



June 16, 2016

VIA electronic submission to <http://www.regulations.gov>

Kimberly A. Holden
Deputy Associate Director for Recruitment and Hiring
U.S. Office of Personnel Management
1900 E Street, NW, Room 6351D
Washington, DC 20415-9700

**Re: Response to Proposed Rule with Request for Comments
81 Fed.Reg. 26,173-26,175; RIN 3206-AN25**

Dear Ms. Holden:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Office of Personnel Management's Proposed Rule with Request for Comments, published in the Federal Register on May 2, 2016, 81 Fed.Reg. 26,173-26,175.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees and applicants, and/or represent federal employees and applicants in employment law matters, and thus we have an interest in potential modifications to federal sector hiring regulations by the Office of Personnel Management (OPM).

As noted by OPM Acting Director Cobert in her April 29, 2016, blog entry,¹ this Proposed Rule is part of the Administration's continuing "ban the box" efforts, a policy initiative by President Obama set out in his April 29, 2016 Presidential Memorandum, "Promoting Rehabilitation and

¹ "Banning the Box' in Federal Hiring," Beth Cobert (April 29, 2016) *available at* <https://www.opm.gov/blogs/Director/2016/4/29/Banning-the-Box-in-Federal-Hiring/>.

Reintegration of Formerly Incarcerated Individuals.”² NELA strongly supports these efforts. The provision allowing for OF-306 questionnaires to be requested only after a conditional offer of employment has been extended represents a sensible compromise between the important competing concerns of promoting fairer hiring practices and meeting minimum suitability requirements for the civil service. Likewise, the provision allowing limited position-by-position waivers of this requirement, subject to prior OPM authorization, is a reasonable approach to effectuate the stated goals of this proposed rule. NELA also supports embedding these regulations specifically into 5 C.F.R. § 731.103, so that any nonselections based on OF-306 information are suitability determinations subject to due process under 5 C.F.R. Part 731, Subparts C and D, and are properly appealable to the Merit Systems Protection Board under 5 C.F.R. § 731.501.

Because the Proposed Rule falls within the ambit of the regulations governing suitability for federal employment, NELA advises that OPM also modify 5 C.F.R. § 731.202 to be consistent with § 2(a) of the Presidential Memorandum, “Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals.” Specifically, NELA recommends that OPM incorporate into 5 C.F.R. § 731.202(c), the mitigating factors and language found in § 2(b)(i-iii) of the Presidential Memorandum. This will ensure that factors such as whether an applicant with a criminal record has completed his or her sentence, the time that has passed since the individual’s arrest, adjudication, or conviction, and the extent to which the nature of the criminal activity is relevant to the position under consideration, will be taken into account.

NELA recommends that the text of proposed 5 C.F.R. §§ 330.1300, 731.103(d)(1) be modified to make explicit that OPM’s authorization for an exception must occur *prior* to posting a vacancy announcement and accepting applications. Requiring prior authorization would prevent agencies from requesting retroactive, *post hoc* exceptions after the conditional offer of employment and the OF-306 information has been requested. OPM should also provide additional guidelines in the text of proposed 5 C.F.R. § 330.1300 to give agencies information regarding the circumstances under which an exception would be permitted. The guidelines should explicitly state that these exceptions will be limited and issued on a position-by-position basis, to discourage agencies from requesting blanket exemptions for all vacancies in their workforces. To do otherwise would defeat the purpose of the Proposed Rule.

Additionally, NELA advocates that OPM amend § 731.103(d)(1) to require that in each instance that OPM authorizes an exception for a particular position, notice of the exception be included in every vacancy announcement for the position. Finally, OPM should modify 5 C.F.R. §§ 731.302(a), 731.402(a) to require production of copies of the agency’s request for an exception and OPM’s grant of the exception, as part of the materials relied upon for the proposed action.

² Presidential Memorandum, “Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals” (April 29, 2016) Available at <https://www.whitehouse.gov/the-press-office/2016/04/29/presidential-memorandum-promoting-rehabilitation-and-reintegration/>.

June 16, 2016

Page 3

NELA appreciates the opportunity to comment on the Proposed Rule, and thanks OPM for its attention and consideration.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Terisa E. Chaw". The signature is fluid and cursive, with a large initial "T" and "C".

Terisa E. Chaw
Executive Director