

## Whistleblower and Retaliation Claims in Healthcare: Compliance Programs, Current Political Climate, Mitigation Risks

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## ANONYMOUS TIPS AND RETALIATION FACT PATTERN

Alan is an employee at Forest Health Hospital. During the course of his regular duties, he encounters some billing irregularities in regard to knee surgeries that were performed. All of the suspected knee surgeries were referred and performed by Dr. Bill Mohr, an employed orthopedic surgeon who, it is widely known, has a very rich compensation package. Although uncertain if he is correct, he believes that, due to these irregularities, the Hospital received substantial amounts of money – totaling nearly \$10 million – in unjustified payouts from Medicare over a six year period. Known for his integrity among his colleagues, Alan decides to inform his supervisor, Alex, Chief Executive Officer, about what he’s discovered. He adds a bullet point – “knee surgery irregularities” – to their weekly meeting’s agenda.

However, when Alan arrives in Alex’s office, Alex first wants to discuss Forest Health’s current financial situation. He emphasizes that it is of utmost importance to be maximizing every dollar the Hospital spends and that Alan may need to be letting employees go if they are causing the Hospital to lose money. Alex also emphasizes that the Hospital needs to treat its referring physicians well to retain volume. Fearing that his discovery may cost him his job, Alan elects not to share his findings with Alex directly and skips the bullet point on their agenda.

Instead, Alan reaches out through Forest Health’s anonymous reporting hotline to bring the matter to the attention of the Compliance Department. After receiving the anonymous tip through the hotline, the Hospital’s Chief Compliance Officer, Hope, immediately identifies how much the matter could cost Forest Health and brings the matter before the Hospital’s Compliance Committee in their monthly meeting.

After the meeting, Alex asks to speak with Hope. Alex is alarmed at the potential loss of nearly \$10 million. Alex reminds Hope that most of the knee surgeries are referred by Dr. Bill Mohr and if any repayment occurs, the repayment could negatively impact Dr. Mohr’s compensation. Hope informs Alex that if the allegations are correct, the Hospital was never entitled to this money in the first place. This frustrates Alex further and he demands to know who filed what he believes to be an “obviously false” claim, to which Hope informs him that it was anonymous. Alex advocated that if the reporter was not willing to identify themselves, the allegation should not be investigated. “This is a waste of our valuable resources.” Then he remembers the bullet point that Alan skipped during their meeting.

Alex informs Hope that they intend to demote Alan and demoting him to an area where Alan will not have access to the Hospital’s billing information. Hope inquires if Alex suspects that Alan is the one who raised the billing matter to the Compliance Department’s attention – which Alex confirms.

Hope informs Alex that such an action could be construed as retaliation and cause further problems and more costs for the Hospital. Furthermore, as an “anonymous tip,” Alex shouldn’t speculate on the anonymous reporter’s identity. Alex ignores Hope’s warning and proceeds unabated by demoting Alan – insisting that if U.S. government officials (such as the President or HHS Secretary) can act this way, then certainly he can too.

This does not go well for the Forest Health Hospital. Upon hearing about his demotion and removal from any position relating to billing, Alan files a *qui tam* lawsuit alleging both the billing irregularities, protection of Dr. Bill Mohr's compensation, as well as retaliatory actions.

The government begins an investigation into Forest Health. The investigation drags on, and the government files multiple extensions to keep the case sealed beyond the initial 60 day period. Although while under seal Alan's identity is not revealed, Alex quickly puts the pieces and concludes that the whistle-blower must be Alan. He further investigates Alan's access to billing information related to knee surgeries and fires Alan "for incompetence".

After a one year investigation the government elects to proceed with the case. The case is unsealed and Alex feels vindicated that he was correct about Alan's role. Unfortunately for Alex, he feels less vindicated by the time the case is resolved and it is found that Forest Health did, in fact, have billing irregularities that resulted in the Hospital receiving a total of \$10 million in Medicare payouts that they were unentitled to retain. Because Dr. Bill Mohr was paid based on productivity, the government asserts that Dr. Mohr was paid above fair market value.

Under the False Claims Act, the government recovers three times the amount inappropriately billed (\$30 million), as well as a fine of between \$5,000 and \$23,330 per violation. Although the amount of these fines can vary, the U.S. Sentencing Guidelines provides a less favorable result for Forest Health on the basis that their Compliance Program was ineffective in finding and resolving the situation by not self-reporting based on the anonymous report. In the end, these fines totaled \$70 million, for a total cost of \$100 million to the Hospital as a consequence of these billing irregularities. As the private citizen who filed the action, Alan receives between 15 and 25 percent of this amount. Forest Health was also responsible for the costs incurred by the government in bringing the claim, as well as their own legal fees – a further total of \$10 million.

In addition, the retaliatory actions the CEO took against Alan result in further payout to Alan. This relief includes Alan's reinstatement to his original position with the same seniority as well as twice the amount of back pay, with interest, that Alan is owed due to his termination.