Health Care Providers Take Note: Your Contract With An HMO May Require Affirmative Action Compliance, Even If It Doesn't Say So

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A Health Care E-Alert

On March 30, 2013, the U.S. District Court, District of Columbia, confirmed that contracting with an HMO to provide medical services to federal employees will subject a hospital to affirmative action obligations under Executive Order No. 11246. The court affirmed an Administrative Law Judge's decision that three Pittsburgh hospitals, who subcontracted with an HMO to provide medical services to federal employees, were federal "subcontractors" under Executive Order No. 11246, giving the Office of Federal Contract Compliance Programs (OFCCP) jurisdiction over the hospitals to audit their records for compliance with the Executive Order's affirmative action obligations. The judge in the case, *UPMC Braddock, et al. v. Harris*, distinguished this HMO arrangement from a situation where a health care provider subcontracts with an insurance company that only provides traditional insurance coverage.

The judge rejected the following arguments by the hospitals:

1. The contract between the HMO and the federal Office of Personnel Management (OPM) specifically excluded medical service providers from its definition of "subcontractors."
2. The hospitals did not provide "nonpersonal services" as required by the OFCCP's definition of "subcontract."
3. The hospitals never consented to be bound by the Executive Order because the subcontract did not include the equal employment clauses necessary to obligate compliance with the Executive Order.

Instead, the judge found that:

1. The agreements between the hospitals and the HMO met the definition of a "subcontract" under OFCCP's regulations, and that definition cannot be altered by the OPM's contract with the HMO.
2. The hospitals did provide "nonpersonal services" and were relying on the wrong definition of that term.
3. The absence of equal opportunity clauses from the hospitals' contracts with the HMO did not absolve the hospitals from being bound by those clauses or their obligations as a federal subcontractor.

Although this decision will most likely be appealed, health care providers should not sit idle. They should take a close look at whether they may unwittingly be a federal subcontractor subject to the Executive Order's affirmative action obligations. This can be done by reviewing contracts with HMOs and discussing the existence of any contract with any federal government agency, including the OPM.

Authors