

Weingarten Rights

The Right to Request Representation During an Investigatory Interview

Section 7 of the National Labor Relations Act (NLRA) protects employees' 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 and protection"

Among the rights protected by Section 7 is the right of employees, upon request, to have their representative present during an interview that the employee reasonably believes could lead to discipline. This right was first articulated by the Supreme Court in the case, *NLRB v. J. Weingarten, Inc.* In that case, the Court found that Section 7 of the NLRA protects employees who refuse to submit to certain interviews without a requested representative present. While under current Board law, only union-represented employees have this right, the NLRB General Counsel is asking the Board to return to its previous rule that all employees have the right, whether represented by a union or not.

An employee's requested representative, which may be a union steward, business agent or officer, or fellow employee, is often referred to as a "Weingarten representative." Weingarten representatives are entitled to provide advice and active assistance to employees during investigatory interviews. Employees' right to request their representatives are frequently referred to as "Weingarten rights."

Employers violate the NLRA if they proceed with an investigatory interview while refusing an employee's request or retaliate against them for making the request. Depending on the circumstances of each case, the Board may order that the employer cease and desist, post a remedial notice, require the employer to repeat the interview with a union member present, or rescind and remedy discipline resulting from a Weingarten violation.

When do employees have a right to request a union representative?

An employee's right to request a representative arises during an investigatory interview. A useful comparison is an individual's Miranda right to an attorney when questioned by law enforcement. However, unlike the right to counsel in a Miranda setting, employers are not required to inform union members of their rights under Weingarten.

Any meeting may be an "investigatory interview" provided that the following occurs:

- A manager, representative of management, or supervisor is seeking to question an employee.

- The questioning is part of an investigation into the employee's performance or work conduct. During an investigatory interview, a representative of management may require an employee to defend, explain, or admit misconduct or work performance issues that may form the basis for discipline or discharge.
- The employee reasonably believes that the investigation may result in discharge, discipline, demotion, or other adverse consequence to their job status or working conditions.
- The employee requests a union representative. Employers are not required to advise employees of their right to representation and third parties (including union representatives) may not make the request on behalf of the employee.

When making a request for a representative, the Board does not require that the employee specify that they need a "Weingarten" representative. Once an employee requests their representative, they are not required to repeat that request.

At times, it is not clear whether a meeting is investigatory or could lead to discipline. In those cases, the National Labor Relations Board (NLRB) looks to the conduct of the meeting and the surrounding circumstances to determine if there was an investigatory purpose. The Board will consider such factors as the identity/status of the participants, the parties' collective-bargaining agreement and disciplinary practices, whether there was a confrontational tone to the meeting, any notices or warnings issued prior to the meeting, or whether employees had been disciplined for similar misconduct.

What types of meetings are not covered by the Weingarten rule?

If the above conditions are met, any meeting between an employer and employee could trigger an employee's Weingarten rights. However, not every meeting or employer questioning satisfies those conditions. For example, employers need not grant an employee's request for a representative in the following situations:

- Instructional meetings where an employee receives training or correction on work techniques. Meetings of this nature generally do not lead to discipline.
- Meetings in which an employer informs an employee (or employees) of personnel policies. Often these meetings do not require questioning of employees and do not lead to discipline.
- Meetings in which the employee is informed in advance that no discipline or adverse employment action will result from the interview.

- Meetings about disciplinary decisions that have already been made. If an employer has made a final decision on a disciplinary action, a meeting with an employee to inform them of that decision is not considered investigatory. In the same vein, if an employee initiates a meeting to discuss a disciplinary action that they have experienced, that meeting is not investigatory in nature because any discipline that the employee has experienced has already occurred.
- Meetings in which an employee is questioned as part of an investigation of another employee's conduct or performance. For example, an employee who witnesses another employee's misconduct is not entitled to Weingarten representation if they are questioned about what they observed.

Even in the above examples, however, the nature of a meeting may change as it progresses. If an employee reasonably believes that a meeting that commenced for some other purpose has become an investigatory interview, the Board will look to the above factors to determine if an employee's request for a representative should have been honored.

Who may serve as an employee Weingarten representative?

An employee may choose their own representative, who may be a representative of the union or a fellow employee. Employers are required to honor that request, so long as that choice does not unduly interfere with the employer's ability to conduct its investigation. Employees may not request a non-employee representative unless that individual is an officer or business agent of the employee's union. For example, an employee may not request a private attorney or a family member as their Weingarten representative if that individual has no affiliation with the employee's union.

How should an employer respond to an employee's request for representation?

When an employee requests a representative during an investigatory interview, an employer may lawfully take one of three courses of action:

1. The employer may grant the employee's request and delay the interview until a representative is available.
2. The employer may deny the request and immediately end the interview, or
3. The employer may allow the employee to choose whether to proceed with the meeting without a representative or to end the interview.

If the employer denies the request and continues to ask questions, this could constitute an unfair labor practice. Also, it is an unfair labor practice for an employer to discipline an employee for refusing to answer questions without their union representative present.

What may a union representative do during an employee interview?

- Union representatives serve as advisors and witnesses during employee interviews. Employers are required to inform union representatives as to the subject matter of the interview and allow time for that representative to meet with the employee prior to questioning.
- During the interview, a union representative may ask the employer to clarify questions, give the employee advice on how to answer questions (within limits), and provide additional information to the employer after the questioning. A union representative may also object to questions if they are badgering, intimidating, or offensive.

What are the limitations on union representation during an employee interview?

- When representing an employee during an investigatory interview, a union representative must remain civil and may not interfere with an employer's legitimate efforts to conduct an investigation. An employer may lawfully remove a union representative from a meeting if they engage in disruptive or hostile behavior.
- A union representative may not tell an employee what to say and may not advise employees to give false answers.