

# HLA Special Alert

2007

## What to Do When the Investigator Arrives

**Y**ou are in your office when a receptionist escorts in a clean-cut young man or woman wearing a windbreaker. As the visitor begins to explain his or her business, you look more closely at the blue jacket and see that it says "FBI" or perhaps simply, "POLICE." You still don't really understand what the government agent is saying, but you do know that this day is going to be interesting—indeed, probably a little too interesting.

Mountains of whistleblower lawsuits and the wide array of federal and state government resources responding to allegations of health care fraud have placed health care providers large and small (and good and bad) in the proverbial bulls-eye. It is well-known that recent years have brought the above scenario to many health care providers, including a large number who would have never expected a visit from a government agent.

Visits by government agents are not social calls, and thus courtesy is secondary to an informed decision about when and by what route to respond to an investigator's questions or provide materials the agent is seeking. It may indeed be in your organization's interest to cooperate truthfully and completely with investigators, but we urge that this be done in the manner that best safeguards your organization's rights under the laws and **Constitution** of the United States.

What follow are some basic recommendations for organizations in the event of a law enforcement visit:

1. Before a visit even occurs:
  - a. Designate one or more upper managerial employees (e.g. – general counsel, compliance officer, administrator) who will have the responsibility to respond to law enforcement inquiries.
  - b. The selection of the designated employees should be such as will ensure immediate availability of such an employee at any and all times.
  - c. Designated employees should be intimately familiar with the contents of this memorandum and any additional procedures that your organization may establish to respond to law enforcement inquiries.
  - d. Establish a process to secure the **immediate (minutes, not days)** assistance of competent **counsel, who specializes in responding to government and law enforcement inquiries and investigations.**
  - e. The steps in this section are particularly critical if you have information that an investigation involving your organization is already under way.
2. When the investigator arrives:
  - a. Try to relax. If they were coming to arrest somebody, they would have done it already.
  - b. Request appropriate identification from the investigator.
  - c. If you are not the employee designated to respond to law enforcement inquiries, the investigator should be directed to that person. If your organization has not designated a specific employee to respond to law enforcement inquiries, you may wish to direct the investigator to the most senior managerial employee who is readily available (e.g. – office manager, administrator, etc.)

**White Collar  
Criminal Defense Group**

Martha P. Rogers  
202-408-8400  
Washington, D.C.

Ray M. Shepard  
410-685-1120  
Baltimore, MD

- d. It is strongly recommended that you **immediately** contact competent **counsel who handles** government enforcement and **investigations**.
  - e. It is strongly recommended that any access afforded to the investigator to either your premises or your records be coordinated through your counsel. This will not be possible if the investigator's entry onto your premises is pursuant to a court-authorized search warrant. (See, *All You Need to Know About Search Warrants (Although You Hope You Never Need to Know)*.)
  - f. If you do **provide** access to your premises or documents before coordinating with counsel, we recommend that, to the extent feasible, **that** you make note of the following:
    - i. Any documents requested by the investigator;
    - ii. Any individuals approached or asked questions by the investigator;
    - iii. Any locations accessed by the investigator; **and**
    - iv. Any and all statements and observations made by the investigator;
    - v. The above information will be useful in assessing the basic nature of the investigation and your organization's potential exposure to enforcement action.
3. If an investigator wishes to speak to you or another employee, we suggest that you consider the following:
- a. Government investigators have the right to contact you and to request an interview. Such contacts might occur at your place of business or they might occur during off-hours at home or otherwise off premises.
  - b. It is strongly recommended that you immediately contact competent legal counsel before speaking with the agent. Your organization may be able to assist you in obtaining counsel. You always have the right to postpone an interview. This applies whether or not you wish to speak to the investigator.
  - c. You have the right to speak with government investigators, as well as the right to decline to be interviewed. You also have the right to have counsel present during any interview, to confer with counsel at any time, and to terminate an interview at any time.
  - d. Remember that investigators do not possess subpoena power or have other legal authority to compel you to speak with them or to submit to an interview. It is improper for investigators to resort to threats or intimidation, whether expressed or implied, in order to obtain an interview.
  - e. Any statements that you make to a government investigator may have significant legal consequences. If you are prosecuted or sued by the government, the statements you make can be used against you or your employer in court.
  - f. If you choose to submit to an interview, tell the truth. State as fact only those matters you know to be fact; do not guess or speculate.
  - g. If you do speak to the government investigator, take time after the interview to make complete and thorough notes about everything that occurred (*e.g.*, any statements the investigator made, the questions asked, and the answers you gave). This information will be invaluable to your counsel in determining the subject matter of the investigation.
  - h. If you decline to speak with the government investigator, he or she may present you with a subpoena to appear before a grand jury. This does not mean that you have done something wrong. It simply means that you **must** appear before a grand jury that is investigating the same allegations as those being pursued by the investigator.

If you are served with a subpoena commanding your personal appearance before a grand jury, it is strongly urged that you contact competent legal counsel for advice concerning your rights and responsibilities.

Ober, Kaler, Grimes & Shriver  
Attorneys at Law

Maryland  
120 East Baltimore Street  
Baltimore, Maryland 21202  
410-685-1120

Washington, D.C.  
1401 H Street, NW  
Washington, D.C. 20005  
202-408-8400

Virginia  
254 North Washington Street  
Falls Church, Virginia 22046  
703-237-0126

www.ober.com