# Opinion No. 43-4429

December 29, 1943

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Mr. J. V. Gallegos, Assistant District Attorney, Tucumcari, New Mexico

We are in receipt of your letter of December 22, 1943 in which you ask our opinion upon the following question:

"May the School Board secure compensation insurance on the janitor employees without securing insurance on the school teacher employees?"

Section 57-903 of the N.M. 1941 Compilation provides in part as follows:

"Every **such** employer engaged in any **such** occupation shall file in the office of the clerk **such** workman is, or it is contemplated at the time of **such** agreement **such** workman is to be employed, previous to or within thirty (30) days after having made any **such** agreement, express or implied, with **such** workman (unless the judge of **such** district court shall, by order duly filed in the office of said clerk, extend the time therefor, in which event the same shall be so filed within the time as so extended) good and sufficient undertaking in the nature of insurance or security for the payment to any and all **such** injured workmen, * * * Provided, however, that the state, counties, cities, towns, school districts, drainage, irrigation or conservancy districts, and public institutions and administrative board thereof shall not be required to give such bond, security, or undertaking."

It is noted that this section requires such employers to file security within thirty days after making such agreement with such workmen for the payment of such injured workmen. It appears to me that the only possible construction of the terms "such employer" and "such employee", are "employers" and "employees" who have agreed to be bound by the Workmen's Compensation Act, and that the terms "such agreement" refers to this agreement between them, whether it be expressed or implied. It then follows that if an employer had agreements to be bound by the Workmen's Compensation Act with certain employees (in other words, came within the act), and did not have such agreements with other employees, as to whom, he would not be within the act, that this section would require him to cover the former employees with insurance or other security, but would not require him to insure the latter employees.

As to school districts, however, it is noted that they "shall not be required to give such bond, security or undertaking." Thus, it is optional with them whether they carry any insurance or not, and it would certainly follow that they could carry insurance covering such employees who come within the act (with whom they had agreements expressly or implied), without covering all employees.

Further, as insurance is a private contract, the employer, as far as his relations with the insurance company is concerned, could make any contract with such company as he desired. This contract might not comply with the requirements of Section 57-903, or carry the New Mexico standard form of Workmen's Compensation indorsement; but as school districts are not required to carry any insurance, it would make no difference that the contract did not comply.

In view of the foregoing, if it is assumed that janitors employed by a school district come within the Workmen's Compensation Act, and school teachers do not, it is my opinion that such school districts may carry insurance which would comply with Section 57-903, and would carry a Workman's Compensation indorsement covering such janitors without covering such school teachers or other employees.

It is further my opinion that in any event a school district can carry multiple insurance on such employees as it chooses, without being required to carry insurance on all its employees (assuming, of course, no questions of budget, finance or teacher's pension exists).

No opinion is expressed herein as to whether or not janitors or other employees of a school district do or may come within the Workmen's Compensation Act.

Trusting that the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Assistant Attorney General