



DIRECTIVE (DIR) 2014- 01

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

Effective Date: May 7, 2014

1. **SUBJECT:** TRICARE Subcontractor Enforcement Activities
2. **PURPOSE:** To establish a five-year moratorium on enforcement of the affirmative obligations required of TRICARE subcontractors and to provide outreach and technical assistance.
3. **REFERENCES:** None.
4. **AFFECTED POLICY:** None.
5. **BACKGROUND:** The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order (E.O.) 11246, as amended, Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended. Collectively, these laws prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, national origin, and status as a qualified individual with a disability or protected veteran. They also require federal contractors and subcontractors to take affirmative steps to ensure equal employment opportunity in their employment processes. In addition, these laws require that federal contracting agencies include in all covered contracts, and that contractors include in their subcontracts, an equal opportunity clause. For a definition of the terms "government contract," "subcontract," "prime contractor," and "subcontractor" see 41 C.F.R. § 60-1.3 (E.O. 11246); 41 C.F.R. § 60-300.2 (VEVRAA); and 41 C.F.R. § 60-741.2 (Section 503). The authority to administer these laws, and to promulgate these regulations, rests solely with the Secretary of Labor.

Recent events have brought to OFCCP's attention that there has been a difference in understanding between the Department of Labor and some entities affiliated with the TRICARE community, as to who is a covered subcontractor under the laws enforced by OFCCP. In light of this confusion regarding who is covered and what obligations the TRICARE subcontractor community has under the laws enforced by OFCCP, the agency is issuing this Directive. The Directive establishes a five-year moratorium on enforcement of the affirmative obligations required of all TRICARE subcontractors. During the moratorium period, OFCCP will engage in outreach and technical assistance to provide greater clarity for the TRICARE subcontractor community about their obligations under the laws administered by OFCCP. In addition, the agency will work with other federal agencies to clarify the coverage of health care providers under federal

statutes applicable to subcontractors.

6. **ROLES AND RESPONSIBILITIES:** To the extent that there are any open compliance evaluations of TRICARE subcontractors covered by the moratorium as described below in Section (7)(a), OFCCP will administratively close those cases within 30 business days of the effective date of this directive. OFCCP issued its most recent scheduling list on January 24, 2014. Since this moratorium will be implemented subsequent to the issuance of that list and the previous scheduling list, dated March 2013, a TRICARE subcontractor establishment may receive an Office of Management and Budget (OMB)-approved OFCCP scheduling letter requesting an Affirmative Action Program (AAP) and supporting data. Should this occur, the TRICARE subcontractor covered by the moratorium shall send to its local OFCCP office a written request that the compliance evaluation be administratively closed with a copy of its agreement to participate in the TRICARE program. If a TRICARE subcontractor covered by the moratorium has received advance notification of scheduling through an OFCCP Corporate Scheduling Announcement Letter (CSAL), the subcontractor should not contact OFCCP. Instead, the subcontractor should wait to receive the OMB-approved OFCCP scheduling letter before it contacts the local OFCCP office to request that the compliance evaluation be administratively closed. A list of OFCCP's local offices may be found at: <http://www.dol.gov/ofccp/contacts/ofnation2.htm>.

If during the course of his or her work, a Compliance Officer (CO) discovers that a TRICARE subcontractor has inadvertently been scheduled for review during the duration of this moratorium, the CO will administratively close the compliance evaluation through OFCCP's normal administrative closure procedure by submitting a request to the National Office for approval to administratively close the compliance evaluation.

7. **POLICY:** Through the exercise of prosecutorial discretion, over the next five years, OFCCP will limit its enforcement activities of TRICARE subcontractors while it engages in extensive outreach and technical assistance to inform TRICARE participants of their responsibilities under OFCCP's programs. In addition, during this time, OFCCP will work with other federal agencies to clarify the principles governing coverage of health-care providers under federal statutes applicable to contractors and subcontractors.
- a. **Who Is Covered?** The five-year enforcement moratorium applies to all health-care entities that participate in TRICARE as subcontractors under a prime contract between the Department of Defense (DoD) TRICARE Management Activity and one of the prime managed-care contractors, including:
 - i. Health-care entities that participate in TRICARE only as subcontractors;
 - ii. Health-care entities that participate in TRICARE as subcontractors *and* as subcontractors under any Medicare program;
 - iii. Health-care entities that participate in TRICARE as subcontractors *and* as subcontractors under the Federal Employee Health Benefits Program (FEHBP); and
 - iv. Health-care entities that participate in TRICARE as subcontractors *and* as subcontractors under any other federal health program.
 - b. **Who is Not Covered?** This moratorium does not apply to health-care entities that participate in TRICARE as subcontractors *and* who are holders of prime contracts

with an agency of the federal government. Similarly, this moratorium does not extend to TRICARE subcontractors that hold a separate, independent non-health-care-related federal subcontract.

- c. Scope of the Enforcement Moratorium: Except for investigation of discrimination complaints, OFCCP is hereby establishing a five-year moratorium on enforcement of all obligations under E.O. 11246, Section 503, and VEVRAA effective from the date of the issuance of this Directive, including enforcement of obligations related to affirmative action programs and recordkeeping, for TRICARE subcontractors as defined in Section 7(a) above. The moratorium does not apply to the processing of complaints of discrimination under 41 CFR 60-1.24; 41 CFR 60-300.61 and 41 CFR 60-741.61. This moratorium does not extend to any obligations a TRICARE subcontractor may have under other federal nondiscrimination laws, including Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*) and the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*).

Upon notice by OFCCP to a TRICARE subcontractor that a complaint of discrimination against the subcontractor has been filed with OFCCP, that subcontractor must retain the following records in its possession until the final disposition of the complaint or any lawsuit or proceeding based on the complaint: 1) personnel or employment records relating to the issues under investigation as a result of the complaint, including all personnel and employment records related to the complainant or other persons alleged to be aggrieved and to all other employees holding or seeking positions similar to that held or sought by the affected individual(s); and 2) all personnel and employment records related to application of the employment practice that is the subject of the complaint, e.g., a pre-employment test or reasonable accommodation practices. Failure to preserve complete and accurate records following the notification that a complaint has been filed will constitute noncompliance with E.O. 11246, Section 503, or VEVRAA, as applicable. Moreover, where the subcontractor has failed to preserve records after notification of a complaint, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the subcontractor. 41 CFR 60-1.12(e); 41 CFR 60-300.80(c); and 41 CFR 60-741.80(c). Further, pursuant to 41 CFR 60-1.43, 41 CFR 60-300.81, and 41 CFR 60-741.81, TRICARE subcontractors must provide OFCCP with access to records and their place of business for the purpose of conducting the complaint investigation, including: inspecting and copying documents, conducting interviews of employees and managers and viewing the workplace.

- d. Outreach and Technical Assistance: During the five-year moratorium, OFCCP will provide extensive technical assistance on compliance with the affirmative action obligations under E.O. 11246, Section 503, and VEVRAA. Among other things, OFCCP will:
 - i. Provide information, materials, and technical assistance training to TRICARE subcontractors on how to develop cost effective affirmative action plans and recordkeeping and applicant tracking systems;

- ii. Conduct regional and national webinars that cover OFCCP's legal authorities, jurisdiction, and federal contractor and subcontractor obligations; and
 - iii. Convene listening sessions to learn about the unique issues facing TRICARE subcontractors in order to provide relevant and targeted technical assistance under all of OFCCP's legal authorities.
- e. Notification of Compliance Assistance Opportunities for TRICARE Subcontractors. If you are a subcontractor under the TRICARE program, please e-mail OFCCP at OFCCP-Public@dol.gov to ensure that you receive notification about upcoming technical assistance and training events. In addition, you are encouraged to visit OFCCP's website at www.dol.gov/ofccp for additional information about OFCCP, the laws it enforces, technical assistance materials, and upcoming events.

8. **ATTACHMENTS:** None.

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