



When Will We See New VA Pension Eligibility Rules?

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The quick answer is not for a while, and even then, they should have a 60-day delayed effective date. We'll take you through the reasoning below.

[Proposed changes to the VA pension eligibility rules](#) were published in the Federal Register in January, 2015. During the 3-month comment period, 864 comments were received. Since that time there has been no action taken on the proposed changes in the Federal Register. There of course has been a lot of speculation as to what may happen but we have not seen any modified rules, nor a published final rule.

When, what and how

The two areas where we see the most concern and speculation from attorneys across the country are 1) when will the final rules be published and what will they include, and 2) the effective date of any new rules, and whether they will be retroactive. We hope to shed some light on both of these areas and have you leave with some comfort about what is in store for all of us who practice in the VA pension area.

When will the rules be passed? Of course, we don't know, but it's important to remember that the new rules are not in place yet. ElderCounsel receives questions weekly either from someone believing the proposed rules have already been passed and wondering how to handle them, or asking whether the new rules are in place. Please rest assured that applications are being submitted and decided under the existing rules.

What role public comments play

An area of confusion for some is how all of those public comments play into the rule-making process. It's very important that you refer to and get familiar with a document called "[A Guide to the Rulemaking Process](#)" prepared by the Office of the Federal Register. You'll see a long footnote in the document on how this outline was prepared. The Guide states that the agency, in this case, the VA, must base its reasoning and conclusions on the rule-making record. The rule-making record consists of comments, scientific data, expert opinions and facts that are accumulated during the pre-rule and proposed rule stages. What's important to take from this is that the rule-making record does include all of those comments that were submitted. It's also important to know that if this rule-making record, again that includes all those comments, contains persuasive new data or policy arguments, or poses difficult questions or criticisms then the agency has some choices there. The agency can terminate the rule-making process, or it can change aspects of the rule to reflect the new issues.

We know from looking at all of those comments that there were a lot of persuasive arguments and a number of criticisms that are now part of that rule-making record. If the VA makes major changes to the proposed rules to address issues raised in the comments, then a supplemental proposed rule may be published.

What does the VA have to do with all of the public comments? They have some options. If the changes are major, then they can propose a new rule. If there are minor changes, then the VA could proceed with the final rule rather than publish a supplemental proposed rule that would otherwise open the session up for comments again. Again, given the rule-making record and all of the comments, and the budget impact that these proposed rules will have, it's difficult to imagine a scenario where they aren't making pretty major changes, but of course it's possible.

The effective date

The other common question is what the effective date will be. Now, we were all a little puzzled by the proposed rule and that fact that it didn't have an effective date, and I think I understand why after digging into the rule-making process. The "Guide to the Rule-making Process" addresses when final rules go into effect. Our focus is on significant rules and major rules. Significant rules - those defined by Executive Order 12866 – are required to have a 60-day delayed effective date. Significant rules are those that constitute a "significant regulatory action" as defined in [Executive Order 12866](#) (see below for more explanation).

Major rules, defined as those that are economically significant and require Office of Information & Regulatory Affairs (OIRA) review, must also have a 60-day delayed effective date.

The Executive Summary in the Federal Register concludes that the proposed rules constitute a "significant regulatory action" under Executive Order 12866, stating, "The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined to be a significant regulatory action under Executive Order 12866 because it will have an annual effect on the economy of \$100 million or more, and it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

This gives us a pretty clear indication that the final rule cannot go into effect right away and should eliminate any concerns about a retroactive effective date. Whether the VA will try to apply the rules retroactively to applications submitted after the effective date is another matter, and one that we can only speculate about at this point.

What happens after final rules are published

Once final rules are published, there are additional steps that may be required before it becomes law. First of all, Congress and the General Accountability Office may be required to review it as they are for any major rule or economically significant rule. Another option is for Congress to enact new legislation or restrict funding, which is certainly a possibility. And, lastly, a lawsuit may be filed once any final rules are published. Any individuals or corporate entities who claim they have been or will be damaged or adversely affected by the regulation could file a lawsuit. For example, if the VA passes a new regulation with a look back period, will they have had the authority to do it without Congressional action? If an

individual or corporate entity believes the VA exceeded their authority, then they could file a lawsuit challenging the final rules.

If a lawsuit is filed by one of these potential claimants, then the court can consider whether the rule is unconstitutional, goes beyond the agency's authority, was made without the appropriate process or was arbitrary, capricious or an abuse of discretion. One argument made in several of the comments was that these rules go beyond the agency's authority and they are arbitrary, capricious or an abuse of discretion. Those same claims could be the basis of a lawsuit.

If a lawsuit is filed and is successful, then the agency must correct the deficiencies, so the VA would have to go back and correct whatever is wrong. They may have to reopen the comment period, publish a new statement of basis and purposes to explain and justify its decisions, or restart the rule-making process from the beginning and issue a new proposed rule, which is most likely what would happen if there was a successful lawsuit.

Still Status Quo

No changes have been made and it's business as usual for now. Once a final rule is published it should have a 60-day delayed effective date – of course we can't say for certain, we only have what the Guide provides regarding this requirement. Assuming this is true, this means the VA should not apply any new rules for at least 60 days from the final Notice in the Federal Register.