

COUNTIES - County employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis;

EMPLOYEES, PUBLIC - Public employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis;

LABOR RELATIONS - Public employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis;

STATUTORY CONSTRUCTION - In general, statutory provisions will control over conflicting contractual language;

WORKERS COMPENSATION - A public employee is not entitled to accrue vacation and sick leave credit for workers' compensation benefits received;

CODE OF FEDERAL REGULATIONS - 5 C.F.R. § 550.1203, 5 C.F.R. § 630.209, 5 U.S.C. § 6302(f);

MONTANA CODE ANNOTATED - Sections 2-18-601(15), 2-18-611, 2-18-611(3), 2-18-611(4), 2-18-618, 2-18-618(2), 2-18-618(3), 39-71-123(1)(a), 39-71-123(2)(b)(ii), 39-71-123(2)(c).

HELD: Public employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis.

January 13, 2016

Ms. Eileen Joyce  
January 13, 2016  
Page 2

Ms. Eileen Joyce  
Butte-Silver Bow County Attorney  
Room 104, Courthouse Building  
155 West Granite St.  
Butte, MT 59701

Dear Ms. Joyce:

**[P1]** You have requested my opinion as to the following questions that I have rephrased as:

1. Are public employees on workers' compensation leave who are supplementing workers' compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement considered to be in a leave without pay status or a leave with pay status?
2. If such employees are considered to be in a leave with pay status, to what extent, if any, are such employees entitled to accrue vacation and sick leave credits under Mont. Code. Ann. §§ 2-18-611 and 2-18-618?

I.

**[P2]** Your opinion request informs me that Butte-Silver Bow County (BSB) and the LUINA Laborers Local No. 1686 entered into a collective bargaining agreement (CBA) in 2005 which, in relevant part, allows workers to supplement their workers' compensation benefits with accrued sick leave, if the employee is off work due to work-related injuries, in order to receive 100% of the employee's current wage. The Union believes that this provision requires BSB to provide full accrual of sick and vacation leave to the employee while the employee is off work and supplementing workers' compensation benefits with sick leave. BSB disagrees based upon the language of the CBA and Mont. Code Ann. §§ 2-18-611(4) and -618(2), which each respectively prohibit accrual of vacation or sick leave benefits while the employee is in a "leave-without-pay" status. As you have pointed out, there is no statutory definition of "leave-without-pay" status.

**[P3]** The first task is therefore to determine whether an employee receiving workers' compensation benefits while supplementing with sick leave is in "leave-without-pay" status. In general, statutory provisions will control over conflicting contractual language.

*Beck v. Board of Trustees*, 233 Mont. 319, 322, 760 P.2d 83, 85 (Mont. 1988) (citing 17 C.J.S. Contracts Section 201 (1963)) (“Broadly speaking, a contract made in violation of a statute is illegal, but the true rule seems to be that of legislative intent.”); *Poeppele v. Flathead County*, 1999 MT 130, ¶ 24, 294 Mont. 487, 982 P.2d 1007 (“The [statutory] six-month qualifying period established by the legislature is separate from, and not controlled by, any probationary period that the local governing body establishes by policy or negotiation of a collective bargaining agreement.”). Therefore we must first look to Montana statutory law to determine the “pay” status.

[P4] Mont. Code Ann. § 2-18-601(15), defines “sick leave” as “a leave of absence *with pay* for [certain medically related events].” Emphasis added. When sick leave is earned and used, an employee is paid for the time they are on leave. Hence, absent a specific statute to the contrary, an employee converting sick leave credit is on “leave with pay.” Looking to Montana’s workers’ compensation statutes, “wages” means all remuneration paid for services performed by an employee for an employer. While the term “wages” does not include “vacation or sick leave benefits accrued but not paid,” Mont. Code Ann. § 39-71-123(2)(c), accrued sick leave, when converted to pay, is within the definition of “wages.”<sup>1</sup> Mont. Code Ann. § 39-71-123(1)(a) (“wages” includes “remuneration at the regular hourly rate for . . . periods of sickness.”). That is the situation here, and it is reasonable to conclude that the use of accrued sick leave to augment workers compensation benefits places the employee in a “leave-with-pay” status, at least as to the sick leave converted, because they are being paid for the leave they are taking.

[P5] This determination is supported by federal law. As recognized by the Tenth Circuit:

Leave has a monetary value. For example, it can be used for paid vacation time. When employees who accrue leave depart government service, they are entitled to a lump sum payment for unused leave. *See* 5 C.F.R. § 550.1203. . . . Likewise, a federal employee is financially responsible for leave taken in excess of what the employee has accrued. *See* 5 U.S.C. § 6302(f); 5 C.F.R. § 630.209. As the district court observed: “*the very concept of ‘leave without pay’ taken when an employee has no leave from which to draw, presumes that an employee is not entitled to pay in the event he must be absent from work but cannot take leave to cover the absence.*”

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<sup>1</sup> For purposes of this Opinion, I am assuming that all the sick leave hours used were earned by the employee. The analysis may change if the sick leave was donated by coworkers. *See Williams v. State Fund*, 1996 MTWCC 10, WCC No. 9505-7304 (Feb. 1, 1996) (“wages” does not encompass sick leave donated by coworkers).

*United States v. Ransom*, 643 F.3d 1285, 1290 (10th Cir. 2011) (emphasis added).

[P6] Likewise, in Washington and Indiana, “sick leave” is defined within the statutes as “wages” and is therefore treated as deferred compensation. *See SCI Indiana Funeral Service L.P. v. Musgrave*, 2008 Ind. App. Unpub. LEXIS 514 (Ind. App. 2008) (unpublished opinion); and *South Bend Sch. Dist. v. White*, 23 P.3d 546 (Wash. App. 2001).

[P7] It is my opinion that a public employee who supplements workers’ compensation benefits by converting accrued sick leave credits into pay during a period of disability, as allowed under Montana law and the CBA here, is in a “leave-with-pay” status as to the sick leave hours converted to pay.

## II

[P8] BSB contends that employees supplementing their workers’ compensation benefits as described are entitled to only a prorated accrual of sick and vacation benefits, to the extent that the employee is “in pay status” by virtue of spending accrued sick leave. The Union contends, on the other hand, that the employee is entitled to full accrual of sick and vacation benefits during the period of supplementation because the CBA provides that “[d]uring this period of sick leave supplementation, the employee’s other benefits will be maintained for the period that sick leave supplementation is available to the employee.”

[P9] However, BSB Policy 323 prohibits an employee from accruing sick and vacation leave credits while on workers compensation leave. This conforms with Montana law, which defines “wages” as not including “sickness or accident disability under a workers’ compensation policy.” Mont. Code Ann. § 39-71-123(2)(b)(ii); *see also* Mont. Code Ann. §§ 2-18-611(4) and -618(2) (prohibiting accrual of leave when employee is in “leave-without-pay” status). The employee, therefore, is entitled to leave accrual for the hours of sick leave converted, but is not entitled to leave accrual for workers’ compensation benefits received.

[P10] This situation is analogous to a part-time employee. Mont. Code Ann. §§ 2-18-611(3) and 2-18-618(3) both provide that a permanent part-time employee is entitled to prorated leave benefits. Therefore it is my opinion that an employee supplementing workers’ compensation benefits with sick leave is entitled to accrue vacation and sick leave on a prorated basis for the sick leave hours converted.

Ms. Eileen Joyce  
January 13, 2016  
Page 5

THEREFORE, IT IS MY OPINION:

Public employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis.

Sincerely,

TIMOTHY C. FOX  
Attorney General

tcf/jss/jym