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CLIENT ALERT

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JUST THE FACTS:
Are the Results of Outside Counsel's Fact-Finding Investigation Privileged?

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When faced with a charge of discrimination or harassment, most employers are well advised to conduct a full investigation into the charges. However, should employers be concerned that the fruits of such an investigation may be used against them later in court? What if an employer hires outside counsel to perform only a factual investigation, but not give legal advice? Will a plaintiff be able to compel the employer to disclose the results of that factual investigation during discovery?

A California appellate court recently addressed these issues. And the answer is good news for employers. In City of Petaluma v. Waters, the First Appellate District held that where an employer hires outside counsel to conduct an investigation, the results of that investigation are protected from discovery by both the attorney-client privilege and the work-product doctrine.

The facts of the case are typical of those faced by employers on a regular basis. Andrea Waters was hired in 2008 as the first (and only) female firefighter and paramedic for the City of Petaluma. The City received an EEOC charge in 2014 in which Waters claimed that she had been subjected to gender-based harassment and discrimination, and that the City retaliated against her when she complained. A few days later, Waters voluntarily resigned. The City had a policy and practice of investigating every claim of harassment. Sometimes the investigation was performed by its own staff, and sometimes it was performed by an outside investigator. Here, the City hired an outside lawyer to conduct the investigation to benefit from her experience in employment law.

The outside lawyer did not, however, offer specific legal advice. Instead, she acted merely as a fact-finder in her investigation. The retention agreement between the City and outside counsel expressly stated that she was hired to "conduct impartial fact-finding," but should stop short of "render[ing] legal advice as to what action to take as a result of the findings of the investigation." Instead, the City

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Attorney would be "solely responsible for providing the City legal advice relating to this matter." Under these guidelines, outside counsel conducted an investigation and prepared a written report.

After Waters filed a lawsuit, she sought documents related to her complaints, including the outside counsel's investigative report. The trial court granted Waters' motion to compel, finding that because the outside counsel was conducting only a *factual* investigation, and not *providing legal advice*, the investigation and report were not protected by either the attorney-client privilege or the work product doctrine.

The appellate court disagreed. The court explained that, even in conducting a "factual" investigation, the outside lawyer had to use "legal expertise to identify the pertinent facts, synthesize the evidence, and come to a conclusion as to what actually happened." This use of legal expertise was sufficient to establish an attorney-client relationship and provide privilege to the communications as well as the ultimate report.

The court left open the question as to whether documents or materials other than the lawyer's investigative report might not be privileged. For example, plaintiff asserted that there might be tape recorded interviews or notes of interviews that should be produced. The appellate court noted that on remand the trial court will have to decide, item by item, what is privileged and what is not.

Ultimately, though, this holding is significant for any organization that faces employment complaints. Employers now have a bit more comfort that they can conduct thorough, fair, and confidential investigations into complaints by hiring outside counsel to conduct those investigations. But as the details of *City of Petaluma* demonstrate, employers should consider the applicability of the privilege at the outset of any investigation and whether they may want to assert a privilege, and discuss that issue with outside counsel.