

Legal Sidebar

The Federal Anti-Nepotism Statute: Limits on Appointing, Hiring, and Promoting Relatives

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The process of presidential transition has raised [questions](#) about who may be appointed to certain executive posts in the White House, an issue addressed under a federal law commonly known as the [anti-nepotism statute](#). Nepotism is defined generally as the exercise of favoritism by a person in a position of authority towards that person's relatives, particularly giving them jobs. The federal [anti-nepotism statute](#) applies to all public officials (including the President and Members of Congress) in all three branches of the federal government. Such officials are barred from appointing, hiring, or promoting – or advocating for the appointment, hiring, or promotion of - a specific class of relatives to a civilian position in the agency in which that official serves or over which the official exercises authority.

History. Congress passed the prohibition in 1967 to address [long-standing criticisms](#) of the practice of some federal officials, particularly some Members of Congress as well as certain postal officials, placing relatives on the federal payroll. Sometimes referred to as the “Bobby Kennedy law,” media [reports](#) often suggest that its passage was a congressional response to President John F. Kennedy's appointment of his brother as Attorney General. Despite this common perception and [substantial criticism](#) of congressional practices leading up to the passage of the law, the provision's sponsor indicated that the impetus was to address the [practice of many local post-masters](#) who put their wives on the public payroll to clerk in small, local post offices. The [legislative history](#) clarified that the prohibition would apply broadly, stating that it would prohibit “all persons, including the President, Vice President, and Members of Congress, having authority to make appointments of civilian officers or employees in the Federal service.”

[Scholars have highlighted](#) the long history of presidential nepotism that preceded the law, as well as points of debate regarding the anti-nepotism statute's potential breadth. Notably, shortly after its passage, the law survived a constitutional challenge in a [lawsuit](#) alleging that the statute was overly broad. Upholding the statute as constitutional, a federal district court explained that the statute “cannot be said to constitute an overbroad classification” because it applies only to “specified kinship relationships.”

Defining Relative, Position, and Agency. Application of the anti-nepotism statute depends on whether the candidate for a job is a *relative* of the public official and whether the individual would hold a *position* in an *agency*. First, the statute expressly defines *relative* to encompass a range of individuals. It includes the official's “father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.”

Second, there must be some civilian *position*, as contemplated under the anti-nepotism law, to which an individual was appointed or hired. It may not be readily evident whether an individual holds a “position” by virtue of that individual's service or duties. Rather, in some cases, the individual might be acting merely in an [informal or personal advisory role](#) to the President or agency head and thus could be found not to hold a position for purposes of the anti-nepotism statute. Holding a federal civilian position may connote an [employment](#) or [office](#) that is created by statute or executive order within the federal government. Additionally, the Supreme Court has considered certain other indicia, such as [tenure, compensation, oath of office, and the exercise of a federal function](#).

Third, the position must be in an *agency*. For purposes of the executive branch, the anti-nepotism statute defines *agency* to include “an Executive agency.” Federal law generally defines [executive agency](#), in turn, to include “an Executive department, a Government corporation, and an independent establishment.” The term [independent establishment](#) is a catch-all provision which encompasses “an establishment in the executive branch ... which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment”

Thus, the statutory language of the anti-nepotism law does not specify whether the White House or the Executive Office of the President in the White House is to be considered an *agency*. Courts have not considered the issue directly, but interpretations of other statutes regulating the federal workforce may be instructive. For example, the [Hatch Act](#) applies to employees in an “executive agency” and has been [interpreted](#) to apply to White House staff (other than the President and Vice President). In other cases, the White House has not been interpreted to be an agency for purposes of federal law, as was the case under the [former provisions of the Freedom of Information Act](#), which has since been amended. In a [case](#) interpreting the Federal Advisory Committee Act but also discussing the anti-nepotism statute, a federal appeals court considered the President’s authority to rely on his spouse as an advisor in the White House or the Executive Office of the President. The court expressed uncertainty about the exact parameters of the anti-nepotism statute, stating a possibility that hiring relatives as special assistants in the White House may not be clearly barred. However, given the broad scope reflected in the legislative history and the express inclusion of the President as a covered public official, it could be argued that the law would logically be interpreted to include the White House and Executive Office of the President as an *agency*.

Enforcement. While the statutory language bars the appointment of relatives as well as the acceptance of such appointments, enforcement of the prohibition may be limited. The remedy expressly provided for violating this prohibition states that the appointed individual “is not entitled to pay, and money may not be paid from the Treasury as pay” for that person. The statute itself does not require nor does it provide expressly for removal of the individual from the federal civilian position. As noted above, the provision was directed at stopping the practice of placing relatives on the government payroll, and thus the law assures that a relative so appointed may not be paid from federal funds for any such service. The statute likewise does not provide a penalty for the public official who appointed the individual. However, it may be noted that for some rank-and-file positions, not of a confidential or policy making nature, the appointment of a relative may involve a [“prohibited personnel practice”](#) by the appointing official.

Despite purporting to bar such appointments, the limited remedy appears to contemplate that relatives may nonetheless accept a position if they forgo compensation. Although [federal law generally prohibits the acceptance of “voluntary services,”](#) that restriction [has been construed not to cover strictly gratuitous services](#). Thus, an individual may serve but must agree to make no later claim against the government for compensation for such service. The [Department of Justice has opined](#) that, if Congress has not established a minimum salary for a position, one may serve without compensation “in a position that ‘is otherwise permitted by law to be nonsalaried,’” including certain voluntary services in the White House.

Applicability of Other Ethics Requirements. Notably, individuals who forgo compensation may be subject to other government ethics laws. An executive advisor – depending on whether the consultations are considered official as opposed to personal and whether one has assumed some governmental responsibilities - may be [considered an “employee” of the government](#) (or a “special Government employee,” depending on the number of days served). As an employee, the individual would be subject to the federal conflict of interest laws, such as those regulating [financial assets](#) and [past employment](#).

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