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# Affirmative Action Requirements Come to Hospitals: Are You in Compliance?

## An Overview of OFCCP and What Steps Need to Be Taken by Hospitals and Other Providers

*Hospitals and other large health care providers must implement affirmative action plans, applicant tracking systems, and various processes if they receive at least $50,000 per year under a contract to provide medical services, directly or indirectly, for the federal government.*

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Historically, many hospitals and other large health care providers have operated on the assumption that they did not need to comply with federal affirmative action and equal employment opportunity regulations enforced by the Office of Federal Contract Compliance Programs (OFCCP), which is a part of the U.S. Department of Labor. These providers made this assumption because they did not have direct contracts with the federal government, and any contracts they did have were not, they believed, connected in any way to the federal government. Alternatively, if an indirect connection were known, the contract related simply to insurance benefits and thus was not covered by the OFCCP, or the contract expressly stated it was not covered by the laws the OFCCP enforced.

OFCCP, however, has been attempting for years to assert jurisdiction over these health care entities, not as direct federal contractors but as federal subcontractors. In October 2010, OFCCP succeeded in establishing that the Florida Hospital of Orlando was a federal subcontractor, despite the argument that it simply received TRICARE insurance benefits, and despite the fact even the Department of Defense considered the contract simply federal financial assistance, which would not constitute a contract covered by OFCCP. Thus, Florida Hospital was required to comply with the discrimination and affirmative action regulations OFCCP enforces.

As a result, it is critical for hospitals and large health care providers to review their contracts to determine whether they, too, are subject to the jurisdiction of the OFCCP and must comply with affirmative action and related legal requirements.

This article provides background on the OFCCP and the laws it enforces, reviews the recent circumstances in which OFCCP has attempted to assert hospitals are federal subcontractors, and provides guidance on next steps hospitals and other large health care providers should take.

## OFCCP and the Laws It Enforces

OFCCP enforces three basic laws relating to discrimination and affirmative action: Executive Order 11246 (EO 11246); Section 503 of the Rehabilitation Act (Section 503); and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). In general terms, these laws must be followed by those who have contracts with the federal government to provide goods and services, as well as those who are deemed subcontractors to such contracts.

A "subcontract" is a contract which is necessary, in whole or in part, to the performance of the original federal contract. A "subcontract" is also a contract under which any portion of the original federal contractor's obligation is undertaken, performed, or assumed.

EO 11246, Section 503, and VEVRAA impose varying requirements, depending on the number of individuals employed and the dollar value of the contract or subcontract. For example, if an entity has 50 employees and receives $50,000 under a federal contract or subcontract, the employer is required to develop and monitor an affirmative action plan for women and minorities, track detailed information about applicants for employment, engage in outreach efforts for veterans and disabled individuals, and analyze the compensation it provides to employees for possible improper disparities.

OFCCP typically enforces these three laws by first conducting a "desk audit," when it reviews materials that are required to be maintained by the federal contractor or subcontractor, such as the affirmative action plan. The desk audit then may lead to an onsite audit, as well as an offsite audit. In its audits, OFCCP is looking for compliance with legal obligations, as well as purported discrimination in employment practices. If OFCCP concludes that violations exist, OFCCP may seek compliance, may seek monetary damages on behalf of alleged victims, and ultimately may seek debarment, *i.e.*, a canceling of the federal contract or subcontract.

## A Critical Distinction: Does the Prime Contract Concern Provision of Insurance Benefits or Medical Services?

In 2003, OFCCP attempted to assert jurisdiction over Bridgeport Hospital, arguing that Bridgeport Hospital was a federal subcontractor as a result of its contract with Blue Cross and Blue Shield, which in turn had a contract with the federal government's Office of Personnel Management (OPM). In *Bridgeport Hospital*, the Department of Labor's Administrative Review Board (ARB) rejected OFCCP's assertion of jurisdiction.[1] The ARB concluded that Blue Cross and Blue Shield was a federal contractor and noted that the primary federal contract was to provide insurance benefits; however, Bridgeport Hospital provided medical services, not insurance benefits, under its contract with Blue Cross and Blue Shield.

The medical services Bridgeport Hospital provided pursuant to its contract with Blue Cross and Blue Shield were not necessary to the performance of Blue Cross and Blue Shield's contract to provide health insurance to OPM. As a result, Bridgeport Hospital was not deemed a federal subcontractor and was not obligated to comply with the laws enforced by OFCCP.

## Provision of Medical Services under an HMO Agreement

Despite the *Bridgeport Hospital* decision, OFCCP continued its efforts to assert ju-

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risdiction over hospitals and, in 2009, succeeded when it used a different approach to coverage. In *UPMC Braddock*, OFCCP focused on a primary federal contract that obligated the contractor to provide medical services, rather than insurance benefits, and obtained its desired result.

The ARB concluded that the University of Pittsburgh Medical Center (UPMC) hospitals were, contrary to their arguments, subject to the jurisdiction of the OFCCP as federal subcontractors.[2] The ARB relied on each hospital's health maintenance organization (HMO) contract with the UPMC Health Plan, through which the hospitals agreed to provide medical products and services to federal government employees covered by the Health Plan. The Health Plan, in turn, had a contract with OPM to provide medical services.

Because the primary federal contract was for the provision of medical services, and the hospitals provided, through their HMO contracts, medical services, the ARB concluded the hospitals were covered federal subcontractors. In doing so, the ARB disregarded the fact that the UPMC-OPM contract specifically excluded providers such as UPMC from the definition of a federal subcontractor, noting that parties cannot, by contract, invalidate the requirements imposed by the laws enforced by OFCCP.

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## Provision of Medical Services under an Insurance-related Agreement: The Florida Hospital Case

While the *UPMC Braddock* decision resulted in some hospitals concluding they were federal subcontractors, most hospitals still felt safe from OFCCP jurisdiction. On October 18, 2010, however, this changed, when OFCCP was successful in asserting jurisdiction over a hospital in a circumstance the hospital argued was simply the receipt of insurance benefits.

In *Florida Hospital of Orlando*, Administrative Law Judge (ALJ) Tureck concluded that Florida Hospital of Orlando was required to comply with the laws enforced by OFCCP.[3] Florida Hospital's connection to the federal government was attenuated, but sufficient, for jurisdiction. Specifically, Florida Hospital had contracted with Humana Military Healthcare Services to provide medical services to beneficiaries designated as eligible to receive benefits under TRICARE, the Department of Defense's health care program for active and retired military and their families. Humana Military Healthcare Services, in turn, had contracted with TRICARE to provide networks of health care providers who would provide services to TRICARE beneficiaries. Florida Hospital received TRICARE insurance benefits for the medical services it provided.

Florida Hospital put forth multiple arguments why it should not need to comply with the laws enforced by OFCCP – all of which were rejected by the ALJ. First, Florida Hospital contended that it was not a subcontractor to the primary federal contract. The ALJ found, however, that the Florida Hospital contract with Humana, to provide medical services, undertook to perform part of the obligations of the contract between Humana and the Department of Defense (to provide medical services). Second, Florida Hospital contended that its receipt of TRICARE dollars simply constituted federal financial assistance, similar to Medicare, and pointed out that the receipt of federal financial assistance had consistently been held not to constitute a federal contract or subcontract for purposes of OFCCP jurisdiction. The ALJ concluded otherwise.

The ALJ noted that Medicare is an insurance program, whereas TRICARE is a program to provide health care services. Finally, the ALJ disregarded the Department of Defense's own characterization of TRICARE as a federal financial assistance program, concluding that the regulations relating to whether something constitutes a contract or subcontract for purposes of OFCCP jurisdiction take precedence.

## Effective Date

As explained above, OFCCP has contended for years that hospitals and other health care providers were federal subcontractors. There are now legal decisions that agree with OFCCP's position, including the circumstance many thought would not be covered, *i.e.*, as a result of providing services and receiving TRICARE insurance payments. There is no "safe harbor" period during which a hospital or other health care provider can assert it need not yet be in compliance. Put simply, the effective date was yesterday.

## Conclusion

Hospitals and other large health care providers should take immediate steps to determine whether their contracts to provide medical services are, directly or indirectly, connected to a contract with the federal government for the provision of medical services. If such a contract exists, and regardless of any language in the contract that purports to exclude the contract from coverage, the hospital or other health care provider likely will be deemed a federal subcontractor and will be obligated to come into compliance with the laws enforced by the OFCCP.

**Endnotes:**

1. *OFCCP v. Bridgeport Hospital*, 97-OFC-1, ARB Final Decision and Order (1/31/03).
2. *OFCCP v. UPMC Braddock* (DOL ARB No. 08-048, 5/29/09).
3. *OFCCP v. Fla. Hosp. of Orlando* (DOL OALJ No. 2009-OFC-00002, 10/18/10).

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