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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

DOL May Expand Bold Plan For Hospitals After Court Ruling

By **Dietrich Knauth**

Law360, New York (April 03, 2013, 9:54 PM ET) -- A Washington, D.C., federal court ruled Tuesday that the U.S. Department of Labor can treat certain hospitals as federal subcontractors for the purposes of affirmative action regulations, expanding the DOL's reach and potentially forcing health care providers to spend more on outreach and hiring documentation.

U.S. District Judge Paul L. Friedman backed the DOL Office of Federal Contractor Compliance Programs' assertion of jurisdiction over three hospitals that provide medical services through a health maintenance organization to individuals covered by the Federal Employees Health Benefits Plan. The judge shot down the hospitals' arguments that they were not subcontractors because the agency they contracted with, the Office of Personnel Management, specifically excluded them from compliance with affirmative action regulations.

The ruling will likely embolden the OFCCP to assert jurisdiction over hospitals and other potential subcontractors, even when other federal agencies try to fight its attempts to claim jurisdiction in the gray areas of federal contracting.

"OFCCP has been pushing to expand its jurisdiction and expand the boundaries of who is a subcontractor," said Rebecca Springer of Crowell & Moring LLP. "This opinion will certainly embolden them to continue that effort."

The opinion puts hospitals and other health care organizations squarely back in the OFCCP's sights, after a brief respite following Congress' exemption of health care providers that provided services to the military and veterans under the U.S. Department of Defense's Tricare health contracts. Hospitals successfully lobbied Congress to exempt Tricare providers from the regulatory responsibilities imposed on subcontractors in the 2012 National Defense Authorization Act.

That victory now seems to be short-lived, because there is likely to be significant overlap between Tricare providers and providers that work in service of HMOs used by nonmilitary government employees, according to Valerie Hoffman, head of Seyfarth Shaw LLP's affirmative action and OFCCP compliance group, and Joshua Roffman, a shareholder in Littler Mendelson PC's affirmative action and OFCCP practice group. The decision could have a far-ranging impact on the health care industry, they said.

“It’s not just hospitals — it’s also pharmacies, big box stores that have pharmacies in them, anyone that contracts to provide services with an HMO that, in turn, contracts with a federal employee health benefits program,” Hoffman said.

The hospitals had hoped for a reprieve from a 2003 decision by the DOL’s administrative review board in OFCCP v. Bridgeport Hospital, in which the review board said Bridgeport Hospital's medical services agreement with Blue Cross Blue Shield did not make it a federal subcontractor because Blue Cross’ contract with the federal government provided only health insurance, not medical services, to the government. But Judge Friedman ruled that the hospitals had agreed to act as HMOs and provide medical services.

The decision reinforces the fact that the OFCCP has many potential bases to assert jurisdiction over health care providers, including contracts through Medicare Advantage programs and any direct contracts with federal agencies that provide health care services, like the U.S. Department of Veterans Affairs and the Federal Bureau of Prisons, Roffman said.

To completely avoid OFCCP jurisdiction and the costs and audits that come with it, hospitals may not have many options other than the politically risky choice to avoid services for government employees.

“OFCCP very much thinks that the greater part of the health care industry is subject to its requirements, and they're going to pursue that,” Roffman said. “It's going to be pretty difficult to avoid unless you make a concerted effort to be outside of the DOL's reach.”

The OFCCP has been particularly tenacious in trying to audit hospitals. Even after the 2012 NDAA passed, OFCCP continued to fight for jurisdiction over Tricare providers on other grounds, but lost in a November decision issued by the DOL’s administrative review board.

"I think it just reminds us all that the Tricare decision was a victory on one narrow way that OFCCP could assert
jurisdiction over health care providers," Roffman said.

OFCCP regulation is a particular concern for hospitals, which often invest very lightly in the administrative and human resources capability that would be needed to perform outreach, track applicants and hiring, and retain extensive documents for possible audits, Hoffman said.

And while the OFCCP has focused its attention on hospitals, the opinion rubber-stamps the agency’s broad definition of subcontractors, and could include, for example, companies that sell automotive parts without realizing that those parts may be used or resold in a government contract.

“There may be a whole class of companies out there who could be deemed to be subcontractors based on the OFCCP's vision of the world, who have no knowledge of that,” Springer said.

The hospitals are represented by Jeffrey W. Larroca, John J. Myers and Ryan J. Siciliano of Eckert Seamans Cherin & Mellott.

The case is UPMC Braddock et al., v. Harris, case number 1:09-cv-01210, in the U.S. District Court for the District of Columbia.

--Editing by Elizabeth Bowen and Jeremy Barker.