Title: Preventing and Reporting Fraud, Waste and Abuse in Federal Health Care Programs

SARATOGA HOSPITAL

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Area Manual: Corporate Compliance **Page:** Page 1 of 10

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Contact Person: Vice President – Chief Information & Compliance Officer

Replaces Policy: **N/A**

Scope: Entire Organization

Policy:

It is the policy of Saratoga Care, Inc., and The Saratoga Hospital (collectively, "Saratoga Care") to:

- ► Comply with all applicable Federal and State laws pertaining to fraud, waste and abuse in Federal health care programs, including but not limited to Section 6032 of the Deficit Reduction Act of 2005;

- ► Not retaliate against an individual or group for reporting a good faith concern related to a violation or potential violation of any Saratoga Care policy or procedure or any applicable law, rule, or regulation; and

- ► Disseminate information to its employees, including management, and to its contractors and agents regarding the following:

    - Federal laws and administrative remedies and State laws related to false claims;
    - Whistleblower protections under such laws;
    - The role of such laws in preventing and detecting fraud, waste and abuse in Federal health care programs; and
    - Saratoga Care's policies and procedures for detecting, preventing and reporting fraud, waste and abuse, including related whistleblower protections that allow such individuals to report potential violations in good faith without fear of retaliation.

II. Definitions

Good Faith: A belief in the truth of an alleged potential violation that is based upon facts. Any allegation made with reckless disregard or deliberate ignorance of factual matters is not made in good faith.

Knowing and Knowingly: The terms knowing and knowingly mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

Potential Violation: Reported conduct that, if true, may (i) result in a determination that a Saratoga Care entity has received an overpayment from a third party payor or payors; or (ii) constitute a violation of Saratoga Care policies or applicable laws, regulations or rules.

Retaliatory Actions: Unfavorable employment actions taken as a payback or to penalize those who report a potential violation in good faith or against those who participate in the investigation of or any proceeding related to such reports. Retaliatory actions may include discharge, suspension, demotion, penalization, harassment, discrimination or other adverse employment actions in the terms and conditions of employment of the reporter or participant.

III. Procedures

A. Non-Retaliation

1. Saratoga Care will not retaliate or permit retaliation against employees, contractor, agents and others for:

    - Filing a complaint or reporting a concern to Saratoga Care or to any regulatory agency or legal authority;
    - Testifying, assisting, or participating in an investigation, compliance review, proceeding or hearing;
    - Opposing, in good faith, any act or practice unlawful under Federal, state, or local law, regulation, or policy, provided that the manner of opposition is reasonable and does not itself violate law; or
    - Exercising any right under or participating in any process established by Federal, state, or local law, regulations, or policy.

2. Saratoga Care strictly prohibits retaliation, discrimination, harassment or any other adverse action by management or any other person or group, either directly or indirectly, against any individual or group who reports a potential violation in good faith under the reporting system described in Saratoga Care's Reporting and Response Policy.

3. Anyone believing that he or she or an employee, contractor, agent or other person has been subjected to retaliation for reporting a potential violation in good faith should report such conduct to anyone designated to receive reports under this Policy.

4. Saratoga Care also strictly prohibits retaliation, discrimination, harassment or other adverse action against any person who participates, in any way, in the investigation of a potential violation.

5. Unless a judicial or other legal process compels otherwise, the identity of any person reporting a potential violation in good faith or a retaliatory action against a reporter or a participant in an investigation shall remain confidential, and shall

only be disclosed to those individuals with a need to know as determined by the reporting system described below.

6. Any efforts to determine the identity of an anonymous reporter may result in disciplinary action against those seeking disclosure of the information.

B. Reporting Violations

1. It is the policy of Saratoga Care to encourage prompt reporting, at the earliest reasonable opportunity, of any activity or conduct in violation of any Saratoga Care compliance policy or any Federal, state or local laws or regulations pertaining to compliance related matters. Examples include, but are not limited to:

    - Financial wrongdoing, including fraud or suspected fraud;
    - Internal corporate financial concerns, such as deliberate omissions or misstatements in preparing, evaluating, reviewing or auditing of financial statements or violation of generally accepted accounting principles;
    - Federal and state healthcare programs or other third-party payor concerns, such as inaccuracies in Medicare cost reports or questionable billing or coding activities;
    - Mistreatment, abuse, or neglect of a patient or client;
    - Falsification of medical records;
    - Dangers to health and safety, including environmental and worker safety issues;
    - Criminal conduct of any kind related to patient care;
    - Favoritism or bias in contractual matters;
    - Any form of retaliation against employees, contractors, agents or others, reporting a potential violation in good faith;
    - A cover-up involving any of the above; and
    - Any other good faith concern.

2. Any individual or group who wishes to report a potential violation should do so in accordance with Saratoga Care's Reporting and Response Policy.

C. Other Methods for Detecting and Preventing Fraud, Waste and Abuse

1. For additional details concerning Saratoga Care's policies and procedures for detecting and preventing fraud, waste and abuse, please refer to Saratoga Care's Compliance Monitoring and Auditing Policy.

IV. Federal and New York Statutes Relating to the Filing of False Claims

The following summarizes Federal laws and administrative remedies and State Laws related to false claims and statements and whistleblower protections under such laws.

A. Federal Laws

False Claims Act (31 USC §§3729-3733)

The False Claims Act ("FCA") provides, in pertinent part, that:

(a) Any person who (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim paid or approved by the Government. . . or (7) 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 Government, *** is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

(b) For purposes of this section, the terms "knowing" and "knowingly" mean 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, and no proof of specific intent to defraud is required.

31 U.S.C. § 3729. While the False Claims Act imposes liability only when the claimant acts "knowingly," it does not require that the person submitting the claim have actual knowledge that the claim is false. A person who acts in reckless disregard or in deliberate ignorance of the truth or falsity of the information, also can be found liable under the Act. 31 U.S.C. §3729(b).

In sum, the False Claims Act:

- Imposes liability on any person who submits a claim to the federal government that he or she knows (or should know) is false.

  Example: A physician who submits a bill to Medicare for medical services she knows she has not provided.

- Imposes liability on an individual who may knowingly submit a false record in order to obtain payment from the government.

  Example: This may include a government contractor who submits records that he or she knows (or should know) are false and that indicate compliance with certain contractual or regulatory requirements.

- Imposes liability in those instances where someone may obtain money from the federal government to which he may not be entitled, and then uses false statements or records in order to retain the money.

  Example: This so-called "reverse false claim" may include a hospital that obtains interim payments from Medicare throughout the year, and then knowingly files a false cost report at the end of the year in order to avoid making a refund to the Medicare program.

In addition to its substantive provisions, the FCA provides that private parties may bring an action on behalf of the United States. 31 U.S.C. §3730 (b). These private parties, known as "*qui tam relators*," may share in a percentage of the proceeds from an FCA action or settlement. Section 3730(d)(1) of the FCA provides, with some exceptions, that a *qui tam relator*, when the Government has intervened in the lawsuit, shall receive at least 15 percent but not more than 25 percent of the proceeds of the FCA action depending upon the extent to which the relator substantially contributed to the prosecution of the action. When the Government does not intervene, section 3730(d)(2) provides that the relator shall receive an amount that the court decides is reasonable and shall be not less than 25 percent and not more than 30 percent.

Administrative Remedies for False Claims (31 USC Chapter 38. §§ 3801 – 3812)

This statute allows for administrative recoveries by federal agencies. If a person submits a claim that the person knows is false or contains false information, or omits material information, then the agency receiving the claim may impose a penalty of up to $5,000 for each claim. The agency may also recover twice the amount of the claim.

Unlike the False Claims Act, a violation of this law occurs when a false claim is submitted, not when it is paid. Also unlike the False Claims Act, the determination of whether a claim is false, and the imposition of tines and penalties is made by the administrative agency, not by prosecution in the federal court system.

B. New York State Laws

New York's false claims laws fall into two categories: civil and administrative; and criminal laws. Some apply to recipient false claims and some apply to provider false claims, and while most are specific to healthcare or Medicaid, some of the "common law" crimes apply to areas of interaction with the government.

1. Civil and Administrative Laws

NY False Claims Act (State Finance Law, §§187-194)

The NY False Claims Act closely tracts the federal False Claims Act. It imposes penalties and fines on individuals and entities that file false or fraudulent claims for payment from any state or local government, including health care programs such as Medicaid. The penalty for filing a false claim is $6,000 -$12,000 per claim and the recoverable damages are between two and three times the value of the amount falsely received. In addition, the false claim filer may have to pay the government's legal fees.

The Act allows private individuals to file lawsuits in state court, just as if they were state or local government parties. If the suit eventually concludes with payments back to the government, the person who started the case can recover 25-30% of the proceeds if the government did not participate in the suit of 15-25% if the government did participate in the suit.

Social Services Law §145-b, False Statements

It is a violation to knowingly obtain or attempt to obtain payment for items or services furnished under any Social Services program, including Medicaid, by use of a false statement, deliberate concealment or other fraudulent scheme or device. The State or the local Social Services district may recover three times the amount incorrectly paid. In addition, the

Department of Health may impose a civil penalty of up to $2,000 per violation. If repeat violations occur within 5 years, a penalty up to $7,500 per violation may be imposed if they involve more serious violations of Medicaid rules, billing for services not rendered or providing excessive services.

Social Services Law §145-c, Sanctions

If any person applies for or receives public assistance, including Medicaid, by intentionally making a false or misleading statement, or intending to do so, the person's, the person's family's needs are not taken into account for 6 months if a first offense, 12 months if a second (or once if benefits received are over $3,900) and live years for 4 or more offenses.

2. Criminal Laws

Social Services Law §145, Penalties

Any person who submits false statements or deliberately conceals material information in order to receive public assistance, including Medicaid, is guilty of a misdemeanor.

Social Services Law § 366-b, Penalties for Fraudulent Practices

(a) Any person who obtains or attempts to obtain, for himself or others, medical assistance by means of a false statement, concealment of material facts, impersonation or other fraudulent means is guilty of a Class A misdemeanor.

(b) Any person who, with intent to defraud, presents for payment and false or fraudulent claim for furnishing services, knowingly submits false information to obtain greater Medicaid compensation or knowingly submits false information in order to obtain authorization to provide items or services is guilty of a Class A misdemeanor.

Penal Law Article 155, Larceny

The crime of larceny applies to a person who, with intent to deprive another of his property, obtains, takes or withholds the property by means of trick, embezzlement, false pretense, false promise, including a scheme to defraud, or other similar behavior. It has been applied to Medicaid fraud cases.

(a) Fourth degree grand larceny involves property valued over $1,000. It is a Class E felony.

(b) Third degree grand larceny involves property valued over $3,000. It is a Class D felony.

(c) Second degree grand larceny involves property valued over $50,000. It is a Class C felony.

(d) First degree grand larceny involves property valued over $1 million. It is a Class B felony.

Penal Law Article 175, False Written Statements

Four crimes in this Article relate to filing false information or claims and have been applied in Medicaid fraud prosecutions:

(a) § 175.05, Falsifying business records involves entering false information, omitting material information or altering an enterprise's business records with the intent to defraud. It is a Class A misdemeanor.

(b) § 175.10, Falsifying business records in the first degree includes the elements of the §175.05 offense and includes the intent to commit another crime or conceal its commission. It is a Class E felony.

(c) §175.30, Offering a false instrument for filing in the second degree involves presenting a written instrument (including a claim for payment) to a public office knowing that it contains false information. It is a Class A misdemeanor.

(d) § 175.35, Offering a false instrument for filing in the first degree includes the elements of the second degree offense and must include an intent to defraud the state or a political subdivision. It is a Class E felony.

Penal Law Article 176, Insurance Fraud

Applies to claims for insurance payment, including Medicaid or other health insurance and contains six crimes.

(a) Insurance Fraud in the 5th degree involves intentionally filing a health insurance claim knowing that it is false. It is a Class A misdemeanor.

(b) Insurance fraud in the 4th degree is filing a false insurance claim for over $1,000. It is a Class E felony.

(c) Insurance fraud in the 3rd degree is filing a false insurance claim for over $3,000. It is a Class D felony.

(d) Insurance fraud in the 2nd degree is filing a false insurance claim for over $50,000. It is a Class C felony.

(e) Insurance fraud in the 1st degree is filing a false insurance claim for over $1 million. It is a Class B felony.

(f) Aggravated insurance fraud is committing insurance fraud more than once. It is a Class D felony

Penal Law Article 177, Health Care Fraud

Applies to claims for health insurance payment, including Medicaid, and contains five crimes:

(a) Health care fraud in the 5th degree is knowingly filing, with intent to defraud, a claim for payment that intentionally has false information or omissions. It is a Class A misdemeanor.

(b) Health care fraud in the 4th degree is filing false claims and annually receiving over $3,000 in aggregate. It is a Class E felony.

(c) Health care fraud in the 3rd degree is filing false claims and annually receiving over $10,000 in the aggregate. It is a Class D felony.

(d) Health care fraud in the 2nd degree is filing false claims and annually receiving over $50,000 in the aggregate. It is a Class C felony.

(e) Health care fraud in the 1st degree is filing false claims and annually receiving over $1 million in the aggregate. It is a Class B felony.

C. Whistleblower Protection

Federal False Claims Act (31 U.S.C. §3730(h))

The FCA provides protection to *qui tam relator* who are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the FCA. 31 U.S.C. §3730(h). Remedies include reinstatement with comparable seniority as the *qui tam relator* would have had but for the discrimination, two times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

NY False Claim Act (State Finance Law §191)

The False Claim Act also provides protection to *qui tam relator* who are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the Act. Remedies include reinstatement with comparable seniority as the *qui tam relator* would have had but for the discrimination, two times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

New York Labor Law §740

An employer may not take any retaliatory action against an employee if the employee discloses information about the employer's policies, practices or activities to a regulatory, law enforcement or other similar agency or public official. Protected disclosures are those that assert that the employer is in violation of a law that creates a substantial and specific danger to the public health and safety or which constitutes health care fraud under Penal Law § 177 (knowingly filing, with intent to defraud, a claim for payment that intentionally has false information or omissions). The employee's disclosure is protected only if the employee first brought up the matter with a supervisor and gave the employer a reasonable opportunity to correct the alleged violation. If an employer takes a retaliatory action against the employee, the employee may sue in state court for reinstatement to the same, or an equivalent position, any lost back wages and benefits and attorneys' fees. If the employer is a health provider and the court finds that the employer's retaliatory action was in bad faith, it may impose a civil penalty of $10,000 on the employer.

New York Labor Law §741

A health care employer may not take any retaliatory action against an employee if the employee discloses certain information about the employer's policies, practices or activities to a regulatory, law enforcement or other similar agency or public official. Protected disclosures are those that assert that, in good faith, the employee believes constitute improper quality of patient care. The employee's disclosure is protected only if the employee first brought up the matter with a supervisor and gave the employer a reasonable opportunity to correct the alleged violation, unless the danger is imminent to the public or patient and the employee believes in good faith that reporting to a supervisor would not result in corrective action. If an employer takes a retaliatory action against the employee, the employee may sue in state court for reinstatement to the same, or an equivalent position, any lost back wages and benefits and attorneys' fees. If the employer is a health provider and the court finds that the employer's retaliatory action was in bad faith, it may impose a civil penalty of $10,000 on the employer.

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References: Deficit Reduction Act of 2005.
New York Office of Medical Inspector General website (www.omig.state.ny.us), "Employee Education Requirement Regarding False Claims Recoveries."
HHS Office of Inspector General Compliance Guidance for Hospitals