

WHISTLEBLOWERS: A PRACTICAL ASSESSMENT

PANDION HEALTHCARE ASSOCIATION
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Robert Trusiak represents hospital and physician clients on regulatory, statutory, and enforcement issues. He separately provides complete health care consulting services for physician providers, hospitals, research labs, skilled nursing facilities, pharmaceutical companies, and durable medical equipment entities and counsels clients on a number of state and federal health care regulatory matters, including health care reform, fraud and abuse, the Stark Law, Privacy Law, and health care compliance issues.

Previously, Robert served as Chief Compliance Officer, Senior Associate Counsel and Privacy Officer at Kaleida Health, Buffalo, New York. Robert managed the internal Compliance team, litigation teams of outside counsel, litigated administrative and contractual actions, ensured regulatory and statutory compliance, and resolved matters involving accrediting and enforcement entities as well as individual matters.

Robert also served as Assistant United States Attorney from 1992-2012. Robert was Chief of the Affirmative Civil Enforcement Unit. Robert prosecuted on behalf of the United States of America and whistleblowers civil and criminal cases involving health care fraud, Department of Defense fraud, HUD fraud, grant fraud, VA fraud, ERISA violations, Tax fraud, Securities fraud, Customs violations, USDA violations, and all forms of procurement fraud.

Robert was also an Adjunct Professor, University at Buffalo, SUNY, teaching a graduate level course entitled Health Care Fraud and Abuse.

Objectives:
Begin with
the end in
mind



Why does a whistleblower blow the whistle?

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Termination of a whistleblower



How to Manage a Whistleblower

Why does a whistleblower blow the whistle?

- ▶ Are whistleblowers loyal?
 - ▶ Resumes to employer
 - ▶ Shipment to Colombia
- ▶ Lack of Success of Internal Efforts
 - ▶ Expected delivery vs. actual delivery
 - ▶ Efforts to internally redress the problem
- ▶ Persistent efforts to disclose the scheme
 - ▶ What is a whistleblower thinking prior to hitting “send”
- ▶ Retaliation and its effect on the Whistleblower
 - ▶ Loss of business

Any reference to any actual case incorporates the totality of pleadings and the opposing party's denial of any wrongdoing.

Termination of a Whistleblower: The Law

- ▶ The FCA complements its anti-fraud objective by protecting employees who act to oppose fraud against the government.
 - ▶ The FCA protects [a]ny employee . . . [that] 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 . . . in furtherance of an action under [the FCA] or other efforts to stop 1 or more violations of [the FCA].
 - ▶ A plaintiff seeking whistleblower protection must plausibly allege facts showing that: (1) the employee engaged in protected activity; (2) the employer received notice of the employee's protected activity; and (3) the employer discriminated against or discharged the employee for engaging in protected activity.
- ▶ (United States ex rel. Feaster v Dopps Chiropractic Clinic, LLC, 2015 US Dist LEXIS 150321, at *23-24 [D Kan Nov. 5, 2015, No. 13-1453-EFM-KGG])

Termination of a Whistleblower

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- ▶ Must an Employee file a False Claims Act Complaint to merit legal protection?
 - ▶ Protected activity includes any formal action under the FCA or other efforts to prevent fraud on the government.
 - ▶ An employee need not actually file a qui tam action to undertake conduct deserving of whistleblower.

- ▶ (United States ex rel. Feaster v Dopps Chiropractic Clinic, LLC, 2015 US Dist LEXIS 150321, at *24 [D Kan Nov. 5, 2015, No. 13-1453-EFM-KGG])

Termination: Are There Limits? Insubordination vs. Retaliation

- ▶ Employees cannot be disciplined for protected activity so long as it is lawful and the character of the conduct is not indefensible in its context.
- ▶ A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and workplace discipline.
- ▶ If the employee's behavior oversteps the defensible bounds of conduct, the employee can lose the protections of the law. For example, swearing at a supervisor, refusing to change conduct, and daring employer to fire the employee.

Termination of a Whistleblower

▶ Considerations

- ▶ Do you want to begin a False Claims Act case?
 - ▶ Continuum: In February 2011, Kane sent an email to Continuum management attaching a spreadsheet of more than 900 potential billing errors, exceeding \$1 million in overpayments. Kane's email explained that further analysis was necessary to confirm the accuracy of the findings, and indeed it was later determined that approximately half of the listed claims were not overpayments. Kane was terminated four days after sending the email. Kane filed a False Claims Act compliant in April 2011.
- ▶ Is the employee taping conversations?
- ▶ Are there performance reviews?
- ▶ Is there a severance agreement?

Termination of a Whistleblower

- ▶ Is the employee stealing company documents?
 - ▶ Documents are generally necessary to demonstrate wrongdoing.
 - ▶ The employee copies and removes company documents available in the regular scope of responsibilities. There is no confidential material in the document, such as trade secrets, protected health information (PHI), attorney advice or client information. The employee has not signed a confidentiality agreement and does not owe any other duty of confidentiality to the employer. After it is taken, the document is shown only to the government for purposes of reporting the misconduct.
 - ▶ The employee copies and removes documents and electronic evidence beyond the scope of responsibilities for the job. The material contains confidential information, PHI or trade secrets. In taking, disclosing or failing to return the documents, the employee has violated an employment agreement or confidentiality agreement. There is also a HIPAA policy that prohibits removal of PHI from the premises. There is no pending whistleblower action. The employee refuses to answer questions regarding whistleblower status; e.g., have you told anyone about your concerns?



How to manage a potential whistleblower (and avoid a whistleblower lawsuit)

INVESTIGATIONS NEVER END AS THEY BEGIN

Common Questions from a (potential) whistleblower

1. What feedback can (and will) you give me about the progress and results of your investigation?
2. Will I get in trouble if I had some involvement?
3. Who is my point of contact and what role do they play in the investigation?
4. Will you take steps to protect my identity during the process?

What feedback can (and will) you give me about the progress and results of your investigation?

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- ▶ WB often feel ignored / stonewalled
- ▶ Often WB do not understand why you can't share details of your investigation
- ▶ Better to explain that up front to manage expectations
- ▶ Explain that transparency does not mean full disclosure

What feedback can (and will) you give me about the progress and results of your investigation?

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- ▶ Give guidance. I can't tell you:
 - ▶ XXX to protect employee privacy;
 - ▶ YYY (e.g., who else we talk to) to protect you and other WB'ers;
 - ▶ ZZZ to protect our attorney client privilege and legal strategies.
- ▶ Consider providing information about your investigative process, a rough idea of the timeline, and what (if anything) you can tell them at the end

Will I get in trouble if I had some involvement?

- ▶ Establish a policy and explain it re: will they get in trouble for reporting the problem?
 - ▶ What if they had some involvement?
 - ▶ Likely someone who knows had some involvement
 - ▶ Primary form of retaliation is to try to throw the WB under the bus
 - ▶ That is a big fear anyway
 - ▶ Ensure WB will get, at least, leniency – and won't get any punishment that is worse than what all others get (and that planners / initiators get worst)
 - ▶ What does your policy say about that? Communicate that to potential WB'ers

Who is my point of contact and what role do they play in the investigation?

- ▶ Is their role to explain process and help me share information more effectively
- ▶ Are they the adjudicator? Will they have an interest in justifying the outcome?
- ▶ Were they involved in the misconduct?
- ▶ Recommend: Have a different person responsible for answering the WB's questions about process versus doing the investigation

Will you take steps to protect my identity during the process?

- ▶ The obvious
- ▶ But also, take suggestions from WB on how to approach the investigation so as not to immediately out them
- ▶ Before you say “outrageous” – many government agencies will do this

Questions?



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