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New Provisions of California's False Claims Act

By Ken O'Brien

California Governor Jerry Brown recently signed into law AB 2492, amending California's False Claims Act to better conform it to requirements of the federal False Claims Act.¹ In addition to amending definitions of "conduct" that would fall under the provisions of the new law, civil penalties are also increased for each violation. The new changes also make it easier for employees who themselves violate the Act to file suit against an employer based on the employee's prohibited conduct and be awarded a share of the proceeds of the action. Courts can, however, reduce the award based on the employee's conduct.

The history of so-called False Claims Act² legislation in the United States dates back to 1863, when individuals and businesses sold the Union Army sick and lame horses and mules, defective firearms and munitions, and rotten food. In one famous example, a certain U.S. Army Major is alleged to have knowingly sold the government 1,000 blind and diseased mules.³ Essentially, federal and state False Claims Acts make it unlawful for persons and entities to present false claims to government agencies to improperly obtain money for goods and services that have not been provided, are provided in excess of what is required, or which are provided but not in conformity with custom, practice or the relevant terms of the contract (for example, blind and diseased mules rather than healthy specimens).

The changes made by AB 2492 may—if employers who provide goods and services directly or indirectly to state and local governments are not careful—lead to an increase in claims for improper billing practices, penalties, and civil lawsuits by employees. The amended law becomes effective on January 1, 2013.

Some of the key changes include a provision making even the person "who planned and initiated" the unlawful claim eligible for an award of up to 50% of the proceeds ultimately paid out by the defendant.⁴ Even though courts have discretion to lower the amount of an award paid to such a person, the statute creates a direct incentive for a person who has played a key role in a false claim

1 Assembly Bill 2492 amends or adds California Government Code sections 12650-12654.5.

2 31 U.S.C. §§ 3729 *et seq.*

3 H.R. 3334, 99th Cong., 2d Sess. (1986) (opening statements of Rep. Glickman before Judiciary Committee on Feb. 5, 1986); see *False Claims Reforms Act: Hearing on H.R. 3334 Before the Subcommittee on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 99th Cong. 2d. Sess. 1 (1986) (opening statement of Rep. Glickman Feb. 5, 1986).

4 Cal. Gov't Code § 12652.

to bring a claim against its employer. In addition, a person who has been terminated, demoted, discriminated against, or otherwise retaliated against for initiating a False Claims Act matter, may seek full relief, including reinstatement, double damages for back pay, special damages, punitive damages, attorneys' fees and court costs.⁵ Such claimants have up to three years to file suit. These and other provisions of the new law require vigilance to avoid additional employee claims against businesses in California.

As always, the key to avoiding such claims requires taking several important actions. The first, and most obvious step, is to avoid actions that may form the basis for a claim under the False Claims Act. Hence, covered businesses should adhere to policies and practices that prevent: (1) knowingly presenting a false claim to government agencies for payment; (2) knowingly making a false record material to a false claim; (3) conspiring with others to commit unlawful acts; or (4) improperly retaining and not reporting overpayments received.⁶

Secondly, covered businesses should ensure open communication with employees who may report unlawful financial billing practices and claims. Appropriate follow-up communications with the employee and with personnel involved in the questioned financial transaction should document a full and honest evaluation of the facts that may be uncovered by management to rectify any improper transaction.

Thirdly, businesses should educate managers to prevent unlawful discrimination and retaliation against employees who bring forth evidence of false claims.

Finally, if an employer becomes aware of facts that may run afoul of any relevant False Claim Act, it should undertake an impartial and thorough investigation to determine whether improper conduct has occurred and, if so, how to rectify it quickly.

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5 Cal. Gov't Code § 12653.

6 Other actions are prohibited as well. California Government Code section 12651 lays these out in detail.