

POST-GOVERNMENT EMPLOYMENT RESTRICTIONS (O-7 and above)

Since you are leaving the Department of Defense, you should be aware of several statutory and regulatory prohibitions that restrict certain post-government employment.

SEARCHING FOR A JOB

Section 208(a) of title 18, United States Code, prohibits a federal employee from participating **personally and substantially**¹ in any particular government matter in which any private entity, with which an employee is negotiating or has an arrangement for future employment, has a financial interest.

In other words, you must refrain from taking any official action affecting any entity with which you are negotiating business, employment, or similar arrangements. You should also notify your supervisor of such negotiations. You should submit a disqualification notice whenever you have contact with such entities concerning the possibility of employment or other business arrangements unless the contact is initiated by another and you immediately reject it.

You are also subject to the DOD Joint Ethics Regulation(JER), DODDIR 5500.7R, which includes the Office of Government Ethics= Standards of Ethical Conduct for Employees of the Executive Service Branch regulation. The regulation is broader in scope than the above restriction. Like section 18 U.S.C. §208, an employee can avoid violating this restriction by refraining from participation in any government matters in which the prospective employer has a financial interest . The same notification procedures discussed above for section 18 U.S.C. §208 should be followed to avoid violating the JER restrictions.

The JER requires that before you begin **seeking employment**² you must disqualify yourself from taking any governmental action involving a prospective employer if you are aware you are, or may be, participating in a particular matter with that employer.

PROCUREMENT INTEGRITY ACT

The Procurement Integrity Act 41 U.S.C §423, restricts job searching activities and post-government opportunities.

Contacts by Offerors regarding Non-Federal Employment

Section (c) of the Act requires an agency official who is personally and substantially participating in an agency procurement (except for contracts under the Asimplified acquisition threshold≡) and who contacts, or is contacted by, a bidder or offeror in that competitive procurement regarding possible non-Federal employment for that official to:

(A) promptly report the contact in writing to the official's supervisor and to the agency Designated Agency Ethics Official DAEO (or designee) and

(B) either reject the possibility of non-Federal employment; or immediately disqualify himself/herself from further personal and substantial participation in the procurement until such times the agency has authorized the official requirements of section 208 of title 18, United States Code, and applicable agency regulations on the grounds that--

(1) the person is no longer a bidder or offeror in the Federal agency procurement;
or

(2) all discussions with the bidder or offeror regarding possible non-Federal terminated without an agreement or arrangement for employment.

Agencies are required to retain such reports of contacts for two years. Officials who fail to file the report can face civil penalties of up to \$50,000.00 plus twice the compensation received or offered. Further, bidders or offerors who engage in employment discussions with an official who has not filed the required notice can face civil penalties of up to \$500,000.00 plus twice the compensation paid or offered.

Compensation from Contractor

Section (d) of the Act bars a former Federal official from accepting **compensation**³ from a contractor as an employee, officer, director, or consultant **for one year** if the employee served in **certain positions**⁴ on contracts that were awarded in excess of ten million or if the employee personally made **certain decisions**⁵ valued in excess of ten million.

However, the Act provides that an employee may accept compensation from a division or affiliate of the prohibited contractor if the affiliate or division does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract in issue. See 41 U.S.C. 423(d)(2). Violations of this section carry the same civil and administrative penalties described above and apply to both former officials and contractors.

Protected Procurement Information

The Act prohibits present and former U.S. officials (includes members of the Armed Forces) from disclosing contractor bid or **proposal information**⁶ or source selection information before the

award of a Federal agency procurement contract. The Act also prohibits other individuals from obtaining such information before the award of a Federal agency procurement contract. Criminal, civil, and administrative penalties may apply for violations.

SWITCHING SIDES

Another statutory restriction that may limit the scope of activities in which you may engage on behalf of an employer is section 207 of title 18, United States Code. It was designed to curb the so-called "switching of sides" that occurs when a government employee leaves government service and then chooses to represent another person or entity on certain matters of interest to the government. **Although the statute does not prohibit the acceptance of any job in the private sector, it does restrict the scope of activities that can be undertaken on behalf of a private employer.** Section 207 includes two provisions that could apply to any former government employee.

First, 207(a)(1), prohibits you from knowingly making, with the intent to influence, any communication to, or appearance before, any officer or employee of any department, agency, court, or court-martial, of the United States, on behalf any other person in connection with a particular matter involving a specific party or parties⁷ in which you participated **personally and substantially** while in Government service. This is a **lifelong restriction** and extends to both formal and informal appearances before the government and all oral or written communications made with an intent to influence. This section of the statute does not, however, restrict federal employees from providing in-house assistance to an employer.

The representational activities that subsection 207(a)(1) bars are further limited to only those particular matters that involved a specific party or parties at the time of government service. For example, a draft request for contract proposals will become a particular matter involving a specific party or parties once potential contractors are identified to the contract. For subsection 207(a)(1) to apply, however, the federal employee's employer does not need to have been identified as a party to the matter prior to departing from government service. So long as some specific party (or parties) was identified, the statute applies.

Secondly, subsection 207(a)(2) is a **two-year restriction** that prohibits the same type of representational activities as subsection 207(a)(1), but applies to any particular matter involving a specific party or parties which was actually **pending**⁸ under the federal employee's **official responsibility**⁹

during the last year of his or her government service. Again the prohibition does not restrict in-house assistance to an employer. This two-year restriction begins upon release from active duty. (Note that the communications or appearances prohibited by subsections 207(a)(1) and (a)(2) require that they be made with the intent to influence a government official.)

As a flag officer, you are also subject to section 207(c) which imposes two further restrictions on former senior officials. This subsection prohibits you, for 1 year following your release from active duty, from knowingly making, with the intent to influence, any communication to, or appearance before, employees of the department or designated components of the department in which you served during your last year of military service, on behalf of any other person seeking official action on a matter. For purposes of section 207(c), the Department of the Defense is divided into a parent department and various components. The implementing regulation provides:

An eligible former senior employee who served in a parent department or agency is not barred by 18 U.S.C. 207(c) from making communications or appearances before any employee of any designated component of that parent, but is barred as to employees of the parent and of other components that have not been designated. An eligible former senior employee who served in a designated component of a parent department or agency is barred from communicating to or making an appearance before any employee of that component, but is not barred as to any employee of the parent or of any other component.

The designated DOD components are the Departments of the Navy, Army and Air Force, Department Information Systems Agency, Defense Threat Reduction Agency, National Imagery and Mapping Agency, and National Security Agency. Section 207(c) restricts your communications to, or appearances before, employees of the Navy and any other component in which you served during your last year of service. It does not restrict your contacts with employees of other designated components. You should also remember that other statutes discussed in this document may restrict your communications to the designated components.

Like the restrictions of subsections 207(a)(1) and 207(a)(2), subsection 207(c) does not prohibit behind-the-scenes assistance. Unlike the restrictions of subsections 207(a)(1) and 207(a)(2), however, this restriction applies without regard to whether you participated in, or had responsibility over, the matter which official action is sought. Section 207(c) also applies to matters that first arise after you leave the Government and which may not involve a specific party.

Finally, for 1 year after you are released from active duty, you may not, by virtue of subsection 207(f), represent, aid, or advise a foreign entity with the intent of influencing an officer or employee of the U.S. Government in carrying out his or her official duties. For purposes of this subsection, a foreign entity includes the government of a foreign country and any person or group of persons exercising sovereign political jurisdiction over any country or any part of a country. The term also includes foreign political parties and any organization or group of individuals engaged in, or seeking to engage in, the establishment, administration, or control of a foreign country or government.

INSIDE INFORMATION

The JER prohibits Federal employees from using nonpublic information to further their own private interests or those of another, whether through action, advice, or recommendation. Non-public information includes information the employee knows or reasonably should know has not been made available to the general public, e.g., that which is exempt from disclosure under the Freedom of Information Act or otherwise protected from disclosure by law or regulation. Therefore, while you can capitalize on your professional skills and knowledge, you can not use nonpublic information to do so.

TERMINAL LEAVE

If there is no bar to your employment with a specific defense contractor, generally speaking, you may begin working for, and receive compensation from, a defense contractor while you are on terminal leave. However, because you are still technically in the military while on terminal leave, the following limitations apply.

a. Filers of financial disclosure reports (SF-278 or OGE-450), must obtain written permission from your Agency Designee⁹ before you begin employment with a defense contractor or other prohibited source.⁹ Your Agency Designee is your first supervisor in the chain of command who is a commissioned military officer or civilian above GS/GM-11. Unless assigned to a remote location, the Agency Designee must consult with the applicable ethics counselor when considering your request. For any military officer in grade O-7 or above who is in command (and any civilian Presidential appointee confirmed by Senate) the Agency Designee is his or her Ethics Counselor.

b. 18 U.S.C. § 205 prohibits a Federal employee from representing any entity other than the United States before any Federal agency. This provision applies while you remain on terminal leave.

c. You may not accept **Acivil office**¹⁰ with a State or local government, nor may you perform the duties of such office while on terminal leave.

ACCEPTING EMPLOYMENT FOR A FOREIGN GOVERNMENT OR ENTITY

Accepting employment as an agent for a foreign government, while in a terminal leave or retired status, requires Secretary of the Navy and Secretary of State consent. Failure to obtain this consent may result in the withholding of your retired pay. The term Aforeign government¹¹ may also include foreign corporations, businesses, universities, or other entities owned, operated, or controlled by a foreign government. Additionally, a former member desiring employment with a foreign government or any foreign business interest may also be required to file with the Attorney General as an agent of a foreign principal.

EMPLOYMENT IN DOD

To avoid appearances of favoritism or preferential treatment, 5 U.S.C. § 3326 prohibits the appointment of a retired member of the Armed Forces to a civil service position (including a nonappropriated fund activity) in DOD or a component thereof for 180 days after retirement unless:

- a) the appointment is approved by the Secretary concerned or his designee;
- b) the retiree is appointed to a position for which the basic rate of pay has been increased under 5 U.S.C. § 5303 (authorizing special pay for positions for which the recruitment efforts are significantly handicapped) ; or
- c) a state of national emergency exists.

In addition, prior to Secretarial approval of any such appointment actions must be taken to ensure that:

- a) full consideration, in accordance with placement and promotion procedures of the department concerned, was given to eligible career employees;
- b) when selection is by other than certification from an established civil service register, the vacancy has been publicized to give candidates an opportunity to apply;
- c) qualification requirements for the position have not been written in a manner designed to give advantage to the former member; and
- d) the position has not been held open pending the retirement of the former member.

The above statute has been implemented in the Department of Defense by DODDIR 1402.1 of January 21, 1982, Employment of Retired Members of the Armed Forces. Under this directive, the Secretary may not approve such an appointment unless the appointment is to a position for which:

- a) equally well-qualified personnel are not available among those required to be considered under applicable in-service placement and promotion procedures;
- b) employee candidates are not available among those required to be considered in priority placement programs or among those on applicable reemployment priority lists or under the OPM Displaced Employee Program; and
- c) intensive external recruitment efforts have failed to produce any better qualified candidates.

In the Navy, the hiring activity or servicing personnel office prepare the waiver requests. The approval authority for waivers for positions GS-8 or higher rests within the Office of the Assistant Secretary of the Navy for Manpower and Reserve Affairs (Director, Program Development and Direction Division,

Deputy Assistant, Secretary of the Navy, Civilian Personnel Policy/Equal Employment Opportunity).
For positions GS-7 and below, requests may be approved by regional personnel offices.
Nonappropriated fund activities have authority to approve their own requests.

- o To participate **personally and substantially** means - through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he.. or any person or organization with which he is negotiating or has any arrangement concerning employment, has a financial interest.

- ² An employee has begun **seeking employment** if he or she has, directly or indirectly
- a. Engaged in Anegotiations≡, i.e. discussions or communication with another person. This is the similar conduct that triggers a section 208 violation, as discussed above.
 - b. Made an unsolicited communication to any person, or such person=s agent or intermediary, regarding possible employment with that person. Submission of a resume or other proposal to an entity or person who is directly affected by the performance or nonperformance of the employee=s duties constitutes seeking employment.

(NOTE: The phrase Aseeking employment≡ does not encompass a mere requesting for a job application, or submission of a resume or other employment proposal, to a person affected by the performance or nonperformance of the employee=s duties only as part of an industry or other discrete class. An employee will be considered to have begun seeking employment, however, upon receipt of any response indicating an interest in employment discussions.)

- c. Made a response other than rejection to an unsolicited communication from any person, or such person=s agent or intermediary, regarding possible employment with that person. A response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment proposal.

Under the JER, an employee is **no longer seeking employment** when:

- a. The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated, or
- b. Two months have expired after the employee=s unsolicited communication and the prospective employer has not responded.

- ³ **ACompensation@** is defined as ...wages, salaries, honoraria, commissions, professional fees, and any other
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form of compensation, provided directly or indirectly for services rendered. Compensation is indirectly provided if it is paid to an entity other than the individual, **specifically in exchange for services provided by the individual.**

⁴ **Certain positions include :**

1. Served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source
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selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000 ;and

2. Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor.

⁵ **Certain decisions** include:

1. A decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor.

2. A decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;

3. A decision to approve issuance of a contract payment or payment or payments in excess of \$10,000,000 to that contractor; or

4. A decision to pay or settle a claim in excess of \$10,000,000 with that contractor.

See 41 U.S.C. 423(d)(1)

⁶ The Act defines the terms Acontractor bid or **proposal information**≡ to include any of the following information submitted to a Federal agency as part of, or in connection with, a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Cost or pricing data (as defined by section 2306a(h) of title 10 United States Code, with respect to procurements subject to that section, and section 304A(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h), with respect to procurements subject to that section).

(B) Indirect costs and labor rates.

(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(D) Information marked by the contractor as Acontractor bid or proposal information≡, in accordance with applicable law or regulation.

See 41 U.S.C. 423(f)(1)

Further , the Act defines Asource selection information≡ as any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal

agency procurement contract, if that information has not been previously made available to the public or disclosed publically:

(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.

(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or list of those proposed costs or prices.

(C) Source selection plans.

(D) Technical evaluation plans

(E) Technical evaluations of proposals.

(F) Cost or price evaluations of proposals.

(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

(H) Rankings of bids, proposals, or competitors.

(I) The reports and evaluations of source selection panels, boards, or advisory councils.

(J) Other information marked as A source selection information⁷ based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates. See 41 U.S.C. 423(f)(2).

⁷ **AParticular matters[@]** include any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, or arrest. Not included are rule-making, the formulation of general policy, or other actions of general applicability in which you were involved unless the outcome may have a direct and predictable effect on a particular person. Thus, in most instances, you may represent a private employer in connection with a matter involving a specific application of policies or rules that you helped formulate.

⁸ **Actually pending**[®] means that the matter was in fact referred to, or under consideration by, persons within your area of responsibility, not that the matter merely could have been referred.

- ⁹ For purposes of subsection 207(a)(2), **Official responsibility**® is defined as a 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.≡
- ¹⁰ A **Acivil office**® is a position in which some portion of a State=s sovereign power is exercised. For example, a county clerk position has been held to be a Acivil office.≡