

Latham & Watkins Litigation Department

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## What To Do When You Are Served With a Search Warrant

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In recent years, state and federal law enforcement agencies continue to increase their investigation and prosecution of white collar crime, particularly relating to the securities and healthcare industries. The search warrant has become a regular method used by authorities to obtain evidence. Law enforcement officers executing a warrant typically arrive at corporate offices with no prior notice, armed with a search warrant that entitles them to seize original business records, including computer records.

Despite the possibility of having law enforcement officers arrive in the administrative suite with search warrant in hand, most business executives and officers lack the training and preparation to deal effectively with a search warrant. As a result, important opportunities to minimize potential criminal or civil liability are missed. In fact, the most valuable evidence gathered during many searches is obtained as a result of the unknowing waiver of important rights by managers and employees. Unless immediately asserted when a search warrant is presented, these rights can be permanently waived and can have a lasting impact on the disposition of the matter.

The purpose of this *Client Alert* is to inform our clients of the basic principles that should govern their preparation for, and response to, the presentation of a search warrant at any of their facilities.

In addition, at the end of this *Alert* is a Search Warrant Reference Guide that identifies the immediate actions that may be appropriate when a search warrant is presented at a facility, as well as an Interview Guide that sets forth precisely what corporate officers should tell their employees concerning the employees' right to grant, or not to grant, an interview to law enforcement officers.

## Misconceptions About Search Warrants

### Misconceptions exist concerning the execution of search warrants

What is a search warrant? A search warrant issued by a judicial officer—a judge or magistrate—means that the judicial officer has found probable cause to believe that a crime has been committed and that evidence of the crime will be found within the premises to be searched. This finding is based upon a written affidavit setting forth the evidence alleged to support issuance of the warrant. The affidavit is almost always sealed by the court when the warrant is issued, and will rarely be unsealed until and unless a criminal prosecution actually takes place. Federal and state authorities may also request access to facility records pursuant to their administrative authorities, although this does not involve use of a search warrant.

## **Government Interviews**

There is no obligation to talk to a law enforcement officer who is serving a search warrant. The warrant creates a right to search for physical evidence, such as documents and objects, not to interrogate subjects. You must, however, be very careful in communicating such information to your employees. It is improper and may be illegal to instruct or attempt to influence your employees not to talk to government agents.

The enclosed Interview Guide specifies how corporate officers should educate their employees on this sensitive subject. It is preferable to have experienced outside counsel provide such education in light of the risks involved.

## **Miranda warnings**

If corporate officers or employees do grant the searching officers an interview, all statements may later be used against the speaker, and possibly the corporation, regardless of whether Miranda warnings are given. Unless you are legally in custody, the requirements of Miranda are irrelevant to the admissibility of your statements.

## **Volunteering information**

Many employers and managers assume that a search warrant is based upon a "misunderstanding" that can be "cleared up" through explanation at the time the warrant is presented for execution. On the contrary, there is rarely anything to be gained by making a statement to searching officers. At the time a warrant is executed, company officials are generally unaware of the subject of the investigation, or of possible witnesses (including individuals within the corporation or facility) and evidence against them or the company. Whatever is volunteered cannot be retracted or modified, regardless of whether or not it is tape-recorded. The prosecutor may attempt to use any errors or misstatements to infer criminal intent on the part of the speaker, or even to initiate an investigation and prosecution for obstruction of justice.

## **Presence of Counsel**

In California, counsel for a corporation has a right to be present during interviews of corporate employees. Immediately upon the execution of the warrant, the Company should inform the government agents that the company wishes counsel to be present at the interviews and that no interview should occur without corporate counsel present. It has become standard practice for corporations to issue such requests, and thus the request will not necessarily be viewed as a failure by the Company to cooperate.

## **Training and Preparation**

Every company can help prepare itself for the execution of a search warrant by doing the following:

- Designate a senior manager, perhaps the corporate compliance officer, as the regulatory affairs (crisis) manager. This individual, and other appropriate company officials, should carefully review this *Client Alert*, and should be responsible for coordinating a facility's response to a search warrant. The designated officer(s) should also be instructed in advance to contact an attorney immediately should a search warrant be presented at the facility. There is no substitute for having an attorney experienced in criminal law matters respond to the premises, or speak with the searching officers by telephone, in order to appropriately assert a provider's rights without the negative implications that may follow if company personnel do so.
- Keep privileged documents (e.g., attorney-client) segregated and clearly marked as such. Otherwise, they are likely to be seized along with other non-privileged documents.

- Keep, and periodically update, a duplicate set of any essential business records at an off-site location. Searching officers will take original documents, copies of which may not be made available during the pendency of the investigation, which can last many months.
- As part of your compliance training and education program, include at least a short segment on search warrants so that all corporate officers know what to expect if the unexpected happens.

## **Conclusion**

It is important to identify in advance the specific steps that may be appropriate when confronted with a search warrant at your facility, and what it is permissible to inform your employees concerning requests from law enforcement for interviews. Please review the enclosed Search Warrant Reference Guide and Interview Guide and establish your company's plan before you are faced with this situation.

## **Search Warrant Reference Guide**

1. Identify the lead officer or prosecutor. Ask to see their credentials, and to be provided with their business card and a copy of the search warrant.
2. Request that as a courtesy the officers delay initiating their search in order for you to contact counsel. Contact the Latham & Watkins lawyer you normally consult or one of the attorneys listed on the back page.
3. Request that corporate counsel be present during any interviews of corporate employees.
4. If you are asked to consent to any aspect of the search, discuss the matter with outside counsel before making any decision. Outside counsel will very likely advise you not to consent to the search. The Company has no obligation to consent to any aspect of the search. Agents are authorized to conduct a search only if they have a warrant or if the party consents to the search. Thus, Agents often seek consent as a backup in case the search warrant is later found to be defective. In some instances, Agents may ask for consent in order to expand the search beyond the scope permitted by the search warrant. The Company does not need to decide on the spot whether to produce documents voluntarily to the government. After the search is complete, the Company can always agree to cooperate and voluntarily to provide any documents that are requested.
5. Ask your outside counsel to instruct your employees of their rights and obligations by reading from the Latham & Watkins' Interview Guide.
6. Ask for the warrant and affidavit. Review the warrant carefully to identify the precise premises to be searched. The officers are not entitled to search any areas not specified in the warrant. If they do, inform the lead officer of your objection and take detailed notes (or photographs) of the officers' improper conduct.
7. You may send non-essential employees home. (Otherwise, it is likely the authorities will seek to interview key employees during the search.) Instruct designated employees to observe the search and take notes concerning what is searched and seized.
8. During the search, you will be asked where certain items can be found. Write down all such questions—they contain valuable information about the government's prior sources of information and possible investigative focus.
9. You are entitled to an inventory of all items seized. Request as detailed an inventory as practical.

## Interview Guide

When law enforcement officers serve a search warrant on a facility, they normally will seek to interview corporate officers and employees to gather information for use in their investigation. Corporate officers and employees should be advised as follows under these circumstances. It is recommended that you read this advisement verbatim, or distribute it, to all employees present at the search location.

1. As you know, the office is being searched by law enforcement officers. I would like to take a moment to inform you of your rights and obligations.
2. First, do not obstruct the search. The officers have a legal right to search the premises and to seize what is designated in the warrant as evidence.
3. The investigating officers may ask you to grant them an interview. You are free to do so, but you are under no legal obligation to grant them an interview. The search warrant entitles them to search the premises. It does not entitle them to interview any person. Company lawyers have requested, and have a right, to be present at any interview with a company employee.
4. If you do grant an interview to the investigating officers, you should be aware that anything you say can be used against you in a criminal prosecution or in a civil enforcement proceeding. This is true regardless of whether the officers give you any so-called Miranda warnings. If you do grant the interview please inform the agents of the company's request for its lawyers to be present at any interview.

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