



**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Parts 870, 875, 890, and 894**

**RIN 3206-AN99**

**Designation of Certain Services as Emergency Services Under the Antideficiency Act; Opportunities to Enroll and Change Enrollment in the FEHB Program During a Lapse in Appropriations; Continuation of Certain Insurance Benefits During a Lapse in Appropriations**

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Office of Personnel Management (OPM) is finalizing provisions to ensure the continuation of certain insurance benefits and services that could be impacted by a lapse in appropriations. First, this final rule implements section 1110 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA), that designated certain Federal Employees Health Benefits (FEHB) Program and Federal Employees' Group Life Insurance (FEGLI) services as emergency services under the Antideficiency Act. Second, this rule also implements section 1110(c)(2) of FY20 NDAA that deems employees furloughed as a result of a lapse in appropriations to be in pay status, for purposes of enrolling or changing enrollment in the FEHB Program. Third, this final rule also ensures, pursuant to section 1111 of the FY20 NDAA, continuation of coverage under the Federal Employees Dental and Vision Insurance Program (FEDVIP) and the Federal Long Term Care Insurance Program (FLTCIP) for enrollees who are furloughed or excepted from furlough and working without pay due to a lapse in appropriations, and provides that coverage may not be cancelled as a result of nonpayment of premiums or other periodic charges due to such a lapse. The rule also clarifies that upon the end of a lapse in appropriations, FEDVIP and FLTCIP premiums will be paid from back pay or may be paid back from a source other than backpay for FLTCIP enrollees who elected to make payments directly to the Carrier. This final rule adopts the proposed rule as published.

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

**FOR FURTHER INFORMATION CONTACT:** Julia Elam, Program Analyst, at (202) 606-2128 or Padma Shah, Senior Policy Analyst, at (202) 606-2128.

**SUPPLEMENTARY INFORMATION:** On July 20, 2020, OPM published proposed regulations (85 FR 43743) to do the following during a furlough as a result of lapse of appropriations: designate FEHB and FEGLI services as emergency service under the Antideficiency Act; deem furloughed employees and employees excepted from furlough and working without pay as a result of a lapse in appropriations to be in a pay status for the purposes of enrolling or changing FEHB enrollment; ensure the continuation of FEDVIP and FLTCIP coverage. The rule amends 5 CFR parts 870, 875, 890, and 894. OPM provided 30 days for the public to comment on the proposed rule. The comment period closed on August 19, 2020. OPM received 7 public comments and one informal comment.

FEGLI is administered by OPM in accordance with Chapter 87 of Title 5 of the U.S. Code and implementing regulations (title 5, part 87, and title 48, chapter 21 of the Code of Federal Regulations). The FEHB Program is administered by OPM in accordance with Title 5 Chapter 89, United States Code and implementing regulations (title 5, parts 890, 892 and title 48, chapter 16). FEDVIP was created as a result of the enactment of the Federal Employee Dental and Vision Benefits Enhancement Act of 2004, Public Law 108-496, and certain TRICARE-eligible individuals who are authorized under section 715 of the National Defense Authorization Act of Fiscal Year 2017, Public Law 114-328, became eligible for FEDVIP. FLTCIP was created as a result of the enactment of the Long Term Care Security Act of 2000, Public Law 106-265.

### **Response to Comments**

OPM received comments from three professional associations, one FEHB Carrier, and one carrier organization, as well as four comments that were outside the scope of this rule. In addition, we received feedback from a benefits administrator. All the commenters were

supportive of the regulation's goal to continue FEDVIP and FLTCIP benefits during a lapse in appropriations and to designate certain FEGLI and FEHB services as emergency services. There was agreement that designating these as emergency services ensures the safety of Federal employees and provides a sense of stability while employees are furloughed. The commenters also supported that the rule ensures that furloughed employees and employees working without pay can continue to enroll and make enrollment changes in the FEHB Program.

The professional organizations commented that lapses in appropriations cause significant financial uncertainty and strain on furloughed employees. The commenters stated the proposed rule would work to provide employees with security and peace of mind during the economic uncertainty surrounding a lapse in appropriations. They also stated that the regulation ensures furloughed employees' health needs are met, making them better equipped to return to work when appropriations are restored. OPM agrees that the regulation can have a positive impact on Federal employees who may be impacted by a lapse in appropriations.

The FEHB Carrier also stated that maintaining health insurance benefits are a matter of human safety. The commenter also agreed with the rule ensuring that furloughed employees and employees working without pay as a result of a lapse in appropriations, can continue to enroll and update their enrollments in health insurance coverage during lapses in appropriations. The commenter stated that the rule will not have a negative impact on its FEHB line of business, since during the 2018-2019 lapse in appropriations, it continued to process enrollments and enrollment changes. The commenter also supported the continuation of vision and dental benefits for employees during lapses in appropriations.

The carrier organization indicated that the proposed rule was consistent with the FY20 NDAA, Public Law 116-92, and had been drafted in a manner that would improve program administration. OPM agrees that the regulation can improve program administration and believes it can assist in processing and continuing benefits during a lapse in appropriations.

The benefits administrator provided feedback about back pay payments for missed FLTCIP and FEDVIP premiums and expressed concern about double deductions for FEDVIP premiums since, prior to this rule, the practice was for the Program Administrator to collect two missed premium payments each month until the previously unpaid premiums are caught up when employees returned to work and received pay upon the end of a lapse in appropriations. The commenter also stated that currently not all payroll providers can process past premiums for FEDVIP and FLTCIP from back pay when a lapse in appropriations ends. The commenter suggested that the rule allow unpaid FLTCIP premiums during a lapse in appropriations be paid by adjusting future deductions as was done during the most recent extended government shutdown. OPM declines to revise the regulation to allow for adjusting future deductions to make payments for premiums. Section 1111 of the FY20 NDAA directs that FLTCIP premiums be paid from back pay or may be paid back from a source other than backpay for FLTCIP enrollees who elected to make payments directly to the Carrier. Therefore, we are finalizing the regulatory text in 5 CFR 875.302(c)(1) as originally proposed, stating that if premium payments are made by Federal payroll or annuity deduction, or uniformed services retirement pay deduction, premiums will be paid to the Carrier from back pay made available as soon as practicable upon the end of such a lapse. OPM encourages payroll providers to make necessary systems change so that back pay can be used as payments for premiums missed during a lapse in appropriations.

The benefits administrator also had concerns about FEDVIP premiums being paid to the Carrier from the enrollee's back pay since only one shared service center can process back payments. It suggested that the regulatory text also include that premiums can be paid from adjustments made to future deductions. It also commented that during the last shutdown the decision to pay back pay was not made until the end of the shutdown and asked how it will know whether to direct bill enrollees.

OPM declines to adjust the regulatory text based on these comments. Section 1111 of the FY20 NDAA directs that FEDVIP premiums be paid from back pay. Therefore, we are finalizing the regulatory text in 5 CFR 894.405(c) and 5 CFR 894.406(c) as originally proposed, stating that premiums will be paid to the Carrier from back pay made available as soon as practicable upon the end of such a lapse. We would like to clarify that enrollees who have been furloughed or excepted from furlough and working without pay will not be billed for services during a lapse in appropriations and coverage should continue. As explained in the proposed rule, assuming Congress appropriates back pay as authorized by 31 U.S.C. 1341(c)(2), FEDVIP premiums will be paid to the Carrier from the enrollee's back pay made available as soon as practicable upon the end of such a lapse. However, we would like to provide a technical correction to the preamble of the proposed rule. If Congress does not appropriate back pay, the Program Administrator may collect missed premiums by adjusting future deductions.

OPM is issuing this final rule with no changes.

### **Expected Impact of the Final Rule**

OPM expects that the regulatory changes which designate certain FEHB Program and FEGLI services for purposes of section 1342 of Title 31, United States Code, as services for emergencies involving the safety of human life or the protection of property Antideficiency Act, will have a positive effect on enrollees impacted by a lapse in appropriations. The updated FEHB regulations will allow Government agencies to continue to employ Federal officers and employees to perform services such as enrolling an individual in an FEHB plan or changing the enrollment of an individual enrolled in FEHB during a lapse in appropriations. The amended FEGLI regulations will assist FEGLI enrollees since it allows agencies to employ officers or employees to perform FEGLI services during a lapse in appropriations. These services include activities related to enrollment, changing enrollment, temporary extension of coverage and conversion, eligibility, certification of coverage, and matters relating to reemployed annuitants and survivor annuitants.

OPM anticipates that the additional FEHB regulatory changes will assist employees who are furloughed or excepted from furlough who may want to enroll, or will assist enrollees who may experience a qualifying life event and may want to make enrollment changes. Under the rule as finalized, an employee, who is furloughed or excepted from furlough and working without pay as a result of a lapse in appropriations, is deemed to be in pay status, during the lapse, for purposes of enrolling and change enrollment in the FEHB Program. Prior to this regulation, such an employee might experience challenges with enrollment or enrollment changes since generally, an employee needs to be in pay status in order to enroll or change enrollment in the FEHB Program. In addition, prior to this rule FEHB services were not designated as emergency services and employees or officers performing those services might have not been allowed to perform those services during a lapse in appropriations.

OPM expects these regulation changes for the continuation of FLTCIP and FEDVIP during a lapse in appropriations will ensure enrollees who are furloughed or excepted from furlough and working without pay to continue FLTCIP and FEDVIP coverage without having their coverage cancelled. Once the lapse in appropriations has ended, FLTCIP premiums will be paid from back pay or may be paid back from a source other than backpay (i.e. automatic bank withdrawal or direct bill) for FLTCIP enrollees who elected to make payments directly to the Carrier. FEDVIP premiums will be paid back from back pay once the lapse in appropriations has ended. OPM anticipates these changes to the regulation will ensure Carriers receive payments for missed premiums that occurred during a lapse in appropriations.

### **Regulatory Impact Analysis**

OPM has examined the impact of this rulemaking as required by Executive Order 12866 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 rulemaking is not a significant regulatory action under Executive Order 12866.

### **Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

### **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.

### **Civil Justice Reform**

This regulation meets the applicable standard set forth in Executive Order 12988.

### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

### **Congressional Review Act**

The Congressional Review Act (5 U.S.C. 801 et seq.) requires rules (as defined in 5 U.S.C. 804) to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this action before its effective date, as required by 5 U.S.C. 801. OMB's Office of Information and Regulatory Affairs has determined that this is not a "major rule" as defined by the Congressional Review Act (5 U.S.C. 804(2)).

### **Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)**

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

## **List of Subjects**

### **5 CFR Part 870**

Administrative practice and procedure, Government employees, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Retirement.

### **5 CFR Part 875**

Administrative practice and procedure, Employee benefit plans, Government contracts, Government employees, Health insurance, Military personnel, Organization and functions, Retirement.

### **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, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

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Alexys Stanley,

Regulatory Affairs Analyst.



Accordingly, OPM amends title 5, Code of Federal Regulations parts 870, 875, 890, and 894 as follows:

## **PART 870 - FEDERAL EMPLOYEES' GROUP LIFE INSURANCE PROGRAM**

1. The authority citation for part 870 is revised to read as follows:

Authority: 5 U.S.C. 8716; Sec. 870.106 also issued under section 1110(b) of Pub. L. 116-92, 133 Stat. 1198 (5 U.S.C. 8702 note); Sec. 870.302(a)(3) also issued under sections 11202(f), 11232(e), and 11246(b) and (c) of Pub. L. 105-33, 111 Stat. 251, section 7(e) of Pub. L. 105-274, 112 Stat. 2419, and section 145 of Pub. L. 106-522, 114 Stat. 2472; Sec. 870.302(a)(3)(ii) also issued under section 153 of Pub. L. 104-134, 110 Stat. 1321; Secs. 870.302(b)(8), 870.601(a), and 870.602(b) also issued under Pub. L. 110-279, 122 Stat. 2604 (2 U.S.C. 2051); Subpart E also issued under 5 U.S.C. 8702(c); Sec. 870.601(d)(3) also issued under 5 U.S.C. 8706(d); Sec. 870.510 also issued under section 1622(b) of Pub. L. 104-106, 110 Stat. 521 (36 U.S.C. 5522); Sec. 870.703(e)(1) also issued under section 502 of Pub. L. 110-177, 121 Stat. 2542 (5 U.S.C. 8701 note); Sec. 870.705 also issued under 5 U.S.C. 8714b(c) and 8714c(c); and Subpart J also issued under section 599C of Pub. L. 101-513, 104 Stat. 2064 (5 U.S.C. 5561 note), as amended.

### **Subpart A - Administration and General Provisions**

2. Add § 870.106 to read as follows:

#### **§ 870.106 Designation of FEGLI services as emergency services under the Antideficiency Act.**

(a) Any services by an officer or employee relating to benefits under this part, shall be deemed, for purposes of section 1342 of Title 31, United States Code, as services for emergencies involving the safety of human life or the protection of property.

(b) The designation of services as emergency services shall apply to any lapse in appropriations beginning on or after December 20, 2019, the date of enactment of Section 1110(d) of Public Law 116-92.

## **PART 875—FEDERAL LONG TERM CARE INSURANCE PROGRAM**

3. The authority citation for part 875 is revised to reads as follows:

Authority: 5 U.S.C. 9008; Pub. L. 116-92, 133 Stat. 1198 (5 U.S.C. 8956 note).

### **Subpart C - Cost**

4. Amend § 875.302 by adding paragraph (c) to read as follows:

#### **§ 875.302 What are the options for making premium payments?**

\* \* \* \* \*

(c) Notwithstanding paragraph (b) of this section, if you are an enrollee who is furloughed or excepted from furlough and working without pay during a lapse in appropriations, your FLTCIP coverage will stay in effect through such a lapse. Your coverage may not be cancelled as a result of nonpayment of premiums or other periodic charges due during such lapse. Pursuant to the National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92, such continuation of coverage during a lapse in appropriations applies to any contract for long term care insurance coverage under 5 U.S.C. chapter 90 entered into before, on, or after December 20, 2019.

(1) If your premium payments are made by Federal payroll or annuity deduction, or uniformed services retirement pay deduction, premiums will be paid to the Carrier from back pay made available as soon as practicable upon the end of such a lapse. If your premium payments are made by pre-authorized debit or by direct billing, you have the option of continuing to pay premiums while you are furloughed or excepted from furlough and working without pay, or not making premium payments. If you opt not to make premium payments during this period, you will be contacted by the Carrier regarding premiums due and must pay premiums to the Carrier as soon as practicable upon the end of the lapse.

(2) Upon the end of a lapse in appropriations, premiums will be required from all impacted enrollees in accordance with enrollees' method of payment, as described in paragraph (c)(1) of this section. If you do not pay the required premiums as soon as practicable upon the end of the lapse when due, your coverage will terminate pursuant to § 875.412.

## **PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM**

5. The authority citation for part 890 is revised to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.102 also issued under sections 11202(f), 11232(e), and 11246 (b) of Pub. L. 105–33, 111 Stat. 251; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521 (36 U.S.C. 5522); Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604 (2 U.S.C. 2051); Sec. 890.113 also issued under section 1110 of Pub. L. 116–92, 133 Stat. 1198 (5 U.S.C. 8702 note); Sec. 890.301 also issued under section 311 of Pub. L. 111–3, 123 Stat. 64 (26 U.S.C. 9801); Sec. 890.302(b) also issued under section 1001 of Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029 (42 U.S.C. 300gg–14); Sec. 890.803 also issued under 50 U.S.C. 3516 (formerly 50 U.S.C. 403p) and 22 U.S.C. 4069c and 4069c–1; subpart L also issued under section 599C of Pub. L. 101–513, 104 Stat. 2064 (5 U.S.C. 5561 note), as amended; and subpart M also issued under section 721 of Pub. L. 105–261 (10 U.S.C. 1108), 112 Stat. 2061.

### **Subpart A - Administration and General Provisions**

6. Add § 890.113 to read as follows:

#### **§ 890.113 Designation of FEHB Program services as emergency services under the Antideficiency Act.**

(a) Any services by an officer or employee under this part and part 892 of this chapter relating to the enrollment of an individual in a health benefits plan under this chapter, or changing the enrollment of an individual already so enrolled, shall be deemed, for purposes of

section 1342 of Title 31, United States Code, as services for emergencies involving the safety of human life or the protection of property.

(b) The designation of services as emergency services shall apply to any lapse in appropriations beginning on or after December 20, 2019, the date of enactment of Section 1110(d) of Public Law 116-92.

### **Subpart C – Enrollment**

7. Amend § 890.301 by revising the section heading and adding a heading for paragraph (n) and paragraph (o) to read as follows:

#### **§ 890.301 Opportunities for employees to enroll or change enrollment; effective dates.**

\* \* \* \* \*

(n) *Determination of lowest-cost nationwide plan option.* \* \* \*

(o) *Pay status during a lapse in appropriations.* An employee, who is furloughed or excepted from furlough and working without pay as a result of a lapse in appropriations, is deemed to be in pay status, during the lapse, for purposes of this section.

### **PART 894—FEDERAL EMPLOYEES DENTAL AND VISION INSURANCE PROGRAM**

8. The authority citation for part 894 is revised to read as follows:

Authority: 5 U.S.C. 8962; 5 U.S.C. 8992; Subpart C also issued under section 1 of Pub. L. 110-279, 122 Stat. 2604 (2 U.S.C. 2051); and Sec. 894.601(b) also issued under Pub. L. 116-92, 133 Stat. 1198 (5 U.S.C. 8956 note).

### **Subpart D - Cost of Coverage**

9. Amend § 894.405 by adding paragraph (c) to read as follows:

**§ 894.405 What happens if I go into nonpay status or if my pay/annuity is insufficient to cover the allotments?**

\* \* \* \* \*

(c) If you are a FEDVIP enrollee, who due to a lapse in appropriations is furloughed or excepted from furlough and working without pay due to such a lapse, your FEDVIP coverage will not stop during such a lapse. Upon the end of such a lapse, premiums will be paid to the Carrier from back pay made available as soon as practicable upon the end of such a lapse.

10. Amend § 894.406 by adding paragraph (c) to read as follows:

**§ 894.406 What happens if my uniformed services pay or uniformed services retirement pay is insufficient to cover my FEDVIP premiums, or I go into a nonpay status?**

\* \* \* \* \*

(c) If you are a FEDVIP enrollee who is furloughed or excepted from furlough and working without pay due to such a lapse, your coverage will not stop during such a lapse. Upon the end of such a lapse, premiums will be paid to the Carrier using back pay.

**Subpart F—Termination or Cancellation of Coverage**

11. Amend § 894.601 by revising paragraph (b) to read as follows:

**§ 894.601 When does my FEDVIP coverage stop?**

\* \* \* \* \*

(b) If you go into a period of nonpay or insufficient pay (or insufficient uniformed services pay or uniformed services retirement pay) and you do not make direct premium payments, your FEDVIP coverage stops at the end of the pay period for which your agency, retirement system, *OWCP*, uniformed services or uniformed services retirement system last deducted your premium payment. *Exception:* If you are an enrollee who is furloughed or

excepted from furlough and working without pay during a lapse in appropriations, your FEDVIP coverage will not stop, and your enrollment may not be cancelled as a result of nonpayment of premiums or other periodic charges due. Pursuant to the National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92, such continuation of coverage during a lapse in appropriations applies to any dental or vision contract under 5 U.S.C. chapters 89A and 89B entered into before, on, or after December 20, 2019.

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