

Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

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Submitted via <http://www.regulations.gov>.

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U.S. Office of Personnel Management
1900 E Street NW, Room 3415
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RE: Comments on RIN 3206-AM86, Federal Employees Health Benefits Program Expansion of Eligibility to Certain Employees on Temporary Appointments and Certain Employees on Seasonal and Intermittent Schedules

I write on behalf of the Tribal Technical Advisory Group (TTAG) of the Centers for Medicare & Medicaid Services (CMS) to comment on the Notice of Proposed Rulemaking (Notice) issued by the Office of Personnel Management (OPM) concerning the extension of eligibility for the Federal Employee Health Benefits (FEHB) program to certain part-time employees.¹ The TTAG advises CMS on Indian health policy issues involving Medicare, Medicaid, the Children's Health Insurance Program (CHIP), and any other health care program funded (in whole or in part) by CMS. In particular, the TTAG focuses on providing policy advice designed to improve the availability of health care services to American Indians and Alaska Natives under these federal health care programs, including through providers operating under the health programs of the Indian Health Service, Indian Tribes, Tribal organizations, and urban Indian organizations.

Thank you for the opportunity to respond to the Notice. The TTAG generally supports the proposed extension of the FEHB program, as well as the opt-out for Tribal employers.² However, the TTAG believes that the opt-out should be automatic at the request of the Tribe, rather than discretionary. We also take this opportunity to request that OPM grant Tribal employers additional flexibility in determining which of their governmental entities are eligible for enrollment in FEHB plans. We set out our comments and suggestions below.

¹ 79 Fed. Reg. 43,969 (July 29, 2014).

² Indian Tribes, Tribal organizations, and urban Indian organizations carrying out programs under the Indian Self-Determination and Education Assistance Act (collectively, Tribal employers) are eligible to participate in the FEHB program. 25 U.S.C. § 1647b.

I. Discussion.

1. The proposed opt-out should be automatic and without preconditions for Tribal governments.

Under current FEHB program standards, part-time employees and employees who are expected to work less than six months in a year are ineligible for enrollment in FEHB plans.³ In the Notice, OPM proposes to extend eligibility to temporary, intermittent, and seasonal employees who are expected to work a full-time schedule of 130 or more hours in a calendar month for at least ninety days.⁴ Because OPM requires FEHB-participating employers to offer coverage to anyone considered to be a “common law employee,”⁵ the Notice would accordingly require employers, including Tribes, to offer FEHB plans to the newly-eligible class of workers. Acknowledging that this could be problematic for employers that “have made or are planning to make other arrangements to provide health insurance for their temporary, seasonal and intermittent employees,”⁶ OPM proposes to grant the Director of OPM the discretion to waive this extension for an employer that demonstrates in writing that a waiver is “necessary to avoid an adverse impact on the employer’s need for self-governance.”⁷

The TTAG generally supports the extension of FEHB eligibility. Due to the remote location of many Indian reservations, Tribal health programs, and other Tribal facilities, it is often difficult for Tribal employers to fill positions and retain long-term staff. Authorizing Tribal employers to offer FEHB coverage to temporary employees will help Tribes market these types of positions in the first instance and potentially encourage employees to remain with the Tribal employer once health coverage is established.

The TTAG also agrees that not every Tribal employer will want to implement the extension, whether due to cost concerns, existing alternative arrangements, etc., and so also supports the proposed opt-out for employers. However, we do not believe that the opt-out should remain at the discretion of the OPM Director in the Tribal context: Tribes are sovereign governments first, and employers second. Tribal governments, and not OPM, have the best understanding of their governmental, employment, and financial needs. As governments, Tribes should not have to “prove” to OPM the effect of a given program change on the Tribe’s internal governmental functions. Rather, the waiver should be available to Tribes upon written request and without preconditions.

³ 5 U.S.C. § 8906a; 5 C.F.R. § 890.102(c).

⁴ 79 Fed. Reg. at 43,969.

⁵ Office of Personnel Management, Tribal Employers: Indian Tribe FAQs, *available at* <http://www.opm.gov/healthcare-insurance/tribal-employers/faqs/> (last visited August 20, 2014).

⁶ 79 Fed. Reg. at 43,969-70.

⁷ *Id.* at 43,971 (proposed 5 C.F.R. § 890.102(k)).

We therefore suggest the following changes to proposed 5 C.F.R. § 890.102(k):

§ 890.102 Coverage.

....

(k) The Director, upon written request of an employer of employees other than those covered by 5 U.S.C. 8901(1)(A), ~~shall~~ may, ~~in his or her sole discretion,~~ waive application of paragraph (j) of this section to its employees ~~when the employer demonstrates to the Director that the waiver is necessary to avoid an adverse impact on the employer's need for self-governance.~~

We believe that these edits better reflect the government-to-government relationship between Tribes and the federal government and ensure that decisions about Tribal health coverage remain at the Tribal level.

2. OPM should clarify the application of the common law employee standard to Tribal employers.

OPM has stated that Tribal employers participating in FEHB must offer FEHB coverage to all of their “common law” employees, as defined by the IRS, and “may not offer alternative major medical coverage to employees eligible for FEHB.”⁸ OPM has further noted that the common law determination “does not make distinctions between commercial or governmental functions.”⁹ That is, regardless of whether an employee works at a governmental program, including casinos, commercial enterprises, or wherever else, the physical location or general nature of their employment is immaterial to the common law determination. Rather, the only pertinent question is whether the individual is a “common law” employee of the Tribal government.

This is not always a clear-cut proposition in the Tribal context, as Tribes offer differing forms and levels of health coverage to employees of different Tribal agencies and businesses. For example, Tribes operate governmental enterprises both on and off reservations, establish entities that participate in the Small Business Administration’s 8(a) program, run hospitals and health clinics, directly employ individuals in “traditional” government functions like Tribal agencies, etc. It is therefore often uncertain as to whether a given employee fits the common law standard with regard to the Tribal government itself as opposed to the subsidiary government unit (such as a casino, hospital, etc.) at which the individual is directly employed. This is

⁸ OFFICE OF PERSONNEL MANAGEMENT, TRIBAL BENEFITS PAPER # 02: ENROLLMENT IN FEDERAL EMPLOYEE HEALTH BENEFITS (FEHB) AND FEDERAL EMPLOYEES’ GROUP LIFE INSURANCE (FGLI) at 5 [hereinafter “BENEFITS PAPER”].

⁹ OFFICE OF PERSONNEL MANAGEMENT, TRIBAL EMPLOYER FAQs – FEDERAL EMPLOYEES HEALTH BENEFITS (FEHB) PROGRAM at 7.

particularly true in situations where Tribal revenue generating enterprises are administratively distinct from the Tribal government proper.

Moreover, OPM’s “one size fits all” approach deters Tribal implementation in the FEHB program. As noted above, Tribes internally construct their governmental, revenue generating, and other capacities to best suit their individual needs. In many cases, governmental “commercial” Tribal entities are operated independently from other Tribal entities, and their management teams conduct the daily affairs and personnel decisions usually attributed to the “employer” under the common law test. As a result of these unique governmental structures, and for administrative, political, or other reasons, the Tribal government proper often has entirely separate Employer Identification Numbers and human resources departments from governmental enterprises like casinos or 8(a) programs. These various entities may provide different health coverage to their employees, with plans administered by different benefits managers and HR departments and tailored to meet the needs of the agency or enterprise at issue: for example, offering more comprehensive benefits for positions with higher turnover or more regional competition in order to attract and retain the best potential employees.

In light of the nuance and frequent stratification that is required in the provision of Tribal employment and benefits, many Tribes view OPM’s top-down approach as a federal reshaping of Tribal self-governance: a unilateral dictation of how Tribes seeking to participate in the FEHB program must structure their health programs.¹⁰ A number of Tribes have therefore opted not to join the FEHB program out of concern that their state’s FEHB plans would not best serve the entirety of the Tribe’s employees.

Tribes should not be put in the position of having to fundamentally alter their governmental programs as a pre-condition of participating in the FEHB program. Indeed, the Notice’s proposed opt-out of the FEHB expansion is designed to prevent just this type of adverse effect on Tribal self-governance. The TTAG therefore requests that OPM clarify in either regulation or guidance that:

- Tribes have the discretion to make a good faith determination as to whether an employee or category of employees are “common law” employees; and
- Tribal employers may offer FEHB-eligible employees alternative coverage on an entity-by-entity basis: for example, offering FEHB coverage to all employees of certain distinct Tribal enterprises or organizational units and non-FEHB coverage to others.

¹⁰ We note that in a related context, the IRS has held that to the extent that Tribal employers are bound by the Affordable Care Act’s employer mandate, Tribal governments may rely on a “good faith” determination of whether its various agencies and governmental units constitute a single or separate employers. 78 Fed. Reg. 218, 222 (Jan. 2, 2013); *see also* 26 C.F.R. § 54.4980H–2(b)(4). OPM should extend similar flexibility to Tribal governments determining which of their agencies and enterprises are covered by the FEHB program.

These accommodations will give Tribes the flexibility to implement the FEHB program in a manner most likely to benefit the Tribe as a whole. Given that as of July 31, 2014, OPM estimates that there are only 11,000 Tribal employees enrolled in FEHB plans¹¹ out of the eight million total FEHB-enrolled individuals nationwide,¹² this seems unlikely to be detrimental to “the stability of the [FEHB] risk pool,” OPM’s express reason for prohibiting alternative offers of coverage.¹³ The TTAG welcomes the opportunity to discuss the logistics of these proposals with OPM, Tribes, and Tribal organizations.

II. Conclusion.

The TTAG largely agrees with OPM’s proposed expansion of FEHB eligibility and the proposed safe harbor. We further request that OPM make the Tribal opt-out mandatory and without preconditions and adjust the implementation of the common law determination and prohibition on alternative coverage as described above.

The TTAG appreciates the opportunity to comment on the Notice and looks forward to a continued open dialogue with OPM concerning Tribal participation in the FEHB program.

Sincerely,



W. Ron Allen
Chair, TTAG

¹¹ Office of Personnel Management, Distribution of FEHB Enrolled Tribal Employers by State, *available at* <http://www.opm.gov/healthcare-insurance/tribal-employers/hr-personnel/outreach-documents/distribution-of-fehb-enrolled-tribal-employers-by-state.pdf> (last visited August 20, 2014).

¹² Office of Personnel Management, The Federal Employee Health Benefits Program, *available at* http://www.ihs.gov/newsroom/includes/themes/newihstheme/display_objects/documents/FEHB_BASICS.pdf (last visited August 20, 2014).

¹³ BENEFITS PAPER at 5.