

# HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

## Yet Another Regulatory Agency Governing Healthcare? The OFCCP May Come Knocking At Your Door

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Recently, many hospitals and other healthcare providers have received notice that they are the subject of "desk audits" by the Office of Federal Contract Compliance Programs ("OFCCP"). These audits generally focus on the healthcare provider's compliance with employment non-discrimination laws in such areas as hiring, compensation, promotion, and termination. However, a fair amount of confusion exists regarding the extent to which healthcare providers fall within the OFCCP's jurisdiction in the first place.

The OFCCP has now issued guidance, referred to herein as the "Directive,"<sup>1</sup> regarding when a healthcare provider or insurer is considered to be a federal contractor or subcontractor for purposes of OFCCP jurisdiction. The resolution of the issue depends on both the nature of the prime contract and whether the subcontract entered into by the healthcare provider will assist the prime contractor in fulfilling its contractual obligations.

### **OFCCP Coverage Generally**

Generally, in order to fall within OFCCP's jurisdiction, an employer must have: (1) contracts or subcontracts with the federal government under Executive Order 11246 in an aggregate value greater than \$10,000 per year; (2) federal contracts or subcontracts under Section 503 of the Rehabilitation Act in an aggregate value greater than \$10,000 per year; or (3) a single contract under the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA") worth at least \$100,000 per year (or at least \$25,000 per year if entered into before December 1, 2003). An employer with 50 or more employees and a federal non-construction (services or goods) contract or subcontract falling in one or more of the foregoing categories and worth at least \$50,000 per year has the additional obligation to prepare and annually update an Affirmative Action Program.

The receipt of reimbursements under Medicare Part A, Medicare Part B, or Medicaid does not in and of itself constitute a covered contract. The OFCCP reasons that these reimbursements constitute federal assistance, not contractual obligations. Similarly, the receipt of grants or other federal financial assistance under a federal healthcare program also does not constitute a

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<sup>1</sup> OFCCP Directive No. 293 (Dec. 16, 2010) can be found at <http://healthcareemploymentcounsel.com/examining-room/OFCCPDirective293.pdf>.

covered contract. Examples mentioned in the Directive include federal financial assistance for educational or research purposes, or for the provision of reduced or no-cost healthcare services to a targeted group or area.

However, healthcare providers who serve TRICARE, CHAMPUS, and federal employee enrollees, or who provide services pursuant to Medicare Advantage plans or Medicare Part D plans, may find themselves subject to claims that they are under the OFCCP's jurisdiction, as will be explained in more detail herein. The Directive repeatedly states that the OFCCP will take a case-by-case approach in determining its jurisdiction. Importantly, the Directive also states that if a multi-establishment entity has just one covered contract or subcontract, all of the entity's facilities and establishments will fall under the OFCCP's jurisdiction, regardless of where the contract is to be performed.

### Recent Decisions Regarding Covered Contracts

Recent decisions have brought these issues into focus for healthcare providers. In *OFCCP v. Bridgeport Hospital*,<sup>2</sup> Blue Cross/Blue Shield ("BCBS") had a prime contract with the U.S. Office of Personnel Management ("OPM") to provide federal employees with insurance coverage. Bridgeport Hospital had an agreement with BCBS under which BCBS would provide reimbursement to the hospital for the cost of medical services that the hospital provided to the individuals enrolled in the BCBS insurance plan. The Department of Labor Administrative Review Board ("ARB") ruled that because BCBS had agreed to provide insurance and not medical services to federal employees, the reimbursement agreement between Bridgeport Hospital and BCBS was not necessary for BCBS to fulfill its contractual obligation. Therefore, the ARB found that the hospital was not a covered subcontractor subject to the OFCCP's jurisdiction.

Conversely, in *OFCCP v. UPMC Braddock, UPMC McKeesport, and UPMC Southside*,<sup>3</sup> the ARB found that three hospitals that contracted with a federal prime contractor were covered subcontractors subject to the OFCCP's jurisdiction. UPMC Health Plan had a contract with OPM to put an HMO into operation. Each of the three hospitals had a contract with UPMC Health Plan to provide the medical services that would be available under the HMO to the HMO participants. The ARB differentiated this case from *Bridgeport Hospital* because the underlying federal contract here dealt with the provision of medical services, while the underlying contract in *Bridgeport Hospital* dealt only with the provision of insurance coverage. Because the services provided by the hospitals were necessary for UPMC Health Plan to satisfy at least part of its contractual obligation to put an HMO into operation for OPM, the hospitals were found to be covered subcontractors.

In a similar case, *OFCCP v. Florida Hospital of Orlando*,<sup>4</sup> Humana Military Healthcare Services ("HMHS") had a prime contract with TRICARE to provide networks of healthcare providers to individuals that receive insurance coverage through TRICARE. Specifically, HMHS was to establish provider networks through contractual arrangements with healthcare providers. Florida Hospital had an agreement with HMHS to be a participating hospital and to provide healthcare services to individuals covered by the HMHS-TRICARE agreement. Here, a

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<sup>2</sup> ARB No. 00-234 (ARB Jan. 31, 2003).

<sup>3</sup> ARB No. 08-048 (ARB May 29, 2009).

<sup>4</sup> ALJ Case No. 2009-OFC-00002 (Oct. 18, 2010).

Department of Labor Administrative Law Judge relied directly on the *UPMC* case to find that Florida Hospital was a covered subcontractor because the medical services that it provided were essential for HMHS to satisfy its contractual obligation to provide provider networks for TRICARE members and beneficiaries.

Although the *UPCM* and *Florida Hospital* cases are still being litigated before the U.S. District Court for the District of Columbia and the ARB, respectively, Patricia Shiu, the Director of the OFCCP, has essentially adopted the reasoning within those decisions in the Directive.

### **Covered Prime Contracts**

If a healthcare provider or insurer enters into a direct contract with a federal agency or program to provide supplies, medical services, or insurance coverage for the members and beneficiaries of a government health plan, a covered contract likely exists. For example, a healthcare provider may contract directly with a federal agency, such as the Department of Veterans' Affairs, to provide healthcare services to military personnel under TRICARE. Or a healthcare provider may contract with a federal healthcare program to establish or operate either a specific coordinated care plan, such as an HMO, or a healthcare facility. Similarly, if an insurer provides insurance coverage under a healthcare program such as Medicare Advantage or Medicare Part D, or contracts with a specific government agency to provide insurance coverage to the agency's employees under Federal Employees Health Benefits Program ("FEHBP"), the OFCCP will have jurisdiction over the insurer.

Notably, the federal government may enter into contracts for the provision of several other types of supplies and services related to a health plan, such as administrative support, customer service, marketing, claims processing, and so on. Thus, contracts for medical services or insurance coverage are not the only contracts that should be evaluated in light of the Directive.

### **Covered Subcontracts**

A covered subcontract likely exists if a contractor with a covered contract enters into an agreement with a subcontractor: (1) for "the purchase, sale or use of personal property or nonpersonal services" which is necessary to the performance of the underlying contract; or (2) under which a portion of the contractor's contractual obligation is to be performed by the subcontractor. Because a covered contract must exist in order for a covered subcontract to exist, the OFCCP will evaluate both the contract and subcontract in determining jurisdiction over a subcontractor.

An example of a covered subcontract is as follows. Federal healthcare programs may contract with a healthcare plan to put healthcare services, such as an HMO or PPO, into operation for certain federal employees. The healthcare plan will then contract with hospitals or other healthcare providers to actually provide the members and beneficiaries of the government health plan with the medical services contemplated by the original contract between the federal government and the healthcare plan. Following the reasoning set forth in the *UPMC* and *Florida Hospital* cases, the Directive states that the agreements between the healthcare plan and the healthcare providers constitute covered subcontracts because those subcontracts are necessary for the healthcare plan to provide the medical services that it contracted to provide the federal healthcare program.

## OFCCP Exemptions

As mentioned earlier, the receipt of reimbursements from Medicare Part A, Part B, or Medicaid does not in and of itself constitute a covered contract. The OFCCP guidance also specifies additional federal government relationships which, by themselves, do not subject a healthcare entity or insurer to OFCCP jurisdiction. One such exemption deals with insurance reimbursement agreements. The government may contract with an insurer to provide insurance coverage to specific members or beneficiaries of a plan, thereby rendering the insurer a federal contractor. However, if a healthcare provider then enters into an insurance reimbursement agreement with the insurer, the healthcare provider does not become subject to OFCCP jurisdiction as a subcontractor **solely** based on the insurance reimbursement agreement. Following the logic in *Bridgeport Hospital*, the OFCCP reasons that because the underlying federal contract in this situation is for the provision of insurance only (and not of healthcare services), the insurance reimbursement agreement is neither necessary to the performance of the underlying contract, nor is it a fulfillment of an element of the underlying contract.

## Conclusion

Given the OFCCP's current focus on coverage of healthcare entities, all such entities should confirm whether they fall under the OFCCP's jurisdiction. As described above, this analysis requires that particular attention be paid by a healthcare provider to the nature of the contractual obligations of any federal prime contractor with which it is entering into an agreement to provide services. The obligations imposed on employers by the OFCCP can be financially and administratively burdensome, not to mention that a failure to comply with such requirements may lead to sanctions, loss of federal contracts, and/or future ineligibility to obtain federal contracts. Thus, covered entities must take appropriate steps to ensure compliance.

If you need assistance in assessing your potential coverage under the OFCCP, complying with obligations as a covered federal contractor, or responding to an OFCCP audit, or if you have any questions about this *Health Law Update*, please contact one of our Labor and Employment attorneys listed below.

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