

**IC 4-2-6-6 Compensation resulting from confidential information
42 IAC 1-5-14 Post-Employment Restrictions (IC 4-2-6-11)**

A former ISDH employee sought advice regarding the application of the post-employment rule to a potential position with a local health department or health coalition that received funding from his Division while he was serving as the Division Director. SEC determined the Post-Employment Restrictions regarding the one year “cooling off” provision and the particular matter restriction would apply to this type of position under IC 4-2-6-11(b) and (c).

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2019-FAO-022

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 former state employee (Former Employee) who previously served as the Director of the Division of Emergency Preparedness (the Division) for the Indiana State Department of Health (ISDH). The Former Employee had worked for ISDH since 2013 and served in this latest position from March 2019 - September 2019. His last day of state employment was September 27, 2019.

The Former Employee is interested in employment with a local health department or healthcare coalition. The Division provides sub-recipient agreements to ninety-three local health departments and ten healthcare coalitions in the State. These agreements are funded from cooperative agreements made by the Centers for Disease Control and Prevention (CDC) and the Assistant Secretary for Preparedness and Response (ASPR), respectively.

The sub-recipient program with local health departments and healthcare coalitions are both administered by the District and Local Readiness Director, a subordinate position to the Division Director. As the Division Director, the Former Employee supervised the District and Local Readiness Director.

The local health department agreements are non-competitive. No application is required, and a level amount is provided to each department. The Former Employee estimates that approximately eighty of the ninety-three departments entered into an agreement for the July 1, 2019 to June 30, 2020 period. An additional funding source, called the Cities Readiness Initiative, provides extra funding for twenty-six local health departments that the CDC specifically identified. This additional funding is also non-competitive and based on a mathematical formula (base + population). ISDH originally implemented this approach for funding several years ago, modeled after the way the CDC allocates these same funds to states.

The Healthcare Coalition agreements also are non-competitive. No application is required, and the funding was based on the same mathematical formula (base + population), modeled

after how the ASPR allocates these funds to states.

The agreements themselves, for both local health departments and healthcare coalitions, had specific deliverables and scope of work that the District and Local Readiness Director and staff developed based on the current cooperative agreement from the CDC and ASPR that provides the direction and requirements for the overall award.

As the Director, the Former Employee's main role and relationship to these contracts was to act as the supervisor for the District and Local Readiness Director. His role included the signing off on Requests for Contracts (RFCs) - a procedural step for ISDH Finance to electronically create contract agreements. The Program Administrator, Division Director, Assistant Commissioner and Chief of Staff are all required to sign off on RFCs. The Former Employee asserts that his role did not include the negotiation or administration of any of these specific contracts.

Should the Former Employee obtain employment at a local health department or healthcare coalition, he writes that he will not be serving as a lobbyist. He has no confidential information relevant to this matter or application. He was never in a position that made any regulatory or licensing decisions. He further did not substantially participate in any of the twelve matters listed as particular matters in IC 4-2-6-11 (a)(1) as it applies to his former position at ISDH with the local health departments or healthcare coalitions.

The Former Employee is seeking the Commission's opinion regarding the application of the post-employment rule to a potential position with a local health department or health coalition that received funding from his Division while he was serving as the Division Director.

ISSUE

Would any of the post-employment restrictions in IC 4-2-6-11 apply to the Former Employee if he were to obtain employment at a local health department or healthcare coalition?

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

A. Confidential Information

IC 4-2-6-6 prohibits the Former 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. So long as any compensation the Former Employee receives does not result from his disclosure of confidential information, his potential post-employment 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 Former Employee from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

In terms of the cooling off restrictions, the Former 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.

The Former Employee provides that he would not be in a position to engage in lobbying activities if he were to secure the type of employment he is seeking at a local health department or a healthcare coalition. To the extent that the Former Employee does not engage in executive branch lobbying for one year after leaving state employment, the Commission finds that a post-employment opportunity with a local health department or a healthcare coalition would not violate this provision of the post-employment rule.

Further, the cooling off restrictions prohibit the Former Employee 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.

The Commission finds that the Former Employee has not made any regulatory or licensing decisions that applied to local health departments or healthcare coalitions during his state employment.

In addition, the Former 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.

As Division Director, the Former Employee supervised the Division staff responsible for administering the sub-recipient contracts to local health departments and healthcare coalitions. ISDH District and Local Readiness Director and staff were responsible for administering these contracts. As the Director's supervisor, the Former Employee was in a position to make discretionary decisions regarding deliverables and scope of work.

Accordingly, the Commission finds that the Former Employee was involved in the administration of the funding contracts to the local health departments and that he was in a position to make discretionary decisions affecting the nature of the administration of these contracts.

Therefore, the Former Employee would be subject to the one-year cooling off period. In the absence of a waiver of the post-employment restrictions from ISDH, he would not be able to work for any local health departments or healthcare coalitions who entered into any of these agreements while the Division was under the Former Employee's supervision until September 27, 2020.

Finally, the Former 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.

In this instance, the Former Employee would be prohibited from representing or assisting a local health department or a healthcare coalition, as well as any other person, in a

particular matter in which he personally and substantially participated as a state employee.

The Commission finds that The Former Employee's participation in the funding contracts provided to local health departments and healthcare coalitions during his tenure as Division Director was personal and substantial. Accordingly, absent a waiver of this restriction from ISDH, he would not be able to represent or assist any person on these contracts, for the life of the contracts. He could, however, work on new contracts.

The Commission further finds that The Former Employee must ensure compliance with the particular matter restrictions and refrain from assisting or representing any person on any other particular matters that he may have been personally and substantially involved in during his state employment.

CONCLUSION

The Commission finds that the cooling off provision of the post-employment rule applies to any post-employment opportunities with local health departments or healthcare coalitions who entered into funding agreements with ISDH during the Former Employee's tenure as Director of the Division of Emergency Preparedness due to his involvement in the administration of these contracts. The Commission further finds that the particular matter restriction would apply and prohibit the Former Employee's from assisting or representing any person in these contracts for the life of the contracts.