

### Michigan Medicaid False Claims Act Revisions

January 16, 2009

Senate Bill 1622 (2008) was signed into law on December 31, 2008 . PA 0421'08 amends Michigan 's "Medicaid False Claim Act," MCLA 400.601-400.613, to bring it into compliance with the federal Deficit Reduction Act and thus qualify Michigan for increased recoveries in Medicaid false claim cases.

#### Background

The Medicaid False Claim Act ("MFCA") was first enacted in 1977 and last amended in 2005 to add qui tam provisions, permitting private citizens to initiate civil actions in the name of the state, and prohibiting retaliation against whistleblowers and others who cooperate or assist in related investigations. In 2006, President Bush signed the federal Deficit Reduction Act ("DefRA") into law, under which financial incentives are awarded to states whose laws meet specified federal standards to encourage and facilitate qui tam actions. 42 U.S.C. § 1396h(b). The U.S. Department of Health and Human Services Office of Inspector General ("OIG") is responsible for reviewing state laws and evaluating their compliance with the federal standards, and the agency has published guidelines for performing those reviews. 71 Fed. Reg. 48552 ( Aug. 21, 2006 ). Those states whose laws are found to comply with the federal standards are entitled to a 10% increase in their share of false claims recoveries.

In a letter dated December 21, 2006 and a supplement dated July 24, 2008, OIG determined that Michigan 's law did not comply with the federal standards. SB 1622 and a similar bill in the Michigan House of Representatives were offered last term to remedy the identified deficiencies.

#### Legislation

As enacted, SB 1622:

- Revises the term "deceptive" to recognize any omissions, not just material omissions, as potentially supporting false claim allegations.
  - Adopts a "deliberate ignorance" or "reckless disregard" standard for determining whether a defendant acted "knowingly" and therefore may be held liable for violating the law. In addition, non-systemic mistakes or inaccuracies are no longer excluded from the definition of "knowing" or "knowingly," and the law now provides that "proof of specific intent to defraud is not required" to demonstrate that a defendant acted "knowingly."
  - Prohibits false records or statements intended "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state" relating to Medicaid and other claims under the Social Welfare Act.
  - Imposes civil penalties ranging between \$5,000 and \$10,000 per false claim, in addition to recoveries previously permitted under MFCA for improper payments and other damages.
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- Imposes a statute of limitations of 6 years following an alleged violation, or 3 years after the date on which the relevant facts are or should become known (previously no such limitation was included in the law).
- Specifies that the burden of proof for civil actions brought under MFCA is a “preponderance of the evidence.”

The 2008 MFCA amendments collectively ease the path for the Michigan Attorney General or private whistleblowers pursuing false claims allegations in connection with the Michigan Medicaid program. (Corresponding amendments were not made during the 2008 session to Michigan’s Health Care False Claims Act, MCLA 752.1001-752.1011, which is similar to MFCA but applies to private health plan claims.) Indeed, the MFCA amendments arguably make it easier to pursue a case under state law than under federal law, perhaps in anticipation of expected enhancements to the federal False Claims Act (two proposals, S. 2041 and H.R. 4854 died in the last Congress but are expected to be re-introduced).

The most effective tool to avoid exposure under the federal and state fraud and abuse laws is the adoption, implementation, and enforcement of a comprehensive compliance program. Those providers who implemented employee and vendor education programs under DefRA in 2006 and 2007 to notify them of the existence of and their rights under federal and state false claims acts should review these materials to assure they accurately reflect MFCA as recently amended.

For more information about designing and implementing effective compliance programs to reduce exposure to civil and criminal liability, contact your Miller Canfield attorney or for information on defending whistleblower claims, contact:

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