“Don’t Let the Door Hit You on the Way Out”: A Primer on Revolving Door Restrictions

May 21, 2018

Election and Political Law

The scenario is all too common: After months of searching for the right candidate and weeks negotiating duties and compensation, a company finally hires a new employee to a position that will entail work on certain government policy issues. The employee seems to be a perfect fit, but after a few days on the job, someone asks whether “revolving door” rules prohibit the employee from engaging in a specific task. That question triggers a broader review by lawyers who advise that, due to these unforeseen post-government employment restrictions, the employee is unable to perform many of the most crucial aspects of the new job. For both the company and the employee, this is an embarrassing and costly fiasco. It is therefore essential that companies who hire government officials understand the potential post-employment restrictions that may apply before the job offer is extended.

To assist companies with these reviews, this advisory provides an overview of the most important post-employment restrictions applicable to federal officials and employees, while highlighting similar provisions adopted by state and local governments throughout the country. We then identify a number of steps private employers can take to ensure their newest hires are ready and able to hit the ground running on their first day in the office.

Executive Branch Restrictions

The primary statutory restrictions applicable to former federal employees are included among the criminal conflicts-of-interest provisions set forth in 18 U.S.C. § 207. Section 207, together with the implementing regulations adopted by the Office of Government Ethics (“OGE”), imposes restrictions of varying scope and duration based on a former employee’s seniority and prior activities. While most of these provisions target direct communications and appearances between current and former employees, certain former officials are prohibited from engaging even in behind-the-scenes efforts to assist others in making such outreach.

“Switching Sides” Restrictions for All Executive Branch Employees

The most fundamental federal revolving door restriction bars former employees from “switching sides” in a particular matter after they leave government service. This provision applies to all executive branch employees and, depending on the former employee’s role in government, runs either for two-years following the employee’s departure from government service or, for certain matters, for the rest of the employee’s life.

The two-year ban applies to any “communication to or appearance before” a federal court or agency in connection with a “particular matter” involving specific parties: (1) in which the United

States has a direct and substantial interest; and (2) that the employee knows or should know was pending under his or her official responsibility during his or her final year of government service. This cooling-off period applies even if the individual did not personally work on the matter in question. For matters in which the employee "personally and substantially" participated as a government employee, this cooling-off period extends to a lifetime ban.

While the principle underlying this rule is intuitive, this apparent simplicity conceals hidden traps for the unwary. For example, although the statute generally does not prohibit behind-the-scenes activities, even conduct that may seem innocuous—like mentioning that a former colleague sends his or her regards—may raise potential criminal liability if accompanied by an intent to influence agency action.

Similarly, while the definition of the term "particular matter involv[ing] a specific party" may seem obvious, OGE regulations emphasize that the "same particular matter may continue in another form or in part." While switching sides in litigation is obviously prohibited, what about working on an issue that connects in some tangential way to a contract or permitting proceeding in which the individual participated? In determining whether two ostensibly distinct matters are in fact the same matter taking different forms, OGE advises that "all relevant factors" must be considered, including "the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed." This added complexity is particularly significant for federal contractors hiring former government employees to assist in multi-phased or other long-running or complex agreements.

Heightened Restrictions for High-Level Officials

In addition to the basic switching-sides restrictions that apply to all executive branch employees, certain high-level agency officials are subject to more stringent restrictions upon the end of their government service. Given that these officials are often the most sought-after agency veterans or political appointees, companies are well advised to review these more restrictive rules carefully before finalizing any hiring decisions.

For so-called "senior" employees—including those paid on the Executive Schedule (or at a rate of approximately $164,000 or more), military officers in pay grade O-7 or above, and certain White House staff—a cooling-off period on communications or appearances before the former agency, in connection with a matter on which the former senior employees seek official action, lasts for one year after they leave government. This period is extended to two years for their "very senior" colleagues, which includes agency heads, staff of the Executive Office of the President paid at Level II of the Executive Schedule, and other senior White House staff, and restricts communications or appearances before not only the former agency but also all Executive Schedule employees anywhere in the federal government.

In addition, former senior and very senior officials are barred from representing a foreign government or political party before *any* federal agency for one year after leaving government. And, importantly, while the other restrictions outlined above prohibit only actual communications and appearances before government officials, this one-year cooling-off period also applies to *aiding or advising* a covered foreign entity with the intent to influence the U.S. government.

Trump Executive Order (The "Ethics Pledge")

Companies concerned about post-employment restrictions should not fall into the trap of thinking that the only restrictions to worry about are those well-known criminal restrictions

described above. As discussed at length in a prior advisory, President Trump issued an executive order soon after taking office that imposes several additional post-employment restrictions on certain former administration officials. While this order rolled back some elements of the similar order in place during the Obama administration, the Trump order also includes new and significant restrictions on the ability of former administration officials to provide even behind-the-scenes lobbying advice.

Specifically, the Trump order prohibits political appointees from engaging in both "lobbying contacts" and so-called "lobbying activities" with respect to "any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration." A similar 5-year ban applies to "lobbying activities" with respect to the individual's former agency. Drawing on the definitions set out in the Lobbying Disclosure Act, the order thus prohibits political appointees from both engaging in lobbying themselves *and* from engaging in behind-the-scenes efforts in support of such lobbying.

This means that a former employee can violate the Executive Order even if the employee does not become a registered "lobbyist" and even if the employee never personally communicates with executive branch officials. As long as the employee engages in at least some "lobbying activities"—which could include, for example, participating in weekly team meetings discussing lobbying strategy or serving on a trade association committee in which communications with executive branch officials are discussed—there is a potential violation.

In addition, the pledge imposes a lifetime ban on engaging in activities that would require the individual to register under the Foreign Agents Registration Act as a foreign agent for a foreign government or foreign political party. As the number of former Trump appointees continues to grow, employers seeking to draw on their experience, relationships, and expertise in government are well advised to consider the restrictions the Trump pledge may impose on their new employees before making final hiring decisions.

For the reader's convenience, a chart summarizing the various criminal and Executive Order-imposed post-employment restrictions on former federal executive branch employees follows:

Who is Covered?	Duration of Restriction	Behind-the-Scenes Restriction?	Nature of Restriction	Restricted from contacting or appearing before whom?
Any former executive branch employee	Lifetime	No	Communications or appearances in connection with certain particular matters in which employee participated personally and substantially	Any officer or employee of any department, agency, or court
Any former executive branch employee	2 years	No	Communications or appearances in connection with certain particular matters pending under employee's official responsibility during final year	Any officer or employee of any department, agency, or court
Any former executive who personally and substantially participated in certain ongoing trade or treaty negotiations in year preceding termination (Also applies to former Members and employees of Congress)	1 year	Yes	Representing, aiding, or advising any other person concerning such ongoing trade or treaty negotiation	Covers contacts with any officials **AND** behind-the-scenes activities
Former "Senior" executive branch employees	1 year	No	Communication or appearance	Any officer or employee of department or agency in which person served in year preceding termination
Former "Very Senior" executive branch employee	2 years	No	Communication or appearance	Any officer or employee of department or agency in which person served in year preceding termination **AND** any Executive Schedule employee
Former "Senior" or "Very Senior" executive branch employees (Also applies to former Members and employees of Congress)	1 year	Yes	Representing a foreign entity before any officer or employee of U.S. or aiding or advising foreign government/political party with intent to influence decision of any officer or employee of the U.S.	Covers contacts with any officer or employee **AND** covers behind-the-scenes activities
Trump appointees	5 years	Yes	"Lobbying activities"	With respect to former agency
Trump appointees	Remainder of Trump administration	Yes	"Lobbying activities"	With respect to any covered executive branch official or non-career SES official
Trump appointees	Lifetime	Yes	Any activities on behalf of foreign government or foreign political party that would trigger FARA	N/A

Department of Defense-Specific Restrictions

Like their senior counterparts in other agencies, former Department of Defense officials and employees have long been subject to additional post-employment restrictions beyond the general side-switching restrictions applicable to all federal employees.

For example, certain Defense Department employees must request written guidance regarding the scope of their post-employment restrictions before receiving compensation from a DOD contractor within two years after exiting government. This mandatory request for written ethics guidance applies to senior military and civilian leaders (*i.e.*, officers in grade O-7 or above and employees in an Executive Schedule position) who participate "personally and substantially" in a procurement valued at more than $10 million, as well as any official who serves in one of several key roles in connection with such a procurement (*e.g.*, program manager or deputy program manager, procuring and administrative contracting officers, and members of a source selection board).

Most recently, as an element of the 2018 National Defense Authorization Act, Congress significantly expanded the restrictions imposed on senior DOD officials who enter the private sector. Specifically, Section 1045 of the 2018 National Defense Authorization Act prohibits former senior DOD military and civilian officials from engaging in either "lobbying contacts" or so-called "lobbying activities" with respect to the entire Defense Department. Like the Trump executive order, this restriction applies to both direct communications with covered DOD officials, as well as behind-the-scenes preparation and planning to assist with such communications. This new provision imposes a one-year cooling-off period for officers in grade O-7 or O-8 (as well as their civilian equivalents), with this period doubled for officers in grade O-9 or above (and their civilian equivalents).

As we discussed in greater detail in a recent client alert, many questions remain regarding the precise scope of this newly adopted provision. Given this continued uncertainty, and mindful of the unique post-employment provisions applicable to many former DOD officials, companies seeking to hire current or recently retired DOD officials should take extra precaution to ensure that they do not run afoul of these more stringent and lesser known restrictions.

Special Considerations for Government Contractors

Under federal procurement integrity statutes, officials who participate in the development, negotiation and implementation of certain federal procurements are also subject to special restrictions not applicable to other executive branch employees.

Most significant among these, officials who serve in any of certain enumerated capacities with respect to a transaction totaling more than $10 million are generally prohibited from receiving *any* compensation from a federal contractor for one year after leaving government service. Beyond this blanket compensation ban, all officials who "personally and substantially" participate in a federal procurement must promptly report any contacts with bidders regarding possible employment. Where such contacts result in an offer of non-federal employment, the employee must either reject the offer or disqualify him or herself from participation in the relevant procurement action.

Legislative Branch Restrictions

While the post-employment restrictions described above primarily target former executive branch officials and employees, Members of Congress and their staff must abide by many similar restrictions under both federal law and congressional ethics rules.

For example, like their counterparts in the executive branch, former legislative branch officials and employees are generally prohibited from lobbying some or all of their former colleagues on the Hill. As with executive branch employees, the duration and scope of this lobbying ban depends on an individual's level of seniority upon exiting federal employment.

By statute, Senators and Representatives are barred from making, with the intent to influence, communications or appearances before Congress entirely (for two- and one-year, respectively). A similar one-year ban applies to former senior Senate communicating with or appearing before the U.S. Senate. A separate one-year cooling-off period applies to former senior House staff communicating with or appearing before their former Member or that Member's employees. Other restrictions apply to former committee staff or leadership staff. While these cooling-off periods apply only to actual communications or appearances, former members and "senior" staff—like senior executive branch officials—are also prohibited from representing, aiding or advising foreign governments and political parties with the intent to influence the federal government.

Beyond these statutory provisions, House and Senate rules impose additional restrictions and requirements on some or all congressional staff. In particular, under Senate Rule XXXVII, all former Senate employees who register as a lobbyist, are employed by a lobbyist, or are employed by an entity that itself retains a lobbyist are subject to a one-year cooling off period with respect to their former office or committee. Finally, while the House has not adopted a separate post-employment rule, both House and Senate rules require members and senior staff to disclose any negotiations and agreements of future employment to the their respective Ethics Committee within three days and to immediately recuse themselves from any matter presenting a conflict or appearance thereof arising out of those negotiations.

As compared to the many complicated provisions that apply to different executive branch officials, the lobbying restrictions applicable to former congressional officials and staff are often more familiar to private employers. Nonetheless, companies seeking to hire from the Hill should take steps to ensure that they understand these restrictions and their implications for new employees.

For the reader's convenience, a chart summarizing these restrictions follows below:

Who is Covered?	Duration of Restriction	Behind-the-Scenes Restriction?	Nature of Restriction	Restricted from contacting or appearing before whom?
Members of Congress	Senators - two years Representatives - one year	No	Communication or appearance	All Members, officers, and employees of both chambers
Members of Congress (Also applies to certain senior staff.)	One year	Yes	Representing a foreign entity before any officer or employee of U.S. or aiding or advising foreign government/political party with intent to influence decision of any officer or employee of the U.S.	Covers contacts with any officer or employee **AND** covers behind-the-scenes activities
Senior Senate Staff (Personal & Committee)	One year	No	Communication or appearance	All Members, officers, and employees of the Senate
Senate Leadership Staff	One year	No	Lobbying	Any Member or staff of leadership of same party
Other Senate Committee Staff	One year	No	Lobbying	Former employing committee and Members thereof
Other Senate Personal Staff	One year	No	Lobbying	Former employing Member and staff of former employing office
Senior House Leadership Staff	One year	No	Communication or appearance	Members of House leadership and House leadership staff
Senior House Personal Staff	One year	No	Communication or appearance	Former employing Member and staff of former employing office
Senior House/Joint Committee Staff	One year	No	Communication or appearance	Members and staff of former committee, including any members of committee in year prior to departure

State and Local Revolving-Door Restrictions

In addition to the post-employment restrictions imposed on former federal employees, more than 40 states and many cities and counties have adopted some form of revolving-door legislation.

By and large, these state and local provisions target many of the same activities that are the subject of the federal provisions described above. For example, the State of New York imposes broad prohibitions on former state officers and employees, restricting them from both appearing before their former agency or otherwise "receiv[ing] compensation for any services rendered" on behalf on another "in relation to any case, proceeding or application or other matter before such agency" for a period of two years. As under federal law, this two-year cooling-off period extends to a lifetime ban on matters with which employee was "directly concerned and in which [employee] personally participated."

Meanwhile, in Virginia, members of the General Assembly are subject to a one-year lobbying ban, while a similar ban extends to all former "public officers"—including heads of state agencies—in Georgia. Similar lobbying bans have been adopted by a number of major cities, with each city imposing unique limitations on the post-employment activities of former city employees and officials.

In light of the variety of revolving-door restrictions imposed by different state and local jurisdictions, before engaging individuals who may have served in state or local government, companies should be mindful to review all potentially applicable restrictions before making a final hiring decision.

Hiring Former Government Officials and Employees - Practice Tips

As emphasized above, the many federal, state, and local revolving-door provisions present a particular challenge to companies that hire former government employees. While each employment search and potential hire is unique, below are some basic steps employers can take to avoid getting suck in the revolving door.

Pre-Negotiation: Before approaching a potential hire, employers should:

1. Maintain written conflicts-of-interest policies and recusal processes and ensure that the human resources department and other key decision-makers are trained and familiar with these guidelines;
2. Review the job description and assess the likelihood that the position's duties may involve interacting with government or providing behind-the-scenes support for the employer's dealings with government, thereby potentially triggering revolving-door rules;
3. Require applicants to disclose their prior government employment and job responsibilities;
4. Consider whether current government employees will be required to disclose the employment negotiation or recuse themselves from any matters in which the new employer has an interest pursuant to Congressional ethics rules or agency rules;

5. Determine the various post-employment rules that will apply to the new prospective new hire, including the federal criminal provisions, Congressional revolving-door rules, Trump appointee "ethics pledge" rules, state and local rules, and agency-specific rules;
6. Involve all relevant internal stakeholders in assessing whether the post-employment issues are a "deal-breaker," including the prospective employee's supervisors. Sometimes, the prospective hire's duties can be cabined off successfully for a period, while permitting the new employee to still make valuable contributions to the organization. Occasionally, however, the revolving door restrictions will be so constraining that the supervisor may determine that the candidate would be unable to successfully function and decide to withdraw the candidate's name from further consideration; and
7. Engage with counsel, as needed.

During Negotiation: Where appropriate, prospective employers should work proactively with the employee's Designated Agency Ethics Official (DAEO) or other ethics staff to identify potential areas of concern and restrictions that may apply to the potential new hire.

Many federal agencies have promulgated their own regulations implementing statutory revolving-door restrictions. In addition, the views of ethics officials in different agencies may vary with regard to the application of the post-employment restrictions to former employees within their agencies. Engaging the relevant ethics officials early in the hiring process often ensures that both the employee and potential employer understand how these regulations will apply to them and can address any ambiguities these regulations may present.

Post-Hiring: Employers should consider providing new employees subject to revolving-door restrictions written "dos and don'ts" guidance as soon as possible after they join the company. Although these former government employees frequently receive an "ethics letter" from their former government employer on their way out the door, these ethics letters are often generic and are not informed by the specific duties of the employee's new role. Written guidance tailored to the new hire can help prevent problems before they arise and protect the company in the event a violation is alleged. This tailored guidance can also address areas that may be overlooked by the "ethics letter." Lawyers, for example, may be subject to bar rule restrictions on their post-government employment activities that are broader than those imposed by 18 U.S.C. § 207. Further, as noted above, under current law, certain DOD officials and employees are *required* to seek written guidance describing how the agency's post-employment restrictions apply to them.

New hires should also understand any ongoing confidentiality obligations that may prevent them from sharing non-public information they learned in connection with their government employment.

* * *

Now more than ever, jurisdictions across the country are taking steps to slow the revolving door between government service and the private sector, and the perceived conflicts that arise therefrom. With these ever-increasing restrictions on the revolving door in mind, companies seeking to hire top-flight talent from the ranks of government must be especially careful to avoid getting caught in the spin.

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

Frederic M. Levy	+1 202 662 5154	flevy@cov.com
Zachary G. Parks	+1 202 662 5208	zparks@cov.com
Perrin Cooke	+1 202 662 5349	pcooke@cov.com