

# Ask the Lawyer



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## Employee's right to representation can be tricky for managers

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Federal managers are often confronted with a situation in which a subordinate employee wants a representative or witness to be part of a meeting. The question for the manager is: Do I have to let the representative in?

The answer depends on whether the employee is a member of a bargaining unit represented by a federal-sector union. If so, specific rules exist concerning formal meetings and investigations. In general, if a meeting is formal, the union must be notified and provided an opportunity to be present. With respect to investigations, a manager must allow a representative into a meeting if the employee requests representation and reasonably believes disciplinary action will result from the meeting. These entitlements are sometimes referred to as Weingarten rights after a Supreme Court decision that established them.

A manager confronted with these situations should consult with a labor relations specialist to prevent the commission of an unfair labor practice. Determining when a meeting is formal and the types of investigations that are covered can be tricky. This exists within a structure that says most day-to-day meetings between a supervisor and subordinate come with no obligation to let the employee delay or control the meeting by requesting a representative or witness.

A manager has more discretion with an employee who is not in a bargaining unit. The subordinate is entitled to a representative only in the context of a criminal investigation, in connection with a grievance, or as a part of a response to a serious disciplinary proposal. Even in a noncriminal investigation, many agencies will permit an attorney or other representative into an interview if the matter under investigation is serious or complicated.

However, employees who are not in bargaining units should be aware that they will have difficulty prevailing on an appeal to the Merit Systems Protection Board if they are fired for refusing to cooperate due to a refusal to attend a meeting without a lawyer present.

The following details situations in which a manager must let an employee's representative into a meeting or investigation:

**Formal meetings.** A formal meeting is one that discusses grievances, personnel policies and practices, or other matters affecting general working conditions. The union would likely need to be notified and at least one representative would be allowed into the meeting if it was to discuss a grievance, a proposed or final decision on a disciplinary or performance action, or a matter of concern to employees generally.

It is not a formal meeting — no representative is required to be present — if its purpose is to discuss a matter that concerns only that employee or if it is a brief meeting on a routine topic.

**Investigations and Weingarten rights.** Before Weingarten rights are applicable, the

employee must be subjected to an examination in connection with an investigation. This usually means the employee is questioned about some matter or issue that has arisen in connection with the job. For example, if an employee is to be questioned about his whereabouts the previous day because he is suspected of misuse of official time, this would give rise to Weingarten rights.

The employee's belief that disciplinary action may result must be reasonable. A concern that it might happen is usually sufficient.

Finally, the employee must request the representation. Be careful, because some agencies have negotiated this away by requiring management to notify the employee of his Weingarten rights.

A manager should check the collective bargaining agreement for clarification of the employee's rights and the manager's obligation on this issue.

