

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

HYPO 1:

An individual is entering government service and his current employer has a policy of paying out severance payments to individuals, based on a formula that factors in the years the employee spent with the company and the compensation of his or her final year with the company. The policy is included in the corporation's employee handbook. It states that the company will pay severance to any employee who retires or who does not go to a competitor. The employee would receive approximately \$75,000 in severance and is going to work for the Department of Defense (DoD). The current employer knows that the individual intends to work for the Executive Branch but does not know in which Executive Department or Agency. Finally, the current employer is a DoD contractor.

Questions—

1. If the severance payment is received prior to the individual entering government, would the payment qualify as an extraordinary payment under 2635.503? Why or why not?

ANSWER: There is a payment— 1) of more than \$10,000; 2) the employer knows that the individual is going to work for the Executive Branch, and it is not necessary for this element that the employer knows which agency, so both these elements are satisfied. What about the third element? The third element is NOT satisfied because this is an established benefits program—it is in writing (in the employee handbook), so there is no .503 restriction.

2. If the severance payment were to be paid out in installments during the individual's government service--
 - a. Should you advise the employee that he or she may accept the installment payments? Why?

ANSWER: 1. We have an officer or employee of the Executive Branch (payment during Government employment); 2. Receiving something of value; 3. From a source other than the United States, but is this payment “compensation for services as an employee of the United States”? Let's look to the factors:

- A. It is not the expressed intent of the payor to compensation for Government service—quite the contrary, it is the stated policy of the company to provide severance for past services to the company.
- B. The employee would potentially be in a position to influence the Government on behalf of the payor, but we would need more facts, here. Also, the payor does not know that the payee would be in that position, because the payor does not know the employee is going to the DoD.

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

- C. There is a substantial relationship or pattern of dealings between the employee's agency and the payor.**
- D. The payment is not given to the employee because of his official position, but rather because of his service to the company.**
- E. The payor is not a Government employee.**
- F. The circumstances do indicate that the payment is motivated by a desire other than to compensate the employee for Government service; again it is to compensate the Government employee for past services to the company.**
- G. Similar payments are made to non-Government employees. In fact, these severance payments are made to all employees who leave, unless the employee goes to a competitor.**
- H. This is not a bona fide public service award.**

So it appears that while some elements are met, based on the totality of the circumstances, e.g. the payor's intent, the fact that payments go to non-Government employees, the fact that the policy is in writing, and the circumstances indicate the motivation is to compensate the employee for something OTHER than Government service, the employee may accept these installment payments.

- b. Do you think that the employee would violate 209 if he or she accepted the installment payments?**

ANSWER: See analysis above, at 2.a.

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

HYPO 2:

An individual is entering government service and his current employer has a policy of paying out severance payments to individuals, based on a formula that factors in the years the employee spent with the company and the compensation of his or her final year with the company. This is the only benefit to which departing employees are contractually entitled. The company will pay severance to any employee who goes into public service, which includes positions with state and local governments and not-for-profit public and private universities. The employee is going to work for the Department of Defense and is expected to receive approximately \$75,000. The current employer knows that the individual intends to work for the Executive Branch but does not know in which Executive Department or Agency. Finally, the current employer is a DoD contractor.

Questions—

1. If the employer determined that, in addition to the severance, it would accelerate the vesting of certain shares of the employer's stock options that would otherwise be forfeited, such that the individual's unvested stock options would vest before the individual becomes a government employee, would these stock options qualify as an extraordinary payment under 2635.503? The options are worth \$40,000. Why or why not?

ANSWER: There are two things of value here— 1) both of which are more than \$10,000—the first is the severance, which we said based on Hypo 1 was not an Extraordinary Payment, but now we also have the vesting of stock options worth over \$40,000; 2) the employer knows that the individual is going to work for the Executive Branch, and it is not necessary for this element that the employer knows which agency, so both these elements are satisfied. What about the third element? The third element is NOT satisfied as to the severance payment because this is an established benefits program—it is in writing (in a contract), but what about the stock options? .503 says that an extraordinary payment means “any item, including cash or an investment interest, with value in excess of \$10,000.” So the stock options would be covered and since the options would otherwise be forfeited/are not awarded based on an established written plan, it is likely that .503 would apply.

NOTE: I say likely because it is under the facts provided above. However, it still possible that the company has a policy or practice of accelerating the vesting of stock options for individuals both entering AND not entering Government, meaning it is possible that the accelerated vesting would not constitute an Extraordinary Payment.

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

2. If the severance payment were to be paid out in installments during the individual's government service--
 - a. Should you advise the employee that he or she may accept the installment payments? Why?

ANSWER: 1. We have an officer or employee of the Executive Branch, that is during Government employment; 2. Receiving something of value; 3. From a source other than the United States. But is this payment “compensation for services as an employee of the United States.” Let’s look to the factors:

- A. It is not the expressed intent of the payor to compensation for Government service—rather the company is paying based on a formula of past service to the company and final year of service.**
- B. The employee would potentially be in a position to influence the Government on behalf of the payor, but we would need more facts here. Also, the payor does not know that the payee would be in that position, because the payor does not know the employee is going to the DoD.**
- C. There is a substantial relationship or pattern of dealings between the employee’s agency and the payor.**
- D. The payment is not given to the employee solely because of his official position, but rather because of his service to the company and a decision to go into public service.**
- E. The payor is not a Government employee.**
- F. The circumstances do indicate that the payment is motivated by a desire other than to compensate the employee for Government service; again it is to compensate the Government employee for past services to the company, and it compensates individuals who both go into a federal government position and those that go into state, local governments, as well as public and private universities.**
- G. Similar payments are made to non-Government employees. Again, the payments are made to employees leaving to go into the federal government, but also those going to state and local government and public and PRIVATE universities.**
- H. This is not a bona fide public service award.**

So it appears that while some elements are met, based on the totality of the circumstances, e.g. the payor’s intent, the fact that payments go to non-Government employees, the fact that the policy is in writing, and the circumstances indicate the motivation is to compensate the employee for something OTHER than Government Service, the employee may accept

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

these installment payments. The broad range of subsequent activities suggests that these types of payments are not truly meant to be compensation for Government services.

- b. Do you think that the employee would violate 209 if he or she accepted the installment payments?

ANSWER: No. See analysis at 2.a., above.

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

HYPO 3:

An individual is entering government service and his current employer has a policy of paying out severance payments to individuals, based on a formula that factors in the years the employee spent with the company and the compensation of his or her final year with the company. The company will pay severance to any employee who goes into the federal government. The employee is going to work for the Department of Defense and the approximate value of the payment is \$75,000. The current employer knows that the individual intends to work for the Executive Branch but does not know in which Executive Department or Agency. Finally, the current employer is a DoD contractor.

Questions—

1. If the severance payment were to be paid out in installments during the individual's government service--
 - a. Should you advise the employee that he or she may accept the installment payments? Why?

ANSWER: 1. We have an officer or employee of the Executive Branch, that is during Government employment; 2. Receiving something of value; 3. From a source other than the United States, but is this payment “compensation for services as an employee of the United States.” Let's look to the factors:

- A. It is not the expressed intent of the payor to compensation for Government service—rather the company is paying based on a formula of past service to the company and final year of service.**
- B. The employee would potentially be in a position to influence the Government on behalf of the payor, but we would need more facts here. Also, the payor does not know that the payee would be in that position, because the payor does not know the employee is going to the DoD.**
- C. There is a substantial relationship or pattern of dealings between the employee's agency and the payor.**
- D. The payment is not given to the employee solely because of his official position, but rather because of his service to the company and a decision to go into the federal government.**
- E. The payor is not a Government employee.**
- F. The circumstances do indicate that the payment is motivated—at least partially—by a desire other than to compensate the employee for Government service; again it is**

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

to compensate the Government employee for past services to the company; on the other hand, it only compensates individuals who go into a federal government position.

G. Similar payments are NOT made to non-Federal employees.

H. This is not a bona fide public service award.

So some elements are met as before. However, the company is saying that it is paying the leaving employee for past service, but it will only do this when the leaving employee goes into the federal government. So it appears that there is indicia that this is for past services to the company, but it is also true that the payment would not be provided but for the employee's decision to go in to federal service specifically. Under these circumstances, OGE and OLC have opined that the individual may not accept the payment. Prudentially, it is not possible to ensure that the true nature of the payment is to compensate the individual for past service to the company AND not future government service. The 209 analysis here is largely dictated by "G.", i.e., the fact that similar payments are NOT made to non-Federal employees.

b. Do you think that the employee would violate 209 if he or she accepted the installment payments?

ANSWER: I truly think based on these facts, a jury could go either way, which is why neither OLC nor OGE permits individuals to accept payments made only to individuals entering federal government service. It is true the payor's formula is objective, based on past service, but it would not be received at all, but for future federal government service. One could argue that the policy is not narrowly tailored to pay only those individuals who went into certain federal government agencies, e.g., only those Government agencies which the company has contracts with, which would perhaps make intent to compensate for Government services clearer. On the balance, though the over-inclusiveness of the policy would not, in of itself, mean that the intent to compensate for future government services could not be found by a jury. It could be that the company realizes that very few employees could or would leave the company to go to a federal agency with which the company does not have extensive dealings, and as such, it is willing to accept the slight over-inclusiveness of the policy in order to create just the type of biased relationship 209 is aimed at prohibiting. In any event, it is not a clear 209 violation, but I believe the matter would have to be referred to DOJ, depending on the totality of facts.

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

HYPO 4:

An employee is a mechanical engineer for NASA, and to stay informed and educated about emerging topics in the world of acoustics, the employee would like to attend a meeting being held by the Acoustical Society of America. The society charges a \$250 fee to attend the meeting.

The engineer's work at NASA does not directly involve acoustical engineering, and you should know that the employee also has an outside position. [The employee has received approval under NASA's supplemental regulations, 5 C.F.R. § 6901.103(g), for the outside employment.]

Situation 1—

The employee asks NASA to permit her to attend the meeting because she feels it will improve her knowledge and ability to perform her government duties. NASA agrees with the employee that it would be helpful for her to attend, but unfortunately it rejects her request because there is a lack of funding. She then comes to you, as an ethics official, because her outside employer has offered to pay for her to attend the meeting.

- a. Should you advise the employee that she may accept the offer of her outside employer? Why?

ANSWER: 1. We have an officer or employee of the Executive Branch, that is during Government employment; 2. Potentially receiving something of value--; 3. From a source other than the United States, but is this payment “compensation for services as an employee of the United States.” Let's look to the factors:

- A. The expressed intent of the payor is not known.**
- B. It is unclear whether the employee would be in a position to influence the Government on behalf of the payor.**
- C. It is unclear whether there is a substantial relationship or pattern of dealings between the employee's agency and the payor.**
- D. The payment might not be given to the employee solely because of his official position. The outside employer might also want the employee to attend the conference. This fact is not clear.**
- E. The payor is not a Government employee.**

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

- F. The circumstances do indicate that the payment is motivated by a desire to compensate the employee for services he would be providing to the Government and might be done on Government time.
- G. Similar payment might be made to non-Federal employees. It is unknown.
- H. This is not a bona fide public service award.

Some elements are met as before. But the most important factors as to whether this is compensation for services as an employee of the United States, is the fact that if NASA had the money this employee would be attending the training on official time. It was been held that 209 applies “if the officer or employee renders the same or similar services to both the Government and a private person.” United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979). Because of this, there is a real concern that the payment could be deemed compensation for services as an employee of the United States. So, you should advise the employee not to ask the outside client to pay.

- b. Do you think that the employee would violate 209 if he or she accepted payment from an outside client to attend the meeting?

ANSWER: This situation is loosely based on United States v. Martel, 792 F.2d. 630, 638 (7th Cir. 1986), which upheld the conviction in a similar fact pattern.

NOTE- It is not clear from the facts of Martel whether the Government employee attended the meeting in his or her official capacity, or private capacity, as the opinion did not analyze the requirement of 18 U.S.C. 209 in depth. I mention this because in light of 209’s intent requirement, as held in POGO, it is possible that a court, as a matter of law, or a jury might not find that the payment was intended as compensation for Government work if the Government employee were attending in his private capacity.

Situation 2—

Same facts, except the employee does not ask NASA to permit her to attend because she realizes that it does not involve her official duties and would not be approved by NASA. She does however perform work for her outside employer involving acoustical engineering. Her outside employer would like her to attend the meeting and will pay for her to go.

- a. If the employee came to you, would you advise her that she may accept the payment of fees and attend? Why?

ANSWER: 1. We have an officer or employee of the Executive Branch, that is during Government employment; 2. Potentially receiving something of value--; 3. From a source

Receipt of Payments Prior to—and During—Government Service:
5 C.F.R. § 2635.503 and 18 U.S.C. § 209

other than the United States, but is this payment “compensation for services as an employee of the United States.” Let’s look to the factors:

- A. The expressed intent of the payor is not known.
- B. It is unclear whether the employee would be in a position to influence the Government on behalf of the payor.
- C. It is unclear whether there is a substantial relationship or pattern of dealings between the employee’s agency and the payor.
- D. The payment is not given to the employee because of his official position. The private employer wants to send the individual to the conference based on the employee’s outside position.
- E. The payor is not a Government employee.
- F. The circumstances do not indicate that the payment is motivated by a desire to compensate the employee for services that he would have provided to the Government and done on Government time. This is a conference unrelated to the services provided to the Government.
- G. Similar payment might be made to non-Federal employees. It is unknown.
- H. This is not a bona fide public service award.

The most important factors as to whether this is compensation for services as an employee of the United States, is simply the fact that this is being done for the individual’s outside position. The work does not involve the same or similar services the individual provides to the Government. Because of this, the payment would probably not be deemed compensation for services as an employee of the United States. So, you should advise the that he or she may accept the conference payment, so long as no other ethics statute or rule would be violated, e.g., Subpart B of the Standards of Conduct.

- b. Do you think that the employee would violate 209 if the employee accepted the payment of fees and attended the meeting?

ANSWER: There would probably be no 209 violation here. This case is based on **United States v. Muntain**, 610 F.2d 964 (D.C. Cir. 1979), where the court held that paid travel to an event was not for services rendered as an employee of the U.S., but rather as an agent of the outside employer.