

SOCIAL SECURITY: The State may, under the provisions of the Constitution of this State, enter into an agreement with the Federal Government extending old age and survivor insurance benefits to employees of the State and employees of its political subdivisions in conformity with the Federal Social Security Act.

November 24, 1950



Honorable Forrest Smith
Governor of the State of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Smith:

This will be in reply to your letter of recent date requesting our opinion on the extension of the Federal Social Security Act by Public Law 734 - (H.R. 6000), recently passed by the Congress of the United States to permit the several States to enter into agreements with the Federal Government providing for the extension of old age and survivor insurance benefits under the Federal Social Security Act for the employees of such States and such political subdivisions. Your letter reads as follows:

"On August 28, 1950, President Truman signed the Social Security Act Amendments of 1950, making several major changes in the Federal Social Security Act. This Act is known as Public Law 734 - 81st Congress (H.R. 6000). One of the changes in the Act was made by adding a new section, known as Section 218 (a), which provides for voluntary agreements between States and the Federal government for coverage of State and local employes under the Old Age and Survivors Insurance provisions of the Social Security Law.

"I would appreciate your reviewing the above amendment to the Social Security Law and advising me on the following questions:

"(1) Could the State of Missouri under its Constitution enter into an agreement with the Federal government for coverage of State employes?

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"(2) If the answer is 'Yes' to question No. 1 what legislation would have to be enacted to enable this State to enter into such agreement?"

The Act referred to in your letter is an amendment to Title II of the Federal Social Security Act.

Your letter presents two questions:

1) May the State of Missouri under its Constitution enter into such an agreement with the Federal Government for such coverage of State employees and employees of political subdivisions of the State.

2) If the State of Missouri may enter into such an agreement what legislation should be enacted to authorize such an agreement with the Federal Government.

We shall consider first the question respecting the power of the State of Missouri under its Constitution to enter into such an agreement with the United States Government. It is a familiar rule applied by the Courts of the country that in the construction of constitutional provisions all parts of the Constitution are entitled to equal weight, and that each section must be considered in relation to the whole (12 C.J., page 708, State ex rel. vs. Hostetter, 137 Mo. 636, l.c. 646). With this rule before us for our guidance we quote the following sections of our Constitution which should be construed in our opinion upon the first question you submit.

Sections 37 and 38(a) of Article III, and Sections 37 and 39 of Article IV, read, respectively, as follows:

Section 37, Article III:

"The general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefor, except (1) to refund outstanding bonds, the refunding bonds to mature not more than twenty-five years from date, (2) on the recommendation of the governor, for a temporary liability to be incurred by reason of unforeseen emergency or casual deficiency in revenue, in a sum not to exceed one million dollars for any one year and to be paid in not more than five years from its creation, and (3) when the liability exceeds one million dollars, the general assembly as on

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constitutional amendments, or by the people by the initiative, may also submit a measure containing the amount, purpose and terms of the liability, and if the measure is approved by a majority of the qualified electors of the state voting thereon at the election, the liability may be incurred, and the bonds issued therefor must be retired serially and be installments within a period not exceeding twenty-five years from their date. Before any bonds are issued under this section the general assembly shall make adequate provision for the payment of the principal and interest, and may provide an annual tax on all taxable property in an amount sufficient for the purpose."

Section 38(a), Article III:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during this service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

Section 37, Article IV:

"The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

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Section 39, Article IV:

"In all matters of public welfare the general assembly may provide by law for cooperation with the United States, or other states."

Section 37 of Article IV, supra, of the present Constitution of this State is an enabling provision authorizing the Legislature to create the Department of Public Health and Welfare and to grant power with respect thereto to counties, cities or other political subdivisions of the State.

Section 39, supra, of our Constitution is likewise an enabling provision without restrictions giving express authority to the General Assembly to provide by law for cooperation with the United States and other States under the subject of public health and welfare.

The Supreme Court of Missouri has not had before it any case to construe the terms of Section 39 of Article IV to determine the question of whether social security legislation to co-operate with the Federal Social Security Act to provide for the general welfare is valid. Eminent text authorities, the Courts of last resort of other States and the Supreme Court of the United States have held such legislation valid, respectively, under the constitutional provisions of such States and the Federal Constitution.

Our Supreme Court has, however, construed statutes and constitutional provisions of this State involving elements of public welfare where the question arose of the authority to pay public money to individuals for services performed by them for the public benefit. In such cases, such as the appropriation of public funds for cities, or to be paid hospitals, industrial homes, county farm bureaus which are formed by private citizens, for the establishment of a municipal airport, and other like matters, the Court has held that such services and enterprises were for public purposes and justified the payment therefor out of public funds, and that such payments did not violate the provisions of the Constitution prohibiting the use of public funds as a gift or grant to private individuals. (State ex rel. Crow, Attorney General, vs. City of St. Louis, et al., 174 Mo. 125; State ex rel. Industrial Home for Girls, 144 Mo. 275; Jasper County Farm Bureau vs. Jasper County, 315 Mo. 569).

The case of State ex rel. Crow, Attorney General vs. City of St. Louis, 174 Mo. 125, was considered by the Supreme Court on the constitutional question of the right of the city to appropriate public money to reimburse a city officer for money expended arising out of the discharge of his official duties. Holding that the

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appropriation of such funds and the payment thereof to the officer for such purposes were constitutional, the Court, l.c. 149, said:

"Here the municipal corporation had a duty to perform, rights to defend, and interests to protect in removing or having removed, the nuisance from the streets. The officer acted bona fide, within the scope of his duties, lawfully. The indemnity was legal and proper."

The above cases arose in the construction by the Court of Sections 47, 47(a) and 48(a) of Article IV and Section 6 of Article IX of the Constitution of 1875, which sections now in general terms and effect constitute Sections 23 and 25 of Article IV of our present Constitution, sections limiting the power of the Legislature to authorize the expenditure of public money.

The Supreme Court of this State in the case of State ex rel. City of St. Louis vs. Public Service Commission, 56 S.W. (2d) 398, long before the adoption of our present Constitution including Sections 37 and 39 of Article IV, in construing Section 5177, Article III, Chapter 33, R.S. Mo. 1929, and in holding an order of the Public Service Commission made under said Section unlawful, quoting 50 C.J., Section 95, page 867, defined "public welfare", l.c. 404, as follows:

"* * * The term 'public welfare' used in the quoted statute, stating the rule of construction of the Public Service Commission Act, is a comprehensive expression, and embraces the health, peace, morals, and safety of the community; that which is a public necessity or for the convenience of the public. * * * ."

Volume 48, Am. Jur., a late, excellent and much quoted text authority, Section 3, page 514, on the subject of legislation, respecting the general welfare under the Federal Constitution and similar provisions in Constitutions of several of the States, states the following:

"It is generally held that the Federal and state governments in the exercise of their police power to provide for the general welfare may enact appropriate legislation to safeguard the interests and protect the social security of employers, employees, and the public at large. * * * * *"

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"Similarly, the fundamental and broader aspects of many of the state acts, designed to operate with the Federal Act, have been held constitutional by both the Federal and state courts. This is particularly the case with reference to state old-age and survivors' insurance, unemployment insurance, and old-age assistance legislation. * * *."

In support of this text in footnotes 4 and 9, respectively, are cited the cases of *Helvering vs. Davis*, (301 U.S. 619, 81 L. ed. 1307, 57 S. Ct. 904, 109 A.L.R. 1319) and the case of *Carmichael vs. Southern Coal and Coke Company* (301 U.S. 495, 81 L. ed. 1245, 57 S. Ct. 868, 109 A.L.R. 1327.) We are here referring to 109 A.L.R. 1319, in the *Helvering* case and to 109 A.L.R. 1327, in the *Carmichael* case, respectively.

The case of *Helvering vs. Davis*, supra, was a direct attack upon the provisions of Title II of the Federal Social Security Act passed August 14, 1935. Chapter 531, 49 Sta. at L. 620. The case was one where shareholders of a Massachusetts corporation sought to restrain the corporation from making the payments and deductions called for by the Act for the payment of old age benefits to cover monthly benefits and lump sum payments when the necessity for such lump sum payments might arise. The Federal District Court had dismissed the Bill filed by the shareholders to restrain the corporation from making the payments and deductions required by the Federal Social Security Act. The United States Circuit Court of Appeals on review, reversed the decree of the District Court. *Certiorari* followed and the case was thus before the United States Supreme Court. The Supreme Court reversed the decree of the Circuit Court of Appeals and affirmed the decree of the United States District Court of Massachusetts whereby the Bill to enjoin the corporation from making the payments and deductions required by the Act had been dismissed by the District Court, leaving the terms of the Act in force and effect. The Court in upholding the constitutionality of the Federal Social Security Act and in affirming the decree of the District Court, l.c. 1323, said:

"* * * The scheme of benefits created by the provisions of title II, is not in contravention of the limitations of the Tenth Amendment.

"Congress may spend money in aid of the 'general welfare.' Const. Art. I., Sec. 8; *United States v. Butler*, 297 U.S. 1, 65, 80 L. ed. 477, 488, 56 S. Ct. 312, 102 A.L.R. 914; * * *."

The case of *Carmichael vs. Southern Coal and Coke Company*, supra, grew out of an Alabama State Statute imposing upon employers the

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obligation to pay a certain per cent of their monthly payrolls, under the taxing power of that State, into the State Unemployment Compensation Fund. The Coal and Coke Company sought in the District Court of the United States for the Middle District of Alabama to enjoin the Attorney General (Carmichael), and other defendants, from the collection of money contributions imposed by the provisions of the Alabama Unemployment Compensation Act. The decree of the United States District Court sustained plaintiffs and enjoined defendants from the collection of such tax. In an exhaustive opinion the Supreme Court of the United States upheld the Alabama statute in its entirety, and held that the same was valid under both the Alabama Constitution and the Constitution of the United States. The Supreme Court of Alabama did likewise. The Supreme Court of the United States in the Carmichael case, l.c. 1331, 1332, taking note of the decision of the Supreme Court of Alabama said:

"In the court below, the statute was assailed as repugnant to various provisions of the state constitution. These contentions have been put at rest by the decision of the Supreme Court of Alabama in Beeland Wholesale Co. v. Kaufman. --Ala. --,-- So. --, holding the state act valid under both the state and federal constitutions.
* * * ."

It will thus be observed that the validity of the Federal Social Security Act and like legislation on the part of a State has been held valid and constitutional as an element of public or general welfare by the Supreme Court of the United States and the Supreme Court of the interested State, respectively, in their respective jurisdictions. We have cited Section 38(a) of Article III of our Constitution, and have set forth its terms herein, in considering all of the sections of the Constitution which might bear upon the question before us. We do not believe that there is any part of said Section 38(a) that would limit the express power and authority created in Section 39 of Article IV of the Constitution authorizing the enactment of legislation by the General Assembly for the State to co-operate with the Federal Government in the extension of the benefits of old age and survivor insurance to employees of the State and employees of subdivisions thereof under the Federal Social Security Act. Said Section 38(a) is a provision of limitation respecting the use of State funds and credit, but it does clearly recognize the use of public funds for old age assistance and for participation in federal aid. The terms of said Section 38(a), we believe, may be reasonably construed to be in support of any need which might arise for the enactment of legislation in furtherance of social security as an incident of public welfare and not in conflict with said Section 39 of Article III.

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Among such sections of our Constitution cited and quoted herein and to be considered in the preparation of this opinion, is Section 37 of Article III. We have examined and studied this section particularly as possibly limiting legislation for the cooperation by this State with the Federal Government in such extension of the benefits of the Federal Social Security Act, as is expressly authorized in said Section 39 of said Article III. Consideration and study of said Section 37 has been directed to the particular provision therein to determine whether it contains a limitation upon the power of the State to contract with the Federal Government for the extension of such benefits as are provided in said Public Law 734 (H.R. 6000), provided an obligation or liability upon the State were fixed by reason of such contract, in excess of One Million Dollars per year. The authorities we have read in the research and study we have given to this question convince us that the section is not in conflict with, in any sense, nor does it constitute any limitation upon the express powers provided in Section 39 granting the General Assembly unrestricted authority to legislate to co-operate with the United States in matters of public health and welfare, and of course, the purpose of such legislation and the whole undertaking would be connected with and in the interest of public welfare. The Supreme Court of this State in the case of State ex rel. vs. Smith, 175 S.W.(2d) 831, gave its construction of the meaning of Section 48 of Article IV, and in its discussion of the provisions of that section, construed also the provisions of Section 44, both of the Constitution of 1875 of this State. The provisions of Section 44 of the 1875 Constitution are in much the same language, although abbreviated, as now stands said Section 37 of Article III of our 1945 Constitution. The case arose, as stated, principally upon the construction of Section 48 of Article IV respecting claims of salaries of officers of the Board of Registration of Architects and Professional Engineers out of a separate fund of monies collected by the Board. Reciting, in part, the provisions of both of said Sections 48 and 44 there being construed and which are pertinent to the question here, and holding that Section 44 of Article IV of the Constitution of 1875, now in effect Section 37 of Article III of our present Constitution, was confined to contracts creating a debt or obligation upon the State through the issue of bonds or otherwise, the Court, l.c. 832, 833, said:

"Section 48, Article IV of the Constitution, Mo. R.S.A., provides: 'The General Assembly shall have no power to * * * pay nor authorize the payment of any claim * * * created against the State * * * under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void.'

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"Section 5 of the act creating the board, Mo. R.S.A. Sec. 10139.5, states: 'The Board shall appoint a secretary who shall also be the treasurer of said Board * * *.' Section 6, Mo. R.S.A. Sec. 10139.6: 'The Board shall have power to employ such consultants * * * and may make expenditures of the fund herein provided for any purpose which in the opinion of the Board is reasonably necessary for the proper performance of its duties under this Act, including the purchase of supplies * * *.' Section 8, Mo. R.S.A. Sec. 10139.8: 'The compensation of all employees shall be * * * commensurate with their duties. * * *' These sections expressly authorize the contracts upon which the claims here involved are based and the constitutional prohibition is not applicable to them.

"Nor has Section 44, Article IV of the Constitution any application to the claims. It provides: 'The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State, or to issue bonds or other evidences of indebtedness thereof, * * *.' This section is a restriction on the power of the legislature to raise revenue through the issuance of bonds and otherwise."

We do not believe that it would be possible for a condition to ever arise where it would be necessary or permissible to undertake to raise funds from bonds to be used as contributions to a fund to be created to meet the terms of such a contract entered into by the State with the Federal Government because such funds would be the lawful and orderly subject of appropriations from time to time of public money provided for in legislation necessary and appropriate to provide for the extension of such benefits under the Federal Social Security Act to employees of the State and employees of political subdivisions thereof. We believe the entry into such contract by the State would not and could not, under the Court's construction of what now is our Section 37 of Article IV of the Constitution of 1945, in *State ex rel. vs. Smith, supra*, create a debt or liability upon the State unless the contract itself requires the State to issue bonds or obligations, the payment and discharge of which would require the issue of bonds.

The distinction to be observed between the creation of a debt, under constitutional authority by the State either at all,

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or in excess of an amount authorized by the Constitution, or to be provided and spent within a definite period as to amount and the appropriation and use of public funds on hand and derived from the collection of revenue is stated in 59 C.J. page 225, as follows:

"* * * An obligation, although amounting to a technical debt, is not forbidden by the provisions of the constitution limiting either its creation or its amount, if funds are in the treasury to meet it, or if the uncollected revenue provided for the year in which it is created will be sufficient to meet it when collected, although payment is deferred; obligations that run current with revenues are not debts within a constitutional limitation. Likewise, an appropriation from public funds available for that purpose does not create a debt within a constitutional limitation, nor a mere transfer from one fund to another of money in the treasury, nor an appropriation of revenue assessed and in process of collection, or of revenue provided for by the revenue laws, even though the appropriation is in anticipation of such revenue; nor does the issuance of a state warrant, where the money is in the treasury, or where a tax levy has been made with provision for its collection, create a debt within a constitutional limitation; likewise, the issuance of treasury notes, in anticipation of revenues from taxes levied, does not incur an indebtedness within a constitutional limitation."

We believe that the General Assembly has express and adequate authority under Section 39 of Article IV of the Constitution of this State to enact legislation permitting the State to enter into such a contract with the Federal Government as is contemplated in said amendment to Title II of the Federal Social Security Act to extend the benefits of old age and survivor insurance to employees of the State and political subdivisions of the State, and that there is no provision in any other section of our Constitution restricting or limiting the full power so provided in Section 39 of Article IV provides that the State "In all matters of public welfare the general assembly may provide by law for cooperation with the United States, or other states." Webster's New International Dictionary, Second Edition, page 585, defines "co-operate" as: 1. "To act or operate jointly with another or others; to concur in action, effort, or effect." 2. "To join in economic cooperation."

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We believe, under the above authorities cited and discussed and under the express provisions of Section 39 of Article IV of our present Constitution, that the General Assembly has authority to enact appropriate laws authorizing the State to enter into an agreement with the Federal Government for the extension of old age and survivor insurance benefits under the Federal Social Security Act for the employees of the State and its political subdivisions and to appropriate and use public funds of the State and such political subdivisions of the State for such purposes.

We have given attention and study to the contents and provisions of the said amendment itself, and have made an extensive research of existing social security legislation, text authorities, and decisions by the Courts of the country pertinent thereto, and as the result of our research it is our opinion that in answer to your second question a comprehensive enabling Act should be passed by the Legislature creating a State agency to make application to enter, and actually enter, into an agreement with the Administrator of the Federal Social Security Act as provided in Section 218, an amendment of Title II of that Act, such agreement to contain such provisions as the State may request for the extension of the benefits of the old age and survivor insurance system, now existing under the Federal Social Security Act, to services performed by individuals as employees of the State, or any political subdivision thereof, or instrumentality thereof, as provided in said Section 218 of said Title II and consistent therewith. Such Act, when passed, should include sections with provisions similar to the following abbreviated outline:

1) Declaring that, in order to extend to the employees of this State and its subdivisions and their instrumentalities and to dependents and survivors of such employees, the benefits of the protection accorded to others by the old age and survivor insurance system contained in the Federal Social Security Act, it is the public policy of this State that agreement be made with the administrator of the Federal Social Security Act upon the request of this State so that the provisions of said Federal Act will be extended to the employees of the State of Missouri and its political subdivisions and instrumentalities under said Section 218 of said Act, as amended,

2) Giving adequate definitions of subjects and terms to be applied in said agreement affecting the extension of such benefits to the State, its political subdivisions and instrumentalities as employers, such as the meaning of "employees", "employment", "services covered", "Federal agency", "Federal Insurance Contributions Act", "Instrumentality", "political subdivision", "Federal Social Security Act", "State agency", and "wages", and such other definitions of terms, entities, words, phrases and subjects as may be deemed necessary by the Legislature in framing such legislation.

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3) The creation of a State agency to enter into such agreement with the administrator of the Federal Social Security Act as amended by Section 218, Title II of said Act, to secure the extension of such benefits to such employees and their survivors, and providing for the powers to be exercised by said State agency, the appointment and qualifications of the members of such agency, their terms of office and the filling of vacancies in such agency.

4) Classifying employees and the services performed by them in conformity with the terms of such agreement, and consistent with the provisions of the Federal Social Security Act.

5) Providing for the withholding and collection from the wages of such employees of the State, its political subdivisions and instrumentalities as employers, and the payment by such employers of such employees as an excise tax or other method, contributions to a Contributions Fund to make effective the benefits provided for and intended by the terms of the Federal Social Security Act, this Act and such agreement when made.

6) Providing for the effective date of the agreement, respecting services of such employees, the percentage of their wages required to be withheld and contributed to such fund, the payment thereof by the State agency, or such other official as may be custodian of the Contributions Fund, to the administrator of the Federal Social Security Act in conformity with such agreement, the other terms of this Act and in conformity with the provisions of the Federal Social Security Act, including adjustments of over-payment or under-payment of such contributions and refunds due such employees under such regulations as may be provided by the Federal Social Security Act.

7) Providing that such agreement may include a joint plan by two or more entities for the extension of such benefits to their employees if any one of them would be unable to submit an approvable plan for such benefits, providing that each plan contains provisions showing compliance with the agreement, the terms of this Act, applicable Federal law, provisions showing all services covered in such plan or employment under this Act and under the Federal Social Security Act.

8) Providing for assurance that the source, or sources, from which payments are required to be made by the State, political subdivisions, or instrumentalities, will be adequate to supply such funds; providing for the methods and the adoption of rules and regulations as may be deemed proper for the administration of the plan by such entities; providing for reports to be made to the State agency, showing compliance with the provisions of this Act and the Federal Social Security Act, authorizing the State agency to terminate a plan, after notice, upon the failure

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of any member of a unit to substantially comply with all applicable laws and conditions pertaining thereto; providing that the State agency may not finally refuse to approve a plan without notice and opportunity for hearing by any unit or any member of a unit containing more than one member; providing for the payment of contributions into the fund from wages, and at such times as are specified in this Act and at rates specified in the agreement, consistent with the provisions of the Federal Social Security Act in amounts not exceeding amounts imposed by Section 1400 of the Internal Revenue Act, if such instant wages would constitute employment under the meaning of that Act, and to deduct such contributions from the wages in discharge of the liability of such entity, but if not withheld and paid, as required as to amounts, neither the employee nor the employer shall be released of the Contributions Fund itself and defining the sources from which such funds are to be derived; providing for the safe custody of such fund, and that payments therefrom shall be made solely to the administrator of the Federal Social Security Act pursuant to such agreement, or the payment of refunds provided for in this Act, and applicable Federal law; providing for biennial appropriations from the contributions paid into the Contributions Fund, to be available for the purposes of the Act until expended, and such additional sums as are found to be necessary in order to make the payments due from any entity to the administrator of the Federal Social Security Act, which the State is obligated to make pursuant to such agreement.

9) Providing that the State Agency shall submit at each regular biennial session of the General Assembly, at a reasonable time in advance of the beginning of the session, an estimate of the amounts authorized to be appropriated to the Contributions Fund by the State, and/or political subdivisions as provided in this Act for the next appropriation period.

10) Providing that the State agency shall make and publish such rules and regulations not inconsistent with the provisions of this Act as it finds necessary or appropriate to the efficient administration of the functions with which it is charged, not inconsistent with applicable Federal law,

11) Providing that the State agency shall make studies of old age and survivor protection for employees of the State and such other entities as may be included in such agreement, and report their recommendations covering the operation of such agreement and plans approved under this Act and that a report thereof be submitted to the General Assembly at the beginning of each regular session concerning the effect and operation of this Act during the preceding biennium, including such recommendations for amendment to the Act as it considers proper and necessary, and,

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12) Providing such other measures and terms as, in the judgment and discretion of the Legislature, may be deemed necessary for the efficient administration of this Act under such agreement, and in conformity with applicable Federal law.

CONCLUSION

It is, therefore, the opinion of this Department:

1) That under the provisions of the Constitution of this State the State of Missouri may pass legislation authorizing the State to enter into an agreement with the Federal Government, for extending old age and survivor insurance benefits provided for in the Federal Social Security Act to employees of the State and its political subdivisions.

2) That to effectuate such an agreement, legislation substantially similar to the plan hereinabove suggested should be enacted by the Legislature.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General