

## ALERTS AND UPDATES

### OFCCP Affirmative Action Directive Gives New Guidance for Healthcare Providers and Insurers

January 31, 2011

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) recently issued a policy directive to "provide comprehensive guidance for assessing when health care providers and insurers are federal contractors or subcontractors based on their relationship with" or participation in a federal healthcare program. The OFCCP's directive supersedes two earlier directives addressing similar issues.<sup>1</sup>

The OFCCP's directive is a significant development for healthcare providers—including entities providing medical services and supplies—because it clarifies recent confusion over the question of whether healthcare providers and insurers can be government contractors and subcontractors with the attendant affirmative action obligations. It also sheds light on the consequences of involvement in programs, such as Medicare, TRICARE and the Federal Employees Health Benefits Program (FEHBP).

The analytical framework articulated in this new policy directive is based on legal concepts espoused in Department of Labor decisions issued since 2003, including *OFCCP v. Bridgeport Hospital*,<sup>2</sup> *UPMC Braddock*<sup>3</sup> and *OFCCP v. Florida Hospital of Orlando*.<sup>4</sup> While Bridgeport triggered speculation in the healthcare arena about the applicability of federal affirmative action authorities to healthcare providers, the latter cases and now this directive appear to eliminate any possible ambiguity about the OFCCP's position. For further information, see our earlier *Alert*, "[U.S. Department of Labor Further Expands Jurisdiction over Hospitals and Healthcare Providers](#)" and the article "[U.S. Government Contractor/Subcontractor Status: The Danger of Continued Complacency](#)."

#### What Are the Key Takeaways?

The key takeaways from the policy directive are:

- The OFCCP may assert jurisdiction over healthcare providers and insurers when legal requirements are satisfied.
- Healthcare providers and insurers within the OFCCP's jurisdiction are required to satisfy applicable affirmative action obligations.
- OFCCP jurisdiction (*i.e.*, federal contractor or subcontractor status) has to be determined on a case-by-case basis, given the wide array of contractual arrangements.
- Contractor and subcontractor obligations cannot be avoided or limited by agreement (*e.g.*, provisions stating that an agreement is not a federal contract or subcontract).
- Reimbursement agreements between insurers and healthcare providers do not subject the healthcare provider to OFCCP jurisdiction.
- Healthcare providers receiving reimbursement pursuant to Medicare Parts A and B or Medicaid are not covered entities by virtue of that reimbursement.
- Contractual arrangements under Medicare Part C (Medicare Advantage) and Medicare Part D (prescription drug plans) may impose OFCCP jurisdiction.
- Contractual arrangements with the FEHBP and TRICARE impose OFCCP jurisdiction.
- Medical service, supply and device companies may be subject to OFCCP jurisdiction if they provide services, supplies and devices to

covered healthcare providers that are necessary for the provider's performance of its obligations under a federal contract or subcontract, or that fulfill an element of the contract or subcontract.

## What This Means for Employers

The OFCCP's policy directive appears to signal a new era for potentially expansive OFCCP jurisdiction over healthcare providers and other related entities. Hospitals, healthcare providers, health plans, pharmaceutical companies and other companies engaged in providing healthcare services and supplies may want to review their contracts to determine whether they have a contractual or subcontractual relationship with the federal government (e.g., TRICARE), and therefore may be subject to the OFCCP's jurisdiction. Where questions arise about the applicability of affirmative action requirements, these companies may also wish to consult with legal counsel to determine whether they may have affirmative action obligations and, if so, what those obligations are and how to meet them.

## For Further Information

If you have any questions about the information addressed in this *Alert*, please contact any [member](#) of our [Employment, Labor, Benefits and Immigration Practice Group](#), or the attorney in the firm with whom you are regularly in contact.

## Notes

1. Directive No. 189, Health Care Entities That Receive Medicare and/or Medicaid (Dec. 16, 1993); and Directive No. 262, Coverage of Health Care Providers Based on Their Relationship with Participants in the Federal Employees Health Benefits Programs (Mar. 17, 2003).
2. *OFCCP v. Bridgeport Hospital*, ARB No. 00-234 (Jan. 31, 2003).
3. *UPMC Braddock*, ARB No. 08-048 (May 29, 2009).
4. *OFCCP v. Florida Hospital of Orlando*, DOL OALJ No. 2009-OFC-00002 (Oct. 18, 2010).

*Disclaimer: This Alert has been prepared and published for informational purposes only and is not offered, or should be construed, as legal advice. For more information, please see the firm's [full disclaimer](#).*