Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Judiciary Committee

HB 2246

Title: An act relating to medicaid fraud.

Brief Description: Concerning medicaid fraud.

Sponsors: Representatives Eddy, Jinkins, Dickerson and Roberts.

Brief Summary of Bill

- Establishes a state Medicaid Fraud False Claims Act that creates civil liability for false or fraudulent claims against the state Medicaid program and authorizes private parties to bring actions on behalf of the state.
- Revises criminal and civil provisions relating to Medicaid theft, fraud, and false statements.
- Creates a Medicaid Fraud Penalty Account to fund Medicaid services and Medicaid fraud prevention, detection, and enforcement activities.

Hearing Date: 1/25/12

Staff: Edie Adams (786-7180).

Background:

Medicaid.

Medicaid is a health care program for qualifying low-income and needy people, including children, the elderly, and persons with a disability. The program is a federal-state partnership established under the federal Social Security Act, and implemented at the state level with federal matching funds. Each state program must establish a plan that meets specified requirements mandated by the federal Centers for Medicare and Medicaid Services. The Washington Health Care Authority is responsible for administering the Medicaid program.

State Medicaid Fraud.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

State law establishes civil and criminal penalties for fraudulent acts related to the Medicaid program. Medicaid service providers that obtain payments through willful false statements, willful misrepresentation or concealment of material facts, or other fraudulent schemes must repay any excess payments that they received, including interest, and may be assessed civil penalties up to three times the amount of the excess payments. In addition, it is a class C felony for any person to knowingly make a false statement or conceal material facts in an application for payment, knowingly make a false statement regarding facts used to determine rights to payments, or have knowledge of the concealment of information with the intent to fraudulently receive unauthorized payments. Other criminal prohibitions relate to inappropriate rebating and referral practices and knowingly charging excessive rates for services to patients.

Federal False Claims Act.

The federal False Claims Act establishes liability for a variety of improper or fraudulent activities in all federal programs, including presenting a fraudulent claim or using false records pertaining to a fraudulent claim; failing to return money or property to the government; and using false records or concealing or improperly avoiding an obligation to pay money to the government.

A person may be found liable under the False Claims Act for up to three times the amount of the damages caused to the federal program, plus penalties of between $5,500 and $11,000 for each false claim. The False Claims Act contains "qui tam" provisions that allow citizens with evidence of fraud against the government to sue on behalf of the government. Qui tam suits are filed under seal for at least 60 days to allow the Department of Justice time to investigate and decide whether to intervene in the action. A person who files a qui tam action on behalf of the government is entitled to a portion of any recovery or settlement obtained in the action, ranging from 15 percent to 30 percent depending on whether the government intervenes and the extent of the qui tam plaintiff's participation in the case.

The Deficit Reduction Act of 2005 provides incentives to states to adopt their own versions of the False Claims Act that meet specific criteria and pertain to Medicaid programs. A state that enacts such a law is entitled to an increase of 10 percentage points in its share of Medicaid fraud amounts recovered under the state false claims action. In order to qualify for this financial incentive, the Inspector General for the U.S. Department of Health and Human Services and the U.S. Attorney General must certify that the state law meets specified criteria, including state liability for false or fraudulent claims that is equivalent to the federal liability, provisions that are at least as effective as federal standards for rewarding and facilitating qui tam actions, and civil penalties that are as much or more than the federal penalties.

Summary of Bill:

General Provisions Regarding Medicaid Fraud.

The specific crime of Medicaid theft is established as a class B felony with a fine up to $50,000. Medicaid theft occurs when a person, including a corporation, either: (1) wrongfully obtains, with intent to deprive, property or services valued over $5,000 from a medical services program; or (2) obtains, through deception, control over property or services valued over $5,000 from a

medical services program with the intent to deprive the program of the property or services. The crimes of Medicaid theft and Medicaid false statements are added to the definition of "crimes relating to financial exploitation" as that term pertains to licensing individuals with unsupervised access to vulnerable adults. The statute of limitations for Medicaid-related felonies is extended from five years to 10 years.

The Attorney General may assess civil penalties, in addition to the Director of the Health Care Authority, for activities involving false statements or misrepresentations. The Attorney General may also contract with private attorneys and local governments to bring such actions.

Whistleblower protections are provided to employees who report to the Health Care Authority that their employer has fraudulently obtained or attempted to obtain Medicaid benefits or payments. These employees are entitled to remedies available under the Washington Law Against Discrimination for any workplace reprisal or retaliatory actions taken by an employer as a result of the report. An employer is not prohibited from terminating, suspending, or disciplining an employee whistleblower for lawful reasons.

Providers of durable medical equipment and related services and providers of medical supplies and related services must be Medicare providers in order to be paid under the Medicaid program.

The Medicaid Fraud Penalty Account (Account) is established. Civil penalties received from actions against Medicaid service providers must be deposited into the Account, rather than the State General Fund. In addition, receipts from settlements under either the state Medicaid Fraud False Claims Act or federal False Claims Act must be deposited into the Account. Moneys in the account may be appropriated for Medicaid services and Medicaid fraud prevention, detection, and enforcement activities.

Medicaid Fraud False Claims Act.

Civil liability: A state version of the federal False Claims Act is established pertaining specifically to Medicaid programs. Under these provisions, liability is established for certain activities that involve claims for payment to a state agency that administers Medicaid programs. These activities generally relate to:

- knowingly presenting a false or fraudulent claim;
- knowingly using false records or statements pertaining to a false or fraudulent claim;
- knowingly failing to return money or property to the state;
- intending to defraud the government through a certification of receipt of property;
- knowingly purchasing public property from a government employee who is known not to be authorized to lawfully sell the property;
- knowingly making or using false records material to, or concealing or improperly avoiding, an obligation to pay money to the government; or
- conspiring to commit a violation of the act.

Liability for presenting such a claim includes a civil penalty between $5,500 and $11,000 plus three times the amount of damages incurred by the state. The court may reduce the damage award to double damages if the person making the claim cooperates with the Attorney General's investigation. The Attorney General must annually adjust the civil penalty to keep the penalty

equivalent to the penalty under the federal False Claims Act in accordance with the federal Civil Penalties Inflation Adjustment Act.

Qui Tam Actions: Qui tam actions are authorized, allowing a private citizen, known as a "qui tam relator," to bring a civil action in the name of the state for violations of the Medicaid Fraud False Claims Act. Prior to commencing the action, the qui tam relator must serve the Attorney General with a copy of the complaint and all material evidence regarding the claim. The action must be filed in camera and remain under seal for at least 60 days, with extensions allowed. The Attorney General has at least 60 days following the receipt of the complaint and the evidence to decide whether or not to intervene in the action.

State Intervention: If the Attorney General intervenes in the action, he or she has the primary responsibility for prosecuting the action. The relator continues as a party but the court may impose restrictions on the relator's participation in the case. The state may seek to dismiss or settle the action over the objections of the qui tam relator. The relator is entitled to notice and an opportunity to contest the motion. The court may allow a settlement over the objections of the relator if the settlement is fair, adequate, and reasonable.

If the state does not intervene, the relator may proceed with the action. The state is entitled to receive copies of all pleadings and deposition transcripts in the action, and upon a showing of good cause, may intervene in the action at a later date.

Proceeds of Qui Tam Action: A relator is entitled to share in the proceeds of any judgment or settlement obtained in the action. In an action conducted by the state, the relator is entitled to receive at least 15 percent but not more than 25 percent of the proceeds, depending upon the extent of the relator's contribution to the prosecution of the action. The award to the relator is limited to no more than 10 percent of the proceeds if the action is based primarily on information from sources other than the relator. The relator and the Attorney General are entitled to an award of reasonable expenses, costs, and reasonable attorneys' fees.

If the state did not intervene in the action, the relator conducting the action is entitled to at least 25 percent but no more than 30 percent of the proceeds of the action or a settlement, plus reasonable expenses, costs, and reasonable attorneys' fees.

In an action that is based on the relator's own wrongful conduct, the court may reduce the relator's share of the proceeds as it deems appropriate. A relator who is convicted of criminal conduct for his or her role in the violation must be dismissed from the action and may not receive any share of the proceeds.

If the Attorney General decides not to intervene in the action and the defendant prevails, the court may award the defendant reasonable attorneys' fees and expenses to be paid by the relator if the court finds the relator's claim was clearly frivolous, vexatious, or brought primarily for the purposes of harassment.

Funds recovered and remaining after distributions to the relator must be deposited into the Medicaid Fraud Penalty Account.

Qui Tam Bars: Qui tam actions may not be brought that are based on the subject of a civil suit or a civil proceeding in which the Attorney General is already a party. Qui tam actions are also barred under the following circumstances, unless the action is brought by the Attorney General or the relator is an original source of the information: where substantially the same allegations were publicly disclosed in federal hearings in which the Attorney General is a party; in a federal report, hearing, audit, or investigation; or by the news media.

Other Provisions: A person who is retaliated against by his or her employer because of the person's actions in initiating or aiding in the investigation of a false claim action may bring a civil action for reinstatement, damages, and reasonable attorneys' fees and costs.

An action under the Medicaid Fraud False Claims Act is not subject to any time limitation for the commencement of actions. Jurisdiction, discovery rules, and other procedures are specified for false claims actions. Procedures are established authorizing the Attorney General to issue civil investigative demands, prior to commencing a civil action, for the discovery of material information relevant to a false claims act investigation.

Beginning November 15, 2012, the Attorney General must report annually on the results of implementing the Medicaid Fraud False Claims Act, including the number of attorneys assigned to qui tam actions, the number of actions brought, the results of the actions brought, and the amount of the recoveries attributable to the Medicaid Fraud False Claims Act.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.