

# COMPANIES MAY NOT SHIELD INTERNAL EMPLOYMENT LAW ASSESSMENTS FROM DISCLOSURE WITH “SELF-CRITICAL ANALYSIS PRIVILEGE”

by Kerrie R. Heslin and Nicole M. Amato

The current climate surrounding the world of employment law presents many challenges for employers. Regulations and applicable labor laws are complex and plentiful, and audits by state and federal departments of labor, as well as litigation brought by employees, are on the rise. In these difficult times, employers must make sure their businesses are in compliance with all of the mandates and responsibilities placed on them by these laws. Employers can meet these obligations proactively by conducting internal assessments of their compliance.

Nevertheless, a district court has recently solidified the jurisprudence reading almost out of existence the self-critical analysis privilege in the Third Circuit. The trend within the Third Circuit diminishes the likelihood that documents generated as a result of a voluntary internal compliance assessment will be protected from disclosure. These courts have held that documents generated as part of a company's voluntary internal evaluation, conducted for the purpose of determining compliance with applicable laws, will not automatically be protected from disclosure by the self-critical analysis privilege. The recent rulings highlight the importance for an employer to proceed with caution when conducting these necessary evaluations in order to adequately protect its interests. Therefore, it is important that

employers consider retaining outside counsel to conduct voluntary internal assessments in order to enjoy the protection of the attorney-client privilege as an alternative to relying on the self-critical nature of the assessment.

The concepts underlying the self-critical analysis privilege are rooted in principles of public policy encouraging entities to engage in self-analysis for the purposes of self-improvement. The theory is that the free flow of information will be enhanced by protecting, with confidentiality, information generated by an internal evaluation, thereby encouraging the flow of honest and accurate information.<sup>1</sup> Despite acknowledgment by the courts of these principles, the self-critical analysis privilege has not been adopted as a defined and freestanding privilege by courts within the Third Circuit and the New Jersey Supreme Court, and has been applied inconsistently across the board.

In *Alaska Electrical Pension Fund v. Pharmacia Corp.*, the Third Circuit stated that “[t]he self-critical analysis privilege has never been recognized by this Court and we see no reason to recognize it now.”<sup>2</sup> In 1997, the district court, in *Spencer Savings Bank, SLA v. Excell Mortgage Corp.*, had held that the self-critical analysis privilege “should not be recognized at federal common law.”<sup>3</sup> In *Bracco Diagnostics, Inc. v. Amersham Health Inc.*, the district court had found that the Third Circuit does not recognize the privilege, *per se*, but nevertheless outlined a six-point balancing test for determining a claim of confidentiality based on materials falling within a purported self-crit-

ical analysis privilege.<sup>4</sup> Even so, the *Bracco* court held that the balancing test will only be available to “‘subjective, evaluative materials, not to objective data.’”<sup>5</sup>

New Jersey state courts share the same tradition in rejecting the notion of adopting the self-critical analysis privilege in favor of a case-by-case approach. The New Jersey Supreme Court, in *Payton v. New Jersey Turnpike Authority*, reasoned that courts regularly engage in an “exquisite weighing process” in determining the disclosure and admissibility of sensitive material, and explained that the concerns of confidentiality versus the need for disclosure are not distinct from those of any other arguably confidential information and, consequently, the existing processes are perfectly adequate in the self-critical analysis context.<sup>6</sup> The Court promoted the use of a practical application of the discovery rules to offer disclosure while minimizing the intrusion on confidentiality to the degree necessary.<sup>7</sup>

One common thread throughout the Third Circuit and New Jersey is that courts have a history of ruling on this issue with a bit of ‘tough love,’ showing little sympathy for employers when asked to enforce the self-critical analysis privilege in employment harassment and discrimination cases.

In the context of these remedial statutes, the courts have traditionally leaned in favor of disclosure. For example, in *Harding v. Dana Transport*, a case involving sexual discrimination, the District Court for the District of New Jersey held that remedial statutes such as the federal equal employment opportunity laws possess “strong policy

in favor of eradicating all vestiges of employment discrimination due to race, sex, or national origin,” and, therefore, the self-critical analysis privilege should be limited if it “hampers the enforcement” of those laws.<sup>8</sup> The New Jersey Supreme Court, in *Payton*, expressed its distinct disfavor in applying the privilege to employment discrimination cases and indicated that, “[b]ecause of the powerful public interest in eradicating discrimination and sexual harassment, we believe that the balance generally will favor disclosure in this type of case.”<sup>9</sup>

These courts have gone one step further, taking the position that the potential for full disclosure of materials generated during a self-critical analysis may actually work to further the goals of the anti-harassment and anti-discrimination laws. The *Harding* court noted that full review of a company’s investigation will actually act to “encourage persons suffering from acts of discrimination to come forward.”<sup>10</sup> In *Payton*, the Court expressed a similar view that the awareness of the clear potential for disclosure will actually have the result of causing the employer to engage in “a more honest assessment,” aware that any deficiencies may be exposed in subsequent litigation.<sup>11</sup> In other words, “[t]he sunshine of public scrutiny would thus act as a catalyst to promote, not inhibit, employers to engage in full and candid equal employment assessments.”<sup>12</sup>

In December 2010, the District Court for the Middle District of Pennsylvania, in *Craig v. Rite Aid Corp.*,<sup>13</sup> was called upon to examine the applicability of the self-critical analysis privilege in a case involving plaintiffs who instituted a class action on behalf of all current and former Rite Aid assistant managers. The plaintiffs claimed they were misclassified as exempt from overtime under the Fair Labor Standards Act (FLSA).<sup>14</sup>

From 2008 to 2009, Rite Aid had conducted a voluntary internal evaluation as part of a store restructuring to evaluate its compliance with the FLSA, other applicable labor laws and bargaining agreements. Rite Aid sought to exercise the privilege of self-critical analysis because the materials were generated as part of an internal assessment conducted for the purposes of

self-improvement. The *Craig* court relied on the Third Circuit opinion in *Alaska Electrical Pension Fund* to conclude that, up to that point, the Third Circuit had not recognized the self-critical analysis privilege.<sup>15</sup> The court also relied on the fact that Congress has not created such a privilege, and also referenced lack of support in the common law for proposed recognition of the privilege.<sup>16</sup> Additionally, the court noted that when the privilege has been applied, it has been restricted to cases where the preparation of documents was mandatory and specifically directed by the government or required by law, which would render its recognition in *Craig* unavailing to those defendants.<sup>17</sup>

Accordingly, the *Craig* court ultimately declined to recognize the self-critical analysis privilege, thereby solidifying its ongoing inapplicability in federal common law within the Third Circuit. The court noted, however, that its decision in doing so does not affect the applicability of other legal privileges, noting the defendant’s position that the documents were also protected by the attorney-client privilege and the attorney work-product doctrine.<sup>18</sup> The court did not make a determination regarding the applicability of those privileges, as they were not currently before the court.

Immediately following the *Craig* case, two other district courts in Pennsylvania followed suit in declining to apply the self-critical analysis privilege, citing to the same footnote in *Alaska Electrical Pension Fund* for the proposition that the Third Circuit does not recognize the self-critical analysis privilege.<sup>19</sup>

The recent solidification of the Third Circuit’s narrow and restrictive view regarding the confidentiality of self-critical analysis suggests that employers should expect that an internal evaluation of business practices will, in all probability, not be protected based on a self-critical analysis privilege. However, this potential for likely disclosure should not affect *whether* the employer performs voluntary compliance assessments but rather *how* it does so. The self-critical analysis privilege is by no means an exclusive shield of protection. The courts’ restrictive use of this privilege has little, if any, effect on the availability of other evidentiary privileges.

By electing to retain outside counsel to conduct voluntary internal assessments, employers can avoid the uncertain scope of the ad hoc self-critical analysis approach that defines the outer limit of confidentiality currently available under that theory. Instead, employers can enjoy the more clearly established scope of the attorney-client privilege.

Moreover, employers should not automatically assume that their interests are best served by nondisclosure. A properly conducted assessment, yielding the identification of deficiencies and the implementation of corresponding remedies, need not negatively affect an employer. Such responsible and progressive actions by an employer may be used as evidence to demonstrate the existence of due diligence and good faith on the part of the employer. As the New Jersey Supreme Court in *Payton* cautioned, “[a] weakly worded, unimaginative, and unaggressive analysis...may be more damning than a candid evaluation recognizing a company’s weaknesses and expressing a serious commitment to overcome those weaknesses.”<sup>20</sup>

In these challenging times, employers must safeguard their interests by constantly reforming the infrastructure of the business itself to ascertain compliance with all of the employment and labor law mandates. Internal assessments are necessary and important to ensure compliance and reduce risk. In doing so, however, employers must continue to safeguard their interests during the evaluative process. The assistance of legal counsel can help to guide the employer and ensure that such assessments are conducted in a manner that strengthens the company from within and protects the employer’s interests in the process. ■

## Endnotes

1. *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1099-1100 (D.N.J. 1996) (citations omitted); *Brunt v. Hunterdon County*, 183 F.R.D. 181, 185 (D.N.J. 1998), citing, *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff’d*, 479 F.2d 920 (D.C.Cir. 1973)). See also, *Payton v. New Jersey Tpk. Auth.*, 148 N.J. 524, 544-45 (1997) (citations omitted).
2. *Alaska Electrical Pension Fund v.*

- Pharmacia Corp.*, 554 F.3d 342, 351 n.12 (3d Cir. 2009).
3. *Spencer Savings Bank, SLA v. Excell Mortgage Corp.*, 960 F. Supp. 835, 839 (D.N.J. 1997) (*emphasis in original*).
  4. *Bracco Diagnostics, Inc. v. Amer-sham Health Inc.*, No. 03-6025, 2006 U.S. Dist. LEXIS 75359, at \*7-9 (D.N.J. Oct. 13, 2006).
  5. *Id.* at \*9. *See also*, *Kopacz v. Delaware River and Bay Auth.*, 225 F.R.D. 494, 497 (D.N.J. 2004) (*citations omitted*); *Harding*, 914 F. Supp. at 1100-1101; *Webb v. West-inghouse Elec. Corp.*, 81 F.R.D. 431, 434 (E.D. Pa. 1978).
  6. *Payton*, 148 N.J. at 545 (*citations omitted*).
  7. *Id.* at 547-50.
  8. *Harding*, 914 F. Supp. at 1100-01, *quoting*, *Webb*, 81 F.R.D. at 433.
  9. *Payton*, 148 N.J. at 545, 549.
  10. *Harding*, 914 F. Supp. at 1102.
  11. *Payton*, 148 N.J. at 547, *quoting*, *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177, 183 n.13, 184 n.16 (S.D. Iowa 1993).
  12. *Id.*
  13. *Craig v. Rite Aid Corp.*, No. 4:08-cv-2317, 2010 U.S. Dist. LEXIS 137773 (M.D. Pa. Dec. 29, 2010).
  14. 29 U.S.C. §201, *et seq.*
  15. *Id.* at \*15-16, *citing*, *Alaska Elec-trical Pension Fund*, 554 F.3d at 351 n.12.
  16. *Id.* at \*16.
  17. *Id.* at \*20-22.
  18. *Id.* at \*23 n.3.
  19. *Sabric v. Lockheed Martin*, No. 3:09-cv-2237, 2011 U.S. Dist. LEXIS 17630, at \*3 (M.D. Pa. Feb. 23, 2011); *Slaughter v. Amtrak*, No. 10-4203, 2011 U.S. Dist. LEXIS 21838, at \*10 (E.D. Pa. Mar. 4, 2011).
  20. *Payton*, 148 N.J. at 547, *quoting*, *Tharp*, 149 F.R.D. at 183 n.13, 184 n.16.

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5. *Thompson*, 131 S. Ct. at 868 (*quoting Burlington N. & F.R.Co. v. White*, 548 U.S. 53, 62 (2006)).
6. *Id.* (*quoting Burlington*, 548 U.S. at 64).
7. *Id.* (*quoting Burlington*, 548 U.S. at 68).
8. *Id.*
9. *Id.*
10. 42 U.S.C. § 2000e-5(f)(1).
11. *Thompson*, 131 S. Ct. at 869. The constitutional requisites for standing under Article III are that the plaintiff must personally have suffered some actual or threatened injury fairly traced to the challenged action of defendant and that the injury is likely to be redressed by a favorable decision. *See, e.g., Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982).
12. *Id.* at 870 (*citing Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)).
13. 5 U.S.C. § 551, *et seq.*
14. *Thompson*, 131 S. Ct. at 870 (*quoting* 5 U.S.C. § 702).
15. *Id.* at 869-70.
16. *Id.* at 870.
17. *Id.*
18. *Id.* (*quoting* Brief for United States as *Amicus Curiae* at 12-13 (*quoting* EEOC Compliance Manual § 8-II(C)(3) (1998))).
19. *Id.* (*quoting* Brief for United States as *Amicus Curiae* at 25-26 (*quoting* EEOC Compliance Manual § 8-II(B)(3)(c))).
20. N.J.S.A. § 10:5-1, *et seq.*
21. 200 N.J. 555 (2010).
22. *See, e.g., Grigoletti v. Ortho Pharmaceutical Corp.*, 118 N.J. 89, 97 (1990).

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- Employee's Facebook Posting, *Connecticut Law Tribune*, Feb. 14, 2011.
5. *See, e.g., Endicott Interconnect Technologies, Inc. v. N.L.R.B.*, 453 F.3d 532 (D.C. Cir. 2006) (the court of appeals upheld the termination of the employee despite the NLRB's order and held that the employee's statements posted on a newspaper website were detrimentally disloyal communications, and thus were not protected by the NLRA).

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