



Best Practices for Internal Investigations

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Shachi Mankodi
Assistant General Counsel (Regulatory)
DaVita Medical Group

Hannah Levinson
Associate
Nelson Mullins Riley & Scarborough


Triggering Events

- Compliance Hotline Report
- Subpoena for documents is served
- Civil Investigative Demand is issued
- Whistleblower has provided confidential information and documents to the Government



Internal Investigations – General Processes

- Intake
- Triage of Issues
- Identification of appropriate stakeholders
- Announcing the Investigation – tips and best practices
- Investigation
- Documentation of the investigative steps
- Corrective measures and closure



Intake Process

- Departments designated as the point of contact for reports that trigger internal investigations:
 - Compliance
 - Office of Special Counsel – responsible for coordinating the effort for internal investigations
- Outside issues that trigger internal investigation:
 - State or federal investigation alleging that the company/client has committed a crime or engaged in fraudulent activities
 - Responses to OIG subpoenas or CIDs
- Common ways to receive information internally:
 - Compliance Hotline
 - Through personnel on the ground (operators in the markets, finance and accounting, auditors, etc.)
 - Other counsel (e.g. Operations Counsel, Regulatory Counsel)
 - Direction from leadership to pursue an investigation

Triage Process

- Is the matter truly one that involves the potential for fraud, waste or abuse?
- Does the matter involve a large scale systemic issue or is it just a one-off issue?
- Does the issue potentially involve government reporting or overpayment repayment?
- Should the matter be handled in-house? Or should outside counsel be retained?
- Is it truly a legal issue or a billing or employment issue?

Once an Issue has been identified:

- Identification of Status and Engagement of Counsel
 - Status in Investigation; possible violation of Federal Criminal law?
 - Target, Subject, Witness of Investigation
 - A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.
 - A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.
 - A "witness" is a person who possess information essential to an investigation.
- The organization's Point Person should immediately contact in-house counsel and consult outside counsel when he/she is alerted to an investigation.

Outside Counsel Role

- Engagement of Counsel considerations
 - Historical engagement
 - Capacity
 - Jurisdictional
- Once Outside Counsel engaged, the Point Person should work with the legal team on the following:
 - Identified privileged documents
 - Working with investigators on narrowing the scope of the inquiry (if applicable)
 - Discuss E-Discovery concerns
 - Employee interviews
 - Document production

General Steps

- Set investigative priorities/objectives
- Determine the deciding authority
- Identify Point Person
- Review what is known
- Identify persons/employees to be interviewed
- Obtain relevant documentation and financial information if applicable
- Set timeline needed to complete investigation
- Discuss report guidelines
- Take corrective actions

Important Communication

- Announcement of investigation to the relevant stakeholders – at direction of counsel (high level summary of the issue, establish privilege, records retention and treatment of papers).
- Opening Memo – provides a framework for the investigation and more detailed instruction on process.
- Closing Memo – Summary of investigation (key information, witnesses, recommendations on corrective action).
- Training and Policies and Procedures

E-Discovery Concerns

- Point Person should work with legal team to consider electronically stored information (ESI) concerns early, including:
 - Identifying custodians/departments that may have relevant information
 - If necessary, issuing a litigation hold/record retention notice to key individuals
 - Working with outside counsel of a list of key terms (often this will also involve working with government agents)
 - Be wary of HIPAA concerns
 - Engage the IT department early and often
 - Protect metadata, even if a formal request for information has not been issued

Privilege Pointers

- Beware of acting as the "privilege fairy"
 - Document is privileged only if sent for the purpose of obtaining or delivering legal advice; copying a lawyer or writing "privileged" is not enough
 - Marking everything as privileged creates a host of problems
- Work Product
 - Only applies to work performed in anticipation of litigation
 - Can be dangerous to mark something as work product w/o issuing a legal hold.
- Putting your name, or the name of your outside counsel on a document helps in a privilege fight
 - Best practice is to use an email signature that identifies you as a lawyer or legal professional
- Be mindful of subject matter privilege waivers
- Be mindful of who owns the privilege (company, not individuals)

Working with Vendors

- Vendor engagement can keep audits and other investigations organized from an early moment
- Consider engaging vendors through outside counsel to preserve attorney/client privilege and foster communication
- Point Person should provide vendors with a point of contact for information collection and metadata preservation concerns


Remediation Post-Investigation

- Repayment
- Stark self-disclosure
- OIG Voluntary Disclosure
- Internal remediation – instituting policies and procedures
- Implementing ongoing monitoring and audit by compliance personnel

Hot Topic – Parallel Investigations

- A parallel investigation means there are simultaneous criminal, civil and administrative investigations
- These are increasingly popular given the long-standing policies that promote collaborations and the OIG/DOJ Joint Task Force (Health Care Fraud Prevention and Enforcement Action Team - HEAT Initiative)
- Requests for information could related to more than one investigation
- Implications for internal investigations if a parallel investigations is suspected or confirmed

Questions?

Shachi Mankodi, Esq.
 Shachi.Mankodi@davita.com

 Hannah Levinson, Esq.
 Hannah.Levinson@nelsonmullins.com
