

Conflicts of Interest Considerations: Employment with Institutions of Higher Education and Related Research, Speaking, and Writing Activities

(Last updated October 2021)



Topics covered include: Employee's Leave of Absence | Teaching as an Outside Activity | Honorarium | Intellectual Property | TIAA

This guidance focuses on potential conflicts of interest that can arise from financial interests that often accompany employment with institutions of higher education, fellowship positions, and related research, speaking, and writing activities. For guidance regarding potential conflicts that can arise from employment interests generally, see [Conflicts of Interest Considerations: Common Employment Interests](#).

Please note that this guide is an evolving document that OGE plans to update over time. If you have any questions, please contact your OGE desk officer or your agency ethics official.

This guide does not contain legal advice. It is intended solely for educational and informational purposes for ethics officials in the Federal executive branch.

Employee's Leave of Absence

18 U.S.C. § 208

Institutions of higher education often have policies that enable leave of absence agreements in order to retain employees in highly competitive positions, such as tenured faculty spots. When on a leave of absence from an outside employer, a Federal employee has an ongoing employment relationship with that employer. Accordingly, an employee on a leave of absence is prohibited by 18 U.S.C. § 208 from participating personally and substantially in any particular matter that the employee knows would directly and predictably affect the financial interests of that organization.¹

Exemptions: Two exemptions may be available to employees who are on leaves of absence from an institution of higher education, as defined in 20 U.S.C. § 1001. The exemption at 5 C.F.R. § 2640.203(b) permits the employee to participate in any particular matter of general applicability affecting the financial interests of the institution of higher education from which the employee is on leave, provided that the matter will not have a special or distinct effect on the institution other than as part of a class. For employees who are (1) employed by a State multicampus institution of higher education and (2) their university position has no multicampus

¹ See OGE Form. Adv. Op. 82 OGE 1 (1982) for a discussion concerning the breadth of the term “organization” as used in 18 U.S.C. § 208 and applied to state colleges, universities, and higher education systems.

responsibilities, the exemption at 5 C.F.R. § 2640.203(c) permits the employee to participate in any particular matter affecting a different campus of the institution.

5 C.F.R. § 2635.502 (Impartiality)

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with an organization, such as an employer, with which the employee has a business, contractual, or other financial relationship that involves other than a routine consumer transaction.² Therefore, when an employee knows that their employer from which they are on a leave of absence is or represents a party to a particular matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.³

*18 U.S.C. § 209 (Supplementation of Salary) and
5 C.F.R. Part 2635, Subpart B (Gifts from Outside Sources)*

18 U.S.C. § 209 prohibits the supplementation of a Federal employee’s salary, which means that an outside entity may not pay an employee to perform their official duties or enhance the employee’s pay because of those official duties. In certain cases, an employee on a leave of absence from an institution of higher education may be eligible to receive certain benefits and privileges from the institution, such as a housing allowance, discounted tuition, or mortgage subsidy. An employee generally may accept these benefits upon a determination by the agency that the benefits do not implicate 18 U.S.C. § 209 or the gifts provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct).⁴

Many of the benefits available to employees on a leave of absence qualify for the exception at section 209(b), which allows continued participation if the benefits are bona fide pension, retirement, group life, health or accident insurance, or other employee welfare or benefit plans maintained by the former employer.⁵ An employee may also accept other types of benefits and privileges from the institution, such as a housing allowance or discounted tuition, so long as the benefits are not given with the intent of supplementing the employee’s salary in violation of 18 U.S.C. § 209. For example, when comparable benefits are available to other persons on leaves of absence who are not going to the Federal Government, it is unlikely that the benefit is compensation for Government service, and section 209 is therefore unlikely to apply.⁶

Certain benefits and privileges may also implicate the Standards of Conduct if such benefits are not offered to other faculty members on leaves of absence.⁷ Additionally, if a paid leave of absence is being contemplated, the employee should consult with their ethics official regarding these issues.

² 5 C.F.R. § 2635.502(b)(1)(i).

³ *Id.* § 2635.502(a).

⁴ 5 C.F.R. pt. 2635, subpt. B.

⁵ OGE DAEOgram DO-02-016 (2002).

⁶ *Id.*

⁷ *See, e.g.*, OGE Inf. Adv. Op. 93 x 29 (1993) (analyzing university benefits and privileges under 5 C.F.R. pt. 2635, subpt. B).

Teaching as an Outside Activity

18 U.S.C. § 208

If the Federal employee's teaching activities create an employment relationship with the outside organization, then the employee has a position that creates a potential conflict under 18 U.S.C. § 208 because the financial interests of the organization are imputed to the employee. As a result, the employee would be prohibited by 18 U.S.C. § 208 from participating personally and substantially in any particular matter that the employee knows would directly and predictably affect the financial interests of that organization.

5 C.F.R. § 2635.502 (Impartiality)

Even if 18 U.S.C. § 208 does not prohibit the employee's participation in a particular matter, such as when an employee no longer holds an employed teaching position or if the employee holds a position other than those identified in the statute, the restrictions in 5 C.F.R. § 2635.502 will nevertheless apply. Under 5 C.F.R. § 2635.502, an employee will have a "covered relationship" with an organization in which the employee is an active participant,⁸ or has or seeks a business, contractual, or other financial relationship that involves other than a routine consumer transaction.⁹ Further, the employee will generally have a covered relationship for a period of one year after separation. Therefore, until the covered relationship has terminated, (1) when an employee knows that their former employer is or represents a party to a particular matter, and (2) when the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.¹⁰

5 C.F.R. § 2635.807 (Teaching, Speaking, and Writing) and 18 U.S.C. § 209 (Supplementation of Federal Salary)

For an employee who anticipates teaching in a personal capacity, 5 C.F.R. § 2635.807 prohibits receiving compensation from any source other than the Government for teaching that relates to the employee's official duties.¹¹ Moreover, the employee's activities would also implicate 18 U.S.C. § 209 if the compensation from the outside source is for teaching performed as part of the employee's official duties.

Outside Earned Income Restrictions

Presidential appointees to full-time noncareer positions are subject to the ban on receiving any outside earned income for activities performed during Government service.¹² Covered noncareer employees, as defined by 5 C.F.R. § 2636.303(a), are subject to a ban on receiving, in a calendar

⁸ 5 C.F.R. § 2635.502(b)(1)(v).

⁹ *Id.* § 2635.502(b)(1)(i).

¹⁰ *Id.* § 2635.502(a).

¹¹ *Id.* § 2635.807(a). Notwithstanding that an activity would relate to an employee's official duties under 5 C.F.R. § 2635.807(a)(2)(i)(B) or (E), an employee may accept compensation for teaching a course requiring multiple presentations, subject to the requirements in 5 C.F.R. § 2635.807(a)(3).

¹² See Exec. Order No. 12,674, § 102; 5 C.F.R. § 2635.804(a).

year, outside earned income – including honoraria – that exceeds 15% of the annual rate of basic pay for level II of the Executive Schedule (\$29,595 for calendar year 2021).¹³

Other Restrictions for Covered Noncareer Employees

Teaching for Compensation: A covered noncareer employee, as defined by 5 C.F.R. § 2636.303(a), may receive compensation for teaching only when specifically authorized in advance by the designated agency ethics official.¹⁴ Covered noncareer employees and their ethics officials should be aware that “teaching” is not limited to teaching that occurs in a formal setting, such as a classroom. Rather, it also extends to instruction on an individual basis or in an informal setting.¹⁵

Other Restrictions on Outside Activities

When undertaking an outside activity, employees must comply with the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) on misuse of position.¹⁶ Employees are prohibited from using their public office to endorse or promote the business, or otherwise for their own private gain.¹⁷ Further, employees must comply with the provisions of the Standards of Conduct relating to the proper use of official time, Government equipment and facilities, and nonpublic information. Additionally, when teaching, speaking, or writing in a personal capacity, they may refer to their official title or position only as permitted by 5 C.F.R. § 2635.807(b).

Employees must also comply with the provisions of the Standards of Conduct on outside activities.¹⁸

Agency-Specific Restrictions

Some agencies have supplemental regulations or other rules that may restrict or prohibit an employee from participating in outside employment or other outside activities. Additionally, employees must comply with any prior approval requirements established by their agency regarding participation in outside employment or other activities.¹⁹

¹³ See 5 U.S.C. app. § 501(a)(1), 5 C.F.R. § 2635.804(b); OGE Legal Advisory LA-21-01 (2021).

¹⁴ 5 U.S.C. app. § 502(a)(5); 5 C.F.R. § 2636.307.

¹⁵ 5 C.F.R. § 2636.307(b).

¹⁶ See 5 C.F.R. pt. 2635, subpt. G.

¹⁷ 5 C.F.R. § 2635.702.

¹⁸ See 5 C.F.R. pt. 2635, subpt. H.

¹⁹ See 5 C.F.R. § 2635.803.

Honorarium

Employee's Honorarium

18 U.S.C. § 208

A Federal employee might receive, or anticipate receiving, an honorarium, which is a payment of money or something of value for an appearance, speech, or article.²⁰ An honorarium is a type of earned income.²¹ Accordingly, the 18 U.S.C. § 208 analysis for honoraria focuses on the person or group paying the honoraria and depends on the timing of the service, the timing of the payment, and the subject matter of the appearance, speech, or article.²²

If an employee has not yet received the honorarium, the employee is prohibited by 18 U.S.C. § 208(a) from participating personally and substantially in a particular matter in the rare case when the employee knows it would directly and predictably affect the ability or willingness of the honorarium source to make the payment.

5 C.F.R. § 2635.502 (Impartiality)

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with an entity with which the employee has or seeks a business, contractual, or other financial relationship that involves other than a routine consumer transaction.²³ In the context of an honorarium, the following scenarios will create a covered relationship between the employee and the source of the honorarium:

- the employee has or is seeking an arrangement to deliver an appearance, speech, or article for pay.²⁴
- the employee delivered an appearance, speech, or article but has not yet been paid.²⁵
- within the last year, the employee delivered an appearance, speech, or article; the employee was paid for that service; and the employee had served in one of the positions listed in 5 C.F.R. § 2635.502(b)(1)(iv).

Therefore, until the covered relationship at issue has terminated, (1) when an employee knows that the source of the honorarium is or represents a party to a particular matter, and (2) when the employee determines that the circumstances would cause a reasonable person with knowledge of

²⁰ *Id.* § 2634.105(i).

²¹ *See id.* § 2634.302(a)(3); *id.* § 2636.303(b).

²² This section analyzes the potential conflicts of interest related to an honorarium received by an employee individually, the source with which the employee has a personal financial interest. The section does not analyze the potential conflicts of interest related to an honorarium that is directed to an organization for which the employee serves as an agent. In that case, the revenue belongs to the organization and is not earned income of the employee.

²³ 5 C.F.R. § 2635.502(b)(1)(i).

²⁴ *See id.*

²⁵ *See id.*

the relevant facts to question their impartiality in the matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.²⁶

Generally, the receipt of a standard, one-time honorarium, except in rare cases such as a large payment or the source doing business with the agency, would not cause a reasonable person to question the employee's impartiality. However, sources from which the employee received multiple honoraria should be reviewed on a case-by-case basis.

*5 C.F.R. § 2635.807 (Teaching, Speaking, and Writing) and
18 U.S.C. § 209 (Supplementation of Federal Salary)*

Under 5 C.F.R. § 2635.807, an employee is prohibited from receiving an honorarium if the honorarium is for teaching, speaking, or writing that relates to the employee's official duties.²⁷ For employees other than special Government employees, the receipt of compensation when the activity is undertaken as part of the employee's official duties is also prohibited by the supplementation of salary bar in 18 U.S.C. § 209. For additional assistance interpreting 18 U.S.C. § 209, see OGE DAEOgram DO-02-016 (2002).

Outside Earned Income Restrictions

Presidential appointees to full-time noncareer positions are subject to the ban on receiving any outside earned income, including honoraria, for activities performed during Government service.²⁸ Covered noncareer employees, as defined by 5 C.F.R. § 2636.303(a), are subject to a ban on receiving, in a calendar year, outside earned income that exceeds 15% of the annual rate of basic pay for level II of the Executive Schedule (\$29,595 for calendar year 2021).²⁹

Agency-Specific Restrictions

Some agencies have supplemental regulations or other rules that may restrict or prohibit an employee from participating in outside employment or other outside activities. Additionally, employees must comply with any prior approval requirements established by their agency regarding participation in outside employment or other activities.³⁰

Spouse's Honorarium

18 U.S.C. § 208

When the employee's spouse has not yet received the honorarium, the employee is prohibited by 18 U.S.C. § 208(a) from participating personally and substantially in a particular matter in the rare

²⁶ *Id.* § 2635.502(a).

²⁷ 5 C.F.R. § 2635.807(a). Notwithstanding that an activity would relate to an employee's official duties under 5 C.F.R. § 2635.807(a)(2)(i)(B) or (E), an employee may accept compensation for teaching a course requiring multiple presentations, subject to the requirements in 5 C.F.R. § 2635.807(a)(3).

²⁸ See Exec. Order No. 12,674, § 102; 5 C.F.R. § 2635.804(a).

²⁹ See 5 U.S.C. app. § 501(a)(1), 5 C.F.R. § 2635.804(b); OGE Legal Advisory LA-21-01 (2021).

³⁰ See 5 C.F.R. § 2635.803.

case when the employee knows it would directly and predictably affect the ability or willingness of the entity to make the payment.

5 C.F.R. § 2635.502 (Impartiality)

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with any organization for which the employee’s spouse is, to the employee’s knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.³¹ Therefore, (1) when an employee knows that a person with whom they have a covered relationship is or represents a party to a particular matter, and (2) when the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.³² When an employee’s spouse has or is seeking a contractual arrangement that will not result in the spouse holding one of the above-listed positions, an employee may determine that participating in a particular matter in which that entity is or represents a party would cause a reasonable person with knowledge of the relevant facts to question the employee’s impartiality in the matter. The employee should then use the process described in 5 C.F.R. § 2635.502 to determine whether or not to participate in the particular matter.

Intellectual Property

Employee’s Intellectual Property

18 U.S.C. § 208

An employee may have a financial interest arising from a patent, copyright, trademark, or similar intellectual property rights through the employee’s property interest in the intellectual property itself and through the employee’s right to royalties from the licensing or commercialization of the work. A financial interest in intellectual property may present conflict of interest concerns, particularly if the subject matter of the work product relates to the agency’s mission or the employee’s responsibilities. Accordingly, an employee may not participate personally and substantially in any particular matter that the employee knows would directly and predictably affect the value of, or income from, the employee’s intellectual property.

5 C.F.R. § 2635.502 (Impartiality)

Under 5 C.F.R. § 2635.502, an employee will have a “covered relationship” with an entity, such as a publisher, with which the employee has or seeks a business, contractual, or other financial relationship that involves other than a routine consumer transaction.³³ Therefore, until the covered relationship has terminated, (1) when an employee knows that the person with whom they have a covered relationship is or represents a party to a particular matter, and (2) when the employee determines that the circumstances would cause a reasonable person with knowledge of

³¹ *Id.* § 2635.502(b)(1)(iii).

³² *Id.* § 2635.502(a).

³³ *Id.* § 2635.502(b)(1)(i).

the relevant facts to question their impartiality in the matter, the employee should not participate in the matter without informing the agency designee and receiving authorization.³⁴

18 U.S.C. §§ 203 and 205 (Representation)

If an employee plans to prepare, file, and prosecute a patent application, the employee must be aware of the limitations on representations made on behalf of a university or other legal entity to the Government.³⁵ Under 18 U.S.C. § 205(a)(2), an employee generally may not represent a third party in a covered matter³⁶ before any agency or court if the United States is a party or has a direct and substantial interest in the covered matter.³⁷ This prohibition applies to both compensated and uncompensated activities. Another statute, 18 U.S.C. § 203, prohibits an employee from seeking, agreeing to receive, or receiving compensation for their own or for another's representational services made on behalf of a third party and rendered while that employee is a Federal employee, in a particular matter before the U.S. Government or any court if the United States is a party to or has a direct and substantial interest in a matter.³⁸

*5 C.F.R. § 2635.807 (Teaching, Speaking, and Writing) and
18 U.S.C. § 209 (Supplementation of Federal Salary)*

For an employee who anticipates writing in a personal capacity (*e.g.*, working on a second edition of a textbook), 5 C.F.R. § 2635.807 prohibits the receipt of compensation for outside writing if the writing relates to the employee's official duties.³⁹

For employees other than special Government employees, the receipt of compensation when the writing is undertaken as part of the employee's official duties is also prohibited by the supplementation of salary bar in 18 U.S.C. § 209. For additional assistance interpreting 18 U.S.C. § 209, see OGE DAEOgram DO-02-016 (2002).

For further guidance on book deals, see OGE DAEOgram DO-08-006 (2008) and OGE Legal Advisory LA-20-06 (2020).

³⁴ *Id.* § 2635.502(a). For example, when an employee has had a longstanding contractual arrangement with an entity and the covered relationship has terminated, an employee may nevertheless determine that participating in a particular matter in which that entity is or represents a party would cause a reasonable person with knowledge of the relevant facts to question the employee's impartiality in the matter. The employee should use the process described in 5 C.F.R. § 2635.502, to determine whether or not to participate in the particular matter.

³⁵ See OGE Inf. Adv. Op. 91 x 11 (1991); OGE Inf. Adv. Op. 01 x 1 (2001).

³⁶ Although the term "covered matter" is used in 18 U.S.C. § 205, OGE has understood it to be the same as the term "particular matter." See OGE DAEOgram DO-06-029 (2006).

³⁷ In addition, 18 U.S.C. § 205 typically bars an employee from prosecuting a claim or receiving payments in consideration of assistance in prosecuting a claim against the United States.

³⁸ See OGE Inf. Adv. Op. 99 x 25 (1999); OGE Inf. Adv. Op. 06 x 7, at 28 (2006).

³⁹ 5 C.F.R. § 2635.807(a).

Spouse's or Minor Child's Intellectual Property

18 U.S.C. § 208

Similar to the conflicts of interest analysis for the employee's own intellectual property, an employee may not participate personally and substantially in any particular matter that the employee knows would directly and predictably affect the value of or income from their spouse's or minor child's intellectual property.

5 C.F.R. § 2635.502 (Impartiality)

When an employee's spouse has or is seeking a contractual arrangement with another entity, such as a publisher, an employee may determine that participating in a particular matter in which that entity is or represents a party would cause a reasonable person with knowledge of the relevant facts to question the employee's impartiality in the matter.⁴⁰ The employee should use the process described in 5 C.F.R. § 2635.502, to determine whether or not to participate in the particular matter.⁴¹

TIAA

18 U.S.C. § 208

TIAA⁴² (Teachers Insurance and Annuity Association of America) is a non-profit entity that provides retirement plans and a variety of financial services. TIAA holdings may consist of annuities, various forms of insurance, cash accounts, and diversified mutual funds. The TIAA product should be analyzed using the guidance applicable to the particular type of asset held. For example, TIAA Traditional is a fixed annuity; therefore, TIAA Traditional should be analyzed in the same manner as any other fixed annuity.⁴³ However, the duties of most employees will not involve participation in particular matters that would have a direct and predictable effect on the employee's financial interests based on ownership of a TIAA product.

Exemptions: Many TIAA products acquired through an employee benefit plan will likely qualify for one of the employee benefit plan exemptions at 5 C.F.R. § 2640.201(c).

⁴⁰ See 5 C.F.R. § 2635.502(a)(2).

⁴¹ *Id.* Additionally, when an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interests of a member of the employee's household (*e.g.*, the employee's spouse), the employee should not participate in the matter without informing the agency designee and receiving authorization. However, when a spouse's financial interest would be affected, 18 U.S.C. § 208 would also apply.

⁴² This entity was previously known as TIAA-CREF (Teachers Insurance and Annuity Association of America – College Retirement Equities Fund) until it was renamed in 2016.

⁴³ Fixed annuities generally do not create the potential for a conflict of interest. See [Conflicts of Interest Considerations: Assets](#) for additional information on annuities.