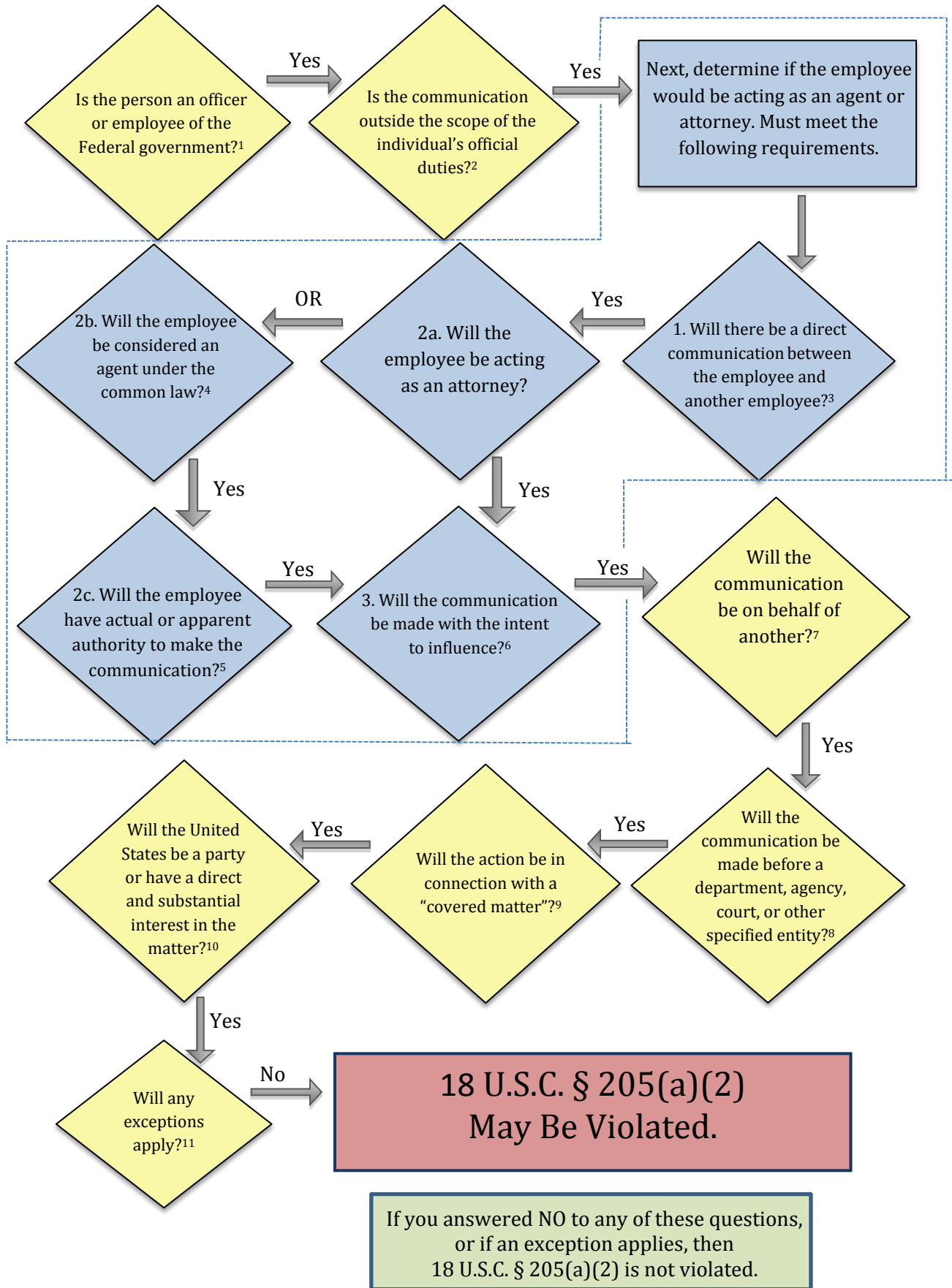


Does an Employee's Activities Implicate 18 U.S.C. § 205(a)(2)?*



*This is a summary and should not be considered legal advice

Section 205(a)(2) of Title 18 generally bars an officer or employee of the United States from, among other things, “acting as agent or attorney for anyone” before any department, agency, or court in connection with a covered matter in which the United States is a party or has a direct and substantial interest. [Compensation is not an element.]

1. Officer or Employee of the Federal Government. Generally, officers or employees of the United States, including employees in all three branches, are subject to § 205(a). The prohibition, however, is inapplicable to the President, Vice President, a Member of Congress, or a Federal judge. *See* 18 U.S.C. § 202(c). Employees of the Office of the U.S. Attorney for the District of Columbia are also subject to § 205(b), which deals with outside activity in connection with claims against the District of Columbia and matters in which the District of Columbia is a party or has a direct and substantial interest. Finally, special Government employees (SGEs), as defined in 18 U.S.C. § 202(a), are subject to less restrictive prohibitions, as set forth in § 205(c).

2. Other than in the proper discharge of official duties. An employee will not be in violation of § 205(a)(2) if the activity is “in the proper discharge of his official duties.” Determining whether a representational activity is “in the proper discharge” of an employee’s official duties requires the employee’s official supervisors to make a factual determination of whether a proposed representational activity falls within the scope of an employee’s official duties, *i.e.*, whether the activity is part of the employee’s job. *See* OGE Advisory Letter 88x14; OGE Advisory Letter 94x8.

3. Direct Communication. An employee does not act as agent or attorney before the Government “in the absence of communication with . . . the Government.” *See* Legal Advisory DO-02-018. The communication must be direct, *i.e.*, between the employee and another Government employee – not through another. “Behind-the-scenes” assistance consisting of a communication that is only indirectly addressed to the Government is not barred by § 205(a)(2). *See* OGE Advisory Letter 04x12.

4. Agent. The common law definition of agent is used in a § 205(a)(2) analysis. *O’Neill v. Dep’t of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000).

5. Actual or Apparent Authority. Being an agent is necessary but not sufficient under § 205(a)(2). Under current case law, § 205(a)(2) also requires that the employee have either actual or apparent authority to act on behalf of a principal to make a communication. *O’Neill*, 220 F.3d at 1360.

6. Intent to Influence. Acting as agent or attorney requires intent to influence. The communication “must be in connection with a matter on which there is some controversy or at least potential for divergent views.” *See* OGE Advisory Letter 94x15. Communications of a “purely ministerial nature,” such as requesting factual information or responding to requests from the Government for factual information, are not barred by § 205(a)(2). *Id.*

7. On Behalf of Another. Section 205(a) does not bar self-representation. *See* OGE Advisory Letter 94 x 15. It also does not bar representation of the United States Government, even if the representation is other than in the proper discharge of official duties. *See* 4 Op. O.L.C. 498 (1980).

8. Department, agency, court, or other specified entity. The term “agency” in § 205(a)(2) encompasses Federal agencies, including those in the Executive and Legislative branches. 5 Op. O.L.C. 194 (1981). The term likely covers Judicial branch agencies as well. *See id.* (explaining that the definition of agency for title 18 is expansive and “in effect, establishes a presumption that a government entity is an agency” for purposes of the conflict of interest statutes). However, § 205(a)(2) “was not intended to prohibit services before ‘Congress or its committees.’” *Id.* The term “agency” also “does not apply to state agencies or agencies of the District of Columbia.” 24 Op. O.L.C. 13 (2000). However, the term “court” in the same provision “covers state as well as Federal courts.” *Id.*

9. Covered Matter: The term “covered matter” means “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter.” 18 U.S.C. § 205(h). The meaning of “particular matter” under 18 U.S.C. § 208 may be applied in the context of § 205(a)(2).

10. Direct and Substantial Interest. There is no statutory definition of the phrase “direct and substantial” as used in § 205(a)(2), but the phrase does appear in other criminal conflict of interest statutes, notably 18 U.S.C. §§ 203 and 207. OGE regulations interpreting § 207, at 5 C.F.R. § 2641.201(j)(2), provide helpful guidance on the application of this phrase. OGE Advisory Letter 94x7.

11. Exceptions. *See* 18 U.S.C. §§ 205(d)(1)(A) (permitting representation in connection with certain disciplinary, loyalty, or other personnel administration proceedings); 205(d)(1)(B) (permitting employees to represent nonprofit employee organizations in certain circumstances); 205(e) (permitting the representation of an employee’s parents, spouse, children, and certain other persons); 205(f) (permitting SGEs performing work under a Government grant or contract to represent in certain situations); 205(g) (permitting the giving of testimony under oath and the making of statements required under penalty of perjury or contempt); and 205(i) (permitting representation pursuant to certain statutes that deal with labor management relations).