



Billing Code 6325-63

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 890

RIN: 3206-AM85

Federal Employees Health Benefits Program: Members of Congress and Congressional Staff

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a proposed rule to amend the Federal Employees Health Benefits (FEHB) Program regulations regarding coverage for Members of Congress and congressional staff.

DATES: OPM must receive comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Send written comments to Chelsea Ruediger, Planning and Policy Analysis, U.S. Office of Personnel Management, Room 2H28, 1900 E Street NW, Washington, DC 20415.

You may also submit comments using the *Federal eRulemaking Portal*:

<http://www.regulations.gov>. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Chelsea Ruediger at (202) 606-0004.

SUPPLEMENTARY INFORMATION: This proposed rule is intended to amend FEHB Program eligibility regulations to comply with section 1312 of the Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the Health Care and Education Reconciliation Act, Public Law 111-152 (the Affordable Care Act or the Act).

Subparagraph 1312(d)(3)(D) of the Affordable Care Act states that, “Notwithstanding any other provision of law . . . the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are– (I) created under this Act (or an amendment made by this Act); or (II) offered through an Exchange established under this Act (or an amendment made by this Act).” The Act defines “Member of Congress” as any member of the House of Representatives or the Senate and “congressional staff” as all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

Currently, Members of Congress (including Delegates to the House of Representatives and the Resident Commissioner from Puerto Rico) and congressional employees (which include each Member’s respective personal staffs, staffs of House and Senate leadership committees, other committee staff and administrative office staff) meet the definition of employee in 5 U.S.C. 8901 of title 5 and are, therefore, eligible to enroll in the FEHB Program.

While the Affordable Care Act does not amend 5 U.S.C. 8901, the effect of the “notwithstanding” clause of section 1312 is to limit the ability of Members of Congress and congressional staff to purchase health benefits plans for which OPM may contract under chapter 89. Section 1312 specifies that “the only health plans that the Federal Government may make available” are those that are either “created under” the ACA, or “offered through an Exchange established under” the Act. The health benefits plans for which OPM can contract under chapter 89 are not “created under” the ACA, nor are they offered through the Exchanges. Therefore,

Members of Congress and congressional staff who are employed by the official office of a Member of Congress may no longer purchase the health benefits plans for which OPM contracts under chapter 89. As part of their service, they are limited to purchasing plans from Exchanges. This proposed rule implements this mandate.

Effective Date of Termination of Coverage

Though the Affordable Care Act does not provide a specific effective date for Subparagraph 1312(d)(3)(D), OPM has concluded that the most reasonable reading of the statute is that enrollment in FEHB contracted plans under chapter 89 of title 5 will no longer be available to Members of Congress and congressional staff who are employed by the official office of a Member of Congress as of January 1, 2014, the date under the Act that Exchanges (also called Health Insurance Marketplaces) established under the Affordable Care Act will be available for providing health insurance coverage.

Accordingly, we are proposing that FEHB health plan enrollment for Members of Congress and congressional staff employed by the official office of a Member of Congress terminate (with a 31-day extension of coverage and opportunity for conversion) on the first day of the last pay period in which they are eligible for FEHB. FEHB coverage will continue through the end of the pay period in which enrollment is terminated. Therefore, the termination of coverage will be effective at midnight on December 31, 2013.

Members of Congress and Congressional Staff

The proposed rule defines a “Member of Congress” as a member of the Senate or of the House of Representatives, a Delegate to the House of Representatives (which includes delegates from the District of Columbia and the territories), and the Resident Commissioner of Puerto Rico. Under the Affordable Care Act, territories are not required to establish an Exchange but may elect to do so. We seek comment on the health plans made available to Members of Congress who represent territories that do not establish Exchanges.

The proposed rule utilizes the statutory definition for congressional staff. Because there is no existing statutory or regulatory definition of “official office,” the proposed rule delegates to the employing office of the Member of Congress the determination as to whether an employed individual meets the statutory definition. OPM seeks comment on this proposal.

Based on research related to the administration of congressional staffing, including communication with the respective House and Senate administrative and disbursement offices, OPM has determined that Members’ offices are best equipped to make the determination as to whether an individual is employed by the “official office” of that Member. OPM’s understanding is that congressional staff often have allocated to them a percentage of work as personal staff and a percentage of work as committee or leadership committee staff. It also is common for the percentage to change during the year. Moreover, staff are often unaware of these percentages or budgetary source of their compensation. OPM believes that allowing the employing office to make the determination as to whether particular individuals are employed by the “official office” is most appropriate, and will allow such determinations to be made by the

office of the Member of Congress, which is their employer. As part of their responsibility to make this determination, the employing offices shall be the final authority with respect to the determination for each individual. Under these proposed regulations, OPM will not review or overturn these determinations. OPM seeks comment on this proposed approach.

The proposed rule provides that a designation as a congressional staff member who is employed by the official office of a Member of Congress will be an annual designation made prior to October of each year for the following year based on expected work. The designation must be made prior to October of the year before the coverage year to allow the individual to participate in either the appropriate Exchange open season in October or the FEHB Program open season in November for the following year.

The proposed rule also states that the designation will be effective for the entire FEHB Program plan year during which the staff member works for that Member of Congress. OPM believes that it would be unduly disruptive for an individual to move back and forth from Exchange coverage to FEHB Program coverage mid-year. In addition, due to the complexity of congressional staffing assignments, OPM's understanding is that payroll changes may be made without the congressional staff member being aware of these changes. Therefore, OPM has proposed that individuals maintain their designations for an entire year so long as they continue to be employed by the same Member of Congress. OPM seeks comment on the feasibility of this method.

Clarification of Meaning of “Health Benefit Plan Under This Chapter” As Used in 5 U.S.C. 8905(b) and 5 U.S.C. 8906.

As noted above, the ACA circumscribes the ability of the Federal Government to offer health insurance to Members of Congress and certain congressional staff in connection with their service to only those plans offered on Exchanges. The ACA did not, however, alter the definition of “employee” as used in 5 U.S.C. 8901(1)(B) & (C) or the definition of “health benefits plan” under 5 U.S.C. 8901(6). Although, pursuant to its authority under chapter 89 of title 5, OPM will have no role in “contracting for” or “approving” health benefit plans that are offered through the Exchanges, there is no doubt that such plans fit within the definition of “health benefit plan” under 8901(6). This proposed regulation imposes no new requirements on qualified health plans or Exchanges.

Prior to the passage of the ACA, there was no need for OPM to clarify that the term “health benefits plan under this chapter” as used in section 8905(b) and 8906 included plans other than those health benefits plans for which OPM contracted or which OPM approved, pursuant to its authority under 5 U.S.C. 8902, 8903 and 8903a. Because there are now employees covered by chapter 89 who will be purchasing health benefits plans on Exchanges, we believe that it is appropriate to clarify that the provisions that authorize an employer contribution for “health benefits plans under this chapter,” and authorize the continuation of such coverage into retirement, includes all health benefits plans fitting within the definition set forth in 8901(6). The revisions adopted here have no impact on the availability to Members of Congress and Congressional Staff Members of the contribution established in 5 U.S.C. 8906. Health benefit plans, as defined at 5 U.S.C. 8901(6), will encompass health benefit plans offered through an Exchange.

The revisions adopted here also will have no impact on the ability of Members of Congress and congressional staff who are employed by the official office of a Member of Congress to continue being enrolled in their existing health benefit plans when they become annuitants. Pursuant to 5 U.S.C. 8905(b), an annuitant who at the time he/she becomes an annuitant was enrolled in a health benefit plan under chapter 89 (which, by definition, would include a health benefit plan offered through an Exchange) may continue his/ her enrollment in the health benefit plan offered through the Exchange under the conditions of eligibility prescribed by OPM in this part.

In order to establish that the contributions and withholdings will be appropriately accounted for pursuant to section 8909 of title 5, we have added new paragraph (h) to § 890.501. The two enrollment categories used by FEHB, self or self and family, are not generally applicable in an Exchange. In an Exchange, a family's premium will generally be based on the actual composition of the family (for example, one adult, two adults, one adult and two children, etc.). A state may also choose to establish family tiers that may differ from the two enrollment categories used by FEHB. Therefore, subparagraph (h)(1) reflects that OPM will apply the self and family contribution level to any Exchange enrollment category other than one adult/individual. Subparagraph (h)(2) clarifies the accounting issue with respect to payments for health benefits plans under Exchanges.

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 involves the issue of where Members of

Congress and certain congressional staff may purchase their health insurance, and does not otherwise alter the FEHB program.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 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

Administration and general provisions; Health benefits plans; Enrollment, Temporary extension of coverage and conversion; Contributions and withholdings; Transfers from retired FEHB Program; Benefits in medically underserved areas; Benefits for former spouses; Limit on inpatient hospital charges, physician charges, and FEHB benefit payments; Administrative sanctions imposed against health care providers; Temporary continuation of coverage; Benefits for United States hostages in Iraq and Kuwait and United States hostages captured in Lebanon; Department of Defense Federal Employees Health Benefits Program demonstration project; Administrative practice and procedure, Employee benefit plans, Government employees, Reporting and recordkeeping requirements, Retirement.

U.S. Office of Personnel Management.

Accordingly, OPM is proposing to amend title 5, Code of Federal Regulations as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1. The authority citation for part 890 is revised 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; Public Law 111-148, as amended by Public Law 111-152.

2. Amend §890.101 adding definitions for “congressional staff member” and “Member of Congress” to paragraph (a) to read as follows:

§ 890.101 Definitions; time computations.

(a) * * *

Congressional staff member means an individual who is a full-time or part-time employee employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

* * * * *

Member of Congress means a member of the Senate or of the House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner of Puerto Rico.

* * * * *

3. Amend §890.102 by adding paragraphs (c)(9) and (10) and revising paragraph (e) to read as follows:

§ 890.102 Coverage.

* * * * *

(c) * * *

(9) The following employees are not eligible to purchase a health benefit plan for which OPM contracts or which OPM approves under this subsection, but may purchase health benefit plans, as defined in 5 U.S.C. 8901(6), that are offered by an Exchange, pursuant to §1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the Health Care and Education Reconciliation Act, Public Law 111-152 (the Affordable Care Act or the Act):

(i) A Member of Congress.

(ii) A congressional staff member, if the individual works for a Member of Congress and is determined by the employing office of the Member of Congress to meet the definition of congressional staff member in § 890.101 of this part effective January 1, 2014, or in any subsequent calendar year. Designation as a congressional staff member shall be an annual designation made prior to October of each year for the following year. The designation shall be made for the duration of the year during which the staff member works for that Member of Congress beginning with the January 1st following the designation and continuing to December 31st of that year.

* * * * *

(e) With the exception of those employees or groups of employees listed in paragraph (e)(1) of this section, the Office of Personnel Management makes the final determination of the applicability of this section to specific employees or groups of employees.

(1) Employees identified in paragraph (c)(9)(i) and (ii) of this section.

(2) [Reserved]

* * * * *

Amend § 890.201 by adding paragraph (d) to read as follows:

§ 890.201 Minimum standards for health benefits.

* * * * *

(d) Nothing in this part shall limit or prevent a health insurance plan purchased through an Exchange, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the Health Care and Education Reconciliation Act, Public Law 111-152 (the Affordable Care Act or the Act), by an employee otherwise covered by 5 U.S.C. 8901(1)(B) and (C) from being considered a “health benefit plan under this chapter” for purposes of 5 U.S.C. 8905(b) and 5 U.S.C. 8906.

4. Amend § 890.303 by revising paragraph (b) to read as follows:

§ 890.303 Continuation of enrollment.

* * * * *

(b) *Change of enrolled employees to certain excluded positions.* Employees and annuitants enrolled under this part who move, without a break in service or after a separation of 3 days or less, to an employment in which they are excluded by § 890.102(c), continue to be enrolled unless excluded by § 890.102(c)(4), (5), (6), (7), or (9).

* * * * *

5. Amend §890.304 by revising paragraph (a)(1)(iii) to read as follows.

§ 890.304 Termination of enrollment.

(a) * * *

(1) * * *

(iii) The last day of the pay period in which his employment status or the eligibility of his position changes so that he is excluded from enrollment.

* * * * *

6. Amend §890.501 by adding paragraph (h) to read as follows:

§ 890.501 Government contributions.

* * * * *

(h)(1) The Government contribution for an employee who enrolls in a health benefit plan offered through an Exchange, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the Health Care and Education Reconciliation Act, Public Law 111-152 (the Affordable Care Act or the Act), or an annuitant whose enrollment in a health benefit plan offered through such an Exchange continues, pursuant to 5 U.S.C. 8905(b), shall be calculated in the same manner as for other employees and annuitants.

(2) Government contributions and employee withholdings for employees who enroll in a health benefit plan offered through an Exchange, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the Health Care and Education Reconciliation Act, Public Law 111-152 (the Affordable Care Act or the Act), or annuitants whose enrollment in a health benefit plan offered through such an Exchange

continues, pursuant to 5 U.S.C. 8905(b), shall be accounted for pursuant to 5 U.S.C. 8909 and such monies shall only be available for payment of premiums, and costs in accordance with 5 U.S.C. 8909(a)(2).

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