

## FEDERAL LAWS RELATING TO FRAUD, WASTE AND ABUSE

### **FEDERAL CIVIL FALSE CLAIMS ACT**

The federal civil False Claims Act, 31 U.S.C. § 3729, *et seq.*, (“FCA”) was originally enacted in 1863 to combat fraud perpetrated by defense contractors against the United States government during the Civil War. The current version of the FCA was enacted in 1982 and was amended in 1986; however, the FCA’s purpose, to protect the United States government from fraud and abuse, remains unchanged.

The FCA prohibits any “person” from:

- Knowingly submitting a false or fraudulent claim for payment to the federal government or causing such a claim to be submitted;
- Knowingly making or using a false record or statement to secure payment from the federal government for a false or fraudulent claim or causing such a false record or statement to be made or used; or
- Conspiring to get a false or fraudulent claim paid by the federal government.

The FCA specifically states that a person acts “knowingly” when that person: (1) has actual knowledge of the information, (2) deliberately ignores the truth or falsity of the information, or (3) recklessly disregards the truth or falsity of the information. The FCA also defines the term “claim” as any request or demand for money or property where the United States government provides any portion of the money or property which is requested or demanded.

A person who has violated the FCA must repay all of the falsely-obtained reimbursement and is liable for a civil penalty of up to \$11,000 and three times the amount of actual damages the federal government sustained for each false claim that was submitted. In addition, a person who has violated the FCA may be terminated from participation in federal health care programs, including the Medicare and Medicaid programs.

Both the United States Attorney General and private citizens may bring lawsuits alleging a violation of the FCA. When brought by private citizens, these actions are known as *qui tam* lawsuits, and the citizens who file these suits are known as “whistleblowers.” When a *qui tam* action is brought, the government may choose to intervene and exercise primary responsibility for prosecuting, dismissing, or settling the claim. If the government declines to intervene, the whistleblower can pursue the suit individually. As a reward for filing the action, a *qui tam* whistleblower may receive 10-30% of the sum recovered for the government, in addition to attorneys’ fees and other expenses. Alternatively, if a court determines that a whistleblower’s suit was frivolous or brought primarily to harass the defendant, the whistleblower will have to reimburse the defendant for the fees and costs it spent defending the lawsuit.

The FCA offers “whistleblower protection” to employees who bring suit pursuant to the FCA. If these employees are discharged, demoted, suspended, threatened, harassed, or discriminated against because of their involvement in an FCA claim, the employee may bring suit against his or her employer. A court may then determine that the employee is entitled to reinstatement, twice the amount of back pay plus interest, attorneys’ fees, and other costs and expenses.

As previously noted, the FCA has limited application to state agencies, including SCHAs. While state agencies may be subject to FCA lawsuits filed by the United States Attorney General, the United States Supreme Court has determined that state agencies cannot be sued by whistleblowers.

## **FEDERAL PROGRAM FRAUD CIVIL REMEDIES ACT**

The Program Fraud Civil Remedies Act of 1986, 31 U.S.C. § 3801, *et seq.*, ("PFCRA") imposes administrative remedies against a person who presents or causes to be presented a claim or written statement that the person knows or has reason to know is false to certain federal agencies, including the United States Department of Health and Human Services. The PFCRA states that a person "knows or has reason to know" that a claim or statement is false if the person: (1) has actual knowledge that the claim or statement is false, fictitious, or fraudulent, (2) deliberately ignores the truth or falsity of the claim or statement, or (3) acts in reckless disregard of the truth or falsity of the claim or statement. The PFCRA, like the FCA, defines a "claim" as any request or demand for money or property where the United States government provides any portion of the money or property which is requested or demanded.

A person who violates the PFCRA may be assessed civil money penalties of up to \$5,000 per false claim and as much as twice the amount of each claim. The PFCRA generally applies to claims valued at less than \$150,000. Alleged violations of the PFCRA are investigated by the agency to which the false claim was submitted, and enforcement actions may be brought only with the approval of the United States Attorney General.

## **FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009**

On May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 ("FERA") was signed into law. It includes the most significant amendments to the FCA since the 1986 amendments. FERA enacted the following changes:

1. Expanded the scope of potential FCA liability by eliminating the "presentment" requirement (effectively overruling the Supreme Court's opinion in [\*Allison Engine Co. v. United States ex rel. Sanders\*](#), 128 S. Ct. 2123 (2008));
2. Redefined "claim" under the FCA to mean "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 (1) presented directly to the United States, or (2) "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 the government provides or reimburses any portion of the requested funds;
3. Amended the FCA's intent requirement, and now requiring only that a false statement be "material to" a false claim;
4. Expanded conspiracy liability for any violation of the provisions of the FCA;
5. Amended the "reverse false claims" provisions to expand liability to "knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government;"
6. Increased protection for qui tam plaintiffs/relators beyond employees, to include contractors and agents;
7. Procedurally, the government's complaint will now relate back to the qui tam plaintiff/relator's filing;
8. Provided that whenever a state or local government is named as a co-plaintiff in an action, the government or the relator "shall not [be] preclude[d] . . . from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence;"
9. Increased the Attorney General's power to delegate authority to conduct Civil Investigative Demands prior to intervening in an FCA action.

With this revision, the FCA now prohibits knowingly (changes are in bold):

1. Submitting for payment or reimbursement a claim known to be false or fraudulent.
2. Making or using a false record or statement **material to** a false or fraudulent claim **or to an ‘obligation’ to pay money to the government.**
3. Engaging in a conspiracy to defraud by the improper submission of a false claim.
4. **Concealing, improperly avoiding or decreasing an ‘obligation’ to pay money to the government.**

### **SOCIAL SECURITY ACT 1902(a)(68)(A)**

A State plan for medical assistance must provide that any entity that receives or makes annual payments under the State plan of at least \$5,000,000, as a condition of receiving such payments, shall establish written policies for all employees of the entity (including management), and of any contractor or agent of the entity, that provide detailed information about the False Claims Act established under sections 3729 through 3733 of title 31, United States Code, administrative remedies for false claims and statements established under chapter 38 of title 31, United States Code, any State laws pertaining to civil or criminal penalties for false claims and statements, and whistleblower protections under such laws, with respect to the role of such laws in preventing and detecting fraud, waste, and abuse in Federal health care programs(as defined in section [1128B\(f\)](#));

### **STATE LAW RELATING TO FRAUD, WASTE AND ABUSE**

#### **Minnesota Statute § 609.455**

This statute makes it a criminal offense for a public officer or employee to allow or pay any claim or demand made upon the state or subdivision thereof or other governmental instrumentality within the state (which includes SCHAs and the programs which it funds) which the public officer or employee knows is false or fraudulent in whole or in part, and provides that the offender may be sentenced to imprisonment of up to five years and fined up to \$10,000.

#### **Minnesota Statute § 609.465**

This statute makes it a criminal offense for anyone who, with intent to defraud, presents a claim or demand, with knowledge that it is false in whole or in part, for audit, allowance or payment to a public officer or body authorized to make such audit, allowance or payment, and provides that any such person shall be punished in accordance with laws prohibiting attempts to commit theft of public funds.

#### **Minnesota Statute § 609.466**

This statute makes it a criminal offense for anyone who, with intent to defraud, presents a claim for reimbursement, a cost report or a rate application, relating to the payment of medical assistance funds pursuant to chapter 256B, to the state agency, which is false in whole or in part, and provides that such a person is guilty of an attempt to commit theft of public funds and may be sentenced accordingly

#### **Minnesota Statute § 609.2335**

This statute makes it a criminal offense for any person to financially exploit a vulnerable adult, and provides penalties of fines or imprisonment for violators. The crime of “Financial Exploitation of a Vulnerable Adult” is defined to include the intentional failure to use the financial resources of the vulnerable adult to provide food, clothing, shelter, health care, therapeutic conduct, or supervision for the vulnerable adult; or in the absence of legal authority, acquiring possession or control of an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, or duress; or forcing, compelling, coercing, or enticing a vulnerable adult against the vulnerable adult's will to perform services for the profit or advantage of another.

### **Minnesota Statute § 626.557**

This statute is a similar law which requires the mandatory reporting of instances of financial exploitation of a vulnerable adult.

“Financial exploitation” is conduct by an entity or individual caregiver who, in breach of that person's fiduciary duty to the adult, engages in the unauthorized expenditure of funds entrusted by the vulnerable adult which results or is likely to result in detriment to the vulnerable adult; or fails to use the financial resources of the vulnerable adult to provide food, clothing, shelter, health care, therapeutic conduct or supervision for the vulnerable adult, and the failure results or is likely to result in detriment to the vulnerable adult. It also includes conduct by a person (actor) who, in the absence of legal authority, willfully uses, withholds, or disposes of funds or property of a vulnerable adult; obtains for the actor or another the performance of services by a third person for the wrongful profit or advantage of the actor or another to the detriment of the vulnerable adult; acquires possession or control of, or an interest in, funds or property of a vulnerable adult through the use of undue influence, harassment, duress, deception, or fraud; or forces, compels, coerces, or entices a vulnerable adult against the vulnerable adult's will to perform services for the profit or advantage of another.

Any professional or employee of a professional engaged in social services, the care of vulnerable adults, or providing services such as nursing homes, home care, personal care under the Medical Assistance laws, is obligated to immediately report instances of financial exploitation to the responsible authorities. Each county designates a "common entry point" to receive such reports, and the identity of such common entry point can be obtained from the county. A person who makes a good faith report is immune from any civil or criminal liability that might otherwise result from making the report, and is also protected against retaliation. A mandated reporter who fails to make a required report is liable for the damages caused by that failure.

### **MINNESOTA FALSE CLAIMS ACT - Minn. Stat. § 15C.01 et seq.**

Under the Minnesota FCA, a "claim" is broadly defined as any request or demand for money or property made by a contractor to the state. A person violates the Minnesota FCA if he or she knowingly presents a false claim for payment, uses a false record to get a claim paid or approved, or knowingly conspires to defraud the state by submitting a false claim or using a false record to obtain payment.

#### One Must "Knowingly" Submit a False Claim:

The Minnesota FCA, similar to the federal FCA, requires that a person submit a false claim "knowingly." Knowingly means that a person either has actual knowledge of the falsity of the information, or acts in deliberate ignorance or reckless disregard of the truth or falsity of the information. It is important to note that no specific proof of intent to defraud is required to commit a violation of the federal or the Minnesota FCA. In 2013, the Minnesota FCA was amended to provide that a person who acts merely negligently, inadvertently or mistakenly can violate the act, closely resembling the federal FCA.

#### Whistleblowers Can Sue Under the Minnesota FCA:

Similar to the federal FCA, the Minnesota FCA allows a whistleblower or private citizen, called a "relator," to file a lawsuit, or qui tam action, against a contractor and receive a certain percentage of the recovery in the action. If the state intervenes in an action brought by a relator, the relator is entitled to 15 to 25 percent of the recovery. If the state does not intervene in the action, the relator is entitled to 25 to 30 percent of the recovery. The potential relator's share of any recovery provides a strong incentive for whistleblowers (and their attorneys) to commence FCA actions.

### Monetary Damages and Attorney Fees:

Identical to the federal FCA, the Minnesota FCA allows \$5,500 to \$11,000 per false claim plus three times the amount of damages actually incurred by the state.

### Alternate Remedies: Suspension or Debarment:

The Minnesota FCA, like the federal FCA, provides that, in addition to monetary penalties, the state may also pursue "alternate remedies" for FCA violations. The most common of these alternate remedies are suspension of a contractor from bidding on public projects for a period of months or years, or permanent exclusion of the contractor from such projects, also known as debarment.

### Employer Vicarious Liability Under the Minnesota FCA:

Until recently, a major difference between the Minnesota FCA and the federal FCA was that, under the Minnesota FCA, an employer was not liable for an act committed by a non-managerial employee unless the employer "had knowledge of the act, ratified the act, or was reckless in the hiring or supervision of the employee." However, in August, 2013, this was amended by the Minnesota legislature to impose vicarious liability on employers for the acts of their employees.

### Whistleblower Protection:

Similar to the federal FCA, the Minnesota FCA holds employers liable for retaliation against whistleblowers who act in furtherance of the FCA—for example, by bringing an action as a relator. In addition to protecting employees, the recently amended federal FCA now protects contractors and agents of employers that help uncover FCA violations. In contrast, the Minnesota FCA whistleblower protection only applies to employees. The consequences of violating these provisions can include employer liability for damages in a civil action, reinstatement of the employee, payment of twice the amount of the employee's lost compensation, plus interest, and special and punitive damages. Federal case law has held that an employee must act specifically under the FCA in order for the whistleblower protections to apply.