

Guidance Regarding the Without Compensation (WOC) and State Treasury Exceptions to 18 U.S.C. § 209 – Conflicts of Interest

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Goals

- Describe requirements of 18 U.S.C. § 209 for Federal employees.
- Discuss impact of Department of Justice (DOJ) guidance to the Department of Veterans Affairs (VA) of 18 U.S.C. § 209 on VA research personnel.
- Define circumstances when the DOJ guidance on 18 U.S.C. § 209 applies to VA employees receiving salary compensation from a non-Federal entity.
- Describe the two (2) exceptions to 18 U.S.C. § 209 that can be used when VA employees are receiving salary compensation from a non-Federal entity.
- Describe potential remedies to mitigate impact on VA research employees affected by the DOJ guidance on 18 U.S.C. § 209.

What is 18 U.S.C. § 209?

- 18 U.S.C. § 209 is a section of the criminal code that covers conflicts of interest.
- 18 U.S.C. § 209 prohibits a Federal employee from receiving any salary, or any contribution to or supplementation of salary, or anything of value from a non-Federal entity as compensation for services he or she is expected to perform as a Government employee.
- This law applies to all Federal employees and carries criminal penalties for noncompliance.

Summary of Issue

- DOJ has provided guidance to VA OGC Ethics Specialty Team (EST) clarifying interpretation of 18 U.S.C. § 209 when VA employees are receiving compensation from a non-Federal entity for VA Research.
- Multiple VA studies are conducted by VA employees who have compensated appointments and who also conduct VA Research outside their VA tour of duty at the VA Facility on WOC appointments.
- VA research is defined in ORD policy as research that is conducted by VA investigators (serving on VA compensated, WOC, or IPA appointments) while on VA time (acting in their VA capacity) or on VA property.
Reference: VHA Directive 1200.01(1): Research and Development Committee, Paragraph 5.f.
- Thus, a **VA compensated employee** who conducts VA Research outside his or her VA tour of duty and holds a separate WOC appointment cannot be compensated by a non-Federal entity to work on VA research unless the State Treasury exception applies even if they hold a separate WOC appointment.

Two Exceptions to 18 U.S.C. § 209

**WOC
Exception**

**State
Treasury
Exception**

WOC Exception

The WOC exception is part of 18 U.S.C. § 209.

Permits a VA employee to be paid for their Federal work by a non-Federal source when their **only** VA appointment is a WOC appointment.

If your only VA appointment is a WOC appointment, you may be paid for your Federal work by a non-Federal source.

State Treasury Exception

- The State Treasury exception is part of 18 U.S.C. § 209.
- Permits a VA employee to be paid for their Federal work **if** the payment comes from the treasury of a state, county, or municipality.
- Under the State Treasury exception, an employee who holds a compensated VA appointment may accept salary payment directly from a state university to perform VA Research under a WOC appointment.
- Requires the VA OGC EST to make a determination that the state university seeking to make the payment, or the university-associated entity seeking to make the payment, is authorized to do so.



Potential Solutions: Proposed Legislation

Legislative relief (e.g., one section of Draft VIPER Act)

- Compensation from a nonprofit corporation established under subchapter IV of this chapter, or a university affiliated with the Department, may be paid, without regard to section 209 of title 18, to an employee described in paragraph (2), for research conducted pursuant to section 7303 of this title if—

“(A) the research has been approved in accordance with procedures prescribed by the Under Secretary for Health;

“(B) the employee conducts research under the supervision of personnel of the Department; and

“(C) the Secretary agreed to the terms of such compensation in writing.

Application Cases: Case #1

VA compensated
5/8ths Ph.D Scientist
with Dual
Appointment at XYZ
University (Private)



Ph.D. Scientist
receives Grant
administered by XYZ
University and
provides 2/8th salary
support



Work is proposed to
be done at a VA
Research Lab



**This scenario triggers
18 U.S.C. § 209.**

- Work is done in VA-owned space
- PI already has a compensated VA appointment and cannot be paid for VA Research outside the VA compensated tour of duty because no exception applies.

Case #1 Possible Solutions for Remediation

Increase effort to 7/8th and have XYZ University reimburse VA.

XYZ University will have to ensure with sponsor if this is allowable

Investigator cost share effort on award/grant and receive no salary from XYZ for the project

Move performance site to XYZ University.

Application Cases: Case #2

- VA compensated 5/8ths Ph.D. Scientist with Dual Appointment at ABC University (State School)
- Receives Grant administered by ABC University and provides 2/8th salary support
- Work is proposed to be done in a VA Lab
- This scenario would meet the State Treasury Exception
 - If ABC University has been vetted by OGC Ethics
 - R&D Committee approves the project as VA research
 - A WOC appointment is granted for work done outside VA Tour of Duty

Application Cases: Case #3

- Full Time VA NPC Employee who holds VA WOC appointment
- Receive grant administered by VA NPC
- Work is performed at VA
- The WOC exception applies to this scenario.

Application Cases: Case #4

- Full-time or part-time VA Employee receives grant administered by VA NPC
- Grant has salary component for VA employee
- VA NPC can:
 - Reimburse VA through an MOU for time worked on grant
 - Full Time up to 40 hours effort
 - In the case of part-time, increase VA compensated effort
 - Work with the grantor to ensure reimbursement to VA for salary component is acceptable

What are the Next Steps for Local VA Research Leadership?

Determine if the affiliates who administer awards are eligible for the State Treasury Exception

- Submit request to Christopher.Britt@va.gov

If the administering entity is a private affiliate or VA NPC

- Develop a process to review all projects administered by VA NPC or Affiliate
- Begin the systematic review of projects
- Determine if any salary is paid to the PI and/or research team
 - If yes, determine if PI or research team members also hold a VA compensated appointment
 - If yes, you will have to review options to increase effort and reimburse VA.

Critical Points to Remember

- You do not have to give up grants. Rather you need to work with your local VA Research Office to find a solution.
- As a VA employee you can still receive an NIH or other Federally funded grant if the WOC or State Treasury Exception apply.
- Alternatively, if there is reimbursement to VA for effort from the award/grant rather than direct payment to the VA employee, then there is no 209 issue.
- Review the FAQ at [FAQs for Payments to VA Researchers from Non-Federal Sources \(sharepoint.com\)](#).

Critical Points to Remember (continued)

- If you would like to further discuss a situation at your facility, please contact ORD (Karen Jeans AND Tony Laracuente) to further discuss.
- If there are questions regarding 18 U.S.C. § 209, please contact the Ethics Specialty Team (Chris Britt).

References

- [18 U.S.C. 209: Salary of Government officials and employees payable only by United States](#)
- VHA Directive 1200.01(1): Research and Development Committee (January 24, 2019) at [VHA Publications](#)

Availability of Recording

- A recording of this session and the associated handouts will be available on ORPP&E's Education and Training website approximately one-week post-webinar
- An archive of all ORPP&E webinars can be found here: <https://www.research.va.gov/programs/orppe/education/webinars/archives.cfm>.



Questions?