

## NuHealth System

### **SECTION: LEADERSHIP POLICY/PROCEDURE**

<b>Title:</b> <b>IMPORTANT LAWS CONCERNING FALSE CLAIMS, FALSE STATEMENTS, INSURANCE FRAUD, HEALTHCARE FRAUD, AND WHISTLEBLOWER PROTECTIONS</b>
<b>Approved:</b> Quality and Policy Advisory Council (QPAC)
<b>Cross References:</b> Corporate Compliance Program LD-227

#### **1.0 PURPOSE**

To provide NHCC's directors, officers, employees, contractors, vendors, and agents with a lay understanding of some of the most significant federal and New York State laws that relate to false claims, false statements, insurance fraud, healthcare fraud, and whistleblower protections.

#### **2.0 FEDERAL LAWS**

##### **2.1 False Claims Act (31 USC §§ 3729-3733)**

The False Claims Act ("FCA") provides, in pertinent part, that:

- 2.1.1 Any person who (1)(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; (3) conspires to commit a violation of subparts 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, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 [28 USC § 2462 note Public Law 104-410] plus 3 times the amount of damages which the Government sustains because of the act of that person.

- 2.1.2 For purposes of this section, (1) the terms "knowing" and "knowingly" mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information, and (B) requires no proof of specific intent to defraud. 31 U.S.C. § 3729. 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).
- 2.1.3 In sum, the False Claims Act imposes liability on any person who submits a claim to the federal government that he or she knows (or should know) is false. An example may be a physician who submits a bill to Medicare for medical services she knows she has not provided. The False Claims Act also imposes liability on an individual who may knowingly submit a false record in order to obtain payment from the government. An example of this may include a government contractor who submits records that he knows (or should know) is 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 federal government to which he 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 a hospital 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.
- 2.1.4 In addition to its substantive provisions, the FCA provides that private parties may bring an action on behalf of the United States. 31 U.S.C. 3730 (b). These private parties, known as "*qui tam* relators," may share in a percentage of the proceeds from an FCA action or settlement.
- 2.1.5 Section 3730(d)(1) of the FCA provides, with some exceptions, that a *qui tam* relator, when the Government has intervened in the lawsuit, shall receive at least 15 percent but not more than 25 percent of the proceeds of the FCA action depending upon the extent to which the relator substantially contributed to the prosecution of the action. When the

Government does not intervene, section 3730(d) (2) provides that the relator shall receive an amount that the court decides is reasonable and shall be not less than 25 percent and not more than 30 percent.

**2.2 Administrative Remedies for False Claims (31 USC Chapter 38. §§ 3801 – 3812)**

- 2.2.1 This statute allows for administrative recoveries by federal agencies. If a person submits a claim that the person knows is false or contains false information, or omits material information, then the agency receiving the claim may impose a penalty of up to \$5,000 for each claim. The agency may also recover twice the amount of the claim. 31 USC § 3802(a) (1)(D)
- 2.2.2 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 the imposition of fines and penalties is made by the administrative agency, not by prosecution in the federal court system.

### **3.0 NEW YORK STATE LAWS**

New York's false claims laws fall into two 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.

#### **3.1 CIVIL AND ADMINISTRATIVE LAWS**

##### **3.1.2 NY False Claims Act (State Finance Law §§ 187-194)**

The NY 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 to \$12,000 per claim and the recoverable damages are between two and three times the value of the amount falsely received depending upon whether the individual cooperates. 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 25-30% of the proceeds if the government did not participate in the suit, or 15-25% if the government did participate in the suit.

##### **3.1.3 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 the amount incorrectly paid or \$5,000 whichever is greater. 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 \$30,000 per violation may be imposed if they involve more serious violations of Medicaid rules, billing for services not rendered or providing excessive services.

##### **3.1.4 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 person's, or the person's family's needs are not taken into account for 6 months if a first offense, 12 months if a second offense (or once if benefits received are between \$1,000 and not more than \$3,900), 18

months if a third offense or if the offense involves wrongful receipt of benefits in excess of \$3,900, and five years for 4 or more offenses.

## **3.2 CRIMINAL LAWS**

### **3.2.1 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.

### **3.2.2 Social Services Law § 366-b, Penalties for Fraudulent Practices.**

3.2.2.1 Any person who knowingly makes a false statement or representation, or who by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain medical assistance to which he is not entitled, shall be guilty of a Class A misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law.

3.2.2.2 Any person who, with intent to defraud, presents for allowance or payment and false or fraudulent claim for furnishing services or merchandise, or knowingly submits false information for the purpose of obtaining greater compensation than that to which he is legally entitled for furnishing services or merchandise, or knowingly submits false information for the purpose of obtaining authorization for furnishing services or merchandise under this title, shall be guilty of a Class A misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law.

### **3.2.3 Penal Law Article 155, Larceny**

3.2.3.1 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.

3.2.3.1.1 Fourth degree grand larceny involves property taken which is valued at over \$1,000, or which is taken from another's person, or is a credit or debit card,

or consists of scientific materials, or is a public record kept with any public office. It is a Class E felony.

3.2.3.1.2 Third degree grand larceny involves property taken which is valued at over \$3,000. It is a Class D felony.

3.2.3.1.3 Second degree grand larceny involves property taken which is valued at over \$50,000 or is committed by extortion regardless of value. It is a Class C felony.

3.2.3.1.4 First degree grand larceny involves property taken which is valued at over \$1 million. It is a Class B felony.

#### **3.2.4 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:

3.2.4.1 §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.

3.2.4.2 § 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 to aid or conceal its commission. It is a Class E felony.

3.2.4.3 §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 or public servant knowing that it contains a false statement or false information and he offers or presents it to a public office or public servant with the knowledge or belief it will be filed with, registered or recorded or otherwise become a part of the records of such public office or public servant. It is a Class A misdemeanor.

3.2.4.4 §175.35, Offering a false instrument for filing in the first degree includes the elements of the second degree offense and must include an intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state, he offers or presents it to a public office public servant, public authority or

public benefit corporation with the knowledge or belief that it will be filed with, registered or recorded or otherwise become a part of the records of such public office, public servant, public authority or public benefit corporation. It is a Class E felony.

### **3.2.5 Penal Law Article 176, Insurance Fraud**

Applies to claims for insurance payment, including Medicaid or other health insurance and contains six crimes.

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

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

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

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

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

3.2.5.6 Aggravated insurance fraud in the fourth degree is committing a fraudulent insurance act having committed such other fraudulent insurance act within the previous five years. It is a Class D felony.

### **3.2.6 Penal Law Article 177, Health Care Fraud,**

Applies to claims for health insurance payment, including Medicaid, and contains five crimes:

3.2.6.1 Health care fraud in the 5th degree when, with intent to defraud a health plan, he or she knowingly and willfully provides materially false information or omits material information and he or another person receives payment to which they are not entitled. It is a Class A misdemeanor.

3.2.6.2 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.

3.2.6.3 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.

3.2.6.4 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.

3.2.6.5 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.



## 4.0 WHISTLEBLOWER PROTECTION

### 4.1 Federal False Claims Act (31 U.S.C. §3730(h))

The FCA provides protection to *qui tam* 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 tam* relator would have had but for the discrimination, two 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.

### 4.2 NY False Claim Act (State Finance Law §191)

The False Claim Act also provides protection to *qui tam* 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 any action under this Article. Remedies include reinstatement with comparable seniority as the *qui tam* relator would have had but for the discrimination, two 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.

### 4.3 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.

### 4.4 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.