

VOLUME NO. 44**OPINION NO. 33**

EMPLOYEES, PUBLIC - Use of sick or annual leave while on workers' compensation;

LABOR RELATIONS - Collective bargaining agreements conflicting with statutes on leave and workers' compensation benefits;

STATE AGENCIES - Payment of sick or annual leave as supplementation to workers' compensation;

WORKERS' COMPENSATION - Supplementation of workers' compensation benefits by sick or annual leave;

MONTANA CODE ANNOTATED - Sections 2-18-618, 39-71-123(1)(a), 39-71-701, 39-71-736;

MONTANA CONSTITUTION - Article II, section 31;
MONTANA LAWS OF 1987 - Chapter 464, section 30;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 34 (1989),
42 Op. Att'y Gen. No. 69 (1988), 42 Op. Att'y Gen. No. 37 (1987), 38 Op. Att'y
Gen. No. 116 (1980), 37 Op. Att'y Gen. No. 113 (1978);
UNITED STATES CONSTITUTION - Article 1, section 10, clause 1.

- HELD: 1. Section 39-71-736(2), MCA, precludes a state agency from complying with a collective bargaining agreement which provides for the supplementation of workers' compensation wage loss benefits with sick leave, where the entitlement to such compensation arose on or after July 1, 1987.
2. A state agency may not supplement workers' compensation wage loss benefits with annual leave upon the request of an employee.

May 4, 1992

John Rothwell, Director
Department of Transportation
2701 Prospect Avenue
Helena MT 59620-9726

Dear Mr. Rothwell:

You have requested my opinion concerning questions which I have rephrased as follows:

1. Does section 39-71-736(2), MCA, preclude a state agency from complying with a collective bargaining agreement which provides for the supplementation of workers' compensation wage loss benefits with sick leave?
2. May a state agency supplement workers' compensation wage loss benefits with annual leave upon the request of an employee?

You have informed me that in the 1970's the Department of Highways, now the Department of Transportation, began a practice of allowing employees who were receiving wage loss benefits from workers' compensation to supplement those benefits by using sick or annual leave payments. The amount of leave was calculated so that an employee's pay for the leave plus the workers' compensation benefits did not exceed the employee's normal net earnings. The purpose of the arrangement was to cover the employee and state shares of group health insurance. The practice of supplementation by sick leave has been incorporated in the current collective bargaining agreement:

In the event an employee is receiving workers' compensation benefits in an amount that is less than the net pay he/she was receiving when he/she was injured, the Employer will supplement those benefits with sick leave benefits. The amount of sick leave benefits the Employer will pay will be an amount that, when added to the workers' compensation benefits being received by the employee, will be equal to the net pay the employee was receiving when he/she was injured. The Employer's obligation under this provision is limited to the amount of sick leave time that the employee has accumulated.

Agreement Between the State of Montana and the Public Employees Craft Council, Highway Maintenance 1991-1993, Art. 12, sec. 2, at 13. The current collective bargaining agreement does not have a comparable provision concerning the use of annual leave benefits.

With regard to the use of sick leave, the Montana statutes contain a specific limitation:

For the purpose of this section, an injured worker is not considered to be entitled to compensation benefits if the worker is receiving sick leave benefits, except that each day for which the worker elects to receive sick leave counts 1 day toward the 6-day waiting period.

§ 39-71-736(2), MCA. The worker may receive sick leave benefits from his employer for six days, and then begin receiving workers' compensation benefits on the seventh day. § 39-71-736(1)(a), (2), MCA. Section 39-71-736(2), MCA, was enacted by the 1987 Legislature as a part of a comprehensive revision of the workers' compensation laws, and became effective on July 1, 1987. 1987 Mont. Laws, ch. 464, § 30. No discussion of subsection 2 appears in the legislative history.

Thus, on the question of supplementation by sick leave, the current collective bargaining agreement conflicts with a statute which has been in force since 1987. Numerous prior opinions have dealt with similar situations, *e.g.*, 43 Op. Att'y Gen. No. 34 at 102 (1989), 42 Op. Att'y Gen. No. 37 at 150 (1987), 38 Op. Att'y Gen. No. 116 at 408 (1980), 37 Op. Att'y Gen. No. 113 at 486 (1978). The general rule is "that, when a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization." 42 Op. Att'y Gen. No. 37 at 151. The requirements for eligibility for workers' compensation have been legislatively set since the inception of the system in 1915 in Montana. A public employer does not have authority to deviate from the mandatory conditions set forth by the workers' compensation laws. The consequence of making payment of accrued sick leave benefits to an employee is that the employee's eligibility for workers' compensation benefits is forfeited under

section 39-71-736(2), MCA. The collective bargaining agreement is unenforceable to the extent that it requires supplementation of worker's compensation benefits by the use of sick leave benefits from the seventh day after the injury, since payment of the latter prevents payment of the former.

It should be noted that this situation is distinguishable from that presented in 42 Op. Att'y. Gen. No. 69 at 271 (1988), wherein a statute required first- and second-class cities to provide compensation in addition to workers' compensation benefits to police officers injured on the job. § 7-32-4132, MCA. Attorney General Greely concluded that nothing in the 1987 amendments to the workers' compensation laws should be construed as altering the statute which specifically concerned police officers. The Legislature is presumed to enact legislation with full knowledge of existing legislation. Thiel v. Taurus Drilling Ltd., 218 Mont. 201, 710 P.2d 33 (1985). A contract, on the other hand, is governed by laws existing at the time of its execution. Neel v. First Federal Savings and Loan Association, 207 Mont. 376, 388, 675 P.2d 96, 103 (1984); Gagnon v. City of Butte, 75 Mont. 279, 289, 243 P. 1085, 1088 (1926). Therefore, as to collective bargaining agreements entered into after July 1, 1987, there can be no impairment of contract issue under either Article 1, section 10, clause 1 of the United States Constitution or Article II, section 31 of the Montana Constitution. See 43 Op. Att'y. Gen. No. 34 at 102 (1989).

Local No. 8 International Association of Firefighters v. City of Great Falls, 174 Mont. 53, 568 P.2d 541 (1977), does not compel a contrary conclusion. That case held that an implied contract was created by a resolution which induced longer service by providing for longevity pay upon completion of 20 years' service. Repeal of the resolution impaired the contracts of those firefighters who had acquired vested rights during the operative life of the resolution. It is important to note that the repeal of the resolution was effective, except as applied to those particular employees. See also Wage Appeal v. Board of Personnel Appeals, 208 Mont. 33, 42, 676 P.2d 194 (1984) (legislature may alter compensation prospectively, prior to vesting of rights). In the instant situation, an argument perhaps can be made that an employee receiving workers' compensation based upon a benefit entitlement determined by statutes in effect prior to July 1, 1987, may receive both such compensation and supplemental sick leave. See Buckman v. Montana Deaconess Hospital, 224 Mont. 318, 730 P.2d 380, 382 (1986) (workers' compensation benefits are determined by statutes in effect on date of injury); Carmichael v. Workers' Compensation Court, 234 Mont. 410, 415, 763 P.2d 1122, 1124 (1988) (right to workers' compensation benefits accrues upon injury). Nevertheless, it is unknown whether this particular scenario exists, and therefore this opinion does not determine the rights of any such employee.

Your second question concerns whether the Department may supplement workers' compensation benefits with payment of accrued annual leave at the request of the employee. Section 39-71-736, MCA, does not address the receipt of annual leave. However, section 39-71-701, MCA, provides that a worker is

eligible for temporary total disability benefits when he or she suffers a total loss of wages. Wages are defined in section 39-71-123(1)(a), MCA, to specifically include "remuneration at the regular hourly rate for ... vacations[] and sickness periods." It stands to reason that if annual leave benefits are paid, then the employee is not suffering a total loss of wages and is not eligible for workers' compensation benefits pursuant to section 39-71-701, MCA. Therefore, supplementation of workers' compensation benefits by annual leave payments would not be consistent with the statute.

THEREFORE, IT IS MY OPINION:

1. Section 39-71-736(2), MCA, precludes a state agency from complying with a collective bargaining agreement which provides for the supplementation of workers' compensation wage loss benefits with sick leave, where the entitlement to such compensation arose on or after July 1, 1987.
2. A state agency may not supplement workers' compensation wage loss benefits with annual leave upon the request of an employee.

Sincerely,

MARC RACICOT
Attorney General