

KEY THEMES

During this session we focused on the practical steps businesses can take to mitigate the commercial litigation risk arising from internal investigations, and how this may evolve in the future.



What types of claims can arise from internal investigations?

- **Shareholder litigation.** E.g. claims for loss of share value arising from the conduct under investigation or in connection with statements made by the company about the conduct or the investigation itself.
- **Contractual counterparty litigation.** E.g. claims for breach of warranty triggered by the underlying conduct or by the investigation itself.
- **Mass tort litigation.** E.g. negligence claims, allegations of breach of fiduciary duty against company directors, based on alleged harm suffered by third parties arising from the underlying conduct under investigation.
- **Employee litigation.** E.g. claims brought by employees for wrongful termination of employment or breach of whistleblowing rights.



Control of evidence and investigation work product

- Control of evidence and investigation work product is key to mitigating the risk of unhelpful documents being disclosed and used against the business in subsequent litigation.
- Especially in cross-border investigations, it is crucial to think strategically at the outset about the location and transfer of evidence and other information, both in terms of jurisdiction and group entity:
 - ▶ In commercial litigation, whether a document is disclosable will often depend on whether it is in the possession or control of a particular group entity. It is therefore important to control exactly how and on what terms information flows between group entities in any investigation.
 - ▶ Similarly, prosecutors and regulators may have powers to compel the disclosure of documents located within particular jurisdictions. Do you know where everyone involved in the investigation is based? What about the company's servers?
 - ▶ What is privileged in one jurisdiction may not be in another. Be mindful of this when working on cross-border investigations involving jurisdictions where privilege rules may differ.
 - ▶ Failure to appropriately manage data across borders can itself give rise to the risk of data privacy litigation.

- Carefully consider whether and how to protect investigative work product through the application of legal professional privilege:
 - ▶ Do not assume that all investigative work product will attract legal privilege. If in doubt, speak to a litigator at the outset (before creating the document).
 - ▶ Just because you can protect work product through legal privilege, does not always mean you should. It may be beneficial in some circumstances to have an open paper trail to justify a business decision (e.g., to justify the dismissal of an employee for misconduct).



Communications with third parties

- **Auditors.** When updating auditors as to the status and findings of an internal investigation, it is important to establish a clear and consistent framework for sharing information.
- **Public statements.** When it comes to making public statements regarding an investigation, early collaboration between legal and PR teams is essential. Potential claimants will pay close attention to the wording of such statements.
- **Contractual counterparties.** Remember to check the terms of relevant contracts early in an investigation: commercial contracts will often contain warranties and representations relating to (amongst other things) criminal conduct, regulatory enforcement and criminal prosecution.



Future trends

- We expect to see more investigations driven by ESG and data, AI and cyber considerations.
- This subject matter lends itself to particular types of commercial claim - in particular, mass tort and shareholder litigation. Accordingly, we expect to see more claims of this nature arising from investigations into these issues.
- New ways of storing data and communicating across businesses (cloud storage, instant messaging services, video call technology and remote working) will make control of evidence for the purposes of mitigating litigation risk even more challenging.

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