

Department of Labor's OFCCP Postpones TRICARE Network Provider Compliance Reviews

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The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), the federal agency tasked with enforcing the affirmative action requirements of Executive Order 11246 and related federal statutes, is notifying TRICARE network providers that any on-going compliance reviews are “on hold,” pending the outcome of **current litigation challenging the OFCCP’s jurisdiction** over health care providers that are part of a TRICARE provider network. TRICARE is the government program under which active duty and retired military service members and their dependents receive health care. Executive Order 11246 and related statutes apply to federal contractors and subcontractors that meet specific legal requirements.

Background

The litigation began several years ago when the OFCCP filed an administrative complaint with the U.S. Department of Labor’s Administrative Review Board (ARB) against Florida Hospital of Orlando to force the hospital to submit to a compliance review. Prior to this case, the OFCCP had never asserted jurisdiction over an employer based solely on its status as a TRICARE network provider. In October 2010, an administrative law judge issued a recommended decision adopting the OFCCP’s position that TRICARE network providers are federal subcontractors. Florida Hospital sought review by the ARB, and that review is still pending.

New Amendment to TRICARE Law: TRICARE Network Providers are **Not** Federal Subcontractors

Throughout this litigation, the U.S. Department of Defense (DoD), the agency responsible for administering the TRICARE program, has taken the position that TRICARE network providers are not federal subcontractors on that basis and are not subject to OFCCP jurisdiction. The OFCCP and the administrative law judge ignored the position of the DoD.

Congress intervened in support of TRICARE network providers, and on December 31, 2011, President Obama signed the National Defense Authorization Act of Fiscal Year 2012, which includes an

amendment to the TRICARE law providing that TRICARE network providers are **not** federal subcontractors on that basis for purposes of Executive Order 11246 and related laws.

Florida Hospital Seeks Dismissal of the Case under the TRICARE Amendment; OFCCP Delays Compliance Reviews until Jurisdiction Issue is Resolved

In January 2012, Florida Hospital filed a motion to dismiss the case as moot based on the TRICARE Amendment passed by Congress. The OFCCP has opposed the dismissal and the ARB requested additional briefing. The parties are currently awaiting a decision from the ARB.

Given the ongoing litigation challenging its jurisdiction, the OFCCP has placed “on hold” compliance reviews of TRICARE network providers until the jurisdiction issue is resolved. The “hold” decision does not apply to TRICARE network providers who are federal contractors by virtue of a direct federal contract, e.g. Department of Veterans Affairs, Bureau of Prisons.

If you have any questions, please contact **Leslie Selig Byrd**, **James H. Kizziar** or **Judy K. Jetelina** at Bracewell & Giuliani LLP.

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