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## MEMORANDUM

February 27, 2017

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

Re: *OPM Final Rule on Federal Employees Health Benefits (FEHB) Delayed Until March 21, 2017*

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On December 28, 2016, the Office of Personnel Management (OPM) published a final rule extending access to Federal Employees Health Benefits (FEHB) to certain tribal employers and employees under Section 409 of the Indian Health Care Improvement Act (IHCIA), as enacted by the Patient Protection and Affordable Care Act (ACA). 81 Fed. Reg. 95397 (Dec. 28, 2016); 25 U.S.C. § 1657b. The final rule establishes procedures for the administration of FEHB benefits including enrollment, coverage selection, and the regulation of premium contributions by tribal employers and employees. Eligibility in the FEHB Program is limited to Indian tribes and tribal organization administering programs under the Indian Self-Determination and Education Assistance Act (ISDEAA) and urban Indian organizations carrying out programs under Title V of the IHCIA. A brief summary of the final rule's major provisions follows.

On January 20, 2017, President Trump issued a White House Memorandum requiring federal agencies to temporarily postpone the effective date of certain rules that had been published in the Federal Register but had not yet taken effect within 60 days of the date of the Memorandum. The FEHB final rule fell within the scope of President Trump's mandate. *The effective date for the final rule is now March 21, 2017.*

### ***Clarifications of the Proposed Rule***

The final rule adopts subpart N relating to tribal employers, as proposed, with only minor two clarifications. First, the final rule clarifies that a tribal employer's contribution to the FEHB Program is credited as both a premium payment and an annual administrative fee. OPM states that a premium payment consists of the tribal employer's and tribal employees' percentage share of the aggregate premium assessed against a tribal employer for enrolling its employees in the FEHB Program. The premium payment is deposited into the Employees Health Benefits Fund to cover program expenses and reports.

Second, in response to a tribal comment recommending that OPM waive or cover the costs of FEHB co-payments for tribal employees that are served by certain tribal entities or an Indian Health Service facility, the final rule clarifies that a tribal employer cannot contribute toward or offer an alternative employer-sponsored health insurance plan for tribal employees within each “billing unit” (or workforce subdivision) for which the employer seeks to purchase FEHB coverage, with the exception of a collectively bargained alternative plan. OPM explains that this limitation applies to ensure that “tribal employees’ plan options and participation rules align[] with those of Federal employees and maintain the stability of the FEHB risk pool.”

### ***Major Provisions of the Final Rule***

#### *Tribal Employer Eligibility and Enrollment Options*

Tribal employer eligibility to offer FEHB coverage to their employees is limited to any tribe, tribal organization, or urban Indian organization carrying out at least one program under the ISDEAA or Title V of the IHCA, as mandated in section 409 of the IHCA. 25 U.S.C. § 1647b. The OPM also maintains final authority, in consultation with the Department of the Interior and the Department of Health and Human Services, to determine whether a tribal employer is eligible for the program.

Under the final rule, a tribal employer who purchases FEHB coverage for at least one billing unit carrying out at least one program under the ISDEAA or the IHCA is able to offer FEHB coverage to other billing units regardless of the type of programs offered by those other units. OPM states that the intended result of this provision is an expanded opportunity for tribal employers to offer FEHB coverage, rights, and benefits to all of their employees, not just those carrying out functions under the ISDEAA or IHCA Title V programs. However, as clarified above, the final rule prohibits billing units that offer FEHB coverage from simultaneously offering any other forms of coverage (such as tribal self-insured policies) to its employees, with the exception of a collectively bargained alternative plan.

#### *Employee Eligibility and Enrollment*

Consistent with current FEHB and federal tax standards, the final rule defines the term “tribal employee” to mean a full- or part-time common law employee of a tribal employer, excluding retirees or annuitants. The final definition specifies that a determination of whether or not an individual is a qualifying common law employee will be “based on all the facts and circumstances...[and] guided by a list of 20 factors developed by the Internal Revenue Service” as well as any future guidance it may release. Intermittent, seasonal, and temporary tribal employees are treated similarly to their federal counterparts; although a tribal employer may choose not to extend coverage to such employees if written notice is provided to the Director of the OPM.

On par with federal employees in the same geographic area, eligible tribal employees have the ability to choose from available FEHB health plans, namely, “self only,” “self plus one,” or “self and family” enrollment options. Similarly, once a tribal employer elects to purchase FEHB, tribal employees are subject to the same initial enrollment period, belated enrollment, and open season rules as federal employees under existing FEHB regulations. Tribal employees have the ability to change, cancel, or decrease enrollment under the same rules and procedures as federal employees. The final rule also sets out requirements for termination and temporary extension of coverage, as well as temporary continuation of coverage upon separation from employment.

### *Tribal Employer Conditions and Responsibilities*

In order to purchase FEHB coverage, the final rule requires tribal employers to enter into an agreement with OPM outlining the tribal employer’s eligibility, contact information, and various conditions of participation, as well as “[o]ther terms and conditions as appropriate.” A tribal employer can elect to purchase FEHB at any time, but must commit to the program for at least the remainder of the calendar year. To terminate participation, a tribal employer must provide the OPM with 60 days’ notice, after which the entity may not purchase FEHB coverage again until the first annual open season that falls at least twelve months after the revocation. If a tribal employer chooses to terminate participation a second time, it will be required to wait until the first open season that falls at least *two* years after the revocation to participate again. Tribal employers must provide their employees with adequate notice regarding any changes to FEHB coverage.

Tribal employers must offer uniform FEHB coverage to all employees within a billing unit that the tribal employer elects to enroll in the program, except where employees within a billing unit are offered alternative coverage as part of a collective bargaining agreement. Stand-alone dental, vision, or disability plans are not considered as an alternative health insurance under the final rule. OPM explains that this provision is intended to prevent the segmentation of tribal employee populations by offering a different set of health benefits to different groups of employees within a single billing unit.

In addition, tribal employers must establish or identify an independent dispute resolution panel for reconsideration of enrollment and eligibility decisions. The panel “shall be authorized to enforce enrollment and eligibility decisions”; must issue written decisions to the tribal employee seeking reconsideration of a decision; and must retain documentation until December 31 of the third year after the date of the decision. If the panel determines that a tribal employee is ineligible for coverage, the employee may seek reconsideration by the OPM, which retains final authority over all employee eligibility determinations.

### *Premiums and Administrative Fee Payments*

Tribal employers that elect to purchase FEHB coverage for their tribal employees must contribute a share of the premium for each specific plan that is at least equivalent to

what the Federal Government contributes for federal employees for that plan.<sup>1</sup> While the United States caps its own contribution level at seventy-five (75) percent of the cost of the premium, tribal employers may pay for up to one hundred (100) percent of the cost of coverage for their employees under the FEHB program. The final rule authorizes tribal employers to vary their contribution amount by enrollment type (self only, self plus one, or self and family) or by billing unit, and does not cap the percentage of premiums that a tribal employer may contribute provided the variation does not “encourage or discourage enrollment in any particular plan or plan option.” Tribal employers also have the choice to prorate their premium share with respect to part-time employees in proportion to the percentage of time that those employees work as compared with a comparable full time position.

In addition to the required premium contribution, OPM will charge tribal employers an annual fee for each enrollment of a tribal employee. OPM explains that the fee “covers the costs of a paymaster to perform the collection and remittance functions that is performed for Federal employees by Federal payroll offices.” Tribal employers are responsible for depositing FEHB payments, including premiums, into the Employees Health Benefits Fund and cannot remit the administrative fee to their employees.

### *Conclusion*

We attach a copy of the final rule and notice of delay in the effective date for your review. If you have any questions about the topics discussed herein, please contact Elliott Milhollin ([emilhollin@hobbsstrauss.com](mailto:emilhollin@hobbsstrauss.com) or 202-822-8282); Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com) or 503-242-1745); or Lisa Meissner ([lmeissner@hobbsstrauss.com](mailto:lmeissner@hobbsstrauss.com) or 202-822-8282).

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<sup>1</sup> Under 5 U.S.C. § 8906, the Federal Government’s contribution for health benefits is 72% of the weighted average of enrollments as determined by OPM on an annual basis, capped at 75% of the premium for any particular plan.