COSMOS
Navigate the Compliance Universe

Compliance Today - November 2018
Understanding whistleblowers: Best practices for compliance professionals

by Michael A. Morse, Esq., CHC

Michael A. Morse (MAM@Pietragallo.com) is a Partner of Pietragallo Gordon Alfano Bosick & Raspanti, LLP in Philadelphia.

The impact that private-citizen whistleblowers have had on healthcare compliance cannot be understated. Since 1986, when the qui tam provisions were added to allow private whistleblowers to file and litigate false claims cases, the DOJ has recovered a whopping $36.4 billion in False Claims Act (FCA) cases involving the healthcare industry.[1] ,[2] Of those recoveries, $30 billion came from lawsuits initiated by private qui tam whistleblowers, who received more than $4.9 billion as a reward for bringing those claims.

Much has been said, both positive and negative, about the qui tam whistleblowers whose reporting has led to these astonishing monetary recoveries by the federal government. There are those who say that whistleblowers are courageous people who have taken tremendous personal risk to report fraud on taxpayers and helped improve the quality of healthcare in America. There are others who say that whistleblowers are disloyal to their employers, and are motivated by the money they might make for themselves. Having worked on whistleblower and compliance cases for nearly 20 years, I can truly say that labeling whistleblowers either as "angels" or "devils" is inaccurate.

More importantly, labeling whistleblowers as either "good" or "bad" stands in the way of an effective compliance program. First, such labels demonstrate a lack of understanding as to who whistleblowers are and what their motivations might be. Second, such labels often shape how an organization treats whistleblowers — either the organization overacts to every potential complaint or it treats those complaints as the musings of disloyal, disgruntled people. Neither reaction is appropriate. Moreover, treating whistleblowers in one of these ways can rob a compliance program of one of its most valuable tools — the ability to learn and correct a potentially unlawful practice before a qui tam lawsuit is ever filed. The focus of this article is on understanding whistleblowers, and identifying some best practices for compliance professionals learned from nearly 20 years "in the trenches" working on whistleblower and compliance cases.

Who are the qui tam whistleblowers

The federal FCA states that any "person" can serve as a qui tam whistleblower and file a civil lawsuit on behalf of the United States against anyone who submits, or causes the submission of, a false claim to the government. Congress intentionally used such broad language to define who can become a whistleblower in order to maximize the number of reports made against those who defrauded the government. In fact, the primary motivation for adding the qui tam provisions to the FCA in 1986 was the recognition that the government alone did not possess enough resources to police all federal spending and to identify those who were submitting false claims to government-funded programs, such as Medicare and Medicaid. Therefore, Congress turned to private-citizen whistleblowers to assist the government in going after fraudsters, and in doing so, it broadly defined those who can report false claims.

Due to the broad language in the FCA, whistleblowers can come from any level inside your healthcare organization, including, but not limited to, doctors, nurses, physician extenders, social workers, lab/imaging technicians, hospital administrators and executives, billing and coding staff, auditors, accountants, and even Compliance department staff. Moreover, as is often misunderstood, a whistleblower can come from outside your organization as well, including competitors, third-party contractors, pharmaceutical/device sales representatives, and patients.

Given the wide diversity of potential whistleblowers, it is important not to pre-judge who represents a "real" whistleblower. For example, you should not make the mistake of treating a complaint by an imaging technician or lower-level staff member as less important, because they have less seniority or little information about your organization's overall operations. It is essential that you take all complaints seriously, because anyone can file a whistleblower lawsuit regardless of their position and/or experience with your organization. Moreover, it is important that you treat all potential whistleblowers with respect, regardless of their seniority. Failing to do so will invariably send a strong message throughout the organization that whistleblowers should not report their concerns to the Compliance department, and it will prevent future whistleblowers from reporting their concerns internally before thinking about a qui tam lawsuit.

Similarly, you should not assume that persons outside your organization lack the ability to become whistleblowers. First, as mentioned above, such an assumption is legally incorrect. Second, outsiders often know quite a lot about your organization (including contracting and billing practices), especially in the age of email and social media. Many healthcare organizations often overlook the compliance message that they send to outsiders, simply by putting language in a contract stating that it expects third-parties to comply with all applicable laws, or posting the hotline number on their website. These measures alone are not sufficient. There are some simple and effective steps that all compliance professionals should consider when it comes to interacting with outsiders — steps which can potentially decrease the chance that your organization will face a qui tam lawsuit.