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3 Tips For Workable FCA Release Programs

By **Erica Teichert**

Law360, Washington (July 25, 2014, 6:36 PM ET) -- As qui tam False Claims Act lawsuits continue to rise, health care companies and their attorneys are working to bolster internal compliance programs and eyeing employee litigation releases as a way to limit exposure. But those agreements require some careful handling.

In 2013, qui tam relators filed a record-breaking 752 complaints — 100 more than in the previous year. The increase in FCA allegations hasn't led to a dramatic increase in government interventions in the litigation, according to Crowell & Moring LLP partner Robert T. Rhoad. But in the steady 25 percent of FCA cases the U.S. Department of Justice does intervene in, it secures settlements or trial victories 90 percent of the time.

However, health care companies are trying to head off these qui tam FCA cases by having departing employees sign whistleblower releases in their severance packages. In these deals, workers promise not to sue and agree that they would have gone through internal avenues if they'd known about any problems.

Since the Fourth Circuit nixed an FCA suit against Purdue Pharma in 2010 due to its release agreement with the employee relator, lawyers have worked to create similar contracts that could help protect their clients from expensive FCA litigation and buoy their internal compliance programs.

"What makes the FCA interesting and special in this regard is there were those early court decisions expressing skepticism about releases in the FCA context," Covington & Burling LLP partner Benjamin J. Razi said. "That's the FCA wrinkle."

Here, attorneys share three tips to crafting an employee release that won't be thrown out in court.

Start Preparing Early

Although a whistleblower release can help a company defend itself against a qui tam complaint, Rhoad says he encourages including an arbitration clause in initial employment agreements with incoming workers as that can also dissuade some litigation.

"You're never going to fully eliminate your exposure," Rhoad told Law360. "But what you can try to do is mitigate it as much as you possibly can. Be forward-looking at the time you employ someone, where you have an employment agreement that obligates them to disclose any information that they may become aware of that might suggest any violation of federal or state law."

But companies need to be careful that their qui tam protections don't deter employees from bringing alleged wrongdoing to the government's attention. They should focus on buoying their internal compliance programs rather than hiding FCA violations with their litigation releases, and they should conduct extensive training on how to properly report suspected wrongdoing, attorneys say.

Many companies are already doing this, according to Epstein Becker & Green PC's George B. Breen: "These are folks trying to create a culture of compliance from the top down."

Make the Release as Broad as Possible

In the Purdue Pharma case, the Fourth Circuit determined that broad employee litigation releases could extend to FCA cases if the fraud allegations had been sufficiently disclosed to the government before the suit was filed. In the wake of this decision, most attorneys encourage their clients to seek broad releases

encompassing any statutory or legal theories of a claim.

"The reason I say to be broad and all-encompassing is not to be unfair. ... [The company and the employee] are parting ways. They're making a deal. What the company is getting at that point is the release," Razi said.

As such, it's important to keep releases clear and concise, using standard language that can cover a myriad of statutes. For some attorneys, that includes naming some of the laws at issue, including the FCA.

"I specifically would also include language that says they are giving up their share of any proceeds of any FCA suit," Sheppard Mullin Richter & Hampton LLP partner David Douglass told Law360. "If they're reluctant to do that, that's a flag."

On the other hand, Morgan Lewis & Bockius LLP's Kathleen McDermott says that thanks to the attention the FCA has received from employers, workers and the government, it may not be necessary to highlight the FCA specifically in companies' whistleblower releases.

"I'm not sure it matters anymore," McDermott said. "There's been a lot of change in the employment environment in health care about FCA practice. There's usually compliance training and whistleblower retaliation training. There's a heightened knowledge of it. You want to assure that the release can be read broadly to include qui tam claims without necessarily mentioning the statute."

Ensure Employees Disclose Past Qui Tam Filings

Despite attorneys' best efforts, clients may still have to endure FCA litigation if an employee has filed a complaint before signing a release. But requiring a release could give a company advance notice of impending litigation before the DOJ or a court unseals an FCA complaint.

Although relators can't break FCA seals, Epstein Becker & Green PC's Stuart Gerson noted that companies can still ask outgoing employees if they know about any potential FCA violations and receive honest, binding answers that could add to an FCA defense.

"The question you're asking is not whether the individual has brought a qui tam suit but whether the individual knows about any misconduct," Gerson told Law360. "It makes you look good because you can argue legitimately that you were looking to find out if there was anything you needed to be worried about."

If the outgoing employee denies knowledge of any wrongdoing despite having filed a qui tam case in the past, Gerson says, that representation violates the separation agreement and could prevent the case from moving forward.

Similarly, Razi encouraged companies to make sure their exit interviews include questions about past and pending litigation as an attempt to cover all the bases.

"What's common in release language is to have a provision that I haven't filed any prior suits against you. There are no claims or lawsuits that I've filed against the company before, period," he said. "If in fact that's false, then arguably, the employee in that situation has breached the contract, and whatever obligations the employer has under the separation agreement are void also."

--Editing by Kat Laskowski and Christine Chun.