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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN: 3206-AM66

Federal Employees Health Benefits Program Coverage for Certain Firefighters and Intermittent Emergency Response Personnel

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final rule to amend the Federal Employees Health Benefits (FEHB) Program regulations to make certain firefighters hired under a temporary appointment and certain intermittent emergency response personnel eligible to be enrolled in a health benefits plan under the FEHB Program. These amendments were the subject of interim rules published on July 19, 2012 and November 14, 2012.

DATES: This rule is effective [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Michael W. Kaszynski, Senior Policy Analyst at Michael.Kaszynski@opm.gov or (202) 606-0004.

SUPPLEMENTARY INFORMATION: This final rule provides eligibility for health insurance coverage under the Federal Employees Health Benefits (FEHB) Program to certain wildfire protection employees and certain intermittent emergency response personnel. The Federal Government has a critical need to hire and quickly deploy qualified firefighters, other fire protection personnel, and certain intermittent emergency response personnel to areas of the country where disasters caused by humans or nature require their services. The Federal agencies that routinely deploy firefighters to respond to these disasters, including the Departments of

Agriculture and Interior, have used temporary appointment authorities which provide the flexibility they need to quickly increase their firefighting workforce during wildfire emergencies and then to decrease the workforce when the emergencies are resolved.

Pursuant to 5 U.S.C. 8913(b), OPM has broad authority to prescribe the conditions under which employees are eligible to enroll in the FEHB Program and is empowered to include or exclude employees on the basis of the nature and type of their employment or conditions pertaining to their appointments, including the duration of the appointments. This regulation allows agencies to make FEHB coverage offers to these firefighters and fire protection personnel, as well as their families, pursuant to OPM's broad regulatory authority under 5 U.S.C. 8913(b), allowing them to obtain health insurance through their employers on day one of employment.

OPM deems the extension of offers of coverage to be appropriate because firefighters face unique hazards and risks to their health. The day-to-day job of a firefighter involves frequent exposure to environmental risk factors that can precipitate the onset of severe and life-threatening diseases like cancer. See Guidotti TL, *Evaluating causality for occupational cancers: the example of firefighters*. *Occup. Med. (Lond)*. 2007;57;466-71. The nature of this work necessarily involves intense physical stress that can result in potentially fatal cardiac events, job-related injuries, and an adverse psychological impact. See U.S. Dep't of Homeland Security, U.S. Fire Admin., *Fire-Related Firefighter Injuries Reported to NFIRS*, Topical Fire Report Series, Vol. 11, Issue 7, February 2011, *available at* <http://www.usfa.fema.gov/downloads/pdf/statistics/v11i7.pdf>; Kales SN, Soteriades ES, Christoudias SG, Christiani DC, *Firefighters and on-duty deaths from coronary heart disease: a case control study*. *Environ. Health*. 2003; 2(1):14; Carey MG, Al-Zaiti SS, Dean GE, Sessanna

L, Finnell DS, *Sleep Problems, Depression, Substance Use, Social Bonding, and Quality of Life in Professional Firefighters*. J. Occup. Environ. Med. 2011; 53(8):928–33.

Although firefighters are eligible for workers' compensation for injuries suffered on the job, they nonetheless have a heightened need for health insurance coverage, so that they can obtain preventive care and benefit from early detection of the chronic and life-threatening conditions from which they face increased risk, in addition to receiving treatment for illnesses and injuries from which they are currently suffering. Providing firefighters coverage under the FEHB Program acknowledges the unique hazards and increased risks that they face for their Federal service and enhances the quality of their lives by ensuring access to the medical benefits necessary to promote prevention and early intervention, as well as treatment for diseases that cannot be prevented.

In addition, in order to protect the public health and safety, the Departments of Agriculture and Interior have had a critical need over the years for experienced firefighting personnel. The agencies wish not only to recruit experienced firefighters this year, but also to maintain their interest in returning to serve during subsequent fire seasons. Offering health insurance coverage on day one of employment will support these Departments' efforts to recruit and retain qualified firefighters and fire protection personnel for both this year's and future fire seasons. OPM is working closely with the Departments of Agriculture and Interior to ensure firefighters are able to promptly enroll for FEHB coverage with minimal burden.

OPM recognizes that there may be other groups of employees not currently eligible for the FEHB Program because of the nature of their work schedules, but who are similarly situated to firefighting personnel in that they perform emergency response services. Accordingly, OPM has also added a new subsection (i) to its regulations that permits agencies to request that OPM

extend FEHB coverage to such employees. OPM intends to construe this subsection narrowly, applying it only to employees engaged in emergency response services similar to the services being performed by those responding to the wildfires, and only when requested by their employing agencies.

On July 19, 2012, OPM issued an interim final regulation to extend eligibility for health insurance coverage and a full Government contribution under the FEHB Program to temporary firefighters and fire protection personnel at 77 FR 42417. In addition, recognizing that there may be other groups of employees not currently covered by the FEHB Program because of the temporary nature of their appointments, the interim rule allowed agencies to request that OPM extend FEHB coverage to similarly situated temporary employees. We also solicited comments from the public regarding whether OPM should explicitly provide FEHB coverage to employees who are appointed pursuant to section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5149(b)(1)) (“Stafford Act”) to respond to major disasters and emergencies declared by the President.

In the meantime, a major natural disaster, Hurricane Sandy, struck the East Coast of the United States at the end of October 2012. The storm resulted in loss of life and major destruction of property across a wide swath of the Eastern seaboard. In affected areas, 8.5 million people went without power, gasoline was scarce, and massive flooding and cold temperatures increased the hardship on those living in the storm’s path. President Obama declared that major disasters had occurred in Connecticut, New York, New Jersey, and Rhode Island, making disaster assistance available to those in the areas heaviest hit by the storm. The President also signed Federal emergency declarations for Connecticut, New York, New Jersey,

New Hampshire, Massachusetts, Virginia, West Virginia, Maryland, Pennsylvania, Delaware, Rhode Island, and the District of Columbia.

Federal agencies, including the Federal Emergency Management Agency (FEMA), worked with state and local partners to respond to this emergency. Over 3,000 FEMA employees were immediately deployed to the hardest hit areas. These FEMA workers may have been exposed to dangerous conditions, and put their health and safety at risk in assisting others. Many of FEMA emergency employees continue to work schedules that prevent them from being eligible for FEHB coverage on day one of employment due to OPM's regulations, specifically 5 CFR 890.102(c)(3), 890.102(j)(1), and 890.102(j)(2). Pursuant to 5 U.S.C. 8913(b), OPM has broad authority to prescribe the conditions under which employees are eligible to enroll in the FEHB Program. OPM may include or exclude employees on the basis of the nature and type of their employment or conditions pertaining to their appointments, "such as short-term appointment, seasonal or intermittent employment, and employment of like nature." *Id.* Intermittent emergency response employees often work in conditions that may expose them to various environmental hazards, similar to the wildland firefighters covered by the regulation described above. In light of the need for agencies to attract and bring emergency workers on board quickly and in recognition of the hazardous conditions those employees often face, OPM concluded in 2012 that its current policy of categorically excluding intermittent employees from FEHB coverage was no longer in the public interest and should be changed. Therefore, on November 14, 2012, OPM issued an interim final regulation at 77 FR 67743 to allow agencies to request FEHB coverage for intermittent employees engaged in emergency response and recovery work as defined by the Stafford Act. Since the publication of that rule, OPM also expanded

coverage under the FEHB Program to certain temporary, seasonal and intermittent employees who are expected to work at least 130 hours per calendar month for at least 90 days.

In addition, if OPM grants any such requests, it is reserving the authority to limit FEHB coverage for intermittent employees only to the periods during which they are in a pay status. This would promote parity between intermittent employees and temporary employees like the wildland firefighters, who receive FEHB coverage only when called up for duty. It would also allow OPM the discretion to craft an appropriate approach to health insurance coverage based on the potentially diverse work schedules of intermittent employees.

We have received a number of comments on our two interim final regulations from Federal agencies, an employee association, a trade association of carriers, and a number of individual employees and union members. Most commenters expressed support for the interim final regulations. The following summarizes and responds to the remaining comments:

Comment: In many cases, there is no way to identify positions whose incumbents provide emergency response services for wildland fire protection. The language in Benefits Administration Letter (BAL) 12-203 seems to contradict, and be superior to, that of the rule itself in two important ways. First, in the rule the determination of eligibility is based on identification of positions, whereas in the Letter it is based on duties actually performed. Second, in the rule the determination of eligible positions is made by OPM, whereas in the Letter the determination of eligible duties is made by agencies. Clearly, the only way in which eligibility of militia members may be determined consistent with the rule's intent is by the process articulated in the Letter: by consideration of duties by agencies.

Response: The new rule at 5 CFR 890.102(h) states:

Notwithstanding paragraphs (c)(1) and (2) of this section, an employee who is in a position identified by OPM that provides emergency response services for wildland fire protection is eligible to be enrolled in a health benefits plan under this part.

BAL 12-203 clarifies the intent of the new rule with the following critically relevant statements:

“The following positions [...] are covered for purposes of 5 CFR 890.102(h): Any position (including supervisory positions) the duties of which include high risk or life-threatening work to control and extinguish wildland fires, to rescue persons endangered by fire, or to reduce or eliminate potential fire hazards, or involving the provision of direct on-site assistance to others engaged in such work.

“[I]n determining whether to extend health benefits coverage for employees, agencies should focus on the duties performed, regardless of the position’s title, occupational series, grade level or geographic location.”

Therefore, there is no conflict between the rule and the BAL. The rule correctly points out that OPM has the ultimate authority to make eligibility determinations while the BAL delegates this authority to the agencies as it does for most FEHB Program eligibility determinations.

Comment: Eligibility should be expanded to other groups.

Response: The commenters believe that expanding the scope of coverage to include other temporary seasonal employees in the final rule is warranted. Since the publication of the interim final regulation, OPM expanded coverage under the FEHB Program to certain temporary, seasonal and intermittent employees. The final regulation is available at 79 FR 62325 and was published October 17, 2014. This regulation allows agencies to provide offers of FEHB coverage

to firefighters and emergency response personnel identified by OPM that are not eligible under the FEHB modification rule due to their work schedules.

Comment: Are these new groups eligible for other Federal Benefit Programs?

Response: The regulation does not create eligibility under any other benefit program.

Comment: One trade association of carriers questioned the requirements for eligibility for enrollment under this new authority and felt that they needed clarification to know when to terminate enrollments.

Response: In the FEHB Program, employing offices are responsible for making enrollment and coverage termination decisions. Carriers must process enrollment and termination transactions based on agency determinations as they do today.

OPM has considered these comments and determined that the interim final regulations should be finalized and published with no changes.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only adds additional groups to the list of groups eligible for coverage under the FEHB Program.

Executive Orders 13563 and 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Orders 13563 and 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, “Federalism,” and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

List of Subjects in 5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

U.S. Office of Personnel Management.

Beth F. Cobert,
Acting Director.

Accordingly, OPM is amending 5 CFR part 890 as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.301 also issued under sec. 311 of Pub. L. 111–03, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; 5 U.S.C. 8913; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under

sections 11202(f), 11232(e), 11246 (b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061.

2. Section 890.102 is amended by revising paragraphs (h) and (i) to read as follows:

§ 890.102 Coverage.

* * * * *

(h) Notwithstanding paragraphs (c)(1) and (2) of this section, an employee who is in a position identified by OPM that provides emergency response services for wildland fire protection is eligible to be enrolled in a health benefits plan under this part.

(i) Notwithstanding paragraphs (c)(1) through (3) of this section, upon request by the employing agency, OPM may grant eligibility to employees performing similar types of emergency response services to enroll in a health benefits plan under this part. In granting eligibility requests, OPM may limit the coverage of intermittent employees under a health benefits plan to the periods of time during which they are in a pay status.

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