

**BAL Making Eligibility Determinations Under The
Federal Erroneous Retirement Coverage Correction
Act (FERCCA)**

Attachment 3

FERCCA Out-of-Pocket (OOP) Guidelines

TABLE OF CONTENTS

Introduction.....Page 2

Guidelines for Waiver.....Page 3

How to Apply.....Page 4

How OPM Makes its Decision.....Page 5

Request for Waiver Model Letter.....Page 6

Guidelines for Payment of Expenses.....Page 8

Attorneys’ Fees.....Page 12

Proving Your Case.....Page 14

How to Apply.....Page 16

How OPM Makes its Decision.....Page 17

Request for Reimbursement Model Letter.....Page 18

FERCCA Out-of-Pocket Guidelines

Introduction

Overview

Public Law 106-265, the "Federal Erroneous Retirement Coverage Corrections Act (FERCCA)," was enacted to relieve problems that had resulted from employees being placed in the wrong retirement system. Generally, the law gave certain employees who had been placed in the wrong retirement system the option of either remaining in that system or transferring to the retirement system in which they should have been participating. This approach allows employees to receive the retirement benefit they had expected to receive.

However, a small number of employees received some form of settlement payments from their agencies in compensation for the error and are barred from having an election unless the settlement payment is repaid or waived by OPM. Congress also recognized that merely correcting the retirement coverage error might not wholly compensate some of the affected employees for all the expenses arising from a coverage error. Therefore, section 2208 of FERCCA permits the Office of Personnel Management (OPM) to waive payments due from eligible employees or to reimburse eligible employees for out-of-pocket expenses incurred as a result of the retirement coverage error, or the correction of a retirement coverage error.

Eligibility of recipient

To be eligible to receive a waiver or reimbursement of an expense, you must first have had a qualifying retirement coverage error. This means you must have been erroneously placed in the wrong retirement system, either CSRS, CSRS Offset, FERS, or Social Security only, when you should have been in one of the other three. This erroneous retirement coverage must have:

- Been in effect at the beginning of 1987, or occurred subsequently.
- Lasted for at least 3 years of service after 1986.

Eligibility of amount

-

To be eligible for waiver, the obligation for payment must have been created by the correction of the retirement coverage error, or be a condition for correction of the coverage error. Also, the payment of the obligation must not be a candidate for reimbursement as an out-of-pocket expense.

Guidelines For Waiver

Waiver of interest

In some instances, a coverage error may change the nature of past service for which no retirement deductions were withheld from FERS service to CSRS service. The amount of the deposit due (principal and interest) to purchase credit for the non-deduction service subsequently increases. However, the value of the lifetime benefit payable under CSRS at retirement also increases significantly. Further, Congress provided that payment for the increased deposit could be made by actuarial reduction from your future annuity.

OPM may waive the additional interest you owe for a civilian or military deposit following correction of the coverage error if you demonstrate that the higher annuity benefit and the fact that you had use of the deposit monies during the error period do not fully compensate you for the error.

Waiver of settlement payment

You may, as a result of litigation over a retirement coverage error, have received a settlement payment or court-ordered payment for losses you sustained because of the retirement coverage error. Generally, you must repay that amount before you can benefit from the correction of a retirement coverage error under FERCCA. However, you may request that OPM waive collection of all or part of the settlement payment or court-ordered payment. To be entitled to waiver, you must demonstrate why the waiver is necessary to fully compensate you for your losses.

NOTE: Out-of-pocket expenses that are reimbursable under Section 2208 of FERCCA cannot be offset from the amount of a settlement or court ordered payment that must be repaid under FERCCA. Instead, you must apply separately for reimbursement of those expenses under the OPM's OUT-OF-POCKET EXPENSES instructions.

How to apply

Write a letter

You do not need to file a form. All you need to do is send OPM a signed letter. This letter should contain, or have attached, specific information that OPM needs before it can act on your request. The information OPM needs is:

1. A description of the retirement coverage error that you believe makes you eligible for waiver. This description should include:
 - The date (month, day and year) of the retirement coverage error.
 - The erroneous retirement coverage (CSRS, CSRS Offset, FERS, or Social Security only).
 - The date the retirement coverage error was corrected.
 - The corrected retirement coverage (CSRS, CSRS Offset, FERS, or Social Security only).
 - The dates of any break(s) in service that occurred during the period of the retirement coverage error.
2. A statement of the specific dollar amount you wish to have waived and why you think it should be waived.
3. Your name, address, telephone number, and Social Security number.
4. The name, address, and telephone number of your current or last Federal employer.
5. A copy of the court order or settlement agreement that awarded the payment, and any other document you believe that OPM should consider when reviewing your request.

Model letter

A model letter is provided for your convenience. Use of the model letter will assure that OPM has all the information it needs to process your request. The model letter is on page 6.

Address

Send your request for waiver to:

US Office of Personnel Management
OOP Claims, Room 4H28
1900 E Street NW
Washington DC 20415

How OPM Makes Its Decision

Decision made on written record

OPM will base its decision on only the written record, including all of your submissions and other documentation in OPM's possession.

Agency report when needed

At OPM's discretion, OPM may request your latest employing agency, or a previous employing agency, if the qualifying retirement coverage error did not occur at your latest employing agency, to provide an administrative report. The report may include:

- A description of the retirement coverage error;
- The agency's recommendation for resolution of the claim; and
- Any other information the agency believes OPM should consider.

No appeal of final decision

The law provides that OPM's decision will be the final decision. It will not be subject to appeal, or any other kind of administrative or judicial review.

Request For Waiver Sample Letter

US Office of Personnel Management
OOP Claims, Room 4H28
1900 E Street, NW
Washington DC 20415

Re: Request for Waiver of under Section 2208 of FERCCA

Dear Sirs:

My name is: _____, my SS# is: _____,

and my address is: _____.

My phone number is: (Day) _____ (Eve) _____.

The name and address of my current or last Federal employer is:

_____.

Their phone number is: _____.

I was placed in the wrong retirement system (Circle one):

CSRS FERS CSRS Offset Soc. Sec. Only

on (date) _____.

My retirement coverage was corrected to (Circle one):

CSRS FERS CSRS Offset Soc. Sec. Only

on (date) _____.

OR

____ My retirement coverage has not been corrected (check if appropriate).

I request waiver of \$_____ of my settlement or court-ordered payment that totaled \$_____ and was made on ___/___/____. Please explain why the waiver is necessary to fully compensate you for the coverage error. (Attach additional sheets as necessary.)

I request waiver of interest or other amount owed to OPM. State why your election of a retirement plan under FERCCA does not fully compensate you for the error. (Attach additional sheets as necessary.)

Check if appropriate:

I have attached copies of documents that support my case.

I received a lump-sum settlement or court-ordered payment. A copy of the agreement or order is attached.

(Signature)

(Date)

Guidelines For Payment Of Expenses

Expense caused by retirement coverage error

Not all out-of-pocket expenses are reimbursable. To be reimbursable, an out-of-pocket expense must be directly caused by the retirement coverage error, or its correction. Certain expenses that are a direct result of the correction of a retirement coverage error, such as additional retirement deductions, are clearly caused by the retirement coverage error. However, when the out-of-pocket expense was not solely caused by the retirement coverage error, but also involved the employee's reaction to the retirement coverage error, then the causal connection is not so clear.

Expense is reasonable

In a case where the out-of-pocket expense is a result of the employee's reaction to the retirement coverage error, OPM must determine whether the employee's reaction, under the circumstances, was reasonable. An employee's reaction is reasonable when it is not taken rashly, but only after some thought, and on its face can be expected to mitigate a problem caused by the retirement coverage error, and when no less expensive action could have easily been identified to have the same consequence.

Expense is not contrary to long term retirement interests

In reaction to the retirement coverage error, the employee should have considered the long term effect on his or her retirement interests. In trying to correct one problem caused by the retirement coverage, the employee should not have created a greater problem. Therefore, as a general rule, a reasonable reaction is also one that is not contrary to the employee's long term retirement interests.

Unrelated expenses are not reimbursed

Expenses that are not directly caused by the retirement coverage error cannot be reimbursed, even though they occurred close in time to the retirement coverage error, or its correction. This is because the expense was either not caused by the retirement coverage error, or the retirement coverage was not the primary cause of the expense. In the latter case, while the retirement coverage error may have had some relationship to the expense, it was not the most significant or controlling factor.

Prohibited expenses

FERCCA specifically prohibits payment of losses related to foregone contributions and earnings under the Thrift Savings Plan (TSP). This would include, by inference, expenses incurred in connection with a non-governmental retirement investment program, meant to compensate for foregone TSP contributions and earnings, and expenses incurred in the liquidation of property or other investments

to fund makeup contributions to the TSP.

Examples

Examples not exclusive

Set out below are examples of the kinds of out-of-pocket expenses that may be reimbursed and may not be reimbursed. These examples do not exclude consideration of any kind of expense that is not listed. However, any claim for another kind of expense is expected to provide a persuasive rationale, consistent with the guidelines above, that the expense was reasonable.

Examples of reimbursable expenses:

FICA tax

OPM will reimburse you for FICA tax (social security deductions) on pay items which were not subject to CSRS deductions, such as overtime and awards, if you were erroneously covered by CSRS, and which, as a result of the correction of the retirement coverage error, are subject to retroactive FICA tax.

Retirement deductions

OPM will reimburse you for CSRS Offset or CSRS retirement deductions you were required to pay because your employer corrected a retirement coverage error. This will generally involve only retirement coverage errors that were corrected before FERCCA became effective. Your employer is required to pay any additional retirement deductions resulting from a retirement coverage error that is corrected under FERCCA.

Additional interest on deposit

In some instances, a coverage error may change the nature of past service for which no retirement deductions were withheld from FERS service to CSRS service. The amount of the deposit due (principal and interest) to purchase credit for the non-deduction service subsequently increases. However, the value of the lifetime benefit payable under CSRS at retirement also increases significantly. Further, Congress provided that payment for the increased deposit could be made by actuarial reduction from your future annuity.

OPM may reimburse you for the additional interest you paid for a civilian or military deposit following correction of the coverage error. This is if you demonstrate that the higher annuity benefit and the fact that you had use of the deposit monies during the error period does not fully compensate you for losses resulting from the error.

Financial planning fees

OPM will reimburse you for reasonable financial planning fees incurred because a retirement coverage error, or the correction of a retirement coverage error, resulted in a need to adjust your household budget and/or long term retirement planning. OPM's reimbursement

will be limited to the amount normally paid for these services.

EXAMPLE: You should have been placed under FERS when you came to work, but were placed under CSRS instead. Later, your retirement coverage is corrected to FERS. In order to take full advantage of FERS, you want to pay makeup contributions to the TSP through payroll deduction. Before you can do that, however, you need to reduce the amount you spend monthly on other items. To accomplish this, you consult a financial management specialist on how to consolidate debt and/or set up a household budget. OPM will reimburse you for fees you pay for this service.

Expenses that are not reimbursable

Where there is no out-of-pocket loss

Before OPM can reimburse an expense, there must be an actual, out-of-pocket loss on your part. When a retirement coverage error is corrected, funds may be transferred from one Government account to another. However, unless you have to pay out additional funds, there is no out-of-pocket expense.

EXAMPLE: A common situation involves retirement and social security deductions. If you were under CSRS you would pay 7 percent of your base pay in retirement contributions, while if you were under CSRS Offset you would pay 6.2 percent of your pay in social security deductions and .8 percent in retirement deductions, up to the social security maximum. For pay in excess of the social security maximum, you would pay 7 percent retirement deductions. You would pay the same total amount in retirement and social security deductions whether you were under CSRS or CSRS Offset. Consequently, if your CSRS retirement coverage is erroneous, and you are changed to CSRS Offset, the Government will move some of the money from the retirement deduction account to the social security deduction account. This is done at no additional expense to you, so there is no expense to be reimbursed. This is true whether your CSRS deductions are adjusted for FICA by your payroll office while you are an employee, or by OPM after you separate. The fact that you expected to receive a full refund of your CSRS retirement deductions when you separated does not convert this offset to an out-of-pocket loss. Further, you will receive full Social Security credit for all years covered by the error.

Indirect expenses

While OPM may reimburse you for expenses caused by a retirement coverage error, it will not reimburse you for expenses you incurred in paying the initial expense. That is because these other expenses are not directly caused by the retirement coverage error.

EXAMPLES: If you paid a reimbursable expense with a credit card,

OPM will not reimburse you for credit card interest. If you sell property to raise funds to pay your attorneys' fees, OPM will not reimburse you for commissions you paid and other expenses incurred in the sale of the property. If you obtain a debt consolidation loan as a consequence of financial counseling, OPM may reimburse you for the financial counseling fee, but it will not reimburse you for the loan origination fee.

**Expenses
caused by
inadequate
information**

You may have made a decision in regard to your retirement, or another benefit or investment program based on inadequate information that resulted in an unwanted expense. That expense cannot be reimbursed unless you can demonstrate that, despite due diligence, you were unable to obtain accurate retirement information from an appropriate source.

Attorneys' Fees

Reimbursable amounts Attorneys' fees, and other costs related to administrative and judicial action you incurred to correct or mitigate the adverse effects of the retirement coverage error may be reimbursed by OPM. This includes not only the actual attorneys' fees but also court costs, expert witness fees, and other litigation expenses. If the attorney bills separately for clerical or office expenses, those amounts would also be reimbursable.

Litigation not necessary Attorney fees incurred by you in an attempt to correct a retirement coverage error are reimbursable even if you did not go to court.

EXAMPLE: You believe that your agency has placed you in the wrong retirement system. You consult an attorney to see what can be done to correct the matter. The attorney researches the law, believes that you are correct, and writes a letter to your employer demanding that your retirement coverage be changed. Your employer denies the request. The attorney advises you that he will need a \$10,000.00 retainer before he can take the matter to court. Because you are unable or unwilling to pay the retainer, you drop the matter. Nevertheless, the amounts you paid the attorney for the initial consultation, to do the research, and write the letter to the agency are reimbursable by OPM.

You do not need to win If your legal efforts to correct your retirement coverage error did involve litigation, it is not necessary for you to have won in court for OPM to reimburse you for your attorneys' fees and other litigation expenses.

EXAMPLE: Your employer erroneously places you under CSRS instead of CSRS Offset. Four years later they make a retroactive correction. You ask OPM to refund your excess CSRS deductions, but it refuses. You appeal OPM's decision, but ultimately the court rules in OPM's favor. The attorneys' fees you incurred throughout the process may be reimbursed by OPM, even though you did not ultimately win.

Fees and expenses must be reasonable As required by the general guidelines outlined elsewhere in these instructions, reimbursable attorneys' fees and other litigation expenses must be reasonable. In determining whether the expenses are reasonable and necessary, OPM will consider the following factors:

- The type and the amount of the expense;
- The circumstances that gave rise to the expense;
- Whether the expense is directly related to litigation or other legal activity concerning a retirement coverage error, and

- Whether the charges are consistent with amounts usually charged in matters of similar complexity.

**Attorneys'
fees awards**

In making this determination, it will be necessary for OPM to review the attorney's itemized billing records. (See the section entitled [Proving Your Case](#) for further information.)

OPM will not pay for legal services that have already been reimbursed by another source, such as an attorneys' fees award by a court or agency, or legal insurance. However, if you only received partial reimbursement from an attorneys' fees award or legal insurance, OPM will consider reimbursing you for the remaining amount.

Proving Your Case

Burden of proof

You bear the burden of proof. If you wish to be reimbursed for expenses, you must show in a clear and convincing manner that the expenses you claimed actually occurred, are reasonable, and that they were directly caused by the retirement coverage error. The following paragraphs describe the minimum kind and amount of evidence that must be submitted before OPM may consider allowing your request.

Proof of Payment

Proof that the expense in question has been paid must accompany any claim for reimbursement of expenses. This proof can take many forms. If it is an expense that you paid directly out of your own funds, the proof could be cancelled checks, receipts, credit card statements, and any other documents which show that you paid the bill(s). If the amount in question was paid by payroll deduction, payroll statements showing the amount that was deducted would be appropriate.

Attorneys' fees and other litigation expenses

The following documents should be submitted with a request for payment:

- A copy of your fee agreement(s) with the attorney(s).
- Itemized statements or bills from your attorney(s). Each line item should describe the task performed to a sufficient degree that it can be determined that the task was related to the retirement coverage error, the amount of time spent on that task, and the rate at which that time was billed.
- If the matter went to litigation, a copy of the complaint or other pleading filed by the attorney with the court or administrative hearing body. This document should clearly state that the litigation has been initiated to either correct or recover damages for a erroneous retirement coverage decision.
- Itemized bills or statements from the clerk of the court and any other agencies or persons who collected fees and costs from you in connection with the litigation.
- A copy of any award for attorneys' fees and litigation expenses that reimbursed you for some or all of the expenses you incurred in connection with the litigation. This would include any payment resulting from a legal insurance policy. If there was no such award, you should state so in your letter.
- Affidavits or declarations made under penalty of perjury by the attorney(s) or other providers which cure any deficiencies in the itemized statements and other billing documents.

**FICA, CSRS
Offset or
FERS
deductions**

When claiming reimbursement for FICA tax charged on items that were not subject to CSRS deductions, or CSRS-Offset or FERS retirement deductions that were not withheld because of the retirement coverage error, but paid later, you should submit a copy of the letter from the agency demanding payment.

**Financial
management
planning fees**

If you request reimbursement of financial planning fees, you should submit a statement that explains why the financial planning was necessitated by a retirement coverage error or the correction of a retirement coverage error, and a copy of the bill you received from the person or organization that provided the service.

**Additional
interest on
deposit**

The following documents should accompany a request for reimbursement of additional interest on a deposit for military service:

- The original bill, showing the deposit without interest, and the interest due.
- A corrected bill showing the deposit without interest, and the interest due.
- Proof of payment. If you are requesting reimbursement of additional interest on a deposit for civilian service, you need only provide your CSD account number.

In addition, you must explain why coverage under CSRS or CSRS Offset does not make you financially whole.

**Other
expenses**

To be reimbursed for expenses other than those enumerated above, you must submit a bill or other document you received at the time of the expense which states the amount of the expense and why it occurred, and a detailed explanation of why you believe that this expense was directly caused by the retirement coverage error.

How To Apply

Write a letter

You do not need to file a form. All you need to do is send OPM a signed letter. This letter should contain, or have attached, specific information that OPM needs before it can act on your request. The information OPM needs is:

1. A description of the retirement coverage error that you believe makes you eligible for reimbursement of a loss. This description should include:
 - The date (month, day and year) the retirement coverage error began.
 - The erroneous retirement coverage (CSRS, CSRS Offset, FERS, or Social Security only).
 - The date the retirement coverage error was corrected.
 - The corrected retirement coverage (CSRS, CSRS Offset, FERS, or Social Security only).
 - The dates of any break(s) in service that occurred during the period of the retirement coverage error.
2. A description of the specific dollar amounts you wish to have reimbursed and why you think they should be reimbursed.
3. Your name, address, telephone number, and Social Security number.
4. The name, address, and telephone number of your current or last Federal employer.
5. Any information or documents you believe that OPM should consider when reviewing your request. (For further information, see the following section, ["Proving Your Case."](#))

Model letter

A model letter is provided for your convenience. Use of the model letter will assure that OPM has all the information it needs to process your request. The model letter is on Page 17.

Address

Send your request for reimbursement to:

US Office of Personnel Management
OOP Claims, Room 4H28
1900 E Street NW
Washington DC 20415

How OPM Makes Its Decision

Written record only

OPM will base its decision on only the written record, including all of your submissions and other documentation in OPM's possession.

Agency report

At OPM's discretion, OPM may request your latest employing agency, or a previous employing agency, if the qualifying retirement coverage error did not occur at your latest employing agency, to provide an administrative report. The report may include:

1. A description of the retirement coverage error;
2. A statement as to whether a settlement or other court-ordered award was made;
3. The agency's recommendation for resolution of the claim; and
4. Any other information the agency believes OPM should consider.

Final decision: no right of appeal

The law provides that OPM's decision will be the final decision. It will not be subject to appeal, or any other kind of administrative or judicial review.

REQUEST FOR REIMBURSEMENT SAMPLE LETTER

US Office of Personnel Management
OOP Claims, Room 4H28
1900 E Street, NW
Washington DC 20415

Re: Request for Reimbursement of Out-of-Pocket Expenses

Dear Sirs:

My name is: _____, my SS# is: _____,

and my address is: _____.

My phone number is: (Day) _____ (Eve) _____.

The name and address of my current or last Federal employer is:

_____.

Their phone number is: _____.

I was incorrectly placed in the _____ retirement system
on (date) _____.

My retirement coverage was corrected to the _____
retirement system on (date) _____.

(OR)

My retirement coverage has not been corrected to the _____
retirement system.

For Social Security taxes (FICA) and CSRS retirement deductions paid, please provide
the amount paid and the agency to which payment was made.

For reimbursement of interest paid on a CSRS (Offset) deposit, please demonstrate why
your election of CSRS (Offset) does not fully compensate you for the error.

For all other expenses, please show (1) amount paid, (2) to whom paid, (3) why you
believe the expense resulted from the coverage error, and (4) how that course of action
would have corrected/mitigated the effect of the coverage error.

Use appropriate closing:

I have attached copies of the necessary documents to prove my case (see the OUT-OF-POCKET EXPENSE Instructions to determine what proof is necessary).

(Or)

I have attached proof that I have paid these expenses (see the OUT-OF-POCKET EXPENSE Instructions to determine what proof is necessary).

(Or)

I received a lump-sum settlement or court-ordered payment. A copy of the agreement or order is attached.

(Or)

I received an award or other payment to cover some or all of my attorney fees. A copy of the award or other document showing the details of the payment is attached.

(Signature)

(Date)