

# A Summary of the Legal Restrictions Governing Employment Discussions with Government Officials and the Work Performed By Former Government Employees



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# Overview

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- Two main sources of law
  - Federal statutes (criminal and civil)
  - Office of Government Ethics Regulations

## Overview (Cont'd)

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- Considered in the aggregate, hundreds of pages of complex material
- Rules are not always common-sense driven
- Other complications: rules keep changing, different rules may apply depending upon actual retirement date, every situation is unique

# Employment Discussions with Government Officials

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- Financial Conflict of Interest - 18 U.S.C. § 208 and 5 C.F.R. § 2635.604
- Prohibits employee participating personally and substantially in a particular matter in which he has a financial interest (including prospective employment)
- Cure: Disclosure and disqualification or exemption
- Penalty: 5 years/civil and criminal fines

# Employment Discussions with Government Officials (Cont'd)

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- Procurement Integrity Act, 41 U.S.C. §423(c) and FAR 3.104-3(c)
- Applies to Government officials “participating personally and substantially” in a procurement
- If procurement official is contacted by an offeror regarding “possible” employment, she (1) must report the contact in writing, and (2) either reject the offer or disqualify herself from involvement in the procurement
- Penalty: civil fine of \$500,000 per violation/2x the compensation received or offered

# Post-Employment Restrictions

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- 18 U.S.C. § 207
- New OGE Regulations Published July 2008
- Lifetime Ban
- 2 Year Ban
- 1 Year Ban - Senior Employees
- 2 Year Ban - Very Senior Employees
- 1 Year Ban - Legislative Officials
- Key Tip: Always have Government employee secure ethics opinion prior to any hiring decision

## Post-Employment Restrictions (Cont'd)

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- Procurement Integrity Act, 41 U.S.C. §423(d) and FAR 3.104-3(d)
- Applies to procurement officials involved in >\$10 million contract or action
- 1 year ban on accepting any compensation
- Penalty: \$500,000/2x

# I. Communications With Intent to Influence

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- “Switching Sides”



# A. Lifetime Ban

<p>A retired officer or employee may not knowingly make any communication or appearance with the intent to influence on behalf of any person concerning a “particular matter”:</p> <ul style="list-style-type: none"><li>(a) in which the U.S. is a party or has a “direct and substantial interest,” and</li><li>(b) In which the officer or employee “participated personally and substantially,” and</li><li>(c) Which involved a specific party or parties at the time such “particular matter” was pending</li></ul>	Acting as agent or attorney or communicating with intent to influence	Lifetime	Retired officer regular or reserve, or former executive branch officer or employee	18 U.S.C. 207(a)(1)
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- Employee was involved in a “particular matter” and participated “personally and substantially”
- In-house work or assistance is not restricted by this statute
- Contact with intent to influence is critical requirement

## B. Two Year Ban

<p>A retired officer or employee may not within two years after Government employment knowingly make any communication or appearance with the intent to influence on behalf of any person concerning a “particular matter”:</p> <ul style="list-style-type: none"> <li>(a) in which the U.S. is a party or has a “direct and substantial interest,” and</li> <li>(b) which such retired employee knew or should have known was actually pending under his responsibility within one year before the termination of his employment, and</li> <li>(c) which involved a specific party or parties at the time such “particular matter” was pending.</li> </ul>	<p>Acting as agent or attorney or communicating with intent to influence</p>	<p>Two years</p>	<p>Retired officer, regular or reserve, or former executive branch officer or employee</p>	<p>18 U.S.C. 207(a)(2)</p>
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- “Particular matter” was under employee’s “responsibility” during his last year of federal employment
- In-house assistance not restricted by this statute
- Contact with intent to influence is critical requirement

## C. One Year Ban – Trade or Treaty Negotiation

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Any former executive branch officer or employee may not, within one year after Government employment, knowingly aid or advise any person concerning any ongoing trade or treaty negotiation where such person personally and substantially participated in such ongoing trade or treaty negotiation within a one year period preceding such employee's termination of Government employment.	Acting as agent or attorney, or communicating with intent to influence	One year	Retired officer, regular or reserve, or former executive branch officer or employee	18 U.S.C. 207(b)
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## D. One Year Ban on Communications

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Former officers and employees of the executive branch which are senior personnel (as defined in this code section) may not, within one year after Government employment, knowingly make any communication or appearance before any officer or employee of the department or agency in which such person served within one year before such termination on behalf of any person with the intent to Influence any matter on which such person seeks Official action by any officer or employee of such Department or agency.	Acting as agent or attorney, or communicating with intent to influence	One year	Retired officer, regular or reserve, or former executive branch officer or employee	18 U.S.C. 207(c)
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- Senior personnel are subject to one-year “cooling off” period for communications
  - Does not restrict “in-house” activities
  - But: the restriction is not limited to matters in which the employee participated in or had responsibility over
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## E. Two Year Ban (Very Senior Personnel)

Former officers and employees of the executive branch which are very senior personnel (as defined in this code section) may not, within two years after Government employment, knowingly make any communication or appearance before any officer or employee of the department or agency in which such person served within one year before such termination on behalf of any person in connection with any matter on which such person seeks official action by any officer or employee of such department or agency.	Acting as agent or attorney, or communicating with intent to influence	Two years	Retired general officer, senior officer, or employee and designed former employee	18 U.S.C. 207(d)
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- Very senior personnel are subject to two-year “cooling off” period (this is a change from previous rule)
- Does not restrict “in-house” activities
- But: the restriction is not limited to matters in which the employee participated in or had responsibility over

## F. One Year Ban (Congressional Employee)

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<p>A former member or employee of Congress may not knowingly make, within one year after termination of that position (Senators – two years), any communication to or appearance With intent to influence before any member or employee of Congress in connection with any matter on which such former member or employee seeks action by a member or employee in his or her official capacity.</p>	<p>Knowingly communicating or appearing with intent to influence</p>	<p>One year – House Two years -- Senate</p>	<p>Former congressional member or employee</p>	<p>18 U.S.C. 207(e)</p>
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## G. One Year Ban on Aiding Foreign Entity

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- 18 U.S.C. 207(f) contains one-year ban against representing or aiding a “foreign entity” – if you are contemplating doing anything for a foreign government, get advice first

## II. Procurement Integrity

### A. One Year Restriction on Accepting Compensation

<p>A former official of a federal agency may not accept compensation from a contractor as an employee, officer, director or consultant of the contractor within one year after such former official:</p> <ul style="list-style-type: none"> <li>a) Served at the time of selection of the contractor or award of the contract as the procuring contracting officer, source selection authority, member of source selection evaluation board, or as chief of the financial or technical evaluation team in a procurement where the contract award exceeds \$10,000,000</li> <li>b) Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded that contractor</li> <li>c) Personally made for the Federal Agency a decision to award a contract, establish overhead or other rates, issue a contract payment, or settle a claim in excess of \$10,000,000</li> </ul>	<p>Participating in contract negotiations or performance</p>	<p>One year</p>	<p>Former Government official or employee (civilian or military)</p>	<p>41 U.S.C. 423(d)</p>
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# III. Other Provisions

## A. Five Year Restriction on Hiring Felons

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For a period of not less than five years from the date of a person's conviction for fraud or any other felony arising out of a DOD contract, a defense contractor or first tier subcontractor may not employ such person in a management consultant, supervisory, or other designated capacity or allow such person to serve on the board of directors of such contractor.	Employing in a management, consultant, supervisory, or other designated capacity or allowing to serve on the board of directors	Five years or more	Defense contractor, first tier subcontractor	10 U.S.C. 2408(a)
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- Applies to defense contractors and first-tier subcontractors, not individuals
- Criminal penalty: \$500,000 fine

## B. Aiding & Abetting

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A person, including a government contractor, DOD officer or employee, may not aid, abet or induce the committing of an offense against the government.	Aiding, abetting or inducing	Lifetime	Person, including government contractor	18 U.S.C. 2(a)
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- Prosecutorial tool for getting those involved in misconduct with former government official

## C. Conspiracy

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Two or more persons, including government contractors, DOD officers and employees, may not conspire to commit any offense against the government and do any act to effect the object of the conspiracy.	Conspiring	Lifetime	Two or more persons, including government contractors, etc.	18 U.S.C. 371
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- Prosecutorial tool for getting those involved in misconduct with former government official