

Primer on Whistleblowing in Healthcare

What are whistleblower lawsuits?

Whistleblower lawsuits and settlements are on the rise and in the news. From January 2009 through September 2013, the federal government recovered \$17 billion in false claims alone. Of course, most healthcare providers are honest and work diligently to improve the health of their patients and contribute to the lawful operation of a healthcare business. It is in the best financial interests of physicians and other healthcare providers who comply with the law that fraudulent schemes to unlawfully obtain government funds be deterred and remedied. The federal and many state governments have determined that a crucial means of combatting healthcare fraud is by incentivizing those who are aware of fraud to report it as a “whistleblower.”¹ In light of spiraling healthcare costs and with state and federal governments’ roles as third party payors, healthcare whistleblowing protects law-abiding taxpayers, healthcare professionals and consumers.

As this article explains, many federal and state whistleblower laws provide legal causes of actions for employees, officials and others who suspect or discover violations of law, waste or abuse within government or fraudulent practices by companies doing business with government. A person with knowledge of a violation or fraud, known as a whistleblower or “relator,” may bring a lawsuit to expose the fraud or abuse and recover damages on the government’s behalf. In many cases, whistleblowers are entitled to a percentage of the recovery for their efforts in uncovering fraud and assisting in the recovery.

Many whistleblower lawsuits must be filed under seal and remain sealed until the government has had an opportunity to review the case and decide if it will intervene, or join in, the case. If the government does intervene, it will typically take the lead in prosecuting the case with the aid of the whistleblower (and her counsel). Whether the government intervenes or not, if a whistleblower lawsuit is successful and results in a recovery the whistleblower may be entitled to receive a percentage of the recovery depending upon her contributions to the case.

Healthcare whistleblower claims

Whistleblower claims in the healthcare industry are commonplace and arise under a number of different laws and circumstances. According to the Federal Bureau of Investigation, healthcare fraud costs taxpayers over \$80 billion annually. That cost is expected to rise with national healthcare spending topping \$2.7 trillion and expenses continuing to outpace inflation.

Healthcare whistleblowing is prevalent in the context of Medicare or Medicaid fraud, which includes a wide range of fraudulent billing and illegal practices and schemes by healthcare providers and facilities, medical device manufacturers and suppliers, pharmaceutical companies and other entities or persons who bill the government for healthcare services, products or supplies. There are also new whistleblower protections and claims for healthcare providers and

¹ The term “whistleblower” is a generic term that can also refer to employees who are protected under certain laws from unlawful retaliation by their employer.

employees under the 2010 Patient Protection and Affordable Care Act (ACA), also known as “Obamacare.”

Healthcare whistleblowers include physicians, staff and other healthcare providers and financial officers, executives, billing and administrative staff, and employees of healthcare facilities and providers including hospitals, surgical centers, nursing homes, physician practice groups and individual practices who have knowledge of fraudulent or illegal activity. Also, employees of medical device companies, drug manufacturers and other healthcare suppliers with knowledge of fraudulent or illegal pricing, billing and other practices may expose fraud under the protection of whistleblowing laws.

Federal and state laws that may involve whistleblowing include:

- False Claims Act (Qui Tam), 31 U.S.C. § 3730(h) – fraudulent billing by Medicare healthcare providers (hospitals, nursing homes, physician practices, etc.), drug and medical device manufacturers and suppliers
- Georgia False Medicaid Claims Act, O.C.G.A. § 49-6-168 *et seq.* – fraudulent Medicaid claims submitted to the state Medicaid program
- Fair Labor Standards Act, 29 U.S.C. § 218C (enacted Sec. 1558 of the ACA) – whistleblower protection for insurance company employees and others reporting violations of insurance reforms under Title I of ACA (e.g., prohibited coverage denials)
- False Claims Act (Qui Tam), 31 U.S.C. § 3729 – fraudulent bills or payments involving federal funds sent or made through a healthcare exchange established under the ACA
- Stark Law/Anti-Kickback Statute, 42 U.S.C. § 1395nn (Stark), 42 U.S.C. § 1320a-7b(b) (AKS) – illegal referral fees or kickback arrangements between hospitals, surgery centers and healthcare facilities and physicians or other persons or entities for treating and referring patients for treatment
- Sarbanes Oxley Act, 18 U.S.C. § 1514A – financial or other misrepresentations and fraud by public healthcare companies (for example, hospital operators)
- Occupational Safety and Health Act (OSHA), 29 U.S.C. § 660(c) – protection for employees and others reporting serious safety violations at healthcare facilities affecting patients or employees (violence against patients, inadequate care, unsafe conditions, etc.)

What to look for?

There is a wide variety of circumstances and schemes that may constitute fraud and, for a person with knowledge, trigger the need to evaluate whistleblower laws. Some types of fraud that have occurred and been exposed are:

- *Provider billing fraud.* Billing fraud by healthcare providers and facilities such as hospitals, nursing homes, rehab and acute care facilities, outpatient clinics, and ambulatory surgery centers may involve billing for services not actually rendered; overbilling and “up-coding” (charging for services other than what is rendered); billing for procedures, hospitalizations, equipment or treatment that is not medically necessary;

misrepresenting procedures performed to obtain payment for non-covered services (such as, for example, cosmetic surgery); unbundling (billing for each stage of a procedure as if it were a separate procedure); waiving co-payments or deductibles and overbilling an insurance plan; and charging a patient in excess of the co-payment amount for services prepaid in full by an insurance plan.

- *Illegal referral fees or kickback schemes.* Such schemes are varied and sometimes very creative, but will always involve some sort of *quid pro quo* by way of a financial incentive, direct or indirect, in consideration for patient referrals. Stark Law (the federal self-referral statute) and Anti-Kickback Statute (“AKS,” also federal), as well as some state statutes, prohibit schemes that involve financial incentives for the referral of patients. Stark Law is civil and imposes civil enforcement penalties. AKS is both a civil and a criminal statute that allows federal law enforcement to pursue civil and criminal enforcement remedies against violators. AKS requires proof of unlawful intent. By contrast, Stark Law is a strict liability statute in that if there is a financial relationship between a physician and another person or entity, referral of Medicare or Medicaid patients is prohibited unless a statutory or regulatory exception applies.
- *Drug manufacturer/medical device fraud.* Federal law prohibits pharmaceutical and medical equipment fraud because improper financial incentives can color the medical judgment of the treating physician. Overutilization of drugs and/or medical devices can be contrary to the best interests of the patient and increase the cost of government health programs. Some examples of kickbacks from drug and medical equipment manufacturers are phony “grants” to healthcare providers in connection with research programs, fake “speaker fees” as ostensible compensation for an educational event, and remuneration or kickbacks paid, directly or indirectly, for participation in purported clinical studies.

What to do if you believe you have whistleblower information?

- *Consider internal reporting.* Larger physician practices and many healthcare organizations and employers may have established policies and procedures for the confidential reporting of suspected fraud or wrongdoing through defined channels within the practice or organization. If your employer has such policies or procedures in place, careful consideration should be given to following them, particularly if it appears that management may be unaware of the wrongdoing.
- *Preserve evidence.* It is extremely important to preserve any evidence relating to suspected fraud or wrongdoing. Such evidence may be crucial to a proper investigation and ultimately to the successful prosecution (either by government or through private action) of a whistleblower claim against the violator(s). Depending on the circumstances, evidence might include written documents such as bills and invoices, treatment records,²

² In dealing with any Protected Health Information (PHI), compliance with HIPAA and company protocols for safeguarding the security and privacy of PHI is paramount. Because HIPAA has a broad reach and involves significant legal concerns and consequences if violated, consultation with an attorney familiar with HIPAA is advisable if evidence of fraud includes or affects PHI.

billing or other notes, correspondence, internal memos, contracts and agreements, payment information, payroll records, ledgers, accounting records, and other business and financial records. In addition, relevant electronic data including emails, text messages, electronic invoices and payment information, database and other computer files, text documents, PDFs and other scanned images, etc. should be kept. If there is any doubt as to whether information is or might be important, it should be preserved.

- *Determine deadlines.* Many whistleblower laws have strict time limits for employees or relators to report illegal activity or fraud, some as short as 30 to 180 days. Timely evaluation of which whistleblower laws or rules apply to a particular situation is critical, so that deadlines may be determined and anticipated to ensure timely compliance.
- *Consult with a professional – early.* Employees and other whistleblowers with knowledge of suspected fraud or illegal activity may face numerous concerns and conflicting obligations and loyalties, not the least of which is the prospect of losing their job if they come forward. Potential whistleblowers might also have concerns about their own involvement (however indirect or coerced) and possible legal culpability for unlawful or fraudulent activity. Not just for these reasons, but also due to the complexity of whistleblower laws and various deadlines for bringing claims, seeking competent legal advice *at the outset* is perhaps the most important thing a prospective whistleblower should do. An attorney experienced in these matters will confidentially review the facts and evidence and provide important legal advice about the whistleblower's legal rights and obligations, including the best course of action to take. This is an important personal decision to make, one that can change the course of an entire career and have lasting effects. Don't make the decision without professional advice.

Disclaimer: thoughts shared here do not constitute legal advice. Please consult with an attorney to discuss your legal issue.

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