

Employment, Labor and Benefits Advisory: Hospitals and Medical Service Providers Take Note: You May be Subject to OFCCP Jurisdiction and Not Even Know It

6/21/2010

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Federal law imposes significant affirmative action obligations on many employers holding contracts or subcontracts to supply goods or services to the federal government.¹ Specifically, federal law requires that all companies with at least \$10,000 in federal government contracts or subcontracts engage in affirmative action to employ and advance in employment minorities and women, as well as qualified individuals with a disability. Companies with at least one contract or subcontract with the federal government valued at \$100,000 or more² must also engage in affirmative action to employ and advance qualified special disabled veterans, veterans of the Vietnam era, and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. Written affirmative action plans (AAP) pertaining to women and minorities and to qualified individuals with a disability must be developed and implemented by those companies with at least 50 employees and \$50,000 in federal contracts or subcontracts; written AAPs pertaining to veterans must be developed and implemented by those companies with at least 50 employees and \$100,000 in federal contracts.³ The laws are enforced by the Department of Labor (DOL), through the Office of Federal Contract Compliance Programs (OFCCP).

When Is a Hospital or Other Health Care Provider a Federal Contractor or Subcontractor?

Subject to the threshold criteria described above, a hospital or other health care provider is a federal contractor if there is any contract or agreement between any federal agency and the health care entity for the purchase, sale, or use of personal property or for services. The website www.usaspending.gov can be very helpful in determining whether an entity is a direct government contractor. Examples of direct contracts include contracts with the U.S. Department of Veterans' Affairs or the Department of Defense for the provision of medical services to active or retired military personnel or federal employees.

Whether a hospital or health care provider is a federal subcontractor is a more complicated question. OFCCP regulations define a covered subcontract as any contract or agreement between a prime contractor and any person or entity:

1. For, among other things, the furnishing of supplies or services which, in whole or in part, is necessary to the performance of any one or more government contracts; or

2. Under which any portion of the contractor's obligation under one or more government contracts is performed, undertaken, or assumed.

For example, the Department of Labor's Administrative Review Board has held that a hospital that contracts with an HMO to provide medical services to the HMO's members is a federal subcontractor if the HMO provides benefits to government workers through a contract with a federal agency because it is taking on some of the HMO's medical service provider-related obligations to the government.⁴ Importantly, it may not matter how the parties define the term "subcontractor" or otherwise characterize the relationship. If, by virtue of the contract the hospital is assuming some portion of the contractor's obligation to the U.S. government, they are a "subcontractor," as a matter of law.

Are there Exceptions?

A hospital or other health care provider is not covered by federal affirmative action laws if its only relationship with the federal government is as a participating provider under agreements for the reimbursement for medical care and services provided to Medicare or Medicaid patients. Further, the receipt of federal grant funds does not, in and of itself, subject a hospital or health care provider to the OFCCP's jurisdiction. Agreements where the parties stand in the positions of employer and employee are not covered.

What is Affirmative Action?

Affirmative Action is not a quota system. Rather, it involves active outreach and recruitment, and the elimination of non job-related barriers to advancement, for both women and minorities. To comply with these requirements, covered employers must:

1. Produce and analyze a workforce snapshot broken down organizationally and by job group
2. Record personnel activity data (applicant flow, hires, promotions, transfers and terminations) by job group
3. Establish percentage placement goals for minorities and women in all "underutilized" areas based on a comparison of internal representation of minorities and women with their availability (both internally and externally) by job group
4. Design programs for outreach and recruitment that use specific good faith efforts to address underutilization, meet articulated goals, and so forth
5. Analyze the personnel selection decisions and compensation disparities, if any, revealed in the company's data to ensure that practices are fair in intent and impact

In addition, covered employers must conduct outreach; review job qualifications to make sure that there are no non job-related barriers to advancement for qualified individuals with a disability, and qualified veterans; make efforts to accommodate individuals with disabilities

(including disabled veterans) and document those efforts; and invite covered individuals to self-identify for inclusion in the affirmative action programs.

What are the Risks?

The OFCCP is an office of the DOL, with its director reporting directly into the Secretary of Labor; previously, as recently as late 2009, the OFCCP reported into the Employment Standards Administration which, in turn, reported into the Secretary. As a result of this reorganization, the OFCCP now has more visibility within the DOL.

The DOL and its offices and agencies, including the OFCCP, have received significantly more funding under the Obama administration than it received under President Bush. The OFCCP now has 210 more employees than it had in fiscal year 2009. Its budget increased from \$84,172,000 in fiscal year 2009 to an estimated \$105,386,000 in fiscal year 2010; the OFCCP has requested a budget of \$113,433,000 for fiscal year 2011. Much of the increased funding has been, and will continue to be, earmarked for enforcement. As stated in the DOL's Congressional Budget Justification documentation supporting the OFCCP's funding request:

OFCCP intends to implement full scale, aggressive enforcement efforts in FY 2011. This is a significant shift from the enforcement strategy utilized during the past several years... OFCCP will investigate all discriminatory practices, not just systemic cases, and enforce affirmative action plans to ensure that federal contractors are committed to advancing equal employment opportunity and are proactive in developing opportunities for minorities, women, individuals with disabilities, and veterans.

What Can Hospitals and Health Care Providers Do to Address the Risks?

Hospital and health care providers should review all of their contracts to determine whether they are federal contractors or subcontractors subject to affirmative action obligations, and consult with counsel where the answer may be unclear. Further, hospitals and health care providers who are covered by the federal affirmative action obligations should adopt and implement appropriate affirmative action plans and consult with counsel to ensure they are otherwise compliant with OFCCP requirements.

Endnotes

¹ Federal law also imposes certain affirmative action obligations on construction contractors and subcontractors. These construction-specific obligations are outside the scope of this advisory.

² The threshold is \$50,000 or more if the contract was entered into before December 2003.

³ The applicable laws are Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and Vietnam Era Veterans' Readjustment Act of 1974, as amended.

⁴ *OFCCP v. UPMC Braddock*, ARB No. 08-048 (May 29, 2009). *Braddock* effectively overturned an earlier decision, *OFCCP v. Bridgeport Hospital*, ARB No. 00-034 (Jan. 31, 2003), where the Administrative Review Board (ARB) held that a hospital providing medical services to federal employees through an insurance arrangement was not a subcontractor. Although the *Braddock* ARB distinguished the two cases by pointing to the fact that the prime contract at issue in *Bridgeport Hospital* was a contract to provide insurance, whereas the *Braddock* prime contract was a contract to provide medical services, this narrow (and somewhat contrived) distinction is unlikely to protect hospitals from OFCCP jurisdiction going forward.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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