I. Introduction

Attorneys general have broad powers to investigate and prosecute wrongdoing in their states. This paper explores a versatile legal resource that is underutilized by many attorneys general: the False Claims Act (FCA). The federal FCA, and the parallel statutes that have been enacted in many states, impose civil liability on any person who submits a false claim for payment to the United States government.\(^1\)

False claims acts may be helpful when existing laws and regulations are inadequate to deter fraudulent or exploitative behavior. This paper focuses on the use of FCAs to supplement wage and hour law, an area where effective enforcement of existing statutes can be extremely difficult. Employers who misclassify workers as independent contractors deprive workers of benefits to which they are entitled and defraud the state of money vital to maintaining a sufficient safety net for working families. Yet the recoveries available may be dwarfed by the resources required to investigate and prosecute under traditional laws and rules. State attorneys general may find state FCAs to be more potent in combating employment fraud.

The advantage of using FCAs is not limited to vindicating workers’ rights. It may be particularly valuable in the realm of licensing, and as the states start to distribute federal money received under the stimulus package, AGs serving as qui tam plaintiffs recovering money under the federal FCA may become a powerful way of ensuring the

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\(^1\) 31 U.S.C. § 3729(a). The state FCAs, discussed *infra*, are modeled on the federal statute and share the purpose and basic elements of the federal FCA.
stimulus is spent appropriately. As states struggle more than ever with budget deficits, the significant recoveries available under false claims acts make them an appealing source of revenue.

This paper first introduces the purpose and elements of the federal FCA. It then explores state FCAs and describes how state AGs may serve as qui tam plaintiffs in federal FCA suits. Finally, it argues that false claims acts provide an effective alternative to current federal and state enforcement of labor standards, and details how state AGs might bring such claims under either state or federal FCAs.

II. Structure of the Federal False Claims Act

The federal False Claims Act applies to any attempt to make or use a false record “material to a false or fraudulent claim” as well as to any “false record or statement to conceal, avoid, or decrease an obligation to pay” money to the government.\(^2\) The latter offense is known as a reverse false claim. State false claims acts are mostly copied from or patterned on the federal act and share the same elements.

The U.S. Attorney General may file suit against anyone who violates the FCA. In addition, the FCA authorizes suits by qui tam plaintiffs – private individuals suing “in the name of the Government.”\(^3\) The qui tam provision encourages parties with knowledge of fraud to come forward, while provisos permitting the government to maintain control over the litigation and making qui tam plaintiffs liable for attorneys’ fees if the defendant

\(^2\) Id.

\(^3\) 31 U.S.C. § 3730(b)(1).
prevails serve to limit frivolous suits. In a qui tam action, the complaint is kept under seal for sixty days during which time the federal government decides whether to intervene and assert control over the case. The majority of recovered funds go to the government, but the quit tam relator is entitled to share in the recovery. If the United States intervenes as a party, the relator receives 15 to 25% of the funds, while if the U.S. decides not to intervene, the relator receives 25 to 30%.

There are four important elements of proof in the federal FCA. Because state false claims statutes are modeled on the federal FCA, these elements are also relevant for AGs bringing actions under state false claims acts. The defendant must have presented a claim to the federal government, and must have done so knowingly. The claim must be false or fraudulent, and the United States (or state) must have suffered damages as a result of the claim – in other words, the fraud must be material.

A. Claim

Claim is broadly defined under the FCA to encompass any demand for payment that causes the federal government to distribute funds. It includes "any request or demand … that is presented to an officer, employee, or agent of the United States; or is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest."

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4 Christina Orsini Broderick, Qui Tam Provisions and the Public Interest: An Empirical Analysis, 107 COLUM. L. REV. 949 (2007) (providing an overview of the qui tam provision and its history, and examining empirical data to conclude that qui tam suits serve the public interest because they detect fraud more than encouraging frivolous suits).
6 31 U.S.C. § 3730(d)(1) and (d)(2).
The United States Congress recently amended the FCA to override precedents that inappropriately restricted claims to those presented directly to the government. In *Allison Engine*, the Supreme Court held that “a defendant must intend that the Government itself pay the claim,” for there to be an FCA violation. Similarly, in *United States ex. rel. Totten v. Bombardier Corp.*, the D.C. Circuit ruled that the FCA’s so-called “presentment clause” precluded liability from attaching to a defendant who submitted allegedly false claims to Amtrak for payment from an account that included federal funds.

Congress rejected these decisions as “contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.” Accordingly, the recent Fraud Enforcement and Recovery Act (“FERA”) amended the FCA by removing the “presentment clause” from the statute. It is now clear that subcontractors who submit false claims to general contractors for receipt of federal funds may be liable under the FCA.

The submission need not be a direct request for funds in order to qualify as a claim. A false representation of compliance with federal regulations or other law, made in connection with a request for funds, may constitute a claim for the purposes of the FCA. This type of certification-based claim is discussed in detail below.

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10 128 S. Ct. 2123, 2128 (2008)
11 380 F.3d 488, 490 (2004). The “presentment clause” in the pre-FERA FCA imposed liability on anyone who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval.”
13 31 U.S.C.§ 3729(b)(2) defines “claim” as includ
14 See *United States ex rel. Fallon v. Accudyne Corp.*, 880 F. Supp. 636 (W.D. Wisc. 1995) (allegation that Accudyne submitted false certifications representing it was compliant with contractually incorporated
B. Knowingly

The government or qui tam plaintiff can satisfy the elements of the FCA without proving that the defendant had the specific intent of defrauding the government. The defendant has acted “knowingly” if he “has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information.”

C. Falsity

The terms false and fraudulent are not defined in the FCA, but falsity is generally determined by the context of the claim. Falsity is a fact-specific inquiry.

D. Materiality

FERA also amended the False Claims Act to confirm that materiality is a required element. A statement is material if it has “a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” In choosing this definition, Congress endorsed the definition of materiality adopted by the Fourth, Sixth

environmental regulations stated a claim under the FCA) (partially overturned on other grounds); Pickens v. Kanawha River Towing, 916 F. Supp. 702 (S.D. Ohio 1996) (defendant made false claims when it submitted claims under a contract that required compliance with the Clean Water Act when it had in fact violated the Clean Water Act).


16 Id. See, e.g., United States ex rel. Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 411 (3d Cir. 1999) (reversing summary judgment for defendant medical researcher based partly on grounds that he had not knowingly submitted false claims by failing to disclose pharmaceutical industry funding on National Institute of Health grant application; although the district court held that the grant application instructions were ‘unclear,’ the form required applicants to “list ‘all… non-Federal… support.’” The Third Circuit further noted that defendant, “a highly-educated professional, would have been aware that the NIH might be interested in his industry ties when the agency decided whether to award him substantial funding to test a key drug in a half-billion dollar industry.”)

and Ninth Circuits prior to the recent amendments, when the FCA was silent on materiality.\(^\text{18}\)

Congress rejected the Eighth Circuit’s stringent “outcome materiality” test, which required a showing that the defendant’s actions had “the purpose and effect of causing the United States to pay out money it is not obligated to pay, or … intentionally deprive the United States of money it is lawfully due.”\(^\text{19}\) This test requires proof that the false statement actually caused the government to issue the payment in question.

The Fourth Circuit’s more expansive definition of materiality, adopted essentially verbatim in FERA, is better suited to the FCA’s broad-ranging approach to deterring fraud.\(^\text{20}\) The materiality inquiry is a mixed question of law and fact for the court’s determination, without requiring a showing that the payment actually hinged on the false statement.\(^\text{21}\) Although less rigid than the outcome materiality test, the natural tendency test still weeds out claims where the false statement is basically irrelevant to the dispersal of funds.\(^\text{22}\) Prior to FERA, courts had adopted the Fourth Circuit’s definition of materiality.\(^\text{23}\)

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\(^{18}\) See S. Rep. 110-10 at 12, citing the Fourth, Sixth, and Ninth Circuit cases defining materiality under the FCA, as well as \textit{Neder v. United States}, 527 U.S. 1 (1999), whose definition of materiality in the mail and wire fraud statutes had guided the circuit courts.

\(^{19}\) \textit{Costner v. URS Consultants, Inc.}, 153 F.3d 677, 667 (8th Cir. 1998) (alleged false claims made to an environmental cleanup trust fund did not give rise to FCA action; although the trust fund was established through negotiation with EPA in settlement of the polluter’s responsibility to clean up the superfund site, no federal funds were included in the trust fund, nor did the EPA have any control over its disbursement.).

\(^{20}\) \textit{United States ex rel. Berge v. Bd. of Trustees}, 104 F.3d 1453, 1460 (4th Cir. 1997) (asking whether the false statement “has a natural tendency to influence or is capable of influencing” government action.)

\(^{21}\) \textit{United States ex rel. Harrison v. Westinghouse Savannah River Co.}, 352 F.3d 908, 914 (4th Cir. 2003) (holding that Westinghouse’s false statement to the Department of Energy that there were no organizational conflicts of interest between it and another entity was material because it would have been precluded from bidding on the contract absent this certification).

\(^{22}\) See \textit{United States v. Southland Mgt Corp.}, 326 F.3d 669 (5th Cir. 2003) (building owners’ claims for payment from HUD under Section 8 program were not false claims merely because the owners certified that the dwellings were “decent, safe and sanitary” when HUD judged them to be unsatisfactory; the contract provided specific remedies if HUD found the housing inadequate; failure to maintain “decent, safe and sanitary” housing was not a condition of payment until HUD exhausted its remedies); \textit{United States v.}
In *Berge*, the case in which the Fourth Circuit formulated its “natural tendency” test, a university included a graduate student’s research in a progress report without crediting her. This failure to attribute credit was not material to the National Institute of Health’s decision to renew the research grant. The graduate student’s research was not central to the university’s project, and the NIH did not require inclusion of all contributing researchers in the report. But when certification is a prerequisite for bidding on a contract or applying for a grant, that certification is clearly material under the FCA. Furthermore, if a court finds that the certification is vital to the government’s decision-making process generally, it may be viewed as material.

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24 See *TDC Management Corp.*, 24 F.3d 292, 298 (D.C. Cir. 1994) (requiring government to prove that defendant “actually knew it had omitted material information from its monthly progress reports.”) (emphasis supplied); *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732-33 (7th Cir. 1999) (company that sold blood plasma derivatives did not submit a false claim by certifying that its products were free of HIV and Hepatitis C merely because the screening process was imperfect; there was no “evidence tending to show that the omission of a total protein test at the plasma intake stage … was material to the United States’ buying decision.”); *United States ex rel. Longhi v. Lithium Power Techs.*, Inc., 513 F. Supp. 2d 866, 887 (summary judgment for United States where defendants had misrepresented physical capacity, corporate status and relationships with other institutions in bid for contract with Army; contract officer testified that “[a]ny variation as to what was presented to me in the proposal would have changed my evaluation,” making fraudulent statements material to bid award decision).

25 See *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group*, 400 F.3d 428, 445 (6th Cir. 2005) (holding that the “natural tendency” test’s focus on the potential effect of the false statement better fits with the FCA’s imposition of liability upon presentment of the claim, rather than receipt of funds; defendant’s inclusion of fraudulent pension expenses on Medicare cost reporting forms was actionable even though Medicare did not reimburse them for other reasons, *id.* at 447); *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008) (adopting the “natural tendency” test as more consistent with the plain meaning of the FCA and applying it to find that fraudulent cost reports were material even though Medicare did not directly rely on them in making payments); *United States v. President and Fellows of Harvard College*, 323 F.Supp.2d 151, 186 (D. Mass 2004) (violation of conflicts-of-interest provision in contract with federal government to support development of capital markets in Russia was material because USAID had legal right to reject requests for funding that did not contain this certification, even if USAID sometimes approved funding requests when filed without the certification).

26 *U.S. ex rel. Berge*, 104 F.3d at 1461-62. See also *United States v. Southland Mgt Corp.*, 326 F.3d at 676 (the defendants’ failure to provide decent, safe and sanitary housing did not render their requests for housing assistance payments false claims because the contract with HUD provided for alternative remedies for a breach of this kind).

25 See *U.S. ex rel. Harrison*, 352 F.3d at 916.

26 Id. “The no-OCI certification plays an important role in the procurement process by ensuring that all government contracts are bid fairly… Westinghouse undermined the integrity of the procurement system.”
III. State False Claims Acts

Fifteen states and the District of Columbia have enacted false claims acts of general application that allow Attorneys General to initiate actions against anyone who has defrauded the state government or a political subdivision. Most states with false claims acts have modeled their statutes on the federal FCA. As a result, the statutes are similar to the federal act, although not uniformly so. The elements of the federal act, outlined above, are relevant to state FCAs, although specific applications may vary by state.

Just as in the federal act, state false claims acts include both affirmative false claims (where the wrongdoer has made a demand for payment) and reverse false claims (where the wrongdoer has used false statements to evade payment owed to the government). Until now, state FCAs have primarily been invoked to pursue healthcare fraud, such as inflated reimbursement claims by hospitals, nursing homes, or drug manufacturers. But attorneys general who have the statutory ability to pursue false claims should consider using their FCAs to aggressively pursue other kinds of fraud, including wage and hour violations. AGs should consider using state false claims acts

27 These states are California, Delaware, Florida, Hawaii, Illinois, Indiana, Massachusetts, Montana, Nevada, New Jersey, New York, Oklahoma, Rhode Island, Tennessee, Virginia. See infra note 33 for citations to relevant statutes. Several states have statutes that only apply to false Medicare claims, but these are outside the scope of this paper.

28 California’s reverse false claims provision is at Cal. Gov. Code § 12651(a)(7); Delaware’s at 6 Del. C. § 1201(a)(7); Florida’s at Fla. Stat. § 68.082(2)(g); Hawaii’s at Haw. Rev. Stat. § 661-21(a)(7); Illinois’ at 740 ILCS § 175/3(a)(7); Indiana’s at IC § 5-11-5.5-2(b)(6); Massachusetts’ at M.G.L.A 12 § 5B(8); Montana’s at MT. St. 17-8-401(g); Nevada’s at Nev. Rev. St. § 357.040(1)(g); New Jersey’s at N.J.S.A. § 2A:32C-3(g); New York’s at McKinney’s St. Fin. Law § 189(1)(g); Oklahoma’s at 63 Okl. St. Ann. § 5053.1(B)(7); Rhode Island’s at RI Gen. Laws § 9-1.1-3(a)(7); Tennessee’s at T.C.A. § 4-18-103(a)(7); Virginia’s at Va. Code Ann. § 8.01-216.3(a)(7); the District of Columbia’s at DC St. § 2-308.14(a)(7).

29 James F. Barger et. al., States, Statutes and Fraud: An Empirical Study of Emerging State False Claims Acts, 80 Tul. L. Rev. 465, 489 (2005). Appendix A, Question III(a). The authors surveyed states with qui tam provisions in their false claims acts; the majority of those with broadly applicable false claims statutes reported that the false claims filed under the statutes were either exclusively or predominantly healthcare related.
when more specific statutes targeting the illegal behavior are unavailable. False claims acts may also be useful when logistical or jurisdictional issues make it difficult to bring suit under more targeted statutes.

A. Subpoena or CID Authority

Even when the illegal course of conduct is actionable under other statutes, state FCAs may expand or amplify the AG’s power. For example, most state false claims acts give the attorney general power to issue subpoenas to investigate possible violations.\(^{30}\) This gives the AG broad authority to gather information – possibly allowing more extensive investigation than the AG would be able to conduct under the subpoena power associated with other statutes.

B. Statute of Limitations

State FCAs also have long statutes of limitation. Most mirror the federal FCA.\(^{31}\) In most states, the attorney general can bring suit within six years of the false claim’s submission, or within three years after the falsity of the claim is discovered up, to a maximum of ten years after the fraud occurred.\(^{32}\) This may allow attorneys general to

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\(^{30}\) See, e.g., 740 ILCS § 175/6 (authorizing the AG to issue a subpoena requiring the production of material or submission of interrogatories or oral testimony if the AG “has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to an investigation.”).

\(^{31}\) 31 U.S.C.S. § 3731(b).

\(^{32}\) Delaware’s statutory language is typical: “A civil action under this chapter may not be brought: (1) More than 6 years after the date on which the violation is committed; or (2) More than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the Government charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.” 6 Del. C. § 1209. See also Fla. Stat. § 68.089; 740 ILCS § 175/5(b); IC § 5-11-5.5-9; M.G.L.A. 12 § 5K; McKinney’s St. Fin. Law § 192; Nev. Rev. St. § 357.170; N.J.S.A § 2A:32C-11; 63 Okl. St. Ann. § 5033.6(B); RI Gen. Laws § 9-1.1-5(b); Va. Code Ann. § 8.01-216.9; D.C. St. § 2-308.17(a). Several other states simply specify that the claim must be brought within three years of discovery but no later than ten years after the false claim occurred.
bring suit under the false claims act after the statute of limitations for other statutes has expired.

C. Monetary Damages

Damages under the false claims act are likely to exceed the amounts provided by other statutes. Each state FCA requires the court to award treble damages as well as significant civil penalties; in some states civil penalties may be assessed for each false claim. Bringing suit under the FCA may result in larger financial recovery for the state and amplify the deterrent effect of the suit.

IV. Attorneys General as Qui Tam Plaintiffs Under the Federal FCA

Corporations that submit false claims to the state by lying about their unemployment insurance and workers compensation obligations may also be liable under the federal False Claims Act. Attorneys General may be able to win larger recoveries and amplify the deterrent effect of false claims suits by filing as relators on behalf of the federal government in addition to bringing claims under the state false claims act. This part argues that AGs are eligible to bring federal qui tam actions and describes how qui


33 Cal. Gov. Code § 12651(a)(1) (civil penalties of $5,000 to $10,000 per false claim); 6 Del. C. § 1201(a)(7) (civil penalties of $5,500 to $11,000); Fla. Stat. § 68.082(2)(g) (civil penalties of $5,500 to $11,000); Haw. Rev. Stat. § 661-21(a)(7) (civil penalties of $5,000 to $10,000); 40 ILCS § 175/3(a)(7) (civil penalties of $5,500 to $11,000); IC § 5-11-5.5-2(b)(6) (civil penalties of $5,000 to $10,000); M.G.L.A 12 § 5B(8) (civil penalties of $5,000 to $10,000); MT. St. 17-8-401(g) (up to $10,000 per violation); Nev. Rev. St. § 357.040(1)(g) (civil penalties of $5,000 to $10,000); N.J.S.A. § 2A:32C-3(g) (civil penalties pegged to the federal FCA); McKinney’s St. Fin. Law § 189(1)(g) (civil penalties of $6,000 to $12,000); 63 Okl. St. Ann. § 5053.1(B)(7) (civil penalties of $5,000 to $10,000, but only if penalties have not been assessed under the federal FCA in the same or prior action); RI Gen. Laws § 9-1.1-3(a)(7) (civil penalties of $5,000 to $10,000, but only if penalties have not been assessed under the federal FCA in the same or prior action); Tennessee’s at T.C.A. § 4-18-103(a)(7) (civil penalties of $2,500 to $10,000 per claim); Va. Code Ann. § 8.01-216.3(a)(7) (civil penalties of $5,500 to $11,000); DC St. § 2-308.14(a)(7) (civil penalties of $5,000 to $10,000 per claim). Some statutes provide for double, rather than treble, damages when the defendant has cooperated.
tam requirements would apply to state AGs. Statutory limitations on qui tam relators under the federal FCA, specifically the prohibition on claims that rely on publicly disclosed information and its “original source” exception, have unique implications for qui tam AGs.

A. Restrictions on Qui Tam Plaintiffs

The Supreme Court has not yet determined whether states, and attorneys general as their representatives, are proper relators under the federal FCA. The legislative history strongly suggests that states may bring suit in the name of the federal government, like any other qui tam plaintiff. This section reviews the impact of the 1986 FCA amendments, and subsequent jurisprudence, on states’ qui tam role.

The federal government has amended the FCA in an effort to provide appropriate incentives for qui tam plaintiffs while discouraging opportunistic suits. In 1943 Congress amended the FCA to prohibit qui tam actions based on information already possessed by the government. But rampant fraud in the defense industry in the 1980s prompted Congress to broaden the qui tam provisions. Section 3730(e) prohibits qui tam actions “based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media.” There is an exception where the qui tam relator is the “original source” of the

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34 Christopher C. Frieden, Comment, Protecting the Government’s Interests: Qui Tam Actions Under the False Claims Act, 47 Emory L. J. 1041, 1042 (1998).
information.\textsuperscript{36} This permits relators to proceed with qui tam actions after they have exposed the existence of the fraudulent claim to the government.

In \textit{Vermont Agency of Natural Resources v. U.S. ex rel. Stevens}, the Supreme Court held that states, and state agencies, were not “persons” for purposes of qui tam liability.\textsuperscript{37} The Court expressly declined to consider whether states were “persons” for the purposes of initiating a qui tam suit.\textsuperscript{38} The holding that states may not be defendants under the FCA is grounded in reasoning that would not support a conclusion precluding states from serving as qui tam plaintiffs, because it focuses on interpretive presumptions against Congress imposing liability on states. For example, the Court noted that the presumption that “person” does not encompass sovereign entities is “particularly applicable” when Congress is subjecting states to newly-imposed liability.\textsuperscript{39} The Court also concluded that the treble damages and civil penalties in the FCA were “essentially punitive” and that state liability was therefore inconsistent with the presumption against levying punitive damages against government entities.\textsuperscript{40} A desire to avoid the constitutional question of whether state liability under the FCA would violate the Eleventh Amendment also underpinned the Court’s reasoning.\textsuperscript{41} These arguments have no bearing on states’ eligibility to file FCA actions as qui tam relators.

\section*{B. 1986 Amendments Written to Include AGs as Qui Tam Plaintiffs}

\textsuperscript{36} 31 U.S.C. § 3730(e)(4)(A).
\textsuperscript{37} 120 S. Ct. 1858 (2000).
\textsuperscript{38} \textit{Id.} at 1870, fn.18.
\textsuperscript{39} \textit{Id.} at 1866-67.
\textsuperscript{40} \textit{Id.} at 1869.
\textsuperscript{41} \textit{Id.} 1870.
The history of the 1986 amendments strongly supports the interpretation that states are proper relators. Indeed, the dissent in *Vermont Agency of Natural Resources*, as well as the majority opinion in the Second Circuit, argued that states must be “persons” for liability purposes because the Congressional intent to include them as “persons” who may commence qui tam actions was so evident.\(^{42}\) The 1986 amendments sought to overturn *United States ex rel. Wisconsin v. Dean*, in which the Seventh Circuit held that it lacked jurisdiction over an FCA claim brought by the state of Wisconsin because the United States already possessed the information underlying the claim.\(^{43}\)

The Senate Report for the 1986 amendments cites the Seventh Circuit’s admonition that “if the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption.”\(^{44}\) It also refers to the National Association of Attorneys General (NAAG) resolution “strongly urg[ing] that Congress amended the False Claims Act to rectify the unfortunate result of the Wisconsin v. Dean decision.”\(^{45}\) A judicial interpretation barring a state as a qui tam relator was one of the primary reasons for Congress’s action in broadening the qui tam provisions.

Section 3730(e)’s language permitting the original source of public information to serve as a qui tam relator specifically abolished the jurisdictional bar invoked by the Seventh Circuit in *Dean* and applies to all original-source relators, not merely states. The amendments can be read more broadly as indicating Congressional intent to permit states to serve as qui tam relators. This is supported by § 3732(b), also adopted in 1986 at

\(^{42}\) *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 204-5 (2d Cir. 1998); 120 S. Ct. at 1874 (dissenting opinion).

\(^{43}\) 729 F.2d 1100 (7th Cir. 1984).


\(^{45}\) *Id.*
NAAG’s request, which grants jurisdiction over state law claims “for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence” as a federal FCA claim.\footnote{31 U.S.C. § 3732(b).}

The Senate Report describes § 3732(b) as “allowing State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence.”\footnote{S. Rep. 99-345 at 16, reprinted in 1986 U.S.C.C.A.N. at 5281.} The Second Circuit in Stevens concluded that since no party other than the federal government may intervene in qui tam actions, this section could not have contemplated that state AGs would intervene in federal FCA suits brought by other qui tam plaintiffs. The amendment “must have been premised on the view that the State may be the qui tam plaintiff.”\footnote{United States ex rel. Stevens, 162 F.3d at 205.}

\section*{C. State Attorneys General Have Successfully Served as Relators}

States have successfully brought suit as qui tam plaintiffs under the federal FCA. Neil Hartigan, then Attorney General of Illinois, brought a qui tam action against twenty-eight entities in the construction business that submitted false payroll reports and equal employment opportunity reports to the Illinois Department of Transportation in connection with projects funded by the U.S. Department of Transportation.\footnote{United States ex rel. Hartigan v. Palumbo Bros., 797 F.Supp. 624 (N.D. Ill. 1992) (finding that Illinois AG’s qui tam suit against construction entities, alleging false payroll and equal employment opportunity reports in connection with project funded jointly by Illinois and U.S. Departments of Transportation, stated a proper claim under the False Claims Act, but dismissing claims without prejudice pending resolution of parallel state court claims under the \textit{Colorado River} doctrine).} His predecessor, Tyrone Fahner, brought a qui tam suit against a doctor who committed Medicaid fraud, recovering over a million dollars for the federal government and another
million for the state of Illinois under the Illinois Public Aide Code. Duane Woodward, then Attorney General of Colorado, served as qui tam plaintiff in a suit against a healthcare center that submitted inflated Medicaid cost reports.

There is no post-*Stevens* case law documenting state AGs serving as relators. This may be because more states have been enacting their own false claims acts, and prefer to prosecute fraud under their own statutes and in their own courts. But AGs in the 35 states without false claims statutes should be alert to opportunities to serve as qui tam relators in federal FCA suits outside the Medicare context. Disbursement of federal stimulus dollars is one area where attorneys general may have more opportunity than federal law enforcement to detect fraud.

### D. Requirements for Qui Tam Relators

#### 1. Public Disclosure Bar in Qui Tam Actions

The public disclosure bar operates to prohibit qui tam actions under the FCA based on allegations that are already in the public domain, unless the relator is the original source of the information. “Public disclosure” includes information revealed in a “criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit, or investigation, or from the news media.” Disclosure made

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51 United States ex rel. Woodward v. Country View Care Center, 797 F.2d 888 (10th Cir. 1986).
52 Jurisdictional issues under the federal false claims act are discussed infra.
54 Id. For a discussion of judicial precedents interpreting these statutory terms, see Androphy & Correro, supra note 7, at 56-77.
solely and confidentially to a government agency is unlikely to be viewed as “public,” as this would defeat the purpose of the FCA to uncover fraud.\textsuperscript{55}

2. Qualifying as an Original Source

Even if the information on which the claim is based has already been publicly disclosed, the qui tam plaintiff can proceed with if he was the original source of the allegations.\textsuperscript{56} “Original source” has two statutory components. A putative relator must have voluntarily provided the information underlying the allegation to the government prior to filing the action.\textsuperscript{57} This may have intended to preclude qui tam suits where the individual provided the information only after being subpoenaed.\textsuperscript{58} This requirement is fairly easily satisfied.

In addition, the relator must have “direct and independent knowledge” of the information underlying the claim.\textsuperscript{59} The Supreme Court recently held in \textit{Rockwell Int’l Corp. v. United States}, that the original source requirement is jurisdictional, so even if the defendant does not dispute the relator’s status as an original source, the court must determine that the relator satisfies this requirement.\textsuperscript{60} The \textit{Rockwell} Court also held that

\textsuperscript{55} United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 728 (1st Cir. 2007); accord Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1043 (10th Cir. 2004) (public disclosure requirement “clearly contemplates that the information be in the public domain in some capacity and the Government is not the equivalent of the public domain.”); United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1518 (9th Cir. 1995) (“[I]nformation that was ‘disclosed in private’ [between government and defendant company] has not been publicly disclosed.”); United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1496 n.7 (11th Cir. 1991) (“Even if a government investigation was pending at the time [the relator] filed his \textit{qui tam} complaint, such fact would not jurisdictionally bar [the claim].”); \textit{but see} United States v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999) (holding that disclosure to the government official responsible for investigating the fraud at issue constitutes public disclosure).

\textsuperscript{56} 31 U.S.C. § 3730(e)(4).

\textsuperscript{57} 31 U.S.C. § 3730(e)(4)(B).


\textsuperscript{60} 549 U.S. 457; 127 S. Ct. 1397, 1406 (2007).
the relator must be the original source of the information on which the entire FCA claim is based, rather than the information that has been publicly disclosed.\textsuperscript{61} Thus, James Stone, the relator in \textit{Rockwell}, was disqualified as an independent source because he lacked direct and independent knowledge of the claims as alleged in the \textit{amended} complaint filed after the government had intervened.\textsuperscript{62}

Direct knowledge is satisfied when the qui tam plaintiff has discovered evidence of fraud through his own efforts, rather than “stumbling across” a document or other source of information; the plaintiff need not be able to provide eyewitness testimony.\textsuperscript{63} In \textit{United States ex rel. Hartigan v. Palumbo}, where the AG of Illinois filed a qui tam action against companies that were defrauding both state and federal departments of transportation, the state had “conducted an extensive investigation” and qualified as an original source.\textsuperscript{64} The circuits are divided as to whether state, as opposed to federal, investigations and reports may constitute public disclosure within § 3730(e)(4)(A).\textsuperscript{65} But this should not bar actions in which AGs serve as relators because the state would be the original source of any state report.

\textsuperscript{61} \textit{Id.} at 470-71.  
\textsuperscript{62} \textit{Id.} at 475. The only false claims found by the jury related to claims of environmental, safety and health compliance; but the information as to which Rockwell was the original source was not a basis for the jury’s decision.  
\textsuperscript{63} \textit{Koch}, 1195 WL 812134 at *11.  
\textsuperscript{64} \textit{U.S. ex rel. Hartigan v. Palumbo}, 797 F.Supp. at 631.  
\textsuperscript{65} \textit{See United States ex rel. Wilson v. Graham County Soil \\& Water Conservation Dist.}, 528 F.3d 292, 301 (4th Cir. 2008) (interpreting the phrase “congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation” as excluding state administrative reports because, applying the canon of \textit{noscitur a sociis}, the exclusively federal application of “congressional” and “Government Accounting Office” suggests that “administrative” also refers only to the federal government; state administrative reports are not public within the meaning of the FCA). \textit{Accord United States ex rel. Dunleavy v. County of Delaware}, 123 F.3d 734, 745 (3d Cir. 1997). \textit{But see United States ex rel. Bly-Magee v. Premo}, 470 F.3d 914, 918 (9th Cir. 2006) (holding that an interpretation of state reports as satisfying the public disclosure clause better fit aims of jurisdictional bar); \textit{Battle v. Bd. of Regents}, 468 F.3d 755, 762 (11th Cir. 2006) (assuming, without discussion, that state audit reports constitute publicly disclosed information).
E. Jurisdiction

The federal FCA specifies that claims “may” be brought in federal court, but not that they may only be brought in federal court. Courts have interpreted this jurisdictional grant to mean that claims arising under the federal FCA can be brought in either state or federal court. Because federal courts have original jurisdiction over federal FCA claims, defendants can remove to federal court any federal FCA claim filed in state court. If state AGs predict litigation advantages associated with proceeding in state court, this removal threat may be a reason to pursue a claim under the state false claims act, if one exists.

Federal courts also have supplemental jurisdiction over state law claims related to the federal FCA action. This allows state AGs to file a qui tam suit under the federal FCA and append a claim under their state FCA, in either state or federal court. An AG from a state that lacks a state FCA may also append a common law fraud claim to a federal FCA claim in which it is the relator.

V. Why Turn to the False Claims Act to Protect Workers?

Existing wage and hour statutes fail to guarantee that workers receive livable wages and basic benefits, and those laws that exist are too rarely enforced. The practice

69 31 U.S.C.S. § 3732(b). See also Illinois v. Abbott Labs (In re Pharm. Indus. Average Wholesale Price Litigation, 509 F. Supp. 2d 82, 93 (D. Mass. 2007) (holding that § 3732(b) grants supplemental, not original, jurisdiction over state law claims; the federal government’s unveiling of a FCA claim in ongoing litigation brought by state AGs did not provide grounds for removal to federal court).
70 State ex rel. Woodward v. Country View Care Center, 797 F2d at 893 (Colorado, as qui tam plaintiff, could recover its portion of Medicare overpayments by filing a pendent state law claim for fraud, in addition to sharing in the federal government’s recovery).
of “misclassifying” employees as independent contractors, or failing to report the real number of employees, in order to avoid obligations under workers compensation and unemployment insurance statutes, is widespread in many industries and regions.

According to a report prepared for the United States Department of Labor in 2000, up to 30% of employers deliberately misclassify workers in order to reduce employment costs.\(^7\) As unemployment rates rise, the number of workers who are wrongly denied unemployment benefits as a result of misclassification may be catastrophic.\(^7\)

Misclassification deprives workers of benefits to which they are entitled, including workers compensation and unemployment insurance. It also carries a high cost for states.\(^7\)

A. Existing Legal Tools and Resources are Inadequate

The main federal wage and hour statute, the Fair Labor Standards Act (FLSA), guarantees a minimum hourly wage, currently $6.55, and mandates time-and-a-half pay for work in excess of 40 hours.\(^7\) However, the FLSA has numerous exemptions and a


\(^7\) See id. at iv, predicting that “an increase in the unemployment rate could precipitate an avalanche” of contested claims.”

\(^7\) See testimony of Catherine Ruckelshaus of the National Employment Law Project before U.S. House of Representatives Committee on Education and Labor, Mar. 27, 2007, available at http://www.nelp.org/site/issues/category/independent_contractor_misclassification_and_subcontracting (noncompliance with payroll taxes in New York means that up to 20% of workers compensation premiums go unpaid each year; Massachusetts loses up to $278 million annually in uncollected unemployment insurance tax, payroll tax, and workers compensation.)

\(^7\) 29 U.S.C. § 206(a). The minimum wage is scheduled to increase to $7.25 per hour on August 25, 2009.
short statute of limitations. Only repeat violators are subject to civil penalties under the FLSA, and those penalties are very low.

Moreover, the federal government allocates increasingly meager funding to enforcing the FLSA. Hampered by limited resources, enforcement of wage and hour laws by federal authorities has plummeted to shocking levels. A recent investigation by the Government Accountability Office found that the Wage and Hour Division (WHD) repeatedly mishandles wage theft cases and “has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn.” Undercover tests by GAO revealed many complaints that were not investigated for over a year (including a child labor case involving over fifty children, despite the fact that child labor violations are considered a top priority) and cases that were dropped based on unverified information from employers or because the employer simply failed to return WHD calls. WHD sometimes took no action when employers found to have violated labor

75 See 29 U.S.C. § 213, exempting several categories of workers including those providing in home care to the elderly and agricultural workers. Claims must be brought within two years of any violation. 29 U.S.C. § 255(a).
76 Employers who violate the youth employment provisions are subject to civil penalties up to $11,000 per employee. But for adult workers, violations of overtime and minimum wage provisions are punishable by penalties of $1,100 only if the employer is a willful or repeat violator. 29 U.S.C. § 216(e).
77 From 1975–2004, the budget for U.S. Wage and Hour investigators decreased by 14% (to a total of 788 individuals nationwide) and enforcement actions decreased by 36%, while the number of workers covered by statutes enforced by the Wage and Hour Division grew by 55%. Annette Bernhardt & Siobhan McGrath, Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004, Economic Policy Brief No. 3 (New York: Brennan Center for Justice at NYU School of Law, September 2003). Moreover, the U.S. Department of Labor is generally uninterested in litigating individual workers’ claims. Peter Romer-Friedman, Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce Wage and Hour Laws, 39 COLUM. J. L. & SOC. PROBS. 495, 506 (2006). DOL data indicates that the agency typically pursues enforcement actions where multiple workers are affected. For example, in 2008 the Wage and Hour Division completed 28,242 wage cases in which they collected back wages for 228,645 employees, or an average of eight workers per case; in 2007 the Division collected back wages for 341,624 employees in 30,467 cases (eleven workers per case). DOL 2008 Statistics Fact Sheet, available at http://www.dol.gov/esa/whd/statistics/2008FiscalYear.htm.
79 Id. At 23-24. Timely investigation is vital because the FLSA has a two-year statute of limitations.
law refused to pay, permitting lawbreaking employers to profit by intransigence. In these cases WHD informed workers of their right to file private lawsuits, which GAO noted is an unrealistic option for impoverished workers.\textsuperscript{80}

Many states have enacted statutes with higher minimum wages and stronger remedies for violations of workplace standards.\textsuperscript{81} And state officials may be more inclined to enforce workplace protection laws than the federal DOL. Certainly, during the past eight years the most aggressive efforts to protect workers have been seen at the state and local level.

While state Attorneys General play a primary role in law enforcement, they may face barriers to enforcing workplace laws. In many states, the Department of Labor has exclusive jurisdiction to enforce workplace standards. If the Attorney General lacks jurisdiction over worker protection statutes and the governor fails to enforce them, employers may feel free to misclassify and exploit workers with impunity.

Even if the AG has concurrent jurisdiction over workplace laws, enforcement can be difficult. Particularly when the offenders are small companies, any individual case may involve such small sums of money that the resources devoted to investigating and prosecuting it dwarf any recovery. If wage and hour statutes provide only for the recovery of money owed and miniscule civil penalties, the risk of being prosecuted for misclassification may be viewed by employers as simply a small cost of doing business, outweighed by the money saved by cheating workers and the state. False Claims Acts

\textsuperscript{80} Id at 19.

often include stronger damages and civil penalties provisions, which may make them more effective enforcement tools. State attorneys general should consider state and federal False Claims Acts as alternative resources in the struggle against exploitative employers.

B. Using State FCAs to Enforce Labor Standards

“Misclassification” refers to the employment practice of characterizing workers as independent contractors rather than employees in order to avoid the obligations of applicable wage and hour laws. Misclassification has become so widespread in the construction industry that in 2008, the state of Illinois passed the Employee Classification Act, specifically penalizing misclassification. But states without such statutes can also use state FCAs to go after violators.

State statutes establishing compulsory unemployment insurance require employers to pay tax on the wages paid to all employees. Some employers avoid their obligation to the state by fraudulently reporting the number of workers who qualify as “employees.” This constitutes a reverse false claim: a statement to “conceal, avoid, or decrease an obligation to pay” money to the government. State regulations issued pursuant to an Unemployment Insurance Act will require employers to submit a specified form to the state reporting their UI obligations. If the form contains an express certification that the information contained within it is true, characterizing the UI form as

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82 820 ILCS § 185/1 et seq. (making it a violation to fail to properly designate or classify individuals performing services as “employees”).
83 See, e.g., 820 ILCS § 405/100 et seq.
84 This language is from the federal FCA, 31 U.S.C. § 3730(b)(1), but many states use the same or similar language.
a false claim is straightforward, provided the AG’s office has shown that the workers in question fit the statutory definition of employee.

Even if the form itself does not require certification by the employer, the UI form may still form the basis of a false claim. State UI regulations may make it clear that submission of the form implies certification as to the truth of its contents. In that case a reverse false claim may be made out under an implied certification theory, discussed in more detail below. This use of the FCA may also be applied to workers’ compensation statutes.

State false claims statutes may present appealing alternatives when enforcement of other statutes is hampered by jurisdictional issues. In Illinois, Enforcement of the Employee Misclassification Act was committed to the Department of Labor, which has exclusive jurisdiction to issue subpoenas and assess civil penalties, only later referring cases to the Attorney General for prosecution.\(^{85}\) Receiving no referrals from the Department of Labor, the AG’s office began to bring false claims actions, using the broad investigative power delegated by the Illinois Whistleblower Reward and Protection Act (the title of the Illinois FCA) and the express certification required by UI-340, the form on which employers report unemployment insurance obligations.\(^{86}\) Although it is too soon to report the outcome, using the FCA may result in higher recoveries. Under the Employee Classification Act, the state can collect wages and benefits owed, and civil

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\(^{85}\) 820 ILCS § 185/25, 185/30.

penalties are limited to $1,500 to $2,500 (for repeat violators).\textsuperscript{87} This is far less than the treble damages and up to $11,000 civil penalties available under the Whistleblower Act.\textsuperscript{88}

State FCAs can also be applied to non-labor areas. If the AG suspects a company of violating environmental laws, for example, it is worthwhile to find out whether that company has any contracts with the state government, and whether the contract bids required or implied certification of compliance with environmental laws. In the absence of a contract, there may be a regulation, or documentation companies are required to submit, that contains such a certification. Depending on jurisdiction, subpoena power, and available damages and fines, the FCA might be an advantageous approach.

C. Federal FCA Claims for Violations of Wage and Hour Law

Cases in which the defendant is defrauding both the state and federal government through the same action are relatively straightforward. This is why Medicare false claims are the bulk of the false claims cases pursued by state AGs, working in collaboration with the Justice Department.\textsuperscript{89} But state attorneys general may use the federal FCA more creatively. In certain circumstances, a qui tam suit could be a valuable weapon against corporations that violate employment law. Employers with federal contracts who falsely certify that they are in compliance with applicable labor and employment laws may be liable under the FCA. This theory could also be used to bring suit against other corporations whose state law violations may breach the terms of their federal contracts or grants.

\textsuperscript{87} § 820 ILCS 185/40.
\textsuperscript{88} 40 ILCS § 175/3(a)(7) (civil penalties of $5,500 to $11,000).
\textsuperscript{89} See Barger et. al, supra, note 29 at Appendix A. United States ex rel. Hartigan v. Palumbo is another example of a case where the same false claims defrauded federal and state governments simultaneously.
1. Obtaining Information About Federal Contracts through FOIA

A state attorney general who is investigating an employer who has violated state laws should explore whether the employer has any federal contracts. If an employer is a party to a federal contract that requires compliance with state law, the violations may give rise to a federal false claims act. The state AG can access this information by filing FOIA requests, but this strategy may only be pursued in some jurisdictions. The Third, Fifth and Sixth circuits have held that the receipt of information in response to a FOIA request automatically renders it public. The Ninth Circuit has held “a response to a FOIA request is not necessarily a report or investigation” that would give rise to the § 3730(e)(4) public disclosure bar; only if the FOIA response comes from a source that would otherwise constitute a public disclosure would the jurisdictional bar apply.

The Ninth Circuit’s analysis better achieves the “twin goals” of the 1986 amendment: “rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.” The government is likely to provide documents through a FOIA request without examining its contents in a manner that would reveal fraud. But until this split is resolved by the Supreme Court, state attorneys general should check the law of their circuits before relying on information gained through FOIA requests to file federal FCA claims.

2. False Claims Certification Theory

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91 United States ex rel. Haight v. Catholic Healthcare West, 445 F.3d 1147, 1153 (9th Cir. 2006), cert denied, 127 S. Ct. 730 (U.S. 2006). Other Circuits apparently have yet to address the issue.
93 Id. (“While the government can be expected to be on notice of fraud when the allegations are contained in a public disclosure such as an administrative or congressional hearing, when responding to a FOIA request, the government need not assimilate the information contained in the requested documents.”).
A defendant who has falsely certified compliance with applicable law may be subject to liability under the FCA. However, the FCA cannot be used to enforce compliance with every federal law or regulation. The Ninth Circuit has framed a two-pronged inquiry in false certification cases, examining “(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering Government's loss.”

Courts recognize two kinds of false certification claims, express and implied certification. Express false certification occurs when a party submits a claim “that falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment.” The implied certification theory may apply where the claim itself does not contain a false certification, but where payment is impliedly conditioned on continued adherence to requirements laid out elsewhere.

94 See U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997) (noting that “claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the FCA” and remanding to district court to determine whether payment for services listed in Medicare providers cost reports were conditioned on certification of compliance); United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266-67 (9th Cir. 1996) cert. denied, 519 U.S. 1115, 136 L. Ed. 2d 844, 117 S. Ct. 958 (1997) (finding that school’s failure to comply with specifications of the Individuals with Disabilities Education Act because, although the school was admittedly out of compliance with IDEA, that statute does not require a certificate of compliance for schools to request reimbursement).
95 United States ex rel. Hopper v. Anton, 91 F.3d at 1266 (quoting John T. Boese, Civil False Claims and Qui Tam Actions 1-29 to 1-30 (1995)).
96 United States ex. rel. Mikes v. Straus, 274 F.3d 687, 698 (2d Cir 2001) (finding that defendant optometrist’s certification on a Medicare reimbursement form that all treatments were “medically necessary” was not made false by the poor quality of the treatment, because “the term ‘medical necessity’ does not impart a qualitative element mandating a particular standard of medical care.”)
97 See, e.g., Ab-Tech Constr. v. United States, 31 Fed. Cl. 429 (Fed. Cl 1994), aff’d, 57 F.3d 1084 (Fed. Cir. 1994). Ab-Tech signed a “Statement of Cooperation” as a condition of participation in a Small Business Administration program granting contracts to minority-owned businesses, in which they promised to comply with all program requirements. Federal regulations authorized the SBA to terminate such contracts if a contractor failed to “obtain prior SBA approval of any management agreement, joint venture agreement or other agreement relative to the performance” of the contract. Ab-Tech’s submission of claims for payment, after it had entered such an agreement without SBA approval, thus constituted a false claim.
either case, compliance with the law or regulation violated must be a condition of payment.98

For example, in United States ex rel. Willard v. Humana Health Plan of Texas Inc., the court found no false claim existed under the implied certification theory when a health plan allegedly denied or discouraged enrollment by unhealthy individuals in violation of applicable regulations.99 These regulations were not referenced in the contract with the government. Moreover, the government was authorized to suspend future payments or levy monetary fines against health plans that discriminated on the basis of health, but not entitled to recoup past payments.100

The certification theory would aid state AGs in pursuing employers that have violated wage statutes only where their compliance is made a condition of the contract. There may already be contracts that require such compliance. For example, some contracts or grants may require a certification that an employer is in compliance “with all applicable state, federal, and local laws.”101

The federal government has broad authority to impose specifications and requirements on corporations seeking federal contracts. The recent election of a more pro-worker president represents a unique opportunity to use federal procurement policy to create incentives to comply with labor and employment laws. Unions and labor-affiliated organizations are already in discussion with the Obama transition team to

98 United States ex. rel. Mikes, 274 F.3d at 697 (the False Claims Act “does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions.”).
99 336 F.3d 375 (5th Cir. 2003).
100 Id. at 382-83; accord United States ex rel. Siewick v. Jamieson Science and Engineering, Inc. 214 F.3d 1372, 1376 (D.C. Cir. 2000).
101 It is not clear how such a broad, generic certification would interact with the materiality requirement and the precedents cited supra, n. 84.
ensure that federal purchasing power is directed toward encouraging responsible employment practices.

Including labor-related certifications as a condition of payment is a virtually cost-free way for the federal government to support state government efforts to eradicate worker exploitation and fraud. State attorneys general in discussion with the Obama administration should push for a federal procurement policy that creates leverage for state AGs. Requiring certification that contractors are in compliance with state law can give AGs access to the powerful False Claims Act and ensure that irresponsible employers are not rewarded with lucrative federal contracts.

V. Conclusion

State and federal false claims acts represent potent weapons against corporations that use fraudulent means to obtain taxpayer funds. Employers that knowingly and systematically lie about their workers to decrease obligations under state wage and hour laws do not commit a minor infraction. They undermine a social safety net that is more crucial than ever in our increasingly fragile economy, and they make it harder for responsible employers to survive in a competitive market.

Attorneys general in states with false claims acts can use these statutes to aggressively pursue wage and hour violators. An AG in a state with a false claims act may find using his state’s own statute preferable to filing a qui tam action under the federal statute, to remain in state court and control the litigation. But if a lawbreaking employer has a contract with the federal government or receives federal stimulus funding, it is worth investigating whether the funding was contingent on a certification that may be
a basis for a federal FCA claim. AGs in states without FCAs may also consider the qui tam approach.

The False Claims Act is a versatile enactment that seeks to broadly deter and penalize fraud against the government. Its treble damages and stiff civil penalties make it an effective law enforcement tool. In times of economic difficulty and increased reliance on government funding, scams and deception are sure to increase. State Attorneys General who familiarize themselves with the FCA may find it can be used to combat a wide variety of wrongdoing, including wage theft, misclassification and other forms of worker exploitation.