OSHA Identifies Health Care Susceptible to Workplace Violence

Health care is a sector with a high incidence of workplace violence, according to a recent directive from the Occupational Safety and Health Administration (OSHA). The directive, Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents, establishes OSHA’s general enforcement policies and procedures and highlights the steps that OSHA field offices should take in reviewing incidents of workplace violence when considering whether to initiate an inspection in those sectors, like health care, identified by OSHA as susceptible to workplace violence. The directive is meant to provide guidance regarding both how an OSHA workplace violence case is developed and what steps will be taken to assist employers in addressing the issue of workplace violence.

The directive, which became effective Sept. 8, is the agency’s first instruction on the enforcement procedures for investigations and inspections that occur as a result of workplace violence incidents.

Employers’ failure to reduce or eliminate workplace violence could violate OSHA standards

OSHA states explicitly in the directive that “[w]orkplace violence is an occupational hazard in some industries and environments which, like other safety issues, can be avoided or minimized if employers take appropriate precautions.” Accordingly, employers may be found to have violated the general duty clause in § 5(a)(1) of the Occupational Safety and Health Act of 1970 if they fail to reduce or eliminate this serious recognized hazard.

OSHA specifically instructs:

By assessing their worksites, employers can identify methods for reducing the likelihood of incidents occurring. OSHA believes that a well written and implemented Workplace Violence Prevention Program, combined with engineering controls, administrative controls and training can reduce the incidence of workplace violence in both the private sector and Federal workplaces.

What health care employers should know about OSHA’s directive

The directive instructs that “[a]n inspection shall be considered where there is a complaint, referral, or fatality (i.e., the death of one or more employees) and/or catastrophic event (i.e., the hospitalization of three or more employees) involving an incident of workplace violence, particularly

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Employing Alternative Dispute Resolution Options for Workplace Disputes

By Christine L. Newhall and Jeffrey T. Zaino

Disputes arise in union and non-union workplaces and managers must be prepared to handle them effectively. Alternative dispute resolution (ADR) options provide flexibility and efficiency often saving time, money and publicity sometimes associated with litigation. This article highlights the dispute resolution processes ADR providers, like the American Arbitration Association (AAA), offer - or should offer - to resolve workplace disputes.

There are three primary ways to offer ADR solutions in the workplace:

■ Collective bargaining agreements for the unionized workplace and for the non-unionized workplace;
■ Employer-promulgated plans; and
■ Individually-negotiated employment agreements.

■ Collective Bargaining Agreements

In the unionized workplace, the union and employer enter into collective bargaining agreements under which the union represents and negotiates on behalf of the employees on issues pertaining to wages, health care, overtime, training, and most grievances. For more than 85 years, ADR has been utilized successfully by the labor-management industry, from creating first contracts (interest arbitration) to resolving all types of grievances (discipline, discharge, suspensions, etc…). The most common ADR method is arbitration with a single arbitrator where the union provides representation to the employee. In many instances, attorneys are not utilized

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when it stems from a workplace in industries identified by OSHA as having a potential for workplace violence.” In addition, the directive states that “[a]n inspection shall be considered during any otherwise programmed inspection where there is recognition of the potential for workplace violence in that industry or where the hazard is identified as existing.”

However, the directive says that an inspection “generally shall not be considered in response to coworker or personal threats of violence.” Where an OSHA area director becomes aware of instances that could be classified as intimidation or bullying, there should be a referral to the appropriate government entity, including local police departments.

The directive identifies:

- Criteria for initiating an on-site inspection when a complaint or referral is received or there otherwise exists reasonable grounds to conduct an inspection.
- Procedures for conducting inspections, including:
  - Holding an opening conference with the employer to explain the reason for the inspection,
  - Instructions to use professional judgment in determining which areas of the facility to inspect, and
  - Areas of focus for relevant evidence gathering, including demonstrate whether an employer recognized, either individually or through its industry, the existence of a potential workplace violence hazard affecting his or her employees and the availability to employers of feasible means of preventing or minimizing such hazards.
- Processes for issuing citations or notices for workplace violence hazards, including the specific types of evidence or documentation necessary to establish each element of a general duty clause violation by an employer.

The directive states that the employer should be encouraged to develop and implement a workplace violence prevention program in a workplace where a potential for violence against employees has been identified. In the closing conference with the employer, OSHA Compliance Safety and Health Officers (CSHOs) are instructed to discuss “potential controls for the types of hazards identified in the workplace analysis of the facility/place of employment, temporary duty locations and workers’ travel routes while on duty.” Regardless of the obligation imposed on CSHOs, OSHA places the burden on the employer to maintain a safe workplace: “it is the employer’s responsibility to employ the most effective feasible controls available to protect its employees from acts of workplace violence.”

Directive applies specifically to OSHA, but states are encouraged to follow it

The directive applies only to inspections or investigations conducted by OSHA officials (i.e., CSHOs and national and regional office officials) in response to a complaint of workplace violence or as a programmed inspection at worksites that are in high-incidence-of-violence sectors. However, OSHA makes clear that the directive is not intended to exclude other programmed inspections when workplace violence is uncovered and well documented.

According to the directive, “[a]n instance of workplace violence is presumed to be work related if it results from an event occurring in the workplace.” But, the directive does not require an OSHA response to every complaint or fatality of workplace violence or require that citations or notices be issued for every incident inspected or investigated. Instead, it offers general enforcement guidance for field offices to apply when determining whether to make an initial response and/or cite an employer.

OSHA strongly encourages that individual states adopt the directive for use with their general duty clause, state-specific workplace violence standard, or other applicable authority under state law. States must submit a notice of intent indicating if the state has or will adopt policies and procedures for enforcement of workplace violence and if so, whether the state’s policies and procedures are or will be identical to or different from the federal. OSHA indicates that it will post on its website summary information on states’ responses.

OSHA offers helpful resources for employers

The directive can be found on OSHA”s Workplace Violence website at www.osha.gov/SLTC/workplaceviolence/index.html. This website provides information on the extent of violence in the workplace, assessing the hazards in different settings and developing workplace violence prevention plans for individual worksites.

OSHA has developed guidance and recommendations on workplace violence prevention in health care settings. OSHA’s Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers can be accessed directly at www.osha.gov/Publications/OSHA3148/osha3148.html. As OSHA notes, this information booklet “provides a general overview of a particular topic related to OSHA standards. It does not alter or determine compliance responsibilities in OSHA standards or the Occupational Safety and Health Act of 1970 (emphasis added).”

Several relevant guidance documents are listed specifically in Appendices A and B of the directive. In addition, the directive’s Appendix C lists research studies addressing different aspects of workplace violence prevention.

Employers can request help on workplace violence prevention from OSHA’s On-site Consultation Program. This program includes an appraisal of the work practices and occupational safety and health hazards of the workplace. It also provides assistance to employers in developing and implementing an effective safety and health program.
Costs of Persuading Employees Not Allowable Costs for Government Contractors

The new FAR rule similarly states “the costs of any activities undertaken to persuade employees, of any entity, to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees’ own choosing are unallowable.” The rule identifies examples of activities for which the costs are unallowable:

- Preparing and distributing materials,
- Hiring or consulting legal counsel or consultants,
- Meetings (including paying the salaries of the attendees at meetings held for this purpose), and planning or conducting activities by managers, supervisors, or union representatives during work hours.

The rule text makes clear that these are only examples, not an exhaustive list, of disallowable costs associated with persuader activities which are the rule’s intended focus.

In addition to disallowing costs related to activities undertaken to persuade employees, the rule also precludes reimbursement for unlawful activities. As the rule’s commentary indicates, “the costs of activities that are unlawful, including unlawful activities under the NLRA, are not allowed under the FAR. FAR 31.201-3(b)(2) makes clear that costs incurred for unlawful activities shall not be reimbursed.”

On the other hand, “costs incurred in maintaining satisfactory relations between the contractor and its employees... including costs of shop stewards, labor management committees, employee publications, and other related activities,” are allowable costs under the rule. As the commentary to the final rule explains, “the costs of collective bargaining that are not [specifically defined under the NLRA]... would be allowable to the extent that the costs were reasonable, allocable, and not unallowable under another cost principle, and are otherwise lawful. In addition, the rule’s commentary indicates that neutrality agreements would be handled in similar fashion. As the commentary explains:

These agreements are entered into by contractors and labor organizations and have often been used to establish mutually agreed-to restraints for reducing disputes associated with union representation. Therefore, costs associated with the development, negotiation, and enforcement of neutrality agreements would not normally be expected to involve any persuader activity. So long as that is the case, under the rule, costs associated with agreements of this kind would generally be allowable as part of the maintenance of satisfactory labor relations, provided that they do not represent persuader activity under FAR 31.205-21(b), are reasonable, allocable, not unallowable under another cost principle, and are otherwise lawful.

Agencies contend new provision not a significant compliance burdens

Despite a number of proposed rule comments arguing otherwise, the agencies unequivocally contend that the new provision imposes no significant compliance burdens or additional accounting costs, including any incurred in distinguishing between allowable and unallowable costs, on federal contractors. The rule’s commentary states that “FAR 31.201-6 requires contractors to have an accounting system to segregate unallowable costs. The incremental costs of implementing and tracking an additional unallowable cost element will be minimal.” We are concerned that the burden imposed on hospitals to segregate costs as prescribed by the final rule may be significant, particularly...
by either the employer or union, providing for an informal process with significant cost benefits to both parties.

■ Employer-Promulgated Plans

Employer-promulgated plans are ADR plans designed for company-wide use by most employees except senior executives who negotiate some or all of their employment terms. The plans vary and are tailored specifically for employer and employee needs. In most cases, employment is conditional on signing the employer-promulgated plan. Plans with pre-dispute clauses are deemed acceptable by ADR providers if certain due process protocols are contained in the plan. For instance, a due process protocol should require that the bulk of the process be paid for by the employer, permit the employee to be represented, and allow the employee equal access to information pertaining to the case.

■ Individually-Negotiated Employment Agreements

Disputes between employers and executive level employees can be damaging to an employer externally and internally. Negotiated employment contracts are contracts between the employer and employee that contain an ADR component, such as early resolution, mediation or arbitration, which can help diminish the threats associated with executive-level employment disputes. Unlike court proceedings that become a part of public record, ADR is a confidential process.

■ ADR Service Options for Workplace Disputes

Most ADR providers provide various service options from full to very limited administrative service, which vary from case to case depending on the nature of the dispute or relationship between the employer, employee and union. Common ADR service options are:

■ Full Case Administration

Full case administration includes an array of important services such as preparing lists of arbitrators, appointing arbitrators, dealing with disclosures of arbitrators, scheduling hearings, handling locale disputes, subpoenas, postponement requests, conference calls, notices, billing, exchange of briefs, transmittal of the award of the arbitrator, post-award issues, among others. In most cases, a dedicated case manager administers the case from start to finish.

■ List Only Services

ADR service providers recruit, interview, screen, and train arbitrators. As a result, ADR users understand the high quality of arbitrator rosters ADR providers develop and maintain. In some instances, an ADR user may not want the full administrative service but still wants to be able to select a quality, experienced arbitrator. To meet this need, ADR service providers offer list only services, which allow for the ADR user to receive a register of 15 or less arbitrators within 48 hours of a joint request for a list to the ADR provider. The role of the ADR provider then ends.

■ List with Appointment

List with appointment adds some administrative tasks beyond list only services. With this service, the ADR provider will review the lists returned by the parties, make the arbitrator appointment, and notify the parties. The role of the ADR provider then ends unless the parties agree to further services.

■ Mediation Services

With a mediation service, the ADR service provider facilitates a mediator appointment by mutual agreement between the parties. The mediator works with the employer and employee to explore the issues in question, discussing a variety of settlement options and offering specific non-binding settlement proposals as appropriate. Some employer-promulgated plans have a first-step mediation requirement before triggering the arbitration process.

■ Early Neutral Evaluation

Early neutral evaluation is a non-binding process designed to enable the employer and employee to gather additional pertinent case-related information and receive an assessment of the merits of their case. An arbitrator, selected for his or her expertise, meets with the parties and then provides an explanation to the likely outcome of their dispute. The explanation is often an eye-opening experience for both parties and can result in an expedited settlement, saving time and money.

■ Fact Finding

Fact finding is a process designed to enable information gathering from documents, witnesses and other material involved in an employer-employee dispute to identify and clarify the central facts in the conflict. In this process, an arbitrator conducts an independent investigation and provides the parties with a non-binding report.

■ Ombudsman

An ombudsman is a person who investigates claims on a more permanent basis and helps facilitate settlement discussions between the employer and employees. The ombudsman functions independently from the employer. ADR providers can provide an external ombudsman or train an employee to serve in that capacity.

Specialized Service Options

ADR providers, unlike the court system, can be far more creative and offer new service options for resolving disputes. For example, the AAA has developed specialized service options to reduce overall ADR costs and for administering less complicated caseloads. The following are a few examples of specialized AAA service options:

■ Rapid Resolve

Rapid Resolve was introduced for the administration of less complicated labor cases and to reduce overall arbitration costs. The parties select one arbitrator to hear up to three cases in a single day with decisions given within a 48-hour period. Arbitrator compensation is on a flat fee basis of $1,000 for the day (includes travel expenses and no study time) and there is an AAA flat fee of $500. Rapid Resolve is a solution for handling backlogged caseloads.

■ File & Hold

In 2010, the AAA introduced a pilot program called File & Hold. Cases are filed and held for a period of time to allow parties to settle. If the parties settle within 30 days, they pay half of the administrative fees. If the case proceeds to arbitration, the normal fee schedule applies.

■ Expedited Arbitration

With expedited arbitration, an arbitrator is appointed who can hear the case promptly. The arbitrator, with limited consultation with the parties, will set the date and time of hearing. Expedited arbitration is unique in comparison to traditional arbitration because there are no briefs, transcripts, or extensive awards. Also, the award must be rendered within seven days after the hearing.

Using an ADR Provider

Regardless of the ADR method being utilized, it helps to be guided and assisted through the process by an ADR provider. Most ADR providers have professional case management staff dedicated to providing expert and efficient cost-saving case management services to meet the parties’ needs. Case management staff acts as an important liaison between the parties and arbitrator. Case managers forward communications to the arbitrator and...
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schedule conference calls for issues that require decisions prior to hearing. They are vital gatekeepers, preventing ex parte communications and allowing the arbitrator and parties to focus on substantive issues.

In addition to a dedicated case management staff, managers need to ask if an ADR provider offers the following:

- **Labor and Employment Arbitrators with Workplace ADR Expertise**

  Most ADR providers create a diverse group of highly qualified arbitrators that have both labor and employment workplace ADR expertise. The arbitrators should have a minimum of 10 years of industry experience. The arbitrators who serve on administered arbitrations should sign an oath attesting to their neutrality. Also, the arbitrators should adhere to the standards established by the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. The Code provisions cover ethical standards and “best practices” for labor arbitrators.

- **State of the Art and Reliable Arbitration Rules and Procedures**

  The ADR provider should have time-tested state of the art and reliable ADR rules and procedures. The rules should be updated regularly to ensure the most efficient and cost-effective process possible for the parties. The rules should also be consistently recognized by courts and legislatures as a fair and enforceable means to resolve workplace disputes. In order to address all potential areas of labor and employment disputes, the ADR provider should provide the following types of rules: (1) Labor Arbitration, (2) Employment Arbitration Rules and Mediation Procedures, (3) Multi-Employer Pension Plan Arbitration, (4) Employee Benefit Plan Arbitration, (5) Agency Fee, (6) Grievance Mediation, and (7) Employment Non-Binding Arbitration.

- **Review of Employer-Promulgated Plans**

  At no expense to the employer, the ADR provider should review employer-promulgated plans to ensure they meet certain due process protocols. The review, ideally, should occur prior to implementing the plan and when it is amended.

- **Online Case Management**

  ADR providers should offer fast, convenient filing through an online case management service. In addition to filing disputes, parties should be able to make payments, perform online case management, access rules and procedures, electronically transfer documents, select arbitrators, use a case-customized message board and check the status of their case.

- **Training and Educational Programs**

  The ADR provider should implement education programs for its staff, ADR users, and arbitrators that are delivered regionally, in person, and via the internet. Dispute avoidance is usually more important than dispute resolution. In addition to educating the community on better ways to implement ADR solutions, training and educational programs offer dispute avoidance solutions and techniques to all interested parties.

- **Publications**

  The ADR provider should publish resources and guidelines to assist both ADR users and arbitrators. For example, clause drafting guidelines and journals containing articles on current trends in ADR are useful publications. One of the most popular guides published by the AAA is Drafting Dispute Resolution Clauses – A Practical Guide.

- **Video Conferencing**

  Video conferencing is an enhancement to ADR provider administrative services. It saves travel time and cost to parties whose witnesses are located out of the city or state in which the hearing is being held.

- **Conference Rooms and Business Centers**

  ADR providers should offer a network of neutral locations throughout the United States with state of the art hearing rooms - including Wi-Fi, video conferencing, and handicap accessible resources - available at a nominal cost, as well as business centers, equipped with copiers and computers.

- **Statistics**

  The ADR provider should maintain case databases that provide statistics and case trends to assist parties in the negotiation of collective bargaining agreements or for creating rotating or permanent panels. Ongoing statistics on arbitrator listing and selection should also be monitored by the ADR provider.

- **Online Labor and Employment Awards**

  The ADR provider should publish and make easily available (i.e., through LexisNexis, Westlaw, etc.) to the public a collection of labor and employment arbitration awards issued by the panels it maintains.

ADR continues to expand and develop because it is an adaptable process any aspect of which the parties, by mutual agreement, can drive, control, and change throughout their case, enhancing its fundamental elements of, speed, economy, and justice.

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during union organizing campaigns.

All hospital employers, regardless whether they are federal contractors, should be aware that the new FAR disallowance of persuader-associated costs is not the only regulation that may impact the treatment of persuader activities. A recent proposal from the Office of Labor-Management Standards (OLMS) of the Department of Labor in the June 21 Federal Register would revise an interpretation of the “advice” exemption to mandatory persuader reporting under Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 433. OLMS’ proposal would expand the circumstances under which reporting is required of employer-consultant persuader agreements by narrowing the definition of “advice.” The practical effect of this proposal may be to diminish an employer’s desire—even ability—to engage expert advice to ensure employees have a range of views about unionization that the NLRA guarantees them.

The AHA joined its American Society for Healthcare Human Resources Administration (ASHHRA) to oppose OLMS’s reinterpretation of the advice exemption; our Sept. 20 comment letter is available at www.aha.org under “Advocacy” and then “Letters.” We will continue to keep hospitals informed as this proposal moves closer to its final form.
Soliciting Employees – Are You Prepared?

By Robert Moll and Nicholas Munday

Employees on the frontlines and with unique knowledge about an organization’s shortcomings are one key to effective regulatory compliance. But employees also can work against an organization, with those most disenchanted or distrustful of management the most likely to take their complaints to regulators, the media or outside activists. And the government is standing by to help.

In April 2010, the U.S. Department of Labor (DOL) launched a new campaign with tools designed for employees, advocacy groups, worker rights organizations and others to assess employer compliance and file complaints. The “We Can Help!” campaign’s stated goal is that “no employer gain a marketplace advantage by using threats or coercion to cheat workers from their rightful wages.”

Depending on the severity, allegations filed with the DOL’s Wage and Hour Division may trigger investigations with other federal agencies, including the Equal Employment Opportunity Commission, Office of Federal Contract Compliance Programs and the Internal Revenue Service.

Unions commonly solicit disenchanted employees within an organization as part of a broader “corporate campaign” against an employer. One common focus is seeking alleged violations of the Fair Labor Standards Act pertaining to wages and hours, Occupational Safety and Health Administration standards related to workplace safety and a wide variety of patient safety, quality and outcome standards. These covert campaigns may be part of an union’s effort to unionize employees or used as leverage during collective bargaining agreement negotiations.

Because unions capitalize on conflict in the workplace, many survey employees looking for critical stories as part of union organizing campaigns. In one such case, a union spotlighted a nurse who claimed she contracted methicillin-resistant Staphylococcus Aureus (MRSA) from a patient at a psychiatric hospital. Months later the union was meeting regularly with employees at the hospital, and collecting signed authorization cards in an effort to unionize those nurses.

With increasing scrutiny and extensive new quality and patient outcome standards that may determine how much hospitals are paid to treat insured patients, it is critically important for leaders to regularly engage employees in decision making and communicate early and often with employees, physicians, patients, donors and the community.

Preparation is vital, with the goal of identifying an organization’s strengths and weaknesses and understanding how any vulnerabilities could be exploited. A strong offense requires leaders to:

Assess Risk

The first step is a comprehensive assessment of an organization’s systems, processes and communications. What opportunities do employees have to share concerns with supervisors, compliance officers or human resources, and do they know how to do so? How are patient-care staffing levels during all shifts? How comprehensive are charity care policies and practices relative to the local market and broader industry? What percentage of revenue does the organization reinvest in the community, and how does that compare to other hospitals and healthcare organizations? What stories does the hospital’s financial statement tell, and are leaders prepared to defend executive compensation, contracts, spending and charitable giving?

Craft the Message

After a thorough, honest assessment of vulnerabilities, create a communications approach to manage questions or issues involving each vulnerability and how the organization is addressing it. Determine what leaders in the organization know how to leverage the experience of professionals in compliance, finance, security and other operational areas to communicate effectively. Draft and approve communications materials ahead of time, with tailored messages for managers, employees and outside constituencies to be ready to respond should an issue emerge.

Choose the Channel

Many organizations mistakenly believe communication begins and ends with sending an email to employees or by posting information on an intranet. Strong organizations work to understand how different groups of employees get their information and how to best communicate with each. Strong organizations train and prepare frontline supervisors and managers to communicate effectively and provide them the information to do so. Strong organizations put their leaders in front of employees and provide small group sessions to promote conversation. Strong organizations then supplement those efforts with clear, conversational communications through social media, print and video.

Frame the Debate

Regrettably, many organizations wait too long to address emerging issues. By proactively educating employees and explaining the organization’s position and rationale for decisions, organizations can frame the debate and manage the message.

Map the Stakeholders

Don’t limit external communications to the media. Identify the people whose direct and indirect decisions affect the organization, including board members, donors, community leaders, (both formal and informal) elected officials, volunteers, suppliers and others. Who within the organization manages these relationships? This information should be maintained in a central database that includes names and contact information as well as notes about what information is shared with them and a history of the relationship, including details about the most recent interaction.

Build Relationships

A wide range of leaders – not only the CEO – should have responsibility for building and maintaining ties with important and influential people in the community. This investment in reputational support helps mitigate the impact of a crisis or coverage critical of the organization.

By undertaking these preparatory steps, a healthcare organization will be well on its way to mitigating potential issues that arise.

Robert Moll and Nicholas Munday advise healthcare leaders about communications and labor issues for IRI Consultants, a firm with practice areas in Labor and Employee Relations, Corporate Communications and Organization Effectiveness.

FOOTNOTES:
1. A corporate campaign is a multi-faceted public attack against a target organization. These campaigns leverage stakeholder relationships (government agencies, suppliers, the media and public-at-large) to promote management to yield their position about such issues as unionization of an organization’s workforce. To learn more, see the AHA’s resource “Corporate Campaigns: Five Questions Every Hospital Leader Should Ask” at www.aha.org.
OFCCP Revises Estimates of Federal Contractors’ Compliance Burdens

Responding in part to comments from the AHA, the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) increased the number of burden hours the agency estimates federal contractors will spend complying with recordkeeping, reporting and disclosure requirements the Office imposes to enforce various nondiscrimination mandates. OFCCP’s new estimates of the burden of compliance reflect an increase over previous estimates of 11 burden hours per individual contractor for a combined total of 11,949,346 compliance hours.

These compliance burdens apply to some hospitals that are longstanding federal contractors. However, they also could potentially impact many other hospitals recently informed that the OFCCP considers them to be contractors because they participate in TRICARE, the Federal Employees Health Benefit Plan, HMOs with federal employees as beneficiaries, and Medicare Parts C and D. While not conceding that OFCCP has such expanded jurisdiction over hospitals, the AHA commented that the agency’s previous burden estimates “seriously underestimate[d] the burden for federal contractors of information collection and reporting requirements” and “call[s] into serious question whether the Request [for Office of Management and Budget (OMB) clearance for continuation of the requirements for federal contractors] should even be granted.”

OFCCP’s revised burden estimates are included in an updated statement supporting a request to OMB to extend regulatory clearance for particular information collection and reporting requirements imposed under the Executive Order 11246, §503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans’ Readjustment Assistance Act.

OFCCP suggests that the revision of the burden hours estimate results “primarily [from] an increase in the number of supply and service contractor establishments from 99,028 to 171,275 (an addition of 72,247 contractors).” The AHA specifically questioned OFCCP’s original estimate of the number of affected contractors, particularly given the Office’s recent efforts to expand significantly its jurisdiction in health care. “The Office cannot have it both ways by asserting that these hospitals must comply... but not accounting for the burden imposed on [them],” the AHA said.

OFCCP also adjusted this estimate to reflect that “[c]overed contractors must develop [Affirmative Action Plans] for all establishments, even those with fewer than 50 employees.” The AHA had pointed out in its comments that:

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. The Office’s [current] assumption [about] 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. This is particularly troublesome for AHA members such as hospitals or health systems that may have many affiliated facilities.

While continuing to assert that “the information it would ask contractors to submit... is information that they are already required to maintain,” OFCCP added additional start-up costs to its burden estimate to reflect time needed to adjust current reporting or create additional reports. The AHA and others had raised concerns about new data collection and reporting obligations contained in the original clearance request to OMB.

The AHA contends that these revised estimates are essential for the proper evaluation by OMB of the OFCCP’s clearance request, but remains concerned whether the OFCCP’s revised burden estimates truly recognize and reflect the reality of federal contractors’ compliance experiences.

Labor Watch...

Keep your eye on potential developments in:

...LEGISLATION

- The National Defense Authorization Act (H.R. 1540), includes language clarifying that TRICARE network providers should not be considered subcontractors under the Federal Acquisition Regulation or other law. The OFCCP recently took the position that hospitals and health systems that contract with DoD to serve as TRICARE providers are federal subcontractors. The AHA had advocated that subjecting hospitals to regulations that apply to federal contractors and subcontractors would impose additional burdensome and costly requirements that are unnecessary. The president is expected to sign the legislation.

- Workforce Democracy and Fairness Act (H.R. 3094) includes provisions to block the National Labor Relations Board from advancing its proposed rule to speed up union representation elections and to reverse the Board’s recent decision in Specialty Healthcare which modified procedures and standards for determining appropriate bargaining units in nonacute care—The bill, which AHA supports, was approved with bipartisan support by the House (235-188) on Nov. 30.

...REGULATION

- National Labor Relations Board (NLRB) final rule requiring posting of notices of employees’ rights under the National Labor Relations Act—Implementation delayed by the NLRB until Jan. 31, 2012 due to pending court challenges (see below).

- NLRB proposed rule speeding up the process for union representation elections—NLRB voted 2-1 to proceed with drafting for Federal Register publication a limited final rule.

- Department of Labor’s Office of Labor-Management Standards proposed rule narrowing the definition of “advice” and thus expanding the circumstances under which reporting is required of employer-consultant persuader agreements under §203 of the Labor-Management Reporting and Disclosure Act of 1959—AHA, ASHHRA on Sept. 20 filed comments critical of the proposal, urging the department decline to adopt the revised definition.

...THE COURT OR ADMINISTRATIVE AGENCY PROCEEDINGS

- Chamber of Commerce v. NLRB, challenging the NLRB’s employee rights notice posting rule—Motions for summary judgment from both plaintiff and defendant filed Nov. 9 are pending in the U.S. District Court of South Carolina and oral arguments on the motion are scheduled for January 2012.

- National Association of Manufacturers v. NLRB, challenging the NLRB’s employee rights notice posting rule—Oral argument is scheduled for Dec. 19 in the US District Court for the District of Columbia.

- UPMC-Braddock v. Solis, concerning whether hospitals are federal subcontractors subject to OFCCP regulations and oversight because they provide services to federal government employees under an HMO contract with the Office of Personnel Management—Case filed June 30, 2009 remains pending in the U.S. District Court for the District of Columbia.

- OFCCP v. Florida Hospital, concerning whether a hospital is a federal subcontractor subject to OFCCP regulations and oversight because the hospital is an in-network TRICARE provider—Case remains pending before the Department of Labor’s Administrative Review Board.

- Roundy’s Inc., concerning the standards for determining whether a denial of union access to an employer’s property is discriminatory—Case remains pending before the NLRB.