

# Pickle People: Using the Pickle Amendment to Obtain Medicaid Eligibility

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## I. INTRODUCTION

Many Elder Law Attorneys have heard of a class of beneficiaries receiving government benefits called “Pickle People.” The name is found in publications dealing with Supplemental Security Insurance (SSI) issues and Medicaid. However, the explanation given of a “Pickle Person” is often arcane and lacks specifics of just exactly who is a Pickle Person. This article will attempt to provide an understanding of *who* qualifies as a Pickle Person and how this status affects a person’s ability to qualify for government benefits, specifically, Medicaid. The details of this article will focus on qualifying someone as a Pickle Person in Texas, but, except for the references to Texas State Medicaid regulations, the general requirements and techniques for qualifying an individual for benefits should be the same for most other states.<sup>1</sup> Texas is a 1634(a) state,<sup>2</sup> however, and the rules set forth in this paper may differ for 209(b) states<sup>3</sup> and SSI-criteria states.<sup>4</sup> In 209(b) states and SSI-criteria states, the particular state Medicaid rules must be consulted.

Generally, the Pickle Amendment continues or reinstates Medicaid for persons who were once eligible for both Social Security and SSI, and who would still have SSI “but for” Social Security cost of living increases. This includes two main groups. First, individuals who have a large Social Security benefit and only a small SSI benefit often lose SSI if the annual cost of living increase in their Social Security benefit overruns the annual increase in SSI. The Pickle Amendment provides continuing Medicaid eligibility for these individuals. Second, this amendment covers a surprisingly large number of individuals who received SSI disability while their Social Security benefit level was being calculated, and then lost SSI when the Social Security disability turned out to be higher than the SSI income limit. At some point, often many years later, the SSI standard of need exceeds the amount of the recipient’s *first* Social Security check, the check that originally made the individual ineligible for SSI. At that point, “but for” the Social Security cost of living increase, the individual would be eligible for SSI and the Pickle Amendment will restore Medicaid eligibility.

A “Pickle Person” is a person who, although originally eligible for SSI and Medicaid benefits after April 1977, has lost that eligibility as a result of increases in countable income as a result of cost of living adjustments (COLA) to that income. The COLA increase can even be to the income of someone other than the beneficiary. If a person whose income is deemed to the beneficiary receives a COLA increase, and as a result, the beneficiary would be ineligible, that beneficiary may keep eligibility as a Pickle Person. The source of the income that initially disqualifies a beneficiary is not limited to Social Security Disability income (SSDI) or a standard Social Security benefit. To be a Pickle Person, the beneficiary must meet all of the other disability and resource rules of Medicaid eligibility.

At first glance, it seems counter intuitive for an increase in Social Security to affect eligibility for SSI. Just like Social Security, the SSI benefit rate is indexed for inflation. So, it would appear that the two would always increase at the same rate and in the same manner so as not to negatively affect SSI eligibility. However, many people are eligible for SSI as a result of the \$20.00 disregard of countable income.<sup>5</sup> The first twenty dollars of income is excluded when determining SSI eligibility. The current Federal Benefit Rate for SSI for the year 2011 is \$674 per month. Thus, someone earning \$693.00 each month in 2011, would still be eligible for SSI because the individual's countable income would be \$673.00. The disregard is not indexed for inflation and, as a result, if the person's SSI eligibility is dependent on the \$20.00 disregard, then COLAs will eventually cause the individual's income to exceed the SSI income limit.

As a result of the Pickle Amendment, many people have their eligibility to SSI-linked Medicaid restored many years after the date they initially lost eligibility. Because of the way the eligibility calculations are made, every year that a COLA is granted to beneficiaries, a new group of beneficiaries become Pickle People.

There are various benefits that are available to persons through the Medicaid program that are not otherwise provided by other public programs such as Medicare. The majority of Pickle Persons will be eligible for Medicare, either as recipients of SSDI or because they are retirement age and have qualified for regular Social Security retirement benefits and, in turn, Medicare. The Pickle Amendment allows the dually eligible status, both Medicaid and Medicare eligibility, which can be an important benefit to these individuals and allow them to benefit from the Medicaid coverage as a gap-stop for Medicare.

## II. THE LAW

### A. The Federal Statute

The Federal law that establishes the Pickle Amendment is found at 42 U.S.C. §1396a, Public Law 94-566 §503, entitled PRESERVATION OF MEDICAID ELIGIBILITY FOR INDIVIDUALS WHO CEASE TO BE ELIGIBLE FOR SUPPLEMENTAL SECURITY INCOME BENEFITS ON ACCOUNT OF COST-OF-LIVING INCREASES IN SOCIAL SECURITY BENEFITS. The Pickle Amendment became effective July 1, 1977. The Pickle Amendment is named after U.S. Representative from Texas, James Jake Pickle. Congressman Pickle originally introduced a bill called Pickle I,<sup>6</sup> that would have indexed the \$20.00 disregard for SSI income calculations for inflation. The bill did not pass; an amendment was eventually offered by Senator Benson and it eventually became what is known today as the Pickle Amendment. The amendment has been described in judicial opinions as "one of the longest run-on sentences to be found in the entire United States Code,"<sup>7</sup> and that the "nearly impenetrable verbiage of the amendment, is quite expansive."<sup>8</sup>

The Federal regulations implementing the Pickle Amendment are found at 42 C.F.R. § 435.135 entitled INDIVIDUALS WHO BECOME INELIGIBLE FOR CASH ASSISTANCE AS A RESULT OF OASDI COST-OF-LIVING INCREASES RECEIVED AFTER APRIL 1977.

#### **B. The Program Operations Manual System (POMS)**

The Program Operations Manual System(POMS) section on the Pickle Amendment is SI 01715.015; specifically for Texas it is SI DAL01730.009. This section of the POMS refers to an agreement that Texas has with SSA whereby SSA makes Medicaid eligibility determinations for most SSI recipients. It further states that annually, at COLA time, the Texas Health and Human Services Commission (THHSC) receives two files identifying the possible Pickle beneficiaries called a “protected group.” The first file, called the 503 leads (Pickle) file,<sup>9</sup> identifies SSI recipients who lost SSI eligibility because of a Title II COLA.<sup>10</sup> The file is transmitted to THHSC immediately following the transmission of the COLA file in late November.

Another file called the Lynch vs. Rank file identifies individuals who would have been identified at COLA time except that they were ineligible for SSI when the file was run, but could be eligible now “but for” the COLA increase. This file provides information for the current year plus the two preceding years. The file is usually transmitted in mid-December. The POMS goes on to state that if an individual meets either of the Medicaid extension provisions (i.e., would have been eligible for SSI except for the COLA increase), and after the beginning of the new year THHSC has not contacted the individual, a referral may be made to the local THHSC office using a form letter set forth in the POMS section.

#### **C. Texas Administrative Code**

The law specifically related to Texas Pickle eligibility is found at 1 Tex. Admin. Code §358.107(5) entitled COVERAGE GROUPS. This section describes the groups of people who are categorically eligible for a Medicaid-funded program for the elderly and people with disabilities (MEPD) under the Texas State Plan for Medical Assistance.

#### **D. Texas Medicaid Eligibility Handbook**

The Texas Medicaid Eligibility Handbook sections that deal with Pickle People are A-1100 TEXAS ADMINISTRATIVE CODE RULES and A-2330 PICKLE and G-4311 PICKLE and G-4312 PING-PONG.

#### **E. Case Law**

There are a few court cases that have addressed Pickle eligibility. The first, *Ciampa v. Sec. of Health and Hum. Services*,<sup>11</sup> involved plaintiffs who were initially eligible for both SSI and SSDI, but who were also receiving a small amount of veterans' benefits. The plaintiffs became ineligible for SSI due to a slight increase in the

veterans' benefits. At that time, the State of Massachusetts had a regulation interpreting the Pickle Amendment that restricted the Pickle benefits to persons who became ineligible for SSI "because of" or "solely because of" COLA increases in Social Security payments. The plaintiffs, who initially became ineligible for SSI because of an increase in veterans' benefits, but later would have qualified for Medicaid under the Pickle Amendment, brought suit against the State claiming the state regulation interpreting Pickle was more restrictive than the Amendment. While the Court discussed at length the Pickle Amendment and its intent, it noted that, "while wordy, [the Amendment] lays down a clear, precise rule."<sup>12</sup> That rule does not include a causation requirement, but simply states that if a person was, at one time, eligible for both SSI and Social Security and would now be eligible for SSI but for a COLA increase in Social Security, then the person is entitled to Medicaid under the Pickle Amendment. The Court held that the State was required to follow the Pickle Amendment, and provide Medicaid benefits to the plaintiffs, rather than relying on its State's interpretation of the law.

The second case, *Lynch v. Rank*,<sup>13</sup> also addresses a more-restrictive State regulation interpreting the Pickle Amendment. In that case, the California regulation contained the same causation requirement that was struck-down in *Ciampa*. The Court held that such a standard was more restrictive and granted the plaintiffs a permanent injunction. The Court, however, also addressed whether a COLA increase to someone whose income is deemed to an SSI beneficiary also falls under the Pickle Amendment. The Court determined that even when the COLA increase was to someone other than the SSI beneficiary, if that COLA increase resulted in SSI ineligibility, then the Pickle Amendment applied and that SSI beneficiary is entitled to Medicaid. Therefore, if an SSI recipient loses SSI as a result of income deemed to the recipient from another person, but the SSI beneficiary would be eligible for SSI but for the COLA increase to the deemed income, he or she is qualified as a Pickle Person.

### III. PICKLE PERSON SPECIFICS

#### a. Who is a Pickle Person?

A Pickle Person is a beneficiary who: (1) has been denied SSI for any reason since April, 1977 and, (2) meets current SSI eligibility criteria, excluding from countable income any Social Security COLA increases received after the person was last eligible for both SSI and Social Security benefits in the same month. If a person qualifies as a Pickle Person, then he or she is entitled to Medicaid coverage in addition to the Medicare benefits provided in conjunction with the Social Security program.

#### b. How do You Identify a Pickle Person?

There are many internet sites that describe the process for determining if a person is eligible under the Pickle Amendment. The Texas Medicaid Eligibility Handbook has an appendix that sets forth the procedure that Texas Medicaid workers use to determine eligibility. It is **Appendix XXVIII Pickle Disregard Computation**

**Worksheet.** It starts with a chart that sets forth what is called the Multiplier. The Multiplier is a decimal that is determined by the last date the person received his or her last SSI check. The decimal is multiplied by the current SSD or regular social security check that the person currently receives. That figure is referred to as the “COLA Disregard Amount.” That number is added to any other countable income that the person currently receives. If the amount is less than the current SSI income limit plus the \$20.00 disregard, and if the person meets all of the other SSI eligibility requirements, he or she qualifies as a Pickle Person. Because the federal benefit rate for SSI increases with each COLA adjustment for regular SSA and SSDI, then at some point the COLA Disregard Amount becomes large enough to qualify almost anyone for SSI eligibility.

### **C. Hints to Find Pickle People**

If you represent a person who was at one time eligible for SSI and is currently eligible for the The Qualified Medicare Beneficiary (QMB) program, the Specified Low-Income Medicare Beneficiary (SLMB) program, the Qualified Individuals (QI-1), or the Qualified Disabled Working Individuals (QDWI) program, then your client may also be a good candidate for the Pickle Program. The income limits for each of the programs are different. The disqualifying issue for the Pickle Program may be the assets of the person. Each of these programs allows for qualification with resources above the SSI limit of \$2000.00.<sup>14</sup>

### **D. Concurrent SSI/SSDI Eligibility**

The beneficiary never had to be receiving SSI and SSDI at the same time. **The statute only requires that the person be eligible for both of the benefits at the same time.** An application for SSI benefits is suppose to be an application for all benefits the individual is eligible for as a result of his or her disability. Many times a person will receive SSI during the 5 month waiting period before the first SSDI check arrives.<sup>15</sup> In other situations, the person may be eligible for retroactive SSDI payments. The key to the dual eligibility for both SSI and SSDI lies in the way the payments are made. SSI checks are payable on the first day of the first month of entitlement. There is a one month lag whereby SSDI payments are not disbursed until the month after entitlement. Therefore, a person who is otherwise eligible for SSI will be entitled to SSI even if they are eligible for retroactive SSDI payments. Under something called the “windfall offset,” SSI payments will be deducted from the retroactive SSDI check the person receives. Therefore, even if the person never *received* an SSI payment, it is possible that he or she was likely concurrently eligible for both SSI and SSDI if the person met all of the other requirements for SSI.

### **E. Pickle vs. Childhood Disability Benefits (DAC)**

Many people confuse eligibility under the Pickle Amendment with eligibility under Childhood Disability Benefits—sometimes referred to as Disabled Adult Child (DAC). The concepts are similar, a person who was once qualified for Medicaid under SSI rules

is later disqualified but can still receive benefits under Pickle or through DAC, the methods of qualifying, however, are different. As previously discussed, the Pickle Amendment allows someone who was previously receiving SSI to continue his or her Medicaid eligibility when he or she receives an increase income due to an annual cost-of-living increase. Disabled Adult Children are persons who were disabled before age 22, and whose parent or parents retire, become disabled, or die. A DAC person is entitled to a Social Security benefit based on his or her parent's earnings record. A DAC who loses SSI disability benefits solely because the Social Security benefits he or she receives on a parent's earnings record exceeds the SSI limit is entitled to continuing Medicaid.

If the adult disabled child receives CDB and loses eligibility for SSI, he or she can continue eligibility for Medicaid.<sup>16</sup> The program that allows them to continue their eligibility is called Disabled Adult Children (DAC) in the Texas Medicaid Eligibility for the Elderly and People with Disabilities Handbook. The handbook describes the program as applying to persons denied SSI after July 1, 1987, and who meet SSI eligibility criteria. When such an individual qualifies for disabled adult children's benefits, the additional income is excluded from countable income. These individuals are persons denied SSI benefits because of an increase in, or receipt of, disabled children's benefits. These persons may continue to be eligible for Medicaid if they:

1. are at least 18;
2. become disabled before they are 22;
3. are denied SSI benefits because of entitlement to or an increase in RSDI disabled children's benefits received on or after July 1, 1987, and any subsequent increase; and
4. meet current SSI criteria, excluding the children's benefit specified above.

When the individual is denied SSI as a result of Disabled Child Benefits, SSA sends electronic notification to HHSC. The notification to HHSC generates a Form H1296 which is mailed to the denied SSI recipient and it informs him or her of the possibility of maintaining Medicaid benefits. The applicant should contact the nearest HHSC office and ask for an application for DAC (Type program 18). The form is an H1200-EZ, Application for Assistance Aged and Disabled. For more information about DAC benefits, please see the author's paper, entitled *Planning for Adult Disabled Children*, which can be found at [www.pi-yimayo.com](http://www.pi-yimayo.com).

Application for this program will allow the adult disabled child to continue his or her Medicaid benefits just as they existed prior to eligibility for DCB. Once he or she receives Medicare eligibility, the child will then be dually eligible for both programs. It is easy to see why Pickle People are often confused with DAC beneficiaries. Both programs allow continued Medicaid eligibility when an SSI recipient's income increases. The key to determining which program a person might be eligible for, is to determine

*why* the SSI recipient lost SSI.

There is no time limit on when a person can qualify under the Pickle Amendment. Because there is no time limit, most anyone who was originally eligible for SSI and later became eligible for SSD or regular SSA will eventually qualify. The Pickle Amendment applies to income deemed to the person from an ineligible spouse or parent. If the income is deemed to the person, then you use the date the person lost their SSI or the date the deemor started their benefits, whichever date is later.

It does not matter what source of income initially caused the person to lose SSI. **The initial loss of SSI eligibility does not have to be from an increase in the COLA from a SSDI check or a regular retirement check.** A person can have income from any other source and, so long as that person later qualifies for SSI but for a COLA increase, the Pickle Amendment applies. For instance, consider the person who lost SSI because he or she married and the new spouse was an ineligible person whose income was deemed to the SSI beneficiary, and the deeming rules put the beneficiary over the SSI limit. The income that initially disqualifies the SSI recipient can be from any source—a spouse’s working income, for example. If for any reason, the former SSI beneficiary later qualifies for SSI but for a COLA increase to Social Security benefits, that beneficiary is eligible for Medicaid under the Pickle Amendment.

The effect of the Pickle Amendment is to freeze the amount the person receives from their SSD payment at the amount it was on the date that person lost SSI eligibility. There is no limitation on the time that a person can use the Pickle Amendment to qualify. The date of the qualification can be many years after the person initially lost SSI eligibility.

#### **IV. CLASSIC PICKLES, SENIOR PICKLES AND WILD PICKLES**

In an article published in The Colorado Lawyer May 2005 Vol. 34, No. 5, Joel R. Hayes, Jr. defines different types of Pickle Persons. A “Classic Pickle” is a person who loses their SSI as a result of a *current* increase via a COLA in SSDI or regular SSA check. The individual may have been on SSI for some time and are just now losing SSI eligibility as a result of the increase in income. A “Senior Pickle” is someone who lives in a state that provides a supplement to the federal SSI benefit. Texas does not have such a supplement. In Colorado, Hayes’ state, the supplement is called Old Age Pension (OAP). It is generally payable to low-income people age 60 or older. The beneficiaries of OAP, if they are disabled or elderly (over 65), are also eligible for Medicaid. The Pickle Amendment also extends to any state supplement to the Federal SSI program. Any COLA increases in a state supplement are also factored in eligibility determinations for these individuals, called “Senior Pickles.” Yet another category of Pickle People, “Wild Pickles,” are persons who may have lost SSI many years ago and

because of continuing increases in the SSI benefit rate have reached a point that SSI eligibility would be restored.

It is clear that there are several different ways in which a person can qualify for Medicaid benefits under the Pickle Amendment. No matter if the individual is a Classic, Senior, or Wild Pickle, it can be a wonderful benefit to the former SSI recipient.

## V. **CONCLUSION**

The Pickle Amendment allows individuals to continue or reinstate Medicaid benefits in certain circumstances. If a person was once eligible for both Social Security and SSI and that person would still have SSI “but for” Social Security cost of living increases, then he or she may be eligible for Medicaid under the Pickle Amendment. As a result of the Pickle Amendment, many people have eligibility to SSI-linked Medicaid restored many years after the date they initially lost eligibility. Because of the way the eligibility calculations are made, every year that a COLA is granted, a new group of beneficiaries become Pickle People.

There are various benefits that are available to person through the Medicaid program that might not otherwise be available to Pickle People. The beneficiaries who are Medicaid eligible under the Pickle Amendment will generally be low income persons even with their Social Security Income. They must meet all of the current SSI eligibility criteria concerning assets. If they can reinstate their Medicaid eligibility using this program it may allow them access to health care they that would otherwise not be available to them or for payments for prescription medications that Medicare Part D may not cover. The Pickle Amendment allows the dually eligible status, both Medicare and Medicaid eligibility, which can be an important benefit to these individuals and allow them to benefit from the Medicaid coverage as a gap-stop for Medicare. This is just another possible benefit that Elder Law attorneys can help their clients qualify for that can improve the quality of their clients life.

1. Arkansas Medical Services Policy Manual §2030 Eligible Due to Disregard of Social Security COLA Increases.
2. 1634 State refers to §1634 of the Social Security Act that provision states that some States have a contract with the Social Security Administration to determine eligibility for Medicaid at the same time a determination is made for receipt of SSI benefits. These 32 States and the District of Columbia also use the same Medicaid eligibility criteria for determining for their aged, blind and disabled SSI recipients as are used for the SSI program.
3. 209(b) states refers to states that use more restrictive Medicaid eligibility criteria for their aged, blind and disabled recipients than are used in the SSI program in one or more eligibility areas and which were in place in the State's approved Medicaid plan as of January 1, 1972, although some §209(b) States do use SSI's definition of disability in determining the Medicaid eligibility of disabled individuals in their State. There are 11 States that are categorized as 209(b) States
4. SSI-criteria States refers to States that use the same Medicaid eligibility criteria for their aged, blind, and disabled SSI recipients as are used for the SSI program, but require that these individuals apply to the State separately from their application for SSI to determine their Medicaid eligibility based upon that application. There are 7 States and the Commonwealth of Northern Mariana Islands that are categorized as SSI-criteria States.
5. 42 U.S.C. § 1382a(b) (2) (A)
6. Ciampa v. Secretary of Health and Human Services, 687 F.2d 518 (1<sup>st</sup> Cir. 1982) at page 3.
7. Lynch v. Rank, 747 F.2nd 528(9th Cir. 1984).
8. Lynch v. Dawson, 820 F.2nd 1014 (9<sup>th</sup> Cir. 1986).
9. "503 leads" refers to Section 503 of P.L. 94-566 the law that created the Pickle Amendment.
10. Title II is SSA shorthand way of referring to the law that created the Federal Old-Age and Survivors Insurance Trust Fund. 42 U.S.C. 401.
11. *Supra* note 6.
12. *Id.* at 16.
13. *Supra* note 7.

14. The income and asset limits for these programs can be found at <http://www.tdi.state.tx.us/consumer/hicap/hicapnews400.html>.

15. 42 U.S.C. § 423(c)(2) (1976)

16. Medicaid Eligibility for the Elderly and People with Disabilities Handbook Section A-2310.

# Medicaid Eligibility for the Elderly and People with Disabilities Handbook

## Appendix XXXVIII Pickle Disregard Computation Worksheet

*Revision 10-1; Effective March 1, 2010*

**Note:** The information in this worksheet is effective Jan. 1, 2010.

Last SSI Check Received Between	Multiplier	Last SSI Check Received Between	Multiplier
<b>1/2009 through 12/2009</b>	<b>0.0548</b>		
1/2008 through 12/2008	0.0548	01/1992 – 12/1992	0.3735
01/2007 – 12/2007	0.0761	01/1991 – 12/1991	0.3959
01/2006 – 12/2006	0.1056	01/1990 – 12/1990	0.4268
01/2005 – 12/2005	0.1408	01/1989 – 12/1989	0.4526
01/2004 – 12/2004	0.1634	01/1988 – 12/1988	0.4736
01/2003 – 12/2003	0.1806	01/1987 – 12/1987	0.4948
01/2002 – 12/2002	0.1919	01/1986 – 12/1986	0.5013
01/2001 – 12/2001	0.2124	01/1985 – 12/1985	0.5163
01/2000 – 12/2000	0.2390	01/1984 – 12/1984	0.5327
01/1999 – 12/1999	0.2569	07/1982 – 12/1983	0.5485
01/1998 – 12/1998	0.2664	07/1981 – 06/1982	0.5796
01/1997 – 12/1997	0.2815	07/1980 – 06/1981	0.6219
01/1996 – 12/1996	0.3017	07/1979 – 06/1980	0.6692
01/1995 – 12/1995	0.3194	07/1978 – 06/1979	0.6990
01/1994 – 12/1994	0.3380	07/1977 – 06/1978	0.7174
01/1993 – 12/1993	0.3548	04/1977 – 06/1977	0.7331

A. Name of Pickle Applicant: \_\_\_\_\_

1. Date Last SSI Check Received: \_\_\_\_\_ and \_\_\_\_\_ (Multiplier)
2. Current Gross RSDI Benefit Amount: \$ \_\_\_\_\_
3. Multiply Current Gross RSDI Benefit Amount by (X) \_\_\_\_\_ (Multiplier)
4. Results of No. 2 x No. 3 \$ \_\_\_\_\_ Round to Nearest whole \$ = \$ \_\_\_\_\_ .00 COLA Disregard Amount

*If the spouse received SSI and is potentially eligible for Type Program 03, use section B for the spouse.*

B. Name of Eligible Spouse: \_\_\_\_\_

1. Date Last SSI Check Received: \_\_\_\_\_ and \_\_\_\_\_ (Multiplier)
2. Current Gross RSDI Benefit Amount: \$ \_\_\_\_\_
3. Multiply Current Gross RSDI Benefit Amount by (X) \_\_\_\_\_ (Multiplier)
4. Results of No. 2 x No. 3 \$ \_\_\_\_\_ Round to Nearest whole \$ = \$ \_\_\_\_\_ .00 COLA Disregard Amount

*If they never received SSI, but receive RSDI benefits, use section C for the spouse or parents.*

C. Name of Ineligible Relative (deemor): \_\_\_\_\_

1. Current Gross RSDI Benefit Amount: \$ \_\_\_\_\_
2. Date Pickle applicant's SSI was discontinued **or** date when ineligible relative started receiving RSDI, *whichever is later*: \_\_\_\_\_ (Date) \_\_\_\_\_ (Multiplier)
3. Results of No. 1 x No. 2 \$ \_\_\_\_\_ Round to Nearest \$ = \$ \_\_\_\_\_ .00 Disregard Amount

**Enter the total RSDI disregard amount in Item 130 of Form H1000-A/B. Include this amount with all other deductions in Item 58 of Form H1000-A/B.**

**Note: No COLA for January 2010.**

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