COVID Compliance is Complicated: Don’t Let a Whistleblower Jab You

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As federal contractors scramble to comply with President Biden’s September 2021 Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, these employers must keep in mind the ever-present risks posed by non-compliance with such requirements. Determining if your company is a contractor that must comply with the vaccine mandate imposed by this Executive Order, is no easy feat. What happens if you decide you are not covered but an employee or other interested party thinks differently and wants to “blow the whistle?” Such a scenario could make your company the target of a whistleblower complaint under the False Claims Act (FCA). If it turns out the whistleblower was right you are covered and you were wrong, it could lead to civil liability or criminal prosecution.

Federal contractors are likely already familiar with the FCA, which imposes liability...
on companies who knowingly submit “false” claims to the federal government. Of course, liability under the FCA is not automatic, and significantly, there can only be liability under the FCA, if the non-compliance is “material” to the government’s payment. Materiality in FCA cases is dependent on a variety of factors, including how government agencies deal with non-compliant contractors.

The intense publicity around the issue of vaccine mandates makes this an attractive potential tool for whistleblowers or qui tam relators, who stand to receive a substantial “bounty” for successful claims. However, the same publicity makes it easy to overlook the fact that there is considerable ambiguity in what “compliance” actually looks like.

The ambiguity in determining who and who is not subject to the contractor vaccine mandate potentially offers an opportunity for companies who may face a lawsuit or whistleblower complaint alleging non-compliance. Here, the complexity of the government’s guidance – and the relatively tight timeline for companies to comply – meaning that companies who act in good faith to comply with the vaccine mandate may find themselves in a better position if they face a claim down the road. Because the FCA doesn’t penalize accidental non-compliance, properly documenting efforts to comply with the Executive Order (including explaining the rationale for why certain things were or were not done) can be compelling evidence in the future to show that the company was acting in good faith to comply with the rules as they understand them and therefore did not have the knowledge required to sustain a violation.

While the specific compliance requirements of the contractor vaccine mandate will come into focus as the law is enforced, companies can nevertheless take steps to ensure that they have an effective internal whistleblower program in place, as an effective program can greatly reduce the likelihood that employees will seek external avenues to report their employers. The most important step is to foster an internal “speak-up” culture that encourages staff to report issues internally without the fear of retaliation. Although many factors can contribute to such an environment, creating trust in an organization’s compliance program is frequently cited as the most significant. An effective, trusted, whistleblower program, with buy-in from employees can be established (or promoted) through regular communications and reinforcement by management of ethics and compliance issues.

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