



DO NOT ENTER

**SEARCH WARRANTS, GRAND JURY
AND REGULATORY SUBPOENAS
AND OTHER INVESTIGATIVE CRISES:
SURVIVING UNTIL HELP ARRIVES**



THE CRISIS



The first minutes and hours after the government executes a search warrant, serves a subpoena, or otherwise lets you know you're under investigation can be critical in determining the investigation's eventual outcome. A company's immediate response may make the difference between an investigation that goes nowhere and one that leads to the company's demise.

This handbook outlines the key do's and don'ts for company executives and in-house counsel during the initial period before counsel arrives. It covers in the most basic terms what to do when:

- The government executes a search warrant, either at corporate headquarters or a corporate facility.
- The government serves a grand jury or administrative subpoena requiring production of vast quantities of documents in a very short time.
- Government agents appear at a company's manufacturing or other facility and start interviewing low-level employees.
- Company counsel learns that government agents have been contacting employees at home in order to interview them or serve grand jury subpoenas.
- Government agents show up unannounced at company headquarters and ask that a company executive speak with them "voluntarily."
- A government contracting officer shows up at an otherwise routine audit with a small army of other government agents.
- OSHA agents arrive at a company facility immediately after an employee is seriously injured or killed in an explosion or industrial accident.
- A news reporter calls with questions about an allegedly nefarious company practice, drawing on information received from a whistleblower.

Although every situation is different and calls for case-specific advice from experienced white collar counsel, general guidelines on how to act in such situations should help prevent the company from making grave mistakes while counsel can be notified and arrive on the scene to assist. This handbook lays out those guidelines.

SEARCH WARRANTS

THE MOST IMMEDIATE DO'S AND DON'TS

DO

Immediately call experienced white collar counsel.

Meet with whomever is in charge of the search (typically called the lead agent) and ask what is going on and what they are investigating.

Get a copy of the search warrant.

Observe the agents' activities, and take notes.

Listen to what the agents are saying, and take notes.

Consider sending employees home.

If agents appear to be detaining employees, ask whether the employees are under arrest or are free to go.

Carefully advise employees of their rights. See the detailed advice on page 9.

Point out and object to the seizure of attorney-client, trade secret or otherwise privileged materials.

Inventory everything that is being seized.

DON'T

Do not obstruct or interfere with the search.

Do not consent to the search of an area not identified in the search warrant.

Do not consent to the seizure of materials not identified in the search warrant.

Do not direct or advise anyone not to speak to agents.

Do not volunteer substantive information.

MORE ABOUT RESPONDING TO A SEARCH WARRANT

- When you learn that a search warrant is being executed at your company, your highest priority is obtaining the assistance of experienced white collar counsel. If you have already identified such counsel, call him or her. If counsel is occupied, insist that he or she be interrupted to take your call. If that is not possible, insist upon speaking with counsel's white collar partner or associate. If you haven't identified experienced white collar counsel in advance, then call your litigation counsel or corporate counsel, obtain a referral and contact him or her.
- Meet with whomever is in charge of the search (typically called the lead agent) and ask what's going on and what they are investigating. Agents are not required to provide this information, but you should get as much of it as they are willing to reveal. Sometimes agents will reveal quite a bit.
- Get a copy of the search warrant (which must be provided), review it and transmit it to counsel. This is a document that identifies (a) the specific premises the agents are authorized to search and (b) what they are authorized to search for. Review the search warrant carefully and transmit it to counsel. See the sample search warrant that is included in this handbook at page 8.
- Do not consent to the search of an area, or to the seizure of materials, not described in the search warrant. For example, the search warrant may authorize the search of Warehouse A for the company's shipping records. Upon discovering that the company has an adjoining Warehouse B, the agents may ask for permission to search it. Do not consent to this expansion of the search warrant.
- Do not interfere with or obstruct the search, even if you believe the warrant is invalid or that the agents are exceeding the scope of the warrant. You do have a right to observe the search, so long as you are not interfering with the agents as they execute the warrant. If you do anything that can be construed as interfering, the agents may detain you.

MORE ABOUT RESPONDING TO A SEARCH WARRANT (Continued)

- If the warrant authorizes the agents to take samples of any products or substances, ask that the agents take a “split sample” of each substance sampled and that they provide the “split” to company counsel.
- Carefully *observe* the agents’ activities, and take notes. These observations and notes may be very helpful later in attempting to determine the scope of the investigation and the legality of the agents’ conduct of the search.
- Similarly, listen carefully to what the agents are saying to you, other company personnel and each other, and take notes. What the agents say to each other may provide particularly important clues as to what they are investigating, and why.
- Consider sending nonessential employees home. The execution of a search warrant can be extremely disruptive to the company’s business. It can also be very upsetting to employees and be the source of harmful speculation or gossip. Sending employees home also makes them less available to agents who may wish to interview them before they can be fully advised of their rights.
- Agents may direct everyone to stay at their desks or work spaces and to desist from phone calls and electronic communications. If agents appear to be detaining employees, ask whether the employees are under arrest or free to go. This question is likely to cause agents to consider carefully whether they have grounds to detain employees and, if not, to release them.
- *Carefully* advise employees of their rights. You cannot advise an employee not to speak to a government agent, because this could be considered obstruction of justice, a criminal offense on its own. However, you can advise employees that the decision whether to speak to agents is entirely up to them and that if they do choose to speak, they can set conditions on the interview, such as the presence of counsel, either corporate or individual. If the company is prepared to do this, you can also advise employees that the company will make independent counsel available to them for consultation about their decision whether to speak to agents. Because employees can misperceive advice on this subject as being a direction or suggestion not to speak with agents, it is best to provide this advice in writing so that there can be no question later about the advice. See the sample memo to employees that is included in this handbook at page 10.
- Point out and object to the seizure of attorney-client, trade secret and other privileged or sensitive materials. Agents should not seize attorney-client communications. However, the character of such communications may not be immediately apparent to the agents. Accordingly, you should advise the agents when they come upon attorney-client communications. They likely will have anticipated this situation and should segregate and not examine any materials you claim to be privileged so that privilege issues can be worked out later between counsel. There are various protocols available for later separation of attorney-client from non-privileged materials. As for trade secret or other highly sensitive or confidential materials, there is probably not a privilege that protects them from disclosure to the government, but you should point them out nonetheless and ask the agents to be particularly sensitive to them.
- Try to inventory what is being seized. The agents are required to furnish an inventory of what they seize, but it is usually a very vague and general description. You should try to observe specifically what the agents are taking and where such files or records were located. This can assist counsel later in determining the focus of the investigation.
- Do not volunteer substantive information. In addition to gathering records, the agents frequently try to gather information either from interviews or informal conversations. As stated above, you cannot instruct employees not to speak to the agents. But you should be cautious not to volunteer substantive information to the agents. So, for example, if the agents ask where certain documents are located, you may want to tell them because it will help speed up the search and get them off the premises more quickly. But it is easy to stumble into the position of trying to explain too many things to the agents. Because you are not likely to know exactly what the agents are investigating and how answers to their questions may harm the company, you should avoid providing substantive information of any sort, at least until you can consult with counsel.

GOVERNMENT SUBPOENAS

THE MOST IMMEDIATE DO'S AND DON'TS

DO

Relax – at least it's not a search warrant.

Call experienced white collar counsel.

Suspend document disposal policies.

Direct relevant personnel to “freeze” their computers and hard files intact and not to destroy or alter anything.

As soon as practicable, issue a litigation hold on all documents.

DON'T

Do not call the agent who has delivered the subpoena or the prosecutor identified on the subpoena.

Do not begin gathering responsive materials on an *ad hoc* basis.

Do not erase, alter, destroy or hide anything.

Do not discuss the subpoena or the alleged conduct to which it may be directed with anyone who is not covered by the attorney-client privilege.

Do not circulate the subpoena.

MORE ABOUT RESPONDING TO A SUBPOENA

Working with experienced outside counsel, you should draft a comprehensive litigation hold memo to ensure that documents that are potentially responsive to the subpoena are not destroyed. Next, you and outside counsel should determine the approximate volume of materials that need to be reviewed and potentially produced in response to the subpoena. Chances are that the subpoena due date is wholly unrealistic given the quantity of documents that you will need to review. In that event, outside counsel should call the prosecutor assigned to the matter and get an extension of time to respond. Outside counsel may also try to narrow the scope of the subpoena while talking to the prosecutor. Such a call is also a first opportunity to learn more about the case from the prosecutor.

Again working with outside counsel, you should assign relevant managers to work with counsel to gather up potentially responsive documents. While this is a time-consuming job, it has to be done as quickly as reasonably possible to give counsel enough time to review the records for potentially responsive documents. The employees working with outside counsel need to know that the collection of documents is the most important task they have to perform until the collection process is complete.

The production of documents responsive to government subpoenas is almost always very costly. Government subpoenas, particularly grand jury subpoenas, are usually extremely broad, and complying with them is a major undertaking. Moreover, the government does not reimburse these costs, including copying. Still, you should take some comfort from the government's decision to serve a subpoena rather than a search warrant. Things could be worse.

OTHER INVESTIGATIVE SITUATIONS REQUIRING IMMEDIATE ATTENTION

Government agents show up unannounced at company headquarters and ask to speak to a company executive “voluntarily.”

Government agents appear at a company’s manufacturing or other facility and start interviewing low-level employees.

A government contracting officer shows up at an otherwise routine audit with other, unknown government agents.

OSHA agents arrive at a company facility immediately after an employee is seriously injured or killed in an explosion or serious industrial accident.

A news reporter calls with questions about an allegedly nefarious company practice based on information received from a whistleblower or other source.

MORE ABOUT RESPONDING TO THESE OTHER INVESTIGATIVE SITUATIONS

In-house counsel should view all of these situations as red flags that a government investigation is under way or that a whistleblower has gone to the government with accusations of wrongdoing. In-house counsel would be well advised to immediately engage outside white collar defense counsel to advise on the best response to each of these situations.

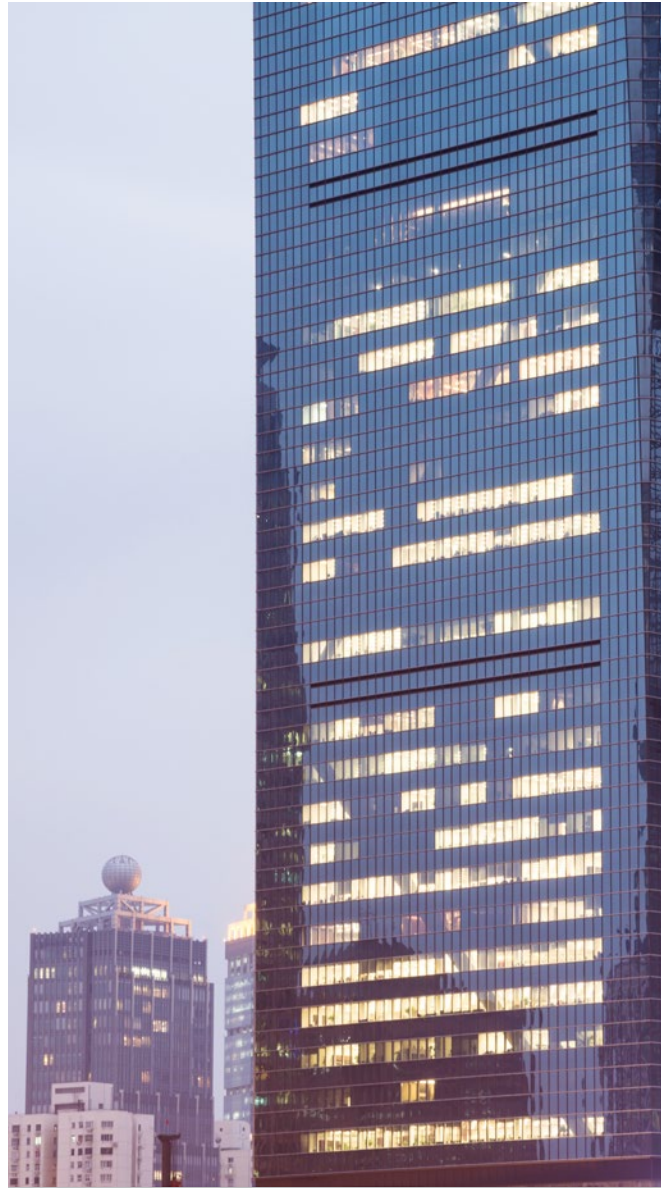
If government agents show up unannounced, in-house counsel should first speak to the agents and have them identify themselves. If they are law enforcement agents, that is a clear signal that a criminal investigation of the company is under way. You should determine from the agents why they want to question the executive and what they want to ask him or her. You should politely decline to make the executive available for questioning until you have had the chance to talk to him or her and possibly advise the executive that he or she may need separate counsel. It would also be prudent to contact outside white collar defense counsel to work with you in determining whether the company has any exposure in the areas that the agents are investigating.

If agents appear at a company facility and begin interviewing low-level employees, you should initially do what is recommended above – have the agents identify themselves, state their business and determine what they are inquiring about. You should talk to any employees who have already been questioned and get as much detail as possible about the questions asked and the answers given. You can politely but firmly advise the agents that you are not going to allow them to question employees on company property or during work hours. Again, this is a good time to contact outside white collar defense counsel to assist in mapping out a strategy to deal with the government investigation.

If a government auditor shows up with other government agents, you should request that the agents identify themselves. If they are law enforcement agents, you would be well advised to suspend the audit until you can find out more about what the agents are investigating. Unless the agents are willing to give you some idea of what they are investigating, you may have to undertake an internal investigation with respect to the operational areas that are subject to the audit.

In the event of a serious industrial accident or chemical release, investigators from OSHA, the EPA, the Chemical Safety Board and/or other regulatory agencies may quickly arrive on the scene. These agencies are charged by law with the responsibility to investigate the accident or release. At least initially, these investigations are administrative in nature, *i.e.*, not criminal, and by law agents are allowed access to the premises without a search warrant. The company should designate a government relations employee to meet with the agents and determine the nature and scope of the investigation. In most instances, the agents will want to interview operational personnel and begin collecting documents. You should notify white collar counsel immediately of the presence of such agents.

If a news reporter wants information or comment on a whistleblower's allegations, you should politely decline until you have been able to determine something about the alleged misconduct. You should, however, take the call seriously and immediately begin an internal investigation to determine whether, in fact, there are any issues of concern. You should also caution other senior managers that they should not comment if they receive calls from the press.



ATTACHMENT A

SAMPLE FEDERAL SEARCH WARRANT

AO 93 (Rev. 12/03) Search Warrant

United States District Court

EASTERN District of CALIFORNIA

In the Matter of the Search of

(Name, address or brief description of person, property or premises to be searched)

SEARCH WARRANT

CASE NUMBER:

TO, _____ and any Authorized Officer of the United States

Affidavit(s) having been made before me by _____ who has reason to believe
Affiant

that on the person of, or on the premises known as (name, description and/or location)

in the EASTERN District of CALIFORNIA there is now
concealed a certain person or property, namely (describe the person or property to be seized)

I am satisfied that the affidavit(s) and any record testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before _____
Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search in the daytime — 6:00 AM to 10:00 P.M. at anytime in the day or night as I find reasonable cause has been established and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to _____ as required by law.

U.S. Magistrate Judge (Rule 41(f)(4))

Date and Time Issued

at

City and State

Name and Title of Judge

Signature of Judge

ATTACHMENT B

ADVISING US EMPLOYEES OF THEIR RIGHTS

- Employees may, but are not required to, answer agents' questions; the decision whether to do so is entirely up to them.
- If they do choose to be interviewed, they can set conditions on the interview, such as the presence of counsel, either corporate or individual.
- If they do choose to be interviewed, they must tell the truth or be subject to potential criminal prosecution for false statements.
- If the company is prepared to make independent counsel available to employees for advice about their decision whether to speak to agents, the company may advise them of that fact.
- Time permitting, it is much better to provide any advice in this area in writing to minimize the potential that an employee will misunderstand the advice and, for example, perceive it as being a direction not to speak to the agents.

ATTACHMENT C

SAMPLE MEMO TO EMPLOYEES REGARDING THEIR RIGHTS

This is only a sample; any actual memo must be tailored to the company's situation.

MEMO

To: All employees [or all employees in a particular location, or division, etc.]

From: In-House Counsel

Government agents are currently executing a search warrant at our premises. These or other agents may attempt to interview you while they are here, or may contact you at your office or home later to request an interview. You are free to talk to the agents, but you are not required to talk to them or submit to an interview. You do have the right to say you want to confer with an attorney – either yours or the company's – first, and to insist on scheduling an interview at a time and place that is convenient. An attorney can meet with you in advance and advise you. Also, by being present at an interview, an attorney can try to avoid any confusion you may have regarding the government agents' questions, and by taking notes the attorney can minimize any potential that you will be misquoted later. The company will arrange for an attorney to talk to you if that becomes necessary and you so desire. If you are contacted by a government agent, please let me know as soon as possible.

Thank you.

CONTACTS

If your company does not already have experienced white collar counsel, DLA Piper's White Collar and Government Investigations practice would be happy to help. Our lawyers understand the urgency of these situations and regularly respond to them on behalf of our clients immediately and comprehensively.

Our US group is one of the most experienced and well respected in the country. It includes former federal prosecutors, former in-house counsel, career defense attorneys, a former law school dean and several adjunct professors, and the past president of the American College of Trial Lawyers.

Our global White Collar group includes more lawyers who concentrate exclusively on white collar crime and international investigations in more offices around the world than any other law firm. Our clients benefit not only from the fact that our lawyers are immersed in the local culture and are known to and by the local regulators and prosecutors, but also from the fact that they pool their experience with their DLA Piper colleagues around the globe. This allows us to handle multi-jurisdictional investigations especially effectively and efficiently.

ABOUT US

DLA Piper is a global law firm with lawyers across the Americas, Asia Pacific, Europe and the Middle East.

From the quality of our legal advice and business insight to the efficiency of our legal teams, we believe that when it comes to the way we serve and interact with our clients, everything matters.

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For our key North American contacts, please visit www.dlapiper.com/us/white_collar/.

For our key contacts in the UK, Continental Europe, the Middle East and Asia Pacific, please visit www.dlapiper.com/global_white_collar_corporate_crime_investigations/.

www.dlapiper.com

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