News & Publications

Careful Investigation of Internal Complaints May Reduce Fraud Exposure

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An employee walks into your office complaining of improprieties concerning claims your hospital submitted to the government. Your initial reaction is the allegations are meritless, and you are inclined to simply ignore them. However, this response could prove dangerous and extremely costly.

Statutes such as the False Claims Act permit a private individual to file suit on behalf of the United States against a person or company that has allegedly submitted false claims to the United States. Every year there are billions of dollars in settlements and judgments in cases involving purported fraud against the government. A defendant in such a lawsuit can be liable for three times the damages sustained by the government as well as for penalties ranging from $5,500 and $11,000 for each false claim in addition to attorneys' fees and costs for the opposition. Furthermore, many senior executives now find themselves being targeted individually in these cases.

Enforcement efforts are ramping up regionally and nationally. In a program held this past April in the Western District of Pennsylvania, the newly appointed U.S. Attorney took the unusual step to declare his jurisdiction was "open for business"

for healthcare qui tam cases. Six regional fraud prevention summits have been held since June 2010. The Affordable Care Act allocated an additional $350 million to fraud enforcement over 10 years and established the Health Care Fraud Prevention and Enforcement Action Team, cleverly dubbed "HEAT." Medicare Fraud Strike Force operations have expanded from their beginnings in South Florida and Los Angeles to a total of nine healthcare fraud hot spots across the country.

Significantly, a recent study by the National Whistleblowers Center found that 89.7 percent of employees who eventually file a lawsuit, such as a False Claims Act case, initially reported their concerns internally, either to supervisors or compliance departments. In other words, a lawsuit was only filed after the employee failed to get satisfaction from the employer's handling of the issue. Many of these cases could potentially have been mitigated and/or prevented by (1) having a sufficient internal compliance program in place, and/or (2) carefully investigating any complaints and reacting appropriately. Taking some simple steps before a lawsuit is filed can ultimately mean the difference in preventing litigation and/or saving significant money.

Although formal compliance plans are still technically voluntary for most entities, even the smallest institutions should have one in place. The Office of Inspector General's 1989 and 2005 Hospital Compliance Guidance documents set forth the government's expectations regarding effective compliance programs. Numbers four and five of the familiar "seven elements" derived from the Federal Sentencing Guidelines are:

(4) The maintenance of a process, such as a hotline, to receive complaints, and the adoption of procedures to protect the anonymity of complainants and to protect whistleblowers from retaliation;

(5) The development of a system to respond to allegations of improper/illegal activities and the enforcement of appropriate disciplinary action against

employees who have violated internal compliance policies, applicable statutes, regulations or federal health4care program requirements.

In connection with the fourth element, the OIG has emphasized that open communication is essential to maintaining an effective compliance program. Generally, open communication is a product of organizational culture and internal mechanisms for reporting instances of potential fraud and abuse. The OIG considers the following factors in assessing an open communication system:

- Has the hospital fostered an organizational culture that encourages open communication, without fear of retaliation?
- Has the hospital established an anonymous hotline or other similar mechanism so that staff, contractors, patients, visitors and medical and clinical staff members can report potential compliance issues?
- How well is the hotline publicized? How many and what types of calls are received? Are calls logged and tracked (to establish possible patterns)? Is the caller informed of the hospital's actions?
- Are all instances of potential fraud and abuse investigated?
- Are the results of internal investigations shared with the hospital governing body and relevant departments on a regular basis?
- Is the governing body actively engaged in pursuing appropriate remedies to institutional or recurring problems?
- Does the hospital utilize alternative communication methods, such as a periodic newsletter or compliance intranet web site?

It is critical for an entity to take appropriate steps to protect the content of any internal audit or investigation from subpoenas by investigators, whistleblowers and other adverse parties. The most effective way to do so is to have your attorney work directly with any outside consultants or auditors and report any

findings to the attorney. To avoid inadvertent waiver of the attorney-client/attorney work product privilege, such reports should not be shared with anyone outside the organization except under the guidance of counsel.

Perhaps the first and most important step when conducting an internal investigation of an employee's complaints is to involve experienced outside counsel in the process as soon as practical. Experienced legal counsel will best be able to assist with interviews of witnesses, document collection and review and computer forensics and legal analyses. It is critical to quickly conduct an internal investigation and thoroughly investigate purported wrongdoing to determine whether a violation exists. This will better allow a healthcare provider to minimize the consequence and to take significant care when responding to any government inquiries.

Involving counsel in internal investigations prior to litigation may have many additional benefits, including identifying solutions and/or formulating appropriate corrective measures. A healthcare provider may determine it wants to settle a matter prior to a suit becoming public in order to minimize publicity. There are formal voluntary disclosure steps that can be taken that may result in the reduction of damages a provider must pay. A healthcare provider may also want to maintain or salvage the business relationship with the "defrauded" government agency. If nothing else, a provider may be able to preemptively convince the government not to prosecute or not to intervene in a whistleblower’s lawsuit, because the claims are meritless.

Even if the matter cannot be resolved prior to litigation, it is important to gather evidence while the information is still fresh. In most circumstances where litigation is filed, significant investigation has already been completed by the government and whistleblower before the healthcare provider is formally made aware of the action. This places the healthcare provider at a significant disadvantage if it must play catch-up. A healthcare provider that waits for formal notice of a lawsuit to begin investigating and preparing its defenses may be

gathering evidence and interviewing witnesses following a substantial passage of time.

A final word of caution — design (or revise) your compliance plan with realistic and achievable elements, follow it and document that you have done so. Compliance manuals and policies that are ignored will do more harm than good. A government prosecutor or private whistleblower plaintiff may use such documents as evidence of knowledge of and intent to violate various governmental policies. Manuals whose remedial provisions are ignored or inadequately implemented are likely to be used as exhibits in any fraud litigation. To obtain the maximum benefit from a compliance program, entities should carefully tailor their efforts to their specific needs, resources and relevant risk areas, and work with qualified advisers to review, document and fully implement their compliance programs.

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