

Office of Government Ethics
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Letter to a Designated Agency Ethics Official
dated October 3, 1994

As you know, we asked the Office of Legal Counsel (OLC) for its views on the issues you raised in your letter of February 24, 1994, concerning the meaning of the terms "employee" and "employment" as used in 18 U.S.C. § 208. OLC has declined to issue an opinion on the matter under present circumstances.

The decision not to issue an opinion appears to be based mainly on the fact that the Standards of Ethical Conduct for Employees of the Executive Branch specifically require an employee to disqualify himself from matters affecting the financial interests of an entity with whom he is negotiating for an independent contractor or consultant relationship. See 5 C.F.R. §§ 2635.602 and 2635.603(a). Thus, in OLC's view, the only practical effect of determining whether the term "employment" encompasses the independent contractor or consultant relationship is that the decision would dictate what form of waiver an employee would seek if he did not wish to be disqualified, i.e. either a waiver issued pursuant to 18 U.S.C. § 208(b)(1) or (b)(3), or an authorization granted in accordance with 5 C.F.R. § 2635.605(b). Furthermore, OLC noted that the Department of Justice has prosecuted cases under the theory that section 208 applies to negotiations for an independent contractor relationship. On the other hand, OLC did not discuss whether the term "employee" as used in section 208 might encompass an independent contractor or consultant relationship.

Given OLC's position, we believe it would be expedient, in matters where the applicability of section 208 is an issue, to advise employees that the Department of Justice has not issued a definitive ruling on whether the terms "employee" and "employment" include an independent contractor or consulting situation. Moreover, under the circumstances, we think it would be prudent to counsel employees to seek a waiver under section 208(b)(1) at least in cases where their official duties would affect the financial interests of someone with whom they are negotiating an independent contractor or consultant relationship, or have an arrangement for such a relationship in the future.

Please do not hesitate to contact my Office if you need further assistance in this matter.

Sincerely,

Stephen D. Potts
Director