

What to Do When the Feds Come Knocking: 5 Steps to Protect Your Company's Interests

By John A. Bourgeois and Ezra S. Gollogly, Kramon & Graham, P.A.



Most businesses won't know that they are under investigation by federal law enforcement until agents arrive in the lobby with a search warrant.

The experience can be confusing, shocking, and even frightening to your employees. Perhaps the agents announce that this is an informal "routine" check. Or maybe they threaten to shut down operations unless you and all of your employees comply with their investigative demands. What do you do in such a situation? Do you permit your employees to speak with the agents? Do you idly stand by as a team of agents rummages through your files and computer systems?

Your response to this situation is critical to managing risk. To best protect your company's interests, establish a plan of action now. Don't wait for the knock on the door. Here are 5 key steps to implement and execute a plan of action so that your company is not caught off-guard.

1. Designate a "response team"

Create a "response team" that is charged with responding to agent inquiries and notifying employees when law enforcement arrives. This team should include a small number of upper managerial employees, e.g., the CEO, in-house counsel, and may include one or more board members, the office manager, security personnel, IT professionals, or other key employee(s) who will have immediate availability. One member of this team should be designated as the point-person.

The response team should be available at all times—either onsite or immediately available by phone. Establish a method of communication that does not rely solely upon email, as federal agents may seize your company's computers.

Your company also should identify and have immediate access to outside counsel who is experienced in white collar criminal defense and familiar with your company's business. The response team's

point-person should immediately contact that counsel upon the arrival of agents.

2. Rehearse your team's reaction

Just as you wouldn't wait until the office is on fire before learning where the emergency exit is located, don't wait until the agents arrive before rehearsing the team's response.

Ensure that the response team knows how to react in such a situation. Commit your plan to writing, circulate it to the designated team, and hold a training session on how to react should the situation ever arise.

3. Have a company-wide notification system in place

You should have in place a mechanism to alert all staff and employees of the agents' presence. Again, this should not rely solely upon email, as federal agents may immediately seize computers. Your receptionist should be instructed to immediately call the response team's point-person upon the arrival of agents. You may want to consider having in place a "phone tree" so that key employees are quickly notified.

The response team's point-person should have a pre-drafted email or text message that can be sent to all employees to notify them of the agents' presence, remind them of the plan, and instruct all non-essential employees who have not yet arrived at the office to stay home.

Also, the point-person should immediately contact outside counsel and the company's insurer. (Some liability policies may defray the legal costs associated with responding to an investigation.)

4. Know if, how, and when to communicate with the investigator

All contact with the agents should be through counsel. Counsel can advise you and your employees regarding the nature and scope of the investigation, and the

risks and benefits of speaking with agents. Also, counsel's presence can serve as a check on the accuracy of agents' reports on the substance of any interviews.

However, it may not be possible to avoid contact until counsel arrives. In that case, all inquiries should be directed to the response team's point-person. If your company has no designated point-person, or such person is not available, direct the agents to speak to the highest-level employee present.

Advise the lead agent as soon as possible that the company and its employees would like to cooperate but have been advised by counsel that agents should not attempt to speak with or interview anyone without a lawyer present. The agent should be told that counsel will facilitate any requests for interviews. Provide the lead agent with counsel's name and phone number.

Employees should be advised that they have the right to have counsel present during any interview to which they agree to submit. Employees should also be advised that they may be contacted by agents offsite or at home. In either case, your employees should be reminded that it would be in their best interest to seek counsel before speaking with agents, and should advise any agents who may request interviews that the request should be directed to counsel. Employees should be encouraged to immediately inform you of any such contacts.

Although they are free to do so, a search warrant does not mean that anybody is required to speak with an agent, answer any questions, or agree to an interview. Agents may try to intimidate you to get you to agree to an interview, but you are not required to speak to them. In the event that counsel is not present, the best course is for the response team's point person to respond as follows to the investigator: "I would like to cooperate with your investigation, but my counsel is not present to advise me. Please contact my counsel and I

continued on page 10

continued from page 9

am sure that my counsel will make appropriate arrangements for my cooperation.” Any employees who are asked to agree to an interview should, provided that they agree, respond in a similar fashion.

If anybody decides to speak to an agent, with or without counsel present, they should understand that they have the right to stop speaking to the agent at any time. It is important to never lie to the agents but know that anything said can be used against them or the company in court, whether an informal comment to an agent or another employee or part of a formal interview.

5. Monitor and control access to your premises

If the agents do not have a warrant, you should deny access to office premises and records. The agents should be referred to the company’s counsel.

If you are presented with a search warrant, don’t obstruct the agents’ access to your premises. However, be sure to monitor the search to ensure it is in compliance with the terms of the search warrant.

By federal law, you are entitled to copy of the warrant. Ensure there is a person on

the response team who is designated to review the warrant. That person should review the warrant before the agents begin their search to ensure that it accurately reflects the company’s address, describes the areas to be searched and items to be seized, and is signed by a judge or magistrate.

If agents attempt to enter an area or seize an item not authorized by the warrant, object to the search of that area or seizure of that item and document your objection.

During the search, take notes describing the areas searched and the items seized.

During the search, take notes of everything the agents say—whether to you or in your presence to somebody else. Include in your notes the identities of all agents present, all employees present and, more particularly, all employees with whom the agents speak, either informally or during an interview. After the search, all such employees should be debriefed by counsel, while their recollections are fresh.

None of the above steps can immunize your company from the consequences of unlawful conduct that may be alleged against the company or its employees. They are, however, necessary steps to

manage the company’s risk and respond appropriately to an unforeseen investigation. Take this advice to heart and hope that you will never need it.

A principal at Kramon & Graham, John Bourgeois leads the firm’s Criminal Defense practice. He is a versatile trial lawyer with extensive jury-trial experience in a variety of civil and criminal cases. He can be reached at jbougeois@kg-law.com.



Ezra Gollogly, also a principal at Kramon & Graham, is a member of the firm’s Criminal Defense, Commercial Litigation, and Insurance groups. He can be reached at egollogly@kg-law.com.



The authors wish to thank summer associate Catherine Florea for her contribution to this article.