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Management Alert

OFCCP Wins Major Battle Over Coverage Of Some Health Care Providers

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) takes an expansive view of its jurisdiction. In recent years, the OFCCP litigated vigorously to assert jurisdiction over many health care providers. Results have been mixed, as explained *here* and *here*. This round goes to the OFCCP. In *Braddock, et al. v. Harris, et al.*, the United States District Court in the District of Columbia held that hospitals that provide medical services to federal employees pursuant to a contract with an HMO qualify as government subcontractors subject to the OFCCP's statutory and regulatory requirements. The opinion is available *here*.

Background

Braddock involved three University of Pittsburgh Medical Center hospital affiliates ("Hospitals"), which had entered into contracts with an HMO known as UPMC Health Plan ("Health Plan"), to provide medical services and supplies to enrollees. In turn, the HMO had contracted with the OPM to provide coverage for federal employees who participate in the Federal Employees Health Benefits Program.

When the OFCCP attempted to enforce Executive Order 11246 ("Executive Order"), Section 503 of the Rehabilitation Act ("Rehabilitation Act"), and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA") against the Hospitals, they denied they were federal subcontractors. OFCCP initiated administrative enforcement proceedings on the matter, and prevailed. This appeal ensued.

The Bottom Line: Health Care Providers that Contract with Some HMOs Now Subject to OFCCP Jurisdiction

The key takeaway from *Braddock*: check your contracts.

Hospitals that hold sub-contracts with HMOs that have contracted with the federal government to provide medical services to federal employees are covered by the OFCCP's jurisdiction. As a result, some will be required to prepare affirmative action plans and comply with the other regulatory requirements. And it's not just hospitals that should pay attention: *Braddock* also has implications for physicians, pharmacies, and other related service providers that provide services to federal employees through an HMO arrangement.

The good news? It is not clear that *all* subcontracts with covered HMOs will be covered by the court's ruling in *Braddock*. For example, in some states, pharmacy services are merely reimbursed by HMOs. Those subcontractors may be exempt from the court's ruling in *Braddock*. Also, if a hospital or other provider *only* holds agreements with fee-for-service insurers (like PPOs) or only through the TRICARE program, they are still outside the reach of the OFCCP.

The Court's Decision

For the legal scholars among us, *Braddock* was an interesting ruling. The Hospitals argued that they were not subject to OFCCP jurisdiction on four grounds, all of which were rejected by the District Court.

First, the Hospitals claimed that the express language of the HMO's contract with the OPM, which defined "subcontractor" to specifically exclude "providers of direct medical services or supplies pursuant to the Carrier's health benefits plan," should trump the Executive Order. The Court quickly dismissed this argument, explaining that these entities are not empowered to override the mandatory requirements of the Executive Order, Rehabilitation Act, and VEVRAA.

Next, the Hospitals' asserted that they do not qualify as "subcontractors" under the Secretary of Labor's own implementing regulations. The Hospitals primary argument was that they should be excluded because their business of supplying medical care is one of offering "personal services" as opposed to "nonpersonal services," which would put them beyond the OFCCP's scope.

Because the statutes and regulations do not explicitly define "nonpersonal services," the OFCCP and Hospitals offered competing alternate "subcontractor" definitions from the Federal Acquisition Regulations (FAR), 48 C.F.R. §§ 37.101 and 1601.101(b), for interpretive guidance. Ultimately, the Court sided with the OFCCP's interpretation.

Third, the Hospitals relied on *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-034, 2003 WL 244810 (2003), in an attempt to argue that they cannot be labeled government "subcontractors" because the medical services they provided as part of their agreements with the HMO were not "necessary to the performance" of the HMO's contract with the OPM, nor was any part of the HMO's obligation to OPM "performed, undertaken or assumed" under their own agreements with the HMO.

In *Bridgeport*, a hospital that provided health care services pursuant to a fee-for-service (PPO) agreement with Blue Cross/Blue Shield was held *not* to be a federal subcontractor. Blue Cross/Blue Shield's agreement with the federal government required that it provide only *insurance* reimbursement to federal employees. The agreement did not require the provision of medical services. The ARB found that the hospital's provision of health care services was not necessary for the performance of the insurance contract which only required insurance reimbursement and, therefore, was not a covered subcontract.

Here, by contrast, the Hospitals contracted with a covered HMO (rather than a PPO). The *Braddock* court found this to be a material difference. The court concluded that pursuant to its contract, the HMO provider was responsible for providing "medical services" for federal employees, not just insurance reimbursement. Therefore, the Court found that the Hospitals who served federal employees under the HMO agreement performed services necessary to the Health Plan's contract, rendering the Hospitals government subcontractors subject to the OFCCP's jurisdiction.

Finally, the court rejected the Hospitals' argument based on contract law principles that their consent was necessary for imposition of the Executive Order and accompanying statutes. Instead, the court ruled that jurisdiction could be invoked as a matter of law.

This decision confirms other longstanding OFCCP positions that have broad implications for all potential subcontractors. The court in *Braddock* supported the OFCCP's view that it can assert jurisdiction over employers, even if: (1) the underlying prime federal contract and the subcontract were silent about Executive Order 11246, Section 503, or VEVRAA obligations; or (2) the parties did not explicitly consent to the OFCCP's jurisdiction.

What Health Care Providers Should Do

All health care providers should review their existing contracts to determine if they provide services or supplies to HMOs who are under contract to provide services to federal employees. If so, the agreements should be analyzed under the guidance set forth in the *Braddock* decision to further determine if the health care provider is a subcontractor subject to OFCCP affirmative action and non-discrimination requirements.

By: *Valerie J. Hoffman*, *Jeffrey A. Berman*, *Annette Tyman*, *Christine Hendrickson* and *Cassandra Carroll*

Valerie J. Hoffman is a partner in Seyfarth Shaw's Chicago and Los Angeles offices. *Jeffrey A. Berman* is a partner in the firm's Los Angeles office. *Annette Tyman* is a partner and *Christine Hendrickson* is senior counsel in the firm's Chicago office. *Cassandra Carroll* is an associate in the firm's San Francisco office. If you would like further information, please contact your Seyfarth attorney, Val Hoffman at *vhoffman@seyfarth.com*, Jeff Berman at *jberman@seyfarth.com*, Annette Tyman at *atyman@seyfarth.com*, Christine Hendrickson at *chendrickson@seyfarth.com* or Cassandra Carroll at *ccarroll@seyfarth.com*.