

**BLACK HILLS SPECIAL SERVICES COOPERATIVE'S POLICY  
TO PROVIDE EDUCATION CONCERNING  
FALSE CLAIMS LIABILITY,  
ANTI-RETALIATION PROTECTIONS FOR REPORTING WRONGDOING AND  
DETECTING AND PREVENTING FRAUD, WASTE AND ABUSE**

The purpose of this policy is to abide by the requirements of Section 6032, of the Deficit Reduction Act of 2005, to implement and enforce Black Hills Special Services Cooperative's (BHSSC) policies and procedures, to detect and prevent fraud, waste and abuse with respect to payments to BHSSC from federal or state healthcare programs, and to provide protections for those who report actual or suspected wrongdoing.

This policy applies to all employees, management, contractors and agents of BHSSC, and shall be distributed to all employees, current and new board members, vendors, independent contractors, and agents of BHSSC.

This policy includes the following information related to applicable fraud and abuse laws; the rights of employees to be protected as whistleblowers and BHSSC policies and procedures for detecting and preventing fraud, waste and abuse.

- I. A summary of the Federal False Claims Act including a summary of protections for employees (qui tam/whistleblowers) who report suspected violations of these federal laws.**
- II. A summary of administrative remedies found in the Program Fraud Civil Remedies Act**
- III. State False Claim Acts**
- IV. The role of federal and state laws in preventing and detecting fraud, waste, and abuse in federal and state health care programs**
- V. BHSSC existing policies and procedures for preventing and detecting fraud, waste and abuse**
- VI. BHSSC prohibitions against retaliation and whistleblower rights and protections**

**I. Federal False Claims Act 31 U.S.C. §§ 3729 - 3733**

The federal False Claims Act, also known as the "Lincoln Law," was first enacted during the Civil War to address fraudulent activity in supplying goods to the Union Army. The law now applies to any federally funded contract or program and establishes liability for any person who knowingly presents or causes to be presented a false or fraudulent claim to the United States government for payment. In 1986, the False Claims Act was expanded to include Medicare and Medicaid programs.

## Summary of Provisions

The False Claims Act prohibits knowingly making a false claim against the government. False claims can take the form of overcharging for a product or service, delivering less than the promised amount or type of service, delivering less than the promised amount or type of goods or services, underpaying money owed to the government and charging for one thing while providing another.

The False Claims Act imposes civil liability on any person or entity who:

- knowingly files a false or fraudulent claim for payments to Medicare, Medicaid or other federally funded health care program;
- knowingly uses a false record or statement to obtain payment on a false or fraudulent claim from Medicare, Medicaid or other federally funded health care program; or
- Conspires to defraud Medicare, Medicaid or other federally funded health care program by attempting to have a false or fraudulent claim paid.

"Knowingly" means:

- actual knowledge that the information on the claim is false;
- acting in deliberate ignorance of whether the claim is true or false; or
- acting in reckless disregard of whether the claim is true or false.

## Penalties

The False Claims Act is not a criminal statute and thus imposes civil penalties. No proof of specific intent is required. A person or entity, such as a hospital, found liable under the False Claims Act is subject to a civil money penalty of between \$5,500 and \$11,000 plus three times the amount of damages that the government sustained because of the illegal act. In health care cases, the amount of damages sustained is the amount paid for each false claim that is filed.

## Qui Tam "Whistleblower" Provision

To encourage individuals to come forward and report misconduct involving false claims, the FCA includes a *qui tam* or whistleblower provision. Anyone may bring a *qui tam* action under the federal False Claims Act in the name of the United States in federal court. A *qui tam* action is defined as a claim brought by an informer/relator under a statute which establishes a penalty for the commission or omission of a certain act. Part of the penalty paid by the wrongdoer is paid to the informer with the remainder going to the government.

### **Qui Tam Procedure**

The case is initiated by an informer filing his or her lawsuit in a federal district court on behalf of the government for false or fraudulent claims submitted by an individual or an entity doing business with, or reimbursed by the United States government. The lawsuit is filed "under seal" and is not served on (presented to) the defendant at this time to enable the government to investigate the claim. The government has 60 days to investigate and decide whether it will pursue the action, in which case the complaint is unsealed and the Department of Justice or a United States Attorney's office begins prosecuting the claim. If the government decides not to pursue the case, the person who filed the action has the right to continue with the case on his or her own. The government may join the action at a later date if it can demonstrate good cause for doing so. Any case must be brought within six years of the filing of the false claim.

### **Qui Tam Whistleblower Awards**

If the government proceeds with the lawsuit and is successful, the person who filed the action will receive between 15 and 25 percent of any monies recovered for the government plus attorney fees and costs. The amount of the award depends on the contributions of the individual to the success of the case. If the government declines to pursue the case, the *qui tam* whistleblower will be entitled to between 25 and 30 percent of the proceeds of the case, plus reasonable expenses and attorneys fees and costs awarded against the defendant. The award may be reduced, however, if the court finds that the whistleblower planned and initiated the violation.

### **Qui Tam Whistleblower Anti-Retaliation Protections**

Individuals within an organization who observe activities or behavior that may violate the law in some manner and who report their observations either to management or to governmental agencies are provided protections under the law. Whistleblowers initiating a *qui tam* action may not be discriminated or retaliated against in any manner by their employer. Employees, who are discharged, demoted, harassed, or confront discrimination in furtherance of a *qui tam* action or as a consequence of whistle blowing activity, are entitled to all relief necessary to make the employee whole.

## **II. Federal Program Fraud Civil Remedies Act 31 U.S.C. §§ 3801 - 3812**

The Program Fraud Civil Remedies Act of 1986 (PFCRA) provides administrative remedies for making false claims to certain federal agencies, including the Department of Health and Human Services (HHS) separate from and in addition to, the judicial or court remedy for false claims provided by the Civil False Claims Act. The Act is quite similar to the Civil False Claims Act in many respects, but is broader and more detailed, with differing penalties. The Act deals with submission of improper "claims" or "written statements" to a federal agency. PFCRA was

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enacted as a means to address lower dollar frauds, and generally applies to claims of \$150,000 or less.

### Summary of Provisions

The PFCRA imposes liability on people or entities who file a claim that they know or have reason to know:

- is false, fictitious, or fraudulent;
- includes or is supported by any written statement that contains false, fictitious, or fraudulent information;
- includes or is supported by a written statement that omits a material fact, which causes the statement to be false, fictitious, or fraudulent, and the person or entity submitting the statement has a duty to include the omitted fact; or
- is for payment for property or services not provided claimed Penalties.

A violation of this section of the PFCRA is punishable by a \$5,000 civil penalty for each wrongfully filed claim, plus an assessment of twice the amount of any unlawful claim that has been paid.

In addition, a person or entity violates the PFCRA if they submit a written statement which they know or should know:

- asserts a material fact that is false, fictitious or fraudulent; or
- omits a material fact that they had a duty to include, the omission caused the statement to be false, fictitious, or fraudulent, and the statement contained a certification of accuracy.

Violations are investigated by the HHS Office of the Inspector General and enforcement actions must be approved by the Attorney General. PFCRA enforcement can begin with a hearing before an administrative law judge. Penalties may be recovered through a civil action brought by the Attorney General or through an administrative offset against "clean" claims. Because of the availability of other criminal, civil and administrative remedies, cases are not routinely prosecuted under PFCRA.

### III. State False Claims Acts

#### South Dakota State False Claims Laws

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The South Dakota false claims and fraud and abuse laws and regulations impose liability on persons or organizations that make or cause to be made false Medicaid claims to the government for payment, or who make or cause to be made a false record or statement to get a claim or

Invoice paid by the government. These South Dakota laws apply to Medicaid reimbursement and prohibit, among other things:

- Making a false claim to the State for payment;
- Making any false representation in order to obtain authorization to provide a good or service;
- Making any false representation for use by another in order to obtain a Medicaid good or service;
- Making a false statement to qualify as a Medicaid provider;
- Submitting any Medicaid enrollment application, cost report or invoice for payment that contains a false material statement;
- Participating in kickbacks or rebates; and
- Intentionally failing to retain the necessary records upon which a Medicaid claim or payment rate is based.

### Civil and Criminal Penalties for False Claims or Statements

A violation of these South Dakota laws may result in civil penalties including payment of interest on the amount of the excess payment, as well as a civil penalty of \$2,000 for each false claim or statement and/or up to three times the amount of damages sustained by the State government, including the cost of investigation and litigation.

In addition, violations of these laws are punishable as a Class 5 felony. The intentional failure to retain the necessary records upon which a Medicaid claim or payment rate is based is a Class 1 misdemeanor. Violations of any of these laws may also result in termination from participation in the Medicaid program. These penalties are in addition to any other available civil or criminal remedies.

### Civil Lawsuits

Currently, unlike the Federal False Claims Act, South Dakota law appears to allow civil lawsuits to recover monetary damages to be filed only by the state government and not by private citizens or employees. Such civil actions must be filed within six years from the time that the cause for action accrues. There is no provision for a private citizen to share a percentage of any monetary recoveries.

### No Retaliation- Whistleblower Protection

Like federal law and BHSSC policy, various South Dakota laws prohibit public employers and certain private employers from retaliating against employees because of their good faith

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disclosure of information about a violation of a law, or a violation that poses a risk to public or patient health, safety or welfare. The State anti-retaliation laws allow public employees to file a grievance for retaliation against them for reporting a violation of state law, and prohibit certain private employers from retaliating against either staff members who report suspected abuse, neglect or exploitation against any person with developmental disabilities, or against the person with the disability. South Dakota law does not appear to contain similar protections for other private employers.

Any employee, who engages in or condones any form of retaliation against another employee because that employee either (1) reported a potential violation of BHSSC policies, or (2) refused to violate BHSSC policies or a government law or regulation, will be subject to disciplinary action up to and including termination of employment.

### **Copies of South Dakota Laws**

The South Dakota laws summarized above include: (1) false claims, fraud and abuse laws and criminal and civil penalties, S.D. Codified. Laws §§ 22-45-1 — 22-45-11; and Anti-Retaliation laws, S.D. Codified Laws §§ 3-6A-52 and 27B-8-43.

### **IV. The Role of False Claims Laws**

The laws described in this policy create a comprehensive scheme for controlling waste, fraud and abuse in federal and state health care programs by giving appropriate governmental agencies the authority to seek out, investigate and prosecute violations. Enforcement activities are pursued in criminal, civil and administrative forums. This provides a broad spectrum of remedies to battle this problem.

In addition, whistleblower statutes and anti-retaliation policies protect individuals who in good faith report waste, fraud, and abuse. Whistleblower statutes, such as the federal Civil False Claims Act create reasonable incentives for this purpose. Employment protections create a level of security employees need to help in prosecuting these cases.

### **V. BHSSC Policies and Procedures for Detecting and Preventing Fraud**

BHSSC has implemented a Compliance Plan to detect and prevent fraud, abuse and waste with respect to federal and state health care programs. A copy of BHSSC's Compliance Plan can be accessed through the internal web site (intranet). Under BHSSC's compliance policies, all employees have a responsibility to comply with the law and to report in the good faith belief, any violation of compliance policies. Any employee who has a good faith belief, based on objective information, that a false claim has been or will be made, must report the alleged violation to his or her supervisor, the Compliance Officer, the HR Coordinator or the CEO.

Failure to report based upon a good faith belief that a false claim will be or has been made will result in disciplinary action up to and including termination. Upon receiving a report based upon a good faith belief that a false claim will or has been made, BHSSC will promptly investigate

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the complaint and work with all parties involved to correct any non-compliance. For more detailed information regarding BHSSC's policies, please refer to the BHSSC Compliance Plan.

### **BHSSC Prohibitions Against Retaliation and Whistleblower Rights and Protections**

Federal and state law and BHSSC policy prohibit any retaliation or retribution against persons who report suspected violations of these laws to law enforcement officials or who file "whistleblower" lawsuits on behalf of the government. Employees who in good faith believe that BHSSC has violated state or federal laws have the right to contact a regulatory agency directly. This right is protected by federal law and BHSSC policies. Although employees have the right to contact regulatory agencies directly and are protected from retaliation, BHSSC's preference is that any employee who believes there has been a compliance violation will first notify BHSSC in order to provide us with the opportunity to do the right thing and promptly investigate, verify, and correct the noncompliance. This preference is not motivated by a desire to "cover up" any non-compliance; rather, we believe that it is best to internally correct non-compliance without the expense, delay, adverse publicity, and disruption that can be caused by external investigations and lawsuits. BHSSC's Compliance Plan is designed to encourage and allow employees to report issues and concerns regarding any potential or actual violations. Therefore, anyone who in good faith believes that he or she has been subject to any such retribution or retaliation should report this to, the Compliance Officer, the HR Coordinator or the CEO.