

Memorandum

January 19, 2010

To: Congressional staff on health reform legislation
From: Tom Devine and Bryn Mayes, Government Accountability Project (GAP)
Re: Necessity for whistleblower protection beyond Title 1 of health reform bill

The posted Senate text for HR 3590, the Patient Protection and Affordable Health Care Act (health reform bill) has an excellent whistleblower protection, but only for Title 1 of the legislation. That means employees could be fired at will for challenging misconduct in three quarters of the bill, ironically including the titles for transparency and program integrity, revenue, payment accuracy, changes to the health care workforce, Medicaid and Medicare prescription drug treatments, expansion of Medicaid for the poor, beneficiary access, rural services, preventive services and innovative treatments.

This accountability loophole would be inexcusable. Protection for employees defending *part* of a statute would be unprecedented. *Every* corporate whistleblower law ever passed within a statute has covered the entire legislation. The loophole also would cut back on accountability boundaries in the stimulus law, which has whistleblower protection for *all* medical care stimulus spending.

COST CONTROL AND FRAUD

Fraud only is the tip of the iceberg for unnecessary health care expenditures, but False Claims Act lawsuits by whistleblowers conclusively prove that -- 1) the medical care industry is the nation's worst for misspending taxpayer funds; and 2) whistleblowers have been the nation's most effective weapon against that misspending.

Drawing from Taxpayers Against Fraud statistics at www.taf.org last year over \$5.6 billion was recovered against civil and criminal fraud through FCA lawsuits, with over \$5 billion of that total from the medical care industry. Fraud by defense contractors was a distant second, accounting for some \$420 million. The defendants and misconduct extended to every facet of health care spending, including drug company off-label advertising; overcharges for medicine; improper billing for occupational therapy, psychiatric counseling, patient transportation and outpatient care; kickbacks for contracts to supply medical equipment, doctor referrals, and prescriptions of potentially dangerous or lethal drugs; overcharges for medicine; and false diagnostic tests; among other abuses.

The misspending has not been limited to hospitals or direct provision of medical care. Defendants have run the gamut of all institutions relevant to provision of medical care, including drug companies, hospitals, laboratories, medical transportation providers, medical device suppliers, nursing homes and hospices.

BREAKDOWNS IN PATIENT CARE

Whistleblowers contacting GAP have alleged retaliation for challenging –

* removal of fallopian tubes without informed consent; a practice shielded by hospitals due to increased reimbursements for the unnecessary care.

* insurance company “purging” of customers by sharply increasing rates to unaffordable levels when families receive diagnoses of expensive conditions. While policyholders can appeal, delays even for successful challenges can be fatal, as when a 17 year old died because a liver transplant did not timely take place. Although her family prevailed in the appeal, it was too late.

* unnecessary, prolonged treatment of juveniles with emotional disorders, plus prescriptions and coerced administration of drugs with dangerous side effects, leading to suicides in some instances; and billing for drugs that were not used in treatment.

* provision of home health services by untrained staff who aggravated preexisting conditions for elderly patients.

* inadequate security and corresponding violence against social work personnel providing pre and post natal counseling, such as knife and Doberman guard dog attacks.

* disproportionate rates of caesarian deliveries, including 100% rates in some counties, that lead to higher Medicare reimbursements. They are more likely to be premature, with increased risks of brain damage, undeveloped organs and blindness. The rate of premature deliveries for the U.S. generally is 10.6%, compared to 6.2% in Europe.

* irresponsible use of pain-relieving drugs such as Lortab that sustain higher Medicaid reimbursements, but risk brain damage and immune system deficiencies for infants. Because it is addictive, misusing Lortab forced methadone treatment for infants to minimize the risk of death from withdrawal.

* failure to check for allergic conditions before providing vitamins and drugs that have caused pregnancy-induced hypertension and kidney damage for the mother. Care providers make a profit through reimbursements for the prescriptions.

* untrained personnel administering highly-controlled substances like anesthesia and cardiac medicine, with consequences from brain damage to lifelong staph infections.

* communications breakdowns between doctors and revolving support personnel, leading to consequences such as not timely sewing a patient back up after surgical procedures and forcing emergency blood transfusions.

* substitution of nurses and interns for primary care physicians in critical patient care functions, although the former have not been trained sufficiently to understand and perform all the codes for next steps in care, which can have life-saving implications.

* mistreating rape victims such as by strapping one naked to a hospital gurney bed for hours without care.