirming the principle that employers may be held liable for not establishing, disseminating, and consistently enforcing a policy that prohibits sexual harassment, recent U.S. Supreme Court decisions confirmed the need for employers to conduct a “reasonable” investigation if a complaint arises (Burlington Industries, 1998; Faragher, 1998). The Equal Employment Opportunity Commission subsequently issued revised enforcement guidelines emphasizing the importance of prompt, thorough, and impartial investigations conducted by well-trained investigators (EEOC, 1999). Given the Supreme Court’s recent rulings and the EEOC’s revised guidelines, there is a greater need now than ever before for an employer to conduct a vigorous and effective investigation when allegations of impropriety first arise. Indeed, the failure to investigate may very well be regarded as strong evidence that the employer approves, albeit implicitly, of the offending behavior.

Unfortunately, over-zealous employers may sanction an accused employee with termination before any type of “procedural due process” is provided. As a result, those accused of inappropriate behavior are also suing their employers for emotional distress, defamation, and wrongful discharge. To minimize the risk of such
litigation, investigations conducted by employers should be perceived as fair and impartial, and merely adhering to the letter of the law may not guarantee such a perception (Dorfman, Cobb & Cox, 2000).

The NLRB and Co-Employee Representation in Nonunion Settings
Consider, for a moment, the managerial and legal implications of the following not-so-far-fetched scenario:

Gorby Gourmet, Inc. employs a sizable nonunionized workforce. Upon receiving a complaint of potential wrongdoing, management decides to investigate one of its employees, James Elgin, for an alleged violation of company policy. Management has requested that Mr. Elgin participate in an interview with appropriate company executives as part of the investigation. Suspecting that there may be disciplinary consequences arising from such an interview, Mr. Elgin demands to be accompanied by a fellow employee during the interview. How should Gorby Gourmet’s management respond?

In an attempt to eliminate the “inequality of bargaining power between employees . . . and employers,” Congress passed the National Labor Relations Act (the Act) in 1935. Most nonunion employers probably believe that if no union is attempting to organize the workplace, the Act does not apply to them. Because Section 1 of the Act encourages collective, not individual, bargaining as a means to reduce industrial strife, it would seem these employers would be correct. However, that is not the case. Section 7 of the Act provides that:

[employees] shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection (29 U.S.C. § 157, emphasis added).

The NLRB and the courts have found that “all” employees, both union and nonunion, have the right to engage in concerted activities for mutual aid or protection. Does this mean that James Elgin is entitled to protection when he made his request for a co-employee to witness the interview?

- The Weingarten Ruling and Its Confusing Legacy
In the early 1970s, the NLRB expanded Section 7 rights to include unionized employee requests to have a coworker present during meetings with their employers if disciplinary action might take place. While the courts did not enforce the initial Board decisions, in 1975 the U.S. Supreme Court decided in NLRB v. J. Weingarten, Inc. that Section 7 gives workers the right to have a union representative at the investigatory interview if disciplinary action is expected. This is now known as the “Weingarten right.” The Court, however, did not address directly whether this right applied equally to nonunion workplaces.

In 1982, over the stern dissents of Chairman Van de Water and Member Hunter, a three-member Democratic majority of the NLRB extended the Weingarten right to nonunionized employees in the Materials Research Corp. decision. The majority believed “the rationale enunciated in Weingarten compels the conclusion that unrepresented employees are entitled to the presence of a coworker at an investigatory interview.” In its reasoning, the majority found that an employee’s request to have a witness or representative at a meeting where disciplinary action is anticipated flows from the rights granted under Section 7 of the Act.

In 1985, the new Republican majority on the NLRB overruled Material Research in the decision of Sears, Roebuck and Co. By reversing itself, the majority essentially found that, in unionized settings, the Weingarten rule was entirely consistent with established principles of labor-management relations (see, e.g., Flack, 1986). The NLRB reasoned, however, that extending the Weingarten right to nonunion workers wreaked havoc with the fundamental provisions of the Act.

The NLRB revisited the issue no less than three more times in a series of decisions involving Dupont (see, e.g., Morris, 1989). Initially, in 1982, the NLRB followed the Materials Research decision (DuPont, 1982, commonly known as DuPont I). On appeal to the federal courts, the NLRB’s decision was upheld (DuPont, 1984). By this time, the Reagan appointees had altered the composition of the NLRB, and they asked the court to vacate its opinion and remand the case for reconsideration. The NLRB subsequently followed the Sears rationale and held that Weingarten rights
were not appropriate in a nonunion setting  
(DuPont, 1985, known as “DuPont II”). On appeal for the second time, the courts disagreed with the new NLRB majority that the Act “compels the conclusion” that nonunion employees are not entitled to Weingarten rights (Slaughter, 1986). Ultimately, in 1988, the NLRB once again ruled that Weingarten rights do not belong in a nonunion setting (DuPont, 1988, known as DuPont III).

- The Epilepsy Foundation of Northeast Ohio Decision
The decision in Epilepsy Foundation of Northeast Ohio (2000) involved a nonunion organization that provides services to persons affected by epilepsy. Two of Epilepsy’s employees, Arnis Borgs and Ashraful Hasan, were involved in a research project concerning school-to-work transition for affected teenagers. In an attempt to remove their supervisor (Rick Berger) from the project, Borgs and Hasan wrote two memos to the executive director of Epilepsy Foundation, Christine Loehrke, stating that Berger was no longer needed on the project. After receiving the second memo, Loehrke directed Borgs to meet with her and the supervisor, but Borgs indicated he felt intimidated by the prospect of meeting with them because of a prior reprimand he had received. Borgs asked if he could meet only with Loehrke, and upon being told no, he asked if his coworker, Hasan, could attend the meeting. Loehrke refused this request, and when Borgs refused to meet without Hasan, she sent Borgs home for the day. The next day Borgs met with Loehrke and the Director of Administration. At this meeting, Loehrke informed Borgs that he committed gross insubordination by refusing to meet with her and the supervisor the previous day and, as a result, was being terminated.

In a 3–2 decision, the Democratic majority in Epilepsy Foundation found that the employer had violated Section 8(a)(1) of the Act and ordered reinstatement and backpay for Borgs and Hasan. In deciding that Weingarten rights apply to the nonunionized sector, the majority decided that Sears and DuPont misconstrued the language of Weingarten and erroneously limited the Weingarten right to unionized settings. With this ruling, the NLRB changed 12 years of precedents (for a chronological summary of these decisions, see Table 1).

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<tr>
<th>Decision</th>
<th>Key Decisions and Principal Rulings</th>
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<tr>
<td>NLRB v. Weingarten, Inc. 420 U.S. 251</td>
<td>Section 7 of the National Labor Relations Act, which addresses “concerted activities” protects the right to be accompanied by a coworker at an investigatory meeting, but the right applies only to unionized workers.</td>
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<tr>
<td>Materials Research Corp. 262 NLRB 1010</td>
<td>The right to be accompanied by a coworker at an investigatory meeting applies to both unionized and nonunionized workers.</td>
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<tr>
<td>Sears, Roebuck &amp; Co. 274 NLRB 230</td>
<td>Overrules Materials Research. The Weingarten decision is reinstated. Section 7 applies only when there is an exclusive bargaining representative.</td>
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<tr>
<td>E. I. DuPont de Nemours &amp; Co. 289 NLRB 627</td>
<td>Weingarten rights not applicable in nonunion settings.</td>
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<tr>
<td>Epilepsy Foundation of Northeast Ohio 331 NLRB No. 92</td>
<td>The principles of Weingarten should be extended to employees in nonunion workplaces, and such employees should be afforded the right to have a coworker present at an investigatory interview that the employee reasonably believes might result in disciplinary action.</td>
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The Expanded Weingarten Right: A Necessarily Incomplete Primer

Any attempt to provide management in a non-union environment with a definitive set of recommendations regarding compliance with the NLRB decision in Epilepsy Foundation will necessarily fall short because of the myriad differences between a union and a nonunion environment. Until greater clarity is achieved through further NLRB decisions, congressional action, or court review, however, management must comply — as best they can — with the Epilepsy Foundation’s unclear edict.

The rights and responsibilities which might flow from Epilepsy Foundation can be organized into two areas: (1) aspects of the Weingarten right that appear to transfer easily and unambiguously to the nonunion setting, and (2) aspects of the Weingarten right where the logic that supports their application is less clear in the absence of a union. In the latter case, management is left in significant peril, relying on nothing more than educated guesswork.

- Areas of Reasonable Certainty

Numerous basic aspects of the Weingarten doctrine appear applicable to the workplace regardless of whether a union is present. For example, the event that triggers the right of an employee to request a coworker’s presence is independent of a union. The Weingarten right should attach to an employee when: (1) an employee is requested to meet individually with a member of management, (2) the employee invited to the meeting is being investigated for possible wrongdoing connected with work, and (3) the employee reasonably believes that discipline or other formal adverse consequences may result from what the employee says. Therefore, an employee accused of participating in a fraudulent transaction, insider trading, theft, or sexual harassment who is asked an “investigatory interview” may invoke the Weingarten right. Note, too, that investigations into absenteeism, poor attitude, or substandard work performance also would initiate this privilege.

The Weingarten right is terminated by the completion of the investigation. Therefore, where the purpose of a conference is to mete out discipline, Weingarten does not require a coworker to be present. Management should understand, though, that if the meeting begins with a purpose of exacting discipline but then is transformed into a discussion regarding whether the employee committed a particular offense, the employee may ask for the presence of a co-employee (Baton Rouge Water Works, 1979). Further, once the right is asserted, employees are entitled to continued representation by a co-employee at subsequent meetings without separately reasserting such a request. Even if the employee fails to assert the Weingarten right at the first investigatory interview, the employee may invoke the right at any later investigatory meeting. These areas of relative certainty are summarized in Table 2.

Supervisors and employees often confuse the Weingarten right with a workplace-type of Miranda warning. The differences between these concepts, though, are considerable. The Miranda right provides, in part, that criminal suspects be apprised of their right to remain silent and have an attorney present during questioning (Miranda, 1966). In stark contrast, regardless of the workplace setting, the employer is under no obligation to inform an employee of the Weingarten right. Also, there is no right to an attorney during the questioning of an employee, according to the U.S. Supreme Court (McLean Hospital, 1982).

Finally, the options available to an employer when an employee requests the presence of a coworker should not change as Weingarten principles are applied in a nonunion setting. One option the employer may elect is simply to grant the request. While criticism has arisen from employer representatives that the presence of a coworker diminishes significantly the effectiveness of the investigatory interview, it is possible that an employer may view an employee representative as beneficial in conducting an effective examination. A second option available to the employer is to decide not to conduct the interview and to conclude the investigation without direct oral contributions from the employee being investigated. Depending on the type of offense and the amount of independent evidence available, there may be no need to ask specific questions of the person under investigation. The final option for an employer is to state to the employee being examined that he or she has a choice; if he or she desires a coworker be present, then no interview will occur or the employee can change his or her mind regarding the presence of a witness and proceed with the interview. This last option forces the employee to weight
Table 2  Commonly Asked Questions and Answers — Areas of Reasonable Certainty

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<tr>
<th>Question</th>
<th>Response</th>
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<td>Does the manager have to notify an employee of the right to have a co-worker present during an “investigatory interview?”</td>
<td>No. Unlike the Miranda warning provided to accused criminals, the employer is not required to notify an employee of the Weingarten right prior to or during the investigatory interview. Further, the employer need not post notices advertising the right.</td>
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<td>Once the employee raises the Weingarten right, must the chosen co-employee receive compensation for the time spent preparing for the interview?</td>
<td>No. In a union setting, the accused employee’s representative need not be paid for the time spent preparing for the interview. In fact, the pre-interview is not required to be conducted on “company time.” It is unlikely the application of Weingarten to the nonunion environment would change these established rules.</td>
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<td>Does the Weingarten right apply to meetings where particular disciplinary measures are announced?</td>
<td>No. A witness is allowed only at meetings where an employee is being investigated for wrongdoing. If the gathering is solely to declare discipline, the Weingarten right is not applicable.</td>
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| If an employee demands a co-employee be present, what options are available to management? | **The employer may:**  
  (1) Accede to the request from the employee;  
  (2) Cancel the interview and proceed with the investigation without direct oral comments from the employee under investigation; or  
  (3) Provide the employee with the choice of either not being interviewed or not having the co-employee present during the interview. |

the strategic advantages associated with agreeing to the interview.

- **Areas of Ambiguity and Confusion**
  While many similarities exist between union and nonunion workplaces, a closer examination of the application of Weingarten to the nonunion environment raises a host of unanswered questions, each of which may activate significant legal liability. Several of the more important areas of uncertainty are examined and summarized in Table 3.

  One area of confusion concerns whether a supervisor is eligible to serve as the co-employee. In the union setting, the bifurcated nature of the workplace into union and management sectors prevents supervisors from serving in this capacity. Functioning within this structure, the authority of the union remains intact because a union representative is presumed to be the appropriate co-employee. But in a nonunion environment, such a severe institutional division does not exist. In fact, it may be wise to allow a supervisor or someone else from management who possesses an understanding of the disciplinary process to serve in the co-

employee role. The Epilepsy Foundation decision is not instructive on this point.

  Myriad additional issues raise greater concerns regarding the application of Weingarten principles to the nonunion workplace. For instance, is it possible to select a co-employee who also may be under investigation for the same wrongdoing? Evidently, the answer is a qualified yes. This is the situation that occurred in Epilepsy Foundation. Borgs wanted to have Hasan, who sent with Borgs the memoranda regarding Berger to Loehrke, accompany him to the meeting with management. The majority of members on the NLRB in Epilepsy Foundation apparently found no fault with such an arrangement.

  Similarly, could the employee choose an individual who is not currently available? In a unionized setting, the employer need not postpone the interview just because the chosen co-employee is unavailable. Instead, because another union representative is usually available, no harm to the employee’s Weingarten right arises. But without a union, can the employee effectively postpone the investigative interview until it is convenient for the selected
Table 3
Commonly Asked Questions and Answers —
Areas of Ambiguity and Confusion

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<tr>
<td>Can an employer evade <em>Weingarten</em> by being vague regarding the purpose of the meeting?</td>
<td>Unclear. The right to a representative attaches once the employee possesses a reasonable belief that discipline might result. If the employer is unclear as to the reason for the meeting, an investigator may be able to make significant progress before the employee thinks about exercising the right.</td>
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<tr>
<td>Who does <em>not</em> possess the right?</td>
<td>Unclear. In a union setting, the distinction between union and management is fairly clear. The <em>Weingarten</em> right is only applicable to union members. But in the nonunion environment, not only is the dichotomy far less severe, the rationale of protecting the integrity of a union is inapplicable.</td>
</tr>
<tr>
<td>Could an employee who was part of the impropriety being investigated serve as an employee representative?</td>
<td>Yes, but ... This was, in fact, the request made by an employee in <em>Epilepsy Foundation</em>, and the majority of members on the NLRB found no difficulty with such a selection. One wonders, however, if permitting the attendance of an alleged wrongdoer’s confederate adequately protects the entire workforce, or whether it merely protects the alleged wrongdoer.</td>
</tr>
<tr>
<td>When an employee asks for a co-employee but is then told that no interview will occur as a result of the request, how does an employer factor out of a decision discipline the fact that the individual was exercising the <em>Weingarten</em> right?</td>
<td>Unclear. While the employer may choose not to conduct an interview after the employee notifies the employer of the employee’s desire to have a co-employee present, the employer will be found to have violated the National Labor Relations Act unless the employer can show that the employee’s refusal to meet was not a “motivating factor” in the company’s decision to discipline.</td>
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Co-employee to participate? This could be an effective delaying tactic for the accused employee, creating a crisis for an employer where the investigation must be concluded within a reasonable time (e.g., in allegations of sexual harassment). On the other hand, might the employer — not the employee — be able to choose the co-employee under *Epilepsy Foundation*? If this was possible, then the investigation could probably proceed expeditiously. Unfortunately, this approach might work against the employee under investigation should the employer pick someone who dislikes the individual who is the subject of the meeting.

Also, it is unclear exactly what role the co-employee plays in witnessing the investigatory interview. In the union arena, it is established that the employee’s representative (often a union steward) cannot provide answers for the employee or attempt to direct the proceedings. On the other hand, the employee’s witness can ask questions of clarification and consult with the employee at any time (MacDougall, 2000). Given these established constraints on the activities of the coworker, the co-employee witness may perform three important roles. First, the presence of an employee representative may serve to defuse a potentially emotional confrontation. Next, the witness provides another set of ears and eyes regarding the nature of the accusations by management. But most significantly, the *Weingarten* representative in a union setting usually brings a detailed understanding of the grievance procedure and pertinent provisions of the labor contract.

In a nonunion setting, these rationales are potentially less powerful. For example, union representatives are far more likely to be trained in conflict resolution than nonunion workers. In addition, the person selected to accompany an employee to an interview may be inclined to contribute little to defuse emotional outbursts for fear of subtle retribution by the employer. Also, while the employee may garner some
emotional support through the presence of the coworker, most individuals chosen for this role would have little understanding of the disciplinary process or the particular elements needed to support an accusation of employee misconduct. The union representative, on the other hand, would be quite conversant with this information. Moreover, in most nonunion enterprises, the disciplinary procedure is either not formalized or, if it is, does not rise to the level of sophistication associated with a unionized workforce. In other words, a person with some understanding of the employer’s disciplinary procedure would probably add little.

Arguments Against Extending the Weingarten Right
In an interesting moment of eloquence, NLRB member Hurtgen wrote in dissent in the Epilepsy Foundation decision:

By grafting the representational rights of the unionized setting onto the nonunion workplace, employers who are legitimately pursuing investigations of employee conduct will face an unknown trip-wire placed there by the Board . . . The workplace has become a garden of litigation and the Board is adding another cause of action to flower therein, but hiding in the weeds (p. 9).

We have shown that the extension of the Weingarten right to the nonunion workplace may raise more questions for employers than it answers, and that it may complicate or frustrate management’s efforts to conduct reasonable investigations of allegations of misconduct. If the trip-wire is to be removed, and if the garden of litigation is to be restored to its prior and less cluttered condition, what would be the major arguments in favor of limiting the Weingarten right to unionized settings?

- Retaining Managerial Prerogatives
The most obvious criticism of the NLRB’s majority opinion in the Epilepsy Foundation decision is that it inappropriately skewes the historical and longstanding delicate balance between the legitimate rights and privileges of both employers and employees. The decision takes away from the nonunion employer the previously unfettered right of such an employer to deal with its employees as individuals rather than as members of a group. The granting of rights heretofore reserved to employees in the collective bargaining context creates an additional exception to longstanding employment-at-will principles. While the provisions of Section 7 of the Act may at most protect an employee’s right to seek the assistance of a coworker in an investigatory interview, the employer should be obligated to comply with that request, and, therefore, should be allowed to discipline the employee for insubordination if the employee refuses to be interviewed without a coworker being present. To effectively balance the conflicting interests of management and labor, and in the absence of a collective bargaining agreement, the employer must retain the prerogative to make judgments about whether or not a legitimate investigation would be assisted or hindered by the presence of a third party.

Similarly, the extension of the Weingarten right to nonunion settings confers a specific “right to representation” in a particular situation (i.e., investigations reasonably believed to result in disciplinary action) despite the fact that these same employees have declined to elect a union to represent them in any other relationships with management. This curious asymmetry gives employees unbargained-for leverage at the expense of their employers. Under the traditions of employment-at-will principle, however, the employer’s freedom to deal individually with employees extends to all of the terms and conditions of employment, including decisions about discipline.

- Resolving Collective versus Individual Interests
While shop stewards are charged with protecting the interests of the group under a collective bargaining agreement, there is no guarantee that an invited coworker in a nonunion setting will safeguard the interests of the employees as a group; indeed, it is assumed that the coworker invited to attend an investigatory interview has been invited by the interviewee precisely to assist the employee’s individual interests. The invited coworker would be under no obligation to act on behalf of any group.

- Recognizing Different “Due Process” Dynamics
It can be further argued that, in contrast to a union steward, a coworker in a nonunion setting would be less able to exercise vigilant oversight regarding any potential unjust imposition of
sanctions by an employer because there would be no established framework for due process (as there would be in a collective bargaining agreement). Access to reliable information regarding how other employees have been treated by the employer under similar circumstances in the past would not exist. An invited coworker probably would not have the knowledge, skills, and experience of union stewards; moreover, it is highly likely that the invited coworker may have some emotional involvement with the interviewee (or, worse, some involvement in the alleged wrongdoing). In a union setting, a union representative in an investigatory interview may serve a useful purpose by making contributions that would head off formal grievances; in the nonunion workplace, however, enforceable formal grievance procedures typically do not exist.

- Precluding a Hobson's Choice
The extension of the Weingarten right to the nonunion workplace may work to the disadvantage of the very employees it was designed to assist. If the employer chose to forego an investigatory interview rather than conduct it with the interviewee’s coworker in attendance, the prospective interviewee will lose a chance to provide the employer with his or her side of the story. Given the choice between being given a chance to provide your side of the story without a coworker present, or being precluded from telling your side of the story because you insisted on the presence of a coworker, what would be your decision?

Conclusion
For 25 years the Weingarten right has aided the unionized work environment as a means of balancing the interests of the union member and management. However, with the extension of the Weingarten right to the approximately 85% of the private sector workforce not represented by a union, many are wondering whether important interests of both individual employers under investigation and management are properly served.

Practical problems exist in attempting to apply the Weingarten right — which appears to be premised, according to the U.S. Supreme Court, on the presence of a collective bargaining environment — to a nonunion environment bereft of a knowledgeable union steward serving as the employee’s representative. Moreover, there are serious theoretical concerns whether the decision impinges unnecessarily on the right of nonunion employers to deal with employees as individuals rather than as members of a group. Finally, unless a compelling rationale can be offered in support of changing a well-established rule of law, societal interests in a stable legal environment — and not political party affiliations on the NLRB — should prevail.

With the growing importance of workplace investigations, employers and employees deserve a legal landscape that accurately describes a set of due process rights applicable to the workplace. And no place within that landscape is more emotionally charged or critical to effectively dealing with potential legal liability than the investigatory interview of one accused with wrongdoing. Unfortunately, as a result of the Epilepsy Foundation decision, practical and conceptual uncertainties abound. The American workplace deserves better.

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(continued on page 40)
Dr. Buchholz, professor of business ethics, has published over 75 articles and 10 books on business and public policy, business ethics, and the environment; he is on the editorial board of several journals. Dr. Rosenthal, professor of philosophy, has approximately 200 articles and 11 books on various dimensions of American pragmatism and its relevance to philosophy, and has written about the relationship of pragmatism to a wide range of business ethics issues. She is on the editorial board of several journals.

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