



Increased False Claims Act Penalties Carry Hidden Risks

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On June 30, 2016, the Department of Justice published an Interim Final Rule adjusting for inflation the civil monetary penalties arising from violations of the False Claims Act (FCA).¹ Currently, civil monetary penalties range from \$5,500 to \$11,000 per false claim. However, effective August 1, 2016, the FCA civil penalty nearly doubles to a range of \$10,781 to \$21,563 per claim. Likewise, on August 1, 2016, the administrative remedies civil penalty increases from \$5,500 per claim to \$10,781 per claim. Going forward, fines will continue to rise as the Federal Civil Penalties Inflation Adjustment Act of 1990 (“Inflation Adjustment Act”) requires agencies to revisit penalty ranges annually.

For Medicaid providers subject to the federal Deficit Reduction Act of 2005 (DRA), codified in 42 U.S.C. § 1396(a)(68), this civil monetary penalty adjustment carries an additional burden. For any entity or provider that receives or makes payments under a state Medicaid plan of at least \$5 million per year, the DRA requires that the provider or entity educate its employees, contractors and agents concerning federal and state false claims act provisions, penalties and protections. A policy summarizing federal and applicable state false claims act provisions must be included in the provider’s employee manual. As a result of the Inflation Adjustment Act, providers and entities that are subject to the DRA must update their DRA policies and procedures in their employee handbooks to ensure that the federal civil monetary penalties stated in their DRA policies accurately reflect the 2016 increases.

While these civil monetary penalties inflation adjustments apply only to federal FCA and administrative remedies, providers should also keep an eye out for anticipated changes to state FCA laws. Section 6031 of the DRA incentivizes states to enact their own false claim acts for false or fraudulent claims submitted to state Medicaid programs by rewarding states with an additional 10 percent of the damages recovered in Medicaid fraud cases if the states enact a qualifying statute. Currently, twenty-nine states have opted into this program. To qualify, the state FCA, among other requirements, must provide for a civil penalty that is not less than the amount of the civil penalty authorized under the federal FCA. Thus, to maintain their incentives, these states will need to increase their civil monetary penalties to match the newly adjusted federal penalties, and providers will also need to alter their DRA policies to reflect these anticipated state law changes.

Finally, increased penalties also result in increased incentives for whistleblowers. The *qui tam* provision in the federal FCA, commonly referred to as the “whistleblower” provision, allows a private person with knowledge of a false claim (a “relator”) to bring a civil action on behalf of the Government. 31 U.S.C. § 3730. In the event that a *qui tam* suit is ultimately successful, the whistleblower that initially brought the suit may be awarded a percentage of the funds recovered. The range of relator recoveries is 15 to 30 percent. Given this dramatic increase in civil monetary penalties, providers should anticipate that more whistleblowers will find that the reward outweighs the risk in bringing a *qui tam* action.

¹ Interim Rule available at: <https://www.federalregister.gov/articles/2016/06/30/2016-15528/civil-monetarypenalties-inflation-adjustment#h-36> (last accessed Aug. 1, 2016).

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