

Post-Government Employment Workshop--18 U.S.C. 207(a)(1)

Elements of 18 U.S.C. 207(a)(1)*

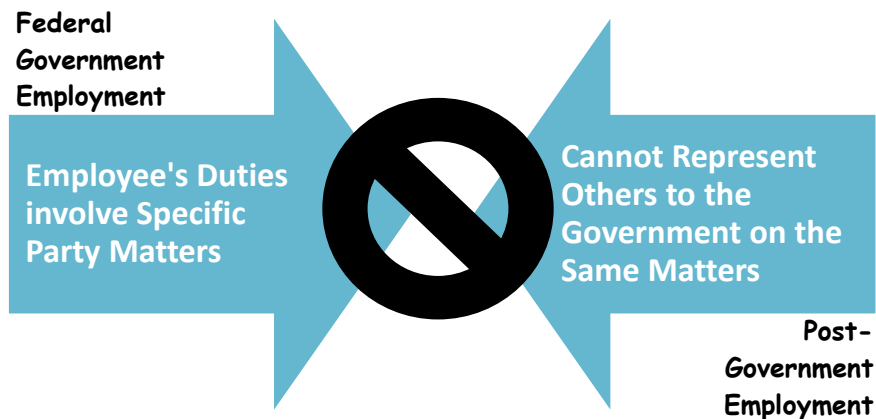
| Permanent Ban |
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| <ul style="list-style-type: none">• (Former) Employee• Knowingly Make• Appearance or Communication• Intent to Influence• To or Before an Employee• On Behalf of Any Other Person• U.S. is a Party or Has a Direct and Substantial Interest• Particular Matter Involving Specific Parties• Same Particular Matter |
| Where Participated Personally and Substantially |

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

Basic Prohibition

None of the provisions of 18 U.S.C. 207 bar any individual from accepting employment with any private or public employer after Government service. Section 207 only prohibits individuals from engaging in certain activities on behalf of persons or entities other than the United States, whether or not done for compensation. None of the restrictions bar self-representation.

Section 207(a)(1) is a lifetime restriction that begins when an employee leaves Government service. This provision prevents a Government employee from “switching sides” and representing another person or entity before the United States on the same matters they worked on as a Government employee. See *DO-04-023a*.



Implementing Regulation

5 CFR Part 2641 -- Post-Employment Conflict of Interest Restrictions under 18 U.S.C. 207 ("207")

5 CFR 2641.201(a) -- Permanent restriction under 18 U.S.C. 207(a)(1)

The Process



Employee

18 U.S.C. 207(a)(1) applies to all Executive branch employees except the President, Vice President, and enlisted military personnel, including: (See 5 CFR 2641.104)

- Full-time “officers” and “employees” of the Executive branch, regardless of grade or rank (except as stated above)
- Part-time employees, including special government employees (SGEs), whether or not compensated; 18 U.S.C. § 202
- “Detailees” under the Intergovernmental Personnel Act; See 5 U.S.C. §§ 3371-3376

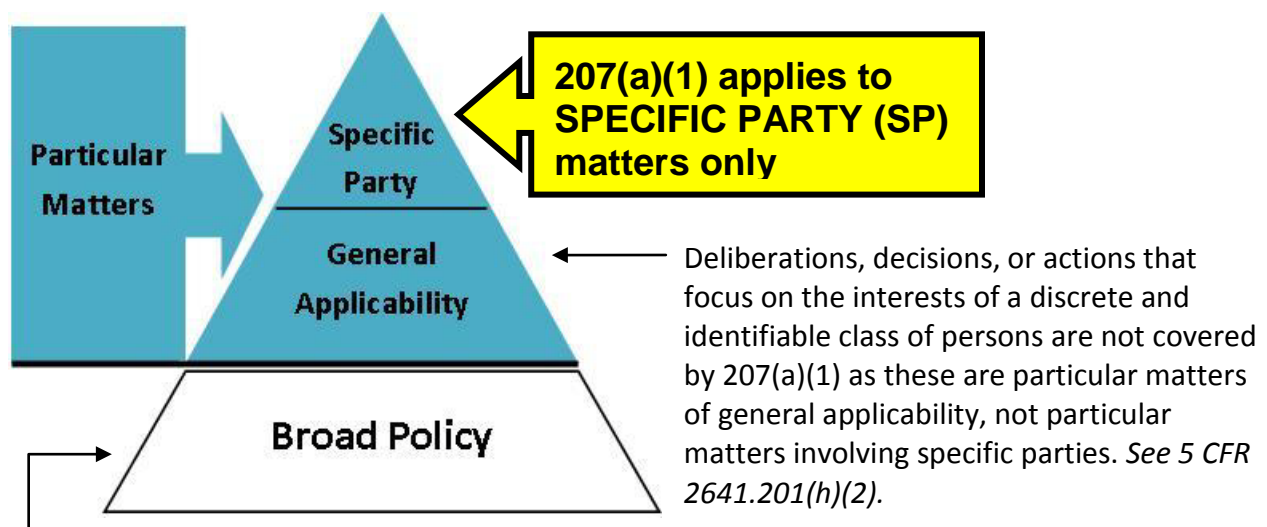
Particular Matters

See 5 CFR 2641.201(h)

A particular matter involving specific parties typically involves:

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

See 5 CFR 2641.201(h)(1)



Broad policy matters (those deliberations, decisions, or actions that focus on the interests of a large and diverse group) are not particular matters at all, thus, not covered by 207(a)(1).

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

Personal and Substantial Participation

5 CFR 2641.201(i)

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

| Term | Definitions |
|--|--|
| Participate Personally 5 CFR 2641.201(i)(2) | <ul style="list-style-type: none">• Directly• Includes direct and active supervision of a subordinate's participation in the matter |
| Participate Substantially 5 CFR 2641.201(i)(3) | <ul style="list-style-type: none">• Involvement is of significance to the matter• May be substantial even though it does not determine the outcome of a particular matter• Should be based not only on the effort devoted to a matter, but also on the importance of the effort; While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial• Can include participation at all levels of the decision-making process, including making recommendations and giving advice; It also includes the direct and active supervision of a subordinate's participation in the particular matter |
| Personal and Substantial Participation 5 CFR 2641.201(i)(1) | <ul style="list-style-type: none">▪ Requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. |

Appearance or Communication

Appearance = physical presence (See 5 CFR 2641.201(d)(2))

- Formal or informal setting
- Participating in discussions
- Simply appearing in the room (even without participation)

Communication = imparting/transmitting information (facts, opinions, ideas, questions, direction, etc.) (See 5 CFR 2641.201(d)(1))

- Formal and informal
- Intent that information be attributed to former employee
- Orally - In writing - Electronically

Behind the Scenes activity is permitted under 207 (a)(1) (e.g., advice or assistance) so long as it is not done through a third party with attribution intended. See 5 CFR 2641.201(d)(3).

A former employee is prohibited from “**knowingly**” making prohibited contact.

- The question of knowledge comes up *after* an appearance or communication occurs and OGE deals with prospective advice so this element is not included in the analysis.
- Only the Department of Justice can decide whether to prosecute a former employee for knowingly making a communication or appearance that violated 18 U.S.C. 207.

Intent to Influence

Intent to influence is present when a former employee seeks:

- A Government ruling, benefit, approval, or other discretionary action OR
 - To affect Government action where real or potential dispute or controversy exists
- See 5 CFR 2641.201(e)(1)*

But not when purely:

- A social visit with former co-workers
- To convey or request purely factual information (no chance of controversy); e.g., status of the matter
- To request publicly available documents

Other specific activities that are not considered to have the intent to influence include:

- Preparers of tax returns
 - Principal investigators for Federal research grants
 - Filers of Security and Exchange Commission forms
- See 5 CFR 2641.201(e)(2)(iii)-(v)*
- Communication made at the initiation of the Government concerning work performed/to be performed under a Government contract or grant during a routine Government site visit to non-Government premises (*See 5 CFR 2641.201(e)(2)(vi)*)

The CHALLENGE... Is a former employee's mere physical presence intended to influence? When a former employee makes an appearance but does not communicate in any way, consider whether:

- The former employee has been given actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance
- It is anticipated that others present at the meeting will make reference to the views or past or present work of the former employee
- Circumstances do not indicate that the former employee is present merely for informational purposes; e.g., merely to listen and record information for later use
- The former employee has entered a formal appearance in connection with a legal proceeding at which he is present
- The appearance is before former subordinates or others in the same chain of command as the former employee.

See 5 CFR 2641.201(e)(4)

All relevant circumstances must be considered for a given case. *See 5 CFR 2641.201(e)(2)*. Be cautious... a communication or appearance that begins without any intent to influence may become one with the intent to influence if an unforeseen dispute arises. *See 5 CFR 2641.201(e)(3)*.

To or Before an Employee

An employee or officer of any:

- Department
- Agency
- Court
- Court-martial

This includes to or before an employee who is detailed to any of the above. *See 5 CFR 2641.201(f).*

Some public commentary is okay, when *specific conditions* are met: *See 5 CFR 2641.201(f)(3)*

- Appearances or communications at public gatherings or conferences, seminars, etc.
- Broadcasts or publications of commentaries

Note, 207(a)(1) does not prohibit communications or appearances before Members of Congress* and legislative staff, or the District of Columbia, but be careful where Federal employees are also in attendance (in their official capacity).

*Not all 207 prohibitions permit communications or appearances with Congress; i.e., 207(f) bars former senior employees from representing a foreign entity before Congress (as well as a department, agency, court, and court-martials) within one year of leaving their Federal Government positions.

On behalf of Any Other Person

Any other person includes: (*See 5 CFR 2641.104; Also see 5 CFR 2614.201(g)(2)*)

- Individual, corporation, company, association, firm, or partnership (commercial or non-profit)
- Any other organization, institution, or entity (commercial or non-profit)
- All Federal, state, local, and foreign governments

The term person also includes any officer, employee, or agent of any of the above. It does not include the former employee themselves or a sole proprietorship owned by former employee (so long as the former employee represents their own interests, not a third party's interests).

Considered on behalf of a third party when a former employee acts: (*See 5 CFR 2641.201(g)(1)*)

- As agent or attorney
- With expressed or implied consent
- Subject to some degree of control or direction

Not considered on behalf of a third party merely because:

- In interest or support of another
- Because it results in a benefit to another

Same Particular Matter

5 CFR 2641.201(h)(5)

The permanent ban in 207(a)(1) applies only to those same particular matter involving specific parties matters that the employee worked on as a Government employee. Some factors to consider in making this determination are:

- Whether It involves the same basic facts
- Whether It involves the same or related parties
- Whether the issues are related
- The amount of time elapsed

See 5 CFR 2641.201(h)(5)(i)

The particular matter must have involved specific parties when the:

- Employee worked on it while with the Government AND
- At the time the former employee makes an appearance or communication

HOWEVER, the parties do not need to be identical at both times. *See 5 CFR 2641.201(h)(3).*

As a point of reference, ordinarily, separate contracts and follow-on contracts are considered separate particular matters involving specific parties; however, if there is some indication that one contract directly contemplates the other contract or if there are other circumstances indicating that two contracts are really part of the same proceeding involving specific parties, then two contracts may be viewed as the same particular matter. Additionally, a Government procurement has specific parties identified to it when a bid or proposal is received in response to a solicitation, if not before. *See 5 CFR 2641.201(h)(5)(ii) for considerations in the case of contracts, grants, and other agreements. See also OGE Opinions 02x5 and 05x6 for discussions on when particular matters involving specific parties are the same matters.*

SCENARIOS: Same Particular Matter

- 1) Apple files a patent infringement lawsuit in the U.S. District Court for the Southern District of New York against seven cell phone manufacturers for infringing on U.S. Patent D781,672 (ornamental design for cell phone).
- 2) Dunlap Grubb Weaver LLC -- for Sarah T. Brown -- files an appeal with the U.S. Patent and Trademark Office on the denial of Patent Application D11-23,779 (ornamental design for beverage container).
- 3) Dunlap Grubb Weaver LLC -- for Nike -- files a patent infringement lawsuit in U.S. District Court against three shoe manufacturers for infringing on U.S. Patent D501,232 (ornamental design of a shoe topper).

U.S. is a Party or Has a Direct and Substantial Interest

The United States (“U.S.”) must be a party or have a direct and substantial interest at the time of the post-Government employment communication. For purposes of 207(a)(1), U.S. encompasses the entire Federal Government, **all branches**, including Government corporations.

- The U.S. does not have to be a party to the matter; e.g., a false claims against the Government case that is being pursued by a whistleblower and not the Government.
- The matter does not have to be pending in a Federal forum for the U.S. to be a party or have a direct and substantial interest; e.g., a matter pending in a State court.
- HOWEVER, the U.S. does not necessarily have an interest in a matter simply because a Federal statute is at issue or the matter is pending in a Federal court.

When it is not clear whether the U.S. is a party to or has a direct and substantial interest in a particular matter, a determination is required. *See 5 CFR 2641.201(j)(2)(i)-(ii) for the procedures required for this determination.*

SCENARIOS: U.S. is a Party or has a Direct and Substantial Interest

- 1) Apple files a patent infringement lawsuit in the U.S. District Court for the Southern District of New York against seven cell phone manufacturers for infringing on U.S. Patent D781,672 (ornamental design for cell phone).
- 2) As an attempt to invalidate Patent D781,672, HTC Corp. (one of the seven companies) requested the U.S. Patent and Trademark Office reexamine the patent. HTC Corp. based its Reexamination Request on specific prior art references that HTC claimed should have prevented issuance of the patent in the first place.
- 3) Apple filed a lawsuit against LG for infringing on Patent D781,672. The lawsuit was filed concurrently with the U.S. International Trade Commission (ITC) in U.S. District Court in Delaware.