

ALERTS AND UPDATES

U.S. Department of Labor Further Expands Jurisdiction over Hospitals and Healthcare Providers; TRICARE Agreements Impose Affirmative Action Obligations

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A recent U.S. Department of Labor Administrative Law Judge (ALJ) decision, *OFCCP v. Florida Hospital of Orlando*,¹ expands the federal subcontractor affirmative action requirements to healthcare providers that provide medical services to TRICARE beneficiaries. These medical services are typically provided pursuant to a provider agreement with a company that administers healthcare provider networks for TRICARE. TRICARE is the U.S. Department of Defense's healthcare program for active and retired military members.

For years, hospitals and other healthcare providers (HCPs) operated with the understanding that, absent a clear contractual or subcontractual relationship with the federal government, they are not federal contractors or subcontractors subject to affirmative action requirements. Hospitals and HCPs relied on a 2003 decision in *OFCCP v. Bridgeport Hospital*,² which was widely understood as insulating HCPs from the "subcontractor" status that can subject them to affirmative action requirements.

However, a May 2009 ruling in *OFCCP v. UPMC Braddock*,³ significantly altered the compliance landscape for hospitals and HCPs. In *UPMC Braddock*, the ALJ found that a hospital system's provider agreement with an HMO, which in turn had a federal contract to provide medical services to government employees, made the hospital system a federal subcontractor subject to affirmative action requirements.

OFCCP v. Florida Hospital of Orlando expands subcontractor status to even more hospitals and HCPs. Florida Hospital participates in a healthcare provider network established by Humana Military Healthcare Services, Inc. (HMHS), a non-insurer / non-HMO that has a government contract to administer the provider network for TRICARE. As part of that network, Florida Hospital provides medical services to TRICARE recipients. The ALJ determined that because the hospital provides medical services to TRICARE beneficiaries through the network, it performs a portion of HMHS's obligations under its contract with TRICARE, and therefore is a federal subcontractor subject to affirmative action obligations. The ALJ said that this is the case even when the provider agreement states that participating healthcare providers are not federal subcontractors.

It is important to note that the *UPMC Braddock* decision controlled the outcome in *Florida Hospital*, which may indicate that the TRICARE context is not the "final frontier" of the Office of Federal Contract Compliance Programs' (OFCCP) jurisdiction over hospitals and healthcare providers—as the OFCCP looks to apply federal affirmative action requirements to an increasing number of entities in the healthcare industry.

What This Means for Employers

Hospitals and other healthcare providers may want to review their existing network provider agreements and any other agreements under which they may provide healthcare services to beneficiaries of a government program. Where questions arise about the applicability of affirmative action requirements, healthcare providers may also wish to consult with legal counsel to determine whether they may have affirmative action obligations and, if so, what those obligations are and how to meet them.

For Further Information

If you have any questions about this *Alert*, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. *OFCCP v. Florida Hospital of Orlando*, DOL OALJ No. 2009-OFC-00002 (Oct. 18, 2010).
2. *OFCCP v. Bridgeport Hospital*, ARB No. 00-034 (Jan. 31, 2003).

3. *OFCCP v. UPMC Braddock*, ARB No. 08-048 (May 29, 2009).

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