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Route To:

Subject: Hiring Former Employees who Separated with a Voluntary Separation Incentive Payment (Buyout)

To: Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs and WO Staff

The Forest Service has been offering employees Voluntary Separation Incentive Payments (VSIP or buyout) during the past two years to assist the agency with managing the impact of our reorganization and centralization efforts. A few units have asked for guidance on the rules for securing the services of employees who separated with a VSIP. This letter provides that guidance. Please note that when an agency takes action to secure the services of a former employee, it is not the agency that is at risk, but it is the former employee who may be required to repay the VSIP.

Employees who separate with a buyout are required to repay the full amount of their buyout if the employee “accepts any employment for compensation with the Government of the United States within 5 years after the date on which the payment is based” (5 Code of Federal Regulations 576.202). Included in this restriction is the hiring of “buyout” employees in AD positions as “casual firefighters.” Additionally, the definition of employment encompasses “personal services contract (or other direct contract).” There are provisions for requesting a waiver of repayment through the Office of Personnel Management, but in the rare case where a waiver is granted, it is usually for temporary employment during “an emergency involving a direct threat to life or property.” A waiver of repayment cannot be granted for personal services or direct contracts.

Based on 5 CFR 576, the Forest Service is unable to directly contract with former “buyout” employees for personal services or other direct contracts without triggering the repayment requirement. Personal services contracts are discussed in the following paragraphs. “Other direct contract” refers to any contract (regardless of format; i.e., services, construction, architect/engineer, etc.) that is awarded to an individual rather than a company. The agency has discussed this restriction on contracting with the Office of Personnel Management (OPM), and they have confirmed that agencies may not directly contract with employees who received a VSIP without triggering the requirement to repay the VSIP. OPM emphasized that it is the responsibility of each agency to determine what is a personal services or direct contract under the VSIP repayment provisions in the regulations.

Defining a Personal Services Contract – A personal services contract is described in 48 CFR 37.101 as: “...a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees.” 48 CFR 37.104(a) and (c) further describe a personal services contract as one which is: “characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel.” An employer-employee relationship exists when: “contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee.”



The key question that must be asked in making a determination as to whether or not a contract is for personal services is: **“Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?”** [48 CFR 37.104(~)(2)] The following should be used as a guide, according to 48 CFR 37.104(d), in determining if a contract meets the definition of personal services:

1. Performance is on site or predominantly so.
2. Principal tools and equipment are furnished by the Government.
3. Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned functions or mission.
4. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
5. The need for the type of service provided can reasonably be expected to last beyond one year.
6. The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees to retain control of the function involved; or retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

NOTE: There is no requirement that a direct contractual agreement must exist between the former employee and the agency to constitute a “personal services contract.” The definition of a personal services contract in 48 CFR 37.101 and 37.104 states that “personal services contract means a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees” (emphasis added). Therefore, units should not assume that there must be a written contract between the employee and the agency in order to constitute a personal services contract.

It is critical to note the following: **“Each contract arrangement must be judged in the light of its own facts and circumstances...”** [48 CFR 37.104(~)(2)] Procurement offices are urged to seek further guidance, including advice from the Office of General Counsel, when considering whether a former Federal employee who has received a buyout is indeed engaged in an arrangement which constitutes a personal services contract or *may* constitute a personal services contract. This determination must be made prior to the contract being put into effect. In addition to these restrictions, please remember that post-employment contracting with Federal employees is guided by the **Ethics Reform Act of 1989**, and those guidelines also apply to employees who accepted a VSIP.

Please direct questions regarding this letter to Mary Saint Louis, WO-AQM, at (703)605-5309 or msaintlouis@fs.fed.us or Doug Bluhm, WO-HCM, at (703) 605-0832 or dbluhm@fs.fed.us.

/s/ *Hank Kashdan*
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cc: pdl wo ops hrm personnel officers