

Paul Hastings

**WHAT TO DO WHEN
THE GOVERNMENT
KNOCKS ON YOUR
COMPANY'S DOOR**



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This document is for friends of Paul, Hastings, Janofsky & Walker LLP and provides an overview of a complex area. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought.

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I. Introduction

Employers today face ever-increasing intrusions into their businesses by federal, state, and local regulators, investigators, auditors, and law enforcement officials (“government agents”). Interaction with these government agents can most effectively be controlled by employers when the contact is expected and the employer’s response prepared. However, when government agents make unexpected contact with a company, the employer and its employees are more vulnerable, since unexpected encounters can lead to unprepared and inappropriate personnel making statements on behalf of the company that may result in misunderstandings between the company and the government agent, greater government involvement and greater disruption of a company’s business.

Unexpected visits or phone calls to your place of business by government regulators, investigators, auditors, and law enforcement officials offer little if any “breathing room,” and therefore create a situation that is difficult for the company to control and contain.

The purpose of these materials is to help you prepare for those unexpected telephonic and in-person visits from government agents. By properly planning for the unexpected visitor who “knocks at your company’s door,” you can minimize the risk of misunderstandings and reduce the frequency of such intrusions in the future.

II. Possible purposes of the visit

It is impossible to list all of the potential reasons why the government may visit your company, but the following are some of the most common.

A. Matters related to the company

1. Serve a subpoena

- a. *Grand jury subpoenas.* Grand jury subpoenas are issued by a local court or a federal district court typically at the request of a prosecutor. The subpoenas may require testimony or documents and physical evidence. The subpoenas may be addressed to the company or individuals within the company.
- b. *Subpoenas for documents.* The company typically has 30 days to collect the documents that are subpoenaed and furnish them to the government. Thus, before handing anything over, the company can consult with a lawyer. No documents should be produced before they are reviewed by counsel. Frequently, the government will agree to limit the scope of otherwise expansive requests.
- c. *Subpoena for appearance of a witness.* A witness subpoena compels the appearance of a witness to obtain testimony, usually at some time in the future. No witness should testify before he or she has met with counsel.
- d. *Administrative subpoenas.* The Inspector General Act of 1978 gives each federal agency inspector general the power to subpoena documents to assist in the performance of the agency's regulatory functions. Some agencies also have the power to issue administrative subpoenas for documents and testimony.

- e. *Civil subpoenas.* Courts issue subpoenas for the appearance of individuals in court, and for documents and records relating to ongoing civil cases.

2. Interview employees

- a. Government agents often conduct “sweep” interviews in conjunction with the execution of a search warrant (discussed below). Sweep interviews are designed to corner key employees before they have an opportunity to speak with counsel and can appear very coercive. Agents may seek to interview various employees, either on or off company premises.
- b. Typically, the first objective of an agent serving a subpoena or warrant is to interview whoever will talk to him or her. Agents view this as a final opportunity to get information when both the company and the interviewee are unprepared, and before the company fully appreciates why the agents are there. An unprepared employee who is contacted by the government agent is unlikely to realize that the questioning may lead up to a subpoena or warrant.
- c. The interview may be designed to elicit information about an individual or the company, or about another company that does business with the company.

3. Execute a search warrant

- a. A search warrant enables government agents to select and confiscate documents, computers, and related

data thought to be important for their case at the time the warrant is served. Search warrants are issued by a local or federal judge or magistrate based on a determination of probable cause.

- b. Government agents have a substantial advantage when executing a search warrant. Agents are experienced in conducting searches, will have time to prepare for and rehearse the search and will surprise the company. The reason for the search warrant may not be immediately clear and the government will not explain it. Additionally, the agents may arrive in large number, armed and wearing raid jackets. Government agents are increasingly using search warrants to investigate their cases.
- c. A government search of a company's offices is extremely disruptive; it can cause panic among employees, and it can result in the loss – if only temporary – of critical documents and computer-related data that the company needs to function.
- d. Although a search warrant can be executed immediately, the company and its employees have the right to contact the company's attorney and should do so right away.
- e. *Employee interviews during the search.* Frequently, government agents attempt to question employees while searching for documents. Agents consider searches a perfect time to catch employees off-guard and obtain potentially damaging information. Employees should understand that, despite the potentially coercive

setting, they do not have to answer questions and may have a lawyer present if they decide to do so. Thus, it is important that the company inform employees of their rights as quickly as possible.

4. Conduct a government audit/investigation

- a. Companies that do business with the government – federal, state, and/or local – face many additional possible investigations and audits, which may include those conducted by investigators that focus on the performance of government contracts, check on compliance with labor requirements, or ensure compliance with environmental laws.
- b. All businesses face possible health and safety inspections, immigration inquiries, corporate tax and employment-related inquiries, and other regulatory inspections and inquiries by the government.

B. Matters related to employees

1. Service of a subpoena on an employee regarding a matter that has nothing to do with the company (for example, divorce, child support, auto accident, or other lawsuit unrelated to the employee's job). The employee could be a party to the suit or action, or simply a witness. The subpoena may require the employee to produce documents, or to appear in person.
2. Execution of search warrant or an arrest warrant for an employee.
3. Garnishment of the wages of an employee.

C. Matters related to a third party

1. The government may request information and records regarding individuals who do business with your company, such as customers, clients, contractors, and suppliers.
2. In most cases, it is prudent to request a subpoena for such records, particularly for records relating to financial information or medical treatment.

III. Be prepared

A. Designate a single contact person to meet with all government visitors

1. All unexpected government regulators, investigators, auditors, and law enforcement officials who call or visit should be referred to a single point of contact in the company (“designated individual”).
 - a. The designated individual may be an in-house attorney, the head of corporate security, or a human resources employee.
 - b. An additional person should be designated as the back-up point person, who will handle inquiries when the designated individual is unavailable or off-site.
2. Appointing a designated individual ensures that the company speaks with a unified voice and permits the company to control the production of documents and dissemination of information in response to the inquiry.

3. The designated individual should decide how to handle the visitor's requests.
4. The designated individual may involve other employees who have particular knowledge about the areas of inquiry.

B. Educate employees about how to “answer the door”

1. Employees must be educated about what they should do when a government agent calls or arrives.
 - a. Educate those most likely to first come in contact with the government agent, such as receptionists and security guards.
 - b. Employees should determine with whom the government agent wants to speak.
 - c. Employees should be cooperative, but provide no information outside the presence of counsel.
 - d. Employees should immediately contact the designated individual responsible for dealing with unexpected contacts from government agents.
2. Inform employees of their rights if they are approached by government agents who want to question that employee.
 - a. Employees are not required to agree to be interviewed; it is solely their decision.
 - b. If an employee agrees to be interviewed, he or she may terminate the interview at any time.

- c. If an employee agrees to be interviewed, he or she must tell the truth. The employee should obtain a copy of any statement he or she signs.
 - d. The employee is entitled to have a lawyer present during the interview. In some instances, the company may have already agreed, or be willing, to pay for the employee's counsel.
- 3. The company must be careful to avoid even the appearance that it discourages employees from talking with government agents.
- 4. Education can be accomplished with a company-wide email or memorandum. A brief description of the company's approach to the issue should be included in the company's employee manual.

IV. Instructions for all employees

A. General considerations

- 1. All employees should be polite and cooperative. Since investigators frequently form an immediate and lasting impression based on the manner in which employees conduct themselves, employees should not be obstructionist or uncooperative.
- 2. No employees other than the designated individual should volunteer information.

3. The company, through its employees, must walk a fine line: making it clear that the company is willing to cooperate and has nothing to hide, while at the same time limiting any information provided to the investigator until the nature of the visit has been established. Even then, all information should be provided by the designated individual.
4. If an employee does not want to answer a question, or is unsure how to respond, he or she should gently deflect the inquiry by telling the investigator he or she will find someone better to respond.
5. Realize that unexpected contacts provide little opportunity to assess the nature, scope, and significance of the visit. This is a good reason to provide information sparingly.

B. What not to do

1. Employees should not respond to any question unless they are sure that their response is complete and accurate.
2. When served with a subpoena for documents, the employee designated to accept service should accept the subpoena politely but not make any statements regarding the company's compliance. Only after the subpoena is reviewed by counsel can the company's position be determined.
3. *NEVER* give the investigators any documents, copies of documents, or other tangible evidence during the initial service of a subpoena or during an interview. While documents produced to a grand jury are afforded legal protections regarding their use, documents given to an agent during an interview might not be subject to those protections.

4. In the case of a search warrant, employees should not speak with the investigator regarding the information sought or answer substantive questions of any kind.
5. Employees should not do anything that could be viewed as interfering in any manner with the search, or as destroying, altering, or removing evidence or documents responsive to the subpoena or warrant.

V. Instructions for the designated company representative

A. Identify all investigators

1. The designated individual must find out who the caller or visitors are and for whom they work. Review the government agent's credentials or business cards and make a copy of them or write down the name, title, employer, business telephone numbers, and business addresses of each agent.
2. Determine with whom the agent has had previous contact at the company, and contact that person to obtain information about those prior contacts.

B. Determine the purpose of the visit

1. Immediately ask the caller or visitor the purpose of the contact.
2. Be wary of the familiar face wearing a different hat. An auditor or investigator who has regular contact with individuals in the company but asks questions about things outside the normal

course of his dealings with the company may be part of an investigation about which the employee is unaware.

3. Be wary of a visitor who says his purpose is “to talk to” or to interview individuals.
 - a. Before serving a subpoena or search warrant, many investigators will ask questions believing they will get the most candid responses before serving the subpoena or warrant.
 - b. A good investigator never forgets seemingly innocuous discussions at the time a subpoena or warrant is served. These discussions typically are memorialized in paperwork prepared by investigators and referred to throughout the course of the investigation. A subsequent statement by a representative of the company that varies from that provided on the day the subpoena or warrant was served will be viewed as an inconsistency.

C. Determine whether the company, an individual employee, or a third party is the focus of the inquiry

1. *Matters involving the company.* Requests for company records or information regarding the company raise more complex issues depending upon the purpose for the visit. Such inquiries may relate to the company’s business operations, its relationships with other companies or individuals, or its relationships with employees.
2. *Matters involving an individual employee.* If the purpose of the visit relates to an individual employee, the major

concerns are the privacy rights of the individual and the disruption of that person's and the company's work. Keep in mind, however, that even what may appear to be a matter involving an individual rather than the company can have implications for the company as well. Typical matters that solely relate to individual employees:

- a. *Requests for medical, financial, and personnel records.* The privacy rights of the individual must be scrupulously protected, and counsel should be consulted before providing any such records.
 - b. *Garnishment of wages.* Garnishment is a remedy for the collection of a debt. Typically, the wages of the debtor, under legal process termed a writ or warrant of attachment, are seized.
 - c. Civil suits involving employees (other than those involving acts committed while acting as an employee).
3. *Matters involving third parties* (including customers, suppliers, contractors, and business partners). It is often unclear at the early stage of such an inquiry whether the government's investigation will also directly or indirectly involve or implicate the company as well.

D. Contact counsel

1. After this basic information is obtained, and before answers are provided to any questions, the company should contact a lawyer who specializes in governmental investigations and describe the inquiry. Of course, if all the agent does is serve a subpoena, the lawyer can be contacted after the agent leaves.

2. Questions posed by government agents should be referred to the lawyer, and, if the lawyer is not on site, the government agent can speak with the lawyer over the phone.
3. Deflection of all questions to counsel should be done in a way that makes it seem routine and in accordance with company policy of deferring all questions from investigators to “the lawyers.”

E. Practical pointers

1. Call the company’s lawyer and describe the situation to him or her. The lawyer may want to talk to the government agent or prosecutor in charge.
2. Do not consent to any search – you may waive the company’s right to contest the legal validity of the search in court. The company should consider whether the circumstances justify the company stating their objection to the search at its outset.
3. Ask for a complete copy of any document the government agent relies upon, to include subpoenas, search warrants, and affidavits supporting any warrant.
4. When executing a search warrant, agents may temporarily detain employees to conduct a security sweep of the search area. Politely object if this detention persists beyond a few minutes, extends beyond the search area, or is unduly coercive.
5. Take detailed notes of the visit during the visit or as soon as the agents leave. Notes should be labeled attorney client privileged-prepared at the direction of counsel. Also, preserve any security video of the visit.

6. Monitor any search carefully, keeping notes that include: the time the search started and was completed; the number of government agents involved, and, if possible, the rooms, areas and documents examined by each.
7. Request copies, or a complete list of, everything removed from the premises by the government agents.

VI. What to do when the government leaves

A. Contact counsel who may conduct an internal investigation

1. Counsel may conduct an internal investigation to determine the scope of the government's inquiry and the facts surrounding the issue, and to debrief those employees interviewed by the government.
2. Counsel should conduct the internal investigation in order to best protect confidential and privileged information.
3. Counsel may prepare a memo to all employees regarding the investigation and employee rights when contacted by the government.

B. Protect the attorney-client and work product privilege

1. All documents generated at the request of counsel should be clearly marked "Privileged and Confidential – Attorney Work Product/Attorney Client Communication."
2. Maintain a separate file for the investigation. Access to files must be limited to attorneys and agents of attorneys to protect any privilege.

C. Responding to a subpoena

1. The manner in which a company responds to a subpoena for documents can have a significant impact on the way in which an agent views the company and the case he may be developing.
2. Involve company counsel immediately.
3. Immediately safeguard all records arguably related to the subject of the subpoena. Take affirmative steps to ensure that computer records, including emails, are protected from inadvertent or routine, scheduled deletion.
4. *Full and complete compliance* with a subpoena is essential; any omission in responding to the subpoena may result in charges of obstruction of justice and could cause the agent to conclude the company is hiding something (which likely would result in the prompt execution of a search warrant).
5. Judicial, grand jury, and administrative subpoenas may require the production of documents that arguably relate to the area of inquiry. Let counsel decide which documents must be produced.

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