



**SEEKING
EMPLOYMENT**

GOE JOB AID

A TOOL FOR ETHICS OFFICIALS

This job aid is designed to assist you in determining whether an employee has a job search conflict and what remedies might resolve the situation.

SEPTEMBER 2009



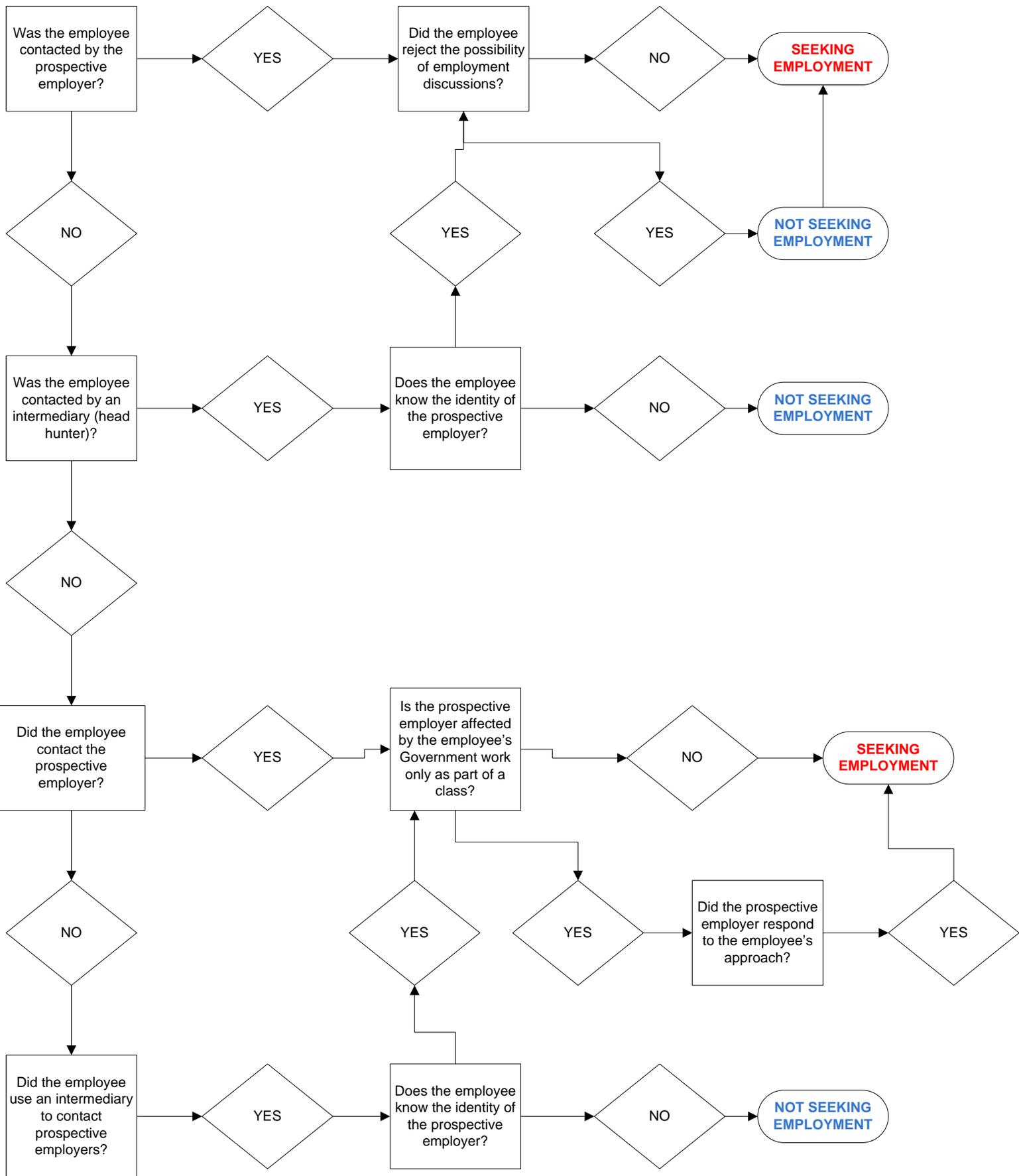
Analyzing Seeking Employment Situations: A Worksheet

5 CFR Part 2635 Subpart F

This job aid prepares you to advise an employee on whether a job search requires the employee to disqualify himself from certain Government matters while seeking employment. Use this worksheet to determine if a job search conflict exists and what remedies might resolve the situation. When giving advice, always consult the complete set of laws, rules, and opinions that apply to the particular situation. Citations that appear on the worksheet are found on pages 7 through 10.

Step 1: Decide if the employee is seeking employment. Use the “Is an Employee Seeking Employment” flowchart on the next page.

Is an employee seeking employment?



Step 2: Determine whether the employee is or would be **participating personally and substantially** in a **particular matter** that would have a **direct and predictable effect** on the **financial interests** of a prospective employer.

2.1 Is the employee participating in a particular matter ?		
a. Does the matter involve deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons? If so, it is a particular matter. (See 5 CFR § 2640.103(a)(1) on page 6.)	<input type="checkbox"/> Yes Go to 2.2	<input type="checkbox"/> No  Subpart F does not apply

2.2 Is the employee's participation in the particular matter " personal and substantial "?		
a. Is the employee participating directly? OR, does the employee have direct and active supervision of a subordinate's participation in the particular matter? (See 5 CFR § 2640.103(a)(2) on page 6.)	<input type="checkbox"/> Yes Go to 2.2b	<input type="checkbox"/> No  Subpart F does not apply
b. Is the employee's involvement of significance to the particular matter? (Involvement may be substantial even if it does not determine the final outcome of the matter. The single act of approving or participating in a critical step may be substantial.) (See 5 CFR § 2640.103(a)(2) on page 6.)	<input type="checkbox"/> Yes Go to 2.3	<input type="checkbox"/> No  Subpart F does not apply

2.3 Would the particular matter have a direct and predictable effect on the prospective employer's financial interests ?		
a. Is there a financial interest? A person (including a prospective employer) has a financial interest if there is the potential for gain or loss to the prospective employer. (See 5 CFR § 2640.103(b) on page 7.)	<input type="checkbox"/> Yes Go to 2.3b	<input type="checkbox"/> No  Subpart F does not apply
b. Is there a "direct" effect? Is there a real possibility of gain or loss to the prospective employer's financial interest? Is there a close, causal link between any decision or action to be taken in the matter and any expected effect of that matter on the prospective employer's financial interest? (See 5 CFR § 2640.103(a)(3)(i) on page 7.)	<input type="checkbox"/> Yes Go to 2.3c	<input type="checkbox"/> No  Subpart F does not apply
c. Is there a "predictable effect"? Is there a real, as opposed to a speculative, possibility that the matter will affect the financial interest? It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial. (See 5 CFR § 2640.103(a)(3)(ii) on page 7.)	<input type="checkbox"/> Yes Go to Step 3	<input type="checkbox"/> No  Subpart F does not apply

Step 3: Recommend an appropriate remedy if a job search conflict exists.

3.1 Employee options		
a. Recusal	<input type="checkbox"/> Yes	<input type="checkbox"/> No. Go to 3.1b
b. Administrative action. If the employee's job-hunting activities conflict with his job duties such that he would have to recuse himself from his entire job, his agency may allow him to be reassigned, take annual leave, leave without pay, etc..." (See 5 CFR § 2635.604(d) on page 8.)	<input type="checkbox"/> Yes	<input type="checkbox"/> No. Go to 3.1c
c. Defer the job search	<input type="checkbox"/> Yes	<input type="checkbox"/> No. Go to 3.2

3.2 Agency options		
a. Impartiality authorization. (Generally not a good option except in limited situations; not an option when employee is negotiating) (<i>See</i> 5 CFR § 2635.605(b) on page 8.)	<input type="checkbox"/> Yes	<input type="checkbox"/> No Go to 3.2b
b. § 208 waiver (rare). Must be issued before employee participates in a particular matter covered by the waiver. If employee is in negotiations and participating in a particular matter affecting the financial interests of a prospective employer, you need to refer the case to the Inspector General.	<input type="checkbox"/> Yes	<input type="checkbox"/> No Go to 3.2c Go to 3.2d if the 2 nd sentence in b applies.
c. Recusal when an offer was rejected or not made after negotiations. (<i>See</i> 5 CFR § 2635.606(b) on page 8.)	<input type="checkbox"/> Yes	<input type="checkbox"/> N/A
d. Referral to the Department of Justice (DOJ) for prosecution (usually the Inspector General or other investigative arm of your agency makes the referral. Only DOJ may decide to pursue criminal charges). (<i>See</i> 28 U.S.C. § 535 on page 9.) Concurrently notify OGE of the referral and later the disposition. (<i>See</i> 5 CFR § 2638.603(b) and 5 CFR § 2638.603(c)(1)-(3) on page 9. <i>See</i> also New Reporting Method for OGE Form 202 on page 10.)	<input type="checkbox"/> Yes	<input type="checkbox"/> N/A

Selected Excerpts from 5 CFR Part 2640

5 CFR § 2640.103(a) Prohibition

Statutory prohibition. Unless permitted by 18 U.S.C. 208(b), an employee is prohibited by 18 U.S.C. 208(a) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest. The restrictions of 18 U.S.C. § 208 are described more fully in 5 CFR §§ 2635.401 and 2635.402.

5 CFR § 2640.103(a)(1) Particular Matter Defined

Particular matter. The term “particular matter” includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons. The particular matters covered by this part include a judicial or other proceeding, application or request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

Note: Refer to the regulation for eight examples of when a matter is or is not a particular matter. The examples are found after § 2640.103(a)(1).

5 CFR § 2640.103(a)(2) Personal and Substantial Participation Defined

Personal and substantial participation. To participate “personally” means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate “substantially” means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval,

disapproval, recommendation, investigation or the rendering of advice in a particular matter.

Note: Refer to the regulation for an example of when an employee's participation is not personal and substantial. The examples are found after § 2640.103(a)(2).

5 CFR § 2640.103(a)(3) Direct and Predictable Effect Defined

Direct and predictable effect. (i) A particular matter will have a “direct” effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this part.

(ii) A particular matter will have a “predictable” effect if there is a real, as opposed to a speculative, possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

Note: Refer to the regulation for four examples of when a particular matter will or will not have a direct and predictable effect. The examples are found after § 2640.103(a)(3)(ii).

5 CFR § 2640.103(b) Financial Interest Defined

Disqualifying financial interests. For purposes of 18 U.S.C. § 208(a) and this part [2640], the term *financial interest* means the potential for gain or loss to the employee, or other person specified in section 208, as a result of governmental action on the particular matter. The disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate. Additionally, a disqualifying financial interest might derive from a salary, indebtedness, job offer, or any similar interest that may be affected by the matter.

Note: Refer to the regulation for three examples of when a financial interest is or is not present. The examples are found after § 2640.103(b).

Selected Excerpts from 5 CFR Part 2635

5 CFR § 2635.604(d) Agency Determination of Substantial Conflict

Agency determination of substantial conflict. Where the agency determines that the employee's action in seeking employment with a particular person will require his disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired, the agency may allow the employee to take annual leave or leave without pay while seeking employment, or may take other appropriate administrative action.

5 CFR § 2635.605(b) Authorization by Agency Designee

Authorization by agency designee. Where an employee is seeking employment within the meaning of §2635.603(b)(1) (ii) or (iii), a reasonable person would be likely to question his impartiality if he were to participate personally and substantially in a particular matter that has a direct and predictable effect on the financial interests of any such prospective employer. The employee may participate in such matters only where the agency designee has authorized his participation in accordance with the standards set forth in § 2635.502(d).

Note: Refer to the regulation for an example of when an employee may not participate in an assignment in the absence of specific authorization by the agency designee. The example is found after § 2635.605(b).

5 CFR § 2635.606(b) Offer Rejected or Not Made

Offer rejected or not made. The agency designee for the purpose of § 2635.502(c) may, in an appropriate case, determine that an employee not covered by the preceding paragraph who has sought but is no longer seeking employment nevertheless shall be subject to a period of disqualification upon the conclusion of employment negotiations. Any such determination shall be based on a consideration of all the relevant factors, including those listed in § 2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency's decision-making process outweighs the Government's interest in the employee's participation in the particular matter.

Note: Refer to the regulation for an example of when an extended recusal is appropriate. The example is found after § 2635.606(b).

Selected Excerpts from Other Sources

28 U.S.C. § 535 Conflict of Interest Referrals to the Department of Justice

28 U.S.C. § 535 requires every department or agency to report to the Attorney General any information, allegations, or complaints relating to violations of title 18 of the United States Code involving Government employees, including possible violations of 18 U.S.C. § 207 by former Government employees.

Guidelines issued by the Attorney General require reporting of such allegations or complaints to the local office of the appropriate investigative agency, the United States Attorney for the district in which the violation occurred or is occurring and the appropriate division of the Department of Justice. *See* 5 CFR § 2638.603(a).

5 CFR § 2638.603(b) Report of Referral

(b) Report of referral. When any matter involving an alleged violation of Federal conflict of interest law is referred pursuant to 28 U.S.C. 535, the agency shall concurrently notify the Director of the Office of Government Ethics of the referral and provide a copy of the referral document, unless such notification or disclosure would otherwise be prohibited by law.

5 CFR § 2638.603(c)(1)-(3) Disposition Reports

(1) Where there has been notice that the matter reported under paragraph (b) of this section will not be prosecuted, the agency shall promptly notify the Director of that fact, the date of the decision and any disciplinary or corrective action initiated, taken or to be taken by the agency.

(2) When the agency is notified or learns from the Department of Justice that an indictment has been handed up and signed or an [sic] information has been filed, the agency shall promptly report that fact to the Director. Thereafter, the agency shall promptly notify the Director of the final disposition of the prosecution and of any disciplinary or corrective action initiated, taken or to be taken by the agency.

(3) When disciplinary or corrective action is initiated or is to be taken, the agency will notify the Director of the final disposition of the matter.

New Reporting Method for OGE Form 202

Agencies are now invited to provide submissions of OGE Form 202 via email to: referrals@oge.gov. In cases where email submission is not possible, please mail or fax completed forms to:

U.S. Office of Government Ethics
Attn: Associate Director, Program Review Division
1201 New York Avenue, N.W., Suite 500
Washington, DC 20005-3917

Fax # 202-482-9238

Source: OGE website at http://www.usoge.gov/forms/form_202.aspx