

# AVOIDING THE TRAIN WRECK:

*Don't Let Procedural Rules Derail  
Your Discipline Decisions*

Labor Relations Institute

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SUMMIT LAW GROUP

ENERGY PASSION COMMITMENT SHIRTSLEEVES

# Speech Overview

- *Weingarten* Rights
- *Garrity* Protections
- *Loudermill* Rights

# *Weingarten* Basics

- Doesn't Refer to "Wine Garden" or "Beer Garden" During Oktoberfest
- Does Refer to Employee's Right to Have a Representative During Certain Meetings With Management
- Only Applies to an Investigatory Interview When the Employee Reasonably Fears Discipline Could Result

# When Doesn't *Weingarten* Apply?

- Casual “shop floor” conversation
- Performance evaluation meetings
- Meeting where employer delivers discipline
- Follow-up counseling sessions
- Interview of employees who are not the target of potential discipline but are merely fact witnesses

# *Weingarten* Details

- Notice Requirements
  - Generally employee's obligation to ask not employer's obligation to inform, unless promised by contract or policy
  - Exception: when interviewer finds out that fact witness might face possible discipline
- Private Attorney or Non-Union Representative in Lieu of or in Addition to Union Rep
  - No requirement in absence of contract or policy

# *Weingarten* Details (cont)

- Usually Only One Union Representative is Required
- Non-union Employees Have No *Weingarten* Rights Unless Your Policies Voluntarily Grant Rights
- What If Desired Union Rep is Unavailable?
  - Balance urgency of timely interview with employee's desires
  - If time is of the essence, find best available representative
- Give Union Representative General Idea of Purpose Before Interview (**beware of over-generous bill of rights provisions promising all documentation**)

# *Weingarten* Details (cont)

- Appropriate Role of Union Rep
  - Witness for employee
  - Object when interviewer strays into irrelevant territory
  - Offer additional information helpful to employee
- Inappropriate Role of Union Rep
  - Questioning interviewer
  - Answering for employee
  - Intrusive interruptions or caucuses

# *Weingarten* Details (cont)

- If Employee Changes Mind Regarding Union Rep, Usually Best to Adjourn to Allow Employee to Find Rep
- *Weingarten* in Pre-termination Hearings
  - Generally not required
  - Contracts may be more generous
  - If employer asks follow-up questions, *Weingarten* may apply
  - Union rep presence may be beneficial

# Consequences of *Weingarten* Violation

- Unfair Labor Practice
- Possible Invalidation of Discipline
- Adds to Union's "Kick Up Dust" Approach in Arbitration

# *Garrity Overview*

- Purpose is to Harmonize Employees' Rights Against Self-Incrimination With Employers' Rights to Investigate Misconduct
- Stems from US Supreme Court Decision in 1966
- Not a Right Regulated by State Law

# When Does *Garrity* Apply?

- Applies When Employer Wants to Compel Employee to Answer Questions And Employee Faces Possible Criminal Prosecution
- Applies Regardless of Union Status
- Applies Equally to Law Enforcement Officers and Non-Law Enforcement employees

# When Doesn't *Garrity* Apply?

- Employee Volunteers Information
- Employee Fears Information Would be Incriminating in a Civil Lawsuit, Not a Criminal Proceeding

# What Do You Do in *Garrity* Situations?

- Order Employee To Answer Questions and Refusal will be Insubordination Which will Lead to Discipline, Up To Termination
- Ask the Employee Questions Specifically, Directly and Narrowly Related to the Possible Offense
- Advise Employee That Answers Will Not be Used Against Them in a Criminal Proceeding

# What is the Scope of Immunity in *Garrity* Situations?

- Use Immunity Rather than Transactional Immunity
- Employee Still Faces Potential Criminal Prosecution Based on All Facts Not Derived from Employer's Interview
- Concerns regarding “Fruit of the Poisonous Tree”
- Coordinate Interview with Prosecuting Attorney and/or Law Enforcement Officer

# *Garrity* Details

- Employer Can Proceed Without Employee Interview, if Remaining Evidence is Strong
- Employer Can Consider Employee Statements From Criminal Investigation
- Consider Timing Between Disciplinary Investigation and Criminal Proceeding
- Interplay between *Garrity* and *Loudermill*

# *Loudermill Overview*

- Due Process Requirement so Not Creature of State Law
- Requires Employer to Give General Basis for Intended Discipline and an Opportunity to Offer Additional Information
- Must Occur Before Discipline Decision is Finalized

# Which Employees Are Entitled to a *Loudermill* Hearing?

- Employees Must Have Some Property Interest in Their Jobs
- “At Will” Employees Do Not Have a Property Interest
- Probationary Employees Are Usually “At Will”
- Employees with “Cause” Protection Have a Property Interest
- *Loudermill* is Not Limited to Unionized Employees

# What Levels of Discipline Require *Loudermill* Hearing?

- Termination
- Suspensions Without Pay
- Demotions
- Any Other Form of Discipline With Tangible Loss
- Not Required For Written or Verbal Warnings
- Gray Areas: Decision-making Leave, Termination in ADA areas, and Layoffs

# Are Multiple *Loudermill* Hearings Ever Required?

- In General, Only One Hearing is Necessary
- Exception: If New Facts Or Harsher Discipline is Considered After Initial Hearing, Give Second Hearing

# How Formal Are *Loudermill* Hearings?

- Does Not Need to Be Formal Like An Arbitration
- No Obligation to Call Witnesses, Offer Exhibits, Allow Cross-examination
- Employer Must Offer General Basis For Considered Discipline and Provide an Opportunity For Employee to Respond

# Who Can Attend A *Loudermill* Hearing?

- The *Loudermill* Right is Held By The Affected Employee
- Union Rep Presence is Not Required By Law Unless Available By Contract or Policy
- Union Rep Presence May Be Helpful to Employer
- No Requirement for Employee's Attorney Unless Available By Contract or Policy

# What Is The Connection Between *Loudermill*, *Weingarten*, and *Garrity*?

- *Loudermill* Hearing is Not a Substitute For Investigatory Interview of Employee
- If Employer Asks Follow-up Question of Unionized Employee in *Loudermill* Hearing, Employee Would Have a Right to Union Rep
- Gray Area About Necessity to Give *Garrity* Warnings in a *Loudermill* Hearing Where Employee May Face Criminal Charges

# Role-Play No. 1 – The Investigatory Interview (Scene 1)

- Obligation To Furnish Documentation Prior To Interview
  - Not required under the law
  - Review more generous rights under policy or contract
  - Usually general purpose of interview is best
- Written Statements in Lieu of Interview
  - Usually unwise
  - Follow-up questions usually needed

# Scene 2

- Right to Choose Union Rep
  - Legally - not required
  - Practically – if doesn't cause undue delay, probably best
- Leaves of Absence During Investigation
  - Judgment call – if serious allegations, best to use administrative leave
  - Leave should usually be paid
  - Clarify rights during leave (i.e., contacting witnesses and coming onto premises)

# Scene 3

- Appropriate Role of Union Representative
  - Generally a witness
  - May object to irrelevant questions
  - May consult with employee in reasonable caucuses
  - You need not become the interviewee
  - You have a right to hear from employee
  - You can't issue a gag order

## Scene 3 (cont)

- Dealing With Evasive Witnesses
  - Pin them down
  - Ask for details
  - Ask more than one time and more than one way
- Potential Illegal Conduct Discovered During Interview
  - Adjourn to consider Garrity implications
  - Give Garrity warnings

# Scene 4

- *Garrity* Warning
- How to Pin Down Evasive Answers
- Difference Between Dishonesty and Evasive Answers

# Scene 5

- Dealing with New Allegations or Forgotten Issues
  - No prohibition on follow-up interview
- Dealing with Union's Attempt to Divert Attention from Misconduct
  - Stay with your agenda
  - Remind union reps the appropriate forum to raise concerns

## Scene 5 (cont)

- Requests for Complainant/Victim Information During Investigation
  - Balance sensitivity of complaint with due process concerns of employee
  - Consider middle ground (redact names but reveal facts, to union rep with agreement on no approach by employee to complainant)

# Role Play No. 2 – The Pre-Termination Hearing (Scene 1)

- Private Attorney/Union Rep Presence
  - Legally, right belongs to employee so no right to attorney or union rep
  - Practically, employer usually wants union rep present to hear directly the nature of the case
  - If allow attorney, make sure appropriate role is clarified
  - No legal obligation for questions in advance – this should primarily be for employer to listen

# Scene 1 (cont)

- Timing of Pre-Termination Hearing And Criminal Proceeding
  - Case by case basis
  - Determine if discipline requires criminal conviction – if so must wait for criminal proceeding
  - Vagaries of criminal proceedings (i.e., plea bargains, higher burden of proof)
  - Political implications of lengthy paid administrative leave

# Scene 2

- Tape Recording
  - Consent required of all parties
  - Consult provisions of policy or contract
  - Pros and cons of taping
- Responding to Script Reading
- *Garrity* Implications in *Loudermill* Hearings
  - If asking questions involving alleged criminal act, either give *Garrity* warning or wait for criminal

# Scene 3

- Union Rep's Role at Pre-Termination Hearing
  - Usually allow both employee and union rep to furnish arguments
  - Absent contract or policy, no legal right to cross examine witnesses
- Employer's Right to Follow-up on New Info
  - Request specifics if appears relevant
- Need Not Announce Decision or Debate Merits at the Hearing

# Scene 4

- Pros and Cons of Asking Follow-up Questions
  - As is, stories have obvious discrepancies
  - Follow-up may allow way to harmonize stories
  - Handling allegations of sexual harassment
- Obligation to Answer Union's Questions Regarding Process and Basis for Discipline
  - Need not be placed on the "hot seat"
  - If previous conviction is part of consideration, clarification is warranted