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Renewed Importance of False Claims Act Enforcement Under the CARES Act

April 10, 2020

The [False Claims Act](#), 31 U.S.C. § 3729 *et seq.* (“FCA”), is one of the federal government’s most powerful tools for recovering fraudulently obtained federal funds. Though it has been in effect for more than 150 years, the FCA will take on renewed importance as the federal government begins to distribute more than \$2 trillion under the Coronavirus Aid, Relief, and Economic Security Act (“[CARES Act](#)”). Signed into law on March 27, 2020, the CARES Act aims to provide relief during the ongoing COVID-19 health and economic crisis and represents the largest economic stimulus package in United States history. Included in the stimulus package are approximately \$130 billion for hospitals and pharmaceutical manufacturers, \$377 billion for small businesses (500 or fewer employees), and \$500 billion for large corporations. Given the historical amount of money available for distribution, CARES Act funds are subject to a robust set rules and regulations to ensure that they are spent as Congress intended. The FCA therefore will play a vital role in ensuring lawful administration and use of these funds in the months and years to come.

Reporting CARES Act Fraud Under the FCA

The FCA prohibits “knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval” of federal funds. 31 U.S.C. § 3729(a)(1)(A). If an employee or other individual discovers a violation of the FCA, she can bring a civil *qui tam action* to recoup the fraudulently obtained funds and, if the action is successful, may be eligible for an award of up to 25% of the proceeds from the action. 31 U.S.C. § 3730(b)-(d). Importantly for employees, the [FCA contains a whistleblower protection provision](#) that prohibits retaliation against individuals who engage in “protected activity” by undertaking “lawful acts . . . in furtherance of” a *qui tam* action or “other efforts to stop 1 or more violations” of the FCA. 31 U.S.C. § 3730(h)(1).

One method of establishing liability under the FCA is the so-called “false certification” theory. Under the false certification theory of liability, a recipient of federal funds violates the FCA by falsely certifying to the government that it is in compliance with the material conditions for payment of those funds. As under other federal funding initiatives, falsely certifying compliance with the conditions of

payment for CARES Act funds therefore could lead to liability under the FCA.

CARES Act Violations and the False Claims Act

For example, the CARES Act allocates approximately \$500 billion in loans and other funding to businesses with over 500 employees. To receive funds, among other things, an eligible business must certify that it will not engage in stock buybacks for the term of the loan, plus one year. If a funding recipient engages in stock buybacks during the prohibited period, it could be in violation of the FCA. The CARES Act also allocates approximately \$350 billion in forgivable loans to small businesses with 500 or fewer employees. For the loans to be forgiven, however, an eligible business must certify that the funds were used to retain employees or to make rent, mortgage, or utility payments. If a funding recipient used those funds for any other purpose, it could be in violation of the FCA.

With more than \$2 trillion available for distribution over the next several months, the [federal government will be especially vulnerable to fraud](#) in the form of false claims for payment. In the five years following the passage of the Emergency Economic Stabilization Act of 2008 (“EESA”), which injected approximately \$700 billion of capital into private banks and financial institutions in the wake of the subprime mortgage crisis, the government recovered nearly \$23 billion in fraudulently obtained EESA funds through FCA actions. This history suggests that employees should be on the lookout for their employers’ compliance with the conditions for payment of CARES Act funds and consult with an employment attorney if they begin to experience [retaliation](#) for FCA-related protected activity in the workplace.