

What Every Labor and Employment Lawyer Should Know About Criminal Investigations

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GOVERNMENT INVESTIGATIONS 101

- Can be civil, criminal or both
- May be hard to know when, where or why it started
- Increasingly common in regulated industries



WHAT IS FRAUD

- Material lie to get money
 - Shortcut/violation of regulation
 - Nondisclosure/omission
 - False statement submitted to government/government regulatory agency
- Plus intent
 - Intent to deceive or cheat



EMPLOYEES ARE ALMOST ALWAYS ESSENTIAL WITNESSES IN FRAUD CASES



"I like you, Thompson. You're smart, a hard worker,
and you're full of potassium."

WHO INVESTIGATES

- Regulatory agency
 - Federal or state
 - SEC (state dept. of finance)
 - HHS-OIG (Medicaid fraud control unit)
 - IRS
- Program agency
 - SBA
 - DoD
- Law enforcement agency
 - FBI
 - IRS-CI



IT'S THE INTENT

- What evidence proves the intent to defraud
 - Personal profit
 - Repeated conduct
 - Knowledge of rules/regs/accurate information
 - Acts in defiance
 - Statements to contrary
- What evidence *looks* like the intent to defraud
 - Evidence almost always circumstantial
- It's not the crime, it's the cover up
 - Altered documents/records
 - Destroyed documents/records
 - Direction to employees to lie
 - Lies to investigators/regulators



WHAT *LOOKS* LIKE INTENT TO DEFRAUD?

- Pre-signed documents
- Communications from the regulator that identify a problem + failure to address the problem
- Knowledge of a problem + failure to correct it
- Backdating
- Failure to address employee's concern about cost, quality, accuracy of representations



COULD MY BUSINESS BE INVESTIGATED?

- Yes, if you (or someone who works for you) certify to regulator/third party payer that
 - all information correct
 - all services have been provided
 - all services have been provided pursuant to rules, regulations, contract terms
 - services are necessary/continue to be necessary

COULD MY BUSINESS BE INVESTIGATED?

- Yes, if
 - Customer/client loses money, blames you (or someone who works for you) for your loss AND
 - You are regulated by state or federal agency (or both)
 - You have an employee/contractor upset with operations who leaves
 - You have expanded operations to a new area with which you are unfamiliar and which is regulated

HOW DOES AN INVESTIGATION START?

- Whistleblower
 - Internal (employee)
 - Competitor
 - Subcontractor
- Significant losses to investors
- Regulatory agency audit
- Complaint to regulatory agency
 - Could be from an employee



HOW DO I HANDLE A WHISTLEBLOWER

- Whistleblowing and employment action may occur at roughly the same time
- What if my employee client wants to be a whistleblower
- Guard against engaging in retaliation
 - Which can also look like obstruction of justice
 - Or witness tampering



UH-OH!



HOW DOES A BUSINESS LEARN ABOUT AN INVESTIGATION, IF STARTS EXTERNALLY

- Someone's knocking at the door
 - Interviews of employees (current or former)
 - Execution of search warrant
 - Regulatory/program agency audit
- No good news comes in a certified letter
 - Administrative subpoena
 - Grand jury subpoena
 - Regulatory/program agency request for information



SW: WHAT IS GOING TO HAPPEN?

- What to expect?
 - Considerable Force
 - Disruptive to Business
- How is it executed?
 - Unannounced
 - Numerous agents/officers
 - Very conspicuous
 - Demand for immediate entry



SW: SHOULD I OPEN THE DOOR AND LET THEM IN?

YES! Any attempt to deny may result in arrest



SW: WHAT SHOULD EMPLOYEES KNOW ABOUT TALKING TO THE GOVERNMENT?

- The decision to be interviewed is entirely up to the employee
- Most Important: **BE TRUTHFUL**
- Company may NOT direct current or former employees to assert the 5th or refuse to speak with investigators. This can lead to witness tampering and obstruction of justice charges

SW: WHAT SHOULD EMPLOYEES KNOW? CONT'D

- Company CAN advise:
 - May speak if you wish, under no obligation
 - May request presence of company counsel
 - Employee has the right to confer with counsel before deciding whether to be interviewed
 - Again: **BE TRUTHFUL**

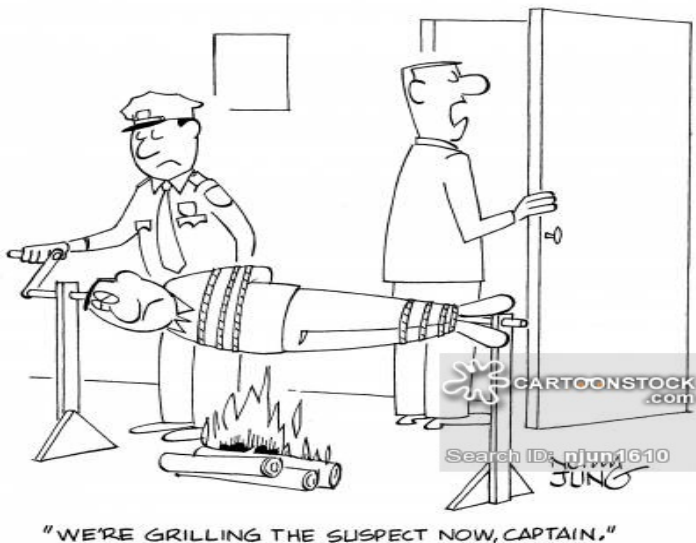
Practice Note: SW aside, agents may try to speak with current or former employees before or after warrant execution or even subpoena service

COOPERATION ISSUES

- Warnings to employees in internal investigations
 - *Upjohn v. U.S.*, 449 U.S. 383 (1981)
 - Corporation, not individual employee, holds attorney-client privilege
 - To avoid inadvertently creating attorney-client relationship with employee during internal investigation
 - Counsel represents corporation, not individual employee
 - Attorney client privilege belongs solely to the corporation
 - Corporation may decide to waive attorney client privilege and disclose information obtained from employee to prosecutor
 - Need to give at outset of interviews, preferably in writing
 - Need to consider whether employee needs separate counsel

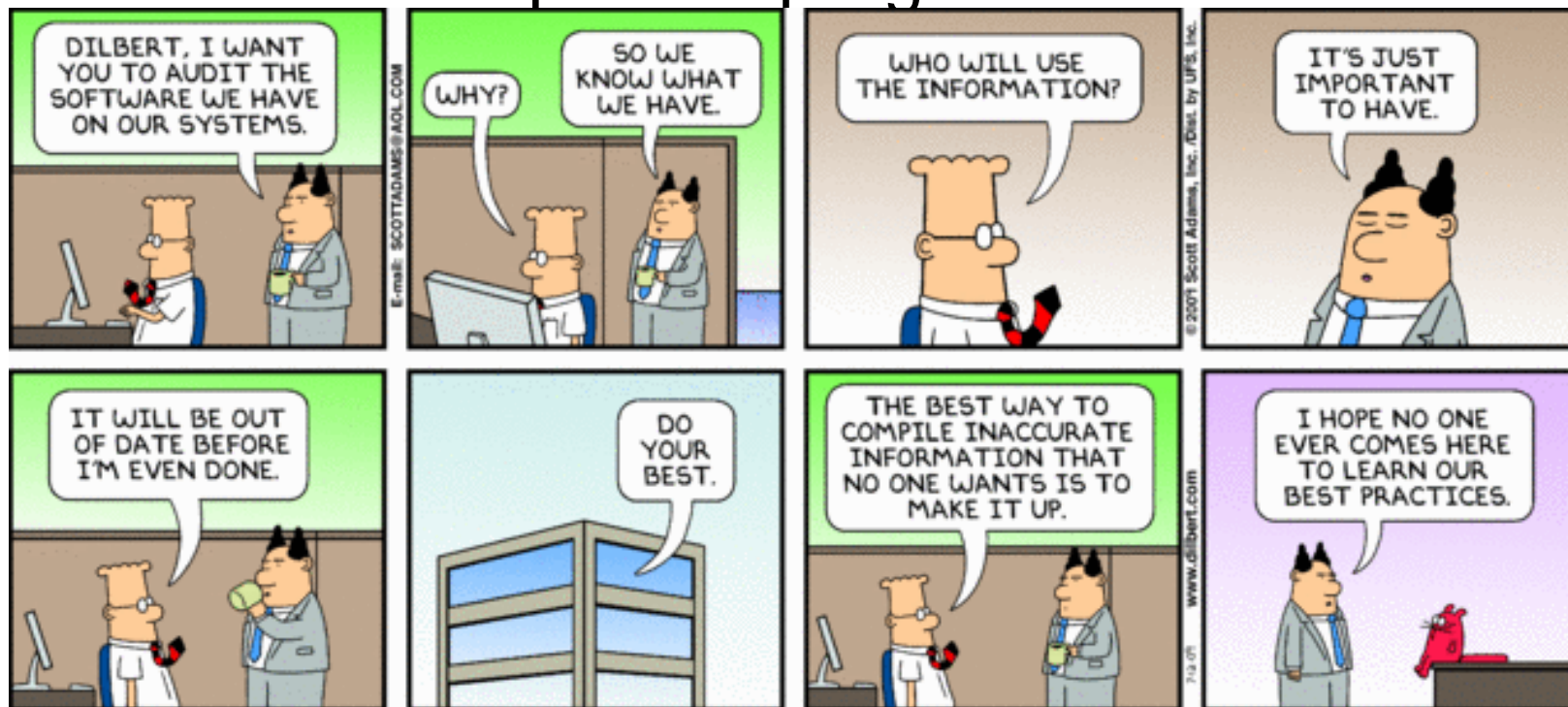
COOPERATION ISSUES

- Fifth Amendment rights
 - Corporation has no privilege against self-incrimination, but individual employees do



DOJ ENFORCEMENT POLICIES

- Avoiding prosecution
 - Effective compliance program



DOJ ENFORCEMENT POLICIES

- Avoiding prosecution
 - Effective compliance program
 - May also help avoid internal victimization
 - Key questions prosecutors will ask
 - Is the compliance program well designed?
 - Is it being applied earnestly/in good faith?
 - Adequate training on compliance program
 - Does the program work?
 - Common compliance program problems
 - Too little oversight/no checks
 - Too much responsibility in one person
 - Unwillingness
 - Profit motive outweighs cost of compliance
 - Lack of sophistication

