

Federal Labor Laws

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Part Three: General Unfair Labor Practices

XI. Interference, Restraint or Coercion

A. General Considerations

1. The two unfair labor practice provisions, which are directly related to the exercise of § 7 rights by workers, are §§ 8(a)(1) and 8(b)(1). These are broad prohibitions concerning coercive actions by employers and unions, respectively.
2. Section 8(a)(1) prohibits employer actions that “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7.”¹
3. Union restraint or coercion may constitute an unfair labor practice under § 8(b)(1). Section 8(b)(1)(A) is the direct counterpart to § 8(a)(1), making it an unfair labor practice for a labor organization to “restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7.”²
4. For unions, there is an additional prohibition against certain activities directed against an employer with which the union has a bargaining relationship. Under § 8(b)(1)(B), it is an unfair labor practice for a union to restrain or coerce an employer in its selection of representatives for purposes of collective bargaining or grievance administration.³
5. The essential element of a violation of § 8(a)(1) is some action on the part of an employer that interferes with, or tends to interfere with, the willingness or ability of workers to engage in protected, concerted activity under § 7.⁴ While the employer’s motive or intent is technically not at issue in establishing a § 8(a)(1) violation, evidence that the employer knew workers were engaged in

¹ 29 U.S.C. § 158(a)(1).

² 29 U.S.C. § 158(b)(1)(A).

³ 29 U.S.C. § 158(b)(1)(B).

⁴ See, e.g., *Alliance Steel Products, Inc.*, 340 NLRB 495 (2003); *Frontier Hotel & Casino*, 323 NLRB 815 (1997).

protected, concerted activity may be necessary.⁵ Questions of motive may arise in evaluating the defenses to a charge raised by the employer.⁶

6. There are three broad categories of employer actions. The ability to prove a violation of § 8(a)(1) depends in part on how a particular action is classified.
 - a. Certain actions of employers are regarded as being "inherently destructive" of employee rights. Inherently destructive actions constitute violations of § 8(a)(1), irrespective of any claim of business justification. For example, overly broad "no solicitation" rules are considered to be inherently destructive of the rights of workers to form, join or assist a labor organization.⁷
 - b. A second category of employer actions are regarded as having an "adverse impact" on the willingness of workers to engage in protected activity. These actions are presumed to violate § 8(a)(1), but the employer may be able to defend its actions on the basis of some legitimate business justification. The burden is on the employer to establish that an action is justified under these circumstances.
 - 1) To determine whether an action is justified despite its adverse impact on workers' rights, the Board and courts use a balancing test. In reconciling the conflict between the property rights of the employer (*i.e.*, the right to run its business the way it sees fit) and the § 7 rights of workers, the Board theoretically weighs the legitimacy of the claimed justification against the degree to which worker rights are harmed by the action.⁹
 - 2) While most adverse impact cases depend upon the unique facts, a classic example of the balancing test is the right of a company to restrict access to private property in organizing drives. Under normal circumstances, non-employee organizers can be prevented from entering the company's property. As

⁵ See, *Meijer, Inc. v. NLRB*, 463 F.3d 534 (6th Cir. 2006), for the knowledge requirement and the subtle distinction between employer knowledge and motive.

⁶ *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *Webasto Sunroof, Inc.*, 342 NLRB 1222 (2004); *American Freightways Co.*, 124 NLRB 146 (1959).

⁷ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

⁸ *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

⁹ See, *e.g.*, *Register Guard*, 351 NLRB No. 70 (2007), balancing the employer's ownership of an email system with the right of workers to solicit support for the union.

long as the organizers have other means of access to the workers, the property rights of the employer outweigh the right of the union to organize. However, if the workers live and work on the company's property, the union may have no other reasonable access, and the property rights may have to give way to the right to organize.¹⁰

- c. A third level of employer actions includes cases in which the Board has given employers the right to act, irrespective of the relative damage done to workers' § 7 rights. For example, employers have the right to hire permanent replacements for economic strikers, even though the negative impact of such an action on the right of workers to strike is overwhelming.¹¹ Technically, these cases began with application of the balancing test, but the determinations have elevated the action to a plane of "managerial rights."

B. Common examples of conduct leading to Section 8(a)(1) cases

1. Violation by an employer of any of the more specific unfair labor practice provisions of § 8(a) also constitutes a violation of § 8(a)(1). For these derivative violations, the specific elements necessary for establishing the more specific unfair labor practice will determine whether § 8(a)(1) has been violated.¹²
2. Many examples of potential violations of § 8(a)(1) are discussed elsewhere in *Federal Labor Laws*.
 - a. Employer actions taken in direct response to workers participation in protected, concerted activity for mutual aid or protection are discussed in conjunction with the basic elements of the § 7 rights of workers, in *Federal Labor Laws, Outline IV*.
 - b. A substantial number of § 8(a)(1) cases arise in the course of union organizing campaigns. General standards concerning the legality of rules restricting solicitation and distribution of literature and other practices during organizing campaigns are discussed in *Federal Labor Laws, Outline V*.
 - c. As with other unfair labor practice provisions, the importance of the free speech provisions of § 8(c) are relevant to a determination of whether § 8(a)(1) has been violated. Under § 8(c), non-coercive, non-threatening statements of opinion

¹⁰ *Lechmere, Inc. v. NLRB*, 502 US 527 (1992).

¹¹ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

¹² See, *Federal Labor Laws, Outlines XII, XIII, XIV, and Part Four*, for a discussion of the more specific employer unfair labor practice provisions.

do not constitute an unfair labor practice or evidence of an unfair labor practice.¹³

3. The types of employer actions that can lead to violations of § 8(a)(1) range from the blatant to the subtle.¹⁴ While there are established guidelines for evaluating the legality of some categories of potential violations, most cases will be determined on the unique facts of the particular case.
4. The timing of an employer's actions may also be relevant for a determination of whether the unfair labor practice provisions have been violated, particularly where the alleged improper conduct involves changes in the terms and conditions of employment of workers.
 - a. To establish that an employer violates § 8(a)(1) by either granting improvements or making adverse changes in conditions of employment, the critical element is intent. If the employer implemented a change with the intent to interfere with the § 7 rights of employees, a violation may occur.¹⁵ Because intent is a critical issue, an employer may justify a unilateral change if it is implemented for a legitimate business purpose and not for purposes of interfering with § 7 rights.¹⁶
 - b. During the critical election campaign period, after a petition is filed and prior to an NLRB election, two distinct standards apply to determine whether a unilateral change in conditions of work is prohibited.
 - 1) During the critical election period, conduct may be objectionable because it interferes with the "laboratory conditions" necessary for the Board to conduct an election. The impact of unilateral changes on the laboratory conditions requires a different analysis than is required to show that a change was implemented in violation of § 8(a)(1).
 - 2) However, a violation of § 8(a)(1) committed during the critical election period will also constitute

¹³ See, *Federal Labor Laws, Outline V*, for a discussion of Section 8(c) and the conditions under which statements of opinion are distinguished from threats or other forms of coercive speech.

¹⁴ *E.g.*, *Towne Ford, Inc.*, 327 NLRB 193 (1998)(blacklisting); *Reno Hilton*, 320 NLRB 197 (1995)(bribery); *Central Valley Meat Co.*, 346 NLRB 1078 (2006)(refusing to allow a worker to wait in the company parking lot for a ride home from work).

¹⁵ *NLRB v. Curwood Inc.*, 397 F.3d 548 (7th Cir. 2005).

¹⁶ See, *e.g.*, *Waste Stream Management, Inc.*, 315 NLRB 1088 (1994)(implementing changes in smoking rules and installing time clocks for legitimate business reasons).

objectionable conduct within the representation case procedures.¹⁷

- 3) Under either standard, during an election campaign the employer is expected to maintain the status quo. Allegations that conditions of employment have been changed improperly may result either from the implementation of new terms or conditions of employment or from the failure to provide regularly scheduled improvements.
 - 4) An employer may be able to suspend regular changes until after the election to avoid the appearance of influencing votes. The employer must make it clear that the suspended benefit will be restored after the vote and irrespective of the outcome of the election.¹⁸
- c. If an exclusive representative has been certified or recognized, different standards apply to the implementation of changes in terms and conditions of employment. Once a bargaining relationship is established, the employer is generally prevented from implementing changes without first fulfilling its duty to bargain over the proposed changes with the exclusive representative.¹⁹
5. The potentially coercive nature of interrogation of union supporters by management officials has been a recurring issue before the Board. Under current standards, interrogation of known union supporters is not considered inherently coercive. In the absence of other threats or promises, the circumstances under which interrogation of known union supporters occurs will determine, on a case-by-case basis, whether the interrogation constitutes a violation of § 8(a)(1). In applying a “totality of the circumstances test,” the Board will consider the nature of the information sought, the identity and position of the questioner, and the place and methods of interrogation.²⁰
 6. Agents of an employer may generally observe public activities of union activists without violating § 8(a)(1). However, if the employer

¹⁷ *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

¹⁸ See, e.g., *Sam’s Club*, 349 NRB No. 94 (2007)(merit raises put on hold pending an election).

¹⁹ See, *Federal Labor Laws, Outline XIX*, for a discussion of the bargaining obligations of the parties prior to any implementation of changes in terms and conditions of employment.

²⁰ *Rossmore House*, 269 NLRB 1176 (1984), citing factors identified in *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964). Compare, *Amcast Automotive of Indiana, Inc.*, 348 NLRB No. 47 (2006)(No violation) with *Holiday Inn-JFK Airport*, 348 NLRB No. 1 (2006)(violation), applying the totality of the circumstances test.

takes out-of-the-ordinary steps to observe and monitor the activities of employees may constitute unlawful surveillance.²¹

- a. Use of cameras or videotaping equipment is an out-of-the ordinary step to observe and monitor employee activity, particularly when new or additional videotaping equipment is used.²² However, an employer may be able to defend against a charge of surveillance on the basis of a legitimate business justification, such as documenting incidents of illegal or unprotected activity, security or safety.²³
 - b. In addition to surveillance, it is also a violation of § 8(a)(1) to create and impression of surveillance. The impression of surveillance may be established either through the apparent use of photographic or videotaping equipment or the statements of an employer agent indicating that workers are being watched.²⁴
 - c. Closely related to the issue of surveillance is the use of workers to inform on coworkers, often couched in terms of soliciting reports of coercive or other unprotected activity. Solicitation of such subjective reports has the double effect of encouraging employees to identify union supporters and to discourage employees from engaging in protected activity.²⁵
7. Occasionally, enforcement of § 8(a)(1) must be balanced against other Constitutional or statutory rights of employers and unions. An important category of cases involves the use of retaliatory law suits, usually filed by an employer against a union in retaliation for exercising § 7 rights.
- a. The major issue in retaliatory law suits is the First Amendment right to petition the government for redress of grievances. Access to the courts is a fundamental Constitutional right that limits the power of the NLRB to enforce the unfair labor practice provisions of the NLRA.

²¹ *Wal-Mart Stores, Inc.*, 340 NLRB 1216 (2003).

²² *Trailmobile Trailer, LLC*, 343 NLRB (2004); *National Steel & Shipbuilding*, 324 NLRB 499 (1997).

²³ See, e.g., *Smithfield Foods, Inc.*, 347 NLRB No. 109 (2006)(monitoring incidents of trespassing).

²⁴ See, e.g., *Cobb Mechanical Contractors*, 356 NLRB No. 96 (2011)(photographing or appearing to photograph job applicants), *Seton Company*, 332 NLRB 979 (2000)(employer use of videotapes of union headquarters where employee meetings are held), and *Ivy Steel & Wire, Inc.*, 346 NLRB 404 (2006)(manager telling union representative that the manager would be in a bar across from union hall at time of employee meeting).

²⁵ *Tawas Industries*, 336 NLRB 318 (2001).

- b. In 1983, the Supreme Court held that the NLRB could not enjoin the prosecution of a state court law suit unless the suit lacks a reasonable basis in fact or law and was pursued because of a retaliatory motive.²⁶
 - c. Following *Bill Johnson's Restaurants*, the Board could not enjoin the prosecution of such a suit. However, it still assumed the authority to pursue an unfair labor practice charge after the suit was completed. The unfair labor practice charge had to be based on the retaliatory motive of the suit and the unsuccessful basis for the law suit.²⁷
 - d. In 2002, the Supreme Court further restricted the ability of the NLRB to base an unfair labor practice charge on a retaliatory law suit. Now, only sham law suits can serve as the basis of an unfair labor practice charge. In addition to being prosecuted for a retaliatory motive, the law suit must not only be without merit, it must be objectively baseless, so that no reasonable litigant could realistically expect success on the merits.²⁸
8. In established bargaining relationships, a recurring practice that raises issues under § 8(a)(1) is an effort of an employer to made settlement of an disciplinary matter. It is a violation of § 8(a)(1) for an employer to make reinstatement of a worker contingent upon that worker's waiver of the right to file a grievance under the existing collective bargaining agreement.²⁹

C. The *Weingarten* Rights

- 1. A very important right of workers under § 7 was recognized by the Supreme Court in the 1975 case, *NLRB v. J. Weingarten, Inc.*³⁰ In that case, the Court ruled that a worker who is the subject of an investigatory interview is entitled, upon proper request, to have a union representative present during questioning. While the *Weingarten* rights are very significant, there are specific mechanics and limitations imposed on the exercise of these rights.

²⁶ *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

²⁷ See, e.g., *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325 (1990)(involving a § 8(b)(1)(A) charge against a union for filing a retaliatory law suit against a member).

²⁸ *B.E. & K Construction Co.*, 351 NLRB No. 29 (2007), *on remand from*, *B.E. & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

²⁹ *Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002 (9th Cir. 1995); *Teamsters Local 171 v. NLRB*, 863 F.2d 946 (DC Cir. 1988); *Prince Trucking Co.*, 283 NLRB 806 (1987).

³⁰ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

2. The Board's justification for the right to request representation during investigatory interviews is based on a five part analysis.³¹
 - a. Under the Board's reasoning, which was accepted by the Supreme Court, the protected activity for § 7 purposes is the request made by worker. This is an example of an individual engaged in concerted activity because the worker is seeking the assistance of his or her representative.
 - b. The right applies only if a request for representation is made. *Weingarten* does not provide a right to representation, only a right to representation during an investigatory interview if a proper request has been made.
 - c. The basis for the request must be a reasonable belief that the investigation could lead to disciplinary action. It does not apply to all discussions between a worker and a representative of the employer.³²
 - d. Exercising the *Weingarten* rights cannot interfere with the legitimate business prerogatives of the employer. For example, a proper request does not prevent the employer from conducting an independent investigation of the worker without an investigatory interview.
 - e. If a union representative is brought into the process and an investigatory interview proceeds, the role of the union representative is limited. The employer has no duty to bargain with the representative. The representative's role is that of an advisor or counselor, not that of a negotiator.
3. If the employer assures the individual that no discipline will result from the interview, there is no "reasonable belief" that the interview could lead to disciplinary action, and the *Weingarten* rights do not apply.³³ The standard is an objective one, not what the employee concerned may have believed given her mental state, but what a hypothetical employee reasonably would have believed.³⁴
4. The right begins only with the onset of the interview. Therefore, a worker may not refuse to go to an office unless a representative is there. The worker must go to the interview and then request the presence of a representative.³⁵

³¹ *Id.*, at 256-260.

³² *NV Energy, Inc.*, 355 NLRB No. 7 (2010).

³³ *Spartan Stores, Inc.*, 235 NLRB 522 (1978) *enforcement denied*, 628 F.2d 953 (6th Cir. 1980).

³⁴ *Southwestern Bell Tel. Co.*, 338 NLRB 552 (2002).

³⁵ *Roadway Express*, 246 NLRB 1127 (1979).

- a. However, there is not a single opportunity to make a valid request. For example, a worker may agree to participate in one or more interviews and still make a proper request for representation at a subsequent interview.³⁶
 - b. The employer commits an § 8(a)(1) violation if the union representative requested by the employee is available, but not allowed to participate in the interview.³⁷
 - c. Absent special circumstances (*i.e.* the requested union representative is unavailable), the choice as to who will represent an employee during an investigatory interview resides with the union and the employee, not with the employer.³⁸
 - d. The individual must invoke the *Weingarten* rights.³⁹ The *Weingarten* rights do not apply unless the worker requests the presence of a representative. A union representative can not make the request for the individual. In addition, the employer is under no obligation to inform the worker of the right.
 - e. For employees discharged for asserting their *Weingarten* rights, make whole relief will be ordered.⁴⁰
5. The individual invoking the *Weingarten* right must be given an opportunity to meet with the union representative before the interview. The representative and the worker must be informed of the general nature of the matter under investigation. The opportunity to meet with the representative does not have to be on company time.⁴¹
 6. The role of the representative in the interview is that of an observer and counselor, but that the union representative may not turn the interview process into an adversarial contest.⁴²

³⁶ *General Motors Corp. v. NLRB*, 674 F.2d 576 (6th Cir. 1982).

³⁷ *Consolidation Coal Co.*, 307 NLRB 976 (1992).

³⁸ *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267 (4th Cir. 2003); *Buonadonna Shopprite, LLC*, 356 NLRB No. 115 (2011).

³⁹ *Spartan Stores, Inc.*, *supra* at note 32.

⁴⁰ *Garment Workers ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

⁴¹ *Postal Service*, 345 NLRB 426 (2005); *U.S. Postal Service*, 288 NLRB 864 (1988).

⁴² *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992).

7. A *Weingarten* representative may object to questions that may reasonably be construed as harassing, but may not obstruct an investigation by insisting that any question be asked only once.⁴³
8. The right of the worker is to be provided with a representative, if the employer proceeds with the interview after a valid request for representation. The employer actually has three options whenever a worker exercises the *Weingarten* rights:⁴⁴
 - a. The employer may grant the request, bring in the union representative, and continue to interview the worker, after all procedural steps have been fulfilled.⁴⁵
 - b. The employer may deny the request and terminate the interview.
 - c. The employer may take disciplinary action against the worker based upon other evidence, without conducting an interview and without bringing the representative in. The right only applies to the investigatory interview, not to a meeting at which the employer is informing the worker of the decision to impose discipline.⁴⁶
9. The *Weingarten* rights do not apply to nonunion workers who request the presence of a coworker during an investigatory interview.⁴⁷ Even though the original *Weingarten* decision was clearly rooted in an interpretation of § 7 rights, extension of the right to non-union workers has been a contentious and inconsistent venture by the Board.
 - a. In 1982, the Board specifically extended the *Weingarten* rights to non-union workers, basing its decision on an interpretation of § 7.⁴⁸ That decision was reversed three years later, after a significant change in Board membership. By 1985, the Board was prepared to reinterpret the *Weingarten* justification, basing it on the concept of § 9 instead of § 7, ruling that the right was based on the status

⁴³ *Id.*

⁴⁴ *Roadway Express, supra* at note 34.

⁴⁵ *Williams Pipeline*, 315 NLRB 1 (1994).

⁴⁶ *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979).

⁴⁷ *IBM Corp.*, 341 NLRB 1288 (2004), *overruling, Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), *enfd in part, denied in part*, 268 F.3d 1095 (D.C. Cir. 2001).

⁴⁸ *Materials Research Corp.*, 262 NLRB 1010 (1982).

of the union as an exclusive bargaining agent, not on the status of the individual as an employee protected by § 7.⁴⁹

- b. The Board again reconsidered its position in 1988, recognizing that its 1985 interpretation may not be the only appropriate approach to *Weingarten* and non-union workers.⁵⁰ Under the revised approach, the Board did not extend *Weingarten* rights to non-union workers, but was prepared to analyze the question under the parameters defined in the original *Weingarten* decision.
 - c. The *IBM* case in 2004 overruled the *Epilepsy Foundation* decision of 2000, returning to the principles articulated in the *DuPont* decision of 1988.
 - e. Employees in a non union workplace retain the right under *IBM* to request a witness during an investigation that she reasonably believes could result in discipline, and cannot be disciplined for making such a request – the request simply does not have to be granted.⁵¹
- 10. The *Weingarten* rights may be waived by clearly worded language in a collective bargaining agreement.⁵² Similarly, the collective bargaining agreement can, and often does, expand the rights beyond the legal minima.
 - 11. The remedies for violation of the *Weingarten* rights are ineffective. A cease and desist order requiring the employer to refrain from future violations is the basic remedy. Until the 1980's, a worker could be reinstated if the employer based disciplinary action on evidence obtained in the improper interview.⁵³ The Board has reversed this decision and now allows a make whole remedy only if the worker is disciplined because he or she has exercised the right.⁵⁴

D. Protection of Union Opponents and Dissidents

- 1. Section 8(b)(1)(A), which prohibits union restraint or coercion of employees, is interpreted in much the same way as § 8(a)(1). Union actions which are designed to intimidate non-members, to

⁴⁹ *Sears, Roebuck & Co.*, 274 NLRB 230 (1985).

⁵⁰ *E.I. DuPont & Co.*, 289 NLRB 627 (1988).

⁵¹ *Wal-Mart Stores Inc.*, 343 NLRB 1287 (2004).

⁵² *NLRB v. U.S. Postal Service*, 689 F.2d 835 (9th Cir. 1982), *citing*, *Prudential Insurance Co.*, 661 F.2d 398 (5th Cir. 1981).

⁵³ *Kraft Foods*, 251 NLRB 598 (1980).

⁵⁴ *Taracorp*, 273 NLRB 221 (1984).

coerce workers to join or be "good" members or to promise benefits or threaten retaliation can all lead to violations of § 8(b)(1)(A).

2. Unlike § 8(a)(1), violation of the other union unfair labor practice provisions does not necessarily constitute a violation of § 8(b)(1)(A).⁵⁵
3. Strictly internal union matters will not serve as the basis of a § 8(b)(1)(A) violation. For a violation to occur, internal union action toward a member must have an impact on the employment relationship, on access to Board processes, or otherwise affecting rights under the Act.⁵⁶
4. Some of the most significant applications of § 8(b)(1)(A) include:
 - a. Picket line activities, particularly intimidation of workers who cross a picket line,⁵⁷
 - b. Violation of the duty of fair representation,⁵⁸
 - c. Attempting to enforce standards of membership through shop floor activities (e.g., threatening discharge if a person does not become a full member of the union),⁵⁹
 - d. Discriminatory referrals of workers through a union hiring hall.⁶⁰
 - e. Fining former union members for conduct engaged in after the members have resigned from the union.⁶¹

E. Case XI-A: Interference, Restraint or Coercion

1. See, *Morris-Knudson Co. v. NLRB*.⁶² Organizing an informal protest against unsafe working conditions is protected activity. The fact that Betty is not personally involved in the hazard is irrelevant.

⁵⁵ See, e.g., *California Nurses Association*, 326 NLRB 1362 (1998).

⁵⁶ *Office and Professional Employees International Union, Local 251, AFL-CIO*, 331 NLRB 1417 (2000).

⁵⁷ See, e.g., *Longshoremen (ILWU) Local 6 (Sunset Line & Twine Co.)*, 79 NLRB 1487 (1948).

⁵⁸ *Miranda Fuel Co.*, 140 NLRB 181 (1962).

⁵⁹ See, e.g., *Professional & Tech. Engineers Local 151 (General Dynamics Corp.)*, 272 NLRB 1051 (1984).

⁶⁰ *Boilermakers Local 374 v. NLRB (Combustion Engineering)*, 852 F.2d 1353 (D.C. Cir. 1988).

⁶¹ *Scofield v. NLRB*, 394 U.S. 423 (1969).

⁶² 358 F.2d 411 (9th Cir. 1966).

2. See, *NLRB v. OklaInn*.⁶³ Concerted protests against job assignments are protected. In the cited case, a walkout to protest job assignments was held to be protected.
3. See, *Eastex, Inc. v. NLRB*.⁶⁴ Activities must normally be work-related to fall under the protection of § 7. Even though the minimum wage is beyond the employer's control, the issue is one which has a direct bearing on the lives of workers and the conditions of work.
4. See, *Jefferson Standard Broadcasting v. Electrical Workers Local 1229*.⁶⁵ Disloyalty has been upheld as legitimate grounds for disciplinary action, and therefore, unprotected.
5. See, *Jacobs Transfer, Inc.*⁶⁶ Efforts to discipline dissidents within the union may constitute violations of both §§ 8(a)(1) and 8(b)(1)(A). If the employer acted without union prompting, there would probably have to be a showing that the nature of the protest involved the issues or form of union representation.

E. Case XI-B: *Weingarten* Rights

- 1 Although the Board now holds that *Weingarten* rights do not apply to nonunion employees, this is the type of case that has historically presented problems. In this case, the rights probably applied even under the restrictive interpretations, as the union is the certified bargaining agent. The nature of this request is sufficient, even though it is phrased as a question, not a request.
2. When asked to go to an investigatory interview, the worker does not have the right to refuse to go. The rights must be invoked at the interview, not as a precondition for participation.⁶⁷
3. The worker does have the right to request a particular representative be present. However, if the representative is unavailable and another union representative is, then the company has fulfilled its *Weingarten* obligation.⁶⁸ The foreman has done what is required.

⁶³ E.g., 488 F.2d 498 (10th Cir. 1973).

⁶⁴ 437 U.S. 556 (1978).

⁶⁵ 346 U.S. 464 (1953).

⁶⁶ 201 NLRB 210 (1973).

⁶⁷ *Roadway Express*, *supra* note 34.

⁶⁸ *Supra*, *Consolidated Coal* at note 36 and *Williams Pipeline* at note 44.

Case XI-A: Interference, Restraint or Coercion

For each of the following incidents, discuss whether the actions of the employer or union violate § 8(a)(1) or § 8(b)(1)(A):

1. After the Extrusion Workers Union is certified as the bargaining agent for production and maintenance workers at the Showmeville Rubber and Plastics complex, a group of seven operators in the rubber plant create an ad hoc health and safety committee to document worker claims of unsafe conditions. The union does not have an official safety committee, but has encouraged workers to get involved. The committee's spokesperson, Betty Jackson, is reprimanded after she brings a potentially unsafe condition to the attention of the Rubber Plant Manager. The company claims, accurately, that the condition had nothing to do with Betty's job and the fact of the union's certification means that the company does not have to deal with these "disruptive and harassing" complaints from individual workers.

2. Joe Fredrickson, Mary Black and Juan Ortega are fired for insubordination after an argument between the three plastics operators and their foreman in which the workers claim that the job assignments made by the foreman are improper. No physical violence is involved in the argument.

3. Mike Thompson is suspended for asking workers to sign a petition during paid breaks. The petition is addressed to the local member of Congress and it calls for an increase in the minimum wage. The company claims that it is permitted to regulate this form of solicitation because it is not union related.

4. Three lab technicians are suspended for 30 days after the corporate vice president for marketing caught them distributing a leaflet at a local car dealership. The handbill said, "Due to the unwillingness of Megalomania Industries to fund its labs properly, buyers of cars with Megalomania Bumpers should Beware! The improperly tested bumpers will probably split, crack, warp or fall to pieces in the first snowstorm!" The handbill said nothing about the existence of a labor dispute at Megalomania Industries.

5. At the request of Barney Williams, the appointed president of the Extrusion Workers, three members of a "Reform Committee" are fired by the company. The reform committee has been handbilling at the time clocks with leaflets demanding an immediate right to elect local leadership of the union. Under the Extrusion Workers Constitution, the International Union appoints interim officers until a new unit negotiates its first agreement. The company and the union both claim that the workplace is no place to handle internal union disputes.

Case XI-B: Weingarten Rights

In each of the following cases, discuss whether the *Weingarten* rights apply:

1. After the Extrusion Workers are certified as the bargaining agent for workers at Megalomania Industries but before the parties negotiate a first agreement, the lab supervisor calls Freda Sparks, a technician, into his office. The supervisor tells Freda that he would like to ask her a few questions about the excessive number of problems on a particular test that Freda and two other technicians run. Freda responds by saying, "Shouldn't I have someone from the union in here with me?"

2. After the Extrusion Workers and Megalomania negotiate their first agreement, the company begins an investigation of theft on the truck docks. Jake Abrams, the warehouse foreman, approaches dockworker Jim Collins and says, "Jim, I would like to ask you a few questions. Would you come to my office with me." Jim refuses to go, saying, "I am not going anywhere without my steward!"

3. The investigation of theft on the dock continues. Foreman Jake Abrams is questioning Laura Long. After a few questions, Laura says, "I am not going to talk any more unless you bring Barney Williams (the local president) in to represent me." Abrams sends for Blake O'Donnell, the steward for the shipping dock for that shift.