

# SOCIAL SECURITY BENEFITS AFTER DOMA:

*ARE SPOUSAL BENEFITS NOW  
AVAILABLE TO MARRIED SAME-SEX  
COUPLES LIVING IN NEW ENGLAND?*

**YES**

LGBT LEGAL ADVOCATES

**GLAD**

Answers

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## Can married same-sex couples living in New England count on Social Security spousal protections like other married couples can?

**YES**

Now that the Defense of Marriage Act Section 3 (“DOMA”) has been declared unconstitutional by the United States Supreme Court, a person married to someone of the same sex living in New England (or any other state in the United States that recognizes the marriage or the District of Columbia or any foreign country) may be eligible to claim the Social Security benefits that might be due to a spouse, including:

- the **spousal retirement** benefit;
- the **spousal disability** benefit;
- the **lump-sum death** benefit; and
- the **survivor** benefit.

In some cases, Social Security also provides benefits to children. A child may be eligible to receive benefits under Social Security’s retirement, disability, or survivor protections.

.....  
If you married overseas, the Social Security Administration (SSA) will seek a legal opinion about whether the marriage is valid in the wage earner’s place of domicile at the time of application or, if the wage earner has died, in the place of domicile at his or her death.

.....  
If you are living overseas, SSA will use the laws of D.C. to determine if your marriage is valid.  
.....

## Does it matter?

**YES**

*Social Security is a complex federal program. This document is intended to provide general information only and cannot substitute for guidance or legal advice as to one's specific situation. Moreover, this publication is based upon the information that is known to us as of January 2014. For guidance on your particular situation, you must consult a lawyer. The provision of this information is not meant to create an attorney-client relationship.*


*For a governmental explanation of the Social Security program, visit the Social Security Administration website, [www.socialsecurity.gov](http://www.socialsecurity.gov)*

Social Security is an important safety net in this country. It can make the difference between living in poverty and having enough to get by. In 2004, the Congressional Budget Office judged that 30% of married same-sex couples would receive higher benefits as a retired couple than they would as two single people, and, about half of same-sex couples would collect higher benefits after one partner died.



## *How do I know if my spouse or children may be eligible for benefits under my Social Security record?*

This document details the different types of Social Security benefits for which your spouse or your child(ren) might be eligible. It lists what the requirements are for each benefit, how to apply for those benefits, and how to file an appeal if the benefit is denied.



**Herb Burtis** (left, with late spouse **John Ferris**), challenging DOMA in GLAD's case *Gill v. OPM*

## Spousal Retirement Benefit

The “spousal retirement benefit” is based on the earnings record of your spouse, as opposed to your own earnings record, and is claimed when both spouses are living. You as the spouse of a retired worker—assuming that you meet age and other requirements—are eligible to receive the greater of either your own Social Security retirement benefits or an amount equal to 50% of your retired spouse’s benefit (subject to reduction for starting benefits before full retirement age).

**One-earner families:** One-earner couples receive a spousal benefit of an extra 50% of the worker’s retirement benefit while both spouses are alive (subject to reduction if the non-wage earning spouse starts benefits before full retirement age).

**EXAMPLE:** *Lee’s spouse receives a Social Security retirement benefit of \$2,000 and Lee never worked. At Lee’s full retirement age of 66, Lee’s spousal benefit will be \$1,000. If Lee takes his benefit before his full retirement age, his spousal benefit will be reduced. See page 10 for more information on early retirement.*

	After DOMA	While DOMA was in effect
LEE	<b>\$ 1 0 0 0</b> spousal benefit	<b>\$ 0</b> spousal benefit
LEE’S SPOUSE	<b>\$ 2 0 0 0</b> retirement benefit	<b>\$ 2 0 0 0</b> retirement benefit
TOTAL BENEFITS	<b>\$ 3 0 0 0</b>	<b>\$ 2 0 0 0</b>

**Two-earner families:** If both spouses have worked long enough to earn worker benefits, each may be “dually entitled.” The lower-earning spouse can receive his or her own benefit plus a spousal benefit to bring his or her total benefit up to 50% of the primary wage earner’s benefit.

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The spousal benefit can help two-earner couples in a second way. Depending on your age, you may be able to receive benefits as a spouse while delaying your own Social Security retirement (to increase your own benefit). If you are full retirement age and your spouse is receiving Social Security benefits, you can choose to file and receive benefits on just your spouse’s Social Security record and delay filing for benefits on your own record up until age 70.<sup>2</sup>

In calculating your own benefit and the spousal benefit, you must take into account rules that may reduce benefits, such as early retirement, the Windfall Elimination Provision and the Government Pension Offset. In addition, if your spouse’s children are also eligible for Social Security, your spousal benefit may be subject to a cap on total family benefits under a single earnings record.

*These potential reductions are described on page 10.*

**EXAMPLE:**

*Mary Ann qualifies for a retirement benefit of \$1,000 on her own earnings record. Her spouse receives a monthly retirement benefit of \$2,400. At Mary Ann’s full retirement age, she will receive her own \$1,000 retirement benefit, and Social Security will add \$200 from her spouse’s benefit, for a total of \$1,200. If she takes her retirement benefit before her full retirement age, both amounts will be reduced.<sup>1</sup> However, were Mary Ann’s retirement benefit \$1,300 instead of \$1,000, she would not receive any spousal benefit.*

<sup>1</sup> <http://bit.ly/retirementbenefitsfamily>.

<sup>2</sup> <http://bit.ly/delayandreceivespousebenefits>; <http://bit.ly/retirementbenefitsfamily>.

## Who qualifies for the Social Security spousal retirement benefit?

*In addition, Oregon appears to be recognizing the marriages of same-sex couples in certain circumstances.*

### **Civil Unions and Domestic Partnerships**

*Social Security has an alternate way of determining whether someone qualifies as a spouse—namely, whether that person would have the same status as a spouse to inherit personal property if the wage earner died without a will under the laws of the state where the wage earner was domiciled at the time of death. This raises the possibility that civil union and domestic partnership couples, who reside in a state that recognizes their relationship or married couples who reside in a state that recognizes then marriage as a civil union or domestic partnership, might also be eligible for spousal benefits. We hope that this will be clarified when Social Security issues its guidance.*

This section states the eligibility requirements for the spousal retirement benefit. If you do not meet these requirements, you do not qualify for this Social Security benefit at this time. The requirements are:

- 1) at the time of your application for Social Security, your spouse, the wage earner on whose record benefits are being sought, must be domiciled in a State that recognizes your marriage to a spouse of the same sex or in Washington, D.C. or in any foreign country.<sup>3</sup>

Temporary residence in one of these jurisdictions is not sufficient.

*In addition to Washington D.C., as of January 2014, the States that permit same-sex couples to marry are:*

- Connecticut
- Iowa
- Massachusetts
- New Hampshire
- New York
- Vermont
- Maine
- Rhode Island
- New Mexico
- Delaware
- Maryland
- California
- Washington
- Minnesota
- New Jersey
- Hawaii
- Illinois (effective 6/1/14)

- 2) you and your spouse must **have been married for at least 12 months** prior to your application for spousal benefits (for Social Security purposes, you will have been married for a period of 12 months on the first day of the month of your first anniversary);



- 3) **you must be at least age 62** or have a qualifying “child” in your care who is entitled to a child’s insurance benefit based on the earnings record of your spouse (by a qualifying child, Social Security means a “child” under age 16 or who receives Social Security disability benefits. “Child” is defined by the Social Security Act as explained on page 24);
- 4) **your spouse**, on whose earnings record you are applying, **must have applied for retirement benefits and be “fully insured”** according to the Social Security Administration, which means that he or she worked and paid into the system long enough to qualify for this particular benefit; and
- 3) **you must not be entitled to a higher social security benefit on your own earnings record** (unless you want to apply for the spousal benefit to delay retirement based on your own earning record).

*If your spouse is of full retirement age but wants to delay receipt of benefits (to draw a greater benefit later), your spouse can apply for retirement benefits and then request to have payments suspended. That way, you can receive a spousal benefit and your spouse can continue to earn delayed retirement credits until age 70.<sup>4</sup>*

*For a Consumer Reports article on how to maximize your Social Security benefits visit: <http://bit.ly/timingsbenefits>. For an AARP publication on “How to Maximize Your Social Security Benefits” visit <http://bit.ly/maximizessbenefits>.*

<sup>3</sup> 42 U.S.C. § 416(h)(1)(A)(i) (An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this title if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.”).

<sup>4</sup> <http://bit.ly/spousebenefits>.

## Potential Reductions to Benefits

In calculating benefits, you must consider rules that could reduce your benefits, including:

- (a) **early retirement**;
- (b) if your children are also receiving Social Security under the same earnings record, the **maximum family benefits limit**; and
- (c) if the worker or spouse worked for an employer that did not withhold Social Security taxes and receives a pension from that work,
  - (i) the **Windfall Elimination Provision**; and
  - (ii) the **Government Pension Offset**.

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**Early retirement.** You may start receiving Social Security as early as age 62 or as late as age 70. However, if you start benefits early, before the full retirement age set for you by Social Security, your monthly benefits are reduced.

The full retirement age for people born between 1943 and 1954 is 66.

In the case of early retirement, a benefit is reduced five-ninths (5/9) of 1% for each month before normal retirement age, up to 36 months. If the number of months exceeds 36, then the benefit is further reduced five-twelfths (5/12) of 1% per month.<sup>5</sup> To compute the effect of early (or delayed) retirement, visit: <http://bit.ly/earlyorlate>

On the other hand, you are rewarded for postponing collecting Social Security. Beginning with the month in which you reach your full retirement age, your check is increased by two-thirds (2/3) of 1% (or 8% every 12 months) for each month that you delay starting Social Security. These delayed retirement credits cease once you turn 70, so there's no advantage in delaying the start of benefits after

that. To compute the effect of early (or delayed) retirement visit: <http://bit.ly/earlyorlate>

According to Social Security, as a general rule based on estimates of an average person's life expectancy, early or late retirement will give someone about the same total Social Security benefits over their lifetime. If a person retires early, the monthly benefit amounts will be smaller to take into account the longer period benefits will be paid. If someone retires late, the person will get benefits for a shorter period of time but the monthly amounts will be larger to make up for the months when the person did not receive anything. Look through factors Social Security suggests you consider in deciding when to retire: <http://bit.ly/consideringyourretirement>

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<sup>5</sup> <http://bit.ly/earlyorlate>.

**Maximum Family Benefits Limit.** There is a limit to the amount of money that can be paid to a worker's family—usually 150-180% of the worker's benefit payment. If the total benefits due to you and the worker's children are more than this limit, each family member entitled to a monthly benefit will receive a monthly benefit, but it will be reduced to meet the benefits maximum. If the family maximum benefit is reached, that amount is divided among all entitled dependents. The more dependents who receive benefits on the worker's Social Security record, the lower the benefit amount will be for each dependent. However, the family maximum does not affect the wage earner's benefit.<sup>6</sup> Contact Social Security for more information.

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**Windfall Elimination Provision ("WEP").** Where a worker worked for an employer that did not withhold Social Security taxes from the worker's salary, such as a federal, state or local government agency, a nonprofit organization or another country, the pension based on that work may reduce the worker's Social Security benefits because of Social Security's Windfall Elimination Provision ("WEP").

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**EXAMPLE:** *A worker and spouse both claim their benefits at full retirement age. Because the worker receives a pension based on work not covered by Social Security, the worker's Social Security benefit amount after WEP is \$700. The spouse's benefit is at most \$350 (one half of the worker's benefit amount).*

Since the spousal retirement benefit is derived from the worker's benefit, WEP affects the spousal benefit as well.<sup>7</sup> While benefits are lowered because of the WEP, they are never totally eliminated. Under a special rule, the reduction under the WEP can be no more than one-half of the amount of the pension from employment that is not covered by Social Security. For example, if the person's pension is \$500 per month, the WEP reduction could not exceed \$250.<sup>8</sup> The maximum reduction under the WEP formula for 2014 is normally \$408.00 per month.

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**Government Pension Offset ("GPO").** The GPO applies to spousal and survivor benefits (whereas the WEP applies to the worker's benefit). The spousal benefit can be reduced based on the GPO if you receive a pension from a federal, state, or local government based on work where you did not pay Social Security taxes.<sup>9</sup> If the GPO applies to you, your Social Security benefits will be reduced by two-thirds of your government pension. In some cases, it will not make sense to apply for the spousal benefit, unless you want to apply for the spousal benefit to delay retirement based on your own earnings record.

*This is just a brief explanation of the WEP and GPO.*

Visit <http://bit.ly/windfallelimination> and <http://bit.ly/govtempoyees> for more information about the WEP, including examples and exceptions.

Visit <http://bit.ly/govtpensionoffset> for more information about the GPO, including examples and exceptions.<sup>10</sup>

Visit <http://bit.ly/benefitsgpoandwep> and <http://bit.ly/govtempoyees> for information about how Social Security benefits are calculated when both the WEP and GPO reduce your benefits.

<sup>6</sup> <http://bit.ly/familymaximумеffect>.

<sup>7</sup> <http://bit.ly/windfalleliminationeffect>.

<sup>8</sup> <http://bit.ly/wepeliminatemonthlybenefit>.

<sup>9</sup> <http://bit.ly/govtpension>.

<sup>10</sup> *Id.*

## Spousal Disability Benefit

Social Security pays benefits to people who cannot work because they have a medical condition that is expected to last at least one year or result in death. Federal law requires this very strict definition of disability. While some programs give money to people with partial disability or short-term disability, Social Security does not.<sup>11</sup>

A spouse may be eligible for a monthly benefit of up to 50% of the disabled worker's benefit. The requirements are very similar to the spousal retirement benefit described on page 8.

In calculating the worker's disability benefit and your possible spousal benefits, you must take into account rules that may reduce benefits, such as the Windfall Elimination Provision and the Government Pension Offset. In addition, if your spouse's children also are eligible for Social Security, your spousal benefit may be subject to a cap on total family benefits. See page 12.



The next page states the eligibility requirements for the spousal disability benefit. If you do not meet these requirements, you do not qualify for this Social Security benefit. The requirements are:

## Who qualifies for the Social Security spousal disability benefit?

- 1) at the time of your application, your spouse, the wage earner on whose record benefits are being sought, must be domiciled in a State that recognizes your marriage to a spouse of the same sex or in Washington D.C. or in any foreign country (*see page 8 for a list of such places as of January 2014*);
- 2) you and your spouse must have **been married for at least 12 months** prior to your application for spousal disability benefits (for Social Security purposes, you will have been married for 12 months on the first day of the month of your first anniversary);
- 3) **you must be at least age 62** or have a qualifying “child” in your care who is entitled to a child’s insurance benefit based on the earnings record of your spouse (By a qualifying child, Social Security means a “child” who is under age 16 or who receives Social Security disability benefits. “Child” is defined by the Social Security Act as explained on page 24);
- 4) **your spouse**, on whose earnings record you are applying, **is entitled to disability benefits**; and
- 5) **you must not be entitled to a higher Social Security benefit on your own record** (unless your benefit is higher than the spousal disability benefit and you want to apply for the spousal disability benefit to delay retirement based on your own earnings record as described on page 7).

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<sup>11</sup> <http://bit.ly/disabilitybenefits>; see also <http://bit.ly/disabilityplanner>.

# Lump-Sum Death Benefit

## LUMP-SUM DEATH BENEFIT

*There is a one-time lump-sum death benefit payable to a surviving spouse, or, if there is no spouse, to a minor child—if certain conditions are met. If no spouse or child meeting these requirements exists, the lump-sum death payment will not be paid.<sup>12</sup>*

## Who Qualifies for the Lump-Sum Death Benefit?

- (a) **Surviving spouse.** This section states the eligibility requirements for a surviving spouse to qualify for the lump-sum death benefit. If you do not meet these requirements, you do not qualify for this Social Security benefit. The requirements are:
- 1) at the time of your spouse's death, your spouse must have been domiciled in a State that recognizes your marriage to a spouse of the same sex or in Washington D.C. or in any foreign country (*see page 8 for a list of such places as of January 2014*);
  - 2) you and your spouse must have been **married for at least 9 months** immediately prior to the day on which your spouse died;
  - 3) your deceased spouse must have been **"fully insured" according to the Social Security Administration**, which means that he or she had worked and paid into the system long enough to qualify for this particular benefit;
  - 4) you and your spouse must have been **living in the same household** at the time of the death (with certain exceptions for things like hospital and nursing home stays); and
  - 5) you, as surviving spouse, must apply for the lump-sum death benefit **within two years** of the date of your spouse's death.



- (b) **Surviving child.** If a qualifying surviving spouse exists for purposes of the lump-sum death benefit, a surviving child will **not** receive the benefit. If there is no spouse eligible to receive the payment, a child who is receiving benefits on the deceased worker's earnings record during the month in which the worker died or is eligible to receive benefits can claim the lump-sum death benefit.<sup>13</sup>

*To determine if a child is eligible for benefits on the deceased person's record, see page 23.*

<sup>12</sup> 42 U.S.C. § 202(i); <http://bit.ly/lumpsumdeathpayment>.

<sup>13</sup> <http://bit.ly/lumpsumdeathbenefit>.

## Surviving Spouse Benefit

When a worker dies, the surviving spouse may be entitled to benefits based on the worker's earnings record. Specifically, a surviving spouse—assuming that he or she meets age or other requirements—is entitled to receive the greater of either his or her own Social Security retirement benefit or the deceased worker's Social Security benefit.

A surviving spouse can also use the survivor's benefit to delay retiring on his or her own record, thereby earning delayed retirement credits and increasing his or her own benefit.<sup>14</sup>

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**EXAMPLE 1:** *Tricia's spouse receives a Social Security retirement benefit of \$2,000 and Tricia receives a benefit based on her own earnings record of \$1,200. Both have reached full retirement age. If Tricia's spouse dies first, Tricia is entitled to receive her spouse's higher payment of \$2,000 as a surviving spouse. If Tricia dies first, her spouse would continue receiving the spouse's own retirement benefit of \$2,000, and will receive no additional benefit based on Tricia's earnings record.*

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**EXAMPLE 2:** *George is 67 and currently receives \$1,500 in Social Security retirement benefits based on his own earnings record. George's spouse is 64, two years short of full retirement age and would receive a monthly benefit of \$2,000 upon retirement. George's spouse dies. George could apply now for the survivor's benefit and begin receiving a monthly benefit of \$2,000 (that George's spouse would have received upon retirement). The age that matters here is the age of the survivor, not the age of the deceased.*

**EXAMPLE 3:** *Karen is 61. If she begins drawing Social Security based on her own earnings record at age 62, her monthly benefit will be \$750. If she waits until she is 66, her monthly benefit will be \$1,000, and if she waits until she is 70, her monthly benefit will be \$1,310. Karen's spouse is retired and receives a monthly benefit of \$1,000. Karen's spouse dies. Because Karen is over 60, she can apply for a survivor benefit based upon her spouse's earnings record and begin receiving a survivor's benefit now (reduced for early retirement). At age 70, Karen will be able to switch over to her own earnings record and receive a monthly benefit of \$1,310.*

	WITHOUT BENEFIT	WITH BENEFIT
AGE 62	<b>\$ 750</b> retirement benefit	<b>\$ 1 000</b> survivor's benefit
AGE 66	<b>\$ 1 000</b> retirement benefit	<b>\$ 1 000</b> survivor's benefit
AGE 70	<b>\$ 1 3 1 0</b> retirement benefit	<b>\$ 1 3 1 0</b> retirement benefit

<sup>14</sup> <http://bit.ly/survivorsplanner>.

## Who qualifies for a survivor's benefit as a widow or widower?

This section states the eligibility requirements for a surviving spouse to receive the widow or widower's benefit. If you do not meet these requirements, you do not qualify for this Social Security benefit. The requirements are:

- 1) at the time of your spouse's death, your spouse must have been domiciled in a State that recognizes your marriage to a spouse of the same sex or in Washington D.C. or in any foreign country (*see page 8 for a list of such places as of January 2014*);
- 2) you and your spouse must have been **married for at least 9 months** immediately prior to the day on which your spouse died;  
*Note: There are several exceptions to the duration requirement. For a full list, visit: <http://bit.ly/mariagerequirement>*
- 3) your deceased spouse must have been **"fully insured" according to the Social Security Administration**, which means that he or she had worked and paid into the system long enough to qualify for this particular benefit;

- 4) you must be:
  - (a) 60 or older;
  - (b) 50 or older and disabled; or
  - (c) caring for a qualifying “child” who is entitled to a child’s insurance benefit based on the earnings record of your spouse (By a qualifying child, Social Security means a “child” under age 16 or who receives Social Security disability benefits on your spouse’s earnings record. “Child” is defined by the Social Security Act as explained on page 24);
- 5) you must not have re-married before age 60 (or, if you are disabled, age 50) unless the later marriage has ended at the time of application, whether by death, divorce, or annulment<sup>16</sup>; and
- 6) **your monthly Social Security benefit must be lower than the monthly amount your deceased spouse was receiving** (unless your own benefit is higher than what you would receive from the survivor’s benefit and you want to apply for the survivor’s benefit to delay retirement based on your own earnings record).

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<sup>15</sup> <http://bit.ly/survivorsplanner>.

## **Potential Reductions to Benefits**

In calculating a survivor benefit, you must consider rules that could reduce your benefits, such as early retirement, maximum family benefits, and the Government Pension Offset (GPO). See page 12. *Note, however, that the Windfall Elimination Provision (WEP) does not apply to survivor benefits.*

### **EXAMPLE:**

*A worker and spouse both claim their benefits at full retirement age. Because the worker receives a pension based on work not covered by Social Security, the benefit amount under the WEP benefit formula is \$700. Based on the WEP benefit amount, the spouse's benefit is \$350 (one-half of the worker's WEP benefit amount).*

**When the worker dies, the WEP reduction is removed. The surviving spouse's benefit is refigured using the regular benefit formula.<sup>16</sup>**

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<sup>16</sup> <http://bit.ly/windfalleliminationeffect>.

A "child" can receive Social Security benefits under Social Security's disability, retirement, or survivor protections if the worker on whose earnings record he or she is claiming worked long enough in a job where he or she paid Social Security taxes.

The child also must be:

- 1) Unmarried; and
- 2)
  - (a) Younger than age 18; or
  - (b) 18-19 years old and a full-time student (no higher than grade 12); or
  - (c) 18 or older and disabled. (The disability must have started before age 22.)

*Social Security does not just help older people. It also can help a worker's "child" or "children" when one or both parents are disabled, retired or deceased. Because Social Security provides an important economic safety net, "child" and "children" are defined broadly.*



**Geraldine** (left) and **Suzanne Artis**, with their three sons, challenging DOMA in GLAD's case *Pedersen v. OPM*

## Who is a “child” under Social Security?

The Social Security law has numerous and complicated tests for who can be a “child.” Because this memo focuses on married couples of the same sex, this section sets forth the definitions most relevant to those couples rather than an exhaustive list. If one of these situations does not apply but the child was dependent on the insured worker for support, contact GLAD Answers or seek legal counsel.

The term “child” means:

1) **A legally adopted child of an individual.**

Because of the Social Security Act’s broad protections, benefits may be available if an adoption is in process at the time a worker dies and sometimes even for a posthumous adoption. The Act provides:

*A person shall be deemed, as of the date of death of an [insured] individual, to be the legally adopted child of such individual if such person was either living with or receiving at least one-half of his support from such individual at the time of such individual’s death and was legally adopted by such individual’s surviving spouse after such individual’s death but only if*

- (a) proceedings for the adoption of the child had been instituted by such individual before his death, or*
- (b) such child was adopted by such individual’s surviving spouse before the end of two years after the day on which such individual died.<sup>17</sup>*



If an adoption of the child was not completed before the insured worker died, please contact GLAD Answers or an attorney that specializes in Social Security.

OR

- 2) A biological child of an insured individual or a child of the insured individual's marriage if the child would be able to inherit intestate (without a will) through the wage earner as a child.<sup>18</sup>

*This definition should protect a child born into a marriage of a same-sex couple in Washington, D.C. or any State that permits such marriages and may protect a child born into such a marriage in a State that recognizes such marriages lawfully performed elsewhere. See page 8 for a list of such places as of January 2014.*

*This also protects a child born into a civil union or domestic partnership in a state that recognizes such relationships.*

OR

- 3) If an applicant is a son or daughter of an insured individual but is not (and is not deemed to (be) the child of such insured individual under subparagraph (2), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, [GLAD believes this could be read gender neutrally] ... went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment ... would have been a valid marriage;"<sup>19</sup>

OR

- 4) If the person is not a child under (3), but  
(a) the insured individual:

- (I) has acknowledged in writing that the applicant is his or her son or daughter,
- (II) has been decreed by a court to be the mother or father of the applicant, or
- (III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter, **AND**

I, II, or III happened in a required window of time as follows:

- In the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits) — not less than one year before such insured individual became entitled to old-age insurance benefits or attained retirement age, whichever is earlier.
- In the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he or she was entitled to old-age insurance benefits — before such insured individual's most recent period of disability began.
- In the case of a deceased individual — before the death of such insured individual.

**OR**

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<sup>18</sup> 42 U.S.C.A. § 416(e) & (h)(2)(A).

<sup>19</sup> 42 U.S.C.A. § 416(e) & (h)(2)(B). This could occur, for example, if one of the participants was previously married and the marriage had not ended before that participant went through a marriage ceremony with another.

- (b) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such applicant's application for retirement or disability benefits was filed or at such time as the insured individual died in the case of survivor benefits.<sup>20</sup>

## OR

- 5) A stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died.

*A person can be deemed a stepchild of an insured individual if the insured individual and the child's parent went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment, would have been a valid marriage.*

***For purposes of this definition of "child," a child shall be*** deemed to have been the stepchild of an individual for a period of one year throughout the month in which occurs the expiration of such one year.<sup>21</sup> (In other words, if a couple were married on June 30, 2012, the child could be deemed the step-child of the insured individual as soon as June 1, 2013)

Please note that some protections can be available to a person who is the grandchild or stepgrandchild of an individual or his or her spouse in certain circumstances. If you think this might apply to you, contact GLAD Answers or an attorney specializing in Social Security.

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<sup>20</sup> 42 U.S.C.A. § 416(h).

<sup>21</sup> 42 U.S.C.A. § 416(e).

## What If I'm Divorced?

A divorced spouse of a retired worker—assuming the marriage lasted at least 10 years and that the divorced spouse meets age and other requirements—is entitled to receive benefits on the earnings record of a former spouse. This includes the spousal retirement benefit, the spousal disability benefit, and the survivor's benefit, ([see pages 6, 14 and 18, respectively](#)) though some eligibility differences apply for divorced spouses.

### **My former spouse is of the same sex.**

Because a divorced spouse can only claim benefits based on a marriage that lasted at least 10 years, for couples married in the United States, the earliest date one could claim Social Security based on the earnings record of a former spouse of the same sex is May 2014 (marriage was first permitted in the United States on May 17, 2004).

### **My former spouse is of a different sex.**

As described above, in some circumstances, a marriage can prevent you from drawing Social Security based on the earnings record of a former spouse (e.g., you cannot claim a survivor's benefit based on the earnings record of a former spouse if you re-marry before age 60 (or age 50 if you are disabled) and the marriage has not ended – [see page 21](#)).

If you qualify to receive benefits from either your former or current spouse, you can make the choice that maximizes your benefits.

## What if I already receive benefits?

Had DOMA not existed when you originally applied for Social Security benefits, the SSA would have helped you to maximize your benefits. However, if you applied for Social Security before DOMA was struck down, it is likely that Social Security did not help you to maximize benefits because it did not recognize your marriage. In many cases, there are still strategies to improve your benefit. You may need a professional to analyze your situation but here is an overview:

### **Option 1: Withdraw Your Original Application**

If you are within 12 months of starting benefits, you can file a request to withdraw your application (form 521) and pay back all the money you have received. If Social Security approves your request, you can then ask Social Security to treat you as if you'd never started benefits. Each Social Security applicant only gets one "do-over" so GLAD suggests you include a request that this "do-over" not be counted against you because it is the result of a major change in the law.

### **Option 2: Go back to work.**

If you're under your Normal Retirement Age (NRA) and outside the 12 month window since starting benefits, if you go back to work, Social Security's "earnings test" will automatically be applied and will reduce your Social Security benefit if your wage earnings exceed a set amount.<sup>22</sup> However, any benefits withheld while you continue to work are not "lost". Once you reach your NRA, your monthly benefit will be increased permanently to account for the months in which benefits were withheld.

### **Option 3: Voluntarily suspend.**

Once you reach your NRA, you can voluntarily suspend your Social Security income and receive credits for delaying your income when you restart your benefits in the future (but no later than age 70).

GLAD will continue to explore whether there are other options to address this situation.

<sup>22</sup> For more detail see: <http://www.ssa.gov/OACT/cola/rtea.html>.

## *Applying for Social Security*

You can apply for Social Security benefits in person at your local Social Security Administration (SSA) office. Although it is possible to apply for some benefits online, GLAD recommends going in person during the initial months of the implementation of the DOMA Supreme Court decision, since the computer systems may not be setup to accept the applications of same-sex married couples.

**GLAD strongly recommends that if you may be eligible for a benefit that you apply immediately, because, when the application is processed, the benefit will be retroactive based on the date of the application.**

If you are prevented from even filing an application for Social Security benefits, please notify GLAD.

In order for local Social Security offices to be able to process benefit applications, they must receive guidance from SSA. For the most recent updates concerning this guidance, go to [www.glad.org/doma](http://www.glad.org/doma) or contact GLAD Answers by email or live chat at [www.GLADAnswers.org](http://www.GLADAnswers.org) or by phone at 800-455-GLAD (4523).

## Appealing a Denial of Social Security Benefits

If the benefit you are applying for is denied, the Social Security Administration will tell you in the denial letter how to appeal the decision to the next level and **you should follow the instructions from Social Security**. The first step is to seek reconsideration of the denial.

GLAD expects that Social Security will instruct you as follows:

- You have 60 days to ask for an appeal.
- The 60 days start the day after you receive this letter. Social Security will assume you got this letter 5 days after the date on it unless you show that you did not get it within the 5-day period.
- You will have to have a good reason for waiting more than 60 days to ask for an appeal.



- To appeal, you must fill out a form called “Request for Reconsideration,” which is form number SSA-561. You can get the form from Social Security, which will help you fill out the form, or visit: <http://bit.ly/reconsiderationrequestform>

Form SSA-561 asks you to explain why you do not agree with the denial of benefits. Where the form states: “I do not agree with the determination made on the above claim and request reconsideration. My reasons are:” you should indicate why you feel that you were unfairly denied the benefit.

After reconsideration, there are three additional levels of appeal. They are:

- Hearing by an administrative law judge;
- Review by the Appeals Council; and
- Federal court review.

For more information from Social Security about the appeals process, visit <http://bit.ly/yourrighttoquestion>. Again, at each step Social Security will tell you how to appeal to the next step.

Questions? LGBT LEGAL ADVOCATES  
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1.



2A.



2B.



2C.



3.



4.



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# AFTER DOMA

## WHAT IT MEANS FOR YOU



To learn more, go to [www.glad.org/doma](http://www.glad.org/doma)

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- Family and Medical Leave Act for Non-Federal Employees
- Federal Taxes
- The Free Application for Federal Student Aid (FAFSA)
- Immigration
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- Medicare Spousal Protections
- Military Spousal Benefits
- Private Employment Issues and Benefits
- Social Security Spousal and Family Protections
- Supplemental Security Income for Aged, Blind, and Disabled (SSI)
- Temporary Assistance for Needy Families (TANF)
- Asistencia Temporal Para Familias Necesitadas (TANF)
- Veteran's Spousal Benefits

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**GLAD Answers**

*can be reached by email or  
live chat at  
[www.GLADAnswers.org](http://www.GLADAnswers.org)  
or by phone*

**1:30 – 4:30 p.m.**

*Monday through Friday  
at **(800) 455-GLAD (4523)***

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