

Live from Workplace Horizons 2025: Can Attorney-Client Privilege Apply to Internal Complaint Investigations? Separating Fact from Fiction.

By Kathleen A. McGinley

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Meet the Authors



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Welcome to a special edition of We get work®, recorded live from Workplace Horizons 2025 in New York City, Jackson Lewis' annual Labor and Employment Law Conference. Over 500 representatives from 260 companies gathered together to share valuable insights and best practices on workplace law issues impacting their business today. Here's your personal invitation to get the insights from the conference, delivered directly to you.



Transcript

INTRO

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CONTENT

Alitia Faccone

Senior Director, Business Development

Good morning, Kathy. Welcome to live from Workplace Horizons 2025. It's day three. I hope you've had a great conference so far.

Kathleen McGinley

Principal, Baltimore

Definitely. I can't believe it's already day three. It's really flown by, but it's been great.

Faccone

There's been a lot of energy in the podcast room this year, so thank you for joining me behind the mic. With me, I have Kathy McGinley, principal in the

Baltimore Office of Jackson Lewis. Kathy, can you tell us a little bit about your practice? What employers are really concerned about these days? What kinds of questions are you getting?

McGinley

I'm the office litigation manager down in Baltimore as well, so half my practice is just straight up litigation defense. Then, the other half of the time, I'm advising counsel and investigations. A lot of what I'm seeing in advising counsel right now, aside from Trump 2.0 in the first hundred days, is just continued accommodation requests and how employers can respond and make sure their business needs are met. To really work with the employee to get them either back to work, back to work in person and things like that.

Faccone

It's what we do best. The title of your presentation was, 'Attorney Client Privilege Apply to Internal Complaint Investigations: Separating Fact from Fiction?' Can you tell us a little bit about your topic and give our listeners a brief summary?

McGinley

Employers are conducting internal investigations all the time, because they're required to by the law under Title VII. If it's a complaint about harassment, discrimination or retaliation, they must investigate to have a defense. Sometimes, they just investigate because their policy promises they will investigate, so they're doing it to keep their promises to the employees. Sometimes, it's hard to decide. Should it be privileged? Should it not? What are the pros and cons of that? That's what David and I went over yesterday.

Faccone

What issues did you really delve into during your presentation, and what issues rose to the top? Because you mentioned earlier, complaints happen every year. How did you decide really what to focus on?

McGinley

It really was back to the basics in terms, everyone is always saying attorney-client privilege – it's confidential, but how does it get to that point? What are the factors that make sure you've met, like having a client, an attorney, a communication for advice and keeping it all confidential? How do you do that? Then, for corporations, who is the client and who can choose to waive that privilege, which is the Upjohn disclosure. Everyone knows that we should be giving that all the time, but what is it, and how do you make sure that it's met? We went over that in pretty basic detail.

Faccone

I'm guessing there were probably several people interested in that discussion. What other issues, if not that one, really resonated with the audience yesterday?

McGinley

Mostly, how things can go wrong so easily and how it could constrain the corporation from seeking a waiver or using something in defense. The reason that we're doing these investigations is to help the company and maybe tell a jury or a judge later what we found, and having the flexibility to do that. When you don't take just some small steps at the beginning, you can find yourself in a mess that can't be undone later. What to do at the beginning was most interesting.

Faccone

Being proactive. We talked about that a lot in the studio this week, mainly because of all of the changes that have been happening with the new administration. It seems like the watchwords are proactivity, policies, planning, patience and all the P words. Sounds like we have a similar theme here. With that in mind, what are some of the key takeaways you want not only our Workplace Horizons attendees to know, but the listeners of our podcast to know?

McGinley

If you're an attorney in a corporation doing an investigation, give that Upjohn warning and put it right on top of your investigation notes. Write down if the individual understood and that they said yes, then put that away in your file and you're pretty much good to go for the rest of your investigation.

Faccone

One simple, solid takeaway. I love it. How is Jackson Lewis helping clients with these issues and working through complaints they get on a regular basis?

McGinley

We had a guest on our panel, one of our clients, and she went over some of the best practices that she does. This included regular training of managers and HR staff led by Jackson Lewis on what an investigation is and how the attorney-client privilege attaches. They're at the front lines receiving the complaints, getting the investigations kicked off, and that's when you want attorney-client privilege to attach. If they understand it through regular training, then you're also set up in a good way, and Jackson Lewis can help with that training.

Faccone

A true partnership. Kathy McGinley, thank you so much for stopping by this morning. I hope you had a great conference, and we'll see you at Workplace Horizons 2026.

OUTRO

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