Seeking Other Employment—5 C.F.R. §§2635.601-606

**Basic Prohibition**

Subpart F of the Standards of Conduct prohibits an employee from participating in an official capacity in any particular matter that will have a direct and predictable effect on the financial interests of any person with whom he is “seeking employment” or with whom he has an arrangement concerning future employment.

The term “seeking employment” encompasses actual employment negotiations, as well as more preliminary efforts to obtain employment. While it generally includes the dispatch of an unsolicited resume, it does not include:

* Sending an unsolicited resume, for example, to someone affected by a matter of general applicability to which the employee is assigned; or
* Requesting a job application.

An employee generally continues to be “seeking employment” until the employee or the prospective employer rejects the possibility of employment and all discussions end. However, in the case of an unsolicited resume, an employee is no longer “seeking employment” once two months have passed without a response from the recipient.

**Elements of Seeking Other Employment Restriction—Subpart F**

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| **Key Elements** |
| * Employee * Personal and Substantial Participation * Particular Matter * Financial Interest of Prospective Employer * Direct and Predictable Effect * Seeking Employment |

\* This is only a summary. When giving advice, always consult the complete set of laws, rules, and opinions that apply to the particular situation.

**The Process**

**\***Note—In the case of a special Government employee serving on an advisory committee, consult the exemption for prospective employment interests at 5 C.F.R. §2640.203(g).

**Employee**

Subpart F of the Standards of Conduct applies to all Executive branch employees *except* the President, and Vice President, including: *(See 5 C.F.R. §2635.103(h))*

* Full-time “officers” and “employees” of the Executive branch, regardless of grade or rank (except as stated above)
* Part-time employees, including special government employees (SGEs), whether or not compensated;
* “Detailees” under the Intergovernmental Personnel Act; *See 5 U.S.C. §§**3371-3376*

The statute does **NOT** apply to contractor employees.

**Personal and Substantial Participation**

*5 CFR §2640.103(a)(2)*

**TIP:** Remember that personal and substantial participation is a **very low threshold**.

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| **Term** | **Definitions** |
| Participate Personally | * Directly * Includes direct and active supervision of a subordinate’s participation in the matter |
| Participate Substantially | * Involvement is of significance to the matter * May be substantial even though it does not determine the outcome of a particular matter * Should be based not only on the effort devoted to a matter, but also on the importance of the effort; While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial * Can include participation at all levels of the decision-making process, including making recommendations and giving advice; It also includes the direct and active supervision of a subordinate’s participation in the particular matter |
| Personal and Substantial Participation | * Requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. |

**Particular Matters**

*See 5 CFR 2640.103(a)(1)*

***Particular matter*** means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." Clearly, then, particular matter may include matters that *do not involve parties* and is not limited to adversarial proceedings or formal legal relationships.

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law.

### The term particular matteressentially covers two categories of matters:

### PM pyramid.JPG(1) those that involve specific parties , and

### (2) those that do not involve specific parties but focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability."

***A particular matter involving specific parties typically involves:***

* Specific proceedings affecting the legal rights of the parties; e.g., judicial proceedings or requests for a ruling or other determination, such as immigration or tax hearings
* Isolatable transaction or related set of transactions between identified parties; e.g., contracts, grants, licenses, product approvals, applications, enforcement actions, administrative adjudications, or court cases.

*See 5 CFR 2641.201(h)(1)*

### *A particular matter of general applicability typically involves:*

### Deliberations, decisions, or actions that focus on a particular industry or profession, such as regulations, programs or standards

### Legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class.

### *Broad policy matters* (those deliberations, decisions, or actions that focus on the interests of a large and diverse group) are not particular matters at all, thus, not covered by 208. For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform

### For further elaboration, see OGE Advisory Memo 06 x 9 of October 4, 2006 titled, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter."*

**Financial Interest of Prospective Employer**

For purposes of the Seeking Other Employment provisions, the term “financial interest” has essentially the same meaning as in 18 U.S. C. section208--the potential for gain or loss to the employee, or to any person with whom the employee is seeking employment, as a result of governmental action on a particular matter.

**Prospective Employer** (*See 5 C.F.R. §2635.603(c)*)

***Prospective employer*** means any person with whom the employee is seeking employment. Where contacts are

made by or with an agent or intermediary, the term includes:

* A n entity who uses an agent or intermediary to contact the employee about a prospective employment relationship, and their identity is made known to the employee; and
* An entity who is contacted by the employee’s agent or intermediary about a prospective employment relationship, and their identity is made known to the employee.

**Direct and Predictable Effect**

*5 CFR §2640.103(a)(3)*

An employee has a disqualifying financial interest in a particular matter only if there is a close causal link (direct effect) between a particular Government matter in which the employee would participate and any effect that matter will have on the asset or other interest that creates the possibility of gain or loss to the employee. The effect must be real (predictable), not speculative, but it need not be probable.

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| **Particular Matter Will…** | |
| **Have a Direct Effect** | **Not Have a Direct Effect** |
| If there is a close causal link:   * Between any decision or action to be taken in the matter; and * Any expected effect of the matter on the financial interest. | If the chain of causation is attenuated or is contingent upon the occurrence of events that are:   * Speculative ;OR * Independent of, and unrelated to, the matter. |
| Effect does not have to occur immediately | If the effect is only as a consequence of its effects on the general economy |

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| **Particular Matter Will…** | |
| **Have a Predictable Effect** | **Not Have a Predictable Effect** |
| If there is a real possibility that the matter will affect the financial interest | If there is a speculativepossibility that the matter will affect the financial interest |
| * Not necessary that the magnitude of the gain or loss be known * Dollar amount of the gain or loss is immaterial |  |

**Seeking Employment**

*5 C.F.R. §2635.603*

***Employment*** means any form of non-Federal employment or business relationship involving the provision of personal services by the employee. It may take place concurrently with or subsequent to Federal employment. It includes, for example, personal services as an:

* Officer
* Director
* Employee
* Agent
* Attorney
* Consultant
* Contractor
* General Partner
* Trustee

An employee is ***seeking employment***, if he has directly or indirectly:

1.) Made an unsolicited communication to any person or their intermediary regarding possible employment (generally this means upon dispatch of a resume, except for paragraph 2 below);

2) Made a response other than rejection to an unsolicited communication from any person or their intermediary regarding possible employment; or

3.). Engaged in ***negotiations*** for employment. The term ***negotiations*** means discussion or communication with another person, or their intermediary, mutually conducted with a view toward reaching an employment agreement. The term is NOT limited to discussions of specific terms and conditions of employment in a specific position.

An employee is ***NOT seeking employment, IF***:

1.) The employee is merely requesting a job application; or

2.) The employee is assigned to a matter or matters of general applicability and he has sent an unsolicited resume or other employment proposal to a person or persons who can only be affected by these matters as part of an industry or discrete class. Under these circumstances the employee will be seeking employment upon receipt of any response indicating an interest in employment discussions.

***Seeking employment ends*** when:

1.) Either the employee or the prospective employer rejects the possibility of employment and all discussions have terminated; or

2.) Two months have transpired after the employee has sent an unsolicited resume or employment proposal and the employee has not received any indication of interest from the prospective employer.

*A response that defers discussions until the foreseeable future does NOT constitute rejection of an unsolicited proposal or resume nor rejection of a prospective employment possibility.*

**Remedies**

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| **Exemption**  *(5 C.F.R. §2640.203(g))* | A special Government employee serving on a FACA advisory committee may participate in any particular matter of general applicability where the disqualifying financial interest results from his non-Federal prospective employment, *provided* that the matter will not have a special or distinct effect on the employee or employer other than as part of a class. |
| **Disqualification**  (*5 C.F.R. §2635.604(a)*) | Unless authorized to participate in the particular matter by virtue of a waiver or an authorization, an employee shall disqualify himself from any particular matter that would have a direct and predictable effect on a prospective employer with whom the employee is seeking employment or has an arrangement for prospective employment.  Disqualification is accomplished by not participating in the particular matter.  **Offer Rejected or Not Made**  *(5 C.F.R. §2635.606(b))*  The agency designee may, in appropriate circumstances, determine that an employee be subject to a period of disqualification upon the conclusion of employment negotiations. Any such determination shall be based upon the relevant factors, including those listed in §2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency’s decisionmaking process outweighs the Government’s interest in the employee’s participation. |
| **Waivers**  (*5 C.F.R. §2635. 605 (a) and §§2640.301-302*) | Where an employee is engaged in discussions that constitute employment negotiations for purposes of the application of 18 U.S.C. section208(a), an agency is authorized to determine in individual cases that the prohibition of 18 U.S.C. section 208(a) should not apply. The ***standards*** for each category of waiver under 208 (b)(1) and (b)(3) are found in Subpart C of 5 C.F.R. section 2640.  Additional requirements:   * All waivers must be issued in writing; * All waivers must be issued **prior** to the employee taking action in any matter; * Where practicable, an agency should consult with OGE prior to granting a waiver; and * Signed copies of all waivers are to be forwarded to OGE. |
| **Authorization**  *(5 C.F.R. §2635.605(b))* | Where an employee is engaged in seeking employment activities that **do not** constitute “negotiations” for purposes of the application of 18 U.S.C. section 208(a), the employee may participate in a particular matter that would have a direct and predictable effect on the financial interest of a prospective employer if the agency designee has authorized his participation in accordance with the standards set forth in section 2635.502(d). |
| **Administrative Action**  *(5 C.F.R.§2635.604(d))* | Where the agency determines that the employee’s action in seeking employment will require his disqualification from matters so central or critical to the performance of his official duties that the employee’s ability to perform his duties would be critically impaired, the agency may allow the employee to take annual leave or leave without pay while seeking employment, or may take other appropriate administrative action. |