

Fact Sheet

EMPLOYMENT LAW



Client Legal Privilege in Safety Investigations

Client legal privilege, often referred to as “legal professional privilege”, is a common law right that applies to confidential communications between a client and its legal adviser for the dominant purpose of giving or obtaining legal advice (advice privilege) or for the use in existing or anticipated litigation (litigation privilege).

It is called “client legal privilege” because the privilege belongs to the client, not the legal adviser. A legal adviser may only disclose privileged communications if clearly instructed to do so by their client.

The rationale behind the claim to client legal privilege is to encourage full and frank disclosure of facts and information to enable a legal adviser to provide accurate advice. In other words, it exists to facilitate the administration of justice.

In the context of a workplace safety investigation, the focus of the business and its staff is typically directed at supporting the affected individual and in determining what went wrong and whether there are any corrective actions required.

To comply with safety laws, a business may choose to carry out an incident investigation. If that safety investigation is conducted as a matter of course and not for the dominant purpose of obtaining legal advice or for the use in existing or anticipated litigation, it is likely that a claim of client legal privilege will not be sustainable.

Accordingly, it is important that you are aware that the emails, documents and paperwork generated during an incident investigation will be discoverable in any subsequent court proceedings unless the incident investigation is carried out for the dominant purpose of obtaining legal advice or for use in anticipated litigation.

To ensure that an investigation is privileged, you should contact your legal adviser to obtain legal advice as soon as possible after the incident. This must occur prior to the commencement of the investigation if the claim of privilege is to stand any chance of being upheld.

We recommend that you give consideration to your incident investigation process and turn your mind to this important issue. If your incident investigations are not subject to a claim of client legal privilege then any documents generated will be discoverable in any subsequent court proceedings and may place your business in a compromising position.



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