

## Eli's Hospice Insider

### Compliance: Head Off Qui Tam Lawsuits With These 11 Steps

**A robust reporting mechanism is your best defense against a whistleblower suit.**

Being the target of a whistleblower lawsuit could cost you dearly, and even close your doors forever. Follow this expert advice to head off an expensive and exhausting qui tam filing.

1. Establish a compliance plan. If you don't have a comprehensive compliance plan in place yet, get one ASAP, legal experts urge. If you have one that's been gathering dust on the shelves, make re-implementing it a top priority.

"This is your chance to keep yourself from being harmed in a whistleblower suit," says attorney **Robert Markette, Jr.** with **Benesch Friedlander Coplan & Aronoff** in Indianapolis.

The only thing worse than not having a plan at all is having one and not following it. You need to have a compliance plan and stick to it, advises attorney **Marie Berliner** with law firm **Joy & Young** in Austin, Texas.

The **HHS Office of Inspector General** provides hospice-specific compliance guidance at [www.oig.hhs.gov/fraud/complianceguidance.asp](http://www.oig.hhs.gov/fraud/complianceguidance.asp). The OIG recommends your plan include seven elements (see box, p. 46).

2. Set up an effective reporting mechanism. One of your compliance plan's most important steps may be providing a way for employees to address concerns about your operations internally. If staff can't air grievances inside the company, they're more likely to seek an outside outlet such as a qui tam attorney.

First, you have to make employees comfortable reporting their problem. A good way to do this is by having an open door policy for managers, Berliner suggests.

Be sure not to chastise workers who raise issues, adds consultant **Joy Barry** with **Weatherbee Resources** in Hyannis, Mass.

When staff come to you with a concern, "you need to take this seriously," Markette counsels. Thank employees for their effort, or at the least acknowledge receipt of the report, Berliner tells home care providers.

3. Take the next step. When your staff report a concern, you need to act on it, Markette advises. Investigate the potential problem and compile the results of your investigation. Even if you find that the issue isn't really a problem, put that in a final report.

Document the steps you took in the investigation and your conclusions, Markette instructs. Then report back to the employee, if appropriate. "Demonstrate you are concerned," he says.

4. Don't ignore outside reports. Your own staff are the most likely source of whistleblower lawsuits, but not the only ones. Outsiders such as consultants and auditors you hire are also potential qui tam relators.

Tip: If you are hiring an outside consultant to investigate a concern, hire an attorney first and then have your lawyer hire the consultant, Markette advises. That way anything the consultant finds and reports is protected by attorney-client privilege.

5. Raise awareness of your compliance plan. Everyone in your organization should be well versed in your compliance plan, including executives, clinical staff, and administrative staff, Markette says. That includes your sales, marketing, and admissions employees.

Be sure to emphasize the internal complaint process in your education efforts, experts stress.

6. Interview departing employees. Don't miss a golden opportunity to glean information from employees leaving your company, Berliner offers. When possible, debrief them on the way out.

7. Assess yourself for risk. The feds have outlined some high-profile targets with recent lawsuits, settlements, and enforcement actions. Long-stay patients, patients with non-specific diagnoses, and patients residing in nursing homes are drawing widespread scrutiny, for example.

Examine your own patient census for these and other hot button issues, Markette recommends.

While isolated incidents usually won't lead to lawsuits or investigations, trends and patterns can, Berliner cautions.

8. Improve charting. You should beef up documentation overall, but especially for patients who are likely to fall into the high-risk categories. "You better be ready, you're going to be scrutinized," Markette warns.

Remember, "if it's not in the record, then as far as any reviewer is concerned, it didn't happen," Berliner reminds agencies.

Self-audits will help you to catch and correct problems before they can become fodder for lawsuits or other investigations.

9. Use cross-education for clinical and financial departments. Clinician complaints can often arise from tensions between the business and clinical sides of your organization, Berliner observes. Each department "needs to understand each other's goals and objectives " as well as limitations," she suggests.

Clinicians must understand that it's OK to drive business growth and admissions, Berliner says. But marketers need to understand that patients may only be admitted if they qualify for the benefit. Admitting ineligible patients won't help the agency if claims are denied or fraud investigations ensue down the road.

10. Set marketing goals carefully. Having benchmarks and goals for marketers "is not inappropriate," Barry notes. But the goals should be related to marketing services rather than admissions numbers to avoid inappropriate admissions, she recommends.

For example: You can provide bonuses related to making service calls or recovering relationships, Barry suggests.

"Compensating for growing census is what's problematic, especially if (marketers) have influence on admissions," Barry says. Those types of financial incentives encourage marketers to seek out the wrong kind of patients -- ones who are potentially ineligible.

11. Have compliance oversee finance. Make sure your marketing department is going by the compliance rules too, Markette advises. That includes managers.

In the Senate Finance Committee investigation into HHA therapy utilization last year, multiple companies' e-mails from marketing managers to employees were used as evidence of the companies' wrongdoing. A similar thing happened in the **AseraCare** lawsuit.

"Those kinds of e-mails shouldn't get sent," Markette emphasizes. "If your clinical folks are getting pressured by financial goals, you're doing something wrong."

Be sure to educate marketing staff carefully on compliance rules. Even innocent comments can get taken out of context in a lawsuit, Markette warns.