

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

September 14, 2018

Moran M. Pope, III, Esq.
Attorney, City of Hattiesburg
Post Office Box 17527
Hattiesburg, Mississippi 39404-7527

Re: "On-call" employees

Dear Mr. Pope:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response.

Issues Presented

You inquire as to whether paying municipal employees for "on-call" duty, which essentially amounts to restricting these individuals from going out-of-town on personal business, would result in an unlawful donation. Specifically, you provide the following:

In an effort to deal with unanticipated events such as severe weather, the City has a practice of requiring certain hourly employees of departments such as Public Works, Water and Sewer, and Parks and Recreation to be "on call" on nights, weekends and holidays to be able to respond to emergencies caused by these unanticipated events. The "on call" duty is on a rotation basis so that not every employee is on duty every night, weekend or holiday.

The question has arisen as to whether the City may compensate these individuals for their "on call" duty. By requiring these individuals to be on call during non-regular work hours, these individuals are, of course, restricted from, for example, going out of town on personal business while they are on call.

My concern is whether paying these individuals for simply being on call

would amount to an unlawful donation.¹

I am aware that your office recently opined that if a municipality “has determined that service by its public safety employee in ceremonial functions at funeral services constitutes legitimate municipal work, it may pay its employees for such work,” and that “[t]he determination as to whether a municipal employee is actually working in the performance of his official duties is a factual one to be made by the municipality itself.” (*Opinion to Turnage*, November 20, 2017). Would it be your opinion that the same standard—i.e., a determination by the municipality as to whether a municipal employee is actually working in the performance of his official duties—would apply in the case of an “on call” employee as set forth above?

Response

Pursuant to Mississippi Code Annotated Section 7-5-25, official opinions of the Attorney General are issued on questions of state law for future guidance of those officials entitled to receive them. As you know, we do not by official opinion interpret federal statutes. Thus, to the extent that your factual scenario involves the Fair Labor Standards Act, we offer no comment on its application.

Assuming that the municipality has determined that the subject employee was working while “on call,” it may compensate said employee for such “on call” work.

Applicable Law and Discussion

As you reference, in a prior opinion addressing the authority of a municipality to pay employees for attendance at funeral services of a coworker’s family member, we opined the following:

A municipal employee may only be paid for hours that he has actually worked in the performance of his official duties. To compensate an employee for hours that he has not actually worked would result in an unlawful donation.

MS AG Op., Turnage (November 20, 2017). See also MS AG Op., Robinson (May 14, 2010). The question of whether a municipal employee is actually working is one to be made by the municipality itself. In our opinion, the same standard would apply here. Provided that the municipality determines that its employee is actually working while “on

¹ Of course, if they are “called out” to work, there is no question that they must be paid.

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call," it may compensate its employee for such "on call" work.² Naturally, the municipality, within its discretion, may establish different rates of pay for different kinds of work.

If we may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Leigh Triche Janous
Special Assistant Attorney General

OFFICIAL OPINION

² In the event that a municipal employee has been provided with a municipal vehicle for use in the performance of his official duties, such vehicle may only be used for conducting city business. There is no authority which would permit municipal employees to use municipal vehicles for personal activities, even when the employee is "on call." MS AG Op., Hunt (February 5, 1999); MS AG Op., Stark (April 12, 1994).