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## State of Louisiana

DEPARTMENT OF JUSTICE  
CIVIL DIVISION  
P.O. BOX 94005  
BATON ROUGE  
70804-9005

January 14, 2022  
OPINION 21-0101

90-A-2 PUBLIC FUNDS – Loan, Pledge or Grants

Honorable John H. Mayweather, Sr.  
Mayor  
City of Mansfield  
P.O. Box 773  
Mansfield, Louisiana 71052

La. Cont. art. VI, § 12      La. Const. art. VII, § 14

The City of Mansfield may grant eligible workers retroactive premium pay for the past performance of a quantifiable amount of essential work performed during the COVID-19 public health emergency provided the City determines that the retroactive payment passes the *Cabelo's* test and adheres to the Interim Final Rule issued by the U.S. Department of the Treasury. Elected officials such as the mayor or council members would not be considered essential workers/front-line employees and therefore are not eligible for retroactive premium pay.

Dear Mayor Mayweather:

You have requested an opinion of the Attorney General concerning whether paying retroactive premium pay to essential workers who worked during the COVID-19 public health emergency as outlined in the American Rescue Plan Act would be in violation of the Louisiana Constitution or state laws. Your request states that the City of Mansfield ("City") will soon be in receipt of funds from the U.S. Department of the Treasury and is hoping to retroactively compensate employees who were considered essential and performed duties during the pandemic. You have also asked whether an elected official would be considered an "eligible worker" under the American Rescue Plan Act and therefore eligible to receive retroactive compensation. Your request has been assigned to me for research and reply.

On March 11, 2021, the American Rescue Plan Act (ARPA) was signed into law by the President.<sup>1</sup> Section 9901 of ARPA amended Title VI of the Social Security Act to add section 603, which establishes the Coronavirus Local Fiscal Recovery Fund in an effort to provide support to local governments in responding to the impact of COVID-19 and in their attempts to contain COVID-19 within their communities, residents, and businesses.<sup>2</sup> Section 603(c)(1) of ARPA provides that funds received by local governments pursuant to this act may be used "to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers." Section 802(g) of ARPA defines "eligible workers" and "premium pay," in pertinent part, as follows:

(2) The term "eligible workers" means those workers needed to maintain continuity of operations of essential critical infrastructure sectors and additional sectors as each Governor of a State or territory, or each Tribal government, may designate as critical to protect the health and well-being of the residents of their State, territory, or Tribal government.

<sup>1</sup> American Rescue Plan Act of 2021 § 9901, Pub. L. No. 117-2, codified at 42 U.S.C. § 802 *et seq.*

<sup>2</sup> 42 U.S.C. 801 *et seq.*

(3) The term "premium pay" means an amount of up to \$13 per hour that is paid to an eligible worker, in addition to wages or remuneration the eligible worker otherwise receives, for all work performed by the eligible worker during the COVID-19 public health emergency. Such amount may not exceed \$25,000 with respect to any single eligible worker.<sup>3</sup>

In the interim final rule to implement the Coronavirus State Fiscal Recovery Fund established under ARPA, the Department of the Treasury further defines "eligible workers," "essential work," and "premium pay," in pertinent part, as follows:

**Eligible workers** means workers needed to maintain continuity of operations of essential critical infrastructure sectors, including health care; emergency response; sanitation, disinfection, and cleaning work; maintenance work; grocery stores, restaurants, food production, and food delivery; pharmacy; biomedical research; behavioral health work; medical testing and diagnostics; home and community-based health care or assistance with activities of daily living; family or child care; social services work; public health work; vital services to Tribes; any work performed by an employee of a State, local, or Tribal government; educational work, school nutrition work, and other work required to operate a school facility; laundry work; elections work; solid waste or hazardous materials management, response, and cleanup work; work requiring physical interaction with patients; dental care work; transportation and warehousing; work at hotel and commercial lodging facilities that are used for COVID-19 mitigation and containment; work in a mortuary; work in critical clinical research, development, and testing necessary for COVID-19 response.

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**Essential work** means work that: (1) Is not performed while teleworking from a residence; and (2) Involves: (i) Regular in-person interactions with patients, the public, or coworkers of the individual that is performing the work; or (ii) Regular physical handling of items that were handled by, or are to be handled by patients, the public, or coworkers of the individual that is performing the work.

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**Premium pay** means an amount of up to \$13 per hour that is paid to an eligible worker, in addition to wages or remuneration the eligible worker otherwise receives, for all work performed by the eligible worker during the COVID-19 public health emergency. Such amount may not exceed \$25,000 with respect to any single eligible worker. Premium pay will be considered to be in addition to wages or remuneration the eligible worker otherwise receives if, as measured on an hourly rate, the premium pay is:

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<sup>3</sup> 42 USC § 802 (g)(2)-(3).

(1) With regard to work that the eligible worker previously performed, pay and remuneration equal to the sum of all wages and remuneration previously received plus up to \$13 per hour with no reduction, substitution, offset, or other diminishment of the eligible worker's previous, current, or prospective wages or remuneration; or (2) With regard to work that the eligible worker continues to perform, pay of up to \$13 that is in addition to the eligible worker's regular rate of wages or remuneration, with no reduction, substitution, offset, or other diminishment of the workers' current and prospective wages or remuneration.<sup>4</sup>

The interim final rule's supplementary information explains that the reasoning behind this premium pay is that many essential workers earn lower wages and live in socioeconomically vulnerable communities and have not yet been compensated for the heightened risk they faced and continue to face and notes:

The low pay of many essential workers makes them less able to cope with the financial consequences of the pandemic or their work-related health risks, including working hours lost due to sickness or disruptions to childcare and other daily routines, or the likelihood of COVID-19 spread in their households or communities. Thus, the threats and costs involved with maintaining the ongoing operation of vital facilities and services have been, and continue to be, borne by those that are often the most vulnerable to the pandemic. The added health risk to essential workers is one prominent way in which the pandemic has amplified pre-existing socioeconomic inequities. The Fiscal Recovery Funds will help respond to the needs of essential workers by allowing recipients to remunerate essential workers for the elevated health risks they have faced and continue to face during the public health emergency.

The Interim Final Rule also addresses providing premium pay to eligible workers and states that a recipient may use funds to provide premium pay to eligible workers of the recipient who perform essential work. However, any premium pay must respond to eligible workers performing essential work during the COVID-19 public health emergency.<sup>5</sup>

A recipient responds to eligible workers performing essential work during the COVID-19 emergency if it prioritizes low- and moderate-income persons.<sup>6</sup> The recipient must provide a written justification to the Secretary of Treasury of how the premium pay responds to eligible workers performing essential work if the premium pay would increase an eligible worker's total wages above the limits set forth in the Interim Final Rule.<sup>7</sup>

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<sup>4</sup> 31 C.F.R. § 35.3 (2021).  
<sup>5</sup> 31 C.F.R. § 35.6(c) (2021).  
<sup>6</sup> *Id.*  
<sup>7</sup> *Id.*

Thus, providing premium pay to eligible workers who performed essential work during the COVID-19 public health emergency is one of the permitted uses under ARPA if it complies with the requirements set forth in ARPA and the Interim Final Rule, including the prioritization of low- and moderate-income persons.

Such a use of public funds by a political subdivision of this state must also be assessed under the Louisiana Constitution. The use of public funds is governed by La. Const. art. VII, § 14, and states, in pertinent part:

A. Prohibited Uses. Except as otherwise provided by this constitution, 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.

The Louisiana Supreme Court has held that a violation of La. Const. art. VII, § 14(A) occurs "when public funds or property are gratuitously alienated."<sup>8</sup> In light of the Court's interpretation of this constitutional provision, this office has consistently opined that in order for an expenditure of public funds or property to be permissible under La. Const. art. VII, § 14(A), 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 the legal authority to pursue;
2. That the expenditure or transfer, taken as a whole, does not appear to be gratuitous; and
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.<sup>9</sup>

In applying the three-prong test, the City has the legal authority to compensate its employees and such payments comport with its lawful government purpose. Public entities may compensate their employees for services rendered; therefore, the first prong is clearly met.

Turning to the second prong, retrospective compensation to essential workers/front-line employees must not be gratuitous when taken as a whole. This office has repeatedly opined that gratuitous unearned payments to public employees or officials are prohibited, as the same are tantamount to donations.<sup>10</sup> Additionally, this office has recognized that

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<sup>8</sup> *Bd. of Directors of the Indus. Dev. Bd. 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").

<sup>9</sup> See La. Atty. Gen. Op. Nos. 20-0077, 20-0074, 19-0134, 18-0075, 16-0198, and 10-0299.

<sup>10</sup> See La. Atty. Gen. Op. Nos. 20-0074, 19-0011, 18-0015, 92-295, 92-282, 89-190, and 88-344.

La. Const. art. VII, § 14 does not in all instances prohibit the retroactive payment of earned compensation.<sup>11</sup>

Based on the specific guidance and parameters contained in the Interim Final Rule to implement the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund established under ARPA, the payment of premium pay in this specific context does not appear to be gratuitous when taken as a whole. The requirements of ARPA and the Interim Final Rule ensure that premium pay is not gratuitous. The premium pay is to compensate essential workers, who earn lower wages and live in socioeconomically vulnerable communities and have not yet been compensated for the heightened risk they faced and continue to face, for essential work during the COVID-19 public health emergency.

It is also worth noting that because premium pay is intended to compensate essential workers for heightened risk due to COVID-19 it must be entirely additive to a worker's regular rate of wages and other remuneration and may not be used to reduce or substitute a worker's normal earnings. Importantly, the rule's definition of premium pay also clarifies that premium pay may be provided retrospectively for work performed at any time since the start of the COVID-19 public health emergency where those workers have yet to be compensated adequately for work previously performed.

It is the opinion of this office that using ARPA funds as provided by federal law to compensate eligible workers for the elevated health risks they faced during the COVID-19 public health emergency while performing essential work is not prohibited. Thus, the question becomes whether retroactive premium pay for eligible employees is permissible under the *Cabela's* criteria where the pay is tied to a quantifiable amount of work already performed.<sup>12</sup> In this specific context, retroactive premium pay to compensate eligible employees within the criteria established by ARPA and the Interim Final Rule is not a gratuitous expenditure according to the *Cabela's* criteria. This is because the premium pay is compensation for eligible employees who faced elevated health risks but continued to perform essential work during the COVID-19 pandemic. The "premium pay to eligible workers responds to such workers by helping address the disparity between the critical services and risks taken by essential workers and the relatively low compensation they tend to receive in exchange."<sup>13</sup>

Finally, to meet the third prong of the test, the City must have a demonstrable, objective, and reasonable expectation of receiving something real and substantial in exchange for the expenditure or transfer of public funds. A decision as to whether this requirement is achieved must be based on the facts and circumstances surrounding the proposed expenditure. In this instance, the City must have received something real and substantial in exchange for an expenditure of public funds in the form of retroactive premium pay. 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.

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<sup>11</sup> See La. Atty. Gen. Op. Nos. 20-0074, 19-0011, 18-0015, 97-394, 95-323, 95-165A, and 94-241.

<sup>12</sup> La. Atty. Gen. Op. No. 21-0107.

<sup>13</sup> 31 C.F.R. § 35 (2021).

Should the City conclude that retroactive premium pay is tied to a quantifiable amount of essential work performed by eligible workers during the COVID-19 public health emergency, then La. Const. art. VII, § 14 would not prohibit the issuance of a retroactive payment.<sup>14</sup>

Because using ARPA funds to issue retroactive premium pay to qualified employees does not appear to be prohibited under La. Const. art. VII, § 14, we must now address whether an elected official would be considered an “eligible worker” under ARPA and therefore able to receive retroactive premium pay.

The compensation of elected officials is addressed in La. Const. art. VI, § 12 which provides that “the compensation or method of fixing the compensation of an elected official of any local governmental subdivision which operates under a home rule charter or plan of government, as provided in Sections 4 and 5 of this Article, shall be provided in its charter. The compensation or method of fixing the compensation of an elected official of any other local governmental subdivision shall be provided by law.” Thus, in the event that a municipality concludes that its elected officials are “eligible workers,” any retroactive pay must still comply with the Louisiana Constitution.

The U.S. Department of the Treasury’s Interim Final Rule states that eligible workers are workers who have been and continue to be relied on to maintain continuity of operations of essential critical infrastructure sectors, including those who are critical to protecting the health and wellbeing of their communities.<sup>15</sup> These essential workers have put their physical wellbeing at risk to meet the daily needs of their communities and to provide care for others.<sup>16</sup> The Interim Final Rule further states that essential workers have borne a disproportionate share of the health and economic impacts of the pandemic and includes an illustrative list of the types of workers who would be considered essential:

- Staff at nursing homes, hospitals, and home care settings;
- Workers at farms, food production facilities, grocery stores, and restaurants;
- Janitors and sanitation workers;
- Truck drivers, transit staff, and warehouse workers;
- Public health and safety staff;
- Childcare workers, educators, and other school staff; and
- Social service and human services staff<sup>17</sup>

As stated earlier, the Interim Final Rule also defines essential work as “work involving regular in-person interactions or regular physical handling of items that were also handled by others.” Additionally, workers performing “telework” from a residence and not physically present at a jobsite would not be eligible for retroactive premium pay.

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<sup>14</sup> La. Atty. Gen. Op. No. 21-0107.

<sup>15</sup> <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf> (accessed September 15, 2021).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*


Considering all of this information, we are of the opinion that an elected official, such as a mayor or council member, would not be considered an essential worker/front-line employee under the Interim Final Rule. Therefore, it is our opinion that elected officials are not eligible to receive retroactive premium pay and the use of ARPA funds to grant retroactive premium pay to elected officials does not appear to be one of its intended uses. However, we note that the U.S. Department of Treasury will be the ultimate arbiter of whether a local government has used ARPA funds properly.<sup>18</sup>

Based on the foregoing, it is the opinion of this office that the City of Mansfield may grant eligible workers retroactive premium pay for the past performance of a quantifiable amount of essential work performed during the COVID-19 public health emergency provided the City determines that the retroactive payment passes the Cabela's test and adheres to the Interim Final Rule issued by the U.S. Department of the Treasury. Additionally, elected officials such as the mayor or council members would not be considered essential workers/front-line employees and therefore not eligible for retroactive premium pay.

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

Yours very truly,

JEFF LANDRY  
ATTORNEY GENERAL

BY:   
Justin H. Lester  
Assistant Attorney General

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<sup>18</sup> *Reporting and requests for other information.*

During the covered period, recipients shall provide to the Secretary periodic reports providing detailed accounting of the uses of funds, all modifications to a State or Territory's tax revenue sources, and such other information as the Secretary may require for the administration of this section. In addition to regular reporting requirements, the Secretary may request other additional information as may be necessary or appropriate, including as may be necessary to prevent evasions of the requirements of this subpart. False statements or claims made to the Secretary may result in criminal, civil, or administrative sanctions, including fines, imprisonment, civil damages and penalties, debarment from participating in Federal awards or contracts, and/or any other remedy available by law.

31 C.F.R. § 35.4 (c) (2021).