

The era of internal investigations: how attorney-client privilege protection can make it or break it

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Internal investigations may be old news, but they will steal the spotlight again with the approach of the deadline for the implementation of the Whistleblowing Directive (December 2021).

In light of this, here is a handbook on designing and conducting internal investigations and why attorney-client privilege protection is a key aspect. Although companies and organizations have had enough reasons so far to conduct internal investigations, such as (a) receiving search warrants, subpoenas, or other requests for information from authorities; (b) employees called as witnesses by the criminal authorities; (c) audit findings; (d) red flags in acquisition due diligence; (e) complaints from vendors, business partners, customers, or competitors, we can expect the number of internal investigations to increase. As a consequence of the protection to be provided to whistleblowers, more internal reports will be filed and they will have to be handled properly by the company and as soon as possible, in order to avoid external reports or, even, media exposure.

You might be thinking *this will not happen to my company*, but the bad news is that, despite implementing the most proper and effective compliance and training programs, companies and organizations still encounter allegations of wrongdoings or misconduct which call for some level of inquiry.

However, we should not forget the many advantages that conducting an internal investigation can bring: limiting potential exposure, retaining customers, preventing or significantly reducing sanctions imposed by the regulatory or criminal authorities, possibly avoiding intrusive criminal investigations. Furthermore, knowledge is power, so gathering information on the matter will ensure some level of control over any possible outcomes.

A company's trump card in internal investigations is the attorney-client privilege; from the outset of any investigations, we should bear in mind that it is impossible to anticipate what could actually be discovered. Thus, it is best to protect your business and the investigations process and findings by benefitting from the protection of the attorney-client privilege.

The attorney-client privilege protects confidential communications between an attorney and its client for purposes of giving or receiving legal advice. In order to preserve the confidentiality of the information, documents and discoveries of an investigation, external counsels should be engaged to provide legal advice on the alleged wrongdoing and obligations of the company based on the outcomes of the investigations and in light of the applicable law, and for such reasons should conduct an investigation to determine the facts.

To cover all aspects of the internal investigation, counsels will also instruct recipients and employees involved not to forward or disclose privileged or confidential communications and will limit distribution of information only to need to know personnel. Also, whenever non-attorneys will participate (e.g. auditors, experts), it will be made clear that such persons are acting under the direction of the attorney for the purpose of providing legal advice to the company and, therefore, will be subject to confidentiality. The extent of an investigation is also one of the first steps. At a minimum, enough information should be gathered as to make an informed decision on the need of solely an informal inquiry or an extended internal investigation. In this regard, we should remember that there is a tendency for the government authorities to expect companies to monitor their own conduct and report any potential wrongdoings in their activity. Otherwise,

whenever wrongdoings are discovered by the authorities using other means, the company is off to a rocky start and risks higher fines and more intrusive investigations.

The lengthy part of any investigation is collecting and reviewing documents, conducting witness interviews, summarizing the background facts and evidence gathered and determining the applicable law to the evidence.

Afterwards, when drafting and implementing the conclusions and recommendations of the investigations, it comes to the company, shareholders and/or managers to take the most important decisions based on the legal advice provided by the attorney.

Then, in most cases, there is a need to draft a remediation plan and implement it as soon as possible, to be able to prove to any authority that the company is making efforts to remove and prevent any wrongdoings in its activity.

Secondly, depending on the outcome of the investigation, there can be an obligation to disclose the findings to a prosecutor, or, in any case, it should be assessed whether to voluntarily disclose the contents of the investigation and if there are any benefits in doing so (e.g. showing cooperation, good faith and proactive behavior, presenting the company's version of the facts first). It has been a global common practice for criminal cases to be opened based on a whistleblowing report and, although we expect this trend to increase starting with 2022, conducting proper internal investigations will keep companies, employees and shareholders as far away as possible from prosecuting offices.

It may seem like there are many *sink or swim* situations, but, fortunately, companies can find those saving life vests with a proactive approach and proper internal investigations, all under the protection of attorney-client privilege.