

employees and applicants for employment who prevail in an initial decision issued by the Merit Systems Protection Board (MSPB) as required by the *Whistleblower Protection Act of 1989*, Pub. L. 101-12 (codified at 5 U.S.C. 7701(b)(2)(A)). The interim relief provisions of the law are applicable whether or not alleged reprisal for whistleblowing is at issue in an appeal to MSPB.

**§ 772.102 Interim personnel actions.**

When an employee or applicant for employment appeals an action to MSPB and the appeal results in an initial decision by an MSPB administrative judge granting interim relief under 5 U.S.C. 7701(b)(2)(A) and a petition for review of the initial decision is filed (or will be filed) with the full Board under 5 U.S.C. 7701(e)(1)(A), the agency shall provide the relief ordered in the initial decision by taking an interim personnel action subject to the following terms:

(a) Interim personnel actions shall be made effective upon the date of issuance of the initial decision and must be initiated on or before the date of a petition for review by the agency or within a reasonable period after the date it becomes aware of a petition for review by the appellant;

(b) The relief provided by interim personnel actions shall end:

(1) When the full Board issues a final decision on a petition for review filed by an applicant for employment, employee, and/or agency under 5 U.S.C. 7701(e)(1)(A),

(2) When the initial decision becomes final pursuant to an action of the full Board or pursuant to a decision by an applicant for employment, employee, and/or agency to withdraw (or change intentions to file) any petition for review filed under 5 U.S.C. 7701(e)(1)(A), or

(3) When the applicant for employment or employee requests or reaches agreement with the agency that the interim relief ordered in the initial decision be cancelled;

(c) Interim relief shall entitle the applicant for employment or employee to the same compensation and benefits he or she would receive if the relief effected had not been on an interim basis

except as provided in paragraph (f) of this section;

(d) An interim personnel action shall not be taken if the MSPB administrative judge, pursuant to 5 U.S.C. 7701(b)(2)(A)(i), determines that granting interim relief is not appropriate;

(e) An interim personnel action under this part shall not entitle the applicant for employment or employee to an award of back pay or attorney fees.

[57 FR 3712, Jan. 31, 1992, as amended at 59 FR 36353, July 18, 1994; 59 FR 65704, Dec. 21, 1994]

**PART 792—FEDERAL EMPLOYEES' HEALTH AND COUNSELING PROGRAMS**

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### Subpart A—Regulatory Requirements for Alcoholism and Drug Abuse Programs and Services for Federal Civilian Employees

#### § 792.101 Statutory requirements.

Sections 290dd-1 and 290ee-1 of 42 United States Code, provide that the Office of Personnel Management shall be responsible for developing and maintaining, in cooperation with the Secretary of the Department of Health and Human Services, and with other Federal departments and agencies, appropriate prevention, treatment, and rehabilitation programs and services for Federal civilian employees with alcohol and/or drug problems. To the extent feasible, agencies are encouraged to extend services to families of alcohol and/or drug abusing employees and to employees who have family members who have alcohol and/or drug problems. Such programs and services shall make optimal use of existing government facilities, services, and skills.

[50 FR 16692, Apr. 29, 1985]

#### § 792.102 General.

It is the policy of the Federal Government to offer appropriate prevention, treatment, and rehabilitation programs and services for Federal civilian employees with alcohol and/or drug problems. Short-term counseling and/or referral, or offers thereof, shall constitute the appropriate prevention, treatment, and rehabilitation programs and services for alcohol abuse, alcoholism, and/or drug abuse required under 42 U.S.C. 290dd-1(a) and 290ee-1(a). Federal departments and agencies

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must establish programs to assist employees with these problems in accordance with the legislation cited in § 792.101.

[50 FR 16692, Apr. 29, 1985]

### § 792.103 Coverage.

This part applies to all positions in Executive agencies as defined in section 105 of title 5 of the United States Code, and to those positions in the legislative and judicial branch of the Federal Government which are in the competitive service.

[49 FR 27921, July 9, 1984]

### § 792.104 Responsibilities of the Office of Personnel Management.

OPM shall provide overall leadership for the Government-wide alcoholism and drug abuse program in cooperation with the Secretary of Health and Human Services. To accomplish this, OPM shall develop and issue policy and program guidance, provide technical assistance to agencies, and determine the overall effectiveness of the Government-wide program, as well as those programs at individual agencies, based on program information required of agencies.

[49 FR 27921, July 9, 1984]

### § 792.105 Agency responsibilities.

(a) Agencies shall establish and administer programs through which practitioners who are knowledgeable in counseling and referral services can offer and provide employees who have alcohol and/or drug problems short-term counseling and/or referrals for long-term counseling or treatment.

(b) Agencies shall issue internal instructions implementing the requirements of 42 U.S.C. 290dd-1(a) and 290ee-1(a) and this regulation.

(c) Whenever a manager/supervisor becomes aware that a Federal employee's use of alcohol and/or drugs may be contributing to a performance or conduct deficiency, the manager/supervisor shall recommend counseling and refer the employee to the agency counseling program. If an employee fails to participate in any rehabilitative program or, having participated, the employee fails to bring conduct or performance up to satisfactory level, the

agency shall evaluate the employee accordingly and initiate an appropriate performance-based or adverse action.

(d) As requested, agencies shall annually submit a report to OPM on their counseling activities for the past fiscal year at a time, and in a manner, set by OPM.

[49 FR 27921, July 9, 1984, as amended at 50 FR 16692, Apr. 29, 1985]

## Subpart B—Agency Use of Appropriated Funds for Child Care Costs for Lower Income Employees—What Is the Child Care Subsidy Program Legislation and to Whom Does It Apply?

SOURCE: 68 FR 14128, Mar. 24, 2003, unless otherwise noted.

### § 792.200 What are the benefits of the child care subsidy program law?

Sec. 630 of Public Law 107-67 permits executive agencies to use appropriated funds to improve the affordability of child care for lower income Federal employees. The law applies to child care in the United States and in overseas locations. Employees can benefit from reduced child care rates at Federal child care centers, non-Federal child care centers, and in family child care homes for both full-time and part-time programs such as before and after school programs and daytime summer programs.

### § 792.201 What is the purpose of the child care subsidy program law?

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

### § 792.202 Do agencies have any notification responsibilities before initiating a child care subsidy program and when may agencies obligate funds for the program?

An agency intending to initiate a child care subsidy program must provide notice to the House Subcommittee on Treasury, Postal Service and General Government Appropriations; to the Senate Subcommittee on Treasury

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and General Government Appropriations; and to its appropriations subcommittees prior to the obligation of funds. The agency must also notify OPM of its intention. The agency must give notice to these Congressional committees and OPM annually, and funds may be obligated immediately after the agency has made these notifications.

### **§ 792.203 What materials are available to assist agencies with the process of establishing a child care subsidy program?**

OPM has developed guidance that contains samples of memoranda of understanding, marketing tools, child care subsidy program applications, and models for determining subsidy program eligibility. These materials are found in the "Guide for Implementing Child Care Legislation—Public Law 107-67, Sec. 630." The Guide is available on OPM's Web site, <http://www.opm.gov/wrkfam>. Agencies may also obtain a copy by writing to OPM at U.S. Office of Personnel Management, Office of Work/Life Programs, 1900 E St., NW., Washington, DC 20415.

### **§ 792.204 Are there any special reporting and oversight requirements related to the child care subsidy program law?**

Agencies are responsible for tracking the utilization of their funds and reporting the results to OPM. OPM will provide agencies the mandatory reporting form for this purpose. OPM also will produce an annual report for use by the agencies.

### **§ 792.205 Which agency funds may be used for the purpose of the child care subsidy program?**

Agencies are permitted to use appropriated funds, including revolving funds, that are otherwise available to them for salaries and expenses.

### **§ 792.206 Are agencies required to participate in this program?**

Agencies are not required to participate in this program. The decision to participate is left to the discretion of the agency. If an agency chooses to participate, it may not use funds other than those specified in § 792.205.

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### **§ 792.207 When does the child care subsidy program law become effective and how may agencies take advantage of this law?**

This authority was made permanent on November 12, 2001. Agencies may now offer child care subsidy programs to their lower income Federal employees to help them reduce their child care costs.

### **§ 792.208 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.

### **§ 792.209 What is the definition of child care subsidy program?**

The term *child care subsidy program*, for the purposes of this subpart, means the program that results from the expenditure of agency funds to assist lower income Federal employees with child care costs, including 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 use of the program.

### **§ 792.210 What is the definition of civilian employee?**

The term *civilian employee*, for the purposes of this subpart, means all appointive positions in an executive agency (5 U.S.C. 105). It does not refer to private contractors hired by the agencies.

### **§ 792.211 What is the definition of a Federally sponsored child care center?**

The term *Federally sponsored child care center*, for the purposes of this subpart, is a child care center that is located in a building or space that is owned or leased by the Federal Government.

### **§ 792.212 What is the definition of a child care contractor?**

Section 630 of Public Law 107-67 provides that child care services provided by contract are encompassed by this new legislation. The term *child care*

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*contractor* applies to an organization or individual providing child care services for which Federal families are eligible. These entities are commonly referred to as “child care providers” in the child care industry and they provide services under contract in center-based child care and family child care homes.

### § 792.213 What is the definition of a *child* for the purposes of this subpart?

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

- (a) A biological child who lives with the Federal employee;
- (b) An adopted child;
- (c) A stepchild;
- (d) A foster child;
- (e) A child for whom a judicial determination of support has been obtained; or
- (f) A child to whose support the Federal employee, who is a parent or legal guardian, makes regular and substantial contributions.

### § 792.214 Which children are eligible for this subsidy?

The law covers the children of Federal employees, excluding contract employees, from birth through age 13 and disabled children through age 18.

### § 792.215 What is the definition of a *child with disabilities*?

For the purpose of this subpart, a *child with disabilities* is defined as one who is unable to care for himself or herself based on a physical or mental incapacity as determined by a physician or licensed or certified psychologist.

### § 792.216 Are Federal employees with children who are enrolled in summer programs and part-time programs eligible for the child care subsidy program?

Federal employees with children (birth through age 13) and children with disabilities (children through age 18) who are enrolled in daytime summer programs and part-time programs such as before and after school programs are eligible for the child care subsidy program. The summer and part-time programs must be licensed and/or regulated.

### § 792.217 Are part-time Federal employees eligible for the child care subsidy program?

Federal employees who work part-time are eligible for the child care subsidy program.

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

The bill includes non-Federal center-based child care as well as care in family child care homes, as long as the providers are licensed and/or regulated by the State and/or local regulating authorities.

### § 792.219 Are agencies required to negotiate with their Federal labor organizations concerning the implementation of this law?

Agencies are reminded of their obligation under 5 U.S.C. 7117 to negotiate or consult, as appropriate, with the exclusive representatives of their employees on the implementation of the regulations in this subpart.

### § 792.220 What are the requirements that child care providers must meet in order to participate in this program?

The provider, whether center-based or family child care, must be licensed and/or regulated by the State and, where applicable, by local authorities where the child care service is delivered. Outside of the United States, agencies may adopt or create criteria to ensure a child care center or family child care home is safe. Agencies must not restrict the use of funds to apply to accredited child care providers only.

### § 792.221 Is there a statutory cap on the amount or the percentage of child care costs that will be subsidized?

The law does not specify a cap on the amount or percentage of child care subsidy that may be subsidized.

### § 792.222 What is the definition of a *lower income Federal employee* and how is the amount of the child care subsidy determined?

Each agency decides who qualifies as a *lower income Federal employee* within

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that agency. OPM has provided guidance for determining eligibility in the "Guide for Implementing Child Care Legislation—Public Law 107-67, Sec. 630." This publication is available on OPM's Web site, <http://www.opm.gov/wrkfam>.

**§ 792.223 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 subsidy program 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 subsidy program eligibility and the amount of the subsidy is always determined by the Federal agency.

**§ 792.224 Are child care subsidies paid to the Federal employee using the child care?**

Agencies must pay the child care provider directly, unless one of the following exceptions applies:

- (a) If an agency chooses to have an organization administer its program (see § 792.223), the organization pays the child care provider;
- (b) For overseas locations, the agency may choose to pay the employee if the provider deals only in foreign currency; or
- (c) In unique circumstances, an agency may obtain written permission from OPM to do so.

**§ 792.225 May an agency disburse funds to an organization that administers the child care subsidy program prior to the time the employee receives the child care services?**

The agency may disburse funds to an organization that administers the child care subsidy program in one lump sum. The organization will be responsible for tracking the funds and providing the agency with regular reports. An agency contract should specify that any unex-

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pending funds shall be returned to the agency after the contract is completed.

**§ 792.226 How may an agency disburse funds to a Federally sponsored child care center in a multi-tenant building?**

In a multi-tenant building, funds from the agencies may be pooled together for the benefit of the employees qualified for the child care subsidy program.

**§ 792.227 How long will the child care subsidy program be in effect for a Federal employee?**

The child care subsidy program, in the form of a reduced child care cost rate, shall be in effect from the time the agency makes a decision for a particular Federal employee and the child is enrolled in the program until one of the following occurs:

- (a) The child is no longer enrolled in the program;
- (b) The employee no longer qualifies as a "lower income employee"; or
- (c) The agency no longer has a child care subsidy program.

**§ 792.228 May these funds be used for children of Federal employees who are already enrolled in child care?**

The funds may be used for children currently enrolled in child care as long as their families meet the child care subsidy program eligibility requirements established by the agency.

**§ 792.229 May an agency place restrictions or requirements on the use of these funds, and may the agency restrict the disbursement of such funds to only one type of child care or to one location?**

- (a) Depending on the agency's staffing needs and the employees' own needs, including the local availability of child care, the agency may choose to place restrictions on the use of its funds for the child care subsidy program. For example, an agency may decide to restrict use to the following:
  - (1) Federal employees who are full-time permanent employees;
  - (2) Federal employees using an agency on-site child care center;
  - (3) Federal employees using full-time child care; or

(4) Federal employees using child care in specific locations.

(a) With the exception of §792.229(c) an agency may determine whether and what restrictions to impose on the use of appropriated funds for the child care subsidy program.

(b) Agencies must not restrict the use of funds to apply to accredited child care providers only.

**§792.230 May an agency use appropriated funds to improve the physical space of the family child care homes or child care centers?**

An agency may not use appropriated funds under this program to improve the physical space of child care centers and family child care homes.

**§792.231 Is an agency permitted to make advance child care subsidy program payments for an individual Federal employee?**

An agency may choose to make advance payments to a child care provider in certain situations. Advance payments may be paid to the child care provider when the provider requires payment up to one month in advance of rendering services. Except in accordance with §792.225, an agency may not make advance payments for more than one month before the employee receives child care services.

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