

# **Stop Whistleblower False Claims Act Complaints and Resulting Penalties**


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## Employee Complaint Process to Avoid Whistle Blower Complaints



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# THE FALSE CLAIMS ACT (FCA) OVERVIEW

- What is the historical background?  
**Enacted during the Civil War to address fraud in military procurement contracts, and combat defense contractor fraud**
- What is the purpose of the statute today?  
**Prohibits knowingly presenting (or causing to be presented) false or fraudulent claims for payment**  
**31 U.S.C. § 3729-3733**

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## Common Types of Fraudulent or False claims

- Healthcare fraud**
- Pharmaceutical fraud**
- Financial industry fraud**
- Defense contracting fraud**
- Energy contracting fraud**
- Environmental fraud**
- Construction and procurement fraud**

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## Key Elements of FCA

- KEY ELEMENTS OF THE FCA
- Any demand for payment from the government could have potential to be a claim
- Each demand for payment is a **separate claim**, even if they come from the **same contract**.
- Each claim requires that the claimant show either **actual knowledge, reckless disregard, or deliberate ignorance** on the part of the person/company who made the demands to the government for payment.
- The claims are characterized as *Qui Tam* lawsuits

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## Who Can bring an FCA Claim?

Current or former employees,  
competitors, subcontractors, providers

.....anyone

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## WHAT HAPPENS ONCE AN INDIVIDUAL MAKES AN FCA CLAIM

- **Each individual who brings a claim is acting in place of the government.**
- **The complaint is made to the government**
- **The lawsuit is filed under seal**
- **The government investigates the individuals' complaints and decides whether or not to “intervene.”**
- **In the *Qui Tam* suit, the relator receives a percentage of any recovery.**



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### What are the potential consequences for an FCA defendant?

- **Defendant can be held liable for mandatory treble damages sustained by the government**
- **Defendant also liable for penalty of between \$5,500 and \$11,000 per claim**
- **Defendant liable for attorneys' fees and litigation costs**
- **Joint and several liability with no right of contribution or indemnity**
- **Exclusion from Medicare/Medicaid for a period of time**
- **Listed on the Office of Inspector General's excluded provider list**

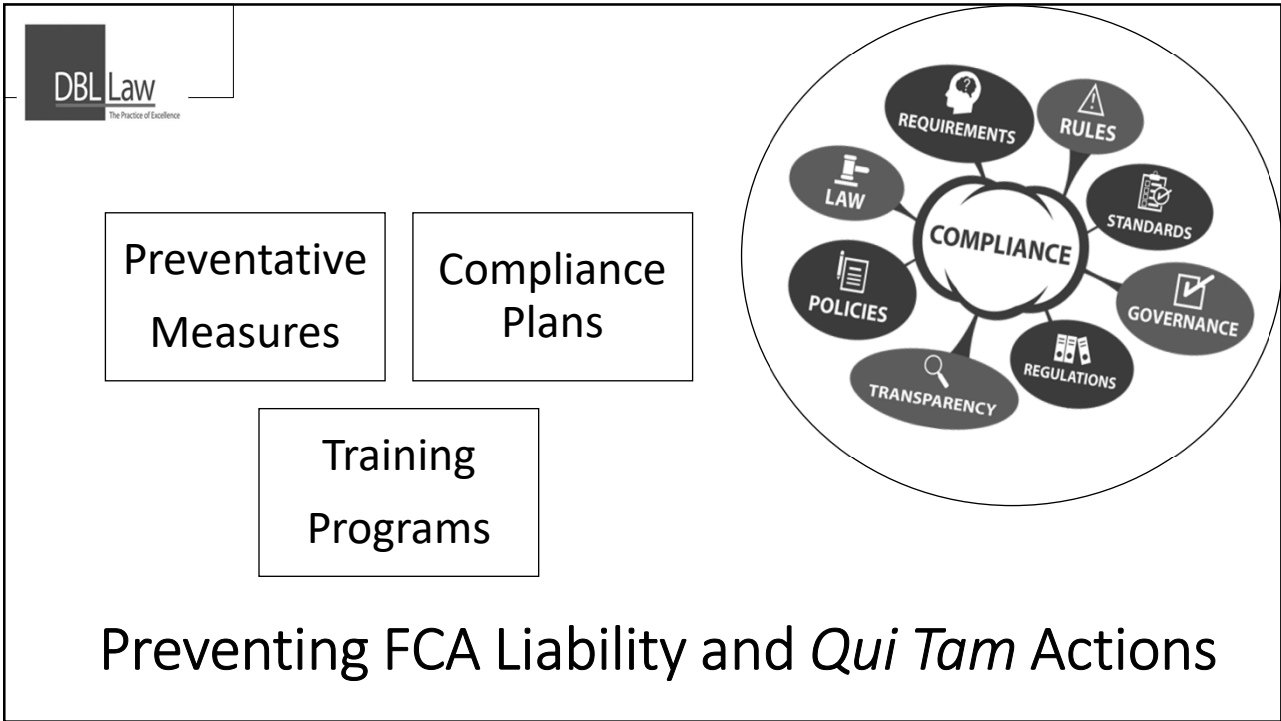
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# FALSE CLAIMS ACT: EXAMPLES

- ☐ Claims for services that were not provided or were different than claimed
- ☐ Failure to comply with quality of care
  - ☐ Express or implied certification of quality
  - ☐ Provision of “worthless” care
- ☐ Failure to comply with conditions of payment of relevant fraud and abuse laws.
  - ☐ Express or implied certification of compliance when submit claims (e.g., cost reports or claim forms).
- ☐ Upcoding
- ☐ Improper Coding



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PREVENTATIVE MEASURES

Avoiding Potential Qui Tam Actions

✓ Encourage employees to report internally

✓ Be proactive in identifying potential issues and disgruntled employees

✓ Address potential issues at the earliest stage possible

✓ Never ignore a complaint even if it lacks a substantial factual basis

✓ Perform thorough independent investigations

✓ Establish a compliance department and complaint procedure plans

✓ Regularly train your employees


✓ Check excluded provider list annually (just upon hire is not often enough)

✓ No retaliation for reporting

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What To Do If An Employee Complains or is Disgruntled?

Meet with employee

Have two company representatives present

Ask employee if they are recording the meeting

Be careful what is said

Ask employee about ethics or billing concerns

Have employee write down complaints

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What To Do If  
An Employee  
Complains  
or is  
Disgruntled?


Review compliance program

Ask specifically if the employee has  
issues with billing

Ask employee if there are any concerns  
regarding potential unethical conduct

Have employee include any  
billing/ethical concerns in their written  
statement

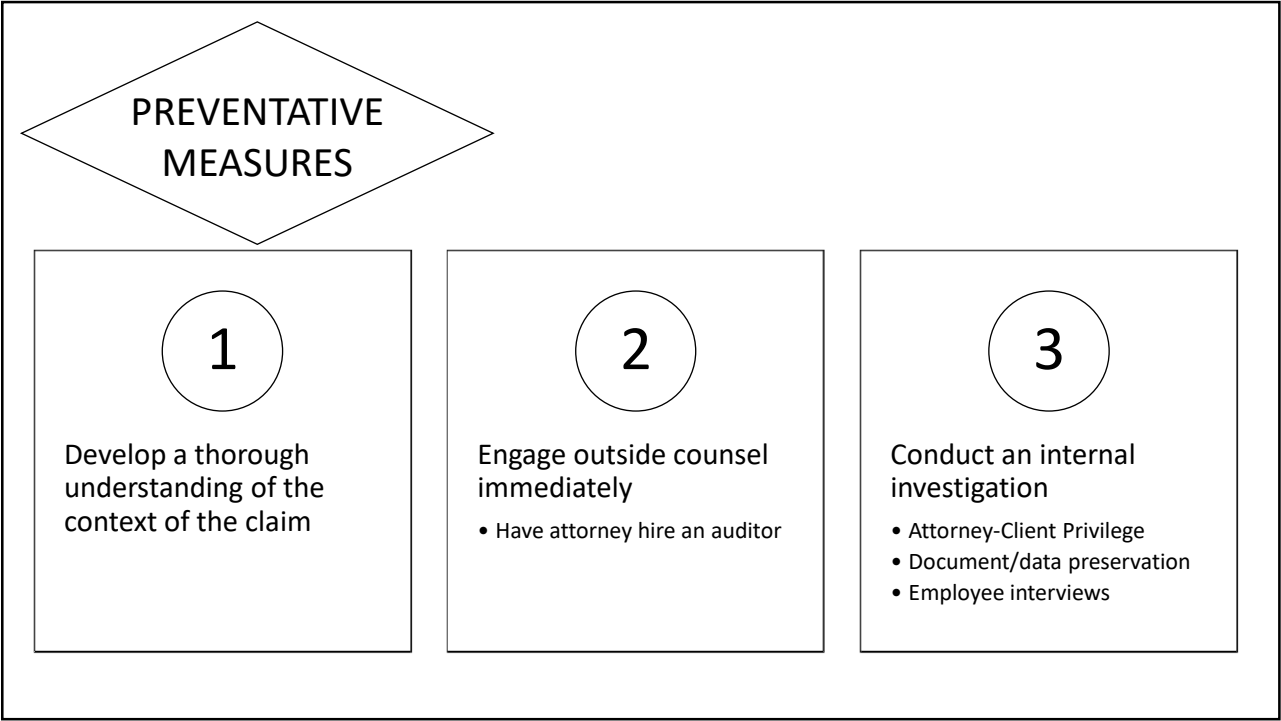
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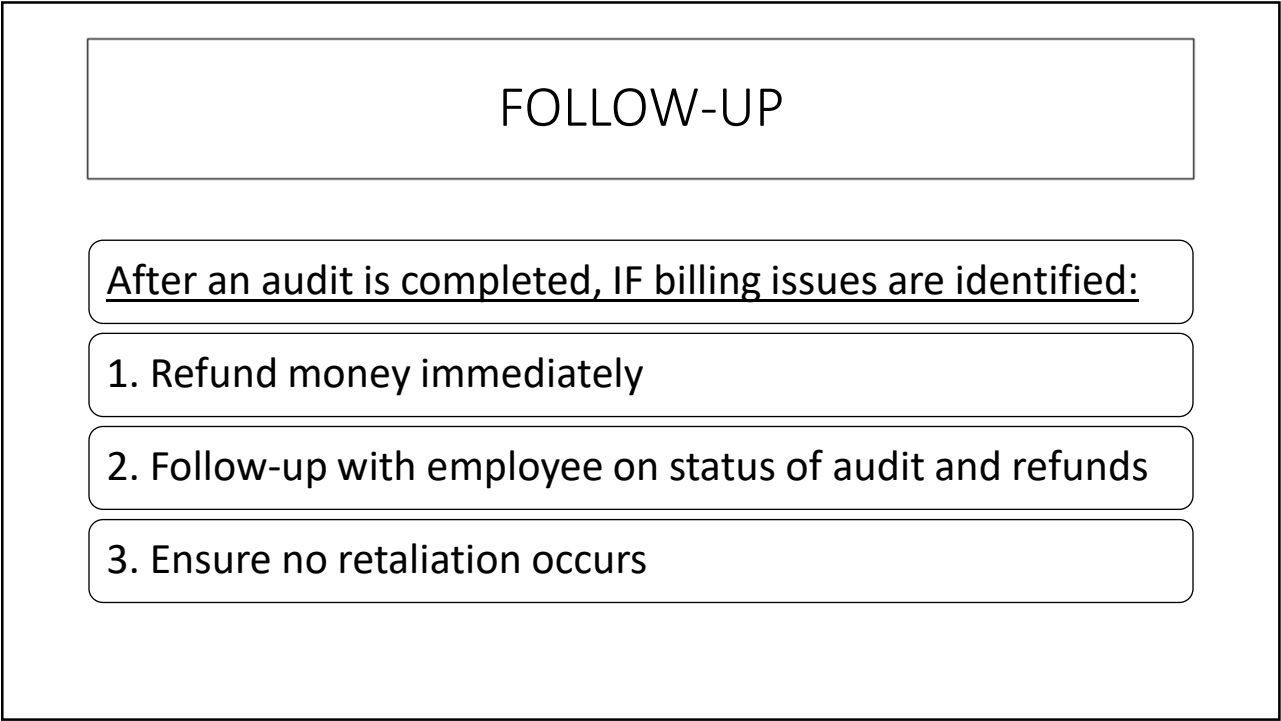
DISGRUNTLED EMPLOYEES

- These employees are your biggest risk
- Why do they file qui tam lawsuits?
  - Money (30% recovery)
  - Revenge
  - Other personal motivation
- Require employees to answer an annual survey about compliance
  - Are they aware of any concerns or compliance issues?
  - What areas of improvement do they suggest?
- Ask similar questions in exit interviews
- Review a departing employee’s email (sent and received items)
- Consider a counter-claim

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## WHAT IF DISGRUNTLED EMPLOYEE QUILTS?

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It is still necessary to investigate

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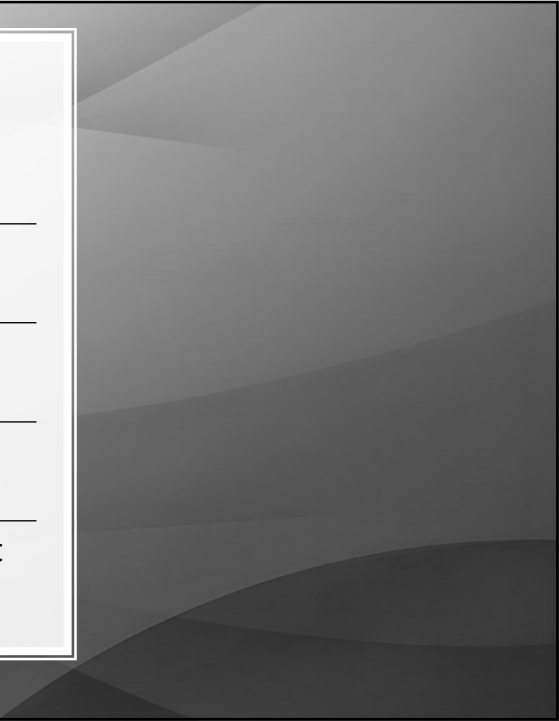
DO an audit AND issue refunds, if necessary

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“Race To The Clock”

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Consider negotiating a severance agreement




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## SEVERANCE AGREEMENTS

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**Allow an attorney to draft  
the agreement**



**OWBPA language is  
over 40**


Employee has 21\* days to consider  
\*45 days if group termination  
Employee has 7 days to revoke  
Employee may consult with a lawyer



**Include an  
acknowledgement that  
employee has fulfilled  
requirements of  
compliance program**

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COMPLIANCE PLANS



**Benefits of Compliance Departments**

- Facilitate compliance and avoid repayments and penalties
- Avoid fraud charges
- Mitigate penalties
- Improve performance
- Facilitate prompt claim submission
- Improves medical record documentation

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COMPLIANCE PLANS

**WHY HAVE A COMPLIANCE PLAN?**

The Affordable Care Act requires providers to have compliance plans as conditions to enroll in Medicare, Medicaid, SCHIP (state children health insurance program).

Compliance departments duties should not only include procedures that allow employees to report internally but also take steps to address potential complaints.

Compliance departments should also conduct reviews and audits of a company's practices to ensure that all laws, regulations, and internal policies are being followed.

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# INTERNAL REPORTING PROCESS

- Discuss the question or concern with your supervisor
- Contact a member of the management team if you are not comfortable contacting your supervisor
- Contact compliance officer directly
- Make an anonymous written report to supervisor, compliance department, management team
- If possible, set up a process for anonymous complaints/concerns
- Confidential complaint hotline

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## TRAINING PROGRAMS

### ANTI-FRAUD TRAINING

Essential Elements for Effective Anti-Fraud Training:

- 1) Clearly define the purpose and objectives of the training
- 2) Use example case studies
- 3) Know your audience
- 4) Favor facilitating over lecturing
- 5) Encourage reporting, including anonymous reporting

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### Mistakes To Avoid

- Not having a compliance plan in place
- Not implementing training programs
- Ignoring complaints
- Failure to use severance agreements
- Not engaging an auditor
- Retaliating against those who make reports



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## SELF-DISCLOSURE

- Self-disclosure is required if a problem is identified
- Work with counsel to effectively self-disclose identified issues
- FCA requires disclosure within 30 days of identifying an issue
- It is recommended to use an outside auditor

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## Benefits of Self-Disclosure

- Lower punishment
- Avoid penalties
- Avoid disbarment
- Avoid corporate integrity agreements
- Avoid government investigations
- Beat whistleblower to the punch

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### CASE EXAMPLES

#### Novartis Pharmaceuticals Corporation

New Jersey corporation paid over \$642 million to resolve claims that it paid kickbacks to doctors to induce them to prescribe its drugs, and for claims of other improper payments to patients and physicians.

The private whistleblower in this case, Oswald Bilotta, was a former Novartis sales representative. *U.S. ex rel. Bilotta v. Novartis Pharmaceuticals Corp.*, 50 F. Supp. 3d 497 (S.D.N.Y. 2014).

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**CASE**  
**EXAMPLES**

- **William Beaumont Hospital**
  - Michigan hospital paid a settlement of \$84.5 million after relator David Felten, a former employee, filed *qui tam* suit alleging various kickback payments to physicians and physicians' groups in exchange for referrals of Medicare, Medicaid, and TRICARE patients.
  - The Court allowed the former employee to seek relief for post termination retaliation under the anti-retaliation provision of the FCA. *United States ex rel. Felten v. William Beaumont Hospital*, 20-1002, 2021 WL 1204981 (6th Cir. Mar. 31, 2021).

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**CASE**  
**EXAMPLES**

**Logan Laboratories Inc.**

Florida reference laboratory and pain relief clinic agreed to pay \$41 million to resolve alleged violations of the False Claims Act for billing Medicare, Medicaid, TRICARE, and other federal health care programs for medically unnecessary urine drug testing.

The lab allegedly knowingly submitted or caused the submission of false claims to federal health care programs for presumptive and definitive urine drug testing, in circumstances where such testing was not medically reasonable or necessary.

*United States ex rel. Cho v. H.I.G. Capital, LLC*, 8:17-CV-983-T-33AEP, 2020 WL 5076712 (M.D. Fla. Aug. 26, 2020)

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## HELPFUL LINKS

- OIG Self disclosure Information  
<https://oig.hhs.gov/compliance/self-disclosure-info/index.asp>
- OIG Literature Directory for Various Compliance Guidance Resources  
<https://oig.hhs.gov/compliance/compliance-guidance/index.asp>
- <https://oig.hhs.gov/compliance/physician-education/05compliance.asp>