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LITIGATION AND LABOR & EMPLOYMENT LAW ALERT

Businesses and Lawyers Need to be Careful when Conducting Confidential Investigations and Interviewing Employees

The Puerto Rico Supreme Court recently issued a decision addressing the famous “attorney-client” privilege in a case where an employee discussed confidential matters with a company’s executives and lawyers, and then used those discussions in litigation against the company.

In José Pagán Cartagena v. First Hospital Panamericano, 2013 TSPR 102 (2013), a psychiatric hospital patient committed suicide. During a private investigation, an employee met with hospital management and lawyers and complained to them about the hospital’s alleged poor security conditions, and said it had been negligent in implementing security measures that would have prevented the death and added that he would provide that same testimony at trial.

The employee was later discharged and filed a lawsuit against the hospital for unjust dismissal and included allegations of illegal retaliation for whistle-blowing. The hospital asked the complaint be dismissed because the communications that took place between the employee and its lawyers were protected under the attorney-client communication.

The Court ruled that those particular private communications were not protected by the attorney-client privilege. Applying the federal rule of corporate attorney-client privilege (*Upjohn* doctrine), the Court concluded that an employee will be considered an authorized representative of the client and its communications privileged as long as: (1) the communications with the corporation’s lawyer were conducted for the purpose of obtaining legal advice for the corporation, (2) the communications were related to the employee’s functions and corporate tasks and the employee was aware that they were given in the context of obtaining legal advice and, (3) the communications were treated as confidential by the corporation under the instructions of management.

The case is also important because it rejects the more limited “control-group” test, which means the attorney-client privilege applies only as to those members of the corporation that exercise managerial control. Instead, it decided to apply the “subject-matter” test which is broader in the sense that it extends application of the privilege to any employee of the corporation as long as: 1) the communication is being conducted under a supervisor’s instructions, and 2) the subject-matter of the communication is related to the tasks and responsibilities assigned to the employee.

In short, businesses and lawyers need to be careful when conducting confidential company investigations and interviewing employees especially when it can have an impact on future, or on-going, civil or employment litigation. Extreme care should be employed to preserve confidentiality.

Should you have any questions or comments, or wish additional information regarding this matter, please contact the following:

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