

HEALTH CARE
ATTORNEYS:

Robert J. Heath, Chair
Burton A. Wagner
Mary H. Michal
Tracey L. Klein
Larri J. Broomfield
Linda Dawson
James A. Pellegrini
Heather L. Fields
Meg S. L. Pekarske
Tiffany L. Roepsch
Matthew K. McManus
Brandon B. Graef
Amy L. Jerdee

Headlines in Health Law

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UNEXPECTED GOVERNMENT INVESTIGATIONS: WHAT TO DO WHEN THE GOVERNMENT VISITS YOUR HEALTH CARE ORGANIZATION

An unexpected visit to your health care organization from state or federal government agents or surveyors can be an intimidating and nerve-racking experience. Unfortunately, the chances of going through such an experience have never been greater for health care organizations. Government investigations may be initiated as a result of an intermediary or carrier audit, random audits by various government agencies, a competitor complaint, a patient complaint regarding improper billing or treatment, or a whistleblower complaint by a current employee or a disgruntled former employee. Regardless of how an investigation is initiated, the agent representing the federal or state agency is usually attempting to gather evidence that will bolster a case against the organization. Therefore, the manner in which an organization's personnel react to an agent's initial investigation may have a significant impact on an organization's future position in the investigation. Following the guidelines below may help to avoid costly mistakes.

- Create a Written Policy Addressing Government Investigations. Implementing a clear, simple response policy is critical to avoiding damaging mistakes during an investigation. It is important to ensure that employees are familiar with such a policy prior to any unexpected investigations.
- Gather and Record Essential Preliminary Information. Ask for and verify each agent's identification and agency affiliation. Obtain their business cards or have someone write down their names, titles and phone numbers. Identify the agent in charge and ask him or her what is being sought and the nature of the investigation or any alleged violations. Try to communicate through the agent in charge.
- Ask For a Copy of the Subpoena, Warrant or Other Authorizing Document. Review the subpoena or search warrant carefully and record key information. Ask if an affidavit was submitted to a court or some other official body as a prerequisite to obtain the authorization and request a copy of any such affidavit. Remember to verify the scope of the subpoena or search warrant because the agent's search or seizure is limited to such scope.

1000 North Water Street
P.O. Box 2965
Milwaukee, Wisconsin
53201-2965
414-298-1000
800-553-6215

22 East Mifflin Street
P.O. Box 2018
Madison, Wisconsin
53701-2018
608-229-2200
800-728-6239

W233 N2080
Ridgeview Parkway
P.O. Box 2265
Waukesha, Wisconsin
53187-2265
262-951-4500
800-928-5529

2215 Perrygreen Way
Rockford, Illinois
61107
815-633-5300
800-840-542

Absent a subpoena or search warrant, agents are not entitled to look at, or take, medical records or other patient-identifiable information or to seize property. If the agents do not have a search warrant, but ask you or others to "consent" to a search or provide access to a file or other item, politely but clearly refuse. Tell them you are not free to consent without first consulting with legal counsel and make a record of your refusal. Warrantless searches such as inspections or audits are requests only. Although it may be in the best interest of an organization to cooperate with agents under such circumstances, it is still important that legal counsel review any such request to ensure that it complies with applicable regulations and to determine whether the scope of the request is properly limited.

- Contact Legal Counsel. Call your attorney as soon as possible. You should contact an attorney that understands health law issues and government investigations. Agents will usually be unwilling to wait for your attorney to arrive prior to their commencing an investigation. They usually begin the investigation immediately, so it is imperative to know what to do when you have no legal aid on the premises.
- Remember that Agents May be Polite But They Are Not Your Friends. While agents may be polite and professional, do not be lulled into a false sense of security. The agents are probably there to develop evidence against your organization. Remember that there is no such thing as an informal conversation or off-the record comment in such circumstances.
- Do Not Impede or Obstruct the Search. Do not in any way impede their ability to search and do not hide, destroy or alter documents. Such action may constitute obstruction of justice.
- Designate One Person to Interact with the Agents. Your selected person (it may be you) should be responsible for keeping an eye on everything and interacting with the agents in charge of conducting the investigation. Depending on the scope of the investigation, you may need more than one person to monitor the investigation. However, one person should be in charge of the overall coordination. The person that is going to be in charge should introduce himself or herself to the agents, especially the agent in charge, and request that all questions or comments from the agents be directed to that person.
- Monitor the Agents and Record What They Examine and Take. The person(s) that monitor the investigation should take note of what the agents do. Notes should be made recording which agents search what areas. To the extent it is possible, a record of what they examined and/or carried away should be created. If seized material is important for the operation of the organization, ask to make copies of the originals before the agents depart. Ask to make a backup of any seized electronically stored information.

Documents that are protected by attorney-client privilege or other protection should have been organized and stored in advance in a manner designated to alert investigators to their special nature.

- Advise Employees Concerning Their Rights Should the Agents Attempt to Interview Them. Remind your employees that they have the right to not talk with the agents. It is important to ensure that employees are aware of this prior to any

unexpected investigations. However, choose your words carefully because it is dangerous to tell your employees not to talk to the agents, or to encourage them to take that stance, as the government may consider such actions to be evidence of obstruction of justice. That said, make clear to your personnel that such decisions are matters of personal choice and make sure your people know that if they do decide to speak to the agents, they do not have to do so at that moment. Rather, they have the right to have an attorney and/or representative of your organization present.

Ideally, statements made to agents should be objective and accurate and not conjecture. To the extent possible, consider sending all nonessential personnel home until the investigators have completed their investigation and vacated the premises. This will reduce the danger of inappropriate or dangerous conversation.

- Obtain A Detailed Receipt of Items Seized and, Other Than Such A Receipt, Do Not Sign Any Statement Without Advice From Legal Counsel. Sometimes the government takes vague, incomplete and frequently cryptic notes of what they have seized, present you with a receipt or voucher tied to those notes, and ask that you sign their receipt acknowledging the accuracy of their notes. You are not obligated to sign the receipt and should not do so unless you are certain it is complete and accurate. Once you have verified the completeness and accuracy of the list, you may sign the receipt. However, never sign any other statements without first talking to legal counsel.
- Do Not Speak to the Media Without Preparing a Statement With Counsel. Inform your personnel that they are not to speak to the press about the investigation or any related matters. Bad press can hurt your organization's reputation long after your problems with the government have subsided. All inquiries from the press should be directed to a specified person. Further, legal counsel should review statements of any kind prior to being released to the media.

For more information or individualized consultation regarding government investigations, please contact a member of Reinhart's Health Care Department at 1-800-553-6215. You may also visit our website at: reinhartlaw.com.

This *Headlines in Health Law* provides general information about health care issues. It should not be construed as legal advice or legal opinion. Readers should seek counsel concerning specific fact situations confronting them.

