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OFCCP Promulgates Final Rule Eliminating Its Authority Over TRICARE Providers

By Jennifer L. Plitsch and Michael Wagner*

A new rule officially removes Office of Federal Contract Compliance Program's regulatory authority over TRICARE providers by amending the definition of "subcontract" set forth in the governing Department of Labor regulations. The authors of this article explain the rule and its implications.

The Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP")[1] promulgated a final rule[2] resolving long-standing uncertainty regarding its enforcement authority over health care providers participating in TRICARE, a federal program that provides health care to service members, veterans, and their families.[3] The rule officially removes OFCCP's regulatory authority over TRICARE providers by amending the definition of "subcontract" set forth in the governing Department of Labor regulations.

Although the amendment carves out TRICARE providers from OFCCP authority by name and leaves the rest of the "subcontractor" definition unchanged, OFCCP expressly raised the possibility that it would issue additional sub-regulatory guidance concerning its jurisdiction over Federal Employees Health Benefit Program ("FEHBP") and Veterans Administration Health Benefit Program ("VAHBP") providers.

BACKGROUND

The final rule draws years of uncertainty about the status of TRICARE providers as "subcontractors" subject to OFCCP regulatory authority to a close.

Beginning in 2007, OFCCP maintained—in both its litigation filings and agency directives—that it possessed enforcement authority over TRICARE providers, though that stance was challenged by several hospitals and provider

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[1] https://www.dol.gov/agencies/ofccp.

[2] https://www.govinfo.gov/content/pkg/FR-2020-07-02/pdf/2020-11934.pdf.

[3] 85 Fed. Reg. 39834 (July 2, 2020) (to be codified at 41 C.F.R. pt. 60), *available at* https://www.govinfo.gov/content/pkg/FR-2020-07-02/pdf/2020-11934.pdf.

networks.[4] Congress attempted to resolve the controversy in the National Defense Authorization Act for Fiscal Year 2012 ("NDAA"), which set forth a provision stating 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." Yet OFCCP maintained its aggressive enforcement posture until 2014 when it announced a five-year moratorium on enforcement action against TRICARE providers. This moratorium subsequently was extended for an additional two years in May of 2018.[5] Finally, on November 6, 2019, OFCCP issued a Notice of Proposed Rulemaking ("NPRM"), which led to the final rule.[6]

CHANGES TO THE "SUBCONTRACTOR" DEFINITION

OFCCP's final rule adds a subsection to DOL's governing regulatory definition of "subcontract" to specify that TRICARE providers are not subcontractors but otherwise leaves OFCCP's current two-prong definition of "subcontractor" intact.[7] The upshot is that even if TRICARE providers might otherwise be classified as "subcontractors" under the prior definition, the added subsection expressly provides that OFCCP lacks authority over them. Note, however, that OFCCP's regulatory requirements continue to apply to TRICARE providers if they hold a separate, unrelated government contract.

OFCCP's final rule reiterates the two rationales for the amendment to the definition of "subcontract" that it described in the NPRM. Its primary rationale is that Congress's passage of the 2012 NDAA did, in fact, remove OFCCP's enforcement authority over TRICARE providers, contrary to the decision of the Department of Labor Administrative Review Board's 2013 decision in *OFCCP v. Florida Hospital of Orlando*.[8]

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[4] *OFCCP v. Fla. Hosp. of Orlando*, No. 2009-OFC-00002 (ALJ Oct. 18, 2010); OFCCP, Directive 293, Coverage of Health Care Providers and Insurers (Dec. 16, 2010) (rescinded Apr. 25, 2012).

[5] OFCCP, Directive 2014-01, TRICARE Subcontractor Enforcement Activities (May 7, 2014); OFCCP, Directive 2018-02, TRICARE Subcontractor Enforcement Activities (May 18, 2018).

[6] 84 Fed. Reg. 59746 (Nov. 6, 2019) (to be codified at 41 C.F.R. pt. 60).

[7] Subcontract is defined as an agreement between a contractor and any person: (1) for the sale/purchase of "nonpersonal services . . . necessary to the performance" of another contract; or (2) where any portion of the contractor's obligation is "performed, undertaken, or assumed." 41 C.F.R. 60-1.3, -300.2(x), -741.2(x).

[8] *OFCCP v. Fla. Hosp. of Orlando*, No. 11-011 (Adm. Rev. Bd. July 22, 2013).

Alternatively, OFCCP's final rule establishes a "national interest" exemption for TRICARE providers from its anti-discrimination and equal opportunity requirements. In the rule, OFCCP provides four reasons that the exemption is in the national interest.

First, OFCCP authority may negatively affect service members' access to health care because the costs of compliance deter provider participation in TRICARE.

Second, pursuing enforcement is not the best use of OFCCP and provider resources, especially because current uncertainty surrounding that authority could lead to lengthy litigation.

Third, the exemption provides uniformity and certainty for providers.

Fourth and finally, the exemption harmonizes OFCCP's approach with the Department of Defense's. OFCCP additionally notes extensive justification for its ability to make a categorical exemption for all TRICARE providers, rather than proceeding case-by-case.

POSSIBILITY OF FURTHER SUB-REGULATORY DEVELOPMENT REGARDING FEHBP AND VAHBP PROVIDERS

In its NPRM, OFCCP requested comments about its authority over providers participating in federal health care programs besides TRICARE. In its final rule, OFCCP addressed FEHBP and VAHBPs in particular. The FEHBP covers all federal employees, and the VAHBPs encompass a variety of agreements between providers and the Veterans Administration for health care services.

A number of stakeholder comments supported exempting both FEHBP and VAHBP providers from OFCCP's compliance requirements. The comments pointed to policy rationales similar to those underlying OFCCP's "national interest" exemption for TRICARE providers. Namely, commentators expressed concern that the compliance burden associated with these programs deters participation, and thus diminishes beneficiaries' access to health care. Further, some comments suggested that providers participating in the FEHBP and/or VAHBPs along with TRICARE may drop out of the non-TRICARE programs in order to preserve their TRICARE exemption. Further, commentators indicated that a uniform rule applying to all health care providers involved in federal programs would further avoid legal uncertainty, a particularly salient concern given the historical confusion regarding OFCCP jurisdiction over these program providers.

OFCCP, however, declined to adopt any regulatory changes related to FEHBP and VAHBP providers in the final rule. Rather than addressing a

possible extension of the "national interest" exemption to these providers, OFCCP instead generally maintained that none of the comments pointed to a valid legal basis for it to disclaim authority over the relevant providers. OFCCP's course of action in this respect implies that it may be reluctant to extend the "national interest" exemption granted to TRICARE providers, even in situations where the rationales for that exemption appear similarly applicable.

OFCCP did leave open the possibility that it would issue additional sub-regulatory guidance regarding its authority over FEHBP and VAHBP providers.

Further, OFCCP's current moratorium on enforcement action, set to end on May 7, 2021, currently covers all VAHBP providers. However, sub-regulatory guidance and use of discretion are easily altered, particularly if there is a change in administration, so providers participating in federal health care program(s) should continue to closely watch for additional developments.