A Timely Analysis of Legal Developments

ASAP®

In This Issue:

November 2010

A Department of Labor Administrative Law Judge recently held that a hospital participating in, and receiving more than $50,000 in reimbursement from, the Department of Defense's TRICARE program was a federal government subcontractor, and thus required to comply with federal affirmative action regulations required by the Office of Federal Contract Compliance Programs (OFCCP).

ALJ Finds Hospitals Receiving More than $50,000 in TRICARE Reimbursement Subject to OFCCP Regulations

By Alissa Horvitz and Joshua Roffman

Department of Labor (DOL) Administrative Law Judge (ALJ) Tureck recently held in *OFCCP v. Florida Hospital of Orlando*, 2009-OFC-02 (Oct. 18, 2010) that a hospital that participated in, and received more than $50,000 in reimbursement from, the Department of Defense's TRICARE program was a federal government subcontractor, and thus was required to comply with the affirmative action regulations promulgated by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

The OFCCP's affirmative action regulations: (1) require the preparation of annual affirmative action plans for women and minorities, certain veteran categories, and individuals with disabilities; (2) impose extensive and complicated record-keeping obligations for applicants and hires; and (3) require all non-executive vacancies being filled with external candidates to be listed with state workforce agencies, among other obligations. The OFCCP also conducts random compliance audits of covered government contractors, which often take years to complete.

TRICARE is the Department of Defense's (DOD) program that pays for the medical benefits of active duty and retired military personnel and their families. DOD has three direct contractors that administer the TRICARE program – Humana Military Health System, TriWest and HealthNet – and these direct contractors, in turn, enter into contracts with hospitals and other medical providers to provide medical care and supplies to military personnel and their family members covered by TRICARE. The TRICARE administrator and direct contractor in the *Florida Hospital of Orlando* case was Humana Military Healthcare Services, Inc. (HMHS). When the hospital resisted OFCCP's efforts to initiate an audit, claiming it was not a covered government contractor, the matter ultimately came before the DOL ALJ.

The issues before the ALJ in that case were:

1. whether a hospital's contract with HMHS under the TRICARE program was a federal subcontract thereby subjecting it to OFCCP affirmative action regulations because the hospital's contract was either: (a) necessary to the performance of HMHS's direct contract with TRICARE; or (b) required the hospital to perform any portion of HMHS's obligation under its direct contract with TRICARE; and

Littler
Employment & Labor Law Solutions Worldwide

2. whether the DOD's assertion that TRICARE payments were federal financial assistance (not contract payments) trumped the DOL's opinion that the payments were pursuant to a federal contract.

The ALJ concluded that hospitals that participate in the TRICARE program are subcontractors because they assume the performance of part of HMHS's obligation in its contract with the DOD. The ALJ also concluded that TRICARE payments were not federal financial assistance and thus were subject to regulatory obligations applicable to federal contracts and subcontracts.

The Medicare Directive of 1993

There has long since existed an OFCCP directive, published in 1993, in which the OFCCP resolved the question whether Medicare or Medicaid reimbursement would subject hospitals to its jurisdiction. OFCCP's 1993 directive concluded that, because Medicare and Medicaid are programs of federal financial assistance, and not contracts, OFCCP had no jurisdiction over hospitals receiving reimbursement.

The Recent Enforcement Actions Involving Bridgeport Hospital and Braddock Hospital

In addition to the Medicare directive, there have been two enforcement actions that forced hospitals again to confront the issue of OFCCP jurisdiction and laid some of the groundwork for the Florida Hospital of Orlando case.

The first case, *OFCCP v. Bridgeport Hospital*, 1997-OFC-01 (Jan. 21, 2000), held that hospitals and medical providers receiving insurance reimbursement under the Federal Employees Health Benefit Program (FEHBP) were not subcontractors. In that case, Blue Cross held the direct contract with the Office of Personnel Management (OPM). The DOL's Administrative Review Board (ARB) observed that the direct contract did not require Blue Cross to provide medical services directly to federal employees under the FEHBP. When Bridgeport Hospital rendered medical services to FEHBP beneficiaries, and was reimbursed by Blue Cross, the ARB held that the hospital's provision of medical services did not make the hospital a federal subcontractor because the hospital's services were not necessary to the direct contractor's insurance and reimbursement relationship with the federal government.

Following this ruling, the OFCCP issued a directive addressing FEHBP-type arrangements. The *Bridgeport* directive states that "health care providers having a relationship with FEHBP participants are not covered under the OFCCP's programs based solely on that relationship." It reiterates the Solicitor of Labor's advice that the "OFCCP cannot establish subcontractor coverage of hospitals, pharmacies or other medical care providers based on the existence of prime contracts with Blue Cross or other FEHBP providers."

That directive was very broadly written, and, although it arose out of the Blue Cross contract with OPM, the OFCCP's policy pronouncement was not limited to that situation.

UPMC Braddock

The FEHBP program came to the forefront again in *OFCCP v. Braddock*, 2007-OFC-01 (May 29, 2009), this time arising out of a direct contract that UPMC Health Plan (an HMO) negotiated with the OPM.

The ARB held in *UPMC Braddock* that participation in a HMO under the FEHBP was necessary to the performance of the contract because the HMO, unlike the Blue Cross insurer, contracted with the OPM to provide actual medical services. Thus, hospitals and medical providers – like Braddock Hospital – that performed medical services as part of an FEHBP HMO were federal subcontractors on the direct contract to provide medical services.

What made that case troubling from a legal and policy perspective is that the Federal Acquisition Regulations that govern OPM's contracts with health plans, hospitals, and medical suppliers expressly and explicitly exclude hospitals and medical suppliers from the definition of subcontractor.[1] One executive agency of the federal government published regulations excluding the hospitals from these obligations (OPM), and the other executive agency has asserted jurisdiction (OFCCP), and the hospitals are caught in between. Moreover, OFCCP's *Bridgeport* directive should have exempted the hospitals in *UPMC Braddock* as that directive explicitly exempted "health care providers having a relationship with FEHBP participants" and did not distinguish between HMOs and insurance arrangements.

UPMC Braddock is on appeal to the U.S. District Court for the District of Columbia.

Florida Hospital of Orlando

In the latest decision, *Florida Hospital of Orlando*, the DOD's TRICARE Management Activity (TMA) office told the OFCCP that it views its TRICARE program to be federal financial assistance. TMA further opined that it would be unable to develop as extensive and comprehensive a network of health providers if these providers were obligated to comply with these additional regulations.

Not surprisingly, Florida Hospital of Orlando tried to position its relationship with HMHS and TRICARE as one of federal financial assistance and reimbursement, but the ALJ rejected those arguments.

In addressing the TRICARE situation, the ALJ concluded that TRICARE, like the HMO contract in *Braddock*, is a program to provide actual medical services, rejecting the Department of Defense's view of its own program as one of federal financial assistance. The ALJ agreed that Medicare and Medicaid were insurance arrangements, and that Medicare and Medicaid were factually similar to *Bridgeport Hospital,* but that the TRICARE arrangement in *Florida Hospital of Orlando* was factually similar to the HMO in *UPMC Braddock*.

From a policy perspective it is odd that participating in an HMO under the FEHBP implicates OFCCP obligations, but that receiving insurance payments under the FEHBP does not. Similarly, it is odd that receipt of payments under Medicare and Medicaid would be considered federal financial assistance, but that receipt of payments under the TRICARE program for military personnel would not be.

Moreover, it is clear that the Department of Labor has no intention of deferring to the opinions of OPM or the DOD as to whether the affirmative action obligations were intended to be imposed on the health care industry.

Especially at a time when the federal government is emphasizing making health care more affordable and increasing the federal government's role in regulating the payment of health services, it seems that the Department of Labor's position is out of step with much broader federal policy considerations related to the health care industry. Yet, until specific laws are passed that exempt health care providers from the laws and regulations enforced by OFCCP, the Department of Labor's position likely will prevail. Indeed, if these cases stand for one thing, it is that another federal agency cannot contractually excuse a company from an obligation that exists under the Department of Labor's regulations. Health care providers and suppliers cannot rely on such contract terms or OPM's separate regulation at 48 C.F.R. Section 1602.170-14 to excuse compliance.

Alissa Horvitz and Joshua Roffman are Shareholders in Littler Mendelson's Washington, D.C. office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Horvitz at ahorvitz@littler.com, or Mr. Roffman at jroffman@littler.com.

---

[1] 48 C.F.R. § 1602.170-14.