Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Fifth Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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Employee Rights: The US Perspective

Milton L Williams, Avni P Patel and Jacob Gardener[1]

14.1 Introduction

Unless required to by contract or subpoena, employees and former employees may decline to provide information or documents in connection with a corporate investigation. However, many employers will insist on employee co-operation and may impose disciplinary measures – up to and including termination – on those employees who refuse.[2] In the absence of contractual protections, employees may have no legal right to refuse to submit to an interview, even if their answers tend to incriminate them. A 2016 decision from the United States Court of Appeals for the Second Circuit in *Gilman v. Marsh & McLennan Companies, Inc*[3] is instructive. There, two employees argued that Marsh & McLennan's demand they submit to an interview in an internal investigation constituted state action that infringed their right against self-incrimination. The court rejected this argument, calling it 'the legal equivalent of the "Hail Mary pass" in football'.[4]

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2 See Testimony of Henry W Asbill, National Association of Criminal Defense Lawyers, to the US Sentencing Commission, at 4 (15 November 2005) ('Increasingly, companies do not hesitate to fire individual employees who refuse to "cooperate".'); Sarah Helene Duggin, Internal Corporate Investigations: Legal Ethics, Professionalism, and the Employee Interview, 2003 Colum. Bus. L. Rev. 859, 907 (2003) ('[I]n most states, [an employee's] refusal to cooperate with an internal investigation "constitutes a breach of the employee's duty of loyalty to the corporation and is good grounds" [for dismissal.]').

3 826 F.3d 69 (2d Cir. 2016).

4 826 F.3d at 76 (internal quotation marks omitted). In exceptional circumstances, where the government exerts overwhelming influence over the internal investigation and the employer's decision-making, the employer's actions may be found to constitute state action. See, e.g., *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008) (holding that 'KPMG's adoption and enforcement

Although employees generally cannot refuse to participate in investigations without risking their employment, they do possess various rights implicated by corporate investigations. The sources of those rights include the employer and federal and state law. With respect to the employer, many companies have policies and procedures for internal investigations. For instance, employee handbooks, company by-laws, written guidelines and employment agreements often contain provisions regarding employee data and document collection, workplace searches, communication monitoring, privacy and confidentiality. These documents may also provide guidance on an employee's right to indemnification for legal fees expended during an investigation or related proceedings. In addition, many companies maintain written policies that protect employees from retaliation for participating in an investigation. These documents, and unwritten, established company procedures, should be considered to understand the protection afforded to employees in an investigation.

Federal and state law also govern the rights of employees involved in investigations. These rights, discussed below, can be divided into three general categories: (1) the right to be free from retaliation; (2) the right to representation; and (3) the right to privacy.

The right to be free from retaliation 14.2

Although employees generally have no right to refuse to participate in a corporate investigation, they may be protected from retaliation. A number of federal employment statutes prohibit retaliation against employees who participate in corporate investigations.[5] State and local laws provide similar protection.

Moreover, employees who possess information regarding corporate misconduct have some leverage in that they may become whistleblowers. Whistleblowers are protected from retaliation under federal[6] and state whistleblower laws.

See Chapter 20 on whistleblowers

The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) provides for both civil and criminal penalties for employers who retaliate against whistleblowers. Section 806 of the law governs civil penalties. It prohibits publicly traded companies from retaliating against employees who assist or provide information to law enforcement, Congress, or 'a person with supervisory authority over the employee' regarding activity the employee reasonably believes is a violation of: (1) federal law

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of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government's overwhelming influence, and that KPMG's conduct therefore amounted to state action'); *United States v. Connolly*, No. 16 CR. 0370 (CM), 2019 WL 2120523, at *11 (S.D.N.Y. 2 May 2019) (holding that because 'the Government outsourced the important developmental stage of its investigation to Deutsche Bank – the original target of that investigation – and then built its own "investigation" into specific employees . . . on a very firm foundation constructed for it by the Bank and its lawyers', statements obtained from the defendant-employee under threat of termination were involuntary and therefore inadmissible).

5 These statutes include Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the National Labor Relations Act, and the Occupational Safety and Health Act.

6 The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the Consumer Financial Protection Act of 2010.

regarding mail, wire, securities, or bank fraud; (2) an SEC rule or regulation; or (3) any provision of federal law relating to fraud against shareholders.[7]

Section 1107 of Sarbanes-Oxley provides for criminal penalties for retaliation against whistleblowers. Specifically, it criminalises '[w]hoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense'.[8]

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) provides anti-retaliation protection for whistleblowers who report possible securities law violations to the Securities and Exchange Commission (SEC).[9] Similarly, Section 748 of Dodd-Frank protects whistleblowers who report violations of the Commodity Exchange Act to the Commodities Futures Trading Commission.[10] And Section 1057, which codifies the Consumer Financial Protection Act of 2010, forbids retaliation against employees who blow the whistle on possible violations of that statute.[11]

Despite their similarities, there are important differences between the whistleblower protections contained in Sarbanes-Oxley and Dodd-Frank. Procedurally, in contrast to Sarbanes-Oxley's requirement that complaints be filed with the Department of Labor within 90 days of the retaliatory action, Dodd-Frank permits an employee to bring a private cause of action directly, without having to go through an administrative agency,[12] and allows the employee to do so within six to ten years, depending on the circumstances.[13] In addition, Dodd-Frank provides more attractive financial incentives for whistleblowers. A whistleblowing employee who prevails under Dodd-Frank may receive up to twice the amount of wages lost due to retaliation, as well as attorneys' fees.[14]

Under Sarbanes-Oxley, by contrast, a whistleblower's recovery is limited to the 'relief necessary to make the employee whole', including reinstatement, back pay, 'special damages' (which includes damages for non-economic harm such as reputational injury, mental anguish and suffering), attorneys' fees and costs.[15]

Critically, however, whereas Sarbanes-Oxley protects employees who report concerns to supervisors at their company, Dodd-Frank does not. Dodd-Frank defines 'whistleblower' to mean a person who provides 'information relating to a violation of the securities laws to the Commission'.[16]

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7 See 18 U.S.C. § 1514A(a).

8 See 18 U.S.C. § 1513(e).

9 See 15 U.S.C. § 77a.

10 See 7 U.S.C. § 26.

11 See 12 U.S.C. § 5567.

12 See 15 U.S.C. § 78u-6(h)(1)(B)(i).

13 See 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)-(II).

14 See 15 U.S.C. § 78u-6(h)(1)(C).

15 See 18 U.S.C. § 1514A(c).

16 See 15 U.S.C. § 78u–6(a)(6). The Supreme Court has held that this provision requires whistleblowers to report to the SEC. See *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776,

The right to representation 14.3

Employees have no automatic right to counsel during an internal investigation,[17] unless contractually provided under the terms of their employment.[18] Nonetheless, employees may choose to retain counsel, particularly if they face liability.

Concerns over individual criminal liability have increased since September 2015, when then Deputy Attorney General Sally Yates issued a memorandum titled 'Individual Accountability for Corporate Wrongdoing'. The 'Yates Memo' stresses the importance of combating corporate misconduct by holding individuals accountable. It lists six steps that should be part of all investigations and prosecutions of corporate misconduct, the first of which is that a corporation's eligibility for co-operation credit depends on it providing the Department of Justice (DOJ) with all relevant facts about the individuals involved in the alleged misconduct. The Yates Memo also states that all investigations must focus on individuals from the inception of the investigation, and that barring extraordinary circumstances, which must be personally approved in writing by specified DOJ personnel, DOJ attorneys will not agree to any settlement or corporate resolution that dismisses charges or provides immunity for individual officers or employees.[19]

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778 (2018). On 9 July 2019, the US House of Representatives passed HR 2515, also known as the Whistleblower Protection Reform Act of 2019, which would have amended Dodd-Frank to clarify that whistleblowers who report misconduct to their employers and not to the SEC also have protections against retaliation under the law. However, it did not pass the US Senate.

17 The Sixth Amendment right to counsel is triggered by a custodial interrogation by law enforcement authorities. See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). An internal investigation by a private company does not generally implicate this right.

18 Union employees, however, may insist that a union representative attend any investigatory interview that could lead to the employee's discipline. See *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975). The union representative may not interfere with the interview. *New Jersey Bell Tel. Co. & Local 827, Int'l Bhd. of Elec. Workers, Afl-Cio*, 308 NLRB 277, 279, 280 (1992). Employers have no obligation to inform employees of their right to union representation or to ask if they would like a union representative present during the interview.

19 The US Department of Justice under President Trump has reaffirmed the importance of prosecuting individual wrongdoers in corporate investigations. However, in a speech given in November 2018, Deputy Attorney General Rod J Rosenstein announced an updated policy to 'make clear that investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted.' Department of Justice News, 'Deputy Attorney General Rod J Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act' (29 November 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0. In addition, on 20 November 2019, the DOJ announced changes to its Foreign Corrupt Practices Act Corporate Enforcement Policy, which now requires, among other things, companies seeking co-operation credit to disclose 'all relevant facts known to [them] at the time of disclosure . . . as to any individuals substantially involved in or responsible for the misconduct at issue' (the previous version required companies to disclose 'all relevant facts' regarding individuals substantially involved in a 'violation of law') and to alert the DOJ of evidence of the misconduct when they become aware of it (previously, companies had to disclose evidence they were or should have been aware of). See Justice Manual, 9-47.000, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.

14.3.1 Interviews without employee's counsel

An employer may seek to conduct an interview of an employee, either with or without company counsel present, before that employee has appointed counsel.[20] Once the employee offers an account of events, it may be difficult to offer a different one later. When counsel for individuals are appointed, they should obtain all information regarding their clients' prior statements about the subject of the investigation, including requesting any relevant memoranda created in prior interviews. Individual counsel should also request all documents, data and other information pertaining to their clients' involvement in the subject of the investigation. Requests for such information may be directed to the client, company counsel, law enforcement and other witnesses (or their counsel). Even if counsel is not allowed to participate in a client's investigatory interview, they should use the acquired information to prepare their clients.[21]

During an interview with no employee counsel, the employee may ask whether he or she should obtain individual counsel. This can place the interviewer in an uncomfortable position. An affirmative answer could have undesirable consequences, including delaying the investigation, chilling the employee's candour, and risking that individual counsel may approach law enforcement before the employer concludes the internal investigation. A negative answer creates complications and potential claims against the employer and investigating counsel if the employee self-incriminates or compromises future legal positions during the interview. Generally, the prudent course is to politely decline to answer the question.

Employers often wish to disclose to the government information obtained from employees during investigatory interviews to obtain co-operation credit or general goodwill. However, in the absence of instructions to the contrary, interviewed employees may believe that their company's attorneys represent them, and may attempt to assert attorney–client privilege over their communications with company counsel. To avoid this problem, counsel should provide an *Upjohn* warning at the start of any interview, and delivery of the warning should be documented by a note-taker.

See Chapters 8 on witness interviews and 16 on representing individuals in interviews

14.3.2 Separate representation arranged by the employer

Whether the employer agrees to arrange for counsel can depend on a number of factors, such as the employee's contractual and indemnification rights, state and

20 If individual counsel is retained, company counsel must be cognisant of Model Rule of Professional Conduct 4.2, which states: 'In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.'

21 If counsel concludes, after reviewing the available information and conferring with the client, that the evidence establishes the client's guilt, counsel may wish to advise the client to decline an interview to avoid making potentially incriminating statements. Although that may prompt the client's termination, counsel may reasonably determine that termination is inevitable regardless of the client's participation in the interview.

local laws, the corporate by-laws, and the potential conflict of interest between the employee and the corporation. Although separate representation of an employee can increase expenses and lengthen the investigation, it can also provide certain advantages to the company. It can reduce any suggestion of improper influence by the company over the employee, which can bolster the company's credibility with the government when reporting the results of the investigation and increase the company's co-operation credit. In some circumstances (particularly when individual counsel has a good working relationship with company counsel), it can facilitate communication with the employee. Company and individual counsel should come from different law firms. Further, arranging for individual representation can deter the government from communicating directly with the employee.

When confronted with multiple employees who warrant separate counsel, employers may seek to reduce costs by arranging for 'pool counsel' to represent the entire group. However, this pool arrangement must be reassessed if a conflict of interest arises within the group.

The right to privacy 14.4

Workplace searches 14.4.1

In most circumstances, an employer can conduct searches of its workplace and computer system to investigate wrongdoing. Such searches are largely unprotected by personal privacy laws as workspaces, computer systems and company-issued electronic devices are generally considered to be company property. Many companies explicitly address this in written corporate policies and employment agreements. However, unwarranted or unreasonable invasions of privacy during a workplace search may be protected under state law – including state constitutional,[22] statutory[23] and common law.[24]

Employees who use their own personal electronic devices for work should be aware that work-related data stored on those devices belongs to the employer. Therefore, employees are advised to refrain from using their personal devices for work, and instead maintain separate work devices. These concerns arising from the use of personal devices for work have become more salient in the age of covid-19, when many employees are working from home. Therefore, it is all the more important now that employers maintain and update their privacy

22 See, e.g., Cal. Const. art. I, § 1 (protecting right to privacy).

23 See, e.g., Cal. Lab. Code § 980 (2012) (prohibiting an employer from requiring or requesting an employee to: (1) '[d]isclose a username or password for the purpose of accessing personal social media', (2) '[a]ccess personal social media in the presence of the employer', or (3) '[d]ivulge any personal social media, except' in response to a request 'to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding'; prohibiting an employer from taking adverse action against an employee or applicant for not complying with a prohibited request or demand for access to social media).

24 See, e.g., claims for invasion of privacy, intentional infliction of emotional distress and negligent infliction of emotional distress.

and bring-your-own-device policies and that these policies be documented, well-defined and require written acknowledgement by employees. If an employer seeks to obtain or review work-related data from an employee's personal device, the employer must be careful to exclude any personal data.

Federal and state law protect employees from unauthorised monitoring of their personal data. The Stored Communications Act (SCA) establishes a civil cause of action against anyone who intentionally accesses without authorisation a facility through which an electronic communication service is provided and thereby obtains access to a wire or electronic communication while it is in electronic storage.[25] Accessing an employee's personal email without permission has been held to violate the SCA.[26] The Computer Fraud and Abuse Act (CFAA) imposes criminal liability on those who gain unauthorised access to a computer, and it permits the recovery of civil damages when the unauthorised access results in losses of at least US$5,000.[27] In addition, several states have enacted laws requiring employers to notify employees before monitoring their electronic communications.[28] In sum therefore, if an employer insists on monitoring its employees' personal devices used for work, clear policies and written consent are critical.

14.4.2 Workplace surveillance

An employer seeking to investigate wrongdoing through electronic surveillance must be mindful of federal and state law.

Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968[29] criminalises the intentional interception of any wire, oral or electronic communication unless at least one of the parties to the communication has consented to such interception or the employer is monitoring or recording employee telephone calls 'in the ordinary course of its business'.[30]

Most states (and the District of Columbia) similarly prohibit electronic surveillance of communications unless at least one party to the communication provides consent. Some, but not all, of these jurisdictions provide exemptions for employer monitoring of employee communications. Eleven states – California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania and Washington – prohibit (either criminally or civilly) surveillance without the consent of all the parties to the communication.[31]

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25 See 18 U.S.C. § 2701. The SCA defines an 'electronic communication service' as 'any service which provides to users thereof the ability to send or receive wire or electronic communications.' 18 U.S.C. § 2510(15).

26 See *Lazette v. Kulmatycki*, 949 F. Supp. 2d 748, 755-59 (N.D. Ohio 2013).

27 See 18 U.S.C. § 1030.

28 See, e.g., Del. Code Ann., tit. 19, § 705; Conn. Gen. Stat. § 31-48d.

29 See 18 U.S.C. § 2510 et seq.

30 See 18 U.S.C. § 2510(5)(a).

31 See Cal. Penal Code § 632 (a)-(d); Conn. Gen. Stat. Ann. § 52-570d; Fla. Stat. Ann. §§ 934.01 to .03; 720 Ill. Comp. Stat. ANN. § 5/14-1, -2; Md. Code Ann. Cts. & Jud. Proc. § 10-402; Mass. Gen. Laws Ch. 272, § 99; Mont. Code Ann. § 45-8-213; Nev. Rev. Stat. § 200.620; N.H. Rev Stat. Ann. §§ 570-A:2; 18 Pa. Cons. Stat. §§ 5702, 5704; Wash. Rev. Code §§ 9.73.030 to 9.73.230.

Notably, with respect to email, because employees generally do not possess an expectation of privacy in their work accounts, employers may access personal emails exchanged over these accounts. Employees should be aware that some employers may choose to install surveillance monitoring systems into work accounts, databases and company-provided devices. As technology and communications systems advance, employees should also be conscious of their activities on communications platforms. Some messenger services used by companies, such as Slack, have announced privacy policies that allow employers to download all data from their workspace, including all employee data and messages.

Polygraph testing 14.4.3

An employer's use of polygraph testing in aid of an investigation is limited by the Employee Polygraph Protection Act of 1988.[32] An employer seeking to use a polygraph must: (1) be conducting 'an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage'; (2) possess 'a reasonable suspicion that the employee was involved in the incident or activity under investigation'; (3) show that 'the employee had access to the property that is the subject of the investigation'; and (4) follow a number of statutorily mandated procedural guidelines.[33] If the employer satisfies these requirements, it can terminate an employee who refuses to take the polygraph test, or takes it and fails, provided there is 'additional supporting evidence' justifying the termination.[34]

The Secretary of Labor may bring court action to restrain employers who violate the statute and may assess monetary penalties. In addition, an employer who violates the law may be liable to the employee or prospective employee for appropriate legal and equitable relief, which may include employment, reinstatement, promotion, and payment of lost wages and benefits.

State law may provide additional restrictions on the use of polygraph tests and other tests purporting to determine truth or falsity.[35]

Covid-19 14.5

The covid-19 pandemic has impacted virtually every aspect of society, especially the workplace; the virus has presented a variety of new challenges for employers and employees. Most notably, companies have had to adjust to remote working and social distancing, which, among other consequences, has made it challenging to conduct internal investigations, especially those involving extensive travel

32 See 29 U.S.C. §§ 2001-2009.

33 See 29 U.S.C. § 2006(d).

34 See 29 U.S.C. § 2007.

35 See, e.g., N.Y. Lab. Law §§ 733, 735 (prohibiting employer from using 'psychological stress evaluator examination' to determine truth or falsity); Cal. Lab. Code § 432.2 (prohibiting employers from 'demand[ing] or requir[ing] any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment').

and interviews. This may create a temptation to delay investigations until business life returns to normal. However, delaying investigations carries significant risks, such as failing to prevent further employee misconduct, impairing access to time-sensitive evidence and key witnesses, increasing the possibility that allegations will be leaked to the government or the media, and jeopardising potential co-operation credit from the government. If an investigation, in whole or in part, is going to be delayed, investigators should take steps to preserve potentially relevant information, institute appropriate interim compliance procedures and regularly monitor the matter for urgent developments. If investigators proceed with an investigation using remote interviews, they should take steps to prevent witnesses making unilateral recordings or interviewing in the presence of third parties, and should be mindful that the interviews may be regarded as having occurred in each of the jurisdictions where the participants are located (requiring consideration of each jurisdiction's laws governing privilege and data privacy).

The pandemic has also created new privacy and discrimination concerns. Employers are permitted to take reasonable measures to combat the spread of the virus, including administering covid-19 tests on employees, taking their body temperatures, making disability-related inquiries, and requiring those who are ill to stay home.[36] But if an employer is concerned about an employee's health, it generally may not exclude that employee – or take any other adverse action – solely because the employee has a disability that places him or her at higher risk. Such action is only allowed if the employee's disability poses a 'direct threat' to her health that cannot be eliminated or reduced by reasonable accommodation.[37] Employers may be compelled to grant reasonable accommodations to employees with disabilities that place them at higher risk from covid-19, provided such accommodations do not create an undue burden.[38] Lastly, while the pandemic has forced many businesses to downsize, employers may not use that as a pretext for unlawful discrimination. For example, a company cannot use the pandemic as an excuse to lay off its older workers because of their age.

14.6 Indemnification

Among the significant issues that may arise from in-house counsel, and often external counsel, representing the company and not the individual is whether the employee has a right to be indemnified. The right to be indemnified may extend to legal fees, advancement of legal fees and for any potential judgment

36 See US Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

37 Id.

38 Id. If an employee does not have a qualifying disability justifying a remote working accommodation, the employer may require him or her to come into the office, subject to any contractual exemptions or applicable state and local law (including stay-at-home orders). However, an employee who is infected or quarantined or who is caring for children or infected family members may be entitled to leave from work under the Family and Medical Leave Act, the Families First Coronavirus Response Act, and analogous state law.

debt or settlement. As discussed above, an employee has a right to have his or her own counsel, even if the company pushes for joint representation by company counsel, but the complicated question of whether the company must indemnify the employee for costs around separate representation may arise. Determining a company's indemnification obligations requires close review of any agreements and understandings that might give rise to indemnification or advancement of fees. It is critical that an employee communicate closely with company counsel to come to a mutual understanding of the company's obligations.

Determining whether an individual is indemnified 14.6.1

Employees should ask their counsel to assertively engage in communications with the employer and company counsel to determine whether the company will agree to indemnify the individual employee and to advance fees. This conversation should also specifically discuss the exact scope of any indemnification. If the company agrees to, or must, indemnify from any agreement or source of this right, employee's counsel should draft and execute a written agreement binding the company. Although the company may seek to impose unfavourable terms, it is generally advisable to reduce the indemnification obligation to writing.

Employees and their counsel should carefully review potential sources of the right to indemnification. These sources may include company by-laws, local law in the state of incorporation, company policies and insurance policies of the employer.

Potential sources of right to indemnification 14.6.2

Corporate by-laws 14.6.2.1

Corporate by-laws often delineate the company's obligation to indemnify an employee's costs arising out of representation for internal investigations or any matters related to his or her official duties. Employee counsel must carefully review corporate by-laws because, even if indemnification obligations are provided, they are often listed with limitations or releases from obligation. For example, many companies include release provisions releasing the company from its obligations or entitling it to repayment of any indemnified cost if the costs subsequently transpire not to be indemnifiable. If these provisions exist, it is likely that the company will require the employee to sign an undertaking letter, in which the employee agrees to repay any amounts advanced if it is later determined that the employee was not entitled to indemnification. Similarly, there is a difference between the duty of an employer to indemnify an employee of costs incurred and any duty to advance defence costs. Some corporate by-laws regarding indemnification may require advancement of attorneys' fees. However, the by-laws should be reviewed carefully, because absent such language, the employee has no right to advancement of attorneys' fees.[39]

39 In practice, more often than not, by-laws will entitle employees to have their attorneys' fees advanced.

Many corporate by-laws also include specific language of which employee categories have a right to indemnification. For example, it is common for company by-laws to indicate that the company must indemnify an officer or director who is successful on the merits or otherwise in the defence of a qualifying claim, but remain silent on the issue of whether other private employees have a right to indemnification. These other employees, or their attorney, should ask for indemnification whenever a claim or investigation arises.

14.6.2.2 Local law in state of incorporation

Employees and their counsel should also review state and local laws in the state of incorporation. Review of state and local laws is often overlooked because employees assume indemnification provisions are exclusively contained in corporate by-laws and any employment or subsequent agreements with the company. However, a number of states impose indemnification obligations on companies in local and state laws for private employees, especially for directors and officers.

Under Delaware corporate law, directors generally have a right to indemnification if they are, or face being, parties to a proceeding or subject to investigation, unless they did not act in good faith and in a manner reasonably believed to be in, or not opposed to, the best interests of the corporation.[40] Directors and officers who succeed in their defence are indemnified. On the other end of the permissive spectrum, if a director or officer acts in 'bad faith', they are not entitled to indemnification. Delaware courts have stated that the 'boundaries for indemnification' are 'success' and 'bad faith'.[41] To determine where on the permissive spectrum their situation lies, directors and officers should turn to any governing documents for additional language. Delaware law also allows directors and officers the right to indemnification through advanced costs for pending litigation.[42]

Both Oregon and Washington law also provide for mandatory indemnification of a director who successfully defends, on the merits or otherwise, any proceeding in which the director was made a party due to his or her position as a director with the company, unless the articles of incorporation provide otherwise.[43]

California is an example of a state that extends indemnification protections to any private employee, not only directors or officers. The California Labor Code provides that an employee has a right to reimbursement. The obligation is found in California Labor Code Section 2082, which states:

> *Any employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even*

40 See 8 Del. C. § 145(c).

41 *Hermelin v. K-V Pharm. Co.,* 54 A.3d 1093, 1094 (Del. Ch. 2012).

42 See 8 Del. C. § 145(e).

43 See ORS 60.394 and RCW 23B.08.520.

> *though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.*[44]

The California Supreme Court explained the statute's application to indemnification as a public policy obligation. In *Edwards v. Arthur Andersen LLP*,[45] the Court stated:

> *California has a strong public policy that favors the indemnification (and defence) of employees by their employers for claims and liabilities resulting from the employees' acts within the course and scope of their employment. Labor Code section 2082 codifies this policy and entitles employees to indemnification from their employer.*

Even if a state statute imposes obligations on companies to indemnify legal costs for private employees, however, the employee may not have the right to select their own separate counsel. In other words, unless a known conflict exists, a private employee may be forced to use whichever counsel represents the company. New York is an example of a state where the statutes provide that even if a court ordered an employer to indemnify a private employee, the employee would have to show that the specific attorneys' fees in question were 'reasonable' and 'necessary',[46] which places the burden on the employee to show why representation separate from company counsel is necessary. This creates a potential issue if a private employee has reason to believe that his or her interests would be better served with separate counsel—the private employee is placed in the difficult position of deciding between having certain legal costs covered and the ability to choose separate counsel to better protect his or her interests. Employees that believe they will be indemnified pursuant to state statute should adequately review the law to ensure that they understand the parameters—and potential limitations—of indemnification obligations at the onset of an investigation.

Company policies 14.6.2.3

Employees should also look at company policies and employment contracts or subsequent agreements as sources of indemnification rights. In addition to indemnification required by corporate law, individual employees may have contractual indemnification rights in their employment agreements. Even if the company by-laws do not indicate a right to indemnification, a company must honour any obligations in individual employment agreements. For example, as good business practice and to promote co-operation with an investigation, some companies may decide to expand the scope of indemnity to include employees who might not be covered by the by-laws or state and local laws that are likely to be witnesses or subjects. As a strategic point, employers may expand the scope of indemnity to ensure

44 See Cal. Labor Code § 2802(a).

45 44 Cal. 4th 937, 952 (2008).

46 See N.Y. Bus. Corp. Law § 724.

co-operation of employees, which may show the company in a more favourable light to any regulator or investigative body.

14.6.2.4 Insurance policies of employer

Some employers may choose to purchase directors' and officers' (D&O) insurance to supplement or provide an alternative to indemnification. Some indemnification agreements require companies to purchase insurance. If the employer has D&O insurance, the nature of the allegation and the terms of the specific policy may trigger payment of defence costs.

D&O insurance is increasingly important in corporate culture owing to the increase in shareholder, class action, derivative action and other prosecutorial and regulatory investigations targeting not only companies, but also their directors and officers. If any employee is also a director or officer of the company, it is important to understand that D&O insurance policies are not standard and can vary in terms of protection. It is crucial for employees and their counsel to review terms, conditions, provisions and exclusions.[47]

14.6.3 Advocating for indemnification

Despite numerous possible sources giving rise to the right to indemnification, companies are not always eager to indemnify employees for representation or costs incurred during an investigation or defence. However, employees should advocate for the company to indemnify them for incurred costs or advancement of fees. The benefits to both the employer and employee should be emphasised, as indemnification can protect both parties' interests. When entering an employment or separation agreement, an employee should request and push for a specifically defined indemnification provision.

The employer or company may become more credible and promote efficiency and effectiveness of an internal investigation by ensuring that employees are adequately represented. If company counsel recognises a conflict of interest and the need for the employee to have separate representation, the corporation benefits if the employee is co-operative. Therefore, the company may assess the employee's involvement and whether failure to pay individual counsel fees or to advance attorneys' fees will make the employee's co-operation less likely. While in some instances employees may be required to co-operate by subpoena, it is in the best interest of the corporation to work jointly with the employee to prepare its own defence and receive information in advance through a joint defence agreement.

In addition, regulators and prosecutors cannot take into account during an investigation whether a corporation is advancing or reimbursing attorneys' fees or providing counsel. Along the same lines, a prosecutor or regulatory body cannot request that a company refrain from taking such action. In 2008, the

47 See generally Matthew L Jacobs, Julie S Greenberg, *Basic Principles of D&O Coverage and Recent Developments*, 741 PLI/Lit 29, *35 (2006).

Department of Justice published the 'Filip Memo',[48] which laid out the principles of federal prosecution of business organisations. The guidelines, codified in the US Attorney's Manual (now called the Justice Manual), state that: 'In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment.'[49]

Situations where indemnification may cease 14.7

Employees should be aware of the circumstances in which a company's obligations to indemnify may cease. As mentioned above in Section 14.5, a company's obligations to indemnify an employee may be contingent on, and circumvented by, any undertaking agreement between the parties. An undertaking agreement requires an employee to repay any advanced or covered costs in the event the costs were ultimately not deemed indemnifiable. A company is generally released from its indemnification obligations for any violation of an undertaking agreement (substantive or procedural) and fraud or bad faith.

Failure to co-operate with investigation

See Chapter 10 on co-operating with authorities

In some instances, an employee's failure to co-operate with a company's investigation could absolve the company's obligation to cover individual costs. This can create a difficult decision for an individual employee regarding whether to co-operate where failure to do so will affect indemnification. Even if an employee does not want to co-operate with company counsel – internal or external – and submit to an interview or otherwise co-operate, he or she may still be called to produce testimony or information pursuant to a subpoena. Failure to initially co-operate may preclude an employee from securing indemnification for assumed costs. However, it is still often in the best interest of an employer to offer to indemnify employees who may initially seem unco-operative, because in the event they are called to testify, it is probably safer for the company if they are represented.

Privilege concerns for employees 14.8

Privilege considerations become central during investigations. Because of the various permutations of attorney–client relationships with both internal and external counsel, it is important for employees to remember that they only enjoy protections over communications with individual counsel. If an employer requests an interview with an employee, employee counsel and company counsel, the communications and testimony at the interview are not privileged.

48 Memorandum from Deputy Attorney General Mark Filip to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations 8 August 2008), available at https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

49 USAM 9-28-730 Obstructing the Investigation.

An employee and his or her counsel should note whether the company counsel issued a proper *Upjohn* warning and whether it was documented. If an inadequate *Upjohn* warning was given, an employee's individual counsel may attempt to prevent or limit disclosure of any statements made by the employee in an interview where individual counsel was not present.

The Third Circuit established the *Bevill* standard to determine whether a company employee holds a joint privilege with the employer company over communications with corporate counsel, which has since been adopted by the First, Second, Ninth and Tenth Circuits. The *Bevill* standard holds that 'any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer'.[50] The Court in *Bevill* extended the privilege to officers and employees in an individual, personal capacity only when the employee satisfies the following five-factor test. First, they must show that they approached counsel for the purpose of seeking legal advice. Second, they must show that when they approached counsel, they made it clear that they were seeking legal advice in their individual capacity rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.[51] Notwithstanding the foregoing, an employee would be ill-advised to confide in, or speak candidly with, company counsel given the subjective nature of the standard. Whenever possible, an employee should make efforts to secure personal individual counsel.

See Chapters 8 on witness interviews and 16 on representing individuals in interviews

Finally, as a practical matter, employees should be aware that communications with other employees or colleagues regarding the investigation are not privileged regardless of whether the colleague is also involved in the investigation or represented by the same counsel. Even if an employee believes he or she is sharing attorney communications with other employees who need to know the attorney's advice and who also have an attorney–client privilege with the same counsel because he or she is involved or implicated in the investigation and also represented by company counsel, it is always prudent to refrain from sharing privileged information. If an attorney's communication is shared beyond those who need to know, the attorney–client privilege, may be destroyed. In addition, employees should attempt to communicate with individual counsel on personal and non-company devices to ensure that the privilege is protected.

See Chapter 37 on privilege

50 *In re Bevill, Bresler & Schulman Asset Mgmt. Corp*. 805 F.2d 120 (3d Cir. 1986).

51 *US v. Graf*, at 8 (citing *Bevill*, 805 F.2d 120 (3d Cir. 1986)).

Appendix 1

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Milt Williams' practice focuses on white-collar criminal and regulatory matters, employment law, litigation and advisory work representing corporations, and complex commercial litigation. He has litigated discrimination claims, Dodd-Frank and Sarbanes-Oxley retaliation claims, and SEC and IRS whistleblower claims on behalf of employees, and he has tried over 55 cases (both civil and criminal) to verdict. Before joining Walden Macht & Haran, Milt served as Deputy General Counsel and Chief Compliance Officer at Time Inc, where his responsibilities included compliance, the Foreign Corrupt Practices Act, OFAC, and Sarbanes-Oxley, as well as intellectual property, privacy, data security, and other cutting edge areas. At Time Inc, Milt actively litigated a variety of employment law matters on behalf of the company concerning race, age and gender discrimination, and independent contractor litigation. In 2013, Milt was appointed co-chair of the Moreland Commission to investigate public corruption. Earlier in his career, Milt served as an Assistant US Attorney in the US Attorney's Office (USAO) for the SDNY. His last assigned unit in the USAO was the Securities and Commodities Fraud Force. He was also an Assistant District Attorney in the Manhattan District Attorney's Office. Milt is a graduate of Amherst College and the University of Michigan Law School in Ann Arbor.

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Avni Patel is an experienced litigator and trial attorney who has represented individuals and corporate clients in complex, sensitive and high-profile cases including in federal, state, and local criminal and regulatory matters. Her practice focuses on white-collar criminal defence, government investigations and regulatory enforcement, and complex litigation. At Walden Macht & Haran, Avni was part of the trial team who successfully defended a corporate client in a high-profile public corruption case in the Southern District of New York. They won the

only acquittal in the highly contested and publicised four-defendant trial. She also is part of the WMH team representing one of the most significant whistleblowers in sports history. Additionally, Avni was also on the leadership team of the independent monitor named by the US Department of Justice to oversee General Motors' compliance with its obligations under the deferred prosecution agreement (DPA) stemming from its recall of defective ignition switches. Before joining Walden Macht & Haran, Avni served as an Assistant District Attorney for five years in the Bronx County District Attorney's Office. In those five years, Avni tried over 15 felony and misdemeanour cases to verdict – five of them to jury verdict – on charges ranging from attempted murder to grand larceny. Avni is a graduate of Boston University School of Law and Northwestern University.

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Jacob Gardener is an experienced litigator who represents corporations and individuals in criminal, civil and regulatory matters. Jake has extensive experience managing internal and government investigations, complex commercial disputes, and appeals. He has helped lead internal investigations into high-stakes matters involving alleged violations of the FCPA and securities laws. Jake has also successfully handled numerous civil cases in a variety of areas, including commercial contract disputes, mortgage-backed securities litigation, shareholder derivative actions, bankruptcy and employment law. He has significant courtroom experience, including briefing and arguing several appeals and dispositive motions in criminal and civil cases. Before joining Walden Macht & Haran, Jake clerked for the Hon. Dennis Jacobs of the US Court of Appeals for the Second Circuit and the Hon. Naomi Reice Buchwald of the US District Court for the Southern District of New York. In addition, Jake served for several years as a New York City firefighter. His academic scholarship has been published in the *Journal of Criminal Law and Criminology* and the *Boston University Journal of Science and Technology Law*. Jake is a graduate of Yale Law School and Stanford University.

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