



October 30, 2024
LA-24-14

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Shelley K. Finlayson
Acting Director

SUBJECT: Counting Days of Service for Special Government Employees: Travel Days,
Past Government Service, and Application of Ethics Laws

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to help agency ethics officials correctly count days of service for special Government employees (SGEs) in the executive branch.¹ Counting days of service for SGEs is important because an employee can only be designated an SGE if they are expected to serve for no more than 130 days in a 365-day period.² In addition, accurate day counting is vital because designation as an SGE affects how ethics rules apply to an employee.

OGE is providing a summary of past guidance focusing on three specific areas of SGE day counting that have led to questions from ethics officials: (1) travel days, (2) past Government service, and (3) past Government service when applying ethics laws and regulations.

(1) Travel days. If an SGE does not receive compensation for service to the Government on a day of travel and conducts no more than *de minimis* work on a day of travel, then the day of travel is not counted toward the SGE's days of service.³

¹ OGE does not have jurisdiction over the laws governing whether an individual qualifies as a Government employee (including an SGE) or whether a day counts as a day of Government service. The Department of Justice's Office of Legal Counsel (OLC) is responsible for interpreting the definition of "officer" and "employee" under title 5 of the United States Code, 5 U.S.C. §§ 2104 and 2105. *See, e.g., Memorandum Op. for the Deputy Assoc. Att'y Gen.*, 4B Op. O.L.C. 441, 442 (1980) (discussing the definitions at §§ 2104 and 2105); *Days of Serv. by Special Gov't Emps.*, 31 Op. O.L.C. 13 (2007) (discussing that service for any part of a day counts as a full day of service). Additionally, the Office of Personnel Management is charged with "executing, administering, and enforcing . . . the laws governing the civil service." 5 U.S.C. § 1103(a)(5)(A).

² Under 18 U.S.C. § 202(a), an SGE is an officer or employee "who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis." SGEs are generally individuals who are recruited due to their outside expertise to fulfill temporary services to the Government. OGE DAEogram DO-00-003, at 1 (Feb. 15, 2000).

³ *See infra* note 8.



(2) Past Government service. When making a prospective estimation to determine whether an individual can be designated as an SGE, agencies should not include days of past regular Government service⁴ in the prospective estimation.⁵

(3) Past Government service when applying ethics laws and regulations. On the other hand, whether to count past service as both a regular Government employee and an SGE, or to count only days already served as an SGE, will depend on the application of the ethics law or regulation at issue.⁶

This Legal Advisory discusses these conclusions in greater detail below.

I. SGE Travel Days Count When Employee is Compensated or More Than *De Minimis* Work is Performed

A common question concerns whether SGEs are treated as having worked on any day they are traveling for official work. OGE has determined that work-related travel is not treated as a day served by an SGE unless the SGE either (1) receives compensation from the Government, other than travel reimbursement, for the travel time, or (2) performs more than *de minimis* work activities while traveling.

A. All Compensated Days Count Toward an SGE's Days of Service

Any day that an SGE is paid by the Government for their service to the Government must be counted as a day of service for SGE day-counting purposes.⁷ This rule is true even if the employee performed no work or only *de minimis* work on that day.⁸ Merely receiving *per diem* or reimbursement for travel expenses does not count as receiving compensation for services rendered for day-counting purposes.⁹

⁴ OLC has stated that, “as a general matter, employees are presumed to be [R]egular government employees unless their appointing Department is comfortable with making an estimate that the employee will be needed to serve 130 days or less.” *Restrictions on a Fed. Appointee's Continued Emp. by a Priv. L. Firm*, 7 Op. O.L.C. 123, 126 (1983).

⁵ The now-sunsetted Federal Personnel Manual provided guidance on how agencies should count days served for an employee who is currently serving as an SGE at a different agency. See OFF. OF PERS. MGMT., FEDERAL PERSONNEL MANUAL (FPM), App. C, Ch. 735 (1992). Specifically, the FPM noted that a second agency must use the SGE's start date at the first agency for making its day-counting estimate. OGE said in 2000, “To the extent much of the guidance contained in [the FPM and the Presidential Memorandum on Preventing Conflicts of Interest on the Part of Special Government Employees] reflects longstanding interpretations of 18 U.S.C. § 202(a) and other provisions of the conflict of interest laws, OGE continues to follow many of the same principles.” OGE DAEOgram DO-00-003, at 4 n.6.

⁶ See 18 U.S.C. §§ 203(c), 205(c), 207(c)(2)(B); 5 C.F.R. §§ 2635.805(b)(2), .807(a)(2)(i)(E)(4).

⁷ The determination of whether to pay SGEs for travel days is a decision that each agency must make based on its internal policies in conjunction with Federal labor laws.

⁸ OGE DAEOgram DO-07-002, at 5 (Jan. 19, 2007) (noting that once an agency decides to pay an SGE for their services, those services cannot “be discounted as inconsequential for purposes of day counting under the conflict of interest laws”).

⁹ Reimbursement for travel expenses is not considered compensation for services to the Government. Compensation is defined as “remuneration and other benefits received in return for services rendered; esp., salary or wages.” *Compensation*, BLACK'S LAW DICTIONARY (12th ed. 2024). Because travel reimbursements are intended to offset

Example 1: An employee is an SGE board member on a Federal commission that meets four times a year. The employee lives in Arkansas, and the commission meets in person in Washington, D.C. The day before a commission meeting, the employee travels from Arkansas to Washington, D.C. The employee performs only *de minimis* work while traveling but is compensated by the commission for the travel day, in addition to receiving travel reimbursement. Because the commission compensated the employee for services to the Government on their travel day, the day counts as a day of service to the commission.

B. Performing Greater than De Minimis Work Activities Makes the Day Count as a Day of Service

As stated above, if an employee receives compensation from the Government for a day of travel, that day counts as a day of service. Additionally, performing work that exceeds a *de minimis* amount will make the day count as a day of service.¹⁰ The Department of Justice’s Office of Legal Counsel (OLC) has said that a partial day of work by an SGE counts as a day of service.¹¹ Additionally, OLC has cited to OGE applying a “rule of reason” wherein agencies consider the particular facts of a situation in order to determine whether an SGE’s activities on any given day are sufficient to constitute a day of work for the purposes of statutory limits.¹² Activities such as uncompensated work limited to strictly administrative matters (such as filling out personnel paperwork), uncompensated brief communications (even if substantive), and uncompensated brief periods of reading or other preparation outside the government workplace do not require an agency to count the day as a day of service to the Government.¹³ Performing more than *de minimis* work on an uncompensated travel day transforms the day into one that must be counted toward the statutory limits.¹⁴

Example 2: Same facts as Example 1, except the employee is not compensated by the commission for their travel time. They now spend the two-hour flight napping and catching up on their favorite show and do no work that day. Because the employee is not paid and performs no official work while traveling, this travel day is not counted as a day of service to the commission.

Example 3: Same facts as Example 1, except the employee is not compensated by the commission for their travel time. They now spend ten minutes on the flight filling out administrative paperwork and scheduling a meeting for the commission for the following week. They do no other work that day. Engaging in these uncompensated, administrative

costs incurred during official travel rather than act as payments for services, travel reimbursements do not constitute compensation for SGE day-counting purposes.

¹⁰ OGE DAEOgram DO-07-005 (Feb. 22, 2007) (citing *Days of Serv. by Special Gov’t Emps.*, 31 Op. O.L.C. 13 (2007) and OGE DAEOgram DO-07-002).

¹¹ *Days of Serv. by Special Gov’t Emps.*, 31 Op. O.L.C. 13 (2007).

¹² See OGE DAEOgram DO-07-002, at 4.

¹³ *Id.* at 5-6.

¹⁴ *Id.*

matters is not a sufficient level of activity. Therefore, this travel day does not count as a day of service to the commission.

Example 4: Same facts as Example 1, except the employee is not compensated by the commission for their travel time. They now spend two hours on the flight sending emails to other commissioners and commission staff about items on the agenda, writing talking points, and preparing questions for subject matter experts. Although the employee was not compensated, they engaged in substantive work activities for a sufficient amount of time. Therefore, this travel day counts as a day of service to the commission.

II. Past Days of Regular Government Service are Not Included in SGE Determination

Past regular Government service is not counted when an agency is making a prospective SGE determination, even if there is no break in service.¹⁵

An SGE is “an employee expected to work no more than 130 days during a 365-day period.”¹⁶ This language is forward-looking. Thus, when making a prospective SGE determination, agencies should not count past service as a regular Government employee when estimating if the individual will serve for more than 130 days in the ensuing 365 days. The 365-day period begins on the day the SGE is appointed. Similarly, the term of an individual’s appointment as an SGE, and their status as an SGE, is effective from the day of their SGE appointment through the ensuing 365 days. At the end of the 365 days, the agency must again determine whether the employee is expected to serve for more than 130 days in the following 365 days.

Example 5: An agency wants to hire an individual to serve as an expert consultant. The agency estimates that this individual will work approximately 100 days for the agency over the next 365-day period. The individual retired as a regular Government employee one month prior to their potential start date as an expert consultant. The agency can hire the individual as an SGE because they are not required to count the days the individual worked as a regular Government employee in determining whether the employee will serve for more than 130 days. Instead, the agency is only required to prospectively estimate the days the employee will work in the 365 days following appointment as an SGE.

Example 6: Due to unforeseen circumstances, an SGE served ten days more than initially estimated, serving 140 days of the 365 days. At the end of the 365-day period, the agency wants to redesignate the SGE for the next 365-day period. Even though the SGE served 140 days in the preceding 365-day period, the agency could potentially redesignate the employee as an SGE if it concludes that the circumstances leading to the additional ten days were unique and unlikely to recur. However, the past year’s day count must be considered as part of their prospective good faith estimate of the number of days the SGE

¹⁵ See *supra* note 5.

¹⁶ 18 U.S.C. § 202(a); *Restrictions on a Fed. Appointee’s Continued Emp. by a Priv. L. Firm*, 7 Op. O.L.C. 123 (1983). Employees who serve for a fixed term that will not exceed 130 consecutive days are considered SGEs. 7 Op. OLC at 126. See also OGE Legal Advisory LA-17-09, at 2 (Aug. 14, 2017).

is expected to serve. For example, if an SGE served 250 days in the preceding 365-day period, it may be difficult for the agency, in good faith, to estimate that the employee will only work 130 days in the following 365 days while serving in the same role.

III. Day Counting for Purposes of the Criminal Conflict of Interest Laws and Standards of Conduct

As discussed above, past regular Government service will not be counted when making the prospective SGE determination. However, whether to count past service as both a regular Government employee and an SGE, or to count only days served as an SGE, will depend on the specific criminal conflict of interest statute¹⁷ or regulation at issue.¹⁸

A. Day Counting When Applying the Criminal Conflict of Interest Laws

The exceptions found in the representational bars of 18 U.S.C. §§ 203 and 205¹⁹ for Government employees require agencies to count past days of service as an SGE and past days of service as a regular Government employee at the same agency in order to determine the nature of the restrictions applicable to the employee.²⁰

By contrast, for the post-Government employment restrictions of 18 U.S.C. § 207(c), only days served as an SGE are relevant to determining the restrictions applicable to the employee.²¹

Example 7: Prior to beginning service as an SGE, a senior employee served as a regular Government employee at the same agency for the past five years until March 1, 2023. The employee begins work as an SGE on May 1, 2023, and completes 50 days of Government work as an SGE. The employee is subject to the additional restrictions of 18

¹⁷ 18 U.S.C. § 209 does not apply to SGEs, regardless of whether they served previously as a regular Government employee.

¹⁸ While past regular Government service is not relevant when determining the applicable financial disclosure rules for SGEs, OGE notes that SGEs will be required to file a public financial disclosure report if they are in a covered position and serve or are expected to serve for more than 60 days in a calendar year. *See* 5 U.S.C. § 13103(f), (h); 5 C.F.R. § 2634.204. All other SGEs are generally required to file a confidential financial disclosure report. *See* 5 C.F.R. § 2634.904(a)(2).

¹⁹ Under 18 U.S.C. § 203(a), employees are generally restricted from accepting or soliciting “any compensation for any representational services” in connection with a particular matter in which the United States is a party or has a direct and substantial interest. Similarly, 18 U.S.C. § 205(a) prohibits an officer or employee of the executive branch from acting as an agent or attorney for anyone (with or without compensation) before any department or agency in any particular matter in which the United States is a party or has a direct and substantial interest.

²⁰ SGEs who have worked in the same agency for “no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days” are only subject to the restrictions in paragraphs (a) and (b) of §§ 203 and 205 for particular matters involving specific parties they have themselves participated in personally and substantially as a Government employee. *See* 18 U.S.C. §§ 203(c), 205(c). However, if an SGE has served in excess of 60 days in an agency during the preceding 365-day period, regardless of whether that service was as a regular Government employee or SGE, they are further restricted from representing outside parties in any particular matter involving specific parties “pending in [that] department or agency of the Government in which [they are] serving.” 18 U.S.C. §§ 203(c)(2), 205(c).

²¹ 18 U.S.C. § 207(c)(2)(B); 5 C.F.R. § 2641.204(c).

U.S.C. § 203(c)(2) and 18 U.S.C. § 205(c)(2) because they served for more than 60 days in the immediately preceding period of 365 consecutive days.

Example 8: Same facts as Example 7. The one-year 18 U.S.C. § 207(c) cooling-off period the employee has by virtue of their past regular Government service will run until March 1, 2024 because the employee ended their service as a senior employee on March 1, 2023. This is true even though the employee was subsequently reemployed at the agency as a senior SGE. The employee ends their senior SGE service on May 1, 2024 with 50 days of senior SGE service. The employee will not be subject to additional 18 U.S.C. § 207(c) restrictions stemming from the senior SGE employment because the employee did not serve as an SGE for more than 60 days.

B. Day Counting when Applying the Standards of Conduct

Government employees, including SGEs, are subject to the Standards of Conduct.²² However, two sections of the Standards apply differently to SGEs who serve or are expected to serve more than 60 days. Specifically, restrictions on service as an expert witness and certain teaching, speaking, and writing restrictions depend on days of service. For service as an expert witness, days of service within “a period of 365 consecutive days”²³ are counted without regard to whether those days were served as a regular Government employee or as an SGE. On the other hand, for teaching, speaking and writing, only days served during the current appointment as an SGE will count towards days of service.²⁴

IV. Conclusion

Ethics officials must apply a clear and consistent methodology when counting days of service for SGEs.²⁵ Any travel day on which an SGE is paid by the Government for their service or conducts more than *de minimis* work is counted toward an SGE’s days of service. When making an SGE designation, agencies must make a prospective estimate of days the employee is likely to serve and should not include past regular Government service. Lastly, whether to count past service as both a regular Government employee and an SGE, or to count only days served as an SGE, will depend on application of the specific statute or regulation at issue.

Agency ethics officials that have additional questions about this Legal Advisory may contact their OGE Desk Officer.

²² Ethics rules that apply to SGEs begin on the first day of their appointment as an SGE. *See, e.g.*, OGE DAEOgram DO-00-003, at 2 (“SGEs are Government employees, for purposes of the conflict of interest laws.”).

²³ *See* 5 C.F.R. § 2635.805(b)(2).

²⁴ *See Id.* § 2635.807(a)(2)(i)(E)(4).

²⁵ When answering questions on this topic, ethics officials can also refer to published guidance in OGE DAEOgrams DO-00-003 (Feb. 15, 2000); (“Summary of Ethical Requirements Applicable to [SGEs]”), DO-07-002 (Jan. 19, 2007); (“Counting Days of Service for Special Government Employees”), DO-03-021 (Oct. 23, 2003); (“Financial Disclosure Reporting Requirements for Special Government Employees”), and DO-07-005 (Feb. 22, 2007) (“New OLC Opinion on SGE Day-Counting”).