A Practical Look at 5 C.F.R. § 2635.502

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Brief

A refresher on 5 C.F.R. § 2635.502

Why impartiality regulations?

- Ensure that employees take appropriate steps to avoid an appearance of loss of impartiality
- Prevent the introduction of bias into the decision-making process
- Protect the reputational integrity of the agency

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Overview

2635.502(a) *Consideration of appearances by the employee*. Where an employee knows that:

- a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a household member, or
- a person with whom the employee has a covered relationship is or represents a party to such matter

and where the employee determines that a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter, the employee should not participate, absent a determination from the agency designee.

Concepts

1. Decision makers

2. Particular matters involving specific parties

3. Financial interest of a household member

4. Covered relationship

5. Reasonable person standard

6. Determination of the agency designee

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Considering appearances

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Who decides?

- **Employee**: makes the first attempt at analysis
- **Supervisor**: provides input as to whether employee should participate; can assign work to another employee
- **Agency designee**: makes determination as to whether participation is proper

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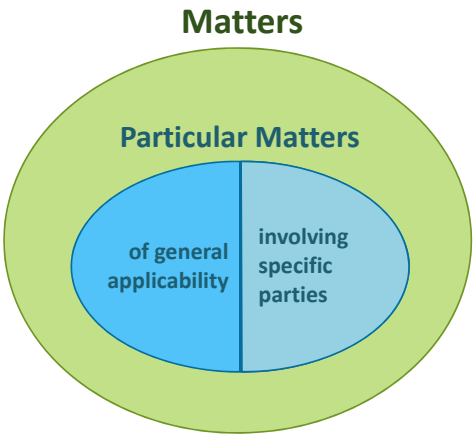
Particular matters involving specific parties



Particular matter involving specific parties

- **Includes:** any judicial or other proceeding, application, request for a ruling or any other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party/parties in which the U.S. is a party or has a direct and substantial interest
- **Does not include**: particular matters focused on interests of a discrete & identifiable class, not involving specific parties *(particular matters of general applicability);* broad policy options directed to interests of a large and diverse group (*matters*)

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Financial interest of household member

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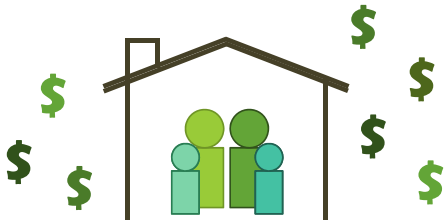

Who is a household member?

For example…

- ❑ Spouse
- ❑ Children living at home
- ❑ Parents
- ❑ Roommates
- ❑ Live-in boyfriend or live-in girlfriend
- ❑ Not a brief visitor

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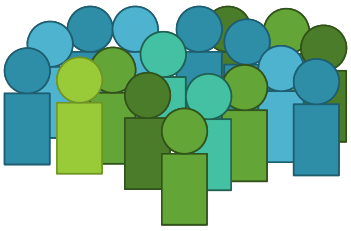
Covered relationships

2635.502(a) *Consideration of appearances by the employee*. Where an employee knows that:

- a person with whom the employee has a covered relationship is or represents a party to such matter



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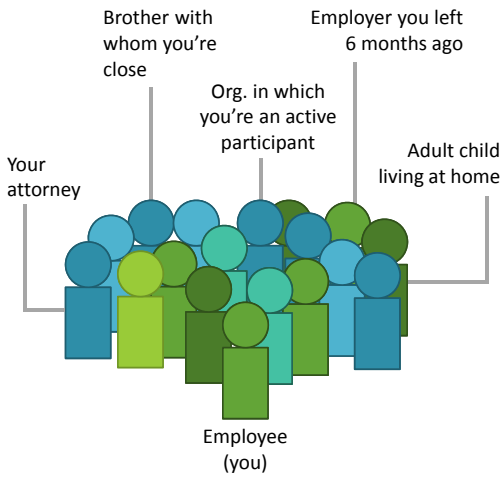
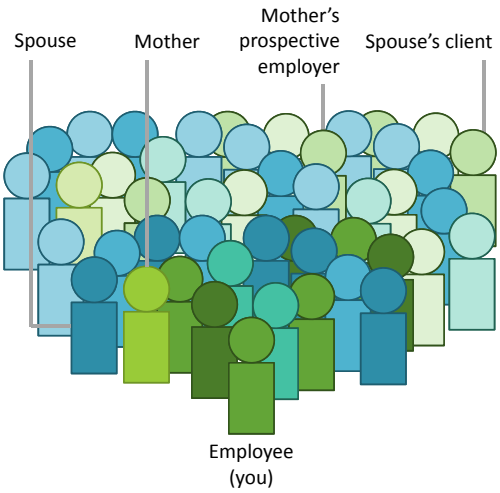
Covered relationships



Employees have covered relationships with:

- ❑ Person (other than prospective employer) with whom they have/seek a business, contractual or other financial relationship that involves other than a routine consumer transaction
- ❑ Member of household or relative with whom they have a close personal relationship
- ❑ Person for whom they have, in the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee
- ❑ Organization in which they are an active participant

(More) Covered relationships



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- ❑ Person for whom they have, in the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee
- ❑ Organization in which they are an active participant
- ❑ Person for whom spouse, parent or dependent child is (to employee's knowledge) serving/ seeking to serve as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee

Considering appearances

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Reasonable person standard

- ❑ Assumes that all of the relevant facts are known
- ❑ Employee's reputation for honesty and integrity don't matter
- ❑ Risk assessment for the agency, not a bright-line test

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Step 1:
Employee's Analysis

Stop and consult with an agency designee.

STOP

Is employee concerned that impartiality may be questioned?

Step 2:
Agency Designee's Analysis

Agency designee makes determination.

Impartiality would not be questioned – employee may participate.

Impartiality would be questioned – employee may not participate.

Impartiality would be questioned, but employee will be authorized to participate.

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Questions for Discussion

Former employer

A former natural gas executive is appointed to a senior position at the Environmental Protection Agency. The EPA is currently drafting fracking regulations.

Can he work on those regulations? *(Red = No; Green = Yes)*

Are people going to question his impartiality?
(Red = Yes; Green = No)

Former employer

A former natural gas executive is appointed to a senior position at the Environmental Protection Agency. The EPA is currently drafting fracking regulations.

What if his former company wants to get a permit?
(Red = Recuse; Green = Participate)

What if his former company wants to get a permit 25 months after he leaves? What if the permit is very controversial?
(Red = Recuse; Green = Participate)

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Outside organization

An IRS employee is a member of a private organization whose purpose is to restore a local historic movie theater. While she is an outspoken advocate of the organization, particularly on social media, she has no formal role or duties – she is simply a dues-paying member. As an IRS employee, she has been assigned to participate in a determination regarding the organization's recent application for tax-exempt status.

Is this a 502 situation? *(Red = Yes; Green = No)*

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Should the employee recuse? *(Red = Yes; Green = No)*

Is there anything else she should do?

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Employee's spouse's client

An employee's spouse works at a law firm and represents many Fortune 500 clients on tax matters.

May the employee work on a contract the agency has with one of his spouse's clients? *(Red = No; Green = Yes)*

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Friendship

Two employees are good friends with each other. In fact, their families frequently socialize outside of the office. One of them has now been appointed to head the office that both of them work in.

Is this a 502 problem? *(Red = Yes; Green = No)*

Does one of them need to be reassigned?
(Red = Yes; Green = No)

Are there precautions that one (or both) of them should take?

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Family member at another federal agency

A Defense Contract Audit Agency employee is assigned to audit a government contract that another DoD agency has with Company XYZ. The employee's spouse was the project manager for the DoD agency on the contract that is to be audited, but is not otherwise involved in this matter.

Is there a 502 issue? *(Red = Yes; Green = No)*

Should the employee be recused from participating in the audit?
(Red = Yes; Green = No)

Are there any other concerns here?

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Family member at a corporation

A senior federal employee's brother is an executive at a corporation that is affected by regulations issued by the senior employee's agency.

Should the employee recuse from working on policy matters affecting the corporation? *(Red = Yes; Green = No)*

What if there is a meeting at the agency to discuss a regulation, and the employee's brother was representing the company? *(Red = Recuse; Green = Participate)*

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Family member at a corporation

A senior federal employee's brother is an executive at a corporation that is affected by regulations issued by the senior employee's agency.

What if the brother is not at the meeting, but is the person at the company who is the head of government affairs and is responsible for the issue affected by the regulation? *(Red = Recuse; Green = Participate)*

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Family member at a corporation

A senior federal employee's brother is an executive at a corporation that is affected by regulations issued by the senior employee's agency.

What if the brother instead worked for a company that was competing for a contract at the agency? Is it covered by 502? *(Red = Yes; Green = No)*

Does the employee need to recuse? *(Red = Yes; Green = No)*

What if there was a meeting to negotiate the contract that the brother was attending? *(Red = Recuse; Green = Participate)*

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Employee determination

An employee read through 2635.502, determined that her participation in a matter would be improper, recused from the matter, and is refusing to do the work. This issue was raised to the ethics office, and the ethics office and the employee's supervisor believe that participation would indeed be proper. The employee says that 2635.502 notes only that she "may" seek guidance from an ethics official – not that she is required to do so.

Can the employee be required to work on the matter? *(Red = No; Green = Yes)*

How should this situation be resolved?

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Alumni

An employee reviews grant applications and makes funding recommendations for a particular grant program at her agency. One of the applicants in this round of funding is the university from which she earned her master's degree three years ago.

Will her impartiality be questioned if she works on this application? *(Red = Yes; Green = No)*

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Alumni

An employee reviews grant applications and makes funding recommendations for a particular grant program at her agency. One of the applicants in this round of funding is the university from which she earned her master's degree three years ago.

What if the university department applying for a grant is not the one from which she earned her degree?
(Red = Recuse; Green = Participate)

What if it's the same department?
(Red = Recuse; Green = Participate)

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Alumni

An employee reviews grant applications and makes funding recommendations for a particular grant program at her agency. One of the applicants in this round of funding is the university from which she earned her master's degree three years ago.

What if she earned her degree 15 years ago?
(Red = Recuse; Green = Participate)

What if she earned it six months ago (and did not have an employment relationship with the university)?
(Red = Recuse; Green = Participate)

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Other than a routine consumer transaction

A federal employee has been trying to sell her car, but hasn't had any success finding a buyer. She mentioned her situation to a contractor employee whom she supervises, when the two of them were casually chatting about the upcoming weekend. Coincidentally, the contractor employee is looking to buy a used car, and suggested that he'd like to take a look at it.

What should the employee do?

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THANK YOU

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