LETTER OPINION
93-L-305

October 25, 1993

Ms. Diane Alm
Executive Director
Workers Compensation Bureau
500 East Front Avenue
Bismarck, ND 58504-5685

Dear Ms. Alm:

Thank you for your September 30, 1993, letter asking whether a state agency may deny an employee participation in the Uniform Group Insurance Program as established under North Dakota Century Code (N.D.C.C.) ch. 54-52.1 if the agency agrees to compensate the employee with 50 percent of the cost of that policy as salary.

The Uniform Group Insurance Program was established in 1971 with the purpose of "promot[ing] the economy and efficiency of employment in the state's service, reduce personnel turnover, and offer an incentive to high-grade men and women to enter and remain in the service of state employment." N.D.C.C. § 54-52.1-02. All eligible employees are entitled under N.D.C.C. § 54-52.1-03 to "be enrolled in the uniform group insurance program created by [N.D.C.C. ch. 54-52.1] by requesting enrollment with the employing department." N.D.C.C. § 54-52.1-01 defines "eligible employee" as "every permanent employee who is employed by a governmental unit, as that term is defined in section 54-52-01." N.D.C.C. § 54-52-01 defines "governmental unit" as "the state of North Dakota or a county or a city thereof, a school district, including the Fargo School District, or any combination thereof, a district health unit, and the Garrison Diversion Conservancy District." N.D.C.C. § 54-52.1-06 directs every state agency to

pay to the board each month from its funds appropriated for payroll and salary amounts a state contribution in the amount as determined by the primary carrier of the group contract for the full single rate monthly premium for each of its eligible employees enrolled in the uniform group insurance program and the full rate monthly premium, in an amount equal to that contributed under the alternate family contract, including major medical coverage, for hospitaland medical benefits coverage for spouses and dependent children of its eligible employees enrolled in the uniform group insurance program pursuant to section 54-52.1-07.

Providing increased compensation to a state employee in lieu of that employee's participation in the group insurance program raises a concern as to whether such a practice is consistent with North Dakota public policy. "Public policy, with respect to contract provisions, is a principle of law whereby a contract provision will not be enforced if it has a tendency to be injurious to the public

or against the public good." Johnson v. Peterbilt of Fargo, Inc., 438 N.W.2d 162, 163 (N.D. 1989). Additionally, "[w]here legislation is intended to secure general objectives of public policy as well as to protect the interests of individuals, it may not be circumvented by private agreement." McKinney v. Employment Division, 537 P.2d 126, 130 (Or. Ct. App. 1975). N.D.C.C. § 9-08-01(2) specifically provides that a contract provision is unlawful if it is "[c]ontrary to the policy of express law, though not expressly prohibited."

The inherent nature of a uniform group insurance program as well as the public policy articulated in N.D.C.C. § 54-52.1-02 run contrary to the practice of having a governmental unit pay one of its eligible employees not to participate in the group insurance program. Paying a person not to participate is diametric to having a uniform group program and counter productive to the principles of risk dispersion. In comparison, I note that no employee can waive the employee's right to receive workers compensation or unemployment compensation. See N.D.C.C. §§ 65-01-10 and 52-06-31. Stating the rationale for the workers compensation nonwaiver rule, Professor Larson explains: "Whatever the rule may be as to questions involving commercial paper, interest, usury and the like, the rule in workmen's compensation is dictated by the overriding consideration that compensation is not a private matter to be arranged between two parties; the public has a profound interest in the matter which cannot be altered by any individual agreements." 4 A. Larson, The Law of Workmen's Compensation, § 87.71 (1992).

Further, where the Legislature has established a method of providing compensation to state employees and officials, it is generally held that method is exclusive. For example, this office has concluded that the former director of the Department of Economic Development and Finance could not receive a flat rate payment for official travel, but rather had to seek reimbursement pursuant to established statutory procedure. Letter from Attorney General Nicholas J. Spaeth to Representative Richard Kloubec (April 6, 1992). This office has also concluded that payment for unused sick leave based on continuous years of service could not be interpreted differently by different state agencies. Letter from Attorney General Heidi Heitkamp to Brian McClure (July 19, 1993). Where the Legislature has determined that there exists a need for flexibility in how state employees are compensated, it has specifically provided for that flexibility. See N.D.C.C. § 44-08-04 ("The head of any department, institution, or agency of this state may set a rate for such expenses less than those set forth in this section for any person or person under his authority.")

Finally, in the area of the Uniform Group Insurance Program, the Legislature has specifically prohibited political subdivisions from paying the costs of health insurance coverage for temporary employees and has set the criteria for employee eligibility evidencing legislative intent that this is not an area in which state agencies are free to contract. N.D.C.C. §§ 54-52.1-03.4 and 54-52.1-01. As noted by former Attorney General Spaeth "[i]t is clear that the state's Uniform Group Insurance Program is a benefit established by the Legislature and must be provided to all 'eligible employees' of the state on a uniform

basis. The individual departments, boards, and agencies have no discretion on decisions whether their employees will participate." Letter from Attorney General Nicholas J. Spaeth to Alan Person (October 14, 1988).

Because it would be contrary to public policy and legislative intent, it is my opinion that a governmental unit may not provide additional compensation to one of its eligible employees and thereby deny the employee the right to participate in the Uniform Group Insurance Program.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dec/vkk