

42 IAC 1-5-14 Post-employment restrictions (IC 4-2-6-11)
IC 4-2-6-6 Compensation resulting from confidential information

An FSSA employee sought advice regarding whether launching a limited liability professional consulting company with a fellow FSSA colleague would violate the Code of Ethics' post-employment rule. SEC determined the employee would not violate any ethics rules, so long as the employee did not receive compensation resulting from confidential information; the employee did not accept employment as a lobbyist during the cooling off period; the employee abided by the one-year restriction regarding registering as an executive branch lobbyist; the employee filed an initial disclosure with several amendments or filed multiple disclosures upon her company entering into contracts with any entities she substantially worked on while employed by FSSA during the 180 day period immediately following her resignation; and the company does not enter into any subcontracts involving the contracts the employee substantially worked on during her time at FSSA.

March 8, 2018
2018-FAO-007

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 Ethics Officer for the Indiana Family and Social Services Administration (FSSA), is requesting a Formal Advisory Opinion on the behalf of the employee. The employee is resigning from FSSA and establishing a professional practice, a limited liability company, with another employee, an FSSA colleague, effective February 28, 2018.

The employee joined FSSA as an employee of the State Personnel Department, embedded in FSSA as the Director of Human Resources in 2013. On January 6, 2014, she became the Director of the Division of Aging (DA). The employee submitted her resignation to FSSA on February 1, 2018. Her resignation from state government became effective February 28, 2018.

As DA Director, the employee was responsible for the development, implementation and oversight of programs, operations and policies relating to the provision of information, resources, and publicly funded long-term care services to individuals with physical disabilities and the aged. The employee was responsible for overseeing the procurement, negotiation, implementation and oversight of all contracts and grants executed by the DA. She also participated in the procurement, negotiation, and oversight of contracts executed through the Office of Medicaid Policy and Planning (OMPP) that were related to work administered by the DA but funded by Medicaid.

The DA has designation authority, as the State Unit on Aging, for Area Agencies on Aging and Aging and Disability Resource Centers. The employee oversaw the work of the DA in carrying out these responsibilities; including overseeing the administration of the grants and contracts with the organizations carrying out these responsibilities. The DA does not perform any licensing activities, but does certify entities to participate in Medicaid waiver programs as providers of home and community based services, and the employee oversaw the work of the unit tasked with this responsibility.

The employee did not perform any oversight activities related to licensure. The DA role is limited to certification of entities to participate in Medicaid waiver programs as providers of home and community based services and the conduct of Medicaid compliance reviews every three years. This includes both licensed and unlicensed providers of services. Licensing and regulatory oversight of providers is the province of the Indiana State Department of Health (ISDH) for providers required by law to be licensed. The DA collaborated with ISDH on provider requirements relating to Medicaid rules. The DA has an MOU with ISDH to grant waivers to ISDH licensure requirements so that providers can be certified to participate in Medicaid waiver programs. The other employee oversees the work of the unit tasked with this responsibility.

The employee was involved in the contracting process for the following entities: netlogx, the Lewin Group, Indiana 211, and Ascend. The DA contract with netlogx is for the development and implementation of data and compliance monitoring and reporting systems. The netlogx contract expires June 30, 2018. Additionally, the DA has a contract with the Lewin Group to provide environmental scans, data analysis, and technical assistance to the DA in support of the agency's "Long Term Care Transformation Project" including the amendment and renewal of the DA's Aged and Disabled Waiver. This contract will expire June 30, 2020. The Indiana 211 contract is for the administration of the Adult Protective Services Hotline and for the establishment and maintenance of a statewide resource database, and it expires October 31, 2018. She also oversaw the administration of an OMPP contract with Ascend, a division of Maximus, for the provision of software and assessments relating to preadmission screening and resident review statewide.

The Ascend contract expires June 30, 2018. There is currently a Request for Proposals in process for this function and an amendment to extend this contract is in progress. Maximus is a contractor to other divisions of FSSA; however, the employee was not involved in the contracting process for any contracts other than the DA contract with Ascend.

The employee's limited liability consulting firm will provide technical assistance to states, other government entities, and direct service providers on matters relating to the access and provision of long term services and supports in home and community based settings. Focus areas include Preadmission Screening and Resident Review, No Wrong Door systems, and the Centers for Medicare and Medicaid Services Final Rule on Home and Community Based Services (the "Settings Rule"). Examples of the types of work that the employee anticipates her business providing include:

- Evaluation and research, analysis and report writing
- Business process optimization and systems implementation
- Quality assurance and quality improvement
- Stakeholder engagement planning and facilitation
- Transition planning and remediation monitoring.

The employee anticipates the possibility that the work that her professional practice hopes to do will be as a contractor or subcontractor to other entities who seek to add subject matter expertise and/or capacity to their engagements with states, other government entities, or provider networks. The market of organizations with specific knowledge in some of the areas above is small. Although the need for these services is great, the employee estimates that there are less than a

dozen large companies providing the same services she plans to offer through her professional practice. Additionally, she believes the number of entities providing assistance with preadmission screening and resident review is even smaller. Therefore, the employee anticipates the potential for referrals to subcontract with some of the organizations that she has previously overseen as contractors to the DA for work in other states. These subcontracts would not involve any contracts the employee was involved in the negotiation or administration of during her employment with FSSA.

The employee has been advised of the disclosure requirements of IC 4-2-6-11(i), and she plans to comply. She also knows and understands that Indiana's ethics laws will continue to apply to her as a business owner of a professional practice. She understands and agrees not to divulge confidential information of FSSA during her post-employment endeavors. Furthermore, the employee understands and agrees to abide by the one-year restriction regarding registering as an executive branch lobbyist.

Based on the information presented, FSSA believes that the employee's plans to establish her professional practice to provide consulting services are permissible under Indiana's ethics laws. They are seeking a Formal Advisory Opinion for confirmation.

ISSUE

What rules in the Code apply to the employee's post-employment plans to establish a professional practice and provide consulting services?

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 professional practice/consulting opportunity 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 opportunity 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 she would not utilize confidential information in her professional consulting practice. So long as any compensation the employee receives through her professional practice does not result from confidential information, her post-employment consulting opportunities 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 and therefore includes a client or customer of a self-employed individual.

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 information provided by the Ethics Officer indicates that the employee understands this restriction and has agreed to abide by the one-year restriction regarding registering as an executive branch lobbyist.

To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, her intended post-employment consulting work 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.

In her role as DA Director, the employee has been substantially involved in the negotiation and administration of numerous contracts for FSSA. According to the information provided by the Ethics Officer, the employee anticipates that the LLC would potentially receive referrals to subcontract with some of the organizations that she has previously overseen as contractors to the DA for work in other states.

The Commission finds that the employee's involvement in these contracts would trigger the cooling off requirement and she would be prohibited from accepting employment from any of these organizations for one year after leaving state employment. However, since she is establishing a professional practice, her LLC could enter into a business relationship with any of these organizations if she meets the disclosure requirements in IC 4-2-6-11(i)(1)-(3) and files a disclosure with the State Ethics Commission within 180 days of leaving state service. The disclosure must (1) be signed by the employee; (2) certify that the employee 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 employee.

The Commission further finds that the employee should file an initial disclosure upon the LLC's entering into a contract with a company that would otherwise trigger the cooling off period within the 180 days; this disclosure can then be amended to include additional information when future contracts are executed. In the alternative, she can file a separate disclosure form each time the LLC enters into a contract with one of these entities during the 180 day period, and this would also meet the requirements in IC 4-2-6-11(i)(1)-(3). The State Ethics Director will prepare a standardized form for this disclosure and assist the employee and the Ethics Officer in the filing process as needed.

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 this provision does not apply as the Ethics Officer has provided that the employee did not perform any oversight activities related to licensure in her role as DA Director and did not make any regulatory or licensing decisions that applied to the potential clients of the LLC.

Fourth, the employee is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose was to influence her in her official capacity as a state employee. The employee has already left state employment and nothing in the information provided suggests that any of the organizations with whom her LLC may contract attempted to influence her in her former 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.

The employee has personally and substantially participated in various contracts during her state employment. However, the employee provided that the LLC will not enter into subcontracts that involve contracts for which she was involved in the negotiation or administration during her employment with FSSA.

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 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 professional practice the employee is establishing will be able to enter into subcontracts with entities with whom she would be prohibited from being employed by for one year after leaving state employment so long as she meets the disclosure requirements under IC 4-2-6-11(i)(1)-(3).

Respectfully Submitted,

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