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Participants in Medicare Part C and Part D May Now Be Considered Federal Contractors and Subcontractors

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Recently, health care providers have been targeted by the Office of Federal Contract Compliance Programs (OFCCP), which has taken the position that participants in Medicare Part C and D are now federal contractors and may be federal subcontractors, subject to equal opportunity and affirmative action requirements.

In 2009 and 2010, the OFCCP decided two administrative cases that address when a participating TRICARE health care provider is a federal contractor or subcontractor. In the first case, an administrative judge held that a Florida hospital was a federal subcontractor because it contracted with Humana Military Healthcare Services to service TRICARE members as part of a provider network. The judge expressly rejected the hospital's assertion that TRICARE payments should be treated like Medicare payments for purposes of determining whether they constituted payments under a federal contract, holding that participation in TRICARE was a contract to provide services, unlike Medicare, which is considered a contract to *pay for services*. Similarly, another administrative judge held that Pittsburgh hospitals, which had contracted with an HMO to provide medical services to current and retired federal employees as part of a provider network, are federal subcontractors because the HMO had a contract with the Office of Personnel Management to provide those services to federal employees. In a third contrasting case, decided in 2003, an administrative judge held that a hospital was not a federal subcontractor when it received only reimbursement for services performed pursuant to a federal contract to provide insurance reimbursement for the Office of Personnel Management policyholders.

At the same time, earlier decisions by the OFCCP had made it clear that receipt of Medicare Parts A (hospital insurance) and B (medical insurance) and Medicare funds would not transform a health care provider into a federal contractor. This is because Medicare Parts A and B and Medicaid are considered federal financial assistance or insurance reimbursement agreements. Given that rationale, health care providers and their attorneys have reasonably believed Medicare Advantage Part C (managed/coordinated care plans) and Medicare Part D (prescription drug plans) would also be considered federal financial assistance and therefore not subject to the jurisdiction of the OFCCP. Nevertheless, the OFCCP is now applying the justifications it used to find federal contractor and subcontractor status in the three TRICARE cases to participants in Medicare Part C and Part D programs.

How is federal contractor or subcontractor status determined under Parts C and D?

Guidance issued by the OFCCP on December 16, 2010, reaffirmed that Medicare Parts A and B, and Medicaid are federal financial assistance or insurance reimbursement agreements. However, for purposes of Medicare Parts C and D participant contracts, the OFCCP will evaluate whether the contract is to provide insurance reimbursement and/or for the delivery of supplies or services. Service contracts – aside from medical supplies and services – can include administrative support, claims and data processing, customer service, marketing and medical savings plans/flexible spending plans, to plan members and beneficiaries. The OFCCP will consider Medicare Part C and D reimbursement or supply/service contracts between health care providers and the federal government to be federal contracts. However, the OFCCP will only consider supply or service subcontract participants federal subcontractors, much like it has done with TRICARE participants. But recipients of reimbursement payments for treatments of insured will not be considered federal subcontractors, even if the payor is a federal contractor.

For example, a health care company that contracts with the Centers for Medicare and Medicaid Services (CMS) to provide an HMO insurance plan, including a prescription drug plan under Medicare Part D, to Medicare Advantage Part C members is considered a federal contractor. This is because of its direct, or prime,

contract with CMS, a federal agency. And if that health care company contracts with a pharmaceutical company to provide prescription drugs under Medicare Part D pursuant to that HMO, the pharmaceutical company is considered a federal subcontractor because it is performing a portion of the federal prime contract. Likewise, if that health care company contracts with a hospital to provide health care services under the HMO to its Medicare Advantage insured, the hospital is also a federal subcontractor.

Similarly, an insurer that has a federal contract to provide insurance under Medicare Parts C and D is also a federal contractor. However, that insurer can then subcontract with a hospital to reimburse for services performed on its insured and the hospital will not be considered a federal subcontractor. Reimbursement alone does not create a subcontractor relationship because payment of health care fees directly to the provider is not necessary to perform the federal insurance contract – unlike pharmaceutical supplies or actual medical services of a supply/service contract. Note that, aside from the reimbursement subcontract, if that hospital also contracts to provide medical services under an HMO (as in the example above), that hospital would be a federal subcontractor subject to OFCCP jurisdiction.

What are the consequences of being a federal contractor or subcontractor?

Federal contractors and subcontractors are subject to the jurisdiction of the OFCCP, and have significant compliance obligations under Executive Orders 11246, 13496, 12989, section 503 of the Rehabilitation Act of 1973 (Section 503), and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRRA). Those obligations include (i) document retention and inspection obligations, (ii) requirements that the organization adopt affirmative action plans, (iii) mandatory filing of EEO-1 and Vets 100/100A reports, (iv) required posting of certain EEO and union/labor notices, (v) electronic verification of employees' rights to work legally in the United States, and (vi) obligations to analyze employment decisions with regard to hiring, firing and promotions for adverse impact. These obligations increase depending on the number of people employed by the contractor/subcontractor and the value of the federal contractor/subcontract.

What should you do now?

Given the complexity of the above distinctions of federal contractor and subcontractor status, health care providers should consult with their counsel and carefully assess whether they have contracts with CMS under Medicare Advantage Part C or Part D. Likewise, health care providers should review any agreements under which they provide medical services to Medicare participants to determine if a federal contractor or subcontractor relationship exists or whether the contract is solely for reimbursement. The OFCCP guidance makes clear that if a health care provider or other company receives only a grant or federal financial assistance for education or research purposes or to provide services to a targeted group, a federal contract is not established.

Each federal contract/subcontract identified must then be evaluated to determine whether it meets the applicable minimum value and/or employee thresholds for compliance under Executive Orders 11246, 13496, 12989, Section 503 and VEVRAA. Importantly, contractor and subcontractor obligations cannot be altered, limited or defeated by contract. Therefore, any contrary contractual provision will not be a successful defense against an OFCCP compliance evaluation or complaint investigation.

In addition to consulting with counsel, and possibly retaining an outside entity to assist in the preparation of any necessary affirmative action plans, the Department of Labor (DOL) offers helpful compliance guidance for federal contractors and subcontractors, which can be found on the DOL's website.