

Legal Sidebar

Congressional Health Coverage: Is the Government Contribution In Limbo?

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Congress's recent attempts to repeal or amend the [Patient Protection and Affordable Care Act](#) (ACA) have sparked renewed interest in executive actions that the Trump Administration may undertake to alter implementation of the Act. In discussing these possible actions, President Trump [stated](#) that if Congress fails to pass health reform legislation, "BAILOUTS for Members of Congress will end very soon." This comment was apparently made in reference to the health coverage that Members and congressional staff may receive pursuant to the ACA and the federal government's financial contribution towards this coverage. Speculation [has arisen](#) over whether the Office of Personnel Management (OPM), which has responsibility for administering the [Federal Employees Health Benefits Program](#) (FEHBP or FEHB program), has the authority to modify its current rules to eliminate the federal contribution and compel Members and staff to pay full freight for their employment-related health benefits. This Sidebar first provides an overview of the statutory framework governing congressional health coverage and the current OPM rule, and then addresses certain legal considerations that may come into play should the Trump Administration take action to modify this existing rule.

The Statutory Framework

[Congressional health insurance](#) has received a great deal of attention both on and off Capitol Hill since the enactment of the ACA. Traditionally, Members of Congress and congressional staff have been eligible to participate in the FEHB program, which provides employer-subsidized health care benefits to federal employees and annuitants. Under the program, OPM [is authorized](#) to contract with qualified insurance carriers to offer certain types of health benefits plans. However, the ACA potentially modified this framework, as the Act [states](#) that the only health plans the federal government may make available to Members and staff with respect to their service are those (1) created under ACA (or an amendment made by ACA); or (2) offered through [health insurance exchanges](#) authorized by the Act.

Shortly after enactment of the ACA, uncertainty arose over how the Act's provision would be reconciled with the FEHBP, and whether Members of Congress and congressional staff would be ineligible for FEHBP coverage once the ACA provision relating to congressional health insurance coverage took effect. Under the FEHBP, the [government's share](#) of a covered employee or an annuitant's premium is set at 72% of the weighted average premium of all health plans in the program, not to exceed 75% of any given plan's premium. The ACA did not amend the [statutes](#) that set forth the requirements of the FEHBP, nor did it expressly state that its purpose was to remove Members and staff from FEHBP participation. Given that the ACA was silent as to a government contribution for congressional health coverage, it [was questioned](#) whether the Act precluded the federal government from providing financial assistance under the FEHBP towards the coverage for Members and their staff.

The Current OPM Rule

While federal law tasks OPM with administration and operation of the FEHB program, the ACA did not provide for any specific entity to replace OPM for interpretation and/or implementation purposes. In 2013, OPM issued a [final rule](#) interpreting the relationship between FEHBP and the ACA with regard to Members of Congress and congressional staff. The rule specified that a government contribution under the FEHBP is available for Members and staff participating in the exchanges that were established pursuant to the ACA. OPM's determination mainly hinged on the agency's

interpretation of what constitutes a “health benefits plan.” Under the FEHB program, OPM may provide a government contribution for an “employee” enrolled in a “health benefits plan” under the FEHB program. A “health benefits plan” is [defined](#) in statute as a “group insurance policy or contract...or a similar group arrangement provided by a carrier for the purpose of providing, paying for, or reimbursing expenses for health services.” In interpreting this provision, OPM indicated in its final rule that Members and staff remain current employees for purposes of FEHBP, and that a plan purchased on a health exchange established under the ACA qualifies as a “health benefits plan.”

However, some [Members of Congress](#) and [others have asserted](#) that the OPM rule runs afoul of the ACA. The issue comes down to a matter of statutory interpretation. While the OPM rule construes the current FEHB statute and the ACA as complementary enactments that allow a government contribution to be offered to Members and congressional staff, critics of the rule claim that the ACA superseded the requirements of the FEHBP, and that permitting Members and staff to continue to receive a contribution under the FEHB program is contrary to the intent of Congress when it passed the ACA. Senator Ron Johnson and a member of his staff [filed](#) a lawsuit against OPM, contending that the agency overstepped its authority by offering a government contribution for plans offered outside of FEHBP. This case was [dismissed](#) by the U.S. Court of Appeals for the Seventh Circuit on standing grounds.

OPM Authority to Modify the Rule

Should the Trump Administration seek to amend the existing OPM rule on the basis that the ACA prohibits the FEHBP contribution to health coverage for Members of Congress and congressional staff, various factors may be considered. Federal agencies [are generally permitted](#) to amend or repeal existing regulations, so long as the amendment does not run afoul of their statutory authority. Additionally, it may be noted that an agency may be authorized to pursue a range of policy outcomes under its statutory authorization. This can include changing course and interpreting a statute differently over time (see more [here](#)). While agencies have the ability to reverse a previously articulated position or interpretation, they may need to provide a reasoned explanation (such as noting changed circumstances or addressing reliance interests generated by the agency’s prior position) in order to survive judicial review.

If OPM amended its regulations to eliminate the government contribution for congressional health coverage, it is possible that an affected Member or staffer could attempt to sue the Administration, claiming entitlement to the contribution under the FEHBP. A reviewing court could examine the interplay between FEHBP and the ACA, potentially addressing whether the relevant statutory language of the ACA either permits OPM to offer a contribution for health plans in an exchange to Members of Congress and congressional staff as part of the FEHB program, or restricts the agency from offering FEHBP-subsidized coverage to these individuals. As part of its analysis, a reviewing court could weigh in on whether the ACA provision is ambiguous on this issue and, if so, whether OPM’s interpretation is therefore [entitled to judicial deference](#). Finally, should the Administration take steps to amend the OPM rule, Congress remains free to pursue legislative options to clarify whether a government contribution is available for congressional health insurance.

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