Employer Update

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NLRB's General Counsel Signals Possible Expansion of *Weingarten* Rights

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On August 12, 2021, newly appointed National Labor Relations Board (the "Board") General Counsel Jennifer Abruzzo issued Memorandum GC 21-04 in which she outlined various issues that she plans to review during her four-year term. In addition to assessing certain Trump-Era Board policies, GC Abruzzo anticipates evaluating the Labor Board's application of *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975), the landmark Supreme Court case which granted unionized employees the right, upon request, to representation during an investigatory interview. More specifically, GC Abruzzo stated that she plans to examine: (i) cases involving *Weingarten* rights in nonunion settings, which the Board addressed (and rejected) in *IBM Corp.*, 341 NLRB 1288 (2004), and (ii) whether there exists a pre-disciplinary interview right to information during employer investigations, which right the Board denied in *U.S. Postal Service*, 371 NLRB No. 7 (2021). With *Weingarten* principles as one of the enforcement priorities for the NLRB, employers should consider re-examining how they currently conduct investigations of alleged employee misconduct, both in union and nonunion settings.

In this month's article, we provide an overview of *Weingarten* rights and implications from GC Abruzzo's recent pronouncement regarding *IBM Corp.* and *U.S. Postal Service*. We also offer some suggestions that employers should consider in conducting investigatory interviews of employees subject to *Weingarten* protections.

Overview of *Weingarten* Rights

Originating from the Supreme Court case, *N.L.R.B. v. J. Weingarten, Inc.*, unionized employees have the right to request a union representative during an investigatory interview. The Board has defined an investigatory interview as any meeting when an employee is being questioned by an employer and the employee reasonably believes that disciplinary action may result. 420 U.S. at 262. The Supreme Court held that such a right stems from Section 7 of the National Labor Relations Act ("NLRA"), which states that "employees shall have the right . . . to engage in . . . concerted activities for the purpose of mutual aid or protection." *Id.* at 267 (quoting NLRA § 7). Failure to provide *Weingarten* rights to eligible employees constitutes an unfair labor practice under Section 8(a) of the NLRA. *Id.* at 260.

Weingarten protections currently apply only to unionized employees. But that has not always been the case. For example, in 2000, in *Epilepsy Foundation*, the Board extended the right to representation to include the right of nonunion

workers to have co-workers present during an investigative interview, reasoning that because non-unionized employees also have Section 7 rights, federal labor law also grants them a right to coworker representation. 331 N.L.R.B. 676, 678 (July 10, 2000). Four years later, the Board overturned this decision in *IBM Corp.*, 341 NLRB 1288 (2004), holding that an "employer's right to conduct prompt, efficient, thorough, and confidential workplace investigation" outweighed the right of a non-unionized employee to have a co-worker present during an investigatory interview. *Id.* at 1294.

By calling for a review of *IBM Corp.* in Memorandum GC 21-04, GC Abruzzo has possibly suggested that she may now support an argument to the Board to reinstate *Epilepsy Foundation of Ohio*. Such a shift in Board precedent would impact all U.S. employers who are subject to the NLRA.

Pre-Interview Information Requests

Another area of enforcement outlined in GC Abruzzo's agenda involves the applicability of *United States Postal Service*, in which the Board addressed the issue of whether *Weingarten* creates a right for unions to request information relating to an employer's investigation in advance of the employee's investigatory interview. *U.S. Postal Service*, 371 NLRB No. 7, 1 (July 21, 2021). In *U.S. Postal Service*, the Board held that *Weingarten* did not establish such a right during the pre-interview phase. *Id.* The union requested, "[p]rior to the investigative interview[,] . . . copies of all records and documents including questions to get used in the interview." *Id.* (internal citations omitted). The Board acknowledged that an employer maintains a duty to timely supply information to a union, however, when the information is requested in the context of an investigatory interview, an employer need only provide it at the closing of the investigation rather than while the investigation is ongoing. *Id.* at 2-3.

The Supreme Court's determination in *Weingarten* that employers have no duty to bargain with union representatives during an investigatory interview supported the Board's holding in *U.S. Postal Service*. *Id.* at 3 (citing *Weingarten*, 420 U.S. at 258–259, 260, 263). Because an employers' "duty to furnish information stems from the duty to bargain," and an employer has no duty to bargain during an investigatory interview, the Board held that it follows that an employer is under no obligation to provide information during the investigation. *Id*.

In discussing an employer's duty to respond to a union's request for information prior to the interview, the Board stated that employers need only provide a broad statement as to the subject of the interview, rather than "the information [the employer] has obtained, or [] the specifics of the misconduct to be discussed." *Id.* (quoting *Pacific Telephone & Telegraph Co.,* 262 NLRB 1048, 1049 (1982), *enfd. in rel. part* 711 F.2d 134 (9th Cir. 1983)). Because the union in *U.S. Postal Service* sought information beyond such a generalized statement, the Board held that the employer could rightfully withhold it prior to the employee's interview. *Id.*

GC Abbruzo's focus on cases involving the applicability of *U.S. Postal Service* means that a possible shift in Board precedent could implicate an employers' right to "control[] the manner, form, and timing of [their] investigatory . . . process," *id.* at 3, 4 (internal quotes omitted), and potentially lead to unions obtaining greater access to information before the conclusion of such investigation.

Practical Considerations

Employers should understand *Weingarten* protections and follow proper procedures when an employee requests that a coworker or union representative be present at an investigatory interview. Initially, an employer should determine whether *Weingarten* protections apply. Under current controlling Board precedent, nonunion employees are not entitled to coworker representation. If a unionized employee requests union representation, he/she has such a right only for an investigatory interview during which a reasonable person would believe disciplinary action may result. In addition, *the employee* has the obligation to make the request for a union representative to be present. *Appalachian Power Co.*, 253 NLRB 931, 933 (1980). A union representative cannot make this request on behalf of the employee. *Id.* The employer

is not obligated to inform an employee of his or her *Weingarten* rights. Nor must the employer volunteer to provide an employee with a representative.

Determining whether an interview in a unionized setting is investigatory and subject to *Weingarten* protections depends on the purpose of the interview. An interview is considered investigatory when a substantial purpose of the interview is to gather factual information to support disciplinary action that the employer is considering. If the employer knows that it does not intend to take disciplinary action, an employer may wish to issue a pre-interview notification to the employee to diminish the employee's reasonable belief that the meeting will result in disciplinary action.

While certain interviews may not be deemed investigatory at the outset, that may change based on follow-up questions and how the conversation progresses. For example, *Weingarten* protections would apply to meetings where the employer issues a disciplinary warning during a meeting and, notwithstanding the employee's request for union representation, questions the employee about performance issues. *See Gen. Die Casters, Inc.*, 358 NLRB 742 (2012). Employers may wish to request that supervisors maintain a record of the purpose and subject matter of investigatory interviews. Such records would provide contemporaneous evidence as to whether a meeting started out as investigatory or became investigatory during the course of the interview, and help the employer to defend against an employee's claim that he or she was denied *Weingarten* protections.

While *Weingarten* rights currently afford unionized employees certain protections, the Supreme Court explained that these protections should not interfere with employers' legitimate prerogatives, including the right to control an investigation. *Weingarten*, 420 U.S. at 258. Once an employee requests representation and the employer determines that *Weingarten* applies, employers can either grant the request, cancel the interview, or offer the employee the option either to be interviewed unaccompanied or have no interview at all. *Id.* Thus, employers maintain the right to seek to conduct the interview without the presence of representation, but only after confirming that the employee voluntarily agrees to proceed without representation. *Id.* at 258-59. In the event the employee agrees to proceed voluntarily, employers should document the employee's decision to help defend against an employee's subsequent claim that he or she was denied representation and forced to proceed with the interview involuntarily. Should the employee refrain from participating and choose to forego any benefits to be derived from an interview, the employer may proceed with its investigation and carry out discipline based on information acquired from other sources. *Id.* at 259. Under any of these circumstances, employers have no obligation to justify their decisions to the employee. *Id.* at 258. As such, employers should consider whether the presence of a particular representative will interfere with the investigation and whether the employer has sufficient information to proceed with the discipline without a meeting with the employee.

Employees generally have a right to choose their representation, but employers may deny an employee's choice under certain circumstances, for example, where a representative is unavailable and another is available or is personally involved in the investigation. *See Pac. Gas & Elec. Co.*, 253 NLRB 1143, 1151 (1981); *Serv. Tech. Corp.*, 196 NLRB 845, 845 n.1 (1972). Representatives cannot prevent employers from repeatedly questioning the employee and cannot turn the interview into an adversarial proceeding. *New Jersey Bell Tel. Co. & Loc. 827*, 308 NLRB at 279 (1992). However, employers must allow representatives to engage in a pre-interview conference with the employee as well as actively advise employees and seek clarity on questions asked during the interview. *See Washoe Med. Ctr., Inc.*, 348 NLRB 361, 361 (2006); *Weingarten*, 420 U.S. at 260; *Pac. Tel. & Tel. Co. v. N.L.R.B.*, 711 F.2d 134, 137 (9th Cir. 1983).

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