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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 553

RIN 3206-AI32

Reemployment of Civilian Retirees To Meet Exceptional Employment Needs

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to amend the criteria under which OPM may grant dual compensation (salary offset) waivers on a case-by-case basis, or delegate waiver authority to agencies. The intended effect of these regulations is to more closely mirror the statutory authority and ensure that the Director and her designee(s) possess the full degree of discretion afforded by the statute in making particular decisions.

DATES: This rule is effective October 19, 2007.

FOR FURTHER INFORMATION CONTACT: Janice Warren, by telephone (202) 606-2367; by fax: (202) 606-2329; by TTY: (202) 418-3134; or e-mail: janice.warren@opm.gov.

SUPPLEMENTARY INFORMATION: On July 21, 2006, OPM issued proposed regulations at 71 FR 41376 to allow OPM to grant or delegate to agencies the authority to grant dual compensation waivers in situations resulting from emergencies posing an immediate and direct threat to life or property or situations resulting from unusual circumstances that do not involve an emergency. The proposed rule also made changes to the section headings and removed any information concerning military employees (i.e., retired members of the uniformed services).

Comments

OPM received written comments from three Federal agencies, and four individuals that are pertinent to the proposed changes. A discussion of the comments is provided below.

Two agencies suggested OPM add criteria to §§ 553.201(f) and 202 to address situations where agencies need to reemploy individuals for succession planning or knowledge transfer purposes. One individual suggested OPM amend §§ 553.201(f) and 202(b) to establish that an agency's need for sustaining critical competencies in accordance with agency human capital plans constitutes an unusual circumstance. OPM is not adopting the suggestion to amend §§ 553.201(f) and 202(b). OPM seeks to maintain maximum flexibility and discretion in its use of this authority. Agency needs to address gaps in critical competencies or skills, and/or addressing knowledge transfer needs, in and of themselves, will not normally be found to constitute "other unusual circumstances" for purposes of these provisions.

We do recognize that examples of what an agency may request under these sections may be helpful. Other unusual circumstances may include, but are not limited to, an agency's need to conform to a Congressional or other mandate to meet a new or expanded mission requirement by a particular date or the need to appoint on a temporary basis an annuitant who possesses a security clearance, authorization, or other similar credential required to perform new or expanded mission-critical work which no other employee could obtain within a reasonable time. We intend to issue supplemental guidance to help an agency determine whether it can demonstrate that these criteria have been met.

One of these agencies suggested OPM limit waivers granted on a case-by-case basis or through a delegation of authority to six months when the approval was used to address knowledge transfer. We did not adopt the suggestion to limit waivers to address knowledge transfer to six months because OPM prefers to maintain maximum flexibility and discretion in response to agency knowledge management needs. OPM encourages agencies to follow succession or workforce planning practices, including knowledge

management, as part of sound human capital management.

One agency asked OPM to clarify the use of the term "temporary basis" as used in § 553.201(c) and (f). The agency commented this term implies that individuals who receive waivers under part 553 may only receive a temporary appointment in conjunction with the waiver. The term "temporary basis" derives from 5 U.S.C. 8344(i)(1)(B) and 8468(f)(1)(B) and reflects the time-limited or non-permanent nature of emergencies or other unusual circumstances for which waivers under this part may be granted. Though agencies typically give temporary appointments to individuals for whom OPM has granted a waiver, agencies may use any appropriate appointing authority, per § 553.201(b)(1), when reemploying individuals.

Two individuals were opposed to the changes OPM proposed to part 553. One individual commented the proposed rule would encourage agencies to reemploy annuitants rather than recruit and train new employees to close skills gaps. The other individual commented the proposed rule to broaden authority to re-employ annuitants would increase skills gap deficiencies because agencies will rely disproportionately on this authority in lieu of hiring, training, and developing newer employees. OPM disagrees, noting these provisions are limited to situations involving exceptional recruiting difficulties and emergencies or other unusual circumstances. In addition, salary offset waivers granted under these provisions are not intended to be a substitute for succession planning. Further, use of this authority may be appropriate for knowledge management purposes, which supports the training and development of newer employees.

One individual suggested OPM amend §§ 553.201(f) and 202(b) by including information pertaining to retention incentives, as an alternative for people who might otherwise retire and seek reemployment under this part. OPM did not adopt this suggestion because consideration or use of retention incentives is not a prerequisite to seeking salary offset waivers or delegations of authority under this part. For this reason, we do not believe including information on such incentives in §§ 553.201 and 202 is appropriate. Agencies that choose to

offer retention incentives prior to consideration of salary-offset waivers can find the applicable provisions in 5 CFR part 575, subpart C.

One individual suggested OPM impose a 5-year waiting period from when an individual retires before an agency may reemploy the individual with a salary offset waiver. OPM did not adopt this suggestion because salary offset waivers are intended to address emergency situations, exceptional recruitment difficulties, or other unusual circumstances. A waiting period would inappropriately delay an agency's ability to respond to the particular circumstance for which a waiver or delegation of authority is being sought.

One individual suggested that salary offset waivers will allow annuitants to be reemployed as contractors, on the basis of their friendships with officials in the employing agency, under the pretense that no qualified employee is available to perform the work. The provisions in part 553 do not apply to contractors, who are not considered reemployed annuitants for these purposes.

OPM also received comments from four Federal agencies, two private organizations, and one individual, which went beyond the scope of the proposed amendments to the regulation. Because these comments were not pertinent to the proposed amendments, OPM is not responding to them. The comments are listed below.

Two agencies commented on the issue of delegating salary offset waiver authority to Federal agencies. One of these agencies suggested OPM delegate waiver authority to agency heads for all waivers expected to last less than one year.

The other agency suggested OPM provide for re-delegation of OPM-approved waiver authority, from the agency head to components within the agency.

This same agency suggested we add language to § 553.203 which states that reemployed annuitants under this part are subject to Social Security tax.

This same agency also suggested OPM establish guidelines for agencies to follow when submitting salary offset waiver requests.

One agency suggested the final rules allow agencies to waive the salary offset to fill positions on either a full-time, part-time or as-needed work schedule limited to 180 days or less.

This same agency suggested the final regulations allow agencies with specific non-annual, but recurring or cyclical work to rehire annuitants with a salary

off-set waiver to assist in completing these on-going projects.

One agency asked OPM to describe whether use of this authority will result in any costs to the employing agency (*i.e.*, the agency to which OPM has granted a waiver on a case-by-case basis or delegated authority).

One private organization asked whether the proposed rule would have any impact on firefighters hired under the administratively determined pay plan authority initially granted to the Forest Service in 1951.

One individual suggested all Federal retirees receive full salary compensation without an offset upon reemployment in the same manner as military retirees.

The same individual suggested reemployed annuitants should be allowed to contribute to the Thrift Savings Plan (TSP), without agencies being required to provide matching contributions.

An individual suggested OPM provide delegation of waiver authority to members of the Senior Executive Service (SES) or general military flag officers, in addition to heads of agencies.

One individual asked whether OPM would provide a website listing positions, which may be filled by reemployed annuitants with salary, offset waivers. Before filling positions with reemployed annuitants under part 553, agencies must follow the appropriate public notice requirements applicable to the position being filled.

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 certain potential applicants and Federal employees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 553

Administrative practice and procedure, Government employees, Military personnel, Retirement, and Wages.

Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, OPM is amending 5 CFR part 553 as follows:

PART 553—REEMPLOYMENT OF CIVILIAN RETIREES TO MEET EXCEPTIONAL EMPLOYMENT NEEDS

■ 1. The authority citation for part 553 continues to read as follows:

Authority: 5 U.S.C. 8344, 8468, Sec. 651, Pub. L. 106–65 (113 Stat. 664).

■ 2. The heading for part 553 is revised as set forth above.

Subpart B—Special Provisions for Reemployment Without Penalty To Meet Exceptional Recruiting or Retention Needs

■ 3. Section 553.201 is amended by revising the section heading, paragraphs (a) and (b)(2), and the introductory text to paragraph (c); removing paragraph (b)(4); redesignating paragraph (f) as paragraph (g); and adding a new paragraph (f) to read as follows:

§ 553.201 Requesting OPM approval for reemployment without reduction or termination of annuity in individual cases.

(a) *Request by agency head.* The head of an agency may request OPM to approve individual exceptions on a case-by-case basis to meet temporary hiring needs based on an emergency or other unusual circumstances or when the agency has encountered exceptional difficulty in recruiting or retaining a qualified candidate for a particular position. Authority to submit such a request may not be redelegated to an official below the agency's headquarters level.

(b) * * *

(2) The request must be submitted in accordance with the criteria set out in paragraphs (c), (d), (e), or (f) of this section.

* * * * *

(c) *Requests based on an emergency hiring need.* An agency may request reemployment without penalty for an individual whose services are needed on a temporary basis to respond to an emergency involving a direct threat to life or property. Requests submitted on that basis must meet the following criteria:

* * * * *

(f) *Requests based on other unusual circumstances.* An agency may request reemployment without penalty for an individual whose services are needed on a temporary basis due to other unusual circumstances. Agencies must provide justification describing the unusual circumstances.

* * * * *

■ 4. Section 553.202 is amended by revising the section heading and paragraph (b)(1) to read as follows:

§ 553.202 Request for delegation of authority to approve reemployment without reduction or termination of annuity in emergencies or other unusual circumstances.

* * * * *

(b) * * *

(1) Description of the situations for which authority is requested. The situation must result from emergencies posing immediate and direct threat to life or property or from other unusual circumstances.

* * * * *

■ 5. Section 553.203 is revised to read as follows:

§ 553.203 Status of individuals serving without reduction.

Annuitants reemployed with full salary and annuity under an exception granted in accordance with this part are not considered employees for purposes of subchapter III of chapter 83 or chapter 84 of title 5, United States Code. They may not elect to have retirement contributions withheld from their pay; they may not use any employment for which an exception is granted as a basis for a supplemental or recomputed annuity; and they may not participate in the Thrift Savings Plan.

[FR Doc. E7-18377 Filed 9-18-07; 8:45 am]

BILLING CODE 6325-39-P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Parts 1600, 1605, 1631, 1651, 1655 and 1690

Employee Contribution Election and Contribution Allocations; Correction of Administrative Errors; Availability of Records; Death Benefits; Loan Program; Thrift Savings Plan

AGENCY: Federal Retirement Thrift Investment Board

ACTION: Final rule.

SUMMARY: The Federal Retirement Thrift Investment Board (Agency) is amending the Thrift Savings Plan (TSP) regulations to provide additional means to verify that an amount is eligible for rollover to the TSP as authorized by the Treasury Regulations interpreting I.R.C. 401(a)(31), to provide that the procedures applicable to an employee who was misclassified as either CSRS or FERS and the retirement system is corrected to FICA also apply to an employee who elects retroactive non-appropriated fund retirement coverage, and to provide that it will authenticate records in a manner consistent with Federal law and regulations. The

Agency is also amending the TSP regulations to provide that it will allow a non-spouse beneficiary to transfer a death benefit payment to an inherited IRA as authorized by the Pension Protection Act of 2006, to provide that a bankruptcy court now lacks jurisdiction over a TSP loan as provided in the Bankruptcy Abuse and Consumer Protection Act of 2005, and to eliminate examples of general and special powers of attorney (some of which are no longer acceptable to the Agency) and, instead, direct participants to a sample form at the TSP Web site.

DATES: Effective September 19, 2007.

FOR FURTHER INFORMATION CONTACT: Megan Graziano on (202) 942-1644.

SUPPLEMENTARY INFORMATION: The Agency administers the TSP, which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401-79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

On August 10, 2007, the Agency published proposed rules with request for comments in the **Federal Register** (72 FR 44982). The Agency received one comment which stated that the Agency should accept any power of attorney that is properly executed and verifiable and that the Agency should not encourage the use of general powers of attorney. The Agency agrees and believes that this is consistent with the intent of the proposed rule. The remainder of this comment dealt with matters outside the scope of the proposed rule change. Therefore, the Executive Director is publishing the proposed rules as final without change.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities. They will affect only employees of the Federal Government.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632,

653, 1501-1571, the effects of this regulation on State, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of \$100 million or more by State, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under § 1532 is not required.

Submission to Congress and the Government Accountability Office

Pursuant to 5 U.S.C. 810(a)(1)(A), the Agency submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before publication of this rule in the **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 814(2).

List of Subjects

5 CFR Parts 1600, 1690

Government employees, Pensions, Retirement.

5 CFR Parts 1605, 1651

Claims, Government employees, Pensions, Retirement.

5 CFR Part 1631

Courts, Freedom of information, Government employees.

5 CFR Part 1655

Credit, Government employees, Pensions, Retirement.

Gregory T. Long,

Executive Director, Federal Retirement Thrift Investment Board.

■ For the reasons set forth in the preamble, the Agency is amending 5 CFR chapter VI as follows:

PART 1600—EMPLOYEE CONTRIBUTION ELECTIONS AND CONTRIBUTION

■ 1. The authority citation for part 1600 continues to read as follows:

Authority: 5 U.S.C. 8351, 8432(a), 8432(b)(1)(A), 8432(j), 8474(b)(5) and (c)(1).

■ 2. Amend § 1600.32 by removing the second sentence of paragraph (a) and adding two sentences in its place, and revising paragraph (b)(2) to read as follows:

§ 1600.32 Methods for transferring eligible rollover distribution to TSP.

* * * * *

(a) * * * The administrator or trustee must either complete the appropriate section of the form and forward the completed form and the distribution to the TSP record keeper or the Agency must receive sufficient evidence from