Podcast

False Claims Act and the Healthcare Industry

By Brett M. Anders &

February 8, 2023

Meet the Authors

Brett M. Anders

Principal and Office Litigation Manager
908-795-5125
Brett.Anders@jacksonlewis.com

Related Services

Healthcare
Life Sciences

Details

February 8, 2023

The government leverages False Claims Act litigation against healthcare organizations as its most effective tool in combating fraud. Employers should prioritize minimizing exposure to qui tam actions and retaliation claims.

Jackson Lewis P.C. · False Claims Act and the Healthcare Industry

Listen on Soundcloud
Listen on Apple Podcasts
Listen on Spotify
Listen on STITCHER
YouTube
Listen on pandora
LISTEN ON libsyn
Listen on Google Podcasts

Transcript

Alitia Faccone:

Welcome to Jackson Lewis' podcast, We Get Work. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies and business oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind: how will my business be impacted?

The government leverages False Claims Act litigation against healthcare organizations as its most effective tool in combating fraud. Employers should prioritize minimizing exposure to qui tam actions and retaliation claims. On this episode of We Get Work, we discuss situations that give rise to FCA claims against healthcare companies, damages available under the FCA, and importantly, strategies for defending FCA claims. Our hosts today are Brett Anders, a principal in the Berkeley Heights office, and co-leader of the Firm's Life Sciences Group. And Karen Glickstein, a principal and office litigation manager in the Overland Park, Kansas office of Jackson Lewis.

Both are members of the firm's healthcare industry group and advise clients on day-to-day employment issues, including discipline and discharge, disability management, reductions in force and restrictive covenants. Brett litigates employment discrimination, wrongful discharge and wage and hour cases. While Karen defends clients in whistleblowing and restrictive covenant matters. She enjoys assisting clients

in finding practical and workable solutions to all types of workplace employment problems. Brett and Karen, the question on everyone's mind today is what strategy should healthcare employers use to avoid FCA claims and how does that impact my business?

Brett Anders:

Thank you for that introduction, Alicia, Karen and I are happy to be here to talk about the False Claims Act and the types of claims we are seeing brought against healthcare companies, and more importantly, how to avoid those claims in the first place. So to kick this off, let's first get some general background on the False Claims Act. Karen, what exactly is the False Claims Act?

Karen Glickstein:

Well, Brett, thanks for asking and it's great to be here with you today. I will admit that I'm a little bit of a history nerd, and so reminding myself of the history of the False Claims Act was kind of fun. The False Claims Act actually originated back during the Civil War. It's sometimes referred to as the Lincoln Law. We'll talk a little bit more about qui tam actions, which are the main part of, I think, what we're going to talk about for healthcare companies' potential liability. And qui tam action is short for a really long Latin phrase that I'm not even going to attempt to pronounce, but it means, "He who brings an action for the king as well as for himself."

And back in the Civil War, apparently, there were a number of companies who were trying to defraud the Union Army, which is what caused Congress and President Lincoln to encourage Congress to enact this. They were doing things like saying they were selling guns to the Army, but really sending boxes of sawdust, or the same calvary horse was sold multiple times to people. So that's how the False Claims Act got its start. As you might imagine, the act has been amended many times since then, I believe most recently in 2010, but it has been used, really, since the 1980s and the Reagan era when there was a lot of Department of Defense spending as a way to make sure companies, and especially government contractors, don't defraud the government.

Brett Anders:

You had mentioned a qui tam cause of action. Are there different types of causes of action under the False Claims Act?

Karen Glickstein:

There are. There's really two kinds of causes of action that I think we'll talk about today. One is a qui tam action and that's when, usually, an individual, called a relator, will go in and file a complaint under seal. The government then has 60 days to decide whether to investigate or take over that claim. Sometimes, however, the government takes way longer than 60 days to make its decision, and we'll talk about the implications of that later. So that's when the government's going in trying to recover the money. The second kind of claim, and one that companies with employees need to be aware of is a general whistleblower claim. It's section 3730(h) of the False Claims Act, and it provides a whistleblower remedy, just like many other whistleblower statutes do, with a couple of tweaks here and there.

Brett Anders:

So would those qui tam actions where the person is suing on behalf of the government or complaining about some type of fraud against the government, what are some of the types of situations that have led to False Claims Act claims against healthcare companies?

Karen Glickstein:

As you might imagine, the list is long because there are many different ways that sometimes individuals or companies might try and defraud the government. Some of the most common are things like improper billing to Medicare, improper patient referrals and kickbacks. If somebody is receiving some kind of enumeration for a referral, if an unnecessary procedure is being billed by a medical practice, that would be another example. Or billing for procedures that were never performed. There've been a lot of judgments in those kinds of cases.

Other things, just because of the complexity of the healthcare field, if something is improperly coded and that is something that is knowing or if somebody is billing separately for services that are typically bundled in an effort to have a larger bill out there to be paid by the government, certainly if you're creating some kind of false document to validate a claim that's going to be a problem, or misrepresenting a diagnosis or procedure, again, to maximize your profits.

And then something that I think companies need to really be aware of in today's world when healthcare is so understaffed, which is a different issue for a different podcast, but where procedures are being performed by individuals who perhaps don't have the license to perform the procedure and are just being asked, "Hey, you're in the room. Can you monitor this? Can you do this?" And the individual who's doing that doesn't have the licensure certification required. Those are kind of an initial laundry list.

Brett Anders:

And let's say a person brings one of these qui tam type cases, what type of damages can they expect to recover and how are those damages calculated?

Karen Glickstein:

So if it's a traditional qui tam action where the government brings the action and is successful, the relator... Well, first of all, the company itself can be penalized. So that's number one, potential liability for the company. A provider can be penalized up to three times the program's loss, plus an additional $11,000 per claim. Penalties in those kinds of cases are going to add up quickly, because as you imagine, if we're talking about billing entries or improper billing, each billing may be a separate claim. In addition to that, the relator himself or herself may be able to receive 30% of any False Claims Act recovery. So there's a real incentive out there and kind of a whole separate industry among the plaintiff's bar for attorneys to bring claims, sign up relators as plaintiffs and bring claims because a lot of these recoveries are in the multimillion dollars.

So successful relator getting 30% of $21 million is a quick $7 million. And as if that weren't bad enough news for some of our clients, if the relator is a current or former

employee and believes that he or she has been retaliated against under that whistleblower statute I mentioned before, there are remedies available there. And that can be an entirely separate lawsuit filed in district court either after the qui tam action is over, or in some cases the two may be on parallel paths. And on those whistleblower claims, if somebody is successful on a whistleblower claim, they can obtain reinstatement with the same seniority, any lost back pay, and actually, two times the actual loss of back pay, interest on the back pay, any special damages as would be true in any kind of lawsuit. And then litigation costs and reasonable attorneys' fees. So companies really, it's not just a one-two punch here, it's a one-two-three punch.

Brett Anders:

Right, right. So, all right, let's shift gears a little bit and talk about the litigation of the claims. What are some of the challenges or strategies for defending against a claim under the False Claims Act?

Karen Glickstein:

Well, I think one of the things that is a challenge is the fact that an individual only need have a reasonable belief that there is wrongdoing. So as in many kinds of whistleblowing cases, many kinds of retaliation cases, even if somebody is wrong, if the individual has a reasonable belief that something is askew, then that's probably enough for a whistleblower case. Certainly it is under 3730(h).

So the Supreme Court on this issue of, "Does somebody have to have a reasonable belief that something happened wrong?" The Supreme Court recently announced, earlier this month, that they're going to consider a couple of cases where the question that the court's going to hear relates to the question of: what does it mean to be objectively reasonable belief? And in a nutshell, the issue that the court is looking at is so many laws where individuals are accusing that fraud has occurred, involve really complex statutory schemes, take Medicare billing for example. A lot of people will tell you it's really hard to determine how or why something should be billed.

And so the question is, if somebody is bringing a qui tam action and in good faith believes that there is some kind of violation, even if there isn't a lot of knowledge about what's going on, if that's subjective, understanding or belief about the lawfulness of the conduct is sufficient to support the knowing requirement under the False Claims Act.

Brett Anders:

So I guess stated a little bit differently, the person doesn't have to necessarily be correct in their complaint, they just have to have a reasonable belief that they're correct.

Karen Glickstein:

That is reasonably correct, yes.

Brett Anders:

All right. So I'm sure what is probably front of mind for a lot of our listeners now is what can they do to prevent having a False Claims Act brought against them?

Karen Glickstein:

So I think there's a couple of different things that employers and clients can do to prevent False Claims Act. One is to have a robust compliance policy and to make sure that there are audits being conducted and individuals are getting the training they need to make sure that billing practices are correct. Because a lot of what motivates these cases, as we noted when we talked about the different kinds of cases, are errors in billing cases. The other thing is making sure that there are avenues of reporting so that individuals can report to the company any wrongdoing without fear of retaliation. Just like in any other kind of employment law. Anonymous hotlines are very helpful, I believe, in qui tam actions because it gives individuals an opportunity to report to the company and to let the company investigate and if there is some kind of wrongdoing to make sure that's taken care of. So those are a couple of ideas of how companies can help stop liability.

Brett Anders:

And I think for the last question that I have for you, it sounds like the damages can really add up with these types of cases. What have you seen in terms of settlements of False Claims Act cases? Where have you seen these cases settle in terms of dollar amounts?

Karen Glickstein:

The amounts are all over the place. And as I alluded to a little bit earlier, usually high. So in a qui tam action, qui tam settlements recently included, and I'll just give you a couple of examples, $21.25 million to resolve allegations that over a five-year period, local physician groups were compensated in excess of fair market value in exchange for referrals of patients. There was another similar referral case where the verdict recovery was 33.725 million. In one case, $90 million was the amount of the settlement based on claims that a healthcare group submitted unsupported diagnoses codes for Medicare Advantage plan beneficiaries in order to receive inflated reimbursements. Another case, this one involving Medicare billing for 11.4 million. In that case, individuals, this goes more to the whole idea of, is the work actually being done by the appropriate people? Patients were admitted or placed in observation for social reasons and lack of safe available placements rather than, for example, referring individuals to a shelter who may need mental health care.

Most recently, on November 20th, a Florida based home health agency and two former executives agreed to pay 5.8 million to settle allegations that the home health agency provided improper financial inducements to referring physicians. So again, those referral issues can really add up. And these settlements, while large, don't take into account that that's just the qui tam settlement. If there were whistleblowers who alleged retaliation, there's a whole nother avenue for those individuals to attempt to recover under that 3730(h) statute for whistleblower recovery with a separate civil action.

Brett Anders:

Well, thank you very much, Karen. Karen, and I would like to thank you all again for listening to our podcast. Now we hope you found the information informative and

helpful. If anyone would like any further information about the topics we discussed, please feel free to reach out to Karen or me or the Jackson Lewis attorney with whom you normally work.

Alitia Faccone:

Thank you for joining us on We Get Work. Please tune in to our next program where we will continue to tell you not only what's legal, but what is effective. We Get Work is available to stream and subscribe on Apple Podcasts, Google Podcasts, Libsyn, Pandora, SoundCloud, Spotify, Stitcher and YouTube. For more information on today's topic, our presenters and other Jackson Lewis resources, visit jacksonlewis.com. As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client lawyer relationship between Jackson Lewis and any recipient.