Office of Federal Contract Compliance Programs Update

March 24, 2011—Web Seminar

Welcome & Program Overview

Liz Mekjavich and Gail Blanchard-Saiger
California Hospital Association
Agenda

- Overview of the program
  Gail Blanchard-Saiger

- The Office of Federal Contract Compliance Programs Update
  Jane Suhr

- OFCCP and Health Care
  G. Roger King

- Question and answer period

Presenter: Jane Suhr

Jane Suhr is the District Director of the U.S. Department of Labor’s Office of Contract Compliance Programs (OFCCP) Los Angeles District Office. Under her leadership, the Los Angeles District Office was recognized as the Most Improved Office of the Region in 2007 and Leading Office in the Pacific region for the previous 4 years with over $6.1 million in remedies to victims of employment discrimination.
OFCCP Update
California Hospital Association

March 24, 2011
Jane Suhr

Topics Covered
- Who is OFCCP
- Laws Enforced by OFCCP
- OFCCP Jurisdiction
- Coverage Issues for Healthcare Providers and Insurers
- OFCCP Enforcement Activities
OFCCP’s Mission

The Office of Federal Contract Compliance Programs enforces, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity.

Laws Enforced by OFCCP

- Executive Order 11246 (“EO 11246”)
  - Prohibits discrimination on basis of race, color, religion, sex and national origin; also has an affirmative action obligation
  - See 41 CFR Parts 60-1 through 60-40

- Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (“Section 503”)
  - Prohibits discrimination on the basis of disability; also required affirmative action to employ and advance in employment qualified persons with disabilities
  - See 41 CFR Part 60-741

  - Prohibits discrimination on the basis of one’s veteran status; also has an affirmative action obligation
  - See 41 CFR Part 60-250 (contracts entered before 12/1/03)
  - See 41 CFR Part 60-300 (contracts entered on or modified after 12/1/03)
Jurisdiction

- Federal Contractor
- Federal Subcontractor
- Coverage Over All Contractor Establishments
- Coverage Based on a Related Contractor Status
- Contract Amount Threshold
- Minimum Number of Employees

Direct Coverage

- Any person holding an agreement with any contracting agency for the purchase, sale or use of personal property or nonpersonal services.
Who is a Subcontractor?

- Any person holding a subcontract
- Subcontract is defined as “any agreement or arrangement between a contractor and any person: (1) for the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any contract; or (2) under which any portion of the contractor’s obligations under any contract is performed, undertaken or assumed.” 41 CFR 60-1.3.

Establishing a Company as a Subcontractor

1. Identify the direct/prime contractor
2. Is there a contract between the direct/prime contractor and the second company
   a) If the contract between the prime contractor and the second company requires the second company to provide any of the actual products or services that the Prime agreed to provide to the government, you have a subcontract.
   b) If the contract between the prime contractor and the second company requires the second company to provide people to perform any of the services that the Prime is required to provide to the government, you have a subcontract.
Coverage Over All Contractor Establishments

- Once it has been determined that a business or organization has a federal contract, then all parts of that same business or organization (i.e., divisions, branches, establishments or facilities) are required to comply with OFCCP’s laws, regardless of whether the particular facility scheduled has a federal contract.

Coverage Based on a Related Contractor Status

- OFCCP coverage can extend to business or organizations that do not directly hold a federal contract or subcontract, provided they are considered a “single entity” with a separately incorporated related business or organization that holds such a contract (e.g., parent-subsidiary corporate relationship).
- Single Entity – Five Factor Test (*Ernst-Theodor Arndt*, 52 Comp. Gen. 145 (1972)).
Exemptions/Waivers

- Certain transactions $10,000 or under
- Contracts with state or local governments
- Contracts with religious entities
- Contracts with certain educational institutions
- Contracts for work outside the U.S.
- Work on or near Indian reservations
- National security
- Other exemptions by the Deputy Assistant Secretary

Legal Authority

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<th>Minimum Coverage Threshold</th>
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<td><strong>EO 11246</strong></td>
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Note: For basic coverage, contracts can be aggregated under EO11246. Aggregation for AAP coverage applies to indefinite delivery vehicle, indefinite quantity and purchase order contracts.
Coverage Issues for Hospitals

- Types of contracts
- Monetary thresholds
- Single-entity determinations
- Coverage as subcontractors

How does OFCCP establish jurisdiction over health care provider or insurer?

1. Direct Contract Relationship
   - Dept of Defense (TRICARE) → Hospital A
     - Purpose of contract: To provide an HMO plan for members of the health plan
   - Dept of Veterans Administration → Hospital B
     - Purpose of contract: To provide health care services to members of TRICARE
How does OFCCP establish jurisdiction over health care provider or insurer?

2. Sub-contractual Relationship
   - DOD (Tricare) → XYZ Healthcare Company
   - Hospital A (subcontractor)
     - Purpose of prime contract: To provide an HMO plan for members of the health plan.
     - Purpose of subcontract: To provide health care services to Tricare beneficiaries.

3. Relationships That Are Not Covered Contracts
   - Federal Financial Assistance
     - Health care entities that receive Medicare Part A and B reimbursements
     - Medicaid reimbursements
   - Grants
Frequently Asked Questions

- What if an agreement or arrangement is not labeled a “contract” or “subcontract”?
  - Any agreement or other arrangement that effectively creates a covered contractual (or subcontractual) relationship between the parities is a contract as defined in OFCCP regulations, whether or not it is labeled a “contract,” or “subcontract” by the parties.

Frequently Asked Questions

- Is the company still covered if the company was never told that they were a covered subcontractor and there’s no EO clause in the subcontract?
  - Yes, the prime contractors are supposed to put the EO clause in their subcontracts and even if they didn’t, EO clause is incorporated into the subcontract by operation of law.
Frequently Asked Questions

- When a covered subcontractor contracts with another company or multiple companies, does OFCCP have jurisdiction over both or all of them?
  - If a covered subcontractor has such contracts with two or multiple companies, OFCCP has jurisdiction over all of the subcontractors, so long as they are providing goods and services necessary to the performance of the prime contract or are fulfilling an element of the prime contract.

Enforcement Activities

- Complaint investigations based on race, color, sex, national origin, religion, disability, and protected veteran status
- Compliance evaluations of supply and service contractors and subcontractors
- Corporate Management Compliance Evaluations (CMCE)
- Compliance evaluations of construction contractors and subcontractors awarded direct or federally-assisted contracts
- Compliance Assistance
Technical Assistance

- **Contact your local office**
  Los Angeles District Office
  11000 Wilshire Blvd., Suite 8103
  Los Angeles, CA  90024
  Tel: (310) 235-6800
  Fax: (310) 235-6833

  Or National Office
  1-866-4-USA-DOL
  OFCCP-Public@dol.gov

- **Attend an OFCCP Seminar or Workshop**
  Calendar available online in “How to Get Help” Section

- **Visit OFCCP’s website:**
  www.dol.gov/esa/ofccp

- **OFCCP Federal Contractor Compliance Advisor:**
  http://www.dol.gov/elaws/ofccp.htm

Thank you

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Roger King represents employers in employment relations matters with a concentration on issues related to the National Labor Relations Act, state and federal equal employment statutes, the Americans with Disabilities Act, and the Family and Medical Leave Act. In addition, Roger’s practice consists of representing employers in collective bargaining negotiations, grievance and arbitration matters, and litigation in state and federal trial and appellate courts regarding a broad spectrum of labor-related matters.
Contractor Obligations Include …

- Nondiscrimination
- Preparation of written Affirmative Action Plan (AAP)
- Display of required postings
- Regular review of employment practices
- Designation of corporate official
- Invitation to employees to self-identify
- Listing open positions with various job banks
- “Flowdown” to subcontractors
- Records preservation
- Employer is never required to set a quota or grant a preference

EO 11246 Obligations

- Internal identification of “problem areas” at each establishment
  - Minority or female utilization at job group level
  - Adverse impact analysis of personnel activity
  - Review of compensation system(s)
  - Review of selection procedures
- Depending on result of analysis, setting of numerical goals and action-oriented programs to achieve them
- Development of internal audit and reporting system
**Enforcement**

- Compliance evaluations
  - Each now includes “full desk audit”
  - OFCCP statisticians can analyze data
  - OFCCP can seek remedy even in absence of employee complaints
- Employees can file complaints, resulting in complaint-based investigations (typically limited to class claims)
- OFCCP (through ALJ hearing process) can seek injunctions, reinstatement, and back pay
- Extraordinary remedies can include suspension of contract or debarment from all federal procurement

**OFCCP Initiatives Since 2009 …**

- Increases in staff and budget
- Rescission of prior guidelines on compensation systems
  - Will be easier to establish “discrimination”
  - Voluntary self-audits will no longer shield employer from investigation
- Dreaded “Equal Opportunity” survey to return
- In works … numerical utilization analysis and goals for qualified individuals with disabilities and protected veterans
- New assertions of jurisdiction in health care …
DISTINGUISHING CONTRACTS FROM
GRANTS

Grants or Contracts

- Both VEVRAA and Section 503 specifically reference government “procurement”
- Executive Order 11246 has been interpreted to be limited to procurement activities also
- Recipients of “federal financial assistance” are covered by different civil rights laws:
  - Title VI of the Civil Rights Act of 1964
  - Title IX of the Education Amendments of 1972
  - Section 504 of the Rehabilitation Act of 1973
Which is Which?

- Regulations for federal financial assistance (FFA) rules define FFA as “grants and loans of Federal funds” or any “Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.”
- OFCCP regulations: “Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or non-personal services.”

Grant and Cooperative Agreement Act

- 1977 legislation designed to address confusion over classification of government funding
- All government spending divided into three categories
  - Procurement contract
  - Grant aid
  - Cooperative agreement
- Contracts provide “direct benefit” to government
- Grants distinguished from cooperative agreement based on level of government oversight
- Applied in Reich v. Partridge
Why Does It Matter?

• Financial assistance statutes do not require affirmative action in the same sense that OFCCP regulations do
• OFCCP compliance is paperwork-intensive – at least 100 hours per year of paperwork even by OFCCP’s own estimate
• Potentially large legal and expert fees to comply
• Risk of investigations and enforcement based on questionable statistical findings of “discrimination” even in the absence of employee complaints
• Potential discovery of adverse impact and other studies required by OFCCP rules

HOW DO I KNOW WHETHER I AM A CONTRACTOR OR SUBCONTRACTOR?
Indian Health Service Rate Quotation

“...IHS will utilize a standard purchase-delivery order form (IHS-843-1A) to issue orders for health care services ...”

HIS Form 843-1A

Incorporates by reference: Federal Acquisition Regulation 52.213-4

FAR 52.213-4

Incorporates by reference: 32 Different Executive Orders, Laws, and Additional Clauses, Including EO 11246, VEVRAA, and Section 503
Arrangements Typically Designated as Contracts

- Veterans Administration
- Indian Health Service
- National Institutes of Health
  - Note: not all research is funded through “grants”
  - Bureau of Prisons

CURRENT HEALTH CARE SUBCONTRACTOR CONTROVERSY
**Subcontractor: OFCCP Definition**

*Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

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**Medicare Parts A and B**

- OFCCP Policy Directive ADM 93-1/JUR (Dec. 16, 1993) directs field not to assert jurisdiction based on participation in Medicare or Medicaid programs
- Possible rationales:
  - Title VI/Rehabilitation Act litigation had established that these programs were “federal financial assistance”
  - Rates paid are product of little to no negotiation
  - Rates frequently do not offer full reimbursement
FEHBP: Bridgeport

• 1990s: OFCCP asserts jurisdiction over hospital that was in-network Blue Cross/Blue Shield PPO provider
• PPO was open to participants in Federal Employees Health Benefits Plan (FEHBP)
• Both ALJ (2000) and DOL Administrative Review Board (in 2003) reject jurisdiction
• Key Holding: Office of Personnel Management’s (OPM) contract with Blue Cross/Blue Shield was a “reimbursement” contract, not a contract to provide medical services
• As such, hospital did not “assume” any obligation of Blue

FEHBP Part 2: UPMC Braddock

• Hospital network established a (separately organized) HMO that enrolled FEHBP participants
• OPM’s regulations and its contract with HMO specifically stated that providers ≠ subcontractors
• ALJ and ARB rule they are subcontractors
• “Even if” first prong (necessary-to-perform test) not met, second prong (assumes-a-portion test) met:
  • HMO contracted with gov’t to put an HMO “into operation”
  • Contract “depended on” medical providers to offer services"
**UPMC Braddock Appeal (D.D.C.)**

- UPMC argues:
  - OPM contract provisions and regulations should control over OFCCP’s
    - No consent when subcontractor was affirmatively led to believe it was not subject to regulation
  - Services are personal (not nonpersonal) and therefore prong 1 (necessary-to-perform) can’t apply
  - HMO only agreed to provide “insurance” and not medical service, therefore prong 2 (assumes-a-portion) doesn’t apply either

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**TRICARE: Florida Hospital**

- Hospital agreed to participate as an in-network provider for TRICARE
- Network administered by a Humana entity
- ALJ rules that the hospital’s provider agreement with Humana was a covered subcontract
- ALJ avoids first prong (necessary-to-perform)
- Instead, ALJ finds that Humana agreed “to provide medical services” to TRICARE beneficiaries, and hospitals provide a portion of those services
**Florida Hospital Before the ARB**

- Briefing complete as of February 28, 2011
- No ETA on Board’s decision
- Florida Hospital has received *amicus curiae* support from
  - American Hospital Association
  - Humana Managed Care Entities
  - National Association of Chain Drug Stores

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**Florida Hospital - AHA Amicus Brief**

- Paperwork burden on hospitals is already substantial
- TRICARE reimbursement is set by statute, not negotiation
- Federal/state labor laws already apply to hospitals
- Grant Act test (grants vs. contracts) should have been applied:
  - TRICARE does not provide a “direct” benefit to the government – it provide a direct benefit to its “beneficiaries”
- Neither government nor Humana “purchases” (procures or acquires) health care; the services are provided to beneficiaries and only reimbursed with gov’t funds
OFCCP Directive No. 293

- Signed December ’10, but published January ’11
- Repeats that Medicare Parts A & B are federal financial assistance, not contracts
- Announces new position that Medicare Parts C & D providers are subcontractors
- Repeats current agency position on FEHBP HMO’s and TRICARE as in-network providers
- Bridgeport (PPO) “do-over” in the works?
  - Repeats that an insurance reimbursement arrangement does not make hospitals subcontractors
  - But insurer’s promise to build a PPO to provide specific services makes providers subcontractors

RECOMMENDATIONS
Recommendations

• Full audit for government “contracts,” looking out for
  • Incorporation by reference
  • “Flowdown” clauses in contracts with private parties
  • Programs already on government’s watch list:
    – TRICARE network provider agreements
    – HMO’s covering federal employees
      – Note: Many large HMO programs have enrolled federal employees
    – Medicare Parts C & D
    – (Potentially) PPO’s covering federal employees

Recommendations

• Know in advance what you would do if you received notice of an OFCCP compliance evaluation
  • OFCCP likely to reactivate cases it was deferring pending Florida Hospital Administrative Review Board decision and UPMC Federal District Court decision
  • Organizations preparing first AAP should consider role for counsel in process
  • Organizations contemplating becoming a federal contractor should fully understand the ramifications of such decision—more than just drafting an AAP
Recommendations

• Organizations choosing to avoid federal contractor status should:

  • Fully understand current agency position and weigh its legal options if OFCCP attempts to assert jurisdiction
  • Fully understand what internal controls should be in place to prevent inadvertent contractor status from being established

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Thank you

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Questions

Online questions:
Type your question in the Q & A box, hit enter

Phone questions:
To ask a question hit *1
To remove a question hit *2

Upcoming Programs

- **Health Policy Legislative Day**
  *April 5 – 6, 2011, Sacramento*

- **California Congressional Action Program**
  *April 10 – 13, 2011, Washington, D.C.*

- **Post-Acute Care and Health Care Reform Seminar**
  *April 28, 2011, Walnut Creek*

- **Consent Law Seminar**
  *May 5, San Ramon; May 24, Ontario; May 25, San Diego; June 1, Sacramento; June 7, Glendale; June 8, Costa Mesa*

- **Hospital Reimbursement Seminar**
  *June 21, Sacramento; June 28, Glendale; June 29, Newport Beach*
Thank you for participating in today’s seminar. An online evaluation will be sent to you shortly.

For education questions, contact Liz Mekjavich at (916) 552-7500 or lmekjavich@calhospital.org.