

SOCO ADVISORY

**Department of Defense
Office of General Counsel
Standards of Conduct Office
(SOCO)**

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"Contractor on Terminal Leave" Redux.

We received several inquiries and comments regarding the [last SOCO Advisory's](#) reminder that it is virtually impossible for military personnel on terminal leave to work as a contractor in the Federal workplace without improperly "representing" the contracting company in violation of 18 USC 205. Recent feedback confirmed our suspicion that the "contractor on terminal leave" scenario is the perfect ethics trap for the unwary. There are at least four reasons why people are surprised:

#1. Leaving Government and returning as a contractor doing the same job while on terminal leave used to be a common practice (and still may be in some places.) It is permissible as long as the employee on terminal leave is not interacting with Federal personnel. This, of course, is almost impossible to do if physically located in the Federal workplace.

#2 Generally, Federal personnel (including lawyers) are unaware of the prohibitions of 18 USC 205 and 203, that prohibit Federal personnel (by definition does not include enlisted personnel) from acting as an agent for someone else before the Government. An employee acting within the scope of his duties is an agent for his employer.

#3 Even personnel who know of 18 USC 205, tend to forget that it still applies to those on terminal leave.

#4 The old view that "merely performing a contract" is not a representation was shot down by OGE in their [opinion 99 x 19](#). OGE later advised that their logic in that opinion also applies to 18 USC 203 and 205. Hence, an Intelligence Analyst, preparing a report under an XCorp Government contract, represents XCorp to the Government when he submits his report. Regardless of whether the report is accurate, timely, useful, responsive, understandable, and comprehensive, it is the representation that is prohibited according to OGE.

Bottom line: It is almost impossible for personnel on terminal leave to be working for a contractor in the Federal workplace. If they can't work behind the scenes while on terminal leave, we suggest that they advance their retirement date and sell back their leave, or delay starting work until after they actually retire.

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