

# OFCCP Asserts Jurisdiction Over Healthcare Providers

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## Winstead News Alert

The Office of Federal Contract Compliance Program (OFCCP) is aggressively pursuing an expansion of its enforcement activities and is targeting certain healthcare providers. Specifically, the OFCCP has begun asserting jurisdiction over healthcare providers delivering medical services to participants of TRICARE, the government healthcare plan for active duty and retired military service members and their dependents, formerly known as CHAMPUS. Recently, the OFCCP notified many of these providers of upcoming reviews to determine their compliance with affirmative action requirements.

The OFCCP, a division of the U.S. Department of Labor (DOL), is the agency responsible for enforcing the affirmative action requirements of Executive Order 11246 and related federal statutes. As these requirements are only applicable to federal contractors and subcontractors, the OFCCP's jurisdiction is limited to such entities.

The OFCCP's newly asserted jurisdiction over TRICARE network providers is based on the contention that these providers are federal subcontractors. For purposes of the affirmative action requirements, an entity is a federal subcontractor if it provides services necessary to achievement of the federal contract or performs part of the federal contract on the prime contractor's behalf. TRICARE, a governmental entity, contracts with regional administrators to develop healthcare provider networks in various regions of the country, and the regional administrators then contract with healthcare providers to provide services to TRICARE participants. Therefore, the OFCCP claims that healthcare providers serving TRICARE participants are federal subcontractors "because providing healthcare services is necessary for [the] regional administrator to meet its obligation under the contract with TRICARE to develop a provider network."

Recently, in *OFCCP v. UPMC Braddock*, the OFCCP successfully asserted its jurisdiction over three hospitals based on the hospitals' contracts with an HMO to provide medical services to federal employees pursuant to the HMO's contract with the U.S. Office of Personnel Management (OPM) to provide medical coverage to such employees. The Administrative Review Board held that the hospitals were federal subcontractors because they provided services necessary to the performance of the prime federal contract. The Board distinguished this case from *OFCCP v. Bridgeport Hospital*, which held that a hospital was not a subcontractor due to its contract with an insurer who contracted with the OPM. Unlike in *UPMC Braddock*, the insurer in *Bridgeport Hospital* did not contract to provide medical services to federal employees, but only to provide reimbursement for covered services, and thus the hospital was not fulfilling part of the prime federal contract by providing medical services.

Being considered a federal subcontractor within the OFCCP's enforcement authority would have significant ramifications for healthcare providers as they would be required to comply with extensive affirmative action requirements. However, it is not absolutely established whether or not healthcare providers are federal subcontractors merely because they contract to provide medical services to TRICARE participants. The decision in *UPMC Braddock* is currently on appeal, and the OFCCP's assertion of jurisdiction over TRICARE network providers is presently being challenged in *OFCCP v. Florida Hospital of Orlando*. The outcomes of these cases will be telling for the future compliance obligations of many healthcare providers.

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