

PUBLIC EMPLOYEES - Sick leave. Sections 59-1001 through 59-1008, R.C.M. 1947.

- HELD:**
1. Temporary or seasonal employees are entitled to sick leave if they have been continuously employed for 90 days or more. A state agency cannot limit sick leave to permanent employees contrary to the provisions of section 59-1008, R.C.M. 1947.
 2. Part-time permanent employees are entitled to sick leave as a matter of right.
 3. The excluded employees under section 59-1007, R.C.M. 1947, are not governed by the provisions of section 59-1008, R.C.M. 1947, relating to sick leave.
 4. Teachers employed by the Montana university system are not governed by the provisions of section 59-1008, R.C.M. 1947, relating to sick leave.
 5. The board of regents does have authority to grant sick leave to teaching personnel of the university system on a reasonable basis, but not in excess of the sick leave benefits granted other state employees under section 59-1008, R.C.M. 1947.
 6. Employees covered under section 59-1008, R.C.M. 1947, are entitled to receive their accumulated sick leave even though they may be receiving industrial accident compensation.

September 8, 1971

Mr. Doyle B. Saxby
State Controller
State Capitol
Helena, Montana 59601

Dear Mr. Saxby:

You have requested my opinion on the following questions regarding the recently enacted legislation covering sick leave contained in chapter 93, Montana Session Laws, 1971, section 59-1008, Revised Codes of Montana, 1947:

1. Are temporary or seasonal employees eligible for sick leave benefits if they are continuously employed for 90 days or more?

If so, can a state agency limit sick leave to permanent employees by administrative action?

2. Are part-time permanent employees eligible for sick leave benefits?
3. Are the exclusions of certain employees provided in section 59-1007, R.C.M. 1947, applicable to the statute providing for sick leave, chapter 93, Montana Session Laws, 1971, section 59-1008, R.C.M. 1947?
4. Do the professors, instructors and other teaching personnel in the Montana university system fall within the definition of a state employee for the purposes of sick leave under chapter 93, Montana Session Laws, 1971, section 59-1008, R.C.M. 1947?
5. Does the board of regents have authority vested in it to grant sick leave to an employee of the university who may not be an employee per sections 59-1001 through 59-1008, R.C.M. 1947, and, if so, on what basis?
6. If an employee is being paid compensation for an industrial accident claim, is he entitled to receive accumulated sick leave?

1. Your questions involve in part an interpretation of chapter 93, Montana Session Laws of 1971, section 59-1008, R.C.M. 1947. That section provides in part as follows:

“(1) An employee of the state of Montana, or of any county or city thereof, shall be granted sick leave with full pay at the rate of one (1) working day for each month of service without restriction as to the number of working days he may accumulate.

“(2) He may not accrue sick leave during a leave of absence without pay, the duration of which exceeds fifteen (15) days. He is entitled to sick leave under the provisions of this act only after being continuously employed for ninety (90) days, upon the completion of which he is entitled to credit for sick leave earned during that period.”

Subparagraph 1 of the above section clearly states that a state employee shall be “. . . granted sick leave with full pay at the rate of one (1) working day for each month of service . . .”. Subparagraph 2 of the above section provides such state employee is entitled to sick leave “. . . after being continuously employed for ninety (90) days . . .”.

Therefore, in answer to the first part of your question, it is my opinion that temporary or seasonal employees are eligible for sick leave benefits if they are continuously employed for 90 days or more and otherwise comply with the statute as hereinafter interpreted.

In the second part of your first question you ask whether a state agency can limit sick leave to permanent employees by administrative action. It is a well-settled rule of administrative law that a public agency or board has the power to do only that which is expressly granted by law. **State v. State Board of Equalization**, 133 Mont. 8, 319 P.2d 221 (1957). Since section 59-1008, R.C.M. 1947, establishes who may receive sick leave, an agency is precluded from deviating from the terms of the statute.

2. Subparagraph 1 of the above section provides for “. . . sick leave with **full pay** at the rate of **one (1)** working day for each month of service . . .”. (emphasis supplied) The words “full pay,” “one (1) working day” and “each month of service” connote to me that the intent of the legislature was that if an employee otherwise is eligible to receive sick leave he should be compensated at the rate per day he was earning while accumulating such sick leave. This intent is substantiated by the following language in subparagraph (3) of the above section: “The pay attributed to his accumulated sick leave shall be computed on the basis of the employee’s salary at the time the sick leave accrued . . .”. If an employee is hired on a permanent basis and has been so employed continuously for 90 days or more and otherwise complies with the statute, the above language would indicate that it makes no difference if he has worked full or part-time.

3. Section 59-1007, R.C.M. 1947, reads as follows:

“The term ‘employee,’ as used herein, does not refer to or include elected state, county, or city officials, or school teachers.”

The legislature, in enacting chapter 93, Montana Session Laws, 1971, specifically included the sick leave provisions in Title 59 as chapter 10, R.C.M. 1947. Under these circumstances I feel it was the intent of the legislature that the new sick leave legislation be interpreted in conjunction with the remainder of Title 59, R.C.M. 1947, which also includes vacation provisions. To ascertain the intention of a legislature, an act must be read as a whole and, when and where possible, conflicting and ambiguous parts made to harmonize. **Aleksich v. Industrial Accident Fund**, 151 P.2d 1016, 116 Mont. 127. I interpret the words “as used herein” contained in section 59-1007, R.C.M. 1947, to mean all of Title 59, R.C.M. 1947. As chapter 93, Montana Session Laws, 1971, was made specifically a part of Title 59, R.C.M. 1947, such sick leave act should be read in conjunction with section 59-1007, R.C.M. 1947.

Therefore, in answer to your third question, it is my opinion that the exclusion of certain employees provided in section 59-1007, R.C.M. 1947, is applicable to the statute providing for sick leave, chapter 93, Session Laws of 1971, section 59-1008, R.C.M. 1947.

4. As stated in **34 Opinions of the Attorney General**, opinion no. 1, construing the vacation provisions of Title 59, chapter 10, R.C.M. 1947:

“However, it is possible that the exemption for ‘school teachers’ was intended to include teaching personnel in the university system. In **Murphy v. Worcester, Consul. St. Py. Co.**, 199 Mass. 2799, 85 N.E. 507, the court said that the word ‘schools’ is one of broad signification, and sometimes it may appear, by the connection in which it is used, to include higher institutions of learning.

“Teaching personnel in the university system are hired on a contract basis for a fixed term. In addition such personnel are governed by the university holiday schedule which results in numerous days when classes are not held due to student vacations. You also advise that the university administrators have considered teaching personnel not to come within the terms of section 59-1001, R.C.M. 1947. Longstanding and reasonable executive construction of a statute should be given considerable weight. **Miller Ins. Agency v. Porter**, 93 Mont. 567, 20 P.2d 643. The foregoing provides a sufficient basis for distinguishing between teaching personnel in the university system and other state employees. Therefore, in answer to your second question, it is my opinion that teaching personnel in the Montana university system should not be considered state ‘employees’ for the purposes of section 59-1001, R.C.M. 1947.”

It seems clear that the circumstances surrounding sick leave and vacation pay for teaching personnel in the university system are completely analogous. Therefore, in my opinion, professors, instructors and other teaching personnel in the Montana university system do not fall within the definition of state employee for the purposes of sick leave under chapter 93, Session Laws of 1971, section 59-1008, R.C.M. 1947.

5. In your fifth question you ask if the board of regents has the authority to grant sick leave to an employee of the university who is exempt by the provisions of section 59-1007, R.C.M. 1947. As stated in **34 Opinions of the Attorney General**, opinion no. 1:

“... The laws of Montana, sections 75-107 and 75-403, R.C.M. 1947, grant general control and supervision over the faculty to the board of regents. The regents are also given authority to hire faculty members, which is done on a contract basis. . . .”

Based on the reasoning contained in the above opinion, it is my opinion that the board of regents has sufficiently broad power to grant sick leave to teaching personnel of the university system for any

reasonable amount of time and on any reasonable basis, but not in excess of the sick leave benefits granted to other state employees under chapter 93, Session Laws of 1971, section 59-1008, R.C.M. 1947. This is consistent with the holding in 27 **Opinions of the Attorney General**, opinion no. 85.

6. In your final question you ask whether an employee being paid compensation for an industrial accident claim is entitled to receive sick leave. An employee is entitled to receive compensation for an industrial accident as a matter of right if he so qualifies. (See Title 92, R.C.M. 1947.) An employee is entitled to receive sick leave as a matter of right if the qualifies under section 59-1008, R.C.M. 1947. Section 59-1008, R.C.M. 1947, nowhere provides that an employee's right to sick leave should be in any way restricted or reduced because he is receiving compensation for an industrial accident. It would seem that the legislative intent of the sick leave statute was to compensate certain employees under certain conditions while they were unable to work because they were physically incapacitated. Whether such person was ill or injured would seem to make little difference. In my opinion, an employee otherwise eligible for sick leave under section 59-1008, R.C.M. 1947, is entitled to receive his accumulated sick leave even though he may be receiving industrial accident compensation.

THEREFORE, IT IS MY OPINION that:

1. Temporary or seasonal employees are eligible for sick leave benefits under the provisions of section 59-1008, R.C.M. 1947, if they are continuously employed for 90 days or more and otherwise comply with the statute. A state agency may not deviate from the terms of the statute and limit sick leave to permanent employees by administrative order and deny sick leave to temporary or seasonal employees eligible under the statute.
2. Part-time permanent employees are eligible as a matter of right for sick leave benefits under the statute but at the rate per day they were earning while accumulating such sick leave.
3. The provision for the exclusion of certain employees contained in section 59-1007, R.C.M. 1947, is applicable to the statute providing for sick leave, section 59-1008, R.C.M. 1947.
4. Professors, instructors and other teaching personnel in the Montana university system do not fall within the definition of state employees for the purposes of sick leave under chapter 93, Session Laws, 1971, section 59-1008, R.C.M. 1947.
5. The board of regents has sufficiently broad power to grant sick leave to teaching personnel of the university system for any

reasonable amount of time and on any reasonable basis, but not in excess of the sick leave benefits granted to other state employees under chapter 93, Session Laws, 1971, section 59-1008, R.C.M. 1947.

6. An employee otherwise eligible for sick leave under section 59-1008, R.C.M. 1947, is entitled to receive his accumulated sick leave even though he may be receiving industrial accident compensation.

Very truly yours,

ROBERT L. WOODAHL
Attorney General