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New VA Benefits Rules: Determining Eligibility, Valuation of Assets, Look-Back Periods, Transfer Rules, Penalties

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New VA Benefits Rules

Presented by:

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&

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Changes in VA Pension Rules Overview

- Effective October 18, 2018
- Net Worth Limit
- Assets
- Income for VA Purposes
- 36 Month Lookback Period
- Medical Expenses
- Opportunities Going Forward

Changes in VA Pension Rules
Net Worth Limit

- *Net Worth*: includes all income and assets and is equal to Maximum Community Spouse Resource Allowance (CSRA) for Medicaid Purposes
  - Sum of the claimant's (and spouse if married) assets and annual income
- Currently at $127,061
  - Home is not included
  - Car is not included
  - "Reasonable lot area" defined as not more than two acres unless the additional acreage is not marketable
- Limit Subject to Increase by same percentage as cost-of-living increase for Social Security

Changes in VA Pension Rules
Net Worth Limit

- Net worth determinations are made as the date of:
  - The original claim;
  - A new claim made after period of non-entitlement;
  - A request of information by VA that a claimant net worth has changed; OR
  - Receipt of information by VA that a claimant's net worth has changed
- *Life estate interest rules have not changed*

Changes in VA Pension Rules
Assets

- Assets: Fair Market Value of all property owned by the claimant and any dependents, less mortgages or other encumbrances

- What assets qualify for VA Pension Purposes?
  - Household assets for a married couple
    - Assets owned by both spouses
  - Household assets for a surviving spouse
    - Only the assets owned by the surviving spouse

Changes in VA Pension Rules
Assets

- Fair Market Value:
  The price at which an asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.

  To determine fair market value, VA will use best available information such as appraisals, public records, and market value of similar property.

Changes in VA Pension Rules
Assets

What assets are exempt?

1. Homestead property
   - Primary residence even if not currently living in the property
   - If currently being rented out, property is still exempt as an asset but income counts toward income total
2. One automobile

Changes in VA Pension Rules
Assets

Decreasing assets:

1. A veteran, surviving spouse or child, or someone acting on their behalf, may decrease assets by spending them on an item or service for which fair market value is received, unless the item or items purchased are themselves part of net worth.

2. The expenses paid for by the claimant's assets must be an expense of the claimant or a relative of the claimant, and the relative must be a member or constructive member of the claimant's household.

Changes in VA Pension Rules
Income for VA purposes (IVAP)

Examples of excluded income are:

1. Income tax returns
2. Veterans benefits from States and municipalities up to $5,000 per year
3. Reimbursement payments for loss such as insurance settlement payments for accidents, theft or loss, or casualty losses
4. Statutory exclusion listed at 38 C.F.R. § 3.279

Changes in VA Pension Rules Income for VA Purposes (IVAP)

Waiver:

- Waiver by a claimant of non-excludable income will be counted as countable income.

- A claimant who withdraws a claim for Social Security retirement benefits at a later age will not be considered as having waived income.

Changes in VA Pension Rules 36-Month Lookback Period

- Triggered by the receipt of an original claim or new claim following a period of non-entitlement
- Will not apply to transfers made prior to 10/18/2018
- 5 year cap
- Only "covered assets" that are transferred will be penalized

Changes in VA Pension Rules 36-Month Lookback Period

Covered Asset:

- An asset that was part of a claimant's net worth, was transferred for less than fair market value and, if not transferred, would have caused or partially caused the claimant's net worth to exceed the net worth limit.

Transfers for less than fair market value are defined as:

- selling, conveying, exchanging, or gifting an asset for an amount less than fair market value of the asset; OR,
- a voluntary asset transfer to, or purchase of, any financial instrument or investment that reduces net worth by transferring the asset to, or purchasing, the instrument investment unless the claimant establishes that he or she has the ability to liquidate the entire balance of the asset for the claimant's own benefit.

Changes in VA Pension Rules
36-Month Lookback Period

- Examples of Covered Assets
  - Claimant has $120,000 and annual income of $0 at the time of the VA application (UMEs reduced income to 0)
  - Gave a friend $30,000 prior to applying for VA pension
    - If $30,000 hadn't been transferred before application, net worth would have been $50,000 and would have been excessive.
    - Covered asset amount is $22,939 ($150,000-$127,061) and will incur a penalty
    - Current penalty divisor is $2,230, so penalty would be 10.28 months, rounded down to 10 months

Changes in VA Pension Rules 36-Month Lookback Period

Penalty Period Calculation

Under the new rules, the transfer of a covered asset during the 36-month lookback period will trigger a penalty period of up to 5 years.

- Lookback period begins on a date on which VA receives a pension claim and includes the 36-months immediately preceding the date of claim
- This DOES NOT include transfers made prior to October 18, 2018

Changes in VA Pension Rules
36-Month Lookback Period

Penalty Period Calculation

- Pursuant to 38 CFR § 3.276(e), VA calculates the length of the penalty period by dividing the total covered asset amount by the monthly penalty rate, which is the maximum annual pension rate (MAPR) for a veteran in need of aid and attendance with one dependent, divided by 12, and rounded down to the nearest whole dollar.
- 2019 divisor amount: $2,230

Changes in VA Pension Rules 36-Month Lookback Period

- Veteran has $110,000 in total assets, $12,000 in income
  - Total net worth = $122,000
  - Transferred $50,000 on November 1, 2018
  - Applied for VA pension on November 15, 2018
  - Approved!

- Because the amount transferred was not from assets over the net worth limit (covered assets), no penalty will be imposed

Changes in VA Pension Rules
36-Month lookback period

Curing a gift

- May be partial or total cure
- Cure must be made before the claim was filed or within 60 days of the notice of penalty
- Evidence of the return/cure must be received not later than 90 days after the notice of decision

Changes in VA Pension Rules 36-Month Lookback Period

Exceptions to the Transfer Penalty

- The result of fraud of unfair business practice
- Transfer to a trust established for a child incapable of self-support to 18
  - No circumstances that the Veteran, Veteran's spouse or surviving spouse can benefit
- Transfer was from assets that were not over the $127,061 limit

Changes in VA Pension Rules 36-Month Lookback Period

Annuities

- The purchase of an annuity after October 18, 2018 will be penalized unless the claimant retains control and the ability to liquidate – then an asset
- Defined as "a financial instrument that provides income over a defined period of time for an initial payment of principal."
  - The uncompensated value is equal to the amount transferred

Changes in VA Pension Rules 36-Month Lookback Period

Trusts

- As with annuities, transfers to a trust will incur a penalty unless all the claimant retains control and the ability to liquidate – then an asset
  - Revocable trust assets would be considered as assets part of net worth

Changes in VA Pension Rules Medical Expenses

- Far more generous than the proposed rules
- “Those that are medically necessary; that improve a disabled individual’s functioning; or that prevent, slow, or ease an individual’s functional decline.”
- One addition to ADLs: “ambulating within the home or living area”

Changes in VA Pension Rules
Medical Expenses

- Medical expenses must be unreimbursed and include payments for items and services that:
  1. Are medically necessary;
  2. Improve a disabled individual's functioning; OR
  3. Prevent, slow, or ease an individual's functional decline.

- List of items considered deductible medical expenses can be found at 38 C.F.R. § 3.278 (c)(1) through (7).
- Payments made to hospitals, nursing homes, medical foster homes, and inpatient treatment centers include the cost of meals and lodging.

Changes in VA Pension Rules Medical Expenses

- Prescriptions are deductible, as is a non-prescription medication obtained lawfully
- Medically necessary food, vitamins and supplements are deductible as long as prescribed by a valid health care professional
- Service animal payments are deductible
- Transportation expenses for health care purposes are deductible

Changes in VA Pension Rules
Medical Expenses

In-Home Assistance

- Payments made for in-home assistance with ADLs and IALDs by an in-home attendant are considered deductible medical expenses as long as attendant provides health or custodial care.
- No limit on hourly rate for home health case
- Caregivers can be paid for IADLS – rules note shopping, meal prep, laundry, housekeeping, handling finances, using the phone and medication assistance may be compensated
  - Must be receiving health care or custodial from an appropriate provider as outlined in the rules for ADLs or IADLs to be deducted

Changes in VA Pension Rules Medical Expenses

- ADLs are basic self-care activities and consist of bathing or showering, dressing, eating, toileting, transferring, and ambulating within the living area.

- IADLs are independent living activities such as shopping, food prep, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes.

Changes in VA Pension Rules
Medical Expenses

- Custodial care is regular assistance with two or more ADLs; or regular supervision because an individual with a physical, mental, developmental, or cognitive disorder requires care or assistance on a regular basis to protect the individual from hazards or dangers incident to his or her daily environment.

Changes in VA Pension Rules
Medical Expenses

Attendant providing in-home care must be a health care provider unless:

1. The disabled individual requires aid and attendance or is housebound; OR
2. A physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that, due to a physical, mental, developmental, or cognitive disorder, the individual requires the health care of custodial care that the in-home attendant provides.

Changes in VA Pension Rules
Medical Expenses

More Options for Medical Expense Deductions in Independent Living Facilities:

- Referred to as "care facilities other than a nursing home or assisted living facility."
  - Care provider can be a non-health care provider if patient is in need of A&A or HB, or a qualified medical professional (as designated in the statute) states that "due to a physical, mental, development or cognitive disorder, the individual needs to be in a protected environment"
- Meals and lodging may also be deductible, but strict requirements apply

Planning Techniques for VA Accredited Attorneys

(1) IRAs

- There are no known planning strategies for IRAs that will work under the new rules.
- Conversions to income annuities are no longer feasible
- The only option for IRAs that exceed the net worth is to liquidate, pay taxes, and spend down appropriately.

Planning Techniques for VA Accredited Attorneys

(2) Irrevocable Trusts

- The use of irrevocable trusts will be helpful in proactive planning or as a substitute to an outright gift

Planning Techniques for VA Accredited Attorneys

(3) Pooled Trusts

- Transfers to a pooled trust will not create a penalty but the assets will count towards the asset limit as it would in a self-settled SNT.
- When to use this technique:
  - If you have a SINGLE applicant trying to qualify for both Medicaid and VA Pension and their assets are more than $2,000 but less than the VA net worth limit.

Planning Techniques for VA Accredited Attorneys

(4) Purchase of a Life Estate in a Child's Home

- The VA rules do not address this but some practitioners think this is a valid spenddown strategy. To date we are not aware of any applications that have been denied under the new rules using this strategy.

(5) Gifting

- Gifting/ adding a non-spouse joint owner to accounts. May result in a penalty, however.

Seven Planning Techniques for VA Accredited Attorneys

(6) Caregiver Agreements

- A caregiver providing in-home assistance must be a health care provider unless; 1) the disabled individual requires aid and attendance or is housebound; or 2) a physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that, due to a physical, mental, developmental, or cognitive disorder, the individual requires the health care of custodial care that the in-home attendant provides.
- If using a caregiver agreement to demonstrate a deductible medical expense to lower the IVAP score it is recommended to obtain a letter from the applicant's physician stating that the individual requires the custodial care being provided.
- Lump sum payment versus hourly payment.

Crisis Planning – How to Reduce Net Worth

- Divided into “blessed by the rules” and “maybe” strategies
- Increase UMEs
- Income counts toward total net worth, UMEs reduce income and increase the potential award available
  - Increase hours of care provided in the home
  - Room and board in an independent living facility may also be deductible, and/or home care provided in the facility
  - ALF expenses are normally deductible
  - See final rule for more detail: https://www.federalregister.gov/documents/2018/09/18/2018-19895/net-worth-asset-transfers-and-income-exclusions-for-needs-based-benefits

Ways to Reduce Net Worth "Blessed by the Rules"

- Paying for goods and services for the claimant, spouse, or other relatives living in the home
  - Vehicle(s), burial plans, other personal property items
- Purchase of a home
- Renovations to the home
- Transfer to an irrevocable trust for a child incapable of self-support prior to age 18
  - Veteran or spouse can receive no benefit from trust assets

Ways to Reduce Net Worth Maybe

- Purchase a life estate interest in someone else's home
  - Not addressed in the rules

Half a Loaf Planning

- Trying to determine whether our client can qualify in less than 36 months by transferring part of their assets and waiting out the penalty period, versus transferring more and waiting 37 months

Example of Half a Loaf Planning

- First have to calculate net worth (income – UMEs (-5% deduction) + plus assets)
- What are total monthly expenses (including UMEs - income)
- Calculate the burn rate to determine whether we can qualify within 36 months or after

Example of Half a Loaf Planning

- Claimant with \$150,000 in excess assets (plus \$127,061), \$5,000/month in total living expenses and \$2,000/month in income
- Burn rate: \$3,000/month
- Penalty divisor: \$2,230/month
  - Penalty period = \$150,000 / (\$3,000+\$2,230) = 28.68 mos.
  - Gift amount = 28.68 x \$2,230 = \$63,956
  - Retained amount = \$150,000 – \$63,956 = \$86,044 (double check: \$86,044 / \$3000 = 28.68 mos.)

When Should a Claimant Wait 37 Months?

- When penalty period is 36 months or greater
- Excess assets: $300,000 (total assets = $427,061); living expenses: $3,000
- Burn rate: $3,000; penalty divisor: $2230
  - Penalty period = 300,000 / (3000+2230) = 57.36 mos.
  - Retained amount = 3000 x 36 = $108,000 (plus $127,061)
  - Gift amount = 300,000 – 108,000 = $192,000
  - We only need to wait 36 months (apply in 37th month)

When Should a Claimant Wait 37 Months?

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  - Gift amount = 300,000 – 108,000 = $192,000
  - We only need to wait 36 months (apply in 37th month)
- What to do with the gifted amount?
  - Outright gift v. transfer to self-settled irrevocable trust

What to do With the Gifted Amount

- Outright Gift
- Transfer to self-settled irrevocable trust

Transfers – Trusts

Why Use a Trust?

1. **Less risky than outright transfers**
   Not subject to death, divorce, or bankruptcy of kids
   Less people holding the assets
2. **Tax Savings**
   Retain capital gains exemption on sale of primary residence
   Retain step in basis on appreciated assets upon death of senior(s)
3. **Convenience**
   Reduce administration expenses at the death of the grantor

VA Trust Issues

- The best guidance is General Counsel Opinions and VBA opinions
  - Each are discussed in detail in the white paper provided
- Bottom line: No income to the grantor, no benefit from trust assets

Opportunities Under the New Rules

- We can finally advise clients with confidence
- Balancing Medicaid with VA pension just got simpler (proactive planning)
- Balancing Medicaid with VA pension just got simpler (crisis planning)

Opportunities Under the New Rules

- Proactive planning using an irrevocable trust (like the Veterans Asset Protection Trust®) will be used more often for VA and Medicaid
- Unmarried claimants can more easily qualify for Medicaid and VA pension

Proactive Planning: Balancing Medicaid with VA

- You have a client who is a wartime Veteran, starting to show signs of mental and physical decline, but still able to live independently. You discuss the benefits of protecting assets now in the event her health fails in the future. Previously, this discussion was all about Medicaid (or trying to avoid using the word "Medicaid.") Now, the conversation can be about planning now, and using a Veterans Asset Protection Trust to qualify for Veterans pension benefits in 36 months.

- In 60 months, if her health is worse and nursing home care is necessary, she can then qualify for Medicaid.

Crisis Planning: More Opportunities for Unmarried Veterans

- Under 38 CFR 3.276, only transfers of assets that would have caused net worth to be excessive will be penalized.
- An unmarried wartime Veteran living in an assisted living facility in a state that has a Medicaid waiver program for assisted living, could transfer $127,061 and not be penalized for VA purposes
- Depending on the nature of the transfer, the Veteran may have a penalty for Medicaid, but could begin receiving VA pension while waiting out the Medicaid penalty.

Opportunities for Unmarried Veterans

- The same is true for a Veteran living in a nursing home who transfers assets to qualify for Medicaid.
  - As long as the transfer involves assets that would have otherwise been counted as net worth and not covered assets, there will be no penalty for VA purposes and that Veteran can begin receiving monthly payments to help defray nursing home costs during the Medicaid penalty period

Balancing VA with Medicaid Unmarried Veteran

- Veteran has $110,000 and is currently in assisted living
- Could transfer all of it and start receiving VA pension benefits immediately
- Can trigger the penalty for Medicaid and VA pension will help pay through the penalty period

Thank You!

To learn more, contact us at:

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