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What Do You Need to Know about Kalkines and Garrity Warnings and Miranda and Weingarten Rights During a Work Place Investigation?

Witnesses in an investigation have rights given to them by law. Here is a summary of some that apply to federal employees.



By [Joe Swerdzewski](#) Updated: April 20, 2021 7:53 PM

Witnesses in an investigation have rights given to them by law or, in the case of a unionized environment, also by the parties' collective bargaining agreement. These include Weingarten rights, Kalkines and Garrity warnings and Miranda rights.

Employees being interviewed in an administrative investigation, not involving potential criminal action, must participate in the investigation or potentially face disciplinary action, including firing for failing to cooperate. However, there are certain warnings that may have to be given to the employee before action can be taken. If a witness is given his Miranda rights, the employee cannot be compelled to answer questions from the investigator; however, disciplinary action may be taken, in appropriate circumstances, based on the results of the criminal investigation.

Weingarten rights apply to employees in a unionized environment that permit the employee to have union representation during an interview. Various rights employees in unionized and nonunion workplaces have during investigations will be discussed below.

Many of you are very familiar with the Weingarten rights of employees in the federal sector. In addition to the Weingarten rights of employees, employer's conducting an investigation must be knowledgeable about Kalkines and Garrity Warnings as well as Miranda rights. The following is a discussion of how Weingarten, Kalkines, Garrity and Miranda affect the conduct of an investigation.

Weingarten Right

The [Weingarten right](#) is intended to allow management to accomplish the purpose of the investigation, obtain all of the relevant facts, and explore all issues regarding the matter

under investigation. The right does not allow an employee to hide or confuse the facts, refuse to answer, mislead investigators, or delay or impede the investigation.

There are four elements of the Weingarten right:

- There must be a meeting between an employee in a bargaining unit and a representative of management,
- An examination in connection with an investigation must take place,
- The employee must reasonably fear discipline, and
- The employee must request union representation.

Once a request for representation has been made by an employee the employer has four options:

- Grant the request and provide the employee with a union representative, or
- Discontinue the interview, ask no further questions, and make a decision based on information already obtained from other sources, or
- Offer the employee the choice between continuing the interview without representation or having no interview. Such offer cannot be made in a threatening or coercive manner. If the employee agrees to go ahead with the interview without representation the employee is considered to have waived the right to representation, or
- Deny the request and proceed with the interview, thereby incurring the risk that unfair labor practice charges will be filed.

The role of the representative is to assist the employee in the interview by clarifying questions and consulting with the employee. The representative has the right to ask for a break to talk with the employee, but the investigator has the right to refuse such a request when appropriate. The representative cannot take over the investigation or cross-examine the investigator. If the employee representative interferes in the conduct of the investigation, the investigator has the right to offer the employee the right to go on with the interview without the union representative present or to discontinue the interview and a decision will be made, based on available evidence without the benefit of hearing the employee's side of the story.

Kalkines Warnings

A federal government employer may conduct an administrative investigation to determine misconduct of an employee at the same time a criminal investigation of the employee is ongoing. The same facts that may lead to a criminal prosecution may be the same facts needed for a disciplinary action.

In *Kalkines v. the United States*, 473 F.2d 1391, an employee who worked for U.S. Customs was faced with being questioned concerning a potential disciplinary matter (alleged taking of bribes) at the same time he was under federal criminal investigation for the same matter. Faced with potential prosecution, he chose not to answer questions from his employer. He was fired for refusing to answer. The Court held the employee could not be discharged for invoking his Fifth Amendment right against self-incrimination.

However, in circumstances where an employee has invoked his 5th Amendment right against self-incrimination, the employer can decide to inform the employee that the employee's participation in the investigation will not be used in a criminal case against the employee. Therefore, if the employee then fails to give evidence, he may be discharged. However, the employer must have received confirmation from the applicable prosecutor that criminal action is not contemplated and the employee has thereby been granted a waiver from prosecution.

Sample Kalkines Warnings

You are going to be asked a number of specific questions concerning the performance of your duties as an employee. You have a duty to reply to these questions, and agency disciplinary proceedings resulting in your discharge may be initiated against you as a result of your answers. However, neither your answers nor any information or evidence that is gained by reason of such statements can be used against you in criminal proceedings. You are subject to disciplinary actions up to and including dismissal if you refuse to answer or fail to answer or fail to respond truthfully to any answers.

Garrity Warnings

While Kalkines warnings apply to federal workplaces, Garrity warnings apply more generally to all workplaces. Garrity warnings are given when an individual is requested to give information on a voluntary basis in connection with his or her own administrative misconduct, and the answers might also be used in a future criminal proceeding. The individual is apprised of his or her right to remain silent if the answers may tend to incriminate him or her, that anything said may be used against him or her in either a criminal or administrative proceeding, and that he or she cannot be disciplined for remaining silent.

Sample Garrity Warnings

You have a right to remain silent if your answers may incriminate you. Anything you say may be used as evidence in both an administrative proceeding and any future criminal proceeding involving you.

If you refuse to answer the questions posed to you on the grounds that the answers may tend to incriminate you, you cannot be discharged solely for remaining silent. However,

your silence can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case. This interview is strictly voluntary and you may leave at any time.

Miranda Warnings

Miranda warnings are given when an individual is being interviewed concerning his or her own potentially criminal misconduct and is taken into custody or deprived of freedom in a significant way. Under this warning, an individual is advised that pursuant to the Fifth and Sixth Amendments to the Constitution, anything said may be used against him or her, and that he or she is entitled to remain silent or otherwise not incriminate himself or herself, and that he or she has the right to the assistance of an attorney.

Should an investigator give Miranda warnings to a witness, that witness cannot be disciplined for asserting the right to remain silent. At no time should a supervisor give an employee Miranda rights. These should only be given by trained investigators.

Supervisors conducting work place investigations rarely have to worry about employee rights other than Weingarten. However, if the conduct being investigated could also result in criminal charges even though the supervisor does not intend to pursue criminal action, the supervisor should seek guidance from the agency's personnel or legal office to assure the proper warnings and rights are given to the employee who is being questioned.

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