

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing proposed regulations to clarify that an employee's same-sex domestic partner qualifies, and should be treated as, a family member for purposes of eligibility for noncompetitive appointment based on overseas employment, as provided in section 315.608 of title 5, Code of Federal Regulations. These regulations implement, in part, a June 2, 2010, Presidential Memorandum by providing same-sex domestic partners with the same employment opportunities that opposite-sex spouses of Federal employees receive under 5 CFR 315.608.

DATES: Comments must be received on or before September 26, 2011.

ADDRESSES: You may submit comments, which are identified by RIN 3206-AM35, by any of the following methods:

- *Federal eRuling Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* employ@opm.gov. Include "RIN 3206-AM35, Career and Career-Conditional Employment" in the subject line of the message.

- *Fax:* (202) 606-4430.

• *Mail:* Angela Bailey, Deputy Associate Director for Recruitment and Hiring, U.S. Office of Personnel Management, Room 6566, 1900 E Street, NW., Washington, DC 20415-9700.

FOR FURTHER INFORMATION CONTACT:

Michelle Glynn, 202-606-0960, *Fax:* 202-606-4430 by *TDD:* 202-418-3134, or *e-mail:* michelle.glynn@opm.gov.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM)

is issuing proposed regulations to amend its current regulations on career and career conditional employment at title 5, Code of Federal Regulations (CFR), part 315. These changes would ensure that an employee's same-sex domestic partner qualifies, and should be treated as, a family member for purposes of eligibility for noncompetitive appointment based on overseas employment, as provided in section 315.608 of title 5, CFR.

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. This proposed regulation responds to Section 1(a)(iii) of the President's memorandum, which identified additional benefits OPM had concluded it could offer and requested OPM to "issue a proposed rule that would clarify that employees' same-sex domestic partners qualify as 'family members' for purposes of noncompetitive appointments made pursuant to Executive Order 12721 of July 30, 1990."

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 Extension of Benefits to Same-Sex Domestic Partners of Federal Employees" to help fulfill the Administration's policy. The memorandum provides definitions to help ensure its consistent application across the Federal Government.

Section 315.608 of title 5, CFR, authorizes noncompetitive appointments to competitive service positions in the United States for certain family members of Federal employees and military personnel who have served overseas. To be eligible for noncompetitive appointment under this authority, a "family member" must have completed 52 weeks of creditable service under a local hire appointment overseas during the time he or she accompanied a Federal civilian employee or member of a uniformed service officially assigned to an overseas location. Family members must also meet all applicable provisions of 5 CFR 315.608 in order to be eligible for noncompetitive appointment. The definition of "family member" in 5 CFR 315.608(e)(1) is currently limited to an "unmarried child under the age of 23 or a spouse." To implement section 1(a)(iii) of the President's June 2, 2010, memorandum, OPM is proposing to change the definition of "family member" and to add new definitions for "domestic partner" and "domestic partnership" at 5 CFR 315.608(e).

These definitions are based upon the definitions contained in the 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 OPM issued on June 2, 2010.

Paragraph (iv) of the *domestic partnership* definition requires that the partners "share responsibility for a significant measure of each other's financial obligations." This criterion, which appears in this and in prior regulations promulgated pursuant 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

exclude partnerships in which one partner stays at home while the other is the primary breadwinner.

We have made a slight change to the wording of criterion (vii). That criterion is intended to prohibit recognition of domestic partnerships between individuals who are related in a manner that would preclude them from marrying were they of opposite sexes. We are maintaining this criterion, but clarifying that the determination is to be made at the time the domestic partnership is formed. It should not be re-examined if the couple relocates to a different jurisdiction. This approach is consistent with treatment of opposite-sex marriages.

For the reasons outlined in the President's June 17, 2009, and June 2, 2010, memoranda, these regulations extend domestic partnership benefits only to same-sex couples who are currently unable to obtain spousal benefits by entering a Federally recognized marriage.

Documentation or proof of a family member relationship for purposes of noncompetitive appointment eligibility would be based on each agency's internal policies. Agencies have authority to request additional information in cases of suspected abuse or fraud, and they would continue to be able to exercise that authority under these proposed regulations. Agencies would be expected to apply the same standards for verification for all dependent and family member relationships, including domestic partners.

E.O. 12866 and E.O. 13563 Regulatory Review

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

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

Government employees.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM is proposing to amend 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 (e)(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 an employee or annuitant 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: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management is proposing to revise 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 would fulfill the Administration policy expressed in Sections 1(a)(v) and (a)(vii) of the President's June 2, 2010, memorandum on the "Extension of Benefits to Same-Sex Domestic Partners of Federal Employees."

DATES: Comments must be received on or before September 26, 2011.

ADDRESSES: You may submit comments, identified by RIN number "3206–AM31" using either of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking.