

# Warning Signs of a Criminal Investigation: Considerations for In-House Counsel and Corporate Executives in a Post-Roe World

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On June 24, 2022, the U.S. Supreme Court released its opinion in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade*—the 1973 landmark ruling that established the constitutional right to abortion. Now, companies that operate in states where abortions are banned or restricted are facing a quagmire of laws and risks regarding enforcement. Additionally, the risk landscape is not static, but rather in flux, as the federal government (agencies such as the U.S. Department of Justice and the U.S. Department of Health and Human Services) and a myriad of states introduce new legislation and issue guidance on a near-daily basis.

Companies of all sizes, in a variety of industries, not limited to health care, throughout the United States are grappling with how to manage enforcement risk in a post-Roe world. Indeed, large companies, such as Apple, Meta, Yelp, Disney, Uber, and Netflix, that operate nationwide have announced that they will pay for transportation costs for employees who require abortions but are unable to access such care in the states in which they reside. Health care provider organizations are struggling to understand the new restrictions that impact the services they can provide and under what circumstances those services may be provided. And uncertainty is further complicated since, in response to *Dobbs*, several states have enacted laws that make it illegal to aid and abet a violation of the state laws restricting abortion services.

In light of these rapid changes regarding access to abortion, enforcement will likely ramp up as state prosecutors or private plaintiffs empowered under various states' laws exercise their enforcement authority under these laws. In-house counsel and corporate executives concerned about the enforcement risks arising from the *Dobbs* decision may wish to consider two important threshold questions when faced with a subpoena, request for records, or government inquiry: (1) is the company under criminal investigation, and if so, (2) what should I do?

## Is the company under investigation?

There is a range of possible warning signs that your company is under criminal investigation—some

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are obvious, and some are not. The following are signs listed in order of the most obvious to the most subtle:

- **Law enforcement executes a search warrant at your company, or at a facility or home connected to an employee, former employee, or business partner.**

It is an obvious sign that your company is under criminal investigation if agents execute a search warrant at your company's offices or facilities. Less obvious is when search warrants are executed at homes or other locations connected to your employees, former employees, or business partners. In the digital age, law enforcement agencies execute many search warrants for data (such as emails) on the service provider (such as Google) without notice to the actual target. However, if you learn of a search at a location other than your company's offices, you may be able to determine if the investigation implicates your company by reading the search warrant, which agents are required to leave at the location of the search.

- **The company, an employee, or former employee receives a "target letter" related to company business.**

A target letter is a letter from a prosecutor advising the recipient that he or she is the "target" of a grand jury investigation. Such a letter informs the target that the government intends to charge him or her with a crime, but before charging, the person has the option to voluntarily testify before the grand jury to tell his or her "side of the story." Assuming that the subject matter of the investigation (which is typically generically described in the target letter) relates to company business or benefits, receipt of such a target letter is a strong indication that the company is under investigation.

- **A law enforcement agent attempts to speak to your employees, former employees, or business partners about your company.**

This activity is a likely sign that your company is under investigation. As in-house counsel or a member of company leadership, you may learn that your current employees were approached by agents (assuming the employees do not accede to a common request by agents to keep the interview confidential). However, you may or may not learn that your former employees or business partners were approached. Typically, agents will not approach individuals at your corporate office, but rather at their homes or other locations.

It may not be apparent if the agent is investigating a criminal or civil violation. You, as in-house counsel or a corporate executive, out of an abundance of caution, should assume the investigation is, or will become, criminal. Investigations that start out civil in nature can quickly "go criminal," and evidence obtained in civil investigations can readily be shared with criminal agents and prosecutors.

- **Your company receives a grand jury subpoena for documents related to the company's benefits, programs, policies, governance, or general operations, or a specific employee.**

Depending on the nature of the documents requested, this could be a sign that your company is under investigation. On the other hand, your company could simply be a third-party records custodian

with no independent exposure. Depending on the type of subpoena, the investigation could be either criminal or civil.

## **The company is under investigation—what should I do now?**

If any of these events occur, your company may be under criminal investigation.

### **Conclusion**

By heeding the warning signs that your company may be under investigation, as discussed above, you'll be better equipped should any of those events occur. If a subpoena, request for records, or government inquiry is received, speed is of the essence. Seek help from experienced criminal defense counsel as soon as possible, and ideally before you respond to any law enforcement inquiries. Trying to handle a criminal investigation with attorneys who have no criminal law background frequently leads to missteps that, unfortunately, generally cannot be undone. Taking the right steps upon learning—or suspecting—a criminal investigation is underway can make all the difference in protecting the organization, its employees, and its executives.

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