VOLUME NO. 33 Opinion No. 29

MINORS - employment of; CHILDREN - employment of. Sections 10-201, 10-204, and 75-2902, R.C.M. 1947.

HELD: 1. The child labor laws of Montana do not prohibit all types of employment of minors.

2. An employed minor is considered an employee under the Montana Workmen's Compensation Act and can qualify to receive benefits.

September 11, 1970

Mr. John Adams
County Attorney
Yellowstone County
Billings, Montana 59101

Dear Mr. Adams:

Your recent letter inquired whether all types of employment for children ages 15 to 17 are prohibited by Montana's child labor laws. If there is no violation of such laws by employing this age group, you also wanted to know whether workmen's compensation provisions restrict coverage by reason of employment of children of this age group.

Section 10-201, Revised Codes of Montana, 1947, is the pertinent statute. It states as follows:

> "Any person, company, firm, association, or corporation engaged in business in this state, or any agent, officer, foreman, or other employee having control or management of employees, or having the power to hire or discharge employees, who shall knowingly employ or permit to be employed any child under the age of sixteen years, to render or perform any service or labor, whether under contract of employment or otherwise, in, on, or about any mine, mill, smelter, workshop, factory, steam, electric, hydraulic, or compressed-air railroad, or passenger or freight elevator, or where any machinery is operated, or for any telegraph, telephone, or messenger company, or in any occupation not herein enumerated which is known to be dangerous or unhealthful, or which may be in any way detrimental to the morals of said child, shall be guilty of a misdemeanor and punishable as hereinafter provided."

From this section it is obvious that any child under the age of sixteen cannot work in the specified occupations without a violation of the child labor act.

Section 10-204, R.C.M. 1947, is also applicable here.

> "Upon obtaining the age of sixteen years any child may make application to the commissioner of labor and industry for an age certificate, which must be presented to any employer with whom such child may seek employment. The employer, if such employment be given, must countersign the certificate and return the same to the commissioner of said bureau, who shall keep the same on file in his office. Any person, firm, company, association, or corporation who employs or permits to be employed in any occupation prohibited by section 10-201, any child without such certificate showing the child to be at least sixteen years of age, shall be guilty of a misdemeanor and punishable as hereinafter provided, should such child prove to be less than sixteen years of age."

It appears that the effect of these two sections is that only children sixteen years of age or older can obtain age certificates (see 23 **Opinions of the Attorney General** No. 136, page 363 and Attorney General Forrest H. Anderson's letter of March 5, 1962, to the Commissioner of the Department of Labor and Industry); and that only children with these age certificates can be lawfully employed in those occupations prohibited to those under sixteen years of age by said section 10-201. It should also be noted that said section 10-204 requires sixteen year olds to present the age certificate "to any employer with whom such child may seek employment. . . ."

The question still remains exactly what occupations are prohibited to those under sixteen years of age by said section 10-201. This is an important question because the section prohibits child employment in certain enumerated types of employment and ". . . where any machinery is operated, . . .". If this prohibition were literally true then virtually all employment of children would be precluded. The case of **Shaw v. Kendall,** 114 Mont. 323, 136 P.2d 748 (1943), however, clarified the prohibition by ruling that under the ejusdem generis rule, the legislature, in adding the words ". . . or where any machinery is operated, . . ." intended to include all places similar to those specifically enumerated but not all places where machinery was being operated. The court found that the tending of a threshing machine on a farm by a fourteen-year-old boy was not included in the prohibited occupations. In the same vein is 24 **Opinions of the Attorney General** No. 34, page 48, wherein it was ruled that the term "machinery" in said section 10-201 does not include delivery trucks and minors under the age of sixteen can be employed to assist in the loading and unloading of such trucks.

In the light of the **Shaw** case and the above-mentioned attorney general's opinion it is apparent that 20 **Opinions of the Attorney Gen-**

eral No. 68, page 84, is incorrect in ruling that minors under sixteen years of age may not be employed in any industry or occupation where machinery is operated. Therefore, it appears that Title 10, chapter 2 of the Revised Codes of Montana, 1947, does not prohibit children under the age of sixteen from being employed in some occupations. Since said section 10-204 only applies to children sixteen years of age and older, those under sixteen years of age may be employed in the non-prohibited occupations without an age certificate. Care should be taken, however, to insure that the other prohibitory phrase in said section 10-204 ("or in any occupation not herein enumerated which is known to be dangerous or unhealthful, or which may be in any way detrimental to the morals of said child, . . .") is not violated.

Section 75-2902, R.C.M. 1947, is also of import in this situation. In essence that section provides that no child under sixteen years of age shall be employed while the public schools are in session unless that child presents to his employer an age and schooling certificate. 20 **Opinions of the Attorney General** No. 173, page 218, interprets this section and points out that the restriction against employment of children under the age of sixteen applies only to the hours of the day during the school term when schools are actually in session. The opinion ruled that no child, under the age of sixteen, may be employed during the hours of the school term when schools are actually in session, except that a child over the age of fourteen may be employed during the hours of the school term when schools are actually in session provided the child obtains the certificate showing he has successfully completed the eighth grade, or that the wages of the child are necessary to the support of the family. Still it is clear the child may not be employed in the prohibited occupations of section 10-201, R.C.M. 1947.

An employer wishing to employ youths in the specified age group in a nonprohibited occupation would have to check his own liability insurance provisions to see if there is any restriction in coverage by reason of employment of such youth. Under Montana's Workmen's Compensation Act, section 92-411, R.C.M. 1947, a minor whether lawfully or unlawfully employed is considered an employee and thus able to receive benefits under the act if the employer elected to be bound by the provisions of the act and the employee did not affirmatively elect not to be bound by the act as provided in section 92-208, R.C.M. 1947. See **Tarrant v. Helena Building & Realty Co.,** 116 Mont. 319, 156 P.2d 168 (1944).

It is important to all employers, including the state, that the **Shaw** case, **supra,** indicates the responsibilities of an employer toward youth in the specified age group employed in a nonprohibited occupation are a little different than toward adult employees. The case pointed out that

if a child is employed in violation of said section 10-201, then the defenses of assumption of risk and contributory negligence are not available. The case went on to say that if there is no violation of said section 10-201 and the named defenses therefore are available, then the jury instructions must be sufficient to instruct the jury as to the difference between an adult and a minor in finding assumption of risk and contributory negligence. Seemingly, the standard of the reasonable man under the circumstances would apply to an employer who is employing a child and one of the circumstances to be considered is the fact that the employee is a child. See **Prosser on Torts,** section 32, 3d ed., 1964.

THEREFORE, IT IS MY OPINION that:

1. The child labor laws of Montana allow employment of children if such employment is not in the prohibited areas of employment specified in section 10-201, R.C.M. 1947.

2. A minor, whether lawfully or unlawfully employed, is considered an employee under the Montana Workmen's Compensation Act and thus is able to receive benefits if the employer elected to be bound by the act and the employee did not affirmatively elect not to be bound by the act.

Very truly yours,

ROBERT L. WOODAHL
Attorney General