

CONGRESS CONSIDERS CARVING OUT TRICARE PROVIDERS FROM LIST OF EMPLOYERS THAT MUST COMPLY WITH AFFIRMATIVE ACTION

Earlier this month, the Senate passed the National Defense Authorization bill (S. 1867), which contains a provision that exempts certain TRICARE network providers from jurisdiction by the Office of Federal Contract Compliance Programs (OFCCP). If it becomes law, this provision will undo the OFCCP's recent efforts to require health care providers that participate in TRICARE to comply with burdensome affirmative action obligations.

MOMENTUM ON THIS CRITICAL ISSUE MAY BE SWINGING BACK TO THE HEALTH CARE INDUSTRY



Until now, the OFCCP has been winning this battle against the health care industry. Last fall, the OFCCP convinced an administrative law judge (ALJ) that it had jurisdiction over a Florida hospital that had entered a TRICARE network provider agreement. Although the ALJ's decision is still under review by the Administrative Review Board, the OFCCP moved forward last December by issuing an internal administrative **directive** in which it confirmed its position that TRICARE network providers are covered. Over the past year, the OFCCP has continued to attempt to assert jurisdiction over health care providers that participate in TRICARE. The OFCCP was not deterred by the Department of Defense's stated concerns that it would be impossible to achieve TRICARE's mission of providing affordable health care for our nation's uniformed servicemen and women if onerous affirmative action obligations were imposed upon the more than 500,000 TRICARE providers in the United States.

The Senate has now responded by passing S. 1867, which includes the following language:

In establishing rates and procedures for reimbursement of providers and other administrative requirements, including those contained in provider network agreements, the Secretary shall to the extent practicable maintain adequate networks of providers, including institutional, professional, and pharmacy. Network providers under such provider network agreements are not considered subcontractors for purposes of the Federal Acquisition Regulation of any other law.

HOUSE BILL STILL MUST BE RECONCILED

It is still too early to call this a victory for the health care industry, however, as the House version of the National Defense Authorization bill does not currently contain this language and would have to be reconciled with the Senate bill. We will continue to monitor and report on this important legislative development.

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