
Employee Incentive Programs

Washington Public Ports Association

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Employee Incentive Programs: Why is this topic of interest right now?

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- Port districts compete with private employers for talented employees.
- As a public employer, Port districts can offer some benefits not available to private employers, e.g. PERS.

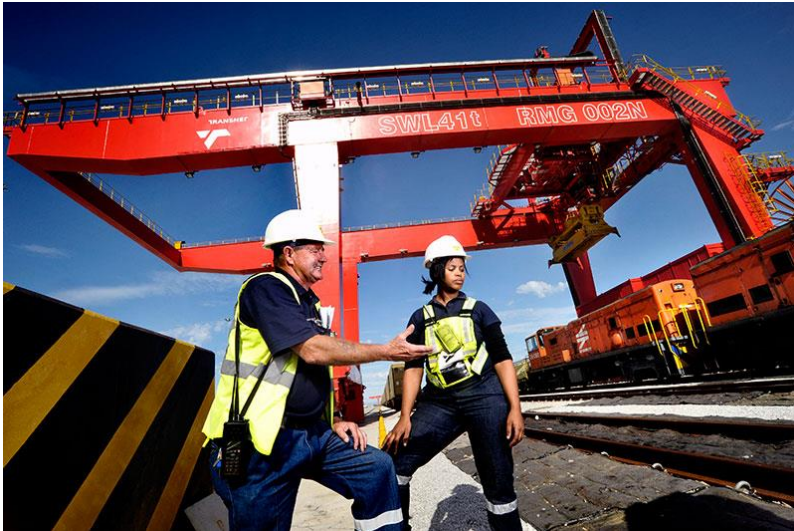
Why is this topic of interest right now?



- But, private employers can offer a variety of financial incentives to attract and retain employees.
- These incentives are not available to public employers in the same, unrestricted manner.
- Recent Port of Seattle Audit Finding has generated some uncertainty concerning what is allowable.

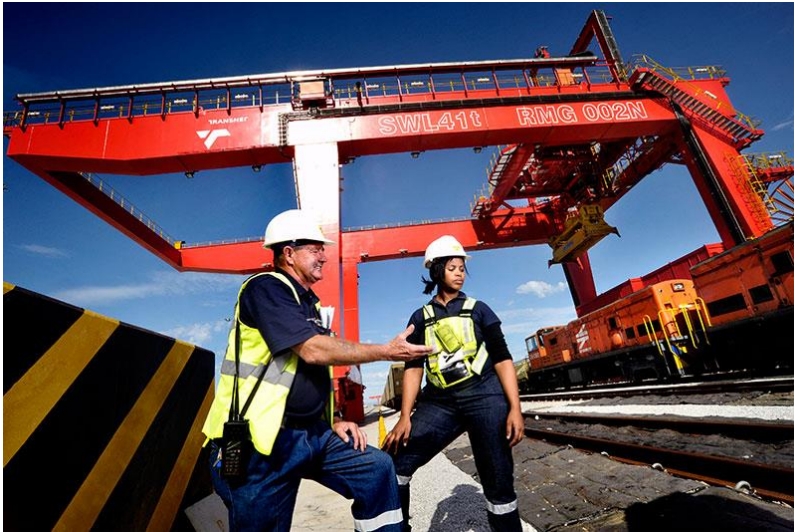
Employee Incentive Programs: What does the law permit?

What does the law permit?



- Ports have broad statutory authority to hire and compensate their employees.
- Port commissions have the power to “create and fill positions” and to “fix wages, salaries, and bonds thereof.” (RCW 53.08.170)
- But the power of ports to compensate their employees is not unlimited.

What does the law permit?



- Two Constitutional provisions restrict a public agency's ability to compensate employees:
 - Article 8, Section 7 prohibits gifts of public funds.
 - Article 2, Section 25 prohibits extra compensation for services that have already been rendered.

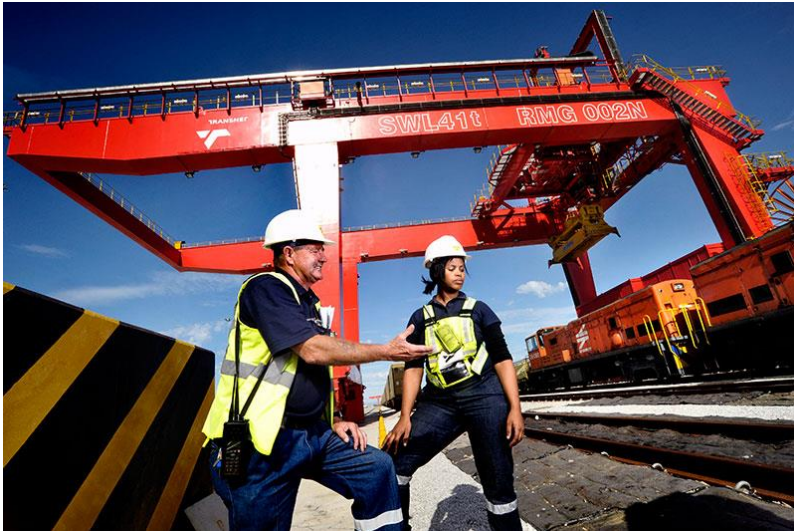
What does the law permit?



Article 8, Section 7:

- **CREDIT NOT TO BE LOANED.** No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.
- What is a gift of public funds?

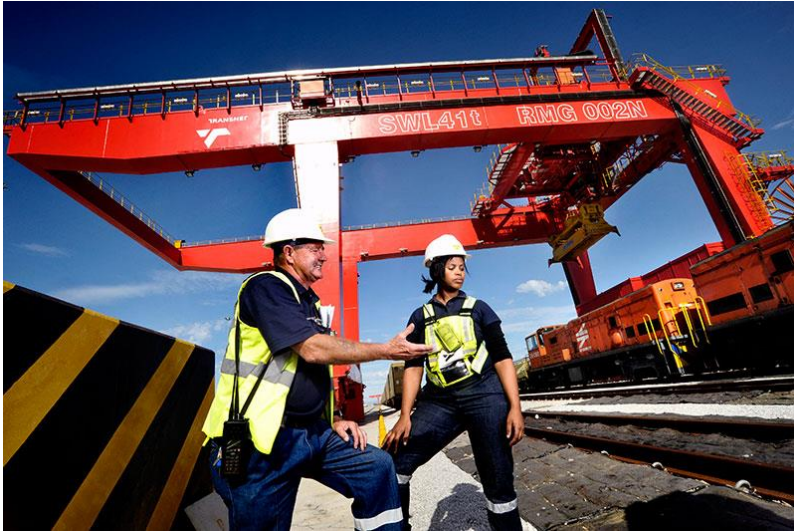
What does the law permit?



Article 8, Section 7:

- Two questions to consider:
 - *Did the public agency have donative intent?*
 - Donative intent means the agency intended to make a gift.
 - *Did the agency receive adequate consideration?*
 - Consideration is the value or benefit received through a contract.

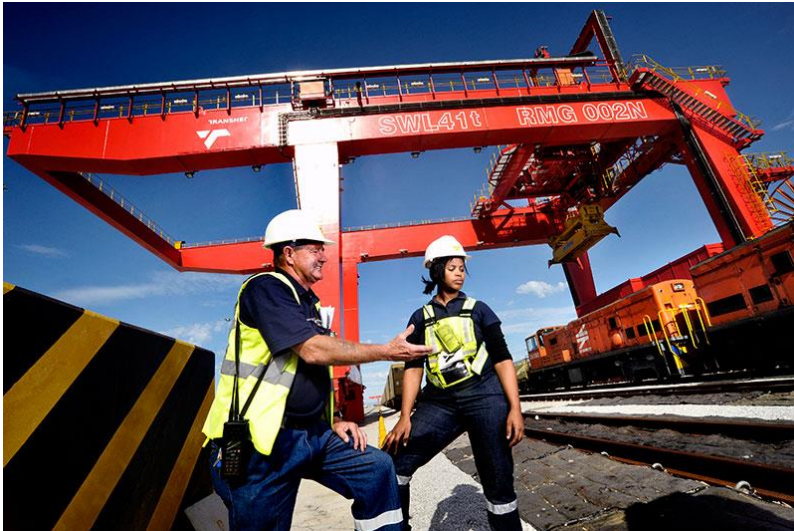
What does the law permit?



Article 2, Section 25:

- **EXTRA COMPENSATION PROHIBITED.** The legislature shall never grant any extra compensation to any public officer, agent, employee, servant, or contractor, after the services shall have been rendered, or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office. Nothing in this section shall be deemed to prevent increases in pensions after such pensions shall have been granted.
- Although this provision only expressly applies to the legislature, Washington courts have extended it to all municipal corporations.

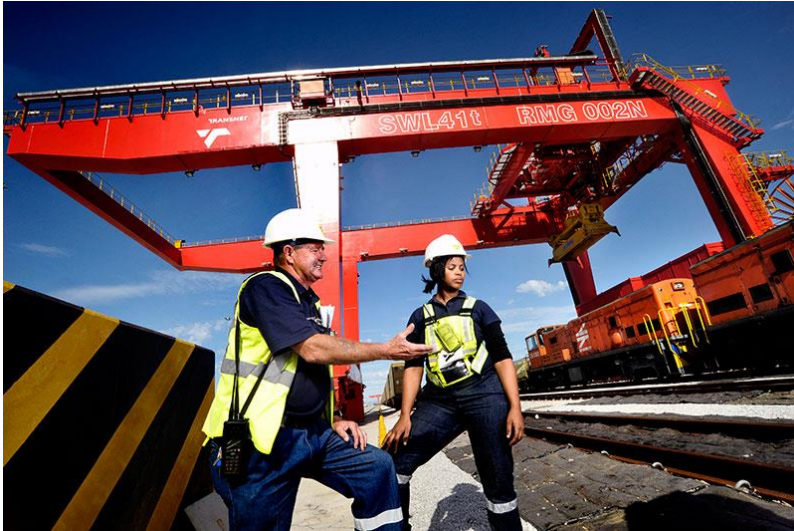
What does the law permit?



Article 2, Section 25:

- What is extra compensation?
- Issues to consider:
 - *Was the employee provided additional compensation for work he or she had already agreed to perform?*
 - *Was the employee required to complete some future act in order to receive the additional compensation?*

What does the law permit?



- Example:
 - A port employee has done an outstanding job on a particular project. When her work is complete, the port commission decides to surprise her with a bonus of \$1,000.
 - Is this constitutional? **No.** Because the employee had no expectation of receiving a bonus for her work, this is “extra compensation” in violation of Article 2, Section 25.

Case Study: Port of Seattle Audit Finding

Case Study: Port of Seattle Audit Finding

Background:

- November, 2015: Port announces that required work week of non-represented employees increases from 37.5 to 40 hours/wk.
- This resulted in a 7% increase for hourly employees.
- No change in pay for salaried employees despite increase in hours.
- Of the 642 salaried employees to receive the increase, 26 were already working 40 hours.



Case Study: Port of Seattle Audit Finding

Background:

- December 8, 2015: Commission authorizes one-time special payment to all non-represented, salaried employees of 7% as of December 31, 2015.
- Purposes: boost morale in face of large scale reorganization, retain high performing employees (forward looking), respond to increase in work hours
- One time cost of \$4.8M cheaper than a permanent pay increase.



Case Study: Port of Seattle Audit Finding

Background:

- Eligibility requirements for bonus:
 - Began work before December 13, 2015
 - Active employee as of December 31, 2015
 - In a regular or temporary position in excess of 6 months
 - Must not have informed the Port that last date of employment would occur prior to February 1, 2016



Case Study: Port of Seattle Audit Finding

Outcome: success!

- 96% retention rate in 2016 which Port attributed to the one-time payment.
- But then the State Auditor's Office stepped in...



Case Study: Port of Seattle Audit Finding

- Audit Finding: one-time payment constitutes extra compensation not allowed by the state Constitution.
 - Payment not contingent on future services
 - Payment not contingent on job performance that exceeded normal employment requirements
 - Payment was not a salary increase.
- Port was advised to determine if compensation was recoverable



Employee Incentive Programs: Keeping it Constitutional

Making incentive programs work

Signing Bonuses:

- Conditions for signing bonuses:
 1. The offer of a bonus must be part of the offer of employment (the bonus can't be offered after the candidate has already accepted employment).



Making incentive programs work

Signing Bonuses:

- Conditions for signing bonuses:
 2. The Attorney General's Office, which advises the State Auditor's office, recommends a "claw-back" provision, which allows the employer to reclaim the bonus if the candidate fails to meet certain conditions (such as a minimum term of employment).



Awards Programs



- Awards given to employees who exceed job performance standards.
- Examples:
 - Longevity awards
 - “Employee of the Year” awards

Making incentive programs work



Awards Programs:

- Conditions for awards programs:
 1. Formal written policy
 2. Identify the basis on which employer will make awards, how employees are chosen, and the type of awards they are eligible for.

Making incentive programs work



Awards Programs:

- Standards for giving awards can be objective (example: working a certain number of years) or subjective (example: employee of the year).

Making incentive programs work



Awards Programs:

- Case Study: Sunnyside School Dist.
 - School District gave \$200 in restaurant gift cards to an employee.
 - The District called these gift cards “honoraria” and said they were for services the employee had provided.

Making incentive programs work



Sunnyside (cont):

- Audit Finding: The District lacked a policy permitting such gifts, and therefore had inadequate internal controls over expenditures. “Without policies addressing bonuses and honoraria, these expenditures could be considered additional compensation.”

Making incentive programs work

Performance Incentive Programs:

- A bonus given to an employee once the employee has met pre-defined performance standards.



Making incentive programs work

Performance Incentive Programs:

- In 1995, the Attorney General's Office issued an opinion laying out the requirements for incentive programs:
 1. Incentives should be provided only for meeting established performance standards or goals that exceed normal employment requirements.



Making incentive programs work

Performance Incentive Programs:

2. Incentives should be structured as a component of the compensation in return for which employees provide their services, in such a way that the employees have an expectation of earning the incentives or awards when they are performing their work.



Making incentive programs work

Performance Incentive Programs:

- The Attorney General Opinion emphasized that purely retroactive increases in compensation, including bonuses where the employer decides “after the fact” that one or more employees should receive extra compensation for past services, are prohibited.



Making incentive programs work

Performance Incentive Programs:

- The State Auditor's Office will also look at whether your employee performance standards are measurable.



Making incentive programs work

Performance Incentive Programs:

- Case Study:
 - Klickitat Public Hospital District No. 1 offered an incentive program with performance goals for employees to meet.
 - The program paid out more than \$143,000 in bonuses over one year.



Making incentive programs work

Performance Incentive Programs:

- The performance standards were broad and applied generally to departments rather than individual employees. The goals:
 - Generating quarterly profits
 - Staying within departmental budgets
 - Demonstrating a “good working relationship with other departments and management”



Making incentive programs work

Performance Incentive Programs:

- The State Auditor’s Office, citing the 1995 Attorney General Opinion, stated that “the ‘bonus’ has to be compensation paid for **measurable** employee performance standards or identified goals that exceed normal employee requirements” and “the criteria for evaluating employees must be clearly defined.”



Making incentive programs work

Performance Incentive Programs:

- Audit Finding: “the incentive plan did not contain measurable employee performance standards or identified goals for employees. Further, there were no clearly defined criteria for evaluating employee performance. Without meeting such requirements, bonuses are considered extra compensation.”



Employee Incentive Programs: Lessons Learned

Case Study Revisited: Port of Seattle

- The State Auditor's Office issued a finding in January of this year that the Port of Seattle's bonus program violated the state Constitution.
- *What might have been done differently to escape auditor criticism?*



Case Study Revisited: Port of Seattle

- The State Auditor's Office suggested several ways the Port of Seattle could have structured the bonus in order to comply with the state Constitution:
 - Tie the bonus to a performance standard so that only those employees who meet that standard receive the bonus.
 - Require employees to perform some future service in order to receive the bonus.
 - Include a claw-back provision.
 - Pay the bonus in installments.



Recommendations



- Adopt a formal policy.
- Identify the awards or bonuses available.
- Establish standards and requirements so employees know what they need to do in order to receive a bonus or award.
- Ensure that in order to receive a bonus, employees must do *something* above and beyond what they've already agreed to do under the terms of their employment.
- Document the basis for any bonus or award with reference to the policy that permits it.

Can a Bonus be “Restructured” to be legal?



- *Can a port still give a bonus to an employee for past work?*
 - Legally, no.
 - Practically, perhaps—but only if it is tied to future work (and it should be supported by a written policy)
 - Consider paying the added compensation on a future, installment basis as work is performed.

Questions?



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