

Pennsylvania Court Holds Union Rep May Request Private Caucus with Employee During Investigative Interview

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In *Department of Corrections v. Pa. Labor Relations Board*, No. 1369 C.D. 2022 (Jan. 18, 2024), a unanimous panel of the Pennsylvania Commonwealth Court recently held that a union representative may request a private caucus or meeting with an employee during an investigative interview, and that the employer's denial of that request violated the Pennsylvania Public Employee Relations Act ("PERA"), also known as Act 195. In so holding, the court expanded the scope of an employee's Weingarten rights to have a union representative present at an investigative interview. Although the case arose under the PERA, which governs public sector or government labor relations, the court's analysis could apply to private sector workplaces, which are subject to the National Labor Relations Act ("NLRA").

Weingarten refers to a United States Supreme Court decision, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), which established an employee's right under the NLRA to a union representative at an investigative interview that the employee reasonably believes will result in discipline. Pennsylvania courts have adopted the *Weingarten* rule in the PERA context. Moreover, courts have extended *Weingarten* beyond simply an employee's right to a union representative at an investigatory interview. For example, in *Commonwealth v. Pa. Labor Relations Board*, 826 A.2d 932 (Pa. Commw. Ct. 2003), the court held that an employee's *Weingarten* rights include the right to consult with the representative before answering a question "when a significant question is asked such as one that could result in the discipline of the employee or when the question asked may be interpreted in more than one way."

The issue in *Department of Corrections* was whether the union representative - not the employee - could request a private caucus during the interview. In that case, the employee was summoned to an investigative interview concerning allegations that he had made improper remarks to coworkers. The employee requested a union representative at the interview, which was granted. After the interview began and he answered the first question, the employee requested a private caucus with his union representative, which was granted. Thereafter, the employer asked a question that shifted the focus of the interview from whether the employee made the improper remarks to whether he was being truthful during the interview. This time, the union representative requested a private caucus with the employee, which was denied. The interview continued, and ultimately, the employee was issued a written reprimand.

The Commonwealth Court concluded that the employer violated the PERA by denying the request. The court rejected the employer's argument that *Weingarten* provides only a limited right to union representation and that only the employee, not the union representative, may request a private caucus. Relying on "broad language" in *Weingarten* as well as a 1983 Ninth Circuit decision under the NLRA (*Pacific Telephone*), the Court was

persuaded that the right to union representation includes participation by the representative. "A knowledgeable union representative is indispensable in such circumstances," the court observed, "yet requiring such a representative to stand mute when the employee's right should be asserted is tantamount to denying representation altogether."

Accordingly, the court held that "a *Weingarten* representative has a right to request a private caucus with an employee to the same extent that the employee himself could make such a request." The court further held that the representative properly requested a private caucus where the focus of the interview shifted to a new issue that could have resulted in additional discipline to the employee.

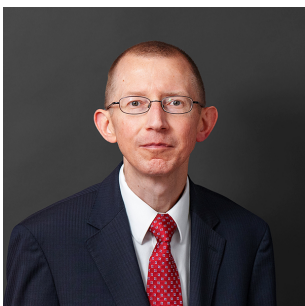
Employer Takeaways

Department of Corrections will directly impact government employers with unionized workers. When conducting an investigative interview at which a union representative is present, employers should expect a representative to request one or more private caucuses during the interview. Nevertheless, an employee's or representative's right to request a private caucus is not unlimited and, as the court noted, may be made only at "appropriate times" during the interview, such as "where the interview's focus shift[s] to a new issue that could result in additional discipline." The employee or representative may not utilize the private caucus as a stall tactic or to otherwise interfere with the interview process.

Finally, although *Department of Corrections* was decided under the PERA, the court's analysis could apply under the NLRA - and receive a warm reception at the current union-friendly National Labor Relations Board. As such, private sector employers with unionized workforces should brace for the possibility that *Weingarten* representatives assert themselves and request private caucuses during investigative interviews.

If you have any questions about *Department of Corrections* or *Weingarten* rights generally, please contact attorney [William Boak](#) or any member of [Barley Snyder's Labor Law Practice Team](#).

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