LEGAL CORNER

New Incentives for States to Modify or Enact Whistleblower Laws

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Effective Jan. 1, 2007, sections 6031 and 6032 of the Deficit Reduction Act of 2005 (DRA) provide greater financial incentives to states and citizens who use state whistleblower statutes modeled after the Federal False Claims Act (FCA).

Defining "Qualified"

Currently, if a claim filed under a State False Claims Act (SFCA) is successful, the state is entitled to a proportion of damages that is equal to the percentage by which the state funds its Medicaid program. For example, a state that contributes 40 percent to Medicaid would keep only 40 percent of the damages recovered from a Medicaid fraud case. (The remaining balance would then go the federal government.) Starting Jan. 1, 2007, states that have enacted a "qualified" State False Claims Act that is compliant with the DRA will be entitled to an additional 10 percent of any monetary reward received.

According to Section 6031 of the DRA, a qualified SFCA must, at a minimum, meet four requirements:

- Establish liability of providers or entities for actions defined as fraudulent by the Federal False Claims Act
- Reward and facilitate *qui tam* (i.e., whistleblower) actions at least as effectively as the Federal False Claims Act
- Require all *qui tam* actions to be filed under seal for 60 days with review by the State Attorney General
- Include a civil penalty that is not less than the amount of the civil penalty authorized under the Federal False Claims Act.

Additionally, the U.S. Department of Health and Human Services (HHS) Office of Inspector General (OIG) has issued guidance about how closely State False Claims Act *qui tam* provisions must imitate the FCA, including:

- Encouraging employees to recognize and report fraud. Such incentives include entitling a whistleblower to receive at least 15 to 25 percent of *qui tam* damages depending on state involvement.
- Providing a cause of action for whistleblowers who suffer retribution from employers for bringing a state-based whistleblower claim.

Finally, though a State False Claims Act may include broader laws, procedural rights, jurisdictional bars, or reductions in whistleblower rewards than the Federal False Claims Act, it *may not* narrow or restrict whistleblower rights or protections. The DRA authorizes the HHS OIG—in consultation with the state's Attorney General—to evaluate whether SFCAs satisfy these criteria on a case-by-case basis.

Employee Education

While states have the *option* of enacting State False Claims Acts, starting next year, the employee education provisions prescribed in the DRA become a *mandatory* condition of payment. In other words, states must enact laws that require entities receiving $5 million or more in state Medicaid funds to adopt the DRA's policies and procedures for educating providers about fraud, waste, and abuse. (This $5 million threshold will likely exempt individual physicians and most physician practices.)

Section 6032 of the DRA effectively requires providers to instruct their employees, management, contractors, and agents about federal and state false claims laws and the required procedures for filing an action. Providers also must furnish detailed written policies on:

- The Federal False Claims Act, the State False Claims Act (if applicable), and any state laws pertaining to civil or criminal penalties for false claims and statements
- Administrative remedies for false claims and statements as provided by 31 U.S.C. Chapter 38
- Whistleblower protections and the role of such laws in preventing and detecting fraud, waste, and abuse in federal healthcare programs.

These written policies must detail the entity's policies and procedures for detecting and preventing fraud, waste, and abuse and must be included in an employee handbook.

Providers Must Prepare

Because the OIG and state Attorney General will evaluate each state's law individually, Medicaid providers should monitor local response to the DRA. Additionally, providers should ascertain whether existing or potential State False Claims Acts are more stringent than the Federal False Claims Act. The OIG views a provider as liable if it acts knowingly, with actual knowledge of the information, or in deliberate ignorance of the truth or falsity of information. While proof of specific intent is not required under the FCA, it equates acts in reckless disregard of the truth or falsity of the information with knowingly defrauding the government.

Providers will also need to revise the fraud, waste, and abuse portions of their employee training programs to ensure that all written procedures, polices, and education tools are consistent with the requirements of the DRA and of local and federal laws. Finally, providers should stay up to date on all changes to local *qui tam* legislation and implement enhanced workforce training when necessary.

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