

## Self-Employment Schema

### Is it Self-employment?<sup>1, 2</sup>

The Social Security Administration must determine whether a beneficiary is engaging in self-employment activity. Generally, if the individual reports self-employment income on their Federal income tax return, the SSA will not question the existence of a trade or business. If there is a question, the field office personnel will send a questionnaire – “Factors Indicating the Existence of a Trade or Business”, and “Development of Questionable Trade or Business”.

The general policy is that a beneficiary is engaging in a trade or business if:

- 1) they demonstrate “good faith intention of making a profit or producing income,
- 2) they engage in the activity on a regular basis, and
- 3) they present themselves to others as “being engaged in the selling of goods or services.”

If an individual derives his/her income from a trade or business, that is significant. The length of time the beneficiary engages in the business is important, keeping in mind that certain activities are seasonal, e.g. landscaping. It should be noted that illegal activity may, according to the SSA, constitute a trade or business. If they are deriving an income from the activity, albeit illegal, they are required to report their income to the IRS and pay self-employment taxes.

If the activity does not provide them with enough income to earn a living it may be considered by the Internal Revenue Service as a hobby. There is a limit to the deductions if there is no intent to make a profit through the business or investment activity.

The Social Security Act references the Internal Revenue Code to define key terms associated with self-employment such as “trade or business,” “taxable year,” and “partnership or partner”. Ultimately, however, the SSA makes the final decision as to whether or not activity is employment or self-employment for SGA determinations and SSI payment calculations.

An individual may have more than one trade or business, or they may have a business on the side while working for an employer.

### **Title II – Disability Insurance:**

A Title II beneficiary will use a Trial Work month if self-employment activity meets the definition of a “service” month: net earnings for the activity equals or exceeds the current year’s Trial Work Period limit (e.g. \$670 in 2008), or, the beneficiary reports spending at least 80 hours engaged in the trade or business during the month. SSA must rely on the individual’s own record of time spent. Service hours are defined only by the period of time the beneficiary spends providing a service to a client or producing a product. The time spent during the “startup” period is not included in the Trial Work Period: planning, purchasing or leasing space, equipment, applying for licenses or permits, etc.

To determine the net profit for a particular month, the SSA will compare the business records, such as profit and loss statements, with the individual’s income tax return. Generally, the SSA will look at each month individually; however it may be necessary to average the earnings over a period of work if it is not possible to establish monthly net earnings.

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<sup>1</sup> Cornell University Work Incentive Project

<sup>2</sup> Edwin J. Lopez-Soto, Eq. & James R. Sheldon, Esq., in An Advocate’s Manual - Benefits Management For Working People with Disabilities, 2008 Supplement

Once the Trial Work Period has been completed, the SSA will review the self-employment activity to determine if the work meets the criteria established for Substantial Gainful Activity.

There are three tests that can be applied during the review:

1. Is the self employed person performing “significant services” in the trade or business AND is s/he deriving “substantial income” from the trade or business?
2. Is the work comparable to an unimpaired individual in the community?
3. Is the work clearly worth more than the SGA level?

In the first test, the income is considered substantial when the net earnings from self-employment, or NESE, is equal to or exceeds the SGA level for the year the work was performed. If the countable, or net, earnings do not average more than the SGA level but the income is comparable to what the beneficiary earned prior to their disability determination, or, the income is comparable to that of a non-disabled individual engaged in the same business, the SSA may find that their income is substantial.

Since only net income is counted when making the SGA determination, one must understand how Net Earnings from Self-employment (NESE) are calculated.

First, as with any for profit business, the individual will report to the Internal Revenue Service only that income left after deducting normal/allowable business expenses. For SSA purposes, however, additional deductions are allowed, such as work incentive deductions including:

- Unpaid Help,
- Impairment Related Work Expenses, and
- Unincurred Business Expenses.

Unpaid Help is that which is provided by family members, friends, or others who work without pay. The SSA determines the value of the unpaid help using the prevailing wage rate in the person’s community for similar services. The that end, they will need to know the name of the individual, their relationship to the beneficiary, the reason the unpaid help is needed, a description of the services provided as well as the time spent, and the length of time the arrangement has been in existence.

Impairment Related Work Expenses, or IRWE, are necessary because of the impairment and in order for the beneficiary to work. The expense must be paid by the beneficiary and not reimbursable by any source. It must be deducted as an IRWE in the month in which it is paid, however, some large expenses can be prorated over several months.

Unincurred Business Expenses, unlike IRWE, is contributed by someone other than the beneficiary. The expense must be one that would be approved by the IRS as a business if the beneficiary, or the business, paid for it. For example, the state Vocational Rehabilitation agency may purchase necessary equipment or pay the initial rent for space if the beneficiary has an approved plan for employment. Both would be considered an approvable business expense by the IRS, but are not incurred by the beneficiary. In some instances, there may be no expense incurred at all. Use of space in a government building is an example of business expense for which there is no exchange of money, but SSA allows it as an unincurred business expense. In-kind use of office space, telephone, office equipment, and perhaps some personnel time (e.g. receptionist) may also be deducted. The method used to determine the value of the expense depends on the type of expense. For example, space and utilities would be valued at the fair market value. If items such as office equipment are involved, SSA will use a method comparable to the depreciation method used for income tax purposes – depreciate the cost of the item over their useful life and deduct the amount of depreciation attributable to the taxable year in question.

Because of the manner in which self-employment income is often received, there may be wide fluctuations in gross receipts for the business. Therefore, the SSA will average the countable income by figuring the “total countable income” for a period of work and dividing that figure by the number of months in the period. If there are distinct periods during which the individual’s net income is higher, the SSA may only use the months in that period to figure the average countable income. For this reason, a self employed beneficiary may be found to be engaged in SGA even though his/her average annual is below the SGA level for that year.

For example:

Joe, an SSDI beneficiary, owns a bicycle sales and repair shop. During the winter months business is slow, but beginning in April his sales and repair work increases significantly. The SSA can average his income during the distinct periods and may find that he is engaging in SGA from April through September.

On the other hand, the self-employment income is averaged over the entire period of work even if the beneficiary doesn’t receive payment in each month of work, e.g. a farmer works his crop from March 1st until September 30th but is only paid after the crop is harvested.

Substantial income is not the only measure for test number one. The beneficiary must be performing significant services to the business as well. In a “one-person” business the services are presumed to be significant. But an individual may own a business but pay other people to do the work. In that case, the income would be unearned. If the business involves more than one person, e.g. employees, partners, assistants, the SSA would consider the beneficiary contributing substantially to the operation of the business if she/he:

- 1) spends more than forty-five hours per month managing the business and it’s employees, or
- 2) contributes more than one-half the time required to manage the business.

Two additional factors may be considered in determining if the income is substantial:

- 1) If the beneficiary was self-employed prior to becoming disabled and it was his/her sole means of livelihood, the SSA may compare the income derived from the business in the past with the current net earnings. If the two are comparable, the person’s income will be considered substantial; and
- 2) If the beneficiary’s earnings from self-employment are comparable to that of similar businesses in the person’s community, the income may be substantial.

In other words, if the person was able to make a living for the business prior to becoming disabled, or, other people in the same community are able to support themselves on similar income, the standard for “substantial income” can be lower than the SGA amount. The local Social Security office personnel may use their own knowledge of the community or obtain evidence from the local Chamber of Commerce in making their decision.

The SSA must also consider the nature of the work. SSA regulations guides the local office with the following:

“If the beneficiary’s services as a physician, dentist, lawyer, accountant, engineer, scientist, management consultant, writer and other highly skilled occupations are of such a nature and value that they are substantial even if 45 hours or less.”

Tests two and three are applied only if the SSA cannot clearly establish SGA based on significant services and substantial income.

#### Test Two: Comparability of Work Activity

If the business is operating at a level comparable to a non-disabled individual in the beneficiary's community engaged in the same or similar business, considering the hours of work involved, skills required, energy output, duties and responsibilities, the beneficiary may be found to be engaging in SGA. If the local office cannot obtain conclusive evidence that the work is comparable using the required factors, the finding must be that the person is NOT engaging in SGA under the comparability test.

It is important that the SSA carefully select the comparison group of non-disabled individuals. They must be engaging in the same type of business and be maintaining a standard of living that is adequate for their community. For this reason, the SSA typically chooses well-established businesses for comparison. They must describe the businesses in detail, conducting an interview with the non-disabled business owner if necessary. To compare the beneficiary's work activity, it is necessary to have adequate description of their business as well, and the local office is directed to obtain this information first-hand through actual participation or observation.

Obviously, when local office personnel live and work in the same community as the beneficiary, as in smaller, rural communities for example, it is more likely that they will have the information required to do a fair comparison.

#### Test Three: Worth of Work Activity

If SGA cannot be established using the comparability of work test, the third test may be applied. SSA regulations provides the following guideline for SSA personnel:

self-employment activity is considered substantial if it is "reasonably worth over the [SGA] amount...when considered in terms of its effect on business or when compared to the salary an owner would pay to an employee for such duties in that business setting." For example, if a beneficiary is involved in self-employment activity in which, in a normal employer-employee arrangement, the earnings would be above the SGA level but the individual is accepting payment at a lower level, SSA may find that the person is engaged in SGA.

For those individuals who are statutorily blind, the SGA level for the blind is used to determine if income is substantial. As of 1978, self-employment activity of blind beneficiaries is evaluated only in terms of SGA. ***Tests two and three, comparability and work of work, are never applied to blind individuals.***

Because many new businesses do not realize net profit in the startup years, many self employed Title II beneficiaries find that their benefits continue for a period of time even if their business is successful because their net earnings do not exceed the Substantial Gainful Activity level.

#### **Title XVI – Supplemental Security Income**

When a Title XVI, or SSI, recipient reports income from self-employment to the Social Security Administration, the field office must first determine whether or not the activity constitutes a trade or business. Some activity may not be considered employment, and will be treated as unearned income.

The occasional selling of crafts produced by the recipient is an example of activity that would not be considered earned income. As with Title II beneficiaries, the activity must be carried out with the intention of making a profit, be regular and ongoing, and meet the factors indicating the existence of a trade or business. In general, if the income meets the definition of wages for the Title II annual earnings test even though no FICA taxes are being deducted, it would be considered earned income.

Example 1: A SSI recipient reports that she is babysitting for her grandchild. She receives \$20 per week from her daughter. She does not babysit for anyone else. The SSA office determines that the activity is not self-employment, but instead is unearned income for the purpose of calculating the SSI payment. In a similar case, however, an SSI recipient indicates that she babysits for several neighbors and friends, a service she has been providing for a number of years. Although she does not advertise her service, is not licensed as a day care, and pays no taxes, this activity meets the criteria of a trade or business and the local office determines that she is self employed.

Example 2: A common situation in which an SSI recipient reports that she/he earns extra money to help with food or rent by collecting aluminum cans off the street and redeems them at a recycling center for cash. Because she/he is known to do this, sometimes members of his community contact him to pick up their cans. He does not file income tax returns but makes about \$200 a month from the activity. This is viewed by the SSA as an ongoing, regular activity that was established with the intent of producing income. She/he is determined to be self employed.

Another frequently seen example is the individual who occasionally mows lawn for neighbors to earn extra money for a one-time expense such as car repair. Because it is not regular and ongoing activity and there is not intent to make a profit, this is considered unearned income in the month in which it is received.

In some self-employment activities, payment is in the form of food, clothing, shelter, or other items such as a car received in lieu of cash. There must be evidence that these were in-kind payments provided in the course of the recipient's trade or business. If not, then they are considered unearned income. In-kind income is valued at its current market value.

Once it is established that the SSI recipient is engaging in self-employment, the SSA will determine the Net Earnings from Self-employment, or NESE, for the purpose of determining continued eligibility and calculating the SSI payment.

To reiterate, NESE is the gross income from a trade or business minus allowable deductions. NESE is determined on a taxable year basis, so that annual net earnings are divided equally among the months in the taxable year to get the monthly NESE. This figure is used to calculate the payment. The entire taxable year is used even if the business is seasonal, starts during the year, and ends before the year is over. The only time less than 12 months may be a taxable year is the basis for reporting income changes, for example from a fiscal to a calendar year, or, the taxpayer dies. The taxable year is not ended if the recipient goes out of business before the year ends.

### **Verifying Net Earnings:**

The Social Security Administration uses a variety of evidence to verify earnings from self-employment. In order of priority, they will review the following:

△ The Detailed Earnings Query (DEQY) - a report generated by the SSA computer that lists covered and non-covered earnings, employer names and addresses, and pension data for each year requested

Δ Federal Income Tax Return – Schedule SE, which shows the net earnings and any net loss; Schedule C which indicates net profit or loss”; Schedule C-EZ for net profit; or, Schedule F for net profit or loss;

Δ Business Records – kept by the individual detailing accounts receivable and accounts payable. Deductions taken on business records are assumed allowable by the IRS;

Δ Individual’s Signed Allegation – if no other evidence is available, the local office may accept a statement by the individual that indicates net earnings.

If an individual has been conducting the same trade or business for several years, and no change is anticipated, the local office may use net earnings from the prior year as an estimate for the current year in order to calculate the SSI payment.

If the individual engaged in the same business ONLY for one year prior, the local office may use a gross-net ratio method to calculate the current year’s net profit. Using the individual’s tax returns or business records from the previous year, the ratio between net profit and gross receipts for that year is determined. That ratio is applied to the actual gross receipts the individual reports receiving in the current year and is used for the remainder of the year.

For example, if John reported a net profit of \$1000 for \$5000 of gross income, his gross-net ratio is 20%. If in July of the current year he reports gross income of \$3000, the projected gross income for the year would be \$6000. The projected net earnings would be \$1200. This method is not used for businesses that are seasonal or have unusually high income at certain times of the year.

If the individual is engaging in a new business, the verification of income received cannot occur until the taxes are filed. In order to calculate the monthly SSI benefit until the taxes are filed, the income is projected or estimated, and adjusted when the net income is reported to the IRS on the Schedule SE. The field office can use partial year net income from profit and loss statements, which should be kept by the business accountant or bookkeeper, or, if no records are available, get a signed statement from the recipient that indicates the estimated net income. When tax records are available, the field office will adjust the SSI payment up or down, depending on the accuracy of the estimated income.

Any net loss from self-employment is deducted from other earned income, either the recipient’s or his/her spouse, when calculating the monthly SSI payment. The net loss must be verified, usually when the individual files the appropriate IRS forms, and is divided evenly over the months in the taxable year. The monthly loss is used to offset the other earned income regardless of whether it’s an eligible couple, or an eligible individual with an ineligible spouse. For example:

Mary is an eligible individual who started a small business in her home. Her husband, John, is not eligible for SSI, and is employed outside of the home. In the past, some of John’s income has been deemed to Mary, resulting in a decrease in her SSI payment. When Mary files her taxes at the end of the year, she reports a net loss in her business. The Social Security Administration will divide the loss by twelve and deduct that from the deemed income. The result will be an increase in Mary’s SSI payment.

Net loss cannot be estimated. It must be verified using tax records.

**Work Expenses that apply to self-employment for the Title XVI recipient:**

Once the monthly NESE is determined, the work incentives are applied in the same way they’re applied to a person with wages from employment. Just as with gross income received in a month, NESE is reduced by the General Income Exclusion if no unearned income, the Earned Income Exclusion, Blind

Work Expenses (BWE) or Impairment Related Work Expenses (IRWE) applicable in a specific month. Net earnings can be set aside in a Plan for Achieving Self Support (PASS).

The same expense cannot be used as a business expense AND a work incentive deduction (BWE, IRWE, or PASS) because it would be used twice to impact the SSI payment. This is particularly important for PASS development, because an expense does not have to be impairment related.

Since only countable income is used in the PASS, the expense would 1) be deducted as a business expense and the resulting countable net income would be used in the PASS, or 2) be deducted from other income (unearned) to get the countable unearned income.

A PASS cannot be approved for an SSI-only recipient unless there is NESE. For example, Mary, an SSI recipient, is self employed as a tailor. She wants to purchase a vehicle in order to expand her business to include delivery of completed work to her customers. This would result in increased business and decreased dependence on SSI. Mary wants to submit a PASS, but her tax records reveal that she has more expenses than gross income from her business, so there is no net income to put aside in the PASS. Mary will have to wait until she has net profit or get a business loan to pay for the vehicle.

The Social Security Act allows that property that is essential to a recipient's means of self support is excluded from the resource test. This exclusion is called Property Essential for Self Support, or PESS. Non-business property used to produce goods or services essential to daily activities, e.g. land to produce vegetables, is limited to a \$6,000 exclusion. Up to \$6,000 of non-business income-producing property, e.g. rental property, is excluded if it produces a 6% net annual return. But property used in a trade or business is excluded regardless of its value or rate of return.