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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN: 3206-AM85

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

AGENCY: Office of Personnel Management.

ACTION: Final Rule.

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

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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

SUPPLEMENTARY INFORMATION: This final rule amends Federal Employees Health Benefits (FEHB) Program 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).

On August 8, 2013, the Office of Personnel Management (OPM) published a proposed rule inviting comments on amendments to the FEHB Program regulations. The 30-day comment period ended on September 9, 2013. In response to this proposed rule, OPM received nearly 60,000 comments. The comments are summarized and discussed below. OPM will provide additional guidance as deemed necessary.

Comments on section 1251(a) of the Affordable Care Act

Several commenters requested that OPM review Section 1251(a) of the Affordable Care Act, which provides continuity of coverage for individuals covered under a group health plan. These commenters suggested that Section 1251(a) provides grounds for “grandfathering” current FEHB-eligible Members of Congress and congressional staff members into their current coverage and applying the requirements of Section 1312 only to Members of Congress and congressional staff hired on or after January 1, 2014.

OPM is not amending the rule in response to these comments. While OPM acknowledges that, in general, the Affordable Care Act did not intend to disrupt existing health insurance coverage, in this context, the Act included clear and unambiguous language providing that all Members of Congress and congressional staff employed by the official office of a Member of Congress be subject to the terms of Section 1312 regardless of their dates of employment. Thus, the final rule implements Section 1312 of the Affordable Care Act as written.

Comments about the method by which Congressional staff are designated as covered by §1312 of the Affordable Care Act

OPM received several comments related to health care coverage for congressional staff and how staff will be designated for the purpose of determining which individuals are required to purchase their health insurance coverage from an Exchange.

OPM has not amended the final rule on the basis of these comments. OPM continues to believe that individual Members or their designees are in the best position to determine which staff work

in the official office of each Member. Accordingly, OPM will leave those determinations to the Members or their designees, and will not interfere in the process by which a Member of Congress may work with the House and Senate Administrative Offices to determine which of their staff are eligible for a Government contribution towards a health benefits plan purchased through an appropriate Small Business Health Options Program (SHOP) as determined by the Director. Nothing in this regulation limits a Member's authority to delegate to the House or Senate Administrative Offices the Member's decision about the proper designation of his or her staff. The final rule has been amended to provide an extension for staff designations affecting plan year 2014 only. Designations for individuals hired throughout the plan year should be made at the time of hire.

Comments on incorporating Exchange plans under the §8901 (6) definition of "Health Benefit Plan under This Chapter"

Some commenters questioned OPM's decision to incorporate Exchange qualified health plans into the Section 8901(6) definition of a health benefits plan. OPM maintains its position that, because the Affordable Care Act did not alter the definition of "health benefits plan" under 5 U.S.C. 8901(6) and because the statutory definition of "health benefits plan" would otherwise apply to an Exchange qualified health plan, this regulation is an appropriate exercise of OPM's interpretive authority under Chapter 89.

OPM has been provided the statutory authority to administer health benefits to Federal employees (as defined in 5 U.S.C. 8901(1)). Because Section 1312 of the Affordable Care Act did not remove Members of Congress or congressional staff from the Chapter 89 definition of

“employee,” it is within OPM’s interpretive authority under Chapter 89 to clarify that a Government contribution may be provided to, and to establish the means for a Government contribution towards health benefits for, Members of Congress and congressional staff, just as we do for other Federal employees.

Comments on Government contributions

Numerous commenters questioned OPM’s proposal to extend a Government contribution for Members of Congress and congressional staff purchasing health plans through the individual market Exchanges. Many commenters expressed their view that a Government contribution is antithetical to the intent of Section 1312 of the Affordable Care Act, which they interpret to require Members of Congress and congressional staff to purchase the same health insurance available to private citizens on the Exchanges. Commenters asserted that Members of Congress and congressional staff should be subject to the same requirements as citizens purchasing insurance on the Exchanges, including individual responsibility for premiums and income restrictions for premium assistance.

As described in the proposed rule, because there are now employees covered by chapter 89 who will be purchasing health benefits plans on Exchanges, we believe that it is appropriate that the provisions that authorize an employer contribution for “health benefits plans under this chapter” includes health benefits plans fitting within the definition set forth in Section 8901(6). Nothing in this rule or the law prevents a Member of Congress or designated congressional staff from declining a Government contribution for himself or herself by choosing a different option for his/her health insurance coverage.

The proposed rule was silent on whether eligible individuals would select qualified health plans through an Exchange in the individual or small group market by way of the SHOP. Because a Government contribution is, in essence, an employer contribution, the final rule clarifies that Members of Congress and designated congressional staff must enroll in an appropriate SHOP as determined by the Director in order to receive a Government contribution. SHOPs are designed to provide employer-sponsored group health benefits and are, therefore, the appropriate environment in which to provide an employer contribution to Members of Congress and congressional staff. Further, this ensures that Members of Congress and congressional staff do not have additional choices in the individual Exchanges with a Government contribution that other individuals lack. Given the location of Congress in the District of Columbia, OPM has determined that the DC SHOP, known as the DC Health Link Small Business Market administered by the DC Health Benefit Exchange Authority, is the appropriate SHOP from which Members of Congress and designated congressional staff will purchase health insurance in order to receive a Government contribution. OPM intends to work with the DC Health Benefits Exchange to implement this rule.

Nothing in the final rule limits an individual from purchasing health insurance through other methods including the individual market Exchanges. Members of Congress and designated congressional staff are subject to the same requirements as citizens purchasing insurance on the Exchanges, including individual responsibility. Access to the Government contribution through the SHOP limits their eligibility for premium tax credits available through the individual market Exchanges.

OPM was also asked to provide additional details on how the Government contribution will be calculated. The formula for Government contributions is set forth in 5 U.S.C. Section 8906.

Comments on retirement

Numerous commenters have urged OPM to reconsider its position that Section 1312 affects annuitant health insurance benefits.

Section 1312 only addresses the health benefits plans that the Federal Government may offer Members of Congress and congressional staff employed by the official office of a Member of Congress while they are employed in those positions. This provision neither amended any of the sections of Chapter 89 relating to annuitant health benefits nor otherwise indicated that the provision applies to annuitants. Because we agree with the central premise of these comments, we have deleted the proposed language in Section 890.501(h)(1) and (2) referring to annuitants. We make this change for the additional reason that, otherwise, Members of Congress and congressional staff would have broader health insurance options in the Exchange in retirement than are available to other Federal annuitants. Members of Congress and congressional staff will be subject to the same rules of participation in the FEHB Program in retirement as other Federal annuitants.

During the comment period, OPM was asked to clarify the effect of this regulation on current congressional retirees. Under the final rule, congressional retirees who are currently enrolled in plans contracted for and approved by OPM will not be affected and will continue enrollment in

their current plans. In addition, OPM was asked if time covered under a plan purchased through the appropriate SHOP with a Government contribution would count towards the 5-year requirement to carry coverage into retirement. Time spent under a plan purchased on the appropriate SHOP as determined by the Director and purchased pursuant to Section 1312 of the Affordable Care Act will count towards the time requirement outlined in Chapter 89 Section 8905(b).

OPM was also asked to clarify the impact of this regulation on reemployed annuitants. This final rule does nothing to affect the choices available to a reemployed annuitant. As a general matter, upon reemployment an annuitant participating in the FEHB Program may choose either to continue that coverage without premium conversion through OPM or to have his/her enrollment transferred to his/her employing office.

Coverage of Abortion Services

OPM received over 59,000 comments regarding coverage of abortion services for Members of Congress and congressional staff. More than 51,000 of these requested that plans available to Members of Congress and congressional staff include abortion services.

Current law prohibits the use of Federal funds to pay for abortions, except in the case of rape, incest, or when the life of the woman is endangered, and the Smith Amendment in particular makes no funds available “to pay for abortions or administrative expenses in connections with health plans under the FEHBP which provides any benefits or coverage for abortions.” Neither the proposed nor final regulation alters these prohibitions. Under OPM’s final rule, no Federal

funds, including administrative funds, will be used to cover abortions or administer plans that cover abortions. Unlike the health plans for which OPM contracts pursuant to 5 U.S.C. 8902, 8903 and 8903a, OPM does not administer the terms of the health benefits plans offered on an Exchange. Consequently, while plans with such coverage may be offered on an Exchange, OPM can and will take appropriate administrative steps to ensure that the cost of any such coverage purchased by a Member of Congress or a congressional staffer from a designated SHOP is accounted for and paid by the individual rather than from the Government contribution, consistent with the general prohibition on Federal funds being used for this purpose.

Comments on effective and termination dates

OPM was asked to clarify the termination date for current FEHB plan coverage. Current FEHB health plan enrollment for Members of Congress and congressional staff employed by the official office of a Member of Congress will terminate at midnight on December 31, 2013. Members of Congress and designated congressional staff who choose to purchase health insurance through the appropriate SHOP as determined by the Director may do so with an effective date of January 1, 2014. OPM will provide additional guidance regarding effective and termination dates as deemed necessary.

Comments on eligibility for other Federal benefits

OPM received one comment requesting clarification on the eligibility of Members of Congress and congressional staff to participate in other Federal benefits programs administered by OPM. Section 1312 and this rule only pertain to Members' or congressional staff's health benefits plans.

Comments about insurance coverage for representatives of U.S. Territories

OPM received a comment from the representatives of U.S. Territories. Because these Members of Congress represent geographic areas where there may not be a health insurance Exchange, commenters expressed concern that these representatives would lose health coverage if removed from current FEHB plan eligibility. Three solutions were suggested: allow these Members and their staff to maintain current FEHB plan coverage, allow them to enroll in a DC-based or Federal Exchange, or allow them to enroll in a Federal Exchange established for territories for this purpose.

After reviewing these options, OPM has determined that, like other Members of Congress and congressional staff, representatives from the U.S. Territories and their staff who want to receive a Government contribution will enroll for coverage through the appropriate SHOP as determined by the Director.

Comments about the Affordable Care Act

OPM received several comments expressing opinions about the Affordable Care Act as a whole. Other comments more specifically addressed the requirement in Section 1312 to remove Members of Congress and congressional staff from current FEHB plan coverage. Some indicated that the decision to remove Members of Congress and congressional staff from current FEHB plan coverage would have detrimental effects to these individuals. Others felt that the provision should only apply to Members of Congress and not to congressional staff. Others indicated that Members of Congress should not be provided with employer-based health coverage at all. The

majority of these comments have been addressed in the above discussion. The remaining comments regarding the Affordable Care Act are beyond the scope of this regulation and are not addressed.

Additional comments

OPM received additional comments regarding coverage of pathology services, Health Reimbursement Arrangements, and employer shared responsibility. These comments have been deemed outside the scope of this regulation and are not addressed in the final rule. In addition, OPM received requests for operational details about the administration of benefits for Members of Congress and designated congressional staff. Most of these questions have been responded to in the final rule. In addition, OPM plans to provide operational guidance in future communications as deemed necessary.

In addition to the changes described above, the final rule includes non-substantive, editorial changes to improve clarity.

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.

Elaine Kaplan,

Acting Director.

Accordingly, OPM is amending chapter I, 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 by adding definitions of “Congressional staff member”, “Member of Congress”, and “Shop” to paragraph (a) in alphabetical order 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.

* * * * *

SHOP has the meaning given in 45 CFR 155.20.

* * * * *

§ 890.102 Coverage.

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

* * * * *

(c) ***

(9) The following employees are not eligible to purchase a health benefit plan for which OPM contracts or which OPM approves under this paragraph (c), but may purchase health benefit plans, as defined in 5 U.S.C. 8901(6), that are offered by an appropriate SHOP as determined by the Director, 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):

(i) A Member of Congress.

(ii) A congressional staff member, if the individual is determined by the employing office of the Member of Congress to meet the definition of congressional staff member in §890.101 as of January 1, 2014, or in any subsequent calendar year. Designation as a congressional staff member shall be an annual designation made prior to November 2013 for the plan year effective January 1, 2014 and October of each year for subsequent years or at the time of hiring for individuals whose employment begins during the year. The designation shall be made for the duration of the year during which the staff member works for the 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]

* * * * *

4. Amend § 890.201 to add a new paragraph (d) to read as follows:

§ 890.201 Minimum standards for health benefit plans.

(d) Nothing in this part shall limit or prevent a health insurance plan purchased through an appropriate SHOP as determined by the Director, 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.

* * * * *

5. Amend §890.303 by revising paragraph (b) 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 paragraphs (c) (4), (5), (6), (7), or (9) of § 890.102.

* * * * *

6. 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 or her employment status or the eligibility of his or her position changes so that he or she is excluded from enrollment.

* * * * *

7. Amend §890.501 to add a new paragraph (h) to read as follows:

§ 890.501 Government contributions.

(h) The Government contribution for an employee who enrolls in a health benefit plan offered through an appropriate SHOP as determined by the Director 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) shall be calculated in the same manner as for other employees.

(2) Government contributions and employee withholdings for employees who enroll in a health benefit plan offered through an appropriate SHOP as determined by the Director , 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) shall be accounted for pursuant to section 8909 of title 5 and such monies shall only be available for payment of premiums, and costs in accordance with section 8909(a)(2) of title 5.

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