

One Minute Memo®



TR(I) Again Later: OFCCP Directive Establishes 5-Year Enforcement Moratorium for TRICARE Providers

By Annette Tyman and Meredith C. Bailey

Effective May 7, 2014, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) halted enforcement of the affirmative action obligations the OFCCP asserted were required of all TRICARE providers for 5 years. In the interim, the agency will engage in outreach and technical assistance in an effort to clarify TRICARE providers' obligations under the laws administered by the OFCCP.

5-Year OFCCP Enforcement Moratorium

OFCCP Directive 2014-01 establishes a five-year moratorium on enforcement over TRICARE providers under Executive Order (E.O.) 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). The moratorium applies to all healthcare entities that participate in TRICARE under a prime contract between the Department of Defense (DoD) TRICARE Management Activity and one of the prime managed-care contractors.

The OFCCP will administratively close all open and scheduled compliance evaluations for TRICARE providers within 30 business days of the Directive's effective date, or June 18, 2014. A TRICARE provider that receives a scheduling letter in error may request administrative closure by submitting a written request to the local OFCCP office.

The moratorium does not apply to:

- Health care entities that hold prime contracts with a federal agency;
- TRICARE providers that hold separate, independent non-health-care-related federal subcontracts;
- Investigation of complaints of discrimination under 41 CFR 60-1.24; 41 CFR 60-300.61 and 41 CFR 60-741.61.
- Obligations that a TRICARE provider may have under other federal nondiscrimination laws, including Title VII and the Americans with Disabilities Act, as amended.

The OFCCP issued the Directive as a result of "confusion regarding who is covered and what obligations the TRICARE subcontractor community has under laws enforced by OFCCP." For years, the OFCCP has pursued jurisdiction and argued that health care providers that participate in the Department of Defense's TRICARE program¹ qualify as federal government

subcontractors who are required to comply with the agency's regulations.

Yet, the OFCCP's jurisdictional claims conflict with other Executive action and guidance. As we discussed [here](#), the 2012 National Defense Authorization Act (NDAA) expressly exempted TRICARE providers from OFCCP jurisdiction. In addition, both the Office of Personnel Management (OPM) and the DoD have stated that participating in federally funded health benefit programs does not confer federal contractor or subcontractor status sufficient to establish OFCCP jurisdiction.

As a result of the "difference in understanding between the Department of Labor and some entities affiliated with the TRICARE community as to who is a covered subcontractor under the laws the OFCCP enforces," the Directive limits the OFCCP's enforcement activities of TRICARE providers over the next five years.

In a letter to Congress, Labor Secretary Tom Perez recently described the 5-year moratorium as a "workable administrative solution" to resolve confusion surrounding OFCCP jurisdiction. During the moratorium, the OFCCP promises to "provide extensive technical assistance [to TRICARE providers] on compliance with affirmative action obligations" under Executive Order 11246, Section 503, and VEVRAA.

The OFCCP will also work with the DoD, which administers TRICARE, OPM, the agency responsible for administering the Federal Employees Health Benefits Program (FEHBP), and the White House Office of Federal Procurement Policy to clarify that health care providers that participate in TRICARE and FEHBP may, in certain circumstances, be subcontractors for purposes of the laws that OFCCP enforces.

What Health Care Providers Can Do Now

While TRICARE health care providers may enjoy a brief reprieve from OFCCP enforcement activities, the Directive's limited scope and duration is a clear message that the agency is not conceding that it lacks jurisdiction over health care providers offering care to participants in federally funded health benefit programs.

Unless Congress takes additional action, health care providers who receive an OFCCP CSAL or scheduling letter based solely on their status as TRICARE participants, should refer to the moratorium and consider affirmatively asserting that receipt of payments under TRICARE does not render them a subcontractor as part of their jurisdictional defense.

Directive 2014-01: TRICARE Subcontractor Enforcement Activities is available on the [OFCCP's website](#).

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¹ TRICARE is the health care program that provides benefits for active duty and retired military personnel and their families.

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