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Handling Potential Whistleblowers: How Providers Can Deter Qui Tam Lawsuits

By JESSE A. WITTEN AND MARK D. NELSON

The biggest fraud enforcement risk facing most health care providers is the risk of a lawsuit by a “whistleblower” under the *qui tam* provisions of the False Claims Act (FCA). Many such lawsuits are filed by disgruntled employees or former employees whose *qui tam* allegations frequently are unrelated to their work place issues. These employees often file *qui tam* lawsuits to get even for the wrongs they believe they have suffered or are experiencing at work. Accordingly, the malcontent employee must be understood as posing potential risk to an organization over and above a traditional human resources challenge.

There are, however, actions a provider can take to reduce the risk that it will be the target of a *qui tam* lawsuit by a dissatisfied employee. Properly handling of such an employee can make the difference between enabling the provider to remediate a regulatory issue internally or spending millions of dollars on legal fees, penalties, and fines.

The Risk From Whistleblowers

The FCA is the federal government's principal tool for fighting fraud, including Medicare and Medicaid fraud. A provider that submits or causes to be submit-

Witten and Nelson are partners in the Washington and Chicago offices, respectively, of the law firm of Drinker Biddle & Reath LLP. Witten counsels health care providers on fraud and abuse matters and litigation, and Nelson represents them on labor and employment issues.

ted a “false or fraudulent claim” to Medicare, Medicaid, or other federal health program can be liable for treble damages plus penalties of \$5,500 to \$11,000 for every false claim. Under the *qui tam* provisions of the FCA, private individuals known as “relators” can file suit on behalf of the government and on their own behalf, accusing the defendant of defrauding the government. Employees and former employees are the most common relators.

A *qui tam* complaint is filed by the relator under seal, and the government has a period of time to investigate and decide whether to intervene and take over the litigation. If the government intervenes, the relator gets to keep 15 percent to 25 percent of whatever the government eventually recovers through settlement or at trial. If the government declines to intervene, the relator still can litigate the action on behalf of the government and is entitled to keep 25 percent to 30 percent of any eventual recovery.

Most of the government's recovery under the FCA comes from cases originally filed by relators under the FCA. For instance, according to Department of Justice statistics, in 2007 and 2008, of the \$3.34 billion recovered by the government under the FCA, \$2.48 billion (or 74 percent) came from cases initially filed by relators. In health care fraud cases, of the \$2.65 billion recovered, \$2.03 billion (or 77 percent) came from cases originally filed by relators.

Over the past 10 years (1999 through 2009), relators filed a total of 3,780 *qui tam* suits, of which 2,315 alleged health care fraud. In 2008, relators filed 375 *qui tam* suits, of which 228 alleged health care fraud.¹

¹ These statistics are available on the Department of Justice's web site, at www.justice.gov/civil/frauds/fcastats.pdf.

The risk of *qui tam* lawsuits promises to increase, due in part to the following developments:

- The Obama administration has made combating health care fraud a top priority, increasing government resources to support FCA litigation and raising awareness among the public and plaintiffs' attorneys of the *qui tam* provisions.
- Recent well-publicized settlements, such as Pfizer's \$2.3 billion settlement in September 2009 (of which six relators will share \$168 million), have also increased awareness of the *qui tam* provisions.
- Public attention to health care reform efforts, including an expanded government role in health care financing, has shined a spotlight on Medicare waste, fraud, and abuse.
- Effective Jan. 1, 2007, federal law has required health care providers that receive at least \$5 million in annual Medicaid reimbursement to provide "detailed information" to their employees on the *qui tam* provisions of the FCA;
- An increasing number of states and local governments have enacted their own versions of the FCA, including *qui tam* provisions. There currently are 24 states and the District of Columbia with their own FCAs, as well as New York City and Chicago.

Channeling Would-Be Relators Into the Compliance Program

The overall objective in dealing with potential whistleblowers should be to channel them through the provider's compliance program. Some employees file *qui tam* lawsuits because they are genuinely frustrated by what they perceive to be regulatory noncompliance and a lack of an adequate response on the part of their employer. For these employees, an effective compliance program and appropriate feedback to the employee after a regulatory concern is raised can be effective.

Other employees, however, file *qui tam* lawsuits for more pernicious reasons, i.e., because they want to make money, they are seeking revenge, or they have some other personal motivation. Because the *qui tam* provisions can trigger the worst in some employees, some strategic work is necessary. To channel these employees through the compliance department, health care providers should require all employees to report regulatory violations internally. Employees should be encouraged to report in the first instance to their supervisor, but be directed to report to the Compliance Department if they prefer or if they are not satisfied with how the supervisor has responded. Providers should give employees notice that the failure to report a regulatory violation of which they are aware can lead to disciplinary action. At the same time, however, employees also should be assured that good faith internal reports will not lead to retaliation against them. These reporting policies should be included in an employee handbook and/or in the compliance program materials.

Some health care providers and other entities require a subgroup of management-level employees to certify annually that they are not aware of any compliance problems or to identify any issues about which they are concerned. If an employer adopts this approach, the certification should not be phrased in a leading manner. For instance, it should not state: "I hereby certify that I

am aware of no regulatory violations." Rather, the certification should be open-ended and drafted in a manner that facilitates disclosure.

When employers do learn of an employee's concern about a regulatory issue, it is important to investigate fully and then take appropriate remedial steps, if necessary. The first step is to obtain a complete account from the employee. Two people should conduct the interview so that there are at least two witnesses who can attest to what the employee said. If the interview is conducted by an attorney, it will be important to advise the employee that the conversation will be covered by the employer's attorney-client privilege, and the employee is not authorized to disclose the content of that communication outside the company.

The employee should be kept abreast of what the employer is doing to look into the employee's expressed concerns about regulatory noncompliance. That does not mean that the employer must reveal all facts to the employee or inform the employee of all investigative measures, but the employer should share enough so that the employee understands that the employer is making a good faith response. How much information should be shared depends on the nature of the complaint and, importantly, on the employee. And, employees must be informed of the ultimate resolution. Again, how to provide that information will vary from one situation to another. In some cases, it may be appropriate to permit the employee to read a final investigative report while in other cases, an oral report may be more appropriate. In any event, it is important to demonstrate to the would-be whistleblower that the investigation and decision regarding remedial action were taken in good faith.

Reassignment

Sometimes, reassigning an employee viewed as a potential whistleblower from one position to another is appropriate. For example, reassignment can be a good option if the employee is uncomfortable with acting in accordance with the employer's regulatory interpretation, though the employee agrees that the employer's position is reasonable. On other occasions, an employee's complaint may in fact be a veiled plea for reassignment and some flexibility in providing the reassignment may be called for.

Any decision to reassign an employee must be taken with care, however, and ideally with the employee's consent. An unwelcome reassignment can subject the employer to an accusation that it has retaliated against the employee. The federal False Claims Act and many state laws prohibit retaliation against employees for raising certain compliance issues. For example, federal law gives employees a right of action against their employer for retaliating against them for taking action to prevent a violation of the False Claims Act.

Departing Employees and Severance Agreements

Exit interviews with departing employees can be effective opportunities to learn of an employee's compliance concerns. Often, however, these interviews are not conducted or the health care provider fails to ask the departing employee whether he or she had any compli-

ance concerns. It is important, however, to ask these questions of departing employees. An employee who intends to file a *qui tam* lawsuit may not volunteer his or her compliance concerns, but by asking the question and documenting the lack of a response, the employer may help itself in its future defense.

When a health care provider elects to enter into a severance agreement with a departing employee, there are a number of provisions that should be included in the agreement but which are frequently omitted. These provisions can smoke out the departing employee's compliance concerns and give the employer the opportunity to act upon them. This can either deter the employee from filing a *qui tam* action or, if the employee does file suit, it can help the employer in its defense.

First, the severance agreement should require the employee to represent that he or she has or will disclose all regulatory violations of which the employee is aware. This provision could recite, for instance:

Employee hereby represents and warrants that [in his memorandum to Jane Roe dated MM/DD/YYYY] [during his exit interview on MM/DD/YYYY with PERSON 1 and PERSON 2], he informed XYZ Health System of all potential regulatory violations by any of the Released Parties, and of all potential overpayments received by any of the Released Parties from Medicare, Medicaid or other third-party payors, of which he is aware.

If the employee claims not to be aware of any regulatory violations, the severance agreement should contain a representation to that effect.

Second, the severance agreement should require the employee to refund all severance payments if he or she has breached any provision of the agreement, such as the following:

If Employee breaches any of the terms of this Agreement, he shall be liable to XYZ Health System for the Settlement Amount in addition to any other remedies available to XYZ under law or equity.²

This provision, along with the first provision, would not preclude an employee from filing a *qui tam* action, but if the employee files suit on the basis of an undisclosed

² If the severance agreement also requires the employee to waive any claims under the Age Discrimination in Employment Act (ADEA), the refund of all severance payments must be coordinated with the EEOC's requirements for lawful ADEA waivers.

regulatory violation or overpayment, the employee will likely be liable to repay the severance payment.

Third, the severance agreement should contain a broad release, broad enough to cover a *qui tam* action. The courts have reached differing conclusions as to whether a release of a *qui tam* action is enforceable. Some courts have held that releases in severance agreements provide an enforceable defense to a *qui tam* action if the government already had knowledge of the allegations and had an opportunity to investigate them prior to the date of the release.³ Other courts have found no public policy bar to enforcing releases broad enough to cover a *qui tam* complaint without regard to the government's knowledge.⁴ Still other courts, however, have held that public policy bars enforcement of a release of a *qui tam* lawsuit.⁵ A broad release of all claims should be sufficient, if the court is willing to enforce a release in the *qui tam* context. Including an express release of the employee's rights under the *qui tam* provisions could backfire and be portrayed as an effort to obstruct justice.

Finally, in some cases, it may be advisable to include a clause in the severance agreement that requires the departing employee to assist with the employer's ongoing investigation. This could require the payment of additional compensation to the departing employee, however, at a time when the employer wants to terminate all ties to a troublemaking employee.

Conclusion

The risk that a disgruntled employee or former employee will file a *qui tam* action against a health care provider under the False Claims Act is a substantial one. There are a number of ways that providers can mitigate that risk, such as by implementing procedures intended to channel regulatory complaints through the provider's compliance program. In addition, when the provider elects to enter into a severance agreement, the provider should insist on including certain provisions that can reduce the risk of a *qui tam* action.

³ See, e.g., *Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997).

⁴ See, e.g., *United States ex rel. Whitten v. Triad Hospitals*, 2005 WL 3741538 (S.D. Ga. Oct. 27, 2005), *rev'd on other grounds*, 210 Fed. Appx. 878 (11th Cir. 2006); *Robbins v. Desnick*, 1991 WL 5829 (N.D. Ill. Jan. 10, 1991).

⁵ See, e.g., *United States ex rel. DeCarlo v. Kiewit/AFC Enterprises, Inc.*, 973 F. Supp. 1039 (S.D.N.Y. 1996).