

Hospice Whistleblowers and the False Claims Act: Part II

In the [first article](#) in this two-part series, we discussed the increasing trend of hospice whistleblower lawsuits under the False Claims Act (FCA).¹ Although hospices cannot entirely eliminate the possibility of FCA lawsuits, in this article we will discuss several steps hospices can take to help manage whistleblower risks.

Take Employee Concerns Seriously

The overwhelming majority of FCA lawsuits come from former employees who believe that the hospice ignored the genuine compliance concerns they raised. No matter what the circumstances, hospices should treat compliance concerns seriously and investigate them. Reports should not be dismissed simply because they are made by a "disgruntled" employee. To ensure that all compliance issues are thoroughly investigated, the hospice should focus on the substance of the complaint, not the individual making it.

Don't Let Employees Doubt Your Commitment to Compliance

By reporting their compliance concerns to the hospice, employees allow the hospice to investigate potential compliance issues and take corrective measures, if necessary, as soon as possible. Allowing compliance problems to fester will only exacerbate the consequences when they are brought to light, whether through whistleblower actions, government investigations or claim denials. Further, if employees believe that the hospice will ignore their concerns or retaliate against them for raising compliance issues, they may feel that they have no option but to take their concerns outside the organization to a lawyer or regulator.

To realize the benefits of employee reporting, hospices should not only ensure that their employees feel free to bring their concerns to someone within the organization without fear of reprisal, but they should actively encourage employees to do so. If employees doubt the hospice's commitment to compliance, they are unlikely to bring their concerns to the hospice's attention. Therefore, hospices should communicate, through both words and actions, their commitment to compliance at every level of the organization. To address

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employee fears of retaliation for raising compliance issues, hospices should consider promoting the availability of anonymous hotlines. If an employee raises a concern that implicates the conduct of a co-worker or manager, the hospice should attempt to protect the employee from retaliation from that individual. When possible, hospices should also try to follow up with employees who reported the concern to let them know that they value their contributions.

Employees must also know that the hospice takes their concerns seriously, even if the hospice ultimately disagrees with the employee's belief that there is a compliance issue. Unless the employee raised the concern anonymously, consider discussing the issue and the hospice's response with the employee. Having a conversation with the employee helps the employee understand that the hospice thoroughly reviewed their concerns and also provides the opportunity to clear up misunderstandings or misinformation that may have been the source of the employee's concern. Even if the report is made anonymously, consider whether it reveals a misunderstanding of clinical issues, the nature of the organization or legal requirements that should be addressed through future staff education.

Implement a Robust Compliance Plan

Hospices should evaluate how they can implement robust compliance plans that go beyond paper compliance. Hospices place themselves at considerable risk if they merely adopt compliance plans that set forth compliance goals and procedures on paper, but are not implemented in practice. The compliance plan should be a living, breathing document that is capable of addressing evolving compliance risks. A key component of the compliance plan will also be regular compliance training for employees.

Understand Risk Areas

The OIG has identified various risk areas for hospices in its *Compliance Program Guidance for Hospices*, but hospices should also be aware of evolving compliance risks. For example, a recent report from the OIG highlights the risks of noncompliance with the specific Medicare coverage requirements for hospices.² Additional indications of risk areas are recent enforcement actions and whistleblower suits against other hospices. Hospices can also identify potential risk areas through internal audits, survey citations and claim denials.



Create Internal Procedures for Addressing Hospice Eligibility Questions

Because questions of eligibility for hospice services form the core allegation of most hospice FCA lawsuits, a formal process for responding to questions about a patient's eligibility will help the hospice to address eligibility questions with consistency and due diligence. If an employee (or any other person) raises questions about a patient's eligibility for hospice, the hospice can use its process to ensure the patient's condition receives a prompt and thorough review.

Dedicate Adequate Compliance Resources

While compliance efforts do not generate any revenue, hospices must bear in mind the significant liabilities that can amass if compliance issues are not promptly identified and resolved. To help manage their risks, hospices should dedicate sufficient resources for compliance personnel to investigate compliance concerns, provide employee training and monitor evolving risk areas.

Ensure the Integrity of Your Documentation

If it is necessary to amend or correct any portion of a medical record, staff should follow clearly defined procedures that are in accordance with state law. The OIG suggests that hospices might correct an error by drawing a single line through the erroneous entry, writing "error" next to the entry, initialing and dating the correction and writing the correct information near the entry or writing where the correct information could be found.³

Protect Privileged Materials

Self-audits are often necessary for a hospice to understand areas that require improvement. However, some whistleblowers have tried to use the results of these audits to support their claims that a hospice has violated the FCA. Unless protected by a privilege (such as the attorney-client privilege or privileges that may exist for quality assurance committees), the results of the audit could be used in subsequent whistleblower litigation. Hospices are encouraged to work with their legal counsel to understand what privileges may apply to their audits and how they can protect those privileges.

Understand and Address the Root Cause of Compliance Problems

If the hospice discovers a compliance problem, corrective action should be focused on addressing not only the particular situation, but analyzing why the problem occurred. Consider, for example, a patient who goes to an emergency room in the middle of the night because of increased symptoms related to his terminal illness without first calling the hospice. Beyond providing the particular patient and his family with education on the need to call the hospice for all concerns related to the terminal illness, the hospice may consider whether staff are providing sufficient education to patients and families at the time of admission, whether the hospice's on-call instructions could be made clearer for both patients and families or whether more proactive management of the patient's symptoms would have prevented the patient from seeking care in the emergency room. By recognizing and addressing the deeper cause of a particular issue, the hospice may prevent the problem from recurring or from leading to related compliance problems in other areas.

Train Managers to Spot Compliance Concerns

A compliance issue can be buried in a personnel dispute or a poor performance review. For instance, in a dispute between two employees that may appear to be a simple personality conflict, one employee may accuse another of conduct that would violate the hospice's compliance policies. Human resources staff, or other managers responsible for reviewing employee performance, should be trained to recognize situations when employees have alleged potential compliance concerns so that they can report the concern immediately to the person responsible for compliance investigations. Even if an employee is disruptive or is a poor performer, the hospice should thoroughly investigate any compliance concerns that the employee raises. If termination of such an employee becomes necessary, hospices are encouraged to work with legal counsel to ensure they do not run afoul of whistleblower protections.

Take Complaints from Competitors Seriously

Hospices face an increasingly crowded and competitive marketplace. If a competitor believes a hospice is using unfair or illegal means of competition, but the hospice ignores the competitor's concerns, the competitor may feel its only

option for survival is to institute a whistleblower suit or report the allegations to law enforcement or regulators. Hospices should carefully evaluate the merits of potential compliance concerns that their competitors raise.

Review Marketing Incentives

To support their allegations that hospices knowingly admitted ineligible patients, whistleblowers have claimed that hospices provided marketing staff with incentive compensation that encouraged improper admissions. While incentive compensation may be provided in ways that are not necessarily illegal, some types of incentive compensation pose higher risk than others. For example, sales commissions based on patients' lengths of stay create a high risk that sales staff may target patients with questionable eligibility. Hospices should evaluate the risks of their incentive compensation and consider whether these risks are justifiable. Hospices should also understand the cumulative impact of their policies on employee behavior. For example, if marketing employees feel intense pressure to meet business goals, they may engage in practices that violate the hospice's compliance policies.

While the hospice does not intend for the employee to violate its own policies, hospices can be held responsible for their employee's actions. While there are no absolute protections against whistleblower actions or FCA investigations, hospices can take reasonable steps to address their risk areas. As always, solid documentation of patient eligibility remains especially important for reducing the risks hospices face in today's climate.

¹ Part I of this series is available at <https://www.reinhartlaw.com/Publications/Documents/ea%2020091211%20HOSP.pdf>.

² For more information about this report, please see our article, "What Every Hospice Needs to Know About the New OIG Report" at <https://www.reinhartlaw.com/Publications/Documents/ea%2020091001%20HOSP.pdf>.

³ See *Compliance Program Guidance for Hospices*, 64 Fed. Reg. 54031, n.37 (Oct. 5, 1999).

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