

Whistleblower Provisions and False Claims Acts

Objective:	To establish a County policy and procedure in order to detect and prevent waste, fraud, and abuse while protecting the right to report an issue or concern in good faith without fear of retaliation. This policy implements New York State Labor Law §740, New York State Labor Law §741, and Civil Service Law §75-b.	Policy/Procedure Number:	11-45
		Effective Date:	August 2, 2011
Reference: (All Applicable Federal, State and Local Laws)	Labor Law §740; Labor Law §741; Civil Service Law §75-b; Federal False Claims Act, 31 U.S.C. § 3729 <i>et seq.</i> ; New York State False Claims Act; County Compliance Program	Responsible Department:	County Administration
		Modified Date (s):	February 5, 2019
Legislative Policy Statement:		Resolution No.:	2011-119; 2019-19
General Information:	This policy is intended to support the reporting of illegal activities and to protect officers and employees from retaliation who, in good faith, have reported a concern of improper governmental action. If the activities are not illegal but are violations of the Code of Ethics, the County officer or employee should report the violation to the Ethics Advisory Board.	Next Scheduled Review:	February 2024

I. Definitions: **Good-Faith Report** - A report of activity that the employee has reasonable grounds to believe to be true and that the employee reasonably believes constitutes improper governmental action, even if the belief should later prove to be unsubstantiated.

Improper Governmental Action - Action taken, or threatened to be taken, directly or indirectly, by the County or any County officer or employee in the performance of the officer's or employee's official duties, whether or not such action is within the scope of his or her employment, that is in violation of any federal, state, or local law, rule, or regulation.

Relative - A parent, step-parent, spouse, spouse equivalent, domestic partner, sibling, step-sibling, sibling's spouse, child, step-child, grandparent, parent of spouse or spouse equivalent or domestic partner; including in-laws and members of the household of a municipal officer or employee, and individuals having any of these relationships to the spouse of the officer or employee.

Retaliation - Disciplinary or other adverse personnel action relating to the terms and conditions of employment taken against the employee, or relative of the employee, because the employee has made a good-faith report.

Qui Tam Action - An action in which a private party called a relator brings an action on the government's behalf. The government, not the relator, is considered the real plaintiff. If the government succeeds, the relator receives a share of the award. Also called a popular action.

II. Policy: **A. Fraud, Waste, and Abuse** - It is the policy of the County to detect and prevent fraud, waste, and abuse in local, state, and federal programs. This policy explains the Federal False Claims Act (31 U.S.C. §§ 3729-3733), the Administrative Remedies for False Claims (31 U.S.C. §§ 3801-3812), the New York State False Claims Act (State Finance Law §§ 187-194), and other New York State laws concerning false statements or claims and employee protections against retaliation. This policy also sets forth the procedures the County has put into place to prevent any violations of federal, state, or local laws regarding fraud or abuse in its programs.

B. Awareness of Improper Governmental Action - Any officer or employee of the County who becomes aware of improper governmental action by an officer or employee of the County has a duty to report such conduct in the manner provided in Section III.

C. No Retaliation - No officer or employee of the County shall take retaliatory action against an employee because the employee makes a good-faith report of any information regarding fraud, waste, abuse, misconduct, or any alleged prohibited or illegal activity in violation of any law, rule, or regulation governing officers and employees of the County of Tompkins. Such improper actions include, but are not limited to, discharge, discipline, personal attacks, harassment, intimidation, or change in job, salary, or responsibilities.

D. Confidentiality - Reports of concerns will be kept confidential to the extent possible, consistent with the need to conduct a complete and fair investigation.

E. Overview of Applicable Laws

1. Federal False Claims Act (31 U.S.C. §§ 3729-3733)

The False Claims Act ("FCA") provides liability for certain acts, in general that any person who,

- (a) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (b) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (c) conspires to commit a violation of subparagraph (a), (b), (d), (e), (f), or (g);
- (d) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
- (e) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (f) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
- (g) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus three (3) times the amount of damages which the Government sustains because of the act of that person.

For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

While the False Claims Act imposes liability only when the claimant acts "knowingly," it does not require that the person submitting the claim have actual knowledge that the claim is false. A person who acts in reckless disregard or in deliberate ignorance of the truth or falsity of the information, also can be found liable under the Act. 31 U.S.C. 3729 (b).

In sum, the False Claims Act imposes liability on entities and any individual who submits a claim to the government that is known (or should be known) to be false. An example

may be a person(s) who submits a bill to Medicare for services that were known to not be provided. The False Claims Act also imposes liability on an entity or individual who may knowingly submit a false record in order to obtain payment from the government. An example of this may include a contractor who submits records that the individual knows (or should know) are false and that indicate compliance with certain contractual or regulatory requirements. The third area of liability includes those instances in which someone may obtain money from the government to which the entity or person may not be entitled, and then uses false statements or records in order to retain the money. An example of this so-called "reverse false claim" may include an organization that obtains interim payments from Medicare throughout the year, and then knowingly files a false cost report at the end of the year in order to avoid making a refund to the Medicare program.

2. *Administrative Remedies for False Claims (31 USC, chapter 38, sections 3801-3812)*

This federal statute allows for administrative recoveries by agencies, including the Department of Health and Human Services, which operates the Medicare and Medicaid Programs.

The law prohibits the submission of a claim or written statement that the person knows or has reason to know is false, contains false information, or omits material information. The agency receiving the claim may impose a monetary penalty of up to \$5,000 per claim and damages of twice the amount of the original claim.

Unlike the False Claims Act, a violation of this law occurs when a false claim is submitted, not when it is paid. Also, unlike the False Claims Act, the determination of whether a claim is false, and imposition of fines and penalties is made by the administrative agency, and not by prosecution in the federal court system.

3. *New York State Laws*

New York's false claims laws fall into two (2) categories: civil and administrative; and criminal laws. Some apply to recipient false claims and some apply to provider false claims, and while most are specific to healthcare or Medicaid, some of the "common law" crimes apply to areas of interaction with the government.

a. *Civil and Administrative Laws*

1. *New York False Claims Act (State Finance Law, §§ 187-194)*

The New York False Claims Act closely tracks the federal False Claims Act. It imposes penalties and fines on individuals and entities that file false or fraudulent claims for payment from any state or local government, including health care programs such as Medicaid. The penalty for filing a false claim is \$6,000 - \$12,000 per claim and the recoverable damages are between two and three times the value of the amount falsely received. In addition, the false claim filer may have to pay the government's legal fees.

The Act allows private individuals to file lawsuits in state court, just as if they were state or local government parties. If the suit eventually concludes with payments back to the government, the person who started the case can recover twenty-five to thirty percent (25-30%) of the proceeds if the government did not participate in the suit and fifteen to twenty-five percent (15-25%) if the government did participate in the suit.

2. *Social Services Law § 145-b False Statements*

It is a violation to knowingly obtain or attempt to obtain payment for items or services furnished under any social services program, including

Medicaid, by use of a false statement, deliberate concealment or other fraudulent scheme or device. The state or the local social services district may recover three times (3x) the amount incorrectly paid. In addition, the Department of Health may impose a civil penalty of up to \$2,000 per violation. If repeat violations occur within five (5) years, a penalty up to \$7,500 per violation may be imposed if they involve more serious violations of Medicaid rules, billing for services not rendered or providing excessive services.

3. Social Services Law § 145-c Sanctions

If any person applies for or receives public assistance, including Medicaid, by intentionally making a false or misleading statement, or intending to do so, the needs of the individual or that of his family shall not be taken into account for the purpose of determining his or her needs or that of his family for six (6) months if a first offense, or twelve (12) months if a second offense (or if benefits received are at least \$1,000, but not more than \$3,900), for eighteen (18) months if a third offense) or if benefits wrongfully received are in excess of \$3,900), and five (5) years for any subsequent occasion of such offense.

b. Criminal Laws

- 1. Social Services Law § 145 Penalties.** Any person who submits false statements or deliberately conceals material information in order to receive public assistance, including Medicaid, is guilty of a misdemeanor.
- 2. Social Services Law § 366-b. Penalties for Fraudulent Practices.**
 - a. Any person who obtains or attempts to obtain, for himself or others, medical assistance by means of a false statement, concealment of material facts, impersonation or other fraudulent means is guilty of a Class A misdemeanor.
 - b. Any person who, with intent to defraud, presents for payment and false or fraudulent claim for furnishing services, knowingly submits false information to obtain greater Medicaid compensation or knowingly submits false information in order to obtain authorization to provide items or services is guilty of a Class A misdemeanor.
- 3. Penal Law Article 155, Larceny.** The crime of larceny applies to a person who, with intent to deprive another of his property, obtains, takes, or withholds the property by means of trick, embezzlement, false pretense, false promise, including a scheme to defraud, or other similar behavior. It has been applied to Medicaid fraud cases.
- 4. Penal Law Article 175, False Written Statements.** Four crimes in this Article relate to filing false information or claims and have been applied in Medicaid fraud prosecutions. Actions include:
 - Falsifying business records involving entering false information or omitting information.
 - Falsifying business records involving entering false information or omitting information with the intent to commit another crime or conceal its commission.
 - Offering a false instrument for filing presenting a written instrument (including a claim for payment) to a public office knowing that it contains false information.
 - Offering a false instrument for filing presenting a written

instrument (including a claim for payment) to a public office knowing that it contains false information and an intent to defraud the state or a political subdivision.

Depending upon the action and the intent, a person may be guilty of a Class A misdemeanor up to a Class E felony.

- 5. Penal Law Article 176. Insurance Fraud.** This Article applies to claims for insurance payment, including Medicaid or other health insurance. The six (6) crimes in this article involve intentionally filing a false insurance claim. Under this article, a person may be guilty of a felony for false claims in excess of \$1,000.

Depending upon the action and the intent, a person may be guilty of a Class A misdemeanor up to a Class D felony.

- 6. Penal Law Article 177, Health Care Fraud.** This Article applies to claims for health insurance payment, including Medicaid. A person commits such a crime when, with the intent to defraud Medicaid (or other health plans, including non-governmental plans), he/she knowingly provides false information or omits material information for the purpose of requesting payment for a health care item or service and, as a result of the false information or omission, receives such a payment in an amount to which he/she is not entitled. Health Care Fraud article contains five (5) crimes and is punished with fines and jail time, based on the amount of payment inappropriately received due to the commission of the crime.

Depending upon the action and the intent, a person may be guilty of a Class A misdemeanor up to a Class B felony.

F. Whistleblower Provisions

- 1. Federal False Claims Act (31 U.S.C. § 3730(h)).** The FCA provides protection to *qui tarn* relators who are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the FCA. 31 U.S.C. § 3730(h). Remedies include reinstatement with comparable seniority as the *qui tarn* relator would have had but for the discrimination, two (2) times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.
- 2. New York False Claim Act (State Finance Law § 191).** The False Claim Act also provides protection to *qui tarn* relators who are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the Act. Remedies include reinstatement with comparable seniority as the *qui tarn* relator would have had but for the discrimination, two (2) times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.
- 3. New York Labor Law § 740.** An employer may not take any retaliatory action against an employee if the employee discloses information about the employer's policies, practices, or activities to a regulatory, law enforcement or other similar agency or public official. Protected disclosures are those that assert that the employer is in violation of a law that creates a substantial and specific danger to the public health and safety or which constitutes health care fraud under Penal Law § 177 (knowingly filing, with intent to defraud, a claim for payment that

intentionally has false information or omissions). The employee's disclosure is protected only if the employee first brought up the matter with a supervisor and gave the employer a reasonable opportunity to correct the alleged violation. If an employer takes a retaliatory action against the employee, the employee may sue in state court for reinstatement to the same, or an equivalent position, any lost back wages and benefits and attorneys' fees. If the employer is a health provider and the court finds that the employer's retaliatory action was in bad faith, it may impose a civil penalty of \$10,000 on the employer.

4. ***New York Labor Law § 741.*** A health care employer may not take any retaliatory action against an employee if the employee discloses certain information about the employer's policies, practices, or activities to a regulatory, law enforcement or other similar agency or public official. Protected disclosures are those that assert that, in good faith, the employee believes constitute improper quality of patient care. The employee's disclosure is protected only if the employee first brought up the matter with a supervisor and gave the employer a reasonable opportunity to correct the alleged violation, unless the danger is imminent to the public or patient and the employee believes in good faith that reporting to a supervisor would not result in corrective action. If an employer takes a retaliatory action against the employee, the employee may sue in state court for reinstatement to the same, or an equivalent position, any lost back wages and benefits and attorneys' fees. If the employer is a health provider and the court finds that the employer's retaliatory action was in bad faith, it may impose a civil penalty of \$10,000 on the employer.

III. Procedure:

A. Training

Tompkins County will provide education/training in regard to this policy and procedure to all of its employees. This training will be provided to all employees as part of new hire employee training and annually thereafter.

B. Reporting Concerns

1. Any employee who has reason to believe that anyone is engaging in practices of waste, fraud, or abuse should make the good-faith report to his or her Department Head.

If the employee is not comfortable addressing the concern to the Department Head, the employee should make his/her report to the County Compliance Officer or the Confidential Compliance Helpline to handle all reports and inquiries regarding non-compliance and illegal use of county resources.

If the report concerns the County Administrator, the employee should report directly to the Chair of the Legislature who will be responsible for investigating the report or designating another person to conduct the investigation.

2. When in receipt of a good-faith report, the Department Head must notify the County Administrator, or the County Compliance Officer to handle reports and inquiries regarding non-compliance and illegal use of county resources, who shall be responsible for investigating all such reports.

The County Administrator may designate the Ethics Advisory Board where appropriate to conduct or participate in any investigation.

3. Detected waste, fraud, or abuse will be responded to in an expedient manner. The County is dedicated to the resolution of such matters and will take all reasonable steps to prevent further similar violations.

4. Any form of retaliation against any employee who reports a perceived problem or concern in good faith is strictly prohibited. Any employee who commits or condones any form of retaliation will be subject to discipline up to, and including, termination.