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Bill Analysis

Version: As Introduced

Primary Sponsors: Reps. Crossman and Hicks-Hudson

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SUMMARY

- Prohibits a person from filing specified false or fraudulent claims for payment with the state and defrauding the state of money or property in specific manners.
- Specifies civil penalties for violating the prohibitions.
- Requires the Attorney General to diligently investigate suspected violations of the prohibitions.
- Authorizes the Attorney General or a private citizen to file a lawsuit on behalf of the state against a person who violates the prohibitions.
- Specifies procedures governing investigations by the Attorney General and lawsuits related to the prohibitions.

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DETAILED ANALYSIS

Prohibitions

The bill prohibits a person from doing any of the following:

- Knowingly presenting, or causing to be presented, to a state officer or employee or to the state a false or misleading claim for payment or approval;
- Knowingly making, using, or causing to be made or used, a false record or statement to get the state to pay or approve a false or misleading claim;
- Conspiring to defraud the state by getting a false or fraudulent claim allowed or paid;
- Having possession, custody, or control of property or money used or to be used by the state and, with intent to conceal the property or money, delivering or causing to be delivered less property or money than the amount for which the person receives a certificate or receipt;
- With intent to defraud, making or delivering a document that certifies receipt of property used by the state or to be used by the state and that the person is authorized to make or deliver if the person does not know that the information on the document is true;
- Knowingly buying, or receiving as a pledge of an obligation or debt, public property from an officer or employee of the state who lawfully may not sell or pledge the property;
- Knowingly making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state;
- Knowingly soliciting, receiving, offering to pay, or paying a kickback, bribe, rebate, or other remuneration for referring an individual to a health care provider, managed care organization, or third person for the purpose of referral of the individual by the

provider, organization, or person for furnishing the individual with goods or services that may be paid for by Medicaid or the workers' compensation system.[1]

For purposes of any of the prohibitions above that requires a person to act "knowingly," the bill specifies that a person, with respect to information and with or without a specific intent to defraud, meets at least one of the following criteria:

- The person has actual knowledge of the information;
- The person acts in deliberate ignorance of the truth or falsity of the information;
- The person acts in reckless disregard of the truth or falsity of the information.

For purposes of any of the prohibition that involves misleading or fraudulent claims, the bill defines "claim" as any request or demand for money or property made to a contractor, grantee, or other recipient if the state provides any portion of (or reimburses for) any of the money or property requested or demanded.[2]

Penalties

Under the bill, a person who violates the prohibitions described above is generally liable to the state for a civil penalty of not less than $5,000 and not more than $10,000 for each violation, plus three times the amount of any damages the state sustained from the violation. However, the person is subject to a lesser penalty of not less than two times the state's damages, plus the costs of any lawsuit brought to recover the penalty or damages, provided the court finds all of the following apply:

- The person committing the violation provided the Attorney General with all information known to the person about the violation within 30 days after the date on which the defendant first obtained the information;
- The person fully cooperated with any state investigation of the violation;
- At the time the person provided the Attorney General with information about the violation, no criminal prosecution or civil or administrative action had begun with respect to the violation, and the person did not have actual knowledge of an investigation of the violation.

Any information provided by a person who receives the lesser penalty is not a public record under and is exempt from disclosure under the Public Records Law.[3]

[1] R.C. 2747.02(A)

[2] R.C. 2747.01(A) and (C).

[3] R.C. 2747.02(B) and (C).

Enforcement

Attorney General

The bill requires the Attorney General to diligently investigate violations of the prohibitions described above. If the Attorney General finds that a person has violated or is violating the bill's prohibitions, the Attorney General may initiate a lawsuit in accordance with the bill.[4]

An investigation or lawsuit filed under the bill does not prohibit any other action otherwise allowed by continuing law, including suits for specific false and fraudulent Medicaid claims.[5]

Private lawsuit; state's option to intervene

The bill authorizes any person to sue on behalf of the person and the state for a violation of the bill's prohibitions. It specifies, however, that the person may not sue the state, a political subdivision, or any instrumentality, officer or employee of the state or political subdivision. It also specifies that a person may not sue if either of the following apply:

- The suit is based on allegations or transactions that are the subject of a lawsuit or an administrative proceeding for a monetary penalty in which the state is already a party;
- The suit is based on the public disclosure of allegations or transactions in a criminal, civil, legislative, or administrative hearing, report, audit, or investigation, or from the news media, unless the person suing has direct and independent knowledge of the information and has voluntarily provided it to the state before filing suit (this limitation does not apply when the Attorney General sues under the bill).

A person who files a suit must file it in the state's name. The bill requires a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses to be served on the Attorney General in accordance with the Rules of Civil Procedure. The complaint must be filed "in camera" (privately), remain under seal for at least 60 days, and not be served on the defendant until the court orders.

The state may intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information. The state, for good cause shown, may request an extension of the time during which the complaint remains sealed and the state may intervene. The request may be supported by privately filed affidavits or other submissions. The bill specifies that the defendant is not required to respond to any complaint (including one originally filed by the Attorney General) until 28 days after the complaint is unsealed and served on the defendant in accordance with the Rules of Civil Procedure.

[4] R.C. 2747.03(A).

[5] R.C. 2747.02(D), by reference to R.C. 5164.35.

Before the expiration of the 60-day period between when a person files the suit and when the complaint is unsealed (or any extensions of that period) the state must either proceed with the suit or notify the court that it declines. If the state proceeds, it must conduct the suit. If the state declines to proceed, the person who filed the suit has the right to conduct it. When a person sues, no entity other than the state may intervene or bring a related action based on the same facts.

Whether or not the state proceeds with the suit, the court may stay discovery proceedings for a period of not more than 60 days if the state shows that the discovery would interfere with an investigation or a current criminal or civil case arising from the same facts. The showing must be conducted privately. The court may extend the 60-day period on a further private showing that the state has pursued the investigation or case with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing investigation or case.[6]

State intervenes

If the state intervenes and proceeds with a suit initiated by a person, it has primary responsibility for the suit. The state is not bound by any action taken by the person who originally filed it. The person who filed the suit has the right to continue as a party, subject to certain limitations.

The state may dismiss the suit regardless of the objections of the person who initiated it. The state must, however, notify the person that it requested dismissal; and the court must give an opportunity for a hearing on the request. The state also may settle the action, provided the court determines, after a hearing, that the settlement is fair, adequate, and reasonable under the circumstances. The court may hold settlement hearings in private if there is good cause to do so.

If the state shows that unrestricted participation by the person who commenced the suit would interfere with or unduly delay the state's case or would be repetitious, irrelevant, or harassing, the court may limit the person's participation, including through any of the following:

- Limiting the number of witnesses called by the person;
- Limiting the length of witnesses' testimony;
- Limiting the person's cross-examination of witnesses;
- Otherwise limiting the person's participation.

If the defendant demonstrates that unrestricted participation by the person who commenced the suit would be harassing or would cause the defendant undue burden or unnecessary expense, the court also may limit the person's participation.

[6] R.C. 2747.03(B), (E), and (H).

The state also may pursue the claim through any available means other than the suit originally filed by the person, including an administrative proceeding for a monetary penalty. If the state uses alternative proceedings, the person who initiated the suit has the same rights in that proceeding as the person would have had under the bill. Any final finding of fact or conclusion of law made in the alternative proceeding is conclusive on all parties to a suit filed under the bill. A finding or conclusion is "final" if it has been finally determined on appeal to the appropriate court, if the time for filing an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.[7]

State elects not to intervene

If the state elects not to intervene, the person has the right to conduct the suit. If the state requests, the person must serve it with copies of all filed pleadings; and at the state's expense, supply it with copies of all deposition transcripts. The court may, for good cause, permit the state to intervene at a later date but may not limit the status and rights of the person conducting the suit.[8]

Distribution of award; fees, costs, and expenses

If the state intervenes, the bill generally requires the person receive no less than 15% and no more than 25% of the proceeds of the suit or any settlement, depending on the extent of the person's contribution to the claim's prosecution. However, if the court finds that the suit is based primarily on disclosures of specific information (other than information provided by the person) relating to allegations or transactions in a judicial hearing or legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award a sum that it considers appropriate. The amount may be no more than 10% of the proceeds, taking into account the significance of the information and the role of the person who filed the lawsuit.

If the state does not intervene, the bill generally requires that the person receive a reasonable amount for collecting the civil penalty and damages. The amount must be no less than 25% and not more than 30% of the proceeds of the action or settlement. When the defendant prevails in a suit where the state did not intervene, the court may award the defendant reasonable attorney's fees and expenses on finding the suit was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

Any payment to the person who filed a suit must be made from the proceeds of the suit or settlement. The person also must receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All expenses, fees, and costs granted to the person who filed the suit must be awarded against the defendant. The state is not liable for expenses that a person incurs bringing a suit authorized by the bill.

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[7] R.C. 2747.03(C) and (F).

[8] R.C. 2747.03(D).

Regardless of whether the state intervenes and proceeds with a suit, the bill specifies that, when the court finds that the suit was brought by a person who planned and initiated the violation underlying the suit, the court may eliminate or reduce the person's share of the proceeds to the extent appropriate. The court must consider the person's role in advancing the case and any relevant circumstances pertaining to the violation. If the person who filed suit is criminally convicted for the person's role in the violation, the person must be dismissed from the suit and cannot receive any of the proceeds. The dismissal does not prejudice the right of the state to continue the suit.[9]

Anti-retaliation protections

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against by the employee's employer because of lawful acts done by the employee or on behalf of the employee or others in furtherance of a suit brought under the bill (including investigation for, initiation of, testimony for, or assistance in a suit) is entitled to all relief necessary to make the employee whole. The relief includes the following:

- Reinstatement with the same seniority status the employee would have had but for the discrimination;
- Two times the amount of back pay and interest on the back pay;
- Compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

The employee may sue in any court of common pleas for the relief of an anti-retaliation prohibition.[10]

Procedure

Statute of limitations

The bill specifies that neither the Attorney General nor a private person may sue for a violation of the bill's prohibitions after the later of the following dates:

- Six years after the date on which the violation was committed;
- Three years after the date on which the Attorney General knows, or reasonably should have known, about facts material to the suit.[11]

Venue; limited immunity

The bill generally allows a lawsuit for a violation to be filed in the Franklin County Court of Common Pleas or the common pleas court for any county in which a defendant can be

[9] R.C. 2747.03(G) and (I).

[10] R.C. 2747.03(J).

[11] R.C. 2747.04(B).

found, resides, or transacts business, or in which any act prohibited by the bill occurred. A suit filed by the Attorney General against an officer or employee of the state, however, must be filed against the state in the Court of Claims. The Court of Claims has exclusive, original jurisdiction to determine whether the officer or employee is entitled to personal immunity under continuing law, and whether the courts of common pleas have jurisdiction over the suit. Except for suits involving the operation of a motor vehicle and lawsuits in which the state is the plaintiff, continuing law grants immunity to a state officer or employee for damages or injury caused in the performance of the officer's or employee's duties, unless one of the following applies:

- The officer or employee acted manifestly outside the scope of the officer's or employee's employment or official responsibilities;
- The officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.[12]

Estoppel

The bill specifies that a person who is found guilty, or who pleads guilty or no contest, in a criminal proceeding charging fraud or false statements is estopped (prevented) from denying the essential elements of the offense in any suit filed under the bill that involves the same transaction as in the criminal proceeding.[13]

Burden of proof

In any lawsuit brought under the bill, the state or private person conducting the suit must prove all essential elements of the claim, including damages, by a preponderance of the evidence.[14]

Subpoenas

A subpoena requiring the attendance of a witness at a trial or hearing conducted under in accordance with the bill may be served pursuant to Civil Rule 45, which governs subpoenas in an ordinary civil trial.[15]

Civil investigative demands by the Attorney General

Under the bill, whenever the Attorney General has reason to believe that a person may be in possession, custody, or control of any documentary material or information relevant to an investigation conducted under the bill, the Attorney General may – before commencing a lawsuit – issue and serve a written civil investigative demand requiring the person to do any of the following:

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[12] R.C. 2747.05, by reference to R.C. 9.86 and 2743.02(F), not in the bill.

[13] R.C. 2747.04(D).

[14] R.C. 2747.04(C).

[15] R.C. 2747.04(A).

- Produce the documentary material for inspection and copying;
- Answer written interrogatories with respect to the material or information;
- Provide oral testimony concerning the material or information;
- Furnish any combination of documentary material, written answers, or oral testimony.

A civil investigative demand must state the nature of the conduct being investigated that allegedly violates the bill's prohibitions. A demand may not require the production of any documentary material, written answer, or oral testimony if the material, answer, or testimony would be protected from disclosure under either of the following:

- The standards applicable to subpoenas or demands for records issued by a court to aid in a grand jury investigation;
- The standards applicable to discovery requests under the Rules of Civil Procedure, to the extent that the application of the standards to the demand is appropriate and consistent with the bill's provisions and purpose.

When a person fails to comply with any civil investigative demand, or when requested material cannot satisfactorily be copied or reproduced and the person refuses to surrender the material, the Attorney General may file and serve a petition for an order enforcing the demand. The petition may be filed in the Franklin County Court of Common Pleas or in the county in which the person resides, is found, or transacts business.

An investigative demand or petition may be served in the same manner as a summons under Civil Rules 4 to 4.3 and 4.5. A verified return by the person serving a civil investigative demand or a petition setting forth the manner of the service is proof of the service. In the case of service by registered or certified mail, the return must be accompanied by the return post office receipt of delivery.[16]

Documentary material

If an investigative demand issued under the bill is for the production of documentary material, the Attorney General must do both of the following in the demand:

- Describe each class of documentary material to be produced with the definiteness and certainty that permits the material to be fairly identified;
- Prescribe a return date for each class of documentary material that will allow enough time for the material to be assembled and made available for inspection and copying.

Production of documentary material must be made under a sworn certificate, in any form that the demand designates, by the following methods:

- In the case of an individual, the individual to whom the demand is directed;

[16] R.C. 2747.06.

- In the case of an entity (such as a business), an individual who has knowledge of the facts and circumstances relating to the production, and who is authorized to act on behalf of the entity.

The certificate must state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the Attorney General. Any person served with a demand for documentary material must make the material available for inspection and copying to the Attorney General at the person's principal place of business, or at any other place that the Attorney General and the person agree to in writing. The person must make the material available on the date specified in the demand, or on any later date that the Attorney General prescribes in writing. The person may, on written agreement between the person and the Attorney General, substitute copies for originals of all or any part of the material.[17]

Answers to written interrogatories

If an investigative demand is for answers to written interrogatories, the bill requires the Attorney General, in the demand, to set forth specific questions to be answered and prescribe dates when the answers must be submitted. Each interrogatory must be answered separately and fully in writing under oath. Answers must be submitted under a sworn certificate, in the form that the demand designates, by the following persons:

- In the case of an individual, the individual to whom the demand is directed;
- In the case of an entity (such as a business), the individual responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection must be stated in the certificate instead of an answer. The certificate must state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information must be identified with particular reasons why it was not furnished.[18]

Oral testimony

If an investigative demand requires a person to give oral testimony, the bill requires the Attorney General, in the demand, to do all of the following:

- Prescribe a date, time, and place at which the testimony will commence;
- Specify that the attendance and testimony are necessary to the conduct of the investigation;
- Notify the person receiving the demand of the right to be accompanied by an attorney and any other representative;

[17] R.C. 2747.07.

[18] R.C. 2747.08.

- Describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry.

The date prescribed for the testimony must be a date that is not less than seven days after the date on which the demand is received, unless the Attorney General determines that exceptional circumstances warrant a shorter period. The Attorney General may not issue more than one demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies the person in writing that an additional demand is necessary.

The bill requires oral testimony to be given under oath or affirmation before an officer authorized by law to administer oaths and affirmations. The officer must, either personally or by someone acting under the officer's direction and in the officer's presence, record the testimony. The testimony must be taken stenographically (or otherwise recorded in accordance with the Rules of Civil Procedure) and must be transcribed. When the testimony is fully transcribed, the officer must promptly transmit a copy to the Attorney General. The bill specifies that it does not preclude taking testimony by any means authorized by, and in a manner consistent with, the Rules of Civil Procedure.

Oral testimony taken under the bill must be taken in Franklin County or in the county within which the person testifying resides, is found, or transacts business, or in any other place agreed on by the Attorney General and the person. A person appearing for oral testimony under a civil investigative demand is entitled to the same fees and allowances that are paid to witnesses in the court of common pleas.

The Attorney General must exclude all persons from the place where the testimony is given except the person testifying, the person's attorney and any other representative, any person agreed on by the person and the Attorney General, the officer before whom the testimony is taken, and any person recording the testimony.

When the testimony is fully transcribed, the Attorney General or the officer before whom it is taken must afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless examination and reading are waived by the witness. Any changes in form or substance that the witness desires to make must be entered and identified on the transcript by the officer or the Attorney General, with a statement of the reasons given by the witness for making the changes. The transcript then must be signed by the witness, unless the witness waives the signing in writing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the Attorney General must sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given.

The officer before whom the testimony is taken must certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or Attorney General must take custody of the transcript.

Any person compelled to appear for oral testimony may be accompanied, represented, and advised by counsel. Counsel may advise the person, in confidence, with respect to any

question asked. The person or counsel may object on the record to any question, in whole or in part, and must briefly state for the record the reason for the objection. An objection may be made, received, and entered on the record when the person refuses to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. The person may not otherwise object to or refuse to answer any question and may not directly or through counsel otherwise interrupt the examination. If the person refuses to answer any question, a petition may be filed in the Franklin County Court of Common Pleas or in the county in which the examination takes place for an order compelling the person to answer the question. If the person refuses to answer any question on the grounds of the privilege against self-incrimination, the court may compel the person to answer after it receives a written request from the county prosecutor and informs the person that the person will be granted immunity under continuing law.[19]

Confidentiality and use of materials, answers, and testimony

While in the Attorney General's possession, the bill generally exempts documentary material, answers to interrogatories, transcripts of oral testimony, and copies thereof from examination by any person other than the Attorney General's employees. The exemption does not apply, however, if the person who produced the material, answers, or transcripts consents to the examination.

The bill also specifies that nothing in its confidentiality provisions is intended to prevent disclosure to any of the following:

- The General Assembly, including any of its committees or subcommittees;
- A state agency for use by the agency in furtherance of its statutory responsibilities;
- A law enforcement officer for use in the furtherance of the law enforcement officer's duties.

Disclosure of information to any agency other than those specified in the bill is allowed only on application by the Attorney General to a court of common pleas. The Attorney General must show substantial need for the information to be used by the agency in furtherance of its statutory responsibilities.

While in the Attorney General's possession and under any reasonable terms and conditions the Attorney General prescribes, documentary material and answers to interrogatories must be available for examination by the person who produced the material or answers, or by a representative of that person authorized to examine the material and answers.

The bill allows the Attorney General to use any documentary material, answers to interrogatories, or transcripts of oral testimony received pursuant to a civil investigative demand under the bill in connection with any case or proceeding before a court, grand jury, or state agency.

[19] R.C. 2747.09, by reference to R.C. 2945.44, not in the bill.

If any documentary material has been produced by any person in the course of any investigation pursuant to a civil investigative demand under the bill, the Attorney General, on written request of the person who produced the material, must return to the person the documentary material, other than copies furnished to the Attorney General or made by the Attorney General under the bill, that has not passed into the control of any court, grand jury, or agency through introduction into the record of the case or proceeding, or into the control of any law enforcement officer, if either of the following applies:

- Any case or proceeding before the court or grand jury arising out of the investigation, or any proceeding before any state agency involving the material, has been completed;
- No case or proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of the investigation.

The bill also specifies that documentary material, answers to written interrogatories, and oral testimony provided under a civil investigative demand are not public records, and are exempt from disclosure under the Public Records Law.[20]

Additional definitions

The bill also defines the following terms:

- "Documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret the data compilations, and any product of discovery.
- "Product of discovery" includes all of the following:
  - The original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, that is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;
  - Any digest, analysis, selection, compilation, or derivation of any item listed above;
  - Any index or other manner of access to any item listed above.[21]

[20] R.C. 2747.10 by reference to R.C. 149.43, not in the bill.

[21] R.C. 2747.01(A), (B), and (D).

HISTORY

Action	Date
Introduced	01-18-22

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