Garrity Warnings: A Practical Guide for HR Professionals

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Why Garrity belongs on Public Employer HR's radar

When a public employer orders an employee to answer questions under threat of discipline, the answers are automatically immune from criminal use. That rule, from *Garrity v. New Jersey* (1967), applies whether or not anyone reads the employee a warning.

For HR professionals in government agencies, school districts, public hospitals and other public employers, this has real consequences. A poorly handled interview can taint a criminal prosecution, unravel an otherwise sound disciplinary decision, or expose the agency to labor and civil claims.

This article explains what Garrity requires, how it differs from Miranda, what employees keep, and what employers must do before, during and after a compelled interview. It closes with a model warning and a pre-interview checklist.

One threshold point: Garrity is a constitutional limit on *government* employers. Private-sector employers are not bound by it, although union contracts and state law may impose similar duties.

The legal foundation

The Fifth Amendment says no person "shall be compelled in any criminal case to be a witness against himself." The Fourteenth Amendment extends that protection to state and local employees.

In *Garrity*, New Jersey police officers under investigation were told they could stay silent but would lose their jobs if they did. They answered, and prosecutors used those answers to convict them. The Supreme Court held that a choice between "self-incrimination or job forfeiture" is no choice at all, so the statements were coerced and inadmissible.

Later cases filled in the rules that HR teams work with today:

Case	Year	What it means for employers
Garrity v. New Jersey, 385 U.S. 493	1967	Statements compelled by threat of job loss cannot be used in a criminal prosecution.
Gardner v. Broderick, 392 U.S. 273; *Uniformed Sanitation Men Ass'n v. Commissioner*, 392 U.S. 280	1968	An employer cannot fire someone for refusing to waive their immunity. It can discipline for refusing to answer questions narrowly related to the job, once immunity is in place.
Kastigar v. United States, 406 U.S. 441	1972	Immunity covers both direct use and derivative use: evidence found because of the statement is also off-limits. Prosecutors must prove an independent source.

Case	Year	What it means for employers
Lefkowitz v. Turley, 414 U.S. 70	1973	Government cannot penalize people (there, contractors) for invoking the privilege when it refuses to grant immunity.
Kalkines v. United States, 473 F.2d 1391 (Ct. Cl.)	1973	Federal-sector counterpart; the advisement given to federal employees is often called a "Kalkines warning."
Fisher v. United States, 425 U.S. 391	1976	The act of producing evidence can itself be testimonial, which matters for compelled passwords and decryption.
United States v. North, 910 F.2d 843 (D.C. Cir.)	1990	Prosecutors carry a heavy burden at a Kastigar hearing, including showing witnesses were not shaped by exposure to compelled testimony.
LaChance v. Erickson, 522 U.S. 262	1998	Employees have no right to lie. A false answer can be disciplined separately.
Chavez v. Martinez, 538 U.S. 760	2003	A Fifth Amendment violation generally requires the statement to be used in a criminal case, which shapes when civil damages claims succeed.

The practical upshot: Garrity immunity is automatic. It attaches the moment an employee is objectively compelled to speak under threat of discipline. The written warning does not create the immunity; it documents the compulsion and sets its boundaries.

How Garrity works in practice

Garrity is not Miranda

The two warnings are often confused but serve opposite purposes. Miranda protects the right to stay silent; Garrity removes it, in exchange for immunity.

	Miranda	Garrity
Setting	Criminal custodial interrogation	Administrative or employment investigation
Who gives it	Law enforcement	The employer
Can the person stay silent?	Yes, with no penalty	No, refusal to answer job-related questions can lead to discipline
Nature of statements	Voluntary	Compelled
Effect of invoking	Questioning stops	Questioning continues; employee must answer
If the warning is skipped	Statements suppressed in the criminal case	Immunity still attaches; the record of scope and compulsion is weaker

The six elements of a sound warning

Administer these orally and in writing before questioning starts:

1. This is an official administrative investigation by the agency.
2. You must answer truthfully and completely. Refusing to answer questions specifically, directly and narrowly related to your official duties may lead to discipline, up to termination.
3. Your answers will be used for employment and administrative purposes only.
4. Your statements are compelled. Neither they nor evidence derived from them may be used against you in a criminal proceeding.
5. You may have union representation or counsel as provided by law and your collective bargaining agreement.
6. A false statement is a separate ground for discipline and is not protected by Garrity immunity.

Best practice is to get the employee's signed acknowledgment, or document a refusal to sign.

What employees keep

- **Immunity from criminal use.** Direct and derivative use are both barred, and compelled statements cannot be used to build probable cause for an arrest or warrant.
- **A limited scope of compulsion.** The duty to answer covers only questions narrowly related to official duties. Outside that scope, the employee keeps the full Fifth Amendment privilege and cannot be disciplined for declining to answer.
- **Representation rights.** In unionized workplaces, employees often may request a representative when they reasonably believe an interview could lead to discipline. In the private sector this is the *Weingarten* right under the NLRA; in the public sector it depends on state law and the CBA.
- **The right to challenge a prosecution.** An employee can seek suppression of tainted evidence, and the prosecution must prove each piece came from an independent source.

Practical guidance for HR

Build the firewall first

The single most important step is a documented wall between the administrative investigation and any criminal investigation. A breach can lead to suppression of evidence and even dismissal of charges.

- **Separate teams.** No one works on both the administrative and criminal sides.
- **No sharing.** Compelled statements and transcripts never go to police or prosecutors.
- **Segregated files.** Garrity materials sit in a separate, access-controlled file.
- **A written memo.** Firewall procedures and personnel are documented before the interview.
- **Legal sign-off.** Counsel approves any release of administrative information to criminal authorities.

Handle concurrent investigations deliberately

Situation	Recommended approach
Criminal charges pending or imminent	Consult counsel first. Consider deferring the compelled interview until the criminal matter resolves.
Parallel investigations underway	Put the full firewall in place immediately. Interview without coordinating with or notifying criminal investigators.
Criminal referral after the interview	Notify counsel at once so Kastigar protections are in place before any contact with law enforcement.

Watch the less obvious situations

- **Written statements.** Ordered incident reports, memos and interrogatory answers are compelled too. Give the warning in writing before directing them.
- **Polygraphs.** Public employers are exempt from the federal Employee Polygraph Protection Act, though state law may restrict them. Disclosures in a compelled exam carry Garrity immunity, so warn first.
- **Voluntary versus compelled statements.** Anything said before compulsion may be voluntary and unprotected. Keep the two parts of an interview clearly separated in the record.
- **Passwords and devices.** Compelling a password or decryption key may be testimonial. Get legal advice before ordering it.

Know the cost of mistakes

Mishandled Garrity materials can lead to suppression or dismissal in the criminal case, reversal of discipline and reinstatement on appeal, and unfair labor practice charges where representation rights are denied. Civil rights claims under 42 U.S.C. § 1983 are also possible, although after *Chavez v. Martinez* courts generally require that the compelled statement actually be used in a criminal case.

The Bottom Line

Garrity gives public employers a powerful tool: the ability to require answers. The price is that those answers belong to the administrative process alone. HR's job is to define the scope, document the compulsion, protect the firewall, and call counsel early whenever a criminal angle appears. A call to counsel costs far less than a Kastigar hearing.

This article is for general information and is not legal advice. Garrity practice varies by jurisdiction, collective bargaining agreement and agency policy. Consult your legal counsel about specific situations.

Model warning

Adapt this to state law, your CBA and agency policy, and have counsel review it:

1. You are being questioned as part of an official administrative investigation of [Agency Name].
2. You must answer all questions truthfully. Refusing to answer questions specifically, directly and narrowly related to your official duties may result in discipline, up to and including termination.
3. Your answers will be used for employment and administrative purposes only.
4. Your statements are compelled. They, and any evidence derived from them, may not be used against you in a criminal proceeding.
5. You may have union representation or legal counsel as provided by law and your collective bargaining agreement.
6. A false statement may be a separate ground for discipline and is not protected by Garrity immunity.
7. Do you understand each of the rights and obligations described above?

Employee signature and date

Investigator signature and date

Pre-interview checklist

- ☐ Confirmed whether a parallel criminal investigation exists or is contemplated
- ☐ Consulted counsel if there is any criminal nexus
- ☐ Defined the investigation's scope in writing
- ☐ Prepared a written warning covering all six elements
- ☐ Established and documented the firewall
- ☐ Notified the employee of the date, time and subject in advance
- ☐ Allowed reasonable time to consult a representative or counsel
- ☐ Arranged for recording or a verbatim transcript
- ☐ Gave the warning orally and in writing
- ☐ Obtained a signed acknowledgment, or documented a refusal
- ☐ Kept questions within the defined scope
- ☐ Stored compelled statements in the segregated file
- ☐ Reviewed all materials before any third-party disclosure