

Recent Federal Court Ruling Highlights Dangers for Companies Conducting Internal Investigations

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A federal court in the District of Columbia recently ruled that a defendant had to hand over to the opposing party documents pertaining to internal company audits and fraud investigations, finding that they were not protected by the attorney-client privilege or the work product doctrine. This decision, which could have far-reaching implications, demonstrates the potential pitfalls of internal company investigations of wrongdoing, and underscores the importance of involving counsel early and extensively in such investigations.

In *United States of America ex rel. Barko v. Halliburton Co.*, Case No. 1:05-CV0-1276 (D.D.C.), defendant KBR, Inc., a government contractor, is being sued by a former employee under the False Claims Act. The suit alleges that KBR defrauded the government through a subcontractor that performed substandard work, and passed along inflated bills for such work. During discovery, the relator sought production of internal audit and investigation reports that had been prepared by KBR and KBR resisted, arguing that the documents were protected by the attorney-client and work product privileges.

In a broadly-worded opinion dated March 6, 2014, the court granted relator's motion to compel, finding that the "investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." Specifically, the investigations were undertaken pursuant to what is commonly referred to as the "mandatory disclosure rule," which requires Department of Defense contractors to have internal control systems in place to facilitate the discovery and reporting of improper conduct in connection with government contracts. The rule requires disclosure of wrongdoing when a contractor has "credible evidence" that it has occurred.

The court found that KBR's internal policies merely implemented these regulatory requirements. The court further found that the reports were not privileged because the interviewers were not attorneys and because the employees involved were not informed that the purpose of the interviews was to assist KBR in obtaining legal advice.

The district court denied KBR's request to certify its opinion for an interlocutory appeal and to stay its order pending the filing of a petition for mandamus with the D.C. Circuit. On March 14, 2014, KBR filed in the D.C. Circuit an emergency motion for stay, a petition for writ of mandamus, and a motion to seal. The D.C. Circuit has entered an administrative stay of the district court's order, pending its review of the petition and motions. These are scheduled to be fully briefed by the end of March, and we will update you on further developments.

Regardless of the outcome of the mandamus petition, this decision highlights one of the many potential pitfalls for companies who conduct internal investigations of wrongdoing. This is not just a concern for government contractors; there are numerous federal statutes that mandate internal compliance programs and/or procedures, such as the Sarbanes-Oxley Act and the Affordable Care Act. As mandatory compliance programs continue to become a commonplace feature of federal regulations, this risk for companies conducting internal investigations will only grow.

Therefore, companies that engage in internal investigations need to be very careful going forward to ensure that they can avail themselves of the protections of the attorney-client privilege and/or the work product doctrine. Companies must involve attorneys in order to secure legal privileges and protections from forced disclosure; it is not enough to simply put lawyers “on the team.” The attorneys should have strategic control of the investigations, early in the investigation process, and should make that involvement explicit. Companies should also be circumspect in how they document such investigations, and they should make it clear in their documentation that the investigations are being conducted for the purpose of obtaining legal advice.

The *KBR* case is also a potent reminder of the importance of hiring outside counsel to conduct and participate in such investigations. Indeed, the court in *KBR* expressly distinguished the internal audits at issue from those in the Supreme Court’s seminal *Upjohn* case, where the communications in question were held to be privileged because they “were conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation.”