

## **Weingarten Rights\***

(UNION REPRESENTATION DURING INVESTIGATORY INTERVIEWS)

Unions should educate their members about the advantages of having a steward present at an investigatory interview. These include the ability of the steward to:

- serve as a witness to prevent a supervisor from giving a false account of the conversation;
- object to intimidation tactics or confusing questions;
- help an employee to avoid making fatal admissions;
- advise an employee, when appropriate, against denying everything, thereby giving the appearance of dishonesty and guilt;
- warn an employee against losing his or her temper;
- discourage an employee from informing on others; and
- raise extenuating factors.

### **WHAT IS AN INVESTIGATORY INTERVIEW?**

Weingarten rights apply only during investigatory interviews. An investigatory interview occurs when:

- (1) Management questions an employee to obtain information; and
- (2) The employee has a reasonable belief that discipline or other adverse consequences may result. For example, an employee questioned about an accident would be justified in fearing that she might be blamed for it. An employee questioned about poor work would have a reasonable fear of disciplinary action if he should admit to making errors.

### **Shop-floor conversation**

Not every discussion with management is an investigatory interview. For instance, a supervisor may speak with an employee about the proper way to do a job. The supervisor may even ask questions. But because the likelihood of discipline is remote, the conversation is not an investigatory interview.

A shop-floor conversation can change its character, however. If the supervisor's attitude becomes hostile and the meeting turns into an investigatory interview the employee is entitled to representation.

### **Disciplinary announcement**

When a supervisor calls an employee to the office to announce a warning or other discipline, is this an investigatory interview? The NLRB says no, because the supervisor is merely informing the employee of an already-made decision. Unless the supervisor asks questions about the employee's conduct, the meeting is not investigatory.

### **EMPLOYEE RIGHTS**

Under the Supreme Court's Weingarten decision, the following rules apply to investigatory interviews:

- The employee can request union representation before or at any time during the interview.

- When an employee asks for representation, the employer must choose from among three options:
  1. Grant the request and delay questioning until the union representative arrives;
  2. Deny the request and end the interview immediately; or
  3. Give the employee a choice of:
    - (a) Having the interview without representation or
    - (b) Ending the interview.
- If the employer denies the request for union representation and continues the meeting, the employee can refuse to answer questions.

### **STEWARD RIGHTS**

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

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

### **EDUCATING MEMBERS**

Employees sometime confuse Weingarten rights with Miranda rights. Under the Supreme Court's Miranda decision, police who question criminal suspects in custody must notify them of their right to have a lawyer present. The Supreme Court did not impose a similar requirement in Weingarten. An employer does not have to inform an employee that he or she has a right to union representation.

### **WEINGARTEN STATEMENT**

(If called to a meeting with management, state the following to management when the meeting begins)

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

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

## **PERC/ CSLRB CHARGES**

An employer's failure to comply with a worker's request for union representation, or a violation of any other Weingarten right, is an unfair labor practice.

## **QUESTIONS AND ANSWERS**

### **STEWARD'S REQUEST**

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

A. Yes. A steward has a right to insist on admission to a meeting that appears to be a Weingarten interview. If the interview is investigatory, the employee must be allowed to indicate whether he or she desires the steward's presence.

### **COERCION**

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

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

### **CAN EMPLOYEE REFUSE TO GO TO MEETING?**

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

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

### **MEDICAL EXAMINATION**

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

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

### **LIE DETECTOR TEST**

Q. Do Weingarten rights apply to polygraph tests?

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

### **SOBRIETY TEST**

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

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

### **LOCKER SEARCH**

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

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

### **COUNSELING SESSION**

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

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

### **PRIVATE ATTORNEY**

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

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

### **TELEPHONE INTERVIEW**

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

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

### **STEWARD OUT SICK**

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

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

### **INTERROGATION OF A STEWARD**

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

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

### **SHOP MEETING**

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

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

### **REMEDIES**

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

A. Generally, no. PERC/ CSLRB considers reinstatement to be an unwarranted "windfall" for an employee who confesses to serious misconduct. The usual Weingarten remedy is a bulletin-board posting in which the employer acknowledges that it violated the Weingarten rules and promises to obey them in the future.

NOTE: The remedy is different when an employee is discharged for requesting a steward or refusing to answer questions without one. In such cases, PERC/ CSLRB may order reinstatement with back pay. A make-whole remedy may also be imposed if an employee is demoted, is transferred, or loses privileges because of a request for union representation.

### **RECORDING THE INTERVIEW**

Q. Can a supervisor tape record an investigatory interview?

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

### **PARTICULAR REPRESENTATIVE?**

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

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

### **QUESTIONS ABOUT OTHERS**

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

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

**OBSTRUCTION**

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

A. Yes. A union representative may not obstruct a legitimate investigation into employee misconduct. If management learns of such orders, you could be disciplined.

\*excerpt from The Legal Rights of Union Stewards by Robert M Schwartz