



Health Care Labor Report

Labor activity, trends & events

Fall 2014

Federal Contractors Face New Labor Obligations

With legislation stalled, Administration imposes new requirements

By Curt Kirschner and Nikki L. McArthur

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has recently reminded America's hospitals of the many strings that can be attached to federal contracts. As the agency charged with enforcing affirmative action obligations on federal contractors, the OFCCP has been asserting jurisdiction not only over hospitals with traditional federal contracts, such as research contracts, but also over hospitals that participate in federally funded health benefits programs. These programs include TRICARE, the health care program for military service members and their families, the Federal Employees Health Benefits Program (FEHBP), and possibly even Medicare Parts C and D.

The AHA supports legislative action to clarify that hospitals participating in TRICARE, the FEHBP, and Medicare should not be subject to the same complex affirmative action and recordkeeping requirements imposed on parties to traditional

federal contracts. The AHA's legislative efforts met with some success when the Department of Labor agreed to a five-year moratorium on enforcement efforts against TRICARE subcontractors.

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Using HR Analytics to Improve Patient Satisfaction

By Scott Mondore, Ph.D.

A new study of four years of Centers for Medicare & Medicaid Services (CMS) data has identified a direct cause-and-effect link to the factors that impact hospital reimbursements, with a focus on clinical compliance, readmission rates and HCAHPS scores. The Affordable Care Act (ACA) mandated several "pay-for-performance" programs that reduce Medicare reimbursement to hospitals that score below national benchmarks on selected quality measures. Readmissions, hospital-acquired conditions, mortality, and patient experience of care are some of the areas measured.

The research, conducted by talent technology and analytics company Strategic Management Decisions, relied upon advanced analytics in assessing CMS data from 3,000 health care organizations to conclusively determine the five key drivers that affect HCAHPS scores. Listed in order of impact, they are:

- Communication between nurses and patients
- Pain management
- Medication and discharge instructions
- The noise level in patient care areas
- The cleanliness of patient care areas

The communication between nurses and

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EBOLA PREPAREDNESS RESOURCES

The AHA continues to link hospitals to the latest information about Ebola. Our Ebola Preparedness Resources Web page, www.aha.org/ebola, has up-to-date guidance from the Centers for Disease Control and Prevention and other authorities, AHA advisories and other resources. In addition, AHA President and CEO Rich Umbdenstock has written several Ebola-related [blog posts](#). We're also sharing information through our daily e-newsletter AHA News Now.

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OBLIGATIONS

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Nonetheless, the OFCCP has retained its position that hospitals participating in a federally funded health benefit program (other than Medicare Parts A and B) should be subject to the array of obligations that are imposed on federal contractors. The state of the law in the area remains unsettled. (For more information about the expansionist efforts of the OFCCP, please see the spring 2014 and winter 2012 [Health Care Labor Report](#).)

As the definition of federal contractor expands to reach more hospitals, the obligations faced by federal contractors also are increasing. Faced with a stalemate in Congress this year, President Obama has issued three Executive Orders that implement as regulations to federal contractors the provisions of bills presently stalled in Congress. This article summarizes the most recent Executive Orders applicable to federal contractors. Hospitals that are or may be deemed to be federal contractors should be aware of the following potential obligations.

Minimum Wage Increase

In February President Obama signed an [Executive Order](#) that requires federal agencies to include a clause in all new contracts, stating that the minimum wage paid to workers in performance of a federal contract or any subcontract thereunder will be at least \$10.10 an hour. This new minimum wage takes effect January 2015, and will increase annually based on inflation.

The Executive Order implements for federal contractors the provisions of the Minimum Wage Fairness Act, which would have raised the federal minimum wage from its present level of \$7.25 to \$10.10 an hour by 2016. That legislation stalled in April, when the Senate refused to bring it to a vote.

The Department of Labor's final regulations implementing the new general minimum wage requirement was published in the Oct. 7 [Federal Register](#).

Equal Pay

In April, President Obama took two steps to challenge discriminatory pay practices by issuing an order that prohibits federal contractors from discouraging the open discussion of wages and directing the creation of a new wage data collection tool. First, President Obama signed an



[Executive Order](#) that prohibits federal contractors from telling their employees that they cannot discuss compensation issues with each other. The National Labor Relations Board has already held that employers may not discipline workers who discuss their wages. The Executive Order is largely redundant of this prohibition, but arguably expands it to employees of government contractors who are not covered by federal labor laws. According to the president, the order will result in increased transparency that will help female and minority employees identify when they are being paid less than their counterparts and pursue their rights under federal law.

The Department of Labor in September issued a proposed rule that would implement the Executive Order's requirements. The rule would require federal contractors to incorporate non-discrimination requirements for compensation disclosures into existing employee manuals and handbooks, as well as to disseminate the policy electronically or by posting. In addition, the proposed rule would establish defenses for contractors who were enforcing a "legitimate workplace rule," such as a prohibition on disruptive conduct, or who disciplined an employee who disclosed confidential wage information to which she was privy as part of an essential job function. Long-pending bills in the House and the Senate would also prohibit retaliation against employees who discuss their own wages or disclose the wages of another employee.

Second, President Obama issued a [Presidential Memorandum](#) directing the Department of Labor

to propose a new rule that would require federal contractors and subcontractors to submit summary data on wages, sorted by sex and race. Published Aug. 8, the proposed rule mirrors provisions of the stalled Paycheck Fairness Act, which would direct both the Equal Employment Opportunity Commission and the OFCCP to collect pay information data from employers as described by the sex, race and national origin of employees.

As presently written, the proposed rule would require companies to submit a so-called "Equal Pay Report" if they file EEO-1 reports with the federal government, have more than 100 employees, and hold federal contracts worth \$50,000 or more. The EEO-1 form already requires employers to report the total number of workers in each job category (i.e., executives, sales workers, laborers) by race, ethnicity and sex. Under the new rule, employers would also be asked to report total W-2 earnings and total hours worked for all workers in each job category, broken down by race, ethnicity and sex. OFCCP would analyze the data submitted to establish objective industry standards. Contractors and subcontractors with the largest race or gender pay gaps, as compared to these objective standards, would have the highest likelihood of selection for an OFCCP audit. In addition, OFCCP hopes that publication of aggregate information will encourage contractors to engage in voluntary efforts to ensure that their wages are comparable to industry norms.

Both the Equal Pay Report and the wage-related Executive Order add to steps the OFCCP

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took last year to increase the agency's scrutiny of potential pay disparities. Specifically, in February 2013, the OFCCP rescinded existing guidelines and issued Directive 307, which gives field investigators new tools to evaluate contractor compensation systems. Directive 307 replaced prior agency guidance that emphasized the importance of supporting statistical analysis with anecdotal evidence of discrimination.

LGBT and Sex Discrimination

On July 21, President Obama signed an [Executive Order](#) that prohibits federal contractors from discriminating on the basis of sexual orientation or gender identity. The order amends Executive Order 11246, which was signed by President Lyndon B. Johnson in 1965, and already "prohibit[s] federal contractors . . . who do over \$10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin."

This July order adds to laws in 18 states and the District of Columbia, which proscribe discrimination based on sexual orientation and gender identity, and laws in three additional states that prohibit discrimination based on sexual orientation only. The Employment Non-Discrimination Act, which would have extended the same nondiscrimination mandate to employers with 15 or more employees nationwide, passed the Senate in 2013. The bill remains stalled in the House.

In addition to proposed regulations implementing this Executive Order, the OFCCP is also expected to issue proposed, updated sex discrimination guidelines later this year. These regulations define what constitutes discrimination on the basis of sex as prohibited by Executive Order 11246. The current regulations were drafted more than 30 years ago and are outdated. For example, as presently written, they prohibit employers from denying female employees the right to jobs based on state "protective laws" that prohibit women from working as bartenders or working more than a certain number of hours a week.

Disclosure of Labor Law Violations

On July 31, President Obama issued the "[Fair Pay and Safe Workplaces](#)" Executive Order that



will require companies, before bidding on contracts worth more than \$500,000, to reveal any violations in the past three years of the Fair Labor Standards Act, the National Labor Relations Act, Title VII of the Civil Rights Act, the Occupational Safety and Health Act, and other federal employment statutes. Employers also must disclose violations of certain state laws as well as violations of the various Executive Orders and laws that the OFCCP enforces. The Order is likely to be used as leverage by labor unions against hospitals with unionized employees, as it is a common practice among labor unions to file unfair labor practice charges during the course of collective bargaining. In addition, hospitals have increasingly become the targets of wage and hour collective actions and would be required to report any adverse determinations related to these cases.

Under this new Order, contracting officers will consider any violations disclosed in determining whether to award a federal contract. The severity of the violations, as well as their frequency, will be part of any award determination, and employers will be given an opportunity to disclose any steps taken to correct the violations or otherwise improve compliance with labor laws.

Affirmative Action for Veterans and Individuals with Disabilities

In addition to these new orders, OFCCP continues to implement new regulations that went into effect in September 2013, which update af-

firmative action requirements for individuals with disabilities and certain categories of veterans. A key aspect of these regulations is the implementation of a hiring benchmark for veterans and a utilization quota for individuals with disabilities. Although failure to meet these standards is not a per se violation, the OFCCP will require employers who fall short of the benchmark or quota to take corrective steps. Among other things, the regulations also require employers to invite job seekers to self-identify as individuals with disabilities or protected veterans as soon as they might be considered applicants. Individuals with disabilities must also be invited to self-identify every five years. ■



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SATISFACTION

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patients – particularly the ability of nurses to listen, react and share information – had by far the greatest effect on patient satisfaction, and also is a factor that influences other key drivers such as pain management and the instructions patients are provided for medication and follow-on care.

Importantly, the analysis challenged conventional wisdom by finding little causal link between physician communication and HCAHPS scores, particularly in comparison to the significant role of nursing communications.

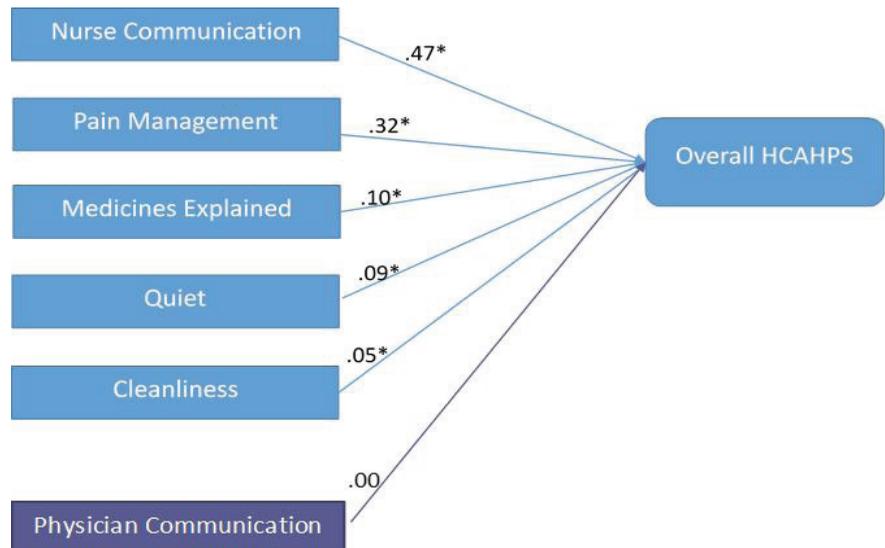
These analytics provide a valuable tool as hospitals adjust and face new challenges under the Affordable Care Act's "pay-for-performance" programs. By identifying those factors most likely to improve their performance in compliance, quality and patient satisfaction, health care providers have an opportunity to minimize payment penalties.

The study first identified consistent trends across those metrics, finding a definitive link to readmissions rates between HCAHPS scores and clinical process compliance. In the next phase, the analysis tracked movement in each area to demonstrate a direct cause-effect relationship between the three metrics.

Finally, the analysis tracked responses over time to each of the 27 questions in the HCAHPS survey – questions that range from a patient's experience communicating with health care providers to how they rank the hospital on a scale of 1-to-10. This longitudinal analysis showed no change over time in the top five drivers.

The study demonstrates for the first time the opportunities analytics present that allow health care leaders to pinpoint the human resources and talent strategies that directly impact financial performance, in part by assessing skills and competencies that drive HCAHPS scores, clinical compliance and readmissions.

These opportunities include the ability to ef-



The four-year longitudinal study shows the five cause-effect drivers, and their level of impact on overall HCAHPS (impact shown by the statistically significant beta-weights in analysis). Also shown is the limited impact that Physician Communication has on overall HCAHPS.

fectively:

- Structure a hiring process that identifies patient care workers with the greatest capacity and skills in communications.
- Assess employee communication skills to identify opportunities where targeted training may bring improvements.
- Use existing employee survey data to discover where cultural barriers negatively impact HCAHPS scores.
- Build competency models for managers and employees that can be integrated into performance reviews and professional development.
- Enhance 360-degree assessments to rate employees on the specific behaviors that affect HCAHPS results.
- Align skills training with patient care models to improve the communications, pain management and comfort factors that drive satisfaction rankings.
- Invest in leadership development programs focused on the interpersonal skills and communi-

cations most closely linked to patient outcomes, quality and satisfaction.

- Provide health care leaders information critical to prioritizing their investments in the people and processes that will directly improve organizational and financial performance. ■



Scott Mondore is the managing partner of Strategic Management Decisions (SMD), and co-author of *Investing in What Matters: Linking Employees to Business Outcomes*. IRI Analytics is the exclusive resource in health care for SMD's patented technology that links survey and assessment data to business outcomes.

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