

## **Law Enforcement Focus on the Health Care and Senior Living Industries During COVID-19**

*Hinckley Allen Government Enforcement and White Collar Defense*

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### **What You Need to Know**

- U.S. Department of Justice, state Attorneys General, and federal and state regulators are aggressively identifying, investigating, and prosecuting fraud
- Nursing homes are one of several government targets in the health care industry
- How to prepare and respond to any potential investigation

Law enforcement does not stop during troubling times, and that remains particularly true in the criminal, civil and regulatory enforcement fields. Indeed, it is often during and in the aftermath of crises that government ramps up its enforcement actions across many industries. Accordingly, as the nation faces unparalleled challenges arising from the coronavirus, the United States Department of Justice and various state Attorneys General have made it clear that the health care industry in general, and nursing homes in particular, will face increased and aggressive scrutiny. A recently announced case in Massachusetts illustrates the government's approach, and the government directives that led to it.

### **Massachusetts Veterans Home Under Federal and State Investigation**

On April 10, 2020, the Department of Justice's Civil Rights Division and the United States Attorney's Office for the District of Massachusetts announced that they are investigating a COVID-19 outbreak at a veterans' home where 32 people died. Specifically, the investigation is to determine "whether the [home] violated the rights of residents by failing to provide them adequate medical care generally, and during the coronavirus pandemic." This announcement came on the heels of Massachusetts Attorney General Maura Healey, two days earlier, launching an investigation into whether legal action is warranted regarding the same home.

Although the specific facts and circumstances surrounding that particular home and investigation are still to be determined, the investigation is the natural and direct result of two recent Department of Justice directives, one addressed specifically to nursing homes and one addressed to coronavirus-related issues.

### **Department of Justice Directives**

On March 3, 2020, even before the coronavirus fully gripped the nation, Attorney General Barr announced the Department of Justice's National Nursing Home Initiative ("Initiative"). The Initiative is designed to "coordinate and enhance civil and criminal efforts to pursue nursing homes that provide grossly substandard care to their residents." In announcing the Initiative, AG Barr stated, among other things, "all too often, we have found nursing home owners or operators who put profits over patients, leading to instances of gross abuse and neglect. This national initiative will bring to justice those owners who have profited at the expense of their residents, and help to ensure resident receive the care to which they are entitled."

On March 16, 2020, as the coronavirus spread, Attorney General Barr issued a memorandum in which, among other things, he directed that every United States Attorney's Office in the country prioritize the investigation and prosecution of coronavirus-related fraud schemes. Following up on that directive, on March 19, 2020, the Justice Department further directed each United States Attorney "to appoint a Coronavirus Fraud Coordinator to serve as the legal counsel for the federal judicial district on matters relating to the Coronavirus, direct the prosecution of Coronavirus-related crimes, and to conduct outreach and awareness."

Based upon actions taken so far, and in recent conversations with federal prosecutors and regulators as well, it is clear that the Justice Department's statements are not just words, but rather serious and concerted mission statements that are expected to be pro-actively pursued. For example, in recently announcing charges in an alleged kickback scheme related to COVID-19 testing, the United States Attorney for Georgia stated, "The U.S. Attorney's Office and our law enforcement partners are focused on protecting the public from this kind of despicable pandemic profiteering, and will act quickly to halt the fraud and bring the perpetrators to justice." This is consistent with historical past crises and calamities and the resulting government investigations, whether after Hurricane Katrina, the BP Oil Spill, 9/11, and countless other situations where government funds have been disbursed to combat these unexpected and wide-scale events.

## **Potential State Relief / Immunity From Civil and Criminal Actions**

In contrast to the federal pronouncements, some states have offered potential relief, in the form of certain immunity, from civil and criminal liability for facilities that act "in good faith" in their approach to combating the coronavirus. For example, New York passed a law immunizing health care professionals and facilities from liability for any harm caused in the treatment or care of any individual during the COVID-19 emergency declaration when the services are provided pursuant to a COVID-19 emergency rule or other applicable law, the treatment was impacted by the COVID-19 outbreak, and the health care services are provided in good faith. Similarly, Massachusetts Governor Charlie Baker signed a law that protects all health care professionals and facilities from lawsuits and civil liabilities over certain errors made in good faith.

The level of protection granted by these laws, however, varies by state. For example, unlike New York, which grants civil and criminal immunity, the Massachusetts law does not immunize criminal liability, and specifically carves out consumer protection actions brought by the state Attorney General and false claims actions brought by or on behalf of the state. Similarly, an Executive Order issued by Connecticut's Governor Ned Lamont excludes from immunity acts of "crime, fraud, gross negligence and willful misconduct." It is important to understand what is, and is not, protected in your state(s) of operation.

Of course, how these protections will play out once regulators and prosecutors and plaintiff families start to pursue cases is another matter. Accordingly, no facility should operate under the belief that it has blanket immunity under these state protections. Indeed, most assuredly the government and private plaintiffs will look at substance, not form, and attempt to find ways around these immunity provisions. Nevertheless, the state protections will at least offer a layer of response and defense for those facilities that follow government guidance and make serious, legitimate and substantive efforts regarding the care and treatment of their residents and patients. Finally, the state laws do not affect the federal government's ability to investigate and prosecute cases.

## **Minimizing The Risk Of Investigation and Handling An Investigation If One Occurs**

We want to ensure that our clients are taking every step necessary and available to ensure that they do not get caught up in any government enforcement action, and know what to do in the unfortunate event that they do. The following are general tips to keep in mind as companies seek to minimize their risk of government scrutiny, and what to do in the event it occurs.<sup>2</sup>

- Companies should adhere to their compliance plan, and their policies, procedures and protocols. Should a company come under scrutiny, one significant line of response will be to demonstrate rigorous compliance with

these items.

- Employees must be educated and informed about policies, procedures and protocols, and the requirement that they be followed.
- Make sure documents are complete and accurate. False information in documents – whether records, applications or any other written representation – is always an area of government focus, and certainly will be so now. In addition, maintain records and documentation of any guidance or directives issued by the government, and adhere to the guidance and directives.
- Short cuts are ill-advised and should not be taken. In times of crises, when companies understandably do not necessarily have the luxury of time, it is all the more important to ensure that decisions and operations are being done the correct way and accurately documented.
- Have a designated “point person,” whether an in-house attorney or outside counsel, available at all times to run questions and issues by.
- Take any internal complaint seriously. Internal complaints should be investigated and documented thoroughly and objectively. It also may be best to have outside counsel do this in order to ensure privilege is maintained.
- If your company receives a written demand or inquiry from any law enforcement or regulatory agency – whether by a subpoena, Civil Investigative Demand, or request for information – take it seriously and immediately consult with outside counsel. Typically, there is a date by which to respond and the requests are often broad and voluminous, both of which can often be negotiated. However, they cannot be ignored, and calling to ask for an extension the day before items are expected to be turned over does not sit well.
- Law enforcement or regulatory agents often will call or just show up at a place of business, or even peoples’ homes, “just to ask a few, informal questions.” No conversation with agents should ever be considered “informal.” The response to any such outreach should be polite and respectful, but you should tell the agent that counsel will be in touch to follow up on the request. While anyone is free to speak to agents if they choose to, it is our best advice that no one should speak to an agent without counsel present, period. Of course, if someone does choose to speak with an agent, he or she must be 100% truthful. Relatedly, employers cannot and should not direct employees not to speak with law enforcement (such a direction could lead to obstruction charges), nor should employers tell employees what to say. However, employees can be told it is their choice as to whether to speak to law enforcement, and they have a right to consult with counsel to make that choice. Employees should also be told that if they decide to speak with law enforcement, they must be 100% truthful. This is not just the case with employees, but anyone who chooses to speak with law enforcement must be 100% truthful.

## Summary

We are still in the early days of the Justice Department’s National Nursing Home Initiative and its declarations that coronavirus-related fraud will be aggressively investigated and prosecuted. However, it is abundantly clear from actions already taken that the healthcare industry in general, including nursing homes in particular, will be within the focus of law enforcement investigations.

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<sup>1</sup>Although the United States Department of Health and Human Services has issued a declaration granting immunity against all claims of loss under federal and state law resulting from the manufacture, distribution, administration, or use of drugs and devices developed to treat, diagnose, cure, prevent, or mitigate COVID-19, the federal government has not issued broad immunity to health care professionals.

<sup>2</sup>Every situation is different, of course. These tips are meant as a general guide of good practice and principles, but your company should consult with

counsel to discuss its specific situation.

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Hinckley Allen's **Government Investigations and White Collar Defense group** is highly qualified and experienced to handle both corporate and individual representations in all government investigations and prosecutions, as well as conduct internal investigations. Our partners include former federal and state prosecutors, as well as a team of attorneys who have vast experience representing and defending corporate and individual clients in government investigations across all industries.

If you have any questions or would like to discuss this further, please contact **Mike Koenig**, co-chair of Hinckley Allen's Government Enforcement and White Collar Defense Group, at 518-396-3100 or [mkoenig@hinckleyallen.com](mailto:mkoenig@hinckleyallen.com) or **Janelle Murnane**, an associate in the firm's Litigation Group, at [jmurnane@hinckleyallen.com](mailto:jmurnane@hinckleyallen.com).

### **Associated People**

Michael L. Koenig

Janelle P. Murnane

### **Related Practices**

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