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Owner KOJI MABUCHI:
SENIOR
DIRECTOR
CORPORATE
COMPLIANCE

Area Administrative
Policy and
Procedure (Non-
Clinical)

Applicability Montefiore
Medical Center +
Medical Group +
Children's AG +
Home Care



Summary of Federal and State False Claims Laws

Policy:

It is the policy of Montefiore Health System and its affiliates and subsidiaries ("Montefiore") that all associates, including employed physicians and voluntary physicians and vendors, consultants and agents who provide health care services or perform billing and coding functions shall comply with all applicable Federal and New York State false claims laws and regulations. Montefiore has instituted various policies and procedures, to ensure compliance with these laws and to assist Montefiore in preventing fraud, waste and abuse in Federal health care programs. As part of Montefiore's Compliance Program, associates shall receive training on these laws, which are summarized below, and should consult with the Compliance Officer if they have questions about the application of these laws to their job.

This policy applies to all Montefiore locations except to the extent an entity has its own specific procedures that are based on its own systems, processes and departments.

I. FEDERAL LAWS

A. The Federal False Claims Act¹

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

1. any person who (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; (C) conspires to commit [the above violations]; . . . 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 \$13,946 and not more than \$27,894,² plus 3 times the amount of damages which the Government sustains because of the act of that person

a. For purposes of this section,

1. the terms "knowing" and "knowingly" (A) 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) require no proof of specific intent to defraud; and
2. the term "claim" (A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that-- (i) is presented to an officer, employee, or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government (I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and
3. the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and
4. the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

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).

In sum, the False Claims Act imposes liability on any person who submits a claim to the

federal government or a contractor of 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 healthcare facility 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 or Medicaid program.

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.

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.

B. The Program Fraud Civil Remedies Act ("PFCRA")³

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.

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.

C. Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards⁴

Section 2 CFR §200.113 Mandatory Disclosures of the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards provides that:

Any non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Failure to make required disclosures can result in sanctions including suspension or debarment.

II. NEW YORK STATE LAWS

New York State False Claim Laws fall under the jurisdiction of both New York's civil and administrative laws as well as its criminal laws. Some apply to recipient false claims and some apply to provider false claims. The majority of these statutes are specific to healthcare or Medicaid. Yet some of the "common law" crimes apply to areas of interaction with the government and so are applicable to health care fraud and will be listed in this section.

A. Civil and Administrative Laws

1. New York False Claims Act

The New York False Claims Act is similar to the Federal False Claims Act. It imposes penalties and fines upon individuals and entities who knowingly file false or fraudulent claims for payment from any state or local government, including health care programs such as Medicaid. It also has a provision regarding reverse false claims similar to the federal FCA such that a person or entity will be liable in those instances in which the person obtains money from a state or local government to which he may not be entitled, and then uses false statements or records in order to retain the money.

The penalty for filing a false claim is six to twelve thousand dollars per claim plus three times the amount of the damages which the state or local government sustains because of the act of that person. In addition, a person who violates this act is liable for costs, including attorneys' fees, of a civil action brought to recover any such penalty.

The Act allows private individuals to file lawsuits in state court, just as if they were state or local government parties, subject to various possible limitations imposed by the NYS Attorney General or a local government. If the suit eventually concludes with payments back to the government, the person who started the case can recover twenty-five to thirty percent of the proceeds if the government did not participate in the suit, or fifteen to twenty-five percent if the government did participate in the suit.

2. Social Services Law, Section 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. In addition, the Department of Health may impose a civil penalty of no less than \$6,000 and up to \$12,000 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. 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 needs of the individual or that of his family shall not be taken into account for the purpose of determining his or her needs or that of his family for six months if a first offense, for twelve months if a second offense (or if benefits wrongfully received are at least one thousand dollars but not more than three thousand nine hundred dollars), for eighteen months if a third offense (or if benefits wrongfully received are in excess of three thousand nine hundred dollars), and five years for any subsequent occasion of any such offense.

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 relate 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 in the first degree includes the elements of the second degree offense and must include an intent to defraud the state or a political 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 2nd 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.
- f. Aggravated insurance fraud is committing insurance fraud more than once. It is a Class D felony.

6. Penal Law Article 177 -- Health Care Fraud

This statute, enacted in 2006, applies to health care fraud crimes. It was designed to address the specific conduct by health care providers who defraud the system including any publicly or privately funded health insurance or managed care plan or contract, under which any health care item or service is provided. Medicaid is considered to be a single health plan under this statute. This law primarily applies to claims by providers for insurance payment, including Medicaid payment, and it includes 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.

III. WHISTLEBLOWER PROTECTIONS

A. Federal False Claims Act ("FCA") (31 U.S.C. §3730[h])

The FCA provides protection to any employee, contractor, or agent who is 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 lawful acts in furtherance of an action under the FCA. Remedies include reinstatement with comparable seniority as the employee, contractor, or agent 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.

B. Pilot Program for Enhancement of Employee Whistleblower Protections (41 U.S.C. § 4712)

This statute applies to all employees working for contractors, grantees, subcontractors and subgrantees of Federal contracts and grants. It provides protections for employees who disclose information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a specific danger to public health or safety, or a violation of law, rule, or regulations related to a Federal contract or grant. The statute provides that employees who make such disclosures may not be discharged, demoted or otherwise discriminated against if the disclosure is made to one of the following:

- A member of Congress or a representative of a committee of Congress
- An Inspector General
- The Government Accountability Office
- A Federal employee responsible for contract or grant oversight or management at the relevant agency
- An authorized official of the Department of Justice or other law enforcement agency
- A court or grand jury
- A management official or other employee of the contractor, subcontractor, or grantee who has responsibility to investigate, discover, or address misconduct.

Any employee who believes he or she has been subjected to retaliation as stated above may submit a complaint to the Inspector General of the governmental agency involved. The employee will have all rights and remedies afforded by Federal law.

C. **New York State False Claim Act (State Finance Law §191)**

The New York State 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 an action under the Act. 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.

D. **New York Labor Law §740**

An employer may not take any retaliatory action against an employee, a former employee, or an independent contractor (collectively "whistleblowers") if the whistleblower makes a protected disclosure of information about the employer's policies, practices or activities to a supervisor or any of the following entities ("public bodies"): the United States Congress, any state legislature, or any elected local governmental body, or any member or employee thereof; any federal, state, or local court, or any member or employee thereof, or any grand or petit jury; any federal, state, or local regulatory, administrative, or public agency or authority, or instrumentality thereof; any federal, state, or local law enforcement agency, prosecutorial office, or police or peace officer; any federal, state or local department of an executive branch of government; or any division, board, bureau, office, committee or commission of any public bodies.

An employer cannot retaliate against: an individual who discloses or threatens to disclose, an actual violation of law, rule, or regulation; or an individual who had a reasonable belief that the employer committed a violation of law, rule, or regulation.

"Retaliatory action" means an adverse action taken by an employer or their agent to discharge, threaten, penalize, or in any other manner discriminate against any employee or former employee exercising their rights under this section, including (i) adverse employment actions or threats to take such adverse employment actions against an employee in the terms of conditions of employment including but not limited to discharge, suspension, or demotion; (ii) actions or threats to take such actions that would adversely impact a former employee's current or future employment; or (iii) threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member.

Protected disclosures are those where the whistleblower acts on a reasonable belief that either a violation of a law, rule, or regulation—including executive orders and any judicial or administrative decision, ruling or order, has occurred, or where there is a substantial and specific danger to the public health and safety inherent in the employer's policies, practices or activities. The whistleblower'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, except in situations where: (a) there is an imminent and serious danger to the public health or safety; (b) the employee reasonably believes that reporting to the supervisor would result in a destruction of evidence or other concealment of the activity, policy or

practice; (c) such activity, policy or practice could reasonably be expected to lead to endangering the welfare of a minor; (d) the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or (e) the employee reasonably believes that the supervisor is already aware of the activity, policy or practice and will not correct such activity, policy or practice.

A whistleblower who has been the subject of a retaliatory personnel action in violation of this section may institute a civil action in a court of competent jurisdiction for relief.

A Notice of Employee Rights, Protections, and Obligations Under Labor Law Section 740 can be found on the Montefiore Intranet.

E. New York Labor Law §741

A health care employer may not take retaliatory action against an employee because the employee does any of the following: (a) discloses or threatens to disclose to a supervisor, to a public body, to a news media outlet, or to a social media forum available to the public at large, an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or improper quality of workplace safety; or (b) objects to, or refuses to participate in any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or improper quality of workplace safety.

Retaliatory action means discharge, suspension, demotion, penalization or discrimination against an employee, or other adverse employment action taken against an employee in the terms and conditions of employment. If personnel actions taken by the employer against a whistleblower are predicated on grounds other than the whistleblower's protected disclosure and/or objection or refusal to participate in any policies, practices or activities, a court may determine that those personnel actions would not be considered as retaliatory in nature.

Protected disclosures are those that an employee assert that, in good faith, the employee has a reasonable belief that the employer's policies practices or activities constitute improper quality of patient care or improper quality of workplace safety. The employee's disclosure is protected only if the employee first brought the improper quality of patient care or improper quality of workplace safety to the attention of a supervisor and has afforded the employer a reasonable opportunity to correct such activity, policy or practice, unless the improper quality of patient care or improper quality of workplace safety described therein presents an imminent threat to public health or safety or to the health of a specific patient or specific health care employee and the employee reasonably believes in good faith that reporting to a supervisor would not result in corrective action.

A health care employee who has been the subject of a retaliatory personnel action may seek enforcement of this law by instituting a civil action in a court of competent jurisdiction for relief.

A Notice of Employee Rights, Protections, and Obligations Under Labor Law Section 741 can be found on the Montefiore Intranet.

Responsibility:

Department of Compliance

¹ 31 USC § 3729 *et seq.*

² Although the statutory provisions of the False Claims Act authorizes a range of penalties of from between \$6,000 and \$12,000, those amounts have been adjusted for inflation and increased by regulation to not less than \$13,964 and not more than \$27,894. 28 CFR §85.3(a) (9).

³ 31 USC §§ 3801, 3802.

⁴ 2 CFR §200.1132, 2 CFR § 200 *et seq.*, 2 CFR part 180, 31 U.S.C. 3321, and 41 U.S.C. 2313

Approval Signatures

Step Description

Approver

Date

Applicability

Montefiore Home Care, Montefiore Medical Center, Montefiore Medical Group, The Children's Hospital at Montefiore