

Workers' Fifth-Amendment Rights Can Clash With Company Policy

By COLLEEN DEBAISE
And CHERYL WINOKUR MUNK

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NEW YORK—As an increasing number of U.S. companies come under regulatory scrutiny, more employees may find themselves stuck between a rock and a hard place.

A recent example involving a Merrill Lynch & Co. executive illustrates the dilemma employees may face when they invoke Fifth Amendment rights; they could find themselves at odds with company policy regarding cooperation with investigators.

"We're going to see this issue cropping up quite a bit, given the revelations regarding corporate activities," said Rogge Dunn, a partner with Clouse Dunn Hirsch LLP in Dallas who specializes in employment law. "Employees are going to have to think carefully about what they should do if they are called upon to testify."

For Merrill, the decision appears to have been simple: The firm's company policy requires that employees must cooperate with government inquiries. Employment lawyers say Merrill, as a private employer, was within its rights to take action against the executive, even though he simply invoked his Fifth Amendment right to avoid self-incrimination.

Employees in these situations face "a choice of consequence," said Peter Zlotnick, an attorney with Mintz Levin Cohn Ferris Glovsky & Popeo PC in New York.

In the Merrill case, Schuyler Tilney, the company's Houston-based managing director for global energy and power, cited an investigation by the Department of Justice as a reason for his refusal to answer questions from the Senate Permanent Subcommittee on Investigations. The subcommittee is investigating the firm's dealings with Enron Corp.

Mr. Tilney is being paid and is receiving benefits during his leave,

which is effective until further notice, according to Merrill. The company said in a statement last week that while it believes its employees behaved properly in the Enron transactions, the forced leave was necessary because the firm's policy is to "cooperate fully with governmental and regulatory inquiries."

Mr. Tilney's attorney, Robert Trout, of Trout & Richards in Washington, didn't return telephone calls seeking comment.

None of this would have happened, of course, if the employee agreed to cooperate. But Charlie Edwards, who heads the labor and employment practice at Womble Carlyle Sandridge & Rice in Raleigh, N.C., said: "No attorney wants his or her client to be questioned by a congressional committee."

At the same time, speaking generally, "for all of the conversation about Fifth Amendment privilege, we all know that the presumption is [the employee] is tacitly admitting guilt," he said. When that happens, the employer must take action to protect its public image, he said.

In most cases, the company also wants to signal to Congress that it didn't encourage the employee to evade a subpoena or request for information. "Perhaps the only way you can show Congress that you didn't coach the employee not to testify is ... to ensure something bad happens to the employee," Mr. Edwards said.

An employee who feels he or she has been wrongfully disciplined or fired can file a lawsuit against the company in an attempt to seek damages.

But "most of these wrongful termination lawsuits are not successful at all," even in states like California with more employee-friendly statutes, said Larry Lorber, an employment law partner at Proskauer Rose LLP in Washington. "Employers have a right to say: 'We want our employee to be truthful and testify.'"