



## California Amends Its False Claims Act to Mirror Federal Law, Preserve Federal Incentive Awards, and Loosen the Reins on Whistleblower Suits

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### INTRODUCTION

On September 27, 2012, Governor Brown signed Assembly Bill 2492 (“AB 2492”) amending California’s False Claims Act, California Government Code §§ 12650, *et seq.* (“CFCA”). The CFCA permits the Attorney General (or local prosecutors) to bring a civil action to recover treble damages and civil penalties against any person who knowingly makes or uses a false record or statement to either obtain money or property from the state or avoid paying or transmitting money or property to the state.<sup>1</sup> In certain circumstances, private individuals—known interchangeably as “whistleblowers,” “qui tam plaintiffs,” or “relators”—are permitted to file suit in the name of the government; if their suit is successful, they share in any financial award. In 1987, California became the first state to adopt a False Claims Act.

The amendments just signed into law were largely designed to conform the CFCA to the federal False Claims Act, 31 U.S.C. §§ 3729, *et seq.* (“FCA”). The amendments, described in more detail below, take effect on January 1, 2013.

### PROTECTING FEDERAL INCENTIVE PAYMENTS DROVE RECENT CHANGES TO CALIFORNIA’S FALSE CLAIMS ACT

The impetus for amending the CFCA was to preserve California’s ability to receive financial bonuses from the federal government for anti-fraud prosecution. Under section 1909 of the Social Security Act (“SSA”), states with false claims act statutes can qualify for federal incentive awards from amounts recovered pursuant to Medicaid-related false claims.<sup>2</sup> To qualify for these incentive payments, certain provisions of the state’s false claims act must mirror the federal FCA. The FCA has been amended three times since 2009—by the Fraud Enforcement and Recovery Act of 2009, the Patient Protection and Affordable Care Act in 2010, and the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. After these

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<sup>1</sup> Cal. Gov’t Code § 12651(a)(1) and (2).

<sup>2</sup> *See* 42 U.S.C. § 1396h. Specifically, the federal Deficit Reduction Act of 2005 (“DRA”) provides states with a financial incentive to enact state false claims laws that are at least as effective as the federal law: states are awarded an additional ten percent of any amount recovered under the state law for false claims to the state Medicaid program.

amendments, the CFCA no longer mirrored the FCA, and tens of millions of dollars in federal financial incentives were at risk of being lost.

In early 2012, the federal Office of the Inspector General of the U.S. Department of Health and Human Services (“OIG”) informed California’s Attorney General that because of the recent amendments of the FCA, the CFCA no longer met the requirements of section 1909 of the SSA. The OIG notified California that it would only remain eligible for federal incentives if its statutory scheme was “at least as effective in rewarding and facilitating qui tam actions” as the FCA.<sup>3</sup> California lawmakers responded to the federal government’s mandate by approving AB 2492 in August 2012.

### AB 2492 AMENDMENTS

Key enactments of AB 2492 are highlighted below:

#### Liability

- Prior to the recent amendments, a suit based on a public disclosure would be barred under the CFCA unless the party bringing the action was an “original source” –*i.e.*, someone who had direct and independent knowledge of the information on which the allegations were based. AB 2492 alters the original source definition to include a person “who has knowledge that is independent of, and *materially adds to*, the publicly disclosed allegations or transactions.”
- Under the CFCA, a false claim can arise for knowingly avoiding or decreasing an obligation to pay the state. AB 2492 now incorporates the federal definition of “obligation,” which also gives rise to liability for the retention of an overpayment.
- Under the prior law, suits based on public disclosures were barred. AB 2492 includes a provision requiring dismissal in the event of a public disclosure “unless opposed by the Attorney General or prosecuting authority of a political subdivision,” creating the potential to override the public disclosure bar in the event the prosecuting authority opposes dismissal.
- With regard to the statute of limitations, AB 2492 provides that if the California Attorney General files a complaint in intervention, it will relate back to the filing date of the whistleblower’s complaint.

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<sup>3</sup> Bill Analysis, AB 2492 (June 18, 2012), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_2451-2500/ab\\_2492\\_cfa\\_20120815\\_175821\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2451-2500/ab_2492_cfa_20120815_175821_asm_floor.html).

Penalties

- AB 2492 increases the civil penalties for a false claim to not less than \$5,500 and not more than \$11,000 for each false claim.
- Under the new law, a defendant can recover attorneys' fees if the defendant prevails in the case and the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. If the Attorney General has intervened in the case, then the attorneys' fees are assessed to the government. If the Attorney General declined to intervene, and the whistleblower proceeded with the case, then the attorneys' fees are assessed to the whistleblower.

Whistleblowers

- Whistleblowers are now potentially eligible for a reduced award even if they planned and initiated the violation upon which the CFCA action was based.
- AB 2492 expands anti-retaliation provisions beyond just employees to contractors and agents.

The amendments to the CFCA increase incentives to bring lawsuits against businesses by enhancing civil penalties, expanding anti-retaliation protections, clarifying the statute of limitations, and facilitating whistleblower suits. In light of these changes, and the public's ongoing scrutiny of government spending, companies would be well-served to revisit their compliance programs with CFCA issues in mind. Ongoing monitoring and handling of employee concerns regarding alleged violations of regulations or government contractual requirements should be prioritized.

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