

THE EMPLOYMENT LAW AFTERMATH



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D.C. District Court Holds That Documents Relating To Internal Investigation Not Privileged Per Se

The U.S. District Court for the District of Columbia ruled that memoranda from an internal investigator to his company's general counsel's office do not enjoy an attorney-client privilege per se and may be ordinary business records. The case is *U.S. ex rel. Harry Barko v. Halliburton Company*.

The Facts Of The Case

Relator Harry Barko brought a qui tam suit against Halliburton subsidiary KBR alleging a violation of the False Claims Act for what Barko views as excessive billing for the provision of laundry services, the construction of a camp, and the drilling of water well in Iraq.

KBR took the position that Mr. Barko's allegations were not of objective instances of mis-billing but were entirely comprised of decisions relating to contract administration with which he disagreed. Mr. Barko filed a motion to compel the production of 89 documents relating to an internal investigation into allegations of billing impropriety.

KBR withheld the documents on the basis of attorney-client privilege or the attorney work-product doctrine. The court ordered production of the documents and KBR moved the court to certify the issue for interlocutory appeal.

What The Court Said

The most important documents in the dispute involved memoranda from an internal investigator to members of KBR's office of general counsel.

Regulations relating to government contracts require contractors to discover and report improper conduct regarding those contracts.

At the end of KBR's internal investigation, its internal investigator prepared a final memorandum and submitted it to his office of general counsel. The memorandum does not request legal advice and it does not identify possible legal issues for further review.

The court found that the memorandum was created to help KBR make a decision as to whether to report kickbacks or contractor fraud to the United States.

KBR argued that communications between its own internal investigator and its office of general counsel were per se covered under an attorney-client privilege. KBR further maintained that the investigation was prompted by a complaint and thus the investigation documents were attorney-work product.

The court held that, because the documents were a part of KBR's duty to comply with regulations mandating discovery and reporting of fraud, and because the

memoranda did not request legal advice or identify possible legal issues for further review, they merely constituted an ordinary business record and did not enjoy any privilege.

What Employers Should Do

This case has potential implications for internal investigations conducted in the workplace context. Arguably, employer-directed investigations into whistleblower or harassment complaints are similarly designed to comply with a legal burden to discover and remediate any alleged wrongdoing.

In light of this case, employers can take steps to increase the scope of documents that fall under a privilege. First, documents created pursuant to an investigation can conclude with a request for legal advice. Second, those documents can be identified as responsive to a counsel's request for information necessary to render legal advice. Third, a firm can direct correspondences to outside counsel, where courts have been more willing to acknowledge a privilege. And fourth, employers can develop written investigation policies that require all drafts and notes to be destroyed once they are faithfully incorporated into a final memorandum that has some of the foregoing features.

Please contact us with any questions.