OUTSIDE EMPLOYMENT GUIDANCE
for
DOL FEDERAL EMPLOYEES

The Department of Labor ethics office has received multiple inquiries regarding the types of outside employment federal employees may accept in the event of a government furlough or shutdown.

There are no special ethics rules that are triggered by these events. Rather, the existing rules and considerations for engaging in outside employment are applicable. These are set forth below.

Seeking Outside Employment

Q: May I seek outside employment while on furlough during a shutdown?

A: Yes, you can always seek outside employment.

Q: When may I start to look for an outside job?

A: Federal employees are permitted to seek outside jobs at any time (during a furlough, shutdown or otherwise). Once you have begun to seek outside employment, the ethics rules require you to disqualify yourself from official matters and assignments involving your prospective employer(s) and to continue to disqualify if hired. (5 CFR § 2635.604). In the event of a government shutdown, this disqualification requirement will be moot until official work resumes.

NOTE: Under the STOCK Act, members of the SES and noncareer employees (i.e., Public Financial Disclosure filers) would need to file a job negotiation notice within 3 days of initiation.

An outside entity becomes a "prospective employer" when:

- You express interest in working for them through in-person discussions or other correspondence, such as by submitting a resume or job application. Even informal conversations with representatives of outside entities will trigger the disqualification requirement once you discuss potential employment opportunities;

- Outside entities are no longer considered prospective employers once (1) you terminate employment discussions, (2) they terminate employment discussions, or (3) two months elapse with no response since submitting your resume or job application; or

- You are approached by an outside entity about a potential position and do not unconditionally terminate the discussion.

Accepting Outside Employment

Q: As a federal employee, what types of outside employment may I accept?

A: Federal employees are free to accept any outside employment, yet there are some ethics restrictions to keep in mind:

- An outside job must not conflict with your official position. A conflict will arise if the outside position relates so closely to your official position that it requires you to disqualify yourself routinely from official assignments to such a degree that it is detrimental to your hiring agency (5 CFR § 2635.802). For example, an OSHA inspector who provides private consulting services on workplace safety must ensure that he/she does not provide consulting services to those businesses that he would routinely inspect on behalf of OSHA. *While these considerations may not directly apply while on furlough or in the midst of a government shutdown, they will be applicable as soon as work resumes.*

- NOTE: Even if you only work temporarily, e.g., only during your furlough days, creating an employment relationship would require that you recuse from any official matter to which your temporary employer is a party or represents a party for one year following termination of that relationship. See 5 CFR § 2635.502.

- There are also criminal conflict of interest concerns that apply to all federal employees involved in outside work – both paid and unpaid. Under 18 USC § § 203 and 205, employees may not represent an outside person or business before a federal court or agency in a matter that (1) involves a federal party or (2) involves a matter of "substantial federal interest" (e.g., taxes, immigration, etc.). This means that you may not represent your outside employer before any federal entities through correspondence or in-person communications (for example, you should not sign correspondence that is directed to a federal agency on behalf of an outside employer).

- Another important consideration is misuse of your official position (see 5 CFR § 2635.702). Federal employees may not use their official position – such as their title or DOL affiliation – for their own private gain. When seeking outside employment while on furlough or during a government shutdown, be careful to avoid improperly using your official authority to obtain the position or to invoke it in performing duties for that position. Of course, you are permitted to include your federal experience in a resume or during a job interview.

- Employees may not use official time toward outside jobs. In the event of a shutdown or during a furlough, this will not be an issue. Please note that you similarly may not use your government computer or other resources in seeking or conducting activities related to an outside job at any time. See DLMS 9, Chapter 900.

Q. I am an attorney – are there additional restrictions that apply to me?

A. All attorneys in the Office of the Solicitor who wish to engage in outside legal work (both paid or unpaid) should review the SOL Pro Bono Policy (attached). If you have a legal degree, but do not work for SOL, the attached policy is informative in that it outlines the applicable ethics rules as well as attorney-specific considerations regarding outside legal work. Attorneys must also consider their respective state Bar professional responsibility rules and should consult their Bar counsel where appropriate.

Continuing Outside Employment

Q. I would like to maintain my outside job part-time even after government work resumes. Is this permissible?

A. Yes. Federal employees may maintain outside jobs even under normal operating conditions.

Once federal operations resume, you are immediately required to disqualify yourself from any official assignments involving your outside employer for the duration of the outside position (18 USC § 208). For example, if you have an outside job with ABC Contracting, you may not attend agency meetings with ABC Contracting as part of your official duties.

Some Final Considerations

- **Prior approval by the employee's agency is not required, unless you work for the Office of the Inspector General.** Employees are urged to seek ethics guidance to ensure they are in compliance with the rules explained in this guidance.

- Employees subject to the financial disclosure requirement would need to report any outside position and earned income on their next report.

- Noncareer senior officials (those occupying positions classified above GS-15 of the General Schedule) are subject to an earned income cap and should consult with our office before accepting outside employment.

CONTACT INFORMATION for DOL FEDERAL EMPLOYEES

If you have additional questions about outside employment, please contact:

Robert M. Sadler at (202) 693-5528 or at sadler.robert2@dol.gov
Kathy Easmunt at (202) 693-5519 or at easmunt.katherine@dol.gov
Rachel Rikleen at (202) 693-5702 or at rikleen.rachel.s@dol.gov

If you are employed in a DOL Regional Office, you may also contact your respective Regional Solicitor.

DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
PRO BONO LEGAL SERVICES POLICY STATEMENT[1]

The Policy

This policy revokes and supersedes the December 9, 1994 Memorandum from then-Solicitor Thomas S. Williamson, Jr. to all attorneys concerning "Pro Bono Activity and Outside Practice of Law."

The Office of the Solicitor strongly supports volunteer efforts, and we encourage all SOL attorneys and legal support staff to actively seek out opportunities to participate in pro bono legal services and other volunteer activities that are consistent with applicable Federal statutes and regulations governing outside activities.

The Office of the Solicitor's Pro Bono Policy reflects the strong commitment of this Agency to encourage employees to step forward to assist the community and young people, and, in particular, it responds to Executive Order 12988 ("Civil Justice Reform"), which calls on Federal agencies to develop appropriate programs to encourage pro bono legal and other volunteer services by government attorneys and legal support staff. Service in the Department of Labor is itself one of the highest forms of public service, but it is also a privilege. As Federal employees and as Americans, we enjoy benefits, security, and a standard of living that is unknown to most of the world. These privileges uniquely position us to strengthen our communities and to foster and promote the causes of ordered liberty and justice by applying our talents and devoting a portion of our time to pro bono and other volunteer activities. Many Federal employees are willing and eager to engage in such activities, but are intimidated by the lack of clear guidance on how to do so, and a lack of understanding of the limited restrictions that apply to participation in pro bono legal services by Federal employees. To this end, the Solicitor of Labor has issued this policy to address various aspects of volunteer and pro bono legal services.

I. What are Pro Bono Legal Services?

The American Bar Association's Model Rules of Professional Conduct state that pro bono legal services are those legal services performed without compensation and include, but are not limited to, the provision of legal services to: persons of limited means; charitable, religious, civic, community, governmental, and educational organizations in matters which are designed primarily to address the needs of persons of limited means, or to further their organizational purpose; individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; or activities for improving the law, the legal system, or the legal profession.

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[1] Approved and effective November 4, 2008.

NOTE: The Solicitor's Office does not impose any restriction, or require prior approval for volunteer or charitable activities in which employees wish to engage in their free time, provided that the activities do not violate any statutory or regulatory restrictions mentioned in section III.

II. Prior Consultation Process

An attorney seeking to engage in representational pro bono legal work or any other compensated or uncompensated outside practice of law must consult with the Ethics Office prior to engaging in such legal work and provide notice to their Associate or Regional Solicitor that they have done so. The purpose of this is to ensure that the services contemplated comply with conflict of interest statutes or ethics regulations (described in more detail below), including restrictions on representing clients before a Federal agency or court, or engaging in activities that interfere with the proper and effective performance of official duties.

III. Ethics Considerations

While not in any way intended to discourage volunteerism, there are several legal constraints that may apply to outside activities of Federal employees, including pro bono activities. Before undertaking a pro bono representation, the Agency Ethics Official should be contacted for advice on these restrictions, which include:

- 18 U.S.C. § 205 (This criminal statute prohibits Federal employees from representing third parties before the Government or acting as an agent or attorney in matters in which the United States is a party or has a direct or substantial interest. Attorneys should be particularly mindful of this rule when considering pro bono representation of a client in federal court or representation of petitioners in federal administrative proceedings or applications.)

U.S. Office of Government Ethics' Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR Part 2635), including:

- Section 2635.502 (restricts Federal employee participation in outside activities, such as pro bono work, that – when viewed by the public – would create an appearance that the employee's official duties with the Department are being performed in a biased or less than impartial manner);
- Section 2635.702 (prohibiting use of Government title or position in any way that suggests that the Government is sanctioning personal activities. Employees may not use office letterhead or fax cover pages, agency or office business cards, or otherwise identify himself or herself as a Federal employee in any communication, correspondence, or pleading

connected with pro bono legal activities or other volunteer services, except under certain limited circumstances – see Section IV below.);

- Section 2635.704 (prohibiting the use of real or personal Government property for other than authorized purposes);
- Section 2635.801 *et seq.* (regarding outside activities by Federal employees, including prohibitions on outside activities that would conflict with the employee's official duties).

IV. Use of Agency Resources

As stated above, employees may not use Government property for other than official purposes. However, pursuant to DLMS 9 Chapter 900, employees are allowed *de minimis* use of office equipment (including use of fax machines and telephones within the local area codes) in connection with pro bono activities. In conjunction with Section III, employees should not use official cover letters for volunteer or pro bono legal services related faxes. Further, government addresses and e-mail accounts may be used for volunteer and pro bono legal services related correspondence, but employees should remove their official titles and/or signature lines before doing so.

Given the unique importance and value of pro bono work to the Solicitor's Office, on-line legal research services may be used in moderation not to exceed 10 hours per month. If an employee's monthly use of on-line research services will exceed 10 hours, he or she should seek supervisory approval beforehand. These restrictions are intended to ensure compliance with the legal requirement that Government resources (including library facilities and equipment) can be used only if that use involves negligible additional expense to the Government.

V. Administrative Leave

When practicable, pro bono activities should be done on an employee's own time outside his or her scheduled working hours. However, recognizing that some of an employee's pro bono activities may require workday courtroom appearances, Solicitor Gregory F. Jacob's January 24, 2008 Memorandum regarding "Official Leave Time for Certain Professional Activities" allows for the use of approved administrative leave in connection with courtroom appearances (see attached). Under this policy, administrative leave may also be granted for paralegal and legal support staff pro bono activity to the extent it necessitates their presence in court.

Additionally, pro bono activities that fall outside the scope of the SOL administrative leave policy may also occur during regular work hours. Employees who foresee time consuming workday pro bono activities (e.g., conference calls, client meetings, depositions, a filing, etc.) must seek supervisory approval prior to taking administrative leave, and supervisors are encouraged to be flexible in considering such requests. Employees should attempt to give supervisors as much notice as possible.

Employees may also use other forms of leave such as annual leave and compensatory time off – once requested and approved in accordance with standard leave procedures – to engage in pro bono legal services.

VI. Additional Considerations

- **Retainer Agreements.** It is strongly recommended that an SOL attorney and his or her client in a pro bono case both sign a retainer letter that, among other things, makes it explicit that the SOL attorney is acting in his or her own individual capacity and not on behalf of the Federal government.

  NOTE: Attorneys should look primarily to the legal service providers they serve, and not SOL, for templates and information regarding retainer agreements. Attached is a U.S. Department of Justice approved retainer agreement template that may be used in the absence of such resources.

- **Malpractice Coverage.** Before agreeing to meet with or accept a pro bono legal client, an attorney who works at the Department should determine whether the referring pro bono program or organization has a malpractice insurance policy that covers volunteer attorneys. The Department of Labor does not provide malpractice coverage for pro bono work.

  NOTE: Generally, volunteer programs organized by the local bar or the more established referral programs do provide malpractice coverage, and all DOJ-referred pro bono projects are with organizations that provide malpractice insurance.

- **Local Bar and Licensing Rules.** Department employees should be aware that local bar and professional licensing rules, including those regarding the unauthorized practice of law, apply to pro bono legal services. Employees are personally responsible for ensuring compliance with these rules.

  NOTE: Agency Ethics Officials are not responsible for researching or providing advice regarding local bar rules.

- **Restrictions on the Unauthorized Practice of Law.** Attorneys not licensed in the District of Columbia may practice subject to the constraints of the District of Columbia's local rule regarding the unauthorized practice of law. D.C. Court of Appeals Rule 49.

  NOTE: On July 29, 1996, the District of Columbia Court of Appeals approved a change to Rule 49, which concerns the unauthorized practice

of law in the District of Columbia, that permits U.S. Government attorneys who are not members of the D.C. Bar to handle pro bono cases in the District of Columbia, if several requirements are met. The requirements in D.C. App. Rule 49(c) state that an attorney must: 1) be an officer or employee of the United States; 2) be a member in good standing of the highest court of a state or territory; 3) provide legal counsel without a fee in any matter that is handled; 4) be assigned or referred to the matter by an organization that provides legal services to the public without fee; 5) be supervised by an enrolled, active member of the D.C. Bar; *and* 6) if the matter requires a court appearance, file with the court having jurisdiction over the matter, and with the D.C. Court of Appeals' Committee on Unauthorized Practice, a certificate that the attorney is providing representation in that particular case without compensation.

VII. Employee Recognition

Given the amount of time and effort employees contribute to effectively participate in pro bono activities, each Division is encouraged to develop ideas for recognizing and thanking employees who perform pro bono or volunteer services. As an example, an office may wish to recognize employee efforts during National Volunteer Week, usually the last week in April, in some appropriate form. Further, the Solicitor will find appropriate opportunities to acknowledge those employees who have made significant contributions in the area of pro bono legal services.

VIII. Administration of Pro Bono Services Program

- **Pro Bono Legal Services Committee.** A Pro Bono Legal Services Committee should be established to oversee the implementation of the SOL Pro Bono Policy. The Committee should be chaired by the Pro Bono Program Manager(s) (see below) and include one representative from each Division within the Solicitor's Office. It is anticipated that an attorney from each Division will serve on the Pro Bono Legal Services Committee to publicize and coordinate pro bono activities within his or her Division and to refer persons to the Agency Ethics Official for conflicts advice when appropriate. The duties of Pro Bono Committee Representatives will include attendance at Committee meetings (where practicable) and distribution to Division employees of materials that are obtained at meetings. He or she may leave the Committee at will. The Committee will meet on a regular but infrequent basis, facilitate the distribution of information on pro bono and volunteer opportunities within the Divisions, answer questions regarding pro bono and volunteer participation, and support the Department of Labor's participation in pro bono activities.

- **Regional Pro Bono Representatives.** It is anticipated that an attorney representative from each Regional Office will volunteer to serve as a

liaison for regional pro bono legal services projects. Regional Pro Bono Representatives will coordinate with the National Office Pro Bono Program Manager(s) as necessary regarding pro bono legal services issues of a more wide-ranging scope.

- **Pro Bono Program Manager.** The Pro Bono Program Manager(s) develops and publicizes pro bono legal services opportunities to facilitate participation in such activities throughout the Solicitor's Office. One or two attorneys from the Office of the Solicitor will voluntarily serve in this role as part of their official duties. The Program Manager works with the U.S. Department of Justice and the Interagency Pro Bono Working Group in the development of pro bono programs and events. The Pro Bono Manager chairs the Committee, and provides committee members with promotional materials for upcoming pro bono opportunities and events. The Program Manager will maintain regular contact with the Regional Pro Bono Representatives to encourage the development and progress of Regional pro bono legal services programs.

IX. Disclaimer

The SOL Pro Bono Policy is intended only to encourage pro bono activities by SOL attorneys and legal support staff, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its offices, or any person. Neither the United States nor the Department of Labor will be responsible in any manner or to any extent for any negligence or otherwise tortious acts or omissions on the part of any employee while engaged in any pro bono activity. While the Office of the Solicitor encourages pro bono activities by its employees, it exercises no control over the services and activities of employees engaged in pro bono activities nor does it control the time or location of any pro bono activity. Each employee is acting outside the scope of his or her Federal employment whenever the employee participates, supports or joins any pro bono activity.