



Legal Alert: OFCCP Update

8/12/2009

Compliance with equal employment opportunity and affirmative action requirements for federal contractors and subcontractors is more important now than ever, with a new director, reorganized department and increased enforcement efforts by the Office of Federal Contract Compliance Programs (OFCCP). This Alert highlights some of the recent developments affecting federal contractors and subcontractors.

Patricia Shiu Named New OFCCP Director/Dissolution of ESA

President Obama has named Patricia Shiu as the new Director of the OFCCP. Ms. Shiu currently is the Vice President of Programs at the Legal Aid Society-Employment Law Center (LAS-ELC), a project of the Legal Aid Society of San Francisco, where she focuses primarily on employment discrimination, including sex and race-based discrimination. She also represents workers in family and medical leave cases. Ms. Shiu is the Director of the Society's Work and Family project and advocated for the passage of California's Family Rights Act and its regulations. Ms. Shiu is also on the Board of the Employee Rights Advocacy Institute for Law and Policy, a nonprofit public interest organization created by the National Employment Lawyers Association (NELA).

Currently, the OFCCP is part of the Employment Standards Administration (ESA) of the U.S. Department of Labor (DOL). However, the DOL announced that, effective November 8, 2009, the ESA will be abolished and the divisions subject to the ESA (the OFCCP, the Wage and Hour Division, the Office of Labor-Management Standards, and the Office of Workers' Compensation Programs) will report directly to the Secretary of Labor. Notwithstanding the reorganization, Ms. Shiu's appointment to Director, a deputy assistant secretary of labor position, does not require Senate confirmation.

Contractors Receiving Funds under the American Recovery and Reinvestment Act to Receive More Scrutiny from OFCCP

According to senior officials at the OFCCP, the agency will be scrutinizing recipients of federal stimulus funds under the American Recovery and Reinvestment Act (ARRA) for compliance with federal affirmative action requirements. A significant portion of these recipients likely will be involved in the construction industry and, thus, will be subject to the regulations pertaining to Construction Contractors. These regulations are located at 41 C.F.R. § 60-4. The OFCCP has updated the Construction Contractors Technical Assistance Guide on its [website](#).

- The OFCCP has stated that it expects to conduct 450 construction audits by close of the next fiscal year in September 2010.

- The agency has indicated that it will routinely schedule desk audits and onsite reviews of supply and service contractors that receive ARRA funds, even when "indicators" of discrimination are not identified.
- The ARRA audits will occur outside of the Federal Contractor Selection System (FCSS); thus, covered contractors may be selected for an audit under either the FCSS method or the new construction selection method.
- The 24-month moratorium on audits for companies on the pre-award registry and the current cap on multi-facility employers of no more than 25 audits per company will not apply. Additionally, the exception that gives contractors a reprieve if their establishment has been reviewed in the prior 24-month period will not apply.

The OFCCP clearly is signaling that if a company benefits from ARRA monies, it should ensure that it is in full compliance with its affirmative action and equal employment opportunity obligations.

Hospitals Providing Medical Services to Federal Employees:

Recent OFCCP activity demonstrates the agency's desire to establish jurisdiction over hospitals and other health care providers even when the hospital does not have a direct contract with a federal agency (e.g., the Bureau of Prisons or the VA).

• ***Providing Services to HMOs:*** Recently, the Administrative Review Board (ARB) upheld an Administrative Law Judge's (ALJ) determination that three hospitals which received payments from an HMO for providing medical products and services to individuals covered by the HMO, including employees of the U.S. government, were federal subcontractors subject to federal equal employment and affirmative action obligations. See *OFCCP v. UPMC Braddock*, ARB No. 08-048 (ARB May 29, 2009). In this case, the Office of Personnel Management (OPM) had a contract with University of Pittsburgh Medical Center (UPMC) Health Plan (an HMO) to provide medical benefits to federal government employees. The three defendant hospitals had contracts with UPMC to provide medical products and services to individuals covered by the HMO. The OFCCP filed administrative complaints with the Department of Labor (DOL) against the three hospitals for non-compliance with Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 because they did not produce documents in response to OFCCP's request and did not allow OFCCP access to their premises for onsite reviews.

The ARB upheld the ALJ's grant of judgment in favor of the OFCCP, even though the hospitals did not consent to be federal subcontractors and the language of their contracts with the HMO specifically excluded them from the definition of subcontractor. The ARB held that the equal employment opportunity clauses in the three federal laws were implied by law in the hospitals' contracts and that the contractual terms did not override the requirements of federal law. The ARB also distinguished its earlier decision in *OFCCP v. Bridgeport Hospital* (Jan. 31, 2003), in which it held that a hospital providing medical services to federal employees under an agreement with Blue Cross and Blue Shield was not a federal subcontractor. In *Bridgeport*, the ARB found that Blue's contract with the OPM was to provide insurance, while its contract with Bridgeport was for the provision of medical services. Thus, the hospital was not considered a subcontractor of the federal contract.

However, in the recent *UPMC* case, the ARB found that the provision of medical services and supplies was a critical component of the contract between the OPM and UPMC Health Plan. The ARB also found that the contract depended on medical providers like the hospitals to enable UPMC Health Plan to meet the obligations of its contract with OPM. Rejecting the hospitals' arguments that they should be considered insurance providers, the ARB found "ample evidence that the Defendants were operating primarily as health care delivery providers and not strictly as insurance providers." Thus, the ARB found the *Bridgeport* decision inapplicable and held that the hospitals were subcontractors subject to the equal employment obligations of the three laws.

• ***Providing Services to TRICARE Beneficiaries:*** Another OFCCP jurisdictional development is that several hospitals have received compliance review letters from the OFCCP in which the agency argues that the hospital is a federal contractor based on the provision of services to TRICARE beneficiaries. Some hospitals/other health care professionals have entered into agreements with HUMANA Military or other third parties to be included in a network of providers for TRICARE beneficiaries to utilize. Ford & Harrison recently learned that one hospital in Florida is challenging the OFCCP's jurisdiction based on TRICARE services alone. According to the OFCCP, this situation is in litigation; thus, we will report on any decisions in this case as they develop.

What do these recent developments mean for hospitals/other health care providers? With the *UPMC* case and the pending Florida hospital TRICARE issue, it is apparent that if OFCCP prevails in its arguments, many hospitals/health care providers will be required to maintain AAPs and adhere to all the requirements associated with them.

If you have any questions regarding these issues, please contact an attorney in Ford & Harrison's [Affirmative Action Compliance Group](#) or the Ford & Harrison attorney with whom you usually work. [Linda Cavanna-Wilk](#) and [Karen Tyner](#) contributed to this Alert.