Whistleblower Lawsuit Can Teach Healthcare Employers How To Proactively Manage COVID-19 Risks

Insights
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It is no surprise that COVID-19 whistleblower lawsuits are being filed against healthcare employers – and a recent claim filed by a former assistant director at a nursing home facility reveals ways in which healthcare employers may be in a vulnerable position if they don't proactively address concerns raised by their employees. Indeed, because the COVID-19 pandemic has increased the focus on health and safety issues, it is now more likely that a terminated employee had some role in actively voicing their opinion about health and safety compliance. As a result, it may now be easier for them to claim they were a whistleblower. In this context, the best defense is a good offense: healthcare employers should already be taking precautions to address the "whistleblower's" complaints and be able to document this in order to defend against the claims. Reviewing the allegations in the *Hinich v. Norwood Life Society, Inc.* case, filed in Cook County, Illinois, can help you develop your own proactive plan to avoid such a lawsuit.

The Alleged Facts Leading To The Whistleblower Lawsuit
The Norwood Crossing facility cares for 250 residents. The fourth floor of the facility cares for 44 long-term care residents with underlying medical conditions that require 24/7 nursing care. Andrea Hinich, the assistant director of nursing, was tasked with developing plans for the fourth-floor residents consistent with Occupational Safety and Health Administration, Centers for Disease Control and Prevention, and Centers for Medicare and Medicaid Services guidelines.

Hinich claimed she engaged in whistleblower activities in March and April 2020 by raising concerns about the following workplace issues:

- *Failure to follow staffing guidelines*. Hinich alleged the applicable guidelines required the facility to maintain the same staffing cohorts. She claimed the facility communicated to residents that it was following this guideline, but that it actually wasn't. She complained to her supervisor about the lack of compliance and misleading statements to residents, but claims she was told not to worry about it.

- *Lack of required staff training*. Hinich told the facility's Administrator and supervisors that the staff lacked sufficient COVID-19 training. She says they reacted negatively to this suggestion. Nevertheless, Hinich developed training and testing materials and e-mailed them to her supervisors, but she claims they never responded to her request for approval.

- *Inaccurate patient charting*. After a Certified Nursing Assistant tested positive for COVID-19, Hinich's supervisor wanted her to cut and paste into each patient's chart that the patient wasn't showing any symptoms; the resident's family was notified; the doctor was notified; and the director of nursing was updated. Hinich refused the supervisor's request and claimed she instead prepared the progress notes in accordance with what she believed were her professional responsibilities.

- *Incorrect reporting of positive COVID-19 nurse*. When a nurse who worked throughout the facility was tested positive for COVID-19, the facility's Administrator e-mailed the facility's community stating that she had only worked on the fourth floor. However, Hinich alleges that the nurse had actually worked on several different floors in the week leading up to her positive test. Further, Hinich's supervisors failed to inform other employees who worked with the nurse about the positive COVID-19 test. Hinich e-mailed the Administrator about the failure to comply with CMS guidelines and she claims he never responded.

- *Failure to provide PPE training.* At an April 21 management meeting, the senior management team discussed a plan to distribute n95 respirator masks to the staff. Hinich objected to providing the masks without training the staff on how to use them. In response, her supervisor allegedly stated the training was unnecessary and they were providing staff with the masks to "make them feel better."

The next day, on April 22, Norwood Crossing terminated Hinich's employment. She claims the facility provided the following reasons for her termination: (1) not following directions in maintaining sufficient emergency supplies; (2) not following reporting requirements for confirmed COVID-19 cases; and (3) not following directions in making notifications regarding confirmed COVID-19 cases. The report documenting these reasons was dated April 20 – the day before the safety meeting. She claims there was no explanation provided for why she was not fired on April 20 (instead of actually being let go two days later, after the safety meeting where she raised safety concerns).

On May 20, 2020, Hinich sued her former employer for wrongful termination in violation of public policy, the Illinois Nursing Home Act, and a state whistleblower statute. Norwood Crossing will likely dispute much of the above but, regardless of the actual facts, the allegations in this recent lawsuit provide valuable reminders of how important it is to be proactive in maintaining timely and accurate communications and documentation.

Steps To Proactively Address the Risks

In order to minimize your chances of being served with a whistleblower lawsuit – and to increase your chances of successfully defending such a claim – you should take the following proactive steps. First and foremost, healthcare employers should take a strong and vocal stance in communicating your commitment in following all applicable federal, state, and local guidelines relating to the health and safety of employees and patients. This includes following recommended safety practices including, but not limited to, providing PPE, exercising consistent and thorough hygienic measures,

regularly cleaning and disinfecting workplaces, and when possible appropriately distancing employees to limit exposure. Your employee training should specifically ensure that all management-level employees understand how to respond to safety concerns raised by others.

Second, your company should actively engage with employees who raise any questions about health and safety matters. For example, Hinich claims that multiple of her health and safety emails went unanswered, which now allows her to argue the company neglected its responsibility – even if that is far from the truth. Simply responding by thanking an employee for such e-mails could go a long away in showing that your company cares. And explaining what you are doing to address the issue could further prove that you are not ignoring the issues. In some cases, it may be necessary to explain the reason for choosing a different option than the one advocated for by the employee.

Finally, you should swiftly and directly confront any employees who violate your health and safety policies and practices. For example, if Hinich had violated Norwood Crossing's COVID-19 practices and procedures, the employer should have written her up as close to the event as possible. In her case, it appears at a minimum there was a two-day delay in the final write-up and termination. This delay allowed her to attend a safety meeting where she allegedly engaged in further whistleblowing activities, which only served to bolster her legal claim.

Further, it is unlikely that all three health and safety violations her employer accused her of occurred on the same day, so they should have been addressed much earlier. A pattern of write-ups on similar issues is more effective, because it shows the company provided the employee fair warning of the expectations and proves the employee continued to neglect her duties in this regard. Instead, she is now alleging that she is the one who continually warned the company that it was the one violating the health and safety guidelines.

Conclusion

If Norwood Crossing took any or all of the above proactive steps (which will be revealed as the lawsuit unfolds), it will be in a much better position to defend against Hinich's claims. Likewise, healthcare providers should remember that the best defense is a good offense. Proactively managing these issues is even more important given the increased likelihood of whistleblower lawsuits during the COVID-19 pandemic.

For further information about COVID-19-related litigation being filed across the country, you can visit our COVID-19 Employment Litigation Tracker. Our COVID-19 Employment Litigation and Class & Collective Actions section also has a listing of our litigation-related alerts and team members handling these types of cases.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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