Preparing for the Impact of the Alaska False Claims Act
Overview

• False Claims Acts Overview
  – Federal FCA
  – Alaska Medical Assistance False Claims and Reporting Act –SB 74

• Alaska FCA Key Provisions
  – Civil and Criminal Penalties
  – Whistleblower Protection
  – *Qui Tam* Claims
  – Duty to Identify/Repay Overpayments
    • Self-Audit & Self-Report
  – Compliance
Why Do Providers Need to Know?

• Alaska legislature passed this legislation for a reason
• Status quo is likely to change
• Potential recovery for State coffers could be significant
  – Consider federal government’s track record on federal FCA penalties
    • $3.5 B in civil settlement / judgments for FYE 9/30/15, including $1.9 B from healthcare industry
    • $26.46B recovered since January 2009

Source: DOJ, Office of Public Affairs Press Release 12/3/15
Why Do Providers Need to Know?

• Any arrangement or transaction that involves a relationship with a healthcare provider or entity of any kind providing services to state or federal healthcare beneficiaries, could implicate the federal and/or state false claims acts
  – space or equipment leases; professional services arrangements; ancillary services arrangements; mergers and acquisitions; service line expansions; co-management or joint venture arrangements; licensing or royalty arrangements

• Are systems in place and personnel trained to spot and report any issues?
Federal FCA Overview

• Liability attaches for knowingly submitting a false claim to the government or causing another to do so, or knowingly making a false record or statement to get a false claim paid
  – e.g., claims made during period of Stark or AKS non-compliance
• “Knowingly” = with knowledge of falsity; acting in deliberate ignorance or reckless disregard of the truth related to a claim
  – e.g., billing for services not provided
• “Reverse” false claims – liability may attach where a person knowingly avoids paying money owed to the government
  – e.g., failure to return an overpayment can trigger FCA liability
Alaska’s New False Claims Act – SB 74

• Prohibits providers and recipients from **knowingly**...  
  – submitting, authorizing or causing to be submitted a false or fraudulent **claim** for Medicaid payment  
  – making, using or causing a false record or statement to get paid  
  – using a false record or statement to conceal, avoid, increase or decrease an **obligation** to repay money / return property

• Prohibits conspiring to defraud the state with a false or fraudulent claim

• Does not apply to claims under $5,500 (aggregate by provider)
What does it mean to act “knowingly”? 

• A person acts “knowingly” if the person (A) has actual knowledge of information, (B) acts in deliberate ignorance of the truth or falsity of the information, or (C) acts in reckless disregard of the truth or falsity of the information.

• Does not require “specific intent to defraud”

• Expect DHSS and Alaska courts to look to federal FCA case law for guidance.
Duty to Return Overpayment

• Later discovery that a claim was false or fraudulent, whether intentional or inadvertent, must be disclosed to the state within 60 days
  – expect to see mechanism for self-disclosure protocol in regulations
  – definitions; e.g., what constitutes “discovery”
Liability for Acts of Agent

- Person / entity is liable for acts of agent if agent has “apparent authority” to act on behalf of person / entity
  - Agent does not have to act for person’s / entity’s benefit
  - Person / entity does not have to adopt or ratify agent’s actions

- Person / entity is not liable for acts of agent if “evidence shows” agent acted with intent to deceive person / entity
Enforcement

- Attorney General’s Office (AGO) and DHSS have authority to investigate

- AGO has power to file civil suit and issue subpoenas
  - If a provider refuses to cooperate, AGO can obtain a court order compelling production of “books, papers, correspondence, memoranda, and other records”
New Civil Penalties

• Alaska FCA
  – Minimum $5,500 / maximum $11,000 (does not say “per claim”)
  – Three (3) times State’s actual damages (may be reduced for self-reporting)
  – Reasonable attorneys’ fees / costs; full fees / costs if fraudulent

• Compare: Federal FCA / Civil Monetary Penalties Act
  – $5,500 per claim minimum / $11,000 per claim maximum**
  – Three (3) times Government’s actual damages (may be reduced for self-reporting)
  – Attorneys fees / costs
Reduced Penalties for Self-Report

• Liability for actual damages may be reduced to not less than twice (2x) State’s actual damages if “court finds” that:

  – provider disclosed to state “all information known” not later than thirty (30) days after “information was obtained”
  – fully cooperated” with investigation
  – no criminal / civil action or investigation was pending at time of disclosure, or if it was, provider did not know about it
New Alaska Qui Tam Provisions

• Private person (Relator) can sue on behalf of State
  – Complaint is filed under seal (judge’s eyes only)
• Copy of complaint and “all material evidence and information the person possesses” go to AGO
• AGO has minimum of 60 days to investigate
  – can refer for criminal prosecution
  – must make “substantial evidence” determination and
    • intervene and prosecute,
    • decline and let relator proceed, or
    • move to dismiss
• Defendant will not know about case or investigation until file is unsealed
Qui Tam Provisions (con’t)

• If AGO intervenes, AGO has exclusive right to direct case
  – Relator is nominal party only
  – AGO can amend or file new complaint (scope not limited to Relator’s initial allegations)
  – AGO can dismiss after Relator has opportunity to be heard
  – AGO can settle
    • Court must find settlement is “fair, adequate and reasonable under all the circumstances”
    • Hearing may be held in camera upon showing of good cause
Qui Tam Provisions (con’t)

- If AGO does not intervene, Relator can proceed
  - AGO can request copies of all documents and pleadings at AGO expense
  - AGO can intervene at any time thereafter

- With or without intervening, AGO can require Relator’s action be stayed so discovery does not interfere with criminal or civil investigation or prosecution
Bars to *Qui Tam* Claim

- Action cannot be maintained if it is based on:
  - evidence or information already known to the State
  - allegations or transactions already subject of civil or criminal action or administrative proceeding where State is a party
  - public disclosure of information (including by media) unless potential Relator is original source of information
  - claim against state or current or former state employees
Qui Tam Relator’s Share of Recovery

• If AGO intervenes, Relator receives 15% to 25% of “proceeds of the action or settlement”
  – Depends on “extent to which (Relator) contributed to the prosecution of the action”

• If AGO does not intervene, Relator receives 25% to 30% of “judgment or settlement”
  – Court decides what is “reasonable for collecting the civil penalty and damages based on the person’s (Relator’s) effort to prosecute the action successfully”
  – Relator gets reasonable attorney fees / costs, or “full reasonable” attorney’s fees / costs if case involves fraud
Criminal Penalties Also Available

• Alaska FCA ties violation of new Act to existing criminal penalties available under Alaska Medicaid program
  – Fines range from $500,000 for Class A misdemeanor to $2.5M for felony conviction of organization
    – $10,000 for Class A misdemeanor to $100,000 for Class B felony conviction of individual
  – Three (3) times pecuniary damage or loss to State
  – Imprisonment for up to 10 years
• Compare: Federal FCA Fines up to $11,000 per false claim, imprisonment for up to 5 years, or both
Alaska’s New Whistleblower Protection

• Employee who is “discharged, demoted, suspended, threatened, harassed, or discriminated against in the terms and conditions of employment” by (employer) “because of” protected activity

• Protected activity = “lawful acts ...in furtherance of an action under (AK FCA) including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed”

• Potential remedies include right to sue employer for damages, including punitive damages

•AGO can seek civil fine up to $10,000
Other Fraud & Abuse Provisions
New DHSS Data / Audit Requirements

• Enhanced computerized income, assets, and identity eligibility verification system
  – third-party vendor with incentives for success rate; must be cost-neutral; applicant fees

• Mandatory independent state-wide provider audits
  – 50 per year; all provider types; DHSS must “attempt to minimize concurrent state or federal audits”;
  – DHSS procedure to recoup overpayments must begin in 90 days; can collect interest and penalties
  – DHSS must share audit information with AGO to screen for criminal activity
New Duty to Identify / Repay Overpayments

• Enrolled providers must conduct biennial review or audit using statistically valid sample of submitted claims

• Identified overpayments must be reported to DHSS “not later than 10 business days after identification” with proposal for repayment
  – DHSS must approve repayment plan: lump sum, payment plan or offset

• Self-identified repayments are not subject to interest or penalties
New Penalties

• In addition to other remedies available to State
• DHSS will adopt new regulations
  – Minimum penalty of $100, up to $2,500 for each violation
  – Factors for appropriate penalty: seriousness of violation, service provided by provider, severity of penalty
  – Appeals depend on penalty
    • less than $2,500 first heard by DHSS (with new regulations required for this), then to Office of Administrative Hearings (OAH)
    • $2,500 heard by OAH under Alaska Administrative Procedure Act
Compliance: Best Practice / Best Defense

• Office of Inspector General’s seven elements for an effective hospital compliance program:
  
  1. The development and distribution of written standards of conduct, as well as written policies and procedures that promote the hospital’s commitment to compliance (e.g., by including adherence to compliance as an element in evaluating managers and employees)
Compliance Program Elements (con’t)

2. The designation of a chief compliance officer and other appropriate bodies, e.g., a corporate compliance committee, charged with the responsibility of operating and monitoring the compliance program, and who report directly to the CEO and the governing body;

3. The development and implementation of regular, effective education and training programs for all affected employees;

4. The maintenance of a process, such as a hotline, to receive complaints, and the adoption of procedures to protect the anonymity of complainants and to protect whistleblowers from retaliation;
Compliance Program Elements (con’t)

5. The development of a system to respond to allegations of improper/illegal activities and the enforcement of appropriate disciplinary action against employees who have violated internal compliance policies, applicable statutes, regulations or Federal health care program requirements;

6. The use of audits and/or other evaluation techniques to monitor compliance and assist in the reduction of identified problem area; and

7. The investigation and remediation of identified systemic problems and the development of policies addressing the non-employment or retention of sanctioned individuals.
Compliance Program Guidance

• Hospital:

• Nursing Facilities:

Please visit the Hall Render Blog at http://blogs.hallrender.com for more information on topics related to health care law.

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