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5 CFR Parts 315, 550, 591, et al.

Same-Sex Domestic Partners: Noncompetitive Appointment of Certain Former Overseas Employees; Change in Definitions; Child Care Costs for Lower Income Employees; Presumption of Insurable Interest; Final Rules; Expanding Coverage of Children Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums; Proposed Rule

**OFFICE OF PERSONNEL
MANAGEMENT**

5 CFR Part 315

RIN 3206-AM35

**Noncompetitive Appointment of
Certain Former Overseas Employees**

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations to establish that an employee's same-sex domestic partner qualifies as a family member for purposes of eligibility for noncompetitive appointment based on overseas employment. The intended effect of this regulation is to ensure same-sex domestic partners are treated as family members.

DATES: This rule is effective August 20, 2012.

FOR FURTHER INFORMATION CONTACT: Michelle Glynn, 202-606-0960, Fax: 202-606-2329 by TDD: 202-418-3134, or email: michelle.glynn@opm.gov.

SUPPLEMENTARY INFORMATION: On July 28, 2011, OPM published proposed regulations in the **Federal Register** at 76 FR 45204 to establish that an employee's same-sex domestic partner qualifies as, and should be treated as, a family member for purposes of eligibility for noncompetitive appointment based on overseas employment, as provided in § 315.608 of title 5, Code of Federal Regulations. This final rule makes the proposed changes in response to the Obama Administration's request, in Presidential Memoranda dated June 17, 2009, and June 2, 2010, that agencies consider extending benefits, where possible, to same-sex domestic partners, and OPM's determination to make benefits available to same-sex domestic partners, to the extent feasible, in this context. In particular, the rule is responsive to Section 1(a)(iii) of the Presidential Memorandum dated June 2, 2010, entitled "Extension of Benefits to Same-Sex Domestic Partners of Federal Employees," which requested OPM to "issue a proposed rule that would clarify that employee's same-sex domestic partners qualify as 'family members' for purposes of noncompetitive appointments made pursuant to Executive Order 12721 of July 30, 1990." OPM received comments from 3 individuals on the proposed rule.

One individual commented that the eligibility for noncompetitive appointment should only be granted if

the same-sex couple has entered into a legal marriage contract. OPM is not adopting this suggestion. Marriage is not an option for same-sex couples with respect to Federal benefits, because of the Defense of Marriage Act ("DOMA"), 1 U.S.C. 7. Even if DOMA were not an obstacle, same-sex couples are not permitted to marry in most states. Thus, if we were to extend this eligibility only to those who are able to enter into a legal marriage contract, we would be defeating the objective, which is to provide the same opportunity to same-sex partners of Federal employees that spouses enjoy.

One individual commented that the definition of "domestic partner" is too vague and would allow for casual relationships to be considered to be domestic partnerships for purposes of noncompetitive appointment eligibility. The commenter also suggested that domestic partners, in order to be covered, should be in a union recognized by a State or other legal body. OPM disagrees with these comments. OPM notes that the term "domestic partner" is defined at length in the regulation and specifies that the underlying domestic partnership must meet nine criteria, which are enumerated in the regulation. In connection with the Presidential Memoranda referenced above, OPM Director John Berry issued a June 2, 2010, Memorandum for the Heads of Executive Departments and Agencies, entitled "Implementation of the President's Memorandum Regarding Extension of Benefits to Same-Sex Domestic Partners of Federal Employees," which provides standard definitions for agencies to use in undertaking changes to their existing regulations in response to the President's request. The definition adopted here includes a provision (described in § 315.608(e)(7)) which allows agencies to require same-sex domestic partners to certify their relationship is a committed one, rather than a casual one, for eligibility under this section. Therefore, the concern underlying this comment has already been addressed, and OPM does not plan to adopt the commenter's suggestion.

We have, however, revised the definition of domestic partner slightly by replacing the phrase "employee or annuitant of the same sex" with "sponsor of the same sex." The original phrase was inaccurate and did not conform to paragraph (e)(2) of this section, entitled "*Sponsor*," which sets out the categories of Federal affiliation that can give rise creditable service for a family member. Pursuant to paragraph (e)(2), this provision covers family

members of "[a] Federal civilian employee, a Federal nonappropriated fund employee, or a member of a uniformed service who is officially assigned to an overseas area." By using the term "sponsor," instead, we have incorporated this definition.

An agency commented that section (iv) of the definition of "*domestic partnership*," which requires that the partners "share responsibility for a significant measure of each other's financial obligations" should be read to include relationships where one person works and the other does not. We agree. This criterion, which appears in this and in prior regulations promulgated in response to the President's June 2, 2010, Memorandum, is intended to require only that there be financial interdependence between the partners; it should not be interpreted to require the exclusion of partnerships in which one partner stays at home while the other is the primary breadwinner."

One individual commented that this rule discriminates against family members who are not same-sex partners. OPM disagrees, noting that the definition of "family member" has simply been broadened to include a person in a domestic partnership with a sponsor of the same sex, but is otherwise unchanged. Spouses of sponsors (i.e., spouses of opposite sex, pursuant to DOMA) and unmarried children under age 23 will continue to be covered as before. OPM has declined to extend the definition of family member to the partner of an opposite-sex sponsor because opposite-sex couples may bring themselves within coverage by marrying. As discussed above, because of DOMA, marriage is not an option for same-sex couples wishing to obtain Federal benefits.

Executive Order 13563 and Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 13563 and E.O. 12866.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only Federal agencies and employees.

List of Subjects in 5 CFR Part 315

Government employees.

U.S. Office of Personnel Management.

John Berry,
Director.

Accordingly, OPM is amending 5 CFR part 315 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. 2560. 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(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473. Sec. 315.708 also issued under E.O. 13318, 3 CFR, 2004 Comp. p. 265. 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. In § 315.608, paragraph (e)(1) is revised and paragraphs (e)(6) and (7) are added to read as follows:

§ 315.608 Noncompetitive appointment of certain former overseas employees.

(e) * * *

(1) *Family member.* An unmarried child under age 23, a spouse, or a domestic partner. An individual must have been a family member at the time he or she met the overseas service requirement and other conditions but does not need to be a family member at the time of noncompetitive appointment in the United States.

* * * * *

(6) *Domestic partner.* A person in a domestic partnership with a sponsor of the same sex.

(7) *Domestic partnership.* A committed relationship between two adults, of the same sex, in which the partners:

(i) Are each other's sole domestic partner and intend to remain so indefinitely;

(ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(iii) Are at least 18 years of age and mentally competent to consent to contract;

(iv) Share responsibility for a significant measure of each other's financial obligations;

(v) Are not married or joined in a civil union to anyone else;

(vi) Are not the domestic partner of anyone else;

(vii) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;

(viii) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, shall be determined by the agency; and

(ix) Are willing promptly to disclose, if required by the agency, any dissolution or material change in the status of the domestic partnership.

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OFFICE OF PERSONNEL MANAGEMENT**5 CFR Parts 550 and 591**

RIN 3206–AM31

Change in Definitions; Evacuation Pay and the Separate Maintenance Allowance at Johnston Island

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management is revising its regulations on evacuation pay and the separate maintenance allowance for duty at Johnston Island to ensure that same-sex domestic partners of Federal employees and the children of such domestic partners have access to these benefits to the same extent as spouses of Federal employees and their children. These changes fulfill the Administration policy expressed in the President's June 2, 2010, memorandum on the "Extension of Benefits to Same-Sex Domestic Partners of Federal Employees."

DATES: This rule is effective August 20, 2012.

FOR FURTHER INFORMATION CONTACT: Kurt Springmann, by telephone at (202) 606–2858 or by email at pay-leave-policy@opm.gov.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing final regulations on evacuation pay at 5 CFR part 550, subpart D, and the separate maintenance

allowance for duty at Johnston Island at 5 CFR part 591, subpart D. These regulations ensure that same-sex domestic partners of Federal employees and the children of such domestic partners have the same access to these benefits as opposite-sex spouses of Federal employees and their children.

Background

On June 17, 2009, President Obama issued a memorandum regarding Federal benefits and non-discrimination that requested the Secretary of State and the Director of OPM, in consultation with the Department of Justice, to extend previously identified statutorily based benefits that those agencies believed could be extended to qualified same-sex domestic partners of Federal employees, consistent with underlying law. This memorandum also directed the heads of executive departments and agencies, in consultation with OPM, to conduct a review of the benefits offered by their respective departments and agencies to determine whether they had the authority to extend such benefits to the same-sex domestic partners of Federal employees. The memorandum further requested that OPM, in consultation with the Department of Justice, make recommendations regarding any additional measures that could be taken to provide benefits to the same-sex domestic partners of Federal Government employees, consistent with existing law.

On June 2, 2010, the President issued another memorandum, entitled "Extension of Benefits to Same-Sex Domestic Partners of Federal Employees," that published the results of the review and identified the benefits that could be extended to same-sex domestic partners and their families. These regulations respond to two portions of the President's memorandum, which identified additional benefits OPM had concluded it could offer and requested OPM to (1) "clarify that under appropriate circumstances, employees' same-sex domestic partners and their children qualify as dependents for purposes of evacuation payments made under 5 U.S.C. 5522–5523"; and (2) "clarify that employees' same-sex domestic partners qualify as dependents for purposes of calculating the extra allowance payable under 5 U.S.C. 5942a to assist employees stationed on Johnston Island, subject to any limitations applicable to spouses."

Also on June 2, 2010, OPM issued a Memorandum for the Heads of Executive Departments and Agencies, entitled "Implementation of the President's Memorandum Regarding