

10 Tips for Managing Qui Tam Exposure

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Your company's False Claim Act exposure may stem from actions in areas you may not consider. While the 1863 Act was originally designed for use against government contractors, the statute applies in all federal contexts. Medicare providers, real estate developers, and bank loan guarantors are just some of the non-procurement targets. The significant damages available under the Act make filing claims attractive to whistleblowers. The Act provides for triple damages, and with \$5,500 to \$11,000 in penalties available for each false claim submitted, the government's potential damages add up fast. For every 100 false claims a provider submits, it can face liability of \$1 million in penalties alone. By taking the following steps, your company can help prevent claims, and manage its exposure when they arise. **1. Create and implement a meaningful compliance program.** Historically, corporate compliance programs were not required, though many health care providers developed them. However, the Patient Protection and Affordable Care Act authorized the Secretary of Health and Human Services "to require providers and suppliers to adopt, as a condition of enrollment, compliance programs that meet a core set of requirements, to be developed in consultation with OIG." Additionally, compliance programs are often required during sentencing in criminal cases or settlements of civil cases, and mandatory compliance programs are also becoming increasingly common in states. A robust compliance program will flag issues as they arise and assist in self-reporting obligations that may exist. Staff your compliance program with employees who will create a culture of compliance. **2. Require signed employee acknowledgments.** All employees should sign a document—upon joining the company, and when the company institutes a new compliance program—that acknowledges they will not break law, will report all violations or attempts, and that they understand their obligations and reporting duties under the company's compliance program. Employees should also agree not to take corporate documents with them before and upon departing the company. If they do, they must agree to provide copies of them to the compliance officer within three days of doing so. **3. Conduct periodic employee compliance interviews (every three to six months).** During these interviews, inquire about potential issues and problems. **4. Interview departing employees—including those who are terminated.** During the interview, determine whether they have any complaints and, if so, determine their nature. **5. Require departing employees to sign statements.** In these statements, employees should affirm they are aware of no violations, suspect none; and have not seen or done anything unprofessional, illegal, improper, unethical, or the

like. **6. Be careful of what you say in emails, written documents, conversations, text messages, and elsewhere.** Be sure your communication is clear and unambiguous. Document conversations that may be subject to varying interpretations. Know that a potential whistleblower might be recording your call or conversation and saving and printing your emails. **7. Investigate and interview at the first hint of impropriety.** Document the allegations and ascertain that there are no additional allegations, facts or circumstances. The goal is to limit the allegations so they don't multiply or change later. The investigation and interviews should not be conducted by HR, but rather, by compliance. Compliance is best trained to assess employees, and write reports that capture their statements. **8. Focus on the allegations, not the whistleblower's credibility.** The government will want to investigate the whistleblower's information regardless of their identity or credibility. **9. Don't run afoul of broad witness tampering or document (including electronic) destruction rules during preliminary fact-finding.** Consult a knowledgeable lawyer regarding these rules and seek legal advice so you have the benefit of the doctrine of good faith reliance on advice of counsel. Consider how to implement a document or litigation hold at the outset of your preliminary fact-finding. **10. When a likely False Claim Act issue arises, bring in outside counsel.** Outside counsel will conduct interviews, render a legal opinion, and issue a comfort letter regarding the entity's exposure. This fact-finding includes a document pull, litigation hold, thorough interview of the employee lodging the complaint, and review of all related facts and circumstances. The legal opinion must address the issue of the company's self-disclosure under the law applicable to the allegation(s).

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