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Showing Up at the Door: Investigative Access to Employer Property

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ISSUES

Issues

- Government access to employer property and premises
 - Actual state of the law vs.
 - Belief of enforcement and supervisor staff
- Effect of standing on employer rights
- Strategies for dealing with access issues

ACCESS TO PROPERTY

Authority

- Various agencies have *legislative* authority to access employer premises
- These laws – on their face – give agencies broad authority to enter workplaces and view employer records at any time, for any reason

Example: Labor Commissioner

- California Labor Code gives what appears to be broad access to Labor Commissioner personnel
 - Labor Code § 90: “Labor Commissioner [personnel] shall have free access to all places of labor.”
 - Any person who “upon request, willfully neglects or refuses to furnish them any statistics or information ... is *guilty of a misdemeanor*”

Example: Labor Commissioner

- Labor Commissioner personnel frequently appear at a workplace and provide documents that demand immediate access to property and records
- Documents *quote* Section 90, especially its threat of misdemeanor liability

State-Law Example: Labor Commissioner

- Labor Commissioner personnel *do not* usually cite Labor Code section 1174(b), which says employers must:
 - “allow any [DLSE agent] free access to the [workplace] to secure any information or make any investigation that they are authorized [to make]”
- More on this below ...

Federal Example: OSHA

- Occupational Safety & Health Act, Section 8: 29 U.S.C. § 657
- OSHA personnel may:
 - enter without delay ... any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer
 - inspect and investigate ... many such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Appearance

- These laws seem to allow *immediate* access to the workplace or employer records
- Noncompliance seems inconsistent with the law –
 - And sometimes looks as if it is *illegal* as well!
- This is well-known to agents, who use the text to suggest that interpretation

BUT IT'S NOT TRUE!

Interpretation of Laws

- One could ask: how can the *legislature* create rights to access that interfere with general *constitutional* rights against unreasonable search and seizure?
- And in fact: courts and agencies have recognized this as well!
- These laws have *not* been interpreted as broadly as written

Example: Labor Commissioner

- Labor Code section 1174 declared *unconstitutional* –
 - Statute “authorizes an unreasonable search and seizure in violation of the Fourth Amendment of the United States Constitution” (*People v. Hutchings*, 69 Cal. App. 3d Supp. 33 (1977))
 - Fourth and Fifth Amendments apply to *all aspects* of investigation by the DLSE (*Craib v. Bulmash*, 40 Cal.3d 475 (1989) – though probable cause is far less strict for subpoenas of legally required documents than for “immediate” searches and seizures (and probable cause varies between criminal and administrative contexts)

Not Followed Well ...

- The Labor Commissioner has not followed these principles very well:
 - Cal Restaurant Ass'n obtains injunction against DLSE conducting warrantless injunctions with threats of misdemeanor prosecution (*Cal Restaurant Ass'n v. Quillan*, Orange Co. Superior Court Case No. 33-20-92 (Oct. 21, 1980))

Not Followed Well ...

- The Labor Commissioner has not followed these principles very well:
 - 1982 DLSE Chief Counsel policy prohibits using Labor Code § 90 to implicitly threaten prosecution in response to § 1983 threats (DLSE Policy & Procedures Memorandum 82-1)
- But here we are, back to use of Section 90 language!

Example: Federal OSH

- Federal OSHA *Field Operations Manual* recognizes the constitutional limitations on authority:
 - Act provides that [OSH] may enter without delay and at reasonable times ... for the purpose of conducting an inspection
 - Unless the circumstances constitute a recognized exception to the warrant requirement ... employer has a right to require ... an inspection warrant

Example: Federal OSH

Also see:

www.osha.gov/Firm_osh_data/100006.html

PROBLEMS

Labor Commissioner

- Personnel now distribute documentation again citing to Labor Code section 90
- Suggest potential personal criminal liability –*even to clerical employees* – for refusal to allow immediate access
- One example: DLSE investigator accessing employer computer when employees stepped out of the room!

Cal-OSHA

- One aspect of penalty calculation is employer cooperation and good faith
- Recent RCR experience: DOSH mid-level employee gloats that ALJ upheld enhanced citation where employer insisted on inspection warrant
- DOSH employee wholly unimpressed about implications or potential Section 1983 liability

U.S. D.O.L.

- U.S. D.O.L. recently aggressive entering agricultural land
- Pressure agents to allow immediate access by federal DOL agents and short-term production of documents
- No apparent understanding of warrant requirements

PRACTICAL ISSUE: POTENTIAL CRIMINAL ENFORCEMENT

Criminal Enforcement

- Many employment laws have *criminal* as well as civil penalties
- Labor Code creates dozens of misdemeanor violations for failure to comply
- Current Labor Commissioner created a “Criminal Investigation Unit” comprised of sworn peace officers to conduct criminal investigations, arrest employers for violating the state’s penal code and labor laws, and refer criminal cases to the district attorney’s office.

Criminal Enforcement

- Federal laws also have serious criminal sanctions:
 - Immigration Reform and Control Act
 - Migrant and Seasonal Workers Protection Act
 - Fair Labor Standards Act
 - Pension Benefit Laws
 - Worker Safety:
 - *See, e.g.,* <https://www.justice.gov/opa/pr/departments-justice-and-labor-announce-expansion-worker-endangerment-initiative-address>

Criminal Enforcement

- Important to remember that agency investigations can have *criminal* outcomes
- Common in worker safety, workers compensation, and employee payroll tax investigations
- Also frequently cited in DHS/ICE immigration investigation – Napolitano famously focused on prosecuting employers rather than unauthorized workers

STRATEGY

When Warrant Not Required

General Requirements

- Search Warrants are generally required when any “government actor” wants to conduct a search on a business or residence or any place that a person has a legitimate expectation of privacy.
- Government Actor include law enforcement and local, state, and federal agencies.

Warrant Exceptions

- Exceptions
 - Plain View – Don't need warrant to seize things in plain view while in a lawful vantage point.
 - Consent – by the owner or first party

Warrant Exceptions

- Exceptions
 - Consent – third party
 - Common authority over premises
 - Government actor requires reasonable belief person has common authority

Warrant Exceptions

- Exceptions
 - Exigent Circumstances – still requires probable cause
 - Enforcement may generally enter an “**open field**” – unenclosed areas around main facility
 - Open Construction Site (management provides access to entire site)

Avoid Creating Exceptions

- **Beware** of creating an exception to the warrant requirement:
 - **Consent** by a representative
 - **Violations in plain view**
 - **“Third party” consent** by people not truly connected with the business or authorized to allow enforcement in

Strategy in All Cases

Considerations

- Legally – no penalty for exercise of constitutional right
- Inevitably they will get warrant vs. cost of noncompliance:
 - (attitude of inspectors, loss of the benefit of doubt, and potential penalty enhancements as discussed above)

If Warrant Served

Process – First Steps

- Warrant Response Team: trained on proper protocol to follow when inspection occurs
- Review warrant: check for discrepancies in address, business name, date
- Identify lead agent

Process – Government Agents

- Monitor but do not interfere with search –
“sit down” “shut up”
- May request to:

Shadow

Photograph

Question the scope

Process – Employees

- Inform employees of search
- Find out if employees may leave the premises
- Instruct not to interfere
- Inform they are not required to answer questions, may have counsel present, request not answer questions

Process – Privilege

- Identify Taint Team Agent
 - or document lack of taint team
- Insist on privilege log
- Request to assist identity of privileged materials

Process - Other

- Insist on list of property seized and any alleged violations

QUESTIONS?

THANK YOU!

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