



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

November 10, 2020

Joyce I. Chiles, Esq.
Board Attorney, Leflore County Board of Supervisors
Post Office Box 250
Greenwood, Mississippi 38935-0250

Re: Incentive (hazard) pay

Dear Ms. Chiles:

The Office of the Attorney General has received your request for an official opinion.

Issue Presented

Can the County expend county funds to give its employee “hazard pay” during the proclamation of an emergency for the COVID-19 pandemic?

Brief Response

A county may only expend county funds for incentive pay, including “hazard pay,” when such incentives are contracted for prior to the date when services are to be performed.

Applicable Law and Discussion

This office has previously had the occasion to opine on the legality of incentive payments made by public employers:

We find no applicable law that would prohibit a duly-adopted, constitutional incentive policy. Further, it is well established that public bodies may pay employees incentives, provided such incentives are contracted for prior to the date when services are to be performed, are determined in accordance with objective standards of measurement and are earned by personal services performed by the employees. MS AG Op., *Robertson* (September 30, 2011); MS AG Op., *Campbell* (April 12, 2010); MS AG Op., *Eleuteris* (November 1, 2013); MS AG Op., *Treadway* (April 1, 2013). Compliance with this criteria is essential to ensure incentive payments do not constitute prohibited payments such as bonuses or donations under Mississippi Constitution Art. IV, Sections 66 and 96.

MS AG Op., *Nettles* at *2 (June 26, 2014).

“Payments to employees in which there is no pre-existing obligation to make the payments, as in the case of bonuses, or in which payments are made for future services that have not been provided at the time the payments are made, as in the case of donations, are considered unlawful, in accordance with Mississippi Constitution Article IV, Sections 66 and 96.” MS AG Op., *Campbell* at *1 (Apr. 12, 2010) (citing MS AG Op., *Allen* (June 11, 2004). “To the contrary, we have previously opined that employee incentive payments which are implemented prospectively and for which payment is made pursuant to conditions met in the future do not run afoul of these constitutional provisions.” MS AG Op., *Campbell* at *1 (Apr. 12, 2010) (citing MS AG Op., *Meredith and Jones* (Dec. 22, 2006)); *see also* MS AG Op., *Siler* at *1–2 (July 18, 2003); MS AG Op., *Jackson* at *1–2 (June 29, 1992); MS AG Op., *Bowman* at *2 (Nov. 14, 2005).

We are of the opinion that a county may only expend county funds for the payment of “hazard pay” where the criteria for incentive pay are met. Accordingly, such pay must be (1) contracted for between the parties or with the employee prior to the date when services are to be performed; (2) determined in accordance with objective standards of measurement; and (3) earned by personal services performed by the employees. *See* MS AG Op., *Nettles* at *2 (June 26, 2014).

However, please note that “performance-based incentive payments” and “other similar extraordinary nonrecurring payments” are excluded from “earned compensation” under Section 25-11-103(k) and should not be reported to the Mississippi Employees’ Retirement System (“PERS”) for retirement purposes. MS AG Op., *Nettles* at *2 (June 26, 2014).

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Phil Carter*

Phil Carter
Special Assistant Attorney General