

One Minute Memo[®]



New Bill Ends OFCCP's Jurisdiction Over Many Health Care Providers; Watch Your Mailboxes, CSAL Scheduling Letters Coming Soon

The old adage that the only constant is change rings true in the new year for federal contractors and subcontractors. These changes, however, are welcome news for many contractors. A bill signed on New Year's Eve by President Obama effectively ended the Office of Federal Contract Compliance Programs' (OFCCP's) jurisdiction over TRICARE health providers. Further, the OFCCP continued a practice it once considered abandoning by issuing Corporate Scheduling Announcement Letters (or CSALs), which is good for federal contractors and subcontractors, as it allows for some advance planning, self-evaluation, and audit preparation and also allows contractors to anticipate the time and resources that will be required for compliance evaluations during the cycle.

Defense Authorization Bill Ends OFCCP Coverage for TRICARE Providers

Health care providers and their legal counsel are all too aware of the OFCCP's oft expressed interest in expanding the OFCCP's jurisdiction over health care providers, resulting in the imposition of affirmative action obligations arising out of Executive Order 11246, Section 503 of the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA") on a huge number of previously uncovered health care providers. The long-awaited decision in *OFCCP v. Florida Hospital of Orlando*, 2009-OFC-02 (2010) extended OFCCP jurisdiction to medical institutions, pharmacies, or other health care providers who participated in a health care provider network for TRICARE, the Department of Defense's health care program for active and retired military members and their families. For more information click [here](#). However, a new law signed by President Obama on December 31, 2011, ends the jurisdiction of the OFCCP over many health care providers.

The National Defense Authorization Act for Fiscal Year 2012 effectively removes medical institutions, pharmacies, or other health care providers who participated in a health care provider network for TRICARE from the ambit of the OFCCP's jurisdiction. Section 715 contains this TRICARE exception:

For the purpose of determining whether network providers under such provider network 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, manage, or maintain 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.

Take note, however, that this Defense Authorization Act does not change the OFCCP's purported coverage over medical institutions, pharmacies, or other health care providers that provide health services to federal employees and their families covered by federal health coverage or to those that provide services pursuant to Medicare Part D. These contractors and subcontractors are still obligated to comply with the affirmative action obligations enforced by OFCCP under Executive Order 11246, Section 503 of the Rehabilitation Act, and the VEVRAA, unless an exemption applies.

OFCCP Corporate Scheduling Announcement Letters On Their Way!

We learned this week that the OFCCP has sent out a new round of CSALs to selected federal contractors or subcontractors. The CSAL is a notification to a parent company that one or more of its establishments are slated for compliance evaluations during the current scheduling cycle, which ends on September 30, 2012.

While this is good news for contractors, as it allows advance planning, it is important to note that the CSAL does not necessarily provide an inclusive list of establishments that may be audited during the scheduling cycle. For example, establishments that are not clearly associated with the parent company on EEO-1 Reports will not be included on a CSAL. It is our experience that OFCCP may choose to audit locations not listed, and some establishments listed will not be audited.

What Contractors Should Do Now

While TRICARE no longer creates OFCCP jurisdiction, healthcare providers may still be subject to OFCCP jurisdiction due to other contract obligations. For that reason, healthcare providers should contact legal counsel to determine the impact of the National Defense Authorization Act on their compliance obligations and should continue to review contracts to determine if they will create compliance obligations. Until a full determination of jurisdiction can be conducted, health care providers who receive federal assistance payments under TRICARE, and who receive an OFCCP CSAL or scheduling letter, may wish to preserve their jurisdiction defense by asserting that receipt of payments under TRICARE does not render them a contractor.

All other contractors, upon the receipt of the CSAL, should immediately notify personnel responsible for the establishment and for affirmative action compliance that an audit is likely. Consider using the time before a scheduling letter is received to conduct a partial or full mock audit of the establishment. At the very least, review the establishment's affirmative action program, adverse impact analysis, outreach efforts, and progress toward goals. Consult with counsel about the best approaches for self-audits and whether some or all of the review should be done under attorney-client privilege.

If you have questions about this One Minute Memo, please contact the Seyfarth Shaw attorney with whom you work or any attorney on our OFCCP & Affirmative Action Compliance Team.

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