

## YOUR UNION RIGHTS

# WHEN THE BOSS CALLS YOU IN...

**LEGAL CORNER**  
**HARVEY MARS, ESQ.**



Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to [HsmLaborLaw@HarveyMarsAttorney.com](mailto:HsmLaborLaw@HarveyMarsAttorney.com). Harvey Mars's previous articles in this series are archived at [www.HarveyMarsAttorney.com](http://www.HarveyMarsAttorney.com). (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

**IMAGINE THAT YOU'RE** a musician covered by a Local 802 union contract playing in a classical ensemble. Let's say that someone has been stealing from the orchestra supply closet and you're a target of the investigation. You're called into the personnel office by orchestra management. Do you have to go alone? Are you entitled to representation at that moment? It's time to remember your union rights and recall something called the **Weingarten rule**.

This rule was established by the U.S. Supreme Court over 40 years ago in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). Basically, Weingarten holds that union-represented employees are entitled to have a union representative present with them during an investigatory interview that they reasonably anticipate could lead to discipline. This right, which has been expanded and contracted since its inception depending upon the political inclination of the NLRB, has remained relatively intact. However, it is not as expansive as many would believe. Employees must be aware of its contours and limitations. I outline six basic precepts here.

- First, the Weingarten right must be invoked by the individual employee it adheres to. It cannot be imposed upon the employee by either the union or management. It is a matter of personal choice. Thus, it is important for employees to understand the Weingarten rule so that they will be equipped to request representation when they need it.

- Second, as a corollary to the first rule, there is no requirement that management inform employees of their Weingarten right. Thus, it is a misconception to equate Weingarten with the Miranda rule, which police officers are required to enunciate prior to arresting someone believed to have committed a crime. Employees must understand the rule and make the request without being prompted to do so.

- Third, Weingarten only adheres when the employee has a reasonable belief that the investigatory meeting she or he is being called to attend could result in discipline. (If there's a dispute about this later, the NLRB will examine the facts. If it is apparent that the investigation was being conducted in a way that could have caused discipline to the employee, the Labor Board will find that the rule applies.)

- If Weingarten applies, the employer can do one of three things. She can honor the request and hold the meeting with the employee and the chosen representative. She could terminate the meeting and complete her investigation without hearing from the employee. Finally, the employer can offer the employer the choice of continuing the meeting without the representative or proceeding without the employee's input. Given the due process concerns involved, the best course of action is to allow the meeting to continue with a representative present. This will ensure that the determination made is the result of a complete investigation.

- Fifth, while an employee is entitled to a representative of their choosing, this right is not unlimited. First,

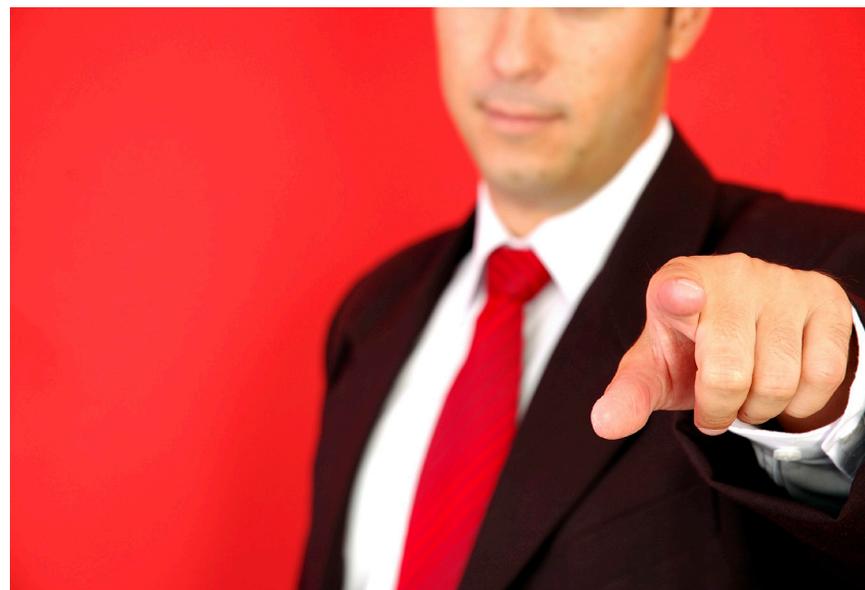


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the representative must be reasonably available. Thus, if the chosen person is on vacation, the employee cannot legitimately insist that she or he attend. Furthermore, the representative must be a fellow employee. A personal friend or attorney cannot be selected, unless they are also an employee.

- Finally, the representative's role is limited to providing advice and guidance to the employee. They are not permitted to turn the meeting into an adversarial process. If the representative is antagonistic, the employer has the right to terminate the meeting and make a decision on the facts that they already possess.

The Weingarten right was once expanded to employees who are not represented by a union. Unfortunately, this expansion was struck down in 2004. While it makes great sense to expand Weingarten to all employees, presently it does not appear that this will change any time soon. On May 3, 2017, the NLRB unanimously denied a petition filed by a former NLRB attorney who had requested the NLRB to implement a rule extending the Weingarten right to non-represented employees.

As it stands, the Weingarten rule is

one of the many benefits of union membership. In order to preserve it during these trying times, it behooves employees and union representatives to understand what this rule permits and what it does not. Failure to do so chances the prospect that it might be lost.

**IN OTHER LABOR NEWS**, the Senate has recently confirmed Marvin Kaplan, who is President Trump's first appointee to the National Labor Relations Board. Mr. Kaplan was instrumental to the effort to block the U.S. Department of Labor's newly-proposed overtime regulations, advocated by the Obama administration, which would expand the population of employees entitled to overtime. Mr. Kaplan is obviously no friend to organized labor. With two NLRB positions remaining to be filled, it is clear that labor advocates can expect that many of the protections employees have achieved under the Obama Board will be eroded or eviscerated. However, it is clear that some fundamental protections will remain intact for employees. One of the most important of these protections is the Weingarten right discussed in this article.