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From: Forest Service Council, National Federation of Federal Employees (NFFE-FSC)
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Re: Comment on interim final rule, "Federal Employees Health Benefits Program Coverage for Certain Firefighters"
Federal Register Citation: 77 FR 42417
OPM Docket ID: OPM-2012-0014

The National Federation of Federal Employees' Forest Service Council (NFFE-FSC) respectfully submits the following comments with regard to the interim rule granting certain firefighters eligibility to enroll in the Federal Employees Health Benefits Program Coverage. The final interim rule was published in the Federal Register at 77 Fed. Reg. 139, 42417-42418 (Jul. 19, 2012) (to be codified at 5 C.F.R. pt. 890).

First, we would like to thank and congratulate OPM for using its authorities to create the exception granting temporary firefighters working for the federal government this eligibility. We also appreciate that OPM established this eligibility through using its emergency powers pursuant to the standards of 553(b) of the Administrative Procedure Act so these workers could obtain health insurance coverage immediately. Immediate implementation had another positive effect: it provided us with the opportunity to identify challenges through experience, thereby leading to better-informed comments based on experience rather than merely speculation.

Background

A brief summary of the division of labor in the Forest Service and other land management agencies and how this cuts across classification series and position descriptions is necessary. There are two categories of employees who fight fire and provide on-site assistance on fire incidents: those with positions in the Fire and Aviation organization (primary firefighter positions) and those with positions outside of this organization. The latter are collectively referred to as the "fire militia."

With respect to primary firefighter positions, there is no classification series to distinguish wildland firefighting positions from other land management positions. Within the Forest Service, temporary seasonal primary firefighter positions are typically classified as GS-0462 Forestry Technicians. Other land management agencies under the Department of the Interior (DOI) make extensive use of the GS-0455 series in addition to the GS-0462 series. Primary firefighter positions are typically only identified by parenthetical designations in job titles. This means that maintaining accurate centralized records is difficult. Lower-graded front-line supervisors, many with limited access to adequate human resources support, hire well over 10,000 temporary seasonal employees in a brief time window. Last season, over 1,500 GS-0462 competitive service temporary seasonal positions in our centralized system of records lacked a parenthetical designation. Eligibility determinations in these cases would require inquiries to the hiring unit to determine the status of the position as a primary firefighter.

In contrast, militia members may be in any of a wide variety of positions and series. Their positions of record are unrelated to the qualifications they have obtained and the duties they perform when serving as front-line firefighters or in a variety of on-site support functions on fire incidents. When serving on a fire or other emergency incident, these employees (operationally speaking) leave their position of record and assume positions in the Incident Command System (ICS, see the appendix for a detailed example of how this redeployment of resources works). A new chain of command and duties completely distinct from their normal duties are operative under this circumstance. Militia employees serving in this capacity either fight fires along with primary firefighters or provide on-site assistance. The key point here is that eligibility for health insurance coverage under the new rule depends upon an employee's ICS duties, not upon his position of record. Documentation concerning these duties or the qualifications necessary to perform them is not maintained in personnel records. Therefore, to administer the new rule during this initial implementation, human resources staff relied upon the system of records of ICS qualifications, which are maintained in an independent inter-agency database (the Incident Qualifications and Certification System, IQCS). This database provides the only means to identify these "off-PD" duties and thereby meet the intent of the new rule. Unfortunately, the IQCS database does not contain personnel data and does not interface with human resources databases. To administer the new benefit in this case, benefits personnel had to manually cross-walk IQCS qualifications with employee personnel data.

We applaud OPM's determination in Benefits Administration Letter 12-203 that eligibility is to be based upon duties actually performed, regardless of the title or series of the position of record. We strongly concur that it is important that militia members be included along with the primary firefighters at whose side they often serve. However, the situation described above does present unique challenges in administration. There is no simple way to identify incumbents whose provide emergency response services for wildland fire protection by relying on a position description or job title. Typically, benefits eligibility determinations are based on the type of appointment. This determination is made when the position is established and classified. The introduction of series, parenthetical job titles, duties, and certifications in non-personnel databases into the determinative process adds levels of complexity about which we will have more to say later in this comment.

In many cases, there is no way to identify positions whose incumbents provide emergency response services for wildland fire protection.

The proposed new rule at 5 CFR 890.102 (h) states:

Notwithstanding paragraphs (c)(1) and (2) of this section, an employee who is in a position identified by OPM that provides emergency response services for wildland fire protection is eligible to be enrolled in a health benefits plan under this part.

As noted above, the position of record does not reflect the qualifications and duties of employees who are members of the "fire militia" when they serve in this capacity. Therefore, if the determination depends upon identification of positions, employees performing militia duties would be erroneously excluded since their position of record would not identify them as such.

Benefits Letter 12-203 clarifies the intent of the new rule with the following critically relevant statements:

The following positions... are covered for purposes of 5 CFR 890.102(h): Any position (including supervisory positions) the duties of which include high risk or life threatening work to control and extinguish wildland fires, to rescue persons endangered by fire, or to reduce or eliminate potential fire hazards, or involving the provision of direct on-site assistance to others engaged in such work.

[I]n determining whether to extend health benefits coverage for employees, agencies should focus on the duties performed, regardless of the position's title, occupational series, grade level or geographic location.

The first statement provides critical specificity with regard to what constitutes “emergency response services for wildland fire protection.” The second statement articulates that it is the duties actually performed, not the position of record (in which they are not necessarily documented), that is the controlling consideration.

With regard to the second point, the language in Benefits Letter 12-203 seems to contradict, and be superior to, that of the rule itself in two important ways. First, in the rule the determination of eligibility is based on identification of positions, whereas in the Letter it is based on duties actually performed. Second, in the rule the determination of eligible positions is made by OPM, whereas in the Letter the determination of eligible duties is made by agencies. Clearly, the only way in which eligibility of militia members may be determined consistent with the rule’s intent is by the process articulated in the Letter: by consideration of duties by agencies.

Further, we believe that responsibility for identification of primary firefighting positions is best designated to agencies as well. Benefits Letter 12-203 lists GS-0462 Forestry Technician positions as being among the positions that are potentially eligible, but notes “this list is not exclusive, nor should coverage necessarily be extended to all employees within one of these occupations.” It goes on to state that agencies should focus on duties in making determinations. This assignment of responsibility is appropriate. A broad range of land management work is described under the GS-0462 series by use of parenthetical designations. The authority to supplement this basic title by adding a parenthetical suffix to identify duties and responsibilities which reflect specific knowledge and skills required in the work has been designated to agencies (<http://www.opm.gov/fedclass/gso462.pdf>). The situation under consideration is similar to that of determining what permanent positions are primary and secondary firefighting positions for purposes of special retirement eligibility. The responsibility for this determination has been delegated to agencies (5 CFR 831.903 and 831.904) because of the specialized, agency-specific knowledge that is required. For similar reasons, determinations of what temporary positions are eligible for health insurance coverage should be delegated to agencies.

If OPM decides to continue to limit eligibility to the same population of employees as described in the emergency rule and in Benefits Letter 12-203, the rule itself should be changed to clearly state the determinations are to be made by agencies based on duties described in the Letter, not the position of record. Otherwise, turnover in OPM and agencies’ staff are likely to lead to interpretations in the future that are not consistent with the rule’s intent. We suggest that if the decision to maintain the same scope of coverage in the final rule as in the emergency rule is reached, then the interim final rule at 5 CFR 890.102 (h) should be clarified as follows:

Notwithstanding paragraphs (c)(1) and (2) of this section, an employee whose duties have been determined by the employing agency head to include high risk or life threatening work to control and extinguish wildland fires, to rescue persons endangered by fire, or to reduce or eliminate potential fire hazards, or involving the provision of direct on-site assistance to others engaged in such work is eligible to be enrolled in a health benefits plan under this part.

Eligibility should be expanded

We appreciate the issuance of this rule as an interim final rule so that it could take immediate effect. We also understand that section 553(b) of the Administrative Procedure Act (5 USC 551 et seq.) required demonstration of a standard that was met by the limitations imposed. However, we believe expanding the scope of coverage to include other temporary seasonal employees in the final rule is warranted on a number of grounds.

The federal government should lead by example. All temporary seasonal employees contribute immensely to our mission to sustain the health, diversity, and productivity of the Nation’s forests and grasslands. Many return for many seasons. Despite the appointment authority under which they were hired, the reality is the work they perform is permanent seasonal work. Providing them with the opportunity to participate in their employer’s health insurance program is simply the right thing to do. As noted in the Federal Register supplemental information accompanying the final interim rule, “allowing [firefighters] the opportunity to obtain health insurance coverage will help them to protect themselves and their families.” This is equally true of other temporary seasonal employees, regardless of the jobs they perform. All play an important role. All deserve this opportunity.

Other temporary jobs have unique health hazards. Fire suppression and land management are tightly intertwined in the Forest Service. Restoration begins before fires are out. Burned Area Emergency Response (BAER) and Emergency Stabilization commences before fires are contained. BAER assessment team members are typically IQCS-certified because they often work within the fire perimeter and we have therefore determined that they are eligible for coverage. However, the implementation personnel who come soon thereafter would, under the interim final rule, be denied coverage. These employees work in unstable landscapes with dead trees that present falling hazards – areas that are often closed to the public for safety reasons. If one understands the work, it is irrational and inequitable to exclude these employees.



All field-going work is dangerous, whether or not it is directly linked to fire suppression activities. GS-0462 Forestry Technicians with wildlife, wilderness, recreation, trails, and timber parenteticals work in wild and remote areas. They face constant threat of injury from snags, slips, falls, tool use, wildlife (bears, lions, etc.), weather events, insect bites and stings (tick-borne diseases are not uncommon), snakes, etc. They engage in potentially hazardous activities like falling trees, regular chainsaw operation, etc. When engaged in restoration work, whether necessitated by wildfire, tornadoes, flood, or insect damage, they like firefighters face danger from falling trees. They often work alone or in pairs or small groups, often going for days in the back country with limited communication. Frankly, this aspect of their working condition compares unfavorably from a health and safety standpoint to the conditions many fire personnel experience when on a fire incident.

The work is also physically demanding. Field-going employees hike through rugged terrain with heavy packs and perform demanding manual labor. Specific incidents may be covered by workman's compensation, but chronic conditions such as tendonitis, aching joints, back pain, and others caused by the physical demands of the work are typically not covered because of the difficulty in proving a nexus between the condition and the job. Even simple injuries due to falls or sprained limbs that would receive attention were the employee insured are commonly ignored because of the poor track record of workman's compensation (many medical practitioners refuse to take workman's compensation cases because of consistently bad experiences with payment). It may well be that the employee failed to notice the specific incident because such occurrences are so commonplace in the field. Most such injuries do resolve with time, but those that do not are even more likely to be denied by workman's compensation. The wear and tear on these employees' bodies could be ameliorated by adequate access to medical care and advice.

Lack of access to health insurance shortens careers because chronic conditions go untreated. Employees lose their livelihoods; the agency loses valuable experience. Workman's compensation is not a reliable protection for chronic conditions; health insurance provides an important safety net that those without it lack.

Seasonal positions suffer from high attrition because of lack of health insurance. The average temporary seasonal employee leaves after 4-5 seasons, just as they are becoming most valuable. Green recruits must then be trained again. The most common reason given is lack of access to employer-sponsored health insurance coverage. In contrast, the retention of seasonal employees eligible for health insurance because of their permanent seasonal appointment is 4-fold greater. Fortune 500 companies provide health insurance plans for their employees because they know it is good business to cultivate a stable workforce. This rationale is equally valid for our agency.

Distinguishing between eligible and ineligible employees under the interim final rule is difficult and will lead to inconsistency and administrative errors. Typically, benefits eligibility determinations are based on the type of appointment. Once an employee has been deemed qualified for a given position of record and placed in it, that employee retains her eligibility for benefits until she resigns, retires, takes another position, or dies. Determination of eligibility is a one-time event and the outcome is stable for the life of that person in that position. The process is not subject to administrative error. The process is an efficient one, in which employees are made aware of their options and given an opportunity to apply during their onboarding.

As described earlier, eligibility determinations of militia members depends on use of the IQCS database in which firefighter and other ICS qualifications are maintained. These determinations are dynamic; they are subject to change over time. Each employee's incident and prescribed fire position qualifications (including physical fitness and experience) must be re-evaluated annually by the certifying official to determine certification, recertification or decertification. Regardless of whether they are in primary fire positions or in militia positions, employees must maintain "currency" to fight fires or provide on-site assistance. Using the current approach for determining eligibility, this means all first-time hires and many returning temporary employees will be ineligible at the time of onboarding – even if they have met the criteria for eligibility in the past and it is anticipated they will regain currency as soon as it can be arranged. In addition, a temporary lapse in currency would equate to a loss of entitlement to health care coverage. Use of IQCS certification status is the only option to comply with the interim rule, but inequitable treatment, delays in coverage, and administrative errors causing coverage to be improperly denied are predictable and highly undesirable outcomes. A simpler approach would be to make coverage eligibility available to the entire seasonal workforce. Communicating with employees and processing their enrollments could then take place in a timely and accurate fashion during the onboarding process.

Expanding coverage to all temporary seasonal employees would improve morale without substantially increasing cost. Front-line employees are well aware of the relative risks and hardships associated with the work they and their coworkers perform. The exclusion of certain portions of the seasonal workforce has been detrimental to morale of these employees. Non-eligible employees perceive that their contributions are not valued. This has generated resentment that will be counterproductive to the efficient operation of the agency. Fire suppression and prevention activities are inextricably intertwined with land management activities. To send the message that employees on the land management side of the house are undeserving of health insurance coverage is to create a second-class population of seasonal employees. This will doubtless undermine collaborative relationships that are important for the agency to effectively accomplish our mission.

Regarding cost, the agency has determined that approximately 8,500 of 12,400 temporary employees (69%) hired during a typical field season are IQCS-certified and therefore eligible under the criteria in Benefits Letter 12-203. Additional non-IQCS certified positions may be identified that are involved in reducing potential fire hazards. Expanding the scope of coverage to include all would remove the wedge of selective coverage that has eroded morale within the non-fire portion of the temporary workforce and have a positive effect on productivity for a modest increase in cost.

Of interest in this regard is the low enrollment rate observed to date. As of September 12, 2012 approximately 198 temporary employees had applied. Of these, 134 were determined to meet the criteria and are currently covered. The low rate may be in part due to confusion regarding eligibility. Other potential factors include difficulty getting the word out to field-going employees who work in remote areas and the relatively high cost of coverage for these lower-graded employees.

We recommend that the final rule be modified in one of the following ways:

For the reasons given above, we recommend that the interim final rule at 5 CFR 890.102 (h) be modified as follows:

Notwithstanding paragraphs (c)(1) and (2) of this section, an employee who receives an appointment as a seasonal temporary employee under 5 CFR part 316 or under Schedule A authority under 5 CFR part 213

and who is expected to be in pay status for 90 or more days during the calendar year commencing on the date of appointment is eligible to be enrolled in a health benefits plan under this part.

We are not in a position to comment upon the effect such a change would have on a government-wide basis; however, it is our understanding that land management agencies are by far the biggest users of this appointment authority. If the change recommended above would have unintended consequences in other federal agencies of which we are unaware, we recommend as an alternative that the interim final rule be modified to provide agencies with the ability to request an expanded scope of coverage under 5 CFR 802.102(i) without restricting such a request to employees performing emergency response services. We suggest the following language for 5 CFR 802.102(i):

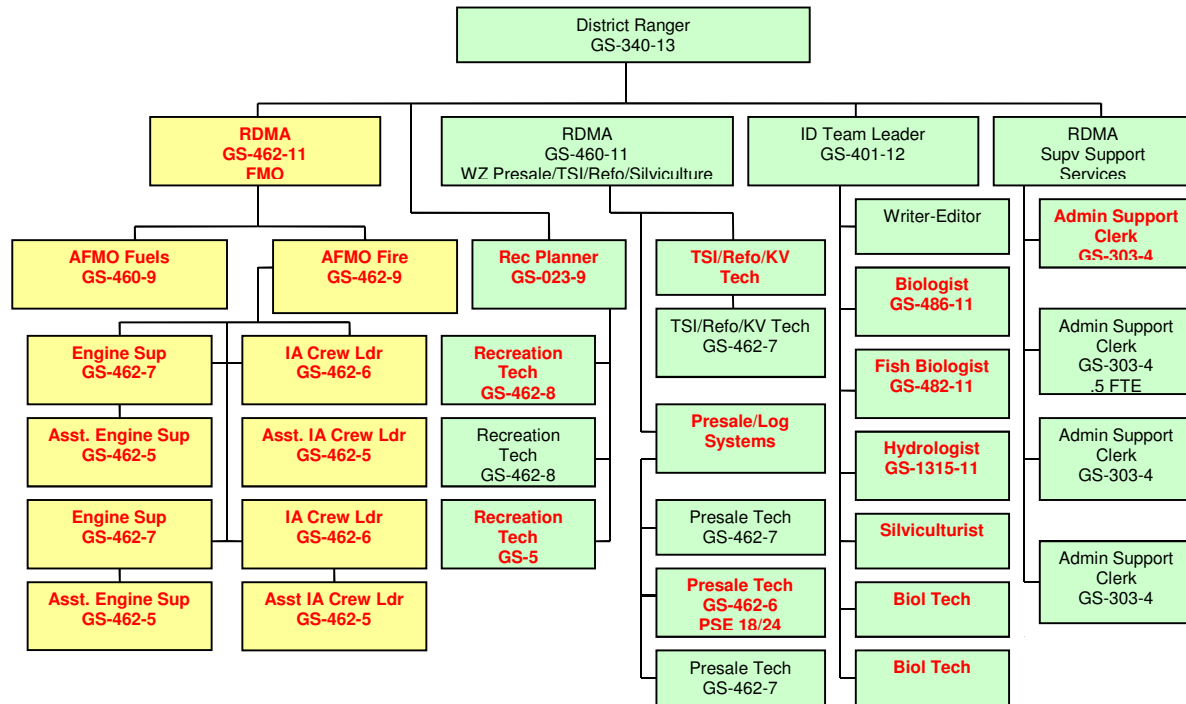
Notwithstanding subsection (c) of this section, upon request by the employing agency, OPM may grant eligibility to employees who would otherwise be excluded by this subsection to enroll in a health benefits plan under this chapter.

Appendix: The Forest Service Fire Militia

The fire militia is always there to respond to wildfires and other emergency incidents such as wildland fire, hurricanes, floods, and terrorist attacks. When not responding to incidents, federal employees in the militia are actively managing the Nation's diverse resources and serving the increasing number of citizens who recreate on them. They are forestry technicians, biologists, hydrologists, forest planners, range specialists, recreation technicians, public affairs officers, etc. However, they have a second, independent role to play when the call comes. Then, they assume specific roles within the Incident Command System (ICS): Logistics, Finance, Planning, Safety, Operations, etc. Others are front-line firefighters. Often, the ICS functions they fulfill are completely unrelated to their normal duties. Many of these collateral militia duties take years of training and experience to acquire.

The organization chart of a typical Ranger District is shown in figure 1. Positions in red text are occupied by employees who serve on fires. Yellow boxes denote the district fire organization and green boxes denote the general land management organization; however, employees are mobilized for incidents regardless of their position in this organization chart. When mobilized, they assume positions in the ICS organization (figure 2, next page) that may or may not be related to their normal duties. Use of the ICS ensures consistency among USDA, DOI, state, and local personnel who frequently cooperate in multi-agency efforts.

Figure 1. Three Rivers Ranger District, a typical field unit organization



Note: these data are not current. They were compiled in 2007 and are shown here for illustrative purposes.

Figure 2. The Incident Command System Major Organization Elements

