



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

Thursday, September 24, 2009

MEMORANDUM FOR: Heads Of Executive Departments And Agencies

FROM: John Berry, Director

Subject: Guidance on Implementing Executive Order 13488, "Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust"

This memorandum provides guidance for agencies to consider when complying with Executive Order 13488 (January 16, 2009). The Order mandates reciprocal recognition by Federal agencies of a prior favorable determination of fitness (based on character and conduct) or suitability when certain conditions are met and authorizes the U.S. Office of Personnel Management (OPM) to issue guidance on implementing the Order.

This guidance memorandum does not cover the portion of the Order mandating reinvestigations of civilian employees in public trust positions. Those reinvestigation requirements will be addressed in 5 CFR part 731. Additionally, this guidance does not cover security clearance reciprocity, which requires a separate and distinct determination.

Reciprocity

The reciprocal recognition of suitability or fitness determinations is intended to simplify and streamline investigative and adjudicative processes where prior determinations are based on equivalent investigations and adjudicative criteria. Reciprocity limits the need to conduct a new fitness determination when an individual moves, without a break in employment, from a position in the Federal government to an excepted service or contractor position, or from a contractor position to an excepted service position or another contractor employee position.

Coverage

The Order is applicable to individuals who have been granted a prior favorable fitness or suitability determination who are later appointed to an excepted service position (other than an excepted service position subject to suitability requirements), or who are hired to perform work as a contractor employee for a Federal agency.

The reciprocity requirements of the Order apply to individuals who are appointed or hired on or after April 16, 2009, without a break in Federal service and/or contractor employment.

Whether a position is covered by the Order is governed by the definitions of “excepted service,” “contractor employee,” and “fitness determination.” This guidance will use the following definitions:

- (1) Excepted service - those positions: (a) not in the competitive service, (b) not in the Career Senior Executive Service, and (c) not in the intelligence community unless covered by OPM appointing authorities.
- (2) Contractor employee - an individual who performs work for or on behalf of an agency under contract (including a subcontract or a personal services contract) and who, in order to perform the work specified under the contract, will require access to space, information, information technology systems, staff or assets of the Federal government.
- (3) Fitness determination - a decision by an agency that an individual has or does not have the required level of character and conduct necessary to perform work for or on behalf of a Federal agency as an employee in the excepted service (other than in an excepted service position subject to suitability, defined below) or as a contractor employee.
- (4) Newly appointed or hired - an individual who is appointed or hired into a position that is subject to a new fitness determination.
- (5) Suitability - has the meaning and coverage provided in 5 CFR part 731.

While the Order does not apply to the majority of positions within the intelligence community, it does apply to those positions in the intelligence community subject to OPM appointing authorities. Examples of excepted service positions which are subject to OPM appointing authorities include those subject to the government-wide appointing authorities described at 5 CFR part 213; certain senior-level positions under 5 CFR part 319; and experts and consultants under 5 CFR part 304. In addition, OPM also excepts agency-specific positions from the competitive service and places them under Schedule A or Schedule B.

Positions covered by suitability procedures in 5 CFR part 731 (positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments to the Senior Executive Service) are not subject to the Order's reciprocity requirements. Refer to 5 CFR parts 731.104 and 731.105 for provisions related to suitability reciprocity for such positions.

There is no requirement that the prior favorable fitness or suitability determination must have been made within a specific time period. As noted in the Requirements section below, however, there must be no break in employment.

Under the Order, reciprocity would not apply to fitness determinations made by private companies (contractors) on their own employees (contractor employees).

Requirements

Agencies making fitness determinations shall grant reciprocal recognition to a prior favorable fitness or suitability determination when:

- (1) the gaining agency uses criteria for making fitness determinations equivalent to suitability standards established by OPM;
- (2) the prior favorable fitness or suitability determination was based on criteria equivalent to suitability standards established by the OPM; and
- (3) the individual has had no break in employment since the favorable determination was made.

Further, the Order allows a gaining agency to deny reciprocal recognition of a prior favorable fitness or suitability determination when:

- (1) the new position requires a higher level of investigation than previously conducted for that individual;
- (2) an agency obtains new information that calls into question the individual's fitness based on character or conduct; or
- (3) the individual's investigative record shows conduct that is incompatible with the core duties of the new position.

Evaluating suitability criteria against OPM standards

While the Order provides that agency heads have the discretion to determine whether their criteria for making fitness determinations are equivalent to OPM suitability standards, the Order also requires agencies to take OPM guidance into account when exercising this discretion.

OPM's suitability criteria are published at 5 CFR part 731.202 and in OPM-issued supplemental guidance. "Equivalent criteria" include criteria that provide adequate assurance that the person to be appointed or hired has the level of character and conduct necessary to perform work for or on behalf of a Federal agency as a Federal employee or a contractor employee.

Examples of equivalent criteria include the disqualification factors provided at 5 CFR part 302.203 or similar authority regarding excepted service employees, and the additional credentialing standards provided in OPM's July 31, 2008, memorandum entitled, "Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD-12."

Examples of criteria that are not considered to be equivalent to OPM suitability standards include polygraph examination or any form of psychological testing. However, where a polygraph or any form of psychological testing was used in addition to the OPM standards in the losing agency's prior favorable suitability or fitness determination, and the gaining agency only uses criteria equivalent to OPM standards to assess fitness, reciprocity should be applied to the prior favorable determination.

Break in employment

No "break in employment" means continuous employment. While contractor or agency pay cycles may differ, it is expected that an individual who is transferring from one agency or contractor to another does so without any period between normal work days.

With regard to contractor employees, a break in employment also refers to a break in employment on a Federal contract, and not just a break in employment with a particular contractor. If the individual has stopped working on a Federal contract, but continues to work for the contractor on a non-Federal contract, this is deemed to be a break in employment.

While reciprocity is not required when there is a break in employment, agencies should consider any information or documentation gathered during the employment/contracting process, to determine whether a new investigation is necessary or appropriate in order to evaluate the individual's fitness.

New information that calls into question the individual's fitness

If, during the course of the hiring process, information is found as a result of gathering routine employment information (such as responses to questions raised during interviews or information obtained during reference checks), and this information calls into question the character or conduct of the individual, such information may result in the need to conduct a new fitness determination, and reciprocity may not apply.

Conduct that is incompatible with the core duties

To ensure alignment for purposes of fitness and suitability, where appropriate, a "core duty" is a continuing responsibility that is of particular importance to the relevant covered position or the achievement of an agency's mission. Core duties will vary from agency to agency and from position to position, and the identification of core duties is the responsibility of the individual agencies.

Incompatibility is not limited to instances where employment would violate a statutory or regulatory bar, but could extend to conduct which, by its nature, is clearly antithetical to the core duties of a position, as illegal drug use may be antithetical to drug enforcement agent duties.

While the Order permits review of an individual's investigative record to determine if there is conduct that is incompatible with the core duties of the new position, agencies are expected to exercise reciprocity in most situations without first reviewing the prior investigative file. Only when the agency has determined the position has specific core duties that would warrant the delay and extra expense associated with reviewing an investigative record should the record be reviewed.

Reporting and obtaining information

Section 6(a) of the Order requires each agency to report to OPM the nature and results of a background investigation and fitness determination made on an individual, to the extent consistent with law.

Agencies will meet this reporting requirement if they record their data on a system that is accessible through the Clearance Verification System (CVS) (e.g. - Joint Personnel Adjudication System (JPAS)).

If the information regarding a prior suitability or fitness determination is not available in OPM's database or is insufficient to make a reciprocity decision, agencies should contact the former or current employing agency to obtain the necessary information to either grant or deny reciprocity consistent with this guidance. If, after contacting the agency that made the prior determination, the agency is unable to determine whether the requirements for reciprocity apply, then reciprocity need not be granted.

Appeal rights

The Order does not create any new appeal rights. A decision to not grant reciprocity is simply a first step in determining an individual's fitness for contract employment or for an excepted service appointment. If, after denying reciprocity, the Agency ultimately makes a negative fitness determination, the applicable redress procedures (if any) are those prescribed by contract terms or by the agency's excepted service staffing policies. (See, e.g., 5 CFR part 6.3(b))

Other Guidance

OPM's Federal Investigative Notice (FIN) system will provide information on agency reporting obligations and on the process for obtaining information about prior investigations and suitability or fitness determinations that might be relied on for reciprocity purposes.

Further Information

For questions related to agency reporting obligations and the process for obtaining information, contact the Operational Policy Group, Federal Investigative Services Division, OPM at 202-606-1042.

For questions related to the interpretation of this guidance, contact the Center for Workforce Relations and Accountability Policy, Strategic Human Resources Policy Division, OPM at 202-606-2930.