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MEMORANDUM

TO:

FROM: Bob Bezemek and David Conway

Re: When You Can Demand A Union Rep at a Meeting, and What Representation by the Union Rep Actually Includes

Date: Updated: December 4, 2017

Outline

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Introduction

Congress enacted the National Labor Relations Act in 1935, one of the hallmark

legislative initiatives of President Franklin Delano Roosevelt. The law, which became effective on July 5, 1935, established the National Labor Relations Board to enforce its provisions. The primary purpose of the law was to promote collective bargaining between employers and representatives of their employees, labor unions. The law was challenged by Republicans, and business groups, who were bitterly opposed to their workers organizing and having a say in their wages, hours and working conditions. In 1937 the U.S. Supreme Court upheld its constitutionality in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937) 301 U.S. 1.

Representation by your labor union during important meetings with management became an important issue but it wasn't until 1975 that the U.S. Supreme Court affirmed this right in the *Weingarten* case. The principles of *Weingarten*, and its easy-to-remember handle have protected public employees since the California Legislature began adopting collective bargaining statutes in the 1960s. These principles are important, but as you will learn, the right to representation enacted by the Educational Employment Relations Act, and other laws enforced by the California Public Employment Relations Board, is actually much broader than *Weingarten*.

I. The Scope of Weingarten Rights

The United States Supreme Court held that an employee required to meet with her or his employer is entitled to union representation where (a) the employee requests union representation, (b) it is for an investigatory meeting, (c) which the employee reasonably believes might result in disciplinary action *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (Weingarten).

II. The EERA's Expansion of Weingarten Rights

While the Weingarten rule is relatively well known, in California, public employees covered by the EERA are actually entitled to representation under the EERA itself and under a California PERB decision and a court decision. See *Redwoods Community College District*, PERB Dec. No. 293, 7 PERC ¶ 14098 (1983), affirmed in *Redwoods Community College District v. PERB* (1984) 159 Cal. App. 3d 617. Sometimes the rule is referred to as a "Redwoods" right, but it is frequently referred to as *Weingarten*.

Both PERB and the California courts recognize that the language of the EERA is **considerably broader than Weingarten**. This is mainly because the EERA guarantees employees a right of representation "in all matters of employee-employer relations." See Cal. Govt. Code § 3543.

Employer-initiated meetings with employees. California PERB decisions have extended the right of representation to employer-initiated meetings held under unusual circumstances - meetings that are not investigative or disciplinary per se. *Redwoods, supra.* 159 Cal. App. 3d at 617; *Capistrano* (2015) PERB Dec. No. 2440-E; *Placer Hills Union School District* (1984)

PERB Dec. No. 377. The right of representation is a dual right: the right of the union to represent, and the right of the employee to be represented. Thus, an employer's refusal to allow such representation, or illegally constrain it, violates the rights of **both** the employee and the union.

Redwoods holds that an employee has a right to union representation in an **investigatory or disciplinary interview, and in other circumstances connected with employment.**[1] **The label** placed on the interview by the employer **is irrelevant** - what matters is the purpose and issues to be discussed. *Rio Hondo Community College District* (1982) PERB Dec. No. 260, 7 PERC ¶ 14010, p. 29. Under *Redwoods* an employee has a right to Union representation when the employee "reasonably believes" discipline may result.

If a meeting is not held solely to inform the employee of, and acting on, a disciplinary decision already made, then union representation must be permitted. Even a conversation with a supervisor aimed at improving workplace communication may trigger the employee's right to representation, if it is "sufficiently linked to a realistic prospect of discipline" stemming from the employee's experiences. California *Public Sector Labor Relations*, § 1503[3][c].

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[1] Examples: informal grievances (*Rio Hondo CCD* (1982) PERB Dec. No. 272, 7 PERC ¶ 14028, p. 97); review of evaluation (*Redwoods CCD, supra.*); meeting to discuss disputes over working conditions such as leave (*Fremont Union High School District* (1983) PERB Dec. No. 301, 7 PERC ¶14130); discussion of salary or classification changes (*University of California* (1984) PERB Dec. No. 403-H, 8 PERC ¶15161); in the FEHA interactive process -- discussions over reasonable accommodations (*SEIU Local 1021 v. Sonoma County Superior Court* (2015) 39 PERC ¶ 88).

An employer violates this right when it refuses the employee the right to union representation. An employer's partial or ambiguous assurance that no discipline will result does not preclude an employee's otherwise effective request for representation at the interview. When the situation, based on the "totality of the circumstances," makes it reasonable for the employee to believe that the circumstances make discipline or other adverse action a realistic possibility, PERB will find the employee had a right to representation.

As a result of the above, employee requests to discuss issues in dispute, such a disputed contractual leave entitlement, or salary or classification changes, will afford a right to union representation. So, employee requests for union representation to discuss working conditions are protected and the employee is entitled to a union representative.

III. The Weingarten Right in Practice – What Can a Union Rep Do?

A. Prepare for the representation.

First, a union representative is, amongst other things, allowed **access to detailed information in advance of an employer-called meeting regarding its purpose.** To obtain this information, the Union must make an oral or written request, specify the information requested (e.g. the complaint(s)), and explain why the requested information is relevant and necessary to the Union's performance of its representational function.

B. Caucus, Object, Interject

Second, a Union rep has rights to **actually participate** in the meeting, not sit silently as an observer, or as a "potted plant." To participate means to provide counsel and assistance, and to interject as needed. While the Union representative cannot obstruct the meeting, s/he can use her/his judgment to be certain it is fair to the employee whom the Union is representing.

1. Participation is more than silent witnessing. It means being involved and speaking as necessary.

The NLRB has ruled that an employer is prohibited from demanding that the representative's participation consist solely of silent presence as an observer of the interview. *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980), *enf. denied* 667 F.2d 470 (5th Cir. 1982)

PERB holds the same view. In *CSEA v. State of California* (1998) PERB Dec. No. 1297-S, 23 PERC ¶30010, the Board affirmed an ALJ's decision which found, relying on *Redwoods*, that "representation is denied if a union representative present at a meeting is prohibited from speaking."

2. Participating may include objections to improper questions or questions

which constitute an invasion of privacy.

> **Objections.** The NLRB has held that **the union representative may properly object to interview questions** that can reasonably be construed as harassing.*New Jersey Bell Telephone Co. v. NLRB*, 720 F. 2d 789 (3d Cir. 1983)
>
> In another decision the NLRB affirmed this principle, noting that, **"Such a limitation is inconsistent with the Supreme Court's recognition that a union representative is present to assist the employee being interviewed."** [Emphasis in the original. Citations omitted.] *Barnard College*, 340 NLRB 934, 935 (2003)." (Emphasis added.)
>
> What sort of questions might involve an objection on grounds of privacy or impropriety?
>
> > Demanding information about protected union or concerted activities. (E.g. a question asking what the accused told the Union.)
> >
> > Invading the privacy of the employee (e.g. asking the sexual orientation of the accused, or whether the employee has a "good marriage.").

3. Participation includes seeking clarification or challenging an improper question. Seeking clarification of an ambiguous or unclear questions, or challenging an improper question, is often critical to the outcome of an investigation.

The NLRB has repeatedly reaffirmed the Union's rights to seek clarification. In *United States Postal Service and National Association of Letter Carriers*, 351 NLRB No. 82, 351 NLRB 1226 (2007), the NLRB held that not only is a union representative allowed to **actively participate**, but that he or she is allowed to **interject to seek clarification or to challenge an improper question**. Citing earlier NLRB precedent, the Board held that an employer violated the NLRA by not allowing a union representative to participate at a "crucial juncture" of the interview:

> "... we rely, in addition ... on *Lockheed Martin Astronautics,* 330 NLRB 422 (2000). In that case, the employee's Weingarten representative was prevented from speaking at a certain point during an investigatory interview, and then permitted to participate later on. The Board adopted the judge's finding that the representative's subsequent participation "[did] not excuse [the respondent's] effort to confine his participation during the interview." 330 NLRB at 429. *Lockheed Martin Astronautics* is on point here. [Respondent's agent] asked employee Robert Kuch if he was aware of the penalties for willfully delaying the mail . . . Kuch's Weingarten representative, Michael Daly, attempted to challenge [her] question . . but [the agent] precluded Daly from speaking. Later,

[Respondent's agent] asked Daly if he wanted to add anything, but the fact remains that Daly's participation was improperly limited at a crucial juncture of the interview. Thus, we agree with the judge's finding that the Respondent violated Section 8(a)(1)."

4. The representative may, when necessary, interrupt a question. The NLRB further held that an employee's *Weingarten* rights stem from having timely and useful Union representation, even if that occurs in the middle of an employer's questioning:

"[T]he Weingarten Court recognized the importance of enforcing the right to a union representative "**when it is most useful to both employee and employer**." Weingarten, supra, 420 U.S. at 262. **The moment of maximum usefulness may arrive, as it did here, in the middle of the employer's questioning**. *Id.* at 263." (Emphasis added.)

5. Participation may include private caucusing and private discussion when the Union rep or employee deems it necessary. The Union rep and the represented employee are entitled to **consult privately or caucus** about questions and other matters which arise during the interview (e.g. new and unexpected accusations or items). See *System 99*, 289 NLRB 723 (1988). There the NLRB adopted the conclusion of an ALJ that the Employer "violated Section 8(a)(1) of the Act[2] at least by refusing Manning's request to consult privately with Pinkston before responding finally to the implicit question: "Will you submit to a sobriety test?"

The caucus should be held out of ear shot, and if necessary, out of the presence of the investigator or other District representatives.

C. Picking the representative.

The employee may not insist on a particular union representative. The union has the unrestricted right to choose. The employer cannot choose the representation - only the union can do this. Because of scheduling conflicts, and other matters, the scheduling process often requires negotiations. For instance, the Union reasonably is entitled to prepare for the representation, with the employee.

IV. Conclusion

Be aware that while this memo is up-to-date as of December 2017, the law evolves so check with us whenever an investigatory situation arises.

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[2] A violation of 8(a)(1) of the NLRB means the employer interfered with, restrained or coerced employees in exercising their rights under the National Labor Relations Act.

Dated: December 4, 2017

By: /s/ Bob Bezemek
/s/ David Conway