



OFFICE OF PERSONNEL MANAGEMENT

Civil Service Retirement System and Federal Employees' Retirement System; Notice to Same-Sex Spouses of Deceased Federal Employees or Annuitants Whose Marriages Lasted Less Than Nine Months

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: To establish entitlement to a survivor annuity or basic employee death benefit (“BEDB”) under the Civil Service Retirement System (CSRS) and the Federal Employees’ Retirement System (FERS), a “widow” or “widower” must have been married to a federal employee or annuitant for at least 9 months immediately before the employee or annuitant’s death. Same-sex spouses of deceased federal employees or annuitants whose spouse died prior to the time the 9-month marriage requirement could be satisfied may have been prevented or frustrated from satisfying this eligibility requirement as a result of provisions enacted under the Defense of Marriage Act (DOMA) or state laws prohibiting same sex marriages, now understood to have been unconstitutional. Therefore, this notice provides information about when, and under what circumstances, OPM will deem the 9-month marriage requirement satisfied, notwithstanding the actual duration of the marriage, to provide affected applicants with benefits they could have obtained had they been permitted to marry earlier in their states of residence.

DATES: If a same-sex surviving spouse of a deceased federal employee or annuitant is unable to show that the couple was married for at least 9-months immediately before the death of the employee or annuitant, and the marriage occurred *before, on, or within one year after* the Supreme Court issued *Windsor* on June 26, 2013 (or occurred *within one year after* the Supreme Court issued *Obergefell* on June 26, 2015, in circumstances where the couple resided in a jurisdiction that prohibited same-sex marriage at any time after the issuance of

Windsor), OPM will deem the 9-month marriage requirement satisfied for purposes of establishing entitlement to survivor annuity benefits and/or a BEDB.

FOR FURTHER INFORMATION CONTACT: Alison Pastor, (202) 606-0299

SUPPLEMENTARY INFORMATION:

On June 26, 2013, the U.S. Supreme Court issued *United States v. Windsor*¹, where it struck down section 3 of Defense of Marriage Act (DOMA), 1 U.S.C. 7 (1996), as unconstitutional inasmuch as it required the Federal Government to treat same-sex marriages differently from opposite-sex marriages for purposes of determining entitlement to federal benefits. The *Windsor* decision, however, did not address whether state laws prohibiting the legal recognition of same-sex marriages were similarly unconstitutional. As a result, there was a period after *Windsor* where some jurisdictions allowed for the legal recognition of same-sex marriages and some did not. Thereafter, the U.S. Supreme Court issued *United States v. Obergefell* on June 26, 2015² striking down state laws that prohibited the legal recognition of same-sex marriages as unconstitutional.

After the U.S. Supreme Court issued *Windsor*, OPM published two *Federal Register* notices. The first notice, 78 Fed. Reg. 47018 (Aug. 2, 2013), informed affected annuitants that they had an extended opportunity, until June 26, 2015—or two years after *Windsor* was issued—to elect a survivor annuity for a same-sex spouse if the couple had married prior to *Windsor* and the annuitant had been prevented by section 3 of DOMA from making a timely election. The second notice, 79 Fed. Reg. 57589 (Sept. 25, 2014), informed same-sex surviving spouses of deceased federal employees or annuitants who died before *Windsor*, that they may apply for survivor benefits or re-apply (if previously denied benefits as a result of DOMA) so that OPM may process their applications in accordance with the *Windsor* decision. In both these notices, OPM indicated that for purposes of determining entitlement

¹See 570 U.S. 744 (2013).

²See 576 U.S. 644 (2015).

to federal retirement benefits, OPM would recognize same-sex marriages legally entered into, whether or not the affected individual's domicile would legally recognize that marriage.

Thus, consistent with OPM's prior *Federal Register* notices and consistent with the holdings in *Windsor* and *Obergefell*, OPM is providing this notice to affected same-sex surviving spouses of deceased Federal employees or annuitants regarding when and under what circumstances OPM will deem the 9-month marriage requirement satisfied under 5 U.S.C. 8341(a), 8441(1)-(2) for purposes of determining an applicant's entitlement to survivor annuity benefits and/or (if applicable) to a BEDB:

If an applicant for survivor annuity benefits and/or a BEDB can show—

- The applicant was in a same-sex marriage with a deceased employee or annuitant;
and
- But for the 9-month marriage requirement under 5 U.S.C. 8341(a) and 8441(1)-(2), the applicant would be eligible for survivor annuity benefits (and/or a BEDB, if applicable);
and
- The applicant was married to the deceased employee or annuitant prior to the Supreme Court issuing *Windsor* on June 26, 2013;
or
- The applicant was married to the deceased employee or annuitant within one year from the date the Supreme Court issued *Windsor* on June 26, 2013;
or
- The applicant was married to the deceased employee or annuitant within one year *after* the Supreme Court issued *Obergefell* on June 26, 2015, in circumstances where the couple resided in a jurisdiction that prohibited same-sex marriage at any time after *Windsor*

—OPM will deem the 9-month marriage requirement satisfied for purposes of determining

entitlement to survivor annuity benefits and/or a BEDB.

Additionally, if an affected applicant (as indicated above) was married to the deceased annuitant *after retirement*, and is additionally unable to show that the annuitant elected a survivor annuity benefit on the applicant's behalf within 2 years of marriage, as required by 5 U.S.C. §§ 8341(b)(3), 8339(j)(5)(C) and (k)(2), 8416(b)-(c), and 8442(a)(2), the applicant may submit evidence to OPM showing that the annuitant intended to elect a survivor annuity for the applicant, and that but for the provisions under DOMA and/or state laws prohibiting same-sex marriage, the annuitant would have timely elected a survivor annuity on the applicant's behalf. OPM will consider any documentary evidence for this purpose, either in its own files or submitted by the applicant, that shows that the annuitant attempted to elect a survivor annuity for the applicant through correspondence with OPM.

Determinations regarding an affected applicant's corresponding entitlement to Federal Employees Health Benefits (FEHB) will be governed by the provisions under chapter 89 of title 5, United States Code; part 890 of title 5, Code of Federal Regulations; and the guidance OPM published in its *Federal Register* notice, Post-DOMA Survivor Annuitant Federal Health Benefit Waiver Criteria, 80 Fed. Reg. 74,817 (Nov. 30, 2015).

HOW TO APPLY FOR BENEFITS: If you are an affected same-sex spouse of a deceased federal employee or annuitant, you may submit an application for death benefits to OPM, Standard Form (SF) 2800 for CSRS and SF 3104 for FERS (or you may resubmit an application if OPM previously denied you survivor annuity benefits or a BEDB because you could not establish you had met the 9-month marriage requirement). You may download these application forms from OPM's website at <http://www.opm.gov/forms/standard-forms/>, and may submit your applications to this address: Office of Personnel Management, Attention: DOMA-9MMR, P.O. Box 45, Boyers, PA 16017-0045. If, in the alternative, you would prefer OPM mail you an application for benefits or if you have questions regarding

submitting your application, you may write OPM using the address provided above, or you may call OPM's Retirement Information Office at 1-888-767-6738 or may send an email to retire@opm.gov.

Office of Personnel Management

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