

HB | Legal Report Series

THE MEDICARE WHISTLEBLOWER

10 STEP GUIDE

to REPORTING

HEALTHCARE FRAUD

& EARNING *a* REWARD

About this Guide

Private Citizens Can Fight Patient Abuse and Earn a Sizeable Reward

Putting profits before patients! We hear that complaint all the time. But patients continue to suffer, and government resources are drained away. For the sake of patient safety and survival of much needed federal programs, the Department of Justice must hold violators accountable. However, there is little they can do without the insider knowledge needed to bring a case. That's where honest citizens like you come in. If you are aware of fraud against a federal healthcare program, such as Medicare, Medicaid, and TRICARE, you can come forward and end illegal practices, such as:

- Billing for name drugs when generics have been provided
- Billing for services never performed
- Falsifying patient records
- Ordering unnecessary tests and treatments to drive up patient costs
- Paying or accepting kickbacks for medications and diagnostic services
- Promoting and prescribing medications for unapproved uses
- Unlawful referral to facilities where the referring provider has a proprietary interest

Far from being a victimless crime, healthcare fraud endangers patients and drains resources dedicated to our vulnerable populations. Lately, many fraud cases have been connected to the opioid epidemic that has ravaged that country in recent years. Unscrupulous pharmaceutical companies, who knew their products were dangerously addictive, induced doctors to recklessly prescribe the drugs to boost company revenues. Countless lives were destroyed in the process.

Because of fraud, federal programs go further into the red every year, jeopardizing care for current and future recipients. If the federal government is going to keep its promise to taxpayers and beneficiaries of these critically important programs, the Department of Justice must make offenders pay for fraudulent activity. But the DoJ is powerless unless honest citizens like you step forward to provide inside information on fraud schemes. Don't let fraud shred the healthcare safety net upon which the poor, elderly, and our military depend.

This guide provides a concise, informative overview of how to:

- Select the proper whistleblower program
- Gather evidence and protect your claim
- Navigate the whistleblower claims process
- Maximize your cash award

Ten Step Guide *to* Reporting Healthcare Fraud & Earning a Reward

Overview	5
Healthcare Insiders Can File Qui Tam Lawsuits to Expose Fraud in Government Programs	5
How Great Are the Potential Rewards for Blowing the Whistle on Healthcare Fraud?	5
Step One: Are You Ready?	7
Step Two: Consult Healthcare Fraud Whistleblower Attorney	8
Step Three: Building Your Healthcare Fraud Case	9
Step Four: Playing the Helpful Drone	10
Step Five: Drafting and Filing Your Whistleblower Complaint	11
Step Six: Assisting the Department of Justice	11
Step Seven: Defendants Settle or the Case Goes to Trial	12
Step Eight: Negotiating Your Reward with the DoJ	13
Step Nine: Protecting Yourself from Retaliation	14
Step Ten: Spend the Reward You've Earned!	15
 About Halperin Bikel PLLC	 17

Overview

Healthcare Insiders Can File *Qui Tam* Lawsuits to Expose Fraud in Government Programs

Forget for a moment about the government's losses. Think of the patients who are not being helped or—even worse—are being abused by healthcare providers they've trusted with their lives. Fortunately, you may be able to do something about it.

The False Claims Act allows citizens with unique, nonpublic knowledge of wrongdoing to file suit on behalf of the government and share in the government's recovery. A *qui tam* lawsuit is a legal action where a whistleblower alleges fraud against the government. If the Department of Justice believes a crime has been committed, it intervenes, prosecuting the case to recover the government's losses plus additional sanctions. The *qui tam* plaintiff, also known as the whistleblower or relator, receives a reward of anywhere from 15 to 30 percent of the government's recovery.

How Great Are the Potential Rewards for Blowing the Whistle on Healthcare Fraud?

When it comes to fraud against the government, healthcare is the 800-pound gorilla. No other category comes close. In 2019, the U.S. Department of Justice recovered more than \$3 billion in False Claims Act settlements. \$2.6 billion of those recoveries involved the healthcare industry. Defendants included drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians.

As a result, healthcare whistleblowers in 2019 were eligible to collect anywhere from \$390 million to \$780 million. 2019 was no outlier. It was

the 10th consecutive year that civil healthcare fraud recoveries exceeded \$2 billion.

Here are a few of the largest fraud cases for 2019:

- **Insys Therapeutics** — This pharmaceutical company based in Chandler, AZ helped fuel the opioid crisis by hooking innocent patients on a dangerously addictive substance that was not designed to treat their conditions. Insys paid \$195 million to settle civil allegations of kickbacks to induce physicians and nurse practitioners to prescribe Subsys, a sublingual form of fentanyl, a fast-acting opioid painkiller for use in cancer treatments. The kickback scheme allegedly encouraged doctors to prescribe Subsys for patients who did not have cancer. Doctors even lied about patients' diagnoses to insurers to facilitate payment from federal healthcare programs.
- **Reckitt Benckiser Group plc** — This Anglo-Dutch multinational headquartered in England paid \$1.4 billion to resolve criminal and civil liability related to its marketing of an opioid addiction treatment drug called Suboxone. The charges included price manipulation, unlawfully promoting Suboxone for unsafe, ineffective, and medically unnecessary uses, and making false and misleading claims that the drug was less risky than similar products.
- **Avanir Pharmaceuticals** — This California company whose website claims, "We're Visionaries, Driven by Our Humanity," was apparently also driven by greed. The company paid more than \$95 million to settle allegations it paid kickbacks and engaged in false and misleading marketing. Avanir promoted unapproved, off-label use of its drug Neudexta for dementia patients. How's that for preying on the vulnerable?

- **The Price Fixing Seven** —The Department of Justice collected more than \$624 million to resolve claims against seven drug companies – Actelion Pharmaceuticals US Inc., Amgen Inc., Astellas Pharma US Inc., Alexion Pharmaceuticals, Inc., Jazz Pharmaceuticals Inc., Lundbeck LLC, and US Worldmeds LLC – that had attempted to facilitate price increases for their drug by funding the Medicare copayments in violation of Congressional requirements.

For most healthcare fraud whistleblowers, the motivation is personal. They entered the healthcare industry to help people, and the level of corruption they observed sickened them. However, the potential rewards cannot be ignored. Finally, it's important to note that whistleblowers can act anonymously and enjoy robust protections against retaliation. So, even if you are identified as a whistleblower, your job is fully protected.

If you have unique, nonpublic information about healthcare fraud impacting the government, the time to act is now. And we're going to tell you how, in 10 steps.

Step One: Are You Ready?

There are two considerations at this point. First, do you have information that healthcare fraud is being or has been committed? Compliance with Medicaid and Medicare programs is complex, and workers in their own silos can't always see the big picture. But you know when something doesn't seem right. For example, pharmaceutical sales reps know they're not supposed to be promoting drugs for uses that the Food and Drug Administration has not approved. So, when the word comes down from corporate that the sales force will now be recommending off-label use of a particular drug, a red flag should go up. Whistleblowing pharma reps have been instrumental in many healthcare fraud recoveries.

If you have a reasonable suspicion that your employer is engaged in fraud, that's reason enough to talk to an expert. But there's a second consideration: How do you feel about being a whistleblower? If you're like most people who chose to go into healthcare, you did it to help people, not put them in jeopardy while gaming the system. Still, loyalty to your employer and coworkers might give you pause.

On the one hand, nobody wants to be a snitch. But on the other hand, who wants to be an unwitting party to a criminal enterprise? Sure, someone was kind enough to offer you a job that provided a comfortable living. It's hard to bite the hand that feeds you, until you find out it's the hand of Harry Lime. (*If you don't get that reference, we recommend Step 1a: watch the Orson Wells thriller *The Third Man* (1949), and picture yourself in the role of Joseph Cotton, an early pharma fraud whistleblower.*)

Put yourself in the place of the victimized patient, callously disregarded and cynically abused to generate more revenue for corrupt interests. If you feel your blood pressure start to rise, you know you can't turn a blind eye to this injustice. But don't take too long making up your mind. The DoJ only pays for unique information. That means you must be the first person to report your company's malfeasance. This is a case where, "He who hesitates is lost," but also where, "Fortune favors the bold." If your mind is set, you're ready for step two.

Step Two: Consult Healthcare Fraud Whistleblower Attorney

Before taking any legal action, it's always best to speak to a knowledgeable professional. The False Claims Act is complex legislation and the process is full of pitfalls, so you want to get reliable advice from an attorney with

extensive experience in this area of the law. A healthcare fraud attorney can assess your situation and let you know:

- Whether you have potential case of healthcare fraud
- Whether your case involves federal or state violations, or both
- What you must do to present a strong case

Since the goal is to file a case that the Attorney General of the United States and/or a state will want to prosecute, you must choose an attorney who knows what it takes to file a successful claim. An experienced lawyer will also know how to obtain the highest possible reward for a relator and how to protect a relator from unlawful retaliation.

Your confidence in your attorney also matters, because he or she must provide essential services throughout the process that will give you peace of mind and make a crucial difference in the outcome of your case.

Step Three: Building Your Healthcare Fraud Case

‘Some fraud cases are brazenly obvious, while others require a trained eye to spot. Some cases only require proof of illegal actions, while others require proof of the intent to commit fraud. Inadvertent mistakes, though they contribute to waste in the healthcare system, are not the types of cases that get prosecuted. Nor do they get rewarded. To build a case that gets Department of Justice intervention, you’ve got to present clear proof of substantial fraud. This requires you to assemble copious documentary evidence, which can include:

- Medical bills
- Internal memos and emails

- Meeting notes
- Accounts receivables, receipts and transaction records
- Other relevant documents

It's also important for your attorney to advise you on how to collect evidence at work in a manner that doesn't violate your whistleblower protections. As long as you act within the law, the FCA protects you from retaliation. But the law won't protect you from discipline if you violate your company's policies or privacy protections.

If you're thinking about going high-tech with audio or video surveillance, you must act within your state's laws. Some states allow you to record a meeting or phone call only when the other party knows you're doing it. However, some states allow recording anywhere a party does not have a reasonable expectation of privacy.

As you collect evidence, your attorney will only be a phone call away. So, make sure you discuss any tactic you have in mind before you attempt it. Overzealous whistleblowers can hoist on their own petard, but you keep yourself safe by operating within the law.

Step Four: Playing the Helpful Drone

When it comes to whistleblowing, preparation is key. That preparation has to take place under deep cover. You want to be trusted so you can have access to the documentary evidence you need to make your case. So, if you've expressed misgivings in the past about sketchy operations, now is the time to shrug and go along. Show you're willing to take one for the team. It's not necessary to play the wild-eyed convert; you just don't want to come off as Erin Brockovich on a mission. If you do, your employer might reassign you

to some position where you won't have access to the records you need to bolster your case.

Step Five: Drafting and Filing Your Whistleblower Complaint

Legal writing requires a combination of art and science that truly tests an attorney's skill. Your lawyer must take a mountain of evidence and distill it into a smooth, convincing narrative. The Department of Justice will accept or pass on your case based on the written complaint and the disclosure statement containing your evidence. An experienced *qui tam* lawyer is indispensable when it comes to drafting a complaint clearly and concisely to prove that a crime has likely been committed.

To protect your anonymity and shield you from retaliation, your *qui tam* lawsuit is filed under seal. There is no immediate public record, and the defendant can't look at it. Only government officials get to see the sensitive information. This is another moment when an attorney's *qui tam* experience can help make sure the court clerks observe all procedural rules to prevent a breach that lets details of your case leak out.

Step Six: Assisting the Department of Justice

After you file, the law requires the U.S. Attorney General to investigate, using appropriate tactics and tools that can include:

- Search warrants
- Subpoenas for documents or electronic records
- Interviews of potential witnesses including compelled oral testimony
- Consultations with experts

U.S. Attorneys conducting the investigation may ask for your help to interpret evidence or explore lines of inquiry. The investigators protect your anonymity throughout the investigation.

When the investigation concludes, the Department of Justice has three options:

- Intervene — The DoJ will prosecute at least one of the counts you have alleged. Intervention occurs in fewer than 25 percent of *qui tam* cases.
- Decline to intervene — The United States will not actively participate, but you and your attorney may proceed to prosecute the case on behalf of the United States. Rarely will a *qui tam* attorney be passionate enough about a case to continue. But, if you win, the government gets the recovery and you are eligible for a reward.
- Move to dismiss — Either the DoJ doesn't believe you have presented a case of fraud or there's a conflict between your case and U.S. law or public policy. Realistically, the case is over.

The goal of any *qui tam* filing is to get the DoJ to intervene. In practice, few private attorneys press on with a *qui tam* case when the government declines to intervene.

Step Seven: Defendants Settle or the Case Goes to Trial

The game changes immediately after the DoJ renders its decision. The court unseals the Complaint, and if the case is to move forward with or without DoJ intervention, you as the relator must serve the Complaint on the defendants. In theory, the case is moving toward trial. But, in practice, the investigation

usually pressures the defendant to settle the allegations. In fact, when the DoJ announces its decision to intervene, it's often able to present a settlement agreement as well.

A False Claims Act prosecution threatens the company and its officers with criminal charges as well as civil penalties. If culpable individuals can avoid potentially lengthy prison sentence, they are inclined to cooperate, even when it means paying treble damages, i.e., three times its original losses. A settlement benefits the DoJ, too. They can clear the case, collect, and move on to the next prosecution. The result is generally a compromise on damages and leniency in sentencing.

But don't get the impression the legal process is swift. Your Complaint could remain under seal for a couple of years as the DoJ attempts to unravel a complex web of fraud and reach a settlement with the defendants' attorneys. When the DoJ finally announces its settlement, you will know the amount the government has recovered, but you still won't know the precise amount of your reward.

Step Eight: Negotiating Your Reward with the DoJ

The False Claims Act allows relators to receive 15 to 30 percent of the U.S. government's recovery. Imagine that your case results in a 1 million-dollar recovery. Your reward would then range from \$150,000 to \$300,000. That's quite a disparity. Your attorney's job is to advocate aggressively to get your reward to the high end of that range by emphasizing factors the DoJ values more highly. According to published guidelines, factors that could increase the percentage of your reward include:

- Whether you reported the fraud promptly
- Whether, when you first learned of the fraud, you attempted to stop it or report it to your supervisor or the government
- Whether the qui tam filing, or the ensuing investigation, caused the offender to halt the fraudulent practices
- Whether the complaint alerted the government to a significant safety issue
- Whether the complaint exposed a nationwide practice
- Whether you provided extensive, first-hand details of the fraud to the Government
- Whether the government had no knowledge of the fraud
- Whether you provided substantial assistance during the investigation and/or pretrial phases
- Whether you appeared to be a credible witness in your deposition or at trial
- Whether your attorney provided substantial assistance
- Whether you and your attorney supported and cooperated with the government during the entire proceeding
- Whether the case went to trial
- Whether the FCA recovery was relatively small
- Whether coming forward had a substantial adverse impact on you

As with your Complaint and your Disclosure, success rests largely with your attorney's ability to draft a persuasive report supporting your case for a high percentage reward.

Step Nine: Protecting Yourself from Retaliation

We touched on this in Step Two, and it's prudent to take anti-retaliation steps early in the process. That's because, even though your complaint is

sealed, your employer is going to assume someone blew the whistle as soon as the DoJ begins its investigation. Your employer might suspect a wide swath of the workforce, but If you've been the slightest bit vocal about fraudulent activity, you could make the top of the list. However, when the Complaint is unsealed, your employer will know who blew the whistle, and that's when the trouble could really begin.

But, doesn't the FCA protect you against retaliation? Yes, but that doesn't mean a resentful boss won't try to punish you, while hiding behind lame justifications. Just when you think the worst is over and the dust has finally settled, you might get hit with an adverse performance review, reassigned to drudge duties, or denied a promotion you've fully earned.

Fortunately, you have the law behind you, and retaliation can expose your employer to civil liability. You could recover monetary damages for unlawful treatment as well as a court order to end the retaliatory behavior. But just as you built the case for fraud, you must carefully document your mistreatment to build your retaliation case. Your *qui tam* attorney can advise you on steps you should take, such as maintaining a journal of exchanges with supervisors, and retaining emails, evaluations, and other relevant documents.

Step Ten: Spend the Reward You've Earned!

Although some folks enjoy the *Spy v. Spy* aspect of healthcare fraud whistleblowing, others find it nerve-racking. For some relators, living under constant suspicion takes an emotional toll. So, when the turmoil is over and your reward comes through, you should thoroughly enjoy it! Take a vacation. Buy a new car, a new home, a new wardrobe. But there's one important *caveat*: Wait until you have that all-important check in hand. As we mentioned above, the DoJ only intervenes in 25 percent of FCA cases.

Filing a Complaint is no guarantee of a big payday. Spending beyond your means while the case is pending might serve as a “pick-me-up” while you’re under pressure, but it could backfire in the long run. There’s a reason that ballplayers wait until the last out of the last inning of the last game before popping the champagne. It just tastes that much sweeter.

If you still have questions about what it takes to become a relator, or if you’re ready to begin the *qui tam* process, contact Halperin Bikel, PLLC. We’ve aided in the recovery of more than \$10 billion in state and federal whistleblower cases. We have the knowledge you need to build a case that gets results.

About Halperin Bikel PLLC

Representing New York Whistleblowers in New York and throughout the United States

Whistleblowers, perhaps more than anyone else, need an experienced attorney to protect and advocate their rights, from retaliation protection through stopping fraud and maximizing government rewards. We hope you find this information helpful. If you are considering becoming a whistleblower or have questions about any of the several programs or about your information or job please call our attorneys at Halperin Bikel at 929.290.1266.

Our subject matter experts, and legal team will help you evaluate your circumstances from every side so you will have the best information on your risks and opportunities.

Halperin Bikel

A Law Firm for New York Whistleblowers

18 E. 48 th Street, Suite 1050

New York, NY 10017-1014

929.290.1266

No-Cost | Confidential | Anonymous (if you prefer)

www.halperinbikel.com