

Whistleblower Defense Just Got Trickier

DOJ's new emphasis on criminal investigations changes stakes for health care clients.

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On Sept. 17, Assistant Attorney General Leslie Caldwell made a request and a promise. Speaking to the Washington-based group Taxpayers Against Fraud, Caldwell asked whistleblowers and their counsel to consider bringing their civil cases to the attention of the Justice Department's Criminal Division, not just the Civil Division as they had done historically. In return, Caldwell promised that "experienced prosecutors in the fraud section are immediately reviewing the qui tam cases when we receive them to determine whether to open a parallel criminal investigation."

Given the extent to which health care providers are the target of False Claims Act qui tam provisions, which award whistleblowers for reporting false claims, this statement has introduced significant uncertainty and risk to the industry.

These qui tam whistleblowers, or "relators," are often company employees who believe they have observed wrongdoing—such as persistent up-coding of services or the use of false certifications. Relators start a civil qui tam case by filing a complaint under seal accompanied by a confidential disclosure statement outlining everything the relator knows about the alleged false claims. While the complaint is under seal, an attorney in the local U.S. attorney's office's civil division and usually a civil fraud attorney in the Department of Justice investigate the allegations in relative secrecy. Sometimes a company or individual may not even know about an investigation until a civil investigative demand arrives, a process that authorizes the civil assistant U.S. attorney to demand documents,



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information and even sworn testimony while the case is under seal. After this investigation is over, the complaint is unsealed and litigated or, in rare cases, dismissed.

Caldwell seemed to up the ante on whether or how individuals should proceed. As it stands, a civil assistant will every so often refer a case to the Criminal Division. No clear legal line has separated a civil false claim from a criminal one, making it difficult for counsel to advise whether employees should cooperate with internal investigations or the government's secretive civil investigative process. But now, health care providers and their attorneys may face even more complex and dangerous decisions.

Let's start with the provider's internal investigation prompted by a qui tam investigation. Typically, in-house counsel will share documents and information with the counsel of the employee targeted in

the investigation. These lawyers may work together to understand the scope of the government's investigation, and possibly to collaborate on a joint defense or settlement strategy. Sometimes corporate internal investigators will ask employee's counsel to submit their client for interview.

This request has not been without risk, because the company could decide to waive its privileges and share the interview, and the employee could be indicted. Nonetheless, the risk has been manageable. Counsel would talk to their client guided by the documents and information company counsel had provided.

This process might reveal that the employee's conduct implicated one of the many regulatory gray areas that the government might find troubling. In that case, counsel might advise the client that the best way to proceed is to proffer the

questionable conduct to the civil assistant investigating the case and ask whether it changes the nature of the case. Counsel might even proffer the conduct to the employer to see whether its counsel finds the conduct defensible. Counsel could explain whatever assurances were received, assess the possibility of corporate privilege waiver and potential indictment, and weigh all of this against the risk of being fired for refusing to cooperate with the internal investigation.

With Caldwell's very public encouragement for relators to submit their qui tam to the Criminal Division, this approach may no longer work. First, civil assistants may no longer be the primary filter for Criminal Division scrutiny. That power may now rest with Taxpayers Against Fraud and its

“HEALTH CARE PROVIDERS, EMPLOYEES AND THEIR COUNSEL MUST ALL OPERATE WITH EXTREME CAUTION.”

members. The organization says it is “dedicated to assisting whistleblowers and their attorneys, to protecting the False Claims Act against attack by big business.”

Furthermore, it appears that no one knows exactly what Caldwell meant when she said the fraud section would be “immediately reviewing the qui tam cases ... to determine whether to open a parallel criminal investigation.” Most attorneys in qui tam cases have always assumed their cases received at least some review from the Criminal Division. Does this mean every qui tam case will now be overseen by the Criminal Division? It is possible, though still unclear, that Caldwell's statement means the Criminal Division has changed the relatively predictable world in which a client's status could be negotiated with some certainty.

Caldwell's pronouncement may also chill a provider's willingness to share documents and information with employees' counsel as they prepare to deal with the government. Some company counsel believe that assisting employees in this manner signals to the government that the company is not cooperative or sufficiently strict with potential wrongdoers, which can be an important factor in deciding whether to charge a company with a crime.

While it's unclear whether Caldwell's new process (if it is indeed new) will lead to more criminal prosecutions, it does seem likely to lead in-house counsel to behave in ways that harm employees. There may now be even greater pressure to convince the criminal assistants that the case should stay civil, and corporations may be less willing to defend conduct in the gray areas (let alone protect the employees who operated in those gray areas irrespective of good faith). Criminal assistants seldom give assurances of nonprosecution without substantial cooperation, and often demand an acknowledgement that gray-area conduct is in fact illegal. This certainly alters a company's cooperation and settlement calculus, including decisions to waive privilege, share interviews, fire employees and enter into settlement agreements with the Civil Division.

And it certainly makes it more difficult to advise clients whether to assert Fifth Amendment rights in a deposition. Assurances from the company and from the civil assistant might once have been enough to justify advising the client to provide sworn testimony and avoid the possibility of being fired or creating adverse inference in future civil litigation by asserting Fifth Amendment rights.

Now, the decision to testify may well carry a magnified risk. If a higher level of Criminal Division scrutiny exists, the client may be testifying under oath during a time when the Criminal Division is still trying to rule out a criminal case. Assurances from the company or from the civil assistant may not be as forthcoming. Nothing prevents

a civil assistant from sharing transcripts of the deposition if the criminal assistant requests them. And, in fact, if the criminal assistant is involved and becomes convinced there is a crime, he or she can ask for the civil case to be put on hold and continue the case in the grand jury.

Caldwell's announcement may also mean it is a far more risky decision whether to proffer the client's “gray area” conduct to the criminal prosecutor assigned to the case. Criminal assistants seldom rule out criminal culpability without substantial reason to do so. This usually means they will require a personal proffer of facts from the client. This decision to proffer a client to criminal assistants and federal agents is an immensely risky one, even more so when the investigation by the Civil Division has just gotten underway.

Certainly, parallel civil and criminal proceedings are constitutional, and the already quasicriminal nature of the civil qui tam civil investigative demand process has always made it difficult to advise clients. But these challenges were usually overcome in a way that protected the various parties' interests. One now has to consider that Caldwell's announcement in such a public manner may have changed the qui tam landscape.

Until a higher level of certainty is restored through government clarification—or court scrutiny—health care providers, employees and their counsel must all operate with extreme caution.

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