

Major Changes for VA Aid and Attendance Rules Finally Here

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Well, it has been over three years since the Department of Veterans Affairs (VA) published proposed regulations governing veterans' eligibility for VA pension and other needs-based benefit programs. On September 18, 2018, however, the VA *finally* got around to publishing Final Rule RIN 2900-AO73, which went into effect on October 18, 2018.

As you can imagine, the new VA rule is long and complex. It addresses everything from net worth limits and asset transfer look-back and penalty periods, to definitions relating to care and caregivers. Explaining the details of the new law far exceeds the scope of this article, so I have chosen to focus narrowly on the changes and additions it makes to eligibility criteria and gifting/penalties related solely to Veterans Affairs Pension with Aid and Attendance (Pension with A&A).

Again, although you will not find all the answers here, we do hope that this article will serve to motivate Veterans and their families to begin asset protection planning sooner than later!

What changed

A lot changed, but is it all bad news? Not really. The new rule does provide a more direct approach and some much-needed clarity in a few areas. For example:

1. There is now a bright-line resource allowance limit - no more than \$123,600 - regardless of the applicant being single or married. The number is not arbitrary. The new bright-line limit is tied to the Medicaid Community Spouse Resource Allowance (CSRA);
2. There is now an easily understood net worth asset calculation. Annual income will be directly included in the calculation. Generally, the new calculation will work as follows: all countable/non-exempt assets PLUS annual adjusted gross income MINUS qualifying Unreimbursed Medical Expenses (UMEs) must total less than \$123,600; and
3. VA provides clarification of the medical expenses that may be deducted from countable income to qualify for the needs-based benefits.

That does not sound so bad, does it? Well, no, but arguably, the new rule does bring what some will consider bad news;

- A. a 36 month (three year) look-back period to review whether assets were transferred for less than fair market value;
- B. a rather harsh penalty period for gifting of up to 5 years; and

C. a limit on the size of the residential lot/property.

Remember, this is just a general overview of the bigger changes. It is not quite this simple!

What stayed the same

- The definition of a qualifying veteran, spouse or widow did not change. Service must include at least 1 day of active duty during a war-time period, 90 days of service generally and a discharge that is anything other than dishonorable.
- Medical Necessity – must need assistance with two or more Activities of Daily Living - ADLs. VA did also define ADLs more clearly.

So let's take a moment to look more closely at two of the biggest changes; the bright line asset limit calculation and the penalty period calculation.

VA Transfer Rule and Penalty Calculation

The “Dreaded” Transfer Rule

Starting on October 18, 2018, VA will begin to request evidence of asset transfers. The broad rule generally states that transfers made on or after October 18, 2018 will be subject to the 3-year lookback period.

Although the look-back period will be 36 months, our understanding is that no penalty will be imposed on asset transfers made on or before October 17, 2018, even if that date falls within 36 months before application. So far so good, right? But it gets even better!

It is also our understanding that even if gifts WERE made after October 18 (within the 36 month look-back period), VA will not impose a penalty period if the applicant's net worth, including the gifted amount, does not exceed the net worth limit (\$123,600 as of 2018)!

Example 1: the applicant has \$100,000 in countable assets, adjusted gross income of \$24,000, Unreimbursed Medical Expenses (UMEs) of \$40,000 and gifted \$35,000 after October 18, 2018. When all the adding and subtracting is done, the applicant's net worth, including the gifted amount, is \$119,000. What does that mean? Immediate eligibility and NO PENALTY!

VA, however, will impose a penalty period for the transfer of assets that *exceed* the net-worth limit.

Example 2: the applicant has \$100,000 in countable assets, adjusted gross income of \$24,000, Unreimbursed Medical Expenses (UMEs) of \$40,000 and gifted \$54,783 after October 18, 2018. When all the adding and subtracting is done, the applicant's net worth, including the gifted amount, is \$138,783. \$138,783 is more than \$123,600. What does that mean? A penalty period. For how long?

Penalty Calculation

The 36-month penalty period starts the month after transfers are made. (This differs from Medicaid rules, which start the look back period on the date of application. The penalty divisor will be the same for all applicants. The divisor is equal to the maximum monthly VA Pension with Aid and Attendance amount for a married veteran, which is \$2,169 in 2018.) Compared to Medicaid (Medicaid's monthly divisor is \$10,043.28 in 2018), the divisor is low and could result in a loooooong penalty period. Fortunately, VA caps the maximum penalty period at 5-years of ineligibility.

Finally, and this was a big change from the proposed rule, the gift may be partially or entirely "cured" (i.e. returned generally) within 90 days of notice of the penalty period and the cure must have been completed before the claim for VA benefits was made or within 60 days thereafter. So how does it all work? Lets use the Example 2 above:

Same Example 2 again: the applicant has \$100,000 in countable assets, adjusted gross income of \$24,000, Unreimbursed Medical Expenses (UMEs) of \$40,000 and gifted \$54,783 after October 18, 2018. When all the adding and subtracting is done, the applicant's net worth, including the gifted amount, is \$138,783. \$138,783 is more than \$123,600. What does that mean? A penalty period. For how long?

Penalty: the maximum net worth is \$123,600. The applicant's net worth, including the gift, is \$138,783. The penalizable gift amount is \$15,183 (\$138,783 - \$123,600). \$15,183 gift divided by \$2,169 divisor = 7 month penalty exactly. Accordingly, we expect the applicant, if the gift is not cured, will have to personally and privately pay for 7 months of care before VA will issue the first Pension with Aid and Attendance check.

WHEW! That was a lot, but it is just the tip of the iceberg. VA also changed the definition of "residential lot area" (watch out land owners), added rules that will restrict the use of annuities as a planning strategy (watch out financial planners!) and added/changed other requirements relating to home health aide care and payment.

With such a significant and complex rule change, the best we can do is give you an overview then strongly encourage you to call our office and schedule an appointment with one of our attorneys to get you started on the best planning path as soon as possible!

To arrange for a no-obligation consultation with Julian Gray Associates, call our office at 412-458-6000.