

# MAINE STATE LEGISLATURE

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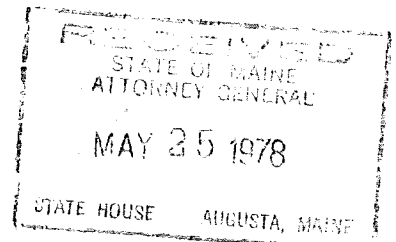


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Workers compens. for Employees lent by State to  
Private Employers

May 24, 1978

Ms. Barbara McGee, Personnel Officer  
Maine Department of Conservation  
Augusta Mental Health Institute  
Ray Building  
Augusta, Maine 04330



In the Matter of: Opinion Request

Dear Ms. McGee:

You have asked the question: Are employees of private employers, when lent by the private employer to fight fires, but who remain on the private employer's payroll, entitled to workers' compensation with the State substituted as employer or insurer for the limited purpose of compensation?

Title 39, M.R.S.A. §1, et seq., the Maine Workers' Compensation Act, does not attempt to define who are employees. The leading treatise, 1A, THE LAW OF COMPENSATION, Sec. 48.00 explains concisely the compensation liability of the lent employee:

"When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:

- (a) the employee has made a contract of hire, express or implied, with the special employer;
- (b) the work being done is essentially that of the special employer; and
- (c) the special employer has the right to control the details of the work.

\* \* \* \* \*

Employment may also be "dual", in the sense that while the employee is under contract of hire with two different employers, his activities on behalf of each employer are separable and can be identified with one employer or the other. When this separate identification can clearly be made, the particular employer whose work was being done at the time of injury will be held essentially liable."

The lent employees from general employers such as Great Northern Paper Company become special employees of the State for limited purposes of workers' compensation when the above three criteria are satisfied. The second and third terms -- work done and right to control -- operate as a matter of fact. The first -- contract of hire -- may arise by implication. However, it would be prudent to draft a form agreement with all such special employees. This would remove any doubt as to their entitlement to workers' compensation when their activities are separate and devoted to the State's interests. If the Maine Department of Conservation executes a written agreement with Great Northern on the subject of borrowing employees, such a clause should be added to the agreement.

In addition, there are some workers' compensation policy considerations which merit attention. The foremost of these is the possibility of having Great Northern agree to cover these lent employees on their own compensation insurance policy. In return, the State would agree to indemnify Great Northern or its insurer for claims which arose out of injuries sustained in the course and scope of the special employment. This would remove from the State the burden of evaluating the limits of and defending itself from claims brought by a class of employees who are under the State's control for a very limited time period. For example, an injury subsequently discovered and allegedly attributable to a period of state employment may not manifest itself for weeks after the end of a particular fire fighting episode. The lent employee will by then have returned to his general employer.

The answer to your question, therefore, is that the State is probably liable for workers' compensation for injury or death in the course of fighting fires for the State, but that any possible ambiguity should be resolved before implementation of any agreement to borrow employees. This would be most appropriately achieved by agreeing with the lending employer that the State assume this responsibility and by entering into this agreement with each lent employee as he reports to his special place of employment.

Sincerely yours,

CHARLES D. DEVOE  
Assistant Attorney General

CDD:sc  
cc: Donald Alexander