

FEDERAL AND STATE FALSE CLAIM AND WHISTLEBLOWER PROTECTION EMPLOYEE EDUCATION AND FRAUD PREVENTION.

I. PURPOSE

The purpose of this section of the employee handbook/manual is to fully comply with certain requirements set forth in the federal Deficit Reduction Act of 2005 (the “DRA”), and sections 6031 and 6032 of the DRA in particular, with regard to educating employees about federal false claims laws, whistleblower protections and the Facility’s policies and procedures for detecting and preventing fraud, waste, and abuse (“fraud prevention”). Under the DRA, the Facility must provide a discussion of applicable State and Federal law relating to civil and criminal false claims/penalties along with a whistleblower protections and the corporation’s own policies relating to fraud prevention. Sections II through VI of this Part of this compendium provides the discussion mandated by DRA in this regard.

II. POLICY

The policy set forth in the Harmony Healthcare Long Island (“HHLI”) compliance program concerning fraud prevention is fully incorporated in this employee handbook/manual. HHLI has adopted a Compliance Manual which is distributed to all employees providing a summary of the corporate compliance program, including specific provisions which provide notice of how employees may report and cooperate in the identification and prevention of fraud, waste and abuse. Employees are expected to adhere to the requirements included in the Compliance Manual with regard to HHLI’s obligations under Medicaid, Medicare and other publicly funded health care programs.

III. SCOPE

This section applies to all HHLI’s programs, operations and employees. This section of the employee handbook/manual will provide the detail required under the DRA and related compliance mandates of State and Federal law. HHLI’s policies for detecting and preventing fraud, waste and abuse also apply to contractors, subcontractors and agents and their employees, particularly those which or who, on behalf of HHLI, furnish, or otherwise authorize the furnishing of Medicaid or Medicare health care items or services, perform billing or coding functions, or are involved in monitoring the health care provided by HHLI.

IV. FALSE CLAIMS

False claims laws seek to prevent fraud, waste, and abuse in government programs. They permit the government to bring civil lawsuits to recover damages and penalties against providers that submit false claims. These laws often permit private persons, including current or former employees of such providers, to bring so-called "whistleblower" actions against the providers on the government's behalf.

A. Federal False Claims Act

1. 31 USC §§ 3729-3733:

The Federal False Claims Act (the “Act”; 31 USC §§ 3729-3733) imposes civil liability upon any person (individual or entity) for knowingly making a false claim to the United States government (“Government”). Specifically, the Act sets forth seven circumstances for which civil liability will be imposed for false claims. These seven circumstances are:

- (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 a violation of subparagraph (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,

The civil penalty that can be imposed for a false claim under the Act is not less than \$10,781 and not more than \$21,563, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461) , **PLUS** three times the amount of damages which the Government sustained because of the false claim, **PLUS** the costs of a civil action to recover the penalties.¹

The Act defines the terms “Claim”, “Knowing” and “Knowingly”, “obligation”, and “material” as follows:

¹ A Court may impose a lesser penalty of not less than two times the amount of damages sustained by the Government where the Court finds the following:

1. The person committing the violation furnished governmental officials responsible for investigating false claims with all information known to the person about the violation within thirty (30) days after the date on which the person first obtained the information;
2. The person fully cooperated with any governmental investigation of the violation; and
3. At the time the person furnished the Government with the information about the violation, no criminal prosecution, civil action, or administrative action had been commenced with respect to the violation and the person did not have actual knowledge of the existence of an investigation into the violation.

“Claim”:

- (A) 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
- (B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

“Knowing” and “Knowingly”:

That a person, with respect to information:

1. has actual knowledge of the information;
2. acts in deliberate ignorance of the truth or falsity of the information; or
3. acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

“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. (see discussion below regarding potential liability under 42 USC §1320a-7k(d)(2))

“Material” means:

having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

In essence, civil monetary penalties may be imposed upon a person for making a false claim to the Government where the individual knows the information in the claim is false, or acts in deliberate ignorance of the truth or falsity of the information in the claim or acts in reckless disregard of the truth or falsity of the information in the claim. Civil monetary penalties are imposed even where there is no specific intent to defraud the Government.

The Act applies to claims submitted under Medicare, Medicaid, other federal health care programs and other state health care programs funded, in whole or in part, by the federal government. Examples of false claims include, but are not limited to:

1. Filing a claim for payment knowing that the services were not provided or were medically unnecessary;
2. Submitting a claim for payment knowing that excessive charges are being billed;
3. Submitting a claim for payment knowing that a higher billing code which does not reflect the services provided is used;
4. Filing a claim knowing that the claim is for duplicate services.

The Act has been used as a basis to impose civil penalties upon persons in situations involving egregious substandard quality of care, that is, the resident's condition is so bad that the services billed for could not have been provided.

In addition, pursuant to 42 U.S.C. § 1320a-7k(d), if a person fails to report and return an identified overpayment within 60 days of identification, the overpayment is considered an "obligation" under § 3729 and subject to the penalties provided for under the False Claims Act.

2. *31 U.S.C. §3730 (Civil Actions Under the Act – Qui Tam):*

Enforcement of the Act is the responsibility of the United States Attorney General. However, private individuals have the ability to bring a civil action for a violation of §3729 of the Act. These private actions are known as "Qui Tam" actions.

Qui Tam actions are brought by private individuals in the name of the Government. When the complaint in an action brought by a private individual is filed with the Court, it remains under seal for a period of sixty days and cannot to be served upon the defendants named therein until ordered by the Court. Under seal means that the action remains confidential and is not subject to disclosure. The private individual must serve a copy of the complaint and written disclosures of substantially all material evidence and information the individual possesses on the Government. Within sixty days of the Government's receipt of the complaint and written disclosures, the Government shall either intervene and proceed with the action, in which case, the action shall be conducted by the Government, or notify the Court that it declines to take over the action, in which case, the private individual bringing the action shall have the right to proceed with the action.

If the Government elects to proceed with the action brought by a private individual, the private individual shall receive at least 15% but not more than 25% of the proceeds of the

action or settlement of the claim, depending upon the extent to which the private individual contributed to the prosecution of the action. If the Government does not proceed with the action, and the private individual is successful in the action or settles the action, the private individual is entitled to an amount not less than 25% and not more than 30% of the proceeds of the action or settlement which shall be paid out of the proceeds of the action or settlement. In addition, the private individual is entitled to receive an amount for reasonable expenses necessarily incurred in the action plus reasonable attorneys' fees and costs. On the other hand, if the private individual is unsuccessful in prosecuting the action, the Court, upon a finding that the action was clearly frivolous, clearly vexatious or brought primarily for purposes of harassment, may award the defendant in the action its reasonable attorneys' fees and expenses. If the private individual in the action is a person who planned or initiated the violation of the Act, the Court, where appropriate, may reduce the amount of the award to the private individual. Moreover, if such private individual is convicted of a crime arising from his or her role in the violation, the person will not receive any share of the proceeds of the action.

A civil action under the Act may not be brought:

1. More than six years after the date on which the violation of the Act is committed; or
2. More than three years after the date when facts material to the right of action are known or reasonably should have been known by an official of the Government charged with responsibility to act in the circumstances but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

3. 31 U.S.C. §§ 3732 and 3733:

These sections provide detailed jurisdictional and investigatory process rules regarding the False Claim process.

B. Federal Administrative Remedies For False Claims And Statements

1. 31 U.S.C. §3801 et. seq.

Section 3801 imposes additional civil penalties for the filing of false claims or statements with the federal government which are conducted through an administrative process. The term "Claim" is defined as:

Any request, demand or submission - -

- (A) made to [the Government] for property, services or money (including money representing grants, loans, insurance or benefits);
- (B) made to a recipient of property, services or money from [the Government] or to a party to a contract with [the Government] - -
 - (i) for property or services if the United States - -
 - (I) provided such property or services;
 - (II) provided any portion of the funds for the purchase of such property or services; or
 - (III) will reimburse such recipient or party for the purchase of such property or services; or
 - (ii) for the payment of money (including money representing grants, loans, insurance or benefits), if the United States –
 - (I) provided any portion of the money requested or demanded; or
 - (II) will reimburse such recipient or party for any portion of the money paid on such request or demand; or
- (C) made to [the Government] which has the effect of decreasing an obligation to pay or account for property, services or money, except that such term does not include any claim made in any return of tax imposed by the Internal Revenue Code of 1986.

The term “Statement” is defined as:

Any representation, certification, affirmation, document, record or accounting or bookkeeping entry made - -

- (A) with respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or
- (B) with respect to (including relating to eligibility for - -
 - (i) A contract with, or a bid or proposal for a contract with; or
 - (ii) A grant, loan or benefit from,

an authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan or benefit, or if the Government will reimburse such State, political subdivision or party for any portion of the money or property under such contract or for such grant, loan or benefit,

except that such term does not include any statement made in any return of tax imposed by the Internal Revenue Code of 1986.

Specifically, civil monetary penalties under 31 U.S.C. §3801 et. seq. will be imposed against:

1. Any person (individual or entity) who makes, presents, or submits, or causes to be made, presented or submitted, a claim that the person knows or has reason to know:
 - (A) is false, fictitious or fraudulent;
 - (B) includes or is supported by any written statement which asserts a material fact which is false, fictitious or fraudulent;
 - (C) includes or is supported by any written statement that:
 - (i) omits a material fact;
 - (ii) is false, fictitious or fraudulent as a result of such omission; and
 - (iii) is a statement in which the person making, presenting or submitting such statement has a duty to include such material facts; or
 - (D) Is for payment for the provision of property or services which the person has not provided as claimed; or
2. Any person who makes, presents or submits, or causes to be made, presented or submitted, a written statement that:
 - (A) The person knows or has reason to know:
 - (i) asserts a material fact which is false, fictitious or fraudulent; or
 - (ii) is false, fictitious or fraudulent as a result of such omission;
 - (B) in the case of a statement described in clause (ii) of subparagraph (A) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; and
 - (C) contains or is accompanied by an express certification or affirmation of the truthfulness or accuracy of the contents of the statement.

The term “knows or has reason to know” means that:

A person, with respect to a claim or statement - -

- (A) has actual knowledge that the claim or statement is false, fictitious or fraudulent; or
- (B) acts in deliberate ignorance of the truth or falsity of the claim or statement; or
- (C) acts in reckless disregard of the truth or falsity of the claim or statement,

and no proof of specific intent to defraud is required.

Civil monetary penalties under 31 U.S.C. §3801 et. seq. are not more than \$5,000 for each false claim or statement (31 U.S.C. §3802). Also, in lieu of damages sustained by the federal government, an assessment of not more than twice the amount of such claim(s) may be imposed. An individual or entity against whom civil monetary penalties are sought under 31 U.S.C. §3801 et. seq. is entitled to notice, an opportunity for a hearing and judicial review (31 U.S.C §§ 3803-3812).

Unlike the False Claims Act, a violation of this law occurs when a false claim is submitted rather than 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. Additional Federal Civil and Criminal Penalties and Sanctions For False Claims

1. 42 U.S.C. §1320a-7a (Civil):

In addition to the False Claim Act and 31 U.S.C. §3801 et. seq., the federal government may, pursuant to, impose civil monetary penalties (CMP) for improperly filed claims. Such claims include those knowingly presented that were:

- 1) for item or service that person knew or should have known were not provided as claimed, including up coding.
- 2) false or fraudulent
- 3) for service that person knew or should have known were by unqualified physician
- 4) provided by provider excluded from federal health care program reimbursement

- 5) for service or item that person knew or should have known were unnecessary
- 6) in violation of assignment, agreement on limited charge, or provider agreement

§1320a-7a also provides for penalties for the following additional acts:

- 1) knowingly providing false or misleading information leading to a hospital discharge
- 2) being excluded and owning or being an officer of an entity submitting claims
- 3) providing remuneration to influence beneficiaries
- 4) contracting with excluded individual or entity for which reimbursement is made
- 5) participating in kickback or improper or rebate referral remuneration
- 6) knowingly making or using a material false record or statement for a claim
- 7) failing to timely permit access to OIG for audit
- 8) ordering or prescribing by provider when he/she knew or should have known she was excluded from federal health care program reimbursement
- 9) knowingly makes or causes to be made any false statement, omission, or misrepresentation of a material fact in any application, bid, or contract to participate or enroll as a provider of services or a supplier under a Federal health care program.
- 10) knows of and fails to report and return overpayment.

The CMP for the above violations may be assessed in addition to any other penalty prescribed by law. The penalties may be up to \$10,000 for each item or service with some exceptions². In addition, a violator shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim.³

The Secretary may also make a determination in the same proceeding to exclude the person from participation in the Federal health care programs (as defined in section 1320a-7b (f)(1)) and to direct the appropriate State agency to exclude the person from participation in any State health care program. Additional CMPs for hospitals and physicians is also provided under the statute.⁴

² \$15,000 for each person provided false or misleading hospital discharge information is give; \$10,000 per day for excluded individual ownership or officer/manager participation in billing entity; \$50,000 for participating in kickback or improper or rebate referral remuneration; \$50,000 for each material false record or statement relating to claim; \$15,000 per day for denial of audit access; and \$50,000 for each false statement, omission, or misrepresentation of a material fact in any application, etc.

³ Where violation is bribe, kickback or other improper remuneration, it is 3 times the remuneration. Where violation is for false statement, omission, or misrepresentation of a material fact in any application, it is 3 times the amounts claimed under the application contract.

⁴ Additional CMPs of up to \$2,000 per patient may be assessed against any hospital which improperly induces by payment a physician for limiting services to a Medicare or Medicaid beneficiary/recipient and \$2,000 per patient against the physician. A CMP of up to the greater of \$5,000 or 3 times the amount of home care payments paid may be assessed to a physician that falsifies a certification of need for home care

2. 42 U.S.C. §1320a-7:

In addition to civil monetary penalties, the federal government may, pursuant to 42 U.S.C. §1320a-7, exclude an individual or entity from participation in federal and state health care programs (including Medicare and Medicaid) for certain false claims or actions. Generally, exclusion is mandatory in cases where the individual is convicted of a felony relating to health care fraud, otherwise, exclusion is permissive, that is, subject to the discretion of the Government.

3. 42 U.S.C. §1320a-7k(d)(2):

Pursuant to 42 U.S.C. §1320a-7k(d)(2) (enacted as §6402 of the Patient Protection and Affordable Care Act), providers are obligated to **report, explain and repay** overpayments within calendar 60 days of identification. Those that fail to properly disclose, explain and repay the overpayment in a timely manner may be subject to liability under the New York and Federal False Claims Act.

4. 42 U.S.C. §1320a-7b (Criminal):

Pursuant to, criminal sanctions may be imposed against an individual or entity for making or causing to be made false statements or representations. Specifically, criminal sanctions will be imposed against an individual or entity who:

1. Knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a federal health care program;
2. At any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefits or payments;
3. Having knowledge of the occurrence of any event affecting (1) his/her initial or continued right to any such benefit, or (2) the initial or continued right to any such benefit or payment of any other individual in whose behalf he/she has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized;
4. Having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person;
5. Presents or causes to be presented a claim for a physician's service for which payment may be made under a federal health care program and knows that the individual who furnishes the services was not licensed as a physician; or
6. knowingly and willfully, for a fee, counsels or assists an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under [Medicaid] if disposing of the assets results in the imposition of a period of ineligibility for such assistance.

In addition, criminal sanctions will be imposed against any individual or entity who knowingly and willfully makes or causes to be made, or induces or seeks to induce the making of, any false statement or representation of a material fact with respect to the conditions or operations of any institution, facility or entity in order that such institution, facility or entity may qualify (either upon initial certification or upon recertification) as a hospital, critical access hospital, skilled facility, facility, intermediate care facility for the mentally retarded, home health agency, or other entity for which certification is required under Medicare or a state health care program or with respect to information required to be provided under 42 U.S.C. §1320a-3a (disclosure requirements for other providers under Medicare Part B).

D. New York State Laws:

1. NY False Claims Act - State Finance Law §§ 187-194 (Civil):

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-\$12,000 per claim plus 3 times the amount of all damages, including consequential damages, which the state or local government sustains because of the violation.⁵ Prohibited acts under State Finance Law § 189 include:

- 1) knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval;
- 2) 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 the Act;
- 4) has possession, custody, or control of property or money used, or to be used, by the state or a local government and knowingly delivers, or causes to be delivered, less than all of that money or property;
- 5) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the state or a local government and, intending to defraud the state or a local government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- 6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state or a local government knowing that the officer or employee violates a provision of law when selling or pledging such property;
- 7) 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 state or a local government; or
- 8) knowingly conceals or knowingly and improperly avoids or decreases an

⁵ The amount may be dropped to 2 times the damages if the court finds that the violator self-disclosed fully within 30 days of having knowledge, fully cooperated with officials and if the self-disclosure was before criminal, civil or administrative prosecution and the violator had no knowledge of investigation

obligation to pay or transmit money or property to the state or a local government, or conspires to do the same.

In addition, the false claim filer may have to pay the government's costs and legal fees expended to recover the damages.

Furthermore, the New York False Claim Act also allows private individuals to file civil lawsuits (Qui Tam) in state court, just as if they were state or local government parties (State Finance Law § 190). 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.

2. Social Services Law, Section 366-b (Criminal):

Section 366-b of the Social Services Law makes it a Class A misdemeanor for any person who, with intent to defraud, does any of the following:

- a. presents for allowance or payment any false or fraudulent claim for furnishing services or merchandise;
- b. knowingly submits false information for the purpose of obtaining greater compensation than that to which he/she 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 the Medicaid program.

3. Article 177 of the Penal Law (Criminal):

Article 177 of the Penal Law establishes the crime of health care fraud. The crime of health care fraud in the fifth degree is a Class A misdemeanor and a person is guilty of this crime when:

With intent to defraud a health plan, [includes the State Medicaid program], he or she knowingly and willfully provides materially false information or omits material information for the purpose of requesting payment from a health plan for a health care item or service and, as a result of such information or omission, he or she or another person receives payment in an amount that he, she or such other person is not entitled to under the circumstances.

Health care fraud in the fourth degree is a Class E felony. A person is guilty of health care fraud in the fourth degree when the person commits the crime of health care fraud in the fifth degree on one or more occasions and the payment or portion of payment wrongfully

received from a single health plan [including Medicaid] in a period of not more than one year, exceeds \$3,000 in the aggregate.

Health care fraud in the third degree is a Class D felony. Health care fraud in the third degree is committed where the wrongful payments exceed \$10,000 in the aggregate in a one-year period. Health care fraud in the second degree is a Class C felony and is committed where the wrongful payments exceed \$50,000 in the aggregate in a one-year period. Health care fraud in the first degree is a Class B felony and is committed where the wrongful payments exceed more than \$1,000,000 in the aggregate one-year period.

Article 177 of the Penal Law provides for an affirmative defense for individuals serving as a clerk, bookkeeper, or other employee of a health care provider who, without personal benefit, was merely executing the orders of his or her employer or a superior employee generally authorized to direct his or her activities. The affirmative defense is not available to any employee charged with the active management and control, in an executive capacity, of the affairs of the corporation.

4. Social Services Law § 145-b- False Statements (Criminal):

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 up to \$10,000 per violation. If repeat violations occur within 5 years, a penalty up to \$30,000 per violation may be imposed.

5. Social Services Law § 145-c – Sanctions (Criminal):

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, the person's family's needs are not taken into account for 6 months if a first offense, 12 months if a second (or once if benefits received are over \$3,900) and five years for 4 or more offenses.

6. Social Services Law § 145 - Penalties (Criminal):

Any person who submits false statements or deliberately conceals material information in order to receive public assistance, including Medicaid, is guilty of a misdemeanor.

7. Penal Law Article 155 – Larceny (Criminal):

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.

8. Penal Law Article 175 - False Written Statements (Criminal):

Four crimes are set forth relating to filing false information or claims and have been applied in Medicaid fraud cases:

- a. §175.05, falsifying business records, involves entering false information, omitting material information or altering an entity'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.

9. Penal Law Article 176 - Insurance Fraud (Criminal):

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.

10. 18 NYCRR Section 515.2 (Administrative):

It is an unacceptable practice under the Medicaid program for an individual or entity to submit false claims or false statements to Medicaid. False claims include:

- a. Submitting, or causing to be submitted, a claim or claims for:
 - (A) unfurnished medical care, services or supplies;
 - (B) an amount in excess of established rates or fees;
 - (C) medical care, services or supplies provided at a frequency or in amount not medically necessary; or
 - (D) amount substantially in excess of the customary charges or costs to the general public; or
- b. Inducing, or seeking to induce, any person to submit a false claim.

False statements are:

- a. Making, or causing to be made, any false, fictitious or fraudulent statement or misrepresentation of material fact in claiming a medical assistance payment, or for use in determining the right to payment; or
- b. Inducing or seeking to induce the making of any false, fictitious or fraudulent statement or misrepresentation of a material fact.

Individuals who have engaged in unacceptable practices under the Medicaid program are subject to one or more of the following sanctions:

- a. Exclusion from the program for a reasonable time;
- b. Censure;
- c. Conditional or limited participation, such as requiring pre-audit or prior authorization of claims for all medical care, services or supplies, prior authorization of specific medical care, services or supplies, or other similar conditions or limitations.

In addition, the Department of Health may require the repayment of overpayments determined to have been made as a result of the unacceptable practice.

V. WHISTLEBLOWER PROTECTION

A. Federal False Claims Act – 31 U.S.C. § 3730(h):

Any employee, contractor, or agent shall be entitled to all necessary “relief” if discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the person furtherance of efforts to stop a violation(s) of the False Claim Act including a civil action under the Act whether brought by the Government or a private individual, including investigation for, initiation of, testimony for, or assistance in any such action maybe because of such actions. Any employee who has been discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment because of such lawful acts shall be entitled to “relief” necessary to make the employee whole, including, reinstatement with the same seniority status such employee would have had but for the discrimination, two (2) times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.

B. State Laws

1. NY False Claim Act – State Finance Law § 191

Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of “lawful acts” done by the harmed individual or associated others in furtherance of an action brought under this article or other efforts to stop one or more violations of the State False Claims Act is entitled to all relief necessary to make the person whole, including (a) an injunction to restrain continued discrimination; (b) hiring, contracting or reinstatement to the position such person would have had but for the discrimination or to an equivalent position; (c) reinstatement of full fringe benefits and seniority rights; (d) payment of two times back pay, plus interest; and (e) compensation for any special damages sustained including litigation costs and reasonable attorneys' fees. “Lawful act” includes obtaining or transmitting to the state, a local government, a qui tam plaintiff, or private counsel solely employed to investigate, potentially file, or file a cause of action under the False Claim Act documents, data, correspondence, electronic mail, or any other information, even though the act may violate a contract, employment term, or duty owed to the employer or contractor, so long as the possession and transmission of such documents are for the sole purpose of furthering efforts to stop one or more violations.⁶

⁶ Nothing in subdivision (h) is to be interpreted to prevent any law enforcement authority from bringing a civil or criminal action against any person for violating any provision of law.

2. Labor Law Section 740

Under Section 740 an employer is prohibited from taking any retaliatory personnel action (discharge, threaten, penalize, or in any other manner discriminate) against an employee in terms and conditions of employment because the employee does any of the following:

- (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation or that the employee reasonably believes poses a substantial and specific danger to the public health or safety;
- (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such activity, policy or practice by such employer; or
- (c) objects to, or refuses to participate in any such activity, policy or practice.

With respect to disclosures to a public body only, protection against retaliatory personnel actions is unavailable unless the employee has made a good faith effort to notify his or her employer by bringing the activity, policy or practice to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct such activity, policy or practice. Such employer notification shall not be required 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.

An employee who has been subject to a retaliatory personnel action may institute a civil action for the following relief within two years after the alleged retaliatory personnel action was taken:

- (a) an injunction to restrain continued violation of Section 740;
- (b) the reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position, or front pay in lieu thereof;
- (c) the reinstatement of full fringe benefits and seniority rights;
- (d) the compensation for lost wages, benefits and other remuneration;
- (e) the payment by the employer of reasonable costs, disbursements, and attorney's fees;
- (f) a civil penalty of an amount not to exceed ten thousand dollars; and/or
- (g) the payment by the employer of punitive damages, if the violation was willful, malicious or wanton.

If the Court determines that a civil action under Section 740 was without basis in law or fact, the Court, in its discretion, may award reasonable attorneys' fees and court costs and disbursements to the employer.

Every employer shall inform employees of their protections, rights and obligations under this section, by posting a notice thereof. Such notices shall be posted conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment.

3. Labor Law Section 741

Under Section 741, specified health care employers may not take retaliatory action against any employee who performs health care services 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 ("improper quality of patient care" means any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient) 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.

The protections under Section 741 are not available to an employee unless the employee has 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. However, the inapplicability of Section 741 for failure to provide an employer an opportunity to correct does not apply to an action or failure to act described in paragraph (a) of subdivision two of this section where 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.

An employee may bring a civil action under Section 740 for the relief identified in Section 740 under the same terms and conditions.

In any court action brought pursuant to Section 741, it is a defense that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by the Section 741.

Every employer must inform its employees of their protections, rights and obligations under Section 741 by posting a notice thereof. Such notices shall be posted conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment.

VI. PROCEDURE

HHLI takes compliance with the FCA seriously. Any employee who becomes aware of a violation or potential violation of such laws, or any fraudulent or potentially fraudulent conduct for that matter, is expected to report the same immediately. Employees, including management, contractors, and agents, should review, understand, and follow the procedures detailed in the Compliance Manual.

The Agency encourages employees to initially report compliance concerns to their immediate supervisors, when appropriate, but they may, in the alternative, report directly to the Compliance Officer in person or by telephone set forth on the Compliance Contact Sheet.

Any information that employees provide in good faith to their supervisors or the Compliance Officer will be kept in confidence to the extent feasible and legal. In the event of a government investigation or lawsuit, or if the need otherwise arises for HHLI to disclose the information, such information may be disclosed at the direction of legal counsel.

HHLI will not take adverse action against an employee for reasonably requesting assistance from, or reporting potential violations of law or HHLI on policy in good faith to, a supervisor, and the Compliance Officer or government authorities. By reporting his or her own misconduct, however, an employee will not insulate himself or herself from potential disciplinary action for such a violation. Employees should report concerns about possible retaliation or harassment to the Compliance Officer.

HHLI does not condone and will not tolerate abuse of the reporting process. Any employee who makes an intentionally false statement, or makes a report of alleged misconduct in bad faith, shall be subject to appropriate disciplinary action.