

Wood County Board of Developmental Disabilities

POLICY

Policy #: 01-ALL-ALL-0172 Subject: False Claims Act and Whistleblower Protections
 Effective Date: 05-21-07 Last Revision: 05-02-12
 Person Responsible: Superintendent
 Approvals/Date: Brent Ober 12/1/17 Superintendent, WCBDD Date
John A. [Signature] 12/1/17 Board President, WCBDD Date

<p>This policy shall cover all Board members, employees, contractors, and agents of the Wood County Board of DD.</p> <p>As part of its ongoing efforts to detect and prevent fraud, waste, and abuse, the Wood County Board of DD shall provide information to employees, contractors, and agents about the applicable federal and state laws. Additionally, we shall provide information regarding our internal programs to find and prevent instances of fraud, waste, and abuse.</p> <p>The Deficit Reduction Act (DRA) of 2005 (P.L. 109-171), §6032 requires entities making or receiving more than \$5 million in Medicaid payments to have written policies about detecting and preventing fraud, waste, and abuse. The policies must summarize certain federal and state law provisions about fraud as well as whistleblower protections.</p> <p>To this end, the Board has adopted the attached summary of the applicable federal and state laws. This summary is adapted from materials provided by the State of Ohio, Department of Jobs and Family Services and the U.S. Department of Justice. This summary is included as Attachment A to this policy.</p> <p><u>For a Summary of Fraud Detection and Prevention Efforts in Place, See:</u></p> <ul style="list-style-type: none"> • Corporate Compliance Plan Policy/Procedure – 01-ALL-ALL-0164 • Risk Management Policy and Risk Management Control System – 01-ALL-ALL-0165 • Internal Auditing procedures include: <ul style="list-style-type: none"> o Director of Fiscal and Fiscal Technician separation of duties including accounts payables, accounts receivables and monthly reconciliation o Periodic review of processes, and changes (monthly expenditures) and thorough analysis of annual budget by Executive Team and Board o County Auditor acts as Fiscal Agent and has final review of all accounts payable (appropriations and estimated revenue) and budget process. Each fund is reconciled by line item monthly. • External Auditing procedures include: <ul style="list-style-type: none"> o ODJFS – Division of Long Term Care – annual/bi-annual at a minimum of every 3 years o Auditor of State of Ohio – annually o ODDD – Division of Audits does a periodic field audit, and a desk review audit annually <p><u>Whistleblower Protections:</u></p> <p>Consistent with the “whistleblower” protections in federal and state law (see 31 U.S.C. §§3729-33, ORC §§124.341 and 4113), the Board shall take no adverse action against any employee, contractor, or agent who:</p> <ul style="list-style-type: none"> • reports in good faith any concerns about waste, fraud, or abuse; and/or • lawfully participates in False Claims Act-related litigation, which are known as <i>qui tam</i> lawsuits.
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Attachments: Attachment A – Summary of the False Claims Act and Whistleblower Protections
 Attachment B – Notice of Investigation and Corrective Action – 03-ALL-ALL-0674

References: 02-ALL-ALL-0706 (AD)
 False Claims Act (FCA), 31 U.S.C. §§3729-33
 Program Fraud and Civil Remedies Act (PFCRA), 31 U.S.C. §§3801-12
 Civil Monetary Penalties Law, 42 U.S.C. §1320a-7a *et seq.*
 ORC §5111.03 [Medicaid Fraud]
 ORC §2913.4 [Medicaid Fraud]
 ORC §124.341 [Whistleblower Protections for State Employees]
 ORC §4113 [Whistleblower Protections for Non-State Employees]

Summary of the False Claims Act and Whistleblower Protections¹

OVERVIEW

The Federal False Claims Act (FCA) is an important mechanism for the Ohio Attorney General (OAG) and the Ohio Department of Job and Family Services (ODJFS) because it permits these state agencies as well as private citizens to sue anyone who submits a false claim to obtain funds from Ohio's Medicaid program for civil damages. Furthermore, the FCA amplifies Ohio state law because unlike Ohio, the FCA permits anyone who files a false claim to be sued for damages whereas Ohio only permits providers of health care services to be sued if they file a false claim. Other important aspects of the FCA are the incentives and protection afforded to whistleblowers under the FCA. Whistleblowers are entitled to a portion of the damages recovered in a suit to which he or she participated, and employees who come forward to report suspected fraud are protected from retaliation by their employers.

WHAT IS THE FCA?

The purpose of the FCA is to recover taxpayers' money that was fraudulently paid to individuals who deceived the government.

The FCA was revised in 1986 because of the increase in fraud perpetuated against the federal and state governments. These revisions helped to strengthen the joint effort needed between the federal and state governments to eliminate the fraud, waste and abuse of government funds, particularly those funds illegally earned through government contracts. These revisions also included more incentives for whistleblowers to come forward with reports of fraud. "By doing so, Congress put into play a powerful public-private partnership for uncovering fraud... and obtaining the maximum recovery for American taxpayers."

The FCA is a valuable device to the OAG and the ODJFS to help maintain the integrity of Ohio's Medicaid program because it specifically provides a mechanism for the government or private individuals to file a civil lawsuit against those who would otherwise be outside the reach of civil prosecution by Ohio because of its limited false claims act. Ohio's false claim act applies only to providers of medical services who receive compensation from the Medicaid program. Together, with knowledge of the FCA, the OAG, ODJFS and private citizens can help eliminate the fraud, waste and abuse of government funds in Ohio.

1. Analysis of the Federal Provisions

The FCA holds anyone who submits or causes someone else to submit a false or misleading claim for government funds liable for civil damages. 31 U.S.C. §§3729-3733. Entities such as businesses, corporations, managed care providers, among others, can also be liable under this act for submitting false claims. A claim is simply some demand for money or property to which the government provides any portion of the money or property requested, and it is the filing of an untrue claim that brings liability upon the person who purported it to be true.

The FCA encompasses several different examples of falsifying claims including, but not limited to: falsifying medical records submitted, billing for services not rendered or goods not provided, duplicating billing to obtain double compensation, and billing, certifying, or prescribing services medically unnecessary. Additionally, no proof of specific intent to defraud the government is required to be held liable under the FCA. All that is required is that the person has actual knowledge, or has acted with deliberate ignorance or reckless disregard of the truth/falsity of his or her claim. Basically, the defense of "I didn't know it was illegal or that my timesheet was false" does not work.

The FCA also mandates whistleblower protections and incentives for employees to come forward and report misconduct. 31 U.S.C. §3730. Generally, a person who knows about the filing of false claims (the whistleblower) may bring a civil action on behalf of the government for a violation of FCA. After the whistleblower files a suit, the government can pursue the claim on its own, or decline to intervene and allow the whistleblower to continue. If the whistleblower's case goes forward, no one else can bring a separate action later. Furthermore, depending on the outcome of the case and the whistleblower's involvement in the prosecution of the case, the whistleblower may be entitled to up to thirty-percent (30%) of the proceeds of the action or settlement.

Under the FCA, a whistleblower also has protection from possible retaliation by his or her employer or fellow employees. For example, after the initial filing of a case, the case remains under seal for sixty (60) days and is not accessible by the public. Moreover, any person who is harassed or discriminated against in any way because of his or her involvement in a FCA action has the right to be made whole. The whistleblower's damages include reinstatement of their job position, two times (2x) back pay, plus interest, and compensation for any special damages including reasonable litigation and attorneys' fees.

2. Federal Administrative Remedies

The Civil Monetary Penalties (CMP) law is a federal administrative remedy that allows the federal government to pursue civil monetary penalties against anyone who files a false or misleading claim. 42 U.S.C. §1320a-7a. Such claims are pursued by the Office of the Inspector General. Penalties for filing a false or fraudulent claim include a possible fifty-thousand dollar (\$50,000.00) fine for each act and the assessment of damages three times (3x) the amount of overpayment due.

Additionally, the Program Fraud and Civil Remedies Act (PFCRA) provides another federal statute under which the government can pursue false or misleading claims. 31 U.S.C. §§3801-12. As with the Civil Monetary Penalties law, the government brings PFCRA actions in administrative rather than a judicial proceedings. Under PFCRA, the penalties for filing a false or fraudulent claim include a possible five-thousand dollar (\$5,000.00) fine for each act and the assessment of damages two times (2x) the amount of overpayment due.

3. State Provisions – False Claims

Although Ohio does not have a law equivalent to the FCA there are still laws that regulate the filing of false claims in an attempt to defraud Medicaid. Under Ohio law, only providers can be civilly liable for obtaining or attempting to obtain "payments . . . to which the provider is not entitled pursuant to the provider agreement, or the rules of the federal government or the department of job and family services." RC 5111.03. Similar to the FCA no actual intent to deceive or defraud the government is necessary. If a provider is found to have violated this particular law he or she could be subject to several civil penalties, including, but not limited to: payment of interest (at the maximum rate) on the amount of the excess payments, payment of three times (3x) the amount of any excess payments, a fine between five (5) and ten thousand dollars (\$10,000.00) for each false filing, and any other reasonable expenses determined by the court. Moreover, a provider will also have his or her provider agreement terminated for five years.

In some circumstances, a provider or any other person who has to repay funds because they provided a false statement to the Medicaid program may also be criminally liable for Medicaid Fraud. RC 2913.40. However, a civil judgment is not a pre-requisite to the filing of a criminal charge, and criminal charges are not limited solely to providers; therefore, anyone who files a false claim or in some way participates in a scheme to file false claims for Medicaid funds can be charged with fraud. Anyone charged with Medicaid Fraud faces a misdemeanor or felony charge depending on the amount of money received fraudulently. If convicted, the individual could go to jail and be ordered to pay fines and restitution. Additionally, if someone, specifically a licensed medical provider, is found guilty of Medicaid Fraud either civilly or criminally, their license can come under review and be suspended or permanently revoked as a result of their fraudulent activity.

4. State Whistleblower Protections

In accordance with Ohio Revised Code (ORC) 124.341 state employees are permitted to file a written report that identifies either 1) a violation of state or federal law or 2) the misuse of public resources that the employee becomes aware of in the course of employment. The written report is to be filed with the employee's supervisor or appointing authority (assuming the supervisor or appointing authority has the authority to correct the violation or misuse). **In addition to or instead of filing a written report with the supervisor or appointing authority, the employee may file a written report with the office of the internal auditing created under section 126.45 of the Revised Code or file a complaint with the author of state's fraud-reporting system under section 117.103 of the Revised Code**

The statute also permits the employee to report the violation of state or federal law or misuse of public resources to a prosecuting attorney, law enforcement or similarly situated person, if the employee reasonably believes that the violation is a criminal offense, or to the Ethics commission if the employee believes that is appropriate.

ORC 124.341 permits an state employee to file an appeal with the state personnel board of review if retaliatory or disciplinary action is implemented as a result of the employee filing a report of a violation of state or federal law or the misuse of public resources. ORC 124.341 further provides that the appeal is the only recourse available to the reporting employee and must be filed within thirty days of the employee receiving the notice of action.

Similarly, ORC 4113.52 provides protections for non-state employees. This statute permits employees to report to their supervisor or other responsible officer of their employer, violations of state or federal statute or any ordinance or regulation of a political subdivision that the employer has authority to correct and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony. The non-state employee shall orally notify the supervisor or other responsible officer of his employer of the violation and subsequently file a written report describing the violation.

This statute also provides that if the employer neither corrects nor makes a reasonable and good faith effort to correct the violation within twenty-four hours after receiving notice of the violation, the employee may file a written report of the violation with any of the following: 1) the prosecuting attorney of the county or municipal corporation where the violation occurred, 2) law enforcement, 3) any governmental entity that has regulatory authority over the employer, or 4) the inspector general (if the violation is within his jurisdiction).

If an employer takes disciplinary or retaliatory action against the reporting non-state employee, ORC 4113.52(B) permits the non-state employee to file a civil action for injunctive relief or other remedies in a court of common pleas, provided the action is brought within one hundred eighty days after the date the disciplinary or retaliatory action was taken. The court may render a judgment that may order reinstatement of the employee, payment of back wages, reinstatement of fringe benefits and seniority rights or any combination of remedies. The court may also award the prevailing party all or a portion of the costs of litigation in an amount the court determines to be appropriate.

Both statutes provide protections for employees who follow the statutory procedures in reporting any of the previously stated matters. The employee must make a reasonable effort to ensure the accuracy of information included in the report and, if it is shown that the employee purposely, knowingly, or recklessly reported incorrect or false information, the employee is subject to disciplinary action, including suspension or removal.

If you have any questions about these federal and state provision you can contact the Ohio Attorney General, Health Care Fraud Section at 1-800-642-2873.

¹ Adapted from "State And Federal False Claims Act and Whistleblower Protections" by the Ohio Department of Jobs and Family Services (available online at <http://jfs.ohio.gov/ohp/infodata/FalseClaimsRecov1.pdf>), with additional text regarding Program Fraud and Civil Remedies Act (PFCRA) provided by Alicia Smith & Associates, LLC.

**Wood County Board of DD
Notice of Investigation and Corrective Action**

Thank you for telling me about your concerns. I take this very seriously.

You will be protected. We will not fire or demote you for reporting your concerns in good faith. We will not take away any raises or pay. We will not retaliate against you.

You reported the following: _____

(Please also attach any written report from employee)

I have investigated your concerns. This is the status:

- I/We need ___ more days to follow up. In the meantime, here are the steps that I/we have taken:

- I/We have finished the investigation. I/we have taken these steps:

If you have any questions, please call me at _____. I would be happy to talk to you about this. Again, thank you for bringing this to my attention.

Signature

Date

Copy to Supervisor [*if concerns were initially reported to him/her*]

Director of Operations Contact Numbers
Work – 419.352.5115 x 3249
Cell – 419.266.2566