

COUNTY OF ORANGE

False Claims Act **and** **Whistleblower Provisions** **Policy and Procedures**

COUNTY OF ORANGE

FALSE CLAIMS ACT
AND
WHISTLEBLOWER PROVISIONS

POLICY AND PROCEDURES

I. Purpose. The County of Orange (“County”) is committed to prompt, complete, and accurate billing of all services provided to individuals. The County and its employees, contractors, consultants, and agents shall not make or submit any false or misleading entries on any claim forms. No employee, contractor, consultant, or agent shall engage in any arrangement or participate in such arrangement at the direction of another person, including any supervisor or manager that results in the submission of a false or misleading entry on claim forms or documentation of services that result in the submission of a false claim.

II. Policy. It is the policy of the County to detect and prevent fraud, waste, and abuse in federal healthcare programs. This policy explains the Federal False Claims Act (31 U.S.C. §§ 3729-3733), the Administrative Remedies for False Claims (31 U.S.C. §§ 3801-3812), the New York State False Claims Act (State Finance Law §§ 187-194), and other New York State laws concerning false statements or claims and employee protections against retaliation. This policy also sets forth the procedures the County has put into place to prevent any violations of federal or state laws regarding fraud or abuse in its healthcare programs.

III. Federal Laws.

A. Federal False Claims Act (31 U.S.C. §§ 3729-3733). The False Claims Act ("FCA") provides, in pertinent part, that: (a) *Any person who* (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim paid or approved by the Government; . . . or (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease 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, plus three (3) times the amount of damages which the Government sustains because of the act of that person(b) For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information (1) has actual knowledge

of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

31 U.S.C. § 3729. 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 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 that obtains interim payments from Medicare 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 program.

B. 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 False Claims Act, a violation of this law occurs when a false claim is submitted, not 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.

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 tarn* 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 tarn* relator, when the Government has intervened in the lawsuit, shall receive at least fifteen percent (15%) but not more than twenty-five percent (25%) 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,

§3730(d)(2) provides that the relator shall receive an amount that the court decides is reasonable and shall be not less than twenty-five percent (25%) and not more than thirty percent (30%).

IV. New York State Laws. New York's false claims laws fall into two (2) 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. New York False Claims Act (State Finance Law, §§ 187-194).** The New York 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 \$6,000 - \$12,000 per claim 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 twenty-five to thirty percent (25-30%) of the proceeds if the government did not participate in the suit and fifteen to twenty-five percent (15-25%) if the government did participate in the suit.

- 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 (3x) the amount incorrectly paid. In addition, the Department of Health may impose a civil penalty of up to \$2,000 per violation. If repeat violations occur within five (5) years, a penalty up to \$7,500 per violation may be imposed if they 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 (6) months if a first offense, or twelve (12) months if a second offense (or if benefits received are at least \$1,000, but not more than \$3,900), for eighteen (18) months if a third offense) or if benefits wrongfully received are in excess of \$3,900), and five (5) years for any subsequent occasion of 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.** § 155.30, Fourth degree grand larceny involves property valued over \$1,000. It is a Class E felony.
 - b.** § 155.35, Third degree grand larceny involves property valued over \$3,000. It is a Class D felony.
 - c.** § 155.40, Second degree grand larceny involves property valued over \$50,000. It is a Class C felony.
 - d.** § 155.42, 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.** This Article applies to claims for insurance payment, including Medicaid or other health insurance and contains six (6) crimes,
 - a. § 176.10, 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. § 176.15, Insurance fraud in the 4th degree is filing a false insurance claim for over \$1,000. It is a Class E felony.
 - c. § 176.20, Insurance fraud in the 3rd degree is filing a false insurance claim for over \$3,000. It is a Class D felony.
 - d. § 176.25, Insurance fraud in the 2nd degree is filing a false insurance claim for over \$50,000. It is a Class C felony.
 - e. § 176.30, Insurance fraud in the 1st degree is filing a false insurance claim for over \$1 million. It is a Class B felony.
 - f. § 176.35, Aggravated insurance fraud is committing insurance fraud more than once. It is a Class D felony.
- 6. **Penal Law Article 177, Health Care Fraud.** This Article applies to claims for health insurance payment, including Medicaid, and contains five (5) crimes:
 - a. § 177.05, 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. § 177.10, 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. § 177.15, 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. § 177.20, 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. § 177.25, 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.

V. Whistleblower Protection.

- A. **Federal False Claims Act (31 U.S.C. § 3730(h)).** The FCA provides protection to *qui tarn* 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 FCA. 31 U.S.C. § 3730(h). Remedies include reinstatement with comparable seniority as the *qui tarn* relator would have had but for the discrimination, two (2) 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. New York False Claim Act (State Finance Law § 191).** The False Claim Act also provides protection to *qui tarn* 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 tarn* relator would have had but for the discrimination, two (2) 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. 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.
- D. 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.

VI. Procedures.

- A. Training.** The County will provide training / education in this policy and procedure to all its employees, contractors, consultants, and agents. This training will be provided to

all new employees as part of the new employee orientation. This policy shall be mailed to all contractors, consultants, and agents.

- B. Reporting.** Any employee, contractor, consultant, or agent, who has any reason to believe that anyone is engaging in false billing practices or false documentation of services, is expected to report the practice to their immediate supervisor, their department's Corporate Compliance Officer, if any, or their department's Commissioner or Deputy Commissioner. Reports may be made anonymously by mailing an unsigned copy of a document detailing the suspected fraud to one of the foregoing individuals.
- C. Agency Response.** Detected false billing practices or false documentation of services will be responded to in an expedient manner. The County is dedicated to the resolution of such matters and will take all reasonable steps to prevent further similar violations.
- D. Retaliation Prohibited.** Any form of retaliation against any employee who reports a perceived problem or concern in good faith is strictly prohibited. Any employee who commits or condones any form of retaliation will be subject to discipline up to, and including, termination.