

Health Law Bulletin

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WHAT TO DO WHEN IT'S MORE SERIOUS THAN AN AUDIT

Although every provider hopes it never happens, you may be the subject of a government investigation at some point. The arrival of investigators is more serious and creates even more confusion and concern than the arrival of auditors. We have prepared a Compliance Bulletin that we recommend you share with your employees regarding what to do when investigators arrive and particularly what to do when the investigators have a search warrant. You should decide whether all staff should receive this bulletin or perhaps only managerial staff. Either way, you should be certain that there is always someone on site who is familiar with this bulletin and its contents.

There are a few things you should keep in mind in using the attached Compliance Bulletin:

- Fill in the name of your organization where the bulletin says “EMPLOYER.” Consider who you want to be the contact person and put that person’s name where the bulletin says “CONTACT.” You may want more than one contact person.
- Although you can request that employees inform you if they are contacted by investigators and you can ask that the employee request the presence of your legal counsel at the interview, you should not *require* employees to do this. If you require this, you run the risk of a criminal charge of obstruction of justice on top of whatever other problems you may be facing.
 - If the investigators have a search warrant, whoever the contact person is should call your legal counsel immediately.
 - If the investigators have a search warrant, you should consider sending as many employees home as possible. Investigators will attempt to get information from employees while they execute their search. It is not fair to your employees, and certainly not to your advantage, for investigators to be questioning employees under such stressful, intimidating, and often chaotic circumstances. If the employees are not on site, the investigators cannot get this information this way.
 - You should be keeping all privileged communications between you and your attorneys in a separate file, clearly marked as ATTORNEY-CLIENT COMMUNICATIONS, so that you can identify those documents and request that the agents wait until your attorneys arrive before doing anything with those documents. If the investigators take privileged documents, make a note that they have done so.
 - Remember that you are not required to assist the investigators in their search, nor should you obstruct their search.

- Agents are required to leave an inventory of items seized. However, the inventory is often very general and fairly useless. Try to keep up with what is being taken and make your own list.

Remember that a search warrant likely means that the government believes a crime has occurred. Execution of a search warrant is much more serious than an audit. When faced with a search warrant, you should contact your attorney immediately.

COMPLIANCE BULLETIN

GUIDELINES FOR EMPLOYEES WHO ARE CONTACTED BY GOVERNMENT INVESTIGATORS

From time to time, EMPLOYER is the subject of Medicaid or Medicare audits or requests for information from government investigators.

It is the policy of EMPLOYER to fully cooperate with government investigators, and EMPLOYER expects its employees to extend the same cooperation. However, it is important that all employees be aware of both their individual rights and privileges as well as those of EMPLOYER during such an investigation.

In the event that you are contacted by a federal or state investigator, you should remember the following:

- You are not required to answer any questions asked by the investigator regardless of what he or she may say, or what assurances may be given you concerning information that you disclose. You may also stop the interview at any time you feel that you do not wish to continue. You are not obligated to continue the interview just because you have answered some prior questions.
- You have the right to talk to a lawyer before answering any questions, and to have that lawyer present when you are interviewed. Obtaining an attorney is simply a wise precaution – it does not mean you have done anything wrong or have anything to hide – and you should not allow investigators to suggest otherwise.
- If a federal or state investigator attempts to interview you at home (which is frequently done to make you feel isolated and/or overwhelmed), you have the right to request that an appointment be scheduled at a convenient time on EMPLOYER premises during regular working hours, or at an alternate time and place of your choosing. EMPLOYER will make an office available to for this purpose and, if you desire, will have EMPLOYER'S attorney or other representative attend the interview with you.
- If you are interviewed, obtain proper identification from the investigator before answering any questions. We recommend that you do not answer questions asked of you over the telephone.
- If you are interviewed, you should answer all questions accurately and truthfully. Tell the truth at all times. Do not guess at answers. If you do not know an answer, say that you do not know. Investigators may try to encourage you to guess by asking questions using the words “could it be,” “would you expect,” “what’s your feeling

about?” Do not offer estimates or guesses if you do not know the answer.

- We recommend that you do not sign a written statement unless you are given a copy. Before signing, make sure that there is a copy machine nearby so that the investigator does not leave without giving you a copy; promises to send you one later rarely are fulfilled. Read the statement carefully before signing it to make sure it reflects exactly what you said. If the statement is wrong, make corrections to it before you sign it.
- Do not provide any EMPLOYER’S documents to the investigator, unless first authorized to make such release by EMPLOYER or its legal counsel.
- If you have your own lawyer, you should be guided by his or her advice. If you do not have your own lawyer but would like to consult with one, EMPLOYER may be able to recommend qualified counsel and, in appropriate circumstances, pay for counsel to represent you.
- EMPLOYER requests that you contact NAME OF CONTACT if you are asked to participate in an interview or contacted by an investigator.

ADDITIONAL GUIDELINES IF THE INVESTIGATORS HAVE A SEARCH WARRANT

Sometimes, investigators will have a search warrant that authorizes them to obtain certain records, documents, or computer information. In these cases, you should take additional steps when the investigators arrive.

- Immediately notify NAME OF CONTACT to inform them that agents have arrived with a search warrant. She/he will notify EMPLOYER’S attorneys.
- If CONTACT does not arrive before the investigators begin their search, ask the investigators to postpone their search until your attorneys can be present. The investigators are not required to wait and probably will not, but an effort should be made to obtain this courtesy.
- If the investigators will not wait for your attorneys or for CONTACT, review the search warrant to see what area the warrant allows the investigators to search and what documents it allows them to seize. Also ask for the affidavit (the sworn statement of allegations used to provide “reasonable cause”) in support of the search warrant. Again, the investigators may not give you the affidavit, but you should ask for it anyway.
- Do not consent to a search of any area or for any documents other than those named in the search warrant.
- You may be sent home by EMPLOYER. If not, you should know that it is your decision

whether you speak to the investigators, and you do not have to consent to be interviewed.

- Do not assist the investigators in their search unless directed to do so by a member of EMPLOYER management. On the other hand, do not interfere with the investigators' search, even though it may involve forced entry of certain areas and may include a search of individual workspaces.
- If the investigators are seizing electronic records, request that you be allowed to copy the files to a CD for the investigator rather than the investigator removing your computer. If the investigator insists on removing the computer, ask if you can copy the files to a CD to keep for our use.