



Alerts

Federal Government "Clarifies" When Health Care Providers and Insurers Need an Affirmative Action Plan

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Hinshaw Health Law Alert

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which administers the federal government program that requires federal contractors to have an affirmative action plan (AAP), recently issued a directive which seeks to "clarify" when health care providers and insurers are required to have an AAP. The directive replaces prior ones issued in 1993 and 2003 and warrants a review by most health care providers and insurers as to whether they are required to have an AAP and will be subject to possible audits and other administrative actions by the OFCCP.

While the directive repeatedly states that each situation must be examined on a case-by-case basis, it does set forth broad guidelines that may impose AAP requirements on entities that were not previously subject to them.

Among the "**basic principles**" in the directive are:

- There must be a covered federal contract or subcontract for the OFCCP to have jurisdiction over the provider or insurer.
- A "covered contract" includes any agreement or arrangement that creates a covered contractual or subcontractual relationship between the parties. In other words, the term "contract" will be broadly interpreted.
- Reimbursements made pursuant to **Medicare Parts A and B** or from **Medicaid** are federal financial assistance and are **not** "covered contracts" which require an AAP.
- Federal health care program **grants** are **not** in and of themselves "covered contracts" under the OFCCP's jurisdiction.

To determine whether a "covered contract" relationship exists, the OFCCP will look at whether the health care provider, insurer or other type of company contracts with a federal government agency or federal health care program (Medicare; Medicaid; TRICARE (the health care program serving Uniformed Service members, retirees and their families worldwide); or the Federal Employees Health Benefits Program (FEHBP)) to provide specific services or supplies. As an example, simply receiving payments from health care insurers for providing services to individuals covered by such plans will likely not require the recipient to have an AAP, even if the individuals happen to be federal employees. But, in situations where a health care provider enters into an arrangement with one of these insurers to specifically provide a portion of the services that the insurer has agreed to undertake for a federal entity, then the OFCCP is likely to consider the provider a subcontractor subject to the AAP requirements.

An example of this latter situation occurred in a recent matter heard by a Department of Labor (DOL) administrative law judge, *OFCCP v. Florida Hospital of Orlando*, where the hospital had an agreement with Humana Military Healthcare Services (HMHS) to assume some of HMHS's responsibilities to provide health care services to TRICARE beneficiaries. Similarly, in another matter heard before a DOL administrative law judge, *OFCCP v. UPMC Braddock*, three hospitals were found to have a covered subcontract subject to the OFCCP's jurisdiction where they each had a health maintenance organization (HMO) contract with the UPMC health plan to provide medical products and services to federal government employees under a contract between the plan and the federal government. While both of these cases are currently in litigation, the directive indicates that the OFCCP will follow the holdings of these cases until such time as they deem them to be overruled by a higher authority.



Depending upon what arrangements health care providers have with Medicare Advantage (Part C) and Part D (prescriptions), the providers may or may not be required to have an AAP.

All contractual arrangements that involve providing health care services directly for federal employees should be reviewed to determine whether an AAP is required. The OFCCP has also taken an expansive view by stating that if a company is a covered contractor or subcontractor, then all of its establishment and facilities are subject to the OFCCP's regulations and requirements, regardless of where the contract is to be performed.

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