



April 15, 2024

The Honorable Martin O'Malley  
Commissioner  
Social Security Administration  
6401 Security Boulevard  
Baltimore, MD 21234-6401

Submitted via [www.regulations.gov](http://www.regulations.gov)

**Re: NPRM on the Use of Electronic Payroll Data to Improve Program Administration [Docket No. SSA-2016-0039]**

Thank you for the opportunity to submit comments about the proposed rule regarding the Use of Electronic Payroll Data to Improve Program Administration. CCD is the largest coalition of national organizations working together to advocate for Federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society free from racism, ableism, sexism, and xenophobia, as well as LGBTQ+ based discrimination and religious intolerance. Our Social Security Task Force (SSTF) focuses on disability policy issues in the Title II Social Security Disability Income (SSDI) program and the Title XVI Supplemental Security Income (SSI) program. The SSI and Title II income supports, along with the related Medicaid and Medicare benefits, are the means of survival for millions of people with severe disabilities. They rely on SSA to adjudicate their applications promptly and fairly for disability benefits and to handle many other government functions that are critical to their well-being.

Thank you for the opportunity to comment on this proposal.

**I. CCD SSTF Applauds SSA's Use of the Work Number to Obtain Timely and Accurate Information on Benefit Recipients and Deemer's Wages.**

The Task force commends SSA for this important effort which will allow SSA to administer its programs more efficiently, reduce the reporting burden on some beneficiaries, and prevent improper payments under Titles II and Titles XVI of the Social Security Act. We are very pleased that SSA is taking steps to implement this change, which will greatly improve the agency's ability to best serve the public. We look forward to working with SSA as it develops sub-regulatory policies, notices to beneficiaries, and forms that will be required to implement this proposed rule. Toward that end, we note the following:

**II. Work Number & Security.**

As the data exchange providers are private companies, we are concerned about the potential for data breaches with regard to collection, storage and use of payroll data for the disabled population and related individuals. We urge SSA to take steps to assure the privacy and security of Personally Identifiable Information (PII) and provide assurances to beneficiaries about how this information will be used kept safe at the point at which they are asked to opt in to the program.

### **III. Documentation and Notices.**

The Task Force believes the success and integrity of this effort will depend on where, when and how these options are explained to beneficiaries, the related notices and forms, and how the individual's decision is documented. We recommend SSA think critically about this step in the implementation and look forward to working with SSA as it develops its notice, form, and documentation policy.

It is essential that the options available to the claimant or beneficiary be explicit and clearly explained, and that the option is selected with the individuals' true understanding, and documented as to exactly what decision was made. These important notices should be fully accessible, in multiple formats including braille, large print and/or audio. It would be ideal if these important notices were available in multiple languages. SSA should employ a clearly-worded, explained, wet/electronically signed document that would be electronically maintained throughout the period of entitlement, even if superseded by a later election. We urge clear training for Field Office (or other involved) personnel about how to most effectively explain the choices, default positions, benefits and potential problems of each choice, as well as an accurate recording of the decisions made. We also request advanced publication of all proposed notice language and election documents for study and potential comment.

Because enrolling in optional PIE will reduce significant burdens for many, we recommend that SSA provide more opportunities to enroll than during the application process or during post-entitlement events. We support SSA's suggestion that they may be able to accept authorizations electronically at a future date. We further recommend SSA explore ways to allow people to enroll in PIE at additional touch points, including possibly via myssa.gov and during field office visits.

Moreover, while the Task Force fully supports the use of payroll data from the Work Number to improve payment efficiency, we note its coverage is not universal. Accordingly, there will still be employers who do not utilize this method. Per the Notice of Proposed Rulemaking, "Equifax reports that The Work Number covers over two-thirds of non-farm payroll, although neither SSA nor Equifax has analyzed whether working disability benefit recipients are represented in a similar proportion in the database," 89 FR 1775. SSA does not know how many beneficiaries or deemors will not be covered by the Work Number. When SSA learns that a beneficiary, or a deemor's employer, does not use the work number, the Task Force recommends that that SSA inform them so they have notice that they must continue wage reporting using the existing methods. This communication will prevent beneficiaries and deemors from incorrectly assuming that they no longer need to report because they signed the SSA-827 allowing SSA to obtain their wages via information exchange.

#### IV. SSA Needs to Ensure Due Process.

The SSTF is concerned that the procedures proposed are inadequate to protect the due process rights of SSI recipients obtained from the work number. SSI benefits, as a means-tested program for extremely low-income recipients, are subject to the same due process protections as in *Goldberg v Kelly*, 397 U.S. 254, 264 (1970).<sup>1</sup> In the context of an SSI benefit reduction or suspension due to allegations of earned income from The Work Number, the most important of these procedural safeguards are a timely and adequate notice detailing the reasons for a proposed reduction or suspension of benefits; an evidentiary hearing to dispute the reduction or suspension of SSI benefits; and having SSI benefits continue to be paid at the Protected Payment Level (PPL)<sup>2</sup> pending a decision on the appeal.

Here the proposal treats SSDI and SSI recipients differently, by only allowing SSDI recipients advanced notice of the Work Number data before generating the Notice of Planned Action (NOPA). As a result, the regulations SSA has in place (which conform to the requirements of *Goldberg* allowing benefit aid-paid pending an appeal) will not likely protect SSI recipients due process rights. For example, consider a circumstance where SSA receives data from The Work Number (TWN) on November 7th regarding the October earnings of an SSI recipient or deemor. SSA would then automatically generate a Notice of Planned Action (NOPA) reducing or suspending the SSI recipient's benefits for December based on the October data. Under the regulations, it is presumed that the SSI recipient would receive that NOPA dated November 7th by November 12th. If the SSI recipient files their Request for Reconsideration disputing TWN data used to reduce or suspend their December benefits on November 22nd, within the 10 days required by the regulations, it will be too late to have their December benefits continue to be paid at the Protected Payment Level (called "Goldberg Kelly" or "GK payment continuation" by SSA), because the December benefit data will have already been transmitted to the U.S. Treasury Department reducing or suspending their benefits based on TWN data. This is particularly true because SSA is experiencing "work-load related challenges" in its Field Offices that often impact its ability to timely process requests for reconsideration. Accordingly, we are concerned the proposed process effectively eliminates the ability to uninterrupted benefit continuation.

The Task force recommends that SSI recipients (like SSDI recipients) be given at least thirty days notice to dispute TWN data before the NOPA is generated that would reduce or suspend their benefits based on the data.

This is particularly important because TWN payroll data is not flawless, and claimants will need to dispute its accuracy. There are two different earnings considerations in using payroll data: 1) Title II entitlement, based on when wages are earned, and 2) Title XIV payment amount, based on when wages are paid. As with earnings information from IRS or NDHD, errors frequently occur due to identity theft or a mismatch of data to consumer, or because of wages earned in a period other than that reported (accumulated sick or vacation pay, severance pay, prior period earnings, etc.). Payroll data also fails to address issues such as subsidy or accommodation. Under the existing non-medical appeal process the burden is on

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<sup>1</sup> *Cardinale v. Mathews*, 399 F.Supp. 1163 (D.D.C., 1975).

<sup>2</sup> The Protected Payment Level is the amount of monthly SSI benefits received prior to a proposed adverse action. It is the unreduced benefit amount that a recipient may continue to receive until there is a decision at the first level of appeal. SSA Program Operations Manual (POMS), SI 02301.300 Due Process Protections – General, paragraph C.11. (July 26, 2023), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0502301300>.

the beneficiary, or deemor, to prove a negative—that the reported wages are not theirs. This presents challenges especially for unrepresented parties, which are likely to be the majority given the lack of representation for SSA non-medical appeals.

The Task Force is therefore concerned about the use of this data as other than a third-party report. The proposal suggests that action be planned, proposed and taken without input from the beneficiary/recipient or the worker. This allows for no option to discuss or explain before the Notice of Planned Action. Once the action is proposed, the beneficiary may question, explain or appeal. But by then the impact is already in process, and automatically carried out unless halted by a specific SSA action.

Along with advanced notice, the Task Force also proposes SSA adjust this proposal to ensure that SSI recipients have access to payment continuation during disagreement with or appeal of an adverse action resulting from the data exchange. As disability benefits are critical to the community involved, we suggest payment continuation through the Hearing level of appeal. As SSI payments are protected by Goldberg/Kelly provisions through the reconsideration level, we propose an expansion through the Hearing level, and we propose payment continuation for SSDI beneficiaries similar to the disability termination (CDR) process.

#### **V. Overpayment Waivers.**

The proposal implies that the Without Fault provisions of overpayment waiver will be “deemed” under certain conditions, i.e., when pertinent individuals opted in and SSA advised that data would be collected from the contractor and no other first party report was required. The proposal does not contemplate any circumstances in which SSA might consider applying an automatic waiver, which is a missed opportunity. Otherwise, SSA will always have to waste scarce resources attempting to collect an overpayment, and the claimant has the burden to affirmatively seek a waiver.

The Task Force recommends that SSA draft policy indicating that a level of overpayment tolerance should be implemented, wherein overpayments not rising to the level of administrative efficiency would be automatically waived without the need for request. Additional program efficiencies would be achieved by certain automatic waivers. We also urge SSA to adopt a liberal interpretation of both “defeat the purpose of the act” and the “against equity and good conscious” provisions. If a beneficiary is overpaid because of reliance on the data exchange program, even after SSA has advised them that reporting is no longer required, then equity is not served and some aspects of the purpose of the act are defeated.

#### **VI. Oral Reconsideration Requests.**

The Task Force strongly urges a change to allow oral requests for reconsideration. Given today’s Field Office and Telephone Service Center environments and backlogs, and the obstacles much of the disabled community faces in travel and communication, we believe all parties are served by eliminating the “written” requirement of appeal. We are concerned, however, about the documentation of and processing of oral appeals. We fear a backlog of

workload, lack of training, or simple human error could result in lost requests for reconsideration, with no proof or evidence that appeal was ever requested. We propose that a stand-alone Confirmation Number be provided to the individual any time an oral reconsideration request is made. This number, or similar proof, would be shared with the individual – by phone, text, email, paper, etc. An individual should be permitted some avenue to verify that reconsideration was requested.

## **VII. Edits to Advance Notice.**

Another opportunity for continued improvement regarding payment issues is if SSA were to edit the content of the Advance Notices sent to Title II beneficiaries for work-related cessations. Claimants frequently receive notices whose eligibility has been ceased and have large overpayments due to SSA's belief that they were working over SGA. Upon investigation, it's clear that the claimant has impairment related work expenses (IRWEs) and/or that their work is subsidized because they receive accommodations. Providing easy to understand information about both IRWEs and subsidized work, and how to report these, in the context of an Advance Notice related to work would be an effective way to ensure beneficiaries are aware of how these work supports factor into SGA. This method could also reduce incorrect cessations and overpayments. Relatedly, we see this proposed rule as an opportunity for SSA to increase its outreach to large employers about what subsidized work is and how it impacts individuals with disabilities who receive benefits from SSA.

We look forward to the final publication of these sensible, much-needed changes in the very near future. Thank you for the opportunity to comment on this important proposal.

Sincerely,

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