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Hello, and welcome to this training course from the Institute for Ethics in Government at the U.S. Office of Government Ethics. My name is Christie Chung. I’m an Assistant Counsel at OGE, and today we will be talking about common conflict of interest and impartiality concerns that arise for employees in the context of spousal employment.

Not uncommonly, ethics officials receive questions from employees who are wondering about whether there are ethics-related considerations that they need to take into account given their spouse’s employment. This training provides a general overview of how the conflict of interest law at 18 U.S.C. § 208 and impartiality regulation at 5 C.F.R. § 2635.502 apply to common scenarios raised by employees relating to their spouse’s employment.

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During this training, we will first discuss considerations under the conflict of interest law. We will then discuss the impartiality regulation. Lastly, the training will address the importance of employees exercising due diligence in this area to avoid potential violations of the law or regulation.

Before we begin, I would like to note that in addition to the conflict of interest law and impartiality rule, some agencies have supplemental ethics regulations that prohibit employees and some family members, such as spouses, from holding certain financial interests. Employees who are subject to such restrictions should be aware of how interests acquired by their spouse through employment (e.g., stock), may implicate those rules that are specific to their own agency.

Also, at the top of this training, I want to flag that spousal employment is an example of one area in which ethics issues may be difficult for employees to resolve. For that reason, human resources officials at agencies may wish to refer prospective employees to an ethics official prior to onboarding if an individual has questions or concerns. This way, agencies can assess and address any issues posed by a spouse’s employment prior to the prospective employee’s onboarding.

And with that being said, let’s get started.

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Starting with 18 U.S.C. § 208, which is often referred to as the primary conflict of interest law –

Under section 208, employees may not participate personally and substantially in any particular matter that they know will directly and predictably affect their own financial interests or financial interests imputed to them. Essentially, no working on things that you know will affect your financial interests.

As noted on this slide, many of the terms that are used in section 208 and in OGE’s regulations implementing 208, are terms of art that have specific meaning for purposes of the statute. Included on this slide are resources that ethics officials may consult for further guidance on certain terms.

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For the purposes of this training, I do want to highlight that “financial interest” is defined to mean “the potential for gain or loss . . . as a result of governmental action on the particular matter.” Also, for purposes of the statute and of relevance for this training, the financial interests of an employee’s spouse are imputed to an employee. Or, in other words, the financial interests of an employee’s spouse are just as disqualifying for an employee as the employee’s own interests.

Accordingly, under section 208, employees may not participate in a particular matter that would have a direct and predictable effect on their spouse’s financial interests.

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In thinking about the potential employment-related financial interests of an employee’s spouse, there is large variation in employment arrangements and forms of compensation. There may be spouses who receive an annual salary to spouses who receive equity-related compensation to spouses who own their own business. The scope of an employee’s recusal obligation under section 208 is going to depend on the specific nature of the financial interests involved.

To structure this 208 discussion, we’ll first go over the relevant analysis for when a spouse does not have any equity-related interests in their employer and when the spouse also does not participate in a profit-sharing arrangement with their employer.

We’ll then go over the 208 analysis for spouses who have equity-related employment interests or who receive compensation that is directly tied to their employer’s profits.

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When an employee’s spouse does not have any equity-related interest in or profit-sharing arrangement with their employer, the employee will only have a disqualifying financial interest in particular matters that would directly and predictably affect their spouse’s compensation, benefits, or continued employment. In other words, when a spouse does not have any equity-related interest and when the spouse does not receive compensation that is directly tied to their employer’s profits, the analysis is focused on whether the particular matter is one that could affect the spouse’s compensation, benefits, or job security.

To help illustrate this analysis, we will now walk through three examples involving types of scenarios that agency ethics officials may encounter. These examples focus solely on the 208 analysis, and so I caution you to remember that in situations where section 208 does not apply, other ethics restrictions, such as the impartiality rule which we will turn to shortly, may still be applicable.

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Example 1

An agency is in the process of negotiating a contract renewal with a contractor, Company A. Company A provides the agency with IT services. An employee at the agency receives an assignment to work on the contract renewal. The employee has a spouse who Company A previously hired specifically to perform work under the contract. If the agency does not renew the contract, then there is a real possibility that the company will no longer have need for the spouse’s services.

Would the employee’s participation in this assignment raise concerns under section 208?

Yes. Because the outcome of the negotiations would directly and predictably affect their spouse’s continued employment with Company A, the employee may not participate in the contract renewal.

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Example 2

An employee at an agency receives an assignment to work on a litigation team that is bringing a high-profile enforcement action against Corporation B. The enforcement action involves claims of serious financial misconduct. The corporation is being represented by a law firm where the employee’s spouse works. The employee’s spouse is a non-equity partner at the law firm and has no involvement in the firm’s representation of Corporation B. As a non-equity partner, the spouse has no ownership interest in the law firm and only receives a fixed salary.

Would the employee’s participation in this assignment raise concerns under section 208?

No, in this scenario there’s no evidence that the enforcement action could affect the spouse’s salary, benefits, or continued employment with the firm. The enforcement action would affect the law firm’s financial interests, but because the spouse has no equity-related interest in the firm and because the spouse does not have a profit-sharing arrangement with the firm, we know that the relevant analysis is whether the particular matter would directly and predictably affect the spouse’s compensation, benefits, or continued employment. The employee would not have a disqualifying financial interest in this assignment arising from their spouse’s employment with the law firm.

I do want to note however that this example does have implications under the impartiality rule. We will return to this example in the next section of this training when we discuss the impartiality regulation.

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Example 3

An employee at an agency receives an assignment to update safe care and handling policies that are applicable to all entities that have artifacts on loan from the employee’s agency. The employee has a spouse who serves on the board of directors of a museum, Nonprofit C. Nonprofit C has artifacts on display that are on loan from the employee’s agency. The spouse receives only a fixed fee of $400 a year for their board service.

Would the employee’s participation in this assignment raise section 208 concerns?

No, there’s no evidence here to suggest that the policymaking would directly and predictably affect the spouse’s compensation from or continued board service with the nonprofit. The safe care and handling policies would affect the nonprofit, but because the spouse does not have any equity-related interest in the nonprofit and because the spouse does not participate in any profit-sharing arrangement, we know that the relevant analysis is whether the particular matter could affect the spouse’s compensation, benefits, or continued board service.

The employee does not have a disqualifying financial interest in this particular matter arising from their spouse’s service on the board of Nonprofit C.

As for the impartiality rule – just in case any of you are thinking ahead and wondering whether there would be impartiality concerns here: the impartiality rule’s two main restrictions at section 2635.502(a)(1) and (2) are not going to apply here because those restrictions apply only to party matters. The policymaking in this scenario is not a particular matter involving specific parties and so we don’t need to worry about the impartiality rule here. I just wanted to mention this in case any of you were curious, but again, we’ll be turning to the impartiality rule properly in just a little bit.

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Not all employees have spouses who receive an annual salary or fixed hourly wages. Employees may have spouses who receive equity from their employer or who receive bonuses that are directly tied to their employer’s profits.

When an employee’s spouse has an equity-related interest in their employer or receives compensation that is based on a share of their employer’s profits, the conflict of interest law requires the employee’s recusal from a broader range of particular matters than when those interests are absent. Under these circumstances, employees must consider both the financial interests of their spouse as well as the financial interests of their spouse’s employer for purposes of the conflict of interest analysis. So in other words, an employee must recuse from any particular matter that would directly and predictably affect the financial interests of their spouse’s employer if their spouse has an equity-related interest in their employer or if their spouse receives compensation that is directly tied to their employer’s profits.

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Common examples of equity-related interests include: stock, stock options, restricted stock units, warrants, participation in an employee stock purchase plan, and membership interest in a company.

And, relatedly, I want to emphasize that the potential for a conflict of interest will arise when a spouse receives the equity-related interest, regardless of whether any applicable vesting has occurred.

We’re now going to walk through two examples to help illustrate the 208 analysis for when a spouse has an equity-related interest in their employer or receives compensation that is based on a share of their employer’s profits.

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Example 4

An employee at an agency receives an assignment to work on an investigation involving Business E that relates to possible fraud. The employee has a spouse who works at a law firm that is representing Business E in connection with the investigation. The spouse receives bonuses that the law firm calculates based on the firm’s annual revenues.

Would the employee’s participation in this assignment raise concerns under section 208?

Yes. Because the spouse has a profit-sharing arrangement with the law firm, we know that the employee may not participate in any particular matter that would directly and predictably affect the law firm’s financial interests. Actions taken by the agency during this investigation would affect the financial interests of the law firm, which is getting paid to represent Business E. Therefore, the employee may not participate in this investigation.

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Example 5

A contracting officer at an agency receives an assignment to review bids for a cleaning contract. The employee’s spouse is the owner of a single-member LLC that provides cleaning services. One of the bids received by the agency identify the spouse’s LLC as a subcontractor in the bid proposal.

Would the employee’s participation in this assignment raise concerns under section 208?

Yes. Because the award of the contract would affect the financial interests of this business that their spouse owns, the employee has a disqualifying financial interest in this particular matter and they may not participate in the review of bids and award of this contract.

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As mentioned earlier in this training, even when a spouse’s employment does not pose an issue for an employee under the conflict of interest law, spousal employment can raise appearance concerns under the impartiality rule.

As you may be aware, the impartiality rule is comprised of more than one restriction. For the purposes of this training, we’ll be focusing on the restriction at 5 C.F.R § 2635.502(a)(2). Section 2635.502(a)(2) states that an employee should not participate in a particular matter involving specific parties if a person with whom the employee has a “covered relationship” is or represents a party to the matter, and the employee determines the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter.

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For purposes of the rule, persons with whom an employee has a covered relationship include any person for whom the employee knows that their spouse is serving, or seeking to serve, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.

So, if an employee knows that a person with whom their spouse has one of these relationships is a party or represents a party to a matter, the employee may not participate in that party matter if the employee determines that the circumstances would raise appearance concerns. In weighing whether a reasonable person with knowledge of the relevant facts would question one’s impartiality, no single factor is necessarily dispositive to the determination. That is to say, employees should consider the totality of the circumstances.

We’ll now walk through three examples to help illustrate the application of the impartiality rule.

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Example 6

On this slide, you’ll see an example that should look familiar. This is one of the examples that we previously discussed during our review of section 208. As you may recall, this example involves an employee’s spouse who works as a non-equity partner at a law firm that is representing a party in litigation brought by the employee’s agency. As you may also recall, we had previously concluded that this employee’s participation in the litigation did not pose a concern under section 208 because there was no evidence that it could affect the spouse’s salary, benefits, or continued employment with the law firm.

Now that we’ve discussed the impartiality rule, however, we know that this employee has a covered relationship with the law firm because the law firm is a person who employs their spouse. Therefore, the employee must consider whether a reasonable person would question their impartiality if they were to work on the case.

In performing the reasonable person test, this employee takes into account their spouse’s seniority in the firm and the prominence and highly sensitive nature of the case. In our example, the employee weighs these facts, they determine that a reasonable person would question their impartiality, and so they recuse from the case.

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Example 7

An employee at an agency receives an assignment to arrange for catering services from a catering company, Company F. The employee’s supervisor selected Company F to cater an event hosted by the agency and the employee is tasked with making arrangements with the company. The employee has a spouse who works for Company F as a salaried IT technician. The spouse neither has any equity-related interests in Company F nor receives any compensation that is tied to Company F’s profits.

Would there be a 208 or 502(a)(2) concern with the employee’s participation?

Because the spouse does not have any equity-related interests in Company F and because the spouse does not receive any compensation that is tied to Company F’s profits, we know that under section 208 the employee will need to recuse from particular matters that could affect their spouse’s compensation, benefits, or continued employment. Since there is no evidence that the catering arrangement here could have any such effect, we can determine that the spouse’s employment would not give rise to a 208 concern for this employee.

However, the employee in this example is going to perform the impartiality analysis because Company F employs their spouse and therefore the employee has a covered relationship with Company F. In performing the reasonable person test, the employee takes into account the fact that they had no involvement in their agency’s selection of Company F for the catering services, and the fact that there is no connection between their spouse’s work and the catering agreement. The employee could justifiably conclude that a reasonable person would not be likely to question their impartiality if they were to participate. Therefore, the employee decides that they may proceed with contacting Company F to arrange for the catering services.

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Example 8

An employee at an agency receives an assignment to review a proposed merger between Company I and Corporation J. The employee’s spouse is a consultant at a large consulting firm, in a position for which the spouse only receives an annual salary for their work. Company I is not a client of the employee’s spouse. But, it is one of many clients to whom the spouse’s employer provides consulting services. The consulting firm has no involvement in the proposed merger.

Would there be a 208 or 502(a)(2) concern with the employee’s participation in this assignment?

Because the spouse does not have any equity-related interest in their employer and the spouse does not receive any compensation that is based on a share of the company’s profits, we know that the relevant analysis under 208 is whether the particular matter would directly and predictably affect the spouse’s compensation, benefits, or continued employment. There’s no evidence here that the merger could have any such effect, and we can determine that 208 would not pose an issue for the employee in this scenario.

Turning to the 502(a)(2) analysis – as a threshold matter, we’ll need to determine whether the employee has a covered relationship with any parties in this matter.

* We know that the employee has a covered relationship with the consulting company that employs their spouse. However, the consulting company is not a party to this merger.
* As for Corporation J – there’s no indication here that the employee has any sort of relationship with Corporation J
* As for Company I – although Company I is a client of the spouse’s employer, Company I is not a client of the spouse. The employee does not have a covered relationship with Company I merely by virtue of the fact that Company I is one of the consulting company’s clients.

The proposed merger is not a party matter in which a person with whom the employee has a covered relationship is or represents a party. Therefore, the employee may review the merger without engaging in the reasonable person test under section 2635.502(a)(2).

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As we’ve seen, an employee’s recusal obligations under the conflict of interest law and impartiality rule are heavily fact-dependent. Therefore, it is important that employees are familiar with the details of their spouse’s employment. To help ensure that employees are well-positioned to identify situations that raise potential conflicts or appearance concerns, OGE encourages ethics officials to counsel employees on the importance of exercising due diligence in developing an understanding of their spouse’s employment. That is to say, employees should take efforts that can be reasonably expected from, and that are ordinarily undertaken by, employees in similar circumstances to avoid a violation of the conflict of interest law or impartiality rule.

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Due diligence is also important because knowledge and the question of what an employee did or did not know is an evidentiary element that investigators and prosecutors examine after there’s been an alleged 208 violation. And, in doing so, those investigators and prosecutors may take into consideration what information was obtainable by an employee, regardless of whether the employee actually accessed the information or not.

For more information on the concepts of constructive knowledge and willful blindness, ethics officials may refer to the two United States Supreme Court cases cited on this slide.

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Now, you may be wondering what constitutes a reasonable effort. The answer to that is necessarily going to depend on the facts of the situation. In situations where an employee needs additional information to perform a conflicts or impartiality analysis, an example of a reasonable action that the employee may take is asking their spouse for the information needed.

At times, there may be restrictions on a spouse’s ability to disclose certain information to an employee. For instance, spouses who have clients may be subject to a confidentiality agreement that prohibits disclosure of their client’s identity. In situations that are likely to implicate the conflict of interest law or impartiality regulation and where employees are unable to obtain relevant information from their spouse, employees may consult an ethics official to discuss what reasonable efforts the employee may take under the circumstances to avoid a potential violation of the law or regulation. As part of this assessment, OGE generally encourages employees to consider whether information relevant to the 208 or 502 analysis is publicly available (e.g., disclosed in a public report or other media).

To help illustrate reasonable efforts that an employee may take to obtain relevant information in situations where spousal employment may raise conflicts or appearance concerns, we’ll now walk through two examples.

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Example 9

An employee at an agency receives an assignment to review a workers’ compensation claim that involves a pharmaceutical company, Company K. The claim relates to a minor accident that occurred on Company K’s premises. The employee’s spouse owns a consulting business through which the spouse provides consulting services to pharmaceutical companies, and the employee believes that there is a likelihood that their spouse provides consulting services to Company K.

What can the employee do?

The employee in this case is able to check with their spouse to see if Company K is in fact one of the spouse’s clients. For the purposes of this example, let’s say that the spouse confirms that they do provide consulting services to Company K but the consulting services are unrelated to the workers’ compensation claim.

With respect to the 208 analysis, there’s no evidence here to suggest that this workers’ compensation claim could affect the spouse’s consulting company. The claim relates to a minor accident that occurred on Company K’s premises, and so, for example, there’s no evidence that the claim could put Company K out of business and therefore result in the spouse losing a client. We can determine that this assignment would not pose concerns for the employee under section 208.

However, as we’ve learned, the employee does have a covered relationship with Company K because Company K is a person for whom their spouse serves as a consultant. To determine whether they may participate in review of the claim, the employee therefore goes on to perform the reasonable person test as described in section 2635.502(a)(2).

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Example 10

Using the same facts from Example 9, but let’s suppose that the spouse instead tells the employee that they have a confidentiality agreement with their clients, and they cannot discuss the identities of their clients with the employee.

What can the employee do?

The employee in this example needs assistance and therefore they decide to contact an ethics official for help. The ethics official asks the employee whether there is any publicly available information that indicates that Company K is a client of the employee’s spouse. The employee is not able to locate any publicly available information that connects Company K to their spouse’s consulting business.

For purposes of the conflict of interest law, the ethics official and employee are able to determine that the employee’s participation in this assignment would not pose concerns under section 208. The employee is familiar with the type of consulting that their spouse provides and the employee knows that any consulting that their spouse provides would be unrelated to this workers’ compensation claim. There’s no evidence here to suggest that the claim could affect the financial interests of the spouse’s consulting company.

For purposes of the impartiality rule, given that the employee does not have any actual knowledge, and that they are unable to access any information, indicating that Company K is a client of their spouse, the employee and ethics official conclude that Company K is not a person with whom the employee knows they have a covered relationship. The employee therefore would not be required to conduct the reasonable person test under section 2635.502(a)(2).

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As we’ve seen, an employee’s recusal obligations under the conflict of interest law and impartiality rule are highly fact-specific. Given the potentially significant ways in which spousal employment—and changes in the details of a spouse’s employment—may impact an employee’s recusal obligations, it is important that employees remain familiar with and mindful of the employment-related interests and relationships of their spouse; and OGE encourages agency ethics officials to counsel employees on the concepts discussed in this video.

To conclude, I hope you’ve found the information in this training helpful. Agency ethics officials who have questions about this training should feel free to contact their OGE Desk Officer. Thank you very much for your time today.