

March 13, 2013

## ALERT | Helping You Do Business In Today's Legal Environment

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Hinkle has a national reputation for helping clients with every facet of business litigation. We also can help you before litigation ever arises and, in many cases, help position you to avoid litigation events through strategic planning. As a part of our service to you, we will be sending out this monthly bulletin with newsworthy items and best practice tips for your business.

## **Best Practices When Conducting an Internal Audit**

Internal investigations allow a company to make informed decisions and pursue more effective responses to inquiries by outside agencies or with regard to potential litigation. However, it is important to be informed of the potential risks of internal investigations, and avoid pitfalls that can lead to heightened exposure for your company.

1. Consider having your investigative actions undertaken at the direction of counsel. While not universally practical, inclusion of counsel is a good way to maximize the protection of the attorney-client privilege by establishing that the investigation is done for legal advice rather than general business purposes. Copy counsel on all communications regarding the review and ensure the receipt of a retention letter detailing the scope of counsel's work. Additionally, instruct employees that the investigation is for the purpose of obtaining legal advice and advise them not to engage in any investigation activities unless it is coordinated with or directed by the attorney. Generate unique documents to be sent to counsel to communicate the message or result contained in form documents. Documents made in the ordinary course of business are potentially discoverable in litigation.
2. Dissemination of review documents and communications should be as limited as possible to maintain the clear intent of confidentiality. If possible, limit dissemination to upper management or, for example, members of the Board of Directors only. Preview the final report before publication to increase the protection of any preliminary information and communications omitted from the final report. Communication regarding preliminary versions should be made by phone or in person rather than electronic or written communication.
3. Avoid libel or slander of individuals and employees. To do so, take care not to name or provide identifying information of any individuals or entities to the extent possible. Ensure the accuracy of the assertions made in all documents, as truth is a defense to any claim of libel or slander. Finally, limit the distribution of materials.

## **Best Practices When Conducting an Internal Audit**

4. Limit the scope of the review. An internal investigation of broad scope may produce liability by disclosing facts beyond the intended goals of

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the investigation. A variety of state and federal agencies, who regulate areas such as financial and environmental issues or employment discrimination, impose affirmative reporting obligations when violations are discovered. Internal investigations may alert these agencies to potential violations or trigger a company's obligation to report known facts, both of which may lead to heightened liability. Often, failure to address a known problem carries more serious consequences.

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