

Dealing with the Surprise Government Interview

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This article will help companies and their employees prepare for and, if necessary, deal with a surprise interview by government agents as part of an investigation of an allegedly defective product.

Periodically, the government conducts criminal investigations into alleged product defects. For example, as *The Washington Post* recently reported, the U.S. Food and Drug Administration has opened a criminal investigation into the highly publicized case involving the contamination of pet food, in which various pet food companies determined that they had used melamine-contaminated ingredients from China in their products. (Patricia Sullivan, *Criminal Probe Opened in Pet Food Scare*, www.washingtonpost.com, April 21, 2007) Investigations such as this one are not isolated events. As noted in a paper issued in 2001 by the National Legal Center for the Public Interest:

The product liability arena has long been subject to criminalization . . . High-profile, product liability tragedies have incited legislatures to take aim directly at CEOs. The media routinely has pounced on product liability crises . . . to bash big business. In turn, society has demanded that someone ‘pay the price.’ Legislators, representing constituents who are thirsty for retribution, have targeted not only corporations but also their CEOs.

After all, someone needs to be held accountable.

(Stanley A. Twardy, Jr., et al., *The Criminalization of the CEO*, National Legal Center for the Public Interest, March 2001; see also Press Release of national profit consumer advocacy organization Public Citizen, “Public Citizen Calls for Criminal Investigation of Breast Implant Manufacturer for Withholding Safety Data from FDA,” www.citizen.org, October 12, 2006; Consumer Product Safety Act, 15 U.S.C. §§ 2068, 2070;

Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 331, 333).

When conducting criminal investigations about possible corporate wrongdoing, in both alleged defective products matters and other cases, government agents often seek to interview company executives and other employees “by ambush” outside the office place, to minimize the likelihood that a supervisor or a company lawyer might intervene to thwart the interview. There is nothing improper in using this investigative technique. Nevertheless, employees should know their legal rights and understand the risks they take when they submit to such surprise negotiations.



Employees should recognize that they are not required under the law to participate in any surprise interview. They should also be aware that any statements that they do make are not “off the record,” and can and will be used later by the government against the company and/or the employee at a trial or other legal proceeding. Generally, employees should carefully consider their options before submitting to interviews of this type without the advice of counsel and without ample time to prepare.

A company and its employees ignore the threat of an

ambush or surprise interview, particularly at a time when the company may have committed wrongdoing or is under investigation, at their own peril. In numerous cases, law enforcement or regulatory agencies have used ambush interviews to collect evidence to prosecute a company and its employees. For example, as noted in a 1999 article in the *Food and Drug Law Journal*:

The government followed this pattern [the use of ambush interviews] ... when it began the public stage of an investigation of suspected fraudulent commodity trading practices in Chicago. For months, the government secretly gathered information through an FBI agent who worked on the trading floor. When that phase of the investigation was complete, the government unleashed teams of prosecutors and agents who visited numerous traders at home during the evening in coordinated and simultaneous interviews. Few traders sought to consult with a lawyer, and many provided information that supported subsequent prosecutions.

(Steven M. Kowal, *When Unexpected Government Agents Drop In: Responding to Requests for Immediate Interviews*, 54 *Food Drug L.J.* 93, 96 (1999))

Additionally, as reported in a May 6, 2007 article in *The Indianapolis Star*, in May 2004, the FBI effectively utilized a series of 20 early morning surprise interviews at the homes of various corporate executives in an Indiana price-fixing case involving concrete companies. (Kevin Corcoran, *The Big Fix*, *The Indianapolis Star*, May 6, 2007) Some of the executives lied to the FBI during these surprise interviews, and one executive, after learning that the FBI wanted to talk to him, even stopped at his office and his home and destroyed incriminating documents. *The Indianapolis Star* article described some of the ambush interviews in detail, including the following interview:

In Noblesville [Indiana], Chris Beaver, operations manager at Beaver Materials, invited investigators in and offered them refreshments. He was calm and talkative, but he repeatedly denied any involvement. His wife was getting their children ready

for school. Beaver, who was being groomed by his father to lead the company, later said he had hoped authorities would leave without hauling him away in handcuffs as his children watched from atop the staircase.

Many of the executives interviewed by the FBI later pled guilty to price-fixing charges or, like Chris Beaver, were convicted after a jury trial, and fines totaling \$35 million were levied by the Justice Department against the concrete companies.

FIVE KEY RULES TO FOLLOW DURING A SURPRISE INTERVIEW

- 1) Be respectful, but do not be intimidated. Act courteously and as calmly as possible under the circumstances, although you may understandably be nervous and concerned. Do not yell, curse, or attack the agents' integrity or motives.
- 2) Consider whether you would prefer to postpone the interview until you have had an opportunity to consult with an attorney and prepare for the interview. If you choose this course, advise the agents that you will be happy to consider speaking to them, but cannot do so now without first speaking to an attorney. Repeat this statement, without embellishment, if the agents try to engage you in a dialogue about why you need the advice of a lawyer. (Of course, if you have already retained a personal attorney or consulted with corporate counsel, you should not submit to the surprise interview, but rather, should advise the agents to contact that attorney.)
- 3) Don't talk, listen. Listen carefully to what the agents tell you about the nature of the investigation and the reason for the interview. It may be useful to prepare notes summarizing what the agents told you (without comment) immediately after they leave. If you choose to postpone the interview until you can consult with an attorney, avoid answering even "background" questions until a formal interview can be arranged, as once you start talking it may be difficult to stop.
- 4) Obtain the business cards of the agents before they leave.

5) After the agents have left, immediately contact your supervisor and/or corporate counsel and advise them of the contact so that the company's legal department can follow up. You and the company's counsel may also want to consider whether it is advisable that you retain your own attorney if you have not already done so.

The surprise interview will most likely occur at a time when it is difficult, if not impossible, for the employee to obtain the advice of corporate counsel, the employee's supervisor, or the employee's personal attorney. The attempted interview will probably take place at the employee's home early in the morning or late at night, or perhaps outside of a store or restaurant during the evening or on a weekend. As the government agents certainly recognize, if the surprise interview is at home and family members are present, the employee may feel added pressure to go ahead with the interview to attempt to get it over with quickly. The employee should recognize, however, that he or she has no obligation even to invite the agents inside, let alone submit to the interview.

The employee is probably not a target of the investigation because the government generally does not conduct surprise interviews of a target, although there are exceptions. Rather, the employee is most likely being interviewed to develop evidence against other employees or the company itself.

Since the employee is not being subjected to a custodial interrogation, the agents do not have to give him or her a *Miranda* warning. Many people, having watched crime shows on television, might incorrectly believe that they are not in any trouble if they are not given a *Miranda* warning. However, the fact that no *Miranda* warning is given does not make the surprise interview any less perilous for the employee or the company.

The agents might even attempt to convince the employee to sign a statement or affidavit. The statement, of course, will have been prepared in a way that supports the government's version of the case. An employee who signs such a statement without having carefully reviewed the key documents and facts of the case with counsel may make misstatements, and thus put both himself or herself and the company at great risk.

Although probably not a target, the employee can quickly become one if he or she answers questions or signs a statement without a sufficient opportunity for thoughtful reflection and preparation. For example, employees can bring suspicion upon themselves by answering questions incorrectly out of haste or poor memory. Of course, an employee may be committing a serious crime if he or she answers the agents' questions in a less-than-truthful way by holding back embarrassing or incriminating information, or denying his or her own acts of misconduct. Lying to the government is a federal crime — regardless of whether it is to an agent during an informal surprise interview or to a prosecutor or regulatory attorney during a deposition taken under oath.

The agents will invariably try to pressure the employee into agreeing to submit to the interview immediately. The agents may serve the witness with a grand jury subpoena and then suggest that answering questions could terminate the investigation, or conversely that a failure to answer might prolong the investigation. The agents may even claim that this is the employee's last chance for leniency. Rarely are these statements anything other than tactics intended to override the employee's better instincts. It is seldom true that there is any genuine necessity for an immediate interview. Furthermore, the refusal to submit to the interview at that time is not likely to result in any adverse consequences to the employee or the company.

Some of the dangers in submitting to a surprise interview include the following.

The agents may employ aggressive interview techniques that make the employee feel nervous and confused. For example, the agents may use the "good cop, bad cop" routine (yes, this technique is actually used at times) in an effort to get the employee to lower his or her guard and speak to the "good cop." Being caught off-guard and probably not having had an opportunity to carefully reflect upon the facts, the employee is more likely to give incorrect or incomplete answers. There are usually two agents, and their interview notes will reflect only their version of the interview. There will be no witness to support the employee's version if it differs from the agents' version.

Each employee should understand that during an attempted surprise interview he or she has a choice as to whether or not to answer questions. Testimony can only be compelled by a subpoena for an appearance before a grand jury or a regulatory agency at a later date.

ADVANTAGES TO CONDUCTING THE INTERVIEW AT A LATER TIME

There are many advantages and few disadvantages to having the interview conducted at a later time. First, delaying the interview affords the employee time to prepare and review the facts with corporate counsel and/or the employee's personal attorney. Documents can be reviewed that may refresh the employee's recollection, thus assuring that more accurate answers are given. The delay also provides the employee with the opportunity to decide in an unpressured setting whether or not to talk to the government at all, or instead exercise his or her Fifth Amendment right not to testify. Second, any later interview will likely be held at a government office, not at home with the employee's spouse and children in the next room. Third, the presence of an attorney on behalf of the employee or the company is protection against a potentially unfair or deceptive interrogation. Fourth, by insisting upon the right to seek the counsel of others, the employee is not sacrificing leniency or the benefits of cooperation for the following reasons:

- It is unlikely that leniency will be withheld if cooperation takes place at a later time;
- Agents do not have the authority to grant leniency;
- Submitting to a surprise interview rarely terminates an investigation;
- If the employee mistakenly gives incorrect answers to the agent's questions, any prospect for leniency may be compromised; and
- Finally, it is highly unlikely that any slight advantage gained from immediate cooperation will ever outweigh the advantages of waiting. The real danger is that the information provided by the employee during the surprise interview will be incomplete, incorrect, or presented in a way that is subject to misinterpretation by the agents.

This danger can be avoided by declining to participate in the surprise interrogation.

CONCLUSION

What a company executive or other employee does when confronted with a surprise or "ambush" interview during a criminal investigation into an allegedly defective product is critical for both the employee and company. Declining to submit to the interview until a later time, so that the employee has a chance to review the facts carefully and speak to an attorney, may well be more advantageous to both the employee and the company.

