

# Latest in the OFCCP / TRICARE Saga: Healthcare Provider NOT a 'Subcontractor'

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by Chris Chrisbens

In an opinion released October 23, the Department of Labor's Administrative Review Board (ARB) ruled Florida Hospital of Orlando's TRICARE network provider subcontract with Humana Military Healthcare Services (HMHS) is not a covered subcontract for purposes of federal affirmative action obligations. *OFCCP v. Fla. Hosp. of Orlando*, DOL ARB, No. 11-011.

For now, it's safe to say that subcontracts to be a TRICARE network provider do not, alone, impose federal affirmative action obligations. However, contractual relationships with other federal agencies or subcontracts with other federal contractors may impose such obligations.

### A Long Road...

HMHS had a managed care support contract with the U.S. military healthcare program TRICARE, including an obligation to establish networks of independent healthcare providers. As with many other providers, HMHS entered into a subcontract with Florida Hospital designating it as a TRICARE network provider.

In 2008, the Office of Federal Contract Compliance Programs (OFCCP) attempted to audit Florida Hospital for compliance with federal affirmative action laws, believing that its subcontract with HMHS qualified as a covered subcontract. Florida Hospital disagreed and OFCCP brought an administrative action which resulted in a 2010 Administrative Law Judge (ALJ) ruling that the Florida Hospital's subcontract was covered and imposed affirmative action obligations. The ALJ also rejected Florida Hospital's argument that TRICARE is a federal financial assistance program (such as Medicare Parts A and B) and, therefore, receipt of financial assistance does not trigger coverage.

After Florida Hospital appealed to the ARB, Section 715 of the 2012 National Defense Authorization Act (NDAA) addressed the matter by amending TRICARE law to state: "For the purpose of determining whether network providers under such provider agreements are subcontractors for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish ... a network of providers may not be considered to be a contract

for the performance of health care services or supplies on the basis of such requirement." Emphasis added.

Based on that language, the ARB ruled that Florida Hospital's TRICARE subcontract was no longer a covered subcontract and OFCCP has no jurisdiction based on such a subcontract.

### **What Now**

It seems unlikely OFCCP will challenge this ruling or attempt to continue TRICARE audits any time in the near future, which is good news for those like Florida Hospital whose TRICARE network provider subcontract is the ONLY basis for affirmative action obligations. It also seems unlikely that the NDAA for 2013 will reverse course on the amendment to TRICARE law. However, for those with other covered federal contracts or subcontracts, this ruling provides little solace.

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