

# 18 U.S.C. § 208(a) Job Aid

**REMEMBER:** All elements of the statute should be analyzed in sequential order.

## **ELEMENT 1: Officer or Employee of the Executive Branch**

This element focuses on whether an individual qualifies as an employee of the executive branch of the federal government. This element includes:

- Employees of independent agencies,
- Employees of agencies of the District of Columbia,
- Employees of the Federal Reserve Bank, and
- Special Government Employees (SGEs).

This element does NOT include the President, Vice President, Members of Congress, or federal judges.

Special consideration should be taken if the government employee is also employed by an outside entity.

In the absence of regulatory definitions or a definitive decision from the Office of Legal Counsel (OLC), OGE usually advises that determining if someone is an “employee” for purposes of 18 U.S.C. § 208 is essentially a factual determination based on the common law of the state.

### **General Guidance:**

Defines “employee” for purposes of 18 U.S.C. § 208(a) - [5 CFR 2640.102\(b\)](#).

This letter explains that the Department of Justice has not determined if 208(a) applies to government contractors or consultants - [94 x 16: Defining "Employment" as used in 18 U.S.C. § 208](#) (PDF).

This OLC opinion explains that the criminal conflict of interest statutes apply when an appointee begins their official duties - [26 Op. O.L.C. 32: Application of Conflict of Interest Rules to Appointees Who Have Not Begun Service \(May 8, 2002\)](#) (PDF). OGE’s summary of this opinion may be found in [DO-02-014](#) (PDF).

### **Independent Agencies:**

This OLC opinion discusses if a commission qualifies as an “independent agency” subject to 18 U.S.C. § 208(a) - [23 Op. O.L.C. 29: Applicability of 18 U.S.C. § 208 to National Gambling Impact Study Commission \(January 26, 1999\)](#) (PDF).

## **Special Government Employees (SGEs):**

This letter discusses how 18 U.S.C. § 208 applies to SGEs - [03 x 5: Appointment to Advisory Committee as "Representative" versus SGE](#) (PDF).

This memorandum summarizes the conflict of interest laws and exceptions that are applicable to SGEs - [00 x 1: A Summary of Ethical Requirements Applicable to SGEs](#) (PDF).

This letter discusses how to determine if an SGE participated "personally and substantially" in a particular matter - [91 x 17: Ethics Restrictions Applicable to Special Government Employees](#) (PDF).

## **Interns:**

This advisory explains how 18 U.S.C. § 208(a) applies to interns within the executive branch - [LA-17-09: The Application of the Ethics Laws to Interns](#) (PDF).

## **ELEMENT 2: Participates Personally and Substantially**

This element establishes whether an employee is sufficiently participating in a government matter to find an 18 U.S.C. § 208(a) violation. “Personal” and “substantial” are distinctly defined under OGE’s regulations, and both definitions must be established to satisfy the element.

Generally, anything beyond ministerial involvement constitutes personal and substantial participation.

### **General Guidance:**

Defines “personal and substantial participation” - [5 CFR 2640.103\(a\)\(2\)](#).

Separately defines “personal” and “substantial” - [5 CFR 2635.402\(b\)\(4\)](#).

This letter explains that an agency cannot use a dollar-based test to determine if an employee participates substantially in a particular matter - [99 x 11: Meaning of "Substantially" for Purposes of 18 U.S.C. § 207 and 18 U.S.C. § 208](#) (PDF).

This letter explains that only personal and substantial participation is prohibited under 18 U.S.C. § 208(a) - [98 x 11: "Personal and Substantial" as Modifier of "Participation"](#) (PDF).

This letter delves into the meaning of personal and substantial participation - [91 x 17: Ethics Restrictions Applicable to Special Government Employees](#) (PDF).

This opinion holds that an employee participated personally and substantially in a matter by persuading his superior how to allocate funding - [United States v. Stadd, 636 F.3d 630 \(D.C. Cir. 2011\)](#) (PDF).

This opinion holds that 208(a) may be violated for actions taken after procurement is authorized and that a discretionary role in carrying out a contract qualifies as personal and substantial participation - [United States v. Selby, 557 F.3d 968 \(9th Cir. 2009\)](#) (PDF).

This opinion holds that the “or otherwise” language in the personal and substantial participation element applies to acts that carry a contract to completion - [United States v. Irons, 640 F.2d 872 \(7th Cir. 1981\)](#).

### **ELEMENT 3: Particular Matter**

This element explains what government actions or issues are covered by 18 U.S.C. § 208(a). “Particular matter” under 208(a) covers both “particular matters involving specific parties” and “particular matters of general applicability,” both of which are separately defined by OGE’s regulations.

#### **General Guidance:**

Defines “particular matter” - [5 CFR 2640.103\(a\)\(1\)](#).

Also defines “particular matter” - [5 CFR 2635.402\(b\)\(3\)](#).

Defines “particular matter involving specific parties” - [5 CFR 2640.102\(l\)](#).

Defines “particular matter of general applicability” - [5 CFR 2640.102\(m\)](#).

This memorandum provides guidance regarding the meaning of these terms and where they appear in the criminal conflict of interest statutes - [06 x 9: "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"](#) (PDF).

This letter explains that preliminary, informal discussions with industry representatives would be considered a particular matter subject to 18 U.S.C. § 208(a) - [06 x 8: Particular Matters for Purposes of 18 U.S.C. § 208](#) (PDF).

This letter explains when policy deliberations constitute a particular matter subject to 208(a) - [05 x 1: 18 U.S.C. § 208 and Development of Policy Options](#) (PDF).

This opinion holds that a consortium of research institutions is a “discrete and identifiable class of persons” that qualify as a particular matter subject to 208(a) - [United States v. Stadd, 636 F.3d 630 \(D.C. Cir. 2011\)](#) (PDF).

This 60-minute training video is designed to be an orientation to the meaning of particular matter and related terminology - [18 U.S.C. 208: Making Sense of Particular Matters \(Nov. 13, 2014\)](#).

This job aid assists with identifying various types of particular matters of general applicability - [The Nettlesome Question of Particular Matters of General Applicability \(Sept. 19, 2014\)](#) (PDF).

## ELEMENT 4: Knowledge

OGE has not explicitly defined the “knowledge” element of 18 U.S.C. § 208(a). Because knowledge is a concept that is not unique to 208(a), to opine on its definition could set legal precedents that are outside of OGE’s jurisdiction. The question of knowledge is a factual matter to be determined by the Department of Justice and the courts in the context of specific cases. Accordingly, the best guidance for the knowledge element may be found in applicable case law.

Please consult with your OGE Desk Officer if you have questions about the application of the knowledge element of 18 U.S.C. § 208(a).

### General Guidance:

Discusses an employee’s responsibility prior to taking official action - [5 CFR 2640.205](#).

This letter explains that an employee’s motive is not considered when determining if there is a violation of 18 U.S.C. § 208(a) - [87 x 7: Triggering of Restrictions in 18 U.S.C. 208\(a\)](#) (PDF).

This opinion holds that acknowledgement of a financial interest in an employee’s ethics agreement constitutes knowledge for purposes of 208(a) - [United States v. Stadd, 636 F.3d 630 \(D.C. Cir. 2011\)](#) (PDF).

This opinion holds that an employee had knowledge of her conflict of interest when she submitted her recusal memoranda to the agency - [United States v. Selby, 557 F.3d 968 \(9th Cir. 2009\)](#) (PDF).

This opinion holds that 18 U.S.C. § 208(a) is a strict liability offense, i.e., that 208(a) does not require the prosecution to prove the employee’s mental state for all of the statute’s elements because there is an explicit mental state requirement in the knowledge element - [United States v. Hedges, 912 F.2d 1397 \(11th Cir. 1990\)](#).

## ELEMENT 5: Financial Interest

“Financial interest” under 18 U.S.C. § 208(a) encompasses both the financial interests that employees hold directly and financial interests that are imputed to employees under the statute. The term financial interest means the potential for gain or loss “as a result of governmental action on the particular matter.”

The following financial interests are imputed to employees under 18 U.S.C. § 208(a):

- Spouse’s,
- Minor children’s,
- General partner’s,
- Organizations’ in which employees are serving as officers, directors, trustees, general partners, or employees, and
- Those of any person or organization with whom the employee is negotiating or has any arrangement concerning prospective employment.

OGE and the OLC have issued extensive guidance on the interpretation of what constitutes a financial interest for purposes of 18 U.S.C. § 208(a).

### General Guidance:

Defines “disqualifying financial interest” for purposes of 18 U.S.C. § 208(a) - [5 CFR 2640.103\(b\)](#).

Sets forth the financial “interests of others” imputed to employees under 208(a) - [5 CFR 2640.103\(c\)](#).

Defines “financial interest” to identify prohibited financial interests - [5 CFR 2635.403\(c\)](#).

Defines “imputed interests” - [5 CFR 2635.402\(b\)\(2\)](#).

This legal advisory explains that OGE considers the financial interests of a company to be the same as the financial interests of the shareholders - [LA-20-03: Conflict of Interest Analysis for Stocks under 18 U.S.C. § 208](#) (PDF).

This opinion holds that 208(a) applies to federal employees’ participation in any application or contract in which they have a financial interest, not just those involving outside suppliers of goods and services to the government - [United States v. Lund, 853 F.2d 242 \(4th Cir. 1988\)](#).

### Outside Organizations’ Financial Interests:

This letter explains that state governments are considered “outside organizations” for purposes of 18 U.S.C. § 208(a) - [99 x 17: Intergovernmental Personnel Act \(IPA\) Assignments](#) (PDF).

This letter explains that 208(a) financial interest concerns may arise depending on the outside positions federal employees have with nonprofit organizations - [95 x 8: Proposed Agreement between Government Agency and Former Employee's Nonprofit Organization](#) (PDF).

This letter discusses the 208(a) implications for members and officers of nonprofit organizations - [90 x 1: Ethical Concerns with Federal Employees Serving as Symposium Speakers](#) (PDF).

This letter explains that membership in an organization does not create a financial interest for purposes of 208(a) - [86 x 19: "Mere Membership" in an Organization and 18 U.S.C. § 208\(a\)](#) (PDF).

This OGE opinion discusses how to classify universities and higher education systems as "organizations" for purposes of 208(a) - [82 OGE 1: Meaning of "Organization" in 18 U.S.C. § 208\(a\)](#) (PDF).

This OLC opinion delves into the financial interests of nonprofits and how to evaluate if they raise 208(a) concerns - [30 Op. O.L.C. 64: Financial Interests of Nonprofit Organizations \(January 11, 2006\)](#) (PDF). OGE's summary of this OLC opinion may be found in [DO-06-002](#) (PDF).

This OLC opinion explains that trustees of a private trust are considered to be "trustees" of an "outside organization" for purposes of 208(a) - [25 Op. O.L.C. 229: Application of 18 U.S.C. § 208 to Trustees of Private Trusts \(November 2, 2001\)](#) (PDF).

This OLC opinion explains that 208(a) does not bar service on outside boards where such boards are "engaged in the standard-setting activities in which Congress directed federal agencies to participate" - [22 Op. O.L.C. 210: Application of 18 U.S.C. § 208 to Service by Executive Branch Employees on Boards of Standard-Setting Organizations \(August 24, 1998\)](#) (PDF). OGE's summary of this OLC opinion may be found in [DO-98-025](#) (PDF).

This OLC opinion explains that federal employees are subject to 208(a) when serving on the boards of outside organizations - [20 Op. O.L.C. 379: Service on the Board of Directors of Non-Federal Entities by Federal Bureau of Investigation Personnel in their Official Capacities \(November 19, 1996\)](#) (PDF). OGE's summary of this OLC opinion may be found in [DO-97-015](#) (PDF).

This OLC opinion explains that the appointment of a federal employee to the board of an outside organization as a part of their official duties will subject the employee to 208(a) - [18 Op. O.L.C. 136: Applicability of 18 U.S.C. § 208 to Proposed Appointment of Government Official to the Board of Connie Lee \(June 22, 1994\)](#) (PDF).

### **Spouses' Financial Interests:**

This letter discusses the application of 18 U.S.C. § 208(a) when an employee will be working on particular matters in the same sector in which their spouse is employed - [00 x 4: Conflict of Interest and Appearance Concerns Raised by Spouse's Employment](#) (PDF).

This letter discusses the 208(a) financial interest concerns that may arise if both spouses work for the same federal agency - [97 x 5: Restrictions Affecting Spouses Who Work for the Same Agency](#) (PDF).

This letter explains why an employee's spouse must divest their financial holdings in order to comply with 208(a) - [96 x 10: Divestiture of Prohibited Holdings by Spouse](#) (PDF).

This letter explains the financial interest concerns that may arise in relation to an employee's spouse's law firm - [95 x 1: Conflict of Interest Issues Raised by Spouse's Position as Partner in Law Firm](#) (PDF).

This letter discusses the application of 208(a) to an employee's spouse's employment interests with a government contractor - [91 x 37: Application of 18 U.S.C. § 208 to an Employee](#) (PDF).

This letter addresses a scenario in which an employee's spouse is employed by a government contractor - [85 x 10: Conflict of Interest Issues Raised by Spouse's Employment with Government Contractor](#) (PDF).

This letter addresses a scenario in which an employee's spouse is on retainer with a government contractor - [84 x 6: Conflict of Interest Issues Raised by Spouse's Employment on Retainer with a Government Contractor](#) (PDF).

This letter discusses the application of 208(a) to an employee's spouse's consulting contract with the employee's agency - [83 x 20: Applicability of 18 U.S.C. § 208](#) (PDF).

### **Outside Employment Interests:**

This memorandum explains how 18 U.S.C. § 208(a) applies to employees working with contractors, including seeking future employment with contractors - [06 x 7: Ethics and Working with Contractors – Questions and Answers](#) (PDF).

This letter explains how the criminal conflict of interest laws would apply to the creation of an exchange program between public-private sector employees - [00 x 7: Extent to Which Ethics Laws and Regulations Apply to Federal Government-Private Sector Exchange Programs](#) (PDF).

This memorandum discusses the application of 208(a) to pension plans provided by former employers - [99 x 6: 18 U.S.C. § 208 and Defined Benefit Pension Plans](#) (PDF).

This letter explains that an employee's 401(k) with a former employer does not implicate 208(a) concerns - [95 x 5: 18 U.S.C. § 208, 401\(k\) Plans, and Appearance of Impartiality](#) (PDF).

This letter explains that an employee's retained pension plan with a former employer is a financial interest subject to 208(a) - [91 x 34: Pension Benefits and 18 U.S.C. § 208](#) (PDF).

This letter explains that an employee will retain their financial interest in an outside entity under 208(a) until payments are complete - [83 x 6: Payments to a Government Employee as a Result of a Covenant Not to Compete](#) (PDF).

This OGE opinion explains that an employee will have a financial interest in a pension plan's sponsoring organization if the pension is a defined benefit plan, the plan holds stock in the corporation, or if the pension plan is managed by employees of the sponsoring organization - [83 OGE 1: Vested Rights in a Pension Plan as a "Financial Interest"](#) (PDF).

This letter explains that an employee's leave of absence constitutes a financial interest in an outside entity - [79 x 4: Right of Re-Employment as a Financial Interest under 18 U.S.C. § 208](#) (PDF).

## **ELEMENT 6: Direct and Predictable Effect**

Although not specified in the original statute, OGE has long relied on the “direct and predictable effect” test to determine if a violation has occurred under 18 U.S.C. § 208(a). The direct and predictable effect test was adopted and implemented through OGE regulation at [5 CFR 2635.402\(a\)](#).

Note that the other elements of 18 U.S.C. § 208(a) must be met BEFORE applying the direct and predictable effect test. OGE does not recommend relying solely on this element when reviewing questions related to 208(a).

### **General Guidance:**

Explains when a particular matter will have a “direct” and “predictable” effect - [5 CFR 2640.103\(a\)\(3\)](#).

Defines “direct and predictable effect” - [5 CFR 2635.402\(b\)\(1\)](#).

This legal advisory discusses the legal history and application of the direct and predictable effect test in-depth - [LA-23-12: Identifying and Preventing Violations of 18 U.S.C. § 208 Arising from Digital Asset Ownership](#) (PDF).

This letter discusses how to apply the direct and predictable effect test - [95 x 5: 18 U.S.C. § 208, 401\(k\) Plans, and Appearance of Impartiality](#) (PDF).

This OLC opinion introduces the direct and predictable effect test - [OLC Opinion 78-37, Memorandum Opinion for the Chief Counsel, Food and Drug Administration \(June 29, 1978\)](#) (PDF).

## **Additional Resources**

### [Legal Research Search Collection](#)

This collection provides links to the resources included in this document, as well as many others that can aid in performing a conflicts analysis, such as all of OGE's legal advisories, rulemaking preambles, legislative histories, Department of Justice legal opinions, and court opinions.

### [Analyzing Potential Conflicts of Interest](#)

This series of guidance documents provides conflicts analyses for various types of employment interests, investment interests, and liabilities.

### [18 U.S.C. 208 Course of Study](#)

This is the central location for training on this criminal statute offered by OGE's Institute for Ethics in Government.

## 18 U.S.C. § 208(a) Elements Checklist

**REMEMBER:** All elements of the statute should be analyzed in sequential order. Each element links back to the relevant legal guidance in the job aid.

1. [Officer or Employee of the Executive Branch](#) ["an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee,"]

2. [Participates Personally and Substantially](#) ["participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise,"]

3. [Particular Matter](#) ["in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter,"]

4. [Knowledge](#) ["in which, to his knowledge,"]

5. [Financial Interest](#) ["he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest."]

6. [Direct and Predictable Effect](#) [“an employee is disqualified from participating in a particular matter when there is a direct and predictable ‘link between [the] governmental matter and a pecuniary gain or loss to the employee or specified entity.”]

