



## U.S. OFFICE OF PERSONNEL MANAGEMENT

### Post-DOMA Survivor Annuitant Federal Employees Health Benefit Waiver Criteria

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Notice.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) has updated its Waiver Policy on the official OPM website<sup>1</sup> to post the additional criteria OPM will consider when reviewing certain requests for waiver of the Federal Employees Health Benefit (FEHB) Program enrollment eligibility requirements. The updates to the Waiver Policy detail the criteria OPM will consider when reviewing waiver requests from individuals who are receiving a monthly survivor annuity as the surviving same-sex spouse of a Federal employee or annuitant who died on or before June 26, 2013. After an individual who is receiving a monthly annuity as the surviving same-sex spouse of a deceased Federal employee or annuitant is granted a waiver pursuant to section 8905(b) of title 5, U.S. Code, and the applicable procedures, the FEHB enrollment will be effective the first day of the first pay period that begins after the date on which that OPM granted the waiver. The individual may not be enrolled in FEHB retroactively, unless there is clear administrative error.

**FOR FURTHER INFORMATION CONTACT:** Chelsea Ruediger,  
chelsea.ruediger@opm.gov, (202) 606-0004.

**SUPPLEMENTARY INFORMATION:** Following the Supreme Court's June 26, 2013 decision in United States v. Windsor, same-sex spouses became eligible family members under a Federal Employees Health Benefits (FEHB) Program enrollment. Because existing same-sex

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<sup>1</sup> See: <https://www.opm.gov/healthcare-insurance/healthcare/reference-materials/reference/annuitants-and-compensationers/#current>

marriages were not recognized by the Federal government before the Windsor decision, all legal same-sex marriages that predated the Windsor decision were treated as new marriages. FEHB enrollees, which included Federal employees and annuitants, had 60 days from June 26, 2013 until August 26, 2013 to submit a request to change their FEHB eligibility enrollment from self-only to self and family, to provide FEHB coverage to their same-sex spouse. *See OPM Benefits Administration Letter 13-203 issued July 17, 2013. <https://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>*. However, Federal employees and annuitants who died on or before the date of the Windsor decision, June 26, 2013, did not have an option to elect FEHB coverage for their same-sex spouse.

In the ordinary course for a surviving spouse to be enrolled in FEHB after the death of the Federal employee or annuitant, the deceased Federal employee or annuitant must have been enrolled in Self and Family FEHB coverage that covered the surviving spouse at the time of death and the surviving spouse must be entitled to a monthly annuity as the survivor of a deceased Federal employee or annuitant. This means, absent a waiver of the FEHB eligibility requirements codified at 5 U.S.C. 8905(b)(2), individuals who are now receiving a survivor annuity as the surviving same-sex spouse of a deceased employee or annuitant who died on or before June 26, 2013, are not eligible for FEHB enrollment.

This notice outlines the updates to the OPM FEHB Eligibility Waiver Policy and identifies the criteria OPM will consider when reviewing waiver requests from individuals who are receiving a monthly survivor annuity benefit as the surviving same-sex spouse of a Federal employee or annuitant who died on or before June 26, 2013. It also prescribes the requirements and enrollment effective dates for these certain survivor annuitants to receive FEHB coverage.

Waiver Statute and Implementing Regulations

Section 8905(b) of title 5, U.S. Code allows OPM to waive certain FEHB eligibility requirements for an individual if OPM:

“determines that, due to exceptional circumstances, it would be against equity and good conscience not to allow such individual to be enrolled as an annuitant<sup>2</sup> in a health benefits plan under [chapter 89].”

The implementing regulation, promulgated at 5 CFR 890.108, requires the annuitant to provide OPM with evidence of the following in order to be granted a waiver for FEHB enrollment:

- (1) The individual intended to have FEHB coverage as an annuitant (retiree);
- (2) The circumstances that prevented the individual from meeting the requirements of 5 U.S.C. 8905(b) were beyond the individual’s control; and
- (3) The individual acted reasonably to protect his or her right to continue coverage into retirement.

OPM does not want to penalize an individual who is receiving a survivor annuity as a same-sex spouse and who was not covered by a FEHB Self and Family plan before his/her spouse’s death because prior to June 26, 2013, the provisions of the Defense of Marriage Act (DOMA) prevented OPM from recognizing the same-sex marriage. Therefore, we believe it would be against equity and good conscience not to grant a waiver request submitted by such individual. OPM will consider the criteria in 5 CFR 890.108 satisfied given the circumstances presented in the scope of this notice, provided that the appropriate documentation of marriage and death is submitted.

OPM will accept the following to meet the requirements above:

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<sup>2</sup> For purposes of the Federal Employees Health Benefits program, “annuitant” has been defined to include, *inter alia*, a member of a family who receives an immediate annuity as the survivor of an employee. 5 U.S.C. 8901(3)(B).

1. Proof of a legally valid same-sex marriage performed prior to June 26, 2013, to the deceased annuitant,
2. Proof that the deceased annuitant died on or before June 26, 2013, and
3. Proof that the deceased annuitant was enrolled in FEHB at death.

Individuals must submit requests for waiver of the FEHB enrollment eligibility requirements under 5 U.S.C. 8905(b) to OPM in writing. These waiver requests should be mailed to:

Office of Personnel Management  
Retirement Programs  
Attn: Retirement Eligibility Services — HB Waiver Request  
1900 E Street NW; Room 2416  
Washington, D.C. 20415

In addition, the individual who is seeking a waiver of the FEHB eligibility requirements must have already been adjudicated eligible for a survivor annuity before he or she may seek a waiver under 5 U.S.C. 8905(b).

#### Enrollment Effective Date

After an individual who is receiving a survivor annuity as a same-sex spouse is granted a waiver pursuant to 5 U.S.C. 8905(b) and the procedures described above, the FEHB enrollment will be effective the first day of the first pay period that begins after the date on which that OPM granted the waiver. The survivor annuitant may not be enrolled in FEHB retroactively, unless there is clear administrative error.

U.S. Office of Personnel Management.

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Beth F. Cobert,  
Acting Director.

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