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Employer Update

Maintaining Privileges in Workplace Investigations

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Employers accused of wrongdoing by their employees often conduct internal investigations and turn to outside counsel for advice about those investigations. When employers communicate with outside counsel in seeking advice regarding their internal investigations, quite understandably, they would like the certainty that those communications will be viewed just as any other attorney-client communication—as confidential and shielded from disclosure in litigation based on the attorney-client and work-product privileges. A recent case, however, suggests that under certain circumstances, at least some courts will view employers' assertions of privilege with skepticism, and place unexpected limits on their claims of privilege.

Whether a court will sustain employers' assertions of the attorney-client privilege over communications with counsel during a workplace investigation depends, in part, on how the court will address one critical issue. A court must decide whether each communication constitutes a request for or the delivery of legal advice, or whether the communication concerns discussions regarding day-to-day activities conducted in the ordinary course of business.

In *Koumoulis v. Independent Financial Marketing Group*, 295 F.R.D. 28 (E.D.N.Y. Nov. 1, 2013), aff'd in part, 29 F.Supp.3d 142 (E.D.N.Y. Jan. 21, 2014), the court addressed this critical issue in the context of an employer's investigation of allegations of discrimination and reached an alarming result. In the circumstances presented, the court held that communications between outside counsel and human resources personnel were not protected by the attorney-client privilege because "their predominant purpose was to provide human resources and thus business advice, not legal advice."[1] *Id.* at 45. As a result, the court ordered production of documents the employer had withheld as privileged, and the deposition of the employer's outside counsel regarding those ostensibly non-privileged communications.

In this article, we analyze *Koumoulis* and explore the fine line the court drew between business and legal advice. We also contrast the decision in *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014), where the U.S. Court of Appeals for the D.C. Circuit adopted a standard more favorable to the assertion of privilege during internal investigations. We then recommend steps employers should take to increase the likelihood that a court will uphold their assertions of privilege over communications with counsel during internal investigations.

Background

The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law"[2] and its purpose is "to encourage clients to make full disclosure to their attorneys."[3] The attorney-client privilege protects communications between attorneys and their clients from disclosure in litigation, and extends to agents of both.

Generally, the elements required to establish attorney-client privilege are "(1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client."[4] To determine whether a communication seeks or provides legal advice, courts often look to its "primary purpose."[5] Courts vary in how they construe the primary purpose of a communication. Some courts have asked whether the communication would have been made "but for" the purpose of seeking or providing legal advice.[6] Other courts have found that a communication's primary purpose was to obtain or provide legal advice even where significant business purposes were involved.[7]

Business or Legal Advice

Koumoulis illustrates how a court can find that communications by company employees with counsel during an internal workplace investigation constitute the delivery of business advice rather than legal advice, and thus preclude protection by the attorney-client privilege. Plaintiffs were former and current employees of a company in the business of providing investment products to financial institutions. Plaintiffs alleged that certain supervisors made derogatory comments about their Greek ancestry and religious affiliation, and constructively discharged or wrongfully terminated three of the plaintiffs. Plaintiffs claimed that defendants discriminated against them because of their religion, national origin, and race; subjected plaintiffs to a hostile work environment; and retaliated against plaintiffs for bringing their complaints.

Plaintiffs moved to compel the production of documents that defendants withheld on the basis of the attorney-client privilege. The withheld documents concerned one plaintiff's internal complaints and the subsequent investigation by the company's human resources managers into those complaints. Defendants described the withheld communications as relating to Equal Employment Opportunity Commission charges and the present litigation, plaintiff's performance issues, and emails between outside counsel and human resources concerning how to conduct the investigation. 295 F.R.D. at 34. Defendants asserted that outside attorneys did not conduct interviews or make any business decisions as part of the investigation.

Magistrate Judge Vera Scanlon ruled that the attorney-client privilege did not protect the communications between human resources and outside counsel, finding that the communications' "predominant purpose" was to seek business advice. *Id.* at 45. The magistrate judge found that the communications generally concerned counsel's advice as to what actions human resources personnel should take regarding the investigation, who should perform those actions, and what should be documented.

The magistrate judge found that the communications by outside counsel to human resources also included draft emails to plaintiffs and scripts for conversations that human resources staff would have with plaintiffs. Defendants' emails to outside counsel reported on the outcome of their actions and new developments, and asked about next steps in the investigation. The magistrate judge described outside counsel's role as "help[ing] supervise and direct the internal investigations primarily as an adjunct member of Defendants' human resources team." *Id.*

The court acknowledged the difficulty of its decision in light of the overlapping nature of legal and human resources advice. The court recognized that human resources programs seek to "ensure compliance with the myriad of laws regulating employer-employee relations, such as…wage-and-hour laws, benefits laws and health-and-safety laws." *Id.* Despite the fact that these subjects involved compliance with law, the court still found the advice business-related because "like other business activities with a regulatory flavor, [human resources work] is part of the day-to-day operation of a business." *Id.* According to the court, "just as an employment lawyer's legal advice may well

account for business concerns, a human resources employee's business advice may well include a consideration of the law." *Id.*

In articulating its decision, the court noted that counsel's advice rarely involved interpreting and applying legal principles. Upon review, District Judge Pamela Chen reaffirmed Judge Scanlon's opinion. She wrote that the overwhelming majority of the communications discussed how human resources should conduct the investigation and how they should respond to plaintiff. Accordingly, the district court labeled outside counsel's advice as "plainly… not legal advice, but rather human resources advice on personnel management and customer relations." *Koumoulis v. Independent Financial Marketing Group*, 29 F.Supp.3d 142, 148 (E.D.N.Y. Jan. 21, 2014).

'In re Kellogg'

Koumoulis hinged upon finding that the advice outside counsel provided was predominantly business advice even though the subject of the advice included compliance with employment laws. Just months after the Koumoulis decision, in *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014), the D.C. Circuit set forth a standard for resolving privilege disputes in a non-employment case concerning communications that have both legal and business purposes. In *Kellogg*, a relator filed suit against government contractors under the False Claims Act and alleged that the contractors schemed to defraud the United States. *United States ex rel. Barko v. Halliburton Company*, 37 F.Supp.3d 1, 1 (D.C. Cir. March 6, 2014). Defendants' legal department directed an investigation of the alleged misconduct. Plaintiff moved to compel the production of documents related to the investigation, and defendants refused to comply on the grounds that the documents were privileged.

The district court ordered defendants to produce the documents, ruling that defendants carried out the investigations for purposes of complying with government regulations and corporate policy rather than obtaining legal advice. The circuit court reversed. The circuit court understood the attorney-client privilege, under the district court's ruling, to "not apply unless the sole purpose of the communication was to obtain or provide legal advice." 756 F.3d at 759. The D.C. Circuit instead ruled that as long as obtaining or providing legal advice "was one significant purpose" of the investigation, the privilege protected communications related to the investigation. *Id.* According to the circuit court, this is true even if there are other purposes for the investigation.

The court held that communications between outside counsel and human resources personnel were not protected by the attorney-client privilege because "their predominant purpose was to provide human resources and thus business advice, not legal advice."

The D.C. Circuit emphasized that courts should not draw "a rigid distinction" between a legal purpose and a business purpose, in part because that "can be an inherently impossible task" where a communication is motivated by more than one purpose. *Id.* Rather, the court articulated its standard in the form of a single question: "Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.* at 760. Where the answer to that question is a "yes," the attorney-client privilege applies.

Although the courts in both *Kellogg* and *Koumoulis* each stated that they were seeking to determine whether the predominant purpose of the communication with counsel was obtaining or providing legal advice, the Koumoulis court appeared to define the "predominant purpose" narrowly where the subject matter of the communications also involved human resources issues. The Koumoulis court found that the subject matter of human resources is inherently a business function even though human resources issues and legal issues frequently overlap. By contrast, the Kellogg court

applied a more traditional approach to the attorney-client privilege by holding that communications with mixed business and legal purposes remain legal in nature, so long as providing legal advice was "a primary purpose" of the communication.

Practice Suggestions

In light of *Koumoulis*, employment counsel should redouble their efforts to preserve privileges associated with their communications with human resources staff conducting internal investigations. For example, counsel should state explicitly in its communications that the communications involve the delivery of legal advice, and are communications outside the ordinary course of the day-to-day operation of the client's business. And where appropriate, counsel should identify applicable legal principles or relevant statutes to help underscore the legal nature of the communication. To the extent that litigation is reasonably foreseeable, counsel should note this as well. Similarly, corporate legal departments should reinforce to their business colleagues that when they write seeking legal advice, they should expressly state that.

Counsel should also include legends on such communications such as "ATTORNEY-CLIENT COMMUNICATION, PRIVILEGED AND CONFIDENTIAL." While such statements certainly do not guarantee that a court will find the communications to be legal rather than business communications, such statements serve as contemporaneous confirmations that the parties to the communication regarded their communications as being legal in nature. However, as *Koumoulis* admonishes, what is far more important than including a legend on the document, is that the substance of the communication contains more than "a stray sentence or comment within an email chain referenc[ing] litigation strategy or advice." 29 F.Supp.3d at 147.

Employers should think critically about whether counsel's involvement in an investigation presents the appearance that counsel is actually participating in the investigation in the background by directing the investigation. Where counsel appears to be directing the investigation, as opposed to providing general legal advice about the investigation process, *Koumoulis* suggests that the attorney-client privilege is less likely to apply.

Employers also should keep in mind that if they will later seek to rely on the sufficiency of the investigation as a defense to plaintiff's claims in litigation, communications with the investigator regarding the investigation could be considered non-privileged. Accordingly, investigators should keep factual information separate from communications and documentation containing legal advice in order to increase the likelihood that a court will deem those latter documents protected by the attorney-client privilege.

At the outset, employers should consider designing their investigations to define clearly the scope and responsibilities of the participants in the investigation. Specifically, employers should identify and insulate those who will investigate the facts from those who will make employment decisions based on those facts. With such clearly defined and separate roles, a court deciding whether communications with counsel are privileged will be able to distinguish between communications regarding the fact-finding process from communications regarding the decision-maker's assessment of the facts.

As the Koumoulis court held, counsel's communications with the business people investigating the facts of a discrimination claim may not be privileged where the employer relies on the investigation as an affirmative defense in subsequent litigation. If the employer has concern about whether it may be waiving privilege over the lawyer's communications with the person charged with investigating the facts, the employer may consider the possibility of hiring a law firm to counsel the investigator that is different from the law firm that counsels the decision-maker. By separating the roles of the lawyer counseling the investigator from the lawyer counseling the decision-maker the employer will be in a better position to demonstrate in a litigation that counsel's communications with the decision-maker about the assessment of the facts, the ultimate employment decision and/or litigation strategy are not waived because the lawyer in that situation will not have participated in the factual investigation.

1. The court also held that the employer waived any attorney-client or work-product privilege that attached to communications with outside counsel by asserting an affirmative defense that relied upon the sufficiency of the investigation. We do not address the waiver issue in this article.
2. *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).
3. *Fisher v. United States*, 425 U.S. 391, 403 (1976).
4. Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 65 (5th ed. 2007).
5. *Id.* at 325.
6. *See*, e.g., *First Chicago Int'l v. United Exchange Co.,* 125 F.R.D. 55, 57 (S.D.N.Y. March 30, 1989).
7. *See*, e.g., *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 404 (8th Cir. 1987).

Recent Federal Rulings on COBRA Notification Requirements

Edited by Steven Margolis

There have been several recently-decided cases concerning employer's responsibilities for continued health care coverage requirements under the Consolidated Omnibus Reconciliation Act of 1985 (COBRA). These cases generally relate to COBRA's administrative requirements, principally whether and when there is an obligation to provide a COBRA notice to participants and their dependents. However, the decisions rest on both procedural and equitable results.

- In *Green v. Baltimore City Board of Commissioners*, the court needed to determine whether a reduction in hours worked was a qualifying event entitling a participant to COBRA coverage.
- In *Sacchi v. Luciani*, the court was faced with whether a same-sex spouse had standing to assert a claim even though he was never a beneficiary under his spouse's group health plan.
- In *Cole v. Trinity Health Corp.*, the court needed to use its discretionary authority in determining whether COBRA penalties for failure to provide the COBRA notice should be imposed on the plan sponsor where the participant mistakenly received free coverage.
- Finally, in *Slipchenko v. Brunel Energy*, the court was asked to approve a COBRA class action settlement with a record settlement of $1 million for failing to provide COBRA notices.

Green v. Baltimore City Board of School Commissioners

COBRA provides that continued health care coverage is only available to an individual when group health coverage is lost due to certain specific "qualifying events". In the case of an employee, a "qualifying event" is (i) voluntary or involuntary termination of employment for reasons other than gross misconduct or (ii) reduction in the number of hours of employment.

In *Green v. Baltimore City Board of Commissioners*, 2015 WL 302812 (D. Md. Jan. 22, 2015), plaintiffs sued their former employer, the Baltimore City Board of School Commissioners (Board) for failure to provide required COBRA notice when they were suspended without pay but kept on the employee roster with their work hours reduced to zero. Since the plaintiffs remained on the employee roster, they continued to be eligible for coverage under the school system's health care plan, but they were now responsible for the full premium amount since their work hours were reduced to zero (prior to the reduction in hours, premiums were jointly paid by both employer and employee). Further, the plaintiffs did not receive notification that the Board continued their medical coverage after their suspension, or that the plaintiffs would be responsible for paying the full premium amount.

The plaintiffs argued that the Board violated COBRA notice provisions since a "qualifying event" occurred under COBRA at the time the plaintiffs work hours were reduced to zero and they were required to pay the full premium amount. COBRA imposes a statutory requirement that a plan administrator notify any employee who is covered by its insurance plan of his or her right to continue health insurance coverage for up to eighteen months, within 44 days of a "qualifying event." The Board argued that there was no COBRA qualifying event because it does not terminate insurance for any of its employees, even if they are working zero hours, until they have ensured that their employees have explicitly sought termination of their benefits, so the Board had no obligation to send the COBRA notice until that termination occurs. The Board also argued that although a reduction of hours occurred, there was no loss of coverage.

While the parties agreed that the Board had an obligation to inform the plaintiffs of their COBRA rights upon the occurrence of a "qualifying event", the parties disagreed as to what constituted the relevant "qualifying event" as described above.

The Court determined that the Board too narrowly construed "loss of coverage" as going from eligible to ineligible for coverage. The COBRA regulations provide that to lose coverage "means to cease to be covered under the same *terms and conditions* as in effect immediately before the qualifying event." The COBRA regulations further define as a loss of coverage "any increase in the premium of contribution that must be paid by a covered employee . . . for coverage under a group health plan that results from the occurrence of one of the events." Therefore, the Court granted the plaintiffs' motion for summary judgment, stating that the plaintiffs suffered a qualifying event on the dates of their suspension, since on such date the plaintiffs were required to pay an increased premium amount, which triggered the Board's obligations under COBRA.

The *Green* decision is a reminder to employers that a reduction in hours – not just termination of employment – will result in a COBRA "qualifying event" if there is also a corresponding premium increase.

Sacchi v. Luciani

In *Sacchi v. Luciani*, 2015 WL 685853 (D.N.J. Feb. 18, 2015), the U.S. District Court for the District of New Jersey held that the same-sex spouse of a former health plan participant did not have standing to assert a claim against the former employer, Meridian Health Systems, Inc. (Meridian), for failure to the provide COBRA notice of continued health coverage because the spouse was never enrolled in Meridian's health plan and was not named a beneficiary under the plan.

During his employment with Meridian, Stephen Simoni participated in Meridian's group health plan and, although he was married, Simoni only elected coverage in Meridian's health plan for himself and not for his spouse, John Sacchi. At the time of Simoni's termination of employment from Meridian, he was entitled to continued health coverage under COBRA from Meridian, but Sacchi alleged that Meridian failed to send him and Simoni timely COBRA notices and the required Open Enrollment Materials. Without these notices, Simoni was unable to continue his coverage under the health plan and add Sacchi as a beneficiary. Sacchi sued for violation of COBRA for deliberate refusal to provide statutory notices. The district court rejected the claim and granted Meridian's motion to dismiss because Sacchi had no standing to bring suit.

"To bring a civil action under ERISA, a plaintiff must have constitutional, prudential and statutory standing." *Id.* at *3 (citations omitted). Specifically, a civil action may only be brought under ERISA Section 502(a)(1) by a participant or beneficiary to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan. "The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to benefits thereunder." *Id.* (quoting 29 U.S.C. § 1002(8)).

Sacchi alleged that ERISA confers standing because he was "eligible to join the plan," and, but for Meridian's conduct, would have been designated as a beneficiary by Simoni. However, the district court of New Jersey rejected this argument and found that Sacchi was not, and had never been, a beneficiary as defined in ERISA because Simoni never named him as a beneficiary under the health plan.

Though courts have frequently enabled individuals to obtain health coverage under COBRA, *Sacchi* makes clear that COBRA's procedural requirements apply equally to individuals as well as to plan sponsors. Since Sacchi never participated in the Meridian health plan and was never named as a beneficiary, he was not entitled to COBRA benefits.

Cole v. Trinity Health Corp.

In a recent ruling, the U.S. Court of Appeals for the Eighth Circuit upheld the decision of the U.S. District Court for the Northern District of Iowa to deny statutory damages to a former employee who did not receive a timely COBRA notice because, notwithstanding the failure to provide such notice, the former employee mistakenly received 11 months of free health coverage.

In *Cole v. Trinity Health Corp.*, 2014 WL 7012371 (8th Cir. 2014), the Eighth Circuit considered the claims of Bonnie Cole, a former employee of Trinity Health Corporation (Trinity), whose employment with Trinity terminated following a period of leave. Cole applied for long-term disability benefits on June 8, 2011, which should have been considered her date of termination for COBRA eligibility under Trinity's plan. Due to an administrative error, her termination was not processed and she and her eligible dependents continued to receive medical coverage under the Trinity plan from June 8, 2011 through April 2012. When Trinity discovered the error, the company cut off the health coverage as of May 1, 2012 and sent Cole a COBRA notice. Cole was able to acquire health insurance coverage through her husband's employer effective June 2012, but had no health care coverage in May 2012 and had incurred medical expenses of $1,307 during that time.

Cole brought suit against Trinity, alleging that Trinity violated COBRA in not timely notifying her of her right to elect COBRA coverage following her termination of employment in 2011. Under COBRA, failure to provide such a notice can result in damages of up to $110 a day from the date of the failure, as well as other relief as a court deems proper.

Rather than focus on COBRA's administrative procedures, the district court decided not to award Cole relief because she and her family effectively received free health insurance coverage for a substantial period of time and only experienced a one-month gap in health insurance coverage before obtaining coverage under her husband's employer. The District Court concluded: "The purpose of the civil enforcement provisions of COBRA is, above all, to put plaintiffs in the same position they would have been in but for the violation … Here, because the Coles' benefit of receiving extended free health care coverage far outweighs their claimed damages from the lack of COBRA notice, the Coles are already in a better position than they would have been in but for the COBRA notice violation." Moreover, the district court determined that Trinity Health acted in good faith as demonstrated by the fact that the Coles received free health insurance coverage.

On appeal, the Eighth Circuit ruled that the district court's denial of damages to the Coles did not constitute an abuse of discretion concluding: "We have consistently held that '[i]n exercising its discretion to impose statutory damages, a court primarily should consider the prejudice to the plaintiff and the nature of the plan administrator's conduct.'"

Employers should understand that courts have discretion to impose penalties for failure to comply with COBRA's statutory requirements. However, at

least with *Cole*, some court's will focus on the equities and make sure that participants are in at least the same position they would have been but for the violation before determining whether to impose any penalties on an employer who acted in good faith and no overall harm was done to the participant.

Slipchenko v. Brunel Energy

A recently-settled class action highlights the importance to employers of complying with their notice obligations under COBRA. In *Slipchenko v. Brunel Energy, Inc.*, 2015 WL 338358 (S.D. Tex. Jan. 23, 2015), the U.S. District Court for the Southern District of Texas approved a record settlement of $1 million in a class action involving claims of violations for failing to provide COBRA notices.

Slipchenko involved claims by former employees of Brunel Energy, Inc. (Brunel), a company in the business of hiring individuals with specialized knowledge to work on temporary projects for its energy industry client companies. When hired to work on a client project, individuals entered into short-term employment contracts with Brunel, which are typically terminated when the project is finished. Each new client project typically required the individual to enter into a new employment contract with Brunel.

During their employment with Brunel, the plaintiffs participated in the Brunel Group Health Plan (the Plan). In 2011, the plaintiffs alleged that Brunel (1) failed to provide them and other similarly situated employees with the initial notice of their right to elect COBRA coverage when they first began participating in the Plan; (2) failed to provide the subsequent notice of their right under COBRA to continue coverage following their termination of employment (based on the argument that this constituted a COBRA qualifying event); (3) failed to offer a premium reduction to eligible individuals as required under the American Recovery and Reinvestment Act of 2009 (ARRA) (which provided for COBRA premium reduction for individuals who experienced involuntary terminations on or before May 31, 2010); and (4) failed to notify employees of their eligibility for premium reduction under ARRA. The district court certified the class action in part because Brunel's course of conduct was the same for all class members.

After years of procedural steps, the parties reached a settlement of the COBRA and ARRA claims on August 25, 2014, which received final approval from the district court on January 23, 2015. The settlement amount is notable – a total sum of approximately $1 million, inclusive of attorneys' fees and other legal expenses. As a result of the settlement, class members are expected to recover approximately $5,000 on average, which the plaintiffs have claimed constitutes "the largest average per person recovery in any reported COBRA class action."

Slipchenko underscores the importance of COBRA compliance, given the potential increased exposure in class action litigations for systemic violations. In an area where compliance is relatively inexpensive and the potential cost of noncompliance (lengthy litigation of a type suitable for class certification) is high, employers are advised to implement sound COBRA compliance procedures, including updating their form COBRA notices and monitoring COBRA notice deadlines and eligibility.

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