



U.S. Department of War Standards of Conduct Office

FURLOUGH ETHICS GUIDANCE

Purpose: To provide guidance on furlough-related ethics concerns for DoW ethics officials and personnel. Utilizing a question and answer format, the guidance below is premised on the fundamental tenet that DoW civilians remain subject to the Federal ethics rules, including DoW's supplemental requirements, when furloughed.

Legal Notice: This document is intended to disseminate relevant information and sources of general guidance, policy, and law on Government Ethics issues. This information is a summary of the rules and is not intended to serve as legal advice. Personnel with ethics questions should seek advice from ethics officials located within their organization's legal office. *For OSW personnel only* - contact the Standards of Conduct Office (SOCO) via e-mail at OSD.SOCO@MAIL.MIL.

Questions & Answers:

Questions about acceptance of gifts between employees and from outside sources may arise as furloughs often trigger an understandable desire by co-workers and support groups to provide financial assistance to furloughed personnel in need. Furloughed personnel may also be considering employment outside the federal government on furlough days, implicating ethics rules regarding outside activities and employment. Specific questions and answers can be found below and further guidance from the Office of Government Ethics is attached. The questions below are focused on matters that arise most often for federal personnel during a furlough.

Gifts Between Employees

Q: I know that I usually cannot accept gifts from employees who receive less pay than I do, but may I accept if my supervisor gives me a gift?

A: Yes, but consider the circumstances. Under the general standards (5 C.F.R. § 2635.302) you may accept a gift from your official superior and the value of that gift *isn't* limited by the \$10 maximum. The prohibitions are against giving a gift to a superior or accepting a gift from subordinate or an employee making less pay than you. However, the superior needs to be sensitive to the possibility that other employees may view this as favoritism, especially where the receiving employee receives promotions or favorable assignments. This could result in employee grievances. Also, the superior's intent must be clearly to give a gift and not to

compensate or provide “bonuses” to employees for their official work. Such compensation/bonuses would violate the criminal statute prohibiting personnel from receiving any outside supplementation of salary under 18 U.S.C. § 209, which is discussed further below.

Q: Must employee contributions towards gifts for co-workers be voluntary?

A: Yes. Each employee must be allowed to decide for himself or herself, without coercion, whether to participate. There is no exception to contributions given voluntarily.

Q: Is the furlough a “special infrequent occasion” such that DoW employees and military members could contribute toward a monetary gift card for a superior or higher paid official?

A: No. The examples and opinions providing interpretation of 5 C.F.R. § 2635.304(c)(1) suggest that an administrative furlough does not qualify as a “special infrequent occasion.”

Gifts from Outside Sources

Q: May Federal employees (or a portion of them, such as those not subject to furlough) donate a portion of their pay to a charity that provides financial assistance to civilian employees?

A: Yes. DoW officials may make charitable contributions to nonprofits that provide financial assistance to Federal civilian employees. The nonprofit organization, under its own guidelines and procedures, would determine whether and to what extent to provide financial assistance to a requesting Federal employee. Each official must conduct his or her own due diligence and make a voluntary decision about how and to whom to make a charitable contribution.

Q: How can we disseminate information about available aid or gifts to furloughed employees?

A: Official information channels (e.g., email, office newsletter, or website) may be used to share factual information about charities with Federal employees. Any such information of general interest should avoid recommending or endorsing a particular charity. Federal employees may *not* engage in fundraising in an official capacity or in the Federal workplace. See 5 C.F.R. §§ 2635.702 and 2635.808. Employees should be directed to provide such information to the appropriate organizational contact (e.g., Public Affairs Office or organization webmaster) for dissemination to guard against the above-described concerns.

Q: May Federal employees accept gifts from charitable organizations or aid societies?

A: While Federal gift rules generally prohibit a federal employee from accepting a gift from an outside source if given because of the employee’s official position, there is a gift exclusion which permits acceptance of opportunities or benefits available to all government employees. See 5 C.F.R. § 2635.203(b)(4). Further, gift exceptions permit acceptance if the gift is: (1) given by a person or organization that is not a prohibited source, and (2) given to any group or class that is not defined in a manner that (a) specifically discriminates among Government employees on the basis of type of official responsibility or (b) on a basis that favors those of a higher rank or rate of pay. Most involved organizations would not be prohibited sources and

generally do not make loans or grants of financial assistance in a manner that favors those of a higher rate of pay. *See* 5 C.F.R. § 2635.204(c)(2)(iii).

Q: Would a gift from an outside source prompted by furlough constitute an improper salary supplementation?

A: Generally, no. A non-Federal source may not make a payment to a federal employee as "compensation" for the employee performing official Government duties.

A criminal statute, 18 U.S.C. § 209, prohibits the supplementation of a government employee's salary by outside sources. Specifically, it prohibits a non-Federal source from providing compensation to a government employee if the compensation is for services the employee has rendered or will render to the Government. Congress intended that 18 U.S.C. § 209 would prevent the divided loyalty of a government employee paid an economic benefit by a non-Governmental source to compensate the employee for performing his official 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. The statute requires only that the outside payment compensate the employee for his or her services to the Government.

Accordingly, if an individual or non-Federal organization were to donate money (or some other form of financial assistance) to a DoW employee and refer to this contribution as "compensation for performing official DoW duties," or "a substitute payment to make up for a DoW employee's inability to draw regular or overtime pay during tough fiscal times," the payment would likely constitute an illegal supplementation of Federal salary under 18 U.S.C. § 209.

However, if an individual or organization is giving financial assistance to a DoW employee because of that employee's individual financial hardship, that would likely constitute a charitable gift or grant—not a payment for performing one's official duties. That the Federal employee's financial hardship derives from a loss of Federal pay during furlough does not mean the contributing individual or charitable organization is "compensating" the employee for performing his or her government duties.¹

¹ Although nexus to the employee's Federal employment is a factor to consider, it is not necessarily dispositive in an 18 U.S.C. § 209 analysis. The Office of Legal Counsel, DOJ, has stated that an intent to compensate cannot be inferred simply because "the class of potential recipients is defined in part by their nexus" to a particular Government agency. Letter from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, to Larry Parkinson, General Counsel, Federal Bureau of Investigation (Oct. 28, 1997). Further, see the example from Office of Government Ethics Memorandum 02 x 4, dated July 1, 2002, providing 18 U.S.C. § 209 guidance: Example 18: A nonprofit organization comprised of former Special Agents of the Federal Bureau of Investigation (FBI) sponsors the "Make a Dream Come True Program" to fulfill the wishes of the terminally ill children of former and current FBI employees. An FBI employee could conclude that the program is motivated by sympathy for his sick child and not intended to compensate him for his government service.

Seeking and Engaging in Outside Employment

Q: What is a quick list of ethics rules that may apply to those who plan to work on the days they are furloughed?

A: The following provides a brief summary of potential concerns listed in the order they are most likely to arise. More detail for each issue is provided in subsequent questions.

- *Disqualification or recusal.* Personnel may not engage in official duties that would affect a prospective or current employer or client. *See* 18 U.S.C. § 208; Section 1117 of the FY2022 NDAA; and 5 C.F.R. §§ 2635.402 and 604.
- *Notification and approval.* Financial disclosure filers planning to work for a “prohibited source” are required to obtain prior approval from their superior and/or their ethics official (5 C.F.R. § 3601.106). Some DoW components require that all personnel obtain prior authorization for outside employment or activities. If you are unsure of your component’s policies, check with your component’s legal office.
- *Pay restrictions.* A criminal statute prohibits receiving pay from a non-Federal source for “performing your federal duties” which may bar working for a contractor closely supporting your current DoW position (e.g., such that your duties for the contractor could overlap with your federal duties.) *See* 18 U.S.C. § 209.
- *Representation restrictions.* A criminal statute prohibits personnel from representing any non-federal entity before a federal agency or court. This means that you cannot work as a contractor employee in the Government space or in any other position that would require you to communicate on behalf of the company to the Government. *See* 18 U.S.C. §§ 203 & 205.
- *Former employer disqualification.* For two years after ending any outside employment you may not participate in a DoW matter where your former employer is a party or represents a party. For former clients the restriction is one year. *See* Section 1117 of the FY22 NDAA and 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. Personnel may not use government resources, including official time, in support of any outside compensated activity or business. *See* 5 C.F.R. § 2635.702-705 and JER 2-301, 3-20, and 3-303.

Q: Is there a requirement for disqualification when seeking outside employment?

A: Personnel are prohibited from participating personally and substantially in any particular matter that could affect a prospective employer, meaning such personnel are recused from such matters. *See* 18 U.S.C. § 208; 5 C.F.R. §§ 2635.604 & 606. Where there is a potential nexus between the employee’s official duties and an any entity with which the employee is seeking to work, DoW regulations require the employee to execute a **written** disqualification and provide a copy to their supervisor and ethics official. *See* 5 C.F.R. § 2635.604 and JER 2-200.

Q: Are there additional “seeking employment” rules if I want to work for a DoW contractor?

A: Financial disclosure filers planning to work for a “prohibited source” are required to obtain prior approval from their superior and/or their ethics official (5 C.F.R. § 3601.106). Some DoW components require that all personnel obtain prior authorization for outside employment or activities. If you are unsure of your component’s policies, check with your component’s legal office.

Q: May I work on the same matters as my federal job for my office’s support contractor?

The supplementation of salary prohibition does not permit DoW civilians to be paid by another to perform their official duties while on furlough. *See* 18 U.S.C. § 209. This may come up if there are contractors and civilians performing shared duties. The Federal employee cannot be hired by the contractor to perform any aspect of the work he or she is unable to perform with the furlough limits on his or her DoW position. Giving a regular DoW employee’s work to a contractor to perform during a furlough period also may violate official furlough implementation guidance and could constitute an 18 U.S.C. § 208 violation if the DoW employee benefits his or her outside employer by leaving work available for the contractor to perform.

Q: Do I have any limitations in performing my non-Federal job?

DoW personnel remain Federal employees while on furlough and subject to all ethics laws. Remember that the criminal representational restrictions at 18 U.S.C. §§ 203 & 205 apply even while on furlough. This means you should avoid any outside employment that requires you to represent the interests of a non-Federal entity back to the Federal Government with the intent to influence official action, including working as a contractor employee in the Government space or in any other position that would require you to communicate on behalf of the company to the Government.

Q: What effect could my outside employment have on my current DoW work?

Upon termination of your outside employment arrangements, your direct financial conflict ends since your non-Federal employer’s interests are no longer imputed to you for purposes of the criminal statute. However, for two years after ending any outside employment you may not participate in a DoW matter where your former employer is a party or represents a party. For former clients the restriction is one year. *See* Section 1117 of the FY22 NDAA and 5 C.F.R. § 2635.502.

Other Matters

Q: Do the political activity restrictions in the Hatch Act and implementing regulations and policies still apply while I am furloughed?

Yes. DoW personnel must abide by the Hatch Act, which governs the political activity of federal employees even in their personal capacity. DoW employees cannot engage in any political

fundraising and cannot use their official titles in connection with any political activity, even if the activity is otherwise permissible under the Hatch Act.

Q: I am a financial disclosure filer. Do the financial disclosure filing requirements still apply to me?

DoW financial disclosure filers remain subject to all financial disclosure and related ethics requirements. However, ethics officials may issue extensions to filers with reports coming due during the furlough period based on inability to access CAC enabled systems and/or unavailability of ethics official assistance.