

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)
42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

The SBOA State Examiner planned on forming a consulting business following his retirement from state employment that would focus on advising local units of government. SEC found the Examiner would not be restricted by the cooling off period of the Postemployment rule since he did not plan on lobbying the executive branch and any clients of the firm would not be considered “employers” as defined by the Code.

Moreover, the Examiner indicated he would avoid involvement in any reports from SBOA bearing his signature to ensure he complied with the particular matter provision.

October 2013
No. 13-I-38

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 state employee serves as the State Examiner for the State Board of Accounts (“SBOA”). The SBOA conducts audits of local units of government. The State Examiner will be retiring on December 31, 2013. Upon retiring, the State Examiner plans on partnering with another individual to form a consulting business. The business will focus on providing consulting services to local units of government to help them have their records in order so that they will be ready for the next audit conducted by the SBOA. The State Examiner’s proposed business will not involve conducting audits.

ISSUE

What rules in the Code apply to the State Examiner in his intended pursuit to form a consulting business upon retiring from state employment? Would his intended business pursuit subject him to any post-employment restrictions under IC 4-2-6-11?

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

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.

IC 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 State Examiner's intended post-employment opportunity implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the State Examiner's opportunity is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the State Examiner 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. The State Examiner represents that he would not utilize confidential information in his consulting practice. So long as he ensures any compensation is not the result of confidential information, his intended consulting business would not violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9 prohibits the State Examiner 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 him. In this case, the State Examiner would like to form a consulting business following his departure from state government that will assist local units of government to prepare for future audits conducted by the SBOA. With that in mind, the State Examiner would need to abstain from participating in any decision or vote for the remainder of his employment with the State which would financially impact him or the consulting business he intends on forming. He must ensure compliance with IC 4-2-6-9(b) if a potential conflict of interest arises.

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 period or revolving door restriction, prevents the State Examiner from accepting employment from an employer for 365 days from the date that he leaves state government under various circumstances.

First, the post-employment rule prohibits the State Examiner from accepting employment for 365 days from the last day of his state employment from an *employer* if he engaged in certain activities during his tenure with the State (emphasis added). The definition of the term “employer” specifically excludes a customer or client of a self-employed individual in a professional practice. In this case, the consulting business the State Examiner intends to form would qualify as a professional practice. Accordingly, any customers or clients of the consulting business would not be considered employers for purposes of the application of the cooling off period.

The State Examiner would however, still be 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 State Examiner represents his intended consulting business would not require him to register as an executive branch lobbyist. To the extent he observes this restriction during the cooling off period, he would not be in violation this portion of the rule.

Finally, the State Examiner 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. Since the firm has not yet been formed, it does not appear that this restriction would apply.

Finally, independent of the one-year cooling off restriction, the State Examiner 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 State Examiner represents that he has been involved in many audits throughout his tenure with the State, some more in-depth than others. Audits would be considered particular matters as determinations. The State Examiner would therefore be prohibited from assisting any of his consulting business' clients with any particular matters, including past audits that he may have personally and substantially participated in throughout his entire tenure with the State. While there is some question whether his involvement in certain audits would amount to personal and substantial participation, the State Examiner proposes that he will not represent or assist any clients with any reports that bear his signature from his time as the State Examiner.

CONCLUSION

The Commission finds the State Examiner's proposed consulting business would not implicate the revolving door restriction of the post-employment rule on the basis that he will not be engaging in executive branch lobbying and that the definition of "employer" excludes the clients of such professional practices. In addition, the State Examiner will avoid involvement in any reports bearing his signature as the State Examiner to ensure he does not violate the particular matter provision of the post-employment rule.