

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Campos et al. v. Kijakazi Settlement Agreement:

What SSI Advocates Need to Know

Webinar Transcript

March 11, 2025

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Tracey Gronniger:

Hello everyone and welcome to today's webinar presentation entitled Campos et al v. Kijakazi Settlement Agreement: What SSI Advocates Need to Know? I am Tracey Gronniger, Managing Director of Economic Security and Housing here at Justice and Aging. I will mostly be silently moderating today's webinar, but I'm here to get us started. I am joined by our presenters, Kate Lang, Director of Federal Income Security, also at Justice and Aging, and Michelle Spadafore, who is a senior supervising attorney at New York Legal Assistance Group or NYLAG. We have the next slide, please.

Before we get started, I would like to go over a few webinar logistics. Again, welcome to all participants. You are all on mute, but we welcome your participation in today's presentation through the Q&A function in the Zoom control panel. Also available in the Zoom control panel is the closed caption button, which enables closed captioning. I will be watching the participant questions as they come in through the webinar and I will uplift high level themes during the Q&A segment at the end of today's presentation. We know that there's a lot going on with SSA recently, but we're not going to be addressing those developments today. But any other questions that you have that are unanswered in today's webinar will be addressed via email following the conclusion of this presentation. And you can also use the Q&A function to request technical assistance with Zoom. You can also send an email to trainings@justiceandaging.org and you can find materials for this training in our resource library.

The webinar is being recorded, and after the conclusion we will be sending the slides and recording of the presentation and putting it on the website. We will also be emailing it to all registrants and we would really appreciate if you could

include your participation in our post webinar survey and that will pop up on the screen at the end of the webinar.

So Justice and Aging. Justice and Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable healthcare, economic security, and the courts for older adults with limited resources. Since 1972, we focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, including women, people of color, LGBTQ+ individuals, and people with limited English proficiency.

Justice in Aging is also committed to advancing equity for low income older adults in economic security, healthcare, housing, and elder justice initiatives. We strive to address the enduring harms and inequities caused by systemic racism and other forms of discrimination that uniquely impact low income older adults in marginalized communities.

NYLAG founded in 1990 is a leading civil legal services organization, combating economic, racial and social injustice by advocating for people experiencing poverty or in crisis. Their services include comprehensive free civil legal services, financial empowerment, impact, litigation, policy advocacy, and community partnerships. NYLAG's staff of 400 people impacted the lives of 130,000 people last year.

So thanks for sticking with us through that background information. I am now going to turn it over to the presenters to get started.

Kate Lang:

Thanks so much, Tracey, for getting us started. My name is Kate Lang, I'm with Justice in Aging and I'm going to get our presentation started on the Campos v. Kijakazi settlement agreement. So if we all think back five years ago to the start of the COVID-19 pandemic. In March of 2020, the Social Security Administration closed their field offices in response to the pandemic. So they sent all of their employees home, they said, "Don't come into the offices," and they closed the offices to members of the public. And at that point there was no agency-wide remote work plan in place. So those SSA employees at home did not have the equipment that they would've needed to do their work and they didn't have access to SSA systems, they didn't have phones or laptops and they didn't have really policies in place for how those employees of SSA could do their work in a secure way at home.

So this resulted in SSA stopping all manual processes and that includes reducing or suspending supplemental security income or SSI benefits. For those of you who are familiar with SSI, I'm assuming everybody who's joined today's webinar is familiar with SSI and familiar with all its financial eligibility rules for income, resources, where people live. Those are all rules that apply to somebody's benefits each month. So any change in those would require SSA to take action on somebody's SSI benefits each month.

And as a result of SSA suspending this work, all of their manual processes including work on the benefits of SSI recipients, there were more overpayments and larger overpayments as a result of SSA suspending its manual processes.

So then a few months later, SSA got the equipment to their employees that they needed to work from home. They put policies in place around SSA employees having a secure environment at home to do their work and started having those manual processes begin up again. Even though the field offices remained closed, SSA employees began to do remote work on manual processes. And beneficiaries because the field offices were closed, they struggled to report changes to the agency or request that any resulting overpayments be waived.

So then in the end of August of 2020, on August 27th of 2020 SSA published an interim final rule in the federal register. It's called Waiver of Recovery of Certain Overpayment Debts Accruing During the COVID-19 Pandemic Period. So they identified this pandemic period as when they had suspended their manual processes, any overpayments that incurred between March 1st of 2020 and September 30th of 2020, that the agency identified by December 31st of 2020 that were the result of SSA suspending their manual processes.

So there were, I should say I've been talking about manual processes. That's most of the majority of the work that SSA does. There were a few automatic processes that continued during this period and those included data matching with Veterans Affairs Administration data and also with SSA's own data so that they knew, for example, if somebody was a concurrent beneficiary receiving retirement benefits and SSA at the same time, SSA's own systems kept talking to each other automatically during this period.

So any other overpayments that happened as a result of SSA suspending manual processes was covered by this waiver process in the IFR and they specified in the IFR that any overpayments that resulted from fraud or similar fault or involving misuse by a representative payee would not be waived under this process, just like they wouldn't be waived under regular SSA waiver policies.

But in this IFR, they created a new waiver process that they called Streamlined so that the overpaid person would be presumed to be not at fault in causing the overpayment and that it would be against equity and good conscience to collect the overpayment from them, so satisfying the two-step process in a waiver decision. And they said that they would streamline this process in that people would not have to complete a waiver application on a paper form, which is SSA-632 to request a waiver, that people could just do it over the phone, could call up SSA and say, "I think this overpayment should be waived," and SSA would do it without requiring them to complete the form, but they would not refund any money that had already been collected from the beneficiary once that overpayment was waived. So that's a little bit different than the regular waiver process where the person can request that if the waiver is granted any money

that's already been collected would be refunded. So they said that's not a possibility with these waivers granted under the Streamlined process.

So we had problems with this Streamlined waiver process. We submitted comments when it was published in the federal register. So even though it was a final, an interim final rule, there was an opportunity to submit comments for 60 days. And basically we submitted comments saying, "You know all you need to know about these overpayments, right? You know how they happened. You know that they were caused by SSA suspending its manual processes during this time period. And for SSI recipients, you know that it would be a hardship for them to repay it, so you should just go ahead and waive these overpayments. Do not require people to even call you on the phone and ask for it because you should just waive them." They ignored us and we waited to see if anybody would get a waiver under this Streamlined process, but it did not go so well.

They did not really effectively inform overpaid people that this new Streamlined process existed. And even people who came to, people like Michelle or other legal aid advocates who knew about this Streamlined process, they were not able to utilize it. So, frequently the employees at SSA offices would not follow the process properly. For example, we heard about SSA employees telling the overpaid person, "You have to call this specific, like, I can't do the waiver, you have to call this specific employee at this specific telephone number," but nobody ever answered that telephone number and there was no way to leave a message so that effectively prevented people from accessing the waiver. Or SSA employees would tell the overpaid person they had to make an appointment with a specific SSA employee to request the Streamlined waiver from them over the phone, but that person had no availability for appointments. So again, no way to access the waiver. So it was not really an effective process for people to get these overpayments waived.

So we sued the Social Security Administration. We filed a nationwide class action in the Eastern District of New York on behalf of five named SSI recipients with overpayments challenging this interim final rule as arbitrary and capricious. We filed the complaint in September of 2021 and there was never any answer or motions or anything filed by the Social Security Administration in response to this. They contacted us pretty quickly and said, "We can work this out. Let's talk. Don't suspend the deadline for us filing an answer. We should negotiate a settlement on this."

So that's what we did. It took some time and now Michelle is going to talk about the settlement agreement we reached with SSA.

Michelle Spadafore: And I really think that they talked to us so fast because they looked in the system and said, "How many of these have we granted?" And they realized that they hadn't granted barely any because every single one that my office asked for was denied for various different reasons. So that's why we brought the case.

Next slide. So there's a couple different pieces to the settlement agreement. One of the pieces is that we asked for them to have guidance put in place on COVID-19 circumstances that could have an impact on fault findings for a waiver determination. So for the whole time period in question from 2020 until the end of the COVID period, there is an EM that talks about the different types of things that an individual can raise when they have filed a waiver for an overpayment during this period that include reasons why they might not have been able to timely report wages or income or something else to Social Security, including that they were sick, a family member was sick, the office was closed, the office wasn't answering the phone, they sent it in, but it was lost. There's a bunch of different things all related to the circumstances that were going on during COVID and how difficult it was for people to report and to contact Social Security, especially during the time periods when they were closed and when their phones were not working so well.

So anybody who has an overpayment incurred during that time period, and this is for SSI and SSD folks, Title II and Title XVI, can use that emergency message and use those factors if they're filing a waiver to raise reasons why they are not at fault and they should go ahead and do so, but they will have to file a waiver to make those allegations. This is not something where they're going to have an automatic waiver applied for applying the allegations from this emergency message.

Next slide. And so all of the people during this period that could have had an overpayment who are SSI recipients will receive this notice that they had an overpayment assessed from March 2020 to April 2023, and that if they fall into the smaller category, which we'll talk about in a minute, that they would have automatic waiver, but if they fall into the broader category of 2020 to 2023, that they can use the emergency message to file a waiver and use that for their fault argument and that they have not already done a waiver, they should. And if they did a waiver before they found out that you could use the COVID related factors, I would argue that somebody should go back in and that that would be new information.

But anybody during this period SI, or SSD can use the EM for fault and to argue why they're not at fault. But only the SSI recipients are going to get these notices. And this will also go to the SSI recipients who Kate was talking earlier about manual versus automatic, this will go to both flavors of people. And so some people will have already been carved out of the automatic waiver for March to September 2020, and those people for overpayments in those periods could use the EM for filing their own waiver and making a no fault argument. Next slide.

Kate Lang:

Yeah, I'll just say we have a link here to a PDF of a copy of a redacted notice that people can look at if they want to see what the notice looks like. But we're not going to try and challenge ourselves technologically to show you a copy of the notice right now, but there is a link in the materials to see one if you're curious.

If you're not sure if the notice your client has gotten is a Campos notice there's one in the materials so you can compare it and see if that's what you've got.

Michelle Spadafore: So one piece of the settlement is an automatic waiver of overpayments from March to September 2020. Social Security doesn't like the word automatic, but we use the word automatic because it's an easier explanation of what's going to happen, which is that it's going to happen automatically. You don't have to file a waiver if you had one of the overpayments that was not carved out so the manual overpayments, it's not due to fraud or similar fault, it's not due to payee abuse that came during March to September 2020, that overpayment is going to be automatically waived and you don't have to do anything. The claimant does not have to do anything. It's just going to happen. Social Security is going to do it in their system. You don't have to submit a waiver request. Social Security will send a separate notice with information about the waiver after it's granted, but they might grant it and then not send that notice for months and months and months, so the two aren't necessarily going to happen very close in time.

They have said that they will grant these waivers by June 2025. We'll see if it actually happens that fast, but that it could take a year or more for you to actually get the notice that they did it. So those things are not going to look like they're tied in time, but they, basically just keep an eye on the bank account that the Social Security money goes into. That's where you're looking for.

If somebody has already repaid some or all of their overpayment from that time period, they're going to get that money back and that's going to be called an underpayment. Now keep in mind if a person has a different overpayment that hasn't been collected, so let's say their 2020 overpayment hasn't been collected at all because they're still working on their 2018 overpayment, they're not going to get anything back if they didn't actually get money taken away yet because they're still working on that old overpayment. Or it's also possible that Social Security did fully recover this 2020 overpayment, but now they have a new overpayment that's being recouped on and Social Security is not going to give them the money back. Social Security is going to use the money that should be repaid to them, the underpayment to offset the overpayment that they owe on this other overpayment.

So if you have an individual who is expecting to get back money, but hasn't, probably the most likely explanation is that that overpayment either never got collected in the first place because they've been recouped on this older one the whole time, or that it was recovered and now it's going to pay back a new overpayment. If somebody's totally in the clear and isn't being recouped at all for anything, then you would expect to definitely see them to get the response to get the money back.

I will note, based on the notice, it says, "If you have any questions, call your local office." If you have any questions, call their local office. Please do not call me and Kate, we cannot fix these things. I mean, unless you see something that's

wildly going off the rails that you like are like, "Oh wow, Social Security is really not doing what it's supposed to do with the settlement agreement." But if it's just a question of figuring out what's going on and when somebody's going to get their money back, that is a field office related question.

They will issue the funds via direct deposit or direct express. Basically, you're going to look for wherever the person's benefits currently go. That's where you're going to look for the response. Like we said for this period, March to September 2020, you don't have to submit any additional paperwork. You don't have to submit a waiver, you don't even have to call about it. You can just wait and see what happens. And then only if you didn't get it after let's say July, would you then want to call and say, "Wait, where's my money?" Like any retroactive Social Security payment, you have nine months to spend it down. Otherwise, it'll be counted as a resource for SSI benefits.

Next slide. Next slide. So here there are some links in the materials to different information about Campos. The first one is the emergency message that talks about the fault pieces that we were talking about earlier. There's also the Campos settlement webpage for Social Security's website. There is the new and wonderful POMS on presumptions of not at fault for waiver determinations. Please make sure to check this POMS directly before you do anything. This POMS could be changed or go away at any moment as the 100% overpayment rate just got reinstated, we don't know what kind of changes we're going to be seeing in the POMS. So anything that you are given POMS-wise in the next, just always check your POMS, make sure it's still accurate. But currently, paragraph B.20, it talks about overpayments during the COVID-19 pandemic period and provides for presumptions of not at fault in certain circumstances. Next slide.

Kate Lang: Yeah, and I just wanted to point out that this paragraph of the section of the POMS does apply to both Title II and Title XVI overpayment. So if you do have somebody with an SSDI overpayment from the March to September 2020, you would need to do a waiver application, but you would want to cite to this paragraph of the POMS. Let's see what's next.

Michelle Spadafore: There's a fact sheet about the settlement agreement on our website, and there's also a webinar that was recently done that talks about the updates to the Social Security overpayment policies of which there are many and they're really, really good. But also we don't know how long they're going to last because everything is on fire. So hopefully they last and at least some of them do. But with these slides as well, please make sure any POMS that cited in these slides that you go and check the POMS and make sure it is still up-to-date. The best thing when you're looking at POMS to know whether something's changed from what was being talked about in these resources is you should look for the date on the top right-hand corner of the POMS and see if it falls before or after the date of the resources that you were working with. And that's it. Questions?

Tracey Gronniger: Thanks both of you. That was really helpful. There are some questions here, so I will jump in. One person asked whether or not someone can stop making payments if they are currently paying off overpayments from this period, or whether they should ask for them to be waived. Is that something that would happen?

Kate Lang: Something we haven't said yet that is always worth repeating is that there's no deadline for submitting a waiver application. A waiver application can be submitted at any time, so there's no harm in waiting. So if somebody knows that the overpayment that they're paying on for an SSI recipient is between March and September of 2020 and they know it was the result of the suspension of manual processes, no fraud or similar fault or misused by a payee involved, then yeah, they can wait and hopefully get that money that they've been paying in now and they would get it refunded later in the next few months, in the coming months. But if somebody is concerned or having trouble making those payments, doesn't want to wait for a refund down the line, then yes, they should go ahead and submit a waiver application, complete that paper form 632 and submit it to SSA. Once that waiver application has been submitted to SSA, then any collection on the overpayment should stop while SSA is making a decision on that waiver application.

Michelle Spadafore: And if they have an overpayment that covers a broader period, right? So let's say it starts in March 2020, but it also goes to March 2021, right? So some of the period's going to be covered by the automatic waiver and some of the period is not. They can file a waiver on, I mean, technically they could file a waiver on the whole period. They're not going to need to file a waiver on the whole period because part of it's going to be automatically waived, but it doesn't hurt. So they could file a waiver on the whole period. Part of it will be automatically waived and then part of it will be looked at underneath the new EM.

So they should also, if they're going to file a waiver for that other part of the period, they should look at the EM and see if any of the COVID related circumstances apply to their case and they should argue that in their no fault argument. And they should also look at the POMS that talks about presumptions of no fault and argue that in their no fault argument. And then if they're currently still an SSI beneficiary, then recovery already is deemed to defeat the purpose. They don't have to do the financial portion of the waiver. They really only have to do page one and two and nine, and then they're done. So it can be really, really fast. And you've got all these resources to just plug in for the no fault piece, the recovery is automatically deemed a defeat for SSI folks, so you don't have to do any of the financial portion.

And then what would happen, I would assume at the local office is they look at the March to September part, that would automatically be waived. And then anything from October onwards, you'd do your normal thing, you'd have a conference, whatever. They talk about what happened during COVID, then it would either get waived or not waived or partially waived.

One good thing about the EM is also look at the fault arguments there. They're not saying that you had to call every day to write a report. They're saying you had to make an attempt, right? So, it's definitely if there's anything that stood in their way, and for most people there is that was COVID related during that time period, they should talk about it.

Also, Kate talked earlier about if your client falls into the category of manual overpayment, not fraud or similar fault, not abuse, then you're going to be in this category. In case that you hear those three things and you're like, "But how do I know I'm one of those three things?" Very, very, very, very generally. You would absolutely know if they're giving you fraud or similar fault problems. And if they're giving you payee abuse problems, you would've heard about it. They would've been jerks and you would know because they would've been saying it. In the context of whether it's manual or not manual, the way you would've known is you would've got your overpayment notices back in the day. You would've got them between March and September 2020 because that was the only thing automatically going out. It didn't require manual action to go out. And so those were already happening between March and September. So you would know that those didn't count. So when you started getting notices after September, those are how you know that those were the manual overpayments and not the automatic ones.

Tracey Gronniger: Someone also asked how binding the settlement agreement is and wondering if there's any reason that we think that there's a way it could be rescinded or changed or if this is final.

Kate Lang: So the settlement agreement is final and it does not hamper any individual from pursuing their own rights regarding their own overpayments. So if somebody had an overpayment notice, if you wanted to file an appeal, you would've had to file it within 60 days of getting that overpayment notice or have good cause for late filing the appeal. But nothing in this settlement agreement precludes someone from appealing an overpayment, from filing their own waiver application, from pursuing any other, negotiating a different repayment amount or anything like that. So people still have the ability to pursue relief for themselves on an individual basis. The settlement agreement doesn't preclude anybody from pursuing anything on their own overpayment.

Tracey Gronniger: Thanks. Someone else asked, "Does any of this apply to survivor's benefits?"

Kate Lang: Right. So we've been talking a little bit about Title II and Title XVI, and this case was only about SSI recipients, only Title XVI benefits. So survivors is under Title II. So this settlement agreement does not apply to people who would have an overpayment regarding survivors benefits, but we mentioned that there are now language in the POMS about presumptions regarding Title II overpayments that happened during the COVID period. So if somebody has a survivor's overpayment from 2020, then I would recommend that they take a look at the emergency message, the EM and that section of the POMS, that paragraph B.20,

to take a look and go ahead and file a waiver application using the language from the resources. But there's not going to be any automatic waiver of survivor overpayments.

Tracey Gronniger: I think you all have hit on the main questions that have been asked. I think that someone else commented that they hoped we would keep them informed about things that are happening and changes, which we always do and we will. And I think some people really appreciated how informative this was and how educational this has been. So for the people who have really more specific questions or other questions, I think they might not apply to this full webinar. You can respond separately, but I think you've answered the main questions. Are there any other things that you guys wanted to bring up or raise before we end?

Kate Lang: No, just to emphasize if people have questions about their specific overpayments, Michelle and I cannot answer them. We've been getting emails and phone calls from beneficiaries and their representatives since these notices started going out in February. We don't have the information about your specific overpayments. We cannot answer those questions. I know it's difficult to get through to SSA these days, but they have the information that can answer your questions about your specific overpayments, so people need to follow-up with the agency directly. But if you have more general questions about the settlement, we're happy to answer that. And we know that people have a lot of questions and concerns about what's going on at SSA these days, and we will be putting out more information as we have it to share with folks through our network.

Tracey Gronniger: Great. Thank you so much. I think we've touched on all the main questions. We really appreciate everyone's participation. I want to thank the presenters. We are really hoping that folks will complete the post webinar survey that will come after this because your feedback is really important on these programs and these presentations. I hope that you all have a great rest of the day. And finally, I just wanted to let folks know about our network. Justice and Aging produces a lot of information like the webinar that you are viewing with fact sheets, issue briefs, alerts, and other material to keep you up to date on all the important developments that are happening. So if you're not already a member of our network, we encourage you to join by going to our website and signing up or simply sending an email to info@justiceinaging.org. So thank you everyone for participating today.