INSPECTOR GENERAL REPORT

2014-07-0153

July 28, 2014

LEGISLATIVE RECOMMENDATION FOR THE 2014-2015 SESSION

Inspector General David O. Thomas reports as follows:

Summary

A recommendation to amend the Executive Branch Post-Employment Rule to require a written disclosure to verify certain post-employment does not violate the rule.

This is the first in a series of Inspector General (OIG) reports which will make recommendations regarding changes in public integrity laws.

The OIG is authorized to make these recommendations for consideration by the Indiana Legislature.[1]

The OIG has made multiple previous recommendations which have been adopted into law.[2]

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[1] IC 4-2-7-3(9).

2 *See e.g.:* http://www.in.gov/ig/files/2010-08-0087.Summary_of_2011-2012_Legislative_Recommendations_WEB.pdf.

- Codification of all public corruption criminal offenses from Titles 4 and 5 (P.L. 126-2012) http://www.in.gov/ig/files/2008.06.0165.UGCProposal.pdf
- Current public corruption offenses in IC 35-44 re-codified by topic (P.L. 114-2012)

The OIG has also previously made a series of recommendations leading into the longer legislative session.[3]

This recommendation involves the Post-Employment Rule (PER).[4] The PER is within the Indiana Code of Ethics. 42 IAC 1-5-14. The PER, in part, restricts an Executive Branch state worker (EBSW) from working within 365 days for an employer, often a vendor with the State, when the EBSW negotiated or administered a contract with, or regulated, the employer.[5] This is often referred

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- Criminal conflict of interest statute clarified (P.L. 110-2011) http://www.in.gov/ig/files/2010.08.0196.COILanguage.pdf
- Criminal depository rule enhanced (P.L. 107-2011) http://www.in.gov/ig/files/2009.02.0013.DepositoryRule.pdf
- Criminal official misconduct statute clarified (P.L. 102-2011) http://www.in.gov/ig/files/2009.09.0191.OfficialMisconductStatute.pdf
- Contract contingency fee review by IG (P.L. 101-2011) http://www.in.gov/ig/files/2011-08-0256.pdf
- Collection of ethics fees to IG (P.L. 136-2012) http://www.in.gov/ig/files/2009.04.0068.SEC_Fines.pdf
- Nepotism restrictions clarified (P.L. 105-2012) http://www.in.gov/ig/files/2010.04.0087.Nepotism_Rule.etal_WEB.pdf
- Ethics opt-out provision in agencies removed for uniformity (P.L. 177-2011) http://www.in.gov/ig/files/2008.01.0002.Ethics_Application.pdf
- Department of Toxicology reconstituted (P.L. 158-2011) http://www.in.gov/ig/files/2010.06.0153.Toxicology.pdf
- Use of publicity state funds by state officers (P.L. 58-2010)
- Non-profit foundation formulation by DOC (P.L. 77-2009)
- State Museum foundation authority with DNR (P.L. 66-2008) http://www.in.gov/ig/files/2005100534_DNR_Museum.pdf
- Indiana State Library and INCOLSA funding (P.L. 234-2007) http://www.in.gov/ig/files/2006110322_State_Library.pdf
- Workers Compensation Board employment (P.L. 134-2006) http://www.in.gov/ig/files/2005020149_WorkerComp.pdf
- Victims' Compensation Fund reimbursement rate (P.L. 121-2006) http://www.in.gov/ig/files/ICJI_Victim_Payments_Report.pdf
- Ethics Commission enabling statute revisions (P.L. 89-2006)

[3] *See e.g.* Inspector General Report 2012-06-0165, currently published on-line at: http://www.in.gov/ig/files/2008-06-0165.Recommendations_for_2012-2013_Legislative_Session_WEB.pdf.

[4] IC 4-2-6-11 / 42 IAC 1-5-14.

[5] IC 4-2-6-11(b).

to as the "cooling off" provision.[6]

There are at least two policy reasons for the PER. The first addresses the perception or reality that the EBSW may have as a government worker favored his future employer in the government contracting or regulation in order to receive future, often more lucrative, employment. A second policy reason for the PER is that government should not incur the financial expense and burden of training an EBSW who then leaves government employment with this newly-acquired or improved expertise to work in a different context with the government.

In this recommendation the OIG addresses how the PER 365-day restriction does not apply if the EBSW leaves state employment and immediately engages in business back with the state through his or her own "sole proprietorship" or through a "professional practice." This is expressly delineated by statute through the definition of an employer.[7]

The OIG recognizes there may be a policy reason for making this distinction within the application of the PER. Forming one's own sole proprietorship or working for a professional practice is more removed from immediately going to work as an "employee" for the entity over which he or she regulated or interacted with the day before. –If the new employment is, in fact, a true "sole proprietorship" or through a "professional practice."

[6] According to information received from the State Personnel Department, roughly more than 50,000 state workers have left the Executive Branch in the past 10 years.

[7] IC 4-2-6-1(10) states: "Employer" means any person from whom a state officer or employee or the officer's or employee's spouse received compensation. For purposes of this chapter, a customer or client of a self-employed individual in a *sole proprietorship* or a *professional practice* is not considered to be an employer (emphasis supplied)."

The OIG also recognizes that a PER must not be overbroad. We have previously explored through a public report the possible consequences of making a PER too restrictive.[8] Initially, the Indiana Executive Branch is the most restrictive government branch in post-employment restrictions. Unlike the other two state government branches, the Executive Branch restricts not only the contact back with the government,[9] it also restricts for 365 days the *actual* employment.[10]

Prior to 2005, there was no post-employment restriction prohibiting the *actual* employment, and the pre-2005 PER also did not apply to all EBSWs.[11]

A second caution in making a PER too restrictive is found in Judicial

[8] See Inspector General report 2012-06-0165 published on-line at: http://www.in.gov/ig/files/2008-06-0165.Recommendations_for_2012-2013_Legislative_Session_WEB.pdf.

[9] See for example the "lobbying" restriction of the PER. IC 4-2-6-11.

[10] In the Judicial Branch, a Prosecuting Attorney who has "negotiated" or "administered" numerous plea agreements may the day after leaving a prosecutor's office work in the opponent defense bar as long as he or she remains in compliance with the Rules of Professional Conduct. Likewise, the recent legislative post-employment rule restricts for 365 days the contact back with the Legislature either as a "lobbyist" or "legislative liaison." It does not prohibit the actual and total employment of the new employment as does the Executive Branch in IC 4-2-6-11/42 IAC 1-5-14.

[11] See page seven of Inspector General Report 2012-06-0165 published on-line at: http://www.in.gov/ig/files/2008-06-0165.Recommendations_for_2012-2013_Legislative_Session_WEB.pdf. This previous report addresses the PER prior to the 2005 legislation with the following chart:

Restriction	Pre-2005	Post-2005
1-year employment restriction	No	Yes
Life-time ban on particular matters	No	Yes
Applicable to all state workers	No	Yes
Lobbying restrictions	No	Yes

scrutiny. As we have reported previously,[12] the Indiana Supreme Court in a different context has warned of civil post-employment restrictions. We previously reported:

> [A] reason to observe caution in restricting post-employment further may be seen in the Indiana appellate scrutiny of employment restrictions in the civil jurisdictions. Although contractual covenants-not-to-compete may have differences to those in governmental post-employment restrictions, the appellate scrutiny may be instructive. Specifically, the Indiana Supreme Court has said that "it is to the best interest of the public that persons should not be unnecessarily restricted in their freedom of contract…." *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276, 279 (Ind.1983) (quoting *Hodnick v. Fid. Trust Co.*, 96 Ind.App. 342, 350, 183 N.E. 488, 491 (1932)). The court has more recently stated that "noncompetition covenants in employment contracts are in restraint of trade and disfavored by law" and will be construed strictly against the employer. *Central Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 728-29 (Ind.2008).

Inspector General Report 2012-06-0165, at page eight.[13] These authorities address the limits when *private* parties contract to restrict post-employment. When the *government* regulates and restricts post-employment, it is arguable that even more caution should be observed because of the vulnerability of "state action" and constitutional claims.

Indeed, in our neighboring state of Ohio, the United States District Court struck down as unconstitutional an entire post-employment rule which was too restrictive.[14] In that unconstitutional statute, the restriction was with regard to the

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[12] See Inspector General Report 2012-06-0165 published on-line at: http://www.in.gov/ig/files/2008-06-0165.Recommendations_for_2012-2013_Legislative_Session_WEB.pdf.

[13] See footnote 11 for on-line publication of this Inspector General Report.

[14] *Brinkman v. Budish*, 692 F.Supp.2d 855 (2010).

contact back with the government, not the *actual* employment prohibited in our PER.

We address these factors only to further the discussion regarding our PER, and what detrimental consequence might occur if, similar to the United States District Court in Ohio, our entire PER were to be declared unconstitutional as to restrictive. We should also remain cognizant that there are financial remedies against the government (taxpayers) for unconstitutional behavior.[15]

However, we are not recommending in this report or with this recommendation an expansion of the PER restriction. Instead, we are recommending a procedure for stricter enforcement of an existing provision of the rule. We believe the PER provision defining an "employer" should be scrutinized to ensure that the EBSW truly changes employment to a "sole proprietorship" or "professional practice" in that actual capacity as opposed to doing so only in appearance to avoid the application of the PER 365-day restriction.

We believe this distinction is often revealed in how the United States Internal Revenue Service (IRS) examines this similar issue for federal income tax purposes.[16] That analysis often examines the treatment of a worker's benefits, such as insurance payments, and the manner in how federal income taxes are paid.[17]

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[15] See e.g. 42 U.S.C. 1983.

[16] The IRS addresses these concerns through a website, currently attached to this report as Exhibit A and published on-line at: http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Defined.

[17] These distinctions are further contrasted by the IRS through Exhibit B and published on-line at: http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee.

By comparison, we believe a post-employment examination of how the former EBSW interacts within these two factors, benefits and tax withholdings, would make more transparent whether the PER is being violated. Specifically, a former EBSW who claims to operate as a "sole proprietor" or through a "professional practice" would be hard-pressed to justify PER compliance if the former EBSW's insurance benefits and tax withholdings are made through the vendor he or she formerly regulated. We also believe the burden imposed on the former EBSW through the proposed disclosure in this report would be minimal, and certainly far less invasive than an OIG investigation. A commitment in a public disclosure document, even with personal identifying information redacted to prevent identity theft, might also reveal violations through a public review by others, and encourage and facilitate a report of violations to the OIG. At a minimum, such a procedure might also deter attempts to violate the PER if a violator knows there will be a disclosure document generated and publicly scrutinized.

Recommendation

For all the above reasons, the OIG respectfully recommends that the PER be amended to add a written disclosure requirement that all EBSWs who leave state employment and within the following 365 days engage in a "business relationship"[18] with the Executive Branch be required to file with the OIG through

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[18] IC 4-2-6-1(5) for purposes of the Code of Ethics defines a "business relationship" as:

a written disclosure, and within 180 days of separation of EBSW service, a written statement, signed and certified[19] by the former EBSW, detailing the former EBSW's treatment by the new employer (the EBSW's own sole proprietorship or the professional practice) of benefits and taxes within the parameters of the IRS publications addressed herein.[20]

Should this legislative change be adopted, the OIG is committed to immediately develop a concise template, approved by the State Board of Accounts, and to post the same on the OIG website for easy access and to include this new provision in future ethics training.

The OIG remains committed to providing the Indiana Legislature additional documentation or information as requested for its consideration.

/s/ David O. Thomas, Inspector General

"Business relationship" includes the following:
(A) Dealings of a person with an agency seeking, obtaining, establishing, maintaining, or implementing:
(i) a pecuniary interest in a contract or purchase with the agency; or
(ii) a license or permit requiring the exercise of judgment or discretion by the agency.
(B) The relationship a lobbyist has with an agency.
(C) The relationship an unregistered lobbyist has with an agency.

[19] The certification rule in IC 35-44.2-2-3 provides:

(b) A disbursing officer (as described in IC 5-11-10) [and not exempted in subsection (a)] who knowingly or intentionally pays a claim that is not:
(1) fully itemized; and
(2) properly certified to by the claimant or some authorized person in the claimant's behalf, with the following words of certification: I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid;
commits a violation of the itemization and certification rule, a Class A misdemeanor.

[20] The OIG stands ready upon request to work with the Legislative Services Agency, as in the past, to draft this language. A simple subsection (h) could be added to the existing provision in IC 4-2-6-11.