

A New Day: New Department of Justice Memo to Increase Prosecutions of White Collar Executives and Other Employees [PODCAST]

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New policy changes implemented by the DOJ will likely make it more difficult for companies to resolve investigations, and will increase exposure of senior corporate executives. This podcast, featuring Carlton Fields attorneys Kevin Napper and Ed Page, provides an overview of the key policy changes outlined in the DOJ memo.

TRANSCRIPT

Ed: Thank you. Good morning. Now Kevin, this is Ed. I wanted to chat with you about the September 9, 2015 memo from the United States Department of Justice. Sally Yates, Deputy Attorney General, issued this memo and the subject line is the focus of our discussion today. It states and provides individual accountability for corporate wrongdoing. In the first page of the memo, it says, "One of the most effective ways to combat corporate misconduct is by seeking accountability from the

individuals who perpetuated the wrongdoing." Now, you know corporations are comprised of individuals, so when you're doing an inquiry into corporate deeds...bad deeds and the like, what is your charge and who's your client?

Kevin: Your client is the company and/or the corporation and your charge is to interview everyone who may have touched the problem. So, when you're brought in, you interview every employee starting top to bottom or bottom to top who had some involvement with the issue at hand.

Ed: And is this called the fact finding part of the investigation or as we call it nowadays, internal investigation?

Kevin: It is.

Ed: And your object in this...your client is the corporation and the object is what?

Kevin: To run the issue to ground zero and find who is responsible. Who touched the problem? Who knew about it? And when did they know about it? And what did they do about it?

Ed: Now, this Department of Justice memo we're talking about dated September 9, this obligates the company to do several different things in order to obtain what's called substantial assistance or cooperation credit to try to lessen the penalty and its exposure for fines, forfeiture, debarment, and other things like that, correct?

Kevin: Correct.

Ed: So, I'm aware that the policy, effective September 9, has several components in it, and I'd like ask you some questions about it.

Kevin: Sure.

Ed: The first one of the components is to...states as follows, "To be eligible for any cooperation credit, corporations must provide to the department all relevant facts about the individuals involved in corporate misconduct." Is that a change or has that remained the same from your perspective?

Kevin: From my perspective, that's no different than what prior policy has been. This September 9 memo by DAG Yates, puts in writing what DOJ policy is going forward, but in my experience, the policy has always been to provide information about the individuals accountable or responsible for a particular issue.

Ed: In a prosecution, whether it's state or federal, the state prosecutor or federal prosecutor is always looking for all the facts to determine who's involved in a potential federal or state criminal problem or scenario, correct?

Kevin: Correct.

Ed: So they're interested in what the facts are regarding the individuals because the individuals, in effect, speak for the corporation.

Kevin: Correct.

Ed: The corporation is just a legal fiction.

Kevin: Right.

Ed: It's all about the people and always has been, correct?

Kevin: That's right.

Ed: So, when this fact finding is undertaken and you're asking your questions, tell us what this really looks like when you're in the room so to speak and doing the fact finding and interviewing a person. How does it unfold?

Kevin: Right. Typically, if you're representing the corporation, you would give an employee what are called Upjohn warnings, and you tell the employee that you represent the company, you don't represent them individually, that the attorney-client privilege is held by the company, that at some point, the company may waive the attorney-client privilege and provide the information provided by the employee to the government or to law enforcement, whatever the case maybe, and...

Ed: Including the Department of Justice?

Kevin: Correct. Whether it's a Department of Justice prosecutor, an Associate United States attorney or a state prosecutor, someone from a state Attorney General's office who's handling an investigation.

Ed: I already feel out of balance. I'm an employee. I'm not in the executive suite, the C-suite as it's called. I'm just an accountant in the accounting department, but I hypothetically know of some impropriety within the corporation. You come in and tell me you don't represent me, I need to talk, the privilege that I thought I might have with you is non-existent, and finally, that you can turn the

information over to the government. From my mouth to your piece of paper and interview memo to the government. Why should I even talk to you?

Kevin: And that's a good question. I'll tell you, the blogosphere has blown up in the last week or two since the Department issued this memorandum with discussion over, in fact, should employees talk, and you and I, of course, in some instances, represent employees and we may counsel our clients not to talk to company counsel who's doing an interview because ultimately that information may be provided to the government. And I would expect it to be now under the DAG Yates memo. And the employee may have criminal liability as a result. The employee may be terminated and obviously it's the employee's decision if they want to keep their mouth shut so to speak and risk termination or talk to the lawyers for the company and ultimately risk prosecution down the road or some other sanction.

Ed: So, you're setting up, as I hear, this conflict between an employee who wants to keep his job, feed his family, make a living, send his kid to college, and his obligation or desire in those areas versus the corporation's desire to pull every single piece of information out of them to then give it to the government under this memo that we're talking about of September 9 which says we need all the facts, otherwise, the corporation won't get sufficient or enough credit. They want to maximize the information to maximize the credit to lessen the sentence, correct?

Kevin: Correct.

Ed: It's called...it's really a trade. Talk more, give me more bad facts, and then the corporation's ultimate penalty and sanctions are fewer or less. Is that fair?

Kevin: Fair.

Ed: So how do we resolve that tension? What happens?

Kevin: It's a very difficult problem. And it remains to be seen how ultimately it will resolve under this new policy. The bloggers have pointed out in just recent days that lower level employees seem to be the ones being thrown under the bus so to speak. The senior management, perhaps the C-suite folks, who perhaps made more money, probably made more money, big bonuses as a result of alleged improprieties, they may be more protected under this policy. Perhaps it's a new day, perhaps they're not.

Ed: So let's go through a hypothetical dialogue that you might have with a CEO and President of a large publicly traded corporation in view of this memo. Let's start off by going back and forth about what that initial couple minutes might look like in view of this new September 9 policy because it seems to me this policy highlights the corporation's duty and obligation to gather every single

possible bad fact, and to turn it over to the government. And now with that highlighting, isn't it probable that the President and CEO would obligate you as the lawyer for the corporation in this internal investigation to by God, do it to perfection, and be methodical about it?

Kevin: I think they would.

Ed: All right, so let's...what would that dialogue look like. I'm the CEO, what are you telling me?

Kevin: I would tell you as the CEO that we are going to leave no stone unturned, that we're going to interview every employee who may have touched the issue, that we are going to recommend to the CEO, as the leader of the company, at the end of the day, to turn that information over to the Department of Justice.

Ed: Because as me, as the CEO, I want as much credit as possible. I want to try to avoid, to use a recent example, that \$900 million of forfeiture that was enforced that was imposed on General Motors according to the US attorney for the southern district of New York in his press comments and press release on September 17, 2015.

Kevin: Correct.

Ed: To use an ongoing and just growing and burgeoning example, Volkswagen now has an issue. Same issue or process would go on if you were to undertake the internal investigation to uncover the facts that led to the allegations there of VW programming its software to pass EPA's emission test.

Kevin: Right.

Ed: You'd be telling the CEO of VW, "Look, to get the maximum credit, we need to find out all the facts regarding all the employees who touched it, and then provide that information, from the lowest level employee up through management, to the Department of Justice."

Kevin: Correct

Ed: So one of the other factors in these 9/9/2015 memo states as follows, "Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation." Is that a change in policy from the Department of Justice?

Kevin: In my view, it's really not. It just, again, puts in writing out there for DOJ employees and prosecutors that the criminal side should work with the civil side, share information, and focus on the individual in their investigations.

Ed: Yet another factor is this, absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals. So the Department is taking a stance here in its policy and in effect, could you sum that up for us and tell us what it really means?

Kevin: Sure. As a practical matter, I don't know that it necessarily is a change from past practices. You know, some of the blogs have suggested that in a cynical way, that DOJ it's all about the money and that in the past, DOJ has resolved corporate prosecutions by extracting large sums of money from corporations and essentially letting the wrongdoers go free so to speak, the executives who may have been running the company at the time of the alleged wrongdoing. But in fact, in my experience, and my view is that DOJ always attempts go after the individuals if there's a provable case. They may extract money from the company to resolve the matter as to the company but they're not going to put the company out of business if they can help it. GM being the most recent example, paying a \$900 million penalty. The US Attorney has indicated in the GM prosecution that they "aren't finished yet with that investigation and intend to proceed against individuals." It remains to be seen if in fact they will proceed against individuals but there was not a resolution or an agreement with the Department of Justice that no individuals would be prosecuted.

Ed: But, for example, you mentioned the GM resolution in the Southern District of New York on September 17, 2015. Were any individuals charged or indicted that day?

Kevin: There were not.

Ed: So, it was just General Motors

Kevin: Correct.

Ed: And why is that, in your view, this GM resolution of a \$900 million forfeiture was not done simultaneously with the indictment or charging of other individuals? What's going on here?

Kevin: Well, one, it's about the money. You know, typically, DOJ would want to proceed against employees if they can within the applicable statute of limitations. In this case, DOJ opted to resolve it against the company. You know, as I said, it remains to be seen if they will proceed against culpable individuals. The US Attorney, in a subsequent press conference, indicated that the matter is not over and they intend to proceed but that remains to be seen.

Ed: There's an unwritten rule in criminal prosecution and that is as follows, I've never seen in print, but it states and it puts as follows, "If the prosecution is going to do more time than a prospective defendant, meaning involved in the investigation in uncovering the facts and prosecuting it, then that defendant, an individual or corporation, doesn't get prosecuted." Do you agree with that?

Kevin: Yes

Ed: So in other words, if I'm going to spend a year to prosecute someone who's gonna get a year of probation, it really doesn't get done, does it?

Kevin: It doesn't.

Ed: Even though the facts might be there that warrant it, if I would spend the time to uncover the facts, charge the individual and prosecute him?

Kevin: Right. Correct.

Ed: So how does that play out with this September 9, Department of Justice memo? Doesn't it kind of tell us that, yes, we're going after individuals, and this highlights this, but we're still doing this balancing act of do I have enough time, resources, and energy to go over after everybody or should I draw a line somewhere?

Kevin: Right, and DOJ always does that. I mean, they are limited by resources, they are limited by general policy, and what they want out in terms of publicity on prosecutions. You know, if they believe that a crime has been committed, will they proceed against it? Yeah, generally speaking, yes. But there's a balancing act as to how much resources they want to put in to investigating and prosecuting somebody who, at the end of the day, may not have any money to turn over to the government, and may not get a stiff sanction.

Ed: So, to be fair and balanced in discussing this DOJ memo, it's possible, sometimes maybe even probable, that if a low level individual cooperated, gave you facts in the internal investigation that you then turned over to the Department of Justice, that they may not get prosecuted anyway because the government, the Department of Justice, or a state prosecution, or Attorney General's office might say, "too low, not involved enough, too time consuming," or the like, and that person might escape or avoid a prosecution?

Kevin: Correct.

Ed: Is that accurate?

Kevin: I think that's accurate.

Ed: In all these people that we've been discussing where you bring in, as you said, corporate employees and interview them, pass the information on up to chain, and perhaps to the Department of Justice. Do they have lawyers?

Kevin: They do.

Ed: And some can go without lawyers, and some, I take it, would choose to have lawyers and those who choose to have lawyers, how does that work? How are those lawyers paid for? Does it come of the individual employee's pockets or from the corporation or what?

Kevin: Typically, the company provides counsel for its employees, even lower level employees. They may, if they determine...if counsel determines that there's not a conflict situation, they may hire what's called pool council. Someone, a law firm, or an individual who can represent a number of lower level employees to interact with the government agents to prepare them for interviews and the like. They may counsel the employee in the interview by the lawyer representing the company the company. You get the tension where, if the counsel advises the employee not to agree to be interviewed, if the lawyer determines that it's not in the employee's best interest to submit to an interview either by company council or by government agents or government prosecutors. And then, it becomes an issue as to whether or not the employee remains employed.

Ed: You said the company provides a lawyer for this employee. Does that also mean that the company pays for that lawyer for the employee?

Kevin: Yes.

Ed: And this is a different lawyer than the lawyer who does the internal investigation?

Kevin: Correct.

Ed: So sounds like we've got more than one lawyer involved in this scenario.

Kevin: You do, and in fact, in many of this internal investigations, you may have 20, 30, 40 different lawyers or law firms representing different individuals. You may have individual, and usually have individual counsel for each of the senior executives. You may have pool counsel for...what's called pool counsel for low level employees.

Ed: A pool council meaning one lawyer representing several employees.

Kevin: Correct.

Ed: So the company pays for those lawyers who represent the employees.

Kevin: Correct. But the...you know, it's not unlike any third-party payer situation where an insurance company for example hires a lawyer to represent a doctor. For example, let's say in a medical

malpractice case. The lawyer's duty of loyalty, and the duty of confidentiality, and the attorney-client privilege is between the lawyer and the doctor and the lawyer doesn't compromise the doctor's interest even though the lawyer's fees are being paid by an insurance company.

Ed: And parents pay the legal fees for their children who get involved in criminal and other problems as well, too.

Kevin: Correct.

Ed: It's called a third-party fee payer, isn't it?

Kevin: Correct, yes.

Ed: And the rules permit that.

Kevin: They do.

Ed: And the rules obligate that lawyer to explain to the client that someone else is paying the fees but my obligation, my duty of loyalty, my master in this matter, as I like to call it, is the client.

Kevin: Is you, Mr. or Mrs. Client. Correct.

Ed: So let's sum up here on this September 9, 2015 memo. We've talked about a variety of topics including the investigation, the employee, the employee gets possibly thrown under the bus, sometimes the Department of Justice doesn't go after even the employee thrown under the bus because we don't...they don't need to or it's ineffective or it costs too much or there's too much work involved or what have you. But at the end of the day, we have this new policy, and it seems to me that it possibly can highlight for a corporation and employees, the tension that's involved here between the corporation's obligation to get cooperation credits. In other words, I want extra credit. This is the parallel. The analogy's, "I want extra credit, teacher." And the teacher is the Department of Justice, and to get that I have to include and give them all relevant, pertinent information that may implicate employees. Right?

Kevin: Correct.

Ed: And to do that, I gather the facts and give them to the Department of Justice.

Kevin: That's right.

Ed: And how it ultimately plays out is anybody's guess in an individual situation.

Kevin: Correct.

Ed: Comments about that?

Kevin: Well, the speculation is that this policy will increase individual prosecutions going forward. Now, obviously, it's too soon. It's been less than two weeks since the policy was implemented or issued in DAG Yates' memo but the speculation is that it will increase individual prosecutions because the company, when it completes its fact finding will tie up the information in a little package and give it to the Department of Justice and individuals will be prosecuted.

Ed: Can we sum it up, really down at the grass roots level, that the Department of Justice wants its cake and wants to eat it too?

Kevin: Yes.

Ed: And it wants its cake, it wants the cooperation and it wants to eat it too, meaning it gets to prosecute not only the corporation but all of the individuals that it wants to devote energy and resources to.

Kevin: Absolutely true.

Ed: This is Ed Page. Thank you for listening today, I hope you've enjoyed the program and we'll have another one in a few weeks. Thank you.

Kevin: This is Kevin Napper. Thanks for listening and we will talk down the road.

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