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INTERNAL INVESTIGATIONS

Keep This Between Us—and the Government: Confidentiality of Witness Interviews in Corporate Internal Investigations

BY JOHN E. CLABBY AND JONATHAN C. STERLING

Internal investigations into suspected employee wrongdoing are particularly tricky for in-house counsel, who must protect corporate confidentiality, be mindful of regulatory reporting requirements, and respect labor agreements and employee rights. As a practical matter, company lawyers also do not want to scare off an employee from providing information that the lawyers need to provide competent legal advice to their clients. This article will discuss recent developments of the law of internal investigation confidentiality, making some practical recommendations for in-house counsel along the way.

John E. Clabby, a former criminal assistant U.S. attorney, practices in Carlton Fields' Tampa office, where he leads the firm's Securities and Derivative Litigation Practice Group. Clabby can be reached at jclabby@carltonfields.com.

Jonathan C. Sterling practices in Carlton Fields' Hartford office, where he defends management in labor and employment litigation and maintains an extensive compliance practice. Sterling can be reached at jsterling@carltonfields.com.

The Standard Warnings

In-house or outside counsel sitting down with an employee as part of an investigation typically give an oral version of what is known as the ''*Upjohn* warning.'' This disclaimer takes its name from *Upjohn Co. v. United States*, 449 U.S. 383 (1981), where the U.S. Supreme Court held that the corporate privilege was not waived despite the corporate lawyer's communication with employees, who might otherwise have been viewed as third parties. This warning, also known as the ''Corporate *Miranda* Warning,'' could be described as having four components:

1. Counsel represents only the company and not the employee as an individual.
2. Counsel is conducting this interview to gather facts to provide legal advice to the company.
3. The attorney-client privilege belongs to the company, and not the individual. The company may later waive this privilege and disclose what the employee said to a government agency, to a court, or to another third party.
4. The employee may not disclose the substance of this interview to any third party, except the employee's lawyer.

The exact contours of the second, third and fourth warnings, and corporate policies as to confidentiality of internal investigations generally, have been impacted by a recent U.S. circuit case, a Securities and Exchange Commission settlement, and a policy shift for the Department of Justice.

When Confidentiality Encroaches Collective Bargaining

Two months ago, the U.S. Court of Appeals for the District of Columbia Circuit found that an employer's investigative confidentiality rule was too broad because

it could interfere with worker's collective bargaining rights. In *Hyundai America Shipping v. NLRB*, 805 F.3d 309 (D.C. Cir. 2015), the court reviewed a 2011 National Labor Relations Board decision invalidating an oral rule that prohibited employees from revealing information about any matter under investigation (65 CARE 65, 11/10/15). The NLRB determined that the rule violated the National Labor Relations Act, which prohibits employers from interfering with workers' rights to form unions, bargain collectively, and engage in similar concerted activities. The court found that the NLRB's application of the law to Hyundai's rule was reasonable and upheld its decision.

The court found that the rule clearly limited employees' NLRA rights to discuss their employment. It concluded that the rule lacked a legitimate and substantial business justification that outweighed this adverse effect on employees. The court acknowledged that there might be situations where investigation confidentiality was appropriate or even required, such as a sexual harassment investigation, but that a blanket rule requiring confidentiality in all investigations was not justified. It is important to note that the NLRB's scrutiny of confidentiality is not limited to unionized workplaces; the NLRB asserts that non-union workers have the same rights to organize and collectively bargain, even if they have not actually done so.

Four lessons from *Hyundai* are as follows:

1. Investigation confidentiality rules will be closely scrutinized by the NLRB and courts.
2. Confidentiality rules must be based on a legitimate and substantial business justification that outweighs employees' interests in discussing the terms and conditions of employment.
3. Even if confidentiality is appropriate for certain types of investigations, that does not mean it is justified for all investigations.
4. The scrutiny of investigation confidentiality under the NLRA is not limited to unionized workplaces.

Based on these considerations, corporate investigators should analyze carefully whether the fourth component of the *Upjohn* warning is appropriate for the particular subject under investigation, and corporate policy makers should generally avoid a blanket confidentiality rule for all investigations if that rule applies irrespective of subject matter.

When Whistle-Blowers Are Perceived To Be Muzzled

The NLRB is not the only regulatory body scrutinizing investigation confidentiality. In April of last year, the SEC announced an enforcement action against and settlement with KBR Inc., in connection with allegedly using improperly restrictive language in written confidentiality agreements used in internal investigations. The SEC touted the settlement as the first whistle-blower protection case against a company for using improperly restrictive language in confidentiality agreements. Under the settlement, KBR, without admitting to any wrongdoing, agreed to pay a $130,000 penalty and make certain changes to its internal investigation practices (13 CARE 711, 4/3/15).

The concern on the part of the SEC was the potential for these warnings to stifle the whistle-blowing process. As the SEC reported, the document stated that the employee could be subject to discipline including termination if she discussed with third parties the internal investigation interview or ''the subject matter discussed during the interview,'' without first clearing the communication with corporate counsel. This is an extension of the traditional advice on *Upjohn*'s fourth component noted above. There are several lessons to note from the KBR settlement.

First, the challenged warnings instructed the employee not to discuss even the ''subject matter'' of the interview with third parties. This goes beyond the standard *Upjohn* warning. Corporate counsel should be mindful of the distinction between restrictions on discussing with a third party what was said to the counsel in the interview (which is privileged) and discussing the underlying facts themselves (which are not). In light of this distinction, some practitioners add language to the fourth *Upjohn* item noted above to this effect: ''The employee may discuss the underlying events with anyone, but not what was said during the discussion with the corporate lawyer.''

Second, the warnings that KBR gave were in writing and, in some cases, had to be signed by employees. It is typically sufficient to give *Upjohn* warnings orally, memorializing them in an interview memo only. In-house counsel, particularly those with public companies or in heavily regulated industries, should work closely with experienced outside counsel before adopting a written confidentiality statement that an employee must sign as part of an internal investigation.

Corporate counsel who have such confidentiality agreements for internal investigations—whether at public companies or not—should review them in light of the KBR matter.

Third, the investigations for which KBR required these agreements included those into possible securities law violations. The matter therefore related explicitly to 1934 Securities Exchange Act Rule 21F-17(a) enacted under the Dodd-Frank Act. This rule provides that ''[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.'' 17 C.F.R. § 240.21F-17(a). This matter, then, is of particular concern for public companies, accounting firms, and those that do business with public companies.

Fourth, the SEC brought the enforcement action despite finding that it was unaware of any instances in which KBR actually prevented an employee from communicating with the SEC about a potential securities law violation. What appear to have irked the SEC were the preclearance requirement and the explicit penalty of disciplinary action, which could have a serious chilling impact that is difficult to measure. The SEC's focus

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here is on prevention, beyond just enforcement of any particular instances of whistle-blower interference. As part of its settlement, KBR amended its confidentiality language to state that employees are free to report possible violations to the SEC and other federal agencies without prior approval or fear of retaliation.

In sum, there are four lessons from the KBR matter:

1. The privilege applies to what the employee has told corporate counsel during the interview, but not to an employee's sharing the underlying facts with a third party.
2. Written, acknowledged warnings are often not necessary, and standard, oral *Upjohn* warnings can suffice.
3. Public companies investigating securities law violations should consider explicit warning language to allow communications to the government about suspected violations.
4. Without such an exception, companies should think carefully before deploying preclearance requirements or explicit warnings of disciplinary action when the controlled information could relate to securities law violations.

This enforcement priority continues for the SEC. In the agency's 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program, released on Nov. 16, 2015, the SEC stated that it would ''continue to focus on agreements that have language that reasonably could have the effect of impeding whistle-blowers from reporting securities violations to the Commission'' (69 CARE, 11/17/15). Corporate counsel who have such confidentiality agreements for internal investigations—whether at public companies or not—should review them in light of the KBR matter.

When Corporate Counsel Might Disclose To the DOJ

The *Hyundai* case and the KBR settlement concerned warnings that were arguably too restrictive in interfering with an employee's protected rights to communicate the underlying facts relayed in an otherwise privileged interview. Another recent development could impact whether more specific warnings as to the use of the information might be necessary.

In a memo released in September 2015, DOJ Deputy Attorney General Sally Yates set out a new investigation policy that raises the risk that companies may have to turn over damaging information on their employees in order for the company to qualify for cooperation credit in the resolution of a government investigation (13 CARE 1952, 9/11/15). The Yates memo has particular impact on corporate internal investigations, which are the tools that companies use to gather information on employees whom the company or the DOJ suspects of wrongdoing.

The memo announced six areas of policy emphasis. While the first area is critical for an in-house counsel in charge of internal investigations, the remaining five provide important context for this shift in focus for the DOJ from corporate to individual accountability:

1. To be eligible for any cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct.
2. Both DOJ criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
3. The DOJ's criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
5. DOJ attorneys should not resolve corporate cases without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.
6. DOJ civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

These areas of emphasis should prompt reflection on the second and third components of the traditional *Upjohn* warning, and, unfortunately, raise more questions than answers for the conscientious practitioner. That is, for the second component, counsel normally would state that counsel is conducting this interview to gather facts to provide legal advice to the company. Should counsel change that warning in some way when another purpose of the interview is to gather what facts the lawyer can so that the company can turn them over to the DOJ to receive cooperation credit?

The third component typically includes language that the company may later waive the corporate privilege and disclose what the employee said to a government agency. When it is far more certain that the corporate counsel conducting the interview is serving as a proxy for the DOJ investigation, does that warning need to change from ''may'' to ''will likely,'' and should the warning include more detail about the DOJ investigation?

The confidentiality of internal investigations is an evolving legal landscape.

The answer to both of these questions will in most cases be ''no,'' but there is ambiguity throughout and little case law to guide practitioners. The warning is typically considered first as a tool to preserve the corporate privilege and avoid ethical conflicts of interest rather than primarily as a tool to protect the employee from speaking when he or she should not be. While an attorney must be truthful, the employee, particularly one suspected of wrongdoing that puts the company at risk of liability, typically does not need to be informed of every possible purpose of the interview and use of the information.

The Yates memo, for its part, includes nothing about how these policy shifts will impact the job of the corpo-

rate attorney charged with gathering these facts during an internal investigation. Nor does the memo discuss in any detail how this will impact current DOJ policy on waiver of the corporate privilege in exchange for cooperation credit.

Finally, additional questions remain as to how this new policy will impact a corporation's internal investigation that commenced upon initial, internal evidence of wrongdoing, but that then is complicated when the company learns of a DOJ investigation into the same alleged wrongdoing. Such an unhappy revelation is not uncommon for in-house counsel at government contractors doing investigations into potential false claims or for in-house counsel at international businesses looking into allegations of benefits conferred to foreign officials. Should a company change its warnings at that time?

Depending on the seriousness and the extent of the alleged wrongdoing under investigation, close coordination with experienced outside counsel will be critical when companies are interviewing witnesses and gathering evidence in the shadow of a DOJ investigation or in cases where such an investigation is likely.

The confidentiality of internal investigations is an evolving legal landscape. The traditional Corporate *Miranda* Warnings have evolved over time, continue to evolve, and should be tailored to the specific matter under investigation. In-house counsel must now carefully weigh the following considerations that have developed from recent regulatory and court activity:

1. Any investigation confidentiality must be based upon a legitimate and substantial business justification, and narrowly articulated to avoid blanket rules regarding all types of investigations.

2. Corporate counsel for public companies or those who wish to deploy written, acknowledged warnings or confidentiality agreements in a particular investigation, should make clear that the employees may share the underlying facts that are the subject of the interview with the government, particularly if an investigation concerns compliance with the securities laws.

3. When an internal investigation is in the shadow of a government civil or criminal investigation, at a minimum a heightened importance should be placed on the warning that the company may at a later point choose to waive the corporate privilege and share the information with the government.

4. Finally, corporate internal investigations should be conducted by trained, experienced personnel who are knowledgeable of the law of attorney-client privilege and work product protections.

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