RESOLUTION NO. 93-10 **Date:** 2/23/2010 **COA-falseclaimsandwhistlesrev.**

ESTABLISHING POLICY AND PROCEDURES FOR COMPLIACE WITH 42 USC 139a(a)(68), False Claims and Whistle Blower Protections

BY: Mr. George Fearon, Government Operations Committee
Mr. Christopher Palermo, Chairperson, Ways & Means Committee

WHEREAS, § 6032 OF 109 P.L. (42 USCA § 1396a (a) (68) (a) - (c)) (hereafter the "Deficit Reduction Act of 2005" or "DRA") requires compliance with DRA requirements from any private or public entity receiving or making annual payments under the State Medicaid plan of at least $5,000,000 ("Entity"); and

WHEREAS, the DRA requires each Entity to establish written policies regarding the false claims laws and whistleblower protections, which policies' shall provide for detecting and preventing fraud, waste and abuse, and which policies must be distributed, included in relevant employee handbooks and/or made available to all employees, contractors and agents; and

WHEREAS, each Entity in New York must annually certify to the State Office of the Medicaid Inspector General that it is and remains compliant with DRA requirements; and

WHEREAS, the County of Cayuga (the "County") must comply with DRA requirements as the County through the activities of its various departments receives amounts and makes payments under the State Medicaid plan in excess of $5,000,000 each year and shall continue to do so into the foreseeable future; now that for be it

RESOLVED, the attached Policies and Procedures concerning false claims and whistleblower protections, attached here to, be and are adopted and apply to the entire County; and be it further

RESOLVED, that each head of each County department shall be responsible for educating all employees of his/her respective department, and any contractors, vendors, agents or assigns with access to information concerning County Medicaid transactions, of this Executive Order and the attached Policies and Procedures by directing those individuals to the designated County intranet or internet site, by providing a paper copy of such or by any other manner of professional communication, and a representative of each County department must certify to the County Compliance Officer, described below, that such information has been distributed to all appropriate individuals; and any new employee of the County shall receive the attached Policies and Procedures a paper copy or by being directed to the appropriate internet or intranet site, and that all County employee handbooks shall be updated to include the attached Policies and Procedures.

Section 23 – Cayuga County Policy Manual

THE COUNTY OF CAYUGA POLICIES AND PROCEDURES FALSE CLAIMS AND WHISTLE BLOWER PROTECTIONS

POLICY

It is the obligation of the County of Cayuga (the "County") to prevent and detect any fraud, waste, and abuse in its organization related to Federal and State health care programs (Medicare, Medicaid, and other governmental payer programs). To this end, the County maintains a vigorous Compliance Program and strives to educate our work force regarding the importance of submitting accurate claims and reports to Federal and State governments, as well as regarding the requirements, rights and remedies of Federal and State laws governing the submission of false claims, including the rights of employees to be protected as whistleblowers under such laws. The County prohibits the knowing submission of a false claim for payment in relation to a Federal or State funded health care program. Such a submission violates the federal False Claims Act as well as various state laws, and may result in significant civil, and/or criminal penalties.

PURPOSE

Under the Deficit Reduction Act ("DRA") of 2005, the County is committed to the education and requirement of all employees, medical staff, volunteers, contractors, vendors, and residents that the County is committed to prevent fraud and abuse through.

SCOPE

This policy applies to all County employees, contractors, medical staff, volunteers, vendors, and residents.

POLICY AUTHOR

The Office of the County Attorney, 315-253-1275

PROCEDURE

A. Fraud and Abuse Detection, Prevention and Employee Protection

To assist the County in meeting its legal and ethical obligations, the Health System expects and encourages any employee who is aware of or reasonably suspects the preparation or submission of a false claim or report or any other potential fraud, waste, or abuse related to a Federally or State funded health care program, to report such information to his/her supervisor, the General Counsel or the Corporate Compliance Officer. Any employee who reports such information will have the right and opportunity to do so anonymously and will be protected against retaliation for making the report. The County obligates itself to swiftly and thoroughly investigate any reasonably credible report of fraud, waste, or abuse or any reasonable suspicion thereof through the County Compliance Program. Please note that the County retains the right to take appropriate action against an employee who has participated in a violation of law or hospital or County policy.

B. State and Federal Fraud and Abuse Detection, Prevention and Employee Protection what is the Federal False Claims Act?

The False Claims Act (31 USC 3729-33) ("FCA") makes it a crime for any person or organization to knowingly make a false record or file a false claim with the government for payment. "Knowingly" means actual knowledge, deliberate ignorance, or reckless disregard of facts that make the claim false.

The FCA does not require proof of ,a specific intent to defraud the United States:, government; instead health care providers can be prosecuted for a wide variety of conduct that leads to the submission of fraudulent claims to the government, including but not limited to the following:

a. Knowingly billing for services that were not provided;
b. Knowingly billing for services that were not ordered by the physician;
c. Double-billing for items or services;
d. Submitting bills for services never performed or items never furnished;
e. Billing for services that are not necessary for the treatment of patient;
f. Billing for services that are more complex and at a higher reimbursement than the actual service provided (i.e., Up coding);
g. Billing for services separately instead of billing the code that includes multiple services (i.e., Unbundling);
h. Falsifying a diagnosis to justify test, surgeries, or other procedures that are not medically necessary.

What are the FCA Penalties?

Violators of the FCA are liable under a civil penalty for each claim of not less than $5,500 and not more than $11,000, plus up to three times the amount of damages sustained by the federal government.

How is the FCA Enforced? What is a "Qui Tam" Lawsuit?

The FCA is enforced by a civil action commenced by either the government or private citizens. To encourage individuals to come forward and report misconduct involving 'false claims," the federal FCA includes a "qui tam" or whistleblower provision. This provision allows any person with actual knowledge of allegedly false claims to the government to file a lawsuit on behalf of the U.S. government. Such a person is referred to as a "relator." Individuals seeking whistleblower status must meet several criteria. The whistleblower/relator must file his/her lawsuit on behalf of the government in a federal district court. The lawsuit will be "under seal" meaning the lawsuit is kept confidential while the government reviews and investigates the allegation.

If the government decides not to join in the lawsuit the whistleblower may pursue the action alone. (The government may still join in later if it demonstrates good cause in doing so.) -

What are the Whistleblower Protections?

The FCA also protects anyone who files a false claims lawsuit from being fired, demoted, threatened, or harassed by his/her employer for filing the suit. If a court finds that the employer retaliated, the court can order the employer to re-hire the employee and to pay the employee twice the amount of back pay that is owed, plus interest and attorney fees.

New York State Labor Law Protections

New York Labor Law-740 provides that 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. 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.

Whistleblower Rewards and Penalties

As an incentive to bring these cases, the FCA provides that whistleblowers who file a qui tam action may receive a reward of 15 – 30% of the monies recovered for the government plus attorneys' fees and costs. This reward may be reduced, however, if for example the court finds the whistleblower planned and initiated the violation. The FCA also provides that "whistleblowers" who bring frivolous qui tam claims can be held liable to a defendant for its attorneys' fees and costs.

New York State Laws

(a) <u>Administrative and Civil Laws</u>

1. Social Services Law § 145-c 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 person's, the person's family's needs are not taken into account for 6 months if a first offense, 12 months if a second (or once if benefits received are $1,000 – 3,900), 18 months if a third (or once if benefits received are over $3,900) and five years for 4 or more offenses.

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.

3. The State or the local Social Services district may recover three times 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 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.

(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 any 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.

   a. Fourth degree grand larceny involves property valued over $1,000. It is a Class E felony.

   b. Third degree grand larceny involves property valued over $3,000. It is a Class D felony.

   c. Second degree grand larceny involves property valued over $50,000. It is a class C felony.

   d. First degree grand larceny involves property valued over $1 million. It is a Class B felony.

4. Penal Law Article 175, False Written Statements. Four crimes in this: Article relates to filing false information or claims and have been applied in Medicaid fraud prosecutions:

   a. § 175.05, falsifying business records involves entering false information, omitting material information or altering an enterprise's business records with the intent to defraud. It is a Class A misdemeanor.

   b. § 175.10, Falsifying business records in the first degree includes the elements of the § 175.05 offense and includes the intent to commit another crime or conceal its commission. It is a Class E felony.

   c. §175.30, Offering a false instrument for filing in the second degree involves presenting a written instrument (including a claim for payment) to a public office knowing that it contains false information. It is a Class A misdemeanor.

   d. §175.35, Offering a false instrument for filing the first degree includes the elements of the second degree offense and must include an intent to defraud the state or apolitical subdivision. It is a Class E felony.

5. Penal Law Article 176, Insurance Fraud, applies to claims for insurance payment, including Medicaid **or other health insurance** and contains six crimes.

   a. Insurance fraud in the 5th degree involves intentionally filing a health insurance claim knowing that it is false. It is a Class A misdemeanor.

   b. Insurance fraud in the 4th degree is filing a false insurance claim for over $1,000. It is a Class E felony.

   c. Insurance fraud in the 3rd degree is filing a false insurance claim for over $3,000. It is a Class D felony.

   d. Insurance fraud in the 2' degree is filing a false insurance claim for over $50,000. It is a Class C felony.

   e. Insurance fraud in the 1st degree is filing a false insurance claim for over $1 million. It is a Class B felony.

6. Penal Law Article 177, Health Care Fraud, applies to claims for health insurance payment, including Medicaid, and contains five crimes:

   a. Health care fraud in the 5th degree is knowingly filing, with intent to defraud, a claim for payment that intentionally has false information or omissions. It is a Class A misdemeanor.

   b. Health care fraud in the 4th degree is filing false claims and annually receiving over $3,000 in aggregate. It is a Class E felony.

c. Health care fraud in the 3rd degree is filing false claims and annually receiving over $10,000 in the aggregate. It is a Class D felony.
d. Health care fraud in the 2nd degree is filing false claims and annually receiving over $50,000 in the aggregate. It is a Class C felony.
e. Health care fraud in the 1St degree is filing false claims and annually receiving over $1 million in the aggregate. It is a Class B felony.

Whistleblower Protection

1 New York Labor Law 740

a. 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 created a substantial and specific danger to the public health and safety. 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.

b. 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.