CLIENT ALERT

OFCCP Directive Continues Agency's Efforts To Expand Its Jurisdiction Over Health Care Providers

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Despite pending litigation regarding the scope of the Agency's jurisdiction in this area, the Office of Federal Contract Compliance Programs ("OFCCP") has issued Directive Number 293 addressing when "health care providers and insurers are federal contractors or subcontractors based on their relationship with a Federal health care program and/or participants in a Federal health care program." The Directive attempts to reconcile recent case law on the issue and furthers the OFCCP's aggressive efforts to extend its jurisdiction over health care providers.

The Directive states that the OFCCP's jurisdiction extends to any health care entities that provide supplies and/or services necessary to perform a prime contract under Medicare, TRICARE, and the Federal Employees Health Benefits Plan ("FEHBP"). The Directive notes that reimbursements made to health care providers pursuant to Medicare Part A (hospital insurance), Medicare Part B, (medical insurance), or Medicaid "are Federal financial assistance, not contracts," and, therefore, health care providers who enter into such reimbursement agreements are not deemed "subcontractors" and are not subject to OFCCP jurisdiction by virtue of those agreements. The OFCCP further confirms in the Directive that recipients of federal grants are not considered contractors or subcontractors by virtue of those grants. The Directive states that agreements by providers with Medicare Part C plans (Medicare Advantage) and Part D (Prescription Drug Plans) are "potential covered contracts".

The Directive draws a distinction between prime contracts with the federal government to "provide health insurance (and not health care services)," which the OFCCP says was the case in *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-234 (January 31, 2003), and the contracts at issue in *UPMC Braddock, et al. v. Solis*, Case No. 1:09-cv-1210 (D.D.C.) and *OFCCP v. Florida Hospital of Orlando*, ARB Case No. 11-011, ALJ Case No 2009-FC-2 (October 18, 2010), pursuant to which the OFCCP claims the contractors agreed to provide medical products and services to federal government employees. The Directive states that "an insurance reimbursement agreement between a health care provider and a federal contractor contracted to provide health insurance only . . . does not create a covered subcontract relationship." However, where a prime contractor holds a contract to create a health plan that provides "medical products and services" or provides "networks of health care providers," any subsequent contracts between the prime contractor and a hospital, doctor, or other health care provider who provides services to a beneficiary of the health plan are subcontracts subject to OFCCP jurisdiction.

This approach makes no distinction between a contract to provide health care services and a contract to provide health care benefits via a network of providers, deeming the health care provider to be a government subcontractor in each scenario. In fact, though, virtually every health insurance program now includes a "network" of providers, so the OFCCP's construct does not explain how to distinguish between the service benefit plan under which contracted providers were found not to be subcontractors in *Bridgeport* and contracts requiring benefits to be offered via a "network" of providers, under which OFCCP says contracted providers are government subcontractors. In fact, the "insurance" arrangement contract at issue in *Bridgeport* was issued to a Blue Cross Blue Shield entity contracting with the government as a "service benefit plan" under which payment for health services is made by the contractor to health care providers under contract to the contractor. See 5 U.S.C. §8903(1).

The timing of the Directive is also notable, as appeals of the *UPMC Braddock* and *Florida Hospital of Orlando* cases are currently pending.

The Directive states that the variety of health care plans, providers, services, and arrangements requires a case-by-case assessment in order to determine whether or not an entity is a federal contractor or subcontractor. However, the Directive's construction of OFCCP's jurisdiction illustrates that the Agency is taking an expansive position on the range of circumstances in which it will claim that medical providers are covered subcontractors.

Health care plans and providers should assess the nature of their contractual arrangements in light of the Directive. They must have an understanding of the government program under which the services are being provided and how the OFCCP may view the services in question. Health care providers found to be covered subcontractors must comply with all the affirmative action obligations imposed upon federal contractors and are subject to compliance audits by the OFCCP. The OFCCP's position is that providers can be found to be subcontractors, and thereby subject to applicable OFCCP requirements, even if the prime government contractor did not flow the required EEO and affirmative action clauses down to the alleged subcontractor in the participation agreement with the provider.

Decisions in the *UPMC Braddock* and *Florida Hospital of Orlando* cases should provide greater clarity regarding the scope of the OFCCP's jurisdiction in this area. We will update you with any further developments. For more information, please contact the professionals listed below or your regular Crowell & Moring contact. Crowell & Moring filed an amicus curiae brief in December with the Department of Labor's Administrative Review Board (ARB) on behalf of the TRICARE program contractors, supporting Orlando Hospital's position that it is not a subcontractor by virtue of its provider agreement with Humana Military Services.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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