7. Employee Rights Laws

PA 397 of 1978/Chapter 7 Interface (1996)
Bullard-Plawecki Employee Right to Know - Act 397 of 1978
Example of Bullard-Plawecki Notices
Disclosure of Employee Job Performance –Act 90 of 1996

The following information provided for reference only:

- Weingarten Rights of Union Employees
- Weingarten Rights: 35 Years and Counting

MEMORANDUM

DEPARTMENT OF COMMUNITY HEALTH

LANSING, MICHIGAN 48913

DATE: July 12, 1996

TO: John Sanford

FROM: Mark Miller

SUBJECT: Bullard-Plawecki Act/Chapter 7 Interface – (reprint)

You have referred an inquiry from Dianne Baker to me in which she asks a question about the relationship between the Bullard-Plawecki Employee Right to Know Act and the Provisions of the new Chapter 7 of the Mental Health Code. I shall attempt to answer Dianne's question.

Question:

How does the Bullard-Plawecki Act apply to ORR Investigation and notice requirements imposed by Chapter 7 of the new Mental Health Code?

Section 6 of the Bullard-Plawecki Act mandates that an employer "shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party I ... without written notice ... "MCLA 423.506(1). Notice must be sent by first class mail to the employee's last known address and must be mailed on or before the day the information is divulged.
MCLA 423.506(2). Chapter 7 of Public Act 290 of 1995 establishes an extensive procedure for the investigation and protection of patient rights. Section 782 of Public Act 290 states in pertinent part:

> "(1) The executive director, hospital director, or director of a state facility shall submit a written summary report to the complainant and recipient, if different than the complainant, within 10 business days after the executive director, hospital director, or director of the state facility receives a copy of the investigative report under section 778(5). The summary report shall include all of the following:
>
> * * *
>
> (g) Action taken, or plan of action proposed, by the respondent."

A recipient or complainant may appeal to the appeals committee for, among other reasons, "[t]he action taken or plan of action proposed by the respondent, does not provide an adequate remedy.

Assuming an ORR investigation revealed a rights violation and the director of the state facility determined that an employee would be disciplined as a result of the investigation, the question arises whether the Bullard-Plawecki notice requirement would apply. I conclude that the notice requirement would be applicable. At the time the summary report indicating disciplinary action was taken or planned was sent to the recipient and/or complainant, the employee would have to be notified by first class mail. Both acts are mandatory. These acts are not in conflict. Both can be complied with without violating the other. There is nothing in the Mental Health Act which would provide the employer with any basis to fail to comply with the Bullard-Plawecki Act.

Further, I do not believe that a hospital can avoid the requirements of the Bullard-Plawecki Act by omitting reference to the action taken or plan of action to remedy the violation. Section 792(1) (g) mandates that the summary report include a statement of action taken or plan of action. Failure to include this information would constitute a violation of the act and would be grounds for appeal. While an employee may have the grievance rights to challenge planned disciplinary action, this does not excuse the employer from advising the recipient or complainant of the proposed action to be taken to remedy the violation.

If I can be of any further assistance, please feel free to contact me.

cc: Dianne Baker
Peter L. Trezise
Mary Fehrenbach

BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT
Act 397 of 1978

AN ACT to permit employees to review personnel records; to provide criteria for the review; to prescribe the information which may be contained in personnel records; and to provide penalties.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

The People of the State of Michigan enact:

423.501 Short title; definitions.

Sec. 1. (1) This act shall be known and may be cited as the "Bullard-Plawecki employee right to know act".

(2) As used in this act:

(a) "Employee" means a person currently employed or formerly employed by an employer.

(b) "Employer" means an individual, corporation, partnership, labor organization, unincorporated association, the state, or an agency or a political subdivision of the state, or any other legal, business, or commercial entity which has 4 or more employees and includes an agent of the employer.

(c) "Personnel record" means a record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. A personnel record shall include a record in the possession of a person, corporation, partnership, or other association who has a contractual agreement with the employer to keep or supply a personnel record as provided in this subdivision. A personnel record shall not include:

(*i*) Employee references supplied to an employer if the identity of the person making the reference would be disclosed.

(*ii*) Materials relating to the employer's staff planning with respect to more than 1 employee, including salary increases, management bonus plans, promotions, and job assignments.

(*iii*) Medical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved.

(*iv*) Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.

(*v*) Information that is kept separately from other records and that relates to an investigation by the employer pursuant to section 9.

(*vi*) Records limited to grievance investigations which are kept separately and are not used for the purposes provided in this subdivision.

(*vii*) Records maintained by an educational institution which are directly related to a student and are considered to be education records under section 513(a) of title 5 of the family educational rights and privacy act of 1974, 20 U.S.C. 1232g.

(*viii*) Records kept by an executive, administrative, or professional employee that are kept in the sole possession of the maker of the record, and are not accessible or shared with other persons. However, a record concerning an occurrence or fact about an employee kept pursuant to this subparagraph may be entered into a personnel record if entered not more than 6 months after the date of the occurrence or the date the fact becomes known.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.502 Personnel record information excluded from personnel record; use in judicial or quasi-judicial proceeding.

Sec. 2. Personnel record information which was not included in the personnel record but should have been as required by this act shall not be used by an employer in a judicial or quasi-judicial proceeding. However, personnel record information which, in the opinion of the judge in a judicial proceeding or in the opinion of the hearing officer in a quasi-judicial proceeding, was not intentionally excluded in the personnel record, may be used by the employer in the judicial or quasi-judicial proceeding, if the employee agrees or if the employee has been given a reasonable time to review the information. Material which should have been included in the personnel record shall be used at the request of the employee.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.503 Review of personnel record by employee.

Sec. 3. An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable intervals, generally not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee. The review shall take place at a location reasonably near the employee's place of employment and during normal office hours. If a review during normal office hours would require an employee to take time off from work with that employer, then the employer shall provide some other reasonable time for the review. The employer may allow the review to take place at another time or location that would be more convenient to the employee.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.504 Copy of information in personnel record; fee; mailing.

Sec. 4. After the review provided in section 3, an employee may obtain a copy of the information or part of the information contained in the employee's personnel record. An employer may charge a fee for providing a copy of information contained in the personnel record. The fee shall be limited to the actual incremental cost of duplicating the information. If an employee demonstrates that he or she is unable to review his or her personnel record at the employing unit, then the employer, upon that employee's written request, shall mail a copy of the requested record to the employee.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.505 Disagreement with information contained in personnel record; agreement to remove or correct information; statement; legal action to have information expunged.

Sec. 5. If there is a disagreement with information contained in a personnel record, removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position. The statement shall not exceed 5 sheets of 8-1/2-inch by 11-inch paper and shall be included when the information is divulged to a third party and as long as the original information is a part of the file. If either the employer or employee knowingly places in the personnel record information which is false, then the employer or employee, whichever is appropriate, shall have remedy through legal action to have that information expunged.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.506 Divulging disciplinary report, letter of reprimand, or other disciplinary action; notice; exceptions.

Sec. 6. (1) An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this section.

(2) The written notice to the employee shall be by first-class mail to the employee's last known address, and shall be mailed on or before the day the information is divulged from the personnel record.

(3) This section shall not apply if any of the following occur:

(a) The employee has specifically waived written notice as part of a written, signed employment application with another employer.

(b) The disclosure is ordered in a legal action or arbitration to a party in that legal action or arbitration.

(c) Information is requested by a government agency as a result of a claim or complaint by an employee.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.507 Review of personnel record before releasing information; deletion of disciplinary reports, letters of reprimand, or other records; exception.

Sec. 7. An employer shall review a personnel record before releasing information to a third party and, except when the release is ordered in a legal action or arbitration to a party in that legal action or arbitration, delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.508 Gathering or keeping certain information prohibited; exceptions; information as part of personnel record.

Sec. 8. (1) An employer shall not gather or keep a record of an employee's associations, political activities, publications, or communications of nonemployment activities, except if the information is submitted in writing by or authorized to be kept or gathered, in writing, by the employee to the employer. This prohibition on records shall not apply to the activities that occur on the employer's premises or during the employee's working hours with that employer that interfere with the performance of the employee's duties or duties of other employees.

(2) A record which is kept by the employer as permitted under this section shall be part of the personnel record.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.509 Investigation of criminal activity by employer; separate file of information; notice to employee; destruction or notation of final disposition of file and copies; prohibited use of information.

Sec. 9. (1) If an employer has reasonable cause to believe that an employee is engaged in criminal activity which may result in loss or damage to the employer's property or disruption of the employer's business operation, and the employer is engaged in an investigation, then the employer may keep a separate file of information relating to the investigation. Upon completion of the investigation or after 2 years, whichever comes first, the employee shall be notified that an investigation was or is being conducted of the suspected criminal activity described in this section. Upon completion of the investigation, if disciplinary action is not taken, the investigative file and all copies of the material in it shall be destroyed.

(2) If the employer is a criminal justice agency which is involved in the investigation of an alleged criminal activity or the violation of an agency rule by the employee, the employer shall maintain a separate confidential file of information relating to the investigation. Upon completion of the investigation, if disciplinary action is not taken, the employee shall be notified that an investigation was conducted. If the investigation reveals that the allegations are unfounded, unsubstantiated, or disciplinary action is not taken, the separate file shall contain a notation of the final disposition of the investigation and information in the file shall not be used in any future consideration for promotion, transfer, additional compensation, or disciplinary action.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.510 Right of access to records not diminished.

Sec. 10. This act shall not be construed to diminish a right of access to records as provided in Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, or as otherwise provided by law.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.511 Violation; action to compel compliance; jurisdiction; contempt; damages.

Sec. 11. If an employer violates this act, an employee may commence an action in the circuit court to compel compliance with this act. The circuit court for the county in which the complainant resides, the circuit court for the county in which the complainant is employed, or the circuit court for the county in which the personnel record is maintained shall have jurisdiction to issue the order. Failure to comply with an order of the court may be punished as contempt. In addition, the court shall award an employee prevailing in an action pursuant to this act the following damages:

(a) For a violation of this act, actual damages plus costs.

(b) For a wilful and knowing violation of this act, $200.00 plus costs, reasonable attorney's fees, and actual damages.

History: 1978, Act 397, Eff. Jan. 1, 1979.

Popular name: Right-to-Know

423.512 Effective date.

To: (Employee's Name)

From: Human Resources

RE: Written Notice regarding the provision of information about disciplinary action

Date:

Per the Bullard-Plawecki Employee Rights to Know Act, Act No. 397 of the Public Acts of 1978, MCL 423.501 et seq.) you are being provided with this written notice, that:

- Disciplinary information is being released to a third party who is not part of (name organization) and not part of a (name labor organization representing the employee.)

- This notice is being sent to you by first-class mail to your last known address, and is being mailed to you on or before the day the information is to be divulged.

- As a general rule, Human Resources/your employer will review your personnel record before releasing information to the third party and that records of disciplinary action more than 4 years old will not be released except under special circumstances such as by court order or as part of an arbitration proceeding.

OR

Date

Name
Address

Dear :

In accordance with §6 of the Bullard-Plawecki Employee Right-to-Know Act, being MCLA §423.506(1) et seq., please take notice that *NAME OF AGENCY* Community Mental Health System (XXCMHS) has disclosed to a party outside XXCMHS a disciplinary report, letter of reprimand, or other disciplinary action. The disciplinary report, letter of reprimand, or other disciplinary action was disclosed to persons prescribed in and by §782(1) of the Michigan Mental Health Code, being MCLA §330.1782.

Sincerely,

cc _____, Personnel File
Recipient Rights Officer

DISCLOSURE OF EMPLOYEE JOB PERFORMANCE
Act 90 of 1996

AN ACT to limit the liability of employers under certain circumstances.

History: 1996, Act 90, Imd. Eff. Feb. 27, 1996.

The People of the State of Michigan enact:

423.451 Definitions.

Sec. 1. As used in this act:

(a) "Employee" means an individual who as a volunteer or for compensation provides an employer with his or her labor.

(b) "Employer" means a person who employs an individual for compensation or who supervises an individual providing labor as a volunteer.

(c) "Prospective employer" means a person to whom an employee or former employee has submitted an application for employment.

History: 1996, Act 90, Imd. Eff. Feb. 27, 1996.

423.452 Disclosure of information relating to employee's job performance; immunity; exception.

Sec. 2. An employer may disclose to an employee or that individual's prospective employer information relating to the individual's job performance that is documented in the individual's personnel file upon the request of the individual or his or her prospective employer. An employer who discloses information under this section in good faith is immune from civil liability for the disclosure. An employer is presumed to be acting in good faith at the time of a disclosure under this section unless a preponderance of the evidence establishes 1 or more of the following:

(a) That the employer knew the information disclosed was false or misleading.

(b) That the employer disclosed the information with a reckless disregard for the truth.

(c) That the disclosure was specifically prohibited by a state or federal statute.

History: 1996, Act 90, Imd. Eff. Feb. 27, 1996.

Weingarten Rights EMPLOYEE'S RIGHT TO UNION REPRESENTATION

The rights of employees to have present a union representative during investigatory interviews were announced by the U.S. Supreme Court in a 1975 case (NLRB vs. Weingarten, Inc. 420 U.S. 251, 88 LRRM 2689). These rights have become known as the *Weingarten* rights.

Employees have *Weingarten* rights only during investigatory interviews. An investigatory interview occurs when a supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his or her conduct.

If an employee has a reasonable belief that discipline or other adverse consequences may result from what he or she says, the employee has the right to request union representation. Management is not required to inform the employee of his/her *Weingarten* rights; it is the employees responsibility to know and request.

When the employee makes the request for a union representative to be present management has three options:

(I) it can stop questioning until the representative arrives.

(2) it can call off the interview or,

(3) it can tell the employee that it will call off the interview unless the employee voluntarily gives up his/her rights to a union representative (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 acknowledges a representative's right to assist and counsel workers during the interview.

The Supreme Court has also ruled that during an investigatory interview management must 1) inform the union representative of the subject of the interrogation. 2) The representative must also be allowed to speak privately with the employee before the interview. During the questioning, the representative 3) can interrupt to clarify a question or to object to confusing or intimidating tactics.

While the interview is in progress the representative 4) can not tell the employee what to say but he may advise them on how to answer a question. At the end of the interview the union representative 5) can add information to support the employee's case.

The five-member board overruled a decision in Epilepsy Foundation of Northeast Ohio and Arnis Borgs and Ashraful Hasan (331 nlrb no. 92). The administrative law judge in that case said a 1975 Supreme Court decision. NLRB v. Weingarten, 420 US 251 granted union employees the right to bring a co-worker to disciplinary meetings with employers. But, citing NLRB precedent, he also ruled that ***nonunion employees don't have so-called Weingarten rights.*** *(no peers, no for non-union)*

Bloomberg Law Reports® Labor & Employment

Weingarten Rights: 35 Years and Counting

Mark Theodore, Proskauer Rose LLP

President Obama's recent recess appointments to the National Labor Relations Board set off the usual alarms about the possibility of drastic upheaval in the natural order of labor law. Speculation and rumor abound, as traditional labor practitioners of all stripes attempt to divine what impact these appointments may have on their respective clients. Although NLRB Chairperson Wilma Liebman recently told an audience that there would be no "radical" changes, such reassurances are viewed by some with skepticism, because one person's reasoned decision is another's radical notion.

Thirty five years ago the Supreme Court set forth the rights of a unionized employee to be represented during a meeting with his or her employer which may result in discipline in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). These rights enter the spotlight and are discussed every time a new presidential administration changes the make-up of the NLRB. That discussion always centers around whether *Weingarten* rights should be extended to employees working at non-union workplaces, because the rights have been extended and taken away by the NLRB numerous times over the last three decades.

Leaving aside for the moment whether the newly constituted NLRB will extend these rights to non-union employees, the primary reason this is an issue at all is there exists a fundamental misapprehension of what constitutes the scope of *Weingarten* rights. Employers, spurred on by aggressive assertion of rights by unions, generally believe the rights are so far reaching they can alter how a workplace investigation is conducted. The truth is much more nuanced, and an examination of these rights shows that they are actually fairly limited, can be invoked only in a very narrow situation, and the zealousness of the representative can actually harm the employee's interests.

What follows are the 6 main things about *Weingarten* rights every traditional labor practitioner no matter their level or which side of the fence they reside on should know.

1. *The right may be exercised only by the employee, not by anyone else, including the employee's union representative.*

First and foremost, it is the employee's choice as to whether to have a union representative present in a *Weingarten* situation. As the Supreme Court held in *Weingarten*, the very essence of the right is choice; the "employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." *Weingarten*, 420 U.S. 251, 257 (1975). While the employer and union may negotiate about and agree on whether the employer must notify the union of investigatory meetings or whether the employer must notify the employee of his or her *Weingarten* rights, the parties cannot impose representation on the employee. This principle has held firm throughout the years, with the NLRB consistently ruling that not even the union representative has the right to invoke representation. See *Appalachian Power Company*, 253 NLRB 931, 934 (1980) (if the right to be present at "a disciplinary interview could be asserted by the union representative, the employee no longer would have the choice of deciding whether the presence of the representative was more or less advantageous to his interests"). Even if these rights were extended to non-union employees, the right to make the request would still rest exclusively with the employee; the NLRB cannot overrule a Supreme Court decision.

2. *Employers have no duty to inform the employee of his or her* Weingarten *rights.*

One reason the representation rights granted by *Weingarten* can be scary to employers is on the surface they seem similar to the types of rights police officers read to suspects prior to custodial interrogations, where the failure to properly notify a suspect of his or her rights can result in evidence being suppressed and cases dismissed. In reality, they are nothing of the sort. The NLRB has decided there is no obligation to give such notice. *Appalachian Power Company* at 234, n. 6. In fact, the misstatement of the scope of *Weingarten* rights can actually form the basis of an unfair labor practice against the union. The NLRB has taken the position that in certain circumstances it is improper for a union to give the appearance that it is mandatory for its members to request *Weingarten* representation. *California Nurses Association (Henry Mayo Newhall Memorial Hospital)*, Case 31-CB-11267, GC Advice Mem. dated September 16, 2003 (a case where the author argued the union's placement of *Weingarten* language on the cover of a collective bargaining agreement was improper in part because the language suggested the employee was required to request union representation).

3. *The employer need only grant an employee's request for representation if the employee has a reasonable belief that the meeting could result in discipline.*

The scope of when a *Weingarten* request must be honored is probably the most hotly debated topic. *Weingarten* rights are not so sweeping that a mere request by an employee in any context requires that the employer provide a representative. The standard used by the NLRB to determine whether an employee reasonably believes the interview might result in disciplinary action is analyzed by an "objective standard" under all the circumstances of the case. This means the request must be evaluated on a case by case basis.

NLRB case law provides important guidance on this issue. Of course, a purely investigatory meeting held to inquire into suspected misconduct clearly would require the presence of a representative, if requested. At the other end of the spectrum, if the purpose of the meeting is merely to communicate a disciplinary decision that already has been made, then no such representative need be provided even if requested. *Baton Rouge Water Works*, 246 NLRB 995 (1995).

The employee's right to representation become less clear when the purpose of the meeting does not fall purely investigatory or purely to communicate. The situations are infinite. Not all inquiries by an employer to an employee are "investigatory" and sometimes the employer does not even know there is anything to investigate. The general thread that runs through the case law is whether there is some intent to investigate some matter at the outset; if not, there is no need to provide a representative. This is so even if the meeting ultimately does result in some sort of discipline; *Weingarten* rights are evaluated at the time of the meeting, not afterwards. *U.S. Postal Service*, 252 NLRB 61 (1980) (employee not entitled to *Weingarten* representation at fitness for duty medical examination, in part, because "the absence of evidence that questions of an investigatory nature were in fact asked at these examinations"); *NV Energy, Inc.*, 355 NLRB No. 7, Op., p. 1 (January 29, 2010) (employee not entitled to representative where purpose of meeting was to follow-up on complaints employee made about training class instructors); Success *Village Apartments*, 347 NLRB 1065, 1071 (2006) (no representative required where meeting was to reiterate previously made non-disciplinary administrative decision).

4. *If an employee makes a valid request for a* Weingarten *representative, the employer has three options.*

If an employee who is entitled to representation makes a request the employer can (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview with no representative or discontinuing the interview altogether. *See Washoe Medical Center*, 348 NLRB 361, 361 n.5 (2006). An employer might choose to discontinue the interview (or not hold it at all) based on confidentiality concerns, especially in cases where there is some sensitivity to information getting out to the general workforce. There is generally speaking no ability, absent some specific agreement, to keep what is said in the meeting confidential. Employers often choose not to continue with the interview in cases of theft where the employer is attempting to stop and apprehend the culprits before tipping them off.

The decision of whether to discontinue an interview should be made carefully. The employer should balance whether giving the employee an opportunity to tell his or her version of events is outweighed by other concerns. While there certainly is no legal requirement to get an employee's version of events, labor arbitrators and courts certainly will evaluate an employer's investigation to see if it was conducted fairly and objectively, and one element of such an evaluation is whether the employee was given due process to hear and respond to allegations. On balance, the situations where the interviews are not held or are discontinued should be rare, because the presence of representation at an interview will only add credibility to the investigation.

5. *While the employee can select a particular representative, the representative must be reasonably available.*

The employee who has the right to a *Weingarten* representative can select a particular person to attend the meeting, and the employer is obligated to provide the person, absent "extenuating circumstances." *Anheuser-Busch, Inc.*, 337 NLRB 3, 7–8 (2001). The person selected could be a full-time, paid union representative, a steward or even a fellow employee. It seems clear that a non-employee with no standing with the union need not be allowed into the meeting.

Extenuating circumstances justifying denial of particular representative usually have to do with the representative's availability. The employer does not have to wait for days before the selected representative becomes available. *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977) (Friday request by employee for vacationing steward who was not to return until Monday reasonably denied) However, waiting several minutes until the representative becomes available might be required, particularly if there is no urgency. *Anheuser-Busch, Inc.* 337 NLRB at 8 (2001) (fact requested person was on lunch break expected to last 15 minutes is "available" when there "was nothing about the allegations against [employee] that demanded instant attention"). If the employee's request for a particular person to act as representative is reasonable under all the circumstances, then the request should be granted.

The employers should conduct the investigatory meeting on a schedule that fits with its objectives. There is no duty to inform an employee or the union that the meeting will take place at a certain time. The presence or absence of a particular individual may not make much of a difference given the restrictions on participation, set forth in number 6, below.

6. *The selected representative can provide advice and active assistance to the employee, but cannot transform the meeting into an adversarial confrontation.*

Many employers worry that having to provide a representative to an employee will turn every investigatory meeting into a formal hearing where its managers and supervisors will be cross-examined, and the inquiry will be turned into something else. In some cases the employer chooses to cancel the meeting altogether if it believes the meeting will be too confrontational. In actuality, despite what is often asserted by union business representatives and stewards across the country, the employer always maintains its right to conduct the investigation free from disruption.

The NLRB standard is that the "[p]ermissible extent of participation of *Weingarten* representatives in interviews is seen to lie somewhere between mandatory silence and adversarial confrontation." *Postal Service*, 288 NLRB 864, 867 (1988). The Supreme Court held that the right to representation must not interfere with legitimate employer prerogatives. *Weingarten*, 420 U.S. 258–259, 263. So, while an employer cannot direct the representative to be silent (*Barnard College*, 340 NLRB 934, 935 (2003)), the representative cannot take any action that is disruptive to the meeting. *New Jersey Bell Telephone*, 308 NLRB 277, 279 (1992) (*Weingarten* does not permit representative to continually object to employer's repeat questions"). The bottom line is the *Weingarten* representative does not have any authority to impede or disrupt an investigation in any way. The representative's role is to advise the

employee, not prove the employee's innocence. The representative does not have the authority to question managers or supervisors or determine areas of inquiry. The investigatory nature of the meeting means the employer has yet to decide what, if any, action is to be taken. The employer decides the areas of inquiry, the pace and the tone of the interview.

If the representative acts in a disruptive manner he or she should be given a clear warning that further disruption could result in termination of the interview or ejection from the meeting. If the warning does not solve the problem the employer should inform the employee that it will make a decision without the information it hoped to obtain during the meeting, and simply discontinue the meeting.

The fact an employee who was represented during an investigatory meeting will add extra credence to the decision to discipline or terminate the employee if and when the matter goes before an arbitrator or court. If the representative was disruptive that fact can be brought out at the arbitration hearing. Conversely, although oftentimes contested, the representative is a witness to what transpired at the meeting and could be called to testify. The *Weingarten* representative best serves the employee by acting calmly and noting what transpires. Acting overzealously can harm the employee's case. For example, a steward's advice to not answer questions may mean the employer is deprived of important information in deciding whether discipline is appropriate or the level.

* * * * * *

The change in the make-up of the NLRB will bring a renewed interest in *Weingarten* rights. The scope and nature of these rights have changed little in the 35 years since the Supreme Court made its decision. an examination of the six most critical aspects of these rights shows they have been carefully balanced so as to give the employee support and assistance during a stressful time, if he or she chooses, but allowing the employer to run its business as it sees fit.

Mark Theodore is a Los Angeles-based partner in the Labor & Employment Law Department at global law firm Proskauer, representing management in traditional labor law matters with a focus on representing union-free employers. His practice includes educating management, conducting vulnerability audits and assisting in the development/implementation of preventive workplace practices and programs. He has extensive experience handling unfair labor practice charges and also represents unionized employers in arbitration proceedings and in the negotiation and administration of collective bargaining agreements, acting as lead negotiator for dozens of major companies in nearly all industries, including multi-unit, multi-location, multi-employer and multi-union bargaining.