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## Internal Disciplinary Investigations: *Weingarten* Rights in Union - and Non-Union - Workplaces

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Many managers and HR professionals in unionized workplaces know what *Weingarten* rights are and how they apply to interviews that are part of an internal investigation. However, many managers in non-unionized workplaces do not know that employees who have been accused of misconduct or other rule violations may be entitled to bring a representative into the investigatory interview with them.

This right has existed for some time in unionized workplaces, but was only recently extended to employees in non-union workplaces. *N.L.R.B. v. Weingarten, Inc.*, 420 U.S. 251 (1975); *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), affirmed by *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001). The controversial ruling applying *Weingarten* to the non-union sector has been challenged in recent cases before the National Labor Relations Board (“the Board”) so it will be important to watch this issue closely for changes.

In unionized workplaces, many questions regarding the extent of the right to bring a representative have been clarified. In the non-union context, the right to representation is fairly new and undefined. While awaiting clarification from the Board and the courts,

non-union employers may seek guidance from cases involving union-represented employees.

This article is a summary of questions and answers which HR professionals and managers tasked with disciplinary investigations often raise about the right to representation. The answers stated below are rules defined by the Board to outline the rights and obligations of the employer, the employee and the union representative. The terms “representative” and “co-worker” may be interchanged depending on whether referring to the union or non-union workplace.

### **To Whom Do *Weingarten* Rights Apply?**

*Weingarten* rights apply to all unionized employees and require that any employee be afforded, upon request, the presence of a union representative at an investigatory interview that the employee reasonably believes might result in discipline. Thus, an employee is entitled to have a union representative present at any investigatory interview by an employer, if the employee reasonably believes that disciplinary action might result. Generally, it is only the employee accused of wrongdoing who is likely to be disciplined, so other witnesses in an investigation need not be granted the right. In 2000, *Weingarten* rights were extended to all

employees in non-unionized workplaces. This was a significant shift from historical precedent which had limited the right to union employees only. Currently, any employee has the right to request that a co-worker be present at any investigatory interview that the employee reasonably believes might lead to discipline.

### **What Does the Right Entail?**

Employees have the right to bring a union representative or a co-worker to the investigatory interview. However, they are not entitled to bring an outside representative, such as an attorney, even in a non-unionized workplace. In situations where an employee's attorney insists on being involved, consult legal counsel as to the various strategies which may be employed to dissuade them.

An employee is entitled to a pre-interview consultation with the person who will assist him at the interview and to be informed of the nature of the matter being investigated. However, at least one case has held that the employer had no obligation to allow the employee to consult union representatives on company time before the interview, if the interview date provides adequate opportunity for pre-interview consultation with union representatives on the employee's own time.

Also, the employer need not postpone the interview because the representative is unavailable for reasons which the employer is not responsible, where the employee could have asked for another representative. The employer is not obligated to suggest or secure alternative representation for the employee. Similarly, the interview need not be postponed so that the employee can consult with his private attorney.

### **When does the Right Apply?**

*Weingarten* rights apply as soon as an employee requests a representative. If the employee does not request representation, the employer has no affirmative duty to inform the employee of his right in this regard.

*Weingarten* rights apply only during investigations which might lead to disciplinary action. Representation is not required at meetings held solely to inform employees of disciplinary decisions already made. It is immaterial if the employer, at the employee's insistence, converses with the employee in an attempt to explain the reasons for its decisions. If, however, new evidence is discovered during the meeting, the situation could be transformed into an investigatory interview and a representative should then be allowed.

In a unionized workplace, employee *Weingarten* rights may be waived during the collective bargaining process, if the union and the employer agree to more restrictive language. Thus, it is important to be familiar with your organization's collective bargaining agreement.

### **What Constitutes a Request for *Weingarten* Rights?**

A direct request for a representative or merely the request for the presence of a supervisor may be sufficient to invoke an employee's rights under *Weingarten* (even though the supervisor is ineligible to represent him in the union context).

An employee who lawfully asks that a representative be present at an investigatory interview with his supervisor, is not required to repeat the request at a subsequent investigatory meeting with a higher-level supervisor, even though the higher-level supervisor was unaware of the earlier request.

In addition, an employer may not lawfully deny an employee's right to representation even though he did not request representation until the third and final interview and he continued to respond to questioning after his request was ignored.

### **What is the Role of the Representative?**

The role of the "representative" at an investigatory interview includes the right to "make proposals and suggestions to the employer concerning such things as alternative discipline and other possible avenues of investigation." In short, employers must permit the representative to play an active role in the discussions.

### **What may an Employer do Once an Employee Asserts his *Weingarten* Rights?**

Generally, an employer may choose between three responses once an employee has asserted his *Weingarten* rights. First, the employer may grant the request for representation and proceed with the interview. Alternatively, the employer may forgo the interview and make a disciplinary decision without interviewing the employee. The employer is not required to conduct an investigatory interview and may instead gather information from other means. Lastly, the employer may give the employee a choice between a) going forward with the interview without a representative (i.e. waiving his *Weingarten* rights), and b) forgoing the interview and its possible benefits to him. Each of these responses brings different results and it is recommended that legal counsel be sought for questions about specific situations.

### **What Happens if an Employee is Discharged for Asserting his *Weingarten* Rights?**

A make-whole remedy – reinstatement and/or back pay – could be issued if an employee is suspended or discharged for invoking his right to be represented at an interview.

### **Conclusion**

While the foregoing provides a fairly comprehensive listing of the rights applicable under *Weingarten* and *Epilepsy Foundation*, there is reason to believe that the law in this area may continue to change, especially in the non-unionized workplace. It is therefore advisable to consult with legal counsel and treat each situation on a case-by-case basis.

### **About the Author:**

*Claudia Viera, Esq. is an employment attorney and mediator who specializes in training on employment law and related topics. She is a former Littler Mendelson attorney and has developed and presented trainings to thousands of supervisors and employees nationwide. Her areas of specialty include harassment and discrimination prevention, lawful investigations and mediation/alternative dispute resolution.*

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