September 8, 2020

VIA FEDERAL eRULEMAKING PORTAL

U.S. Office of Personnel Management
1900 E Street N.W.
Washington, D.C. 20415-1000

Re: RIN 3206-AN96, Paid Parental Leave

Dear Sir or Madam:

The National Treasury Employees Union (NTEU) submits these comments in response to OPM's Federal Register notice published on August 10, 2020. See 85 Fed. Reg. 48075. In that notice, OPM issued an interim final rule implementing the Federal Employee Paid Leave Act (the Act).

Congress's passage of the Act was a watershed event and the result of the tireless efforts of NTEU and like-minded advocates. NTEU raises the following concerns about aspects of OPM's interim final rule that are in tension with Congress's intent in providing this significant and necessary benefit to federal employees.

I. OPM Should Make it Less Onerous for Employees to Retroactively Elect to Take Paid Parental Leave.

OPM's interim final rule generally provides that, prior to using paid parental leave, the employee must affirmatively elect to use paid leave and execute an agreement providing that the employee will work for the agency for twelve weeks following the paid leave (a work obligation agreement). See Interim Final Rule, Section 630.1705(a). A retroactive election for paid parental leave is available only where the employee "was physically or mentally incapable" of making the election before the child's birth or placement. See id., Section 630.1706(a).

This onerous standard for retroactive election is ill-suited to satisfy Congress's overall objective of providing this benefit to qualifying employees. Employees who qualify for paid parental leave and who enter into a work obligation agreement should be able to retroactively elect paid leave without having to demonstrate that they were physically or mentally incapable of doing so before the birth or placement of their child.

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OPM's standard, moreover, fails to account for the non-birthing parent of a child who is born earlier than expected. The employee may need to leave work, immediately, to care for his or her family. This departure might occur before the employee elects paid parental leave and executes a work obligation agreement. But, under Section 630.1706(a)'s strict language, the employee would not be able to retroactively opt for paid parental leave because he or she would have been physically and mentally capable of timely making the election.

NTEU thus urges OPM to revise its interim final rule. OPM should allow retroactive election for qualifying employees. At a minimum, OPM should amend its standard to allow a non-birthing parent who has a child earlier than expected to retroactively elect for paid parental leave.

II. OPM Should Limit an Agency's Discretion to Require Certification or Documentation for Paid Parental Leave and its Discretion to Invalidate Paid Parental Leave.

OPM's interim final rule allows an agency to request certification or other documentation related to a birth or placement for which paid parental leave is requested. See Interim Final Rule, Section 630.1703(h). It further empowers an agency to invalidate paid parental leave and to convert an employee to non-pay status if the employee does not timely provide that certification or documentation. See id. NTEU urges OPM to set limitations in these areas so that an agency does not arbitrarily or needlessly exercise its discretion. OPM should also clarify that an agency must bargain over its use of this discretion.

As an initial matter, OPM itself notes that an agency, typically, would have no need to request certification or documentation for the use of paid parental leave. As OPM correctly observes, "the risk of fraud is low—especially in birth cases." See 85 Fed. Reg. 48086. Given this reality, OPM should revise its interim final rule to provide that an agency may not request certification or documentation from an employee using paid parental leave unless it has an objectively reasonable basis for suspecting fraud. Otherwise, an agency would have no reason to burden the employee and his or her family during this busy time.

Further, an agency's discretion to invalidate paid parental leave should be extremely narrow. Whereas Congress intended to provide a financial benefit to employees, an agency's invalidation of those benefits could cause financial harm from which the employee and his or her family might never recover. OPM should therefore revise its interim rule to limit an agency's discretion in this area. Invalidation should be permitted only where an agency has a reasonable basis to suspect fraud and an employee completely and continuously fails to respond to the agency's request for certification or documentation for the entire duration of the paid parental leave. Even then, an agency should exercise restraint.

Finally, it is essential that agencies bargain with labor unions over the exercise of their discretion in these areas. That bargaining would include negotiations over when certification and documentation may be requested, deadlines for provide certification or documentation, the types of certification or documentation that are sufficient, the circumstances under which invalidation may occur, and related processes and procedures. Without bargaining, there would be a heightened risk of inconsistent application of the agency's discretion in these areas.

III. An Agency Cannot Require Additional Medical Examinations and Certifications After a Healthcare Provider Has Certified that a Serious Health Condition Prevents the Employee from Returning to Work.

The Act requires that employees who use the paid parental leave benefit return to work for twelve weeks after the leave concludes, unless "a serious health condition (including mental health)" related to the birth or placement or a "circumstance beyond the control of the employee" prevents it. See 5 U.S.C. § 6382(d)(2)(F). Otherwise, the agency "may recover" the amount that it paid to maintain the employee's health coverage while the employee was on leave. See 5 U.S.C. § 6382(d)(2)(G).

OPM's interim proposed rule, at Section 630.1705(g), allows an agency to "require an employee to provide certification from a health care provider supporting the employee's claim that a serious health condition is causing the employee to be unable to require to work." Section 630.1705(g) goes on to allow an agency that has received such a certification to require any "additional examinations and certifications from other health care providers" that the agency "deems [] necessary" to confirm the serious health condition. NTEU objects to this disconcerting authorization.

First, the Act does not authorize an agency to demand additional certifications from "other" healthcare providers affirming the employee's serious health condition. See Interim Final Rule, Section 630.1705(g). Once the employee provides a medical certification supporting to the serious health condition that prevents a return to work, that should be the end of the matter. See 5 U.S.C. § 6382(d)(2)(F)(iii). An agency has no statutory authority to order the employee to solicit additional certifications from "other health care providers," which would necessarily entail additional medical examinations from those providers. See Interim Final Rule, Section 630.1705(g).

Second, the Act provides no authority whatsoever for an agency to subject an employee to "additional examinations" after a health care provider certifies that the employee is unable to return to work because of a serious health condition. Congress did not condition paid parental leave on an employee giving up medical

autonomy. It did not empower an agency to require that an employee undergo additional physical or mental examinations to avoid financial harm. Neither could the government, in any event, condition the use of paid parental leave on an employee ceding her constitutionally protected interests in this area. See, e.g., Alliance for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev., 651 F.3d 218, 231 (2d Cir. 2011) ("the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights"), aff'd, 570 U.S. 205 (2013).

NTEU thus urges OPM to revise its interim final rule to remove all language authorizing agencies to require additional examinations or certifications from employees for whom a healthcare provider has already certified that a serious health conditions prevents a return to work. At a bare minimum, an additional certification should not be required unless the agency has a substantial basis for believing that the initial certification is fraudulent. Otherwise, an agency should not be permitted to second-guess a medical professional's assessment of the employee's health and intrude upon the employee's privacy rights.

IV. Congress Did Not Grant Agencies Sole and Exclusive Discretion Over When They May Require Reimbursement if an Employee Does Not Return to Work for Twelve Weeks at the Conclusion of Paid Parental Leave.

OPM's interim final rule, at Sections 630.1705(f), (h), and (j), addresses potential reimbursement to the agency for its healthcare contributions during paid parental leave if an employee does not return to work for twelve weeks following his or her leave. An agency may not seek reimbursement if the employee does not return to work due to a serious health condition or to a "circumstance beyond the employee's control." See Interim Final Rule, Section 630.1705(f), (h). Otherwise, OPM purports to give agencies "sole and exclusive discretion" over whether "to impose the reimbursement requirement." Id. at Section 630.1705(f)(2). OPM also directs agencies to adopt "its own set of policies governing when it will or will not apply the reimbursement requirement . . . so that employees within an agency are treated consistently." Id. at Section 630.1705(j).

As an initial matter, an agency should rarely, if ever, exercise its discretion to seek reimbursement from an employee who fails to return to work to care for his or her growing family. Requiring reimbursement might cause the employee's family irremediable financial harm. It would also be inconsistent with the Act's basic objective. As OPM itself notes, the Act aims to benefit "American society as a whole" with the government acting as a "model in providing paid parental leave to its employees." See 85 Fed. Reg. 48086. This might influence other employers to offer "similar benefits" and lead to "parents around the country . . . "spending additional time bonding with children." See id. Recovering healthcare costs from

employees who decide to care for their children instead of returning to work would not further this objective and it would indisputably harm employees and their families.

Further, nothing in the Act's text gives agencies "sole and exclusive discretion" over whether to seek reimbursement, and OPM cannot grant such discretion in Congress's stead. Cf. Interim Final Rule, Section 630.1705(f)(2). Consistent with Chapter 71 of Title 5, an agency must therefore engage in collective bargaining over the exercise of its discretion over, and its "agency-wide set of policies" governing, when it "will or will not apply the reimbursement requirement." See id. at Section 630.1705(j).

Such bargaining, moreover, would help alleviate OPM's own concerns about agencies treating employees "consistently" when exercising their reimbursement discretion. See id. at Section 630.1705(j). Bargaining will help ensure that an agency's policies on reimbursement provide real parameters for when reimbursement will be sought, so that inconsistent application or abuse does not occur. Otherwise, an agency would have no incentive to limit its discretion on its own by providing concrete standards on reimbursement in its parental leave policies.

V. OPM Should Clarify That an Involuntary Separation is a "Circumstance Beyond the Control of the Employee."

OPM's interim proposed rule provides that "a separation . . . before completion of the required weeks of work will constitute [a] failure to return to work for 12 weeks," unless the separation is due to an "intra-agency reassignment without a break in service." See 85 Fed. Reg. 48082 (discussing Interim Final Rule, Section 630.1705(f)). This failure to return to work for the agency for twelve weeks would permit an agency to "impose the reimbursement requirement," unless a statutory exception to the twelve-week requirement applies. See id.

OPM should clarify that an involuntary separation is a "circumstance beyond the control of the employee," which excuses performance of the twelve-week work obligation. See 5 U.S.C. § 6382(d)(2)(G)(ii). OPM interprets this statutory exception to include circumstances "that truly preclude an employee from returning to work with the employing agency." See Interim Final Rule, Section 630.1705(h). An employee who is terminated from his or her position before completing the twelve-week work requirement would unequivocally be "preclude[d] from "returning to work." Id. This inability to return to work would plainly be "beyond the control of the employee." Id. OPM should therefore confirm that an agency would not be permitted to impose the reimbursement requirement against an employee in this situation.

VI. OPM Should Clarify that Employees May Use Annual Leave to Extend Paid Time Off to Care for Their Children.

OPM's interim final rule reflects statutory limitations on the number of weeks of Family Medical Leave Act (FMLA) leave that may be taken in a twelve-month period. As a result of that limitation, if an employee takes unpaid FMLA leave during the same 12-month period in which he or she also wishes to take paid parental leave under the Act, the amount of paid parental leave available might be decreased by the amount of unpaid FMLA leave that was used. See 85 Fed. Reg. 48077, 48078 (discussing leave entitlement under various scenarios).

This possibility underscores the importance of employees knowing that they may seek to extend their paid parental leave using annual leave. This is especially important if an employee does not feel physically or mentally able to return to work but needs to remain in a paid status to support his or her family.

OPM notes that, outside of an FMLA request, an employee "has a right to take annual leave, subject to the right of the agency to schedule the time at which annual leave may be taken." See 85 Fed. Reg. 48079.

Critically, an employee's collective bargaining agreement may provide further assurances that annual leave requests will not be unreasonably denied. OPM's final rule on paid parental leave should note that employees may seek to use annual leave to extend their paid time off to care for their children and that their collective bargaining agreements may provide important guidance on this point.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact NTEU for elaboration of these views.

Sincerely,

Anthony M. Reardon
National President