Could An Affirmative Action Plan Be In Your Future?

Insights
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No one would deny that labor and employment law presents a cornucopia of challenges for healthcare executives. Presently, you must contend with employee concerns caused by difficult economic times along with new laws, such as the Lilly Ledbetter Fair Pay Act. On the horizon are possibly even more daunting changes to the legal landscape, such as the Employee Free Choice Act (EFCA) – frequently referred to as the card check law. Added to these challenges is the very real possibility that a great many more hospitals and healthcare organizations will have to adopt written affirmative action plans.

The Department of Labor's Office of Federal Contracts Compliance Programs (OFCCP), the agency enforcing affirmative action regulations, has for many years looked for ways to expand its jurisdiction over healthcare. These regulations require written affirmative action plans for employers with at least 50 employees who hold a single contract or subcontract of at least $50,000 to provide goods or services to the federal government. Obviously, if they have such a contract or subcontract, many healthcare organizations will easily fall within these parameters.

Having a written affirmative action plan involves not just the expense of adopting a plan and updating it on a yearly basis, but also requires much more detailed and expansive recordkeeping along with the distinct possibility of being faced with exhaustive reviews by the OFCCP of an organization's employment practices and decisions as well as its compensation systems. These reviews can and do result in the imposition of hiring goals, payment of back wages and adjustments to compensation.

What's The Basis For A Plan?
Receiving Medicare or Medicaid funds has long been considered *not* to be sufficient grounds for coverage, as they are not considered to be contracts for goods or services. As a result, the OFCCP has looked for some other basis to assert jurisdiction.

One such basis was a hospital's receipt of reimbursements from insurance companies, such as Blue Cross, which held a prime contract under the Federal Employee's Health Benefits Program (FEHBP). The theory was that entering into such contracts with Blue Cross made hospitals and healthcare organizations subcontractors on the prime contract, and thus covered by the affirmative action regulations.

That issue was decided against the OFCCP in a 2003 case involving Bridgeport Hospital. There, the OFCCP argued that the Hospital was a subcontractor based on its contracts with Blue Cross that, in

turn, had a prime contract with the federal government to provide medical insurance for federal workers. The OFCCP began enforcement procedures when the Hospital denied coverage.

The U.S. Department of Labor found that the Blue Cross contract did not obligate Bridgeport to provide medical services to policyholders, but rather to reimburse policyholders for medical care costs. That relationship was not a contract for goods or services and the OFCCP was cautioned that it could not establish sub-contractor coverage for hospitals, pharmacies or other medical care providers based upon the existence of a contract with Blue Cross or other FEHBP providers.

Not surprisingly, the OFCCP did not abandon the effort to assert jurisdiction over healthcare providers, but merely adopted a different basis. Following the Bridgeport Hospital decision, the OFCCP began asserting jurisdiction over healthcare providers, based upon contracts with entities holding a contract to put into operation health maintenance organizations for federal employees. The OFCCP began arguing for coverage based upon contracts with Tricare to provide medical services for uniformed service members and their dependents, as well as other organizations providing HMOs for federal employees.

This approach has now been tested by three hospitals in Pennsylvania, arguing that they were not covered. The OFCCP again started enforcement proceedings, but this time an Administrative Law Judge in the Department of Labor found in favor of the OFCCP. In a decision last year, the ALJ concluded that the Bridgeport Hospital decision did not apply since the prime contractor, UPMC, had a contract to provide medical services to federal employees through HMOs, and the hospitals, in turn, had a contract with UPMC to provide medical services to the patients. This decision is, of course, subject to appeal, but on the strength of this decision we expect the OFCCP to continue its efforts to cover even more of the healthcare industry.

The Bottom Line

What does this mean for healthcare executives whose organizations do not currently have written affirmative action plans? First, you need to determine if you have contracts with organizations setting up health maintenance organizations for federal government employees or with Tricare, providing care for military personnel and their dependents. If so, and you otherwise meet the 50 employee and $50,000 standards, then you should begin to explore the costs of adopting any obligations imposed by written affirmative action plans and determine whether and to what extent you wish proactively to comply with the regulations. If you would like our help in guiding you through this process just give us a call.