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**POSITION PAPER**

On June 9, 2004, the National Labor Relations Board by a 3-2 vote reversed precedent and decided that employees who are not represented for purposes of collective bargaining by a labor organization do not have a right to have a co-worker present during an interview that may lead to discipline of the employee. IBM Corp., 341 NLRB No. 148.

The Board said that a reconsideration of the existing law was required, in part, because the Board must now take into account both real and threatened terrorist attacks in light of the events of September 11, 2001 and its aftermath.

The Committee on Labor and Employment Law of the Association of the Bar of the City of New York (the "Committee")<sup>1</sup> strongly believes that the events of September 11 and the aftermath should not be used to justify the view adopted by the majority. To rely on such events in determining the rights of employees have under the National Labor Relations Act distorts the legitimate decision making process and injects essentially political considerations into a matter of statutory construction. The Committee does not endorse the interpretation of the Act of either the majority or the dissenting opinions in IBM, but rather believes that the issue of employee rights in such circumstances should be decided on the application of traditional criteria of statutory construction.

Under the interpretation of the statute reversed in IBM, the employee's right to have a representative present when being questioned about a matter that could lead to discipline does not limit an employer's right to discharge an employee for misconduct. There is no requirement that the employer even conduct an investigation. The issue of representation only arises if the employer wishes to conduct the interview and to deny the employee his or her request to have another employee present.

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<sup>1</sup> The Committee is made up of labor, management and public sector representatives. Although all parties agree that the position set forth in this paper reflects the views of the Committee, certain members of the labor bar have additional views concerning the Board's decision to reverse precedent that are not expressed herein. Celeste J. Mattina, Regional Director of NLRB Region 2, abstained from the Committee's vote on this Position Paper.

Under NLRB law, the right of representation does not encompass a right to refuse to cooperate in the employer's investigation. A refusal to cooperate is itself a valid ground for discharge. There is no right of silence; an employee's refusal to fully answer the employer's questions can constitute a legitimate ground for discharge. If the investigation proceeds with the representative present, the representative may not in any way interfere with the employer's interrogation of the employee. There may be situations, of course, where the employee's choice of representative cannot be accommodated either because of unavailability or because it is not appropriate for that person to act as representative in light of the information to be discussed. These matters should be decided on a case by case basis before the Board.

The role of the representative is to be in a position to assist the employee being interrogated in articulating the employee's position and in providing a witness to the interrogation.

The Committee believes that the need to fully protect society from potential terrorist attacks does not include a need for employers to interrogate employees about matters that could lead to discipline without a representative present. The employer's right to protect its business and the people connected with it is fully recognized by the Committee. The Committee appreciates that an employer must have the tools to carry out that responsibility fully and adequately. The role of a representative for an employee under suspicion is not changed, however, because the matter under investigation is related to terrorism. If the National Labor Relations Act, as properly interpreted, provides a right to have a representative present to assist the employee under suspicion, that right is in no way diminished because of a societal concern about terrorists activity, however valid. Indeed, it may be argued that the consequences of an investigation of potential terrorists activity increases the employee's need for representation. The Committee, however, expressly refrains from taking a position on the validity of the IBM decision. We merely reiterate that the threat of terrorism should not be used to modify the interpretations of a statute passed in 1935 with a purpose of regulating employer-employee relations. To rely on such concerns, distorts the debate and unnecessarily injects political considerations into a matter that should be decided on its legal merits and has no relevance to the question of whether the employee is or is not represented by a labor organization.

Dated: October 13, 2004