

Ethics Restrictions on Current and Former Federal Employees: A Primer for Individuals and the Businesses Who Seek To Employ Them

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1. Introduction

- a. There is always interest in employing former Federal employees, especially in agriculture. It's a tight-knit community, and specialized experience is highly-valued. Many individuals are not aware of the ethics restrictions on seeking employment, accepting future employment, and the continued responsibility to comply with the ethics laws after Federal employment. It's also hard to navigate for the private sector businesses who seek to or currently employ individuals subject to these restrictions, since most of these organizations do not have staff on hand who regularly deal with Federal ethics laws.
- b. There are considerations at each stage of the job hunt for federal employees and continued responsibilities once an offer for employment has been accepted and employment in the private sector commences. The one thing I stress to all employees, regardless of title or grade level, is to consult with your agency's ethics team before starting your job search in the private sector, if possible, and if that isn't possible, confer with a member or members of that team as soon as you're able. I, personally, would never expect an employee to remember all these regulations off the top of his or her head and to then apply them to the facts of specific situations without guidance.
- c. In addition to the Federal ethics rules, there are relevant state ethics requirements related to moving in and out of the government and the conflicts of interest that may arise. I will discuss the VA Rules of Professional Conduct but be sure to consult the rules of the state(s) in which you are licensed and in which you practice.

2. What is Considered Seeking Employment? When Do the Ethics Rules Kick In?

- a. 18 U.S.C. § 208 prohibits a federal employee from participating personally and substantially in an official capacity, in any "particular matter" that, to the employee's knowledge, would have a direct and predictable effect on the employee's financial interests or on the financial interests of a person or organization with whom the employee is negotiating or has an arrangement concerning prospective employment. A related executive branch-wide regulation, Subpart F of [5 C.F.R. part 2635](#), prohibits an employee from working on a particular matter if the employee is "seeking employment" with a person or organization affected by that matter, even though the employee's job search has not progressed to actual negotiations.
- b. Similarly, VA Rules 1.11, 1.13, 1.6, and 1.9, respectively, cover the concepts of conflicts of interest for former and current government officers and employees, the organization as the client, confidentiality of information, and conflicts of interest with former clients, which are all relevant considerations when moving between a Federal agency or a political position and back into private practice. In the provision most similar to the Federal ethics rules, VARPC 1.11 prohibits a lawyer from representing a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation.

- c. Conversely, the VARCP 1.11 takes it a step further than the Federal rules and prohibits a lawyer serving as a public officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, absent specific exception.
- d. It's important to remember that lawyers employed by the government are subject to both the Federal ethics rules and the Rules of Professional Conduct in the states in which the lawyer is licensed and in which the lawyer is practicing.
- e. **The Office of Government Ethics has a very broad definition of seeking employment**
 - i. the employee is engaged in actual negotiations for employment; (no brainer)
 - ii. a prospective employer has contacted the employee about possible employment and the employee makes a response other than rejection; (this means that if you beat around the bush, try to be polite by not giving a flat out no, or simply offer something other than an unequivocal rejection, you are seeking employment for the purposes of the ethics laws); or
 - iii. the employee has contacted a prospective employer about possible employment, unless the sole purpose of the contact is to request a job application. (An employee is seeking employment with any person to whom he sends an unsolicited resume, regardless of how many resumes the employee sends to other employers at the same time.) (this is tricky and gets people into trouble).
 - iv. Note - If a search firm, an online resume distribution service, or other intermediary is involved, recusal is not triggered unless the intermediary identifies the prospective employer to the employee.
- f. If an employee is seeking employment and the prospective employer has business before the employee's agency or department, there is a potential conflict and a recusal may be required. Do not pass go. If you haven't already, contact your ethics official.
- g. An employee is no longer considered seeking employment when
 - i. Two months have elapsed since the employee's dispatch of an unsolicited resume and the employee has received no expression of interest from the prospective employer; or
 - ii. Either the employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have ended. A response that merely defers discussion until the foreseeable future does not constitute rejection.
- h. **Stock Act Requirements**
 - i. Apply to OGE 278 filers – public financial disclosure

- ii. Must notify the ethics team in WRITING within 3 days of entering negotiations for a position with or accepting an offer of employment with a private sector business.

- i. Notes

- i. Each ethics team is different, but what I really encourage is for employees is to come talk to us early and often. Our discussions are always confidential until you must notify your supervisor of a recusal. At that time, we will draft a recusal, have you review it for accuracy, and then have you sign it and send copies to us and to your supervisor.
- ii. Many times, I will draft a very vague recusal if an employee is worried about the supervisor's biases after finding out he/she is looking for another job. It's up to you what and when you tell your supervisor why you're recused at that point. Some teams may do it differently, but I consider this a best practice.

3. Interview Process and Expense Considerations

- a. If you've signed a valid recusal, you're able to accept "gifts" of meals, lodging, transportation, and other benefits customarily provided by a prospective employer in connection with bona fide employment discussions. This gift provision is published at 5 C.F.R. § 2635.204(e)(3). However, when the prospective employer is a foreign government or international organization, the employee must also comply with the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342.

4. Job Search Ends and You Stay in Place. Now What?

- a. Recusal is no longer necessary – I leave a "voided" copy of the recusal in an employee's ethics file to avoid any question in the future about whether the employee complied with these laws.

5. You've Accepted a Job. Now What?

- a. Recusal stays in place until you depart.

6. Post-Employment Restrictions

- a. All Federal Employees (and DC employees)

- i. 18 USC § 207

- 1. Permanent/Lifetime Ban

- a. A former employee is prohibited from representing anyone else before the government on a particular matter involving specific parties in which the former employee participated personally and substantially during government service when the US or DC is a party or has a direct and substantial interest.

2. Two-Year Ban

- a. A former employee is prohibited for two years from representing anyone else before the government on a particular matter involving specific parties which was pending under his or her responsibility during the last year of government service.
- b. Standard is knew or “reasonably should have known” it was pending under supervision during last year.

b. Senior Employees

i. 18 USC § 207

- 1. One-year Ban - A former “senior” employee is generally prohibited from having contact with an employee of his or her former Federal agency, on behalf of another person or entity, concerning any official matter
- 2. In 2019, the basic rate of pay (does not include locality) is \$166,340. If an employee earns more than that, he or she is considered “senior” for purposes of the statutory prohibition.
- 3. This prohibition is tricky because many employees have personal relationships with former senior employees that both individuals wish to continue. Personal relationships and conversations are perfectly fine. There should be no talk of business.

c. All Attorneys (Consult the Rules in Your State(s))

i. VARCP 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

- 1. VARPC 1.11 prohibits a lawyer from representing a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation.
- 2. VARCP 1.11 prohibits a lawyer serving as a public officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, absent specific exception.

ii. VARCP 1.13 Organization as Client

- 1. Reminder that the Agency at which you are now employed is the client, not individual employees of the Agency.

iii. VARCP 1.6 Confidentiality of Information

1. Lawyers cannot reveal information protected by attorney-client privilege. This runs both ways. Lawyers can't take attorney-client privileged information from the Agency to the private sector or vice versa.

iv. VARCP 1.9 Conflict of Interest: Former Client

1. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of a former client unless both the present and former client after consultation.
2. This provision has the same goal as the Federal rules – they both prevent switching sides.

d. Example – VA Legal Ethics Opinion 1430 – Appearance of Impropriety: Former Local Government Attorney Hired by Firm Employed as Outside Counsel for Same Local Government Entity

- i. Facts: Local government uses an outside firm to handle certain legal matters. Attorney working for local government, who works closely with the outside firm, is offered employment by the outside firm. Ongoing litigation in which the attorney and the firm have been working closely together will continue for at least another 2 years.
- ii. Issue: Whether it would be appropriate for the law firm to employ the local government attorney, as long as the attorney is screened from any matters involving his former government agency, including any direct financial benefit accruing to the firm from the firm's involvement in the matter.
- iii. Analysis: The government attorney has been substantially involved in ongoing litigation, and the rules prohibit the attorney from personally participating in the same matter in his new capacity as a private attorney, even though adverse representation is not involved. However, nothing in the rules disqualifies the other attorneys in the firm from continuing to work on the local government's case, so long as the former government attorney doesn't work on the matter. Since there are no adverse interests involved, there is no imputed disqualification, and no formal screening is required.
- iv. Conclusion: The former government attorney may not work on the local government's case while employed at the new firm, but no formal screening is required. Other attorneys at the firm may continue to work on the case.

e. Involvement in Trade or Treaty Negotiations

i. 18 USC § 207

1. One-year Ban - A former employee may be prohibited from using non-public information concerning an ongoing trade or treaty negotiation to provide certain assistance to another person or entity concerning the

negotiation (even though the assistance does not involve contact with a Government employee)

2. Must have been involved in the negotiations within the last year of government service.
3. Applies to officers and employees and Members of Congress

f. Politically-Appointed Employees Who Were Required to Sign the Ethics Pledge

i. Executive Order 13770 (Trump pledge)

1. Applies to appointees on or after January 20, 2017
2. Within 5 years of termination of government employment, will not engage in lobbying activities with respect to former agency
3. Cannot engage in any lobbying activities with any executive branch official or SES for the remainder of the Administration.
4. Cannot engage at any time after termination of employment in activity on behalf of a foreign government that would have required registration under the Foreign Agents Registration Act of 1938 if conducted on January 20, 2017.
5. Cannot participate personally and substantially in matters directly and substantially related to former employer or clients from 2 years of date of appointment.
6. If a registered lobbyist before appointment, will not participate in any particular matter on which you lobbied during the last 2 years before appointment or participate in the specific area that matter falls.
7. No gifts from lobbyists – not necessarily an employment restriction, but something to keep in mind when accepting invitations if you move from private practice into government

ii. Former Executive Order 13490 (Obama pledge)

1. Sec 6. Of Executive Order 13770 revoked the Obama pledge
2. No further action to make appointees who were appointed before the Trump Administration sign the new pledge – these folks are in limbo

g. Members of Congress 18 USC § 207

i. Senators

1. Cannot have business contact with any other member of either the House or the Senate for 2 years after leaving office.

2. Former officers and “senior staff” are banned for 1 year from contacting only the Senate.
 3. All former employees, even if not senior, are prohibited from making certain lobbying contacts for 1 year after leaving.
- ii. House of Representatives 18 USC § 207
1. Cannot have business contact with any other member of either the House or the Senate for 1 year after leaving office.
 2. A former **Member** may not seek official action from any current Member, officer, or employee of **either the Senate or the House**, or from any current employee of any other legislative office (§ 207(e)(1)(B)).
 3. A former **elected officer** of the House may not seek official action from any current Member, officer, or employee of the House (§ 207(e)(1)(B)).
 4. A covered former employee on the **personal staff** of a Member may not seek official action from that Member or from any of the Member’s current employees (§ 207(e)(3)).
 5. A covered former employee of a **committee** may not seek official action from any current Member or employee of the employing committee or from any Member who was on the committee during the last year that the former employee worked there (§ 207(e)(4)).
 6. A covered former employee on the **leadership staff** (*i.e.*, an employee of any leadership office) may not seek official action from any current Member of the leadership of the House or any current leadership staff employees (§ 207(e)(5)).
 7. A covered former officer or employee of any other **legislative office** may not seek official action from a current officer or employee of that legislative office (§ 207(e)(6)).
- iii. Certain Congressional Staffers
1. If you meet a specific pay threshold, the restrictions also apply to you.
- iv. Notes – There are very many resources available on the House and Senate ethics websites to inform you. If you have specific questions, please contact the respective Ethics Committees for the House and Senate.