HALL RENDER
KILLIAN HEATH & LYMAN

HEALTH LAW NEWS

MAY 07, 2014

WHEN DO HOSPITALS HAVE TO COMPLY WITH AFFIRMATIVE ACTION?

Nearly all hospitals are prohibited by federal law from discriminating in employment based on race, color, sex, religion, ethnicity, disability and age. Those that have certain types of federal contracts must go further by engaging in affirmative action. Compliance with federal affirmative action laws is difficult and expensive, especially when audits are involved. Unfortunately for hospitals, it is not always clear when they have to comply.

For years, the Office of Federal Contract Compliance Programs ("OFCCP"), the government agency that enforces federal affirmative action rules, has largely ignored hospitals. That has changed over the past several years, as OFCCP has clearly been targeting the health care industry. Whether OFCCP has jurisdiction over a hospital depends on whether the hospital is a federal contractor. Generally, a hospital becomes a federal contractor when it performs services that are used by the federal government. This may be pursuant to a direct contract with a federal government agency, or it could be an indirect arrangement with another entity that has a federal contract. These indirect arrangements are known as subcontracts.

Whether and when hospitals are covered federal contractors or subcontractors subject to OFCCP's jurisdiction has been the subject of much discussion and litigation recently. Although many issues remain uncertain, here's what we know as of now:

- **Grants** - Grants are considered "federal financial assistance" and are distinguishable from contracts. Participating in a federal grant does not give OFCCP jurisdiction over a hospital.
- **Medicare/Medicaid** - Medicare Parts A and B and Medicaid are also considered "federal financial assistance" and are not a basis for OFCCP jurisdiction. OFCCP has suggested that its jurisdiction may arise based on certain arrangements under Medicare Advantage (Part C) and Medicare Part D (Prescription Drug Coverage), but this has not been fully explained by OFCCP and, so far, there has been no litigation on this issue. OFCCP's jurisdiction in connection with Medicare Parts C and D is questionable.
- **TRICARE** - OFCCP believes it has jurisdiction over hospitals that participate as TRICARE network providers. This was the subject of ongoing litigation against a Florida hospital. OFCCP recently dropped its case against the hospital, though, and announced that it would not pursue jurisdiction over TRICARE network providers for at least the next five years. This is one we will continue to monitor.
- **Certain HMOs** - OFCCP also believes it has jurisdiction over hospitals that participate in HMOs or other coordinated care programs in which federal civilian employees are beneficiaries through the Federal Employee Health Benefit Plan. So far, the courts have agreed with OFCCP on this issue, even when the hospital receives no notice of its affirmative action obligations.
- **Other Typical Hospital Contracts** - Hospitals often become covered by federal affirmative action rules when they provide services used by the Department of Veterans' Affairs, Federal Bureau of Prisons, Department of Defense, Department of Health and Human Services and the Centers for Medicare and Medicaid Services.

WHY DOES THIS MATTER?

OFCCP audits can be lengthy and expensive to defend even if the hospital is prepared. If the hospital is not prepared, it will be a nightmare. In addition to affirmative action compliance, OFCCP will look carefully for evidence of systemic discrimination, especially with respect to hiring and compensation. Settlement demands can reach millions of dollars for large workforces. Preparation is the key to mitigating risk and saving money.

PRACTICAL TAKEAWAYS

Here is what every hospital executive should do right now:

1. Know if your hospital is covered. If the answer is unclear, and it may be, there are proactive steps you can take to substantially minimize risks. Know what they are.
2. Know how your hospital will respond if it is selected for an OFCCP compliance audit. You'll only have 30 days to respond, and that's not nearly enough time to get into compliance.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.

3. If your hospital is covered, consider whether it makes sense to remain a federal contractor. Unless the contract is very lucrative, the costs and risks almost certainly outweigh the benefit.
4. Get help from someone familiar with OFCCP jurisdiction matters. You can't afford to wait any longer. There is too much at stake.

If you have any questions or would like additional information about this topic, please contact Jonathan C. Bumgarner at (317) 977-1474 or jbumgarner@hallrender.com or your regular Hall Render attorney.

Please visit the Hall Render Blog at http://blogs.hallrender.com/ for more information on topics related to health care law.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.