



Clarifying ARPA “Premium Pay” Options

The America Rescue Plan Act of 2021 is a federal law providing for federal funds to be used to assist in Coronavirus recovery efforts. Sections 602 through 605 of [Subtitle M—Coronavirus State And Local Fiscal Recovery Funds](#) deal with payments to state and local governments.

It is important to note that ARPA is not an “authorizing statute” for Michigan local governments. In other words, even if the ARPA authorizes payments to be used for a particular purpose, that does not change Michigan law. ARPA cannot authorize townships to do things that would be unlawful for Michigan townships. Michigan law on what townships use public funds for must still be followed.

What is Premium Pay?

The ARPA says in Section 602(c) that funds paid to local governmental units may be used: “(B) to respond **to workers performing essential work during the COVID–19 public health emergency** by providing premium pay to eligible workers of the metropolitan city, nonentitlement unit of local government, or county that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work; ...” [Emphasis added]

Section 602(g): states: “(3) PREMIUM PAY.—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.”

The [U.S. Treasury’s Coronavirus State and Local Fiscal Recovery Funds Frequently Asked Questions](#) (as of July 19, 2021—*still the current FAQs on August 19*) provide additional guidance from U.S. Treasury on the uses of ARPA funds:

Question 4.7 states that “Premium Pay – Recipients may provide premium pay retrospectively for work performed at any time since the start of the COVID-19 public health emergency. Such premium pay must be “in addition to” wages and remuneration already received and the obligation to provide such pay must not have been incurred by the recipient prior to March 3, 2021.”

And Section 5, Eligible Uses – Premium Pay, goes into detail:

“5.1. What criteria should recipients use in identifying essential workers to receive premium pay?”

“Essential workers are those in critical infrastructure sectors who regularly perform in person work, interact with others at work, or physically handle items handled by others. Critical infrastructure sectors include healthcare, education and childcare, transportation, sanitation, grocery and food production, and public health and safety, among others, as provided in the Interim Final Rule.

“Governments receiving Fiscal Recovery Funds have the discretion to add additional sectors to this list, so long as the sectors are considered critical to protect the health and well-being of residents. The Interim Final Rule emphasizes the need for recipients to prioritize premium pay for lower income workers. Premium pay that would increase a worker’s total pay above 150% of the greater of the state or county average annual wage requires specific justification for how it responds to the needs of these workers.

“5.2. What criteria should recipients use in identifying third-party employers to receive grants for the purpose of providing premium pay to essential workers?”

“Any third-party employers of essential workers are eligible. Third-party contractors who employ essential workers in eligible sectors are also eligible for grants to provide premium pay. Selection of third-party employers and contractors who receive grants is at the discretion of recipients. To ensure any grants respond to the needs of essential workers and are made in a fair and transparent manner, the rule imposes some additional reporting requirements for grants to third-party employers, including the public disclosure of grants provided.

“5.3. May recipients provide premium pay retroactively for work already performed?”

“Yes. Treasury encourages recipients to consider providing premium pay retroactively for work performed during the pandemic, recognizing that many essential workers have not yet received additional compensation for their service during the pandemic.”

Who is eligible for premium pay?

One area of confusion about “premium pay” is that it refers to “essential workers” in “critical infrastructure sectors,” using terms similar to those used during the early State of Michigan Executive Orders to identify who could be allowed to continue to work for a township during the shutdowns that otherwise required people to work from home.

For example, [Executive Order 2020-21](#) of March 24, 2020 stated that “for the purposes of this order” critical infrastructure workers included those in the following governmental areas (excerpted list): health care and public health; law enforcement, public safety, and first responders; energy; water and wastewater; transportation and logistics; public works, and other “community-based government operations and essential functions.”

At that time, MTA Legal Counsel advised that township board members and their deputies performing statutory duties of their board offices were “critical infrastructure workers” for the purpose of performing their statutory duties.

However, both the Executive Order’s definitions and MTA Legal Counsel’s guidance were for the *purposes of the order*, determining who could leave home to work in those fields to keep government services functioning. They did not determine the definition of who is an essential worker for ARPA premium pay purposes. According to the U.S. Treasury FAQs, “Governments receiving Fiscal Recovery Funds have the discretion to add additional sectors to this list, *so long as the sectors are considered critical to protect the health and well-being of residents.*”

That last part is a condition that goes beyond general provision of government operations and essential functions or those functions critical to support government operations.

For the purposes of ARPA premium pay, if a township or other local government is considering which of their employee positions are eligible, and wishes to add employees not specifically listed, they may do so—as long as those positions are doing work that is critical to **protect the health and well-being of residents**.

Ultimately, U.S. Treasury will be the final judge of whether a local unit has used ARPA funds properly within the terms of the ARPA payments, based on reporting from the local unit. It is not known at this time whether U.S. Treasury will expand the definition of those eligible to receive premium pay.

How does that apply in Michigan?

Townships have until December 31, 2024 to decide how to use their ARPA funds. MTA expects more guidance will be coming from U.S. Treasury as the current process moves into the implementation phases. At this time, based on the language of the ARPA and the U.S. Treasury’s guidance, MTA recommends that township boards who may be discussing using their funds for premium pay consider the following:

- Under Michigan law, **township board members** cannot be paid any additional compensation--in addition to the salary of the office stated in the salary resolution--for performing the **statutory** duties of their office. (Attorney General Opinion 1431, July 30, 1951) Township board members cannot be paid premium pay for performing the **statutory duties** of their respective offices.
- And, under the Michigan Constitution, **township board members** cannot be paid retroactively (after the fact) for performing the statutory duties of their office. It is illegal to authorize retroactive payment of salary to elected officials, other public officers, agents or contractors of a township: “Neither the legislature nor any political subdivision of this state shall grant or authorize extra compensation to any public officer, agent or contractor after the service has been rendered or the contract entered into.” (Michigan Constitution of 1963, Article 11, Section 3)

- However, it is not illegal to retroactively pay **employees**. Township employees who are “essential workers” for ARPA purposes may be paid retroactively or receive bonuses. Essential workers are those in critical infrastructure sectors who regularly perform in person work, interact with others at work, or physically handle items handled by others. Critical infrastructure sectors include healthcare, education and childcare, transportation, sanitation, grocery and food production, and public health and safety, among others, as provided in the Interim Final Rule. A township board has the discretion to add additional sectors to this list, so long as the sectors are considered *critical to protect the health and well-being of residents*.
 - For example, could election workers receive premium pay? We do not have specific guidance from U.S. Treasury on this currently. Even though the work election workers perform is absolutely critical to elections, the issue is whether you can make the argument (in reporting to US Treasury) that their work is *critical to protect the health and well-being of residents*.
- Also, in a township under 40,000 in population, **township board members** may be authorized by the township board to perform “additional services” for the township unrelated to the statutory duties of their office. (MCL 15.183(4)(c)) And township board members may serve as township fire, EMS or law enforcement personnel for the township. (MCL 15.183(4)(a) and (b))
 - So, for example, if a township board member serves as an EMT for the fire department that serves the township, then that board member could potentially receive premium pay going forward for their work as an EMT.
- The **salary of township board offices** may be increased during the term of office. The method an individual township must use to increase the salary of an office stated in the salary resolution for that office will depend on which of the three statutory procedures apply in the individual township.

Townships and other local governments in Michigan have served admirably during the Covid-19 pandemic, continuing to provide governmental functions under hazardous conditions and enormous demands. However, when considering how to use ARPA funds, boards must be mindful of Michigan law, as well as public expectations of how their tax dollars are spent.

Many township employee positions have had to deal with additional functions and stresses at work due to Covid-19. But not all of those additional functions and stresses are due to protecting the health and well-being of the residents. Even if those positions are not ultimately eligible under ARPA for premium pay, a township board could vote to increase pay rates or provide bonuses to recognize increased job functions or safety concerns, and any applicable township revenues could be used.