

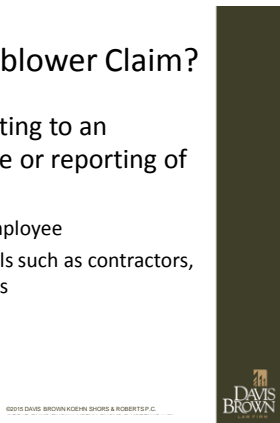
Reducing Your Whistleblower Risk

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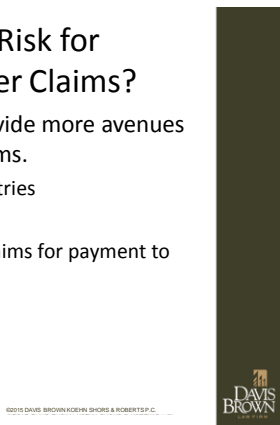
What is a Whistleblower Claim?

- Typically claims relating to an “insider’s” disclosure or reporting of information.
 - Most commonly an employee
 - Can be other individuals such as contractors, agents, board members



Who is At Risk for Whistleblower Claims?

- Certain industries provide more avenues for whistleblower claims.
 - Highly regulated industries
 - Public entities
 - Entities that submit claims for payment to government



Qui Tam – What Does That Mean?

- A “Qui Tam” claim allows a person with evidence of false claims to sue the alleged wrongdoer on behalf of the Federal Government.
- Government is given the right to intervene, but if the Government declines, individual may pursue the claim.

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What Types of Violations May Be Pursued?

- Knowingly presenting a false or fraudulent claim
- Knowingly making or using a false record or statement that is material to false claim
 - Purpose here is to include those who make a false record to help others get paid
- Knowingly making or using a false record or statement to avoid or decrease an obligation to pay (called a reverse false claim)
- For health care providers, many violations of federal laws could result in a false/fraudulent claim because of the claim certification

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Employee Protections

- Employees who take acts in furtherance of an action brought under the False Claims Act are protected from retaliation

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Penalties and Risk?

- Three times the value of the claims
- Civil penalties for each false claim
- Plaintiff receives between 15-30 percent of recovery

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Government Recovery: A Snapshot

- In 2014, Government recovered total of \$5.69 billion through false claims cases
- \$2.3 billion in health care fraud recovery, Medicare and Medicaid
- \$3 billion through qui tam actions

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Recent Settlement Examples

- Omnicare settlement of \$116 Million
 - Kickback arrangement with skilled nursing facilities to choose Omnicare as pharmacy provider (services covered by Medicare/Medicaid)
 - Qui tam former employee receive \$17.24 million
- Community Health Systems settlement of \$98.15 million
 - Hospitals intentionally billing Medicare/Medicaid for inpatient services that should have been outpatient
 - 6 qui tam plaintiffs, amount not yet set

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Recent Settlement Examples

- Amedisys Inc. settlement of \$150 million
 - Billing for unnecessary services, nurses and therapists pressured to provide care based on financial benefits
 - Qui tam former employees split \$26 million
- CA Technologies settlement of \$11 million
 - Government contractor of software and maintenance plans
 - Purposefully steering Department of Defense customers away from inventory causing them to spend more on same products
 - Qui tam employee will receive \$2 million

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How Do You Reduce Your Risk?

- Recognize the Warning Signs
- Implement an Effective Compliance Plan
 - Prevent, Detect, Respond
- Set a Culture of Compliance
- Hold Everyone Accountable

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1. Recognize the Warning Signs

- Strong personality that is essential to the provider's business
 - Could be a referring physician, a CEO, or contractor
- Disgruntled employee(s)
- Prior complaint by disgruntled employee is perceived by the employee to be "blown off"
- Disengaged management
 - Limited information shared with management

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I See Red Flags...Now What?

- Make sure the strong personality is not your compliance officer (more on this later)
- Make sure the employee concerns are appropriately addressed and employees have an individual they feel comfortable taking complaints to
- Investigate the employee complaints and react appropriately
- Re-engage your Board
- Contact Legal Counsel

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2. Implement an Effective Compliance Plan

- 3 main goals are to “Prevent, Detect, Respond”
 - Outlines expectations for staff/leadership
 - Identifies risk areas
 - Strives to prevent misconduct
 - Brings potential non-compliance to light
 - Establishes systems for prompt damage control if violations are identified

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How Do I Make My Program Effective?

- Adopt a Plan
- Appoint a Compliance Officer & Committee
- Create a Compliance Culture
- Conduct Initial and Periodic Training
- Schedule Regular Compliance Meetings
- Communicate to Others
- Implement Routine Audits
- Respond and Resolve

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Appoint a Compliance Professional

- Well respected
- Has time
- Becomes the point person for staying current on compliance issues and changes in laws and regulations
- Has a direct line to the Board President/Owners

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And...Establish Compliance Committee

- We recommend a minimum of 3 individuals
- Led by Compliance Officer
- Can include a board member or owner
- Diversify strengths
 - Quality of Care
 - Billing
 - Business Issues

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Implement Routine Audits

- You should periodically review risk areas and audit yourself to determine compliance
 - Audit a sampling of Medicare claims prior to submission
 - Review agreements with physicians, referral sources, and other providers
 - Audit documentation for a sampling of residents

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Audit Policy Example

- Choose three areas to audit during the year
 - Can be based on a recent survey, high risk areas, hot topics, OIG work plan, complaint
 - Should include risk areas identified in Compliance Manual
 - Determine sampling size
 - Report to Board
 - Implement improvement measures
 - Audit later to determine improvement

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Respond and Resolve

- Take all complaints/concerns reported seriously
- Implement an intake process
 - Start a chart which identifies each and how it was resolved
- After a cursory review, those which raise compliance concerns need to be investigated

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Respond and Resolve

- Your response should be proportionate to the violation
- **No one should be above discipline**

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3. Create a Compliance Culture

- The provider’s attitude toward compliance is critical and not dependent on resources
 - Make sure compliance is a leadership priority
 - Communicate this priority to staff
 - Be responsive to complaints/questions
 - The tone must be that compliance trumps profits

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Tips for Creating a Compliance Culture

- Place compliance updates as a routine agenda item for board and staff meetings
- Start a quarterly compliance bulletin to staff
 - Changes in laws/regulations
 - Discuss compliance areas provider has chosen to focus on
 - Publish reporting reminders
 - Celebrate employees committed to compliance
- Incorporate in staff evaluations

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Tips for Creating a Compliance Culture

- Set goals for targeted risk areas and communicate to staff
 - Publicize and celebrate accomplishments
- Periodically ask others for feedback
 - Staff
 - Patients
 - Other providers/contractors

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Tips for Creating a Compliance Culture

- You absolutely must be responsive to employees who come to you with appropriate complaints/concerns
 - When someone reports, follow the process, regardless of who the report involves
 - Must be willing to investigate any employee, including management
 - Your compliance officer should not be the CEO/Administrator but must have direct line to Board/Owners
 - Report back to employee

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Tips for Creating a Compliance Culture

- Include compliance message in meetings
- Be approachable
- Encourage reporting
- Provide frequent opportunities for feedback
- Do Exit Interviews with Employees Prior to Their Departure
 - Ask them about any concerns they have regarding compliance issues within the provider

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4. Hold Everyone Accountable

- If there is an issue involving a “Very Important Person” in your organization, you need to deal with it
- Management should be engaged
- Choose strong board members who are able to make tough decisions
- Work with legal counsel

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Take-Away Tips

- Dedicate resources to ensuring you understand billing/regulatory requirements and invest in training/auditing
- Make sure your compliance plan is more than a piece of paper or electronic file
 - Prevent/Detect/Respond
- Engage your Board and ensure they understand the compliance risks and are committed to compliance
- Encourage reporting/Create safe environment
- Follow the complaint/investigation process for all complaints and document

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Wrongful Discharge Against Public Policy – What is That?

- Generally, employees are “at will” unless they have a specific employment agreement
- Law protects employees from certain discharges that are considered to be against public policy
- Must derive from statute, not generalized concept of socially desirable conduct

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Exercising Statutory Right

- Right to file workers’ compensation claim
- Right to pursue partial unemployment benefits

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Refusing to violate state law/ regulations

- Testifying truthfully
- Following regulations: Jasper v. H. Nizam, Inc.
 - Director of daycare Kid University
 - Jury found in favor of Director, who alleged that she was fired for refusing to staff the daycare below the child-to-staff ratios set out by DHS
 - Court found appropriate to draw public policy from agency regulations

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Reporting a Statutory Violation

- More complicated area – rights of others
- Must be able to tie report to statutory right or violation
- Examples: reporting child abuse, cooperating in action relating to unpaid wages, opposing workplace discrimination

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Reporting a Statutory Violation: Two Recent Cases

- Dorshkind v. Oak Park Place
 - Employee reported belief that state mandated training documents were forged
 - Reported internally to former (not current) supervisor, who reported claim to HR
 - Assisted living administrative rules demonstrated public policy to ensure proper care of dementia patients

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Reporting a Statutory Violation: Two Recent Cases

- Ballalatak v. All Iowa Agriculture Ass'n
 - Supervisor called general manager to report concern that employees' workers compensation claims would not be covered. Fired during the call.
 - No protection. Court found no clear statutory right to raise concerns about other employee's workers' compensation claims

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Take-Away Tips

- Public policy for internal complaints more likely to exist when regulated area relates to protection of vulnerable (children, elderly, patients)
- Take complaints seriously and document responses and investigations
- Document basis for any employment actions

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Iowa's Public Employee Whistleblower Statue

- Iowa Code 70A.29 Prohibits:
 - employment action toward employee of political subdivision
 - as reprisal for disclosure of information to general assembly, official of that political subdivision, state official, public official, or law enforcement agency
 - where employee reasonably believes information evidences violation of law or rule, mismanagement, gross abuse of funds, abuse of authority, or substantial and specific danger to public health or safety

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Remedies/Penalties

- Civil Action allowed
- Reinstatement, back pay, equitable relief, attorney fees and costs
- Violation also a simple misdemeanor

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Crusador for Public Good v. Insubordinate Employee

- Carter v. Lee County
 - Maintenance director for Lee County.
 - Repeatedly spoke during public Board of Supervisors' Meetings about his concerns with contractor bids.
 - Eventually fired for failing to raise concerns with his own supervisors, failing to accept supervisor decisions, and constantly bringing things to the Board in public meetings.

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Crusader for Public Good v. Insubordinate Employee

- Carter v. Lee County
 - Affirmed grant of JNOV.
 - Reasonable person standard
 - Disagreeing with supervisors does not rise to level of reasonable belief of violation
 - Not intended to cover venting of complaints and disagreements
 - “squeaky wheels” and “pains in the ass” are not protected classes

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Crusador for Public Good v. Insubordinate Employee

- Donnell v. City of Cedar Rapids
 - Cedar Rapids mechanical inspector believed cronyism was causing selective enforcement of city codes.
 - Went to Mayor, State Fire Marshal, Iowa Attorney General, and Building Code Bureau.
 - Fired for “one man crusade,” focusing on one specific contractor, refusing to work within the system.

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Crusador for Public Good v. Insubordinate Employee

- Donnell v. City of Cedar Rapids
 - Court denied summary judgment.
 - Employer cannot order employee not to blow the whistle and then fire the employee for not following orders.

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Take-Away Tips

- Cases are often fact specific, summary judgment difficult to obtain
- Written documentation of insubordination will be helpful to employer
- Written documentation of how internal complaints are handled

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First Amendment Retaliation – What is it?

- Speech by **public employee**
- On a **matter of public concern**
- Example: Pickering v. Board of Ed
 - Teacher could not be fired for letter to the editor regarding school budget, which was matter of public concern
 - Youth program director could not be fired for giving truthful testimony under subpoena regarding fraud uncovered in audit

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First Amendment Retaliation

- Speech made **as a citizen**
- Speech made pursuant to official job duties is not speech as a citizen
- Example: Garcetti v. Ceballos
 - Prosecutor passed up for promotion due to internal memorandum regarding search warrant affidavit with serious misrepresentations
 - No claim because memo was prepared in course of prosecutor's job duties

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First Amendment Retaliation

- Balancing Test Applies : Government may prohibit if it has adequate justification
 - Promoting efficiency and integrity
 - Maintaining proper discipline
 - However, stronger showing of Government interest is required, the more serious the matters of public concern

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Take-Away Tips

- For public employers, if an employment action is being considered on the basis of speech, analyze whether speech was made as a citizen on a matter of public concern prior to action.
- Document basis for any employment action or discipline.
- Take concerns and complaints seriously.

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In Conclusion

- Steps Set Out Earlier Will Help With All Types of Whistleblower Risks
 - Recognize the Warning Signs
 - Implement an Effective Compliance Plan
 - Prevent, Detect, Respond
 - Set a Culture of Compliance
 - Hold Everyone Accountable

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Thank you

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