



WEINGARTEN RIGHTS: UTLO MEMBERS HAVE A RIGHT TO UNION REPRESENTATION

What are Weingarten rights? UTLO members do not have to be alone when they are questioned by their employer in a situation that might result in discipline. An UTLO member's right to representation in investigatory or pre-disciplinary meetings was established in a 1975 United States Supreme Court decision, *NLRB v. Weingarten, Inc.*

When do UTLO members have a right to representation under Weingarten? If a UTLO member has a reasonable belief that the answers they give might result in discipline, they have a right to UTLO representation during the meeting.

UTLO members **are** entitled to Weingarten rights in the following situations:

- "Investigatory interviews," in which the supervisor is seeking to elicit facts, to have the UTLO member explain his or her conduct, to discover the UTLO member's "side of the story" or to obtain admissions or other evidence.
- A request for a written statement or written answers about an incident or accident in which the UTLO member's own conduct may be at issue.
- A meeting or discussion in which the employer either has not yet decided whether to impose discipline or is seeking information to support that decision.

UTLO members **are not** entitled to Weingarten rights in the following situations:

- When the meeting or discussion is merely for the purpose of conveying work instructions, training or needed corrections.
- When the purpose of the meeting is simply to inform the employee about a disciplinary decision that has already been made and no information is sought from the employee.
- When the employer has clearly and overtly assured the UTLO member prior to the interview that no discipline or adverse consequences will result from the interview, provided the employer keeps that promise.
- When, after the employer notifies the UTLO member that he or she is being disciplined, the UTLO member initiates further discussion.

What about investigations that are part of the employer's sexual harassment policy and procedures? Yes, UTLO members would have a right to representation when the UTLO member being questioned is an alleged harasser or is alleged to have aided or abetted another person's harassment.



What about job performance reviews or evaluation conferences? Possibly. The UTLO would argue that these rights apply when the UTLO member's performance has been under scrutiny and the UTLO member reasonably believes that his or her job is in jeopardy. However, it is unlikely that UTLO member's would have a right to representation when an evaluator comes in to conduct a performance observation.

How about "counseling" sessions with supervisors regarding absenteeism or drug or alcohol problems? Possibly, especially when the employer is seeking information from the UTLO member or has given the employee a reasonable basis for believing that discipline or termination might result from the information exchanged during the discussion.

What about an employer's request that an UTLO member respond in writing to written questions? Sometimes employers demand that UTLO members provide written statements or written answers to questions about accidents, events or allegations of misconduct. Sometimes the UTLO member is asked to provide such written information by a certain time (such as, "by the end of the day.") Sometimes UTLO members are invited to a meeting and asked to write their statements or answers right on the spot. A UTLO member is entitled to the assistance of a union representative in any of these situations. The UTLO Union representative may be able to convince the employer that the questions are inappropriate or that additional questions ought to be asked. In addition, whether the UTLO member is responding orally or in writing, he or she is entitled to consult with a UTLO union representative before submitting responses.

Does the location of the interview matter? No. Although such interviews typically take place in the office of a supervisor, Weingarten rights apply anywhere.

Does the employer have to inform the UTLO member about Weingarten rights before conducting the meeting or interview? Absolutely not. Weingarten rights are not like Miranda warnings, which require the police to advise a suspect of his or her rights to remain silent and to have a lawyer present. Absent such a requirement in the UTLO collective bargaining agreement, the employer has no obligation to advise UTLO members that they can have UTLO union representation present. Instead, it is up to UTLO member to know their rights and ask for representation in investigatory interviews in which there is a reasonable belief that discipline may result.

What constitutes a "reasonable belief or expectation" that discipline may result? Whether the UTLO member "reasonably expects discipline may result" is not determined by the UTLO member's subjective feelings. Instead, the question is whether any reasonable UTLO member, given the same circumstances, would believe that discipline could result. For example: What did the employer say to the UTLO member when announcing or initiating the meeting? Has the employer provided any oral or written warnings? Have there been oral or written allegations of misconduct? Has the



UTLO member been under scrutiny previously? Have other UTLO members been disciplined for conduct similar to that being investigated at this meeting?

What if the employer states that a disciplinary decision has already been made, but then begins to question the UTLO member about his or her conduct? Is there still an expectation that discipline may result? The cases are unclear in this situation. We recommend that UTLO members ask for representation at any point in the meeting when the employer solicits information. When an employer is questioning a UTLO member to obtain information to support or possibly alter its disciplinary decision, Weingarten rights apply. The employers should stop the meeting and allow the UTLO member to contact his or her UTLO union representative when Weingarten rights are asserted.

How and when should an UTLO member request representation? When should the request be made? The UTLO member should request representation as soon as the UTLO member becomes aware that the employer is seeking information that may result in discipline, or that may support a disciplinary decision already made. The UTLO member can make the request at any time, even in the middle of the meeting. If a UTLO member delays in making the Weingarten request, the employer is allowed to use any information obtained before the request was made, as long as the request for representation is honored promptly.

How does a UTLO member exercise Weingarten rights? Simply stating, "I would like my UTLO union representative present" is sufficient to invoke the right. Even questions such as, "Shouldn't I have a UTLO representative here?" is considered sufficient to assert Weingarten rights. The UTLO member's request does not have to be in any particular form; no magic words are required, nor does the request have to be in writing.

Does the UTLO member need to repeat the request for representation more than once? No. It is incumbent upon the employer to provide Weingarten rights, even if the request is made to a lower-level supervisor who is not conducting the meeting and the request is not repeated at the outset of the meeting.

What should an UTLO member do if he or she is unsure whether a particular meeting calls for Weingarten rights? UTLO members should ask for representation even if they are not sure they're entitled to it. The employer cannot discipline an UTLO member simply for asking. UTLO members could also ask whether the meeting could result in disciplinary action. If the employer answers "no," the employer must follow through on that promise or risk violating the law. If the employer's answer is anything but "no," the UTLO member should ask for representation.



Can an employee "waive" his or her Weingarten rights? How? Yes. If an UTLO member does not affirmatively ask for representation, he or she will be considered to have "waived" his or her rights. However, as noted earlier, there are no "magic words" required in making the request. All that is required is for UTLO members to say enough to convey to the employer that UTLO representation is requested. If the employer claims that the UTLO member chose to continue the interview without representation, the employer must demonstrate that the choice was voluntary, clear and unmistakable.

What happens after an UTLO member has requested representation? Once the request is made, the employer has three lawful options:

1. The employer can grant the request and delay the interview or meeting until the UTLO representative arrives and has a chance to consult privately with the UTLO member;
2. Discontinue the meeting or interview or allow the UTLO member to choose whether to continue unrepresented; or
3. Forgo the interview entirely.

Does the employer have to provide the UTLO member and the UTLO representative with a copy of the charges that have been made against him or her? Although the law is not completely settled on this issue, we believe the answer is "yes." Some courts have held that "meaningful" representation implicitly requires advance notice of the precise allegation against the employee, even if the person making the charges has been promised confidentiality. Without knowing what the charges are, the UTLO cannot provide meaningful advice or assistance. Certainly, the UTLO has a right to information under M.G.L. c. 150E, including information about allegations that are made against bargaining unit members and copies of written charges and witness statements.

If the employer insists that the investigation continue without allowing the UTLO member to have a representative present, may the UTLO member refuse to answer questions or even walk out of the meeting? Yes. UTLO members cannot be disciplined or discharged for refusing to surrender their right to UTLO union representation under Weingarten. If it is truly a Weingarten situation, the UTLO member may remain silent or even leave and return to his or her normal work duties. However, given the complexity and unpredictability of the law, it is often prudent for the UTLO member to comply with the employer's directives, knowing that any discipline resulting from the unlawful meeting might be challenged and overturned. Otherwise, the UTLO member risks being disciplined for insubordination.

Note: If the allegations are criminal in nature, such as assault or sexual assault, the right against self-incrimination may apply. The UTLO union would seek the assistance of legal counsel before advising the UTLO member on how to respond to the questions.



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