THE
NATIONAL LAW REVIEW

Health Care Providers, Tricare Reimbursement and the OFCCP: Hope for the Best but Prepare for the Worst

Thursday, November 25, 2010

Article By Thomas E. Obenberger
Eric H. Rumbaugh
Michael Best & Friedrich LLP

Government Contracts, Maritime & Military Law
Public Education & Services
Health Law & Managed Care
Insurance Reinsurance & Surety
Litigation / Trial Practice
Administrative & Regulatory
All Federal

Recent Decisions Extend OFCCP Jurisdiction Over Many Health Care Providers

The Office of the Federal Contract Compliance Programs ("OFCCP") is the federal agency responsible for enforcing affirmative action rules for federal government "contractors" or "sub-contractors." An entity with a federal government "contract" or "sub-contract" of $50,000 or more must create or maintain an OFCCP – complaint affirmative action plan, which is significant burden. Over the years, there has been significant litigation concerning which types of financial arrangements with the federal government constitute "contracts" and which do not. Just receiving money from the government is not enough; but how much is required to convert a relationship into a "contract" and create an affirmative action duty? The answer to this question has just changed, dramatically, for some health care providers.

By now, most in the health care and legal professions are aware of several recent decisions expanding OFCCP jurisdiction over health care providers, resulting in the imposition of affirmative action obligations arising out of Executive Order 11246, Section 503 of the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA") and the possibility of intrusive OFCCP compliance audits. Decisions in OFFCP v. UPMC Braddock, ARB NO. 08-048 (2009) and OFCCP v. Florida Hospital of Orlando, 2009-OFC-02 (2010) extended OFCCP jurisdiction over a potentially huge number of previously uncovered health care providers.

The most significant of the decisions is Florida Hospital, which held that a hospital's receipt of more than $50,000 in federal reimbursement under the Department of Defense's Tricare Program for services rendered to active duty and retired military personnel and their families subjected it to the jurisdiction of OFCCP as a covered federal subcontractor. The decision in Florida Hospital rejected arguments raised by both the hospital and Department of Defenses that payments received by providers under Tricare were not contract or sub-contracts, but were federal finance assistance payments, much like Medicare and Medicaid, which have subjected the recipient providers to OFCCP jurisdiction.

Appeals are currently pending in both UPMC Braddock and Florida Hospital cases, but it could be months, or possibly even years, before the appeal process is concluded. Much has been written about these decisions, but little guidance has issued as to what health care providers who receive significant Tricare payments may expect or should do in the interim.

OFCCP Will Aggressively Assert Jurisdiction and Pursue Compliance Reviews

OFCCP has made clear that it will not defer its assertion of jurisdiction over or enforcement activities against health care providers who receive Tricare reimbursement pending resolution of the appeal in

the FloridaHospital case. In fact, OFCCP is stepping up its identification of health care providers who are recipients of assistance payments under Tricare, and is issuing “scheduling letters” which initiate compliance reviews under the Executive Order, the Rehab Act and VEVRAA, always accompanied by a multi-page “itemized listing” demanding extensive records, supporting data an analyses covering several years.

Many health care providers, who have been the recipients of federal assistance payments under Medicare, Medicaid and even Tricare programs hove not developed federal affirmative action plans, and have not undertaken the recordkeeping, record retention and analysis responsibilities of “covered” federal contractors and subcontractors. Most find themselves shocked – and totally unprepared – when confronted with an OFCCP compliance review and demand for production of voluminous records, supporting data and analyses – all due in 30 days time.

While OFCCP may be persuaded to grant some additional time for the submission of requested data, and perhaps even a bit longer for the development of required affirmative action plans by newly covered health care providers, it is better for providers to plan for OFCCP’s letter before it comes.

What to Do Now?

- Health care providers who annually receive more than $50,000 in federal assistance payments under Tricare, and who receive an OFCCP “scheduling letter” may wish to preserve, by asserting, a defense to OFCCP jurisdiction that receipt of payments under Tricare does not render them a federal contractor or subcontractor, at least while the appeal in the Florida Hospital case is pending. Chances of reversal are unclear, but the potential jurisdictional defense should not be waived.

- In view of OFCCP’s refusal to defer compliance reviews or enforcement until after the Florida Hospital appeal is decided, potentially covered health care providers should decide now are they required to comply, and what to do. One risky option is to wait for the resolution of appeals of the Florida Hospital case. Employers who elect to comply with OFCCP’s position should begin – or continue – to maintain the records and supporting data that will be requested by OFCCP as part of any compliance review. OFCCP’s “itemized listing” data requests are based largely on recordkeeping standards set forth in 41 CFR Parts 60-1, 60-2 and 60-3, which should be reviewed. From among the many types of data and reports requested by OFCCP, potentially covered contractors would be well advised to develop and devote attention to a few, which will provide some advance indication of potential risk, and may suggest measures to be taken in advance of any OFCCP compliance review, including:

- A document separating the workforce into job groups – each group to be made up of a number of job titles which have similar content, wage rates and opportunities.

- For each group, a calculation of the percentage of minority and female incumbents. {In full blown affirmative action plans, minority and female availability also will be stated for each job group, along with a comparison of incumbency to availability, possibly resulting placement goals. Those steps should not be taken as a part of preliminary data gathering or retention.}

- Copies of EEO-1 reports for the past several years.

- Data on employment activity – fully documenting applicant flow, hires, promotions and terminations for the preceding year or two. Care should be take to identify true “applicants,” as opposed to those who merely express interest in employment, particularly with regard to use of the internet, and to insure that appropriate disposition codes are recorded for each applicant. Some analysis of selection rates comparing percentage selection of minorities or women as opposed to others should also be undertaken for each of the major employment activities mentioned.

- Begin preparing OFCCP – complaint affirmative action plans. This will be a very involved process for employers that have not previously maintained an OFCCP plan. Most employers will need to engage outside help in creating a first plan.

Additional Defenses to Consider

- Health care providers over which OFCCP attempts to assert jurisdiction should be aware of minimum employment levels and the dollar value of contracts or subcontracts which are triggering points for OFFCP jurisdiction under the Executive Order, Rehab Act or VEVRRA.

- Religious based or affiliated health care providers as to whom ongoing and pervasive OFCCP jurisdiction

and enforcement may give rise to First Amendment objections may wish to consider a defense based upon the decisions of the Administrative Law Judge and Secretary of Labor in OFCCP v. Aid Association for Lutherans, 93-OFC-11 (1994), affirmed 93-OFC-11 (1995).

Source URL: https://www.natlawreview.com/article/health-care-providers-tricare-reimbursement-and-ofccp-hope-best-prepare-worst