

Whistleblower Risk & False Claims Act Liability



**SCCE Webinar
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Main Topics of Discussion



- **Whistleblowers:**
 - Who are they?
 - Why do they file Qui Tam cases under the False Claims Act?
 - Evaluating whistleblower cases.
- **Can organizations manage whistleblower risk?**
- **Tips for compliance program effectiveness**

Impact of FCA Whistleblowers



- Since 1986, DOJ has recovered \$30 Billion in FCA suits filed by qui tam whistleblowers
- In last 3 years, whistleblowers have filed 2,019 new FCA lawsuits:
 - 2017 – 674 new matters
 - 2016 – 706 new matters
 - 2015 – 639 new matters
- In last 3 years, whistleblowers have received \$1.4 Billion in relator share awards (\$1.2 billion of which came from intervened cases)

Who are Whistleblowers



- **Your Employees!**
 - Current and Former
- **Competitors**
- **Customers / Patients**
- **Others, including: Consultants, Accountants, Physicians, Nurses**
- **Data miners**
- **FCA permits any “person” to be a whistleblower**

Why do People Become Whistleblowers?



- To “right” a “wrong”
- Their concerns are ignored by defendant
- Fear of losing license or being viewed as complicit in fraud
- Treated poorly by defendant
- No feedback after internal reporting
- Other reasons -- money

What Whistleblower Counsel Look For in Evaluating Cases



- **Ideal Whistleblower:**
 - Detailed knowledge of the fraud (but, does not have to be an insider)
 - Evidence supporting the allegations (How was that evidence obtained?)
 - Credibility
 - Ability to explain the fraud & assist government
 - Bringing the case for the “right” reasons
 - Not personally involved in fraud
 - Reported the case promptly
 - Stomach to “go the distance” through a lengthy process

What Whistleblower Counsel Look For in Evaluating Cases



- Clear FCA violation & strong evidence
- What are the potential factual/legal defenses
- Did the relator report internally?
- Must be harm to the government
- Amount at stake, and collectability
- Cases which are important to government
 - Are there safety risks at issue

Potential Roadblocks



- First to file: has someone else already filed a case?
- Is there a public disclosure concern?
 - E.g. other cases, government reports, news media
- Was the relator involved in the fraud?
 - Potential for little or no recovery under the FCA
 - Relator may need advice from criminal counsel
- Did relator sign separation agreement?

How Government Considers Whistleblower Cases



- Government must evaluate all cases
- Importance of the Issue(s)
- Strength of FCA violation (clear guidance)
- Strong evidence / examples of fraud
- Similar cases / repeat offenders
- Contracting agency's view
- Safety issue / potential harm
- Amount at issue
- Resources to pursue

How Organizations Can Prevent Whistleblowers



- Strong compliance programs
 - Demonstrate importance of program inside and outside organization
 - Be more than a hotline number
 - Clear lines of communication
- Data mining of your own data
- Voluntary repayments
- Follow up with complainants
- Collaboration within organization
- Independent investigations
- Prompt and adequate closure

How Organizations Can Prevent Whistleblowers



- Take every complaint seriously: Even difficult people can raise valid issues
- Keep open lines of communication
- Guard against retaliation
- Build relationships with regulators and enforcers

Questions?



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