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FISCAL IMPACT REPORT

SPONSOR Neville LAST UPDATED _____
ORIGINAL DATE 2/2/23
SHORT TITLE Medicaid False Claims Changes BILL NUMBER Senate Bill 138
ANALYST Armatage/Esquibel

REVENUE* (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY23	FY24	FY25		
	\$35.0 to \$939.0	\$35.0 to \$939.0	Recurring	General Fund

Parentheses () indicate revenue decreases.

*Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Responses Received From

Attorney General's Office (NMAG)

Human Services Department (HSD)

SUMMARY

Synopsis of Senate Bill 138

Senate Bill 138 (SB138) would amend the New Mexico Medicaid False Claims Act (MFCA) to align with the federal False Claims Act. Aligning state and federal law would allow the state to retain a higher percentage of Medicaid funds collected through recoveries made in a case brought under the MFCA. New Mexico is one of only seven states noncompliant with the federal False Claims Act. SB138 is endorsed by the Legislative Finance Committee.

Section 2 adds provisions that violators shall be liable to the state for a civil penalty tied to the Federal Civil Penalties Inflation Adjustment Act of 1990, no less than \$12,537 and no more than \$25,076 for each violation, as well as reasonable attorney fees and costs of a civil action incurred by the state.

Section 7 amends language that a court shall not have jurisdiction over an action brought under the MFCA against an HSD official when the action is substantially based on evidence known to the state— to include a member of the Legislature, judiciary, or senior executive branch official—mirroring the federal FCA.

Section 9 expands whistleblower protections to contractors and agents, in addition to employees.

The section also limits actions brought under the section to no more than three years after the date on which the retaliation or discrimination occurred. These changes mirror the federal act.

Section 10 adds provisions that a civil action pursuant to the MFCA may not be brought more than six years after the date on which the violation occurred or more than three years after the date on which the state official charged with responsibility to act in the circumstances was aware of the facts, and in any event, no more than 10 years after the violation was committed, whichever occurs last. This language mirrors the federal FCA.

Section 11 adds a provision to make the MFCA the controlling act when conflicts exist between the MFCA and the Fraud Against Taxpayers Act, for cases involving Medicaid filed on or after July 1, 2023.

Section 12 adds a provision to allow the Attorney General to obtain attorney fees and costs, as statute currently provides for HSD.

Section 13 adds a civil investigative demand provision, which mirrors the federal FCA and would enable the Attorney General to obtain documents, answers to interrogatories, and require oral testimony during the investigative process. The Office of the New Mexico Attorney General states the ability of the Attorney General to issue civil investigative demands will allow for more thorough and expedient investigations of Medicaid fraud cases.

The effective date of the provisions of this act is July 1, 2023.

FISCAL IMPLICATIONS

The bill does not include an appropriation.

The bill would bring the New Mexico False Claims Act into compliance with the federal False Claims Act, increasing New Mexico's share of recoveries made under the Act by 10 percentage points. Based on past recoveries, the additional funds could be significant. Since FY2011, New Mexico has foregone an estimated \$4.7 million due to federal noncompliance.

Because Medicaid fraud varies from year to year, annual recoveries vary. However, from FFY11 to FFY21, estimated additional recoveries, had New Mexico been compliant with the FCA, would have ranged from an estimated \$35 thousand to \$939 thousand.

Reaching compliance is increasingly compelling for New Mexico, as the state stands to lose out on a greater share of recoveries each year. Furthermore, the statutory changes would strengthen protections for whistleblowers and tie penalties to inflation.

Federal False Claims Act compliance would have netted New Mexico an estimated \$4.7 Million since federal fiscal year 2011 (FFY2011)

FFY	Total Recoveries	Medicaid FMAP	FMAP if NM Compliant	State Recoveries Expected w/o FCA Compliance	State Recoveries Expected w/ Compliance	Difference
2011	\$3,387,516	0.6978	0.5978	\$1,023,707	\$1,362,459	\$338,751
2012	\$3,599,264	0.6936	0.5936	\$1,102,814	\$1,462,741	\$359,926
2013	\$2,017,386	0.6907	0.5907	\$623,977	\$825,716	\$201,738
2014	\$9,389,208	0.692	0.5920	\$2,891,876	\$3,830,796	\$938,920
2015	\$351,475	0.6965	0.5965	\$106,672	\$141,820	\$35,147
2016	\$6,205,203	0.7037	0.6037	\$1,838,601	\$2,459,121	\$620,520
2017	\$1,712,900	0.7113	0.6113	\$494,514	\$665,804	\$171,290
2018	\$3,941,930	0.7216	0.6216	\$1,097,433	\$1,491,626	\$394,193
2019	\$1,373,807	0.7226	0.6226	\$381,094	\$518,474	\$137,380
2020	\$6,449,922	*0.7891	0.6891	\$1,360,288	\$2,005,280	\$644,992
2021	\$8,565,048	*0.7966	0.6966	\$1,742,130	\$2,598,635	\$856,504
Total						\$4,699,366

Note: *FFY20 and FFY21 FMAPs reflect the 6.2 percentage point increase provided to states who meet certain requirements through the end of the Public Health Emergency.

SIGNIFICANT ISSUES

The Human Services Department reports the changes made through SB138 would assure that New Mexico’s statute is compliant with federal rules and guidance.

Presently, when a recovery is made as a result of an action relating to false or fraudulent claims under the Medicaid program, New Mexico must share the recovery with the federal government in the same proportion that the federal government contributes to the New Mexico Medicaid program. This percentage, called the federal medical assistance percentage (FMAP), varies but has ranged from 69.8 to 81.6 percent between FY11 and FY23. As incentive for enacting legislation that aligns with the federal False Claims Act, states in compliance may increase their share of funds recovered under the act by 10 percentage points. The current New Mexico False Claims Act does not pass federal review; therefore, New Mexico’s Medicaid program is not qualified to retain the additional federal funds.

To qualify for this incentive, the state law must meet specific requirements, as determined by the federal Department of Health and Human Services Office of the Inspector General (HHS-OIG) in consultation with the United States Attorney General. HHS-OIG provides specific guidelines for drafting qualifying false claims legislation. False claims actions may be initiated by the state or a relator, a whistleblower, in a qui tam lawsuit filed on behalf of the state. In reviewing state laws for compliance, HHS-OIG closely reviews any variation from the FCA. To qualify, a state’s False Claims Act must establish liability to the state for false or fraudulent claims, as described in the federal FCA with respect to Medicaid spending. It must contain provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in the federal FCA; contain a requirement for filing an action under seal for 60 days with review by the State Attorney General; and contain a civil penalty that is not less than the amount of the civil penalty authorized under the federal FCA and adjusts with inflation at the same rate. State law must mirror the language within the federal FCA, including the definitions contained therein, with little variation.

This bill authorizes the New Mexico Attorney General to investigate and pursue violations of the Medicaid False Claims Act (MFCA). Currently, the MFCA only authorizes the Human Services Department (HSD) to investigate and pursue MFCA claims. The amendments do not remove the authority of HSD. According to the Office of the New Mexico Attorney General, SB138 will not create additional duties for the Attorney General as they already litigates all Medicaid False Claims Act litigation for the state. Furthermore, the NMAG expects SB138 to add clarity and provide additional tools, such as civil investigative demands, that would improve their ability to litigate these cases.

This bill incorporates language to mirror the federal False Claims Act and would make the New Mexico Act more relator-friendly by removing current language, which provides for the automatic unsealing of the complaint at the expiration of the seal.

PERFORMANCE IMPLICATIONS

As noted by the New Mexico Attorney General, aligning the MFCA with the federal FCA will, “...clarify the laws and recovery sums, which may encourage New Mexico law firms, who were previously reluctant to bring whistleblower cases, to file more cases to help directly combat Medicaid fraud in New Mexico.”

Passage of this legislation would align New Mexico’s Medicaid False Claims Act with the federal False Claims Act resulting in New Mexico retaining more funds recovered under the Medicaid False Claims Act.

ADMINISTRATIVE IMPLICATIONS

NMAG reports, their ability to issue civil investigative demands under Section 13 of SB138 will allow for more thorough and expedient investigations of Medicaid fraud cases.

The additional 10 percent to recovery payments will strengthen the performance metrics of the New Mexico Medicaid Fraud Control Unit in NMAG. This increase in recoveries will go directly back to fund Medicaid programs in the state.

NMAG currently litigates all Medicaid False Claims Act (MFCA) litigation for the State of New Mexico, so SB138 will not create additional duties for the Attorney General. Rather, passage of this legislation is expected to improve NMAG’s ability to litigate these cases by adding clarity and providing additional tools, such as the civil investigative demands, to more effectively combat Medicaid fraud and protect this important funding for patient care.

OTHER SUBSTANTIVE ISSUES

Passage of this legislation would align New Mexico’s Medicaid False Claims Act with the federal False Claims Act resulting in New Mexico retaining more funds recovered under the Medicaid False Claims Act.

The current version of this bill has passed informal federal HHS-OIG review, and any amendments may take it out of compliance with federal requirements.