

OFCCP SEEKS TO MAKE TRICARE CARVE OUT PERMANENT

In more happy news for the health care industry, the Office of Federal Contract Compliance Programs ("OFCCP") is proposing to amend its regulations concerning its jurisdiction over health care providers that participate in TRICARE. The amendments would revise OFCCP's regulatory definition of "subcontractor . . . to exclude health care providers with agreements to furnish medical services and supplies to individuals participating in TRICARE." Notably, OFCCP would retain jurisdiction over a TRICARE provider that holds a separate federal contract or covered subcontract unrelated to TRICARE.

Should OFCCP's **proposed rule** become a final regulation, it would end nearly 10 years of uncertainty for the health care industry regarding whether TRICARE subcontractors must comply with the burdensome affirmative action obligations that OFCCP enforces. OFCCP believes removing this uncertainty would improve access to health care services for current and retired members of the military and their families.

As an alternative to amending its definition of "subcontractor," OFCCP has proposed a national interest exemption from compliance with federal affirmative action requirements for health care providers participating in TRICARE. OFCCP cites several "special circumstances" justifying the exemption, including better access to health care services for TRICARE beneficiaries, avoiding the potential for future protracted litigation concerning whether TRICARE providers are covered and the opportunity to harmonize OFCCP's position with that of the Department of Defense, which has long argued that TRICARE providers should not be subject to federal affirmative action requirements.

Additional procedural steps must be followed before OFCCP's proposed rule becomes final, including a 30-day notice period during which the rule would be open to public comments. Hall Render will continue to monitor this process and report on significant developments.

If you have any questions or would like additional information, please contact **Jon Bumgarner** at (317) 977-1474 or jbumgarner@hallrender.com or your regular Hall Render attorney.

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