Dealing with Known or Suspected Whistleblowers in Internal Investigations: Status of the Law, Challenges Facilities Face, and Strategies for Managing Risk

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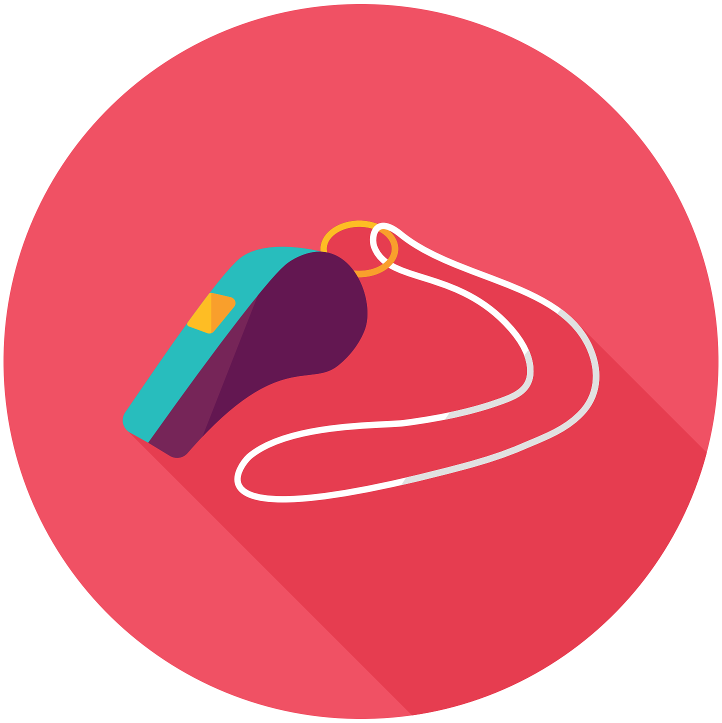


Health care attorneys are frequently confronted with complaints from employees of long term care (LTC) and other post-acute health care providers who are currently, or who may one day become, whistleblowers (or qui tam relators) under the Federal False Claims Act (FCA or Law).[1] When faced with such allegations of noncompliant or fraudulent practices, health care attorneys, compliance officers, and providers often turn to internal compliance plans for guidance and may even initiate an internal investigation. Although most compliance plans likely provide a roadmap to regulatory compliance and set forth prudent policies and procedures to help direct an internal investigation, it is important to offer guidance on one of the most common questions associated with situations involving employee allegations of fraud: How should a health care provider deal with an employee who is a known or suspected whistleblower?

In addition to explaining the evolution of the FCA's anti-retaliation provision, this article aims to answer this difficult question and provide tips to help avoid liability under the FCA's anti-retaliation provision.

The FCA's Reliance on Qui Tam Relators and the Evolution of Whistleblower Empowerment

Referred to in its early years as "Lincoln's Law," U.S. Congress enacted the FCA in 1863 to recoup moneys paid on claims submitted to the federal government for faulty equipment delivered to the Northern troops during the Civil War.[2] The goal of the FCA has remained constant since its inception: Eradicate fraud against the government.[3] To accomplish this laudable goal, the FCA allows common citizens (referred to as "relators" or "whistleblowers") with knowledge of past or present fraud committed against the government to file qui tam lawsuits on behalf of the government.[4] Throughout the FCA's 150-year history, Congress has tempered relator incentives to file qui tam actions by increasing or decreasing pleading standards and by protecting relators from retaliation by employers.

The 1863 version of the FCA not only allowed relators to file qui tam lawsuits on behalf of the government, it also provided rich incentives for doing so.[5] The civil provisions of Lincoln's Law allowed a private citizen to bring a qui tam action on behalf of the federal government against anyone who knowingly submitted false claims for payment of federal funds.[6] If the qui tam lawsuit was successful, the offending party was required to pay double damages and a $2,000 penalty per false claim.[7] The relator, in turn, was entitled to receive 50% of the amount recovered.[8] The main problem with the 1863 version of the FCA was that the Law made it too easy for relators to file qui tam lawsuits. Because the original FCA did not require any independent knowledge of the alleged fraudulent conduct, relators soon learned that they could file qui tam actions based on information gleaned from government indictments and other publicly available information.[9]

Despite such rich incentives and minimal pleading standards, relators seldom used the original FCA for the first 60 years of the Law's existence. Once they discovered how easy it was to file a qui tam lawsuit, however, FCA litigation increased. By the early 1940s, relators were gleaning information from criminal FCA indictments of federal attorneys general to help craft civil qui tam complaints that were regularly devoid of any original information. A 1943 U.S. Supreme Court decision, *U.S. ex rel. Marcus v. Hess*[10]—and Congress' swift response to that decision—served as a death knell to what became known as the proliferation of "parasitic qui tam lawsuits."[11]

In *Marcus*, though critical of the practice, the Court held that based on a strict reading of the FCA relators were permitted to file qui tam lawsuits without offering any new information.[12] Congress read between the lines of the Court's decision in *Marcus*[13] and moved quickly to revise the FCA and alleviate the deluge of qui tam lawsuits that flooded the federal docket. The resulting legislation[14] barred qui tam suits based on information already within the government's possession.[15] Moreover, the 1943 amendments reduced relators' 50% share of recovery under Lincoln's Law to a mere 10% share if the government intervened in the qui tam action, and no more than 25% if the government declined to intervene.[16]

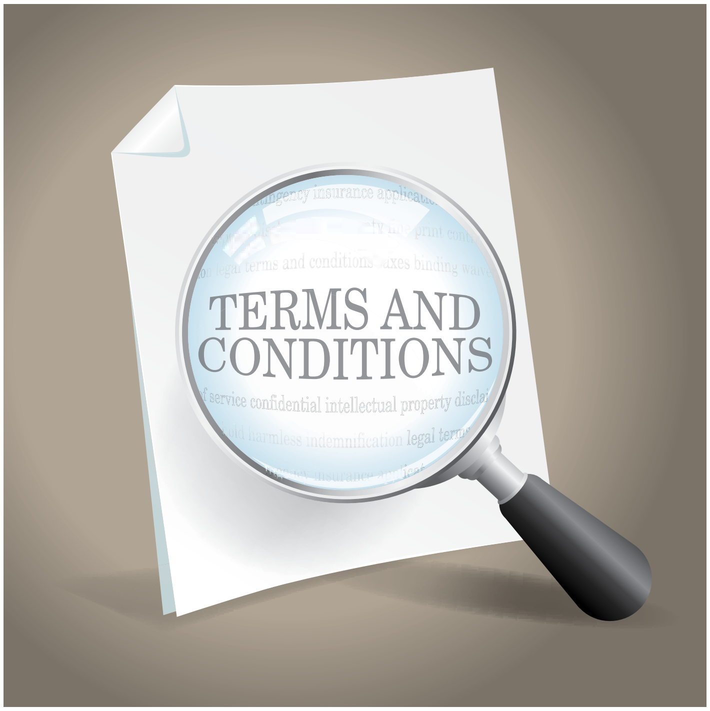
In 1986, the Senate again proposed to amend the FCA to encourage qui tam actions in an effort to combat the "rampant fraud in Government programs" that arose in the wake of the 1943 amendments.[17] At that time, the Senate Judiciary Committee estimated that instances of *unknown* fraud had likely drained as much as 1% to 10% of the entire federal budget, or $10 to $100 billion annually.[18] The fraud problem highlighted by the Senate Judiciary's Report required a significant departure from the post-1943 version of the FCA, and the final 1986 amendments delivered.

For starters, the 1986 amendments incentivized relators to file qui tam lawsuits by increasing the civil penalties to $5,000 to $10,000 per false claim and providing for treble rather than double damages.[19] The 1986 amendments also encouraged qui tam actions by increasing the relator's share of the recovery and providing protection from employer retaliation for blowing the whistle on FCA violations.[20] Codified at 31 U.S.C. § 3730(h), for the first time, the FCA's anti-retaliation provision provided a private right of action for any potential whistleblower employee who was discriminated against in any manner by an employer due to the employee's investigation or reporting of potential fraud.[21]

The 43 years of qui tam inactivity between the 1943 and 1986 amendments made it clear that the success of the FCA—and perhaps even the successful prevention of mass fraud against the federal government—depends on whistleblowers' ability to detect and report fraud. As one court noted, the 1986 amendments embraced this reality and empowered "a posse of ad hoc deputies to uncover and prosecute fraud against the government."[22]

Recent Amendments to the FCA's Whistleblower Anti-Retaliation Provision

In the two-plus decades that led up to the 2008 financial crisis, whistleblowers filed more than 6,000 qui tam lawsuits.[23] Despite the significant uptick in FCA recoveries, Congress enacted a series of amendments in 2009 and 2010 to set aside judicial decisions it felt did not coincide with the



intent of the FCA and to further empower whistleblowers to protect the "extraordinary economic support" the government was preparing to pump into the economy.[24] The Fraud Enforcement and Recovery Act of 2009[25] (FERA) and the Dodd-Frank Wall Street Reform and Consumer Protection Act[26] (Dodd-Frank) contained two such amendments.

FERA, signed into law on May 20, 2009, expanded the FCA's anti-retaliation provision to proscribe retaliation against "contractors and agents" in addition to employees. Interestingly, FERA also narrowed the FCA's anti-retaliation provision by redefining "protected conduct" (i.e., conduct immune from retaliation under the FCA) as "lawful acts done . . . in furtherance of other efforts to stop 1 or more [FCA] violations," thereby protecting only conduct that involved attempts to stop alleged fraud. Only 13 months later, however, Dodd-Frank again revised the definition of "protected conduct" to include "lawful acts done . . . in furtherance of [an FCA action] or other efforts to stop 1 or more violations."[27]

Together, the FERA and Dodd-Frank amendments to the FCA provide unprecedented levels of protection from employer retaliation to known and suspected FCA whistleblowers. To sidestep avoidable pitfalls associated with whistleblower retaliation lawsuits, health care providers, attorneys, and compliance officers should take time to understand the text and judicial interpretations of Section 3730(h).

Elements of an FCA Retaliation Claim

To prevail in an FCA whistleblower retaliation claim, an employee, contractor, or agent must demonstrate three elements: (1) the whistleblower was engaged in protected conduct; (2) the defendant knew that the whistleblower was engaged in protected conduct; and (3) the defendant made an adverse employment decision because of the whistleblower's protected conduct.[28]

"Protected Conduct" Under the FCA

A person engaged in conduct protected by the FCA "must be investigating matters which are calculated, or reasonably could lead to a viable FCA action."[29] The employee does not have to actually file a qui tam action to engage in "protected conduct." In fact, the employee does not even have to know the FCA exists; rather, the employee must demonstrate only a reasonable belief that the employer was committing an act of fraud against the government that would be actionable under the FCA and that the employee made an effort to investigate or prevent such fraud.[30]

Defendant's Knowledge of Protected Conduct

A whistleblower must show that "the employer had knowledge the employee engaged in 'protected activity.'"[31] Here, too, courts apply a reasonableness standard and require that the employee's words or actions put the employer on notice that FCA litigation is a "reasonable possibility."[32] In applying this standard, courts have held that mere grumblings or complaints about regulatory noncompliance are insufficient to inform an employer that an employee is engaged in protected conduct under the FCA.[33] Courts also place a considerable amount of weight on the employee's job description. For example, some courts have required "fraud alert employees" (i.e., employees whose job descriptions include reporting on and/or investigating regulatory compliance) to provide explicit notice that their conduct is motivated by the intent to file a qui tam lawsuit.[34] At the very least, courts may require that such fraud alert employees use certain "buzz words" such as "fraudulent"[35] or "illegal"[36] when voicing concerns to employers.

Causal Connection Between Protected Conduct and Adverse Employment Action

After demonstrating that the employer knew the employee was engaged in protected conduct, a whistleblower also must "supply sufficient facts from which a reasonable jury could conclude that the employee was discharged because [the employee was engaged in the protected conduct]."[37] There also must be "temporal proximity" (defined as being "very close") between the time the employer learned the employee was engaged in protected conduct and the time of the adverse employment action.[38] However, even if an employee demonstrates all three elements and temporal proximity exists, an employer can still defeat an FCA retaliation claim by demonstrating that the adverse employment action would have occurred even if the employee had not engaged in the protected conduct.[39]

Tips to Avoid Liability Under the FCA's Retaliation Provision

Implement a Robust Compliance Program

LTC and other post-acute health care providers should develop and implement a comprehensive compliance program in an effort to prevent retaliation against known or suspected whistleblowers and to prevent potential FCA retaliation claims by relators. Often, employees become whistleblowers when they feel that the organization has failed to adequately address their concerns internally or if they are hesitant to disclose concerns directly for fear of repercussions. To encourage employees to voice concerns as soon as possible and to ensure that organizations adequately address all concerns, health care providers should formulate a compliance program that does all of the following:

- Ensures that compliance is a priority that is taken seriously and that all employees are aware of their organization's compliance guidelines;
- Provides resources for employees to report concerns internally within the organization, including a hotline to report anonymously;
- Appoints a compliance officer to oversee compliance throughout the organization and to whom employees can report actual or suspected wrongdoing;
- Performs corporate compliance training periodically. Stresses employees' integral role in ensuring that the organization acts lawfully. Encourages employees to bring any concerns to the forefront immediately so the organization can address and remedy any potential compliance concerns or breaches;
- Develops a non-retaliation policy and ensures understanding of the policy by all employees, specifically supervisors;
- Retains outside counsel in the event of a compliance violation or suspected violation to perform an independent investigation; and
- Conducts exit interviews of employees and asks questions specific to the organization's commitment to compliance to determine whether compliance systems and processes are operating effectively.

Take Extra Time to Plan and Conduct Compliance Investigations Involving a Known or Suspected Whistleblower

Once actual or suspected fraud or wrongdoing is reported, the health care provider should retain outside counsel immediately to conduct an investigation and to preserve privilege over that investigation. Although some investigations stem from anonymous complaints while others feature employees who come forward directly with their concerns, the organization and investigating counsel should always operate under the assumption that any employee may be a potential or actual whistleblower. While conducting a compliance investigation, the organization should take into account the following recommendations:

- Ensure immediate initiation of the compliance investigation upon learning of a suspected or actual violation. Not only is it critical to detect, report, and correct any actual violations immediately under the FCA, it is important for potential whistleblowers to know that the organization has heard their concerns and takes them seriously;
- During the course of the investigation, reiterate that the organization takes compliance concerns very seriously and that it appreciates employees coming forward. Recruit reinforcement of supervisors or regional or divisional supervisors to meet with employees and show support;
- Stress the organization's non-retaliation policy and ensure that the policy is followed. Retaliation is illegal pursuant to the FCA, and an organization's compliance program should expressly prohibit it. Reporting a suspected or actual violation must not affect an employee's job in any way, including termination, change in hours, change in job responsibilities, threats, harassment, or discrimination of any kind;
- Correct any messaging problems immediately. Compliance investigations may reveal that no wrongdoing actually occurred but that employees feel pressure to hit certain targets for the financial benefit of the organization. Train supervisors on how to properly message employees and on the risks involved when the focus becomes financial instead of patient-centered; and
- If the known or potential whistleblower resigns after reporting a suspected or actual violation, attempt to conduct an exit interview to give the employee the chance to air all complaints. If the employee becomes a whistleblower, the exit interview can assist in establishing that the organization investigated all complaints brought to its attention.

The Special Case of the Compliance Investigation that Reveals Potential Whistleblower Wrongdoing

An investigation may reveal that the potential whistleblower committed the underlying fraud or wrongdoing. In such a situation, the organization must take steps to protect itself but should use caution prior to taking adverse employment action:

- Conduct a thorough investigation of the employee's potential wrongdoing and obtain verifiable facts and documents to support the adverse action;
- Confront the employee about the fraud or wrongdoing, and afford the employee an opportunity to explain his actions. Maintain the attorney-client privilege by ensuring that outside legal counsel is present during this conversation; and
- With the consultation of legal counsel, ensure that fraudulent conduct is disclosed and notify the appropriate agencies of the employee's conduct.

Conclusion

LTC providers, like the rest of the modern health care industry, must comply with complex and constantly evolving federal laws and regulations governing the provision of care and how claims for payment must be submitted. The task of complying with these rules and regulations can become even more difficult when and if a provider's employee investigates alleged noncompliance. LTC providers must recognize the risks associated with retaliating against a potential or known whistleblower and implement policies and procedures now to mitigate such risks in the future.

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1 The FCA is codified at 31 U.S.C. §§ 3729-3733.
2 United States Department of Justice (DOJ) Pub., The False Claims Act: A Primer, *available at:* www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf (last visited August 5, 2014).
3 S. REP. No. 99-345, at 8 (1986).
4 31 U.S.C. § 3730.
5 S. REP. No. 99-345, at 10 (1986).
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at 544.
10 *Id.*
11 H. Rept. No. 78-263 at 2 (1943).
12 *Marcus* 317 U.S. 547.
13 *Id.* at 548, n. 9 ("There is of course no reason why Congress could not, if it had chosen to do so, have provided specifically for the amount of new information which the informer must produce to be entitled to reward.")
14 Pub. L. No. 78-213, 57 Stat. 608 (1943).
15 31 U.S.C. 232(C) (1946).
16 57 Stat. at 609; *compare*, 31 U.S.C. § 234 (1940), *with* 31 U.S.C. § 232(E) (1946).
17 S. REP. No. 99-345, at 13 (1986).
18 *Id.*
19 *Id.* at 17.
20 *Id.* at 34.
21 *Id.*
22 *U.S. ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Center,* 961 F.2d 46, 49 (4th Cir. 1992).
23 DOJ Pub. FRAUD STATISTICS OVERVIEW October 1, 1986 - September 30, 2008 Civil Division (Nov. 2008) *available at:* www.justice.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm.
24 S. REP. No. 111-10 at 4 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430, 432.
25 FERA Pub. L. No. 111-21, 123 Stat 1617 (2009).
26 Dodd-Frank Pub. L. No. 111-203, 124 Stat 1376 (2010).
27 31 U.S.C. 3730(h).
28 *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996). Note that the 8th Circuit also requires a whistleblower to prove that the whistleblower's protected conduct solely motivated the retaliation. *See Schuhardt v. Washington Univ.*, 390 F.3d 563, 566 (8th Cir. 2004).
29 *Id.*
30 *Fanslow v. Chicago Mfg. Ctr., Inc.,* 384 F.3d 469, 480 (7th Cir. 2004) (protected conduct only occurs when the employee had reasonable, good-faith belief that the employer is committing fraud against the United States); *see also Weihua Huang v. Rector and Visitors of U. of Va.,* 896 F. Supp. 2d 524, 551 (W.D. Va. 2012) ("the question is not whether, looking backward, Defendants' conduct was actionable under the FCA, but rather whether, at the time, [the Plaintiff] believed his disclosure could reasonably lead to an FCA action").
31 S. REP. No. 99-345, at 35 (1986).
32 *U.S. ex rel. Alpharma, Inc.,* 493 Fed.Appx. 380, 388 (4th Cir. 2012).
33 *Campion v. Northeast Utils.,* 598 F. Supp. 2d 638, 657-658 (M.D. Pa. 2009).
34 *Id.; see also U.S. ex rel. Herron v. Indianapolis Neurosurgical Grp.,* 2013 WL 652538 *8-9 (S.D. Ind. Feb. 21, 2013).
35 *U.S. ex rel. Sharp v. E. Okla. Orthopedic Ctr.,* 2009 WL 499375, *26 (N.D. Okla. Feb. 27, 2009).
36 *U.S. ex rel. Marlar v. BWXT Y-12, LLC*, 525 F.3d 439, 449-450 (6th Cir. 2008).
37 *Luckey v. Baxter Health care Corp.,* 2 F. Supp. 2d 1034, 1065 (N.D. Ill 1998).
38 *Shenoy v. Charolette-Mecklenburg Hosp. Auth.,* 521 Fed.Appx. 168, 175 (4th Cir. 2013) (unpublished), *citing Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) ("The timing between an employer's knowledge of protected activity and an adverse employment action. . . must be very close").
39 *U.S. ex rel. Gonzalez v. Fresenius Med. Care N. Am.,* 689 F.3d 470, 479 (5th Cir. 2012).