

## Health Care Law E-news

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### **Fraud Enforcement and Recovery Act of 2009: Passed and Signed**

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Congress passed and the President signed the Fraud Enforcement and Recovery Act of 2009 (FERA). There is a section on the False Claims Act eliminating the requirement that a false claim must be presented to a federal official or that it involves direct federal funds to bring a FCA action. This is an important change.

For instance, if overpayments are retained then that could give rise to a False Claim. A change in Compliance Plans is likely indicated to address overpayments. The legislation says the "knowing" retention of an overpayment is a violation of the FCA. The implication is clearly a process is needed to address identification of overpayments.

The new law also removes the intent element ie. intent to defraud. The liability will depend on whether a false record or statement was "material" to getting a false claim paid. The "materiality" provision means "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

FERA also expands bar on retaliatory actions against employees to include retaliatory measures taken against a contractor or agent.

The effective date is mostly prospective, but with one exception relating to the Allison Engine case which is the amendment to section 3729 (a)(2), which took effect on June 7, 2008. This retroactivity does raise constitutional questions. The FCA has been determined to be a punitive statute and so there is a question of whether the retroactivity can apply.

The statute also allows the AG to appoint someone to approve a civil investigative demand which requires the production of information, documentary material, or physical evidence relevant to civil antitrust investigations. Only the AG could authorize the issuance of a CID previously.

If you have any questions about the above, please contact your Butzel Long attorney, or any member of our Health Care Industry Team as indicated below.

Robert H. Schwartz	<a href="mailto:schwartzrh@butzel.com">schwartzrh@butzel.com</a>	248 258 2611
Susan H. Patton	<a href="mailto:patton@butzel.com">patton@butzel.com</a>	734 213 3432
Carol A. Romej	<a href="mailto:romej@butzel.com">romej@butzel.com</a>	734 302 1025
Julie A. Rajzer	<a href="mailto:rajzer@butzel.com">rajzer@butzel.com</a>	248 258 2610
Thomas L. Sparks	<a href="mailto:sparks@butzel.com">sparks@butzel.com</a>	517 372 4372
Max R. Hoffman	<a href="mailto:hoffman@butzel.com">hoffman@butzel.com</a>	517 372 4374

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