



A PilieroMazza Update for Federal Contractors and Commercial Businesses

When the Law Comes A Callin': A "How To" For Responding to Subpoenas and Document Requests

By Matt Feinberg



Since the last Presidential election campaign began almost three years ago, there has been a significant public focus on sexual harassment, income inequality, crimes against women, public corruption, and the income gap. Sexual harassment claims have skyrocketed in recent months, with some states reporting as much as 400% increases in claim reports. The Department of Labor is enforcing ever-changing compensation rules on service employers. Federal courts are recognizing an expanded reach of workplace non-discrimination laws to the LGBTQ+ community. And, various government watchdogs, including several state attorneys general are opening large-scale policy-based investigations seeking to expose sexual harassment, workplace discrimination, and unequal treatment.

Based on these trends, we predict substantial increases in the number of individual employee claims and government-backed investigations over the next several years. And, we expect that these trends will hit every industry, particularly those with large numbers of low-wage earners, service workers, younger employees, or male-dominated workforces. Federal and state government contractors are also prime targets, as they are subject to public whistleblower laws and aggressive competitors eager to obtain an advantage in the race for government contracts. Companies operating within these parameters should expect that it is a question of when—not if—they will become involved in some sort of investigation or receive a subpoena or document request from a state attorney general, an agency or

inspector general, or a party in private litigation. So, what can you do to protect your company's bottom line before and after the law comes a callin'?

Create and Maintain a Paper Trail

One might assume that the fewer records a company maintains, the less likely it is for those documents to cause long-term problems. However, in the vast majority of investigations, and in litigation, that is not the case. Incomplete or inaccurate record keeping and insufficient record retention are among the greatest pitfalls a company can face when responding to a subpoena or document request. Even if a company has done everything right, it may nevertheless face substantial risk without written proof, and a perceived lack of documentary evidence can lead to service of additional subpoenas, wide-ranging interviews or depositions, or, worse, in-person investigations by governmental authorities. It is, therefore, critical for companies to create and maintain accurate records of employee complaints, trainings, payroll, and disciplinary actions, among other things. Companies should also implement conservative document destruction policies which preserve documents that are relevant to these common topics of investigation and litigation. Without detailed records, companies could be facing an uphill battle in responding to any subpoena or investigation.

Lawyer Up

Responding to a subpoena can be a complicated endeavor, implicating complex and varied areas of the law and carrying with it damaging ramifications from both public relations and financial perspectives. As soon as a subpoena or document request is received

Continued on page 2



or anticipated, a company should seek out skilled and experience counsel to represent it. Retained counsel should have experience in responding to subpoenas or government investigations as well as in the specific area of law that is the subject of the subpoena or investigation. The company may be able to invoke certain subject matter-specific defenses or privileges, and an attorney with topic-specific experience is in the best position to advance those arguments. In addition, a company should maintain a good relationship with corporate counsel, i.e., an attorney with whom the company can communicate on day-to-day issues and who can identify areas of risk and solve small problems before they become big headaches. When a subpoena is received or an investigation commences, having trusted counsel that knows the ins and outs of the company, understands relevant corporate policies and company atmosphere, and is invested in a long-term relationship can be a major benefit to the company and its bottom line.

Remedy the Problem Areas

Although it is easy to treat subpoenas and investigations as “out of sight, out of mind,” once the response to the subpoena has been delivered to the requesting party, the task is not complete. If done properly, the company’s compilation and production of documents should, and likely will, identify some of the company’s areas of vulnerability: practices and procedures that need to be polished, or behaviors that must be corrected. Counsel should offer practical solutions to cure these problem areas, or the company may request that guidance. And, the company should take action on those recommendations, implementing new or updating old policies and procedures to satisfy the changing political and legal landscape.

Implementing these practical suggestions will help put the company in the best position to respond to a subpoena or government investigation while protecting the company’s bottom line.

ABOUT THE AUTHOR: Matt Feinberg is an associate with PilieroMazza who practices in the areas of litigation, labor and employment, and business and corporate law. He may be reached at mfeinberg@pilieromazza.com.

The Legal Advisor is a periodic newsletter designed to inform clients and other interested persons about recent developments and issues relevant to federal contractors and commercial businesses. Nothing in the Legal Advisor constitutes legal advice, which can only be obtained as a result of personal consultation with an attorney. The information published here is believed to be accurate at the time of publication but is subject to change and does not purport to be a complete statement of all relevant issues.