

'I Plead The Fifth!' — Employee Rights in Connection with Company Investigations

BY ANDREW GOULD, ESQ.

THE U.S. Constitution is a wonderful document, brilliantly crafted, able to stand the test of time. Among the many rights and protections it affords all Americans is the right to keep your mouth shut, a right provided under the Fifth Amendment of the Bill of Rights. "Pleading the Fifth," may be your right, but at work, it won't protect you from losing your job. The reason, employers have a duty, often established by state or federal law, to investigate employee complaints and allegations of infractions of company policy. As a result, employers may require their employees to fully cooperate during the investigative process.

An employee who refuses to answer a question on any grounds, including that answering will result in self-incrimination, impedes the investigative process. An employee is certainly free to sit idly by and refuse to answer questions. Unfortunately, the employer would be within its rights to discipline the individual and/or to even terminate the employee for doing so (see below for differences when the

employer is unionized). Employers would be wise to include in their company policies/handbook the mandate that employee cooperation during investigations is required.

UNION VS. NON-UNION

Employees may also believe they are entitled to have a friend, co-worker, or even their attorney attend a workplace investigative interview with them. They would be mistaken, unless they work in a unionized environment, and then, only for interviews in which the information provided can be used as a basis for discipline. Known as one's "Weingarten" rights, union employees may have a union representative present when being questioned by their employer as part of an "investigatory interview." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). This is the one time when an employee may plead the Fifth, so to speak, without suffering adverse consequences. If a union employee invokes his Weingarten rights and the employer denies them and continues with the investigation by asking the

employee questions, the employer would be subject to an unfair labor practice charge if it disciplined the individual for not answering.

Interestingly, non-unionized employees were afforded Weingarten rights for a brief period of time in the early 2000s. Between 2000, when the National Labor Relations Board decided a case styled *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92, and 2004 when it decided *IBM Corp.*,

So the next time your supervisor tells you that she needs to speak with you about a matter, you may want to think twice before refusing to answer her questions. It should go without saying that being honest, forthright, and cooperative are always advisable in such situations. Indeed, rather than contemplating the Fifth Amendment, one may be better off simply telling the truth, the whole truth, and nothing but the truth. ☐

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341 NLRB No. 148, all workers had such rights. The Board in *IBM* reverted back to its previous stance regarding the matter, concluding that a coworker was not the same as a union representative and that an employer's right to conduct a prompt, efficient, and confidential investigation outweighed the right of an employee to have a co-worker present.

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