

LABOR & EMPLOYMENT

ALERT

OFCCP CONTINUES TO ENGAGE IN EFFORTS TO ASSERT JURISDICTION OVER THE HEALTH CARE INDUSTRY AND HOSPITALS THAT PARTICIPATE IN OR RECEIVE PAYMENTS FROM TRICARE

By Kenneth A. Rosenberg and Jordan Kaplan

Over the past several years, the U.S. Department of Labor's (DOL) Office of Federal Contractor Compliance Programs (OFCCP) has engaged in ongoing efforts to assert jurisdiction over hospitals and the health care industry based on its assertion that these entities are government subcontractors within the meaning of 41 C.F.R. § 60-1.3.

Pursuant to this regulation, a subcontract constitutes any agreement between a contractor and a third party for either: (1) the purchase, sale or use of personal property or non-personal services, which is necessary for the performance of any one or more contracts (Prong One); or (2) under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed (Prong Two).

The OFCCP has argued that hospitals are subcontractors under both of these prongs when they became involved in TRICARE networks or accepted reimbursement payments from TRICARE. TRICARE is a health care program of the Defense Health Agency under the guidance of the Assistant Secretary of Defense that provides civilian health benefits for military personnel, military retirees and their dependents. These efforts were temporarily stalled when the DOL's Administrative Review Board (ARB) ruled on November 13, 2012, that the OFCCP did not have jurisdiction over Florida Hospital, as a subcontractor, simply because it provided medical services to TRICARE beneficiaries as part of Humana Military Healthcare Services' (HMHS) integrated health care delivery system based on Section 715

of the National Defense Authorization Act (NDAA). *OFCCP v. Florida Hospital of Orlando*, ALJ Case No. 2009-OFC-0002 (October 18, 2010). Section 715 of the NDAA, in relevant part, provides that "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."

However, on July 22, 2013, the ARB heard the OFCCP's motion for reconsideration in *OFCCP v. Florida Hospital of Orlando* and reversed its initial decision. In doing so, the ARB found that while Section 715 of the NDAA precludes the OFCCP from asserting jurisdiction over hospitals where they have merely performed, undertaken or assumed a portion of a federal contractor's obligation to provide medical services to TRICARE beneficiaries (Prong Two of the subcontractor definition), it did not prevent the OFCCP from demonstrating that a hospital had otherwise entered into a subcontractor relationship with the government under Prong One. Specifically, the ARB stated that Section 715 of the NDAA did not create a blanket prohibition of OFCCP jurisdiction over hospitals and a separate analysis must be performed to determine if Prong One jurisdiction still exists.

Under the facts and circumstances of *Florida Hospital*, the court found that Prong One jurisdiction still applied because the hospital's contract with HMHS was for the

performance of non-personal services, and the purchase of the hospital's services was necessary for the managed care support contract between HMHS and TRICARE.

It is of note, however, that the analysis of OFCCP jurisdiction did not end there. The ARB recognized the hospital's argument that TRICARE may qualify as a federal financial assistance program, thereby falling within another exception to the OFCCP's jurisdiction. As such, the ARB remanded the case back to the administrative law judge (ALJ) for additional fact-finding on the issue as to whether Congress intended for TRICARE to be a federal financial assistance program. If the ALJ finds that TRICARE is a federal financial assistance program, then the hospital will not be subject to OFCCP jurisdiction.

As the OFCCP has been attempting to assert jurisdiction over the health care industry and hospitals based on their acceptance of TRICARE reimbursement

payments, these entities should continue to monitor the *OFCCP v. Florida Hospital of Orlando* case because its outcome could turn them into a federal contractor/subcontractor thereby creating significant new compliance issues for them in the future. In the event a hospital or health care provider has any questions about the potential implications regarding this case, they should consult with counsel for guidance.

For more information about this alert or if you have any questions or concerns, please contact Kenneth A. Rosenberg at 973.994.7510 or krosenberg@foxrothschild.com or any member of Fox Rothschild's Labor & Employment Department.



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