

Duty to Fair Representation

“The employee organization or certificated as the exclusive representative for the purpose of meeting and negotiation shall fairly represent each and every employee in the appropriate unit.” Government Code 3544.9

GENERAL DUTY OF FAIR REPRESENTATION

Application of the general duty of fair representation to specific situations has resulted in the development of the following specific duties that a union owes to all unit employees:

1. Duty to represent all certificated employees.
2. Duty to negotiate on behalf of all unit employees and consider non-joiner views concerning negotiations.
3. Duty to be faithful with the Collective Bargaining Agreement (Contract).
4. Duty to advise unit employees of their legal rights in the context of the contract.
5. Duty to process grievance in a non-arbitrary, non-discriminatory and good faith manner
6. Duty to investigate grievances.
7. Duty to satisfy contractual time limits.
8. Duty to notify a Grievant of union decisions.
9. Duty to present a good arbitration case.
10. Duty to allow a Grievant to have his/her attorney present at arbitration proceedings.

YOUR RIGHT TO BE REPRESENTED



The Association is the exclusive representative for the teachers in your District and therefore the only employee organization authorized to represent individual teachers in certain situations.

What are those situations in which you may want or need representation?

You have the right to be represented by the Association when:

1. An administrator calls a conference with you and you have reason to believe that you will be subjected to reprimand or disciplinary action.
2. You receive a “does not meet standards” overall evaluation rating.
3. You have a grievance. You are entitled to Association Representation at every step of the grievance process, including the informal conference. The earlier you get help, the more effective it may be.
4. A meeting has been arranged to resolve a complaint about you - - if the complainant is someone other than your designated evaluator, and an administrator is to be present.

IMPORTANT NOTE:

An employee always has the right to halt any conference already in progress with any administrator, if the conference becomes disciplinary in nature, and may demand postponement for a reasonable amount of time to obtain representation. If you need to be represented, contact your Association Representative or an Association Grievance Representative or call the Association office.

THE WEINGARTEN RULE:

**AN EMPLOYEE HAS THE RIGHT TO HAVE A UNION REPRESENTATIVE
AT A MEETING WITH THE EMPLOYER IF HE OR SHE
HAS A REASONABLE EXPECTATION THAT DISCIPLINE MAY RESULT.**

This is a private sector rule that has been made applicable to Public School employees under the KERA. (See Redwood CCD v. PERB (1984) 159 Cal.App.3d 617)

THE COURT'S GUIDELINES

1. The employee must request the representative. The right arises only in situations where the employee requests representation. The employee may and will forfeit this right if he/she goes ahead and meets with management without an Association Representative.
2. There must be a reasonable belief that discipline will result from the investigatory meeting. Regular "run-of-the-mill" conversations with management such as review of job requirements or training will not be covered. However the right to representation exists even in cases where no discipline does result from the interview. The right to representation is based on the reasonable belief of the employee, not anyone else in the situation.
3. The employer is *not* required to interview the employee. The employer may decide not to interview the employee, if the employee requests the presence of a Union Representative, but *may* continue the investigation. The employer does not have to justify his/her refusal to allow union representation. The employer is free to carry on the inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that may be derived from one. If the employee refuses to be interviewed without his/her Rep, the employer would then be free to act on the basis of information obtained from other sources.

Though this appears to leave the union and employee a choice to make, there is, in fact, nothing to be gained by meeting with management without one's union representative. An employer who is serious about resolving a problem should welcome a union's participation. The choice, then, remains the employer.

4. The employee has no duty to bargain with the union representative at an investigatory interview. The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at the time, in hearing the employee's own account of the matter under investigation.



DO YOU UNDERSTAND YOUR WEINGARTEN RIGHTS?

By Sherry Posnick-Goodwin

Your principal calls you into her office, shuts the door and asks you to sit down. She questions you about the way you handled a certain situation and begins to make accusations. You start to feel anxious and worry you could face disciplinary action. Should you invoke your Weingarten rights? The answer is yes, absolutely.

Based on the 1975 U.S. Supreme Court ruling of *NLRB v. J. Weingarten, Inc.*, union employees are entitled to have union representation at meetings with supervisors that are investigatory or that could lead to disciplinary action. These rights have become known as the Weingarten rights.

The case is based on an employee who worked at a food outlet operated by J. Weingarten, Inc. She was summoned to an interview with supervisors and questioned about failing to pay full price for a box of chicken. The employee, a member of the Retail Clerks Union, asked for a union representative several times, but her request was refused by the manager each time. The employee reported what had happened to her shop steward and other union representatives. As a result of her being denied a union representative, an unfair labor practice charge was filed with the National Labor Relations Board, and the ruling in favor of the employee was appealed numerous times until it went before the high court.

To invoke Weingarten rights, a union member should say something like this: ***"If this discussion could lead to my being disciplined, I request union representation at this meeting, and that the meeting be postponed until my union representative arrives."*** When the employee makes the request for a union representative to be present, management has three options: It can stop questioning until the representative arrives; it can call off the interview; or it can tell the employee that it will call off the interview unless the employee voluntarily gives up their rights to union representation (an option the employee should always refuse).

Employers will often assert that the only role of a union representative in an investigatory interview is to observe the discussion. The Supreme Court, however, clearly acknowledged a representative's right to assist and counsel workers during the interview.

The Supreme Court also ruled that before an investigatory interview, management must inform the union representative of the subject of the interrogation. The representative must also be allowed to speak privately with the employee before the interview and at any time during the interview. During the questioning, the representative can interrupt to clarify a question or to object to confusing or intimidating tactics.

While the interview is in progress the representative cannot tell the employee what to say — but may advise them on how to answer a question. At the end of the interview the union representative can add information to support the employee's case.

"Employees must demand their right to be represented in these investigatory interviews," says Priscilla Winslow, assistant chief counsel of the CTA Legal Department. "Don't be afraid to ask for what you are entitled to."

Shop Stewards (Union Reps) Have Weingarten Rights, Too.

May 4, 2015 by [Christopher Hammer](#)

Union members have the right to the presence of a union representative at an investigatory interview that the employee reasonably believes may result in discipline: this is the *Weingarten right*, named after the U.S. Supreme Court case of the same name. **The legitimate role of the union representative includes providing assistance and counsel to employees** who may lack the ability to express themselves or who may be too afraid or inarticulate to raise extenuating circumstances. Importantly, **representatives are not required to merely be a "silent witness."** They have the right to:

1. Be informed by the supervisor of the subject matter of the interview;
2. Take the employee aside for a private conference before questioning begins;
3. Speak during the interview;
4. Request that the supervisor clarify a question so that what is being asked is understood;
5. Give the employee advice on how to answer a question; and
6. Provide additional information to the supervisor at the end of the questioning.

The law also, however, recognizes the employer's right to investigate an employee's alleged misconduct without interference from union officials, and to insist on hearing the employee's own account of the matter under investigation. How far can a union representative go in representing a member in a *Weingarten* interview without losing the protection of the law?

The NLRB addressed this question in a decision issued in March. In *Howard Industries, Inc.*, 362 NLRB No. 35, the shop steward, during the employer's investigatory interview, tapped on his notebook to draw the attention of the employee and then held up the notebook for the employee to read from verbatim. Prior to the investigatory meeting, the steward had met with the employee and took notes of the extenuating circumstances the employee described. When the steward refused to close his notebook at the employer's request, the employer threatened to suspend him.

The Board found the steward's conduct remained protected because the use of the notebook provided the employee "clarification and counsel" by reminding him of his defense. The employee was entitled to be reminded of his defense at that point in the interview when it was most useful to both employee and employer. The Board concluded that the union representative's conduct did not interfere with the integrity of the employer's investigation, and therefore, the employer's threat to suspend him was unlawful.

Notwithstanding this decision, shop stewards are reminded that assistance to a member in a *Weingarten* interview that interferes with the employer's legitimate right to interview the employee will not be protected and will subject the steward to lawful discipline.

As of today, the *Weingarten* protections only apply in a unionized setting. But the NLRB in the past, before reversing itself, has extended these protections to non-unionized employees as well. It is possible the current Board, dominated by Obama appointees, will revisit this issue, and if so, perhaps all employees will once again have a right to representation in investigative meetings.

The *Weingarten* protections for union representatives during employer investigatory meetings are a dynamic area of labor law. Beeson, Tayer & Bodine is a [California law firm that represents unions and their members](#), and routinely practices before the NLRB. The reader might find this related blog article interesting where we highlight the union representative's rights to insist on knowing the purpose of an investigatory meeting in advance, [Weingarten Representatives Have Rights Too](#).

