



MAJOR CHANGES TO THE FEDERAL FALSE CLAIMS ACT ESTABLISH GREATER LIABILITY FOR PHYSICIANS AND HOSPITALS FOR FALSE CLAIMS

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On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act (the “FERA”). This legislation expands the reach of federal law to combat financial fraud. Of great importance to physicians and hospitals is the fact that FERA will implement significant changes to the federal False Claims Act (“FCA”).

The FCA is a law that provides a cause of action to the United States and private whistleblowers for significant damages and civil penalties when false or fraudulent claims for payment are made to the federal government. FERA expands potential liability for false claims by applying the FCA to more entities, including physicians and hospitals, and a broader range of transactions, reducing the proof required to establish liability, and expanding the pool of potential whistleblowers that may bring retaliation claims.

Most notably, FERA amends the FCA in the following ways:

Extends the FCA to a wider range of transactions. Prior to the new legislation, the FCA required that allegedly false claims for payment must be presented *directly* to an officer or employee of the government. Under the new law, FCA liability attaches so long as the person “knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval” to *any* entity. For example, any false or fraudulent claim submitted by a physician or a hospital to a subcontractor or contractor of the federal government could lead to FCA liability.

In addition, the new legislation expands the definition of a “claim” under the FCA to include any request or demand for money or property, whether or not the government has title to the money or property, including requests for money to a contractor, grantee, or any other recipient of government funds used to advance a government program. In other words, FERA imposes FCA liability for any physician or hospital who submits a claim to *any* recipient of government funds even where the claim cannot be traced back directly to the federal government.

Reduces the intent required to establish liability. Prior to enactment of FERA, courts applying certain provisions of the FCA limited liability to circumstances in which a false claim was made for the purpose of getting a claim paid by the government. FERA, however, relaxes the necessary connection between a false statement and payment by requiring only that the false statement be “material” to a false or fraudulent claim. The term “material” is now defined as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” As a result, a violation of

the FCA would occur whenever a person makes a false statement that has the natural tendency to influence the Government's decision to pay a claim, regardless of whether the person intends the statement to result in the payment of a claim by the Government. This particular amendment to the False Claims Act is retroactive to June 2008.

Permits non-employees to bring retaliation claims. The FCA allows employees to sue their employer for damages and other relief if they are discriminated against as a result of their actions in connection with a false claims lawsuit or investigation. FERA now makes these retaliation claims available to contractors and agents who contend that they have been discriminated against. This change in the FCA may have the greatest impact on physicians and hospitals, as disgruntled or terminated employees now have the opportunity to make such claims against their employer.

Additionally, FERA expands the scope of liability under the conspiracy provisions of the FCA. Previously, FCA liability only applied to a conspiracy to get a false or fraudulent claim paid. Under the new law, FCA liability extends to any conspiracy to violate any requirement of the FCA. For example, an employee is now permitted to allege that a physician or hospital retaliated against the employee based upon the employee “blowing the whistle” on a false claim submitted.

Broadens the reverse false claims provision. Prior to FERA, the reverse false claims provision prohibited the use of a false statement or record to avoid paying or returning government funds that it is otherwise obligated to return. FERA broadens this provision to apply to circumstances where an obligation to pay is not fixed, but contingent, and where an entity knowingly and improperly conceals, avoids or reduces an obligation to pay money to the government, even if no false statement is made. One of the concerns with this change is that Medicare providers regularly retain overpayments subject to a negotiated reconciliation process with Medicare.

Facilitates greater sharing of investigation materials by the Department of Justice. FERA permits the government to disclose to a qui tam whistleblower any information the government obtains through its investigation. It also allows the Department of Justice to share information with other government agencies more freely and eliminates the requirement that the Department first seek court approval for inter-agency disclosures.

The enactment of FERA signals the government's renewed commitment to the investigation and prosecution of financial fraud. The expansion of federal financial fraud units across the country is likely to boost government enforcement efforts in a wide variety of white collar areas. To be prepared, it is important that companies take the following proactive steps:

- Update existing compliance programs to ensure that they adequately address recent government priorities and initiatives;
- Ensure that all company units provide prompt notice to management upon receiving any subpoena or government inquiry, including a Medicare or Medicaid audit;
- Apply additional scrutiny to all contracts that involve federal funds or federal programs, including Medicare and Medicaid contracts; and
- Assess and evaluate the benefits of voluntary disclosure if the company encounters a problem.