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Investigations and the Garrity Warning

Public sector employers, including school districts, often struggle when faced with an investigation of employee misconduct that might also involve criminal conduct by the employee. A unique and important tool exists which allows an investigator conducting a school district investigation to compel an employee to answer questions surrounding the matter while protecting the employee's statements from being used against the employee in any subsequent criminal proceedings. This is known as *Garrity* warning. In general, a school district investigator should give an employee a *Garrity* warning, preferably in writing, prior to asking the employee specific questions about potentially criminal conduct. This warning compels the employee to answer all the investigator's questions under penalty of potential discipline or termination and informs the employee that prosecutors will not be able to use his/her answers against him/her in subsequent criminal proceedings. Giving a *Garrity* warning not only provides for effective information gathering by the investigator, but also ensures that the investigation is constitutional. Once a school district investigator gives a *Garrity* warning, the district can discipline or terminate the employee based on the employee's answers or the employee's refusal to answer questions.

BACKGROUND OF *GARRITY* WARNINGS

The concept of *Garrity* warnings derives from *Garrity v. New Jersey*, a 1967 United States Supreme Court decision which held that a public employee's answers given under threat of removal from office constitute compelled statements that prosecutors cannot use in subsequent criminal proceedings due to the Fifth Amendment's prohibition on compelling someone to be a witness against him or herself in criminal proceedings, otherwise known as a right not to self-incriminate. This decision has been interpreted to create a duty for public employers, requiring them to give a *Garrity* warning prior to asking an employee questions regarding potentially criminal conduct, which may lead to incriminating statements by the employee. A *Garrity* warning must inform the employee that: 1) he/she cannot refuse to answer the employer's questions based on the employee's right not to self-incriminate; 2) if the employee refuses to answer, the employer may discipline or terminate the employee; but 3) the employee's answers cannot be used against him/her in any subsequent criminal proceedings.

The immunity that a *Garrity* warning provides to an employee justifies a school district's ability to threaten discipline or removal from employment upon the employee's refusal to answer questions. Because the Supreme Court in *Garrity* did not define what constitutes a "threat of removal from office," lower courts

have developed various tests for determining when a public employee's statements are compelled and therefore cannot be used in criminal proceedings. Although the Wisconsin Supreme Court's test differs from the Seventh Circuit Court of Appeals' test, the underlying principles of compulsion are similar for all practical purposes.

A public employee's statements are likely considered compelled under Seventh Circuit law when the employee has a reasonable subjective belief that he/she will face disciplinary action for noncooperation with an employer's investigation. An employer must give a *Garrity* warning to assure immunizing an employee's statements from prosecution when the employee reasonably believes the employer would take an adverse employment action against him/her for exercising his/her Fifth Amendment right to remain silent.

Although Wisconsin's narrower test seems to require a *Garrity* warning only when an employer explicitly threatens termination, in practice, school districts operating in Wisconsin should err on the side of complying with the broader Seventh Circuit law. If a school district investigator creates circumstances coercive enough to compel an employee to answer questions out of fear that his/her silence will result in discipline or termination, the lack of an express threat of termination may be inconsequential to a court applying the Seventh Circuit test.

STRATEGIC CONSIDERATIONS

Sometimes it is not obvious whether criminal conduct may be involved and whether a *Garrity* warning is required at the onset of an interview with an employee. In such cases, the investigator can wait to give the *Garrity* warning until potential criminal conduct is likely to be discussed or comes up during the course of the interview. Some investigators prefer giving the *Garrity* warning at the beginning of questioning when there is any possibility that the investigation could lead to discussion of potential criminal conduct, just to be safe. Remember, not all employee misconduct involves criminal conduct or potentially criminal conduct. In fact, the majority of investigations probably involve much more mundane actions or inactions. In those cases, no *Garrity* warning is needed. . However, if it is a school district's practice not to give a *Garrity* at the beginning of every investigatory interview, its investigators must be trained to recognize when the investigation has raised the possibility of criminal conduct, and immediately stop the interview to give the *Garrity* warning before asking any more questions.

A school district should also consider coordinating its questioning with any police investigation. While granting certain immunity by using a *Garrity* warning prohibits law enforcement and prosecutors from using the employee's statements, a school district can coordinate with law enforcement and prosecutors to ensure that its investigator's questions do not lead to suppression of valuable evidence in criminal proceedings. Many times the police will want to go first – especially if it is likely criminal conduct will be involved. However, sometimes criminal conduct comes up during the middle of a school district investigator's questioning. In that case, the investigator must determine whether to stop the interview and contact law enforcement, or give a *Garrity* warning and continue the interview. Although a school district's relationship with law enforcement and prosecutors is not critical to a school district's internal investigations, the district, law enforcement, and prosecutors all share a mutual interest in holding the employee accountable for criminal conduct. As long as the district's investigator first confirms with law enforcement and prosecutors that the district's investigation will not impair subsequent criminal proceedings, there is no disadvantage to investigators giving *Garrity* warnings at the onset of an investigation into an employee's potentially criminal actions.

CONCLUSION

School districts benefit in many ways from requiring their investigators to give *Garrity* warnings prior to asking employees questions about potentially criminal conduct. Warning an employee that he/she will be disciplined or terminated for refusing to answer questions makes it much more likely the employee will answer questions. Not only does this achieve optimal employee cooperation during investigations and lead to maximum information gathering, but it also allows school boards to discipline or terminate an employee for an incriminating statement that reveals criminal misconduct that justifies termination. Creating such coercive circumstances is permissible as long as the investigator's warning makes clear that the employee's answers cannot be used against the employee in subsequent criminal proceedings.

PRIMARY AUTHORS

Doug Witte

(608) 283-7529
DWITTE@BOARDMANCLARK.COM

■ Michael J. Julka	(608) 286-7238	■ Richard Verstegen	(608) 283-7233	■ JoAnn M. Hart	(608) 286-7162
■ Doug E. Witte	(608) 283-7529	■ Eileen A. Brownlee	(608) 822-3251	■ M. Tess O'Brien-Heinzen	(608) 283-1798
■ James K. Ruhly	(608) 283-1738	■ Steven C. Zach	(608) 283-1736	■ Brian P. Goodman	(608) 283-1722