

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

All changes are denoted by **blue font**.

Substantive revisions are denoted by an * 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 November 2008 is archived.

PARAGRAPH	EXPLANATION OF CHANGE/REVISION	PURPOSE
All	Updated hyperlinks and formatted to comply with current administrative instruction.	Update
0501 previous version	Deleted this section which was based upon a repealed statute. Renumbered sections accordingly.	Delete
050103.A	Added Note on repealed statute, 18 U.S.C. 281(a).	Add
0502	Added section on Conviction of Crimes Affecting Retired Pay – Hiss Act Violations.	Add
050202.C previous version	Deleted this subparagraph because it was based upon repealed statutes. Renumbered paragraphs accordingly.	Delete
050401.A	Added reference to specific statute.	Add
050401.B.	Added reference to specific statute and expanded information.	Add
050401.C	Expanded information in accordance with statute.	Update
Table 5-1	Deleted, no longer needed.	Delete
Bibliography	Updated Bibliography and added it to TOC	Update

Table of Contents

VOLUME 7B, CHAPTER 5: “EMPLOYMENT”	1
0501 CONFLICT OF INTEREST	3
050101. General	3
050102. Withholding Retired Pay.....	3
050103. Forfeiture of Annuities and Retired Pay	3
*0502 CONVICTION OF CRIMES AFFECTING RETIRED PAY – HISS ACT VIOLATIONS.....	4
050201. General.....	4
050202. Violation of 5 U.S.C. 8312	4
050203. Convictions Under Other Statutes	4
0503 FOREIGN GOVERNMENT EMPLOYMENT.....	4
050301. Background.....	4
050302. Legislative History.....	5
050303. Types of Employment.....	6
050304. Adjustment to Retired Pay	6
0504 FEDERAL JUDGES	6
050401. General.....	6
050402. Limitations	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 CONFLICT OF INTEREST

050101. General

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 applicable in general to those whose government service has ended accomplished these purposes 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.

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 [DoD 5500.7-R](#), “Joint Ethics Regulation,” Chapters 5 and 9, and Appendix A.

050102. 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.

050103. Forfeiture of Annuities and Retired Pay

Although violation of conflict of interest laws may result in the imposition of criminal penalties (including fines and imprisonment) or administrative fines and sanctions, entitlement to military retired pay is directly affected only [in circumstances provided under subparagraphs A and B of this paragraph and section 0502 of this chapter](#).

* [A. Selling.](#) A retired Regular officer is convicted of “selling” during any period prior to October 13, 1994. “Selling,” as an activity under the conflict-of-interest laws, is prohibited during any time prior to October 13, 1994 under [Title 18, United States Code, section 281\(a\) \(18 U.S.C 281\(a\)\)](#). A retired Regular officer may not, during the 2-year period following retirement, represent any person in the sale of anything to DoD in which the officer holds retired

status. This statute has been interpreted by the Department of Justice as prohibiting a retired Regular officer from representing any party other than himself or herself in connection with a contract for the sale of services or for the sale of supplies. Since an officer is disqualified from holding any office, or position of honor, trust, or profit of the United States (U.S.) as a result of conviction, entitlement to retired pay ceases.

Note: Title 18 U.S.C. 281(a) has been repealed.

B. The prohibition against selling has been broadly interpreted to include virtually all activities involved in the selling process and to apply in any case reasonably within the scope of the statute where the conduct at which it was directed could arise.

*0502 CONVICTION OF CRIMES AFFECTING RETIRED PAY – HISS ACT VIOLATIONS

050201. General

Entitlement to retired pay is directly affected when a retiree is convicted of violating the Hiss Act, 5 U.S.C. 8311 – 8322.

050202. *Violation of 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 section 8311(2) or (3) of title 5:

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

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

050203. Convictions Under Other Statutes

Fines levied for convictions under other statutes may result in debts to the United States that may be collected in accordance with Chapter 28 of this volume. However, they do not affect a convicted member's entitlement to receive retired pay.

0503 FOREIGN GOVERNMENT EMPLOYMENT

050301. Background

A. Employment of retired members by a foreign government is restricted. The primary restriction is in [article 1, 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 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.

050302. 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.
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.

050303. 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 of this volume for additional information.

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

050304. Adjustment to Retired Pay

A. Withhold retired pay 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 nonmilitary 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.

0504 FEDERAL JUDGES

050401. General

* A. Title 10, U.S.C. 945. A person who has completed a term of service as a judge of the U.S. Court of Appeals for the Armed Forces is eligible for a retirement annuity upon separation from civilian service in the Federal Government. Retirement annuities and survivor annuities for judges retired from the United States Court of Appeals for the Armed Forces are paid from the DoD Military Retirement Fund.

* B. Title 28, U.S.C. 371. Any justice or judge of the United States appointed to hold office during good behavior may retire from the office after meeting the following age and service requirements, whether continuous or otherwise; and during the remainder of his or her lifetime, receive an annuity equal to the salary they were receiving at the time they retired.

Attained age:	Years of service:
65	15
66	14
67	13
68	12
69	11
70	10

* C. Retention of Office After Retirement From Active Service. Any justice or judge of the United States appointed to hold office during good behavior may retain the office, but retire from regular active service after meeting the age and service requirements, whether continuous or otherwise; and during the remainder of his or her lifetime, continue to receive the salary of the office if he or she meets the requirements in 28 U.S.C. 371(e).

050402. Limitations

A. Title 10, U.S.C. 945. A person who is receiving a retirement annuity by reason of service as a judge of the United States Court of Appeals for the Armed Forces, and who subsequently is appointed to a position in the Federal Government, is entitled to the higher of the retirement annuity as a judge or the pay for the Federal Government position.

B. Title 28, U.S.C. 371. A member who became a judge could not receive military retired pay while performing regular judicial active service as a judge. On and after October 1, 1999, this restriction has been repealed and military retired pay shall be resumed without reduction.

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 shall 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 accepting employment by, or holding an office or position in, the military forces of a newly democratic nation and 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 shall apply 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](#).

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050502	10 U.S.C. 1060
050503	10 U.S.C. 1060