

Post-Employment Conflicts of Interest for State Employees

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Governing Statute- Post Employment Restrictions

- Ind. Code §4-2-6-9 Decisions & Voting Conflicts of Interest
 - Post Employment Conflict of Interest= Subsection (a)(4)
 - Disclosure Requirement- ALL post-employment COI
 - Conflict of Interest Screen- ALL post-employment COI
 - Advisory Opinion Option- When does post-employment COI arise?
- Ind. Code §4-2-6-11 Post-Employment Restrictions
 - Cooling-Off Period
 - Administrative Law Judge= Subsection (h)
 - Particular Matter Restriction (“PMR”)
 - Waivers
 - Prohibited Employment Arrangements= Subsection (d)
 - Sole Proprietorship & Professional Practice Disclosures= Subsection (i)

Ind. Code §4-2-6-9 Decisions & Voting Conflicts of Interest

- COI disclosure and screen requirements triggered when state employee *commences employment negotiations with agency vendor*
 - Merely “exploring options” not COI
 - Employment Negotiations=Interview Conducted
 - Moot if state employee/vendor disengages after interview
 - Screen expires when employee leaves agency or no job offer/offer declined
- What is employee screened from?
 - Decisions/votes in which vendor has interest
 - Matter in which vendor has interest
 - Matter participated in while employed by INDOT (post-employment)
- What is disclosed?
 - Employment negotiations- name of employee and name of vendor
 - Execution of screen with agency ethics officer
 - Certification of compliance with notice and timing requirements
- Per **IC 4-2-6-11(i)** a disclosure must also be filed by former state employees who form a sole proprietorship or professional practice and engage in a business relationship with an agency vendor otherwise covered by the post-employment restrictions provided in code of ethics

Ind. Code §4-2-6-11(b) Post-Employment Restrictions: Cooling-Off Period

- **Cooling-Off Period**

- Employee prevented from accepting employment as lobbyist/with vendor for shorter of:
 - 365 Days after leaving agency
 - 2 years from last conflict causing contact with vendor
- Cooling-Off Period applies to *all lobbyist positions*
- Cooling-Off Period applies to non-lobbyist position if:
 1. Employee administered or negotiated contract with employing vendor within last 2 years & held position with discretionary authority to:
 - a) Establish value, scope, or nature of contract
 - b) Change the value, scope, or nature of contract
 2. Employee did not administer or negotiate a contract with employing vendor but did make regulatory/licensing decision in which vendor or affiliate has an interest
 3. Employee made decisions as an Administrative Law Judge or presided over information gathering or order drafting proceedings which directly applied to proposed employer - **IC 4-2-6-11(h)**

Ind. Code §4-2-6-11(g) Waiver of Cooling-Off Period

- Requirements for waiver of Cooling-Off Period
 - Employee's appointing authority may waive application of cooling off period when:
 1. Waiver is in the public interest; and
 2. Waiver is required to prevent employee from suffering undue economic hardship
 - As applied by INDOT, economic hardship means the employee would not be able to practicably obtain a job in the employee's chosen industry without a waiver
 - Availability of waivers where baseline standards satisfied is up to discretion of appointing authority and operational preferences of governing bodies
- Waivers must contain all information provided by Ind. Code §4-2-6-11(g)(2)
- Before taking effect, waivers must be approved by the State Ethics Commission at a hearing held during one of the SEC's monthly meetings
 - Hearings require attendance of ethics officer, employee, agency head or designee
 - Hearings involve extensive questioning and decisions are based on the SEC's determination of whether the waiver meets all requirements; is in the public interest; and necessary to avoid undue economic hardship

Ind. Code §4-2-6-11(c) Post-Employment Restrictions: Particular Matter Restriction (“PMR”)

- **Particular Matter Restriction**

- State employee cannot assist any future employer with any matter she “personally and substantially” participated in as state employee
- Restriction applies in perpetuity, for the life of the “matter”

- **What is a “matter” (Ind. Code §4-2-6-11(a))?:** (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

- For INDOT, most common “matters” are projects and individual construction and consulting contracts. But also see conflicts related to licenses/permits and enforcement proceedings.
- For INDOT, phasing/workflow matters- differentiating between *project* and *contract*

- **What is “personal and substantial” participation?**

- SEC looks at the time devoted to the matter as part of overall work, but this does not always work for INDOT
- Important consideration for INDOT is whether employee played project/contract/permit specific role, versus performing rote task that does not require individual engagement in specific facts of the matter
- For INDOT, question is whether employee obtained project specific information or made project specific determinations while working on behalf of the agency, such that will accrue unfair advantage of subsequent employer or would result in conflict in form of dual representation

Ind. Code §4-2-6-11(g) Waiver of Particular Matter Restriction

- Waiver requirements and approval process identical to Cooling Off Period
- However, INDOT generally **does not** pursue waivers for particular matters
 - Consequences of dual representation mean benefit of public-private partnership is lost
 - Advantage to employer of conflicted state employee creates a new conflict of interest in violation of laws governing competition for public contracts
 - Granting PMR waivers could incentivize/accommodate double dealing on the part of unscrupulous contractors and employees
 - Risk of creating environment subject to such dual representation outweighs any public interest in granting waiver
 - Risk of direct conflict of any nature in private delivery of public contract likewise outweighs public interest in waiver in most situations
- SEC examines “personal and substantial” nature of employee participation in matter, which is undefined, ambiguous, and hard to measure
 - Unknown outcome of SEC review makes pursuit of PMR waiver by agency unpalatable from operational perspective

Ind. Code §4-2-6-11(d) Post Employment Restriction- Job Offers Constituting Improper Influence

- **Third (3rd) and final post-employment restriction- Ind. Code §4-2-6-11(d):**

A former state employee may not accept employment or compensation if the circumstances surrounding the arrangement would lead a reasonable person to conclude that the same is being offered for the purpose of influencing the former state employee in the performance of the individual's duties or responsibilities while a state employee

- There is NO WAIVER for such an improper arrangement
- This has, fortunately, not arisen in my time at INDOT

Summary: Post-Employment Ethical Considerations for State Employees

- Before leaving state employment, employees should clear their proposed employment arrangement with their agency ethics officer to:
 - (1) Ensure they can commence such employment immediately
 - (2) Identify matters they are prohibited from participating in for subsequent employers
 - (3) File any required disclosures
 - (4) Take appropriate measures to avoid COIs pending departure from public employ
- If a state employee enters employment negotiations with a firm that has a business relationship with her appointing agency, she **must** file a disclosure with the SEC & be screened from matters in which said firm has an interest
- A former state employee may not represent future employers with regard to matters she personally and substantially participated in as a state employee
- Certain state employees, specifically those serving in positions with discretionary authority over public contracts or regulatory matters, may be subject to the cooling off period with regard to companies they worked with during their last two (2) years of state employment

Questions? Email me!

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