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Tips for conducting effective internal corporate investigations

At some point during their existence, many corporations face the unfortunate need to conduct an internal investigation to either ferret out or confirm the details of employee malfeasance. This article provides some tips to assist in-house and outside counsel in ensuring that such investigations are conducted properly.

Identify the investigation's overall purpose

It is initially important to identify the investigation's purpose. The objectives of internal corporate investigations may differ. Goals common to almost all internal investigations include the desire to discover the existence and extent of employee malfeasance, to prevent any further malfeasance from occurring, to allow the executives to make informed remedial and disciplinary decisions and to implement timely remedial measures.

It is important to consider whether the investigation's goal will be to initiate criminal or civil actions against the employee, obtain recompense from the employee, bring legal action against third parties or additional employees who may be implicated or perhaps provide a report to a regulatory or licensing agency. The more clearly defined the investigation's purpose is the more thoroughly and efficiently it can be carried out.

Develop an action plan

Early in the process, develop an action plan. This plan should establish procedures for the initiation of a formal investigation and develop a written scope for the investigation to prevent the relevant parties from spending time and resources on tangential issues. An organization chart with assigned statement of responsibilities should be created. The location of relevant documents

must be identified.

If the investigation's target is a former or suspended employee, the plan needs to include the steps that will be taken to prevent existing employee contact with the targeted employee. Additionally, the plan should provide measures to ensure that the targeted employee is isolated from servers, clients and company documents. The employee's laptop and/or company phone will need to be secured, and the contents of the employee's office computer folders and materials will need to be preserved.

A list of search terms for computer document collection should be created. Additionally, it should be determined if there will be a need for outside expertise, and, if so, the relevant experts should be engaged.

Formulate a document collection plan and conduct a document sweep

In formulating a document collection plan, it is critical to de-

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termine who will be in charge of running the document sweep and also determine where relevant information and documents may be located. To this end, all potential document custodians must be identified.

In addition, either one or a small handful of individuals must be identified who will be in charge of collecting documents from all potential document custodians. A central repository for collected documents should also be identified.

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Early in the process, it is important to collect documents that may aid in the investigation such as the employee's master personnel file, the employee's performance appraisals, expense reports, documents from internal interviews, employee or corporate manuals or official codes of conduct and information from a prior investigation.

Take steps to protect corporation and attorney-client privilege throughout process

To ensure that the attorney-client privilege is protected through the investigation, it is first critical to determine how broadly the privilege applies in the relevant jurisdiction. Illinois applies the control group test.

Under this test, the corporation may assert the privilege over communications with those corporate constituents who have decision-making authority with respect to the relevant issue.

Other jurisdictions may apply the subject matter test enunciated by the Supreme Court in *Upjohn Co. v. United States*. Under this test, the privilege can extend to any employee who communicates with counsel at the direction of his

or her superiors, regarding matters within the scope of his or her duties.

It is important to keep in mind that the attorney-client privilege does not protect communications primarily regarding business advice. Thus, for the privilege to apply, the confidential communications must be primarily legal in nature.

Where the client is the corporation, such as in the context of an internal investigation, the attorney-client privilege generally applies to the organization rather than to any individual employee or officer. Thus, when interviewing employees, it is important that the employee be informed that he/she is not the client, but rather that the corporation is the client and that, therefore, no legal advice can be given.

Interview memos should be marked confidential. Have counsel take the only notes of the interview and include within the notes the attorney's mental impressions to increase the likelihood that the work-product privilege will apply.

Identify the individuals to interview and collect the facts

When conducting an internal investigation, it may be necessary to interview a variety of people. Make a list of all possible interviewees and the relevant subjects who will need to be discussed with each interviewee.

At a minimum, the following individuals should be interviewed: The employee who made the complaint or uncovered the wrong doing, the employee who is the subject of the investigation, witnesses to the conduct and authors of key documents.

When conducting interviews, remember that it is critical to obtain the information needed but at the same time, limit the number of interviewees so that the investigation remains efficient and focused.

By following these tips, internal investigations will be carried out in a thorough and professional manner.