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Tips for Providers to Cope with the Challenge of Whistleblower Retaliation Claims

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Operating in the long term care (LTC) industry is undoubtedly challenging. On top of limited reimbursement from government payors, there are stringent regulations, surveys and other forms of regulatory scrutiny, malpractice lawyers, and difficulties in recruiting and retaining qualified staff. Add to that, LTC providers must deal with the challenges of the anti-retaliation provision of the False Claims Act (FCA).

LTC providers occasionally receive complaints from staff regarding the provider's policies and practices. Some complaints may be legitimate, but others may be invalid. Sometimes complaints are made while a provider is considering disciplinary action against staff who engage in misconduct or provide substandard services. These circumstances present a potential minefield for LTC providers that need to avoid retaliatory conduct, but do not want to be hand-cuffed from taking appropriate disciplinary action simply because an employee has made a complaint. Individuals making complaints may see themselves as "whistleblowers," while providers may see some employees as raising unwarranted complaints to excuse their substandard performance. While the line between permissible and impermissible disciplinary action by a provider is sometimes difficult to draw – and depends on the particular circumstances of each case – there are general guidelines that providers should always keep in mind.

The FCA's anti-retaliation provision states that "[a]ny employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter."

The law was amended a few years ago to provide greater protection for whistleblowers. Previously, the law only created liability for employers who retaliated against employee-whistleblowers. However, in today's workplace, there is not always a strict employer-employee relationship. Sometimes a whistleblower has a contractor or agency relationship with a provider, and the FCA was amended to accommodate those relationships. For LTC providers, that means they may face retaliation claims from both employees and agency staff used to provide services.

In order to win a retaliation claim in court, the whistleblower needs to prove three things. First, the whistleblower must prove that he or she was engaged in "protected activity." That means the whistleblower must be investigating activity that could reasonably lead to a claim that the government was billed fraudulently, or the whistleblower must be attempting to stop suspected fraud on the government or refusing to participate in activity that he or she reasonably believes is fraudulent. All of that would be considered protected activity.

It is important to keep in mind that the whistleblower's assertion of fraud does not need to be correct. Even if the provider is not involved in actual fraud, if the whistleblower has a reasonable belief that fraud has occurred or is occurring, that is enough to constitute protected activity. It is viewed from the perspective of what a reasonable whistleblower would believe, so even though a provider may believe, or even know, that a

whistleblower's complaint of fraud is wrong, the whistleblower still could be involved in protected activity. However, the whistleblower's complaint must involve suspected billing fraud on the government. It is not enough to complain about the quality of a provider's services, or even to complain about a regulatory violation that does not impact the billing of services to the government.

Thus, for example, staff complaints about inaccurate MDS documentation or RUG scores, inappropriate extension of Medicare stays, unnecessary therapy services, and kickbacks to referral sources could potentially involve improper billing to government payors and – even though the complaint may ultimately be without merit – should raise red flags that the whistleblower's complaint may involve protected activity. Many other types of complaints fall into a gray area where uncertainty exists regarding the protected activity.

Second, the whistleblower must prove that the provider knew the whistleblower was engaged in protected activity. This is viewed from the perspective of whether a reasonable provider would believe the whistleblower is investigating or complaining about fraudulent billing to the government. The fact that a whistleblower may think he or she has alerted the provider to suspected fraud is not enough if a reasonable provider would not perceive a complaint of fraud. For example, a minimum data set (MDS) coordinator who is requested to falsify MDS documentation, and then leaves his shift early to protest the improper request, may subjectively think he has sent a "message" to the provider, but the coordinator's act of leaving work early may not be sufficient to alert the provider that the coordinator was complaining about, or attempting to stop, fraudulent billing to the government. By contrast, a whistleblower's note, memo, or email to the provider, or a phone call to a compliance hotline complaining about the provider's billing practices, could be sufficient to show the provider was aware of the whistleblower's complaint.

Third, the whistleblower must prove that the provider retaliated against him or her because of the whistleblower's protected activity. Retaliation includes the termination, demotion, or suspension of a whistleblower for engaging in protected activity. The law also prohibits subjecting the whistleblower to threats, harassment or discrimination for engaging in protected activity. It is not always clear what constitutes a threat, harassment or discrimination. Potentially, changing a whistleblower's compensation or other benefits, reassigning the whistleblower to a different job or location, or changing his or her job title or duties could amount to prohibited retaliatory action.

In addition, there must be some causal link between the provider's retaliation and the whistleblower's protected activity. The courts do not handle that issue consistently. In some jurisdictions, the whistleblower must prove that the provider would not have retaliated "but for" the whistleblower's protected activity. In other jurisdictions it is enough to show that the retaliation was motivated, at least in part, by the whistleblower's protected activity. The safest course for providers is to make sure that any adverse action against a whistleblower is not based in any part on retaliation for the whistleblower's protected activity.

There are several factors that may suggest retaliatory behavior against a whistleblower. For example, taking adverse action against a whistleblower soon after the whistleblower complains to the provider may suggest retaliation. In addition, taking an adverse action following a history of the whistleblower receiving favorable performance evaluations raises the suspicion of retaliation. Furthermore, if a provider first offers one explanation for disciplining a whistleblower, but later offers a different explanation, that could suggest that the provider is making up excuses to hide a retaliatory motive.

It is often difficult to determine: (1) whether a whistleblower is engaged in protected activity; (2) whether the provider has knowledge of a whistleblower's protected activity; and (3) whether a provider is disciplining a whistleblower, in part, because of protected activity. Consequently, providers should consult with their legal counsel when they receive whistleblower complaints and before taking any disciplinary action against a whistleblower to avoid violations of the FCA anti-retaliation provision, as well as additional whistleblower

protections that may exist under other federal and state laws. Furthermore, before imposing any discipline against a whistleblower, it is important that providers document a valid and substantiated basis for taking disciplinary action in the whistleblower's personnel file. Moreover, it is crucial for providers to have a written anti-retaliation policy and for staff to be trained on the policy and how to avoid allegations of retaliation.

In addition to avoiding liability for retaliation against whistleblowers, it is vital for providers to investigate whistleblower complaints to evaluate whether there are any billing errors and, if so, what corrective action is necessary. This is not merely a hypothetical concern. There are numerous actual cases in which whistleblower complaints have turned into prolonged and expensive FCA litigation against LTC providers. Two recent examples are *U.S. ex rel. Crockett v. Complete Fitness Rehab, Inc.* and *U.S. ex rel. Chase v. HPC Healthcare, Inc.* Conducting an effective and privileged internal investigation of a whistleblower's complaint could lead to prompt corrective action that avoids, or at least reduces, a provider's significant financial liability for false claims under the FCA.