

42 IAC 1-5-14 Post-employment restrictions (IC 4-2-6-11)

IC 4-2-6-6 Compensation resulting from confidential information

A former employee of the Worker's Compensation Board (WCB) sought advice regarding whether she could represent injured workers, none of which had come before the WCB during her tenure, in her private law practice. SEC determined that the employee's post-employment opportunity would not violate IC 4-2-6-11 as long as the employee did not engage in executive branch lobbying for one year following her state employment; and the employee did not assist or represent any person with regard to any particular matters that she substantially or personally participated in a state employee.

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The Indiana State Ethics Commission (Commission) issues the following advisory opinion concerning the State Code of Ethics (Code) pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A former employee of the Indiana Worker's Compensation Board, is requesting a Formal Advisory Opinion regarding her post-employment as an attorney representing injured workers.

The employee retired from her position with the State of Indiana on October 19, 2018. She had served as an employee of the Worker's Compensation Board (WCB) since 2004 and was appointed as a board member by then Governor Mitch Daniels in 2007. As a member of the WCB, the employee was responsible for conducting hearings and making decisions regarding an employee's right to compensation and benefits under the Indiana Worker's Compensation Act. The powers and duties of the WCB are set forth in Ind. Code 22-3-1-1. The employee, as a board member, was not responsible for and did not engage in the negotiation of any contracts on behalf of the WCB. The employee notes that the WCB does not make payment of benefits or compensation but rather is a neutral arbitrator of disputes.

The employee's post-employment position would consist of the private practice of law on behalf of injured workers who have not previously filed a disputed claim with the WCB. The employee notes that she will not represent injured workers who had a pending claim before the WCB while she was a board member. Additionally, she will not represent employers who had cases before the WCB when she was a member.

The employee is seeking confirmation through this Formal Advisory Opinion that her planned post-employment practice of law would not violate IC 4-2-6-11.

ISSUE

What rules in the Code apply to the employee's post-employment as an attorney in the private practice of law?

RELEVANT LAW

IC 4-2-6-6

Present or former state officers, employees, and special state appointees; compensation resulting from confidential information

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

IC 4-2-6-11 (42 IAC 1-5-14)

One year restriction on certain employment or representation; advisory opinion; exceptions; waivers; disclosure statements; restrictions on inspector general seeking state office

Sec. 11. (a) As used in this section, "particular matter" means any of the following:

- (1) An application.
- (2) A business transaction.
- (3) A claim.
- (4) A contract.
- (5) A determination.
- (6) An enforcement proceeding.
- (7) An investigation.
- (8) A judicial proceeding.
- (9) A lawsuit.
- (10) A license.
- (11) An economic development project.
- (12) A public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;
- (2) from an employer if the former state officer, employee, or special state appointee was:
 - (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
 - (B) in a position to make a discretionary decision affecting the:
 - (i) outcome of the negotiation; or
 - (ii) nature of the administration; or
- (3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer;

before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

(c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.

(d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that:

- (1) employment; or
- (2) compensation;

is given or had been offered for the purpose of influencing the former state officer, employee, or special state appointee in the performance of the individual's duties or responsibilities while a state officer, an employee, or a special state appointee.

(e) A written advisory opinion issued by the commission certifying that:

- (1) employment of;
- (2) consultation by;
- (3) representation by; or
- (4) assistance from;

the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.

(f) Subsection (b) does not apply to the following:

- (1) A special state appointee who serves only as a member of an advisory body.
- (2) A former state officer, employee, or special state appointee who has:
 - (A) not negotiated or administered any contracts with that employer in the two (2) years before the beginning of employment or consulting negotiations with that employer; and
 - (B) any contract that:
 - (i) the former state officer, employee, or special state appointee may have negotiated or administered before the two (2) years preceding the beginning of employment or consulting negotiations; and
 - (ii) is no longer active.

(g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. A waiver must satisfy all of the following:

- (1) The waiver must be signed by an employee's or a special state appointee's:
 - (A) state officer or appointing authority authorizing the waiver; and
 - (B) agency ethics officer attesting to form.
- (2) The waiver must include the following information:
 - (A) Whether the employee's prior job duties involved substantial decision making authority over policies, rules, or contracts.
 - (B) The nature of the duties to be performed by the employee for the prospective employer.

(C) Whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee.

(D) Whether the prospective employment may be beneficial to the state or the public, specifically stating how the intended employment is consistent with the public interest.

(E) The extent of economic hardship to the employee if the request for a waiver is denied.

(3) The waiver must be filed with and presented to the commission by the state officer or appointing authority authorizing the waiver.

(4) The waiver must be limited to an employee or a special state appointee who obtains the waiver before engaging in the conduct that would give rise to a violation of subsection (b) or (c).

The commission may conduct an administrative review of a waiver and approve a waiver only if the commission is satisfied that the information provided under subdivision (2) is specifically and satisfactorily articulated. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

(h) Subsection (b) applies, subject to waiver under subsection (g), to a former state officer, employee, or special state appointee who:

(1) made decisions as an administrative law judge; or

(2) presided over information gathering or order drafting proceedings;

that directly applied to the employer or to a parent or subsidiary of the employer in a material manner.

(i) A former state officer, employee, or special state appointee who forms a sole proprietorship or a professional practice and engages in a business relationship with an entity that would otherwise violate this section must file a disclosure statement with the commission not later than one hundred eighty (180) days after separation from state service. The disclosure must:

(1) be signed by the former state officer, employee, or special state appointee;

(2) certify that the former state officer, employee, or special state appointee is not an employee of the entity; and

(3) state in detail the treatment of taxes, insurance, and any other benefits between the entity and the former state officer, employee, or state appointee.

(j) The inspector general may not seek a state elected office before the elapse of at least three hundred sixty-five (365) days after leaving the inspector general position.

ANALYSIS

The employee's post-employment opportunity in private law practice implicates the provisions of the Code pertaining to confidential information and post-employment. The application of each provision to the employee's prospective post-employment law practice is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the employee from accepting any compensation from any employment, transaction, or investment that was entered into or made as a result of material information of a confidential nature. Based on the information provided, it does not appear that the employee would utilize confidential information in her private law practice. So long as any compensation the employee receives does not result from

confidential information, her post-employment in her private law practice would not violate IC 4-2-6-6.

B. Post-Employment

IC 4-2-6-11 consists of two separate limitations: a “cooling off” period and a “particular matter” restriction. The first prohibition, commonly referred to as the cooling off or revolving door period, prevents the employee from accepting employment from an employer for 365 days from the date that she leaves state employment under various circumstances. Employer is defined in IC 4-2-6-1(a)(10) as any person from whom a state employee receives compensation; therefore, it includes a client or customer of a self-employed individual.

First, the employee is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration (IDOA).

The employee does not anticipate engaging in any lobbying activities in her private legal practice. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, she would not violate this provision of the post-employment rule.

Second, the employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer with whom 1) she engaged in the negotiation or administration of a contract on behalf of a state agency and 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract. The employee provides that her WCB position did not involve any sort of contracting responsibility.

Based on the information provided, the employee has never participated in the negotiation or administration of a contract nor was she in a position to make a discretionary decision affecting the outcome of the negotiation or administration of any contract with any potential employer or clients of her potential private practice during the course of her state employment. Accordingly, the Commission finds that this provision would not apply to the employee’s post-employment in her private law practice.

Third, the employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary.

The employee’s duties with the WCB may have amounted to making “regulatory” decisions; therefore, she may be prohibited from being employed by any parties to such decisions until the lapse of 365 days from the date she left state employment.

Based on the information provided, the employee would be engaging in private practice as a sole proprietor or join a firm that did not previously handle workers compensation issues that came before the WCB while she was a board member. To the extent that she would not then be an employee of anyone who had a case pending or adjudicated during her time on the WCB until October 19, 2019, she would not be in violation of this rule. Accordingly, the Commission finds that this provision would not apply to her intended post-employment in a private law practice so long as she does not accept compensation from any individuals who were subject to any regulatory decisions she made as a member of the WCB.

Fourth, the employee is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence her in her official capacity as a state employee. The information the employee presented to the Commission does not suggest that any offer of employment she would receive through her law practice would be extended in an attempt to influence her in her official capacity, especially since she is already retired from state employment. Accordingly, the Commission finds that this restriction would not apply to her intended post-employment opportunity.

Finally, the employee is subject to the post-employment rule's "particular matter" prohibition in her prospective post-employment. This restriction prevents her from representing or assisting a person on any of the following twelve matters if she personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project, or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

It appears that the employee personally and substantially participated in claims and determinations as part of her role with the WCB. Thus, the Commission finds that she would be prohibited from representing or assisting a firm or client in the particular matters in which she substantially participated as a state employee. However, she is not prohibited from working on any *new* matters that involve workers compensation claims before the WCB.

CONCLUSION

Subject to the foregoing analysis and application of the one-year restriction regarding executive branch lobbying, the Commission finds that the employee's intended post-employment plans would not violate the post-employment restrictions found in IC 4-2-6-11.

Respectfully Submitted,

Jennifer Cooper
Ethics Director

