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New Jersey Enacts False Claims Act

On January 13, 2008, Governor Jon Corzine signed the New Jersey State False Claims Act ("NJFCA" or the "Act") into law. P.L. 2007, c. 265. The Act imposes liability on any person for, among other things, knowingly presenting a false or fraudulent claim to the state government for payment or approval. Private parties may sue on behalf of the state and receive a percentage of any verdict or settlement obtained in that suit.

Some State Attorneys General have employed state false claims acts as powerful weapons in their arsenal against companies allegedly filing false claims with the government. In the health care and life sciences industries, in particular, state and federal false claims acts are increasingly being used to pursue claims for alleged false Medicare and Medicaid billing or price reporting matters. These acts also have been used to pursue false claims related to other industries such as transportation, insurance, and education.

State False Claims Acts and the Deficit Reduction Act of 2005

The NJFCA, modeled after the federal False Claims Act ("federal FCA"), was initially introduced to the New Jersey State Senate in January 2006. Under the federal FCA, the Justice Department has recovered roughly $20 billion dollars since 1986, and approximately $2 billion in 2007 alone[1]. The enactment of the NJFCA will likely spur the filing of additional lawsuits in New Jersey and will be a potentially powerful fund raising tool for the state.

Like several other state acts, the NJFCA was enacted in the wake of the federal Deficit Reduction Act of 2005 ("DRA"). The DRA provides a financial incentive for states to enact and enforce their own false claims acts establishing liability for the submission of false claims to the state's Medicaid program. The DRA provides for an increase in the amount of Medicaid false claims recovery that a state can retain from monies recovered under a state's false claims act, provided that the state's law has been approved by the Department of Health and Human Services Office of the Inspector General ("OIG") in consultation with the U.S. Attorney General. Pursuant to the DRA (42 U.S.C. 1396h(b)), and OIG's guidelines for evaluating the four key

[1] U.S. Department of Justice Release #07-873 (Nov. 1, 2007).

elements of state false claims acts (71 Fed. Reg. 48552), any state may seek approval of its false claims act by submitting its act to the OIG[2]. According to the OIG website, thirteen state false claims acts have thus far been reviewed (not including the NJFCA), and eight of those have been approved by the OIG[3]. It appears likely that New Jersey will seek and obtain the OIG's approval of its Act to receive the benefits of the DRA.

NJFCA

The NJFCA establishes civil penalties and treble damages against any person who submits or causes the submission of claims to the State for government funds or property knowing that those claims are false or fraudulent, or for acting with reckless disregard or deliberate ignorance of the truth or falsity of such claims.

Like its federal counterpart, the Act provides that an individual (referred to as a "relator") may sue on behalf of the state government and receive a portion of any recovery. Such cases, known as "*qui tam*" actions, are filed under seal to provide the State Attorney General time to decide whether to join the case. If the NJ Attorney General joins the NJFCA action and prevails, the relator will be awarded 15% to 25% of the recovered proceeds. If the relator prevails without the Attorney General having joined the action, the relator may generally receive 25% to 30% of the proceeds. Additionally, the NJFCA contains anti-retaliation provisions to protect employee whistleblowers, and allows such persons to bring civil actions for violation of the Act. The remedies for unlawful retaliation include reinstatement, double back pay, special and punitive damages, and attorneys' fees. Also similar to the federal FCA, if the NJ Attorney General has reason to believe that a person has violated the Act, he/she may issue subpoenas to compel the attendance of witnesses or the production of documents as part of a pre-suit investigation. The NJFCA also provides that, upon violation of the Act by any person licensed or certified by a NJ licensing authority, the Attorney General must notify the licensing authority of the violation for the taking of "appropriate administrative action."

The NJFCA does have a few differences from the federal FCA. The primary difference between the NJFCA and the federal FCA, is that the NJFCA applies to false claims made to the state, or to "any contractor, grantee, or other recipient of State funds," as opposed to the federal government. In addition, NJFCA actions may be brought in either state or federal court, whereas federal FCA matters may be brought only in federal court.

False Claims Avoidance

The NJFCA does not specifically require companies to implement any particular measures to safeguard against the making of false claims. However, under the NJFCA, a court may reduce a treble damages award upon a finding that the violator furnished the relevant State officials with all known information within thirty (30) days after the violator first obtained such information. Having an effective corporate compliance program may help companies act quickly to take advantage of this voluntary disclosure opportunity.

In addition, a company's failure to maintain an effective corporate compliance program might be used as evidence that it submitted false claims "with reckless disregard" to their falsity. Thus, if any organization that does business with the State of New Jersey is not otherwise required by state law, contract

[2] In that circumstance, a state can be entitled to receive 10% of the federal government's share of any recovery in an action for submission of false Medicaid claims.

[3] The following state false claims acts have been approved to date by the OIG: New York, Texas, Massachusetts, Virginia, Illinois, Tennessee, Hawaii and Nevada. See http://oig.hhs.gov./fraud/falseclaimsact.html#1.

or as a condition of accreditation to have adopted a corporate compliance program, the organization should consider adopting such a program. An organization that has adopted a corporate compliance program should review the program regularly to ensure that it is "effective" within the expected meaning of the law.

Epstein Becker & Green has worked with clients in all sectors of the health care and life sciences industry in developing corporate compliance programs and assessing the effectiveness of such programs. Set forth below is a list of suggested elements of an effective corporate compliance program, prepared by Epstein Becker & Green, and based in part on the DRA and the U.S. Sentencing Commission guidance:

- establish an effective code of conduct/business ethics and compliance program;
- designate specific high-level personnel with direct responsibility for overseeing compliance who have direct access to the CEO and board of directors;
- appoint a compliance officer with authority to independently investigate and act on matters related to compliance;
- inform employees of the existence, importance, and details of the company's compliance program and adopt an appropriate employee handbook;
- arrange for regular reports to the board concerning internal investigations;
- establish effective methods of monitoring, auditing, or reporting on compliance, including without limitation establishing an anonymous hotline and providing protection for whistleblowers;
- implement systems to prevent retaliation and assure reasonable steps to respond to or investigate reported offenses;
- periodically review policies and procedures addressing compliance risk areas and establish internal controls to counter vulnerabilities;
- conduct background checks on employees and contractors, including without limitation checking the OIG website for excluded and the GSA website on debarred individuals and entities;
- periodically audit the organization's conformance with the compliance program;
- comply with additional DRA requirements concerning written policies for employees, contractors and agents with details about fraud, waste and abuse detection/prevention, the federal FCA, whistleblower protections, certain federal administrative remedies, and applicable state laws including state false claims acts;
- consistently enforce the company's compliance policies and procedures through documented training and corrective action; and
- archive appropriately the relevant documentation so it can be retrieved when needed.

Conclusion

The NJFCA is similar to its federal counterpart, but its enactment greatly expands potential false claims liability in New Jersey and applies not only to Medicaid but to all types of state government programs. In light of this new state law, organizations doing business with the state of New Jersey, including those in the health care and life sciences, construction, transportation, and financial industries, are advised to consider implementing and reviewing the effectiveness of their corporate compliance programs to help minimize or avoid potential liability for false claims under the NJFCA.

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