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# Congress Overrules OFCCP: TRICARE Providers Are Not OFCCP Subcontractors

For the past year, healthcare providers have been in a quandary as they tried to assess whether receipt of TRICARE dollars really meant they had to comply with the affirmative action requirements enforced by the Office of Federal Contract Compliance Programs (OFCCP). The quandary is over. The National Defense Authorization Act (NDAA) for Fiscal Year 2012, signed by President Barack Obama on December 31, 2011, establishes definitively that receipt of TRICARE dollars does not render the recipient a covered subcontractor for OFCCP purposes.

In October 2010, an Administrative Law Judge (ALJ) ruled that, due to receipt of TRICARE dollars, Florida Hospital was subject to the jurisdiction of the OFCCP. By December 2010, the OFCCP published Directive No. 293 in which it rescinded prior guidance and took the position that healthcare providers were subcontractors subject to its jurisdiction if, among other things, they received sufficient TRICARE dollars. Florida Hospital appealed the ALJ's decision, and healthcare providers began analyzing the contours and burdens of compliance.

Congress has now provided a legislative fix to the TRICARE issue for healthcare providers. In rejecting OFCCP coverage of healthcare providers under TRICARE, the new legislation states: "For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the Federal Acquisition Regulations 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 healthcare services or supplies on the basis of such requirement." In an express rejection of the

approach taken by the OFCCP, the Conference Report issued with the new legislation specifically noted it was “aware” the Administration was undertaking a review with various agencies, including the Departments of Defense and Labor, “to clarify the coverage of healthcare providers under federal statutes applicable to contractors and subcontractors. The conferees agree that this is a complex issue which merits continued review . . . .”

Despite the plain language of the legislation, the OFCCP is not necessarily ceding it has no jurisdiction over healthcare providers under TRICARE. Director Patricia Shiu stated, “Section 715 of the NDAA seeks to exempt certain TRICARE providers from complying with civil rights laws that – for nearly half a century – have prohibited employment discrimination and ensured affirmative action for vulnerable workers. Our commitment to enforcing those laws is unwavering. This isn’t over yet.”

### **What This Means to You**

If a healthcare provider’s only link to federal subcontractor status was through TRICARE, the healthcare provider can point to Congress’ legislative overruling of the OFCCP in concluding it is not covered by the affirmative action laws enforced by the OFCCP. However, there are many other ways in which a healthcare provider can become a federal subcontractor and thus subject to OFCCP’s jurisdiction. These ways include a contract directly with a federal agency, such as the Veterans Administration. Additionally, the OFCCP has maintained that receipt of Medicare Part C and Part D funds may subject the recipient to OFCCP jurisdiction, and this concept, which was incorporated in Directive No. 293, was not overturned by the legislation. We anticipate further developments in this area.

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