



U.S. Department of Justice

Justice Management Division

Departmental Ethics Office

Washington, D.C. 20530

**SUMMARY FOR NON-CAREER APPOINTEES
OF ETHICS RULES APPLICABLE TO JOB SEARCHES
AND POST-GOVERNMENT EMPLOYMENT**

**DEPARTMENTAL ETHICS OFFICE
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I. INTRODUCTION

Department appointees who are undertaking a job search need to be aware of certain ethics rules that apply as soon as they have begun to seek employment outside the government. They also need to be aware of ethics rules that will follow them after they have left government service and, depending on the circumstances, that will restrict certain activities on behalf of a non-federal employer. The following is a summary of those rules, and includes specific guidance from the Office of the Counsel to the President.

Appointees should remain mindful that their focus while working for the Administration should be advancing the President's agenda and working for the American people, and part of achieving these goals is speaking with one voice that reflects both the Department and the Administration.

II. RULES APPLICABLE TO JOB SEARCHES

An administrative regulation, 5 C.F.R. § 2635.604, requires an employee to be recused from a matter that could affect a prospective employer with whom the employee has begun seeking employment. Once the job search advances to the negotiation phase, a criminal statute, 18 U.S.C. § 208, requires recusal from a matter that would affect the prospective employer. So, while the penalties for not adhering to the prohibition may differ, the requirement to recuse from a matter affecting a prospective employer is in effect from the beginning of the employment search.

Restrictions When Seeking Employment

A Department employee may not work simultaneously on a matter affecting a potential employer while seeking a job with that person or organization. Section 2635.604 prohibits an employee from participating personally and substantially in a particular matter that the employee knows will have an effect on the financial interests of a prospective employer with whom the employee is seeking employment.

Restrictions When Negotiating for Employment

A Department employee may not work simultaneously on a matter affecting a potential employer while negotiating for a job with that person or organization. Section 208 of Title 18, United States Code (U.S.C.), prohibits an employee from participating personally and substantially in a particular matter in which the employee knows a person with whom the employee is negotiating for employment, or with whom the employee has an arrangement for future employment, has a financial interest. “Negotiating” is defined as “discussions or communication conducted with a view toward reaching an agreement regarding possible employment with that person.”

The scope of conduct covered by Section 2635.604 (seeking employment) is broader than the criminal statute (negotiating for employment). Under the regulation, simply sending a resume or not rejecting an overture by a potential future employer is “seeking” employment and will trigger the requirement to recuse. The employee actually must be negotiating or have an agreement for employment in order to trigger the criminal statute, 18 U.S.C. § 208. However, the action that an employee must take, whether at the seeking stage or the negotiating stage, is the same: disqualification. The Department generally does not waive disqualification for something so significant as the financial interests of a future employer.

Notification and Recusal Requirements for Public Financial Disclosure Filers

Under the STOCK Act of 2012, a covered employee (an employee who files a Public Financial Disclosure report) must file a notification statement with his or her Deputy Designated Agency Ethics Official (DDAEO) within three (3) business days of commencing negotiations or reaching agreement (whichever occurs first) for future employment or future compensation with a non-Federal entity. Future compensation means compensation that will be received in return for services rendered after termination of federal government employment.

In addition, an employee who files a notification statement regarding the negotiation or agreement for future employment or future compensation must also file a notification with his or her supervising ethics office regarding recusal whenever there is a conflict of interest or appearance of a conflict of interest with respect to the non-federal entity identified in the notification.

An approved format for this notification and recusal may be found on the Departmental Ethics Office’s website, <https://www.justice.gov/jmd/ethics/leaving-government> . The notification is made to the appointee’s Ethics Official.

Frequently Asked Questions

When am I seeking employment?

You are seeking employment under the regulation when you send a resume, call a potential employer, or do not immediately reject the possibility of employment with someone who has

approached you about a job. *Postponing* employment discussions until you have finished working on a matter *does not relieve* you of the conflict or the need for recusal. You must either reject an unsolicited communication about a job, or, if you wish to follow up, you must disqualify yourself immediately from the matter.

Do I need to notify anyone if I received an unsolicited inquiry regarding future employment?

If an entity or person who is involved in a matter assigned to you initiates discussions regarding future employment, you should report the inquiry and your response to a supervisor. Even if you immediately reject the offer or invitation to apply, it is appropriate for the agency to consider what action, if any, is appropriate. In most instances, an immediate rejection will not warrant recusal or disqualification.

Are there any special notification requirements under the Procurement Integrity Act?

The Procurement Integrity Act, 41 U.S.C. § 423(c), states that an official participating personally and substantially in a procurement for a contract in excess of the simplified acquisition threshold (\$100,000) who is contacted by a bidder regarding non-federal employment during the conduct of the procurement shall report the contact in writing to the employee's supervisor and the Designated Agency Ethics Official (Lee J. Lofthus, Assistant Attorney General for Administration), and reject the offer or be disqualified until the bidder no longer is a participant in the procurement or employment discussions have terminated.

What if I use a headhunter or other resource?

You must be disqualified from a matter if the headhunter tells you the name of the prospective employer that has been approached or communicated with on your behalf. Similarly, you are seeking employment if you provide your resume to another individual (a former colleague, friend, mentor, etc.) who will make an introduction or submit your resume on your behalf. An attorney should provide a headhunter with a list of firms or entities that may not be contacted because the attorney is currently working on matters or cases that involve those firms, or, alternatively, the employee should give authorization before the headhunter contacts any firm or entity. Both the regulation and the statute have a knowledge test. Once you know that a prospective employer has been supplied with your resume, you are disqualified from matters involving that entity. 5 C.F.R. § 2635.603(c).

May a prospective employer pay my travel expenses for an interview?

Yes, because such payment qualifies for the exception from the gift prohibition that allows for a gift based on an outside business relationship, and it is premised on your recusal from matters affecting the prospective employer. You do not need approval to accept these paid expenses, but if the expenses (whether paid directly or by reimbursement) exceed \$375, you must report it on your financial disclosure report, either confidential (Form 450) or public (OGE 278).

What steps do I need to take for disqualification and recusal?

You need to inform fellow employees, including subordinates, peers, and supervisors who would communicate with you about a matter, that you may not discuss with them matters involving the entity/individual with whom you are seeking employment, and you must absent yourself should information or discussions about these matters otherwise arise. It is important to notify all persons who may approach you on a given matter, although the scope of notice will be determined on a case-by-case basis. An ethics official can assist you in determining who must be notified. In addition, you may be able to arrange for another member of the staff to screen matters that are presented to you and thus serve as a “gatekeeper.” You should create a written record of your disqualification/recusal, including the persons notified, or notify persons of your recusal by memoranda or electronic mail.

In addition, employees who are public financial disclosure filers must notify their ethics official within 3 business days of commencing negotiations with a prospective employer or reaching agreement for future employment (whichever comes first), which also certifies that all necessary recusals are in place, using a form available from the Ethics Office or on the ethics website. <https://www.justice.gov/jmd/ethics/leaving-government> .

If I do not reach an agreement with the prospective employer, can I return to work on the project from which I was recused?

You should assume that your involvement in a particular matter will cease permanently at the time you begin seeking, and especially negotiating, with a prospective employer. See 5 C.F.R. § 2635.606(b). In limited circumstances, you may be able to obtain authorization to return to work on a matter. For example, if two months pass after you send your resume with no response, management may consider authorizing you to return to your duties. A waiver of the prior disqualification also is possible if the prospective employer’s involvement in the matter is attenuated (as compared to being a party or representing a party), or if the discussions were brief and/or not substantive, and did not reach the point of negotiating for employment.

What action do I need to take if I have an arrangement or agreement for future employment that precedes my resignation?

If you have an arrangement or agreement for future employment, you must recuse yourself from any matters involving the future employer. It is highly unlikely that a waiver will be granted to allow you to work on a matter involving the future employer.

III. DEPARTURE ANNOUNCEMENTS

Appointees may not issue statements and may not permit a future employer to issue statements announcing their future employment while still working for the Administration.

Appointees may not send internal emails announcing future employment prior to their last day in the Administration.

IV. RULES APPLICABLE TO POST-GOVERNMENT EMPLOYMENT

Most of the ethics restrictions on former employees are found in 18 U.S.C. § 207, a criminal statute. While the ethics statutes and regulations do not bar self-representation or assistance behind-the-scenes in a particular matter with parties, lawyers must be mindful of their bar rules, which generally do prohibit behind-the-scenes assistance when an employee has worked personally and substantially on a particular matter with parties.

Matters Participated in Personally and Substantially - Permanent Restriction

18 U.S.C. § 207(a)(1) prohibits a former employee from communicating with or appearing before any court or federal agency with the intent to influence on behalf of someone other than the United States on a particular matter involving specific parties in which the former employee participated personally and substantially while with the government and in which the United States is a party or has a direct and substantial interest.

This prohibition lasts for the lifetime of the matter and is very similar to the bar rule that prohibits switching sides. However, most bar rules also prohibit all aspects of representation, including counseling or other behind-the-scenes assistance. See ABA Model Rule 1.11.

The regulation interpreting this restriction is set forth at 5 C.F.R. § 2641.201.

Matters Under Official Responsibility - Two Year Restriction

18 U.S.C. § 207(a)(2) prohibits a former employee from communicating with or appearing before any court or federal agency with the intent to influence on behalf of someone other than the United States on a particular matter involving specific parties that the former employee knows was pending under his or her official responsibility during the last year of government service and in which the United States is a party or has a direct and substantial interest. “Official responsibility” means “the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government actions.” 18 U.S.C. § 202. The scope of official responsibility will be determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority. 5 C.F.R. § 2641.202(j)(1).

This is a two-year bar and there is no parallel bar rule. It is important to note that an employee's recusal from a matter does not remove it from the employee's official responsibility. These are matters that the employee may not have worked on at all and may not have even known were pending while the employee was serving. After you leave government service, if you are not sure if a matter was pending under your official responsibility, you may call the Deputy Designated Agency Ethics Official (DDAEO) for the office where you last worked, or the Departmental Ethics Office, who will assist in making this determination. You should not contact your former colleagues to make these inquiries.

The regulation interpreting this restriction is set forth at 5 C.F.R. § 2641.202.

Trade or Treaty Matters - One Year Restriction

18 U.S.C. § 207(b) bars a former employee from representing, aiding or advising on the basis of confidential information, on behalf of someone other than the United States, on an ongoing treaty, or a trade negotiation under the Omnibus Trade and Competitiveness Act of 1988, in which her or she participated personally and substantially during their last year as a senior employee.

This is a one-year bar. The Department generally is not involved in trade agreements to which the statute applies, but some Justice employees have been involved in treaty negotiations.

The regulation interpreting this restriction is set forth at 5 C.F.R. § 2641.203.

Senior Employees - One Year Restriction

18 U.S.C. § 207(c) bars a former senior employee from communicating to or appearing before an agency in which the former senior employee served during the last year of government service, with the intent to influence, on behalf of another person on a matter on which the former senior employee seeks official action. A “*senior employee*” includes Executive Level officials, and any individual who is paid at a *rate of basic pay* equal to or greater than 86.5% of the rate for Level II of the Executive Schedule, which is \$160,112 as of January 2016. See 5 C.F.R. § 2641.104. Therefore, SES officials whose basic pay is at least \$160,112, and Senior Level (SL), Scientific or Professional (ST), or other non-GS employees whose basic pay is at least \$160,112 are “*senior employees*” who are covered by this bar.

This is a one-year bar (*see*, also, Ethics Pledge section below) and covers direct contacts with Department officials as well as appearances in court (including submission of pleadings) when the Department of Justice is participating in the matter. Executive Level presidential appointees are barred from representations before the whole Department. Members of the SES and other “*senior employees*” (including employees who receive a base salary of \$160,112 or higher as of January 2016) in components designated as separate are barred from representations to their own components.¹ In addition, a former “*senior employee*” may not appear or communicate with an otherwise permissible component if the former senior employee’s communications are shared, with attribution, with members of the former senior employee’s former office. All circumstances are considered in assessing whether there is an inference of intent for attribution when communications are made with a permissible component. For example, a former Criminal Division employee cannot contact DEA if circumstances support an inference of intent that the former employee’s communications with DEA will be shared, with attribution, with the Criminal Division. However, a former Criminal Division employee may contact an employee in the Civil

¹ Separate components include all bureaus, divisions (except NSD), each U.S. Attorney's Office (USAO) and each U.S. Trustee's Office (USTO). Each USAO is designated separate from other USAOs, and similarly for USTOs, but the Executive Office for U.S. Attorneys and Executive Office for U.S. Trustees are not designated separate from any USAO or USTO, respectively.

Division on a new matter during the one-year period as long as there is no inference or indication that the communications will be shared, with attribution, with the Criminal Division.

“*Senior employees*” (SES, SL, ST) in the senior management offices and in components not designated separate are barred from their own offices and from all components not designated separate.² In addition, a former senior employee may not appear or communicate with an otherwise permissible component if the communications are shared, with attribution, with members of an office not designated separate. All circumstances are considered in assessing whether there is an inference of intent for attribution when communications are made with a permissible component. For example, a former ODAG employee cannot contact the Civil Division if circumstances support an inference of intent that the communications with Civil will be shared, with attribution, with the Associate AG’s office (a “non-separate” office).

There are some exceptions to section 207(c) for representing certain types of organizations, such as a state or local government or an organization with 501(c)(3) status, *as an employee of such entity*.

The regulation interpreting this restriction is set forth at 5 C.F.R. § 2641.204.

Very Senior Employees - Two Year Restriction

18 U.S.C. § 207(d) bars a former cabinet official from making, with the intent to influence, a communication to, or appearance before, any Executive Level official in the Executive Branch on behalf of someone other than the United States.

This is a two-year bar.

There are some exceptions to section 207(d) for representing certain types of organizations, such as a state or local government or an organization with 501(c)(3) status, *as an employee of such an entity*.

The regulation interpreting this restriction is set forth at 5 C.F.R. § 2641.205.

Advising a Foreign Entity - One Year Restriction

18 U.S.C. § 207(f) bars a former *senior employee* from representing a foreign entity before an agency of the United States, or aiding or advising a foreign entity with the intent to influence an employee of a federal agency, even without direct representations to the federal employee on the foreign entity’s behalf. A foreign entity is defined as a foreign government or political party.

This is a one-year bar and covers employees paid at the Executive Level and any individual who is paid at a rate of basic pay equal to or greater than 86.5% of the rate for Level II of the

² The following offices are not designated ‘separate’ for purposes of Section 207(c): the Senior Management Offices (OAG, ODAG, and OASG), OSG, JMD, OIG, OLC, OLA, OIP, OLP, OPR, OTJ, PAO, PRAO, COPS, EOIR, OCDETF, INTERPOL, NSD and A2J.

Executive Schedule, which is \$160,112 as of January 2016.

The regulation interpreting this restriction is set forth at 5 C.F.R. § 2641.206.

Restriction on Sharing in Fees

18 U.S.C. § 203 bars a former employee from sharing in fees for representations before a federal agency or a court rendered by another at the time the former employee was with the government on matters in which the United States is a party or has a direct and substantial interest.

The consequence of Section 203 is that if a former government employee joins a law firm or other partnership that has a government practice, the former employee should receive a fixed amount of compensation for a period of time. Alternatively, the former employee's share of fees must be screened so that the share does not include fees from cases with the United States that were earned by representations from members of the firm before a federal agency or a court at a time when the former employee served in the government.

Ethics Pledge Restrictions

Political appointees are subject to certain additional post-employment restrictions under the Ethics Pledge. For former senior employees who are covered by 18 U.S.C. § 207(c), the one-year restriction under the statute is extended to two years following the end of the appointment. Ethics Pledge, paragraph 4. Former political appointees are also barred from lobbying any covered executive branch official or non-career SES appointee for the remainder of the Administration. Ethics Pledge, paragraph 5. To "lobby" means to act as a registered lobbyist under the Lobbying Disclosure Act of 1995. The definition of "covered executive branch official" includes: (1) the President, (2) the Vice President, (3) an officer or employee, or any person functioning in such capacity, in the Executive Office of the President, (4) any person serving in an Executive Level position, (5) any member of the uniformed services whose pay grade is at or above O-7, and (6) any employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character as designated by the Office of Personnel Management. See 2 U.S.C. § 1602(3).

IV. CONCLUSION

DDAEO's and the Departmental Ethics Office are available to provide guidance on seeking employment and post-employment issues, including post-employment queries that arise after you leave the Department. If you need guidance please contact your former Ethics Official or DEO, not former colleagues. The Departmental Ethics Office's number is (202) 514-8196. The names and contact information for DDAEOs are available on the Department's website:

<https://www.justice.gov/jmd/ethics>