Employee Rights 2018
Introduction

William Burck and Richard Smith
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GIR KNOW-HOW

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This first edition of Employee Rights presents the views and observations of leading internal and government investigation practitioners in key jurisdictions around the globe, including Brazil, Germany, Singapore, Switzerland, United Kingdom and the United States. From responding to allegations of assault, harassment, sexual harassment, improper use of corporate funds or assets, the development of the #MeToo movement and other similar movements, to dealing with shareholders lawsuits and the increased global enforcement of anti-corruption laws, a company's need to investigate employment-related issues arises more frequently today than it has in the past. Most allegations against a corporate entity, including employee, customer, community, regulatory and governmental complaints or concerns, extend into the employment sphere. This creates serious legal and reputational concerns for a corporate entity, which may require the assistance of experienced employment and white-collar attorneys who can efficiently and sensitively examine the truth of the allegations and help the corporate entity determine the best path forward.

An employee facing an internal investigation has a number of rights that the corporate entity, employee and their counsel should consider at the onsite of the investigation. This is the case regardless of whether the employee is a witness or subject of the internal investigation. Additionally, complication arise from the fact that an employee's rights may vary based on the jurisdiction, type of company (public v privately held), corporate policies of the entity, the employees positon and seniority within the entity and whether a governmental regulatory or criminal enforcement agency is, or may become, involved. If governmental regulators or criminal enforcement agencies are involved and the corporate entity is the subject of the investigation, its people, policies and procedures will be at issue.

There are differences between investigations in the US and foreign jurisdictions. In the US, a proper Upjohn warning clearly communicates to an employee that the company's counsel represents the company and not the employee; if necessary, the company can use the threat of disciplinary action to encourage its employees to cooperate. Internal investigation conducted in foreign jurisdiction, on the other hand, because of the absence of at-will employment and privacy rights in those jurisdiction, may have less leverage in securing an employee's cooperation and fewer options for disciplining employees who fail to cooperate with an internal investigation. Corporate entities with employees in foreign jurisdictions and employees employed in foreign jurisdictions must be cognisant of the legal and cultural differences regarding the employer-employee relationship in each jurisdiction.

There is no one-shoe-fits-all in the context of an internal investigation; corporate entities, general counsel and HR professionals engaged in an internal investigation should consider the principles addressed in the responses to the questionnaire when they consider conducting an internal investigation. The answers to the questionnaire are intended to provide guidance and information about employee rights during a corporate entity's internal investigation. They highlight the issues and consideration that are applicable to a corporate entity and its employees.

We want to thank all of the contributors who prepared submission for this project. They have taken time from their practice to provide insight and observations that will assist corporate entities, practitioners and their clients in navigating the minefield associated with an internal investigation.

Readers should be aware that the answers to the questionnaire are intended to be an overview of laws (not legal advice) and that even within each jurisdiction, laws and court interpretation of those laws may vary by jurisdiction.

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The company's investigation

1 How does the company retain its privileges, including the attorney-client privilege, when interacting with employees in an investigation?

To ensure attorney–client privilege attaches to communications with company employees, the communications/information must be: (i) confidential; (ii) between an employee and corporate counsel; (iii) to secure legal advice; (iv) unavailable from upper-level management and within the scope of the employee's work duties; and (v) provided with adequate Upjohn warning. See Upjohn Co. v United States, 449 U.S. 383, 390-92, 394 (1981).

An Upjohn warning makes clear to the employee that: (i) the company counsel is providing legal advice to the company; (ii) the company counsel represents the company and there is no attorney–client relationship between the company counsel and the employee; (iii) the conversation between the company counsel and the employee is privileged and should remain confidential; and (iv) the privilege belongs to the company, the company alone can choose to waive privilege and, in the future, the company may share the information with a third party. See, for example, In re Grand Jury Subpoena: Under Seal, 415 F.3d 333, 336, 340 (4th Cir. 2005). This warning should be documented in case the privilege is later challenged.

When a special committee to the board of governors retains external counsel to conduct an investigation, the attorney–client privilege exists between the counsel and the special committee. See, Ryan v. Gifford, Civil Action No. 2213-CC, 2007 WL 4259557, at *3 n.2 (Del. Ch. Nov. 30, 2007). While communications between a special committee and its counsel are protected, it is less clear that the communications by committee counsel and other stakeholders (in-house counsel or management) in an investigation are protected, particularly if they are the subject of the investigation. See id. Special committees should be particularly mindful of not waiving the attorney–client privilege by disclosing privileged information to individuals who, as a result of the investigative findings, "cannot be said to have interests that are so parallel and non-adverse to those of the Special Committee that they could reasonably be characterised 'joint venturers'" – eg, individual defendants accused of misconduct that also serve on the board of directors. See id. at *3.

2 How does the company retain work product privileges when interacting with employees?

In contrast to the attorney–client privilege, which only protects confidential attorney communications, the attorney work product privilege protects "any [materials] prepared in anticipation of litigation by or for the attorney." See In re Antitrust Grand Jury, 805 F.2d 155, 163 (6th Cir. 1986). This can include witness interviews, reports and similar materials.

To qualify for work product protection, materials must be prepared with litigation in mind and not for ordinary non-litigation business purposes. See Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987). Generally, courts do not require that litigation be in progress, but they will inquire as to whether a document was created because of a reasonable possibility of litigation. See Biegas v. Quickway Carriers, Inc., 573 F.3d 365 (6th Cir. 2009).

Most courts distinguish between factual and opinion work product. See Upjohn, 449 U.S. at 400-01. Factual work product may be discoverable upon a showing of substantial need. An example of substantial need would be if an eyewitness passes away after having been interviewed. Opinion work product, which contains an attorney's own legal analysis or impressions, receives absolute or heightened protection depending on the court.

To avoid discovery of attorney work product, company counsels should integrate their legal analysis and impressions into the documents and memoranda they create rather than simply resuscitating facts. Companies should be careful not to inadvertently waive the work product privilege by making documents public or revealing them to those with adverse interests. See, eg, In re Steinhardt Partners, 9.F.3d 230, 234 (2d. Cir. 1993).

3 What claims may an employee bring against the company during an investigation? How can the company protect against them?

Employees may bring claims against the company for alleged misconduct during an investigation for, among other things, defamation, whistleblower violations, wrongful termination, false imprisonment, intentional infliction of emotional distress, malicious prosecution, and violations of an employee's collective bargaining rights or privacy rights. To protect against these claims,

companies should carefully consult with counsel to ensure their interactions with employees throughout the investigatory process do not create legal exposure. Supervisory actions, state law, federal law and employment documents, such as company policies and employment contracts, create a minefield of potential liability that a human resources department would struggle to navigate without the help of experienced counsel.

4 What agency procedures or whistleblower rules should the company be aware of in this jurisdiction?

There is an array of state and federal whistleblower statutes. Among the most important in the corporate investigation sphere are the Sarbanes-Oxley Act and the Dodd–Frank Act. Sarbanes-Oxley was passed in response to the 2002 Enron scandal. In addition to creating an expansive regulatory regime to govern corporate fraud, it included whistleblower protections for any person reporting instances of mail fraud, wire fraud, bank fraud, securities fraud, or any other US Securities and Exchange Commission (SEC) regulation violation. Likewise, Dodd–Frank was passed after the 2008 recession. Similar to Sarbanes-Oxley, it grants protections to people who report securities violations; however, it also expands these protections and provides monetary rewards to whistleblowers. These laws now cover a wide array of corporate and financial crimes, including violations of the Foreign Corrupt Practice Act (FCPA).

To the extent a company conducts business with the US government, the False Claims Act permits a whistleblower to file an action on behalf of the US by asserting that the company presented a false claim for payment to the federal government or has knowingly and improperly avoided or decreased an obligation to pay money owed to the federal government. If a whistleblower pursues a claim against a company under the False Claims Act, the act prohibits the company from discharging, demoting, suspending, threatening, harassing or in any other manner discriminating against the employee in the terms and conditions of her or his employment as a result of her or his lawful acts that were done to stop one or more violations of the False Claims Act.

5 What are the considerations when conducting without notice interaction with company employees in an investigation?

If an employee initiates a without notice interaction with the company related to its investigation, the company should immediately request that the employee terminate the conversation and wait so that proper procedures can be followed. Unplanned interactions can lead to mistakes, such as communicating with an employee who is represented by outside counsel, in violation of attorney ethics rules (see question 12), or not meeting all the necessary requirements to assert privilege over a communication (see question 1). It can also lead to improper recordkeeping, such as not having a second investigator in the room to take notes and corroborate any later disputes about the content of those communications.

6 What should the company know about the anti-bribery and anti-corruption laws in this jurisdiction? How, if at all, does the Voluntary Self Disclosure and FCPA Pilot Program apply to this investigation?

The FCPA is the primary tool the United States uses to combat bribery of foreign government officials. In addition to prohibiting bribery, it contains accounting provisions which require public companies to maintain accurate books and a system of internal accounting controls. In 2016, the US Department of Justice (DOJ) launched the FCPA Pilot Program, which creates incentives for companies to self-report FCPA violations and cooperate with federal officials in exchange for leniency. In 2017, the DOJ made this guideline permanent.

Federal and state law also allow the prosecution of domestic bribery of government officials and private parties in the United States. For example, 18 U.S.C. § 201 prohibits the bribing of federal officials and many states have laws that prohibit bribery between solely private parties. See Perrin v. United States, 444 U.S. 37, 50 (1979).

7 How do labour laws, collective bargaining agreements, and the procedural pre-emptions affect the internal investigation?

The National Labor Relations Act protects the right of all non-supervisory employees, even non-unionised ones, to engage in "concerted activity", which can include discussing ongoing investigations involving company employees. Companies can request that an employee maintain the confidentiality of an interview, but they must show that they have a "reasonable basis for seeking confidentiality". See Banner Health Sys., 362 NLRB No. 137 (26 June 2015), aff'd in part, 851 F.3d 35 (D.C. Cir. 2017). This can include instances where "witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up." Id. In most investigations there will be a reasonable basis for seeking confidentiality, but companies should avoid a blanket confidentiality requirement that applies in all investigations. Instead, they should document a case-specific basis for each investigation.

Unionised employees have a right to request that a union representative be present at any investigative interview that the employee reasonably believes could lead to disciplinary action. See N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 257-62 (1975). This does not, however, mean a union representative must be present or an employee must be informed of this right.

8 Does this jurisdiction recognise the "employment at will" doctrine? Are there exceptions to this doctrine?

Yes. The presumption in the United States is that employer/employee relationships are "at will – ie, an employee can be fired or quit at any time without cause. There are, however, a number of exceptions to this default rule that vary in their application by state. First, parties can explicitly contract for "just cause" protection or negotiate a term contract. Second, most states recognise an implied-contract exception to the employment at will doctrine. Implied contracts can be created by things like oral assurances of job security or written assurances in an employee handbook. Third, most states recognise an exception to employment at will if a discharge offends public policy. For example, a court may find a company cannot fire an employee for refusing to break the

law. Fourth, a minority of states recognise a general covenant of good faith and fair dealing in every employee relationship. For instance, a company may not fire a long-term employee to avoid having to pay them retirement benefits. There are also many statutory exceptions, such as not being able to fire an employee based on discrimination or for certain types of whistleblowing. See Charles J. Muhl, The Employment-at-Will Doctrine: Three Major Exceptions, January 2001, https://www.bls.gov/opub/mlr/2001/01/art1full.pdf.

9 Does this jurisdiction recognise claims for unlawful retaliation by an employer against a whistleblower?

Yes, a whistleblower may bring a claim for unlawful retaliation both under federal and state laws. Claims for retaliation can allege forms of misconduct that do not necessarily include termination. For example, retaliation can include conduct that affects the conditions of employment such as a demotion, suspension, threats or harassment. See Sarbanes-Oxley Act § 806. In addition to consulting counsel before taking any action against a whistleblower, companies should create an effective anonymous reporting system and retain external counsel to investigate serious whistleblower reports as necessary.

10 Who may represent the employees in an investigation, and what are the company's obligations to facilitate their representation?

Employees may retain their own independent counsel during an investigation and, depending on the circumstances, employers may be obligated to pay for it. Such obligations can arise statutorily or from contracts, such as indemnification agreements or corporate by-laws. See, eg, Waltuch v. Conticommodity Servs., Inc., 88 F.3d 87, 94-96 (2d Cir. 1996). Even if the company does not finance independent representation, it is often a good idea for them to recommend that employees retain outside counsel to preserve the integrity of an investigation and protect unwary employees from potential liability. Sometimes, companies are ethically required to recommend that an employee retain outside counsel. See question 13.

Company lawyers may concurrently represent an employee and the company in certain circumstances. See ABA Model Rules, Rule 1.13(g). To do so, however, a lawyer must obtain informed consent from both the company and employee, and would need to reasonably believe that she/he could adequately represent both parties' interests. See ABA Model Rules, Rule 1.7(b). Dual representation, however, can raise a number of legal and ethical issues and should generally be avoided.

11 What obligations does external counsel to the company have towards employees that are not considered to be clients of the attorney? Is this the same for in-house counsel?

When representing a company a lawyer's obligation is to represent the interests of the company, as distinct from the interests of its employees. See ABA Model Rules, Rule 1.13. This rule applies to both in-house and outside counsel.

If a company's interests come into conflict with those of an employee, company lawyers are ethically obligated to explain to the employee that they represent the interests of the company—not the employee – and they should consider seeking independent counsel. See ABA Model Rules, Rule 1.13, Comment 10. Counsel must exercise care to ensure employees do not form the mistaken belief that they are their client. If it becomes apparent that an employee has formed this misimpression, counsel should correct it. See ABA Model Rules, Rule 4.3.

Finally, Upjohn warnings should be given to employees before an interview to prevent employee misunderstandings regarding who controls the privilege. See question 1.

12 What should the company consider when interacting with employees represented by an attorney?

Company attorneys and their agents are prohibited from contacting a represented employee in connection to an investigation without consent from the employee's attorney. See ABA Model Rules, Rule 4.2.

If the company interests align with an employee's interests, a company may choose to enter into a common interest or joint defence agreement. See question 22. Such an agreement would encourage cooperation on the part of the employee and offer increased privilege and work product protection. Companies, however, must weigh these benefits versus the risk that entering into a joint defence agreement may limit their ability to disclose investigation results to the government to earn cooperation credit.

13 How does this change for employees who are not represented by an attorney?

Company attorneys must take extra care to ensure an unrepresented employee understands that they represent the company, not the employee. Failure to do so could severely undermine an investigation. Unrepresented employees must be given an Upjohn warning so they understand that the attorney does not represent them as an individual, but the company only. See question 1. This is especially important when the employee is unrepresented. Likewise, if it becomes apparent that the employee's and company's interests may be adverse, the counsel should reiterate that they represent the company only – and not the employee – and they should recommend that that the unrepresented employee consider seeking the advice of outside counsel. See question 11.

14 If documents or electronically stored information containing employee information is sent from this jurisdiction to another, for analysis or use in legal proceedings, what are the aspects to be considered?

Privacy protection in the United States is not as robust as in many other countries. There are a number of ad hoc data protection laws at the state and federal level, such as the Health Insurance Portability and Accountability Act, which protects healthcare data, but the United States does not have any laws that offer across the board data privacy protections or regulate cross-border transfers of personal information, such as the European Data Protection Directive. To ensure they are in compliance with all applicable laws, companies should consult counsel familiar with the particular locale and industry. Companies should also be sure to continue to honour any privacy policy they have put in place even after the information is sent abroad.

For more information on United States data privacy law, see https://globalinvestigationsreview.com/know-how/topics/1000306/data-privacy-&-transfer-in-investigations.

15 What are the company's public disclosure obligations about the internal investigation in this jurisdiction?

Securities laws may require companies to publicly disclose information related to an internal investigation. For example, SEC Regulation S-K requires companies to periodically report major pending or contemplated litigation proceedings that are not incidental to the ordinary course of business, such as claims for damages that exceed 10 pe cent of the value of the company. See 17 C.F.R. § 229.103. It also requires reporting of any known events or "uncertainties that have had or that the company reasonably expects will have a material… impact on net sales or revenues." See 17 C.F.R. § 229.303. Not all legal exposure will be considered "material" and thus may not need to be included. See In re Lions Gate Entm't Corp. Sec. Litig., 165 F. Supp. 3d 1, 20 (S.D.N.Y. 2016). In general, the larger and more certain the potential exposure, the more likely it should be reported. In addition to mandatory SEC requirements, there are statutes that apply to particular industries. For example, certain illegal kickbacks and improprieties in the government contract industry must be reported to the government. See, 48 C.F.R. 52.203-13.

16 Are public company statements relating to employee misconduct protected from defamation claims?

No. Public company statements relating to employee misconduct are not protected from defamation claims. See, eg, Pearce v. E.F. Hutton Grp., Inc., 664 F. Supp. 1490, 1517 (D.D.C. 1987).

From the employee's perspective

17 What is the law, policy and enforcement track record on individual accountability for corporate wrongdoing?

The DOJ has recently increased their focus on individual accountability for corporate wrongdoing. In what has since become known as the Yates Memo, the DOJ stated that "[o]ne of the most effective ways to combat corporate misconduct" is through individual accountability. See Sally Yates Memo, available at https://www.justice.gov/archives/dag/file/769036/download.

The memo described the DOJ's strategy towards individual accountability going forward. Key points include: (i) in order to receive any cooperation credit, a corporation must completely disclose details regarding individual misconduct; (ii) investigators should focus on individual actors from the outset of any investigation; and (iii) absent extraordinary circumstances, no immunity should be granted to individuals as part of a deal with a corporation. Recent enforcement actions have underscored the DOJ emphasis on individual accountability. See Press Release, DOJ, Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce (7 November 2017).

18 What is the employee's obligation to speak with the company in an internal investigation?

As a general rule, there is no legal obligation for an employee to cooperate with the company in an internal investigation. But, this does not mean that non-cooperation is without potential consequences. A private company cannot subpoena an employee, but they are well within their rights to take disciplinary measures to induce cooperation. Such measures can include demotion, suspension, or even discharge. See, eg, Gilman v. Marsh & McLennan Companies, Inc., 826 F.3d 69, 74 (2d Cir. 2016).

It is possible, however, that an employee or union contract will grant certain employee protections or outline procedures that the company must follow during an investigation.

19 What are attorneys' roles representing the company and representing the employee, and who should explain these roles to the employee?

Generally, company attorneys represent the interests of the company, not the employees. In certain situations, attorney ethical rules require them to explain that their duty is do what is in the best interest of the company. For example, an attorney is required to explain to employees that they represent the company any time the attorney realises the company's and employee's interests are in conflict. See question 11. In certain circumstances it is possible for an attorney to represent both a company and one of its employees – by obtaining the employee's informed consent and the ability to adequately represent both parties – but those situations should generally be avoided. See question 10.

20 May an employee appoint its own counsel in an internal investigation?

Yes, an employee may appoint their own independent counsel in an internal investigation. Although a company may object to such a retention, subject to contractual and union obligations, the company should generally welcome the involvement of an impartial counsel to bolster the integrity of an investigation.

21 Who pays for employee representation?

An employee may need to pay for their own representation, but it is common for the company or an insurance policy to cover legal fees due to a contractual or statutory obligation. See question 10.

22 May employees enter into joint defence agreements? With whom?

Yes. Employees may enter into joint defences agreements (JDAs) with the company and/or other employees if all parties share a common legal interest. See, eg, United States v. LeCroy, 348 F. Supp. 2d 375, 381 (E.D. Pa. 2004). JDA's encourage cooperation and lower costs by pooling resources. They also increase privilege and work product protections by allowing a third party to be present during an attorney–client communication while still: (i) shielding information from the government; and (ii) preventing parties to the JDA from disclosing information they learned as a result of information sharing.

An employee should weigh the benefits of a JDA versus potential drawbacks. Whenever privileged information is shared with a third party, the chance of inadvertent waiver of the privilege increases. The privilege may be inadvertently lost if all the elements necessary to establish a JDA are not met. See, eg, In re Grand Jury Subpoena: Under Seal, 415 F.3d 333, 338 (4th Cir. 2005). Furthermore, a party may lose privilege claims over information they shared with other parties to a JDA if they decide to leave the JDA and cooperate with the government. See, eg, United States v. Almeida, 341 F.3d 1318, 1326 (11th Cir. 2003).

23 Do employees have any constitutional or basic legal rights that they can rely on during government and internal investigations?

If the government is conducting the investigation – ie, their agents are interviewing the employees – employees have all the well-known criminal protections that the US constitution provides. Among these include the Fifth Amendment right against self-incrimination and the Fourth Amendment protections regarding unreasonable searches and seizures.

If the employer is conducting an investigation, even if it is related to a potential government investigation, these constitutional protections do not apply because it is only an interaction between private parties. Although a company cannot compel an uncooperative employee to cooperate as they might be able to with formal judicial resources, employers generally possess mechanisms to discipline any employee who does not cooperate. See, eg, Gilman v. Marsh & McLennan Companies, Inc., 826 F.3d 69, 74 (2d Cir. 2016). In rare circumstances, a court may find that the government exerted such influence and pressure on a company conducting an investigation that it became unconstitutional state action. For example, the Second Circuit has held that the government pressuring a company to not advance legal fees of their employees amounted to state action that violated the Sixth Amendment right to counsel. See United States v. Stein, 541 F.3d 130, 136 (2d Cir. 2008).

Separately, an employee has some limited privacy rights in the workplace, but generally work-related materials, such as emails on a company server, are company property and can be culled, searched, and processed as part of an investigation. See questions 3 and 24. Some employees have contractual or union-negotiated procedures that must be followed during an investigation. See question 7.

24 Who owns the documents and electronically stored information within employees' possession or control and how can employees protect their privacy rights in this context?

Generally, employers have the right to search company property, which can include office space, company emails and electronic information sent across a company network. This right is curtailed when an employee enjoys a reasonable expectation of privacy based on a company's policies or general practices. For example, businesses can usually search employee lockers, but allowing an employee to use their own personal lock may create an employee expectation of privacy. See, eg, K-Mart v. Trotti, 677 S.W.2d 632, 637 (Tex. App. 1984). An employer can normally search emails within their own computer system, but courts have found searching personal emails sent on workplace computers can create legal liability, especially in instances where the company policy does not clearly address what sources of information will be monitored. See Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 663 (N.J. Sup. Ct. 2010). In response to these privacy concerns, some state statutory regimes require an employee be notified in advance if their electronic communications will be monitored. See, eg, Del. Code Ann., Tit. 19, § 705 (2005).

To ensure confidential treatment of personal information, employees should understand and abide by the company's privacy policies and procedures as well as avoid using company property and networks to send personal communications.

25 What are the employee's responsibilities if there is a parallel civil proceeding against the company or against the employee?

Parallel proceedings against a company or an employee can create privilege and conflict of interest issues. Employees must balance their own personal legal interests with obligations to their employer. For example, in a civil proceeding against a company, an employee may wish to invoke their Fifth Amendment right against self-incrimination. An employee's refusal to testify, however, can create an adverse inference against the company. See, eg, Brink's Inc. v. City of New York, 717 F.2d 700, 707-10 (2d Cir. 1983). In these situations companies may pressure an employee to cooperate, and the employee will need to weigh the benefits of mitigating potential personal exposure versus disciplinary measures due to refusal to cooperate.

26 What should employees do if they are sued by shareholders or other private parties as a result of an investigation?

If an employee is sued personally they should seek the advice of personal and company counsel to discuss how best to proceed. If the employee has been named in a lawsuit, the interests of the company and employee may diverge, and it is important that the employee have personal counsel. See question 19. Employees are often entitled to indemnification for actions they took on behalf of their employer under company bylaws, state law, contracts or an insurance policy. See, eg, Waltuch v. Conticommodity Servs., Inc., 88 F.3d 87, 94-96 (2d Cir. 1996). Depending on the details of the lawsuit, this can include the payment of legal fees or damages awards. If an employee is unable to afford the upfront costs of litigation, they may be able to obtain an advance of legal fees from the company or an insurance policy. See, eg, Citadel Holding Corp. v. Roven, 603 A.2d 818, 826 (Del. 1992).

27 What are the employees' responsibilities to comply with law enforcement investigations, subpoenas and searches?

Employees are legally required to comply with subpoenas, warrants and similar court orders. If personally served with a subpoena, employees should consult counsel to determine the scope and reasonability of the subpoena. Similarly, if served with a warrant, an employee should allow the investigators to search the area specified in the warrant unimpeded, subject to the employees rights.

There are, however, situations where law enforcement will seek voluntary cooperation. If there is no formal subpoena, warrant or similar document, the employee is under no obligation to cooperate. Government agents often conduct scheduled voluntary interviews with an employee with the full knowledge of the corporation. It is also possible a government agent will attempt to interview an employee unannounced, such as by going to their house. See, eg, In re Amgen Inc., 2011 WL 2442047 (E.D.N.Y. Apr. 6, 2011). It is often best for the employee to politely decline to answer any questions during such a contact until the employee is able to confer with company and/or personal counsel; information disclosed to law enforcement may be used against the employee or against the company in an enforcement action.

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The company's investigation

1 How does the company retain its privileges, including the attorney–client privilege, when interacting with employees in an investigation?

Attorney–client privilege exists between the company and external legal counsel. Correspondence with and work-products by in-house counsel are not protected by legal privilege. Consequently, in an investigation, a company will act through external counsel when interacting with employees.

Amendments to the law are currently being discussed to expand privilege to in-house counsel.

Recent case law by the Swiss Federal Tribunal introduced a test whether work products of an investigation conducted by external counsel are protected by privilege. The cases to date concerned exclusively investigations conducted for regulated financial institutions. There, the Federal Tribunal held that it considered certain fact-gathering tasks to be measures that the company must undertake under the relevant compliance and anti-money laundering provisions in any event. As such, related work products would not constitute "typical attorney work products", even if produced by a law firm in the context of an internal investigation. This has produced a degree of uncertainty beyond the area of regulated financial institutions, raising the question of whether work products of an internal investigation such as minutes of interviews with employees are covered by privilege. In light of these recent developments, external counsel must carefully consider how to approach the fact-finding stage of any internal investigation.

2 How does the company retain work product privileges when interacting with employees?

Attorney work product privilege as such does not exist as a separate concept under Swiss law. Rather, work product privilege is encompassed by attorney–client privilege. This means that any work product created by external counsel for a company in connection with "typical attorney work" such as legal representation or legal advice, is protected under Swiss law, while any work product created by employees of a company, including in-house counsel and even in anticipation of litigation, is not protected (for the time being, subject to potential amendments to the law, see question 1).

3 What claims may an employee bring against the company during an investigation? How can the company protect against them?

Employees may bring claims against the company for alleged misconduct during an investigation for, among other allegations, violation of the duty of care of employers towards employees, wrongful termination, defamation, false accusations, intentional infliction of emotional distress and violations of an employee's privacy and data protection rights. To protect against these claims, companies should carefully consult with counsel to ensure their interactions with employees throughout the investigatory process do not create legal exposure.

4 What agency procedures or whistleblower rules should the company be aware of in this jurisdiction?

Whistleblowing is not specifically regulated under Swiss law, and both the Swiss Code of Best Practice for Corporate Governance and the Swiss Stock Exchange's Directive on Corporate Governance are silent on this topic.

A plan to introduce a specific whistleblower protection regime is being debated by parliament. Until such a regime will be implemented, courts will continue to approach whistleblower cases based on existing employment law, which contains both an obligation of employees to point out illicit acts within the company as well as protection of employees against unjustified retaliatory measures by the employer.

Separately, it is argued by some that companies have an implicit obligation to implement a whistleblower system based on the provision on corporate liability in Swiss criminal law, which allows for the prosecution of corporations that have failed to institute adequate and reasonable organisational measures to prevent certain offences including bribery of officials, money laundering, financing of terrorism and engaging in a criminal enterprise (see question 6). Establishing an effective whistleblower mechanism can be seen as one element of an adequate and reasonable corporate organisation, designed to prevent the offences listed above (see question 9 for employee-related aspects of whistleblowing).

5 What are the considerations when conducting without notice interaction with company employees in an investigation?

Employment law (notably article 321a(1) Swiss Code of Obligations) stipulates a duty of care and loyalty of employees towards the company. As a general rule, employees are required to cooperate in an investigation by the company and to provide a truthful and comprehensive account of events, even if approached by the company without notice.

In turn, the company, and external counsel acting on behalf of the company, must not violate the company's duty of care towards employees. This does not in itself preclude without notice interactions with employees but requires companies to adopt a reasonable and proportionate approach in doing so. In particular, the company must not exert undue pressure on an employee subject to the investigation or use deceptive means when monitoring or interviewing an employee.

If an employee initiates a without notice interaction with the company related to its investigation, the company should request that the employee terminate the conversation and wait so that proper procedures can be followed. Unplanned interactions can lead to mistakes, such as communicating with an employee who is represented by outside counsel, in violation of attorney ethics rules, or not meeting the necessary requirements to assert privilege over a communication (see question 1). It can also lead to improper record-keeping, such as not having a second investigator in the room to take notes and corroborate any later disputes about the content of those communications.

6 What should the company know about the anti-bribery and anti-corruption laws in this jurisdiction? How, if at all, does the Voluntary Self Disclosure and FCPA Pilot Program apply to this investigation?

In 2003, Switzerland codified the criminal liability of corporations for offenses conducted by individuals that acted on behalf of the corporation (article 102 of the Swiss Criminal Code; "CrimC"). Whereas the prohibition of bribery of public officials is long-established under Swiss criminal law, the bribery of private individuals has only been prohibited under the CrimC since 1 July 2016 as an offence that is prosecuted ex officio. Prior to this date, "private corruption" had been prohibited under the Federal Unfair Competition Act and had only been prosecuted upon complaint by a damaged party.

According to the new regime, as currently in force, the corporation is itself – and alongside the respective individual – subject to criminal prosecution for certain offences, including bribery of officials, money laundering, financing of terrorism and engaging in a criminal enterprise, if the company is unable to show that it took all reasonable organisational measures that are required in order to prevent the occurrence of such an offence. For the corporate liability to be triggered, it is not required that management was aware of the activities of the respective individual or that the individual acted within his or her sphere of responsibilities provided that the individual acted in the context of the company's business. The maximum penalty that can be imposed on a company if it is found to have failed to prevent any of the listed offence is a fine of up to 5 million Swiss francs, plus disgorgement of illicitly obtained profits.

Furthermore, companies may face criminal prosecution for any felony or misdemeanor committed in the exercise of commercial activities in accordance with the purpose of the company, if it is not possible to attribute the wrongdoing to a specific individual owing to an inadequate organisation of the company.

7 How do labour laws, collective bargaining agreements, and the procedural pre-emptions affect the internal investigation?

Collective labour laws and collective bargaining agreements do not specifically affect internal investigations. See question 3 with respect to duties of the employer under Swiss statutory employment law.

8 Does this jurisdiction recognise the "employment at will" doctrine? Are there exceptions to this doctrine?

Under Swiss Law, both the employer and the employee are generally free to give notice at will, without having to establish just cause. However, both parties must respect applicable statutory and contractual notice periods must be respected by both parties. Additionally, an employment contract may be terminated extraordinarily without notice and with immediate effect by both parties following serious incidents and breaches of contract committed by the respective other party.

If in the course of an internal investigation the company detects that an employee has committed serious breaches of contract or law, thereby rendering the continuation of the employment relationship untenable, the company is required to issue notice immediately following the detection of the breach. Serious breaches of contract and law may include the refusal of an employee, against whom the company has a reasonable suspicion of serious wrongdoing, to participate in the internal investigation.

9 Does this jurisdiction recognise claims for unlawful retaliation by an employer against a whistleblower?

Swiss law does not specifically address whistleblowers (see question 4). However, retaliation against a whistleblower's employment may be abusive and thus unlawful, giving rise to civil claims of the employee against the company.

10 Who may represent the employees in an investigation, and what are the company's obligations to facilitate their representation?

Employees may retain their own independent counsel during an investigation and, depending on the circumstances, employers may be obligated to pay for it. Such obligations can arise statutorily or from contracts, such as indemnification agreements or corporate bylaws.

Even if the company does not finance independent representation, it is often good practice for the company to recommend that employees retain outside counsel to preserve the integrity of an investigation and protect unwary employees from potential liability. Under certain circumstances, companies are required to recommend that an employee retain outside counsel.

11 What obligations does external counsel to the company have towards employees that are not considered to be clients of the attorney? Is this the same for in-house counsel?

When representing a company, external counsel is obliged to represent the interests of the company, as distinct from the interests of its employees.

If a company's interests come into conflict with those of an employee, counsel for the company are ethically obligated to explain to the employee that they represent the interests of the company – not the employee – and that the employee should consider seeking independent counsel. Counsel must exercise due care to ensure employees do not form the mistaken belief that they are counsel's client. If it becomes apparent that an employee has formed this misimpression, counsel should correct it. Employees should be duly informed before an interview to prevent employee misunderstandings regarding who controls the privilege.

12 What should the company consider when interacting with employees represented by an attorney?

Counsel for a company are prohibited from contacting a represented employee in connection to an investigation without consent from the employee's attorney.

If the company's interests are aligned with an employee's interests, the company may consider discussing a common defence strategy. However, very careful consideration must be given particularly in the early stages of an investigation so as not to raise suspicion of collusion and witness tampering.

13 How does this change for employees who are not represented by an attorney?

Counsel for a company must take due care to ensure that an unrepresented employee understands that they represent the company, not the employee. Failure to do so could severely undermine the integrity of an investigation. Unrepresented employees must be given adequate warning so they understand that counsel does not represent them as an individual, but the company alone. Likewise, if it becomes apparent that the employee's and company's interests may not be aligned, counsel should reiterate that they represent the company only – and not the employee – and they should recommend that the unrepresented employee consider seeking the advice of individual counsel.

14 If documents or electronically stored information containing employee information is sent from this jurisdiction to another, for analysis or use in legal proceedings, what are the aspects to be considered?

A company that intends to transfer data across the Swiss border must adhere to a set of rules, which have become increasingly complex over the last few years due to stricter data protection and privacy regulation.

Generally, a company transferring employee information out of Switzerland must prevent the employee's privacy from being infringed. The employee's privacy is assumed to be infringed if the destination jurisdiction does not provide for adequate data protection.

The Swiss Data Protection and Information Commissioner (FDPIC) publishes a list that defines which foreign jurisdictions provide for adequate data protection (List available in French and German at https://www.edoeb.admin.ch/datenschutz/00626/00753/index.html). Even if the employee data transfer is effected within a group of companies across different jurisdictions, the company must provide adequate data protection. The company may invoke binding corporate rules to satisfy data protection standards.

If a company intends to transfer data abroad that is being stored in Switzerland for use in a foreign proceeding or to cooperate with authorities, it must navigate the pitfalls posed by articles 271 and 273 Swiss Criminal Code, which can be described as "blocking statutes". In situations of cross-border transfer of data for use in foreign proceedings, in particular if third-party data is involved, it is recommended that the company seek advice from counsel.

15 What are the company's public disclosure obligations about the internal investigation in this jurisdiction?

If the company is publicly listed on a Swiss stock exchange it is obliged to disclose facts that are potentially price-sensitive (ad hoc publicity). The existence of an internal investigation may be regarded as a price-sensitive fact that must be provided under ad hoc publicity rules. Further, a duty to report pending or contemplated litigation proceedings that are not incidental to the ordinary course of business may arise under statutory periodic reporting rules, in particular if such proceedings have a material impact on the company. In general, the larger and more certain the potential exposure, the more likely it should be reported.

In complex cases, disclosure obligations and obligations under criminal (procedure) law may collide, requiring the company to proactively tackle potential issues. It is suggested that, in such circumstances, the company seek advice from counsel.

16 Are public company statements relating to employee misconduct protected from defamation claims?

No. Public company statements relating to employee misconduct are not protected from defamation claims.

From the employee's perspective

17 What is the law, policy and enforcement track record on individual accountability for corporate wrongdoing?

Corporate criminal liability was only introduced in Swiss criminal law relatively recently (2003). Since then, there has been a growing trend, in particular over the past five years, of prosecutions of companies as opposed to individuals. Under the respective statute, however, prosecution of a company does not necessarily rule out prosecution of individual employees in parallel, and there has been a growing number of cases in which both company and individuals were prosecuted, in particular in the context of bribery and money laundering offences.

Against the background of an ever-growing number of prosecutions of companies, the Office of the Attorney General of Switzerland has been advocating for an amendment of criminal procedure law to allow the use of deferred or non-prosecution agreements with the aim to facilitate prosecution and to give prosecutors increased discretion to reward cooperation of companies and individuals under investigation.

18 What is the employee's obligation to speak with the company in an internal investigation?

Employment law (notably article 321a(1) Swiss Code of Obligations) stipulates a duty of care and loyalty of employees towards the company. Thus, as a rule, the employee is obliged to cooperate with and inform the company in response to its inquiries. This duty also generally obliges the employee to participate in interviews in an investigation and to answer any questions.

It is controversial, and yet unresolved by case law, to what extent employees may rely on the privilege against self-incrimination and the presumption of innocence principle, both based on constitutional rights and criminal procedure rules, in the context of internal investigations. A related question is to what extent information gathered in interviews conducted as part of an internal investigation may be introduced in criminal proceedings. The significant uncertainties regarding these issues may make it sensible for companies to confer with the authorities to try to agree on a set of rules and procedures ahead of an internal investigation. In some cases, however, such an approach may not be advisable for strategic reasons. See question 13.

19 What are attorneys' roles representing the company and representing the employee, and who should explain these roles to the employee?

Generally, both in-house and external counsel represent the interests of the company, not the employees – even if these are management, executives, and sometimes the owner of the company.

In certain situations, rules of professional conduct require counsel for the company to explain that their duty is to do what is in the best interest of the company. For example, counsel is required to explain to employees that they represent the company any time counsel realises the company's and employee's interests are in conflict (see question 11). In certain circumstances, it is possible for counsel to represent both a company and one of its employees – by obtaining the employee's informed consent and the ability to adequately represent both parties (provided that the interests of all parties regarding the investigations are aligned) – but those situations should generally be avoided (see question 10).

20 May an employee appoint its own counsel in an internal investigation?

Yes, an employee may appoint his or her own independent, individual counsel in an internal investigation. Although the employee does generally not have a right to have his or her attorney be present when interviewed by the company in the context of the internal investigation, he or she should be allowed to bring along an attorney if the company (or the employee) considers introducing information relevant to an investigation conducted by authorities.

21 Who pays for employee representation?

This very much depends on the specific circumstances. If the employee seeks representation for a dispute with the company, then the company typically is under no obligation to cover the costs. This includes cases in which the employee has violated Swiss law, his or her employment contract or company guidelines.

On the other hand, if the employee is involved in a government investigation which is connected to the employee's work activity, the company may be responsible for covering the costs of legal representation and other costs associated with the investigation.

Specific questions relating to D&O insurance will typically arise when the directors and board members incur legal costs in connection with the internal investigation.

22 May employees enter into joint defence agreements? With whom?

Yes, if their interests are aligned. While joint defence agreements are not a recognised instrument in Swiss criminal procedure law as such, multiple employees, or employees and the company, may decide to mount a joint defence if their interests in the respective proceeding are aligned. A joint defence strategy will require that each party authorise their attorney to share privileged information with counsel for the other parties (such sharing of privileged information does not result in a waiver of attorney–client privilege).

23 Do employees have any constitutional or basic legal rights that they can rely on during government and internal investigations?

If the government is conducting the investigation, ie if public prosecutors are interviewing the employees, the employees have all the well-known criminal protections that the Swiss constitution, the European Convention on Human Rights, and Swiss criminal or administrative procedure law provide. Among these are the right against self-incrimination, the presumption of innocence principle, the right against disproportionate compulsory measures (such as searches and seizures), the right to be heard and further due process guarantees.

If the employer is conducting an investigation, even if it is related to a potential government investigation, these protections do not apply because it is only an interaction between private parties. A company may even ask a court to compel an uncooperative employee to cooperate based on employment law and the employment contract.

Separately, an employee has some limited privacy rights in the workplace, but generally work-related materials, such as emails on a company server, are company property and can be culled, searched and processed as part of an investigation (see question 24).

24 Who owns the documents and electronically stored information within employees' possession or control and how can employees protect their privacy rights in this context?

Under Swiss employment law, the company owns all of the information originating from the employee in the course of his or her contractual activities. This is derived from the employee's duty to immediately hand over to the employer all work produced in the course of his or her contractual activities (article 321b(2) Swiss Code of Obligations). This obligation affects information both in paper and digital form. The company may also handle data concerning employees, however, only to the extent that such data concern the employees' suitability for their jobs or are necessary for the performance of the employment contract. In other words,

the company may only handle personal employee information where there is a factual link to the employment relationship.

For the purpose of an internal investigation, the company is generally free to access and process all of the work-related data including personal data related to the employment relationship. However, the processing of data containing employee-specific information must adhere to the standards set out in the Federal Data Protection Act. Refusing to provide access to the work-related information in an internal investigation may expose the employee to contractual claims.

With regard to private personal data, which is not work-related, the rule is that the company is prohibited from processing such data in an internal investigation. If the company fails to comply with this rule, it may give rise to civil claims (see question 3). The employee may request that data processing be stopped, that no data be disclosed to third parties or that the personal data be corrected or destroyed. Data protection law affords an employee the right to enquire and be informed about personal data being processed during an internal investigation.

25 What are the employee's responsibilities if there is a parallel civil proceeding against the company or against the employee?

Parallel proceedings against a company or an employee can create privilege and conflict of interest issues. Employees must balance their own personal legal interests with obligations towards their employer. For example, in a civil proceeding against a company, an employee may wish not to make any statement at all. An employee's refusal to testify, however, can create an adverse inference against the company. In these situations companies may pressure an employee to cooperate, and the employee will need to weigh the benefits of mitigating potential personal exposure versus disciplinary measures due to refusal to cooperate.

26 What should employees do if they are sued by shareholders or other private parties as a result of an investigation?

If an employee is sued personally they should seek the advice of personal and company counsel to discuss how best to proceed. If the employee has been named in a lawsuit, the interests of the company and employee may diverge, and it is important that the employee have personal counsel (see question 19). Employees are often entitled to indemnification for actions they took on behalf of their employer under company bylaws, contracts or an insurance policy.

27 What are the employees' responsibilities to comply with law enforcement investigations, subpoenas and searches?

Swiss law enforcement authorities have various legal instruments at their disposal to order compulsory measures for the purposes of an investigation. To what extent an employee is affected by an investigation largely depends on whether the employee is regarded as a "person involved in the proceeding", such as a witness, "a person providing information" or even a specific target. Determining which persons are involved is an integral part of the investigation, since only these persons can be summoned. Non-compliance with a summon may result in a fine or the police may use force to ensure the physical presence before the competent authority. In addition, law enforcement officials may undertake searches of the workspace of the employees. Preventing law enforcement officials from carrying out their duty is a punishable offence. If an employee is subjected to compulsory measures ordered by a prosecutor in connection with an investigation related to the company but outside of the company's premises, the employee should seek immediate legal advice. Depending on the circumstances, counsel will advise whether and, if yes, how to inform or generally approach the company.

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The company's investigation

1 How does the company retain its privileges, including the attorney–client privilege, when interacting with employees in an investigation?

In the UK, legal professional privilege may be asserted in circumstances where advice is sought or given, or in circumstances where communications take place for the purpose of ongoing or reasonably contemplated litigation. There are therefore two broad categories, "advice privilege' and "litigation privilege".

In the context of an internal investigation, it is unlikely that interactions between a legal representative (whether internal or external) and an employee will be covered by "advice privilege', unless a series of conditions are met, including crucially whether or not that employee can be considered to be the "client". Ordinarily, the client for these purposes is easily identifiable as the senior individual(s) capable and authorised to seek legal advice. Therefore, while advice given to the client concerning the parameters, execution, and conclusion of an internal investigation can potentially attract advice privilege, it is unlikely that communications with employees, including, for example, the conduct of employee interviews by legal representatives, will attract advice privilege protection.

In Re the RBS Rights Issue Litigation [2016] EWHC 3161 (Ch), it was recently held that advice privilege will not attach to lawyers' notes taken during the course of an internal investigation. The judge in this case also held that there was no category of 'lawyers' working papers' privilege that would afford such documents legal professional privilege protections.

Prior to the recent case of The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd (ENRC) [2017] EWHC 107 (QB), a company could argue that privilege protections were afforded to documents and communications created in the context of an investigation by law enforcement by relying on litigation privilege. This is the first case before an English court that has considered a claim for litigation privilege in which the proceedings said to have been reasonably in contemplation were of a criminal, rather than civil, nature. The judge ruled that a criminal investigation (here, brought by the Serious Fraud Office) is not "adversarial litigation" for the purposes of asserting litigation privilege. The rationale is that at the investigatory phase, a decision to prosecute and therefore commence adversarial litigation can only be made upon the discovery of actionable evidence. Here, ENRC were not aware of any such evidence, and the SFO had not uncovered any. Therefore, it cannot be said that litigation was either in progress or reasonably in contemplation. It is important to note that the judge drew a distinction between criminal and civil litigation on the basis that unfounded civil proceedings may be brought at will, and therefore it was appropriate to make that distinction and limit only criminal internal investigations.

This case, coupled with those restricting the use of advice privilege in the context of internal investigations have resulted in a very narrow set of circumstances in which legal professional privilege can be properly asserted. The ENRC judgment is currently the subject of an appeal.

2 How does the company retain work product privileges when interacting with employees?

There is no concept of "attorney work product privilege" in the UK, and accordingly legal professional privilege may only be asserted in circumstances where advice is sought or received, or where a document or communications are created or take place in the context of actual or reasonable contemplated litigation. At all times, materials must remain confidential, as loss of confidentiality may amount to a waiver of privilege.

In order to preserve or create reliable protections, practical considerations would include identifying those who make up the 'client' pool. All personnel at the company authorised to seek and obtain legal advice should be readily identifiable by reference to written records and/or policies and procedures. These records should be routinely maintained and referred to at the outset of an internal investigation. Any communication that is required to be protected by legal professional privilege should be limited to those within this pool and the legal representatives. All such communications should be marked in such a way as to denote the intention to create or maintain privilege protections (for example, including "Privileged and Confidential" in the text of an email).

Privileged communications should not be shared with persons outside of the client–lawyer relationship, as doing so may be construed as a waiver of privilege or loss of confidentiality. Such communications should also be kept to a minimum and, where

possible, limit the degree of sensitive information directly relating to an investigation.

Pure fact finding during an investigation, for example, a written record or transcript of an employee interview, will not be afforded advice privilege protection. Litigation privilege may apply in the context of actual or impending civil litigation, but not necessarily in a criminal context. The applicable litigation context, whether civil or criminal, should be discussed at the outset of an investigation, and the rationale for any application of litigation privilege recorded. This record should be maintained and amended where necessary during the course of an investigation in order to remain reliable.

3 What claims may an employee bring against the company during an investigation? How can the company protect against them?

An employee may bring claims against a company in the event that an investigation results in the termination of their employment. Such claims are limited to instances in which the termination was "unfair", and can include circumstances in which an employee was made to feel harassed or discriminated against by virtue of being the target of an investigation. Such claims would have to be based on evidence, and an employee would have the right to disclosure over any materials generated as a result of or in the course of the investigation that were not protected by legal professional privilege.

An employee cannot be compelled to engage with an internal investigation. If support for such an investigation is required, for example, as part of their employment contract, and the refusal to do so was the reason for termination, it is possible that would provide grounds to dismiss that employee. However, that decision could be challenged depending on the factual circumstances surrounding the need for their involvement. If the company were in possession of substantial evidence that pointed to the employee having a significant role in wrong doing, or otherwise acting not in accordance with their employment obligations, that could provide defensible grounds for termination. In these circumstances, the company would have to consider a number of factors prior to dismissal, including the potential reputational damage that may be incurred during a public employment tribunal hearing, in which the details of an internal investigation were to be heard.

Companies will hold a degree of "personal data" for each of its employees, which may be the target of a "subject access request" under the Data Protection Act 1998. While not a claim as such, an employee would be entitled to request disclosure of any materials that contain their personal data that are not subject to legal professional privilege. A company can protect against this by limiting the use of personal data in sensitive documents.

4 What agency procedures or whistleblower rules should the company be aware of in this jurisdiction?

The Public Interest Disclosure Act 1998 inserted provisions into the pre-existing Employment Rights Act 1996 that provide employees protection from victimisation or dismissal following the reporting of malpractice by their employers. The legislation operates such that a mistreatment or dismissal of an employee on the basis of their having made a "protected disclosure" is automatically unfair, and the company will be subject to an uncapped damages claim as a result. A protected disclosure is defined as a disclosure of information (but not merely the gathering of evidence – this may amount to misconduct and therefore potentially invalidate any claim in this context), falling into one of six categories that cover criminal or otherwise unlawful conduct, danger to health and safety, damage to the environment or attempts to conceal information relating to those former categories.

The legislation encourages employees to report, in the first instance, concerns or allegations of malpractice internally. Accordingly, companies should have a clear an accessible internal whistleblower procedure that is monitored by compliance and/or legal functions.

5 What are the considerations when conducting without notice interaction with company employees in an investigation?

There is no obligation to notify an employee of an internal investigation, or that they may be required to participate. Practically, of course, if an employee is to participate a degree of interaction will be required. Such interactions should not include sensitive information about the investigation, as they will not be privileged or protected from disclosure. Best practice would dictate that approaches in this context are not made in person in order to preserve a record of the request and response accurately. If an employee were to make a without notice interaction with an internal or external person involved in the conduct of an investigation, that interaction should be swiftly brought to an end, and where appropriate, an explanation of the need to preserve confidentiality and privilege given.

6 What should the company know about the anti-bribery and anti-corruption laws in this jurisdiction? How, if at all, does the Voluntary Self Disclosure and FCPA Pilot Program apply to this investigation?

In the UK, anti-bribery and corruption offences are largely governed by the Bribery Act 2010. The Act introduced an offence of failure to prevent bribery on behalf of a commercial organisation. The offence operates in such a way as to make the organisation liable for the criminal offences of bribery and corruption committed by their employees on behalf of the organisation. The only defence to this offence is to demonstrate that the organisation had in place adequate procedures to prevent such bribery and corruption taking place. Whether a particular organisation's procedures are "adequate" will require a subjective analysis of what degree of policy, procedure, training, monitoring and so on could be reasonably implemented by the organisation, having regard to its size, nature of business activities, the locations it operates in and any other relevant factors.

The corporate offence under the Bribery Act can also become engaged where the underlying criminal offence is committed by a person associated with the organisation. This can include subsidiary companies, partners to a joint venture, third-party contractors, suppliers or any other party who performs a service for the organisation.

The Act also contains offences relating to private bribery and bribery of foreign public officials, and has no de minimis provision, such that facilitation payments are not permissible as is the case under the US FCPA.

7 How do labour laws, collective bargaining agreements, and the procedural pre-emptions affect the internal investigation?

There is no statutory obligation to allow an employee to be accompanied by anyone during an interview as part of an internal investigation. The situation is different in relation to disciplinary meetings or hearings internally, in which a trade union representative may attend. An employee may request that he be accompanied by a personally engaged legal representative, but there is no obligation to acquiesce to that request. There are benefits to both parties if such a request is made, but the position in relation to confidentiality, legal professional privilege and potential future litigation will have to be carefully considered.

8 Does this jurisdiction recognise the "employment at will" doctrine? Are there exceptions to this doctrine?

While the UK does not recognise the doctrine of "employment at will", there are certain organisations that employ workers on a temporary basis with no guarantee, or obligation on behalf of the employee, to undertake paid work.

9 Does this jurisdiction recognise claims for unlawful retaliation by an employer against a whistleblower?

Such claims in the UK are automatically considered unlawful and actionable. The relevant legislation protects both against dismissal and victimisation as a result of making a whistle blowing disclosure. In addition to claims brought by the employee, in certain circumstances there may be regulatory sanction as well. One recent example is the Financial Conduct Authority's decision to fine Barclay's CEO Jes Staley in excess of £640,000 in relation to attempts he made to uncover the identity of a whistleblower. This case highlights both the need for an anonymised internal reporting structure and the importance of not engaging in attempts to circumvent that protection.

10 Who may represent the employees in an investigation, and what are the company's obligations to facilitate their representation?

There is no obligation to recognise or accommodate a legal representative of an employee, but in circumstances where an employee instructs such a representative, it is often beneficial to both parties to allow that representative to attend and participate. There may be circumstances in which an employer would suggest that an employee seek legal representation, but that would likely come about as a result of an expectation that the employee is not only substantially involved in any misconduct being investigated, but also likely to adopt a position adverse to the company, and that there is a likelihood of adversarial litigation following the conclusion of the investigation. An alternative situation in which employee legal representation would be beneficial would be if an employee with seniority sufficient to be potentially considered the controlling mind and will of the company as a whole was the subject of an investigation, and therefore outside of the pool of internal "client" personnel. In that situation, additional legal representation would assist in the event that there were to be a joint defence agreement or a common interest privilege sharing agreement.

11 What obligations does external counsel to the company have towards employees that are not considered to be clients of the attorney? Is this the same for in-house counsel?

For external representatives, the situation is straight forward as they have no obligation to any company employee that is not considered to be their client. If an employee not considered to be within the pool of personnel considered the lawyer's client were to seek advice of that lawyer, in order to prevent a potential conflict of interest arising, the lawyer should not provide any advice and instead refer the employee to internal legal personnel or suggest that they seek independent external legal advice.

In-house lawyers will often have both a traditional advisory role and business support role, that will require them to engage in issues and with personnel that an external lawyer would not. In-house lawyers will need to consider whether they are truly engaging in the necessary lawyer–client relationship such that privilege protections can accrue.

12 What should the company consider when interacting with employees represented by an attorney?

Rules of professional ethics dictate that in circumstances where an employee of an external lawyer's client is legally represented themselves, all communications should be conducted between the representatives. The SRA Solicitors Code of Conduct Outcome 11.1 requires that all third parties are treated fairly. An "indicative behaviour" associated with this suggests that Outcome 11.1 is "likely" to be breached in the event that a lawyer were to contact an employee directly. While not a legislative rule, it is common practice that this approach is observed.

13 How does this change for employees who are not represented by an attorney?

Lawyers are expected to conduct themselves ethically and fairly at all times, so it follows that lawyers should make clear that they represent the company in an internal investigation and not the employee so as to avoid giving the impression that they are able to advise or offer protection to the employee. There is no formal Upjohn requirement in the UK however. The considerations in relation to legal professional privilege will also be relevant in any interaction with any unrepresented employee who is not part of the client pool.

14 If documents or electronically stored information containing employee information is sent from this jurisdiction to another, for analysis or use in legal proceedings, what are the aspects to be considered?

Data protection laws will vary by country, but in Europe the general position is that employee personal data cannot be sent outside the EEA without the consent of the employee. In the UK, the Data Protection Act 1998 sets out the principles that must be complied with if there is to be any transfer of personal data outside the EEA. There is a requirement to comply with all the principles and the Act as a whole, including the first principle (fair and lawful processing), which may require that employees be informed about disclosures of their personal data overseas, the seventh principle (information security), and the eighth principle, which stipulates that "personal data shall not be transferred to

a country or territory outside the EEA unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data."

Following the introduction of the General Data Protection Regulation, Chapter V of that regulation introduces similar protections from disclosure and data handling generally.

15 What are the company's public disclosure obligations about the internal investigation in this jurisdiction?

In general there is no requirement to publicly disclose the fact that an internal investigation is taking place. Certain disclosure obligations may arise for companies operating in a regulated sector or those with listings, in particular for investigations that have the potential to have a material impact on the business. There are also certain circumstances in which ongoing monitoring obligations are imposed (for example, as part of a deferred prosecution agreement) in which an authority or law enforcement body is required to be notified of new internal investigations.

16 Are public company statements relating to employee misconduct protected from defamation claims?

Since the introduction of the Defamation Act 2013 claims for defamation have been limited to just those in which the claimant can demonstrate "serious harm" to his or her reputation had been incurred as a result of the defamatory statement. In any such claim, the ability to demonstrate that the statement was substantially true is an absolute defence. While not protected from defamation claims, statements concerning an employee's role in any misconduct will only be actionable if they cause serious harm to the employee's reputation and cannot be defended on grounds that the statement was substantially true.

From the employee's perspective

17 What is the law, policy and enforcement track record on individual accountability for corporate wrongdoing?

Prior to the introduction of the "failure to prevent bribery" offence in the Bribery Act 2010, corporate prosecutions were very rare as prosecutors had to identify the controlling mind and will of a corporate suspect, and have evidence of those individuals' involvement in any criminal wrongdoing. Since the introduction of the Act, and the associated deferred prosecution agreement (DPA) powers introduced by the Crime and Courts Act 2013, there have been a number of successful prosecutions and DPAs concluded with corporate suspects. Notably, the recent case of SFO v Rolls-Royce PLC resulted in a DPA with a penalty of almost £500,000,000. See also the case of Jes Staley mentioned above.

18 What is the employee's obligation to speak with the company in an internal investigation?

There is no legal obligation for an employee to speak with the company or its advisers as part of an internal investigation. To refuse to do so may well be a breach of the terms of their employment contract.

19 What are attorneys' roles representing the company and representing the employee, and who should explain these roles to the employee?

A company's external legal representatives will represent the company as an organisation only, and not the employees. There are occasions in which the lawyers may represent both (for example, on a joint defence basis); however, this is a matter for the employee to decide, irrespective of who is paying for that representation. In-house lawyers also act only for the company and not its employees, but may offer legal assistance to employees in relation to the aspects of the business that employee is engaged in. In general, it is the obligation of the lawyer to make clear whom they represent.

20 May an employee appoint its own counsel in an internal investigation?

There is no restriction on an employee who wishes to instruct their own counsel, but there is also no obligation on the part of the employer to allow that representative to attend or participate in an internal investigation. In practice, such relationships have the potential to assist the process, but it is important that parameters are clearly defined at the outset, and in particular, that privilege is preserved where possible.

21 Who pays for employee representation?

It is unlikely that an employer will pay for employee representation during the course of an investigation unless that employee appears likely to be prosecuted personally and alongside the company in relation to the misconduct under investigation. In these circumstances, the employee will retain the ultimate decision of whether to accept that representation. There may be provision within their employment contract or other employment-related documents (such as a compromise agreement) that legal fees incurred assisting an investigation and/or in relation to representation during proceedings connected with the conduct of their employment obligations is covered, and there may also be insurance coverage from which the company and employee may benefit in the event of criminal or regulatory investigation by a law enforcement authority.

22 May employees enter into joint defence agreements? With whom?

Employees are free to enter into agreements with each other and their employer in the event that litigation is brought against those relevant parties. The benefits of doing so include preservation of privilege on a common interest basis, a reduction in legal fees and clarity as to overall strategy. Naturally, each case requires a careful assessment of all the facts and the basis for the assertion of a common interest.

23 Do employees have any constitutional or basic legal rights that they can rely on during government and internal investigations?

If a law enforcement authority is conducting a criminal investigation, any interviews under caution must be conducted in accordance with Police and Criminal Evidence Act 1984, which governs the powers of investigation including, arrest, detention,

interrogation, entry and search of premises, personal search and the taking of samples. Among the individual's rights, is the right to silence, as protected by the European Convention of Human Rights (Murray (John) v UK (1996) 22 EHRR 29). However, this right is not absolute and in the UK a jury may be entitled to draw adverse inferences from the silence of a defendant during a caution interview (eg, see sections 34, 35, 37 and 38 Criminal Justice and Public Order Act 1994). If the employer is conducting an investigation, even if it is related to a potential law enforcement investigation, these protections do not apply because it is only an interaction between private parties. See also question 3.

24 Who owns the documents and electronically stored information within employees' possession or control and how can employees protect their privacy rights in this context?

Generally, employers have the right to search company property, which can include office space, company emails and electronic information sent across a company network. This right is curtailed when an employee enjoys a reasonable expectation of privacy based on a company's policies or general practices. To ensure confidential treatment of personal information, employees should understand and abide by the company's privacy policies and procedures as well as avoid using company property and networks to send personal communications.

The recently introduced European General Data Protection Regulation came into force in the UK on 25 May 2018. This regulation strengthens the protections of personal data and its use. In this context, the key changes to be aware of are that an employee's personal data cannot be sent outside of the European Economic Area unless the receiving nation has an adequate level of data protection. If such transfers are necessary, there are a series of exceptions to the prohibition, chief among which is obtaining the individual's consent.

25 What are the employee's responsibilities if there is a parallel civil proceeding against the company or against the employee?

Parallel proceedings against a company or an employee can create privilege and conflict of interest issues. Employees must balance their own personal legal interests with their obligations to their employer. It will often be the case that witnesses of fact in an internal investigation can lend assistance and support to the defence of their employer in the context of parallel civil litigation. However, employees must be aware of their rights against self incrimination and for the potential to invite personal civil claims (where appropriate) by virtue of agreeing to support their employer in this way. It would be prudent therefore to confirm, in advance, with one's employer what precisely are the obligations on both parties. In particular in relation to fees, common interest privilege sharing, and existing contractual obligations concerning the provision of support and assistance during the course of civil litigation concerning the organisation and its employees.

26 What should employees do if they are sued by shareholders or other private parties as a result of an investigation?

If an employee is sued personally they should seek the advice of personal and company counsel to discuss how best to proceed. If the employee has been named in a lawsuit, the interests of the company and employee may diverge and it is important the employee have personal counsel. See question 19.

27 What are the employees' responsibilities to comply with law enforcement investigations, subpoenas and searches?

Employees are legally required to comply with notices issued by law enforcement bodies, such as information or document request notices issued by the UK Serious Fraud Office under section 2 of the Criminal Justice Act 1988, warrants, and similar court orders. If personally served with such notices or orders, employees should consult legal counsel to determine their scope and validity. Similarly, if served with a warrant, an employee should allow the investigators to search the area specified in the warrant unimpeded subject to the employee's rights. Law enforcers in the UK have a range of powers to enter and search a premises, including business premises. It is prudent for organisations to have clear policies and internal reporting procedures to assist employee responses to such an event.

Law enforcement may also approach an employee and request voluntary cooperation. If there is no formal notice or order of the court, the employee is under no obligation to cooperate. In such circumstances it is often best for the employee to politely decline to answer any questions during such a contact until the employee is able to confer with company or their own personal legal counsel; information disclosed to law enforcement may be used against the employee or against the company in an enforcement action.

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Dr Robert Amaee is the head of white-collar crime and corporate investigations in London. He advises clients on sensitive criminal and regulatory matters typically involving allegations or suspicions of bribery, fraud, money laundering or sanctions violations. He represents companies and individuals in investigations launched by law enforcement agencies from the UK or overseas, and advises on asset tracing and proceeds of crime issues, often in the context of civil litigation.

Legal directories quote clients who describe him as "highly regarded for his ability to manage sensitive global investigations, money laundering and corruption work … a great pragmatist who can work through very difficult legal issues in a practical way and who has a clear understanding of the law … exceptional in how sharply he focuses his attention on anything we ask of him … an astute expert who gives sound advice, while also being a real pleasure to deal with … efficient and knowledgeable practitioner … approachable manner … with genuine depth of experience, having practised as a criminal barrister and worked at the [Serious Fraud Office]."

Previously, Robert served as head of anti-corruption, head of proceeds of crime and head of international assistance at the Serious Fraud Office (SFO), leading the investigation and prosecution of high-profile bribery and money laundering cases. In those roles, he worked with prosecutors, regulators, multilateral development banks and governmental bodies from the UK and internationally. He represented the SFO on the UK Attorney General's Working Group tasked with drafting the UK government's guidance to the Bribery Act.

Robert is admitted to practice as a barrister in England and Wales, and has defended and prosecuted cases in the criminal courts. He has practical business experience having worked in senior business roles across EMEA for VeriSign Inc and APC Inc. He holds a PhD in medical research and a BSc in life sciences.

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