



OFCCP Says TRICARE Providers Are Independent From Affirmative Action Obligations

Insights

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The government agency overseeing affirmative action requirements for federal contractors recently declared that healthcare providers who participate in TRICARE – the federal health care program providing benefits to uniformed service members, retirees and their families – are “independent” from its jurisdiction. The final rule released by the Office of Federal Contract Compliance Programs (OFCCP) establishes a national interest exemption from Executive Order 11246 (E.O. 11246), Section 503 of the Rehabilitation Act of 1973 (Section 503), and the Vietnam Era Veterans’ Readjustment Action of 1974 (VEVRAA) for those health care providers with agreements to furnish medical services and supplies to individuals participating in TRICARE. Thus, long-awaited regulations make clear that hospitals whose only “federal contract” is the acceptance of the military healthcare insurance program are not subject to the requirements or the enforcement of the OFCCP regulations.

Background

Federal law requires that government contractors refrain from discriminating on the basis of race, sex, and other grounds. Government contractors must also take affirmative action to ensure equal employment opportunities in their employment practices. The OFCCP enforces the equal employment opportunity laws and regulations that apply to federal contractors. In addition to providing the parameters necessary for contractors to meet their affirmative action requirements, the regulations provide that the OFCCP’s director may exempt a federal contractor from E.O. 11246, Section 503, and VEVRAA if they determine that special circumstances in the national interest require doing so.

TRICARE is a health care program for uniformed service members, retirees, and their families around the world. It is managed by the Defense Health Agency, which contracts with individual and institutional health care providers to provide health care for its constituents. Based on these contracts, the OFCCP had determined it had enforcement authority over TRICARE providers. However, the Final Rule released at the beginning of this month clarifies that the OFCCP does not have any such jurisdiction.

OFCCP’s Enforcement History Of TRICARE Providers

A lengthy back-and-forth between the OFCCP and the hospital community began in 2007 that has only now been resolved by this Final Rule. The OFCCP first asserted its enforcement authority over health care providers solely based on their provision of medical care to TRICARE beneficiaries in

healthcare providers' safety, based on their provision of medical care to military beneficiaries in

2007 when it litigated an enforcement action against a Florida hospital. Later that year, it issued a new directive (Directive 293) asserting its authority over certain healthcare providers participating in TRICARE. The following year, the National Defense Authorization Act (NDAA) included a provision expressly stating that TRICARE provider agreements were not government contracts. Later, OFCCP rescinded Directive 293.

In light of the provisions in the NDAA, the Department of Labor's Administrative Review Board – which was reviewing the 2007 Florida litigation – determined that the OFCCP was precluded from asserting authority over the Florida hospital. Congress then introduced legislation seeking to exempt all healthcare providers from OFCCP's jurisdiction.

In response, the Secretary of Labor penned a letter to the House Committee on Education and the Workforce and the Subcommittee on Workforce Protection stating that Congressional leaders had made clear their intent to remove OFCCP's jurisdiction from TRICARE subcontractors. Rather than take legislative action, the Secretary proposed that the OFCCP would “exercise prosecutorial discretion” in the following five years to limit its enforcement activities with regard to TRICARE subcontractors, and issued a directive in May 2014 to that effect. That moratorium was later extended an additional two years, with an expiration date of May 7, 2021.

OFCCP Issues Final Rule

However, with the Final Rule, OFCCP has indicated that its prior positions as to its jurisdiction over TRICARE providers “warranted reconsideration.” Thus, “after careful consideration, OFCCP has reconsidered its position and now concludes that it does not have authority over TRICARE providers.” Additionally, the desire to provide “lasting certainty” to TRICARE healthcare providers was found to be a national interest. Accordingly, under the Final Rule, OFCCP also grants TRICARE providers an exemption from E.O. 11246, Section 503, and VEVRAA.

The OFCCP determined that this national interest exemption was necessary for three main reasons: (1) the agency was concerned that the prospect of exercising authority over TRICARE providers is affecting or would affect the government's ability to provide healthcare to uniform services members, veterans, and their families; (2) further pursuit of enforcement efforts against TRICARE providers is not the best use of OFCCP's resources; and (3) the exemption provides uniformity and certainty in the healthcare community with regard to legal obligations concerning participation in TRICARE.

The third reason for the national exemption is one of the more compelling for healthcare providers. This is because, despite the enforcement moratorium, the question remained unanswered as to whether OFCCP would, at some point in the future, attempt to enforce federal contractor compliance on TRICARE providers. The Final Rule puts that uncertainty to rest.

What TRICARE Providers Should Know Going Forward

Notably, however, OFCCP retains jurisdiction over healthcare providers participating in TRICARE if those providers have a separately covered federal contract or subcontract that is not for providing

those providers have a separately covered federal contract or subcontract that is not for providing health care services under TRICARE. Additionally, TRICARE providers remain subject to all other federal, state, and local laws prohibiting discrimination and providing for equal employment opportunity.

Surprisingly, OFCCP has not adopted any regulatory changes with regard to companies that participate in the Federal Employees Health Benefits Program (FEHBP) or the U.S. Department of Veterans Affairs Health Benefit Provider (VAHBP). Thus, participants in these programs are still subject to the uncertainty that previously plagued TRICARE participants, unless or until additional regulations issue that incorporate these programs.

Accordingly, TRICARE healthcare providers should review any other contracts to which they are a party to determine if they are government contracts, which would trigger the jurisdiction of OFCCP. Further, they should ensure that they are compliant with all other federal, state, and local anti-discrimination laws and regulations.

Providers subject to the FEHBP should continue to monitor the regulations as OFCCP plans to issue sub-regulatory guidance to these providers. Providers with VAHBP agreements are still exempted from OFCCP's jurisdiction through May 7, 2021 under directive 2018-02, and OFCCP has stated it will consider additional sub-regulatory guidance to provide certainty and clarity to those with VAHBP agreements.

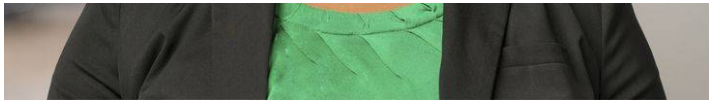
Conclusion

We will continue to monitor developments regarding this issue. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. If you have questions about how this rule impacts your organization, please reach out to your Fisher Phillips attorney or any member of our [Affirmative Action and Federal Contract Compliance Practice Group](#).

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