

*Submitted electronically*

July 8, 2011

Debra A. Carr  
Director, Division of Policy, Planning & Program Development  
Office of Federal Contractor Compliance Programs  
200 Constitution Ave., NW  
Room C-3325  
Washington, D.C. 20210

*RE: Comments Regarding OMB Control No. 1250-0003*

Dear Ms. Carr:

On behalf of our more than 5,000 member hospitals, health systems and other health care organizations, and our 42,000 individual members, the American Hospital Association (AHA) submits the following comments in response to the Notice of Proposed Extension of the Approval of Information Collection Requirements and Comments Request (Notice), published in the May 12 *Federal Register*. Issued by the Office of Federal Contractor Compliance Programs (OFCCP or the Office), the Notice describes the proposal to extend Office of Management and Budget (OMB) approval of information collection requirements applicable to supply and service contractors as a result of the OFCCP's enforcement of Executive Order 11246 (EO 11246 or the Order). The Notice's proposed extension of approval for the Information Collection Request (ICR) is accompanied by a Supporting Statement that the AHA believes seriously underestimates the burden imposed on supply and service contractors and subcontractors. Unless otherwise noted, we use the phrase "contractors" in our comments to mean both supply and service contractors and subcontractors. The significant burden that the Office's information collection requirements impose on federal contractors are out of step with President Barack Obama call in the January 18, 2011, Executive Order 13563, "Improving Regulation and Regulatory Review," for "cutting down on the paperwork that saddles businesses with huge administrative costs."

The recordkeeping and reporting obligations of EO 11246, which prohibits federal contractors from discriminating against applicants and employees on the basis of race, color, religion, sex, or national origin, have been accepted and are familiar to some of the AHA's members because these hospitals and health systems are longstanding federal contractors. However, many of the



AHA's members recently have been informed that the OFCCP considers them to be contractors based on relationships—direct or indirect—that they have with any number of federal health care programs, including TRICARE, Federal Employees' Health Benefits Program (FEHBP), HMOs with federal employees as beneficiaries, and Medicare Parts C (Advantage) and D (prescription drug plans). While the AHA in its comments below discusses the OFCCP's arguments asserting jurisdiction, the AHA does not concede that the Office has jurisdiction.

The nation's hospitals, as the AHA has advocated elsewhere, currently are subject to extensive workforce regulations outside of those regulations accompanying the laws enforced by the OFCCP. *See* Amicus Curiae Brief of the American Hospital Association in Support of Florida Hospital of Orlando, *OFCCP v. Florida Hospital*, ARB Case No. 11-011 (Dec. 29, 2010), <http://www.aha.org/aha/content/2010/pdf/101229-amicus.pdf>. Based on these burdens, and the significant financial challenges facing America's health care providers, *see id.*, the AHA has a significant interest in an accurate statement of the burdens facing federal contractors. For these reasons, the AHA requests that the OFCCP either revise its estimates or include these comments in its extension request to the Office of Management and Budget, so that the OMB may carefully consider the actual burden placed on federal contractors, particularly those in the health care field.

## SUMMARY OF COMMENTS

Based on the Office's Notice and Supporting Statement seeking extension of the ICR, the AHA believes that the estimated burden is significantly understated—both in the aggregate and as applied to individual contractors—and urges careful consideration of whether to approve the request. First, the AHA questions the Office's number of 108,288 supply and service contractors, particularly given the Office's recent efforts to expand significantly its jurisdiction in the health care industry. Because the number of contractors is too low, the aggregate number of burden hours calculated based on the number of contractors also is too low. Second, the AHA believes that the Office's estimated burden hours for individual contractors is too low because the Office appears to have omitted obligations that will exponentially increase the number of hours a single contractor spends attempting to comply with EO 11246. Third, the estimates that are included are frequently understated and do not reflect the reality of contractors' experiences.

## COMMENTS

### **I. The Office's Recent Attempts to Expand Its Jurisdiction Vastly Increases the Number of Entities Subject to EO 11246**

Recently, many of AHA's members have been informed by the OFCCP—for the first time—that they are considered federal contractors and thus subject to the rules, regulations, and laws enforced by the OFCCP and the accompanying burdens. OFCCP advances arguments specifically supporting an expansion of its jurisdiction based on participation in any of the following:

- Medicare Parts C or D, as indicated by the Office in Directive No. 293;
- TRICARE, as currently being litigated in the *Florida Hospital* case;
- an HMO that includes federal employees, as currently being litigated in *UPMC Braddock v. Solis*, No. 1-09-CV-01210 (D.D.C. filed June 30, 2009);
- as a member of a health care system that meets the single entity test. *Cf. OFCCP v. Manheim Auctions, Inc.*, 2011-OFC-00005 (June 14, 2011).

In the AHA's view, nearly all of these claimed bases for jurisdiction are specious and, in any event, are unsettled as they currently are either being litigated or, in the case of Medicare Parts C and D, have been announced by the Office but, to the AHA's knowledge, not yet enforced.

While the AHA contests whether the Office actually has jurisdiction in many of these cases, the Office's positions, if correct, would greatly increase the number of covered federal contractors. Three developments in the Office's jurisdiction over the health care industry merit discussion.

First, in *OFCCP v. UPMC Braddock*, ARB No. 08-048 (ARB May 29, 2009), the OFCCP urged the Department of Labor's Administrative Review Board (ARB) that three hospitals that did not directly contract with the federal government were nevertheless federal subcontractors subject to the OFCCP's jurisdiction. The ARB found that the hospitals were federal subcontractors by virtue of an HMO health plan contract that included federal government employees among its beneficiaries. Because the HMO health plan provided medical services and supplies to its beneficiaries, and the hospital provided those supplies and services to the HMO, the ARB found that the hospitals were covered federal subcontractors. That case is currently on appeal to the U.S. District Court for the District of Columbia. *See UPMC Braddock v. Solis*, No. 1-09-CV-01210 (D.D.C. filed June 30, 2009).

Second, the OFCCP is attempting to assert jurisdiction over health care providers based on their participation in TRICARE – a U.S. Department of Defense military health care program providing coverage to active and retired U.S. military personnel. *See OFCCP v. Florida Hospital*, 2009-OFC-00002 (Oct. 18, 2010). In that case, the administrative law judge found that Florida Hospital was a federal subcontractor based on an agreement it had with a private company responsible for administering the TRICARE program. Florida Hospital filed exceptions to the administrative law judge's decision, and the case is currently pending before the ARB. *See OFCCP v. Florida Hospital*, ARB Case No. 11-011. As mentioned above, the AHA has filed an amicus brief in this matter urging the ARB to reverse the administrative law judge's decision. *See Amicus Curiae Brief of the American Hospital Association in Support of Florida Hospital of Orlando, OFCCP v. Florida Hospital*, ARB Case No. 11-011 (Dec. 29, 2010), <http://www.aha.org/aha/content/2010/pdf/101229-amicus.pdf>.

Third, and most recently, the OFCCP issued Directive No. 293, an internal memorandum entitled "Coverage of Health Care Providers and Insurers", attached hereto as Exhibit A. Directive No. 293, which does not appear to have been published publicly by the OFCCP, is a 12-page document offering instructions for how the Office intends to carry out its coverage assessments in the health care industry. Directive No. 293 includes the Office's first formal statement that

participating in Medicare Parts C or Part D may subject a health care provider to the OFCCP's jurisdiction.

If the Office is correct that all, or even one, of these bases for jurisdiction are legally supportable, the number of federal contractors that will experience the burden of complying with EO 11246 will far exceed the 108,288 quoted in the Notice and Supporting Statement. For instance, TRICARE reports that it has 379,233 civilian network individual providers; 3,146 TRICARE Network Acute Care Hospitals; 63,775 contracted network retail pharmacies; and 65,099 network dentists. *See* Evaluation of the TRICARE Program; Fiscal Year 2011 Report to Congress at 15 (Feb. 28, 2011), [http://www.tricare.mil/tma/downloads/TRICARE2011\\_02\\_28\\_11v8.pdf](http://www.tricare.mil/tma/downloads/TRICARE2011_02_28_11v8.pdf).

Likewise, the Office's asserted coverage could increase by thousands of contractors based on participation in Medicare Parts C and D. The Centers for Medicare & Medicaid Services' (CMS) Medicare Fiscal Year 2009 Cost Report data reported that 4,721 prospective payment system (PPS) and critical access hospitals report receiving Medicare reimbursement. Of those hospitals, 2,042 report receiving reimbursement for Medicare HMO days and, under Directive No. 293, could be considered federal subcontractors. However, because health care providers occasionally fail to report or properly classify such information, the actual number of participating providers may be higher. The Kaiser Family Foundation reports that there are 2,011 Medicare Advantage plans offered this year. *See* Kaiser Family Foundation, Medicare Advantage 2010 Data Spotlight: Plan Availability and Premiums (October 2010), <http://www.kff.org/medicare/upload/8007.pdf>. If any health care provider who provides services under those 2,011 plans could be a covered subcontractor, *see* Example, Exhibit A at 11, the reach of jurisdiction based on Medicare Parts C and D would expand significantly.

Finally, a fourth basis for OFCCP jurisdiction—the Office's single-entity test—also suggests that relying on the number of federal contractors, alone, understates the number of entities that are required to comply with the burdens of EO 11246. According to the OFCCP, under the single-entity test, the OFCCP's jurisdiction extends to separately incorporated businesses or organizations that do not hold federal contracts or subcontracts but are "related" to a business or organization with a contract. *See* Garcia, Dankowitz, & Torre, *Jurisdiction Webinar* (December 3, 2009) attached hereto as Exhibit B.

As demonstrated by an example in the OFCCP's 2009 webinar on jurisdiction, one federal contract can cause multiple entities to be covered by the OFCCP. *See id.* at 16. In that example, government funds deposited at a bank could spread the EO 11246 obligations to the contractor's parent company; to the parent company's parent company; to all other companies owned by the parent company's parent company; and to the holding company owning all of the companies. *See id.* AHA members such as health systems and their hospital affiliates—already facing significant reporting burdens—are understandably concerned that the OFCCP would take the position that a federal contract at one clinic of one hospital could subject every other hospital in a system to the Office's jurisdiction, despite the fact that all dollars and work on the federal

contract were limited to the individual clinic holding the contract. Such vast extension of the EO 11246 obligations and burden is unaccounted for in this ICR.

Simply stated, by not accounting for all entities that the Office expects to bear these burdens, the ICR vastly understates the aggregated burden imposed by the Office's regulations. While the AHA firmly believes that many of the Office's positions on its jurisdiction are unsupportable, the Office cannot have it both ways by asserting that these hospitals must comply with EO 11246, but not accounting for the burden imposed on those alleged contractors.

## **II. The Office Underestimates the Burden on Individual Contractors**

The Notice seeking approval of extension indicates that, on average, a federal contractor will spend 103.19 hours per year complying with EO 11246's reporting and recordkeeping obligations. *See* 76 Fed. Reg. 27670, 27671. The Supporting Statement explains that, while contractors with an Affirmative Action Plan (AAP) will spend 100.44 hours per year updating and maintaining the plan, contractors who have never developed an AAP will spend 111.61 hours creating the AAP.

Interestingly, the Supporting Statement indicates the OFCCP's belief that "the development time [for an AAP] is more than 2 ½ times greater than the time required for the annual update." Supporting Statement at 13. While the Office estimates that the annual time required for updating is 50.22 hours per contractor, the estimate for development of an AAP is only 111.61 hours. Under the Office's own estimation, the number of hours for developing an AAP should be estimated to be at least 125.55 hours.

The Office concludes that these AAP obligations, as well as obligations for complying with the Uniform Guidelines on Employee Selection Procedures (UGESP), responding to compliance letters, and disclosing information to third parties, results in an average burden of 103.19 hours per year. *See* 76 Fed. Reg. 27670, 27671; Supporting Statement at 23-24. However, because the Office has either failed to include certain obligations or has included them at unreasonably low estimates, the AHA believes that the OFCCP's burden estimate should be rejected.

### ***A. The Office Failed to Include Recordkeeping Obligations Related to Applicant Flow Data***

Under the Office's regulations codified at 41 C.F.R. § 60-1.12, contractors are required to retain records including, but not limited to:

records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do with requests for reasonable accommodations, the results of any physical examination, job advertisements and postings, applications, resumes, and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted

regarding their interest in a particular position (for purposes of recordkeeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; for purposes of recordkeeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualification for the particular position who are considered by the contractor), regardless of whether the individual qualifies as an Internet Applicant under 41 C.F.R. § 60-1.3, tests and test results, and interview notes.

The recordkeeping obligations go on to provide more specific examples of what must be retained. *Id.* Despite these extensive recordkeeping obligations, the Supporting Statement does not contain any estimate of burden hours for the collection and retention of such information. It appears that the Office believes that the burden of recordkeeping obligations are duplicative and do not need to be accounted for in this ICR.

The AHA believes that the OFCCP has not included a burden estimate for recordkeeping either (1) because the Office believes that these are records that are otherwise maintained in the normal course of business, *see* Supporting Statement at 10 (noting that burdens will not be calculated for employment data maintained as a normal course of business), or (2) because the Office believes that this burden is captured by the ICR on UGESP, OMB Control No. 3046-0017. Neither reason justifies the exclusion of this significant burden.

First, employers do not keep such records “in the normal course of business.” Rather, the types of documents that must be kept and when the documents must be kept are all the product of a 2004-2005 rulemaking culminating in the obligations at 41 C.F.R. § 60-1.12. *See* 70 Fed. Reg. 58946 (Oct. 7, 2005). As a part of that rulemaking, the OFCCP solicited and received numerous comments on the definition of “Internet Applicant” and what records the employer was required to retain with respect to an “Internet Applicant.” *See id.* at 58948-58960. Clearly, the retention of such widespread records for “Internet Applicant”—an OFCCP term of art—is not part of a company’s “normal course of business” but is a product of the EO 11246 obligations.

Second, the 41 C.F.R. § 60-1.12 recordkeeping obligations relating to such data—referred to as “applicant flow data”—are not covered by the EEOC’s ICR at OMB Control No. 3046-0017. The EO 11246 recordkeeping obligations codified at 41 C.F.R. § 60-1.12 and the UGESP obligations codified at 41 C.F.R. § 60-3 are far different. Indeed, the rulemaking history regarding recordkeeping obligations for Internet Applicants reveals that the OFCCP sought to add additional regulations beyond those being considered by the UGESP parties.

The OFCCP’s final rule on Internet application recordkeeping obligations notes that OMB asked the UGESP parties to evaluate the need for recordkeeping guidelines in light of the growth of the

Internet as a job search mechanism. *See* 70 Fed. Reg. at 59846. In March 2004, the UGESP parties issued a Notice entitled “Agency Information Collection Activities: Adoption of Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on [UGESP] as They Relate to the Internet and Related Technologies.” *See* 69 Fed. Reg. 10152 (Mar. 4, 2004). The UGESP parties’ proposed Notice on Internet recordkeeping obligations was subsequently withdrawn. *See* 73 Fed. Reg. 15754 (Mar. 25, 2008). The ICR covering UGESP, OMB Control No. 3046-0017, was reauthorized without change. *Id.*

However, prior to the withdrawal of the UGESP Notice, the OFCCP decided to engage in its own rulemaking on recordkeeping obligations with respect to the Internet. *See* 69 Fed. Reg. 16446 (Mar. 29, 2004). In the final rule containing the obligations now codified at 41 C.F.R. § 60-1.12, the OFCCP justified its decision to engage in separate rulemaking by stating that it “determined that *additional regulations* were required to clarify OFCCP applicant recordkeeping requirements in light of OFCCP’s unique use of applicant data for compliance monitoring and other enforcement purposes.” 70 Fed. Reg. 58946 (Oct. 7, 2005) (emphasis added).

In short, the OFCCP promulgated additional recordkeeping regulations not required by the UGESP. And, given that the UGESP parties did not modify ICR Control No. 3046-0017, the Office is incorrect in asserting that the recordkeeping obligations at 41 C.F.R. § 60-1.12 are covered by the ICR for UGESP. Accordingly, because the Office has not accounted for the burden of its recordkeeping obligations under 41 C.F.R. § 60-1.12, the burden estimate for individual contractors is understated and inaccurate.

***B. The Office’s Recordkeeping Burden Fails to Account for Contractors with Multiple Establishments***

Additionally, the OFCCP’s Supporting Statement apparently assumes that one federal contractor must either develop or update and maintain only one AAP. However, under the Office’s regulations, one federal contract generally covers all of a contractor’s facilities, unless the facility receives an exemption from the Office. *See* 41 C.F.R. § 60-1.5(b)(2). If a company has multiple facilities or establishments that are covered by EO 11246, the company must prepare an AAP for each establishment. *See, e.g.,* 41 C.F.R. § 60-1.40(a)(1). The Office defines an establishment “as a facility or unit that produces goods or services, such as a factory, office, store or mine. In most instances, the unit is a physically separate facility at a single location.” *Technical Assistance Guide for Federal Supply & Service Contractors* at 10 (August 2009), [http://www.dol.gov/ofccp/TAguides/SS\\_Technical\\_Assistance\\_Guide.pdf](http://www.dol.gov/ofccp/TAguides/SS_Technical_Assistance_Guide.pdf).

Because each federal contractor must complete an AAP for each establishment, the Office’s burden estimate for developing or updating and maintaining AAPs multiplies with each additional facility. This is particularly troublesome for AHA members such as hospitals or health systems that may have many affiliated facilities. The Office’s assumption of approximately 100 AAP hours per contractor does not reflect the reality that, particularly for larger businesses, one federal contract often requires contractors and non-contractors to develop and maintain numerous AAPs.

***C. The Office's Burden Estimate Does Not Recognize the Reality of Federal Contractor Experiences and Is Otherwise Inaccurate***

Finally, the Office's estimate and Supporting Statement fails to account for the reality of federal contractors' experiences in dealing with the Office, based on information the AHA has received from its members. For example, one member—a hospital that has been a federal contractor for a number of years—informs us that it compiles the raw data for the AAP each year and then submits the data to an outside consultant who analyzes the data for the AAP. It takes approximately three months of dealing with the vendor to have the AAP completed. At that time, the hospital reviews the information, including any problem areas, to determine whether there is a nondiscriminatory explanation for the variance. As required by the regulations, the hospital engages in this exercise annually. Our member estimates that it spends, on average, approximately 400 hours per year attempting to comply with the Order's obligations, far in excess of the Office's average estimate of 103.19 hours per year.

There is an additional burden not accounted for in the ICR: the amount of time it takes to communicate with the OFCCP and explain the intricacies of the health care setting. As a federal contractor, the health care setting is different from many other federal contractors such as the construction, production or manufacturing industries. Our member reports that OFCCP auditors are frequently unfamiliar with the health care field, job groupings and categories, job requirements and qualifications, criteria for hiring decisions, etc. For instance, we understand that one member spent a considerable amount of time responding to an allegation of discrimination with respect to full faculty positions, all of whom have PhDs or medical doctorates. The hospital spent considerable time explaining hiring decisions and criteria such as the value of an education at one school of medicine over another based on quality of the program; the value of publication in specific fields or journals; the quality of a certain individual's work experience; and many other factors that affect the hiring process in the health care field, but not in a typical federal contractor setting. The uniqueness of the health care field as compared to other contractors, particularly at the most specialized levels, results in burdens not accounted for in the Notice or Supporting Statement.

We also are told that the Office's recent shift from searching for systematic discrimination to individualized discrimination, and the related requests for individualized pay data and to submit data by job title rather than job group, makes the reporting more burdensome for contractors. Not only does the contractor have to organize the data into more groups and subsets, but even at large employers the relevant groupings become so small that statistical deviations are no longer actually significant. Nonetheless, when a deviation occurs—which is more often in small sample sizes—the contractor is forced to spend resources in reviewing the reasons for the disparity to ensure that there is no discrimination.

Our member's point illustrates an overarching concern: as the Office becomes increasingly aggressive, there are far more burdens to complying with EO 11246 than merely recordkeeping, maintaining an AAP, and responding to the occasional audit letter. While the Office assumes that contractors will spend 26.01 hours per year responding to a Scheduling Letter and Itemized Listing, that assumption is based on the premise that when the contractor responds to the letter,



the matter is at an end. However, the Office frequently returns with follow-up requests for different or more specific information that adds to the burden of responding. This additional burden is not new, and has been raised by multiple commenters objecting to prior ICR approval requests from the Office. *See* Comments of Maly Consulting LLC In Response To Request For Extension In OMB Control No. 1512-0072 (July 3, 2008) (describing OFCCP demands for additional compensation and associated burdens); Comments of The Management Advantage, Inc. In Response To Request For Extension In OMB Control No. 1512-0072 (June 2, 2008) (accord). Indeed, our member estimates that during audits, its hours burden increases from the average 400 hours per year to between 800 and 1,000 hours spread over the course of three-quarters of the year.

The Office's current Supporting Statement seems to recognize that federal contractors were burdened beyond the prior estimates when, after the Office requested aggregate compensation data, it would then request individualized employee data. Now, as an apparent remedy to the problem, the Office has decided to ask for individualized employee compensation data from every federal contractor in the first instance, rather than allowing the contractor to submit aggregated data. The Office, however, asserts that by requesting the more specific data, the federal contractor's burden is *decreased* from 5.23 hours to 1.87 hours. *See* Supporting Statement at 18. The request now asks for:

Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of February 1st (i.e., the data as it existed on the most recent February 1st date). Provide gender and race/ethnicity information and hire date for each employee by job title, EEO-1 Category and job group in a single file. Provide all requested data electronically in Excel format, if available.

- a. For all employees, compensation includes base salary, wage rate, and hours worked. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.
- b. You may provide any additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.
- c. Documentation and policies related to compensation practices of the contractor also should be included in the submission, particularly those that explain the factors and reasoning used to determine compensation.

The AHA submits that it is patently unreasonable for the OFCCP to expect that federal contractors can produce these reports in 1.87 hours, particularly if, as discussed above, the contract affects multiple businesses or multiple establishments.

Likewise, the Office has added a new item to the Itemized Listing requiring that employers produce employment policies, including policies on accommodations for religious observances and practices. *See* Supporting Statement at 16. Without citing any support, the Office assumes that 1 percent of contractors will not have a religious accommodations policy and that such a policy can be written, reviewed, and promulgated in two (2) hours. Based on the AHA's own experience promulgating corporate policies, it is unreasonable to expect a company to draft, obtain legal review, and publish a policy in two hours. While these hours are, in the aggregate, only a small portion of the 11,174,641 hours estimated by the Office, they again reflect that the Office's estimates are grossly understated estimates.

In addition, while the AHA's comments have focused on the Office's underestimation of the time burden placed on federal contractors, the financial burden also is significant. Though the Supporting Statement indicates that there is no capital or start-up cost, many federal contractors including AHA members find the recordkeeping and reporting obligations so onerous that they purchase software specifically for the purpose of streamlining the AAP process. Likewise, as many AHA members find themselves subject to an OFCCP audit for the first time, they incur additional costs of consultants and attorneys as they seek advice as to their legal obligations. Even those contractors who have been submitting AAPs for years, such as the member hospital discussed above, find it necessary to employ the services of a consultant to ensure that they are complying with the Order's obligations. At a time when the nation's health care providers are under significant pressure from government, payers and recipients to reduce health care costs, such additional burdens should not be lightly extended.

The AHA urges that the OFCCP revise, consistent with these comments, its estimate of the compliance burdens for federal contractors for submission to the OMB or to include our comments directly in the Approval Request. Such revised estimates are essential for the proper evaluation of the Request and call into serious question whether the Request should even be granted. Please contact me or Lawrence Hughes, assistant general counsel, at (202) 626-2346 or [lhughes@aha.org](mailto:lhughes@aha.org) if you have any questions about AHA's comments.

Sincerely,

/S/

Rick Pollack

Executive Vice President

Attachments



## TRANSMITTAL

**U.S. DEPARTMENT OF LABOR**  
**Employment Standards Administration**  
**Office of Federal Contract Compliance Programs**

Number: 293

Date: **DEC 16 2010**

OFCCP Order No. ADM Notice/Jur

1. **SUBJECT:** Coverage of Health Care Providers and Insurers
  
2. **PURPOSE:** To provide comprehensive guidance for assessing when health care providers and insurers are federal contractors or subcontractors based on their relationship with a Federal health care program and/or participants in a Federal health care program.
  
3. **FILING INSTRUCTIONS:**  

Holders of ADM and LEG Binders only: File this Notice behind the "JUR" (jurisdiction) tab in your Administrative Practices Binder. Remove Transmittal Numbers 189 and 262 which are superseded by this Directive.

District and Area Office EOSs and EOAs only:  
 File this Notice behind the tab for ADM Directives in your FCCM Binder. Remove Transmittal Numbers 189 and 262 which are superseded by this Directive.
  
4. **OBSOLETE DATA:** This Directive supersedes two earlier Directives. They are: Directive Number 189, Health Care Entities that Receive Medicare and/or Medicaid (December 16, 1993); and Directive Number 262, Coverage of Health Care Providers Based on their Relationship with Participants in the Federal Employees Health Benefits Program (March 17, 2003).
  
5. **DISTRIBUTION:** A, B (both hard copy and electronically); C (hard copy only).
  
6. **EXPIRATION DATE:** This directive remains in effect until rescinded or modified.

*Patricia A. Shiu*  
 PATRICIA A. SHIU

Director

Office of Federal Contract Compliance Programs

*12/16/10*  
 DATE

**EMPLOYMENT STANDARDS ADMINISTRATION  
U.S. DEPARTMENT OF LABOR  
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS  
WASHINGTON, D.C. 20210**

**OFCCP Order No. ADM Notice/Jur**

1. **SUBJECT:** Coverage of Health Care Providers and Insurers
2. **PURPOSE:** To provide guidance for assessing when health care providers and insurers are federal contractors or subcontractors based on their relationship with a Federal health care program and/or participants in a Federal health care program.

3. **BACKGROUND:**

A wide range of relationships exist between health care providers and/or insurers, and Federal health care programs and/or participants in Federal health care programs. Some of these relationships constitute Federal contracts within OFCCP jurisdiction, while others do not. Recent case decisions and changes in the health care industry and Federal health care programs have given rise to questions about which health care provider/insurer relationships constitute covered Federal contracts. This Directive addresses these coverage questions with respect to three nationwide Federal health care programs – Medicare, TRICARE, and the Federal Employees Health Benefit Plan (FEHBP) - and provides guidance for assessing when a health care provider or insurer is a covered federal contractor for purposes of OFCCP jurisdiction.

Three significant OFCCP cases address health care provider coverage issues and provide the basis for a framework for the analysis of these issues. In *OFCCP v. UPMC Braddock, UPMC McKeesport, and UPMC Southside*, ARB Case No. 08-048 (May 29, 2009),<sup>1</sup> a case involving the FEHBP, the Department of Labor Administrative Review Board (ARB) determined that three hospitals under review by OFCCP were covered subcontractors. Each hospital had a Health Maintenance Organization (HMO) contract with UPMC Health Plan to provide medical products and services to Federal Government employees covered by the UPMC Health Plan, pursuant to the Health Plan's contract with the U.S. Office of Personnel Management (OPM). The decision found that, under the terms of the HMO contract, the hospitals were to provide the medical services necessary for the UPMC Health Plan to meet at least a portion of its contractual obligation to OPM to put an HMO into operation. Thus, the hospitals were subcontractors subject to OFCCP jurisdiction.

Following these same principles, in *OFCCP v. Florida Hospital of Orlando*, ALJ Case No. 2009-OFC-00002 (October 18, 2010), an Administrative Law Judge (ALJ) determined that the hospital was a covered subcontractor. In this case, the Humana Military Healthcare Services (Humana) held a prime contract with TRICARE to provide

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<sup>1</sup> The *UPMC* case is still in litigation, as it is currently in federal court on judicial review under the Administrative Procedures Act. See *UPMC Braddock et al. v Solis*, Case No. 1:09-cv-01210-PLF (D. D.C.)

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networks of health care providers for TRICARE beneficiaries. The Florida Hospital, a participating hospital, had an “agreement” with Humana to assume some of the prime contractor’s responsibility to provide health care services to TRICARE beneficiaries. The hospital was, therefore, found to be a covered subcontractor.<sup>2</sup>

By contrast, an earlier decision, *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-234 (January 31, 2003), illustrates circumstances in which a hospital was not a federal contractor. In this FEHBP case, the ARB found that an agreement between the hospital and Blue Cross/Blue Shield that provided solely for *reimbursement to the hospital* for the cost of medical services the hospital provided to Federal Government employees enrolled in the Blue Cross insurance plan was not a covered subcontract. Such a reimbursement agreement – between a medical service provider (Bridgeport) and an insurer (Blue Cross) - was not necessary to the performance of the prime health insurance contract Blue Cross had with OPM to reimburse Blue Cross *policyholders* for their medical costs. Consequently, the hospital was not a covered subcontractor.

#### 4. **DIRECTIVE DEFINITIONS:**

- **Government contract/Federal contract** – means any agreement or modification thereof between any contracting Federal agency or department and any person for the purchase, sale or use of personal property and nonpersonal services. (See 41 CFR §§ 60-1.3, 60-250.2(i), 60-300.2(i), 60-741.2(i)) Unless otherwise noted, the term “contract” encompasses both contracts and subcontracts.
- **Subcontract** – means any agreement or arrangement between a federal contractor and any person, not in an employer/employee relationship: (1) for the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of a contract, or (2) under which any portion of the federal contractor’s obligation under the contract is performed, undertaken or assumed. (See 41 CFR §§ 60-1.3, 60-250.2(l), 60-300.2(l), 60-741.2(l)).
- **Health care plans/Plans** – are plans or programs for the delivery of health care services. There are two basic types of plans, and some health plans contain elements of both basic plan types. The two basic types of plans are:
  - **Managed/coordinated care plans** – are health care plans designed to control health care costs through a variety of mechanisms such as controls on inpatient admissions and lengths of stay, access to a select group of health care providers, etc. These plans include a variety of arrangements such as Health Maintenance Organizations (HMO), Preferred Provider Organizations (PPO), and Provider Sponsored Organizations (PSO).

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<sup>2</sup> The *Florida Hospital* case is still in litigation, as Florida Hospital has filed Exceptions to the ALJ’s decision with the ARB.

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- **Fee-for-service plans** – are plans that provide “traditional” health insurance that allows the beneficiary to make most health care decisions independently. Typically, the plan beneficiary pays for the health care service and receives reimbursement from the health plan if the service is covered under the insurance policy.
- **Health care provider** – includes hospitals and medical facilities, doctors and medical professionals, and any other professional, company, or entity that provides medical services and supplies. Health care providers may contract directly with the contracting Federal agency or be subcontractors.
- **Insurance reimbursement agreement/reimbursement agreement** – There are two general kinds of insurance reimbursement agreements. A reimbursement agreement may be a contract or agreement between a health care provider and an insurer (that has a prime contract with a Federal health care program) to provide payment (reimbursement) to the health care provider for medical services it provides to patients covered by the health care program. This type of reimbursement agreement is usually associated with “fee for service plans” that provide traditional health insurance to plan beneficiaries. A reimbursement agreement may also be a contract or an agreement between a health care provider and Medicare/Medicaid (or its contracting agency) to accept payment directly from Medicare/Medicaid for medical services provided to patients that are reimbursable under Medicare Parts A, B and/or Medicaid. See additional information regarding Medicare Parts A and B in the Basic Principles section and in section 6, Procedures: A2 below.
- **Insurer** – a company that has a contract to provide health insurance for the benefit of Federal health care program members and beneficiaries.
- **Federal health care programs (Federal Programs)** – The three major nationwide Federal health care programs are:
  - **Medicare** - is a social insurance program administered by the U.S. Government, providing health insurance coverage to people who are aged 65 or over, or who meet other special criteria. Medicare is administered by the Centers for Medicare and Medicaid Services (CMS), a component of the U.S. Department of Health and Human Services (HHS). The Medicare program includes: Medicare Part A (medical insurance); Medicare Part B (hospital insurance); Medicare Advantage (Part C) (managed/coordinated care plans); Medicare Part D (prescription drug plans); and Medicaid (a State-administered health care program primarily for those with low income).
  - **TRICARE** - is the Federal health care program serving active duty military service members, members of the National Guard and Reserve, and military retirees. TRICARE also serves the families of military service members, and certain former military spouses worldwide. TRICARE is administered by the TRICARE Management Activity (TMA), a program of the U.S. Department



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of Defense. TRICARE includes insurance and supplemental insurance, direct health care services, managed/coordinated care, and special needs plans. Eligibility for TRICARE's various components and plans varies.

- **FEHBP** – is the Federal health care program serving civilian federal employees, retirees and their families. The program is administered by the U.S. Office of Personnel Management (OPM). The FEHBP offers federal employees and retirees a variety of health plans to choose from, including insurance and supplemental insurance plans, health care services plans, and other special needs plans.

**5. POLICY:**

This directive transmits the basic principles and procedures for determining whether a covered prime contract or subcontract relationship is created based on a company's relationship with a Federal health care program and/or with participants in a Federal health care program. This directive will remain in effect until it is rescinded or modified.

**BASIC PRINCIPLES:**

- A health care provider or insurer must have a covered federal contract or subcontract in order for there to be OFCCP jurisdiction over the provider or insurer. The wide array of health care plans, providers, services, and arrangements available necessitates a case-by-case approach when determining whether federal contractor or subcontractor coverage may be established.
- Any agreement or other arrangement that effectively creates a covered contractual (or subcontractual) relationship between the parties is a contract as defined in OFCCP regulations, whether or not it is labeled a "contract," or "subcontract" by the parties.
- Contractor (or subcontractor) obligations mandated by OFCCP programs cannot be altered, limited, or defeated by the inclusion in the contract of provisions contrary to such obligations.
- Under each of the major Federal health care programs, a company may enter into a prime contract with a Government agency to provide insurance, health care services, administrative support, (e.g., claims processing), or a combination of these services.
- Under each of the major Federal health care programs, a prime contractor may subcontract the performance of elements of its contract to one or more companies or may subcontract for supplies or services necessary to the performance of the contract. This creates a subcontract relationship and establishes coverage over the company(ies) providing/fulfilling an element of the prime contract or providing the necessary supplies or services.

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- When a covered subcontractor contracts with another company to provide supplies and services necessary to the performance of the prime contract or to fulfill an element of the prime contract, another subcontract relationship is created and OFCCP has jurisdiction over both subcontractors. If a covered subcontractor has such contracts with multiple companies, OFCCP has jurisdiction over all of the subcontractors, so long as they are providing goods and services necessary to the performance of the prime contract or are fulfilling an element of the prime contract.
- An insurance reimbursement agreement between a health care provider, (e.g., a doctor or hospital), and a federal contractor contracted to provide health insurance only (and not health care services) does not create a covered subcontract relationship. Such a reimbursement agreement does not provide OFCCP with jurisdiction over the health care provider.
- Reimbursements made pursuant to Medicare Parts A and/or B (or Medicaid) are Federal financial assistance, not contracts.<sup>3</sup> Therefore, health care providers that enter into agreements to receive such reimbursements for services provided to Medicare beneficiaries are recipients of Federal financial assistance, and are not considered contractors because of the reimbursement relationship.
- Federal health care programs may offer grants for eligible companies and individuals. While the receipt of a true grant does not create a contractual relationship, a grant recipient may also be a contractor if it has, or enters into, a Government contract or subcontract.

## **6. PROCEDURES**

OFCCP must first establish the existence of a federal contractor or subcontractor relationship in order to exercise jurisdiction over a company, e.g., a health care provider or insurer. In the initial stages of a compliance evaluation or complaint investigation, OFCCP will determine whether there is contract coverage for the time period in question. This will include obtaining and reviewing a copy of each relevant prime contract and subcontract. If a company holds a covered Government contract or is a subcontractor to a Government contract, then all of the company's establishments and facilities are subject to OFCCP regulatory requirements, regardless of where the contract is to be performed.

There are a variety of relationships that may exist among health care providers, insurers, companies providing supplies and non-medical services, and Federal health care programs (Federal Programs). Medicare, TRICARE and FEHBP, through their Federal contracting agencies, may contract for the delivery of such supplies and services. The Federal Programs may also award Federal financial assistance or grants to health care providers or other companies to provide reduced or no-cost services to specified

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<sup>3</sup> The legislative history of Medicare Parts A and B, and the Medicaid programs indicates that these are Federal financial assistance programs designed to provide a National health insurance program for eligible beneficiaries.



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communities, groups or individuals. Generally, receipt of Federal financial assistance or a grant, by itself, does not establish a covered contractual relationship.

Under each of the Federal Programs, a company may enter into a direct (prime) contract with a Government agency, and/or a prime contractor may subcontract elements of its contractual obligations to provide health care services, insurance, administrative support or other supplies and services. It is these contractual relationships over which OFCCP has enforcement authority.

OFCCP takes a case-by-case approach to the issue of whether a federal contractor or subcontractor relationship exists and OFCCP jurisdiction may be established. Guidance regarding when there is and is not a contractual relationship is provided below.

**1. Determining That a Federal Contract Relationship Exists****A. Direct Contract Coverage**

Direct or “prime” contract coverage is established when a contract exists between a Government agency/Federal Program and a health care provider, insurer, or other type of company to provide specific supplies or perform particular services. Once a direct contract is found, OFCCP will examine the nature and purpose of the contract and determine its value and duration to ensure that coverage thresholds are met.<sup>4</sup>

Direct contracts may exist between one or more Federal Program(s) and any of the following typical types of health care related entities.

**1) Health Care Providers**

Direct contracts with health care providers usually provide that the health care provider will provide specified health care services to members and beneficiaries of one or more health plans within a Federal Program. A contract between a Government agency/Federal Program and a health care provider may also provide that the health care provider will establish and/or operate a managed or coordinated care plan, (e.g., an HMO), or facility. Direct contracts with health care providers are used by TRICARE, FEHBP, and Medicare’s Advantage and Part D programs.

**EXAMPLE:** A Federal Program contracts with Hospital A to provide an HMO Plan for the members and beneficiaries of one of its health plans. Hospital A is a direct (prime) contractor and OFCCP jurisdiction is established.

**EXAMPLE:** An outpatient medical facility contracts with the Department of Veterans’ Affairs and the Department of Defense to provide health care services to active duty and retired military personnel under the TRICARE

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<sup>4</sup> Throughout this directive and in all of the examples provided, it is assumed that contract thresholds have been met, unless stated otherwise.

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program. The outpatient medical facility is a direct (prime) contractor and OFCCP jurisdiction is established.

**2) Insurers**

TRICARE, FEHBP, and/or Medicare's Advantage and Part D programs may enter into direct contracts for the provision of health insurance for members and beneficiaries of a number of their health plans, including fee-for-service and PPO plans. Under such circumstances, a direct Federal contract exists with the insurer and OFCCP jurisdiction is established.

Thus, for example, in the *Bridgeport* case<sup>5</sup>, the ARB determined that there was a direct contract between the Office of Personnel Management (the contracting agency for the FEHBP) and Blue Cross/Blue Shield (the insurer) to provide health insurance to certain federal employees and beneficiaries. OFCCP therefore had jurisdiction over Blue Cross/Blue Shield.

Medicare Advantage and Medicare Part D both offer a variety of plans, including fee-for-service plans that provide insurance, but not supplies or medical services to plan members and beneficiaries. Like the contract at issue in *Bridgeport*, these insurance-only plans are direct Federal contracts that establish OFCCP jurisdiction over the insurer.

**3) Other Types of Direct Contracts**

Federal Programs and/or their contracting agencies may also enter into contracts for the provision of various other supplies and services for one or more of their health plans, or for the Federal Program as a whole. These may include contracts for the provision of administrative support, claims and data processing, customer service, marketing, medical savings plans/flexible spending plans, etc. Such contracts are Government supply and service contracts, over which there is OFCCP jurisdiction.

EXAMPLE: A Federal Program contracts with Company X to provide claims processing services and regional administrative service centers for the benefit of its members and beneficiaries. A direct contract relationship exists between Company X and the Federal Program.

**B. Potential Subcontract Relationships**

OFCCP jurisdiction may also be established when a subcontractor relationship exists. To determine if a subcontractor relationship exists, it must first be determined whether there is an underlying prime contract between a Federal Program and/or its contracting agency and a company, insurer, or health care provider, and if so, what the obligations are under that contract. Next, it must be determined whether there is

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<sup>5</sup> See *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-234, (January 31, 2003).

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also an agreement or arrangement between the prime contractor and the subcontracting company:<sup>6</sup> (1) for the purchase, sale or use of personal property or nonpersonal services<sup>7</sup> which, in whole or in part, is necessary to the performance of the underlying contract, or (2) under which any portion of the prime contractor's contractual obligation is performed.

To assess whether there is a subcontract within OFCCP's jurisdiction, the nature and purpose of BOTH the prime contract AND the subcontract at issue will be examined. If the subcontract satisfies at least one of the two prongs discussed above, then a subcontract within OFCCP jurisdiction exists.<sup>8</sup>

Provided below are examples of some typical health care related subcontractor relationships. However, it is important to note that the terms of individual contracts and subcontracts vary, and that assessments of contract coverage are made on a case-by-case basis.

### *1) Provision of Health Care Services*

In addition to offering insurance plans, each of the Federal Programs (and/or its contracting agency) offer health care plans that provide actual health care services, rather than only insurance, to its members and beneficiaries. Health care plans that provide actual health care services include HMOs, and may include PPOs, PSOs, or other forms of managed or coordinated care<sup>9</sup>. To offer such plans, a Federal Program will typically contract with a health care plan or company to establish or provide the desired managed care plan. Often, the health care company will then contract with one or more health care providers to provide some or all of the medical services the plan is contractually obligated to provide to the Federal Program. Under such circumstances, the health care provider is a covered subcontractor.

The *UPMC* case<sup>10</sup> illustrates this situation. There the ARB determined that a prime contract existed between OPM (the FEHBP Program contracting agency) and the UPMC Health Plan (the health plan company) to put an HMO into operation. Each of the hospitals (health care providers) was under a contract with UPMC to provide members and beneficiaries of the UPMC health plan with medical supplies and services required by UPMC's prime contract with OPM. Consequently, the ARB determined the hospitals were covered subcontractors.

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<sup>6</sup> Excluding employer/employee agreements or arrangements.

<sup>7</sup> The term "nonpersonal services" includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. 41 CFR § 60-1.3.

<sup>8</sup> As noted in the Basic Principles section, above, the same analysis applies in determining whether there is OFCCP jurisdiction over a contract between a covered subcontractor and a third company.

<sup>9</sup> HMOs, PPOs, and PSOs, are all managed/coordinated care plans that vary in how they are organized and administered, whether they include a specific "network of providers," and the types of services they provide. It is imperative that each plan is examined on a case-by-case basis, rather than just assuming based on a label (e.g., PPO) that the plan works in a particular manner or otherwise imposes certain obligations on the plan.

<sup>10</sup> See *OFCCP v. UPMC Braddock, UPMC McKeesport, and UPMC Southside*, ARB Case No. 08-048 (May 29, 2009).

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These same principles were applied in the *Florida Hospital* case.<sup>11</sup> In this case, an ALJ determined that a prime contract existed between TRICARE and Humana in which Humana was obligated to establish provider networks through contractual arrangements. Florida Hospital had an “agreement” with Humana to provide health care services for TRICARE beneficiaries. The ALJ thus determined that Florida Hospital performed a portion of Humana’s obligations by providing some of the medical services to TRICARE beneficiaries that Humana had contracted to provide. For this reason, the ALJ concluded that Florida Hospital was a covered subcontractor.

EXAMPLE: CMS, Medicare’s contracting agency, contracts with a health plan company to provide a PPO Health Plan that includes a prescription drug plan (Medicare Part D), for Medicare Advantage members. The health plan company then contracts with a pharmaceutical company to provide the necessary prescription drugs. The health plan company also contracts with a hospital to provide the health care services the PPO requires. The pharmaceutical company is a covered subcontractor because it has contracted to fulfill a portion of the prime contract between CMS and the PPO Health Plan company. The hospital is also a covered subcontractor because its contract is to fulfill the prime contract’s requirement to provide health care services.

## 2) *The Provision of Insurance and Reimbursement Agreements*

When the prime contract is for the provision of health insurance, the insurer (insurance carrier) is a covered prime contractor and must comply with OFCCP regulations. Generally, an insurer does not provide direct health care services to the insured. Rather, it provides payment or partial payment to defray the costs of obtaining certain medical supplies and services. In some cases, the insured must pay the health care provider the full cost of services he or she receives and then seek reimbursement from the insurance plan. However, insurers often enter into agreements with health care providers to directly pay, (i.e. “reimburse”), the provider for the cost or a portion of the cost of eligible medical goods or services that it provides to an insured, saving the insured the cost and inconvenience of having to first pay the provider and then seek reimbursement from the insurer. These reimbursement agreements between insurers and health care providers do **not** create a covered subcontractor relationship. Because the prime contract is an insurance contract **solely** for the provision of health insurance to Federal Program members and beneficiaries, the payment of fees directly to health care providers is neither necessary to the performance of the prime contract, nor the fulfillment of an element of the prime contract.

This issue was addressed in the *Bridgeport* case<sup>12</sup> in which the ARB found that the reimbursement agreement between the hospital and the insurance provider, Blue

<sup>11</sup> See *OFCCP v. Florida Hospital of Orlando*, ALJ Case No. 2009-OFC-00002 (October 18, 2010).

<sup>12</sup> See *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-234, (January 31, 2003).

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Cross/Blue Shield, was not a Government subcontract. This was because Blue Cross's prime contract with OPM only provided for health insurance for the health plan members, not for the provision of health care services from providers. On the other hand, if a prime insurance contractor were to subcontract out its obligation (or any part of it) to provide health insurance, then that subcontract would be subject to OFCCP jurisdiction.

It should be noted that in some situations a reimbursement agreement may be combined with a contractual obligation, e.g., to provide medical services. In such circumstances, a covered subcontract is created. Thus, if one of the contract's provisions creates a covered subcontract, the mere fact that the contract also contains a reimbursement agreement does not defeat the subcontractor relationship.

EXAMPLE: Company D has a prime contract with OPM to establish and manage a PPO for one of the FEHBP's health plans. The contract includes ensuring the availability of a network of health care providers to provide specific health care services to the beneficiaries of the health plan. Company D contracts with Medical Practice F to provide some of these medical services. The contract between Company D and Medical Practice F also contains a reimbursement agreement for the medical services that are provided. Medical Practice F is a covered subcontractor because its contract with Company D is necessary to the performance of the prime contract Company D holds with OPM. The inclusion of the reimbursement clause in the contract does not alter or defeat the existence of the covered subcontract relationship.

In sum, a covered subcontractor relationship exists when the contract at issue is necessary to the performance of a covered prime contract, or when the subcontract's purpose is to perform any portion of the prime contractor's obligation. Whether a particular contract is a covered subcontract must be determined on a case-by-case basis, considering all of the contract's provisions and their relation to the prime contract. If it is not clear whether a covered subcontract exists in a particular situation, the Compliance Officer (CO) will contact the Division of Program Operations for guidance.

**2. Special Relationships That Are Not Covered Contracts****A. Health Care Entities that Receive Medicare Part A, Medicare Part B, or Medicaid Reimbursements**

Medicare Parts A and B are Federal financial assistance programs that provide medical and hospital insurance to Medicare beneficiaries. The Medicare Program receives Federal funding to provide this insurance coverage to eligible beneficiaries. When a health care provider, (e.g., a hospital, physician, or other medical service), enters into an agreement with Medicare to be reimbursed for services covered by Medicare Parts A and B, a covered contract relationship is not

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formed. Rather, the reimbursed health care provider is considered a recipient of Federal financial assistance.

Medicaid, jointly funded by the Federal Government and the various State governments, is a State-administered health care program. Federal funding is provided to the State-administered health care programs, and the State reimburses health care providers for the services provided to Medicaid beneficiaries. As in the case of Medicare A and B reimbursements, such Medicaid reimbursement arrangements do not create a covered contract.<sup>13</sup>

However, OFCCP may have jurisdiction over a health care provider receiving Medicare reimbursements if the health care provider also holds a separate covered Federal contract or subcontract. Potential covered contracts or subcontracts may include contracts related to Medicare Advantage (Part C) or Part D programs, contracts with another Federal Program, and/or contracts with prime contractors of other Federal Programs.

**EXAMPLE:** Company G has a reimbursement agreement with Medicare Parts A and B to receive payment for services it provides to Medicare A and B beneficiaries. Company G also contracted with Medicare (CMS) to establish a Medicare Advantage PPO and to be reimbursed for the health care services provided by the PPO. The PPO contract also includes the establishment of a prescription drug plan and claims processing services. The reimbursement agreement with Medicare A and B does not create a contractor relationship because Medicare A and B are Federal financial assistance programs.

However, Company G's contract with Medicare (CMS) to establish a Medicare Advantage PPO creates a covered prime contract pursuant to which Company G may subcontract with other companies to provide the required health care services, prescription drug program and claims processing. If Company G does enter into such subcontracts, the companies holding them will be covered subcontractors.

#### **B. Other Grants and Federal Financial Assistance**

Under the Federal health care programs, individuals and health care providers may be eligible for specific grants and/or Federal financial assistance. If a health

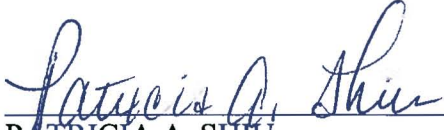
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<sup>13</sup> In *United States v. Baylor University Medical Center*, 564 F. Supp. 1495 (N.D. Tex. 1983) the court concluded that Medicare (Parts A and B) and Medicaid are Federal financial assistance programs. In reaching its conclusion, the court considered the legislative history of the Medicare Program and other civil rights statutes, and that the HHS's regulatory interpretation of the Medicare statute expressly stated that Medicare and Medicaid are Federal financial assistance for purposes of Section 504 of the Rehabilitation Act. The Fifth Circuit in 736 F.2d 1039 (5<sup>th</sup> Cir. 1984) affirmed the district court's decision in relevant part and the U.S. Supreme Court denied a petition for *certiorari* in 469 U.S. 1189 (1985).



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care provider or other company is **only** a recipient of a grant or Federal financial assistance, contract coverage is not established. For example, a health care provider may be awarded a grant or other Federal financial assistance exclusively for educational or research purposes, or to provide services to a targeted group, (e.g. rural populations that are underserved because of their distance from health care facilities).

  
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PATRICIA A. SHIU

Director

Office of Federal Contract Compliance Programs

  
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DATE



# Jurisdiction Webinar

December 3, 2009

By: **Gilberto Garcia, Jr., Esq.**, Chief of OFCCP's Branch of Enforcement & Appeals and **Bev Dankowitz**, Counsel for Litigation & Regional Coordination and **Karen Torre**, Attorney, of the Civil Rights and Labor-Management Division, National Solicitor's Office at the U.S. Dept. of Labor



This Webinar and information contained in the slides for this presentation is intended to address general concepts regarding OFCCP contractor coverage, not to provide advice applicable to coverage of specific contractors or subcontractors.





# Topics to be Covered

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- OFCCP's Legal Authority to Assert Jurisdiction over Government Contractors & Subcontractors
- Monetary & AAP Thresholds that Establish Coverage
- Key Factors OFCCP uses to Assert Jurisdiction
- Aggregation of Contracts – Basic Coverage & AAP
- Types of Contracts used to Establish Coverage
- Establishing Coverage over Subcontractors
- Single-Entity Determinations
- Coverage Issues Pertaining to Particular Types of Industries – Financial Institutions & Hospitals
- Exemptions to OFCCP Contract Coverage
- Contractor Defenses



# Types of Contractor Investigations by OFCCP

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- 1) Investigations generated by the filing of a discrimination complaint with OFCCP
- 2) Compliance Evaluations
  - Compliance Review (3 stages – desk audit, on-site review, and, if necessary, off-site analysis)
  - Off-Site Review
  - Compliance Check
  - Focused Review
  - Corporate management compliance evaluation
  - ❖ ***Note:** Under EO 11246, OFCCP can conduct pre-award compliance evaluation.*





# OFCCP's Laws

- 1) Executive Order 11246, as amended
  - **Prohibits discrimination on basis of race, color, religion, sex & national origin; also has an affirmative action (AA) obligation**
  - *See 41 CFR Part 60-1*
  - *See 41 CFR Part 60-4 (construction contractors – AA requirements)*
  - *See 41 CFR Part 60-20 (sex discrimination guidelines)*
- 2) Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793
  - **Prohibits discrimination on the basis of disability & also to take AA to employ and advance in employment qualified persons with disabilities**
  - *See 41 CFR Part 60-741*
- 3) Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 4212, as amended
  - **Prohibits discrimination on the basis of one's veteran status; also has an AA obligation**
  - *See 41 CFR Part 60-250 (contracts entered before December 1, 2003)*
  - *See 41 CFR Part 60-300 (contracts entered on or after Dec. 1, 2003)*



# Legal Authority

	Supply & Service (S&S) Contractors	Federal Construction Contractors	Federally-Assisted Construction Contractors
<b>Executive Order 11246, as amended (EO 11246)</b>  <b>41 CFR Part 60-1</b>	<ul style="list-style-type: none"> <li>Contractors and subcontractors with government contracts in excess of \$10,000</li> <li>Written affirmative action program (AAP) 120 days after contract starts, if: 1) 50 or more employees AND, 2) a single contract of \$50,000 or more</li> </ul>	<ul style="list-style-type: none"> <li>Contractors and subcontractors with government contracts in excess of \$10,000</li> <li>Must evidence good faith efforts to increase participation of minorities and women in the skilled trades</li> </ul>	<ul style="list-style-type: none"> <li>Same as Federal Construction Contractors</li> </ul>
<b>Section 503 of the Rehabilitation Act of 1973, as amended (Section 503)</b>  <b>41 CFR Part 60-741</b>		<ul style="list-style-type: none"> <li>Contractors and subcontractors with government contracts in excess of \$10,000</li> <li>Written AAP 120 days after contract starts, if: 1) 50 or more employees AND, 2) a single contract of \$50,000 or more</li> </ul>	<b>No Coverage</b>

# Legal Authority



EXHIBIT B PAGE 6 OF 45

	Supply & Service (S&S) Contractors AND Federal Construction Contractors	Federally-Assisted Construction Contractors
<b>Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA), 38 U.S.C. § 4212</b>  <b>41 CFR Part 60-250</b> <b>41 CFR Part 60-300</b>	Before 12/1/2003	<b>No Coverage</b>
	<ul style="list-style-type: none"> <li>■ Contractors and subcontractors with government contracts of \$25,000 or more</li> <li>■ Written AAP 120 days after contract starts, if: 1) 50 or more employees AND, 2) a single contract of \$50,000 or more</li> </ul>	
	After 12/1/2003	
	<ul style="list-style-type: none"> <li>■ Contractors and subcontractors with government contracts of \$100,000 or more</li> <li>■ Written AAP 120 days after contract starts, if: 1) 50 or more employees AND, 2) a single contract of \$100,000 or more</li> </ul>	



# Key Factors to Establish Jurisdiction

- 1) Must be a “Government contract” or “subcontract”, as defined in OFCCP’s regulations, not a grant.
  - *See 41 CFR 60-1.3 (EO 11246); 60-250.2, 60-300.2 (VEVRAA); & 60-741.2 (Section 503)*
- 2) Must be a “Government contract” with a “contracting agency”, as defined in OFCCP’s regulations.
- 3) Government contract or subcontract must meet minimum dollar thresholds under OFCCP’s laws.
- 4) Government contract or subcontract must have been current during the period OFCCP reviews, or, if a complaint investigation, when the alleged discrimination occurred.
  - *See OFCCP v. Priester Construction Co., 1983 WL 411026 (Secretary Decision & Order, 78-OFC-11, Feb. 23, 1983)*
  - *41 CFR 60-1.3 (definitions of “prime contractor” and “subcontractor”)*



# Key Factors for AAP Coverage: Executive Order 11246

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- Under Executive Order 11246, federal construction contractors are not required to develop an AAP.
  - **Note:** They are required to develop an AAP under Section 503 & VEVRAA.
- Under Executive Order 11246, **nonconstruction** (supply and service) contractors are required, within 120 days of the start of a contract, to develop and maintain a written affirmative action program (AAP) for each of its establishments, if the contractor has 50 or more total employees (not per establishment) AND:
  - 1) has a contract of \$50,000 or more; or
  - 2) has Government bills of lading which in any 12-month period can reasonably be expected to total \$50,000 or more; or
  - 3) serves as a depository of federal funds in any amount; or
  - 4) is a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

- **See 41 CFR 60-2.1 (EO 11246); Note: Section 503 and VEVRAA do not refer to U.S. savings bonds, bills of lading, or depository of federal funds for AAP requirement.**



# Key Factors for AAP Coverage: Section 503 & VEVRAA

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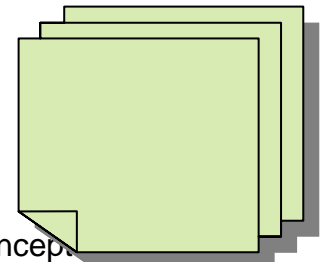
- Under Section 503, contractors (S&S and construction) are required, within 120 days of the start of a contract, to develop and maintain a written affirmative action program (AAP) for each of its establishments, if the contractor has 50 or more total employees (not per establishment) AND has a contract of \$50,000 or more.
  - *See 41 CFR 60-741.40.*
  
- Under VEVRAA, contractors (S&S and construction) are required, within 120 days of the start of a contract, to develop and maintain a written affirmative action program (AAP) for each of its establishments, if the contractor has 50 or more total employees (not per establishment) AND:
  - if the contract was entered into **before** December 1, 2003, has a contract of \$50,000 or more (*See 41 CFR 60-250.40*); or
  - If the contract was entered into **on or after** December 1, 2003, has a contract of \$100,000 or more (*See 41 CFR 60-300.40*).





# When does OFCCP aggregate contracts for jurisdiction?

- General Rule: To establish “basic” coverage, if a contractor has contracts or subcontracts with the federal government in any 12-month period with an aggregate total value (or can reasonably be expected to have an aggregate total value) at or above the monetary threshold.
  - *See 41 CFR 60-1.5(a)(1) (EO 11246); **Note:** Section 503 and VEVRAA do not permit aggregation of contracts for “basic” coverage.*
- Generally, to establish AAP coverage, OFCCP cannot aggregate contracts. For AAP coverage, must have “single contract” or “Gov’t bills of lading which total in any 12-month period” the AAP threshold.
  - *See 41 CFR 60-2.1(b)(1) (EO 11246)*
  - ❖ *But AAP aggregation can apply to indefinite delivery vehicle, indefinite quantity & purchase order contracts*





# Indefinite Quantity Contracts

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- 41 C.F.R. § 60-2.1(b) states: “(1) Each nonconstruction contractor must develop and maintain a written affirmative action programs for each of its establishments if it has 50 or more employees and: (i) has a contract of \$50,000 or more; or (ii) has Government bills of lading which in any 12-month period, total or can reasonably be expected to total \$50,000 or more...”
- A contract that sets the terms for subsequent transactions, i.e., a Blanket Purchase Agreement or Purchase Notice Agreement, is a contract under which the total monetary value of the subsequent transactions should be aggregated to determine whether that contract meets the threshold amounts set forth in 41 C.F.R. § 60-1.40 and 41 C.F.R. § 60-2.1. [\*Star Machinery\*, 83-OFCCP-4](#); [\*Bruce Church, Inc.\*, 87-OFCC-7](#); [\*Goya de Puerto Rico, Inc.\*, 1998-OFCC-00008](#); cf. [\*United Biscuit Co.\*, 359 F.2d 206](#).
- Transactions occurring under a single Indefinite Quantity Contract will be aggregated to determine whether the contract meets the AAP threshold amount. The period of aggregation is not limited to the 12-month period applicable to basic coverage in 41 C.F.R. § 60-1.5 (a)(1) or for AAP coverage based on bills of lading in 41 C.F.R. § 60-2.1(b)(ii). Therefore, all transactions under a single contract that occur during the life of that contract may be aggregated to determine AAP coverage. See, [\*Star Machinery\*, 1983 WL 509225 \\*3](#).



# Dollar Amount of Contract Activity at Time of Scheduling



- Must there be actual contract activity of \$50,000 or more before OFCCP can apply the AAP requirement against a contractor?
- 41 C.F.R. § 60-2.1(c) states: “The affirmative action programs required under paragraph (b) of this section must be developed within 120 days from the commencement of a contract and must be updated annually.”
- The AAP requirement is triggered by the contract **amount**, not the contract activity at the time of the notice of audit. If the contract value meets the threshold amount, it does not matter whether the activity occurs in year 1 or year 5 of the contract.
- Requiring AAPs no later than 120 days after commencement of the contract promotes the purpose of the OFCCP programs by requiring affirmative action measures to be in place early enough in the life of the contract to have an impact on any hiring and other personnel activity done during the duration of the contract.
- Thus, if the value of the contract is \$50,000 or more during the life of the contract, or, for a BPA, reasonably expected to reach that value, it does not matter for coverage purposes whether at least \$50,000 has changed hands at the time of the review. **Star Machinery, 83-OFCCP-4, 1983 WL 509225 \*3 (“[A] blanket purchase agreement is one contract with the value measured by the total amount of orders the parties reasonably anticipate to be placed during the life of the contract.”)**



# Direct Coverage over a Contractor

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- If a business or organization has a federal contract, provided that it meets the minimum dollar threshold for coverage, and OFCCP schedules that facility with the contract for a compliance evaluation or complaint investigation, then that business or organization is required to comply with OFCCP's laws.
  - *See OFCCP's FAQ "For Employers"*



# Coverage over All Contractor Establishments

- Once it has been determined that a business or organization has a federal contract, then all parts of that same business or organization (*i.e.*, divisions, branches, establishments or facilities) are required to comply with OFCCP's laws, regardless of whether the particular facility scheduled has the federal contract.
  - See *Board of Governors of Univ. of N. Carolina v. DOL*, 917 F.2d 812, 813 (4<sup>th</sup> Cir. 1990); *Trinity Industries v. Herman*, 173 F.3d 527 (4<sup>th</sup> Cir. 1999)
  - See OFCCP's FAQ "For Employers"



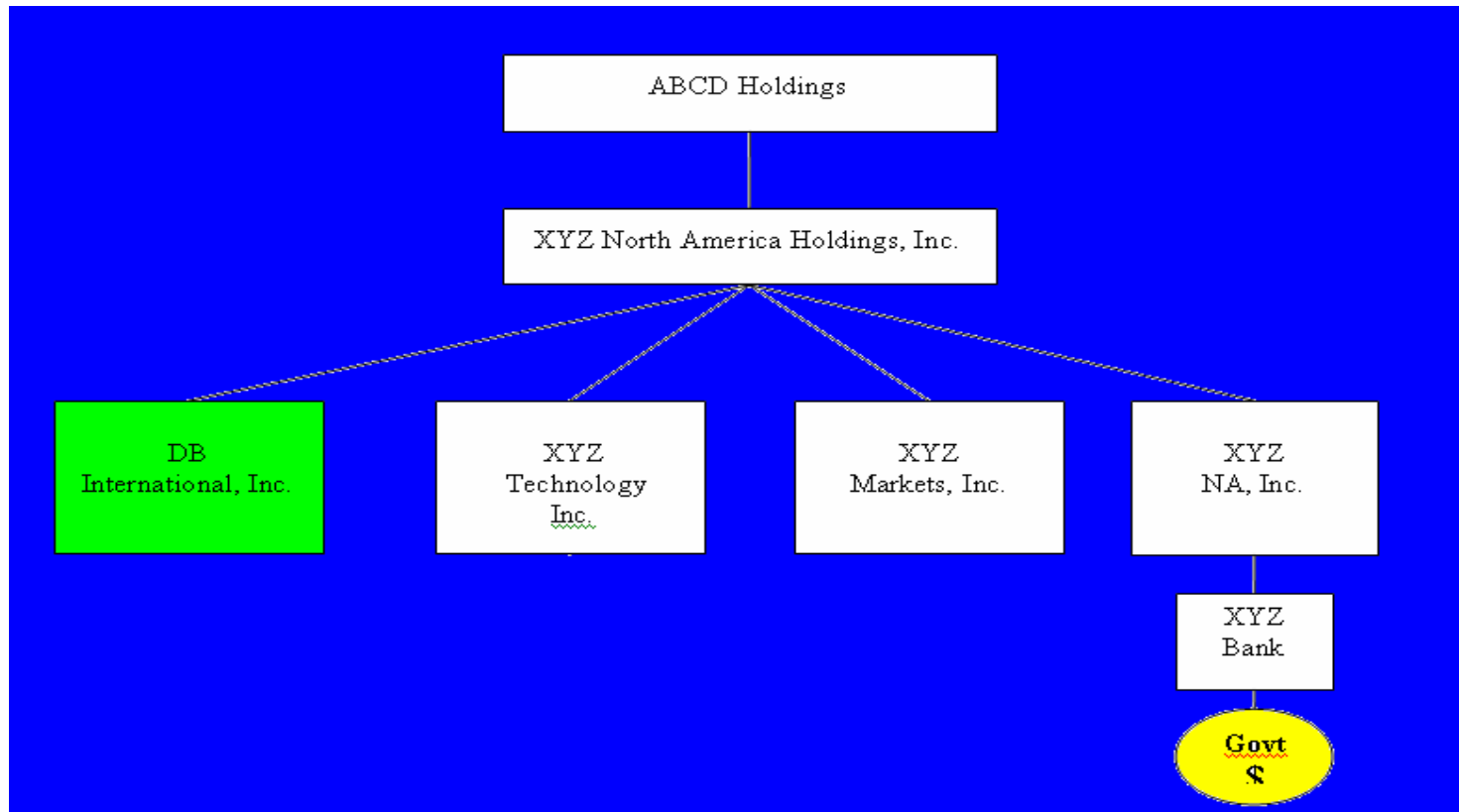
# Coverage Based on a Related Contractor

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- OFCCP coverage can extend to businesses or organizations that do not directly hold a federal contract or subcontract, provided they are considered a “single entity” with a separately incorporated related business or organization that holds such a contract (e.g., parent-subsidary corporate relationship).
  - See *OFCCP’s FAQ “For Employers”*
  - See *OFCCP v. MBNA, 1999-OFC-2, ALJ Order (Sept. 7, 1999)*



# Single Entity Diagram





# Single Entity – Five Factor Test

*Ernst-Theodor Arndt*, 52 Comp. Gen. 145  
(1972)

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- 1) Common ownership
- 2) Common directors and/or officers
- 3) De facto exercise of control
- 4) Unity of personnel policies
- 5) Dependency of operations







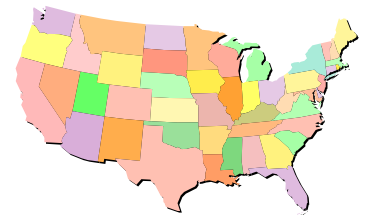
# Contracts & Grants

- Generally, OFCCP establishes coverage over a business or organization because it has a federal contract or subcontract, not by a grant nor federal financial assistance (e.g., Medicare Part A and Community Services Block Grants not basis for coverage).
- However, OFCCP can establish coverage over a business for its participation in a federally-assisted construction project (*i.e.*, DOT funds given to States and then States issue contracts to contractors).
  - But Section 503 and VEVRAA regulatory requirements will not apply.
- Note that just because the agreement is labeled a “grant” or “cooperative agreement” by the contracting agency, OFCCP still has the authority to review the agreement to determine if it meets OFCCP’s regulatory definition of a government contract.



# Exemptions/Waivers: Contracts with States or Local Governments

- OFCCP only covers those entities in State or local government that “participates” in work on or under the Government contract or subcontract, not all parts of the State or local government.
  - *See 41 CFR 60-1.5(a)(4) (EO 11246); 60-250.4(a)(4), 60-300.4(a)(4) (VEVRAA); & 60-741.4(a)(5).*
- Under EO 11246, if a State or local gov’t agency has a **direct** contract, but that entity **IS NOT** a medical or educational institution, then they are not required to maintain a written AAP.
- This same AAP exemption **DOES NOT** apply to Section 503 or VEVRAA.
- Thus, State and local government agencies **ARE NOT** exempt from developing AAPs under Section 503 and VEVRAA. They can still be scheduled and reviewed for compliance by OFCCP for all other EO 11246 obligations (*See 41 CFR 60-1.4 - EO Clause obligations*) & for Section 503 and VEVRAA compliance.





# Exemptions/Waivers: Contracts for Work Inside or Outside the U.S.

- Under Executive Order 11246, if the work under the contract was performed outside the U.S. by employees who were recruited outside the U.S., then the contract is exempt from EO clause.
  - However, if contractor recruits its employees within the U.S. and is transferred immediately or later to work outside the U.S. on the contract, then would be covered.
  - This is known as extra-territoriality.



# Exemptions/Waivers: Contracts for Work Inside or Outside the U.S.

- Under Section 503 and VEVRAA, if the employment activities or decisions occur outside the U.S., which are the alleged discriminatory acts, then the contract is exempt from the applicable EO clauses.
  - However, if alleged adverse employment activities occur within the U.S., and contractor recruits such employees to work outside the U.S. on the federal contract, then would be covered under Section 503 and VEVRAA.
  - *See 41 CFR 60-741.4(a)(4) (Section 503) for definition of reg. term “employment activities within the U.S.”*



# How Does OFCCP establish jurisdiction over banks and credit unions?

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- 1) If banks or credit unions have any federal contracts or subcontracts that meet the monetary thresholds, then covered under OFCCP's applicable laws.
- 2) If bank or credit union is a depository of federal funds in ANY amount, then covered under Executive Order 11246.
- 3) If bank or credit union is an issuing and paying agent of U.S. savings bonds in ANY amount, then covered under Executive Order 11246.
- 4) If bank or credit union subscribes to deposit insurance from the FDIC or NCUA, then covered under OFCCP's laws.
  - FDIC or NCUA is a federal agency, part of the Executive Branch
  - Deposit or share insurance meets the reg. definition of Gov't contract and common law characteristics of a contract





# What is a Subcontract?

- Any agreement or arrangement between a contractor and any person:
  - (1) for the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any contract; or
  - (2) under which any portion of the contractor's obligations under any contract is performed, undertaken or assumed. **41 CFR 60-1.3.**



# Who is a covered “subcontractor”?

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- **Subcontractor** is any person holding a subcontract subject to Executive Order 11246, Section 503, or VEVRAA, or for the purposes of the enforcement procedures – compliance evaluations and complaint investigations – any person who has had a subcontract subject to OFCCP laws. 41 CFR 60-1.3, 60-250.2, 60-300.2, and 60-741.2.
- The term “**first-tier subcontractor**” refers to a subcontractor holding a subcontract with a prime contractor. 41 CFR 60-1.3.



# Establishing a Company as a Subcontractor

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1. Identify a prime contractor. Existence of a contract between the employer and a federal government agency for the purchase, sale or use of personal property or nonpersonal services that covers the period under investigation.



2. Existence of a contract between the prime contractor and the second company that also covers the period under investigation.





# Establishing a Company as a Subcontractor (cont'd)

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3.
  - a. If the contract between the prime contractor and the second company requires the second company to provide any of the actual products or services that the Prime agreed to provide to the government, **you have a subcontract.**
  - b. If the contract between the prime contractor and the second company requires the second company to provide people to perform any of the services that the Prime is required to provide to the government, **you have a subcontract.**
4. Both the prime contractor and the subcontractor must satisfy the \$10,000 contract amount requirement for EEO clause compliance (41 C.F.R. § 60-1.5(a)(1)) and the 50-employee and \$50,000 contract amount requirement for AAP coverage. (41 C.F.R. § 60-2.1(b)).



# Examples: HMOs and Fee-for-Service

- An HMO contracts with OPM to provide medical services and supplies to federal employees in exchange for payment of premiums. HMO contracts with hospitals to provide those medical services and supplies. The hospitals are subcontractors because the provision of medical services and supplies was a critical component of the prime contract. The contract depended on medical providers to offer medical services and supplies necessary for the prime contractor to meet its obligations under its contract with OPM. [OFCCP v. UPMC, 2007-OFC-001, -002, -003, ARB \(May 29, 2009\)](#) (Federal court challenge pending).
- A fee-for-service health insurer contracts with OPM to provide reimbursement to federal employees for their medical care costs in exchange for premiums. Insurer contracts with hospital to provide medical services covered by federal employees' insurance policies with the insurer. The hospital is **not a subcontractor** because the insurer agreed to provide reimbursement for covered services but did not agree to provide or guarantee the services themselves. [OFCCP v. Bridgeport Hospital, 97-OFC-1, ARB Final Decision and Order \(Jan. 31, 2003\)](#).



# Examples: Tricare

- TRICARE, the DOD's health care program for members of the uniformed services and their families, contracts with health benefits company (regional administrator) to develop health care provider networks in various regions of the country. Regional Administrator contracts with hospitals to provide health care services to TRICARE participants. Hospitals are subcontractors because providing health care services is necessary for regional administrator to meet its obligation under the contract with TRICARE to develop a provider network.
  - [OFCCP v. Florida Hospital, 2009-OFC-02](#) (pending before ALJ)



# Examples: Medicare

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- OFCCP Policy on Medicare and Medicaid (1993 Directive): OFCCP will not assert jurisdiction over health care entity solely on the basis of its receiving reimbursement for services to Medicare Parts A and B or Medicaid beneficiaries.
- Medicare+ Choice, Medicare Part C provides for medical benefits administered by HMOs. Medicare D provides insurance for prescription drugs. OFCCP has not taken a position yet on whether these Medicare Part C and D agreements are covered under laws enforced by OFCCP.



# Examples: Leases

- EPA leases office space from a building owner under which the owner agrees to provide the space, electricity, heat, repairs, etc. Building owner has a contract with a property manager to maintain the building space in good condition, do repairs. The property manager is a subcontractor because it has contracted with the property owner to provide a portion of the services called for in the government contract. OFCCP v. Coldwell, Banker & Company, 78-OFCCP-12, Secretary's Decision and Final Administrative Order (Aug. 14, 1987).



# Examples: Suppliers to Utilities

- Energy company contracts with GSA to provide electric and steam service to federal facilities. Railway company contracts with energy company to bring coal on its rail lines to energy company's power generation plants. Many other carriers also transport coal to the power company and the coal that the railway company delivers is also used to deliver power to non-government contractors. Government uses only .4% of total electricity generated by the power company annually. The railway company is a subcontractor because its delivery of coal, in part, is "necessary" for the power company to perform under its contract with GSA. [OFCCP v. Monongahela Railroad Co., 1985-OFC-2, ALJ Recommended Decision and Order \(April 2, 1986\), aff'd, Deputy Under Secretary's Final Decision and Order \(Mar. 11, 1987\)](#)





# Subcontractor Defenses: We Didn't Know

- **Defense:** “We were never told we were a covered subcontractor. There’s no EO clause in our subcontract.”
- **OFCCP Response:** It doesn’t matter.
  - Prime contractors are supposed to put the EO clause in their subcontracts. **41 CFR 60-1.4(c).**
  - Even if they don’t, if you meet the reg. definition of “subcontractor,” EO clause is incorporated into your subcontract by operation of law.
  - Don’t even need a written contract.
  - **41 CFR 60-1.4(e):** “By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated into such contracts and whether or not the contract . . . is written.”

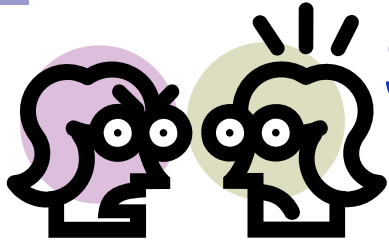


# Subcontractor Defenses: We Didn't Know (cont'd)

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- “Incorporation by operation” regulation has been upheld by Federal courts.
  - integral part of a long-standing program which Congress has recognized and approved.
  - evocation of the strict policy that the affirmative action obligation is an understood and unalterable part of doing business with the government.
  - [United States v. New Orleans Public Service, Inc. \(“NOPSI”\), 553 F.2d 459 \(5th Cir. 1977\)](#)
  - [U.S. v. Mississippi Power, 638 F.2d 899 \(5th Cir. 1981\)](#)
  - Current [UPMC](#) litigation





# Subcontractor Defenses: We Didn't Consent

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- **Defense**: I didn't consent to coverage.
- **OFCCP Response**: Consent is not required.
  - **DOL Decision-makers**: EO Clause is binding on contractors even when contracting agency doesn't include clause or contract isn't signed.
  - [Goya de Puerto Rico, Inc., 2002 WL 32984076 \(ARB 2002\);](#)
  - [UC Berkeley, 1980 WL 275520 \(Sec'y 1980\).](#)
  - [Southwest Gas Corporation, 87-OFC-6 \(ALJ 1988\).](#)
  - **Federal courts agree**:
  - [NOPSI](#)
  - [Liberty Mutual Ins. Co. v. Friedman, 485 F. Supp. 695, 703 \(D. Md. 1979\), reversed on other grounds, 639 F.2d 164 \(4th Cir. 1981\)](#)



# Subcontractor Defenses: Nonpersonal Services

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- **Defense:** “The services we provide are not ‘nonpersonal’ services.” (Prime contractors may also assert this)
- **OFCCP Response #1:** “Yes, they are.” (Usually)
- “Nonpersonal services” is not defined in regulations, which only give examples – utilities, construction, transportation, research, insurance, and fund depository.” *41 C.F.R. § 60-1.3.*



# Subcontractor Defenses: Nonpersonal Services (cont'd)

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- The FAR defines a “nonpersonal services contract” as one which people providing the services are not subject to the type of direct supervision and control usually found between the Government and its employees. *48 C.F.R. § 37.101.*
- By contrast, “A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel. ...”



# Subcontractor Defenses: Nonpersonal Services (cont'd)

- **OFCCP Response #2:** The second company may also provide “personal property” that is necessary to the performance of the prime contract.
- Examples of “personal property” in the EO regulations include:
  - Contracts for use of real property, e.g., leases
  - Supplies
  - so if contract between the prime contractor and the sub includes supplies in an amount meeting the monetary thresholds, the company is a covered subcontractor. **41 C.F.R. 60-1.3**





# Jurisdiction to Investigate Jurisdiction

- What if OFCCP is unsure of coverage at time of scheduling?
  - Contractor disputes single entity or subcontractor status
  - Recent corporate restructuring
- OFCCP can investigate whether it has jurisdiction
  - Contractors can't deny records or access on grounds that OFCCP can't prove coverage with certainty before the review.
  - [Donovan v. Shaw](#), 668 F.2d 985, 989 (8<sup>th</sup> Cir. 1982)
- Contractors must provide all information that is relevant and material
  - Standards of relevance and materiality are to be broadly construed.
  - Compliance officer needs reasonable basis for further inquiry.
  - [In re Merck and Co.](#), [Decision of the Director](#)
- Contractor has burden to show request is unreasonable
  - Burden is not easily met: complying would unduly disrupt or seriously hinder normal operations
  - Cost is not enough.
  - [OFCCP v. Georgia-Pacific Corp.](#), 90-OFC-25, Final Decision and Order (Dec. 28, 1990)





# Investigating Jurisdiction (cont.'d)

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- Failure to provide access for OFCCP to investigate coverage may subject contractor to sanctions.
  - We should treat refusals same as any other denial of access case
  - Debarment is available as a sanction for **any** violation of the EO.
  - [Uniroyal v. Marshall](#), 482 F. Supp. 364 (D.D.C. 1979)

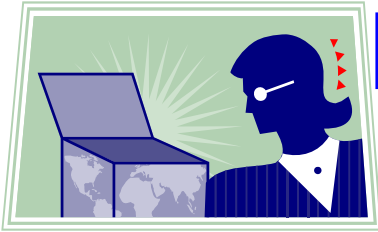




# Relevant Review Period: Looking Back

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- 2-year liability/back pay period doesn't define period for which OFCCP can gather information.
- Acts occurring before the liability period can still provide relevant background evidence even if we can't get relief for them.
  - [Bazemore v. Friday](#), 478 U.S. 385 (1986)
- Proof that an employer discriminated earlier may support an inference that discrimination continued, particularly where selection process didn't change.
  - [Hazelwood School District v. US](#), 433 U.S. 299 (1977)
- Contractor's prior knowledge of past discriminatory acts also is relevant as background evidence regarding more recent claims
  - [National R.R. Passenger Corp. v. Morgan](#), 536 U.S. 101 (2002)



# Relevant Review Period: Looking Forward

- SOL is not limited in litigation to the 2-year liability period
- Executive Order does not limit discovery to time period covered by the review if relevant to contractor's compliance.
  - [OFCCP v. Jacksonville Shipyards](#), 89-OFC-1, ALJ Order (March 10, 1989)
  - [US DOL v. Harris Trust and Savings](#), 79-OFC-2, ALJ Order (Sept. 23, 1978)
  - [OFCCP v. Uniroyal](#), 77-OFC-1, Secretary Final Decision (June 28, 1979)

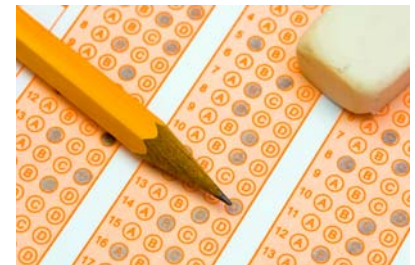




# Relevant Review Period: Looking Forward

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- Evidence is relevant to whether discrimination has continued past the review period
  - Relevant to monetary relief – Does back pay stop accruing? Who are the victims?
  - Relevant to injunctive relief – Does contractor need to change its selection system?





# Relevant Review Period: Looking Forward (cont'd)

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EXHIBIT B PAGE 43 OF 45

- Cases brought forward:
- [USAir](#), 88-OFC-17: Hiring minority pilots and flight attendants.
  - Got data for 4 years post-review
  - Corp. take-over, new procedures
- [Bank of America](#), 97-OFC-16: Hiring minority tellers
  - For 1993 review, got data for 2002-2005
  - Missing records





# Compliance Assistance Resources

- Visit OFCCP's website
  - <http://www.dol.gov/ofccp>
- Attend an OFCCP Seminar or Workshop
  - Calendar Available Online in "How to Get Help" Section
- Call or Email for Individual Assistance
  - 1-866-4-USA-DOL or 1-800-397-6251
  - [OFCCP-Public@dol.gov](mailto:OFCCP-Public@dol.gov)
- OFCCP Federal Contractor Compliance Advisor
  - <http://www.dol.gov/elaws/ofccp.htm>

**KEY – Does Not  
Trigger Evaluation**



# Questions?