

## **False Claims Act**

The False Claims Act (“Act”) 1 is a federal law that covers fraud involving any federally funded contract or program, including Medicare and Medicaid, with the exception of tax fraud. The Act prohibits any person from knowingly submitting or conspiring with others to submit or cause a false or fraudulent claim for payment or approval by the Federal Government.

Health care providers can be prosecuted for a wide variety of conduct that leads to the submission of a fraudulent claim, such as falsifying records, double-billing for items or services, submitting bills for services never performed or items never furnished, or knowingly or causing with deliberate disregard up-coding (the practice of billing for a more highly reimbursed service or product than the one provided).

The *Fraud Enforcement and Recovery Act of 2009* Public Law 111-21), or FERA, contains the first significant expansions to the federal civil False Claims Act affecting hospitals and health care providers that receive funds from the federal government directly or as part of downstream payment in a federal program. The definition of a “claim” in the False Claims Act now includes requests for funds to a contractor, grantee or other recipient. The claim is no longer just to the government but also to anyone that receives funds from the government that is expected to be “spent or used on the Government’s behalf or to advance a Government program or interest.” A person is now liable if she/he 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.

The Patient Protection and Affordable Care Act (PPACA), effective March 23, 2010, modified the “reverse false claims” provision adding new liability and risk related to overpayments from government payors. Overpayments must be reported and returned by 60 days after the date on which the overpayment is identified or by the date any corresponding cost report is due.

- 1) Penalties:** Health care providers and suppliers who violate the Act are liable for civil penalties ranging from \$5,500 to \$11,000 for each false claim, plus up to three times the amount of damages sustained by the Federal Government. The provider or supplier may also be excluded from participation in federal health care programs.
- 2) Qui Tam Provisions:** One of the unique aspects of the Act is the qui tam provision, commonly referred to as the whistleblower provision. This provision allows any individual with actual knowledge of the alleged false claims, known as a “relator”, to file lawsuit on behalf of the Federal Government as a whistleblower. To qualify as whistleblower under these

provisions, an individual must have direct and independent knowledge of the information on which the allegations are based and must voluntarily provide the information to the Federal Government before filing an action under the Act. This is called a *qui tam* action. The individual must file the lawsuit on behalf of the government in federal district court. The lawsuit is kept confidential while the government reviews and investigates the allegations contained in the lawsuit and decides how to proceed. FERA grants greater latitude for the Department of Justice (DOJ) to issue subpoenas and to share information with whistleblowers and state and local governments.

If the government decides the lawsuit has merit, the government may intervene or join in the lawsuit. If the government decides not to join in the lawsuit, the individual may still continue with the lawsuit on his or her own.

If the lawsuit is successful, an individual may receive an award ranging from 15 to 30 percent of the amount recovered by the government and may also be entitled to reasonable expenses, including attorney's fees. However, this is reduced or nullified if the individual is found to have planned or initiated the violation. Further, the individual may be held liable for the defendant's attorney's fees if it is a frivolous claim.

- 3) Non-retaliation for whistleblowers:** An individual bringing a lawsuit under the Act as a whistleblower is offered a number of protections under federal law. Any employee who is discharged, demoted, harassed, or otherwise discriminated against because of lawful acts by the employee in furtherance of an action under the Act is entitled to any relief necessary to make the employee whole. FERA extends anti-retaliation protection to contractors and agents.
  
- 4) Administrative Remedies for False Claims:** The Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. sec. 3801, et. seq., provides for administrative remedies against persons who make, or cause to be made, a false claim or written statement to certain federal agencies, including the Department of Health and Human Services. The PFCRA was enacted as a means to address lower dollar frauds, and generally applies to claims of \$150,000 or less. The PFCRA provides that any person who makes, presents, or submits, or causes to be made, presented or submitted a claim that the person knows or has reason to know is false, fictitious, or fraudulent is subject to civil money penalties of up to \$5,000 per false claim or statement and up to twice the amount claimed in lieu of damages. Violations are investigated by the Office of Inspector General and enforcement actions must be approved by the

U.S. Attorney General. The PFCRA enforcement can begin with a hearing before an administrative law judge. Penalties may be recovered through a civil action brought by the U.S. Attorney General or through an administrative offset against “clean” claims. Because of the availability of other criminal, civil, and administrative remedies, cases are not routinely prosecuted under this civil remedies act.

**5) State laws:** Although the state of Arizona does not have its own “False Claims Act”, there are a number of state laws that apply to filing fraudulent claims with the government.

**A.** It is unlawful for a person to make a claim to the state, the AHCCCS administration, or a contractor for an item or service the person knows was not provided, is false or fraudulent, or may not be made by the health care system for specified reasons such as medical necessity. §§36-2918, 36-2957, A.R.S.

**B.** A person who knowingly obtains services or property of another person commits theft and is guilty of a felony, except where the amount involved is less than \$1,000, in which case the theft is generally a misdemeanor. A.R.S. §13-1802.

A person commits forgery and is guilty of a felony if, with intent to defraud, a person: (1) falsely makes, completes or alters a written instrument; or (2) knowingly possesses a forged instrument; or (3) offers or presents, whether accepted or not, a forged instrument or one that contains false information. A.R.S. §13-2002.

A person who knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions upon any other person is guilty of a felony. A.R.S. §13-2310.

In any matter related to the business conducted by any department or agency of the state or any political subdivision thereof, any person who, pursuant to a scheme to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains any false, fictitious or fraudulent statement or entry is guilty of a felony. A.R.S. §13-2311.

**C.** An employee can make a claim against an employer if that employee is terminated in retaliation for disclosing information in a reasonable manner that the employer or an employee of the employer has violated the law. §23-1501, A.R.S. 4)

**D.** It is a felony offense for a person to knowingly offer, deliver, receive or accept compensation in any form for referring a patient, client or customer to any individual, pharmacy, laboratory, clinic or health care institution providing medical or health-related services or items. §13-3713, A.R.S.