

NWX-DOL ESA OFCCP (US)
Moderator: Lisa Burns
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Coordinator: Welcome and thank you for standing by. At this time, all participants are in a listen-only mode until the question and answer session of the call. To ask a question during that time, please press Star followed by Number 1. Today's conference is being recorded. Any objections, you may disconnect at this time. Now I'd like to turn over the conference to Lisa Burns. Thank you. You may begin.

Lisa Burns: Welcome, everyone, and good afternoon. Welcome to OFCCP's TRICARE Final Rule webinar. I'm Lisa Burns from the training branch. During today's briefing, our goal is to walk you through the TRICARE final rules. The briefing should take less than an hour with questions and answers.

We will be taking questions at the end of the call through the chat function. Also, please feel free to submit the questions in chat as we go. Now I'd like to introduce Mr. Craig Leen -- the Director of OFCCP -- for some opening remarks. Mr. Leen?

Craig Leen: Thank you very much, Lisa. It's a pleasure to be here today with all of you. As you know, OFCCP is strongly committed to compliance assistance, to transparency in operations, and we wanted to have this opportunity to speak with everyone today to go through the TRICARE Final Rule -- which goes into effect today -- and to answer any questions that people have, and I think you're going to really enjoy the presentation today.

Right at the outset, I wanted to emphasize that the TRICARE Final Rule, the policy emphasis for it, and of course, there are legal grounds for it, too, because of the jurisdictional issues. But the policy grounds for it involved the

protection of veterans' healthcare. OFCCP has received information that in a number of areas of the country.

It was sometimes difficult for veterans to receive access to healthcare -- and to TRICARE in particular -- and that TRICARE entities - or potential TRICARE entities were not signing up for TRICARE because of the regulatory burdens and costs associated with compliance with OFCCP regulations.

And this was harming a protected class that OFCCP is entrusted to defend and protect, which is veterans. We are very concerned that veterans weren't having this access to healthcare and that really was the policy emphasis for the TRICARE Final Rule, and this has been going back to the prior administration.

As many of you may know the history here, there was a moratorium directive related to TRICARE issued in the prior administration and then an additional moratorium directive extending the moratorium was enacted in this - or was issued in this administration, and so this has been going on for a number of years.

Congress has spoken on the topic as well through the National Defense Authorization Act and there has been a back and forth going on initially with Congress and the agency, and then through the rulemaking process with commenters, and that has led us to today. So as I mentioned, the rule goes into effect today, August 31, 2020. The purpose of the rule -- as indicated in the preamble -- is acceptability of healthcare for veterans and clarity as to OFCCP requirements.

Key provisions of the TRICARE Final Rule include OFCCP determined that it lacks authority to regulate healthcare providers solely because they participated in TRICARE, the healthcare program for uniformed service members, retirees, and their families. To the extent there was jurisdiction, a national interest exemption would apply for the policy reasons that I just gave you.

The final rule makes no changes regarding the obligations of TRICARE providers who have other federal contracts and subcontracts that meet the jurisdiction thresholds and OFCCP's laws and regulations. To put that more simply, if you're a federal contractor for something other than TRICARE, you remain a federal contractor and you remain subject to OFCCP regulations.

This is not an exemption that would that - if you participated TRICARE that automatically means that you're no longer a federal contractor even if you have other federal contracts. It's not that broad.

What it means is if you don't have other federal contracts and you're a TRICARE provider or wish to be a TRICARE provider that alone will not subject you to OFCCP jurisdiction. That's a really important point that we want to emphasize today and you're going to hear more about that.

It also does not change the applicability of other federal, state, and local laws prohibiting discrimination and providing for equal employment opportunities. So another point that everyone needs to know is that this rule does not exempt TRICARE providers from Title VII of the Civil Rights Act or the EEOC's jurisdiction generally. This exemption has nothing to do with that. This relates to OFCCP requirements.

In addition, no changes were made regarding the Federal Employees Health Benefits Program -- FEHBP -- or the US Department of Veterans Affairs Health Benefit Provider Agreement. Both of those programs remain subject to OFCCP jurisdiction. Now, I am going to give you a caveat related to VAHBP -- Veterans Affairs Health Benefit Providers -- because they remain subject to a more historical directive, which I'll mention in a second.

The rule - the reason why we limited the rule to TRICARE -- and you may hear more about this today -- is because of the jurisdictional concerns and issues that were weighed when Congress in the MVAA indicated that they did not believe that TRICARE providers were federal contractors and OFCCP made the determination that that was the congressional intent.

And then for that reason and all the reasons stated in the preamble, the agency made the determination that there was not jurisdiction over TRICARE and that -- if you recall -- was the reason for the moratorium directives to begin with.

It was to allow us to assess that issue and we have and this is the rule that we've issued. Now, as I mentioned, there is an alternative basis for the rule, which is the national interest exemption because of veterans' health and veterans' access to healthcare. So those are the two rounds of the TRICARE Rule.

Now, I want to mention something briefly about the moratorium directive. On May 18, 2018, OFCCP issued Directive 2018-02. You can look it up on the web site under OFCCP Directives. Put that into a web browser, look up Directive 2018-02, TRICARE Subcontractor Enforcement Activities.

That was the title. What this did was extended the moratorium on enforcement of the affirmative obligations required of TRICARE subcontractors. It was actually the second moratorium. It was the one extending the prior moratorium from the prior administration.

This moratorium extended a scheduling - essentially what the moratorium did was it - there are two types of obligations. There's a lot of obligations, but just to be simple about it, there's affirmative obligations, affirmative action, and there's the nondiscrimination obligation.

The moratorium basically said that TRICARE subcontractors and VAHBP providers did not have to comply with the affirmative action obligation and they would not be scheduled for a neutral - under our neutral scheduling process for compliance review. But they remained subject to the nondiscrimination requirement and the ability of OFCCP to investigate a complaint that was made. So, that's just a recap of what that was.

That moratorium lasted until May 7, 2021, so it's still in existence. Now,

obviously, the TRICARE rule has superseded that exemption as to TRICARE. The TRICARE rule now takes precedence and what TRICARE says is there is no jurisdiction over TRICARE providers and if there were, they have an exemption.

But the moratorium remains in effect at the VAHBP providers until May 7, 2021, and I want you to know that a lot of the reasons for why we issued the TRICARE directives -- pardon me -- the TRICARE final rule about veterans' healthcare and access to veterans' healthcare by veterans and making sure that our veterans are taken care of by this country based on the sacrifices they made for our country's welfare and security. Those apply to VAHBP providers as well.

So right now, that moratorium exists until May 7, 2021, but I want you to know that the agency is considering sub-regulatory guidance on that point, and so stay tuned. We want to get that sub-regulatory guidance out soon because obviously May 7, 2021 is approaching and my general view on this subject is that -- and this is something within the OFCCP directors' discretion, just so you know, I issue these directives -- my general view on this subject is that VAHBP should continue to be subject to a moratorium of that nature. So we're continuing to look at that and determining how to address that point.

But stay tuned. Just because VAHBP was not in this final rule does not mean that it will - that we are going to be scheduling VAHBP providers after May 7, 2021. We're still looking at that issue and as I told you, the policy reasons supporting a moratorium continue to apply. So stay tuned on that.

Lastly, I just wanted to mention that we will be publishing more sub-regulatory guidance generally in this area. It's very important to OFCCP that we get it right and that we're clear about it so that everyone knows what their obligations are and where we have jurisdiction, we will vigorously enforce it.

And I know everyone on this call wants that because no one supports discrimination and everyone supports affirmative action to ensure equal

employment opportunities. So that's something that we remain strongly committed to as an agency, but where we have jurisdiction and that's where we will be devoting our resources.

So thank you, everyone, for being on the call today. I'm looking forward to watching the presentation with all of you and I would like to turn it back to Lisa at this time. You'll hear from me again at the end.

Lisa Burns: Thank you, Mr. Leen. Now it's my pleasure to introduce your presenters for today's brief. Jaime Regan is a Regulatory Analyst with OFCCP's Policy Division and (Kevin Koll) is an attorney with the Civil Rights and Labor-Management Division of the (unintelligible) Office. Jaime?

Jaime Regan: Thank you, Lisa. Again, I'm Jamie Regan with OFCCP's Policy Division. Thank you again, everyone, for joining us today. So we're probably going to go over some stuff that Craig has already talked about throughout the meeting, so it might be a bit duplicative, but we just want to make sure that the rule is clear and that we're completely transparent. So we'll start with a brief overview of the regulations of this rule and facts.

This rule amends the regulations implementing Executive Order 11246 Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act of 1974. These laws require affirmative action and prohibit federal contractors from discriminating on the basis of race, religion, color, sex, sexual orientation, and their identity, national origin, capability, or status as a protected veteran. Contractors are also prohibited from discrimination against applicants or employees if they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

A little bit of background. So, what is TRICARE? TRICARE is a healthcare program for uniformed service members, retirees, and their families around the world. TRICARE (unintelligible) of the Defense Health Agency under the leadership of the Assistant Secretary of Defense Health Affairs.

On May 7, 2014, OFCCP issued Directive 2014-01, establishing a five-year moratorium on enforcement of the affirmative action obligations required of all TRICARE providers. On May 18, 2018, OFCCP issued Directive 2018-02, which extended the initial moratorium by two years to May 7, 2021. OFCCP initiated the NPRM on November 6, 2019, which proposed a move in TRICARE prior from OFCCP's jurisdiction permanently.

OFCCP received 16 comments during the notice of comment period, some of which supported the proposed rule and some of which opposed it. After careful consideration to the comments, OFCCP adopted the rule as initially proposed.

The final rule's official title is Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors TRICARE Providers. OFCCP refers to this as the TRICARE Rule. And as Director Leen said, the rule is effective today, August 31, 2020.

Now we'll talk about the policy justification. Comprehensive care networks are a critical component to ensuring access to healthcare. Uniformed service members, veterans, and their families face (unintelligible) difficulties in obtaining adequate healthcare. It is the intent of this rule to remove the cost of compliance barrier that made some healthcare providers reluctant to participate in TRICARE.

By removing TRICARE providers from OFCCP coverage, OFCCP believes it will increase access to medical care for uniformed service members, veterans, and their families. With the final rule, TRICARE providers now have greater certainty regarding their equal employment opportunity obligations.

OFCCP conducts a case by case inquiry when cases - or when questions of jurisdiction arise. The exemption on this rule ensures healthcare providers know that they are not subject to OFCCP jurisdiction. And now I'll turn it over to (Kevin Koll) from (unintelligible) Office.

(Kevin Koll): Good afternoon, everyone, and thank you for joining us today with this webinar. I want to talk briefly about some of the regional considerations of the final rule. The National Defense Authorization Act -- or NDAA -- for fiscal year 2012 authorized appropriations for military activity of the Department of Defense. OFCCP's purpose for 2012 MVAA was to remove TRICARE providers from OFCCP's authority.

Specifically, the rule asserts that Congress intended to remove OFCCP's authority over TRICARE providers when it announced at the 2012 MVAA (unintelligible) the proper use of OFCCP's regulatory authority to reconsider its previous position and conform its regulations to that legislative effort.

In light of this congressional intent, the final rule amended the definition of subcontract to make it clear that OFCCP does not consider TRICARE providers to be covered subcontractors. In the alternative, the final rule makes clear that TRICARE providers are exempt from coverage under OFCCP's laws in the national interest. OFCCP also anticipates that the final rule may result in cost savings to some TRICARE providers.

Under the final rule, TRICARE providers who do not hold any other government contracts or subcontracts do not have EEO obligations under OFCCP's legal authority. However, they may still have EEO obligations.

First, TRICARE providers who have a separate federal contract or subcontract for goods or other services that meet the threshold under OFCCP's laws will remain under OFCCP's enforcement authority. Secondly, TRICARE providers remain subject to all other federal, state, and local laws prohibiting discrimination and otherwise providing for equal employment opportunity.

OFCCP received and considered comments suggesting that healthcare providers participating in the Federal Employees Health Benefit Programs -- or FEHBP's -- and the U.S. Department of Veterans Affairs Health Benefit Programs -- or VAHPB's -- should be exempt from the agency's jurisdiction.

Thought OFCCP declined to make those changes through the final rule, the agency plans to develop sub-regulatory guidance on FEHBP providers and will consider additional sub-regulatory guidance on VAHBP providers as necessary and allowable by law in order to take a uniform approach to all government healthcare plans.

For now, OFCCP's jurisdiction over FEHBP providers remains unchanged. Additionally, VAHBP providers remain subject to Directive 2018-02 TRICARE Subcontractor Enforcement Activities issued May 18, 2019. The Directive extends the TRICARE moratorium on scheduling to include VAHBP agreements. This moratorium remains in effect until May 7, 2021.

Jaime Regan: Thanks, (Kevin). And on this slide, you will see resources for additional information. As always, please reach out to OFCCP through our Contact Us Page on our web site, which includes our help desk contact information if you have further questions.

Lisa Burns: As we mentioned at the beginning of today's briefing, our objective was to walk you through the TRICARE final rules. We hope this briefing accomplished that. Now we're going to turn to some questions coming through the chat box.

If you haven't already done so, please submit your questions in chat. We may not get through all the questions today, but we will review all questions and update our frequently asked questions on the OFCCP web site based on the type of questions we receive today.

So we are going to take five minutes to review the questions. Please do not disconnect. Again, we're going to take five minutes to review the questions and we'll be back to answer questions, so please do not disconnect. (Angela)?

Coordinator: One moment. You may begin.

Lisa Burns: Thank you everyone for holding and welcome back. Before we start answering your questions I would like to introduce (Keir Bickerstaffe). He's with OFCCP's Council (for) Interpretation and Advice who will be assisting in answering some of the questions that we have today. So first question. Is a privately owned nursing home which holds the contract with the Veterans Administration to provide nursing home care considered a (TRICARE) provider or a VAHBP provider?

(Keir Bickerstaffe): Thanks Lisa. So I think I would need to be able to see the contract to answer the questions whether or not they are a Tricare provider. It seems almost certain that they are a VAHBP provider. So this is not an entity that would be scheduled by OFCCP under the current moratorium that Director (Leen) talked about 2018 that (I) showed you that was inactive in 2018.

So again we did - I'll also add on we did get a number of questions about specific types of contracts that it's a little bit difficult to answer without actually seeing the contract. So please do - for those of you with those types of specific questions do reach out to OFCCP after this webinar with those specific matters and we can answer them.

It's a little hard to do it without sort of seeing the contract in front of us. But for purposes of question number one, you know, it seems I would say almost certain that that is at least a VAHBP provider that would not be scheduled and may be a Tricare provider depending on the types of - you know, what kind of service it's providing.

Lisa Burns: Great. Thank you. The next question. Does OFCCP anticipate issuing sub-regulatory guidance on health provider subcontractor status via the (FEHBP)? I'm sorry.

(Keir Bickerstaffe): Yes. Director (Leen) talked about in his introduction that it's something that we are actively looking at both for (FEHBP) and (VAHBP). (VAHBP) providers -- as Director (Leen) mentioned -- are currently covered under the moratorium scheduling. (FEHBP) providers currently can be scheduled. And

so that is something that we are looking at going forward.

Lisa Burns: Thank you. Next question. Could you summarize the comments opposing (NPRM) and the department's response to these in the final rule?

(Keir Bickerstaffe): Sure I can summarize. I think the better discussion about it is in the preamble of the final rule which we issued which goes through each of the comments that we received and whether or not they supported or opposed.

I think in general those comments opposing the (NPRM) were concerned that individuals' (EEO) protections would be lessened. In response, the rule makes clear that even though these Tricare providers may not be covering the future (unintelligible) they likely are covered under other federal, local, and state laws that provide for non-discrimination protections like (EEO).

I think that there are also some concerns just with regard to OFCCP's new review of what the 2012 NDAA did. The final rule found that the intent of that law was to remove OFCCP's authority from those entities. There were some that disagreed with OFCCP's rationale in the final rule. So I'm saying that those are the two main types of comments that the agency received in opposing (NPRM).

Lisa Burns: Great. Thank you. Next question. Will the final rule make it easier for organizations to become part of the participating provider rosters for mental health care services and support?

(Keir Bickerstaffe): So I can just I can talk generally about the intent behind the rule as Director (Leen) mentioned at the outset that one of the main intentions behind the rule was to make it easier for veterans to be able to access healthcare. There has been some testimony and evidence that having to comply with OFCCP obligations made it less likely for some providers to agree to become a Tricare provider because it would have to comply with OFCCP obligations.

So part of -- certainly a large part of the intent behind the final rule -- was to

then make it easier for those entities to join and become Tricare providers if they don't have to comply with OFCCP obligations. So whether or not that will - whether or not that will be the case for specific different types of services and supports I can't really answer.

But certainly, the overall intent of the rule was to make it easier for veterans to acquire health care services through Tricare because of the lessened burden for Tricare providers not having to have to comply with OFCCP obligations.

Lisa Burns: Great. Thank you. Next question. Who qualifies for TRICARE?

(Tammy): So Tricare is a health care program for uniformed service members, retirees or veterans, and their families around the world.

Lisa Burns: Great. Thank you (Tammy). Next question. My husband is a retired Vietnam Vet and has contacted the local CBOC office three times over the last two weeks for different problems. He has not heard back. Excuse me. Will this final rule help him access healthcare?

(Keir Bickerstaffe): Again I'll just refer to my previous response that it is certainly the intention of the rule is to lower costs for entities that would otherwise have decided not to be Tricare providers. So it is certainly the intent is that it will indirectly allow more veterans to be able to access healthcare. I can't speak to any particular specifics or specific circumstances but that is the overall intent behind the rule.

Lisa Burns: Great. Thank you. Thank you for sending your questions. That concludes the questions today. I would like to turn it over to Director (Leen) for some closing remarks. Director (Leen)?

Director (Leen): Thank you, everybody. If you have a question that you weren't able to ask or it just occurred to you now or after this presentation's over today please make sure to send it to us. We want to answer every question we can. We want just to be as clear as possible.

I wanted to just emphasize again because in particular because I heard a question relating to a veteran who was undergoing some difficulties and was seeking assistance. One thing I want to tell to all the veterans out there and also to all the companies that provide services to veterans.

Take a look at OFCCP's web site. Go to our VEVRAA Focus Review web page. You can go onto your web browser and just type in V-E-V-R-A-A space Focus Review and you can put OFCCP in there as well and you'll go to our web page. It has a lot of helpful guidance and resources to ensure equal employment opportunities for veterans.

I encourage all companies to look at that. Contractors and non-contractors - take a look at it. Even if you're subject to this Tricare rule take a look at it. You don't have to but this is very helpful. You don't have to obviously if you're a non-contractor. Contractors should look at it because that's what we're going to be enforcing. But take a look at it. The information there is so helpful. And every company wants to have equal employment opportunities for veterans. I know that.

I've talked to many veterans and talked to many companies and ultimately the Tricare rule -- we believe -- and look I'm the director. I issued the rule. I believe that ultimately that helps veterans because it provides more access to health care. And that is so key to our nation's veterans. But I want you to also know that OFCCP is doing (conference) of actions in this area to help veterans also through our enforcement programs and our compliance assistance programs.

So go on our Web site. Take a look at that. We're strongly committed to it. Also, military and veteran spouses go on our Web site take a look at what we're doing in that area. We are now applying VEVRAA to veterans' spouses. It's always applied to them but we are making that a focus and for military spouses who are not veterans spouses but are spouses to someone in the active military we did issue a directive that's encouraging companies to do more for military spouses as well although we have less jurisdiction there.

And lastly, I should mention that we're right in the process now of doing our VEVRAA Focus Reviews. Issued 500 - I issued a (scheduling) list of 500 VEVRAA focus reviews where we're going to companies and looking at VEVRAA. Take a look at that as well. I think you'll see that OFCCP's program as it relates to veterans is very comprehensive.

And it's dedicated to equal employment opportunities for veterans. I'm strongly committed to that as a director. I know my staff is. We believe this Tricare rule will help veterans as well. And if anyone has any questions please send them to us. It's been a real pleasure talking to you all today.

Also if you have any feedback on the program please send it to us as well because we want these programs to be as helpful as possible. So I wish everyone a wonderful day. Thank you for joining us.

Lisa Burns: Thank you for attending today's briefing. Have a great day.

Coordinator: Thank you for your participation in today's conference. Please disconnect at this time.

END