

**42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)  
42 IAC 1-5-6 Conflicts of Interest (IC 4-2-6-9)**

The General Counsel and Ethics Officer for the Indiana Department of Labor (IDOL) sought advice regarding a candidate for the IDOL position of Whistleblower/Intake Supervisor (Supervisor) with IDOL's Indiana Occupational Safety and Health Administration (IOSHA) and whether the Supervisor would have a conflict of interests under the Code if she were to accept the Supervisor position with IDOL and maintain an interest in her outside business. The Commission finds that this would create potential conflicts of interests for the Supervisor under both IC 4-2-6-5.5. and IC 4-2-6-9.

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2021-FAO-008

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 General Counsel and Ethics Officer (Ethics Officer) for the Indiana Department of Labor (IDOL) is requesting an advisory opinion on behalf of a candidate for the IDOL position of Whistleblower/Intake Supervisor (Supervisor) with IDOL's Indiana Occupational Safety and Health Administration (IOSHA). Specifically, the Ethics Officer is seeking the Commission's opinion addressing whether the Supervisor would have a conflict of interests under the Code if she were to accept the Supervisor position with IDOL and maintain an interest in her outside business. Her business is a professional services contractor specializing in Occupational Safety and Health Compliance Management that offers safety solutions to help workers follow company policies and standard operating procedures so that employers can comply with applicable safety and health codes.

The Supervisor is the sole owner of a company called Code-Keepers, LLC (Code-Keepers). Code-Keepers was registered with the Indiana Secretary of State in June 2017 and currently has an Active status. Code-Keepers creates safety plans for companies based on OSHA requirements for Hazard Communication, Emergency Action Plan, Fire Safety, Exit Routes, Walking/Working Surfaces, Medical and First Aid, Recordkeeping and more.

The services that Code-Keepers offers are similar to the services that IDOL's health and safety consultation division, INSafe, currently offers to Indiana employers free of charge; however, there should be no internal dealings between INSafe and the Supervisor position, and the Ethics Officer does not anticipate a conflict of interests for the Supervisor in this regard. Currently Code-Keepers has only one client and has one company with whom it recently spoke; however, it does not yet have a contract with this second company. Code-Keepers is an Indiana Department of Transportation (INDOT) certified Disadvantaged Business Enterprise/Airport Disadvantaged Business Enterprise (DBE/ACDBE) and an Indiana Department of

Administration (IDOA) approved Minority/Women Business Enterprise (M/WBE). Code-Keepers is registered on INDOT's and IDOA's Contractor/Vendor Listings for working with state-certified contractors and General Industry employers. It also has a website and social media pages.

The Supervisor position, among other things, requires the review of complaints and referrals provided to IDOL about potential health and safety hazards that are alleged to exist at places of employment across the State of Indiana. The Supervisor then makes a decision regarding the next steps for the complaint or referral, including if an on-site inspection is to be assigned to an IOSHA compliance officer. The Supervisor also makes decisions regarding whether whistleblower complaints against employers across the State of Indiana meet the prima facie elements to warrant an investigation and ultimately if the complaint has merit. The Supervisor has other responsibilities that include supervising and training IDOL intake staff, team leaders and whistleblower investigators as well as having a shared responsibility to assist in training new compliance officers.

IDOL proposes that it put screens in place to prevent the Supervisor from having to make a decision in her capacity as Supervisor regarding a client or prospective client of Code-Keepers. The Supervisor has already provided IDOL with a current client list, and she agrees to update that list whenever Code-Keepers begins to establish a business relationship with a new client. IDOL proposes that it will compare every employer that is reported to IDOL as having a potential health and safety hazard or has a whistleblower complaint against Code-Keeper's client list. If a reported employer is not on the list, the Supervisor will be able to execute her duties as usual; however, if a reported employer is on the list or is otherwise a client or potential client of Code-Keepers, IDOL will route the decisions to be made regarding those complaints or referrals through other IDOL personnel who are capable of making those decisions.

The Supervisor also understands and agrees that she shall not use her IDOL position to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside of state government. Specifically, she shall not use information she obtains regarding reported employers to build a prospective client list for Code-Keepers or to contact the employers for any purpose other than for IDOL business in her capacity as Supervisor during IDOL work hours. She also understands and agrees that she shall not use her position as Supervisor with IDOL to obtain clients for Code-Keepers or to benefit the business in any way. This includes not mentioning or posting her position as Supervisor publicly so that clients or potential clients of Code-Keepers do not know she works for IDOL. Finally, she understands and agrees to comply with the ghost employment, use of state property and confidential information provisions of the Code.

The Ethics Officer and the Supervisor would like the Commission's opinion on whether the proposed screen would be appropriate and permit the Supervisor to continue operating her outside business if she accepts the Supervisor position with IDOL.

## ISSUE

- 1) Would the Supervisor's continued operation of her outside business, Code-Keepers, create any conflicts of interests for her under the Code once she becomes a state employee?
- 2) What other ethics issues, if any, arise for the Supervisor given her prospective position as Supervisor and her continued operation of her outside business.

## RELEVANT LAW

### **IC 4-2-6-5.5 (42 IAC 1-5-5)**

#### **Conflict of interest; advisory opinion by commission**

Sec. 5.5. (a) A current state officer, employee, or special state appointee may not knowingly do any of the following:

- (1) Accept other employment involving compensation of substantial value if the responsibilities of that employment are inherently incompatible with the responsibilities of public office or require the individual's recusal from matters so central or critical to the performance of the individual's official duties that the individual's ability to perform those duties would be materially impaired.
  - (2) Accept employment or engage in business or professional activity that would require the individual to disclose confidential information that was gained in the course of state employment.
  - (3) Use or attempt to use the individual's official position to secure unwarranted privileges or exemptions that are:
    - (A) of substantial value; and
    - (B) not properly available to similarly situated individuals outside state government.
- (b) A written advisory opinion issued by the commission stating that an individual's outside employment does not violate subsection (a)(1) or (a)(2) is conclusive proof that the individual's outside employment does not violate subsection (a)(1) or (a)(2).

### **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 relating 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 not 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.

## ANALYSIS

### *A. Outside employment*

An outside employment or professional activity creates a conflict of interests under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value if the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or critical to the performance of his official duties that his ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use his official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

A written advisory opinion issued by the Commission stating that an individual's outside employment does not violate subsection (a)(1) or (a)(2) is conclusive proof that the individual's outside employment does not violate subsection (a)(1) or (a)(2).

The Commission finds that it is unable to provide a statement that the Supervisor's continued operation of her outside business would not violate subsection (a)(1) or (a)(2) once she became a state employee. The Commission has concerns about conflicts of interests under this rule and under IC 4-2-6-9 (See Section B below).

The Commission finds that in order to avoid a conflict of interests under IC 4-2-6-9, the Supervisor would likely have to recuse herself from matters that are central and/or critical to the performance of her official duties such that her ability to perform them may be materially impaired. Specifically, the Commission finds that serving in the IDOL Supervisor position while simultaneously operating Code-Keepers, a business focused on assisting other businesses who are likely the subject of complaints/referrals that IDOL receives, would create an inherent conflict of interests for the Supervisor under the Code. No screening mechanism could prevent this conflict of interests because, in her role as Supervisor, she would review the complaints/referrals that IDOL receives regarding these businesses and be in a position to make decisions on next steps,

Further, the Commission finds that a position with IDOL would enable the Supervisor to have a perceived, if not actual, unfair advantage over competitors in identifying clients for her outside business. Members of the public and/or competitors could see her position with IDOL in screening complaints regarding workplace safety and her simultaneous operation of her outside business in assisting companies with workplace safety compliance as her using her IDOL position to secure an unfair advantage in identifying and building a client base.

Accordingly, the Commission does not approve the Supervisor's continued operation of her outside business if she were to accept the Supervisor position with IDOL.

*B. Conflict of interests - decisions and votes*

IC 4-2-6-9 (a)(1) prohibits the Supervisor from participating in any decision or vote, or matter relating to that decision or vote, if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the Supervisor from participating in any decision or vote, or matter relating to that decision or vote, if she or a business organization for which she serves as an officer or employee has a financial interest in the matter. The definition of "financial interest" in IC 4-2-6-1(a)(11) includes, in part, "an interest arising from employment."

The Supervisor is a candidate for the position of Supervisor at IDOL. As Supervisor, her responsibilities would include reviewing complaints and referrals provided to IDOL about potential health and safety hazards that are alleged to exist as places of employment across the State of Indiana.

The Supervisor would like to continue her operation of her business, Code-Keepers, if she accepts the Supervisor position at IDOL. Code-Keepers assists companies in creating custom safety plans and solutions so that they can comply with applicable safety and health codes for their employees.

The Commission finds that the decisions the Supervisor would have to make in her IDOL capacity could have a financial impact on her outside business as her business provides services to employers related to the types of complaints and referrals for which she would be reviewing and determining any needed next steps. This presents a potential conflict of interests under IC 4-2-6-9(a).

IC 4-2-6-9(b) requires that an employee who identifies a potential conflict of interests notify his or her Ethics Officer and Appointing Authority and seek an advisory opinion from the Commission or file a written disclosure statement with the Office of Inspector General (OIG). Both options require the implementation of a screen that would ensure that the employee does not participate in matters that would create a conflict of interests.

The Ethics Officer identified this potential conflict of interests, and he has requested this formal advisory opinion and indicated that IDOL is prepared to implement a screen to ensure the Supervisor is not involved in any decisions, votes or other matters in which her outside business would have a financial interest; however, the Commission finds that it would not be possible to screen the Supervisor from all decisions/votes in which her business could have a financial interest in the outcome of the matter. The Commission finds that the proposed screening procedures would not prevent a conflict of interests from arising for the Supervisor under IC 4-2-6-9.

The Commission finds that due to the nature of the Supervisor's business, Code-Keepers, every complaint and referral she would review and make a decision as to its disposition for IDOL would identify a potential client for her business. Although the Commission appreciates IDOL's and the Supervisor's efforts to adhere to the requirements of the Code and attempts to prevent a conflict of interests for the Supervisor, the Commission finds that the proposed screen could never completely eliminate the potential conflict or perceived impropriety of the Supervisor having access to information about every business that would be a candidate for the services that her outside business provides.

Accordingly, the Commission finds that IDOL would be unable to adequately screen the Supervisor from participation in all matters in which her outside business would have a financial interest. As a result, she cannot operate her outside business while serving in the Supervisor role for IDOL without violating this rule.

## **CONCLUSION**

The Commission is unable to approve the Supervisor's operation of her outside business if IDOL hires her in the Supervisor position. Operating her Code-Keepers business while simultaneously working as a Supervisor for IDOL would create potential conflicts of interests for her under both IC 4-2-6-5.5. and IC 4-2-6-9. The Commission did not address other rules under the Code as a result of this finding.

Respectfully Submitted,

Jennifer Cooper  
Ethics Director