



HOSPICE COMPLIANCE LETTER

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How to Plan for the Blow of a Qui Tam Lawsuit

Allegations of ineligible admissions are growing; suits may be lurking

Several recent, high-profile, multi-million-dollar qui tam lawsuits charging hospices with violations of the False Claims Act for inappropriately admitting patients who weren't terminally ill or eligible for the benefit, and then billing Medicare for their care, have certainly captured the industry's attention. Often these cases are initiated by disgruntled ex- (or current) employees. Because their filings are initially sealed in the courts while the government investigates and decides if it wants to join the case, the hospice may be blissfully unaware of the trouble that's looming until a large demand for patient records arrives on its doorstep.

Because of the lure of potentially large payouts to whistleblowers, there may be many more cases out there than anyone in the field realizes. William Athanas, an attorney with the Birmingham, Ala., office of the Nashville firm Waller Lansden Dortch & Davis, who has represented hospices and other health providers against such charges, says it is not possible to know how many such cases are currently under investigation. "But if I had to guess, I'd say the number of hospice cases sealed or in process is closer to triple, rather than single, digits."

"This could happen to just about any hospice," notes another industry expert, attorney Mary Michal of the Wisconsin firm Reinhart Boerner Van Deuren. "All it takes is a disgruntled employee or former employee, and allegations of improper directives from the hospice leadership, however misinterpreted those allegations might be."¹

¹ HCL also tried to contact four plaintiffs' attorneys prominent in hospice qui tam cases to hear their side of the story, but none responded to our messages.

What can hospice providers do to protect themselves—or at least minimize their qui tam exposure? Experts say there are two keys to a preventive strategy. First is an aggressive, robust, sufficiently resourced corporate compliance program, one that follows the guidelines spelled out in the Office of Inspector General’s 1999 guidance on hospice compliance programs.²

Second is careful attention to human resources policies and practices, to ensure as much as possible that an employee’s report of agency practices not in compliance with Medicare regulations is taken very seriously—not brushed aside, potentially creating another disgruntled ex-employee. In other words, you want to keep whistleblowers within the agency’s compliance policies and processes, reporting problems to you, rather than on the outside, talking to a lawyer. And every hospice needs a solid process for investigating compliance reports, Michal says. Give your employees a workable mechanism for reporting their concerns.

Ronald Clark, a False Claims Act consultant who formerly litigated on both sides of these cases for the Department of Justice and the New York law firm Arent Fox, says a corporate compliance program “is really the only way to protect yourself. Compliance is more important than ever, given the government’s growing issues about hospices. If you haven’t been concerned about it before, now you really have to be concerned about it. This is all extremely expensive and disruptive. These are horrible situations that can really slam a hospice, whether from the government, a disgruntled former employee or a competitor.”

Many Hospices Will Face Qui Tam Suits

And yet, Clark adds, “it is increasingly likely that many hospices will encounter qui tam lawsuits along the way. The important thing is not to panic over this situation, but to prepare for it, because there are things a hospice can do to protect itself.” He emphasizes the importance of an experienced compliance officer for the hospice and of investing in an effective and meaningful compliance program. “I would sit down with the compliance officer. I would wonder if we have a response plan for when the government shows up—a designated response officer who will take charge

² <http://oig.hhs.gov/authorities/docs/hospicx.pdf>.

of the situation.” Clark also recommends establishing a working relationship with a good health care lawyer, “perhaps the same individual who helps to draft your corporate compliance plan. Periodically, have that lawyer review how the compliance plan is working. Be prepared to show the government how a ‘culture of compliance’ prevails at your agency and how the hospice is working hard to be a responsible health care provider. The government knows no compliance plan is 100 percent effective; what is important is what the hospice does when it discovers a problem,” he explains.

“When I was in the Department of Justice, visiting health care agencies, I’d often ask staff at random: Do you have a compliance plan? Who’s your compliance officer? When was the last time you received compliance training?” Answers to these questions could have a big impact on future government investigations. “I have talked to any number of disgruntled ex- or current employees. They all say, ‘I didn’t do it for the money.’ A lot of situations arise where the employee thinks something wrong is going on. They report it to the company, nothing happens, and they get frustrated. Had there been an effective compliance plan, so they could see a positive response, maybe there would not have been a qui tam lawsuit.”

Part of a good compliance plan is a whistleblower policy spelling out protections for staff who raise compliance concerns, Athanas says. A whistleblower policy could describe the responsibilities and obligations of both the company and the whistleblower—principally, to take the complaint seriously and to only make complaints in good faith, supported by facts. “Keep track of compliance trainings—who attended or did not. Have an internal reward program for compliance concerns that prove to be accurate. Document your system successes. Celebrate when the compliance plan works. And specify factors that would trigger the need for outside counsel’s involvement,” Athanas says.

Connie Raffa, an attorney with Arent Fox who has represented hospices in such cases, underscores the importance of the compliance program. If someone from billing or finance comes to the compliance officer with a concern, “take that person and their information seriously. Do an internal investigation within 60 days. If substantiated, contact a health care attorney, make a disclosure to the government, and pay back what is owed. The worst thing you can do is not to treat these things seriously.”

What Is a Qui Tam Suit?

Hospices should realize that qui tam is both similar to but different from the types of scrutiny and litigation they are used to, Athanas says. “It starts with the whistleblower—a person who has information about what they believe is a violation of the law.” Qui tam provisions allow that individual, who is called a relator in legal parlance, to sue others on the government’s behalf under the False Claims Act, and recover up to 25 or 30 percent of the settlement, which can add up to a lot of money.

Qui tam suits are filed in secret—under seal by the court—and because usually only the first filer for a given allegation can benefit from the recovery, there may be some urgency to file a case, even without a full understanding of the facts. The government has 60 days to decide if it believes the case has merits and whether it wants to join the case, although it typically asks for one or more extensions for further review, Athanas says. If the government decides to intervene, it takes on primary responsibility for prosecuting the case. But if the government decides not to intervene, that doesn’t necessarily mean the end of the case.

“During this process, the hospice provider hasn’t been served with a complaint, and has no idea what’s going on. One clue might be if government agents start interviewing former employees. The hospice may also get a formal order requiring the production of documents, known as a Civil Investigative Demand, which often represents the clearest indication that it is the target of a qui tam lawsuit.”

Basically, the whole process puts the provider on the defensive, Athanas says. “These cases can create a perfect storm for the hospice. High staff turnover, because of the nature of the work, increases the number of potential whistleblowers. The amount of money billed and received by a hospice can be substantial, often attracting the attention of lawyers and government regulators. Hospice admission and recertification decisions are rarely black and white. Even well-intentioned providers can have patients on service whose eligibility might be questioned.”

The growing number of fraud cases has caused the government to view hospices with skepticism, he says. Are there hospices out there engaged in fraudulent activity? Probably. Yet Athanas argues, and most observers would agree, the much larger portion of the bell curve is genuinely committed to complying with Medicare regulations.

He adds that it is important for hospices to thoroughly document their medical decision-making process to support the enrollment decisions that are made. A couple of years down the road, when memories of a particular case may have faded, it will be critical to have memorialized in the medical record the decision-making process and the particular set of circumstances that justified this patient's terminal prognosis and admission or recertification. "If it's not captured up front, it may be lost forever. There's an additional administrative burden to capture the key information at the time the decision is made, but doing it right will pay off down the line."

Don't Create More Disgruntled Ex-Employees

One of the major dilemmas of qui tam law is the need to develop an appropriate and proportional disciplinary process, Athanas says. "The government expects companies to enforce disciplinary measures against those who run afoul of established guidelines, in order to demonstrate a genuine commitment to compliance and to enforcing a culture of compliance." In fact, if a hospice is later investigated under the False Claims Act, the government will want to see evidence of consistent disciplinary measures taken against employees. They may even question why no employee has ever been fired for compliance violations.

If discipline is not applied consistently, or if the company has trouble demonstrating how it enforced disciplinary measures, the government will become skeptical that compliance is a genuine concern, Athanas says. "The government wants to be convinced that disciplinary actions against violators have practical impact—and are not just slaps on the wrist. But application of disciplinary measures comes with its own risks." Terminated employees may seek redress in the courts, suing the hospice for wrongful termination. "The punishment for compliance violators must fit the crime. This is what providers often find most challenging about compliance programs, and where the government doesn't fully appreciate the dilemmas they face."

Among his recommendations are developing a manual with a written description of the disciplinary system, laying out in writing penalties for first and subsequent violations. He urges principled decision-making, consistently applied. Incremental disciplinary measures could include increased reporting obligations by the staff member, increased supervision or probationary periods.

Athanas also recommends holding an exit interview with departing employees. “Ask them if they are aware of compliance violations, making it clear that the company seeks such information to understand how and where it can improve.” A note signed by a departing employee saying they are not aware of compliance violations could become compelling evidence down the road. Other experts urge caution, to avoid planting explicit seeds in the employee’s mind, although a more open-ended exit interview still could be valuable.

Qui Tam Resources

Contact William Athanas at: Bill.Athanas@wallerlaw.com, 1901 Sixth Avenue N., Suite 1400, Birmingham, AL 35203, phone: 205/226-5703. Among other resources, his website (<http://www.wallerlaw.com/attorneys/2009/10/08/athanas-william-c.106342>) contains two articles on how to balance corporate compliance with employee relations.³

False Claims Act expert Ronald Clark has a website at <http://fcaexpert.com>, which includes a number of articles and other resources. Email him at: fca.expert@gmail.com.

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Connie A. Raffa at Arent Fox; New York, NY 212.484.3926

The American Health Lawyers Association, with 10,000 members devoted to legal issues in health care, including health providers, offers a number of resources include a False Claims Act manual, at:

www.healthlawyers.org/.

OIG has produced a series of provider compliance training videos and podcasts, accessible at:

http://www.oig.hhs.gov/newsroom/video/2011/heat_modules.asp and on YouTube.

³ <http://www.corporatecomplianceinsights.com/navigating-between-scylla-and-charybdis-effectively-enforcing-corporate-compliance-programs-without-turning-violators-into-whistleblowers-%E2%80%93-part-1/> and <http://www.corporatecomplianceinsights.com/navigating-between-scylla-and-charybdis-effectively-enforcing-corporate-compliance-programs-without-turning-violators-into-whistleblowers-%E2%80%93-part-2/>.