Management Alert

OFCCP Directive 293: Jurisdiction Over Health Care Providers

Following the recent Administrative Law Judge's decision (now on appeal) in *OFCCP v. Florida Hospital of Orlando*, ALJ Case No. 2009-OFC-00002 (October 18, 2010) [click *here* for more information], the Office of Federal Contract Compliance Programs (OFCCP) issued a directive providing "comprehensive guidance for assessing when health care providers and insurers [collectively HCPs] are federal contractors or subcontractors …" Directive 293 was issued on December 16, 2010, and it can be accessed *here*. It provides guidance by the OFCCP for assessing whether an HCP's relationship with a federal entity or program or a third party federal contractor renders the HCP a federal contractor or subcontractor for purposes of OFCCP jurisdiction.

The Directive specifically addresses relationships with Medicare and Medicaid, TRICARE, and the Federal Employees Health Benefit Plan (FEHBP). It supersedes prior Directives 189 and 262 regarding Medicare, Medicaid and FEHBP. Importantly, although the Directive purports to be "comprehensive," it fails to mention that its guidance regarding TRICARE is currently the subject of further review in the *Florida Hospital* appeal.

Case-By-Case Approach; Principles Remain Constant

OFCCP's position concerning the HCP relationships that result in federal contractor or subcontractor status has not changed. Directive 293 memorializes the principles and analysis OFCCP has been applying in this context for some time. And in the new Directive, OFCCP stresses that a case-by-case approach remains necessary to determine whether an HCP is a federal contractor or subcontractor in light of "the wide array of health care plans, providers, services, and arrangements available."

Clearly, an HCP becomes a federal contractor by entering into a direct contract with a federal government agency or federal program. It remains the case, however, that participating providers under Medicare Parts A & B and Medicaid are not subject to OFCCP jurisdiction by virtue of their participation because those programs are considered to be federal financial assistance rather than federal contracts. By contrast, OFCCP jurisdiction may attach where an HCP has contracts related to Medicare Advantage Part C or Part D or other federal programs.

Determining whether an HCP is a federal subcontractor involves more detailed analysis. OFCCP assesses whether the HCP entered into an arrangement or agreement with a federal contractor either (1) for the purchase, sale, or use of personal property or nonpersonal services necessary, in whole or in part, to performance of the underlying contract; or (2) under which a portion of the federal contractor's contractual obligation is assumed or performed. In other words, if an HCP provides services or performs an obligation necessary for a federal contractor to meet its obligations under a federal contract, it will be subject to OFCCP jurisdiction. This inquiry requires analysis of both the underlying contract and the agreement between the HCP and federal contractor.

Three Significant Cases Provide Analytical Framework

OFCCP relies on three significant court decisions addressing health care provider coverage issues as "the basis for a framework for the analysis of these issues." In addition to the *Florida Hospital* decision mentioned above, OFCCP's analysis in Directive 293 is predicated on *OFCCP v. UPMC Braddock*, *UPMS McKeesport*, and *UPMC Southside*, ARB Case No. 08-048 (May 29, 2009); and *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-234 (January 31, 2003).

Fundamentally, these cases illustrate the importance of analyzing both the HCP agreement with a federal contractor and the underlying federal contract. Under the *UPMC* and *Florida Hospital* decisions, HCPs become federal subcontractors by providing health care services or supplies for entities that contract with the federal government to provide health care services or supplies. In *UPMC Braddock*, hospitals that provided medical services and supplies to UPMC, which contracted with the Office of Personnel Management to put a health maintenance organization into operation, were found to be performing an essential part of UPMC's contractual obligation. Similarly, in *Florida Hospital*, a hospital that contracted with a third party to provide health care services as a preferred provider was found to be performing a portion of the third party's obligation to create networks of preferred providers to provide medical services for TRICARE beneficiaries.

By contrast, in *Bridgeport Hospital*, a hospital that provided health care services pursuant to a third party agreement was held not to be a federal subcontractor by virtue of that relationship. The underlying federal contract required the federal contractor to provide health insurance benefits, not health care services, for federal employees. Because the hospital was providing health care services, not insurance, it had not assumed any portion of the contractor's obligation under the federal contract and was not providing services necessary to the performance of the contract.

Significantly, the *UPMC* and, as mentioned previously, the *Florida Hospital* cases are pending on appeal, and the ultimate outcome of the appeals could impact OFCCP's analysis in this area.

What Health Care Providers and Insurers Should Do

HCPs should determine whether they have direct contracts with federal programs and agencies, and assess the terms of those agreements. In addition, they should determine whether they are preferred providers under any government health care plans or have any other arrangement to provide services or supplies for a federal contractor. If so, the HCP's agreements, as well as any underlying federal contracts, should be analyzed to determine whether the HCP agreed to perform services or provide products necessary to the performance of a federal contract, or assumed a portion of the federal contractor's obligation under the federal contract. If the contract involves coverage under the TRICARE program, the HCP may wish to assess its readiness to come into compliance should the OFCCP's and ALJ's positions be upheld on appeal.

HCPs who are federal contractors or subcontractors should determine whether their agreements meet the threshold dollar requirements for OFCCP jurisdiction under Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1974, as amended; and/or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended. If so, they should implement the following affirmative action obligations, among others, that are applicable:

- Developing an affirmative action plan for each establishment with 50 or more employees (and including employees at smaller establishments in an appropriate AAP);
- Conducting adverse impact analysis on hires, promotions and terminations;
- Performing mandatory compensation analysis;
- Acknowledging federal contractor or subcontractor status in response to question C3 on annual EEO-1 reports;
- Filing an annual VETS-100A report;
- Engaging in meaningful outreach to recruit minorities, women, covered veterans, and individuals with disabilities; and
- Complying with other obligations such as recordkeeping, soliciting race and gender information, inviting post-offer applicants to self-identify as covered veterans or disabled individuals, mandatory posting obligations, and more.

If you have questions about this One Minute Memo, please contact the Seyfarth Shaw attorney with whom you work or any attorney on our OFCCP & Affirmative Action Compliance Team.

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