

### Inside this Issue ...

**SEARCH AND SEIZURE:**

What to do when federal agents arrive at a company facility with a search warrant.

(See page 8 for an **emergency checklist**.)

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## An Emergency Guide to Federal Search Warrants



The manager of one of your company facilities has just called you in a panic. Armed federal agents have entered the premises with a search warrant. They have herded employees into the cafeteria and are attempting to interview several of them. They are carting off dozens of boxes of documents and copying files from computers. And they have threatened the manager with arrest and prosecution if he interferes. What should you do?

Search warrants are an established law enforcement tool that is increasingly being used in federal investigations of white collar offenses. Search warrants usually involve surprise, the use or potential use of force, and the unavailability of defense attorneys knowledgeable about the rights of companies and individuals who find themselves confronted by federal agents brandishing a warrant. No company is immune from such an experience, particularly in light of the ever-expanding reach of federal criminal laws and the increasing aggressiveness of federal law enforcement agencies in white collar cases.

The following guide is designed to assist counsel who find themselves in such a situation. An emergency checklist is included at the end of this article.



## The Basics Of Federal Search Warrants

A federal search warrant must be issued:

- By a federal magistrate judge;
- Within the federal district where the property to be seized is located at the time the warrant is issued;
- At the request of a federal law enforcement officer or attorney for the government;
- Upon affidavit or sworn oral statement establishing probable cause to believe that a crime has been committed and the evidence of that crime is located at the place specified in the warrant.<sup>1</sup>

The warrant must identify with particularity:

- The place to be searched;
- The property to be seized.<sup>2</sup>

The warrant permits a law enforcement officer to search for and seize property:

- That constitutes evidence of the commission of a crime, contraband, or property that has

been or may be used to commit a crime;<sup>3</sup>

- Within a specified period not to exceed 10 days from the date of issuance;<sup>4</sup>
- During the daytime (i.e., 6:00 a.m. to 10:00 p.m. local time), unless specifically authorized for nighttime search;<sup>5</sup>
- With force, including breaking into the facility, internal areas of the facility, and anything within the facility, e.g., safe, filing cabinet, desk drawers, after giving notice of authority and purpose and being refused admittance (if someone is present).<sup>6</sup>

## What To Do ... And What Not To Do

Listed below are the common steps that should, and should not, be taken when dealing with the execution of a search warrant. These items are listed roughly in order of priority and are summarized in an emergency checklist at the end of this article.

- Do not attempt to prevent the search from taking place or obstruct the agents executing the warrant. Employees should be instructed

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1 See Fed. R. Crim. P. 41(b) & (d). Rule 41 also allows state judges to issue warrants if a federal magistrate judge is not reasonably available. Fed. R. Crim. P. 41(b)(1). In terrorism investigations, a warrant may be issued by any magistrate judge regardless of whether the person or property sought is located in the same judicial district, as long as activities related to the terrorism occurred within the magistrate's district. Fed. R. Crim. P. 41(b)(3).

2 Fed. R. Crim. P. 41(e)(2); U.S. Const. amend IV. The Fourth Amendment extends to both individuals and corporations. See *See v. Seattle*, 387 U.S. 541, 545-46 (1967).

3 Fed. R. Crim. P. 41(c).

4 Fed. R. Crim. P. 41(e)(2)(A).

5 Fed. R. Crim. P. 41(e)(2)(B) & (a)(2)(B).

6 See 18 U.S.C. § 3109. Generally, agents must follow this "knock and announce" rule at the outset of the search. See *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995). However, the "knock and announce" rule need not be followed when agents have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

In addition, the government may obtain "sneak and peak" or "surreptitious" search warrants, which allow searches without notification to anyone at the time of the search. The circumstances under which such warrants may be obtained were significantly expanded by legislation passed in the wake of September 11th. See USA PATRIOT Act § 213 (amending 18 U.S.C. § 3103a). However, notification must follow within a reasonable time period, and at least two circuits have limited this period to seven days, "except upon a strong showing of necessity." *United States v. Pangurn*, 983 F.2d 449, 453-454 (2d Cir. 1993) (quoting *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986)).

likewise. Such actions can result in criminal sanctions.<sup>7</sup> In addition, agents executing a search warrant are authorized to use force.<sup>8</sup>

- Identify and meet with the lead agent as soon as possible. It is also helpful to obtain the business cards, or at least the names and affiliations, of the agents involved in the search, as well as the name of and contact information for the Assistant United States Attorney responsible for execution of the warrant.<sup>9</sup> You may ask the lead agent for information concerning the status of the company (e.g., target or subject of the investigation, or neither) and the nature of the allegations being investigated. They will rarely provide such information, but it usually does not hurt to ask. You should also ask whether any employees have been or are being interviewed, and request to be present at any such interviews.
- Ask for a copy of the warrant and review it carefully. You are entitled to a copy.<sup>10</sup> The agents will typically provide a copy of the warrant at the time of entry. Review it as soon as possible to ensure that the search

is properly authorized and limited to the area described and the items specified in the warrant.<sup>11</sup> The Fourth Amendment requires that warrants “particularly describ[e] the place to be searched, and the . . . things to be seized.” General searches that result in “exploratory rummaging” are prohibited; however, agents generally will be allowed more flexibility by the courts in complex cases where the items to be seized are difficult to describe.<sup>12</sup> Do not obstruct the agents if you feel the search is outside the scope of the warrant. Instead, make the agents aware of your concerns and document your objections. In extreme circumstances, you may wish to contact the Assistant United States Attorney in charge of the investigation or even the magistrate judge who issued the warrant.

- Determine whether agents are detaining employees. Persons in the area to be searched can generally be temporarily detained and searched before leaving the area only if the agents have an “articulable and individualized” suspicion of wrongdoing by those persons. However, under the

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7 See 18 U.S.C. §§ 1501 (“Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States . . . in serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States . . . shall . . . be fined under this title or imprisoned not more than one year, or both.”), 1509, 1512, 2231 (“Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto or on account of the performance of such duties, shall be fined under this title or imprisoned not more than three years or both . . .”), 2233 (“Whoever forcibly rescues, dispossesses, or attempts to rescue or dispossess any property, articles, or objects after the same shall have been taken, detained or seized . . . shall be fined under this title or imprisoned not more than two years, or both.”).

8 However, a search warrant cannot be executed with “unnecessary severity.” 18 U.S.C. § 2234.

9 Government attorneys typically do not accompany the agents in order to avoid the possibility of becoming witnesses concerning the manner in which the search is conducted. However, they will usually be available by phone.

10 “The officer executing the warrant must . . . give a copy of the warrant . . . to the person from whom, or from whose premises, the property was taken . . .” Fed. R. Crim. P. 41(f)(3).

11 The affidavit or other sworn statement underlying the warrant will typically be sealed and not available to counsel. Most courts have held that there is no automatic right to unseal the affidavit. See *In re Eyecare Physicians of America*, 100 F.3d 514, 516-517 (7th Cir. 1996). But see *In re Search of Wag-Aero, Inc.*, 796 F. Supp. 394, 395 (E.D. Wis. 1992) (court set aside an order to seal where defendant’s interests in due process outweighed potential harm to the government’s case).

12 See *United States v. Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982).



pretense of securing the premises, agents may attempt to confine personnel to certain areas, to limit use of the telephone, and to pat down individuals and search their personal effects. Asking agents whether individuals are under arrest will usually prompt them to desist from unreasonable attempts to restrict movement or use of the telephone.

- Advise employees of their rights. It is common for agents to attempt to question employees, including meeting with them individually in a commandeered office. It is important, therefore, that all employees understand their rights. Be very careful not to give any advice to employees that could be construed as an instruction not to cooperate with the agents. Such actions can lead to charges of criminal obstruction.<sup>13</sup> It is generally permissible, however, to advise employees that (1) they are not required by law to answer agents' questions and whether to do so is entirely up to them; (2) if they do so they (a) must tell the truth and could be subject to criminal prosecution for any false statements, and (b) can set any conditions they choose, such as having company counsel present for any questioning. You should not suggest that a decision to speak with agents will be viewed unfavorably by the company.<sup>14</sup>
- Do not remove or destroy documents to prevent their seizure. This may seem

obvious, but it is advisable to remind employees that removing, destroying or deleting documents is strictly prohibited and could lead to criminal prosecution. Similarly, if you know that a search warrant has been issued, or is likely to be issued, it is a crime to notify anyone for the purpose of preventing an effective search and seizure.<sup>15</sup>

- Consider sending employees home. Because the search is likely to substantially disrupt work, it may be best to send non-essential personnel in affected areas of the facility home for the day. This will also minimize the agents' ability to interview employees.
- Do not consent or otherwise give your permission to search any area or seize any property. In the event of any question concerning the warrant's coverage, or if the agents believe that a broader search is necessary, they may seek your permission. Don't give it. Be very clear that you will not consent to a warrantless search. After you refuse permission, the agents may seek advice from an Assistant United States Attorney or an oral expansion of the warrant from the issuing magistrate.
- Do not volunteer substantive information. A search warrant does not require making any statements or giving any substantive information to the agents. You are not required to show them the location of documents or other property, describe

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13 See 18 U.S.C. § 1512(b).

14 If the agents are particularly aggressive in seeking to question employees, it may be necessary to undertake individual representation of particular employees for the limited purpose of questioning during the search. However, the rules of professional conduct generally require a careful explanation to the employee of possible future conflicts between the interests of the employee and the company before undertaking such a representation. See Model Rules of Prof'l Conduct R. 1.7 (2003). Once such a representation is established, it is permissible to advise the employee whether or not speaking with the agents is in their individual best interests.

15 See 18 U.S.C. § 2232.

property, or otherwise assist in the search. However, good judgment suggests that assistance be provided when the answer is obvious (e.g., “Is this Mr. Doe’s office?” – where it is and there is a sign on the door identifying it as such) or to prevent unnecessary disruption by the agents in reaching their objective (e.g., directing them to Ms. Roe’s office when there are ten offices with no nameplates).

- Object to seizure of privileged documents. If the agents insist on seizing legally privileged documents despite your objections, immediately contact the responsible Assistant United States Attorney. If the seizure goes forward, propose that you gather the documents under the agents’ supervision and seal them so that they cannot be opened without breaking the seal.<sup>16</sup> In this manner, you can prevent government review of privileged documents until the matter is litigated or otherwise resolved. Alternatively, if privileged documents are seized by the agents, counsel should prepare the most detailed inventory possible under the circumstances and promptly file a written request with the AUSA and the judicial officer who issued the warrant that those documents be placed under seal.<sup>17</sup>
- Make a record of events as they unfold. It is crucial to make such a record to support

a possible challenge to the legality of the search, to aid in negotiation for return of materials, and generally to collect information concerning the scope and nature of the investigation. A pocket-sized tape recorder is often the best means to record extemporaneous notes. (E.g., “It is 9:25 a.m. FBI Special Agent Brute Force has just advised me that he has spoken by phone with AUSA Frank Flunky who agreed with him that the computer room was a proper area to search.”) Making a video tape is another option, although this may unnecessarily antagonize some agents. Depending on the number of agents involved, additional attorneys and/or paralegals may be required to properly monitor the agents’ activities; a single attorney dealing with a search conducted by a dozen or more agents may quickly become overwhelmed.

- Ask to be present when the agents make an inventory of the property to be seized. You are entitled to be present and to a receipt for the property before the agents leave.<sup>18</sup> Typically, the agents will provide you with a copy of their inventory as the “receipt.” If they refuse, you are entitled to obtain a copy of the inventory from the issuing court.<sup>19</sup>
- Make your own inventory of the seized property, including photographs. Agents’

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16 Reasonable prosecutors will usually consent to such arrangements because they do not want their cases tainted by exposure to privileged materials. In addition, the DOJ Manual states that “a search warrant should normally not be used to obtain [attorney-client privileged or attorney work product] materials.” *Department of Justice Manual* § 9-19.220 (2000 Supplement).

17 A government-designated “privilege team” (sometimes referred to as a “taint team”) consisting of agents and lawyers not involved in the investigation may accompany the agents executing the warrant. The privilege team, which can also be located off-site, may advise the agents during the course of the search in order to avoid any compromise of privileged material, but will not participate in the search. *Department of Justice Manual* § 9-13.420(E) (2000 Supplement).

18 “An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. . . . [and] must . . . give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken . . . .” Fed. R. Crim. P. 41(f)(2) & (f)(3).

19 “The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken . . . .” Fed. R. Crim. P. 41(f)(4).



“inventories” can be notoriously sparse and unhelpful. The most expeditious method often is to use a pocket-sized tape recorder to dictate your notes.

- Ask for copies of seized computer files. Computer searches are generally executed in one of four ways: (1) printing hard copies of files on-site; (2) making electronic copies of files on-site; (3) creating “a duplicate electronic copy of the entire storage device on-site, and then later recreat[ing] a working copy of the storage device off-site for review;”<sup>20</sup> or (4) seizing the computer hardware and reviewing it off-site.<sup>21</sup> The method utilized will usually depend upon the role of the hardware in the alleged offense. There is no requirement that agents provide you with electronic copies of seized computer files, but it generally doesn’t hurt to ask.
- Ask for split samples when agents seize samples, such as in environmental investigations. If a split sample is refused, take your own parallel sample.
- Advise the lead agent of any classified documents that are seized. Classified documents are not exempt from search and seizure, but the agent in charge of the search should be advised of the status of such documents if the company has an obligation

to protect classified information.<sup>22</sup> If classified documents are seized, the agency with jurisdiction over the information should be notified immediately.

- Interview individuals whose offices were searched or who interacted with the agents as soon as possible in order to prepare a precise and complete record of what transpired. It is particularly important to determine the questions asked by the agents and the answers given, and to identify any documents shown to employees in the course of questioning.
- Be prepared for publicity. Unlike a grand jury subpoena, the issuance of a search warrant is public. It is not unusual for agents to provide the news media with advance notice of the execution of a warrant. Indeed, the news media, including television remote units, may arrive before the agents. Consider preparing a brief press statement and designating a press contact.
- Commence an internal investigation as soon as possible. A search warrant almost always means that the company itself is the target of an investigation and that the government has probable cause to believe that it will find evidence of a crime on the premises.

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20 Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (July 2002) (available at <http://www.cybercrime.gov/searchmanual.htm>).

21 Searches of seized computer hardware often takes months, although some courts are mandating shorter and more reasonable search periods. *Id.*

22 See Department of Defense, *National Industrial Security Program Operating Manual* ¶ 5-510 (as amended in 2001) (“Contractors shall not disclose classified information to federal or state courts, or to attorneys hired solely to represent the contractor in a criminal or civil case, except in accordance with the special instructions of the agency that has jurisdiction over the information.”).

Counsel should expeditiously commence an investigation to determine what conduct is at issue and assess the company's potential exposure.

## Warrantless Searches

In limited circumstances, a search may be conducted without a warrant. Examples include searches:

- Incidental to a lawful custodial arrest;<sup>23</sup>
- With the consent of the occupant of the premises;<sup>24</sup>
- At international borders;<sup>25</sup>
- In exigent circumstances, such as where necessary to prevent the destruction of relevant evidence.<sup>26</sup>

Moreover, evidence may be seized without a warrant when in plain view of agents who are lawfully on the premises.<sup>27</sup>

## Precautions

No law-abiding company expects to be the subject of an unannounced search by armed federal agents. Nonetheless, any company that may come under federal investigation, particularly those in heavily-regulated industries, should be prepared for the worst. Advisable steps include:

- Clearly marking privileged documents and maintaining them separately from non-privileged material;
- Maintaining copies of essential business records (including records stored on personal computers) off premises;
- Ensuring that at least one lawyer at each facility has been trained in proper response to a search warrant. Management at facilities where there is no lawyer should know whom to call in the event of a search;
- Identifying outside counsel experienced in criminal law, preferably within a reasonable distance from company facilities; and
- Developing a plan for closing the facility in case of such an emergency.

## Post-Search Remedies

**Motion for Return.** Seized property will be held in the custody of the investigating agency and ordinarily will not be returned until the government has no further use for it. However, Rule 41 provides that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return."<sup>28</sup> The motion for return "must be filed in the district where the property was seized."<sup>29</sup> Such efforts

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23 *New York v. Belton*, 435 U.S. 454, 457 (1981) (lawful custodial arrest "justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area").

24 18 U.S.C. § 2236. Consent must be voluntary and can be garnered from a third party "who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Jenkins*, 46 F.3d 447, 451, 454 (5th Cir. 1995). Courts have validated searches performed through consent of employees, in which case the relevant issue is whether the employee has joint access to or control over the property to be searched. See *Jenkins*, 46 F. 3d at 455; *United States v. Murphy*, 506 F.2d 529, 530 (9th Cir. 1974); *United States v. Longo*, 70 F. Supp.2d 225, 256 (W.D.N.Y. 1999); *United States v. Buitrago Pelaez*, 961 F. Supp. 64, 68 (S.D.N.Y. 1997).

25 *United States v. Roberts*, 274 F.3d 1007, 1011 (5th Cir. 2001).

26 *United States v. Alfonso*, 759 F.2d 728, 742 (9th Cir. 1985).

27 See *Horton v. California*, 496 U.S. 128, 136-137 (1990) (warrantless seizure justified where seizing officer "d[oes] not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed," "the incriminating character" of item is "immediately apparent," and officer "h[as] a lawful right of access to the object itself") (internal citations omitted).

28 Fed. R. Crim. P. 41(g) (emphasis added).

29 *Id.*

rarely succeed when the search was lawful. However, the threat of a motion for return may prompt a prosecutor to accommodate counsel's request for access to or copies of certain materials, particularly where they are necessary for the continued day-to-day operation of the business.

**Motion to Suppress.** Consider these questions in determining whether evidence was collected via an illegal search and seizure and, therefore, must be suppressed (or returned, if the motion is made pre-indictment):

- Was there probable cause to believe that an offense had been committed?
- Was there probable cause to believe that evidence related to that offense would be found on the premises searched?
- Were all the areas searched and the items seized described with particularity in the warrant?
- Was the information supporting the showing of probable cause sufficiently current to justify a belief that the materials would be found on the premises at the time the search was performed?
- Is there any basis for asserting that the affiant supporting the warrant deliberately provided false information or exhibited a reckless disregard for the truth?
- Did the agents exceed the scope of their authority, e.g., did they conduct a general search by rummaging at large through materials on the premises?

**The contents of this newsletter are not intended to serve as legal advice in individual situations. Counsel should be consulted for legal advice and planning.**

## Emergency Checklist

**The items in this checklist are explained in more detail above.**

### Do's

- Identify and meet with the lead agent.
- Ask for a copy of the warrant and review it carefully.
- Determine whether agents are detaining employees.
- Advise employees of their rights.
- Consider sending employees home.
- Object to the seizure of privileged documents.
- Make a record of events as they unfold.
- Ask to be present when agents make an inventory of seized materials.
- Make your own inventory of seized materials.
- Ask for copies of seized computer files.
- Ask for split samples.
- Advise the lead agent of any classified documents that are seized.
- Interview individuals whose offices were searched or whom agents interviewed.
- Be prepared for publicity.
- Commence an internal investigation.

### Don't's

- Do not interfere with the search.
- Do not allow anyone to hide or destroy documents.
- Do not consent to the search of any area or seizure of any materials.
- Do not volunteer information.