

# Compliance Investigations: How to Prevent the Response from Making Things Worse

Presented by

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# Today's Presenter: Robert W. Markette, Jr.

Robert is an attorney with Hall, Render, Killian, Heath & Lyman, P.C. He focuses his practice on representing home health, hospice, and private-duty providers. With over a decade's experience, he works on issues related to Medicare and Medicaid compliance including surveys, responding to surveys, state and federal appeals of survey findings; payer issues, including appealing payer audit findings; HIPAA compliance; Medicare and Medicaid fraud and abuse, including developing and implementing compliance programs, performing internal investigations and representing providers in external investigations and civil and criminal matters. Robert further assists clients with purchasing and selling home health, hospice, and private-duty agencies.

Because these providers depend heavily on their staff, Robert also addresses legal issues related to employment matters. A frequent speaker, Robert graduated from Hanover College with a degree in Computer Science and received his law degree from Indiana University School of Law. Robert is certified in health care compliance by the Health Care Compliance Board and is admitted to practice in Indiana and Oklahoma.



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# Audits, Investigations & Other Government Activity

Audit activity has been high for several years. The trend over the last 10 years has been a steady increase in fraud enforcement in homecare. This includes criminal investigations, FCA cases, ZPIC audits, etc.



# Fraud Enforcement

- Passages Hospice (IL) – CEO convicted of fraud scheme for kickbacks to SNFs. Receives 6.5 years in prison.
- Hospice owner and wife indicted on fraud charges. Allegations include false orders related to continuous care and overdosing patients.
- May 2016 California. Two physicians convicted of fraud for falsely certifying hospice patients as terminally ill.



# Fraud Enforcement

- Houston TX – September 2016. HHA owner convicted of \$13 Million fraud scheme involving kickbacks and unnecessary services
- Miramar FL – September 2016. HHA owner receives 20 year prison sentence for 7 year, \$57 Million fraud scheme. Provided unnecessary services and billed for services not provided.
- Chicago. Owners of three HHAs indicted in alleged \$45 Million home health fraud scheme.



# False Claims Act Update

- For FY 2016 DOJ recovered more than \$4.7 Billion in FCA settlements and judgments.
- Yearly average from 2009 – present is \$4 Billion. Total recovery more than \$31 Billion.
- \$2.5 Billion of the \$4.7 Billion was from the healthcare industry.





# False Claims Act Update

- False Claims Act Penalties Doubled in 2016
- Damages per claim now \$10,781.40 - \$21,562.80 per claim.
- The penalties are even more painful now.
- Not clear if this will impact DOJ's position regarding double damages.
- Compliance is more important than ever.



# Fraud & Abuse

In this environment it is important to be prepared.

Having a corporate compliance program is extremely important. Identifying problems and fixing them, before the government, is extremely important.

However, mishandling identified/alleged non-compliance can make non-compliance worse.



# Fraud & Abuse

Failing to investigate or respond can be considered deliberate indifference or reckless disregard. Failing to be diligent can lead to violations of the 60 day repayment rule.

Need to properly investigate and respond to identified non-compliance.



# Identifying Non-Compliance

Non-Compliance can come to your attention in a number of ways:

1. Result of routine audit.
2. Anonymous complaint.
3. Government survey/audit.
4. False claims act or similar litigation.
5. Government criminal investigation/indictment.



# Identifying Non-Compliance

The manner in which non-compliance comes to your attention, the nature of the non-compliance and the scope of the non-compliance will all factor into your response.



# How Was Non-Compliance Identified?

The way the non-compliance comes to your attention will influence many of your follow-on decisions:

1. Identified through internal investigation – lowest risk. You may have identified problem before government or whistleblower. Primary considerations – deadline for repaying overpayment, 60 days, and disclosing/fixing before anyone else discovers.



# How Was Non-Compliance Identified?

The way the non-compliance comes to your attention will influence many of your follow-on decisions:

2. Anonymous complaint. Higher risk. Someone is aware of the issue. Higher risk. Complainant could become whistleblower. Primary considerations: 60 day repayment deadline and risk of complainant becoming whistleblower.



# How Was Non-Compliance Identified?

The way the non-compliance comes to your attention will influence many of your follow-on decisions:

3. Government Survey/Audit. Will result in payback/corrective action. Timelines will be driven by particular review process.

Question: Does issue require more follow-up?





# How Was Non-Compliance Identified?

Example: Provider receives notice of government payer audit. Begins pulling requested records and auditing them. Identifies a compliance issue. Appears that issue implicates more than just the time frame under review.

Provider cannot just ignore.



# How Was Non-Compliance Identified?

4. False claims act litigation. This will require retaining counsel and responding to litigation.

Internal investigation at this point may simply create more evidence for plaintiff. Need to retain counsel to address defense, potential retaliation issues, etc.



# How Was Non-Compliance Identified?

5. Criminal Investigation/Indictment. May discover during investigation, may not know until DOJ wants to discuss a pre-indictment offer. Important to retain counsel as soon as you learn of criminal investigation.

May investigate issues, but not internally. Investigation handled by defense counsel.



# How Was Non-Compliance Identified?

Criminal investigation.

Providers sometimes learn of government investigations before the government contacts them directly. Employees may report being stopped and “interviewed” by individuals who are with the FBI, OIG, MFCU or other fraud investigating agency.

This is the first sign of a problem. Will require a careful response.



# How Was Non-Compliance Identified?

Criminal investigation.

May not learn of problem until agents show up at the office with a search warrant. Much different scenario.

Do you have a policy for this situation?



# How Was Non-Compliance Identified?

## Criminal Indictment

DOJ/OIG/FBI/MFCU usually will approach a provider before seeking an indictment to make a pre-indictment offer.

At this point, your options are severely limited.



# Role of Counsel

How you identified non-compliance will also help you to address another important issue: Do we need to involve counsel?

Bringing in counsel to handle investigation can be important in some cases. Results of investigation performed by counsel are privileged. May be important if issue becomes part of an FCA lawsuit or government investigation.



# Role of Counsel

When addressing issues identified through routine auditing and monitoring, may not need to bring in outside counsel.

If you identify fraud, intentional misconduct, large overpayments or if issue involves a whistleblower, government audit or government investigation, consider counsel early.





# Some Initial Considerations

Let's assume you have identified non-compliance at a stage requiring an investigation. As you move forward, you want to consider several issues. These are all questions you will need to answer in order to be sure you have taken appropriate actions to respond.



# Some Initial Considerations

There are a few key questions that you need to answer in any investigation?

1. What is the nature of the non-compliance?
2. Does it result in a payback?
3. How long has the non-compliance been occurring?
4. What was the “root cause” of the non-compliance?
5. What do we need to do to fix the problem?



# Nature of the Non-Compliance

Non-compliance can come in different forms:

1. Employee negligence – failing to take certain steps.
2. Employee ignorance – not knowing they are supposed to take certain steps.
3. Employee acting intentionally – employee knew what they were supposed to do, but did the wrong thing.



# Nature of the Non-Compliance

What you determine at this stage will influence a number of decisions later.

Ignorance v. Negligence/Recklessness v. Intentional

May mean the difference between reversing an overpayment and a self-disclosure.

Will impact how you deal with employees.



# Does it Result in a Payback?

Not all identified non-compliance will result in a payback. For example, in a Medicare episode, determining a nurse did not make all of her visits may not lead to a payback.

Similarly, identifying routine down coding will not lead to a payback.



# Does it Result in a Payback?

Even if money does not have to be paid back, will still need to address compliance.

For example, if the non-compliance involves an issue related to the Conditions of Participation, you will want to fix those, to avoid survey findings and potential termination.



# How Long?

An important issue to address for purposes of taking corrective action is identifying how long a non-compliant practice has been occurring.

If you are investigating diligently, the sixty day repayment clock does not start until you have determined the scope of the problem.



# How Long?

This is also important, because if you are going to self-disclose, reverse claims or simply cut a check, you have to be able to explain the scope of what you are repaying.

Can you explain the period you reviewed? How far back to look?





# How Long?

The look back period is a key consideration.

If you identify a pattern of non-compliance, do you look back 1 year, two years, three years, or more?

The statute of limitation for the FCA is six years. Auditors may look back three years.



# How Long?

Providers often want to limit the look back period as much as possible.

Question: If you pick a period other than the statute of limitations or auditor look back period, do you have a reason for taking that position? Proof of when issue started?



# How Long?

THIS IS IMPORTANT. If you fail to lookback appropriately, you have not adequately investigated the scope of the problem.

If the problem goes back farther and you simply chose not to lookback, these other claims will be false claims.



# The Investigation

Once you begin an investigation, or become aware of an outside investigation, you need to be careful of actions you take.

**IMPORTANT:** If you are investigating non-compliance or aware of such an investigation, **ALL DOCUMENT DESTRUCTION MUST CEASE!!!**



# The Investigation

Related Issue: You should have, and follow, a document destruction policy. Destroying documents according to a written policy on document retention and destruction is acceptable.

However, as noted above, when you are investigating a matter, or if there is an outside investigation, the document destruction policy should be suspended.



# The Investigation

This is EXTREMELY IMPORTANT. Destroying or altering documents is VERY PROBLEMATIC.

Any “COVER UP” or APPEARANCE OF A COVER-UP will only make the situation worse.



# The Investigation

Also, all staff must understand, no retaliation against whistleblowers.

If management/supervisors take any action that could be construed as retaliation – demotion, schedule changes, other harassment, the individuals responsible must be punished immediately.



# The Investigation

Retaliation against a whistleblower is forbidden.

Can turn a simple matter into an extremely difficult matter.





# The Investigation

You should have a written policy that prohibits retaliation against whistleblowers. It should clearly state that those who retaliate against whistleblowers will be disciplined.

Failing to prevent retaliation against whistleblowers is another area where an internal investigation can go wrong.



# What Was the Root Cause?

You need to determine the root cause of the non-compliance.

You will need to explain this to any government entity with whom you interact on the issue.

You cannot fix the non-compliance if you do not understand what happened.



# What Was the Root Cause?

Root Causes generally will fall into one of several categories:

1. Employees failed to follow agency policies and procedures.  
(Negligence/Recklessness/Willfulness)
2. Employees were unaware of the proper policies and procedures.
3. Agency did not have policies and procedures to address the issue.



# What Was the Root Cause?

Investigation:

1. Review documentation related to alleged issue.
  - a. Obvious issues? codes not supported? EMR date stamps raises questions? Repetitive notes? Signatures not always the same?
  - b. Telephony, GPS other attendance records?



# What Was the Root Cause?

Documentation:

This review will likely include a full probe sample audit of charts to identify potential non-compliance.

In fraud cases, the issue is often trying to identify fraudulent entries in record.



# What Was the Root Cause?

Documentation:

If you are not dealing with an EMR, and the individual was careful, fraudulent record entries can be hard to identify. Need outside evidence – witness testimony, etc.



# What Was the Root Cause?

Documentation:

Reviewing documentation first may help you to catch individuals before you even interview them or to be ready to identify misrepresentations in their responses.



# What Was the Root Cause?

Documentation:

Example: Employee visit notes show employee in home on 3/31/2017, but the patient's clinical record shows that the patient was admitted to the hospital on 3/30/2017 and not discharged until 4/2/2017.





# What Was the Root Cause?

Documentation:

Example: Employee visit note shows employee in the home on April 5 at 11:00 a.m., but the EMR has time and date stamped the patient's signature as being entered on April 8 at 2:00 a.m.



# What Was the Root Cause?

Documentation:

Example: Therapy care plans for patients all look exactly the same. Furthermore, it appears, from the plans of care, that the therapist inappropriately bifurcated therapy to stretch patient care out over two episodes.



# What Was the Root Cause?

Documentation:

Similarly, codes that are not supported by the nurses OASIS assessment or visit notes that all read exactly the same raise serious red flags.

Although repetitive notes may simply be the result of a poorly implemented EMR.



# What Was the Root Cause?

Investigation:

Interview staff involved in matter.

Interview patient(s) and others in-home.



# What Was the Root Cause?

Investigation:

Once you have reviewed the records, you can begin to plan a strategy for interviewing staff, patient, and others in the patient's home. You may determine to interview the patient and others in the patient's home first.

If patient is in a facility, may need to interview facility staff.



# What Was the Root Cause?

Investigation:

If you will need to interview patient(s), individuals present in the home and/or facility staff, need to be careful.

Avoid identifying that you have a potential compliance issue.



# What Was the Root Cause?

Investigation:

Do not want to create potential whistleblowers.

Need to approach this aspect of the investigation with care.



# What Was the Root Cause?

Example: Allegation that employee has been submitting visit documentation for visits that did not occur. Consider a “customer satisfaction survey” of all patients/clients seen by staff member. Ask about attendance, amongst other issues.

Same can be done for facility staff. Might even do these on a recurring basis, so that it does not seem unusual.





# What Was the Root Cause?

This type of survey is also less likely to cause potential witnesses to be hesitant to share information.

They think of it as a routine customer satisfaction function and may not have any idea of the non-compliance issues.



# What Was the Root Cause?

CONCERN: In some cases, patients, and their families, have been known to lie to cover up staff misconduct.

Need to interview them anyway if allegations include missed visits, etc. They may “stick to their story”, but you will be able to show you asked.



# What Was the Root Cause?

In these situations, may push a little harder. For example, if you think patients signed blank documents or clocked employee in and out, may inform witness that falsifying documentation is a felony.



# What Was the Root Cause?

Interviewing other staff assigned to patients served by staff members under investigation is extremely important. Other staff may have information to confirm or deny absences, etc.

Again, need to be cautious, lest you make staff aware of the non-compliance.



# What Was the Root Cause?

NOTE: If you believe one or more individuals were involved in intentional misconduct, they should be suspended pending the outcome of your investigation.

PREVENT FURTHER NON-COMPLIANCE.



# What Was the Root Cause?

Employee(s) may, or may not, return to work upon completion of investigation.

Whether the employee gets their job back will depend upon what your investigation concludes.



# What Was the Root Cause?

Obtaining cooperation of employee(s) involved in fraud can be extremely important.

In some investigations, you may suspect fraud, but leave the employee under the impression they will get to keep their job, in order to encourage cooperation.



# What Was the Root Cause?

Employee cooperation can be extremely important in identifying the scope of a problem. Employee may be the only one who can tell you when the issue started.

In order to be sure you have properly identified the scope, need to know start date of employee mistake/misconduct.





# What Was the Root Cause?

When employee terminated, basis for employee discipline must be clearly documented.

EEOC or other investigator should understand exactly what the employee did and why the employee's conduct required termination.



# What Was the Root Cause?

Not all identified non-compliance will be fraud. You may identify non-compliance due to negligence or mistake on the employee's part.



# What Was the Root Cause?

Example: EMR documentation with late timestamps. Agency suspects fraud. Investigation, including interviews of staff and patients concludes that staff member performed all visits. Issue was failure to follow policy on documenting at time of visit.

Non-compliance? Yes.

Fraud? No.

Discipline employee? Yes.

Fire employee? Maybe.



# What Was the Root Cause?

Your investigation should result in a written report that identifies:

1. How you learned of the non-compliance.
2. The causes of the non-compliance.
3. The scope of the non-compliance.
4. Your response to the non-compliance.



# What Was the Root Cause?

If not prepared by counsel, this report is not-confidential. It would need to be disclosed in response to a subpoena.

This report is a road map of the problem. That is why considering counsel at the very beginning is important.



# Responding to Non-Compliance?

Determining the source and scope of the non-compliance is only the first step. Agency must then determine the appropriate response to the non-compliance.

Mishandling the response can create additional liability for agency.



# Responding to Non-Compliance?

Several important considerations:

1. Taking action to prevent a repeat of the non-compliance.
2. Disciplining employees.
3. Returning/Repaying funds.
4. Reporting employees to licensing boards.
5. Self-disclosing.



# Preventing a Future Recurrence

Agency must identify a plan of correction to address the root cause(s) of the non-compliance identified during the internal investigation.





# Preventing a Future Recurrence

This may involve:

1. Preparing new policies and procedures.
2. Revising current policies and procedures.
3. Training staff on current policies and procedures.
4. Disciplining staff who violated policies and procedures.



# Preventing a Future Recurrence

It will also involve auditing and monitoring of the issue to ensure that the corrective actions taken by agency actually fixed the problem.

Making the same mistake a second or third time looks more like more intentional action.



# Disciplining Employees

Discipline will depend on the severity of employee misconduct.

1. Employees who engaged in intentional non-compliance/fraud will be terminated.
2. Employees who were negligent/reckless may be terminated, but they may also be subject to lesser discipline.
3. Employees who engaged in any manner of retaliation will be disciplined. Most likely termination.
4. Employees who interfered with investigation will be terminated.



# Disciplining Employees

IMPORTANT HR CONSIDERATION:

Your discipline and discharge policies should make this clear. These types of infractions DO NOT result in progressive discipline, but immediate termination, **IN EVERY CASE!!!**

The employee discipline should clearly note their non-compliance and the policies requiring termination.



# Repaying Overpayment

Any money received in error must be returned.

1. Once you know the scope of the overpayment, the 60 day clock starts.
2. Reverse Claims? Self-Disclose? Other?
3. It is best to attempt to repay the money at the “lowest point on the ladder.”
4. MFCU/OIG Self-disclosure? Crime involved?



# Repaying Overpayment

Any money received in error must be returned.

If you have to send a check to the MAC, to the extent possible, provide them with information to allow them to identify the specific claims you are returning. Send all information, and the check, at once. Avoids confusion from the MAC.



# Repaying Overpayment

Self Disclosure to OIG/MFCU.

Many states have a Medicaid Self-Disclosure protocol. Follow those rules as appropriate.

OIG – Need to identify fraud that was committed and be over a minimum amount to utilize OIG protocol. **CONSULT WITH COUNSEL.**



# Repaying Overpayment

Any self-disclosure will clearly explain what happened and, as appropriate, identify the specific individuals whose actions led to the non-compliance. It will also explain the steps taken to fix the problem and discipline against the violating employees.





# Reporting Licensed Professionals

If an RN, LPN, PT, OT, PTA or OTA was involved in misconduct or any action that would be considered a violation of their specific practice act/regulations, you should report them to the licensing board.

Falsifying documentation is often misconduct.



# Reporting Licensed Professionals

Failing to take this step can lead to issues for other licensed professionals.

Many professional licensure statutes/regulations make it a professional violation to fail to report the misconduct of another.



# Additional Considerations

Agency may first learn of an investigation when government shows up with a warrant.

You should have a policy for this circumstance.

**IMPORTANT TO ENGAGE COUNSEL IMMEDIATELY!!!**



# Additional Considerations

## Key Points.

1. You can let your staff go for the day. You do not have to pay them to stay and be interviewed by investigators.
2. Unless individuals are under arrest, they are free to leave.
3. Staff should know that you do not object to them cooperating, as long as they tell the truth.



# Additional Considerations

Do not encourage staff or instruct staff to refuse to speak to investigators. THIS IS OBSTRUCTION.

IT IS NOT OBSTRUCTION to tell staff they can go home for the day if the DOJ shows up with a warrant.



# Additional Considerations

Your compliance plan should be clear on this as well.

If you learn of an investigation before a warrant, you can tell staff that you do not object to them answering questions, as long as they tell the truth.

You can tell staff that they do not have to accommodate investigator whenever the investigator chooses.



# Additional Considerations

Again, if you learn of an investigation (DOJ, FBI, MFCU, etc.) you should retain counsel quickly.

A formal criminal investigation involving these offices is an extremely serious matter.

You will want to start your own investigation under privilege.



# Conclusion

In the current environment, compliance is extremely important. Compliance is even more important in an internal investigation, to avoid the investigation making matters worse.





# Thank You for Attending

## Compliance Investigations: How to Prevent the Response from Making Things Worse



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