AMENDMENTS TO 18 U.S.C. § 207(c): NEW STANDARD FOR DETERMINING "SENIOR EMPLOYEE" STATUS

Section 1125 of "The National Defense Authorization Act for Fiscal Year 2004," Public Law 108-136, amends 18 U.S.C. § 207(c) to establish a new standard for determining the applicability of the one-year post-employment restriction applicable to former "senior employees." Effective January 11, 2004, § 207(c) will apply to individuals whose rate of basic pay equals or exceeds 86.5 percent of the rate for level II of the Executive Schedule (EL II). With the pay increase for 2004, 86.5 percent of the rate of basic pay for EL II will be $135,805 on January 11.

Section 1125 establishes a new pay-for-performance compensation system for the Senior Executive Service (SES). The law eliminates both the discrete rates of basic pay for the SES (ES-1 through ES-6) and locality pay for the SES. In their place, the law establishes a pay-for-performance system consisting of a single pay band. What SES members formerly received as a locality pay supplement to their pay will now be included as part of their basic pay. Because of this increase in rate of basic pay for the SES generally, OPM estimates that the vast majority of SES members will have a rate of basic pay that meets or exceeds the $135,805 level as of January 11. In other words, many SES members who are not covered by 18 U.S.C. § 207(c) now will be subject to that restriction as of January 11, 2004. A grandfather provision in the law provides that SES members (as well as non-SES employees whose rate of pay equals or exceeds ES-5) who were subject to § 207(c) on the day prior to enactment of the new law will continue to be considered senior employees for two years after the date of enactment. The President signed The National Defense Authorization Act for Fiscal Year 2004 on November 24, 2003.

For general information about the substance of the restrictions found in § 207(c), please see DAEOgram DO-00-006A, February 17, 2000, "Summary of Post-Employment Restrictions of 18 U.S.C.§ 207," available on the OGE web site at www.usoge.gov, under "DAEOGRAMS."

Treatment of Locality Pay for non-SES Positions

The question has arisen whether the recent amendments mean that certain positions in non-SES pay systems, which are still eligible for locality pay, will now meet the basic pay threshold for coverage under § 207(c). As noted above, section 1125 of the new law abolishes locality pay for the SES. We have concluded, after consultation with the Office of Personnel Management, that locality pay for non-SES positions should continue to be excluded from an employee's rate of basic pay for purposes of determining coverage by 18 U.S.C. § 207(c).

Section 1125 does not eliminate locality pay for positions in any non-SES type pay system, such as SL, ST, and AL. Furthermore, the new standard for determining senior employee status, in 18 U.S.C. § 207(c)(2)(A)(ii), as amended, no longer contains the express exclusion for locality pay that existed under the prior version of that section. (The exclusion only remains in the 2-year "grandfather"clause that refers to the prior version of the law).

The law that established locality pay in the Federal Government provides that locality pay

is deemed to be part of basic pay only for specifically enumerated purposes (unrelated to 18 U.S.C. § 207), and "for such other purposes as may be expressly provided by law or as the Office of Personnel Management may by regulation prescribe." 5 U.S.C. § 5304(c)(2)(A)(emphasis added). Nothing in the new amendments or any other law or OPM regulation expressly provides that locality pay is considered part of basic pay for purposes of section 207(c). To the extent that the new amendment omits the former express exclusion of locality pay, we note that section 1125 is focused primarily, as its title suggests, on "Senior Executive Service and Performance," and it is not surprising that Congress would omit the former reference to a type of pay that is not even applicable to the SES now. Finally, there is no suggestion in the language or legislative history of section 1125 that Congress intended what would be a dramatic change to the longstanding treatment of locality pay for purposes of section 207(c)(2)(A)(ii).

In sum, for purposes of section 207(c)(2)(A)(ii), locality pay should not be counted as part of basic pay for any non-SES position that is still eligible for locality pay.

Waiver under § 207(c)(2)(C)

A number of agencies have asked whether OGE is going to issue a waiver, pursuant to 18 U.S.C. § 207(c)(2)(C), temporarily exempting employees who otherwise will become subject to the one-year cooling off period in section 207(c) on January 11, 2004. As discussed above, many SES members who presently are not covered by section 207(c) will become subject to the restriction in that section as a result of certain changes to the SES pay system. After considering this matter, OGE has decided not to grant a temporary waiver. Accordingly, agency ethics officials should take steps to notify affected employees that they will become subject to the one year post-employment restriction beginning on January 11, 2004. In the meantime, OGE will continue to work with the Office of Personnel Management to evaluate the post-employment effects of the new SES pay system, and to seek legislative relief, as appropriate.