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Whistle While You Work - How to Prevent Activity Leading to Whistleblower Actions and Protect Health Organizations and Medical Practices from Whistleblower Threats

While Ralph Nader is frequently credited with coining the phrase "whistleblower" in the 1970's, informants have been a part of the justice system in the U.S. since at least the Civil War, when the government embraced whistleblower information relating to government contracts. The False Claims Act came about in 1863, when President Abraham Lincoln encountered fraud related to faulty supplies during the Civil War. The term *Qui Tam* has been around since the thirteenth century and is Latin for "he who sues in this matter for the king as well as for himself." The Founding Fathers incorporated several *Qui Tam* provisions.

Today the term is used when a whistleblower (relator) gives the government information about false claims and is rewarded by the government for this information–if the claim is true and the government takes action against the organization/individual. Whistleblower cases have increased substantially in the last few years. The Department of Justice Office announced in 2014 that they had obtained a record $5.69 billion involving fraud and false claims – bringing total recoveries from 2009-2014 to over $22.75 billion. This trend has increased exponentially and it is not expected to slow any time soon. To the contrary, the government has greatly enhanced rewards to whistleblowers in a number of areas, and the perception of whistleblowers has sometimes turned from that of a snitch to an American hero.

Whistleblowers, both real and purported, have become a part of everyday business life. Organizations that fail to prepare for complaints about illegal and/or unethical activities and ignore or minimize these complaints could be a recipe for disaster. This presentation is intended to help organizations identify whistleblowers generally; identify the sources of whistleblower complaints; handle complaints appropriately; manage the substantial risks associated with responding to complaints; and make recommendations that companies can take to prepare and protect the organization before a complaint is made.

In today's business environment, whistleblowers are highly incentivized to provide information and materials to regulators. Incentives, however, are not always monetary. Businesses and their risk advisors sometimes do not deeply contemplate who whistleblowers are and how they communicate their complaints or fully understand the whistleblower motives.

The potential whistleblower in any organization is a current employee. It could be an employee who feels disenfranchised by the organization, or one who has raised a complaint that was ignored (or for which there is no responsible person available to resolve the matter). Compliance officers and auditors are not immune from becoming whistleblowers. There are even cases where in-house lawyers have become whistleblowers, raising monumental ethical considerations. Whistleblowers do not need to come from within a company. They can be outside competitors, partners, or vendors who may have some type of grievance about the business. Physicians have also been whistleblowers.

There are numerous motivations for individuals to become whistleblowers. Some become whistleblowers because they want to receive a bounty. In many contexts, the U.S. Securities and Exchange Commission, the IRS and the U.S. Department of Justice (false claim act cases) have monetary incentives for whistleblowers to step forward and provide damning information about certain business practices. Some have more noble reasons–They want to effect change in a business that may have been inattentive to complaints and that did not want to address misconduct. Some whistleblowers may be competitors who want to hurt their competition. Often, the most vicious of whistleblowers are former employees who believe that they were treated poorly, or possibly wrongfully terminated.

Some current employees will attempt to become whistleblowers so that they can leverage their status and avoid termination or demotion. Ethical issues, such as professional code of conduct for various credentials (compliance, medical coding and billing, healthcare information, medical doctor, etc.) of whistleblowers is also a motivating factor. Many professionals pledge to protect the public if misconduct has happened; however, the whistleblower does have a moral obligation to raise the concern to the highest level possible within the organization prior to going outside of the organization for help.

Once a whistleblower decides to blow the whistle, they have a variety of means to do so. They will sometimes go straight to a civil, administrative or criminal regulator, often with documents and information that they have removed (legally or illegally) from the business. We have seen some whistleblowers attempt to report potential misconduct internally, through a company hotline (not all companies have hot lines, and some do not carefully monitor them and respond appropriately to complaints), or established lines for communicating complaints – like going to a compliance officer or in-house counsel. These days, it is not unusual for whistleblowers to report a business to a regulator, and then also disclose the information publicly through various websites (anonymously or not) and in social media. If the whistleblower is blowing the whistle on a government entity or large religious entity, the whistleblower will sometimes go to the largest media source possible. One example is the physician whistleblower in the 2014 Arizona Veterans Administration case, or the 2002 case investigated by the Boston Globe involving the Catholic Church (that inspired the 2016 Oscar winning movie Spot Light).

Rather than just discuss these issues hypothetically, one of the members of this panel was an actual whistleblower regarding substantial allegations of wrongdoing at a large healthcare entity. Professor Bloink attempted to report the wrongdoing internally, but received insufficient and even hostile responses. With great risk to her employment and reputation, and not wanting the misconduct to continue, Professor Bloink reported the matter to the appropriate regulators. She will discuss these matters in detail during our presentation.

Businesses who receive complaints internally should address those complaints after a thorough and prompt investigation. Those businesses should view the receipt of a complaint as an opportunity to address any misconduct and to take immediate remedial measures. Businesses will want to demonstrate that they have procedures and policies in place to address misconduct and to remedy inappropriate conduct. Although there are different rules and regulations that apply to publicly-traded companies and privately-held organizations, the mentality about how to respond to complaints should be similar.

Big or small, businesses should not ignore complaints, as those complaints are rare opportunities to address and improve upon business practices and possibly defuse damaging information that could be shared by a whistleblower with a regulator or law enforcement. In 2015, the Health Care Compliance Association, Office of inspector General/Department of Health and Human Services, American Health Lawyers Association and Association of the Healthcare Internal Auditors announced that they would collaborate to assist governing boards with their compliance plan oversight obligations in terms of educational tools. This collaboration is the first of its kind in a proactive attempt to help educate healthcare organizations in the area of identifying risks and giving them tools to assist in the prevention of fraud, waste and abuse. The educational information is designed to help create a corporate culture of compliance in order to protect the integrity of the country's healthcare system.

The most effective businesses have procedures in place to promptly investigate complaints, including, where appropriate, using outside counsel to conduct the investigation. Disorganized businesses, which face the greatest risk, have no idea what to do when they receive a complaint. Most often, when the complaint is not anonymous, having a dialogue with the complaining party is important. It may lead to important avenues of investigation and also avoid miscommunication. Not surprisingly, sometimes complaints are based in whole or in part on inaccurate information, speculation or flat-out erroneous miscommunications. Outside counsel can also be used as a tool to help the whistleblower feel as though their concerns are being heard by a source identified as "outside the inner circle." Many times the internal structure of the organization is the problem in the whistleblower's eyes, and an outside opinion could be the difference between a *Qui Tam* suit or an internally-handled matter.

What happens when a business does not properly manage complaints? Those complaints can materialize into full-blown whistleblower complaints to regulators. Once the disclosed information is in the hands of regulators, it can lead to very involved regulatory and even criminal investigations. Search warrants, wire taps, Grand Jury subpoenas, and interviews by a scary number of regulatory agencies can challenge the resolve of any business. The risk of lawsuits (false claim act and general business suits), regulatory actions, criminal prosecutions and public relations hits can be daunting. Businesses should do everything available to them to resolve complaints and invite appropriate complaints, so as to avoid having to later manage expensive regulatory and criminal investigations and the attendant public relations disaster that can follow.

Often, the original complaint from the whistleblower is not the end result of the government investigation; however the whistleblower may have opened the door for further investigation. Once the government has their foot inside the door they can look into records for many years beyond the original complaint. As an important aside, we will discuss the U.S. Department of Justice's recent policy shift,

known as the Yates Memo, which focuses the DOJ's resources to prosecute individual executives for misconduct. The Exclusion Laws are also important when discussing misconduct.

Whistleblower complaints are predictable, and businesses should take proactive measures to prepare for when such complaints occur. Businesses can start with the basics. What is the company's compliance policy, standards of conduct, and mission statement? Is the policy easily and clearly stated for everyone in the company? Importantly, is the company adhering to its own policies and procedures and mission statement? The most effective compliance program should be easily understood by all members of the business – at all levels. Is there a channel to go above chain of command if someone has an issue with a supervisor? How can the governing board ensure that all complaints are heard and not censured by bias administrators? The procedures need to delineate how one makes a complaint and to whom the complaint is made. There should be a clear focus on giving people the opportunity to voice their complaints, anonymously if they wish, so that the business can promptly and fairly evaluate the complaints and take whatever remedial action, if any is necessary. Is the compliance policy reviewed every year and revamped to incorporate new ideas on protecting the organization. How is the organization ensuring that repeat mistakes do not happen again?

Sometimes the compliance function is given a backseat to other company business. Compliance officers in some companies have little or no authority. Many compliance professionals are stressed due to the lack of control, yet must shoulder all of the blame if something goes wrong. The Health Care Compliance Association stated in 2012 that 60% of compliance officers were looking for other jobs. Compliance is there to protect the organization as a type of insurance policy. Compliance does not add revenue to the organization, and therefore that department is often given fewer resources. Often compliance is not valued until there are hefty fines after a complaint. For a compliance program to be effective, it has to have decision-making authority, and there should be clear and direct reporting to the highest levels in the organization. Compliance has to be embraced as a critical component of any business and viewed as the frontline in handling complaints, before those complaints become dangerous whistleblower complaints. Boards should consider having compliance at all board meetings and include them in the C-suite.

Electronic data is a serious concern. Robust efforts should be made to ensure that a company's data is handled appropriately and is safe and secure. Too often businesses devote too little attention to ensuring that its networks and data systems cannot be compromised and its sensitive data is protected from breaches by potential whistleblowers who may wish to harm the business. Social media and a whole variety of website-saving applications make data security and retention critically important. It is not uncommon to hear that employees take information in attempt to protect themselves if a false claims accusation is brought by the government. These employees are not whistleblowers, but have left an organization due to lack of compliance. They think that by keeping examples of data they will be safe if ever called to be a witness.

BIBLIOGRAPHY

The panel will engage in an extensive discussion of numerous legal authorities. There will be a focus on legal authority from California, Texas and Florida, as illustrative of trends throughout the country. For

example, there will be a discussion of the pertinent California, Texas and Florida statutes and laws regarding retaliation against whistleblowers. Some of the cases and articles in the presentation that will be relied upon are listed below.

CASE CITATIONS

USA and Elin Baklid-Kuntz v. Halifax Hospital Medical Center, et al.
No. 6:09-CV-1002-ORL-31, 2013 WL 6017329 (M.D. Fla. Nov. 13, 2013) ***[FLORIDA]**

United States of America v. Quest Diagnostics Incorporated, et al.
734 F.3d 154 (2d Cir. 2013)

NML Capital, Ltd., EM Ltd. v. The Republic of Argentina
680 F.3d 254 (2d Cir. 2012)

United States of America ex rel. v. Quest Diagnostics Incorporated, et al.
05 CIV. 5393 RPP, 2011 WL 1330542 (S.D.N.Y. Apr. 5, 2011)

In re The City of New York, et al. v. The City of New York Commissioner of NYPD
607 F.3d 923 (2d Cir. 2010)

Woods v. Empire Health Choice, Inc.
574 F.3d 92 (2d Cir. 2009)

United States, ex rel, v. City of New York, et al.
129 S.Ct. 2230 (2009)

United States of America, ex rel. v. Flaherty
540 F.3d 89 (2d Cir. 2008)

Rockwell International Corp, et al. v. United States, et al.
127 S.Ct. 1397 (2007)

Rates v. Dow Agrosciences LLC
125 S.Ct. 1788 (2005) **[TEXAS]**

Grievance Committee for the Southern District of New York v. Simels
48 F.3d 640 (2d Cir. 1995)

United States of America ex rel. v. X Corp.
862 F. Supp. 1502 (E.D. Va. 1994)

Ackerman v. National Property Analysts, Inc., et al. v. Talansky
887 F. Supp. 510 (S.D.N.Y. 1993)

Cipollone v. Liggett Group, Inc.
112 S.Ct. 2608 (1992)

Chambers v. Nasco, Inc.
111 S.Ct. 2123 (1991)

United States v. Long Island Lighting Co.
912 F.2d 13 (2d Cir. 1990)

General Dynamics Corp. v. Superior Court
876 P.2d 487 (Cal. 1994) [**CALIFORNIA]**

Willy v. Coastal Corp.,
647 F. Supp 116, 117 (S.D. Tex. 1986), rev'd on other grounds, 855 F.2d 1160 (5th Cir. 1988) [**TEXAS**]

Abourezk, et al. v. Reagan, et al.
785 F.2d 1043 (D.C. Cir. 1986)

Commodity futures Trading Commission v. Weintraub
105 S.Ct. 1986 (1985)

W.T. Grant Company v. Haines, et al.
531 F.2d 671 (2d Cir. 1976)

Hull v. Celanese Corporation
513 F.2d 568 (2d Cir. 1975)

Board of Education of the City of New York v. Nyquist
590 F.2d 1241 (1979)

The Fund of Funda, Limited, FOF v. Arthur Andersen & Co.
567 F.2d 2265 (1977)

Hall v. A. Corporation et al.,
483 F.2d 1375 (1972)

John DOE v. A Corp et al.
330 F.Supp 1352 (1971)