

**42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)
IC 4-2-6-1 Definitions**

The Director of the Division of Disability and Rehabilitative Services with FSSA intended to leave his state employment to establish his own consulting firm which would in turn do business with a contractor that had a contract with another FSSA division. SEC found the cooling off prohibitions in the Postemployment rule would not apply to the Director's proposed employment since he would not be serving as a lobbyist and the definition of "employer" excludes the clients of a self-employed individual. However, SEC advised the Director to screen himself from any matters related to the contractor during the remainder of his state employment and to seek further guidance from the FSSA Ethics Officer.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to I.C. 4-2-6-4(b)(1).

BACKGROUND

A state employee currently serves as the Director of the Division of Disability and Rehabilitative Services ("DDRS") within the Family and Social Services Administration ("FSSA"). Prior to assuming this position, the Director worked as the Deputy Director of DDRS, as the Director of Project Management within DDRS, and in a small group with the Office of Management and Budget.

The Director would like to leave his state employment to establish his own consulting firm ("Firm") and subcontract with Health Management Associates ("HMA") to work with the Office of Medicaid. HMA currently has a contract ("Contract") with the Office of Medicaid Policy and Planning ("OMPP"), a division within FSSA. Since it is with a separate division at FSSA, the Director does not have authority to administer or negotiate the Contract between HMA and OMPP. In addition, the Director has never worked for OMPP, nor has he ever done work for OMPP during his employment with the State. As part of the intended subcontract agreement between the Firm and HMA, the Director would be performing Medicaid consulting work with OMPP.

The Director indicates that he is aware of the prohibitions in I.C. 4-2-6-11 and will not be working on any "particular matter" in which he has personally and substantially participated as a state employee. However, the Director seeks clarification on: 1) whether he is permitted under the Code of Ethics ("Code") to subcontract with HMA since it currently holds the Contract with OMPP and 2) whether he is permitted to work with OMPP on Medicaid matters.

ISSUE

What rules in the Code would apply to the Director's intended post-employment arrangement in establishing the Firm and contracting with HMA to provide services to OMPP? Would this arrangement subject him to any post-employment restrictions under I.C. 4-2-6-11?

RELEVANT LAW

I.C. 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.

I.C. 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any 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 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 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:

(1) 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

(2) 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.

(c) A written determination under subsection (b)(2) 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)(2) shall be filed with the appointing authority.

I.C. 4-2-6-11 (42 IAC 1-5-14)

One year restriction on certain employment or representation; advisory opinion; exceptions

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

(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 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) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. 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 his or her 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) representation by; or
- (3) 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 a special state appointee who serves only as a member of

an advisory body.

(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. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under I.C. 4-22-2 to establish criteria for post employment waivers.

ANALYSIS

The Director's intended post-employment venture implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Director's arrangement is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Director from accepting any compensation from any employment, transaction, or investment which 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 his intended contractual relationship with HMA would have resulted from information of a confidential nature. Accordingly, it would not appear that the Director's subcontract work with HMA would violate I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the Director from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including himself or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment. In this case, the Director's arrangement for the Firm to subcontract with HMA to provide services for OMPP amounts to an arrangement concerning prospective employment. Consequently, the Director must abstain from participating in any decision or vote for the remainder of his employment with the State in which he or HMA has a financial interest in the outcome of the matter to ensure he avoids violating I.C. 4-2-6-9. Further, the Commission recommends that the Director contact the FSSA General Counsel and Ethics Officer to seek assistance and guidance in complying with I.C. 4-2-6-9(b).

C. Post-Employment

I.C. 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 period, would prevent the Director from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Director 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 Director should contact the Office of Executive Branch Lobbying to ensure that his intended

employment with HMA would not require him to register as an executive branch lobbyist. To the extent that his employment relationship with HMA would not require him to accept compensation as an executive branch lobbyist during the cooling off period, this restriction would not apply.

Second, the Director 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. The term employer is defined in I.C. 4-2-6-1(a)(10) and specifically indicates that a customer or client of a self employed individual in a sole proprietorship or a professional practice is not considered an employer. In this case, the Director wishes to establish the Firm. Accordingly, it would appear none of his clients, including HMA, would be considered an “employer” pursuant to this definition. As a result, none of the remaining one-year cooling off prohibitions would appear to be implicated by the Director’s proposed post-employment.

Although it appears the revolving door portion of the post-employment rule would not apply to the Director’s post-employment opportunity, he would still be subject to the rule’s “particular matter” prohibition in his proposed employment. This restriction prevents him from working 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.

Although the Director has not identified any particular matters in which he anticipates working on in his intended post-employment venture, he must continue to ensure compliance with this restriction.

CONCLUSION

Subject to the foregoing analysis, the Director is not prohibited under the Code from establishing his Firm and subcontracting with HMA to provide services to OMPP as long as he 1) screens himself from any matters related to HMA at DDRS during the remainder of his state employment and 2) recuses himself from all HMA matters at FSSA. In addition, the Commission advises the Director to seek assistance and guidance from the General Counsel and Ethics Officer at FSSA.