hello I'm Cheryl Kane peki senior

0:06

instructor with OG's Institute for

0:08

ethics and government and I am Melba

0:11

Melton assistant counsel in OG's ethics

0:14

law and policy branch and welcome to

0:17

part one of our series on 18 USC 208 B1

0:24

waivers in this module we'll provide an

0:27

overview of 208 B1 waivers for those who

0:30

may be unfamiliar with what they are or

0:33

who are unsure when and how to seek

0:36

them first we will begin with a brief

0:39

introduction to the statute 18 USC 208

0:44

then we'll provide an overview of the

0:46

nature and function of a B1 waiver as a

0:49

conflict of interest remedy next we'll

0:52

briefly explain OG's role in the review

0:55

and issuance of these

0:57

waivers lastly will Identify some

1:00

critical resources you will need when

1:03

Drafting and submitting waivers for OG

1:07

review now before you decide that a 208

1:10

B1 waiver is the right remedy for any

1:13

conflict of interest you've identified

1:16

it's important to understand what a B1

1:18

waiver is and what it does and as always

1:22

we begin with the law

1:26

itself the criminal law at 18 USC

1:30

208a is a participation bar it prohibits

1:35

an employees participation in a

1:37

particular government matter where the

1:39

employee has a disqualifying financial

1:42

interest in the

1:43

matter put plainly an employee avoids

1:47

violating the statute simply by not

1:50

participating in the government

1:52

matter this means that disqualification

1:55

or recusal from the matter is the

1:58

default remedy for a to weight conflict

2:01

so unless or until another remedy is

2:03

applied if an employee has a financial

2:06

interest in a government matter they

2:08

must not participate in that

2:11

matter now 18 USC section 208a is not

2:16

however a financial Holdings bar in fact

2:20

the statute is utterly indifferent as to

2:23

the type of holding that creates the

2:26

disqualifying interest or the amount of

2:29

any Financial interest an employee has

2:31

in a government matter whether an

2:33

employees's potential for gain or loss

2:35

in a matter is worth 1,000 or 1 million

2:39

the prohibition at 208a equally requires

2:42

their disqualification from the matter

2:45

there is no statutory di

2:48

Minimus so to help mitigate the broad

2:51

effects of section

2:53

208a Congress did provide agencies with

2:57

two statutory waiver authorities one at

2:59

208 B1 and the other at 208

3:03

B3 these authorities allow agencies in

3:07

individual cases to wave the employees

3:09

disqualification requirement from

3:12

government matters in which they have a

3:13

financial interest now the standards for

3:16

each the B1 and B3 waiver Provisions are

3:19

quite distinct and they're addressed in

3:21

the implementing regulations at 5cfr

3:24

part

3:26

2640 by contrast OG was given The

3:30

Authority Under 208 B2 to exempt certain

3:34

Financial interests those it deems too

3:37

remote or

3:39

inconsequential these B2 exemptions are

3:41

issued by regulation and are also found

3:44

in 5cfr part

3:47

2640 in this training we'll focus only

3:50

on the agency's Authority Under 208 B1

3:53

to issue individual waivers that allow

3:56

an employee to participate in a

3:58

government matter more

4:01

matters so what is a B1 waiver what does

4:04

it do and what does it not

4:07

do in order to issue a B1 waiver your

4:10

agency must first make a determination

4:14

that an employees financial interest in

4:16

a government matter or matters is not so

4:19

substantial to affect the Integrity of

4:21

the employees service now there are many

4:24

factors that go into making that

4:25

determination which we'll discuss in

4:27

more detail in part two of our series

4:30

however once that determination is made

4:33

the B1 waiver will allow the employee to

4:35

participate in all or in just part of a

4:39

government matter not withstanding that

4:41

they continue to have a financial

4:43

interest in the matter in other words

4:46

the waiver does not eliminate the

4:49

financial interest in the matter it

4:51

simply waves some or all of the

4:53

employees disqualification

4:57

requirement a waiver is not the only

5:00

remedy for a conflict of interest so

5:02

where does it fit into the array of

5:04

potential

5:06

remedies while there many reasons why an

5:08

agency might want to wave an employees

5:10

to await this qualification requirement

5:13

it always behooves us to remember that

5:16

we are waving the provisions of a

5:18

criminal

5:19

statute so in that vein one of the first

5:21

questions we should always consider is

5:24

whether the 208 conflict could be

5:27

resolved completely through other means

5:30

such as a recusal from the matter

5:32

divesture of the conflicting holding or

5:35

a resignation from a conflicting

5:37

position or whether any of the

5:39

self-executing regulatory exemptions at

5:41

5cfr part 2640 apply in other words can

5:45

we eliminate the conflict itself either

5:49

by foregoing participation or by

5:51

eliminating the disqualifying financial

5:53

interest if not then a waiver is

5:56

certainly another

5:58

option we might also consider a waiver

6:01

when the employees participation in the

6:02

matter can be limited in time scope or

6:06

type for example the employee will only

6:08

participate in the beginning stages of a

6:11

matter or their role will be limited to

6:14

providing predecisional advice or to

6:17

participating only in general matters

6:19

versus specific party

6:21

matters likewise a waiver might be

6:23

considered in circumstances where the

6:26

financial interest can't be divested or

6:28

it's not controlled by

6:30

employee and finally a waiver may be

6:33

suitable where it's unclear that the

6:35

matter will have a direct and

6:36

predictable effect on the employees's

6:39

interest now sometimes a waiver is not

6:43

the answer and May in fact be

6:45

inappropriate or

6:47

inadvisable a 208 B1 waiver is

6:50

definitely not appropriate if it does

6:52

not meet the statutory requirements

6:55

meaning it must be issued in writing

6:59

before the employee participates in the

7:02

matter it must include the agency's

7:05

determination that the waiver standard

7:07

is

7:08

met and it must fully disclose the

7:10

disqualifying financial interest and the

7:13

particular government matter or matters

7:15

involved a 208 B1 waiver may be

7:19

inadvisable if as we mentioned before

7:22

other remedies exists that would

7:23

eliminate the conflict of interest

7:25

altogether or when the scope of the

7:27

government matter of matters covered by

7:29

the waiver is just too broad or IL

7:32

defined so who decides when and whether

7:37

a 208 B1 waiver should be issued

7:41

ultimately the statute places the

7:43

authority to Grant waivers in the hands

7:46

of agency officials thus the final

7:49

decision of whether to Grant a waiver

7:51

rests with the agency not with

7:54

OG so what does that mean it means that

7:58

OG does not concur in any waiver

8:01

determinations and Consulting with OG is

8:04

not the same thing as getting OG's

8:07

approval OG's role in the waiver

8:10

consultation process which we will

8:13

discuss next is to provide advice that

8:16

being said in some instances OG May

8:20

advise against issuing a waiver if

8:22

statutory requirements are not met we

8:26

will discuss OG's role in Greater detail

8:28

in the next slide

8:31

so now we're going to talk about OG's

8:33

role in the 208 B1 waiver

8:36

process OG has three primary roles in

8:40

the 208 B1 waiver process as you can see

8:44

here with the letters and bold I like to

8:47

imagine OG's role as a passenger in a

8:50

car c being driven by the

8:55

agency this car is very important and it

8:58

matters to us that this car arrives at

9:01

its destination safely so let's talk

9:04

about what OG does from the passenger

9:07

seat of this

9:08

car number one we consult one of OG's

9:12

primary roles in the waiver review

9:15

process is Consulting with the

9:17

agency as background and to Center Us in

9:20

the regulation 5 CFR 2640 303 and

9:26

section 301d of executive order 1

9:30

2731 state that agency officials are

9:33

required to consult with OG prior to

9:37

issuing a waiver under 18 USC

9:41

208b where

9:43

practicable so this is actually a pretty

9:46

high standard and requires agencies to

9:48

consult with OG in all circumstances

9:52

unless there is an urgent

9:55

situation in fact your waiver document

9:58

must include a statement that the agency

10:01

has consulted with OG we will discuss

10:04

that requirement in Greater detail in

10:06

our next

10:08

training now as Cheryl mentioned briefly

10:11

before it is also critical to note that

10:13

208 B1 waivers cannot be issued for past

10:18

conduct but are only for prospective

10:22

participation what does that mean this

10:24

means that the waiver must be issued

10:27

before the employee particip IP Ates in

10:30

any particular matters covered by the

10:33

waiver the consultation process is

10:36

relatively straightforward once the

10:38

agency ethics official has drafted the

10:41

waiver they will send it to their OG

10:43

desk officer the B1 waiver is then

10:46

assigned to an elb attorney who may not

10:50

be that agency's desk

10:52

officer once the waiver has been

10:54

assigned the elb attorney will reach out

10:57

to the agency with any questions they

10:59

may have and this initiates the

11:01

consultation

11:03

process number two we give advice when

11:06

an agency ethics official is working

11:09

through the waiver analysis they may

11:11

encounter some complex facts or need

11:13

additional guidance regarding their 208

11:16

analysis that is where OG can be of

11:19

assistance during the consultation OG

11:23

can provide agencies with guidance and

11:26

help to ensure that statutory

11:28

requirements are met

11:30

last but certainly not least agencies

11:33

are required to send OG copies of any

11:36

waivers they

11:37

issue pursuant to 5 CFR 2640 303 once an

11:43

agency's consultation with o has

11:46

concluded and any outstanding issues are

11:49

resolved the agency must send OG a copy

11:52

of the final signed issued

11:56

waiver I hope this was a helpful way to

11:58

remember for OG's role in the 208 B1

12:01

waiver process we really want to ensure

12:04

that this car makes it to its

12:06

destination so we like to sit in the

12:08

passenger side and let the agency

12:12

Drive last but not least we want to

12:15

highlight some very valuable resources

12:17

for you so on one side of the slide we

12:20

have a list of relevant authorities of

12:22

course there is the 208 statute itself

12:25

which is a great starting point however

12:27

we encourage you to also review 5 CFR

12:31

part 2640 which is the implementing

12:34

regulation 418 USC 208 which OG codified

12:38

in

12:39

1996 these regulations provide specific

12:42

considerations that agencies should keep

12:45

in mind when deciding to issue an 18 USC

12:48

208 B1

12:50

waiver lastly section 301d of executive

12:54

order

12:56

12731 sets forth the requirement for

12:59

agencies to consult with OG before

13:02

granting a waiver under 18 USC 208 and

13:06

to provide OG with a copy of the issued

13:11

waiver on the other side of the slide we

13:13

have a list of some valuable guidance

13:15

document do

13:18

07006 I personally find this document to

13:21

be extremely useful and often rely on it

13:24

when I have questions about a waiver I'm

13:26

reviewing this document was created by o

13:29

G in 2007 and provides an in-depth

13:32

discussion of the waiver factors

13:34

described in the

13:35

regulations it also discusses B3 waivers

13:39

but for our purposes you may want to

13:41

focus on the sections that address B1

13:43

waivers

13:45

specifically legal advisory 1808 it

13:49

provides some really helpful template

13:51

language for drafting a waiver for a

13:54

disqualifying financial interest arising

13:57

from intellectual proper property rights

14:00

so here even if you're not drafting a

14:02

waiver for disqualifying financial

14:04

interest or rising from intellectual

14:07

property rights the sample language in

14:09

this advisory is very

14:12

useful last but not least do

14:15

105 drives home the point that 208 B1

14:19

waivers must be issued prospectively to

14:22

be valid we discussed this earlier in

14:25

the presentation and to further

14:27

underscore the point it's critical that

14:29

waivers are issued before the employee

14:33

has engaged in otherwise prohibited

14:35

conduct wavers issued after the employee

14:39

has engaged in that prohibited conduct

14:41

are not

14:42

valid now you may be wondering okay

14:46

great you know you've told me about all

14:47

of this really great information and

14:49

these wonderful resources but where can

14:51

I find them so on this slide we've

14:55

included a screenshot of

14:57

o.gov our website

15:00

you can find these guidance document in

15:02

more legal advisories on OG's legal

15:05

research search collection to get there

15:09

you go to www.

15:11

o.gov which will take you to the screen

15:13

you see here you then click resources

15:16

for ethics officials which is circled in

15:19

Orange and then on the right hand side

15:22

in red click the conduct legal research

15:26

box also circled for you and it should

15:29

take you to our legal research search

15:31

collection we encourage you to check it

15:33

out if you haven't

15:36

yet and that actually concludes our

15:38

introductory training module on 18 USC

15:41

208 B1 waivers stay tuned for part two

15:45

which will provide you with an overview

15:47

of drafting 208 B1 waivers and include

15:51

helpful tips and tricks that every

15:53

agency ethics official should

15:57

know

hello I'm Cheryl Kan peki senior

0:03

instructor with OG's Institute for

0:04

ethics and government and I am Melba

0:07

Melton assistant counsel in OG's ethics

0:10

law and policy branch and welcome to

0:13

part two of our series on 18 USC 208 B1

0:19

waivers in today's module we are

0:21

focusing on drafting and organizing your

0:25

waiver now one purpose of two8 waivers

0:29

is to document an agency's legal

0:32

determination that however is not their

0:34

only purpose waivers should be drafted

0:37

with all end users in mind including the

0:40

employee recipients who must follow them

0:43

and members of the public who request

0:45

them so to that end agency should draft

0:48

clear waivers that provide employees

0:51

with unambiguous notice of what they may

0:54

and may not work on and also that

0:56

provide the public a thorough and

0:59

transparent just ification for the

1:00

agency's decision to Grant a waiver now

1:03

of course to draft clear and thorough

1:06

waivers proper organization is

1:09

key and there are some important things

1:12

to keep in mind before you start

1:14

drafting we are going to discuss some

1:16

key threshold considerations for B1

1:20

waivers statutory and regulatory

1:22

requirements for B1 waivers how to

1:25

organize your B1 waiver and some helpful

1:29

tips and tricks from OG about things you

1:32

should and should not do when drafting

1:34

your B1

1:36

waiver but before we jump into the

1:39

details let's take a moment to address a

1:41

few threshold considerations that we

1:43

also raised in part one that we think

1:45

you should think about before you begin

1:47

drafting it to a wa B1

1:49

waiver first is there another remedy

1:53

that would resolve the conflict

1:55

completely could for example a

1:57

regulatory exemption under 5cf part 2640

2:01

apply these exemptions in subpart B of

2:04

2640 apply automatically and where they

2:07

apply they eliminate all or some of the

2:10

disqualification requirements into A8

2:13

a if not can the employee recuse

2:17

completely from the matter or be

2:20

reassigned where an employees

2:22

participation isn't in dispensable you

2:25

might consider whether recusal or

2:27

removal from a matter may actually be

2:29

prefer able to the issuance of a waiver

2:32

given that it completely eliminates the

2:34

conflict and thereby fully protects the

2:36

Integrity of the government matter

2:40

involved can the employee devest their

2:42

interest or resign from a conflicting

2:45

outside

2:46

activity in cases where Dev vesture of

2:49

the disqualifying financial interest is

2:51

feasible it's often the best possible

2:54

solution because the agency gets the

2:56

benefit of the employees participation

2:59

while completely completely foreclosing

3:01

any possibility that a financial

3:03

interest will affect the Integrity of

3:05

the employee

3:06

service now once you decide that a

3:09

waiver is the preferred remedy you might

3:12

still consider whether there are

3:13

limitations you can place on the scope

3:15

of the waiver that can balance the

3:18

agency's need for the employee service

3:20

on the one hand with the goals of the

3:22

statute and any appearance concerns the

3:24

public might have on the

3:26

other some typical limitations include

3:29

for example

3:30

limits on the type of matters to which

3:32

the waiver applies or limits on the work

3:35

the employee is allowed to perform on

3:37

any particular government

3:40

matter so now that we've highlighted

3:42

some things you should consider before

3:45

beginning to draft a B1 waiver let's

3:47

take a look at what a B1 waiver actually

3:52

requires so the requirements for all to

3:55

A8 B1 waivers are outlined in the

3:58

statute and Deb 5 CFR

4:01

26431 a when you initiate your

4:05

consultation with OG these are the

4:07

elements we will be looking for to

4:09

ensure that the statutory standards are

4:11

met first the waiver must be issued in

4:15

writing by the government official

4:17

responsible for appointing the employee

4:19

to their position now this Authority can

4:22

be delegated and oftentimes is to the

4:25

designated agency ethics

4:27

official second the waiver must be

4:29

issued before the employee takes any

4:32

action in the matters covered by the

4:34

waiver a waiver cannot I repeat a waiver

4:38

cannot be given for conduct that has

4:41

already

4:43

occurred third the employee must fully

4:46

disclose to the person with the

4:48

authority to issue the waiver the type

4:51

and amount of their disqualifying

4:53

financial interest and the nature and

4:56

circumstances of the particular matter

4:58

or matters involved if the employee

5:00

fails to make a full disclosure of all

5:03

the relevant information this can

5:05

jeopardize the validity of the

5:08

waiver fourth the waiver document itself

5:12

should clearly describe the

5:15

disqualifying financial interest the

5:17

particular matter or matters to which it

5:19

applies the employees role in the matter

5:22

or matters and any limitations on the

5:25

employees ability to act in those

5:27

matters finally the waiver document

5:30

itself must make it clear that the

5:33

waiver is based on the applicable

5:35

statutory standard in other words the

5:38

waiver must include the agency's

5:40

determination that an employees

5:42

disqualifying financial interest in a

5:44

particular matter is not so substantial

5:46

to affect the Integrity of the employee

5:48

services to the government in that

5:51

matter so now melb is going to show you

5:54

how to organize your draft waiver to

5:56

ensure that all these requirements are

5:58

in fact met

6:00

Melda thank you for covering those

6:03

waiver requirements Cheryl with the

6:05

requirements for B1 waivers in mind

6:08

let's take a look at how they show up in

6:10

a waiver to do that we are going to take

6:13

a step back and look at a model waiver

6:16

outline to see how it should be

6:19

organized and then discuss each section

6:21

individually so that you have a better

6:24

understanding of the content of your

6:26

waiver don't forget if you have

6:29

questions along on the way please take a

6:31

look at the resources we provided you

6:33

with during our last training module

6:36

which was an overview of 208 B1 waivers

6:39

now let's get

6:42

started before we dive into the

6:44

individual sections of a B1 waiver I

6:47

want to provide you with a big picture

6:49

overview of how a B1 waiver should be

6:52

organized so you can visualize where we

6:55

are going on this drafting Journey so

6:59

take a moment to note some of the

7:00

information contained in each section of

7:03

this model waiver outline following this

7:06

outline or a similar one will facilitate

7:09

your consultation with

7:12

OG now that we have covered the required

7:15

elements of a 208 B1 waiver the next

7:18

topic will be how to organize your B1

7:22

waiver however before we dive into

7:25

organizing your waiver I want you to

7:27

recall our discussion and training

7:29

module one about OG's role being like

7:32

that of a passenger in a car that the

7:35

agency is driving so as you know OG is

7:39

very invested in this car making it

7:41

safely to its destination so as we

7:44

discuss drafting the B1 waiver I want

7:47

you to keep in mind that these are the

7:49

elements your passenger OG will be

7:52

looking for when you submit your waiver

7:54

to us for

7:57

consultation We Begin our drafting

7:59

Journey with the introductory paragraph

8:02

there are three main components of an

8:04

introductory paragraph first in actual

8:08

introduction to the document which is

8:10

the sample language you see on this

8:11

slide this paragraph contains

8:14

information about what the document

8:16

actually is a waiver who it's for and

8:20

their position and what the basis is for

8:24

issuance number two the introductory

8:27

paragraph should also contain a state

8:29

statement of the 18 USC 208 B1 standard

8:34

and lastly the agency's initial

8:39

recommendation we recommend beginning

8:41

your waiver with a statement of the

8:43

basic prohibitions of 18 USC

8:47

208a and the legal standard in 18 USC

8:51

208

8:53

B1 stating the general prohibition and

8:56

the legal standard for waiver of the

8:58

prohibition is helpful because it

9:00

provides context for the agency's

9:03

assessment of the facts and its decision

9:06

to issue the

9:07

waiver because the waiver is both a

9:09

legal document and a document of notice

9:13

stating the obligations and waiver

9:16

authorities informs the employee of the

9:19

expectations of their conduct and the

9:22

limit of permissible actions under the

9:26

waiver the introductory paragraph should

9:29

also provide a statement that the waiver

9:32

determination is based on the facts and

9:35

circumstances as provided by the

9:38

employee seeking the waiver it is very

9:42

important to remember that a valid 208

9:44

B1 waiver is based on a full disclosure

9:48

of all information relevant to the

9:51

disqualifying financial interest and the

9:54

nature and circumstances of the

9:56

particular matter at issue this is why

10:00

it is imperative for you to outline the

10:02

facts that the waiver is based

10:05

on okay we have discussed the element

10:08

that should be included in your

10:09

introductory paragraph now let's discuss

10:13

the next section of your waiver a

10:15

description of the employees official

10:18

duties after discussing the statutory

10:21

framework for providing a 208 B1 waiver

10:24

you should describe the employees

10:26

position at the agency and their

10:29

relevant duties in as much detail as

10:33

possible these details are very

10:35

important because they explain why the

10:38

employee needs to participate in a

10:41

particular matter affecting their

10:42

financial interest and whether the

10:45

disqualifying financial interest should

10:48

actually be waved for example if the

10:51

employees role is Administrative or

10:53

advisory and they do not have any

10:55

decision-making Authority it may be

10:58

easier to justif the issuance of a

11:01

waiver next up discussing particular

11:04

matters and the employees role in your

11:07

B1

11:08

waiver it is critical that you identify

11:11

what the particular matter actually is

11:14

and what the employees role would be in

11:17

that particular matter this is a key

11:19

part of the 208 analysis so after a

11:23

general discussion of the employees

11:25

duties you should provide a description

11:27

of the particular matter or

11:29

types of particular matters that are the

11:32

subject of the

11:33

waiver next describe the employees role

11:37

in the matter this paragraph should

11:39

describe the employees role in the

11:41

particular matter such as their very

11:43

specific duties and include any

11:46

limitations on the types of activities

11:48

that they can engage in we will be

11:51

discussing limitations in Greater detail

11:53

later on in this

11:56

presentation while limiting the level of

11:58

participation that an employee May

12:00

engage in does not affect whether they

12:03

would normally be disqualified from

12:05

participating in a particular matter

12:07

these facts may help to mitigate the

12:10

effect that the employee could

12:11

realistically have on the disqualifying

12:14

financial interest and may lower the

12:17

appearance of

12:19

impropriety and that concludes part one

12:21

of our training module on drafting and

12:24

organizing your 208 B1 waiver stay tuned

12:27

for part two

12:30

welcome to part two of our training

12:32

module on drafting and organizing your

12:35

B1 waiver we are going to continue our

12:38

training with the discussion of the

12:39

disqualifying financial

12:42

interest as you are aware an employee

12:45

has a disqualifying financial interest

12:48

if the particular matter they want to

12:50

participate in would lead to a potential

12:53

monetary gain or loss to the employee or

12:58

another person's specified in 18 USC

13:02

208a the waiver therefore should

13:04

describe both the financial holding or

13:07

other interest that could be affected by

13:10

the matter as well as describing how the

13:13

particular government matter could

13:15

affect the interest so in this section

13:19

of the waiver we want you to First tell

13:22

us in sufficient detail what the nature

13:25

of the disqualifying financial interest

13:28

is

13:29

for example does the employee own stock

13:33

in a particular company do they or their

13:36

spouse hold a particular position with

13:38

an outside

13:39

organization or does their spouse own a

13:42

retirement asset that could experience a

13:45

monetary gain or loss as a result of

13:48

government action in a particular matter

13:51

as you can see we have provided some

13:53

sample language on this slide but please

13:56

modify the language as needed so that it

13:58

fits with your unique fact

14:02

scenario in this same paragraph you want

14:05

to describe why the employee would be

14:08

disqualified from

14:10

participation let's take a look at the

14:12

example we've provided an employee

14:15

spouse has an employment interest with a

14:19

company the employee is disqualified

14:22

from any particular matter that would

14:25

affect The spouse's employment related

14:28

interests this could include for example

14:31

compensation continued employment and

14:34

possibly investment

14:36

interests you should address not only

14:39

the type of employment related interest

14:42

that could be affected by the government

14:43

matter for example a type of

14:46

compensation like a performance bonus

14:49

but how the particular matter a

14:51

government contract with the company for

14:53

example could affect the

14:57

interest in most instances es a

14:59

disqualifying financial interest arises

15:02

because of ownership of certain

15:05

Financial Holdings or Investments such

15:07

as stocks bonds or other

15:09

Holdings however a disqualifying

15:12

financial interest can also arise

15:15

through contractual obligations

15:17

employment rights or even job

15:20

offers because there are so many types

15:22

of financial interests the language in

15:25

this section describing the otherwise

15:27

disqualifying interest must be detailed

15:30

and

15:31

specific all right now we are

15:34

approaching the heart of the waiver

15:35

where the agency needs to weigh the

15:37

facts and other considerations to

15:40

justify the

15:42

waiver the 208 B1 analysis is your

15:46

determination that the financial

15:48

interest in the matter is not so

15:50

substantial to affect the Integrity of

15:53

the employee service how are you

15:55

arriving at this determination to do

15:58

this you should consider the factors

16:00

found in 5 CFR

16:03

26431 these include among other things

16:07

the dollar value of the potential gain

16:09

or loss that may result from

16:12

participation in the particular matter

16:14

and the nature and importance of the

16:17

employes role in the matter including

16:20

the extent to which the employee is

16:22

called upon to exercise discretion in

16:24

the

16:26

matter in discussing the import

16:28

importance of the employees role in the

16:30

particular matter you also want to

16:32

consider whether there are any

16:34

mitigating factors that should be

16:36

included in the waiver while mitigating

16:39

factors do not necessarily speak to the

16:41

substantiality determination under 18

16:44

USC

16:45

2081 they may support the agency's

16:48

determination by addressing any

16:50

potential appearance concerns so on this

16:54

slide we are only providing you with

16:56

examples of mitigating factors related

16:58

to the employees role in the particular

17:01

matter these are not the only types of

17:04

mitigating factors that are available in

17:07

fact there are many different types of

17:09

mitigating factors that you may want to

17:11

consider as a justification for your

17:13

waiver but here they are related to the

17:16

employees

17:18

role a few examples include the employee

17:21

is not able to make any policy

17:23

recommendations or the employee will not

17:26

be able to exercise any independent

17:29

Authority or where the employees

17:31

participation will be subject to

17:33

additional layers of oversight as a

17:36

member of an Advisory board or some

17:38

other multi-layered review

17:41

process all right next up

17:46

limitations while it is important to

17:48

note limitations early in the waiver

17:50

they should be restated and addressed

17:53

more fully in their own

17:55

section agencies should make it a

17:57

priority to to ensure that the

17:59

limitation section is written clearly

18:02

with the view of informing the employee

18:04

of their legal

18:06

obligations as you draft your waiver you

18:09

may also want to use this section to

18:11

highlight additional limitations or

18:13

monitoring requirements that did not fit

18:16

in other areas of the waiver these

18:18

additional considerations may include

18:20

limitations on fundraising or lobbying

18:23

activities or reminders that other

18:27

statutory restrictions such as

18:29

limitations on representational Services

18:32

under 18 USC 203 and 205 still apply or

18:36

other limitations that are tailored to

18:38

the specific

18:40

situation it is also recommended that

18:42

agencies consider including a statement

18:45

that clearly indicates what

18:47

participation is actually

18:50

permitted it is important to remember

18:52

that this waiver is for the employee and

18:55

also the public so Clarity on the

18:57

Contours of the waiver is very

19:00

helpful all right we have arrived at our

19:03

last section of the waiver the

19:05

concluding

19:07

paragraph okay now we are in the home

19:11

stretch let's talk about the information

19:13

you should include in your concluding

19:15

materials first when you are drafting

19:18

your conclusion keep in mind that the

19:20

conclusion should reinforce that the

19:22

waiver is the product of an objective

19:25

process by highlighting the fact that OG

19:28

was made aware of and consulted with

19:31

during the determination

19:33

process the summary should concisely

19:36

summarize the analysis and outcome of

19:38

the waiver determination for quick

19:41

reference now let's discuss the OG

19:44

consultation statement I want to really

19:48

emphasize an important point about the

19:50

OG consultation statement you cannot use

19:54

this statement until you have number one

19:58

actually completed your consultation

20:00

with OG and number two OG did not object

20:04

to the issuance of the

20:07

waiver if OG does not agree with an

20:09

agency's analysis that does not mean

20:12

that the waiver is

20:14

ineffective however OG's records will

20:18

indicate that the agency was advised

20:20

against issuing the waiver and you will

20:23

not be able to use this statement in

20:25

your

20:27

waiver the conclusion should also

20:29

explain that waivers are publicly

20:31

available under 5 CFR 2640

20:36

304 including this statement provides

20:38

the employee and the public with

20:40

appropriate notice of the authorities

20:43

and limitations under which waivers are

20:46

made available to the

20:49

public the signature block is the last

20:52

section of your B1 waiver here the

20:55

appointing official or the individual

20:57

who has delegated Authority usually the

21:00

do or AO must sign the document

21:03

attesting to the fact that they believe

21:05

that the standard of 18 USC 208 B1 has

21:10

been met and that they are granting the

21:12

waiver to the requesting

21:15

employee okay now let's talk about some

21:18

important things you should remember to

21:20

do in your waiver and things you should

21:23

not

21:24

do all right so starting with the does

21:28

do to make sure the employee has not

21:30

already taken any action on the matter

21:33

we recommend being proactive and

21:36

confirming with the employee that they

21:38

have not

21:40

participated we cannot emphasize enough

21:43

that waivers are prospective and must be

21:45

issued before the employee

21:49

participates do submit your waiver

21:51

timely submit with sufficient time

21:54

before the employee participates this

21:56

will also give you enough time to

21:58

complete your consultation with

22:01

OG do make it clear what activity is

22:04

actually permitted please remember that

22:06

the waiver is for the employee so you

22:09

should make it clear in the waiver what

22:10

they are allowed to do and what they are

22:13

not allowed to do do write clearly

22:17

remember that waivers are publicly

22:19

available thus we want waivers to be

22:22

written clearly so that the public

22:25

understands how the agency arrived at

22:27

its conclusion not only that but because

22:30

the media is increasingly more aware of

22:32

waivers they are receiving more

22:34

attention this underscores the

22:36

importance of a clearly written

22:39

waiver and do give yourself enough time

22:42

to be deliberative when drafting your

22:44

waiver agencies should be submitting

22:47

completed polished draft

22:50

waivers okay so here are the things you

22:53

should not do when it comes to your B1

22:55

waiver do not issue waiver for past

23:00

conduct remember waivers are perspective

23:04

forward-looking documents and are not

23:06

available for past

23:08

conduct do not wait until the last

23:11

minute to submit your waiver to OG

23:14

please make sure you are building in

23:16

enough time to complete your

23:19

consultation do not forget to consult

23:22

with o agencies are required to consult

23:25

with OG when

23:27

practicable

23:29

and that concludes our training module

23:31

on drafting 208 B1 waivers stay tuned

23:35

for our final training module on B1

23:37

waivers all about what happens to your

23:40

waiver once it's submitted to OG thank

23:43

you so much for tuning

23:46

in

hello I'm Cheryl Kan peki senior

0:05

instructor with OG's Institute for

0:06

ethics and government and I am Melba

0:09

Melton assistant counsel in OG's ethics

0:13

law and policy branch and welcome to

0:15

part three of our series on 18 USC 208

0:20

B1

0:22

waivers in this session we'll be

0:24

discussing the process you'll follow

0:26

once you have a draft 208 B1 waiver

0:28

ready for OG to

0:31

review your waiver Journey Begins with

0:34

its submission to OG to initiate the

0:37

consultation process once the

0:40

consultation process concludes your

0:42

waiver must be signed and

0:45

issued final waivers are then subject to

0:48

recordkeeping requirements and to

0:50

release to the public upon

0:53

request as Melba said the journey to a

0:56

final waiver begins when you submit your

0:58

draft waiver to OG

1:01

so clearly before you can initiate a

1:03

waiver consultation process with OG you

1:06

have to have prepared a draft waiver

1:08

hopefully following the guidelines we

1:10

discussed at length in part two of this

1:12

series Once you have your draft waiver

1:14

prepared and ready for review you'll

1:17

submit that draft waiver to the OG desk

1:19

officer assigned to your agency your

1:22

desk officer will then review the draft

1:23

waiver to become familiar with the facts

1:26

and they may contact you with general

1:27

questions about the circumstances of the

1:29

waiver

1:31

they'll then refer the draft waiver to

1:32

OG's chief of the ethics law and policy

1:35

Branch for assignment to an OG attorney

1:38

who may or may not be your desk officer

1:41

that assigned OG attorney will be the

1:44

primary point of contact during your

1:45

consultation process with OG which Melba

1:49

will now

1:50

discuss thank you for that wonderful

1:52

handoff Cheryl next we're going to talk

1:55

about what happens once you have

1:57

submitted your waiver to OG where does

2:00

it go who reviews it what happens next

2:03

all of your burning questions will be

2:07

answered so now you may be wondering

2:11

what's the next stop for your waiver on

2:13

its journey to final issuance once your

2:17

draft waiver has been assigned to an OG

2:19

attorney the OG attorney will review it

2:22

for legal sufficiency this Begins the

2:25

consultation

2:26

process while a review for legal

2:29

sufficiency is one aspect of the OG

2:32

consultation your reviewer will also

2:34

email the agency with any questions they

2:37

may have during their initial review

2:40

these comments are typically provided

2:42

via email as comments in the draft

2:45

waiver

2:47

document in some instances where OG has

2:50

several comments or if the agency

2:52

requires a little bit of assistance with

2:54

some part of the waiver analysis the OG

2:57

attorney May schedule a phone call to

2:59

discuss the

3:01

waiver once OG's questions or comments

3:04

have been addressed and there are no

3:06

outstanding concerns your consultation

3:09

with OG will

3:11

conclude so as you may recall during our

3:14

last training module about Drafting and

3:17

organizing your B1 waiver we discussed

3:19

the requirement to include a statement

3:22

that the agency has consulted with

3:24

OG however please remember that you

3:28

cannot use this statement until number

3:31

one you have actually completed your

3:33

consultation with OG and number two OG

3:38

did not object to the issuance of the

3:41

waiver if OG has objected to the waiver

3:45

you cannot use this statement if you are

3:48

unsure whether your consultation has

3:50

concluded please confirm with your OG

3:54

reviewer okay you have completed your OG

3:58

consultation yay all right now what it's

4:01

time to talk about

4:05

issuance once the consultation process

4:08

with OG is completed the agency will

4:11

prepare a final waiver and ensure that

4:14

either the authority responsible for the

4:17

employes appointment or another person

4:20

who has been delegated that Authority

4:22

signs the waiver this is the last

4:26

section of your waiver which we

4:28

Illustrated in our previous training

4:30

module about Drafting and organizing

4:32

your waivers so Shameless plug if you

4:35

have not seen our second video please be

4:38

sure to check it

4:39

out once the final waiver has been

4:42

signed the employee should receive a

4:44

copy of the final waiver in addition the

4:48

regulation does require that the agency

4:50

send a copy of the final signed waiver

4:53

to

4:54

OG this requirement pertains to all

4:58

final waivers issued by agency even if

5:01

the agency did not consult with

5:06

OG now all final 18 USC 208 waivers are

5:10

federal records and as such they have an

5:13

approved National Archives disposition

5:16

Authority so agencies must retain all

5:20

final 208 waivers by fiscal year these

5:24

waivers are subject to a six-year

5:26

retention period by fiscal year they can

5:29

be destroyed at the end of the six-year

5:31

retention period unless of course

5:33

there's a reason to retain them longer

5:36

for example if there's an ongoing

5:38

investigation or litigation related to

5:40

the

5:41

waiver agencies are also required to

5:44

make all final waivers publicly

5:46

available upon request and that should

5:48

be in accordance with the process found

5:51

at 5 USC

5:53

13107 and finally when responding to

5:56

public requests for 208 waivers agencies

5:59

should follow the release procedures

6:01

including the limitations on

6:03

availability found at 5cfr

6:08

26434 as always if you have any

6:11

questions about any of the content found

6:13

in this or prior parts of the series

6:16

please reach out to your OG desk officer

6:18

for

6:19

assistance thank you so much for joining

6:22

us on this journey as we learn more

6:24

about 18 USC 208 B1 waivers we hope this

6:29

training Series has been

6:32

helpful