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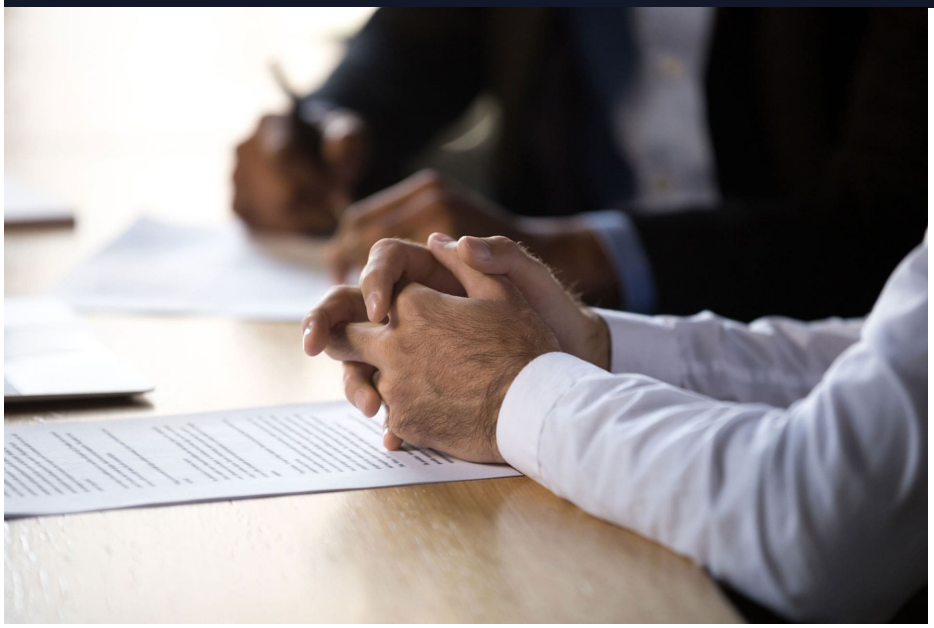

What The Heck Are Employee Weingarten Rights And Are There Limits?

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There are many legal nuances companies must deal with on the employee relations front in union versus non-union environments. For example, employees in a unionized workforce have the right to have, upon request, a union representative present with them during any investigative interview that may lead to discipline of that employee – commonly referred to as "Weingarten rights."

These rights currently apply only to employers who have unionized workforces. The National Labor Relations Board (NLRB) expanded Weingarten rights to non-union employees for a brief period in the early 2000s, but the agency has since reverted to having them apply exclusively in union settings.

It is important for companies to understand, however, that a union representative at such an interview does not have carte blanche to interfere with the interview process. For example, in *New Jersey Bell Telephone Co.*, 308 NLRB 277, 278-280 (1992) the NLRB found that that the employer lawfully ejected a Weingarten representative from an investigatory interview where the representative raised objections and interrupted the employer's questions. That conduct was deemed to have interfered with the company's right to conduct an effective investigation. The Board specifically held:

"In light of these well-established principles, we cannot find that Weingarten grants to a union representative the right to preclude an employer from

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repeating a question to an employee at an investigatory interview. **The Supreme Court directly cautioned against the transformation of an investigatory interview into an adversarial contest by virtue of the presence of a union representative.** Incorporation of such a rigid limitation on questioning would only serve to turn an investigatory interview into a formalized adversarial forum. This is clearly contrary to Weingarten.

"Furthermore, it is within an employer's legitimate prerogative to investigate employee misconduct in its facilities without interference from union officials.… Indeed, an employer may, without violating the Act, seek to compel its employees to submit to questioning concerning employee misconduct when the employer's inquiry is still in the investigatory stage and no final disciplinary action has been taken…. The limitation on questioning that the Union seeks to impose under the aegis of Weingarten would severely circumscribe an employer's legitimate prerogative to investigate employee misconduct. Such a limitation in effect vests in a union representative the authority to terminate an investigatory interview following a single series of questions by the employer. We cannot reconcile such a restriction with the Court's explicit intention to preserve legitimate employer prerogatives, and our duty to maintain the careful balance of the rights of employer and employee articulated by the Court.

…

"Consequently, the [union] representative cannot act to preclude the employer from [asking questions]. If he does so, as [union representative] did in this case, he loses whatever protection the Act affords a Weingarten representative.

"We find, therefore, that [union representative], by advising [employee] to answer questions only once, **and by preventing the Respondent by his persistent objections and interruptions from asking questions** more than once at [employee's] investigatory interview, **exceeded the permissible role of a Weingarten representative."** (Emphasis added.)

The board recently affirmed some of these principles in a case involving PAE Applied Technologies earlier this year. In that case, the NLRB determined an employer properly instructed union representatives and other attendees at an investigatory meeting to stop speaking when people were talking over one another while the interview was being conducted. The company desired to get an uninterrupted account of the employee's version of events, so it was within its authority to direct the cessation of the extraneous chatter to ensure it remained in control of the interview.

This case follows a significant NLRB General Counsel memo from last year that notes a union cannot force an employer to permit verbatim recordings of investigatory interviews involving union employees.

Honoring Weingarten rights is important when they apply because failure to do so can result in any ultimate discipline being overturned. However, the cases above show that companies retain the right to conduct these interviews in an effective manner and there are limits on union conduct at such

meetings.