What Exactly Are Whistleblower Lawsuits—and How Can You Protect Your Urgent Care Operation?

Urgent message: The increasing visibility of "whistleblower cases," in which employees share in any fines from reporting their employer's malfeasance to federal and state authorities, calls for urgent care center owners to understand the False Claims Act and the whistleblower lawsuit process.

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A "whistleblower" is an employee who makes complaints about a company's misconduct. This includes complaints about health and safety code violations, financial fraud, discrimination, or other illegal activities.[1]

Whistleblower claims are not uncommon in the urgent care industry. Perhaps most visible is the $10 million penalty assessed a large Arizona-based urgent care operator in 2012.[2] In that case, prosecutors alleged that the company submitted false claims to Medicare, TRICARE, and the Federal Employees Health Benefits Program, along with the Medicaid programs of several states. The urgent care company billed for unnecessary allergy, H1N1 virus, and respiratory panel testing. The federal government also alleged that it inflated billings for urgent care medical services—a practice known as upcoding.[2]

According to testimony, the former CEO threatened to fire managers who didn't hit a quota for giving allergy tests to patients who didn't need them and billing Medicare and Medicaid for the unneeded tests.[3]

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Recent Urgent Care Violations

In May 2018, another major urgent care company that at the time operated 88 urgent care centers in the New York City area was ordered to pay $6.6 million to settle False Claims Act (FCA) allegations in a whistleblower lawsuit. Federal prosecutors alleged that the company billed Medicare for services that physicians failed to perform and billed Medicare for more expensive and complex services than were actually provided to their urgent care patients.[4] Then just a month later, the company paid New York State $883,000 to settle false-claims allegations involving inappropriate facilities fees charged to the state's Empire Plan health insurance program for government workers and their families.[5]

As you can see, urgent care centers have run afoul of the False Claims Act and whistleblower lawsuits for many years. And whistleblower activity in healthcare continues to gain momentum. In the first half of 2018 alone, the Department of Justice announced roughly $600 million in FCA settlements.

In light of this, it's critical for urgent care center owners to understand the False Claims Act and the whistleblower lawsuit process.

The False Claims Act

The FCA is a federal law that makes it a criminal offense for any individual or organization to knowingly make a false record or file a false claim for any federal healthcare program. This includes any plan or program that provides health benefits

whether directly, through insurance, or otherwise, and which is funded directly, in whole or in part, by the U.S. government or any state healthcare system.[6]

The term *knowingly* includes having actual knowledge that a claim is false or acting with *reckless disregard* as to whether a claim is false.[6] This federal law covers fraud involving any federally funded contract or program, such as Medicare or Medicaid. The significant activities that may constitute violations under the False Claims Act include:

- Knowingly presenting (or causing to be presented) to the federal government a false or fraudulent claim for payment
- Knowingly using (or causing to be used) a false record or statement to have a claim paid by the federal government
- Conspiring with others to have a false or fraudulent claim paid by the federal government
- Knowingly using (or causing to be used) a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the federal government.[7]

Some common examples of potential false claims include knowingly billing Medicare for services that weren't provided, billing for provided medical services that weren't medically necessary, submitting fraudulent claims for actual services provided, and making false statements to obtain payment for services.[8]

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Whistleblowers

Any individual or organization that has evidence of fraud against federal programs or contracts may file a *qui tam* lawsuit.[9] The law provides whistleblowers with incentives that reward them for coming forward. Under the False Claims Act, whistleblowers receive between 15% and 30% of the monies the government recovers when these civil fraud cases are resolved by settlement or trial.[10] For example, an employee of one of the companies described previously who was fired shortly before the filing her

Case Example: Whistleblower Allegations of Upcoding Result in $1.2 Million Settlement

In March 2018, the United States Department of Justice announced a $1.2 million settlement with an urgent care company that operates more than 160 walk-in medical clinics. A whistleblower who brought the case received approximately $204,000, according to The United States Department of Justice.

According to allegations, the company engaged in a practice known as upcoding, or billing the government for a higher level of service than what was actually performed. Medicare billing protocol allows a provider to bill for doctor visits by selecting the appropriate Evaluation and Management (E/M) code. The codes are divided into Levels 1 through 5, with Level 1 providing the lowest reimbursement and Level 5 the highest.

According to Medicare, a Level 5 visit may involve either a new or established patient and must include all three of the following: (i) a comprehensive review of the patient's medical history; (ii) a comprehensive medical exam, and; (iii) highly complex medical decision-making. Allegedly, this company was routinely billing for Level 5 visits where such visits did not actually occur.

The settlement resolved a civil lawsuit filed by a former employee under the whistleblower provisions of the False Claims Act, which permits private parties to file suit on behalf of the government and obtain a portion of the government's recovery.

(Adapted from Justice News. Department of Justice Office of Public Affairs. March 18, 2014.)

claim shared an award of roughly $1.6 million with another whistleblower who filed a similar lawsuit a year later.[10]

The False Claims Act is an extremely persuasive tool to thwart fraud on the government. The legislation generates more than $15 in recoveries to the taxpayers for every $1 spent on healthcare fraud enforcement.[11]

Violators of the FCA are liable for three times the dollar amount that the government is defrauded and civil penalties of $5,000 to $10,000 for each false claim.[7]

When a whistleblower files a *qui tam* lawsuit, it is placed "under seal" for 60 days. The government keeps the claim secreted from the accused employer. In the hands of the Justice Department, the claim is investigated. These federal whistleblower investigations can take months or years to resolve. As a result, the court may extend its seal order numerous times to allow the government additional time to investigate.[12] During this time, the government will examine the whistleblower's evidence to determine whether to get involved or "intervene" in the case.[12] Government involvement occurs in just a fraction of the *qui tam* cases—those that are most likely to be successful. Many *qui tam* cases settle, and to assist in that process, the government may request the seal to be lifted to discuss settlement negotiations.[9]

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Whistleblower Protections

The laws protect employees and whistleblowers so they can stop, report, or testify about employer actions that are illegal, unhealthy, or violate specific public policies.[13]

The whistleblower statutes protect employees from retaliation.[14] Further, the Patient Protection and Affordable Care Act[15] broadened the government's reach under the False Claims Act with requirements aimed at enhancing fraud-fighting and increasing penalties for submitting false claims. Beginning in 2012, physicians are required to return known overpayments to the government within 60 days of discovering an error.[16]

However, a significant weakness in many statutory whistleblower protection laws is the brief statute of limitations, which is often exploited by entities accused of FCA violations. The clock on a case usually is deemed to start when the employee learns that she will be retaliated against, rather than her last day of employment.[13]

Takeaways for Urgent Care Owners and Operators

Urgent care center owners and operators should be aware that one of the most litigated issues in whistleblower law is the precise definition of protected whistleblower activity.[13,17-19] Note that some states have very narrow definitions of what constitutes whistleblower activity, and others have definitions that are much broader.[20] Consult with your legal counsel for the specific parameters in your state.

One way that owners can reduce the risk of a whistleblower lawsuit is be certain that their urgent care center compliance programs are up-to-date and comprehensive. These programs should be disseminated in writing to all employees.

Urgent care centers should also have a process for reporting compliance issues to a compliance officer. This gives employees the opportunity to report any issues—and urgent care centers are given the responsibility of investigating and addressing these concerns without retaliating against employees for re-

porting any perceived unlawful activity.[21]

Finally, urgent care centers should document the investigation, keep the whistleblower apprised of the investigation, and report the conclusions. Another best practice is to consider engaging a neutral third-party to investigate the claim.[21] ■

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