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**The Government Wants to Know:  
Responding to Requests for Employee Background Checks and Other Data**

I conducted a highly unscientific survey of employment attorneys on how they would respond to the following scenario:

*A government agent makes an unscheduled visit to your office or facility. She seeks an immediate interview with an employee on duty, and requests that you summon the employee for this purpose. She does not have a warrant or a subpoena. What is your response? Do the following factors impact your decision?*

- ◆ *The agency involved, e.g., federal security (FBI, CIA, DEA, etc.) versus local law enforcement.*
- ◆ *The nature of the investigation, e.g., terrorism, kidnapping, securities violations. What if no information is forthcoming?*
- ◆ *Whether attempts to interview the employee outside of work have been unsuccessful.*
- ◆ *The employee's job level.*
- ◆ *The employee's job duties.*
- ◆ *The employee's membership in a collective bargaining unit. If covered by a collective bargaining agreement, would you inform the union representative?*
- ◆ *The employee's race or gender.*

*Once summoned, the employee refuses to be interviewed and requests the opportunity to consult his counsel. What is your response? Will a refusal be subject to discipline, and if so of what kind?*

Fifteen attorneys were generous enough to think through this problem. Five were managers in public law departments with mostly unionized employees, six were corporate counsel in mid-sized companies, and four were partners in private law firms. For brevity and convenience, I have grouped their response into the following categories: public employers, private employers with unionized workforces, private employers with non-covered workforces, and outside counsels.

*Public employers-* this group without exception was generally reluctant to either fully cooperate or to refuse to cooperate. "You're damned if you do- who wants the FBI snooping around- and damned if you don't- who wants to be the one who failed to turn over the terrorists? What a nightmare." They were the group most suspicious of local law enforcement, and expressed concerns about possible civil rights violations if only minority workers were targeted. On the other hand, there was a feeling that inter-government cooperation was a value worth trying to maintain. Most would inform the employee of the nature of the request for his presence, and all would inform the union representative if the worker is member of a collective bargaining unit. "Why buy yourself the headache of a grievance for this? Let him have anyone he wants; at least that way you're protected." A refusal to cooperate would not be subject to discipline unless the collective bargaining agreement or employment policies would clearly sustain it, and even then most were quite reluctant to try to impose any sanction. All would permit the employee to seek counsel before answering any questions from authorities. Two expressed concerns about protecting the employee from retaliation from other workers: "If your only Muslim employee is hauled in for FBI questioning, I want to be sure he doesn't catch hell when he gets back to his station. Otherwise, I now have a possible discrimination claim for a hostile work environment."

*Private employers with unionized workforces-* these responses were similar to those of the public lawyers, but with fewer concerns about liability for civil rights violations and none for government comity. However, one deputy general counsel for a large, international manufacturer stated that "we would expect all of our employees to cooperate fully with law enforcement, especially in the wake of the terrorist attacks on our nation. Anyone who refused would be subject to discipline for insubordination and failing to live up to our company's code of ethics."

*Private employers with non-covered workforces-* there was much greater variation in how to handle this situation from in house counsels for private, non-unionized firms. For those companies with an employee handbook, complying with its provisions was important. All were willing to summon the employee and direct him to cooperate immediately. Three were unwilling to let him consult with counsel first. There was a universal recognition of the attorney's interest in minimizing the time and trouble for management that this scenario would create. The employee's status in the company seemed to be more important to these respondents, with senior managers receiving more notice and deference than low level workers. The nature of the investigation, if disclosed, impacted decision making as well. One general counsel stated that "it would be a different ballgame if it's the SEC investigating insider trading by the CEO." In that situation, she would disclose to the corporate officer the nature of the investigation, that it was a law enforcement person seeking the interview, and let the CEO determine his response from that point, including refusing to appear or first obtaining counsel.

*Outside counsels-* this group was the most willing to act in accordance with law enforcement's wishes. The concerns about the effect of such a situation on internal operations were mostly absent. All raised the issues about how to treat a member of a collective bargaining unit, the effect of any employee handbook or other policies, and retaliation against the worker. Whether the investigation involved "national security" claims seemed most relevant to this group. "Everyone must support our government in these times," stated one

partner who advises smaller companies on employment issues. The employee's refusal to cooperate was most likely to result in discipline from outside counsels. There was, however, a greater willingness to permit consultation with an attorney for this group than private firms' in house attorneys. Interestingly, when asked how they would respond to this situation in their law firms, without exception partners would not require their employees, especially attorneys, to cooperate, would permit the employee to seek legal advice, and would not discipline for non-cooperation.

In summary, there was general consensus that:

- ◆ the employee would be summoned for the interview;
- ◆ the lawyer should get as much information about the nature of the investigation and the need for a workplace interview as possible;
- ◆ a union member would be permitted to have representation by his bargaining unit;
- ◆ refusal to cooperate would be disciplined, if at all, with great care; and
- ◆ the employee should be protected from relation or harassment.