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Trump's 'Abnormal' Use Of FCA Could Get Tricky In Court

By **Phillip Bantz**

Law360 (August 19, 2025, 12:41 PM EDT) -- The Trump administration is wielding the False Claims Act in unusually narrow ways to drive policies on social and cultural issues — including gender-affirming care and diversity, equity and inclusion programs — but the government's potential theories of liability under the federal law remain largely untested and might not hold up in court, experts say.

Among the most powerful tools to combat healthcare fraud, the FCA allows for the recovery of treble damages against anyone who knowingly submits a false claim for money from the government. FCA civil liability also can lead to criminal charges.

Through a series of executive actions and memos, the administration has made clear its intent to leverage the FCA to pressure federally funded medical providers and others to stop providing various forms of gender-affirming care, including cross-sex hormone therapy, puberty blockers and surgery to individuals younger than 19. The U.S. Department of Justice has also vowed to wield the law against what it calls "illegal" DEI programs in the private sector.

That's a departure from how the government typically uses the FCA to combat wider patterns of misconduct, according to Justin Lugar, a former Virginia federal prosecutor who served as the DOJ's civil healthcare fraud coordinator. A more common use of the FCA would be targeting fraudulent claims for loans from the federal Paycheck Protection Program created to support businesses and their employees amid the COVID-19 pandemic.

"The administration is using its enforcement tools to focus on some very narrow areas. It's kind of an abnormal use of the FCA. It doesn't fit the pattern of typical healthcare fraud enforcement," Lugar, now of counsel at Woods Rogers, told Law360.

He added, "In any area where this administration wants to get a particular point of view across, the FCA could be used — because all they have to do is make it a condition of payment."

While prior administrations have used executive orders and federal spending to further social policy goals, "there have not been prior instances in which the potential for FCA enforcement has been explicitly linked to policy objectives articulated in presidential directives," said Jason Crawford, a partner at Crowell & Moring LLP. He formerly served as a DOJ trial attorney who investigated and litigated FCA cases.

"Historically, a change in administration has only impacted FCA enforcement at the margins, but the

present administration has been far more active in using the FCA as a tool to achieve policy goals," Crawford added.

In July, a month after DOJ Civil Division head Brett A. Shumate issued a memo outlining new civil enforcement priorities to advance President Donald Trump's policy objectives, the DOJ announced that it sent more than 20 subpoenas to doctors and clinics that offer gender-affirming care — an unorthodox move, as the government typically begins FCA cases under seal.

"All of this is rapid," Preston Pugh, co-chair of Crowell & Moring's FCA practice, told Law360. "The FCA is typically not an area where we see a lot of immense change. Typically, it's a pretty stable playing field. So this is all new. And everybody's trying to get their arms around it."

The DOJ and U.S. Department of Health and Human Services have indicated that the agencies will be focused on three primary areas of FCA civil liability related to gender-affirming care: miscoding or misbilling for treatment in an attempt to avoid government scrutiny; providing government-funded treatment without a patient's valid or informed consent; and billing for medically unnecessary services.

The medical necessity issue is the "elephant in the room" as it will likely be the most challenging of the three theories for the government to prove, according to Lugar.

"When I was a federal prosecutor, we really tried to stay away from medical necessity cases, unless it was a very clear lack of medical necessity," he said. "Otherwise, you get into a battle of experts about what is medically necessary and what is not. And it's not the government's job to play the role of doctor."

Still, the administration has signaled that it will potentially pursue FCA cases under the medical necessity theory. Experts say doctors, clinics and other federally funded entities that intend to continue providing gender-affirming treatment should carefully document the basis for why they believe the treatments are, in fact, medically necessary.

At the same time, though, those providers should take into account the government's revocation earlier this year of guidance issued under President Joe Biden that supported gender-affirming care. In rescinding that guidance, HHS essentially asserted that the "risks [of treatment] are underplayed and the benefits are overstated," according to Hoyt Y. Sze, a member of the healthcare team at Sheppard Mullin Richter & Hampton LLP.

"We haven't seen that a lot, where the ground is shifted on what is medically necessary in advance of FCA enforcement. It is unusual and something providers need to be wary of," Sze told Law360. "But in terms of how this is going to play out, medical necessity cases are always difficult for the government to pursue because it's a clinical judgment."

While informed consent and miscoding are well-established theories of FCA liability, they also have not been tested in the gender-affirming care context and it remains to be seen how the government's potential arguments will play out in court, experts said.

Proving that a false claim was submitted knowingly also could prove to be tricky, in part because the certifications that healthcare providers and other federal funding recipients must sign contain arguably "vague" language, according to Pugh. He said the government is asking providers to certify that they do not have any programs that provide gender-affirming care and that no government funds are being used

for such programs.

Trump's Jan. 28 executive order on gender-affirming care refers to "chemical and surgical mutilation" to define its prohibitions. But some providers "argue that the phrase is a mischaracterization, creates ambiguity regarding the types of care that fall under the scope of the order and potentially leads to uncertainty for providers and those seeking care about what services are targeted by the order," Pugh said.

"If the government can't tell you what you're doing wrong, then it's hard for the government to say that you did something that was wrong and, more importantly, that you knew that something was wrong," he added.

Another potential hurdle for the government is showing damages stemming from an improper certification under the FCA, according to Pugh.

"The assumption is that the government is going to pursue a fraudulent inducement theory, but that can be difficult to prove as well," he said.

The U.S. Supreme Court ruled in May in Kousisis et al. v. U.S. that using deceptive means to induce a business transaction may still be a crime, even if the defendant doesn't seek to cause economic loss. That decision could bolster the government's use of the fraudulent inducement theory in FCA cases involving gender-affirming care or DEI policies where damages might be difficult to prove, experts said.

Meanwhile, the government faces pushback from a coalition of 16 state attorneys general who sued Trump, U.S. Attorney General Pam Bondi and the DOJ in Massachusetts federal court on Aug. 1, arguing that the administration has wrongly "weaponized" the FCA and other federal laws to undermine state protections for gender-affirming care.

"Absent a change in federal law about covered services, accurately billing federal programs for the provision of health care for transgender patients on its own is not a violation of the False Claims Act," the complaint states.

The government has not yet responded to the suit.

In Maryland and Washington, federal courts have enjoined Trump's Jan. 28 order in PFLAG Inc. v. Trump and Washington v. Trump. Plaintiffs in both cases argue that Trump's order denies them equal protection under the law and forces healthcare providers to set aside their medical judgment and follow the Trump administration's ideologies. The courts issued both injunctions after determining that the plaintiffs are likely to succeed on the merits of their equal protection claims.

The injunction in the PFLAG case is national, while the Washington injunction is limited to the plaintiff states of Washington, Minnesota, Oregon and Colorado. Experts say the cases could clarify the scope of the U.S. Supreme Court's decision on June 18 that upheld Tennessee's ban on gender-affirming medical care for minors. The justices ruled in a 6-3 decision that the state law does not violate the equal protection clause.

"The rollout of these initiatives has undoubtedly drawn attention to the administration's social agenda in a way that may be alluring to future administrations, which may try to leverage the statute to advance a very different set of policy priorities," Crawford at Crowell & Moring told Law360.

"That said, it remains to be seen the extent to which any of the current initiatives will achieve the statute's main purpose — recovering dollars to the public fisc," he said. "FCA cases often have a long lifespan, and so it will be interesting to see what happens in cases when the government's view of what constitutes fraud shifts with a change in administration."

--Additional reporting by Dan McKay, Gianna Ferrarin, Hannah Albarazi and Mark Payne. Editing by Marygrace Anderson.
