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Policies and Procedures

Title: REE Employees Appearing as Witnesses in Judicial and Administrative Proceedings; Process in Suits Against the United States

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This P&P sets forth policy and procedures concerning the appearance of employees as witnesses in judicial and administrative proceedings as related to employment with USDA.

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1. References

- 7 Code of Federal Regulations (CFR) Part I, Subpart K - Appearance of USDA Employees as Witnesses in Judicial or Administrative Proceedings
- Federal & Agriculture Travel Regulations
- P&P 158.1, Freedom of Information Act and Privacy Act Guidelines
- P&P 402.6, Leave - specifies the policy applicable to employees using leave for witness service.

2. Policy

Occasionally, as a result of conducting work within the scope of Federal employment, an employee can be the subject of a law suit or sought as a witness to testify or produce official documents in judicial or administrative proceedings.

In order to protect all employees, including those served by the District of Columbia Circuit Court, it is required that any summons relating to or stemming from official work, including Civil Rights and Equal Employment Opportunity (CR/EEO) matters, be brought to the immediate attention of their supervisor, the REE Ethics Advisor and/or the Chief of the Employee Relations Branch (ERB) located within the Human Resources Division (HRD), Administrative and Financial Management (AFM), ARS. The ERB may be reached on 301-504-1355. Civil Rights and Equal Employment Opportunity matters must also be brought to the attention of the appropriate agency's Civil Rights Office (ARS - 202-720-6161; CSREES - 202-720-2700; ERS - 202-694-5005; and NASS - 202-720-8257).

This P&P does not apply to appearances by USDA employees as witnesses in judicial or administrative proceedings which are purely personal or do not arise out of or relate to their employment with USDA.

An employee who testifies or produces documents in a judicial or administrative proceeding in violation of this P&P may be subject to disciplinary action. The information regarding the violation will be coordinated with the ERB for action.

3. Appearances at Judicial and Administrative Proceedings

USDA employees may not provide testimony or produce documents in a judicial or administrative proceeding unless authorized in accordance with 7 CFR Part I, Subpart K.

Appearance as a witness on behalf of the United States

An employee may appear as a witness on behalf of the United States in any judicial or administrative proceeding without the issuance of a summons, subpoena, or other compulsory process. Employees should obtain permission to appear as witnesses from their immediate supervisor and from the appropriate Ethics Advisor or the REE Ethics Advisor.

Appearance as a witness on behalf of a party other than the United States where the United States is not a party (Not related to official duties)

An employee served with a valid summons, subpoena, or other compulsory process demanding his or her appearance on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, will promptly notify the appropriate Ethics Advisor or contact the REE Ethics Advisor and/or the Chief of the ERB of the existence and nature of the order compelling his or her appearance, or of the document requesting release of information. The employee will also specify, if known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested. An employee may appear only if such appearance has been authorized in the interest of USDA and after receipt of supervisory approval. If the request relates to CR and EEO matters, the employee should also contact the appropriate agency's Civil Rights Office.

An employee requested to appear as a witness without the service of a valid summons, subpoena or other compulsory process may appear only if such appearance has been authorized by his or her USDA Agency, Department, with concurrence from the USDA Office of General Counsel (OGC) that such appearance is in the interest of USDA.

If it is determined that information sought relates to official work and there is concurrence from OGC, the Agency Administrator, Chief of the ERB or REE Ethics Advisor, and supervisor that such assistance would not benefit the agency, the employee will most likely be required to "politely decline." If information sought from the employee is not related to official work, the employee should, in most instances, treat the incident as an outside activity.

In determining whether the employee's appearance is in the interest of USDA, the following is considered:

- What USDA interest would be promoted by the employee's testimony;
- Would the appearance result in interference with official duties; and
- Would the testimony appear to favor one litigant over another.

Appearance as a witness or production of documents on behalf of a party other than the United States where the United States is a party

An employee served with a valid summons, subpoena, or other compulsory process demanding the employee's appearance on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party, will promptly notify his or her supervisor, the appropriate Ethics Advisor or the REE Ethics Advisor, and/or the Chief of the ERB of the existence and nature of the order compelling his or her appearance, or of the document requesting his or her attendance. If the request involves CR and EEO matters, the employee should also contact the appropriate agency's Civil Rights Office. As appropriate, the REE Ethics Advisor and/or the Chief of the ERB will contact OGC to determine whether there are grounds to oppose the employee's attendance or production of documents. If so, the REE Ethics Advisor and/or the Chief of the ERB will determine whether to seek to quash the summons, subpoena, compulsory process, or to deny authorization. As appropriate, OGC will request the assistance of the Department of Justice, a United States Attorney, or other counsel representing the United States, in the case of a judicial proceeding; or of the official or attorney representing the United States in the case of an administrative proceeding, to represent the interest of the employee and USDA.

4. Subpoena Duces Tecum

When a subpoena duces tecum for USDA records in judicial or administrative proceedings is received, forward it to the Chief of the ERB for review. In most cases, the ERB will forward the subpoena duces tecum to the Freedom of Information Act/Policy Act (FOIA/PA) Coordinator, Information Staff, for review in compliance with the FOIA.

5. Procedures

Employees

REE employees expecting personal involvement in civil litigation through testimony or release of official documents because of their inherent expertise or official work, should immediately contact their supervisor, the appropriate Ethics Advisor or the REE Ethics Advisor and/or the Chief of the ERB. If the matter relates to CR and EEO matters, also contact the appropriate agency's Civil Rights Office.

Employees called upon to testify (whether or not subpoenaed) in any case under Section 3 (Appearance at Judicial and Administrative Proceedings) will **immediately** communicate the information listed below to their appropriate Ethics Advisor, or contact the REE Ethics Advisor who will notify the Chief of the ERB, before providing any testimony or the production of documents. If the employee is to appear as a witness under Section 3, he/she will provide the approving official information listed below by fax, or by telephone if time does not permit communication by other means, before appearing for witness duty:

- Names of parties involved.

- The matter in suit.
- Nature of the testimony the employee expects to give.
- Name of the court, body, or official issuing the subpoena or requesting the testimony.
- Date and place of appearance.
- Nature of any record or material employee has been directed or asked or anticipates being asked to produce or disclose.

Approving Officials

The Agency Administrator, Deputy Administrators, Division/Staff Directors, Area Directors and the designated Area Ethics Advisors in conjunction with the Chief of the ERB and/or the REE Ethics Advisor will determine, in each case, the propriety of an employee's involvement in any judicial proceeding as listed above. Whenever the production of records or an employee's testimony is contrary to statutory or regulatory provisions, he/she will refer the matter to the Chief of the ERB and/or the REE Ethics Advisor.

Employee Relations Branch

Whenever an employee is involved as a witness in any type of proceeding listed above, the REE Ethics Advisor or the Chief of the ERB will relay the necessary information to the appropriate attorney at OGC for advice as to whether the employee may be compelled to comply. A response will be provided to the employee by the Chief of the ERB as soon as possible.

6. Travel Expenses

An REE employee authorized to serve as a witness while on official duty will be paid the usual travel expenses by his or her agency except to the extent that travel expenses are paid to the employee by the court, authority, or party other than the United States which caused him/her to be summoned. Guidance and instructions in individual cases will be provided by HRD on the basis of the Agriculture Travel Regulations.

7. Witness Fees

An REE employee who appears as a witness before a judicial or administrative proceeding on behalf of the United States is not entitled to receive witness fees for such appearance.

An REE employee who appears as a witness in a judicial or administrative proceeding on behalf of a party other than the United States, when such appearance is in his or her official capacity or arises out of or relates to his or her employment with USDA, is required to collect the authorized fees for such service and to remit these fees made payable to his or her USDA agency.

8. Summary of Responsibilities

Employees

- Contact the appropriate Ethics Advisor, or the REE Ethics Advisor who will notify the Chief of the ERB, if they are expecting to be personally involved in civil litigation through testimony or release of official records, because of their inherent expertise or official work.
- Contact the appropriate agency's Civil Rights Office regarding subpoenas relating to CR and EEO matters.
- Communicate the information listed in Section 5 to their appropriate Ethics Advisor, prior to providing any testimony or the production of documents.

Approving Officials

- Determine, in each case, the propriety of an employee's involvement in a judicial or administrative proceeding.
- Refer the matter as soon as practicable to the REE Ethics Advisor or the Chief of the ERB for advice as to whether the employee should be compelled to comply.

Employee Relations Branch

- Relay necessary information to the appropriate OGC attorney.
- Prepare and send a written response to the employee and to the party issuing the subpoena once concurrence or nonconcurrence is obtained from OGC.
- Prepare a written advisory to the employee and the person issuing a subpoena duces tecum that the matter is being referred to the FOIA Coordinator in compliance with the FOIA.

Freedom of Information Act Coordinator

- Respond to the request for documents and release information in compliance with the FOIA.

9. Glossary

Administrative proceeding. Any proceeding pending before any Federal, State, or local agency that issues regulations, orders, licenses, permits, or adjudicates disputes or controversies.

Appearance. Providing testimony or documents which arise out of, or relate to, an employee's official duties. An appearance includes an affidavit, deposition, interrogatory, or other required written submission.

CFR. Code of Federal Regulations

ERB. Employee Relations Branch, HRD

HRD. Human Resources Division, AFM

Judicial proceeding. Includes any case or controversy pending before any Federal, State, or local court.

OGC. Office of General Counsel, USDA

Quash. Legal term to nullify a judicial action.

Subpoena duces tecum. A writ commanding a person to produce in court certain designated documents or other evidence.

Travel expenses. The amount of money paid to a witness for reimbursement for transportation, lodging, meals, and other miscellaneous expenses in connection with attendance at a judicial or administrative proceeding.

Witness fees. The amount of money paid to a witness as compensation for attendance at a judicial or administrative proceeding.

-/Sd/-

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