

# ***WEINGARTEN: THE RIGHT TO REPRESENTATION***

Weingarten rights guarantee an employee the right to union representation during an investigatory interview. The following Q&A was prepared by the MTA Division of Legal Services to acquaint MTA members with the extent and limits of these rights.

These rights are based upon private- and public-sector collective bargaining laws. An employee's right to representation in investigatory or pre-disciplinary meetings was established in a 1975 United States Supreme Court decision, *NLRB v. Weingarten, Inc.* The Massachusetts Labor Relations Commission has adopted the Weingarten rules for public employees covered by M.G.L. c. 150E.

## **What situations give rise to Weingarten rights?**

- Where the employee has a reasonable expectation that discipline may result; for example, where the meeting is part of the employer's disciplinary procedure.
- Where the purpose of the meeting or interview is to *investigate* an employee's allegedly inadequate work performance or other misconduct, where discipline of any kind is a *possible result*.
- Where the purpose of the interview or meeting is to elicit facts, the employee's "side of the story" or obtain admissions or other evidence either to determine whether or not discipline is warranted OR to support a disciplinary decision already made.
- Where the employee is required to explain or defend his/her conduct in a situation that the employee reasonably fears could affect his/her working conditions or job security. (Note that it is not clear whether this would include non-disciplinary situations, such as RIFs.)

## **What situations DO NOT give rise to Weingarten rights?**

- Where the meeting or discussion is merely for the purpose of conveying work instructions, training or needed corrections.
- Where the purpose of the meeting is simply to inform the employee about a disciplinary decision that has already been made and no information is sought from the employee.
- Where the employer has clearly and overtly assured the employee prior to the interview that no discipline or adverse consequences will result from the interview.
- Where any discussion that occurs after the employer has notified the employee of the discipline has been initiated *by the employee* rather than the employer.

## **Do job performance reviews or evaluation conferences give rise to Weingarten rights?**

- Possibly. We would argue that these rights apply where the employee's performance has been under scrutiny and the employee reasonably believes that his/her job is in jeopardy. However, the right is unlikely to apply to classroom observations.

## **How about "counseling" sessions with supervisors regarding absenteeism or drug or alcohol problems?**

- Again, possibly, especially where the employer is seeking information from the employee or has given the employee a reasonable basis for believing that discipline or termination might result from the problems under discussion.

### **What constitutes a “reasonable expectation” that discipline may result?**

- The test is *objective, not subjective*. The employee’s belief must be a reasonable assessment of the objective circumstances. For example, has the employer provided any oral or written warnings? Have there been oral or written allegations of misconduct? Has the employee been under scrutiny previously? Have other employees been disciplined for conduct similar to that being investigated at this meeting? Note that an employer may be able to avoid Weingarten problems by clearly informing the employee that no discipline will result from the meeting and by following through on that promise.

### **What if the employer states that a disciplinary decision has already been made, but then begins to question the employee about his or her conduct?**

- The cases are unclear on this situation. We recommend that employees ask for representation at any point in the meeting when the employer solicits information from them. We would argue that seeking such information shows that the employer is trying to support or possibly alter its disciplinary decision, which gives rise to Weingarten rights.

### **Does the location of the interview matter?**

- It is more likely that Weingarten rights are involved when the interview or discussion takes place in a supervisor’s office, but this is not a hard and fast rule.

### **Does the employer have to inform you about your Weingarten rights before conducting the meeting or interview?**

- ABSOLUTELY NOT. It is up to employees to know their rights and ask for representation in investigatory or disciplinary interviews.

### **How and when should an employee request representation?**

- As soon as the employee becomes aware that the employer is seeking information that may result in discipline, or to support a disciplinary decision, the employee should state his/her desire for representation.
- The employee’s request does not have to be in any particular form, nor does it have to be in writing. Even words such as “Shouldn’t I have a representative here?” have been considered sufficient to assert Weingarten rights.
- As to when, the employee can make the request at any time, even in the middle of the meeting. (However, the employer will be permitted to use any information obtained before the request has been made, as long as the employer provides Weingarten rights promptly upon the employee’s request.)

### **Does the employee need to repeat the request for representation more than once?**

- No. It is incumbent upon the employer to provide Weingarten rights, even if the request is made to a lower-level supervisor who is not conducting the meeting and is not repeated at the outset of the meeting.

### **What are the Weingarten rights that the employer must offer after an employee has requested representation?**

The employer has three lawful options:

- Grant the request and delay the interview or meeting until the representative arrives and has a chance to consult privately with the employee.
- Discontinue the meeting or interview.
- Allow the employee to choose whether to continue with the interview unrepresented or forgo the interview entirely.

## **What should the employee do if s/he is unsure whether a particular meeting calls for Weingarten rights?**

- There is no harm in asking for representation even if you're not sure you're entitled to it. *The employer cannot discipline you simply for asking.* Employees could also ask whether or not the meeting could result in disciplinary action; if the answer is anything but "no," the employee would be reasonable in asking for representation.
- *Cautionary Note:* An employee may not be protected if s/he refuses to participate in a meeting that is subsequently found to lack Weingarten status. Therefore, we recommend that employees consult with their association representatives for advice about their rights any time they are called to a meeting with the employer.

## **If the employer insists that the meeting continue without a representative, may the employee refuse to answer questions or even leave the meeting?**

- Arguably yes. An employer cannot discipline or discharge an employee for refusing to surrender his Weingarten rights to representation. If it is truly a Weingarten situation, the employee may remain silent or even leave and return to his/her normal work duties.
- However, given the complexity and unpredictability of the law, it is often more prudent for the employee to comply with the employer's directives, knowing that s/he might later be able to overturn any discipline that results from the unlawful meeting. Otherwise, the employee risks being disciplined for insubordination.

## **Can the employee insist on a particular representative? Does it have to be an association representative?**

- The employee may choose his/her own representative, whether it's an association official or another employee, without the employer's interference, as long as the choice does not unduly disrupt the employer's ability to conduct the investigation. In practice, this usually means that the employer should try to comply with the employee's request, even if it means some delay in scheduling the meeting.
- On the other hand, the employee can't expect the employer to postpone the meeting unreasonably. The reasonableness of either the employer's or the employee's behavior can only be measured on a case-by-case basis.

## **Does the employer have to give release time to the representative requested by the employee?**

- The general rule is that the employee may choose his/her representative if that person is "available." If the interview or meeting is scheduled sufficiently in advance that the representative can meet with the employee on off-duty time, then they will be required to do so. Of course, your local collective bargaining agreement may also provide for release time in these situations.
- If the interview or meeting is scheduled so closely that off-duty consultation is not possible, the employer would have to provide release time to the representative who is on the premises unless the employer can establish some overriding management need that would preclude doing so.

## **If an employer has provided all the necessary Weingarten rights, may an employee refuse to answer questions?**

- No, unless the matter under discussion has criminal implications. Generally, an employee does not have the right to remain silent, as long as his/her representational rights have been honored; nor may the association representative direct the employee to remain silent.

## **What are the representative's role, rights and duties at a Weingarten meeting?**

While Weingarten meetings are not “bargaining sessions,” the association representative has the following rights:

- To be informed about the subject matter of the meeting.
- To consult privately with the employee before the meeting.
- To speak and be proactive during the interview, as long as doing so does not interfere with or disrupt the meeting.
- To advise and counsel the employee.
- To provide additional information to the employer at the end of questioning.
- To bear witness to the proceedings, take notes, etc.

## **Can an employee “waive” his/her Weingarten rights? How?**

- If an employee does not affirmatively ask for representation, he or she will be considered to have “waived” his or her rights. However, as noted earlier, the request for representation does not have to comprise any “magic words,” as long as it puts the employer reasonably on notice that the employee would prefer representation.
- If the employer claims that the employee chose to continue the interview without representation, the employer must demonstrate that the choice was voluntary, clear and unmistakable. For example, if the employee elected to go forward without a representative only after the employer told him “things will be worse for you if you insist on having the association present,” then the choice would not be deemed “voluntary.”

## **What remedy is available for violation of Weingarten rights?**

- An employer commits a prohibited practice under Chapter 150E if the employer (1) refuses an employee's request for representation during an investigatory or disciplinary meeting or otherwise withholds the full panoply of Weingarten rights; (2) disciplines an employee for asserting his/her Weingarten rights; (3) threatens or coerces an employee exercising Weingarten rights; or (4) threatens or disciplines an association representative for assisting an employee in a Weingarten meeting.
- The state Labor Relations Commission will order the employer to rescind any retaliatory threats or discipline imposed because an employee or association representative exercised Weingarten rights. Moreover, if the commission finds that the discipline ultimately imposed by the employer was affected by the information obtained at the unlawful meeting, or was affected by the fact that no association representative was present, then the commission will also order that discipline rescinded. The commission will also order the employer to post a notice of the violation.
- Arguably, information obtained at a meeting in violation of Weingarten rights should be excluded from any eventual discharge or discipline arbitration.