

## Opinion No. 62-69

June 12, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General William E Snead, Assistant Attorney General

**TO:** Patrick F. Hanagan, District Attorney, Fifth Judicial District, Roswell, New Mexico

### QUESTION

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1. Do the "wages and compensation earned and unpaid" which, under Section 59-3-6, N.M.S.A., 1953 Comp., become due and payable at the next pay day after a suspension of work due to a labor dispute, include accrued vacation and leave pay?
2. Does the fact that the leave or vacation time has or has not been applied for affect the decision?

#### CONCLUSIONS

1. Yes.
2. See analysis.

### OPINION

#### ANALYSIS

The example referred to in your request for an opinion presented the situation in which there was a work stoppage occasioned by employees striking because of a labor dispute. All wages and compensation earned and unpaid at the time of the work stoppage became due and payable at the next pay day pursuant to Section 59-3-6, N.M.S.A., 1953 Comp. Your first question is whether the words "wages and compensation earned and unpaid" include accrued leave and vacation pay. We answer this question in the affirmative.

It is a well settled point of labor relations law that paid leave time or vacations are a form of additional compensation and are not gratuities. Even the termination of the contract by its own terms or the removal from the state of the employer do not affect the right to compensation. **Kidde Mfg. Co. v. United Electrical Radio and Machine Workers**, 27 N.J. Super. 183, 99 A. 2d 210 (1953); **Textile Workers Union of America v. Paris Fabric Mills, Inc.**, 22 N.J. Super. 381, 92 A. 2d 40 (1952); **Division of Labor Law Enforcement v. Ryan Aeronautical Co.**, 106 C.A. 2d 833, 236 P. 2d 236 (1951). The rule was stated succinctly in the **Textile Workers** case, *supra*, to be that a contractual

provision for vacation pay is neither a gratuity nor a gift, but is a supplement to the employment agreement which constitutes an offer of reward or additional wages for services, and employees are entitled thereto upon performance of the obligations imposed by the employment contract.

The status of vacation pay as compensation is strengthened by many cases in which accrued paid vacation time has been allowed as a wage claim in bankruptcy proceedings against an employer. The preferred status has been given in the cases of **United States v. Munro-Van Helms Co.**, 243 F.2d 10 (C.A. 5, 1957); **Division of Labor Law Enforcement v. Sampsell**, 172 F.2d 400 (Cal. 1949); **In re Will-Low Cafeterias, Inc.**, 111 F.2d 429 (C.A. 2, 1940), to mention only a few of the more recent.

Your second question is whether the answer to the first question is affected in any way by the fact that there has or has not been an application for the leave or vacation by the employee.

We are able to answer this question only by saying that a decision depends upon the terms of the contract. For example, many contracts specify a minimum period of employment before an employee is eligible; some contracts state that the vacation time shall be taken only during specified months. Therefore, we are not able to state the effects of varying circumstances upon the decision. As pointed out in the **Textile** case, *supra*, the provisions regarding vacation time are contractual with the provisions of the contract controlling the eligibility of a particular employee and the accrual of the right. It should be noted, however, that substantial performance of the provisions of the contract are probably sufficient as in most other contracts unless stated to be otherwise. It should also be noted that where no provision for application for vacation time is stated in the contract as a condition precedent to accrual of the right to the compensation, such a condition would ordinarily not be implied. See annotation, 30 **A.L.R.** 2d 346.