

New Mexico

New Mexico State False Claims Laws

This is a supplement to The Evangelical Lutheran Good Samaritan Society's ("The Society") Employee Handbook for employees who work in New Mexico. As stated in our Employee Handbook, the federal False Claims Act and similar state laws assist the federal and state governments in combating fraud and recovering losses resulting from fraud in government programs, purchases and/or contracts. These laws are some of the most important laws that govern our business. Like the federal False Claims Act, the New Mexico Medicaid False Claims Act ("NMFCA"), the New Mexico Medicaid Fraud Act, and other New Mexico laws impose liability on persons or companies that make or cause to be made false or fraudulent claims to the government for payment or who knowingly make, use or cause to be made or used, a false record or statement to get a false or fraudulent claim paid by the government. These New Mexico laws apply to Medicaid reimbursement and prohibit, among other things:

- Billing New Mexico's Medicaid program for services not rendered
- Submitting a false claim for payment
- Conspiring to make a false claim or get one paid
- Solicit, offer or receive a kickback in connection with furnishing goods or services for Medicaid
- Making a false statement with respect to the conditions of operation in order to obtain certification as a hospital or skilled nursing facility
- Making or using a false record to conceal, avoid or decrease an obligation relative to the Medicaid program
- Obstructing an investigation under the Medicaid Fraud Act

Civil and Criminal Penalties for False Claims or Statements

A violation of these New Mexico laws may result in civil penalties equal to three times the amount of damages sustained by the state. In addition, a person who violates these laws commits a crime punishable by imprisonment for up to nine years and a fine of not more than \$10,000. An entity that commits Medicaid fraud is subject to a fine of not more than \$250,000 for each violation.

Civil Lawsuits

Like the federal False Claims Act, New Mexico law also allows civil lawsuits to be filed by the state government or by private citizens, including employees. If the private citizen (also called a *qui tam* plaintiff) is successful in the lawsuit, he/she may share a percentage of any monetary recovery and receive an award for reasonable attorney's fees and costs. However, if a *qui tam* plaintiff brings a lawsuit and the court finds that the claim was filed for an improper purpose, frivolous, or not founded in fact, then the court may award the defendant its reasonable attorney fees and costs against the *qui tam* plaintiff.

Retaliation

Under federal law and Society policy, various New Mexico laws, including the NMFCA, prohibit employers from retaliating against employees for reporting or harassing employees because of their lawful participation in a false claims disclosure or their refusal to assist employees in violating laws such as the NMFCA. These laws also provide for certain monetary awards and equitable relief to the prevailing plaintiff, including compensation for lost wages and reinstatement to a former position.

Any employee who engages in or condones any form of retaliation against another employee because that employee either (1) reported a potential violation of The Society's Code of Ethics or regulatory violation, or (2) refused to violate The Society's Code of Ethics or government law or regulation, will be subject to disciplinary action up to and including separation of employment. For additional information, please see the "Fair Treatment Policy" section of the Employee Handbook and section IV "Reporting Compliance Concerns" of The Society's Compliance Program Handbook.

Examples of New Mexico Laws

New Mexico laws summarized above include: (1) The New Mexico Medicaid False Claims Act, N.M. Stat. Ann. §§ 27-14-1; and (2) New Mexico Medicaid Fraud Act, N.M. Stat. Ann. §§ 30-44-1. If you have questions about any of these requirements, you may contact The Society's Compliance Solutions Hotline at 1-800-631-6142.

The New Mexico Medicaid False Claims Act

Executive Summary

The New Mexico Medicaid False Claims Act ("NMFCA") combats fraud and abuse by health care providers participating in the Medicaid Program. N.M. Stat. Ann. §§ 27-14-1.

Liability and Damages

- Actions that violate the NMFCA include: (1) submitting a false claim for payment under the Medicaid program, (2) submitting a claim for payment under the Medicaid program knowing that the person receiving the benefit is not eligible; (3) making a false record or statement to get a false claim paid; (4) conspiring to defraud the state by getting a false claim paid; and (5) making a claim under the Medicaid program for a service or product that was not provided. It is also a violation to make a false statement or misrepresentation concerning the conditions or operation of a health care facility so that the facility may qualify for certification or recertification by the Medicaid program.
- Any person or entity that violates the NMFCA is liable for three times the amount of damages that the state sustains.
- Actions must be filed within four years after the claim was submitted.

Qui Tam Actions/Whistleblower Protections

- Private individuals (or *qui tam* plaintiffs) who report fraud receive between 10 and 25 percent of the total amount recovered if the human services department prosecutes the case, and between 25 and 30 percent (plus reasonable costs and attorney fees) if the *qui tam* plaintiff litigates the case on his or her own. An individual cannot file a lawsuit based on public information, unless he or she is the original source of the information. The NMFCA contains important protections for whistleblowers.
- Employees who report fraud and consequently suffer discrimination may be awarded: (1) two times their back pay plus interest, (2) reinstatement at the seniority level they would have had except for the discrimination, and (3) compensation for any costs or damages they have incurred.

Summary of Key Provisions

False or Fraudulent Statements or Claims § 27-14-4

False or Fraudulent Statements or Claims

The following actions constitute NMFCA false claims violations:

- Knowingly submitting (or causing to be submitted) a false claim for payment under the Medicaid program;
- Submitting (or causing to be submitted) a claim for payment under the Medicaid program knowing that the person receiving the benefit is not eligible;
- Knowingly making or using (or causing to be made or used) a false record or statement to get a false claim paid or approved by Medicaid;
- Conspiring to defraud the state by getting a false claim allowed or paid;
- Knowingly making or using a false record to conceal, avoid, or decrease an obligation to pay money or transmit property to the state, relative to the Medicaid program;
- Knowingly applying for and receiving a benefit or payment on behalf of another person and converting that benefit or payment to his own personal use;
- Knowingly making a false statement or misrepresentation concerning the conditions or operation of a health care facility so that the facility may qualify for certification or recertification required by the Medicaid program; and
- Knowingly making a claim under the Medicaid program for a service or product that was not provided.

Liability

The person or entity will be liable for three times the amount of damages that the state sustains because of the violation.

Definitions § 27-14-3

Claim

"Claim" means a written or electronically submitted request of payment for services provided under the Medicaid program.

Department

"Department" means the Human Services Department.

Civil Actions §§ 27-14-7- 27-14-10

Action by Department § 27-14-7

The Department must diligently investigate suspected violations, and it is authorized to file a civil suit.

Actions by Private Persons § 27-14-7

A private individual (or *qui tam* plaintiff) has the right to bring a civil suit in the name of the state, if the person is affected by the false claims violations. The action may be dismissed upon written consent of the court and the Department.

New Mexico

If a *qui tam* plaintiff alleges false claims violations, the complaint and a written disclosure of the evidence and information that the person possesses must be served on the Department. If the Department determines that there is no substantial evidence that a violation occurred, the complaint will be dismissed.

If the Department decides to proceed with the civil suit, it must obtain approval from the Attorney General. The Department assumes responsibility for prosecuting the action and is not bound by the acts of the *qui tam* plaintiff. The *qui tam* plaintiff shall have the right to continue as a nominal party to the action.

If the Department decides not to proceed, the ***qui tam*** plaintiff has the right to proceed with the lawsuit. The Department may intervene later, upon a showing of good cause.

Certain Actions Barred § 27-14-10

A *qui tam* plaintiff cannot bring an action against a Department official, if the action is based on information known to the Department when the action was filed.

A *qui tam* plaintiff cannot bring an action based on allegations that are the subject of a civil suit to administrative proceeding to which the state is already a party.

A *qui tam* plaintiff cannot bring a suit based on the public disclosure of allegations unless he or she is the original source of the information, e.g. an individual with direct and independent knowledge of the information on which the allegations are based and who has voluntarily provided the information to the Department before filing a civil action. Public disclosure includes disclosure in a criminal, civil, or administrative hearing; or from the news media.

Award to *Qui Tam* Plaintiff § 27-14-9

If the Department prosecutes a case initiated by a private plaintiff and obtains an award or settlement, the private plaintiff will receive between 10 and 25 percent of the recovery, plus reasonable costs and attorney fees. The court will consider the *qui tam* plaintiff's contribution to the investigations and proceedings in determining the award. If the case is primarily based on public disclosures of information other than those provided by the *qui tam* plaintiff, the courts may award the to the *qui tam* plaintiff whatever amount they consider appropriate up to 10 percent of the proceeds.

If the Department decides not to intervene and the *qui tam* plaintiff successfully litigates the action, he or she will receive between 25 and 30 percent of the award or settlement plus reasonable expenses and attorney's fees.

If the court finds that the *qui tam* plaintiff planned and initiated the violation upon which the civil suit was based, it may reduce the share of the recovery that the person would otherwise receive. If the person is convicted of criminal conduct arising from their role in the fraud or false claims violation, the court must dismiss the person from the civil action and bar them from receiving *any* share of the proceeds.

New Mexico

Whistleblower Protections § 27-14-12

Employer Interference with Employee Disclosures

Any employee who has been discharged, demoted, suspended, threatened, harassed, or otherwise discriminated against because of his or her involvement in a false claims action is entitled to all relief necessary to make that person whole including:

- Reinstatement with the same seniority status that the employee would have had except for the discrimination;
- Two times the amount of back *pay* plus interest and
- Compensation for any special damage sustained because of the discrimination, including reasonable costs an attorney fees.

The protected false claims activities include investigating, initiating, testifying, or otherwise assisting in a civil action. An employee is entitled to bring an action in the appropriate court for damages.

*N
e
w*

*M
e
x
i
c
o*