

IBM Corp. - NLRB Overturns Epilepsy Foundation: *Weingarten* Rights in Non-Union Setting Back on Track!

By Bob Sebris

Hopefully, people will someday take the politics out of National Labor Relations Board (“NLRB” or “Board”) decisions—and hell will freeze over. Until that happens, as Republicans and Democrats change power in the White House over the coming decades, we will have the principle of *Weingarten* rights in a non-union setting to kick around. During the last twenty-five years, the NLRB has repeatedly switched positions—reversing itself four times on this question—always depending upon whether the Republicans or the democrats had control. In the latest flip-flop, the NLRB ruled in *IBM Corp.* that employees in non-union represented businesses again do not have the right to representation in a *Weingarten* interview situation.

From the employer perspective, this ruling by the Bush Board puts this basic right back on track. Overruling the Clinton Board’s *Epilepsy Foundation* decision, *IBM* makes *Weingarten* applicable only in a “unionized” setting for a private sector employer covered by the National Labor Relations Act (“NLRA” or “Act”). Public employers take note: Remember that our Washington State Public Employment Relations Commission (PERC) is “guided” by NLRB precedent, but is not controlled by it. While PERC has endorsed *Weingarten* concepts, it has never expanded *Weingarten* rights to a “non-union” public employer work setting, so *IBM* does not change anything.

Basic *Weingarten* Principle—Investigative Interview Right. Back in 1975, the U.S. Supreme Court ruled that an employee in a union represented work force had the right to union representation in certain investigative meetings. *NLRB v. Weingarten* (1975). Upholding the NLRB’s interpretation of certain inherent NLRA Section 7 rights regarding “concerned activity,” the court ruled that an *employee* had the *right to request union representation* for an *investigative* interview where the employee *reasonably believed* that *discipline* could result.

Applying *Weingarten*—The Basic Scope of the Right. Over the years, the *Weingarten* right has been clarified as specific questions emerged and were addressed in case decisions:

- ✓ The Worker has to request representation—management does not have to offer it (unless the employer negotiated something different in its collective bargaining agreement).
- ✓ The *Weingarten* right only applied to investigative interviews—not meetings to evaluate, train, give instruction, or present discipline.
- ✓ The *Weingarten* right applies to drug testing situations (and polygraph tests as well.)
- ✓ The employee may have a union representation present—not an attorney.
- ✓ The employee need not specifically request a union representative—merely asking for a co-worker or supervisor to be present may be sufficient to trigger the right to union representation.

Representation Issues—Refresher on Nuances of the Rule. Once the *Weingarten* right is involved under the Act by the employee, the employer may:

1. grant the request;
2. decide to proceed without the interview; or
3. give the employee the clear choice to proceed with a union representative or have no interview.

Employers can make this decision on a case-by-case basis, as in some matters the interview will be an essential fact-gathering tool and in others it will not.

The employers must be fair in permitting the employee to select and use a union representative once requested. However, if the employee's specific representative (*e.g.*, a particular union steward) is not available within a reasonable period of time, then the employer may require the employee to use another union representative who is readily available. The union representative and the employee have the right to confer briefly about the situation prior to the start of the interview. The union representative can participate in the discussion, but can not be disruptive or obstruct the interview.

Conclusion. Now that *IBM* has put *Weingarten* back on the right track, non-union employers need not struggle with this concept. However, the basics still apply to union represented employees. Such employers—private sector or public sector—need to be comfortable with the application of these principles to avoid unnecessary unfair labor practice litigation that undermine disciplinary situations.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.



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