ROBERT J. BEZEMEK
PATRICIA LIM
DAVID CONWAY

LAW OFFICES OF
ROBERT J. BEZEMEK
A PROFESSIONAL CORPORATION
THE LATHAM SQUARE BUILDING
1611 TELEGRAPH AVE., SUITE 936
OAKLAND, CALIFORNIA 94612
Telephone: (510) 763-5690 ● Facsimile (510) 763-4255
rjbezemek@bezemeklaw.com
dconway@bezemeklaw.com
www.bezemeklaw.com

MEMORANDUM

TO: Clients

FROM: Bob Bezemek and David Conway

Re: When You Can Demand A Union Rep at a Meeting It Began With Weingarten, but is Expanded by the EERA

Date: April 12, 2017

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 a California PERB decision. See *Redwoods Community College District*, PERB Dec. No. 293, 7 PERC ¶ 14098 (1983); *Redwoods Community College District v. PERB* (1984) 159 Cal. App. 3d 617.

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.

California PERB decisions have thus 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.

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 the meeting is not held solely to inform the employee of, and acting on, a disciplinary decisoin 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.**

B. Caucus, Object, Interject

Second, a Union rep has rights to actually participate in the meeting, not sit silently like a "potted plant." To participate means to provide counsel and assistance, and to interject as needed. While you can't obstruct the meeting, you can use your judgment to be certain it is fair to the employee you represent.

1. Participation is more than silent witnessing.

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, attempts at clarification, and caucusing when necessary.

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., supra.

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? Demanding information about protected union or concerted activities, invading the privacy of the employee, are two good examples.

Seeking clarification. The NLRB has repeatedly reaffirmed these rights. In *United States Postal Service and National Association of Letter Carriers*, 351 NLRB No. 82, 351 NLRB 1226 (2007), the NLRB further 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)."

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.)

3. Any representative.

The employee may not insist on a particular union representative. The union has the unrestricted right to choose.

IV. Conclusion

The right to a union representative is an important right, one recognized by PERB.

Dated: April 21, 2017 By: /s/ Bob Bezemek

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