

# Compliance Today – September 2018

## What compliance officers should know about state False Claims Acts

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We are all now familiar with the stories of the recent record-setting recoveries by the United States Department of Justice (DOJ) in lawsuits filed under the federal False Claims Act (FCA). In fiscal year 2017 alone, the DOJ recovered more than \$2.5 billion from FCA cases involving the healthcare industry, including drug companies, hospitals, pharmacies, laboratories, and physicians. Since 1986, when the qui tam provisions were added to allow private whistleblowers to file and litigate false claims cases, the DOJ has recovered a whopping \$36.4 billion in FCA cases involving the healthcare industry. Of those recoveries, \$30 billion came from lawsuits initiated by private qui tam whistleblowers, who received more than \$4.9 billion in rewards for bringing those claims.

Often overlooked in those astounding federal recoveries, however, is the increasing importance of state false claims laws. Not only has the number of states with their own false claims statutes increased, but also the state investigators, auditors, and attorneys who enforce these state statutes have become more coordinated and sophisticated in their efforts to combat healthcare fraud. Understanding these state false claims laws is important for many reasons, including:

1. State FCAs provide a legal basis, separate from the federal FCA, for recovering funds defrauded from the Medicaid program or other state-funded healthcare programs;
2. State FCAs are not all alike, and the differences in these state laws deserve careful attention;
3. State FCAs are enforced by an impressive team of state attorney generals, and Medicaid Fraud Control Units are becoming increasingly sophisticated in their efforts to detect and combat healthcare fraud; and
4. Healthcare-related qui tam cases, especially those involving the Medicaid program, almost always include claims filed under the federal FCA and these numerous state false claims statutes.
5. For these reasons, it is essential that healthcare compliance professionals understand the provisions of their state false claims statute and how those statutes can impact healthcare compliance matters.

### **Proliferation of state false claims statutes**

Although some states enacted false claims statutes decades ago, the proliferation of these state laws, along with their powerful qui tam whistleblower provisions, can be traced to the federal Deficit Reduction Act of 2005 (DRA). Section 6031 of the DRA, entitled Encouraging the Enactment of State False Claims Acts (commonly referred to as the State Incentives provision), enacted substantial new financial incentives for states to enact false claims laws that are modeled after the federal FCA.<sup>[1]</sup> If a state false claims statute is determined by Health and Human Services (HHS) Office of Inspector General (OIG) to meet certain enumerated requirements, the state is entitled to an increase of 10% in the state medical assistance share of any amounts recovered under that state false

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claims statute. In order to qualify for this financial incentive, the state must have in effect a law that meets the following requirements:

1. Establish liability to the state for false or fraudulent claims described in the federal FCA with respect to any expenditures related to state Medicaid plans described in Section 1903(a) of the Social Security Act;
2. Contain provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in the federal FCA;
3. Contain a requirement for filing an action under seal for 60 days with review by the state attorney general; and
4. Contain a civil penalty that is not less than the amount of the civil penalty authorized under the federal FCA.<sup>[2]</sup>

As a result of these financial incentives, a growing number of state legislatures across the country enacted false claims laws that were modeled on the federal FCA. As of the end of 2017, 31 states and the District of Columbia have enacted false claims statutes that authorize qui tam whistleblowers to initiate and litigate false claims lawsuits (see Table 1).

Additionally, the following states have enacted civil false claims laws that permit only that state, and not private qui tam whistleblowers, to file a lawsuit against those who submit false claims to state funded healthcare programs: Arkansas, Kansas, Maine, Nebraska, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin. However, even in these “non-qui tam states,” claims of Medicaid fraud are not out of reach for private whistleblowers. Instead, these Medicaid fraud claims can, and frequently are, filed under the federal FCA, because the Medicaid program is jointly funded by the federal and state government.

State	False Claims Statute	DRA Compliant	Total 2017 Staff in Medicaid Fraud Unit
Alaska	AS09.58.010	N/A	12
California	Gov. Code § 12650	Yes	240
Colorado	CRS 25 5-4-303.5	Yes	16
Connecticut	CT Gen. Stat. 17b-301a	No	13
Delaware	6 Del. C. 1201	No	18
Dist. of Columbia	DC Code 2.308.15	No	20
Florida	F.S. 68.081-68.09	No	203
Georgia	O.C.G.A. 49-4-168	Yes	45
Hawaii	H.R.S. 661-21	Yes	15

State	False Claims Statute	DRA Compliant	Total 2017 Staff in Medicaid Fraud Unit
Illinois	305 ILS 5/8A-3	Yes	44
Indiana	IC 5-11-5-5-2	Yes	57
Iowa	Iowa Code Ch.685	Yes	10
Louisiana	LA RS 46.4371.1	No	66
Maryland	Health Gen. 2-603	No	39
Massachusetts	M.G.L. c.12, §5A	Yes	37
Michigan	MCL 400.612	No	31
Minnesota	Minn. Stat. 15C	Yes	23
Montana	MCA 17-8-403	Yes	9
Nevada	NRS 357.010	Yes	19
New Hampshire	RSA 167:61-b	No	8
New Jersey	NJSA 2A:32-1	No	30
New Mexico	NMSA 1978 §30-44-1	No	25
New York	State Fin. Law 187-194	Yes	308
North Carolina	NCGS 108A-70.10, 1-605	No	51
Oklahoma	63 O.S. 5053	Yes	30
Rhode Island	RIGL 9-1.1-4	Yes	12
Tennessee	TCA 71-5-181	Yes	39
Texas	THRC Ch.36	Yes	196
Utah	Utah Code 26-20-9.5	N/A	13
Vermont	32 V.S.A. 631.632(b)	Yes	9

State	False Claims Statute	DRA Compliant	Total 2017 Staff in Medicaid Fraud Unit
Virginia	V.A. Code 32-1-312, 313	Yes	102
Washington	RCW 74.09.210(2)	Yes	39.5

Table 1: States that allow whistleblowers to initiate and litigate false claims lawsuits\*

\* See NAMFCU: 2018 Statistical Survey of State Medicaid Fraud Control Units. Available at <http://bit.ly/2LpLUbS>

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