

AFTER DOMA

WHAT IT MEANS FOR YOU

The Supreme Court victory in *United States v. Windsor* striking down the discriminatory federal Defense of Marriage Act (DOMA) affirms that all loving and committed couples who are married deserve equal legal respect and treatment from the federal government. The demise of DOMA marks a turning point in how the United States government treats the relationships of married same-sex couples for federal programs that are linked to being married. At the same time, a turning point is part of a longer journey, not the end of the road. There is much work ahead before same-sex couples living across the nation can enjoy all the same protections as their different-sex counterparts.

Keep in Mind:

- The Supreme Court's ruling in *Windsor* applies only to the federal government. It does not change discriminatory state laws excluding same-sex couples from state-conferred marriage rights.
- The ruling striking down DOMA will not be effective until 25 days from the decision. Even when effective, federal agencies—large bureaucracies—may need and take some time to change forms, implement procedures, train personnel, and efficiently incorporate same-sex couples into the spousal-based system.
- Until same-sex couples can marry in every state in the nation, there will be uncertainty about the extent to which same-sex spouses will receive federal marital-based protections nationwide. For federal programs that assess marital status based on the law of a state that does not respect marriages of same-sex couples, those state laws will likely pose obstacles for legally married couples and surviving spouses in accessing federal protections and responsibilities.
- Securing fair access to federal protections that come with marriage for all same-sex couples in the nation will take some time and work. In some situations, it may require Congressional action or formal rule-making by agencies.
- Before making a decision, it is essential that you consult an attorney for individualized legal advice. This is particularly important for people who are on certain public benefits, as getting married may jeopardize your eligibility without providing you the full measure of protections other married couples enjoy. In addition, couples who travel to another place to marry and then return to live in a state that does not respect their marriage may be unfairly unable to obtain a divorce, which can lead to serious negative legal and financial consequences. People must make careful decisions when and where to marry, even as we work together to end this injustice.
- We are committed to winning universal access to federal marital protections for married same-sex couples through ongoing public policy advocacy, and, where necessary, strategic litigation. Contact our organizations if you have questions, for updates and to learn more about what you can do to achieve full equality for those who are LGBT.

This Guidance is intended to provide general information regarding major areas of federal marriage-based rights and protections based on how the various federal agencies have administered federal benefits. ***It should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.*** Past practice is no guarantee of future developments. While laws and legal procedure are subject to frequent change and differing interpretations in the ordinary course, this is even more true now as the federal government dismantles DOMA and extends federal protections to same-sex couples. None of the organizations publishing this information can ensure the information is current or be responsible for any use to which it is put.

No tax advice is intended, and nothing therein should be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Contact a qualified attorney in your state for legal advice about your particular situation.

SOCIAL SECURITY SPOUSAL AND FAMILY PROTECTIONS

This guidance addresses Social Security spousal benefits: when one spouse retires; in the event of disability; and when one spouse has passed away. Access to each of these benefits was blocked or affected by the federal Defense of Marriage Act (DOMA). Now that DOMA has been declared unconstitutional by the United States Supreme Court, this guidance summarizes these benefits, who qualifies, special concerns, possible reductions to benefits, how to apply, and how to appeal if your claim is denied.

For more information, visit the Social Security Administration website, www.socialsecurity.gov.

What is the Social Security Retirement Spousal Benefit?

The “retirement spousal benefit” (the spousal benefit) is a benefit for a non-earning or lower-earning spouse that allows him or her to collect an amount that is equal to half of the other spouse's Social Security benefit. People are only eligible for a spousal benefit when their own benefit is less than half of their retired spouse's benefit, or when they seek to delay their own application for Social Security benefits based on their own work record. For more information, consult the SSA's “[Retirement Planner: Benefits For You As A Spouse](http://www.socialsecurity.gov/retire2/applying6.htm),” www.socialsecurity.gov/retire2/applying6.htm.

- One-earner couples receive a spousal benefit of an extra 50% of the worker's retirement benefit while both spouses are alive.
- For two earner couples who worked long enough to qualify for Social Security benefits, a 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 higher benefit.
- If you are at retirement age and your spouse has applied for Social Security benefits (even if he or she files and suspends), 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.

For more information, consult:

the SSA's page, “[Delay my Social Security retirement and receive spouse's benefits](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1944/kw/can%20i%20draw%20a%20spousal%20benefit%20and%20delay%20my%20retirement%3E),” http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1944/kw/can%20i%20draw%20a%20spousal%20benefit%20and%20delay%20my%20retirement%3E;

the SSA's publication, “[Retirement Benefits](http://www.socialsecurity.gov/pubs/EN-05-10035.pdf),” www.socialsecurity.gov/pubs/EN-05-10035.pdf;

Consumer Reports' “[Timing your Social Security benefits](http://www.consumerreports.org/cro/magazine-archive/2011/october/money/timing-your-social-security-benefits/overview/index.htm),” www.consumerreports.org/cro/magazine-archive/2011/october/money/timing-your-social-security-benefits/overview/index.htm;

This series of fact sheets produced together by:

American Civil Liberties Union | Center for American Progress | Family Equality Council | Freedom to Marry | Gay & Lesbian Advocates & Defenders
Human Rights Campaign | Immigration Equality | Lambda Legal | National Center for Lesbian Rights | National Gay and Lesbian Task Force | OutServe-SLDN.

and AARP’s “How to Maximize Your Social Security Benefits,” www.aarp.org/content/dam/aarp/money/budgeting_savings/2012-02/How-to-Maximize-Your-Social-Security-Benefits-AARP.pdf.

Survivors Receive?,” www.socialsecurity.gov/survivorplan/onyourown5.htm, and GLAD’s publication, “Social Security Benefits and The Defense of Marriage Act,” www.glad.org.

Note: In calculating a survivor benefit, reductions for early retirement, maximum family benefits, and the Government Pension Offset apply, but the Windfall Elimination Provision (WEP) does not apply to survivor benefits. See below: “What Factors Could Reduce My Benefits?”

What is the Social Security Disability Spousal Benefit?

Social Security pays benefits to people who cannot work (are unable to engage in substantial gainful activity) because they have a medical condition that is expected to last at least one year or result in death. For more information, consult the SSA’s [Disability Planner: Social Security Protection If You Become Disabled](http://www.ssa.gov/dibplan/index.htm), <http://www.ssa.gov/dibplan/index.htm>, and publication, “Disability Benefits,” www.socialsecurity.gov/pubs/EN-05-10029.pdf.

When a worker qualifies for Social Security disability benefits, the 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 retirement spousal benefit discussed above.

What is the Lump-Sum Death Benefit?

There is a one-time death benefit of \$255 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. For more information, consult the SSA’s “[Lump-sum death payment](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/202/-/lump-sum-death-payment),” http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/202/-/lump-sum-death-payment.

What is the Surviving Spouse Benefit?

After a spouse’s death, Social Security allows the surviving spouse to keep collecting his or her own Social Security payment or to collect the full payment of the deceased spouse. 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. For examples and more information, see SSA’s “[Survivors Planner: How Much Would Your](#)

What is the Child’s Benefit?

Social Security can also help a worker’s “children” when one or both parents are disabled, retired or deceased. Because Social Security provides an important economic safety net, “child” is defined broadly and is based on state law recognition of the parent-child relationship. Please refer to the Social Security website for the numerous tests of who can be a “child.”

Who Qualifies for Social Security Spousal Benefits

This chart outlines the basic requirements for each type of Social Security benefit available to spouses and is discussed in more detail below. You must meet each requirement listed under a given benefit in order to qualify for the benefit. The Social Security website provides further details.

	Spousal Retirement Benefit	Spousal Disability Benefit	Survivor’s Benefit	Lump-Sum Death Benefit
SS Work Credits	<input type="checkbox"/> Your spouse worked and paid into the system long enough to qualify for this particular benefit			
Recognition	<input type="checkbox"/> The wage earner’s state of domicile (primary residence) at the time of your application would consider you married or able to inherit personal property from each other without a will as would a spouse	<input type="checkbox"/> The wage earner’s state of domicile (primary residence) at the time of your spouse’s death would consider you married or able to inherit from each other without a will as would a spouse		
Duration	<input type="checkbox"/> You have been married for at least 12 months prior to applying for spousal benefits		<input type="checkbox"/> You have been married for at least 9 months immediately prior to the day your spouse died (Click here for exceptions to this rule from the SSA). http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/395/kw/defense%20of%20marriage%20act	
Age	<input type="checkbox"/> You are at least age 62 or of any age if you have a qualifying “child” of the worker in your care who is under age 16 or disabled		<input type="checkbox"/> You are at least age 60, at least age 50 and disabled, or of any age if you have a qualifying “child” of the worker in your care who is under age 16 or disabled	

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Other		<input type="checkbox"/> You have not 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 (see SSA's " Survivors Planner ")	<input type="checkbox"/> You and your spouse were living in the same household at the time of the death (with certain exceptions for things like hospital and nursing home stays)	
Benefit Limitations	<input type="checkbox"/> You are not entitled to a Social Security benefit on your own earnings record that is greater than one half of your spouse's (unless you are applying for the spousal benefit to delay your own application for Social Security benefits based on your own earnings record)	<input type="checkbox"/> You are not entitled to a higher Social Security benefit on your own record (unless you are applying for the spousal disability benefit to delay your own retirement, as discussed above regarding the spousal retirement benefit)		
Application Deadline	No deadline, but there may be eligibility for limited number of months prior to filing application.	Same	Same	<input type="checkbox"/> You, as surviving spouse, applied for the \$255 death benefit within two years of the date of your spouse's death

Q. I'm married and my spouse resides (or resided at the time of passing away) in a state that recognizes marriages between spouses of the same sex. If I meet the other criteria, am I eligible for spousal-based benefits?

A. Yes. The Social Security law uses the wage earner's "place of domicile" as the relevant state law for assessing who is a spouse for benefits purposes. The Social Security law states that a person is considered a spouse if the courts of the state at the time of application would find that the couple was validly married.

Q. I joined in a Civil Union or Registered Domestic Partnership, my spouse resides (or resided at the time of passing away) in that state, and I meet the other criteria. Am I eligible for spousal-based benefits?

A. Although this is untested, we believe the answer should be yes. The Social Security law states that even if the state law of domicile at the time of application would find that you are not married, you are nevertheless eligible for spousal benefits if the laws of your state provide that you can inherit personal property without a will under your state's law as would a "wife, husband, widow or widower." 42 U.S.C. § 416(h)(1)(A)(ii).

All of the state civil union and registered domestic partner laws allow those joined in these statuses to inherit intestate (without a will) personal property as a spouse. In addition, states with more limited domestic partnership or reciprocal beneficiary laws (e.g. Wisconsin), even if the state also has marriage or civil unions (e.g. HI, ME, NJ), may provide a basis for those joined in the more limited statuses to make a claim for spousal benefits if you meet all of the other qualifications. Consult a local practitioner to learn more about your state's relationship recognition and intestacy laws.

If you are married but your spouse resides (or resided at the time of passing away) in a state that treats marriages of same-sex couples as a "civil union" or "registered domestic partnership," we believe you may make a claim for spousal benefits if you meet all of the other qualifications.

Q. My spouse resides (or at the time of passing away resided) in a state that does not recognize marriages of same-sex couples, but we married in another state and I meet all of the other criteria. Am I eligible for the spousal-based benefits?

A. Under existing law, the Social Security statute uses the wage earner's "place of domicile" as the relevant state law for assessing who is a spouse for benefits purposes. This will likely result in the agency denying crucial benefits to married same-sex couples and widows and widowers until the law is changed. Our organizations will be working urgently to attain respect for all marriages, though it will take legal changes.

Q. I am divorced. Can I obtain benefits based on my former marriage? What happens to those benefits if I remarry?

A. A divorced spouse of a retired, disabled or deceased worker—assuming the marriage lasted at least 10 years and that the divorced spouse is not married to someone else and meets age and other requirements—is entitled to receive benefits based on the earnings record of a former spouse. This includes the retirement spousal benefit, the disability spousal benefit, and the survivor's benefit, though some eligibility differences apply for divorced spouses. For information about access to benefits and how marrying will affect benefits from a former spouse, consult the SSA's "[Retirement Planner: Benefits For Your Divorced Spouse](#)," www.socialsecurity.gov/retire2/yourdivspouse.htm.

What Factors Could Reduce My Benefits?

The most common factors that can reduce benefits are discussed below.

Early retirement. If you start retirement 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. You can [calculate the benefits of early or later retirement on the Social Security website](http://www.socialsecurity.gov/OACT/quickcalc/early_late.html). For more information, consult the SSA's publications, "[Retirement Benefits](#)," "[When To Start Receiving Retirement Benefits](#)" and "[Retirement Planner: Other Things to Consider](#)."

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Maximum Family Benefits Limit (Family Cap) If your or your spouse's children are also eligible for or receiving Social Security based on the same worker's earnings, your *spousal benefit* may be subject to a cap on total family benefits under a single earnings record. For more information, consult the SSA's "[Formula For Family Maximum Benefit](http://www.ssa.gov/oact/cola/familymax.html)," www.ssa.gov/oact/cola/familymax.html.

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"). Since the spousal benefit is derived from the worker's benefit, WEP affects the *spousal benefit* as well. While benefits are lowered because of the WEP, they are never totally eliminated. For more information, consult the SSA's "[WEP eliminating a monthly Social Security benefit](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1354/-/wep-eliminating-a-monthly-social-security-benefit)," http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1354/-/wep-eliminating-a-monthly-social-security-benefit; www.socialsecurity.gov/pubs/10045.pdf.

Government Pension Offset ("GPO"). The GPO applies directly to reduce spousal benefits if you receive a pension from a federal, state, or local government based on work where you did not pay Social Security taxes. If the GPO applies to you, your Social Security benefits will be reduced by two-thirds of your government pension. For more information, consult the SSA's publication, "[Government Pension Offset](http://www.socialsecurity.gov/pubs/10007.pdf)," www.socialsecurity.gov/pubs/10007.pdf.

What Can I Do to Protect and Preserve My Rights While the Social Security Administration Sorts Out if My Marriage or Other Relationship "Counts" for Benefits Purposes?

If you meet all of the qualifications for a benefit, you can apply for Social Security benefits **now** to preserve the start date for your benefits based on the date of your application.

However, if the wage earner lives or lived in a state that does not recognize your legal relationship (marriage, civil union, registered domestic partnership), you will likely be denied benefits if you apply. Our organizations are working to ensure that all marriages respected, but it will take legal changes.

How Do I Apply for Social Security Spousal Benefits and How Do I Appeal If Benefits Are Denied?

GLAD's publication, "[Social Security Benefits and The Defense of Marriage Act](http://www.glad.org)," www.glad.org, outlines the application and appeals process in detail. Some of the important tips from that publication:

Apply in Person! You can apply for Social Security benefits in person on your own at your local Social Security Administration Office.

What to bring. Provide a copy of your marriage, civil union or RDP certificate in support of your application and, if you are applying for survivor benefits, a copy of your spouse's death certificate. Make sure you get a dated copy of your application (or some other dated receipt) as evidence that you actually applied should you need this later.

If you are told you cannot apply. You may be told that you cannot apply for marriage-based benefits based on your marriage, civil union or RDP. You

need to persist politely until you are permitted to complete an application. If necessary, you can explain that you simply wish to preserve your legal rights.

Insist on a Written Denial. It is possible that a Social Security representative will tell you orally that your application is denied. If that happens, politely insist on a written denial, which Social Security is required to give you. This is important in order to assure your right to appeal.

Addressing Delays. If you do not receive a decision on your application from Social Security within two weeks, write to Social Security and request a decision.

Appeal Denials to Keep Benefits Claim Alive. When your application for any Social Security benefit is denied, you must appeal the denial to try to keep your claim for benefits "open" or "alive" and possibly obtain benefits based on the date of application. The time limit for filing an appeal is 60 days from the Notice of Denial.

- **Follow the Directions.** The Social Security Administration will tell you your options at each stage of the appeals process. You have an absolute right to appeal the denial of your benefits. For more information from Social Security about the appeals process, consult the SSA's publication, "[Your Right To Question The Decision Made On Your Claim](http://www.socialsecurity.gov/pubs/EN-05-10058.pdf)," www.socialsecurity.gov/pubs/EN-05-10058.pdf.
- **Try to keep your appeal pending as long as possible.** Because it is likely that it will take some amount of time for the post-DOMA issues to sort themselves out, keep your appeal pending as long as possible so that the agency and legal processes can do what they need to do to clarify the rules. To extend your appeal process, wait until any deadline nears to file the next challenge to your denial (but be sure not to miss the 60 day deadline for each step of the appeal process). You can apply again if the law changes.

Question About Grant of Benefits. If your application for benefits is granted and you think it should not have been under existing legal standards, contact an attorney. If you improperly receive benefits, the government can require you to pay those back.

Timing. There is no deadline for applying for a spousal benefit (except the lump-sum death benefit) though benefits begin based on the date you filed an application.



FOR MORE INFORMATION, CONTACT

GAY & LESBIAN ADVOCATES & DEFENDERS

glad.org

LAMBDA LEGAL

lambdalegal.org

NATIONAL CENTER FOR LESBIAN RIGHTS

nclrights.org

AMERICAN CIVIL LIBERTIES UNION

aclu.org/lgbt

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