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Amendments To New York State False Claims Act Encourage *Qui Tam* Actions

By Anthony N. Moshirnia

On August 13, 2010, effective August 27, 2010, the New York legislature enacted Chapter 379, turbo-charging the New York False Claims Act ("FCA"), N.Y. State Fin. Law § 187 *et seq*., and providing would-be whistleblowers with powerful new incentives to file *qui tam* actions. The revised New York FCA generally adopts the provisions recently added to the federal FCA. New York's amended FCA also differs from its federal and sister state counterparts in three key ways.

First, with the enactment of Chapter 379, liability under the New York FCA now extends to false or fraudulent claims, records, or statements made under the State tax laws. Pursuant to Section 189, violations of the State tax code are actionable under the New York FCA so long as "the net income or sales of the person [including any partnership, corporation, association, or other legal entity] against whom the action is brought equals or exceeds one million dollars for any taxable year" and "the damages pleaded in such action exceed three hundred and fifty thousand dollars." If these requirements are satisfied, a defendant faces potential FCA penalties of three times the amount of the tax underpayment, plus $6,000 to $12,000 for each false claim, record, or statement. In an action brought under the FCA, the defendant need not have knowingly or intentionally violated the tax code. A false tax return submitted in "reckless disregard" of the law is sufficient. While the million dollar net income threshold will exempt many individuals, it provides little shelter for most businesses.

Second, the amended New York FCA provides increased protections for *qui tam* plaintiffs against retaliation for their role in bringing a whistleblower action. The law's newly-expanded anti-retaliation provisions create a comprehensive scheme covering "any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or prospective employer, because of lawful acts done . . . in furtherance of an action brought under this article."

The third, and perhaps most significant, change to the New York FCA is the immunity (and encouragement) it appears to provide to current employees, contractors, and agents, who steal confidential or otherwise sensitive documents from their workplace to help beef up FCA claims against their employers. For the purposes of the FCA, a "lawful act" includes "obtaining or

transmitting to the state, a local government, a *qui tam* plaintiff, or private counsel solely employed to investigate, potentially file, or file a cause of action under [the FCA], documents, data, correspondence, electronic mail, or any other information." Significantly, this immunity attaches even if the removal of such materials "may violate a contract, employment term, or duty owed to the employer or contractor." Although the law attempts to prevent abuse of this provision by limiting it only to "efforts to stop one or more violations of [the FCA]," its tacit promotion of document theft is likely to result in many cats escaping from many bags. Further, this provision appears to apply equally to private and public employees, suggesting that it is now permissible for government workers to steal government documents for the benefit of a private whistleblower lawsuit.

These, as well as other, amendments to the New York FCA have further sharpened the teeth of an already potent piece of legislation. It is unclear how the Courts will apply the revised law. As it is written, however, the New York FCA appears to create unprecedented levels of liability for businesses (especially those who file New York tax returns) and equally impressive levels of security for whistleblowers, government investigators, and the FCA plaintiffs' bar.

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