

## A 'Watershed' DOJ Tipster Program Eyes Private Payer Fraud

By **Theresa Schliep**

*Law360 (August 6, 2024, 9:14 PM EDT)* -- A U.S. Department of Justice pilot program promising payouts to qualifying whistleblowers who tip off investigators about schemes at private healthcare payers marks a big shift in federal fraud enforcement efforts, and a significant new liability risk for providers.

The bounty program announced last week looks to fill in gaps in existing disclosure regimes across a host of industries, from financial services to defense contracting.

One of those holes is in the healthcare industry, and it's a big one: While whistleblowers have long been incentivized by big potential payouts to disclose fraud against federal payers, especially Medicare and Medicaid, no such rewards existed for private payers, which cover roughly two-thirds of people with health insurance.

Until now. Under the three-year pilot program, first teased by the DOJ this spring, those who provide the Justice Department with original information about corporate misconduct not already covered by other such programs can receive up to 30% of forfeitures of up to \$100 million.

For forfeitures between \$100 million and \$500 million, the payout is up to 5%.

"We think it's consequential because any time there are bounty programs, as we have seen with the False Claims Act, it certainly can lead to enhanced enforcement," said Meredith S. Auten, a partner with Morgan Lewis & Bockius LLP. "And it certainly can lead to lots of employees, former employees, disgruntled folks, coming forward in the hopes of getting some type of bounty."

Jason Mehta, a Foley & Lardner LLP partner and former federal prosecutor, called it a "real watershed moment" for healthcare fraud enforcement.

The program targets four areas: financial institutions, foreign corruption by companies, domestic corruption by companies and healthcare fraud implicating private payers.



Under the DOJ's pilot program, whistleblowers who provide original information about corporate misconduct not already covered by other programs can receive up to 30% of forfeitures of up to \$100 million. (iStock.com/wildpixel)

Beyond the healthcare context, there are currently whistleblower programs at the U.S. Securities and Exchange Commission, Commodity Futures Trading Commission, Financial Crimes Enforcement Network and the IRS.

The FCA, which covers all types of false claims submitted to the federal government and leads to billions of dollars every fiscal year in settlements and judgments, is the leading statute for addressing healthcare fraud. The law subjects violators to treble damages and penalties, and healthcare fraud is typically the largest source of settlements and judgments.

But those settlements and judgments have been generated by cases involving claims to federally-funded healthcare programs. Since the act does not implicate claims to private health insurers, whistleblowers have lacked incentives to tell the federal government about, say, healthcare providers billing private payers for care they didn't provide.

Michael J. Gilbert, a Sheppard Mullin Richter & Hampton LLP partner, called the current landscape of federal whistleblower programs a "patchwork."

"Now, they're applying that same strategy basically to private health insurance," Gilbert said. "That's new, that's different, and opens up a whole new front, so to speak."

The new program is designed to encourage whistleblowers to first head for internal compliance regimes before bringing claims to the department, officials said.

People who report misconduct internally first can still seek out whistleblower awards if they submit the information to the DOJ within 120 days of their internal report, and those who make internal disclosures might be entitled to a larger whistleblower award, according to the Justice Department.

Attorneys in the FCA bar characterized the pilot program as a significant step forward for the government in its anti-fraud efforts, and an extension of the Biden administration's interest in rooting out fraud.

"I think it's a big deal," Mehta said. "At the same time, I think it's a continuation of tried-and-true practices that have worked for the government in other contexts."

Auten likewise said that "there's been a real focus for this Justice Department on corporate crime and fraud enforcement."

The program likely aims to capture issues involving private payers that are common in the False Claims Act context, like false billing or overbilling, according to Auten.

It's also caught some flak from some attorneys representing whistleblowers who question the award caps and criticized the discretionary nature of the rewards, among other elements of the program.

Some FCA defense attorneys likewise have gripes with the program. While whistleblowers are encouraged to report things internally, they're not required to. Notably, the program covers criminal acts, while the FCA bounty program involves civil enforcement.

"To us on the defense side, it seems a bit of a stretch, this concept of giving financial incentives on the

criminal side," Auten said.

It's also not definite that the program will lead to a rise in enforcement. While the government is required to investigate claims made in qui tam cases, it doesn't face the same requirement in this pilot program, which might reduce its utility.

Still, the program is putting providers on notice.

"To me, this creates both a lot of opportunities for the government and for whistleblowers, and it creates potential risk for healthcare providers," Mehta said. "A lot of healthcare providers have historically thought that if they weren't billing federal programs, there was significantly more latitude. That might be closing because of this type of program."

--Additional reporting by Sarah Jarvis. Editing by Melissa Treolo.

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