Overview of Presentation

• Who are whistleblowers?

• Criteria used by whistleblower lawyers when screening validity of whistleblower claims

• Best compliance practices to prevent whistleblower claims

• Managing organizational risks after whistleblower claim has been asserted
Part 1

Who Are Whistleblowers?

Whistleblowers

• Have positive feelings about their jobs
• Have good job performance
• Believe that the company will be responsive to their complaints
• View whistle-blowing as integral to their role in the organization.

Whistleblower Statistics

60% Received No Response

85% Blew Whistle TWICE Internally

39% <2yrs with Company

Source: “Raising Concerns at Work: Whistleblowing Guidance for Workers and Employers in Health and Social Care”

Employees Prefer to Resolve Their Concerns Internally

84% of whistleblowers that reported a compliance concern outside their company first reported the concern internally.

Only after the employer failed to address the concern satisfactorily did the employee report the concern to a third party outside the company.

Whistleblower Reporting

<table>
<thead>
<tr>
<th>How Incident Was Reported</th>
<th>Percent Utilizing Reporting Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervisor</td>
<td>82%</td>
</tr>
<tr>
<td>Higher Management</td>
<td>52%</td>
</tr>
<tr>
<td>Human Resources</td>
<td>32%</td>
</tr>
<tr>
<td>Hotline/Help Line</td>
<td>16%</td>
</tr>
<tr>
<td>Ethics Officer</td>
<td>15%</td>
</tr>
<tr>
<td>Outside person (not governmental or regulatory authority)</td>
<td>13%</td>
</tr>
<tr>
<td>Legal</td>
<td>11%</td>
</tr>
<tr>
<td>Governmental or Regulatory Authority</td>
<td>9%</td>
</tr>
</tbody>
</table>

Overall, 20% of reporters chose to tell someone outside the company.

Responses total more than 100% because respondents selected all that applied.

Part 2

A Whistleblower Lawyer’s Screening of Whistleblower Claims: How to Simultaneously Protect:
1) the Public Fisc,
2) Prosecutorial Resources,
3) Counsel’s Time, and
4) the Whistleblower’s Personal Interests
Screening Potential Qui Tam FCA Cases

• Importance of screening cases upfront:
  – Protect Whistleblower from a bad qui tam outcome coupled with blackballing
  – Discourage bad cases that make bad law
  – For good cases, allows presentation of a cogent case for government review and involvement
  – Prevents relator counsel from wasting her resources

Screening Whistleblower Claims

Factors supporting a good whistleblower claim:
• Relator has good, lawfully obtained evidence of fraud (lying, stealing and cheating)
• Relator has actual knowledge of relevant facts
• Collectability; solvent defendant(s)
Screening Whistleblower Claims

Red flags that whistleblower claim might be weak:
• The law is not what/where the whistleblower thinks it is; claims are not false claims
• Materiality issues – Escobar: Might not be fraud if the Government knew about the alleged conduct and continued paying the allegedly false claims
• Whistleblower does not have any documentation to support his factual allegations

Screening for Whistleblower Claims

Takeaways for providers:
• Learning what a whistleblower lawyer looks for when deciding whether to take a case should help providers avoid whistleblower cases or minimize their potency.
• Stand in the whistleblower’s shoes – what does your organization’s regulatory compliance look like from the perspective of a whistleblower lawyer?
Part 3

Best Compliance Practices To Avoid Whistleblower Claims

Is a Compliance Program in Place and is it Effective?

1. Written policies and procedures
2. Compliance Officer/Compliance committee
3. Effective compliance training
4. Effective communication
5. Multiple reporting options/non-retaliation policy
6. Enforcement of standards
7. Internal monitoring/investigation
8. Risk Assessment
Perception
The Blind Men and the Elephant

CO Checklist to Prevent a Whistleblower

- Ensure the elements of an effective compliance program are in place and perform a risk assessment annually. – Kick the Tires!

- Track and Trend Key Metrics for Patterns

- Partner with Human Resources
  - Employee satisfaction surveys
  - Exit Interviews
  - Investigations
CO Checklist to Prevent a Whistleblower

✓ Have Effective Communication with the person who reported the concern.
  ▪ Listen to them. Let them know the company cares and will follow up.
  ▪ Don’t Stonewall. Get back to them. Document the investigation and the interaction.
  ▪ Review the Conclusion and explain “why” (with caution)
    ▪ If they are right, correct it asap. File a Self-Disclosure if appropriate.
    ▪ If they are wrong, address their perception
    ▪ Do not discuss privileged information and partner with counsel on the response.
    ▪ Thank them for reporting
    ▪ Ensure there is no retaliation.

OIG Self Disclosure Information

[Image of OIG Self Disclosure Information]
Part 4

Managing Organizational Risks After Whistleblower Claim Has Been Asserted

Investigating Whistleblower Claims

Goals of Internal investigation:

• Find out what happened
• Evaluate what corrective action necessary
• Prevent recurrence
• Assess financial exposure
• Assess reporting obligations
Use of Legal Counsel

- Whistleblower claims present several risks for providers:
  - government investigations
  - financial liability under the False Claims Act and parallel laws
  - exclusion from government health care programs
  - corporate integrity agreement
  - adverse publicity

- Complexity of issues and risks requires use of legal counsel

Use of Legal Counsel

- Options:
  - in-house counsel
  - outside counsel

- Factors to consider:
  - complexity of issues
  - availability of in-house resources
  - cost
Legal Privileges

- When a whistleblower claim is first asserted, the provider must engage in-house or outside counsel to establish legal privileges to protect an investigation of the whistleblower’s claims.

- Cannot convert non-privileged information into privileged information simply by bringing in a lawyer later in the case.

Legal Privileges

- Attorney-client privilege
  - protects written and oral communications between an attorney and a client
  - intended to be confidential
  - a primary purpose of the communication is requesting or receiving legal services

- Exception if legal counsel was involved in furthering the fraud

- Work product privilege
  - protects confidential material
  - prepared by or at the direction of a lawyer
  - for litigation, or in anticipation of litigation
Legal Privileges

• Burden on the provider to demonstrate that information is protected by a valid legal privilege

• If a privilege is not established, a provider's confidential information regarding investigation of a whistleblower's claim may be subject to disclosure

Preserving Information

• Immediately after learning of whistleblower claim, provider must issue a document hold notice:
  – hard copy records
  – electronic records – emails, texts, social media
  – identifying universe of record custodians
  – identifying universe of relevant records
  – relevance = information supporting/refuting whistleblower's claims

• Negative consequences for losing records/data
Do You Have Insurance?

- General liability and employer liability policies usually don’t cover whistleblower claims
- Officers & Directors liability policies may possibly cover whistleblower claims, but there may be coverage exclusions and limitations
- Consult with legal counsel regarding possible insurance coverage

Interviews

- Who has relevant information?
  - employees
  - contractors

- Use of experts?
  - medical
  - billing/coding

- Interviews/experts must be coordinated by legal counsel to preserve privileges
Interview of Whistleblower

- Is he/she still working with the provider?
- Is he/she willing to discuss claim?
- Does he/she have a lawyer?
- Legal counsel should be consulted regarding communications with whistleblower

No Retaliation Against Whistleblower

- What is protected activity?
- Are you aware of protected activity?
- What is retaliatory conduct?
Questions

Resources

• OIG Compliance Guidance's

• U.S. Department of Justice, Evaluation of Corporate Compliance Programs

• OIG Measuring Compliance Program Effectiveness
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