Balancing Privilege Interests with Employees' US Labor Rights in Internal Investigations

Compliance and Ethics

During high-stakes internal investigations involving allegations of potential wrongdoing by employees, corporate counsel must take proper steps to preserve the company's argument that the attorney-client privilege protects investigation materials from disclosure. At the same time, they must balance

compliance with federal labor laws protecting employees' rights to discuss workplace issues and, for unionized employees, to have union representation at certain investigatory interviews.

This article explores the intersection of preserving privilege during an internal investigation while maintaining compliance with employees' federally protected rights. In short, it is not settled whether the attorney-client privilege protects an interview conducted with a union representative present, so attorneys must proceed cautiously and strategically. However, attorneys can instruct employees to not discuss privileged interviews in the right circumstances.

Brief overview of the law: *Upjohn*, *Weingarten*, and protected concerted activity

Upjohn and privileged interviews of employees

Most attorneys will recognize the familiar standard from *Upjohn Co v. United States*, 449 U.S. 383 (1981) for when a company's communications qualify as attorney-client privileged. For the privilege to apply, in general, a communication must be (1) confidential; (2) between an attorney (or someone acting on the attorney's behalf) and a client; and (3) for the purpose of obtaining legal advice.

When the client is a company, the privilege applies to communications between the company's attorneys and its employees when the communication (1) otherwise qualifies as privileged as defined above; (2) concerns the company's legal matters; and (3) is disclosed only to those who reasonably need to know of the communication to act for the company.

Under those criteria, the privilege can extend to counsel's interviews with non-management employees, particularly when those employees have information critical to the attorney providing legal advice to the company. But when dealing with non-management employees (more specifically, employees who do not qualify as "supervisors" under Section 2(11) of the National Labor Relations Act), the requirements for confidentiality and limited disclosure butt up against those employees' federal labor law rights.

Weingarten rights

For employers with unionized workforces, counsel must be mindful of *Weingarten* rights when conducting investigatory interviews of unionized employees. In *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), the US Supreme Court held that such employees are entitled to union representation at investigatory interviews that the employee reasonably believes may result in discipline against them.

The representative is usually a coworker, union steward, or other union agent. Sometimes the representative is employed by the company, sometimes not. The representative's role is to assist the employee by, for example, clarifying facts or identifying other employees with relevant knowledge.

When an employee properly invokes *Weingarten* rights, the employer has three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between an unrepresented interview or no interview.

If the employee elects to discontinue the interview, then the employer cannot require an unrepresented interview or penalize the employee. However, the employee forfeits the chance to tell his or her side and any benefits that might have been derived from the interview (such as reducing

the risk of discipline). The employer's right to proceed with the investigation without interviewing the employee stems from the National Labor Relations Board's (NLRB) and Supreme Court's recognition that an employee's exercise of *Weingarten* rights cannot interfere with legitimate employer prerogatives.

Protected concerted activity

In both union and non-union workforces, rank-and-file employees (i.e., non-Section 2(11) supervisors) enjoy the NLRA's protections to engage in concerted activity, including discussing their terms and conditions of employment in certain situations. In the investigation context, the NLRB holds that employers cannot require that employees keep all workplace investigations confidential, as such a requirement would infringe on employees' rights to discuss workplace conduct under Section 7 of the NLRA.

In *Banner Estrella Medical Center*, 362 NLRB 1108, 1109 (2015), the NLRB held that "an employer may restrict [discussions of workplace investigations] only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights to discuss such investigations. Such justifications can include preventing witness tampering, evidence destruction, retaliation, or violence — if the employer can show it held those concerns in the particular investigation in which it required confidentiality.

Navigating the intersection of privilege and federal protections for employees

Given that backdrop, how can counsel preserve the company's argument that the investigation is privileged without running afoul of employees' federal labor rights? Counsel should first consider whether it needs to conduct the interview at all for purposes of its investigation. If the privilege is important, and the investigation can get the information from sources other than rank-and-file employees, then counsel could opt not to conduct the interview at all.

But if counsel deems the interview necessary, proceed cautiously and strategically. In the union context, that means understanding the limits of *Weingarten* rights. For example, *Weingarten* rights are not automatic; absent a contrary company policy or collective bargaining agreement, the employee must affirmatively request representation. Additionally, the request must be based on a *reasonable* belief that the interview could lead to discipline. If the employee's belief is objectively unreasonable under the circumstances, then *Weingarten* rights do not apply.

If an employee properly invokes *Weingarten* rights for a necessary interview, then the company must let the representative attend or risk an unfair labor practice charge. But consider limiting the interview to questions about the employee's role in the underlying event. If the employee has additional relevant knowledge, evaluate whether time and resources permit a separate post-disciplinary interview without union representation.

Note that we are aware of no directly controlling authority that says the presence of a *Weingarten* representative destroys privilege. And some authority supports that the presence of a *Weingarten* representative would not destroy the privilege.

Thus, absent contrary authority in your jurisdiction, consider treating such interviews as privileged to preserve the company's best arguments that the entire investigation is privileged. At the same time,

recognize that the risk of impairing the privilege exists. To mitigate that risk, appropriately segregate notes and other investigation materials from interview notes where a representative was present.

As for telling employees to keep the investigation confidential, counsel should first consider whether "legitimate and substantial business justifications" exist for directing employees not to talk about the investigation. We have yet to see a case that holds that the desire to keep the investigation privileged qualifies as a "substantial business justification that outweighs employees' Section 7 rights"; however, we can see a strong argument that it would, particularly in cases where the company anticipates litigation related to the investigation. The safest course would be to couple the privilege justification with another justification that the NLRB has previously recognized (e.g., preventing evidence tampering).

If sufficient justifications exist, counsel should consider identifying them to the employee (in writing) when telling the employee to keep the investigation confidential. Numerous NLRB cases suggest that such explanations help establish an employer's legitimate justifications at trial (e.g., *The Boeing Co.*, 365 NLRB. No. 154, at 43 [Dec. 14, 2017]).

An alternative, conservative approach is to tell the employee (in writing) not to share the specifics of what they discussed with counsel but that they remain free to discuss their terms and conditions of employment with their coworkers.

Summary of practical tips

- Before interviewing the employee, evaluate whether sufficient justification exists to require confidentiality. If so, consider identifying those justifications when instructing the employee to keep the investigation confidential. Give the instruction and justification in writing, along with the *Upjohn* warning (and a *Johnnie's Poultry* warning, as necessary).
- Before interviewing the employee, determine whether *Weingarten* rights will attach if requested. If they will, your investigation strategy should account for that possibility. Determine in advance how you will respond to that request (e.g., whether you will stop the interview, whether you will proceed with the interview and take notes assuming the privilege may not attach, whether you will limit the interview's scope, etc.).
- Evaluate whether it is truly necessary to interview rank-and-file employees and employees represented by a union. If you can get the same information from other sources (e.g., employees who qualify as supervisors under Section 2(11) of the NLRA, documents), then consider not compromising the privilege for the sake of being overly thorough.
- Label all investigation notes, memoranda, reports, emails, and other correspondence "attorney-client privileged and confidential." As appropriate, also label them "attorney work-product," as work-product protections extend to more communications than the attorney-client privilege.
- Segregate notes from interviews where *Weingarten* representatives were present (e.g., through clear labeling or by placing in a separate portion of the investigation file). In such notes, avoid writing mental impressions or segregate such thoughts to minimize the risk to work product-protected information.

Further Reading

See *Julian v. Securitas* Sec. Servs. USA, Inc., No. 308CV1715MRK, 2010 WL 1553778, at *18 n.5

(D. Conn. Apr. 19, 2010) (“[I]t seems logical that the privilege would extend to a union representative attending the meeting on [the employee’s] behalf.”).

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