MTA Division of Legal Services

# WEINGARTEN: THE RIGHT TO REPRESENTATION

Questions & Answers

## *What are Weingarten rights?*

Employees do not have to be alone when they are questioned by an employer in a situation that might result in discipline. An employee's right to representation in investigatory or predisciplinary meetings was established in a 1975 United States Supreme Court decision, *NLRB v. Weingarten, Inc.* The Massachusetts Department of Labor Relations has adopted the Weingarten rules for public employees covered by Massachusetts General Laws, Chapter 150E.

## *When do employees have a right to representation under Weingarten?*

If you have a reasonable belief that the answers you give could result in your being disciplined, you have a right to union representation during the meeting.

Employees are entitled to Weingarten rights in the following situations:

- "Investigatory interviews," in which the supervisor is seeking to elicit facts, to have the employee explain his or her conduct, to discover the employee's "side of the story" or to obtain admissions or other evidence.
- A supervisor's request for a written statement or written answers to interrogatories about an incident or accident in which the employee's own conduct may be at issue.
- A meeting or discussion in which the employer either has not yet decided whether to impose discipline or is seeking information to support that decision.

Employees are not entitled to Weingarten rights in the following situations:

- When the meeting or discussion is merely for the purpose of conveying work instructions, training or needed corrections.
- When 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.
- When the employer has clearly and overtly assured the employee prior to the interview that no discipline or adverse consequences will result from the interview, provided the employer keeps that promise.
- When, after the employer notifies the employee that he or she is being disciplined, the employee initiates further discussion.

### *What about investigations that are part of the employer's sexual harassment policy and procedures?*

Yes, employees would have a right to representation when the person being questioned is an alleged harasser or is alleged to have aided or abetted another person's harassment.

### *What about job performance reviews or evaluation conferences?*

Possibly. We would argue that these rights apply when the employee's performance has been under scrutiny and the employee reasonably believes that his or her job is in jeopardy. However, it is unlikely that employees would have a right to representation when an evaluator comes in to conduct a performance observation.

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

Possibly, especially when 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 information exchanged during the discussion.

### *What about an employer's request that an employee respond in writing to written questions?*

Sometimes employers demand that employees provide written statements or written answers to questions about accidents, events or allegations of misconduct. Sometimes the employee is asked to provide such written information by a certain time (such as, "by the end of the day.") Sometimes employees are invited to a meeting and asked to write their statements or answers right on the spot. An employee is entitled to the assistance of a union representative in any of these situations. The representative may be able to convince the employer that the questions are inappropriate or that additional questions ought to be asked. In addition, whether the employee is responding orally or in writing, he or she is entitled to consult with a representative before submitting responses.

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

No. Although such interviews typically take place in the office of a supervisor, Weingarten rights apply anywhere.

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

Absolutely not. Weingarten rights are not like Miranda warnings, which require the police to advise a suspect of his or her rights to remain silent and to have a lawyer present. Absent such a requirement in your collective bargaining agreement, the employer has no obligation to advise you that you can have union representation present. Instead, it is up to employees to know their rights and ask for representation in investigatory interviews in which there is a reasonable belief that discipline may result.

## *What constitutes a "reasonable belief or expectation" that discipline may result?*

Whether the employee "reasonably expects discipline may result" is not determined by the employee's subjective feelings. Instead, the question is whether any reasonable employee, given the same circumstances, would believe that discipline could result. For example: What did the employer say to the employee when announcing or initiating the meeting? 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?

### *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? Is there still an expectation that discipline may result?*

The cases are unclear in this situation. We recommend that employees ask for representation at any point in the meeting when the employer solicits information. When an employer is questioning an employee to obtain information to support or possibly alter its disciplinary decision, Weingarten rights apply. Most employers will stop the meeting and allow the employee to contact his or her union representative when Weingarten rights are asserted.

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

### *When should the request be made?*

The employee should request representation as soon as the employee becomes aware that the employer is seeking information that may result in discipline, or that may support a disciplinary decision already made. The employee can make the request at any time, even in the middle of the meeting. If an employee delays in making the Weingarten request, the employer is allowed to use any information obtained before the request was made, as long as the request for representation is honored promptly.

### *How does an employee exercise Weingarten rights?*

Simply stating, "I would like my union representative present" is sufficient to invoke the right. Even questions such as, "Shouldn't I have a representative here?" have been considered sufficient to assert Weingarten rights. The employee's request does not have to be in any particular form; no magic words are required, nor does the request have to be in writing.

### *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 the request is not repeated at the outset of the meeting.

### *What should an employee do if he or she is unsure whether a particular meeting calls for Weingarten rights?*

Employees should ask for representation even if they are not sure they're entitled to it. *The employer cannot discipline an employee simply for asking.* Employees could also ask whether the meeting could result in disciplinary action. If the employer answers "no," the employer must follow through on that promise or risk violating the law. If the employer's answer is anything but "no," the employee would be reasonable to ask for representation.

### *Can an employee "waive" his or her Weingarten rights? How?*

Yes. 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, there are no "magic words" required in making the request. All that is required is for the employee to say enough to convey to the employer that representation is requested.

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 union present," then the choice would not be deemed "voluntary."

## *What happens after an employee has requested representation?*

Once the request is made, the employer has three lawful options: The employer can 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 or allow the employee to choose whether to continue unrepresented, or forgo the interview entirely.

### *Does the employer have to provide the employee and the representative with a copy of the charges that have been made against him or her?*

Although the law is not completely settled on this issue, we believe the answer is "yes." Some courts have held that "meaningful" representation implicitly requires advance notice of the precise allegation against the employee, even if the person making the charges has been promised confidentiality. Without knowing what the charges are, the union cannot provide meaningful advice or assistance. Certainly, a union has a right to information under M.G.L. c. 150E, including information about allegations that are made against bargaining unit members and copies of written charges and witness statements.

### *If the employer insists that the investigation continue without allowing the employee to have a representative present, may the employee refuse to answer questions or even walk out of the meeting?*

Arguably, yes. Employees cannot be disciplined or discharged for refusing to surrender their right to union representation under Weingarten. If it is truly a Weingarten situation, the employee may remain silent or even leave and return to his or her normal work duties. However, given the complexity and unpredictability of the law, it is often prudent for the employee to comply with the employer's directives, knowing that any discipline resulting from the unlawful meeting might be challenged and overturned. Otherwise, the employee risks being disciplined for insubordination.

*Note: If the allegations are criminal in nature, such as assault or sexual assault, the right against self-incrimination may apply. The union should seek the assistance of MTA counsel before advising the employee on how to respond to the questions.*

## *Who is the representative and what are the representative's rights and duties at a Weingarten meeting?*

### *Who is the representative? Can the employee insist on a certain representative? Does it have to be a union representative?*

The employee may choose his or her own representative, whether a union 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 employer does not have to postpone the meeting unreasonably. The reasonableness of either the employer's or the employee's behavior is measured on a case-by-case basis.

### *What is the role of the representative?*

The union representative should provide assistance, as needed, to the employee during the meeting. Thus, the representative should be informed about the subject matter of the meeting, including (at least arguably) copies of charges or allegations, if written, and copies of witness statements. In addition, the representative may consult privately with the employee before the meeting; speak and be proactive during the interview as long as doing so does not interfere with or disrupt the meeting; advise and counsel the employee; provide additional information to the employer at the end of questioning; and bear witness to the proceedings, take notes, etc.

### *Is the representative entitled to release time?*

The general rule is that the employee may choose his or her own representative if that person is "available." If the interview or meeting is scheduled sufficiently in advance, the representative can meet with the employee on off-duty time. 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. Local collective bargaining agreements may also address release time in these situations.

## *If an employer has provided all the necessary Weingarten rights, can 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 or her representational rights have been honored, and the union representative may not direct the employee to remain silent.

*Cautionary Note:* An employee may not be protected if he or she refuses to participate in a meeting that is subsequently found to lack Weingarten status. Therefore, we recommend that employees consult with their union representatives for advice about their rights any time they are called to a meeting with the employer.

## *Does either the supervisor or the employee have a right to tape-record the interview?*

It is illegal under the state's "wiretapping law" to secretly tape-record an oral communication, including an interview, and a person who does so can incur both criminal and civil penalties. It is not clear whether one party can lawfully insist upon openly tape-recording against the wishes of the other party. We maintain that the practice of tape-recording investigatory meetings is a mandatory subject of bargaining.

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

An employer commits a prohibited practice under Chapter 150E if the employer refuses an employee's request for representation during an investigatory or disciplinary meeting or otherwise withholds the full panoply of Weingarten rights; disciplines an employee for asserting his or her Weingarten rights; threatens or coerces an employee exercising Weingarten rights; or threatens or disciplines a union representative for assisting an employee in a Weingarten meeting.

The Department of Labor Relations will order the employer to rescind any retaliatory threats or discipline imposed because an employee or union representative exercised Weingarten rights. Moreover, if the department 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 union representative was present, then the department will also order that discipline rescinded. The department will also order the employer to post a notice of the violation. In addition, information obtained during questioning of an employee in violation of the employee's Weingarten rights should be excluded as evidence of misconduct in any discharge or discipline arbitration.