

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: May 2, 2016

TO: Judy von Kalinowski, Human Resources Department Director
Karen DeCrescenzo, Human Resources Department Deputy Director

FROM: City Attorney

SUBJECT: Recruitment Incentives

You have asked for a legal opinion on the ability of the City of San Diego (City) to implement a recruitment incentive or “signing bonus” as a means to recruit prospective employees into certain positions, especially positions where the City is experiencing difficulty with hiring. You have also asked whether it is possible to implement a payment that is not required to be factored into retirement benefits.

QUESTIONS PRESENTED

1. Can the City implement a recruitment incentive, or “signing bonus,” as a means to recruit prospective employees into certain positions?
2. Can the City exclude a recruitment incentive payment from the calculation of retirement benefits?

SHORT ANSWER

1. Yes. The City can implement a recruitment incentive as a means to recruit prospective employees into certain positions, as long as there is a finding by the San Diego City Council (Council) that there is a public purpose for the recruitment incentive and procedural requirements are satisfied.
2. Yes. The City can implement a recruitment incentive payment that is not factored into the calculation of retirement benefits, as long as the incentive is not an ongoing payment for services provided.

DISCUSSION

Recruitment incentives are used by employers, including federal agencies, to attract prospective employees to positions that are otherwise difficult to fill without the incentive.¹ *See* 5 U.S.C. § 5753 (2016).² If the City implements a recruitment incentive, the payment must be distinct from the regular compensation paid for services provided to the City, to ensure that it is not pensionable.

City employees have distinct retirement plans, depending on when they were hired. For purposes of this discussion, “pensionable pay” is defined as pay that is included in the calculation of pension benefits for those employees in the City’s defined benefit pension plan or pay that is included in the calculation of the contributions that must be made to the City’s defined contribution plan for those employees who do not have a defined benefit pension.

The City offers a defined benefit pension plan administered by the San Diego City Employees’ Retirement System (SDCERS) for eligible employees initially hired before July 20, 2012. *See* San Diego Charter (Charter) §§ 141-148; San Diego Municipal Code (Municipal Code or SDMC) §§ 24.0100-24.1706.³ A defined benefit pension plan provides employees with a specified monthly allowance upon retirement, based on a formula in place during employment that uses the employee’s age at retirement, compensation, and an applicable retirement calculation factor. *See* SDMC § 24.0103. Under the City’s defined benefit pension plan, the City and its employees make regular contributions to SDCERS, to fund the employees’ future retirement allowance. San Diego Charter §§ 141.2, 143.

The City offers a defined contribution pension plan for employees initially hired on or after July 20, 2012. San Diego Charter §§ 140, 150. The City’s defined contribution plan for employees without a defined benefit pension plan is the Supplemental Pension Savings Plan H (SPSP-H), which was amended and restated effective December 1, 2015, by the Council. San Diego Resolution R-310090 (Nov. 19, 2015). Upon retirement, employees have access to the funds in their individual accounts in lieu of receiving a specified monthly allowance.

¹ *See also* United States Office of Personnel Management, “Fact Sheet: Recruitment Incentives,” at <https://www.opm.gov/policy-data-oversight/pay-leave/recruitment-relocation-retention-incentives/fact-sheets/recruitment-incentives/>.

² As an example, eligible federal employees must enter into a written service agreement to complete a certain period of employment. 5 U.S.C. § 5753(c). The federal recruitment incentives may be paid in an initial lump sum, in installments, as a final lump sum upon completion of the full period, or a combination of these options. 5 U.S.C. § 5753(d)(2).

³ Employees hired before July 20, 2012, who work less than forty hours a pay period without a standard work schedule are not in the City’s defined benefit pension plan. They participate in the Supplemental Pension Savings Plan H, discussed in this section. New employees hired on or after July 1, 2012, other than sworn police officers, do not come under the City’s defined benefit pension plan. However, an existing City employee, hired before July 20, 2012, may seek employment in a different classification, and, therefore, the provisions of the City’s defined benefit pension plan are relevant in determining whether a payment is pensionable.

Under SPSP-H, employees and the City contribute a specific percentage of compensation, which is defined as “regular biweekly salary, and pay received for special assignments, shift differentials, sick leave, industrial leave, annual leave, and overtime.” The definition of “compensation” does not include “bonus awards” and “suggestion awards.” The SPSP-H Plan is silent on whether a recruitment incentive is included in compensation for purposes of calculating the SPSP-H benefit. However, “bonus awards” are excluded. Therefore, to the extent that a recruitment incentive involved a single payment to entice a prospective employee to work for the City, it likely would not be included in the definition of “compensation” under the SPSP-H. However, an ongoing payment likely would fit within the definition of “compensation,” and the City would be required to contribute a percentage of the payment to an employee’s SPSP-H account.

For employees under the City’s defined benefit pension plan, pensionable compensation is broadly defined. As this Office explained in a 2011 legal opinion, an employee’s defined benefit pension is based on “base salary or wages paid (standard hours multiplied by the hourly rate) on a regular bi-weekly basis to an employee for his or her services in any given pay period.” SDMC § 24.0103 (definition of “base compensation”). *See also* 2011 Op. City Att’y 2 (2011-1; Jan. 10, 2011) (2011 Legal Opinion); City Att’y MS 2015-6 (Mar. 17, 2015).

“Base compensation” includes holiday pay, annual leave taken, compensatory time offtaken, industrial leave taken, discretionary or furlough leave taken, and pay for out-of-class assignments. SDMC § 24.0103. Any compensation paid on a regular biweekly basis for services provided must be included in the defined benefit pension calculation. *See* 2011 Legal Opinion.

Compensation excluded from the pension calculation includes overtime payments, exceptional performance bonuses, flexible benefit payments, and allowances for uniforms, tools, automobile use, and moving. SDMC § 24.0103. A one-time recruitment incentive or bonus could be implemented to fit within compensation that may be excluded from pensionable compensation, as long as the pay is negotiated and implemented as non-pensionable, and the Council directs its exclusion from pensionable compensation in the annual Earnings Codes Document. *Id.*⁴

There are procedural requirements the City must follow prior to implementation of recruitment incentives. First, the City must meet and confer with its recognized employee organizations in accordance with the Meyers-Milias-Brown Act., the state law that governs collective bargaining for the City as a public agency employer.⁵ Second, the City must comply with the provisions of Charter section 70.2, which apply to collective bargaining, including obtaining an actuarial study

⁴ Under Municipal Code section 24.0103, items of compensation that are not pensionable must be memorialized as non-pensionable in the annual Earnings Codes Document.

⁵ Compensation, including the methodology used in making wage payments and how and when employees are paid, is subject to collective bargaining under the Meyers-Milias-Brown Act. *See* Cal. Gov’t Code §§ 3504, 3505, 3508; *Lake Elsinore School District*, PERB Dec. No. 646 (Dec. 18, 1987) (a stipend is an aspect of wages and is negotiable); *see Laguna Salada Union School District*, PERB Dec. No. 1103 (May 11, 1995) (methodology of making wage payments is negotiable).

from the SDCERS actuary prior to bargaining and an updated study prior to final approval of any negotiated agreement.

Third, the Council must determine that there is a public purpose for implementation of a recruitment incentive, to ensure compliance with Charter section 93. This section states, in pertinent part: "The credit of the City shall not be given or loaned to or in aid of any individual, association or corporation." San Diego Charter § 93. *See also California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 583 (1976); *Tevis v. San Francisco*, 43 Cal. 2d 190, 197 (1954); *City & County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 103-04 (1988).

Fourth, City staff should seek the advice of the City's Personnel Department and Civil Service Commission before proposing a recruitment incentive for classified positions. Charter section 130 requires that the Civil Service Commission prepare and furnish to the Council, prior to adoption of the annual salary ordinance, a report that identifies classifications of employees in the Classified Service that merit special salary consideration because of recruitment or retention programs or other factors set forth in the Charter. The Charter requires "uniform compensation for like service" for employees in the Classified Service. San Diego Charter § 130. Further, the Civil Service Commission supervises the selection of classified employees, and the Personnel Director is the "Chief Examiner" and "superintend[s] the [classified employee] examinations, subject to the direction of the Commission." San Diego Charter §§ 115, 116.

In accordance with their Charter duties, the Personnel Director and the Civil Service Commission must determine whether there is a true recruitment issue in the classified service and make recommendations consistent with their findings. Further, Personnel Department staff must apply uniform, citywide criteria and standards in making recommendations to the Civil Service Commission. If there is a recruitment concern and an increase to base pay is warranted, then a recruitment incentive should not be a substitute or disguise for the necessary increase to base pay, if the City wants to avoid a challenge to the pensionable nature of the pay. If a recruitment incentive is to be non-pensionable, it must not be paid as compensation for services nor can it be an unreasonably high amount. Rather, it must be a one-time payment to incentivize and cover costs related to relocation from another employer to the City, similar to a moving allowance. It is necessary to have the Civil Service Commission's input so that a recommendation to the Council is consistent with the process required by Charter section 130. Further, if there is a recruitment issue, then there may need to be adjustments to selection criteria or qualifications of specific classifications. These issues and concerns should be brought the attention of the Personnel Department and the Civil Service Commission for their assistance and guidance in resolution.

Judy von Kalinowski, Human Resources Department Director
Karen DeCrescenzo, Human Resources Department Deputy Director
May 2, 2016
Page 5

This Office is available to provide further assistance if the Mayor and Council want to proceed with development of a recruitment incentive.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/Joan F. Dawson
Joan F. Dawson
Deputy City Attorney

JFD:ccm
Doc. No.: 1271806
MS-2016-11