

Diagnosing the Risk: Affirmative Action Obligations for Health Care Providers

By Amy Conway and Stephanie Scheck

Health care providers have long lived in a world of acronyms, but in recent years, a new acronym has arisen in connection with many health care-related headlines: OFCCP. The OFCCP is the Office of Federal Contract Compliance Programs, a division of the U.S. Department of Labor that enforces various employment-related obligations for federal contractors and subcontractors. The extent to which health care providers are subject to the OFCCP's jurisdiction remains a hotly debated issue, and the stakes are high. Companies that have a federal contract or subcontract must comply with myriad obligations, from listing open positions with state workforce agencies to developing affirmative action plans to continually reviewing their hiring and compensation practices for potential bias.

Many health care organizations do not know that they are covered by the laws the OFCCP enforces. The attached article provides an introduction to understanding when a health care provider may be a covered federal contractor or subcontractor, the obligations for such a covered organization, and the risks associated with noncompliance.

What does the OFCCP do?

The OFCCP is tasked with enforcing three laws: Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). These laws collectively prohibit federal contractors and subcontractors from discriminating against employees and applicants for employment on the basis of race, color, religion, sex, national origin, status as a qualified individual with a disability, and protected veteran status.

A company is subject to the OFCCP's regulatory requirements if it has a contract or subcontract with the federal government in excess of \$10,000. Smaller contracts are aggregated to reach this amount and contracts of an indefinite amount will subject a company to OFCCP jurisdiction if the amount is reasonably expected to exceed \$10,000 in a year. While various requirements attach at the \$10,000 contract or subcontract level, the most onerous requirement - preparation and maintenance of an affirmative action program (AAP) - attaches when the contractor has 50 or more employees and a contract or subcontract of at least \$50,000. An AAP is a document that (among other things) lays out a company's commitment to equal employment opportunity and affirmative action in its workforce, provides a detailed analysis regarding the makeup of the current workforce, and sets goals for diversity improvement. In March 2014, the OFCCP revised its regulations to increase contractors' AAP obligations regarding veterans and individuals with disabilities.

The OFCCP is authorized to audit contractors for compliance with the laws the OFCCP enforces and the corresponding regulations. The OFCCP under the Obama Administration has been incredibly active. For its 2014 fiscal year, the OFCCP included 2,193 establishments on its [audit scheduling list](#).

When might a health care provider be a federal contractor or subcontractor?

Most health care providers will know if they are a federal contractor; this occurs when the provider has a direct contact with the federal government. For example, a hospital may have a direct contract with the U.S. Department of Veterans Affairs to provide health care services to veterans or with the U.S. Department of Health and Human Services to conduct research.

The more complicated question - and the subject of much litigation - concerns when a health care provider is a federal subcontractor. The OFCCP regulations for Executive Order 11246 define "subcontract" as follows:

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Any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

[41 C.F.R. § 60-1.3.](#)

There are a few clear lines - for now - regarding when a health care provider is not automatically a federal subcontractor. A health care provider is not covered by OFCCP regulations solely as a result of reimbursements the provider receives for services provided under the Federal Employee Health Benefits Program (FEHB). See *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-034, 2003 WL 244810, at *3-4 (Jan. 31, 2003). Similarly, a health care provider is not a federal subcontractor solely as a result of reimbursements it receives for medical care and services it provides to Medicare or Medicaid patients.

In May 2014, the OFCCP announced that it would impose a five-year moratorium on enforcement of affirmative action obligations that it believes are required of health care providers that participate in TRICARE in order to "provide outreach and technical assistance" given the "difference in understanding between the Department of Labor and some entities affiliated with the TRICARE community." [OFCCP Directive No. 2014-1 \(May 7, 2014\)](#). Importantly, however, the TRICARE moratorium does *not* relieve health care providers who would be covered contractors or subcontractors on other grounds from their affirmative action obligations.

Illustrative Case: UPMC Braddock v. Harris

The battle over the subcontractor definition in the health care industry is currently brewing in *UPMC Braddock v. Harris*. In March 2013, the U.S. District Court for the District of Columbia ruled that three plaintiff hospitals were subcontractors subject to OFCCP jurisdiction due to contracts they had with the University of Pittsburgh Medical Center Health Plan (the Health Plan). 934 F. Supp. 2d 238, 261 (D.D.C. 2013). The hospitals had entered into contracts with the Health Plan to provide medical services and supplies to patients enrolled in the Health Plan. Subsequently, the Health Plan entered into a contract with the U.S. Office of Personnel Management (OPM), under which the Health Plan would provide coverage for certain federal employees. Although the hospitals' original contracts with the Health Plan preceded the Health Plan's OPM contract, the hospitals renegotiated and renewed their contracts with the Health Plan after the OPM contract was executed.

The OFCCP sent letters to the hospitals, notifying them that they had been selected for a compliance review. The hospitals refused to participate, arguing that they were not subject to OFCCP jurisdiction. The U.S. District Court for the District of Columbia granted summary judgment to the OFCCP, rejecting four arguments the hospitals made in favor of non-coverage. First, the Court rejected the argument that the hospitals could not be subcontractors because the terms of their contracts with the Health Plan specifically stated that they were not subcontractors for purposes of OFCCP regulations. The Court noted that the parties cannot override the regulations by contract. Second, the Court rejected the argument that the hospitals were not subcontractors because they were providing "personal services," and not "nonpersonal services" as required by the regulations, finding instead that the hospitals provided nonpersonal services because their personnel "were neither in an employer-employee relationship with UPMC nor under the supervision and control that an employer would exercise over its employees." Third, the Court rejected the argument that the services the hospitals provided were not "necessary to" the Health Plan's contract with OPM. The Court found that the provision of medical services was a "critical component" of the Health Plan's contract with OPM, and the hospitals' services were, therefore, necessary to the Health Plan-OPM contract. Finally, the Court rejected the hospitals' argument that they could not be subcontractors because they never consented to be bound by the laws OFCCP enforces.

UPMC Braddock demonstrates that health care providers can be subject to OFCCP jurisdiction merely by providing services under a covered health plan. It is imperative that health care providers understand whether the entities with which they contract have federal contracts of their own, so that the providers can make an informed choice as to whether to potentially subject themselves to affirmative action requirements. *UPMC Braddock* is currently pending on appeal before the U.S. Court of Appeals for the District of Columbia Circuit, with oral argument scheduled for September 2014.

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What obligations does a covered federal contractor or subcontractor have?

Like other companies, health care providers that have a contract or subcontract with the federal government need to comply with regulations enforced by the OFCCP. While listing all of a government contractor's obligations is beyond the scope of this article, it is important for health care providers to understand what obligations they are assuming if they accept government work through a contract or subcontract. Federal contractors' obligations include, but are not limited to:

- Including equal employment opportunity language in all job advertisements, purchase orders, and subcontracts for goods and services necessary to performance of the government contract. There are regulations governing what type of language must be used.
- Listing job openings with workforce agencies in each state in which the contractor has openings.
- Preparing and maintaining an AAP, which involves substantial compilation of data and analysis of workforce hiring and compensation practices.
- Establishing goals for hiring of women and minorities based on the relevant labor market, establishing a goal that 7% of each job group be comprised of individuals with disabilities, and establishing an 8.2% veterans' hiring benchmark.
- Inviting employees and applicants to self-identify as members of various protected classes at various states of the application process and employment relationship.
- Auditing internal practices on a regular basis to ensure no class-based disparities regarding hiring, promotion, retention, and compensation.

What should health care providers do to minimize their risk of facing the OFCCP's wrath?

Health care providers should review their relationships with other entities to determine whether the services they provide may subject them to OFCCP jurisdiction as a government subcontractor. Current contracts should be reviewed to determine whether they incorporate OFCCP regulations through language such as "the parties hereby incorporate the requirements of 41 C.F.R. § 60-1.4(a)(7), 29 C.F.R. Part 741, Appendix A to Subpart A, 41 C.F.R. § 300.5(a)(ii) and 41 C.F.R. § 60-741.5(a), if applicable."

Health care providers that contract directly with the federal government should ensure that they comply with the OFCCP's regulations. Health care providers who are or arguably are government contractors or subcontractors should consult legal counsel to assess the risks of non-compliance with OFCCP regulations. Even if a provider determines that the burden of full compliance outweighs the risk of non-compliance for their organization, it is better to at least understand that risk than to be surprised upon receipt of notice of an OFCCP audit.

Federal contractors or subcontractors who do not comply with the laws and regulations enforced by the OFCCP may face cancellation or suspension of their contracts and ineligibility for future government contracts. Further, if the OFCCP finds that a federal contractor or subcontractor engaged in discriminatory practices, it can seek monetary damages and/or injunctive relief on behalf of affected applicants and employees. The most recent four settlements touted on the [OFCCP's website](#) total more than \$2.7 million.

Contact Us

For more information on evaluating whether a health care-related organization is a covered contractor or subcontractor or for other affirmative action compliance assistance, please contact the attorneys listed below or your usual Stinson Leonard Street contact:



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