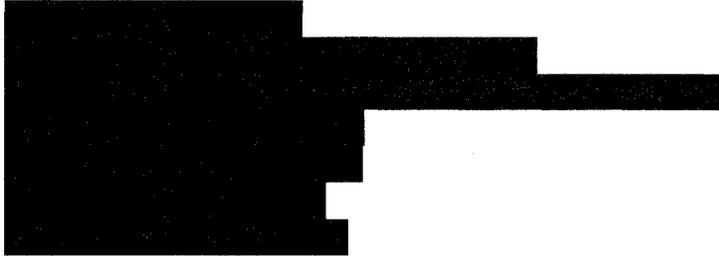




U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505  
202-254-3600

August 8, 2013



VIA E-MAIL: [REDACTED]

Re: OSC File No. [REDACTED]

Dear [REDACTED]:

This letter is in response to your request for an advisory opinion concerning the Hatch Act, 5 U.S.C. §§ 7321-7326. Specifically, you asked whether an individual who enters into a contract for personal services with an executive branch agency<sup>1</sup> is covered by the provisions of the Hatch Act. As explained below, we have concluded that a personal services contractor (PSC) may be covered by the provisions of the Hatch Act, depending on the law under which their contract is authorized.

The Hatch Act regulations indicate that independent contractors are not covered by the Act.<sup>2</sup> However, the regulations do not provide any additional guidance concerning contractors or define that term for purposes of the Hatch Act, much less address PSCs specifically. Nevertheless, we understand that PSCs maintain an employer-employee relationship with the Government and are therefore distinct from independent contractors.<sup>3</sup> Accordingly, OSC must look to the Hatch Act's definition of "employee" to determine if PSCs fit within that definition.

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<sup>1</sup> While "[t]he Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws," federal agencies may obtain personal services by contract where specifically authorized by statute (e.g., 5 U.S.C. § 3109) to do so. See 48 C.F.R. § 37.104(a)-(b).

<sup>2</sup> See 5 C.F.R. § 734.205, ex. 5.

<sup>3</sup> Compare 48 C.F.R. § 37.104(a), (c)(1) (stating that a contract for personal services is characterized by the employer-employee relationship it creates between the Government and the individual as caused by the relatively continuous technical direction, supervision, and control of the agency over the individual) and 48 C.F.R. § 37.101 (defining "nonpersonal services contract" as "a contract under which the personnel rendering the services are not subject . . . to the supervision and control usually prevailing in relationship between the Government and its employees") with Black's Law Dictionary (9th ed. 2009), available at Westlaw BLACKS (defining independent contractor as "[o]ne who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it").

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The Hatch Act defines “employee” at 5 U.S.C. § 7322(1) as:

any individual, other than the President and the Vice President, employed or holding office in—

- (A) an Executive agency other than the Government Accountability Office; or
- (B) a position within the competitive service which is not in an Executive agency;

but does not include a member of the uniformed services or an individual employed or holding office in the government of the District of Columbia[.]

OSC interprets the Act’s definition of “employee” under the common law because the plain language of the statute indicates that the common law definition should apply and because the Act’s definition modifies the general definition of “employee” for purposes of Title 5 and therefore controls.<sup>4</sup>

In determining whether an individual is an employee under the common law, one must consider the hiring party’s right to control the manner and means by which the goal is accomplished.<sup>5</sup> More specifically, “[t]he critical determination in distinguishing a federal employee from an independent contractor is the power of the federal government ‘to control the detailed physical performance of the contractor.’”<sup>6</sup> “[T]he key inquiry under this control test is whether the Government supervises the day-to-day operations of the individual.”<sup>7</sup>

Federal Acquisition Regulation (FAR) 37.104 states that the key characteristic of a contract for personal services is that “the Government exercise[s] relatively continuous supervision and control over the [individual] performing the contract.”<sup>8</sup> Moreover, the FAR sets

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<sup>4</sup> See Fathauer v. United States, 566 F.3d 1352, 1355-56 (Fed. Cir. 2009) (construing an act’s definition of “employee” under the common law where the act, codified in Title 5, defines “employee” as “an employee in or under an Executive agency”); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444-45 (2003) (determining that an act’s definition of “employee” as “an individual employed by an employer” should be construed under the common law test); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992) (adopting the common law test for determining who qualifies as an “employee” where the statutory definition is “any individual employed by an employer”); 5 U.S.C. § 2105(a) (providing the definition of employee “for purposes of [Title 5], . . . except . . . when specifically modified”); Fathauer, 566 F.3d at 1355-56; Horner v. Schuck, 843 F.3d 1368, 1371 (Fed. Cir. 1988) (looking exclusively to the definition of “employee” at 5 U.S.C. § 7511 because it is “a specific exception” to § 2105(a) and so modifies it); Int’l Broad. Bureau, Broad. Bd. of Govs., Washington, D.C., 63 FLRA 42, 44 (2008) (stating that “there is Authority precedent to support the . . . contention that 5 U.S.C. § 7103(a)(2)(A) alone should be used to determine whether the [contractors] are employees under the Statute”) (citing Long Beach VA Med. Ctr., Long Beach, Cal., 7 FLRA 434, 441 (1981); Fort Knox Dependent Schs., 5 FLRA 33, 37 (1981)).

<sup>5</sup> See Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448 (2003); accord Fathauer, 566 F.3d at 1357 (“Thus, whether an individual is an ‘employee’ under the Supreme Court’s approach depends . . . on the level of control exercised by the hiring party.”).

<sup>6</sup> Lilly v. Fieldstone, 876 F.2d 857, 858 (10th Cir. 1989) (quoting Logue v. United States, 412 U.S. 521, 528 (1978)).

<sup>7</sup> Lilly, 876 F.2d at 858 (quoting Lurch v. United States, 719 F.2d 333, 337 (10th Cir. 1983)).

<sup>8</sup> 48 C.F.R. § 37.104(c)(2).

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forth a number of factors to use as a guide in distinguishing a PSC from an independent contractor, nearly all of which are also found in the common law test to determine whether an individual is an employee or an independent contractor.<sup>9</sup> Therefore, an individual who enters into a contract for personal services with an executive agency is employed by that agency under the common law. As the common law definition of “employee” controls for purposes of the Hatch Act, PSCs are subject to the Act unless otherwise precluded by law.

For instance, some statutes authorizing an agency to contract with individuals for personal services also provide that “such individuals shall not be regarded as employees of the United States Government for the purpose of any law administered by the Civil Service Commission” or the Office of Personnel Management (OPM).<sup>10</sup> As OPM is one of the successor agencies to the Civil Service Commission,<sup>11</sup> and OPM, in part, administers the Hatch Act,<sup>12</sup> PSCs hired under an authority containing similar language are not subject to the Hatch Act. However, not all authorizing statutes contain such language.<sup>13</sup> Therefore, whether a PSC is subject to the Hatch Act depends upon whether the law under which the contract is authorized specifically excludes the individual from being considered a federal employee.

If you have any questions concerning this matter, please contact me at (202) 254-3678 or [tmason-gale@osc.gov](mailto:tmason-gale@osc.gov).

Sincerely

A black rectangular redaction box covering the signature of the sender.

Treyer Mason-Gale  
Attorney, Hatch Act Unit

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<sup>9</sup> Compare Clackamas, 538 U.S. at 449-50, with 48 C.F.R. § 37.104(d).

<sup>10</sup> See, e.g., 22 U.S.C. § 2396(a)(3) (authorizing the U.S. Agency for International Development to contract with individuals for personal services abroad).

<sup>11</sup> See generally Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111.

<sup>12</sup> See Authority for Issuing Hatch Act Regulations, 18 U.S. Op. Off. Legal Counsel 1 (February 2, 1994).

<sup>13</sup> See, e.g., 22 U.S.C. § 2199(d) (authorizing the Overseas Private Investment Corporation, an agency of the U.S. Department of State, to contract for personal services domestically and abroad).