

THE EFFECT OF THE WEINGARTEN DECISION ON EMPLOYEE DISCIPLINE

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A. When Weingarten Applies.

NLRB v. Weingarten is a U.S. Supreme Court decision that lays a foundation for union representation at investigatory interviews. The basic criteria of the Weingarten rule are as follows:

1. *Source of Weingarten right.* The right to union representation comes from the guarantee of the right of employees to "act in concert for mutual aid and protection."

2. *Request for representation.* The right arises only in situations where the employee requests representation.

3. *Scope of Weingarten right.* The employee's right to request representation is limited to situations where the employee reasonably believes that the investigation will result in disciplinary action. This determination is based upon "objective standards" and a reasonable evaluation of "all of the circumstances," not on the subjective reaction of the employee. For example, a counseling session deemed by management to be a preliminary step to the imposition of discipline falls within the scope of the rule. A run-of-the-mill shop-floor conversation such as giving instructions, training or needed corrections of work techniques is outside the scope of the rule. Additionally, an employee "acts at his or her own peril" if the employee refuses a request merely to accompany a supervisor to an office or some other location where further discussion is contemplated. However, talking to an employee about increasing production may be sufficiently linked to the threat of discipline to trigger Weingarten.

4. *Limitations on exercise.* Exercise of the right cannot interfere with "legitimate employer prerogatives" (for example, the union representative cannot interfere with the employer's ability to conduct the interview, which is decided on a case-by-case basis).

5. *Employee's options.* The employer may carry on its inquiry without interviewing the employee, giving the employee the choice between having an interview without a union representative or having no interview and foregoing any benefits that might be derived from it.

6. *Employer's options.* Once a request for representation has been made, the employer can grant the request, cancel or discontinue the interview, or offer the employee the choice of having or continuing the interview without a union representative or having no interview and foregoing any benefits that might be gained from it. The employer cannot continue the interview without a union representative unless the employee voluntarily agrees to remain unrepresented after having been presented with, or having been made aware of, these choices.

7. *Pre-interview consultation.* If the employer insists that the interview take place immediately, the employer must allow the employee to meet and confer with the union

representative in private in advance on the City's time. If the interview date provides adequate opportunity to meet outside of the City's time, there is no requirement that the consultation with the union representative be on the City's time.

8. *Selection of representative.* If the requested union representative is unavailable at the scheduled interview time, the interview can still go forward as long as another union representative is available. The employer is not required to suggest or obtain an alternate representative for the employee. The employer cannot demand a specific representative if the employee prefers a different representative and the employee's choice of representative is available. The presence of a fellow employee does not fulfill the representation requirement because the employee has a right to be represented by an agent of the labor organization that is the exclusive representative of the employees.

9. *No duty to bargain.* The employer has no duty to bargain with any union representative that attends the investigatory interview. The representative must be given an opportunity to speak, though, because the representative's role is to provide "assistance" and "counsel" to the employee.

10. *Applicability to non-investigatory meetings.* The NLRB, in a case called Certified Grocers of California, applied Weingarten to a non-investigatory interview where there was a reasonable basis for believing that disciplinary action would result. The employee was required to meet with the plant manager and was given a disciplinary layoff for low production. The Ninth Circuit Court of Appeals overruled the NLRB to the extent that the case required union representation at an interview that was called to inform the employee about a previously made disciplinary decision. As a result, at least in the Ninth Circuit, union representation is not required at an interview to inform the employee of disciplinary action that has already been decided upon. If the scope of the interview expands, however, union representation may be required.

11. *Drug tests.* Where a drug test is part of a broader investigation, Weingarten applies even if no questions are going to be asked of the employee. A drug test, standing alone, probably does not trigger Weingarten.

12. *Waiver.* It may be possible for an employees' collective bargaining representative to waive Weingarten rights, but the waiver must be clear and unmistakable. Merely signing a form permitting the interview is not enough.