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Warning Signs: Sixth Circuit Preserves Privilege for Internal Investigations Despite Challenge

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The United States Department of Justice (DOJ) urges companies to conduct internal investigations to identify potential wrongdoing by individuals and timely self-disclose when appropriate. However, a U.S. district court judge's opinion in May 2024 threatened companies' incentives to do so after ruling that the attorney-client privilege did not apply to FirstEnergy Corporation's (FirstEnergy) internal investigation following the receipt of subpoenas from the DOJ in 2020. On August 7, 2025, the Sixth Circuit stayed the lower court's order that the internal investigation be produced in a securities class action, confirming that the privilege applies when companies seek legal advice through internal investigations in response to criminal and civil inquiries, even if it is (as it almost always will be) also used for a business purpose.

Background

FirstEnergy conducted two internal investigations after former Ohio House Speaker Larry Householder was indicted on multiple felony charges, which implicated the company in a bribery scheme related to the passage of an Ohio House bill. Shareholder litigation followed. In that securities class action, the shareholders sought the fruits of those investigations during discovery. The lower court ordered that it be produced, holding that FirstEnergy's use of its counsel's advice throughout the investigations did not protect it as privileged because FirstEnergy also used the advice for business purposes.

On First Energy's motion to stay pending resolution of a petition for writ of mandamus, the Sixth Circuit stayed the district court's order and the production of the investigation materials. Because nearly all internal investigations have a business-related reason for starting, "[w]hat matters for attorney-client privilege is not *what* a company does with its legal advice, but simply *whether* a company seeks legal advice." The Sixth Circuit further opined that the investigation materials were also likely protected by the work product doctrine in light of the subpoenas, lawsuits, and investigations that FirstEnergy faced.

Why This is Important

While the Sixth Circuit corrects what appears to be a rogue lower court opinion, it serves as a reminder that companies must carefully scrutinize their processes for – and documentation of – internal investigations to maximize application of the attorney-client privilege and work product doctrine.

In line with the court's opinion, when undertaking an internal investigation companies should adhere to the following hallmarks to maintain privilege:

- Led by counsel (whether in-house or, in FirstEnergy's case, external);
- Clearly documented purpose of the investigation;
- Interviews and record reviews are done in connection with serving as counsel and clearly marked;

- As the investigation unfolds, counsel provide "legal updates" on their investigative findings and those records are kept segregated; and

- Any third parties hired to assist with the investigation are retained and overseen by counsel, and the engagement letter is clear that the services are offered to assist counsel in forming and rendering legal advice.

Even if all the proper steps are taken, one concern must also always be at the forefront: waiver. Even the most pristinely documented internal investigation will not withstand inadvertent waiver, which can be complicated in the context of special committees, parents and subsidiaries, and various levels of employees. Companies must maintain confidentiality of the investigation's processes and results, from the outset (including by giving UpJohn warnings) through any contemplated end product.

If you have any questions about this ruling and what steps you should be taking moving forward, please reach out to Tom Barnard, Annie Kenville, or a member of Baker Donelson's Government Enforcement and Investigations Group.