

Minimize Qui Tam/Whistleblower Lawsuits with Corporate Compliance Plans

MINIMIZE QUI TAM / WHISTLEBLOWER LAWSUITS WITH CORPORATE COMPLIANCE PLANS

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The Law

The civil False Claims Act, ("FCA"), 31 U.S.C. Sections 3729 through 3733, is arguably the most powerful tool the federal government has to enforce fraud and abuse prohibitions.

The FCA provides that any person who knowingly presents, or causes to be presented, to the U.S. government a false or fraudulent claim for payment or approval; knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government; or conspires to defraud the government by getting a false or fraudulent claim allowed or paid violates the FCA.

Anyone who violates the FCA is liable to the government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus treble damages sustained by the government, for each false claim filed. No proof of actual damages, such as payment or approval of the claim, is needed to prove a violation of the FCA. In addition, liability can be established by proving deliberate ignorance or reckless disregard for the truth of the claim submitted. Innocent mistakes or negligence will not support such liability. Corporate officers who are or should be aware of the false claims, as well as the corporate employees who actually file them, may be liable under the FCA.

Either the Attorney General or private persons can bring civil lawsuits for false claims. This means that an employee can bring what is called a qui tam lawsuit. These lawsuits are often referred to as "whistleblower" lawsuits. What is in it for the "relator" or "whistleblower", i.e., the private person bringing the lawsuit? The relator is entitled to recover at least 15 percent but not more than 25 percent of the proceeds of the qui tam lawsuit. The percentage depends upon the extent to which the relator participated and contributed to the qui tam lawsuit.

The FCA protects employees who bring qui tam lawsuits under the FCA. An employer is prohibited from firing, demoting, harassing or otherwise discriminating against an employee who brings a qui tam lawsuit. The employer, if found to have retaliated against the employee for bringing a qui tam lawsuit, may be forced to reinstate the employee and to pay twice the amount due for back pay along with interest on the back pay. The

employer may also be forced to pay the additional costs incurred in the employee's seeking relief from the employer, including but not limited to the costs of bringing the lawsuit against the employer, as well as reasonable attorneys' fees.

The Relator / Whistleblower

Assume for purposes of discussion that employees are, for the most part, honest and law abiding. Let's assume that many of them are also loyal to their employers, but only to the degree that the employees believe the employers are equally honest and law abiding. Just such an employee will, most likely, bring issues involving possible false claims to their supervisor's attention. For example, if upcoding is being inadvertently being done, or if medical record documentation is not as complete and precise as it needs to be to support medical necessity, the honest and loyal employee will, we assume, first bring such issues to the attention of his or her supervisor.

But what if the supervisor does not listen, for whatever reason? What if the supervisor is not as knowledgeable as the employee that an issue of concern really does exist? What if the supervisor is more concerned with cash flow and maximizing reimbursements? What if, even worse, the supervisor has the attitude: "We need to make up for the reimbursement cuts from last year and this is as good a way as any." Would the employee by-pass the supervisor and seek assistance from a higher up?

What if that higher up is a physician or an owner of a facility who has an honest lack of understanding and appreciation of the potential consequences from the inappropriate and potentially unlawful billing? What then? Many qui tam lawsuits have involved just such a situation. The employee then has choices: Keep quiet; go over the supervisor's head and risk retaliation, contact the Office of the Inspector General ("OIG") directly or contact an attorney to initiate a qui tam lawsuit.

An employee need not rationalize too much before attempting to initiate a qui tam lawsuit. The employee need only say to herself: "If the medical practice / facility will not change its behavior, then it really is not the honest and law-abiding medical practice / facility I thought it was. I am not going to risk my career and my ability to participate in the Medicare program for an employer who doesn't have the same values as I do. I also deserve to make some money as a result of the terrible exposure that my employer is subjecting me to."

Corporate Compliance Plans Minimize Qui Tam Lawsuits

The corporate compliance plan is designed to address just such an employee. A loyal and concerned employee can turn to a compliance officer with such issues. The compliance officer to whom the employee confides is independent and has more authority than any supervisor to whom the employee normally reports. The compliance officer is also receptive to the employee's concerns because the compliance officer is focusing on the greater risks to the employer that are associated with issues like illegal upcoding. The

attorney involved in setting up and maintaining the compliance plan is also another contact for the employee to express his or her concerns to. The anonymous hotline set up under the compliance plan offers yet another option for the employee's concerns to be heard.

The compliance officer and the attorney have different priorities than the employee's supervisor. The latter may be caught up with maximizing revenue for the provider; the former is focused on keeping the physician / owner out of jail. An effective compliance plan emphasizes during the employee's training that the provider strictly adheres to all laws and regulations. The following exemplifies such a philosophy statement:

"We do not tolerate the perception or the reality of fraud. If there are any concerns about improper practices and procedures, then we insist that all employees bring their concerns to the attention of their supervisor. If the supervisor is unresponsive, for whatever reason, the employee is encouraged to immediately bring the concerns to the attention of the compliance officer, either directly or indirectly (telephone hotline) or to our attorney. We are committed to abiding by all federal, state and local laws and regulations in our attempt to provide care for our patients."

Conclusion

A compliance plan, with a receptive and effective compliance officer and attorney, as well as through the proper training of all of the employees and owners, can keep employee concerns within the provider's organization and away from the OIG. Legitimate employee concerns can be directly addressed by providers and channeled into legally compliant practices and procedures. In the process, qui tam lawsuits might be avoided, thereby minimizing the criminal and civil exposures that both the owners and the employees face from such unlawful business practices. Corporate compliance plans are not just for the OIG. Corporate compliance plans are, arguably, more important for a provider's employees. In many situations, it may be more likely that an employee will "blow the whistle" before the OIG will independently knock on a provider's door. If so, employers are encouraged to immediately put into place corporate compliance plans, possibly the most effective strategy to minimize employee qui tam lawsuits. The expense and possible consequences associated with qui tam lawsuits warrant this effort. Visit other areas of our website for overview of our services, our experience and our attorney profiles.