

Compliance

Robust Compliance Regimes a Must for Health-Care Organizations

After years of struggling to prevent their advice from being ignored or overridden, chief compliance officers face a new challenge with boards, already facing a compliance overload, believing the Trump administration's new deregulatory push will ease compliance burdens.

The Trump administration may be fueling that sentiment, but hospitals and other health-care organizations should not relax. They continue to face a dense thicket of federal and state laws and regulations they have to navigate as part of their day-to-day operations, so it is more important than ever for them to have a robust compliance department led by a chief compliance officer, attorneys and consultants told Bloomberg Law.

In terms of federal law alone, violations of the physician self-referral law, the Health Insurance Portability and Accountability Act's privacy rule, or the Emergency Medical Treatment and Labor Act could cost a hospital hundreds of thousands of dollars in civil monetary penalties and possibly even get it excluded from participation in the federal programs like Medicare, Medicaid, and TRICARE. Given the possible effect on a hospital's bottom line, more and more hospitals are engaging the services of a chief compliance officer to address these risks.

Over the last 20 years, CCOs and the departments they lead have been asked to get involved in more aspects of the operations for health-care organizations, making sure that clinical, billing, human resources, and information technology sections of the business stay within the bounds of federal and state regulations.

This portfolio is not going to stop expanding even with the current federal deregulation push, and it will require close coordination between CCOs and other executives in the company, according to Michael Peregrine, an attorney with McDermott Will and Emery in Chicago.

"Health-care leadership is definitely looking for people who can function in this role," Werner Boel, a senior partner in the Atlanta office of executive search firm Witt/Kieffer, told Bloomberg Law. "The key is for a chief compliance officer to be a voice of reason; the ethical, moral, and compliance compass for the organization," he added.

Compliance Fatigue However, at least one attorney who advises health-care organizations on corporate governance warned some executives and boards could start suffering from "compliance fatigue."

"In some cases management and board members are saying to the compliance departments: Okay, you've had your 15 years of fame and now we really need to emphasize other aspects of the business," Peregrine said. "The idea that compliance may have lost its pizzazz is a risk that must be addressed." Peregrine serves on a Bloomberg Law advisory board.

When you couple that fatigue with the strong deregulation push by federal agencies under the Trump administration, even some compliance officials could be convinced to allow corporate resources to drain away from compliance programs.

Peregrine and Roy Snell, the chief executive officer of the Health Care Compliance Association and the Society of Corporate Compliance and Ethics, warn that would be a costly mistake.

"When you look at the last 20 years with situations like Enron, Tyco, Volkswagen, Wells Fargo, Penn State, where there has been an epic compliance failure, there was most likely a meeting where six or seven people rationalized doing nothing," Snell said. "But what was missing from those meetings was someone who could convince the leaders to actually address and fix the problem. That's why this profession was created."

Any officials advising leadership or board members that federal deregulation should allow resources from the compliance department to be redirected were a danger to that company, Snell said.

"Letting a pedophile run around on your campus for years is still going to be wrong, regardless of what this administration does," Snell said. "Setting up millions of fake bank accounts, setting up a deceit device on your cars to pass emissions tests will always be illegal."

"Any so-called compliance experts who tell leadership that fewer resources are needed because of the new administration are a risk to the business community," Snell said.

Boel agreed that compliance departments are still essential, particularly in the health-care industry, where much of the enforcement risk comes from legal and not just regulatory authority. Health-care organizations face potential liability under the False Claims Act, Stark (physician self-referral) law, and anti-kickback statute, along with the requirements of the Affordable Care Act, making it absolutely critical that they have a robust

compliance department led by a strong chief compliance officer, he said.

Position Overlap That same statutory basis for health-care liability could lead to some overlap in job responsibilities between a chief compliance officer, whose goal is to make sure the company is following the applicable laws and rules, and the corporate general counsel, who acts as the primary legal adviser for the company.

“If there is going to be tension between the CCO and the [general counsel], that is total frictional cost, a complete waste of time,” Peregrine said. “Both are critical officers, so they’ve got to work together; the company depends on them cooperating and being collegial.”

Peregrine said the gray areas between both jobs need to be cleared up by management and the board by establishing very clear roles for the two positions. He said the board and management must be clear about the respective roles and continue to monitor the areas of overlap to avoid allowing a possible legal violation to slip by.

Legal Background The conflict could result from hiring a CCO with a legal background and then expecting that person to act in a legal capacity.

“This invites the most amount of controversy about what is the real role of the compliance officer,” Peregrine said. “The board has to recognize that the compliance officer has an enormous responsibility already and shouldn’t be put in a position where she is expected to play lawyer and interpret the law.”

Snell said most companies would be better served not focusing on the legal backgrounds of a potential CCO but instead on the ability of that person to work with corporate management.

“I would personally seek a corporate executive background for a CCO, because that person would have the ability to influence leadership,” he said. “I would advise a corporate board to focus on interpersonal skills and emotional IQ over the technical background when examining candidates.”

In a 2017 compliance survey conducted by the HCCA, 22 percent of the 664 chief compliance officers who responded said they had a law degree. According to Boel, health-care organizations have trended toward hiring attorneys to serve as CCOs, but the massive reach of the position does lend itself towards candidates who don’t have a law degree.

“With a clinical background or a financial or auditing background, people without a JD can be equally successful in the position,” he said.

Numbers Growing Boel said he has seen an uptick in companies searching for a chief compliance officer.

“This is a growing field and it is becoming a lot more expected to have a chief compliance officer and to have a dedicated team for compliance, even for smaller health-care organizations,” he said.

Snell pointed to the HCCA’s increasing membership as a sign that more companies are seeking out compli-

ance professionals to help keep them on the right side of regulatory demands.

“Membership in HCCA has grown every year for 20 years, the number of people getting certified as compliance professionals has grown and the number of people attending our conferences has grown every year,” Snell said. “It’s pretty safe to say that the community of health care compliance professionals is growing substantially.” Snell serves on a Bloomberg Law advisory board.

Strategic Business Partners The wide range of responsibilities for compliance officers means that they have a special role to play in advising management and the board of health-care organizations, Boel said.

“A compliance officer shouldn’t be a technocrat, governing strictly from his technical expertise of the law, instead he should be a strategic business partner helping the board reach its overall goals and objectives,” Boel said.

Snell agreed, saying that the main difficulties that companies face from enforcement agencies aren’t from a lack of legal knowledge.

“The biggest challenge for a compliance officer has been and always will be influencing others,” he said. “Leadership gets a great deal of bad advice about how close they can get to the edge of the rule of law, and compliance officers have to figure out how to counteract that effectively,” he added.

According to Peregrine, in many instances, the health-care compliance officer will be challenged to expand the program beyond its billing and anti-fraud concentration. “Important new topics include criminal and IRS Section 501(r) (rules for charitable hospitals) compliance—particularly following passage of the Tax Cuts and Jobs Act,” he said. “Compliance programs are not intended to be single-subject in nature,” he added.

An additional challenge, Peregrine said, is the potential for the duties of a compliance officer to bump up against the expanding responsibilities of several other executive officers in the corporation. “The chief information security officer, chief diversity officer, internal auditor, chief human resources officer: all of these executives oversee departments that need to comply with laws and regulations that govern privacy, workplace culture, discrimination, and other aspects,” he said.

Peregrine said a well-run board will require communication and coordination between all of these executives and the CCO.

“Everyone has to work together or ultimately things will fall through the cracks and that is dangerous for a corporation,” he said.

By MATTHEW LOUGHRAN

To contact the reporter on this story: Matthew Loughran in Washington at mloughran@bloomberglaw.com

To contact the editor responsible for this story: Peyton M. Sturges at psturges@bloomberglaw.com