

WEINGARTEN RIGHTS DISCUSSED

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“Weingarten Rights” are often referred to in the context of disciplinary investigation of employees by their employers. These rights are based on a U.S. Supreme Court case, known as *NLRB v. Weingarten*, 420 U.S. 251 (1975). In that case, the Supreme Court set forth rules for disciplinary investigative interviews by employers of employees. The Court held that when employees are interviewed in the course of an investigation which may lead to disciplinary action, employers must honor an employee’s request for a union representative to be present, or forego the interview altogether.

This decision established what has become known as “Weingarten Rights” for employees, generally including Federal workers and law enforcement personnel. Congress has passed a law protecting those rights, codified at 5 U.S.C. § 7114.

The *Weingarten* case involved an employee at a department store lunch counter accused of paying \$1 for food valued at \$2.98. The employer refused to let a union representative sit in on the interview despite repeated requests from the employee. The employee indicated that she had bought the meal to donate to a church dinner and used a large box to hold a \$1 meal because the lunch counter was out of small boxes.

The employer checked out her story and then ended the interview, asking the employee to keep the matter confidential. Instead, the employee told her union representative, and the union filed an unfair labor practices case that went all the way to the Supreme Court.

The *Weingarten* rule is somewhat similar to the right of a person accused of a crime to an attorney during police questioning. The *Weingarten* rights can and should be asserted whenever an employee believes they are being investigated in a possible disciplinary action. Otherwise the employee may not get the benefit of all of their rights under the collective bargaining agreement.

Once an employee has asserted their *Weingarten* rights, management must usually (1) allow the union representative to be present, or (2) cease interviewing the employee. If management terminates the interview, it may continue its investigation without an interview of the employee subject to the possible disciplinary action.

It is important to understand that *Weingarten* rights attach only under certain circumstances. Important to *Weingarten* rights are the following: (1) the employee must reasonably believe that they may be subject to disciplinary action as a result of the interview and (2) the employee must assert the right. Furthermore, the employer has no duty to bargain with the union representative during the interview with the employee.

It is also helpful, in any discussion of *Weingarten*, to see specific examples of matters falling under *Weingarten*:

Need to Request Representative at Meeting

Example: Employee is questioned about possible misconduct. Employee wants a Union representative present and is worried that he or she may be in trouble. Employee, however, does not tell the questioner that she wants a Union representative present. Employee then tells the questioner that she did it. Employee then gets fired and feels that he or she should have been offered a Union representative. Employee is generally out of luck here, because you must invoke *Weingarten* to have its protections. In other words, you must ask for a Union representative. *See Sears v. Dep't of Navy*, 680 F.2d 863 (1st Cir. 1982) (Employee need not advise the employee of his or her right to a union representative).

Ordered by Employer to Give Statement Without Representative

Example: Employee is questioned about possible misconduct. Employee wants to have a Union representative present. He or she then requests a union representative and is told that they cannot have a union representative present. The Employee is then told that he or she must still give a statement even though they cannot have a union representative. If the supervisor continues to ask questions, can the employee object or walk out of the office to get a steward?

In some cases, yes. According to some NLRB decisions, when an employee is entitled to union representation and the employer denies the employee's request, the employee can refuse to participate in the interview, even to the point of walking out to seek a union representative. However, do not take this approach. It is far better to note your objections on the record and then to contact an attorney rather than attempting to walk out. Doing so may put yourself in serious employment jeopardy given the mixed approach that the FLRA and NLRB has taken.

In other words, it is far better to object on the record, then risk termination of employment by walking out. When this happens, you must strenuously object to the questions without the presence of a steward and then answer under protest, documenting each and every request and witnesses present. Management can then be subject to unfair labor practice charges. This is one of the most complex areas of *Weingarten* and can vary depending on specific circumstances so please consult with an attorney in serious situations.

Preference of Particular Representatives

Example: Employee is questioned about possible misconduct. Employee decides that he or she wants a particular Union representative present. The Employer says that they cannot have the particular Union representative present, but can have another one. The Employee then gets into trouble for the statement that is made. This is a gray area. Sometimes the Federal Labor Relations Authority has held that an employee is not entitled to a particular union representative. However, the Federal Labor Relations Authority will review each matter on a case by case basis.

If a particular union representative is available at the time of an investigator interview, it is likely that you would be able to have that representative represent you. If

a particular union representative could not attend the meeting, then the Employee may have to continue with the interview with the union representative present.

Intimidation or Promise

Example: An employee is called to an interview with a supervisor and asks for his steward. In response, the supervisor states the following: "You may request your steward, but if you decide to do so, I will have to bring in the head supervisor, and you know how cruel she can be. The supervisor then tells the employee that if we can keep it at the level we're at, things will go a lot better for you." This is a violation; the supervisor is threatening greater discipline to coerce the employee into abandoning his *Weingarten* rights. This constitutes an unfair labor practice.

Meeting to Administer Discipline

Example: An employee is called to the supervisor's office to be given a written warning or reprimand about being absent without leave. Does the employee have a right to demand the presence of a union steward at the meeting where the written warning is given? This depends on whether the employee has a reasonable fear that the meeting where he is to receive the warning could result in further discipline. Generally, however, if the employer is simply administering discipline, and the meetings will not be used for further discipline, *Weingarten* probably would not apply.

Role of Union Representative

Example: Union representative represents Employee at Investigatory Interview. Union representative wants to know exactly the bounds of his ability to represent an employee at such interviews. The *Weingarten* Court and decisions that have followed offers the following guidance for such representatives. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may knowledge of them." The representation was not intended by Congress necessarily to be adverse, but the Employer cannot instruct a Union representative to be silent during his representation. Thus, a balance must be achieved. The Employer is permitted to ask the questions that they want to ask, but the Union representative is there for support, assistance, and to clarify questions.

The Congress has passed a law to codify the rights guaranteed under *Weingarten* for federal employees. The law is found at 5 U.S.C. § 7114(a)(2), and it requires that an exclusive representative of an appropriate bargaining unit in an agency shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the unit in connection with an investigation if the employee reasonably believes the examination may result in disciplinary action against him or her and then requests representation. Assertion of this right does not preclude an employee from being represented by an attorney or other representative other than the exclusive representative.

Many employers are not familiar with *Weingarten* rights and are sometimes surprised when they are asserted by an employee. It is not unusual for the investigator to be completely unaware of the meaning of *Weingarten* rights. When these issues arise it is well-advised for the employee to contact an attorney immediately for legal advice and/or representation. Questions regarding specific *Weingarten* issues should be directed to an attorney.

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