

42 IAC 1-5-14 Post-employment restrictions (IC 4-2-6-11)
42 IAC 1-5-6 Conflict of interests; decisions and voting (IC 4-2-6-9)
IC 4-2-6-6 Compensation resulting from confidential information

An Ethics Officer requested advice on behalf of an employee who wished to work for one of the MCEs that contract with FSSA. SEC determined that the post-employment rule's cooling off period did not apply to the employee, as the employee did not make regulatory or licensing decisions that directly applied to the employer; nor was she in a position to make discretionary decisions affecting the outcome of the negotiation or nature of the administration of the employer's MCE contract. Further, SEC determined that the employee's post-employment opportunity would not violate any ethics rules 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 the post-employment rule's particular matter restrictions.

February 14, 2019
2019-FAO-002

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

The Ethics Officer for the Indiana Family and Social Services is requesting an advisory opinion on behalf of the employee whom is the Healthy Indiana Plan (HIP) Operations Manager in the Office of Medicaid Policy and Planning (OMPP). Specifically, the Ethics Officer is requesting an opinion from the Commission addressing any conflicts of interests and post-employment restrictions that would apply to the aforementioned employee.

The employee began working for FSSA in 2014 as the Executive Assistant to the Medicaid Director. In 2017, she became the HIP Operations Manager. Her position is responsible for working with the Quality and Outcomes Section in OMPP to establish and measure the quality components of HIP. She is responsible for assisting with the development and implementation of the Medicaid quality strategy plan related to HIP. Her responsibilities include managing operations of the HIP program and working with the OMPP Quality & Outcomes Section to monitor the compliance of the four managed care entities (MCE). The MCEs contract with FSSA as their performance directly impacts the operations of the program. The employee supervises two staff members who are responsible for handling client case concerns and processing questions related to the program, MCEs, State, or provider. Each member of her staff is responsible for dealing with customer complaints for his or her assigned MCEs. Her staff reviews the matters on their own and if they have questions they consult the employee on the scenario of the case. There is a third staff member who is responsible for the same tasks but solely focuses on Gateway to Work, a component of HIP for all four MCEs.

The employee receives information regarding trends in the program by reviewing reports to see what can be done to correct data discrepancies between the eligibility, fiscal, and MCE systems. She provides guidance to the Division of Family Resources, ICES, DXC Technology, and the MCEs on interim solutions to systematic problems that arise. The

information and guidance she provides is shared equally with the MCEs. In other words, all of the MCEs receive the same information. If she identifies an issue with compliance she escalates the matter to contract compliance. The employee does not provide any recommendations regarding the action that should be taken regarding an MCE's compliance, nor does she have authority to recommend any course of action.

The employee is interested in leaving state employment for a position as a Market Service Manager with CareSource. CareSource is one of the MCEs that contracts with FSSA to coordinate care for members enrolled in Indiana Medicaid programs. CareSource is a nonprofit managed care company based in Dayton, Ohio. The company offers Medicaid managed care plans, Medicare Advantage plans and Marketplace insurance plans in multiple states. On November 20, 2018, the employee notified the Ethics Officer that she applied for and had a first interview for the Market Service Manager position with CareSource.

As the HIP Operations Manager, the employee regularly interacts with CareSource and the other MCEs. The majority of her interactions are with an analyst who reviews member issues with her team or the compliance section when there are questions or clarifications needed related to all MCEs. The employee ensures productivity among business partners, including ICES, DXS and MCEs. She works closely with all MCEs to answer clarifying questions on policies and issues they routinely see from member calls. She also participates in meetings that address ways to improve the HIP program for the State and the MCEs. Additionally, she advises on all system changes and design for HIP program operations within the fiscal agent, MCE, or eligibility determination systems.

The Ethics Officer provided that the employee has not engaged in the negotiation or administration of any contract between the State and CareSource nor was she in a position to make a discretionary decision affecting the outcome of the negotiation or administration of any contract with CareSource. The employee's role primarily involves identifying and solving problems related to HIP policies and operations as they relate to all of the MCEs. She does not make decisions about or work directly on the MCE's contracts, including CareSource's contract.

In 2016, while working as the HIP Compliance Analyst, the employee participated in scoring the HIP portion of the MCE Request for Proposals (RFP). The RFP was a large scale project, and the employee was a member of a team working on scoring the RFP. There were four sections for the RFP, the employee only participated in scoring the HIP section, and her score was only one part of the overall process. Her score was not binding on the total score of each MCE. The employee was not part of the team that made the final decision to award a contract to CareSource.

Once OMPP was made aware of the employee's interest in employment with CareSource, she was removed from working on any issues related to their contract operations. A different person was assigned to handle all correspondence with CareSource. In addition, the employee has not participated in any one-on-one operational meetings with CareSource regarding HIP POWER account reconciliation or Gateway to Work operations, nor did she participate in any onsite reviews to see if CareSource was ready to operate the new Gateway to Work program.

OMPP's Quality & Outcomes section maintains oversight of the MCEs and manages their contracts to ensure compliance. Contract managers under the leadership of the Managed Care Compliance Manager and Quality and Outcomes Section Director are the primary point of contact for the MCEs. CareSource has an assigned contract manager.

The employee's role as Market Service Manager with CareSource would include consulting with market leaders and account executives to ensure initiatives align with the company's overall business strategy and to develop business cases for new investments.

FSSA is seeking the Commission's opinion regarding the application of any of the rules in the Code of Ethics to the employee's post-employment opportunity with CareSource.

ISSUE

What rules in the Code apply to the employee's post-employment opportunity with CareSource?

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 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests; commission advisory opinions; disclosure statement; written determinations

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter related to that decision or vote, if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The state officer, employee, or special state appointee.
- (2) A member of the immediate family of the state officer, employee, or special state appointee.
- (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a member, a trustee, a partner, or an employee.
- (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and ethics officer in writing and do either of the following:

(1) Seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(A) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(B) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(2) File a written disclosure statement with the commission that:

(A) details the conflict of interest;

(B) describes and affirms the implementation of a screen established by the ethics officer;

(C) is signed by both:

(i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and

(ii) the agency ethics officer;

(D) includes a copy of the disclosure provided to the appointing authority; and

(E) is filed no later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(1)(B) shall be filed with the appointing authority.

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

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. So long as any compensation the employee receives does not result from confidential information, her potential employment with CareSource would not violate IC 4-2-6-6.

B. Conflict of Interests

IC 4-2-6-9(a)(1) prohibits the employee from participating in any decision or vote, or matter related to that decision or vote, if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits her from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom she is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, “an interest arising from employment or prospective employment for which negotiations have begun.”

In this case, employment negotiations have already begun. Accordingly, the employee would be prohibited from participating in any decision or vote, or matter related to a decision or vote, in which she, by virtue of her employment negotiations with the vendor, or the vendor itself would have a financial interest in the outcome of the matter.

IC 4-2-6-9(b) requires a state employee who recognizes a potential conflict of interests to notify her agency’s appointing authority and ethics officer and either (1) seek a formal advisory opinion from the Commission; or (2) file a written disclosure form with the OIG.

The Ethics Officer provides that the employee notified her and the agency of the potential opportunity with CareSource in November of 2018, and FSSA took steps to screen her from matters in which CareSource would have a financial interest in the outcome of any decisions or votes she would make as part of her responsibilities as HIP Operations Manager. Specifically, the Ethics Officer provides that the employee was removed from working on any issues related to their contract operations. A different person was assigned to handle all correspondence with CareSource. In addition, the employee has not

participated in any one-on-one operational meetings with CareSource since beginning employment negotiations with CareSource. The Ethics Officer then requested this formal advisory opinion on the employee's behalf.

To the extent that she continues to not participate in any decisions or votes, or matters relating to any such decisions or votes, in which she or CareSource has a financial interest in the outcome of the matter for the remainder of her state employment, and she ensures that FSSA's appointing authority has been notified of the identified potential conflict of interests, the Commission finds that the employee has complied with this rule.

C. 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.

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.

The Ethics Officer provides that the employee understands she is prohibited from engaging in any lobbying activities in her prospective employment with CareSource. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, her intended employment with CareSource 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.

In 2016, while working as the HIP Compliance Analyst, the employee did participate in the RFP process for all four of the MCEs as part of a team that scored the HIP portion of the RFP for all four of the MCE contracts. There were four sections of the RFP, the employee only participated in scoring the HIP section, and her score was only one part of the overall process. The RFP process is part of the contract negotiations that eventually led to CareSource's contract with FSSA.

In Formal Advisory Opinion [17-I-10](#), the Commission found that a former FSSA Contract Compliance Manager who was part of a team who scored portions of the MCE RFP was not subject to the one-year cooling off period. The Commission found that this employee's limited participation (scoring only the HIP portions as part of a team of

scorers) in the scoring of the RFP was not enough to constitute a discretionary decision affecting the outcome of the negotiation of the contract.

Consistent with 17-I-10, the Commission finds that the employee's limited participation in the scoring of this RFP is not enough to constitute a discretionary decision affecting the outcome of the negotiation of a contract. Accordingly, the employee would not be subject to the cooling off restriction for her role in this RFP process, and she may accept employment with CareSource immediately upon leaving state employment.

The Commission further finds that although some of the employee's current duties for FSSA appear to come close to or at least relate to the administration of a contract, it does not appear that the employee had the discretionary authority to affect the nature of CareSource's MCE contract. Although the employee escalates concerns to other FSSA divisions regarding MCEs not meeting a contract requirement, The Ethics Officer explained that another division at FSSA is responsible for MCE accountability. According to the Ethics Officer, OMPP's Quality & Outcomes section maintains oversight of the MCEs and manages their contracts to ensure compliance. Contract managers under the leadership of the Managed Care Compliance Manager and Quality and Outcomes Section Director are the primary point of contact for the MCEs. CareSource has an assigned contract manager who makes any discretionary decisions regarding the nature of the administration of their contract.

Accordingly, the employee would not be subject to the cooling off restriction for her role in the RFP process and other duties related to the CareSource contract, and she may accept employment with CareSource immediately upon leaving state employment.

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.

Based on the information provided, the employee has never made a regulatory or licensing decision that directly applied to CareSource during the course of her state employment. Accordingly, the Commission finds that she is not prohibited under this provision from accepting employment with CareSource immediately upon leaving state employment.

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 presented to the Commission does not suggest that CareSource has extended an offer of employment to the employee in an attempt to influence her in her capacity as a state employee. Accordingly, the Commission finds that this restriction would not apply to her intended employment opportunity with CareSource.

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.

According to the information provided, the employee's prospective position as Market Service Manager with CareSource would include consulting with market leaders and the account executives to ensure initiatives align with the company's overall business strategy and to develop business cases for new investments. The employee will not have any responsibilities regarding CareSource's MCE contract with FSSA nor, to the best of her knowledge, will she have to communicate with FSSA.

The Commission finds that the employee must ensure compliance with the particular matter restriction and refrain from assisting CareSource or any other person on any of the particular matters listed above in which she may have participated personally and substantially during her state employment.

CONCLUSION

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

Respectfully Submitted,

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Ethics Director