



**United States  
Office of Personnel Management  
Retirement and Insurance Service**

**Benefits Administration Letter**

Number: 97-107

Date: September 25, 1997

**SUBJECT: Corrections of Automatic FERS Coverage for Employees With 5 Years of Civilian Service Before 1987**

**Introduction**

Due to a recent decision of the United States Court of Appeals for the Federal Circuit, certain employees who were automatically placed in the Federal Employees Retirement System (FERS) must now be considered to have been erroneously placed in FERS. The Court ruled that the Office of Personnel Management's (OPM) regulations implementing the 5-year test in the FERS law are incorrect. The 5-year test is used to determine whether an employee who is subject to Social Security is automatically covered by FERS. If an employee satisfies the 5-year test, he or she is not automatically covered by FERS, even though he or she may elect FERS coverage. The Court's ruling applies only in cases in which employees were placed in automatic FERS coverage, not those who elected to join FERS.

The definition of the 5-year test is set out in 10A1.1-2I of the *CSRS & FERS Handbook for Personnel and Payroll Offices*, and application of the test is illustrated in various examples. This Letter contains no change in policy other than as explained below under "Revised 5-year test."

**Old 5-year test**

The 5-year test, which is set out in 5 U.S.C. § 8402(b), has two versions. OPM's FERS implementation regulations interpreted the test as covering two mutually-exclusive groups of Social Security-covered employees: those who had a break in service ending after December 31, 1986, and those who did not have such a break. As of January 1, 1987, or, upon first receiving an appointment in which the employee was eligible for FERS coverage, if later, automatic FERS coverage applied, unless:

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in the *no-break-in-service* group, the employee had completed 5 years of creditable civilian service by December 31, 1986; or

in the *break-in-service* group, the employee met both of the following requirements:

- completed 5 years of creditable civilian service as of the most recent break in service, AND
- had past covered service under the Civil Service Retirement System (CSRS) or the Foreign Service Retirement System (FSRS).

Under these rules, an employee in the break-in-service group who had never been subject to CSRS or FSRS prior to a FERS-eligible appointment on or after January 1, 1987, would have automatic FERS coverage, regardless of how much prior service he or she had performed. Because the FERS Act allows a CSRS component in a FERS retiree's benefit only if the individual elected FERS, an employee who became subject to FERS automatically will have all of his or her service computed under FERS rules.

In the litigation mentioned above, *Conner v. OPM*, an employee had over 5 years of creditable civilian service by December 31, 1986, and was re-hired in a FERS-eligible appointment after a break in 1987. None of the prior service was subject to CSRS or FSRS deductions, and the employee was automatically placed in FERS in 1987.

The employee argued that the FERS law excluded him from automatic FERS coverage based solely on the fact that he had completed 5 years of creditable civilian service by December 31, 1986. The United States Court of Appeals for the Federal Circuit agreed, and invalidated the OPM regulation that interpreted the break-in-service version of the 5-year test.

### **Revised 5-year test:**

Because of the ruling in *Conner*, a new rule now applies:

**An employee who performed 5 years of creditable civilian service as of December 31, 1986, is excluded from automatic FERS coverage.**

The old 5-year test is not otherwise changed. Accordingly, the no-break-in-service version of the test is unaffected, and the break-in-service version, as stated in the old rule, applies only if the individual did not complete 5 years of creditable civilian service before January 1, 1987. A person who completed 5 years of creditable civilian service before January 1, 1987, satisfies the 5-year test and is not subject to automatic FERS coverage, even if he or she has had a break in service ending after December 31, 1986, and has never had any past covered service (that is, service subject to retirement deductions).

Therefore, the new version of the 5-year test for the *break-in-service* group is satisfied if an employee meets either of the following conditions:

- EITHER:            completed 5 years of creditable civilian service before January 1, 1987;
- OR, IF NOT        --        completed 5 years of creditable civilian service as of the most recent break in service, AND
- had past covered service under CSRS or the Foreign Service Retirement System (FSRS).

Any individual who completed at least 5 years of creditable civilian service as of December 31, 1986, but has been placed in FERS automatically after a break in service ending after December 31, 1986, must now be treated as having been erroneously placed in FERS.

### **Retroactive effect**

The new 5-year test applies to all retirement coverage determinations made on or after January 1, 1987. Any employee who was placed in automatic FERS, despite having completed 5 years of creditable civilian service before 1987, has been placed in the wrong retirement system. These employees should have been placed under CSRS Offset coverage (if employed under an appointment qualifying the employee for CSRS Offset coverage, such as a career conditional appointment) with the right to elect FERS. If such an employee was employed under an appointment not qualifying for CSRS Offset coverage, but qualifying for FERS coverage (such as a term appointment or an excepted indefinite appointment), the employee was properly in Social Security only, with a right to elect FERS. If the employee was under an appointment excluded from both CSRS Offset and FERS coverage (such as a temporary appointment), he or she would have been properly covered by Social Security only, and therefore the 5-year test would not be applicable.

### **General notice to potentially affected employees**

Affected employees must be notified. Most will have an election right, as explained below. Agencies may wish to allow employees to identify themselves for this purpose. For example, a pay-slip notice that could be targeted to all employees who were placed in FERS automatically (not by election) might state: "If you completed 5 years of creditable civilian service as of December 31, 1986, contact the personnel office." The personnel office then would be responsible for determining whether the change in rules affects the individual.

## **Agency correction of errors**

When agencies become aware that an employee was erroneously placed in automatic FERS, they must apply the "deemed FERS" procedures contained in part 11A6 of the *CSRS & FERS Handbook for Personnel and Payroll Offices*. The basic concept is that if an employee was placed in FERS erroneously during the period when the employee could have elected FERS, the employee, retiree or survivor must be allowed an opportunity to remain in FERS, or to have the coverage that applied by law in the absence of a FERS election. The individual must be given written notice that unless he or she elects in writing within 60 days of the date of the notice to be corrected retroactively to CSRS Offset coverage, the employee will be deemed to have elected FERS. The agency is responsible for counselling the individual about the consequences of the election.

To illustrate, a typical situation affected by the *Conner* decision may be that of an employee who had 5 years of civilian service performed before 1987, all of it under temporary appointments and consequently not subject to retirement deductions; then following a break in service the employee entered a permanent type of appointment and was placed in FERS in accordance with then current regulations. Under *Conner*, the employee is considered erroneously placed in FERS, and should have been in CSRS Offset instead. An employee in that situation is eligible to elect FERS, but due to the erroneous FERS placement, was not given the opportunity to make a FERS election. The employee must now be given the opportunity to have a deemed FERS election retroactive to the time of the erroneous FERS coverage, or to be placed retroactively into CSRS Offset.

The employee's records must be corrected consistent with the election, including the Thrift Savings Plan account. If the employee opts not to be deemed to have elected FERS coverage, any contributions to the Thrift Savings Plan in excess of 5%, as well as any agency matching and automatic 1% contributions, must be backed out of the employee's account in accordance with the regulations of the Federal Retirement Thrift Investment Board.

If, while under FERS, the employee made a deposit under FERS rules for military service or for the nondeduction civilian service performed before the erroneous coverage began, the amount due for the deposit is computed under CSRS rules, since both the military and civilian service will either be part of a CSRS component of a FERS benefit (if the employee elects to remain in FERS), or will be included in the computation of a CSRS Offset annuity, if the employee elects CSRS Offset.

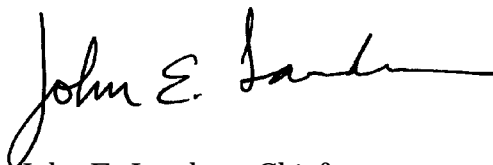
When OPM discovers errors that go undetected until retirement, OPM will notify the agency of the error. The agency is responsible for proper counselling and documentation of the election of retirement coverage under the procedures established in chapter 11 of the *CSRS & FERS Handbook for Personnel and Payroll Offices*.

**New re-hires**

Upon reemployment, employees who had 5 years of civilian service as of December 31, 1986, even if none of that service was covered under CSRS, are not automatically covered under FERS. If otherwise eligible, they are subject to CSRS Offset with an opportunity to elect FERS.

**Regulatory changes**

Section 842.104(c) and (d) of Title 5, Code of Federal Regulations, will be revised to conform with the court's interpretation of the statute. However, even before the revision, those paragraphs are inapplicable.

A handwritten signature in black ink that reads "John E. Landers". The signature is written in a cursive style with a long horizontal line extending to the right.

John E. Landers, Chief  
Retirement Policy Division