Bloomberg Law Reports®

Vol. 4, No. 20 | Labor & Employment | May 17, 2010

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Weingarten Rights: 35 Years and Counting

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President Obama's recent recess appointments to the National Labor Relations Board set off the usual alarms about the possibility of drastic upheaval in the natural order of labor law. Speculation and rumor abound, as traditional labor practitioners of all stripes attempt to divine what impact these appointments may have on their respective clients. Although NLRB Chairperson Wilma Liebman recently told an audience that there would be no "radical" changes, such reassurances are viewed by some with skepticism, because one person's reasoned decision is another's radical notion.

Thirty five years ago the Supreme Court set forth the rights of a unionized employee to be represented during a meeting with his or her employer which may result in discipline in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). These rights enter the spotlight and are discussed every time a new presidential administration changes the make-up of the NLRB. That discussion always centers around whether *Weingarten* rights should be extended to employees working at non-union workplaces, because the rights have been extended and taken away by the NLRB numerous times over the last three decades.

Leaving aside for the moment whether the newly constituted NLRB will extend these rights to non-union employees, the primary reason this is an issue at all is there exists a fundamental misapprehension of what constitutes the scope of *Weingarten* rights. Employers, spurred on by aggressive assertion of rights by unions, generally believe the rights are so far reaching they can alter how a workplace investigation is conducted. The truth is much more nuanced, and an examination of these rights shows that they are actually fairly limited, can be invoked only in a very narrow situation, and the zealousness of the representative can actually harm the employee's interests.

What follows are the 6 main things about *Weingarten* rights every traditional labor practitioner no matter their level or which side of the fence they reside on should know.

1. *The right may be exercised only by the employee, not by anyone else, including the employee's union representative.*

First and foremost, it is the employee's choice as to whether to have a union representative present in a *Weingarten* situation. As the Supreme Court held in *Weingarten*, the very essence of the right is choice; the "employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." *Weingarten*, 420 U.S. 251, 257 (1975). While the employer and union may negotiate about and agree on whether the employer must notify the union of investigatory meetings or whether the employer must notify the employee of his or her *Weingarten* rights, the parties cannot impose representation on the employee. This principle has held firm throughout the years, with the NLRB consistently ruling that not even the union representative has the right to invoke representation. See *Appalachian Power Company*, 253 NLRB 931, 934 (1980) (if the right to be present at "a disciplinary interview could be asserted by the union representative, the employee no longer would have the choice of deciding whether the presence of the representative was more or less advantageous to his interests"). Even if these rights were extended to non-union employees, the right to make the request would still rest exclusively with the employee; the NLRB cannot overrule a Supreme Court decision.

2. *Employers have no duty to inform the employee of his or her* Weingarten *rights.*

One reason the representation rights granted by *Weingarten* can be scary to employers is on the surface they seem similar to the types of rights police officers read to suspects prior to custodial interrogations, where the failure to properly notify a suspect of his or her rights can result in evidence being suppressed and cases dismissed. In reality, they are nothing of the sort. The NLRB has decided there is no obligation to give such notice. *Appalachian Power Company* at 234, n. 6. In fact, the misstatement of the scope of *Weingarten* rights can actually form the basis of an unfair labor practice against the union. The NLRB has taken the position that in certain circumstances it is improper for a union to give the appearance that it is mandatory for its members to request *Weingarten* representation. *California Nurses Association (Henry Mayo Newhall Memorial Hospital)*, Case 31-CB-11267, GC Advice Mem. dated September 16, 2003 (a case where the author argued the union's placement of *Weingarten* language on the cover of a collective bargaining agreement was improper in part because the language suggested the employee was required to request union representation).

3. *The employer need only grant an employee's request for representation if the employee has a reasonable belief that the meeting could result in discipline.*

The scope of when a *Weingarten* request must be honored is probably the most hotly debated topic. *Weingarten* rights are not so sweeping that a mere request by an employee in any context requires that the employer provide a representative. The standard used by the NLRB to determine whether an employee reasonably believes the interview might result in disciplinary action is analyzed by an "objective standard" under all the circumstances of the case. This means the request must be evaluated on a case by case basis.

NLRB case law provides important guidance on this issue. Of course, a purely investigatory meeting held to inquire into suspected misconduct clearly would require the presence of a

representative, if requested. At the other end of the spectrum, if the purpose of the meeting is merely to communicate a disciplinary decision that already has been made, then no such representative need be provided even if requested. *Baton Rouge Water Works*, 246 NLRB 995 (1995).

The employee's right to representation become less clear when the purpose of the meeting does not fall purely investigatory or purely to communicate. The situations are infinite. Not all inquiries by an employer to an employee are "investigatory" and sometimes the employer does not even know there is anything to investigate. The general thread that runs through the case law is whether there is some intent to investigate some matter at the outset; if not, there is no need to provide a representative. This is so even if the meeting ultimately does result in some sort of discipline; *Weingarten* rights are evaluated at the time of the meeting, not afterwards. *U.S. Postal Service*, 252 NLRB 61 (1980) (employee not entitled to *Weingarten* representation at fitness for duty medical examination, in part, because "the absence of evidence that questions of an investigatory nature were in fact asked at these examinations"); *NV Energy, Inc.*, 355 NLRB No. 7, Op., p. 1 (January 29, 2010) (employee not entitled to representative where purpose of meeting was to follow-up on complaints employee made about training class instructors); Success *Village Apartments*, 347 NLRB 1065, 1071 (2006) (no representative required where meeting was to reiterate previously made non-disciplinary administrative decision).

4. *If an employee makes a valid request for a Weingarten representative, the employer has three options.*

If an employee who is entitled to representation makes a request the employer can (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview with no representative or discontinuing the interview altogether. *See Washoe Medical Center*, 348 NLRB 361, 361 n.5 (2006). An employer might choose to discontinue the interview (or not hold it at all) based on confidentiality concerns, especially in cases where there is some sensitivity to information getting out to the general workforce. There is generally speaking no ability, absent some specific agreement, to keep what is said in the meeting confidential. Employers often choose not to continue with the interview in cases of theft where the employer is attempting to stop and apprehend the culprits before tipping them off.

The decision of whether to discontinue an interview should be made carefully. The employer should balance whether giving the employee an opportunity to tell his or her version of events is outweighed by other concerns. While there certainly is no legal requirement to get an employee's version of events, labor arbitrators and courts certainly will evaluate an employer's investigation to see if it was conducted fairly and objectively, and one element of such an evaluation is whether the employee was given due process to hear and respond to allegations. On balance, the situations where the interviews are not held or are discontinued should be rare, because the presence of representation at an interview will only add credibility to the investigation.

5. *While the employee can select a particular representative, the representative must be reasonably available.*

The employee who has the right to a *Weingarten* representative can select a particular person to attend the meeting, and the employer is obligated to provide the person, absent "extenuating circumstances." *Anheuser-Busch, Inc.*, 337 NLRB 3, 7–8 (2001). The person selected could be a full-time, paid union representative, a steward or even a fellow employee. It seems clear that a non-employee with no standing with the union need not be allowed into the meeting.

Extenuating circumstances justifying denial of particular representative usually have to do with the representative's availability. The employer does not have to wait for days before the selected representative becomes available. *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977) (Friday request by employee for vacationing steward who was not to return until Monday reasonably denied) However, waiting several minutes until the representative becomes available might be required, particularly if there is no urgency. *Anheuser-Busch, Inc.* 337 NLRB at 8 (2001) (fact requested person was on lunch break expected to last 15 minutes is "available" when there "was nothing about the allegations against [employee] that demanded instant attention"). If the employee's request for a particular person to act as representative is reasonable under all the circumstances, then the request should be granted.

The employers should conduct the investigatory meeting on a schedule that fits with its objectives. There is no duty to inform an employee or the union that the meeting will take place at a certain time. The presence or absence of a particular individual may not make much of a difference given the restrictions on participation, set forth in number 6, below.

6. *The selected representative can provide advice and active assistance to the employee, but cannot transform the meeting into an adversarial confrontation.*

Many employers worry that having to provide a representative to an employee will turn every investigatory meeting into a formal hearing where its managers and supervisors will be cross-examined, and the inquiry will be turned into something else. In some cases the employer chooses to cancel the meeting altogether if it believes the meeting will be too confrontational. In actuality, despite what is often asserted by union business representatives and stewards across the country, the employer always maintains its right to conduct the investigation free from disruption.

The NLRB standard is that the "[p]ermissible extent of participation of *Weingarten* representatives in interviews

is seen to lie somewhere between mandatory silence and adversarial confrontation." *Postal Service*, 288 NLRB 864, 867 (1988). The Supreme Court held that the right to representation must not interfere with legitimate employer prerogatives. *Weingarten*, 420 U.S. 258–259, 263. So, while an employer cannot direct the representative to be silent (*Barnard College*, 340 NLRB 934, 935 (2003)), the representative cannot take any action that is disruptive to the meeting. *New Jersey Bell Telephone*, 308 NLRB 277, 279 (1992) (*Weingarten* does not permit representative to continually object to employer's repeat questions"). The bottom line is the *Weingarten* representative does not have any authority to impede or disrupt an investigation in any way. The representative's role is to advise the employee, not prove the employee's innocence. The representative does not have the authority to question managers or supervisors or determine areas of inquiry. The investigatory nature of the meeting means the employer has yet to decide what, if any, action is to be taken. The employer decides the areas of inquiry, the pace and the tone of the interview.

If the representative acts in a disruptive manner he or she should be given a clear warning that further disruption could result in termination of the interview or ejection from the meeting. If the warning does not solve the problem the employer should inform the employee that it will make a decision without the information it hoped to obtain during the meeting, and simply discontinue the meeting.

The fact an employee who was represented during an investigatory meeting will add extra credence to the decision to discipline or terminate the employee if and when the matter goes before an arbitrator or court. If the representative was disruptive that fact can be brought out at the arbitration hearing. Conversely, although oftentimes contested, the representative is a witness to what transpired at the meeting and could be called to testify. The *Weingarten* representative best serves the employee by acting calmly and noting what transpires. Acting overzealously can harm the employee's case. For example, a steward's advice to not answer questions may mean the employer is deprived of important information in deciding whether discipline is appropriate or the level.

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The change in the make-up of the NLRB will bring a renewed interest in *Weingarten* rights. The scope and nature of these rights have changed little in the 35 years since the Supreme Court made its decision. an examination of the six most critical aspects of these rights shows they have been carefully balanced so as to give the employee support and assistance during a stressful time, if he or she chooses, but allowing the employer to run its business as it sees fit.

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