

FEDERAL AND STATE STATUTES RELATING TO FALSE CLAIMS, FRAUDULENT PRACTICES AND TO WHISTLEBLOWER PROTECTIONS

Following is a brief summary of federal and New York State laws regarding false claims and whistleblower protections, as well as the Anti-Kickback laws and regulations and Civil Monetary Penalties law.

FALSE CLAIMS STATUTES

FEDERAL LAWS

The Federal False Claims Act (31 U.S.C. §§ 3729-3733)

The federal False Claims Act ("FCA") provides, in pertinent part, that:

(1) (a) In general. Subject to Paragraph (2), any person who -

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (C) conspires to commit a violation of subparagraphs (A), (B), (D), ... or (G); (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;... or (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

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is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced Damages.

If the court finds that - (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information; (B) such person fully cooperated with any Government investigation of such violation; and (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.

A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.

For purposes of this section:

(1) the terms "knowing" and "knowingly" (A) mean that a person, with respect to information - (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information; and (B) require no proof of specific intent to defraud;

(2) the term "claim" (A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that - (i) is presented to an officer, employee, or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government (I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

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(d) Exclusion.

This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3729.

While the FCA imposes liability only when the claimant acts "knowingly," it does not require that the person submitting the claim have actual knowledge that the claim is false. A person who acts in reckless disregard or in deliberate ignorance of the truth or falsity of the information also can be found liable under the Act. 31 U.S.C. § 3729(b).

In sum, the FCA imposes liability on any person who submits a claim to the federal government, or submits a claim to entities administering government funds, that he or she knows (or should know) is

false. An example may be a physician who submits a bill to Medicare for medical services she knows she has not provided. The FCA also imposes liability on an individual who may knowingly submit a false record in order to obtain payment from the government. An example of this may include a government contractor who submits records that he knows (or should know) are false and that indicate compliance with certain contractual or regulatory requirements. The third area of liability includes those instances in which someone may obtain money from the federal government to which he may not be entitled, and then uses false statements or records in order to retain the money. An example of this so-called "reverse false claim" may include a health care facility that obtains interim payments from Medicare or Medicaid throughout the year, and then knowingly files a false cost report at the end of the year in order to avoid making a refund to the Medicare or Medicaid program.

In addition to its substantive provisions, the FCA provides that private parties may bring an action on behalf of the United States. 31 U.S.C. § 3730(b). These private parties, known as "qui tam relators," may share in a percentage of the proceeds from an FCA action or settlement.

Section 3730(d)(1) of the FCA provides, with some exceptions, that a qui tam relator, when the government has intervened in the lawsuit, shall receive at least 15 percent but not more than 25 percent of the proceeds of the FCA action depending upon the extent to which the relator substantially contributed to the prosecution of the action. When the government does not intervene, section 3730(d)(2) of the FCA provides that the relator shall receive an amount that the court decides is reasonable and shall be not less than 25 percent and not more than 30 percent.

Administrative Remedies for False Claims (31 U.S.C. §§ 3801–3812)

This statute allows for administrative recoveries by federal agencies. If a person submits a claim that the person knows is false or contains false information, or omits material information, then the agency receiving the claim may impose a penalty of up to \$5,000 for each claim. The agency may also recover twice the amount of the claim.

Unlike the federal FCA, a violation of this law occurs when a false claim is submitted, not when it is paid. Also unlike the federal FCA, the determination of whether a claim is false, and the imposition of fines and penalties, is made by the administrative agency, not by prosecution in the federal court system.

New York False Claims Laws

NEW YORK STATE LAWS

New York State False Claim laws fall under the jurisdiction of both New York's civil and administrative laws as well as its criminal laws. Some apply to recipient false claims and some apply to provider false claims. The majority of these statutes are specific to health care or Medicaid. Yet some of the "common law" crimes apply to areas of interaction with the government and so are applicable to health care fraud.

New York Civil and Administrative Laws

New York False Claims Act (State Finance Law §§ 187-194)

The New York False Claims Act is similar to the federal FCA. It imposes penalties and fines on individuals and entities who knowingly file false or fraudulent claims for payment from any state or local government, including health care programs such as Medicaid. It also has a provision regarding "reverse false claims" similar to the federal FCA, such that a person or entity will be liable in those instances in which the person obtains money from a state or local government to which the person may not be entitled, and then uses false statements or records in order to retain the money.

The penalty for filing a false claim under the New York False Claims Act is \$6,000-\$12,000 per claim, plus three times the amount of the damages which the state or local government sustains because of the act of that person. In addition, a person who violates this act is liable for costs, including attorneys' fees, of a civil action brought to recover any such penalty.

The New York False Claims Act allows private individuals to file lawsuits in state court, just as if they were state or local government parties. If the suit eventually concludes with payments back to the government, the person who started the case can recover 25%-30% of the proceeds if the government did not participate in the suit; or 15%-25% if the government did participate in the suit.

Social Services Law § 145-b - False Statements

It is a violation to knowingly obtain or attempt to obtain payment for items or services furnished under any Social Services program, including Medicaid, by use of a false statement, deliberate concealment or other fraudulent scheme or device. The state or the local Social Services district may recover three times the amount incorrectly paid. In addition, the New York State Department of Health may impose a civil penalty of up to \$10,000 per violation. If repeat violations occur within 5 years, a penalty up to \$30,000 per violation may be imposed if the repeat violations involve more serious violations of Medicaid rules, billing for services not rendered, or providing excessive services.

Social Services Law § 145-c - Sanctions

If any person applies for or receives public assistance, including Medicaid, by intentionally making a false or misleading statement, or intending to do so, the needs of the individual or that of his family shall not be taken into account for six months if a first offense, for twelve months if a second offense (or if benefits wrongfully received are at least \$1,000 and no more than \$3,900), for eighteen months if a third offense (or if benefits wrongfully received are in excess of \$3,900), and five years for any subsequent occasion of any such offense.

Criminal Laws

Social Services Law § 145 - Penalties

Any person who submits false statements or deliberately conceals material information in order to receive public assistance, including Medicaid, is guilty of a misdemeanor.

Social Services Law § 366-b - Penalties for Fraudulent Practices

Any person who obtains or attempts to obtain, for himself or others, medical assistance by means of a false statement, concealment of material facts, impersonation or other fraudulent means is guilty of a class A misdemeanor.

Any person who, with intent to defraud, presents for payment any false or fraudulent claim for furnishing services, knowingly submits false information to obtain greater Medicaid compensation, or knowingly submits false information in order to obtain authorization to provide items or services is guilty of a class A misdemeanor.

Penal Law Article 155 - Larceny

The crime of larceny applies to a person who, with intent to deprive another of his property, obtains, takes or withholds the property by means of trick, embezzlement, false pretense, false promise, including a scheme to defraud, or other similar behavior. It has been applied to Medicaid fraud cases.

Fourth degree grand larceny involves property valued over \$1,000. It is a class E felony.

Third degree grand larceny involves property valued over \$3,000. It is a class D felony.

Second degree grand larceny involves property valued over \$50,000. It is a class C felony.

First degree grand larceny involves property valued over \$1 million. It is a class B felony.

Penal Law Article 175 - False Written Statements

Four crimes in this Article relate to filing false information or claims and have been applied in Medicaid fraud prosecutions:

§ 175.05 - Falsifying business records involves entering false information, omitting material information or altering an enterprise's business records with the intent to defraud. It is a class A misdemeanor.

§ 175.10 - Falsifying business records in the first degree includes the elements of the §175.05 offense and includes the intent to commit another crime or conceal its commission. It is a class E felony.

§ 175.30 - Offering a false instrument for filing in the second degree involves presenting a written instrument (including a claim for payment) to a public office knowing that it contains false information. It is a class A misdemeanor.

§ 175.35 - Offering a false instrument for filing in the first degree includes the elements of the second degree offense and must include an intent to defraud the state or a political subdivision. It is a class E felony.

Penal Law Article 176 - Insurance Fraud

This law applies to claims for insurance payments, including Medicaid or other health insurance and it includes six crimes.

Insurance fraud in the 5th degree involves intentionally filing a health insurance claim knowing that it is false. It is a class A misdemeanor.

Insurance fraud in the 4th degree is filing a false insurance claim for over \$1,000. It is a class E felony.

Insurance fraud in the 3rd degree is filing a false insurance claim for over \$3,000. It is a class D felony.

Insurance fraud in the 2nd degree is filing a false insurance claim for over \$50,000. It is a class C felony.

Insurance fraud in the 1st degree is filing a false insurance claim for over \$1 million. It is a class B felony.

Aggravated insurance fraud is committing insurance fraud more than once. It is a class D felony.

Penal Law Article 177 - Health Care Fraud

This statute primarily applies to claims for health insurance payments, including Medicaid, and contains five crimes:

Health care fraud in the 5th degree - a person is guilty of this crime when, with intent to defraud a health plan, he or she knowingly and willfully provides material false information or omits material information for the purpose of requesting payment from a health plan. It is a class A misdemeanor.

Health care fraud in the 4th degree - a person is guilty of this crime upon filing such false claims on more than one occasion and annually receiving more than \$3,000. It is a class E felony.

Health care fraud in the 3rd degree - a person is guilty of this crime upon filing such false claims on more than one occasion and annually receiving over \$10,000. It is a class D felony.

Health care fraud in the 2nd degree - a person is guilty of this crime upon filing such false claims on more than one occasion and annually receiving over \$50,000. It is a class C felony.

Health care fraud in the 1st degree - a person is guilty of this crime upon filing such false claims on more than one occasion and annually receiving over \$1 million. It is a class B felony.

WHISTLEBLOWER PROTECTIONS

Federal False Claims Act (31 U.S.C. § 3730(h))

The federal FCA provides protection to qui tam relators (individuals who commence a False Claims action) who are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the FCA. 31 U.S.C. 3730(h). Remedies include reinstatement with comparable seniority as the qui tam relator would have had but for the discrimination, two times the amount of any back pay,

interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

New York False Claims Act (State Finance Law § 191)

The New York State False Claims Act also provides protection to qui tam relators who are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the Act. Remedies include reinstatement with comparable seniority as the qui tam relator would have had but for the discrimination, two times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

New York Labor Law § 740

An employer may not take any retaliatory action against an employee if the employee discloses information about the employer's policies, practices or activities to a regulatory, law enforcement or other similar agency or public official. Protected disclosures are those that assert that the employer is in violation of a law that creates a substantial and specific danger to the public health and safety or which constitutes health care fraud under Penal Law § 177 (knowingly filing, with intent to defraud, a claim for payment that intentionally has false information or omissions). The employee's disclosure is protected only if the employee first brought up the matter with a supervisor and gave the employer a reasonable opportunity to correct the alleged violation. If an employer takes a retaliatory action against the employee, the employee may sue in state court for reinstatement to the same, or an equivalent position, any lost back wages and benefits and attorneys' fees. If the employer is a health provider and the court finds that the employer's retaliatory action was in bad faith, it may impose a civil penalty of \$10,000 on the employer.

New York Labor Law § 741

A health care employer may not take any retaliatory action against an employee if the employee discloses certain information about the employer's policies, practices or activities to a regulatory, law enforcement or other similar agency or public official. Protected disclosures are those that assert that, in good faith, the employee believes constitute improper quality of patient care. The employee's disclosure is protected only if the employee first brought up the matter with a supervisor and gave the employer a reasonable opportunity to correct the alleged violation, unless the danger is imminent to the public or patient and the employee believes in good faith that reporting to a supervisor would not result in corrective action. If an employer takes a retaliatory action against the employee, the employee may sue in state court for reinstatement to the same, or an equivalent position, any lost back wages and benefits and attorneys' fees. If the employer is a health provider and the court finds that the employer's retaliatory action was in bad faith, it may impose a civil penalty of \$10,000 on the employer.

ANTIKICKBACK LAWS AND CIVIL MONETARY PENALTIES LAW

Federal Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b))

Under the federal Anti-Kickback Statute:

(b) (1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

(2) whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person--

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b(b).

In sum, the federal Anti-Kickback Law imposes criminal penalties on any person that knowingly and willfully solicits, receives, offers, or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind, to any person, in return for or to induce such person to do either of the following: refer an individual to a person for the furnishing or arranging for the furnishing of an item or service for which payment may be made in whole or in part under a federal health care program, or purchase, lease, order, or arrange for or recommend the purchasing, leasing, or ordering of any good, facility, service, or item for which payment may be made in whole or in part under a federal health care program. Not all interactions encompassed by the broad scope of the statute, however, violate the statute. There are statutory exceptions to the prohibition for certain types of activities.

New York State Anti-Kickback Laws and Regulations

Social Services Law § 366-d.

The statute applies to all providers in the New York Medicaid program and prohibits such providers from soliciting, receiving, accepting or agreeing to receive or accept or offer, agree to give or give any payment or other consideration in any form from another person to the extent such payment or other consideration is given: (a) for the referral of services for which Medicaid payment is made; or (b) to purchase, lease or order any good, facility, service or item for which payment is made under the Medicaid program.

While the statute does not enumerate any "safe harbors," subsection 2(d) specifically states that the prohibition "shall not apply to any activity specifically exempt by federal statute or federal regulations promulgated thereunder." A violation of the statute is either a misdemeanor or felony depending upon whether the defendant obtains money and/or property in violation of the statute and, if so, the amount obtained.

Social Services Law § 366-f.

The statute provides that no person acting in concert with a Medicaid provider may solicit, receive, accept or agree to receive or accept or offer, agree to give or give any payment or other consideration in any form from another person to the extent such payment or other consideration is given: (a) for the referral of services for which Medicaid payment is made; or (b) to purchase, lease or order any good, facility, service or item for which payment is made under the Medicaid program. The statute specifically exempts from the prohibition any activity exempt by federal statute or regulation. A violation of the statute is a misdemeanor punishable by imprisonment or a fine of \$10,000 or double the amount of gain attributable to the violation. If the violation results in the individual obtaining money or funds in excess of \$7,500, such violation is a class E felony.

18 N.Y.C.R.R. § 515.2

This regulation lists unacceptable practices under the Medicaid program, including: (a) directly or indirectly soliciting or receiving any payment, or offering or paying any payment, in cash or in kind, in return for referring a client for medical care, services or supplies for which payment is claimed under the medical assistance program, and (b) purchasing, leasing, ordering or recommending any medical care, services or supplies for which payment is claimed under the medical assistance program.

10 N.Y.C.R.R. §29.1(3)

Section 29.1 of Title 10 of the NYCRR defines professional misconduct of professionals under the New York State Education Law. Included in the specific listing of practices or activities constituting misconduct is the direct or indirect "offering, giving, soliciting, or receiving or agreeing to receive, any fee or other consideration to or from a third party for the referral of a patient or client or in connection with the performance of professional services." 10 NYCRR §29.1(13). Any professional in violation of this regulation shall be subject to the penalties that includes censure and reprimand, fines (up to \$10,000 for each violation), suspensions and/or probationary terms.