

2009 WL 1968583 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 4, 2009

*1 The Honorable Ralph Anderson
Senator
District No. 7
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Anderson:

In a letter to this office you questioned the legality of providing credits and monetary incentives for organ donations. You specifically referenced legislation in other states that allow inmates to avoid the death penalty by donating organs, giving inmates time off for organ donations, and legislation providing exclusions from income taxation with respect to certain organ donations and donation expenses.

In prior opinions dated November 30, 2007 and February 27, 2007, this office dealt with proposed legislation which would have entitled an inmate who donates bone marrow or human organs to receive a deduction from his sentence. The opinions dealt with a construction of 42 U.S.C.A. § 274(e) which states that “[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.” The term “human organ” is defined by subsection (c)(1) as “...the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.” Pursuant to subsection (c)(2) of that provision, the term “valuable consideration”

...does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

The term “interstate commerce” for purposes of such provision is defined as “...commerce between any State or Territory and any place outside thereof, and...commerce within the District of Columbia or within any other Territory not organized with a legislative body.”

The referenced February 15, 2007 opinion noted that the term “human organ” specifically includes bone marrow for purposes of the federal prohibition. As to whether the receipt of a deduction from a period of incarceration would constitute “valuable consideration”, reference was made to another prior opinion of this office dated January 11, 1996 which stated that

[a] commonly-accepted definition of valuable consideration...[is that such]...consists of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.

In resolving the question as to whether the donation of bone marrow would affect interstate commerce, reference was made to a prior opinion of the Kansas Attorney General dated March 17, 2000 which stated:

*2 Congress' commerce power derives from the United States Constitution and its scope is not confined to the regulation of commerce between the states but may reach intrastate activities which interfere with or obstruct the exercise of this granted power.

The prior opinion of this office noted, therefore, that intrastate activities are also to be examined with regard to any effect on interstate commerce. See also: Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (inns and hotels catering to intrastate guests); Wickburn v. Filburn, 317 U.S. 111 (1942) (homegrown wheat). It stated that “[a]rguably, the donation of bone marrow by a prisoner would also implicate intrastate activities involving interstate commerce.”

In dealing with the donations of organs pursuant to the National Organ Transplant Act, the Kansas Attorney General in the referenced 2000 opinion determined that

[i]nterstate commerce is affected when, upon receipt of a body part... (which would presumably include bone marrow) ...an approved hospital or storage facility in the state contacts an organ procurement organization through the National Organ Procurement and Transplantation Network established by Congress to assist in the nationwide equitable distribution of organs. The Network was established pursuant to the National Organ Transplant Act...Interstate commerce is affected when body parts for human transplantation enter the Network established by Congress....It was referenced that “(a)s a condition for receipt of medicare funds, hospitals are required to contact a regional organ procurement organization... and establish protocols for the identification of potential organ donors.”

Consistent with the above, the February, 2007 opinion of this office, concluded that as a result of the involvement of such a network, the donation of bone marrow or blood-forming cells by a prisoner would affect interstate commerce and would, therefore, be inconsistent with the federal legislation. The November 30, 2007 opinion concluded that “... we must caution that the law in this area is unsettled and that a court could conclude that the donation of organs or bone marrow by a prisoner for “good time credits” could be considered “valuable consideration” in violation of the... (federal)...statute.

Consistent with the above opinion, it is the opinion of this office that legislation allowing certain condemned prisoners to become organ donors and thereby reduce their sentences to life in prison without the possibility of parole or giving inmates time off for organ donation could similarly be a violation of the federal statute. Of course, only a court could resolve this issue with finality.

As to the question of providing an exclusion from state income taxation with respect to organ donation expenses, the March 17, 2000 Kansas Attorney General's opinion specifically dealt with the question of whether legislation providing tax credits for anatomical donations violates the referenced federal statute. The opinion stated that

*3 [w]ith the exception of reasonable payments for the costs associated with the procurement of the organs, the federal statute prohibits the payment of valuable consideration for the transfer of human organs used in human transplantation. A tax credit is valuable consideration, and thus we must determine whether the payment of the tax credit...for blood donation is prohibited and whether the tax credit...for the organ donation is prohibited...[I]n our opinion...(the legislation)...which provides a tax credit for the donation of blood, blood derivatives and products, does not violate the federal prohibition against the transfer, acquisition, or receipt of human organs for valuable consideration because there is no federal prohibition against the transfer of blood and blood derivatives...(As to the legislation which)...provides a tax credit for donation of a body part... [s]ince the federal prohibition applies only to the transfer of human organs, only body parts that meet the definition of human organs...(as specified in the federal legislation)...are subject to the prohibition...Accordingly, in our opinion, the tax credit for the donation of body parts for human transplantation...provides valuable consideration for the transfer of human organs in violation of federal law.

The March 17, 2000 Kansas Attorney General's opinion is the sole authority that I have located in my research that has dealt with such issue. Therefore, consistent with the referenced opinion, this office would similarly conclude that providing an exclusion from state income taxation by tax credits with respect to organ donations as defined by the federal legislation would be prohibited.

With respect to an exemption for unreimbursed expenses associated with an organ donation, I have found no opinions of other attorneys general or case law directly on point. However, as noted above, 42 U.S.C.A. § 274(e) states that “[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.” Pursuant to subsection (c)(2) of that provision, the term “valuable consideration” “...does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.” Therefore, there is an exemption for certain expenses incurred by the donor in association with the donation of an organ. Moreover, as to the State authorizing tax credits, generally, it is recognized that the legislature may enact tax credits through legislation. See: Ops. Atty. Gen. dated April 1, 2009; January 11, 2008. In an opinion of the Washington Attorney General dated April 12, 1951, it was stated that “[a] state legislature has very broad discretion in making classifications in the exercise of its taxing powers.” As similarly referenced in an opinion of the Iowa Attorney General dated December 11, 1984 in upholding a tax credit,

*4 ...the legislature of a state has very broad discretion in creating classifications within a tax program. Therefore, as long as a classification is based on a rational basis and does not involve a suspect classification (race, religion, national origin), it will be upheld as constitutional. Moreover, any reasonable distinction the government makes for the classification will be deemed sufficient.

See also: Op. Nevada Atty. Gen. dated April 16, 1981 (as to tax credits, “[t]here exist no constitutional provisions that limit the legislature's discretion to enact programs that benefit certain classes of citizens, if the laws enacted are general laws and of uniform application throughout the state.”). Therefore, in the opinion of this office, legislation creating a tax credit associated with unreimbursed expenses associated with organ donations may be upheld.

If there are any questions, please advise.

Very Truly Yours,

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