

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)
42 IAC 1-5-6 Conflict of interests; decisions and voting (IC 4-2-6-9)

An FSSA employee sought advice regarding the application of post-employment restrictions to an opportunity for future employment with an organization that had a contract with FSSA to coordinate care for members enrolled in Indiana Medicaid programs. The employee neither engaged in the negotiation or administration of any contracts between the state and the organization, nor did he have any authority to make any discretionary decisions regarding same. SEC determined that the employee's post-employment opportunity would not violate post-employment restrictions found in IC 4-2-6-11, so long as the employee complied with the executive branch lobbying restrictions.

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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 a Formal Advisory Opinion on the behalf of an employee. Since December 2014, the employee has worked for FSSA's Office of Medicaid Policy and Planning (OMPP) as a Government Affairs Analyst. OMPP oversees the administration of Indiana Health Coverage Programs, which include Medicaid, the Children's Health Insurance Program (CHIP) and the Healthy Indiana Plan (HIP). The employee assists the FSSA Legislative Director and Medicaid Director in executing Medicaid's legislative goals. His duties include analyzing state legislation and federal regulations, responding to external inquiries, and serving as the Medicaid legislation liaison. The purpose of the employee's position is to effectively manage Medicaid legislation and ensure the program is in compliance with federal law and regulations.

On October 5, 2017, the employee notified the Ethics Officer of his intent to apply for a State Policy & Legislative Affairs Manager position with CareSource, and she reviewed the post-employment restrictions that would be applicable. The Ethics Officer determined there was no need for an internal screen since the employee had not commenced negotiations. The following week, the employee was contacted for a first round interview on October 11, 2017. Although the employee does not oversee CareSource's contract with the State, the employee and the Ethics Officer agreed that an internal screen would be appropriate to avoid any potential conflicts of interests and the appearance of impropriety during the negotiation process. The employee's supervisor implemented a screen so that the employee would not handle any matters related to CareSource.

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. CareSource, one of the four managed care entities ("MCE"), contracted with FSSA to coordinate care for members enrolled in Indiana Medicaid programs.

The employee neither 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. 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.

The employee periodically interacts with policy and government relations staff from all MCEs, including CareSource. Typically, his work involves an occasional email or call to discuss policies or legislation relevant to FSSA's managed care programs. The employee has more frequent contact with MCEs when the Indiana General Assembly is in session. Such contact can include weekly policy discussions. According to the employee, CareSource often participates in these discussions or may contact him directly with questions. His participation in these discussions includes highlighting recent state or federal developments, providing any relevant information on the subject matter and asking for feedback concerning the impact to the members FSSA serves. The employee indicates that his role with CareSource would support the company's government affairs team by developing and implementing advocacy plans, monitoring legislative and governmental activities, analyzing legislation and maintaining relationships with legislative and government officials.

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.

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

The employee's post-employment opportunity with CareSource implicates the provisions of the Code pertaining to confidential information, conflicts of interests, and post-employment. The application of each provision to the employee's prospective post-employment opportunity with CareSource 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. Based on the information provided, it does not appear that the employee would utilize confidential information in his potential employment with CareSource. 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. Conflicts of Interests

IC 4-2-6-9(a)(1) prohibits the employee from participating in any decision or vote, or matter related to any such decision or vote, if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits the employee from participating in any decision or vote, or matter related to any such 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 as the employee was contacted for an interview on October 11, 2017. Accordingly, a conflict of interest would arise for the employee if he participates in a decision or vote, or matter related to such decision or

vote, in which either he, by virtue of his employment negotiations with CareSource, or CareSource itself would have a financial interest.

The employee informed the Ethics Officer of the particular opportunity with CareSource, and they determined that the employee was not in a position to participate in decisions or votes involving CareSource's contract with FSSA. However, the employee's supervisor implemented an internal screen to ensure that the employee did not handle any matters related to CareSource.

The employee must ensure he does not participate 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. Further, if he identifies a potential conflict of interests, he must follow the requirements in IC 4-2-6-9(b) to avoid violating this rule.

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. Employer is defined in IC 4-2-6-1(a)(10) as any person from whom a state employee receives compensation and therefore includes a client or customer of a self-employed individual.

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 (IDOA). The information provided by the Ethics Officer indicates that the employee understands this restriction and has agreed to abide by the one-year restriction regarding registering as an executive branch lobbyist.

The employee's prospective position as State Policy & Legislative Affairs Manager with CareSource would support the company's government affairs team by developing and implementing advocacy plans, monitoring legislative and governmental activities, analyzing legislation and maintaining relationships with legislative and government officials. Because this type of work appears to include contact with government officials, the Commission has requested that the employee read the IDOA's Executive Branch Lobbying manual to ensure that he understands the types of interactions with the executive branch that would be considered to be executive branch lobbying or require him to register as an executive branch lobbyist. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, 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. The employee neither engaged in the negotiation or administration of any contract between the State and CareSource, nor was he in a position to make a discretionary decisions affecting the outcome of the negotiation or nature of the administration of any contract with CareSource during his state employment. Accordingly, the Commission finds that the employee is not prohibited under this provision from accepting 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 Commission finds that this provision does not apply to the employee because he has not made any regulatory or licensing decisions that applied to CareSource as a state employee. Consequently, 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 the offer of employment from CareSource was extended 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.

The employee has not identified any particular matters. Further, his work with FSSA primarily involves legislative and policy matters that would be exempt from the particular matter restrictions.

The Commission finds that the employee must ensure compliance with the particular matter restriction and refrain from assisting or representing CareSource or any other person on any of the particular matters listed above that he may have personally and

substantially worked on during his state employment regardless of whether it involved CareSource.

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 CareSource would not violate the post-employment restrictions found in IC 4-2-6-11.

Respectfully Submitted,

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Ethics Director