

OFCCP CLARIFIES WHEN HOSPITALS MUST COMPLY WITH AFFIRMATIVE ACTION

Executive Summary The Office of Federal Contract Compliance Programs (OFCCP) recently issued an administrative directive designed to clarify its position as to when health care providers are considered federal contractors or subcontractors subject to affirmative action obligations. The directive, which does not have the force of law, sets forth OFCCP's own opinions and provides examples intended to illuminate whether health care providers are covered pursuant to their participation in a variety of federal health care programs. Most notably, OFCCP announced, for the first time, its belief that it has jurisdiction over health care providers with contracts related to Medicare Part C (Medicare Advantage) and Part D (Prescription Drug Programs). OFCCP's ability to enforce the positions set forth in its directive will likely depend, in part, on the outcome of two OFCCP cases that are currently under appeal. Reference: OFCCP Order No. ADM Notice/Jur., Transmittal Number 293 (Dec. 16, 2010). OFCCP's Enforcement Jurisdiction Employers with at least 50 employees who enter into direct contracts or covered subcontracts with the federal government are subject to federal affirmative action obligations under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, as amended and the Vietnam Era Veteran's Readjustment Assistance Act of 1974, as amended. These obligations, which are enforced by OFCCP, require contractors to ensure nondiscrimination in their employment practices, and prepare and maintain written affirmative action plans in accordance with complicated regulations. If covered by OFCCP's enforcement jurisdiction, contractors are subject to randomly scheduled compliance audits that can take years to complete. Those without exemplary recordkeeping practices, especially at the applicant/hiring stage, may find it extremely difficult to defend potential systemic discrimination findings by OFCCP. Damage awards or settlement agreements in the hundreds of thousands of dollars are not uncommon. Which Contracts and Subcontracts are Covered? Before OFCCP can audit a company, it must establish the existence of either a direct federal contract with a government agency, or a covered federal subcontract. Because OFCCP for years has taken the position that participation in Medicare (Parts A and B) and Medicaid constitute federal financial assistance and not contracts, most health care providers have operated comfortably outside the reach of OFCCP jurisdiction. In recent years, however, OFCCP has been attempting to establish jurisdiction over health care providers that participate in other types of federal health care programs, including various arrangements under: • the Federal Employees Health Benefit Plan (FEHBP) (administered by the Office of Personnel Management (OPM) and serving civilian federal employees/retirees and their families); and • TRICARE (administered by the TRICARE Management Activity (TMA) and serving active and retired military service members and their families). Indeed, OFCCP has already won significant initial litigation victories in these two areas, although both cases remain under appeal. (See *OFCCP v. UPMC Braddock*, ARB Case No. 08-048 (May 29, 2009); and *Florida Hospital of Orlando*, ALJ Case No. 2009-OFC-00002). Now, on the heels of these victories, OFCCP is using its new directive to announce, for the first time, its position that certain contracts related to Medicare Parts C (Medicare Advantage) and D (Prescription Drug Plans) constitute federal contracts. Importantly, this position has not yet been litigated. Noting the wide array of health care plans, providers, services and arrangements that are available in the health care industry, OFCCP emphasizes in its directive that a case by case approach is needed to determine whether health care providers fall under its jurisdiction. The following examples and explanations are intended to help health care providers determine the likelihood that OFCCP would conclude they are subject to affirmative action obligations. Direct or "Prime" Federal Contracts OFCCP may establish jurisdiction over a health care provider based on the existence of a direct or "prime" federal contract with a government agency. In these direct (prime) federal contracts, the health care provider often agrees to either: (i) provide specified health care services to beneficiaries under one or more federal health care programs; or (ii) establish and/or operate a managed or coordinated care plan, such as an HMO, or facility. Noting that direct care contracts such as these are used by FEHBP, TRICARE and Medicare Advantage and Part D programs, OFCCP provides the following examples in its directive: **EXAMPLE:** A federal health care program contracts with Hospital A to provide an HMO Plan for the members and beneficiaries of one of its health plans. Hospital A is a direct (prime) contractor and OFCCP jurisdiction is established. **EXAMPLE:** An outpatient medical facility contracts with the Department of Veterans' Affairs and the Department of Defense to provide health care services to active duty and retired military personnel under the TRICARE program. The outpatient medical facility is a direct (prime) contractor and OFCCP jurisdiction is established. Note that in each case, in order for OFCCP to have jurisdiction, the health care provider would have to have at least 50 employees and the direct (prime) federal contract must meet the required monetary threshold (i.e., \$10,000 for "basic" coverage and \$50,000 for "full" coverage, which requires preparation of written affirmative action plans). Covered Federal Subcontracts OFCCP may also establish jurisdiction where a health care provider has entered into a covered federal subcontract. Unfortunately, reaching this determination can involve a fairly complex analysis. The first step of the analysis is to determine the existence of an underlying prime federal contract, and if one exists, what the obligations are under that contract. In the health care

industry, the prime federal contract is typically between a federal health care program (i.e., FEHBP, TRICARE, Medicare) and/or its contracting agency,¹ and another company, insurer or health care provider. Once the obligations under an existing prime federal contract are known, the next step is to determine if the health care provider in question has entered into a subcontract in which it is: 1. providing goods or non-personal services that are necessary to the performance of the prime federal contract; or 2. performing or assuming any portion of the obligations under the prime federal contract. Importantly, the same analysis applies to subcontractors of subcontractors, all the way to the nth tier, so long as each subcontract "down the line" satisfies at least one of the two prongs set forth above, as well as the required number of employee and monetary thresholds. It is also important to point out that OFCCP can assert jurisdiction over a covered federal subcontractor even when the subcontract contained no notice or reference to affirmative action obligations. Indeed, OFCCP has made clear its position that its jurisdiction "arises as a matter of law," and that a contractor/subcontractor's obligations cannot be altered or limited by contractual terms. Insurance Only - Not Covered OFCCP notes in its directive that each of the federal health care programs offer a variety of different types of plans to their beneficiaries. Some of those plans simply provide for health insurance and nothing more. In those cases, health care providers who are merely reimbursed for providing health care services to beneficiaries of the plan are not considered covered federal contractors. (See *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-234 (January 31, 2003)). Actual Health Care Services - Covered Other federal health care program plans provide for actual health care services in addition to health insurance. In a typical arrangement, the federal health care plan will contract with a separate health care plan or company in order to establish HMOs or other forms of managed or coordinated care programs. By virtue of such arrangements, these separate health care plans or companies become prime federal contractors. Those prime federal contractors, then, will often contract with one or more private health care providers to provide some or all of the health care services the plan is obligated (under the prime contract) to provide. When this happens, the private health care providers become covered federal subcontractors subject to OFCCP's jurisdiction. Such was the situation in the *OFCCP v. UPMC Braddock* case. There, the Administrative Review Board found that three hospitals that received payments for providing medical services to federal government employees through an HMO agreement were covered federal subcontractors. The hospitals became covered because the prime contractor, the HMO, had a contract with the federal government (OPM) to provide medical services (not just health insurance). Because the hospitals had agreed in a subcontract with the HMO to provide a portion of those medical services, the subcontractor test described above was satisfied. Notably, the Braddock hospitals' appeal is still pending in federal court. TRICARE Contracts Analyzed the Same Way More recently, OFCCP successfully applied the same principles in the *Florida Hospital of Orlando* case. There, an Administrative Law Judge determined that the hospital was a covered federal subcontractor by virtue of its agreement with one of TRICARE's regional administrators (Humana Healthcare Services) to participate as a network provider under TRICARE. Because Humana Healthcare Services had a prime contract with TRICARE to provide networks of health care providers for TRICARE beneficiaries, the judge ruled that the Florida Hospital's agreement to be a part of the network meant the hospital was assuming a portion of the prime contractor's obligations. Hoping to avoid coverage under OFCCP's jurisdiction, the hospital argued that participation in TRICARE and participation in Medicare are "essentially indistinguishable." The ALJ rejected this argument, noting that Medicare is an insurance program that merely pays for, but does not provide, medical services. TRICARE, on the other hand, does both. Like Braddock, the *Florida Hospital of Orlando* case is pending appeal. Medicare Advantage and Part D Programs Emboldened by these recent victories, OFCCP used its new directive to announce, for the first time, its position that contracts related Medicare Advantage and Part D (Prescription Drug Plans) create affirmative action obligations. Specifically, OFCCP provides the following example: EXAMPLE : Medicare's contracting agency, CMS, contracts with a health plan company to provide a PPO Health Plan that includes a prescription drug plan (Medicare Part D), for Medicare Advantage members. The health plan company then contracts with a pharmaceutical company to provide the necessary prescription drugs. The health plan company also contracts with a hospital to provide the health care services the PPO requires. The pharmaceutical company is a covered subcontractor because it has contracted to fulfill a portion of the prime contract between CMS and the PPO Health Plan company. The hospital is also a covered subcontractor because its contract is to fulfill the prime contract's requirement to provide health care services. If the health plan company also contracted with a company to provide claims processing for the PPO, the claims processing company is also a covered subcontractor. As stated above, OFCCP's position that it has jurisdiction over health care providers with contracts related to Medicare Parts C and D has not been litigated. Its ability to enforce this position is likely to depend, in part, on the outcomes of the Braddock and *Florida Hospital of Orlando* appeals. Unfortunately for the health care industry, the results of those appeals may not be known for months or years. Common Health Care Arrangements that are NOT Covered Contracts In a small bit of good news for health care providers, OFCCP's new directive also confirms that certain special relationships in the health care industry are not covered contracts, including: • Participation in reimbursement agreements with Medicare Part A, Medicare Part B or Medicaid. • Participation in insurance reimbursement agreements related to a prime federal contract that is solely for the provision of health insurance (and not medical services) for beneficiaries under a federal health care program. • Receipt of federal grants and/or other federal financial assistance. OFCCP Expected to Aggressively Pursue Health Care Providers The release of this new

directive signals OFCCP's intent to expand its jurisdictional reach and step up its enforcement efforts in the health care industry. If OFCCP ultimately prevails in its pending appeals, it is expected that a majority of hospitals will be required to start complying with burdensome affirmative action obligations, including: • Preparation and maintenance of written affirmative action plans for minorities, women, veterans and individuals with disabilities; • Annual self-audits of personnel decisions related to hires, promotions, terminations and compensation; • Compliance with complicated recordkeeping rules concerning applicants and hires; • Posting of notices informing employees of their rights to join unions; and • Listing nearly all external job openings with state workforce development agencies. Although most new contractors will find complying with affirmative action obligations to be difficult, the real downside to being a covered federal contractor is being subject to OFCCP's randomly selected compliance audits. These audits are almost always lengthy and expensive, especially if the contractor is unprepared. What Should You Do? Generally speaking, if a health care provider has agreed to provide medical services to federal employees or military personnel, there is a good chance OFCCP will conclude that the health care provider is subject to its jurisdiction. Making matters worse for health care providers, OFCCP does not appear to be waiting for the results of its pending litigation before initiating compliance audits. As a result, it has never been more important for health care providers to examine closely their existing arrangements with federal health care programs, and to consider carefully the potential consequences before entering any new ones. Consideration should also be given as to whether existing arrangements with federal health care programs can be modified to improve the health care provider's position to contest OFCCP's jurisdiction, if necessary. For example, those health care providers that have already signed up to be part of the TRICARE network may find it advisable to cancel those contracts and participate in TRICARE, instead, as a non-network provider. Once health care providers have a firm understanding of their existing federal health care program arrangements, they will be better positioned to assess their overall level of risk. Some may decide they can afford to "wait and see" if the Braddock and Florida Hospital of Orlando cases are overturned, or, alternatively, "wait and see" if they are selected for an audit before initiating compliance efforts. These strategies are risky, as many experts believe it is unlikely that OFCCP's litigation victories will be overturned. Further, it is nearly impossible to achieve compliance with affirmative action obligations while "under the gun" of an OFCCP audit. In addition to assessing their level of risk, health care providers should also consider whether they have the resources and resolve to contest OFCCP's jurisdiction if selected for an audit. Those that peril at the thought of a potentially lengthy battle with OFCCP over whether they were rightfully selected may decide it is better to take a more proactive approach. This could mean a firm commitment to full compliance with affirmative action obligations, which for most "new" contractors would involve some type of partnership with outside consulting experts. Or, it could mean focusing on making any needed improvements to basic personnel practices, while stopping short of preparing full blown affirmative action plans. Either approach would surely cause the health care provider to be better prepared to defend an audit should OFCCP come knocking. The bottom line is that there is no "one size fits all" strategy that is best suited for all health care providers. Rather, decisions about the issues raised above demand careful consideration and should be made with the help of legal counsel experienced in affirmative action law. If you have questions regarding this topic, please contact Jon Bumgarner (317.977.1474 or jbumgarner@hallrender.com) or your regular Hall Render attorney.

_____ 1 FEHBP's primary contracting agency is the Office of Personnel Management (OPM). TRICARE's primary contracting agency is the TRICARE Management Activity (TMA). Medicare's primary contracting agency is the Centers for Medicare and Medicaid Services (CMS).