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Some basic considerations when thinking of reporting health care fraud

Most employees never imagine reporting their employers. No one takes a job with their sights set on clandestinely gathering evidence for a government health care fraud investigation. But, anyone working in the health care field long enough knows that fraud is still rampant and it sometimes causes real patient harm. So, how does a loyal employee turn whistleblower, and what should you do if you find yourself in this position?

What is the False Claims Act and what does a whistleblower do? The Federal False Claims Act dates back to the Civil War and is also referred to as “Lincoln’s Law” as it was signed by President Lincoln. While it lay dormant for decades, it was strengthened by both Presidents Reagan and Obama. The current law provides for civil liability to anyone who knowingly presents or causes to be presented a false claim, uses a false record, conspires to commit these acts, or conceals or avoids an obligation to pay the Government. 31 U.S.C. § 3729. The Act carries significant penalties of between \$5,000 and \$10,000 per claim plus three times the amount of the damages sustained by the Government.

The False Claims Act is one of the only vehicles that allows a private person to bring a claim on *behalf of the Government* – to do some of the Government’s work for it. Though this is not the whistleblower’s claim, if a case is successful, a whistleblower is entitled to receive between 15%-25% of the proceeds of a settlement. While this has been described as a “bounty” by some, it is much more. For, the successful whistleblower has intimate knowledge of the fraud, the scheme and the ways in which the defendant attempts to cover it up. The whistleblower has gathered evidence and taken personal risk to bring the fraud to light. He or she works closely with the Government to investigate, map out the fraud, and drive the defendant to the negotiation table or to trial. For his or her efforts, the Government will then pay the successful whistleblower between 15% - 25% of the total recovery. If a case goes forward without the Government’s participation (“non-intervention”), the percentage increases to between 25% - 30% of the ultimate recovery. 31 U.S.C. § 3730(d).

What Does Health Care Fraud Look Like? If you have witnessed or have been asked to participate in fraud, you might want to, or feel compelled to, report it. Fraud can take just about any form. Fraudsters can be creative. [There are lots of examples of fraud.](#) But, here is a list of some of the most common fraud in the health care space:

- False and off-label marketing and promotion;
- [Kickbacks or quid pro quo arrangements](#) (e.g., speaker or writer fees, sham consultant agreements, paid dinners, outings or vacations, paid advertising);
- Upcoding CPT codes, DRGs, RUG rates or HHRG scores to increase reimbursement;

- The fabrication of records or bills;
- Billing for services not provided at all or not provided as billed;
- Billing for services or patients that are ineligible for government reimbursement; and
- Providing unreasonable and unnecessary medical services

Some fraud is blatant, rampant and out in the open. Most fraud, however, is more subtle and takes an insider to detect and uncover it. Basically, any time an employer is directing you to skirt the rules, or when you discover that decisions are being made for monetary reasons instead of in compliance with governing rules and regulations, you might rightfully suspect fraud.

Act Fast. If you are considering reporting fraud and filing under the False Claims Act, you must act fast. This cannot be overstated. The Act has a harsh “first-to-file” rule. Even if your allegations are more detailed and you have more evidence than the person who is first to file, if you are not first, you are **entitled to nothing** under the Act.

Maintain All Records. As with any potential litigation, if you are even considering filing a whistleblower lawsuit, you should maintain, and do not purge, your files. If you do end up retaining an attorney to file under the False Claims Act, you will need to turn over all of your evidence to your attorney, who will then turn it over to the Government as required in a detailed Disclosure Statement. However, never try to get documents that you do not normally have access to or to which you are not privy. You can blow a case before it has a chance if you unlawfully obtain documents.

Keep Quiet! False Claim Act cases, unlike other types of litigation, are filed *under seal* and are not served on the defendant at first. This means that during the Government’s investigation, the defendant target is unaware that you have filed a case and is unaware that the Government is pursuing a False Claims Act case against it. As soon as you file suit, the Court will issue sealing order, with which you and the Government must abide until it gets lifted, which could take years. This sealing provision is a critical part of the Act that allows the Government to conduct its investigation thoroughly, without detection and without fear that the defendant might destroy or compromise sensitive evidence. Any good whistleblower attorney will tell you to assume the seal is in place even before you file, while you are still putting together your Complaint. This means that you need to keep strict confidentiality about what you are doing and the evidence you are gathering from your friends, family and even from your spouse.

Get Trusted Legal Advice. If you have witnessed activities you think may violate Medicare, Medicaid, or other health care laws or regulations (including private insurance regulations in certain states), you should consult with an experienced whistleblower attorney immediately. These consultations are **confidential** and are protected from disclosure. Always call or email an attorney from a personal phone or personal email address and **never** from a work-sponsored computer or hand-held device tied to a company server to ensure the communication remains protected.

An experienced whistleblower attorney will walk through your various options, which may include: (1) filing a case under the False Claims Act or state false claims act equivalents; (2) bringing a retaliation claim under the False Claims Act and/or state laws; (3) negotiating a settlement and severance with the employer; and (4) other options depending on your unique situation.

Trust your gut! Trust your instincts, your training and your experience. If an employer is asking you to perform tasks that you know or feel are outside or contrary to Medicare’s or Medicaid’s rules and regulations, then you are right to question and pushback on these requests. If you are complicit in fraud, then there is a likelihood that someone will report it, whether it is a co-worker, a patient or a competitor. You will then be on the wrong side of the inevitable investigation. Licenses and livelihoods are then on the line. In the most egregious cases, criminal charges can result. It is best to consult with

an attorney to know your rights and map out a strategy that works for you.

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