F6: Compliance with Federal and State False Claims Laws: Overview of the Laws Regarding False Claims and Whistleblower Protections

BACKGROUND/PURPOSE

Community Home Health Care ("the Agency") is committed to complying with the requirements of Section 6032 of the Federal Deficit Reduction Act of 2005, and preventing and detecting any fraud, waste, or abuse. To this end, the Agency maintains a Compliance Program and strives to educate its work force on fraud and abuse laws, including the importance of submitting accurate claims and reports to the Federal and State governments. The Agency has instituted various procedures, which are set forth in our Compliance Manual and various Compliance Program policies and procedures, to ensure compliance with these laws and to assist us in preventing fraud, waste and abuse in Federal health care programs. In furtherance of this policy and to comply with the Deficit Reduction Act, the Agency disseminates this policy to all personnel
(including management, contractors and other agents) to ensure that such persons are aware of certain relevant Federal and State laws, and that submission of a false claim can result in significant administrative and civil penalties under the Federal False Claims Act and other Federal and New York State laws.

POLICY

To assist the Agency in meeting its legal and ethical obligations, any personnel who reasonably suspects or is aware of the preparation or submission of a false claim or report or any other potential fraud, waste, or abuse related to a Federally or State funded health care program is required to report such information to the Compliance Officer. Any personnel who report such information will have the right and opportunity to do so anonymously and will be protected against retaliation and intimidation for coming forward with such information both under our internal Compliance Program policies and procedures and Federal and State law. However, the Agency retains the right to take appropriate action against any personnel who has participated in a violation of Federal or State law or the Agency's Compliance Program.

The Agency is committed to investigating any suspicions of fraud, waste, or abuse swiftly and requires all personnel to assist in such investigations. Corrective action will be promptly and thoroughly implemented, as necessary and appropriate. Failure to report or assist in an investigation or resolution of fraud and abuse is a breach of the personnel's obligations to the Agency and may result in disciplinary action, up to, and including termination of employment or affiliation with the Agency.

RELEVANT LAWS:

I. FEDERAL LAWS

A. <u>The Federal False Claims Act (31 USC §§ 3729-3733)</u>

The False Claims Act ("FCA") provides, in pertinent part, as follows:

§ 3729. False claims

a. Liability for certain acts.

1. **In General** – Subject to paragraph (2), any person who -
   - Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
   - Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
   - Conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
   - 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;
   - Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
   - Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
   - 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, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461) [1] 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 -
   - The person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all

[1] Although the statutory provisions of the Federal False Claims Act authorizes a range of penalties of from between $5,000 and $10,000, those amounts have been adjusted for inflation and increased by regulation to not less than $11,803 and not more than $23,607 for penalties assessed after December 13, 2021, whose associated violations occurred after November 2, 2015. *See 28 C.F.R. §85.5*.

information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

- 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 -
     - Has actual knowledge of the information;
     - Acts in deliberate ignorance of the truth or falsity of the information; or
     - 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 -
     - Is presented to an officer, employee, or agent of the United States; or
     - 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—
       - ➢ Provides or has provided any portion of the money or property requested or demanded; or
       - ➢ Will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and
   - **B.** Does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

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.

c. Exemption from disclosure.--Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

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

While the False Claims Act 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 False Claims Act 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 False Claims Act 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 hospital which 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) 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.

B. Administrative Remedies for False Claims (31 USC Chapter 38. §§ 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, the agency receiving the claim may impose a penalty of up to $5,000 for each claim.[2] The agency may also recover twice the amount of the claim.

Unlike the False Claims Act, a violation of this law occurs when a false claim is submitted rather than when it is paid. Also unlike the False Claims Act, 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.

II. NEW YORK STATE LAWS

New York's false claims laws fall into two categories: civil and administrative; and criminal laws. Some apply to recipient false claims and some apply to provider false claims, and while most are specific to healthcare or Medicaid, some of the "common law" crimes apply to areas of interaction with the government.

A. Civil and Administrative Laws

1. NY False Claims Act (State Finance Law, §§187–194)

The NY False Claims Act closely tracks the federal False Claims Act. It imposes penalties and fines on individuals and entities that file false or fraudulent claims for payment from any state or local government, including health care programs such as Medicaid. The penalty for filing a false claim is equal to the amount that may be imposed under the federal FCA (as may be adjusted for inflation) and the recoverable damages are between two and three times the value of the amount falsely received. In addition, the false claim filer may have to pay the government's legal fees.

The 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.

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[2] Although the statutory provisions of the Program Fraud Civil Remedies Act authorize a penalty up to $5,000, that amount has been adjusted for inflation and increased by regulation to not more than $11,803 for penalties assessed after December 13, 2021, whose associated violations occurred after November 2, 2015. *See 28 C.F.R. §85.5.*

2. **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 Department of Health may impose a civil penalty of up to ten thousand dollars per violation. If repeat violations occur within five years, a penalty of up to thirty thousand dollars 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.

3. **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 the purpose of determining his or her needs or that of his family for six months if a first offense, for twelve months if a second offense (or if benefits wrongfully received are at least one thousand dollars but not more than three thousand nine hundred dollars), for eighteen months if a third offense (or if benefits wrongfully received are in excess of three thousand nine hundred dollars), and five years for any subsequent occasion of any such offense.

B. Criminal Laws

1. **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.

2. **Social Services Law § 366-b – Penalties for Fraudulent Practices**
   a. 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.
   b. Any person who, with intent to defraud, presents for payment and 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.

3. **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.
   - **a.** Fourth degree grand larceny involves property valued over $1,000. It is a Class E felony.
   - **b.** Third degree grand larceny involves property valued over $3,000. It is a Class D felony.
   - **c.** Second degree grand larceny involves property valued over $50,000. It is a Class C felony.
   - **d.** First degree grand larceny involves property valued over $1 million. It is a Class B felony.

4. **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:
   - **a.** § 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.
   - **b.** § 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.
   - **c.** § 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.
   - **d.** § 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.

5. **Penal Law Article 176 – Insurance Fraud**
   Applies to claims for insurance payment, including Medicaid or other health insurance and contains six crimes.
   - **a.** Insurance Fraud in the 5th degree involves intentionally filing a health insurance claim knowing that it is false. It is a Class A misdemeanor.
   - **b.** Insurance fraud in the 4th degree is filing a false insurance claim for over $1,000. It is a Class E felony.
   - **c.** Insurance fraud in the 3rd degree is filing a false insurance claim for over $3,000. It is a Class D felony.
   - **d.** Insurance fraud in the 2nd degree is filing a false insurance claim for over $50,000. It is a Class C felony.

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

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

6. Penal Law Article 177 – Health Care Fraud

Applies to claims for health insurance payment, including Medicaid, and contains five crimes:

a. Health care fraud in the 5th degree is knowingly filing, with intent to defraud, a claim for payment that intentionally has false information or omissions. It is a Class A misdemeanor.

b. Health care fraud in the 4th degree is filing false claims and annually receiving over $3,000 in aggregate. It is a Class E felony.

c. Health care fraud in the 3rd degree is filing false claims and annually receiving over $10,000 in the aggregate. It is a Class D felony.

d. Health care fraud in the 2nd degree is filing false claims and annually receiving over $50,000 in the aggregate. It is a Class C felony.

e. Health care fraud in the 1st degree is filing false claims and annually receiving over $1 million in the aggregate. It is a Class B felony.

III. WHISTLEBLOWER PROTECTIONS

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

The Federal False Claims Act 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.

B. NY False Claim Act (State Finance Law §191)

The New York State False Claim Act also 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 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.

C. <u>New York Labor Law §740</u>

Labor Law Section 740 prohibits the taking of "retaliatory" action by an employer against an employee (including former employees and natural persons working as independent contractors), whether or not the employee is acting within the scope of his or her job duties, because the employee does any of the following:

a. Discloses or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation or that the employee reasonably believes poses a substantial and specific danger to the public health or safety; [3]

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such activity, policy or practice by such employer; or

c. Objects to, or refuses to participate in, any such activity, policy or practice.

Under Section 740, "retaliatory action" is defined to mean an adverse action taken by an employer or his or her agent to discharge, threaten, penalize, or in any other manner discriminate against any employee or former employee exercising his or her rights under Section 740. This includes: (i) adverse employment actions or threats to take such adverse employment actions against an employee in the terms of conditions of employment (including but not limited to discharge, suspension, or demotion); (ii) actions or threats to take such actions that would adversely impact a former employee's current or future employment; or (iii) threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member.

If an employer takes a retaliatory action against the employee, the employee may bring a civil action within two years after the alleged retaliatory action was taken. The parties to such an action are entitled to a jury trial. A court may order: an injunction to restrain continued violation of the law; the reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position, or "front pay;" the reinstatement of full fringe benefits and seniority rights; the compensation for lost wages, benefits and other remuneration; the payment by the employer of reasonable costs, disbursements and attorneys' fees; a civil penalty not to exceed $10,000; and/or the payment by the employer of punitive damages, if the violation was willful, malicious or wanton.

D. <u>New York Labor Law §741</u>

Labor Law Section 741 prohibits certain defined health care employers from taking "retaliatory action" against an employee because the employee does any of the following:

[3] The employee's disclosure under this provision will only be protected if the employee first made a good faith effort to notify his or her employer.

a. discloses or threatens to disclose to a supervisor, to a public body, to a news media outlet, or to a social media forum available to the public at large, an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or improper quality of workplace safety; or

b. objects to, or refuses to participate in, any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or improper quality of workplace safety.

Section 741 defines "retaliatory action" to mean the discharge, suspension, demotion, penalization or discrimination against an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.

An employee will not be protected under Section 741 unless he or she has brought the improper quality of patient care or improper quality of workplace safety to the attention of a supervisor and has afforded the employer a reasonable opportunity to correct the activity, policy or practice.

However, such notice and opportunity to correct is not required in connection with disclosures or threats to disclose an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or improper quality of workplace safety where it presents an imminent threat to public health or safety or to the health of a specific patient or specific health care employee and the employee reasonably believes in good faith that reporting to a supervisor would not result in corrective action.

The same relief and enforcement provided for under Labor Law Section 740 (described above) are applicable to retaliatory actions under Section 741.