

One Minute Memo[®]



Victory For Employers In Dismissal Of OFCCP'S Case Against Florida Hospital; Some Health Care Providers Will Not Be Subject To OFCCP Jurisdiction

Health care providers whose only federal contracts or subcontracts for affirmative action purposes derive from their participation as TRICARE network providers can breathe a little easier. On Friday, the Department of Labor's Administrative Review Board (ARB) dismissed the Office of Federal Contract Compliance Programs' (OFCCP) complaint in the closely watched *Florida Hospital of Orlando* case, ending the OFCCP's quest to retain jurisdiction over TRICARE network providers. The decision is available [here](#).

Almost exactly two years ago, an Administrative Law Judge held that Florida Hospital of Orlando ("Florida Hospital") is a federal subcontractor by virtue of its participation in a health care provider network administered by Humana Military Healthcare Services, Inc. for TRICARE, the Department of Defense's health care program for active and retired military members and their families. The Florida Hospital then sought relief before the ARB. (For more information on the *Florida Hospital* litigation, see [here](#).)

While the litigation was pending before the ARB, on December 31, 2011, President Obama signed the National Defense Authorization Act of 2012 (NDAA), which contains a provision that specifically excludes TRICARE managed care support contracts that include the requirement to establish, manage, or maintain a network of providers from OFCCP jurisdiction. (Click [here](#) for more information about the NDAA.) on December 31, 2011,

Despite passage of the NDAA, the OFCCP would not concede a lack of jurisdiction over Florida Hospital, but rather pursued its position before the ARB, merely putting "on hold" compliance evaluations for health care providers where the only basis for OFCCP's jurisdiction is a TRICARE managed care support contract. (For more information on the OFCCP's latest position generally on jurisdiction over health care providers, please click [here](#).)

In its decision, the ARB rejected the OFCCP's position, finding that Section 715 of the NDAA encompasses the very type of subcontract under which Florida Hospital provides medical services to TRICARE beneficiaries as part of a health care provider network established by HMHS, which in turn had a prime federal contract with the Department of Defense. In so ruling, the ARB determined that it could retroactively apply the NDAA because it "does not increase any party's liability, impair any rights, or impose new duties."

What This Means for Contractors and Subcontractors

The ARB's decision is great news for health care providers and insurers, including retail stores with pharmacy operations, whose only federal contract or subcontract is a TRICARE managed care support contract. Because the NDAA can be applied retroactively, employers previously subject to OFCCP jurisdiction based solely on their status as TRICARE providers can expect administrative closure of outstanding compliance evaluations.

Health care providers and insurers must keep in mind, however, that OFCCP has vowed to move forward with compliance

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evaluations of health care providers and insurers where it can find a basis for jurisdiction independent of TRICARE (such as a contract with the Department of Health and Human Services, the Veterans Administration, or the Department of Justice). Federal contractors or subcontractors should therefore consult with counsel to determine if there are other bases on which OFCCP may assert jurisdiction and to reassess their affirmative action obligations.

Health care providers should be particularly aware that neither the NDAA nor *Florida Hospital* impact 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 Parts C and D.

In addition, another case pending on appeal will likely impact OFCCP's jurisdiction over health care providers. In *OFCCP v. UPMC Braddock, UPMS McKeesport, and UPMC Southside*, ARB Case No. 08- 048 (May 29, 2009), the ARB ruled in favor of OFCCP in finding that hospitals that provided medical services and supplies to UPMC, which contracted with the Office of Personnel Management to put a health maintenance organization into operation, were performing an essential part of UPMC's contractual obligation and were thus subject to OFCCP jurisdiction. *Braddock* is currently on pending on appeal in the United States District Court for the District of Columbia.

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