



Legal Alert Update: Will Congress Exempt Health Care Providers from Affirmative Action Obligations?

12/15/2011

Executive Summary: On December 14, 2011, the House passed H.R. 1540, the National Defense Authorization Act (NDAA), which included language with respect to exempting TRICARE providers from OFCCP jurisdiction.

Background:

In our previous legal alert, we informed you that the Senate passed the NDAA on December 1, 2011, which exempts TRICARE network providers from the jurisdiction of the Office of Federal Contract Compliance Programs (OFCCP). On December 13, 2011, a conference report was passed to reconcile the differences between the House and Senate versions; the conference report contained the following language:

In establishing rates and procedures for reimbursement of providers and other administrative requirements, including those contained in provider network agreements, the Secretary shall to the extent practicable maintain adequate network of providers, including institutional, professional, and pharmacy. For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.

Thus, the conference report established a similar exemption for TRICARE providers. Last night the House passed H.R. 1540 which is based on the conference report. The Senate is expected to vote on the NDAA this week, which will contain the language discussed above.

There is no word on the OFCCP's interpretation of the NDAA. The Agency may still attempt to assert jurisdiction over health care providers even if the NDAA becomes law given the change in the language from the Senate version. However, the clear message from the Senate version and the conference report is that health care providers are not subcontractors under applicable regulations including those dealing with OFCCP jurisdiction.

Ford & Harrison will continue to monitor the progress of this legislation and any information about it from the OFCCP.

If you have any questions regarding this Alert or other labor or employment issues affecting government contractors, please contact the author of this Alert, Karen Tyner, a partner in our Spartanburg office at kytyner@fordharrison.com, or the Ford & Harrison attorney with whom you usually work.