



March 19, 2020

## Federal Executive Agencies: Hiring Flexibilities for Emergency Situations

On January 31, 2020, Secretary of Health and Human Services Alex Azar declared a public health emergency for the United States in response to Coronavirus Disease 2019 (COVID-19). To assist the federal government in responding to the emergency, Congress passed legislation that provides Direct-Hire Authority (DHA) to the Department of Health and Human Services (HHS). The U.S. Office of Personnel Management (OPM) has also reiterated long-standing guidance on flexibilities for hiring in executive agencies that are codified in Title 5 of the *United States Code* and Title 5 of the *Code of Federal Regulations*.

### Direct-Hire Authority

Section 302 of P.L. 116-123 (H.R. 6074), the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, as enacted on March 6, 2020, provides the HHS Secretary with DHA to appoint individuals to positions that perform critical work related to coronavirus. The law states that appointments may be made without regard to Title 5, Sections 3309-3319, of the *U.S. Code*, which prescribe veterans' preference requirements, requirements for rating and ranking applicants, and category rating procedures that increase the number of eligible candidates a selecting official may choose from. Still, public notice of positions the department seeks to fill would need to be given. And, the Secretary would need to determine that a public health threat exists.

Under Section 3304(a)(3), OPM may also authorize an agency to appoint candidates directly to positions without regard to Sections 3309-3318. The statute provides that public notice must be given for positions the agency seeks to fill. OPM would need to determine that there exists a severe shortage of candidates (for the Department of Veterans Affairs, there must be a severe shortage of highly qualified candidates) or that there is a critical hiring need. OPM regulations indicate that there is a severe shortage of candidates when “an agency is having difficulty identifying candidates possessing the competencies or the knowledge, skills, and abilities required to perform the job requirements despite extensive recruitment, extended announcement periods, and the use, as applicable, of hiring flexibilities such as recruitment or relocation incentives or special salary rates.” A critical hiring need occurs when “an agency has a need to fill the position(s) to meet mission requirements brought about by circumstances such as, but not limited to, a national emergency, threat, potential threat, environmental disaster, or unanticipated or unusual event or mission requirement, or to conform to the requirements of law, a Presidential directive or Administration initiative.”

The regulations also provide that OPM may decide independently that a severe shortage exists or that there is a critical hiring need or may make a decision about granting DHA in response to an agency's written request. An agency with delegated examining authority may request DHA for a position or group of positions in the competitive service at pay grade GS-15 (or equivalent) and below. OPM determines the length of the authority. The regulations specify the evidence that must support an agency's request. Periodically, OPM reviews DHAs and may extend them if the conditions justifying their use are continuing. DHAs may be terminated or modified when changes occur in the justifying conditions or when an agency does not use them properly. An agency must also report to OPM when there are adequate numbers of qualified candidates for positions filled by direct hire. (5 C.F.R. Part 337, Subpart B)

OPM maintains a webpage with information on DHA, including templates for submitting direct-hire requests based on a severe shortage of candidates and critical hiring need.

### Guidance on Hiring Flexibilities

On February 7, 2020, OPM issued guidance on human resources flexibilities for COVID-19 that included policies related to hiring. With regard to DHA authorities, OPM reminded agencies that direct hire is authorized government-wide for certain positions, including the following:

- Medical officers, nurses, diagnostic radiologic technicians, and pharmacists for all grade levels and locations;
- Information technology management (information security) for GS-9 and above at all locations;
- Veterinary medical officers for GS-11 through GS-15 nationwide, including overseas territories and commonwealths, indefinitely, until terminated;
- Scientific, technical, engineering and mathematics for GS-11 through GS-15 nationwide through October 10, 2023; and
- Cybersecurity-related positions for GS-12 through GS-15 nationwide, indefinitely, until terminated.

Individuals in the positions listed above may be appointed as competitive service career, career-conditional, term, or temporary employees. The guidance advised an agency to contact OPM “if it believes it has one or more occupations

for which an agency-specific direct hire authority may be appropriate in support of relief and recovery efforts.”

Competitive service positions are civil service positions in the executive branch that are not specifically excepted from the competitive service by or under statute, positions to which appointments are made by nomination for confirmation by the Senate (unless the Senate otherwise directs), and positions in the Senior Executive Service (SES) (5 U.S.C. §2102(a)). Competitive service positions require applicants to compete against one another in open competition based on job-related criteria to obtain employment (5 C.F.R. Parts 212, 330, and 332).

Several long-standing hiring flexibilities available to federal agencies were identified by OPM in reiterating its guidance:

*Excepted Service Appointment—Temporary Emergency Need* (5 C.F.R. §213.3102(i)(3)). Agencies may appoint individuals for 30 days and may extend the appointment to up to an additional 30 days if continued employment is essential to the agency’s operations. The same individual may not be employed for more than 60 days in a 12-month period. The agency determines the qualification requirements. The authority may be used to fill senior-level and lower-level positions. Excepted service positions are civil service positions that are not in the competitive service or the SES (5 U.S.C. §2103(a)). Qualification standards and requirements for these positions are established by the individual agencies. The Title 5 rules on appointment (except for veterans’ preference), pay, and classification do not apply (5 C.F.R. Parts 213 and 302).

*SES—Limited Appointments* (5 C.F.R. Part 317, Subpart F). Agencies may appoint career employees to limited term or limited emergency appointments provided such appointments are within the space allocations limit previously authorized by OPM. If an appointment would not be within that limit, an agency may request a temporary space allocation. Agencies may request authority from OPM to appoint non-career employees to limited term or limited emergency appointments. A limited term appointee is an individual appointed under a nonrenewable appointment for a term of three years or less to an SES position the duties of which will expire at the end of such term. A limited emergency appointee is an individual appointed under a nonrenewable appointment, not to exceed 18 months, to an SES position established to meet a bona fide, unanticipated, urgent need (5 U.S.C. §3132(a)(5)(6)).

SES positions are classified above GS-15 or in level IV or V of the Executive Schedule, or an equivalent position, and are not filled by presidential appointment with the advice and consent of the Senate. SES members, among other duties, direct the work of an organizational unit and exercise important policymaking, policy-determining, or other executive functions (5 U.S.C. §3132(a)(2)).

*Use of Private Sector Temporary Help Service Firms* (5 C.F.R. Part 300, Subpart E). (Conditions for using private sector temporaries are at Title 5, Section 300.503, of the *Code of Federal Regulations*.) Agencies may contract for up to 120 workdays with private sector temporary help

service firms to quickly provide specific services (but not for SES, managerial, or supervisory positions). A contract may be extended for an additional 120 workdays. Individuals provided by temporary help service firms are not considered or treated as federal employees for any purpose.

*Competitive Service Appointment—Temporary Appointments, 120 Days or Less* (5 C.F.R. §330.609(c) and 5 C.F.R. §330.707(e)). Agencies may make appointments of 120 days or less without first selecting a surplus or displaced employee who is eligible for appointment under an Agency Career Transition Assistance Plan (CTAP) or an Interagency Career Transition Assistance Plan (ICTAP). For appointments of longer duration, the CTAP and the ICTAP may be used to identify well-qualified displaced federal employees who are available for immediate employment (5 C.F.R. Part 330, Subparts F and G).

*Reemployment Priority List (RPL)* (5 C.F.R. Part 330, Subpart B). The RPL is used by agencies to give reemployment consideration to their current and former competitive service employees who will be, or were, separated by reduction in force or who are fully recovered from a compensable injury after more than one year (5 C.F.R. §330.201). Agencies may use the RPL as a source of qualified individuals who are available for temporary appointments (generally, one year with up to one additional year), term appointments (more than one year but not more than four years), or permanent appointments in the competitive service. An agency may apply an exception to choosing someone from the RPL from the list of exceptions at Title 5, Section 330.211, of the *Code of Federal Regulations*.

*Reemployed Annuitants* [5 U.S.C. §8344(i), §8468(i)]. Agencies, without OPM approval, may reemploy retirees without applying the dual compensation salary offset, which prohibits federal retirees from getting the full combined value of their salary and annuity upon reemployment. Appointments are for one year or less. Reemployed annuitants may work 520 hours during the first six months of retirement, 1,040 hours during any 12-month period, and 3,120 total hours during any period. Authorization for a longer time period requires OPM approval. Reemployment may not exceed 2.5% of the full-time workforce at any time. An agency must explain and justify the reemployment if it exceeds 1% of the full-time workforce.

*Reemploying Recipients of Voluntary Separation Incentives* (commonly referred to as buyouts) (5 U.S.C. §5597 note). Upon agency request, OPM may authorize agencies to rehire federal employees who retired or separated with buyouts. Laws authorizing buyouts may have included a requirement that the buyout be repaid upon government reemployment. Agencies may request that OPM grant a waiver of any buyout repayment.

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