



# HEALTH CARE UPDATE

May 26, 2009

## **New Amendments To False Claims Act Increase Whistleblower and Other Exposures For Health Care Providers *Amendments Take Effect As DOJ/HHS Step Up Health Care Fraud Enforcement***

Health care providers and other parties covered by the False Claims Act, 31 U.S.C. § 3729 (FCA), now face expanded whistleblower and other liability under amendments to the FCA enacted under the “Fraud Enforcement and Recovery Act of 2009”(FERA). The amendments increase the likelihood both that whistleblowers will turn in health care providers and other individuals and organizations that file false claims in violation of the FCA and the liability that violators may incur for that misconduct.

Signed into law by President Obama last Wednesday (May 20, 2009), FERA immediately upon enactment:

- Amends the whistleblower protections afforded to employees, contractors and agents who suffer retaliation for taking lawful efforts to stop violations of the FCA and to make it easier for those individuals to pursue retaliation claims;
- Expands liability under for making false or fraudulent claims to the federal government under the FCA;
- Applies liability under the FCA for presenting a false or fraudulent claim for payment or approval (currently limited to such a claim presented to an officer or employee of the federal government); and
- Requires persons who violate such Act to reimburse the federal government for the costs of a civil action to recover penalties or damages

Concurrent with President Obama’s signature of FERA into law, the U.S. Departments of Justice (DOJ) and Health & Human Services (HHS) jointly announced the expansion of federal health care fraud enforcement efforts. On May 20, 2009, HHS and DOJ announced their activation of a new interagency team to combat health care fraud highlights the increasing need for health care providers and health plans to review and tighten their practices for dealing with Medicare and other federal programs to survive scrutiny under federal health care fraud initiatives. Coupled with FERA and the already significant increase in federal health care fraud detection and enforcement activities in recent years and a proposed 50 percent increase in funding for these activities included in President Obama’s Fiscal Year 2010 budget, health care providers and payers must be prepared to defend their dealing with Medicare, Medicaid and other federal health care programs.

The expanded protections afforded under FERA to whistleblowers and others suffering retaliation for opposing or reporting illegal actions can be expected to serve as a key tool in these efforts. These new retaliation safeguards are designed further increase the likelihood that employees and other insiders will help government officials ferret out false claims and other fraud. Specifically with regard to retaliatory action claims Section 4(d) of FERA amends 31 U.S.C. § 3730(h) to provide for the recovery of “all relief necessary to make that employee, contractor, or agent whole” where that individual is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts he does or takes on behalf of an individual in furtherance of other efforts to stop a violation of the FCA.

FERA expressly provides that relief to victims of retaliation will include “reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.”

The FERA amendments to the FCA, the new TEAMS enforcement effort announced simultaneously with its signature into law mean that health care industry organizations and others covered by the FCA must implement appropriate fraud prevention, detection, redress and other procedures to help defend against possible FCA or other health care fraud claims and investigations.

The attorneys at Curran Tomko Tarski, LLC have extensive experience representing and advising health industry and other clients against FCA and other federal health care and fraud laws.

#### **For More Information**

We hope that this information is useful to you. If you need assistance with auditing or defending health care fraud concerns or other health care compliance, risk management, transactions or operations concerns, please contact Curran Tomko Tarski LLP Partners Cynthia Marcotte Stamer at (214) 270-2402, [CStamer@CTTLegal.com](mailto:CStamer@CTTLegal.com); Michael T. Tarski at (214) 270-1420 or [MTarski@CTTLegal.com](mailto:MTarski@CTTLegal.com); Edwin J. Tomko at (214) 270-1405 or [ETomko@CTTLegal.com](mailto:ETomko@CTTLegal.com).

You can review other recent health care and internal controls resources and additional information about the health industry and white collar experience of the Curran Tomko Tarski LLP attorneys at [www.CTTLegal.com](http://www.CTTLegal.com). If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail - by creating or updating your profile at [CTTLegal.com](http://www.CTTLegal.com) or e-mailing this information to [CStamer@CTTLegal.com](mailto:CStamer@CTTLegal.com).

If you are interested in this health industry development, you also may be interested in reviewing some of our other recent updates available at <http://slphealthcareupdate.wordpress.com> including:

- OCR Disability Charges Settlement Requires Equal Access to Transportation Services at Anchorage Pioneer Home
- HHS Announces Availability of \$50 Million In Grants To Strengthen Nonprofit and Faith Based Organizations Aiding Families & Communities Struggling With Economic Downturn
- Sebelius Announces Key Personnel At New HHS Office of Health Reform
- HHS Report Highlights Rural Health Insurance Crisis
- CMS Proposes Policy And Payment Rate Changes For Inpatient Stays In Acute Care And Long-Term Care Hospitals In FY 2010
- Texas Senate Committee Schedules May 5 Hearing On Proposed Texas Medical Board Reforms
- Latest OIG Audit Results Announcements Find Overpayments In High-Dollar Payments For Services Processed By Wisconsin Physicians Service and Interrupted Stays At Inpatient Rehabilitation Facilities
- FTC Extends Red Flag Rule Compliance Deadline From May 1 to August 1, 2009
- Swine Flu Treatment & Pandemic Response Information Updated
- CMS Plans Hospital & Hospital Quality Open Door Forum to Wednesday, May 6, 2009
- HHS Releases Report Comparing Average Sales Price to Average Manufacturer Prices of Prescription Drugs
- HIPAA Complaint Basis For Texas Whistleblower Claim
- Connecticut Man Pleads Guilty To Multi-Million Dollar Tax Fraud Conspiracy Involving False Charges For Hospital Maintenance & Insulation Services

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information – including your preferred e-mail - by creating or updating your profile at [CTTLegal.com](http://CTTLegal.com) or e-mailing this information to [CStamer@CTTLegal.com](mailto:CStamer@CTTLegal.com).