

General Law Handouts

A Tool for JBSA Separating and Retiring Employees (O-6 and below)

Post-Government Employment Restrictions

NOTE: This is general information. Each situation is different. Please contact the legal office for more information about your particular situation.

PURPOSE: In planning to leave the Department of Defense (DoD) for private employment, federal ethics laws may impact you while looking for a job and after leaving government service. Being alert to the general restrictions helps ensure a smooth and successful transition! These rules apply to Military Personnel E-1 through O-6 and Civilian Personnel who are not members of the Senior Executive Service.

LEGAL NOTICE: *Because restrictions are dependent on specific facts, and because this information is a summary of the rules, DoD personnel should contact your 502 ABW legal office to discuss their particular situation. DoD personnel served by other ethics offices should consult with their ethics officials. You may also consult with your personal attorney. Advice from ethics officials with respect to these matters is **advisory only**, and is provided in accordance with 5 C.F.R. § 2635.107/ 41 U.S.C. § 2104 (Procurement Integrity Act). Ethics officials are acting on behalf of the U.S. Government, and not as your personal representative. No **attorney-client** relationship is created.*

I. RESTRICTIONS FOR RETIRED MILITARY PERSONNEL AND RESERVISTS

A. Restrictions While Seeking Private Employment (BEFORE You Leave DoD)

SIMPLIFIED RULE: Once you have started *seeking employment* with a prospective employer, you may not take any official action that will affect the financial interests of that prospective employer.

RULE: An officer or employee may not *participate personally and substantially* in a *particular matter* that, to his knowledge, will have a *direct and predictable effect* on the financial interests of a prospective employer with whom the employee is *seeking* employment (5 C.F.R. § 2635.604).

Definitions:

- *Particular Matter:* Matters that involve deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons. These matters may include a contract, claim, application, judicial, or other proceeding, request for a ruling or other determination, controversy, investigation, or charge. A *particular matter* could even include legislation or policy-making that is narrowly focused on the interests of a discrete and identifiable group of parties or organizations, *e.g.*, DoD policy affecting only military aircraft manufacturers.
- *Personal* participation means that you are directly participating in the matter or that one or more of your subordinates, whom you are directing, is participating.
- *Substantial* participation means your participation must be of significance to the matter, which may be based on the amount and importance of your effort. One act, such as approving a critical step, may be substantial. Likewise, if you have to review and approve a certain step, and work would stop if you did not approve, then your participation is substantial, even though it may have seemed like a paperwork exercise to you. On the other hand, an entire series of peripheral acts might not be substantial.

If you merely have knowledge of the matter, routine or superficial involvement, or involvement on a peripheral or administrative issue, you are *not substantially* involved. If you are not involved in the substantive merits, you may not be substantially involved, even though you put a lot of time into the matter. If you are merely responsible for reviewing the matter for compliance with administrative or budgetary considerations, you are also not substantially involved. This ban remains for the lifetime of the *particular matter*.

- *Direct and Predictable Effect* means there must be a close, causal link between any action taken on the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A matter that may affect the financial interest only because of its effects on the general economy is not direct. There must

also be a real, not speculative, possibility that the matter will affect the financial interest, but the size of the gain or loss is not relevant.

- *Seeking* employment means if the above definitions apply to your situation, then you must complete a *disqualification* for those non-Federal entities with whom you are “seeking” employment. Seeking employment includes your inquiries regarding potential future employment, including negotiations; and your responses, other than an immediate and clear rejection, to an unsolicited communication regarding possible employment. “Seeking employment” does *not* include requesting a job application, but does include forwarding a resume. If you send a resume, you are considered to be seeking employment for 2 months unless either you or the company rejects the possibility of employment prior to that time.

- *Disqualification* means do not do any work on the task. DoD requires that you give a written disqualification to your supervisor (5 C.F.R. § 3601.105(c); section 2-204c of DoD 5500.07-R, Joint Ethics Regulation (JER)). The written disqualification must state that you will not participate in any official matter that has a direct and substantial effect on the prospective employer(s) that you identified. Withdrawal of Disqualification: When negotiations have terminated with a decision not to work for the prospective employer, you should withdraw your disqualification.

- *Supervisory Determination* means when you are seeking employment, but have not yet entered into negotiations with the prospective employer, your supervisor may authorize your participation in a matter if he or she determines that the Government's interests outweigh the concern that the integrity of the agency's program and operation may be questioned. The supervisor must consider at least six factors and must consult with JA before making the determination.

B. Restrictions While *Negotiating* Private Employment

SIMPLIFIED RULE: Once you have started *negotiating* with a prospective employer, you may not take any official action that will affect the financial interests of that prospective employer.

RULE: An officer or employee may not personally and substantially participate in a particular matter in which, to the officer or employee's knowledge, the officer or employee, his/her spouse, child, partner, organization in which the officer or employee serves as an officer, director, trustee, partner, or employee, or *organization with whom he or she is negotiating or has any arrangement concerning prospective employment* has a financial interest. An arrangement or negotiation for prospective employment is considered to create a financial interest of the officer or employee in the company with whom he or she is seeking employment. It has the same effect as if the employee purchased stock in the company (18 U.S.C. § 208).

Definitions:

- *Negotiating* means any discussion with the organization, or an agent, with the mutual view of reaching an agreement regarding possible employment. It is not limited to just discussing specific terms and conditions of employment in a specific position.

- See section I.A. for the definitions of *particular matter*, *personal* participation, *substantial* participation, and *direct and predictable effect*.

- *Disqualification*: See section I.A. for an explanation. Even if your supervisor has authorized your participation in a matter while seeking employment, you must disqualify yourself the moment you start negotiating.

- *Waiver* means the official responsible for your appointment to your position is the only one who can grant a waiver of this disqualification. He or she must find that your financial interest is not so substantial as to be deemed likely to affect the integrity of your services. The official must consult with SOCO before granting a waiver and allowing your participation in the matter. DoD recommends that the granting of waivers be carefully scrutinized in the light of all the facts and circumstances.

TIP: You must also be careful not to misuse government resources (such as official time, the services of other employees, equipment, supplies, and restricted information) in connection with job seeking. You may accept travel expenses from a prospective employer during the interview process if that is part of their normal hiring process. If the value of travel, meals, etc. paid by a prospective employer exceeds \$305 and you file an annual OGE 450 form, you must include the details on your form.

C. Representation to the Government

RULE: While in Government service, including on terminal, transition, or separation leave or associated TDY, you are prohibited from representing someone else, with or without compensation, and from accepting compensation for representational services provided by anyone, before any Federal agency or court regarding particular matters in which the United States is a party or has a direct and substantial interest (18 U.S.C. §§ 203 and 205).

Definitions:

- See section I.A. for the definitions of *particular matter*.
- *Interview Expenses* means you may accept travel expenses (meals, lodging, transportation) from a prospective employer if they are customarily provided in connection with *bona fide* employment discussions. If the performance of your official duties could affect a prospective employer, you must first be disqualified from acting on those matters. If these expenses exceed \$350, and you file a financial disclosure report (OGE Form 450), you must include them on your report.

D. Foreign Employment

SIMPLIFIED RULE: Unless you receive prior authorization from your Service Secretary and the Secretary of State, you may forfeit your military retired pay during the time you perform services for a foreign government.

RULE: The Emoluments Clause of the U.S. Constitution prohibits retired military personnel and reservists from receiving pay from *Foreign Governments* without Congressional authorization. This may extend to receipt of pay from a U.S. contractor or subcontractor for providing services to a Foreign Government and profit sharing at any commercial firm or business. In 37 U.S.C. § 908, Congress authorizes the Secretary of State and Secretary of the appropriate Military Department to approve such receipt of pay. Each Military Service has implementing procedures for the approval process. The penalty for violating the Emoluments Clause is suspension of retired military pay during the period of the violation. *Foreign Governments* may include educational and commercial entities that are substantially owned or controlled by foreign governments.

E. DoD Employment

RULE: To avoid the appearance of favoritism, 5 U.S.C. § 3326 prohibits the appointment of retired military personnel to civil service positions (including a non-appropriated fund activity) in any DoD component for 6 months after retirement. NOTE: The Secretary concerned may waive this prohibition. However, DoD Instruction 1402.1 requires the Secretary concerned to conduct intensive external recruitment before granting the waiver. This restriction has been temporarily waived during the current national emergency following the attacks of 9/11.

F. Employment during Terminal Leave

RULES:

1. Holding a civil office in state or local government: While on active duty (including terminal leave) military *officers* are prohibited by 10 U.S.C. § 973(b) from holding a "civil office" with a state or local government.
2. Civilian position in the U.S. Government: Military personnel on terminal leave are authorized to accept a civilian position in the U.S. Government and receive the pay and allowances of that position as well as their military pay and allowances. (5 U.S.C. § 5534a)
3. Remember that while on terminal leave, you are still an active-duty service member, and the restrictions that apply to you while on active duty still apply. For example: (a) Restrictions on political activities; and (b) Outside employment: If you are currently required to obtain permission prior to engaging in outside employment, that requirement will most likely carry over to you during terminal leave. Check with your supervisor.
4. Restriction on representing others to the Federal Government: During terminal leave, you may not receive compensation for the representation of anyone before an agency or court of the Federal Government on a matter in which

the United States is a party or has a substantial interest. This prohibition applies whether you provide representation yourself or you share in compensation from someone else's representation. 18 U.S.C. § 203. You also may not represent anyone before an agency or court of the Federal Government, with or without compensation, on a matter in which the United States is a party or has a substantial interest. 18 U.S.C. § 205. For military officers working on terminal leave, this means you may not interact or appear on behalf of your post-military employer before Federal employees – whether or not in a Federal workplace. Being present in Government offices on behalf of a contractor inherently is a representation. Military officers on terminal leave may work for the contractor, but only "behind the scenes" at a contractor office or otherwise away from the Federal workplace. Enlisted members are not subject to 18 U.S.C. §§ 203 or 205.

5. Prohibition on working for a foreign principal: Over and above the restriction of receiving compensation from a foreign government, there is also a specific prohibition of a public official from being or acting as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938 (expanding the restriction beyond foreign governments to include persons and corporations (18 U.S.C. § 219).

II. PROHIBITED COMPENSATION

GENERAL RULE: After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service. (Examples: Lobbying, consulting, and law firms). 18 U.S.C. § 203. This is separate and distinct from the procurement related compensation restrictions. This rule does not apply to former military enlisted personnel.

III. REPRESENTATIONAL RESTRICTIONS AFTER LEAVING DOD (18 U.S.C. § 207)

A. Personal Participation: Lifetime Representational Ban

SIMPLIFIED RULE: After you leave Government service, you may not represent someone else to the Government regarding *particular matters* that you worked on while in Government service.

RULE: Former Government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any Federal agency officer/employee or court in connection with a *particular matter* in DoD which the officer or employee *personally and substantially* participated, which involved a *specific party* at the time of the participation and representation, and in which the U.S. is a party or has a direct and substantial interest. 18 U.S.C. § 207(a) (1). This rule does not apply to former enlisted personnel.

Definitions:

- See section I.A. for the definitions of *particular matter*, *personal* participation, and *substantial* participation. This ban remains for the lifetime of the *particular matter*.
- *Specific Parties*, for this statute, means particular matters must also involve *specific parties*. This means that identifiable parties exist. For example, a procurement may be a *particular matter*, but it might not become one involving “specific parties” until the first bid is received.

B. Official Responsibility: 2 Year Representational Ban

SIMPLIFIED RULE: For 2 years after leaving Government service, you may not represent someone else to the Government regarding *particular matters* that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

RULE: For a period of 2 years after termination of Government service, former Government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of any Federal agency or court, in connection with a particular matter which the employee reasonably should have known was actually pending under his or her *official responsibility* within 1 year before the

employee left Government service, which involved a specific party at that time, and in which the U.S. is a party or has a direct and substantial interest. 18 U.S.C. § 207(a) (2). This rule does not apply to former military enlisted personnel.

Definition:

- *Official responsibility* means direct administrative or operating authority to approve, disapprove, or otherwise direct, Government actions. It includes a supervisor at any level having responsibility for the actions of a subordinate employee who actually participates in a matter.

Although you may have been disqualified from personally acting on a particular matter during your last year in the Government, this section of the statute will still apply to you if the particular matter was still under your official responsibility during that period. Example: Because you owned stock in IBM, you were disqualified from reviewing a particular contract with IBM, which was reviewed by one of your subordinates during your last year in the Government. Under this statute, because the particular matter was under your responsibility during your last year of service, you are prohibited from representing others regarding that contract.

C. Trade or Treaty Assistance: 1 Year Representational Ban

SIMPLIFIED RULE: For 1 year after leaving Government service, you may not aid, advise, or represent someone else regarding trade or treaty negotiations that you worked on during your last year of Government service.

RULE: For a period of 1 year after leaving Government service, former employees or officers may not knowingly represent, aid, or advise someone else on the basis of *covered information*, concerning any ongoing *trade or treaty negotiation* in which the employee participated personally and substantially in his or her last year of Government service. 18 U.S.C. § 207(b).

Definitions:

- *Trade negotiations* are those undertaken pursuant to the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 2902). Treaties are international agreements that require the advice and consent of the Senate.
- *Covered information* means agency records accessible to the employee but exempt from disclosure under the Freedom of Information Act.

D. Private Sector Information Technology Assignee

SIMPLIFIED RULE: For 1 year after leaving Government service, you may not represent, aid, counsel or assist in representing in connection with any contract with DoD.

RULE: For 1 year after the termination of your assignment from a private sector organization to DoD under the Information Technology Exchange Program, 5 U.S.C. chapter 37, no former assignee shall knowingly represent, or aid, counsel or assist in representing any other person in connection with any contract with that agency. 18 U.S.C. § 207(l). This rule does not apply to former military enlisted personnel.

E. Exceptions to Representational Bans

There are exceptions to the restrictions of 18 U.S.C. § 207. For additional details, please consult an ethics counselor. Common exceptions include: (a) Acting on behalf of yourself or acting on behalf of the U.S. Government; (b) Aiding, advising, and representing certain international organizations with prior Secretary of State certification. (c) Making statements based on special knowledge, if unpaid; (d) The lifetime representational ban does not apply to communications that furnish scientific or technological information with prior, published certification by the Secretary of Defense; and (e) There are special rules regarding testimony under oath.

F. Penalties and Injunctions

A violation may subject you to imprisonment for not more than 5 years, a criminal or civil fine, and a court order prohibiting you from engaging in the conduct in the future.

IV. REQUIREMENT TO REQUEST AN OPINION

If you will be receiving compensation from a defense contractor within two years of leaving DoD, you may be required to request a written opinion regarding the applicability of the post-employment restrictions to the activities you undertake on behalf the defense contractor. This requirement applies to any employee who participated personally and substantially in an acquisition with a value in excess of \$10M **and** who serves or served in: (1) an Executive Schedule position; (2) a Senior Executive Service position; (3) a general or flag officer position; or (4) in the position of program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation. You must obtain this written opinion prior to accepting compensation from the contractor.

Anyone may ask for a similar written opinion. Indeed, some employers require a written opinion before they will hire you. (They may use the term "30-day letter". The Joint Ethics Regulation allows legal offices 30 days to provide the written opinion -- but rest assured, our office strives to complete such reviews in just three days.)

To request a written opinion on how the post-government employment restrictions apply given your specific DoD service and a private position you have been offered, please submit a DD Form 2945 to your servicing legal office.

If a private employer has asked for a legal opinion before offering you a definite position, please complete the DD Form 2945 with whatever specific information you have -- and ask for a "Certification of No Conflict" when you submit it to your servicing legal office.

V. ADMINISTRATIVE REMINDERS

A. Use of Nonpublic Information: Even though you have left Government service, you still may not use nonpublic information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.

B. If you Accepted a Buy-Out: If you accepted a *buy-out* or separation payment, you have re-employment restrictions. Please contact your personnel office if you are unsure of those measures.

C. Questions? Please call if you have questions, even *after* you leave Government service, please call the DoD Standards of Conduct Office: (703) 695-3422. Fax: (703) 695-4970. E-mail: OSD.SOCO@MAIL.MIL or your local legal office. Thank you for your service to your country.

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