

OGE Updates Rules Governing Recruiting of Federal Employees to Private Sector Jobs

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Election and Political Law

Companies are increasingly hiring out of the federal workforce, only to find that their new hires are restricted by “revolving door” rules that prohibit their participation in certain matters—sometimes for a limited time, sometimes permanently. [New rules](#) issued recently by the U.S. Office of Government Ethics (“OGE”) serve as a reminder that, even before hiring a federal employee, a company may find itself entangled in federal ethics rules that regulate the job negotiation process. These rule changes are particularly timely as we come to the end of the Obama Administration and political appointees find themselves looking for the next step.

Under existing rules, federal employees seeking nonfederal employment may need to recuse themselves from handling matters involving potential employers with whom they are discussing future employment. Once hired, the “revolving door” rules may prohibit a former federal employee from making communications to, or appearances before, the federal government. State bar rules may impose further restrictions if the federal employee is a lawyer.

The new rules are a revision of 5 C.F.R. Part 2635, governing how federal employees may interact with potential nonfederal employers. The rules address the criminal conflict of interest law at [18 U.S.C. § 208](#), the requirements of [Executive Orders 12674 and 12731](#), and, with this revision, the notification and disclosure requirements of the Stop Trading on Congressional Knowledge Act (“[STOCK Act](#)”). In addition, the Office of Government Ethics has subsequently issued an [Advisory Opinion](#), providing a “plain language” description of the post-employment rules in a question and answer format.

The newly issued rules include substantive additions and changes that will affect employers. The most important ones are highlighted below. They take effect August 25, 2016.

The STOCK Act

The new rules incorporate the notification and recusal provisions of the relatively new STOCK Act. Employers seeking to hire upper-level government employees should know that those employees are likely governed by these rules. Employees must make written disclosures of any employment negotiations and agreements, which must include the name of the company and the date the negotiation or agreement began. They also must disclose any conflict that arises because of that negotiation or agreement, and recuse themselves. Covered employees are those identified as “public filers” under [5 C.F.R. § 2634.202](#). This includes, among others, the President and Vice President, presidential appointees in the Executive Office of the President, employees classified above pay grade GS-15, employees outside the GS scale with pay fixed at

120 percent or more of GS-15, service members at pay grade O-7 or above, administrative law judges, and positions excepted from the civil service as confidential or policymaking roles.

Other Recusal and Notification Issues

The new rules put a heavier burden on employees not covered by the STOCK Act to make sure they have properly recused themselves. Potential employers should be aware of this and know that employees may face difficult decisions about notification as these new rules settle in. Companies should not interfere with a federal employee's decision about whether to recuse himself or herself or file a notification of that recusal.

The new rule emphasizes and clarifies that recusal may be necessary even in "particular matters of general applicability," not only matters involving a specific party. Thus, even if a company does not have a particular matter pending before an agency, the employee's role in regulating the company's industry might constitute a conflict during job negotiations.

Social Media Activity

The new rules give some guidance on social media and online hiring activity. An employer may review a person's LinkedIn or similar profile without causing that person to be "seeking employment." However, if a company reaches out to an employee after finding them on a social network, and the employee's response does not reject the outreach, then the employee is seeking employment. When an online resume distribution service sends an employee's resume to a potential employer and tells the employee it has done so, the employee is seeking employment. Note that it is thus possible for an employee to be "seeking employment" without the potential employer taking an active role. This one-sided outreach may require recusal when the employee then has to handle a matter affecting the potential employer.

Volunteer Activity

Companies and nonprofits seeking to fill unpaid directorships, advisory boards, and other volunteer positions may trigger these rules even though the role is uncompensated or not traditionally thought of as "employment." This clarifies an ambiguity in the old rules, so that activity is not covered by if it is "informal, uncompensated, and non-fiduciary," like serving at a soup kitchen. However, uncompensated service that creates a "specific relationship," like board service, may be covered.

Rejecting Unsolicited Offers

Whether an employee is seeking employment may depend on whether the employee rejects an unsolicited approach from an employer. The new rule includes the language, "I am not talking to anyone about employment until I leave the Government," as an example of language sufficient to decline the outreach. Potential employers should be prepared to begin hearing this language, perhaps verbatim, from employees who do not want to implicate the employment negotiation rules.

Relationship to Other Laws

Potential employers should be aware that each agency is allowed to have supplemental rules, and those rules may be more restrictive than those found in the OGE's general restrictions.

Moreover, many states, cities, and counties across the country have adopted their own ethics rules governing job negotiations and related revolving door rules. These rules apply when hiring state and local officials to serve in private sector positions. Given the increasing complexity of these federal, state, and local rules, corporations should consider adopting policies governing the hiring of government officials and ensuring that human resources departments are familiar with the policies.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Election and Political Law practice:

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