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DEPARTMENT OF JUSTICE
CIVIL DIVISION
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OPINION 21-0060

Hon. Josh Guillory
Mayor-President
Lafayette Consolidated Government
705 West University Ave.
P.O. Box 4017-C
Lafayette, LA 70502

90-A-1 PUBLIC FUNDS & CONTRACTS

La. Const. art. VII, §14

It is not a prohibited donation for public entities to provide their employees with coffee if they have a demonstrable, objective, and reasonable expectation that doing so will provide a real and substantial benefit to the public entity.

Dear Mayor Guillory:

You have requested an opinion from this office concerning the expenditure of public funds. Specifically, you ask whether providing coffee to certain Lafayette Consolidated Government ("LCG") employees would be considered a prohibited donation of public funds. For the reasons set forth below, it is the opinion of this office that a public entity, such as the LCG, may provide its employees with coffee if it reasonably believes that doing so would provide a real and substantial benefit to the public entity.

Louisiana Constitution article VII, §14(A) states that "the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private."¹ In analyzing this constitutional provision, the Louisiana Supreme Court has held that a *prohibited donation* under La. Const. art. VII, §14(A) occurs "when public funds or property are gratuitously alienated."² In light of the court's interpretation of this constitutional provision, this office has consistently applied a three-part test to determine whether an expenditure of public funds is permissible under the Constitution. Under this test, the public entity must have the legal authority to make the expenditure and must show all of the following:

1. a public purpose of the expenditure or transfer that comports with the governmental purpose for which the public entity has legal authority to pursue;
2. that the expenditure or transfer, taken as a whole, does not appear to be gratuitous; and

¹ See La. Const. art. VII, §14(A).

² *Board of Directors of the Industrial Development Board of the City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of the City of Gonzales, et al.*, 2005-2298 (La. 9/6/06); 938 So.2d 11. ("Cabela's").

3. that the public entity has a demonstrable, objective, and reasonable expectation of receiving something real and substantial in exchange for the expenditure or transfer of public funds.³

In this case, the purchase of coffee, as an ancillary benefit of employment, would comport with the governmental purpose for which the public entity has the legal authority to pursue. Public entities, of course, have the legal authority to hire and compensate employees in order to carry out their respective governmental purpose(s). Along with typical compensation (i.e., a salary), public entities provide employees with other benefits such as health insurance, retirement benefits, office space, etc. As such, providing of coffee to employees would be construed as a benefit of employment.⁴ Therefore, the first prong of the test is met.

Turning to the second prong, the providing of coffee to employees does not appear to be gratuitous when taken as a whole. In analyzing this prong, the Louisiana Supreme Court has pointed out that the term *donation* in the Constitution can be equated to a gratuitous contract under the Civil Code, with an emphasis on the gratuitous intent of the parties.⁵ The Court also focused on the presence of a “counter-performance” and a “reciprocity of obligations” in determining whether the transaction was of a gratuitous, rather than onerous nature.⁶ This office has consistently surmised that where both parties to the arrangement derive some advantage or benefit in return for their performance, it is one of a non-gratuitous nature.⁷

Here, it appears that both parties to the transaction will derive some benefit. The employees, obviously, will receive the benefit of having coffee provided in the workplace. The public entity/employer, on the other hand, will presumably receive a more productive employee. We emphasize here, as did the Louisiana Supreme Court, that it is the intent of the public entity that matters. Thus, the question is whether the public entity reasonably believes that by providing its employees with coffee that it, in fact, will have more productive and efficient employees. On the other hand, if the public entity believes that providing its employees with coffee will not provide some benefit to the public entity, then the public entity would essentially be “giving away free coffee.” The former would be constitutionally permissible, while the latter would likely be considered gratuitous. Moreover, as this office has previously articulated on numerous occasions, it is the “reasonableness of the expenditure under the circumstances” that must be analyzed, “not the specific item of food or beverage.”⁸ For example, in connection with purchasing food/refreshments with public funds, this office stated that “champagne, alcoholic beverages and caviar are unreasonable, but coffee, soft drinks and doughnuts are

³ See e.g., La. Atty. Gen. Op. Nos. 16-0198, 10-0299, 10-0171, 09-0271, and 09-0260.

⁴ We note that this opinion is limited and does not opine on whether providing coffee on a routine basis (versus occasional) qualifies as a fringe benefit which is a taxable form of compensation.

⁵ *Cabela's*, 938 So.2d at 22; see also La. C.C. arts. 1468 and 1910.

⁶ *Id.*

⁷ La. Atty. Gen. Op. No. 10-0299.

⁸ See La. Atty. Gen. Op. No. 02-0125; see also 90-63 and 99-358.

reasonable.”⁹ In line with this reasoning, providing coffee, such as drip coffee to employees appears to be a reasonable expenditure under the circumstances. This opinion does not purport to endorse providing employees with specialty coffee drinks, as the high cost of these beverages would not be a reasonable expenditure. Nor does the opinion condone providing employees with any other food or beverage items except coffee.

We also distinguish this opinion from perhaps one of our most notable prior opinions addressing the purchase of coffee. In that opinion, this office stated that “[u]nder the strictest interpretation of LA Constitution, Art. VII, Sec.14 (1974), providing even ‘coffee, soft drinks and donuts’ is a prohibited gratuitous alienation of public funds.”¹⁰ That opinion, however, was analyzing whether the South Louisiana Port Commission could purchase alcoholic beverages for its customers during lunches or dinners.¹¹ The key distinction is that this opinion is addressing the purchase of coffee for a public entity’s *employees*, not customers or even the general public. The employer-employee relationship does not change merely because the employer is a public entity.¹² In other words, providing coffee to employees is a benefit of employment. As discussed above, this benefit is no different than providing employees with other benefits of employment such as pay raises, use of technology such as phones or computers, office supplies and furniture, or other items the employer feels will improve employee performance.¹³ Thus, as long as the public entity expects that the providing of coffee to employees will result in more productivity, higher employee retention and recruitment rates or provide some other benefit to the public entity, such a transaction does not appear gratuitous when taken as a whole.

With respect to the third prong, the public entity must also have a demonstrable, objective, and reasonable expectation of receiving something real and substantial in exchange for providing the coffee. A determination of whether this requirement is satisfied depends on the facts and circumstances surrounding the proposed expenditure. As a general rule, this office refrains from conducting such a fact-intensive analysis and leaves such determinations to the public entity seeking to expend public funds or property. Nonetheless, as outlined above, it appears that both parties to this transaction will receive something real and substantial in exchange for their performance. Employers have an interest in increasing and maintaining a productive workforce, employee morale, and higher employee recruitment and retention rates. In a 2017 Employee Benefit Survey, the Society for Human Resource Management (“SHRM”) noted that, there was an increase in employers who offered free coffee (from 72% to 80% over the past five years).¹⁴ This

⁹ La. Atty. Gen. Op. No. 90-63.

¹⁰ La. Atty. Gen. Op. No. 02-0125.

¹¹ *See id.*

¹² *See* La. Atty. Gen. Op. No. 17-0174, *citing Knecht v. Bd. of Trs. for State Colls. & Univs.*, 591 So. 2d 690, 694 (La. 1991)(*citing*, 1 Litvinoff § 135 at p. 227 (1975).

¹³ We note that there are numerous examples of ancillary benefits (parking, security, air conditioning, etc.) provided to employers that presumably increase their performance

¹⁴ *2017 Employee Benefits Remaining Competitive in a Challenging Talent Marketplace*, Society for Human Resource Management 2017, at 26, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/2017-employee-benefits.aspx>.

increase remained largely unchanged in subsequent benefit surveys.¹⁵ The top reason for increasing benefits was to remain competitive in the talent market place. . . benefits can be leveraged to help with common recruiting strategies, including increasing retention efforts.¹⁶ Therefore, the third prong is likely satisfied.


Considering the foregoing, it is the opinion of this office that public entities may provide their employees with coffee if they have a demonstrable, objective, and reasonable expectation that doing so will provide a real and substantial benefit to the public entity.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

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BY:


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¹⁵ "Most workplaces provide . . . free coffee (78%) to employees." *Executive Summary, SHRM Employee Benefits 2019* at 8, <https://shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/Benefits19.aspx>.

¹⁶ *2017 Employee Benefits Remaining Competitive in a Challenging Talent Marketplace*, Society for Human Resource Management 2017, at 1.