

How early childhood experiences shaped a career in Compliance

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COMPLIANCE 101

The seven essential elements, Part 7: Response & prevention

- » Failure to demonstrate effective response and prevention might discredit the compliance program.
- » The success of a compliance program depends on the skills of the compliance officer.
- » Act immediately to avoid a potential *qui tam* lawsuit.
- » The compliance officer should maintain detailed notes of the investigation.
- » The 4th Amendment of the U.S. Constitution guarantees people the right to be secure in their persons, papers, and effects against unreasonable searches and seizures.

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As the recently appointed compliance officer (CO), you have done your due diligence to establish a compliance infrastructure that reflects the recommendations outlined in the Federal Sentencing Guidelines. Since your appointment, you have been establishing rapport throughout the organization, obtaining support from the board of directors and senior management, and receiving accolades for the compliance activities implemented thus far. Failure to demonstrate the implementation and a working process for this final element (Response and prevention) has tremendous potential to discredit the compliance program and worse, damage the organization's public image and weaken its financial stability.

Overview of Response and prevention

As the CO, you are expected to be independent, conservative, and fair in your dealings. At first glance, you might think "fair" means that everyone and everything is treated exactly the same way. However, your response to alleged violations depends on the situation. For example, overpayments would be handled differently than employee theft and differently than harassment.

In *The Characteristics of a Great Compliance Officer*, Nicole H. Waid describes a good compliance officer as one who is fair and who assesses all the facts and circumstances before reaching a conclusion. "The success of a corporation's compliance program is dependent on the success and skill set of the compliance officer."¹

To conduct a thorough investigation, a CO may decide to involve directors from other departments, such as Health Information Management, Information Technology Security,



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Audit, Risk Management, or Human Resources. The CO may subsequently involve Legal if the circumstances found during the investigation warrant a legal opinion.

Fortunately, the CO can rely on guidance documents to help steer actions and decisions. The Office of the Inspector General (OIG) developed a series of voluntary compliance program guidance documents directed at various segments of the healthcare industry (e.g., hospitals, nursing homes, durable medical equipment suppliers, third-party billers) to encourage development and use of internal controls to monitor adherence to applicable statutes, regulations, and program requirements.² Your first step might be to involve legal counsel, especially in the event of overpayments or employee theft.

Act immediately to avoid a potential *qui tam* lawsuit. Ignoring or delaying your response can alienate staff, especially the individual who reported the claim. If you deem it necessary, notify legal counsel and develop an investigation plan. Depending on the situation, you might decide to engage external counsel. With the advice of counsel, you should decide whether to conduct the investigation under attorney-client privilege. In any event, a thorough, objective investigation should be conducted. (See our article on Element 5, Reporting & investigation, in the July 2015 issue of *Compliance Today*). The OIG requires prompt reporting to government authorities within a reasonable period. The reasonable period is defined as not more than 60 days after credible evidence is found; to

avoid stricter fines, you should report within 30 days of the discovery of credible evidence.³

Detailed documentation is critical. The CO should maintain detailed notes of the investigation, including the nature of the allegation, who was interviewed, interviewee responses, when and where the investigation took place, location of any supporting documents or other

evidence, the actions taken, and any other outcomes of the investigation.

Sometimes the government notifies the organization of an alleged violation, such as a *qui tam* allegation. In this situation, the government conducts the investigation.

The role of the CO during a government

investigation is to protect the organization while cooperating with and monitoring the actions of the government investigators. In *Compliance 101*, Troklus and Warner suggest the following when dealing with a government investigation:

- ▶ Policies and procedures should explain how to handle contact from the government.
- ▶ Policies and procedures should spell out who is responsible in the event of a search warrant or subpoena (usually the CO).
- ▶ Notify legal counsel immediately.
- ▶ All nonessential staff should be sent home or relocated during the search.
- ▶ Only identified documents can be searched. The CO must be present and keep a detailed account of all activities and an itemized inventory of documents inspected and documents removed from the premises.⁴

The role of the CO during a government investigation is to protect the organization while cooperating with and monitoring the actions of the government investigators.

The 4th Amendment of the U.S. Constitution guarantees people the right to be secure in their persons, papers, and effects against unreasonable searches and seizures. A search requires probable cause, which exists when a reasonable person has an honest belief that the objects sought are linked to the commission of a crime, and that those objects will be found in the place to be searched and the items to be seized. The investigating officer has no discretion; the investigating officer must follow the description on the face of the search warrant.⁵

Impact on program elements

A summary of the other six elements follows, with examples showing how an effective compliance program would impact each scenario.

Standards of conduct

Response and prevention contributes to the determination of whether an organization's Standards of Conduct (SOC, also called a code of conduct) are words on paper or words in action. Remember, a key aspect of the SOC is that they apply to everyone within the organization. Using the working assumption that everyone has developed an understanding of what is expected under the SOC (through the application of an effective training and education program), people know essentially what is allowed and what is not allowed in terms of behavior. In addition, these same people also understand what to expect if they or others demonstrate non-compliant behavior. This is where the response and prevention element provides a tangible illustration as to how committed an organization is in its implementation of its

compliance program. If people witness non-compliance followed by a non-response by the organization, what is the basis for anyone to make the connection that the organization is serious about maintaining an effective compliance program? The answer is simple. There is no basis. In fact, it would not be unreasonable to make the assumption that the lack of response to detected non-compliance actually promotes the idea that the compliance program is ineffective or that the behavior is condoned.

Example of non-compliance:

An employee reports seeing pictures on social media of a hospital vendor and other hospital employees at a dinner party. An investigation ensues. After interviewing all parties, it is determined that the vendor paid for the dinner party for the participating employees, and that no other gifts or money were received by the employees. To resolve these issues, the employees are re-educated and provided with a reminder of the gifts and entertainment policy and its meaning.

Additionally, members of the organization begin to realize that the organization's actions in cases like this speak volumes to

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its commitment in upholding the values and expectations codified in the SOC. People are going to formulate and own their perspectives about the organization's SOC based on what they see or experience, whether directly or indirectly.

Certainly the SOC clearly describe what is also considered compliant behavior. However, most people would likely agree that organizations are probably more known by their employees

for how they respond to transgressions versus how expected behavior is acknowledged and recognized. This may be one area that is ripe for development. If the CO can build and promote activities that bring positive attention to those who support the SOC through their actions, it will help drive the point that the organization is totally committed to its SOC, rather than the impression that the organization and, just as importantly, the CO are just focused on non-compliance.

Compliance Officer and Compliance Committee

Hiring the right person as the compliance officer epitomizes response and prevention. An experienced CO performs risk assessments, conducts audits, monitors adherence to policies, and provides education to the organization. A skilled CO is visible and makes himself/herself available to all within the organization. The CO responds in a timely manner to all reports of non-compliance and establishes procedures to prevent non-compliance. The CO does not just report to the Compliance Committee. The CO develops a report based on trust and action. The CO and the Compliance Committee work together to reduce risk to the organization.

Responding promptly and fairly to reports of non-compliance is essential to the success of the organization. Fair responses result in higher morale and engaged, motivated employees. As the saying goes, an ounce of prevention is worth a pound of cure. That is certainly true when it comes to the CO's role of preventing risk to the organization.

Example of Compliance teamwork:

An organization allows employees to partake in social media activities during their breaks. The organization's IT department has established controls that disable access to identified social media sites after 30 minutes of daily accumulative use. The CO receives notification that employees are using their 30 minutes to share work-related activities. After conducting an investigation, the CO determines next steps to update the social media policy and conduct training. The CO shares the issue with the Compliance Committee. As representatives of the operational areas, they provide feedback to the proposed social media policy revisions. Additionally, they share the best time and location to conduct training with minimal interruption to the continuity of care.

The Compliance Committee may also provide an effective forum for its members to regularly review and assess the organiza-

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tion's efforts related to its prevention and response-related activities. This is more than just formulating or displaying a chart or graph that shows how many reports were received, which of these reports translated into investigations, the status and number of investigations that are

open or closed, and their respective outcomes. The Compliance Committee is uniquely qualified by virtue of its membership to engage in meaningful discussions on whether the prevention and response-related activities taken by the compliance program are positively received by its employees. Do employees think

the organization responds too harshly? Does the organization respond in a timely manner? Do employees feel that sanctions are applied consistently with well-publicized policies and procedures? These are a few of many important questions that the Compliance Committee can consider as an ongoing, practical assessment of whether the prevention and response-related activities are contributing to the effectiveness of a compliance program.

Education and training

Education and training is often attributed to efforts to get new members of the workforce on board through new employee orientation or in response to the need to re-educate or re-train workforce members when issues are detected and mitigating action is needed. However, response and detection can play a vital role in promoting the education and training element during other critically important times as well.

An organization might identify through its policy and procedure management process that certain updated policies are not accessed by staff. This may indicate that the employee base is not aware of important process changes or industry updates relative to that policy. The organization may see an increase in the number of incidents that border between non-compliance and compliance. This could indicate a potential risk of non-compliance. By reintroducing related education and training, the CO could reduce that risk. Education and training also help people realize what

adjustments they need to make to keep their actions in alignment with expectations.

Example of non-compliance:

A hospital employee does not observe the HIPAA minimum necessary requirements when leaving a telephone message with the daughter of a patient, detailing both her medical condition and treatment plan. The ensuing investigation also indicates that confidential communication requirements were not followed. The employee left the message at the patient's home telephone number, despite the patient's instructions to contact her through her work number.

To resolve the issues in this case, the hospital develops and implements several new procedures. One addresses the issue of

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minimum necessary information in telephone messages. Employees are re-educated to provide only the minimum necessary information in messages, and are given specific direction as to the content of that information. Employees are also trained to review registration information for patient contact directives regarding

leaving messages. The new procedures are incorporated into the standard staff privacy training, both as part of a refresher series and mandatory yearly compliance training. To prevent recurrence of this issue, the organization schedules periodic audits and monitors staff responsible for followup with patients via telephone.

Auditing and monitoring

The OIG states: “The best evidence that a provider’s compliance program is operating effectively occurs when the provider, through its compliance program, identifies problematic conduct, takes appropriate steps to remedy the conduct and prevent it from recurring, and makes a full and timely disclosure of the misconduct to appropriate authorities.” To identify the problem areas, utilization of internal and external audits is the key. A good compliance plan that utilizes both internal and external auditors shows the facility’s desire to operate within the guidelines.⁶ The OIG strongly recommends that hospitals conduct an external compliance effectiveness review of its compliance program at least every three years.⁷ If the organization does not have a strong history or track record of auditing and monitoring, it can develop one moving forward. Organizations in such a position may benefit by starting on a very small and selective scale in defining and conducting auditing and monitoring-related activities. As internal experience and expertise develops, the organization can advance to identifying more activity within those identified risk areas that lead to auditing and monitoring.

Example of auditing and monitoring:

As part of the audit plan for 2015, the CO audits medical plans for appropriate dependency claims. The audit reveals that several employees have included former spouses, close friends, deceased family members, and adult children over the age of 26. The inappropriate dependents have cost the organization over a million dollars in premiums. The insurer has paid several million dollars in claims for the inappropriate dependents.

All employees were required to confirm dependents, and all records were updated. The insurer was notified and a restitution plan was

created. Continued monitoring now occurs annually during the enrollment period.

Reporting and investigating

Reporting can take several forms. First is organizational level reporting where each individual is responsible for reporting misconduct or wrongdoing within the organization. Most organizations are best situated when multiple methods of reporting are offered, such as a confidential hotline, suggestion or message box, and of course, the open door policy of the CO. The next level of reporting occurs when an organization voluntarily reports misconduct or wrongdoing to an authority or government agency. Voluntary reporting is a mitigating factor in the event of a government investigation.

Example of reporting and investigating:

An employee reports via the hotline that another employee is soliciting his own personal business during working hours. He is involved in a multi-level marketing company and is pressuring others to join. He is also selling his products during work hours. Company policy clearly prohibits selling products and soliciting personal business. The CO starts the investigation by interviewing employees within the same department where the subject works. After ascertaining that the activity is occurring, the CO involves the department manager and Human Resources. The subject is reeducated regarding the policy.

Investigation is imperative for all claims of misconduct. An organization is best served by developing and utilizing a standard investigation process (e.g., a questionnaire template to be used during interviews, a check box form for documentation reviews, and a policy that dictates when an external party should be involved in the investigation).

Enforcement and discipline

Enforcement and discipline are at the core of establishing the validity of a compliance program. A clear message is communicated to members of the workforce with endorsement by the organization's uppermost levels of management. Demonstrating support for the compliance program via genuine efforts to enforce adherence and mete out consistent discipline assures that the compliance program will meet its objectives. Support from leadership encourages employees to abide by the objectives of the compliance program. (See our article on Element 6, Enforcement & discipline, in the September 2015 issue of *Compliance Today*).

Example of enforcement and discipline:

The CO receives an anonymous tip through the compliance hotline that an employee is not complying with their assigned work schedule. According to the anonymous statement, the alleged employee is arriving late, taking extended lunch periods, and leaving early. After conducting an investigation, evidence supports the allegations. The CO meets with the employee's supervisor and Human Resources. It is determined that the employee will be placed on suspension, which includes three days leave without pay. A few months later, the CO receives notification of a similar violation involving a different employee.

Investigating the new violation requires consistency, regardless of the rank or position that the employee holds. Although the details vary by violation, the CO adheres to the same investigation process to determine whether or not a violation exists and recommends disciplinary action based on the severity of the violation.

Conclusion

As CO, you are an invaluable component of the organization. As the delegated individual responsible for day-to-day operations of the compliance program, you determine the magnitude of the program.⁸ Your ability to implement the compliance program elements and demonstrate the organization is doing its due diligence is essential. Failure to demonstrate these actions may discredit the compliance program.

The success of the organization relies on the collaborative efforts of all employees. Compliance is not the sole responsibility of the CO. By incorporating colleagues early, compliance initiatives will be easier to implement. Show gratitude, publicly acknowledge contributions, and authentically support incentives for colleagues who promote the program. By participating in operational initiatives and intentionally adding value, responding to and preventing potential compliance deficiencies may be less taxing on organizational resources and long-term initiatives. Commitment from all levels may lead to a program that exceeds regulatory requirements and meets public expectations. ☺

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