

“Hey, THE BOSS JUST CALLED ME INTO THE OFFICE!”

The Weingarten Decision and the
Right to Representation on the Job

Fifth Edition

2021

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by David Rosenfeld and Jolene Kramer

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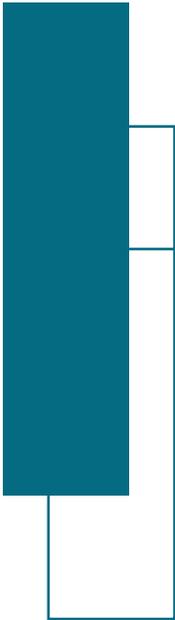
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Introduction

Labor unions in the United States have the fundamental right to represent their members before an employer. On behalf of workers, unions negotiate contracts with employers—setting wages, hours, and working conditions—and represent members in grievance procedures. In addition, the National Labor Relations Act (NLRA) provides workers with important protections when they are being investigated by an employer for possible discipline. These protections are called *Weingarten* rights, named for one of two Supreme Court cases, decided concurrently, that established this important right.

The two cases, described in Section II, concern situations that may be familiar to many people involved with union activities. They reflect the kind of ongoing tension and difficulty that unionists face in representing their fellow workers. Under the pressure of management, workers are often threatened with or actually subjected to investigations, interrogations, discipline, and discharge. The cases, *NLRB v. J. Weingarten, Inc.*¹ and *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.*,² are important because they have changed the right of representation in the workplace.

In general terms, an employee who is the subject of an investigatory meeting that the employee reasonably believes may lead to discipline has the right to representation in the unionized workplace. Although this sounds straightforward, the application of this rule is sometimes complex.

¹ 420 U.S. 251 (1975).

² 420 U.S. 276 (1975).

The purpose of this pamphlet is to provide a basic overview of these cases, and to explain how the National Labor Relations Board (NLRB) and the courts have interpreted and applied the principles expressed in these cases over the years. Further, this pamphlet is designed to provide a guide to union activists and leaders regarding how they can most effectively assert the right to representation in the unionized workplace.

Labor unions in the United States have the fundamental right to represent their members before an employer.

Union employees in the private sector, the California public sector, and the federal public sector have different levels of *Weingarten* protections. Sections II-IV of this pamphlet lay out *Weingarten* rights for private sector employees under the NLRA. Section V explains *Weingarten* rights for two kinds of California employees: non-union employees and agricultural workers. Section VI covers California public sector and federal union employees. Section VII provides sample language for the *Weingarten* Rule that unions should attempt to negotiate into their contracts.

One final word. This pamphlet is intended for use by union officers, stewards, and rank-and-file union members. We provide legal citations only as a reference for those who may do more research. They are not necessary to an understanding of the rights described herein.

2.

Unions Push for Representation When Members Face Discipline

A. *NLRB v. J. Weingarten, Inc.*

In June 1972, Leura Collins, a lunch counter salesclerk for the J. Weingarten, Inc. Store No. 98 in Houston, Texas, was called into her store manager's office and interrogated by the manager and an undercover investigator employed by the store. Unknown to Collins, she had been under surveillance by the investigator for the prior two days as he investigated a report that she was stealing money from the cash register. His investigation had turned up no evidence of wrongdoing, but the manager had received a report from another employee that Collins "had purchased a box of chicken that sold for \$2.98, but had placed only \$1.00 in the cash register." During the questioning regarding this incident, Collins requested that her shop steward or another representative from her union, Local 455 of the Retail Clerks, be called into the meeting. Her repeated requests for such assistance were denied. In response to questions about the chicken, Collins explained she had only taken a dollar's worth of food, but placed the food in a larger box because the store had run out of smaller boxes. The investigator left the office and confirmed this fact with other store employees. Upon returning to the interview, the investigator "told Collins that her explanation had checked out, that he was sorry if he had inconvenienced her, and that the matter was closed."

Collins broke down and began to cry. She "blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch." The manager and investigator were surprised by this admission because free lunches were not allowed at this particular store. They once again began interrogating

Collins. She once again requested the presence of her shop steward, and the store manager again denied her request.

During the course of the questioning the investigator asked Collins to sign a statement saying she owed the store approximately \$160 for lunches. She refused to sign the statement. Collins pointed out that in Store No. 2 of the Weingarten chain, where she had worked for nine years prior to her transfer to Store No. 98, free lunches were a regular policy. When company headquarters advised the investigator that it was not certain whether the policy against providing free lunches was in effect at Store No. 98, he ended his interrogation and Collins left the manager's office. Though told to keep the matter to herself, Collins "reported the details of the interview fully to her shop steward and other union representatives" and an unfair labor practice charge was filed.

B. *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.*

On October 16, 1969, owners of Quality Manufacturing Co., a West Virginia women's clothing factory, fired three employees: Catherine King, Delia Mulford (the International Ladies' Garment Workers' Union shop chairwoman), and Martha Cochran (the assistant chairwoman). The firings came after a week-long series of confrontations between the three women and management. The events began on October 10, when King and two other employees complained to the company president that "they were unable to make a satisfactory wage under the piecework system then in effect." The meeting was bitter and ended with an order from the company manager to return to work and a threat that they were free to "go elsewhere if they were dissatisfied with the company."

Soon after the meeting, the company production manager (who was also the wife of the company president) noticed King had turned off her machine and was speaking to a group of workers on the shop floor. These workers had also turned off their machines. The production manager ordered them back to work, but King told her to mind her own business, after which the production manager ordered King to follow her to the president's office. King asked Mulford, the union chairwoman, to accompany her. The president told Mulford to go back to work and ordered King to meet with him alone. Both women refused. The production manager phoned Mulford that evening and told her she was suspended for two days.

On October 13, King was again ordered to meet with the company president. This time she asked the assistant union chairwoman, Cochran, to accompany her. They were met at the president's office by the production

manager, who refused to allow Cochran into the meeting and told her that if she wanted to keep her job she should return to work. Cochran replied that, if the purpose of the meeting was to discuss the October 10 dispute, then “that is union business and she has asked me to represent her.” Management refused to meet with the two women together, and refused to allow King to return to work until she met with the president alone. The two employees then sat down outside the president’s office and waited.

Their sit-in continued the next day; Cochran was then suspended for two days. On October 15, they were joined by Mulford, whose two-day suspension had ended. King once again refused to meet with the company president without union representation. On October 16, all three women went again to the company president’s office. Cochran was ordered to return to work and did so. King was ordered again to meet with management alone; she again refused and was fired. Shop chairwoman Mulford was also fired.

“You’ve worked this morning, but you’re not working this afternoon. Just go home. You wanted to draw unemployment now go on and draw it.”

Later in the day, Cochran attempted to file grievances on behalf of all three employees with the president, who stated he was about to leave town and had no time for such things. When she put the list of grievances on his desk, he picked it up and threw it into the wastebasket. He then pulled Cochran’s timecard and told her, “You’ve worked this morning, but you’re not working this afternoon.” When Cochran asked if she had been fired he replied, “Just go home. You wanted to draw unemployment now go on and draw it.”

3.

The *Weingarten* Rule: An Employee's Right to Representation

On February 19, 1975, the United States Supreme Court issued decisions in the above cases, finding in both cases that the employer committed unfair labor practices. In making that finding, the Supreme Court affirmed what had already been the position of the NLRB for many years: Employee insistence upon union representation during an investigatory interview that the employee reasonably believes may result in disciplinary action is protected concerted activity.³ The Board had recognized this right at least as far back as 1965, when it considered the right to representation in the *Texaco* case.⁴ The Supreme Court's holdings are together known as the "*Weingarten* Rule."

The Court decisions in favor of the employees in *Weingarten* and *Quality Manufacturing* were based on an interpretation of Section 7 of the National Labor Relations Act (NLRA), which states:

“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 or protection....⁵

³ The Court ruled on both cases on the same day, but most of its reasoning is expressed in *Weingarten*.

⁴ *Texaco, Inc.*, 179 NLRB 976 (1969).

⁵ 29 U.S.C. §157.

The rights given to employees under the NLRA are designed to eliminate the inequality of bargaining power between employees and employers.

The NLRA enforces this right through Section 8(a)(1), which states: “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”⁶

In *Weingarten*, the Supreme Court recognized that the rights given to employees under the NLRA are designed to eliminate the “inequality of bargaining power between employees ... and employers.”⁷ In evaluating the scope of Section 7 rights in the context of an employee requesting union representation at a meeting with an employer, the Court stated:

“The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of [Section] 7 that “[e]mployees shall have the right ... to engage in ... concerted activities for the purpose of ... mutual aid or protection.” This is true even though the employee alone may have an immediate stake in the outcome; he seeks “aid or protection” against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee’s interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.⁸

Thus, the Court found that the employees of *Weingarten, Inc.* and *Quality Manufacturing Co.* were unjustly denied their right to union representation under the NLRA.

Following these decisions, the NLRB and the courts have ruled on more specific guidelines regarding the right to union representation. A summary of these guidelines and the questions that may arise are covered in the following sections.

⁶ 29 U.S.C. §158(a)(1).

⁷ *Weingarten*, 420 U.S. at 261-62.

⁸ *Id.* at 260-61 (internal citation omitted).

4.

The *Weingarten* Guidelines

1. The employee must request that a union representative be present in the meeting

The right to union representation is triggered only after the employee affirmatively requests representation.⁹ That affirmative request can take the form of a straightforward demand, a question, or a request for delay to obtain an alternative representative.¹⁰ However, a statement of fact, such as “I’m here without representation,” is not an affirmative request.¹¹ Moreover, the employer has no duty to advise the employee of their *Weingarten* rights.¹² The employee may also intentionally choose to forego these rights and participate in an interview or meeting unaccompanied by a union representative.¹³

The rule is that ***the employee must request union representation***; the employer does not have to offer it!

⁹ *Id.* at 257.

¹⁰ *Circus Circus Casinos, Inc. v. NLRB*, No. 18-2101, 2020 WL 3108276 at *5 (D.C. Cir. June 12, 2020) (providing examples such as “I need a Union Steward” and “Should I have a union representative present?”).

¹¹ *Id.*

¹² *Id.*; *U.S. Postal Serv.*, 241 NLRB 141, 152 (1979); *El Paso Healthcare Sys., Ltd.*, 358 NLRB 460, 467 (2012) (*Noel Canning* victim) (“The employee’s right to the assistance of a union representative arises only upon the request of the employee; the employer has no duty to inform the employee of the right.”) (citing *NLRB v. N.J. Bell Tel. Co.*, 936 F.2d 144 (3d Cir. 1991)).

¹³ *Weingarten*, 240 U.S. at 257.

However, some collective bargaining agreements provide additional protection by requiring the employer to offer union representation even if the employee does not specifically request it. This is an important protection to include in the union contract if possible.

2. An employee is only entitled to union representation if the meeting is investigatory and the employee reasonably believes discipline may result

In order to have the right to a union representative, an employee must be subjected to an investigatory interview that the employee “reasonably fears” may result in disciplinary action. In *Lennox Industries, Inc.*, the court summarized the limitations on *Weingarten* representation rights as follows:

“Under *Weingarten*, an employee is entitled to a union representative only when (1) the interview in question is *investigatory*, i.e., when it is designed to elicit answers to work-related questions which might affect the employee or the bargaining unit, and (2) the employee reasonably fears that discipline might result from the interview.¹⁴

An employee is therefore not entitled to a union representative if the meeting is called solely to administer discipline without any investigation, for instance if an employer calls an employee into his office simply to announce or apply disciplinary action already decided.¹⁵ Prior to a meeting or interview, an employee may ask if discipline could result from the employer’s questioning; if the answer is no, then the employee cannot exercise any *Weingarten* rights. The employee should ask again if the subject matter or the nature of the questioning changes.

However, an employer is prohibited from using the issuance of discipline as an excuse to investigate further without a union representative present.¹⁶ If,

¹⁴ *Lennox Indus., Inc. v. NLRB*, 637 F.2d 340, 343 (5th Cir. 1981), *enforcing* 244 NLRB 607 (1979).

¹⁵ *Baton Rouge Waterworks Co.*, 246 NLRB 995, 997 (1979); *see also NLRB v. Texaco Inc.*, 659 F.2d 124, 126 (9th Cir. 1981); *see also Tampa Tribune*, 351 NLRB 1324, 1333-34 (2007), *enforcement denied on other grounds sub nom., Media Gen. Operations, Inc. v. NLRB*, 560 F.3d 181 (4th Cir. 2009).

¹⁶ *Gen. Die Casters, Inc.*, 358 NLRB 742 (2012) (finding that an employee was denied *Weingarten* rights where he was issued a warning during the meeting, but his employer questioned him about more general performance issues, and the employee repeatedly asked if he needed to “get somebody in here”).

during a meeting, the employer advises the employee of a disciplinary decision and then seeks additional facts or information, or attempts to have the employee admit their alleged wrongdoing or sign a statement to that effect, the employee would have a right to representation and should ask for it.¹⁷

An employee may not be entitled to a union representative where the purpose of a meeting is supervisory rather than investigatory, i.e., if the meeting is designed to show an employee how to improve their work performance.¹⁸ The NLRB has held that even if the employee reasonably believed discipline could result from a meeting, *Weingarten* rights did not arise where the sole purpose of the meeting was to inform the employee of a previously made nondisciplinary administrative decision.¹⁹

This sometimes puts an employee in a difficult position of being unsure whether to insist upon their *Weingarten* rights. In *El Paso Healthcare System*, an employer essentially deceived her employee by claiming a meeting was not investigatory.²⁰ Prior to the meeting, the employee asked over e-mail, “Will this meeting that you would like to have with me possibly lead to me being disciplined? If so, I would like to have a union rep. present.”²¹ The employer responded, “No, it is not... I just need to ask you some questions.”²² However, the meeting itself was plainly investigatory, and the employee was disciplined thereafter.²³ The NLRB found this to be a violation of the employee’s *Weingarten* rights.²⁴

An employee can assert their *Weingarten* rights only when the employee has a reasonable belief or concern that an investigatory meeting may lead to discipline. But when is it reasonable to believe there may be discipline? This is

¹⁷ *Titanium Metals Corp.*, 340 NLRB 766, 774 (2003), *reversed on other grounds*, *Titanium Metals Corp. v. NLRB*, 392 F.3d 439 (D.C. Cir. 2004) (finding that where an employer informs an employee of disciplinary action and then questions the employee to seek information to bolster that decision, the right to representation applies).

¹⁸ *Weingarten*, 420 U.S. at 257-58; *see also Gen. Elec. Co.*, 240 NLRB 479, 480-81 (1979) (noting the difficulty in distinguishing the circumstances where an employee could have a reasonable objective basis for believing discipline may result).

¹⁹ *Success Village Apartments, Inc.*, 347 NLRB 1065, 1071 (2006).

²⁰ *El Paso Healthcare Sys., Ltd.*, 358 NLRB at 468-70.

²¹ *Id.* at 465.

²² *Id.* at 466.

²³ *Id.* at 468-70.

²⁴ *Id.*

based on an objective standard considering all of the circumstances of the case; the understanding of the employee alone does not typically settle the issue.²⁵

In *Lennox Industries, Inc.*, the court concluded that an employee's fear was reasonable even though the employer claimed it intended no discipline. Because the subject matter of the employer's questioning related to poor work performance and problems with a supervisor, the court found that, from an objective perspective, the employee had a reasonable fear of discipline despite

the employer's claims otherwise.²⁶ The Court reasoned that, in certain situations, discipline could result notwithstanding an employer's intentions. For example, "an interview in which work-related questions are asked of an employee, but which the employer does not intend to result in discipline may nevertheless result in discipline if the employee surprises his employer with an answer which the employer finds unsatisfactory or threatening."²⁷ Thus, an interview may be investigatory and include

a "risk of discipline" even though the employer is not seriously contemplating discipline at the time.²⁸

In contrast, in *Southwestern Bell Telephone Co.*, the NLRB found that an employee's fear of discipline was not reasonable even though the employee was asked to meet with a senior-level manager about one month after his supervisor informed him that he needed to improve his work production and he had been previously referred to the employee assistance program. The Board noted the employee had never been disciplined for production problems, nor had any other employee, and the employee assistance program was not disciplinary.²⁹ Therefore, the employee was not entitled to a union representative during a meeting with his supervisor.

A 2016 case shows that the NLRB will step in when an arbitrator fails to recognize the employee's reasonable fear as the dispositive factor.³⁰ The Board overturned an arbitration award as "palpably wrong" and "repugnant to the Act"

The rule is that the employee must request union representation; the employer does not have to offer it!

²⁵ *Sw. Bell Tel. Co.*, 338 NLRB 552, 553 (2002).

²⁶ *Lennox Indus., Inc.*, 637 F.2d at 344.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Sw. Bell Tel. Co.*, 338 NLRB at 552, 557-58.

³⁰ *Verizon Cal., Inc.* 364 NLRB No. 79 (Aug. 19, 2016).

where the arbitrator focused on the intent of the employee's supervisor rather than whether the employee had a reasonable fear of discipline.³¹ The Board found that the arbitrator ignored "objective facts," such as that the employee was called into his supervisor's office over an issue about which he had been very recently disciplined. The Board held that the proper standard was "the point of view of a reasonable employee rather than the supervisor."³² To be clear, however, the test is an objective one from a reasonable employee's perspective, viewing the totality of the circumstances.

As is clear from these cases and examples, application of the *Weingarten* Rule in a specific situation will require a fact-intensive analysis and may well be subject to debate. One of the best ways to resolve the rights of employees is through contract language that spells out employees' rights to a union representative. Sample contract language is provided in Section VII below.

One unique circumstance is where an employee is not *obligated* to take part in an investigatory hearing and is technically doing so voluntarily. In such cases, there is no requirement that the employee be granted *Weingarten* rights.³³ In *Menorah Medical Center*, the NLRB found that a hospital violated the NLRA by denying two nurses' requests for a union representative when they appeared before the hospital's peer review committee, which had the authority to determine whether employees met medical standards.³⁴ However, when the decision was appealed, the court reversed the Board's finding because the nurses were not *obligated* or *required* to participate in the peer review committee meeting.³⁵

As a final point, regardless of the circumstance, an employer may not punish an employee for simply requesting a representative because that itself is an act protected by Section 7.³⁶ This protection exists even if the employee is not entitled to a representative under the law, and the employer may not threaten to impose or actually impose more severe discipline because of such a request.³⁷

³¹ *Id.*

³² *Id.*

³³ *Menorah Med. Ctr.*, 362 NLRB No. 193 (Aug. 27, 2015), *petition for review granted and enforcement denied in relevant part, Midwest Div.- MMC, LLC v. NLRB*, 867 F.3d 1288, 1298-99 (D.C. Cir. 2017) (denying enforcement because the employees were not obligated to attend the investigatory meeting even though they may have felt there was a need to attend).

³⁴ *Id.*

³⁵ 867 F.3d at 1298-99.

³⁶ *See Sw. Bell Tel. Co.*, 227 NLRB 1223, 1223 (1977).

³⁷ *Id.*

3. The *Weingarten* Rule has been extended to polygraph testing and drug testing

When employers use polygraph testing and other forms of lie detectors in discipline situations, employees are entitled to *Weingarten* rights in all phases of the testing process. *Weingarten* rights apply to pre-polygraph interviews, the administration of polygraph tests, and post-polygraph interviews.³⁸

An employee's request to be represented by a union representative is an exercise of their rights under Section 7.³⁹ Disciplining an employee for exercising that right is an unfair labor practice.⁴⁰ Therefore, where an employer administers a medical test, for example a drug or alcohol test, as part of an investigation into an employee's misconduct, the employee has a right to consult with their union representative before consenting to take the test. Note, however, that

pre-employment or random drug testing are not part of such an investigation and do not give the employee a right to be represented.

In two recent cases, the NLRB held that an employee's refusal to submit to an investigatory drug or alcohol test without a union representative cannot be used against the employee, including as evidence of insubordination.⁴¹ This is true even if waiting for the representative would delay the testing process for a reasonable period of time—the employer must afford the employee a reasonable period of time to obtain union representation.⁴² Employer policies that treat

a refusal to take a drug or alcohol test as a positive test cannot be enforced if the employee was denied their *Weingarten* rights.⁴³

Regardless of the circumstance, an employer may not punish an employee for simply requesting a representative.

³⁸ *Consol. Casinos Corp.*, 266 NLRB 988, 1009-10 (1983); *Sahara Las Vegas Corp.*, 284 NLRB 337 (1987); see also *Ghr Energy Corp.*, 294 NLRB 1011, 1016 (1989) (finding that implementation of a polygraph testing program was a mandatory subject of bargaining). It is not a lawful condition of employment in California for private employer to condition employment on taking a polygraph or similar test. Labor Code § 432.2. Federal law limits the use of polygraph tests. 29 U.S.C. § 2001.

³⁹ *Safeway Stores, Inc.*, 303 NLRB 989, 996 (1991).

⁴⁰ *Id.*

⁴¹ *Ralphs Grocery Co.*, 361 NLRB 80 (2014); *Manhattan Beer Distribs., LLC*, 362 NLRB 1731 (2015), enforced, *Manhattan Beer Distribs., LLC v. NLRB*, 670 F. App'x 33 (2d Cir. 2016).

⁴² *Manhattan Beer Distribs., LLC*, 362 NLRB at 1732.

⁴³ *Id.*

4. If the employee asks for representation, the employer can terminate the interview and make a disciplinary decision without the interview

If the employee requests the presence of a union representative, the employer has three options: (1) grant the request, (2) terminate the interview, or (3) offer the employee the choice of continuing the interview without representation or not having the interview at all.⁴⁴ The employer cannot insist on continuing the investigatory interview without union representation. If the employer wishes to continue the interview, it must allow the union representative to be present *or* obtain the employee's consent to continue the interview without representation.⁴⁵ If the employer fails to follow one of the above three options, the employee's continued participation in the interview is not considered a waiver of their *Weingarten* rights.⁴⁶

Note that if the employee chooses not to be interviewed, they may lose the benefit of providing their side of the story:

“The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or not having an interview and forgoing any benefit that may be derived from one.”⁴⁷

The NLRB recently reiterated that “*Weingarten* gives employees a right to union representation during investigative interviews, but it does not afford immunity for unexplained misconduct.”⁴⁸ However, if an employer chooses to terminate an interview because the employee requests union representation, and subsequently disciplines the employee, the union could file a grievance asserting that the employer did not conduct an adequate investigation.

Therefore, an employer conducting an investigation has a choice to make when an employee asserts their *Weingarten* rights. The employer may allow the

⁴⁴ *Consol. Freightways Corp.*, 264 NLRB 541, 542 (1982).

⁴⁵ *Id.*; see also *YRC Inc.*, 360 NLRB 744 (2014) (an employer did not violate the Act by denying an employee's request for a representative then discontinuing the interview).

⁴⁶ *El Paso Healthcare Sys., Ltd.*, 358 NLRB at 469.

⁴⁷ *Weingarten*, 420 U.S. at 258-59.

⁴⁸ *YRC Inc.*, 360 NLRB at 745.

union's participation in order to obtain the benefits of a full investigation, or refuse the union's participation and face the possibility of a union grievance should the employee be disciplined.

5. The employee generally has the right to their chosen representative

Generally, collective bargaining agreements allow the union to designate stewards, typically via the union's own bylaws or internal procedures.⁴⁹ Therefore, in the context of an investigatory interview, the employee is generally limited to the steward(s) or representative(s) established by the agreement.

The employee may select a particular union steward or representative to attend the investigatory interview as long as that steward is readily available.⁵⁰ An employer's refusal to allow the employee the representative of their choice when that designated representative is present and available is a violation of the *Weingarten* Rule.⁵¹ "The selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, as long as the selected representative is available at the time of the meeting."⁵²

However, the employer can insist upon an available shop steward or union-appointed representative over the objections of the employee if the employee's chosen representative is unavailable.⁵³ If using the representative chosen by the employee would result in an unreasonable delay, the employer may force the employee to accept a different representative.⁵⁴

In *Buonadonna Shoprite, LLC*, the NLRB held that an employer did not violate the NLRA when it disciplined an employee who, at the advice of the union steward, refused to provide a written statement requested by the employer during an investigatory interview until the particular union representative of his choice could attend.⁵⁵ The Board held that the employee's rights were adequately protected under the NLRA, and the employer was not required to wait for another

⁴⁹ See *Newman v. Local 1101, CWA*, 570 F.2d 439, 443 (2d Cir. 1978).

⁵⁰ *Pac. Gas & Elec. Co.*, 253 NLRB 1143, 1143 (1981).

⁵¹ *Consol. Coal Co.*, 307 NLRB 976, 978 (1992).

⁵² *Barnard Coll.*, 340 NLRB 934, 935 (2003) (citing *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), modified, 337 NLRB 756 (2002), enforced, 338 F.3d 267 (4th Cir. 2003); *Pac. Gas & Elec. Co.*, 253 NLRB at 1143).

⁵³ *Anheuser-Busch, Inc.*, 337 NLRB at 7-9; *Pac. Gas & Elec. Co.*, 253 NLRB 1143.

⁵⁴ *Consol. Coal Co.*, 307 NLRB at 978; *Coca-Cola Bottling Co.*, 227 NLRB 1276, 1276 (1977).

⁵⁵ 356 NLRB 857 (2011).

union representative to be available because the employee's regular steward was present and available to represent him.⁵⁶

If no union-designated representative is available, the employer must generally wait to conduct the meeting unless the circumstances require an immediate investigation.⁵⁷ For example, if the steward is out sick or working elsewhere and there is no other union-designated representative available, the employer must wait until the steward becomes available or advise the employee that they can waive the right to union representation and go ahead with the interview.

In addition, an employee who is a union officer is entitled to representation if requested. The NLRB has found a *Weingarten* violation where an employer refused to allow an employee who was a union steward to speak with his union representative prior to an investigatory interview.⁵⁸

6. The *Weingarten* Rule applies to group meetings where management confronts more than one employee at a time

Weingarten rights may also be asserted during group meetings where management confronts more than one employee at the same time. The determining factor is “whether discipline reasonably can be expected to follow.”⁵⁹

In a 2012 decision, the NLRB held in *Banner Health System* that a blanket instruction to employees to maintain confidentiality during a workplace investigation violates Section 7 of the NLRA, which provides employees the right to engage in “concerted activity” regarding working conditions.⁶⁰ However, in 2017, *Banner Health* was overruled in *Apogee Retail LLC*, where the Board held that employers could caution workers to keep an investigation confidential while the investigation is underway.⁶¹ This creates the additional question of

⁵⁶ *Id.*

⁵⁷ See *Williams Pipeline Co.*, 315 NLRB 1 (1994) (holding that an employee was denied his *Weingarten* rights when his employer substituted the union-designated steward, who was not at work that day, for another union member who had formerly been a steward).

⁵⁸ *U.S. Postal Serv.*, 345 NLRB 426, 426 (2005).

⁵⁹ *Nw. Eng'g Co.*, 265 NLRB 190, 191 (1982).

⁶⁰ *Banner Health Sys.*, 358 NLRB 809 (2012), *affirmed and adopted as modified*, 362 NLRB No. 137 (June 26, 2015), *enforced in relevant part*, *Banner Health Sys. v. NLRB*, 851 F.3d 35, 38 (D.C. Cir. 2017), *overruled by Apogee Retail LLC*, 368 NLRB No. 44 (2019).

⁶¹ 368 NLRB No. 44 (2019).

whether the employer can insist that a union representative keep a conversation confidential as a condition of granting *Weingarten* rights.

Consistent with the principles discussed above, if the interview is with an employee who is not the possible subject of discipline, under *Apogee Retail* the employee can be instructed not to say anything, including to their union representative, until the investigation is complete.

7. The employee is entitled to information from the employer regarding the subject of the investigation prior to the meeting

The employee is entitled to know the subject matter of the meeting prior to the meeting itself.⁶² Knowing the subject matter of the meeting allows the employee to consider whether discipline may occur and thus whether union representation is warranted.⁶³ If the *stated* subject matter of the meeting is benign but the employer begins to interrogate the employee in a manner that may lead to discipline, the employee has a right to union representation.⁶⁴ Interview subjects may change, and at any point the employee's right to union representation could arise.

The NLRB has long required employers to provide unions with the names of witnesses with knowledge related to grievances and discipline. In 2015, the Board overturned longstanding precedent that allowed employers to refuse to provide witness statements.⁶⁵ Now, if a union requests witness statements obtained by the employer and the employer argues it has a confidentiality interest in protecting those statements from disclosure, the Board will apply the balancing test set forth in *Detroit Edison v. NLRB*.⁶⁶ Under that case, the NLRB balances the union's need for the requested information against any legitimate and substantial confidentiality interests established by the employer.⁶⁷

⁶² *Pac. Tel. & Tel. Co. v. NLRB*, 711 F.2d 134, 137 (9th Cir. 1983), *enforcing* 262 NLRB 1034 (1982).

⁶³ *Id.*

⁶⁴ *Titanium Metals Corp.*, 340 NLRB 766, 774 (2003), *enforced in relevant part*, *Titanium Metals Corp. v. NLRB*, 392 F.3d 439 (D.C. Cir. 2004).

⁶⁵ *Am. Baptist Homes of the W. ("Piedmont Gardens")* 362 NLRB No. 139 (2015), *enforced*, *Am. Baptist Homes of the W. v. NLRB*, 858 F.3d 612 (D.C. Cir. 2017).

⁶⁶ *Detroit Edison v. NLRB*, 440 U.S. 301 (1979).

⁶⁷ *Piedmont Gardens*, 362 NLRB 1135 (2015).

8. The employee is entitled to consult with their union representative prior to the meeting

The NLRB has ruled that, if the employer insists on an immediate interview, the employee and their union representative are entitled to some time to confer privately in advance of the meeting.⁶⁸ The employer is not, however, required to provide the employee and the union representative an opportunity to confer during work time if the meeting date is scheduled sufficiently in advance to allow them to confer during non-work time.⁶⁹

In *Pacific Telephone*, the Ninth Circuit held that it is an unfair labor practice for an employer to refuse an employee the opportunity for a pre-interview conference with their union representative.⁷⁰ Failure to grant such a pre-interview conference constitutes an unfair labor practice because, without such a conference, the ability of the union representative to give the aid and protection sought by the employee is seriously diminished.⁷¹

9. The employer must allow the union representative a private pre-interview consultation with the employee upon request

It is the employee's responsibility to request *Weingarten* representation and the employer need not notify the employee of this right. However, once the employee has obtained union representation, the union representative may request, and the employer must grant, a private pre-interview conference with the employee prior to the investigatory interview.⁷²

10. The role of the union representative

The union representative must be allowed a chance to speak on behalf of the employee. The employer violates the law when the representative is told they cannot say anything during the investigatory interview.⁷³ The union representative must be afforded the opportunity to provide "advice and active

⁶⁸ *U.S. Postal Serv.*, 288 NLRB 864, 866-67 (1988); *System 99*, 289 NLRB 723 (1988).

⁶⁹ *Climax Molybdenum Co. v. NLRB*, 584 F.2d 360, 365 (10th Cir. 1978).

⁷⁰ *Pac. Tel.*, 711 F.2d at 137.

⁷¹ *Id.*

⁷² *Pac. Tel.*, 711 F.2d at 137.

⁷³ *Sw. Bell Tel. Co.*, 251 NLRB 612, 613 (1980), *enforcement denied*, 667 F.2d 470 (5th Cir. 1982); *see also Texaco, Inc.*, 659 F.2d at 126-27.

assistance” to a represented employee.⁷⁴ This means the union representative can take reasonable caucuses during the interview to consult with the employee.⁷⁵ The union representative cannot, however, disrupt or obstruct the interview.⁷⁶

A union representative may generally assist the employee in answering questions in an investigatory interview, but a recent case demonstrated how an employer may demand to hear directly from the employee.⁷⁷ In *PAE Applied Technologies, LLC*, a disciplinary meeting with seven individuals, including the employee and his union representative, descended into a “cacophany.”⁷⁸ The employer instructed everyone in the room not to speak unless called upon and then asked the employee to prepare a written account of the incident under investigation.⁷⁹ The employer then allowed the employee to speak with his representative before being questioned about his written statement.⁸⁰ The NLRB found that the limitation on speaking did not violate the *Weingarten* right to “advice and active assistance” because it applied to management and union officials alike and only at the moment when the employee was to provide a factual account of the incident.⁸¹

In *Howard Industries, Inc.*, the steward showed the employee his notebook, which contained statements the employee had previously made to the steward, and the employee read statements from the notebook while answering the employer’s questions.⁸² The NLRB held this did not interfere with the employer’s right to investigate the employee’s alleged misconduct and to hear the employee’s own account.⁸³

The union representative may make notes about the interview, but this may have to be done on non-work time. Notes may take the form of written notes or even dictation to a cell phone. Be aware, however, that secretly recording such conversations is illegal in California and some other states. Recordings should not

⁷⁴ *El Paso Healthcare Sys., Ltd.*, 358 NLRB at 468 (citing *Washoe Med. Ctr., Inc.*, 348 NLRB 361 (2006); *Barnard Coll.*, 340 NLRB 934).

⁷⁵ See *Murtis Taylor Human Servs. Sys.*, 360 NLRB 546, 571-72, 568 n.23 (2014).

⁷⁶ *Mead Corp.*, 331 NLRB 509, 514 (2000); *N.J. Bell Tel. Co.*, 308 NLRB 277, 279-80 (1992).

⁷⁷ *PAE Applied Tech., LLC*, 367 NLRB No. 105 (2019).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Howard Indus., Inc.*, 362 NLRB 303 (2015).

⁸³ *Id.*

be made by anyone—management, workers, or workers’ union representatives—unless everyone present has consented.⁸⁴ Employers may discipline employees in some cases where they engage in such secret recordings.

Remarks made by an employee or union representative during the course of an investigatory meeting constitute protected activity.⁸⁵ In *Atlantic Steel*, the Board established a four-part test to determine whether an employee’s conduct is so egregious that they lose the protection of the National Labor Relations Act. The test considers the following: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee’s outburst, and (4) whether the outburst was, in any way, provoked by the employer’s unfair labor

practices.⁸⁶ A wider range of conduct would be protected in a grievance proceeding than, for example, on the shop floor, since the potential for disruption on the shop floor is greater than in a private meeting.⁸⁷ A union representative who uses a loud voice or asks persistent clarifying questions is protected by the NLRA provided the representative does not engage in threatening behavior, prevent the employer from asking questions, or prevent the employee from answering.⁸⁸ In 2020, the NLRB issued a decision modifying *Atlantic Steel* and replacing it with the so-called Wright Line standard.⁸⁹ Under this standard, if an employer can show it would have

disciplined an employee for profane, racist, or otherwise abusive comments made outside of activity protected by Section 7, then the worker will not be protected from discipline for uttering such comments in the course of Section 7-protected activity. It is difficult to understand how this will apply in *Weingarten* meetings, which are generally private meetings. Such conduct should now be considered risky and should be discouraged. Union representatives should refrain from profane and disrespectful conduct and should counsel the employee to do the same.

Audio recordings should not be made by anyone—management, workers, or workers’ union representatives—unless everyone present has consented.

⁸⁴ Cal. Penal Code § 632.

⁸⁵ *Crown Cent. Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (1970).

⁸⁶ 245 NLRB 814, 816 (1979).

⁸⁷ *Id.*

⁸⁸ *Murtis Taylor Human Servs. Sys.*, 360 NLRB 546, 547 (2014); *but see Pub. Serv. Co. of N.M.*, 364 NLRB No. 86, slip op. at 7-8 (Aug. 22, 2016) (finding a steward lost NLRA protection by obstructing and effectively terminating an employee meeting).

⁸⁹ *General Motors LLC*, 369 NLRB No. 127 (2020).

11. The employer does not have a duty to bargain with the union representative at an investigatory interview

Although the union representative does not have to remain silent, the employer has no obligation to bargain with the union representative.⁹⁰ This means, for example, that the union representative cannot force the employer to explain its position during an investigatory interview of an employee. The employer's presentation of its position can be reserved for a later grievance procedure or other proceeding and is not required in the *Weingarten* setting.

The union representative is present in order to assist the member in facing management. An individual member will have natural fears and concerns during an investigatory meeting, which may make it difficult for them to present an accurate picture of the matter under investigation. The union representative may be able to bring information into the meeting that will help resolve the issue. However, the employer can decide to disregard that information. The employer may also insist on hearing the employee's account of the matter under investigation.⁹¹

As mentioned above, however, the employer cannot force the union representative to be silent. The court reasoned in *Texaco*:

“ We agree with the Board here that [the language in *Weingarten* allowing an employer to “insist” on hearing the employee's account] is directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation. The passage does not state that the employer may bar the union representative from any participation. Such an inference is wholly contrary to other language in the *Weingarten* opinion which explains that the representative should be able to take an active role in assisting the employee to represent the facts.... In refusing to permit the representative to speak, and relegating him to the role of a passive observer, the respondent did not afford the employee the representation to which he was entitled.⁹²

⁹⁰ *Weingarten*, 420 U.S. at 259-60.

⁹¹ *Id.* at 260.

⁹² *Texaco, Inc.*, 659 F.2d at 126-27, enforcing 251 NLRB 633 (1980).

Although the boundaries of a union representative's participation are not "precisely defined," a representative must be given the opportunity to lend "active assistance" and should not be relegated to the role of a passive observer.⁹³ Indeed, *Weingarten* itself contemplates the active involvement of a union representative.⁹⁴

This is an important point for union representatives. To be effective, a representative must be forceful and yet respectful. The steward is the equal of the manager for this purpose but should not themselves engage in insubordination.⁹⁵

12. The employee may refuse to attend an interview if they have been denied a union representative, but attendance may be prudent to avoid accusations of insubordination

Although an employee may refuse to attend an interview where they have been denied a union representative, the line between insubordination and a legal refusal to participate in an investigatory interview is thin. If the employer insists on meeting with the employee alone and threatens disciplinary action if they refuse, the employee should be advised to attend the meeting but remain silent. This may be necessary to avoid a situation where the boss could falsely claim not to have refused the employee's request for union representation. Afterwards, with the assistance of the union, the employee can file a grievance and/or unfair labor practice charge against the employer for insisting the employee forgo the right to representation. This is an extension of the "obey-now, grieve later" provision of most union contracts.⁹⁶

⁹³ *U.S. Postal Serv.*, 351 NLRB 1226, 1230-32 (2007).

⁹⁴ *Weingarten*, 420 U.S. at 262-63; see also *NLRB v. Sw. Bell Tel. Co.*, 730 F.2d 166, 172 (5th Cir. 1984).

⁹⁵ Although there is no obligation to bargain during a *Weingarten* meeting, there are some circumstances under which the employer is obligated to bargain over disciplinary issues. If the employer and union are bargaining a first contract, the employer has an obligation to offer the union an opportunity to bargain over imposing a suspension or termination. The employer may also have this obligation in some circumstances where the contract has expired. These rights are separate from *Weingarten* rights. *Total Sec. Mgmt. Ill. 1, LLC*, 364 NLRB No. 106 (Aug. 26, 2016) (employer must bargain before imposing discipline involving termination, suspension or demotion where discretion is involved in the absence of grievance procedure).

⁹⁶ *Roadway Express, Inc.*, 246 NLRB 1127, 1127-28 (1979).

13. An employee is not entitled to a “make-whole” remedy for denial of *Weingarten* rights; however, the employee is entitled to a “make-whole” remedy if disciplined because of invoking their *Weingarten* rights or because of their interview conduct

When an employee is disciplined or terminated for demanding their *Weingarten* rights, it is an illegal violation of the NLRA and the employee is entitled to reinstatement and backpay, also called a “make-whole” remedy.⁹⁷ However, if the employer had other cause for terminating the employee, the employer may do so without violating the Act.⁹⁸ In a 2015 case called *Dupont*, the NLRB clarified that a “make-whole” remedy is appropriate when: (1) the discharge decision was based at least in part on the employee’s misconduct during an interview in which they were denied their *Weingarten* rights; and (2) the employer was unable to show that it would have discharged the employee anyway.⁹⁹

Although the boundaries of a union representative’s participation are not precisely defined, they should not be relegated to the role of a passive observer.

In the *Dupont* case, the employee had asked for union representation on multiple occasions and his employer denied those requests and proceeded with the interviews. Later, the employer discharged the employee because of “inconsistent statements” made during its investigations. The NLRB remanded the case back to the judge for a determination of whether the employee’s discharge was based, at least in part, on his conduct during the unlawful interviews. If so, and if the employer could not prove it would have discharged the employee anyway based on conduct *outside* the unlawful interviews,

the employee would be entitled to reinstatement with back pay. Such relief is available where “the employee’s discharge may have been caused, at least in part, by conduct that would not have occurred but for the employer’s violation of the employee’s *Weingarten* right.”¹⁰⁰

Generally, where there is no reinstatement and/or back pay available, the remedy ordered by the NLRB for a *Weingarten* violation is a cease and desist

⁹⁷ See *Anheuser-Busch, Inc.*, 351 NLRB 644, 648 (2007).

⁹⁸ *Pac. Tel.*, 711 F.2d at 138; *Taracorp Indus.*, 273 NLRB 221, 223 (1984).

⁹⁹ *E.I. Dupont De Nemours & Co., Inc.*, 362 NLRB 843 (2015).

¹⁰⁰ *Id.* at 847.

order stating that the employer must allow workers their *Weingarten* rights in the future and post a notice to that effect.

14. Arbitrators will sometimes grant *Weingarten* remedies in discipline cases

Sometimes, in the context of labor arbitration, arbitrators will enforce *Weingarten* requirements as part of a “just cause” analysis. When an employer has not provided due process rights as required under a collective bargaining agreement, the arbitrator may use *Weingarten* remedies to cure these violations.¹⁰¹ Arbitrators tend to be more flexible than the NLRB in selecting remedies for procedural violations, and often order reinstatement rather than lesser forms of relief for *Weingarten* violations.¹⁰² In addition, arbitrators, unlike the NLRB, may find that an employer should have advised its employee of the nature and purpose of a meeting so the employee could decide whether to exercise their *Weingarten* rights.¹⁰³

Arbitrators can also prohibit the employer from relying on evidence arising from a *Weingarten* violation, including statements made where the employee was not afforded their *Weingarten* rights.¹⁰⁴ They may also consider a *Weingarten* violation as a factor in determining whether to mitigate a discharge to a lesser form of discipline.¹⁰⁵

Therefore, if confronted with a potential *Weingarten* violation, it may be prudent to file a grievance under the union contract if possible.

15. Employees working remotely are still entitled to representation

Employees who work remotely, either temporarily or permanently, are still entitled to a union representative at an investigatory interview where they reasonably believe discipline could result. During the COVID-19 pandemic that spread in 2020 and into 2021, many employers implemented or improved the ability to conduct meetings via video conference software. Depending on the circumstances, the employee or union may wish to request a video conference,

¹⁰¹ See generally Elkouri & Elkouri: How Arbitration Works, Ch. 15.3.F.v, Ch. 19.3.B (8th ed. 2016).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See generally *id.*

¹⁰⁵ *Id.*

particularly if the employee works from home. If a video conference is not possible, the employee or union representative should request that all attendees appear by phone (having the union representative appear by phone while the employer and employee are meeting in person could lead to difficulties in representation and should be avoided if possible).

The employee is also entitled to designate their representative and conduct a preliminary meeting with their representative, where reasonable, according to the above principles concerning availability. Opportunities or requirements to work remotely may increase in the future; unions should consider including language specifically addressing this issue in their next contract negotiations.

16. The employee in the non-union setting is not entitled to representation

Non-union workers do not have the right to a union representative or fellow employee in a meeting with management.

In 2000, in *Epilepsy Foundation of Northeast Ohio*, the NLRB ruled *Weingarten* rights apply to employees in non-union workplaces.¹⁰⁶ This granted non-union employees the right to have a coworker represent them at an investigatory interview if the employee reasonably believed discipline might result. This was an important new right afforded to non-union employees.

However, in 2004, the NLRB overruled *Epilepsy* (in a 3-2 vote) and returned to prior NLRB precedent holding that *Weingarten* rights apply only to unionized employees.¹⁰⁷ In reversing *Epilepsy*, the NLRB noted that there are “two permissible interpretations of the Act,” and that “policy considerations support the denial of the *Weingarten* right in the nonunionized workplace.”¹⁰⁸ It is not unusual for the NLRB to change positions on such issues when there is a change in administration.

It is important that *Weingarten* rights are afforded to workers represented by a union from the moment the union is recognized or when an NLRB election is conducted and the Union is certified after winning the election. Workers

¹⁰⁶ *Epilepsy Found. of Ne. Ohio*, 331 NLRB. 676, 676 (2000), *enforced in relevant part*, 268 F.3d 1095, (D.C. Cir. 2001), *cert. denied*, 536 U.S.904 (2002).

¹⁰⁷ *IBM Corp.*, 341 NLRB 1288, 1288 (2004).

¹⁰⁸ *Id.* at 1289-93; *but see Publix Super Mkts., Inc.*, 347 NLRB 1434, 1435 (2006) (applying *IBM* rule retroactively).

have *Weingarten* rights even when the employer is challenging representation and refusing to recognize the union. Despite its reversal of *Epilepsy*, the NLRB continues to recognize that an employer’s unlawful refusal to recognize or bargain with a majority union does not defeat an employee’s *Weingarten* rights.¹⁰⁹

17. The NLRB defers unfair labor practice charges when a collective bargaining agreement is in existence

Generally, when an unfair labor practice charge is filed during the existence of a contract, the NLRB will defer the charge and wait until the grievance and arbitration procedures have concluded before acting on it. In the context of *Weingarten* violations, this deferral occurs if the violations are arguably within the “compass or scope” of a provision in the parties’ contract¹¹⁰ and if the employer is willing to proceed to arbitration and to waive procedural challenges. Unless “clearly repugnant to the purposes and policies of the Act,” the arbitration decision on the unfair labor practice charge will render NLRB action unnecessary, and the NLRB will defer to the decision of the arbitrator.¹¹¹

Thus, where an unfair labor practice charge is filed for a *Weingarten* violation during the life of a contract, the NLRB will generally defer the charge until after the grievance is resolved. If the eventual decision is “palpably wrong and repugnant to the Act”¹¹² the NLRB will make an independent finding on the unfair labor practice charge regarding the refusal to provide *Weingarten* rights.

18. Summary

Weingarten rights are among the most important workplace rights given to unions to protect workers under the National Labor Relations Act. Stewards and other union representatives are first responders in protecting workers in the disciplinary process. *Weingarten* rights serve an important purpose in workplace democracy. They should be exercised vigorously and responsibly.

¹⁰⁹ *Five Star Mfg., Inc.*, 348 NLRB 1301(2006), *enforced*, 278 F. App’x 697 (8th Cir. 2008).

¹¹⁰ *MV Trans.*, 368 NLRB No. 66 (2019).

¹¹¹ *Altoona Hosp.*, 270 NLRB 1179, 1186 (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080, 1090 (1955).

¹¹² The “palpably wrong” standard was applied in *Verizon California, Inc.*, 364 NLRB No. 79, and the arbitrator’s decision was rejected. The Board’s deferral standards in cases involving *Weingarten* rights were briefly modified by *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014), *petition for review denied*, *Beneli v. NLRB*, 873 F.3d 1094, 1097 (9th Cir. 2017). However, in *UPS*, 369 NLRB No. 1 (2019), the Board returned to the “palpably wrong” standard.

5.

***Weingarten* Rights for California Agriculture Workers and California Non-Union Workers**

1. California Agricultural Labor Relations Act

There is no direct precedent of the Agricultural Labor Relations Board (ALRB) applying the *Weingarten* Rule. However, because the ALRB generally follows NLRB precedent, workers in the agricultural sector should assert their *Weingarten* rights in any unionized setting.

2. California law provides similar rights to employees not protected by another statute

It is the policy of the state of California that employees not represented by labor unions still have the freedom to organize and designate representatives of their choosing. California Labor Code section 923 declares the policy of the state as follows:

“Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own

choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

It is the policy of the state of California that employees not represented by labor unions still have the freedom to organize and designate representatives of their choosing.

If the employer is not a public employer (see below) and is not covered by the NLRA, *Weingarten* rights may be inferred from this California statute. Therefore, an unrepresented employee may be able to invoke this policy to request representation—generally by a lawyer—where discipline or other adverse action is taken in the workplace. Notably, under California law, an employee cannot be discharged for demanding to be represented by an attorney.¹¹⁵

¹¹⁵ *Gelini v. Tishgart*, 77 Cal.App.4th 219 (1999).

6.

Public Employees

1. California public employees are entitled to representation in the disciplinary process

In California, public employees have the same right to representation during an investigatory interview as unionized workers in the private sector. The NLRB's *Weingarten* Rule was applied to California public employees by the California Supreme Court even before the United States Supreme Court upheld *Weingarten* itself on appeal.¹¹⁴ In applying the *Weingarten* Rule to public sector employees, the California Supreme Court concluded that a public employee's right to effective union representation under the laws establishing public sector collective bargaining¹¹⁵ "includes a right to have a union representative accompany him to a meeting with his employer when the employee reasonably anticipates that such meeting may involve union activities and when the employee reasonably fears that adverse action may result from such a meeting because of union-related conduct."¹¹⁶

The protection of public employees in California therefore goes *beyond* the NLRA because it extends to any meeting or interaction that an employee reasonably anticipates "may involve union activities" and where the employee reasonably fears "adverse action may result." Therefore, California public sector workers are entitled to union representation during, for example, a meeting to

¹¹⁴ *Soc. Workers' Union v. Alameda Cty. Welfare Dep't*, 11 Cal.3d 382, 384 (1974).

¹¹⁵ The original decision was issued under California Government Code §3500.

¹¹⁶ *Soc. Workers' Union*, 11 Cal.3d at 384.

review a negative performance evaluation,¹¹⁷ a meeting to resolve a dispute over leave rights under the terms of a contract,¹¹⁸ a meeting to seek salary increases or classification changes,¹¹⁹ an interactive process meeting regarding reasonable accommodations,¹²⁰ and any post-termination hearing.¹²¹ The right goes beyond the typical meeting setting: a recent set of Public Employment Relations Board (California's equivalent of the NLRB) decisions found that employees were entitled to the presence of a union representative during physical body searches as part of a criminal investigation of a prison guard¹²² and when an employee was sent to a room to provide a written statement on his whereabouts during work time.¹²³

The Public Employment Relations Board (PERB) recently held that the right to representation is designed to protect employees not only from unwitting admissions during an investigation, but also from circumstances where a representative might otherwise have prevented them from losing their temper, becoming insubordinate, lying, or engaging in other misconduct, and giving the employer additional or alternative grounds for discipline.¹²⁴ Therefore, an employee whose misconduct was in part a result of an interview held under unlawful conditions may be entitled to make-whole relief.¹²⁵

In *Los Angeles Community College District*, PERB adopted the *Banner Health* principle, since overturned in the NLRB context, that a blanket instruction to employees to maintain confidentiality during a workplace investigation violates Section 7 of the NLRA.¹²⁶ In ruling that such an instruction violates public sector statutes, PERB reasoned, "In the area of employer rules and directives, PERB does not look favorably on broad, vague directives that might chill lawful speech or other protected conduct."¹²⁷ However, keep in mind there may be circumstances

¹¹⁷ *Redwoods Cmty. Coll. Dist.*, PERB Dec. No. 293 (1983) (disapproving rule that no reasonable belief in discipline is needed), *enforced*, 159 Cal.App.3d 617 (1984).

¹¹⁸ *Fremont Union High Sch. Dist.*, PERB Dec. No. 301 (1983).

¹¹⁹ *Univ. of Cal.*, PERB Dec. No. 403-H (1984).

¹²⁰ *Sonoma Cty. Superior Court*, PERB Dec. No. 2409C (2015).

¹²¹ *E. Sierra Unified Sch. Dist.*, PERB Dec. No. 312 (1983).

¹²² *State of Calif. (Dep't of Corr. & Rehab.)*, PERB Decision No. 2598-S (2018).

¹²³ *San Bernardino Cmty. Coll. Dist.*, PERB Decision No. 2599-E (2018).

¹²⁴ *Capistrano Unified Sch. Dist.*, PERB Dec. No. 2440E (2015).

¹²⁵ *Id.*

¹²⁶ *L.A. Cmty. Coll. Dist.*, PERB Dec. No. 2404-E (2014).

¹²⁷ *Id.*

California public employees have the right to representation at any meeting that an employee reasonably anticipates may involve union activities and reasonably fears may result in adverse action.

where the employer has a legitimate interest in such a restriction, for example where there is an actual risk the speech will interfere with an ongoing confidential workplace investigation.

The right to representation extends to all public employees under the various state laws governing public employees.¹²⁸ This right is generally enforceable by filing a charge with PERB; the Unfair Practice Charge form is available online at <https://perb.ca.gov/how-to-file-an-unfair-practice-charge/>.

Peace officers in California have specific protections under the Public Safety Officers Procedural Bill of Rights Act, found at California

Government Code sections 3300 *et seq.* Section 3303 describes in detail the conditions that must be followed “[w]hen any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action....”¹²⁹ The statute states that prior to interrogation, an officer must be informed of the identity of the interrogators and the nature of the investigation.¹³⁰ The interrogation must be conducted at a reasonable hour, for a reasonable period of time, may not include offensive language, and may be tape-recorded by the officer.¹³¹ Similar to the *Weingarten* Rule, the right to representation under the Public Safety Officers Procedural Bill of Rights Act arises when the interrogation focuses on matters likely to result in disciplinary action.¹³²

¹²⁸ See the Meyers-Milias-Brown Act, Cal. Gov’t Code §§ 3500-3511. There are several state laws governing public employees in particular sectors. See *Univ. of Cal.*, PERB Dec. No 403-H (1984); *E. Sierra Unified Sch. Dist.*, PERB Dec. No 312 (1983); *Fremont Union High Sch. Dist.*, PERB Dec. No. 301 (1983); *Redwoods Cmty. Coll. Dist.*, PERB Dec. No. 293 (1983) (disapproving rule that no reasonable belief in discipline is needed), *enforced*, 159 Cal.App.3d 617 (1984); *Rio Honda Cmty. Coll. Dist.*, PERB Dec. No. 272 (1982). The California Public Employee Relations Program of the UC Berkeley Institute for Research on Labor and Employment publishes many booklets (called pocket guides) on the laws governing public employees in California. They are useful guides and are available at <http://cper.berkeley.edu/pocket-guides/>.

¹²⁹ Cal. Gov’t Code § 3303.

¹³⁰ *Cal. Corr. Peace Officers Ass’n v. State*, 82 Cal.App.4th 294, 306 (2000).

¹³¹ *Id.*

¹³² *Id.*

2. California public employees must disclose potentially incriminating information if given the *Lybarger* admonition

Normally citizens have the right to remain silent in the face of questioning by public authorities under the United States and California Constitutions. This is often referred to as “pleading the fifth” and is specific to potential criminal liability. Citizens may refuse to make statements that could incriminate them (i.e., subject them to criminal prosecution).

However, under California law, public employees may be compelled to disclose potentially incriminating information to their employer for purposes of an internal investigation, and may be disciplined for refusing to do so.¹³³ Public employees can be required to answer any investigatory inquiry from their employer if they are given what is referred to as the “*Lybarger* admonition.” In *Lybarger v. City of Los Angeles*, the California Supreme Court held that a police officer had no constitutional or statutory right to refuse to answer potentially incriminating questions if the officer has been advised that their answers cannot be used in a subsequent criminal proceeding.¹³⁴ The holding in *Lybarger* was extended to all California public employees, even employees of government contractors, in *TRW, Inc. v. Superior Court*.¹³⁵

California public employees may be compelled to disclose potentially incriminating information to their employer and may be disciplined for refusing to do so.

Therefore, if a public employer advises its employee that any statement the employee makes cannot be used against them in a criminal case, and the employee nonetheless refuses to answer, the employee can be disciplined, up to dismissal, for insubordination in refusing to answer.¹³⁶ In other words, public sector employees cannot “plead the fifth” in order to avoid answering questions

¹³³ Cal. Gov’t Code § 3303(e). This code section generally regulates the conditions for interrogation of public employees.

¹³⁴ 40 Cal.3d 822, 827 (1985).

¹³⁵ 25 Cal.App.4th 1834, 1853 (1994).

¹³⁶ *Spielbauer v. Cty. of Santa Clara*, 45 Cal.4th 704, 729 (2009).

from their employer that could lead to discipline, if they are given the *Lybarger* admonition.

3. Federal employees may also be compelled to answer incriminating questions during an investigatory interview

Federal employees may also be compelled to answer questions during an investigatory interview provided they are not made to waive their Fifth Amendment right against self-incrimination. In *Garrity v. New Jersey*, the United States Supreme Court held that the government may not, upon threat of termination, require a public employee to speak *and* to waive the immunity from use in a subsequent criminal prosecution.¹³⁷ Therefore, as long as the employer states that the employee's statements will not be used in criminal prosecution, the employer can compel the employee to answer questions during an investigation by threatening their job if they remain silent.¹³⁸

In addition to *Garrity* rights, federal employees have *Loudermill* rights, which require due process before an employee can be dismissed from their job. In *Cleveland Board of Education v. Loudermill*, the United States Supreme Court held that federal employees must be afforded due process in the form of a pre-termination meeting.¹³⁹ The employer must present the grounds for termination, and the employee must have the opportunity to respond.¹⁴⁰

4. Federal employees are entitled to union representation in meetings with management regarding potential disciplinary action

Federal employees also have a right to union representation at any examination by their employer in connection with an investigation if (1) the employee reasonably believes the examination may result in disciplinary action; and (2) the employee requests representation.¹⁴¹ Federal agencies are required to

¹³⁷ *Garrity v. New Jersey*, 385 U.S. 493, 494-97 (1967).

¹³⁸ *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 426 F.2d 619, 628 (2d Cir. 1970) (holding that employees who refused to answer questions during a workplace investigation, after being clearly informed that their answers, and any information gained as a result of their answers, could not be used against them in a criminal proceeding, were lawfully terminated for their refusal).

¹³⁹ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

¹⁴⁰ *Id.* at 543.

¹⁴¹ 5 U.S.C. § 7114(a)(2)(B).

inform employees annually of their rights under this provision.¹⁴² These rights are enforced by the Federal Labor Relations Authority.

Interviews conducted by *other* federal agencies that do not employ the person being interviewed, and are not performing the function of the employing agency or operating under the employing agency's control, are not required to extend *Weingarten* rights.¹⁴³ Hence, persons interviewed by the Office of Personnel Management, which manages the federal workforce, may not be entitled to union representation.¹⁴⁴

¹⁴² 5 U.S.C. § 7114(a)(3).

¹⁴³ *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 754 F.3d 1031 (D.C. Cir. 2014) (upholding Federal Labor Relations Authority decision).

¹⁴⁴ *Id.*

7.

Sample Contract Language for the *Weingarten* Rule

To provide the best protection for union members, unions should attempt to negotiate into their contracts the basic tenets of the *Weingarten* decision. **Contract language can be stronger than what has been provided in court rulings and NLRB decisions**, and will be enforceable through the grievance procedure.

Suggested Language:¹⁴⁵

- A. “The employer recognizes the employee’s right to be given requested representation by a steward at any investigatory interview. As a result, it will not conduct such an interview without notifying the steward and allowing the steward to be present. Any discipline which is imposed without affording this right shall be null and void.”
- B. “The employer recognizes the employee’s right to be given requested representation by a steward at any investigatory interview. The employer will remind the employee of this right at the time that the employer requests the investigatory interview.”
- C. “When the employer contemplates discipline of an employee, the employer shall offer an interview to allow the employee to answer the charges involved. The employee shall be permitted to have a shop steward present with them during the interview.”

¹⁴⁵ This proposed language contemplates there is an on-site steward. If there is no on-site steward, the language will have to be modified to reflect the circumstances.

- D. “No interview of any employee where discipline may result shall occur without the presence of the steward. This right may be waived by the individual with a written waiver which must be provided to the union. Any discipline which arises as a result of such a meeting in violation of this provision is null and void.”
- E. “If it becomes necessary for management to discipline any employee, such disciplinary action shall be carried out as follows: The employee’s supervisor must first discuss the matter of contemplated discipline with the employee’s steward. The employee and the steward shall be given a reasonable time to discuss the matter together and respond to the supervisor’s allegations. The employee’s supervisor will have the authority to resolve the problem at this level.”

Technically, the union can lawfully waive *Weingarten* rights in a contract, but the waiver must be explicit.¹⁴⁶ Very few unions ever waive this right.

Suggested Handout:

One way to remind employees of their *Weingarten* rights is to give them a pocket size handout to retain on their person. Sample language could read as follows:

“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 be present at this time.”

In Spanish, this sample language is:

“Si esta discurso puede dar lugar a disciplina, castigo, despedida, o pueda causar algun efecto en las condiciones de me trabajo personal – les pido respetuosamente que este presente mi representante de la Union.”

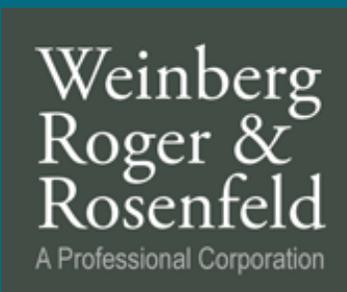
¹⁴⁶ See *Prudential Ins. Co. of Am.*, 275 NLRB 208, 209-10 (1985).



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