

1976 S.C. Op. Atty. Gen. 296 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4441, 1976 WL 23058

Office of the Attorney General

State of South Carolina

Opinion No. 4441

September 3, 1976

*1 1. Sick leave provided by the Public School Employees Sick Leave Act is limited to sickness of employees but does include maternity leave.

2. Days under the Act are computed on the basis of 1 and $\frac{1}{4}$ days per month, except for a $\frac{3}{4}$ day bonus after the initial nine months of employment with a single district; the Act does not provide for the transfer of accrued leave from one district to another.

3. Under the Act, an employee must first accrue leave before qualifying for the 91 day grace period against a material breach of contract because of inability to perform duties due to sickness.

4. The Act merely establishes minimum sick leave benefits; districts with more liberal benefits generally may reduce these liberal benefits so long as such a reduction is not in conflict with this Act and not in violation of vested rights accrued prior to the repeal of the more liberal benefits.

5. The Act does not prohibit different sick leave policies for certified and non-certified employees, provided all 'full-time employees' have the minimum leave promulgated by the Act.

6. The legal effect of employing substitutes for full-time employees on long term sick leave depends on the terms of the individual employment contracts with the substitutes or part-time employees.

TO: Cyril B. Busbee
State Superintendent of Education

QUESTION:

What is the definition of 'sick leave' for public school employees under 1976 Act R724, and does it include maternity leave?

DISCUSSION:

The phrase 'sick leave' has a common or popular meaning referring specifically to the actual sickness of an employee; through further definition by employers the term has also taken on a technical meaning with additional application for such benefits as sickness of immediate family, doctor's/dentist's appointment, alcoholism, etc. [Nelson v. Dean](#), 168 P.2d 16, 22d Cal.2d 873, 168 A.L.R. 467, 473-4 (1946). See also [39 Words and Phrases](#), Sick Leave

In 1976 Act R724 the South Carolina General Assembly did not define the term 'sick leave' for public school employees, but left it open for the school districts to provide more liberal sick leave benefits. Section 1, 1976 Act R724. The absence of a definition and the reference to more liberal district policies on sick leave indicate that the Legislature intended to establish a minimum sick leave policy by using the term in the common sense rather than the liberal, technical sense. [Sutherland Statutory Construction](#), Section 47.29 Technical Meaning. [Cummings v. Coleman](#), 7 Rich. Eq. (28 S.C.) 509,

62 Am.Dec. 402 (1852); [Poole v. Saxon Mills](#), 6 S.E.2d 761, 192 S.C. 339 (1940). 1967–68 Op. Atty. Gen., No. 2557, p.252. Thus the local school districts have the option to provide a more liberal definition or coverage for sick leave so as to best promote the efficiency, morale, and general welfare of their respective employees consistent with each district's fiscal status. Such an interpretation parallels the Legislature's previous action in the State Employees Sick Leave Act which established the number of days and accrual rate but left the definition for the State Budget and Control Board. Section 1–66.1, Code of Laws of South Carolina (Supplement).

*2 The issue of maternity leave is currently before the United States Supreme Court on certiorari. The current holding of the Fourth Circuit is that sick leave benefits would include maternity leave. [Gilbert v. General Electric Company](#), 519 F.2d 661 (4th Cir. 1975). See also 42 U.S.C. Section 2000e and 29 C.F.R. Section 1604.9 School districts should treat absences for maternity purposes the same as sick leave. Special conditions should not be placed on maternity leave under sick leave provisions since such conditions would most probably be discriminatory.

CONCLUSION:

The term 'sick leave' in this act providing sick leave for full-time public school employees applies only to sickness of the employees themselves; however, under current case law this term would include maternity leave.

QUESTION:

How do you compute the sick leave days in the Public School Employees Sick Leave Act and are the days transferable?

DISCUSSION:

The Act provides that sick leave shall accrue 'on the basis of one and one-fourth days of sick leave for each month of active service or twelve days for nine months of active service.' Obviously, the accrual rate for twelve days over nine months is one and one-third (1 $\frac{1}{3}$) days per month instead of the one and one-fourth (1 $\frac{1}{4}$) days per month provided earlier in the same sentence. The statute should be construed so as to give effect to all provision unless an irreconcilable conflict exists. [Jolly v. Atlantic Grayhound Corp.](#), 35 S.E.2d 42, 207 S.C. 1 (1945).

The transferability of sick leave from one district to another depends upon the policy of the district to which the employee is transferring. The Public School Employees Sick Leave Act does not create any right to transfer leave—it merely provides that no leave shall be lost as result of the Act.

CONCLUSION:

In order to give effect to both provisions for all full-time employees, employees would accrue one and one-fourth days per month until the ninth month, at which time they would accrue an extra three quarter day; continued employment would accrue sick leave at the rate of one and one-quarter days per month without any further bonus unless otherwise provided by more liberal district policy. The Act does not make accrued leave transferable from one district to another.

3.

QUESTION:

Do public school employees automatically get a 91 day non-paid sick leave for a continuing illness, or must they first report to work and/or use some earned, accumulated sick leave.

DISCUSSION:

‘A school employee using sick leave as provided for in this act shall not be terminated from employment nor shall any such employee be terminated during a continuing sick leave of less than ninety-one days.’ (Emphasis my own.) Section 1 1976 Act R724. Where the term is clear and not ambiguous, it must be applied according to its literal meaning. [Jones v. South Carolina State Highway Department, 146 S.E.2d 166, 247 S.C. 132 \(1966\)](#). The 91 day provision clearly exceeds and is distinct from the 60 day accumulation allowed. In order to be eligible for the 91 day termination protection, an employee must be ‘using sick leave as provided for in the Act’; therefore, an employee must have worked initially at least one month (certified employee) or five months at 30 hours per week (non-certified employee) before qualifying as a full-time employee and accruing any leave. See 78 C.J.S., Schools, Section 152 Termination of Employment.

CONCLUSION:

*3 Under the terms of the Act, this 91 day termination provision does not apply to a person who never began work for a district or does not have any accrued leave. The difference between the leave accrued and the 91 days allowed against termination would be leave without pay unless the district provides otherwise.

4.

QUESTION:

What effect does this Act have on more liberal district sick leave policies and can districts with more liberal policies now reduce or repeal these liberal benefits?

DISCUSSION:

A district's sick leave policy is not altered by the Act except to set minimum standards for benefits and coverage. More liberal benefits provided by a district prior to the Act remain in effect and force until such time as changed by the district; for example, if a district policy currently allows five days automatically at the beginning of employment, this first five days simply accrues at an accelerate rate, rather than monthly as provided for in the new School Employees Sick Leave Act—the district is not required to advance more than the first five days already established in its sick leave policy.

Section 1, 1976 Act R274 provides in part: ‘Provisions for the additional benefits provided for in this act shall be made on the same basis as existing sick leave benefits.’ This Section further provides: ‘The provisions of this act shall not apply to employees of a school district which provides more liberal sick leave policy or automatically extend such a policy beyond its current conditions.’ See [Jones v. South Carolina State Highway Department, supra](#).

A district may revise its more liberal sick leave policy to reduce it to the minimum requirements of the Act, provided such a revision does not interfere with vested rights, i.e. sick leave already accrued pursuant to past policy. The same rules of construction are applied in construing school board rules and regulations as in construing statutes. 78 C.J.S., Schools, Section 121, Power to Make Rules and Regulations. ‘Rights which are vested are secure against impairment not only by affirmative legislation but also by repealing acts.’ [Sutherland Statutory Construction](#), Section 41.06, Statutes Affecting Vested Rights. Once leave is accrued, it becomes vested in an individual. See 92 C.J.S., Vest.

CONCLUSION:

The Act does not affect more liberal provisions in existing district policies, and a district is free to revise or repeal its more liberal benefits so long as the minimum requirements are met and vested rights are not disturbed.

5.

QUESTION:

Can a district have a different sick leave policy for certified and non-certified persons?

DISCUSSION:

This Act covers 'full-time employees' defined as 'any persons employed in position for which certification is required by the State Department of Education or persons who have been employed in the school district for five months and work at least 30 hours per week.' Section 2, 1976 Act R724. This Act, therefore, requires that a district provide the same minimum sick leave for both certified and non-certified personnel who meet the definition of 'full-time employees.'

CONCLUSION:

*4 Assuming a reasonable basis for the distinction, a district can have different sick leave policies for certified and non-certified personnel, provided the minimum benefits granted by the Act are provided for all 'full-time employees'.

QUESTION:

What is the legal status of an employment relationship between a district and a substitute filling in for a full-time employee on long-term sick leave?

DISCUSSION:

The employment status and legal rights of a substitute or part-time employee depend on the terms or conditions of the employment agreement or contract itself. If a substitute employee's contract is not designated as temporary or conditional, the substitute may gain an interest in continued employment depending on such factors as the type of employment and district's past employment practices. The specificity of the contract becomes especially important for certified employees because of statutes and case law affecting their employment rights. See Sections 21–361, et seq., Code of Laws of South Carolina (Supplement) and [Johnson v. Fraley](#), 470 F.2d 179 (4th Cir. 1972).

CONCLUSION:

Any employment rights of part-time or substitute employees are generally fixed by agreement or contract.

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