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Corporate Internal Investigations: Best Practices

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A CEO receives an anonymous call claiming that someone is stealing company trade secrets or that an employee is taking kickbacks from a vendor. A GC gets a call from the HR director who has an employee accusing the company of submitting false bills to a government agency. You are served by a government agency with a subpoena seeking records indicating a criminal investigation is underway for violations of environmental laws, insider trading, tax laws or fraud. Your company receives a credible threat of litigation. These are all real scenarios that occur daily in companies of all sizes all over the world. They trigger critical internal investigations that require substantial time and resources. Regardless of the nature of the investigation, it is vital that it be conducted efficiently, with clear direction and attention to preservation of the attorney-client privilege. This article sets out best practices for doing so.

Internal investigations are very complex, and organization and planning is crucial. Preserving privilege is critical and employee interviews must be handled with care. Companies often grapple with *whether to conduct the investigation internally or retain outside counsel*, recognizing that disclosure decisions are complex. The possibility of future criminal or civil litigation must be continually assessed. When initiating the investigation, companies should consider the advisability of conducting the investigation in house, or whether it would be more beneficial to conduct the investigation through outside counsel. Experience dictates that there is a much greater likelihood of maintaining the confidentiality of the investigation if conducted through outside counsel.

It is critical to *develop a plan* defining both the scope and objectives. In most cases, outside counsel should take the lead to preserve the attorney-client and work product privileges. Non-attorneys (management, human resources, internal audit, security, internal/external experts) also play a role. Separate representation issues should be addressed and a protocol and lines of reporting and supervision established. Key is anticipating possible problems.

Preservation of the *attorney-client privilege and work product doctrine* are key considerations. Only attorney-client communications are protected, not the underlying facts themselves. A common mistake made by many employees is that they believe that copying an attorney on an email or memo transforms it into a privileged communication. *This is not the case*. The communication itself must

be confidential and for the purpose of obtaining the attorney's legal advice. Alternatively, if a communication contains an attorney's mental thoughts, impressions or opinion, then it is protected attorney work product. Care must be given to distinguish between opinion as opposed to factual work product. Additionally, documents prepared in anticipation of litigation may be protected. Materials prepared by corporate employees for an attorney may enjoy a qualified immunity, but again, there are pitfalls that must be considered and avoided. For example, care must be taken to avoid an inadvertent disclosure/waiver of the privilege. Where a company relies on advice of counsel as a defense, then the communication is placed at issue and is discoverable. Voluntary disclosure and disclosure to government authorities also operates as a waiver.

The process of *gathering and organizing documents* is another key consideration. First, the company should be able to show that documents have been preserved, collected and controlled. Critical is the issuance and timing of a "Do Not Destroy" notice. Document retention policies and destruction timing will be at issue. Companies often find themselves receiving the ire of investigating authorities and courts for failure to preserve potential evidence. Next, the sources of the documents must be identified and procedures established for identifying and tracking documents. It is not uncommon for an outside vendor to be retained to process and manage documents. Consideration should be given to whether relevant documents may be in the hands of third parties. Documents must be reviewed and analyzed in a coherent, methodological manner and indexed and coded for easy retrieval/incorporation into issue outlines. Categories such as chronologies are usually critical, as are key documents.

Witness interviews can be particularly tricky. First, in the preliminary statement to the witness, the investigator must make it clear that he represents the company and not the employee. The purpose of the investigation should be described (*i.e.*, to obtain factual information in order to provide the company with legal advice). The attorney-client privilege and work product doctrines should be explained in layman's terms and the employee informed that under certain circumstances, federal rules impose an obligation on the company to inform the government if the company has discovered credible evidence of intentional or reckless conduct. The employee should also be informed that the company may choose to disclose to anyone any information obtained from the investigation. Employees must be given an opportunity to ask questions about the process. The admonition given to the employee should be clearly memorialized in the interview memorandum.

Thought should be given to preparation and organization of the interviews including who should be interviewed, in what sequence, and the location. Questions should be set forth in an outline to determine: the date, location, and time of each incident; exactly who was present, what was said or done; subsequent actions; and documentation in the witness' possession or in possession of others. Generally, it is best to move from general to specific lines of questions. The interview should be conducted using open-ended questions. This permits the interviewer to evaluate credibility and not influence the employees' answers. Sometimes it is appropriate to record an interview or obtain a signed witness statement. There should always be two people present for the company during the interview.

Interview notes and summaries of the interview should be prepared and maintained. The employee should be informed about the potential for contact by government investigators.

Planning for potential issues and pitfalls that sometimes arise during the interview process should be given thorough consideration, including, for example:

- the employee who asks for legal advice

- the reluctant employee
- the employee who places conditions on the interview and/or seeks to leverage his or her cooperation for some employment advantage
- the employee who purports to “blow the whistle” on others
- the employee who is untruthful or evasive
- the employee who admits wrongdoing, perhaps as to matters unrelated to the investigation
- former employees
- avoiding witness tampering or obstruction by interviewer

The company’s and employees’ rights and duties also require detailed consideration. The employee may be entitled to certain contractual rights, as well as legal rights, such as the right to privacy, privilege against self-incrimination and certain “whistleblower” and Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*., protections. In given situations, an employee also may have the right to counsel. The company, on the other hand, will need to be apprised of its options and any limitations against seeking to terminate employees for being a whistleblower, for failure to cooperate with the investigation, or while asserting rights against self-incrimination. Each situation brings unique circumstances that require careful analysis in conjunction with applicable laws. The company also may have a duty to pay the fees of certain employee’s counsel. Joint defense or common interest privileges also may apply.

The *report of the internal investigation* is critically important and its discoverability should be thoughtfully assessed. Not only does the decision about whether to prepare a written report as opposed to providing an oral report require careful consideration, but in the event a written report is drafted, one must determine whether to produce an interim draft prior to a final report. A written report should contain a privilege legend, an executive summary, an explanation of the origin of the investigation, a summary of relevant facts and any relevant, unknown factual issues, application of the law to the facts, an analysis of the company’s and the subject employee’s potential liability and/or disclosure obligations, and should identify any corrective action or preventive measures that have been taken, or that management should consider taking.

In *dealing with the government*, there are a number of factors to consider. If the government investigation already has begun, it is important that the company’s investigation stay a step or two ahead. Define the scope of cooperation with the government and develop a strategy for dealing with the government. Consider the need for retaining separate counsel for certain employees. Determine how to deal with third parties and former employees. This is all part of the careful planning that should take place at the outset.

At some point, the company must decide whether *disclosure of investigation results to third parties* is required. There are legal mandatory disclosure requirements such as the FAR Mandatory Disclosure Rule, 73 Fed. Reg. 67064. Under the FAR, the company must “timely” disclose, in writing, “credible evidence” of (1) any violation of the civil False Claims Act, 31 U.S.C. §§ 3729–3733, and (2) any violation of Title 18 of the United States Code involving fraud, conflict of interest, bribery or the gratuity laws, in connection with the award, performance or closeout of a government contract. The

company risks suspension and debarment for a “knowing failure” by a “principal” of a government contractor to timely disclose credible evidence of a covered violation or a “significant overpayment.” In addition, other legal bases, such as the Sarbanes-Oxley Act, 15 U.S.C. § 7201, *et seq.*, or the Anti-Kickback Act, 18 U.S.C. § 874, as well as administrative agreements also may require mandatory disclosure. In addition, there are times when a voluntary disclosure is appropriate. The company should be sure to coordinate disclosure with all relevant players, such as the Department of Justice, Department of Defense, contracting officers and other customer representatives. The company must consider the effects of disclosure on attorney-client and work product protections.

All of these issues highlight the complex nature of internal investigations and demonstrate how crucial organization and careful planning are throughout. Detailed efforts must be made to preserve privileges, and employee interviews must be handled with care and precision. Disclosure decisions are complex and the possibility of future criminal or civil litigation must continually be assessed.

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