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NEWSLETTER

Practical Tip: Post-Government Employment

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Beware the Revolving Door!

With a national election on the horizon, Washington, DC may soon witness another large-scale turnover of officials in both the legislative and executive branches of the federal government, regardless of who wins. In the states, too, the revolving door of government service constantly sends many individuals back into the private sector. Those who employ persons leaving government jobs must cast a careful eye toward rules and regulations that restrict legally permissible contact with previous employers. These restrictions can last for long periods of time and can affect a potential employee's utility. A brief discussion of the federal rules and the rules for California and Texas as representative examples follows below.

Federal Restrictions

Legislative Branch Officials and Members of Congress

The employment restrictions of former legislative branch members are all one year in duration. The former employee's position is the only distinction that the law makes, with elected officials subject to the ban with the broadest scope. By federal law and for one year, all members of Congress are banned from attempting to influence any member, officer or employee of Congress (House or Senate) from representing or advising a foreign entity, and from using confidential information obtained through trade and treaty negotiations in any private situation.

As for non-elected Congressional employees, only individuals who meet an annual salary threshold of 75 percent of the basic pay rate of a member of Congress in *any* 60-day period during the final year of employment are covered by federal statutory restrictions upon post-employment activities (the 2004 threshold is $118,575).

The general rules for Congressional staffers are as follows:

- A personal staff employee who meets the 75 percent threshold is banned for one year from seeking official action from his former employer or any of his current staff members.
- A committee staff employee is barred for one year from seeking to influence anyone, either involved with the specific committee during the time of employment (including members of Congress) or with the committee currently, regarding any matter, not just those within the committee's jurisdiction.

- A leadership staff employee for one year may not attempt to influence any current member of the chamber's leadership or any current staff member.
- All other legislative employees are restricted for one year from lobbying any current member of the office in which the former employee worked.

In addition to federal law, the Senate imposes rules of its own upon former Senators and former Senate employees who become lobbyists. These rules cover *all* former employees,*regardless of salary threshold*—a scope of coverage greater than that of federal law. Former Senators may not lobby any current Senator or employee of the Senate for one year, while Senate employees may not lobby their former offices or any offices in which they held "substantive responsibilities" for that same period. Substantive responsibilities involve actually assisting with drafting committee bills or with hearings and mark-up, rather than merely monitoring a committee or serving as a liaison for a member's personal office. Therefore, a personal Senate staff member is not necessarily free to lobby the committees on which his former employing Senator sat. Rather, one must look at the staffer's past work and involvement with the committee.

Former Executive Branch Officers and Employees

For executive branch members, post-employment restrictions vary by the type of work performed for the government and the depth of one's involvement in that work. In general, the more immersed one was in a particular matter, the longer lasting the restrictions upon that person.

To begin, anyone who participated "personally and substantially as [an] officer or employee" in a specific matter is banned for life from acting overtly with the intent to influence on behalf of another party, other than the United States, in that same matter. In comparison, the prohibition against a former employee acting on behalf of another, with the intent to influence, in matters "actually pending" during his tenure over which the employee had an "official responsibility" is merely two years.

The two-year ban upon applicable former employees makes use of two key phrases not found in the lifetime ban: "official responsibility" and "actually pending." Official responsibility involves any authority to "approve, disapprove, or otherwise direct Government action," including anything that an employee knew or should have known would fall under his purview, either as the intermediate or final authority, and anything over which the employee would have exerted authority had he not recused himself. All matters that any of the former employee's subordinates had been in the process of considering during his supervision are encompassed by matters that were "actually pending." Therefore, any future employer must take a close look at the employment activities of all new hires to determine not only the matters on which the new hire actually worked, but also the matters over which the new hire had decision-making power, regardless of whether he actually exercised that power.

While the above restrictions apply to all members of the executive branch, the law also makes distinctions between different levels of personnel, creating special restrictions for "senior personnel" and "very senior personnel." In general, the higher the office held, either in pay or influence, the broader the restrictions will be. For those in a senior position, a one year ban is imposed upon any communication, with the intent to influence, regarding any matter before anyone in his or her former department. For those in a very senior

position, the scope of the one-year prohibition broadens to include not only those in the employee's former department, but also most employees in executive-appointed positions within any department.

As mentioned above, distinctions also are made between types of work. Additional prohibitions are placed on those involved in trade or treaty negotiations. Anyone who participated "personally and substantially" in such a negotiation is barred for one year from representing or advising any other party involved in or affected by that negotiation. Like the other bans, this restriction does not apply to advising or representing the United States, any of its entities or the employee himself. Like other executive branch work restrictions, a distinction is made by personnel level, with U.S. Trade Representatives and Deputy U.S. Trade Representatives prohibited from representing or advising any foreign entity for one year after leaving office.

State Restrictions

Former Government Officials

While federal law and Senate rules cover a wide range of former employees and their post-employment activities, a 2002 Center for Ethics in Government study found that fewer than thirty states have any sort of limited time ban on lobbying or other "revolving door" statute. Nearly forty states, however, have an ethics commission or other agency charged with investigating conflict of interest complaints and overseeing the ethical standards of other state agencies, public officials, and governmental employees. Generally, those commissions and agencies govern post-employment activity compliance where such restrictions exist. Two states are highlighted below: California and Texas.

California

In California, overseen by the state's Fair Political Practices Commission, all state employees, elected officials and state board or commission members are forbidden, for one year, from representing any party before the state agency by which they were formerly employed. For legislators, this ban includes any appearance before or communication with a legislator, employee, committee or subcommittee. For employees, the ban includes not only the agency of previous employment but also any other agency that would fall under the direction or control of the former agency. A lifetime ban also exists against switching sides in a matter on which an official worked while employed by or elected to the state government.

Texas

In contrast to the breadth of California's coverage, the length of the post-employment ban in Texas is doubled, but the scope is much smaller. The "revolving door provisions," which fall under the purview of the Texas Ethics Commission, only apply to former officers and employees of the executive branch; in Texas, unlike California, a former legislator or legislative employee can begin to lobby current legislators and legislative employees the day after termination of employment, subject only to general state lobbying provisions. In the executive branch, no board member or executive head of a regulatory agency may appear before or communicate with the officers or employees of the board or agency on which he or she served for two years. In addition, no former agency employee or officer who was paid above a certain salary threshold may represent a party or receive compensation from a party regarding any "particular matter" in which the employee "participated" during his or her government service or for which the employee was responsible—a lifetime ban.

"Particular matter" is defined quite narrowly to be a specific proceeding, so that a former employee would be barred from representing a party in a specific permit application process in which the employee participated but not in that permit application process generally. Thus, a former employee can work on behalf of clients who appeared before his or her former agency, just not on specific matters that came before the former agency while the employee worked there and not for two years after employment if the former employee was a board member or executive head of a regulatory agency.

Conclusion

While profound differences in post-employment restrictions exist among the several states and within the different branches of the federal government, the key, when one is contemplating employing individuals who are leaving government posts, is to research the scope of their government duties and to understand how that scope will affect future employment. As can be seen in the examples provided above, laws restricting post-employment activities often limit the immediate plans of a former government employee and may carry additional lifetime restrictions upon future employment.