



June 21, 2023
LA-23-07

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Acceptance of Pro Bono Legal Services under the Legal Expense Fund regulation, 5 C.F.R. part 2635, subpart J

This Legal Advisory provides guidance to ethics officials on what circumstances would permit employees to accept *pro bono* legal services under the newly published Legal Expense Fund (LEF) regulation,¹ which standardizes the process for acceptance of *pro bono* legal services for legal matters arising because of federal employment.² Previously, employees seeking to accept *pro bono* services could do so only within the confines of the gift rule, generally by determining that the legal services entity was not a prohibited source.³ Given the breadth of practice of many major law firms, this approach significantly limited access to legal services for employees.

This Advisory addresses anticipated questions on *pro bono* services for employees; however, OGE recommends that any employee considering accepting *pro bono* legal services under subpart J consult with their agency ethics official.

1. May employees use subpart J to accept *pro bono* legal services for any kind of legal matter?

No. Subpart J only permits employees to accept *pro bono* legal services for legal matters arising in connection with their past or current official position, their prior position on a

¹ 5 C.F.R. part 2635, subpart J.

² Employees do not need to create an LEF trust solely for *pro bono* services solicited or accepted in accordance with 5 C.F.R. § 2635.1009.

³ See 5 C.F.R. § 2635.203(d) (defining a “prohibited source” as “any person who (1) is seeking official action by the employee’s agency; (2) does business or seeks to do business with the employee’s agency; (3) conducts activities regulated by the agency; (4) has interests that may be substantially affect by the performance or nonperformance of the employee’s official duties; or (5) is an organization a majority of whose members are described in paragraphs (d)(1) through (4) or this section”).



campaign of a candidate for President or Vice President, or their prior position on a Presidential Transition Team.⁴ Matters that are primarily personal in nature are not covered by subpart J. Personal matters include, but are not limited to, tax planning, personal injury litigation, protection of property rights, and family law matters.⁵

2. What type of *pro bono* legal services may employees accept?

Pro bono legal services are defined as legal services provided without charge, or for less than market value.⁶ Legal services include work performed by attorneys or under the supervision of attorneys for a client (*e.g.*, attorney services, court filing fees, and expert witness costs).⁷

Employees may accept either *in kind* legal services, donated directly from a legal service provider (*e.g.*, a law firm or nonprofit organization),⁸ or payments from a 501(c)(3) organization to an outside attorney or law firm for their legal services representing the employee.⁹ Such arrangements are considered to be gifts from the 501(c)(3) organization, as the legal services entity and attorneys providing the services are compensated for their work.

3. From whom may an employee accept *pro bono* legal services?

An employee may only accept *pro bono* legal services from an individual attorney who is not an agent of a foreign government or a lobbyist, and who does not have interests that may be substantially affected by the performance or non-performance of the employee's official duties.¹⁰ In addition, the offering attorney's employer must not have interests that may be substantially affected by the performance or nonperformance of an employee's official duties.¹¹

In practice, these requirements mean that an agency ethics official must perform a two-tiered evaluation if a law firm or a non-profit organization that provides legal services offers to provide *pro bono* legal services to an employee. First, the agency ethics official will need to determine if the legal services entity has interests that may be substantially affected by the performance or nonperformance of the employee's official duties.¹² If the entity providing legal services has such interests, then the employee may not receive *pro bono* legal services from that entity.

⁴ 5 C.F.R. § 2635.1002(a).

⁵ *Id.* § 2635.1002(b)(1).

⁶ *Id.* § 2635.1003. "Market value" is defined in the rules governing gifts from outside sources at 5 C.F.R. § 2635.203(c).

⁷ See *Legal Services*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/legal-services> (last visited Jan. 24, 2023) (defining "legal services" as work done by a lawyer for a client).

⁸ See 5 C.F.R. § 2635.1009(a).

⁹ *Id.* § 2635.1009(b).

¹⁰ *Id.* § 2635.1009(a)(1).

¹¹ *Id.*

¹² *Id.* § 2635.1009(a)(2).

Second, if the agency ethics official determines that the legal services entity does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties, then the ethics official will need to confirm that each attorney performing the legal work meets certain qualifications. To provide *pro bono* legal services, the attorney providing those services may not be:

- A foreign agent;¹³
- A lobbyist;¹⁴ or
- A person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

Notably, if the entity offering legal services does not have interests affected by the performance of the employee's official duties, in most cases the individual attorney will not either.¹⁵ However, the ethics official should nevertheless confirm that the attorney has no interests before the agency that would be affected by performance of the employee's official duties. The employee may only accept the legal services once each of these determinations is made.

Example 1: An attorney at a large law firm offers to represent an employee at the Social Security Administration (SSA) in proceedings relating to workplace discrimination. The ethics official must first determine if the firm has interests (such as pending SSA litigation) that would be affected by the performance of the employee's official duties.¹⁶ The fact that the firm has litigation before SSA would not necessarily disqualify the firm from providing *pro bono* services to the employee. Rather, the firm would be disqualified only if the specific SSA employee worked on that litigation or performed other duties that affected the firm's interests. Separately, although the individual attorney will generally not have interests affected by the performance of the SSA employee's official duties if the offering law firm does not have such interests, the ethics official should nonetheless confirm that the attorney has no interests (such as a personal Social Security claim) that would be affected by performance of the employee's official duties. Finally, the ethics official must determine that the individual attorney is not registered as a lobbyist, a foreign national, or a foreign agent. The employee may only accept the legal services once each of these determinations is made.

¹³ "Foreign agent" means an agent of a foreign government as defined in 5 U.S.C. § 7342(a)(2). Ethics officials may consult <https://www.justice.gov/nsd-fara> to determine if the attorney offering services is an agent of a foreign government.

¹⁴ "Lobbyist" means a lobbyist, as defined by 2 U.S.C. § 1602(10), who is currently registered pursuant to 2 U.S.C. § 1603(a). Ethics officials may consult <https://lda.senate.gov> or <https://lobbyingdisclosure.house.gov> to determine if the attorney offering services is a registered lobbyist.

¹⁵ Of note, if the attorney offering the *pro bono* services is a sole practitioner, the analysis of the firm's interest and the attorney's interest is the same.

¹⁶ It is important to note that these potential disqualifying interests are limited to the matters directly impacted by the single employee's duties; comparatively, a "prohibited source" analysis under 5 C.F.R. 2635.203(d) would disqualify any attorneys or entities who do business with, seek to do business with, or are regulated by the entire agency.

Example 2: An attorney at a law firm offers *pro bono* legal services to an employee of the Veterans Administration (VA) who is involved in a workplace harassment issue. Another attorney at that firm represents a client in a VA disability matter. If the employee is involved in that disability matter, they could not accept the *pro bono* services unless they recuse themselves from this disability matter (*see* impartiality discussion in question #6). However, if the employee has no involvement in this firm’s disability matter, the fact that the firm has matters before the agency would not preclude the attorney from providing *pro bono* services to the employee. The ethics official must also determine that the attorney is not registered as a lobbyist, foreign national, or foreign agent, and is not substantially affected by the employee’s official duties. The employee may only accept the legal services once each of these determinations is made.

4. If another attorney at a law firm is registered as a lobbyist or foreign agent, may the firm still provide *pro bono* services?

Yes. The regulation requires only that the individual attorney providing the *pro bono* services to the employee not be registered as a lobbyist or foreign agent.¹⁷ Accordingly, an employee may accept *pro bono* services even if another attorney at the firm – or the law firm itself – is registered as a lobbyist or foreign agent.¹⁸

5. When may a 501(c)(3) organization pay for an outside legal entity, such as a law firm, to provide legal services for an employee?

If a 501(c)(3) organization offers to pay for the legal services, the analysis is three-tiered. As a threshold matter, the agency ethics official must make the following determinations about the organization:

- It is a 501(c)(3) organization;
- It was established for more than two years; and
- It does not have interests that may be substantially affected by the performance or nonperformance of the employee’s official duties.¹⁹

Following that determination, the agency ethics official should proceed with the analysis outlined in question #3 above to confirm that the legal services organization and the individual attorney offering services meet the criteria set forth in the regulation.

Example 3: A 501(c)(3) organization that focuses on employment discrimination offers to pay an outside law firm to represent a Department of Homeland Security employee in a legal matter relating to an equal employment opportunity complaint. The agency ethics

¹⁷ Example 4 to 5 C.F.R. § 2635.1009(c) makes this specific distinction: in that example, the offering attorney is not a lobbyist or foreign agent and neither the offering attorney nor the law firm has interests that may be affected by the performance or nonperformance of the employee’s official duties. The employee may thus accept the offered *pro bono* services even though there are other attorneys at the offering law firm who are registered lobbyists.

¹⁸ OGE has consulted with the White House on the application of E.O. 13989 (the “Pledge”) in this context, and per that consultation, a Pledge signer may accept *pro bono* services permitted under this regulation from a law firm that is registered as a lobbyist - as long as the attorney providing legal services is not registered as a lobbyist.

¹⁹ *See* 5 C.F.R. § 2635.1009(b).

official must first determine whether the organization is registered as a 501(c)(3) organization with the Internal Revenue Service and has been in existence for more than two years. Then, the ethics official must determine whether the 501(c)(3) organization does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Once the ethics official has confirmed that the 501(c)(3) meets the subpart J criteria, the ethics official must confirm (1) that the attorney providing services is not a lobbyist, foreign agent, or foreign national, and (2) that neither the attorney nor the firm have interests that may be substantially affected by the performance or nonperformance of the employee's official duties. The employee may only accept the legal services after the ethics official confirms that all the subpart J criteria are met.

6. What are the recusal requirements when an employee accepts *pro bono* legal services under subpart J?

The new Legal Expense Fund regulation imposes mandatory recusal requirements for any employee who utilizes subpart J. When an employee accepts *pro bono* legal services under subpart J, that employee must recuse from particular matters involving specific parties in which the employee knows a *pro bono* legal services provider (both the offering attorney and the legal services entity) is a party or represents a party from the time the *pro bono* legal services provider begins providing services until two years after the date they last provided services.²⁰ This mandatory two-year recusal is required by subpart J and is separate and distinct from recusals resulting from impartiality concerns under 5 C.F.R. § 2635.502.²¹ However, this recusal does not extend to matters involving the clients of the legal services provider, so as long as the client is not represented by that provider in those matters (see example 5).

Example 4: A United States Department of Agriculture (USDA) employee receives *pro bono* services from an attorney at a law firm that occasionally has matters before the USDA. The employee must recuse not only from party matters involving the employee's attorney, but also from party matters involving the entire law firm. If the legal expenses are paid by an outside 501(c)(3) organization, this recusal applies to the 501(c)(3) organization in addition to the law firm and the offering attorney.

Example 5: A Federal Trade Commission employee is receiving *pro bono* representation from a large law firm. The employee may continue working on a class action suit against a large internet company that is a client of the law firm, as long as the company is not represented by the law firm in the class action matter.

²⁰ See *id.* § 2635.1002(c)(2). If the legal expenses are paid by an outside 501(c)(3) organization, this recusal also applies to the 501(c)(3) organization.

²¹ An employee accepting *pro bono* services would likely also have a covered relationship with the legal services organization under 5 C.F.R. § 2635.502(b)(1)(i); however, the mandatory two-year recusal required by subpart J would encompass any such recusal.

7. What are the financial disclosure obligations for employees who accept *pro bono* services under the regulation?

Under the Ethics in Government Act,²² public financial disclosure filers are required to report gifts aggregating to more than \$480²³ received from any one source in the reporting period.²⁴ Confidential disclosure filers are subject to a similar requirement.²⁵ As a result of these requirements, financial disclosure filers must report contributions for any *pro bono* legal services received from a single legal services provider in excess of \$480²⁶ on their financial disclosure report.²⁷

Anonymous whistleblowers are permitted to exclude *pro bono* services from their confidential financial disclosure reports pursuant to a new gift reporting exception.²⁸ However, OGE was not able to create a similar exception for public financial disclosure filers because the gift reporting requirements and the exceptions to those requirements are determined by statute.²⁹

Agency ethics officials may contact their OGE Desk Officers if they have any questions about the acceptance of *pro bono* legal services under subpart J.

²² 5 U.S.C. § 13101 *et seq.*

²³ This amount in 5 C.F.R. § 2634.304(a) is updated every three years and was formally updated in June 2023 to reflect the current amount.

²⁴ 5 U.S.C. § 13104(a)(2).

²⁵ 5 C.F.R. § 2634.907(g).

²⁶ *See supra* note 22.

²⁷ This financial disclosure reporting is separate and distinct from the new quarterly reporting requirement created by subpart J, which requires reporting of any contribution or distribution of \$250 or more.

²⁸ 5 C.F.R. § 2634.907(g)(5)(iv).

²⁹ 5 U.S.C. § 13104(a)(2).