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TriCare Network Contracts Create Affirmative Action Obligations for Health Care Providers

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The Office of Federal Contracts Compliance (OFCCP) has made no secret of its desire to impose affirmative action obligations on hospitals. It moved quite a bit closer to this goal last month by winning a case against a hospital that had signed a TriCare network contract. In *OFCCP v. Florida Hospital of Orlando*, the hospital challenged OFCCP's jurisdiction over it, and the Administrative Law Judge ruled in OFCCP's favor. While this case dealt with a hospital in Florida, hospitals here in North Carolina can expect to see OFCCP issuing Notices of Audit to facilities in North Carolina, because the Florida case is strong precedent supporting OFCCP's jurisdiction over hospitals that contract to provide TriCare network services.

OFCCP is the federal government agency charged with enforcing Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). Companies that have a contract or subcontract of \$10,000 or more with a federal executive agency, such as the Department of Defense, are subject to the OFCCP's regulations. TriCare is a Department of Defense program that provides worldwide health care for active duty and retired military personnel and their families. Humana Military Healthcare Services, Inc. is the direct contractor with the Department of Defense for administration of the program. Humana's contract provides that it "shall provide a managed, stable, high-quality network, or networks, of individual and institutional health care providers." Humana subcontracts with hospitals and doctors to provide network services for TriCare beneficiaries.

OFCCP has taken the position that a health care provider that enters into a network contract with Humana must comply with the equal opportunity/affirmative action obligations of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 and VEVRAA. On October 18, 2010, an administrative law judge upheld OFCCP's position, finding that because Florida Hospital of Orlando had entered into a medical contract with Humana to provide medical services to TriCare beneficiaries, it was a covered government subcontractor.

The ALJ rejected Florida Hospital of Orlando's argument that TriCare is structured like Medicare and therefore should not be considered a covered government contract. The OFCCP has previously conceded that provider agreements pursuant to which hospitals and other health care providers receive reimbursement for services covered under Medicare parts A and B are not covered government contracts under the laws enforced by OFCCP. However, the TriCare contracts are not simply reimbursement arrangements, but are contracts to provide the actual medical services, and thus OFCCP, and now the ALJ, distinguishes the TriCare contracts from Medicare provider agreements.

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This decision will provide OFCCP with the ammunition it needs to pursue other hospitals that have entered into contracts to be TriCare network providers, and to require them to comply with the equal opportunity/affirmative action obligations. These obligations include implementing an Affirmative Action Program. This requires employers to create written Affirmative Action Plans for minorities, women, veterans, and disabled applicants and employees. In addition, companies must engage in affirmative action outreach activities. These activities include listing open positions with the Employment Security Commission and communicating with and encouraging referral of applicants from veterans' and disabled advocacy groups. The regulations also require companies to evaluate personnel actions and compensation on an annual basis to see if specific racial, ethnic or gender groups have been negatively impacted. Finally, regulations impose special record-keeping requirements for applicants. OFCCP routinely audits government contractors and subcontractors to determine whether they are in compliance with these obligations, and to look for and remedy discriminatory employment decisions. Failure to comply with the equal employment opportunity/affirmative action obligations places companies at significant risk. Sanctions can include back pay, required reporting and the loss of federal contracts.

All hospitals should review their TriCare contracts and determine whether OFCCP could contend that they are subject to the equal employment opportunity/affirmative action obligations, and whether they intend to implement Affirmative Action Programs or try to dispute OFCCP's jurisdiction if a notice of audit is received.

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