

Opinion No. 74-36

November 4, 1974

OPINION OF: DAVID L. NORVELL, Attorney General

BY: W. Royer, Assistant Attorney General

TO: The Honorable Betty Fiorina Secretary of State Executive-Legislative Building
Santa Fe, New Mexico 87501

QUESTIONS

1. Can an employer change normal working hours on election day in order to take advantage of the exception to the time off for voting requirement in Section 3-12-66, NMSA, 1953 Comp.?
2. If the answer to Question 1 is No, may the employer specify a time that would include the employee's normal lunch period or include a time period either prior or subsequent to his normal working hours?
3. If the answer to Question 1 is No., is the employer required to pay the employee his normal salary for the period the employee absents himself from work?

CONCLUSIONS

1. No.
2. No.
3. Yes.

ANALYSIS

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Question 1

Section 3-12-66, NMSA, 1953 Comp. provides as follows:

"EMPLOYEES -- TIME TO VOTE. -- A. On election day any voter may absent himself from employment in which he is engaged for two [2] hours for the purpose of voting between the time of opening and the time of closing the polls. The voter shall not be liable to any penalty for such absence; however, the employer may specify the hours during this period in which the voter may be absent.

B. The provisions of subsection A of this section do not apply to any employee whose work day begins more than two [2] hours subsequent to the time of opening the polls, or ends more than three [3] hours prior to the time of closing the polls.

C. Any person or corporation who refuses the right granted in this section to any employee is guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars (\$ 50.00) nor more than one hundred dollars (\$ 100)."

Enactments such as the above have uniformly been upheld as a proper exercise of the State's police power since they attempt to safeguard the rights of suffrage and insure the full and free exercise of the elective franchise. **People v. Ford**, 63 N.Y.S.2d 697 (1946). Such enactments are not to be construed in a manner which will defeat, unduly restrict, or obstruct the free exercise of the rights provided. **State ex rel. Read v. Crist**, 25 N.M. 175, 179 P. 629 (1919). Election laws should be liberally construed to accomplish their purpose. **State ex rel. Palmer v. Miller**, 74 N.M. 129, 391 P.2d 416 (1964).

The exclusion provided in Section 3-12-66(B), **supra**, applies only to those employees whose work day begins two hours after the opening of the polls, or 10:00 A.M., or whose work day ends three hours prior to the closing of the polls, or 4:00 P.M. It is our opinion that the term "work day" means the normal or usual work day as scheduled by the employer during the course of the year. Accordingly, an employer may not adjust the working hours on election day to bring the working hours of employees within the exemption provision. Construing this provision otherwise would defeat the purpose of the statute.

Question 2

Section 3-12-66A, **supra**, provides that the employer may specify the hours during which the employee may absent himself to vote. This provision is qualified by the words "during this period." This qualification must of necessity refer to regular working hours since the statute is based upon a voter absenting himself during employment. Employment is defined in Webster's New International Dictionary (Third Ed.) as "work . . . in which one's labor or services are paid by an employer." Prior and subsequent to an employee's normal working hours and during the period an employee is given for lunch, he is not working and not being paid for his services. Therefore, it is our opinion that the employer may not designate a period in which the employee may absent himself that includes either the employee's normal lunch period or that includes a period either prior or subsequent to his normal working hours.

Question 3

This question was answered in Opinion of the Attorney General No. 62-137, dated November 2, 1962. We concur with that opinion today. We are enclosing a copy of that opinion for your convenience.