

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 890

RIN 3206-AN33

#### Federal Employees Health Benefits (FEHB) Program: FEHB Employee Premium Contributions for Employees in Leave Without Pay or Other Nonpay Status

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The United States Office of Personnel Management (OPM) is issuing a proposed rule to provide flexibility to agencies regarding payment for Federal Employees Health Benefits (FEHB) coverage for employees entering leave without pay (LWOP) or any other type of nonpay status, except when nonpay is as a result of a lapse of appropriations. The regulation also affects employees who have insufficient pay to cover their premium contribution. Under current regulations, a Federal agency pays the employee's share and the Government's share of FEHB premiums if an employee in LWOP or other nonpay status elects to continue coverage while in LWOP or other nonpay status and agrees to repay the agency (referred to interchangeably as "employing office") for their employee share upon return to employment for up to 365 days. In other words, the agency must allow an employee to incur a debt for the employee contribution to premium. This outlay of funds may result in an agency incurring a significant amount of debt. This proposed rule would provide an agency with the flexibility to require that all of its employees in LWOP or other nonpay status, except as a result of lapse of appropriations, pay their employee share for FEHB coverage directly to the agency and keep the payments current, if those employees elect to continue FEHB enrollment. Under 5 U.S.C. 8906(e), if an employee

in LWOP status chooses to continue FEHB enrollment, the employee and Government contributions shall be paid on a current basis; and, if necessary, the agency shall approve advance payment of a portion of basic pay sufficient to cover the employee contribution. The agency will then recover the amount that it advanced from the employee upon his or her return to employment.

Under current regulations employees in LWOP or other nonpay status can elect to make premium payments directly to an agency and keep payments current. Alternatively, employees in these circumstances may elect not to pay premiums directly on a current basis and can incur a debt such that their employing office advances the payments to cover their premiums. The employee agrees that upon his or her return to employment, or upon pay becoming sufficient, the employing office will deduct, in addition to the current pay period's premium, the accrued unpaid premiums from the employee's salary until the debt is recovered. Under this proposed rule, an agency may choose to require that an employee pay premiums directly to the agency on a current basis if the agency makes a determination that all employees in non-pay or insufficient pay status must pay premiums currently. The proposed rule also specifies the procedures for disenrollment for nonpayment of premiums.

**DATES:** Comments are due on or before October 31, 2016.

**ADDRESSES:** Send written comments to Julia Elam, Planning and Policy Analysis, U.S. Office of Personnel Management, Room 4316, 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:** Julia Elam at (202) 606-0004.

**SUPPLEMENTARY INFORMATION:** OPM is revising the options and procedures that employing offices may use when an employee elects to continue FEHB coverage in leave without pay (LWOP) or other nonpay status, except as a result of lapse of appropriations, when the employee's pay is insufficient to cover premiums. Under 5 U.S.C. 8906(e)(1)(a), an employee enrolled in a

health benefits plan who is placed in a leave without pay or other nonpay status may have his coverage and the coverage of members of his family continued under the plan for not to exceed one year. According to the statute, the agency is responsible for ensuring the employee and Government contributions are paid to the Employees Health Benefits Fund on a current basis; and if necessary, the head of the agency may approve advance payment of employee premiums, which the agency can later recover from the employee. The employee may alternatively elect to terminate FEHB enrollment. This proposed rule does not affect agencies' advancing payment of health insurance premiums for employees with the following categories of qualifying LWOP, which includes the following: Family and Medical Leave Act, performance of duty in the uniformed services under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*, receiving medical treatment under Executive Order 5396 (Jul. 7 1930), and periods during which workers compensation is received under the Federal Employees Compensation Act, 5 U.S.C. chapter 81. We solicit comments on the exemption of categories of employees in LWOP from this proposed rule.

Under current regulations at 5 CFR 890.502(b), an employing office must inform the employee about available health benefits choices as soon as it becomes aware that an employee's premium payments cannot be made because he or she will be, or already is in a LWOP or other nonpay status, or the employee's pay is insufficient to cover premium. The employing office must give the employee written notice of the options to terminate coverage or continue coverage with either the direct pay or the advance payment option. The employee then must elect in writing to either continue health benefits coverage or terminate it, while in LWOP or other nonpay status or pay is insufficient to cover premiums. If the employee's coverage is continued, the employee may pay the employee share of the premium directly to the agency, or the employee may opt for the agency to advance payment of the employee portion of the premium and agree to repay the premiums to the agency upon returning to employment or upon pay

becoming sufficient. Accordingly, there is the possibility that the employee will incur a debt to the agency if the employee chooses to continue coverage and receive an advanced payment and does not return to work or is, for some reason, unable to repay the premium amount. Under § 890.502(b)(2)(ii), the employing office can pay the employee's contributions and recover the amount of accrued unpaid premiums as a debt to the Federal Government upon the employee's return to employment or when the employee's pay becomes sufficient.

Under this proposed regulation, each agency would make the determination of whether its employees in LWOP or other nonpay status would be required to pay the employee share of premiums directly to the agency on a current basis, or whether it is necessary, within the meaning of 5 U.S.C. 8906(e)(1)(B), for the agency to approve advance payment of the employee share of the premium. The agency would make the determination for all its affected employees at least once every 2 years. OPM is proposing this change to complement the FEHB Modification of Eligibility final regulation (79 FR 62325, published on October 17, 2014) which allows generally for certain temporary, intermittent and seasonal employees to enroll in the FEHB Program if they are expected to work at least 130 hours per month for at least 90 days. OPM recognizes that the recent expansion of eligibility for FEHB coverage may impact an agency's budget due to the required FEHB Government health benefit contributions for newly eligible employees who elect to participate in FEHB coverage and go into LWOP or other nonpay status based on the intermittent nature of the work performed.

OPM proposes for § 890.502(b) to establish that an agency have the discretion to determine whether it is necessary for employees in LWOP or other nonpay status to be advanced a portion of basic pay sufficient to pay current employee contribution to premium, or whether the employees must be required to pay the employee contribution of the FEHB premium currently to the agency. The determination made by the agency must apply to all employees in non-pay or insufficient pay status, and it cannot be made on a case-by-case basis. When assessing whether it is necessary to pay advanced employee contributions for premiums, the regulation provides that an agency shall balance the needs of the agency, including available financial resources and ease of operation, with those of its employees, including typical

job series and pay grades and access to direct payment methods. Agencies should also consider that if they do advance employee contributions for premiums, these employees will incur a debt which may not occur if the employee had an option to pay premiums directly to the agency. We are seeking comment on these and other factors agencies should utilize to make this determination. The agency may reassess its determination every one or two years and provide notification to all employees. An agency may default to its original determination and is not required to make a new determination at the time of reassessment. If an agency chooses to require its employees in these circumstances to make direct premium contributions on a current basis, it must provide written notice to the affected employees. This section also explains that an agency may choose the other option to exercise its discretion to approve advance payment of the employee portion of the premium while its employees are in LWOP or other nonpay status. This would be a change to current regulations at § 890.502(b)(2)(ii), which presently provides that an employee may choose this option if he or she does not does not wish to pay the premium directly to the agency and keep the payments current.

OPM proposes for § 890.502(c)(2) to establish procedures for terminating enrollment for employees in LWOP or nonpay status that fail to directly pay premiums currently. The regulation also proposes notice requirements for the employee to receive regarding termination of enrollment.

Under this proposed regulation, an employee that is in LWOP or other nonpay status or has insufficient pay to cover his or her share of FEHB premiums will have his or her enrollment cancelled if he or she has signed an agreement to directly pay premiums on a current basis and fails to make these payments currently, or enrollment terminated if the employee does not return the written notice. The proposed regulation gives an employee the opportunity to seek reinstatement from the agency if he or she can show they were prevented from paying premiums, or from returning the written notice, by circumstances beyond their control. The employee must describe the circumstances that prevented him or her from making a payment or returning the notice within 31 days after receiving notice of disenrollment. Under this proposal, termination of an enrollment for failure to return a written notice entitles the employee to a 31-day temporary extension of coverage and

opportunity to convert to an individual policy, while failure to pay premiums after electing to continue FEHB enrollment is considered a cancellation. OPM is seeking comments on the implementation of this proposed rule for employees currently on LWOP or other nonpay status in which pay is insufficient to cover the employee share of FEHB premiums. OPM proposes making the rule effective for employees who enter into LWOP or other nonpay status after the date of the rule and not affecting employees currently on LWOP or other nonpay status.

### Regulatory Impact Analysis

OPM has examined the impact of this proposed rule 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 rule is not considered a major rule because there will be a minimal impact on costs to Federal agencies.

### 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 affects health insurance benefits of Federal employees and annuitants.

### 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 restates existing rights, roles and responsibilities of State, local, or tribal governments.

### List of Subjects on 5 CFR Part 890

Administrative practice and procedure, Government employees, Health insurance.

U.S. Office of Personnel Management.

**Beth F. Cobert,**  
*Acting Director.*

For the reasons set forth in the preamble, the Office of Personnel Management proposes to amend 5 CFR part 890 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 101, 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.

### Subpart E—Contributions and Withholdings

■ 2. In § 890.502:

- a. Redesignate paragraphs (b) through (f) as paragraphs (c) through (g).
- b. Add new paragraph (b).
- c. Revise newly redesignated paragraph (c).

The addition and revision read as follows:

#### **§ 890.502 Withholdings, contributions, LWOP, premiums, and direct premium payment.**

\* \* \* \* \*

(b) *Agency flexibility to require direct payment of employee premiums on a current basis.* An agency may require all employees that enter leave without pay (LWOP) or other nonpay status except for as a result of lapse of appropriations, whose pay is insufficient to cover premium, pay their employee premium contributions directly to the agency on a current basis or; if necessary, the agency may elect to provide advance payment of the employee portion of premium for all employees in these circumstances. In determining whether it is necessary to pay employee contributions for premiums, an agency shall balance the needs of the agency, including available financial resources and ease of operation, with those of its employees, including typical job series and pay grades and access to direct payment methods. The agency may reassess its policy decision every one or two years and should provide notification to all its employees. An agency must choose one of these two options for all employees that enter nonpay status or whose pay is insufficient to cover premium, except for certain qualifying LWOP categories.

(1) For purposes of this paragraph (b), qualifying LWOP categories are exempt from an agency determination. Regardless of the agency's determination under paragraph (b), an

agency shall advance payment for employee premiums for employees utilizing the following categories of LWOP: For purposes of the Family and Medical Leave Act, for performance of duty in the uniformed services under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*, for receiving medical treatment under Executive Order 5396 (Jul. 7 1930), and for periods during which workers compensation is received under the Federal Employees Compensation Act, 5 U.S.C. chapter 81.

(2) If an employing office requires an employee to pay the employee share of premium contributions directly to the agency on a current basis for the period during which an employee specifies he or she will be in LWOP or other nonpay status, the employing office must provide the employee written notice and an agreement that he or she will be required to pay premiums directly to the agency on a current basis by following the procedures as outlined in paragraphs (c)(2) of this section. The employee must sign the agreement if he or she chooses to continue coverage under an agency's election to require that payments be made directly on a current basis.

(3) If necessary, an agency may elect to advance a portion of basic pay sufficient to pay current employee contributions to premium for employees entering LWOP or other nonpay status. If the agency so elects, the employing office must provide the employee written notice and an agreement that he or she will incur a debt to the extent of the advanced premiums, and will be required to repay the unpaid premiums from salary deduction, upon returning to pay status or upon payment becoming sufficient to cover premiums, until the debt is recovered in full, by following the procedures as outlined in paragraphs (c)(2) of this section.

\* \* \* \* \*

(c) *Procedures when an employee enters a leave without pay (LWOP) or other nonpay status or pay is insufficient to cover premium.* The employing office must tell the employee about available health benefits choices as soon as it becomes aware that an employee's premium payments cannot be made because he or she will be or is already in a leave without pay (LWOP) status or other type of nonpay status. (This does not apply when nonpay is as a result of a lapse of appropriations or employees have been furloughed. In these instances, the premiums will accumulate and be paid upon return to duty). The employing office must also tell the employee about the option

available to them as determined by the agency or that the employee can elect to terminate enrollment when an employee's pay is not enough to cover the premiums.

(1) The employing office must provide the employee written notice of the option available to them as determined by the agency and consequences as described in paragraphs (c) (2) (i) and (ii) of this section and will send a letter by first class mail if it cannot give it to the employee directly. If it mails the notice, it is deemed to be received within 5 days.

(2) The employee must elect in writing to either continue their FEHB enrollment under the option that the employer has chosen or terminate it. (Exception: An employee who is subject to a court or administrative order as discussed in § 890.301(g)(3) cannot elect to terminate his or her enrollment as long as the court or administrative order is still in effect and the employee has at least one child identified in the order who is still eligible under the FEHB Program, unless the employee provides documentation that he or she has other coverage for the child(ren).) The employee may continue enrollment by returning a signed form to the employing office within 31 days after he or she receives the notice (45 days for an employee residing overseas). When an employee mails the signed form, its postmark will be used as the date the form is returned to the employing office. If an employee elects to continue their enrollment under the option that the employer has chosen, he or she must elect in writing the option that has been specified by the employing office for all employees as described in paragraph (b). The employee would agree to the following as specified by the employing office:

(i) If the agency has elected to allow all employees to pay the premium directly to the agency and keep the payments current, the employee must agree to pay the premium directly, or;

(ii) If the agency has elected to allow all employees to incur a debt as described in paragraph (b)(2) he or she must agree that upon returning to employment or upon pay becoming sufficient to cover the premiums, the employing office will deduct, in addition to the current pay period's premiums, an amount equal to the premiums for a pay period during which the employee was in a leave without pay (LWOP) or other nonpay status, or pay was not enough to cover premiums. The employing office will continue using this method to deduct the accrued unpaid premiums from salary until the debt is recovered in full.

The employee must also agree that if he or she does not return to work or the employing office cannot recover the debt in full from salary, the employing office may recover the debt from whatever other sources it normally has available for recovery of a debt to the Federal Government.

(iii) If an employee elects to terminate enrollment, the effective date of the termination is retroactive to the end of the last pay period in which the premium was withheld from pay.

(3) If the employee does not return the signed form within the time period described in paragraph (c)(2) of this section, the employing office will terminate the enrollment and notify the employee in writing of the termination.

(4) If an employee has not elected to terminate enrollment and is prevented by circumstances from returning a signed form indicating the employee elects to continue their enrollment under the option that the employer has chosen, the employee may request reinstatement.

(i) If the employee is prevented by circumstances beyond his or her control from returning a signed form to the employing office within the time period described in paragraph (c)(2) of this section, he or she may write to the employing office and request reinstatement of the enrollment. The employee must describe the circumstances that prevented him or her from returning the form. The request for reinstatement must be made within 30 calendar days from the date the employing office gives the employee notice of the termination. The employing office will determine if the employee is eligible for reinstatement of coverage. When the determination is affirmative, the employing office will reinstate the enrollment of the employee retroactive to the date of termination. If the determination is negative, the employee may request a review of the decision from the employing office (see § 890.104).

(ii) If the employee is subject to a court or administrative order as discussed in § 890.301(g)(3), the coverage cannot terminate unless the employee has provided documentation to the employing office that he or she has other coverage for the child or children, and the employing office has determined the coverage is appropriate, as discussed in 5 CFR 890.301(g)(3). If the employee does not return the signed form, the coverage will continue and the employee will incur a debt to the Federal Government, and the employing office will recover the amount of accrued unpaid premium as a debt

under as discussed in paragraph(c)(2)(ii) of this section.

(5) Terminations of enrollment under paragraphs (c)(2) and (3) of this section are retroactive to the last day of the last pay period in which the premium was withheld from pay. The employee and covered family members, if any, are entitled to the 31-day temporary extension of coverage and opportunity to convert to a non-group policy under § 890.401. An employee whose coverage is terminated under this paragraph may re-enroll upon his or her return to duty in pay status in a position in which the employee is eligible for coverage under this part.

(6) If an employee signs and returns a form to the employing office stating that he or she will make premium payments directly to the agency and keep the payments current in accordance with paragraph (c)(2)(i) but fails to pay currently, as soon as it becomes aware of the nonpayment of premium, the employing office shall notify the employee that he or she has 31 days to make payments current or she or he will have coverage terminated retroactively to the day that follows the last day of the last pay period for which a current employee contribution was received.

(i) If the employee does not make a payment within the 31 days of the notification, the employing office must terminate the employee's enrollment retroactively to the day that follows the last day of the last pay period for which a current employee contribution was received.

(ii) Termination of an enrollment for failure to pay premiums after the employee had elected to continue coverage and to pay premiums currently under (c)(2)(i) and (c)(6), is considered a cancellation as described in § 890.401(a)(2) and the employee is not entitled to a 31-day temporary extension of coverage or opportunity to convert to an individual policy.

(iii) If an employee that has enrollment terminated under this part was prevented by circumstances beyond his or her control from making payment within 31 days after receipt of the notice of termination, he or she may request reinstatement of coverage by writing to the employing office. Such a request must be filed within 30 calendar days from the date of termination and must be accompanied by verification that the employee was prevented by circumstances beyond his or her control from paying within the time limit. The verification must describe the circumstances that prevented him or her from making a payment within 31 days after receipt of the notice of termination.

The employing office will determine if the employee is eligible for reinstatement of coverage; and, when the determination is affirmative, notify the carrier of the decision. The notice must set forth the findings on which the decision was based. If the employing office determines that the employee was prevented from making payments current within the timeframe due to circumstances beyond his or her control, the employee's enrollment will be reinstated retroactive to the date of termination.

(iv) An employee whose coverage is terminated under paragraph (c)(6) may enroll upon his or her return to duty in pay status in a position in which the employee is eligible for coverage.

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[FR Doc. 2016-20565 Filed 8-29-16; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 205

[Document Number AMS-NOP-16-0069; NOP-16-08]

#### National Organic Program: Notice of Interim Instruction on Material Review

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice of availability of interim instruction with request for comments.

**SUMMARY:** The Agricultural Marketing Service (AMS) is announcing the availability of an interim instruction document intended for use by accredited certifying agents. The interim instruction document is entitled: NOP 3012: Material Review. This instruction specifies the criteria and process that USDA accredited organic certifying agents (certifiers) must follow when approving substances for use in organic production and handling. This instruction is directed at certifiers, who must meet certain terms and conditions as part of their accreditation. The AMS invites interested parties to submit comments about this instruction document.

**DATES:** To ensure that NOP considers your comment on this interim instruction before it begins work on the final version, submit written comments on the interim instruction by October 31, 2016.

**ADDRESSES:** Submit written requests for hard copies of this interim instruction to Dr. Paul Lewis, Standards Division, National Organic Program (NOP),