

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

All changes are 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 **June 2015** is archived.

PARAGRAPH	EXPLANATION OF CHANGE/REVISION	PURPOSE
All	Updated hyperlinks, statutes, and formatted to comply with current administrative instructions.	Revision
050203	Deleted information based on Title 18, United States Code, section 281. This section has been repealed and not replaced.	Deletion

Table of Contents

0501 GENERAL 3

 050101. Purpose 3

 050102. Authoritative Guidance 3

0502 CONFLICT-OF-INTEREST 3

 050201. Statutes 3

 050202. Withholding Retired Pay 3

0503 CONVICTION FOR CRIMES AFFECTING RETIRED PAY 4

 050301. Entitlement 4

 050302. Violation of Title 5 U.S.C. § 8312 4

 050303. Convictions Under Other Statutes 4

0504 FOREIGN GOVERNMENT EMPLOYMENT 5

 050401. Background 5

 050402. Legislative History 6

 050403. Types of Employment 7

 050404. Adjustment to Retired Pay 7

0505 SERVICE IN MILITARY FORCE OF NEWLY DEMOCRATIC NATIONS 7

 050501. Determination of Newly Democratic Nation 7

 050502. Consent of Congress 7

 050503. Continued Entitlement to Retired Pay and Benefits 8

BIBLIOGRAPHY 9

CHAPTER 5

EMPLOYMENT

0501 GENERAL

050101. Purpose

This chapter addresses employment of personnel who are drawing 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.

050102. Authoritative Guidance

The bibliography at the end of this chapter lists the authoritative references.

0502 CONFLICT-OF-INTEREST

050201. Statutes

A. 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.

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

1. Imposing limitations in some cases upon the employment of former Department of Defense (DoD) procurement personnel by Defense contractors;

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

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.

C. 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,” Chapters 5 and 9, and Appendix A.

050202. Withholding Retired Pay

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

0503 CONVICTION FOR CRIMES AFFECTING RETIRED PAY

050301. Entitlement

Entitlement to retired pay is directly affected when a retiree is convicted of violating the law under [Title 5, United States Code \(U.S.C.\), sections 8311 through 8322](#).

050302. Violation of Title 5 U.S.C. § 8312

The receipt of 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):

A. If a retired member is convicted of any crime as described in 5 U.S.C. § 8312(b) after September 1, 1954, payment is prohibited.

B. If a retired member is convicted of any crime as described in 5 U.S.C. § 8312(c) after September 26, 1961, payment is prohibited.

C. 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.

D. After January 6, 1996, the spouse of an individual, whose annuity or retired pay is forfeited under 5 U.S.C. § 8312 or § 8313, is eligible for spousal pension benefits, if the U.S. Attorney General determines that the spouse fully cooperated with the Federal authorities in the conduct of a criminal investigation and subsequent prosecution of the individual which resulted in the forfeiture.

050303. Convictions Under Other Statutes

A. 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:

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:

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

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

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:

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

b. Establishment, by force, violence, or other unconstitutional means, of a Communist totalitarian dictatorship in the United States; or

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

B. The prohibition on payment of annuity or retired pay under subparagraph 050303.A.1, applies to the period after the date of the failure or refusal of the individual, or after September 1, 1954, whichever is later.

C. 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.

0504 FOREIGN GOVERNMENT EMPLOYMENT

050401. Background

A. 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.

B. 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.

1. The approval by the Secretary of the Military Department concerned (or designee) and Secretary of State for a 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.

2. The compensation received from the foreign government without approval 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 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 retired pay accrued during the same period, only the retired pay amount may be collected.

050402. Legislative History

A. 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.

B. 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.

C. There are at least five criteria that may be considered in determining whether the relationship of employer and employee exists. They are:

1. The selection and engagement of the employee;
2. The payments of wages;
3. The power to discharge;
4. The power to control the employee's conduct; or
5. The relationship of the work to the employer's business, whether the work is a part of the regular business of the employer.

D. 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.

050403. Types of Employment

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

B. 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.

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

050404. Adjustment to Retired Pay

A. Retired pay is withheld in an amount equal to the amount of compensation received from the foreign government. 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 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.

B. 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 member has no entitlement to them and should not be "held in trust" for them pending possible future congressional consent to their receipt.

0505 SERVICE IN MILITARY FORCE OF NEWLY DEMOCRATIC NATIONS

050501. Determination of Newly Democratic Nation

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

050502. Consent of Congress

A. Consent. The Congress consents to a retired member of the Uniformed Services: (1) accepting employment by, or holding an office or position in, the military forces of a newly democratic nation; and (2) accepting compensation associated with such employment, office, or position.

B. Approval Required. The consent provided for a 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.

050503. Continued Entitlement to Retired Pay and Benefits

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 050502. 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.

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