

May 27, 2020

To: Chairman Thomas Murt
Chairman Angel Cruz
Honorable Members of the House Human Services Committee

From: The Hospital and Healthsystem Association of Pennsylvania
Pennsylvania Chamber of Business and Industry
Pennsylvania Manufacturers' Association
PhRMA
NFIB – PA
Leading Age PA
Pennsylvania Medical Society
Healthcare Council of Western Pennsylvania
Pennsylvania Health Care Association
Pennsylvania Coalition for Civil Justice Reform
Insurance Federation of Pennsylvania
Pennsylvania Food Merchants Association
Curi
The Doctors Company
The Philadelphia County Medical Society
Pennsylvania Association of Mutual Insurance Companies

Re: HB 2352 - Oppose

HB 2352 purports to create a "False Claims Act" in Pennsylvania. While promoted as an avenue to recoup allegedly false or fraudulent claims for Medicaid and other human services programs, in reality, HB 2352 would only expose business and health care to needless litigation at a time when they are struggling to keep us safe while dealing with an unprecedented economic downturn. This anti-business, anti-healthcare legislation should be rejected by the General Assembly as it has been rejected in every legislative session since 2011. At a minimum, HB 2532 should be the subject of a thorough public vetting process that includes public hearings and a reasonable opportunity for health care providers and businesses to make their case

No one disputes that recouping mis-spent dollars is good for the Commonwealth and its taxpayers. However, this amendment to the Human Services Code will provide no benefit to the Commonwealth that it does not already receive under the federal False Claims Act. Yet Pennsylvania employers will be subject to a new cause of action at a time when many are struggling to stay afloat due to the devastating economic impact of the COVID – 19 pandemic. In addition to the increased liability associated with the pandemic that the legislature has so far not addressed, subjecting businesses and health care providers to another money-making scheme to benefit the plaintiffs' bar is unconscionable.

Many believe that a False Claims Act only recovers money for which the Commonwealth was fraudulently billed. Not true. Not only does the bill specifically state that fraud need not be proven, those contracting with the Commonwealth need only make an innocent mistake to be subject to astronomical damages and penalties. This is not fair or desirable under the best of economic circumstances, let alone the dire situation facing employers today with layoffs and skyrocketing unemployment.



A State FCA is Unnecessary, Redundant, and Ripe for Abuse

- **HB 2352 Creates a New Cause of Action Against Employers.** Enactment of a state FCA creates a new cause of action against thousands of Pennsylvania employers at the worst possible moment. It unnecessarily duplicates a federal cause of action that is successfully used for all state programs receiving federal funding (Medicaid etc.)
- **HB 2352 Penalizes Employers Who Make Innocent Billing Mistakes.** Human Services programs combine federal and state money. It can be complicated and difficult for a business to understand every nuance of billing. Yet the legislation specifically states that fraud does not have to be proven in order to recover. In fact, under federal court interpretations of the federal False Claims Act, mere mistakes are all that are necessary to be found liable under the act.
- **A Mistake Can Result in Liability for Three Times the Amount of Damages, Plus Penalties and Costs.** The bill imposes three times the amount of damages actually incurred by the Commonwealth. On top of that, penalties of \$8,000 per violation are assessed. On top of that, anyone found liable for damages and penalties is also liable to the Commonwealth for reasonable costs of investigation and prosecuting violations, including reasonable costs to the Attorney General or DA. Multiple, innocent mistakes add up to huge liabilities.
- **HB 2352 Awards Treble Damages (3X Actual Damages) Using the Lowest Burden of Proof.** A person can be found liable for treble damages, penalties, and costs if the Commonwealth meets the lowest burden of proof available in court – a preponderance of the evidence. To extract such punishing damages, the Commonwealth should at least be required to prove its case by clear and convincing evidence.
- **The Attorney General Is Given Unprecedented Investigatory Authority Before a Case is Even Filed.** The bill gives the Attorney General expansive and intrusive authority to investigate a contracting party without ever filing a claim. HB 2532 contains 20 pages, nearly two-thirds of the legislation, outlining the new “Civil Investigative Demands” powers granted to the Attorney General. This language effectively provides an end run around traditional restrictions on Attorney General power (i.e., a court supervised subpoena process requiring a showing of probable cause). On page 10, Section 1413-D(a)(1) provides what is the equivalent of an open-ended fishing expedition:

“Whenever the Attorney General ... **has reason to believe** that a person may be in possession ... of documentary material or information relevant to a false claims investigation ... **the Attorney General** or designee **may**, before commencing a civil action ... issue in writing and **cause to be served upon the person a civil investigative demand requiring the person to ... furnish any combination of materials, answers or testimony.**” (emphasis added)

- **A Statute of Limitations of 10 Years.** It is rare that any cause of action has a statute of limitations this long. At 10 years, memories fade and evidence is often lost or irretrievable.
- **The Attorney General Has Complete Discretion for Three Years.** To implement the act, the Attorney General may promulgate and use guidelines by merely transmitting them to the Legislative Reference Bureau for publication in the PA Bulletin. They will be effective for three years and not subject to review.
- **HB 2352 Promotes Unnecessary Litigation.** A state FCA is inconsistent with recent efforts to curb lawsuit abuse. It will discourage job growth and investment from small and large businesses.

We urge you to take a studied approach to this issue. HB 2352 has many harmful aspects not immediately apparent until you look beneath the surface and understand the full impact of the bill. A majority of states have not adopted FCA's due to serious policy objections. Wisconsin repealed its FCA in 2015, yet still posts above average Medicaid recoveries without one. We urge due diligence and hearings on this complex and multi-faceted issue.

We strongly oppose HB 2352.