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ALERT

Six Steps to Prevent Disclosure of Internal Investigation Reports

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A federal court in Washington, DC sent shockwaves through the government contractor community this month when it ordered a company to produce confidential internal investigation reports to a *qui tam* plaintiff in a False Claims Act case. The reports, which the court called "eye-openers," contained sensitive—and reportedly embarrassing—information about employee misconduct. While the correctness of the ruling may be decided on appeal, there are lessons to be learned from the decision, right now, for companies as they carry out inquiries into compliance-related matters. This alert explains why the ruling occurred and suggests practical steps to strengthen your privilege claim and avoid suffering the same fate.

The Court's Ruling

In *United States ex rel. Barko v. Halliburton Co.*, 2014 WL 1016784 (D. D.C. Mar. 6, 2014), a *qui tam* plaintiff moved to compel investigation reports prepared by defendant Kellogg Brown & Root in response to hotline tips. The findings in the report covered a wide range of activity governed by the company's Code of Business Conduct, including acceptance of kickbacks from subcontractors, bid-rigging, and poor oversight of subcontractor performance and billing. Company investigators, under the management of the Director of the Code of Business Conduct, would interview employees and review relevant documents. The investigators were not attorneys. Witnesses signed statements agreeing to keep the interview confidential because of the "sensitive nature of the review." The investigators would prepare reports of their findings, which would be transmitted to the company's law department.

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The court rejected arguments that the reports were attorney-client privileged or attorney work product, finding they were a "routine corporate . . . compliance investigation required by regulatory law and corporate policy." The court viewed the investigations as implementing the Federal Acquisition Regulation (FAR), which generally requires contractors to maintain internal controls for compliance, internal audits, disciplinary action for improper conduct, and timely reporting to appropriate government officials, among other things. To the court, these investigations were for business, not legal, advice.

In an emergency filing, the defendant has asked the D.C. Circuit to vacate the district court order in a writ of mandamus.

Practical Steps to Prevent Disclosure

While no measure will guarantee confidentiality of an internal investigation, there are several steps a company can take to maximize the likelihood a court will view the investigation as privileged and prevent disclosure of an internal investigation report:

- **Authorize the investigation "for the purpose of obtaining legal advice and assessing litigation risk."** The defendants in the *Barko* case may have created a compliance program for legal purposes, but to the court, legal advice appeared to be only a secondary consideration. To prevent disclosure of investigation reports, the company should memorialize that the investigation is for the purpose of obtaining legal advice and assessing litigation risk. The best time to document this purpose is at the outset of the investigation in a written communication authorizing the investigator to begin, and in the initial "document hold" notice issued when the inquiry commences. Investigators should then repeat that language in each interview conducted, and each interview memo or investigation report they prepare.
- **Involve a lawyer in each stage of the investigation.** One takeaway from the *Barko* case is that it is not enough for attorneys to set up a compliance program and then wait to receive fact-finding reports before rendering legal advice. To claim privilege over the full investigation, an attorney should be involved from the outset. The best practice is for counsel to plan the investigation, coordinate document collection, lead witness interviews, and oversee reports. Non-attorneys can assist with the investigation, but the record should clearly reflect that their work is at the direction of counsel.
- **Inform witnesses that the investigation is for the purpose of obtaining legal advice.** Employees interviewed in the *Barko* matter were not informed that the investigation was for a legal purpose. It was also not apparent from the circumstances: non-attorneys conducted the interviews, and witnesses signed statements acknowledging only the "confidential" and "sensitive" nature of the investigation. A company's claim to privilege will be strongest when employees hear at the beginning of the interview that the investigation (or "internal review") is for legal purposes. The presence of an attorney will reinforce that message. If a memo of the interview is created, it should memorialize the message that was delivered to the witness. If a witness signs a statement, it should acknowledge explicitly that the interview is "for legal purposes" and that confidentiality is "necessary to preserve attorney-client privilege."

- **Mark all communications appropriately.** Communications to or from counsel in connection with an investigation should be marked as "attorney-client privileged." Similarly, communications, analyses, and reports prepared by counsel should be labeled as "attorney work product." Any documents or communications created by non-attorneys in connection with the investigation should be marked "created at the direction of counsel."
- **Combine factual reports with legal analysis and impressions.** Legal analyses and impressions enjoy much greater protection under the attorney work product doctrine than factual notes, even when an attorney is the author. Accordingly, when drafting interview memos that are for internal review only, avoid styling the memo as a transcription—in fact, it is a good practice to specifically state that the memo is not verbatim. Organize the memo by topic (even if the interview jumped around) and prioritize the most important issues from a legal perspective. When drafting privileged investigation reports, add a legal analysis to the factual account. For every document that you intend to keep confidential, include a disclaimer at the beginning that explains the legal nature of the work product. If, on the other hand, you are intentionally drafting a document that can be shared with the government or an outside auditor —*i.e.*, a summary of the results of the investigation—keep the contents strictly limited to the facts and avoid including any legal analysis or impressions. This will minimize the chances that the intentional disclosure of a single document is considered a waiver of privilege for the rest of the investigation.
- **Consider retaining outside counsel.** For an added layer of protection, involve outside counsel in sensitive investigations. In rejecting the privilege claim, the *Barko* judge noted the absence of outside counsel, calling the compliance investigation "routine." The *Barko* judge contrasted this practice with the Supreme Court's decision in *Upjohn Co. v. United States*, where the "internal investigation was conducted only after attorneys for the legal department conferred with outside counsel on whether and how to conduct an internal investigation."

Each internal investigation is unique, and a company's approach will need to vary with the circumstances. Following these practices will help strengthen a claim to privilege, but counsel should be careful to assess the risks of disclosure at each stage in the investigation.