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What To Do When The Investigator Knocks

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The Knock on the Door

Utilize a Two-Step Approach

- **Develop effective policies and procedures**
 - **Establish company policy**
 - **Train your employees**

Company Policy

- **Your organization's policy regarding government investigations should include, at a minimum, the following principles:**
 - **Organization will cooperate fully with any appropriately authorized investigation or audit**
 - **Organization will assert all protections afforded it by law**

Company Policy

- **Organization will instruct all employees to tell the truth in all circumstances**
- **Organization will never tell employees not to cooperate or not to speak to investigators**
- **Organization will not retaliate against anyone who cooperates with the investigation or who reports possible wrongdoing, improper or illegal activity**

Company Policy

- **Organization will establish a procedure for the orderly response to government investigation**
 - **Protect the organization's and its employees' rights and interests**
 - **Ensure appropriate cooperation**

Company Policy

- **Proper procedures protect both the organization as well as its employees**
- **Consider implementing a policy that directs all employees to report any and all illegal activity or contacts about possible illegal or improper activities to their supervisor or the Compliance Officer**

Who May Be Knocking?

Investigative Contacts

Government contacts can come in several forms:

- **Routine licensure, certification, survey and complaint visits from Department of Health, Department of Aging and Department of Human Services (DHS)**
- **Investigations by Department of State Professional Boards (Nursing Home Administrators, Nursing, Medicine)**

Investigative Contacts

- **Investigations by District Attorney or the State Office of the Attorney General**
- **Medicaid Fraud Control Unit**
- **DHS Bureau of Program Integrity**
- **U.S. Attorney's Office**

Investigative Contacts

- **Routine financial audits**
- **Investigations by the Area Agency on Aging (AAA)**
- **Investigations by the Federal Bureau of Investigation (FBI)**
- **Investigation by the U.S. Office of Inspector General (OIG)**

Investigative Contacts

- **Investigation by the Department of State, Bureau of Professional and Occupational Affairs**
- **Investigations by the Centers for Medicare and Medicaid Services (CMS) and/or its contractors (Medicare Administrative Contractors (MAC), Recovery Audit Contractors (RAC), Medicaid Integrity Contractors (MIC), Program Safeguard Contractors (PSC), Zone Program Integrity Contractors (ZPIC), Medicare Drug Integrity Contractors (MDIC), and Unified Program Integrity Contractors (UPIC)**

Investigative Contacts

Government contacts may take different approaches, each of which may have significant consequences:

- **Requests for information presented either in person (including subpoenas), by correspondence or by phone**
- **Interviews of past and current employees, vendors, residents, families and others**

Investigative Contacts

- **Undercover Investigations**
- **Subpoenas**
- **Search Warrants**

What Do They Want?

What Do They Want?

- **Some visits may be fact-finding, while others may be regulatorily prescribed, such as licensure inspections or surveys**
- **Other visits, however, may carry civil or criminal ramifications**

What Do They Want?

Practice Pointer #1

- **Always try and determine the Purpose of the visit**
 - **Is the visit “routine” from your perspective?**
 - **Is your organization or one of your staff under investigation?**

How Are Investigators Trained?

- **According to the U.S. Department of Justice Manual on Investigating and Prosecuting Health Care Fraud, agents are taught:**
 - **How to observe and identify the names of all support personnel**
 - **How to observe and locate file locations**

How Are Investigators Trained?

- **How to note and record “important” aspects of their conversations with witnesses**
- **How to make an interrogation appear to be a simple interview**
- **Federal investigators can record conversations without a court order and without consent**

What Do They Want?

Practice Pointer #2

- **Be Certain that employees know the “chain of command” to advise of a visit by the Government, including what to do with a request for documents**

When... Not If

Training Employees

- **Train Employees to know company policy, and to question when someone asks them to do something unethical, questionable or illegal**
- **Ensure that employees know their rights**
- **Ensure that employees know how to address a government request for information**

Training Employees

- **If you have an effective compliance program, your employees will know to report all suspicious conversations to the Compliance Officer, and to direct the person making such inquiries to the Compliance Officer or Hotline**

Training Employees

- **Proper procedures protect both the organization as well as its employees**
- **Consider implementing a policy that directs all employees to report any and all illegal activity or contacts about possible illegal or improper activities to their supervisor or the Compliance Officer**

Qui Tam

**“Qui Tam pro domino rege quam pro sic ipso in hoc parte
sequitur.”**

“Who as well for the king as for himself sues in this matter.”

Qui Tam Action

- **Allows a private individual to bring a civil action on his and the government's behalf**
- **Also called the "whistleblower" statute, describing an employee who reports illegal activities of coworkers or company**
- **Attractive because of monetary rewards; the individual can receive from 15 to 30% of whatever is recovered from the lawsuit**

They Are Here – Now What?

Dealing With Your Staff

Employee Interviews

- **Employees should always ask for the following information:**
 - **Investigator's name**
 - **Agency affiliation**
 - **Phone number and address**
 - **Business card**
 - **Reason for visit**
 - **Whether there is a search warrant or subpoena and for a copy of any such document**

Employee Interviews

- **NEVER ENCOURAGE OR INSTRUCT EMPLOYEES TO SAY ANYTHING OTHER THAN THE TRUTH**
- **Investigational interviews of employees often occur off the work site**
 - **Educate employees that they are likely to be contacted at home, in the early evening or on the weekend**

Employee Interviews

- **The U.S. Department of Justice Manual states:**

“Government attorneys say, without apology, that the increasing use of home visits and warrants is to side step counsel and get the unvarnished truth before attorneys get the chance to color it and coordinate what other witnesses will say.”

Employee Interviews

- **Employees are not required to speak with government investigators**
- **Your organization MUST NEVER TELL EMPLOYEES THAT THEY SHOULD NOT SPEAK WITH THE INVESTIGATORS**

Employee Interviews

- **Instruct employees that they will not be reprimanded for talking to investigators**
- **It is up to the individual employee whether he or she will exercise his/her right to talk or not to talk**

Employee Interviews

- **What are an employee's options if an investigator visits off the job?**
 - **Consent to the interview**
 - **Decline to be interviewed at the time, but:**
 - ❖ **Request that the interview be conducted during regular working hours, either at the business site or another location**

Employee Interviews

- **Decline to be interviewed :**
 - ❖ **In a criminal investigation, the agent may have the authority to subpoena the employee to appear before a grand jury**

- **The employee should follow company policy and immediately notify appropriate personnel**

Employee Interviews

- **Employee right to legal counsel:**
 - **As an organization, you must determine when and if you will provide counsel to your employees**
 - **Often organization's lawyer will not be able to represent the organization and its employees**
 - **An interview may always be stopped by an employee's request that the interview be conducted when the employee has his/her attorney present**

Employee Interviews

- **Agents may tell your employees that they would prefer that there be no discussion of the meeting with anyone**
- **They may want to keep the meeting a secret, so as not to jeopardize the investigation**

Employee Interviews

- **Agents have NO right to ask your employees to keep secrets from the employer**
- **Your employees have every right to tell the organization about the contact and interview**

Employee Interviews

- **Employees should be told that they will not be punished for speaking with government agents**
- **Encourage employees to report ALL government contacts to specified personnel within the organization**

Employee Interviews

- **Employees should be told to tell the truth. They should not be told to “protect” the company**
- **Tell employees that your organization always tries to do the right thing and believes it is honest and forthright in its dealings with the government**

Do's and Don'ts

Practice Pointer #3

- **Do be fully aware of everything the government is doing – documents reviewed; personal interviews conducted**
- **Do ask questions**
- **Do cooperate, but...**
 - **Don't volunteer information**
 - **Don't discuss merits of the investigation**

Do's and Don'ts

Practice Pointer #3 (con't)

- **Don't compare your organization with others**
 - **Don't argue**
 - **Don't admit violations**
-
- **Do secure copies of all documents copied by the investigators**

Do's and Don'ts

Practice Pointer #3 (con't)

- **Do keep senior management advised**
- **Do ask why it is taking place**
 - **Don't be defensive**

If out of the ordinary, i.e., federal agents armed with a search warrant and performing criminal investigation, contact counsel immediately!

Armed With a Subpoena

Subpoenas

- **“Document subpoenas” are often directed to the custodian of records**
- **You usually do not have to surrender documents immediately**

Subpoenas

- **“Document subpoenas” require the production of documents only**
 - **The agent cannot use this type of subpoena to force a witness to talk to them**
- **Create a subpoena policy and procedure**
 - **Train all staff how to respond if they are handed a subpoena**

Subpoenas

- **Make a list of requested documents and copy the records**
- **Whenever possible, try to keep your original copies and give copies to the agent**
- **Take the subpoena and the agent's card and tell the agent that the appropriate person will contact them**

Subpoenas

- **Limit the people within your organization who are authorized to release records**
- **Ensure all such contacts are reported immediately**
- **Have counsel review the subpoena to ensure that it is proper and does not exceed the scope of authority**

Knocking With a Search Warrant

Search Warrants

- **A search warrant is a court order**
- **Authorizes search for and seizure of specified contraband, evidence of a crime, or the fruits and instrumentabilities of a crime**

Search Warrants

- **A search warrant must contain:**
 - **The place to be searched**
 - **The time of the search**
 - **The items to be seized**

Search Warrants

- **A search warrant is authorizes the investigator to:**
 - **Enter private property**
 - **Search for evidence of criminal activity**
 - **Seize documents or items listed in the warrant**
- **A search warrant DOES NOT require employees to speak with investigators, only to provide the documents or the other identified items in the warrant**

Search Warrants

- **Employees should immediately request a copy of the warrant**
- **Ask for a copy of the affidavit as well**
 - **The affidavit will list reasons why the search warrant was issued**
- **Instruct employees to ask the investigator to wait until designated company official (Administrator, CEO, Compliance Officer, Counsel) arrives**

Search Warrants

- **Always request an opportunity to consult with your lawyer before the search starts**
 - **Give your lawyer a copy of the warrant**
 - **If you get your lawyer on the phone, let him/her speak with the head of the investigative team**

Search Warrants

- **Try to establish a search and production procedure with the investigators**
 - **Sequence of the Search**
 - **Copies of originals**
 - **Who will make copies**
 - **Can you keep a set of all copies**
 - **How will you be able to access seized records or computers**

Search Warrants

- **Try to negotiate alternatives to the search and seizure**
 - **Sometimes you can discover what they are looking for and provide it immediately, thereby ending the ordeal**

Search Warrants

- **Carefully review the search warrant**
- **Limit search to the items/areas stated in the warrant**
- **Do not let the investigators expand the search beyond the scope of the warrant**

Search Warrants

- **If the agent tries to expand the search, immediately notify counsel**
- **Do NOT prevent the agents from conducting their search**
- **“Plain View” Rule – investigators have the right to seize evidence in plain view, even if it is not identified in the warrant**

Search Warrants

- **When a warrant is served, remove all non-essential staff from the area**
- **Monitor the search**
- **Never leave the investigators alone, if possible**
- **Always make sure at least two employees are with the investigator to monitor only**

Search Warrants

- **Try and protect privileged documents**
- **A court can direct the privileged documents be placed under seal until a decision is made as to whether the investigators can read the material you believe is privileged**
- **Try to download copies of files from computer hard drives and diskettes**

Search Warrants – Post Search

- **Agents are required to give a detailed list of all documents taken**
- **Document where agent searched; what files did they examine; for how long and with whom?**
- **Try to create your own inventory list**

How Can Your Documents Protect You?

- **Examine existing reporting and record systems to identify potential operational challenges**
- **Implement systems for timely responses to audit**
- **Don't be short-sighted**
- **Identify potential internal risk factors**
- **Create an interdisciplinary "CYA" (Comprehensive Yellow-flag Audit) Committee**
- **Involve Counsel**
- **Enhance compliance initiatives, particularly related to documentation and coding education**

QUESTIONS???

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