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Electronic Alert

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D.C. Circuit Reaffirms that Weingarten Rights Require an Affirmative Request

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Last month, in *Circus Circus Casinos Inc. v. NLRB*, No. 18-1201 (June 12, 2020), the U.S. Court of Appeals for the D.C. Circuit overruled the NLRB's expansion of *Weingarten* rights for unionized employees during investigative interviews. The court held that the National Labor Relations Board (NLRB) improperly expanded the scope of *Weingarten* protections, and reaffirmed that an employee's right to union representation during an investigatory interview requires an affirmative request from the employee.

Background

In 1975 the U.S. Supreme Court held that a unionized employee is entitled to have a union representative present in any investigatory interview that the employee reasonably believes could result in discipline. *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975). But the *Weingarten* Court also held that right to union representation is not self-executing, and arises "only in situations where the employee requests representation."

Two years ago, in *Circus Circus Casinos, Inc.*, 366 NLRB 110 (2018), the NLRB departed from over 40 years of precedent by expanding what constitutes an adequate request for representation. There, a union employee was under investigation for failure to comply with company policies. At the beginning of his investigative interview, he told the employer that he had called the union three times, and that no one had showed up, so he was present without representation. The employer continued the interview and ultimately terminated the employee for misconduct. The NLRB ruled that the employee's vague statement about calling the union constituted a "reasonably understood request" to have union representation at the meeting, and ordered reinstatement with back pay.

D.C. Circuit: Weingarten Rights Require an Affirmative Request

Last month the D.C. Circuit overruled the NLRB's expansion of *Weingarten* rights in its *Circus Circus* decision. The Court noted that the employee's statement merely recited facts about his past communication with the union and the circumstances of his attendance at the interview. The Court found that the employee's statement was ambiguous, and not sufficient notice that he desired union representation. The employee's affirmative request was made to the union rather than the employer, and thus it did not trigger any right to representation under *Weingarten*.

According to the Court, to invoke *Weingarten* rights, an employee's utterance must be "reasonably calculated" to put the employer "on notice of the employee's desire for union representation." Under the "reasonably calculated" notice standard, an employee is required to make an affirmative request for union representation, and employers do not have an affirmative obligation to inform employees

of their *Weingarten* rights. However, the Court noted that affirmative requests can come in many forms, providing examples such as: "I need a Union Steward," or "Should I have a Union representative present?"

What this Decision Means for Employers

The D.C. Circuit's decision restored the well-established standard for invoking *Weingarten* rights: employees must affirmatively request union representation. However, the Court's discussion of what might constitute an affirmative request makes clear that a valid request for representation could come in many forms. Thus, the most prudent approach is to treat any mention of a union representative by an employee in the context of an interview as a request for representation.

If you have questions about Weingarten rights or investigating and addressing misconduct in a unionized workplace, please contact Trevor Caldwell at tcaldwell@barran.com or (503) 276-2117.