

**Before the
OFFICE OF PERSONNEL MANAGEMENT**

Petition for Amendment of Regulations of:)
)
NATIONAL TREASURY) File No. _____
EMPLOYEES UNION,)
)
Petitioner.)
_____)

**PETITION FOR AMENDMENT OF REGULATIONS
TO ALLOW WEATHER AND SAFETY LEAVE DURING
COVID QUARANTINE AND ISOLATION**

Pursuant to 5 U.S.C. § 553(e), the National Treasury Employees Union (NTEU) submits this petition for an amendment of 5 C.F.R. Part 630, Subpart P of OPM’s regulations and OPM’s February 7, 2020 guidance to federal agencies titled “Human Resources Flexibilities and Authorities for the 2019 Novel Coronavirus.”

NTEU represents federal employees in thirty-four departments and agencies. Throughout the pandemic, tens of thousands of those employees have faithfully reported to their physical offices and workplaces to perform their duties, despite the serious health risks to themselves and their families. Tens of thousands of additional NTEU-represented employees will likewise soon return to their physical

workplaces, even though COVID-19 continues to infect and kill Americans each day. NTEU's proposals will ensure that these public servants do not have to use their personal leave if they are infected by COVID-19 and forced to isolate under their agency employer's policies.

NTEU's primary proposal is that OPM revise 5 C.F.R. Part 630, Subpart P, to allow agencies to grant weather and safety leave to non-telework-eligible employees who must quarantine or isolate because they have been exposed to or infected by a communicable disease like COVID-19.¹ See Part I, infra.

Alternatively, NTEU proposes that OPM revise 5 C.F.R. Part 630, Subpart P, to explicitly allow weather and safety leave for employees who (1) are exposed to a communicable disease like COVID-19 and must quarantine or (2) are infected by a communicable disease like COVID-19 and, though asymptomatic, must isolate. See Part II, infra.

Pursuant to 5 C.F.R. § 120.8, NTEU likewise requests that OPM modify its February 7, 2020 memorandum entitled "Human Resources

¹ The CDC defines "quarantine" as limiting contact with others due to exposure and "isolation" as limiting contact after testing positive or developing symptoms. See, e.g., CDC, "Quarantine and Isolation," www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html (updated Jan. 27, 2022).

Flexibilities Available for Federal Employees Impacted by the 2019 Novel Coronavirus” and the attachment thereto (hereinafter HR Flexibilities Memo).² The revised guidance should correspond with the new, amended regulations. Even if OPM does not pursue regulatory amendments, it should modify its guidance to eliminate inconsistent practices among agencies. See Part III, infra.

NTEU’S PROPOSALS AND STATEMENT OF GROUNDS

I. OPM should amend its regulations to allow weather and safety leave for all non-telework-eligible employees in COVID quarantine or isolation.

NTEU understands OPM’s interpretation of its current guidance to be that weather and safety leave is permitted when non-telework-eligible employees must quarantine due to exposure, but not when they must isolate because of a positive test, symptoms, or both. NTEU’s primary proposal asks OPM to: (1) codify its existing interpretation as to quarantine; and (2) also allow weather and safety leave for employees in isolation, for the reasons explained below. See Part I.B-C, infra.

² A copy is available at <https://www.chcoc.gov/content/human-resources-flexibilities-available-federal-employees-impacted-2019-novel-coronavirus>.

A. NTEU's Proposed Language

NTEU proposes adding a new section, 630.1608, to 5 C.F.R.

Subpart P. That section would read as follows:

5 C.F.R. § 630.1608 Use of weather and safety leave for required quarantine and isolation related to a communicable disease.

- (a) An agency may grant weather and safety leave to employees who, in accordance with guidance from federal, state, or local public authorities, the agency requires to:
 - (1) quarantine because of exposure to a communicable disease; or
 - (2) isolate because of infection with a communicable disease.³
- (b) Consistent with § 630.1605 of this subpart, weather and safety leave under this section is only available to employees who are not participating in a telework program, do not have any portable work, and are unable to safely travel to and work at an approved telework site, subject to the exceptions set forth in § 630.1605(a)(2).
- (c) Weather and safety leave under this section may not be granted after the required quarantine or isolation period. If an employee does not feel well enough to return to the workplace (i.e., is incapacitated) after the

³ This language is drafted to apply to both COVID-19 and future health emergencies. It is important to codify this qualifying use of weather and safety leave so that the federal government is better prepared for such emergencies. With this regulation in place, agencies will not need to rely solely on emergency legislation and guidance if and when these emergencies arise.

required time away, the employee must take sick leave or another form of personal leave.

B. NTEU’s proposed amendment is consistent with the governing statute and regulations.

Under the Administrative Leave Act of 2016, as relevant here, agencies may grant paid weather and safety leave to employees with a “condition” that prevents them “from safely traveling to or performing work at an approved location.” 5 U.S.C. § 6329c(b)(3).

Quarantine or isolation to prevent the spread of COVID-19 is a qualifying “condition” under 5 U.S.C. § 6329c(b)(3). Indeed, such quarantine or isolation is required precisely because it is unsafe for the employee to travel to and to work at an approved work location.

The fact that sick leave could also apply does not change the analysis. Nothing in the statute—or in OPM’s implementing regulations—prevents the use of weather and safety leave when another type of leave could apply. All that matters is whether the circumstances fall within the coverage of 5 U.S.C. § 6329c(b).

In sum, NTEU’s proposed regulatory amendment is consistent with 5 U.S.C. § 6329c and OPM’s implementing regulations.

C. The proposed amendment is good policy.

- 1. The proposed amendment is a fair solution to an unprecedented problem, and a necessary one given the expiration of emergency paid leave.**

NTEU's proposed regulation will ensure that federal employees are not forced to use their own personal leave, or take leave without pay, if they are required to isolate or quarantine because of COVID exposure or infection. Federal employees who are unable to telework should not be penalized for the requirement that they stay away from the workplace to keep others safe.

- a. Congress passed the Families First Coronavirus Response Act (FFCRA) in March 2020. For the first nine months of the pandemic, the FFCRA required the federal government to provide most employees with emergency paid sick leave for specified reasons related to COVID-19. Congress then passed the American Rescue Plan in March 2021, which allowed emergency paid leave for federal employees for a variety of COVID-19-related qualifying circumstances. Congress passed these laws because it recognized the urgent, unprecedented, and continuing health risks posed by the pandemic, which has taken nearly one million American lives.

The emergency paid sick leave available under the FFCRA expired on December 31, 2020. Emergency paid leave under the American Rescue Plan was available only between March 11 and September 30, 2021. Thus, federal employees have not had access to these forms of leave for six months and counting. But consistent with CDC guidance, federal agencies continue to require isolation and quarantine in appropriate circumstances. Without emergency COVID leave, agency policies require employees to use their personal leave when they test positive for COVID-19 or experience symptoms, even if they were potentially exposed while at work. This is unfair to federal civil servants who have been risking the health and safety of themselves and those around them so that they can continue to do jobs that cannot be done remotely.

b. This is a particularly important time for OPM to revise its regulations in the manner that NTEU proposes. Two years into the pandemic, the federal government is moving away from a maximum telework posture and requiring more employees to return to their government offices. For these employees—and for those who have been

working in their government offices throughout the pandemic—COVID-19 still poses a significant health risk.

Federal employees will continue to be exposed to and infected with COVID-19 for the foreseeable future. Under their agencies' policies and consistent with CDC guidance, they will be required to quarantine or isolate, as applicable. The use of weather and safety leave in these circumstances is appropriate to allow such employees to remain away from the workplace for the required time—thus protecting their coworkers and members of the public with whom they interact—without sacrificing their personal leave or taking leave without pay.⁴

2. The proposed amendment promotes healthier and safer workplaces.

a. NTEU's proposed regulatory amendment will encourage employees to self-report positive COVID test results, which is essential to maintaining a safe and healthy workplace. This is especially crucial because agencies are still working to develop employee testing programs, two years into the pandemic.

⁴ Many NTEU-represented employees interact with the public on a daily basis. For example, Customs and Border Protection Officers encounter the public at ports of entry and IRS employees assist taxpayers in person at service centers around the country.

NTEU's proposal incentivizes employees to engage in more frequent voluntary self-testing and to disclose positive results. With the knowledge that weather and safety leave is available if they test positive and cannot telework, employees are much more likely to alert their agencies if they contract COVID-19. Otherwise, employees will continue to be penalized for self-reporting positive results through the loss of personal leave or, in the absence of leave, pay.

b. Additionally, allowing the limited use of weather and safety leave for employees who must stay home and cannot telework will allow those employees to save their sick days for other occasions when they or their family members are ill. This, in turn, will limit the spread of contagious diseases in the federal workplace.

3. The proposed amendment incorporates clear time and circumstance limitations that reduce administrative and financial costs.

NTEU's proposed regulatory amendment will only apply in a limited set of circumstances with clearly defined bounds. First, the proposal only applies to employees who cannot telework and cannot be

given portable work.⁵ This substantially limits the proposal's application. Second, NTEU's proposed amendment only applies when employees must quarantine or isolate pursuant to agency requirements. Once that time period ends, employees must take personal leave if they wish to stay away from the workplace.

Thus, NTEU's proposal represents only a limited expansion in the amount of weather and safety leave that will be granted to employees. It will also be straightforward for agencies to determine when the leave should be granted.

4. NTEU's proposed regulation also eliminates the administrative burden of verifying employees' symptomatic status.

NTEU's primary proposal eliminates the need to distinguish between asymptomatic and symptomatic employees and to track when asymptomatic employees might become symptomatic. It would also eliminate any incentive for employees to hide their symptomatic status to avoid using personal leave during agency-required isolation. For

⁵ NTEU's proposal incorporates 5 C.F.R. § 630.1605, which—subject to limited exceptions—prohibits weather and safety leave for employees who are telework-eligible and can safely perform work at an approved telework site such as their home.

these reasons, NTEU's primary proposal would be more workable and less administratively burdensome for federal agencies.

II. In the alternative, OPM should amend its regulations to explicitly allow weather and safety leave for asymptomatic employees in COVID isolation along with those in quarantine.

As noted in the introduction to Part I, NTEU understands that OPM currently interprets its existing guidance to allow weather and safety leave for non-telework-eligible employees subject to agency-required quarantine, but not employees in isolation. Under NTEU's alternative proposal, employees in quarantine and asymptomatic employees in isolation would be eligible for weather and safety leave. These groups should be treated alike for the reasons explained below.

A. NTEU's Alternative Proposal

If OPM does not wish to allow weather and safety leave for all non-telework-eligible employees in isolation, it should at least issue a regulation clarifying that such leave is appropriate for asymptomatic employees, consistent with NTEU's reading of its guidance. NTEU's proposal for such a clarifying regulation would have the same placement and text as the proposal above, except that subsection (a) of the proposal would read as follows:

- (a) An agency may grant weather and safety leave to employees who, in accordance with guidance from federal, state, or local public authorities, the agency requires to:
 - (1) quarantine because of exposure to a communicable disease; or
 - (2) isolate because of asymptomatic infection with a communicable disease.

B. NTEU’s alternative proposal is consistent with governing statutes, regulations, and OPM’s existing guidance.

A regulation clarifying that weather and safety leave is available for asymptomatic employees in isolation is consistent with statute, regulation, and OPM’s existing guidance for the COVID-19 pandemic. The regulatory revision is needed because agencies are defying OPM’s guidance.

As OPM’s guidance states, “agencies may authorize weather and safety leave when an asymptomatic employee (i.e., healthy, not displaying symptoms of the given disease) is subject to movement restrictions (quarantine or isolation) under the direction of public health authorities due to a significant risk of exposure to a quarantinable communicable disease, such as 2019-nCoV.” HR Flexibilities Memo at 1. OPM’s guidance further provides that weather and safety leave in these circumstances “supersede[s]” the use of sick

leave under 5 C.F.R. § 630.401(a)(5). Id. at 2. In other words, while sick leave is allowed when employees must stay home because their presence would “jeopardize the health of others . . . because of exposure to a communicable disease,” 5 C.F.R. § 630.401(a)(5), OPM has found it more appropriate to use weather and safety leave for these situations in the COVID-19 context.

OPM’s view, as expressed in its guidance, is lawful and logical. For leave purposes, there is no meaningful difference between employees merely exposed to a disease and those who are infected but asymptomatic. Asymptomatic employees could go to work but for the need to stay home because they would “jeopardize the health of others by [their] presence on the job.” 5 C.F.R. § 630.401(a)(5). This superseded sick leave provision applies equally to exposed employees and infected, asymptomatic employees.

Likewise, asymptomatic employees do not fit the circumstances under which OPM’s existing COVID-19 guidance states that sick leave is appropriate: under 5 C.F.R. § 630.401(a)(2). HR Flexibilities Memo at 2. That provision allows sick leave when an employee is “incapacitated” by a physical or mental illness or another condition. An asymptomatic

employee is not incapacitated. Thus, asymptomatic infected employees fall squarely within § 630.401(a)(5)—a provision that OPM has declared superseded by weather and safety leave during the COVID-19 pandemic.

Nonetheless, agencies are not acting uniformly when it comes to COVID-positive asymptomatic employees. Some agencies are allowing weather and safety leave while others are not. This is likely because OPM's guidance, at times, is less than clear. See Part III, infra. OPM should therefore issue a regulation that confirms what its guidance provides: that weather and safety leave is available to asymptomatic COVID-infected employees during their isolation period.

C. NTEU's alternative proposal is supported by compelling policy considerations.

1. NTEU's alternative proposal promotes equity and fairness for employees who risk their health to perform their duties at the workplace. Under the alternative proposal, COVID-positive employees who remain asymptomatic would not be forced to take personal leave or leave without pay to complete agency-required isolation when they are physically capable of coming to the office to perform their duties.

2. NTEU’s alternative proposal also promotes healthier and safer workplaces by encouraging employees to disclose positive test results, even when they are asymptomatic. In addition, the alternative proposal would help employees save sick leave for other appropriate circumstances.

3. NTEU’s alternative proposal retains the clear time and circumstance limitations that streamline the administration of weather and safety leave. See Part I.C.3, supra.

III. OPM should modify its guidance to eliminate existing confusion in agency administration of COVID leave policies.

Pursuant to 5 C.F.R. § 120.8, NTEU requests that OPM modify the guidance reflected in the February 7, 2020 HR Flexibilities Memo. As an initial matter, if OPM adopts either of NTEU’s regulatory proposals, it should modify its guidance to reflect those regulatory revisions. But even if OPM does not initiate a rulemaking process, it should revise its guidance to eliminate inconsistencies among agency policies and practices.

OPM should revise its guidance to further clarify the availability of weather and safety leave for asymptomatic employees. OPM’s guidance states that “agencies may authorize weather and safety leave

when an asymptomatic employee (i.e., healthy, not displaying symptoms of the given disease) is subject to movement restrictions (quarantine or isolation) under the direction of public health authorities due to a significant risk of exposure to a quarantinable communicable disease, such as 2019-nCoV.” HR Flexibilities Memo at 1.

But, in tension with that accurate and specific statement, OPM’s guidance goes on to state, more generally, that weather and safety leave is “inappropriate” for employees who are “diagnosed as being infected, or likely [have] been infected, with a quarantinable communicable disease.” Id. at 2. Thus, OPM should, at a minimum, revise its guidance to delete this language on page 2. That would clarify for agencies that, consistent with existing statute and regulation, they may allow weather and safety leave for asymptomatic employees in isolation. See Part II.B, supra.

CONCLUSION

For the foregoing reasons, OPM should amend 5 C.F.R. Part 630 and modify its related guidance.

Respectfully submitted,

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March 28, 2022

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