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March 23, 2020

Mr. Daryl G. Purpera
Louisiana Legislative Auditor
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Baton Rouge, LA 70804

Re: Constitutionality of compensating public employees who are unable to work due to COVID-19

Dear Mr. Purpera:

Due to the public health threat created by COVID-19, on March 11, 2020, Governor John Bel Edwards declared a public health emergency in the State of Louisiana.¹ In addition, just two days later on March 13, 2020, President Donald J. Trump declared a national emergency.² Along with many other precautionary measures being taken by national, state, and local officials, President Trump recommended that social gatherings be limited to no more than ten (10) people in accordance with the Center for Disease Control ("CDC") guidelines.³ In Louisiana, Governor Edwards ordered all gatherings larger than ten (10) people be postponed until at least April 13, 2020.⁴ He additionally ordered the closing of many businesses, including malls, bars, restaurants, casinos, etc.⁵ The World Health Organization has characterized COVID-19 as a pandemic, and as of March 22, 2020, over fifteen thousand (15,000) cases have been confirmed in the

¹ See Proclamation Number 25 JBE 2020, available at, <https://gov.louisiana.gov/assets/Proclamations/2020/25-JBE-2020-Public-Health-Emergency-UPDATED.pdf>.

² See Presidential Proclamation Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), available at, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>.

³ Andrew O'Reilly, Trump releases guidelines to slow coronavirus spread in '15 days,' but warns crisis could stretch to summer, <https://www.foxnews.com/politics/trump-coronavirus-guidelines-15-days-crisis-summer-recession> (last visited March 20, 2020).

⁴ The original order was limited to gatherings of 50, but it was subsequently decreased to gatherings of no more than 10. See Proclamation Number 33 JBE 2020 (March 22, 2020), available at, <https://gov.louisiana.gov/assets/Proclamations/2020/JBE-33-2020.pdf>; see also Proclamation Number 30 JBE 2020 (March 16, 2020), available at, <https://gov.louisiana.gov/assets/Proclamations/2020/Proc-No-30-updTED.pdf>.

⁵ *Id.*

United States.⁶ As of March 22, 2020, eight hundred thirty-seven (837) cases have been reported in Louisiana, resulting in twenty (20) deaths.⁷

On March 22, 2020, Governor Edwards took the extraordinary measure of issuing a “stay-at-home order” in Louisiana.⁸ Under this order, citizens of Louisiana are directed to stay home unless performing an “essential function” as defined by the order.⁹ With this order, the Governor also closed all state office buildings to the public.¹⁰ Given this great threat to the public safety of the citizens of Louisiana, local public entities have also ordered public office buildings closed or considered closing offices in an attempt to limit the spread of COVID-19.

The issue of compensation of employees has been brought to the attention of my office. Particularly, the issue of whether those public employees who are unable to work due to an office closure may still be compensated. For the following reasons, it is the opinion of this office that public entities may still compensate their employees who are unable to work because of an office closure due to COVID-19.

The Constitution of Louisiana generally prohibits public entities from donating public funds. Specifically, it provides that “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.”¹¹ Our office has consistently analyzed the expenditure of public funds in accordance with the Louisiana Supreme Court’s holding that a prohibited donation occurs “when public funds or property are gratuitously alienated.”¹² In light of the court’s interpretation of this constitutional provision, our office has consistently opined that in order for the use of public funds to be permissible under the Constitution, 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 legal authority to pursue;

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>. (last visited March 22, 2020).

⁷ <http://ldh.la.gov/Coronavirus/>. (last visited March 22, 2020).

⁸ See Proclamation Number 33 JBE 2020 (March 22, 2020), available at, <https://gov.louisiana.gov/assets/Proclamations/2020/Proc-No-33-updTED.pdf>.

⁹ *Id.* Examples of “essential functions” include obtaining food, medicine, non-elective medical care and treatment, going to and from an individual’s workplace, going to and from a family member’s home or place of worship, and engaging in certain outdoor activities.

¹⁰ *Id.*

¹¹ La. Const. art. VII, § 14(A).

¹² *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 (“Cabela’s”).

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 of value in exchange for the expenditure or transfer of public funds.

The first prong of the *Cabela's* test is unequivocally met. The Louisiana Supreme Court has said that “[n]early every state has determined, using precepts similar to our civilian principles, that when an employer promises a benefit to employees, and employees accept by their actions in meeting the conditions, the result is not a mere gratuity or illusory promise but a vested right in the employee to the promised benefit.”¹³ This applies even where the employer is a public entity.¹⁴ This authority is not somehow interrupted or suspended because an employee may be unable to work as a result of an office closure due to COVID-19. A public employee whose workplace is temporarily closed as a direct result of the declaration of a public health emergency due to COVID-19 remains an active employee for the duration of the declaration unless their employment is otherwise terminated. Thus, as they always do, public entities certainly have the legal authority to compensate their employees.

Turning to the second prong of the analysis, the compensation of those employees who are unable to work due to an office closure during the COVID-19 public health emergency does not appear gratuitous when taken as a whole. As the Louisiana Supreme Court has pointed out, the term “donation” in the Constitution can be equated to a gratuitous contract under the Civil Code, with an emphasis on the *gratuitous intent* of the parties.¹⁵ The Court also focused on the presence of a “counter-performance” and a “reciprocity of obligations” in determining whether a payment was of a gratuitous, rather than onerous nature.¹⁶ This office has consistently surmised that where both parties to the arrangement derive some advantage or benefit in return for their performance, it is one of a non-gratuitous nature.¹⁷

If the public employer determines that the employee is prevented by a public health emergency (such as COVID-19) from performing his duty, or that because of the COVID-19 public health emergency it is impracticable for his employees to report to work, that employee may be given time off without loss of pay.

As the Louisiana Supreme Court has articulated, the focus of the analysis is the *gratuitous intent* of the public entity. There can be no question, here, as to the lack of *gratuitous intent* of those public entities affected by COVID-19. Due to the recommendations of the Centers for Disease Control, citizens have been asked to significantly limit the size of their social gatherings. Additionally, Governor Edwards and

¹³ *Knecht v. Bd. of Trs. for State Colls. & Univs.*, 591 So. 2d 690, 695 (La. 1991).

¹⁴ *Id.*, citing, 1 Litvinoff § 135 at p. 227 (1975).

¹⁵ *Cabela's*, 938 So.2d at 22; see also La. C.C. arts. 1468 and 1910.

¹⁶ *Id.*

¹⁷ La. Atty. Gen. Op. No. 10-0299.

other local officials have issued orders prohibiting gatherings of a certain number of persons.¹⁸ As such, certain governmental offices may be forced to close for a period of time in order to prevent the spread of COVID-19. These office closures are done in order to protect the lives of our citizens, not as a free vacation for public employees. When looked at as a whole, it is evident there is no gratuitous intent on behalf of the public entities who continue to compensate their employees during the emergency declarations of the Governor and President. The key here is the *intent* of the public entities. The intent is to sustain the public workforce while mitigating the spread of the coronavirus, not to grant gratuitous unearned compensation. Therefore, the paying of employees who are unable to work due to an office closure does not constitute gratuitous intent.

In addition, we find there to be a counter-performance and reciprocity of obligations in this circumstance. Public employees who are unable to work due to an office closure resulting from the declaration of public emergency are expected to stand ready to return to work as soon as the public health emergency declaration by the Governor is no longer in effect or when they are called back to work. They must also abide by any leave policies that their governing authority may adopt concerning compensatory, annual, or sick leave during the emergency declaration. Thus, we find there to be a counter performance and a reciprocity of obligations between the public entities and their employees who may be compensated while their office is closed due to the COVID-19 public health emergency. Accordingly, the second prong is met.

Finally, turning to the third prong, public entities must also have a demonstrable, objective, and reasonable expectation of receiving something of value in exchange for compensating their employees. A determination of whether this requirement is satisfied depends on the specific facts and circumstances surrounding the proposed expenditure. 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.

Nonetheless, we find that public entities will undoubtedly receive something of value in exchange for the continued compensation of their employees under these unprecedented circumstances. As an example, when the emergency declaration of the Governor is no longer in effect and public entities who were forced to close offices must resume full operation again, they will certainly need competent, experienced, and well-trained staff in order to serve the public. State and local governments have a compelling interest in their employees remaining away from work in order to minimize the spread of COVID-19. Were those public entities to cease compensating their employees, presumably, a great number of those employees who were not paid will be unavailable when government operations are resumed at the end of the declaration. Foreseeably, some public entities could potentially see drastic reductions in staff (and subsequently

¹⁸ Proclamation Numbers JBE 2020-30 and 33. For example, "City of New Orleans Health Department Guidelines for COVID-19 Response and State At Home Directives" 3/20/2020, available at <https://ready.nola.gov/NOLAReady/media/Documents/Coronavirus/Proclamation-Guidance-3-20-20.pdf> (last visited 3/22/2020).

services to its citizens) were this to occur. Thus, at a minimum, public entities can expect to receive the value of competent, experienced, and well-trained employees ready to serve the public once this public health emergency is over. Accordingly, we find that the third prong is satisfied.

Considering the forgoing, it is the opinion of this office that public entities may still compensate their employees who are unable to work because of an office closure due to COVID-19. If our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,



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