

42 IAC 1-5-14 Post-employment restrictions (IC 4-2-6-11)

42 IAC 1-5-6 Conflict of economic interests (IC 4-2-6-9)

IC 4-2-6-6 Compensation resulting from confidential information

A FSSA employee sought advice regarding a post-employment opportunity working as a Regulatory Contract Manager with an entity with whom FSSA contracts. SEC determined that the post-employment rule's cooling off period did not apply to the employee, as the employee did not have contracting responsibilities nor did he make regulatory or licensing decisions in his position as FSSA.

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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) is requesting an advisory opinion on behalf of the employee, a Client Healthy Indiana Plan (HIP) Analyst Operations Manager in FSSA's Office of Medicaid Policy and Planning (OMPP).

The employee began working for FSSA in this position in 2018. In this position, he works with Managed Care Entities (MCEs) and is responsible for assisting with customer service efforts; participating in regular customer service team meetings with MCEs; researching and tracking member issues; and responding to inquiries from members, legislators and other officials. Additionally, his duties include routine reporting of cases and issues; identifying critical customer service issues; and bringing them to the HIP team attention for policy and system resolution.

MCE members pay MCEs for health coverage through the State. Mr. Hunter provides trouble shooting by assisting the members in opening up their account with the State. Mr. Hunter is also responsible for relaying information to MCEs and directing the flow of Medicaid/HIP applications to MCEs. The individual applying for state health insurance selects the MCE, and Mr. Hunter directs the application accordingly.

On July 16, 2019, the employee notified the Ethics Officer that he applied and interviewed for a Regulatory Contract Manager position with CareSource, one of the MCEs that contracts with FSSA to coordinate care for members enrolled in Indiana Medicaid programs. CareSource is a nonprofit managed care company based in Dayton, Ohio. The company offers Medicaid managed care plans, Medicare Advantage plans and Marketplace insurance plans in multiple states. The employee learned about the position after uploading his resume in June 2019 to various online job search websites. On July 1, 2019, CareSource contacted him requesting a phone interview on July 3, 2019. CareSource then conducted a second interview with him on July 11, 2019.

The Ethics Officer provides that although the employee regularly interacts with CareSource in his current position, he was not part of the team that made the final decision to award a contract to CareSource. Furthermore, the employee has not engaged in the negotiation or administration of any contract between the State and CareSource, nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or administration of any contract with CareSource. He does not make any regulatory or licensing decisions.

According to the Ethics Officer, OMPP's Quality & Outcomes section maintains oversight of the MCEs and manages their contracts to ensure compliance. Contract managers under the leadership of the Managed Care Compliance Manager and Quality and Outcomes Section Director are the primary point of contact for the MCEs. CareSource has an assigned contract manager.

Once OMPP was made aware of the employee's interest in employment with CareSource, OMPP removed him from working on any issues related to their contract operations. OMPP assigned a different person to handle all correspondence with CareSource.

The potential CareSource position is different from the duties that Mr. Hunter has currently with the OMPP. Mr. Hunter's role as a Regulatory Contract Manager with CareSource would require him to be responsible for ensuring that CareSource fulfills its contract obligations with the State's HIP 2.0 Program. This would include establishing and maintaining a collaborative working relationship with his assigned regulatory agency (FSSA); serving as the primary liaison per contract requirements with FSSA; and providing replies to requested data or reports from regulators.

Additionally, the position would require him to be the primary person accountable for providing interpretation and guidance to CareSource regarding regulatory requirements and government contract administration. The position would also require him to respond to incoming regulatory and legislative inquiries and issues regarding compliance requirements.

The employee has confirmed with the Ethics Officer that he 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 to anyone. Furthermore, the employee understands and agrees to abide by the one-year restriction regarding registering as an executive branch lobbyist.

FSSA is seeking the Commission's opinion regarding the application of any of the rules in the Code of Ethics to the employee's post-employment opportunity with CareSource.

ISSUE

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

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

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 potential employment with CareSource 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 would be 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 CareSource, would have a financial interest in the outcome of the matter.

The Ethics Officer provides that once the employee informed her that he had applied and interviewed for the Regulatory Contract Manager position with CareSource, OMPP removed him from working on any issues related to their contract operations. OMPP assigned a different person to handle all correspondence with CareSource.

Based on the information provided, it appears that a potential conflict of interest was identified. IC 4-2-6-9(b) requires that a state employee who identifies a potential conflict of interests notify his 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 provides that the employee notified her of the potential opportunity with CareSource on July 15, 2019, and FSSA took steps to screen him from matters in which CareSource would have a financial interest in the outcome of any decisions or votes he would make as part of his responsibilities as a Client HIP Analyst, including providing troubleshooting and directing the flow of Medicaid/HIP applications. The Ethics Officer then requested this formal advisory opinion on the employee’s behalf.

The Commission finds that the employee, with the Ethics Officer’s assistance, has complied with the disclosure requirements under IC 4-2-6-9, including the request for a formal advisory opinion. 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 CareSource has a financial interest in the outcome of the matter for the remainder of his state employment.

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 CareSource. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, the Commissioner finds that his intended employment with CareSource 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.

According to the Ethics Officer, the employee has not engaged in the negotiation or administration of any contract between the State and CareSource, nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of any contract with CareSource.

The Commission finds that the employee did not have any contracting responsibilities in his position at FSSA and would not be subject to the cooling off restriction for his role in interacting with CareSource and the other MCEs as a Client HIP Analysis. Accordingly, he may accept employment with CareSource 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 Ethics Officer provides that the employee does not make any regulatory or licensing decisions in his position with FSSA. The Commission finds that the employee has never made any regulatory or licensing decisions that applied to CareSource as a state employee, and he is not prohibited under this provision from accepting employment with CareSource 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 CareSource 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 his intended employment opportunity with CareSource.

Finally, the 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 employee would be prohibited from representing or assisting CareSource, as well as any other person, in a particular matter in which he personally and substantially participated as a state employee.

The Ethics Officer provides that the employee's prospective job responsibilities with CareSource would be different from the duties that Mr. Hunter has currently with the OMPP. The employee's role as a Regulatory Contract Manager with CareSource would require him to be responsible for ensuring that CareSource fulfills its contract obligations with the State's HIP 2.0 Program. This would include establishing and maintaining a collaborative working relationship with his assigned regulatory agency (FSSA); serving as the primary liaison per contract requirements with FSSA; and providing replies to requested data or reports from regulators.

Although he interacted with CareSource and the other MCEs and assisted in troubleshooting matters with them, the employee did not have any contract responsibilities as an FSSA employee. It does not appear that he actually worked on CareSource's contract itself. Accordingly, the Commission finds that the employee did not personally and substantially participate in CareSource's contract while an FSSA employee, and he would not be prohibited from working on this contract for CareSource, as it appears he would be doing in his prospective position as the Regulatory Contract Manager for CareSource.

The Commission further finds that the 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

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the employee's potential post-employment opportunity with CareSource would not violate the post-employment restrictions found in IC 4-2-6-11.

Respectfully Submitted,

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