ADVISORY OPINION NO. 2011-04

Issued On May 5, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Per Diem Legislative Attorney** asks whether the revolving door amendment to the Ethics Act applies to his position if he becomes an independent contractor prior to the legislation's effective date.

FACTS RELIED UPON BY THE COMMISSION

On March 18, 2011, the West Virginia State Legislature passed HB 2464, amending the West Virginia Governmental Ethics Act in various ways. The Ethics Act now prohibits certain public servants from registering as lobbyists during, and for one year following, the termination of their service or employment. The Requester asks about the application of this new provision to his situation.

The Requester has worked for the Legislature as a per diem employee during the legislative session for the past five years. He is considering converting his status to an independent contractor to avoid the newly enacted prohibition against lobbying. It does not appear that his duties and responsibilities will change in any way, only the characterization of his employment status with the Legislature. He asks whether the new amendment applies to him "if measures are taken to ensure he ... is working as an independent contractor... prior to the effective date of the legislation on July 1, 2011". In his request, he further states, "The 'revolving door' provision does not apply the one year prohibition ... to independent contractors. The legislature decided not to apply the revolving door provision to independent contractors."

The Requester states that it is unclear whether per diem legislative attorneys are employees or independent contractors. Further, Senate Resolution No. 15 authorizes the Senate "to appoint **employees** to receive the per diem compensation" during the legislative session and any extension thereof. (emphasis supplied)

According to the West Virginia State Senate Fiscal Office, the primary difference between per diem employees and per diem independent contractors is the method of payment. Employees receive a paycheck with the standard withholdings subtracted from their salary, and receive a Form W-2 at year's end. Independent contractors, however, receive the full amount of pay without undergoing any withholdings for taxes, social security, etc., and at year's end receive a Form 1099. Independent contractors are responsible for their own taxes.

As a result of the foregoing, the Requester proposes to convert his status to an independent contractor if, by doing so, he avoids the newly enacted prohibition against lobbying for one year following the termination of his public service/employment.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

The amendment to W. Va. Code§ 6B-3-2 reads, in relevant part:

> (e) The following public officers or employees may not, during or up to one year after the termination of their public employment or service, be allowed to register as lobbyists:
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> (3) Will and pleasure professional employees of the legislature under the direct supervision of a member of the legislature....

W. Va. Code§ 6B-1-3 contains relevant definitions, and reads:

> U) "Public employee" means any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.
>
> (k) "Public official" means any person who is elected or appointed to any state, county or municipal office or position and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interest or interests of any person.

W. Va. Code§ 6B-2-5(a) identifies those public servants whose conduct is governed by the Ethics Act, and reads:

> The provisions of this section apply to all elected and appointed public officials and public employees, whether full or part time, in state, county, municipal governments and their respective boards, agencies, departments and commissions and in any other regional or local governmental agency, including county school boards.

ADVISORY OPINION

The amendment to the Ethics Act imposes a "revolving door" prohibition on certain legislative employees. The Ethics Commission has never held that the Ethics Act applies to independent contractors. Instead, in Advisory Opinion 96-27, the Commission held that a private engineering firm that had a contract with a public agency was not a public entity. Citing W. Va. Code§ 6B-2-5(a), the Commission concluded that the private engineering firm's staff was not subject to the Ethics Act. Thus, there is nothing in the Ethics Act nor the Ethics Commission's precedential opinions that subjects independent contractors to the provisions of the Ethics Act.

Even so, the Commission is troubled that an employee of the very governing body that so recently enacted the revolving door amendment has chosen to seek a way to escape its application. The Commission frowns on such conduct, and questions whether the Requester's employer is even aware of his intentions to circumvent the spirit and intent of the Ethics Act's new prohibitions or agrees to the Requester's proposed course of conduct.

The federal Internal Revenue Service (IRS) interprets the Internal Revenue Code. The IRS has the sole authority to determine whether an individual is an employee or an independent contractor for purposes of the federal tax code and related regulations.[1] The Ethics Commission lacks the authority to interpret federal tax law.

The Commission notes, however, that IRS regulations covering whether an individual is an employee or an independent contractor depends on various factors, including whether the employer has treated "any worker holding a substantially similar position" as an employee.[2] Further, contrary to popular opinion, attorneys are not automatically considered independent contractors, as a class of professionals. See, e.g., Donald G. Cave A Professional Law Corp. v. Commissioner, T.C. Memo 2011-48.[3] See *also,* Kovacevich v. Commissioner, T.C. Memo. 2003-161, *aff'd.* 177 Fed. Appx. 561 (9th Cir. 2006).[4] The Ethics Commission is not convinced that a mere change in payroll status is sufficient to satisfy the requirements of federal tax law as set forth in the Internal Revenue Code.[5] Nonetheless, the Ethics Commission defers to the IRS for the ultimate determination on the Requester's employment status.

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[1] For example, the Workers' Compensation Division and Unemployment Compensation Division also make legal determinations as to who is an employee or independent contractor for purposes of their statutes or regulations.

[2] *See* http://www.irs.gov/businesses/sma1l/article/O)d=99921,00.html for a discussion of the factors the IRS considers in determining whether an individual is an employee or an independent contractor.

[3] The Tax Court found that attorneys working with a law firm were employees of the firm for employment tax purposes, and that the firm was liable for employment taxes and penalties with respect to amounts paid to the attorneys for the periods in question. This decision was contrary to the law firm's treatment of the attorneys as independent contractors.

[4] The Tax Court found that Kovacevich was an employee of his law firm, not an independent contractor.

[5] "For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing...." Internal Revenue Code, Section 3401(c).

Thus, reading W. Va. Code§ 6B-1-3 together with the amendment to W. Va. Code § 6B-3-2, the Commission hereby finds that a per diem legislative attorney who is an independent contractor is **not** a public employee as contemplated by the Ethics Act, including the newly enacted revolving door prohibitions. Thus, if, as of July 1, 2011, the Requester is no longer a legislative **employee,** as defined by the IRS, he may register as a lobbyist without violating the Ethics Act.

Still, the Legislature, not the Requester, must ultimately determine whether it may legally convert the Requester's employment status to independent contractor and, if so, whether it is willing to do so. The Ethics Act establishes the minimum standards for public servants. Agencies are permitted to impose stricter limitations than the code of conduct set forth in the Ethics Act.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public employees unless and until it is amended or revoked, or the law is changed.

/s/R. Kemp Morton, Chairperson
West Virginia Ethics Commission