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Healthcare Providers' Affirmative Action Obligations Take Center Stage

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A new decision by the federal Administrative Review Board (ARB) shines the spotlight on healthcare providers' obligations to comply with federal affirmative action laws.

Health Care Providers as Government Contractors

Businesses that enter into contracts with the federal government or into subcontracts with government contractors (we'll call them all "contractors" for simplicity) are subject to legal affirmative action employment requirements. Contractors must, for example, maintain written affirmative action plans, comply with special record-keeping and reporting rules, self-audit personnel actions, post notices, and cooperate in government audits. Non-compliance can lead to large back pay awards, hiring of previously rejected applicants, termination of contracts, repayment of contract proceeds, and being barred from future contracts.

Many healthcare providers—often unknowingly—fall under the definition of "government contractor" and thus are subject to affirmative action laws. For example, entities that provide services pursuant to a contract with, or a subcontract or arrangement that flows from, the Federal Employees Health Benefit Plan, TRICARE, or Medicare Advantage Part C or Part D are covered, according to the Office of Federal Contract Compliance Programs, the agency that enforces affirmative action laws. (However, being a participating provider under Medicare Parts A and B or Medicaid does not trigger affirmative action law coverage, because those programs are considered to be federal financial assistance rather than federal contracts.)

TRICARE Network Providers Get Reprieve

In an order released last week, the ARB reversed an administrative law judge's ruling that OFCCP has jurisdiction over a hospital that subcontracted as a network provider of medical services to TRICARE beneficiaries. A divided ARB concluded that Congress intended to exclude such "subcontracts" from the definition of "government contract" by enacting language to that effect in the 2012 defense appropriations bill.

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While this ruling is welcome news, it is not a free pass for healthcare providers. First, it does not limit OFCCP's jurisdiction over providers who directly contract with TRICARE or who render services, directly or indirectly, under other federal contracts. Second, the legislative exclusion the ARB relied on does not extend beyond 2012, and it remains to be seen whether it will be renewed in the future. Third, the opinion leaves many unanswered questions and may leave room for OFCCP to try to assert jurisdiction over TRICARE network providers on alternative theories not decided by the ARB.

Bottom Line

Healthcare providers should assess not only whether they have direct contracts with federal programs and agencies, but also whether they are a preferred provider under any government health care plan or have any other arrangements to provide services or supplies for a federal contractor. If so, they should carefully analyze the contract or arrangement and determine whether it subjects them to coverage under the affirmative action laws. And, if they are covered, health care providers need to ensure that they are complying with their affirmative action obligations.

FOR FURTHER INFORMATION

If you have questions or want more information, you should contact your legal counsel to ensure compliance with the federal affirmative action laws. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. Boyd Byers is available to help you navigate the affirmative action laws or for general employment law counsel. Boyd can be reached at 316.291.9716 or bbyers@foulston.com. If you are looking for general health care counsel you may contact Scott Palecki at 316.291.9578 or spalecki@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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