

# The Care & Feeding of Whistleblowers

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## Healthcare Whistleblowing Take-Aways

- Who blows the whistle?
- What "rights" do whistleblowers have to obtain evidence, including HIPAA protected data, to support their claims/concerns?
- How to foster a "Just Culture" to encourage internal whistleblowing?
- To the contrary, how to encourage outside whistleblowing?
- What is the potential liability for retaliation?

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## Whistleblower Statutes

- **False Claims Act** – relates to overbilling, other fraudulent billing, ineligible government patients (such as hospice), Stark, kickbacks, etc.
- **Wisconsin HealthCare Worker Protection** - Wis. Stats. §146.997
- **Occupational Safety & Health Act of 1970** - Sec. 11(c) involves e.g. bloodborne pathogens, infectious waste, standard safety issues.
- **Sarbanes-Oxley Act & Dodd-Frank Act** - protects corporate whistleblowers for providing information about securities fraud, shareholder fraud, bank fraud, a violation of any SEC rule or regulation, mail fraud, or wire fraud.
- **Wisconsin Common Law Wrongful Discharge**

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### OSHA Whistleblower Provisions

- Section 11(c) of the OSH Act prohibits employers from discriminating against their employees for exercising their rights under the OSH Act.
- These rights include filing an OSHA complaint, participating in an inspection or talking to an inspector, seeking access to employer exposure and injury records, reporting an injury, and raising a safety or health complaint with the employer.
- If workers have been retaliated or discriminated against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action.
- FERTILE GROUND FOR WHISTLEBLOWERS, resulting in inspections, fines & monitoring.

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### False Claims Act

- Prohibits any person who:
  - (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government a false or fraudulent claim for payment or approval; or
  - (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government.

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### FCA Whistleblower Provisions

- *Qui tam* is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*
  - Meaning "[he] who sues in this matter for the king as well as for himself"
- Brought by private individual known as a "relator" but brought *on behalf of the government*.
- The relator is most often a former employee of the defendant.
- Sometimes the relator is a current employee, a competitor, or a "serial" relator.
- Relator must be represented by counsel.

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### FCA Whistleblower Provisions

- Case is filed under seal and the complaint is not immediately served on the defendant.
- Relator serves a copy of the complaint along with a written disclosure of “substantially all material evidence and information” on the Attorney General, the U.S. Attorney, and the affected agency.
- The complaint remains under seal while the government investigates the allegations.

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### FCA Whistleblower Provisions

- Allows for monetary award for relator (percentage of the recovery);
  - 15-20% if the case is settled before an intervention decision or the government intervenes, or
  - 25-30% if the government does not intervene and the relator prosecutes action.
- If there is a recovery, the relator is also entitled to costs and fees.

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### 2017 FCA and Whistleblower Recoveries

**FY 2017:**

- DOJ recovered over **\$3.7 billion**.
- **\$2.4 billion** in healthcare related recoveries (**67% of total**).
- **\$3.4 billion (93%) related to qui tam/whistleblower suits under FCA**.
- Nearly **\$393 million** paid out to whistleblowers or their counsel.
- Relators filed over **670** new whistleblower/*qui tam* suits.
- DOJ recovered **\$60 million** from individuals.

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### FCA Trends

- More whistleblower filings but steady 20% rate of DOJ intervention.
- Increasing sophistication of relator’s bar.
- More DOJ declined cases litigated and more aggressively.
- Continuing focus on individuals in civil and criminal cases. Per DOJ policy, all *qui tams* reviewed for possible parallel criminal investigation or enforcement.

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### The Whistleblower Process

The Whistleblower Profile:

- Whistleblowing (reporting unethical conduct to a third party) involves an individual ethical quandary.
- Studies show that the decision about whether to blow the whistle often rests on concepts of **loyalty** vs. **fairness**.
- Personal, situational & cultural factors affect whether a person is more bound by loyalty or by fairness.

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### The Whistleblower Process

The Whistleblower Profile:

- Relators are most often current or former employees.
- Cases typically involve a matter that was raised (or attempted to be raised) internally.
- Motivation is not always financial.
- Labeling whistleblowers as “disgruntled” employees.
- Increasing allegations of retaliation – damages include “special damages” and double economic losses with interest and fees.

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### Whistleblower Pre-Filing Investigation

Obtaining the Specificity Required for Complaint:

- Public/Private partnership, limited government resources.
- Federal rules requiring pleading FCA claims with particularity.
- Corporate level of the scheme.
- Individuals involved & corporate knowledge or indifference.
- Systems, procedures, document terminology, software.
- Specific patient examples.

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### Use of Corporate & HIPAA Records

- HIPAA regulations contain a safe harbor for employees who disclose protected health information to the government or to their attorney. This includes patient medical records and billing data that is patient-specific.
- In Wisconsin, anyone may record a conversation to which he or she is a party.
- In general, there is no protection for information based upon its proprietary nature or confidentiality agreements, provided documents are relevant to the alleged fraud and they are not provided to a third party.
- Photos and screen shots are common supporting data collected by whistleblowers.

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### The Care and Feeding of the Whistleblower

The Role of the Internal Investigation:

- Whistleblowers want problems to be fixed and to be heard.
- In order to adequately address concerns, a targeted but complete investigation of the allegations is necessary.
- May involve:
  - Interviewing other employees;
  - Analysis of emails;
  - Review of affected claims;
  - Refund of any overpayment.
- Consider protections provided by the attorney-client privilege.

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## The Care and Feeding of the Whistleblower

### Responding to the Employed Whistleblower

- Provide appropriate feedback to reporters.
- Protect against retaliation (real or imagined).
- Is it ever appropriate to terminate the whistleblower?
- Return or destruction of materials forming basis of *qui tam* suit (Aetna/CVS).

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## U.S. ex rel. Denk v. PharMerica

- Relator was the pharmacy operations manager for the Milwaukee pharmacy.
- Licensed pharmacist but had worked in retail pharmacies only.
- Started at PharMerica in October 2008 and was not provided any training on long term care pharmacies or compliance.
- Handcuffed with \$10,000 signing bonus to be repaid in full if employment did not continue for full two years.
- Shortly after she started at PharMerica, Denk observed that the pharmacy was not obtaining prescriptions prior to dispensing many controlled substances.

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## PharMerica

- Starting in March 2009, Denk began raising these issues with local management.
- Denk was instructed to continue with the established practice.
- An internal compliance audit was done in May 2009.
- Denk was advised by her supervisor that the lack of compliance was "global," that corporate was aware of the problem, but that they could not make any changes locally.
- During the audit, Denk advised the corporate auditors of the problem and they instructed her to clean-up the paper work in case they were audited by the DEA.

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## PharMerica

- After receiving the supervisor's email, Denk called the DEA.
- DEA came to the premises to do a desk audit and requested that certain records be copied and sent to the investigators.
- Denk's supervisor told her to only send the records that she could "fix" (meaning, match up with a signed prescription).
- When relator raised a concern with HR about altering the documents requested by the DEA, PharMerica essentially fired Denk.
- Denk eventually filed a *qui tam*.
- Case eventually settled for \$31.5 million.

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## Is It Ok to Fire a Whistleblower?

- A compilation of studies show that about 82% of whistleblowers report at least some form of retaliation.
- Prohibited Retaliation under the FCA: "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."

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## Firing a Whistleblower?

- Prohibited Retaliation is different under each statute, but may include:
  - action taken against employee of a subcontractor,
  - legal action or counter claims against whistleblower,
  - post employment retaliation (not FCA),
  - retaliation against family or friends of whistleblower, or
  - "soft" retaliation, such as a change in duties, responsibilities, reporting structure, subordinates.

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## Firing a Whistleblower?

- Considerations:
  - Risk of patient harm or quality of care;
  - Whistleblower initiated/participated in the fraud;
  - Other violations of work rules/conditions of employment;
  - Consistency of discipline;
  - Appropriate, contemporaneous documentation.
- Timing may be important:
  - Can the employer demonstrate that negative behavior/conduct started *before* any protected activity took place.

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## Pointers

- Training.
- Consider all negative job actions.
- Watch first line supervisors. Monitor.
- Timing can create an uphill battle.
- Exit interviews.

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## QUESTIONS?

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