

**ETHICS AND PRIVILEGES IN THE  
CONTEXT OF EMPLOYMENT  
INVESTIGATIONS**

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## I. INTRODUCTION<sup>1</sup>

The role of the lawyer in conducting corporate investigations has become increasingly important in recent years. Companies may undertake internal investigations for a variety of reasons, including identification and control of problems, compliance with federal and state regulations, investigative responsibility imposed by fiduciary statutes or existing consent decrees, and gathering information to defend in actual or threatened civil litigation.

Attorneys engaged to conduct internal investigations must be familiar with a variety of ethical, evidential and legal issues. Some of those issues relate to:

- the corporation as the client;
- the lawyer as a witness;
- the preservation of evidentiary privileges;
- joint representations; and
- the legality of the investigation under the federal Fair Credit and Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., the National Labor Relations Act ("NLRA"), 29 U.S.C. 151 et seq., and the Victim and Witness Protection Act, 18 U.S.C. § 1512 et seq. (the Federal witness tampering statute).

## II. THE CORPORATION AS THE CLIENT

### A. Rule 1.13(a): The Corporation is the client

Rule 1.13(a) provides that an attorney retained by a corporate entity to represent the entity's interests represents the corporation – not any individual employees. Whether the investigation concerns the corporation's Chief Executive Officer, the Vice President of Human Resources or General Counsel, the client is the corporation. No matter how close counsel is with his or her day-to-day contacts, the corporation's interest always must be paramount.

### B. Rule 1.7(a)(1): No joint representation during an investigation

Frequently, employees under investigation request representation by counsel. Rule 1.7(a)(1) provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to that of another client unless each client consents

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after consultation and the lawyer reasonably believes that the representation will not adversely affect that relationship with the other client. Although there may be occasions in litigation where the interest of the employer and an employee are parallel and, therefore, a joint representation can occur, that is not the case in the context of an investigation. First, at that early stage, there is little way for the lawyer to know whether a representation of an individual in an investigation will adversely affect the relationship with the corporate client. Indeed, no consultation on the subject could be meaningful enough for a client to validly consent. Second, the involvement of corporate counsel on behalf of an individual involved in an investigation would, at a minimum, create the appearance of a sham investigation and, potentially, make the lawyer a potential witness at a subsequent trial.

**C. Rule 1.7(b): No involvement where relationships with employer will materially limit the investigation**

Frequently, counsel have close relationships with high-ranking management representatives of corporate clients. Those representatives often are the people who hired or retained a lawyer, are the day-to-day contact and/or pay the bills. If counsel determines that he or she cannot maintain the requisite objectivity to conduct an appropriate and meaningful investigation, he or she must not undertake the investigation. In this regard, Rule 1.7(b) states: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . to a third person, or by the lawyer's own interests . . . ."

**D. Rule 1.13(d): Don't mislead an interviewee**

Rule 1.13 requires that an attorney must ensure that he or she does not mislead a non-client into concluding that the attorney represents anyone other than the corporation. Specifically, Model Rule 1.13 provides:

a. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

b. A lawyer representing an organization also may represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7 (governing conflict of interest). If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Additionally, corporate counsel has an ethical obligation to avoid misrepresenting his or her loyalties. Model Rule 4.3, "Dealing with Unrepresented Person," provides that: "When the lawyer knows or reasonably should know that the unrepresented person

misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

During the course of the interview, counsel must avoid any statements or comments that could be construed as an attempt to mislead the witness or to influence his or her possible testimony. Therefore, characterization of the company's position or the testimony of other witnesses should, to the extent possible, be avoided.

The District of Columbia Bar Legal Ethics Committee has provided guidance on the obligation of a lawyer to clarify his or her role in an internal corporate investigation. See D.C. Bar Op. No. 269, Obligation of a Lawyer for Corporation to Clarify Role in Internal Investigation (1997). According to the opinion, disclosure of a potential conflict of interest must be made whenever there "may be" an adversity between the interests of the corporation and employee. As to confidentiality, the opinion emphasizes the lawyer's responsibility to clarify the nature of the privileges available before interviewing corporate employee witnesses:

Notwithstanding the law on this subject, a corporate interviewee might reasonably conclude that the information she provides to the investigating lawyer will be treated as confidential by the lawyer, perhaps because she mistakenly believes that the lawyer is representing her also. This then is another situation in which Rule 4.3(b) and 1.13(b) may require the lawyer to clarify his role and the status of the information to be provided by the interviewee.

These ethical obligations are not merely academic. Investigative interviewees frequently will seek to confide in counsel with a preamble such as: "Just between you and me . . . ." Thus, it is essential that prior to conducting an employee interview and when such a comment is made, the interviewing attorney should advise the interviewee that s/he represents the company and not the employee witness personally. The attorney should advise the interviewee that although the conversation may be confidential under the attorney-client privilege, this privilege belongs to the company and that the company may waive the privilege at its discretion or that it may be necessary to disclose the subject-matter to others in order to complete a thorough investigation. See John F. Savarese and Carol Miller, Protecting Privilege and Dealing Fairly With Employees While Conducting an Internal Investigation, 1178 PLI/Corp 665, May 2000.<sup>2</sup> The safest thing to do is to have and maintain a written "script" so that you cannot later be accused of not having properly "Mirandized" the interviewee. The close of the interview will provide counsel with a convenient occasion to restate the employee's rights and counsel's role.

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<sup>2</sup> Compliance with these ethical obligations also should ensure that the lawyer does not place his or her client in violation of the NLRA, which requires that the attorney/investigator advise the employee of the purpose of the interview, confirm that the employee's participation is voluntary, and reassure the employee that no reprisals will result from the information that he provides. See Johnnie's Poultry Co., 146 NLRB 770, 775 (1964).

Often during an investigatory interview, the interviewee may inquire whether he should obtain counsel. In answering this question, the interviewing attorney must walk a fine line, not wanting to mislead the employee and at the same time not wanting to cause the employee to become overly cautious and less forthcoming during the interview. The attorney should respond that he or she is not in a position to advise the interviewee whether it would be advisable to obtain counsel, but that the purpose of the interview is simply to obtain complete and accurate information to assess whether the Company has any obligations to take further action to ensure it is in full compliance with all applicable laws. If the interviewee continues to express discomfort, you should not stand in the way of the obtainment of counsel. You may, however, decide that the presence of counsel is inappropriate and that, therefore, you may not wish to proceed with that interview.

Although these ethical obligations are, by their very nature, restrictive, a lawyer need not immediately give up the search for information when an interviewee becomes reticent. Experience reflects that if an interviewee wants to make a statement, he or she will do so. The lawyer simply is prohibited from misleading the interviewee into making the statement. The lawyer can and should use honest creativity to come up with ways to satisfy the interviewee that the information and the interviewee's identity will be maintained as confidentially as possible under the circumstances. In addition, there is nothing unethical about reminding the interviewee that the purpose of the investigation is to determine whether inappropriate or illegal conduct has taken place and that if the interviewee refuses to provide information critical to the investigation, the employer/client may be hamstrung in providing a better workplace where the interviewee and his or her colleagues can work comfortably and efficiently.

**E.     Rule 4.2: Ex Parte Communications**

Lawyers are generally prohibited from communicating with represented persons outside the presence of their attorney. However, in the case of corporations acting through individuals, it may be difficult to tell which persons are covered by this rule. Rule 4.2 prohibits communication with employees who are in the "litigation control group" as defined by Rule 1.13(a). This prohibition also applies to former employees who were in the litigation control group.

### III. THE IMPACT OF AN INVESTIGATION ON REPRESENTATION IN LITIGATION

#### A. Rule 3.7: The Lawyers as Witness

Rule 3.7 of the Model Rules provides that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where (1) the testimony relates to an uncontested issue; (ii) the testimony relates to the nature and value of legal services rendered in the case; or (iii) disqualification of the lawyer would work substantial hardship on the client. The Rules provide, however, that a lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 (concerning conflict of interest generally) or Rule 1.9 (concerning conflict of interest regarding former clients).

The lawyer who serves as both advocate and witness potentially harms both the client and the lawyer's adversary. The client is harmed if the lawyer's testimony contradicts that of the client or if the lawyer's credibility is impeached. The adversary is harmed by potential confusion of the jury as to the role of the lawyer/witness. The lawyer/witness also may find him or herself in the precarious situation of having to defend his or her own testimony, thus violating the rule against expressing opinions during argument. The disadvantage of preventing the lawyer from serving as a witness is that in the case of a long and complex investigation, the attorney may be the only witness who can present a coherent narrative. The lawyer also may be the most articulate witness available. Prohibiting the lawyer from serving as a witness also interferes with the client's choice of advocate and may result in increased costs – particularly when the lawyer is not identified as a witness until late in the litigation. These concerns have been exacerbated by parties who use disqualification motions as a tactical device.

Although Rule 3.7 would not necessarily prohibit an attorney in the firm of the investigating attorney to litigate a subsequent trial, such a strategy should be examined even before the investigation commences. As a practical reality, if a member of a firm is a witness at trial, the jury will be tasked with assessing credibility and inevitably will draw a conclusion as to that witness's likability. If the jury were to distrust and/or dislike the trial attorney's testifying partner, there very likely will be some guilt by association cast upon the member of the firm litigating the case. That, of course, is not in the best interest of the firm's client and is a risk that must be carefully assessed before its taking. Thus, although from outside counsel's perspective it is of concern because it may provide another firm with an introduction to your client, it may be advisable to bring in a separate firm to conduct an investigation if the client expects its regular outside counsel to litigate any subsequent lawsuit. From in-house counsel's perspective, the pros and cons of who will represent the client at a subsequent trial need to be raised with the client before the investigation commences to ensure that the client is well aware of all of its options. Although the cost of involving two firms may seem inefficient at first, the cost of having your case weakened by the testimony of your litigation Firm's own lawyers testifying and, worst yet, the cost of a disqualification motion in the course of litigation may far outstrip the cost of retaining a separate entity to conduct an investigation.

**B. Preserving Evidentiary Privileges for Subsequent Litigation**

Internal corporate investigations – investigations of suspected illegal activity or other misconduct by a corporation’s officers or employees – are increasingly common. These investigations, which are often the precursor to formal litigation or governmental investigation, are often conducted by attorneys. Unless carefully planned and executed, such an investigation can be counterproductive, privileges may be destroyed and future litigants may gain a roadmap for a claim of corporate liability. Thus, at the outset, an internal investigation should be designed to ensure that the investigatory work product developed is shielded from disclosure in any subsequent legal action, if that course is deemed appropriate.

Generally, a corporation may claim that the attorney-client and work product privileges and, to a lesser extent, the self-evaluative privilege protect the confidentiality of the communications and materials generated in connection with an internal investigation conducted by counsel. See Upjohn v. United States, 449 U.S. 383 (1981). However, recent decisions have made it clear that courts will not automatically respect the privileges simply because the person conducting or supervising the investigation is a lawyer. The company must be able to establish the traditional elements of these privileges in order to rely on the privileges to protect material from disclosure.

Additionally, it is important to recognize that these privileges have come increasingly under attack in recent years. Privilege is no longer sacrosanct; privilege claims are often challenged and these challenges are more often successful than they were in the past. Even where the privilege is sustained, the challenge may result in the judge’s in camera review of materials. Technological developments, such as e-mail and voicemail have raised complex new questions about privilege.

1. Attorney-Client Privilege

The attorney-client privilege generally protects communications between a lawyer and client for the purpose of enabling the lawyer to render legal advice. The necessary elements for invoking the privilege are: (1) a client; (2) a lawyer; and (3) a communication between them with an intent that the communication be confidential. See, e.g., Montgomery Cty. v. Microvote Corp., 175 F.3d 296 (3d Cir. 1999). Pursuant to Upjohn, supra, 449 U.S. 383, a corporation, like an individual client, may assert the privilege. Id. at 394-95 (holding that “. . . where communications at issue were made by corporate employees to counsel for corporation acting as such, at direction of corporate superiors in order to secure legal advice from counsel, and employees were aware that they were being questioned so that corporation could obtain advice, such communications were protected.”); Matter of Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124 (3d Cir. 1986) (holding that attorney-client privilege applies to corporations as well as individuals). Although the privilege applies to in-house as well as outside counsel, courts may scrutinize more closely assertions of privilege relating to communications from in-house lawyers to management. Compare United Jersey Bank v.

Wolosoff, 196 N.J. Super. 553, 483 A.2d. 821 (App. Div. 1984) (remanding decision regarding applicability of attorney-client privilege for further review where in-house counsel conducted investigation), with Nat'l Utility Svc., Inc. v. Sunshine Biscuits, Inc., 301 N.J. Super. 610, 694 A.2d. 319 (App. Div. 1997) (applying the privilege where in-house counsel acted in furtherance of litigation). In addition, in-house counsel often advise their clients when those clients are acting as fiduciaries for shareholders or employees. In those instances, the true client is the beneficiary of the fiduciary relationship and, therefore, the privilege would not protect against disclosure to those persons. See, e.g., Garner v. Wolfenbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971) (attorney-client privilege may be inapplicable in context of shareholder derivative action if good cause shown by plaintiff shareholder); Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982) (advice to ERISA plan fiduciary is advice on behalf of participants and, therefore, privilege against disclosure is held by participants).

In many internal investigations, the issues presented for review are likely to involve questions of both law and business. However, for a particular communication to be privileged it must be primarily or predominantly of a legal character. Harding v. Dana Transport, Inc., 914 F. Supp. 1084 (D.N.J. 1996) (counsel conducting investigation into sexual harassment allegations in furtherance of his representation of the company in connection with administrative charges was acting as attorney for purposes of attorney-client privilege); Nat'l Utility Svc., Inc., 301 N.J. Super. at 322, 694 A.2d. at 615.

The privilege only protects communications, it does not protect the underlying, pre-existing facts from disclosure. As the Supreme Court stated in Upjohn:

[T]he protection of the privilege extends only to communications and not to facts. . . . The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such facts into his communication to his attorney.

449 U.S. at 395-96 (quoting Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)). It is of course critical that the material sought to be protected be accorded confidential treatment or the privilege may be waived through disclosure to third parties. Id. 951 F.2d at 1414.

## 2. Work-Product Doctrine

The work product doctrine provides another basis to protect the confidentiality of materials generated during an internal investigation. In contrast to the attorney-client privilege which protects against disclosure of communications, the work product doctrine protects against disclosure of an attorney's mental impressions, conclusions, opinions or legal theories, to prevent the opposing side from benefiting from the fruits of their labor. As the Supreme Court recognized in Hickman v. Taylor, 329 U.S. 495, 510-11 (1947)

"were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten."

The Federal Rules of Civil Procedure recognize the need for this material to remain confidential. Rule 26(b)(3) provides that:

A party may obtain discovery of documents and tangible things otherwise discoverable . . . prepared in anticipation of litigation . . . by or for another party . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case . . . In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, or legal theories of an attorney or other representative of a party concerning the litigation.

See also N.J. Court Rules 4:10-2(c) (GANN).

Courts distinguish between "factual" and "opinion" work product. See, e.g., Upjohn, 449 U.S. at 400; Wagi v. Silver Ridge Park West, 243 N.J. Super. 547, 580 A.2d. 1093 (App. Div. 1989) (citing N.J. Court Rules 4:10-2(c)). Factual work product, which includes documents showing the underlying facts of the case, may be discoverable when substantial need and undue hardship can be demonstrated by an adversary. "Opinion" work product is not discoverable except upon a showing of extraordinary need and has been accorded absolute protection by some courts. See, e.g., Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985) (opinion work product "almost entirely immune" from disclosure).

For material to be prepared "in anticipation of litigation," the prospect of litigation must be identifiable. A remote possibility of litigation does not trigger work product protection, but "investigation by a federal agency presents more than a remote prospect of future litigation and provides reasonable grounds for anticipating litigation sufficient to trigger application of the work product doctrine." Pacamor Bearings, Inc. v. Minebea Co., Ltd., 918 F. Supp. 491, 513 (D. N.H. 1996), quoting Martin v. Monfort Inc., 150 F.R.D. 172 (D. Colo. 1993).

3.     The Self-Evaluative Privilege

Although courts and commentators refer to the self-evaluative or self-critical analysis privilege, it has not been broadly recognized. A recent case set forth the standard for applying the privilege:

The privilege of self-critical analysis exempts from disclosure deliberate and evaluative components of an organization's confidential materials. . . . The primary justification for this privilege is the encouragement of candor and frankness toward the ends of discovering the reasons for past problems and preventing future problems.

Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 544, 691 A.2d. 321, 331 (1997).

In Payton, the Supreme Court of New Jersey declined to adopt the privilege of self-critical analysis. The Court held instead that the concerns regarding such information should be addressed by "the exquisite weighing process' that our courts regularly undertake when determining whether to order disclosure of sensitive documents in a variety of contexts." 148 N.J. at 545, 691 A.2d. at 331. The Court then held that in the context of employment discrimination, "we believe that the balance generally will favor disclosure . . ." Id. at 549, 691 A.2d. at 333; see also Brunt v. Hunterdon County, 183 F.R.D. 181, 186 (D.N.J. 1998) (court declines to adopt "full-fledged privilege," holding that case-by-case balancing approach is sufficient to address self-critical analysis concerns); Reyes v. Meadowlands Hosp. Med. Ctr. 355 N.J. Super. 226, 236, 809 A.2d 875, 882 (2001) (refusing to invoke the self-critical analysis privilege, and ordering disclosure of information gathered during hospital's internal investigation process); Cloud v. Superior Court (Litton Indus.), 58 Cal. Rptr. 2d 365 (Cal. Ct. App. 1996) (California does not recognize a self-critical analysis privilege to shield an employer's internal assessment of its affirmative action plans and practices); Joe v. Prison Health Servs., Inc. 782 A.2d 24, 34-35 (Pa. Commw. 2001) (declining to apply self-critical analysis privilege, and noting that application of such privilege is appropriate only when the flow of the type of information sought would be curtailed if discovery were allowed); Harris-Lewis v. Mudge, No. 96-2349F, 1999 Mass. Super. Lexis 51, at \*7-8 (Feb. 18, 1999) (refusing to adopt the self-critical analysis privilege in Massachusetts, and ordering production of college's internal records concerning its athletes' drug use); Wealton v. Werner Enter., No. 99C-02-246-JOH, 2000 Del. Super. Lexis 385, at \*10 (Oct. 16, 2000) (declining to adopt the self-critical analysis privilege in Delaware, and ordering production of defendant's internal safety records); But see Sheppard v. Consolidated Edison, 893 F. Supp. 6 (E.D.N.Y. 1995) (defendant not required to disclose evaluative material in affirmative action study under self-critical analysis privilege); Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 387-88 (N.D. Ga. 2001) (holding that self-critical analysis privilege protected from disclosure defendant's reports concerning the company's work culture, including analysis regarding workplace diversity).

4. Waiver in Litigation

It is important to note that where attorney-client and/or work product privileges exist, they may be waived under certain circumstances. For example, waiver may occur where a company divulges information in cooperation with a government investigation. Additionally, if the employer raises its investigation of a sexual harassment claim as an affirmative defense, this may result in waiver of the privilege. See Payton v. N.J. Turnpike Auth., 148 N.J. at 554, 691 A.2d at 336. In Payton, the employer claimed that because it only had raised the result of its investigation as an affirmative defense and not the attorney's role in the investigation, it had not waived the attorney-client privilege. The Court rejected this argument, holding that the entire investigatory process was relevant to the plaintiff's attempt to overcome the affirmative defense and that consequently the defendant had waived the attorney-client privilege. Id. at 554. See also Harding v. Dana Transport, 914 F.Supp. 1084, 1099 (D. N.J. 1996) (holding that employer impliedly waived work product privilege by raising its investigation as a defense against a Title VII claim). In addition, the privileges can be waived through inadvertent disclosures under certain circumstances. Those circumstances are addressed in our separate outline on that topic, which is also contained in this book.

5. Practical Steps

In order to take all necessary steps to preserve the attorney-client privilege and the work product doctrine in the context of an investigation – even if the client later decides to waive it for strategic litigation purposes – the investigation must have a primarily legal purpose. To memorialize that legal advice is being sought, written authorization from the Board of Directors or senior officers of the corporation should be obtained, reflecting that counsel has been asked to assess possible legal problems or risks, rather than to conduct a factual inquiry. Thus, the written authorization should:

- identify particular practices that are thought to raise legal issues;
- refer to prior incidents that may have raised legal issues and liabilities;
- refer to the possibility of implementing changes in business practices to avoid future legal problems;
- distinguish, if possible, between the legal and purely business objectives of the investigation.

Because the more widespread the dissemination of confidential material, the greater the risk of waiver, the dissemination of confidential materials relating to the investigation should be severely limited and copies should go only to those on the investigative team as well as those members of management who need to see the document. Copies of all documents should be numbered and tracked, recipients should be instructed not to make additional copies of the document. All privileged documents

should be marked: "CONFIDENTIAL DO NOT DUPLICATE" and should contain the legend "PRIVILEGED AND CONFIDENTIAL/ATTORNEY WORK PRODUCT."

To ensure greater protection of the investigatory materials, notes should reflect counsel's mental impressions and legal theories and should not be verbatim transcripts of interviews. Documents generated by employees should be prefaced with an introductory paragraph specifying that they have been produced at the direction of counsel and have been designated for use by the lawyers to assist them in rendering legal advice to the company.

#### IV. CONDUCTING A LEGAL INVESTIGATION

The preamble to the Model Rules of Professional Responsibility states: "A lawyer should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." Accordingly, a fundamental precept to ensuring an ethical investigation is that the investigation should be conducted in accordance with all applicable law. In addition to other ethical requirements, there are several legal implications that now impact upon any internal corporate investigation.

##### A. Fair Credit Reporting Act (FCRA)<sup>3</sup>

###### 1. A Brief Overview of FCRA

In 1970, Congress enacted the Fair Credit Reporting Act (FCRA) in order to establish procedures governing the collection and use of consumer information regarding creditworthiness and general reputation. The purpose of FCRA, as reflected in its language and legislative history, is to address the effect of inaccurate credit reports on the financial system and the financial well-being of consumers. See 15 U.S.C. §1681(a)(1) (1998). In 1996, Congress passed the Consumer Credit Reporting Reform Act, which expanded FCRA's procedural requirements for the acquisition and use of consumer reports in the employment context.

FCRA requires that an employer or others seeking a credit report from a credit reporting agency (1) provide advance written notice to the employee of intent to obtain the report; (2) get the written consent of the employee; (3) provide the employee upon request a description of the nature and scope of the proposed investigation; (4) release the unredacted investigative report to the employee; and (5) notify the employee of his or her FCRA rights<sup>4</sup> prior to any adverse employment action.

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<sup>3</sup> Some states have parallel legislation. For example, the New Jersey Fair Credit and Reporting Act is substantially the same as the federal statute. N.J. Stat. Ann. §56:11-28 et. seq. (West 2000).

<sup>4</sup> Under FCRA, an employee who has been or will be subjected to adverse employment action has the right to obtain the name, address, and phone number of the consumer reporting agency (CRA) that provided the credit report. The employee may request a copy of the report from the CRA within sixty days at no additional charge. The employee also may dispute information contained in the report, and have any inaccurate information deleted or corrected.

The scope of FCRA is very broad. The statutory definition of "consumer report" includes, "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes." *Id.* A "consumer reporting agency" is defined as any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

2. Exclusion of Certain Employee Investigation Communications from Definition of Consumer Report

In November, 2003, Congress adopted an amendment to the FCRA, which excludes certain employee investigation communications from the Act's definition of "consumer report." *See* Fair Credit Reporting Act, H.R. 2622, 108th Cong. §603 (q) (2003). Specifically, this amendment excludes from the Act's coverage communications regarding "suspected misconduct relating to employment" and "compliance with Federal, State or local laws. . . ." Assuming that President Bush signs this legislation, employers no longer will have to obtain written consent from "accused" employees prior to the employer retaining professional firms to conduct internal investigations concerning such alleged misconduct or compliance with the aforementioned laws. *Id.* President Bush is expected to sign this legislation, and it is likely that the legislation will become effective by the end of January, 2004.

Congress adopted the FCRA amendment in response to the widespread controversy and criticism that erupted as a result of the advisory letter that the Federal Trade Commission (FTC), the agency that enforces FCRA, issued in April, 1999. In this letter, the FTC opined that FCRA's requirements extended to employers using "outside organizations" to conduct investigations. The FTC based its opinion on FCRA's broad definitions, concluding that investigations that touch upon an employee's character and reputation constituted a "consumer report." The FTC also determined that an outside entity – such as a law firm – which assists an employer in conducting an investigation may be a "consumer reporting agency" whose report is subject to FCRA.<sup>5</sup> The recent FCRA amendment will eliminate such widespread concern regarding the FCRA's applicability to investigations of employee conduct.

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<sup>5</sup> The FTC's position evoked widespread controversy and criticism. Following the publication of the FTC's interpretation, the Labor and Employment Section of the American Bar Association asked the FTC to "revoke, re-examine, and recast" its opinion letter. *See* Letter from Max Zimny, Chair, Section of Labor and Employment Law, American Bar Assoc., to Debra A. Valentine, General Counsel, Federal Trade Commission (Aug. 16, 1999).

**B. The NLRA's Implications**

1. The Epilepsy Foundation Decision

It is well-established under the NLRA that union-represented employees have a right to have a union representative present during investigatory interviews where discipline may result. These so-called "Weingarten" rights flow from the decision of the United States Supreme Court in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

On July 10, 2000, the National Labor Relations Board (NLRB) ruled in Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000), *enforced in relevant part*, 268 F.3d 1095, 1099-1102 (D.C. Cir. 2001)<sup>6</sup> that non-unionized employees have a right under the NLRA to have a co-worker present during investigatory interviews where the employee reasonably believes that the interview may result in discipline. This ruling extends to non-unionized employees rights similar to those unionized employees have had since the 1975 Weingarten holding.

The five member NLRB divided sharply by a 3 to 2 vote in the Epilepsy Foundation ruling, with Members Hurtgen and Brame writing forceful dissenting opinions. In its ruling, the NLRB overturned 15 years of precedent under which non-unionized employees did not have the right to co-worker representation at investigatory interviews. The decision effectively reinstates the NLRB's short-lived ruling in Materials Research Corporation, which was overruled in 1985, just three years after the Board had rendered it.

The NLRB based its ruling in Epilepsy Foundation on NLRA Section 7's grant to employees of the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . ." The NLRB found that the underlying rationale for Weingarten rights in the unionized setting is equally applicable to the non-unionized setting because "the right to have a coworker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'"

Under Epilepsy Foundation and other NLRB rulings on Weingarten rights, an employer's obligation is limited to situations in which an employee requests that a co-worker be present during an investigatory interview from which the employee reasonably believes discipline may result. Significantly, the employer has no obligation under the NLRA to hold an investigatory interview. Nor does the employer have an obligation to inform an employee of his or her right to have a co-worker at the meeting. The employer's obligation arises only when the employee requests a representative.

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<sup>6</sup> Although the Court of Appeals for the District of Columbia enforced the NLRB's determination that non-unionized employees have a right under the NLRA to have a co-worker present during investigatory interviews, the court held that the NLRB erred in applying its new rule in a retroactive manner. Epilepsy Foundation, 268 F.3d at 1102-03. Thus, the court concluded that the employer in Epilepsy Foundation acted in conformity with the prevailing law at the time it denied its employee's request to have a co-worker present during his interview. Id. Accordingly, the court held that the employer would not have to pay damages. Id.

Moreover, the right to the presence of a representative applies only to an investigatory meeting but does not apply to meetings in which a previously decided disciplinary action is merely being delivered.

Under Weingarten and, presumably, Epilepsy Foundation, the employee must have a reasonable belief that the meeting may result in his or her discipline to trigger the right to have a representative present. See BLT Enterprises, No. 20-CA-30455-1, 2003 NLRB Lexis 42, at \*63-65 (Jan. 31, 2003) (holding that employer violated the NLRA under Epilepsy Foundation by denying employee's request for a witness at investigatory meetings where the employee reasonably believed that his employer was going to take disciplinary actions against him). Further, an employee who asks for a co-worker representative may waive his or her right. Thus, the employer may advise an employee who requests a co-worker representative that he or she has the choice of having the meeting without a representative or the employer will make a determination as to discipline of the employee without the employee's input.

In Epilepsy Foundation, the NLRB speaks in terms of a "co-worker" representative, indicating that an employee is entitled only to a single representative. This conclusion is supported by NLRB rulings construing Weingarten rights in the union setting, which hold that only a single union representative is required. The NLRB's exclusive and consistent reference in Epilepsy Foundation to "co-worker" also indicates that an employee has a right to have a fellow employee present, not to a third party such as an attorney. The NLRB expressly ruled in a 1985 decision which followed Materials Research Corporation that an employee is not entitled to have his or her personal attorney as his Weingarten representative.

Principles adapted from NLRB decisions in the unionized setting suggest that the employee may select a co-worker representative of his or her choosing. For example, the NLRB has held that the union or employee may request a particular union representative for an investigatory interview. The employer must honor the employee's selection unless there are special circumstances which would warrant precluding the representative chosen by the employee, such as the fact that the representative is himself/herself a material witness, or the selected representative's unavailability would unduly delay the interview.

The likely remedy for a violation of an employee's Weingarten rights in a non-union environment also may be gleaned from NLRB decisions in a union context. Thus, the NLRB will order an employer to reinstate an employee and award the employee "make-whole" relief (back pay) in cases where the employer terminates an employee for attempting to assert Weingarten rights or relies on information obtained during an interview in which it ignored a request for a Weingarten representative. In such cases, relief will be granted unless the employer can establish that the employee would have been terminated even absent the protected activity.

## 2. Unanswered Questions

Despite these established principles, there are many questions left unanswered by Epilepsy Foundation. One question is whether an employer must pay the employee representative for the time spent in the interview. In the union setting, this issue typically is addressed through collective bargaining negotiations. Another issue left undecided is whether the employee may delay a meeting by selecting a representative who is currently engaged in work activities or not at work at the time or whether the employer must allow the selected employee to suspend his or her activities to attend the interview. Nor is the scope of the rights of the representatives selected clear from the decision. Presumably, an employee selected by a co-worker to “represent” him or her must agree to serve as a representative and certainly an employer is precluded from retaliating against an employee for serving in this role. The decision, however, does not provide guidance on the permissible scope of the representative’s activities. According to the NLRB, the role of the union representative is to provide assistance and counsel to the employee being questioned, not to “transfer the interview into an adversary context or a collective-bargaining confrontation.” Because “the exercise of the Weingarten right must not interfere with legitimate employer prerogatives,” an employer need not tolerate persistent objections and other attempts to prevent questioning. When a representative exceeds his or her permissible role, the employer can order the representative to leave. Similarly, the right to have a representative present does not include any right to determine which management representatives should be present during the meeting. Despite these limits on the representative’s role, the NLRB authorizes a union representative to meaningfully participate in the meeting, not merely to attend as a witness. As such, the NLRB has found that it is an unfair labor practice to refuse to allow the representative to speak on the employee’s behalf during the meeting. Moreover, in the unionized context, employers are required to disclose to the representative the nature of the allegations against the employee and allow the representative and employee to confer prior to the interview. Presumably, the Weingarten principles will be transplanted to the non-union setting.

A particularly difficult question is how to balance confidentiality concerns with Weingarten rights in the non-union setting. Confidentiality concerns are acute in investigations in which employers seek to encourage reporting and to avoid potential retaliation against employees who report misconduct. Employers in the unionized setting may limit confidentiality concerns through agreement with the union. The union will have substantial incentives to maintain confidentiality where the employee who reports the misconduct or the employee partaking in such conduct are represented employees. By contrast, in the non-union setting, one of the rationales for permitting an employee representative to be present is to enable the representative to inform other employees about the employer’s investigation and discipline of the investigated employee. Thus, in Materials Research Corporation, the NLRB explained that “a coworker who has witnessed employer action and can accurately inform co-employees may diminish any tendency by an employer to act unjustly or arbitrarily.” However, a request to have another employee present in certain types of investigations may compromise their confidentiality.

One problematic area is determining which types of interactions with an employee implicate rights to a co-worker representative under the NLRA. Determining whether the meeting might reasonably result in disciplinary action will require the exercise of good judgment. As noted above, the right does not arise in meetings in which the disciplinary action is implemented, provided that there is no investigatory component of the meeting. The NLRB long ago announced that "run of the mill shopfloor conversations as, for example, the giving of instructions or training or needed corrections of work techniques" do not create a right to representation. However, the NLRB more recently has taken an expansive view when determining whether Weingarten rights attach to a meeting. For example, the NLRB has held that Weingarten extends to "coaching meetings" where employee productivity issues are discussed based upon a recognition that continuing performance issues could ultimately result in discipline or termination.

Finally, employers must be sensitive to practical considerations in determining how to respond to Epilepsy Foundation. Confidentiality concerns, disruption of the management process, and the potential for an adverse witness against the employer all weigh against holding investigatory interviews where the employee insists on a representative. On the other hand, an employer's disciplinary decision may be suspect if the employer fails to interview an employee who insists on a representative. For example, a terminated employee who brings a discrimination claim against an employer may be better positioned to establish pretext based on the employer's failure to conduct an interview of the employee even if that failure were occasioned by a request for a co-employee.

### 3. Practical Suggestions

The extension of Weingarten to a non-union context presents many troublesome issues for employers and their counsel who are called upon to conduct investigations. In general, the unionized or partially organized employer should react in a manner consistent with the employer's good human resources practices. Thus, if the investigation is important to proper administration of the employer's policies and practices, in most cases those practices should not be abandoned because of the employee's assertion of a right to have a co-worker present. Each situation will require a case by case assessment, however, there are certain guidelines which attorneys may follow when engaged to interview an employee, the results of which may lead to disciplinary action of the employee:

- In most instances where counsel is involved, a meeting with an employee who is under suspicion of wrongdoing may result in disciplinary action. If that is, in fact, the case, you must allow a co-worker to be present if requested.
- **DO** inform the employee of the subject matter of the interview at the beginning of every meeting so that the employee cannot later argue that he/she was unaware that it was an investigatory meeting.

- **DON'T** announce that the employee has a right to have a co-worker present unless you believe that the presence of a second employee will be helpful (and most employers **don't**).
- **REMEMBER** there is no obligation to read the employee his/her "rights."
- **DON'T** lose sight of the purposes of the investigatory meeting – to investigate the incident or problem in order to insure that the good decisions are being made regarding possible disciplinary action.
- **DO** go forward with the investigation except in very limited circumstances. You will have lost the opportunity to learn more about the facts which may result in bad decisions.
- **DON'T** insist upon going forward with the meeting without a co-worker if the employee asks for one. You will have bought an unfair labor practice charge which could result in the disciplinary action being overturned.
- **DO** allow the employee to select the co-worker to be present. But
- **DON'T** delay the meeting if the employee's "first choice" is not available. Allow the employee to choose another co-worker. A rule of reason should be used.
- **REMEMBER** that the person selected must be a "co-worker" – the right does not extend to attorneys or other third parties.
- **DON'T** allow the co-worker to interfere with or disrupt the investigatory meeting. If either the employee or co-worker is disruptive and cannot be brought under control, discontinue the meeting.
- **DO** stress confidentiality, particularly in sexual harassment or other sensitive investigatory meetings. This should apply to both the employee and the co-worker.
- **DON'T** allow an employee to serve as a co-worker if the employee is a material witness or potentially subject to disciplinary action for the same matter. Under these circumstances, advise the employee that he/she should select another co-worker to be present.
- **REMEMBER**, most employees are not likely to be aware of their right to ask to have a co-worker present. Those who do are likely to be litigious. Be careful.

**C. Johnnie's Poultry Warning**

In Johnnie's Poultry Co., 146 NLRB 770 (1964), the NLRB considered whether an employer's attorneys had proceeded properly in interviewing employees. The NLRB's opinion delineates specific safeguards which should be taken "to minimize the coercive impact of such employer interrogation." Id. at 777. Although the conduct in Johnnie's Poultry occurred in the unionized workplace, this guidance should also be observed by employers and their attorneys conducting interviews of non-union employees for any reason:

"Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not itself be coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees." Id. at 775.

Numerous courts have adopted the standard set forth in Johnnie's Poultry. See Standard-Coosa-Thatcher Carpet Yarn Div., Inc., 691 F.2d 1133, 1141 (4th Cir. 1982) (affirming the NLRB's decision that an employer's failure to observe the Johnnie's Poultry standards constituted an unfair labor practice); A&R Transport, Inc. v. NLRB, 601 F.2d 311, 313 (7th Cir. 1979) ("The interrogation standards set forth in Johnnie's Poultry are relevant in determining whether an interview was coercive. . . .")

**D. Electronic Communication in the Workplace**

The use of electronic communication in the workplace has opened up a new realm of ethical issues in conducting employee investigations. As employees increasingly utilize email for both business and personal communications, employers and their attorneys must wrestle with the role that these communications play in investigations and litigation. Moreover, in investigations of this sort, review of an employee's email boxes and computer files often provide a treasure trove of information.

A threshold question is the extent to which such communications are private. Although the Electronic Communications Privacy Act purports to cover email,<sup>7</sup> the law contains an exemption where one of the parties has given prior consent to message interception; an employee's use of an employer's computer system following employer's warning that messages may be monitored may imply such consent. Furthermore, those courts which have considered the issue of email privacy have generally held that

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<sup>7</sup> Although the term "email" is not found in the language of the ECPA, the statute's definition of electronic communication and the legislative history indicate clear Congressional intent that email be included in the scope of the statute.

employees utilizing employer's electronic communications networks do not have a reasonable expectation of privacy. See Smyth v. Pillsbury Co., 914 F. Supp. 97, 101 (1996) ("Once plaintiff communicated the alleged unprofessional comments to a second person (his supervisor) over an e-mail system which was apparently utilized by the entire company, any reasonable expectation of privacy was lost."); McLaren v. Microsoft, No. 05-97-00824-CV, 1999 WL 339015 \*5 (Tex. App. May 28, 1999) (holding that company's interest in preventing inappropriate and unprofessional comments, or even illegal activity, over its e-mail system outweighed employees claimed privacy interest).

Even where an employer is not precluded from accessing employee email, ethical questions remain regarding the utilization of information learned from email in litigation. In the absence of clear guidance on the subject, employers and their attorneys should analogize to non-electronic communications and should exercise good judgment when considering the appropriateness and relevance of the information contained in the e-mail to the facts of the dispute. For example, an attorney who uncovers emails on an employee's computer system that implicate an employee in an extramarital affair should be careful how to use such information, if at all. In addition to potential privacy claims arising out of the access to and/or disclosure of such information, the use of a threat to disclose such information to force an employee to resign, for example, or to settle a claim of wrongful termination might be deemed extortionate behavior.

**E.     Obstruction of Justice**

Familiarity with the obstruction of justice statutes is essential. Avoiding a charge of obstruction of justice is key concern in conducting interviews, even of company employees by company counsel.

1.     Victim and Witness Protection Act

In 1982, Congress enacted the Victim and Witness Protection Act (18 U.S.C. §§ 1512-15), which expanded the scope of federal criminal liability for activities that are commonly described as "witness tampering."

Section 1512, which encompasses the traditional obstruction of justice offenses, now also makes it a felony offense, *inter alia*, for any person to engage in misleading conduct to "influence . . . the testimony of any person in an official proceedings." 18 U.S.C. § 1512(b)(1).<sup>8</sup> This amorphous standard is repeated in Section 1512(c), which makes it a crime to "harass" another person, thereby hindering or dissuading any person from testifying or providing information to federal law enforcement officials or from causing a criminal prosecution to be sought or instituted. The affirmative defense to a charge of obstruction of justice under Section 1512 is that the conduct consisted solely of lawful conduct and "the defendant's sole intention was to encourage, induce, or cause the

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<sup>8</sup> Counsel should be aware that the Act applies equally to the government and the company. Accordingly, if a government agent furnishes misleading information to a witness in order to influence his or her testimony, the agent violates the Act and may taint the government's investigation. Query what the appropriate remedy may be, or if in fact the courts will fashion one.

other person to testify truthfully." Id. § 1512(d). There is no question that a corporation can be found guilty of obstruction of justice based on the acts of its employees. See United States v. Conneaut Indus., Inc., 852 F.Supp. 116, 123-26 (D.R.I. 1994).

For purposes of Section 1512, the official proceeding need not be pending or even about to be instituted at the time of the offense, and the testimony or documents need not be admissible in evidence or free of a claim of privilege. Id. § 1512(e); see also Conneaut Indus., 852 F. Supp. at 125.

The term "misleading conduct" is defined in 18 U.S.C. § 1515(a)(3) as:

- Knowingly making a false statement;
- Intentionally omitting information from a statement, causing a portion of it to be misleading, or intentionally concealing a material fact, or creating a false impression;
- With intent to mislead, knowingly submitting or inviting reliance on a writing or recording which is false, forged, altered, or otherwise lacking in authenticity;
- With intent to mislead, knowingly submitting or inviting reliance on any object which is misleading in a material respect; or
- Knowingly using a trick, scheme, or device with intent to mislead.

In the first case addressing the "misleading conduct" component of Section 1512, the Second Circuit held that conduct that is not intended to mislead the witness cannot be the basis for a conviction. United States v. King, 762 F.2d 232, 237 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986). The defendant had tried to persuade the witness to lie, and the district court ruled that this evidence failed to support any inference that the witness was or could have been misled. The government argued on appeal that Congress intended Section 1512 to reach conduct intended to mislead the government, even though it was not misleading to the person at whom it was directed. The Second Circuit rejected this contention and held that only the conduct enumerated in Section 1512 is prohibited by the particular statute. Id. at 237-38.

There is no denying the obvious: Section 1512 has a tremendous potential for mischief. Claims that lawyers representing defendants or potential defendants in federal investigations are engaging in overbearing conduct (e.g., by misleading a witness during an interview, suggesting a witness is less than candid, or even informing a witness of the company's interpretation of the facts) can be escalated into criminal indictments by zealous prosecutors. It is not clear whether such conduct by a prosecutor trying to make his or her case would violate the statute. Fortunately for the prosecution and the defense, "[t]his chapter does not prohibit or punish the providing of lawful, bona fide, legal

representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c).

## 2. The Sarbanes-Oxley Act

On July 30, 2002, in the aftermath of a series of accounting scandals involving major U.S. corporations, President Bush signed into law the Sarbanes-Oxley Act of 2002 (the "Act"). This law includes two separate provisions, one civil and the other criminal, designed to prohibit retaliation against employees and others who report improper conduct regarding securities fraud and corruption.

Under the civil whistleblower provision of the Act: "No [public] company . . . or officer, employee, contractor, subcontractor or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding conduct that the employee reasonably believes constitutes a violation of: (a) any rule or regulation of the SEC; (b) any provision of federal law relating to fraud against shareholders; or (c) federal criminal law provisions prohibiting mail fraud, bank fraud, or fraud by wire, radio, or television, when the information or assistance is provided to or the investigation is conducted by –

- a federal regulatory or law enforcement agency;
- any member of Congress or any committee of Congress; or
- a person with supervisory authority over the employee;
- [a] person working for the employer who has the authority to investigate, discover, or terminate misconduct; or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed . . . relating to [an alleged violation of any rule, regulation, or law listed in paragraph (1) above.]" 18 U.S.C. § 1514A (2003).

Clearly, an employee is protected when providing information to, or assisting in a formal official "investigation" (concerning the various kinds of alleged unlawful activity) that is being conducted by one of the enumerated categories of entities or persons. Less clear, however, is whether employees are protected when providing information to one of the enumerated categories of entities or persons when no "investigation" is ongoing or when such entity or person is not involved in the ongoing "investigation." Employees

seeking protection under this Act will contend that an investigation is not a prerequisite to filing a claim. As such, employers should be prepared for this expansive reading of the Act.

The Sarbanes-Oxley Act also includes a provision that imposes criminal penalties for retaliation against whistleblowers. This provision imposes criminal penalties for retaliation against persons who report or provide information to a law enforcement officer relating to the possible commission of any federal offense, not just offenses relating to accounting or securities issues. The criminal liability provisions are also not limited to public companies. Criminal liability can be imposed on any company or person.

The criminal provision of the Act makes it unlawful to “knowingly, with the intent to retaliate, take [] any action harmful to any person, including interference with lawful employment or livelihood of any person, for providing to a law enforcement officer<sup>9</sup> any truthful information relating to the commission or possible commission of any Federal offense.” 18 U.S.C. §1513(e) (2003). Thus, while this whistleblower provision broadly covers the reporting or providing of information relating to the commission or possible commission of any federal offense and any type of retaliatory action, not just adverse employment action, it applies only in circumstances where the information is provided to a law enforcement officer and the information provided is truthful.

Individuals who violate this provision are subject to a fine of up to \$250,000, imprisonment for up to ten years, or both. Entities may also be subject to criminal penalties under this provision and face fines of up to \$500,000.

Pursuant to the Act’s protection for whistleblowers, employers should consider taking the following action:

- Promptly establish policies and procedures to encourage employees to complain about any adverse employment actions that they believe were based on protected conduct. This will allow the employer to become aware of the alleged misconduct, investigate it, and, if appropriate, take remedial action which, in turn, may reduce the risk of liability.
- Promptly educate their officers, employees, and other agents about the Act, including advising them that they risk discipline up to and including discharge, as well as civil liability and criminal penalties, if they violate the law.

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<sup>9</sup> See 18 U.S.C. § 1515(a)(4) (“the term ‘law enforcement officer’ means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant – (A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or (B) serving as a probation or pretrial services officer under this title”).

- Review and revise, as necessary, employment, settlement and confidentiality agreements, as well as company policies, handbooks, codes of conduct and directives governing reporting of corporate wrongdoing or improper conduct, communications with regulatory or law enforcement agencies and protection of confidential information to ensure that they do not prohibit communications or conduct protected by the Act.
- For example, employers should review such documents for restrictions on communicating with, providing information to, assisting in an investigation by, or filing or participating in proceedings before government agencies. Such restrictions may be found in non-disclosure and non-disparagement provisions and in covenants not to sue.
- Take special care in dealing with employees who have provided information or assisted in an investigation involving possible violations of federal law including, but not limited to, securities laws. Indeed, even if the employee is wrong, and a violation has not occurred, the employee may still be protected from retaliation if she or he reasonably believed that a violation occurred, or if the information was provided to a law enforcement officer and was truthful.