

EMPLOYEE INTERVIEWS

KNOW YOUR “WEINGARTEN” RIGHTS

The United States Supreme Court held, in NLRB v. Weingarten, that certain (but not all) types of interviews of an employee by an employer warrant the presence of a bargaining representative. The Wisconsin courts and the WERC have also rendered decisions embodying the principles of the Weingarten decision.

Simply stated, an employee is entitled to the PRESENCE of a UNION representative UPON REQUEST at any interview with management in which the employee is questioned about something for which the employee could be disciplined or which could affect the employee's working conditions or job security. Examples of such an interview are:

1. The interview is part of the employer's disciplinary procedure or is a component of the employer's procedure for determining whether discipline will be imposed.
2. The purpose of the interview is to investigate an employee's performance where discipline, demotion or other adverse consequences to the employee's job status or working conditions are a possible result.
3. The purpose of the interview is to elicit facts from the employee to support disciplinary action that is probable or that is being considered, or to obtain admissions of misconduct or other evidence to support a disciplinary decision already made.
4. The employee is required to explain his/her conduct, or defend it during the interview, or is compelled to answer questions or give evidence.

It is important that the UNION educate bargaining unit employees about their Weingarten rights BEFORE an occasion to use them arises. An employee must state to the employer that he/she wants a UNION representative present; the employer has no obligation to ask the employee if she/he wants a representative.

The employer can cancel the interview if it does not want a UNION representative present. However, the employer's action in canceling the interview may affect its ability to establish just cause before an arbitrator.

The employer will be ordered to cease and desist and to post a notice. Discipline that is imposed for insisting on Weingarten rights will be overturned. Under federal and state law, discipline will not be overturned if the discipline was for reasons other than insistence on Weingarten rights.

An employee has NO right to the presence of a UNION representative where:

1. The employee-supervisor contact is merely for the purpose of the conveying work instructions, training, or communicating needed corrections in the employee's work techniques.
2. The employee is assured by the employer prior to the interview that no discipline or adverse employment consequences can result from the interview (and no such discipline, in fact, results).

3. The employer has reached a final decision to impose certain discipline on the employee prior to the interview and the purpose of the interview is to inform the employee of the discipline or to impose it.
4. A conversation or discussion conveying the reasons for the previously determined discipline, or its fairness or justification, is initiated by the employee and without employer encouragement or instigation after the employee is informed of the employer's disciplinary decision.

Even in the above four circumstances, the employee can still ask for UNION representation. Many employers will permit a representative to attend, even when not required to.

Under federal law, employees can lawfully be disciplined for their refusal to attend a meeting without UNION representation where the meeting is the kind where no Weingarten rights exist. State law has not addressed this issue.

The law only requires the employer to permit the UNION representative to take notes, witness the meeting, and state the employee's position at the end of the meeting.

A UNION representative should also try to serve as the employee's advocate by, for instance, asking clarifying questions; bringing out mitigating circumstances or exculpatory facts; raising unequal treatment issues (if applicable), etc. It would be helpful if the representative could meet with the employee first. An employer is not required to allow the representative to do these things. However, the employer's refusal to let the representative take an active role may affect the employer's ability to establish just cause before an arbitrator.

If you act as a Union Representative:

Warn the member:

- Not to make spontaneous responses to accusations made against them;
- Not to meet with the administrator unless accompanied by a competent witness;
- Not to attempt to defend themselves;
- Not to accept a lesser penalty under threat of a greater one without careful reflection;
- Not to agree to any proposals either orally or in writing.

How you can help the employee in the disciplinary meeting:

- Act as a witness to prevent administrators from giving a false account of the conversation.
- Object to intimidating tactics or confusing questions.
- Advise the employee against giving unwise responses or fatal admissions to the administrator (e.g. making inaccurate admissions or making hasty statements without thinking things through, etc.)
- Warn the employee against losing his/her temper.
- Raise concerns or issues to assist the employee.

What to do after the meeting:

- Write down immediately everything that happened including time, date, location, names, witnesses, conversations, etc. -- for both the incident and follow-up meeting;
- Contact and get advice from the NTU office (715.369.2222 or 1.800.367.4901) immediately instead of waiting to see what happens;
- Keep copies of all correspondence and papers relation to the incident;
- If it is a legal issue or a criminal matter, tell the member not to answer questions before they talk to legal counsel.

Summary of Weingarten

- Rule 1: An employee is entitled to union representation **upon request** when the purpose of the meeting to investigate an employee's performance or to obtain admissions of misconduct or other evidence.
- Rule 2: An employee is entitled to union representation when the purpose of the meeting is to ask the employee to explain the employee's conduct or defend it.
- Rule 3: An employee is entitled to union representation when the purpose of the meeting is to compel the employee to answer questions or give evidence.
- Rule 4: Generally, an employee is entitled to union representation **UPON REQUEST** at any interview or meeting with management when the employee will be questioned about something which could affect the employee's working conditions or job security.

What do I do if I am called into a meeting with my administrator?

1. Ask the administrator the purpose of the meeting. Get an answer that satisfies you. Know the purpose of the meeting. If the meeting is to discuss your performance, parent complaints, or other issues relating directly to you, demand union representation. The statement below may be used, or paraphrased, in requesting this representation:

"If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I respectfully request that my Association Representative be present at the meeting. Without representation, I choose not to answer any questions."

2. SPEAK TO NO ONE ABOUT THE SITUATION!

3. Attend the meeting and take notes. Make it clear to the administrator that you are taking notes. If you wish, ask to tape the meeting. If the administrator wishes to tape the meeting, agree but demand a copy of the tape. Keep your notes at home.

Since an employee only has the right to a union representative when he/she "reasonably" believes discipline may result from the interview, what is a "reasonable" belief?

The reasonableness of a worker's fear is determined by objective factors. These factors include: the employee's prior discipline record; the events leading to the interview; the location of the interview; the company representative present at the interview; and the company's opening words at the interview. These factors must be analyzed on a case-by-case basis.

What if the employee requests a union representative and there are none on the premises?

There is no simple answer to this. The employer may have to postpone the interview or it may be able to go ahead without a union representative. However, a worker should still insist upon the presence of a union representative.

The employee's right is to the presence of a union representative, not to a specific person. So, if the representative the employee wants is not available and another one is, the employee is entitled to the presence of the union person who is available.

The District must make reasonable accommodations to your union representative. That means the meeting must be scheduled at a time which is reasonable, given the circumstances.

What is the role of the union representative in the Weingarten interview:

The employee is entitled to the assistance of the representative, not just his/her presence. The union representative has the right to speak at the interview; he/she should be able to take an active role in helping the employee to present the facts.

Is the employee entitled to meet privately with the union representative before the interview?

Yes. An employee is entitled to meet with the union representative before the interview. A general idea of the reason for the interview must be given to the employee beforehand so that the representative has some information. However, the employer does not have to give specific information about the case.

BUT, I attended a meeting to discuss something else and suddenly the administrator started asking questions about my performance. What do I do?

1. Inform the administrator that the purpose of the meeting is different from the current discussion.
2. Request union representation and attempt to leave.
3. If ordered to remain, inform the administrator (again) that you desire union representation of your choice. Request that the administrator put his/her directive to meet without representation in writing. Participate as little as possible. **You cannot be disciplined for not responding to questions or accusations.** When asked to respond, state that you are unable to respond until you have consulted your UniServ Director. TAKE NOTES!

4. **Do not provide a written or verbal statement** to the police, social worker, police liaison officer, or even your administrator, involving a situation where you are accused of doing something wrong until you have consulted a person who is knowledgeable about your rights.

Must I answer questions, if asked?

1. That depends on the question. If your union representative is present and the questions are not threatening or incriminating, keep your answers brief. Answer just the question asked.
2. If your representative is not present, simply reply that you cannot respond without union representation or the advice of any attorney.

Is a conversation at your work station concerning productivity a Weingarten interview?

It depends. The law draws a line between "run of the mill" conversations about productivity and conversations where the employee reasonably expects discipline will result. Where the worker has no reasonable fear of discipline in a discussion concerning production, he/she is not entitled to representation. Where the worker has this reasonable fear, he/she is entitled to representation.

There are many situations which arise in school buildings which are not covered by this document. All of them are fact specific and subject to the interpretation of each person present.