

ADVISORY OPINION

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Stock Options and Post-State Employment

QUESTIONS

1. Does a former state employee's ownership of stock in his or her post-state employer create a beneficial interest in that employer's contracts with the former employee's agency?

2. If the answer to question one is yes, does RCW 42.52.080(2) or any other provision of chapter 42.52 RCW prohibit the former employee from owning any of the company's stock during the two-year period following termination of the former employee's state service?

3. Does the answer to question two change if the former employee's interactions with the company included participation in the agency's decision to award contracts to the company?

4. If the answer to question two is yes, then would it be permissible for the company to provide stock options to the former employee, provided the former employee could not exercise the options within the two-year period following the termination of state service?

5. Are there any precautions a company can follow prior to and during the employment of a former state employee to assure compliance with RCW 42.52.080?

ANSWERS

1. Yes, the ownership of stock confers ownership in a company's assets; allows stockholders to participate in the general management of the company; and provides the stockholders with a share in company profits or earnings. To the extent that a company's profits or earnings derive from its contracts, stock ownership confers a beneficial interest in those contracts.

2. No, a former employee is not prohibited from owning stock in his or her new employer unless the former employee participated in executive action to authorize or fund one or more contracts with that new employer. [Emphasis added]

3. Yes, if a former employee participated in executive action to award contracts to the new employer, the former employee could not acquire a beneficial interest in those contract through stock ownership for a period of two years after termination of state service under RCW 42.52.080(2).

4. Yes, provided the strike price of the option is not below the current value of the company's stock, and the option is not exercised for a period of two years after the former employee terminates state service.

5. Yes, however compliance with the provisions of RCW 42.52.080 is primarily the responsibility of the former state officer or employee and not the new employer. If an employer intends to discuss post-state employment with a current state officer or state employee, the prospective employer should advise the officer or employee to seek guidance regarding potential conflict of interest issues under the state's ethics law. Once an offer of employment is accepted by the state officer or state employee, the new employer should ensure that the employee does not perform duties that could create a violation of RCW 42.52.080 with regard to contracts or other transactions involving the state that the former officer or employee may have participated in while in state service, or that could involve the disclosure of confidential information gained by reason of state employment.

ANALYSIS

A company that primarily contracts with state agencies is interested in filling a high-level position in marketing with a state employee who has participated in state transactions involving the company. Specifically, the state employee has (a) signed contracts valued at more than \$10,000 within the last year; and, (b) exercised discretionary authority, but no supervision or administrative responsibilities, over these contracts. All contracts were issued as a result of the Request for Proposal (RFP) Process. The employee did not serve on any of the selection committees for the RFP; however, the employee participated in the development of selection criteria for the RFP.

The position for which the employee may be hired would include marketing the company's products to in-state and out-of-state clients, including state agencies. The position would develop new contracts, and would not have duties relating to monitoring, fulfilling, or implementing the provisions of any existing contracts, state agency or otherwise. The employee's compensation may include, in addition to salary, stock options.

For the purposes of this opinion, the Board assumes that the intended offer of employment in this case would not violate either RCW 42.52.080(3) and (4).

1. Does a former state employee's ownership of stock in his or her post-state employer create a beneficial interest in that employer's contracts with the former employee's agency?

In Advisory Opinion 97-07, the Board relied on Christiansen v. Department of Social Security, 15 Wn.2d 465, 467, 131 P.2d 189 (1942) to define “beneficial interest”, and agreed with the court’s definition that a beneficial interest was the “profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from legal ownership or control.” The Board concluded that any determination of whether a former state employee would have a beneficial interest in the contracts of a new employer necessarily depended on the arrangements between the employee and the new employer. If a former state employee merely receives a salary from the new employer, and has no special rights to receive profit, benefit, or advantage from any contract with the state, the employee could not be said to have an interest in his or her employer’s contracts with the state.

This conclusion is different when a former employee owns stock in a new employer. The holding of stock confers ownership in the company’s assets, allowing the stockholder to participate in the general management of the company and to share in its profits or earnings. To the extent that a company’s profits or earnings derive from its contracts, stock ownership confers a beneficial interest in those contracts.

2. If the answer to question one is yes, does RCW 42.52.080(2) or any other provision of chapter 42.52 RCW prohibit the former employee from owning any of the company’s stock during the two-year period following termination of the former employee’s state service?

With the exception of RCW 42.52.050, which prohibits disclosure of confidential information gained by reason of state employment, the main provision governing post-state employment is RCW 42.52.080. Under RCW 42.52.080(2):

No person who has served as a state officer or state employee may, within a period of two years following the termination of state employment, have a direct or indirect beneficial interest in a contract or grant that was expressly authorized or funded by specific legislative or executive action in which the former state officer or state employee participated.

Although the Board has concluded that stock ownership creates a beneficial interest in a company’s contracts, a former state officer or employee would not be prohibited from owning the company’s stock for a period of two years from the date of termination of state service unless the former officer or employee participated in the executive action that authorized or funded contracts with the company.

3. Does the answer to question two change if the former employee’s interactions with the company included participation in the agency’s decision to award contracts to the company?

Yes. Pursuant to RCW 42.52.080(2) a former state officer or employee is prohibited from acquiring a beneficial interest in contracts with his or her former state agency if the former state officer or employee participated in executive action to authorize or fund the contracts. A decision to award a contract is a decision to authorize the contract.

RCW 42.52.080(2) is the only provision that limits a former state officer or employee from acquiring a beneficial interest in contracts with his or her former state agency. While not prohibiting the ownership of stock, RCW 42.52.080(5) contains a broader prohibition than RCW 42.52.080(2), and prohibits former state officer or employee from assisting a company with regard to any transaction involving the state that he or she participated in while in state service:

No state officer or state employee may at any time subsequent to his or her state employment assist another person, whether or not for compensation, in any transaction involving the state in which the former state officer or state employee at any time participated during state employment. This subsection shall not be construed to prohibit any employee or officer of a state employee organization from rendering assistance to state officers or state employees in the course of employee organization business.

The prohibition in this subsection extends beyond participation in executive action prohibited under subsection (2). In this case, the company has indicated that the former state officer or employee only would work on new contracts. In limiting the duties of the former state officer or employee to new contracts, a violation of RCW 42.52.080(5) is avoided.

4. If the answer to question two is yes, then would it be permissible for the company to provide stock options to the former employee, provided the former employee could not exercise the options within the two-year period following the termination of state service?

While stock ownership creates a beneficial interest in a company's current contracts, stock options are based on the expectation that future performance will exceed current performance. An option provides the buyer with the right, but not the obligation, to buy or sell stock at a specified price within a specified time period. As such, a buyer does not acquire a beneficial interest in the company until the option is exercised. To avoid a violation of RCW 42.52.080(2), the company may provide stock options to a former state officer or employee, provided that the strike price for the option is not below the current value of the company's stock, and the employee does not exercise the option within the two-year period following termination of state service.

5. Are there any precautions a company can follow prior to and during the employment of a former state employee to assure compliance with RCW 42.52.080?

The post-state employment restrictions under RCW 42.52.080 contain various prohibitions. RCW 42.52.080(1) prevents former state officers and state employees from accepting post-state offers of employment where duties would include matters relating to certain state contracts:

- (a) The officer or employee, during the two years immediately preceding termination of state employment, was engaged in the negotiation or administration on behalf of the state or agency of one or more contracts with that employer and was in a position to make discretionary decisions affecting the outcome of such negotiation or the nature of such administration;

- (b) Such a contract or contracts have a total value of more than ten thousand dollars; and
- (c) The duties of the employment with the employer or the activities for which the compensation would be received include fulfilling or implementing, in whole or in part, the provisions such a contract or contracts. This subsection shall not be construed to prohibit a state officer or state employee from accepting employment with a state employee organization.

RCW 42.52.080(1) does not prohibit a former state officer or employee from working for any particular employer, but it does limit the kind of work that can be performed. Thus, the fact that a prospective employer entered into contracts with the employee's or former officer's agency does not prohibit employment with a post-state employer. However, RCW 42.52.080(1)(c) would not permit a former state officer or employee to perform duties for the new employer that would involve fulfilling or implementing the contracts with his or her former agency, or supervising or controlling actions taken to fulfill or implement those contracts.

Whether the prohibitions under RCW 42.52.080(3) and (4) apply to the employment of a former state officer or state employee depends on specific facts concerning post-state employment. RCW 42.52.080(3) provides:

No former state officer or state employee may accept an offer of employment or receive compensation from an employer if the officer or employee knows or has reason to believe that the offer of employment or compensation was intended, in whole or in part, directly or indirectly, to influence the officer or employee or as compensation or reward for the performance or nonperformance of a duty by the officer or employee during the course of state employment.

RCW 42.52.080(4) provides:

No former state officer or state employee may accept an offer of employment or receive compensation from an employer if the circumstances would lead a reasonable person to believe the offer has been made, or compensation given, for the purpose of influencing the performance or nonperformance of duties by the officer or employee during the course of state employment.

These two provisions prohibit employment by a specific employer under specific factual circumstances. RCW 42.52.080(3) applies if the former state officer or employee knows or has reason to believe that the employment is offered to influence or reward the performance or nonperformance of his or her official duties, e.g., awarding a contract to the prospective employer.

RCW 42.52.080(4) imposes a similar restriction, but the standard by which a violation would be judged is whether a reasonable person would believe that employment is offered to reward or influence. Absent specific facts, the Board cannot predetermine whether offers of employment may

violate these provisions.

In Advisory Opinion 98-11 the Board advised that state officers or employees could avoid a conflict of interest under either of these provisions by disclosing an offer of prospective employment to his or her state supervisor, and by requesting removal from any matter that involves the prospective employer.

RCW 42.52.080(5) does not limit employment with a particular person, but does limit the duties that can be performed. Under this provision, a former state officer or state employee may not perform duties for the new employer that involve contracts or other transactions involving the state when the former state officer or employee participated in those transactions while employed in state service. "Participate" is broadly defined under RCW 42.52.010(13) as:

"Participate" means to participate in state action or a proceeding personally and substantially as a state officer or state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or otherwise but does not include preparation, consideration, or enactment of legislation or the performance of legislative duties.

The final provision of the state's ethics law that limits the activities of former state officers and employees is RCW 42.52.050, Confidential information, which provides in part:

- (1) No state officer or state employee may accept employment or engage in any business or professional activity that the officer or employee might reasonably expect would require or induce him or her to make an unauthorized disclosure of confidential information acquired by the official or employee by reason of the official's or employee's official position.
- (2) No state officer or state employee may make a disclosure of confidential information gained by reason of the officer's or employee's official position or otherwise use the information for his or her personal gain or benefit or the gain or benefit of another, unless the disclosure has been authorized by statute or by the terms of a contract involving (a) the state officer's or state employee's agency and (b) the person or persons who have authority to waive the confidentiality of the information.
- (3) No state officer or state employee may disclose confidential information to any person not entitled or authorized to receive the information.

RCW 42.52.050(1) prohibits a state officer or employee from accepting employment if it might reasonably require or induce the officer or employee to disclose confidential information. This provision applies to post-state employment and could prohibit a state officer or employee from accepting employment from a particular person if it seemed likely that disclosure of confidential information was likely or required. As with RCW 42.52.080(3) and (4), the application of this restriction depends on the facts of each situation and cannot be resolved in an advisory opinion.