

## **A Long Term Care and Seniors Housing Law Update**

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### **Long Term Care Facilities May Face Increased Affirmative Action Enforcement by DOL**

The Department of Labor's ("DOL's") Office of Federal Contract Compliance Programs is taking a closer look at long term care facilities (in fact, all facilities that provide medical services) to ensure compliance with Executive Orders and other equal employment opportunity laws that govern federal procurement.

#### **What is the Office of Federal Contract Compliance Programs?**

The Office of Federal Contract Compliance Programs ("OFCCP") is charged with enforcement of various equal employment opportunity laws, including Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act. These Executive Orders, statutes and regulations require specific "affirmative action" and, therefore, encompass greater compliance obligations than other federal fair employment statutes that do not, such as Title VII of the Civil Rights Act, the Americans with Disabilities Act, or the Equal Pay Act. In other words, the OFCCP enforces laws that require federal contractors and subcontractors to take "affirmative action" toward equal employment opportunity, including preparing affirmative action plans and monitoring progress toward numerical affirmative action goals.

#### **Do you provide services through a contract or subcontract with a federal agency?**

As providers of skilled nursing or assisted living services have long understood, their receipt of payments from the Medicare or Medicaid programs does not constitute a "government contract" for purposes of OFCCP jurisdiction. However, the result is different when a facility contracts directly or indirectly with a government agency to provide services. Any facility providing medical-related services to federal employees, veterans, or active duty military should be aware that its contract with the government or with a government contractor may subject the facility to a wide variety of recordkeeping and affirmative action obligations.

Facilities providing care to residents under contracts with the Veterans Administration, or providing medical services under subcontracts with health care administrators that contract with the federal government, need to be cognizant that they may be subject to OFCCP oversight. For purposes of OFCCP jurisdiction, a purchase order to provide care to a single veteran can be considered a government contract and can trigger compliance obligations with specific regulations.

Accordingly, long term care facilities need to analyze whether their contracts subject them to OFCCP jurisdiction, and, if so, carefully audit their business to ensure that they are complying with all federally-mandated affirmative action requirements. Recently, many long term care providers have been surprised to receive notice of OFCCP audits. Non-compliance with OFCCP's numbers-driven regulations can result in significant damages, as well as possible cancellation of the contract and declaration that the organization is ineligible for future government contracts.

### **What are the specific compliance requirements?**

Executive Order 11246 requires an organization providing services to federal employees, military personnel or veterans as a contractor or subcontractor to follow specific requirements including:

- Developing a written affirmative action plan that sets out specific and result-oriented procedures for ensuring equal employment opportunities for all applicants and employees;
- Self-auditing and tracking of the workforce to ensure that equal employment opportunities are implemented with respect to all applicants and employees;
- Ensuring that women and minorities are adequately represented in the organization's workforce, are not disproportionately subjected to involuntary terminations and are proportionally afforded promotional opportunities; and
- Taking steps to overcome a shortfall in the representation of women and minorities, including outreach, recruitment and training activities to boost the pool of qualified women and minorities.

These requirements are incorporated into all non-exempt government contracts and subcontracts. A new ruling by a Florida administrative law judge for the DOL demonstrates the level of scrutiny the OFCCP has recently been applying to medical-related facilities. It also confirms that providing medical services to federal employees, military personnel or veterans is fundamentally different than receiving federal financial assistance through an entity such as Medicare.

In *OFCCP v. Florida Hospital of Orlando*, Humana Military Healthcare Services, Inc. ("HMHS"), a division of Humana, Inc., contracted with TRICARE, the Department of Defense's health care program for military members and their families, to provide networks of health care providers to active duty and retired service members and their families. HMHS then subcontracted with Florida Hospital, an acute care, not-for-profit hospital, to provide such medical services. In August 2007, OFCCP initiated an affirmative action compliance review of Florida Hospital. Florida Hospital objected to this review, claiming that it was not subject to OFCCP jurisdiction because (1) it is not a covered subcontractor as defined by federal regulations, and (2) participation in the TRICARE program only constitutes the receipt of "federal financial assistance" and OFCCP does not have jurisdiction over companies that merely receive such assistance.

The DOL's administrative law judge disagreed with Florida Hospital and found that TRICARE is not analogous to Medicare because Medicare does not *provide* medical services — it *pays* for such services. TRICARE, on the other hand, "brings together the health care resources of the uniformed services and supplements them with networks of civilian health care professionals, institutions, pharmacies and suppliers to provide access to high-quality health care services." TRICARE, according to the judge, is in the business of providing services, not just paying for them. OFCCP has taken a similar position with regard to its jurisdiction over nursing homes that provide care to veterans under contracts with the Veterans Administration.

Long term care facilities and companies should also be aware that if one facility contracts with the government to provide services, the OFCCP will likely consider the company and its other facilities to be "government contractors," and thus subject them to the affirmative action requirements and OFCCP oversight.

### **What This Means for Long Term Care Providers**

Long term care facilities with 50 or more employees may be within the enforcement jurisdiction of OFCCP and subject to specific affirmative action requirements if they provide more than \$50,000 in services to active or retired military under a contract with the Department of Veterans Affairs or the Department of Defense. Providers with questions regarding whether they are obligated to comply with the specific federal procurement executive orders, statutes and regulations should consult counsel.

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