

THE ETHICS OF HIRING GOVERNMENT EMPLOYEES

Six Basic Rules to Follow

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The sad plight of Ms. Darleen Druyun at the Department of Defense and Mr. Michael Sears at Boeing highlights the need for government contractors to be extremely careful in their employment discussions with government employees. The statutes and regulations which govern this area of the law are complex—they include criminal statutes, the Procurement Integrity Act, and a host of regulations promulgated by the Office of Government Ethics (OGE). Adherence to a few basic rules, discussed below, can help keep most government contractors well out of harm's way. Be aware, however, that these are only the general rules—each hiring situation is different and may require detailed analysis and advice.

Rule #1—

Don't discuss employment with an existing government employee who has a personal and substantial role to play in awarding, modifying or administering your firm's government contracts.

This is the rule which Ms. Druyun and Mr. Sears violated. It ruined her career and will require that she spend nine months in prison as a convicted felon; according to the December 9, 2004 issue of the *Wall Street Journal*, Ms. Druyun also incurred legal bills "in the hundreds of thousands of dollars." Mr. Sears

was also fired from Boeing and was convicted of criminal misconduct, for which he was recently sentenced to four months in prison and fined \$250,000. This rule does have one exception—such discussions can proceed if the government employee makes full written disclosure of the employment contact to his or her superior and recuses himself from further personal and substantial participation in such procurement activities.

Rule #2—

Prior to hiring any government employee, always ask for, review and understand the ethics opinion provided to a former government employee upon his departure from government service.

Upon leaving government service, every government employee is entitled to request and receive an ethics opinion which identifies the limitations which may apply to the employee's work in the private sector. As a prospective employer, you can—and always should—ask to see this ethics opinion before you decide to hire any former government employee. If the prospective employee does not have an ethics opinion, ask him or her to get one before continuing with any further employment discussions.

Rule #3—

Do not hire or pay any compensation to a procurement official who was responsible for contract actions with your company with a value of greater than \$10 million for at least a one-year period after the official has left government service.

The source of this rule—which is specific to procurement officials who take actions above the \$10 million threshold—is the Procurement Integrity Act. The rule essentially requires a “cooling off” period of one year before a company affected by the procurement official’s actions can compensate that official. A procurement official includes, but is not limited to, the following job categories: procuring contracting officer, source selection authority, member of source selection evaluation board, chief of financial or technical evaluation team, program manager, deputy program manager, or administrative contracting officer. For more details, see FAR 3.104-3.

Rule #4—

Never ask a former government employee to lobby or appear before her former government agency upon your company’s behalf concerning a particular matter in which the former government employee participated personally and substantially.

This is one variant of the “revolving door” rule codified in a federal criminal statute, 18 U.S.C. Section 207. This rule operates as a lifetime ban, and is intended to prevent “influence peddling” by former government officials before their old agencies (and friends). The phrases “particular matter” and “personal and substantial participation” are legal

terms which limit, to some extent, the sweeping effects of this rule but any government contractor should be extremely wary about tasking any former government employee to appear before her old agency.

Rule #5—

For at least two years after a former government employee has left government service, do not ask that employee to lobby or appear before his former government agency upon your company’s behalf concerning a particular matter which was pending under that employee’s official responsibility during his last year of government service.

This is another (and complicated) variant of the “revolving door” rule, but unlike Rule #4, this ban applies only for two years, not a lifetime. However, this rule is also triggered by a somewhat lower level of involvement by the former government employee—personal and substantial involvement is not required for the two-year ban to kick in. Rather, the two-year ban applies if the matter was only pending under the former government employee’s official responsibility. The basic moral of the story for government contractors remains the same—don’t send your new employee back to his former agency to lobby on your company’s behalf unless and until you have confirmed that such activity is lawful (which it probably isn’t).

Rule #6—

If you have hired a senior government employee (basically, SES level or above), do not ask that employee to appear before her former agency with the intent to influence that agency for a one-year period.

This is the third main variant of the “revolving door” rule, and it applies only to senior government officials. Basically, such officials can’t go back to their former agencies for any reason for a one-year period after they have left that agency. While purely social visits are probably acceptable, the rule prohibits, among other things, communications with the intent to influence. Since social communications can be misconstrued, the safer approach is for the former senior official to stay completely away from her agency for a one-year period.

While there are exceptions and other restrictions which govern this complex area of the law, government contractors who follow these basic rules should stay out of trouble in their employment discussions with government personnel. Similarly, by adhering to these basic rules, former government officials now in the private sector should manage to enjoy their second careers without interruption or threat of criminal sanction. Given the severity of the penalties for violation—including but not limited to jail time, hefty fines, crushing legal bills, loss of employment and suspension and debarment—compliance with these rules is clearly the preferred course of action for government contractors and those government employees contemplating a move (or who have recently moved) to the private sector.

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