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<b>Subject</b>	Deficit Reduction Act of 2005 -False Claims and Whistleblowers
<b>Index Number</b>	GL-3014
<b>Section</b>	Compliance and Ethics
<b>Subsection</b>	General
<b>Category</b>	Corporate
<b>Contact</b>	Adank, Kari
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### References

Section 6032 of the Deficit Reduction Act of 2005, P.L. 109-71

### Applicable To

All employees of Gundersen Lutheran Health System, Inc. and its affiliates including Gundersen Clinic, Ltd., Gundersen Lutheran Medical Center, Inc. and Gundersen Lutheran Administrative Services, Inc. (collectively "Gundersen").

### Detail

It is the policy of Gundersen to provide information concerning false claims recoveries as required under Section 6032 of the Deficit Reduction Act of 2005, P.L. 109-71 (the "DRA")

### Implementation

#### GENERAL INFORMATION:

#### A. The Federal False Claims Act and State Laws Pertaining to Penalties for False Claims and Statements

The federal civil False Claims Act, 31 U.S.C. §§ 3729, et seq. ("FCA" or the "Act"), is a civil statute whereby the United States can recover monetary damages from parties who file fraudulent claims for payment of funds by the federal government. Criminal penalties for false claims are also available pursuant to 18 U.S.C. § 287, which allows for punishment of up to five years in prison and a fine calculated under the United States Sentencing Guidelines.

The False Claims Act (FCA) created liability for false claims under seven circumstances:

1. Knowing presentation of a false or fraudulent claim to the federal government for payment or approval (31 U.S.C. § 3729(a) (1))
2. Knowing use or creation of a false record or statement to get a false or fraudulent claim paid by the federal government (31 U.S.C. § 3729(a)(2));
3. Conspiring to defraud the federal government to get a false or fraudulent claim paid (31 U.S.C. § 729 (a)(3));
4. Intentional failure to return all federal government money or property (31 U.S.C. § 3729(a)(4));
5. intentional making and issuance of a receipt for more than what the federal government actually received (31 U.S.C. § 3729(a)(5));
6. Knowing purchase or receipt of property from a federal official who is not authorized to sell or deliver the property (31 U.S.C. § 3729(a)(6));
7. Knowing creation or use of a false record or statement to decrease a monetary obligation to the government (31 U.S.C. § 3729(a) (7)).

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Most cases brought under the FCA fall under either sections 3729(a) (1) or (2). In order to establish liability under 31 U.S.C. §§ 3729(a) (1) or (2), a plaintiff bears the burden of showing:

1. That the defendant submitted or caused the submission of a claim to the federal government;
2. That the claim was false or fraudulent, or the defendant made or used false or fraudulent records or statements to obtain the claim's payment or approval; and
3. That the defendant either had actual knowledge of the claim's falsity or acted in reckless disregard of the claim's validity.

Because the FCA specifically creates liability for parties who not only directly submit claims to the government, but for parties who cause such submissions to be made as well, it is not necessary for the plaintiff to show that the person actually presenting the claim knew it to be false.

In addition to the federal FCA, some states have enacted false claims statutes. These state law versions are often modeled on the FCA. They may include, among other things, *qui tam* or whistleblower provisions (discussed in Sections 3 below).

### **Definitions**

**False Claim** - A false claim is a claim for payment for services or supplies that were not provided specifically as presented or for which the provider is otherwise not entitled to payment. Examples of false claims for services or supplies that were not provided specifically as presented include, but are not limited to:

1. A claim for a service or supply that was never provided
2. A claim indicating a higher level of service than was actually provided
3. A claim indicating the service was provided for a diagnosis, which is not the true diagnosis, in order to obtain reimbursement.

**Knowingly** - To "knowingly" present a false or fraudulent claim means that the provider:

1. Has actual knowledge that the information on the claim was false;
2. Acts in deliberate ignorance of the truth or falsity of the information on the claim; or
3. Acts in reckless disregard of the truth or falsity of the information on the claim.

It is important to note the provider does not have to deliberately intend to defraud the Federal Government in order to be found liable under this Act. The provider need only "knowingly" present a false or fraudulent claim in the manner described above.

**Deliberate Ignorance** - To act in "deliberate ignorance" means that the provider has deliberately chosen to ignore the truth or falsity of the information on a claim submitted for payment even though the provider knows or has notice that information may be false. An example of a provider who submits a false claim with deliberate ignorance would be a provider who ignores provider regulatory bulletins and thus does not inform staff of changes in the Medicare billing guidelines or update its billing system in accordance with changes to Medicare billing practices. When claims for non-reimbursable services are submitted as a result, the FCA has been violated.

**Reckless Disregard** - To act in "reckless disregard" means that the provider pays no regard to whether the information on a claim submitted for payment is true or false. An example of a false

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claim submission with reckless disregard would be intentionally upcoding office visits that were submitted for payment to Medicare.

**B. Federal Administrative remedies for False Claims and Statements**

The FCA calls for civil penalties in the amount of \$5,500 to \$11,000 per false claim, as well as damages totaling three times the amount of damage sustained by the government as a result of the false claims. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3. Violation of the FCA also can be grounds for exclusion from participation in federal and state health care programs.

**C. Whistleblower Provisions Under the Federal and State Laws**

The *qui tam*, or "whistleblower," provisions of the FCA allow private persons called "relators" to bring civil false claims actions on behalf of the government. 31 U.S.C. § 3730(b)(1). Under these provisions, a relator is required to file its suit under seal and to serve the government with the complaint, along with disclosure of all material evidence and information in the possession of the relator in connection with the alleged false claims. 31 U.S.C. § 3730(b)(2). Once served with the complaint and information, the government has a sixty-day period to investigate the complaint and decide whether it wants to intervene in the action. If the government chooses to intervene, it exercises primary responsibility for the case, and the relator has limited control over the action. 31 U.S.C. § 3730(c) (1). If the government proceeds with the action, it has the right to settle or dismiss the suit over the objections of the relator. 31 U.S.C. § 3730(c)(2). Moreover, the government may limit the participation of the relator in the suit upon a showing that full participation would be detrimental to the government's case. If the government declines to participate, the relator may pursue the action without the government's assistance. 31 U.S.C. § 3730(c)(3). The same rules and standards regarding liability and calculation of damages and penalties apply in a *qui tam* action as under a normal FCA action. Upon a successful recovery by the government, a relator is entitled to share in the damages. 31 U.S.C. § 3730(d). The FCA and many state acts contain a section designed to prevent retaliation against whistleblowers by their employers as a result of their reporting fraud. The whistleblower retaliation section of the FCA provides as follows:

*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 section, including investigations for, initiation of, testimony for, or assistance in any action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. (31 U.S.C. § 3730 (h))*

**D. Gundersen's Policies and Procedures for Detecting and Preventing Fraud, Waste, and Abuse**

Gundersen has a robust Compliance Program for detecting and preventing fraud, waste and abuse. We believe that use of Gundersen's internal compliance process may be a better option than the pursuit of *qui tam* actions, which may take years to resolve and where recoveries may be uncertain, because it allows us to more quickly address potential issues. Consistent with your obligation under our Compliance Program to report actual or potential Compliance problems, employees are encouraged to make use of our internal processes for reporting and resolving compliance concerns. Our Compliance Plan and Standards of Conduct includes detailed information about our Compliance Program and policies and procedures for detecting and preventing fraud, waste and abuse. The

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Standards of Conduct and related Compliance Program policies can be found on our Compliance Office website on Gladiator as well as [www.gundersenhealth.org](http://www.gundersenhealth.org).