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PRACTICALHEALTH

Increasing I-9 Inspections Put Employers on Alert

The Department of Homeland Security (DHS) recently released their 2012 budget proposal which reveals that I-9 inspections will continue to remain a focus in the upcoming year.

Government-issued Form I-9 inspections are dramatically increasing in frequency across the country. Immigration Customs and Enforcement (ICE) has modified their strategy from conducting workplace raids to reviewing I-9 compliance. This has resulted in the imposition of significant administrative fines. The costs of non-compliance range from $110 to $1,100 per I-9 paperwork violation. The Department of Homeland Security (DHS) recently released their 2012 budget proposal, which reveals that I-9 inspections will continue to remain a focus in the upcoming year. ICE has acknowledged that this nationwide initiative will impact employers of all sizes, including hospitals and health care entities.

Beginning February 16, 2011, ICE served another round of Notices of Inspection on 1,000 employers. These Notices serve as the formal initiation of an I-9 inspection. Upon receipt of a Notice of Inspection, employers must present the requested documentation, including all Forms I-9, within three business days. This is an extremely limited period of time considering the documentation which may be requested.

In light of the refocused enforcement strategy by ICE, employers should immediately take action to ensure their Forms I-9 are in order. At a minimum, employers should:

- Conduct internal audits of their Forms I-9 to evaluate their compliance with I-9 requirements;
- Establish and follow specific protocols for conducting an internal I-9 audit;
- Make corrections to erroneous Forms I-9;
- Identify/resolve insufficient initial Form I-9 documentation; and
- Complete new Forms I-9 where required.

Employers should engage experienced immigration/I-9 counsel to assist and advise throughout the internal audit to mitigate the possibility of overlooking errors or making additional mistakes. Even the most diligent employers may discover that some segment of their workforce either lacks authorization to work or have Forms I-9 requiring correction.

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OFCCP Wants the Health Care Industry to Take Affirmative Action

Health care providers with at least 50 employees that provide medical services to federal employees or military personnel, or that are participating in Medicare Parts C or D, should be preparing and maintaining written affirmative action programs, even if they have no direct contracts with the federal government. In a nutshell, that's the current position of the Office of Federal Contract Compliance Programs (OFCCP), the government agency responsible for enforcing federal affirmative action rules. This is unwelcome news for the health care industry, which for years has largely avoided having to comply with these complicated and burdensome obligations.

ESTABLISHING JURISDICTION

Before an employer can be audited for compliance with affirmative action rules, OFCCP must establish the existence of a direct federal contract or a covered subcontract. Employers usually know when they have entered into direct contracts with the federal government. Whether they have a covered subcontract can be more difficult to determine.

According to OFCCP's regulations, covered subcontracts are those in which the subcontractor is: (1) providing goods or non-personal services that are *necessary to the performance* of a prime federal contract; or (2) *performing or assuming any portion of the obligations* under a prime federal contract. In order to apply this test, the subcontractor must have a detailed understanding of the existing obligations under the prime federal contract. Problems arise when the subcontract fails to reference the prime federal contract, leaving the subcontractor with no notice of its affirmative action obligations. According to OFCCP, that's no defense.

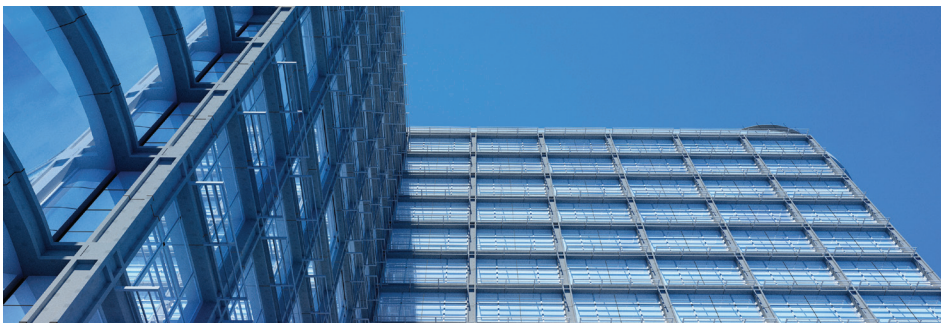
OFCCP SCORING EARLY VICTORIES OVER HOSPITALS

For years, OFCCP's position has been that Medicare Parts A and B and Medicaid are "federal financial assistance" and not federal contracts for purposes of establishing affirmative action jurisdiction. Although that position remains unchanged, OFCCP is now pursuing other avenues as it aggressively attempts to expand its jurisdiction within the health care industry.

In 2009, OFCCP successfully argued that three Pittsburgh area hospitals were covered contractors by virtue of their participation in an HMO arrangement established under the Federal Employees Health Benefit Plan (FEHBP). FEHBP is the federal health care program that serves civilian federal employees, retirees and their families. In that case, the HMO had entered into a *prime federal contract* under which it agreed to provide health insurance and medical services to federal employees. The hospitals, in turn, had entered into a *subcontract* with the HMO to provide a portion of the medical services the HMO was obligated to provide. Because the hospitals were assuming a portion of the obligations under the HMO's prime federal contract, they were found to be covered federal subcontractors. The fact that the subcontract did not contain any notice of affirmative action obligations did not get the hospitals off the hook. *(See OFCCP v. UPMC Braddock, ARB Case No. 08-048 (May 29, 2009).)*

More recently, OFCCP convinced a federal judge that a Florida hospital was covered by virtue of its agreement to participate as a network provider under the federal TRICARE program. TRICARE is the government health care program that provides medical benefits for active and retired military personnel and their families. The judge rejected the hospital's argument that participation in TRICARE was akin to participation in Medicare, calling them "totally different programs." The judge noted that Medicare is an insurance program that merely pays for, but does not *provide*, medical services. TRICARE, on the other hand, does both. Because the hospital had agreed to provide a portion of those medical services, it was deemed to be a covered federal subcontractor. *(See Florida Hospital of Orlando, ALJ Case No. 2009-OFC-00002.)*

Although both the *UPMC Braddock and Florida Hospital of Orlando* decisions are currently under appeal, few experts believe the decisions will be overturned. Further, OFCCP does not appear to be waiting around to find out. Indeed, OFCCP recently announced, for the first time, its position that participation in certain arrangements under Medicare Parts C (Medicare Advantage) and D (Prescription Drug Plans) would create coverage under its rules. OFCCP's ability to enforce this position, which has not yet been litigated, will likely be affected by the outcomes of the *UPMC Braddock and Florida Hospital of Orlando* appeals. CONTINUED ON PAGE 3



OFCCP Wants the Health Care Industry to Take Affirmative Action (Continued)

WHAT SHOULD YOU DO?

Compliance with affirmative action rules can be difficult and expensive. Being ill-prepared for an OFCCP compliance audit is even worse. Indeed, OFCCP has reached six figure settlement agreements with contractors who were caught flat footed. As a result, it has never been more important for health care providers to closely examine their existing arrangements with government health care programs, such as Medicare (Parts C and D), FEHBP and TRICARE, and to carefully consider the potential consequences before entering any new ones. Once health care providers have a firm understanding of their existing arrangements, they will be better positioned to assess the likelihood that OFCCP would consider them to be covered federal contractors or subcontractors.

Health care providers should also consider whether they have the resources and resolve to contest OFCCP's jurisdiction if selected for an audit. Health care providers may decide to be proactive and get into compliance now. Others may choose to "wait and see" if OFCCP's initial litigation victories are overturned or "wait and see" if they are selected for an audit. These strategies are risky as it is nearly impossible to achieve compliance with affirmative action obligations while "under the gun" of an OFCCP audit.

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 whether and when to get into compliance with affirmative action require careful consideration and should be made with the help of legal counsel experienced in this area of the law. ■

Don't Forget About the Genetic Information Nondiscrimination Act

While regulations were issued for the Genetic Information Nondiscrimination Act of 2008 (GINA) back in January 2011, many employers may still not have fully internalized the implications of this statute. In general terms, GINA prohibits: (i) discrimination against individuals based on genetic information; (ii) the acquisition[1] of genetic information; and (iii) retaliation against employees who oppose acts prohibited by GINA.

An important starting point for understanding GINA is to know what qualifies as "genetic information." Per the new regulations, genetic information includes: (i) genetic tests of an individual; (ii) genetic tests of the individual's family members; (iii) the individual's family medical history; (iv) the individual's request for, or receipt of, genetic services by the individual or the individual's family members; or (v) the genetic information of a fetus carried by an individual or the individual's family member or of any embryo legally held through assisted reproductive technology.

The practical day-to-day implications of GINA are employers must now be aware that acquisition of or knowledge regarding an individual or individual's family members' genetic information potentially exposes employers to liability under GINA. There are exceptions where acquisition or knowledge is permissible; however, from a practical standpoint, there are a few steps employers should take to limit their exposure to potential liability:

1. Include "genetic information" in EEO policy language;
2. Review and revise pre-employment physical forms to ensure there are not questions about family medical history or other genetic information;
3. When requesting medical information from employees, whether it be for worker's compensation, ADA accommodations or the employee's own medical leave, include disclaimer language that states the employer does not want the health care providers to provide any genetic information when responding to the request [2]; and,
4. Educate supervisors to not inquire regarding an employee's family member's medical condition. [3] ■

[1] Acquisition includes requesting, requiring or purchasing genetic information.

[2] The GINA regulations provide specific safe harbor language that employers may use when requesting medical information from employees.

[3] While the GINA regulations provide an exception for the inadvertent acquisition of genetic information through casual conversation with an employee, this exception does not apply if the employer asks follow-up probing questions used to elicit genetic information, i.e. additional questions regarding the family member's medical condition and medical history.

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With more than 150 attorneys, Hall Render partners with clients to direct them through the ever-changing business landscape of today's health care industry.

CONTRIBUTING AUTHORS

JON BUMGARNER represents management all over the country in all types of labor and employment issues, including discipline and discharge, wage and hour, disability discrimination and accommodation, FMLA, policy and handbook review, alternative dispute resolution, affirmative action and workplace harassment. Jon graduated summa cum laude from Indiana University School of Law – Indianapolis in 2002.

NATALIE DRESSEL focuses her practice in the areas of business and family immigration. She assists clients in the acquisition of employment and family based visas and counsels on general immigration issues, including I-9 compliance, nonimmigrant visas and permanent resident status. Natalie graduated from Indiana University School of Law – Indianapolis in 2009.

MICHAEL KIM leads the firm's immigration practice and focuses entirely on business immigration matters. He routinely handles a wide-range of employment-based immigration matters for hospitals, health care entities, physician practice groups, corporations, businesses and individuals across the United States. Michael graduated from University of Tulsa College of Law in 1996.

JENNIFER RICHTER focuses her practice in the area of labor and employment law with an emphasis on counseling employers through all areas of the employment relationship. Jennifer graduated from Indiana University School of Law in 2006.

JOHN RYAN emphasizes his practice specifically tailored to health care labor and employment issues, providing consulting and litigation expertise to Hall Render's health care clients across the country. John graduated from Indiana University School of Law in 1998.

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