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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
Acting Director and General Counsel

SUBJECT: The Application of the Ethics Laws to Interns

Agency ethics officials often receive questions regarding whether, and to what extent, students who are interns with the Federal government are covered by the ethics laws. To ensure accurate guidance in this area, the U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to remind agency ethics officials that the executive branch ethics laws have differing application depending on whether a student intern serves as a regular employee, a special Government employee (SGE), or a volunteer. OGE is also taking this opportunity to provide answers to questions concerning the application of specific provisions of the ethics laws to students serving as interns with the Federal government.

The services of student interns are generally retained in one of two ways. First, students may be appointed, employed, or retained as government employees, either on a full-time or part-time basis. These students are considered “employees” of the government as that term is used in 5 U.S.C. § 2105. Second, students may serve with the government on a voluntary basis pursuant to 5 U.S.C. § 3111 and the implementing regulations at 5 C.F.R. § 308.101, *et. seq.* (“volunteer interns”). Because interns are subject to different ethical requirements depending on the hiring authorities used by their agencies, it is important for ethics officials to work closely with their agencies’ human resources departments to understand what hiring authorities are being used for student interns.

A. Employee Interns

Regular Employees

Employee interns who receive appointments in the civil service are employees of the executive branch under 5 U.S.C. § 2105. *See* 5 C.F.R. § 213.3402. Employee interns who do not qualify as SGEs will be considered regular employees who are fully subject to the Ethics in Government Act of 1978 (EIGA), as amended; the conflict of interest statutes found in chapter 11, title 18 of the United States Code; and the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) found at 5 C.F.R. Part 2635.



See, e.g., OGE Inf. Adv. Op. 02x3 (2002); OGE Inf. Adv. Op. 91x21 (1991); OGE Inf. Adv. Op. 90x5 (1990).

Special Government Employees

Employee interns are SGEs if they are “retained, designated, appointed, or employed to perform, with or without compensation . . . temporary duties either on a full-time or intermittent basis,” for a period not to exceed 130 days in any period of 365 consecutive days. 18 U.S.C. § 202.¹ Although most ethics rules apply to SGEs, some rules have a more limited application to SGEs than to regular employees. *See* OGE Inf. Adv. Op. 00x1 (2000) (describing how the ethics laws apply to SGEs). For example, as discussed later in this Legal Advisory, 18 U.S.C. § 209 does not apply to SGEs, and certain laws, such as 18 U.S.C. §§ 203 and 205, have more limited application.

B. Volunteer Interns

Volunteer interns who are appointed under the authority of 5 U.S.C. § 3111 are not generally considered executive branch employees for purposes other than certain laws relating to travel subsidies, injury compensation, and the Federal Tort Claims Act. *See* 5 U.S.C. § 3111(c)(1); 5 C.F.R. § 308.102.² On that basis, OGE has consistently held that volunteer interns appointed under 5 U.S.C. § 3111 are not covered by the conflict of interest statutes 18 U.S.C. §§ 202-209, nor are they covered by the EIGA or the Standards of Conduct. *See* OGE Inf. Adv. Op. 90x5 (1990). Although the ethics laws do not apply to volunteer interns, OGE urges agencies to consider whether permitting volunteer interns to engage in activities that would otherwise be prohibited by the ethics laws would be inappropriate. As a matter of prudence, an agency may make a management decision to exclude volunteer interns from such activities where warranted.

I. Questions Related to Ethics Program Administration

Q.1: Are employee interns and volunteer interns required to receive initial ethics training?

Answer: It depends. Employee interns are government employees and generally must receive initial ethics training. 5 C.F.R. § 2638.304. Volunteer interns are not required by OGE’s

¹ Employee interns who serve for a fixed term that will not exceed 130 consecutive days are considered SGEs. *See* Restrictions on a Federal Appointee’s Continued Employment by a Private Law Firm, 7 Op. O.L.C. 123, 126 (1983) (stating that the 130-day standard is met when “the length of [the] employee’s entire tenure with the government will be less than 130 days.”) (emphasis added). Other employee interns may meet the definition of an SGE if it is prospectively determined in good faith when they are appointed that they are not expected to serve more than 130 days in a 365-day period, regardless of their actual length of service thereafter during the 365-day period. *See id.*; OGE Inf. Adv. Op. 00x1 (2000).

² Volunteer interns appointed to the Internal Revenue Service, Department of Treasury, are also considered to be employees of the executive branch for purposes of certain additional statutes that are unrelated to the conflict of interest statutes or the Ethics in Government Act of 1978, as amended. *See* 5 U.S.C. § 3111(c)(2).

regulations to receive such training, although it may be prudent to provide training pursuant to agency policy.

Regular Employees & Special Government Employees

Employee interns are employees of the executive branch for purposes of the executive agency ethics training regulations, and generally must receive interactive initial ethics training within 3 months of entering service. *See* 5 C.F.R. § 2638.304.³ This is true whether the intern is a regular employee or an SGE. *Id.* Because employee interns may be new to the Federal work force, they may not be sensitive to the potential for inadvertent unethical conduct. For example, interns may not understand that they are generally prohibited from giving gifts to their official supervisors and higher-paid co-workers, or that they are prohibited from using government property and resources for unauthorized uses. 5 C.F.R. §§ 2635.302, 2635.704(a). OGE urges agencies to provide training to interns on these types of issues.

Volunteer Interns

Volunteer interns who are appointed under 5 U.S.C. § 3111 are not employees for purposes of the executive agency ethics training regulations, and therefore are not required to receive initial ethics training pursuant to 5 C.F.R. § 2638.304. Agencies may, however, require volunteer interns to attend initial ethics training pursuant to their internal policies. At a minimum, it may be prudent to train volunteer interns that they should not misuse government property or resources, and should not disclose non-public information.

Q.2: Are employee interns and volunteer interns required to file financial disclosure reports?

Answer: It depends. Employee interns are generally not required to file financial disclosure reports unless they are SGEs and have not been exempted from confidential filing requirements. Volunteer interns are not required to file financial disclosure reports.

Regular Employees

Employee interns will generally not be paid enough to meet the definition of “public filer” for purposes of determining whether they are required to file public financial disclosure reports pursuant to title I of the EIGA. *See* 5 C.F.R. § 2634.202.⁴ Employee interns who are not SGEs generally will also not meet the definition of “confidential filer” and will therefore not be required to file confidential reports. *See* 5 C.F.R. § 2634.904(a)(1).

³ In appropriate cases, employee interns at or below the GS-8 grade level may be excluded from the requirement to receive an interactive training presentation, provided that: (1) the Designated Agency Ethics Official has made a written determination that the duties of the intern’s position do not create a substantial likelihood that conflicts of interest will arise; (2) the employee intern is not a confidential financial disclosure filer; and (3) the employee intern is provided with the written materials described in 5 C.F.R. § 2638.304(e)(2). 5 C.F.R. § 2638.304(a)(2).

⁴ Even in the rare occasion where an employee intern might otherwise meet the definition of “public filer,” the filing requirements of the EIGA would not apply if the intern serves for no more than 60 days in any calendar year. *See* 5 U.S.C. app. § 101(h); 5 C.F.R. § 2634.204(a).

Special Government Employees

As described in OGE's regulations, the default rule is that SGEs who do not file public financial disclosure reports must file confidential reports. 5 C.F.R § 2634.904(a)(2); *see also* OGE Inf. Adv. Op. 03x5 (2003). Under 5 C.F.R. § 2634.904(b), an agency may, however, exempt an individual or a class of SGEs from the financial disclosure reporting requirements when the agency "determines that the duties of [their] position[s] make remote the possibility that [they] will be involved in a real or apparent conflict of interest." A determination that employee interns are not required to file will frequently be appropriate, as the types of duties normally assigned to interns are unlikely to involve real or apparent conflicts of interest. A categorical determination may also be appropriate, depending on how an agency uses the services of employee interns. OGE encourages agencies to establish and memorialize their policies on whether interns need to file confidential reports.

Volunteer Interns

Volunteer interns appointed under 5 U.S.C. § 3111 are not employees of the executive branch for purposes of the financial disclosure provisions of the EIGA, and therefore are not required to file public or confidential financial disclosure reports pursuant to title I of the EIGA. *See* 5 C.F.R. §§ 2634.202, 2634.904.

II. Questions Related to Specific Conflict of Interest Provisions

Q.3: Are employee interns and volunteer interns allowed to accept relocation reimbursement from their home institution?

Answer: In many cases, yes. However, employee interns who are regular employee (not SGEs) should consult their agency ethics officials and consider the implications of 18 U.S.C. § 209 before accepting such payments during Government service. Volunteer interns are not subject to 18 U.S.C. § 209.

Regular Employees

Employee interns who are not SGEs may not receive any supplementation of their federal salary as compensation for their services as employees of the United States as per 18 U.S.C. § 209(a). *See, e.g.*, OGE Inf. Adv. Op. 02x4 (2002); OGE Inf. Adv. Op. 81x18 (1981).⁵ In many cases, relocation or moving expenses paid by an intern's home institution will not violate 18 U.S.C. § 209. First, 18 U.S.C. § 209 does not cover payments that are made before an employee enters into government service. *See Crandon v. United States*, 494 U.S. 152, 160 (1990). As such, relocation and moving expenses provided to an employee intern prior to commencing the duties of the government position would not fall within coverage of the law. Second, relocation and moving expenses are not restricted unless they are made to compensate

⁵ Employees serving without compensation are not, however, covered by the prohibition in section 209(a). *See* 18 U.S.C. § 209(c).

the employee intern for his or her government services. *See* 5 Op. O.L.C. 150, 151 (1981).⁶ When evaluating whether such payments are intended to compensate an intern for his or her government services, agencies should consider, among other relevant factors, whether the payments are regularly made to similarly-situated students who are serving with organizations other than the federal government. *See* OGE Inf. Adv. Op. 02x4 (2002). Similarly, employee interns may also be offered stipends, per diem, or other cost-of-living allowances by their home institutions during the course of their internships. Agencies should consider the guidance set out in OGE Informal Advisory Opinion 02x4 to determine whether such payments are made “as compensation for” the intern’s federal service, and should contact OGE as necessary to assist in that determination.

Special Government Employees

Employee interns who are SGEs are not covered by the restrictions of 18 U.S.C. § 209. *See* 18 U.S.C. § 209(c); OGE Inf. Adv. Op. 00 x 1.

Volunteer Interns

Volunteer interns appointed under 5 U.S.C. § 3111 are not employees of the executive branch for purposes of the conflict of interest statutes, and therefore are also not covered by 18 U.S.C. § 209. *See* 5 U.S.C. § 3111(c); *cf.* 29 Op. O.L.C. 127, 127 (2005).

Q.4: May an employee intern or volunteer intern represent a third party before the government, e.g., as part of a law clinic?

Answer: It depends. The main statutory prohibition on such conduct, 18 U.S.C. § 205, applies differently to employee interns depending on whether they are regular employees or SGEs. Volunteer interns are not subject to 18 U.S.C. § 205.

Regular Employees

OGE has previously provided substantial guidance on this question in OGE Informal Advisory Opinion 90 x 5. Employee interns who are regular employees are covered by the restrictions of 18 U.S.C. § 205(a). Under that law, regular employees are generally prohibited from representing others before the United States in a particular matter⁷ in which the government is a party or has a direct and substantial interest. 18 U.S.C. § 205(a)(2). The bar under 18 U.S.C. § 205(a)(2) applies to both compensated and uncompensated representational activities. Student

⁶ A provision of 18 U.S.C. § 209 provides an express exception permitting the acceptance of actual relocation fees by participants in certain executive exchange and fellowship programs. *See* 18 U.S.C. § 209(e). If this provision does not apply, agency ethics officials must evaluate relocation payments on a case-by-case basis to determine whether acceptance of the payment would violate the criminal law.

⁷ The term used in the statute is “covered matter.” The definition of “covered matter,” found at 18 U.S.C. § 205(h), however, includes “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter.” (emphasis added). Therefore both OGE and the Department of Justice understand the terms “covered matter” and “particular matter” as being functionally equivalent. *See* OGE Inf. Adv. Op. 06x9 (2006).

interns who are regular employees are therefore barred by section 205(a)(2) from, among other things, engaging in covered representations on a *pro bono* basis, unless the representations qualify for an exception specified in law. *See United States v. Bailey*, 498 F.2d 677, 680 (D.C. Cir. 1974). At the same time, 18 U.S.C. 205(a)(2) does not prohibit employees, including employee interns, from engaging in “behind-the-scenes” assistance related to such matters, and interns may do so as long as those activities do not violate any other law. *See OGE Inf. Adv. Op. 04x12* (2004). In addition, regular employees of the executive branch are generally barred from prosecuting or sharing in any claim on behalf of another against the United States. 18 U.S.C. § 205(a)(1).

Special Government Employees

Employee interns who are SGEs are subject to the more limited prohibition at 18 U.S.C. § 205(c). SGE interns who serve with their employing agency for 60 days or less in any 365-day period are prohibited only from representing others before the United States in particular matters involving specific parties (such as lawsuits, contracts, or grants) in which they have participated personally and substantially as a government employee. 18 U.S.C. § 205(c)(1). SGE interns who serve over 60 days with their employing agency are also prohibited from representing others before the United States in any particular matters involving specific parties that are pending in the department or agency of the government in which they are serving, regardless of whether they have participated in the matter or not. 18 U.S.C. § 205(c)(2).

Volunteer Interns

Volunteer interns appointed under 5 U.S.C. § 3111 are not covered by the ethics laws and therefore the prohibition at 18 U.S.C. § 205(a) does not apply to them. Some agencies may, however, have procedures or policies restricting volunteer interns from engaging in certain outside activities or representing others before their agency.

Q.5: May employee interns and volunteer interns work on matters affecting their home institutions?

Answer: It depends. Employee interns must consider whether such participation would violate 18 U.S.C. § 208 or the Standards of Conduct. Volunteer interns are not subject to those laws, but agencies may exercise managerial discretion to exclude them from matters affecting their home institutions when warranted.

Regular Employees and Special Government Employees

Employee interns are subject to both the criminal conflict of interest statute, 18 U.S.C. § 208, and the impartiality regulations in the Standards of Conduct at 5 C.F.R. § 2635.502. These rules apply to both regular employees and SGEs. Unless an employee intern is an “officer, director, trustee, general partner, or employee” of his or her home institution, however, he or she will generally not be disqualified from participating in matters affecting that institution under 18 U.S.C. § 208. The analysis is different under the Standards of Conduct, however.

For purposes of the impartiality regulations at 5 C.F.R. § 2635.502, an employee intern will have a “covered relationship” with his or her home institution. *See* 5 C.F.R. § 2635.502(b)(1)(i) (explaining that an employee has a covered relationship with any person with whom the employee has a “business, contractual or other financial relationship that involves other than a routine consumer transaction”). As such, before working on any particular matter involving specific parties in which the intern’s home institution is a party or represents a party, the employee intern should consult with his or her supervisor or ethics official for assistance in determining whether a reasonable person with knowledge of the relevant facts would question the intern’s impartiality. *See* 5 C.F.R. § 2635.502(a), (c).

Volunteer Interns

Volunteer interns appointed under 5 U.S.C. § 3111 are not covered by 18 U.S.C. § 208 or 5 C.F.R. § 2635.502. Some agencies may, however, have procedures or policies restricting volunteer interns from participating in matters affecting their home institutions.

Q.6: Do any restrictions apply to employee interns and volunteer interns who are in the process of seeking employment with a non-Federal entity?

Answer: It depends. Employee interns are subject to the limitations found in 5 C.F.R. § 2635.604(a) and 18 U.S.C. § 208 when seeking employment. Volunteer interns are not subject to either 5 C.F.R. § 2635.604(a) or 18 U.S.C. § 208.

Regular Employees and Special Government Employees

As described above, employee interns are executive branch employees, and are subject to the Standards of Conduct, including 5 C.F.R. § 2635.604(a). Employee interns are also subject to the criminal prohibition at 18 U.S.C. § 208. These laws place limitations on when an employee intern, whether a regular employee or an SGE, may participate in a particular matter that could affect a non-Federal organization with whom he or she is seeking, negotiating, or has an arrangement for, prospective employment. Because interns are often in the process of seeking future employment while serving with the government, ethics officials should ensure that supervisors are aware that employee interns need to be recused from matters affecting non-Federal entities with whom they are seeking employment. Employee interns should be encouraged to notify their supervisors as soon as they begin seeking employment with an outside entity that could be affected by the work of their agency.

Employee interns should also be aware of other provisions of the Standards of Conduct that are applicable to seeking future employment. For example, student interns may not use non-public information for private gain and may not use government property for unauthorized purposes. 5 C.F.R. §§ 2635.703, 2635.704. Employee interns who intend to use government work products as part of an employment application should seek advice from their supervisors to confirm that such use is permissible and to ensure that they do not violate any provision of the Standards of Conduct.

Volunteer Interns

Volunteer interns appointed under 5 U.S.C. § 3111 are not covered by 18 U.S.C. § 208 or 5 C.F.R. § 2635.604(a). Some agencies may, however, have procedures or policies restricting volunteer interns from participating in matters affecting prospective employers.

Q.7: Do any restrictions apply to employee interns and volunteer interns after they end their internship?

Answer: It depends. Employee interns are subject to the limitations found in 18 U.S.C. § 207. Volunteer interns are not subject to 18 U.S.C. § 207.

Regular Employees and Special Government Employees

Employee interns are subject to the post-employment restrictions at 18 U.S.C. § 207(a)(1). The law applies to regular employees and SGEs. Employee interns should be made aware of all applicable post-employment limitations. For example, an employee intern who provides personal and substantial assistance in the preparation of a lawsuit may not represent the opposing party back to the government in the same lawsuit after terminating government service. Similarly, employee interns should be made aware of any additional agency-specific statutes, regulations, or directives that may apply to their post-internship activities. Agency-specific restrictions could include limiting the use of nonpublic, confidential, privileged, or protected information gained while serving in the government.

Volunteer Interns

Volunteer interns who are appointed under 5 U.S.C. § 3111 are not covered by 18 U.S.C. § 207. Similar to employee interns, however, volunteer interns should be made aware of any agency-specific statutes, regulations, or directives that may apply to their post-internship activities.