

# MAINE STATE LEGISLATURE

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October 2, 1959

Marion E. Martin, Commissioner

Labor and Industry

James G. Frost, Deputy Atty. Gen.

Attorney General

Minimum Wage Interpretation

We have your memo of September 25, 1959, in which you ask three questions relating to interpretations of the minimum wage law, Chapter 30, sections 132-A to 132-J, as amended by Chapter 362 of the Public Laws of 1959, in anticipation of your publishing "Guide to Maine's Minimum Wage Law."

In your draft of items to be included in the "Guide" you stated in III C, "Members of a corporation or partnership are not considered to be employees." With respect to this statement you advise:

"This was questioned at the public hearing and it was suggested that we use the words, "Officers of a corporation or members of a partnership", whereupon a question was raised as to "what officers" and "how many". Is there some precedent established which could be used as a guide in this instance?"

Answer: "Generally the officers of a corporation are enumerated in its charter or bylaws, and include a president, vice-president, secretary, treasurer, and sometimes others. The statutes in most of the States expressly provide for the election of a president, secretary, and treasurer, and then provide that there shall be such other officers, agents, and factors as the corporation shall authorize for that purpose." Fletcher Cyclopedia Corporations, 1954, section 169.

In Maine our statute provides that "corporations" shall have a president, directors, clerk, treasurer, and any other desirable officers. Such officers shall be chosen annually and shall continue in office until others are chosen and qualified in their stead." Chapter 53, section 32, Revised Statutes 1954. The officers as such are the corporation. Fletcher, section 266.

With respect to employment under the unemployment compensation law where "employment" is defined as meaning any service performed for wages or under any contract of hire, written or oral, expressed or implied, our courts said in Higgins vs. Shirt Company, 129 Me. 6:

"When the president of a corporation acts only as such, performing the regular executive duties pertaining to his office, he is not an employee within the statutory definition."

We believe the same rule would apply to officers of a corporation under the minimum wage law and those officers would consist of the persons mentioned in the above-quoted Chapter 53, section 32.

It should be borne in mind that such an officer could be employed by the corporation to perform services not executive in character, in which case he would be such employee as should be considered as being under the minimum wage law.

"At the public hearing, the question was raised whether or not certain "fringe benefits" might be included as part of the minimum wage. These fringe benefits might include insurance wholly paid for by the employer, Christmas bonuses, vacation pay, sick pay, and discount on purchases. Is it your opinion that these benefits might be considered as "other facilities" or as "gratuities and commissions of every kind" in Sec. 132-B, V of the law?"

**Answer:** Generally speaking, benefits received by an employee are either covered by contract, and therefore something due the employee as a matter of contractual right, or he receives the benefit as a gratuity.

"Gratuity" is something acquired without bargain or inducement - a gift.

A bonus is usually a gratuity but it can be otherwise, if considered as a part of the employment contract.

The same can be said of sick pay and vacation pay, although such rights are usually contractual. In any case, the minimum wage law contemplates that gratuities shall be included in determining wages.

We would point out here that it has been our policy to refuse to answer academic questions - that is, we refuse to give opinions when no actual problem exists.

The reason for such a policy is plain when one considers the enforcement of a law such as the minimum wage law. Opinions given in an attempt to anticipate problem areas often have the effect of blocking or handicapping effective enforcement.

While we realize that some areas are susceptible to present opinions to be used as a guide in administering the law - and in those areas we have tried to be helpful - there are some areas that are not susceptible to anticipatory opinions. In those areas the facts of a particular situation must be considered before a determination can be made as to whether or not the law is being violated.

It appears to us that your second question contains such uncertain areas, for example: Should an employer be permitted to pay his employees 85¢ per hour on the basis that at the end of the year he would give his employees a substantial bonus? Probably not - yet such a bonus is either a contractual right or a gratuity and in either event would be considered as "wages."

October 2, 1959

We are merely pointing out that many such problems can, and probably will, arise and any attempt to give an opinion which defines "gratuities" in relation to a "bonus" may result in acknowledging the effectiveness of the law.

Difficulties are also present with sick pay and vacation pay.

In theory, vacation pay or sick pay would be embraced in the term "wages" either as a sum contractually due the employee or given to him as a gratuity. But we believe the application of such pay in relation to "wages" is of such uncertainty as would not permit a present opinion. Certainly, if a person is sick or on vacation for a time contemporaneous with a pay period, the employer would not be in violation of the law in failing to pay \$1.00 per hour to such employee during the period of illness or vacation, because the employee is not then working.

Vacation is a time of respite; a scheduled period during which activity or work is suspended. Unemployment Compensation Pay 72 A 2d 54, 136 Conn. 482.

How such vacation or sick pay could otherwise be used in ascertaining "wages" should await a time when the problem arises.

We are of the opinion that insurance premiums paid for by an employer on behalf of an employee should be included in determining "wages" for that employee.

"Is it your opinion that municipal employees, such as those employed by the fire departments, police departments, public works, etc., would be exempt from the minimum wage law under Sec. 132-B, III, B, "Any individual engaged in the activities of a public supported nonprofit organization . . . "?"

Answer: It is our opinion that employees of municipalities are not exempt or excepted from the minimum wage law.

That portion of section 132-B III B, which provides "any individual engaged in the activities of a public supported nonprofit organization" is not the usual term used by the legislature in referring to municipalities.

We would draw to your attention the fact that the State of Vermont in enacting its minimum wage law has a clause identical to that above quoted. However, in a sub-paragraph immediately preceding such clause, the Vermont statute provides that "any individual employed by the United States or by the State or any political sub-division thereof" is excepted from the act. Chapter 303, section 3, II (c) Vermont Public Laws 1957.

For the above reasons we conclude that employees of municipalities are not excepted from provisions of our minimum wage law.

JGF:GBH