King & Spalding
Client Alert

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US/UK Investigations Comparative Note

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King & Spalding's April Client Alert provided an overview of and practical advice related to issues that an employer should consider before conducting an internal investigation in the United Kingdom: privilege, privacy, discipline, and whistleblower laws. This Alert is a companion piece and focuses on those subjects in the United States. As this Alert demonstrates, even when internal investigations are conducted in countries with shared languages and legal traditions, employers and investigators cannot rely on a one-size-fits-all approach.

PRIVILEGE

Privilege is a key consideration, as the unwanted disclosure of communications and materials from an investigation may pose significant risks and reputational harm to an employer.

Generally, oral and written communications between a client and an attorney are protected by the "attorney-client privilege" ("legal advice privilege" in the UK). Material created by or on behalf of attorneys and their clients in anticipation of litigation is protected by the "work-product doctrine" ("litigation privilege" in the UK). Attorney-client privilege is limited to communications wherein legal advice is sought or given. The work-product doctrine is applicable to material created in advance of pending or contemplated litigation. In both the US and UK, privilege usually does not attach to communications and material made by non-attorneys, such as HR, audit, or compliance teams. Also, in both the US and UK, privilege usually does not attach to communications and material made by in-house counsel as part of the ordinary course of business.

Where legal privilege differs most notably between the US and UK is in the definition of "client." In the US, "client" includes the company itself and many of its employees. In the UK, however, "client" is limited to the company and its employees who are authorized to seek and receive legal advice. As such, attorney investigators in the US have wider latitude to investigate under the protection of privilege.

Finally, privilege is an ongoing consideration. Where a company shares findings and reports from an investigation with its Board, auditors, or government regulators, it may waive privilege that attached during its course and care should be taken not to do so inadvertently.

UPJOHN WARNINGS

In the US, in-house or outside counsel conducting an investigation must explain to witnesses that they represent the company, not the witness (commonly known as an *Upjohn* warning based on the Supreme Court decision by that name). While the interview is confidential and privileged, the company alone may waive that privilege. Accordingly, US investigators cannot guarantee confidentiality to witnesses. US labor laws and collective bargaining agreements may impose additional limitations on confidentiality in investigations. In UK internal investigations, similar warnings are merely a best practice, not a legal necessity.

DOCUMENT COLLECTION AND DATA PRIVACY

There exists no uniform federal privacy regime in the US, but rather a patchwork of federal and state laws that may apply in the context of an investigation. US investigators enjoy greater access to employee information, records, and data than UK investigators. Absent a state law or CBA provision to the contrary, searches and questioning undertaken in an investigation are usually limited only by the standards of “reasonableness” and “legitimate business purpose.”

US employers and investigators should remember, however, that the UK’s data protection rules have extraterritorial reach, and those strict standards may apply to US multinationals that offer goods and services in the UK depending on the location of the data and the individuals.

US employers have little to lose and much to gain by ordering employees and IT to preserve documents at the outset of an investigation. Employers who fail to preserve documents and data after they learn of pending or contemplated litigation are subject to serious penalties.

DISCIPLINARY ACTION TO FOLLOW

There are great differences between the disciplinary processes in US and UK internal investigations. US investigators may provide evaluative opinions and decide upon discipline, and employees do not have a right to be accompanied at a disciplinary hearing or appeal discipline. US employers with unionized workforces may be subject to additional requirements.

When employee misconduct is ongoing, employers should consider the risks of immediate harm and act to stop it. The best way to do so is to place any involved employees on paid leave; limit their access to the worksite and company IT; and make a final decision regarding their continued employment after the conclusion of an internal investigation.

WHISTLEBLOWING

There is no uniform, omnibus federal whistleblower regime in the US. Two notable whistleblower protection provisions are found in the Dodd-Frank Act and Sarbanes Oxley Act (SOX). Dodd-Frank applies to publicly traded companies and the private companies with whom they do business. The Act protects “any individual” from retaliation who reports employers’ violations of laws pertaining to wide-ranging activities in financial markets and in overseas business. SOX protects employees and independent contractors at publicly traded companies who report violations of federal laws or

misconduct that might affect shareholders. Importantly, SOX requires publicly traded companies to establish an ethics code and internal procedures by which employees and independent contractors can report violations.

US BEST PRACTICES

The "Golden Rules" suggested in April's Client Alert for UK employers are applicable to US investigations too. In addition, US employers and investigators should remember the following:

- Clearly define the scope, goals, and applicable privileges of any internal investigation at the outset in a formal statement of work. Doing so may help to resolve any challenges to privilege that arise later.
- Always review federal *and* state laws and regulations at the beginning of an investigation and as new issues and facts arise during its course.
- While internal complaint and investigation procedures for whistleblowers are required for publicly traded companies, they are also a best practice for all companies. These procedures promote transparency and compliance across an entire company.