Section 7
Investigatory Interviews

Mr. Hoffman, the gate guard saw you carrying a large plastic bag to your car yesterday. If it was scrap, you have nothing to worry about. Just tell us what was in it.

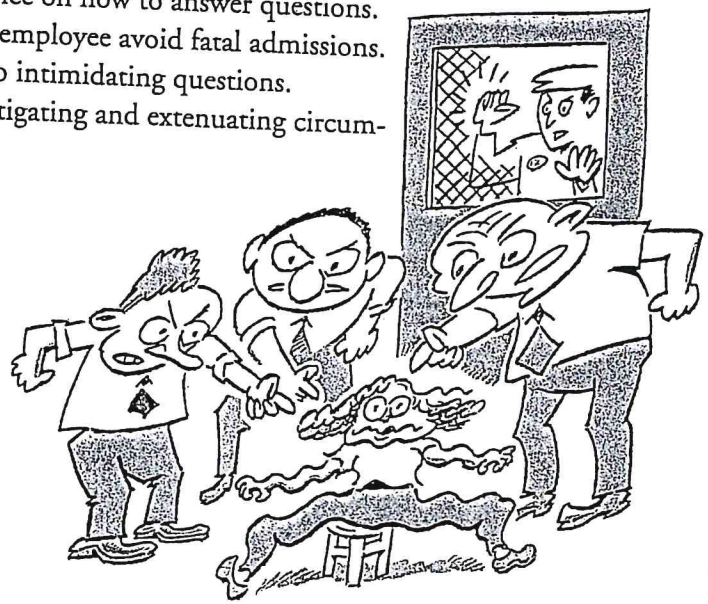
Weingarten Rights

Investigatory interview ◦ Weingarten procedures ◦ Steward rights ◦ Educating members

WHEN MANAGERS, SUPERVISORS, or security personnel interrogate employees, there is always a danger that they will use coercive or dishonest methods. To deter this, the U.S. Supreme Court has promulgated safeguards known as "*Weingarten* rights."[79] During investigatory interviews, employees have a right to ask for union representation and can refuse to answer questions until the request is honored.

Unions should encourage members to exercise their *Weingarten* rights. In addition to serving as a witness, a steward or officer can:

- Give advice on how to answer questions.
- Help an employee avoid fatal admissions.
- Object to intimidating questions.
- Raise mitigating and extenuating circumstances.



INVESTIGATORY INTERVIEW

The right to union assistance only applies during "investigatory interviews." An investigatory interview (sometimes called a "fact-finding meeting") occurs when (1) an employer or an agent asks questions and (2) the employee has a reasonable fear of discipline or other adverse consequences. It is immaterial that the interrogator tells the employee: "We are only interested in finding out what happened."

Run-of-the-mill conversation. Not every discussion with management is an investigatory interview—even if questions are asked. For instance, a supervisor may call a worker to the office in order to give

instructions, correct a work technique, or point out new procedures. The worker may be apprehensive, but because the likelihood of discipline is remote, the worker may not insist on a steward before participating.

Routine discussions can change their character. If a supervisor bears down and begins to ask probing questions, the employee, sensing trouble ahead, may request representation.

> Note: When a supervisor firmly promises that no disciplinary action will result from an employee's answers, and there are no reasonable grounds for disbelief, the employee usually does not have a right to union assistance.

Disciplinary announcement. A supervisor calls a worker to the office to present a warning or other discipline. Is this an investigatory interview? The NLRB says no—except in cases where the supervisor questions the employee.[80] Unless a contract provision requires the union's presence, the worker cannot insist on representation.

Medical examination. Routine medical and fitness evaluations are not investigatory interviews. But if management orders an employee to take a drug or alcohol test to further a disciplinary investigation, the worker must be allowed union assistance before and during the test.[81]

WEINGARTEN PROCEDURES

The following procedures apply during investigatory interviews:

The request. The employee can request union representation when the interview begins or at any time thereafter. The employee can specify any currently available union agent.

The response. Upon receiving a *Weingarten* request, an investigator has three lawful options:

1. Stop asking questions and call in the sought-after representative.
2. Discontinue the interview.
3. Offer the employee a choice of (a) continuing without representation or (b) ending the interview.

Violation. An investigator that denies or ignores a request for representation and continues asking questions without the employee voluntarily relinquishing her *Weingarten* rights commits an unfair labor practice—even if the employee answers the questions. The employee cannot be charged with insubordination for refusing to answer.

STEWARD RIGHTS

Employers sometimes assert that the only right of a steward during an investigatory interview is to observe in silence. But the law says a union representative must be allowed to give effective assistance and counsel. In particular:

- The steward can ask for the specific charges being investigated.[82] Management does not have to give away its entire case, but must provide at least a general description. For example: "We have a concern that Lyndon has been abusing the company's sign-in policy."
- The steward can insist on a private consultation or "caucus" with the employee.
- The steward can advise the employee on how to answer particular questions.

- The steward can ask the interrogator to clarify the issues being investigated and can object to harassing or confusing questions. However, the steward cannot repeatedly interrupt, abuse the interrogator, or attempt to turn the meeting into a debate. Management has a right to investigate misconduct and employees have a duty to cooperate.
- The steward must be allowed to present extenuating and mitigating circumstances.

If the interrogator refuses to reveal the matter being investigated or to allow a private consultation, the steward can advise the employee not to answer.

EDUCATING MEMBERS

Weingarten rights are sometimes confused with *Miranda* rights. Under the U.S. Supreme Court's *Miranda* decision, a police officer questioning a person in custody must explain the person's right to legal representation. *Weingarten* does not go this far: an employer has no duties to inform an employee about his or her right to union assistance.

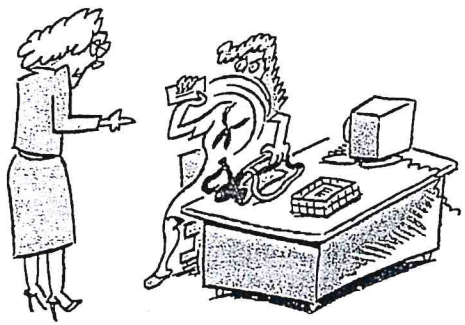
Unions should educate members about the value of representation. One technique is to distribute wallet-sized cards making a request for

(Weingarten Card)

I REQUEST UNION REPRESENTATION

If my responses to your questions could lead to discipline or termination, or adversely affect my personal working conditions, I respectfully request that you summon my union representative. Until my representative arrives, I choose not to answer any questions.

union assistance. Members are advised to present the card if they are called in for questioning.



ULP charge. Requiring a worker to answer questions without representation, refusing to tell the representative the reason for the investigation, refusing to allow a private caucus with the employee, or telling the representative not to speak during a meeting violate Section 8(a)(1) of the NLRA. The union can file a ULP charge even if the employee answered the employer's questions. The Labor Board usually does not defer *Weingarten* charges to the grievance-arbitration process.[83]

SAMPLE CHARGE

On February 1, 2017, the employer refused the request of employee Harold Brown for union representation during an investigatory interview.

QUESTIONS AND ANSWERS

ATTEMPT TO DISSUADE

Q. A supervisor questioned an employee about an accident on the job. When the worker asked for union representation, the supervisor said: "If you insist on a steward, I will have to bring

in labor relations. If we can keep it at this level, things will be better for you." Violation?

A. Yes. The boss is trying to coerce the employee into abandoning his *Weingarten* rights.

JUMPING THE GUN

Q. A foreperson told a worker to report immediately to human relations for a talk about her attitude. When the worker asked to speak to her steward first, the foreman said no. Can the worker refuse to go to the office?

A. No. The worker must request representation when the HR agent begins the interview.

CONTRACT WAIVER

Q. The company says the union contract gives up workers' *Weingarten* rights. Could this be true?

A. Yes, if the contract expressly provides that the employer may conduct interviews outside the presence of a union representative.

SECOND CAUCUS

Q. Can a steward insist on a second private caucus while an employee is being questioned?

A. The Board has not ruled on this issue.

LOCKER SEARCH

Q. If management orders a worker to open her locker, can the worker refuse until she has a chance to consult her steward?

A. Yes, unless the employer is conducting a general search of all lockers.

TELEPHONE CALL

Q. A boss called a worker at home to ask about an accident on the job. Did the worker have to answer the questions?

A. Not immediately. *Weingarten* rights apply to telephone calls. An employee who fears discipline can refuse to answer questions until he has a chance to consult with his union representative.[84]

HOT SEAT

Q. When management asks a steward to defend her own conduct, can the steward insist on union representation?

A. Yes. Stewards and officers have the same *Weingarten* rights as rank-and-filers.

Note: When an employer interrogates a steward or other representative about union misconduct, it may only ask about the allegedly unprotected aspects of the steward's conduct, not its legitimate aspects.[85]

REMEDIES

Q. If a manager rejects a worker's request for union assistance during an investigatory interview, coerces him into admitting guilt, and fires him, will the NLRB put the worker back on the job?

A. Probably not. The usual remedy for a *Weingarten* violation is an order that the employer post a notice acknowledging the violation and promising not to repeat it. If the union takes the worker's case to arbitration, however, the arbitrator may refuse to consider the illegally procured confession.[86]

QUESTIONS ABOUT OTHERS

Q. If management asks an employee whether another worker violated a safety rule, can the employee insist on union assistance before answering?

A. Yes, if the worker has a reasonable fear that her failure to report the incident could lead to punishment.[87] But if management unequivocally assures the employee that she will not suffer any harm from her answers, she can be compelled to go forward without help from the union.[88]

WRITTEN ACCOUNT

Q. A worker accused of fighting was told to "write down everything that happened." Did the worker have a right to consult a steward before putting the account together?

A. Yes. The request comes under *Weingarten*.[89]

STEWARD OUT SICK

Q. Can a worker insist on postponing an interview because her steward is out sick?

A. Not if another union representative is available.

WORK ORDER

Q. Does an employee have a right to consult a steward before carrying out an order that appears to violate the contract?

A. No. An order to perform work is not a *Weingarten* interview.

DISHONESTY

Q. Can a worker be punished for dishonest statements during an interview?

A. Yes. Workers have a duty to answer questions in a truthful manner.

This letter is issued because of your insubordinate behavior during a first-step grievance meeting. While arguing your case, you pointed at Supervisor Brian Mooney, called him a liar, and used an obscene word. You are hereby suspended for one day and advised that a repetition will result in severe discipline, up to and including discharge.

2

The Special Status of Union Stewards

Equality rule • No reprisals • Same standards

STANDING UP TO BOSSES is essential to being a steward. On the shop floor, in supervisors' offices, and in grievance meetings, you must defend the actions of members and, when necessary, contest those of management. In most cases you should be able to make your points temperately, practicing "quiet diplomacy." But occasions will undoubtedly arise when you will feel a need to raise your voice, challenge a supervisor's credibility, or argue your case in other vigorous ways.

A widely accepted principle in labor relations allows employees to be disciplined if they exhibit disrespect for management. Some legal treatises call this the "master-servant rule." If this rule applied to union activity, stewards would face intolerable risks: speaking up for a member could put their own jobs in jeopardy.

To resolve this dilemma, labor law accords a special status to stewards, officers, and other union representatives.

EQUALITY RULE

Under the National Labor Relations Act, when union stewards and officers engage in representational activity, including grievance meetings and bargaining sessions, they must be treated as equals with management. Behavior that in other circumstances could warrant discipline must be tolerated. According to one NLRB ruling:

> Some profanity and even defiance must be tolerated during confrontations over contractual rights.[4]

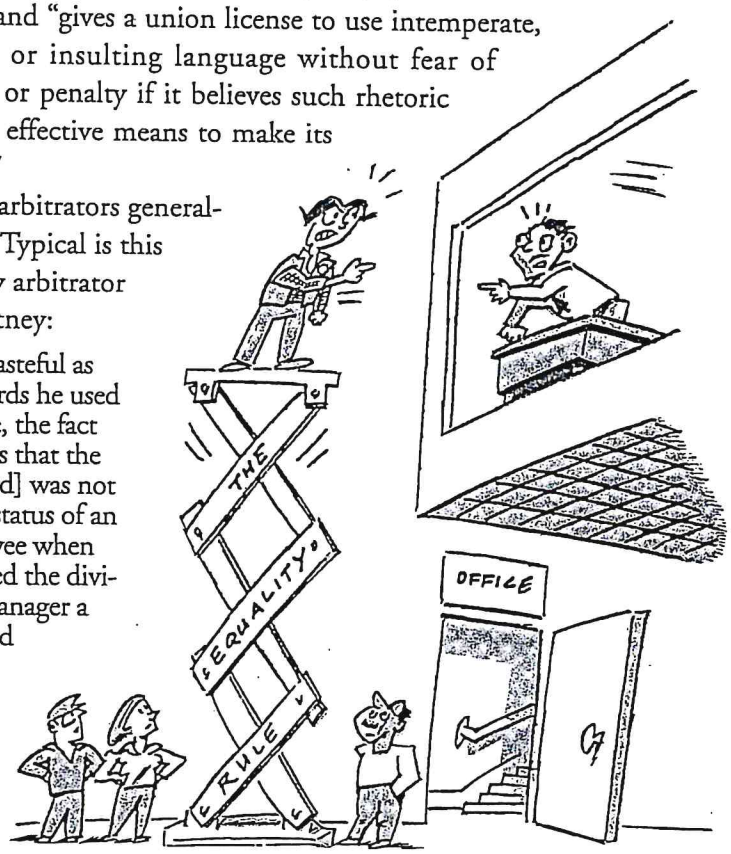
In another oft-quoted decision, the Board said:

> The relationship at a grievance meeting is not a "master-servant" relationship but a relationship between company advocates on one side and union advocates on the other side, engaged as equal opposing parties in litigation.[5]

The premise of union equality, which is sometimes termed "steward's immunity," is also recognized by the courts. As stated by the Fifth Circuit:

> The [National Labor Relations] Act has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts.[6]

Union equality is consistent with U.S. Supreme Court pronouncements that federal labor policy protects "robust debate" and "gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its points."[7]



Labor arbitrators generally agree. Typical is this ruling by arbitrator Fred Witney:

> As distasteful as the words he used may be, the fact remains that the [steward] was not in the status of an employee when he called the division manager a fool and liar. At that time, the

employer and employee relationship did not exist. Rather the relationship was between a Company and Union representative, the matter under consideration being a grievance filed by employees whom the grievant represented in his official capacity as a Union Steward. They stood as equals when negotiating the grievance.[8]

Union equality allows a representative to speak in a loud voice, gesture, use "salty" language, demean a supervisor's credibility, or threaten group protests. Aggressive advocacy may or may not be appropriate, but it is not insubordination.

When does the equality rule apply? Being a steward is not a general license to tell management to "stick it." Union equality applies when a steward acts in a representational capacity. It does not apply when a steward acts in his or her individual capacity.

A steward acts in her representational capacity when she argues a contract matter, attempts to resolve a problem, investigates a complaint, requests information, presents a grievance, disputes a decision affecting the bargaining unit, or leads a union protest.

A steward acts in his individual capacity when he objects to a work assignment, responds to criticisms of his job performance, or receives notice of his own discipline. NLRA protection has its limits. Management may impose discipline for "egregious" misconduct that renders the representative "unfit for further service." Cases in point include extreme profanity, racial epithets, physical threats, and blocking or touching a supervisor.[9] Stewards can also be disciplined for dishonesty, soliciting false testimony, taking part in illegal walkouts, disrupting work, or advising an employee to disregard a supervisor's order.

Some bosses are quick to take unjustified offense. To deter a supervisor from exaggerating or mischaracterizing your conduct, bring one or more coworkers to grievance meetings and similar discussions.

NO REPRISALS

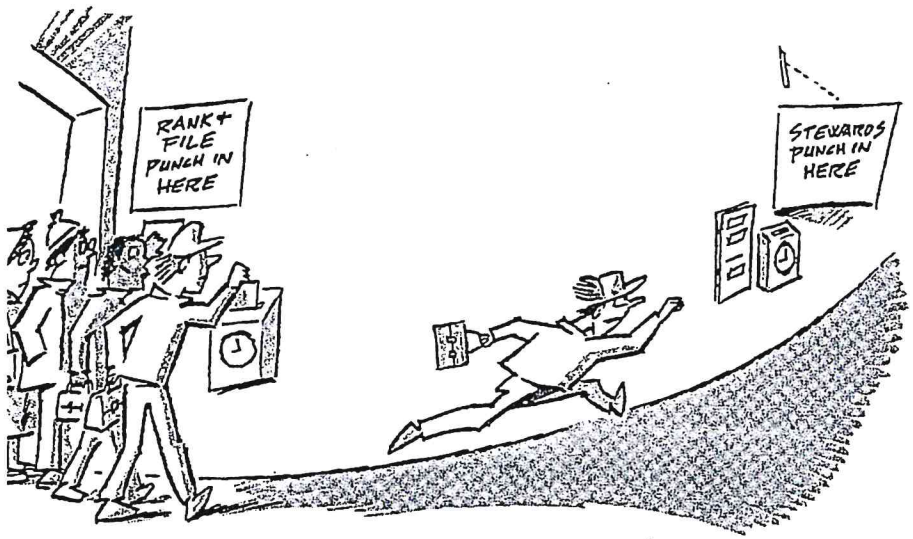
A steward may not be warned or punished for filing a grievance—even if a case lacks merit or is petty or "offensive." Nor may a steward be threatened for encouraging other employees to file. The law also forbids managers from engaging in other retaliatory conduct such as:

- Poor evaluations
- Burdensome work schedules
- Transfers to other departments

Veiled threat. Veiled threats can be just as coercive as direct threats. It is unlawful to tell a steward, "If you don't like it around here, why don't you get another job?" because it suggests that employment and union activity are not compatible.

SAME STANDARDS

Many bosses believe that a steward can be held to a higher standard than a rank-and-file worker. A supervisor may say, "Of all people, you are supposed to know the rules," as he writes up a



steward for a minor infraction. This mindset is unlawful.

An employer violates the NLRA if it applies a higher standard to a union representative than to a rank-and-filer. Nor may a harsher punishment be imposed for the same offense. Even telling a steward that he or she is expected to set an example is an unfair labor practice.[10]

Exception. A special rule applies to walkouts that violate contractual no-strike clauses. An employer can impose an unequal penalty on an officer or steward if the contract requires the representative to take affirmative steps, such as ordering employees to return to work.[11]

ULP charges. If management threatens, discriminates against,

or disciplines a steward for taking part in grievance activity, the union should file a ULP charge as well as a grievance. The union may be able to persuade the Labor Board not to defer the charge (see previous chapter) by taking one or more of the following steps:

- Include a Section 8(a)(4) claim asserting that the employer's actions were based at least in part on the steward's use or threatened use of NLRB procedures.
- Include a Section 8(a)(5) claim that the employer failed to timely furnish information requested by the union to investigate the matter.
- Refuse to stipulate that an arbitrator can rule on the unfair labor practice.

QUESTIONS AND ANSWERS

FINGER SHAKER

Q. While arguing a grievance, I shook my finger at a manager. He said, "I don't care if you're a steward: If you do that again, I will have your job." Did I go over the line?

A. No. Shaking a finger is not egregious. File a ULP charge against the illegal threat.

SOUND ARGUMENT

Q. I was given a warning for yelling at a grievance meeting. Don't I have a right to raise my voice?

A. Yes, unless it disrupts production. The Labor Act protects

vigorous conduct, including shouting.[12]

HARSH ACCUSATION

Q. At a second-step grievance meeting, I called my supervisor a "bare-faced liar." As it turned out, I was wrong. Can I be punished?

A. No. A steward who honestly believes that a supervisor is lying has a right to say so, even if the accusation turns out to be incorrect.[13]

COOLING OFF

Q. In the middle of a grievance discussion, the personnel manager declared: "This meeting is over, go back to work." I continued to argue for a minute or so. Am I subject to discipline?

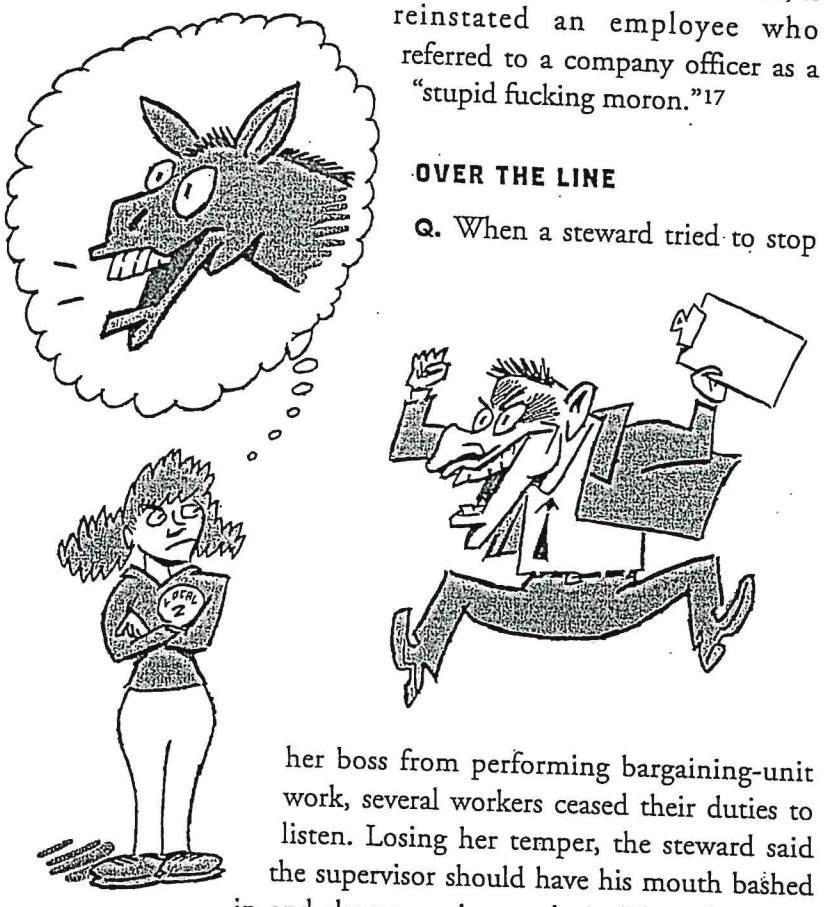
A. This depends. The Board says an employer must tolerate a short cooling-off period at the end of a grievance discussion as "it is unrealistic to believe that the principals involved in a heated exchange can check their emotions at the drop of a hat."[14] Punishment may be imposed, however, if you refused repeated orders to return to work.

SALTY LANGUAGE

Q. A supervisor made several ridiculous claims during a grievance meeting. Infuriated, I called him a "jackass." Am I in trouble?

A. No. Mild swearing during a grievance discussion, short of extreme profanity, is protected. In one case, the Board reinstated a steward who was fired for calling his boss "a stupid ass."[15] In

another, it removed the reprimand of a representative who told his supervisor, "I don't give a fuck who you call."[16] In a third, it reinstated an employee who referred to a company officer as a "stupid fucking moron."[17]



OVER THE LINE

Q. When a steward tried to stop her boss from performing bargaining-unit work, several workers ceased their duties to listen. Losing her temper, the steward said the supervisor should have his mouth bashed in and she was going to do it. Then she dared him to fire her, which he did. The next day the steward

called to apologize, but the company refused to take her back. Do we have a case under the Labor Act?

A. Probably not. The steward threatened violence and disrupted work, the essence of egregious misconduct.

SUPERVISOR TO STEWARD: "SHUT UP"

Q. Can a supervisor tell a steward to "shut up and listen" during a grievance meeting?

A. Yes, if this is the worst of it. A vigorous give-and-take is allowed both parties during grievance discussions.

SLANDER SUIT

Q. At a first-step grievance meeting, I accused a supervisor of altering an employee's time records. She said she would sue me for slander. Should I be concerned?

A. No. Statements during grievance and arbitration sessions are protected against defamation lawsuits.[18] File a ULP charge over the threat.

PERSONAL CRITICISM

Q. My supervisor called one of my grievances "infantile." Should I file a ULP charge?

A. No. Bosses may criticize union activity as long as the comments do not include threats, coercion, harassment, or other forms of intimidation.

OVER-SUPERVISION

Q. Since my election as steward, management has been all over me, sometimes staring at me for hours. Is this legal?

A. No. Monitoring a steward more closely than other workers violates the Labor Act.[19]

STEWARD CHARGED WITH HARASSMENT

Q. An employee in my department told her boss that a coworker was sleeping on the job. When I told her that the union has a strong rule against informing, she complained to human relations that I "harassed" her. Company policy defines harassment as "any statements considered offensive by another employee." Can the company take action against me?

A. No. Stewards can insist that members obey union rules.

Encouraging union solidarity is protected by the NLRA even if a worker is upset or offended.[20]

GREATER PUNISHMENT

Q. A supervisor saw myself and two others drinking beer during lunch. The coworkers received written warnings but I got a three-day suspension because: "You're the union steward and should know better." ULP?

A. Yes. Management may not escalate a punishment because a worker is a union representative.[21]

OBEY NOW, GRIEVE LATER

Q. If a member is assigned duties outside of her job description, can I tell her not to do the work?

A. Not without risk to you and the employee. One of the most venerable maxims in labor relations, applicable to both rank-and-filers and stewards, is "obey now, grieve later." Tell the member to do the work. Then file a grievance.

Note: The "obey now, grieve later" rule does not apply in all circumstances. An employee does not commit insubordination if she refuses work that is unusually dangerous and outside the normal duties of her job.[22] Also excepted is an order to carry out an illegal or unethical act.[23]

WARNING SLIP

Q. Can I get in trouble for advising a worker not to sign a warning slip?

A. Yes, if company policy requires employees to sign. The safest course is to direct the worker to write "Signed under protest."

SNEAK ATTACK

Q. Personnel wants to get me because I am "too confrontational" when arguing grievances. If they check my job application and find a false entry about my educational level, could they fire me?

A. Not legally. Investigating a steward's background because of protected activity violates the NLRA.[24]

PROMOTION

Q. I applied for a promotion. The plant manager said the post requires full-time attention and since I spend 10 hours a week on union business, I cannot qualify. Legal?

A. Hard to say. Years ago, the NLRB ruled against a steward on the ground that the Labor Act does not guarantee a right to engage in union activity during work time.[25] A later decision, however, says this case should be given a narrow application.[26]

SUPERSENIORITY

Q. Can a union contract award stewards superseniority?

A. Yes, depending on its terms. Superseniority can be granted in the event of a layoff or recall to work. Contractual preferences for other purposes, however, such as vacations or days off, generally violate the NLRA.

BULLYING CHARGE

Q. I urged two witnesses to sign statements supporting a grievant. One of them complained to management. Now I have been charged with "bullying." ULP?

A. Yes. The special protections afforded union representatives apply to a broad range of grievance-related activity, including attempts to persuade witnesses to testify. The fact that an employee is annoyed or upset does not make a steward's conduct unprotected.

SHADING A FACT

Q. The union grievance form requires a grievant's signature. A worker was absent on the last filing day so I signed for him. If management checks the handwriting, could I be discharged for dishonesty?

A. Not lawfully. Grievance activity is protected in the absence of egregious misconduct. Signing an employee's name in order to preserve a grievance, and not for the representative's own gain or benefit, does not rise to this level.[27]

George, the union wants the name of every supervisor and manager who has been counseled for a drinking problem over the past three years. You're the company lawyer—please tell me I can blow them off!

4

Union Right to Information

Contract administration • Relevancy • Documents, data, facts • Particular grievances • Supervisors and other non-unit personnel • Time limits • Employer excuses

THE NATIONAL LABOR RELATIONS ACT requires employers to furnish unions with information needed to investigate, evaluate, and present grievances. Information must also be provided for contract negotiations, midterm bargaining, and other matters relating to union representational responsibilities.[48] The obligation to provide information is part of the duty to bargain in good faith. Refusals and unreasonable delays violate Section 8(a)(5) of the Act.

CONTRACT ADMINISTRATION

Unions can request information at any point in the contract administration process, including to:

- Monitor whether the employer is obeying the contract
- Investigate a complaint by an employee
- Decide whether to file a grievance or move it to a higher step
- Prepare for an arbitration hearing

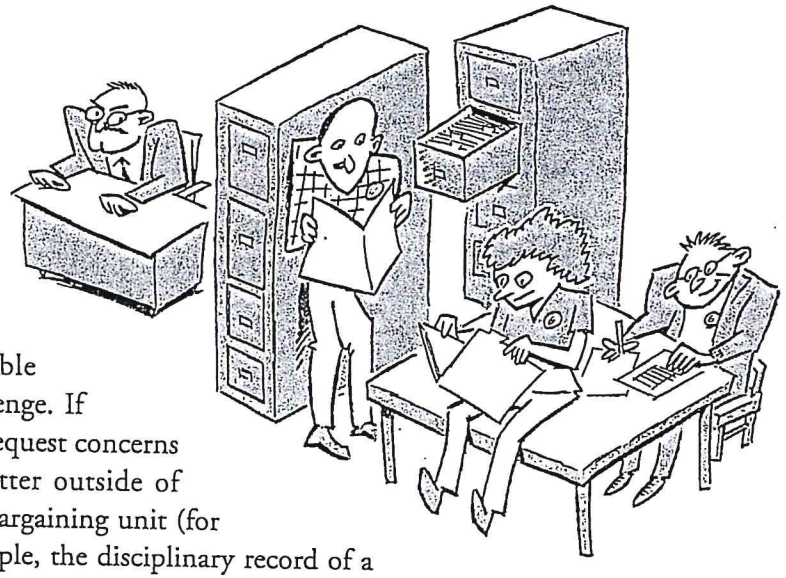
Although information can be requested orally, it is better to mail or email the request or attach it to a grievance. Follow-up requests can be submitted. See pages 55–59 for samples.

It is good practice to request information for all or almost all grievances. Some unions allow stewards to initiate the process. Others limit authority to officers or business agents.

RELEVANCY

The duty to supply information applies to records or facts that are potentially relevant to contract administration or other union responsibilities. Information is relevant if it bears on the issues involved or could lead to the identification of useful data. The union is entitled to information that both supports and weakens its position on a matter.

Subject matter. When a union asks for information about bargaining-unit members, relevance is presumed and the union does not have to explain its reasons unless the employer raises a



credible challenge. If the request concerns a matter outside of the bargaining unit (for example, the disciplinary record of a supervisor or correspondence with a subcontractor), the employer can require a brief explanation of why the information is needed.

Specificity. Information requests must be reasonably specific. A request for "all documents that support the company's position" meets the test; a request for "all information relevant to this grievance" is too broad.

Good faith. Information requests must be made in good faith. A request whose only purpose is to harass the employer can be refused.

DOCUMENTS, DATA, FACTS

The employer's information duty includes documents, data, and facts.

Documents. The following are some of the documents a union can request:

- accident reports
- air quality studies
- annual reports
- attendance records
- bargaining notes
- benefit plans
- bonus records
- consultants' reports
- contracts with customers, suppliers, and contractors
- correspondence (letters and e-mail) between management and outside entities such as government agencies and workers' compensation carriers
- correspondence (letters, email, and text messages) between management and supervisors
- customer complaints
- customer lists
- disciplinary records of grievant or others
- drug tests
- EEO reports
- employee evaluations
- equipment specifications
- handwriting analysis
- injury reports
- inspection records
- insurance policies
- internal memos and policies
- interview notes
- investigative reports
- investigatory files
- job assignment records
- job descriptions
- leave requests
- manuals
- material safety data sheets (MSDSs)
- memorandums prepared after meetings with employees
- merger agreements
- OSHA logs
- overtime records
- payroll records
- pension contribution records
- personnel files
- photographs
- piece-rate records

- policies
- prior grievances and arbitration awards
- private detective reports
- sale of enterprise documents
- schedules
- security logs and reports
- seniority lists
- supervisors' notes and files
- telephone and cell phone records
- test results
- time cards
- time-study records
- training manuals
- video surveillance tapes
- wage and salary records
- work rules

If a request asks for a relevant document held by a related business entity, such as a contractor, a parent corporation, or a subsidiary, the employer must attempt to obtain the matter for the union.[49]

Data. The union can request lists, statistics, or other data related to a matter being investigated. Examples: the names of employees previously disciplined for the same infraction; promotions broken down by race and sex; jobs subcontracted from the bargaining unit; chemicals used in the workplace; instances in which a practice was or was not followed. NLRB judges routinely approve data requests going back several years. Where past practice is at issue, a request can go back ten years or longer.[50]

Facts. The union can seek factual information needed to evaluate or present a grievance. Examples:

- "Describe the alleged misconduct in detail."
- "Identify all persons interviewed."
- "Provide all reasons for your decision."

- "Please explain why you gave lesser penalties to the employees listed below."
- "In discussions with the union about this grievance, you stated that management took similar actions without union objection on several prior occasions. Please identify each occasion referred to, including the date, supervisor, and employee involved."

PARTICULAR GRIEVANCES

Some common grievances suggest routine information requests.

Discipline. Ask for a list of employees who committed the offense in past years and the level of discipline applied. If management interviewed the grievant or witnesses, ask for copies of the interview notes.

Contract interpretation dispute. Ask for all facts or occurrences that support the employer's position. Request the employer's bargaining notes from the session during which the disputed language was negotiated.

Promotion dispute. Request the personnel file of the successful bidder as well as notes or reports evaluating the applicants.

Dangerous substance. Request the material safety data sheet supplied by the manufacturer, copies of any OSHA citations, studies concerning the substance, and any known illnesses or claims for workers' compensation.

Discretionary leave. Ask for a list of leave requests over the past five years and the reasons why each was granted or refused.

Subcontracting. Ask for a description of the work, the reason for the contract, and the number of employees involved.

Request copies of any correspondence (including e-mails) between the employer and the contractor.

> Note: A union may not be entitled to the costs or cost-savings of a subcontract for grievance purposes unless the bargaining agreement cites cost-savings as a permitted ground for subcontracting or if the employer claims cost-savings as a justification for its decision.[51]

SUPERVISORS AND OTHER NON-UNIT PERSONNEL

A union can request information about non-bargaining-unit personnel, such as supervisors or office staff, if the information is potentially relevant to a unit member's grievance.

Disparate treatment. The treatment of non-unit personnel is often relevant in unit discipline cases. A labor relations principle dictates that when a work rule applies within and without the bargaining unit, such as a ban on intoxication, an employer may not impose a substantially greater penalty on a unit member than it imposed on a non-unit member who committed the same offense.[52] To investigate, ask for the names of any non-unit personnel known to have violated the rule, an account of the infraction, and any discipline imposed.

If the union has a factual basis for believing that a supervisor took part in similar misconduct as a grievant, and the rule in question applies throughout the workplace, ask to examine the supervisor's disciplinary record.[53]

> Example: The U.S. Postal Service fired a union member for falsifying a medical report. To prove unequal discipline, the union sought disciplinary records for two supervisors known

to have doctored reports; one to make himself appear more productive, the second to obtain a leave. The Postal Service claimed the records were irrelevant and that releasing them would violate the supervisors' privacy rights. The Board ordered the records to be produced.[54]

Harassment. When grieving a supervisor who threatens, curses at, or intimidates a bargaining-unit member, ask for information about the employer's investigation of the matter, any disciplinary or corrective actions taken, and any other charges of harassment against the supervisor.[55]

Bargaining-unit work. When grieving a supervisor doing bargaining unit work, ask for the supervisor's job description, schedule, and time records.

INFORMATION REQUEST (TARDINESS)

Date: October 10, 2017
To: Paul O'Connor, Labor Relations Manager
From: Madge Kho, Steward
Re: Discharge of Dana Moore for tardiness

Dear Mr. O'Connor:

To prepare the grievance of Dana Moore, the union requests the following information (by email, where possible):

1. Dana Moore's personnel file.
2. The reasons for her discharge.
3. All information considered in making the decision to terminate.
4. Details of any counseling of Ms. Moore regarding tardiness.
5. Tardiness records for all bargaining-unit employees over the past three years.
6. Names of all employees disciplined or discharged for tardiness, dates and descriptions of each discipline, and the amount of tardiness that led to each discipline over the past three years. In each case, please attach a copy of the disciplinary letter provided to the employee. Also indicate any adjustments in discipline that occurred in the course of the grievance procedure, and attach copies of any settlements.
7. All personnel manuals, notices, or other documents that set forth the company's tardiness policies.

Please provide the information prior to the grievance meeting scheduled for October 20, 2017. If any part of this request is denied or if any material is unavailable, please state so in writing and provide the remaining items as soon as possible, which the union will accept without prejudice to its position that it is entitled to all documents and information called for in the request. Failure to comply with this request in a timely manner will be viewed by the union as a refusal to bargain.

INFORMATION REQUEST (FIGHTING)

Date: October 10, 2017
To: Emilio Castagnaro
From: Gilberto Diaz, Steward
Re: Discharge of Michael Torrence for violation of Rule 8 (assault)

Dear Mr. Castagnaro:

To process the Michael Torrence grievance, the union requests the following information:

1. The personnel file of Michael Torrence.
2. All information considered in deciding to terminate Mr. Torrence.
3. The names and addresses of persons who supplied information or were interviewed as part of the company's investigation.
4. Copies of all interviews.
5. The investigative or security report compiled with respect to this case.
6. The names of all bargaining- and non-bargaining-unit employees (including supervisory and professional employees) charged with violations of Rule 8 over the previous five years, including descriptions of the infraction, the penalty originally imposed, and any grievance settlements.
7. The personnel files and disciplinary records of all employees named in response to request number 6 above.

Please provide the information prior to the grievance meeting scheduled for October 24, 2017. If any part of this request is denied or if any material is unavailable, please state so in writing and provide the remaining items by the above date, which the union will accept without prejudice to its position that it is entitled to all documents and information sought in this request. Failure to comply with this request in a timely manner will be viewed by the union as a refusal to bargain.

INFORMATION REQUEST (SUBCONTRACTING)

Date: October 10, 2017
To: Charlene Brooks
From: Paul Hiller, President, Local 520
Re: Subcontracting grievance (painting #3 crane)

Dear Ms. Brooks:

To police the collective bargaining agreement, the union requests the following information regarding painting work on the #3 crane:

1. The name of the subcontractor, the date of the work, the number of persons employed, their occupations, and their hours worked.
2. The reason or reasons the company did not assign the work to bargaining-unit personnel.
3. Copies of all correspondence between the company and the subcontractor.
4. A list of each occasion on which the company subcontracted painting work over the past five years, including the names of contractors and a description of the work.

Please provide the information by October 24, 2017. If any part of this request is denied or if any material is unavailable, please state so in writing and provide the remaining items by the above date, which the union will accept without prejudice to its position that it is entitled to all documents and information sought in this request. Failure to comply with this request in a timely manner will be viewed by the union as a refusal to bargain.

INFORMATION REQUEST (HEALTH AND SAFETY)

Date: October 10, 2017
To: Maxwell Petrie
From: Sandra Tormey, Chief Steward
Re: Health and safety investigation

Dear Mr. Petrie:

To police the collective bargaining agreement, and ensure the safety of bargaining-unit employees, the union requests the following information (by email where possible):

1. The generic and trade names of all chemicals used in the plant.
2. MSDS forms for each chemical.
3. Any clinical or laboratory studies of employees exposed to harmful substances over the past five years.
4. A list of all claims for workers' compensation for illnesses caused by chemical or toxic exposures over the past five years.

Please provide the information by October 24, 2017. If any part of this request is denied or if any material is unavailable, please state so in writing and provide the remaining items by the above date, which the union will accept without prejudice to its position that it is entitled to all documents and information sought in this request. Failure to comply with this request in a timely manner will be viewed by the union as a refusal to bargain.

Some unions prepare master information-request forms such as the following:

Date: _____
To: _____ (name of manager)
From: _____ (name of union representative)
Re: _____ (subject of inquiry)

Dear _____:

In connection with the above matter, and to assist the union in policing the collective bargaining agreement, the union requests that the employer provide the following information:

1.
2.
3.
4.

Please provide this information by _____ (date). If any part of this request is denied or if any material is unavailable, please state so in writing and provide the remaining items by the above date, which the union will accept without prejudice to its position that it is entitled to all documents and information sought in this request. Failure to comply with this request in a timely manner will be viewed by the union as a refusal to bargain.

TIME LIMITS

The NLRA does not set a particular time limit for answering union information requests. Instead, it requires employers to comply as promptly as circumstances allow, considering the com-

plexity of the information sought, the difficulty of obtaining it, and the time needed to bargain on legitimate confidentiality or burdensomeness issues. Contractual deadlines for filing or appealing grievances bear on timeliness, but are not controlling. Easily accessible records such as personnel or attendance files should be supplied within one or two weeks.[56]

Note: An employer's failure to furnish information does not relieve the union from complying with a contractual deadline to file or advance a grievance.

EMPLOYER EXCUSES

Employers often make self-serving excuses to avoid providing grievance information. Among those that the NLRB routinely rejects are:

- No grievance is pending.
- Grievance has no merit.
- Grievance is late.
- Grievance is not arbitrable.
- Information was posted.
- Employees must sign off before information about them can be disclosed.
- Records will be brought to arbitration.
- The information sought will not be cited at arbitration.

Unless the union has directed otherwise, management may not insist that requests be filed by an upper-level union official. Nor may the employer withhold data on the ground that the union can obtain the records through other sources.

An employer that does not understand a request, or finds it vague, must request clarification from the union rather than issue a blanket denial. If a request seeks both relevant and irrelevant information, the employer must furnish the relevant information. If information is maintained in a slightly different format than requested or if a document has a different title, the employer must inform the union so that it can modify its request.

Confidentiality. An employer can refuse, at least initially, to provide "confidential" information. Information is confidential if it is highly sensitive to the employer or highly personal to an employee. Trade secrets, profit levels, and disclosures that could jeopardize an ongoing investigation usually meet the highly sensitive standard. Individual medical records, psychological test results, and aptitude scores usually qualify as highly personal.

Employee addresses and telephone numbers are not confidential. Nor are disciplinary histories or personnel records. "Private" is not the same as "confidential."

Note: An assurance in a personnel manual that the employer will not disclose disciplinary records without the employee's written consent does not create a lawful basis to withhold such documents from the union. Nor may an employer refuse to furnish an employee's record because the employee objects.[57]

An employer that has a legitimate confidentiality concern must offer an alternative form of disclosure that protects union and employer interests. For example, the employer may offer to supply medical files without names or other identifying data. The employer may also offer to supply information subject to a "confi-

dentiality agreement" promising to limit access to particular persons, such as union officers and the union attorney. An employer that rejects a reasonable alternative suggested by the union or imposes an unreasonable condition violates the Labor Act.

ULP charge. The union should file a ULP charge if the employer ignores, refuses, or unreasonably delays answering a request for information. The NLRB does not defer failure-to-provide-information charges.[58]

The usual Board remedy for an information violation is an order requiring the employer to fulfill the union's request. If arbitration is imminent, the union may need to subpoena the needed materials or ask the arbitrator for a continuance until the NLRB rules on the union's ULP charge.

ULP CHARGE

On October 14, 2017, the union requested information relevant to a disciplinary grievance. See attached letter. The employer has refused to comply with the union's request.

QUESTIONS AND ANSWERS

PRE-GRIEVANCE INVESTIGATION

Q. Can a union seek information before it files a grievance?

A. Yes, to police the contract or to investigate an employee complaint.

NATURE OF GRIEVANCE

Q. We asked for employee pay records for contract administration purposes. Labor relations wants to know the violation we are investigating. Do we have to provide it?

A. No. When seeking information about unit pay, benefits, or working conditions, a union does not have to explain the specific reason for its request.[59]

PERSONNEL FILES

Q. When we requested the disciplinary records of three bargaining-unit members, management said we need signed authorizations from each employee. Is this a lawful requirement?

A. Only if a file contains highly sensitive medical records or low scores on aptitude tests. In such cases, the union can usually overcome the objection by instructing the employer to remove the confidential records.

ATTENDANCE RECORDS

Q. Can labor relations refuse to release an attendance file because it contains medical data?

A. Not usually. Medical references in attendance files are usually too brief or too vague to qualify as confidential.

DEMAND TO PAY

Q. Can the company require us to pay $20 in order for it to fulfill our information request?

A. No. Providing information is a normal cost of doing business. An employer may not seek reimbursement unless substantial expenses are involved.[60] If the employer does not back down, file a ULP charge.

Several techniques can help a union avoid charges for copying or research:

- *Instruct the employer to send the information electronically.*
- *Offer to copy materials on a union machine.*
- *Notify the employer that union staffers will do research work, for example, searching through the company's paper or electronic records.*[61]

STANDING REQUEST

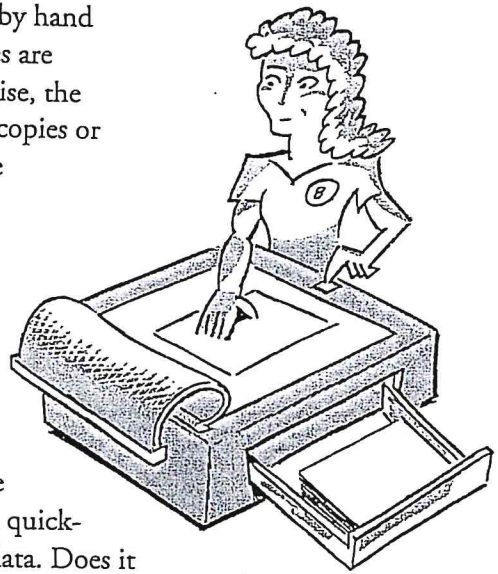
Q. Can the union request that the employer give it written notice within five days of executing a contract with an outside entity to perform bargaining unit work?

A. Yes. Employers must comply with reasonable requests for ongoing information.[62] The union may also request prompt notice when the employer hires a temporary employee, imposes discipline on a bargaining-unit member, approves or disapproves a request for FMLA leave, or becomes aware of a workplace accident or illness.

COPIES VS. NOTES

Q. Instead of letting us copy 50 pages of safety records, the company says we must take notes by hand. Kosher?

A. No. An employer may only force the union to take notes by hand when the relevant entries are extremely brief. Otherwise, the employer must provide copies or allow the union to make them.[63]



UNNECESSARY WORK

Q. In response to a request for work-hours, HR said it would give us 6000 time cards. The company can quickly calculate the needed data. Does it have to?

A. Yes. An employer that can easily compile information may not put the union through unnecessary work.

SUMMARIES

Q. We asked for the company's notes of an interview with a grievant. Management only provided a summary. Don't we have a right to the original record?

A. Yes.

SERIAL QUESTIONS

Q. Can the union submit follow-up requests for the same grievance?

A. Yes, answers to an initial request often spur follow-up questions.

BURDENSOME REQUEST

Q. To investigate a machine failure, we asked for a list of all similar malfunctions over the past ten years. Management says that gathering the data would be "too burdensome." Is this a valid excuse?

A. Not in itself. Although an employer does not have to comply with an "unduly burdensome" information demand, the Labor Board imposes a high standard. The employer must substantiate its claim with details and exhibit a willingness to fulfill a less extensive request. By reducing its demand or by offering to do work itself, the union can usually overcome the objection.

ARBITRATION

Q. Arbitration is scheduled in three weeks. Can we still request information?

A. Yes, but you cannot insist that the employer provide you with a list of the witnesses it intends to call or the exhibits it intends to introduce.[64]

CHEMICALS

Q. Can we demand the names of chemicals used in the plant?

A. Yes. A union is entitled to a list of all chemicals that employees work with—other than substances whose identity reveals valuable proprietary information.[65]

INVESTIGATIVE REPORT

Q. A bus driver was fired for missing stops. Security has compiled a detailed investigative report. Are we entitled to a copy?

A. Yes. Investigative, security, and supervisory records needed to evaluate or present a grievance must be provided to the union.[66]

COMPLAINANTS

Q. A salesperson was fired for intoxication. The company says a customer saw him falling down. Does management have to give up her name?

A. Yes. Unions are presumptively entitled to the names, addresses, and telephone numbers of complainants and witnesses, whether they are clients, customers, co-employees, or members of the community.[67] Exceptions apply if there is a history or likelihood of retaliation by the union or grievant or if the employer promised anonymity prior to receiving a complaint. In such cases, the employer must offer the union a reasonable method of communicating with the complainant, such as an email interview through a third party.[68]

Note: An employer's claim that it promised anonymity does not hold water unless it pledges not to call the complainant as a witness during grievance and arbitration proceedings.[69]

DRUG CASE

Q. A worker was fired for selling drugs. Labor relations says it received a tip from a coworker. Are we entitled to the worker's name?

A. Not necessarily. The NLRB is particularly sensitive to disclosures in drug cases. To facilitate future investigations, an employer may be permitted to withhold an informer's identity.[70]

WITNESS STATEMENTS

Q. Management collected signed statements from four witnesses: three fellow employees and a supervisor. HR says a Labor Board rule allows it to withhold copies from the union. Is this right?

A. No. Although a 1974 NLRB decision called *Anheuser-Busch* excepted witness statements from the duty to disclose, the Board overruled the case in 2015.[71] Under current law, employers must furnish witness statements unless they contain information that is privileged under the Board's confidentiality standard, for example, information that is likely to lead to retaliation against a witness. Even in such cases, the employer must offer an accommodation that meets the union's legitimate needs, such as disclosure subject to a confidentiality agreement.

OUTSIDE EXPERT

Q. The international union has an industrial hygienist on staff. Does management have to allow her access to the shop?

A. In most cases, yes. A union can generally bring in outside experts to investigate conditions as long as the expert does not interfere with operations.[72]

AFFIRMATIVE ACTION

Q. The company's affirmative action plan analyzes the workforce by race and sex and lists hiring and promotion goals. Are we entitled to a copy?

A. The union is presumptively entitled to the analysis portion of the plan but must generally show particular relevance to obtain the company's goals and proposals.

EMPLOYER REQUEST

Q. After we requested the company's investigative file for a disciplinary case, the company demanded a copy of the steward's grievance file. Do we have to comply?

A. No. Although the union has a duty to furnish relevant information to the employer, a rule called the "work-product privilege" allows it to withhold documents prepared in anticipation of litigation.[73] This usually covers union grievance files. The company's investigative file does not fall under this privilege because it was created in the normal course of business for purposes other than litigation.

EMPLOYEE DATA

Q. Does an employer have to give the union the telephone numbers of bargaining-unit members?

A. Yes. The union is also entitled to email and home addresses, ages, hiring dates, marital status, job locations, hours of work, job classifications, and salaries.

DOUBLE-DEALING

Q. If management refuses a request for a document, and later tries to introduce it at an arbitration hearing, would the union have a good objection?

A. Yes. Arbitrators frequently exclude evidence that was wrongfully withheld during the grievance process.[74]

ULP INVESTIGATION

Q. We filed a ULP charge at the NLRB over discrimination against a union officer. Can we request company records that might support the claim?

A. No. The duty to provide information does not apply to a request made solely to support a ULP charge.[75]

HIPAA (1)

Q. Whenever we ask our employer (a warehouse) for a document that mentions an employee's medical condition, HR refuses, citing a law called "HIPAA." Do we have any rights?

A. Yes. HIPAA is a federal law that forbids covered entities from disclosing personally identifiable health information without the

patient's written authorization. Covered entities are limited to health care providers such as hospitals, nursing homes, and health maintenance organizations. HIPAA does not apply to warehouses. File a ULP charge.

HIPAA (2)

Q. We represent a unit of hospital nurses. One of our members has been charged with abuse for allegedly pushing an elderly patient. We need the patient's medical record to show her history of making false accusations. Can the hospital refuse to provide it under HIPAA?

A. No. An exception in HIPAA applies to disclosures "required by law."[76] This includes relevant information requested by unions under the NLRA.[77]

> Note: The hospital can insist that the union sign a confidentiality agreement promising not to disclose the patient's medical information outside of the grievance and arbitration process.

INFORMATION REQUEST DURING WEINGARTEN INTERVIEW

Q. Management called an employee and his steward in for an interview and said it had a videotape showing the employee leaving the premises without permission. The steward asked to see the tape before the employee answered any questions but was refused. Violation?

A. Possibly. The tape is relevant to an immediate union responsibility—properly counseling an employee during a *Weingarten*

interview. As a general rule, such information may only be withheld if it contains overriding confidential data, such as the identity of a witness who was promised anonymity beforehand, or if its release would impede an ongoing investigation.[78]

Note: Other than during a *Weingarten* interview, a union is usually not entitled to information while a disciplinary investigation is in progress. The union's rights generally begin when an employee is notified of discipline.