

## *Weingarten Rights* – Unionized Employees’ Right to a Representative in Investigatory Interviews

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conducted an investigatory interview into the alleged chicken theft. Collins requested the presence of her union representative several times during the interview, but the employer denied her request. Her case made it all the way to the U.S. Supreme Court, which held that an employee has a right to have a union representative present during an investigatory interview or other interview the employee reasonably believes could lead to discipline.

### **Why did the court grant these rights?**

When employers with a unionized workforce discipline an employee covered by a just cause provision in a collective bargaining agreement, the due process afforded to the employee is often almost as important as proving the underlying misconduct. A key aspect of due process is the right of unionized employees in both the private and public sector to have a union representative present during an investigatory interview.

*Weingarten* rights stem from the

humble facts of a 1975 Supreme Court case where these rights were first defined. J. Weingarten, Inc. employee Leura Collins selected four pieces of chicken from her employer’s lunch counter. The to-go box normally used for the four-piece meal was out of stock, so she used a larger box, and paid the one-dollar price for the four pieces. One of Collins’s coworkers saw her pay the dollar while holding a large box and suspected that Collins had underpaid, so she reported what she saw to management. The company

The Supreme Court reasoned that *Weingarten* rights safeguard the employee from intimidation, help elicit favorable facts or extenuating circumstances before discipline is issued, and further the union’s function as the employee’s collective bargaining representative. The presence of a union representative also provides secondary benefits to the employer because it prevents employees from alleging coercion during investigatory interviews in an attempt to avoid discipline. Finally, an employee who feels they

have been afforded due process is less likely to file a grievance.

### **When do *Weingarten* rights apply?**

Employees in a unionized workplace are entitled to assert their *Weingarten* rights during an investigatory interview where the employee reasonably believes discipline might result and the employee affirmatively requests a union representative. Under current NLRB precedent, non-union employees do not have *Weingarten* rights. However, an employee may not be disciplined for requesting the presence of a representative or a coworker. An investigatory interview is a meeting called by the employer to help determine whether or not to discipline an employee. If the disciplinary decision has already been made, the employee does not have the right to a union representative. The “reasonable belief” test is objective and considers whether a reasonable person would think discipline could result from the interview. Finally, the employee must affirmatively request the representative. Generally, the employer does not have a duty to inform the employee of his or her *Weingarten* rights, unless required by the collective bargaining agreement.

### **How can an employer respond to a request for a representative?**

Once the employee requests a representative, the employer has several options on how to proceed with the interview. It can:

- grant the request and allow the representative;
- end the interview;
- discontinue the interview until the representative arrives;
- offer the employee the choice

between continuing the interview without a representative or having no interview at all; or,

- assure the employee that no disciplinary action will result from the meeting and continue the investigation.

### **Who can serve as representative?**

An employee has the right to only one representative, and only a designated union representative such as the shop steward or local executive board member may accompany the employee in the investigatory interview, not just another coworker. The employee does not have an absolute right to select his or her representative, but the employer should permit the desired representative if reasonably available.

### **What is the representative’s role?**

During an investigatory interview, the union representative is generally allowed to:

- ask management what the investigation is about,
- seek clarification of questions during the interview,
- ask the employee questions to clarify previous answers or to elicit further relevant information once the employer has finished questioning the employee,
- suggest to the employer other witnesses to interview and describe relevant practices, prior situations, or mitigating factors; and
- request a break when reasonable.

The union representative is generally not allowed to:

- answer questions on behalf of

the employee,

- consult with the employee before the employee answers each question,
- present witnesses,
- make a “closing argument,” or
- bargain with the employer regarding disciplinary measures.

### **Practical Considerations**

There are several reasons why employers may allow a representative beyond what the law requires. The representative’s role is limited and may provide a useful perspective to the employer’s benefit. Further, a non-investigatory meeting may evolve into an investigatory meeting as information is solicited from the employee. Finally, the employer may avoid having to litigate the issue. Therefore, we often suggest that employers err on the side of caution and allow a representative if requested by the employee.

Recently, we have seen union representatives trying to expand their role during investigatory interviews. Hearing an employee’s version of events is often vital to an investigation, and the union representative is not allowed to interfere with that process. The proper response to a union representative going beyond the permissible scope of his or her role depends on the circumstances, but delaying the interview and seeking advice of labor counsel is a safe strategy.

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