



U.S Department of Defense Standards of Conduct Office

Frequently Asked Questions (FAQs) Regarding the Application of Post-Government Restrictions for DoD Attorneys Departing Federal Service

These FAQs are intended to be used, by DoD attorneys departing Federal Service (“departing attorneys”) as a supplement to the seeking employment and post-Government employment handouts published by the DoD Standard of Conduct Office (SOCO). Please refer to those handouts for a more in depth explanation of the seeking employment and post-Government employment rules. Post-Government employment advice is very fact specific and involves the application of highly technical criminal statutes to a particular set of facts. Departing attorneys are encouraged to consult with a DoD ethics counselor.

In addition to the post-employment rules, there are a number of professional responsibility issues for attorneys to consider when departing Federal service, only some of which are discussed here. Attorneys separating from Federal service should also consult the professional responsibility rules of their individual state licensing authorities.

Q: Can I begin seeking or negotiating employment with a law firm that represents a party to litigation in which I am participating personally and substantially as a DoD attorney?

A: Once you have started seeking or negotiating employment with a prospective employer you may not take any official action that will affect the financial interests of that prospective employer. (*See* 18 U.S.C. § 208, 5 C.F.R. § 2635.604) Therefore, once you begin seeking employment with a prospective employer you should recuse yourself from participating in any matter involving your prospective employer. These provisions will not preclude you from seeking or negotiating employment once you have properly recused yourself.

However, the ABA Model Rules of Professional Conduct impose a slightly broader restriction. Specifically, Model Rule 1.11(d)(2)(ii) states that attorneys serving as public officers or employees are prohibited from negotiating for private employment *with any person who is involved as a party or as an attorney for a party in a matter in which the attorney is participating personally and substantially*. Unlike 18 U.S.C. § 208 and 5 C.F.R. § 2635.604, this rule does not require that your prospective employer have a financial interest in the matter. Therefore, depending on the version of the rule adopted by your licensing jurisdiction(s), your personal and substantial participation in the litigation could be enough to preclude you from negotiating employment with the law firm while you are still a Federal employee.

Q: Are there any post-Government employment restrictions that prohibit sharing in fees or other compensation?

A: Yes, there are restrictions on sharing in fees or other compensation for representational services before the Federal Government that apply to you while you are a DoD employee and after you depart Federal service. Specifically, 18 U.S.C. § 203 prohibits DoD employees from receiving any legal fees, partnership shares, bonuses, or any other form of compensation derived from representational services of others in matters before the Executive or Judicial Branches when the United States is a party or has a direct and substantial interest. This restriction applies to representations made, by members of the firm, while you were a DoD employee, regardless of whether or not you were aware of the representation, or receive any funds during or after Federal service. This conflict can be resolved if your new employer: (1) implements an accounting system that segregates any fees earned from representations before the Federal Government (while you were a DoD employee) to ensure that you do not receive a portion of any of those fees; or (2) pays you fixed salary until those billings have worked their way through the accounting system.

Q: Could my personal and substantial participation in litigation as a DoD attorney limit my prospective employer's ability to represent clients in the same matter?

A: Yes, depending on the professional responsibility rules of the jurisdiction(s) in which you are licensed, it is possible that your participation in the matter could prohibit your prospective employer's ability to represent clients in the same matter unless your prospective employer takes remedial action upon your hire. In this instance, the ABA's Model Rules of Professional Conduct create broader restrictions than the Federal post-Government employment restrictions. Specifically, Model Rule 1.11(a) requires that you disqualify yourself from participating in any particular matter that you participated personally and substantially as a public officer or employee unless the appropriate Government agency gives its informed consent, confirmed in writing, to the representation. This is significant because Model Rule 1.11(b) states that if you are disqualified from representation under Model Rule 1.11(a), then no attorney in the firm with which you are associated may knowingly undertake or continue representation in such a matter unless: (1) you are timely screened from any participation in the matter and are apportioned no part of the associated fee; and (2) written notice is promptly given to your former agency to enable it to ascertain compliance with the provisions of this rule. However, the version of the rule adopted your licensing jurisdiction(s) may differ from the Model Rule, so you should look to the rules of your respective jurisdiction(s) for definitive guidance.

Q: As a former DoD attorney, are there any of post-Government employment restrictions that limit my ability to appear as an attorney in litigation against the U.S. Government?

A: The answer to your question depends on several factors, to include your level of participation in the litigation (or underlying matter¹), your grade/rank, as well as the professional responsibility rules of the jurisdiction(s) in which you are licensed. If you or any of your subordinates (within the last year of your Government service) participated personally and substantially in the litigation (or underlying matter) you may be subject to the lifetime and two-year representational bans under 18 U.S.C. §§ 207(a)(1) and (a)(2). These bans would prohibit you from representing a non-Federal entity, involved in the litigation, before the Executive and Judicial Branches of the U.S. Government. Additionally, if you personally and substantially participated in the litigation (or underlying matter), Model Rule 1.11 (as adopted by your licensing jurisdiction(s)), may also prohibit you from participating in all other aspects of legal representation and counseling, *to include behind-the-scenes representation or assistance*, unless the appropriate Government agency gives its informed written consent to the representation. However, unless an exception under 5 CFR 2641.301 applies, such agency consent does not remove any applicable restrictions under the criminal statute, which may only be waived by the Director of the Office of Government Ethics.

If you served as a DoD *senior official*², for one year after leaving your senior position, you may not represent any other person/entity, with the intent to influence, before your former agency regarding any official action. Therefore, if your former agency is a party to the litigation, and you are still within your one year cooling-off period, you are prohibited from appearing as an attorney on behalf of another party to that litigation. This is consistent with one year cooling-off period under 18 U.S.C. § 207(c). DoD *senior officials* are also subject to either a one or two year ban under Section 1045 of the NDAA of FY2018 (hereinafter “Section 1045). This ban prohibits *senior officials* from engaging in lobbying activities with respect to the DoD.

In addition, Executive Order 13770 (the Trump Ethics Pledge) prohibits all former political appointees appointed during President Trump’s administration from engaging in lobbying activities with respect to their former agency for five years as well as engaging in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service (SES) employee for the remainder of the Administration.

For the purposes of Section 1045 and the Trump Ethics Pledge, the terms lobbying activities and lobbying contacts have the meaning given to such terms in the Lobbying Disclosure Act. These provisions preclude *senior officials* from appearing in litigation on behalf

¹ For the purposes of 18 U.S.C. 207(a)(1) and Model Rule 1.11, the litigation could be considered a continuation of the underlying matter under dispute. However, this is a factual determination that should be made in consultation with a DoD ethics counselor. If the litigation and the underlying matter are considered the same matter for the purposes of these restrictions and you only personally and substantially participated in the underlying matter while you were a Federal employee, the restrictions described above may limit your ability to participate in the litigation once you leave Federal service.

² For civilian personnel whose rate of base pay is at or above 86.5% of the rate for Executive Schedule Level II (\$170,665 in 2020); Flag and General Officers; and all Presidential Appointees confirmed with advice and consent of the Senate (PAS) officials.

of a client or other employer, if their appearance would be before a covered executive branch official or non-career SES and would constitute a lobbying contact or an effort in support of a lobbying contact (to include some behind-the-scenes assistance). However, there are several exclusions to the definition of a lobbying contact that could apply such as: (1) administrative requests that do not attempt to influence a covered executive branch official; (2) required responses to information demands (i.e. subpoenas); and (3) communications with regard to agency-initiated civil, criminal, and administrative proceedings.

Q: Will the two-year representational ban imposed by 18 U.S.C. § 207(a)(2) apply to me if I am not personally and substantially involved in litigating cases but I supervise attorneys who are involved in the litigation?

A: Yes, the two-year representational ban will apply to you regarding all particular matters (e.g. litigation) that were pending under your responsibility during your last year of Government service. Specifically, 18 U.S.C. § 207(a)(2) prohibits you from representing a non-Federal entity to the Executive and Judicial Branches of the Federal Government regarding particular matters that you did not work on yourself, but were pending under your responsibility during your last year of Federal service.

A communication or appearance is not prohibited unless, at the time of the proposed post-employment communication or appearance, you know or reasonably should know that the matter was actually pending under your official responsibility within the one-year period prior to your termination from Federal service. It is not necessary that you knew during your Federal service that the matter was actually pending under your official responsibility.

Q: Will any of the post-Government employment restrictions prohibit me from working behind the scenes on litigation against or involving the U.S. Government for a law firm or company after departing from Federal service?

A: The answer to this question depends on several factors, to include your level of participation in the litigation while you were a DoD employee, your grade/rank, the nature of the behind the scenes assistance that you will provide, as well as the professional responsibility rules of the jurisdiction(s) in which you are licensed.

If you personally and substantially participated in the litigation while you were a DoD employee, Model Rule 1.11 (which prohibits the same conduct as 18 U.S.C. § 207(a)(1)), as adopted by your licensing jurisdiction(s), may prohibit you from participating in all aspects of legal representation and counseling, including behind the scenes representation or assistance, unless the appropriate Government agency gives its informed written consent to the representation. As discussed above, such consent is not an exception or waiver of the criminal statute's restrictions under 5 CFR 2641.301.

If you are a *senior official*, you are also subject to either a one or two year ban under Section 1045. This ban prohibits you from engaging in lobbying activities with respect to the DoD.

If you are a political appointee, the Trump Ethics Pledge prohibits you from engaging in lobbying activities with respect to your former agency for five years as well as engaging in lobbying activities with respect to any covered executive branch official or non-career SES employee for the remainder of the Administration.

For the purposes of Section 1045 and the Trump Ethics Pledge, the terms lobbying activities and lobbying contacts have the meaning given to such terms in the Lobbying Disclosure Act. In some circumstances, this may include restrictions on behind the scenes assistance. These determinations are highly fact-specific and should be discussed with a DoD ethics counselor.

Q: Are there are any specific restrictions on my ability to use or share sensitive or non-public information that I obtained throughout my career as a DoD attorney?

A: Yes, there are several restrictions on the use of non-public information. All former DoD employees who had access to national security information retain the responsibility to protect the confidentiality of that information. In addition, 5 C.F.R § 2635.703, prohibits the improper use of nonpublic information to further the private interest of a former DoD employee or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

Additionally, Model Rules 1.6, 1.9(c), and 1.11(c) prohibit attorneys departing from Federal service from using or disclosing the confidences and secrets of clients unless the client consents. Model Rule 1.11(c) prohibits a former Government attorney from using confidential information about a person acquired when the attorney worked for the Government in a matter on behalf of a new client if the new client's interests are adverse to the person and the information could be used to the detriment of the person. As used in Rule 1.11(c), the term "confidential Government information" means information that has been obtained under Governmental authority and which the Government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom. However, your licensing jurisdiction(s) may have adopted a different version of the Model Rules, so it is prudent to look to the rule of that jurisdiction(s).

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