

PUBLICATION

Changes to FEMA's Public Assistance Appeals and Arbitrations Regulation Go Into Effect January 1, 2022

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The Federal Emergency Management Agency's (FEMA) Public Assistance Appeals and Arbitrations regulation at 44 C.F.R. § 206.206 will change on January 1, 2022. Recipients and subrecipients should be prepared for changes in filing deadlines and content requirements to avoid automatic denial.

Between October 1, 2021 and November 23, 2021 FEMA Headquarters issued decisions on 38 Public Assistance program second appeals. The agency denied 18 percent of those because either the applicant or the recipient failed to meet filing deadlines. According to a new [final rule](#) published on August 16, 2021, the agency does not intend to relax its strict deadline enforcement one bit. In fact, the new rule clearly states that "[i]f the applicant or the recipient do not [meet their respective... deadlines, FEMA will deny the appeal."

Appeal Deadlines

Every Determination Memo from FEMA should contain language directing the applicant to the appeal provisions at [44 C.F.R. § 206.206](#) and explaining that if the applicant seeks to appeal the agency's decision, it must submit a written appeal to the recipient (typically the state) within 60 days. *Under the current rules*, the 60-day appeal period begins when the applicant *receives notice* of the action that is being appealed. Once the recipient receives the appeal from the applicant, the recipient is then required to forward the appeal, together with the recipient's recommendation, to FEMA within 60 days. Again, *under the current rules*, the recipient's 60-days for forwarding the appeal to FEMA begins with the recipient's *receipt* of the applicant's appeal.

Under the revised rules, the 60-day timeframes remain in effect for applicants and recipients, but the deadlines will be calculated from the date that FEMA issues the decision – not from the date of receipt. The applicant will be required to submit its appeal within 60 days of the decision, and the recipient will be required to forward the appeal with the recipient's recommendation to FEMA within 120 days of the decision. For consistency, the rule adds an electronic submission requirement for both first and second appeals, and FEMA is taking programmatic and technological steps to tie the date of determination to the date of transmittal.

This means that if FEMA issues a Determination Memo on June 3, 2022 the applicant must submit its appeal to the recipient on or before August 2, 2022 and the recipient must forward the appeal with its recommendation to FEMA on or before October 1, 2022, *regardless of the date that the recipient actually files its appeal*.

This change arguably improves a recipient's ability to meet deadlines as the recipient will know the date by which it must file any appeal packages as soon as FEMA issues its determination. The recipient's deadline will be the same, whether it receives the appeal from the applicant on the 10th day or the 59th day after the appealable decision is issued. This does have a downside for the applicant, however, as after the rule goes into effect, any speed by the applicant to file ahead of its deadline will not necessarily encourage speedier submission by the recipient or a quicker decision by FEMA.

The changes also include a new 30-day standard for applicants to supplement appeals with additional information. Currently, there is no consistent deadline for FEMA Requests for Information (RFIs) or for applicants to voluntarily provide supplementary information.

Arbitration Provisions

The changes also include new arbitration provisions to implement the right to arbitration provided by the Disaster Recovery Reform Act of 2018 (DRRA). The DRRA directed FEMA to arbitrate Public Assistance disputes over \$500,000 (or \$100,000 for applicants in rural areas) in lieu of second appeal and in lieu of first appeal if FEMA fails to issue a first appeal decision within 180 days. The regulatory revisions incorporate FEMA's arbitration procedures currently documented in an agency [Fact Sheet](#), with a few clarifications and changes from current practice.

First, FEMA clarifies that because the DRRA added the arbitration provision to section 423 of the Stafford Act (which applies only to major disasters), arbitration is not available for disputes arising from declared emergencies.

Second, FEMA revised the language describing what can be arbitrated. An applicant may appeal "any determination previously made related to an application for or the provision of Federal assistance" and may request arbitration to "dispute the eligibility for assistance or the repayment of assistance." The differences between what may be appealed versus what may be arbitrated will likely be clarified over time through future agency attempts to dismiss arbitration cases.

Third, the regulatory changes also include a sequence of actions required when the applicant seeks arbitration following FEMA's failure to issue a first appeal decision within 180 days. Currently, there is nothing preventing an applicant from filing a Request for Arbitration and waiting for confirmation that the arbitration will not be dismissed for subject matter jurisdiction or other procedural problem before withdrawing the first appeal. Under the new regulation, the applicant must first provide electronic notice to both the recipient and FEMA Regional Administrator that it withdraws its first appeal before it may then file its Request for Arbitration. Once notice of withdrawal is given, the applicant must file a Request for Arbitration with the Civilian Board of Contract Appeals (CBCA) and FEMA within 30 days of the date of the withdrawal.

As with deadlines, FEMA is keen on enforcing the procedural content of appeal and arbitration filings. Appeal requests will still require documented justification supporting the applicant or recipient's position, the amount in dispute, and the specific provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination is inconsistent. A Request for Arbitration, however, must also include the disaster number and the name and address of the applicant's authorized representative or counsel.

Effective Date

Typically, unless specifically required to do otherwise by statute, FEMA looks to the regulations and policies that were in effect on the date a disaster was declared to establish consistency in the rules and procedures that apply to each particular event. This is why FEMA applies the Public Assistance Program and Policy Guide v. 3.1 (issued May 4, 2018) for COVID-19 (declared in March 2020), as opposed to the new version 4 of the guide that was issued on June 1, 2020.

Although the changes to the rule go into effect on January 1, 2022, it is not expressly stated in the rule or preamble whether the changes apply only to disasters declared after that date, or if they apply to all appeal or arbitration actions that take place after that date. FEMA's regulatory team has indicated that the agency intends to release a policy clarifying the regulation changes.

Until or unless FEMA issues clarifying guidance to the contrary, after January 1, 2022 applicants and recipients should be prepared to calculate deadlines using both the rule in effect on the date of the disaster and the new rule – and file before whichever date occurs first.

Conclusion

FEMA and the CBCA consistently deny appeals and requests for arbitration for failure to comply with the rules. This is not expected to change under the upcoming regulatory changes.

Applicants who seek to challenge unfavorable agency decisions must do so within 60 days. Today, the 60-day clock starts on the date the decision is received – after the start of the new year, the clock will start on the date the decision is issued.

Similarly, recipients must carefully abide by their filing deadlines to avoid denial of the applicant's appeal. Under the new rule, recipients will be required to forward any appeals together with the recipient's recommendation within 120 days of the date of the decision.

Applicants who seek arbitration instead of a second appeal or after waiting 180 days for FEMA to issue a decision on a first appeal, may do so. However, under the new rule, if the request is related to a languishing first appeal, the applicant must first withdraw the first appeal, and then must request arbitration within 30 days.

As always, applicants need to understand and comply with the rules. Filing a Request for Arbitration that omits something as seemingly insignificant as the disaster number could result in an agency request for dismissal. Similarly, filing or forwarding an appeal even one day late could result in denial.

Please contact [Erin Greten](#), or any member of [Baker Donelson's Disaster Recovery and Government Services Team](#) with any questions or for further information.

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