

One Minute Memo®



Recent Amendments to the California State False Claims Act Expand Its Reach for Both *Qui Tam* and Whistleblower Retaliation Claims

In late September 2012, Governor Jerry Brown signed a bill amending California's False Claims Act, Cal. Gov't Code §§ 12650 *et seq.* ("CFCA") and expanding its applicability and the potential penalties for violations. The amendments, which take effect January 1, 2013, can be broken down into the following categories:

1. Changes definitions to broaden the meaning of "claim" and "original source" while defining "obligation;"
2. Increases the civil penalty for each violation;
3. Authorizes a Court to award a share of the proceeds of a false claims prosecution to a person who planned and initiated a violation;
4. Allows the Attorney General to avoid the public disclosure bar;
5. Increases retaliation protections for whistleblowers by expanding the categories of both protected whistleblowers and protected activities;
6. Modifies the applicable statute of limitations; and
7. Clarifies that defendants can recovery attorneys' fees in certain circumstances.

The CFCA amendments broaden the definition of a "claim" to include any request made to a contractor, grantee or other recipient if the money, property, or service is to be spent or used on a state or ***any political subdivision's behalf or to advance a state or political subdivision's program or interest.***

"Original source" is now defined as a person that either: (1) voluntarily disclosed to the government the claim information prior to public disclosure; or (2) has independent and material knowledge that adds to the publicly disclosed information and voluntarily provided that information to the government before filing a false claims suit.

A definition of "obligation" is now included in the CFCA, and it is defined as an established duty, whether fixed or not, arising from one of the following: (a) an express or implied contractual, grantor, or licensor relationship; (b) a fee-based or similar relationship; (c) statute or regulation; or (d) retention of any overpayment.

Several of the CFCA amendments amend the law to comport with provisions of the federal False Claims Act ("FCA"). For example, the CFCA amendments increase the applicable civil penalty from the previous range of \$5,000 to \$10,000 per violation to the new penalty of \$5,500 to \$11,000 for each violation, which matches the civil penalties provided in the FCA. In addition, like the FCA, the CFCA amendments allow courts to award a share of the proceeds to the relator plaintiff even if the court finds the action "was brought by a person who planned and initiated the violation ... upon which the action was brought." However, the FCA requires a court to dismiss a relator if that person is convicted of criminal conduct arising from his or her role in the subject violation, which bars relator from receiving any share of the proceeds. This FCA caveat providing a bar for criminal convictions, which was added to the FCA in 1988, is not part of the CFCA amendments.

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Courts can still dismiss a *qui tam* case if the relator plaintiff filed suit based on substantially the same allegations or transactions that were publicly disclosed in government reports or hearings or the news media. However, the public disclosure bar is avoided if the relator is the “original source” of information, or if the Attorney General or applicable prosecuting authority either files the suit or opposes dismissal in the relator plaintiff’s suit.

The CFCA amendments also expand the retaliation protections for whistleblowers, so that the CFCA now more closely tracks the FCA retaliation provisions. The CFCA amendments expand the categories of protected whistleblowers to include “employees, contractors, agents, or associated others” and expand protected activity to include “lawful acts done . . . in furtherance of an action under this section or other efforts to stop one or more violations of this article.” For example, the CFCA likely will now cover certain internal reports to a supervisor even if a *qui tam* action is not filed or contemplated. The potential remedies include all relief necessary to make the whistleblower whole, including reinstatement at the same seniority status, double the amount of back pay plus interest, litigation costs and reasonable attorneys’ fees, special damages, and, where appropriate, punitive damages. Employers are advised to implement appropriate policies and procedures to make sure covered whistleblowers do not face retaliation for engaging in protected activity.

The CFCA amendments also state that if the Attorney General files a complaint, it will relate back to the filing date of the relator plaintiff’s complaint for statute of limitations purposes.

Finally, the amendments clarify that a defendant may receive its reasonable attorneys’ fees and expenses if the court finds the claim was clearly frivolous, clearly vexatious, or brought primarily to harass the defendant. If the Attorney General intervened in the case, the attorneys’ fees and expenses are recoverable against the government. If the relator plaintiff proceeds without government intervention, the relator plaintiff is liable for the defendants’ attorneys’ fees and expenses.

By enacting these CFCA amendments, California is now entitled to receive a ten percent increase in its share of amounts recovered for false claims related to the state Medicaid program pursuant to section 1909 of the Social Security Act, 42 U.S.C. § 1396h and U.S. Department of Health and Human Services Office of Inspector General incentives. Even though California amended the CFCA in large part to receive additional incentives related to Medicaid false claims proceeds, the CFCA and its amendments apply to any and all government claims, not just those that are health services related.

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