



Post-Employment Restrictions

For Former **IRS** and
Office Of Chief Counsel
Employees

POST-EMPLOYMENT RESTRICTIONS FOR FORMER IRS AND OFFICE OF CHIEF COUNSEL EMPLOYEES

The post-employment restrictions are intended to prevent employees from switching sides or creating the appearance that they are doing so on matters in which they participated or that were under their official responsibility while with the government. These laws are needed to safeguard public confidence in the integrity of government by preventing actual and apparent conflicts of interest. Former employees should pay close attention to these requirements because they carry potential criminal sanctions. Following an overview of the rules, decision trees are provided to assist former employees in determining how the various post-employment rules apply to them. Decision Tree #1 provides a general overview of the various rules. Decision Tree #2 focuses on 18 U.S.C. § 207(a)(1), which applies to matters on which the former employee worked personally and substantially while with the government. Decision Tree #3 focuses on 18 U.S.C. § 207(a)(2), which applies to matters which were actually pending under the former employee's official responsibility during his last year of government service. In all cases, former employees are encouraged to contact General Legal Services at 202-927-0900 if they have any questions or concerns regarding how the post-employment rules apply to their particular circumstances.

The various post-employment authorities overlap with one another in a number of areas; where this occurs, the more restrictive rule should always be followed.

Post-Employment Restrictions Applicable To All Executive Branch Employees

A. Lifetime Representational Bar: Under 18 U.S.C. § 207(a)(1), a former employee is *permanently barred* from knowingly communicating with or appearing before the government on behalf of another *with the intent to influence* regarding any *particular matter* involving a specific party or parties in which the employee participated *personally and substantially* while with the government, and which involved a specific party or parties at the time of such participation.

Under this rule, for example, a revenue agent for a particular examination may accept employment with the taxpayer and represent it before the government on matters unrelated to the one in which he participated while with the government. However, the former revenue agent may not represent the taxpayer before the government regarding the years (and potentially future years as described below) under examination for which he served as a revenue agent.

It is important to remember that the prohibition runs to representational activities regarding particular matters, not issues. For example, an attorney advising a revenue agent on an examination may not represent the taxpayer before the Tax Court regarding the same return, even if the issues in litigation are completely unrelated to those on which the attorney previously provided advice. On the

other hand, the attorney could represent another taxpayer before the Tax Court in an unrelated case that involves the same legal issue upon which he provided guidance to the revenue agent. In addition, the restriction does not cover "behind the scenes" activities, only representation before the government. *But see* discussion below on Treasury Circular No. 230 and American Bar Association Model Rule of Professional Conduct 1.11.

The term "particular matter" includes such activities as examinations, investigations, collections, applications, procurements, contracts, and requests for rulings. The specific party requirement excludes rulemaking, legislation, the formulation of general policy standards, and similar activities. Thus, for example, a former IRS employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he had a role in establishing are involved in the proceeding. Informational, technical, scientific, and similar exchanges normally are not representational activities knowingly made with the intent to influence.

A particular matter may continue in another form or in part. As an example, consecutive returns of a taxpayer may be the same particular matter because they may share common facts, issues, and confidential information; the parties are the same; and little time has elapsed between them. This means that a revenue agent responsible for examining a given return probably may not represent the same taxpayer before the government with respect to the taxpayer's subsequent year return.

In order to be personal and substantial participation, the employee's involvement must be of significance to the matter. Thus, a one time approval of a decision to proceed with the matter is substantial participation, whereas purely administrative participation over an extended period of time probably is not.

B. Two-Year Representational Bar: Under 18 U.S.C. § 207(a)(2), an employee is *barred* for *two years* after he leaves the government from knowingly communicating with or appearing before the government on behalf of another *with the intent to influence* regarding any *particular matter* involving a specific party or parties that was *actually pending* under the employee's *official responsibility* at any time during the employee's final year with the government, and which involved a specific party or parties at the time it was so pending. The type of representational activities prohibited by this section are the same as in section 207(a)(1).

This two-year bar primarily covers supervisors, whether immediate or higher level, whose employees participated personally and substantially in a particular matter, but who did not themselves participate personally and substantially in the matter. See 18 U.S.C. § 202. The former employee need not have known at the time that the matter was under his official responsibility in order for the restriction to apply. An employee has a duty to inquire if he becomes aware of facts

indicating that the matter may have been under his official responsibility during his final year with the government. Such inquiries should be directed to the address listed on page 7.

Post-Employment Restrictions Applicable To Senior Officials

Pursuant to 18 U.S.C. § 207(c), sometimes referred to as the "no contact rule," any presidential appointee to a position for which the rate of pay is specified in the Executive Schedule, and any employee whose basic rate of pay is equal to or greater than 86.5% of the basic rate of pay for level II of the Executive Schedule (EL-2), is *prohibited* for *one year* after the termination of such employment from knowingly making, with the intent to influence, any communication to or appearance before *his former department or agency* on behalf of anyone else in connection with *any matter* on which that person seeks *official action* by the department or agency.

Section 207(c) varies in several significant respects from section 207(a). Section 207(c) is broader than section 207(a) in that it: (1) applies to "matters" rather than "particular matters;" and (2) *covers all matters whether or not the former employee participated personally and substantially in the matter while with the government or had official responsibility for the matter during his last year of government service*. It is narrower in some respects than section 207(a) because: (1) the restriction applies only to communications to or appearances before the Internal Revenue Service and Office of Chief Counsel (except for the Commissioner and the Chief Counsel for whom the restriction covers Treasury as a whole) rather than such activities before the government; and (2) the bar is effective only for one year.

Limitations on Fee Sharing

A former employee who leaves the government to become a partner in a law firm, accounting firm, or other entity is prohibited by 18 U.S.C. § 203 from sharing in any fees received by the firm in a matter covered by the statute (*i.e.*, matters in which the firm provided representational services before the government and in which the government had an interest), which were earned for services rendered by the firm *at any time during the former employee's government employment*. The matter need not have been before the former employee's department or agency, and the former employee need not have been aware of the matter while with the government. The new partner and his firm must make suitable arrangements to ensure that he does not share in any prohibited fees. An employee who leaves the government for a salaried position is not subject to section 203.

Post-Employment Restrictions Regarding Practice Before the Internal Revenue Service

Treasury Circular No. 230, 31 C.F.R. § 10.25, contains certain restrictions regarding the practice of former government employees before the Service. These restrictions apply only with regard to matters that are currently before the Service. This means, for example, that they are inapplicable to matters before the Tax Court or any other court. These limitations are as follows:

A. Section 10.25(b)(1) bars a former government employee from representing anyone else before the Service if that representation would violate 18 U.S.C. § 207 or any other law.

B. Section 10.25(b)(2) is substantially similar to the lifetime bar in 18 U.S.C. § 207(a)(1) for matters in which the former government employee participated personally and substantially, except that the prohibition goes to both representational *and assistance activities*. This means that an employee who is barred from representing a third party before the Service under 18 U.S.C. § 207(a)(1) and this section may not provide "behind the scenes" assistance in the matter while it is before the Service.

The following example illustrates the point. Employee A was the lead agent in the examination of Taxpayer X's 2008 return. Employee A leaves the government and sets up her own accounting practice. Employee A is permanently barred by 18 U.S.C. § 207(a)(1) and Treasury Circular No. 230 § 10.25(b)(2) from representing Taxpayer X regarding the 2008 return before the government. In addition, Employee A may not provide behind the scenes advice or assistance to anyone else regarding the matter while it is before the Service.

C. Section 10.25(b)(3) is substantially similar to the temporary two-year bar in 18 U.S.C. § 207(a)(2) for matters that were under the employee's official responsibility during his final year with the government. As in 18 U.S.C. § 207(a)(2), the prohibition goes to *representational, but not assistance activities*. This means that an employee may provide behind the scenes advice and assistance on a matter before the Service, but may not perform representational activities pursuant to 18 U.S.C. § 207(a)(2) during the two-year period following his government employment.

D. Section 10.25(b)(4) restricts a former government employee, for one year after he leaves the government, from *communicating with or appearing before* any Treasury employee in connection with the publication, withdrawal, amendment, modification, or interpretation of a rule in the development of which the employee participated, or for which the employee had official responsibility during his last year with the government (recall that rulemaking generally is not covered by 18 U.S.C. § 207(a)). *The restriction not only applies to physical appearances before a government employee but also covers written*

correspondence, telephone contacts, or electronic communications. It does not preclude a former employee from representing another before the Service in connection with a matter involving the *application* of the rule with respect to the matter provided that: (1) such representation is otherwise permissible under 18 U.S.C. § 207 and all other authorities; and (2) the employee does not use or disclose any confidential information that he acquired in the development of the rule. Example: Employee Z drafted a new tax regulation. Employee Z then leaves the government. The proposed regulation is published in the Federal Register with a request for comments. Employee Z may not submit written comments or speak at a hearing on the rule for one year after he leaves the government. Employee Z may however represent Taxpayer Q before the Service regarding her 2008 return even though the matter involves the application of the rule Employee Z drafted, provided that the conditions above are satisfied.

E. Section 10.25(c) provides that where a firm is representing or assisting another in a matter before the Service, and a partner, associate, or employee ("member") of the firm is a former government employee who is barred from representing or assisting in that matter under 18 U.S.C. § 207 or Treasury Circular No. 230 § 10.25(b)(2), the *employee must be isolated from the matter* in such a way that he does not participate in the matter. *If this does not occur, then the firm as a whole may not represent or provide assistance to another on that matter.* When isolation is required, the former employee and the firm should execute an isolation statement which must be retained by the firm and, upon request, be provided to the Director, Office of Professional Responsibility.

Post-Employment Restrictions Applicable To Employees Engaged In Procurement and Contract Administration Matters

Under the Procurement Integrity Act (41 U.S.C. § 423(d)) a former government employee may not accept compensation from a contractor for one year after the employee:

1. served at the time of source selection or contract award to that contractor, as procuring contracting officer, source selection authority, member of the source selection evaluation board, or chief of the technical or financial evaluation team in a procurement in which that contractor was awarded a contract for more than \$10 million;
2. served as the program manager, deputy program manager, or administrative contracting officer for a contract for more than \$10 million with that contractor;
3. personally made a decision to award a contract, subcontract, modification, task order, or delivery order for more than \$10 million to that contractor;

4. personally made a decision to establish overhead or other rates applicable to a contract for that contractor valued in excess of \$10 million;
5. personally made a decision to approve issuance of a contract payment or payments in excess of \$10 million to that contractor; or
6. personally made a decision to pay or settle a claim for more than \$10 million with that contractor.

These restrictions cover contracts that were competitively or non-competitively awarded.

While these provisions technically do not prohibit outright a former employee from working for a contractor, the one year compensation prohibition has such a practical effect. An employee who is covered by the above restrictions may still accept compensation from a division or affiliate of a contractor that does not produce the same or similar products or services as the contractor.

Post-Employment Restrictions Applicable to Attorneys

Attorneys who are members of bars or are practicing before courts (including the Tax Court) that have adopted the American Bar Association's Model Rules of Professional Conduct are covered by Model Rule 1.11(a). This rule states that a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a government employee. The term "represent" includes both appearances and behind the scenes advice. The lawyer's disqualification is imputed to his firm unless: (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is provided to the government. The ABA Model Code of Professional Responsibility, which is still in effect in some jurisdictions, contains a similar limitation on post-government employment activities. DR 9-101(B).

In addition, a lawyer who acquired information about a person as a government employee that he knows is confidential may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. The employee's firm may undertake such representation only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom. ABA Model Rule of Professional Conduct 1.11(b).

Obtaining Legal Assistance

The post-employment laws contain more detail than can be described in this document. Former employees may obtain oral or written advice on the post-employment laws from the Office of Associate Chief Counsel (General Legal

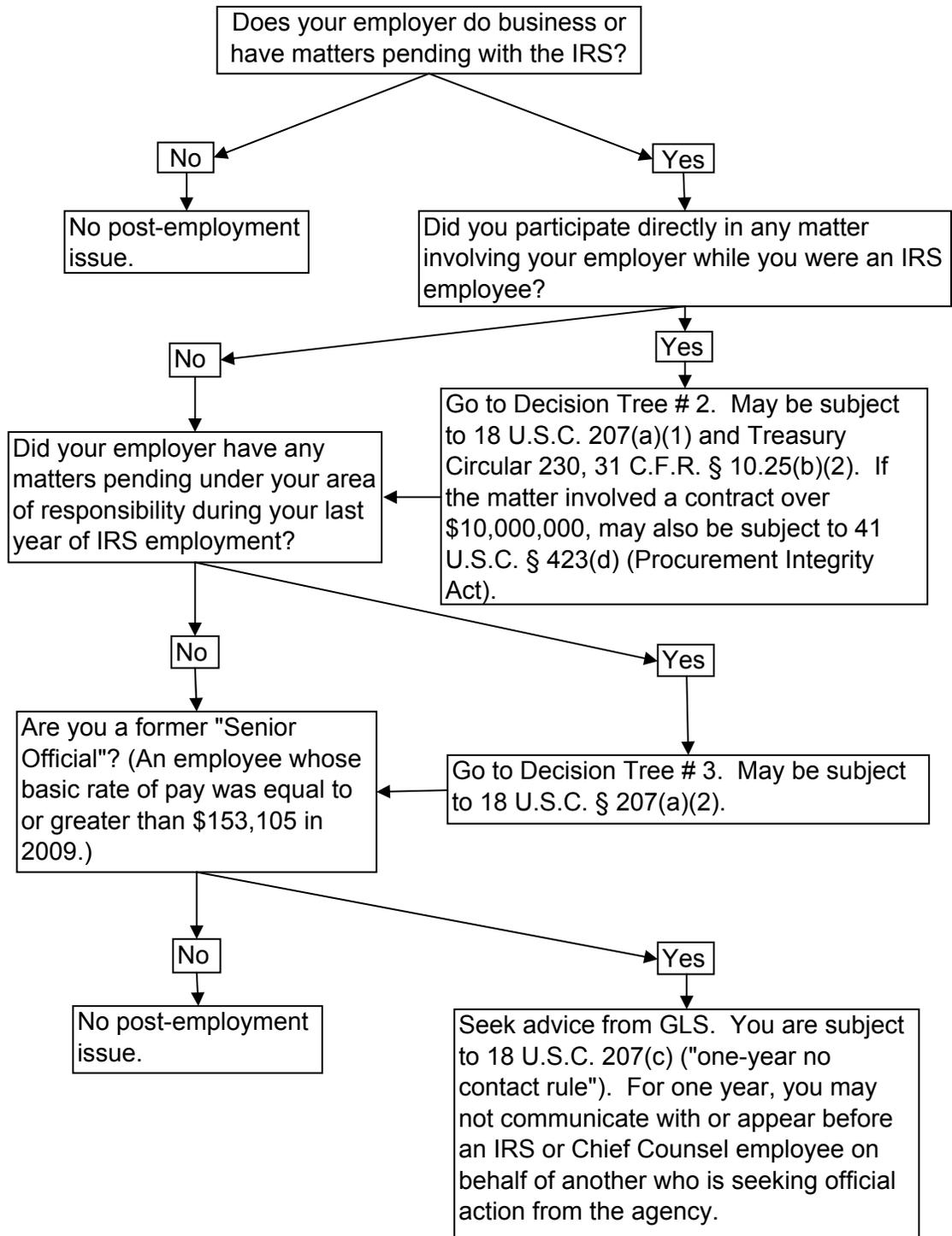
Services). GLS will provide oral advice on general questions in this area, and will answer specific questions in writing upon submission of a written request.

Questions should be directed to GLS at the following address:

Office of Associate Chief Counsel
General Legal Services
Ethics & General Government Law Branch
Room 6404
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

(202) 927-0900 (voice) (202) 622-0017 (fax)

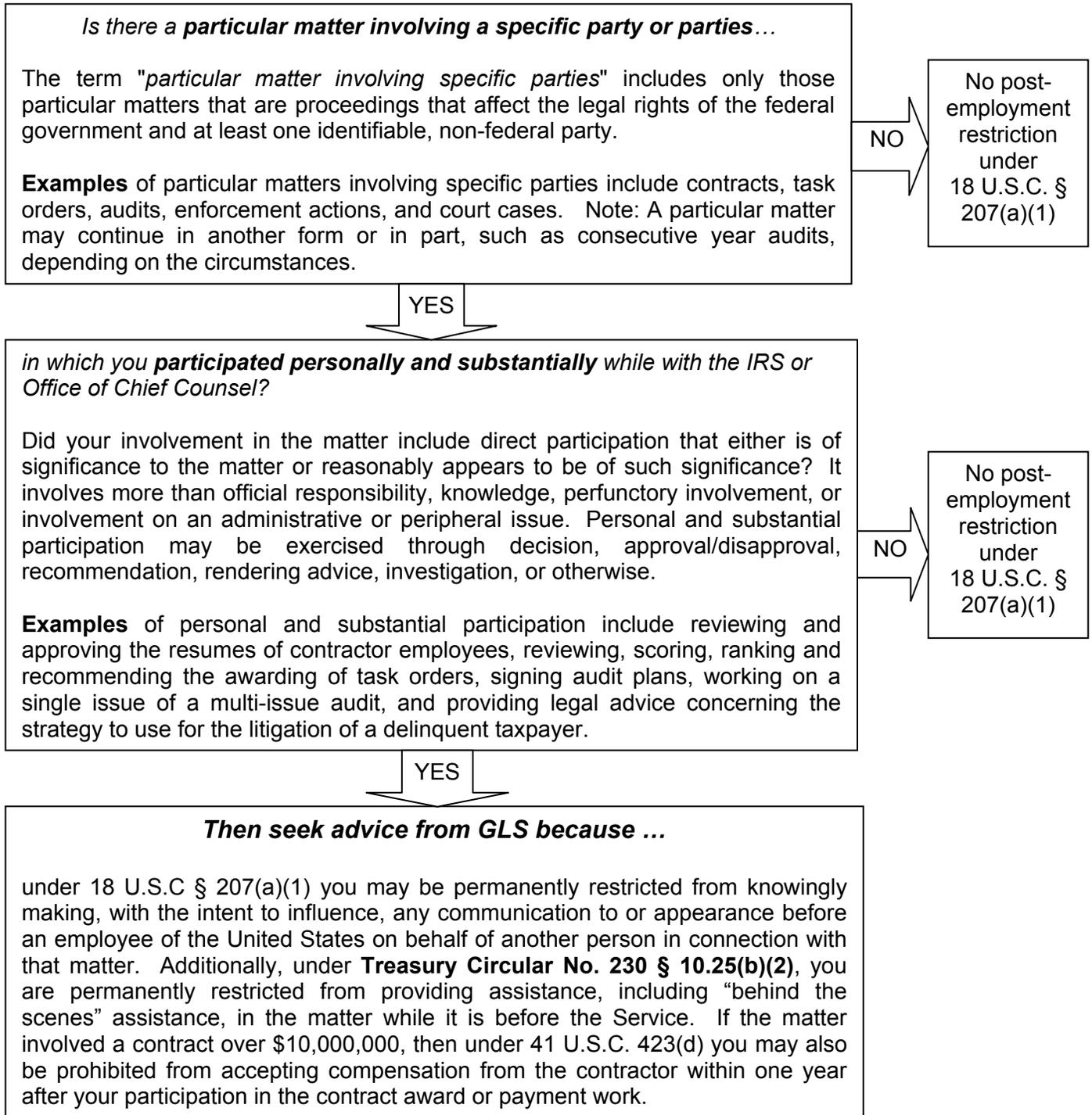
Post-employment Restrictions for Former IRS and Office of Chief Counsel Employees Decision Tree # 1



Post-employment Restrictions for Former IRS and Office of Chief Counsel Employees

Decision Tree # 2: 18 U.S.C. § 207(a)(1)

Under 18 U.S.C. § 207(a)(1), no former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of another person in connection with a **particular matter involving specific parties** in which he **participated personally and substantially**.



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Decision Tree # 3: 18 U.S.C. § 207(a)(2)

For two years after his government service terminates, no former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of another person in connection with a particular matter involving specific parties which was actually pending under the employee's official responsibility during his last year of government service. This two-year restriction commences upon an employee's termination from government service.

