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Internal Investigations: Compliance and Legal Partnership

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Agenda

- ***Role of Legal and Compliance in Developing and Implementing a Comprehensive Investigation Plan***
- ***Privilege and representation issues during an Internal Investigation***
- ***Avoiding common pitfalls when conducting a Comprehensive Internal Investigation***

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Hypothetical

- Two weeks ago, PeachKare System received an anonymous compliance hotline call expressing concern about billing practices for surgical procedures by some of PeachKare's employed physicians. ConsultCo, a national consulting firm, has been helping the Revenue Cycle Department with an unprivileged billing audit that includes these physicians and procedures.
- Early indications suggest that there could be some validity to the hotline caller's concerns and PeachKare has recently seen increased claims denials for certain procedures. Today, the System received a series of medical record requests and audit letters from a government payor that seem to relate to the same issue.

Preliminary Matters



- Determine initial scope
- Consider whether investigation should be conducted under attorney-client privilege and work product protection
 - In-house or outside counsel?
 - Current employees, former employees
- Start thinking about independence issues
 - Counsel and consultants

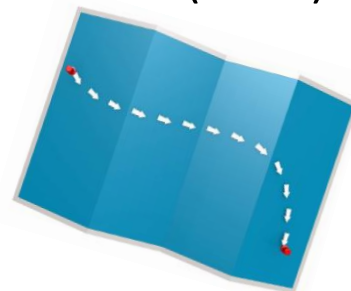
Develop a Comprehensive Investigation Plan

- Establish written work plan to guide investigation and focus inquiry
- Consider eventual audience (disclosure to the government?)
- Define investigation team from the outset
 - Remove stakeholders from process
 - Consider expert or consultant needs early
 - Establish clear lines of communication



Develop a Comprehensive Investigation Plan (cont.)

- Anticipate the potential results
 - Education and training?
 - Board report?
 - Self-disclosure / repayment?
 - Secondary issues?
 - Litigation?
- Include specific tasks with deadlines and accountability
 - Include facts known and needed
 - Plan for government interface as appropriate
- Every task should be necessary to final remediation
- Consider what written work product you need (if any)





Develop a communication strategy

- Witnesses
- Stakeholders
- Board



Consider Privilege

- If privileged, ensure that all work is done at the direction of counsel
 - DOJ guidance prevents federal prosecutors from conditioning cooperation credit on waiver of privilege
- Memorialize the privilege through delegations of authority and properly labeled communications – witness interview *impressions*
- Maintain narrow lines of communication



Documents: Preservation, Collection, and Review

- Develop a plan, modify as needed. Document everything.
- Issue document holds and preservation notices
 - Include medical record and billing systems, emails, paper records, text messages
 - Don't forget applicable contractors, third party systems, and cloud-based information
- What do you need to review? What does the government want you to review?
 - Emails
 - Cell phones
 - Other user-generated electronic data (hard drives, shared drives, document management systems)
 - Electronic databases
 - Medical records
- Who collects documents?
- Who does the review?
- Remember HIPAA and get BAAs if necessary



Consultant v. Expert

- Initial considerations
- Consulting or testifying
- Liability or damages
- Scope of review
- Privilege and work product protection





Hypothetical: Additional Facts

- The head of PeachKare’s Revenue Cycle Department insists that the System is doing everything right, and blames the audit activity on Cathy Coder, a “problem child” coder who takes a rigid view of how to document, code, and bill for such things. Coder, who is a frequent visitor to HR, has been outspoken at team meetings about the System’s revenue capture initiatives. She has also made comments that PeachKare is overpaying the physicians based on their productivity comp model.
- Initial internal investigation suggests possible wrongdoing by head of revenue cycle. Now, PeachKare has received a Civil Investigative Demand (CID).



Dealing with Potential Whistleblower

- Determine HR’s involvement in the review
- Whistleblower protections
 - Make sure company and all employees are clear that there can be no retaliation
 - Do not try to discover the identity of the whistleblower
 - Separate FCA penalties for whistleblower retaliation
- Consider Administrative Leave for potential whistleblower





Witness Interviews

- Who to interview, and when?
- What do you disclose about the investigation?
- Practical considerations
 - Does in-house counsel or compliance officer participate?
 - In-person or over the phone
 - Documents
 - Memorializing the interview



Privilege and Representation Issues

- The *Upjohn* admonition
 - How to give the admonition
 - What happens if you don't give the admonition?
 - Caution for public corporations (SEC Rule 21F-17)
- What if the witness asks:
 - "What is this investigation about?"
 - What's my liability?" or "Do I need a lawyer?"
- When do you get individuals their own lawyer
 - Legal/contractual requirements
 - Practical considerations
- Joint defense agreements and the common interest privilege
 - Does it have to be in writing
 - Practical considerations and pitfalls
 - Caution when dealing with companies subject to open records laws

Remediation

- Systemic or isolated?
- Process changes needed?
- Personnel changes needed?
- Self Disclosure?

Avoid Common Pitfalls



- Non-privileged communications
- Stakeholder bias or conflict
- Too many quarterbacks
- Failure to manage reporter



Avoid Common Pitfalls (cont.)

- Scope creep
- Stagnant progress
- Poor documentation
- Inadvertent waiver
- Incomplete remediation



Questions

