

# Health Care Bulletin



## *False Claims Act*

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## Expanded FCA Opens Door to More Qui Tam Whistleblower Actions Against Health Care Organizations

It was predicted some time ago that the 2009 passage of the Fraud Enforcement and Recovery Act (FERA), which amended and strengthened the False Claims Act (FCA), all but guaranteed an increase in the number of whistleblower actions filed against hospitals and other health care providers. Recent conversations with government attorneys handling false claims cases appear to confirm this prediction. Since enactment of the amendments last May, the volume of FCA cases being handled by prosecutors has increased. Although a portion of this increase likely includes self disclosures filed by providers themselves trying to beat whistleblowers to the government's door, it is unlikely that the increase is due solely to self disclosures. When Congress expanded the scope of the FCA, it also expanded the number of potential whistleblowers within health care organizations as well.

For instance, individuals may be in a position to know whether written contracts exist, or whether compensation arrangements comply with fair market value considerations. These individuals include those with knowledge of or access to information about the organization's contractual relationships with certain parties (e.g., physicians, physician groups, suppliers), including accounts

payable, compliance, and billing and coding staff and contractors as well as individuals in your physicians relations department. Given the government's new and expanded willingness to charge health care organizations with potential Stark and Anti-Kickback violations under the FCA, these individuals could easily be the next crop of insider whistleblowers.

There also may be individuals within an organization with knowledge or access to information regarding overpayments received from the State and/or federal government. Although such overpayments are normally repaid through the normal reconciliation process, there may be instances where funds are held longer than would be expected. Given the expanded scope of the FCA's reverse false claim provision, an organization's retention of any overpayments could result in a whistleblower lawsuit being filed by one of these individuals.

So what can organizations do? First, be careful not to take any retaliatory action against these individuals. It is illegal under the FCA for health care providers to retaliate against individuals for "blowing the whistle" on potential violations of law. Organizations can, however, ensure that policies are in place requiring em-

employees to report to management potential violations of law, including potential violations of the FCA. In addition, health care providers may want to consider having employees at certain levels of management and/or with certain job functions (e.g., coders, compliance staff, accounts payable, physician relations) attest in writing whether they have any knowledge or suspicion of potential violations of law within the organization. This may not prevent an employee from filing a whistleblower action, but should the matter

ever proceed to trial, it could impact the government's decision whether to intervene in the action and on the employee's credibility before a jury.

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*This bulletin was prepared by Richard H. Blake. For questions about this issue or any other issues relating to the Federal False Claims Act, please contact the Bricker & Eckler False Claims Act team. This and previous Bulletins may be accessed at [www.bricker.com/Publications](http://www.bricker.com/Publications).*

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