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JILL E. SCHULTZ
MPA, SPHR
HR ADVISOR

2900 Highwoods Blvd
Raleigh, NC 27604

Phone: 888.473.9778 or
919.431.6096

Fax: 919.431.6094

E-mail:

jill.schultz@callhrexper.com

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Are Health Care Providers Federal Contractors?

The Office of Federal Contract Compliance Programs (OFCCP) is the federal agency responsible for enforcing the contractual promise of affirmative action and equal employment opportunity required of those who do business with the Federal government.

Due to recent court decisions, the jurisdiction of the OFCCP over many health care providers has been expanded and those health care providers are now subject to federal contractor affirmative action requirements.

Health care providers have long-standing and a vast range of relationships with Federal health care programs and/or participants in Federal health care programs. Some of these relationships constitute Federal contracts within OFCCP jurisdiction and others do not. In December 2010, the OFCCP issued a policy directive that makes it clear that a wide variety of arrangements with a health care provider may create a covered contract or subcontract. The Directive also provides that the wide variety of health plans, providers, services and arrangements requires an individual determination of whether there is OFCCP coverage which often makes it difficult for a health care provider to understand their obligations. (Refer to "Coverage of Health Care Providers and Insurers," Directive No. 293 - http://bit.ly/OFCCP_Directive).

Further, the OFFCP Directive makes it clear that, despite continuing litigation, it will not delay its assertion of jurisdiction over or enforcement activities against health care providers who receive reimbursements under the following programs: Federal Employees Health Benefit Program (FEHBP), Medicare Part C, Medicare Part D, and TRICARE.

What are a Federal Contractor's Responsibilities?

If you are a government contractor, affirmative action requirements under the following three regulations apply to you:

Executive Order (E.O.) 11246 - Prohibits federal contractors and subcontractors from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. E.O. 11246, requires Government contractors to engage in affirmative action for women and minorities.

The Rehabilitation Act of 1973, Section 503 - Prohibits discrimination against individuals with disabilities; requires employers to take affirmative action in all employment activities for qualified individuals with disabilities; and requires employers to make reasonable accommodations for individuals with disabilities.

The Vietnam Era Veterans Readjustment Assistance Act of 1974 - Prohibits discrimination based on veteran status and requires covered federal government contractors and subcontractors to take affirmative action to employ and advance covered veterans in all employment decisions.

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Per the regulations listed on the previous page, employers with 50 or more employees and a federal contract or subcontract of \$50,000 or more must develop and maintain written affirmative action programs (AAP). For E.O. 11246, an acceptable affirmative action program must include a "utilization analysis" of employee job classifications and provide written explanations if this analysis shows that minorities or women are being underutilized in any job classification.

Time to Take Action

Due to OFCCP's position that it will not delay compliance reviews or enforcement despite continuing litigation, it is recommended that health care organizations begin to maintain the records and supporting data that can be requested by OFCCP and should be reported on EEO-1 and VETS-100 reports as well as supporting documentation for an AAP, if applicable.

If you are an employer with a federal contract of \$10,000 or more, prepare to do the following:

- Include the phrase "Equal Opportunity Employer" in all solicitations and advertisements for employment
- Post in conspicuous places available to employees and applicants the U.S. Department of Labor's "Equal Employment Opportunity is the Law" poster. This poster is also required of all employers with 15 or more employees.
- Include provisions of the "Equal Opportunity Clause" in all subcontracts or purchase orders with third parties of \$10,000 or more that involve the procurement of supplies or services necessary for the completion of the employer's government contract. Contact jill.schultz@callhrexper.com for a sample purchase order statement.

If you're a federal contractor with 50 or more employees and a government contract of \$50,000 or more, below are the steps you need to take to be able to prepare an AAP within 120 days.

- Ask external applicants who apply for advertised positions to voluntarily self-identify their race and gender when they complete an application or submit their resume for consideration. Contact jill.schultz@callhrexper.com for sample self-identification forms.
- Ask current employees to self-identify using the same forms as above. Also invite current employees to self-identify their disabled and/or veteran status. Veteran and Disabled status should not be solicited until post job offer.
- Create a document which divides the workforce into job groups. Contractors with fewer than 150 employees can use the EEO-1 job categories to formulate job groups. EEO-1 job category descriptions and position examples are available at <http://www.eeoc.gov/employers/eeo1survey/upload/jobclassguide.pdf>
- Create an EEO-1 and VETS-100/100A report for at least the current year. Retain any prior EEO-1 and VETS-100/100A reports.
- Create a list of all open positions for the past 12 months (or longer depending on how long positions take to fill) and sort applicants (internal and external) according to position applied for. Generally, applicants are individuals who responded to a specific position.
- Document disposition of each applicant (not considered, interviewed, offered position, hired, etc). You do not need to itemize each individual, but be able to report on the number of applicants not considered, interviewed, etc. by position.
- Document hires, promotions and terminations for the past 12 months by date, position/job category, gender, and race.

