Pre- and Post-Employment Restrictions For Separating and Retiring Air Force Personnel

Office of the 366th Fighter Wing
Staff Judge Advocate
366 Gunfighter Ave, Ste 432
Mountain Home AFB, ID 83648
(208) 828-2238

Pre- and Post-Employment Restrictions
For Separating and Retiring Air Force Personnel

Updated: Oct 2010

INTRODUCTION

Whether you are a military member or civilian employee, and whether your service ends through separation or retirement, there are laws that may affect your pre- and post-employment activities. Most people have two questions: (1) What restrictions apply to job-hunting activities; and (2) What restrictions apply to post-government employment? To answer these questions, we have prepared this handout to summarize the employment restrictions that may apply to you.

This handout is for general guidance only and is not to be cited as legal authority or relied upon as legal advice. Binding legal authority is found only in primary legal authority -- the Federal statutes, government regulations, and official decisions made by designated ethics counselors. Therefore, before you make any decisions that might affect your present or future endeavors, be sure that you have an accurate understanding of the law from a reliable source.

Also, keep in mind that Air Force ethics counselors represent the interests of the Air Force — they do not represent you, as an individual. Furthermore, legal counseling on standards of conduct is not "legal assistance." This means that the normal confidentiality afforded a person who consults with an attorney does *not* apply to discussions on pre- and post-employment.

Finally, if you need one-on-one counseling, it is important that you contact the appropriate ethics counselor.

- **For personnel assigned to the 366 Fighter Wing**
  Contact: 366 FW/JA, 366 Gunfighter Ave, Ste 432, Mountain Home AFB, ID
  (208) 828-2238.

The rules on post-Government employment are set out in various Federal statutes, Office of Government Ethics (OGE) regulations, and, for DOD personnel, the Joint Ethics Regulation (JER)(DoD 5500.7-R). In this handout, we will apply the rules to four categories of personnel. You may find yourself in one or more of these categories. If so, read the rules for each section.

A. All Air Force Personnel (military and civilian)
B. Senior Government Employees (general officers and SES'ers),
C. Retired Military Members
D. Contracting Officials

ALL AIR FORCE MEMBERS AND EMPLOYEES

Pre-Separation Activities

When job hunting, Air Force personnel should avoid the temptation of using Government resources in job searches. The JER prohibits the use of Government property, time, and subordinates for other than official duties. For example, an Air Force officer who uses his office computer during duty hours to prepare his resume, the civilian who asks her secretary to type resume cover letters at the office, and the enlisted member who uses the office telephone to make long-distance telephone calls to prospective employers, are misusing government resources. While limited, reasonable uses of government equipment may be authorized by your supervisor or commander, do not assume that your use is reasonable or authorized unless you clear it in advance. When in doubt, ask your supervisor or commander for permission.

Air Force personnel (officer, enlisted, and civilian) are generally not prohibited from negotiating for future employment while on active duty or in Air Force employment. However, employees who are negotiating for future employment must:

(1) Ensure that the prospect of employment does not affect the performance or non-performance of their official duties;

(2) Ensure that they do not communicate "inside" or privileged information to a prospective employer; *and*

(3) Avoid any activity that would affect the public's confidence in the integrity of the Federal government, even if such activity were not an actual violation of the law.

People searching for employment can easily lose sight of the fact that officers and civilian employees must disqualify themselves from participating in any particular matter that will have a *direct and predictable effect* on the financial interests of a person with whom they are *negotiating* or have *any arrangement* concerning prospective employment. If that possibility arises, employees must disqualify themselves, in writing, from any participation in the matter.

Many people find jobs by "networking" with acquaintances that work at civilian firms or companies that they deal with in their Air Force positions. This is fine, except that once you begin to actively pursue employment with a particular person or company, you are precluded from participating in an official capacity in any matter that might affect them.

Remember: An employee must notify his or her supervisor, in writing, of employment contacts that may impact his or her duties and disqualify him/herself from any further involvement with matters involving those entities. This restriction applies to everyone (civilians, officers and enlisted personnel) in any career field or occupation. A sample disqualification letter is found in Attachment 1.

Guidance for DOD employees is more restrictive because it specifically *includes* enlisted personnel in its coverage, and prohibits participation in any matter that could have a direct and predictable effect on a prospective employer with whom the employee is "*seeking* employment." The phrase "seeking employment" includes communicating with another person with a view toward reaching an agreement regarding employment, making an unsolicited communication regarding employment, or not rejecting an unsolicited communication from any person regarding possible employment. Simply sending a résumé to a specific person/company qualifies!

A person is no longer seeking employment when he or she rejects the possibility of employment and all discussions terminate, or when two months have transpired after sending a resume or employment proposal to a potential employer without response. Note that *deferring* a discussion or decision regarding a particular employer is not equivalent to *rejecting* employment: deferring employment means that you are still seeking employment and, therefore, the restrictions apply.

Terminal Leave

Prior approval - All military personnel (both officer and enlisted) assigned to 366 FW intending to perform off-duty employment must submit an AF Form 3902. A civilian employee who intends to perform off-duty employment must submit an AF Form 3902 if: (A) they are required to file a financial disclosure report (i.e., SF 278 or OGE Form 450) and (B) they will be working for a "prohibited source" (such as a DoD or Air Force contractor). JER para. 2-206(a). Off-duty employment includes employment by military members while on terminal leave and employment by civilian employees while on annual leave.

The AF Form 3902 to must be submitted to your first-level supervisor at least two weeks before beginning employment (except in cases where two weeks notice is not possible). ACCI51-901, *Off-Duty Employment.* Final approval must be obtained prior to starting off-duty employment. Medical service personnel must comply with the requirements regarding off-duty employment in AFI 44-102, *Patient Care and Management of Clinical Services,* in addition to the requirements of this instruction. Supervisors and commanders will obtain a legal review if required by ACCI51-901.

Please 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: Restrictions on political activities.

Restriction on representing others to the Federal Government - You may not represent anyone outside the Government to the Government on any particular matter involving the Government. Military officers working on terminal leave (like all Federal employees) are prohibited by 18 USC 205 and 18 USC 203 from representing their new employer to the Government. In almost every case, this precludes a member from interacting or appearing in the Federal workplace as a contractor. Being present in Government offices on behalf of a contractor inherently is a representation. Of course, military officers on terminal leave may begin work with the contractor, but only "behind the scenes" at a contractor office or otherwise away from the Government workplace. Enlisted members are not subject to 18 USC 203 or 205.

A. Post-Separation Rules for All Air Force Personnel

The primary post-retirement restriction statute is 18 U.S.C. 207. The purpose behind the law is simple:

> When a former Government employee who has been involved with a particular matter decides to act as the representative for another person on that same matter, the "switching of sides" undermines the public's confidence in the fairness of Government proceedings and creates the impression that personal influence, gained by Government affiliation, is decisive.

The restrictions of 18 U.S.C. 207 do not bar anyone, regardless of grade or position, from accepting employment with any private or public employer after their Government service ends. Section 207 only prohibits individuals from engaging in certain activities on behalf of persons or entities other than the United States. In other words, the statute does not limit *who* you work for, but it may limit *what you do for them*.

18 U.S.C. 207 contains six substantive post-employment restrictions: three that apply to all former officers and employees; one for former "senior employees;" one for former "very senior employees;" and one for both "senior" and "very senior" employees. (The last three restrictions are discussed in the section for "senior officers.")

Let's look first at the three 18 U.S.C. 207 restrictions that apply to all military officers and civilian employees (but not to enlisted personnel):

> **Restriction 1.** 18 U.S.C. 207(a)(1) sets out a **lifetime ban** against making, with the intent to *influence*, any *communication to* or *appearance before* an employee of the U.S. on behalf of any other person in a *particular matter* involving a *specific party* in which the employee *participated personally and substantially* as an employee, and in which the U.S. *is a party* or has a *direct and substantial interest*.
>
> This restriction applies to representations back to the government. It does not apply unless a former employee communicates to or makes an appearance before the United States, including any employee of any department, agency, court, or courts-martial of the United States. 18 U.S.C. 207(a)(2).
>
> The term "particular matter" includes any investigation, application, request for ruling or determination, rule making, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. 18 U.S.C. 207(i)(3). Additionally, the "particular matter" must involve the same specific party, or specific parties, at the time of the employee's participation. 5 CFR 2637.201(c).

An employee may have participated "personally" in a matter even though directing a subordinate's involvement. An employee may have participated "substantially" if his involvement was of significance to the matter. Participation in a single critical step may be considered substantial, while much involvement in minor issues may be insubstantial. The facts regarding the level of involvement are important to the analysis. 5 CFR 2637.201(d).

Note that each of the key elements (italicized words above) must be present before the restriction applies. For example, an employee is not prohibited from giving "behind-the scenes" assistance in connection with another person's representation to the government; but, former employees are prohibited from personally communicating with a Federal employee on the same matter themselves. The restriction also does not apply to communications involving purely social interaction, requests for publicly available documents, or requests for factual information.

Restriction 2. 18 U.S.C. 207(a)(2) sets out a very similar ban, except that it is of shorter duration (only **two years** following the employee's termination of service) and applies only to those who had *official responsibility* for a matter that was *actually pending* during the employee's *last year* of Government service. In other words, even though the employee was not "personally and substantially" involved in a particular matter, if the matter fell within his or her official responsibility during the last year of service, the employee is barred from communicating (with the intent to influence) with any Government employee on the same issue. Again, every word in the statute is narrowly defined and applied.

"Official responsibility" is the authority to approve or disapprove, or otherwise direct, government action. 18 U.S.C. 202(b).

"Actually pending" under the employee's official responsibility is if the matter was in fact referred to or under consideration by persons within the employee's area of responsibility. 5 CFR 2637.202(c).

Restriction 3. 18 U.S.C. 207(b) bars a former employee, for **one year** after his Government service ends, from knowingly *representing, aiding or advising* on the basis of *covered information*, any other person concerning any *ongoing trade or treaty negotiation* which, in the *last year* of Government service, the employee *participated personally and substantially*. The term "covered information" refers to agency records which were accessible to the employee and were exempt from disclosure under the Freedom of Information Act. If the restriction applies, note that it applies even to "behind-the-scenes" assistance.

B. MORE RULES FOR SENIOR PERSONNEL (GENERAL OFFICERS & SES'ERS)

Pre-Separation

Senior officers (general officers) and senior civilians (SES officials), like other federal employees, must comply with the 18 U.S.C. 208 restrictions described above. While there are no special pre-separation rules for senior officials, higher-ranking officials operate under a higher degree of scrutiny than other employees and must be especially careful to avoid even the appearance of any conflict of interest situations. When in doubt, seek specific guidance from your ethics counselor.

Post-Retirement

In addition to the post-employment rules described above, three Title 18 provisions apply only to "senior" or "very senior" employees. A "senior" employee is a Senior Executive Service (SES) civilian or general officer. A "very senior" employee is a person holding a position for which the rate of pay is equal to level I of the Executive Schedule and certain officials in the Office of the President. (Since "very senior" employees ***do not*** include general officers or most SES'ers, we have not included a discussion of them.)

The following two restrictions apply to all general officers and to those SES personnel whose rate of pay is equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule. Currently, that means it applies to civilian employees (including SES, SL, SR, ST and IPA's) whose basic pay (without locality pay) is equal to or greater than $142,898.

Restriction 1. Federal statute 18 U.S.C. 207(c) is known as the "revolving door" restriction. This means that for **one year** after their service terminates, senior employees may not knowingly make, with the *intent to influence*, any *communication or appearance* before an employee of the *agency in which they served* in the *year prior to their leaving*, if the communication or appearance is made on behalf of any other person and *official action* by the agency is sought.

The purpose of this "cooling off" period is to allow for a period of adjustment for the former senior employee and personnel at the agency served and to diminish any appearance that government decisions are being improperly influenced by the former senior employee. This restriction does not apply to "behind-the-scenes" assistance. However, it does *not* require that the former senior employee was "personally and substantially" involved in the matter that is the subject of the communication or appearance. Instead, it applies to any representation back for the purpose of influencing employees at the agency that the employee just left. We cannot emphasize this enough -- you may not communicate back to an employee of the agency you left, for the purposes of influencing that agency, for one calendar year after you retire or separate from your Air Force position. If you do, you are subject to criminal prosecution by the Office of Special Counsel, U.S. Department of Justice.

For most Air Force employees, the term "agency" refers to employees of the Air Force, not the Department of Defense, not the other military services, and not other Federal agencies. However, if the officer leaves a job that is "dual-hatted," such as a Unified or Joint Command position that has both Air Force and DOD responsibilities, then the one-year bar applies to *both* agencies (USAF and DOD), with some exceptions.

Restriction 2. For **one year** after their service terminates, senior and very senior employees may not *represent, aid or advise* a *foreign government or foreign political party* with the *intent to influence* the decision of an employee of *any department or agency* of the United States. Note that this prohibition *includes* "behind-the-scenes" assistance, such as drafting a proposal, advising on another's appearance, or consulting on strategies. 18 U.S.C. 207(f).

SF 278s - Public Financial Disclosure Reports

Under the Ethics in Government Act of 1978, SES civilians, general officers, and certain other high-level civilians (such as designated agency ethics officials (DAEOs), presidential appointees, administrative law judges, etc.) must publicly disclose their financial interests to "ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust." The disclosure is made by filing a Standard Form 278, *Executive Branch Personnel Public Financial Disclosure Report*. The form is filed when Government service begins and annually (by May 15th) thereafter. The form must also be completed and filed within 30 days after the official's Government service ends. For 366 FW personnel, the SF 278 is filed with 366 FW/JA (legal office). The exception is for those assigned to the Joint Chiefs of Staff or military commands directly under DOD control; for those assignments, the SF 278 should be filed with the organization's legal office. **Failure to file this form may result in a financial penalty**.

C. ADDITIONAL CONSIDERATIONS FOR MILITARY MEMBERS

Military Retirees Working for the Federal Government (Dual Compensation): At one time, military retirees who found second careers in the Federal Government forfeited a sizable portion of their retired military pay under dual compensation pay caps. But the FY00 DOD Authorization Bill (Public Law 106-65) repealed this statute and the dual compensation restrictions. The new law eliminated the mandatory reduction in retirement pay for retired military members who accepted employment with the Federal Government. In simple English, this means that military members can now receive their full military pension in addition to their Federal civilian paycheck—there is no offset or pay cap on military pensions and/or Federal pay.

Military Retirees Working for DOD: To avoid the appearance of favoritism or preferential treatment, retired military members may not be selected to fill a DOD civil service positions (including non-appropriated fund instrumentalities) within 180 days following retirement unless one of three exceptions exists: (1) the appointment is authorized by the head of a DOD Component, or designee; (2) the minimum rate of basic pay for the position has been increased under 5 U.S.C. 5305; or (3) a state of national emergency exists. (On 14 Sep 01, the President signed a proclamation that declared that a national emergency exists. On 28 Aug 08, the

President extended the national emergency for another year.) For further information, see 5 U.S.C. 3326, JER 9-700b, and DODD 1402.1**.**

Military Retirees Working for a Foreign Government: All retired military members (officer and enlisted, regular and reserve) are ***prohibited*** from working for a foreign government unless the Secretary of the Military Department and the Secretary of State jointly grant approval. **Retirees who violate this rule may forfeit their military retired pay**. Often, the most difficult issue is defining the term "foreign government," because the prohibition includes political subdivisions, certain foreign companies, and even American companies that provide certain governmental services to foreign countries. If a foreign government controls the activity at issue, then the restriction may apply.

The landmark Comptroller General decision in this area is "*In the Matter of Major Stephen M. Hartnett*" (65 Comp. Gen. 382 (1986)). Retired Major Hartnett, who worked for an *American* company as an instructor for Saudi Arabian naval personnel, was found by the Comptroller General to be an employee of the Saudi Arabian government because they had the right to control, supervise and direct his work, which was to train foreign military personnel. This decision stands for the proposition that it is not simply who you work for, but what you do for them that triggers the restriction.

Retirees considering employment by a foreign government should consult AFI 36-2913, *Request for Approval of Foreign Government Employment* (19 Nov 03*)*. The responsible office is the Military Personnel Flight.

D. ADDITIONAL RULES FOR CONTRACTING/PROCUREMENT OFFICIALS

Military and civilian employees who work with contracts and procurement, or make key decisions in this area, must also be aware of special pre- and post-separation restrictions arising from *The Procurement Integrity Act*, 41 U.S.C. 423. The Act is implemented within DOD through the Federal Acquisition Regulation (FAR), Part 3.104.

The Act has four basic provisions: (1) a ban on disclosing procurement information; (2) a ban on obtaining procurement information; (3) a requirement for contracting officials to report employment contacts by/with a bidder or offeror in the procurement; and (4) a 1-year ban for certain personnel on accepting compensation from certain contractors.

1. Disclosing Procurement Information

The Act prohibits the disclosure of "contractor bid or proposal information" and "source selection information." These terms are defined in the Act. The ban applies to current Federal employees; former Federal employees; individuals (such as contractor employees) who are currently advising the government regarding the procurement; and individuals who have advised the government regarding the procurement, but are no longer doing so. The ban applies until the contract is awarded.

2. Obtaining Procurement Information

Individuals are prohibited from knowingly obtaining "contractor bid or proposal information" or "source selection information" before the award of the contract to which such information relates, other than as provided for by law. The ban applies to everyone (including Federal employees and contractor personnel).

3. Employment Contact Reporting Rule

This rule applies only to contracts in excess of the simplified acquisition threshold, which is generally $100,000. If an employee who is participating personally and substantially in procurement makes contacts with, or is contacted by, a bidder or offeror in that procurement regarding possible employment, the employee must:

- Promptly report the contact in writing to the employee's supervisor and to the designated agency ethics official (or designee), *and*

- Either:
  - (a) Reject the possibility or employment, *or*
  - (b) Disqualify himself or herself from further personal and substantial participation in the procurement until the agency has authorized the employee to resume participation in the procurement on the grounds that: (1) the company that the employment contact was with is no longer a bidder or offeror in the procurement, or (2) all discussions between the employee and the company regarding possible employment have terminated without an agreement or arrangement for employment.

4. The 1-year Ban on Accepting Compensation from the Contractor

The 1-year ban will apply if any of the following is true:

- You serve as the Procuring Contracting Officer (PCO) on a contract over $10 million at the time the contractor is selected or the contract is awarded.

- You serve as the Source Selection Authority (SSA) on a contract over $10 million at the time the contractor is selected or the contract is awarded.

- You serve as a member of the Source Selection Evaluation Board on a contract over $10 million at the time the contractor is selected or the contract is awarded.

- You serve as the chief of a financial or technical evaluation team on a contract over $10 million at the time the contractor is selected or the contract is awarded.

- You serve as the Program Manager on a contract over $10 million.

- You serve as the Deputy Program Manager on a contract over $10 million.

- You serve as the Administrative Contracting Officer on a contract over $10 million.

The 1-year compensation ban also applies to anyone who personally makes any of the following types of decisions:

- Decision to award a contract or a subcontract over $10 million.
- Decision to award a modification of contract or subcontract over $10 million.
- Decision to award a task order or delivery order over $10 million.
- Decision to establish overhead or other rates applicable to a contract or contracts that are valued over $10 million.
- Decision to approve issuance of a contract payment or payments over $10 million.
- Decision to pay or settle a contract claim over $10 million.

The 1-year employment ban applies to officers, enlisted personnel, civilian employees, and special government employees. It applies regardless of whether one retires, resigns or separates from the government. The ban can apply in connection with both competitively awarded contracts and non-competitively awarded (i.e. sole source) contracts. The 1-year ban applies to accepting compensation as an employee, officer, director or consultant of the contractor.

The ban does <u>not</u> apply to accepting compensation from any division or affiliate of a contractor that does not produce "the same or similar products or services" as the entity of the contractor that is responsible for the contract you were involved in (such as a commercial division of the contractor). The term "affiliate" means an associated business concern or individual if, directly or indirectly, either (a) one controls or can control the other, or (b) a third party controls or can control both. "Compensation" means wages, salaries, honoraria, commissions, professional fees, and any other 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.

Ethics Reviews ("30-day" Letters)

Current and former employees who have been offered a definite position with a private employer may request a written legal opinion on whether the Procurement Integrity Act compensation ban applies to them. The ethics official ordinarily issues this legal review within 30 days of the request (hence, the name "30-day Letter.")

Employees are not required to have a 30-day letter in hand before they begin to talk to a company about employment, nor does the Government require that the employee obtain a 30-day letter at all. However, it is not unusual for a private employer to request that a former Federal official submit a letter during the interview process. **366 FW/JA policy is that a 30-day letter will not be issued unless the employee or former employee has a definite job offer and the job is contingent upon an ethics review**. A request for a 30-day letter must be submitted on the DD Form 2945. (This Form **cannot** be submitted electronically.) The form must contain all the requested information, including the duties the employee recently held with the Federal government, as well as the duties the employee anticipates undertaking for the new employer.

CONCLUSION

Whether you are separating or retiring, your awareness of the pre-and post-Government employment restrictions should help you to avoid any misunderstanding of the law. If you have any questions, please contact 366 FW/JA (listed on the first page) for further guidance from an ethics counselor. Good luck with your future endeavors!

Attachment:
Sample 18 U.S.C. 208(a) Disqualification Letter

ATTACHMENT

[____Date____]

MEMORANDUM FOR ___(*your supervisor or commander*)_____

FROM: ____(*your name and organization*)_____

SUBJECT: Disqualification - Employment Discussions

This is to inform you that I intend to have discussions with _____(*list all persons/companies to be contacted*)_____concerning possible post-Government employment.

Pursuant to 18 U.S.C. 208(a), the Joint Ethics Regulation (DOD 5500.7-R), and the Standards of Ethical Conduct for the Executive Branch Employees (5 CFR 2635), I am required to disqualify myself from participation in any particular matter that could have a direct and predictable effect on the financial interests of a person or organization with whom I am seeking arrangement concerning employment.

Therefore, until further notice, I will not participate in any matter that might have a direct and predictable impact on the persons or companies listed in paragraph one. I will refer any matter brought to me concerning these persons or companies to _____ _____(*name of person(s) who will review these matters*)_____ for appropriate action. I will inform you immediately if I am no longer seeking or negotiating employment with these persons or companies, in which case disqualification is no longer needed.

YOUR SIGNATURE BLOCK

cc:
366 FW/JA (optional)