LEGAL UPDATES

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UPMC Braddock: Has Anything Changed with OFCCP's Jurisdiction over Subcontractor Hospitals?

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On March 30, 2013, the U.S. District Court for the District of Columbia issued *UPMC Braddock et al. v. Harris*, a long-awaited decision in the trilogy of cases in which OFCCP has attempted to assert jurisdiction over hospitals as covered federal subcontractors. The district court affirmed the decision of the U.S. Department of Labor's Administrative Review Board, finding that the hospital is a covered federal subcontractor. The case is notable because this is the first time a federal district court has ruled on these issues.

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246, which requires equal employment and affirmative action for federal contractors and "covered subcontractors." Covered subcontractor status attaches when the subcontractor either 1) stands in the shoes of the direct contractor, or 2) provides services that are necessary to the performance of the direct contract. The OFCCP has repeatedly tried to use "covered subcontractor" status to assert jurisdiction over hospitals that provide medical care through a subcontract with a government contractor. *UPMC Braddock* represents the agency's latest attempt to broadly define the scope of its jurisdiction.

The direct contract at issue in *UPMC Braddock* provided for the maintenance of an HMO, the UPMC Health Plan. This health plan contracted with the U.S. Office of Personnel Management (OPM) and agreed to establish a health maintenance organization (HMO) and offer coverage for medical services for federal employees. In turn, UPMC Braddock and two other University of Pittsburgh Medical Center (UPMC) system hospitals contracted with the Health Plan HMO to provide *medical services* to individuals participating in the HMO.

At dispute in the case was whether the UPMC Health Plan's direct contract for the maintenance of an HMO was an insurance agreement or an agreement to provide medical services. If the former, the hospital's services under the subcontract were neither the same as the direct contractor nor necessary to the direct contractor's performance and, therefore, the hospital would not qualify as a covered subcontractor. If the latter, however, the subcontractor hospital would be standing in the shoes of the direct contractor and would be a covered subcontractor.

Affirming the decision of the U.S. Department of Labor's Administrative Review Board (ARB), District Judge Paul Friedman determined that the direct contract between OPM and the UPMC Health Plan was an agreement to provide medical services. In a lengthy examination of the nature of an HMO compared with an agreement to provide insurance services, the judge concluded that the party maintaining an HMO does more than just provide insurance services; it agrees to deliver actual medical care to federal employees. Therefore, the subcontractor hospital stands in the shoes of the direct contractor as a covered subcontractor when it too delivers medical services.

The earliest case in the trilogy, *Bridgeport Hospital*, reached the opposite result. In this case, Bridgeport Hospital contracted with Blue Cross/Blue Shield (BCBS), which in turn contracted with the Office of Personnel Management. The agreement between BCBS and the OPM was determined to be one for insurance services only, and the hospital was not a covered subcontractor.

The other recent case in the trilogy, *Florida Hospital*, is on appeal within the Department of Labor and involves different questions about the government contract at issue. In this case, the DOL's Administrative Review Board determined that the nature of the prime contract between the Department of Defense's Tricare program and Humana Military Health System (HMHS) was to *develop a network* of healthcare providers. Florida Hospital, in turn, contracted with HMHS to provide *medical services*. Because the purpose of the two contracts was different, Florida Hospital was neither standing in the shoes of HMHS nor providing necessary services to the direct contractor, and the hospital was not a covered subcontractor. The OFCCP has filed a request for reconsideration of the decision. Regardless of the outcome, we expect the losing party will seek redress in the U.S. District Court.

Reading the three cases together, we conclude the following:

A direct contract for the provision of *insurance services* from which a hospital subcontracts to provide *medical services* will not cause the hospital to qualify as a "covered subcontractor" (*Bridgeport Hospital*).

A direct contract for the *maintenance of an HMO* from which a hospital subcontracts to provide *medical services* to the HMO will cause the hospital to qualify as a "covered subcontractor" (*UPMC Braddock*).

A direct contract for the *maintenance of a network of healthcare providers* to serve Tricare beneficiaries from which a hospital subcontracts to provide *medical services* to the network will not cause the hospital to qualify as a "covered subcontractor" (*Florida Hospital*).

These cases help define the scope of OFCCP jurisdiction when it is applied indirectly to subcontractors of government contracts. However, many hospitals have direct contracts with the federal government that create OFCCP jurisdiction. For example, a direct contract with the Veterans Administration to treat patients from the local VA hospital will create OFCCP jurisdiction over the hospital. A contract with a federal agency to perform certain medical testing or research can also create OFCCP jurisdiction, but independent research that is simply funded in whole or in part by a federal grant is not subject to OFCCP oversight. Hospitals that are subject to OFCCP authority must maintain a written affirmative action plan, submit to OFCCP compliance reviews, and engage in a variety of other responsibilities as a federal contractor.

What This Means to You

Hospital subcontractors should thoughtfully inquire about the nature of the direct contracts related to the medical services they provide to various federal employees, members of the military and their dependents. If the direct contract is an HMO, hospitals should be prepared to fully comply with OFCCP's equal employment and affirmative action regulations.

Although the district court merely affirmed the Department of Labor's Administrative Review Board decision in *UPMC Braddock*, query whether OFCCP will be emboldened by this victory and attempt to assert jurisdiction over more hospitals, regardless of the HMO nature of the direct government contract. Given OFCCP's long desire for jurisdiction over acute-care hospitals, such a result would not be surprising.

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