



# Employee Issues Arising In Investigations

See the full Investigations Toolkit at [bakerbotts.com](http://bakerbotts.com).

## 1. WHAT INFORMATION SHOULD YOU GIVE EMPLOYEES?

Carefully balance when and what to tell employees about the investigation.

- Existence of investigation:
  - Employees generally learn of an investigation when they receive a document retention notice or when they are asked to provide access to their files.
  - Consider responding individually to employee questions about the investigation *process* (e.g., who is leading; will the employee be interviewed).
- Findings:
  - While U.S. law protects certain communications with employees under the company's *attorney-client privilege* (*Upjohn*), sharing the findings of an investigation increases the chance of public disclosure.
  - Employees may ignore confidentiality warnings and discuss findings with third parties, endangering the company's privilege.
  - Other countries may not share the U.S. view on privilege; outside the U.S. internal disclosures may constitute a privilege waiver.

### Key Reminders

- Keep employees on a “need to know” basis to protect confidentiality, avoid confusing memories, and limit the risk of coordinating recollections.
- Company counsel may decide to limit its legal representation to the company only to ensure no future risk of disqualification based on a later-identified conflict of interest.
- Consider sharing “lessons learned” from an investigation through training sessions or by announcing revised policies. These lessons will necessarily be drawn from the disclosed facts and legal analysis, but rarely need to disclose either to be effective.

## 2. WHEN SHOULD YOU HIRE INDEPENDENT COUNSEL?

Explore whether it is in the company's best interest for employees to be represented by separate counsel and how to interact with such counsel.

- When to hire independent counsel:
  - Do you expect that the state or federal government may question that employee as a witness, subject, or target and has company counsel advises against a joint representation?
  - Has the company learned of conduct that may lead to separate criminal or regulatory exposure for that employee (e.g., debarment; suspension; indictment)?

- Whether to pay independent counsel:
  - Does the employee have a right to indemnification (e.g., employment agreement; collective bargaining)?
  - Will company's interests be better served with employees being ably represented during any questioning?
  - What precedent will this set for other employees requesting similar treatment?
  - What is the company's status with the investigating authorities? While the U.S. Department of Justice no longer formally views company-funded legal counsel for an employee to be inconsistent with cooperation, the company may still receive queries from individual prosecutors about this decision.
  
- What to share or accept with independent counsel:
  - *Give nothing* – Is it in the company's interest to have a prepared witness or counsel? Could the company face additional scrutiny or expense due to uninformed witness responses? Are there strategic or tactical benefits for this witness?
  - *Give something* – How much information does the witness or counsel need to prepare for their issues? Can you limit the risk of a third party gaining access to that information later using a common interest agreement?
  - *Receive something other than company records* – Are there conditions on accepting this information (e.g., returning it upon cooperation) that might limit the company's options in deciding whether to later cooperate with a regulator or prosecuting authority?

### 3. SHOULD YOU DISCIPLINE THE EMPLOYEE?

Competing pressures in deciding whether and when to discipline employees come from many sources—other employees, management, directors, cultural norms, the public, and regulators or prosecuting authorities.

- Whether to discipline:
  - *For prior conduct* – consider the company's code of conduct, applicable laws and, if a regulator or prosecutor is involved, whether that authority will expect discipline as part of any company remediation.
  - *For non-cooperation during the investigation* – consider whether company policies or employment agreements create a duty to cooperate and ask why the employee is not being cooperative.
  
- When to discipline:
  - Normally reserved until after the fact-finding exercise is complete.
  - Act too soon and later-discovered facts may alter the company's assessment of the proper outcome or the company may lose access to crucial information needed to analyze the company's exposure.
  - Wait too long and other employees may conclude that the company does not punish certain behavior.
  - If an employee may pose a current risk to business or an impediment to the ongoing investigation, consider whether it is permissible to place that employee on paid leave pending the outcome of the investigation.
  - Some regulators ask cooperating companies to wait to terminate culpable employees until their own investigation is complete, presumably to enhance the likelihood of cooperation from those witnesses.

This material is for general informational purposes and is not intended as legal advice. The transmission and receipt of information contained in this document do not form or constitute a lawyer-client relationship. This material may constitute attorney advertising in some jurisdictions.

© Baker Botts L.L.P. 2019. All rights reserved.