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Listening to Employees To Lessen Government Scrutiny

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Today, even the most ethical and compliant health care and life science companies are faced with substantial risks while operating in a highly regulated field of ever-changing laws, rules, and regulations. As federal and state health care investigations and prosecutions continue to increase, there has also been a dramatic increase in the number of whistleblower, or qui tam, suits filed each year. In fiscal year 2013, a total of 753 qui tam suits were filed under the federal False Claims Act,[1] alleging health care fraud and other frauds against the government.[2] Those 753 complaints represent a 15 percent increase over the prior year's record number of 652 complaints filed.

While companies may feel helpless to stem the tide of suits by whistleblowers, there are steps that companies can and should take to lessen the chances of being named as a defendant in a qui tam suit and thereby lessen the chances of being subjected to the glare of government scrutiny. There are also steps that companies can and should take to best position themselves to address and resolve the employment-related issues that often accompany claims of alleged misconduct by whistleblowing employees.

Reporting and Retaliation

In many instances, the person who files a qui tam complaint—often referred to as a relator or whistleblower—is a current or former employee of a company who first reports the concerns internally and informally to the company, identifying the specific fraudulent practices and/or acts of misconduct that are allegedly being carried out by the company or co-workers. This kind of informal complaint or report provides the company with a tremendous opportunity to investigate and determine whether any real problems exist.

If any compliance or other issues are identified, the company is in a position to address and correct those issues before a qui tam complaint is filed and/or the matter otherwise is brought to the attention of law enforcement. Once the company understands the issue or issues and has taken corrective action, it may also want to consider voluntarily disclosing the matter to law enforcement, as discussed more fully below, in an effort to avoid having to deal with a full-blown government investigation down the road.

With some degree of frequency, we have found that the whistleblowing employee also claims that she or he has been subjected to retaliation as a result of an alleged unwillingness or refusal to engage in the complained-of conduct. In other instances, the whistleblowing employee may claim that she or he has been the subject of reprisal simply as a result of raising the claims or complaints about the alleged misconduct.

In either scenario, it may be that the employee's claim has merit, or it may be that the employee has serious performance-related issues at work and raised the claims or complaints in an effort to stave off or avoid anticipated adverse employment consequences. The only way to determine whether the employee's claims have merit or are baseless is to investigate them. Thus, to the extent that the whistleblowing employee raises any claims of retaliation or reprisal, those claims also must be investigated.

Of critical importance here is the fact that there are various federal and state laws that protect whistleblowers

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from retaliatory action by employers. Accordingly, once an employee actually raises claims and blows the whistle (even if only internally and informally), it is important that the company take immediate affirmative steps to ensure that no retaliatory employment-related action is taken. Moreover, even if the company were already planning or had decided to take employment-related actions against the employee (up to and including termination) before the employee raised the claims, it is vital that the company carefully consider the timing of such actions. Typically, a company should hold off on carrying out any such plan until after the investigation has been conducted, otherwise it might appear as though the actions were being taken solely as a consequence of the employee's claims.

To ensure that any employment-related actions are properly reviewed and the timing of such actions is carefully considered while any investigations are ongoing, it is imperative that the appropriate people at the company be made aware of any whistleblower claims. Determining who needs to be notified about a whistleblower's claims merits careful consideration. As a general rule, and as is the case with respect to most internal investigations, efforts should be made to reveal information only to those with a genuine and legitimate "need to know." This helps both maintain the integrity of the investigation and shield the whistleblower from any potential negative consequences.

Best Practices

With regard to the investigation itself, it should conform to legal requirements and other well-established best practices. Among other things, company employees and representatives who are interviewed in the course of the investigation should receive appropriate instructions and warnings, such as Upjohn warnings, so that the employees understand that counsel is conducting the investigation for the purpose of providing the company with legal advice, that counsel represents the company, that the communications between counsel and the employees being interviewed are confidential and privileged, and that the company alone holds and can waive the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

In addition, it is a best practice to conduct the investigation while taking every step and action to preserve attorney-client privilege unless and until an affirmative decision is made to waive the privilege. At the same time, the investigation should be conducted and any reports should be prepared to segregate factual information from true attorney-client communications and attorney work product so as to permit the sharing of factual information when and if the company decides to share or disclose that factual information.

There are steps that companies can and should take to lessen the chances of being named as a defendant in a qui tam suit.

Significantly, the company can use the investigative process not only to obtain the facts relating to the alleged misconduct or fraudulent activities but also to send the right message to employees, letting them know that the company is sincere in its efforts to investigate and address complaints and issues—which may, in turn, encourage others to come forward and disclose to the company first any concerns of improper practices.

Although investigations can take some time, any investigation of potential wrongdoing or misdeeds at the company should be carried out expeditiously, and preliminary conclusions should be drawn as quickly as reasonably possible. If problems are found to exist, the company should take steps to halt the problematic conduct or actions immediately. The company should address and correct the underlying issues and ensure that changes are made to the compliance program to better detect and prevent future occurrences. By taking these actions, the company not only addresses and remedies any substantive issues, but it also limits any potential exposure if the claims are subsequently the subject of a government inquiry.

While federal prosecutors typically give a would-be defendant or target more cooperation credit for voluntarily disclosing problematic conduct or actions in advance of any government inquiry or investigation, prosecutors also take a more favorable view of companies that clearly take affirmative steps to address and correct identified issues.

Meanwhile, if a meaningful and bona fide internal investigation reveals that there are no actual underlying problems or issues, then the company is positioned to address the whistleblower directly and hopefully convince the whistleblower that any concerns were misplaced.

If the company's investigation into the whistleblower's claims of retaliation ultimately reveals that those allegations are baseless, and further, if the employee's performance has been deficient and those deficiencies have been adequately documented, then it may be appropriate for the company to take action with regard to the employee. The key here is to evaluate objectively the adequacy of the record: Is it well documented and complete, and does it support the anticipated employment action? If the employment record is clear and complete, with objective, well-documented evaluations and reports, it may be appropriate to move forward with employment-related action against the employee despite the fact that the employee has raised claims. The company should understand, of course, that such decisions bear risk of further litigation, but it may still

be in the company's best interest to press forward and take affirmative action in such an instance despite the risk of the whistleblower complaint being lodged or an employment-related suit being filed.

In those instances where the company decides to press forward and terminate the employment of the whistleblowing employee, the company should consider whether it wants to offer the employee severance in exchange for the employee's execution of a release of all claims against the company and/or involving actions by the company. Such provisions are routinely drafted broadly to include not only claims that the employee might personally bring against the company in the employee's own name, but also claims that the employee might bring in the name and on behalf of another (such as the U.S. government in the case of a federal False Claims Act complaint) and also where the employee provides information that forms the basis for a claim brought by another.

While there are legitimate public policy considerations that weigh against the enforceability of contractual terms that forbid an employee or any individual from reporting suspected wrongdoing to law enforcement, the courts have been more willing to enforce bargained-for contractual terms that limit the complaining employee's right to collect or share in any monetary recovery personally, whether the employee brings or causes the claims to be brought contrary to contractual terms.

Voluntary Disclosures

Finally, regardless of whether the internal investigation into the alleged improprieties or misconduct reveals that there are issues, the company should consider disclosing the facts to law enforcement preemptively. If the investigation reveals there are no substantive issues, then the company can approach the government—including any one of the 94 U.S. attorneys' offices—and go on the record and let the government know the relevant facts, including that the company took the complaints seriously and investigated the claims thoroughly. By coming forward in this way, the company can tell its affirmative story first, before any claim is filed by a whistleblower or any investigation is begun by the government.

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This strategy is not without risk, however. The internal investigation may have failed to find a real, actual issue, and/or the government may wish to investigate a bit (or more) to confirm the facts brought forth by the company. But there are ways to lessen those risks, including making the initial disclosure on a hypothetical basis, if the relevant prosecutor is amenable, to help the company gauge the government's reaction and level of interest before a full-scale disclosure is made.

Meanwhile, if the investigation reveals that the company has some actual exposure, a voluntary disclosure can also be a means by which the company affirmatively accepts responsibility for the issue by addressing it head on, and such a disclosure can help limit exposure. A company that self-reports typically receives more lenient treatment—and sometimes much more lenient treatment—than a company that does not self-report and then becomes the subject of a full-blown government investigation.

It bears noting here that while there are some well-established protocols for making voluntary disclosures, including the more formal ones provided by the Office of the Inspector General of the U.S. Department of Health & Human Services[3] and the Centers for Medicare & Medicaid Services[4] (for Stark violations), disclosures can also be made on a less formal, less structured basis at a U.S. Attorney's Office, which permits a company the opportunity to select which Office to approach—and even which individual prosecutor within a particular Office to contact.

Because of this flexibility, a company may choose to disclose to a U.S. Attorney's Office where there is a pre-existing relationship and credibility has been established previously and/or to an office that is known for dealing fairly with self-reporting parties. In any event, by taking affirmative action to disclose the matter before a claim is lodged or filed, the company can demonstrate that it is taking responsibility and acting like a good corporate citizen.

1. 31 U.S.C. §§ 3729-3733.
2. http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.
3. http://oig.hhs.gov/compliance/self-disclosure-info/files/Provider-Self-Disclosure-Protocol.pdf.
4. https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/downloads/6409_srdp_protocol.pdf.