

Responding to Subpoenas and Government Investigations of Employees

By Tera Schreiber and Karen Sutherland

Legal Background

In the wake of the 9/11 terrorist attacks, Congress has passed an anti-terrorism law that allows the FBI and CIA unprecedented power. In addition, these and other agencies are motivated to investigate terrorism domestically like never before. This new wave of investigation could directly affect you and your employees. Investigators may stop by your office and ask to look at records or speak with people, or you could receive a subpoena. Either way, employers need to be aware of potential issues relating to compliance with requests for information.

If a law enforcement officer comes to your office and asks to look at records, you have no obligation to provide access to any records without a subpoena or court order from a body that has jurisdiction over you. In fact, in some cases, providing information voluntarily could result in liability to the employee whose information is sought because of the employee's right to privacy or other applicable law, such as the Americans with Disabilities Act, which protects medical information from disclosure, or the laws regarding libel and slander. In Washington State, the state Constitution is broader in its right of privacy than federal law; the same may be true in other states.

By way of example, in some circumstances, a government entity could be liable for disclosing medical information, employee addresses and phone numbers, names of family members of employees, employee financial information, and Social Security numbers. These privacy rights apply not only to documents sought for criminal investigations, but to requests for information for civil proceedings, such as for background checks, lawsuits or divorce proceedings.

Sometimes an employer will receive a subpoena to produce documents, as opposed to having law enforcement agents or personnel from some other agency personally appear and make a request for information. Although a subpoena may look very official, employers need to be aware that there are threshold procedural requirements that must be met before a subpoena is valid and enforceable. For example, in Washington State courts, the subpoena must require appearance in the county where the entity being subpoenaed resides, works or transacts business, or in the county where the entity being subpoenaed was served. This is important because sometimes subpoenas are given to employers asking them to deliver documents to a distant county, or even to another state. These subpoenas are not valid.

In addition, a subpoena must be served in person by a suitable person over 18 years of age. This requirement is important because sometimes subpoenas are mailed or faxed to an employer instead of being personally served, which is not valid service. Also, the subpoena must have some connection to a legal proceeding, so it should include a cause number or some other indication of who the parties are and who issued the subpoena.

Besides the possibility of a lawsuit by an employee for wrongfully releasing information, there are other issues to consider before providing information in response to a subpoena or other request. For example, sometimes blanket compliance with a subpoena can be harmful to the employer's business or organization. The Uniform Trade Secrets Act allows a business to protect

its trade secrets from disclosure, even when a legitimate subpoena has been issued. These secrets and other confidential information can be protected through a protective order.

Practical Guidelines

There are some steps that employers can take to protect themselves and their records:

- Periodically check your records to be sure that there is nothing in them that does not belong there. Do not, however, start throwing away old or inappropriate records after you have received a subpoena or request for the records.
- If you have policies governing how long certain records are maintained, follow those policies.
- Keep medical records and other medical information in a separate file, as required by the Americans with Disabilities Act (ADA).
- When in doubt about whether and how to comply with investigators' requests and/or subpoenas regarding an employee's records, you would be best served by contacting an attorney who has experience with subpoenas and employment law matters.
- An attorney can appear for you, file an objection to the subpoena and protect your rights if the subpoena was improperly issued or served, or if you cannot comply with a subpoena, or feel that you or your organization will be harmed through compliance.
- It is important that you contact an attorney right away upon receipt of a subpoena or any other legal process. If you fail to object within the time allowed by the court rules, you may lose that option, along with any protections you might be entitled to receive. In addition, failure to comply with or object to a subpoena may subject you to contempt proceedings.

If you have any questions about subpoenas or investigations, please feel free to contact one of the employment law attorneys at Ogden Murphy Wallace, P.L.L.C.

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