

As amended through 77 Del. Laws, c. 166, approved by the Governor July 19, 2009.

## **DELAWARE FALSE CLAIMS AND REPORTING ACT**

### **TITLE 6**

#### **Commerce and Trade**

#### **SUBTITLE II**

### **CHAPTER 12. DELAWARE FALSE CLAIMS AND REPORTING ACT**

#### **§ 1201. Liability for certain acts.**

(a) Any person who:

(1) Knowingly presents, or causes to be presented to an officer or employee of the Government 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 to get a false or fraudulent claim paid or approved by the Government;

(3) Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) Has possession, custody or control of property or money used or to be used by the Government and, intending to defraud the Government or wilfully to conceal the property, delivers or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) 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;

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government who may not lawfully sell or pledge the property; or

(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government

shall be liable to the Government for a civil penalty of not less than \$5,500 and not more than \$11,000 for each act constituting a violation of this section, plus 3 times the amount of damages which the Government sustains because of the act of that person.

(b) Notwithstanding the foregoing, the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person, if:

(1) The person committing the violation of this subsection furnished officials of the Government responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(2) Such person fully cooperated with any government investigation of such violations; and

(3) At the time such person furnished the Government with the information about the violation, no criminal prosecution, civil action, investigation or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violations.

A person violating this subsection shall also be liable for the costs of a civil action brought to recover any such penalty or damages, including payment of reasonable attorneys fees and costs.

(c) The Superior Court shall have jurisdiction of all offenses under this chapter.

72 Del. Laws, c. 370, § 1; 77 Del. Laws, c. 166, §§ 1-4.;

#### **§ 1202. Definitions.**

(1) "Claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee or other recipient where the Government provides any portion of the money or property which is requested or demanded, or where the Government will reimburse such contractor, grantee or other recipient for any portion of the money or property which is requested or demanded.

(2) "Government" includes all departments, boards or commissions of the executive branch of the State, all political subdivisions of the State, the Delaware Department of Transportation and all state and municipal authorities, all organizations created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function, and all organizations, entities or persons receiving funds of the State where the act complained of pursuant to this chapter relates to the use of such funds of the State.

(3) "Knowing" and "knowingly" mean that a person, with respect to information:

a. Has actual knowledge of the information;

b. Acts in deliberate ignorance of the truth or falsity of the information; or

c. Acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

72 Del. Laws, c. 370, § 1; 77 Del. Laws, c. 166, §§ 5, 6.;

**§ 1203. Civil actions for false claims.**

(a) Responsibilities of the Attorney General. -- The Attorney General shall diligently investigate suspected violations under this chapter. If the Attorney General finds that a person has violated or is violating the provisions of this chapter, the Attorney General may bring a civil action under this section against the person.

(b) Private actions. --

(1) A private civil action may be brought by any person or labor organization as defined by § 1107A(d) of Title 19 (hereinafter "private party" or "party") for a violation of this chapter on behalf of the party bringing suit and for the government. The action shall be brought in the name of the government. The action may be dismissed only if the court and the Department of Justice give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the private party possesses shall be served on the Department of Justice pursuant to Rules 4 and 5 of the Superior Court Civil Rules. The complaint shall be filed in camera and shall remain under seal for at least 60 days. The complaint shall not be served on the defendant until the expiration of 60 days or any extension approved under paragraph (b)(3) of this section. Within 60 days after receiving a copy of the complaint, the Department of Justice shall conduct an investigation of the factual allegations and legal contentions made in the complaint. The Department of Justice may elect to intervene and proceed with the action within 60 days after it receives the complaint, the material evidence and information.

(3) The Department of Justice may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (b)(2) of this section. Any such motion may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Superior Court Civil Rules.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (b)(3) of this section, or within 20 days of being notified by the court that the seal has expired, the Department of Justice shall:

a. Proceed with the action, in which case the action shall be conducted by the Department of Justice; or

b. Notify the court that it declines to take over the action, in which case the private party bringing the action shall have the right to conduct the action.

(5) When a party brings an action under this subsection, under the federal False Claims Act (31 U.S.C. § 3729 et seq.), or under any similar provision of the law of any other state, no party other than the Department of Justice may intervene or bring a related action based on the facts underlying the pending action.

72 Del. Laws, c. 370, § 1; 77 Del. Laws, c. 166, §§ 7-12.;

**§ 1204. Rights of the parties to qui tam actions.**

(a) If the Department of Justice proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the party bringing the action. Such party shall have the right to continue as a party to the action, subject to the limitations set forth in subsections (b), (c) and (e) of this section.

(b) The Department of Justice may dismiss the action notwithstanding the objections of the party initiating the action if the party has been notified by the Department of Justice of the filing of the motion and the court has provided the party with an opportunity for a hearing on the motion.

(c) The Department of Justice may settle the action with the defendant notwithstanding the objections of the party initiating the action if the court determines after a hearing that the proposed settlement is fair, adequate and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(d) If the Department of Justice elects not to proceed with the action, the party who initiated the action shall have the right to conduct the action. If the Department of Justice so requests, it shall be served with copies of the pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Department of Justice's expense). When a party proceeds with the action, the court, without limiting the status and rights of the party initiating the action, may nevertheless permit the Department of Justice to intervene at a later date upon a showing of good cause.

(e) Whether or not the Department of Justice proceeds with the action, upon a showing by the Department of Justice that certain actions of discovery by the party initiating the action would interfere with the Department of Justice'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 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Department of Justice 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.

(f) Notwithstanding § 1203(b) of this title, the Department of Justice may elect to pursue its claim through any available alternate remedy, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the party initiating the action shall have the same rights in such proceeding as such party would have had if the action had continued under this chapter; provided however, that no insurer subject to the insurance fraud provisions of Chapter 24 of Title 18 shall have a cause of action pursuant to this chapter. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this chapter. For purposes of the preceding sentence, a finding or conclusion is final if it has been fully determined on appeal to the appropriate court, if all time for filing such appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

72 Del. Laws, c. 370, § 1; 77 Del. Laws, c. 166, §§ 13-18.;

**§ 1205. Award to qui tam plaintiff.**

(a) If the Department of Justice proceeds with an action brought by a party under § 1203(b) of this title, such party shall, subject to the second sentence of this subsection, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the party substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the party bringing the action) relating to allegations or transactions in a criminal, civil or administrative hearing, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the party bringing the action in advancing the case to litigation. Any payment to a party under the first or second sentence of this paragraph shall be made from the proceeds. Any such party shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. In determining the amount of reasonable attorneys' fees and costs, the court shall consider, without limitation, whether such fees and costs were necessary to the prosecution of the action, were incurred for activities which were duplicative of the activities of the Department of Justice in prosecuting the case, or were repetitious, irrelevant or for purposes of harassment, or caused the defendant undue burden or unnecessary expense. All such expenses, fees and costs shall be awarded against the defendant.

(b) If the Department of Justice does not proceed with an action under this chapter, the party bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such party shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. In determining the amount of reasonable attorneys' fees and costs, the court shall consider, without limitation, whether such fees and costs were necessary to the prosecution of the action, were incurred for activities which were repetitious, irrelevant or for purposes of harassment, or caused the defendant undue burden or unnecessary expense. All such expenses, fees, and costs shall be awarded against the defendant.

(c) Whether or not the Department of Justice proceeds with the action, if the court finds that the action was brought by a party who planned and initiated the violation 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 party would otherwise receive under subsection (a) or (b) of this section, taking into account the role of that party in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the party bringing the action is convicted of criminal conduct arising from that party's own role in the violation of this chapter, that party shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the Department of Justice to continue the action on behalf of the government.

(d) If the Department of Justice does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

72 Del. Laws, c. 370, § 1; 70 Del. Laws, c. 186, § 1; 77 Del. Laws, c. 166, §§ 19-22.;

**§ 1206. Certain actions barred.**

(a) No court shall have jurisdiction of an action brought pursuant to this chapter against a State Government official if the action is substantially based on evidence or information known to the Government when the action was brought.

(b) In no event may a party bring an action under this chapter which is substantially based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the Government is already a party.

(c) No court shall have jurisdiction over an action under this chapter based upon the public disclosure of allegations or actions in a criminal civil or administrative hearing, or from the news media, unless the action is brought by the Attorney General or the party bringing the action is an original source of this information.

For purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Attorney General before filing an action under this chapter that is based on the information.

72 Del. Laws, c. 370, § 1; 77 Del. Laws, c. 166, § 23.;

**§ 1207. Government not liable for certain expenses.**

No Government shall be liable for expenses which a party incurs in bringing an action under this chapter.

72 Del. Laws, c. 370, § 1.;

**§ 1208. Employee protection.**

(a) Any employee who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this chapter, including investigation for, initiation of, testimony for or assistance in an action filed or to be filed under this chapter, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 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. An employee may bring an action in the appropriate court of the State for the relief provided in this subsection.

(b) It shall be the duty of every employer of more than 15 employees to post and maintain in a place accessible to its employees and where they normally pass a summary of this chapter upon request and without charge. Such summaries shall be provided by the Delaware Department of Justice to the Delaware Department of Labor for distribution. As an alternative to posting, such employer may establish written policies for all employees that provide an explanation of state and federal False Claims Act [this chapter and 31 U.S.C. § 3729 et seq.] provisions and a resource for obtaining additional information about the law.

72 Del. Laws, c. 370, § 1; 70 Del. Laws, c. 186, § 1; 77 Del. Laws, c. 166, § 24.;

### **§ 1209. False claims and reporting procedure.**

(a) A civil action under this chapter may not be brought:

(1) More than 6 years after the date on which the violation is committed; or

(2) More than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the 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.

(b) In any action brought under this chapter, the Department of Justice or the private party shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(c) Notwithstanding any other provision of law, the Delaware Rules of Criminal Procedure, or the Delaware Rules of Civil Procedure, a final judgment rendered in favor of the Government in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under this chapter.

(d) Upon motion of the Department of Justice, the court shall have the power to grant other equitable relief, including temporary injunctive relief, as is necessary to prevent the transfer, concealment or dissipation of the illegal proceeds, or to protect the public.

72 Del. Laws, c. 370, § 1; 77 Del. Laws, c. 166, §§ 25, 26.;

### **§ 1210. Annual reporting requirement.**

On August 15, 2009, and annually on July 16, the Department of Justice shall submit to the Delaware legislature a report containing the following information:

- (1) The number of cases the Department of Justice has filed during the previous calendar year under this chapter;
- (2) The number of cases private individuals filed under this chapter during the previous calendar year, including those cases that remain under seal, and specifying:
  - a. The state or federal courts in which those cases were filed and the number of cases filed in each court;
  - b. The state program or agency that is involved in each case;
  - c. The number of cases filed by private individuals who previously had filed an action based on the same or similar transactions or allegations under the federal False Claims Act [31 U.S.C. § 3729 et seq.] or the false claims act of another state; and
  - d. The amount recovered by the State under this section in settlement, damages, penalties, and litigation costs.

77 Del. Laws, c. 166, § 27.;

**§ 1211. Severability of noncompliant provisions.**

Any provision of this chapter that the federal government determines does not comply with the requirements for state false claims acts set forth in the Deficit Reduction Act of 2005 (Pub. L. 109-171, 120 Stat. 4) shall be repealed to the extent that this chapter is inconsistent with the Deficit Reduction Act.

77 Del. Laws, c. 166, § 28.