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State of Louisiana
DEPARTMENT OF JUSTICE
CIVIL DIVISION
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August 20, 2020
OPINION 20-0074

The Honorable R.L. "Bret" Allain II
Senator, District 21
600 Main Street, Suite 1
Franklin, LA 70538

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

La. Const. art. VII, § 14

Franklin Foundation Hospital Board may grant its front-line employees hazard pay for the past performance of a quantifiable amount of hazardous work.

Dear Senator Allain:

You have requested an opinion from our office regarding whether essential critical infrastructure workers of Franklin Foundation Hospital may receive retroactive hazard pay related to the health emergency resulting from COVID-19. You stated that the Franklin Foundation Hospital Board recently received guidance from the Department of the Treasury that CARES Act funds may be expended in the form of hazard pay. Prior to that guidance allowing payment, the District did not have sufficient funds to make the indicated payments. Your request has been assigned to me for research and reply.

St. Mary Parish Hospital Service District No. 1 ("District") operates as Franklin Foundation Hospital ("Hospital"). The District was created in 1959 by St. Mary Parish Ordinance No. 559 to operate, control and manage matters concerning the health care of citizens within the District. Commissioners of the District are appointed by the St. Mary Parish Council, and the hospital is considered to be a component unit of the parish government.

In March of 2020, the governor declared the existence of a public health emergency related to COVID-19 throughout the state.¹ Since that time, employees of the Hospital treated or encountered people diagnosed or showing symptoms of COVID-19 in the course of their employment during the public health emergency. Other employees tasked with housekeeping, laundry services, food services, and waste management at the Hospital were in contact with contaminated or potentially contaminated items from patients diagnosed or showing symptoms of COVID-19 during the course of their employment. You indicate that the District was unable to issue hazard pay to its employees contemporaneously solely as a result of budget constraints. You provided information to this office that, if allowed, the District would issue hazard pay to employees who provided the front-line services listed above retroactive to April 1, 2020. However, before the Franklin Foundation Hospital Board authorizes the issuance of hazard pay, you ask our office whether retroactive hazard pay is permissible under the Louisiana Constitution.

¹ See Emergency Proclamation No. 25 JBE 2020.

The use of public funds is governed by La. Const. art. VII, § 14. It states in relevant 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.

This office has consistently opined that La. Const. art. VI, § 14(A) prohibits the payment of a bonus, or any other gratuitous unearned payment to public employees.² To assess whether an expenditure or payment represents a impermissible gratuity or bonus, we turn to most recent guidance provided by the Louisiana Supreme Court. In *Board of Directors of the Industrial Development Board 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 (the "Cabela's" case), the Louisiana Supreme Court articulated the standard of review governing La. Const. art. VII, § 14(A) stating that this article "is violated when public funds or property are gratuitously alienated."³ In light of the Court's interpretation of this constitutional provision, this office maintains 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: (i) 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; (ii) that the expenditure or transfer, taken as a whole, does not appear to be gratuitous; and (iii) 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.⁴ Accordingly, we must analyze whether the public entity's intent is gratuitous.

In applying the three-prong test, the first prong is clearly met under the facts given to this office. The District has the legal authority to compensate its employees and such payments comport with its lawful government purpose. Simply put, public entities may compensate their employees for services rendered.

Turning to the second prong, the compensation to the essential critical infrastructure 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.⁵ On the other hand, this office has recognized that La. Const. art. VII, § 14 does not in all instances prohibit the retroactive payment of earned compensation.⁶

² See La. Atty. Gen. Op. Nos. 09-260, 06-220, 05-060, 00-29, 99-307, 95-323, 95-165, 92-295, 92-282, 89-190, 88-344, 86-639, 83-940-A, 81-1329 and 80-806.

³ *Cabela's*, 938 So.2d at 20.

⁴ See La. Atty. Gen. Op. Nos. 20-0077, 19-0134, 18-0075, 16-0198, and 10-0299.

⁵ See La. Atty. Gen. Op. Nos. 19-0011, 18-0015, 92-295, 92-282, 89-190, 88-344, 86-639, 83-940A, 81-1329 and 80-806.

⁶ See La. Atty. Gen. Op. Nos. 19-0011, 18-0015, 97-394, 95-323, 95-165A, 94-241 and 78-1526.

The guidance recently issued by the U. S. Department of the Treasury⁷ relative to state expenditures of federal Coronavirus Relief Funds may only be used to cover costs that:

1. are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
2. were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the State or government; and
3. were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

The Department of Treasury Guidance lists ineligible expenses to include "workforce bonuses *other than* hazard pay or overtime." Additionally, the Department of Treasury defines hazard pay as "additional pay for performing hazardous duty or work involving physical hardship, in each case that is related to COVID-19."⁸

Your request asks whether retroactive hazard pay may be made now that the District has determined that it can use CARES Act funds for hazard pay to its essential critical infrastructure workers/front-line employees. It is the opinion of this office that using CARES Act funds to provide additional earned compensation paid to essential critical infrastructure workers/front-line employees appears to be permitted in the Department of Treasury guidelines. Thus, the question becomes whether retroactive hazard pay for qualified employees is permissible under the *Cabela's* criteria where the pay is tied to a quantifiable amount of work already performed that would have been issued at the time the work was performed but for budgetary constraints. In that context, it would seem that the pay would not be viewed as a gratuity according to the *Cabela's* criteria. However, the final determination as to whether the pay is gratuitous must be made by the District taking into account the relevant facts and circumstances.

To help in developing a policy relative to hazard pay, we would direct your attention to Act 12 of the 2020 First Extraordinary Session, which was signed by the governor and became effective in July of 2020. Part of this Act provides for a one-time hazard pay rebate to essential critical infrastructure workers. To be considered an "essential critical infrastructure worker" the individual must meet all of the following criteria:

- i) The worker is determined to be an essential critical infrastructure worker as that term is defined by the federal Cybersecurity & Infrastructure Security Agency in its publication "Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response Version 3.1.

⁷ <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf> (accessed August 11, 2020).

⁸ <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf> (accessed August 11, 2011).

- ii) The worker was employed in at least one of the following essential critical infrastructure sector jobs on or after March 11, 2020:
 - a. Nurses, assistants, aides, medical residents, pharmacy staff, phlebotomists, respiratory therapists, and workers providing direct patient care in inpatient and outpatient dialysis facilities.
 - b. Housekeeping, laundry services, food services, and waste management personnel in hospitals and healthcare facilities.
- iii) The worker was required to provide in-person services outside of the worker's residence substantially dedicated to responding to or mitigating the COVID-19 public health emergency for at least two hundred hours during the period from March 22, 2020, through May 14, 2020.⁹

The criteria set forth in Act 12 may be a useful guide to establishing your own policy. However, please note that the District is not limited to the statutory criteria when creating a policy relative to retroactive pay to essential critical infrastructure workers/front-line employees.

Finally, to meet the third prong of the test, the District must have a demonstrable, objective, and reasonable expectation of receiving something real and substantial in exchange for the expenditure or transfer of public funds.¹⁰ 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 District must have received something real and substantial in exchange for the expenditure of public funds in the form of hazard 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. Should the District conclude that the hazard pay is tied to a quantifiable amount of actual work performed under conditions that bring the work within the hazard pay category, the La. Const. art VII, § 14 would not appear to prohibit the issuance of a retroactive payment.

Based the foregoing, it is the opinion of this office that the Franklin Foundation Hospital may grant its essential critical infrastructure workers/front-line employees retroactive hazard pay for the past performance of a quantifiable amount of hazardous work provided the District determines that the pay meets the *Cabela's* test.

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

⁹ Act 12 of the 2020 First Extraordinary Session and La. R.S. 51:1787(K).

¹⁰ See La. Atty. Gen. Op. No. 20-0077.

With best regards,

JEFF LANDRY
ATTORNEY GENERAL

BY:

A handwritten signature in black ink, appearing to read "Brett A. Robinson", written over a horizontal line.

Brett A. Robinson
Assistant Attorney General

JL/BAR