January 29, 2018

***VIA* Electronic Mail**

Office of Information and Regulatory Affairs
Office of Management and Budget
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Re: Response to 30-Day Notice and Request for Comments
82 Fed.Reg. 61,593

To Whom It May Concern:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Office of Personnel Management's (OPM) 30-Day Notice and Request for Comments on revisions to Standard Form 3112 ("SF-3112"), published in the Federal Register on December 28, 2017, 82 Fed. Reg. 61,593 ("Submission for Review: CSRS/FERS Documentation in Support of Disability Retirement Application, Standard Form 3112").

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, comments on relevant Notices of Proposed Rulemaking (NPRMs), and engages in legislative advocacy on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees, including applicants for federal disability retirement. Thus NELA has an interest in the proposed modifications to SF-3112.

The 30-Day Notice and Request for Comments specifically solicits comments that "Enhance the quality, utility, and clarity of the information to be collected" and that "Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, e.g., permitting electronic submission of responses." This comment letter proposes specific revisions, which, if adopted, will enhance SF-3112 in both ways described in the 30-Day Notice.

Enhancement Of Quality, Utility, And Clarity Of Information To Be Collected

Based on NELA members' experiences representing applicants for federal disability retirement, this document sets out several specific recommended modifications to SF-3112, which would improve the quality and clarity of information collected.

- SF-3112-A, Section 7 should incorporate additional questions to elicit whether or not the applicant is litigating a denial of reasonable accommodation Equal Employment Opportunity (EEO) complaint (either in the Equal Employment Opportunity Commission (EEOC)'s federal sector complaints process or in court) at the time the disability retirement application is submitted. The inclusion of these questions will provide additional, important information to OPM. It also will reduce confusion for applicants who do not understand that they are permitted to pursue these two processes contemporaneously.

  In practice, the litigation of an EEO complaint of a denial of reasonable accommodation often lasts for years. Even under the idealized timeframes for EEO complaint processing in the federal sector complaints process under EEOC regulations—timeframes that are rarely met in practice—complaints in the federal sector complaints process are scheduled to take no fewer than 390 calendar days from the date the informal EEO complaint is initiated. *See, e.g.*, 29 C.F.R. §§ 1614.105(e)-(f), 1614.108(e)-(f), (h), 1614.109(i). Under 5 U.S.C. §§ 8337(b), 8453, however, the deadline for disability retirement applications is one year from separation from federal service. Thus the time allotted for complaint processing of the EEO complaint regarding the denial of a reasonable accommodation is greater than the time period within which the employee must submit an application for disability retirement. To preserve the employee's right to apply for disability retirement, it is often necessary for the employee who is challenging the employing agency's denial of the reasonable accommodation request to simultaneously apply for disability retirement benefits.

  Litigating a denial of a reasonable accommodation request while also applying for disability retirement benefits, is potentially prejudicial to the applicant, who may be forced to make apparently inconsistent statements concerning whether or not he/she believes that he/she could be accommodated by the agency and/or whether he/she qualifies for disability retirement. The addition of questions to Section 7, SF-3112-A asking an applicant if he/she is currently litigating a claim or claims related to the denial of requested reasonable accommodation(s) would help solve this problem. The SF-3112 form (either on SF-3112-A or the narrative instructions section) should make clear that statements in the disability retirement application will not collaterally estop claims regarding denial of reasonable accommodation or vice versa.

These modifications will further an important public policy objective; encouraging eligible employees to work with the benefit of reasonable accommodations, and discouraging agencies from unnecessarily moving disabled employees into disability retirement rather than providing reasonable accommodations, as required by the Rehabilitation Act.

- SF-3112-A should include a new question asking if the applicant was removed, in whole or in part, based on a medical inability to perform. In *Bruner v. Office of Personnel Management*, 996 F.2d 290 (Fed. Cir. 1993), the Court of Appeals for the Federal Circuit held that an employee's removal for inability to perform the essential functions of his position constitutes *prima facie* evidence that he is entitled to disability retirement. *See Bruner*, 996 F.2d at 293-94. Once the employee has established a *prima facie* case (i.e., by showing that he/she was removed for medical inability to perform), the burden shifts to OPM to provide evidence sufficient to support a finding that the appellant is not disabled. *See id.* at 294.

  The *Bruner* presumption substantially modifies OPM's default analysis for determining an applicant's eligibility for disability retirement. In the collective experience of many NELA members who handle these cases, however, OPM often disregards the *Bruner* presumption in initial decisions denying disability retirement. Instead, OPM frequently requires applicants to specifically assert the *Bruner* presumption in a request for reconsideration or in subsequent litigation before the Merit Systems Protection Board (MSPB). This is not proper and results in unnecessary delay in granting disability retirement benefits. *Pro se* retirement applicants who are unaware of *Bruner* are further prejudiced, and risk losing the benefits of the *Bruner* presumption because they do not have counsel to assert the presumption.

  This recurring problem could be avoided easily by simply asking applicants if they have received a proposed medical inability to perform removal, which would flag the issue for OPM and allow OPM to properly apply the *Bruner* presumption at the initial decision stage. Doing so would reduce wait times and burdens for qualifying applicants, and would further reduce the burden on OPM by avoiding unnecessary requests for reconsideration and MSPB litigation.

- SF-3112-A, Section 11 should also include a question to allow CSRS Offset and FERS applicants to indicate if the applicant's application for Social Security disability benefits was denied, and is on appeal.

- SF-3112-D, Question 4, Box 1 should be modified by striking the phrase "the medical evidence presented to the agency shows that" and the word "physical" from the text of the question. Some applicants for disability retirement qualify for disability retirement under circumstances such that the impossibility of reasonable accommodation is readily apparent to all parties without tangible medical documentation being available for the

agency to review (for example, situations where the employee suffers apparent injuries or where continuing medical deterioration is clearly discernable). Further, qualified applicants are eligible for disability retirement based on mental disabilities and inability to perform the mental requirements of the position. Eliminating the language set out above from SF-3112-D, Question 4, Box 1 would help ensure clearer answers in these situations and eliminate confusion.

Minimization Of Burden Of The Collection Of Information

- SF-3112-A should be modified to expressly allow applicants to designate representatives in the retirement application process, if the applicant so chooses. NELA members routinely assist clients in preparing applications for federal disability retirement. This eases the burden on applicants in preparing and arguing their claims for disability retirement. Such assistance benefits OPM by providing the agency with clearer, better organized, and more complete retirement applications that are easier for OPM to process. Historically, however, OPM has refused to recognize representatives in the retirement application process, directing correspondence solely to the applicant. OPM's unwillingness to recognize the fact that many employees seek assistance in this process is counterproductive. OPM should formally permit and acknowledge the involvement of representatives in the disability retirement application process and in other federal retirement applications as well.

- OPM should modify its online Adobe Acrobat .pdf version of SF-3112, and all related OPM webpages, by adding hyperlinks to all the forms that applicants are required to submit. This will assist applicants in finding and submitting applications that are complete. Federal retirement applications require inclusion of many different forms. For example, a typical FERS disability retirement package will include an SF-3107, SF-3101-1, SF-2818, W-4 (and state tax withholding form), SF-3112-A, SF-3112-B, SF-3112-C, SF-3112-D, and SF-3112-E form, along with other supporting documentation.

  The forms themselves should be hyperlinked on the OPM website in a fashion that is user-friendly for *pro se* applicants. Currently, they are typically listed in numerical order by form number on OPM's webpage (*see* https://www.opm.gov/forms/standard-forms/), which makes it easy for the webmaster to upload them, and very difficult for the user/applicant to identify which forms should be included in his/her application packet.

  Applicants who are still working at their employing agencies *may* have assistance from the agency's human resources staff. However, such assistance is not available for applicants who file after separating from federal service.

  The addition of hyperlinks to the .pdf versions of the retirement application packets online, and grouping links to the forms in a user-friendly fashion on the OPM website,

would ease the burden on applicants organizing the many forms necessary for a complete application packet.[1]

- The SF-3112-E checklist should be made optional. NELA members have observed many situations in which OPM treated the checklist as a mandatory submission for a disability retirement application, rather than as a tool available to help the applicant submit a complete application. Indeed, NELA members are aware of situations in which OPM has held processing of an application for lack of an SF-3112-E checklist, declaring the application incomplete on that basis. This is especially problematic. NELA members also have observed situations in which agencies were reluctant to sign the SF-3112-E checklist for applicants who had been separated from the agency for more than 30 days and who file their applications directly with OPM, rather than through the agency. The practice of treating the checklist as a mandatory part of the application can delay processing of meritorious retirement applications.

- SF-3112-A, Box 12 and SF-3112-C should be modified to require submission of *all* medical statements directly to the applicant, rather than requiring medical statements for applicants who are still in federal service to be sent to the employing agency. SF-3112 assumes a workflow for application paperwork in which the SF-3112-A is filed with the agency and then the medical reports are subsequently requested.

  In practice, NELA members often work with medical providers contemporaneously with applicants' completing the SF-3112-A forms. It is not uncommon for advocates to provide clarification to medical providers about how to articulate the diagnoses in a format that makes the applicants' diagnoses, prognoses, limitations, and disability clear and easily understood by OPM reviewers. Requiring that all medical statements be sent to the applicant who will then provide them to the employing agency would better integrate this permissible practice into the application process. Further, NELA members have had many experiences in which certain agencies do not provide accurate information as to which office should receive the medical documents. Allowing the applicant to receive all such documents would solve this time-consuming and frustrating problem.

- Ultimately, OPM should seek to modify its retirement application procedures to, as noted in the 30-Day Notice, "permit[] electronic submission of responses," *i.e.*, to permit electronic filing of retirement applications and related paperwork. OPM's present antiquated system of 'hardcopy file processing out of a cave in rural Western Pennsylvania' has been well-documented. [2]

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[1] Analogous modifications to other federal retirement forms would similarly be beneficial to applicants, and therefore to the agencies processing the applications.

[2] *See, e.g.*, Fahrenthold, David, "Sinkhole of Bureaucracy," *Washington Post*, Mar. 22, 2014, *available at* http://www.washingtonpost.com/sf/national/2014/03/22/sinkhole-of-bureaucracy.

It is understood that full conversion of the retirement processing system is a long-term, complex project dependent on appropriations. The following interim steps, however, are not costly and would reduce significantly the burden on applicants. For example, OPM's general practice is to calculate applicants' timeliness for filing based on OPM's date of actual receipt of the documentation. This is contrary to OPM's own regulations, which specify a "received or postmarked" date as the date from which deadlines for initial filing of disability retirement applications should be calculated. *See* 5 C.F.R. §§ 831.1204(b), 844.202(a)(2). The narrative instructions on SF-3112 misstate the deadline standard specified in OPM's regulations, stating "OPM ***must receive*** your application not more than ***one year*** after the date you separated from your position," without explaining that a postmark date is properly considered the date of filing. *See* SF-3112 at 1 (emphasis in original).

The standard practice of OPM is to set deadlines in subsequent document requests based on a number of days from the date that OPM mailed the request, not based on the applicant's date of actual receipt. These standard practices improperly and substantially reduce the number of days applicants have to meet deadlines. The effect of this on individual applicants varies, depending on where the applicant lives and how long it takes mail to get back and forth between the applicant's address and Boyers, PA.

OPM should correct the narrative instructions on SF-3112 to correctly state the "received or postmarked" standard, change its practices to deem subsequent submissions filed when received or postmarked, and set deadlines for applicants' submissions based on a number of days from the applicant's date of actual receipt of the document request, rather than the date OPM sends the document.

- The current SF-3112 does not emphasize strongly enough the need to file an SF-3112-A to meet the statutory disability retirement application deadline, the sufficiency of filing only the SF-3112-A for purposes of meeting the timeliness requirement, and the necessity for this filing even if the applicant is also litigating the denial of a reasonable accommodation. It seems probable that many applicants instead get confused as to whether they also need to file SF-3112-B, SF-3112-C, SF-3112-D, and SF-3112-E as part of their initial submissions to OPM for their applications to be deemed timely, resulting in avoidable denials of disability retirement benefits. This issue could be corrected by providing stronger language, either on SF-3112-A or on the narrative instructions to SF-3112, specifically stating that filing of SF-3112-A (and SF-3107) is itself sufficient to meet the deadline for requesting disability retirement.

- The present structure of SF-3112 burdens applicants with the responsibility for procuring SF-3112-B and SF-3112-D forms from their employing agencies over whom they have no control. NELA members have observed many instances where the former employing agencies delay or refuse to issue the forms entirely. Applicants should not be penalized for the agencies' refusal to cooperate in the disability retirement application process. Accordingly, SF-3112-B, SF-3112-D, and standard OPM process should be modified to

require OPM to procure missing SF-3112-B and SF-3112-D forms from the employing agencies directly, and to mandate prompt agency cooperation in providing these forms.

- The narrative instructions on the SF-3112 should be modified to more strongly warn CSRS Offset and FERS disability retirement applicants of the need to promptly file their Social Security disability application paperwork. Failure to do so can prejudice applicants given that Social Security (unlike OPM) conventionally does not make retroactive payments for later-filed applications.