

3 Considerations for Nonprofits when Conducting Internal Investigations

Compliance and Ethics



When a claim arises due to potential litigation — usually relating to employment discrimination, harassment matters, fraud, embezzlement, or bribery — organizations often conduct an internal investigation to determine the underlying facts relating to the claim and what steps should be taken to

mitigate the claim or prepare for litigation.

This article provides an overview of three issues to consider when conducting internal investigations.

1. Clarifying attorney-client privilege and attorney work product

Retaining privilege over internal investigations is important to ensure that advice and counsel provided during the investigation remain protected from disclosure. However, maintaining privilege during internal investigations is not always straightforward. When initiating interviews, counsel should ensure that *Upjohn* warnings are given to staff to ensure that the information collected is understood to be protected by privilege and considered confidential.

According to the [Yates Memo](#), the *Upjohn* warning should normally address the following points:

- The lawyer represents the company only and not the witness personally.
- The lawyer is collecting facts for the purpose of providing legal advice to the company.
- The communication is protected by the attorney-client privilege, which belongs exclusively to the company, not the witness.
- The company may choose to waive the privilege and disclose the communication to a third-party, including the government.
- The communication must be kept confidential, meaning that it cannot be disclosed to any third party other than the witness's counsel. See, e.g., ABA, White Collar Crime Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts With Corporate Employees* (July 17, 2009).

The *Upjohn* warning is important not only to explain that the discussion is privileged, but to ensure that the employee does not mistakenly believe that the counsel conducting the investigation is his or her own attorney.

Despite *Upjohn* warnings, courts have held that information collected during investigations conducted by in-house (or regular outside) counsel are [not privileged](#) in certain circumstances, such as in *Banneker Ventures, LLC v. Graham*. Here, the US District Court for the District of Columbia found that the [attorney work-product doctrine](#) did not apply when an investigation was undertaken years after the company anticipated litigation and the attorney-client privilege did not apply because the resulting report was released to the public.

In two opinions involving Kellogg Brown & Root, the District of Columbia Circuit Court affirmed that internal investigations conducted by in-house counsel be privileged and create [protected attorney work product materials](#). Furthermore, “[c]ounsel must be careful to distinguish between material that is protected by the attorney-client privilege and material that is protected by the work-product doctrine. In addition, counsel must understand that factual work product material receives less protection than opinion work product.”

2. Investigate claims in timely manner

One goal of an internal investigation is to gather facts to determine whether a claim or allegation is made in good faith. That said, organizations should initiate an investigation even if a [formal claim](#) has not been filed:

“Nonprofits, like any other employer, are obligated to conduct an investigation when the nonprofit knows or has reason to know that an employee is being subjected to discrimination, harassment, or other unlawful conduct in the workplace, even if the complainant never submits a formal written complaint and no witnesses provide written statements.”

Employers are expected to investigate complaints in a timely manner, [per federal and local laws](#) (e.g., Title VII, Americans with Disabilities Act (ADA), Sarbanes-Oxley Act). They should be prepared to quickly determine and implement actions that mitigate risk. Delaying an investigation could be problematic, and can expose the organization to risks including waiver of attorney-client privilege.

To further [mitigate retaliation claims](#), in-house counsel should use a comprehensive protocol when investigating claims. From preparing for the investigation to interviewing the complainant to making necessary actions, having and following the [right framework](#) is critical to ensure a fair investigation and avoid litigation.

3. Beware of retaliation against whistleblowers

Employers should be careful not to retaliate against employees who make claims in good faith. These employees are likely considered “whistleblowers” and are entitled to protections under various state and federal laws — and could win [costly lawsuits](#).

Legal risks for retaliation are high because retaliation is easier to prove than some of the underlying claims that [led to retaliation](#):

“To make out a claim for retaliation, it must be shown that (1) plaintiff was engaged in a statutorily protected activity by opposing an employment practice that she has a good faith, reasonable basis to believe is unlawful; (2) an 'adverse employment action' was taken by the employer; and (3) there is some causal connection between the two.”

Conclusion

Conducting internal investigations is complicated and should be approached thoughtfully, yet swiftly. Companies run the risk of losing privilege and potentially being exposed to additional claims if investigations are not managed appropriately.

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