

“WEINGARTEN RIGHTS” (UNION REPRESENTATION DURING COMPANY INTERROGATIONS)

One of the most vital functions of a Union steward is to prevent management from intimidation employees. Nowhere is this more important than in closed-door meetings when supervisors, or guards, often trained in interrogation techniques, attempt to coerce employees into confession to wrongdoing.

The rights of employees to the presence of union representatives during investigator interviews was announced by the U.S. Supreme Court in 1975 in *NLRB vs. J. Weingarten, Inc.* Since that case involved a clerk being investigated by the Weingarten Company, these rights have become known as *Weingarten rights*.

Unions should encourage workers to assert their *Weingarten rights*. The presence of a steward can help in many ways. For example:

- ❖ The steward can help a fearful or inarticulate employee explain what happened.
- ❖ The steward can raise extenuating factors.
- ❖ The steward can advise an employee against blindly denying everything, thereby giving the appearance of dishonesty and guilt.
- ❖ The steward can help prevent an employee from making fatal admissions.
- ❖ The steward can stop an employee from losing his or her temper, and perhaps getting fired for insubordination.
- ❖ The steward can serve as a witness to prevent supervisors from giving a false account of the conversation.

NOTE: the NLRB does generally not defer Charges alleging a violation of Weingarten rights. Nor are violations considered “de minimus” even if no employee is disciplined.

WHAT IS AN INVESTIGATORY INTERVIEW?

Employees have *Weingarten rights* only during investigatory interviews. An investigatory interview occurs when a supervisor questions an employee to obtain information that could be used as a basis for discipline or asks an employee to defend his or her conduct. **If an employee has a reasonable belief that discipline or other adverse consequences may result from what he or she says, the employee has a right to request union representation.** Investigatory interviews usually relate to subjects such as:

- ❖ absenteeism
- ❖ accidents
- ❖ damage to company property
- ❖ drinking
- ❖ drugs
- ❖ falsification of records
- ❖ fighting
- ❖ insubordination
- ❖ lateness
- ❖ poor attitude
- ❖ sabotage
- ❖ theft
- ❖ violation of safety rules
- ❖ work performance

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

Nonetheless, even ordinary shop-floor discussions can change its character if the supervisor is dissatisfied with the employee's answers. If this happens, the employee can insist on the presence of a union representative before the conversation goes any further.

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

NOTE: An employer that has followed a *past practice* of allowing stewards to be present when supervisors announce discipline must maintain the practice during the contract term. Refusing to allow a steward to attend would constitute an unlawful unilateral change.

WEINGARTEN RULES

Under the Supreme Court's *Weingarten* decision, when an investigatory interview occurs, the following rules apply:

RULE 1: ***The employee must make a clear request*** for union representation before or during the interview. The employee cannot be punished for making this request.

RULE 2: After the employee makes the request, the employer must choose from among ***three options***. The employer must either:

- a. ***Grant the request*** and delay questioning until the union representative arrives and has a chance to consult privately with the employee; or
- b. ***Deny the request*** and end the interview immediately; or
- c. Give the employee a choice of:
 1. having the interview without representation; or
 2. ending the interview.

RULE 3: If the employer denies to request for union representation, and continues to ask questions, it commits an unfair labor practice and the employee has a ***right to refuse*** to answer. The employer may not discipline the employee for such a refusal.

RIGHTS OF STEWARDS

Employers often assert that the only role of a steward at an investigatory interview is to observe the discussion, in other words to be a *silent witness*. **The Supreme Court, however, clearly acknowledged a steward's right to assist and counsel workers during the interview.**

Decided cases establish the following procedures:

1. When the steward arrives, the supervisor must inform the steward of the subject matter of the interview, i.e., the type of misconduct for which discipline is being considered (theft, lateness, drugs, etc.).
2. The steward must be allowed to take the worker aside for a private pre-interview conference before questioning begins.
3. The steward must be allowed to speak during the interview. However, the steward does not have the right to bargain over the purpose of the interview.
4. The steward can request that the supervisor clarify a question so that the worker can understand what is being asked.
5. After a question is asked, the steward can give advice on how to answer.
6. When the questioning ends, the steward can provide additional information to the supervisor.

It must be emphasized that if the *Weingarten* rules are complied with, stewards have no right to tell workers not to answer questions, or to give false answers. Workers can be disciplined if they refuse to answer questions.

EDUCATING WORKERS

You may be familiar with the “Miranda warnings” given by the police. The Miranda warnings notify criminal suspects of their rights, including the right to a lawyer and to remain silent. Unfortunately, the Supreme Court did not impose a notice requirement in its *Weingarten* decision. Employers have no obligation to inform workers of their right to request union representation. **THIS IS THE UNION’S JOB.**

Unions should explain *Weingarten* rights at meetings and in newsletters. A good way to get the word out is to distribute wallet-size cards saying the following:

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

On the other side of the card, print information about the union, such as office address, telephone number, and the names of officers. Tell members to present the card whenever they fear that what they say may affect their position.

QUESTIONS AND ANSWERS FOR STEWARDS

- Q. If I see a worker being interviewed in a supervisor’s office, can I demand to attend the meeting?
- A. Yes. A steward has a protected right to demand admission to a *Weingarten* interview. However, once the request is made, the employee being interviewed must indicate a desire for your presence. If the employee states that he or she wishes to be interviewed alone. The steward must leave.
- Q. An employee was summoned to an interview with his foreman and asked for his steward. In response, the foreman said, “You can request your steward, but if you do, I will have to bring in the plant manager, and you know how temper mental she is. If we can keep it at the level we’re at, things will be a lot better for you.” Violation?

- A. Yes. The foreman is threatening greater discipline to coerce the employee into abandoning his *Weingarten* rights. This is an unfair labor practice.
- Q. An employee was ordered by her foreman to go to the personnel office for a “talk” about her attitude. She asked to bring a union representative but the foreman said she would have to make her request when she got to the office. Can she refuse to go to the office?
- A. No. *Weingarten* rights do not begin until the actual interview begins. The employee must go to the office and repeat her request to the official conducting the interview. Only, if a supervisor makes clear in advance to an employee that he or she intends to conduct an investigatory interview without union representation, does an employee have a right to refuse to go to a meeting.
- Q. The company is recalling working from a layoff and is insisting on medical examination for those out of work three months or more. Can the workers demand a steward’s presence during the examination?
- A. No. Medical examinations are not investigatory interviews. *Weingarten* rights do not apply.
- Q. Does *Weingarten* rights apply to a polygraph examination?
- A. Yes. An employee has a right to union representation during the pre-examination interview and the examination itself.
- Q. If management asks a worker to submit to a urine test for dregs, does *Weingarten* apply?
- A. Yes and no. Since a urine test is not questioning, an employee does not have right to the presence of a steward during the actual test. Management must, however, allow the employee to consult with a union representative to decide whether or not to take the test.
- Q. Can management order a worker to open a locker without a steward being present?
- A. Yes. Locker searches, car searches, or handbag searches are not interviews. Employees do not have a right to insist on the presence of a steward.
- Q. An employee was given a written warning about poor attendance and told he must participate in absence-counseling sessions with a member of the personnel department. Does the worker have the right to demand the presence of a union steward at the counseling sessions?
- A. This depends on whether the employee has a reasonable fear that the counseling sessions could result in further discipline. If notes from the session are kept in the employee’s permanent record, or if other employees have been disciplined after counseling sessions, the employee’s fears would be reasonable and would entitle him to bring a steward. But if the employer gives firm assurances that the meetings will not be used for further discipline and promises that the conversations will remain confidential, *Weingarten* probably would not apply.
- Q. If a worker is given a warning slip for misconduct and is asked to sign the slip to acknowledge receipt, must the employer permit her to consult her steward before signing?
- A. No. Since the employer is not questioning the worker, *Weingarten* rights do no apply.
- Q. Can a worker insist on the presence of a lawyer before answering questions at an investigatory interview?
- A. No. *Weingarten* rights apply only to the presence of union representatives.

- Q. Over the weekend, a foreman called a worker at home to ask questions about missing tools. Did the worker have to answer the questions?
- A. No. *Weingarten* rights apply to telephone interviews. A worker who fears discipline can refuse to answer questions until he or she has a chance to consult with their steward.
- Q. A worker was called into the manager's office. She asked for her steward, but was refused. The manager said, "Doreen, yesterday you refused a direct order to work overtime. Therefore, we're giving you a one-day suspension for insubordination." Did the company violate *Weingarten*?
- A. No. *Weingarten* rights do not apply to meetings employers simply announcing discipline. However, if the employer starts asking questions or tries to make the employee admit guilt, *Weingarten* would apply and the employee can insist on the presence of a steward or other union representative before answering.
- Q. If a worker's steward is out sick, can the worker insist that the interview be delayed until the steward is available?
- A. No. Management does not have to delay an investigation if other union representatives are available to assist the employee at the interview.
- Q. If a steward is called in by his/her foreman to discuss his/her work record, does he/she have the right to a union representative?
- A. Yes. Union stewards have *Weingarten* rights. If you fear discipline or other adverse actions, you have the right to the presence of a union representative.
- Q. Suppose a worker's request for a steward is denied. If the supervisor continues to ask questions, can the worker walk out of the office to get a steward?
- A. In some cases, yes. According to NLRB decisions, when an employee is entitled to union representation and the employer denies the employee's request, the employee can refuse to participate in the interview, even to the point of walking out to seek a union representative.
- Q. If the company calls a meeting to lecture workers about job performance, do the employees have a right to demand the presence of a union representative before attending the meeting?
- A. No. Holding a meeting on work time that does not involve interrogation is not a *Weingarten* meeting. There is no right to a steward unless the employer begins asking questions of employees in a manner that creates a reasonable fear of discipline.
- Q. If management refuses an employee's request for union representation, gets the employee to confess to theft, and then fires the employee, will the NLRB order the worker to be reinstated?
- A. Probably not. The NLRB used to order the reinstatement of employees who were fired as a result of admissions during an illegal interview. But in 1984 the Board ruled that such a penalty was an unwarranted "windfall" for guilty workers. The standard *Weingarten* penalty is now limited to a bulletin board posting in which the employer promises not to repeat its violations.