# Lessons Learned – How compliance officers can better protect their organizations (Part 5)

March 5, 2015

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This fifth and final installment in a series of bulletins discusses a few final tips for health care providers and their compliance officers working cooperatively to establish and maintain effective compliance programs and avoid False Claims Act whistleblower lawsuits.

A Few More Tips: Avoiding Whistleblower Lawsuits and Investigations

Once you have your compliance program in place and have instituted as many best practices as you can with respect to the structure and operation of your compliance program, what else can you as a compliance professional do to try to avoid being the target of a government investigation or whistleblower lawsuit? First, know and understand your business – that knowledge is key to preventing a whistleblower action. Compliance officers should know and understand their organization's interests and be aware of the specific pressures that are facing management and employees. Compliance officers can accomplish this by reaching out to human resources professionals and other trusted employees, attending meetings, and really listening to the business issues the organization is grappling with.

Compliance needs and business needs are not always aligned; to be effective and listened to, the compliance officer needs to be in tune with the organization's business needs and work diligently to weave compliance into the business conversations so that the two become more aligned. Compliance officers who sit in their ivory tower and preach the black letter law and always tell business leaders that what they are proposing cannot be done risk being shut out of the discussions they most need to be included in. Ask questions so you can identify the needs of the organization and work with the business leaders to find a compliant way to accomplish the goals identified. Doing this will keep you at the table for those important discussions and help your organization proactively avoid compliance issues that could be the potential subject of a whistleblower action.

Second, understand that everybody in and around the organization is a potential

whistleblower. There is no such thing as only certain types of persons being whistleblowers. Whistleblowers can be competitors, independent contractors, former employees, current employees, physicians, consultants, or patients – they can be anyone. Recently, whistleblower lawsuits have been successfully brought by a consultant brought in to audit claims for a hospital system (Shands) and by an employee in an organization's compliance department (Halifax) in addition to the usual whistleblowers we have seen over the years. If an organization is acting in a compliant manner, has a culture of compliance with open lines of communication, and responds appropriately when compliance issues are reported, this will go a long way in preventing whistleblower actions from being filed against your organization.

Third, be proactive. Compliance officers should ensure all complaints are investigated and should notify complainants, to the extent possible, that their concerns are being reviewed. The OIG notes that "Information obtained over the hotline may provide valuable insight into management practices and operations, whether reported problems are actual or perceived."1 In addition, consider seeking outside counsel for guidance on how to investigate significant complaints and to protect communications under attorney-client privilege.2

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Footnotes

- See, e.g., In re Kellogg, Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014). In that case, the D.C. appellate court ruled that as long as one of the principal purposes of the communication or investigation is to obtain legal advice, that is sufficient for the attorney-client privilege to apply. The court noted that the "primary purpose" test, which it had previously used in privilege decisions, meant that "one of the significant purposes" of the communication or investigation must be to obtain or provide legal advice: "In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply." 756 F.3d at 760. That need not be the only purpose. The D.C. Court of Appeals further noted that "so long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." Id. at 758-59. "This is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy. " Id. at 760.