

THOUGHT LEADERSHIP

LEGAL UPDATES

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OFCCP Compliance

Recent OFCCP Developments

The Office of Federal Contract Compliance Programs (OFCCP) has been very busy the past few months, and anticipates heightened activity in the months to come. Areas of focus include asserting jurisdiction over healthcare entities, a misclassification initiative, new affirmative action regulations and significant enforcement efforts.

Healthcare: The Battle for OFCCP Coverage Continues

In October, we sent out an alert concerning the decision of *OFCCP v. Florida Hospital of Orlando*, ALJ case no. 2009-OFC-00002 (October 18, 2010). The *Florida Hospital* case concluded that certain contracts with TRICARE resulted in jurisdiction by OFCCP over the hospital. While the *Florida Hospital* case is currently on appeal, and many in the healthcare community are fighting coverage, OFCCP is, as we predicted, marching full steam ahead. On December 16, 2010, OFCCP issued Directive No. 293, which outlines in detail OFCCP's position on coverage of healthcare providers and insurers. Directive No. 293 confirms that a case-by-case analysis will be necessary to determine coverage of a healthcare provider or insurer, and the analysis will include a number of key points, including: (1) when a prime contractor subcontracts the performance of part of its obligations to the government, or for necessary supplies or services, the requisite contractual relationship for coverage exists, and OFCCP will have jurisdiction over the subcontractor; (2) when a subcontractor enters into further contracts, the requisite contractual relationship for coverage exists, and OFCCP will have jurisdiction over the subsidiary subcontractors; (3) insurance reimbursement agreements, which are solely for the provision of insurance and not for healthcare services, will not result in coverage; (4) use of the term "contract" or "subcontract" in the parties' agreement is irrelevant; and (5) the parties cannot contractually alter, limit or defeat obligations enforced by OFCCP.

As some of those in the healthcare community continue to dispute coverage, we anticipate the critical issue in these cases will be whether the subcontractor's obligations are deemed "necessary" to the performance of the prime contract.

One other statement in the Directive is important to point out, as it will be new news for the healthcare community. OFCCP now explicitly contends it may have coverage under certain Medicare programs, specifically, under Medicare Part C (Medicare Advantage) and Part D (prescription drugs). OFCCP's rationale is that a subcontract in these circumstances is not simply for reimbursement of medical and hospital Medicare funds, but instead, for the provision of required health services, prescription drug programs or claims processing services. Analysis of OFCCP coverage based on Medicare Part C and D will follow the general, OFCCP healthcare coverage analysis, set forth above.

OFCCP Looking for Misclassified Workers

In its FY 2012 budget justification, released on February 14, 2011, OFCCP stated it will move forward on a misclassification initiative, geared toward identifying workers who are misclassified as contractors. While OFCCP has historically confined itself to enforcing the three laws for which it has primary responsibility (Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, all as amended), it has, on occasion, expanded its reach, such as looking at I-9 compliance. OFCCP has now announced it will be training its compliance officers to look for workers misclassified as contractors, as part of the Obama administration's push to address misclassification of employees. The classification of a worker as a contractor or an employee is highly complex and nuanced, and we encourage government contractors to take this opportunity to review their worker classifications, and ensure their classification decisions are appropriate.

New Affirmative Action Regulations on the Horizon

OFCCP has stated it will issue new proposed regulations in three areas: under VEVRAA; Section 503; and for construction contractors. Specifically, OFCCP is considering, among other things, proposing goals for veterans and the disabled. OFCCP is also planning to update the utilization goals for construction contractors for the first time since 1980, and may impose additional requirements on construction contractors. Since OFCCP has already issued Advanced Notices of Proposed Rulemaking for its upcoming regulations, look for the new regulations to be published later this year.

Increased Enforcement Efforts: Systemic Sex Discrimination in the Food Industry and Expanded Desk Audits

The food industry has been reported as one of OFCCP's current targets, and its recent administrative activity confirms this is the case. For example, earlier this month, OFCCP settled a claim of systemic sex discrimination in hiring against Green Bay Dressed Beef LLC for \$1.65 million. In December,

OFCCP filed an administrative complaint against Nash Finch Co., asserting systemic sex discrimination in hiring. And in October 2010, OFCCP settled a claim of systemic sex discrimination in hiring against Gruma Corp. for \$167,000.

The food industry, and systemic sex discrimination, are not the only OFCCP targets, however. In November 2010, OFCCP filed an administrative complaint against Meyer Tool Inc., claiming systemic race discrimination in hiring. Additionally, OFCCP announced this month it would be conducting more comprehensive desk audits. While acknowledging this might reduce the overall number of audits conducted, OFCCP wants to delve more deeply into the information it receives from contractors. As OFCCP stated on February 14, 2011, it will no longer be focusing primarily on low wage, hiring discrimination cases. Instead, in its expanded audits, OFCCP would be looking for, among other things, compensation disparities, vigorous recruitment of veterans, and employment practices that hinder the employment and promotion of the disabled. OFCCP's new approach reinforces the need to make sure your affirmative action plans and other obligations under the law are in order.

What This Means to You

Healthcare entities should review each of their contracts and, in consultation with counsel, determine whether they may be subject to OFCCP's assertion of jurisdiction and how best to proceed. More generally, federal contractors should take the opportunity to review their policies, processes and affirmative action plans to ensure compliance with all laws, specifically including OFCCP's stated areas of interest.

Contact Info

If you have questions about these issues, please contact your Husch Blackwell attorney or Molly Kurt at 816.983.8229.

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