

# SMITH ANDERSON

## **Guidelines for Handling Employee Requests for the Presence of Third Parties at Meetings with Company Representatives**

Kimberly J. Korando  
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.  
Raleigh, North Carolina  
919.821.6671  
kkorando@smithlaw.com

***[Optional: Employee rights and obligations with regard to the presence of third parties at meetings with company representatives are governed by a variety of frequently changing labor laws.]***

***The purpose of these guidelines is to assist supervisors, managers and human resources personnel in handling employee requests for the presence of third parties at meetings with company representatives in an appropriate and lawful manner. Supervisors, managers and other company representatives who conduct these meetings and fail to comply with applicable law subject the company to legal liability and themselves to disciplinary action.***

***Questions about the application of these guidelines should be directed to [insert appropriate title].***

It is the Company's policy to deal with its employees directly without the involvement of third parties. Accordingly, the presence of, or representation by, third parties (including lawyers, coworkers, friends, relatives, or other counselors) at an employee's request at meetings with supervisors, managers or other Company representatives generally is not permitted, except as set forth below. Failure by supervisory or management employees to comply with these guidelines may result in disciplinary action, up to and including immediate termination.

**Collective Bargaining Unit Employees.** Requests by a collective bargaining unit member to have a third party present at meetings which he or she has with supervisors, managers or other Company representatives will be handled in strict accordance with the collective bargaining agreement and applicable law. ***[Questions about handling these requests should be directed to [insert title].]***

**Nonsupervisory, Nonmanagement and Non-Employee Relations Personnel.** If an employee who is not in a collective bargaining unit nor in a supervisory,

# SMITH ANDERSON

management, or employee relations role requests that a coworker be present during an investigatory interview with Company representatives, the supervisory/management personnel to whom the request was made shall **before proceeding with the interview**, contact **[insert HR title]** and, together with HR, take the following steps:

1. Confirm that the employee is not a supervisory, management, employee relations or collective bargaining unit member.
2. Confirm that the person whose presence is requested is an available coworker. The coworker selected must be available for, and agree to attend, the meeting. The coworker has the right to refuse. If the selected coworker is unavailable or declines to attend, then the employee may select another coworker. The meeting should not be delayed due to the unavailability of the coworker.

The role of the coworker at the meeting is limited. The coworker is not permitted to prevent the employee from answering questions, disrupt or interfere with the meeting, or negotiate or bargain on the employee's behalf. These requirements should be explained to the employee at the time of the request and to the coworker. Attendance of lawyers, relatives, friends, other counselors or third parties is strictly prohibited and requests for the presence of these individuals shall be denied.

3. Confirm that the meeting is an investigatory interview that the employee reasonably believes may result in disciplinary action.

Investigatory interviews are meetings at which the Company seeks to gather facts that might lead to disciplinary action such as:

- interviews regarding behavior (e.g., harassment complaints/investigations, insubordination, workplace violence or other inappropriate conduct)
- interviews concerning compliance with Company policy (e.g., suspected violations of standard operating procedures, substance abuse policies, EEO/discrimination policies)
- interviews relating to job performance
- interviews relating to theft or misappropriation of property

# SMITH ANDERSON

- drug, alcohol or other tests that could result in disciplinary action.

Meetings that are conducted **solely** to inform the employee of a disciplinary decision that **already** has been made or to present a performance evaluation are **not** covered, unless they evolve into a further investigation of the underlying conduct.

4. If steps 1-3 are confirmed, then the employee shall **not** be **required** to participate in the meeting without a coworker present and the Company shall choose one of the following four options.

**IMPORTANT NOTE: The National Labor Relations Board (NLRB) and some courts currently take the position that the prohibitions and actions set forth in this paragraph are required by law. No deviation from this paragraph is authorized by the Company unless advance authorization is obtained from the [insert title].**

Selecting the most appropriate option will depend on the particular circumstances and should be made after considering impact on the integrity of the fact finding process, confidentiality and sensitivity of the matter in question, employee relations and perception of fairness. In situations where the coworker is a potential witness or participant in the matter under investigation or the risk of potential disclosure to those who may be witnesses or participants is great, the coworker's presence may impair the integrity of the fact finding process and options 1 or 2 may be the most appropriate. Similarly, options 1 or 2 may be the most appropriate in situations where the matter under investigation involves the disclosure of personal, sensitive or other confidential information. In situations where the coworker's presence will not be potentially harmful to the process, options 3 or 4 may offer the benefit of fostering employee relations.

# SMITH ANDERSON

## Options

1. Cancel or stop the interview and proceed with the investigation without conducting the interview. Even if the interview is not conducted, the Company may discipline an employee based on information it gathers from other sources; however, ***adverse action may not be taken against the employee for requesting the presence of a coworker.***
2. Cancel or stop the interview and request that the employee submit a written statement explaining his/her side of the story. There is no right to coworker involvement in preparation of this statement.
3. Give the employee the choice of either undergoing the interview without a coworker present ***or*** declining the interview and giving up any benefit he or she would have gained from the interview. The decision to proceed without representation must be voluntary and must be made after the employee has been made aware of his/her options. This decision should be made in writing signed by the employee. A form is attached which can be used for this purpose. If the employee refuses to choose, than the interview should be cancelled or stopped as set forth in option 1 or 2.
4. Grant the request.

No adverse action may be taken against the employee for requesting the presence of a coworker.

## Additional information regarding investigatory interviews

These guidelines do not require or suggest that an investigatory interview be conducted before disciplinary action is taken. The decision to conduct an investigation or interview, and determination as to the nature and extent of any such investigation or interview, should be based on the circumstances in question. Similarly, there is no obligation to advise the employee of the right to request that a coworker be present during an investigatory interview.

These guidelines are not, and shall not be construed to be, a contractual obligation by the Company. There may be circumstances that warrant action other than as set forth above. As in all cases, the Company shall take the action that it deems appropriate under the circumstances.

# SMITH ANDERSON

## Investigatory Interview Election Form

I, \_\_\_\_\_, have requested that a coworker be present during my interview with company representatives.

I understand that, in response to my request, the company has denied my request and given me the following two options from which I must choose one:

Check selected option:

***voluntarily and on my own free will*** withdrawing my request and participating in the interview ***without*** a coworker being present

or

declining to participate in the interview without coworker presence and foregoing any benefit I may have gained from the interview.

I CERTIFY UNDER PENALTY OF PERJURY THAT I HAVE SELECTED THE ABOVE CHOICE VOLUNTARILY OF MY OWN FREE WILL WITHOUT ANY THREAT, COERCION OR OTHER UNDUE INFLUENCE.

\_\_\_\_\_  
Employee signature

\_\_\_\_\_  
Date

Witnessed by: \_\_\_\_\_