

42 IAC 1-5-14 Post-employment restrictions (IC 4-2-6-11)
42 IAC 1-5-6 Conflict of interests; decisions and voting (IC 4-2-6-9)
IC 4-2-6-6 Compensation resulting from confidential information

An Ethics Officer requested advice on behalf of an employee who was seeking an employment opportunity with a research and consulting firm that has a contract with FSSA. SEC determined that the employee's post-employment opportunity would not violate any ethics rules as long as the employee did not engage in executive branch lobbying for one year following his state employment; and the employee did not assist or represent any person with regard to the post-employment rule's particular matter restrictions. Further, the SEC determined that the post-employment rule's cooling off period did not apply to the employee, as the employee did not engage in the negotiation or administration of any contracts between the new employer and his state agency, nor did the employee make any regulatory or licensing decisions that directly affected the new employer, its parent, or its subsidiary.

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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) requests an advisory opinion on behalf of an employee who serves as a FSSA Director.

As Director, the employee's responsibilities include the development, implementation and oversight of programs, operations and policies relating to the provision of information, resources and publicly funded services to individuals with mental illness and addictions. The employee plans to retire from state service on April 30, 2019. He is interested in pursuing a post-employment opportunity as a Senior Consultant with Health Management Associates (HMA), following his retirement with an anticipated start date of May 13, 2019. He expects that he will be consulting and providing recommendations to states on how they should proceed with certain Medicaid waivers and how they can improve services they provide as related to the criminal justice system and addiction and mental health services, as well as other HMA national projects in this role.

HMA is an independent national research and consulting firm in the healthcare industry. HMA has offices throughout the United States, with its corporate headquarters in Michigan. FSSA currently has a contract with HMA that is set to expire on June 30, 2019. The scope of work for the contract requires HMA to assist the State's Medicaid program in policy development, implementation efforts and operational support. Specifically, the contract requires HMA to: (1) perform tasks for the Healthy Indiana Plan (HIP), such as project management, evaluation and monitoring, etc.; (2) perform tasks for the 1115 waiver; and (3) provide policy support, including ad hoc consulting as requested by FSSA division directors.

The employee did not have any involvement in the negotiation or administration of HMA's contract with FSSA nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or the nature of the administration.

The ethics officer provides that the employee knows and understands that Indiana's ethics laws will continue to apply to him as a private sector employee. He understands and agrees not to divulge confidential information of FSSA during his post-employment endeavors. Furthermore, the employee understands and agrees to abide by the one-year restriction regarding registering as an executive branch lobbyist. The ethics officer and the employee are seeking a formal advisory opinion to ask the Commission whether it is permissible for the employee to be employed by HMA upon leaving state employment.

ISSUE

What rules in the Code apply to the employee's post-employment opportunity with HMA?

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; commission advisory opinions; disclosure statement; written determinations

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter related to that 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 member, 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 ethics officer in writing and do either of the following:

(1) 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:

- (A) 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

(B) 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.

(2) File a written disclosure statement with the commission that:

(A) details the conflict of interest;

(B) describes and affirms the implementation of a screen established by the ethics officer;

(C) is signed by both:

(i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and

(ii) the agency ethics officer;

(D) includes a copy of the disclosure provided to the appointing authority; and

(E) is filed no later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) 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)(1)(B) 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; 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 opportunity with HMA implicates the provisions of the Code pertaining to confidential information; conflict of interests, decisions and votes; and post-employment. The application of each provision to the employee's prospective post-employment 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. So long as any compensation the employee receives does not result from confidential information, his prospective employment with HMA would not violate IC 4-2-6-6.

B. Conflict of Interests

IC 4-2-6-9(a)(1) prohibits the employee from participating in any decision or vote, or matter related to that decision or vote, if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits him from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, "an interest arising from employment or prospective employment for which negotiations have begun."

In this case, employment negotiations have already begun. Accordingly, the employee is prohibited from participating in any decision or vote, or matter related to a decision or vote, in which he, by virtue of his employment negotiations with HMA, or HMA itself would have a financial interest in the outcome of the matter.

IC 4-2-6-9(b) requires that a state employee who identifies a potential conflict of interests notify his or her agency's appointing authority and ethics officer and either (1) seek a formal advisory opinion from the Commission; or (2) file a written disclosure form with the OIG.

The ethics officer filed a Conflict of Interests: Decisions and Votes disclosure form on behalf of the employee with the Office of Inspector General on March 19, 2019. Under the screen overseen by FSSA's Deputy Medicaid Director, the employee is prohibited from participating in any meetings, discussions, votes, or decisions involving HMA.

The Commission finds that the employee must ensure he continues to refrain from participating in any decisions or votes, or matters relating to any such decisions or votes, in which he or HMA has a financial interest in the outcome of the matter for the remainder of his state employment in order to avoid violating IC 4-2-6-9.

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

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.

The ethics officer provides that the employee understands he is prohibited from engaging in any lobbying activities in his prospective employment with HMA. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, his intended employment with HMA 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 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.

Based on the information provided, the employee has not been involved in any negotiation or administration of HMA’s contract with FSSA nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or the nature of the administration of the contract.

Accordingly, the Commission finds that the employee is not prohibited under this provision from accepting employment with HMA immediately upon leaving state employment.

Third, the employee is prohibited 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 employee has never made a regulatory or licensing decision that directly applied to HMA during the course of his state employment. Accordingly, the employee is not prohibited under this provision from accepting employment with HMA immediately upon leaving state employment.

Fourth, the employee 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. The information presented to the Commission does not suggest that HMA has extended an offer of employment to the employee in an

attempt to influence him in his capacity as a state employee. Accordingly, the Commission finds that this restriction would not apply to the employee's employment opportunity with HMA.

Finally, the employee is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prohibits 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.

Based on the information provided, the employee would not be expected to assist or represent HMA on any particular matters in which he personally and substantially participated in as a state employee. 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 he may have personally and substantially worked on during his 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 employee's post-employment opportunity with HMA would not violate the post-employment restrictions found in IC 4-2-6-11.