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Weingarten Rights

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Note that the information provided in this presentation is intended to be a general guide and should not be relied upon for legal advice. Please consult with your Deputy City Attorney or the Employee Relations Division if you have any questions about a specific case. **AND BE SURE TO REFER TO THE APPLICABLE MOU!**

What is *Weingarten*?

- In the 1975 ruling known as *Weingarten*, the US Supreme Court held that an employee who is required to attend an investigatory interview with his/her employer is entitled to union representation if the employee has a reasonable basis to believe discipline may result from the meeting.
- This means that the employer must not deny an employee's request for representation if:
 1. the employee requests representation;
 2. for an investigatory meeting;
 3. which the employee reasonably believes might result in disciplinary action.

What Constitutes an “Investigatory Meeting?”

- *Weingarten* rights arise when the purpose of the interview is to obtain facts to support disciplinary action and the reason for such action.
- A disciplinary interview/meeting need not be labeled “investigatory” to invoke *Weingarten* rights (that is, it doesn’t matter what the department calls it if it is for the purpose of getting information from the employee that could lead to discipline).
- However, simply asking questions does not necessarily constitute an “investigatory meeting” for purposes of invoking an employee’s right to representation.

What Constitutes an “Investigatory Meeting?”

- The following are generally not considered “investigatory” meetings, even if the employer asks questions during the interaction:
 - Meetings for the sole purpose of notifying an employee of a decision to impose discipline.
 - Careful– a meeting could possibly implicate the right to representation if the supervisor asks questions to solicit information about, or an explanation regarding the subject matter of the discipline.
 - “Run-of-the-mill” shop-floor conversations (e.g., giving instructions, providing training or giving needed corrections of work techniques) or routine conversations, where the employee has no reasonable fear that discipline could result.

What Constitutes a “Reasonable Belief” that Discipline could Result?

- The employee must have an objectively reasonable fear that discipline will result from their answers.
 - This determination is made on a case-by-case basis in consideration of all of the circumstances– it is not based on the employee’s subjective belief. (E.g., would a reasonable person believe that discipline could result, is the possibility of discipline remote, etc.?)
- Caution: PERB has held that there may be a right to union representation in “highly unusual circumstances,” even if at the outset there is no reasonable belief that disciplinary action will result.

What are “Highly Unusual Circumstances?”

- In determining if “highly unusual circumstances” exist, PERB will consider: the nature of the meeting (was it a formal interview or informal), the tone of the meeting (was the employer hostile), who conducts the meeting (is just the supervisor, or is it a high-level manager or attorney), whether it in fact does result in discipline, etc.
- If the employer assures the employee that no discipline will result and denies the employee’s request for representation, and PERB determines that “highly unusual circumstances” existed, the employer will be prohibited from imposing the discipline resulting from the information obtained that interview.

What Constitutes a “Request for Representation?”

- The employee must affirmatively request union representation in order to invoke his/her right to representation at an investigatory interview.
- The employee can ask for a union representative at any time during the meeting (that is, they do not waive their right to representation just because they do not ask for it at the outset of the meeting).
- The employee need not make repeated requests for representation once the employee requests representation at an early stage of the investigation. However, it is not the department’s responsibility to arrange for representation.
- Expressing reluctance to attend a meeting without union representation alone is insufficient, standing alone, to invoke the right to representation. However, departments should error on the side of caution and allow the employee to obtain representation—make sure to ask your Deputy City Attorney, since it will depend on the circumstances.

Upon Request for Representation, What Should the Employer Do?

- If an employee being interviewed as the subject of an investigation that could result in discipline, requests union representation, the investigator has one of three options:
 - Grant the request, and delay questioning until the union representative arrives or reschedule the interview.
 - Stop the interview.
 - Give the employee a choice of continuing the interview without representation or ending the interview.
- If the employee opts to end the interview, then the employer may continue with the investigation without interviewing the employee. The employee is thereby giving up his/her right to any benefit that may have arisen from the opportunity to respond.

Upon Request for Representation, What Should the Employer Do?

- If the employee is being interviewed as a witness in the investigation and requests union representation, the investigator must ask him/herself whether there is a possibility that the employee could be disciplined as a result of the interview.
- If the investigator thinks there may be possibility of discipline for that witness, then the investigator must choose between one of the three options on the previous slide.
- If the investigator does not think there is a possibility of discipline for that witness, then the investigator should inform the employee that he/she is not under investigation, deny the request for representation, and continue with the interview.
 - If the employee unexpectedly makes an incriminating statement sometime thereafter, the employee need not reassert his/her request for union representation; the investigator must stop the questioning and choose from one of the three options on the previous slide.

Upon Request for Representation, What Should the Employer Do?

- If a witness in an investigation refuses to answer any questions in the absence of a union representative, and there is no objective and reasonable basis to believe that discipline could result, he/she should be ordered to cooperate with warning that failure to do so could lead to discipline.
- Employers may not discipline an employee on the basis that he/she did not cooperate during the investigative interview if he/she requested representation and had a right to such representation.
- Nor can the employer discipline the employee based on the information he/she provided during the investigative interview if he/she was denied representation which he/she requested and to which he/she had a right.
- Remember: when the employee who is the subject of the investigation asks for union representation during the interview, the investigator has the option to stop the interview and to recommend discipline based on an independent investigation.

What is the Role of the Union Representative In the Meeting?

- The union representative's role is only to observe, assist and clarify facts.
 - However, they are not required to be silent or completely passive, and they have the right to advise the employee and assist them in presenting facts.
- The thought is that “a knowledgeable union representative could assist the employer in eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.”
- The department has no duty to bargain with the union representative and can insist that the representative not interfere with, or obstruct the questioning.

Questions

- Is the employer required to notify the employee of his/her right to union representation?
 - No, there is no obligation to notify the employee of his/her right to representation, nor is there an obligation to notify the union that an investigatory meeting is taking/will take place (in fact, we strongly advise against it).
- Is the department required to disclose the subject matter of the interview in advance?
 - It is recommended that departments give the employee and union a general sense of the subject matter of the interview, as long as it will not harm the investigation (e.g., will it give the employee time to hide evidence, will it give employees time to get their “stories straight,” is there concern that the employee will seek to intimidate other possible witnesses, etc.?). If the investigation would be harmed, then the employee should be notified of the subject matter as soon as it is appropriate to do so but no later than at the time that the union representative arrives to the meeting.

Questions

- What if the union representative insists on attending a meeting to review a performance evaluation?
 - The employee generally does not have a right to representation.
- What if it is the union who is inserting him/herself into a meeting with an employee who did not request representation?
 - The right to representation belongs to the employee.
- What if the employee wants to postpone a scheduled interview until he/she can get a union representative?
 - You must allow them a reasonable amount of time to do so (and allow them time to consult with their union representative beforehand).
 - HOWEVER, they are not entitled to the union representative of their choice— they only have a right to any representative who is available at the time so that the interview may timely proceed.

Questions

- Does the employee have a right to insist on having their attorney present?
 - No– they only have a right to union representation.
- What if in the middle of an investigatory interview the department discovers that the employee's responses could lead to discipline?
 - Unless the employee at any point requested representation, there is no obligation to stop the interview.
 - If before, or at any time during the meeting, the employee asked for representation and it was denied on the basis that it would not lead to discipline, the employer must stop the meeting at the point that it realizes that discipline could result and allow the employee to obtain representation.

Questions

- Note—asking for a union representative during an investigatory interview qualifies as engaging in a protected activity, and any action taken because the employee refuses to meet without one could be considered retaliation in violation of the MMBA.
- Additional Points:
 - Always refer to the MOU.
 - When in doubt, error on the side of caution.
 - Remember that the information in this presentation is intended to provide **general guidance** only, and depends on the facts and circumstances of the situation.
 - **Check with your Deputy City Attorney or the Employee Relations Division** if you have any questions or need guidance in a specific matter.

Additional Questions on *Weingarten* or *Skelly* Rights?

- In general, if you have any questions about *Skelly* or *Weingarten* Rights, you can also contact your Deputy City Attorney, the Employee Relations Division of DHR or me any at any time.

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