

INTERVIEWING PUBLIC EMPLOYEES REGARDING POSSIBLE CRIMINAL VIOLATIONS

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**COMPELLING PUBLIC EMPLOYEES
TO ANSWER INVESTIGATIVE QUESTIONS
WHEN THE POSSIBILITY OF CRIMINAL CHARGES EXISTS**

- A. A public employee can refuse, on constitutional grounds, to answer any employer questions that might incriminate the employee, unless the employer grants immunity from criminal prosecution (so-called “use immunity”). (*Garrity v. State of New Jersey*).
- B. The basic premise of the *Garrity* protection is straightforward: First, a public employee cannot be compelled, by the threat of serious discipline, to make statements that may be used in a subsequent criminal proceeding; Second, a public employee cannot be terminated for refusing to waive his/her Fifth Amendment right to remain silent. Therefore, if an employee is forced to give a statement as part of an administrative investigation the statement is “protected,” and cannot be used in a subsequent criminal prosecution.
- C. The employer must inform the employee that it is not questioning the employee for purposes of instituting a criminal proceeding against the employee or to obtain additional evidence that can be used in a pending criminal action. In granting this immunity, if any incriminating statements are obtained from an employee under threat of job security, they cannot be used in a subsequent criminal prosecution. An employee can be compelled to make a statement as long as there is full immunity from state and/or federal criminal prosecution. In other words, if immunity has been given, an employee who refuses to cooperate with an investigation, or fails to answer the questions truthfully and completely may be disciplined for such refusal. However, an employee may not be disciplined for refusing to waive the privilege.
- D. The “*Garrity*” warning helps to ensure the employee’s constitutional rights, while also helping state or local employers preserve the evidentiary value of statements provided by subjects in concurrent administrative and criminal investigations.

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