



do your employees have the proper legal training when it comes to government investigations or inquiries?

MSK Client Alert

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There is a general understanding that the Fifth Amendment to the U.S. Constitution gives a person the right not to incriminate him- or herself, and that understanding comes, in large measure, from movies and television programs showing police officers reading suspects their Miranda rights. What gets lost in the drama of these shows is that that right is not absolute. It only attaches when one is a suspect and does not apply to corporations, only individuals.

On June 17, 2013, the U.S. Supreme Court issued its decision in *Salinas vs. Texas*, No. 12-246, 2-13 BL 158572 (U.S., June 17, 2013). What the court held is that, if someone voluntarily speaks with the police and sits mute in the face of a question, the fact of that person's silence can be used against him or her in a subsequent prosecution. In that case, Mr. Salinas agreed to accompany the police to their station in order to answer questions. As is typical, the police advised they wanted to ask those questions in order to clear him of potential charges – a statement that itself should have served as a red flag to Mr. Salinas. This was a noncustodial situation, meaning Mr. Salinas was free to leave at any time, so the Miranda warnings were not given and did not apply.

During the course of the interview, and after answering a number of other questions, Mr. Salinas was asked whether his shotgun “would match the shells recovered at the scene of the murder.” In response, Mr. Salinas “[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up.” After sitting silent for about two (2) minutes, subsequent questions were asked and answered. Mr. Salinas was later arrested for the murders and convicted. On appeal, he argued that the prosecutor commented on his silence during closing argument and that is not permitted as his silence was used against him.

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The Supreme Court held that, in order to assert the Fifth Amendment right against self-incrimination, the claim must be affirmatively made. While exactly what Mr. Salinas needed to say in order to make clear he was invoking his right was never clarified, but the Supreme Court did hold that silence alone was not enough.

The Supreme Court also made clear that, if Mr. Salinas was in custody and had been given his Miranda rights, the decision might have been different since silence is permitted in such a circumstance, but here, the interview was noncustodial.

This case serves as a reminder to companies of the importance of explaining legal rights to more than just managers, directors, and executives. A typical way in which government agents interview employees follows execution of a search warrant. The agents have identified the relevant employees during the warrant execution process, generally have had preliminary conversations with them, and now want to follow up and get more information. Another example of how such interaction arises is when the agents are investigating a matter and simply contact employees, often at home. A common approach is for the agents to say they just have a few questions and want to clear up some issues. Another common method is to say, we aren't really after you; we want your bosses and if you cooperate with us, nothing will happen to you. All of these statements should serve as red flags to employees, regardless of their position in the company. For companies, no matter how good their internal controls, mistakes do happen.

Compounding the situation is investigators will often express veiled threats about the employee's immigration status or otherwise conduct the interview in such a manner as to intimidate the employee and then use that person's fears to their advantage in building the case against the company and the individuals. While these are permissible interrogation techniques, they do leave companies vulnerable, and so it would be wise for businesses of all sizes to make sure they give proper training to all staff members (from top to bottom) about their legal rights. Obviously, the size of the company makes that task easier or more difficult in direct relation to the number of employees and the different locations in which the company operates. Further complicating matters is when the company has locations in multiple countries as local laws differ.

This training would be expected to make clear to employees of the American company, they have the right to decline to speak with investigators, whether arrested or interrogated, or even to meet freely. If they elect to speak with investigators, the company will also want to emphasize any information the employee shares must be accurate. To do otherwise creates other potential liabilities. How the subject of legal rights and how to invoke them is worked into the training tools the company makes available to its employees will need to be stylized to the individual audience, but in light of the holding in Salinas, companies would be wise to consider how best to protect themselves and their employees as so many of the mistakes being made are now being investigated first as criminal prosecutions, and only later do the authorities settle for civil consequences.