

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 330 and 731

RIN 3206-AN25

Recruitment, Selection, and Placement (General) and Suitability

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) is proposing to revise its regulations pertaining to when, during the hiring process (unless an exception is granted), a hiring agency can request information typically collected during a background investigation from an applicant for Federal employment. OPM is proposing this change to promote compliance with Merit System Principles as well as the goal of the Federal Interagency Reentry Council and the President's Memorandum of January 31, 2014, "Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own." The intended effect of this proposal is to better ensure that applicants from all segments of society, including those with prior criminal histories, receive a fair opportunity to compete for Federal employment.

DATES: Comments must be received on or before July 1, 2016.

ADDRESSES: You may submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this proposed rulemaking. You may also send, deliver, or fax comments to Kimberly A. Holden, Deputy Associate Director for Recruitment and Hiring, U.S. Office of Personnel Management, Room 6351D, 1900 E Street NW., Washington, DC

20415-9700; email at employ@opm.gov; or fax at (202) 606-4430.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Gilmore by telephone on (202) 606-2429, by fax at (202) 606-4430, by TTY at (202) 418-3134, or by email at Michael.Gilmore@opm.gov.

SUPPLEMENTARY INFORMATION: Current regulations at 5 CFR part 731.103(d) allow agencies to begin to determine an applicant's suitability at any time during the hiring process. Agencies use a variety of methods to determine an applicant's suitability for Federal employment. Criminal conduct is one of several criteria agencies consider in the course of making suitability determinations. Many agencies administer the Optional Form (OF) 306, "Declaration for Federal Employment," to applicants in order to collect information about an applicant's history, as an advance screening process prior to the suitability investigation that is required for appointment in a covered position. The OF-306 contains a variety of questions about background information. Among these are several questions about an applicant's criminal history, including past convictions or current arrests that were not yet the subject of a final disposition.

Currently, there is nothing in OPM's regulations to prevent hiring agencies from requiring an applicant to complete and submit the OF-306 or equivalent information collection as part of the job-seeker's initial application package. The better practice, and one that many agencies already employ, is to wait until the later stages of the hiring process to collect this kind of information.

Early inquiries into an applicant's background, including his or her criminal or credit history (such as at the point at which an applicant submits his or her application materials) could have the effect of discouraging motivated, well-qualified individuals from applying for a Federal job. In particular, collecting such information from those who have a criminal record, but who have served their time and been rehabilitated, might discourage them from applying for a Federal job and limit their opportunities to obtain the means to secure stable housing, provide support for their families, and contribute to their communities. Early inquiries could also result in the disqualification of an otherwise eligible and qualified applicant solely on the

basis of his or her criminal history—regardless of whether an arrest has actually resulted in charges or a conviction, and regardless of whether consideration of the applicant's criminal history is justified by business necessity, *i.e.*, in the suitability context, whether the suitability action will protect the integrity or promote the efficiency of the service. Therefore, OPM is proposing to amend parts 330 and 731 of its regulations to prevent agencies, unless an exception is granted from OPM, from administering the OF-306 to applicants, or otherwise making inquiries into an applicant's background of the sort asked on the OF-306's 'Background Information' section or other forms used to conduct suitability investigations for Federal employment, unless the hiring agency has made a conditional offer of employment to the applicant. Though agencies generally defer collecting this information until the end of the process, it is a good practice to take steps to affirmatively prevent misuse of such information earlier in the process—either inadvertent or intentional.

Under the proposed rule, agencies will not be permitted to make specific inquiries concerning an applicant's background of the sort asked on the OF-306's 'Background Information' section or other forms used to conduct suitability investigations for Federal employment unless the hiring agency has made a conditional offer of employment to an applicant. This will preclude agencies, in most cases, from making a referral or initial selection decision on the basis of adverse criminal or credit history or other factors normally developed through the OF-306. The proposed rule will permit the agency to make an objection, pass-over request, or suitability determination on the basis of criminal history record information or other information normally collected on the OF-306 only after the applicant's qualifications for the position being filled have been fairly assessed and the hiring agency has made a conditional offer of employment to the applicant. The proposed rule provides a mechanism for agencies to request exceptions from this prohibition where there are legitimate, specifically job-related reasons why agencies might wish to disqualify candidates based on their criminal history. Nothing in this

proposed rule affects the timing of pre-employment medical examinations or inquiries as required by section 501 of the Rehabilitation Act.

OPM is proposing this change to continue to encourage applicants from all segments of society to seek Federal employment, and to ensure that for most Federal jobs, individuals with prior criminal or other adverse history are given the opportunity to demonstrate their knowledge, skills, and ability in a fair and open competition. The proposed rule will strengthen the enforceability of OPM's regulations while preserving necessary processes that ensure the efficiency, integrity and safety of the service.

The Merit System Principles provide that "Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a workforce from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity." 5 U.S.C. 2301(b)(1). The Director of OPM is charged with "executing, administering, and enforcing" the Civil Service laws, including the Merit System Principles, and "securing . . . justice in the functions of the Office." 5 U.S.C. 1103(a)(1), (a)(5).

In addition, the Director of OPM is a member of the Federal Interagency Reentry Council chaired by the Attorney General. OPM is committed to the Council's stated goal of "remov[ing] Federal barriers to successful reentry, so that motivated individuals—who have served their time and paid their debts—are able to compete for a job, attain stable housing, support their children and their families, and contribute to their communities . . . to not only reduce recidivism and high correctional costs, but also to improve public health, child welfare, employment, education, housing and other key reintegration outcomes." See Federal Interagency Reentry Council, <https://csgjusticecenter.org/nrrc/projects/firc/> (last visited March 15, 2016).

Finally, prompted, in part, by the recent Presidential Memorandum, "Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own," 79 FR 7045 (Feb. 5, 2014), OPM has determined that it would be good policy to require agencies to defer the collection of the types of background information collected on the OF-306 until the hiring agency has made a

conditional offer of employment to an applicant, with appropriate exceptions, so that there is less opportunity for this information to be misused at the preliminary screening stage. Below is an explanation of the proposed rule:

Specifically, OPM is proposing to amend 5 CFR parts 330 and 731 to require that, unless an exception has been requested by the hiring agency and granted by OPM, agencies cannot begin collecting background information unless the hiring agency has made a conditional offer of employment to an applicant. This change would limit the flexibility currently granted to agencies to administer the OF-306, and any other form of inquiry into an applicant's background, at any time during the hiring process.

The proposed language, in new subpart M of 5 CFR part 330 and 731.103(d), will require agencies to defer the collection of background information required by the OF-306 until the hiring agency has made a conditional offer of employment to an applicant. This change in requirements will further the objective that most applicants would have the opportunity to apply and be fully considered and evaluated before any action can be taken by the hiring official in reliance on that information. This will preclude agencies, in most cases, from making referral or initial selection decisions on the basis of criminal history or other information normally collected on the OF-306's background information section, and will permit the agency to make an objection, pursue a pass-over of, or make a suitability-based decision on a candidate on the basis of such information only after the applicant's qualifications have been fairly assessed and the applicant has received a conditional job offer.

The proposed rule allows agencies to request from OPM an exception to collect background information earlier in the hiring process. OPM recognizes there are legitimate, job/position-related reasons why a hiring agency may have a need to disqualify candidates with significant issues, including, *e.g.*, criminal history, from particular types of positions they are seeking to fill. These exceptions could include, for example, certain law enforcement or public trust positions where the ability to testify as a witness is an aspect of the work, and thus a clean criminal history record would be essential to the ability to perform one of the duties of the position effectively. In these cases, the agency will need to demonstrate the validity of its conclusion that the presence of certain background information should be disqualifying.

It could also include positions where the expense of completing the examination makes it appropriate to adjudicate suitability at the outset of the process (*e.g.*, a position that requires that an applicant complete a rigorous training regimen and pass an examination based upon the training before he or she may be selected).

In any event, the applicant would have notice of the process, an opportunity to rebut any issue(s) that arose, and the ability to appeal any adverse suitability action to the Merit Systems Protection Board.

OPM is proposing to consider requests for exceptions on a case-by-case basis (rather than prescribe specific criteria for an exception) in order to provide maximum flexibility to hiring agencies and account for the many unique circumstances that agencies face. In determining whether an exception is justified, OPM will consider, among other things: The occupation, and grade level(s) of the position(s) being filled; the basis for any conclusion that certain information is appropriately considered to be disqualifying; for requests based upon expense, at what point in the hiring process the agency has been conducting suitability screening for the position(s) for which an exception is being sought; and the specific need for the exception. OPM is prepared to consult with agencies and to receive requests for exceptions prior to the effective date of the final rule. In appropriate cases, OPM will be prepared to grant exceptions immediately upon effect of the final rule.

OPM is proposing the new subpart M to part 330 in order to impact all forms of placement in the Competitive service (*e.g.*, hiring under the competitive examining process, reinstatement of a former Federal employee, or the transfer of a current employee from one agency to another). Many agencies administer the OF-306, "Declaration for Federal Employment," to applicants in order to collect information about an applicant's history, as an advance screening process prior to the suitability investigation that is required for appointment in a covered position. The OF-306 contains a variety of questions about background information. Among these are several questions about an applicant's criminal history, including past convictions or current arrests that were not yet the subject of a final disposition. OPM is proposing to limit the discretion agencies have in collecting this information from Federal job applicants, whether through the OF-306 or through other similar inquiries or investigative inquiries, such as fingerprint records

checks, before the hiring agency makes a conditional offer of employment to an applicant.

Executive Order 13563 and Executive Order 12866, Regulatory Review

The Office of Management and Budget has reviewed this rulemaking in accordance with E.O. 13563 and 12866.

Regulatory Flexibility Act

I certify that these proposed regulations will not have a significant economic impact on a substantial number of small entities because the regulations pertain only to Federal agencies and employees.

E.O. 13132, Federalism

This proposed regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E.O. 12988, Civil Justice Reform

This proposed regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in Title 5 CFR Parts 330 and 731

5 CFR Part 330

Armed forces reserves, District of Columbia, Government employees.

5 CFR Part 731

Administrative practices and procedures, Government employees.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM is proposing to revise 5 CFR parts 330 and 731 as follows:

PART 330—RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)

- 1. The authority citation for part 330 continues to read as follows:

Authority: 5 U.S.C. 1104, 1302, 3301, 3302, 3304, and 3330; E.O. 10577, 3 CFR, 1954–58 Comp., p. 218; Section 330.103 also issued under 5 U.S.C. 3327; Subpart B also issued under 5 U.S.C. 3315 and 8151; Section 330.401 also issued under 5 U.S.C. 3310; Subparts F and G also issued under Presidential Memorandum on Career Transition Assistance for Federal Employees, September 12, 1995; Subpart G also issued under 5 U.S.C. 8337(h) and 8456(b).

- 2. Add subpart M, consisting of § 330.1300 to read as follows:

Subpart M—Timing of Background Investigations

§ 330.1300 Timing of suitability inquiries in competitive hiring.

A hiring agency may not make specific inquiries concerning an applicant's background of the sort asked on the OF-306's 'Background Information' section or other forms used to conduct suitability investigations for Federal employment unless the hiring agency has made a conditional offer of employment to the applicant. However, in certain situations, agencies may have a business need to obtain information about the background of applicants earlier in the hiring process to determine if they meet the qualifications requirements or are suitable for the position being filled. If so, agencies must request an exception from the Office of Personnel Management in order to determine an applicant's ability to meet qualifications or suitability for Federal employment prior to making a conditional offer of employment to the applicant(s). OPM will grant exceptions only when the agency demonstrates specific job-related reasons the agency wishes to evaluate suitability earlier in the process or consider the

disqualification of candidates with criminal backgrounds or other conduct issues from particular types of positions. OPM will consider such factors as, but not limited to, the nature of the position being filled (e.g., a law enforcement position) and whether a clean criminal history record would be essential to the ability to perform one of the duties of the position effectively. OPM may also consider positions for which the expense of completing the examination makes it appropriate to adjudicate suitability at the outset of the process (e.g., a position that requires that an applicant complete a rigorous training regimen and pass an examination based upon the training before he or she may be selected).

PART 731—SUITABILITY

- 3. The authority citation continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 7301; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218, as amended; E.O. 13467, 3 CFR 2009 Comp., p. 198; E.O. 13488, 3 CFR 2010 Comp., p. 189; 5 CFR parts 1, 2 and 5.

- 4. Revise § 731.103(d) to read as follows:

§ 731.103 Delegation to agencies.

* * * * *

(d)(1) A hiring agency may not make specific inquiries concerning an applicant's background of the sort asked on the OF-306's 'Background Information' section or other forms used to conduct suitability investigations for Federal employment unless the hiring agency has made a conditional offer of employment to the applicant. However, in certain situations, agencies may have a business need to obtain information about the suitability or background of applicants earlier in the process. If so, agencies must request an exception from the Office of Personnel Management, in accordance with the provisions of 5 CFR part 330 subpart M.

(2) OPM reserves the right to undertake a determination of suitability based upon evidence of falsification or fraud relating to an examination or appointment at any point when information giving rise to such a charge is discovered. OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud in examination or appointment, and OPM will take a suitability action where warranted.

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