

Understanding the False Claims Act & Civil Investigative Demands: What Employers Need to Know

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Agenda

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- FCA Overview and Purpose
 - Elements of a Claim: Overview
 - FCA Process
 - Life Cycle of FCA Action
 - Damages and Penalties
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- AG Civil Rights Fraud Initiative
- AG's Guidance on Unlawful Discrimination
- Best Practices

The Executive Orders: Overview

On January 20 and 21, 2025, the President issued two Executive Orders (EOs) targeting diversity, equity and inclusion policies and programs that may be used by government agencies, government contractors, educational institutions as well as the private sector:

- EO 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing
- EO 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity



EO 14173 Certification Requirement

(iv) The head of each agency shall include in every contract or grant award:

(A) A term requiring the contractual counterparty or grant recipient to agree that its **compliance in all respects** with all applicable Federal anti-discrimination laws is **material to the government's payment decisions** for purposes of section **3729(b)(4)** of **title 31**, United States Code; and

(B) A term requiring such **counterparty or recipient to certify** that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.

FCA Overview and Purpose

- The False Claims Act (“FCA”), 31 U.S.C. 3792 et seq., is a federal statute that permits the government and/or private plaintiff whistleblowers (“relators”) to bring a civil action in federal court for damages and statutory civil penalties against companies that allegedly submit false claims for payment to the government.



FCA Overview and Purpose

The FCA is Designed To:

- Recover misspent taxpayer money
- Deter future misspending of taxpayer money
- Encourage/incentivize individuals to blow the whistle on so-called fraud, waste, and abuse
- Protect whistleblowers from retaliation



FCA Overview and Purpose

The FCA prohibits:

- **False Claims:** Knowingly submitting a false claim for payment to the United States
- **False Records or Statements:** Knowingly making or using a false record or statement material to a false claim
- **Reverse False Claims:** Knowingly failing to reimburse the government for overpayments
- **Conspiracy:** Conspiracy to submit a false claim
- **Retaliation:** Protects employees pursuing FCA claims

Elements of a Claim: Overview

Elements of an FCA claim:

1. Submission of a claim

- Or records/statements in connection with claim for payment

2. Falsity

3. Scier (knowledge it was false)

- Actual knowledge; or
- Deliberate ignorance or reckless disregard of the truth/falsity

4. Materiality

- False statement influenced payment of money

5. Caused Payment

Elements of a Claim: Knowledge

- A “three-part test for scienter” requiring either **actual knowledge, deliberate ignorance, or reckless disregard** of the truth or falsity of the information
 - Does not require intent to defraud
- In *U.S. ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023), the Supreme Court ruled that a defendant’s subjective state of mind can be sufficient to establish scienter
 - Largely tracks the traditional common-law scienter requirement for claims of fraud
 - Rejects the view that scienter is never possible when the defendant’s actions were “consistent with any objectively reasonable interpretation” of the regulatory requirements underlying an FCA claim
 - Focuses primarily on what defendant thought and believed when presenting the claim

Elements of a Claim: Falsity

- To be actionable under the FCA, claims must be "false" or "fraudulent" —yet the FCA contains no definition of either
- Courts have developed a framework for determining falsity that differentiates between factual and legal falsity
 - Factual falsity is when the claim includes a misrepresentation of a relevant fact (e.g., by seeking payment for services that were not provided)
 - Legal falsity occurs when a claim does not comply with applicable legal requirements (i.e., when a claim violates an underlying contractual, regulatory or statutory obligation)

Elements of a Claim: Materiality

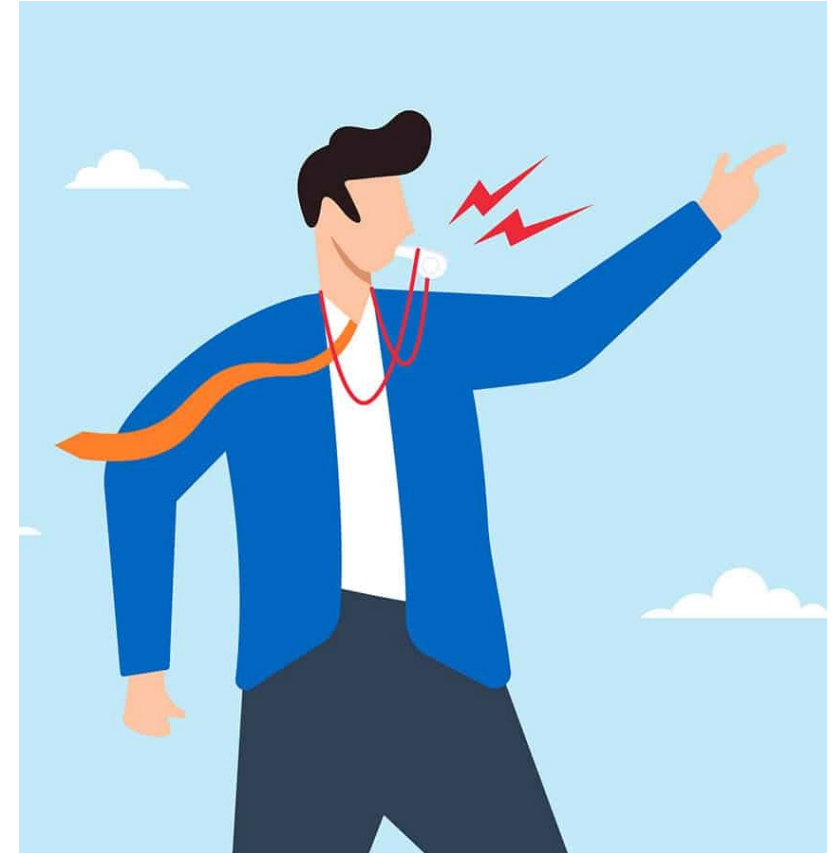
- Material means “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” 31 U.S.C. § 3729(b)(4)
- Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016): A “misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government’s payment decision”
- A requirement (or misrepresentation) is not material simply because the government designates a statutory, regulatory, or contractual requirement as a condition of payment:
"What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."
- The Government’s actual knowledge that certain requirements were violated, coupled with its payment of a particular claim in full, or regular payment of a particular type of claim in full without signaling a change in position, “is strong evidence that the requirements [violated] are not material”—but not dispositive

FCA Process

1. Origin of an investigation:
 - DOJ can initiate an FCA matter of its own accord, OR
 - Relator files a Complaint in a federal district court
 - FCA Complaint is filed under seal & defendant is not served the Complaint
2. Relator serves the United States Attorney General + the United States Attorney with the Complaint and a disclosure of relevant evidence
3. DOJ reviews the complaint
4. If DOJ elects (finds the information sufficiently credible) it can investigate
 - DOJ may ask the relator to assist with the investigation
5. DOJ will decide whether to settle/litigate/decline to take over the matter
 - If DOJ declines, relator can continue on behalf of the government

FCA Process: Typical Relators

- Employees—current or former employees (e.g., employees of government contractors, health care entities, or other regulated entities)
- Non-employees (e.g., competitors, clients, customers, auditors, reviewers, consultants, industry experts)
- Anyone with evidence & knowledge of false claims involving the public fisc *may* be a relator with certain limitations



Life Cycle of an FCA Action: The Government Investigation

- The government may issue:
 - Civil Investigative Demands (CIDs)
 - Administrative subpoenas
 - Letter requests
- Complaint may remain under seal
 - Time extensions of the sealing period are routine and often for months or even years
 - May occur with even more frequency based upon recent government personnel actions

Life Cycle of an FCA Action: The Government Investigation

- DOJ usually leads the initial investigation
- Relator's team can play a role in shaping the case:
 - Helping DOJ with legal theories
 - Responding to the agencies' questions/concerns
 - Responding to defense arguments
 - Reviewing documents produced by the parties + assisting with claims data analysis
 - Increased involvement by litigation funding entities
- Defendant's process & response:
 - Clarify and narrow government requests
 - Negotiate document productions & interrogatories
 - Weigh the benefits and risks of cooperation (e.g., potential to lower multiplier vs. risk of disclosing bad facts the government would never have found)
 - Negotiate a resolution (e.g., convince DOJ to decline or settle)
 - Litigate

Life Cycle of an FCA Action: Intervention

DOJ: declines or intervenes

- If the government intervenes:
 - Relator remains a party to the suit
 - The Government can move to dismiss the action over the objection of the Relator so long as the relator is notified of the motion and given an opportunity for hearing
- If the government declines:
 - Relator can move forward with the suit
 - The Government can later seek leave from the court to intervene “upon a showing of good cause.” 31 U.S.C. § 3730(c)(3)
 - The Government may not move to dismiss a qui tam action if it has never intervened *U.S. ex rel. Polansky v. Executive Health Resources*, 599 U.S. 419 (2023)

Life Cycle of an FCA Action: Relator's Recovery

- A qui tam relator is entitled to receive **up to 30%** of the final recovery
 - Between 25% and 30% if the government does not intervene
 - Up to 25% of the proceeds if the government intervenes
 - Payment of attorneys' fees
 - May also be entitled to:
 - Reinstatement with the same seniority status
 - Twice the amount of backpay plus interest
 - Compensation for any special damages sustained resulting from the discrimination, including litigation costs and reasonable attorneys' fees
- 31 U.S.C. § 3730(h)(2)

Damages and Penalties

- Amount paid on claims—subject to trebling
- Civil monetary penalty of **\$14,308** to **\$28,619** per statutory violation
 - As of 2025, with penalties to increase again next year
- Suspension or debarment from participation in federal health care programs
- Corporate Integrity Agreement (“CIA”) or other ongoing government oversight



Legal Defenses under the FCA

- Failure to plead fraud with particularity
 - Fed. R. Civ. P. 9(b): Plaintiffs alleging any fraud-based claim must "state with particularity the circumstances constituting fraud."
 - Must plead "representative examples" or "reliable indicia supporting strong inference" that claims were submitted
 - E.g., *U.S. ex rel. Benaissa v. Trinity Health*, 963 F3d 733 (8th Cir. 2020)
 - Affirming dismissal because Relator did not plead representative examples of false claims or details of scheme with reliable indicia that support a strong inference the claims were submitted.
 - Key point weighing against "reliable indicia" was that physician did not work in the billing department.
 - But see *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201 (9th Cir. 2019)
 - Reversing dismissal because relators pled "reliable indicia" through an analysis of company records showing defendant was miscoding Medicare bills
 - Relator was told by another employee that claims were submitted
 - Relator raised the issue, and she was fired

Legal Defenses under the FCA

- **The Public Disclosure Bar**
 - A *qui tam* action must be dismissed if the substantially same allegation was already publicly disclosed.
- **First-to-file bar**
 - Prohibits second relator from bringing another action based on the same facts underlying the pending action
- **Statute of Limitations**
 - Six years after violation
 - 3 years after the U.S. knows or should have known about material facts, but not more than 10 years after violation

DOJ Civil Rights Fraud Initiative

Deputy AG Todd Blanche issued memo establishing Civil Rights Fraud Initiative

- Use False Claims Act to investigate and “aggressively pursue” civil rights-related claims
- Colleges and universities explicitly referenced as potential enforcement targets



AG's Guidance on Unlawful Discrimination

- Attorney General July 29, 2025 memo:
[Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination](#)
 - Declares unlawful preferential treatment based on protected characteristics
 - Prohibits use of proxies and segregation based on protected characteristics
 - Bans training that stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment



Best Practices

- **Compliance Program Essentials:**
 - Regular audits of relevant programs
 - Document decision-making processes
 - Train employees on FCA risks
- **Response Plan:**
 - CID protocol
 - Privileged internal reviews
 - Whistleblower hotline & anti-retaliation measures

Bios

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Thank You