

Policy and Practice Brief:

Administrative Offsets and Social Security Benefits

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This is one of a series of articles written for benefits specialists employed by Benefits Planning, Assistance and Outreach projects and attorneys and advocates employed by Protection and Advocacy for Beneficiaries of Social Security programs. Materials contained within this policy brief have been reviewed for accuracy by the Social Security Administration (SSA), Office of Employment Support Programs. However, the thoughts and opinions expressed in these materials are those of the authors and do not necessarily reflect the viewpoints or official policy positions of the SSA. The information, materials and technical assistance are intended solely as information guidance and are neither a determination of legal rights or responsibilities, nor binding on any agency with implementation and/or administrative responsibilities.

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I. Introduction

The Anti-assignment clause of the Social Security Act (the Act) was intended to provide absolute protection against the collection of public and private debts from social security benefits paid under the Act. The Anti-assignment clause¹ provides that

the right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Social Security Disability Insurance (SSDI) benefits, and others paid under Title II of the Act, are not as well protected as they once were. The protection once provided by the Anti-assignment clause is slowly being eroded. Congress must speak clearly and specifically in order for exceptions to this clause to be created. In the absence of specific Congressional language “execution, levy, attachment, garnishment, or other legal process” is not allowed. Congress has provided language in several instances, including specifically addressing the issues of child support, student loans, food stamp overpayments.

Supplemental Security Income (SSI) benefits, paid under Title XVI of the Act, remain protected from garnishment, or other legal process, with the exception of interim assistance recoupment.

Both SSDI and SSI recipients who decide to return to work will be taking active steps to reduce their dependence upon public benefits while replacing those benefits with earned income. This effort requires careful planning, such as that provided by Benefits Planning Assistance and Outreach programs, and access to advocacy services provided by the Protection and Advocacy for Beneficiaries of Social Security. Administrative offsets threaten the delicate balancing act that a working recipient must maintain in order to make the transition from benefits to financial independence. With knowledge comes power. Decision making concerning a return to work must consider any potential administrative offset that will diminish both a recipient’s income and work effort.

This memo will discuss administrative offset generally and will specifically address the offset against SSDI benefits for child support, student loan and food stamp debts as these tend to be the most common offsets facing our client community. Interim assistance and the SSI program will also be addressed. An accompanying power point presentation is also available for advocate and/or client education.

II. The Anti-Assignment Clause

SSDI benefits provide a cash and health care safety net for disabled workers and their dependents. The Anti-assignment clause of Title II of the Act² was created to provide protection for the SSDI benefits paid to qualified recipients. This important right of the recipient not to have any future payment transferred, assigned, or subject to legal process has, over time, been weakened for specific types of debt.

¹ 42 U.S.C § 407(a).

² 42 U.S.C. § 407(a).

The Anti-assignment clause has been codified in SSA's regulations for Title II purposes. The regulations³ discuss the general provisions as interpreted by SSA.

§ 404.1820 Transfer or assignment of payments.

- (a) *General.* We shall not certify payment to-
 - (1) Any person designated as your assignee or transferee; or
 - (2) Any person claiming payment because of an execution, levy, attachment, garnishment, or other legal process, or because of any bankruptcy or insolvency proceeding against or affecting you.
- (b) *Enforcement of a child support or alimony obligation.* If you have a legal obligation to provide child support or make alimony payments and legal process is issued to enforce this obligation, the provisions of paragraph (a) of this section do not apply.

While child support is specifically mentioned within the regulation it is important to note that the underlying statute,⁴ also specifies that the Anti-assignment clause is not intended to prohibit the withholding of tax debt.

In order for other exceptions (e.g., student loan and food stamp debt) Congress must specify that administrative offset as a collection tool is an appropriate method to recoup monies owed to a third party. Student loan debt was addressed in the Debt Collection Improvement Act. Food stamp debt was authorized by the Department of Agriculture.⁵ Both will be discussed in the sections addressing each type of offset.

III. Child Support Offset

"The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."⁶

To every provision there exists an exception. In 1983, subsection (b) was added to § 407. Subsection (b) states that "no other provision of law, enacted before, on, or after the date of enactment of this section, may be construed to limit, supercede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." In other words, after passage of subsection (b) any modification of the anti-assignment clause of § 407 required that Congress specifically invoke subsection (b) when creating the exception. Exceptions now exist for delinquent taxes, interim assistance collection, defaulted student loans, food stamp overpayments and delinquent child support debt.

The specific legal process by which SSA will take benefits in order to meet a beneficiary's child support obligation is called garnishment.⁷ **NOTE: Black Lung and SSI payments are not subject to garnishment.** SSI benefits cannot be garnished for child support enforcement. The law varies from state to state as to whether a support order can even issue against an SSI recipient. For example, the states of Illinois and Massachusetts will allow a minimum order to issue despite it being unenforceable via garnishment. Whereas, the state of Maine specifically prohibits a child support order to issue against an SSI non-custodial parent.

³ 20 C.F.R. § 404.1820.

⁴ 42 U.S.C. § 407(c).

⁵ 7 C.F.R. 3.23.

⁶ 42 U.S.C. § 407.

⁷ POMS GN

02410.001(b)(4). This exception to the anti-assignment clause allowing SSDI (Title II) benefits to be garnished is found at 42 U.S.C. § 659, and applies to both the payment of child support and alimony.

In order for garnishment to be an alternative collection mechanism, the underlying child support order must meet some basic criteria:

- a. There is an “order” resulting from legal process. GN 02410.200(B)
- b. There is an obligation to pay child support/alimony which is enforceable under appropriate state or local law. GN 02410.200(C)
- c. The payment is a “periodic payment of funds for the support and maintenance of a child in accordance with state or local law.” GN 02410.200(D) or,
- d. The payment is a “periodic payment of funds for the support and maintenance of a spouse or former spouse” in accordance with state or local law. It includes, but is not limited to, separate maintenance and spousal support. GN 02410.200(E)

Both child support and alimony amounts claimed and collected by garnishment of SSDI benefits may include attorney fees, interest and court costs if expressly made recoverable under a garnishment order issued by a court in accordance with state or local law. **NOTE: Specific POMS will provide information concerning the garnishment limit in your state.** Limits are currently set at 50% or 60% of monthly payments. Should the support payments be more than 12 months late the limit can increase to 55% or 65%, depending upon the law of your state. The limits may only be exceeded because of a specific court order ordering a higher garnishment rate.

A notice of intent to garnishment benefits must be sent to the beneficiary within 30 days of SSA receipt of the garnishment order. NL 00703.723(B) Remedy exists with the court ordering garnishment and **not** with SSA. SSA is simply an enforcement agent. SSR 79-4 does prohibit the imposition of any fee or penalty by SSA upon garnishment of a benefits payment.

What Can a Beneficiary Do?

As indicated above, SSA is simply an enforcement agent and cannot be turned to in order to seek relief from garnishment. In order to seek relief, the underlying judgment/order for garnishment must be challenged. This challenge may come in the form of a modification of the original child support/alimony order and/or the direct payment of current support.

In most states, modifications of child support are not retroactively allowed but will be allowed as of the date of filing regardless of when the final order is issued *. Should a child support obligor become an SSDI beneficiary, a motion/petition for child support/alimony modification should be filed immediately in order to timely adjust child support/alimony debt. Ignoring the child support/alimony issue will simply result in the continual accruing of a debt that cannot be satisfied short of payment.

It is also important that the SSDI beneficiary understand the potential of applying for dependents' benefits for a child covered by a support order. In many instances a state's child support enforcement agency (CSEA) or state court will credit the amount of title II benefits paid directly to the child toward the monthly child support debt. In some cases, the amount of title II benefits may even exceed the child support order. With proper CSEA and/or state court intervention, the disabled recipient will see an appropriate modification of existing child support orders to reflect the new stream of income. Again, please note, that how much credit is given and how the benefits impact an existing order is a matter of state law. Some states will credit the SSDI payments provided to the child on a dollar for dollar basis, while others will consider the SSDI as part of the parent's income when determining the amount of child support to be paid.

*It may be possible to retroactively reduce and/or eliminate any penalties, interest, fees imposed upon an obligor by the state child support enforcement agency. Further, child support debts owed to the state (payable during a time of welfare payments on behalf of the child) may be subject to negotiation in both administrative and court forums.

IV. Food Stamp Debt Offset

The food stamp debt offset provision is not as readily apparent as are other exceptions to the anti-assignment clause.⁸ The implementing regulations⁹ govern the collection by the Department of Agriculture through an "administrative offset" via the Treasury Department's Treasury Offset Program (TOP). In order for the offset to go into effect, the government does not need a judgment nor does the debt have to be undisputed. The offset will be effective 31 days after the debtor receives a Notice of Intent to Collect by Administrative Offset, or when a stay of offset expires, unless the agency determines that under that immediate action is necessary.¹⁰ It is highly unlikely that, in the case of food stamps overpayments, the agency would determine that immediate action was necessary.

People contesting the overpayment of food stamp benefits are entitled to an administrative hearing before the food stamp administering agency. This hearing and its filing dates are controlled by state regulation and the state agency administering the food stamp program. Generally this is the state welfare department. These hearings are very informal and follow the state administrative practice rules. Check you state administering agency's hearing rules for details.

The administrative hearing is an appropriate setting in which to determine whether all possible deductions for earned income, medical expenses, excess rent, heat and cooling expenses, etc., have been considered by the administering agency. Only after the consideration of all of the income and deductions of a food stamp household are considered can the appropriate monthly grant be determined. Often times overpayment situations can be remedied and/or adjusted at the review hearing and avoid the necessity of administrative offset against Title II benefits.

⁸ The Department of Agriculture's authority to participate in an administrative offset program is found at 31 U.S.C. 3716(c)(3)(I)(I).

⁹ 7 C.F.R. 273.18(f)(7).

¹⁰ 7 C.F.R. 3.26.

Once a debt has been determined by a state agency, it must be “certified” and referred to Treasury for TOP implementation. In order to be “certified” the state agency must show that the debt has been delinquent for 180 days and that it is legally enforceable.¹¹ As with other types of administrative offsets, this method of collection is inappropriate if the debtor is a member of a participating household. In other words, if the debtor is still receiving food stamps, TOP cannot be used to collect the overpayment. TOP implementation must cease once the debt is paid, the claim is otherwise disposed of (e.g., waiver by the state agency) or the debtor arranges to begin or resume payment to the state agency.¹²

The debtor is entitled to receive advance notice of the offset 30 calendar days before offset is scheduled to begin unless, in the very unlikely event, that immediate collection is deemed necessary. Once the notice has been received, the debtor has 20 calendar days to request a document review or administrative hearing. This process must take place within 45 days of the request and will consider all existing documents and any other evidence submitted within 10 days of the request for hearing or review.¹³

V. Student Loan Offset

The Debt Collection Improvement Act of 1996,¹⁴ allows for expanded collection of delinquent student loans from Title II Social Security benefits. The impact on a disabled or elderly recipient can be devastating. As a result, it has become critical that we know whether our Title II clients have outstanding student loans that may impact on their Title II awards. Since Title II clients will have their rights to benefits continually endangered by past, delinquent student loans, it is the responsibility of the representative to alert them to their options for dealing with their student loan debts. As indicated above, Title II benefits are generally protected from legal process. The Debt Collection Improvement Act of 1996 (Debt Collection Act) is one such instance in which Congress specifically indicated its intent to waive the anti-assignment clause protection.

It is important to note that there is no statute of limitations that applies to the collection of student loans. The Department of Education (DOE), initiates collection by providing notice of intent to collect past due student loans to the benefits recipient. This notice of offset will provide hearing rights and limited remedy information. The recipient has the right to request a hearing to challenge the offset or to set up a repayment plan to avoid offset. Hearings and repayment plans must be made with DOE. The Social Security Administration (SSA) has no authority to modify or terminate DOE offsets. DOE must certify the debt to the Department of Treasury (Treasury). After which, once all notice time periods have run and hearings have occurred, Treasury will order SSA to assign a portion of the recipient’s monthly Title II benefits to DOE. Notices from Treasury will come from the Financial Management Service (FMS).

¹¹ 7 C.F.R. 273.18 (n)(1)(I).

¹² 7 C.F.R. 273.18 (n)(4)(ii)(B)(2)-(5).

¹³ 7 C.F.R. 3.29 (c)-(d).

¹⁴ 31 U.S.C. 3716.

The Debt Collection Act does provide some protections however. The first \$750 of Title II paid to a recipient is protected and the total amount recouped from each monthly benefit payment cannot exceed 15% of the total benefit. SSI benefits are specifically exempted from this process and remain totally protected.

Once a Notice of Offset has been received by a recipient, or even after offset has begun, there are several potential debt cancellation options for the recipient. The most effective are the “disability discharges.”

A. Disability Discharges

1. Disability Discharge - DOE will NOT accept an SSA determination of disability for the purpose of a disability discharge. The DOE standard requires that the recipient be “unable to work and earn money or attend school because of an injury or illness that is expected to continue indefinitely or result in death.” In instances where disability existed at the time of the granting of the loan discharge may be denied unless there is a substantial deterioration of that pre-existing disability.

Beginning in July, 2002, a new process for disability discharges will exist. DOE will issue a “conditional discharge” for a period of 3 years. During this period DOE will review the recipient’s ability to work (most likely by reviewing SSA income reports) in order to determine whether the “conditional discharge” remains appropriate. The recipient also has an affirmative duty to report earnings over poverty to DOE. During the 3 year period the recipient will be allowed earnings up to the poverty level. If earnings exceed poverty, the loan will again become due and owing. Should the recipient have no earnings during the 3 year period, the discharge will become permanent.

2. Debt Cancellation - Based upon “hardship,” debt cancellation is one of the most effective ways for a recipient to obtain relief from DOE collection efforts. While there is no time limit associated with the filing of a cancellation request, the student loan in question must have been made in 1986, or later. Cancellation will result in the complete elimination of the student loan debt and the reimbursement of all monies paid out by the recipient, including tax refunds seized by the IRS and payments made by the recipient. DOE will also be required to assist in “cleaning up” the credit report of the recipient after cancellation.

There are several types of debt cancellation available to the recipient. They include a “closed school discharge” available for loans received, at least in part, after January 1, 1986. The student must have been enrolled at the time of the school’s closure. If the student withdrew, the withdrawal must have occurred within 90 days of the school’s closure. DOE maintains a list of official school closing dates at <http://www.ed.gov/offices/OSFAP/Students/closedschool/search.html>.

A “false certification discharge” also applies to student loans received, at least in part, after January 1, 1986. Perkins loans are not eligible for this type of discharge. This type of cancellation requires that the student prove that his/her eligibility to borrow was falsely certified to DOE by the school. In most cases, students with high school diplomas or G.E.D.s at the time of admission will not be eligible for this type of cancellation. However, if the student is unable to meet minimum state employment requirements for the job for which the student was being trained, or if the school forged or altered the loan note or check endorsements, a false certification discharge may be available.

Lastly, an “unpaid refund discharge” will allow a student/recipient to discharge any part of loan liability that is directly due to the school’s failure to pay tuition refunds to the student. The loan must also have been obtained after January 1, 1986.

Upon the denial of a discharge there exists an informal DOE review process, a second discharge request can be submitted, or the recipient can seek review by the Federal Court.

Should the recipient not be entitled to any of the cancellations or discharges, repayment options also exist. Repayment plans can be made directly with DOE on an informal basis. The repayment agreement and repayment compliance will cease all offset efforts.

B. Bankruptcy and Repayment

1. Bankruptcy - While severe limitations have been placed on the discharge of student loans, it is still possible to discharge a student loan on the basis of “undue hardship.” There must have been a “good faith” effort to pay the debt in the past together with no prospect for future income. Albeit, it is a very high hardship standard, it may warrant exploration in appropriate cases.
2. Loan consolidation may also be available and can be a great alternative. Consolidation plans should be treated as a refinancing agreement and payment plans are set by DOE. **The payment level of a recipient with income at, or below, poverty is \$0 per month.** The consolidation plan will remove any default that was outstanding prior to the adoption of the plan and a re-evaluation of the recipient’s income situation will occur each year to adjust the payment level accordingly. After 25 years of compliance with the consolidation plan the entire loan is considered paid in full. Consolidation applications can be found on-line at <http://www.ed.gov/directloan>. An on-line calculator will allow the student to determine monthly repayment levels before completing the consolidation application. The calculator can be found at <http://www.ed.gov/DirectLoan/Repay/Calc/dlentry2.html>. Please be aware that the ability of debtors to consolidate loans may be reduced beginning 2007 should pending legislation be enacted.

VI. Interim Assistance Recoupment

The recoupment of interim assistance has long been part of the SSI eligibility and payment process. Interim assistance is the cash assistance paid to a recipient by a state, county or local government agency during the pendency of an SSI application.¹⁵ The effective date of recoupment begins with the effective date, or payment date, of the SSI application. Only interim assistance paid during a period of retroactive SSI payment may be recouped by the paying entity.

For example, Joan received state disability benefits beginning April, 2002. After receiving these payments for 12 months she was required by state law to apply for SSI benefits. Her application was filed on April 16, 2003, with an effective date of May 1, 2003. On June 18, 2004, Joan's SSI application was approved with an onset date June 1, 2003. Her retroactive benefit was paid by SSA on July 1, 2004. The state will be sent Joan's retroactive SSI payment and will be entitled to recoup all state funds paid between June 1, 2003 and July 1, 2004. These months represent the payment "overlap" period or the period during which, if all benefits were paid in a timely manner, Joan would have received both state disability payments and SSI.

In order for a state, county or local government entity to be allowed to recoup funds from an SSI retroactive payment, the recipient of the state funds must sign an interim assistance reimbursement agreement.¹⁶ The recipient's authorization will remain in effect until SSA has made a payment on the claim, made a final determination on the claim or until the recipient and state terminate the agreement.¹⁷ A reapplication will require a new authorization form. **NOTE: Be sure to check your state form for any automatic termination date.**

In SSI application cases involving interim assistance recoupment, SSA will send the SSI retroactive payment directly to the agency providing interim assistance benefits. That agency will then send any remaining SSI retroactive funds to the recipient. The SSI recipient will have appeal rights after receiving a statement from the state concerning the recoupment offset.¹⁸ The state must provide an accounting of benefits paid, SSI received and a month by month breakdown of benefits recouped. Appeal deadlines are state specific and are controlled by the regulations implementing the state program.

The state must also have an agreement with SSA in place at the time the retroactive payment is made.¹⁹

VII. Conclusion

Administrative offset against Title II or Title XVI benefits can present a very difficult financial situation for disabled recipients attempting to return to work. Many, if not all, social security recipients make attempt to make plans before re-entering the workforce. These plans include a financial aspect that will take into consideration the reduction of benefits that occurs when earned income increases. Administrative offset reducing the amount of benefits payable to a disabled worker still receiving social security benefits can render their return to work plans unworkable by preventing the ability to meet even the most basic needs let alone the extra costs associated with working.

¹⁵ 42 U.S.C. 1383(g), 20 C.F.R. 416.1901, *et seq.*

¹⁶ 20 C.F.R. 416.1904(b).

¹⁷ 20 C.F.R. 416.1906.

¹⁸ 20 C.F.R. 416.1920.

¹⁹ 20 C.F.R. 416.1904(a).

MY NOTES ON TRANSLATING THIS TO PRACTICE:

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