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# STRATEGIC PERSPECTIVES: Health care compliance professionals: How to ensure whistleblower protection when reporting misconduct

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A health care compliance professional is a critical line of defense for his or her organization. The compliance professional ensures that the organization understands and follows its regulatory and legal obligations. What happens, however, when he or she learns about fraud or other misconduct in the organization, reports it to supervisors or organization officials as required, and, instead of taking corrective action, the organization terminates or retaliates against the compliance professional?

Even though reporting fraud and misconduct is part of a compliance professional's job duties, it is likely that they are protected as a whistleblower. That being said, compliance professionals face unique hurdles for ensuring whistleblower protection. This article will briefly explain some of the most common legal protections for health care compliance professionals. It will then provide some tips on how they can best position themselves to be protected under those laws and how to avoid pitfalls that might limit those protections.

## Whistleblower Protections for Health Care Compliance Professionals

A number of laws provide whistleblower protections for health care compliance professionals, including the False Claims Act (FCA), the Sarbanes-Oxley Act (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), as well as state laws.

**False Claims Act.** In the health care arena, the FCA is a well-known law, particularly given the enormous and headline-catching settlements some health care companies have paid to federal and state governments over the past ten years. The FCA prohibits companies from fraudulently billing the U.S. government; in health care that usually means submitting false claims to Medicare or Medicaid. For example, off-label marketing of a pharmaceutical company's product or intentionally submitting claims with improper billing codes can result in millions of dollars of government overpayments through Medicare and Medicaid. Whistleblowers, typically company employees aware of the misconduct as a result of their jobs, can file an FCA claim under seal (a *qui tam* claim) to alert the government. The FCA incentivizes whistleblowers to report such fraud directly to the government by providing for an award of between 15 and 30 percent of any monies recouped by the whistleblower's lawsuit.

Equally as important, the FCA also prohibits employers from retaliating against employees who investigate such fraud, oppose it, or otherwise attempt to stop it. Both refusing to engage in fraud against the government and reporting it internally are protected activities under the FCA anti-retaliation provision. Under the FCA, an employee who engages in such protected activity is not only protected from termination, but also from less severe forms of retaliation, such as demotion, denial of a bonus, or harassment. The law provides for the recovery of twice the whistleblower's back pay

(economic losses from the time of termination through trial), either reinstatement or payment for future economic losses, emotional distress and reputational harm, and attorney fees and costs.

**Sarbanes-Oxley and Dodd-Frank Acts.** For health care compliance professionals that work for a publicly traded company, SOX and the Dodd-Frank Act also offer whistleblower protections. These two laws protect whistleblowers who report conduct they reasonably believe constitutes mail fraud, wire fraud, bank fraud, securities fraud, shareholder fraud, or any violation of a Securities and Exchange Commission (SEC) rule or regulation or other law designed to protect shareholders.

Although the connection between securities law and health care compliance may not be intuitive for many health care compliance professionals, these laws protect employees of publicly traded pharmaceutical companies, hospitals, health insurance providers, health care companies, and the like who report fraud, including fraud against the government, patients, or even other companies. They also protect employees whose reports relate to public misstatements made in their companies' SEC filings. For example, if a company falsely reports in its SEC filings that it is complying with the terms of a corporate integrity agreement by which it is legally bound, or if the company falsely states that it is in compliance with CMS rules and regulations, the health care compliance professional often would be legally protected for reporting or opposing such misstatements. Successful plaintiffs under SOX and the Dodd-Frank Act can obtain recovery for economic losses, reinstatement or payment for future economic losses, emotional distress, and attorney fees and costs. The Dodd-Frank Act also provides for recovery of double back pay.

**State laws.** State laws also may provide protections for health care compliance professionals that have been terminated for reporting or refusing to engage in unlawful conduct. A majority of states prohibit terminating an employee who blew the whistle on unlawful conduct, although states vary widely as to the scope of these protections. In some states, the report must relate to the violation of a state law (not federal), sometimes explicitly a criminal law. Still in other states, individuals are only protected if they report the misconduct externally to law enforcement or appropriate state regulators. In states that do have wrongful termination laws, an employee can recover for economic loss, and sometimes for emotional distress and reputational harm. Some states even allow employees to sue for punitive damages—damages designed to punish and deter wrongdoing—which can result in a sizeable award if the lawsuit is successful.

### How Do Health Care Compliance Professionals Blow the Whistle Safely?

There are several steps that a health care compliance professional can take to best position him or herself to be protected by whistleblower laws.

**Report outside of regular job duties.** The most critical step health care compliance professionals can take to protect themselves when blowing the whistle is to make clear to their employer that they are making the report outside of their regular job duties. They must do this because, for employees such as health care compliance professionals whose job duties routinely involve investigating fraud, the FCA and other whistleblower laws require that the whistleblower's employer knew or concluded that the employee was investigating or reporting fraud outside of their regular job duties. This can be done this in a number of ways:

- **Report outside chain-of-command.** Health care professionals can escalate reports of fraud to executives who are outside their typical chain-of-command who have the ability to take action to address the misconduct. Courts have found that compliance officers who reported fraud to their supervisor's supervisor or a corporate officer had met this notice requirement.
- **Explicitly state conduct is illegal.** Health care professionals can utilize language that shows that their primary concern is not protecting the company's interests but that the illegal conduct cease. For example, stating "This is illegal and I'm not willing to be a part of it" will be more likely to lead to whistleblower protection than reporting the same issue by saying "I just want to protect the company against potential liability."

- **Report externally.** Health care professionals can report the matter externally to the appropriate regulator, such as to CMS or the U.S. Department of Justice, as well as notify their employer that they have done so. Such external reports are generally found to be outside a compliance professional's normal job duties.

**Report in writing.** Because the substance of the health care professional's report is critical, the report should be in writing. Employers frequently defend themselves against retaliation claims by arguing that the employee never reported legal violations, rather he or she only addressed a billing issue or complained about a business decision. By reporting concerns in writing, health care professionals will avoid any he-said-she-said situations regarding the substance and focus of the report.

**Report specific facts and potential legal violations.** Reports about violations of the law are often legally protected, while reports about violations of internal company policies or ethics rules may not be. Therefore, a health care compliance professional's report should be specific about the type of misconduct that is being reported, what type of legal violation he or she is concerned about, and the facts that support the belief that the company's conduct may be violating the law. As a compliance professional charged with knowing the legal obligations applicable to the employer, courts may hold a compliance officer to a higher standard of reasonableness as to whether certain actions are likely unlawful. That does not mean that compliance officers have to be right about there being a legal violation, but it does mean that their belief has to be reasonable based on the facts as they know them.

**Impact of HIPAA protections on whistleblowing.** Another important concern that health care professionals of all stripes who blow the whistle must keep in mind is not violating the Health Insurance Portability and Accountability Act (HIPAA). HIPAA provides federal protection for the individually identifiable health information of patients. Often documents and facts that support a health care whistleblower's reports of fraud include health information that is normally protected under HIPAA. Given these protections, it is reasonable for health care professionals to be concerned that if they provide this supportive information externally, they will violate HIPAA.

Fortunately, HIPAA provides for disclosures of protected patient information by a whistleblower provided the whistleblower believes in good faith that the employer engaged in unlawful conduct or conduct that otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the covered entity potentially endanger one or more patients, workers, or the public. The disclosure must only be to a health oversight agency or public health authority authorized by law to investigate the matter, an appropriate health care accreditation organization, or the whistleblower's attorney. It is critical to remember that this HIPAA carve out does not permit all disclosures of protected information, such as disclosure to a journalist or in publicly filed court documents.

### **The Employer Retaliated—What Next?**

If an employer terminates the health care compliance professional after he or she blew the whistle, the compliance professional must use caution when signing any paperwork. More and more, employers are attempting to limit their exposure to whistleblower claims by having terminated employees sign paperwork that includes attestations that the employee has not witnessed any legal or ethical violations or, if the employee has seen such violations, the employee disclosed to the employer all information related to such violations. While the health care compliance professional reported unlawful conduct, it is likely that he or she is aware of more factual details and probably more misconduct than he or she had the chance to report to the employer before termination. The health care professional is under no legal obligation to sign such a statement and doing so only helps the employer limit its exposure.

The health care compliance professional should also seek legal representation as soon as possible. Some laws have relatively short statutes of limitations, after which time the potential claim may be forever barred. SOX, for example, requires an individual to take legal action within 180 days of termination (or other retaliatory act). Additionally, the longer the individual waits the harder it can be for an attorney to gather supportive evidence for the claims. The health care compliance professional should not sign a proposed severance agreement prior to discussing the case with an attorney who has experience in the representation of whistleblowers. Such an agreement will almost surely release all

legal claims the health care compliance professional has against the employer and, depending on the facts of the case, the compliance professional may have a strong claim for far more compensation.

Additionally, depending on the nature and scope of the misconduct the health care compliance professional reported, he or she may have a viable FCA qui tam action or whistleblower tip under the SEC's whistleblower reward program. As mentioned above, a whistleblower who initiates a qui tam claim is eligible for an award of between 15 to 30 percent of the monies recovered. In the case of a successful SEC whistleblower tip, the [SEC Office of the Whistleblower](#) provides awards of 10 to 30 percent of the amount of sanctions and penalties the SEC imposes on wrongdoers as a result of the whistleblower's information. An attorney who specializes in representing health care whistleblowers can help evaluate whether such potential actions are available.

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