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AFFIRMATIVE ACTION ALERT

TRICARE PROVIDERS ARE FEDERAL SUBCONTRACTORS, SAYS JUDGE

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In a decision that could expand the jurisdiction of the Office of Federal Contract Compliance Programs over health care providers, an administrative law judge with the U.S. Department of Labor has **held** that a hospital that subcontracted to provide medical services to TRICARE beneficiaries is a federal subcontractor subject to the affirmative action laws. If not reversed on appeal, this decision could have widespread implications for hospitals, rehabilitation centers and hospices. Any such entity that receives more than $50,000 annually for medical services performed under such a TRICARE subcontract could be subject to OFCCP jurisdiction and required to comply with the affirmative action laws.

TRICARE is a government program that provides medical benefits for active and retired military, and their dependents.

In this case, Humana Military Healthcare Services, Inc., had an agreement with TRICARE Management Activity of the Department of Defense to establish a healthcare provider network for beneficiaries under the program, and Florida Hospital of Orlando was a "participating hospital." Neither TRICARE nor the hospital considered the hospital to be a federal subcontractor.

The federal affirmative action laws (Executive Order 11246, Section 503 of the Rehabilitation Act and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974) apply only to federal contractors and subcontractors. To be a subcontractor, a company must (1) be furnishing non-personal services to a contractor that is necessary for the performance of the contract, or (2) be performing, assuming or undertaking any portion of the contractor's obligations under its contract. If covered by the affirmative action laws, a company must comply with the three affirmative action regulations, which includes maintaining a written affirmative action plan, posting notices and collecting employment data.

Administrative Law Judge Jeffrey Tureck found that Florida Hospital was a subcontractor because it was "performing, assuming or undertaking" a portion of Humana's prime contract to provide services to TRICARE beneficiaries. **In a similar case that Constangy reported on in 2009**, a hospital chain that provided care to federal employees was found to be a federal subcontractor because it was under a contract with a prime contractor that had agreed to provide such services. By contrast, in cases where the prime contractor merely agrees to provide insurance and the subcontractor provides care, the caregiver is not a federal subcontractor.

Although receipt of Medicare funds does not transform a health care provider into a federal subcontractor, ALJ Tureck found that Medicare was not analogous to TRICARE. The former, he said, is a federal financial assistance program that pays for medical services (presumably analogous to insurance), whereas the TRICARE contract at issue involved the actual provision of those services. (Based on this distinction, healthcare providers that are simply reimbursed through the TRICARE program, as opposed to those that have contracted to provide actual medical services, may still have a defense, but they shouldn't count on it.) The fact that the Defense Department has designated TRICARE as a federal financial assistance program was not relevant to Tureck, who said that the hospital's arguments on Medicare were "simply wrong" and that the Medicare cases it cited were "inapposite, and demonstrate[d] the weakness" of the hospital's position.

Nor was it relevant to Turek that neither TRICARE nor Florida Hospital considered the hospital to be a subcontractor or that the relevant contract did not include the required EEO notice clauses. In so doing, the ALJ affirmed that a subcontractor cannot use lack of knowledge as a defense. The regulations provide that the affirmative action obligations apply to federal contractors and subcontractors by operation of law, so lack of notice or knowledge does not preclude coverage.

The *Florida Hospital* decision, coupled with the 2009 *Braddock* decision, may reflect the current political climate and demonstrate a new eagerness on the part of the government to expand the reach of the affirmative action laws.

If you need assistance in determining whether your company is a federal contractor or subcontractor, please contact any member of Constangy's **Affirmative Action Practice Group** or the Constangy attorney of your choice.