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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 890 and 894

RIN: 3206-AN34

Federal Employees Health Benefits and Federal Employees Dental and Vision Insurance Programs' Coverage Exception For Children of Same-Sex Domestic Partners

AGENCY: U.S. Office of Personnel Management.

ACTION: Interim Final Rule.

SUMMARY: This action amends the rule to create a regulatory exception that allows children of same-sex domestic partners living overseas to maintain their Federal Employees Health Benefits (FEHB) and Federal Employees Dental and Vision Program (FEDVIP) coverage until September 30, 2018. Due to a recent Supreme Court decision, as of January 1, 2016, coverage of children of same-sex domestic partners under the FEHB Program and FEDVIP will generally only be allowed if the couple is married, as discussed in Benefits Administration Letter (BAL) 15-207 dated October 5, 2015. OPM recognizes there are additional requirements placed on overseas federal employees that may not apply to other civilian employees with duty stations in the United States making it difficult to travel to the United States to marry same-sex partners.

DATES: This rule is effective on [INSERT DATE PUBLISHED IN THE *FEDERAL REGISTER*].

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

comments using the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

SUPPLEMENTARY INFORMATION:

I. Background

Effective January 1, 2014, the Office of Personnel Management (OPM) published the “Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Expanding Coverage of Children; Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums: Conforming Amendments” final rule (78 FR 64873) to extend FEHB and FEDVIP coverage to children of same-sex domestic partners of Federal employees and annuitants who would marry their partners but live in states that do not allow same-sex couples to marry. As the result of the June 26, 2015, Supreme Court *Obergefell v. Hodges* decision, all U.S. states now allow same-sex couples to marry. Accordingly, as of January 2016, coverage of an enrollee’s stepchild(ren) is only allowed if the couple is married.

II. Discussion of Interim Rule

This rule amends §§ 890.302 and 894.101 of title 5, Code of Federal Regulations. The amendments will allow an employing agency to request, and for OPM to grant, a continued coverage exception for children of an employee’s same-sex domestic partner living outside the United States. Any coverage under such an exception will not extend beyond September 30, 2018. The OPM recognizes there are additional requirements placed on overseas employees that may not apply to other civilian employees with duty stations in the United States making it difficult to travel to the United States to marry same-sex partners. Therefore, OPM is creating the authority to allow an exception for

Federal employees in a domestic partnership and living outside of the United States. If requested by an enrollees' agency, coverage of children of same-sex domestic partners can be continued under self and family or self plus one enrollment in the FEHB and FEDVIP Programs. This continued coverage exception will be available to overseas employees until September 30, 2018.

Under Section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 551, et seq.) a general notice of proposed rulemaking is required unless an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. In addition, the APA exempts interpretative rules from proposed rulemaking procedures. This rule continues benefit eligibility past January 1, 2016, for children of same-sex domestic partners of employees living abroad, which require OPM to amend current regulations in an expeditious manner. Therefore, OPM has concluded that delaying implementation of this rule due to a full notice and public comment period would be impracticable and contrary to the public interest since the time it would have taken to issue proposed and final rules would have significantly delayed the implementation of this important regulatory change. For the foregoing reasons, OPM asserts that good cause exists to implement this rule as an interim rule under the APA, 5 U.S.C. 553(b) and accordingly, adopts this rule on that basis.

Regulatory Impact Analysis

OPM has examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and Executive Order 13563, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if

regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of \$100 million or more in any one year. This rule is not considered a major rule because OPM estimates there are a relatively small number of overseas enrollments that will be affected. Premium cost increases for this regulatory change will not equal or exceed \$100 million.

Paperwork Reduction Act

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Public Law 96-354) (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.” To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.” I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to overseas Federal employees, annuitants and their former spouses who are in same-sex domestic partnerships and are not married.

List of Subjects in 5 CFR Parts 890 and 894

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.

5 CFR Part 894

Administrative practice and procedure, Civil rights, Government employees, Individuals with disabilities, Intergovernmental relations.

U.S. Office of Personnel Management.

Beth F. Cobert,
Acting Director.

Accordingly, OPM is amending 5 CFR parts 890 and 894 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; Pub. L. 111-148, as amended by Pub. L. 111-152.

2. In § 890.302, revise paragraph (b)(2) to read as follows:

§ 890.302 Coverage of family members.

(b)***

(2) *Meaning of stepchild.* Except as provided in paragraph (b)(5) of this section, for purposes of this part, the term “stepchild” refers to the child of an enrollee's spouse or domestic partner and shall continue to refer to such child after the enrollee's divorce from the spouse, termination of the domestic partnership, or death of the spouse or domestic partner, so long as the child continues to live with the enrollee in a regular parent-child relationship. Coverage of children of domestic partners terminates on January 1, 2016, unless an agency requests, and OPM grants, the agency a continued coverage exception for enrollees living overseas. This continued coverage exception will be available to overseas employees and all coverage, under such an exception, will end on September 30, 2018.

PART 894—FEDERAL EMPLOYEES DENTAL AND VISION INSURANCE PROGRAM

3. The authority citation for part 894 continues to read as follows:

Authority: 5 U.S.C. 8962; 5 U.S.C. 8992; subpart C also issued under sec. 1 of Pub. L. 110-279, 122 Stat. 2604.

4. In § 894.101, the definition of “Stepchild” is revised to read as follows:

§ 894.101 Definitions.

Stepchild means:

(1) Except as provided in paragraph (2), the child of an enrollee's spouse or domestic partner and shall continue to refer to such child after the enrollee's divorce from the spouse, termination of the domestic partnership, or death of the spouse or domestic partner, so long as the child continues to live with the enrollee in a regular parent-child relationship.

(2) The child of an enrollee and a domestic partner who otherwise meet the requirements of paragraphs (1) through (8) of the definition of *Domestic partnership* in this section, but live in a state that has authorized marriage by same-sex couples prior to the first day of Open Season, shall not be considered a stepchild who is the child of a domestic partner in the following plan year. The determination of whether a state's marriage laws render a child ineligible for coverage as a stepchild who is the child of a domestic partner shall be made once annually, based on the law of the state where the same-sex couple lives on the last day before Open Season begins for enrollment for the following year. A child's eligibility for coverage as a stepchild who is the child of a domestic partner in a particular plan year shall not be affected by a mid-year change to a state's marriage law or by the couple's relocation to a different state. For midyear enrollment changes involving the addition of a new stepchild, as defined by this regulation, outside of Open Season, the determination of whether a state's marriage laws render the child ineligible for coverage shall be made at the time the employee notifies the employing office of his or her desire

to cover the child. Coverage of children of domestic partners terminates on January 1, 2016, unless an agency requests, and OPM grants, the agency a continued coverage exception for enrollees living overseas. Continued coverage exceptions will only be granted to children of domestic partners living overseas and all coverage exceptions will end on September 30, 2018.

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