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The Emergency Room

• **Supreme Court says courts cannot review arbitration agreements for errors of law, even if parties agree that they can.** In **Hall Street Associates, LLC v. Mattel**, the Supreme Court said that such an agreement was unenforceable. The parties, both businesses, and both of whom were represented by counsel, had agreed to arbitrate a dispute subject to court review for errors of law. Hall Street lost at arbitration, and went to court over it. The court found that the arbitrator had made a legal error and sent the case back. This time, the arbitrator found in favor of Hall Street, and Mattel appealed, contending that the agreement for court review was unenforceable (even though Mattel had freely agreed to the deal). The Supreme Court sided with Mattel. In light of this decision, health care employers should exercise extreme caution before entering into agreements to arbitrate employment claims. Click here for the full story.

• **A “charge” by any other name . . . is probably still a charge.** In **FedEx Corporation v. Holowecki**, the Supreme Court decided that any filing that could be “reasonably construed” as a request for agency action should be treated as a bona fide charge of discrimination. This is so even though the employer may never receive a notice that such a “charge” has been filed against it. The *Holowecki* case involved a charge of age discrimination filed with the U.S. Equal Employment Opportunity Commission, but the court’s reasoning presumably applies to other types of discrimination charges as well. Justice Clarence Thomas dissented, saying that the Court’s decision in effect meant that an EEOC charge is “whatever the [EEOC] says it is.” Click here for the full story.

• **“Me, too! Me, too!”** In *Sprint/United Mgmt. Co. v. Mendelsohn*, the Supreme Court decided that courts should admit or exclude on a case-by-case basis evidence of plaintiffs’ co-workers who also claim to be discriminated against. Click here for the full story.

• **Forever hold your peace -- FMLA comment period expired April 11.** As most health care employers know, the U.S. Department of Labor has issued proposed regulations interpreting the Family and Medical Leave Act, and Congress passed the National Defense Authorization Act, which provided for FMLA leave in certain military situations. The Department of Labor requested comment on both the proposed regulations (interpreting the “old” FMLA provisions) and on how it should interpret the new military-leave provisions. The deadline for comment was April 11, and Constangy will keep you informed of all developments.

• **SEIU endorses Barack Obama.** The Service Employees International Union, which is a major player in health care organizing efforts, has endorsed Barack Obama for president in 2008. Most other unions have done likewise, although a few have endorsed Hillary Clinton.

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April 22, 2008

OFCCP Sets Its Sights on Health Care Industry

Kristie Smith
Macon, GA

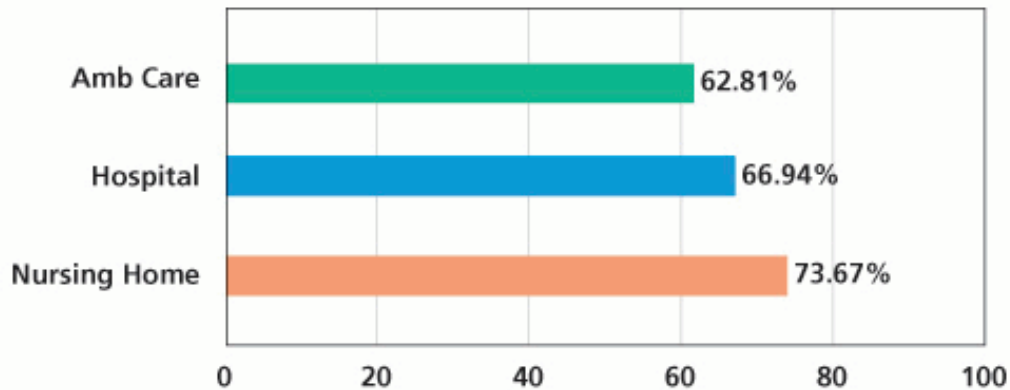
In early March, the Office of Federal Contract Compliance Programs issued Corporate Scheduling Announcement Letters, identifying facilities that may be scheduled for compliance evaluations during the fiscal year, which closes September 30, 2008. The OFCCP identified approximately 5,000 facilities for possible review in this scheduling cycle, using its Federal Contractor Selection System. This is on the heels of the OFCCP's collection of \$51,680,950 in back pay and benefits last year for 22,251 workers. According to the OFCCP, 98 percent of its enforcement cases involved systemic discrimination where the Agency found significant number of workers or applicants subjected to discrimination because of an unlawful employment practice or policy.

We are often asked to "predict" the industry and/or regions the OFCCP will target. Candidly, we don't know. We have seen, however, an increase in the number of hospitals, health care facilities, and diagnostic centers selected for review. The assumption that health care facilities are required to develop affirmative action plans because of Medicare and Medicaid funds received is incorrect. Health care entities are generally captured by affirmative action regulations because of compensation received from the Veterans Administration for services rendered to patients, direct contracts with the Department of Defense or related agencies for health care services performed or to be performed through programs such as the Civilian Health and Medical Program of the Uniformed Services, or contracts to perform testing for agencies of the U.S. government. Given the many organizational, compensation, and functional issues unique to the health care industry, it is imperative that strategic AAPs are developed that accurately reflect the workplace, selection processes, and compensation structure, and avoid creating the appearance of discrimination.

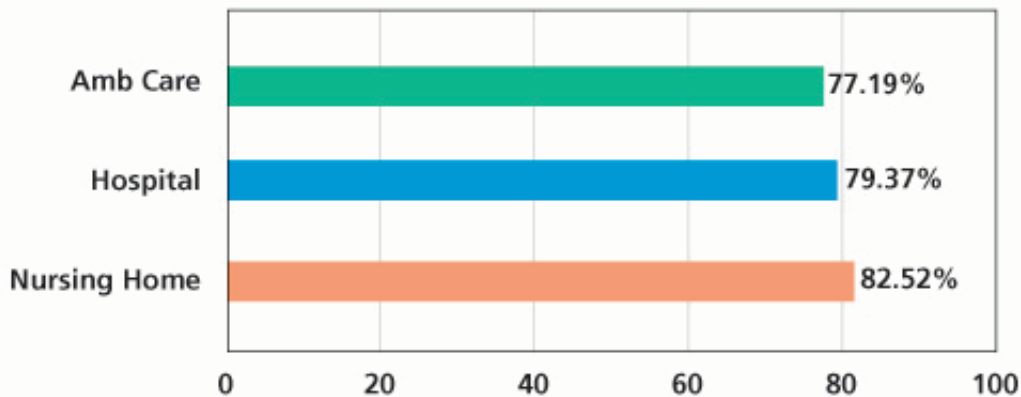
Health care employers, as well as all federal contractors and subcontractors, should prepare now for an eventual audit. The OFCCP's selection methods are far-reaching and consider information that was previously unavailable or under-used, such as the Agency's "Contracts First" initiative, pre-award notifications, and conciliation agreement monitoring. Under the Contracts First initiative, the OFCCP gathers information from the various federal agencies regarding companies that are directly or indirectly doing business with them. This allows the OFCCP to go beyond the universe of companies that have self-identified as federal contractors on EEO-1 Reports. Thus, many companies who don't even know that they are required to comply with affirmative action requirements will be receiving scheduling letters from the OFCCP. Ignoring these letters would be a mistake – rather, recipients should thoroughly research whether they are federal contractors or subcontractors within the meaning of the regulations because the OFCCP is not sending out scheduling letters without some basis for believing that coverage exists.

In addition, the "new and improved OFCCP" screens contractors' AAPs for potential discrimination indicators using its Active Case Management system, seeking to effectively and efficiently use its resources to get the biggest "bang for its buck." Therefore, health care employers should have accurate and strategic AAPs in place before the OFCCP comes calling.

PERCENTAGE OF WOMEN IN HEALTH CARE MANAGEMENT



PERCENTAGE OF WOMEN EMPLOYED IN HEALTH CARE



SOURCE: U.S. Equal Employment Opportunity Commission, "Characteristics of Private Sector Employment"

PRN

Nurses' unions butt heads. The California Nurses Association recently played a key role in defeating an effort to get SEIU representation of the approximately 8,000 nurses employed by Catholic Healthcare Partners in Ohio. According to the CNA, this was a "rigged election" because the health care chain supported the SEIU. Per the SEIU, the nurses' association "flooded the state with hostile organizers and bombarded workers with wildly false and misleading phone calls and leaflets and phone calls urging them to vote against the union."

And the donnybrook continues. Late last week, the CNA obtained a court order restraining leaders and members of the SEIU from threatening and harassing them. The SEIU says it will file a motion to dismiss the order and called it "an entirely frivolous injunction being used for political purposes." AFL-CIO President John Sweeney is trying to persuade the parties to let him mediate a settlement.

Constangy, Brooks & Smith, LLC has counseled employers, exclusively, on labor and employment law matters since 1946. The firm represents Fortune 500 corporations and small companies across the country. More than 100 lawyers work with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Georgia, South Carolina, North Carolina, Tennessee, Florida, Alabama, Virginia, Missouri, and Texas. For more information about the firm's labor and employment services, visit www.constangy.com, or call toll free at 866-843-9555.