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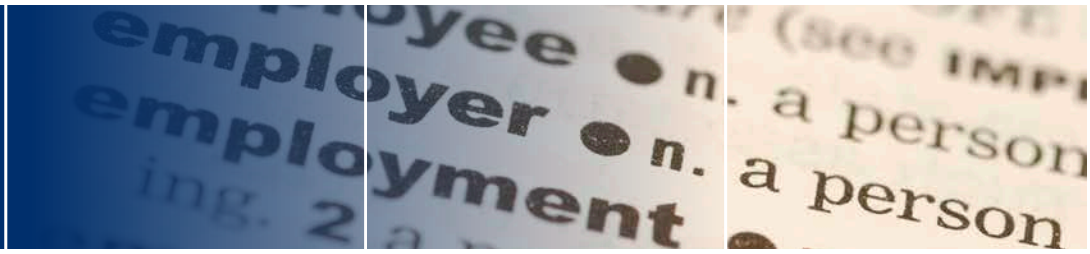

NEWSLETTER
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"Round Up the Usual Suspects" and Violate the NLRA? The Implications of Extending *Weingarten* Rights to Nonunionized Workplaces

Facing a situation in which one or more employees are suspected of misconduct, the natural employer action is to bring in the suspects for questioning. Human Resources departments and/or management interview each employee in an attempt to determine the facts in preparation for appropriate discipline, if warranted in the judgment of the employer.

In a unionized workforce, however, an employer generally may not proceed with an investigatory interview if the employee under investigation demands representation by a union official. This so-called Weingarten right (named for the case in which it was addressed by the Supreme Court)[1] does not currently apply to a nonunionized workforce. That may change.

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[1] *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

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The National Labor Relations Board (Board) interprets and enforces the National Labor Relations Act (NLRA). The basic protection afforded employees "to act in concert for mutual aid and protection" as set forth in Section 7 of the NLRA extends to nonunion workforces. The current Board has been particularly aggressive in applying the NLRA to that type of workforce. Also, based on its recent history of decisions favoring employees over employers, extending *Weingarten* to virtually all employers, including those not organized by a union, is almost certainly an action that the current Board majority will favor. Understanding the contours of the *Weingarten* right is a preparatory exercise that employers would be wise to undertake.

THE *WEINGARTEN* RIGHT

An employee protected by *Weingarten* has the right to refuse to participate in a meeting – an "investigatory interview" – that he reasonably believes may result in his discipline unless he is assisted during the meeting by a union representative.

An employer violates the NLRA if it insists on continuing the meeting without affording the employee this right to representation, once asserted. Rather, the employer either must terminate the interview or pause to allow the presence of a representative.

The elements of *Weingarten*, at least as currently structured by Board law, are as follows:

- The meeting is to **investigate** some situation, usually a claim that the employee has engaged in some workplace rules violation or other misconduct.
- The employee has an **objectively reasonable fear** that he faces **discipline** of some sort.
- The employee speaks up and **asks** for representation.
- The requested representative is a **current non-supervisory employee**, usually a predesignated type of union official, such as a shop steward.

INVESTIGATORY INTERVIEW

For the *Weingarten* right to be invoked, the purpose of the meeting must be to gather facts, that is, to investigate. If the employer already has decided what its course of action will be, the meeting is not investigatory, and *Weingarten* does not apply. Of course, usually it is prudent for an employer to speak with an accused employee to gather facts, or at least the employee's side of the story, prior to making a final decision to impose discipline. Otherwise, it may make a decision without all of the relevant facts and appear unfair in the eyes of a potential future jury or arbitrator.

Even if the employer believes that it has all of the facts, and has made a tentative decision to take action it considers appropriate, *Weingarten* attaches if the purpose of the meeting is to gather still more facts

from the accused employee. Gathering facts from the employee to confirm the decision, or even simply to allow the employee to tell his side of the story, will most likely make the meeting "investigatory."

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OBJECTIVE FEAR OF DISCIPLINE

The employee must believe, based on objective facts, that he risks discipline if he participates in the meeting. An employee who is brought into a meeting involving a claim that the employee stole, or committed sexual harassment, or was excessively absent from work will objectively fear that the outcome of the investigation will be discipline. By contrast, a meeting to discuss why the employee has been showing up for work unusually irritable and out of sorts may arise from simple concern over the employee's well-being, without any objectively reasonable prospect of discipline.

Even when management has no reason to think that it will be imposing discipline on the employee, however, it might not be aware of all the facts. For example, suppose an employee is brought in because he is believed to have been a witness to an act of alleged sexual harassment. If the employer's harassment policy mandates that all employees have a responsibility under pain of discipline to report instances of observed harassment, the employee being questioned might be concerned that he will suffer discipline for not speaking up sooner on behalf of the allegedly harassed employee.

Whether that concern is objectively reasonable is another issue. The employer also might assure the employee that the employer simply is concerned with finding out the facts of a claim brought by the harassed employee so that the harassment may be promptly addressed. It may even decide to "immunize" the employee regarding discipline for his cooperation.

Still, whether the employee's concern over discipline is objectively reasonable is part of the *Weingarten* inquiry. The basis for the employee's concern may have to be addressed before a decision on allowing representation is made. However, the employer must be careful that its questioning as to the basis for the employee's concern about discipline does not slide into insisting that the employee participate in the interview without requested representation.

A REQUEST MUST BE MADE

To fall under the *Weingarten* right, the employee must invoke the right to representation by asking for it. The employer is not required to inform the employee of his right to representation. Whether the employee has sufficiently invoked his right to representation may depend on the facts of the specific situation.

IDENTITY OF THE REPRESENTATIVE

The employee has the right to request that a particular union official join the meeting. If the employee's preferred representative is not available (through no fault of the employer), the employee may be required to use another union representative.

The contours of the right to request a particular union representative also may be impacted by an existing collective bargaining agreement, which may designate who is to be used in *Weingarten* situations. Indeed, an underlying assumption of *Weingarten* is that the representative is someone knowledgeable about employees' rights and experienced in assisting an employee in clarifying the issues faced and protecting him.[2]

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[2] In explaining why union representation is important at the investigatory stage of the discipline process, the Supreme Court noted that: "[Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel that their union steward might represent." *Weingarten*, 420 U.S. at 262, *quoting Independent Lock Co.*, 30 Lab. Arb. 744, 746 (1958); *see also Weingarten*, 420 U.S. at 263 ("A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.").

The right to representation does not extend to asking that a personal attorney be allowed to join the meeting. Also, in a unionized setting the representative must be associated with the currently recognized collective bargaining representative (as noted above, a union may in fact have designated those who are to be called in), not another labor organization that may be in the picture.

ROLE OF THE REPRESENTATIVE

Upon request, the employee will be allowed to confer with his representative prior to starting the interview, giving the representative time to prepare to represent the employee. The representative should be informed of the subject matter of the investigation.

The role of the representative is to assist the employee being interviewed, ensuring that the employee understands the questions and the subject matter of the investigation, clarifying the issues and helping to bring out relevant facts. This does not mean, however, that the representative is allowed to block the questioning or turn the meeting into an adversarial hearing. Nor is the employer required to "bargain" with the union representative at the meeting.

PROTECTION FROM DISCIPLINE

An employee may not be disciplined for asserting his right to representation, although he still may be disciplined for the misconduct. Nor may the union representative be disciplined for his role in properly representing the employee.

WAIVER OF THE RIGHT TO REPRESENTATION

An employee who knows of his *Weingarten* rights may waive such and voluntarily agree to participate in the interview without union representation. The waiver must be "clear and unmistakable."

WHY THIS CONCERN FOR A NONUNIONIZED WORKFORCE?

The concern that nonunionized workforces may soon face the imposition of *Weingarten* does not rest simply on the perceived pro-employee tendencies of the

current Board majority (exemplified most recently by the "joint employer" decision effectively expanding the reach of union authority).[3]

The fact is that the Board has repeatedly ruled that *Weingarten* applies to nonunionized workplaces. Since the early 1980s, the Board has veered back and forth in applying *Weingarten* to the nonunionized setting.[4] It thus would not be surprising if the current Board decided to revert to the questionable rationale of certain prior Board cases and decide to impose *Weingarten* upon non-organized employers.[5]

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[3] *BFI Newby Island Recyclery*, 362 NLRB No. 186, 2015 NLRB LEXIS 672 (Aug. 27, 2015).
[4] *Materials Research Corp.*, 262 NLRB 1010 (1982) (holding that the *Weingarten* right applies in a nonunion setting); *Sears, Roebuck & Co.*, 274 NLRB 230 (1985) (*Weingarten* rights do not apply in the absence of a certified or recognized union, overruling *Materials Research*); *E. I. DuPont & Co.*, 289 NLRB 627 (1988) (adhering to *Sears, Roebuck* while conceding that its conclusion was not mandated by the NLRA); *Epilepsy Foundation*, 331 NLRB 676 (2000), *enforced,* 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002) (overruling prior decisions and again holding that the *Weingarten* right applies in a nonunion setting); *IBM Corporation*, 341 NLRB 1288 (2004) (overruling *Epilepsy Foundation*).

CONCLUSION

The implications of such an extension of *Weingarten* rights could result in substantial disruption to employer investigations and significant confusion as to how *Weingarten* would apply in situations in which no trained union representatives are available to participate in investigatory interviews. One need only consider the potential complications facing an employer investigating a claim of unlawful harassment who might suddenly have to pause in a key interview of an accused harasser to allow him to bring in a co-worker friend to "represent" him in such a sensitive meeting, when all the employer is trying to do is to protect a possible victim of harassment. So, too, how the current Board majority might modify the *Weingarten* rule in an attempt to shoehorn it into a nonunion environment can only be a matter of uneasy speculation for management.

Such questions soon may be answered, and probably not in a way that will make management's life easier. Employers would be wise to have experienced labor counsel on call in the event that the Board expands *Weingarten* to their workplaces.

[5] This is not intended to offer legal advice to be used in any specific situation. Legal counsel should be consulted to address any particular issue facing the reader.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

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