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RISK & COMPLIANCE ISSUES DURING SALE & ACQUISITION: PRACTICAL APPROACHES TO DUE DILIGENCE AND BEYOND

BEHAVIORAL HEALTH ASSOCIATION OF PROVIDERS
JUNE 10, 2020



SO I'M GOING TO START WITH THE END...



**WHY IS EVALUATING
COMPLIANCE
EFFECTIVENESS DURING
THE DUE DILIGENCE
PROCESS SO IMPORTANT?**



IT ALL COMES DOWN TO VALUE...

**WHAT IS THE ORGANIZATION THAT YOU
ARE ACQUIRING OR SELLING WORTH?**



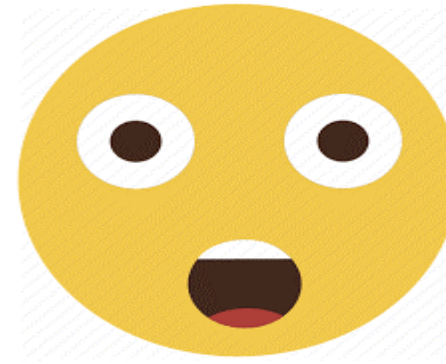
WHAT DO WE REALLY MEAN BY THAT?

Some Unique Features of the Addiction Treatment M&A World

- Successor Liability
- Overpayment Recovery
- Predicting Future Revenues



SUCCESSOR LIABILITY



PERILS OF FAILING TO CONDUCT COMPLIANCE DUE DILIGENCE:

- 2017 - Quest Diagnostics, Inc. settled with the DOJ for \$6 million to resolve a lawsuit alleging improper kickbacks provided by Berkeley HeartLab, acquired in 2011
- 2017 - Genesis Healthcare, Inc. agreed to pay \$53.6 million to resolve claims for medically unnecessary services and sub-standard care alleged to have been provided by entities acquired by Genesis years earlier.

**ALL ALLEGATIONS RELATED TO THE
TARGET'S PRE-ACQUISITION CONDUCT!**



THE OVERPAYMENT RECOVERY PROCESS

- Insurers Typically Recover About 3% of Claims Volume as “Overpayments”

- Nickel-and-Dime Error
- Case Rate Error
- Improper Coding



OVERPAYMENT RECOVERY PROCESS

- Recovery Process Examples
- Limitations and Considerations
- Analysis and Discovery
- Disgorgement of Reimbursements
- Can Impact Cash Pay Clients as Well if Tainted by AKS or Other Considerations



PREDICTING FUTURE REVENUE

IF PAST REVENUES AROSE FROM FRAUDULENT BILLING
OR OTHER NON-COMPLIANT OR UNETHICAL
PRACTICES...

HOW ACCURATE ARE THE FINANCIALS THAT YOU RELIED
UPON IN MAKING ACQUISITION DECISIONS?



DUE DILIGENCE

So, what to evaluate during the due diligence phase from a compliance perspective?



SOME HEALTHCARE-SPECIFIC FOCUS AREAS



- Government Investigations/Qui Tam Litigation
- Compliance Program Effectiveness
- Coding and Billing
- Referral Source Financial Relationships
- HIPAA Privacy and Security Compliance
- Prior HIPAA Breaches
- Excluded or Sanctioned Employees
- Potential Whistleblowers
- HR Issues (Prior Liabilities, I-9s, 1099/W2 Classification, etc.)



**THE BOTTOM LINE: A COMPLIANT
ORGANIZATION IS A MORE VALUABLE
ORGANIZATION**



I GET IT, SO WHAT DO I DO ABOUT IT?:



PRE-CLOSING

- Self disclosures and repayments
- Indemnification and escrows
- Modifying the deal structure (e.g., purchase price change, asset vs. stock purchase, spinoffs)



POST-CLOSING



Building a robust
organizational
compliance and risk
management
program



ELEMENTS OF A ROBUST ADDICTION TREATMENT ORGANIZATION'S COMPLIANCE AND RISK MANAGEMENT PROGRAM



1. DESIGNATION OF A COMPLIANCE OFFICER



Designating a compliance officer with the appropriate authority is critical to the success of the compliance program, with direct access to the organization's governing body, the CEO, all other senior management and legal counsel.

**ASK ME ABOUT THE DIRTY
LITTLE SECRET REGARDING
COMPLIANCE OFFICERS AND
YOUR LEVEL OF RISK!!!**



2. POLICIES AND PROCEDURES

What areas should they cover? At a Minimum:

1. False Claims and Billing
2. Client Financial Responsibility
3. Gifts and Inducements
4. Marketing
5. Referrals
6. Personnel Issues
7. HIPAA Privacy and Security



2. POLICIES AND PROCEDURES (CONTINUED)...

HAVE A COMPLIANCE PROGRAM AND COMPLIANCE PLAN FOR FY 2020

The **Compliance Program** is a descriptive document to show internally (employees and clients) and externally (payors, regulators) the elements of your organization's risk management infrastructure.

The **Compliance Plan** is a yearly (quarterly?) road map of how your organization is going to execute its Compliance Program. It is customized to your organization's specific risk areas and the current enforcement climate.



3. STAFF TRAINING



On what?

Well.... Start with your own policies and procedures!

Construct an effective training plan for your organization.

One of the biggest risk areas for an addiction treatment provider is having robust policies and procedures, but not having staff who are appropriately trained on them.

**ASK ME HOW CROSS-
EXAMINATION SOUNDS WHEN
YOUR STAFF ISN'T PROPERLY
TRAINED!!!**



4. EFFECTIVE COMMUNICATION: INTERNALLY AND EXTERNALLY

Effective compliance programs should include a grievance hotline. Hotlines provide an important avenue of communication between employees and management, as well as among the organization, its clients and clients' families.



5. INTERNAL AUDITING AND MONITORING



A good compliance program contains both the elements of:

Monitoring:

Regular reviews performed as part of normal operations, to confirm ongoing compliance.

Auditing:

Formal reviews of compliance, with set of standards as base measures.

Of what? Well... Start with what we've discussed today!



6. ENFORCEMENT OF STANDARDS

Create a Culture of Compliance in
Your Addiction Treatment Organization

How?

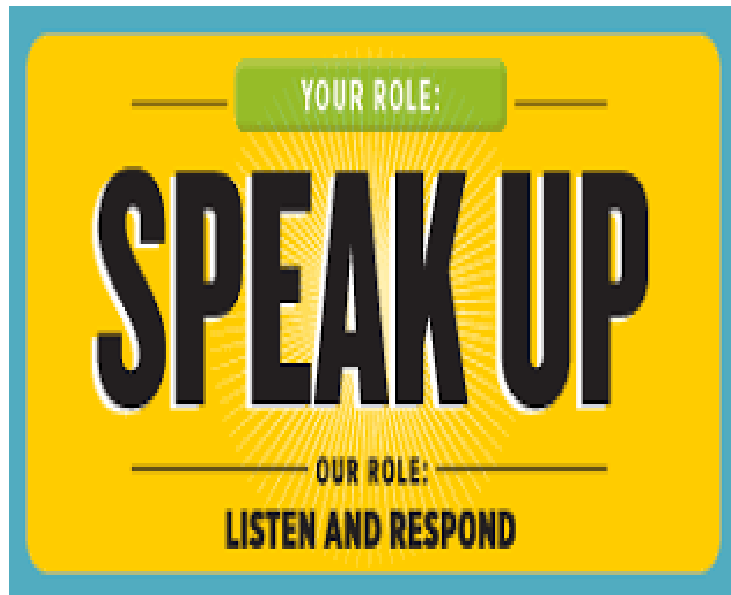
Have clearly articulated standards –
HR Policies, Code of Conduct, Mission,
Vision, Values...

Enforce them compassionately, but
consistently and fairly. Promote,
demote, fire, etc., based on them.

Lead from the top – Walk the Walk...



7. RESPONDING TO COMPLIANCE VIOLATIONS



Have an interdisciplinary “Compliance Response Team” in place – led by a compliance officer – to rapidly address compliance incidents.

This team should meet regularly to assess risk and report on status of organizational compliance.

Build effective plans of correction for each incident.

Have access to the right resources to ask for help.

**REMEMBER: DOCUMENT, DOCUMENT,
DOCUMENT!!!!**



LAST WORD: A LESSON FROM THE U.S. ATTORNEY'S OFFICE



INTRODUCTIONS: A LITTLE ABOUT ME BEFORE WE CLOSE

Nick Merkin is the Chief Executive Officer of Compliagent, a national healthcare compliance consulting firm based in Los Angeles.

As part of his consulting practice, Nick assists organizations with the mergers and acquisition process and serves as a fractional or outsourced compliance officer for healthcare providers experiencing rapid growth, compliance challenges, or in the process of merger or acquisition.



QUESTIONS?

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