



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

1200 New Jersey Ave. S.E.
Washington, D.C. 20590

APR 27 2016

MEMORANDUM TO DEPARTMENTAL EMPLOYEES

FROM:


Judith S. Kateta
Deputy General Counsel and Designated Agency Ethics Official

SUBJECT: Guidance on Seeking or Negotiating for Employment and Post-Government Employment Restrictions

The purpose of this memorandum is to provide updated guidance to DOT employees regarding seeking or negotiating for employment with a non-Federal entity, and the restrictions on post-Government employment activities.

If you have any questions about this memorandum, please contact the OST Ethics Office at (202) 366-9150, or your Ethics Official listed on DOT's website, www.dot.gov/ethics.

Attachments

**U. S. DEPARTMENT OF TRANSPORTATION
GUIDANCE ON NEGOTIATING FOR FUTURE EMPLOYMENT AND POST-
EMPLOYMENT RESTRICTIONS**

APRIL 2016

This document is intended to assist employees with navigating the rules on negotiating for future employment and the post-Government employment restrictions. However, application of the rules is highly fact-dependent. Departing employees should consult an Ethics official to determine how these rules apply in specific circumstances. (See Attachment 1 for a list of Ethics Officials).

PART I: RESTRICTIONS BEFORE LEAVING FEDERAL SERVICE

If you are planning to leave the Federal government and seek a job with a private sector employer, a nonprofit organization, or state or local government, you need to know how the federal ethics laws may affect your job search. The Standards of Conduct for Executive Branch Employees and criminal conflict of interest statutes prohibit 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 he or she is seeking employment or with whom he or she has an arrangement for future employment. See 18 USC § 208.

A. General Considerations

Current employees who have begun seeking or negotiating for subsequent non-federal employment must immediately stop any participation in an official matter that involves the prospective employer as an identified party, such as a grant, contract, application, audit, investigation, or lawsuit and sign a recusal. The recusal also must extend to any particular matter of general applicability that affects the discrete industry, economic sector, or other defined class of organizations in which the prospective employer operates, such as a legislative initiative, regulatory proposal, or policy determination that affects the prospective employer as a member of such class. In addition, if you participate in certain procurement matters, you may be subject to additional rules, including the duty to report employment contacts made by you or a bidder or offeror.

B. Seeking Employment

The rules define “seeking employment” broadly. Employees will be considered to be seeking employment even before job negotiations. For example, sending a resume or having contacts about possible employment (other than requesting a job application), are generally considered seeking employment.

You may occasionally receive unsolicited overtures from prospective employers. You are seeking employment if you make a response other than rejection to such an unsolicited offer. The

April 2016

ethics regulations provide that “a response that defers discussion until the foreseeable future does not constitute rejection” of an unsolicited employment overture.

C. Negotiations

Negotiating for future employment generally begins when an employee begins actual discussions with an employer regarding potential employment. Negotiating is not limited to discussions of specific terms and conditions of employment. Once negotiation has begun the criminal conflict rules apply and an employee must definitely be recused from working on any matters that could affect the prospective employer. An employee who continues to work on such matters while negotiating for employment could be subject to a \$50,000 fine, five years of imprisonment, or both. If you accept a job outside the Government, you must continue to refrain from working on matters that would affect the financial interests of your prospective employer until you leave the Government.

D. Using a Headhunter or Employment Search Firm

Employees who use an intermediary such as a headhunter or employment search firm should make sure they explain their Federal status to the firm. If an employment search firm contacts a prospective employer on behalf of a Federal employee, the employee is NOT considered to be seeking employment until the search firm tells the employee that a particular company was contacted. Therefore, an employee could specify to a search firm that the firm should only communicate serious offers to the employee to avoid the need to recuse from every potential employer that the firm contacts.

E. Recusal and Screening Arrangement

When negotiating for future employment begins, an employee must execute a written recusal and screening arrangement to be recused from participation in those matters affecting the potential employer. Written recusals, signed by the employee and developed with the help of an Agency Ethics Official, are essential for all employees. All appointees who have been confirmed by the Senate (PAS employees) must develop and file their recusals with the Designated Agency Ethics Official (Judy Kaleta). Recusals remain in place until the employee leaves the Government or ceases negotiations with the employer.

If you are required to file an OGE 278 Public Financial Disclosure Report, you must notify your agency ethics official of any negotiation for, or agreement of future employment or compensation with, a non-federal entity within three business days after commencement of the negotiation or agreement. You must submit a written recusal statement with your notification whenever there is a conflict of interest or appearance of a conflict of interest with the entity.

A sample Recusal and Screening Arrangement-Negotiating for Employment is attached to this Guidance as Attachment 2. This process is important to ensure that employees do not work on matters involving a prospective employer.

F. Interview Expenses

An employee may accept meals, lodging, transportation, and other benefits customarily provided by a prospective employer in connection with an employment interview, including travel to and from the interview.

G. Restrictions Applicable to Employees who Work on Procurement Matters

The Procurement Integrity Act, at title 41 U.S.C. § 2101 et seq., also contains a restriction concerning negotiations for future employment. Any employee who personally and substantially participates in an agency procurement over \$150,000 must report in writing to his or her supervisor, and to the Designated Agency Ethics Official (Judy Kaleta) or the appropriate Ethics Official in the operating administration, any contacts with or by a bidder or offeror regarding possible non-Federal employment. (See Attachment 1 for a list of DOT Ethics Officials). The employee making the report must either reject the possibility of non-Federal employment, or recuse him or herself from further personal and substantial participation in the procurement until the agency authorizes the employee to resume participation. (See Attachment 2).

PART II: RESTRICTIONS AFTER LEAVING FEDERAL SERVICE

All employees who leave Government service are subject to certain restrictions on representing a third party back to their former agency based on either their position while they were a Government employee or based on certain official actions they took while working for the Government. See 18 U.S.C. § 207.

The purpose of the law is to promote public confidence in the fairness of Government proceedings by preventing an employee from “switching of sides” in their representation on matters they were involved with during Federal service. The restrictions do not bar anyone, regardless of grade or position, from accepting employment with any private or public employer after their Government service ends and in most cases do not prohibit the sharing of public information with such employers. The law only prohibits individuals from engaging in certain activities on behalf of others before the Federal Government.

A. Definitions Common to all Post-Employment Rules

Federal statutes and regulations address post-employment restrictions that apply to employees leaving Federal service. Generally, these statutes and regulations prohibit certain former employees from representing anyone before their former operating administration or the Office of the Secretary of Transportation (OST). Representing is defined as knowingly communicating- orally or in writing- with the intent to influence, with any Federal employee on behalf of any person other than you.

A communication occurs when a former employee imparts or transmits information of any kind - including facts, opinions, ideas, questions or direction -- to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means.

An appearance occurs when a former employee physically presents him or herself before an employee of the United States, in either a formal or informal setting. Although an appearance also may be accompanied by certain communications, an appearance need not involve any communication. Mere presence in a meeting may be considered an appearance.

A communication or appearance is made with the intent to influence when made for the purpose of either (i) seeking a government ruling, benefit, approval or other discretionary government action or (ii) affecting government action in connection with an issue or aspect of a matter which involves an appreciable element of an actual or potential dispute or controversy.

Intent to influence is generally not present where a former employee makes a routine request for a publicly available document or inquires about the status of a matter, or makes factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action.

These restrictions are representational restrictions only. Former employees may always provide “behind the scenes” advice to a particular contractor or organization, even on matters in which they participated personally and substantially or were under their direct supervision, as long as they do not act as the company’s representative before their former agency through appearance or communication. Although former employees are unable to telephone, sign their name to a letter addressed to, or attend a meeting with, a DOT official, they may legally tell an employer the name of the DOT employee to call or write, or with whom to meet.

B. Restrictions Based on Prior Government Work or Supervision

All Employees: Permanent Restriction: A former employee may not represent anyone before DOT, including any of its operating administrations or OST, or before any U.S. court, court-martial, or any other agency or department, concerning any particular matter (e.g., a contract, grant, inspection, enforcement action, court or administrative case, etc.) in which he or she participated personally and substantially while in Federal service, and which involved a specific party or parties. This does not prohibit a former employee subject to this restriction from providing “behind-the-scenes” aid and advice.

EXAMPLE: Chris is an Engineer in the Federal Railroad Administration (FRA). While at FRA, he worked on the testing of certain rail cars. Chris leaves FRA to go work for a railroad. He may never represent his new employer before FRA, any other operating administration, or OST, or any other Federal department or agency on the specific testing matters he worked on while at FRA. He can, however, provide his new employer with aid and advice using his expertise in rail car testing, so long as he does not disclose non-public information.

Supervisors: Two-Year Restriction: A former employee may not represent anyone before DOT, including any of its operating administrations or OST, or before any U.S. court, court-martial, or any other agency or department, for two years after leaving Federal service concerning any

particular matter which was pending under his or her official responsibility during his or her last year in Federal service, and which involved a specific party or parties. This does not prohibit a former employee subject to this restriction from providing “behind-the-scenes” aid and advice.

EXAMPLE: Sally, a Federal Aviation Administration (FAA) career supervisor, oversees all employees working on an airline inspection, though she did not herself work on the inspection personally. The inspection occurred within the year before Sally left FAA. Sally would not be able to represent anyone before FAA, any other operating administration, or OST, or any other Federal department or agency concerning that inspection for two years after leaving Federal service. However, if Sally worked personally and substantially on that inspection, she would also be subject to the permanent restriction.

C. Restrictions Based on Employee Status

Senior Employees: One-Year Restriction: Each former senior employee who worked in OST or the Pipeline and Hazardous Materials Safety Administration (PHMSA) and who was paid at the current annual rate of basic pay of \$160,111.50 or more (exclusive of any locality pay) may not represent anyone in any matter pending before any of these two organizations for one year after leaving Federal service. Each former senior employee who worked in any other operating administration and who was paid at the current annual rate of basic pay of \$160,111.50 or more (exclusive of any locality pay) may not represent anyone in any matter before his or her former operating administration for one year after leaving Federal service.

However, these restrictions do not apply to a former senior employee who is representing a State or local government entity or an accredited institution of higher education as an employee of that entity or institution.

EXAMPLE: Two months after resigning from DOT, Tanique, a former Deputy Assistant Secretary, who was a career official with an annual salary of more than \$160,111.50, is asked to represent a domestic airline in an enforcement matter pending in OST. Tanique did not work on the enforcement matter while at DOT and the matter was never pending in OST. Tanique may not represent the airline before an OST employee in connection with the compliance matter. She has ten months remaining on the one-year restriction applicable to senior employees.

PAS and Senior-Level Appointees Leaving Federal Service: As a condition of their employment, appointees of the Obama Administration are required to sign an Ethics Pledge pursuant to Executive Order 13490 (January 21, 2009, “Ethics Commitments by Executive Branch Personnel”).

Thus, PAS and former Senior-Level appointees who worked in OST or PHMSA and who were paid at an annual rate of basic pay of \$160,111.50 or more (exclusive of any locality pay) may not represent anyone in any matter pending before any of these two organizations for two years after his or her appointment ends.

Each other former PAS or Senior-Level appointee of the Obama Administration who worked in any other Operating Administrations and was paid at an annual rate of basic pay of \$160,111.50 or more (exclusive of any locality pay) may not represent anyone in any matter before his or her former Operating Administration for two years after his or her appointment ends.

However, these restrictions do not apply to a former PAS employee or other Senior-Level appointee who is representing a State or local government entity or an accredited institution of higher education as an employee of that entity or institution

Appointees Leaving Federal Service to Lobby: A former appointee of the Obama Administration may not lobby¹ any covered executive branch official, including senior White House officials, PAS employees, and Schedule C employees, or any non-career Senior Executive Service appointee, for the remainder of the Obama Administration.

These restrictions do not prohibit a former appointee from providing “behind-the-scenes” aid and advice.

EXAMPLE: Two months after resigning from DOT, a former Deputy Assistant Secretary, who was an appointee of the Obama Administration with an annual salary of more than \$160,111.50, is asked to represent a domestic airline in an enforcement matter pending in OST. The former Deputy Assistant Secretary did not work on the enforcement matter while at DOT and the matter was never pending in her office. The former Deputy Assistant Secretary may not represent the airline before an OST employee in connection with the compliance matter. She has one year and ten months remaining on the two-year restriction applicable to Senior-Level appointees of the Obama Administration.

D. Restrictions Applicable to Attorneys Leaving the Government

Attorneys who leave the Federal Government need to be aware that, depending on the specific rules of the jurisdiction or jurisdictions where the attorneys hold Bar membership, they may face additional restrictions in working on such matters.

Under the American Bar Association (ABA) Model Rules of Professional Conduct, an attorney cannot 1) reveal any information relating to the representation of a Government client without informed consent of the appropriate agency; 2) represent a new client if there is a conflict of interest with the former Government client; 3) represent a new client in the same or substantially related matter where the new client’s interests are adverse to the former Government client; 4) use or reveal information relating to the representation of the Government to the Government’s disadvantage; or 5) **work on any matter, even behind the scenes and not adverse to the Government’s interests**, if the attorney worked on the matter personally and substantially during Government employment. See Model R. Prof. Conduct 1.6, 1.7, 1.9, 1.11 (ABA 2013).

¹ "Lobby" and "lobbied" shall mean to act or have acted as a registered lobbyist. "Registered lobbyist or lobbying organization" shall mean a lobbyist or an organization filing a registration pursuant to section 1603(a) of title 2, United States Code, and in the case of an organization filing such a registration, "registered lobbyist" shall include each of the lobbyists identified therein. See Exec.Order No. 13490, at Sec.2(e),(f) (January 21, 2009),

Many states have adopted the ABA Model Rules, but it is recommended that attorneys leaving the Federal Government check with each jurisdiction where they are barred to ensure they are in compliance with their state's rules.

E. Restrictions Applicable to Employees who Work on Procurement Matters

The Procurement Integrity Act, at title 41 U.S.C. § 2101 et seq., also contains post-employment restrictions. Under these restrictions, certain former employees are prohibited from accepting compensation from a contractor for serving as an employee, officer, director, or consultant of that contractor for one year after:

- having served, at the time of selection of the contractor or the award of a contract to that contractor, as a procuring officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team on a contract over \$10,000,000 awarded to that contractor;
- having served as the program manager, deputy program manager, or administrative contracting officer for a contract over \$10,000,000 awarded to that contractor; or
- having personally made the agency decision to:
 - award a contract, subcontract, modification, task order, or delivery order worth over \$10,000,000 to that contractor;
 - establish overhead or other rates valued over \$10,000,000 for that contractor;
 - issue contract payments over \$10,000,000; or
 - pay or settle a claim over \$10,000,000 with that contractor.

The Procurement Integrity Act also prohibits a former employee who had access to contractor bid and proposal information, or to source selection information, from knowingly disclosing that information before the award of a government contract to which the information relates.

EXAMPLE: Jerry is a former DOT Contracting Officer who now works for ABC Contractor. While at DOT, Jerry had access to source selection information for Contract X, including ABC's bid on Contract X. Jerry cannot disclose that source selection information to ABC Contractor before the award of Contract X.

F. Restrictions Applicable to Former Employees who testify in Court in Matters Involving DOT

The DOT regulations (49 CFR Part 9) limit, and in some instances prohibit, former DOT employees from providing testimony in legal proceedings. These regulations describe procedures that must be followed when a former DOT employee is served with any request or subpoena, or who voluntarily decides to provide testimony in legal proceedings concerning matters that the former employee worked on while at DOT.

Any former employee in this situation should immediately contact the Chief Counsel's Office in the Operating Administration where he or she worked, or in the case of former employees in OST, the Office of the General Counsel, Assistant General Counsel for Litigation.

G. Restrictions Applicable to Employees Engaged in Trade and Treaty Negotiations

Employees who personally and substantially participate in ongoing trade or treaty negotiations on behalf of the United States within one year before leaving Federal service, and who have access to information which by law cannot be disclosed, may not for one year after leaving Federal service represent, aid, or advise any other person concerning those negotiations using that information. This restriction includes a one-year prohibition against providing “behind-the-scenes” aid and advice.

H. Restrictions Applicable to Employees Leaving Federal Service to Work for Foreign Entities

Federal law and regulations impose additional detailed restrictions that prohibit certain former senior employees, for one year, from representing or advising foreign governments and certain other foreign entities in certain matters involving the Federal Government. Employees to whom these restrictions might apply are strongly encouraged to consult with an Ethics Official. This restriction includes a one-year prohibition against providing “behind-the-scenes” aid and advice.

I. Sanctions Applicable to Violations of Post-Employment Restrictions

Pursuant to 18 U.S.C. § 207, a former DOT employee who violates these post-employment restrictions (contained in 5 CFR Part 2641) could be subject to a \$50,000 fine, five years of imprisonment, or both. Violations of the post-employment restrictions may also result in injunctions and prohibitions on future representations to DOT.

Pursuant to Executive Order 13490, appointees of the Obama Administration who violate the Ethics Pledge could be subject to government sanction, which could include debarment, the initiation of civil judicial proceedings, and the pursuit of declaratory, injunctive or monetary relief.

Pursuant to the Procurement Integrity Act (41 U.S.C. § 2101 et seq.), a DOT employee who violates the restrictions laid out in the Act could be subject to a fine, five years of imprisonment, and/or administrative penalties, including debarment.

PHMSA Deputy Ethics Official: Vasiliki Tsaganos vasiliki.tsaganos@dot.gov x60639
Contact: Brandon Hollingshead brandon.hollingshead@dot.gov x60845

SLSDC Deputy Ethics Official: Craig Middlebrook craig.middlebrook@dot.gov x60105
Contact: Carrie Lavigne carrie.lavigne@dot.gov (315) 764-3231

OIG Deputy Ethics Official: Seth Kaufman seth.kaufman@oig.dot.gov x62462
Contact: Fritz Swartzbaugh fritz.swartzbaugh@oig.dot.gov x65511

**U.S. DEPARTMENT OF TRANSPORTATION SAMPLE RECUSAL AND SCREENING
ARRANGEMENT - NEGOTIATING FOR EMPLOYMENT**

Instructions for Filling Out This Form:

Upon a determination that a conflict of interest exists, an Agency Ethics Official shall execute this arrangement with the employee. Once executed, the Agency Ethics Official shall distribute copies of this arrangement to the employee immediately after execution, and if selected, a screener.

FROM: [Employee]

DATE:

TO: [Agency Ethics Official]

This is to advise that I am seeking employment with _____ and thus, I am recusing myself from personal and substantial participation in any particular matter that would have a direct and predictable effect upon the financial interests of that organization.

____ I have notified my immediate supervisor of this recusal, who will screen any matters from this organization for me.

____ I have consulted with an Agency Ethics Official and made alternate arrangements in the event that any matter in which I am recused from comes to my attention.

I understand that this recusal shall remain in place until I cease employment negotiations with this organization or in the event I am not selected for a position.

/s/ _____
Signature of Employee

/s/ _____
Signature of Agency Ethics Official