

Current through amendments made by 2010 Laws, Chapter 379, effective August 27, 2010.

## **NEW YORK FALSE CLAIMS ACT**

New York State Finance Law

Chapter 56. Of the Consolidated Laws

Article XIII. New York False Claims Act

### **§ 187. Short title**

This article shall be known and may be cited as the "New York false claims act".

### **§ 188. Definitions**

As used in this article, the following terms shall mean:

1. "Claim" (a) means any request or demand, whether under a contract or otherwise, for money or property that
  - (i) is presented to an officer, employee or agent of the state or a local government; or
  - (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the state or a local government's behalf or to advance a state or local government program or interest, and if the state or local government
    - (A) provides or has provided any portion of the money or property requested or demanded; or
    - (B) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded;
- (b) does not include requests or demands for money or property that the state or a local government has already paid to an individual as compensation for government employment or as an income subsidy with no restrictions on that individual's use of the money or property.
2. "False claim" means any claim which is, either in whole or part, false or fraudulent.
3. "Knowing and knowingly" (a) means 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, provided, however that acts occurring by mistake or as a result of mere negligence are not covered by this article.

4. "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.

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

6. "Local government" means any New York county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state, or of such local government.

7. "Original source" means a person who

(a) prior to a public disclosure under paragraph (b) of subdivision nine of section one hundred ninety of this article has voluntarily disclosed to the state or a local government the information on which allegations or transactions in a cause of action are based, or

(b) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the state or a local government before or simultaneous with filing an action under this article.

8. "Person" means any natural person, partnership, corporation, association or any other legal entity or individual, other than the state or a local government.

9. "State" means the state of New York and any state department, board, bureau, division, commission, committee, public benefit corporation, public authority, council, office or other governmental entity performing a governmental or proprietary function for the state.

### **§ 189. Liability for certain acts**

1. Subject to the provisions of subdivision two of this section, 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 a violation of paragraph (a), (b), (d), (e), (f) or (g) of this subdivision;

(d) 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;

(e) 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;

(f) 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; 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 state or a local government shall be liable to the state or a local government, as applicable, for a civil penalty of not less than six thousand dollars and not more than twelve thousand dollars, plus three times the amount of all damages, including consequential damages, which the state or local government sustains because of the act of that person.

2. The court may assess not more than two times the amount of damages sustained because of the act of the person described in subdivision one of this section, if the court finds that:

(a) the person committing the violation of this section had furnished all information known to such person about the violation, to those officials responsible for investigating false claims violations on behalf of the state and any local government that sustained damages, within thirty days after the date on which such person first obtained the information;

(b) such person fully cooperated with any government investigation of such violation; and

(c) at the time such person furnished information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation.

3. A person who violates this section shall also be liable for the costs, including attorneys' fees, of a civil action brought to recover any such penalty or damages.

4. (a) This section shall apply to claims, records, or statements made under the tax law only if

(i) the net income or sales of the person against whom the action is brought equals or exceeds one million dollars for any taxable year subject to any action brought pursuant to this article; and

(ii) the damages pleaded in such action exceed three hundred and fifty thousand dollars.

(b) The attorney general shall consult with the commissioner of the department of taxation and finance prior to filing or intervening in any action under this article that is based on the filing of false claims, records or statements made under the tax law. If the state declines to participate or to authorize participation by a local government in such an action pursuant to subdivision two of section one hundred ninety of this article, the qui tam plaintiff must obtain approval from the attorney general before making any motion to compel the department of taxation and finance to disclose tax records.

## **§ 190. Civil actions for false claims**

1. Civil enforcement actions. The attorney general shall have the authority to investigate violations under section one hundred eighty-nine of this article. If the attorney general believes that a person has violated or is violating such section, then the attorney general may bring a civil action on behalf of the people of the state of New York or on behalf of a local government against such person. A local government also shall have the authority to investigate violations that may have resulted in damages to such local government under section one hundred eighty-nine of this article, and may bring a civil action on its own behalf, or on behalf of any subdivision of such local government, to recover damages sustained by such local government as a result of such violations. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity. The attorney general shall consult with the office of medicaid inspector general prior to filing any action related to the medicaid program.

2. Qui tam civil actions. (a) Any person may bring a qui tam civil action for a violation of section one hundred eighty-nine of this article on behalf of the person and the people of the state of New York or a local government. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity. For purposes of subparagraphs (i) and (iv) of paragraph (a) of subdivision eight of section seventy-three of the public officers law, any activity by a former government employee in connection with the securing of rights, protections or benefits related to preparing or filing an action under this article shall not be deemed to be an appearance or practice before any agency.

(b) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the state pursuant to subdivision one of section three hundred seven of the civil practice law and rules. Any complaint filed in a court of the state of New York shall be filed in supreme court in camera, shall remain under seal for at least sixty days, and shall not be served on the defendant until the court so orders. The seal shall not preclude the attorney general, a local government, or the qui tam plaintiff from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action, on relevant state or local government agencies, or on law enforcement authorities of the state, a local government, or other

jurisdictions, so that the actions may be investigated or prosecuted, except that such seal applies to the agencies or authorities so served to the same extent as the seal applies to other parties in the action. If the allegations in the complaint allege a violation of section one hundred eighty-nine of this article involving damages to a local government, then the attorney general may at any time provide a copy of such complaint and written disclosure to the attorney for such local government; provided, however, that if the allegations in the complaint involve damages only to a city with a population of one million or more, or only to the state and such a city, then the attorney general shall provide such complaint and written disclosure to the corporation counsel of such city within thirty days. The state may elect to supersede or intervene and proceed with the action, or to authorize a local government that may have sustained damages to supersede or intervene, within sixty days after it receives both the complaint and the material evidence and information; provided, however, that if the allegations in the complaint involve damages only to a city with a population of one million or more, then the attorney general may not supersede or intervene in such action without the consent of the corporation counsel of such city. The attorney general shall consult with the office of the medicaid inspector general prior to superseding or intervening in any action related to the medicaid program. The attorney general may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under this subdivision. Any such motions may be supported by affidavits or other submissions in camera.

(c) Prior to the expiration of the sixty day period or any extensions obtained under paragraph (b) of this subdivision, the attorney general shall notify the court that he or she:

(i) intends to file a complaint against the defendant on behalf of the people of the state of New York or a local government, and thereby be substituted as the plaintiff in the action and convert the action in all respects from a qui tam civil action brought by a private person into a civil enforcement action by the attorney general under subdivision one of this section;

(ii) intends to intervene in such action, as of right, so as to aid and assist the plaintiff in the action; or

(iii) if the action involves damages sustained by a local government, intends to grant the local government permission to: (A) file and serve a complaint against the defendant, and thereby be substituted as the plaintiff in the action and convert the action in all respects from a qui tam civil action brought by a private person into a civil enforcement action by the local government under subdivision one of this section; or (B) intervene in such action, as of right, so as to aid and assist the plaintiff in the action.

The attorney general shall provide the local government with a copy of any such notification at the same time the court is notified.

(d) If the state notifies the court that it intends to file a complaint against the defendant and thereby be substituted as the plaintiff in the action, or to permit a local government to do so, such complaint must be filed within thirty days after the notification to the court. For statute of limitations purposes, any such complaint filed by the state or a local government shall relate back

to the filing date of the complaint of the qui tam plaintiff, to the extent that the cause of action of the state or local government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of the qui tam plaintiff.

(e) If the state notifies the court that it intends to intervene in the action, or to permit a local government to do so, then such motion for intervention shall be filed within thirty days after the notification to the court.

(f) If the state declines to participate in the action or to authorize participation by a local government, the qui tam action may proceed subject to judicial review under this section, the civil practice law and rules, and other applicable law. The qui tam plaintiff shall provide the state or any applicable local government with a copy of any document filed with the court on or about the date it is filed, or any order issued by the court on or about the date it is issued. A qui tam plaintiff shall notify the state or any applicable local government within five business days of any decision, order or verdict resulting in judgment in favor of the state or local government.

3. Time to answer. If the state decides to participate in a qui tam action or to authorize the participation of a local government, the court shall order that the qui tam complaint be unsealed and served at the time of the filing of the complaint or intervention motion by the state or local government. After the complaint is unsealed, or if a complaint is filed by the state or a local government pursuant to subdivision one of this section, the defendant shall be served with the complaint and summons pursuant to article three of the civil practice law and rules. A copy of any complaint which alleges that damages were sustained by a local government shall also be served on such local government. The defendant shall be required to respond to the summons and complaint within the time allotted under rule three hundred twenty of the civil practice law and rules.

4. Related actions. When a person brings a qui tam action under this section, no person other than the attorney general, or a local government attorney acting pursuant to subdivision one of this section or paragraph (b) of subdivision two of this section, may intervene or bring a related civil action based upon the facts underlying the pending action, unless such other person has first obtained the permission of the attorney general to intervene or to bring such related action; provided, however, that nothing in this subdivision shall be deemed to deny persons the right, upon leave of court, to file briefs amicus curiae.

5. Rights of the parties of qui tam actions. (a) If the attorney general elects to convert the qui tam civil action into an attorney general enforcement action, then the state shall have the primary responsibility for prosecuting the action. If the attorney general elects to intervene in the qui tam civil action then the state and the person who commenced the action, and any local government which sustained damages and intervenes in the action, shall share primary responsibility for prosecuting the action. If the attorney general elects to permit a local government to convert the action into a civil enforcement action, then the local government shall have primary responsibility for investigating and prosecuting the action. If the action involves damages to a local government but not the

state, and the local government intervenes in the qui tam civil action, then the local government and the person who commenced the action shall share primary responsibility for prosecuting the action. Under no circumstances shall the state or a local government be bound by an act of the person bringing the original action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (b) of this subdivision. Under no circumstances shall the state be bound by the act of a local government that intervenes in an action involving damages to the state. If neither the attorney general nor a local government intervenes in the qui tam action then the qui tam plaintiff shall have the responsibility for prosecuting the action, subject to the attorney general's right to intervene at a later date upon a showing of good cause.

(b)(i) The state may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the motion. If the action involves damages to both the state and a local government, then the state shall consult with such local government before moving to dismiss the action.

If the action involves damages sustained by a local government but not the state, then the local government may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the motion.

(ii) The state or a local government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after an opportunity to be heard, that the proposed settlement is fair, adequate, and reasonable with respect to all parties under all the circumstances. Upon a showing of good cause, such opportunity to be heard may be held in camera.

(iii) Upon a showing by the attorney general or a local government that the original plaintiff's unrestricted participation during the course of the litigation would interfere with or unduly delay the prosecution of the case, or would be repetitious or irrelevant, or upon a showing by the defendant that the original qui tam plaintiff's unrestricted participation during the course of the litigation would be for purposes of harassment or would cause the defendant undue burden, the court may, in its discretion, impose limitations on the original plaintiff's participation in the case, such as:

(A) limiting the number of witnesses the person may call;

(B) limiting the length of the testimony of such witnesses;

(C) limiting the person's cross-examination of witnesses; or

(D) otherwise limiting the participation by the person in the litigation.

(c) Notwithstanding any other provision of law, whether or not the attorney general or a local government elects to supersede or intervene in a qui tam civil action, the attorney general and

such local government may elect to pursue any remedy available with respect to the criminal or civil prosecution of the presentation of false claims, including any administrative proceeding to determine a civil money penalty or to refer the matter to the office of the medicaid inspector general for medicaid related matters. If any such alternate civil remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

(d) Notwithstanding any other provision of law, whether or not the attorney general elects to supersede or intervene in a qui tam civil action, or to permit a local government to supersede or intervene in the qui tam civil action, upon a showing by the state or local government that certain actions of discovery by the person initiating the action would interfere with the state's or a local government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than sixty days. Such a showing shall be conducted in camera. The court may extend the period of such stay upon a further showing in camera that the state or a local government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

6. Awards to qui tam plaintiff. (a) If the attorney general elects to convert the qui tam civil action into an attorney general enforcement action, or to permit a local government to convert the action into a

civil enforcement action by such local government, or if the attorney general or a local government elects to intervene in the qui tam civil action, then the person or persons who initiated the qui tam civil action collectively shall be entitled to receive between fifteen and twenty-five percent of the proceeds recovered in the action or in settlement of the action. The court shall determine the percentage of the proceeds to which a person commencing a qui tam civil action is entitled, by considering the extent to which the plaintiff substantially contributed to the prosecution of the action. Where the court finds that the action was based primarily on disclosures of specific information

(other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil or administrative hearing, in a legislative or administrative report, hearing, audit or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than ten percent of the proceeds, taking into account the significance of the information and the role of the person or persons bringing the action in advancing the case to litigation.

(b) If the attorney general or a local government does not elect to intervene or convert the action, and the action is successful, then the person or persons who initiated the qui tam action which obtains

proceeds shall be entitled to receive between twenty-five and thirty percent of the proceeds recovered in the action or settlement of the action. The court shall determine the percentage of the proceeds to which a person commencing a qui tam civil action is entitled, by considering the extent to which the plaintiff substantially contributed to the prosecution of the action.

(c) With the exception of a court award of costs, expenses or attorneys' fees, any payment to a person pursuant to this paragraph shall be made from the proceeds.

7. Costs expenses, disbursements and attorneys' fees. In any action brought pursuant to this article, the court may award the attorney general, on behalf of the people of the state of New York, and any local government that participates as a party in the action, and any person who is a qui tam plaintiff, an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees, plus costs pursuant to article eighty-one of the civil practice law and rules. All such expenses, fees and costs shall be awarded directly against the defendant and shall not be charged from the proceeds, but shall only be awarded if the state or a local government or the qui tam civil action plaintiff prevails in the action.

8. Exclusion from recovery. If the court finds that the qui tam civil action was brought by a person who planned or initiated the violation of section one hundred eighty-nine of this article upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise be entitled to receive under subdivision six of this section, taking into account the role of such person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the qui tam civil action is convicted of criminal conduct arising from his or her role in the violation of section one hundred eighty-nine of this article, that person shall be dismissed from the qui tam civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the attorney general to supersede or intervene in such action and to civilly prosecute the same on behalf of the state or a local government.

9. Certain actions barred. (a) The court shall dismiss a qui tam action under this article if:

(i) it is based on allegations or transactions which are the subject of a pending civil action or an administrative action in which the state or a local government is already a party;

(ii) the state or local government has reached a binding settlement or other agreement with the person who violated section one hundred eighty-nine of this article resolving the matter and such agreement has been approved in writing by the attorney general, or by the applicable local government attorney; or

(iii) against a member of the legislature, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the state when the action was brought.

(b) The court shall dismiss a qui tam action under this article, unless opposed by the state or an applicable local government, or unless the qui tam plaintiff is an original source of the information, if

substantially the same allegations or transactions as alleged in the action were publicly disclosed:

(i) in a state or local government criminal, civil, or administrative hearing in which the state or a local government or its agent is a party;

(ii) in a federal, New York state or New York local government report, hearing, audit, or investigation that is made on the public record or disseminated broadly to the general public; provided that such information shall not be deemed "publicly disclosed" in a report or investigation because it was disclosed or provided pursuant to article six of the public officers law, or under any other federal, state or local law, rule or program enabling the public to request, receive or view documents or information in the possession of public officials or public agencies;

(iii) in the news media, provided that such allegations or transactions are not "publicly disclosed" in the "news media" merely because information of allegations or transactions have been posted on the internet or on a computer network.

10. Liability. Neither the state nor any local government shall be liable for any expenses which any person incurs in bringing a qui tam civil action under this article.

### **§ 191. Remedies**

1. 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 employee, contractor, agent, or associated others in furtherance of an action brought under this article or other efforts to stop one or more violations of this article, shall be entitled to all relief necessary to make the employee, contractor or agent whole. Such relief shall include but not be limited to:

(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 as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

2. For purposes of this section, a "lawful act" shall include, but not be limited to, 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 this article, documents, data, correspondence, electronic mail, or any other information, even though such 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 of this article.

Nothing in this subdivision shall be interpreted to prevent any law enforcement authority from bringing a civil or criminal action against any person for violating any provision of law.

3. An employee, contractor or agent described in subdivision one of this section may bring an action in the appropriate supreme court for the relief provided in this section.

### **§ 192. Limitation of actions, burden of proof**

1. A civil action under this article shall be commenced no later than ten years after the date on which the violation of this article is committed. Notwithstanding any other provision of law, for the purposes of this article, an action under this article is commenced by the filing of the complaint.

(1-a) For purposes of applying rule three thousand sixteen of the civil practice law and rules, in pleading an action brought under this article the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section one hundred eighty-nine of this article are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government effectively to investigate and defend the allegations made.

2. In any action brought under this article, the state, a local government that participates as a party in the action, or the person bringing the qui tam civil action, shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

### **§ 193. Other law enforcement authority and duties**

This article shallnot:

1. preempt the authority, or relieve the duty, of other law enforcement agencies to investigate and prosecute suspected violations of law;
2. prevent or prohibit a person from voluntarily disclosing any information concerning a violation of this article to any law enforcement agency; or
3. limit any of the powers granted elsewhere in this chapter and other laws to the attorney general or state agencies or local governments to investigate possible violations of this article and take appropriate action against wrongdoers.

### **§ 194. Regulations**

The attorney general is authorized to adopt such rules and regulations as is necessary to effectuate the purposes of this article.

**HISTORY:** Added by 2007 Laws, Chapter 58, § 39 (Part C), effective April 9, 2007, deemed effective on and after April 1, 2007. Amended by 2010 Laws, Chapter 379, effective August 27, 2010.

From 2007 NY Laws 58: "Section 93. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2007; provided, however, that:

....

"5. section thirty-nine of this act shall apply to claims filed or presented prior to, on or after April 1, 2007;

....

"9. any rules or regulations necessary to implement the provisions of this act may be promulgated and any procedures, forms, or instructions necessary for such implementation may be adopted and issued on or after the date this act shall have become a law;

"10. this act shall not be construed to alter, change, affect, impair or defeat any rights, obligations, duties or interests accrued, incurred or conferred prior to the enactment of this act;

"11. the commissioner of health and the superintendent of insurance and any appropriate council may take any steps necessary to implement this act prior to its effective date;

"12. notwithstanding any inconsistent provision of the state administrative procedure act or any other provision of law, rule or regulation, the commissioner of health and the superintendent of insurance and any appropriate council is authorized to adopt or amend or promulgate on an emergency basis any regulation he or she or such council determines necessary to implement any provision of this act on its effective date; and

"13. the provisions of this act shall become effective notwithstanding the failure of the commissioner of health or the superintendent of insurance or any council to adopt or amend or promulgate regulations implementing this act."