

VOLUME 7B, CHAPTER 5: “EMPLOYMENT”**SUMMARY OF MAJOR CHANGES**

Changes are identified in this table and also denoted by **blue font**.

Substantive revisions are denoted by an asterisk (*) symbol preceding the section, paragraph, table, or figure that includes the revision.

Unless otherwise noted, chapters referenced are contained in this volume.

Hyperlinks are denoted by ***bold, italic, blue, and underlined font***.

The previous version dated **October 2020** is archived.

PARAGRAPH	EXPLANATION OF CHANGE/REVISION	PURPOSE
All	Updated hyperlinks, statutes, and formatting in compliance with current administrative instructions.	Revision
3.3.2 (050303.B)	Moved and renamed this subparagraph to 3.3.1.1.3 to align with similar topics.	Revision
3.3.1.1.4 (050303.A.1.d)	Added subparagraph to reflect other prohibitions.	Addition
4.1.2 (050401.B)	Updated to include expanded permissions for foreign employment per Public Law 116-617, section 642.	Revision

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CHAPTER 5

EMPLOYMENT

1.0 GENERAL (0501)

1.1 Purpose (050101)

This chapter addresses employment of personnel who are drawing military retired pay. This includes, but is not limited to foreign government employment, service in military forces of newly democratic nations, conflict-of-interest issues, and convictions of crimes affecting retired pay.

1.2 Authoritative Guidance (050102)

The pay policies and requirements established by the DoD in this chapter are derived primarily from, and prepared in accordance with the United States Code (U.S.C.), including Titles 5, 10, 18, 37, and 42. Due to the subject matter in this chapter, the list of authoritative sources is extensive. The specific statutes, regulations, and other applicable guidance that govern each individual section are listed in reference section at the end of the chapter.

2.0 CONFLICT-OF-INTEREST (0502)

2.1 Statutes (050201)

2.1.1. Conflict-of-interest statutes are intended to safeguard the integrity of public administration and prevent government officials from using their positions and influence for personal gain.

2.1.2. Conflict-of-interest statutes are applicable, in general, to those whose government service has ended, and their purposes are accomplished by:

2.1.2.1. Imposing limitations in some cases upon the employment of former DoD procurement personnel by Defense contractors;

2.1.2.2. Requiring the employment of former DoD procurement personnel by Defense contractors in other instances be reported; or

2.1.2.3. Restricting the activities of former DoD officers and employees in representing or assisting their employers in claims-related matters or becoming personally involved in the process of “selling” to the government.

2.1.3. A comprehensive digest of laws, including conflict-of-interest laws applicable to retired military personnel, is set forth in the [DoD Regulation 5500.7-R](#), Joint Ethics Regulation (JER), Chapters 5 and 9, and Appendix A.

2.2 Withholding Military Retired Pay (050202)

Military retired pay may be withheld or forfeited when the employment falls under certain categories of activities prohibited under conflict-of-interest laws.

3.0 CONVICTION FOR CRIMES AFFECTING RETIRED PAY (0503)

3.1 Entitlement (050301)

Entitlement to military retired pay is directly affected when a retired member is convicted of violating the law under [5 U.S.C. §§ 8311 – 8322](#).

3.2 Violation of Title 5 U.S.C. § 8312 (050302)

The receipt of military retired pay by the retired member, or receipt of the annuity by the retired member's survivor or beneficiary is prohibited, subject to certain exceptions described in 5 U.S.C. § 8311(2) or (3):

3.2.1. If a retired member is convicted of any crime as described in 5 U.S.C. § 8312(b) before, on, or after September 1, 1954, payment is prohibited. [The prohibition on payment applies to the period after the date of conviction or after September 1, 1954, whichever is later.](#)

3.2.2. If a retired member is convicted of any crime as described in 5 U.S.C. § 8312(c) before, on, or after September 26, 1961, payment is prohibited. [The prohibition on payment applies to the period after the date of conviction or after September 26, 1961, whichever is later.](#)

3.2.3. If an individual, who was convicted of an offense named by 5 U.S.C. § 8312, or an offense constituting a violation of 5 U.S.C. § 8314 or § 8315, is pardoned by the President, in accordance with 5 U.S.C. § 8318, the right of the individual and his survivor or beneficiary to receive annuity or retired pay previously denied under this paragraph is restored as of the date of the pardon or the effective date of restoration prescribed by the President.

3.2.4. After January 6, 1996, the spouse of an individual, whose annuity or retired pay is forfeited under 5 U.S.C. § 8312 or § 8313, may have his or her rights to a spousal survivor benefit plan restored, if the U.S. Attorney General determines that the spouse fully cooperated with Federal authorities in the conduct of a criminal investigation and subsequent prosecution of the individual which resulted in the forfeiture. In no event will the spousal survivor benefit plan benefits be paid to the spouse before the retired member has passed away.

3.3 Convictions Under Other Statutes (050303)

3.3.1. An individual, or his or her survivor or beneficiary, may not be paid annuity or retired pay on the basis of the service of the individual which is creditable toward the annuity or retired pay, subject to the exceptions in 5 U.S.C. § 8311 (2) and (3), if the individual before, on, or after September 1, 1954:

3.3.1.1. Refuses, or knowingly and willfully fails to appear, testify, or produce documents relating to his or her service as an employee, before a Federal grand jury, U. S. court, court-martial, or congressional committee, in a proceeding concerning:

3.3.1.1.1. Past or present relationship with a foreign government; or

3.3.1.1.2. A matter involving or relating to a plan or attempt to interfere with or endanger, the national security or defense of the United States, **in accordance with 5 U.S.C. § 8314**; or

*3.3.1.1.3. The prohibition on payment of annuity or retired pay under subparagraph 3.3.1.1, applies to the period after the date of the failure or refusal of the individual, or after September 1, 1954, whichever is later.

*3.3.1.1.4. The prohibition of payment of an annuity or retired pay under subparagraph 3.3.1.2 applies to the period after the statement, representation, or concealment of fact is made or occurs, or after September 1, 1954, whichever is later.

3.3.1.2. Knowingly and willfully makes false, fictitious, or fraudulent statements or representations, concealing material facts concerning his or her past or present membership, affiliation, association with, or support of the Communist Party, chapter, branch, or subdivision, in or outside the United States, or other organization, party, or group advocating:

3.3.1.2.1. The overthrow, by force, violence, or other unconstitutional means, of the Government of the United States;

3.3.1.2.2. The establishment, by force, violence, or other unconstitutional means, of a Communist totalitarian dictatorship in the United States; or

3.3.1.2.3. The right to strike against the United States; as stated in 5 U.S.C. § 8315.

3.3.2. Fines levied for convictions under other statutes may result in debts to the United States. However, they do not affect a convicted member's entitlement to receive retired pay.

3.4 Repayment of Annuity or Retired Pay Properly Paid; Waiver (050304)

An individual, to whom payment of retired pay is denied due to a conviction under 5 U.S.C. §§ 8311 – 8322, is not required to repay amounts received before the date of conviction. Any amounts of retired pay paid in error after the conviction that, but for the conviction, were otherwise proper, may be subject to repayment.

4.0 FOREIGN GOVERNMENT EMPLOYMENT (0504)

4.1 Background (050401)

4.1.1. Employment of retired members by a foreign government is restricted. The primary restriction is in Article I, section 9, clause 8 of the Constitution of the United States, which reads: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." The Comptroller General interpreted this to prohibit employment of all retired personnel, including members of the Fleet Reserve or Fleet Marine Corps Reserve, by a foreign government unless congressional consent is granted.

*4.1.2. The conditions for accepting foreign employment were modified by Public Law ([PL 95-105, section 509\(a\)\(1\) and \(2\)](#)). The Congress granted consent for retired members to accept employment or compensation from foreign governments if the members obtain the approval of the Secretary of the Military Department concerned (or designee) and the Secretary of State before accepting employment or compensation. [PL 116-283, section 641](#), further amended 37 U.S.C. § 908 to permit retired members of the uniformed services to accept payment from foreign governments for speeches, travel, meals, lodging, registration fees, or non-cash awards, if the payment and/or award is approved by the Secretary concerned.

4.1.2.1. The approval by the Secretary of the Military Department concerned (or designee) and Secretary of State for a retired member to accept foreign employment is only effective prospectively from the date the approval is granted and may not be made retroactively to authorize foreign employment and compensation received before approval is granted.

4.1.2.2. Compensation received from a foreign government without approval [from both the Secretary concerned and Secretary of State](#) is considered received by the retired member for the United States. A debt in favor of the government is created which is to be collected by withholding from military retired pay. The debt is an amount equal to the compensation received from the foreign government. When the compensation earned during the period of unauthorized employment exceeds the amount of military retired pay accrued during the same period, [the retired member may not retain the pay earned from that employment](#).

4.2 Legislative History (050402)

4.2.1. The history of the constitutional provisions under consideration indicates that the condition intended to be avoided is the exercise of undue influence by a foreign government upon retired members of the United States.

4.2.2. In determining the existence of an employer-employee relationship between a retired member and a foreign government, or instrumentality thereof, the common law rules of agency are applied to determine whether such instrumentality has the right to control and direct an employee in performance of his or her work and the manner in which the work is done.

4.2.3. When determining whether the relationship of employer and employee exists, there are at least five criteria that may be considered:

4.2.3.1. The selection and engagement of the employee;
4.2.3.2. The payments of wages;

4.2.3.3. The power to discharge;

4.2.3.4. The power to control the employee's conduct; and

4.2.3.5. The relationship of the work to the employer's business, whether the work is a part of the regular business of the employer.

4.2.4. The decisive test to determine the existence of an employer-employee relationship is whether the employer has the right to control and direct the employee in the performance of his or her work and in the manner in which the work is to be done. Additionally, the Comptroller General has ruled that a corporation incorporated in the United States, which maintains a separate identity and appears to be a separate legal entity from its dominant shareholder, does not necessarily become an instrumentality of a foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government.

4.3 Types of Employment (050403)

4.3.1. Employment by educational or commercial institutions that are owned, operated, or controlled by a foreign government is included within the scope of this restriction.

4.3.2. Employment with a foreign government which requires acquisition of foreign citizenship results in forfeiture of entitlement to retired pay. See Chapter 6 for additional information.

4.3.3. Employment by international agencies, such as the United Nations, is not prohibited.

4.4 Adjustment to Retired Pay (050404)

4.4.1. Retired pay is withheld in an amount equal to the amount of compensation received from the foreign government [subject to the exceptions in paragraph 4.1.2](#). Compensation includes salary, free transportation, household goods shipments at employer's expense, housing allowances, and gifts. To determine the amount to be withheld from a retired member because of the non-military elements of compensation, the value should be set fairly, considering the actual value or estimates of the compensation received. A gift of more than minimal value is deemed to have been accepted on behalf of the United States. It is deposited by the donee for use and disposal as property of the United States.

4.4.2. Amounts of retired pay withheld from members of the uniformed services who accept foreign employment without congressional consent, as required by the United States Constitution, should be treated as though the retired member has no entitlement to them and should not be “held in trust” for them pending possible future congressional consent to their receipt.

5.0 SERVICE IN MILITARY FORCE OF NEWLY DEMOCRATIC NATIONS (0505)

5.1 Determination of Newly Democratic Nation (050501)

The Secretary of the Military Department concerned (or designee) and the Secretary of State jointly determine whether a nation is a newly democratic nation.

5.2 Consent of Congress (050502)

5.2.1. Consent. Congress consents to a retired member of the uniformed services accepting:

5.2.1.1. Employment by, or holding an office or position in, the military forces of a newly democratic nation; and

5.2.1.2. Compensation associated with such employment, office, or position.

5.2.2. Approval Required. The consent provided for a **retired** member of the uniformed services to accept employment or hold an office or position applies to a retired member only if the Secretary of the Military Department concerned (or designee) and the Secretary of State jointly approve the employment or the holding of such office or position.

5.3 Continued Entitlement to Retired Pay and Benefits (050503)

The eligibility of retired members to receive retired or retainer pay and other benefits, arising from the retired member’s status as a retired member of the uniformed services, may not be terminated by reason of employment or holding of an office or position consented to in paragraph 5.2. The eligibility of such retired member’s dependents to benefits may not be terminated based on the retired member’s status consented to in this section.

REFERENCES

CHAPTER 5 – EMPLOYMENT

2.0 – CONFLICT-OF-INTEREST (0502)

3.0 – CONVICTION OF CRIMES AFFECTING RETIRED PAY (0503)

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|-----|---------------------------------------------------------------------------------|
| 3.2 | 5 U.S.C. §§ 8311 - 8322
18 U.S.C. §§ 2151 - 2156
42 U.S.C. §§ 2272 - 2276 |
| 3.3 | 5 U.S.C. §§ 8311 - 8318
10 U.S.C. § 1450 |
| 3.4 | 5 U.S.C. § 8317 |

4.0 – FOREIGN GOVERNMENT EMPLOYMENT (0504)

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|---------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4.1.2 | 37 U.S.C. § 908 |
| 4.1.2.2 | 61 Comp Gen 306, March 25, 1982
Comp Gen B-231498, June 21, 1989 |
| 4.2.1 | 69 Comp Gen 220, B-220860, February 2, 1990
53 Comp Gen 753, B-178538, April 9, 1974
Comp Gen, B-152844, December 12, 1963 |
| 4.2.3 | <i>Maloof v. United States</i> ,
242 F. Supp. 175, 181 (1965) |
| 4.2.4 | 41 Comp Gen 715, B-147777, May 1, 1962
44 Comp Gen 130, B-154213, September 11, 1964
53 Comp Gen 750, B-180419, April 8, 1974
62 Comp Gen 432, B-210346, June 2, 1983 |
| 4.3.1 | Comp Gen, B-152844, December 12, 1963 |
| 4.4 | 5 U.S.C. § 7342
Comp Gen, B-178538, October 13, 1977 |
| 4.4.2 | 58 Comp Gen 487, B-193562, December 4, 1979 |

5.0 – SERVICE IN MILITARY FORCE OF NEWLY DEMOCRATIC NATIONS (0505)

10 U.S.C. § 1060