

## Ethics Corner

# Are You Prepared for A Government Probe?

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Government investigations are on the rise in the healthcare, defense, energy and insurance sectors. Agents from all levels of government have greater investigatory power through more inter-agency coordination and resource sharing.

Companies today thus find themselves face-to-face with government agents with greater frequency. When a company anticipates government contact, it can most effectively control that contact through a prepared response. However, what happens when a company receives an unexpected government visitor?

To prevent adverse consequences, companies should establish a response plan. By proper planning, a company can ensure full cooperation and honesty, minimize disruption to business and prevent a situation that is difficult to contain.

**Employee Education.** A fine line should be observed in responding to an agent: be courteous, but cautious. Investigators often form lasting impressions based on a company's willingness to cooperate from the outset. The company needs to send this message that it has nothing to hide. It thus should instruct all employees to be polite and accommodating. However, the company needs to be mindful that information provided to an agent could lead to misunderstandings, especially when employees provide inconsistent or uninformed responses. No information should be provided until the nature and the significance of the visit is established.

Employees should not respond to any question unless certain the response is complete and accurate; should politely accept a subpoena — but no statements as to company compliance should be made that are not first coordinated by the company's counsel. Employees should never provide tangible evi-

dence during the service of a subpoena or during an interview — this may waive legal protections.

**Preparing the Company Representative.** Designating a single contact person to meet with government agents will help ensure that the company speaks accurately, and helps to control dissemination of information.

**Identify the Investigator.** Find out the agents' names and organizations. Request, review and record their credentials. And determine who, if anyone, the agents have contacted previously. Know before proceeding what, if any, contractual provision exists to authorize the visit.

**Determine the Purpose of the Visit.** First ask the agent the purpose of the contact. Be wary of visitors who say their purpose is "to talk" to individuals. Before serving a subpoena or search warrant, investigators often ask questions to get the most candid responses. Seemingly innocuous discussions will be reflected in an investigator's paperwork. Subsequent statements that vary from preliminary discussions will be viewed as inconsistent. This could lead to a more intense — time-consuming and costly — inquiry.

**Determine the Focus of the Inquiry.** If the inquiry involves an individual employee, be mindful of privacy rights and disruption to the employee's work. If the inquiry involves the company directly, such as requests for company records or other information, such matters can raise more complex issues: treat these types of inquiries carefully and limit communications until involving company counsel. Even when the inquiry concerns an employee or a third party, it is often unclear whether the investigation may have implications for the company.

**Contact Counsel:** Before answering questions, call counsel and explain the situation. All questions may be deferred to the lawyer. If the representative chooses this route, she

should do so in a way that makes it seem routine and in accordance with company policy.

**What to Do When the Government Leaves.** Counsel needs to be involved immediately to determine the course of action. This may include conducting an internal investigation, debriefing employees who had contact with the agent, and circulating a memo on document retention and employee rights.

All documents generated in furtherance of the government inquiry should be clearly marked "Privileged and Confidential — Attorney Work Product/Attorney Client Communication."

The company should maintain a separate file for the investigation and access to files must be limited to attorneys and their agents. When responding to a subpoena, the company must be aware that full and complete compliance is essential. Any omission may result in charges of obstruction of justice and could cause the agent to conclude the company is hiding something. It is important to safeguard all records, such as e-mails arguably related to the subject of the subpoena. Finally, the company should let counsel decide which documents must be produced.

The volume and intensity of government investigations have been on a steady but significant climb over the past several years. Companies that are unaware of, or have ignored, this reality may find themselves unsteady at the knock at their door by a government agent. In order to minimize disruption to your business and to minimize the level and frequency of government intrusion into your business, it is important to set in place a plan of action for that unexpected call.

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