

July 29, 2013

OFCCP Scores Surprising Victory in its Continuing Battle for Jurisdiction Over Healthcare Providers Based on TRICARE Participation

By David Goldstein

On July 22, 2013, the Office of Federal Contract Compliance Programs (OFCCP) won a surprising victory before the Department of Labor's (DOL) Administrative Review Board (ARB), breathing new life into the agency's efforts to assert jurisdiction over healthcare providers.

For nearly five years, OFCCP has been tenaciously pursuing jurisdiction over healthcare providers based on the theory that providers participating in, and receiving more than \$50,000 in reimbursement from, the Department of Defense's (DOD) TRICARE program qualify as federal government subcontractors required to comply with the agency's regulations.

In December 2011, when Congress passed legislation apparently designed to reject OFCCP's position, the agency's director, Patricia Shiu, responded that "this is not over yet," and continued to pursue an action against Florida Hospital of Orlando arguing that the Congressional action had not divested the agency of its jurisdiction.

And in October 2012, after the ARB ruled in favor of Florida Hospital, OFCCP again refused to accept defeat. OFCCP filed a motion before the ARB asking it to reconsider its decision and stating in its brief that notwithstanding the ARB's decision in *Florida Hospital*, OFCCP "intends to continue to schedule and attempt to review hospitals because they are TRICARE network providers."

The ARB, in an extremely unusual move, granted OFCCP's request for reconsideration and then issued a new opinion last week holding, by a three-to-two vote, that the 2011 legislation did not foreclose all of OFCCP's arguments for jurisdiction. The case has now been remanded back to an administrative law judge (ALJ) for further proceedings.

As discussed below, significant legal questions remain unanswered by this new decision, and years of additional litigation may still lie ahead for Florida Hospital and the OFCCP. It is not clear whether the agency will now resume aggressively scheduling TRICARE participants for audits or wait for a more final resolution. Given this uncertainty, prudent health care providers should be thinking carefully about their options now and deciding whether to challenge OFCCP jurisdiction or avoid litigation by either ending their participation in TRICARE or complying with OFCCP's requirements.

Background

TRICARE is the DOD program that pays for the medical benefits of active duty and retired military personnel and their families. The DOD has three direct contractors that administer the TRICARE program: (1) Humana Military Healthcare Services; (2) TriWest; and (3) Health Net. These three contractors, in turn, enter into contracts with hospitals and other medical providers to provide medical care and supplies to military personnel and their family members covered by TRICARE. The TRICARE administrator and direct contractor in the *Florida Hospital* case was Humana Military Healthcare Services, Inc. (HMHS).

When the hospital resisted the OFCCP's efforts to initiate an audit, claiming it was not a covered government contractor, the matter ultimately came before a DOL ALJ.

The issues before the ALJ were:

- Whether the hospital's contract with HMHS under the TRICARE program was a federal subcontract, thereby subjecting it to OFCCP jurisdiction, because the hospital's contract (1) was necessary to the performance of HMHS's direct contract with TRICARE, or (2) required the hospital to perform any portion of HMHS's obligation under its direct contract with TRICARE; and
- Whether the DOD's assertion that TRICARE payments were federal financial assistance (not contract payments) trumped the DOL's opinion that the payments were pursuant to a federal contract.

The ALJ concluded that Florida Hospital, through its participation in the TRICARE program, was performing a portion of HMHS's obligations to the DOD under its contract, making Florida Hospital a subcontractor under the HMHS-DOD prime contract. The ALJ concluded also that TRICARE payments were not federal financial assistance and, thus, were subject to regulatory obligations applicable to federal contracts and subcontracts.

Florida Hospital appealed the ALJ's decision to the ARB.

The National Defense Authorization Act for Fiscal Year 2012 and the First ARB Decision

On December 31, 2011, while Florida Hospital was still pending before the ARB, President Obama signed into law the National Defense Authorization Action for Fiscal Year 2012 (NDAA). The NDAA included a provision that specifically addressed OFCCP jurisdiction over TRICARE providers. In particular, Section 715 of the NDAA states, in relevant part:

(3) In establishing rates and procedure 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. *For the purpose of determining whether network providers under such provider network agreements or subcontractors for purposes of the Federal Acquisition Regulation 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 health care services or supplies on the basis of such requirement.* (emphasis added)

Although Section 715 was widely viewed as intending to foreclose further assertions of OFCCP jurisdiction based solely on TRICARE, the OFCCP interpreted the provision differently. To support its jurisdiction over Florida Hospital, the OFCCP first noted that it has jurisdiction over two different types of "subcontracts" based on the definition of that term in its regulations. The first prong of the applicable regulation defines a subcontract as "any agreement or arrangement between a contractor and any person . . . (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more [covered government] contracts. . ." 41 C.F.R. § 60-1.3. The second prong of the applicable regulation defines a subcontract as "any agreement or arrangement between a contractor and any person . . . (2) [u]nder which any portion of the contractor's obligations under any one or more [covered government] contracts is performed or undertaken or assumed." *Id.*

The OFCCP admitted that Section 715 bars it from arguing that a provider has entered into a covered “subcontract” based on the second prong of the definition of a subcontract. However, it then argued that Section 715 did not bar it from asserting jurisdiction over a TRICARE participant based on the first prong of the definition.

As this is an extremely technical argument, it is worth quoting from the description of the OFCCP’s position as set forth in the ARB’s October 19, 2012 decision (*Florida Hospital I*):

[OFCCP admits] that it “can no longer assert . . . that HMHS’s obligation to create a network of healthcare providers encompasses the obligation to deliver medical services and that by providing such medical services as a subcontractor to HMHS, Florida Hospital performed, undertook, or assumed HMHS’s obligations under the prime contract” OFCCP contends, however, that Section 715 does not address the first prong of the subcontract definition that “TRICARE contracting with HMHS to set up a network of providers and ensure access to care for TRICARE beneficiaries [and] HMHS discharged this obligation in part by contracting with Florida Hospital to become a network provider.” OFCCP argues that Florida Hospital’s services as a participant in the network were “necessary to the performance of the TRICARE – HMHS prime contract and met the first prong of the subcontractor definition”

Florida Hospital I at 9. In their plurality decision, two members of the ARB—Chief Administrative Appeals Judge Paul Igasaki and Judge Lisa Wilson Edwards—found that the purpose of the prime contract between HMHS and TRICARE was to develop a network of healthcare providers that will serve TRICARE beneficiaries and that the agreement between HMHS and Florida Hospital was likewise to provide healthcare services to TRICARE beneficiaries “and be part of the network of provider services pursuant to the prime TRICARE/HMHS contract.” Judges Igasaki and Edwards then concluded that because Florida Hospital’s agreement “involves the provision of healthcare providers pursuant to a managed care prime contract between TRICARE and HMHS that includes the requirement to maintain a network of providers[,]” the agreement cannot be considered to be a covered “subcontract” under either prong of the definition of a subcontract in light of the language of Section 715. *Florida Hospital I* at 23.

The other three judges wrote separate opinions to explain their reasoning, each suggesting that the OFCCP’s “prong one” argument might prevail in other contexts, but indicating an unwillingness to address the issue in the case before them for various procedural reasons.

The Second ARB Decision

In a July 22, 2013 decision (*Florida Hospital II*), the three judges who wrote separately in the first opinion joined forces to write a single 37-page decision holding that Congress, in enacting Section 715, only intended to divest OFCCP of “prong two” jurisdiction over TRICARE participants. The judges based this conclusion on their interpretation of Section 715’s legislative history.

Therefore, according to the majority opinion, OFCCP may establish jurisdiction over a healthcare provider by showing that the provider’s participation in TRICARE satisfies the first prong definition of a subcontractor.

Having found that the NDAA did not bar jurisdiction, the judges then turned back to the second issue that had originally been before the ALJ: whether the DOD’s assertion that TRICARE payments were federal financial assistance (not contract payments) trumped the DOL’s opinion that the payments were pursuant to a federal contract.¹

The ALJ had ruled that TRICARE payments were **not** federal financial assistance and that recipients of such payments were, therefore, subject to the regulatory obligations applicable to federal contracts and subcontracts.

The three judges, however, were not so sure. They concluded that this is an issue of Congressional intent and that the record before them was insufficient to permit a determination. Accordingly, they remanded the matter to the ALJ “for further findings and/or legal argument by the parties on the issue of federal financial assistance.”

¹ Under the terms of Executive Order 11246 and OFCCP’s regulations, OFCCP only has jurisdiction over entities entering into *contracts (or subcontracts)* with the government and does not have jurisdiction over entities that merely receive *federal financial assistance*. Incredibly, however, the majority in *Florida II* seems to question even this: “neither party has pointed to any statute or regulation indicating that federal financial assistance programs exclude the possibility of coverage under the EO Laws. . . .” *Florida Hospital II* at 31.

Conclusion

Before the question of OFCCP jurisdiction over TRICARE participants is finally resolved, further proceedings before the ALJ, the ARB, and in the federal courts are likely for several years.

Providers should consider the possibility that such participation may lead to OFCCP audits before participating or continuing to participate in TRICARE. As there are very significant costs associated with both compliance and the refusal to comply with OFCCP's regulations, providers should be discussing these issues very carefully with legal counsel and business leadership now and deciding how best to proceed.

[David Goldstein](#) is a Shareholder in Littler Mendelson's Minneapolis office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Goldstein at dgoldstein@littler.com.