

# PUBLICATION

---

## TRICARE Providers: Expect OFCCP to Make House Calls

November 03, 2010

Until recently, hospitals have been fairly successful at staying out of the Office of Federal Contract Compliance Program's (OFCCP) sights. However, in the middle of 2009, OFCCP scored a huge victory in establishing jurisdiction over hospitals that provide health care services to an HMO which, in turn, have a medical services contract with the Office of Personnel Management (OPM). *OFCCP v. UPMC Braddock*, DOL ARB, No. 08-048 (May 29, 2009). Although the hospitals in *UPMC* have appealed the Administrative Review Board's (ARB) decision in OFCCP's favor, *i.e.*, that the hospitals in that case were unwitting federal subcontractors, it is anticipated that the district court will agree with the ARB.

More recently, an administrative law judge (ALJ) has ruled that the OFCCP has jurisdiction over a Florida hospital that provides medical services for a federal contractor that administers a network for TRICARE (the Department of Defense's health care program for active and retired military members). *OFCCP v. Fla. Hosp. of Orlando*, DOL OALJ, No. 2009-OFC-00002 (Oct. 18, 2010). The hospital at issue was found to be a federal subcontractor by the ALJ because it participates in a health care provider network established by Humana Military Healthcare Services Inc., which has a federal contract with the Department of Defense's (DOD) TRICARE Management Activity. In other words, pursuant to its contract with Humana, the hospital provides medical services to TRICARE beneficiaries, making the hospital a subcontractor of Humana's contract with the DOD.

### *So, Why Should I Care About The OFCCP And TRICARE?*

The main reason hospital directors should take notice of the above rulings, especially the TRICARE case, is that if they also have similar contracts with a TRICARE administrator, as a federal subcontractor, the hospital must comply with the affirmative action and equal employment opportunity (EEO) obligations found in Executive Order 11246 which is enforced by the OFCCP. These obligations may require a written affirmative action plan and certainly involve specific recordkeeping practices and other equal employment opportunity practices. In addition, a hospital, if audited by the OFCCP, may be required to grant OFCCP access to its facilities to determine whether it is in compliance with its obligations under the Executive Order.

### *My Contract With The TRICARE Administrator Does Not Even Mention The Executive Order – How Can I Be Subject To The Order?*

The fact that most, if not all, contracts with TRICARE administrators do not mention Executive Order 11246 or other EEO clauses is immaterial to OFCCP's jurisdiction. These clauses are determined to be incorporated by law into such subcontracts even if the parties' contract does not mention them or even if the parties' contractual definition attempts to disclaim them.

### *What Should I Do Now?*

Given the above decisions granting OFCCP jurisdiction, it is very unlikely that hospitals will be able to use an "I didn't know" defense if OFCCP comes knocking. Thus, hospital leaders should examine whether they have similar TRICARE contracts or other contracts which could bring them under OFCCP's jurisdiction.

In addition, Baker Donelson Labor & Employment attorneys are ready and able to assist in determining whether you might be an unwitting federal subcontractor and, if so, help bring your hospital into compliance with the Executive Order's requirements. For guidance, reach out to your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys, located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.