Considerations When Hiring Legislative Branch Employees

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With the 114th Congress drawing to a close, a number of officials will leave the legislative branch for new opportunities. This transition allows the private and nonprofit sectors to recruit seasoned professionals with recent congressional experience. Without appropriate controls, however, this process can create legal and reputational risks for prospective employers and employees alike.

Federal laws and Congressional rules restrict the recruiting and post-government professional activity of legislators and their employees. Missteps can, in extreme cases, lead to criminal penalties. But even minor violations of ethical rules can lead to unwelcome criticism of former officials, their new employers and their clients.

To manage these risks, prospective employers and employees must be mindful of the legal and ethical rules governing the transition from congressional employment to the private sector. To that end, we provide here an overview of the basic restrictions applicable to members of Congress and their staff. (A previous article we wrote addressed the restrictions that apply to executive branch employees.) The application of these rules can vary substantially based on one's previous position and anticipated private sector role, so individualized planning and counseling are essential.

Members' and Staffers' Negotiations for Future Employment

Senate and House Rules restrict members' and senior employees' ability to negotiate future private employment. Specifically, no sitting senator or representative may negotiate private employment until after his or her successor has been elected, unless he or she takes steps to disclose those negotiations publicly. Moreover, sitting senators are flatly prohibited from negotiating any employment that involves lobbying until their successors are elected. Senate Rule XXXVII(14); House Rule XXVII.

Likewise, Senate and House staffers who earn more than 75 percent of a member's salary ($130,500 in 2016) must notify their chamber's respective ethics committee of any employment negotiations. Representatives and senior staffers must also recuse themselves from any activities that could create a conflict or appearance of a conflict of interest involving a prospective employer, such as speaking with the employer about legislation of interest.

The Senate and House Rules do not specifically define "negotiations" for purposes of this restriction. But based on existing guidance, simply sending a resume to numerous potential employers would not normally constitute negotiations with any of them within the meaning of the rule, while more advanced discussions and interviews likely would be.

Given the obvious sensitivities, organizations need to exercise care in discussing potential employment with current members or senior congressional staff. To avoid inadvertently triggering the restrictions of this provision, organizations should carefully coordinate any employment-related outreach and limit the number of individuals who are authorized to initiate employment discussions with members and their senior staff. Companies should educate those individuals, and other persons interacting with the Hill, regarding what interactions can give rise to a recusal obligation.

Post-Government Employment Restrictions, 18 U.S.C. § 207

Federal ethics laws impose "cooling off" periods that limit the activities of former members of Congress and employees for a period after they leave government. These restrictions are codified at 18 U.S.C. § 207, a federal criminal statute. We summarize the principal restrictions and provide some practical observations below.

Summary of Restriction	**Duration**
Ban on former members of Congress contacting anyone in Congress. 18 U.S.C. § 207(e)(1). No former senator or representative may knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of Congress in connection with any matter on which he/she seeks official action. Important considerations: • The prohibition is on communications or appearances before Congress; behind-the-scenes work is permitted. Note, however, that de facto communication through an intermediary is still prohibited (e.g., "Your former colleague X told me that I should be sure to tell you that …"). • The ban applies to communications with all members, officers or employees of Congress, regardless of their seniority. • The ban is not limited to particular matters involving specific parties — it applies even to communications about matters of general applicability.	For senators, two years after leaving office; For representatives, one year after leaving office

Ban on former senior Senate staffers contacting anyone in the Senate. 18 U.S.C. §§ 207(e)(2). No former senior Senate employee may knowingly make, with the intent to influence, any communication to or appearance before any member, officer or employee of the Senate on behalf of any other person in connection with any matter on which he/she seeks official action. Important considerations: • The prohibition is on communications or appearances before the Senate; behind-the-scenes work is permitted. • Senior Senate staffers covered by this ban are those whose base salaries had been at least 75 percent of a Senator's salary. In 2016, 75 percent of a Senator's salary equals $130,500. Senate staffers whose salaries fall below this level are not subject to any cooling-off period. • The ban applies to communications with all members, officers or employees of the applicable House of Congress, regardless of their seniority. • The ban applies only to the Senate. It does not prohibit a former Senate staffer from contacting members or staff in the House of Representatives. • The ban is not limited to particular matters involving specific parties — it applies even to communications about matters of general applicability.	One year after leaving employment

Ban on former senior House staffers contacting their former office. 18 U.S.C. §§ 207(e)(3), (4), (5). No former senior House employee may knowingly make, with the intent to influence, any communication to or appearance before anyone from their former office on behalf of any other person in connection with any matter on which he/she seeks official action. For former staffers who worked in a member's personal office, this includes the member for whom they worked and any of the member's personal staff; for committee staffers, this includes any member of the committee and all committee staff; for leadership staffers, this includes any member of the House leadership and all leadership staff. Important considerations: • The prohibition is on communications or appearances before Congress; behind-the-scenes work is permitted. • Senior House staffers covered by this ban are those whose base salaries had been at least 75 percent of a member's salary. In 2016, 75 percent of a member's salary equals $130,500. House staffers whose salaries fall below this level are not subject to any cooling-off period. • The ban applies to communications with all employees of the former staffer's office, regardless of their seniority. • The ban is not limited to particular matters involving specific parties — it applies even to communications about matters of general applicability.	One year after leaving employment

Ban on aiding or advising private parties on trade or treaty negotiations on the basis of confidential information obtained during final year in government. 18 U.S.C. § 207(b). No former member or employee who participated personally and substantially in any trade or treaty negotiation on behalf of the United States within a year prior to his/her termination of government service, and who had access to confidential information concerning the negotiation, may knowingly represent, aid or advise any other person concerning such negotiation. Important considerations: • This prohibition precludes even behind-the-scenes advice. • This rule applies to members of both houses of Congress, as well as all former staffers, regardless of their seniority.	One year after leaving employment
Ban on former members of Congress and senior staffers representing, aiding or advising foreign entities before U.S. agencies. 18 U.S.C. § 207(f). No former member of Congress or senior staffer may knowingly represent, aid or advise a foreign government or political party with the intent to influence an official decision of any officer or employee of any U.S. agency. Important considerations: • This prohibition precludes even behind-the-scenes advice. • Senior staffers covered by this ban are those whose base salaries had been at least 75 percent of a member's salary. In 2016, 75 percent of a member's salary equals $130,500. Staffers whose	One year after leaving employment

salaries fall below this level are not subject to this ban.	

Post-Employment Lobbying Restrictions under the Senate Rules

Senate rules impose additional restrictions on the lobbying activities of former senators, officers and staffers. These restrictions are similar, but not identical, to those in 18 U.S.C. § 207(e) that are summarized above. (There is no equivalent rule in the House of Representatives.) In addition, any lobbying activity by anyone, including former members of Congress and staff, is governed by the Lobbying Disclosure Act of 1995.

Summary of Restriction	**Duration**
Ban on former senators and senior staffers lobbying anyone in the Senate. Senate Rule XXXVII(8), (9)(c). No former senator or senior Senate employee may lobby any senator, officer or employee of the Senate with the intention of influencing the content or disposition of any issue before Congress. Important considerations: • The prohibition is on communications or appearances before Congress; behind-the-scenes work is permitted. • Senior Senate staffers covered by this ban are those whose base salaries had been at least 75 percent of a Senator's salary. In 2016, 75 percent of a Senator's salary equals $130,500. Senate staffers whose salaries fall below this level are not subject to any cooling-off period. • This rule does not prohibit former senators and staffers from lobbying in the House of Representatives. • This rule applies to any former senator or senior staffer who is required to register as a lobbyist	For senators, two years after leaving office; For senior staffers, one year after leaving employment

under federal lobbying law, or who works for a firm that employs or retains lobbyists.	
Ban on former Senate staff lobbying their former office. Senate Rule XXXVII(9)(a), (b). No former Senate staffer may lobby anyone from their former office with the intention of influencing the content or disposition of any issue before Congress. For staffers who worked in senators' personal offices, this includes lobbying the senator for whom they worked and members of the senator's personal staff; for former committee staffers, this includes lobbying any senator on the committee and all committee staff. Important considerations: • The prohibition is on communications or appearances before Congress; behind-the-scenes work is permitted. • This rule applies to all former staffers, regardless of their seniority. • This rule does not prohibit former staff from lobbying other senators besides those covered by the prohibition, or Congressional employees who work in offices other than the former staffer's office. • This rule applies to any former staffer who is required to register as a lobbyist under federal lobbying law, or who works for a firm that employs or retains lobbyists.	One year after leaving employment

Limitation on Compensation, 18 U.S.C. § 203

A criminal provision, 18 U.S.C. § 203, prohibits federal employees, including members of Congress and legislative staff, from sharing in compensation earned by others if the money was earned for representing clients before the government during the employee's government service. Thus, for example, government employees joining law firms or lobbying firms

would be prohibited from sharing in any of the firms' income earned for representing clients before the government while the employee was in government.

Under relevant ethics opinions, this restriction does not apply to persons who receive a salary from their new employer or who do not share in profits. To comply with this restriction — which applies to both the provider and recipient of such compensation — the compensation of former government employees brought in as partners typically is set at a fixed rate that excludes any profit-sharing for one to two years following their termination of government employment.

Special Considerations for Lawyers Under Rules of Professional Conduct

Lawyers should be mindful of additional restrictions imposed by the rules of professional conduct. Rule 1.11 of the American Bar Association's Model Rules of Professional Conduct states that "a lawyer who has formerly served as a public officer or employee of the government" — even in a nonlawyer position — may not "represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." This prohibition goes beyond the communications and lobbying bans in 18 U.S.C. § 207(e) and Senate Rule XXXVII in that it precludes even behind-the-scenes participation on a matter. In addition, the lawyer must be screened from all matters he/she worked on while in government in order to allow his/her firm to carry on the representation. Many states have adopted this model rule.

Lawyers subject to the Washington, D.C., Rules of Professional Conduct face an additional restriction. The D.C. version of Rule 1.11 is not limited to matters a lawyer worked on personally and substantially while in government, but extends to matters "substantially related" to such matters, requiring a broader screen for former government employees than that required by the model rules.

The model rules and D.C. rules apply only to matters involving specific parties. Therefore, representations regarding legislation or policymaking matters in which the member or staffer may have participated are not prohibited. However, a congressional investigation focused on the activities of particular persons might be considered a matter involving specific parties. In that case, the different versions of Rule 1.11 are particularly relevant for those members and staffers who participated in congressional investigations. Switching sides to represent a person or company who is being investigated by Congress — or even advise the subject of an investigation behind-the-scenes — when the member or staffer was previously involved on the investigative side, could violate Rule 1.11.

Conclusion

Careful attention and planning can minimize the legal and reputational risks that accompany hiring or retaining former members of Congress and staff. The unique skills and perspective possessed by these individuals will often make such an effort worthwhile.

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