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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 890

RIN 3206-AM74

Federal Employees Health Benefits Program Coverage for Certain Intermittent Employees

AGENCY: Office of Personnel Management.

ACTION: Interim final rule.

SUMMARY: The United States Office of Personnel Management (OPM) is issuing an interim final rule to amend the Federal Employees Health Benefits Program (FEHBP) regulations to make certain employees who work on intermittent schedules eligible to be enrolled in a health benefits plan under the FEHBP. This rule is intended to allow agencies such as the Federal Emergency Management Agency (FEMA) to apply to OPM for authorization to offer FEHBP coverage to intermittent employees engaged in emergency response functions.

DATES: This rule is effective November 9, 2012. OPM must receive comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Send written comments to Michael W. Kaszynski, Senior Policy Analyst, Planning and Policy Analysis, U.S. Office of Personnel Management, Room 3415, 1900 E Street NW, Washington, DC; or FAX to (202) 606-4640 Attn: Michael Kaszynski. You may also submit comments using the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Michael W. Kaszynski at

Michael.Kaszynski@opm.gov or (202) 606-0004.

SUPPLEMENTARY INFORMATION: On July 17, 2012, OPM issued an interim final regulation to extend eligibility for health insurance coverage under the Federal Employees Health Benefits program (FEHBP) to temporary firefighters and fire protection personnel. 77 FR 42417. In addition, in recognition of the fact that there may be other groups of employees not currently covered by the FEHB program because of the temporary nature of their appointments, the 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 FEHBP 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. OPM is currently reviewing the comments it received in response to its interim final regulation.

In the meantime, a major natural disaster, Hurricane Sandy, struck the East Coast of the United States at the end of October. 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 have gone without power, gasoline has been scarce, and massive flooding and cold temperatures have 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), have worked and continue to work 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 be exposed to dangerous conditions, and put their health and safety at risk in order to assist those who have been affected by the storm. Because many of these FEMA employees work intermittent schedules within the meaning of 5 C.F.R. 340.403, they are not eligible for FEHBP coverage under OPM's regulations, specifically 5 CFR 890.102(c)(3).

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. It is empowered to 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 has concluded that its current policy of categorically excluding intermittent employees from FEHBP coverage is no longer in the public interest and should be changed. Therefore, OPM is issuing this interim regulation to allow agencies to request FEHBP coverage for intermittent employees engaged in emergency response and recovery work as defined by the Stafford Act. In addition, if OPM grants any such requests, it is reserving the authority to limit FEHBP 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 FEHBP 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.

Waiver of Proposed Rulemaking

OPM is issuing this regulation as an interim final rule. Under section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 551 et seq.), an agency may issue a final rule without first publishing a general notice of proposed rulemaking when it determines, for good cause, that notice and public comment are impracticable, unnecessary, or contrary to the public interest. We have determined that this standard is satisfied.

Hurricane Sandy left death and massive destruction in its wake. Many of the people in the storm's path continue to be exposed both to the elements (just as colder weather has arrived) and to inherently hazardous conditions where they are located and are thus in immediate need of emergency assistance. FEMA is playing a major role, working with state and local partners, to provide this assistance. Therefore, the federal government has a critical need to deploy additional qualified emergency response workers to serve the American people.

Moreover, emergency response workers are voluntarily exposing themselves to hazardous working conditions every day. They have a need for health insurance coverage to obtain preventive care, to allow for early detection of potentially serious conditions, and to address any health issues that may arise as a result of their service. The regulatory obstacle preventing such agencies as FEMA from submitting a request for FEHBP coverage of these men and women should thus be eliminated without delay.

Because of these conditions, OPM has determined that it would be impracticable, unnecessary, and contrary to the public interest to delay putting the provisions of this interim final regulation in place until a public notice and comment process has been completed. We find good cause to waive the notice of proposed rulemaking and to issue this final rule on an interim basis. We will accept public comments on this interim final rule for 60 days.

We are also dispensing with the usual requirement that a new rule not take effect until 30 days after it is issued. Instead, this rule is effective immediately upon public display. Immediate effectiveness is authorized because this is a substantive rule granting an exception to the prohibition on providing health insurance coverage to intermittent employees. *See* 5 U.S.C. 553(d)(1). Moreover, for the reasons set forth above, there is good cause to make this rule effective immediately.

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 FEHB.

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 Parts 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Reporting and recordkeeping requirements, Retirement.

U.S. OFFICE OF PERSONNEL MANAGEMENT.

John Berry,
Director.

Accordingly, OPM is amending title 5, Code of Federal Regulations, Chapter I 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 paragraph (i) to read as follows:

§ 890.102 Coverage.

* * * * *

(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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