

# SOCO ADVISORY

**Department of Defense  
Office of General Counsel  
Standards of Conduct Office**

**September 29, 2021  
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## **Ethics Guidance for Employees in Non-Pay Status During a Lapse in Appropriations**

DoD personnel remain subject to the Federal ethics rules, including DoD's supplemental requirements, even when furloughed.<sup>1</sup> The attached Office of Government Ethics (OGE) Legal Advisory<sup>2</sup> provides answers to frequently asked questions (FAQs) to assist employees<sup>3</sup> and ethics officials in navigating common situations employees in a non-pay status may face during a lapse in appropriations. In addition to the general rules about gifts, crowdsourcing, and outside employment that are discussed in the OGE advisory, DoD personnel are subject to additional rules discussed below.

The following provides a brief summary of issues that DoD personnel may encounter during a lapse in appropriations. The attached OGE Advisory provides a more detailed explanation of many of these rules.

- *Gifts.* Unless an exclusion or exception to the general rule applies, a Federal employee may not accept any gift given (1) because of their official position or (2) from any person who is seeking action from the DoD, does or seeks to do business with the DoD, conducts activities regulated by the DoD, has interests that can be affected by the performance or non-performance of the employee's official duties, or is an organization the majority of whose members are in any of those classes (i.e. a "prohibited source").
- *Disqualification or recusal.* Federal personnel may not work on a matter in their Federal position affecting a prospective or current employer or client with whom they seek work. Where an actual conflict arises between DoD duties and the entity with which a DoD employee seeks employment, DoD regulations require the employee to provide a written disqualification to the employee's supervisor. A copy of the disqualification should be provided to the employee's local ethics official. See JER 2-204(c) and 5 C.F.R. 3601.105.
- *Notification and approval for Outside Activities.* DoD personnel who file a financial disclosure report (OGE 450 or OGE 278) must obtain written approval from their supervisor before engaging in a business activity or compensated outside employment with a defense contractor or other prohibited source. See JER 2-206 and 5 C.F.R. 3601.107. Public Financial Disclosure Report (OGE Form 278) filers are required to file a statement notifying their ethics counselor of any negotiation for or agreement for employment within three business days after commencement of the negotiation or agreement. A sample STOCK Act notice can be obtained by contacting SOCO.

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<sup>1</sup> For the purposes of this advisory, the term "furloughed" refers to all federal personnel in a non-pay status, whether required to work or not.

<sup>2</sup> "Ethics Guidance for Employees in Non-Pay Status During a Lapse in Appropriations," Office of Government Ethics Legal Advisory LA-19-01, February 15, 2019.

<sup>3</sup> For the purposes of this advisory, the term "employee" includes military personnel.

- *Compensation restrictions.* A criminal statute prohibits Federal employees from receiving pay from a non-Federal source for performing their Federal duties. The criminal statute applies even when the receipt of outside compensation does not create a conflict of interest or cause actual injury to the United States. This law may, for example, bar DoD personnel from working for a contractor closely supporting their DoD position. *See* 18 U.S.C. § 209.
- *Representation restrictions.* Criminal statutes prohibit Federal employees from representing an outside organization, employer, or client before any Federal agency, with or without compensation. *See* 18 U.S.C. §§ 203 & 205.
- *Former employer disqualification.* For one year after ending any outside employment, DoD personnel may not participate in a DoD matter in which their former employer or clients is a party or represents a party. *See* 5 C.F.R. 2635.502.
- *Use of government resources.* Ethics rules prohibit the use of government resources, time, or position for other than official or authorized purposes. *See* 5 C.F.R. 2635.702-705 and JER 2-301, 3-20, and 3-303.

**DISCLAIMER: The purpose of this advisory is to disseminate relevant information and sources of general guidance, policy and law on Government Ethics issues to the Department of Defense ethics community. Advisories are not intended to be and should not be cited as authoritative guidance, DoD policy, or law**

DoD Standards of Conduct Office  
<https://dodsoco.ogc.osd.mil/>

**Attachment:**

“Ethics Guidance for Employees in Non-Pay Status During a Lapse in Appropriations,”  
Office of Government Ethics Legal Advisory LA-19-01, February 15, 2019

Note: Executive Order 13770 has been revoked. "Employees and former employees subject to the commitments in Executive Order 13770 will not be subject to those commitments after noon January 20, 2021."

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS



February 15, 2019  
LA-19-01

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Emory A. Rounds, III  
Director

SUBJECT: Ethics Guidance for Employees in Non-Pay Status During a Lapse in Appropriations

A number of ethics-related issues have arisen during recent lapses in appropriations, especially in the areas of gifts, crowdsourcing, and outside employment. The U.S. Office of Government Ethics (OGE) is providing answers to frequently asked questions (FAQs) to assist employees and ethics officials in navigating the common situations employees in non-pay status<sup>1</sup> may face during a lapse in appropriations. Employees continue to be subject to all of the ethics rules while they are in non-pay status.<sup>2</sup> And, as always, employees are encouraged to seek ethics advice from their agencies about specific situations. Additionally, agency ethics officials should proactively provide employees with guidance about agency-specific rules with their furlough or exempt notice and make sure such advice is easily accessible on the agency website.

**Gift Issues**

Generally an employee may not accept any gift given (1) because of the employee's official position or (2) from a prohibited source.<sup>3</sup> A gift is given because of an employee's official position if it would not have been given had the employee not held the status, authority, or duties associated with the employee's federal position.<sup>4</sup> A prohibited source is any person who is seeking action from the employee's agency, does or seeks to do business with the employee's agency, conducts activities regulated by the employee's agency, has interests that can be affected by the performance or non-performance of the employee's official duties, or is an organization the majority of whose members are in any of those classes.<sup>5</sup> However, there are several exclusions and exceptions that may apply, as discussed below.

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<sup>1</sup> For the purposes of this advisory, the term "furloughed" refers to all federal employees in non-pay status, whether required to work or not.

<sup>2</sup> OGE Legal Adv. LA-18-16 (2018).

<sup>3</sup> 5 C.F.R. §§ 2635.201(a), 2635.202.

<sup>4</sup> 5 C.F.R. § 2635.203(e); *see* OGE Inf. Adv. Op. 07 x 2 (2007).

<sup>5</sup> 5 C.F.R. § 2635.203(d).



## ***Crowdsourced Funding***

Some employees have sought financial assistance through electronic “crowdsourcing” campaigns through platforms such as GoFundMe.<sup>6</sup> Such campaigns raise a variety of ethics concerns, the most common of which are addressed below. However, because these campaigns require careful planning to avoid violating ethics rules, employees are urged to always check with their agency ethics official prior to launching a crowdsourcing campaign.

- **May I, or may someone on my behalf, start a crowdsourcing campaign to raise funds because I am in non-pay status?** Generally, no. An employee (or a person acting on the employee’s behalf, such as a spouse<sup>7</sup>) may not solicit a gift based on the employee’s federal employment.<sup>8</sup> Therefore, an employee’s agency, title, or status as a federal employee should not be used in any such solicitation. Additionally, employees cannot generally accept gifts from prohibited sources. Therefore, an employee would need to be able to identify and reject such prohibited donations.<sup>9</sup> An employee could accept donations from the employee’s friends or relatives when it is clear that any donations accepted are based on that friendship or family relationship.<sup>10</sup> Given the number of potential ethical pitfalls, OGE strongly encourages employees to consult an ethics official before any such campaign begins.
- **May I accept assistance from a crowdsourcing campaign designed to provide assistance to federal employees in non-pay status?** It depends. Such offers of assistance may be accepted if (1) the assistance is offered to a broad class of government employees that does not discriminate based on responsibility, rank, or rate of pay (such as all furloughed federal employees) and (2) the campaign organizer is not a prohibited source.<sup>11</sup>

## ***Other Common Gift Questions***

- **May I accept free meals or discounts offered to all federal workers or the general public?** Yes. Many restaurants and other businesses extend offers of free meals, discounts, and other support to federal workers during a government shutdown. As long as the offer is extended to all federal employees, it may be accepted as a benefit available to a class consisting of all Government employees or all uniformed military personnel, even if the offer is restricted by geography.<sup>12</sup> For example, an employee may accept a free meal or Metro ride made available to anyone in the metro Washington D.C. area who shows a federal employee ID card. Additionally, an employee may ask for and accept

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<sup>6</sup> For the purposes of this guidance, crowdsourcing is the practice of soliciting contributions or services from a large group of people, and especially from the online community. See Crowdsourcing, Merriam-Webster Dictionary (11<sup>th</sup> ed., 2016); “crowdsourcing” for yourself or on your behalf in this context is distinct from “fundraising” as defined in 5 C.F.R. § 2635.808.

<sup>7</sup> 5 C.F.R. § 2635.203(f).

<sup>8</sup> 5 C.F.R. § 2635.702(a).

<sup>9</sup> 5 C.F.R. §§ 2635.201(a), 2635.202.

<sup>10</sup> Employees should refer to the discussion below for ethics guidance on gifts based on a personal relationship.

<sup>11</sup> 5 C.F.R. § 2635.204(c)(2)(iii).

<sup>12</sup> 5 C.F.R. § 2635.203(b)(4).

assistance from organizations that provide aid to members of the general public, such as food banks or religious institutions.

- **May I accept any benefits offered only to furloughed federal workers?** It depends on who is offering the benefit. Employees may accept gifts offered to a class of government employees that does not discriminate on the basis of official duties or rank<sup>13</sup> (such as all furloughed federal employees) given by an organization or person who is not a “prohibited source” (such as an organization or person that has business with your agency, as described more fully above).<sup>14</sup> For example, an employee may accept a free month of gym membership available to all furloughed federal employees as long as the gym is not a prohibited source for that employee.
- **May I accept a low or no interest loan from a bank or credit union?** It depends. Employees may accept loans from banks or financial institutions on terms available to the general public<sup>15</sup> or to all federal employees, whether or not restricted by geographic considerations.<sup>16</sup> If an offer is limited only to furloughed federal employees, the employee may accept as long as the bank or credit union making the offer is not a prohibited source for that employee.
- **May I accept a small gift, other than cash, offered as an individual gesture of goodwill?** Yes, provided certain conditions are met. A career government employee may accept such offers as long as the offer is unsolicited, the offered gift’s value is \$20 or less, the offered gift is not cash or a cash equivalent (such as a VISA or MasterCard gift card), and the employee does not accept more than \$50 from the same person in a year.<sup>17</sup> For example, an employee may accept an unsolicited offer to provide or pay for the employee’s lunch as long as the lunch bill is \$20 or less. However, most political appointees cannot use this exception to accept a gift from a lobbyist.<sup>18</sup>
- **May I accept financial assistance offered by a friend and/or family member?** In most cases, yes. Employees may accept gifts that are based on personal relationships as long as the circumstances make clear that the relationship is the motivating factor, rather than the employee’s federal position.<sup>19</sup> Relevant factors include the history and nature of the relationship and whether the family member or friend is personally offering assistance.<sup>20</sup> For example, an employee may likely accept a \$1,000 cash loan offered by a family member or close friend. However, an employee would generally need to decline a similar offer from a friend who works for an agency’s contractor where the employee’s official duties affect the contractor.

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<sup>13</sup> 5 C.F.R. § 2635.204(c)(2)(iii).

<sup>14</sup> 5 C.F.R. § 2635.203(d).

<sup>15</sup> 5 C.F.R. § 2635.203(b)(3).

<sup>16</sup> 5 C.F.R. § 2635.203(b)(4).

<sup>17</sup> 5 C.F.R. § 2635.204(a).

<sup>18</sup> Exec. Order No. 13770, sec. 1, par. 5; sec. 2(b).

<sup>19</sup> 5 C.F.R. § 2635.204(b).

<sup>20</sup> *Id.*

- **May I offer or accept financial assistance from co-workers?** The limitations on gifts between employees remain in effect. Generally, employees may not give, donate to, or solicit contributions for, an official supervisor, and may not accept gifts from employees receiving less pay.<sup>21</sup> However, employees may accept the following from subordinates or employees receiving less pay: (1) non-cash gifts with a value of \$10 or less, (2) gifts of personal hospitality of a type and value customarily provided, or (3) food and refreshments to be shared in the office.<sup>22</sup> Additionally, while appropriate gifts may be given on infrequently occurring occasions of personal significance, a lapse in appropriations in itself is not such an occasion.<sup>23</sup> OGE encourages employees to discuss offers of financial assistance between co-workers with their ethics official.
- **What else should I consider when deciding whether to accept such a gift?** A criminal law prohibits employees from receiving any contribution to or supplementation of salary as compensation for their services as an employee.<sup>24</sup> However, the Department of Justice's Office of Legal Counsel (OLC) has previously found that payments (in that instance, limited to terminally ill children or grandchildren of present or former employees of a federal agency) that were motivated by sympathy, rather than an intent to compensate the employee for the employee's government service, did not violate this law.<sup>25</sup> Donations made to furloughed federal employees who are not in a position to influence the government on behalf of the payor would generally appear to be motivated by sympathy unless there is some clear indication to the contrary. If employees have concerns, they should discuss their concerns with their ethics official.

## Outside Employment

The duration of a partial lapse in appropriations may also result in some employees seeking outside employment while in non-pay status. While career employees may generally take on outside employment during a funding lapse, common concerns are addressed in the FAQs below. Moreover, employees considering outside employment are cautioned to coordinate with their agency ethics officials because some agencies have additional restrictions such as prior approval requirements.

- **May I seek alternative employment while I am in non-pay status?** Generally, yes, if it does not conflict with your official duties and your agency does not have additional requirements. There is no government-wide restriction on outside employment for career employees. However, employees may not accept outside employment that would conflict with their official duties.<sup>26</sup> Outside employment is unlikely to conflict with an employee's official duties unless the outside employer is an organization with which the employee is likely to interact or otherwise affect in the course of the employee's government duties. Be aware that many agencies have specific regulations or statutes

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<sup>21</sup> 5 C.F.R. § 2635.301.

<sup>22</sup> 5 C.F.R. § 2635.304(a).

<sup>23</sup> 5 C.F.R. § 2635.304(b).

<sup>24</sup> 18 U.S.C. § 209(a).

<sup>25</sup> See "Applicability of 18 U.S.C. § 209 to Acceptance by FBI Employees of Benefits Under the 'Make a Dream Come True' Program," 21 Op. O.L.C. 204 (1997).

<sup>26</sup> 5 C.F.R. § 2635.802.

relating to outside employment, including, in some cases, prior approval requirements. Additionally, public and confidential financial disclosure filers must report any outside earned income and employment positions on their financial disclosure forms.<sup>27</sup> Finally, some noncareer employees are prohibited from earning outside income,<sup>28</sup> and most other noncareer employees are limited in the amount they can earn.<sup>29</sup>

- **How do I determine if my agency has any additional outside employment limitations?** Employees who may wish to pursue outside employment at any time are encouraged to consult with their agency ethics officials. Because employees may be unable to contact an ethics official during a lapse in appropriations, employees are encouraged to become familiar with their agencies' outside employment rules prior to a lapse in appropriations. Agency ethics officials are encouraged to provide accessible resources to their employees regarding outside employment requirements.
- **Are there limitations on what I can do for an outside employer?** Yes. Employees are prohibited from representing outside parties before the federal government.<sup>30</sup> For example, a furloughed employee may not contact a federal government agency or court that is open during a lapse in appropriations in order to sell a company's products or services. Employees considering outside employment which involves representation before the federal government should seek guidance from an agency ethics official.
- **May I use my official title or position in connection with my non-federal employment?** Generally, no. Employees are prohibited from using their federal government title or position to benefit a non-federal employer.<sup>31</sup>
- **What should I do when I return to federal service?** Once employees return to their federal employment, they should consult with agency ethics officials to discuss whether their outside employment during the lapse would require them not to work on matters involving their former employer for a period of one year.<sup>32</sup> If an employee is going to continue outside employment after returning to federal service, it is vital that the employee meet with an ethics official to ensure that the outside employment does not create a conflicting interest with the employee's federal duties.<sup>33</sup>

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<sup>27</sup> 5 C.F.R. §§ 2634.302, 2634.307; 5 C.F.R. §§ 2634.907(b), 2634.907(e).

<sup>28</sup> Exec. Order No. 12674, sec. 102; *see* 5 C.F.R. § 2636.302.

<sup>29</sup> 5 C.F.R. §§ 2636.301, 2636.304.

<sup>30</sup> 18 U.S.C. §§ 203, 205. Employees are also prohibited from sharing in payments others have received for representing other parties before the federal government.

<sup>31</sup> 5 C.F.R. § 2635.702.

<sup>32</sup> 5 C.F.R. § 2635.502.

<sup>33</sup> 18 U.S.C. § 208; 5 C.F.R. § 2635.802.