



OFCCP Setting Its Sights On TRICARE Providers?

Insights

5.05.14

Healthcare providers are waiting anxiously to see the Office of Federal Contract Compliance Programs' (OFCCP) most recent position on whether it will continue trying to assert jurisdiction over them on the basis of participation in the TRICARE Program. For years, OFCCP's position was that the receipt of insurance reimbursement alone would not subject the healthcare provider to OFCCP's jurisdiction. In fact, in its FAQs available on its website, OFCCP has expressly stated that participation in Medicare Parts A and B does not create such status.

But several other programs have proved very problematic during recent years. The Federal Employee Health Benefits Program (FEHBP), TRICARE, and Medicare Parts C and D are programs that OFCCP has recently used as grounds for its jurisdiction over those who participate in those programs. On March 11, 2014, the Secretary of Labor, Tom Perez, proposed a unique sidestep position on this issue.

Healthcare Provider Bill Hearing

Many members of the government-contractor community first learned about Secretary Perez's March 11 letter when portions of it were discussed during a congressional hearing on a bill titled "Protecting Healthcare Providers from Increased Administrative Burdens Act" before the House Subcommittee on Workforce Protections. This hearing included testimony and statements related to the OFCCP's jurisdiction over healthcare providers on the basis of their participation in TRICARE, Medicare and FEHBP Programs. Key points included:

- Although it appears the OFCCP's position is to distinguish between fee-for-service v. managed-care plans, the testifying spokesperson for the American Hospital Association said that is a distinction without a difference for the healthcare-provider community.
- The Office of Personnel Management (OPM) and the Department of Defense (DOD) have previously stated that participating in FEHBP (OPM) or in TRICARE (DOD) does *not* create federal contractor/subcontractor status to establish OFCCP jurisdiction. Thus, other federal agencies hold a position contrary to the OFCCP's.
- Several subcommittee members and witnesses stated that they had believed that the prior 2011 National Defense Authorization Act (NDAA) expressly stated that TRICARE participation did not create federal subcontractor status or OFCCP jurisdiction, and they were surprised and

disappointed that the current proposed act would even be necessary in light of the previous 2011 NDAA statement.

DOL Secretary Tom Perez had issued a letter dated March 11, 2014, stating that OFCCP would promise a five-year moratorium on enforcement of healthcare providers who are federal subcontractors solely on the basis of their acceptance of TRICARE. Pending OFCCP enforcement actions involving these entities on this basis will be dismissed, according to the subcommittee members addressing Secretary Perez's letter.

The controversial *OFCCP v. Florida Hospital of Orlando* case, which addresses this issue, will be withdrawn, under the terms of Secretary Perez's letter.

Secretary Perez's Five-Year Moratorium Letter

Secretary Perez's letter seeks to use a five-year moratorium on enforcement by the OFCCP as a "workable administrative solution" offered "in lieu of legislative action," that is, the currently pending H.R. Protecting Healthcare Providers from Increased Administrative Burdens Act. Secretary Perez repeatedly uses the phrase "TRICARE subcontractors" throughout his letter and presents an initiative that includes the following steps:

1. OFCCP will issue a directive establishing the 5-year moratorium on enforcement of the affirmative action obligations required of "all TRICARE subcontractors."
2. OFCCP will administratively close open and scheduled compliance evaluations for "TRICARE subcontractors."
3. During the 5-year moratorium period, the OFCCP proposes to:
 - Provide information, materials and technical assistance training "to TRICARE subcontractors" on how to develop cost effective AAP's, recordkeeping, and applicant tracking systems;
 - Conduct national and regional webinars on its authority and subcontractors' obligations;
 - Convene listening sessions "to learn about the unique issues facing TRICARE subcontractors in order to provide relevant and targeted technical assistance under all OFCCP legal authorities; and
 - Work with DOD, OPM, and the White House Office of Federal Procurement Policy to clarify that healthcare providers participating as "subcontractors in TRICARE and FEHBP may, in certain circumstances, be subcontractors for purposes of the laws that OFCCP enforces."

The moratorium does not apply to prime contract holders or TRICARE subcontractors that hold an independent non-healthcare federal subcontract, nor does the moratorium cover TRICARE subcontractors' non-discrimination requirements.

Federal subcontractor status on the basis of the FEHBP and on Medicare Parts C and D were not substantively addressed in the Secretary Perez letter. The letter stated that, during the five-year moratorium, OFCCP will work with DOD and other agencies to clarify that those healthcare providers that participate as subcontractors under TRICARE and FEHBP may, in certain circumstances, be subcontractors for purposes of the laws that OFCCP enforces.

What Does It Mean In English?

The majority of the subcommittee members did not express support for the proposed five-year moratorium plan offered by Secretary Perez. Similarly, other testifying witnesses were also skeptical that Secretary Perez's moratorium would adequately address the needs of the healthcare provider community or the military and federal employee community whose access to high-quality healthcare may be negatively impacted by the increased administrative burdens imposed on healthcare providers who are required to engage in full affirmative action compliance requirements by the OFCCP.

The OFCCP's insistence on the use of the phrase "TRICARE subcontractors" does not bode well for the healthcare contractor community. The OFCCP's unwillingness to accept the NDAA exclusion of federal contractor or subcontractor status on the basis of TRICARE remains in place in its outlook as expressed by Secretary Perez.

Thus, although the contractor community may receive a five-year moratorium, that respite is extended to TRICARE (or possibly FEHBP) subcontractors, meaning they would likely need to be prepared to face full government audits at the end of that timeframe. We will continue to watch for OFCCP directives on this issue.

For more information, contact the author at CBehymer@fisherphillips.com or (803) 255-0000 .

Related People



Cheryl L. Behymer

Senior Counsel
803.255.0000
Email