

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 FSSA employee sought advice regarding a post-employment opportunity working as a consultant on an FSSA project. SEC determined that the post-employment rule's cooling off period did not apply to the employee, as the employee did not have contracting responsibilities nor did she make regulatory or licensing decisions in her position as FSSA. Further, SEC determined that the employee did not personally or substantially in the project and, therefore, was not prohibited from working on the project for her new employer.

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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 Family and Social Services Administration (FSSA), requested a Formal Advisory Opinion regarding her post-employment as a consultant on an FSSA project.

The employee retired from her position with the State of Indiana on February 1, 2019. At FSSA, the employee worked as a Provider Communications Manager for the Office of Medicaid Policy and Planning (OMPP). In this position, she was responsible for overseeing OMPP provider communications and provider-facing guidance and resources.

Specifically, she worked with FSSA/OMPP's fiscal agent contractor, DXC Technology (DXC), to process and publish all provider-facing communication regarding Indiana Medicaid. This included reviewing, editing and approving all provider bulletins, banner page articles and website content. As such, she interfaced with OMPP subject matter experts to understand, clarify and communicate provider guidance, and she managed the process for updating provider policy and guidance modules, forms and other provider documents consistent with OMPP policy.

The employee has been offered an opportunity to subcontract with netlogx LLC (netlogx) to provide consultation services to OMPP related to the new FSSA Provider Enrollment and Credentialing (EnCred) Project. Netlogx contracts with FSSA/OMPP to provide project management assistance and consultation on a number of projects. As related to EnCred, netlogx serves in a project management role for FSSA/OMPP on the design, development and implementation of this project.

As the Provider Communications Manager, the employee was not involved in the solicitation or selection process for any FSSA vendors nor did she have contracting responsibilities with any FSSA vendors. Accordingly, she was not involved in the solicitation or contracting process with the EnCred vendor, Conduent, or with the solicitation or contracting process with netlogx. Once

the design/development for EnCred was underway she was involved on an as-needed basis to address issues related to provider communication or provider interfacing with the new system.

Prior to leaving state employment, the employee worked on and approved the initial provider communications about EnCred, as she did with all provider communications. With respect to netlogx, she was involved in some agency projects for which netlogx provided project management assistance. Her involvement included project meetings, document reviews and responding to project action items related to provider communications, which in some cases, were coordinated by netlogx. She was not responsible for directing netlogx's work on any projects.

In her potential role as a subcontractor with netlogx, the employee will be consulting with the OMPP provider enrollment team on the EnCred communication strategy and on configurable provider-facing elements of the EnCred product itself. Consultation will include advising on strategies and timelines for publications, document development and training as well as evaluating the EnCred solution in test mode relative to provider data entry, navigation and other interface issues. Although she will be involved to some degree with provider-facing or stakeholder-facing publications and document development, she will be doing so from the perspective of a subject matter expert. She will not be responsible for approving publications or documents generated by the project or for overseeing the State's publication of same. Her subcontract would not include executive branch lobbying or require the disclosure of confidential information. Further, the employee's position with FSSA did not involve making any regulatory or licensing decisions.

The employee requested an informal advisory opinion from the Office of Inspector General. The OIG advised that she seek a formal advisory opinion from the Commission regarding the post-employment rule's particular matter restriction and its application to her prospective subcontract with netlogx.

ISSUE

What rules in the Code apply to the employee's post-employment opportunity with netlogx, an FSSA contractor?

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 with netlogx 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 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 consultant work with netlogx. So long as any compensation the employee receives does not result from confidential information, her post-employment opportunity with netlogx 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.

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 has provided that her subcontract with netlogx would not involve any executive branch lobbying activities. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, the Commission finds that 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 Commission finds that the employee's FSSA position did not involve any contracting responsibility and she did not participate in the negotiation or administration of a contract with netlogx during the course of her state employment. Accordingly, this provision would not apply to the employee's post-employment opportunity with netlogx.

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 Commission finds that the employee's duties with FSSA did not include making regulatory or licensing decisions and that she has never made a regulatory or licensing decision that directly applied to netlogx during the course of her state employment. Accordingly, this provision would not apply to the employee's post-employment opportunity with netlogx.

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 Commission finds that the employee is already retired from state employment; therefore, any future employer cannot influence her in her official capacity as a state employee.

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.

In this instance, the employee would be prohibited from representing or assisting netlogx, as well as any other person, in a particular matter in which she personally and substantially participated as a state employee. Based on the information she provided, it appears that the employee had at least some involvement in the EnCred project as an FSSA employee and netlogx has a contract with FSSA to provide project management services to FSSA related to the EnCred project.

The Commission finds that the employee had no contracting responsibility for FSSA and her involvement in netlogx's contract as related to the EnCred project was not personal and substantial. Accordingly, she is not prohibited from working as a subcontractor on netlogx's contract with FSSA. The Commission further finds that the employee must ensure compliance with the particular matter restriction and refrain from assisting or representing any person on any other particular matters that she may have personally and substantially worked on 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 potential post-employment opportunity with netlogx would not violate the post-employment restrictions found in IC 4-2-6-11.