



LEGAL HOTLINE FOR TEXANS

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SOCIAL SECURITY

THIS PUBLICATION IS NOT A SUBSTITUTE FOR THE ADVICE OF AN ATTORNEY.

The pamphlets of the Legal Hotline for Texans are general in nature and should not be relied on as advice for your particular circumstances. For advice that is specific to your particular circumstances, you should consult a lawyer.

The Legal Hotline for Texans (LHT) is a telephone hotline providing free legal advice and consultation and other free legal services to Texans Age 60 and Older or Eligible for Medicare; Crime Victims Age 60 and Older and their Family Members and Authorized Claimants; and Pension and Retirement Plan Employees, Participants and Beneficiaries.

Eligible Clients can consult with an attorney of the Legal Hotline for Texans free of charge by calling one of the phone numbers listed above. If clients would like to consult with an attorney in their communities, or if ongoing representation by an attorney is needed, the Legal Hotline for Texans may be able to make a referral.

Depending on individual circumstances and local availability, such a referral may be to an organization providing free attorneys to low income persons, or may be to an attorney on the Legal Hotline for Texans' reduced-fee panel, or may be to a statewide or local lawyer referral service.

The Legal Hotline for Texans is a project of the Texas Legal Services Center with support from the Texas Department of Aging, and Disability Services (DADS), the U.S. Centers for Medicare and Medicaid Services (CMS), the U.S. Administration on Aging (AoA) and the Texas Equal Access to Justice Foundation through the Texas Basic Civil Legal Services Program (BCLS) and the Texas Crime Victims Civil Legal Services Program (CVCLS)

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SOCIAL SECURITY

The Old Age Survivors, and Disability Insurance program (OASDI), and the Social Security Administration which administers the program, were created by the Social Security Act of 1935 (42 U.S.C. 301 et seq., 20 C.F.R. 404.1-.2127).

The OASDI program provides for disability or retirement benefits for workers, benefits for spouses and children of retired or disabled workers, and benefits for the surviving family of deceased workers. To become eligible, a worker must work in employment “covered” by the Social Security Act for a sufficient number of calendar quarters (January-March, April-June, July-September, October-December).

The OASDI program is funded by a Social Security tax paid by workers and employers on income earned from “covered” employment.

OASDI (or other governmental programs), non-governmental employee benefits, and private investment make up the so-called tripod or three-legged stool of economic security which underlies the foundation of individual and family financial security. Many individuals and families only have OASDI income or have OASDI and Supplemental Security Income benefits.

FAMILY CAREGIVERS

Children under the age of 18 are eligible for auxiliary retirement, survivors and disability income benefits under OASDI if the child’s parent is collecting retirement or disability benefits or if the parent is deceased and was either fully or currently insured at the time of death. Children being raised by their grandparents may qualify for benefits as a dependent child based on a grandparent’s work record. These and other matters related to beneficiaries up to age 18 and beneficiaries age 60 and older are discussed in detail below.

ELIGIBILITY FOR OASDI

In order to be eligible for benefits, a worker must have worked a sufficient number of calendar quarters in employment that is covered by the Social Security system.

COVERED EMPLOYMENT

Services performed after 1954 within the U.S. by an employee for her or his employer constitute covered employment, unless specifically excepted by law.

The citizenship or residence of the employee or employer is immaterial except for services performed by agricultural workers, services performed in Guam by a resident of the Philippines, and services performed by a nonresident alien temporarily present in the U.S.

If at least one-half of the employee's time in the employ of a particular employer in a pay period is spent in performing services which constitute employment, then all the services of that employee for that person in that pay period are deemed to be employment. On the other hand, if less than one-half of the employee's time is spent in such employ, then none of the services of that employee for that person in that pay period are deemed to be employment. A pay period for Social Security purposes is a period of not more than 31 consecutive calendar days for which an employer ordinarily pays an employee wages, salary, or remuneration. The rule does not apply where part of the work is performed within the U.S. and part is performed outside.

Employment by a political organization that has five or more employees is covered employment.

Special "covered employment" rules apply to the following: services performed by an American Indian, services performed by a resident alien, services performed before 1955 for which remuneration was paid, services performed by Canadian citizens or residents, service outside the U.S., Uniformed Services, Hospital Interns, Aliens, service for international organizations and foreign governments, other services, and employment of family members.

SUFFICIENT NUMBER OF CALENDAR QUARTERS

Accumulation of Sufficient Number of Calendar Quarters

Quarters of coverage are accumulated for most workers as follows: From 1937 to 1977, a worker is credited with coverage for each calendar quarter in which he or she earned cash wages of \$50.00 or more. From 1951 to 1977, a worker is credited with coverage for each calendar quarter in which he or she earned \$100.00 while self-employed. Since 1978, a worker is credited with a quarter of coverage for each quarter during which the worker earned a minimum annual amount of covered earnings, set by statute with a maximum of four quarters of coverage in a year. The minimum annual amount for the year 2001 is \$830.00.

Domestic Workers. Domestic employees, including housekeepers, cooks, and gardeners have been covered by Social Security since 1951. Prior to 1995, a domestic employee's wages were covered if one employer paid her or him \$50.00 or more in cash in a 3-month calendar quarter. Beginning in 1994, rules for coverage of domestic services performed in the private home changed. The domestic employee received one quarter of coverage for each quarter during which the employee earned a minimum annual amount of cash wages, set by statute with a maximum of four quarters of coverage in a year. For calendar years after 1998, the earnings threshold will adjust in multiples of \$100 in a given year, as average wages adjust. The minimum annual amount for the year 2001 is \$1330.00.

Farm Workers. Farm workers' wages are covered if the employer pays \$2,500.00 or more to all employees during the taxable year or he or she received \$150.00 or more in cash pay during a year from any one employer. Prior to December 31, 1987, a farm worker's wages were covered if he or she worked for one employer for 20 or more days during a year and was paid in cash for work which is computed on the basis of time rather than piecework. Farm work by foreign workers lawfully residing in the U.S. on a temporary basis is not covered employment. Farm work by a self-employed sharecropper is covered employment. The minimum annual amount for the year 2001 is \$830.00.

If a worker lacks several quarters of coverage he or she may try to make up the quarters. This may be done by working some more quarters, by working in a public employment program financed by federal funds which encourage older persons to work in public service positions, for example, the Senior Aide program, by working in the home of the worker's own child, or by working for the worker's spouse.

Social Security Taxes for Workers and Employers

OASDI is financed by Social Security tax on earned income from covered employment paid by workers or employers.

In order to determine the amount of tax to be paid, and by whom, it must first be determined whether the worker is a wage-earning employee or an independent contractor. A worker or employer may request a Determination on the issue of employee vs. independent contractor from the Internal Revenue Service.

Social security payroll taxes are withheld from wage-earning employers at the rate of 6.20% of regular earnings. Employers of wage-earning employees also currently pay Social Security taxes of 1.45% of regular earnings of employees. Independent contractors generally make quarterly payments of self-employment social security tax at the rate of 15.30% of net self-employment income. Thus, the employer and employee each pay half of the Social Security tax for the wage-earning employee, and the independent contractor pays all the self-employment social security tax. Independent contractors may deduct 50% of the self-employment Social Security tax from gross income on their federal income tax returns.

Insured Status. There are three basic insured statuses: fully insured, currently insured, and disability insured

Fully Insured: Workers must be fully insured to receive most Social Security Benefits. For workers born before January 2, 1929, a

worker is fully insured if he or she has earned quarters of coverage equal to the number of elapsed years between the following years: first, the later of 1950 or the year the worker reached age 21, and second, the year the worker reached age 62, became disabled, or died. Workers born on or after January 2, 1929 need 40 quarters of coverage to be fully insured.

Currently Insured. Currently insured status is for certain types of survivor's benefits. A deceased worker must have had 6 quarters of coverage during the full-13 quarter period ending with the calendar quarter in which he or she became entitled to retirement benefits, most recently became entitled to disability benefits, or died.

Disability Insured. In order to be disability insured, a worker must be fully insured plus have a recent attachment to the work force. A special test for disability benefits is as follows: If the worker is disabled before age 24, the worker needs credit for 6 quarters (1.5 years of work) in the 12 quarters (3 years) before disability starts. If the worker is disabled between age 24 and age 31, the worker needs credit for half the time between the 21st birthday and the time disability starts. If the worker is disabled at age 31 or later, the worker must be fully insured, plus, 20 quarters (5 years) of the work must be in the 40 quarters (10-year period) immediately before disability begins.

SOCIAL SECURITY DISABILITY

In order to be eligible for Social Security disability benefits a worker must be insured and must meet the Social Security definition of disability.

Definition. The definitions for disability under both Social Security and Supplemental Security Income are as follows: An inability to “engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months ...” The Social Security definition continues as follows: “An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” The Social Security definition of disability for widows, surviving divorced wives, widowers, or surviving divorced husbands is based on medical factors only and not on vocational factors such as age, education, and work experience. Widows, widowers, surviving divorced-wives, and surviving divorced-husbands also must not be gainfully employed. Generally, if a worker earns \$750.00 or more in a month, the worker is presumed for Social Security disability purposes to be gainfully employed.

Social Security Determinations of Disability.

6-Step Process. The Social Security Administration uses a 6-step process in determining whether a worker is disabled.

Listings. Most Social Security disability applicants will have their claims evaluated under a “Listing of Impairments” which is contained in the Social Security regulations. There are two sets of listings. One set generally applies to individuals over age 18, and the other set applies to individuals under age 18. Both sets categorize impairments into thirteen body systems as follows: (1) musculoskeletal system, (2) special senses and speech, (3) respiratory system, (4) cardio-vascular system, (5) digestive-system, (6) genito-urinary system, (7) hemic and lymphatic system, (8) skin, (9) endocrine system, (10) multiple body systems, (11) neurological, (12) mental disorders, (13) neoplastic diseases, malignant. The listing which applies to children also categorizes growth impairment.

Grids. Other Social Security regulations formalize the consideration of a claimant’s vocational factors (age, education, and work experience). If a Social Security claimant’s residual functional capacity (RFC) for work is determined to be limited to sedentary, light, or medium work, then each of three RFC tables or grids will be used to find disability or non-disability. Great caution must be used when applying the grids.

Multiple Impairments. The Social Security Administration must consider the combined effect of multiple impairments on the worker’s ability to work throughout the 6-step evaluation process.

ELIGIBILITY FOR RETIREMENT BENEFITS

Workers. A worker who is age 62, fully insured, and has retired, is eligible for retirement benefits.

Early Retirement Benefits. Benefits are reduced 5/9ths of one percent for each month of retirement before age 65, or a reduction of 20% if benefits start at age 62.

Delayed Retirement Credit. Delayed retirement credit may be earned for delaying retirement until after retirement age. For a person who became age 65 before 1990, the delayed retirement credit is one-fourth of one percent of their monthly benefit amount times the number of months the person was fully insured but did not receive benefits. The number of months begins with the month of becoming age 65 and ends with the month before becoming age 70. For persons who attain age 65 in 1990 or later, the one-fourth of one percent rate will be increased by one-

twenty-fourth of one percent in each even year until the rate reaches two-thirds of one percent for persons retiring at age 66 in 2009 and later.

Husband and Wives' Benefits.

A husband or wife age 62, or younger if caring for the worker's child(ren), is eligible for retirement benefits based on the worker's eligibility. The husband or wife usually receives half of the worker/spouse's benefit, but sometimes less.

An unmarried divorced spouse age 62 or older who was married to the worker at least 10 years before their divorce became final is eligible for retirement benefits based on the worker's eligibility. The worker must be 62 years of age or older. Benefits won't be terminated if the divorced spouse and the worker remarry or if the divorced spouse marries a person entitled to spouse's, widow's, widower's, mother's, father's, parent's, or childhood disability benefits under Social Security. In addition, if the divorced spouse has been divorced from the former worker/spouse for at least two years, the divorced spouse may receive benefits off the former spouse's work record, even if the former spouse is still working.

Childrens' Benefits.

Children of a retired parent are eligible for a benefit, which is usually half the benefit paid to the retired parent, if they are unmarried, dependent on a retired worker, and fit into one of the following age categories: under age 18, or under age 19 and attending elementary or secondary school full time, or age 18 or over with a disability which began before the child reached age 22. The term child includes adopted children, stepchildren, and, under certain conditions, grandchildren and illegitimate children.

Children being raised by their grandparents may qualify for benefits as a dependent child based on a grandparent's work record. A child would be so qualified under the following conditions: (1) if the child's natural or adoptive parents are disabled or deceased or (2) the child was legally adopted by the grandparents and the child's natural parent was not living in the same household and making regular contributions to the child's support at the time the grandparent died. The child can be adopted by the surviving grandparent and become eligible as a dependent of the deceased grandparent. To be considered dependent on the grandparent, the child must have begun living with the grandparent before the child turned 18 years old and must have lived with the grandparent in the United States and received at least one-half support from the grandparent. These benefits are available only to children raised by their grandparents.

Children raised by other relatives may qualify for dependent benefits if they are legally adopted by the relative caregiver.

Grandparents and other relatives can apply for benefits on behalf of the child based on the earnings records of the parent as custodian, informal or otherwise, and may serve as representative payee for those benefits. If the child was born without benefit of marriage, paternity may be shown by a court order, an admission in writing from the putative father, such as voluntary acknowledgment of paternity under the Texas version of the Uniform Parentage Act, including the child in a health or other insurance policy, birthday card, letter, etc., or, if all else fails, several statements from persons, particularly his own relatives, to whom he declared himself the father of the surviving child.

ELIGIBILITY FOR DISABILITY BENEFITS

A worker is eligible for disability insurance if he or she is disabled, is fully insured, and has earned twenty quarters of coverage, or five years, in the last 40 quarters, or 10 years. Disability benefits are available to widows, widowers, and the worker's dependents.

ELIGIBILITY FOR SURVIVORS BENEFITS

Monthly survivors benefits are paid to the widow or widower of the deceased worker and to the worker's parents and children. In order for parents to be eligible, generally, they must be 62 years of age or older, and must have been receiving at least one-half support from the worker at the time of the worker's death. In addition, a small lump-sum death payment is available on death of the worker to the "qualified" surviving spouse or divorced spouse, or to children eligible for benefits on the worker's earnings record for the month of the worker's death if there is no "qualified" surviving spouse.

Widows and Widowers.

For Social Security purposes, a widow or widower must have been married to the worker for at least nine months, or be the biological or adoptive parent of the worker's child, or the worker must be the adoptive parent of the child of the widow or widower.

A widow or widower who is age 60 or older, or is between 50 and 60 and is disabled, is eligible to receive monthly survivors benefits if the deceased worker/spouse was fully insured at the time of death. An unmarried surviving divorced spouse who is age 60 or older, or is between 50 and 60 and is disabled, who was married to the deceased at least ten years, is eligible to receive monthly survivors benefits also. Widow or Widower's benefits are between 82.50% and 100% of the deceased spouse's basic monthly benefit.

A widow or widower may also be eligible for mother's or father's insurance benefits if the worker died fully or currently insured, and if the widow or widower is unmarried and caring for the deceased spouse's minor or disabled child. Mother's and father's benefits are about 75 percent of the deceased spouse's basic monthly benefits.

Children. The terms "children" and "dependents" are defined for Social Security disability the same way they are defined for Social Security retirement. Unmarried children are eligible for survivors' benefits if the parent/worker became disabled or died while fully or currently insured. Children are eligible for three-quarters of the deceased parent's basic monthly benefit, subject to a "family maximum".

Family Maximum. There is a family maximum amount of Social Security benefits that may be paid to a family, regardless of the number of entitled beneficiaries on a worker's record. The family maximum is determined according to a formula.

Parents. Parents at least 62 years of age who were dependent on the deceased worker for half of the dependent's support are eligible for monthly survivor's benefits. The parent's benefit is usually 82.5% of the deceased worker's benefit.

A worker's benefit level depends on the amount of Social Security tax contributed and the number of quarters of coverage earned. The worker's benefit is also affected by whether the worker has dependents and by how long the worker and the worker's dependents survive.

The "Notch" Effect. A change in the method of determining benefits under the Social Security law lowered benefits for workers born in 1917 and later. Special computation procedures apply to workers born between 1917 and 1921. Some of the workers born during those years still complain that their benefit is lower than it should be.

APPLYING FOR BENEFITS

Applicants generally apply for Social Security benefits through the local Social Security office. Texans age 60 or older and Medicare beneficiaries may contact the local Area Agency on Aging Benefits Counselor or the Legal Hotline for Older Texans if they need assistance applying for benefits. The Social Security Handbook lists the proof needed to establish eligibility for Social Security benefits. The validity of an informal Texas marriage may be proven in a Social Security administrative or legal proceeding.

RECEIVING BENEFITS

Social Security benefits may be paid under an electronic funds transfer system. Traditionally Social Security checks have been paper checks sent through the U.S. mail.

A “Representative Payee” may be appointed by the Social Security Administration to receive Social Security benefit payments on behalf of a beneficiary.

If a beneficiary between age 62 and age 65, and is eligible for both early retirement benefits and disability benefits, there are two advantages to choosing disability over early retirement. First, if a beneficiary receives Social Security disability checks for 24 months, then the beneficiary will be entitled to Medicare. Second, the Social Security retirement will not be reduced 5/9ths of 1% for each month or early retirement.

The amount of retirement benefits received each year depends on whether the beneficiary is fully or partially retired. There is an annual exempt amount for beneficiaries age 62 through 64. In the year age 65 is reached, beneficiaries are subject to a different annual exempt amount. The exempt amounts also vary from year to year according to increases in the nationwide earnings level. In 1996, Congress passed a law that gradually increases the annual exempt amount for the year age 65 is reached to \$30,000 in the year 2002. The exempt amount for beneficiaries age 62 through 64 continues to be computed each year according to the formula provided in the Social Security Act. This formula takes into account an increase in national earnings levels. For 2001, the exempt amount for beneficiaries reaching age 65 is \$25,000 and the exempt amount for beneficiaries between age 62 through 64 is \$10,600. For 2002, the exempt amount for beneficiaries reaching age 65 is \$30,000 and the exempt amount for beneficiaries between age 62 through 64 is to be determined.

There is a five-month waiting period for Social Security disability benefits. There is a 29-month waiting period to become eligible for Medicare – the five-month Social Security disability waiting period plus the 24-month period of disability checks. Social Security disability benefits may be granted retroactively for 1 year from the date of application. Thus, if a 62-year-old worker had been disabled 17 months prior to the date of application for Social Security disability benefits, benefits could be granted retroactively 12 months. In this case, the five-month waiting period would have been the period from 17 months prior to application to 12 months prior. Also, the worker would be entitled to Medicare if he or she continued to receive disability checks for one year after the date of application, at which time the worker would have received 24 Social Security disability checks prior to becoming age 65.

Fully insured workers are eligible for Medicare when they reach normal retirement age.

Social Security beneficiaries may also receive Supplemental Security Income, in which case they would also receive regular Medicaid, MQMB if they receive Medicare, would be eligible for food stamps, and may be eligible for subsidized housing.

Government Pension Offset. The government pension offset may reduce the Social Security benefit for spouses, divorced spouses, surviving spouses, or surviving divorced spouses who are beneficiaries of government pensions. There is a formula to compute the offset.

Overpayment and Recovery. If Social Security Administration believes there was an overpayment of benefits, they may try to recover it through reduction or suspension of benefits. However, Social Security may not recover an overpayment if the recipient was not at fault and if recovery of the overpayment would be “against equity and good conscience” or would “defeat the purpose of the Social Security Act.” Normal Social Security Appeals procedures are used on overpayment cases. Under current procedures, a request for waiver or reconsideration made within 30 days of the date of receipt of the notice of overpayment will suspend the overpayment recovery at least until reconsideration.

Social Security benefits are exempt from creditors even after receipt, except for the IRS, child support, and alimony. If Social Security funds are direct deposited to a bank account which never contained funds other than Social Security benefits, and the bank has been notified in writing of the status of the funds in the account, then the funds will be non-garnishable for most creditors.

Taxation. Social Security benefits may taxable depending on the amount of income received by the Social Security beneficiary.

NOTICE AND APPEALS

Disability applications usually take at least several months to process. Retirement and survivors’ benefits applications are usually processed in 60 to 90 days. If 90 days have passed since the last information was submitted on a retirement or survivors’ benefits application then the applicant may demand in writing that the Social Security office pay and the Social Security office is required to pay within 15 days of the demand.

Applicants are notified in writing of the Social Security office’s initial determination and how to request reconsideration of the initial determination. The notice must state the reason for and effect of the initial determination, plus, it must notify the claimant of the right to request a reconsideration. The initial determination notice of a disability determination must contain a statement of the case in understandable language. A personalized attachment containing certain required information must also be provided to disability claimants with unfavorable disability determinations.

A request for reconsideration must be filed in writing within 60 days after the date the claimant receives the notice of determination. An appellant seeking reconsideration of a disability determination is entitled to a hearing on reconsideration. Reconsideration hearings are complex and an appellant should generally be represented by an advocate or attorney. All other appellants are only entitled to case review, which consists of independent review, informal conference, or formal conference. Social Security must

schedule the time, date, and place for an informal or formal conference within 15 days after a request for reconsideration is made. Notices of reconsideration determinations must state the specific reasons for the determination, notify the claimant of the right to appeal to an Administrative Law Judge within 60 days from the date of the receipt of the determination. A reconsideration determination notice in a disability insurance benefit case must be personalized.

A claimant may be able to continue monthly disability benefits while the determination decision is appealed through the Administrative Law Judge hearing stage if, within 10 days of receipt of the initial determination or reconsideration determination, the claimant requests in writing both an appeal of the disability determination and continuation of the disability benefits.

There is an expedited appeals process which permits the claimant, under certain conditions, to file suit in federal court without exhausting all administrative appeals.

If the claimant requested an Administrative Law Judge hearing, Social Security sends or serves the claimant a notice of hearing at least 20 days before the scheduled hearing. Administrative Law Judge hearings are complex and the claimant should generally be represented by an advocate or attorney.

Denials at the Administrative Law Judge level may be appealed within 60 days of receipt of the notice of denial to the Social Security Administration, Appeals Council. After denial by the Appeals Council, the case may be appealed within 60 days of date of receipt of the denial to federal district court. From district court the case may be appealed to the federal appeals court and then to the U.S. Supreme Court.