



Considerations for Conducting Employee Interviews: A Primer for Investigations

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PREPARING FOR THE INTERVIEW

- **Identifying Potential Interviewees**

- Start identifying potential interviewees early in the investigation while document collection and review is ongoing.
- Use early interviews to identify additional witnesses.

- **Sequencing Interviews**

- If applicable, interview any identified whistleblower first to understand the nature of the allegations and establish a line of communication.
- Otherwise, begin by interviewing employees who can provide relevant background information regarding company practices and identify key personnel who were involved in, or were aware of, the alleged conduct.
- Proceed with interviews in order of ascending significance to the conduct. However, consider interviewing any individual targets of the allegations early if there is a risk that they may leave the company or that other employees may tip them off.

- **Selecting Documents for the Interview**

- Think critically about which documents to use in the interview. Use interviews to understand documents that appear to implicate the company or any employees in misconduct.
- To preserve the confidentiality of documents, avoid showing an employee any document that the employee did not create, send or receive.

PRESERVING PRIVILEGE

- At the outset of an interview, provide an *Upjohn* warning to clarify that counsel represents the company, not the employee. Explain that the interview is subject to the attorney-client privilege, and that while the privilege is held by the employer, not the employee, the content of the interview is still confidential.
- Counsel **can ask** employees to keep the substance of questions and answers confidential.

- Counsel **cannot require** employees to keep the facts underlying their answers confidential, so should be cautious in divulging facts to employees during an interview.
- Companies should not have a blanket policy requiring confidentiality when conducting an internal investigation. Such policies are disfavored by the National Labor Relations Board.

SETTING THE RIGHT TONE

- Counsel must be sensitive to the fact that internal investigations can be terrifying for employees and terrible for morale.
- Remember that not every witness interview needs to be an interrogation.

ADDRESSING EMPLOYEE QUESTIONS

Before conducting interviews, counsel should develop a strategy for addressing commonly asked questions, such as:

- **“Do I need my own lawyer?”**
 - Except where an individual has a specific right to counsel (e.g., a director or officer), there is no affirmative duty to recommend outside counsel.
 - Company counsel may not give legal advice to employees but should not discourage an employee from securing outside counsel and can recommend that the employee do so if the employee may have conflicting interests with the company.
- **“Have I done something wrong?”**
 - It is best not to discuss whether an employee has been implicated in the misconduct. However, if there is no reason to suspect an employee in any wrongdoing, it is okay to say so if it will aid the investigation.
- **“Do I have to cooperate in the investigation?”**
 - Uncooperative employees can hinder fact-gathering in an investigation. Companies should maintain a policy requiring cooperation or distribute a memorandum to employees at the start of an investigation stating the employee’s duty to cooperate. Companies may also include a clause in individuals’ employment contracts requiring cooperation with internal investigations.
 - Employers can discipline an employee who refuses to cooperate but should first try to understand the uncooperative employee’s concerns and determine whether they can be accommodated before taking disciplinary action.
- **“Can I bring someone with me to the interview?”**
 - Employees may ask to bring a non-legal representative, such as a co-worker or union representative, to the interview. A union employee has the right to be accompanied by a union representative during an investigative interview that the employee reasonably believes could result in discipline. However, a non-union employee does not have this right, and to preserve privilege counsel should not permit any non-legal representative to attend the interview.

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- **“Can we go off the record?”**
 - Counsel should not accept off-the-record statements as they will not be documented and will add little value to the investigation. Counsel should try to understand and address the employee’s concerns and should explain that they are interested in discovering facts about the misconduct and all of the information the employee has.
- **“Will you tell my supervisor what I say?”**
 - Counsel should explain that, as attorneys for the company, they are required to share their findings with the company.
 - In the *Upjohn* warning provided at the outset of the interview, counsel should also make clear that the company may decide to waive its privilege by disclosing the content of the interview with third parties, including the government.
- **“Will I be disciplined?”**
 - Before fully understanding whether the employee is implicated in any misconduct, counsel should not guarantee that the employee will avoid disciplinary action.
 - However, companies are prohibited by law from retaliating against whistleblowers because they reported potential wrongdoing.
 - Companies should also maintain a non-retaliation policy stating that they will not discipline an employee who in good faith raises concerns or reports suspected misconduct.

TIPS

- If an employee implicates himself in misconduct during an interview:
 - You do **not** need to terminate the interview.
 - You **may** advise the employee to seek outside counsel.
- Recordings of interviews may be considered factual since they are verbatim transcripts. To preserve attorney work product protections:
 - Have one attorney ask questions and another attorney take notes in every interview.
 - Prepare a memorandum summarizing the interview that includes counsel’s opinions and mental impressions.

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