

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

An IFA staff attorney was permitted to accept employment as a federal tax attorney with the municipal finance section of a law firm, subject to particular matter and confidential information restrictions.

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ISSUE

A current state employee with the Indiana Finance Authority seeks an advisory opinion to determine whether her post-employment opportunity to work with the law firm of Ice Miller as a federal tax attorney for their municipal finance section would be permissible under Indiana ethics law. The state employee was a private practice municipal finance lawyer with Ice Miller from 1996 until March 2003. In September 2004, she was hired as Executive Director of the Indiana Transportation Finance Authority. When the current administration took office in January 2005, the Public Finance Director for the State of Indiana requested that the state employee stay with the office to assist with its transition. In May 2005, the Indiana Transportation Finance Authority became part of a consolidated debt issuing agency currently known as the Indiana Finance Authority. The state employee has been employed as a staff attorney with the Indiana Finance Authority since the formation of the consolidated agency. The state employee's duties have involved rendering legal advice to both the Indiana Finance Authority and another entity that is referred to as the Indiana Health and Educational Facility Financing Authority, which issues debt for health care organizations and private institutions of higher education.

RELEVANT LAW

- A. IC 4-2-6-11
- B. IC 4-2-6-6

ANALYSIS

A. Post-Employment Ethical Considerations under IC 4-2-6-11: Restrictions Related to Lobbying; Negotiating and Administering Contracts; Making Regulatory or Licensing Decisions; and the "Particular Matter" Prohibition

The state employee's intended post-employment is subject to IC 4-2-6-11. The latter statute would generally prohibit the state employee from engaging in the following types of post-employment:

1. Working as a lobbyist until the elapse of at least three hundred sixty-five (365) days after the date on which she ceases to be a state employee (see IC 4-2-6-11(b)(1));
2. Working for any employer with whom she negotiated or administered a contract on behalf of the state until the elapse of at least three hundred sixty-five (365) days after the date on which she ceases to be a state employee (see IC 4-2-6-11(b)(2));
3. Working for any employer for whom she made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer until the elapse of at least three hundred sixty-five (365) days after the date on which she ceases to be a state employee (see IC 4-2-6-11(b)(3)); and,

4. Working for any employer on a "particular matter" on which she worked while employed by the state. The "particular matter" prohibition under the statute has been interpreted to apply for the life of a "particular matter," and is otherwise not limited to a three hundred sixty-five (365) day term (see IC 4-2-6-11(c)).

The application of post-employment restrictions set forth in IC 4-2-6-11 hinge primarily on two issues. First, post-employment restrictions may be invoked based upon the nature of the work that the person performed while employed with the state. Second, post-employment restrictions may apply depending upon the nature of the work that the person intends to perform upon termination of their employment with the state. Where the employee would be subject to a three-hundred sixty-five (365) day restriction, the clock begins to run after the date on which the individual ceases employment with the state.

In this case, the state employee has not made any representations to the State Ethics Commission (hereinafter "SEC") that she intends to work as a lobbyist when she leaves the state's employ. If the state employee were to engage in lobbying activity, she would be subject to the three hundred sixty-five day limitation set for in IC 4-2-6-11(b)(1). In addition to the one-year restriction from lobbying, the state employee's intended employment with Ice Miller must be evaluated in terms of the remaining statutory restrictions in IC 4-2-6-11 related to the following: (1) whether the state employee has been involved with any contract that the state may have had with Ice Miller such that she was in a position to make a discretionary decision affecting the outcome of the negotiation or the nature of the administration of any contract; (2) whether she has been involved in any regulatory or licensing decisions on behalf of the state that directly applied to Ice Miller or to a parent or subsidiary; and, (3) whether she personally and substantially participated in any "particular matters" while employed with the state such that she would be precluded from assisting or representing Ice Miller, its clients, or any other person in the matter upon termination of her state employment.

While the state employee acknowledges that the Indiana Finance Authority has retained Ice Miller to work on various projects, the state employee notes that she has never had any procurement authority and that she has never been a part of any contract between Ice Miller and the Indiana Finance Authority or between Ice Miller and the Indiana Health and Educational Facility Financing Authority. See Letter to State Ethics Commission from the state employee, dated 14 June 2006. The state employee also represents that she has never been in a position to make a discretionary decision affecting the outcome of any negotiation or the nature of the administration of any contract between Ice Miller and the Indiana Finance Authority or between Ice Miller and the Indiana Health and Educational Facility Financing Authority. *Id.* The state employee further represents that she has never made any regulatory or licensing decisions that apply to Ice Miller. *Id.* Based on The state employee's representations regarding her lack of involvement in both contracting and any regulatory or licensing decisions involving Ice Miller during her tenure with the state, the SEC finds that the state employee would not be subject to the statutory one-year restriction related to these issues as outlined in IC 4-2-6-11(b)(2) through (b)(3).

The issue remains as to whether the state employee's post-employment intentions would implicate the "particular matter" prohibition set forth in IC 4-2-6-11(c). The latter statute would prohibit the state employee from representing or assisting Ice Miller, its clients, or any other "person" as defined by the statute, in a "particular matter" involving the state if she had personally and substantially participated in the matter as a state employee, state officer, or special state appointee. The particular matter prohibition applies regardless of whether the individual receives compensation for the representation or assistance.

In this case, the SEC finds that the state employee will be subject to post-employment restrictions related to certain matters involving her work with the Indiana Health and Educational Facility Financing Authority and the Indiana Finance Authority. The SEC separately addresses the state employee's involvement with actual or potential "particular matters" relating to the foregoing entities.

With regard to the Indiana Health and Educational Facility Financing Authority, the state employee discloses that individual transactions that have come before the entity during the time that she has been employed with the Indiana Finance Authority could constitute "particular matters" for purposes of IC 4-2-6-11. See Letter to State Ethics Commission from the state employee, dated 14 June 2006. As an example, the state employee offers that her involvement in a bond deal for Union Hospital could be considered a particular matter. Id. However, the state employee states that her responsibility regarding such matters is limited in terms of her personal time commitment and the level of responsibility that other parties had who were involved in the matter. Id. The state employee discloses that she spends an average of two to three hours on a transaction that typically takes two months to complete, and that she is not required to participate in meetings or calls or draft any documents. Id. Overall, the state employee states that it is "unclear whether [her] participation in these transactions...rises to the level of 'substantial' participation," because she does not find a definition of "substantially participated" in IC 4-2-6-11. Id.

With regard to the Indiana Finance Authority, the state employee discloses that she has worked on special projects that qualify as "particular matters" for purposes of IC 4-2-6-11. Id. The state employee states that she has been involved in the transaction to lease the toll road and has been responsible for monitoring the United Airlines bankruptcy proceedings. Id.

The state employee states that her role with regard to her duties for both the Indiana Health and Educational Facility Financing Authority and the Indiana Finance Authority have not involved rendering any federal tax advice. Id. The SEC cautions the state employee that, regardless of whether she has rendered federal tax advice on any of the actual or potential "particular matters" that she has disclosed, the state employee would be prohibited from assisting or representing Ice Miller, its clients, or any other person on a matter where she has substantially participated in the matter, irrespective of whether her assistance or representation would relate to federal tax advice.

The SEC finds that the state employee would be restricted from assisting or representing Ice Miller, its clients, or any other person in the particular matters that she has disclosed with regard to the following: (1) the Indiana toll road; (2) the United Airline bankruptcy proceedings; and (3) the special projects and/or individual transactions in which she has substantially and personally participated while performing duties for the Indiana Health and Educational Facility Financing Authority and/or the Indiana Finance Authority. The SEC notes the state employee's concern that IC 4-2-6-11 does not provide a statutory definition for the term "substantially participated." Absent an individual's disclosure to the SEC that they have substantially participated in a matter, and where an individual is unsure as to whether their conduct would constitute substantial participation, the SEC 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). In the state employee's case, in the event that she should be in a position to represent or assist Ice Miller, its clients, or any other person with a matter that would constitute a "particular matter" for purposes of IC 4-2-6-11(a), yet she is unsure whether she substantially participated in the matter while in the state's employ, the SEC directs the state employee to disclose the issue to the SEC for an advisory opinion.

In her request for an advisory opinion from the SEC, the state employee also described the nature of the work that she will perform for Ice Miller. She states that her role as a federal tax lawyer in the municipal section at Ice Miller "will consist of advising the lawyers in that section on all federal tax matters related to issuing tax exempt bonds, including preparing the necessary documents to show compliance with the federal tax code." See Supplemental letter to State Ethics Commission from the state employee, dated 16 June 2006. The state employee states that she "will advise and document compliance with federal tax code requirements at the time of issuance of the bonds and also provide documentation and assistance on the federal tax code requirements that must be met subsequent to issuance of the bonds." Id. The state employee

further states that she will "provide advice as to whether a particular project qualifies for tax exempt financing under the federal tax code." Id.

To the extent that the state employee's work for Ice Miller will intersect with work that she performed while employed by the state (for example, where she will perform work for a client that had business with the state that involved the state employee in some capacity), the SEC directs the state employee to disclose any potential conflict of interest to the parties, especially as it may relate to the particular matter prohibition discussed in the above paragraphs. In the event that there may be a potential violation of the post-employment statute, or any other ethics rule, the state employee should disclose the matter to all parties involved, including the SEC. Further, upon identification of any potential conflict of interest or post-employment restriction/prohibition, the state employee should ensure that all necessary screening measures are implemented. The SEC recommends that in conjunction with the start of the state employee's employment with Ice Miller, that the state employee ensure that the law firm has screening measures in place for particular matters that have already been identified, including the Indiana toll road and the United Airlines bankruptcy.

B. Post-Employment Ethical Considerations under IC 4-2-6-6, Compensation resulting from Confidential Information

The state employee's intended post-employment is subject to the prohibition described in IC 4-2-6-6. Specifically, the state employee would be prohibited 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 employee has not disclosed any facts to the SEC that would suggest her expected employment with Ice Miller would present a violation under IC 4-2-6-6. The state employee is nevertheless cautioned that she would be prohibited from disclosing any confidential information to Ice Miller, its clients, or any other person, which she may have obtained during the course of her employment with the state.

CONCLUSION

Subject to the foregoing analysis and identified limitations pertaining to post-employment restrictions, especially "particular matters," The state employee's representations as to the terms of her intended post-employment with the law firm of Ice Miller would appear to comply with the ethical rules set forth in IC 4-2-6-11 and IC 4-2-6-6.