

What To Do Before Government Agents Come Knocking

By Joe D. Whitley & Matt S. Chester

Perhaps the most feared moment in corporate America today is the “surprise attack” by federal agents – in one scenario, waves of agents arrive to execute a search warrant; in another scenario, agents perform “ambush” interviews at employee homes, usually early in the morning. Crucial questions are thus raised: can the company demand to keep its computers and records? Can it instruct its employees not to talk? Do employees have the right to counsel? By using these “blitzkrieg” tactics, the government can obtain unfettered access to key records and obtain statements from intimidated witnesses, which could later be misused or used for unintended purposes, all to the detriment of the employee and the company.

A sound crisis management plan can help the company provide the government information it is entitled to while reducing the disruption the investigation will inevitably cause. A solid compliance program will also help answer many critical questions to help the company properly deal with these emergency situations.

Surprise Interviews

Picture the scenario. Federal agents perform mass “ambush” interviews of key employees, arriving at their homes without warning, often early in the day when both colleagues and counsel are generally unavailable to the employee. Given the circumstances, key decisions are often made without counsel’s advice, resulting in an employee, often intimidated, who acts on the natural desire to be helpful. A good crisis management plan should anticipate this problem, ideally delivered in advance of an investigation and provide the following crucial points:

- Employees are free to choose whether and how to respond to the government’s inquiry, including the ability to refuse to participate in the voluntary interview.
- Employees have the right to answer the agent’s questions with counsel, which assistance is invaluable to understanding the scope of the investigation.
- The employee may terminate the interview at any time.

An internal compliance manual should further require notification to the company’s general counsel and the preservation of pertinent records relating to the investigation.

Search Warrants

An even more frightening picture emerges with the execution of a governmental search warrant: teams of agents literally take complete control of the company’s facility and employees are split up and commanded to wait in different rooms. While one group of agents gathers physical evidence, another group of agents may select certain employees to interview separately. If in house counsel is, for example, unavailable or if the facility is one where the general counsel does not maintain an office, the atmosphere, by definition, is a highly emotional and coercive one.

A good crisis management plan may help mitigate against these issues. If the company is fortunate enough to learn of the investigation before the search, outside counsel should be retained to begin an internal investigation, which should include, among other things: (1) copying and imaging of all pertinent hard copy and electronic files; (2) retention of all original records; (3) the labeling of records that may be subject to the attorney-client privilege; and (4) advising key personnel of the investigation, their rights in the event of interviews and a potential execution of a search warrant.

In the harrowing event of a surprise execution of a search warrant, counsel should, among other things, meet the agents upon their entrance to the company’s premises, request identification and obtain a copy of the search warrant; designate appropriate personnel to assist or shadow the agents while they review and take pertinent documents; have designated employees maintain a log of seized records and items; send home all nonessential employees; and advise all present employees of their rights relating to any requested interview. At the conclusion of the search, counsel should develop a log of seized records and copies of those materials should be requested from the government.

Conclusion

While no one endorses criminal activity, “ambush” interviews or “surprise” search warrants have the ability to disrupt the company’s business, not to mention obtain information that may be potentially used in a subsequent criminal prosecution. A well-crafted crisis management plan, including

some of the points above, may help mitigate the adverse impact of an investigation and will go a long way in helping counsel maximize the company’s chances of avoiding prosecution while still permitting it to cooperate and correct any wrongdoing that is discoverable.

This brief review is not intended to be comprehensive and was developed to highlight the need for careful planning by businesses in the face of unexpected government investigations. Please contact the authors or counsel of your choosing to assess the vulnerabilities that are presented by surprise government interviews of employees and search warrants.

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