

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

A Senior Policy Director in the Governor's Office was extended a general employment offer by a law firm in which she had previously been a partner and sought ethics advice on whether she could return to the Firm immediately upon leaving state employment. SEC found that none of the cooling off provisions would apply to the Policy Director's employment opportunity since the Firm would be considered her "employer" and not any state agencies or other clients for which she would be performing legal services. In addition, the only matters in which she had been involved with the State that might be implicated in her postemployment were legislative matters that fell outside the definition of the term "particular matter."

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

BACKGROUND

A state employee currently serves as the Senior Policy Director in the Office of the Governor ("Governor's office"). Prior to assuming this position on January 14, 2013, the Director was a member of the law firm Ice Miller LLP ("Firm") for sixteen years, most recently a partner in its Tax Group. While at the Firm, the Director represented charitable and governmental clients, focusing on corporate governance and tax issues. The Director's position at the Firm did not involve any lobbying of either the executive or legislative branch.

The Director resigned her partnership with the Firm, effective December 31, 2012, and commenced her role as Senior Policy Director with the Governor's office on January 14, 2013. At the outset of her role with the Governor's office, the Director made a six month commitment to serve with the State through the first legislative session. The Director's duties with the State included advising the Governor on policy development, providing policy input on legislation, interacting with executive branch agencies, and communicating the Governor's policy positions both within state government and to the general public.

The Firm has extended a general offer for the Director to return as a partner. The Director has not yet accepted the offer nor has she discussed the parameters of the offer with the Firm or the terms under which she would return to the Firm. She does anticipate, however, that she may be involved in work with the State or other state agencies in accepting this opportunity. Her return would be subject to an affirmative vote of the Firm's equity partners which has not occurred. Upon her return to the Firm, the Director's duties would include providing legal, consulting, and tax advice to the Firm's clients, primarily its charitable and government clients. The Director does not anticipate engaging in either executive or legislative branch lobbying in her prospective position with the Firm.

The Firm has numerous contracts with the State to perform a variety of legal work. The Director, however, has not been involved in the negotiation or administration of any contracts between the Firm and the State or any of its agencies while working with the Governor's office. The Governor's General Counsel handles all contracts or engagements with outside law firms,

and the Director was not involved in any discussions with him on these matters. The Director was involved in a few meetings with representatives from the Firm and their clients during the legislative session to give or receive input on pending legislation. However, the Director was never involved in any contract, grant, regulatory or licensing decision that involved the Firm or any of its clients while in her state role.

Regarding particular matters, the Director identifies the following three matters that she was involved with during her tenure with the State:

1. SEA 510: The Director provided policy input regarding the drafting and passage of SEA 510. In the context of her analysis of the bill, the Director reviewed contracts and other regulatory filings related to Indiana Gasification, LCC, the Indiana Finance Authority, and the Indiana Utility Regulatory Commission. In order to avoid any appearance of impropriety, the Director plans to voluntarily have the Firm screen her (the Firm has formal screening procedures administered through its Ethics Officer) from engaging in any projects that the Firm undertakes in the future relating to SEA 510 or related legal, regulatory or agency actions arising directly from the subject matter of the legislation.
2. SEA 91: The Director provided policy input regarding the drafting and passage of SEA 91. In the context of her analysis of the bill, the Director provided input regarding the prospective terms of a business transaction or economic development project that may arise as a result of the passage of SEA 91. In order to avoid any appearance of impropriety, the Director plans to voluntarily have the Firm screen her from engaging in any projects that the Firm undertakes in the future relating to SEA 91 or related legal, regulatory or agency actions arising directly from the subject matter of the legislation.
3. Healthy Indiana Plan (“HIP”)/Medicaid Expansion: The Director had limited involvement while at the Governor’s office in this project in which the Firm is also involved. In her former employment with the Firm, the Director provided legal counsel to the Indiana Family and Social Services Agency (“FSSA”) in regards to the Patient Protection and Affordable Care Act of 2010 (“PPACA”). In her role as Senior Policy Director, the Director’s staff worked extensively on issues relating to the HIP, the potential parameters of any Medicaid expansion and proposed legislation addressing those issues. While the Director was present in briefings from her staff on these issues she did not have primary responsibility for these issues; rather, other members of the Governor’s senior staff provided direct oversight of these issues. The Director would like to continue to advise clients (including the State, FSSA, or other clients) regarding issues associated with PPACA, HIP or any proposed Medicaid expansion through her prospective position at the Firm so long as any such involvement would not be a violation of any of the rules in the Code.

ISSUE

What rules in the Code would apply to the Director’s intended employment opportunity with the Firm, and would her acceptance of the offered position subject her 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 employment with the Firm invokes consideration of the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Director 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, including the Director's contention that the Firm's offer was extended on the basis of her past employment relationship with the Firm, it does not appear that the Firm's offer of employment resulted from information of a confidential nature. Accordingly, the Commission finds that the Director's intended employment with the Firm does not 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 she has knowledge that various persons may have a "financial interest" in the outcome of the matter, including herself or any person or organization with whom she is negotiating or has an arrangement concerning prospective employment. In this case, it appears that the Director has an arrangement for prospective employment with the Firm. Accordingly, the Director would be prohibited from participating in any decision or vote in which she or the Firm would have a financial interest in the outcome of the matter. The Director indicates that she has not participated in any vote or decision in which the Firm has a financial interest during her tenure as Senior Policy Director. To the extent that the Director continues to abstain from participating in any decision or vote in which she or the Firm has a financial interest in the outcome of the matter for the remainder of her state employment, and ensures compliance with I.C. 4-2-6-9(b) if a potential conflict of interest arises, the Commission finds that the Director's intended employment with the Firm does not violate I.C. 4-2-6-9.

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 she leaves state government under various circumstances. Because the Firm would be the Director’s employer, the analysis of the application of the post-employment rule focuses on the Firm and not on any clients she may perform work for as a Firm employee.

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 does not anticipate engaging in any lobbying activities in her prospective employment with the Firm. To the extent the Director ensures compliance with this provision for the entirety of the cooling off period, the Commission finds that the Director’s intended employment does not violate this provision.

Second, the Director 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 this case, the Director indicates that she has never negotiated or administered a contract with the Firm on behalf of the State. Accordingly, the Commission finds that this restriction does not apply to the Director’s intended employment with the Firm.

Third, the Director 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 this restriction does not apply to the Director’s intended employment with the Firm because she did not make regulatory or licensing decisions affecting the Firm at any time during her tenure with the State.

Fourth, the Director 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 the Firm’s offer of employment was extended to the Director in an attempt to influence her in her capacity as a state employee. Accordingly, the Commission finds that this restriction does not apply to the Director’s intended employment with the Firm.

Finally, the Director 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 case, the Director identifies three different matters that may qualify as particular matters. The first matter involves the Director's policy input regarding the drafting and passage of SEA 510. Because SEA 510 is a legislative matter and legislative matters are expressly excluded from the definition of a particular matter under I.C. 4-2-6-11(a), it is the opinion of the Commission that the particular matter restriction would not apply to the Director's involvement in matters associated with this bill.

Likewise, the Commission finds that the second matter identified, the Director's policy input regarding the drafting and passage of SEA 91, would also be exempt from application of the particular matter restriction.

The third matter identified pertains to the HIP/Medicaid Expansion. It is unclear whether this matter would qualify as a particular matter under I.C. 4-2-6-11(a). Nevertheless, the Director indicates that she had limited involvement in this matter during her tenure as Senior Policy Director and that she does not believe her participation would rise to the level of being personal or substantial. In opinion 06-I-17, the Commission opined that "[a]bsent an individual's disclosure to the Commission that they have substantially participated in a matter, and where an individual is unsure as to whether their conduct would constitute substantial participation, the Commission will make a case-by-case determination as to whether an individual would be subject to the particular matter restriction set forth in IC 4-2-6-11(c)." Having considered the Director's limited involvement and the fact that the HIP/Medicaid Expansion matter may not even qualify as a particular matter under I.C. 4-2-6-11(a), the Commission finds that the particular matter restriction does not apply in this instance and any work the Director may perform on the HIP/Medicaid Expansion matter in her post-employment.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Director may accept employment with the Firm immediately upon leaving state employment. Moreover, the Commission finds that the particular matter restriction would not prevent the Director from working on any of the three matters identified by the Director and discussed herein. Finally, because the post-employment restrictions set forth in I.C. 4-2-6-11 apply to the Firm and not its clients, the Director would not be prohibited from performing work for the State or its agencies in her intended employment with the Firm.