



Protecting Your Urgent Care Center Against Whistle-Blowers

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Urgent message: Government financial enticements for whistle-blowing have resulted in a sharp rise in employee reports against their health-care employers. Urgent care centers can protect themselves by identifying potentially litigious employees, having a well-publicized compliance program, and by establishing internal reporting procedures.

Introduction

In recent years, there has been a dramatic rise in the number of whistle-blower lawsuits in the health-care industry. Because these lawsuits reap huge payouts for the federal government, whistle-blowers are monetarily enticed to report their employers to government agencies rather than fix noncompliance issues within their organizations. This trend has reared its head in the urgent care industry. As a result, it is imperative that urgent care centers understand what they can do to protect themselves.

Whistle-Blowing Lawsuits on the Rise for Foreseeable Future

Whistle-blowing lawsuits have become a significant revenue-generating stream for the U.S. government. Since the Fraud Enforcement and Recovery Act amended the False Claims Act (FCA) in 2009, the government has collected nearly \$23 billion under the act, with nearly 4000 new FCA matters initiated. Of those monies collected since 2010, \$16.5 billion can be attributed to health care. Before 2010, there was only 1 year in the history of the FCA when more than 700 new FCA qui tam matters were filed. [Qui tam is an abbreviation of a Latin phrase used to refer

to legal action by a private citizen regarding potential violations of government laws.] However, every year since 2010 has seen more than 700 new FCA suits—with 804 new matters docketed in 2014 alone, and with an unprecedented \$5.7 billion in health-care fraud-related recoveries. The flood of FCA activity is therefore not expected to abate anytime soon.

There are a myriad of ways that whistle-blowers can report fraudulent conduct to the government; in addition to reporting under the FCA, whistle-blowers can file under the Internal Revenue Service's Whistleblower Office, or through the U.S. Securities and Exchange Commission's Office of the Whistleblower, which came out of the Dodd-Frank Act. Under that act, whistle-blowers, or qui tam relators, as they are frequently called, are provided incentives by the government and have proven to be effective tools in battling health-care fraud.

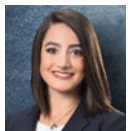
In 85% of cases, relators are current or former employees of the defendants, including former executives. Under the FCA, whistle-blowers receive between 15% and 30% of the monies the government recovers when these civil fraud cases are resolved by settlement or trial. The FCA is a powerful weapon against fraud, generating more than \$15 in recoveries to taxpayers for every \$1 spent on health-care fraud investigations. As the federal government's recoveries have soared in recent years, so too have relators' bounties. In 2014, relators raked in \$435 million—their second-most lucrative year ever. Hence, it is not surprising that the government, prospective whistle-blowers, and their attorneys are eager to expose any perceived mishap by health-care providers.

Urgent Care Is a Prominent Target

In 2012, the U.S. Department of Justice reached a settlement with a well-known urgent care organization to resolve charges that it had submitted fraudulent claims to Medicaid, Medicare, and other federal and state programs over the course of many years. The lawsuit alleged that the urgent care organization had been submitting claims for thousands of medically unnecessary tests and procedures, primarily unnecessary allergy testing, H1N1 virus testing, and respiratory panel testing. Two whistle-blowers shared an award of approximately \$1.6 million.



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In January 2015, a settlement was announced in a matter involving defendants who operated urgent care facilities in Charleston, South Carolina. In that case, relators asserted that the defendants violated the FCA and Anti-Kickback Statute by engaging in fraudulent billing procedures for claims that were submitted to Medicare, Medicaid, and TRICARE. It was alleged that defendants had provided illegal bonus incentives to physicians. The plaintiffs also contended that the facilities had fraudulently billed for ancillary services, including computed tomography scans and x-rays. Further, many of the billed services were in some cases not performed at all, or were allegedly performed by unlicensed technologists.

How Can You Avoid Lawsuits Related to Whistle-Blowing?

One of the ways in which whistle-blowing claims can be avoided is by conducting background checks on job candidates to determine whether they have sued or initiated any qui tam suits against their former employers. Checks can be run through county, state, and federal court systems. Even search engines can be employed to determine new hires' history of whistle-blowing. As a result, entities can make informed hiring decisions that lessen the likelihood of whistle-blowing claims.

Second, compliance programs reduce the risk of violating applicable laws, rules, and regulations and may allow urgent care centers to benefit from minimized impact of civil, criminal, and administrative enforcement efforts. Additionally, compliance programs create a culture of compliance that lessens the likelihood of retaliation against whistle-blowers by individuals within a company. Employees are encouraged to report any compliance risks to a compliance officer or committee, which affords employees with the opportunity to report any issues and urgent care centers with the responsibility of investigating and addressing any reported compliance concerns without retaliating against employees for reporting any perceived unlawful activity.

Further, effective compliance programs are well-publicized, user-friendly, internal reporting systems that include written policies, procedures, and standards of conduct. As discussed in the federal sentencing guidelines, effective compliance programs are generally considered to have at least seven components:

1. Standards and procedures
2. Oversight
3. Education and training
4. Auditing and monitoring
5. Reporting
6. Enforcement and discipline
7. Response and prevention

Such systems encourage compliance and stress the importance of reporting complaints so that employees become inclined to raise concerns informally within the company's management

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structure, rather than resort to whistle-blowing to external agencies.

Best Practices for Dealing with a Complaint

- **Conduct an initial investigation:** First, after becoming aware of a whistle-blower complaint, the company must quickly and thoroughly analyze the underlying facts and circumstances. Determinations regarding the scope of the investigation and the proper party to conduct the inquiry must be made early on, including how serious a complaint appears, plausibility of the events described, the complainant's background, and the potential legal and financial ramifications if the allegations are ultimately proven to be true. Consider consulting outside counsel if the allegations involved are more serious, there is a government program at risk, there is greater confidentiality needed for the results, senior management is involved as the bad actors, or if the whistle-blower has obtained counsel or filed an administrative complaint.
- **Deal with the documents:** Second, the company should collect and review relevant documents and interview witnesses, beginning its fact-finding efforts as quickly as possible. Taking document preservation seriously and moving quickly and proactively show the whistle-blower and other interested parties that the complaint is being taken seriously and prevent potential charges of obstruction of justice.
- **Prevent retaliation:** Last, urgent care centers should keep the following tips in mind:
 - Use outside neutral consultants.
 - Document the investigation closely.
 - Keep the whistle-blower engaged in the investigation.
 - Report conclusions of the investigation.

These steps help to avoid retaliation allegations from the whistle-blower or potential whistle-blowers.

Although the tide of whistle-blower litigation in the health-care industry is unlikely to be stemmed anytime soon, steps can be taken to decrease your urgent care center's likelihood of becoming a target. Educate yourself on the kinds of issues that could lead to complaints, and take steps to ensure that your center maintains compliance with legislation. A little preventive medicine will go a long way toward ensuring the financial and reputational health of your urgent care center. ■