

Weingarten Rules Overview

NLRA – Section 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection"

NLRB v. Weingarten, Inc. 420 U.S. 251 (1975):

The employer violated [Section] 8 (a) (1) of the National Labor Relations Act because it interfered with, restrained, and coerced the individual right of an employee, protected by [Section] 7, "to engage in ... concerted activities for ... mutual aid or protection," when it denied the employee's request for the presence of her union representative at the investigatory interview that the employee reasonably believed would result in disciplinary action.

Weingarten Rights. Most union members have heard this term. Many shop stewards have the right to protect their members because of it. But what is the origin of these rights? What lies behind one of the most significant labor law rulings in recent history? For thirty years, Weingarten has been an often-used word in the vocabulary of union advocates.

Here is the story:

J. Weingarten, Inc. operated a large chain of convenient stores, several of which allowed customers to purchase packaged meals. In June 1972, Ms. Leura Collins, a lunch-counter clerk at Store No. 98 in Houston, Texas, was called into the manager's office and interrogated by her manager and a loss prevention investigator employed by the store. Unknown to Ms. Collins, this investigator had been observing her for the past two days on the basis of a report that she was stealing from the register. Although this particular investigation uncovered no evidence of wrongdoing on Ms. Collins' part, another manager learned (from a coworker) that she "had purchased a [\$2.98] box of chicken ... but had placed only \$1.00 in the cash register."

During the interview, Ms. Collins, a member of Retail Clerks Local Union No. 455, requested several times that her steward or another union representative be present. When questioned about the chicken, Ms. Collins replied that she only took a dollar's worth, but was forced to use a large-size box since the small ones were not available. The investigator went to confirm this; upon his return he "told Collins that her explanation had checked out [and] that he was sorry if he had inconvenienced her, and that the matter was closed."

It was at this point that Ms. Collins finally broke down, exclaiming that the only thing the company ever gave her was a free lunch. Hearing this, the manager and the investigator were surprised, since Store No. 98 had no such policy. Once again Ms. Collins was interrogated, once again she requested representation and

once again it was denied. The investigator then asked her to sign a statement that claimed she owed the company \$160 for those "free" lunches. She refused. In Store No.2, where she had previously worked [1961-1970], free lunches were policy. It was later learned that other J. Weingarten employees, including the manager, took "free" lunches, since the company had no official policy that forbade it, a fact confirmed to the investigator who then ended the interview. Upon leaving, Ms. Collins was asked by the manager "not to discuss the matter with anyone because he considered it a private matter between her and the company [and] of no concern to others." However, Ms. Collins reported this incident to her union and an unfair labor charge was filed.

The Purpose

One vital function of the steward is to prevent an employer from coercing or intimidating employees into confessing misconduct, especially in situations where the supervisor (or any other employer representative) engages in interrogatory techniques.

The NLRA protects union concerted activities, which includes a member's right to request union representation during investigatory interviews. This right was recognized in 1975 with the U.S. Supreme Court's ruling in *NLRB v. J. Weingarten*. (420 U.S. 251)* and became known as a member's Weingarten Right.

**Note: This opinion was delivered by Justice William Brennan and was joined by Justices Douglas, White, Marshall, Blackmun and Rehnquist [the current Chief Justice]. The dissenting opinion was filed by Chief Justice Warren Burger and joined by Justice Powell.*

A lone employee, confronted by the employer's investigation and the possibility of discipline, may be either too afraid to face accusations, too inarticulate to accurately explain, or simply too uninformed to raise extenuating factors. A knowledgeable union representative could assist this employee by drawing out favorable facts or applicable mitigating circumstances.

A tangible knowledge of Weingarten is vital, since it allows the steward to:

- Serve as a (non-silent) witness to this interview
- Contradict a supervisor's possibly false account of said interview
- Prevent intimidating tactics or confusing questions by supervisor
- Prevent the member from making self-incriminating statements or admissions
- Advise the member, under certain circumstances, to deny everything
- Warn the member about losing his or her temper
- Discourage the member from informing on others, i.e., co-workers
- Identify any extenuating or mitigating factors that could benefit the member

The Investigatory Interview

Weingarten Rights can be invoked ONLY in an investigatory interview, which occurs when:

- Employer Representatives (Supervisor, Manager, et. al.) question an employee about specific conduct or to obtain information that could be used as a basis for discipline.
- As a result of the above, the employee has a reasonable belief that the interview could result in discipline or some other adverse consequence. Example: an employee being questioned about an accident would be justified in fearing that he or she might be blamed.

Of course, not every interaction between employee and supervisor is an investigatory interview; for example, a supervisor speaking to a subordinate about a particular job performance. While the supervisor may no doubt question the worker about his or her performance, the likelihood of discipline is not the issue. Both parties are merely engaged in a work-related conversation – there is no investigation.

However, this workshop conversation could suddenly acquire an entirely different demeanor should the supervisor becomes hostile or the questioning turns into suspicion. In this case, any employee may become fearful; at this point would require union representation.

Yet, when a supervisor (or any agent of the employer) calls an employee into the office to warn, reprimand or impose discipline already decided, this is not – according to the NLRB* – an investigatory interview, since employee conduct is not being questioned, but rather has been observed and is being acted upon.

* Baton Rouge Water Works, 246 NLRB 995 (1979)

Shop-floor conversations: Not every administrator-initiated discussion is an investigatory interview. For example, a supervisor may talk to an employee about the proper way to do a job. Even if the boss asks questions, this is not an investigatory interview because the possibility of discipline is remote. The same is true of routine conversations to clarify work assignments or explain safety rules.

Nevertheless, even an ordinary shop-floor discussion can change its character if the supervisor is dissatisfied with the employee's answers.

If this happens, the employee can insist on the presence of a union representative before the conversation goes any further.

Disciplinary announcements: When a supervisor calls an employee to the office to announce a warning or other discipline, is this an investigatory interview affording the employee a right to union representation? The NLRB says no, because the employer is merely announcing a previously arrived-at decision and is not questioning the worker. Such a meeting, however, can be transformed into an investigatory interview if the supervisor begins to ask questions to support the decision.

Note: An employer that has followed a past practice of allowing association representatives to be present when supervisors announce discipline, must maintain the practice during the contract term. Refusing to allow an association representative to attend would constitute an unlawful unilateral change.

Conclusion

The right to representation is available to virtually every civilian employee in the United States. The Weingarten Decision helps clarify the correct procedures that should be followed during disciplinary meetings.

As an employee, a supervisor or as an association representative, it is your responsibility to be aware of your rights and responsibilities and to act accordingly.

Educating Members

Unlike Miranda, another landmark Supreme Court case, Weingarten does not require notice at the time of questioning – or, in this case, an investigatory interview. This means that the Employer is not required to inform the employee that he or she has a right to Union representation. For the union and the steward, this means educating their membership by explaining these rights. Many local union contracts contain Weingarten in their language, such as this example:

The employer recognizes the employee's right to be given representation by a steward, or a designated alternate, at any investigatory interview. The employer will remind the employee of this right at the time that the employer requests the investigatory interview.

Many local unions provide their members with wallet-sized cards that read: If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I respectfully request that my union representative, officer, or steward be present at this meeting. Until my representative arrives, I choose not to participate in this discussion.

Weingarten and Public Employees

The original applications of Weingarten covered only those employers under the National Labor Relations Act; therefore, it did not address public employers. However, each state has its own laws for public sector employees – and, each state will have different views on the right to union representation. For example, California public employees have the same rights during an investigatory interview, as do private sector employees. In any case, public sector employees are protected by the due process tenets provided in the Fifth and Fourteenth Amendments of the U.S. Constitution.

Note: Weingarten Cards (English and Spanish) can be ordered through the Teamsters Education Department.

Steward Rights

Employers sometimes assert that the only function of a steward at an investigatory interview is to observe the discussion; in other words, to be a silent witness. This is incorrect. The steward must be allowed to advise and assist the employee in presenting the facts. When the steward arrives at the meeting:

- The supervisor or manager must inform the steward of the subject matter of the interview: in other words, the type of misconduct being investigated. 197
- The steward must be allowed to have a private meeting with the employee before questioning begins. 198
- The steward can speak during the interview, but cannot insist that the interview be ended. 199
- The steward can object to a confusing question and can request that the question be clarified so that the employee understands what is being asked. 200
- The steward can advise the employee not to answer questions that are abusive, misleading, badgering, or harassing. 201

Weingarten Card

(If called to a meeting with management, read the following or present this card to management when the meeting begins.)

If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I respectfully request that my union representative, officer, or steward be present at this meeting.

Until my representative arrives, I choose not to participate in this discussion.

*****You can and should print out the last two pages of this document on some card stock paper. Print one side then flip over and print the other page on the back. Cut the now two sided card out and share them with your Sisters and Brothers.**

NLRB CHARGES

An employer's failure to comply with a worker's request for union representation, or a violation of any other

Weingarten right, is an unfair labor practice. Unless a grievance is pending on the matter, the NLRB does not defer Weingarten charges. 203

QUESTIONS AND ANSWERS

STEWARD'S REQUEST

Q. If I see a worker being questioned in a supervisor's office, can I ask to be admitted?

A. Yes. A steward has a right to insist on admission to a meeting that appears to be a Weingarten interview. 204

If the interview is investigatory, the employee must be allowed to indicate whether he or she desires the steward's presence. 205

COERCION

Q. An employee, summoned to a meeting with her supervisor, asked for her steward. The supervisor said, "You can request your steward, but if you do, I will have to bring in the plant manager and you know how temperamental she is. If we can keep it at this level, things will be better for you." Is this a Weingarten violation?

A. Yes. The supervisor is raising the specter of increased discipline to coerce an employee into abandoning her Weingarten rights. 206

CAN EMPLOYEE REFUSE TO GO TO MEETING?

Q. A supervisor told an employee to report to the personnel office for a "talk" about his attendance. The employee asked to see his steward but the supervisor said no. Can the employee refuse to go to the office without seeing his steward first?

A. No. Weingarten rights do not arise until an investigatory interview actually begins. The employee must make a request for representation to the person conducting the interview. 207 An employee can only refuse to go to a meeting if a supervisor makes clear in advance that union representation will be denied at the interview. 208

MEDICAL EXAMINATION

Q. Our employer requires medical examinations when workers return from medical leaves. Can an employee insist on a steward during the examination?

A. No. A run-of-the-mill medical examination is not an investigatory interview. 209

LIE DETECTOR TEST

Q. Do Weingarten rights apply to polygraph tests?

A. Yes. An employee has a right to union assistance during the pre-examination interview and the test itself. 210

SOBRIETY TEST

Q. If management asks an employee if he will submit to a test for alcohol, does Weingarten apply?

A. Yes. The employee must be allowed to consult with a union representative to decide whether or not to take the test. 211

LOCKER SEARCH

Q. If a guard orders an employee to open a locker, can the employee insist on a steward being present?

A. No. A locker search is not an investigatory interview. 212

COUNSELING SESSION

Q. An employee was given a written warning for poor attendance and told she must participate in counseling with the human relations department. Does she have a right to a union steward at the counseling sessions?

A. This depends. If notes from the sessions are kept in the employee's permanent record, or if other employees have been disciplined for what they said at counseling sessions, an employee's request for a steward would come under Weingarten.²¹³ But if management gives a firm assurance that the meetings will not be used for discipline, and promises that the conversations will remain confidential, Weingarten rights would probably not apply. ²¹⁴

PRIVATE ATTORNEY

Q. Can a worker insist on a private attorney before answering questions at an investigatory interview?

A. No. Weingarten only guarantees the presence of a union representative. ²¹⁵

TELEPHONE INTERVIEW

Q. Over the weekend, a supervisor called a worker's home to ask about missing tools. Did the worker have to answer the questions?

A. No. Weingarten applies to telephone interviews. An employee who fears discipline can refuse to answer questions until the employee has a chance to consult with a union representative. ²¹⁶

STEWARD OUT SICK

Q. If a worker's steward is out sick, can the worker insist that a Weingarten interview be delayed until the steward returns?

A. Usually, no. Management does not have to delay an investigation if another union representative is available to assist the employee. ²¹⁷

INTERROGATION OF A STEWARD

Q. If a steward is called in by supervision to discuss her work, can she insist on the presence of another steward?

A. Yes. Stewards have the same rights to assistance as other employees.²¹⁸

SHOP MEETING

Q. When management calls a meeting to go over work rules, do employees have a right to demand a union representative?

A. No. Weingarten rights do not arise unless management asks questions of an investigatory nature. ²¹⁹

REMEDIES

Q. If management rejects a worker's request for union assistance at an investigatory interview, induces him to confess to wrongdoing, and fires him, will the NLRB order the worker reinstated because of the Weingarten violation?

A. No. The NLRB considers reinstatement to be an unwarranted "windfall" for an employee who confesses to serious misconduct. ²²⁰

The usual Weingarten remedy is a bulletin-board posting in which the employer acknowledges that it violated the Weingarten rules and promises to obey them in the future.

NOTE: The remedy is different when an employee is discharged for requesting a steward or refusing to answer questions without one. In such cases, the NLRB orders reinstatement with back pay. 221

A make-whole remedy is also imposed if an employee is demoted, transferred, or loses privileges because of a request for union representation.

RECORDING THE INTERVIEW

Q. Can a supervisor make an audio recording of an investigatory interview?

A. This depends. The Weingarten decision itself does not forbid an employer from tape recording an investigatory interview. But, if this represents a new policy on the part of the employer, the steward can object on the grounds that the union did not receive prior notice and an opportunity to bargain. 222

PARTICULAR REPRESENTATIVE?

Q. If an employee asks to be represented by her chief steward instead of her departmental steward, must management comply?

A. Usually, yes. If two representatives are equally available, an employee's request for a particular representative must be honored. 223

QUESTIONS ABOUT OTHERS

Q. If a worker is summoned to a meeting and asked about the role of other employees in illegal activities, can he insist on assistance from a union representative?

A. Yes. Although the employee may not be involved in wrongdoing himself, he risks discipline if he refuses to inform on others or admits that he was aware of illegal activities. Because what he says at the meeting could get him into trouble, he is entitled to union representation.

OBSTRUCTION

Q. The company is interviewing employees about drug use in the plant. If I tell my people not to answer questions, could management go after me?

A. Yes. A union representative may not obstruct a legitimate investigation into employee misconduct. 224

If management learns of such orders, you could be disciplined.

Notes

195. NLRB v. J. Weingarten, Inc. 420 U.S. 251, 88 LRRM 2689 (U.S. Sup. Ct. 1975).

196. Baton Rouge Water Works Co., 246 NLRB 995, 103 LRRM 1056 (1979).

197. Pacific Telephone and Telegraph Co., 262 NLRB 1048, 110 LRRM 1411 (1982), enforced in part, 711 F.2d 134, 113 LRRM 3529 (9th Cir. 1983).

198. U.S. Postal Service, 303 NLRB 463, 138 LRRM 1339 (1991).

199. See Southwestern Bell Telephone Co., 251 NLRB 612, 105 LRRM 1246 (1980); New Jersey Bell Telephone Co., 308 NLRB 277, 141 LRRM 1017 (1992); Yellow Freight System, Inc., 317 NLRB 115; 149 LRRM 1327 (1995) (steward may be issued a warning letter for repeatedly interrupting interview, profanity, and pounding on manager's desk).
200. U.S. Postal Service, 288 NLRB 864, 130 LRRM 1184 (1998); NLRB v. J. Weingarten, Inc. 420 U.S. 251, 260, 88 LRRM 2689 (U.S. Sup. Ct. 1975).
201. New Jersey Bell Telephone Co., 308 NLRB 277, 141 LRRM 1017 (1992).
202. NLRB v. J. Weingarten, Inc. 420 U.S. 251, 88 LRRM 2689 (U.S. Sup. Ct. 1975).
203. See Amoco Oil Co., 278 NLRB 1, 2-3, 121 LRRM 1308 (1986).
204. ILGWU v. Quality Mfg. Co., 420 U.S. 276, 88 LRRM 2698 (U.S. Sup. Ct. 1975).
205. Appalachian Power Co., 253 NLRB 931, 106 LRRM 1041 (1980). An employee's silence, after a steward asks to be present, may be considered agreement with the request. See Colgate Palmolive Co. 257 NLRB 130, 107 LRRM 1486 (1981).
206. Southwestern Bell Telephone Co., 227 NLRB 1223, 94 LRRM 1305 (1977).
207. Joseph F. Whelan Co., 273 NLRB 340, 118 LRRM 1040 (1984); Roadway Express, 246 NLRB 1127, 103 LRRM 1050 (1979).
208. See Glomac Plastics, Inc., 234 NLRB 1309, 97 LRRM 1441 (1977), enforced, 592 F.2d 94, 100 LRRM 2508 (2d Cir. 1979); Interstate Security Services, Inc. 263 NLRB 6, 110 LRRM 1535 (1982).
209. U.S. Postal Service, 252 NLRB 61, 105 LRRM 1200 (1980).
210. Consolidated Casinos Corp., 266 NLRB 988, 1008-10, 113 LRRM 1081 (1983).
211. System 99, 289 NLRB 723, 131 LRRM 1226 (1988).
212. See E.I. du Pont de Nemours & Co., 100 LRRM 1633 (Advice Memorandum 1981) (car search); Chrysler Corp. (Advice Memorandum 1981) (cited in Walnut Hill Convalescent Home, 114 LRRM 1255 (Advice Memorandum 1983) (handbag search)).
213. Good Hope Refineries, Inc., 245 NLRB 380, 382-84, 102 LRRM 1302 (1979).
214. Amoco Chemicals Corp., 237 NLRB 394, 396-98, 99 LRRM 1017 (1978).
215. TCC Center Companies, 275 NLRB 604, 119 LRRM (1985).
216. See generally Pacific Southwest Airlines, Inc., 242 NLRB 1169, 1175-76, 101 LRRM 1366 (1979) (ALJ's conclusion that telephone interview is covered by Weingarten, not rejected by Board).
217. Coca-Cola Bottling Co. 227 NLRB 1276, 94 LRRM 1200 (1977).
218. Keystone Consolidated Industries, Inc., 217 NLRB 995, 89 LRRM 1192 (1975).
219. Northwest Engineering Co., 265 NLRB 190, 111 LRRM 148 (1982).
220. Taracorp, Inc. 273 NLRB 221, 117 LRRM 1497 (1984).
221. Safeway Stores, 303 NLRB 989, 138 LRRM 1007 (1991).

222. Cf. Pennsylvania Telephone Guild, 277 NLRB 501, 120 LRRM 1257 (1985), enforced, 799 F.2d 84, 123 LRRM 2214 (3d Cir. 1986).

223. Consolidated Coal Co., 307 NLRB 976, 977-78, 140 LRRM 1248 (1992).

224. See Manville Forest Products Corp., 269 NLRB 390, 115 LRRM 1266 (1984); Cook Paint & Varnish Co., 246 NLRB 646, 102 LRRM 1680 (1979). See also Service Technology Corp., 196 NLRB 845, 80 LRRM 1187 (1972) (employee has no right to refuse to answer questions about misconduct he has been involved in or witnessed).

“If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I request that my steward or union officer be present at the meeting. Without representation, I choose not to answer any questions.”

(This is my right under the Supreme Court Weingarten Rules)

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