

**OFF-DUTY EMPLOYMENT
BY
DEPARTMENT OF DEFENSE HEALTH CARE PROVIDERS**

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1. Introduction.

a. Assistant Secretary of Defense (Health Affairs) Policy Memorandum 96-050² specifically addresses the constraints and limitations placed on the off-duty employment of DOD health care providers.³ This policy memorandum has been implemented by U.S. Army MEDCOM Regulation 600-3⁴. It cannot be further supplemented within MEDCOM, unless specifically approved by HQ, MEDCOM, ATTN: MCPE-MA.

b. In addition to being responsible for knowing and abiding by the provisions of the DOD Policy memorandum, any implementing service regulations,⁵ and any local supplementation, Department of the Army (DA) health care providers must adhere to the

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² Assistant Secretary of Defense (Health Affairs) memorandum 96-050, subject: Policy for Off-Duty Employment By DoD Health Care Practitioners (hereinafter cited as "ASD(HA) memo").

³ As used in this article, the phrases "health care provider" and "health care professional" (hereinafter used interchangeably) include all AMEDD military personnel (officer, warrant officer, non-commissioned officer, and enlisted) assigned or attached to MEDCOM or to a subordinate command, and all full-time (40 hours per week) privileged civilian personnel of MEDCOM or a subordinate command; this is the population to which MEDCOM Regulation 600-3 is directed. The population addressed by the phrase "DOD health care providers," as used in the DOD(HA) memo is more restrictive, in that it applies only to personnel required to possess a professional license or other authorization under DOD Directive 6025.13. The off-duty employment provisions of AR 40-1 (i.e., para 1-8) are applicable only to commissioned and warrant officers.

⁴ USAMEDCOM Regulation 600-3, Off-Duty Employment, 8 July 1998 (hereinafter cited as MEDCOM Reg 600-3). This regulation is a revision of U.S. Army Health Services Command Regulation 600-3, dated 28 May 1992. This regulation is not only broader in terms of covered personnel but also in terms of activities regulated. The ASD(HA) memo only applies to off-duty services "for which compensation is received." Similarly, Army regulation 40-1 requires command approval only for "remunerative" professional civilian employment. MEDCOM Regulation 600-3, however, requires command approval for all off-duty commitments, to include "uncompensated volunteer activities involving the delivery of health care or related services."

⁵ E.g., AR 40-1, Medical Services-Composition, Mission, and Function of the Army Medical Department (1July 1983); Air Force Instruction 44-102, Community Health Management (1July 1998).

standards of conduct⁶ and pertinent parts of other regulations, such as AR 27-40.⁷

2. General Rules.

a. Both conflicts of interest and the appearance of conflicts of interest are to be avoided.⁸

b. Personnel may teach and write for publication.⁹ There are, however, limitations on the use of governmental information¹⁰ and outside speaking, teaching, and writing which relate to official duties.¹¹

c. Testifying as an expert witness in private litigation is generally prohibited unless the litigation involves the treatment of one's patient, laboratory studies one has performed, or other actions taken in the regular course of one's duties. Additionally, personnel must limit their testimony to factual matters, and must not provide expert or opinion testimony, responses to hypothetical questions, or prognosis.¹²

d. Health care provider officer trainees engaged in full time graduate training programs may not engage in off-duty employment.¹³

e. Health care personnel are prohibited from receiving, directly or indirectly, any additional compensation for health care services provided to any DOD authorized beneficiary.¹⁴ This

⁶ See DOD Directive 5500.7-R, Chapters 2, 3, 5, 8 and 9.

⁷ AR 27-40, the subject of which is "Litigation", clearly sets forth the limitations on expert testimony in private litigation by a member of the Army Medical Department.

⁸ See DOD Directive 5500.7-R, Chapters 2, 3, 5, 8 and 9.

⁹ See DOD Directive 5500.7-R, Chapter 2, Section 2635.807.

¹⁰ See DOD Directive 5500.7-R, Chapter 2, Section 2635.703.

¹¹ Ethics Reform Act of 1989, Public Law 101-194; DOD Directive 5500.7-R, Chapter 2, United States v. National Treasury Employees Union, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995); Information Paper, Subject: Outside Speaking, Teaching, and Writing, Dated 13 August 1998, DAJA-SC.

¹² AR 27-40, Para 7-10.

¹³ ASD(HA) memorandum, para 2.b.4; MEDCOM Reg 600-3, para 6.g.(4). Although neither source includes the words "full time," in practice, they are understood. Enrollment in an evening graduate degree program where one takes one or two courses a semester would not necessarily preclude any off-duty employment. Accepting that "full time enrollment or participation in a graduate training program" is the meaning intended, this would include all individuals who are interns, residents, and fellows. It would also include all individuals whose primary military duty is the completion of a graduate academic program, e.g., officers enrolled in the U.S. Army Baylor University Graduate Program in Health Care Administration, and the U.S. Army Baylor University Graduate Program in Physical Therapy.

¹⁴ ASD (HA) memo, para. 2.b.4; MEDCOM Regulation 600-3, para 6j, requires that a health care provider neither solicit nor accept compensation, directly or

prohibition does not apply to dental health care providers who may provide off-duty care to CONUS enrollees of the TRICARE Family Member Dental Plan.¹⁵

f. Health care personnel are prohibited from engaging in "private" (i.e., solo) off-duty practice. Further, such personnel may not assume primary responsibility for the care of any patient on a continuing basis at the site of off-duty employment.¹⁶

g. Health care personnel must obtain written permission from their commanders before engaging in any off-duty employment.¹⁷

h. Health care personnel, with limited exceptions, are prohibited from using their titles or positions in connection with any commercial enterprise or in endorsement of any commercial product.¹⁸ This does not, however, preclude identification of materials published in accordance with DOD procedures.

3. Responsibilities of Hospital Judge Advocates (JAs).

a. Compliance with the restrictions and limitations of off-duty employment is, in large part, the responsibility of the individual health care provider.¹⁹ Commanders must, however, require reports, maintain records, and take reasonable steps to ensure the compliance of their subordinates.²⁰

b. Depending upon the command structure, a hospital JA's responsibilities may include:

- (1) familiarizing oneself with pertinent regulations, policies, and forms;
- (2) advising the commander as to what his or her supervisory obligations are;

indirectly, for care provided to a DOD beneficiary. Non-DOD Medicare and Medicaid patients are not included in the prohibition; health care providers may be compensated by Medicare and/or Medicaid for health care to non-DOD entitled beneficiaries. Consider a dependent of a U.S. Government civilian employee: because the dependent is covered by an insurance policy made available ("directly or indirectly") as part of government employment, neither the patient nor the carrier can be billed if care is provided by an off-duty health care provider.

¹⁵ ASD(HA) Memorandum, subject: Policy Memorandum: Off-Duty Employment by DOD Dental Care Providers, 10 December 1996.

¹⁶ MEDCOM Reg 600-3, para. 6.h.

¹⁷ ASD(HA) memo, para. 2.b.1; MEDCOM Reg 600-3, para 6c.

¹⁸ DOD 5500.7-R, paras. 3-209, 3-300.

¹⁹ Id. at para 2.b.3

²⁰ Id. at para 2.a.4

(3) reviewing and advising on potentially problematic off-duty employment requests;

(4) coordinating with MEDCOM (and, as needed, with the Office of The Judge Advocate General, Litigation Division) regarding requests for health care personnel to testify in private litigation;²¹

(5) instruction in the area of off-duty employment issues; and,

(6) reviewing and advising personnel with regard to the filing of forms SF 278 and OGE 450.²²

4. Problem Areas for Hospital JAs.

a. Although you may think that everyone certainly knows the rules by now, you will find that they, in fact, do not (and when you tell them what they are, you are sure to encounter skepticism). Accordingly, I recommend that you keep all directive and regulatory materials in one notebook and regularly update it. Additionally, to help you combat the "it can't possibly be that way" syndrome, sections 5 and 6 infra of this chapter are written in a directive style, so that you can easily use them in briefing the health care personnel at your own installation or activity.

b. Regulatory guidance provides that lecturing, teaching and writing²³ are to be encouraged. As noted above,²⁴ however, that guidance does not constitute blanket permission to engage in these activities.

c. AR 27-40, para 7-10, covers the subject of expert testimony in private, civilian litigation, but does not address private consultation. You may find that health care providers at your installation are serving, or desire to serve, as consultants or expert medical reviewers for law firms or insurance companies.²⁵ This is a lucrative sideline, but one with many pitfalls. First, you must treat this as employment, i.e., an activity requiring the prior permission of the individual's commander. Secondly, you will most certainly have to "sell" the commander on the idea that approving such requests is not in his or her best interests or that of the AMEDD. Brief him on the

²¹ Note 6, supra.

²² See DOD Directive 5500.7-R, chapter 7.

²³ Note 8, supra.

²⁴ Para 2.b., supra.

²⁵ Individuals who are asked to consult or review cases are usually highly regarded senior clinicians or academicians.

serious problems that may arise if approval is granted. Point out that there is great potential for conflicts of interest, since, through no fault of the reviewer, he or she may be sent a case involving allegations of military medical malpractice. Further, the reviewer may well find himself subpoenaed as an expert witness in direct contravention of the prohibitions of AR 27-40.²⁶

5. Responsibilities of Active Duty AMEDD Personnel and of Full Time, Privileged DA Civilian Health Care Providers.²⁷

a. Ensure that military/governmental duties take precedence over contemplated or actual off-duty employment.²⁸

b. Ensure that there will be no conflict of interest, or appearance of conflict of interest, between off-duty employment and military/governmental duties.²⁹

c. Ensure that contemplated off-duty employment will not interfere with the employment of local civilians.³⁰

d. Recognize that testifying for remuneration, e.g., serving as a witness for a party other than the Government as to treatment rendered while in an authorized off-duty employment status constitutes off-duty employment.³¹

e. Recognize that reviewing medical records for remuneration constitutes off-duty employment.³²

f. Be aware that they are not protected by the Government (i.e., by the Federal Tort Claims Act³³ or the Gonzales Act³⁴) from individual liability while in an off-duty employment status. Instead, the health care provider must obtain medical malpractice insurance, as well as comply with all local licensing requirements of the jurisdiction, in order to engage in off-duty employment.

²⁶ Note 6, supra.

²⁷ See ASD(HA) memo, AR 40-1, and MEDCOM Regulation 600-3.

²⁸ For example, a health care provider may not assume primary responsibility for the continuing care of any private patient; doing so might well cause that provider to be faced with a choice between military duties and the care of such a patient.

²⁹ Employment by a government contractor may constitute a conflict of interest or give the appearance of a conflict of interest. See DOD Directive 5500.7-R.

³⁰ Documentation of this fact is required, e.g., a letter from the president of the local medical society so stating, or a letter from the administrator of the private facility where off-duty employment is sought. See ASD(HA) memo, para 2.b.1.c; MEDCOM Reg 600-3, para 6.r.

³¹ Note 6, supra.

³² Note 6, supra.

³³ 28 U.S.C. 1346 and 2671 et seq.

³⁴ 10 U.S.C. 1089.

g. Forward documentation or certification of malpractice insurance and licensure compliance to the commander as part of the request to engage in off-duty employment.

h. Receive the commander's permission to accept an offer of off-duty employment before beginning such employment.³⁵

i. Comply with specific limitations, including, at a minimum, the following:³⁶

(1) Work only "reasonable" hours. Requests to work more than 16 hours a week generally will not be granted;

(2) There must be at least a 6-hour period of rest between the end of the health care provider's off-duty employment and the start of his or her military/governmental duties;

(3) Work at a site no more than two hours by land travel (taking into account traffic conditions) from one's regular place of military/governmental employment, unless in an official leave status;

(4) Do not refer patients from an MTF or DTF to one's place of off-duty employment;³⁷

(5) Do not use military/governmental supplies, equipment, or facilities in the course of off-duty employment;³⁸

(6) Do not solicit or accept compensation, directly or indirectly, for any care rendered to a federal health care beneficiary in the course of off-duty employment; and,

³⁵ If one enters into a contract that obligates him or her to perform off-duty employment before receiving permission to engage in such employment, one could potentially be held liable for damages for breach of contract if the request is ultimately not approved.

³⁶ MEDCOM Reg 600-3, para 6.

³⁷ AR 40-1, para 1.7.b. An exception to this would be if the health service is to be provided without cost to the patient, the Government, or any other person or firm.

³⁸ See generally, note 5 supra. In some places, especially overseas, colleges or universities offer credit courses at night on military or governmental installations. Assuming that you are not in a status where off-duty employment is prohibited and assuming that the proper permission to engage in off-duty employment has been granted, you may receive reimbursement from such an institution for teaching even though the class is located in a federal facility.

(7) Do not engage in off-duty employment for any employer who does not furnish a written statement detailing that he or she:

(a) understands the limitations and constraints of a military/Government employee's off-duty employment;

(b) will not seek reimbursement from federal health care programs for any health care service provided by a military/Government health care provider to a DOD federal health care beneficiary; and,

(c) will not seek direct payment from any DOD patient/federal health care beneficiary for health care services provided by a military/Government health care provider to that patient beneficiary.

j. Submit a report by the 10th of each month providing the number of hours worked in the preceding month.

6. Responsibilities of Commanders.

a. As previously noted, compliance with off-duty employment restrictions is largely the responsibility of the individual health care provider, but commanders must mandate reports, maintain records, and make reasonable efforts to ensure the compliance of their subordinates.³⁹

b. Specifically, commanders shall:⁴⁰

(1) require each military health care provider and each full time, credentialed DA civilian health care provider to request and receive permission to engage in off-duty employment before doing so;⁴¹

(2) require that each health care provider seeking permission to engage in off-duty employment certify his or her understanding of all applicable DOD off-duty employment policies and restrictions;

(3) require that each request be in the specified format;⁴²

(4) require each health care provider (both military and civilian, as noted above) who has been granted permission to

³⁹ ASD(HA) memo, para 2.a.

⁴⁰ Citations for the following subparagraphs are given to MEDCOM Regulation 600-3 only, although most could also be cited to AR 40-1.

⁴¹ MEDCOM Regulation 600-3, para 6c.

⁴² Id. At 6e.

engage in off-duty employment to advise the commander, before the fact, of any change in circumstances with regard to that employment;⁴³

(5) require yearly verification of current off-duty employment status from all covered military and civilian health care providers;⁴⁴

(6) ensure the necessary review of all requests;⁴⁵ and,

(7) maintain appropriate files regarding off-duty employment reports, requests, reviews,⁴⁶ approvals, denials, and changes.

7. Conclusion.

a. Off-duty employment is a subject which generally elicits a strong emotional response because it affects not only a health care provider's personal finances but also his or her professional standing as well. More significantly from a command perspective, such employment can affect military readiness if it is abused.

b. All health care providers should be familiar with current policies, and should also be aware that these policies do change. The responsibility rests with the individual provider to keep abreast of such changes and to comply with them.

⁴³ Id. At 6d.

⁴⁴ Id. At 6d.

⁴⁵ This would appear to be implicit in the foregoing requirement but is, nonetheless, set forth in MEDCOM re 600-3, para 7.

⁴⁶ See MEDCOM Regulation 600-3, para 6.g.3, which requires the monthly submission and review of a statement indicating the number of hours actually worked during the preceding month.

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REFERENCES:

1. Federal Statutes/Laws:

- a. Ethics Reform Act of 1989, Public Law 101-194
- b. 28 U.S.C. Section 1346 and 2671 et seq.
- c. 10 U.S.C. Section 973
- c. 10 U.S.C. Section 1089
- d. 42 U.S.C. Section 2651
- e. 32 C.F.R. Sections 516.40-516.56

2. DOD Publications:

- a. DOD Directive 5500.7-R
- b. DOD Directive 5405.2, Dated 23 July 1985, Subject: Release of Official Information in Litigation and Testimony by DOD Personnel as Witnesses.
- c. ASD(HA) Policy Memorandum 96-050
- d. ASD(HA) Policy Memorandum 97-019

3. Army Regulations/Circulars/Letters/Pamphlets:

- a. AR 27-40. Litigation.
- b. AR 40-1. Composition, Mission, and Functions of the Army Medical Department.
- c. AR 40-66. Medical Record Administration.
- d. AR 40-68. Quality Assurance Program.
- e. USAMEDCOM Regulation 600-3. Off-Duty Employment.

4. Court Decisions:

United States v. National Treasury Employees Union, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

