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Deficit Reduction Act
Employee Information Requirements

The Deficit Reduction Act ("DRA") requires states participating in the Medicaid program to amend their State Plans to mandate that providers and others that receive or make annual payments of at least $5 million under a state's Medicaid program establish written policies for all their employees (and any contractor or agent) to provide "detailed information" about:

- the federal False Claims Act
- the federal Program Fraud Civil Remedies Act
- state laws pertaining to civil or criminal penalties for false claims and statements
- any whistleblower protections provided under such laws
- the role of such laws in preventing and detecting fraud, waste and abuse
- policies and procedures of the provider (or others) for preventing and detecting fraud, waste and abuse.

In addition, to comply with the DRA, states must require that any employee handbook of a covered entity include a "specific discussion" of the above laws and of the rights of employees to be protected as whistleblowers. Although some have described the DRA to include a training requirement, the statute includes no such requirement.

The DRA mandate for state plans goes into effect January 1, 2007. While CMS is expected to issue guidance, to date none has been issued. What follows is a framework for consideration by hospitals that want to begin advance preparation for compliance. Summaries of the several federal laws that the DRA requires be included in policies, procedures, and employee handbooks are set forth below. To assist in determining whether state law provisions need to be included in your policies, the framework also contains a list of states that have enacted false claims laws as of November 1, 2006.

Descriptions of False Claims Laws, *Qui Tam* Provisions and Whistleblower Protections

Numerous federal and state laws prohibit health care providers from submitting "false" or "fraudulent" claims for payment to public health care programs funded by taxpayer dollars. Primary among these are the federal statutes and regulations that apply to claims submitted to

Medicare and Medicaid and other federally-funded health care programs. The federal and some of the state laws also provide financial incentives to encourage whistleblowers to come forward to file suit against entities who they find to be submitting false claims. The federal statute and the laws of several states also contain whistleblower protection provisions that preclude employers from taking any retaliatory action against such a whistleblower.

I. Federal Civil False Claims Act

The federal civil False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA"), was originally enacted in 1863 after a series of Congressional inquiries disclosed several instances of fraud among defense contractors during the Civil War. The current FCA was passed by Congress in 1982 and was amended in 1986. The FCA is designed to enhance the government's ability to identify and recover losses due to fraud. Since the FCA's enactment, the government has recovered billions of dollars through litigation or settlement of allegations that corporations and individuals violated the statute and thereby improperly obtained federal health care program funds. Congress and the government believe that the FCA is a very effective means to detect fraud, by encouraging individuals, often called "whistleblowers" or "relators," to uncover and report fraud, and to prevent fraud, by creating strong incentives for companies and individuals to be vigilant in their pursuit of compliance and avoid liability for multiple damages and penalties under the statute.

1. FCA Prohibitions

The federal civil False Claims Act prohibits any individual or company from knowingly submitting false or fraudulent claims, causing such claims to be submitted, making a false record or statement in order to secure payment from the federal government for such a claim, or conspiring to get such a claim allowed or paid. Under the statute the terms "knowing" and "knowingly" mean that a person (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. Thus, specific intent to defraud is not required for there to be a violation of the law. Examples of the types of activity prohibited by the FCA include billing for services that were not actually rendered, and upcoding (the practice of billing for a more highly reimbursed service or product than the one provided).

The FCA is enforced by the filing and prosecution of a civil complaint. Under the Act, civil actions must be brought within six years after a violation or, if brought by the government, within three years of the date when material facts are known or should have been known to the government, but in no event more than ten years after the date on which the violation was committed.

2. Penalties

Individuals or companies found to have violated the statute are liable for a civil penalty for each claim of not less than $5,500 and not more than $11,000, plus up to three times the amount of damages sustained by the federal government.

3. *Qui Tam* and Whistleblower Protection Provisions

The FCA authorizes the United States Attorney General to bring actions alleging violations of the statute. The statute also authorizes private citizens to file a lawsuit in the name of the United States for false or fraudulent claims submitted by individuals or companies that do business with, or are reimbursed by, the United States. Commonly known as a *qui tam* action, a lawsuit brought under the FCA by a private citizen commences upon the filing of a civil complaint in federal court, under seal, and service of a disclosure of material evidence on the Attorney General. The government has sixty days to investigate the allegations in the complaint and decide whether it will join the action, in which case the complaint is unsealed, and the Department of Justice or a United States Attorney's Office takes the lead role in prosecuting the claim. If the government decides not to join, the whistleblower may pursue the action alone, but the government may still join at a later date if it demonstrates good cause for doing so. As an incentive to bring these cases, the Act provides that whistleblowers who file a *qui tam* action may receive a reward of 15-30% of the monies recovered for the government plus attorneys' fees and costs. This award may be reduced, however, if for example the court finds the whistleblower planned and initiated the violation. The FCA also provides that "whistleblowers" who prosecute clearly frivolous *qui tam* claims can be held liable to a defendant for its attorneys' fees and costs.

Whistleblowers are also offered certain protections against retaliation for bringing an action under the Act. Employees who are discharged, demoted, harassed, or confront discrimination in furtherance of such an action or as a consequence of whistleblowing activity a re entitled to all relief necessary to make the employee whole. Such relief may include reinstatement, double back pay, and compensation for any special damages including litigation costs and reasonable attorneys' fees.

II. Federal Program Fraud Civil Remedies Act

The Program Fraud Civil Remedies Act of 1986 ("PFCRA"), 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 ("HHS"). PFCRA was enacted as a means to address lower dollar frauds, and generally applies to claims of $150,000 or less. 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 HHS Office of the Inspector General and enforcement actions must be approved by the Attorney General. PFCRA enforcement can begin with a hearing before an administrative law judge. Penalties may be recovered through a civil action brought by the 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 PFCRA.

III. State False Claims Acts

Many states have enacted statutes like the federal FCA that provide a civil remedy for the submission of false and fraudulent claims to state health care programs, including primarily Medicaid. Other states continue to deliberate enactment of similar provisions as well. Like the federal FCA, several of these statutes include whistleblower provisions that allow enforcement through *qui tam* actions, and protect whistleblowers from retaliation. As of November 2006, at least twenty-five states have enacted civil false claims laws.[1] Of these, seventeen contain *qui tam* provisions: California, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, Nevada, Tennessee, Texas and Virginia. At least seven states have enacted civil false claims laws that do not contain *qui tam* provisions: Arkansas, Colorado, Maine, Nebraska, North Carolina, Ohio, Utah, and Washington. Several states also impose criminal penalties for the false claims to a state health care program.

IV. Company Policies and Procedures for Detecting and Preventing Fraud, Waste, and Abuse

[The DRA requires that State Medicaid Plans mandate that employers meeting the $5 million threshold provide written descriptions of the entity's policies and procedures for preventing and detecting fraud, waste and abuse. Most health care providers already maintain compliance plans, programs and procedures, as well as internal audit programs that serve these functions. Employers planning to publish materials intended to comply with DRA mandates prior to the issuance of CMS or State guidelines should consider summarizing and cross-referencing those documents, materials and functions to meet the requirements of this section.]

V. Company Prohibitions Against Retaliation and Whistleblower Rights and Protections

[The DRA requires that State Medicaid Plans also require employers meeting the $5 million threshold to include a specific discussion of the above laws and of the rights of employees to be protected as whistleblowers in any employee handbook. Until CMS or State's issue further guidance, employers planning to revise or supplement any employee handbook should consider summarizing and referring to the hospital's non-retaliation policies and procedures, in addition to providing descriptions of relevant false claims laws, or incorporating by reference the relevant policies and procedures where such information can be found.]

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[1] *See* Cal. Gov't Code §§ 12650 – 56; Del. Code. Ann. tit. 6, §§ 1201 – 1209; D.C. Code §§ 2-308.03 – 2-308.21; Fla. Stat. §§ 68.081 – 68.092; Haw. Rev. Stat. §§ 661-21 – 661.29; Haw. Rev. Stat. §§ 46-171 – 46.179; 740 Ill. Comp. Stat. §§ 175/1 – 175/8; In. Code 5-11-5.5-1 – 5-11-5.5-18; La. Rev. Stat. Ann. §§ 46:437.1 – 46:440.3; Me. Rev. Stat. Ann. Tit. 22, § 15; Mass. Gen. Laws ch. 12, §§ 5A – 5O; MI Public Act 337; N.H. Adv. Legis. Serv. 167:61-b – 167:61-e; 2004 N.M. Adv. Legis. Serv. 49 §§ 1-15; Nev. Rev. Stat. §§ 357.010 – 357.250; Ohio Rev. Code § 5111.03; Tenn. Code. Ann. §§ 71-5-181 – 71-5-186; Tex. Hum. Res. Code Ann. §§ 32.039, 36.001 – 36.008, 36.051, 36.101 – 36.132, 531.101 – 531.108; Va. Code. Ann. §§ 8.01-216.1 – 8.01-216.19; Wash. Rev. Code §§ 48.80.010 – 48.80.900.

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