

OFCCP WINS A BATTLE, BUT THE TRICARE WAR IS BOUND TO CONTINUE

The Administrative Review Board ("ARB") ruled on July 22, 2013 that Florida Hospital of Orlando ("Florida Hospital") is a covered federal subcontractor subject to Office of Federal Contract Compliance Programs' ("OFCCP") jurisdiction by virtue of its participation as a network provider under TRICARE. The ruling comes nine months after the same panel of judges *dismissed* OFCCP's case against Florida Hospital after finding that it was *not* a covered federal subcontractor based on the same set of facts. Confused? You should be. In an effort to make this complicated story as simple as possible, here is a high-level snapshot of the key events over the past three years:

- *October 2010*: OFCCP convinces an Administrative Law Judge ("ALJ") that Florida Hospital's TRICARE network agreement causes it to be a covered federal subcontractor, which means Florida Hospital is subject to OFCCP's compliance review jurisdiction. Rather than cooperate with OFCCP's compliance review, Florida Hospital appeals the ALJ decision to the ARB.
- *December 2010*: While Florida Hospital's appeal is pending, OFCCP releases Directive 293, which declares, among other things, that it has jurisdiction over TRICARE network providers.
- *December 2011*: While Florida Hospital's appeal is *still* pending, President Obama signs the National Defense Authorization Act ("NDAA"), which includes language seemingly intended to carve out TRICARE network providers from OFCCP's jurisdiction.
- *October 2012*: The ARB grants Florida Hospital's motion to dismiss OFCCP's case against Florida Hospital as moot in light of the passage of the NDAA. OFCCP requests reconsideration of the ARB's decision to dismiss.
- *July 2013*: The ARB issues a second decision (a mulligan?), this time ruling that the specific language in the NDAA did not foreclose *all* possible arguments that Florida Hospital is a covered federal subcontractor by virtue of its TRICARE network agreement. At the same time, the ARB remanded the case back to the ALJ for further consideration of a separate issue: whether TRICARE payments are federal financial assistance.

WHAT DOES IT MEAN?

In short, it virtually guarantees that the health care industry is going to have to live with several more years of uncertainty regarding whether participating in TRICARE means having to comply with affirmative action.

On one hand, we'll have to wait for the ALJ's decision regarding whether TRICARE payments are federal financial assistance. No matter what the ALJ decides, expect another appeal to the ARB. And, if the ARB rules against Florida Hospital, the federal financial assistance issue will likely wind up in federal court. That's potentially three more rulings concerning the federal financial assistance issue alone.

Then, assuming Florida Hospital wants to keep fighting, it will also likely appeal the ARB's most recent ruling regarding the effect of the NDAA. That, too, would go to federal court, although the timing of the appeal remains uncertain.

Also uncertain is what the OFCCP will decide to do with all of the TRICARE-based compliance reviews that it has temporarily placed on hold. Will it reopen them on the heels of this ARB victory or sit back and wait as the litigation continues to unfold? Will more TRICARE-based compliance reviews be scheduled in the meantime? It is a bit too soon to know the answers to these questions, but we will closely monitor them and report any new significant developments.

If you have questions regarding this topic, please contact Jon Bumgarner at 317.977.1474 or jbumgarner@hallrender.com or your regular Hall Render attorney.