TRICARE and OFCCP Jurisdiction Over Providers

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Practice Area: Health Law & Health Industry Labor, Employment and Immigration & Labor and Employment

Recent decisions by the Department of Justice have changed the standard under which the Office of Federal Contract Compliance Programs ("OFCCP") exercises jurisdiction over hospitals and other providers in some circumstances.

Recent TRICARE Case
In the most recent case, a hospital's agreement to provide services to veterans under the TRICARE program of the Department of Defense was found to make the hospital a federal subcontractor subject to affirmative action requirements and OFCCP jurisdiction. In an earlier case the Administrative Review Board ("ARB") drew a distinction between hospital contracts with insurers, which do not create OFCCP jurisdiction, and hospital contracts with HMOs or other entities that provide medical services, which do create OFCCP jurisdiction. In the new case, the ARB found that the TRICARE program was not a contract to provide insurance but rather a contract to provide medical services, like an HMO. The key is that the hospital had "undertaken to perform a portion of the [prime contractor's] obligations under the TRICARE contract." *OFCCP v. Florida Hospital of Orlando*, Case No. 2009-OFC-00002 (Oct. 18, 2010).

What is the Law Now?
The recent cases make clear that the OFCCP is taking an aggressive approach to expand its jurisdiction over healthcare providers. However, there are still limits to OFCCP jurisdiction.

Grants and Federal Financial Assistance
Grants from the federal government are still not considered contracts that create affirmative action obligations or OFCCP jurisdiction. Several years ago, the OFCCP issued an internal directive confirming that receipt of Medicare reimbursement for services does not trigger affirmative action obligations or OFCCP jurisdiction. That has not changed.

Contracts With Health Insurance Providers (as opposed to HMOs)
As mentioned above, the OFCCP has previously ruled that healthcare providers' contracts with insurance companies do not create OFCCP jurisdiction, even if the insurance company contracts to provide insurance to federal employees. Note that the OFCCP draws a distinction between insurance companies and HMOs.

TRICARE and HMOs that Serve Government Employees

While the decision involving an HMO serving government workers has been appealed, and the TRICARE case is likely to be appealed, the OFCCP's current position stands. Healthcare providers that have contracts with TRICARE or with an HMO providing services to government employees are subject to affirmative action requirements and OFCCP jurisdiction. As the Department of Defense noted in the TRICARE case, affirmative action obligations and the prospect of an OFCCP audit are significant burdens that might discourage providers from contracting with TRICARE to provide services. Providers may determine that the most efficient response to the recent expansion of OFCCP jurisdiction is to end their relationships with TRICARE.

Incidental Relationships With Other Government Contractors

Healthcare providers' contracts with other businesses that are federal contractors will not necessarily trigger affirmative action obligations and OFCCP jurisdiction. The recent cases expanding OFCCP jurisdiction focused heavily on the fact that the prime contractors' obligations to the government required that they provide medical services, and the hospitals in question were providing those services. These cases do not provide a basis for OFCCP to assert jurisdiction over alleged subcontractors who are not performing any part of the prime contractor's obligations to the government. For example, a hospital that provides occupational health services for a manufacturing company that contracts with the federal government to provide airplane parts is not performing any portion of that manufacturing company's obligation to provide airplane parts. The prime contractor could provide airplane parts without the occupational health services of the hospital. The hospital, therefore, does not fit the definition of "subcontractor" and does not fall under the OFCCP's jurisdiction.

Conclusion

Most healthcare providers previously lumped TRICARE and HMOs in with Medicare and insurance providers and believed all were outside the scope of contracts that create OFCCP jurisdiction. The recent cases change that. Healthcare providers that have agreements with HMOs serving government employees (not health insurance providers) or with TRICARE (valued over $50,000) will need to comply with affirmative action requirements and submit to OFCCP audits. Beyond that, however, these cases do not establish greater OFCCP jurisdiction.

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