

HB | Legal Report Series

# THE QUI TAM WHISTLEBLOWER

10 STEP GUIDE *to*  
REPORTING FRAUD  
*for* FALSE CLAIMS ACT  
REWARDS

## About this Guide

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If you suspect an individual or organization of involvement in government contract fraud, health care fraud, pharmaceutical fraud, cybersecurity breaches, or other forms of misconduct, you're facing some challenging decisions. Ten Steps to Filing a Qui Tam Claim offers an inside look at protecting yourself from retaliation, maximizing your cash award, and ensuring a bulletproof case right from the start.

- 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 Steps *to* Filing a Qui Tam Claim

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# Ten Steps *to* Filing a Qui Tam Claim

## **Patriotic Private Citizens Can Profit by Exposing Wrongdoing in Just 10 Easy Steps**

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At a key turning point in U.S. history, President Abraham Lincoln famously resolved “that government of the people, by the people, for the people, shall not perish from the earth.” Yet, despite the “new birth of freedom” that followed the Civil War, our form of government continued to suffer from a cancer of corruption. Federal funds—drawn from the hard labor of taxpayers and meant to serve and protect our citizens—are siphoned off through fraud in such staggering amounts that many government agencies cannot even give a reasonable estimate of their losses.

Lincoln’s response to fraud that undermined the war effort was to sign into law the False Claims Act in 1863. This federal statute empowers ordinary citizens to file [\*qui tam\*](#) lawsuits against companies that defraud the U.S. government and share in the government’s recovery. Today, False Claims Act prosecutions are perhaps the government’s most potent weapon against fraud. In 2019 alone, the U.S. government recovered more than \$3 billion through FCA *qui tam* actions. The whistleblowers who exposed the fraud earned an estimated \$265 million for providing information.

## **Waste, Fraud, and Abuse! Have You Finally Had Enough?**

How often have you heard Congress promise they would cut the budget deficit by eliminating waste, fraud, and abuse? Yet fraud continues to eat away at agency budgets, services suffer, and the deficit grows. The simple truth is: Congress cannot solve the problem without the help of honest citizens with inside information about illegal practices. If you have such information, you can:

- Provide an important public service by helping to eliminate fraud
- Earn a reward of 15 to 30 percent of the government's recovery in your case
- Protect yourself from any retaliation on the job

Here are just a few examples of FCA recoveries from 2019:

- **Healthcare fraud** — In 2019, FCA settlements netted more than \$2.6 billion in this sector. 2019 was the tenth consecutive year the government recovered more than \$2 billion for fraud against Medicaid, Medicare, TRICARE, and other federal programs.
- **Procurement fraud** — This category refers to theft related to goods or services ordered by the government. In 2019, five companies paid more than \$162 million in FCA settlements.
- **Research grant fraud** — For example, Duke University paid \$112.5 million to resolve allegations it had violated the False Claims Act by submitting falsified research on grant applications to the National Institutes of Health and the Environmental Protection Agency.
- **Mineral royalties fraud** — In one such [case](#), gas marketer B. Charles Rogers Gas Ltd. paid more than \$3.5 million to settle allegations it had engaged in a scheme to reduce mineral royalty payments for natural gas removed from federal lands.

- **Small business assistance fraud** — A Virginia-based defense contractor ADS, Inc. paid \$20 million to settle allegations it had fraudulently obtained federal set-aside contracts reserved for small businesses for which the company was ineligible.

These recoveries were possible because honest citizens came forward with inside information about the fraudulent activity. If you have knowledge of fraud against the government, now is the time to come forward and claim the reward you deserve.

## **In 10 Easy Steps, You Can Become Your Own Attorney General, Strike a Blow for Good Government, and Earn a Substantial Reward.**

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The False Claims Act, also known as The Lincoln Law, allows private citizens to act as private Attorneys General to file a lawsuit on behalf of the government. The lawsuit is called a *qui tam* action, short for the Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” which means “he who sues on our Lord the King’s behalf as well as his own.” As the *qui tam* plaintiff, you are known formally as the “relator,” and informally as the “whistleblower.” If your action is successful, you can earn a reward of 15 to 30 percent of the government’s recovery.

To qualify as a *qui tam* relator, you must:

- Have knowledge of fraud that is unique, new and “nonpublic”
- Be the first person to file a claim on that knowledge

If you are considering coming forward with what you know about fraud against the government, but don’t think your case is large enough to be worth

your while, consider this. The law allows a relator to sue for treble damages, *i.e.*, three times the amount the defendant stole from the government. So, if the losses in your case amount to half a million dollars, the government's recovery is potentially \$1.5 million. Your reward is based on the treble damages, not the initial losses.

## **Robust Protections for FCA whistleblowers**

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The FCA allows you to file under seal, so you remain anonymous during the investigation. But just in case your employer learns your identity or simply decides to retaliate out of suspicion, the FCA protects relators from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" because of their whistleblowing activities. If your employer violates those provisions, a court could issue an injunction ending the mistreatment and even award you monetary damages.

## **State False Claims Act Prosecutions Are Also Possible**

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The original False Claims Act is a federal law that only applies to fraud against the U.S. government. However, 30 states, including New York, have passed their own versions of the Lincoln Law that allows private citizens to bring *qui tam* lawsuits. Most state *qui tam* claims relate to Medicaid and tax evasion. Because there is often a nexus between the state and federal programs being defrauded, a relator can sometimes pursue state and federal claims simultaneously.

## **Ten Steps to Filing Your False Claims Act Lawsuit**

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So, how do you become an FCA relator? Here is a brief overview of the process from start to finish.

## Step One: Self-Assessment

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The entry-level question is whether you have information that qualifies you to be a relator. In practical terms, you should have inside information that your employer has done one or more of the following:

- Has knowingly presented a false or fraudulent claim to a government agency for payment
- Has knowingly made or used a false record or statement in a claim to the government
- Has conspired to violate the False Claims Act
- Has knowingly delivered less money or property than owed to the government
- Has delivered a false receipt for government property without knowing if the information in the receipt is true
- Has participated in the sale of a government asset with a government employee who is not authorized to conduct the sale
- Has knowingly made or used a false record of an obligation to pay the government

All of these actions would constitute a false claim. But there is also something known as a reverse false claim. This often happens in healthcare fraud, where a government error results in too great a refund to a company. The company catches the error but does not return to overpayment within the required statutory period.

If your knowledge arouses a reasonable suspicion in your mind, that's sufficient at this point. The next part of the self-assessment has to do with you personally.



How do you feel about being a whistleblower? It takes a degree of courage to confront an employer's criminal practices. It's certainly easier to go along. But are you the kind of person who can sit quietly while deceitful people enrich themselves unjustly at the expense of the public?

If you work for a company that contracts with the government, you probably got into your profession out of a desire to serve. It can't feel right to be helping yourself at others' expense. Of course, you may feel constrained by loyalty to your employer, but when you took the job, were you volunteering to be part of a criminal conspiracy?

For many people, justice is a sufficient motivator. Personal reward is only a sweetener. And it's encouraging to know that by law your job is protected. But as you "screw your courage to the sticking place," don't take too long. Remember, the Department of Justice only pays rewards for unique information. So, you don't want anyone else in your company who knows about the fraud to beat you to the punch. Now, if you're ready, you can move to step two.

## **Step Two: Consult an FCA Whistleblower Attorney**

It's always best to get professional legal advice before taking action, and since the False Claims Act is a complex piece of legislation, you want to consult an attorney who has had ample practice in this area of the law. An FCA whistleblower attorney can assess the situation and tell you:

- Whether you have a viable case of fraud against the government
- Whether your action should be filed under federal or state law, or both
- What you must do to strengthen your case

The consultation might also put you at ease about the process, since you'll be able to speak to someone who has filed successful claims, obtained rewards for relators, and protected them from unlawful retaliation.

In addition, an experienced FCA lawyer will provide essential services throughout the subsequent steps that will make a crucial difference in the success of your case.

### **Step Three: Building the Case**

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If you read through the list of FCA violations in Step One, you may have noticed one word coming up several times: knowingly. The government would appreciate learning about inadvertent errors in billing, but it's not going to pay a bounty on them. The FCA only pays rewards for evidence of deliberate wrongdoing. That requires evidence that goes beyond a pattern of behavior to prove intent. Documentary evidence can include:

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

Importantly, your attorney can advise you on how to collect evidence at work without violating your whistleblower protections. The FCA protects you from retaliation for whistleblowing activity, but it doesn't protect you from discipline for violating company policies or privacy protections.

You must also be aware of your state's surveillance laws. In some states it is illegal to videotape a meeting or record a phone call unless the other party is

aware. Some states will allow recording if it occurs in a place where a party does not have a reasonable expectation of privacy. Operating within the law will spare you potential grief.

Throughout this stage of the case, your attorney should be accessible to answer your questions and give your specific guidance. If you have any questions about a tactic for obtaining evidence, consult your attorney first.

### **Step Four: Keeping a Low Profile**

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As you gather evidence, you want to arouse as little suspicion as possible. If you've voiced any objection to corrupt practices in the past, it's time to show yourself as a team player. You don't have to fake enthusiasm for dirty deeds. You just want to avoid coming off as some combination of Bob Woodward and Eliot Ness. Your employer may not fire you, but you could be reassigned to a position where you'd have no access to the evidence you need to build the case.

### **Step Five: Drafting and Filing**

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Some FCA lawsuits are based on straightforward fraud, which is obvious as soon as it's revealed. But other schemes are highly sophisticated and require an artful explanation. This is where the skill of an experienced *qui tam* attorney is indispensable. Your attorney must draft your complaint clearly and concisely enough to demonstrate that a crime has likely been committed. Your *qui tam* lawsuit is filed under seal, which allows your sensitive information to be seen by government officials without going on the public record, or being revealed to the defendant. This provides you with anonymity that protects you against retaliation. An experienced attorney can help ensure the court clerks observe all rules regarding a filing under seal to prevent a breach that can compromise your case.

Along with your complaint, you must also file under seal a disclosure statement containing the evidence in your possession. Your attorney composes the disclosure statement so that your evidence is presented in an orderly, comprehensible, and compelling way to maximize the impact of your filing.

## **Step Six: Working with the Department of Justice**

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After you file, the U.S. Attorney General is required to investigate your case. The investigation generally involves specific techniques, such as:

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

During the investigation, U.S. Attorneys may ask you to help them interpret evidence or suggest alternate avenues of inquiry. Your participation in the investigation remains anonymous.

At the conclusion of the investigation, the Department of Justice has three options:

- **Intervene** — This means the DoJ will participate in your case as prosecuting attorneys for at least one count you have alleged. Fewer than 25 percent of qui tam cases result in an intervention.
- **Decline to intervene** — You may proceed with your own attorney to prosecute the case on behalf of the United States, but the United States is not a party. The government is still entitled to its recovery. Depending on how strongly your attorney believes in the case, he or she may press forward or decline to take further action.

- **Move to dismiss** — The DoJ has concluded you haven't made a case or your case conflicts with U.S. law or public policy. For all practical purposes, the case is dead.

Your best-case scenario is DoJ intervention. In actual practice, few private attorneys will take a *qui tam* case forward if the government declines to intervene.

## **Step Seven: Settlement or Trial**

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When the DoJ renders its decision, the Complaint is unsealed, and you, as the relator, have the obligation to serve the Complaint on the defendants. So, in theory, after the DoJ renders its decision to intervene, the case proceeds to trial. (Likewise, if the DoJ declines but the *qui tam* plaintiff and attorney want to forge on.) However, in practice, the investigation itself usually puts sufficient pressure on the defendant to leverage a settlement. In fact, quite often, the DoJ will announce its decision to intervene simultaneously with the settlement agreement.

Since the company and its individual officers may be liable for criminal charges as well as civil penalties, there is considerable pressure for the company to settle. The DoJ also benefits from a settlement; they clear the case and collect on behalf of the government. However, since the government is empowered to collect treble damages, i.e., three times its original losses, defendant companies try to leverage some degree of leniency in exchange for a settlement.

This is not to imply that the process is swift. Depending on the complexity of the charges and the scope of the DoJ investigation, complaints can remain under seal for two years or more as the investigation and settlement talks

move forward. Once the defendant company agrees to a settlement, the amount of the government's recovery is known, but your reward must still be calculated.

## **Step Eight: Negotiating Your Reward**

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Under the FCA, relators are entitled to 15 to 30 percent of the U.S. government's recovery. Thus, the potential rewards for a million-dollar case range from \$150,000 to \$300,000. That's quite a spread, and it's your attorney's job to negotiate your reward upward as much as possible.

According to DoJ guidelines, factors that could increase the percentage of your reward include:

- If you reported the fraud promptly
- If, when you first learned of the fraud, you attempted to stop it or report it to your supervisor or the government
- If the *qui tam* filing, or the ensuing investigation, caused the offender to halt the fraudulent practices
- If the complaint alerted the government to a significant safety issue
- If the complaint exposed a nationwide practice
- If you provided extensive, first-hand details of the fraud to the Government
- If the government had no knowledge of the fraud
- If you provided substantial assistance during the investigation and/or pre trial phases
- If you appeared to be a credible witness in your deposition or at trial
- If your attorney provided substantial assistance
- If you and your attorney supported and cooperated with the government during the entire proceeding

- If the case went to trial
- If the FCA recovery was relatively small
- If coming forward had a substantial adverse impact on you

You should not passively wait for an offer. Your attorney must draft a persuasive report to the DOJ supporting your case for a high percentage reward.

## **Step Nine: Brace for Retaliation**

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Even though your complaint is sealed, your employer will learn of a DoJ investigation and is going to assume someone blew the whistle. If you have previously expressed concern about the company's fraudulent activity, you may be a prime suspect.

While it's true that the FCA protects you against retaliation, there's no guarantee a resentful boss won't try to punish you, while offering up lame justifications. And, while retaliation could begin as soon as the investigation breaks, it's more likely to ramp up after the case has closed and the dust has settled.

Remember, the law is behind you, and your employer's actions can expose them to civil liability for any unlawful treatment. But to get the benefit of the law, you have to document the mistreatment carefully. Keep a journal of exchanges with supervisors, retain emails, evaluations, and other relevant documents. Your *qui tam* attorney should be able to advise you on steps you should take at every turn.

## **Step Ten: Spend Your Reward; You've Earned It!**

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Being a whistleblower can be nerve-racking. Some relators enjoy playing *Mission: Impossible* on the job, but for others, living under suspicion can take an emotional toll. So, when your reward finally comes through, enjoy it! Our only word of advice on this point is to wait until you have the cash (or check) in hand.

Remember, the DoJ only intervenes in less than 25 percent of FCA cases, so filing a Complaint is no guarantee of future income. Trusting your ship will come in a while indulging in a little “retail therapy” to calm your nerves may put you in a deep hole. But delaying gratification will make your victory that much sweeter.

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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 our lawyers at 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

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# 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 me, Steve Halperin at Halperin Bikel at 929.290.1266. Our subject matter experts, e.g. pharmaceutical fraud, healthcare... and legal team will help you evaluate your circumstances from every side so you will have the best information on your risks and opportunities.

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