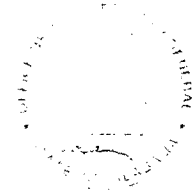


# OFFICE OF THE ATTORNEY GENERAL

97-00147



BILL PRYOR  
ATTORNEY GENERAL  
STATE OF ALABAMA

MAR 24 1997

ALABAMA STATE HOUSE  
11 SOUTH UNION STREET  
MONTGOMERY, ALABAMA 36130  
AREA (334) 242-7300

Honorable Robert J. Burns  
Mayor, City of Tarrant  
P. O. Box 170220  
Tarrant, AL 35217-0220

Municipal Employees -  
Safety - Incentives -  
Funds - Lotteries

In order to avoid the prohibitions of Constitution of Alabama 1901, § 68, any municipal safety incentive plan must be adopted prior to the beginning of the fiscal year and must set forth the amount which can be "earned" by each employee.

Dear Mayor Burns:

This opinion is issued in response to your request for an opinion from the Attorney General.

## QUESTION

That the Mayor of the City of Tarrant is authorized and directed to seek an Attorney General's opinion as to whether or not the City of Tarrant may utilize any City funds to support a safety incentive program for City employees.

## FACTS AND ANALYSIS

Your request presents the following pertinent information:

Honorable Robert J. Burns  
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The City has been introduced to a dynamic safety incentive program which has proven itself to save thousands of dollars in unnecessary insurance premiums in the private sector. The program is called "Safety Pays." The program starts with a twenty-five dollar (\$25.00) pool which increases by one dollar for each day that there is not a loss-time accident, until the pool caps out at one hundred dollars (\$100.00) or drops back to twenty-five dollars (\$25.00) in the event of a loss-time accident. Every employee of the City receives a safety card with numbers. Each day a safety number is drawn and recorded on a safety tote board. When an employee's safety card has five safety matches in a row the employee is given the cash safety award. If an employee offers a safety suggestion which is implemented by the City, the employee is granted a bonus safety card. It is believed that employees will police each other to refrain from an unsafe practice as their safety card's number sequence gets closer to five in a row.

The City of Tarrant is located in Jefferson County. The City is reluctant to use the term safety bingo. All city employees would be allowed to participate equally at no cost to the employee. Records would be kept of safety aware recipients and the income could be reported on an IRS 1099 form.

It is the opinion of this office that municipal funds cannot be used as you propose. However, other types of safety incentive programs may, under certain circumstances, be funded by the municipality. In an Opinion to Honorable Chalmus Bryant, Mayor of Andalusia, under date of August 10, 1979 (A.G. No. 79-00147), this office held that the city could include, as part of the annual salary of city employees, an Employee Safety Incentive Plan.

While this office applauds your efforts to institute a safety incentive program, it appears that the major obstacles to the program as proposed are found in Constitution of Alabama 1901, § 68, as amended. That section provides that the legislature shall have no power to grant or authorize or require any county or municipal authority

to grant, nor shall any county or municipal authority grant any extra compensation, fee, or allowance to any public officer, servant, or employee, agent, or contractor, after service shall have been rendered or contract made. It does not appear that the plan you propose could ever be structured in such a way as to avoid this conflict. Moreover, your proposed plan could be found to be an unlawful lottery.

The City of Andalusia avoided these prohibitions by implementing, as a part of the employees' annual salary at the beginning of the year, a Safety Incentive Plan set at 1% of the employee's annual salary reduced according to the individual's loss ratio. The Opinion to Mayor Bryant, supra, also noted that Code of Alabama 1975, § 11-43-7 vests in the governing body of a municipality broad discretion in establishing the salary of employees and that this grant of authority included establishing an incentive pay plan as a portion of the employee's compensation. There is no requirement that the amount be a percentage of salary, but the incentive could be stated, for example, as a fixed amount. In any event, any plan established must set forth a quantitative amount which an employee can earn and the plan must be established prior to the beginning of a fiscal, or salary, year.

More recently, in Kohen v. Board of School Commissioners of Mobile County, 510 So.2d 216 (Ala. 1987) the Supreme Court held that § 68 contains no prohibition against the granting of additional compensation in exchange for additional consideration given by the employee. In Kohn the school board "gave up" leave days in order to achieve perfect attendance and receive the "bonus." The Supreme Court did find that the retroactivity provision of the pay plan violated § 68.

If the same type of program approved in the Bryant opinion, supra, were instituted in the City of Tarrant, employees, in order to receive the incentive, would be required to maintain an acceptable loss ratio. Furthermore, the plan would have to be instituted before the beginning of a fiscal year.

In the Bryant opinion, supra, this office stated:

While this opinion approves the concept of allowing this method of payment as a part of an employee's total compensation it should be noted that this does not constitute an endorsement of this

Honorable Robert J. Burns  
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plan or any particular type plan. Furthermore, any such plan which may be adopted must clearly spell out in advance of the performance of services by the employees the terms and conditions of such plans and the plan must be administered in a fair and impartial manner for all employees.

We do, therefore, urge caution in the formulation and adoption of any safety incentive plan.

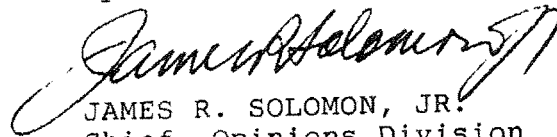
CONCLUSION

Any safety incentive plan adopted for municipal employees must set the terms and conditions of the plan prior to the beginning of a fiscal year in order to avoid the prohibitions of § 68.

I hope this sufficiently answers your question. If our office can be of further assistance, please contact Carol Jean Smith of my staff.

Sincerely,

BILL PRYOR  
Attorney General  
By:

  
JAMES R. SOLOMON, JR.  
Chief, Opinions Division

BP/CJS/jho  
B3.97/OP

# OFFICE OF THE ATTORNEY GENERAL



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AUG 10 1979

*R*

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Honorable Chalmers Bryant  
Mayor  
City of Andalusia  
Post Office Box 429  
Andalusia, AL 36420

Municipalities - City of Andalusia -  
Public Employees

City of Andalusia may include as  
part of annual salary of city  
employees an Employee Safety  
Incentive Plan.

Opinion by Assistant Attorney  
General Solomon.

Dear Mayor Bryant:

The request for an opinion of this office submitted by the City Council of the City of Andalusia has been received concerning the legality of the City implementing, as a part of City employees' annual salary, a Safety Incentive Plan. The amount is to be 1% of the employees' annual salary and shall be contingent on each individual's safety record and shall be reduced according to the individual's loss ratio. The method of computing the loss ratio is set out in the Resolution adopting the plan.

Honorable Chalmers Bryant  
Mayor  
City of Andalusia  
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Code of Alabama 1975, § 11-43-7, states in part as follows:

"All employees of any city or town whose compensation is not fixed by law shall receive such salary or fees for their services as the council may by ordinance from time to time prescribe."

This section vests in the governing bodies of cities and towns broad discretion in establishing the salary and fees for employees of such bodies. The authority to include a safety incentive pay plan as a portion of an employee's compensation comes within the authority granted such governing bodies by this section.

While this opinion approves the concept of allowing this method of payment as a part of an employee's total compensation it should be noted that this does not constitute an endorsement of this plan or any particular type plan. Furthermore, any such plan which may be adopted must clearly spell out in advance of the performance of services by the employees the terms and conditions of such plans and the plan must be administered in a fair and impartial manner for all employees.

Sincerely yours,

CHARLES A. GRADDICK  
Attorney General