

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: June 19, 2021

**MEMORANDUM**

TO: Mayor Satya Rhodes-Conway  
Members, Common Council

FROM: City Attorney Michael Haas

RE: Premium Pay Provisions of American Rescue Plan Act and Resolution to Provide Premium Payments to General Municipal Employees

This memorandum outlines federal regulations governing the use of American Rescue Plan Act of 2021 (ARPA) funds which may be used to provide premium pay to certain municipal employees, and the impact of those regulations on the pending Resolution (Legistar item 65933) which proposes to use ARPA funds to provide emergency stimulus payments to all general municipal employees. In short, it is my opinion that such payments to all general municipal employees would not qualify as an acceptable use of ARPA funds.

ARPA Regulations

The American Rescue Plan was signed into law on March 11, 2021.<sup>1</sup> Among its many provisions, Section 603 of ARPA created the Coronavirus Local Fiscal Recovery Fund (the Fund), which is intended to provide support to local governments in responding to the impact of COVID-19 and in their efforts to contain COVID-19 in their communities. To assist municipalities in complying with eligibility requirements for ARPA, and to avoid penalties for the impermissible use of ARPA funds, the Department of Treasury has published an Interim Final Rule (<https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>) and a FAQ document (<https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf>) which describe the allowable uses of ARPA funds. The FAQ document is continuously updated by the Treasury Department and this memorandum relies on the version of the document dated June 17, 2021.

Section 603(c)(1) of ARPA uses general language to outline the allowable uses of the Local Fiscal Recovery Fund. Municipalities may use their allocations from the Fund for the following purposes:

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<sup>1</sup>The American Rescue Plan of 2021 (ARPA) was enacted as Public Law 117-2.

- 1) To respond to the public health emergency or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
- 2) To respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers;
- 3) For the provision of government services to the extent of the reduction in revenue due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year prior to the emergency; and
- 4) To make necessary investments in water, sewer or broadband infrastructure.

The second purpose listed above is the relevant provision for evaluating the Resolution proposing premium pay for general municipal employees. In interpreting this provision the Code of Federal Regulations states as follows:

*(c) Providing premium pay to eligible workers.* A recipient may use funds to provide premium pay to eligible workers of the recipient **who perform essential work** or to provide grants to eligible employers, **provided that any premium pay or grants provided under this paragraph (c) must respond to eligible workers performing essential work during the COVID-19 public health emergency.** A recipient uses premium pay or grants provided under this paragraph (c) to respond to eligible workers performing essential work during the COVID-19 public health emergency **if it prioritizes low- and moderate-income persons.** The recipient must provide, whether for themselves or on behalf of a grantee, a written justification to the Secretary of how the premium pay or grant provided under this paragraph (c) responds to eligible workers performing essential work if the premium pay or grant would increase an eligible worker's total wages and remuneration above 150 percent of such eligible worker's residing State's average annual wage for all occupations or their residing county's average annual wage, whichever is higher. **(emphasis added)**  
*31 C.F.R. § 35.6*

Under the federal regulations, the definition of “eligible workers” means workers needed to maintain continuity of operations of essential critical infrastructure sectors during the period of the COVID-19 pandemic. This is a broad definition and may include any work performed by municipal employees. However, eligibility for premium pay is further restricted to eligible workers who perform “essential work,” which is defined as work that:

- (1) Is not performed while teleworking from a residence; and
- (2) Involves either a) regular in-person interactions with patients, the public, or coworkers of the individual that is performing the work; or b) 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. *31 C.F.R. § 35.3.*

Section II.B. of the Interim Final Rule provides further explanation of the intent of the premium pay provisions:

Since the start of the COVID-19 public health emergency in January 2020, essential workers have put their physical wellbeing at risk to meet the daily needs of their communities and to provide care for others. In the course of this work, many essential workers have contracted or died of COVID-19. . . . Furthermore, many essential workers are people of color or low-wage workers. These workers, in particular, have borne a disproportionate share of the health and economic impacts of the pandemic. Such workers include:

- 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.

While this is not an exhaustive list, the Interim Rule requires that a municipality consider several factors in designing any premium pay program. Premium pay may be provided retrospectively for work performed at any time since the start of the COVID-19 public health emergency but only for eligible work, which does not include teleworking. Premium pay is designed to compensate essential workers for the elevated health risks they actually faced and may continue to face during the pandemic by regular interaction with the public or by regularly handling items that were handled by the public or coworkers. Premium pay is not targeted to compensate employees who were able to avoid those elevated health risks by teleworking. The Interim Rule states that “a worker would not be engaged in essential work and, accordingly, may not receive premium pay, for telework performed from a residence.”

Any program to provide premium pay must also “respond to” the workers performing the work. According to the Interim Final Rule, premium pay responds to workers performing essential work “if it addresses the heightened risk to workers who must be physically present at a jobsite and, for many of whom, the costs associated with the illness were hardest to bear financially.” Noting that many of the workers performing essential services are low- or moderate-income individuals, the Rule states that premium pay “should prioritize compensation of those lower income eligible workers that perform essential work.” In doing so, premium pay helps address the disparity between the critical services and risks taken by essential workers and the relatively low compensation they tend to receive in exchange.

Finally, there are restrictions on the actual amount of premium pay that may be provided. ARPA allows premium pay up to \$13 per hour and in an aggregate amount not more than \$25,000 per eligible worker. Recognizing the emphasis on providing premium pay to low- and moderate-income workers, there is an additional requirement if premium pay is not targeted in that way. If premium pay would increase a worker's total pay above 150 percent of the State's average annual wage for all occupations, or their residing county's average annual wage, the municipality must make publicly available a written justification of how the premium pay is responsive to workers performing essential work during the public health emergency.

As with other federal funding programs, any jurisdiction providing premium pay under ARPA must submit periodic reports to the federal government. The report must include the number of workers compensated, and for groups of workers for whom premium pay exceeds the income thresholds described above, a narrative justification of how the premium pay responds to workers performing essential work during the public health emergency. This narrative could include a description of the essential workers' duties, health or financial risks faced due to COVID-19, and why the jurisdiction determined that the premium pay was responsive to workers performing essential work during the pandemic.

ARPA also includes recoupment provisions if a jurisdiction fails to comply with the restrictions on premium pay or other programs using ARPA funds. If the Treasury Department identifies a violation based on information collected from the jurisdiction or members of the public, it will provide written notice to the jurisdiction. The jurisdiction may request reconsideration of the Treasury Department's determination. If a determination of a violation is affirmed, the jurisdiction must repay any amounts subject to recoupment within 120 calendar days of the Department's final notice.

#### Resolution to Provide Premium Payments (Legistar Item 65933)

Legistar Item 65933 would provide a one-time emergency stimulus payment to general municipal employees equal to 3.75% of the average yearly wage of all permanent general municipal employees. The Finance Department has calculated the preliminary estimated cost of this proposal as \$2.8 million in general and library funds and \$4.5 million in all funds, out of \$47 million of ARPA funds allocated to the City. The draft resolution further mentions that general municipal employees wage increases are 6 percent behind the city's protective service employees and that no increase was received in 2021, while protective service employees received a 3.75% wage increase for 2021.

This proposal must be evaluated under the ARPA provisions and regulations, keeping in mind the reporting requirements and recoupment provisions. In doing so, I recommend that the Common Council consider the following:

1. Is the premium pay provided for "essential work?"
2. Does the premium pay "respond to" workers providing essential work?
3. Does the premium pay prioritize low- and moderate-income workers?

In my opinion, the Resolution does not adequately establish an allowable basis for a premium pay program under ARPA and its regulations. First, the resolution's definition of workers providing essential services is broader than that in the Interim Final Rules. While the resolution correctly states that general municipal employees provide "essential, critical services to maintain continuity of operations across all areas of City operations and infrastructure, providing services that are critical to protect the health and well-being of residents," that is not the standard required by ARPA. The law defines "essential work" more narrowly as work that involves either regular in-person interactions with the public or coworkers or regular physical handling of items that were handled by the public or coworkers. Significantly, "essential work" specifically excludes telework. Consideration must be given not only to the work that was performed but to how it is completed.

Second, and related to the first point, the Resolution does not appear to "respond to" workers providing essential work by addressing "the heightened risk to workers who must be physically present at a jobsite and, for many of whom, the costs associated with the illness were hardest to bear financially." As support for the premium pay program, the Resolution notes a disparity in recent wage increases between different categories of City employees as well as increased costs and hardships of employees resulting from the pandemic. While these points may also be accurate, they do not seem to meet the requirement that premium pay must address actual heightened risks to workers who must be physically present at the jobsite.

Finally, the Resolution provides for an across-the-board premium pay for all general municipal employees without regard to income levels and without prioritizing low- and moderate-income workers.

### Conclusion

For these reasons, it is my opinion that the Resolution likely does not comply with the requirements of ARPA and its Interim Final Rule. In short, the Resolution would not provide premium pay only to those City employees who have experienced a heightened risk by being physically present at work, regularly interacting with the public or coworkers, or physically handling items that are handled by the public or coworkers. The Resolution also does not prioritize premium pay to low- and moderate-income workers. If the Resolution is adopted without assurance from the Treasury Department that the resulting premium pay is permitted under ARPA, the City risks a finding that the program constitutes a violation of the law and the potential that the Treasury Department attempts to recoup funds equal to the amount expended in premium pay.