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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

10 Tips For An Effective Cross-Border Investigation

Law360, New York (October 31, 2012, 1:39 PM ET) -- The Dodd-Frank Wall Street Reform and Consumer Protection Act creates new and significant remedies for whistleblowers in the United States. It provides rewards (or bounties) for whistleblowers, and strengthens existing penalties against employers under the Sarbanes-Oxley Act for retaliating against whistleblowers.

Dodd Frank and Sarbanes Oxley have also greatly heightened employers' interests in identifying potentially unethical conduct. Employers now have added incentive to encourage potential whistleblowers to come forward and air issues and complaints, so they can be investigated and eliminated before the underlying conduct becomes a cause célèbre.

Multinational employers may find themselves investigating alleged wrongdoing that occurred in more than one nation, and U.S.-based lawyers and human resources executives often coordinate and directly carry out investigations overseas. Before boarding an international flight to interview witnesses or to review personnel files, however, in-house counsel and HR executives need to understand that the rules are different when it comes to conducting international investigations.

The rules of privilege are starkly different; certain investigatory steps that are routine in the United States can jeopardize the employer's position when carried out overseas; and overseas employees have significantly different rights when it comes to being interviewed concerning alleged wrongdoing.

This article provides the top 10 tips for multinational employers when they are conducting investigations beyond U.S. borders, whether they are investigating allegations of internal corruption, discrimination or harassment, or other claims of wrongdoing.

Preserve the Attorney-Client Privilege

In the United States, companies investigating claims of wrongdoing must be concerned with the possibility that the results of the investigation — wherever in the world they may be conducted — are subject to discovery in a lawsuit or arbitration brought by the whistleblower, or by the government, or even in related claims brought by others. However, discovery normally may not be had of information that is protected by the attorney-client privilege. While the employer may choose to waive the privilege in order to assert an affirmative defense, nevertheless, the employer is best advised to take all steps necessary to ensure that the attorney-client privilege attaches to the investigation.

However, outside of the U.S., some jurisdictions do not recognize the attorney-client privilege at all, or recognize only a principle of confidentiality that is not coextensive with the protections provided by the privilege in the United States. Some jurisdictions may prevent the lawyer from revealing communications with the client — but do not protect the

client from having to disclose communications with counsel.

Further, while United States courts, consistent with Upjohn Co. v. United States, 449 U.S. 383 (1981), generally recognize that the privilege may attach to communications between in-house counsel and the corporate client, in other jurisdictions, the privilege does not routinely extend to these communications.

In Europe, for example, the European Court of Justice held in September 2010 that, at least in the context of antitrust investigations, communications with in-house counsel are not privileged. Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission, Case 155/79, A M & S Europe Limited v. Commission, [1982] ECR 1575. The court held, in sum, that in-house counsel are not independent enough to warrant extending a legal professional privilege.

Thus, as the status of in-house counsel in Europe as a professional legal advisor for the purposes of applying the U.S. attorney-client privilege is not guaranteed, employers need to consider involving outside counsel in order to help ensure application of the privilege.

Be Sure That Local Bar Rules Permit the Investigations

Careful attention must be paid at the outset of any investigation to the laws, bar rules, and privilege customs of the local jurisdiction in which the investigation is being conducted. For example, the use of lawyers (whether in-house counsel or an outside firm) to conduct investigations may violate bar rules in some jurisdictions outside the United States.

A U.S.-based client who expects a French attorney, for example, to help lead or even participate in an investigation and questioning of a France-based employee may find that the lawyer will decline to do so, in light of bar rules. As an illustration, the French Supreme Court held in an important decision that an employer cannot be assisted by external counsel, in particular his lawyer, when conducting a pre-dismissal meeting (Cass. Soc., May 27, 1998; no. 96-40.741).

Similarly, using a U.S.-based lawyer to conduct the investigation may prejudice the client's ability to discipline the employee at issue.

Check Whether Discipline May Be Imposed Based on Investigation

As noted above, in some countries (France, for example), it is unlawful for an employer to impose discipline based on information obtained during an investigative interview. Where this restriction/prohibition exists, the interviewer must understand that an interview should be suspended if the witness volunteers information about wrongful conduct that may subject him or her to discipline. In such a case, statutory rules concerning representation (for example, by a union or a works council), as well as the legal prerequisites to imposing discipline, must be considered.

Determine Whether the Employee Is Entitled to Representation

In some jurisdictions, the employee has the right to legal representation during an interview. And, it may be advisable, once litigation commences, to permit an employee's lawyer to be present during an interview even if it is not legally required, in order to maintain the integrity of the investigation. Any such decision should be made only after consultation with legal counsel who is well informed about the requirements of the particular jurisdiction.

Consider Cultural and Language Differences

Given the likelihood of a cultural divide and the potential for misunderstanding, U.S. lawyers or other U.S.-based employees conducting interviews overseas should consider having the local HR representative or compliance employee conduct the questioning — at the very least, such employees should attend the interview.

The same can be said regarding any questioner from a country other than that of the individual being questioned: The employer needs to be aware of potential cultural differences that can affect understanding on the part of the questioner and the interviewee. Also, employees whose first language is not English and who are not used to the U.S. method of questioning may require interpreters or "cultural liaisons" to be present during interviews.

Be Aware of Conflicts Issues

In-house counsel and other employees involved in disciplining and meeting with the subject of an investigation may not be appropriate candidates to investigate that employee's alleged misconduct. Similarly, legal or compliance personnel who are familiar with the conduct under investigation because they previously played a role in reviewing or making decisions regarding the employee's duties should not actively participate in an investigation of that conduct. Those legal and compliance personnel are, at the least, potential witnesses who themselves may need to be interviewed. Separating them from the investigation team will help maintain the integrity of the investigation.

Coordination Between the Human Resources and Compliance Functions

The employer's labor counsel and compliance counsel need to share essential facts with each other in conducting the investigation, as do the HR and compliance departments. If HR has information concerning an alleged whistleblower's wrongdoing, this information should normally be provided to compliance personnel. Sharing this information generally does not "taint" the compliance department's investigation. To the contrary, keeping facts away from investigators in the hope of assuring an impartial investigation could compromise the effectiveness of the investigation.

Further, to help avoid compromising the employer's legal position, employment counsel and HR generally should coordinate their investigations with those of compliance counsel and compliance staff. For example, an investigation that conclusively determines that an employee committed wrongdoing despite the presence of policies and practices designed to prevent misconduct may also have the unintended effect of insinuating that the employer did not have effective compliance practices in place, even if the opposite is true.

Thus, prior to concluding whether wrongdoing occurred, it is important for the investigator to assure that he or she is sending no unintended messages regarding the employer's policies or practices.

Be Aware of Data Privacy Issues

Many countries regard the United States' celebration of whistleblowers as social heroes to be unacceptable and to reflect a "culture of denunciation" which is contrary to their own fundamental societal tenets. Data privacy permeates all aspects of an investigation carried out overseas or that involves transmission of data (whether electronic or hard copies) from overseas to the United States.

Any efforts to search email, review personnel records, or transport records across borders, whether electronically or otherwise, must be considered in the context of local privacy law issues. Corporate procedures encouraging confidential disclosure of internal wrongdoing,

such as whistleblower hotlines, must be reviewed for compliance with data protection and privacy laws. The consequences of violating these laws are severe, and may, for example, subject the company to government sanctions. Moreover, European “data subjects” have a private right of action for data law violations.

Consider the Consequences of Retaining Outside Consultants

Retaining an outside consultant to conduct an investigation, even in the context of an otherwise “privileged” investigation conducted by counsel, may raise reporting requirements in the United States and other jurisdictions. The employer should consult with corporate and U.S. Securities and Exchange Commission or foreign corporate counsel to determine the scope of any such obligation. Of course, the employer must be sure to preserve the attorney-client privilege in the event it retains a third-party consultant.

Consider Retaining a Communications Expert

Companies can benefit from the advice of experts in corporate communications in the event of a crisis or potential litigation. Particularly when a matter involves facts that put the employer’s reputation at risk, such as high profile claims of wrongdoing, the employer and counsel can benefit by helping to frame the issues for the various potential audiences — the press, prosecutors and the general public.

Courts in the United States recognize that advice provided by corporate communications counsel to legal counsel, including drafts of public statements or responses to various media or other third parties, may be privileged and confidential, and hence shielded from discovery. To preserve the privilege, communications experts must act at the direction of counsel, to aid counsel to provide legal advice to the employer client.

This list is only partial and cannot be used to guide every investigation of alleged misconduct outside of the United States. But the differences between U.S. and non-U.S. investigations are stark, and the consequences of failing to understand and take note of them can be devastating to an employer’s interests. In-house counsel and HR executives should consult with legal counsel should they have any concerns about these issues.

--By Philip Berkowitz, Littler Mendelson PC

Philip Berkowitz is co-chairman of the U.S. international employment law practice at Littler Mendelson's New York office.