



## **CITY OF FORT BRAGG**

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### **Legal Considerations for Offering Childcare Assistance to City Council Members**

This request must consider the rules and regulations surrounding City Council salaries, reimbursements and benefits. In the wake of the City of Bell scandal, salaries and benefits provided to city council members are under increased scrutiny. Government Code Section 36516 authorizes councilmember monthly salaries for cities with populations of up to and including 35,000 people, that must be approved by ordinance, up to a maximum of \$300 per month. This is councilmembers current salary. Government code allows cities to increase the salary of councilmembers beyond what is provided in the government section by an ordinance or by amendment to an ordinance by no more than an amount equal to 5 percent for each calendar year from the operative date of the last adjustment of the salary in effect when the ordinance or amendment is enacted. The maximum 5% per year percentage must only be applied once, with no compounding. The calculation may only be based on what the actual salary was, not on what it could have been. In the City of Fort Bragg's case, it has been ten years since the last salary ordinance in 2012. Therefore, only one calculation – an increase of 50% - is to be made (10 years times 5% = 50%), not ten separate calculations, one on top of another. This calculation amounts to \$450 per month, an increase of \$150 per month or \$1,800. Automatic future increases are not allowed.

If the a salary ordinance was enacted, Government Code Section 36515.5 prohibits any change in compensation during the council member's term of office. It does not mean that Councilmember X, elected in 2020, must wait until their next term of office beginning in 2024. Since city council members serve staggered terms, Councilmember X will be eligible for an increase following the next municipal election in 2024, when two or three of their compatriots must run for reelection, even though X is in the middle of their own term. There are more rules regarding salary, but this is meant to provide the main points. If it ends up that council wants to move in this direction, then more specifics will be provided.

While it may seem the above is not relevant, it is relevant due to the rules regarding stipends, which is one possible way to provide childcare assistance. In general, if payment to a council member is not a permissible retirement or health and welfare benefit, or is not a valid expense reimbursement, then it will be counted for purposes of determining salary.

Another area to look at is through the City's health and welfare benefits. Pursuant to Government Code Section 36515, any amounts paid by a city for retirement, health and welfare, and federal social security benefits shall not be included for the purposes of determining salary under Government Code Section 31516, provided the same benefits are available and paid by the City for other employees. Amounts paid by a city for actual and necessary expenses shall not be included for the purpose of determining salary pursuant to Government Code Section 36514.5 under Section 36515.

Currently, the City's municipal code title 2.04.065 provides "City councilmembers and their dependents are eligible for health care and dental insurance through plans offered by the Redwood Empire Municipal Insurance Fund (REMIF). The premiums for such health care insurance and dental insurance are paid by the City during the time that a Councilmember serves on the City Council. The City also provides a life insurance and accidental death and dismemberment policy in the amount of \$5,000 for each Councilmember. The aforementioned benefits are not included for the purposes of determining salary provided the same benefits are available and paid by the City for its employees. This ordinance passed on June 11, 2012. Vision is also included as it is 100% paid for all City employees. As no mention is ma

The relevant municipal code mentioned above is silent on flexible spending accounts. Referring to a 2011 white paper authored by Brian Libow, City Attorney, San Pablo, obtained through the City of Fort Bragg's city attorney, Keith Collins, it is the author's opinion that a council member may participate in the City's flexible benefits plan, where the City, along with the employee, contributes pre-tax dollars to pay for medical or childcare expenses. Mr. Libow states the flexible spending arrangement is a valid health and welfare benefit despite its form as a direct payment to the council member, as it is effectively a reimbursement for actual medical expenses. This should be allowable and, as a health and welfare benefit received by all other city employees, may be authorized by resolution as well as by ordinance, as provided in the next paragraph.

Permissible health and welfare benefits, and provisions for expense reimbursement, may be established by resolution. An ordinance is not necessary. Since this is the case, what about payments such as stipends, such as cell phone, or other advance payments? So long as they are authorized by ordinance and, when added to normal salary, are under the maximum, such payments would be allowable. The legal article talks about other stipends. In our case, it would be a stipend for childcare by stating "While an invoiced reimbursement for official phone calls would clearly be permissible, a stipend is not a "reimbursement" under the Attorney General's analysis. While it is permissible for other city employees, the payment of such stipends to council members would seem to constitute monetary compensation that is not authorized by either by a salary ordinance, nor by a statutory provision, such as Section 1223 regarding car allowances. Since a childcare stipend is considered income, then the most the stipend can be is \$150 per month (\$1,800 annually). Otherwise, the City cannot allocate public funds for childcare purposes UNLESS the City does this for City employees, which we do not.

Based on the above information, it seems the options thus far are either to provide flexible spending account, dependent care, with the City contributing money along with the employee, or to allow for direct reimbursement. Offering a stipend is not an option. Direct reimbursement for childcare while conducting City business does seem to be an option. Pursuant to Government Code Section 36514.5, city council members may be reimbursed for actual and necessary expenses incurred in the performance of official duties. Any amounts paid by a city to reimburse a council member for actual and necessary expenses shall not be included for purposes of determining salary (§36516(e)). Reimbursement for expenses is subject to Government Code sections 53232.2 and 53232.3. Under these sections, the City must adopt a written policy which specifies the types of occurrences that qualify for reimbursement. The policy may also specify reasonable reimbursement rates. Council must complete the expense reports documenting that the expenses meet the existing policy and must be submitted within a reasonable time, and must be accompanied by receipts. The documentation is considered a public record.

At this time, the City's municipal code is silent on offering flexible spending reimbursement accounts (FSA) to council members. The City offer's two FSAs, a health care reimbursement (Health FSA) and a dependent care reimbursement (Dependent Care FSA). Neither of these FSA accounts have city contribution. All FSA contributions are employee contributions made on a pre-tax basis. The Health FSA is not relevant because it is meant to cover medical, dental and vision expenses, that are defined by the Internal Revenue Service (IRS). Health FSAs do not allow dependent care expenses. The Dependent Care FSA *does* allow and is specifically for childcare expenses.

It is also important to factor in any conflict of interest concerns. Government Code Section 1090, there will be no violation when council members approve salary or benefits for themselves. Regarding the Political Reform Action, council members may ordinarily vote for the ordinance increasing their salary. However, if any particular vote will only affect *some* council members, but not *others*, then a conflict may be deemed to exist.

Section 87100 of the Political Reform Act prohibits any public official from making, participate in making, or using their official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interest (§87103(c); Regulation 18703.3.) This section provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or on any of the official's economic interests. For council members, there are two economic interests in their salary.

- An economic interest in a source of income, including promised income, which aggregates to \$500 or more within twelve months prior to the decision.
- An economic interest in their personal finances, including those of their immediate family.

City Council salary does not constitute an “economic interest in a source of income,” because the Act’s definition of *income* expressly excludes salary and reimbursement for expenses and per diem received from a state, local, or federal government agency. However, Fair Practices Political Commission (FPPC) letters clearly specify that an effect on an official’s governmental salary may still be disqualifying under limited circumstances as it would be considered “material and foreseeable financial effect on the official’s personal finances” based on *Scott Howard Advice Letter, A-07-182, and Robert Hoffman Advice Letter, I-11-005*. Under Regulation 18705.5(a), a financial effect of a decision on an official’s personal finances is material if it is at least \$250 in any 12-month period. As noted above an annual childcare expenses is approximately \$2,131 annually. There is an exception, however, under Regulation 18705.5(b) for certain governmental decisions that affect only the salary, per diem, or reimbursement of the public official:

“The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of their immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of their immediate family, *or to set a salary for the official or a member of their immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position.*”  
(emphasis added and changed to reflect gender neutral language)

Therefore, the FPPC has advised that generally an official is not disqualified from taking part in salary and benefit decisions that will affect their income as an employee of the agency. However, the Act would prohibit the official from taking part in salary and benefit decisions that will set a salary or benefits for the official different from other employees in the same job classification or position. The bottom-line on this area is that careful consideration of how a council vote may impact different council members differently. Though nominally broad in application, if the real life impacts of the ordinance will affect some council members, but not others, a conflict of interest is deemed to exist.

**This a summary of the League of California Cities paper titled: *City Council Salaries and Benefits*, presented at League of California Cities general session in September 2011 prepared by HR Analyst, Juli Mortensen.**