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# FEHB Program Carrier Letter

## All Carriers

U.S. Office of Personnel Management  
Federal Employee Insurance Operations

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**Letter No. 2012-18**

**Date:** June 18, 2012

Fee-for-service [15]    Experience-rated HMO [15]    Community-rated HMO [17]

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**SUBJECT:** FEHBA Preemption of State Law re: Subrogation and Reimbursement

The purpose of this letter is to address concerns raised about the ability of Federal Employees Health Benefits (FEHB) Program carriers to collect subrogation and/or reimbursement recoveries. These recoveries occur when an enrollee who is injured obtains benefits from his or her FEHB Program plan and either 1) the plan recovers payment for those benefits from a third party tortfeasor as a subrogee of the enrollee or 2) the enrollee pursues an action against a third party tortfeasor and the terms of the plan require the enrollee, as a result of recovery, to reimburse the plan for benefits initially paid.

Some states are not allowing FEHB Program carriers to collect subrogation and/or reimbursement recoveries due to state law that either prohibits or limits these recoveries. This is to advise you that the Federal Employees Health Benefits Act (FEHBA) preempts state laws prohibiting or limiting subrogation and reimbursement. As a result, FEHB Program carriers are entitled to receive these recoveries regardless of state law.

The FEHBA, as codified at 5 U.S.C. § 8902(m)(1) provides:

The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

FEHB Program contracts and the applicable statement of benefits (brochures) require enrollees to reimburse the plan in the event of a third party recovery. Carriers are required to seek reimbursement and/or subrogation recoveries in accordance with the contract. The funds received by experience-rated carriers from these recoveries are required to be credited to Employees Health Benefits Fund established by 5 U.S.C. § 8909, held by the Treasury of the United States, and for experience-rated carriers and most community-rated carriers, subrogation and reimbursement recoveries serve to lower subscription charges for individuals enrolled in the Federal Employees Health Benefits Program. The carrier's right to subrogation and /or reimbursement recovery is both a condition of, and a limitation on, the payments that enrollees are eligible to receive for benefits; the carrier's contractual obligation to obtain them necessarily relates to the enrollee's coverage or benefits (including payments with respect to benefits) under the FEHB Program. These recoveries therefore fall within the purview of the FEHBA's preemption clause, and supersede state laws that relate to health insurance or health plans.

The United States Supreme Court provided, in *Empire Healthchoice Assurance, Inc. v. McVeigh* that it is plausible to construe subrogation and reimbursement contract terms as a condition or limitation on benefits received by a Federal employee, allowing these FEHB Program contract requirements to preempt state law according to 5 U.S.C. § 8902(m)(1). See, 547 U.S. 677, 697-698 (2006). OPM maintains this construction of the statute allowing for preemption of state laws relating to subrogation and reimbursement.

In support of OPM's position, Federal courts have held that state laws restricting or prohibiting subrogation and/or reimbursement activities "relate" to plans for purposes of triggering the state law preemption provisions of FEHBA. See, e.g., *Medcenters Health Care v. Ochs*, 26 F.3d 865 (8th Cir. 1994); *NALC Health Benefit Plan v. Lunsford*, 879 F. Supp. 760 (E.D. Mich. 1995); *Botsford v Blue Cross and Blue Shield of Montana, Inc.* 314 F.3d 390 (9th Cir. 2002)(as to conflict preemption).

As the Federal agency with regulatory authority over the FEHB Program, OPM has consistently recognized that the FEHBA preempts state laws that restrict or prohibit FEHB Program carrier reimbursement and/or subrogation recovery efforts, and we continue to maintain this position.

Please utilize this correspondence as needed in your recovery efforts.

Sincerely,

John O'Brien  
Director  
Healthcare and Insurance