

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 FSSA employee sought advice regarding whether ending his Vocational Rehabilitation Counselor position to begin overseeing home bathroom modifications for the elderly under the Medicaid Programs Department of Portals would create any conflicts of interests under the Code of Ethics. SEC determined that the employee's post-employment opportunity would not violate any ethics rules as long as the employee did not receive compensation resulting from confidential information; the employee did not participate in any decisions or votes or matters related to same in which Portals would benefit from the outcome for the remainder of his state employment; the employee disclosed potential conflicts of interest; the employee did not engage in executive branch lobbying for one year following his state employment; and the employee did not assist or represent any person with regard to the post-employment rule's particular matter restrictions. Further, the SEC determined that the cooling off period did not apply to the employee, as the employee did not engage in the negotiation or administration of any contracts between Portals and FSSA, nor did the employee make any regulatory or licensing decisions that directly affected Portals, its parent, or its subsidiary.

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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

The employee is a state employee currently serving as an Itinerant Vocational Rehabilitation (VR) Counselor with the Family and Social Services Administration (FSSA).

As a VR Counselor with FSSA, the employee works with participants with disabilities that are looking to gain employment. He performs a variety of duties, including working directly with consumers in the form of his own caseload. He also assists with training new employees and filling in for supervisors when needed. When working with clients, he helps them develop job goals for employment. He uses a variety of tools to help them come up with a plan for employment. In addition, he assists in identifying any services the client needs, while also providing counseling and guidance. When a service has been identified as needed, he provides the client with an informed choice so that the client can select the best vendor for their needs.

The employee is interested in transitioning from state employment to a private company called Portals (the Company). He provides that he has not negotiated any contracts with the Company and that he does not make contract decisions at FSSA. According to the Ethics Officer, FSSA does not have a contract with the Company, but the Company is included on a list of providers from which his clients can choose. The employee's clients can select a provider through informed choice for different services that they provide. Specifically, when it is determined that a client is in need of a service, they are given choices of providers from which to select.

The clients may ask questions about the different providers, but the employee, as a VR Counselor, does not make the selection for the client. The client must make the selection on his or her own. The employee has had clients in previous years that have selected the Company, but the

employee has not referred a client to the Company in over a year due to not having any clients that needed the service the Company provides.

The employee has signed off as a supervisor on authorizations and claims that have been generated by VR counselors, including himself. The Ethics Officer provided that in this role the employee has very limited discretion in approving an authorization or signing off on a claim for services. So long as the individual is receiving needed services as identified on their individualized employment plan, an authorization is approved. Likewise, as long as the services authorized were actually delivered to the individual, the claim is approved. The employee provides that FSSA does not regulate or license the Company.

If the employee accepts a position with the Company, he would be working in a department that deals with Medicaid programs. He will assist with overseeing home modifications for the elderly. Specifically the program is intended to assist Medicaid recipients in getting an accessible bathroom when needed.

The employee requested an informal advisory opinion from the Office of Inspector General on April 13, 2018. The informal advisory opinion raised concerns regarding the employee's approvals of referrals to the Company and his position as a supervisor with possible discretionary authority over the administration of a contract. The employee is now seeking a Formal Advisory Opinion to determine if the post-employment rule's cooling off period would apply to him or if he can accept the position with the Company immediately after leaving state employment.

ISSUE

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

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

The employee's post-employment opportunity with the Company implicates the provisions of the Code pertaining to confidential information, conflicts of interests, and post-employment. The application of each provision to the employee's prospective post-employment opportunity with the Company 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.

The employee confirmed that he would not be required to utilize any confidential information in his potential employment with the Company. So long as any compensation the employee receives does not result from confidential information, his potential employment with the Company 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 he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits him from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom he 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."

The Ethics Officer provides that the employee discussed the possibility of a potential opportunity informally with the owner of the Company, whom he knows on a personal level. She explained that no formal interview has taken place, and the employee wanted to ensure that he was in full compliance with all of the ethics rules before pursuing a specific opportunity with the Company.

Once employment negotiations begin, the employee would be prohibited from participating in any decision or vote, or matter related to a decision or vote, in which the Company would have a financial interest in the outcome of the matter.

The Ethics Officer provides that as a VR Counselor, the employee does not have the discretion to choose a certain provider, such as the Company, for a consumer or encourage a consumer to choose one provider over another. The employee only advises consumers on options based on the type of services needed and location, and the consumer chooses the provider. Further, when approving authorizations and claims for services, the employee is approving that the service is necessary (based on their individualized plan) when approving authorizations and that the services were delivered when approving claims; in either situation he is not approving any particular provider for the services – the consumer makes that decision.

Accordingly, it does not appear that the employee has a potential conflict of interests at this time. The employee must ensure that he does not participate in any decision or vote, or matters relating to any such decision or vote, in which the Company would have a financial interest in the outcome of the matter for the remainder of his state employment. Further, if he identifies a potential conflict of interests, he must follow the requirements in IC 4-2-6-9(b) to avoid violating 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 he 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 (IDOA).

The Ethics Officer provided that the employee does not anticipate engaging in any lobbying activities in his prospective employment as a consultant with the Company. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, his intended employment with the Company 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 his state employment from an employer with whom 1) he 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.

Based on the information provided by the Ethics Officer, the Company does not have a contract with FSSA. Accordingly, the Commission finds that the employee did not negotiate or administer a contract with the Company on behalf of FSSA, and he is not

prohibited under this provision from accepting employment with the Company immediately upon leaving state employment.

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

Based on the information provided, FSSA does not regulate or license the Company. Accordingly, the Commission finds that this provision does not apply to the employee, and he is not prohibited under this provision from accepting employment with the Company 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 him in his official capacity as a state employee. The information provided does not suggest that the Company has extended an offer of employment to the employee in an attempt to influence him in his capacity as a state employee.

Finally, the employee is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters if he 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.

The employee has not identified any particular matters. The Commission finds that the employee must ensure compliance with the particular matter restriction and refrain from assisting or representing any person on any of the particular matters listed above that he may have personally and substantially worked on during his 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 the Company would not violate the post-employment restrictions found in IC 4-2-6-11.

Respectfully Submitted,

Jennifer Cooper
Ethics Director