

Littler Mendelson's Retail Practice Alert #2

OFCCP Directive Seeks to Extend Jurisdiction to Retail Pharmacies Via Medicare Part D, Imposing Significant Affirmative Action, Recordkeeping and Outreach Obligations

On December 16, 2010, the OFCCP issued [Directive 293](#) stating for the first time that contractual arrangements under Medicare Part C (Medicare Advantage) and Medicare Part D (prescription drug plans) may impose OFCCP jurisdiction, and restating its position in recent litigation that contractual arrangements with the Federal Employees Health Benefit Program (FEHBP) and TRICARE impose jurisdiction. Given the number of providers that already have signed the types of agreements described in the directive or are contractually participating in the Medicare Part D prescription drug program, the OFCCP has expanded its jurisdictional reach dramatically.

With OFCCP jurisdiction comes a variety of legal obligations including the annual preparation of affirmative action plans, substantive outreach to veterans and individual with disabilities, and complicated record keeping obligations.

In the Directive, the OFCCP recognizes the wide range of relationships that exist among health care providers and/or insurers, federal health care programs, and participants in federal health care programs. It states its intention to evaluate the contractual and subcontractual relationship in each case in which a medical provider or health care entity opposes jurisdiction to see if it falls within the directive's examples of the type of arrangements that impose jurisdiction.

In-store pharmacies and pharmaceutical companies should gather documentation of their contractual and subcontractual relationships to the federal government, TRICARE, and under Medicare Part D, and determine whether they are covered by OFCCP's jurisdiction.

In-store pharmacies that are not contracting directly with the federal government may still need to determine whether their provision of prescription drugs to a direct or prime Medicare Part D insurer is necessary to the performance of the direct contractor's relationship with Medicare, FEHBP or TRICARE, in which case OFCCP will assert that the in-store pharmacy is a covered subcontractor.

Although OFCCP regulations provide 120 days from contract signing for new contractors to come into compliance, the new OFCCP administration may be rigid about affording health care entities additional time to comply, given its position in the Directive.

Please contact [Alissa Horvitz](#) or [Josh Roffman](#) for further information or compliance assistance.