Court Upholds OFCCP's Jurisdiction Over Healthcare Providers

Insights
5.01.13

A federal district court has confirmed the position of the Office of Federal Contract Compliance Programs (OFCCP) finding that three hospitals providing medical services to U.S. government employees, and receiving payments from a health plan for these services, are subject to the OFCCP's jurisdiction.

In light of the decision, hospitals must review contracts and determine if they are first-tier subcontractors and subject to the OFCCP's jurisdiction. As you'll see, a hospital can be a federal contractor even if there is no contractual provision alerting the hospital to this status. *UPMC Braddock v. Harris.*

Background
The case involves the University of Pittsburgh Medical Center (UPMC) Health Plan, which has a federal contract with the Office of Personnel Management (OPM) to provide health services to federal employees. Three hospitals, UPMC Braddock, UPMC South Side and UPMC McKeesport, contracted with UPMC Health Plan to provide medical services for persons insured under the UPMC Health Plan. The OFCCP sent scheduling letters proposing to conduct compliance reviews to the hospitals, which all denied being subcontractors.

Subsequently, the OFCCP filed an administrative action with the U.S. Labor Department. An administrative law judge ruled that the hospitals were federal subcontractors, and the Administrative Review Board (ARB) upheld the ALJ's opinion. The ALJ and the ARB reasoned that the hospitals provide medical services to U.S. government employees, fulfilling the contract between the OPM and UPMC Health Plan. Thus, the hospitals' participation was necessary to the contract performance and the Hospitals were subcontractors.

The Court's Decision
The federal district court for the District of Columbia agreed with the ALJ and ARB, rejecting the hospitals' arguments. The hospitals argued first that they could not be federal contractors because the OPM's contract with the UPMC Health Plan excluded medical service providers as subcontractors. Similarly, they argued that since they did not voluntarily agree to be subcontractors, and had no knowledge that they would become subcontractors, they could not be federal contractors now.

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The district court held that neither the UPMC Health Plan or OPM could override federal law, which holds that subcontractors are subject to the OFCCP's jurisdiction. Further, the OFCCP's jurisdiction exists over subcontractors, regardless of whether the subcontractors intend to be under federal contracts or not.

Next, the hospitals argued that they were not subcontractors as they did not provide "non-personal services" as decided by the OFCCP's definitions. The hospitals argued that they provided "personal" medical services, which did not meet the OFCCP's definition. Again, the court sided with the OFCCP, holding that the term "non-personal services" did not refer to the interaction between the hospital and those it assisted under the contract. Instead, "non-personal services" refers to the relationship between the government and the employees of the subcontractor.

Finally, the hospitals asserted that they were in the same position as the hospital in the 2003 case *OFCCP v. Bridgeport Hospital*. The *Bridgeport* case held that healthcare providers of medical services and supplies to federal health-insurance-program participants were not federal subcontractors, and thus not subject to affirmative action obligations. The district court quickly distinguished the cases.

In *Bridgeport* the OPM had contracted with Blue Cross/Blue Shield to provide health insurance to federal employees, and Bridgeport Hospital, in turn, contracted to receive reimbursement for health-insurance holders. Thus, the contract with Bridgeport Hospital was not for medical services and supplies. In contrast, the prime contract in the UPMC case requires UPMC Health Plan to provide the actual medical services, and the Hospitals agreed to provide the medical services.

What About Contracts Under TRICARE?

Section 715 of the National Defense Authorization Act (NDAA), enacted on Dec. 31, 2011, states that a "TRICARE managed support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies" when determining whether the network providers are federal contractors, subject to OFCCP jurisdiction.

On October 19, 2012, the ARB applied Section 715 of the NDAA retroactively in *OFCCP v. Florida Hospital of Orlando*, holding that a subcontract to provide medical services for a federal contractor that administers a network for TRICARE does not grant the OFCCP jurisdiction over the medical services provider. But while the five-judge panel agreed on the decision, two of the judges found that it was "debatable" whether the OFCCP could assert jurisdiction over the hospital for reasons other than those prohibited by Section 715.

So Are All Hospitals Subject To OFCCP Jurisdiction?

The decision resolves, at least momentarily, one of many current conflicts regarding the extent of the OFCCP's jurisdiction over healthcare providers. *UPMC Braddock* holds that hospitals providing medical services to fulfill a federal contract, held by another entity and the federal government, are first-tier subcontractors and subject to the OFCCP's jurisdiction. Ignorance is no defense – even if

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first-tier subcontractors and subject to the OFCCP's jurisdiction. Ignorance is no defense – even if the contract provides no notice, the current law finds hospitals subject to the OFCCP's jurisdiction, if the other requirements are met.

Additionally, while the OFCCP made clear in late 2010, that a healthcare provider is not a federal contractor by accepting insurance under Medicaid or Medicare Parts A and B, the OFCCP stated that it does have jurisdiction over those accepting payment under Medicare Parts C and D. Further, while the NDAA and the decision in *Florida Hospital* state that a hospital is not subject to federal-contractor status based on a subcontract to provide medical services to a prime-contract holder through TRICARE, the OFCCP is still not in agreement and may still argue this issue.

What is clear is that hospitals must proactively review current contracts to see if they would be considered a federal contractor or first-tier subcontractor by the OFCCP, or risk being found non-compliant in an OFCCP audit.

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