

Preparing Your “Break The Glass” Kit For Surviving A Government Investigation

ACC – National Capital Region CLE Program

March 17, 2020

Presented by



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Agenda

1. Why the Government Would Contact an Employer (and by Which Agency)
2. Government Investigation Tools & Techniques
3. Responding to the Different Methods of Contact
4. Other Areas of Concern
5. Plan Ahead: Create Your “Break the Glass” Kit
6. Wrap Up



Why the Government Would Contact an Employer (and by Which Agency)

What Does Enforcement Look Like?

FTC & DOJ Antitrust: “No-Poach” Agreements

- *Antitrust Guidance for Human Resource Professionals*, October 2016
 - Joint guidance from DOJ’s Antitrust Division and FTC regarding enforcement of U.S. antitrust laws
 - Announced efforts will specifically target no-poach agreements
 - DOJ also stated intention to proceed criminally against naked wage-fixing/no poaching agreements entered into or continued after October 2016, but so far only one criminal case has been brought
- Deputy Assistant Attorney General Michael Murray, March 2019: Reviewing no-poach agreements
 - Are the parties to the agreement capable of “concerted action” under the antitrust laws?
 - Do the parties to the no-poach agreement compete against one another in the labor market?
 - Is the no-poach agreement “subordinate and collateral” (i.e. ancillary) to a separate, legitimate transaction and reasonably necessary to “make the main transaction more effective in accomplishing its purpose”?
- Severe penalties for violating antitrust laws, including subsequent private lawsuits where treble-damages may be available

What Does Enforcement Look Like?

FTC & DOJ Antitrust: “No-Poach” Agreements (Continued)

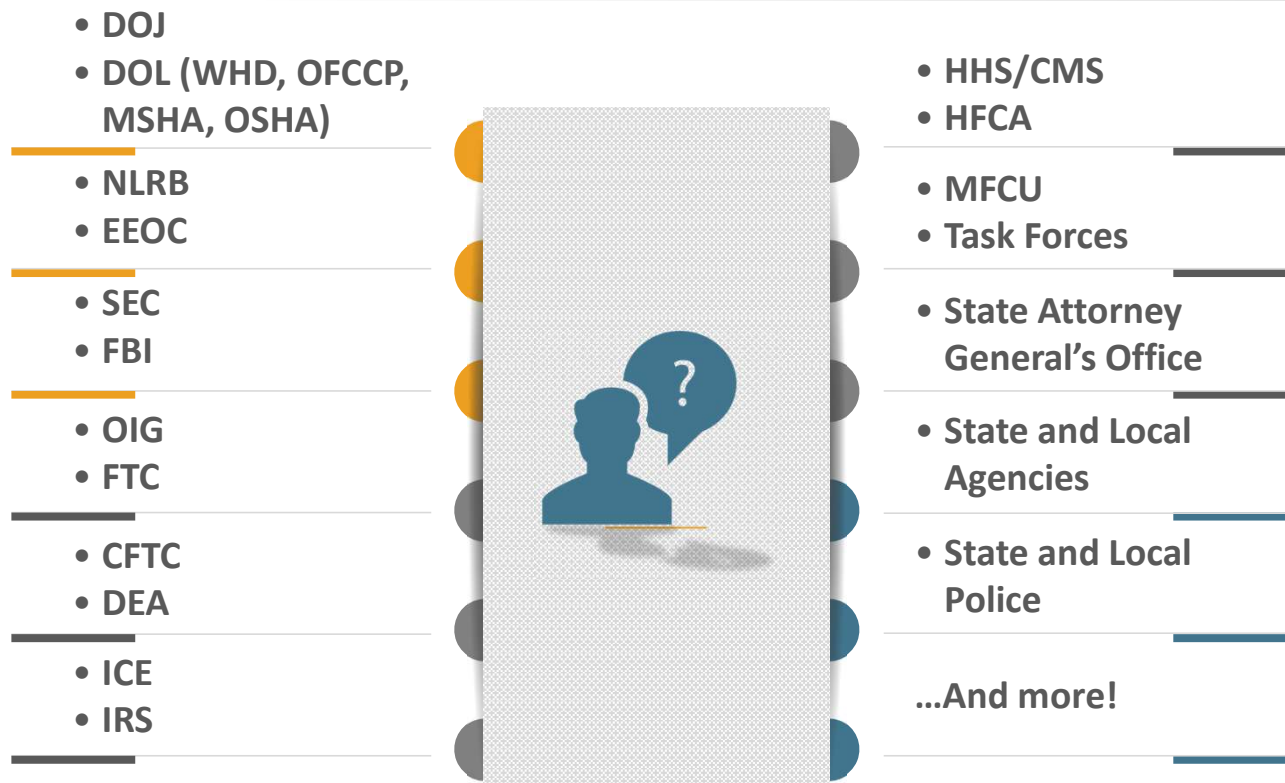
- *US v. Adobe Systems Inc., et al.* (2010)
 - DOJ investigates Adobe, Apple, Google, Intel, Intuit, Pixar, & Lucasfilm alleged use of “no cold call” agreements
 - Brought civil suits against those companies, alleging that they had engaged in naked horizontal restraints that constituted *per se* violations of Section 1 of the Sherman Act
 - Subsequent class-action filed by affected employees, which Adobe, Apple, Google and Intel settled for \$415 million, while other companies settled for \$20 million
- Fast Food
 - In 2019, the DOJ has filed statements of interest in lawsuits involving no-poach provisions in franchise agreements among fast-food companies, urged application of “rule of reason” standard
 - March 2020, Burger King, Popeye’s, and Tim Hortons discontinue use of no-poach agreements enter settlement agreements with California AG; faced threat of lawsuits from 12 other states



What Prompts an Investigation?

- Employee complaints
- Workplace injuries or accidents
- Violations in plain view
- Previous citations or issues
- Questionable employer responses to agency inquiries
- Information from third parties
- Random investigation
- Informants
- Whistleblowers (bounty incentives)
- Investigation of/disclosure by a competitor
- Voluntary self-disclosure
- Mandatory self-disclosure
- Media reports
- Significant shifts in stock prices coupled with allegations of wrongdoing
- Referrals from other state or federal agencies
- Referrals from industry self-regulatory organizations
- Regularly scheduled inspections

Who Might Be Investigating



What Might Be Investigated

- Workplace safety
- Discrimination & retaliation against employee
- Antitrust & unfair trade practices
- Foreign Corrupt Practices Act
- Environmental
- Securities fraud
- Mail/wire frauds
- Health care fraud
- Food, Drug & Cosmetics Act
- Money laundering
- Tax



Types of Government Investigations & Inquiries



Administrative

Civil

Criminal

Administrative Actions



- Brought by State or Federal administration
- Agency to address violations of agency related laws or rules
- Sanctions include:
 - Fines and other civil monetary penalties;
 - Debarment or exclusion;
 - Loss of licensure; and
 - Imposition of remedial action.

Civil Actions



- Brought by appropriate State or Federal agencies or departments to enforce legal requirements or punish violations
- Sanctions and Actions include:
 - Injunctions; and
 - Civil penalties, disgorgement, and costs.
- Examples:
 - Antitrust/No Poaching
 - False Claims Act
 - FCPA
 - SEC
 - Other state laws

Criminal Actions



- Brought by Federal or State prosecutorial departments
- Sanctions include:
 - Fines;
 - Incarceration;
 - Restitution; and
 - Forfeiture.

What Do You Do When the Government Shows Up?

You're not going to hide

- Failure to provide “immediate” access can result in serious consequences (e.g., suspension or exclusion from participation in federal programs)
- Destruction or alteration of documents “in contemplation of” a federal matter is a crime
- Cooperation is usually a good idea, but “unthinking” cooperation may leave employer vulnerable

What you do in practice depends upon:

- Nature/seriousness of inquiry
- Entity making inquiry
- Breadth of inquiry
- Size/resources of organization
- Level of individual(s) involved

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Government Investigation Tools & Techniques

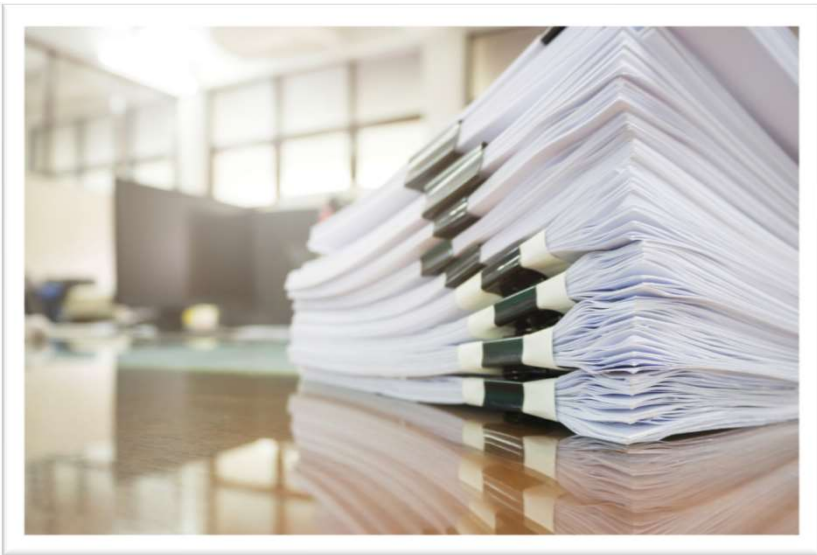
How the Government Investigates

Contact Methods and Investigation Tools

- Telephone inquiries
- Notices of Inspection
- Voluntary interviews
- Subpoenas
 - Grand jury
 - Administrative
 - Directed at party under investigation or third parties (who may be unknown)
- Civil Investigative Demand (“CID”)
- Search warrants
- Undercover investigative techniques (e.g., wiretaps)



What Does The Government Want?



- Documents and records
- Interviews/statements
- Computers/data

Telephone Inquiry



Agencies or law enforcement may telephone with an inquiry

Notice of Inspections



Workplace visits are especially likely for companies holding a government contract

E.g., OIG can conduct inspections on 24 hours notice, or immediately if records may be altered or destroyed (42 C.F.R. § 1001.1301)

Requests for inspections are supposed to be “during reasonable business hours”

Cooperation is encouraged and sometimes required

E.g., Provider/entity can be excluded from federal health care programs for failure to provide "immediate access" to documents, records or the facility

Notice of Inspections

Example: OFCCP Reviews

- Types of reviews:
 - **Compliance review** – comprehensive analysis and evaluation of each aspect of hiring and employment practices, policies and conditions. Begins with a desk (i.e. document) audit, but may also include an onsite review
 - **Offsite review** – review of records that may consist of a full desk audit, which is a review of the contractor’s AAP or portions thereof, or a review of particular records such as personnel data
 - **Focused review** – onsite review restricted to one or more components of the contractor’s organization or one or more aspects of the contractor’s employment practices
 - **Compliance check** – a determination of whether the contractor has maintained records consistent with 41 CFR 60-1.12; at the contractor’s option the documents may be provided either onsite or offsite
- Contractors selected for review will be notified by a Scheduling Letter
- Nov. 30, 2018, released three new directives that minimize the “gotcha” approach
 - Corporate Scheduling Announcement List now published annually as a courtesy
 - Two-year period between *neutrally* scheduled compliance evaluations
 - Onsite investigations limited to “nature or scope of the indicators or concerns that triggered the onsite review”

Voluntary Interviews

- Government could request interviews with current and former employees/staff
- Request for interview may occur at the workplace or even at employee's home
- Request for voluntary interviews may signal a criminal investigation involving the company, a current or former employee, or a third party
- Remember:
 - Employers should inform employees/staff they are not *required* to speak with investigators, but are free to do so
 - No stigma/legal consequences for declining to speak without first consulting company's or outside counsel
 - Company should supply outside counsel to those who ask for it in relation to an investigator contact and consider entering a joint defense agreement, or obtain a conflict waiver
 - Remember that statements given can be used against the interviewee or target company
 - No legal prohibition against taking notes during an interview

Grand Jury Subpoenas

- Issued by Judge or Magistrate and signed by government prosecutor handling the criminal investigation
- Relatively common, but could signal a criminal investigation involving the company, employee and/or third party
- May be addressed to the company and/or current or former employees and staff
- Failure to comply may lead to criminal charge of obstruction of justice
- For documents (*duces tecum*)
 - Generally, will be overly broad and need to be narrowed
 - Identifies the lead prosecutor for the case and return date
 - Testimony of record keeper frequently will be waived (at least initially)
 - Provides clues regarding the focus of the investigation
- For testimony
 - Compels appearance of a witness to obtain testimony, usually at some time in the future
 - No witnesses should testify without first meeting with company's and/or outside legal counsel

Civil Investigative Demands & Administrative Subpoenas

■ CIDs

- Pre-complaint procedure used to compel one or a combination of:
 - Production of documents (including electronic)
 - Written answers to interrogatories
 - Deposition testimony
- Issued by agency without need to petition court
- Agency need only to have reason to believe that person/entity has possession, custody, or control of info relevant to its investigation
- May be served on any person or business in any U.S. or foreign jurisdiction
- Failure to comply may subject company to court sanctions

■ Administrative subpoenas

- Certain agencies (e.g., FTC, DEA, ICE, FDA) have the power to issue administrative subpoenas/summons
- Similar to grand jury subpoenas, but are issued in an agency's name
- Generally, can only request documentary information
- Will be upheld as long as it is “reasonable”

Search Warrants

- Issued by a federal judge after finding of probable cause that a crime has been committed and evidence of the crime is located at the premises to be searched
- The search warrant must:
 - Be filed in good faith by a law enforcement officer;
 - Be based on reliable information showing probable cause to search;
 - Be issued by a neutral and detached magistrate; and
 - State specifically the place to be searched and the items to be seized.
- Scope of the search is defined by the warrant, but can expand if the agents:
 - Have consent
 - Are preventing destruction of evidence
 - Are protecting their safety or the safety of others

Search Warrants

What to Expect

- Overwhelming force
- No notice
- Multiple armed agents wearing clothes identifying themselves as federal agents
- Demands for immediate entry and access
- Possible request that all employees leave premises; alternatively, requests to interview designated employees
- Possible arrest of employees viewed as targets
- Possible live media coverage

Search Warrants

Important Issues



- Agents can ask, but the company has no obligation to voluntarily give consent to search or seize beyond the warrant's authorization
- Consent cannot be taken back! Company can always consent to provide other documents, items at a later date
- Ensure employees do not grant Agents consent to search beyond scope of warrant without speaking with Company's counsel



- Search warrant does not compel employee interviews, though employees can consent
- Anything they say can be used against them or the company later, so make sure employees know their rights

Search Warrants

Important Issues (Continued)



- If company property, cell phone or computer can be collected
- If employee property, must consider whether:
 - The employee consented to company searches as a condition to access the company network
 - The employee consented to company searches as a condition to the company paying the bill
- If there is advance employee consent, it is likely that the company will be deemed to have “control” over the item for purposes of the warrant
- If not, the government can request consent at the time from the employee

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Responding to the Different Methods of Contact

First Things First

Selecting a Designated Person

- Response plan should identify a Designated Person (“DP”)
- Who should company pick to be DP?
 - Significant degree of authority & responsibility (e.g., head of security, CFO, compliance officer)
 - Accessible and available at odd hours
 - If company is global, consider expertise and needs in each particular region
- Create a hierarchy of backup DPs (“alternative DPs”) who are likely to be available if primary DP cannot be reached
- Distribute work phone numbers, cellular phone numbers, and any other appropriate way to reach DPs to all employees and staff



Initial Contact

Designated Person's Response

- Discover the identity of the agents, their respective agencies and whether state and/or federal
- Request to see the agents' credentials
- Ask for business cards, or if not available, write down agents' names and phone numbers
- Inquire as to the nature of the agents' visit
- Ascertain the identity of the prosecutor assigned to the investigation (if available)
- Ask why the investigation was initiated



Initial Contact

Designated Person's Response (Continued)

- Indicate the company's intention to fully cooperate with the authorities in their investigation
- Explain any substantive inquiries by the agents must be directed to company's legal counsel
- Provide the agents with counsel's contact information and:
 - **Request:** promptly make arrangements for the agents to speak with counsel
 - **CID or subpoena:** explain that company's counsel will review it so that the company can comply fully and promptly with the demand without compromising its rights or the rights of employees, clients and customers
 - **Search warrant:** agents will not need to wait for counsel's involvement and state that the company will comply with any authorized demands immediately

Initial Contact

First Employee/Staff to Speak with Government Agent's Response

- The first contact with the government:
 - Sets the tone and can set the scope of the investigation
 - May affect government's willingness to make accommodations based on company's time and staffing concerns
- Response plan should lay out steps for initial contact:
 1. Person who is contacted, regardless of identity or rank in the company, should immediately contact the DP to advise them of the request and presence of the agents;
 2. If physically present, request agents to remain in the reception area until DP comes to greet them; and
 3. Receptionist or initial contact person should not give agents the name or office location of any individual other than the DP.
- Goals are to provide DP with advanced notice, contain agents within defined area, and avoid waiving any rights or privileges

Initial Contact

Company's Legal Counsel

- Call government attorney within 24 hours of the initial government contact
- Get as much information as you can
 - What is it about? What triggered investigation? Why is company involved?
- Inquire whether the corporation is the “target” or the “subject” of the investigation
 - Target = “a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant”
 - Subject = “a person whose conduct is within the scope of the grand jury’s investigation”
 - If answered, question will give company valuable information
 - If not answered, at least signals to the government that the company knows the rules of the road

Telephone Inquiry

What to Do

- Employee who receives the call should:
 - Ascertain the name of the government agent and the agency he represents;
 - Request the telephone number where the agent can be contacted;
 - Advise the agent that a corporate representative will immediately return his call; and
 - Have the DP promptly return the call, preferably in the presence of/after speaking with company's in-house or outside counsel.
- When DP returns the call, they should follow Initial Contact steps described earlier
- Another corporate representative should be in the room/listening to the call and taking notes of the conversation
- If possible, the company's legal counsel should also be in the room/listening to the call



Workplace Visits

Request to Inspect Documents (No Warrant)

- Employee who is first contacted should request official's name, agency/affiliation, phone number & address, then contact DP
- DP should advise the agent that they will immediately contact company's legal counsel
 - Neither employee nor DP should not respond to the request until speaking with company's legal counsel (caveat: some agencies can demand immediate access)
- DP/employee should avoid being overly "helpful" in providing information to agents, limit all responses to an agreement that company's legal counsel will be promptly notified of the record demand
- If DP chooses to allow "immediate access" to records before consulting company's attorney, they should at a minimum:
 - Attempt to photocopy any documents prior to allowing them to be inspected by, or provided to, agents
 - Consult company's legal counsel as soon as possible
 - *Note:* Employees may produce copies of personal documents (not business records), but they are not obligated to do so

Workplace Visits

Request to Search (No Warrant)

- Employee who is first contacted request official's name, agency/affiliation, phone number & address
- Politely ask them the purpose and authority for the request
- Neither DP nor employees should agree to the request until speaking with company's legal counsel, but also should not physically impede an inspection or search if they refuse to wait
- Ask that they wait in the reception area until you can contact your counsel
- Do not agree to a request to "consent" or "look around" until you have discussed with counsel
- Absent a search warrant, generally cannot insist upon inspection or physical search of a premises
 - Exceptions may apply to certain licensed or regulated facilities depending upon which agency is making the request and the purpose of the inspection or site visit
- If an inspection or search takes place, treat it as though a search warrant is being executed

Voluntary Interviews

What to Do

- Agents can visit employees at home and request an “on the spot”, voluntary interview
- If an employee reports such a visit:
 - Get the name of the agent and ask whether the company is the target of the investigation and, if so, for the name of the prosecutor; assert the company’s request to be involved in interviews of current employees
 - Consider appropriate litigation holds
 - Consider whether to advise other employees of their rights if it appears an interview “sweep” is underway
- Company may not direct current or former employees either to assert the Fifth Amendment or to refuse to speak to Government investigators
- Consider whether Company should offer to refer employees to qualified outside counsel, offer to indemnify/advance fees to employees, and enter a joint defense agreement (or obtain a conflict waiver)
- No matter what, employees should be told to always be truthful if they speak to Government investigators

Voluntary Interviews

Example: DOL WHD Inspection

- Inspectors may take notes or request to record employee and management interviews, and ask witnesses to write statement
- Employer's role in the interview process:
 - Schedule interviews in advance, where possible
 - Object to impromptu, onsite interviews that last more than ~5 minutes
 - No right to participate in non-exempt employee interviews, but do have and should exercise right to participate in all interviews of management
 - May request alternative times and locations for interview if unduly hinders business operation
 - Prepare all employees for their interviews
- Prepare employees for interviews and inform employees of their rights including the right to have a representative with them, examine documents, take a break for any reason, and not be video/audio recorded

Voluntary Interviews

Prepping Interviewees

■ Employees

- May consult with the company's counsel prior to interview if interests do not conflict
 - What if interests diverge?
 - Consider obtaining conflict waiver or joint defense agreement
 - Remind employees of applicable policies, practices, procedures, and training that they have received, but **DO NOT COACH**
 - Consider having an attorney present at the interview and that the employer will pay for
- Have a supervisor arrange for the employee to speak with an agent in a private, secure environment (if on employer's premises)
 - Ask the employee to contact the employer after the interview – *this is not illegal in any way*
 - Advise employee to answer questions truthfully



Voluntary Interviews, con't

Prepping Interviewees

■ Management

- Managers' statements, admissions, and knowledge are attributed to the company
- Managers should inform agent that they are represented by company's legal counsel and that they would like all contacts to be directed to counsel
- Should avoid making any statements about the allegations or facts underlying the investigation
- Should not be belligerent or confrontational



Subpoenas

What to Do

- Identify agencies involved, lead government agent or attorney, and issues (may not be possible)
- Call prosecutor to establish dialogue, assure compliance with subpoena, and avoid more drastic action
 - Negotiate scope of subpoena and an extension, if needed
- File motion to quash, if necessary
- Consider notifying board of directors
 - May have reporting obligations
 - Examples: possible SEC reporting; government contractor must report if it becomes aware of kickbacks to upper and lower tier subcontractors
- Consider whistleblower possibility (False Claims Act, Sarbanes-Oxley, Dodd-Frank)
 - Employees who know about a subpoena should be strongly admonished that they should avoid discussions about the investigation or the subpoena. (No “group discussions” regarding the possible problem)
 - Discussions regarding the facts should occur with attorney present to protect the attorney-client privilege

Subpoenas

Document Production

- What counts as a record?
- Nothing is more important than the integrity of your document production
 - No alterations, No additions, No destruction
- Immediately put a document hold in place and suspend record destruction
- Stay organized
 - Consider appointing an independent *custodian for production* (e.g., compliance officer, another individual with no personal stake in the subject of the investigation) with authority to obtain any records
 - Maintain detailed record of the manner and scope of the search company conducted
- Outside or internal counsel reviews all records before they are produced, segregates privileged documents
- Keep a detailed record of materials produced

Subpoenas

Document Holds

- Issue an investigation hold and memo to IT and all employees or staff with potentially relevant documents, explaining that all relevant documents must be secured
 - Memo should emphasize importance of full compliance
- Immediately suspend general record destruction policies (e.g., automatic deletion of emails)
- Require signed acknowledgments from all effected individuals affirming:
 - They have received the hold notice
 - They will not delete or destroy any relevant records (and they err on the side of over-inclusion)
 - They understand serious adverse consequences for them and the company if they fail to comply
- Contact IT department and HR to ensure they understand importance and what is needed, as well as procedures should effected employee leave the company
- Do not forget to check for relevant information stored outside workplace!

Civil Investigative Demands

What to Do

- Notify team leader, counsel and others identified in response plan
- Verify the credentials of the investigator
- Clarify scope of investigation and precise nature of documents or other information requested - Do not provide to the investigator more than what is asked for
- If team leader or other management representative is not available, generally inspectors must wait a reasonable amount of time (normally not more than an hour)
- If you need more time or the agency is unwilling to negotiate a reasonable scope/procedure for the investigation, consider demanding a subpoena instead of consenting to CID
- Identify custodians who may have responsive material and issue document holds to avoid spoliation
 - Standard CID requests production of documents within 20 days as provided in 31 U.S.C. § 3733, but the agency will usually agree to extra time and allow for rolling productions
 - Consider conducting parallel investigation

Civil Investigative Demands

Should the Company Consent?

- Consenting to an investigation instead of requiring a subpoena is generally advantageous, but only after negotiating a reasonable scope of the audit
- When evaluating whether to consent to an inspection, consider:
 - The risk of signaling to the agency that you may have something to hide;
 - The loss of control over the inspection's scope;
 - The benefit of cooperating with the agency; and
 - The benefit of the opportunity to negotiate the scope and procedures of the investigation.

Interviews, Subpoenas & CIDS

Dos and Don'ts

DO

- Engage with prosecutor
- Consider whether outside legal expertise is needed
- Evaluate potential scope and target of investigation
- Issue a litigation hold notice and suspend document retention policies
- Understand the burden of production
- Assert rights to avoid waiver of any applicable privileges
- Inform employees of their rights

DON'T

- Ignore the subpoena or hope the agent goes away
- Destroy potentially relevant evidence
- Sign anything without advice of counsel
- Tell employees not to talk to the agents
- Speak to people about the investigation without direction from counsel

Search Warrants

4th Amendment



“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Search Warrants

What to Do at the Start

- Allow agents access
- Identify the lead agent, on-scene agents, and prosecutor; request business cards of those present
- Designate a liaison as the point person for the agents during the execution of the search warrant
- Request, inspect, and copy all relevant documents (i.e., warrant, subpoena, affidavit)
- Request a delay to allow you to consult legal counsel (agents not required to wait)
- Notify company's designated officer and legal counsel immediately
- Notify all employees of the presence of federal agents and specifically inform all employees not to interfere with the agents in any manner
- If warrant seeks electronic data, notify IT Department
- Implement company's crisis management plan
- If press arrives, make no public comment other than the entity is "cooperating with the investigation"

Search Warrants

What to Do During the Search

- Do not obstruct or otherwise get in the way of the agent's search (it is a crime)
- Designate employees to accompany agents and document areas searched and items seized
 - Do not offer to take the agents where they haven't requested to go
 - Do not volunteer information
 - If agents object to the escort, do not attempt to resist/prevent the search
- Questions about location of documents/items should be answered by the designated liaison
- Object and document any areas where agents are going beyond the authorized scope (notify counsel)
- If applicable, assert privilege and segregate privileged records
- Attempt to copy all documents before seizure
- Engage counsel and lead prosecutor to understand the reason for and scope of the investigation
- Prepare communications plan for employees and outside inquiries

Search Warrants

What to Do If Employees Are Interviewed

- Request that company's counsel attend interviews with employees
- Make sure employees know their rights:
 - The investigating officers may ask you to consent to an interview
 - You may talk to the investigating officers if you want to but you are under no legal obligation to speak with them
 - If you do speak with the investigating officer, you should be aware that you have a right to request that you have counsel present. You should also be aware that anything you say can be used against you in any criminal or civil enforcement proceeding.
 - Let the employee know:
 - Whether the company will pay for or provide access to counsel, if desired
 - That the company has asserted its right to be present at any interviews of employees
- Where possible, excuse all non-essential staff in the search area from responsibilities during the search, consider sending them home

Search Warrants

What to Do After the Search

- Request inventory of items seized
- Communicate with employees regarding rights
- Interview any employee who consented to interviews with agents
- Analyze list of records seized, questions asked and information gathered to understand nature and scope of investigation
- Issue a litigation hold notice
- Identify and obtain duplicates of any essential business records
- Conduct investigation, as necessary, to defend the company
- Anticipate grand jury subpoenas (if not already served)
- Implement business continuity plans to maintain critical business services

Search Warrants

Dos and Don'ts

DO

- Prepare in advance; anticipate issues
- Assert company's legal rights
- Consider contacting experienced criminal counsel
- Be polite and address questions related to the warrant
- Inform employees of their rights
- Preserve relevant records

DON'T

- Hope nothing ever happens
- Consent to waive the company's legal rights
- Try to wing it
- Try to offer explanations or defenses to what is being investigated
- Tell employees not to talk to agent
- Delete or destroy records, otherwise obstruct justice
- Speak to people about the investigation without direction from counsel

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Other Areas of Concern

Independent Internal Investigations

Why Conduct an Internal Investigation?

- Upon receipt of grand jury subpoena or CID, company should strongly consider initiating an internal investigation (e.g., wage and hour audit)
- Stop any ongoing wrongdoing and prevent problems from reoccurring
- Enables company to “get ahead” of the government investigation and address the issues or questions raised more effectively
- Provides credibility and enables cooperation with government agency
- Assists in the development of facts needed for a defense
- Supports ability to negotiate a resolution
- Key to demonstrating effective compliance program
- Protects executives and board from claims of breach of fiduciary duties
- May also function as a public relations response

Independent Internal Investigations

Structure and Execution

- Who will conduct the investigation (external and internal resources)
- What issues are at the focus of the government investigation
- What questions are likely to be asked
- What are the relevant document types and sources company needs to identify
- Who are the witnesses and interviewees
- Issue a document preservation notice
- Avoid credibility issues and obstruction of justice
- Conduct the witness interviews (employees may have duty to cooperate under statute)
- Manage attorney-client privilege
- Consider extent of any written products of the investigation (memos, reports, briefings)
- Minimize privilege waiver by entering into confidentiality agreement with the government

Independent Internal Investigations

Risks



- If the government goes forward with a criminal case, it might at some point demand the internal investigation report
- Information may be discoverable by class or whistleblower plaintiffs
- May be costly and disruptive
- Privileges may be inadvertently waived
- May lead to a PR backlash caused by leaks or assertions of whitewashing

Independent Internal Investigations

Privacy and Privilege Issues

- Employee's Expectation of Privacy
 - Employees have little privacy at the workplace
 - All communications on the employer's property (i.e. work email, work phone messages) are not private
 - Employee's personal, password-protected email and other accounts should not be accessed
- Maintain Privilege
 - Communication between the company's counsel and company's employees are generally privileged, so long as certain steps are taken to maintain the privilege
 - Before each witness interview, provide *Upjohn* Warning, stating:
 - Counsel represents the company and not the employee
 - The purpose of the interview is to learn facts in order to provide legal advice to the company
 - The interview is confidential and protected by the attorney-client privilege
 - The company holds the privilege, not the employee
 - The company may decide to disclose the information obtained during the interview to third parties

In-House vs. Outside Counsel

- Who should respond/handle the government inquiry?
- Factors to Consider
 - Experience of company's in-house counsel
 - Types of claims and allegations
 - Job level of the employees involved in the matter
 - Risk to the organization



Public Relations & Social Media

- Expect word will get out and the media will be on your doorstep (maybe while search is in progress)
- Designate someone to monitor the media reports and social media chatter
- Standard response:
 - Confirm inquiry
 - Confirm company's good faith cooperation
 - Confirm faith in company's compliance with the law
- Can instruct employees not to talk about the matter with the media or with any others
- Coordinate communications to speak with “one voice” based on inputs from leadership, communications, and legal advisers
- Avoid misstatements and incomplete statements that will need to be corrected
- Prepare an affirmative plan for key stakeholders





Plan Ahead: Create Your “Break the Glass” Kit

Response Plan for Government Inquiries

Response plan should include:

- Carefully reading any subpoenas, CIDs, or search warrants and understanding precisely what the government is after
- How the company will staff the investigation (i.e., outside experts)
- Step-by-step instructions for the initial contact
- Company's policy to cooperate fully during an investigation or inquiry
- Whether an internal investigation will be initiated and its procedure
 - Whether company will hire outside counsel or staff
 - Identifying and preparing witnesses
 - Steps to remediate any wrongdoing uncovered
 - How C-Suite and Board will be kept updated on the investigation's progress

Response Plan for Government Inquiries

Continued

- Document production procedures
 - How company will keep and preserve attorney-client privilege, make sure privileged documents are not turned over to the government accidentally
 - Process for handling “smoking gun” documents
- Notice that government may request an interview, and employee’s right to cooperate or refuse
- Disclosure and public relations policy
 - Policy for handling media inquiries
 - Reminder about communications regarding an investigation
 - Reminder to be courteous but concise
- Designation of a senior official as a DP and others as alternative DPs
- How any in-house counsel will insulate itself from any personal exposure with regulators
- Know your jurisdiction! Global companies should tailor Response Plans to laws/customs of each location (off-hours coverage, “regional” planning)

Utilize Flowcharts and “Cheat Sheets”

- One-page guidance for emergency situations, government visitors and legal service
- Easy access to key information and step-by-step instructions for employees and staff
- Especially useful for receptionists and other public-facing staff

Guidance for Emergency Situations, Government Visitors and Legal Service

Immediate Threat to Safety/Medical Emergency (including someone threatening harm to self):

1. **Call 911** (or if you are outside of US add your local emergency # here: _____).
2. **In case of fire, evacuate the office.**
3. **Contact Company's [security office] at _____.**
 - o The [security office] will contact the appropriate stakeholders from Information/Physical Security, Legal, People (HRBP/Benefits), Facilities, and Office Leadership.
 - o An Incident Response Team will triage the issue, and invoke the Incident Response and Crisis Plan as appropriate.
4. The designated Incident Response Team Anchor will contact you, identify themselves to you, and let you know if there is anything else for you to do. Direct any further questions to the Incident Anchor.

Unexpected Government/Law Enforcement visit:

1. **Cooperate but do not consent to anything without contacting Legal first.**
 - o You can politely say "Our Legal Department told us we must contact them immediately before letting you do anything or accessing our work space."
 - o Don't answer any specific questions - politely tell them to wait for company legal counsel.
2. **Ask to see Badge/credentials and paperwork official says they have (e.g. warrant. Authorization or mandate).**
 - o Record identity and contact information of officials and ask to copy documentation (if they won't let you copy then just record important pieces).
3. **Contact Legal at _____ or by phone (____ or ____).**
 - o Legal will direct you on what to do (and will give heads-up to Physical Security at _____).
 - Legal may tell you to ask government to wait for company legal counsel and/or to contact Office Leadership.
 - Do not sign any documents presented by officials without approval from Legal.
 - o If in a U.S. Office with federal government project contact _____ at ____.
4. **A company employee must stay with officials at all times (preferably Legal or Office Leader) and take notes on what they do including questions asked and materials they request to copy or remove.**
 - o If officials want copies of documents, make sure originals are kept
 - o Do not authorize removal of materials without approval from Legal.
5. **Don't communicate with anyone inside or outside company without business need to know.**
 - o No photos or social media.
6. **Do not delete or destroy anything; do not obstruct or interfere with officials' actions.**
7. **Ask for follow up actions and expected communication Company can receive in reference to the visit?**

Subpoenas or other Legal Documents being Hand-Delivered to office:

- Be polite, but do not accept a package or delivery for a legal document addressed to Company.
- Tell individual that Company has formal agent for service of process: [AGENT NAME]. Otherwise they can contact the Legal Department at _____.
- You do not have authorization to accept service on behalf of the company.
- If package is for an employee, tell messenger to serve somewhere else; not at office.

Legal Documents/Communications received in other ways:

- Email the Legal Team at [e-mail address].
- Do not correspond with any attorney outside of the company (unless at the direction of company Legal department).

Date: _____

Train Employees

- Response plan should be disseminated and available to all employees
- Establish and publicize call hotlines and call trees for rapid response
- Train all managers on what to expect
- Consider providing additional training to those employees who are likely to be the first approached by law enforcement (e.g., receptionists, assistances, security staff)
- Inform building security personnel of the procedures for contacting the DP and alternative DPs, particularly if agents are executing a search warrant

Keep “House” In Order



- Establish a comprehensive compliance program
- Keep privileged documents (PHI – Attorney/Client) clearly marked & segregated
- Maintain an updated copy of essential records off-site (i.e., backup computer systems)
- Become familiar with available agency and judicial guidance
 - Department of Justice criteria for prosecution
 - Federal sentencing guidelines
- Regularly review and update response plan
- Consider requiring refresher training for key employees

EPSTEIN
BECKER
GREEN

Wrap Up

Key Points to Remember



- Avoid potential obstruction of justice claims
- Create, practice, and maintain investigation response plans
 - Adopt procedures and designate selected company representative to handle surprise government contacts
 - Adopt procedures and train for potential search warrant scenarios
- Prepare legal hold policies
- Train employees
 - As part of ethics & compliance training, inform employees of their rights, designed company representatives and the procedures the company has in place for government enforcement matters
- Inspect and investigate yourself
- Employees can be allies
 - Encourage employees to report concerns and suspected misconduct to stay ahead of problems

Q & A



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Preparing Your “Break The Glass” Kit For Surviving A Government Investigation

ACC – National Capital Region CLE Program

March 17, 2020