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OFCCP Enforcement Powers Expanded Over Healthcare Industry

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In a case closely monitored by the healthcare industry, a recent decision from the United States District Court for the District of Columbia expanded the jurisdiction of the Office of Federal Contract Compliance Programs ("OFCCP") over many healthcare providers. *UPMC Braddock v. Harris*, Civil Action No. 09-1210, 2013 WL 1290939 (D.D.C. March 30, 2013). As a result of this decision, the OFCCP will likely continue asserting jurisdiction over healthcare providers it determines are government subcontractors and require that they comply with all requirements imposed on government contractors and subcontractors.

The Case

The district court considered whether the OFCCP could assert jurisdiction over three hospitals that subcontracted with insurance companies. The court concluded that the hospitals qualified as government subcontractors and, as a result, were subject to certain statutory and regulatory requirements promoting equal opportunity and affirmative action efforts. Consequently, certain hospitals will be subject to reporting requirements, compliance evaluations, and on-site reviews administered by the Office of Federal Contract Compliance Programs ("OFCCP").

The hospitals in this case were three hospitals affiliated with the University of Pittsburgh Medical Center ("UPMC") that entered into contracts with UPMC Health Plan ("Health Plan"), a health maintenance organization ("HMO"), to provide medical services and supplies to individuals enrolled in its coverage plan. The Health Plan subsequently contracted with the U.S. Office of Personnel Management ("OPM") to provide coverage for certain federal employees. Accordingly, the court found that the hospitals were government subcontractors subject to the nondiscrimination provisions of Executive Order 11246; Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (requiring government subcontractors to "take affirmative action to employ and advance in employment qualified individuals with disabilities"); and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 4212 (mandating a contractual provision that requires government subcontractors to "take affirmative action to employ and advance in employment qualified covered veterans").

During the administrative hearing, the hospitals made four objections to the OFCCP's determination that they were "government subcontractors." First, the hospitals argued that the terms of their contract expressly stated that a provider of medical services was not a "subcontractor" for purposes of the laws and regulations administered by the OFCCP. The court recognized the terms of that contract but found the hospitals' asserted legal implications were incorrect. The Court found that the hospitals were, indeed, providing services under a federal contract and that the hospitals were subcontractors under that contract. Second, the hospitals argued that they did not qualify as "subcontractors" under the OFCCP's own regulations, arguing that they provided "personal services," whereas the existing regulation included only "nonpersonal services."[1] The court found this argument unpersuasive.

[1] *See* 41 C.F.R. § 60-1.3.

The hospitals' third argument was that the medical services which they provided were not "necessary to the performance" of the Health Plan's contract with OPM. The court rejected the argument and specifically found that the hospitals in this case were, indeed, involved in providing medical care under the primary contract with OPM.[2] Finally, the hospitals argued that they "never consented to be bound by the equal opportunity clauses." Disregarding the hospitals' contention, the court relied heavily on Fifth Circuit precedent that found where a contractual relationship exists with the federal government, 'express consent' is unnecessary for it to be bound by the obligations imposed by statute and regulation on federal contractors."[3] The court explained that this principle is likewise applicable to government *subcontractors*.

WHAT DOES THIS MEAN?

This decision opens the door for expanded jurisdiction over hospitals that provide medical care to employees and their dependents insured through the various health benefit programs contracted by OPM.

The Court's decision implicates coverage for hospitals, physician groups and others that either have contractual relationships with HMOs or who merely provide medical services under any covered health benefit plan. These entities will now be deemed to be within the jurisdiction of the OFCCP.

The scope of the decision also expands the potential coverage of a vast number of "subcontractors" doing business with a covered prime contractor. In this case, the court made it clear that a subcontractor need not be in contractual agreement with a prime contractor in order for the OFCCP's jurisdiction to apply. This potentially expands the OFCCP's jurisdiction to anyone doing business with a federal contractor. This decision potentially expands those employers that will be required to maintain written affirmative action programs.

Generally, for compliance purposes, any contractor with 50 or more employees and a contract or subcontract of $50,000 or more for supplies or services must develop, on an annual basis, a written affirmative action plan for all employees and affirmative action plans for persons with disabilities and veterans. Covered contractors and subcontractors with 50 or more employees must also file an annual EEO-1 report and a VETS 100 report; post their jobs with the state's employment service; undertake certain outreach recruitment activities; in addition to certain other record-keeping obligations.

Failure to comply with the mandatory written affirmative action plan and job posting requirements and the attending record-keeping obligations may subject covered contractors and subcontractors to enforcement actions by the OFCCP.

[2] *Cf. OFCCP v. Bridgeport Hosp.*, ARB Case No. 00-034, 2003 WL 244810 (Jan. 31, 2003).
[3] *See United States v. New Orleans Pub. Svc. Inc.*, 553 F.2d 459, 469 (5th Cir. 1977).

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