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Does OFCCP Have Jurisdiction Over TRICARE Participants? Stay Tuned. The Answer Lies Years In The Future

By David Goldstein

Over the past several years, we have written repeatedly about the efforts of the Office of Federal Contract Compliance Programs (the OFCCP) to gain jurisdiction over health care providers based solely on providers' participation in TRICARE—the federal program that provides health care services to members of the military and their families.

On May 7, 2014, the OFCCP issued a directive placing a moratorium on TRICARE-related audits. Some commentators have described this event as a victory for health care providers. To the contrary, as explained in this article, this directive is bad news for providers and promises years of further uncertainty and litigation.

In asserting jurisdiction over health care providers based on TRICARE, the OFCCP was not only taking a very aggressive position, but actually acting in apparent disregard of Congressional intent. The OFCCP's position was being challenged in ongoing litigation—the *Florida Hospital of Orlando* case, and by proposed legislation—the Protecting Health Care Providers from Increased Administrative Burdens Act (H.R. 3633). In the view of many practitioners, going into 2014 it was only a matter of time before the agency's arguments in support of TRICARE jurisdiction were conclusively rejected and providers could finally agree to provide medical care to members of the military and their families without any fear of becoming subject to OFCCP's burdensome regulations.

By issuing the moratorium, however, the OFCCP has effectively preserved its ability to claim jurisdiction over health providers into the foreseeable future and postponed for many years a final determination as to the validity of its claims of TRICARE jurisdiction. This event has significant implications not only for health care providers, but also for the military, which has been having difficulties arranging adequate health care for service members and their families. This event is also another example of how the current Administration has flouted the will of Congress when the laws it enacts are at odds with the policies administrative agencies seek to impose.

TRICARE and the OFCCP's Argument for Jurisdiction

The OFCCP is the federal agency charged with enforcing the government's rules imposing affirmative action obligations on federal contractors and subcontractors.

Among other obligations, the OFCCP's affirmative action regulations: (1) require the preparation of annual affirmative action plans for women and minorities, certain veteran categories, and individuals with disabilities; (2) impose extensive and complicated recordkeeping obligations for applicants and hires; and (3) require all non-executive vacancies being filled with external candidates to be listed with state workforce agencies. The OFCCP also conducts random compliance audits of covered government contractors, which can often take several years to complete.

TRICARE is the Department of Defense (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.

Not long after President Obama took office, the OFCCP began to argue that it had jurisdiction over health care providers that participate in the TRICARE program based on the theory that they qualify as federal government subcontractors required to comply with the agency's regulations.

Pursuant to this argument, the OFCCP attempted to conduct an audit of the Florida Hospital of Orlando, a health care provider that had agreed to provide care to military members and accept reimbursement through a TRICARE administrator and direct contractor, Humana Military Healthcare Services (HMHS).

When the hospital resisted the OFCCP's efforts to initiate an audit, claiming it was not a covered government contractor, the OFCCP commenced enforcement proceedings and the matter ultimately came before a Department of Labor (DOL) administrative law judge (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, thus making Florida Hospital a subcontractor under the HMHS-DoD prime contract. The ALJ also concluded that TRICARE payments were not federal financial assistance and therefore were subject to regulatory obligations applicable to federal contracts and subcontracts.

Florida Hospital appealed the ALJ's decision to the DOL's Administrative Review Board (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 under Section 715 that specifically addressed the OFCCP's jurisdiction over TRICARE providers:

> (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 are 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 foreclosing further assertions of OFCCP jurisdiction based solely on TRICARE, the OFCCP refused to give up. Indeed, shortly after the legislation was signed, the agency's director, Patricia Shiu, declared that "this is not over yet," and the agency continued to pursue its claims against Florida Hospital, arguing that the Congressional action had not divested the agency of its jurisdiction.

When the ARB ruled in favor of Florida Hospital in October 2012, objective observers generally agreed that the ARB had reached the correct result and assumed that the matter had been finally resolved as the OFCCP is not permitted to appeal an adverse determination by the ARB. Nevertheless, the OFCCP once again refused to accept defeat, filing a highly unusual (if not unprecedented) motion asking the ARB to reconsider its decision and stating in its brief that notwithstanding the ARB's decision in *Florida Hospital*, the OFCCP "intends to continue to schedule and attempt to review hospitals because they are TRICARE network providers."

In an even more unusual move, the ARB granted the OFCCP's request for reconsideration and then issued a new opinion on July 22, 2013, holding by a three-to-two vote that the NDAA did not foreclose all of the OFCCP's arguments for jurisdiction. The case was then remanded back to an ALJ for further proceedings.

Congressional Oversight

Concerned over the OFCCP's aggressive regulatory and enforcement agenda and disturbed by the agency's position regarding TRICARE, the House Committee on Education and the Workforce began to take a more active interest in the OFCCP's activities. In April 2012, the House Subcommittee on Health, Employment, Labor, and Pensions held a hearing to consider the increasing burdens that the OFCCP was placing on federal contractors.

Continuing concerns led to the introduction in the House, initially with bi-partisan support, of the Protecting Health Care Providers from Increased Administrative Burdens Act.

This legislation would prevent the OFCCP from asserting jurisdiction over health care providers based on their federal health program participation. Specifically, this bill provides:

> A State, a local government, or other recipient that receives a payment from the Federal Government, directly or indirectly and regardless of reimbursement methodology, related to the delivery of health care services to individuals, whether or not such individuals are or have been employed by the Federal Government, shall not be treated as a Federal contractor or subcontractor by the Office of Federal Contract Compliance Programs based on the work performed or actions taken by such individuals that resulted in the receipt of such payments.

Subcommittee Chair Tim Walberg (R-MI) described the bill an attempt to "rein in executive overreach," and "prevent an administrative nightmare for health care providers" and those needing access to care. The subcommittee scheduled a hearing for March 13, 2014, to receive testimony on this proposed legislation.[1]

In response to this proposed legislation and the impending hearing, Labor Secretary Thomas Perez sent a letter to House leaders on March 11, 2014 offering a "compromise." According to Perez,

> I believe that . . . in lieu of legislative action, we can come to a workable administrative solution that addresses your concerns and provides greater clarity to the TRICARE subcontractor community while maintaining important civil rights protections . . . The Department can achieve those goals by having OFCCP exercise prosecutorial discretion over the next five years to limit its enforcement activities with regard to TRICARE subcontractors while it engages in extensive outreach and technical assistance to inform TRICARE participants of their responsibilities and works with other Federal agencies to clarify coverage of health care providers under Federal statutes applicable to contractors and subcontractors.

In other words, the agency offered a five-year moratorium on OFCCP audits of health care institutions, during which time the OFCCP would embark on a campaign of compliance assistance to such hospitals and medical institutions in an effort to teach them about subcontractor jurisdiction and their compliance obligations. This, however, was not a compromise that would definitively settle the OFCCP jurisdictional issue, nor would it comply with Congress's intent established by the NDAA. To the extent the DOL's proposal would not end the *Florida Hospital* litigation and does not represent a commitment by the OFCCP to relinquish its claims of jurisdiction over TRICARE participants in non-audit

1 The author of this article had the privilege of being called as one of the witnesses at the subcommittee hearing. *See* Ilyse Schuman and Michael J. Lotito, L*ittler Shareholder David Goldstein Explains Attempts at OFCCP Healthcare Overreach During House Subcommittee Hearing*, Workplace Policy Update (March 13, 2014), *available at* http://www.littler.com/workplace-policy-update/littler-shareholder-david-goldstein-explains-attempts-ofccp-healthcare-overr.

contexts (such as complaint investigations), nothing is really being resolved. Moreover, accepting this proposal would reinforce a very disturbing trend that contractors have seen at the OFCCP in the context of compliance reviews: indifference by the agency to the letter of the law when, in its judgment, the letter of the law is inconsistent with the agency's goals.

At the hearing, both Republican and Democrat members of the subcommittee acknowledged that it had been the intent of the Congress in enacting the NDAA to clearly establish that OFCCP had no jurisdiction over TRICARE providers. Nevertheless, the Ranking Member of the Committee, Joe Courtney (D-CT), indicated satisfaction with the Secretary's proposal in that it would delay enforcement for five years and by then the issue would resolve itself, as there would be a new president and labor secretary.

OFCCP Lives to Fight Another Day

Less than a week after the March 13, 2014, hearing before Congress, the OFCCP notified Florida Hospital that it was dropping its case. Thus, after five years of litigation and great expense, the issues in dispute in the *Florida Hospital* case remain unresolved.[2] As a result, if (or more likely when) the OFCCP again attempts to assert jurisdiction over health care providers based on TRICARE participation, the next subject of the OFCCP's attention will have to litigate the issue from the very beginning. Based on the *Florida Hospital* experience, it could be a decade or more before a final decision on this issue is obtained in the courts.

Also in accordance with the Labor Secretary's March 12, 2014, letter to Congress, the OFCCP issued a directive on May 7, 2014, purporting to establish:

> a five-year moratorium on enforcement of the affirmative obligations required of all TRICARE subcontractors. During the moratorium period, OFCCP will engage in outreach and technical assistance to provide greater clarity for the TRICARE subcontractor community about their obligations under the laws administered by OFCCP.

The directive is described herein as only "purporting" to establish a five-year moratorium because this directive is not binding on subsequent administrations (indeed, the moratorium is not even binding on the current administration). Therefore, even assuming the present administration intends to keep its word regarding the moratorium, the OFCCP would still be free to attempt to audit providers based on TRICARE participation beginning in January 2017, when the next president is sworn into office. Since an audit involves a review of the contractor's employment-related activities over the prior year, a provider would have to begin complying with OFCCP's rules in 2016 in order to be able to respond satisfactorily to an OFCCP audit in 2017.

Moreover, the directive makes it clear that the OFCCP is still maintaining that it has jurisdiction over TRICARE providers. Indeed, the directive makes it clear that even if the agency will not audit providers during the moratorium, it will still investigate any discrimination complaints that it receives regarding TRICARE providers—something it cannot do unless it has jurisdiction.

Thus, the directive does not represent a concession to the plainly expressed will of Congress, but merely a temporary strategic withdrawal from the field of battle. Had the OFCCP litigated the *Florida Hospital* case to conclusion, the issue of its jurisdiction would have been settled once and for all. A judgment against the OFCCP would have ended its ability to claim or attempt to exercise jurisdiction over TRICARE providers. By dismissing the case and laying low for a while under the guise of a moratorium, the OFCCP is now able to avoid an adverse judicial ruling. This move can also be seen as a way to sidetrack the Protecting Health Care Providers from Increased Administrative Burdens Act. Instead of knowing with certainty whether TRICARE participation would subject them to OFCCP's regulations, this issue will now remain unresolved for the foreseeable future. Providers that were standing on the sidelines waiting for the resolution of this issue before deciding whether to participate in TRICARE will now likely remain on the sidelines. And because providers will remain reluctant to participate in TRICARE, service members and their families will continue to enjoy fewer health care options than the general public.

The one silver lining for providers is that the OFCCP has promised to close all currently pending audits where the agency's claim of jurisdiction was based solely on TRICARE, many of which have been on hold for years pending resolution of the *Florida Hospital* case.

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2 In a federal court action, the OFCCP would not have been permitted to dismiss its action without the defendant's agreement or the court's approval. Because the case was still in administrative proceedings, however, the OFCCP was able to simply dismiss the matter without having to obtain permission and with no liability to Florida Hospital for its costs or fees.

Beware of Government Agents Bearing Gifts

In early May 2014, health care providers began receiving emails from the OFCCP providing notice of the moratorium and including the following statement:

> If you are a subcontractor under the TRICARE program, please e-mail us at OFCCP-Public@dol.gov to ensure that you receive notifications about technical assistance and training events. In addition, you are encouraged to visit OFCCP's website at www.dol.gov/ofccp for additional information about our agency, the laws we enforce, technical assistance programs and upcoming events.

It is hard to view this message as anything other than an attempt by the OFCCP to compile a database of TRICARE participants which may later be used by the agency to identify providers for audits. TRICARE providers have no obligation to respond to these emails and nothing to gain from doing so.

Action Items for Health Care Providers

For providers that were unwilling to enter into TRICARE agreements without an assurance that they would not be required to comply with OFCCP's regulations, nothing has changed. Such providers should not participate in TRICARE unless they are now willing to either comply with the regulations or accept the risk of litigation.

In light of the agency's commitment to close all pending TRICARE audits, it is recommended that every health care provider with a pending OFCCP audit promptly review the basis upon which OFCCP has based its assertion of jurisdiction. If the provider understands that the audit was commenced based on TRICARE, the provider should be asking the agency to now close the audit, even if there has already been a significant amount of activity in connection with the audit. If the basis of jurisdiction is not clear, the provider should ask the OFCCP to state its basis for claiming to have jurisdiction and then take appropriate action depending upon the agency's response. Remember that the OFCCP bears the burden of establishing jurisdiction. Contractors are not required to guess.

Providers should also keep in mind that if they were previously selected for an audit based on TRICARE participation, the OFCCP may again seek to audit on that basis in the future. Accordingly, such providers that want to avoid the risk of a future audit should use the moratorium as an opportunity to end their TRICARE relationships.

At the same time, however, providers should not assume that they are now completely off the hook for the next few years. The OFCCP continues to have jurisdiction over providers that have covered contracts with, for example, the Federal Bureau of Prisons to treat federal inmates, HMO's and other networks that are participating in FEHBP, and the Veterans Department.

Therefore, providers that do not want to become subject to the government's affirmative action requirements should continue to review new contracts and relationships in order determine whether they involve covered government contracts.

Conclusion

The validity of the OFCCP's claim that it has jurisdiction over TRICARE participants remains doubtful. Nevertheless, absent a change in policy, it seems likely that sometime in the next few years, the OFCCP will resume its attempts to compel TRICARE providers to comply with its regulations. Accordingly, providers that agree to participate in TRICARE must either comply with the OFCCP's regulations or be prepared for a fight. Providers that do not want to incur the costs and burdens associated with federal contracting, and that are not willing to litigate the issue, should decline to participate in the TRICARE program.

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