

WEINGARTEN RIGHTS: Guidance for Nonunionized Employers

The National Labor Relations Board's decision to extend "Weingarten rights" to nonunion employees will have implications for all employers. Under the Board's new ruling, a nonunion employee has the right to have a coworker present at an investigatory interview that the employee reasonably believes might result in discipline. *Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92 (2000)*.

This right is derived from the Supreme Court's 1975 Weingarten decision where the court recognized union employees' rights to representation at investigatory interviews. Prior to the *Epilepsy Foundation* decision, the Board limited the right to representation at investigatory interviews to union-represented employees. The Board now takes the opposite position and holds that the right to representation at investigatory interviews applies equally to union and non-union employees.

In *Epilepsy Foundation*, the Board stated that the employee is free to choose whether to request or forgo representation. The Board also commented that the employer is not required to conduct investigatory interviews and may pursue other means of

investigating the matter.

In an effort to ensure that nonunionized employers understand both their obligations and their rights in the wake of the Board's decision, below is a set of guiding principles prepared by the Duvin, Cohn and Hutton employment law firm.

GENERAL GUIDELINES

- Under the NLRB's new expansion of Weingarten rights, a nonunion employee:
 - has the right to have a coworker present;
 - at an investigatory interview;
 - that the employee reasonably believes might result in discipline.
- Weingarten rights must be invoked by an employee before an employer has any corresponding obligations:
 - An employee must request the presence of a coworker at an investigatory interview.
 - An employer is not required to advise or inform the employee of his right to have a coworker present.
- In most circumstances, it is best to allow a coworker witness if requested by an employee, rather than to com-

pel the employee to attend the meeting alone or to cancel the meeting altogether. While nonunion employees may request coworker witnesses, such requests are likely to be infrequent.

- Employers should maintain their current approaches toward the investigation of incidents that may result in discipline. However, employers should notify supervisors of the possibility of Weingarten requests from nonunion employees, institute a basic protocol for dealing with such requests, and train supervisors on how to deal with Weingarten rights.

COMMON QUESTIONS AND ANSWERS

Q: When do Weingarten rights apply?

A: Weingarten rights apply only to an investigatory interview that an employee reasonably believes might result in discipline.

Q: Are all meetings with employees that involve workplace incidents and performance "investigatory"?

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A: No. A meeting is not investigatory if it is routine. Regular meetings regarding such issues as training instructions, correction of work techniques and quality assurance, for example, are generally considered routine. As the Supreme Court stated in Weingarten, "In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of a representative." Generally, first round interviews regarding workplace incidents are considered routine, while follow-ups are investigatory.

Q: Do Weingarten rights attach if the investigation involves some other employee's conduct?

A: No. Even if a meeting is investigatory, a specific employee does not enjoy Weingarten rights if he or she is interviewed merely as a witness. For example, if the investigation only elicits information concerning another individual's conduct, the employee interviewed does not enjoy Weingarten rights. (The same rationale would apply, for example, to completing routine incident reports, where the employee serves only as a witness.)

Q: What if the focus of the meeting changes, and we begin to suspect that an employee being interviewed as a witness may have played a part in the misconduct?

A: If the focus of the meeting changes, and the employee is viewed as a possible suspect who might be disciplined, Weingarten rights would apply.

Q: Do Weingarten rights apply when we meet with an employee just to inform him of our decision to impose discipline?

A: No. If the employer has already reached a final decision about imposing discipline, and is meeting with the employee only to inform him or her of that decision, Weingarten rights do not attach because the meeting is not investigatory.

Q: Is management required to advise an employee that he has the right to have a coworker present in an investigatory meeting?

A: No. Supervisors are under no obligation to "read the suspect his rights" before beginning a disciplinary or investigatory meeting. In the union context, the cases have consistently held that a worker must specifically request the presence of a union representative. That same rule would apply in the nonunion setting, i.e., an employee must specifically request the presence of a coworker.

A: The NLRB has previously ruled that an employer has a legitimate need to proceed in a timely fashion with such meetings. For example, an employer in the union context does not violate Weingarten by proceeding with a sobriety test where the employee requests a union representative to the exclusion of all other witnesses, and no such representative can be located after a good faith effort. We believe a similar standard will apply in the nonunion setting,



Q. Can management avoid the Weingarten issue by advising an employee that he or she is not a suspect?

A. Yes, so long as the representation is genuine at the time it is made. If the focus of the investigation later changes to include the employee in question, it would be prudent to advise the employee of that fact if it is necessary to subject him to further investigatory meetings.

Q: Can the employee targeted for investigation choose just any coworker to accompany him to a disciplinary or investigatory meeting?

A: In the union context, an employee is simply entitled to a union representative, and not necessarily the representative of choice. We believe that precisely the same rule will apply to nonunionized workforces:

- There is no right to a particular coworker witness.
- Management need not postpone an interview until the return of the employee's coworker of choice if another coworker is available as a witness.

Q: What if an interview is particularly time-sensitive — e.g., it involves a drug test or sobriety test — and no coworker is available as a witness?

and an employer will be entitled to proceed with a time-sensitive drug or sobriety test so long as it makes a good faith effort to secure a coworker witness if the employee requests one. The employee will not be entitled to delay the test until his coworker of choice arrives.

Q: What if the employer suspects that two workers were involved in the same misconduct, and management wants to interview them separately to get to the bottom of what happened? Can they thwart this by demanding to be interviewed together, each one selecting the other as his Weingarten witness?

A: As discussed above, an employee is entitled to a witness, not a particular witness. We believe that in this situation, an employer should be entitled to insist that each suspected employee choose a "neutral" coworker, i.e., one not suspected of involvement in the misconduct at hand, as the coworker witness.

Q: As a practical matter, how should we handle employee requests to have coworkers present at investigatory interviews?

A: First, do not overreact. Second, we believe it is better to allow the presence of a coworker witness in most cases. In rare cases, we

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Romance In The Workplace

The subject of romance in the workplace can produce snickers, snide remarks, and leers. It brings to mind articles in women's magazines about finding Mr. Right in the next cubicle or rumors at the water cooler of co-workers who find imaginative ways to use the conference room table.

Ever since women started entering the workplace in large numbers, the office has become not just a place to earn a living, but also a place to meet a potential mate. After all, the largest chunk of many people's waking hours is spent at work, so it is only natural that relationships will develop there. (Even Bill Gates met his wife at work - she was a Microsoft employee.) Statistics show that about one-third of all romances began at work and that about half of them result in either marriage or a long-term relationship. However, not all is blossoms and wedding bells in workplace romances - there are pitfalls that an employer needs to be aware of.

The most potentially troublesome situation is when a supervisor starts dating a subordinate. There may be a question of whether the relationship is truly consensual or did the subordinate feel he/she couldn't say no to the boss. Co-workers may feel the person dating the boss is receiving favorable treatment, be it in work assignments or just access to information. Then, if the relationship ends, there may be claims of sexual harassment by the subordinate or revenge-motivated complaints by either party.

Another difficulty is that when breakups of workplace romances occur, and they inevitably do, there may be lost productivity as the former partners try to avoid each other. There may be distractions in the workplace as co-workers "take sides" as to who is the injured party. There is also the potential for stalking to occur if one party can't let go of the relationship.

In light of all the potential problems caused by romance in the workplace, what should an employer do? Would a prohibition on employees dating each other work? What about the supervisor/subordinate situation? Should your company have a written policy on workplace relationships?

Very few companies have a complete ban on employee fraternization. The feeling is that it intrudes on the privacy of the employees, besides being unworkable. Human nature being what it is, people working together will feel attracted to each other. To prohibit

employee dating does not overrule human nature, it just forces it underground and makes employees sneak around and be secretive.

A survey by the Society for Human Resource Management showed that only about one-fourth of employers had a policy on workplace romances and of that number, about half had written policies and the other half had unwritten understandings. The advantage of a written policy is that it would provide exact guidelines to employees. An unwritten policy would be less precise but would provide more flexibility to adapt to different circumstances. Some companies provide "guidelines" for conducting office romances as part of their sexual harassment policy.

If your company chooses not to have a written policy on office romance, you still must have a written sexual harassment policy. The greatest liability problem in office romances is the potential for claims of sexual harassment, either in the supervisor/subordinate relationship or the situation where one party can't accept that someone does not wish to have or continue a relationship with them. It has been estimated that up to 50 percent of sexual harassment lawsuits arise out of workplace relationships that start out as consensual. There are numerous court cases where an employer ends up getting sued when a workplace romance goes sour. Here are just a few examples -

- A jury awarded \$300,000 to a male dude ranch wrangler who claimed he was sexually harassed by a female manager with whom he had a brief relationship.
- A female police officer sued the city after being harassed both on and off duty by her ex-boyfriend, a fellow officer. He made numerous calls to her, threatened suicide, and tried to run her off the road in an unmarked police car.
- A teacher involved the school district in a suit in which he claimed his former lover placed notes on his car windshield, used foul language, ripped his shirt, and kicked him. The sexual harassment claim was ultimately rejected.

In the supervisor/subordinate situation, most would agree that a person should not supervise someone with whom they are in a relationship. When the employer discovers or is made aware of such a relationship, one of the two should be moved to a different department or the chain of command altered.

Problems can arise when the relationship between superior and subordinate is kept secret, perhaps because one of the parties is married to someone else. This can create very sticky situations in the workplace wherein a couple is trying to hide the relationship, co-workers may be asked to "cover" for someone to their spouse, and business trips together are suddenly suspect.

The best method to head off problems with office romances is to have a strong sexual harassment policy in place. Sexual harassment programs should include education and acknowledgement by employees and supervisors that they have received information describing what is and is not sexual harassment. They should also include training that clearly communicates the company's stance on sexual harassment and the procedure for reporting harassment. The U.S. Supreme Court has ruled that employers that have communicated sexual harassment policies to their employees and taken reasonable steps to avoid harassment may be able to avoid liability if the harassed employee then fails to make use of the company's procedures to report the harassment.

If a dating relationship exists between employees, the policy may suggest that the relationship be reported to the affected employees' managers so that an appropriate decision may be made in regard to avoiding any sense of real or perceived impropriety. At the same time, employees need to understand that it is okay to ask a co-worker out on a date. Harassment occurs when the employee indicates no interest and the unwanted attention continues.

Much as a company or its human resources personnel may wish to, they cannot prevent romantic relationships from developing in the workplace. Even though banning workplace affairs is not realistic, this does not mean that the issue should be ignored. As suggested before, an employer should have a strong sexual harassment policy of which all supervisors and employees are knowledgeable and should keep an eye and ear out for any problems that might be brewing because of a workplace romance involving your workers.

Some literature even suggests that workplace romances may be a positive thing for a company because the parties involved look forward to coming to work each day and may increase their productivity in order to impress their love-interest!

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SHORT FACTS

UNEMPLOYMENT - The national unemployment rate was 5.6% in September. The jobless rate was 5.0% a year ago. Iowa's unemployment rate for September was 3.9%. The Iowa rate one year ago was 3.5%

CPI - The Department of Labor reported that for the 12-month period ending in September, the CPI-U increased 1.5%.

BAGEL CHAIN TO PAY \$500K IN OT - New World Restaurant Group has agreed to pay close to \$500,000 in back pay owed to assistant store managers who were misclassified as exempt from the Fair Labor Standards Act's overtime requirements, the Labor Department announced September 25.

BLS TALLIES WORKER TENURE - Workers surveyed in January have been with their current employers for a median of 3.7 years, up slightly from 3.5 years reported in 2000, according to figures released September 19 by the Labor Department's Bureau of Labor Statistics.

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would advise proceeding with the investigation without interviewing the employee in question.

Q: What role does a coworker witness play at an investigatory interview? Can the witness impede the interview?

A: In the union context, the representative's role is to provide assistance to the employee under investigation. The general rules that apply to union settings will also apply here. Management must permit the coworker witness to speak, and may not require him to remain silent or designate him simply as an "observer." For example, the coworker might clarify factual statements or suggest possible witnesses. However, the coworker is not entitled to unduly interrupt the meeting or otherwise interfere with the employer's ability to conduct the interview. In fact, management may insist that the coworker withhold his

comments until after the employee under investigation has spoken. Management should permit the employee under investigation to consult with the coworker witness prior to the interview, upon request, though we believe this right is not as clear-cut as it is in the union context, where the emphasis is on representation.

Q: Do Weingarten rights apply to supervisors? If a company is investigating alleged misconduct by a supervisor, does he or she have the right to bring a coworker to an investigatory meeting?

A. No, if the employee in question is legitimately a "supervisor" under applicable law. If the employer is uncertain as to the employee's supervisory status, our advice in most settings would be to allow the employee to have a coworker present at the investigatory interview.

Q: Does the NLRB's decision apply to nonunionized public sector employees?

A: The Iowa Public Employment Relations Board (PERB) has ruled that unionized public employees in Iowa have Weingarten rights.

CONCLUSION

All supervisors should be advised immediately of your employees' right to representation at investigatory interviews that could lead to disciplinary action. Violation of an employee's Weingarten/Epilepsy Foundation rights could result in an award of back pay and reinstatement if the employee is suspended or discharged in violation of these rights.

While we have attempted to answer the most common questions that will arise as nonunion employers face Weingarten issues, we realize that you will have more questions unique to particular situations that we were unable to address here. Please give us a call if you have any specific questions.