

Proposed Rules

Federal Register

Vol. 64, No. 246

Thursday, December 23, 1999

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 792

RIN 3206-AI93

Agency Use of Appropriated Funds for Child Care Costs for Lower Income Employees

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing a rule to set forth how agencies may use appropriated funds to reduce child care costs for lower income Federal employees. The intended effect of this rule is to enable lower income Federal employees to better afford child care.

DATES: Comments must be received on or before January 24, 2000.

ADDRESSES: Send written comments to Anice V. Nelson, Office of Personnel Management, Room 7315, 1900 E St. N.W., Washington, DC 20415-1300.

FOR FURTHER INFORMATION CONTACT: Patricia Kinney, Office of Personnel Management, 1900 E St. N.W., Room 7315, Washington, DC 20415-1300; Phone: (202) 606-1313; Fax: (202) 606-2091.

SUPPLEMENTARY INFORMATION: Federal families are more challenged than ever before to meet the expenses of child care. Child care is a labor-intensive service that requires adequate, trained staff to provide child care services that are safe and appropriate for children and their families. An increasing number of Federal families are funding that affordable child care is getting more difficult to find even when their own agencies sponsor on or near-site child care centers. Vacancy rates in Federally sponsored child care centers have steadily grown due to the affordability problem. Despite efforts of non-profit organizations to raise funds through charitable contribution, the affordability of child care for lower income Federal employees sometimes remains out-of-

reach since child care costs can translate up to 50 percent of a Federal family's total family income.

Reduced child care tuition, as a result of agency contributions permitted by this law, can have significant impact on employees' ability to utilize safe and reliable child care. Benefits to the agencies include better recruitment and retention of qualified personnel, lower absenteeism, and improved morale. Improved retention can result in significant recruitment and training cost savings to agencies. Over the past ten years, anecdotal evidence from on-site Federally sponsored child care centers has shown that more and more employees consider the availability of affordable child care as a major reason for choosing one job over another.

An added benefit for agencies that sponsor on-site child care centers at some of their locations is that they can expect to see improved Federal employee participation in their centers. For small agencies that have been unable to provide agency-sponsored on-site child care centers, this law would permit them to assist their employees with a variety of other child care choices.

Sec. 643 of Pub. L. 106-58 authorizes the use of appropriated funds to assist lower income Federal workers to access child care services. This law, enacted by Congress, became effective on September 29, 1999, and remains in effect for one year. The law enables Federal agencies, for the first time, to assist their civilian employees with costs of child care. Until now, the only financial remedy for Federal employees was through limited fundraising conducted by non-profit boards of directors for Federal child care centers. That type of assistance has been inadequate for lower income Federal employees. Financial assistance for Federal employees in non-Federal child care and for family child care has been virtually non-existent.

Child care exists in a variety of forms. Because child care is not universally available through agency-sponsored child care centers, Pub. L. 106-58 permits agencies to work with a broad range of child care providers to ensure that child care is more affordable to lower income Federal employees.

In summary, the rule authorizes Federal agencies to use appropriated funds from their salaries and expense

accounts to assist their lower income Federal employees with the costs of child care in child care centers and family child care homes. Agencies can choose from a number of models for determining employee eligibility and the amount of the tuition assistance subsidy. In light of the fact that agencies have differing needs from one location to another, the proposed rule allows for maximum flexibility so that agencies can take different approaches for making those determinations. Forthcoming guidance from OPM instructs agencies on certain basic tuition assistance program requirements; provides specific steps for implementing the regulation; and includes direction for OPM's reporting requirements. OPM will be interested in learning whether or not the range of flexibilities and sample models were helpful to agencies in determining their definitions of *lower income Federal employees*.

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would only apply to Federal agencies and employees.

List of Subjects in 5 CFR Part 792

Alcohol abuse, Alcoholism, Drug abuse, Government employees.

Office of Personnel Management.

Janice R. Lachance,
Director.

Accordingly, OPM is proposing to amend part 792 of title 5 of the Code of Federal Regulations as follows:

PART 792—FEDERAL EMPLOYEES' HEALTH AND COUNSELING PROGRAMS

1. The authority citation for part 792 is revised to read as follows:

Authority: Sec. 201 of Pub. L. 91-616, 84 Stat. 1849, as amended and transferred to sec. 520 of the Public Health Services Act by sec. 2(b)(13) of Pub. L. 98-24 (42 U.S.C. 290dd-1) and sec. 413 of Pub. L. 92-255, 86 Stat. 84, as amended and transferred to sec. 525 of the Public Health Service Act by sec. 2(b)(16)(A) of Pub. L. 98-24 (42 U.S.C.

290ee-1); sec. 643, Pub. L. 106-58, 113 stat. 477.

2. Subpart B is added to read as follows:

Subpart B—Agency Use of Appropriated Funds for Child Care Costs for Lower Income Employees—What is the new child care legislation and to whom does it apply?

Sec.

- 792.200 To whom do “we”, “you”, and their variants refer?
- 792.201 What does the new law permit?
- 792.202 What is the purpose of the new law?
- 792.203 Should we notify anyone of our intention to make such a disbursement?
- 792.204 Are there sample memoranda and other documents available to assist us with this process?
- 792.205 Are there additional materials necessary for the implementation of this process and are there any special reporting and oversight requirements related to this law?
- 792.206 What are the benefits to an agency of providing such assistance to its lower income employees?
- 792.207 Which agency funds can be used for the purpose of this law?
- 792.208 Is the use of appropriated funds for this purpose mandatory?
- 792.209 How can agencies take advantage of this new law and when does this law become effective?
- 792.210 What is the definition of Executive agency?
- 792.211 What is the definition of tuition assistance program?
- 792.212 What is the definition of civilian employee?
- 792.213 What is the definition of a Federally sponsored child care center?
- 792.214 What is the definition of contractor?
- 792.215 What is the definition of a child?
- 792.216 What children are eligible for this subsidy??
- 792.217 Are children enrolled in summer programs and part-time programs eligible?
- 792.218 Are part-time Federal employees eligible?
- 792.219 Does the law apply only to on-site Federal child care centers that are utilized by Federal families?
- 792.220 What is the process for helping lower income employees with child care tuition?
- 792.221 Are agencies required to negotiate with their Federal labor organizations about the provisions of this law?
- 792.222 Are there any conditions which the child care provider must meet in order to participate in this program?
- 792.223 Is there a statutory cap on the amount or the percentage of child care tuition that will be subsidized?
- 792.224 What is the definition of a lower income Federal employee and how is the amount of the tuition assistance subsidy determined?
- 792.225 Who determines if a Federal employee qualifies as a lower income employee and how is the program administered?

792.226 Do child care subsidies get paid to the Federal employee using the child care?

792.227 May we disburse funds to a child care provider or to an organization that administers our program prior to the time the employee utilizing the reduced tuition has enrolled his or her child in the child care center or family child care home?

792.228 How will this work where there is a Federally sponsored child care center in a multi-tenant building?

792.229 For how long will tuition assistance be in effect for a Federal employee?

792.230 Can these funds be used for children of Federal employees who are already enrolled in child care?

792.231 Can we place special restrictions or requirements on the use of these funds, how else can we use these funds, and can we restrict the disbursement of such funds to only one type of child care or to one location?

792.232 May we use the funds to improve the physical space of the family child care homes or child care centers?

792.233 For how long is the law effective?

792.234 Who will oversee the disbursement and use of these funds?

Subpart B—Agency Use of Appropriate Funds for Child Care Costs for Lower Income Employees—What Is the New Child Care Legislation and to Whom Does it Apply?

§ 792.200 To whom do “we”, “you”, and their variants refer?

Use of pronouns “we”, “you”, and their variants throughout this part refers to the agency. OPM is always referred to as “OPM”.

§ 792.201 What does the new law permit?

Public Law 106-58 (the law) permits agencies to use appropriated funds from their salaries and expense accounts to assist lower income Federal employees with the costs of child care. Employees can benefit from reduced tuition rates at Federal child care centers, non-Federal child care centers, and in family child care homes.

§ 792.202 What is the purpose of the new law?

The law is intended to make child care more affordable for lower income Federal employees through the use of agency appropriated funds.

§ 792.203 Should we notify anyone of our intention to make such a disbursement?

Yes, you must provide prior notice to the House Subcommittee on Treasury, Postal Service and General Government and to the Senate Subcommittee on Treasury and General Government and to your appropriations subcommittees. This is a Congressional notification

requirement. You must also notify OPM of your intention.

§ 792.204 Are there sample memoranda and other documents available to assist us with his process?

Yes, when you notify OPM of your intent to initiate a program, OPM will provide you with guidance that contains sample memoranda of understanding, sample marketing tools, sample tuition assistance applications, and models for determining tuition assistance eligibility. OPM will also provide agencies with the mandatory reporting form.

§ 792.205 Are there additional materials necessary for the implementation of this process and are there any special reporting and oversight requirements related to this law?

Yes, you are responsible for tracking the utilization of your funds and reporting the results to OPM. OPM will provide you with a mandatory reporting form. OPM is required to provide a report to the appropriations committees no later than September 1, 2000. Therefore, you are required to report your results to OPM no later than August 1, 2000. OPM will provide you with guidance on this subpart.

§ 792.206 What are the benefits to an agency of providing such assistance to its lower income employees?

There are several benefits for the agencies beginning with improved recruitment and retention. Cost savings in recruitment and training costs can be significant. In addition, absenteeism rates related to child care problems can be reduced. Providing such subsidies can also increase morale, particularly among families who cannot afford the child care located at or near a child care center that is sponsored by their agency. The use of funds for lower income families who are enrolled or wish to enroll in Federal child care centers will increase the Federal participation rates where there is a regulatory requirement that at least 50 percent of the children enrolled have parents or guardians who are Federal employees.

§ 792.207 Which agency funds can be used for the purpose of this law?

You are permitted to use funds from your salaries and expense account for the purpose of this law

§ 792.208 Is the use of appropriated funds for this purpose mandatory?

No, the decision to use appropriated funds for the purpose of this law is left to the discretion of the agency.

§ 792.209 How can agencies take advantage of this new law and when does this law become effective?

The law became effective as of September 29, 1999. Agencies are permitted to spend funds beginning on [effective date of final rule].

§ 792.210 What is the definition of Executive agency?

The term *Executive agency* is defined by section 105 of title 5, United States Code, but does not include the General Accounting Office.

§ 792.211 What is the definition of tuition assistance program?

The term *tuition assistance program*, for the purposes of this regulation, means the program that results from the expenditure of agency funds to assist lower income Federal employees with child care costs, including, but not limited to, such activities as: determining which employees receive a subsidy, and the size of the subsidy each employee receives; distributing agency funds to participating providers; and tracking and reporting to OPM information such as total cost and employee utilization of the program.

§ 792.212 What is the definition of civilian employee?

The term *civilian employee*, for the purposes of this regulation, means all appointive positions in an executive agency.

§ 792.213 What is the definition of a Federally sponsored child care center?

A *Federally sponsored child care center* is a child care center that is located in a building or space that is owned or leased by the Federal government.

§ 792.214 What is the definition of contractor?

Sec. 643 of Pub. L. 106–58 says that child care services provided by contract are covered by this provision. The term *contractor* applies to an organization or individual who provides child care services for which Federal families are eligible. The definition includes center-based child care and family child homes. The term *provider* is typically used to denote contractor in the child care industry. For the purposes of this subpart, the term *provider* is used to denote both center-based child care and family child care homes.

§ 792.215 What is the definition of a child?

For the purposes of this subpart, a *child* is considered to be:

(a) A recognized natural child who lives with the Federal employee in a regular parent-child relationship;

- (b) An adopted child;
- (c) A stepchild;
- (d) A foster child;
- (e) A recognized natural child for whom a judicial determination of support has been obtained; or
- (f) A recognized natural child to whose support the Federal employee makes regular and substantial contributions.

§ 792.216 What children are eligible for this subsidy?

The law covers Federal employees' children from birth through age 13.

§ 792.217 Are children enrolled in summer programs and part-time programs eligible?

Yes, employees with school-age children (13 years of age and younger) who are enrolled in summer school programs and part-time programs are eligible.

§ 792.218 Are part-time Federal employees eligible?

Yes, Federal employees who work part-time are eligible.

§ 792.219 Does the law apply only to on-site Federal child care centers that are utilized by Federal families?

No. The bill is broad in scope and includes non-Federal center-based child care as well as care in family child care homes, as long as they are licensed and/or regulated by the State and/or local regulating authorities.

§ 792.220 What is the process for helping lower income employees with child care tuition?

(a) OPM guidance includes further explanation, but the process can be summarized in 8 steps:

- (1) After completing your collective bargaining obligations, where applicable, notify the Congressional committees and OPM of your decision to use a specific amount of appropriated funds for this purpose;
 - (2) Determine how you will structure the program and which tuition assistance model you will use;
 - (3) Determine how you will administer the program;
 - (4) Advertise the program;
 - (5) Conduct the application process;
 - (6) Make the tuition assistance determinations and notify the employees (parents are then charged a reduced tuition rate by the provider);
 - (7) Provide the funds to the provider or to an organization that will administer the program for you; and
 - (8) Report the results to OPM on the mandatory reporting form.
- (b) [Reserved]

§ 792.221 Are agencies required to negotiate with their Federal labor organizations about the provisions of this law?

You are reminded of your obligation to negotiate or consult, as appropriate, with the exclusive representatives of your employees on the implementation of these regulations under 5 U.S.C. 7117.

§ 792.222 Are there any conditions which the child care provider must meet in order to participate in this program?

Yes, the provider, whether center-based or family child care, must be licensed and/or regulated by the State and/or local authorities where the child care service is delivered.

§ 792.223 Is there a statutory cap on the amount or the percentage of child care tuition that will be subsidized?

No, the law does not specify a cap.

§ 792.224 What is the definition of a lower income Federal employee and how is the amount of tuition assistance subsidy determined?

Each agency makes the determination of the definition of lower income Federal employee. Lower income Federal employee can be defined by an agency in a number of ways. The process for determining both eligibility and the amount of tuition assistance subsidy for each family involves consideration of total family income along with other factors, depending on the tuition assistance model you use. In their guidance to the regulations, OPM will provide examples of models with detailed explanations.

(a) If the model or models you select includes a total family income threshold, you can use criteria such as those from:

(1) The Child Care Development Block Grant as defined (42 U.S.C. § 9858);

(2) A formula based on a percentage of the State poverty level (as many States do for certain programs); or

(3) A set amount of total family income the agency chooses depending on the agency demographics and need to assist lower income Federal employees.

(b) Some models do not require a threshold amount, since eligibility is determined as a function of the relationship between total family income, actual child care tuition costs, and an amount or percentage the agency is willing to pay.

(c) In order to determine the amount of tuition assistance subsidy by which tuition will be reduced for a Federal employee, a number of approaches can be taken. The size of the subsidy is dependent on different income levels. It

can be based on a tuition sliding scale such as that used in the military formula (10 U.S.C. 1791–1798); a formula based on a specific percentage of total family income the family is expected to pay with the agency paying the remaining amount; or a formula based on a specific percentage of child care tuition the family is expected to pay with the agency paying the remaining amount. Each of these approaches is based on different philosophical assumptions and it will be up to the agency to determine which model or models best fits its needs. The models are described in detail in OPM's guidance.

(d) Besides total family income, you may consider extraordinary financial situations to determine eligibility and the subsidy amount.

§ 792.225 Who determines if a Federal employee qualifies as a lower income employee and how is the program administered?

The agency or another appropriately identified organization determines eligibility using certain income and/or tuition criteria chosen by the agency. If the agency itself does not administer the program, it must select another organization to do so, using procedures that are in accordance with the Federal Acquisition Regulations. Regardless of what organization administers the program, the model for determining both the tuition assistance eligibility and the amount of the subsidy is always determined by the Federal agency.

§ 792.226 Do child care subsidies get paid to the Federal employee using the child care?

No. The child care subsidy is paid to the child care provider. If you choose to have an organization administer your program (see § 792.225), the subsidy is paid to the organization and they, in turn, pay the provider. In any case, the provider will invoice the organization that administers the program.

§ 792.227 May we disburse funds to a child care provider or to an organization that administers our program prior to the time the employee utilizing the reduced tuition has enrolled his or her child in the child care center or family child care home?

Yes, you may wish to disburse one lump sum to the organization administering the tuition assistance program and they will be responsible for tracking the utilization and providing you with regular reports.

§ 792.228 How will the disbursement covered by § 792.227 work where there is a Federally sponsored child care center in a multi-tenant building?

In a multi-tenant building, funds from the agencies would be pooled together

for the benefit of the employees qualified for tuition assistance and whose children are enrolled at the Federally sponsored child care center. The designated organization administering the program (§ 792.225) would then make the individual tuition assistance determinations for the eligible Federal employees based on the tuition assistance model chosen by the agencies. Agencies in the multi-tenant space must agree on the selection of one tuition assistance model for that particular child care center. If an agency chooses to administer its own program, it would not be required to pool its funds with the other agencies or use the model they have chosen for pooled funds. In either case, because the law requires that your funds be used for your civilian employees, the tracking system must include information about the number and income level of your employees who were able to make use of child care services as a result of this law.

§ 792.229 For how long will the tuition assistance be in effect for a Federal employee?

The tuition assistance, in the form of a reduced tuition rate, will be in effect from the time the decision for a particular Federal employee is made and the child is enrolled in the program, until the child is no longer enrolled, but not later than September 30, 2000.

§ 792.230 Can these funds be used for children of Federal employees who are already enrolled in child care?

Yes, the funds can be used for children currently enrolled in child care as long as their families meet the tuition assistance eligibility requirements established by your agency.

§ 792.231 Can we place special restrictions or requirements on the use of these funds, how else can we use these funds, and can we restrict the disbursement of such funds to only one type of child care or to one location?

(a) Yes, depending on your staffing needs and your employees' situations, including the local availability of child care, you may choose to place restrictions on the use of your funds in one of the following ways:

(1) Fund Federal employees using family child care homes;

(2) Fund Federal employees using your on-site child care center;

(3) Fund Federal families using community, non-Federal child care centers; or

(4) Restrict the use of such funds to one or more locations.

(b) It is up to you to determine whether there will be any restrictions on

the use of your appropriated funds for child care tuition costs.

§ 792.232 May we use the funds to improve the physical space of the family child care homes or child care centers?

No, the legislation specifically addresses making the child care more affordable for lower income Federal employees.

§ 792.233 For how long is the law effective?

The law is effective for one year, ending September 30, 2000.

§ 792.234 Who will oversee the disbursement and use of funds?

You will be responsible for tracking the utilization of these funds. OPM's guidance contains details about the oversight of this program and the mandatory reporting requirements.

[FR Doc. 99–33150 Filed 12–20–99; 4:37 pm]

BILLING CODE 6325–01–M

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Proposed rule; request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) proposes to amend its rules of practice and procedure with respect to attorney fee proceedings to provide reimbursement to a prevailing appellant's attorney at his customary billing rate if that rate is consistent with the prevailing community rate where the attorney ordinarily practices. The intent of the proposed amendment is to provide a more equitable scheme for reimbursement of a prevailing appellant's attorney fees.

DATES: Submit comments by February 7, 2000.

ADDRESSES: Send comments to Robert E. Taylor, Clerk of the Board, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419. Comments may be sent via e-mail to mspb@mspb.gov.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653–7200.

SUPPLEMENTARY INFORMATION: The Merit Systems Protection Board requests comments on a proposal to amend its rule at 5 CFR 1201.203, which governs attorney fee proceedings, to provide that