

Internal Investigations: Avoiding Common Missteps; Recent Developments

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Failure To Initiate & Properly Plan the Internal Investigation

- Internal investigations generally should be initiated under the following circumstances:
 - Civil suits
 - Whistleblower
 - Government subpoena (to you or others similarly situated)
 - Government investigation
 - Newspaper articles
- Must determine if the problem is local, domestic or international
- Must determine if there are criminal implications
- If there is a parallel government investigation, planning considerations are different

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Failure To Initiate & Properly Plan the Internal Investigation, cont'd

- Must have a plan or protocol to handle employees who fail to cooperate
- Must have a public relations and public disclosure plan
- Must determine early on if there is a need for experts or consultants
- Must preserve documents and evidence
- Must also consider the risks of initiating an internal investigation
 - May have to disclose in closing corporate merger or acquisition documents
 - Could prompt class actions/civil suits

Failure To Have the Right Person(s) Conduct the Investigation

- Internal Investigations should be conducted and supervised by experienced counsel
- In-house counsel vs. outside counsel (which outside counsel)
- Who should not conduct the internal investigation
 - Managers/supervisors
 - Employees
 - Anyone with a potential conflict of interest
- Other professionals (non-lawyers) can conduct/participate in the investigation (CPAs, economists; private investigators; computer forensic specialists; engineers) if they are retained by counsel
 - Which professional? Should not use anyone who may be a fact witness
- Must determine if the individuals conducting the investigation have the requisite experience

Failure to Clearly Distinguish the Purpose of an Internal Investigation

- Is the Internal Investigation being conducted for business reasons rather than for obtaining legal advice?
- Internal Investigations should never be conducted in a business-as-usual manner
- Must clearly document the purpose and intent of the investigation from its early stages
- Must diligently document your mental impressions and the decision-making process

Failure to Clearly Distinguish the Purpose of an Internal Investigation, cont'd

- Must make it clear that any non-lawyer who is participating in the investigation is doing so at the direction of counsel
- Must make it clear to all members of the investigative team as well as interviewees that the investigation is being conducted at the direction of counsel for legal purposes
- Must require all individuals who are involved with the investigation report to counsel
- Should not distribute the written report of the results of the internal investigation to those who do not need to know

Failure to Administer Upjohn Warnings and Properly Plan for Employee Interviews

- Counsel must clearly warn employees at a minimum:
 - You represent the company, not the employee/witness
 - They have a right to counsel
 - The privilege belongs to the company and it may or may not waive it
 - False statements may result in criminal prosecution
 - They should maintain the confidentiality of the interview
- Counsel should also warn former employees

Failure to Administer Upjohn Warnings and Properly Plan for Employee Interviews, cont'd

- Should consider handing out a form with the warnings and consider having the witness/employee sign the form
- Should not advise employee on whether he/she needs a lawyer
 - Make sure you are aware of state law
 - Make sure you are aware of any relevant portions of a CBA
 - Make sure you are aware of the company's policies and bylaws (HR)
- Must analyze/consider where to conduct the interviews
- Avoid common missteps when conducting employee Interviews

Failure to Analyze and Address Potential Conflicts of Interest

- When company counsel also represents employees, there is an omnipresent potential for conflicts of interest, especially where the company cooperates with a government investigation or intends to do so
- Failure to obtain a written conflicts letter/waiver (not every conflict is waivable)
- Failure to promptly withdraw from representation when it is clear there is a conflict
- Failure to preserve privileged communications/information occurring prior to withdrawal from representation

Failure to Analyze and Address Potential Conflicts of Interest, cont'd

- If it is determined that an employee needs separate counsel, careful consideration should be given as to whether the company should suggest a counsel and/or pay their fees (check bylaws, CBA)
- If an employee has retained separate counsel, ethical rules preclude interviews of those employees without their counsel being present
- It may not be advisable for a company to enter into joint defense agreement with employee's separate counsel

Failure to Analyze and Address Potential Conflicts of Interest, cont'd

- It may not be advisable for a company to enter into joint defense agreement with employees' separate counsel, as that could limit the company's ability to cooperate with the government regarding disclosure of the employees' interviews if such cooperation is in the company's interest.
- Potential issues/concerns:
 - Maintaining control of shared documents/information
 - Creating the appearance that an attorney formed an attorney/client privilege with other parties to the joint defense agreement who are represented by separate counsel
 - Failing to specify what happens to confidential information when a co-defendant's interest diverges

Failure to Analyze and Address Potential Conflicts of Interest, cont'd

- Potential issues/concerns:
 - Potential for disqualification:
 - Mutual joint defense agreement promises of confidentiality if parties become adverse
 - Lawyers who are parties to the agreement when there are no present conflicts represent subsequently added parties. *Trinity Ambulance Service, Inc. v. G & L Ambulance*, 578 F. Supp. 1280 (D. Conn 1984)
- If there is a parallel government investigation, failure to consider the impact of the Yates Memorandum when deciding whether to cooperate with the government or whether to enter into a joint defense or common interest agreement

Failure To Protect Information From Discovery:
Waiver Of the Attorney/Client Privilege or Work Product Doctrine

- Failure to properly create a Kovel privilege for consultants, agents and experts
- Producing documents to the government
- Producing documents to a party in civil litigation
- If privileged documents are voluntarily produced to the government, failing to obtain a confidentiality or non-waiver agreement between the government and the company
- Requiring employees to sign or adopt an interview memorandum
- If the investigation reveals illegal activity, failing to immediately stop/cease the conduct or attempting to cover up the activity/conduct

Failure To Protect Information From Discovery:
Waiver Of the Attorney/Client Privilege or Work Product Doctrine,
cont'd

- Allowing other individuals to be present during interviews (family, spouse, significant other, priest, friends, etc.)
- Every document generated by the investigation team should have a legend clearly indicating that it is subject to the attorney/client privilege and/or work product doctrine
- Improper use, formation and/or implementation of joint defense/common Interest agreements
- Allowing the employee/interviewee to take notes during the interview
- Verbatim recording the employee/witness interview

The Yates Memo Implements Steps DOJ Will Follow in Order to Increase its Focus to Hold Individuals Accountable

1. If a corporation wants cooperation credit from DOJ, it must give DOJ all relevant facts related to individuals involved in the identified misconduct
2. Civil and criminal attorneys at DOJ handling an investigation should be in frequent contact with one another
3. DOJ attorneys and investigators should focus on individuals from the start of any investigation

The Yates Memo Implements Steps DOJ Will Follow in Order to Increase its Focus to Hold Individuals Accountable, cont'd

4. Generally, DOJ will not release individuals from liability when resolving a matter with a corporation
5. DOJ attorneys should not resolve a matter with a corporation if there is not a clear plan in place to resolve cases against individuals involved in the wrongdoing
6. Civil investigations should focus on individuals and consider bringing a lawsuit against an individual based on considerations other than whether or not that individual can pay any fine that may be imposed

The Yates Memo Implements Steps DOJ Will Follow in Order to Increase its Focus to Hold Individuals Accountable, cont'd

- Considerations:

- Separate counsel for individuals must be careful in deciding what information it shares with company counsel
- It is probably not a good idea to share experts
- Individuals who may be culpable will likely insist on separate counsel ab initio
- Where there is a parallel government investigation, separate counsel representing culpable individuals will try to get immunity, since they should expect company counsel will disclose incriminating/aggravating facts to the government

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