

Hiring From the Federal Government: A Top 12 List

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With the change of Presidential Administrations and with a new Congress, many current federal government officials and employees – whether elected, appointed, or hired – are exploring employment opportunities in the private sector. In their new positions, these officials and employees – particularly if they are coming from the Executive branch – will need to comply with an array of statutory and other restrictions, some of them specific to their former employing agency, on their post-government employment activities. Restrictions may apply, as well, to their activities in seeking, negotiating for, or agreeing to new employment. The burden of compliance does not fall only on the former official or employee: Private-sector employers hiring from the government may also have legal exposure if relevant requirements and restrictions are not observed. And remember: Violations of federal statutory post-employment restrictions may be punished as felony criminal offenses.

To give you just a brief idea of how tricky the terrain can be, here are 12 tips to help those navigating post-employment restrictions for federal employees.

Hiring From the Executive Branch

1. Three statutory post-employment restrictions apply to all former Executive branch employees: (1) a permanent ban on communicating, with the intent to influence an official action, on particular matters involving specific parties in which the former employee was involved personally and substantially for the government; (2) a two-year ban on communicating, with the intent to influence an official action, with anyone on particular matters involving specific parties that were pending under the

Authors

Robert L. Walker
Of Counsel, Deputy General Counsel
202.719.7585
rlwalker@wiley.law
Hannah Bingham
Associate
202.719.3455
hbingham@wiley.law
Hannah J. Miller
Associate
202.719.3573
hmliller@wiley.law

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former employee's official responsibility; and (3) a one-year ban on representing, aiding, or advising in connection with certain trade or treaty negotiations.

2. Former "senior employees" of the Executive branch are subject to additional restrictions, namely a one-year ban on communicating to influence an official action with anyone in the former employee's employing agency, as well as a one-year prohibition on representing, aiding, or advising certain foreign entities before the federal government. Former "very senior employees" are additionally subject to a two-year ban on communications to influence an official action with the former employee's former employing agency and with certain other officials.

3. There are several exceptions to the statutory post-employment restrictions, including for communications made solely for the purposes of furnishing scientific or technological information. Also, strictly "behind the scenes" communications are permitted under many of these statutory restrictions; however, even such "behind the scenes" communications are prohibited under the restrictions relating to the representation of foreign entities and to representations in connection with trade and treaty negotiations.

4. Current and former Executive branch employees can seek advice on specific post-employment scenarios from their agency's designated ethics officer. Given the consequences of violating post-employment restrictions, prospective employers should obtain a copy of the prospective hire's written post-employment advice or, if no such written advice has been provided, ask the prospective hire to obtain such guidance.

5. Appointees who signed the Biden Ethics Pledge are subject to additional post-employment restrictions, including a so-called "shadow lobbying" ban. It is an open question, however, whether the Biden Ethics Pledge will remain in effect after the end of the Biden Administration; the Pledge could be revoked by either the outgoing or the incoming President.

6. Former contracting officials are subject to additional post-employment restrictions under the Procurement Integrity Act, including a prohibition on disclosing procurement information such as bid, proposal, and source selection information to which they had access as a result of government employment. Certain former officials are subject to a restrictive one-year prohibition on acceptance of compensation from a contractor if the former official had various responsibilities related to contracts valued over \$10 million.

7. Executive branch employees who are seeking employment outside the federal government must recuse themselves from participating in any matter which has a direct and predictable effect on the financial interest of the prospective employer. Certain employees are also required to notify their employing agency within three days after starting employment negotiations or entering into an agreement for future employment. A notification of recusal statement may be required where prospective employment poses a conflict of interest.

Hiring From the Congress

8. Former U.S. Representatives may not, by statute and for one year post-service, communicate with current members, officers, or employees of the House or Senate with the intent to influence official action. Former U.S. Senators may not, by statute and for two years post-service, communicate with members, officers, or employees of the House or Senate with the intent to influence.

9. Certain staff of the Senate and House are also subject to statutory post-employment restrictions. "Senior staff" of the Senate must refrain for one year post-service from communicating with members, officers, or employees of the Senate with the intent to influence official action. Former highly paid House staff face a one-year ban on post-employment communications with the intent to influence; the scope of this restriction depends on whether the former staffer served in the House in a member's personal office, on a committee staff, or for the leadership.

10. Members of the House and Senate, as well as staff of the House or Senate subject to the statutory restrictions discussed above, by law must also observe a one-year ban on representing, aiding, or advising a foreign government or foreign political party.

11. In addition to statutory post-employment restrictions, under the rules of the Senate a member or staffer of the Senate who becomes a registered lobbyist under the Lobbying Disclosure Act (LDA) – or who is employed or retained by an entity that employs or retains a registered lobbyist – is subject to restrictions on lobbying the Senate.

12. Current members, officers, and certain staff of the House or Senate who negotiate or enter into agreements for future private-sector employment are subject to written notification and recusal requirements.

To make it a Baker's Dozen, here is a point to remember if you are a lawyer leaving the government: The attorney rules of professional conduct of many jurisdictions include specific provisions governing conflicts arising from an attorney's successive government and private employment.

Many of the terms and concepts mentioned above have very specific meanings, and their application in any specific circumstance can be very nuanced. Whether you are an individual thinking about leaving the government for the private sector or your organization is looking to bring a former government official on board, Wiley's Election Law & Government Ethics Practice lawyers can assist you in understanding how the restrictions on hiring from the government apply to your unique situation.

Rob Walker, Hannah Bingham, and Hannah Miller recently co-authored chapters on "Hiring from the Executive Branch" and "Hiring from Congress" in the ABA book The Lobbying Manual.