Conflicts of Interest in Payor and Managed Care Organizations

Vickie McCormick
Halleland, Lewis, Nilan, Sipkins & Johnson
vmccormick@halleland.com
612.204.4156

Robert Freeman
Associate General Counsel and Compliance Officer
Blue Cross and Blue Shield of Massachusetts
Robert.Freeman@bcbsma.com
617.246.3533
What is a conflict of interest?

- A conflict of interest exists when one’s personal interests are inconsistent with the best interests of the organization.

- Directors, Officers and Employees have a duty of loyalty to the organization.

  Sources of duty of loyalty:
  - Corporate statutory and case law
  - Tax-exemption rules for non-profit organizations
  - Employment contracts, codes of conduct and employee handbooks
Categories of conflicts of interest

Actual
- Direct and immediate conflict between individual’s and organization’s interests.

Potential
- No immediate conflict, but possibility for a conflict in future.

Appearance of
- Appearance of actual or potential conflict of interest to people unfamiliar with all facts and circumstances.

Indirect
- Conflicts involving family members or friends of the individual.
Why be concerned?

- Potential legal exposures
  - Anti-kickback Act
  - False Claims Act
  - ERISA
  - Bribery
  - Breach of fiduciary duties
  - Shareholder derivative actions
  - Non-profit/tax exemption requirements
  - Attorney General actions (e.g., Allina/Medica)

- Harm to reputation and public image
- Actions that harm or disserve the organization
Why be concerned?

- Undermines organization credibility
- Vulnerability to external criticism (e.g., jilted vendor complains of favoritism shown to competitor with connections)
- A culture tolerating conflicts may tend to tolerate other conduct deleterious to the organization and its stakeholders
  - Enron, WorldCom, Adelphia, etc.
- Possible disclosure of proprietary information
How to deal with conflicts of interest

- Structure and process to identify and resolve actual, potential, appearance of and indirect conflicts of interest.
  - Policies and procedures
  - Periodic conflict disclosure program
  - Awareness and education
  - Process to evaluate and sanction/modify/disapprove conflict situations
  - Resolution
Conflict of Interest Policy

- Define organization’s position
  - Total prohibition vs. permissible with approval
  - Address high risk areas (e.g., gifts, grants, nepotism)
  - Include typical examples

- Describe process for addressing conflict situations
  - Self reporting and disclosure
  - Direct employees to call hotline if suspicion exists of undisclosed conflict involving another employee
Periodic conflict disclosure process

Who?
- All Officers and Directors?
- Employees?
  - Everyone?
  - By grade levels?
  - By job category?
- Contractors?

What?
- Outside directorships?
- Outside employment?
- Business courtesies?
- Investments/financial interest?
- Charitable activities?
- Political activities?
- Family members?

When?
- Upon employment?
- New occurrence?
- Periodically (may be determined by regulatory requirement)?

How?
- Handling the paper chase - process for obtaining disclosure statements?
  - Online disclosure process?
  - Require responses from everyone or only positive responses?
- Storage and access?
Awareness and education

- Code of conduct
- Policies and procedures
- Compliance program education
- Periodic company communications
- Specific conflict of interest education
Process to address conflict situations

Who receives notice?

- Manager?
- Human Resources?
- Compliance?
Process to address conflict situations

Who decides?

- Manager?
- Human Resources?
- Compliance?
  - Does it depend on level of employee?
- Board of Directors or senior management?
  - Should conflict situations involving senior managers be presented to and decided by the Board?
Process to address conflict situations

Bases for decision

- Factors to consider:
  - Law
  - Actual or possible adverse consequences for organization, i.e., adverse business deal terms
  - Perception and appearance
  - Affect on other employees -- consistent treatment
  - Possible disclosure of proprietary and confidential information
- Different standards for senior managers and officers?
Process to address conflict situations

Record of resolution

- Maintain consistent records of the identification and resolution of conflict situations
Conflict resolution

Best interest of the organization

- Always the first consideration
  - Risk/benefit analysis for the organization
  - Personal interests of the director, officer and employee always defer
  - If no identified immediate harm to the organization:
    - Perception/appearance?
    - Potential for future harm?
    - Process for continued evaluation and notice of any changes?
    - Disclosure?
Conflict resolution

Headline test

- How would outsiders judge the situation if the situation was publicly disclosed, particularly if addressed in a sensationalized or adversarial manner?
Small group discussion scenarios & issues

For each scenario:

**Structure**
- What additional *structural* elements can address the specific type of conflict?

**Process**
- What additional *procedures* can address the specific type of conflict?

**Recommended Resolutions**
- How should the specific type of conflict be resolved?
Conflict of interest scenarios & issues

Moonlighting

- Payor HEDIS manager requests permission to conduct HEDIS audits for another company during time-off. Audits will be performed on unrelated companies and not direct competitors. Supervisor believes activity will improve the employee’s knowledge for his Payor responsibilities.

- Payor nurse works for another Payor as a UR coordinator. The Payors are not direct competitors because they operate in different states.

- Payor claim processor works for a physician’s office doing general administrative work on weekends.
Conflict of interest scenarios & issues

Investment and Ownership Interests

- Payor employee has restricted stock from prior employer, ABC Consulting, which is also a vendor to the current employer. Employee’s responsibilities includes defining and coordinating ABC Consulting’s work for Payor. Stock restrictions will continue for 12 months.

- Employee’s spouse is a partner in a law firm. Although the spouse agrees not to participate in any matters involving the Payor, his firm would like to represent the Payor.
Conflict of interest scenarios & issues

Outside directorships or memberships

- For profit corporation that does - or could do - business with employer.

- Local non-profit hospital.

- Local charitable organization that does not compete or do business with Payor but that solicits the business community, including Payor, for program support.

- Effect on resolution for each if directors receive payment or stock grants/options.
Conflict of interest scenarios & issues

Political Activities

- Employee wearing shirt with company logo at planned parenthood rally or universal payor ballot initiative

- Employee or employee’s family member running for state legislature and health care coverage is major issue in race.
Conflict of interest scenarios & issues

Family Members

- Prospective candidate for a position is the child of a board member or member of senior management.

- One of two siblings who worked in the same department is promoted to a management position and the other sibling now directly or indirectly reports to the promoted sibling.

- Immediate family member works for a vendor seeking business from Payor.
  - Does size of vendor matter? For example, family member works for Staples/Office Max v. small (possibly family owned) office supply company.
Conflict of interest scenarios & issues

Vendors

- Business Courtesies
  - Vendor candidate offers/provides gifts or entertainment to the staff responsible for making vendor selections.
  - Vendor sponsors site visit.
  - Potential vendor sponsors site visit to review its bid.
  - Vendor offers to pay for staff to attend substantive conference that will be highly beneficial to attending staff.
  - Vendor candidate offers to pay for staff to attend substantive conference that will be highly beneficial to attending staff.

- Conflict disclosure requirement in RFPs
  - What should be requested?
  - Is disclosure enough?
  - Ethical walls
Conflict of interest scenarios & issues

Honoraria

- Speaking
  - Actual vendor
  - Potential vendor
  - No direct or indirect relationship with employer
- Attending conference
  - Actual vendor
  - Potential vendor
- Own time/company time
Conflict of interest scenarios & issues

- Pharmaceutical, Medical Device and Biotech Industry Funding
  - Clinical studies
  - Education grants
  - Speakers list
  - Clinical staff education
  - Formulary modification
Conclusion

- Actual, potential, perceived, and indirect conflicts of interest are pervasive, numerous and complex
- Broadcast company policy to create expectations
- Have a process in place to identify and resolve conflicts of interest
- Involve appropriate people in resolution
- Be uniform and consistent
- Organization interests #1, personal interests #2
- Use the “headline” test