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A PROFESSIONAL LAW CORPORATION

CLIENT E-NEWSLETTER

SPECIAL BULLETIN

Office of Federal Contract Compliance Programs Provides New Regulatory Guidance to Healthcare Providers

On December 16, 2010, the OFCCP issued Directive No. 293 to provide guidance to healthcare providers and insurers for determining when their activities may give rise to a duty to prepare Affirmative Action Plans. Directive 293 supersedes two earlier Directives, numbers 189 and 262, which provided guidance to healthcare entities that receive reimbursement for medical services provided under Medicare Parts A and B and healthcare providers who provided medical services to participants in the Federal Employee's Health Benefits Program ("FEHBP"), respectively. The new Directive combines advice provided in the earlier Directives and supplements them by commenting on three recent cases involving OFCCP jurisdiction over hospitals:

OFCCP vs. Bridgeport Hospital, Arb. Case No. 00-234 (Jan. 31, 2003);
OFCCP vs. UPMC Braddock, Arb. Case No. 08-048 (May 29, 2009); and
OFCCP vs. Florida Hospital of Orlando, ALJ Case No. 2009-OFC-2 (Oct. 18, 2010).

Directive 293 confirms the longstanding OFCCP position that jurisdiction may be asserted over healthcare providers and insurers by means of (1) direct contracts with government agencies or (2) subcontracts between prime contractors and subcontractors (i) that are "necessary to the performance of the underlying contract" or (ii) in which the subcontractor assumes "any portion of the prime contractor's contractual obligation."

Direct (or Prime) Contracts

Regarding direct contracts, Directive 293 confirms that direct contracts between the federal government and healthcare providers for the provision of specific healthcare services or supplies to beneficiaries of government-run health plans are subject to OFCCP jurisdiction. Direct contracts generally fall into one or more of three categories: (1) contracts with a government agency to provide medical services or supplies in connection with a federally-run healthcare program (e.g., the Veterans Administration, the Bureau of Prisons, FEHBP, U. S. Family Health Plan); (2) contracts to underwrite insurance for beneficiaries of such healthcare programs (e.g., FEHBP or Medicare); and (3) contracts to provide administrative support, claims processing, data processing, customer service, and marketing.

Subcontract Relationships

Of more recent interest to many healthcare providers is the OFCCP's attempt over the past few years to expand its jurisdiction over healthcare providers in connection with reimbursement agreements (subcontracts) between such providers and prime contractors, usually insurers.

In the *Bridgeport Hospital* case, the Office of Personnel Management ("OPM") contracted with Blue Cross/Blue Shield of Connecticut, Inc. ("Connecticut Blue") to provide federal employees with a fee-for-services **health insurance policy**. Connecticut Blue in turn contracted with various healthcare providers, including Bridgeport Hospital, to establish a provider network. In exchange for participating in the provider network, the healthcare providers agreed to accept

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reimbursement for medical services on a fee-for-services basis. In response to the OFCCP's attempt to assert jurisdiction over Bridgeport Hospital, which participated in the network provider system established by Connecticut Blue, the Administrative Review Board ("ARB") of the U. S. Department of Labor noted that the prime contract between OPM and Connecticut Blue did not obligate the insurer to provide medical services and supplies to any government employee or beneficiary, while the contract between Connecticut Blue and Bridgeport Hospital required the hospital only to provide medical services and supplies, but not insurance. Because the services provided under the prime contract were of a different nature from those provided under the provider network and reimbursement agreement, the ARB found that there was no "subcontract," and, thus, there was no need to determine whether Bridgeport's contract with Connecticut Blue was "necessary to the performance of" the prime contract or amounted to part performance of the prime contract. Accordingly, the ARB ruled that the OFCCP had no jurisdiction over Bridgeport Hospital on the facts presented.

In *OFCCP v. UPMC Braddock, et al*, UPMC Health Plan contracted with OPM to provide **healthcare services** to federal employees in the form of a health maintenance organization ("HMO"). The UPMC Health Plan in turn contracted with its member hospitals, including UPMC Braddock, to provide medical services to UPMC Health Plan members and beneficiaries. Because the prime contract and the subcontract both required the provision of medical services, the ARB found that UPMC Braddock's agreement to provide healthcare services was, unlike in the *Bridgeport* case, indicative that the subcontractor agreed to perform or assume part of the prime contractor's obligations under its agreement with OPM.

Effects on Healthcare Providers

Directive 293 seizes upon the decisions of the ARB in *UPMC Braddock* and the ALJ in *Florida Hospital of Orlando* in an attempt to expand its jurisdiction over healthcare providers under the subcontract analysis. It should be noted, however, that both the *UPMC Braddock* and *Florida Hospital of Orlando* cases have not been finally decided and are at various stages in the appeals process.

Recently, in the *Florida Hospital of Orlando* case, the OFCCP commenced an enforcement action against Florida Hospital of Orlando based on that entity's agreement to participate in a provider network in connection with the TriCare military health program. The prime contract involved was between TriCare and Humana Military Health Services ("HMHS"), which, like Connecticut Blue in the *Bridgeport Hospital* case, acted as an underwriter of insurance and administrator of claims. Florida Hospital of Orlando, like Bridgeport Hospital, agreed to participate in the provider network established by HMHS. Importantly, Florida Hospital of Orlando did not contract to provide any underwriting or insurance for military health plan participants, nor did it agree to provide any administrative services for claims submitted in connection with medical services provided to military health plan participants. Despite the submission of uncontroverted evidence by Florida Hospital of Orlando that HMHS did not contract to provide healthcare services to TriCare, and that Florida Hospital of Orlando did not contract to insure or underwrite the military health plan or provide administrative services, the Administrative Law Judge ("ALJ") seized upon a typographical error in the motion for summary judgment submitted by Florida Hospital of Orlando which inadvertently, but erroneously, stated that HMHS actually contracted with TriCare to provide healthcare services, and thus that Florida Hospital of Orlando partially performed or assumed some portion of HMHS' obligations under the prime contract. As a result, the ALJ concluded that the OFCCP had jurisdiction over Florida Hospital of Orlando.

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TriCare Issues

Numerous medical providers around the country, including hospitals and physician practice groups alike, have been the subject of recent attempts by the OFCCP to assert jurisdiction utilizing the subcontract analysis solely on the basis of the providers' participation in provider networks and agreements to accept reimbursement on a fee-for-service basis for medical services provided to TriCare beneficiaries under subcontracts with TriCare prime contractors (currently TriWest in the West Region, Health Net Federal Services in the North Region and Humana Military Health Services in the South Region).

Where the prime contract requires only the provision of medical insurance and the administration of

claims and does not directly require the provision of medical services through an HMO-type arrangement or other type of managed care (most TriCare prime contracts are for insurance and administration only, but some, such as the U. S. Family Health Plan, do establish HMOs or managed care), medical service providers that are merely participants in provider networks established by prime contractors and receive reimbursement on a fee-for-service basis should continue to aggressively object to the assertion of jurisdiction by the OFCCP, pending final resolution of the *Florida Hospital of Orlando* case.

Medicare Issues

Directive 293 confirms that provider reimbursement agreements in connection with Medicare Parts A and B and Medicaid will not give rise to OFCCP jurisdiction.

While the OFCCP in the past has not opined on its jurisdiction over contracts involving insurance, services or supplies provided in connection with Medicare Parts C and D, Directive 293 states that Medicare Parts C and D may give rise to OFCCP jurisdiction on either a direct contract or subcontract basis.

The Centers for Medicare and Medicaid Services ("CMS") directly contracts with insurers to provide Part C and D coverage and with healthcare providers to provide medical services to Part C and D participants. That those ***prime (or direct)*** contracts with CMS would subject those insurers and healthcare providers to OFCCP jurisdiction should come as no great shock to anyone and is merely an outgrowth of current and past law.

On the issue of OFCCP jurisdiction over subcontractors, however, the OFCCP to date has not attempted to assert jurisdiction over healthcare providers who merely participate in a provider network established by an insurer who has a direct contract with

CMS to provide Medicare Parts C or D benefits. Directive 293 may signal that inactivity on the part of OFCCP may be coming to a close.

If the direct contract between CMS and the prime contractor requires the provision of medical services in an HMO-type setting or on a managed-care basis, such an agreement will likely subject the subcontractor to OFCCP jurisdiction under the *UPMC Braddock* theory. If the direct contract between CMS and the prime contractor is only for the provision of insurance and administrative services, participation in the network established by the prime contractor on a fee-for-service basis will not likely subject a healthcare provider to OFCCP jurisdiction.

In many instances, OFCCP jurisdiction will not be clear. To be sure, healthcare providers who are considering entering into a network provider agreement with a Part C or D prime contractor should request a copy of the direct contract from the prime contractor. The contract language should be reviewed to determine if it requires the provision of medical services by the prime contractor. If it does, OFCCP jurisdiction over a subcontractor performing medical services is likely. However, nothing in Directive 293 indicates that the OFCCP will now attempt to assert jurisdiction

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over healthcare providers who accept reimbursement on a fee-for-services basis for Medicare Part C or D services or products, so long as the prime contract is only for insurance and administrative services and does not require the provision of medical

services. Such an effort would appear precluded by the ARB's decision in *Bridgeport Hospital*. Of course, this could all change if the *Florida Hospital of Orlando* decision is upheld by the ARB or an appellate court.

If you have any questions about this directive or would like to discuss the possibility that the OFCCP might attempt to assert jurisdiction over your healthcare entity, please contact the Kullman Firm attorney with whom you normally correspond.



Management Resource in Labor and Employment Law

1600 Energy Centre, 1100 Poydras Street / New Orleans, LA 70163 / 504.524.4162
Suite A, 4605 Bluebonnet Boulevard / Baton Rouge, LA 70809 / 225.906.4250
Suite 340, 600 University Park Place / Birmingham, AL 35209 / 205.871.5858
Suite 704, Court Square Towers, 200 6th Street North / Columbus, MS 39701 / 662.244.8824
Suite 120, 1640 Lelia Drive / Jackson, MS 39216 / 601.366.2990
1100 Riverview Plaza, 63 S. Royal Street / Mobile, AL 36602 / 251.432.1811

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