

WHISTLEBLOWERS: Who Are They, Why Do They Blow The Whistle, And Managing The Risks

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Overview of Presentation

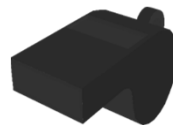
- **Who are whistleblowers?**
- **Criteria used by whistleblower lawyers when screening validity of whistleblower claims**
- **Best compliance practices to prevent whistleblower claims**
- **Managing organizational risks after whistleblower claim has been asserted**

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.



McMillan, Michael (2012, Oct). Retaliation against Whistle-Blowers: No Good Deed Goes Unpunished. www.CFAInstitute.org

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"

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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.

National Business Ethics Survey
2013. www.ethics.org

Whistleblower Reporting

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

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

Responses total more than 100% because respondents selected all that applied.
National Business Ethics Survey 2013. www.ethics.org

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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

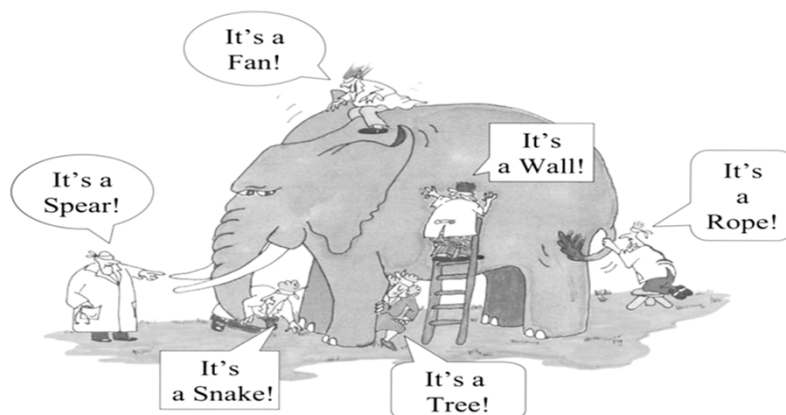
Best Compliance Practices To Avoid Whistleblower Claims

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



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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

The screenshot displays the Office of Inspector General (OIG) website. At the top, there is a navigation bar with links for Home, FAQs, FOIA, Contact, and Download Reader. The main header features the OIG logo and the text "Office of Inspector General, U.S. Department of Health & Human Services". A search bar is located on the right side of the header.

The main content area is titled "Self-Disclosure Information". It includes a sub-header "Self-Disclosure Information" and a paragraph explaining that the OIG has several self-disclosure processes for reporting potential fraud. A note states: "Self-disclosures should not be reported to the OIG Hotline." Below this, there is a section for "Health Care Provider Self-Disclosures" which mentions that health care providers can use the Provider Self-Disclosure Protocol to voluntarily disclose self-discovered evidence of potential fraud.

On the right side of the page, there is a sidebar titled "I'm looking for" with a dropdown menu. The dropdown menu is currently set to "Select One" and lists several categories: Accountable Care Organizations, Advisory Opinions, Compliance Resource Portal, Compliance Guidance, Corporate Integrity Agreements, Open Letters, and DAT STATE.

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**
 - <https://oig.hhs.gov/compliance/compliance-guidance/index.asp>
- **U.S. Department of Justice, *Evaluation of Corporate Compliance Programs***
 - <https://www.justice.gov/criminal-fraud/page/file/937501/download>
- **OIG *Measuring Compliance Program Effectiveness***
 - <https://oig.hhs.gov/compliance/101/files/HCCA-OIG-Resource-Guide.pdf>

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