

Federal Government Targets TRICARE Subcontractors For Compliance with Requirements Applicable to Government Contractors

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In October 2010, the U.S. Department of Labor Office of Federal Contractor Compliance Programs (OFCCP) confirmed that a hospital participating in TRICARE is a federal contractor required to comply with Affirmative Action Plan obligations under Executive Order 11246. Hospitals that hold TRICARE contracts should take steps to ensure compliance and prepare for a potential audit by OFCCP.

On October 18, 2010, the U.S. Department of Labor Office of Federal Contract Compliance Programs (OFCCP) issued a summary decision and order in *OFCCP v. Florida Hospital of Orlando*, Case No. 2009-OFC-00002. In *Florida Hospital*, the OFCCP concluded that hospitals that enter into participating hospital agreements with TRICARE contractors to provide health care services to TRICARE beneficiaries are “federal contractors” subject to the requirements of Executive Order (EO) 11246. This decision is consistent with the holding in an earlier OFCCP decision issued on May 28, 2009, *OFCCP v. UPMC Braddock*, Case No. 08-848, in which the OFCCP concluded that hospitals that enter into an HMO contract to provide health care services to U.S. government employees also constitute federal contractors.

In contrast to *Florida Hospital* and *Braddock*, the OFCCP has held that under certain circumstances health care providers, including hospitals, that agree to subcontract with fee-for-service insurance providers to provide health care services to beneficiaries that include federal employees are *not* federal contractors. *OFCCP v. Bridgeport Hospital*, Case No. 00-034 (Jan. 31, 2003). The key distinction between *Florida Hospital* and *Braddock* versus *Bridgeport*, in the opinion of the OFCCP, is that a fee-for-service contract to provide services to insurance beneficiaries is distinguishable from an HMO participation agreement, where the HMO acts as “more than an insurer” and “[p]rovision of medical services and supplies was a critical component of the” HMO contract with the federal government.

Florida Hospital and *Braddock* illustrate that hospitals that enter into agreements to provide medical services to federal employees, whether by virtue of HMO participation agreements to provide care to federal employees or through TRICARE agreements, must be prepared to comply with certain specific employment-related requirements as federal contractors and particularly with EO 11246 if they satisfy certain requirements.

EO 11246

EO 11246 imposes several requirements on federal contractors and subcontractors with federal revenue in excess of certain annual dollar values. Service contracts and subcontracts resulting in revenue below \$10,000 are exempt from compliance. At \$10,000 of federal receipts and above, contractors are required to comply with equal employment opportunity requirements that a contractor display certain notices and posters, maintain personnel records and not engage in discrimination in employment decisions on account of age, race, color, religion, sex or national origin.

Contractors and subcontractors with at least \$50,000 in government business who employ 50 or more employees must satisfy the same requirements as apply at the \$10,000 level, and such contractors and subcontractors are also required to develop, implement and maintain a written affirmative action plan (AAP). In order to create an AAP, an organization must undertake an assessment of its current hiring practices and establish goals for hiring. Such a process often entails engagement of outside experts to conduct this analysis. Generally an AAP will address potential problems in the participation and utilization of women and minorities in the contractors and workforce. The AAP will also specify procedures the contractor will follow and good faith efforts the contractor will make to provide equal employment opportunity. In addition, each year the contractor is required to report certain information regarding compliance with regulatory requirements to the Equal Employment Opportunity Commission (EEOC) using an EEO-1 form.

OFCCP Enforcement

The OFCCP independently conducts compliance audits to investigate the employment practices of government contractors, which may include a review of the contractor's AAP, personnel policies, payroll and numerous other aspects of the contractor's operations. Individuals can also file complaints with the OFCCP if they believe they have been discriminated against. If a complaint alleges discrimination against only one person, the OFCCP typically refers the complaint to the EEOC. However, if a complaint is alleged against a group or alleges a pattern of discriminatory behavior, the OFCCP will typically investigate and resolve such complaints on its own.

Violations of EO 11246 requirements can result in various liabilities, including restoration of back pay and employment status and benefits for the victim(s) of discrimination, as well as cancellation, suspension or termination of contracts, withholding of progress payments, debarment and/or other sanctions. Typically the OFCCP will investigate and attempt to resolve any instances of noncompliance. However, if it is unable to do so, the OFCCP may refer the matter to the Office of the Solicitor for enforcement through administrative proceedings and review by an administrative law judge.

What Employers Should Do Now

Since 2003 the OFCCP has acted in a manner consistent with the position that certain contractors and subcontractors providing health care services to federal employees are subject to the jurisdiction of the OFCCP and subject to EO 11246. The decisions of the administrative law judges in *Florida Hospital* and *Braddock* underscore this position by the OFCCP. While institutions that have been challenged by the OFCCP in some cases are appealing the characterization as a government contractor (e.g., the defendant in *Florida Hospital* has appealed the decision of the administrative law judge and *Braddock* is currently on appeal to the U.S. District Court for the District of Columbia), the trend both in these decisions and anecdotally through OFCCP audits and investigations is toward the position outlined by the OFCCP. Therefore employers that could potentially be subject to EO 11246 and the jurisdiction of the OFCCP should not only be aware of this increased vigilance on the part of the OFCCP, but should also assess their level of compliance with applicable requirements.

As an initial matter, any organization that maintains TRICARE contracts or that participates in HMO agreements to provide services to federal employees should evaluate its contracts and relationships to determine whether the organization could be subject to EO 11246. Specifically the organization should determine whether its annual revenue received from such contracts (i.e., government revenue) meets the applicable \$10,000 and \$50,000 thresholds, and, in the case of the \$50,000 threshold, that the organization has at least 50 employees.

If the organization satisfies an applicable threshold, it should conduct a cost-benefit analysis to determine whether ongoing participation under the TRICARE or HMO services agreement is justified given the potential cost of ongoing compliance. Important in this regard is an analysis of the annual revenue received from each such contract, as compared to the explicit and implicit costs of complying with the applicable requirements.

Explicit costs may include the initial cost to establish currently nonexistent policies and procedures that would be required under applicable provisions of EO 11246, as well as ongoing costs of satisfying the applicable administrative requirements (e.g., employee costs to monitor compliance, reporting costs, ongoing legal costs of compliance, etc.).

Implicit costs may include the ability to establish and provide a good faith effort in maintaining an AAP, the impact of the AAP on the organization's recruiting efforts and the ability of the OFCCP to access information maintained by the organization.

If the organization determines that maintaining the contract would result in significant burdens that outweigh the benefits received from the contract, the organization may want to evaluate whether it can terminate the contract and the potential costs to do so. Given the term and duration of the contract, as well as penalties for terminating the arrangement, the organization may want to either immediately, or in an ensuing year, terminate the arrangement and sever its obligations under EO 11246.

If the organization decides to maintain in its federal contracts, it should identify the obligations applicable given its revenue level and assure those obligations are satisfied annually. Because the organization's revenue can change from year to year, it should evaluate its revenues annually to assure it continues to satisfy the applicable EO 11246 requirements.

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