

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 95-39
October 19, 1995

RE: May employees engage in outside accounting work?

DECISION: Yes, within limitations.

This opinion is in response to your September 8, 1995, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 19, 1995, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You are the Director of the Division of Personnel Services within the Workforce Development Cabinet. You recently received some correspondence from employees within your agency concerning ethics issues regarding outside employment of field auditors within the division of Unemployment Insurance, Tax Audit and Enforcement Branch. You believe these issues need to be addressed by the Commission. The issues are detailed below.

The Division of Unemployment Insurance regulates 76,000 businesses for purposes of unemployment insurance. Several of your field auditors have outside employment or independent businesses as accountants or bookkeepers. You ask if your employees are restricted from working for or with these businesses. Specifically you ask:

- 1) *May an auditor engage in outside accounting, tax preparation, or bookkeeping work in a community which falls within his jurisdiction for unemployment insurance investigation and enforcement? You state that this places the auditor in competition with other practitioners in the community. Such outside employment could pose a problem because many of the practitioners must deal with the auditor in the course of his state employment duties, potentially giving the auditor access to "inside" information such as client lists and fee schedules.*
- 2) *May an auditor engage in the following outside employment situations:*
 - a) *Bookkeeping or tax preparation for a business with no employees and therefore not subject to unemployment insurance reporting requirements;*
 - b) *Bookkeeping for a business subject to unemployment insurance requirements that has filed all reports properly; if unemployment insurance reports are properly filed, but other tax reports are not;*
 - c) *Preparation of unemployment tax reports for a fee when this service is free if performed by the auditor during working hours;*
 - d) *Tax preparation work limited to taxes other than unemployment insurance; or*
 - e) *Tax preparation work limited to individuals rather than businesses.*

- 3) *What is the auditor's responsibility to disclose information obtained outside of his professional capacity which relates to work? If access to an individual's or company's tax documents discloses potential reporting problems by the individual's employer or the company, does the auditor have an obligation to investigate in his professional capacity? Will he be guilty of a conflict of interest if he fails to do so?*
- 4) *Should a distinction be made between outside self-employment and working for others? If bound by company confidentiality policy, what if the auditor becomes aware from his outside employment of flagrant erroneous reporting by a company subject to unemployment insurance requirements?*
- 5) *If an auditor does outside accounting work, to what extent may he solicit such work (e.g., distributing business cards) during the performance of his official duty?*
- 6) *May an auditor give an employer advice or assistance with other taxes without charging the employer as part of his official duty? Auditors have been instructed not to assist with other taxes or bookkeeping issues; however, many have expertise and are willing to assist in the interest of good customer service.*
- 7) *May an auditor operate an accounting business if all work which may be a conflict for the employee is performed by others, such as a spouse in a family business?*

The Commission advises that employees who work as unemployment insurance auditors and are involved in the regulation of private businesses which are subject to unemployment insurance reporting requirements must refrain from outside employment which presents a conflict of interest between their private interest and their duties in the public interest.

KRS 11A.020(1)and (2) provide:

**11A.020 Public servant prohibited from certain conduct --
Disclosure of personal or private interest.**

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

(b) Use or attempt to use any means to influence a public agency in derogation of the state at large;

(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

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(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

(2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.

The Commission believes the code of ethics does not entirely prohibit an employee who is involved in the auditing of businesses which are subject to unemployment requirements from engaging in accounting, tax preparation, or bookkeeping work as long as the employee does not use his official position to obtain financial gain, or advantages over the general public, and does not use his influence in a matter which poses a conflict between his private interest and his duties in the public interest. Specifically, an auditor may not use his official position to obtain information such as clients lists or fee schedules which he could use to his benefit. He should not distribute business cards in an attempt to solicit private business during the performance of his official duty. He should refrain from preparing unemployment insurance reports which are reviewed by his agency. In addition, in order to avoid the appearance of a conflict of interest, an employee should not audit businesses which are in competition with his business or a business for which he works.

If an employee's private business has employees and is subject to unemployment insurance requirements, the employee should not represent his business before the state agency for which he works. In addition, he should not be involved as part of his official duty in any matters concerning his private business.

Questions which you present regarding whether an employee may charge for services which are provided free by your agency, whether he may give free advice, or what obligation the employee has to report violations disclosed through his private work are not under the jurisdiction of the Commission and should be addressed by agency management personnel. However, the Commission believes every employee has a responsibility to notify the proper authority when a violation of a law is suspected.

An employee is not relieved from potential conflicts of interest if the work in his private business is performed by others, such as a spouse or family member.

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Finally, KRS 11A.040(9) provides:

(9) Without the approval of the commission, no public servant shall accept outside employment from any person or business that does business with or is regulated by the state agency for which the public servant works or which he supervises, unless the outside employer's relationship with the state agency is limited to the receipt of entitlement funds. The commission shall promulgate administrative regulations to establish a procedure for the approval of outside employment of a public servant, including a requirement that the public servant and his appointing authority state in writing that the public servant is not in a position to influence any agency decision relating to the outside employer.

Employees of your agency who seek outside employment with an entity which may be subject to an unemployment insurance regulation by your agency are prohibited from accepting outside employment without the approval of the Commission and are subject to the requirements of 9 KAR 1:050 (a copy of which is included).

EXECUTIVE BRANCH ETHICS COMMISSION

BY: Martin J. Huelsmann, Chairman

Enclosure: 9 KAR 1:050