



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

January 24, 2023

Peter C. Abide, Esq.
Attorney, City of Biloxi
925 Tommy Munro Drive, Suite H
Biloxi, Mississippi 39532

Re: Incentive Payment for City Employees that Receive Annual Wellness Check

Dear Mr. Abide:

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

Question Presented

May the City of Biloxi add an employee incentive of \$200.00 a year for those employees who receive an annual wellness check with their primary care physician?

Brief Response

A city is authorized to make incentive payments for future performance when it is contracted for prior to the date when services are to be performed, determined in accordance with objective standards of measurement, and earned by personal services performed by the employees.

Applicable Law and Discussion

Sections 66 and 96 of Article IV of the Mississippi Constitution prohibit public entities from paying employees extra compensation for past services because doing so would amount to an unlawful donation. MS AG Op., *Eleuteris* at *1 (Nov. 1, 2013). Employee incentive payments that “are implemented prospectively and for which payment is made pursuant to conditions met in the future do not run afoul of [the] constitutional provisions.” MS AG Op., *Campbell* at *1 (Apr. 12, 2010). Therefore, if the city wishes to provide employee incentive pay, the incentive payments 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 employee.” MS AG Op., *Chiles* at *1 (Nov. 10, 2020); *see also* MS AG Op., *Gaskin* (Oct. 11, 2022). Whether the proposed incentive payments for wellness checks meet the requirements is a determination to be made by the municipality,

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consistent with fact, and spread upon the minutes of the governing authority. *See* Miss. Code Ann. § 25-41-11 (requiring minutes to be kept of all meetings of a public body and including “an accurate recording of any final actions taken at such meeting”); MS AG Op., *Custom* at *2 (Mar. 12, 2010) (“[A] public body may only speak through its minutes.”)

Additionally, though performance-based incentive pay for municipal employees is authorized when the aforementioned requirements are met, such payments are excluded from “earned compensation” as defined by Mississippi Code Annotated Section 25-11-103(k) and may not be reported to the state’s Public Employees’ Retirement System (PERS) for purposes of retirement. *Chiles* at *2.

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/ Abigail C. Overby

Abigail C. Overby
Special Assistant Attorney General

OFFICIAL OPINION