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**EXPANSION OF OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS'  
JURISDICTION OVER HEALTH CARE PROVIDERS**

**September 2, 2010**

The Office of Federal Contract Compliance Programs (OFCCP), the federal agency tasked with enforcing certain labor laws and regulations governing federal contractors and subcontractors, has recently increased its enforcement activities with health care providers, many of which were previously considered exempt from the OFCCP's jurisdiction. Following an estimated 33 percent budget increase for fiscal year 2011, new OFCCP leadership, and recent litigation involving jurisdiction over hospitals, the OFCCP has notified TRICARE network providers (TRICARE is the Defense Department's healthcare program for uniformed service members and their families) nationwide of compliance reviews.

If a contract between a prime contractor and a second company, such as a hospital, (1) requires the second company to provide any of the actual products or services that the prime contractor agreed to provide to the government or (2) requires the second company to provide personnel to perform any of the services the prime contractor is required to provide the government, the second company is deemed a subcontractor. Because the OFCCP has increased its enforcement efforts regarding affirmative action and equal employment opportunity requirements, the determination of subcontractor status for health care providers has become critical. Defenses of "we did not know we were covered" or "we did not agree to be subcontractors" are not valid jurisdictional defenses.

Despite prior trends to the contrary, recent cases involving the OFCCP's jurisdiction over subcontractors have specifically involved hospitals: *OFCCP v. Bridgeport Hospital*, No. 00-034 (DOL ARB, 2003) and *OFCCP v. UPMC Braddock*, No. 08-048 (DOL ARB, 2009).

In *OFCCP v. Bridgeport Hospital*, Bridgeport Hospital had an agreement with Connecticut's Blue Cross/Blue Shield (BCBS), governing the terms of payment from BCBS to the hospital for the provision of medical services to BCBS's policyholders. BCBS also entered into a contract with the U.S. Office of Personnel Management (OPM) on behalf of BCBS' plans to provide health insurance to federal employees. The OFCCP cited the hospital for noncompliance with the anti-discrimination provisions based on the hospital's failure to have in place an affirmative action program, and alleged that the hospital was a subcontractor since it provided services to BCBS policyholders, which was a service necessary to the performance of BCBS's contract with OPM. The hospital denied that it was covered by the anti-discrimination provisions, and argued that it was not a subcontractor. The ALJ concluded that the hospital was not a subcontractor as the term is defined by the OFCCP, and the OFCCP brought the matter to the Department of Labor's Administrative Review Board ("ARB"). The ARB agreed with the ALJ that the hospital was not a subcontractor because the medical services the hospital provided to BCBS's policyholders were not necessary to the performance of the prime contract between BCBS and OPM, which was to provide health insurance, and not medical services, to federal employees.

In *OFCCP v. UPMC Braddock*, a group of Pittsburgh hospitals contracted with the University of Pittsburgh Medical Center (UPMC) to provide medical products and services to health maintenance organization (HMO) members. The UPMC also had a contract with OPM to provide HMO coverage for federal employees. Even though the contract between the UPMC and OPM expressly excludes hospitals and medical service providers from the definition of subcontractor, the OFCCP claimed that the hospitals were subcontractors of UPMC, and therefore within the jurisdiction of the federal labor laws and regulations. The ALJ concluded that the hospitals were subcontractors, and the ARB agreed with the ALJ that the hospitals could not rely on the definition of subcontractor in the agreement, since the definition conflicted with federal law and was therefore invalid or void. The ARB also concluded that the equal employment opportunity clauses under federal labor laws and regulations are incorporated into every applicable contract and subcontract by operation of law. The ARB distinguished the *UPMC Braddock* matter from *Bridgeport Hospital* by concluding that unlike *Bridgeport Hospital*, which did not involve the provision of services necessary to the performance of the prime contract, the UPMC's contract with OPM required the creation of an HMO and thus depended on medical providers like the hospitals to offer medical services and supplies, such that the hospitals provided services necessary to the performance of the prime contract between the HMO and OPM. The hospitals appealed the ARB's decision to federal court, and this matter (*UPMC Braddock v. Solis*, 1:09-CV-01210 (D.D.C.)) is currently pending. The parties are expected to file motions for summary judgment this September, and the federal government will likely issue a ruling on those motions before the end of the year.

Currently pending before an ALJ at the DOL is *OFCCP v. Florida Hospital of Orlando*, No. 2009-OFC-02 (DOL OALJ). Florida Hospital of Orlando is one hospital within a network that contracted with a regional TRICARE administrator to provide medical services to TRICARE beneficiaries as part of a contract with TRICARE to develop regional provider networks. The OFCCP is currently asserting that by entering this agreement with a TRICARE regional administrator, the hospital became a federal subcontractor under OFCCP jurisdiction. Until this matter is definitively resolved, it is not settled whether TRICARE network hospitals are federal subcontractors.

## **CONCLUSIONS**

The issue of whether health care providers are subject to the jurisdiction of the OFCCP remains uncertain and the outcome of the above matters will be critical in the evaluation of such jurisdiction and available objections to such jurisdiction, many of which could be limited. Any such potential contracts should be carefully examined in light of the issues raised above.

Contact Information: If you have questions regarding the effect of the OFCCP's expanded jurisdiction, please contact Charlie Edwards, Theresa Sprain, or Sarah Crotts, the principal authors of the alert. You may also contact the Womble Carlyle attorney with whom you usually work, or any of our Labor and Employment or Healthcare attorneys.

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