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labor & employment alert

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November 2010

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The Department of Labor Expands Its Definition of a Government Subcontractor: Is Your Business Next?

Development:

The Office of Federal Contract Compliance Programs ("OFCCP") recently took a significant step towards expanding the scope of its jurisdiction over hospitals and other health care providers.

On October 18, 2010, in a high-profile decision by the Department of Labor ("DOL"), *OFCCP v. Fla. Hosp. of Orlando*, DOL OALJ, No. 2009-OFC-00002, 10/18/10, an Administrative Law Judge ("ALJ") concluded that Florida Hospital of Orlando is a federal subcontractor because of its participation in a provider network administered by Humana Military Healthcare Services, Inc. ("Humana") for TRICARE, the federal health care program for active and retired military personnel. The ALJ found that DOL had jurisdiction to audit the hospital's compliance with its affirmative action and non-discrimination obligations. The decision is particularly noteworthy for its expansion of OFCCP jurisdiction over the health care industry. Because Medicare and Medicaid had long been considered federal financial assistance, not a contract, the health care industry had largely eluded OFCCP attention historically. Interestingly, at least prior to the ALJ decision, the Department of Defense had taken the position that TRICARE, like Medicare and Medicaid, constituted federal financial assistance.

The OFCCP is a federal government agency tasked with enforcing equal employment opportunity and affirmative action laws that apply to companies that sell products and services to the federal government. Government contractors and subcontractors must comply with a panoply of requirements not typically found in a commercial contracting setting. For example, most government contractors are required to have affirmative action plans for each of their facilities.

There are generally two circumstances in which a person doing business with a government contractor is considered a subcontractor: (1) when the person provides the Federal contractor with services or property **'necessary to achievement of the prime Federal contract;'** and (2) when a person 'performs part of the Federal contract' on the Federal prime contractor's behalf. *Office of Federal Contract Compliance Programs v. Bridgeport Hospital*, ARB Case No. 00-034 (Jan. 31, 2003) (emphasis added).

In this case, the Florida Hospital of Orlando had an agreement with Humana – an entity that performed a government prime contract – to provide managed health care services to TRICARE beneficiaries. The ALJ found that the prime contract required the provision of medical services to TRICARE beneficiaries and, by providing medical services to its patients who were TRICARE beneficiaries, the hospital did perform part of HMHS' prime contract duties.

In reaching this conclusion, the ALJ distinguished the Bridgeport Hospital case (*OFCCP v. Bridgeport Hospital*, ARB 00-034, 2003 WL 244810 (1/31/03)) where the underlying contract was for insurance not the medical services the hospital provided in that case. Not surprisingly, the ALJ found the Braddock case (*OFCCP v. UPMC Braddock*, ARB Case No. 08-048 (5/29/09) (currently on appeal to D.D.C.) more persuasive. There an HMO had contracted with the federal government to provide medical services, and then subcontracted with the UPMC health plan to render some of those services, thereby rendering the entity a federal government subcontractor.

It is important to recognize that the Florida Hospital decision is subject to review and almost certainly will be appealed. Nonetheless, because of the very real impact the case could have, it bears close monitoring.

Advice to Employers:

- The Florida Hospital decision serves as a wake-up call for all providers of medical services when they have agreements with federal health care program contractors.
- Healthcare entities – including hospitals, skilled nursing facilities, residential or special treatment centers or other health care providers – should conduct an immediate review of contracts and consult with legal counsel to determine whether they may now be deemed federal contractors or subcontractors under federal law.
- Employers should re-examine their direct and indirect agreements with the federal government and any related entities, like TRICARE, the Veterans Administration, and others to determine whether

these relationships are impacted by the Florida Hospital decision.

- TRICARE network providers and employers with other potentially qualifying contracts should consult with counsel to assess whether to comply with federal contractor and subcontractor obligations such as:
    - Developing an affirmative action plan for each establishment with 50 or more employees;
    - Conducting adverse impact analysis on specified personnel practices;
    - Complying with obligations such as recordkeeping, soliciting race and gender information, inviting post-offer applicants to self-identify as covered veterans or disabled individuals, and mandatory posting obligations;
    - Performing detailed, statistical compensation analysis;
    - Identifying that the employer as a federal subcontractor on EEO-1 reports; and
    - Filing an annual VETS-100A report.
