



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

AUG - 3 2012

The Honorable Tom Coburn, M.D.
United States Senate
172 Russell Senate Office Building
Washington, DC 20510

Dear Senator Coburn:

This is in response to your letter of July 20, 2012, regarding the U.S. Office of Personnel Management's (OPM) recent issuance of an interim final rule to provide immediate coverage to wildland firefighters under the Federal Employees Health Benefits Program (FEHBP). I join you in commending the men and women who put themselves in harm's way to fight these wildfires to preserve the life and property of people in the affected areas. Answers to your specific questions are provided below.

1. In announcing the regulation, OPM Director Berry explained the rule met a presidential directive to ensure that temporary federal employees who are currently fighting wildfires across the country "are eligible for the same health insurance available to other federal employees, retirees and their families." What were the findings of any assessment OPM conducted to assess other health coverage options available these newly eligible personnel?

OPM did not assess whether there were health coverage options available to the firefighters outside of the FEHBP, which allows Federal agencies to provide group health insurance coverage to their employees.

2. The regulation explained that "the only circumstances under which temporary employees previously could secure coverage under the FEHB program are those set forth in 5 U.S.C. 8906a which allows temporary employees who have completed one full year of continuous employment to secure coverage at their own expense. Temporary firefighters and fire protection personnel do not generally qualify for coverage under 5 U.S.C. 8906a because they do not work for full one-year periods." Please provide the additional legal analysis OPM conducted to conclude the Administration held sufficient authority under 5 U.S.C. 8913(b) to modify eligibility requirements with regulation, absent legislative action.

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 FEHBP. The law specifically authorizes OPM to include or exclude employees on the basis of "the nature and type of their employment" or "conditions pertaining to their appointments," including the duration of the appointment. Including the temporary wildland firefighters falls within this broad statutory authority to determine FEHBP coverage.

3. In the regulation, OPM announced the Administration will in the future announce additional categories of personnel who will be eligible for participation in the FEHB

1

program. From the regulation: "OPM recognizes that there may be other groups of employees not currently covered by the FEHB program because of the temporary nature of their appointments, but who are similarly situated to firefighting personnel in that they perform emergency response services. Accordingly, OPM has also added a new subsection (i) to its regulations that permits agencies to request that OPM extend FEHB coverage to such employees. OPM intends to construe this subsection narrowly, applying it only to employees who are engaged in emergency response services similar to the services being performed by those responding to the wildfires, and only when requested by their employing agencies." What are these additional categories of personnel who will be eligible for participation in the FEHB program? When will OPM make this announcement, and does OPM anticipate using an interim final regulation for that action as well?

OPM did not commit to cover additional groups of employees. Rather, it has provided a vehicle for agencies to request coverage for employees who are performing emergency response services similar to those being provided by the wildland firefighters. OPM is currently preparing guidance for agencies to follow when submitting requests for additional coverage. We will evaluate any requests we receive and, if we decide that extension of coverage to any additional group of employees is appropriate, we will determine at that point which vehicle to use to do so.

4. The regulation includes a certification that the 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." Please provide a copy of any economic impact assessment conducted for this regulation.

OPM made this certification in compliance with Executive Order 12866 (September 1993, Regulatory Planning and Review) 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 OPM estimates, based on the number of temporary employees potentially affected by this regulation, that premiums paid by Federal employees and agencies will be well below this threshold.

5. Please provide a copy of any FEHB premium impact assessment conducted for this regulation, or explain why no such assessment was conducted.

Based on an assessment of position descriptions and occupational codes, as well as discussions with Federal agency representatives, we determined that approximately 5,000 to 8,000 firefighting personnel would be eligible to obtain coverage under the new rule. We also estimated that the firefighting personnel would work an average of four months in a fire season. Using an average 2012 Government Contribution for a self only enrollment of \$385 a month, or \$865 for self and family, if all eligible firefighters enrolled, we project the cost to the Federal government would be approximately \$14 to \$22 million for 2012. We do not expect all eligible firefighters

to enroll, however, as some may have alternative health insurance arrangements. Accordingly, we expect that the actual cost to the government will be significantly lower.

6. Please provide a copy of the ten-year cost to federal taxpayers for this new regulation, or explain why no such assessment was conducted.

We estimate the ten-year cost to be in the range of \$184-295 million.

7. The use of an interim final regulation may be permissible, but by its design, it is usually relatively rare since it effectively circumvents a normal transparent public comment period. As the regulation explained, "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." Please provide OPM's explanation of why allowing public comment was contrary to the public interest or unnecessary.

To clarify, OPM is soliciting public comment for a 60-day period. We will consider making changes to the rule based on any comments we receive.

We did, however, make the determination that it was appropriate to issue the regulation as an interim final rule with immediate effect because the legal standard for doing so was met. As we explained in the Federal Register notice:

The United States is experiencing an active wildfire season. Not only are tens of thousands of acres in Western states being blackened, but the wildfires are creating significant environmental damage and health hazards. Water quality, for example, is being compromised up to 100 miles from the burn. Big fires have significant consequences, especially for air quality. A series of large wildfires in Canada in 1995 created massive plumes of carbon monoxide that drifted south through Boston, New York and Washington. The 2003 wildfire season in California caused such a substantial increase in particulate matter, carbon monoxide and nitrous oxide that the fires polluted the air quality outside and inside homes as well. Forest fires can also result in large releases of sediment into rivers and streams, which can clog reservoirs and undermine the quality of drinking water. Therefore, the federal government has a critical need to hire and deploy qualified firefighters to serve the American people.

Moreover, the firefighters and fire protection personnel are putting their lives on the line and voluntarily exposing themselves to hazardous working conditions every day. They have an immediate need for health insurance coverage to obtain preventive care and to allow for early detection of

potentially serious conditions, in addition to addressing any health issues that arise during this fire season. Allowing these men and women the opportunity to obtain health insurance coverage will help them to protect themselves and their families.

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.

8. According to some reports, approximately 5,000 to 10,000 firefighters will be eligible for enrollment under the new regulation. What is OPM's estimate of possible total enrollment in the first year and first five years?

OPM estimates 5,000 to 8,000 firefighters would be eligible to participate in the FEHBP this fire season. How many of those eligible will actually enroll for coverage is yet to be determined. We are working closely with Federal agencies to determine the total enrollees under this new regulatory provision. The number of actual enrollees in year one will be used as a predictor for future enrollment.

9. The interim regulation offers "health insurance coverage under the Federal Employees Health Benefits (FEHB) program to temporary firefighters and fire protection personnel." What is the projected average length of federal service for an eligible firefighter or fire protection personnel?

The interim final regulation allows firefighters who are not eligible based on their type of appointment or work schedule to enroll for health insurance under the FEHBP. While some firefighters are on types of appointments (e.g. permanent) that allow them to return each year, others are hired through an annual recruitment process. Temporary employees are generally hired for less than six months each year. We do not have projected lengths of service for temporary employees.

10. As you know, under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA; P.L. 99-272), employers must offer the option of continued health insurance coverage at group rates to qualified employees and their families who are faced with loss of coverage due to certain events. Coverage generally lasts 18 months. Will temporary firefighters and fire protection personnel newly covered under this regulation be eligible for COBRA after the termination of their "temporary" service?

When the firefighters' employment ends, they will have a 31-day extension of coverage under their health plan, as do all Federal employees covered by FEHBP. During that period, they can contact their plan and convert it to an individual

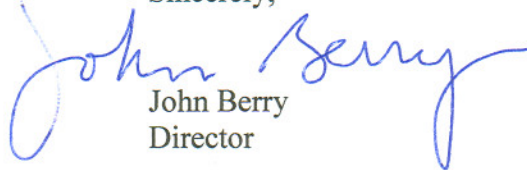
contract with the health plan. Alternatively, they can enroll in Temporary Continuation of Coverage (TCC) to continue their coverage through a FEHBP plan. TCC is available to eligible former employees for up to 18 months following the end of employment. TCC enrollees can choose among the same plans that they had as an employee, but they pay the full premium (government and enrollee share) plus a 2 percent administrative fee.

11. Under current law, in 2014, would temporary firefighters and fire protection personnel be subject to the individual mandate tax under the Patient Protection and Affordable Care Act (P.L. 111-148 and P.L. 111-152) if they do not utilize COBRA coverage or other coverage after the termination of their "temporary" service?

OPM is not responsible for administering the provisions of the Affordable Care Act (ACA) requiring maintenance of minimum essential coverage and assessing any penalties associated with that requirement. It is our understanding that the ACA contains various exceptions to and exemptions from that requirement. Accordingly, whether the requirement to maintain minimum essential coverage and the penalty associated with noncompliance would apply to each of the firefighters and fire protection personnel would depend on the application of the legal provisions regarding the requirement to each individual employee.

I appreciate the opportunity to respond to your interest in the matter. If you have any further questions, please feel free to contact Tania A. Shand, Director, Congressional and Legislative Affairs at (202) 606-1300.

Sincerely,

A handwritten signature in blue ink that reads "John Berry". The signature is fluid and cursive, with a large initial "J" and "B".

John Berry
Director