News & Publications

Hospitals and Healthcare Providers Beware: You May Be Subject to Federal Affirmative Action and Equal Employment Opportunity Hiring Requirements and Not Even Know It

Written by Kenneth A. Rosenberg, Esq. and Todd A. Palo, Esq., Fox Rothschild

March 09, 2011

Recently, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has been notifying hospitals and other healthcare providers that they are "federal contractors" who are subject to OFCCP jurisdiction based on their participation in TRICARE or provision of services to TRICARE beneficiaries. The notice further advises that due to the hospital's or healthcare provider's "federal contractor" status it must provide the OFCCP with an Affirmative Action Plan and supporting documentation or risk being audited and fined. Predictably, this notice has surprised many hospitals/healthcare providers because they never entered into a federal contract regarding TRICARE and thus never suspected they were subject to the OFCCP's jurisdiction. [1]

However, an entity can be deemed a "federal contractor" not only for having a direct arrangement or contract with the U.S. government, but also where it enters into a subcontract with a U.S. government contractor. Pursuant to Executive Order 11246 and related statutes, a "subcontract" is defined as:

any agreement or arrangement between a federal contractor and any person, not in an employer/employee relationship: (1) for the purchase, sale or use of personal property or non-personal services which, in whole or in part, is necessary to the performance of a contract, or (2) under which any portion of the federal contractor’s obligation under the contract is performed, undertaken or assumed. See, 41 CFR §§ 60-1.3, 60-250.2(1), 60-300.2, 60-741.2(1).

As such, a hospital or healthcare provider can be subject to the OFCCP's jurisdiction where it enters into a written or unwritten agreement or arrangement with a "federal contractor" to: (i) provide personal property or non-personal services which, in whole or part, is necessary to the performance of the federal contractor's contract with the government or (ii) perform, undertake or assume any portion of the contractor's obligations of the federal contract.

Additionally, a "subcontractor relationship" can exist where an entity contracts with a covered subcontractor to provide supplies or services necessary to the performance of the prime contract or to fulfill an element of the prime contract. See, OFCCP Order No. 293 ADM Notice/Jur., at 5 (Dec. 16, 2010). Either way, another link in the "subcontractor relationship" chain is created resulting in both entities being deemed "subcontractors" and thus subject to OFCCP jurisdiction. Hence, if a covered subcontractor enters into contracts with multiple companies, the OFCCP has jurisdiction over all of these "subcontractors," provided that the subcontracts are related to the execution of the prime contract.

Pursuant to OFCCP policy, whether or not an agreement or other arrangement is labeled a "subcontract" by the parties is irrelevant to the OFCCP's "subcontractor relationship" analysis. Id. at 4. This is because the OFCCP has stated its regulations rather than the parties' contractual language governs this determination. Thus, a contractor’s OFCCP obligations cannot be altered, limited or defeated by the inclusion in a contract or arrangement of provisions contrary to such obligations. Id.

The OFCCP has recently applied the foregoing principles to assert its jurisdiction over hospitals that participate in or provide services to federal healthcare programs such as TRICARE and the Federal Employees Health Benefit Plan (FEHBP).

In OFCCP v. UPMC Braddock, UPMC McKeesport, UPMC Southside, ARB Case No. 08-048 (May 29, 2009)[2], the Department of Labor's Administrative Review Board (ARB) found that three hospitals were subject to OFCCP jurisdiction even though they did not have a contract or arrangement with the federal government. The ARB reached this conclusion because it found the hospitals had entered into a contract with UPMC Health Plan, an HMO, to provide medical products and services to the U.S. Office of Personnel Management's (OPM) employees who had Federal Employee Health Benefit Plan (FEHBP) coverage. The UPMC Health Plan, in turn, had contracted with the OPM to provide medical services and products to their employees through the FEHBP. As such, the ARB found that the hospitals were subcontractors of the UPMC Plan because it was enabling the UPMC Health Plan to meet at least a portion of its contractual obligations to OPM to provide medical services to its employees. The ARB reached this conclusion even though the hospitals' contracts with the UPMC Health Plan explicitly stated they were not federal contractors or subcontractors.

Similarly, in OFCCP v. Florida Hospital of Orlando, 2009-OFC-00002 (October 18, 2010)[3], a Department of Labor Administrative Law Judge (ALJ) held that the hospital was a covered subcontractor, in part, because it had contracted with Humana Military Healthcare Services (Humana) to be a network provider for TRICARE beneficiaries. Humana had contracted with the U.S. Department of Defense to provide medical services to TRICARE beneficiaries. As such, the ALJ found that the hospital had an agreement with Humana to assume some of its responsibility to provide healthcare services to TRICARE beneficiaries. Thus, it deemed the hospital a subcontractor and thus subject to OFCCP jurisdiction.

These cases demonstrate that the OFCCP will assert jurisdiction over a hospital or healthcare provider as a federal contractor if it agrees to perform medical services or to provide products to federal healthcare programs even if it did not enter into an arrangement or contract directly with the federal government and even where it attempts to avoid OFCCP jurisdiction through explicit contract language.

However, not all contracts with a federal health care program will trigger the OFCCP's jurisdiction. In fact, there are a number of circumstances in which a

hospital or healthcare entity will not be deemed a federal contractor or subcontractor even though it is involved with a federal health care program including, but not limited to, where:

- It does not have a contract or subcontracts with the federal government in an aggregate value greater than $10,000 per year or a single contract worth at least $100,000 per year (or at least $25,000 per year if the contract was entered into before December 1, 2003) [4];
- It is merely receiving reimbursements from Medicare Parts A and/or B (or Medicaid) as Medicare is considered financial assistance which does not form a contractual relationship ;
- It is the recipient of a grant from a federal healthcare program as grants do not create a contractual relationship[5]; and/or
- The underlying contract between the federal government and prime contractor only involves insurance reimbursements as opposed to the provision of medical services or products. See OFCCP v. Bridgeport Hospital, ARB Case No. 00-234 (January 31, 2003).

The foregoing is not an exhaustive list of arguments that can be asserted to contest one's alleged contractor, subcontractor status, and/or the OFCCP's jurisdiction. Accordingly, hospitals should carefully and expeditiously review their connections to any federal health care programs before and/or upon receiving the notice. If this review shows a "federal contractor" or "subcontractor" relationship exists, the hospital should immediately contact counsel and determine whether it has to develop a written affirmative action plan and/or comply with the numerous other discrimination related notice, posting, and recording requirements that are enforced by the OFCCP.

As a result of the OFCCP's aggressive enforcement initiative towards the healthcare industry, all hospitals and healthcare providers should immediately take proactive steps to ensure they are in compliance with any applicable affirmative action obligations before receiving the dreaded Notice. Failing to do so could result in a hospital being caught 'flat footed" and unnecessarily incurring monetary penalties and/or having to engage in costly and time consuming litigation with the OFCCP.

Kenneth A. Rosenberg is a partner at Fox Rothschild, and he can be reached at krosenberg@foxrothschild.com . Todd A. Palo is an associate at Fox Rothschild, and he can be reached at tpalo@foxrothschild.com .

[1]The OFCCP is the governmental agency responsible for enforcing the federal affirmative action and equal opportunity employment obligations mandated by: (i) Executive Order 11246, (ii) Section 503 of the Rehabilitation Act of 1973, and (iii) the Vietnam Era Veteran's Readjustment Assistance Act of 1974. *See* Exec. Order No. 11,246, 3 F.F.R.330 (1964-1965), *reprinted* in 42 U.S.C. § 2000e app. at 28-31 (1982); The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (*codified as amended* at 29 U.S.C. § 793 (1988)); Vietnam Era Veteran's Readjustment Assistance Act of 1974, 38 U.S.C. §§ 4211-4215 (2002), *as amended.*

[2]The hospitals appealed this ARB decision to the U.S District Court for the District of Columbia, Case No. 1:09-cv-01210.

[3]The hospital has appealed this ALJ decision to the ARB, ARB Case No. 11-011.

[4]The OFCCP has jurisdiction over an employer under (i) Executive Order 11246 where there is a contract or subcontract with the federal government in an aggregate value greater than $10,000 per year, (ii) Section 503 of the Rehabilitation Act where there is a single contract worth $10,000 or more and (iii) under VEVRAA where there is a single contract of at least $100,000.

[5]Note, the OFCCP has indicated that contracts related to Medicare Advantage Part C or D could trigger jurisdiction.