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The OFCCP Extends Its Reach To Healthcare Providers

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(Healthcare Update, No. 1, February 2011)

The Office of Federal Contracts Compliance Programs (OFCCP), the branch of the U.S. Department of Labor charged with overseeing affirmative action obligations, has recently targeted the healthcare industry for increased enforcement. Healthcare providers have comfortably operated for years under the belief that receipt of funding from the government does not subject them to the affirmative action obligations imposed on federal contractors, which includes creating an affirmative action plan and maintaining various records.

The OFCCP recently argued that contracts to provide medical services for a government agency do create affirmative action obligations. Consequently, a flurry of administrative actions has ensued as healthcare providers challenged the OFCCP's new position. An OFCCP Directive issued on December 16, 2010, summarizes recent legal interpretations and affirms the agency's position that the receipt of most Medicare or federal grants alone does not create federal contractor status. However, contracts to provide health care services for TRICARE beneficiaries or other federal agencies are now deemed to create affirmative action obligations.

This position was argued in a recent case, in which an administrative law judge upheld the OFCCP's enforcement strategy, demarcating a difference between funding reimbursement and contractor responsibilities. Healthcare providers now face the challenge of determining on which side of this line their contracts fall. *OFCCP v. Florida Hospital of Orlando.*

Background

In 2003, the issue of whether healthcare providers were subject to the OFCCP's jurisdiction due to contracts with Medicare was at issue in *OFCCP v. Bridgeport Hospital*. There the Administrative Review Board (ARB) found that reimbursement contracts were not enough to subject healthcare providers to the OFCCP's requirements. Healthcare providers assumed that this decision meant that similar contracts did not subject them to affirmative action obligations.

The OFCCP challenged this assumption in 2009, in *OFCCP v. UPMC Braddock*, and carved out an important exception. The ARB reviewed whether a hospital's contract to provide medical services for a non-governmental agency created a federal subcontractor relationship due to the third party contract with the federal government. UPMC, an HMO, entered into a contract with the Office of Personnel Management to provide medical services

for federal employees. UPMC then entered into agreements with individual physicians, medical groups, and hospitals to provide the contracted-for services. The initial contract between UPMC and OPM expressly excluded the hospitals from subcontractor status.

But the ARB held that providing services, as opposed to providing only medical insurance, created a subcontractor status with the federal government and placed the hospital squarely under the affirmative action guidelines. The case is currently on appeal to the federal district court in Washington. The decision caused concern in the healthcare industry as most healthcare providers had been operating under the assumption that such contracts did not subject them to affirmative action obligations.

Reimbursement v. Providing Services

The OFCCP then initiated a compliance review of Florida Hospital of Orlando (FHO), a non-profit hospital. FHO responded that the OFCCP lacked jurisdiction over it and that it was not subject to the affirmative action requirements. FHO based its argument on the *OFCCP v. Bridgeport Hospital case, arguing that contracts for reimbursement are not considered federal contracts subject to affirmative action program responsibilities.* The OFCCP disagreed, arguing that FHO provides medical services pursuant to a federal subcontract with Humana through its contract with TRICARE and did not simply receive reimbursement. The OFCCP had argued this similar position successfully in the *OFCCP v. UPMC Braddock* case.

Drawing Distinctions

TRICARE is a Department of Defense program that provides worldwide health insurance for military members and their families. TRICARE contracts with other companies to administer its health program. In August 2003, Humana Military Healthcare Services (HMHS) entered into a contract with the Department of Defense to provide health-benefits support and services to eligible military and their family members in a portion of the southern United States. Other service providers hold contracts to provide services elsewhere, such as Health Net for the northern area.

These service providers agree to provide services for TRICARE, which include providing a network of health care providers and medical specialists. HMHS and other service providers then subcontract with the healthcare providers, such as hospitals, to provide these services. Essentially, healthcare providers that hold these subcontracts are providing services for the federal government, helping companies such as HMHS fulfill their government contracts with TRICARE. In contrast, contracts with Medicare are considered reimbursement contracts whereby hospitals are simply reimbursed for services.

What Does This Mean To You?

With the new delineation between reimbursement contracts and subcontracts, healthcare providers must review current contracts in place. This is no easy feat as not all contracts include a notification provision that the subcontractor is subject to affirmative action requirements, yet the healthcare provider may still be responsible for compliance. The December 16, 2010 Directive sets forth parameters to consider in evaluating contracts. If a contractor relationship exists, a healthcare entity must immediately begin gathering appropriate data and taking other steps to ensure compliance with affirmative action requirements.

Healthcare providers subject to the federal contractor requirements must comply with affirmative action obligations under several federal laws, and are required to take such steps within 120 days after entering into the contract. These obligations include implementing an Affirmative Action Program (AAP) with written plans (including statistical analyses) for minorities and women, and creating AAPs for veterans and disabled individuals. Employers also must list all open positions with the relevant state unemployment agencies and demonstrate outreach efforts for minorities, women, veterans and disabled applicants.

In addition, companies are required to evaluate personnel actions and compensation on a yearly basis to see if a specific gender or racial group has been impacted negatively. The failure to comply may subject a company to sanctions that include back pay for employees or applicants, or the loss of contracts. To find out if you're in compliance, and how to get that way if you're not, contact your Fisher and Phillips attorney.

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