

ARTICLE

Mitigating contractor risks from hiring federal employees on "deferred resignation"

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The government's employee buyout program — announced on Jan. 28, 2025, and offering virtually all government employees a deferred resignation during which employees would "retain all pay and benefits regardless of your daily workload and will be exempted from all applicable in-person work requirements until September 30, 2025" — closed on Feb. 12, and the Administration has reported that around 75,000 federal employees accepted the offer. Many of these individuals have valuable skills and experience and may seek employment in the private sector, including with government contractors.

Former federal employees often have restrictions on the types of activities they can perform after they leave government, however. And the framework of the buyout program has likely added even more limitations. Government contractors should fully understand these limitations and consider potential actions to limit risk to the company.

The deferred resignation program

The buyout program is structured as a "deferred resignation," in which a federal employee who accepts the offer has an effective resignation date of Sept. 30, 2025. The Administration has promised that such employees will maintain current compensation and benefits until their resignation date and be exempt from any "Return to Office" requirements.

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Additionally, the Office of Personnel Management (OPM) has advised that employees accepting the offer are not expected to work during the deferred resignation period and can even get a second job in the private sector.

The template deferred resignation agreement that OPM circulated to agencies states that employees will work through Feb. 28, 2025, and then be placed on paid administrative leave through Sept. 30, 2025. The template agreement states that the employee may accept non-federal employment if the employment does not violate the Standards of Ethical Conduct of Executive Branch Employees (5 C.F.R. part 2635) or other applicable federal laws or regulations. Thus, even if federal employees are generally allowed to accept other employment during their deferred resignation period, these restrictions may prohibit them from accepting specific positions, including those that may conflict with their dormant government responsibilities.

Employment restrictions may apply during the deferred resignation period

The restrictions in the Standards of Ethical Conduct of Executive Branch Employees arise from various provisions in Title 18. The provisions that are typically applicable to the hiring of federal employees are 18 U.S.C. §§ 207 and 208. Federal procurement officials are also subject to additional restrictions in the Procurement Integrity Act (PIA), which are found in 41 U.S.C. §§ 2103-05.

Section 208 prohibits a federal employee from participating in an official capacity in particular matters in which she has a personal financial interest. The Standards of Ethical Conduct further explain that employees "shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities." 5 C.F.R. § 2635.101.

If a current federal employee has an arrangement concerning prospective employment, the employee must recuse herself from participating personally and substantially in any particular matter that has a direct and predictable effect on the financial interest of the prospective employer. See 18 U.S.C. § 208; 5 C.F.R. § 2635.402.

The PIA also prohibits certain procurement officials from engaging in employment discussions with an offeror/bidder on a procurement in which that official is participating, unless the official has reported the discussions and recused themselves from the procurement. See 41 U.S.C. § 2103.

Section 207 restricts the activities that former federal employees can perform with a new employer. The statute places 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. 18 U.S.C. § 207(a)(1).

Further, there is 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 former employee's official responsibility. 18 U.S.C. § 207(a)(1). Additional restrictions also apply to "senior" employees, such as a one-year ban on communicating with any agency in which the former senior employee served during her last year in government service. 18 U.S.C. § 207(c).

The PIA adds more restrictions on contracting officers and other procurement officials, including prohibiting them from accepting for one year compensation from contractors whose work the officials approved or oversaw.

Contractors should keep in mind that the Section 207 and PIA bans will likely extend from the employee's deferred resignation date (i.e., Sept. 30) rather than the date the employee started working for the contractor. Moreover, although Section 207 applies to former federal employees, contractors should nonetheless ensure that new employees on deferred resignation abide by these restrictions to avoid even the appearance of conflicts of interest with current or future government contracts.

Even for government contractors that are familiar with the restrictions and requirements in Sections 207 and 208 and the PIA, the deferred resignation framework could create complications because employees will technically still be employed during the deferred resignation period.

For instance, 18 U.S.C. § 203 prohibits federal employees from accepting compensation for representing a party before a federal court or government agency in a particular matter in which the United States is a party or has a direct and substantial interest. As another example, 18 U.S.C. § 205 prohibits a federal employee from acting as an agent or attorney for anyone before a federal court or government agency.

Thus, even if an employee abides by Section 207's post-employment restrictions, she could still run afoul of the restrictions in Sections 203 or 205 because she would technically be a current federal employee albeit on a deferred resignation status.

Additional considerations

In addition to employment restrictions, there are other considerations government contractors should keep in mind when it comes to hiring individuals who have accepted the buyout offer. Most notably, there are a lot of uncertainties surrounding the offer.

While OPM states that employees on deferred resignation will not have to work and will be placed on administrative leave, there is always the chance that the employee will have to continue working or called back to work after a period of inactivity. Indeed, the Administrative Leave Act states that an agency may not place an employee on administrative leave for more than 10 work days. 5 U.S.C. § 6329a(b). OPM could also rescind its guidance regarding working a second job. In other words, these employees may not be able to direct their full efforts to their new employer.

A government contractor hiring employees with a deferred resignation may also face allegations from competitors of an organizational conflict of interest or unfair competitive advantage, which could lead to bid protests.

In some situations, the Government Accountability Office and the Court of Federal Claims have found that a contractor's hiring of a former government employee creates an unfair competitive advantage in a procurement (e.g., the former government official helped to develop the requirements in a procurement for

which the official's new employer is competing). If the individual is still employed by the procuring agency, that could give a competitor another reason to argue that the contractor has gained an unfair competitive advantage by hiring an official on a deferred resignation.

Contractors can take actions to limit their risk

A contractor can take several actions to limit the potential risk in hiring a federal employee who accepted the buyout offer. The best way to attain some security is to have the prospective employee obtain an ethics letter from the relevant agency official. An ethics letter is a written opinion from the appropriate official regarding the applicability of any employment restrictions to the activities the federal employee is expected to undertake on behalf of the contractor. An ethics letter should be obtained prior to starting employment with the contractor and should be maintained in the employee's personnel file.

A contractor can also include specific language in an employment agreement or offer letter requiring the employee to notify the company if any conflict arises between her employment with the company and any obligation arising under any statute, regulation or guidance. The employment agreement or offer letter should allow the company to take any action to remediate or eliminate the conflict, including termination. These types of clauses place the obligation on the employee to understand any changes to the deferred resignation program and report such changes to the contractor.

Finally, if an employee on deferred resignation is called back to her job or other complications arise, the employee could simply accelerate her resignation. OPM states that an employee taking the buyout offer can "unilaterally accelerate" her final resignation date "for any reason." An accelerated resignation could help the contractor and employee avoid many headaches.

The Administration's buyout program has certainly resulted in flood of potential employees who could be valuable additions to a contractor's workforce. The unorthodox nature of the program suggests that contractors should proceed carefully, however.