

Developing a “Best-in-Class” Internal Investigation Policy

Key Compliance Strategies for Hospitals and Health Systems



Sheila Sawyer
Waller, LLP
sheila.sawyer@wallerlaw.com



Bill Athanas
Waller, LLP
wathanas@wallerlaw.com



John Park
Waller, LLP
john.park@wallerlaw.com

The regulatory labyrinth which overlays the health care industry provides ample opportunity for employees to commit violations of law that expose their employers to civil and criminal liability. When hospitals and other providers suspect or learn of misconduct by employees, they must examine what happened and take corrective action promptly. In undertaking to investigate questionable behavior, however, those organizations should understand the risks of conducting inquiries in an inconsistent or indiscriminate fashion. These risks include lawsuits from disciplined or discharged employees, as well as skepticism from government regulators about the legitimacy of the process. In those cases, the manner in which the investigation is conducted can be as important as the findings themselves.

We spoke with **William Athanas**, **John Park**, and **Sheila Sawyer** from the law firm **Waller** to gain insight into the value of an internal investigation policy as part of every health care organization’s compliance strategy.

1) Where do hospitals and health systems most commonly expose themselves to liability in conducting an inquiry into employee misconduct?

In responding to a government investigation, a primary area where health care providers expose themselves to liability is by conducting their own internal review in a fashion that effectively undermines the organization’s credibility. Ultimately, the credibility of an internal review is an essential commodity to convince federal regulators that the complaint has been resolved, or is something that is not systemic across the organization. Hospitals and health systems may face significant consequences—both financial and operational—by undertaking an internal investigation that leads regulators to believe that it was designed to overlook any deficiencies, or even if undertaken in good faith, was flawed in its execution.

In situations when the government is not the impetus for conducting an internal investigation, it is critical to avoid the “silo effect” when reviewing allegations of misconduct. Information about employee misconduct may come in through a variety of avenues and different departments: human resources, compliance, legal, risk management, quality assurance, or peer review. It’s important that these departments coordinate and consult regularly with each other to ensure that the report of employee misconduct is fully and properly investigated.

For example, some “routine” HR complaints will implicate broader patient care, billing, or compliance issues. A health system must effectively communicate across different areas of the organization to understand the full implications of a particular complaint, even if it’s not apparent on the face of the report that it raises potential regulatory concerns. A lawsuit from a disciplined employee can quickly turn into a larger compliance problem if not properly managed.

Another common shortcoming is the failure of providers to get at the root cause of the misconduct. Any time there is a violation or allegation of wrongdoing, employers should always be asking, “How did this happen?”, “Why did this happen?”, and “How can we improve our compliance program so that this does not happen again?” These are critical questions that always need to be asked, so that from an organizational standpoint, a hospital can put systems and policies in place to prevent the same conduct from occurring again in the future. That is really the hallmark of an effective compliance program, and what the government expects to see.

2) How may the adoption of an internal investigation policy minimize employers' risk?

The government expects that every company in the health care industry maintain a compliance program that is effective, and capable of detecting, investigating, and preventing employee misconduct and Fraud & Abuse. An internal investigation policy is the primary mechanism for safeguarding that an organization has thoroughly and appropriately reviewed all allegations of wrongdoing.

Foremost, an internal investigation policy serves as a resource for carrying out a comprehensive and uniform examination based upon underlying principles and standards. This provides tangible evidence of the commitment that a provider has to methodically vetting all cases of employee misconduct or potential noncompliance. Additionally, an investigation strategy that includes a transparent and recognized anti-retaliation policy minimizes the risk of lawsuits from terminated employees who previously filed a complaint.

3) What are the essential components of an effective and comprehensive internal investigation strategy?

- **Impartial:** Health care organizations should demonstrate that facts have been gathered in a fair and disinterested fashion, and the investigation has taken an unbiased look at the complaint at hand. Many, if not most, investigations that arise can and should be conducted by internal compliance and in-house counsel. However, it's important to understand that there are some types of allegations that warrant the involvement of outside counsel to serve as an independent, neutral third-party. Although this decision is not always easy, when making the decision whether to involve outside counsel, organizations should consider nature and seriousness of the allegation, whether it suggests systematic wrongdoing, and whether the alleged wrongdoing was directed or tacitly approved by senior management or those who will necessarily be involved in the internal investigation.
- **Uniform:** While employers won't be able to conduct an investigation in exactly the same manner each time due to different factual scenarios, the underlying approach and principles should remain consistent across operational and geographic lines. A systematic process must be in place so that the individuals in question receive a notice of the allegations against them, are provided an opportunity to respond, and there is a formal procedure in place for gathering documents and interviews.

- **Confidential:** Organizations should keep not only the content, but in many cases, the existence of an internal investigation confidential to the greatest extent possible. Discretion is imperative to avoid unnecessarily tarnishing the reputation of an employee if allegations of misconduct prove unfounded.
- **Thorough:** An internal investigation should gather and review all evidence that is likely to have a bearing on the subject matter, both in terms of documentation and oral testimony. This means compliance teams must interview all individuals and witnesses involved in the allegation to assess the credibility of the complaint. Employers should also be conscientious in detailing the review process to make certain a written record exists that reflects the thoroughness of the investigation. Providers need to keep in mind that the findings in this report may need to be communicated to other key constituents, such as the compliance committee, the Board of Directors, and potentially the federal government.
- **Complete:** Often there are corrective actions that are put in place as a result of the investigation, making follow-up critical to confirm that the necessary remedial steps were taken to achieve compliance. Putting in place a timeline for executing a corrective action plan and contacting those responsible for implementing the plan to make sure that it was completed is essential for employers to close out an internal investigation.

4) What steps should in-house counsel and compliance teams take today to integrate new policies into broader compliance efforts?

Health care providers should first evaluate existing processes or procedures, informal or otherwise, for dealing with internal investigations when issues arise. In many cases, organizations may have a set of protocols that have evolved over time, or a more formalized system in place. Whatever the situation, employers should assess their current state of readiness, existing gaps in internal processes, and ways to move toward a more comprehensive investigation policy.

Second, the development of standard forms or templates can serve as a useful guide to ensure that the investigation policy is followed during an investigation. A checklist should include the type of allegation, how it came to an organization's attention, who was interviewed, what documents were reviewed, the findings or conclusions, and if correction action was taken. This ensures that a provider doesn't overlook any important steps in the investigation process, and provides a comprehensive record to use in the event of an employee lawsuit or government investigation.



2445 M Street NW | Washington DC 20037
P 202.266.5600 | F 202.266.5700

advisory.com