THE OFCCP IS BROADENING ITS REACH: HOW WILL IT AFFECT YOU?

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For several decades the Office of Federal Contract Compliance ("OFCCP") has been enforcing Section 503 of the Rehabilitation Act of 1973, the Vietnam Era Veteran's Readjustment Act of 1974 and Executive Order 11246. These laws prohibit federal contractors and subcontractors from discriminating[i] in their employment practices and require employers who enter into certain government contracts to maintain formal Affirmative Action Plans to assure equal employment opportunities in their workplaces.[ii] For those employers subject to the OFCCP's jurisdiction, not much has changed over the past forty years. These federal contractors have adopted Affirmative Action Plans, have undertaken recruitment efforts to attract female, minority, disabled and veteran applicants, have tracked and recorded diversity data, and have filed annual EEO-1 reports.

However, recent actions by the OFCCP are likely to significantly change the landscape, especially for hospitals and healthcare providers that, until recently, were not considered to be federal contractors. This Article will briefly address each of these developments, to help employers understand and prepare for what is expected to be a surge in government regulation and enforcement in this area.

1. **D.C. District Court Rules that Hospitals Participating in Health Plans Which Cover Federal Employees Are Federal Subcontractors.**

Until recently, hospitals and healthcare providers were not generally viewed as government contractors unless they directly contracted with a government agency, such as the Veteran's Administration. For example, mere receipt of medicare reimbursements did not subject a healthcare provider to OFCCP jurisdiction. However, on March 30, 2013 the D.C. federal district court issued a decision in UPMC Braddock v. Harris, No. 09-1210, 2013 US Dist. LEXIS 45953 (Mar. 30, 2013) **,** which upheld an administrative ruling that three hospitals affiliated with the University of Pittsburgh Medical Center ("UPMC") were subject to Executive Order 11246. The hospitals had contracts with the UPMC Health Plan (the "Health Plan"), an HMO, to provide medical services to subscribers to the Health Plan. The Health Plan, in turn, contracted with the federal Office Personnel Management ("OPM") to provide medical services to employees who participated in the Federal Employees Health Benefits Plan. The case began in 2004 when the OFCCP initiated a compliance review of the hospitals. The hospitals naturally responded by asserting that they were not federal contractors and were not subject to OFCCP jurisdiction. Administrative complaints were filed by the OFCCP and an Administrative Law Judge and then the Administrative Review Board both agreed with the OFCCP, which led to the appeal in federal court.

On appeal, the hospitals made three primary arguments: that the contract between the Health Plan and the OPM excluded medical service providers from the definition of "subcontractor"; that the hospitals provided personal services to the Health Plan beneficiaries not to a federal contractor which were not

necessary to the Health Plan's ability to perform under its contract with the OPM; and, lastly, that the hospitals had never consented to becoming federal contractors or subcontractors. The D.C federal court rejected these arguments. On the substantive argument, the court found that because the Health Plan was an HMO, it was contracting to provide medical services, not just insurance.[iii] Thus, medical services were an essential element of the contract and the hospitals, by providing medical services to the Health Plan beneficiaries, were enabling the Health Plan to fulfill its contract with the OPM. The Court also ruled that express consent is not required in order to become subject to Executive Order 11246 and that the parties could not avoid status as a subcontractor and coverage under Executive Order 11246 by simply adopting their own definition of "subcontractor."

While an appeal of this decision is still possible, the likelihood of a different result is small. Agency decisions are given great deference and a court may only overturn such a decision on the grounds that it was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law or supported by substantial evidence. Although the decision is only binding in the District of Columbia, it is likely that the OFCCP will rely on this decision in initiating enforcement efforts in other jurisdictions. Thus, hospitals and healthcare providers in New Hampshire and elsewhere in the country ought to carefully review their contracts, especially any contracts with HMOs, to determine whether such contracts might unwittingly have created a federal subcontractor status. As can be seen from the length of time that transpired between initial enforcement activity and the decision by the federal district court, challenging the OFCCP's jurisdiction will no doubt be a time-consuming and costly exercise. Voluntarily coming into compliance may be the more economical approach.

2. OFCCP Issues New Directives on Advancing Equal Pay Enforcement

The Obama administration has made equal pay one if its goals. The Lilly Ledbetter Fair Pay Act[iv] was signed by President Obama in January of 2009. The National Equal Pay Enforcement Task Force was established by the White House in 2010. The Paycheck Fairness Act[v] passed the House and is currently pending in the Senate.

An outgrowth of the National Equal Pay Enforcement Task Force was the OFCCP's announcement on February 28, 2013, that it was rescinding two guidance documents from 2006, *The Standards Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination* and *The Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with Respect to Systemic Compensation Discrimination.* At the same time, the OFCCP issued a new directive, Directive 307, which sets forth the procedures, analysis and protocols the OFCCP will use when conducting compensation compliance investigations. The OFCCP has always investigated pay inequities as part of its enforcement mandate, but the prior guidance limited the analytical procedures it could employ and provided a safe harbor for contractors who performed self-evaluations using the methodology set forth in *the Voluntary Guidelines*. Among other things, the Directive allows the OFCCP to determine the appropriate analytical approach on a case-by-case basis, directs the OFCCP to look at total compensation (including commissions, bonuses, differentials, etc,) and advancement opportunities (i.e. glass ceiling issues), allows the OFCCP to determine the appropriate "comparable" groupings in each case rather than relying

only on a comparison of "similarly situated employees," allows the OFCCP to analyze systemic, small group and individual pay disparities, and allows the OFCCP to test and disregard merit variables if not fairly and consistently applied or if they have an adverse impact.

Federal contractors can expect to see more rigorous enforcement efforts focused on compensation. While the OFCCP Fact Sheet touts that the new Directive will result in more consistent enforcement efforts and transparency for workers and contractors, the flexibility that the OFCCP has to determine the analytical approach and the employee groupings to be used for comparison purposes makes it impossible for contractors to know with any degree of certainty that they are in fact compliant. The best advice for contractors is to:

1. continue to do self-analyses, using job groupings which make sense based on the contractor's workforce, but also look at other possible groupings (larger and smaller);
2. assure that training and advancement opportunities are offered consistently throughout the job groupings; and
3. analyze any merit variables in the compensation system, document what those are and assure that they are applied fairly and consistently.

Conclusion

These recent developments, the court decision in UPMC Braddock v. Harris and the issuance of Directive 307 by the OFCCP, change the landscape for affirmative action efforts for the first time in decades. A large group of employers, hospitals and healthcare providers, who were never subject to OFCCP enforcement actions will now find themselves faced with potential compliance requirements. At the same time, the OFCCP's compliance effort in the area of pay discrimination is going to be stepped up significantly. Employers who may be affected by these developments are advised to take proactive steps to be assured they are in compliance.

Endnotes

[i] Section 503 of the Rehabilitation Act prohibits discrimination against qualified disabled individuals. The Vietnam Era Veterans' Readjustment Act prohibits discrimination against qualified protected veterans. Executive Order 11246 prohibits discrimination by federal contractors on the basis of race, color, religion, sex or national origin.

[ii] With a few exceptions, any federal contract of $10,000 per year or more is subject to Executive Order 1146's anti-discrimination rules. Any contractor with 50 or more employees and a government contract of $50,000 or more is also required to develop and maintain a written Affirmative Action Plan.

[iii] Where the contract between the healthcare provider and the plan provides simply for reimbursement by the plan for services provided by the healthcare provider, the OFCCP has not sought to enforce Executive Order 11246. The distinction between these two types of contracts may be very difficult to identify.

[iv] The Lilly Ledbetter Act amends the Civil Rights Act of 1964 to provide that the 180 day statute of limitations for filing an equal pay claim begins with each new paycheck issued after the discriminatory act (rather than on the date of the initial discriminatory wage decision).

[v] The Paycheck Fairness Act, which has been introduced in every Congress since 2009, proposes to amend the Equal Pay Act by closing certain loopholes, allowing employees to share salary information and requiring employers to show that pay disparities are based on job performance, not gender.