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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 315 and 752

RIN 3206-AL30

#### Career and Career-Conditional Employment and Adverse Actions

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations governing Federal adverse actions. The final regulations conform the adverse action rules regarding employee coverage to binding judicial decisions interpreting the underlying statute.

**DATE:** *Effective Date:* The rule is effective March 10, 2008.

**FOR FURTHER INFORMATION CONTACT:** Sharon L. Mayhew by telephone at (202) 606-2930; by FAX at (202) 606-2613; or by e-mail at [CWRAP@opm.gov](mailto:CWRAP@opm.gov).

**SUPPLEMENTARY INFORMATION:** On May 1, 2007, OPM published at 72 FR 23772 (2007) proposed amendments to the regulations in 5 CFR part 752, to conform the adverse action rules regarding the procedural and appeal rights of individuals serving a probationary period in the competitive service or a trial period in the excepted service to binding judicial decisions interpreting the underlying statute. We also proposed amendments to 5 CFR part 315 to make corresponding changes to the career and career-conditional employment rules governing probationary periods. The public comment period on the proposed regulations ended on July 2, 2007. OPM carefully considered the three comments received.

Two commenters supported and commended OPM's proposed amendments to the regulations in parts

315 and 752 of title 5 CFR. They recommended OPM make similar changes to procedural and appeal rights in 5 CFR part 432, the regulations governing performance-based actions. One of the commenters suggested additional amendments be made to 5 CFR part 315 to cover actions taken under 5 CFR part 432. These suggestions, however, are beyond the scope of the proposed regulations.

The third commenter supported OPM's proposed amendments to the regulations in parts 315 and 752 of title 5 CFR. The commenter also advocated Congressional legislation to support OPM's interpretation of the statute at 5 U.S.C. 7511 and recommended that OPM repeat previously stated interpretive guidance regarding trial periods for excepted service appointments pending conversion to the competitive service. See 57 FR 20041. These recommendations are beyond the scope of the proposed regulations and will not be further addressed.

Finally, while supporting the language in the proposed regulations, the third commenter expressed concern that a literal reading of the Federal Circuit decision in *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144 (Fed. Cir. 1999), could potentially result in coverage, for example, of a recently hired nonpreference eligible excepted service employee serving in a temporary position not pending conversion to the competitive service. As stated in the supplementary information accompanying the notice of proposed rulemaking, 72 FR at 23773 (2007), OPM's reading of the statute with regard to those employees, among others, is consistent with statute, and supported by the Merit Systems Protection Board's (Board) decision in *Johnson v. Department of Veterans Affairs*, 99 MSPR 362 (2005), which was decided after *Van Wersch*. OPM, like the Board, considers this interpretation to be consistent with *Van Wersch* and in accordance with the law.

For these and all the reasons stated in the proposed regulations published at 72 FR 23772 (2007), OPM issues these final regulations without modification, except for two minor non-substantive grammatical changes in § 752.401(11) and § 752.401(13).

### E.O. 12866, Regulatory Review

The Office of Management and Budget has reviewed this rule in accordance with E.O. 12866.

### Regulatory Flexibility Act

OPM has determined these amendments will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

### List of Subjects in 5 CFR Parts 315 and 752

Administrative practice and procedure, Government employees.

Office of Personnel Management.

**Linda M. Springer,**

*Director.*

■ Accordingly, OPM amends parts 315 and 752 of title 5, Code of Federal Regulations, as follows:

### PART 315—CAREER AND CAREER CONDITIONAL EMPLOYMENT

■ 1. The authority citation for part 315 continues to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, and 3302; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218, unless otherwise noted; and E.O. 13162; secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec 315.603 also issued under 5 U.S.C. 8151. Sec 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp., p. 111. Sec 315.606 also issued under E.O. 11219, 3 CFR, 1964-1965 Comp., p. 303. Sec 315.607 also issued under 22 U.S.C. 2506. Sec 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp., p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(d). Sec 315.611 also issued under Section 511, Pub. L. 106-117, 113 Stat. 1575-76. Sec 315.708 also issued under E.O. 13318. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp., p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp., p. 264.

■ 2. Revise § 315.803 to read as follows:

#### § 315.803 Agency action during probationary period (general).

(a) The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

(b) Termination of an individual serving a probationary period must be

taken in accordance with subpart D of part 752 of this chapter if the individual has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less and is not otherwise excluded by the provisions of that subpart.

- 3. Revise § 315.804(a) to read as follows:

**§ 315.804 Termination of probationers for unsatisfactory performance or conduct.**

(a) Subject to § 315.803(b), when an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

\* \* \* \* \*

- 4. Revise § 315.805 introductory text to read as follows:

**§ 315.805 Termination of probationers for conditions arising before appointment.**

Subject to § 315.803(b), when an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

\* \* \* \* \*

**PART 752—ADVERSE ACTIONS**

- 1. The authority citation for part 752 continues to read as follows:

**Authority:** 5 U.S.C. 7504, 7514, and 7543.

- 2. Revise § 752.401 (c)(1) and (2), (d)(11) and (12), and add (d)(13) to read as follows:

**§ 752.401 Coverage.**

\* \* \* \* \*

(c) \* \* \*

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period;

(2) An employee in the competitive service who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

\* \* \* \* \*

(d) \* \* \*

(11) A nonpreference eligible employee serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service, unless they meet the requirements of paragraph (c)(5) of this section;

(12) An employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by separate statutory authority in the absence of any provision to place the employee within the coverage of chapter 75 of title 5, United States Code; and

(13) An employee in the competitive service serving a probationary or trial period, unless they meet the requirements of paragraph (c)(2) of this section.

- 3. Revise § 752.402 (b) to read as follows:

**§ 752.402 Definitions.**

\* \* \* \* \*

(b) *Current continuous employment* means a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.

\* \* \* \* \*

[FR Doc. E8-2121 Filed 2-6-08; 8:45 am]

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**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Parts 550 and 892**

**RIN 3206-AJ88**

**Allotments From Federal Employees**

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing final regulations dealing with the use of OPM's allotment authority to allow for pretax salary reductions as part of OPM's flexible benefits plan. Using an allotment from an employee's pay to the employing agency allows certain payments (e.g., employee health insurance premiums, contributions to a flexible spending arrangement, and contributions to a health savings account) to be paid with pretax dollars, as provided under section 125 of the Internal Revenue Code. In addition, these regulations finalize certain policy clarifications and changes to make the regulations more readable.

**DATES:** *Effective Date:* The final regulations are effective on March 10, 2008.

**FOR FURTHER INFORMATION CONTACT:** Kevin Kitchelt by telephone at (202) 606-2858; by fax at (202) 606-0824; or by e-mail at *pay-performance-policy@opm.gov*.

**SUPPLEMENTARY INFORMATION:** On November 17, 2006, the U.S. Office of Personnel Management (OPM), issued interim regulations (71 FR 66827) on OPM's allotment authority at 5 CFR part 550, subpart C, to allow for pretax salary reductions as part of OPM's flexible benefits plan. Using an allotment from an employee's pay to the employing agency allows certain payments (e.g., employee health insurance premiums, contributions to a flexible spending arrangement, and contributions to a health savings account) to be paid with pretax dollars, as provided under section 125 of the Internal Revenue Code. The interim regulations also made certain policy clarifications and changes to make the regulations more readable

The 60-day comment period ended on January 16, 2007. During the comment period, OPM received one comment that was outside the scope of these regulations. Therefore, we are adopting the interim regulations as final with a correction to a section title.

**Regulatory Flexibility Act**

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

**E.O. 12866, Regulatory Review**

The Office of Management and Budget has reviewed this rule in accordance with E.O. 12866.

**List of Subjects in 5 CFR Parts 550 and 892**

Administrative practice and procedure, Claims, Government employees, Wages, Health insurance, and Taxes.

U.S. Office of Personnel Management.

**Linda M. Springer,**  
*Director.*

- Accordingly, the interim rule amending 5 CFR parts 550 and 892 which was published at 71 FR 66827 on November 17, 2006, is adopted as final with the following change:

**PART 550—PAY ADMINISTRATION (GENERAL)**

**Subpart C—Allotments From Federal Employees**

- 1. The authority citation for subpart C of part 550 continues to read as follows:

**Authority:** 5 U.S.C. 5527; E.O. 10982, 3 CFR 1959-1963 Comp., p.502.