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MEMORANDUM

TO: Speaker KC Becker

FROM: Office of Legislative Legal Services

DATE: December 18, 2020

SUBJECT: Legal Restrictions on Employment Opportunities for Departing Legislators[1]

Introduction

This memorandum is intended to provide guidance to members of the General Assembly and other interested parties, especially members approaching the completion of their service in the General Assembly, in navigating the legal restrictions under Colorado law that apply to the post-legislative employment of members, including restrictions on their ability to undertake employment as professional lobbyists.

Colorado law establishes a number of legal restrictions on the employment that a former member of the General Assembly may undertake when the employment bears some relationship to the legislative arena. This memorandum provides a summary of these restrictions, emphasizing those that apply to a former member who is considering employment as a professional lobbyist. Some of the restrictions address negotiations concerning future employment in which an outgoing legislator may participate before leaving the General Assembly. Other restrictions, including the two-year ban on being a professional lobbyist under article XXIX of the state constitution (more commonly

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[1] This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

referred to as Amendment 41), more directly affect the type of employment that a former member may undertake after the legislator leaves the General Assembly.

Discussion

1. General Background

Colorado's part-time legislature enables citizens to serve as members of the General Assembly while retaining their regular private-sector employment. Just as the law generally imposes moderate restrictions on what a legislator may do by way of employment while serving in the General Assembly, so too the law generally permits a legislator to engage in whatever post-employment activities the member chooses, subject to a select number of important restrictions discussed in this memorandum. As can be expected, these restrictions generally affect post-legislative employment that has some connection to official action in which the legislator was involved while serving in the General Assembly. This memorandum discusses the legal restrictions departing legislators should keep in mind as they contemplate employment following their service in the General Assembly. This memorandum begins with the restrictions applicable to a member before that member leaves the General Assembly followed by the restrictions applicable to the member after the member has left the General Assembly.

2. Restrictions on a member *before* the member leaves the General Assembly

2.1. Promises or negotiations of future employment

It is natural that, as a member of the General Assembly contemplates post-legislative employment, the member may consider various offers of employment. To what extent does governing legal authority permit the member to even consider employment offers or negotiate employment terms before leaving office?

Section 3(2) of Amendment 41, which establishes a gift ban applicable to members of the General Assembly, includes as a gift, "promises or negotiations of future employment."[2] In its Position Statement 09-03 (PS 09-03),[3] the Independent Ethics Commission (IEC) declined the opportunity to construe this clause in Amendment 41

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[2] Colo. Const. art. XXIX, § 3(2).

[3] Independent Ethics Commission, Position Statement 09-03 (Clarification of "promises or negotiations of future employment"), State of Colorado (September 21, 2009).

so strictly as to "deprive covered officials of the ability to seek or negotiate future employment during their government service."[4] Rather, in order to determine whether negotiations for future employment are barred for want of consideration of equal or greater value, the IEC determined that the totality of the circumstances should be considered with particular focus on the following two factors:

1) *Whether the remuneration that is being offered to the public official or employee is appropriate or patently excessive*. With respect to this factor, the IEC stated that, "if the salary and/or benefits offered are appropriate to the position, then there is a presumption that the new employment was negotiated in good faith and not based on the public employment of the job seeker. However, if the salary and/or benefits are clearly and substantially in excess of the market rate for the position, then soliciting, negotiating, or offering such employment may run afoul of Section 3(2)."[5]
2) *Whether the offer or solicitation is made under circumstances indicative of a conflict of interest?* With respect to this factor, the IEC noted that, "[i]f a public official or employee who is negotiating for future employment is not currently, was not in the recent past, and will not in the reasonably foreseeable future, be in a position to take direct official action with respect to the prospective employer, then there will be a presumption that section 3(2) is not violated. However, those individuals who are in a position to take direct official action, either currently or in the reasonably foreseeable future[,] should not be placed in situations where their judgment might be perceived to be influenced one way or another. The inclusion of this factor is to avoid any perception that that individual is being rewarded for a previous official act or decision or that the public employee or official has a conflict of interest. See, Position Statement 08-02 (Travel). Clearly if there is any indication that the offer of employment was made to curry favor with the public official or employee, such as the situation in which it is stated or implied that employment could result if a public official or employee acted in a specific manner, then the offer would lack lawful consideration and Section 3(2) would be prohibitive. In addition, such an offer may implicate the bribery provisions of the Colorado Criminal Code."[6]

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[4] *Id.*, at p. 3.

[5] *Id.*, at p. 4.

[6] *Id.*, at pps. 4-5.

Drawing upon the principles articulated in PS 09-03, before the conclusion of a member's service in the General Assembly, the member may consider employment offers and negotiate the terms of possible future employment if:

1) The salary and benefits associated with the prospective employment are appropriate to the position to satisfy the presumption that the new employment was negotiated in good faith and not based on the member's status as a legislator; and
2) The member was not in the recent past, is not at the time the member is seeking employment, and will not in the reasonably foreseeable future (and certainly through the end of the member's tenure in office) be in a position to take official action with respect to the prospective employer.[7]

2.2. Statutory ban on activity relating to lobbying before the member leaves the General Assembly

Section 24-18-106 (3), C.R.S., part of the statutory standards of conduct, prohibits a member of the General Assembly from lobbying, soliciting lobbying business or contracts, or otherwise establishing a lobbying business or practice respecting issues before the General Assembly before the expiration of the member's term.[8]

For purposes of the regulation of lobbying, section 24-6-301 (3.5), C.R.S., defines "lobbying" to mean, in relevant part, communicating directly, or soliciting others to communicate, with a covered official[9] for the purpose of aiding or influencing official action by a covered official regardless of whether the General Assembly is in session.[10]

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[7] These facts address any concern that the offer or solicitation is made in circumstances indicative of a conflict of interest on the part of the soon-to-be former member.

[8] This provision was added to the statutory standards of conduct by the General Assembly in 2003 before the adoption of Amendment 41 by Colorado voters in 2006. At the time of its enactment, it was the only such "revolving door" provision in state law. The limitations set forth in § 24-18-106 (3), C.R.S., have been somewhat eclipsed and superseded by the revolving door provisions of section 4 of Amendment 41. After all, it would make little sense to establish a lobbying practice to lobby on Colorado state matters before the expiration of one's term when the former member would be prohibited from engaging in such practice as soon as the member leaves office and for the following two years.

[9] For lobbying in connection with the various enumerated matters that could arise before the General Assembly, "covered official" is defined to mean "the governor, the lieutenant governor, a member of the general assembly, or the director of research of the legislative council of the general assembly or any member of legislative council staff." § 24-6-301 (1.7)(a), C.R.S.

[10] § 24-6-301 (3.5)(a), C.R.S.

The statute specifies as lobbying any aiding or influencing in the drafting, introduction, sponsorship, consideration, debate, amendment, passage, approval, or veto by any covered official on: 1) Any bill, resolution, amendment, nomination, appointment, or report, whether or not in writing, pending or proposed for consideration by either house of the General Assembly or committee thereof, whether or not the general assembly is in session;[11] or 2) any other matter pending or proposed in writing by any covered official for consideration by either house of the General Assembly or a committee thereof, whether or not the General Assembly is in session.[12]

Accordingly, as "lobbying" is defined for purposes of the lobbying law with reference only to communications with covered officials for the purpose of aiding or influencing official action of the kind that is before covered officials in Colorado, it is reasonable to assume that the type of lobbying referenced in section 24-18-106 (3), C.R.S., encompasses only lobbying on Colorado state matters before these covered officials prior to the expiration of the member's term and does not apply to lobbying, the solicitation of lobbying business, or otherwise establishing a lobbying business at the federal level or local levels or in other states prior to the expiration of the member's service.[13]

3. Restrictions on a member *after* the member leaves office

3.1. Revolving door restrictions imposed by Amendment 41: General Standards

The main legal restriction a former legislator faces on post-service employment is the so-called "revolving door" restriction established in section 4 of Amendment 41. This section, in relevant part, prohibits statewide elected officeholders and members of the General Assembly from personally representing another person or entity, for compensation, before another member of the General Assembly or other statewide elected officeholder for a period of two years after leaving office.[14]

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[11] § 24-6-301 (3.5)(a)(I)(A), C.R.S.

[12] § 24-6-301 (3.5)(a)(I)(B), C.R.S. The statute also includes as forms of official action implicating the definition of "lobbying": The preparation of an initial fiscal impact statement, a fiscal summary, the convening of business to be transacted at a special session of the General Assembly, or the drafting, consideration, amendment, adoption, or defeat of any rule, standard, or rate of a state agency having rule-making authority. § 24-6-301 (3.5)(a)(II.5), (III), or (IV), C.R.S.

[13] *See also* Section 3.4 of this memorandum.

[14] The full text of section 4 of Amendment 41 reads as follows:

Under Amendment 41, a "person" is broadly defined to mean a natural person, or an "individual,"[15] and any one of a number of different forms of "legal entities."[16] "Legal entity" is not defined in Amendment 41. Black's Law Dictionary defines "legal entity" to mean "a body, other than a natural person, that can function legally, sue or be sued, and make decisions through agents."[17] The word "entity" is also not defined in Amendment 41. Given the dictionary definition of "entity," it is reasonable to conclude that the term includes a state agency or a local government.[18] Under these definitions, a "person" or "entity" for which a professional lobbyist could provide representational services appears to include any form of governmental entity.

The IEC's Position Statement 09-02 (PS 09-02)[19] specifically addressed the revolving door provision. In it, the IEC determined "that the term 'personally represent' was intended to mean that elected officeholders and members of the general assembly are prohibited from serving as 'professional lobbyists' for two years following leaving office."[20] Under the IEC's construction of the revolving door prohibition, a former statewide elected officeholder or member of the General Assembly is precluded from accepting employment that would require the former officeholder or member to register as a lobbyist under the Rules of the Secretary of State and other relevant laws

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Section 4. Restrictions on representation after leaving office. No statewide elected office holder nor member of the general assembly shall personally represent another person or entity for a period of two years following vacation of office. Further restrictions on public officers or members of the general assembly and similar restrictions on other public officers, local government officials or government employees may be established by law.

[15]A natural person is a human being as distinguished from an artificial person created by law. *Black's Law Dictionary* 1162 (7th ed. 1999).

[16] Colo. Const. art. XXIX, § 2(4) defines "person" to mean "any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity." In addition, the IEC has opined that the term "person" is broad enough to include a governmental agency or a public entity such as an institution of higher education. *See* Independent Ethics Commission, Position Statement 09-04 (Definition of "person"), State of Colorado, (September 21, 2009), at p. 4.

[17] *Black's Law Dictionary* 903 (7th ed. 1999).

[18] *Black's Law Dictionary* 553 (7th ed. 1999) ("Entity" defined to mean "[a]n organization (such as a business or a governmental unit) that has a legal existence apart from its members.")

[19] Independent Ethics Commission, Position Statement 09-02 (Restrictions on Representation after Leaving Office), State of Colorado (August 21, 2009).

[20] *Id.*, at pps. 3-4.

and statutes governing the former officeholder's or former member's new position.[21] Accordingly, a former member would be barred from accepting any employment that would put that individual's activities within the purview of the Secretary of State's rules and other applicable laws governing lobbyists, even if, in undertaking that employment, the former member never actually appears before the General Assembly.[22] Thus, to be considered to be representing another person or entity under Amendment 41's revolving door provision, a former member of the General Assembly must be undertaking activities that require one's registration as a professional lobbyist under Colorado statutory provisions governing lobbyists (and interpretive rules and advisory opinions). "Simply stated, any former elected office holders or members of the general assembly cannot accept employment that will also require their registration as a professional lobbyist under [section] 24-6-301."[23]

As noted above, lobbying under Colorado law is defined very broadly to essentially mean any effort at communicating with a covered official for the purpose of aiding in or influencing the covered official's consideration of various forms of official action before the General Assembly. If the person doing the communicating is compensated for undertaking such communication, the person must register as a professional lobbyist. It is this type of conduct the revolving door provision is intended to prohibit for the two-year period following the member's departure from service in the General Assembly.

3.2. Permissible post-legislative employment opportunities that involve interaction with the General Assembly

The revolving door ban does not prevent a former member from accepting employment with a person or entity that frequently appears before statewide elected officeholders or members of the General Assembly in connection with lobbying activity by someone other than the former member. The revolving door provision similarly does not prohibit employment with a person or entity that may also employ a

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[21] *Id.*, at p. 5.

[22] *Id.*, at p. 4. This interpretation also precludes a former member from serving as a legislative liaison for a state agency for the two-year period, as that type of employment typically requires the employee's registration with the Secretary of State as a professional lobbyist. *See* § 24-6-303.5, C.R.S. Although there are different registration and disclosure requirements for legislative liaisons, the IEC found "no basis in the definition of professional lobbyist which would permit an exception for lobbyists who work for governmental entities." PS 09-02, at p. 5.

[23] *Id.*, at p. 4.

lobbyist. Rather, the prohibition specifically addresses personal representation by the former member of a person or entity *before* a statewide elected officeholder or member of the General Assembly *for compensation* for the two-year period. Again, under the IEC's interpretation of the revolving door ban, if the former member's new employment does not require registration as a professional lobbyist, then the employment does not violate the revolving door prohibition in section 4 of Amendment 41.

The determination focuses on the core responsibilities of the former member's new employment. If the former member's employment responsibilities do not require appearances before or communication with a statewide elected officeholder, member of the General Assembly, or a board of such individuals in a representative capacity, then the employment would likely not violate the revolving door provision. For this reason, the prohibition would not preclude a former member from being employed by another person or entity that compensates one or more additional individuals, other than the former member, to represent that person or entity before statewide elected officeholders or members.

Former members have frequently been asked to serve in the Governor's cabinet or as the head of a state agency. In reviewing these employment opportunities, the IEC held that it would be permissible for a former statewide elected official or member to accept another job in state government, such as a position in the Governor's cabinet, within the two-year period. "The fact that a cabinet member or other state employee may appear before a committee of the general assembly and perform other 'lobbying' activities incidental to his or her primary responsibilities does not disqualify the former official meeting with another statewide elected official or member of the general assembly on behalf of a state agency."[24]

Accordingly, if a former member's employment responsibilities do not require appearances before or communications with a statewide elected officeholder or member of the General Assembly to lobby for compensation as a core function of the employment, then it does not appear that the revolving door provision is implicated. If a former member communicates with legislators only as an incidental component of the former member's primary employment responsibilities, then the revolving door ban is not implicated. In light of these general standards, the revolving door ban does not prohibit a former member from being employed with any of the following employers, again assuming any communication with legislators is an incidental component of

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[24] *Id.*, at p. 6

such employment: 1) A law firm that engages in lobbying activities; 2) a business entity or trade association that employs a lobbyist; 3) a public interest organization or a think tank such as the Independence Institute or the Bell Policy Center; or 4) a state agency or local government.[25]

Nevertheless, a former member should be certain that post-legislative employment in one of these capacities will not require the former member to undertake in an indirect manner what Amendment 41 prohibits the former member from doing directly. The line between being a professional lobbyist (prohibited) and undertaking these other responsibilities (permissible) is best characterized as a gray area. It is not entirely clear what degree of communication with statewide elected officeholders or members of the General Assembly in support of or opposition to some form of official action necessitates one's registration as a professional lobbyist. The former member is advised to stay clear of the line or the former member could become the subject of an ethics complaint filed with the Secretary of State or with the IEC. If, during the two-year period, a former member is undertaking, on a "behind the scenes" and compensated basis, many of the activities ordinarily undertaken by a lobbyist without directly communicating with members—regardless of whether the former member has registered as a professional lobbyist—the Secretary of State may well conclude that the former member is, in fact, acting as a professional lobbyist in violation of Amendment 41.[26] The most prudent course of action is for the former member not to undertake these types of activities on a compensated basis on behalf of clients with business

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[25] "Covered official" as defined in § 24-6-301 (1.7)(b), C.R.S., also includes a member of a rulemaking board or commission or a rulemaking official. § 24-6-301 (3.5)(a)(V), C.R.S., includes within the definition of "lobbying" aiding or influencing "[t]he drafting, consideration, amendment, adoption, defeat of any rule, standard, or rate of any state agency having rulemaking authority." The Secretary of State's Lobbying Guidance Manual states that "[a]iding in or attempting to influence the drafting, consideration, amendment, adoption, or defeat of any rule, standard, or rate is also lobbying and is subject to disclosure." Colorado Secretary of State Lobbying Guidance Manual, January 2020, at p. 8. Thus, aiding in or attempting to influence rulemaking is also lobbying under Colorado law.

[26] In the case of a complaint alleging someone is acting as a professional lobbyist without registering, the Secretary of State's office customarily scrutinizes the work product of the individual in question to evaluate the nature of the work the individual has prepared on behalf of the individual's clients. For example, written communication from the former member to other individuals who are directly lobbying a particular bill discussing arguments for or against the bill or a detailed memoranda from the former member discussing strategy on a particular bill designed for use by registered lobbyists engaged in direct communication with sitting legislators could demonstrate that the former member is indeed acting as a professional lobbyist, which means that the former member should not undertake those tasks prior to the completion of the two-year period following departure from office.

before the General Assembly during the two-year period following the member's departure from the General Assembly.

3.3. Employment as a volunteer lobbyist

As noted above, in light of the IEC's construction of the revolving door ban under which the personal representation requirement is equated with registration as a professional lobbyist, a volunteer lobbyist, who by definition is not compensated for lobbying, is not covered by this ban.[27] Thus, a former member is not prohibited from serving as a volunteer lobbyist or from simply representing another person or entity without accepting any form of financial remuneration at all for the representation before a statewide elected officeholder or member of the General Assembly during the two-year period following the completion of the former member's service in the General Assembly.

3.4. Lobbying before the federal government, a local government, or other state government

Under a literal reading of the definition in Amendment 41, the term "professional lobbyist" makes no distinction between lobbying before a statewide elected officeholder or member of the General Assembly and lobbying before similar officials in the federal government, a local government, or before other state governments. It seems reasonable to read the term in context as applying exclusively to those lobbying for compensation before Colorado statewide elected officials or members of the General Assembly. As noted above, the statutory definition of "lobbying" applies only to communicating with covered state officials in connection with official action before the General Assembly or state agencies.[28]

Moreover, as discussed above, the focus of the prohibition in section 4 of Amendment 41 is the *personal representation* before covered officials at the Colorado state level,

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[27] Section 2(5) of Amendment 41 expressly excludes a "volunteer lobbyist" from the definition of "professional lobbyist". "Volunteer lobbyist" is defined under state law to mean "any individual who engages in lobbying and whose only receipt of money or other thing of value consists of nothing more than reimbursement for actual and reasonable expenses incurred for personal needs, such as meals, travel, lodging, and parking, while engaged in lobbying or for actual expenses incurred in informing the organization making the reimbursement or the members thereof of his lobbying." § 24-6-301 (7), C.R.S. Moreover, volunteer lobbyists are not required to register with the Secretary of State's office but instead with the Chief Clerk of the House of Representatives. *See* Rule 40(a) of the Rules of the Colorado House of Representatives; Rule 31(e) of the Rules of the Colorado Senate.

[28] § 24-6-301 (3.5), C.R.S.

which "representation" the IEC has equated with activities that would require one's registration as a professional lobbyist. The determination of the IEC that the parameters of lobbying should be drawn with reference to whether someone would have to register as a lobbyist under Colorado state law provides some additional context for determining the type of lobbying activity Amendment 41 is intended to circumscribe. Individuals lobbying before the federal government, local governments, or before other state governments do not register with the Colorado Secretary of State.

Accordingly, because the prohibition appears to apply only to persons required to register with the Colorado Secretary of State in order to be able to lobby a statewide elected official or a member of the General Assembly on a compensated basis, it does not appear the prohibition applies to a person who seeks to lobby at the federal level, at the local level in Colorado, or before other state governments. Revolving door provisions, often referred to as mandatory "cooling off" or "waiting" periods, forbid individuals from engaging in lobbying activities for a period of time after public service.[29] These provisions are generally enacted to prevent legislators from showing bias toward prospective employers while in office, as well as to prevent legislators from exploiting past connections, friendships, and inside information to gain undue and unfair advantage for their clients.[30] These concerns are much less present and operative when a former statewide elected officeholder or member is lobbying at the federal or local levels or before other state governments where the former Colorado officeholder does not enjoy the same degree of personal connection with officials, the depth of inside information, and past relationships and, therefore, accompanying access to these officials.

Even though it does not appear that there are any legal restrictions prohibiting a member of the General Assembly (or a former member) from lobbying at the federal or local levels or before other states, this Office nevertheless cautions such individuals to be sensitive to any appearance issues that may accompany a decision to lobby at the federal or local levels or before other state governments. Because of the commonality of the issues and stakeholders at these other levels of government, especially in other state capitols across the nation, the individual committed to protecting that individual's professional reputation and the ethical reputation of the General Assembly in general needs to be sensitive to the potential appearance of impropriety that may result from

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[29] National Conference of State Legislatures, *Revolving Door Prohibitions*, https://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx (accessed December 17, 2020).

[30] Alan Rosenthal, *Drawing the Line: Legislative Ethics in the States*, 92 (University of Nebraska Press 1996).

engaging in lobbying before these other public bodies. Whether still serving in the General Assembly or retired from service and still within the two-year period, such individual should refrain from doing anything that could reasonably be construed as an indirect attempt to circumvent applicable ethical restrictions, including the restriction imposed by Amendment 41 in the case of an outgoing member.[31]

3.5. Permissible forms of communication by a former member with current members of the General Assembly

As previously recommended, the most prudent course for a former member to follow to avoid an ethics complaint arising from post-service involvement in legislative matters is to refrain, for the two-year period after the member leaves the General Assembly, from undertaking any conduct that suggests the former member is lobbying members of the General Assembly or other statewide elected officeholders. To satisfy this standard, the former member should refrain, for the two-year period, from communicating with sitting members or statewide elected officeholders regarding any matter concerning which the sitting member or officeholder could take official action if the former member's compensation is based on such communication on more than an incidental basis. Because Amendment 41 (as construed by the IEC) prohibits the former member from serving as a professional lobbyist, its restrictions are much broader than simply prohibiting the former member from testifying before a legislative committee or being physically present at the capitol. During the two-year period, a former member who is being compensated for communicating with elected officials to promote the interests of clients should not be communicating with sitting members of the General Assembly (or sitting statewide elected officeholders) to solicit their support of or opposition to any matter concerning which these covered officials may take official action.

However, there is nothing in the revolving door provision of Amendment 41 that prohibits a former member from communicating with a current statewide elected officeholder or member about legislation (or any other matter)—if the former member is not undertaking such communication *for compensation*. Again, the central focus of

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[31] If either a still-serving or former member is employed by a law firm, lobbying firm, corporation, or other entity that has a lobbying presence in Colorado as well as before other states, sufficient ethical screening should be adopted to ensure that the member (still serving or former) is not undertaking responsibilities that violate, or even appear to violate, any of the revolving door restrictions imposed by Amendment 41 (as applied to the former member) or the conflict-of-interest requirements (as applied to a sitting member)—and preferably is not kept informed about the details of any representation that would involve Colorado.

the prohibition in section 4 of Amendment 41 concerns the former member lobbying current officeholders or members on a compensated basis to solicit their support on matters subject to their official action. A former member may permissibly communicate with current members about bills or amendments if the former member is not being paid to undertake such communication.

4. Restrictions on accepting employment with an employer that may have benefited from official action

Finally, a member may also be presented with employment opportunities that raise concerns about accepting employment with an employer that may have benefited from legislation the member supported (or opposed) while serving in the General Assembly. The concern is that the member could be accused of accepting employment with the employer as a reward for past legislative support of the entity.

The principle legal restriction implicated by this concern is that a member should not accept employment that would constitute a conflict of interest and should avoid accepting employment that suggests an appearance of impropriety. The concern about a conflict of interest in these circumstances is separate and apart from a related concern about a conflict of interest arising in connection with negotiations over future employment that may constitute an improper gift under section 3(2) of Amendment 41.[32] Colorado law and legislative rules require a member to abstain from voting on a bill or other measure in which the member has a personal or private interest.[33] The key test in determining whether a member has a personal or private interest in a bill or other measure indicative of a conflict of interest is the degree to which passage or failure of the bill will result in the member deriving a direct financial or pecuniary benefit that exceeds any financial benefit realized by any other legislator in the member's profession, occupation, industry, or region.[34] A personal interest indicative of an improper conflict would be present if the member accepted an offer of employment from an employer that the member previously favored with official action. Official action in this context would include sponsoring or cosponsoring legislation as well as voting for or against a particular measure that favors a prospective employer.

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[32] The treatment of negotiations over future employment under section 3(2) of Amendment 41 is discussed in section 2.1 above.

[33] Colo. Const. art. V, § 43; § 24-18-107 (2), C.R.S.; Senate Rule 17(c) of the Rules of the Senate; House Rule 21 (c) of the Rules of the House of Representatives.

[34] Joint Rule 42 of the Joint Rules of the Senate and the House of Representatives.

The member's goal here should be to "avoid any perception that the individual is being rewarded for a previous act or decision or that the public official or employee has a conflict of interest."[35]

The statutory standards of conduct identify three factors that should guide a legislator in determining whether the legislator has a conflict of interest as a general proposition.[36] Although arising in a different context, PS 09-03 provides a helpful basis for determining whether a conflict of interest is present in connection with the particular circumstances of an offer of employment. Specifically, as noted above in section 2.1 of this memorandum, the IEC cautioned that a covered official negotiating for future employment should not have been in the recent past and should not currently, or will not in the foreseeable future, be in a position to take direct official action with respect to a prospective employer. To address any concern about a conflict of interest with respect to acceptance of an employment offer more generally, there should be no evidence to support a claim that the former member obtained a particular job because of any official action the member took with respect to the potential employer while still in the General Assembly.[37] Specifically, there should be no evidence that the member was promised employment because of any official action the member took benefiting the potential employer. There should be no evidence that the member may have even negotiated for employment—or that future employment was even contemplated at all —when the member took the official action at issue.

Even in the absence of a conflict of interest or other conduct that would constitute a clear-cut legal violation applicable to the acceptance of such employment, a member should still demonstrate concern about an appearance of impropriety that could arise from accepting employment with an employer whose position was favored by any form of official action the member took while still in office. Even if the end of a member's tenure in office means that the member is no longer subject to applicable legal restrictions governing the conduct of sitting members, a former member may still engage in conduct that, while falling short of a legal violation, may still subject the former member to criticism based on an appearance of impropriety. Such an improper

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[35] PS 09-03, at p. 5.

[36] In deciding whether or not the member has such an interest, the member shall consider, among other things, the following: (1) Whether the interest impedes his or her independence of judgment; (2) The effect of his or her participation on public confidence in the integrity of the General Assembly; and (3) Whether his or her participation is likely to have any effect on the disposition of the matter. *See* § 23-18-107 (2), C.R.S.

[37] PS 09-03, at p. 4.

appearance may undercut the former member's reputation for integrity and other forms of good character. To the extent a former member accepts employment with an employer whose mission is in accordance with the former member's long-held and consistently articulated beliefs and there is no evidence to suggest that the former member's acceptance of a particular job is a reward for past official action, concerns about improper appearances are unlikely.

Conclusion

The area of legal restrictions on the employment of a former member of the General Assembly is a complicated one, with many minefields for an outgoing member to navigate if the member desires continued involvement in the legislative arena. A wrong move could result in an ethics complaint against the departing member with one or more adjudicatory bodies as well as permanent harm to the former member's reputation for integrity and good character. Any member approaching the end of service in the General Assembly is encouraged to consult the Office of Legislative Legal Services with specific questions concerning these matters.