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An Act Relating to False Claims under the Medicaid Program

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 22 MRSA §15, as amended by PL 1995, c. 191, §§1 to 4, is further amended by adding at the end a new paragraph to read:

Civil liability under this section is independent of liability under section 15-A.

Sec. 2. 22 MRSA §15-A is enacted to read:

§ 15-A. MaineCare False Claims Act

1. Short title. This section may be known and cited as "the MaineCare False Claims Act."

2. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Claim" means a request or demand for money, property or services made to an employee, officer or agent of the State or to any contractor, grantee or other recipient, whether under contract or not, if any portion of the money, property or services requested or demanded issued from or was provided by the State or if the State will reimburse the contractor, grantee or other recipient for any portion of the money, property or services requested or demanded.

B. "Employer" means a person or an entity affiliated with the State that is involved in a nongovernmental function, including a postsecondary educational institution or a hospital, and that compensates another person under a contract of hire, express or implied, oral or written, to perform work for the employer.

C. "False claims action" means a court action brought under this section.

D. "Hospital" means a state mental health institute as defined in Title 34-B, section 3801, subsection 9 or a hospital licensed under chapter 405.

E. "Knowingly" means that a person, with respect to information:

(1) Has actual knowledge of the information;

(2) Acts in deliberate ignorance of the truth or falsity of the information; or

(3) Acts in reckless disregard of the truth or falsity of the information.

F. "MaineCare program" means the program of health coverage provided under chapter 855.

G. "Original source" means a person who has direct and independent knowledge of the information on which allegations are based and has voluntarily provided the information to the State before filing an action under this section based on the information.

H. "Person" means a natural person, corporation, firm, association, organization, partnership, business or trust.

I. "Plaintiff," with respect to a qui tam action, means the relator and, if the Attorney General elects to intervene in and prosecute the action, the State or both as determined in the action.

J. "Postsecondary educational institution" means the University of Maine System, the Maine Maritime Academy and the Maine Community College System.

K. "Proceeds" means the amount awarded to the State against a defendant in an action under this section, including but not limited to damages, fines, payments for costs of compliance and other economic benefit realized by the State as a result of an action.

L. "Qui tam action" means an action brought by a person for the benefit of the person and for the benefit of the State in the name of the State and, at the election of the Attorney General, in which the State is also a plaintiff.

M. "Relator" means a person who brings a qui tam action for a violation of this section.

3. Prohibited acts. A person may not file a false claim against the State with regard to the MaineCare program.

A. A person who commits any of the acts listed in this paragraph with regard to the MaineCare program is liable for damages, costs and penalties as provided in this subsection.

(1) A person is liable under this subsection if the person, with regard to the MaineCare program:

(a) Knowingly presents or causes to be presented a false claim;

(b) 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 State;

(c) Conspires to defraud the State by causing a false claim to be allowed or paid or conspires to defraud the State by knowingly making, using or causing 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 State;

(d) Has possession, custody or control of public property or money used or to be used by the State and knowingly delivers or causes to be delivered less property or money than the amount for which the person receives a certificate or receipt;

(e) Is authorized to make or deliver a document certifying receipt of property used or to be used by the State and knowingly makes or delivers such a document that falsely represents the property used or to be used;

(f) Knowingly purchases, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property; or

(g) Is a beneficiary of an inadvertent submission of a false claim, subsequently discovers the falsity of the claim and fails to disclose the false claim to the State within a reasonable time after the discovery of the false claim.

Proof of a person's specific intent to defraud is not required to determine that the person acted knowingly.

(2) The court may determine a person liable to the State for a violation of this paragraph:

(a) For damages in the amount of 3 times the amount of damages that the State sustained because of the violation;

(b) For the costs of a qui tam action brought to recover any penalties and damages; and

(c) For a fine of not less than \$5,000 and not more than \$10,000 for each violation.

B. The court shall determine civil liability and assess damages against a person who violates this subsection of at least 2 times the amount of damages that the State sustained because of the violation, except that the court may not assess a fine if the court finds that:

(1) The person who committed the violation furnished officials of the State who are responsible for investigating false claims violations with all information known to the person about the violation within 30 days after the date on which the person first obtained the information;

(2) The person fully cooperated with any investigation into the violation by the State; and

(3) At the time the person furnished the State with information about the violation, no criminal prosecution, qui tam action or administrative action had commenced with respect to the violation and the person did not have actual knowledge of the existence of an investigation into the violation.

C. A person is liable to the State under this subsection for the acts of that person's agent when the agent acted with apparent authority, regardless of whether the agent acted, in whole or in part, to benefit the person and regardless of whether the person adopted or ratified the agent's claim, representation, statement or other action or conduct.

D. This subsection does not apply to claims, records or statements made to the State under Title 36.

4. False claims action; qui tam action. A false claims action may be brought against a person who violates subsection 3 in accordance with this subsection and subsections 5 to 7.

A. The Attorney General shall diligently investigate a suspected or alleged violation of subsection 3. If the Attorney General finds that a person has violated or is violating subsection 3, the Attorney General may bring a false claims action under this subsection against the person or intervene in a qui tam action brought by a person under paragraph B.

B. A private person may bring a qui tam action for a violation of subsection 3.

(1) Once filed, the qui tam action may be dismissed only with the written consent of the court, after taking into account the best interests of the parties involved and the public purpose of this section.

(2) The relator shall serve on the Attorney General a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses as provided in the Maine Rules of Civil Procedure, Rule 5.

(3) The complaint must be filed in camera and must remain under seal for at least 60 days and may not be served on the defendant until the court so orders.

(4) The Attorney General may elect to intervene in and proceed with the action on behalf of the State within 60 days after the Attorney General receives both the copy of the complaint and the written disclosure of the material evidence and information from the relator.

(5) The Attorney General may, for good cause shown, move the court for extensions of time during which the complaint remains under seal under subparagraph (3) and during which the Attorney General may elect to intervene in and proceed with the action under subparagraph (4). A motion under this subparagraph must be supported by an affidavit or other submission in camera.

(6) Before the expiration of the 60-day period under subparagraph (4) or of any extension ordered under subparagraph (5), the Attorney General shall:

(a) Proceed with the action by intervention on behalf of the State as plaintiff, in which case the action must be conducted by the Attorney General as the attorney for the plaintiff; or

(b) Notify the court that the Attorney General declines to take over the action, in which case the relator has the right to conduct the action as plaintiff.

(7) The defendant is not required to respond to any complaint filed under this paragraph until after the complaint is unsealed and served on the defendant as provided in the Maine Rules of Civil Procedure, Rule 5.

(8) When a person brings an action as relator under this paragraph, a person other than the Attorney General on behalf of the State may not intervene or bring a related action based on the facts underlying the action while the action is pending.

C. The rights of the parties to a qui tam action under this subsection are determined under this paragraph.

(1) If the Attorney General elects not to intervene in and proceed with the action, the relator has the right to conduct the action as plaintiff.

(a) At the request of the Attorney General, and upon payment by the Attorney General of the cost of transcription, copying and mailing, the relator shall serve on the Attorney General copies of all pleadings filed in the action.

(b) The court, upon the Attorney General's showing good cause and without limiting the status and rights of the relator, may permit the Attorney General to intervene after the expiration of the 60-day period under paragraph B, subparagraph (4) and any extension ordered under paragraph B, subparagraph (5).

(2) If the Attorney General intervenes in and proceeds with the qui tam action, the Attorney General has the primary responsibility for prosecuting the action and is not bound by any acts of the relator. The relator has the right to continue as a party to the action, subject to the limitations of this subparagraph.

(a) The Attorney General may move to dismiss the action for good cause shown notwithstanding the objections of the relator if the relator has been notified by the Attorney General of the filing of the motion and the court has provided the relator with an opportunity to oppose the motion and present evidence at a hearing.

(b) The Attorney General may settle the action with the defendant notwithstanding the objections of the relator if the court determines, after a hearing at which the relator has had an opportunity to present evidence, that the proposed settlement is fair, adequate and reasonable under all of the circumstances.

(c) Upon a showing by the Attorney General that unrestricted participation during the course of the action by the relator would interfere with or unduly delay the prosecution of the action by the Attorney General or would be repetitious, irrelevant or for purposes of harassment, the court may, in its discretion, impose limitations on the participation of the relator, including but not limited to:

(i) Limiting the number of witnesses the relator may call;

(ii) Limiting the length of the testimony of the witnesses called by the relator; and

(iii) Limiting the relator's cross-examination of witnesses.

(d) Upon a showing by the defendant that unrestricted participation during the course of the action by the relator would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation of the relator in the action.

(3) Whether or not the Attorney General intervenes in and proceeds with the action, upon a showing by the Attorney General that certain actions of discovery by the relator would interfere with the Attorney General's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay the discovery for a period of not more than 60 days. A showing under this subparagraph must be conducted in camera. The court may extend a 60-day stay granted under this subparagraph upon a further showing in camera that the Attorney General has pursued the criminal or civil investigation or proceedings with reasonable diligence and that the proposed discovery in the qui tam action would interfere with the ongoing criminal or civil investigation or proceedings. A motion with regard to discovery in a qui tam action must be filed with the court in accordance with the Maine Rules of Civil Procedure, Rules 26 to 37, as applicable.

(4) Notwithstanding the provisions of paragraph B, the Attorney General may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceeding to determine a civil penalty or any action under section 15. If an alternate remedy is pursued in another proceeding, the relator has the same rights in the proceeding as the relator would have had if the action had continued under this subsection. For the purposes of this subparagraph, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the State, if all time for filing appeals with respect to the finding or conclusion has expired or if the finding or conclusion is not subject to judicial review.

D. If the Attorney General intervenes in and proceeds with a qui tam action under this subsection and a judgment is entered in favor of the plaintiff or a settlement is entered in the action, the court shall enter an order as follows.

(1) Except as provided in subparagraph (2), the court may award the relator at least 15% but not more than 25% of the proceeds of the action or settlement of the claim, depending on the extent to which the relator and the counsel for the relator contributed to the prosecution of the action. Any payment to the relator under this subparagraph must be made from the proceeds.

(2) If the court finds that the action is based primarily on disclosures of specific information, other than information provided by the relator, relating to allegations or transactions specifically in a criminal, civil or administrative hearing, in a legislative or administrative report, hearing, audit or investigation or from the news media, the court may award the relator such sums as it considers appropriate, but in no case more than 10% of the proceeds, taking into account the significance of the information and the role of the relator in advancing the case to litigation. Any payment to the relator under this subparagraph must be made from the proceeds.

(3) The court shall order payment of the reasonable expenses of the relator that the court finds to be necessarily incurred, plus reasonable attorney's fees and costs. All expenses, fees and costs must be awarded against the defendant.

E. If the Attorney General does not intervene in and proceed with a qui tam action under this subsection and a judgment is entered in favor of the plaintiff or a settlement is entered in the action, the court shall enter an order as follows. The relator must receive an amount that the court determines reasonable for causing to be collected the fines and damages. The amount must be at least 25% but not more than 30% of the proceeds of the action or settlement and must be paid out of the proceeds. The relator must also receive an amount for reasonable expenses that the court finds to be necessarily incurred, plus reasonable attorney's fees and costs. All expenses, fees and costs must be awarded against the defendant.

F. Whether or not the Attorney General intervenes in and proceeds with the action, and whether or not a judgment is entered in favor of the plaintiff or a settlement is entered in the action, if the court finds that the action was brought by a relator who planned and initiated the violation of subsection

3 upon which the action was brought, the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that the person would otherwise receive under this subsection. The court shall take into account the role of the relator in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the relator is convicted of a crime arising from the role of the relator in the violation of subsection 3, the relator must be dismissed from the qui tam action and may not receive any share of the proceeds of the action. Dismissal of the relator under this paragraph does not prejudice the right of the State to continue the action as plaintiff.

G. Except as otherwise provided in this section, no liability may be incurred by the State, the department or the Attorney General for any expenses, attorney's fees or other costs incurred by any person in bringing or defending an action under this subsection.

H. All money collected from the defendant in an action under this subsection, with the exception of money payable under this subsection to another person, must be paid to the State Controller for credit to the MaineCare False Claims Act Fund under subsection 8.

I. The following limitations apply to qui tam actions under this subsection.

(1) The court does not have jurisdiction over an action brought against a member of the Legislature, a Judge of the District Court or a Justice of the Superior Court or Supreme Judicial Court or an executive branch official appointed by the Governor if the action is based on evidence or information known to the State when the action was brought.

(2) The court does not have jurisdiction over an action based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a legislative or administrative report, hearing, audit or investigation or from the news media, unless the Attorney General intervenes in and proceeds with the action or the relator is the original source of the information.

(3) The court does not have jurisdiction over an action brought by a former or present member of the Armed Forces of the United States against another member of the Armed Forces arising out of that other member's service in the Armed Forces.

(4) A person may not bring an action if the action is based upon allegations or transactions that are the subject of a civil suit or an administrative civil penalty proceeding in which the State is a party.

(5) Upon motion of the Attorney General, the court may, in consideration of all the equities, dismiss a relator as plaintiff if the elements of the false claims action alleged in the complaint have been publicly disclosed specifically in the news media or in a publicly disseminated governmental report at the time the complaint is filed.

J. In the furtherance of a qui tam action under this subsection, the provisions of this paragraph apply as protections for employees. An employee who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment by the employee's employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a qui tam action under this subsection, including investigation for, initiation of, testimony for or assistance in an action filed or to be filed under this subsection, is entitled to all relief necessary to make the employee whole. Relief under this paragraph includes reinstatement with the same seniority status that the employee would have had but for the discriminatory action of the employer, 2 times the amount of back pay, interest on the back pay and compensation for any special damages sustained as a result of the employer's discriminatory action, including litigation costs and reasonable attorney's fees. An employee may bring an action in Superior Court in the county in which the employer is located or the county of residence of the employee.

5. Qui tam action procedures. The following provisions apply to a qui tam action under subsection 4.

A. An action under subsection 4 may not be brought more than 6 years after the date on which the violation was committed or more than 3 years after the date when facts material to the cause of action are known or reasonably should have been known by the state official charged with the responsibility to act in such circumstances but in no event more than 10 years after the date on which the violation is committed, whichever occurs later.

B. An action under subsection 4 may be brought by the relator in the county in which the relator resides, in the county in which the defendant has its principal place of business or in the Superior Court of Kennebec County.

C. In an action brought under subsection 4, the State or the relator is required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

D. Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding alleging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, estops the defendant from denying the essential elements of the offense in an action brought under subsection 4 that involves the same transaction as in the criminal proceeding.

6. Civil investigatory demands. In an investigation of a violation under subsection 3, the provisions of Title 5, section 211 apply to civil investigatory demands and to the examination of books, records, papers and memoranda of whatever nature and persons having knowledge regarding those materials.

7. Applicable rules of civil procedure. The Maine Rules of Civil Procedure apply to all aspects of service, subpoena power, discovery and court procedure of an action filed pursuant to subsection 4 unless inconsistent with the provisions of this section.

8. Application. This section applies to false claims filed against the State on or after January 1, 2006 with regard to the MaineCare program, subject to the statute of limitations specified in subsection 5, paragraph A.

9. MaineCare False Claims Act Fund. There is established within the department the MaineCare False Claims Act Fund to receive funds collected as a result of actions prosecuted under this section and to provide funding for investigatory, enforcement and litigation expenses within the department related to this section. The MaineCare False Claims Act Fund is a nonlapsing fund dedicated to the purposes of this section.

10. Remedies under other laws; severability of provisions; liberality of legislative construction; adoption of legislative history. The remedies provided for in this section are not exclusive and are in addition to any other remedies provided for under section 15, in any other law or available under common law. If any provision of this section or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the section and the application of the provision to other persons and circumstances is not affected thereby. This section must be liberally construed and applied to promote the public interest. This section also adopts the congressional intent behind the federal False Claims Act, 31 United States Code, Sections 3729 to 3733, including the federal False Claims Amendments Act of 1986.

SUMMARY

This bill enacts the MaineCare False Claims Act in order to protect the State and the Federal Government against false and fraudulent claims under the Medicaid program, known in the State as the MaineCare program. This bill provides authorization for qui tam actions, which are brought by a person for the benefit of the person and the State in the name of the State. This bill provides protection from discrimination for an employee who participates in a qui tam action. This bill provides possible recoveries for the person who brings the qui tam action in addition to recoveries for the State. This bill establishes the MaineCare False Claims Act Fund to receive the proceeds payable to the State as a result of false claims litigation to be used for investigatory, enforcement and litigation expenses.