

Have Plan in Place in Case Agents Arrive With Search Warrant

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As seen on [BNA: Prevention of Corporate Liability](#).

If state or federal authorities knocked on your door tomorrow, would you know how to prepare for, weather, and respond to a criminal investigation of your business? Today's increasingly regulated environment and the encouragement of whistleblowing has created an atmosphere of greater risk of exposure to a criminal investigation. Some industries are highly regulated, and even the most conscientious businesses are under constant scrutiny. In addition, competitors and former or disgruntled employees may present as great a risk to your company as do regulators.

The first line of defense is to establish a robust compliance and ethics program that not only cultivates a climate of good corporate citizenship but also encourages internal early disclosure of regulatory violations and other misdeeds. This gives companies the opportunity to correct problems before they come to the attention of government authorities.

Prepare for the Worst

The second step every company should take is to prepare for the worst. You probably have procedures in place in the event of emergencies: fire wardens, natural disaster protocols, or crisis response plans. Treat intrusion by government investigators as you would any other corporate crisis. Be prepared. Have a plan. A timely and organized response to government action can set the tone as a criminal investigation moves forward. Once you formulate a plan, make sure all of your employees know the plan and know who is responsible for seeing it through.

Many criminal investigations may begin with a search warrant or a subpoena for testimony or documents. Before you are faced with a search warrant or subpoena, assemble a "response team" that is comprised of both a response coordinator at each facility and legal counsel.

The response coordinator should be someone of suitable seniority and demeanor to accept service of subpoenas or to be in charge in the event a search warrant is executed on the premises. Ensure that all employees know to refer authorities to that person. The response coordinator or legal counsel should educate the staff on their rights and responsibilities in advance of receiving a search warrant or subpoena.

The second key part of the response team is founded on a current relationship with competent legal counsel who has experience in criminal law. The moment when law enforcement agents are combing through your file cabinets and seizing your computers is not the time to be frantically searching the yellow pages for a criminal lawyer.

Not every investigation starts with a subpoena or a search warrant. Encourage your employees to report any contact they may have had with government authorities. A round of interviews with employees at their homes after hours could be a good indication that a criminal investigation is underway.

But as a general practice, you should be vigilant about your business. Know where you are most vulnerable, and have procedures in place to detect potential missteps. Conducting your own internal investigations and responding appropriately is the best way to prevent external investigations from occurring.

Once you are aware that an investigation is underway, routine destruction of documents should be suspended. If you are presented with a search warrant, request a copy of the warrant and the affidavit. Request the identities of all agents on the premises. Immediately notify your legal department or adviser. Keep as good a record as you can of what and where the search involved. Make sure you are given a written inventory of all items taken.

Tell Workers What Not to Do

Many times agents will want to conduct interviews of your staff contemporaneous to serving the warrant. It may be prudent to close the office for the day and to send everyone home, leaving the responsible official on site to handle the situation. If you are served with a subpoena for the production of records, usually there is a date in the future for compliance. Make sure your legal adviser is promptly notified of the existence of the subpoena.

Often, a criminal investigation is a stressful and intimidating process. Different employees may react in different ways; therefore, it is best to communicate some guidelines and rules with employees at the earliest possible stage of the investigation. There are a number of activities employees should never do, as these activities are crimes. No one should destroy or alter files or documents.¹ No one should lie to a law enforcement agent.² Any attempt to interfere with or attempt to obstruct the execution of a search warrant is a crime.³ Employees should be reminded that attempting to influence the statements or testimony of a witness is also a crime.⁴

Explain Employee Rights

Other good reminders to employees include encouraging them to be professional and courteous in all dealings with government agencies. Employees should be aware that they are free to but do not have to speak with government agents conducting enforcement actions or investigations, but if they do communicate with them, their responses should be truthful, complete, and accurate. Whether any employee wishes to have legal representation prior to speaking with a government agent is his or her personal choice.

Following the investigation, the response team should follow up with the employees. This is a good time to remind employees of their rights and responsibilities regarding interviews with authorities. Make sure they know not to speculate about matters on which they may be uninformed. Business leadership should determine whether the company will help employees obtain independent legal counsel.

Consider conducting your own internal investigation to determine the nature and extent of any criminal exposure. Employees who are interviewed by government agents or called to testify before a grand jury should be debriefed if possible while their recollection concerning their

testimony or interview is still fresh.

Should Privilege Be Waived?

Establish a line of communication with government authorities through your legal counsel. The decision to conduct an internal investigation should include consideration of what is to become of the results of that investigation. How an internal investigation is structured and conducted may affect whether the information so acquired is protected by the attorney-client, work product, or self evaluation privileges. The Department of Justice no longer requires waiver of these privileges to gain cooperation credit⁵, but there is still substantial pressure to disclose the results of your audit or investigation to the authorities.

The issue of waiver of these privileges is a complicated and important one because once waived, privileged communications and information could then become discoverable in ancillary proceedings, such as shareholder lawsuits or commercial litigation.⁶ On the other hand, disclosure to the government of internal findings may influence prosecutorial decisionmaking. Any decision to disclose should include informing the government of what remedial steps have been taken to resolve the problems discovered. This could include employee disciplinary actions, implementation of procedures to prevent further misdeeds, or victim compensation. The government exercises wide discretion in its charging decisions. Included in the articulated factors that go into those decisions is how a company responds when confronted with being investigated.⁷

Facing a criminal investigation of your company is a serious and complicated matter that you should not take on alone. By planning ahead and getting good, early advice, you can meet the challenges presented by the investigation and steer it towards a more favorable result.

(1) 18 U.S.C. §§1512(c) and 1519.

(2) 18 U.S.C. § 1001

(3) 18 U.S.C. § 1501

(4) 18 U.S.C. § 1512(b)

(5) U.S. Attorneys' Manual, Chapter 9-28.720.

(6) See *In re Columbia/HCA Healthcare Inc.*, 293 F.3d 289 at 306-7 (6th Cir. 2002) (enforcing waiver as to third parties in spite of confidentiality agreement with government agency).

(7) Included among the factors that are considered in charging business organizations: nature and seriousness of the offense, pervasiveness of wrongdoing, history of similar conduct, timeliness of voluntary disclosure, cooperation with authorities, establishment of an effective compliance program, remedial action, collateral consequences to third parties, adequacy of prosecution of individuals, and adequacy of non-criminal resolution. U.S. Attorneys' Manual, Chapter 9-28.300.