

OFCCP rescinds Directive 293 regarding jurisdiction over health care providers and insurers

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The United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has rescinded Directive 293, *Coverage of Health Care Providers and Insurers*, which outlined OFCCP policy for determining whether OFCCP has jurisdiction over health care providers and insurers based on their relationship with federal health care programs.

On April 25, 2012, the OFCCP announced that it was rescinding Directive 293, effective immediately, in light of questions raised with respect to the OFCCP's jurisdiction over health care providers: "[R]ecent legislation and related developments in pending litigation warrant rescission of Directive 293 at this time." Those recent developments include: (1) the pending appeal of *OFCCP v. Florida Hosp. of Orlando*, ALJ Case No. 2009-OFC-00002 (October 18, 2010) (concluding that hospital was covered subcontractor where it had a contract with Humana to provide health care services to TRICARE beneficiaries); (2) the passage of the National Defense Authorization Act (NDAA) of 2012 (exempting from OFCCP jurisdiction medical providers who participate in the Department of Defense TRICARE program, the health care program for active and retired military personnel); and (3) the pending appeal of *OFCCP v. UPMC Braddock*, ARB Case No. 08-048 (May 29, 2009) (concluding that

hospital was covered subcontractor, where it had a Health Maintenance Organization (HMO) contract to provide medical products and services to federal government employees).

With respect to health care providers and insurers, the OFCCP explained in the April 25, 2012 Notice of Rescission that it "will continue to use a case-by-case approach to make coverage determinations in keeping with its regulatory principles applicable to contract and subcontract relationships and OFCCP case law." To view a copy of the OFCCP's Notice of Rescission of Directive 293, dated April 25, 2012, see this site.

In addition, the OFCCP announced yesterday that it will be placing "on hold" all pending OFCCP reviews where the *only* basis for coverage is the health care provider's agreement with a prime contractor to provide services to TRICARE beneficiaries. The OFCCP will continue its review, however, where there is an independent basis for jurisdiction - i.e., a contract other than the TRICARE contract, such as contracts to provide services to federal employees under the Federal Employee Health Benefit Program. The OFCCP also indicated that it will be mailing letters to health care providers with pending OFCCP reviews, with notification that either: (1) their OFCCP review is "on hold;" or (2) their review will

continue because they have an independent, non-TRICARE contract, which should also be specifically identified in the OFCCP letter. For now, it also appears that the OFCCP is still interested in asserting jurisdiction over providers that have managed care contracts where a provider agrees to provide services to federal employees under Part C or Part D of Medicare. As discussed in our June 7, 2011 Legal Alert, *Potential New OFCCP Affirmative Action Requirements for Health Care Providers*, the assertion of jurisdiction in that area is at

odds with the long-understood position that Medicaid and Medicare Parts A and B are federal financial assistance that do not provide a basis for jurisdiction for the OFCCP.



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