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Five signs your organization’s real estate compliance program needs first aid

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In fiscal year 2020, the Department of Justice obtained more than \$2.2 billion in settlements and judgments from civil cases involving fraud and false claims against the government.^[1] Of the \$2.2 billion, \$1.8 billion involved “the healthcare industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians,” and \$1.6 billion arose from whistleblower lawsuits, which are filed under the qui tam provisions of the False Claims Act. The recoveries in 2020 marked the first year since 2009 in which civil healthcare fraud settlements and judgments involving the Department of Justice did not exceed \$2 billion,^[2] and that can likely be attributed to the disruptions caused by the COVID-19 pandemic. Simply put, the healthcare industry is in the government’s crosshairs.

Despite these astronomical numbers, many health systems fail to take compliance seriously. Viewed by many organizations as cost centers, some compliance departments are not adequately funded and staffed and are not given the necessary authority within the organization to enforce and maintain a culture of compliance. In addition, many organizations view compliance as the responsibility of only the compliance and the legal departments and not of the entire organization.

Prudent health systems, however, know better. They understand that compliance has a significant impact on the financial performance of the organization and its long-term viability. Years of profitable business ventures can be wiped out by a single healthcare fraud lawsuit. Some lawsuits have required systems to enter burdensome corporate integrity agreements or, even worse, forced systems to sell or close all together. Recognizing the importance of entering into business arrangements that are not in violation of the applicable laws, prudent health systems make compliance an integral part of their corporate cultures and invest resources to establish and operate effective compliance programs.

When building an effective compliance program, it is important to ensure that the program is designed to address all types of business arrangements that can expose health systems to regulatory risks. One of the areas of health systems’ compliance programs that is often overlooked and neglected by many health systems and their compliance departments involves real estate lease arrangements between health systems and physicians. Although healthcare fraud lawsuits that stem from real estate lease arrangements with referral sources represent a relatively small percentage of the total annual recoveries referenced above, a recent study by the healthcare law firm Hall, Render, Killian, Heath & Lyman of settlement data that is published by the Centers for Medicare & Medicaid Services and the Office of Inspector General revealed that the cost of settlement of a potential violation involving a real estate arrangement was 66% higher than the average settlement that did not involve a real estate arrangement.^[3] The study also found that “the average settlement involving a real estate arrangement was \$731,654.17 compared to the average settlement amount of \$439,097.43 for matters not involving a real estate arrangement.” Because real estate lease arrangements with referral sources pose regulatory risks and the average settlement amounts tend to be greater than settlements that do not involve real

estate, health systems should specifically create healthcare real estate compliance programs and include them as subsets of their broader compliance programs.

Key areas to review when developing a real estate compliance program

The first step to creating an effective real estate compliance program is evaluating the current state of the program. The signs outlined below could indicate key areas for improvement of a real estate compliance program.

1. Lack of written real estate policies and procedures

The most obvious sign that a health system's real estate compliance program needs first aid is the lack of written, up-to-date real estate policies and procedures for health systems' arrangements with referral sources. When real estate processes are not put in writing, inconsistencies are created over time in how real estate lease arrangements are structured and administered. This problem is further compounded when real estate personnel changes. With each transition of personnel, certain real estate processes are lost, and new ones must be created, which results in needless operational inefficiencies at best and, at worst, additional real estate compliance risks.

At a minimum, every health system should create policies and procedures outlining the lease approval and lease administration processes, the requirements for real estate fair market value (FMV) support, how rent collection issues should be resolved, and how and when space measurements should be performed.

2. Lack of centralized lease administration software

The absence of a centralized lease administration software can also lead to real estate compliance concerns. The lack of a centralized lease administration software increases the chances of leases not being tracked and administered correctly, which exposes health systems to potential financial and regulatory risks. Additionally, it can result in lease files being incomplete and lacking all supporting documents.

When health systems rely on spreadsheets and other internally generated documents to track important lease information, such as lease expiration dates, rent escalators, rent collection, and payment, there is a higher likelihood of compliance violations. Spreadsheets and other internally generated documents do not send automated reminders related to material terms of leases (e.g., lease expirations, rent escalations) and often become outdated. To remain compliant, health system employees must remember to check their spreadsheets and internally generated documents regularly to track important lease milestones. When employees forget to do this, compliance infractions can occur.

Health systems can improve their real estate compliance programs by implementing a centralized lease administration software that can be used to store lease files and supporting documents and track lease expiration dates, rent escalators, rent collection, and payment information.

3. Inconsistent square footage measurements of leased premises

Although most health systems recognize the importance of procuring FMV reports to support the lease rates with referral sources, many fail to focus on the other element of the equation that is just as important: accurate square footage measurements. Remuneration under a lease arrangement is determined by multiplying the lease rate by the total rentable square footage that is being leased by or from a referral source. If either the lease rate or the rentable square footage is inaccurate, the total remuneration may not be consistent with FMV, which can expose health systems to regulatory liability.

Failing to consistently and accurately document and measure leased spaces as well as failing to correctly allocate the square footage of the common areas of the properties may result in inaccurately measured spaces and tenants accessing or using space not specifically covered by their respective lease agreements. To avoid this, health systems should implement a system to keep and maintain up-to-date floor plans displaying accurate square footages of various spaces in buildings owned by health systems and clearly identifying the leased premises and any building common areas that will be shared with other tenants.

4. Lack of space monitoring

Many health systems do not conduct regular walk-throughs of owned properties. As a result, health systems do not know whether the leased spaces in those owned properties are being used per the terms of the applicable lease arrangements and, for timeshare arrangements, per the prescribed time blocks.

Health systems should conduct regular walk-throughs of leased spaces at their properties to ensure that the spaces are used in accordance with the applicable leases. Those walk-throughs should be documented and included in the appropriate lease files.

5. Lack of real estate compliance training

Finally, lack of real estate compliance training can expose health systems to systemic compliance risks. Healthcare laws and regulations are complicated and all-encompassing. Real estate personnel who are tasked with administering real lease arrangements with referral sources are not typically trained in the specific nuances of the applicable regulations and, in the absence of such training, often do not fully understand how the relevant laws affect their daily job responsibilities. Consequently, it is imperative for health systems to provide real estate compliance training to their real estate personnel to help them understand how they can conduct their jobs in a compliant manner.

Conclusion

The government's annual recoveries from healthcare fraud cases show that health systems have no other choice but to implement strong regulatory compliance frameworks that are designed, in part, to help keep health systems' real estate lease arrangements with physicians compliant. By creating and implementing practices that address the weaknesses outlined above, health systems can create robust and effective real estate compliance programs to help them avoid real estate compliance violations. Although implementing robust real estate compliance programs requires an investment of time and resources, the returns generated from avoiding high-profile healthcare fraud lawsuits and subsequent potential multimillion dollar settlements far outweigh those development and implementation costs. In the words of former U.S. Deputy Attorney General Paul McNulty, "If you think compliance is expensive, try noncompliance."

Takeaways

- Develop written real estate policies and procedures.
- Look into centralized lease administration software.
- Keep accurate square footage measurements of leased premises.
- Monitor leased space for usage per the terms of lease arrangements.
- Conduct real estate compliance training.

- 1** U.S. Department of Justice, “Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020,” news release, January 14, 2021, <https://bit.ly/3tibgcX>.
- 2** U.S. Department of Justice, “Justice Department Recovers Over \$3 Billion from False Claims Act Cases in Fiscal Year 2019,” news release, January 9, 2020, <http://bit.ly/35ENCeA>.
- 3** Andrew A. Dick, “OIG Data Confirms That Non-Compliant Real Estate Arrangements Are Costly,” Lexology, October 20, 2016, <https://bit.ly/3oZ3rdt>.

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