



Weingarten Rights for National Guard Federal Technicians

A 1975 Supreme Court decision (NLRB v. J. Weingarten, Inc.) provides that a union-represented employee has the right to a steward when facing an investigatory interview. This private sector labor decision was applied to federal employees by Congress at 5 USC 7114(a)(2)(B). The important thing to remember about your “Weingarten Rights” is that management does not have to notify you of this right: The employee is responsible for being aware of the right to request representation. Therefore, make sure to educate your bargaining unit employees of their rights to request union representation. Here is what you, and they, need to know:

- a. The meeting has to be *investigatory* in nature for it to be covered by Weingarten. *Investigatory* means a meeting/discussion between management (or a management representative like OIG, LMR, JAG, etc.) and a bargaining unit employee where questions are being asked. Usually these questions are asked pursuant to an ongoing criminal or administrative investigation; however, less formal questioning by a manager or supervisor could qualify as well.
- b. In addition to (a) above, the employee must reasonably believe that discipline could result from the investigatory meeting. If the employee being investigated is the subject of the investigation (i.e. the alleged wrongdoer) then he/she will undoubtedly have a reasonable fear of discipline. If the employee is not the subject of the investigation, the employee may still have a reasonable fear of discipline depending on their potential involvement in the subject being investigated. For example, if an employee observed the misconduct and failed to report the misconduct to a supervisor, the employee being questioned could fear discipline for failing to report what they saw.
- c. If the criteria established in both (a) and (b) above are met, then the employee **MUST** make a clear and unambiguous request for union representation. “I want a Union representative before I answer your questions!!” is the best response. Anything less definitive, such as “Do you think I need a union representative?” or “I am considering having a union representative present” won’t do it.
- d. Assuming the criteria in (a) and (b) above are met and the employee requests a representative as explained in (c), then the employee should not answer any questions until the union representative is present. The Agency cannot legally require an employee to answer questions until their union representative is present.

For National Guard Technicians the issue can become slightly more complicated because they can become targets or witnesses to a military investigation.

Weingarten Questions for either type of investigation

1. Is the employee's participation voluntary or involuntary?
 - If it's voluntary then walk away
 - If it's involuntary then meeting becomes custodial

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Frequently Asked Questions About Weingarten Rights for National Guard Technicians (cont'd)

Note: It's important to establish whether the investigatory interview is being conducted as part of a criminal investigation or not. If it is and the employee is being ordered to appear at the investigation by the Agency then the meeting is 'custodial' and the employee in this situation has the Constitutional right to remain silent and demand a criminal defense attorney under Miranda. The courts have all held that an investigatory interview in this context is akin to an arrest. Here, the employee's Constitutional rights against self-incrimination trump the Agency's right to conduct an investigation and an employee therefore cannot be compelled to answer investigatory questions.

2. Is this an investigatory meeting?
3. Is this a civilian or military investigation?
4. Under whose authority is this investigation being conducted?
5. Can you provide the employee with a copy of your appointment letter/orders and inform them of the nature of your investigation (IAW Army AR 15-6 Section 3-8(a)(1); Air Force AFI 90-301 Para 1.7-1.8)?
6. Is the employee merely a witness, or are they considered a respondent or the target of this investigation?
7. Is it criminal or administrative?
 - a. If the investigation is administrative then the employee has to cooperate with the questioning.
 - b. If the employee is told that he/she is a respondent or target/witness to a criminal investigation then they can invoke their 5th Amendment protections and should immediately request that counsel be provided (for military IAW AR 15-6 Section 5-6(a)) before going any further.
 - c. If this is a criminal investigation do not attempt to represent the employee as you are not a lawyer. Recommend that employee contact a lawyer before they say anything further. The employee does not have to answer questions until his/her request for counsel is granted. If after invoking counsel the investigator changes the type of investigation from criminal to administrative then go to d (below).
 - d. If the investigation is deemed administrative then employee has to cooperate, but if there's still doubt as to the intent of the investigator (they're saying administrative but they may change it to criminal later), before proceeding ask the investigator to provide the employee with a written Kalkines Warning (see sample on next page). This document will absolve the employee of criminal charges (immunity) resulting from the answers provided in the meeting. In these cases when there's doubt as to the investigator's intent or assurances that no criminal charges will be brought forth, you should not allow the employee to answer questions until the Kalkines warning has been signed.

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Frequently Asked Questions About Weingarten Rights for National Guard Technicians (cont'd)

Kalkines Warning

Investigator: _____

Employee: _____

You are being questioned as part of an internal and/or administrative investigation. You will be asked a number of specific questions concerning your official duties, and you must answer these questions to the best of your ability. Failure to answer completely and truthfully may result in disciplinary action, including dismissal. Your answers and any information derived from them may be used against you in administrative proceedings. However, neither your answers nor any information derived from them may be used against you in criminal proceedings, except if you knowingly and willfully make false statements.

Investigator Signature: _____

Employee Signature: _____

Date: _____