Opinion No. 42-4184

November 16, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Vincent J. Jaeger State Labor Commissioner Santa Fe, New Mexico

*{*276}* You have submitted a fact situation to this office concerning a state school which does not carry any workman's compensation insurance. You further state that the employees in a certain project being carried on by such state school are willing to share the expense of a workmen's compensation policy. You wish to know whether such an arrangement would violate any of the workmen's compensation or labor laws of New Mexico.

It is noted that Section 156-103, New Mexico Statutes Annotated, 1929 Compilation, exempts such schools from the general requirement of furnishing a bond security or undertaking in connection with the Workmen's Compensation Act of this state. Therefore, insofar as this school is concerned, such part of Section 156-124, New Mexico Statutes Annotated, 1929 Compilation, that provides that:

"Any employer who shall fail in any case covered by this act to file undertaking of insurance, guaranty or security for the payment of compensation * * * shall be deemed guilty of a misdemeanor and shall be punishable by a fine of not more than one thousand dollars ($ 1,00) for any such offense."

has no bearing on this problem under your fact situation.

At this point I wish to specifically state that if your question did not involve an institution exempt from the general provisions of Section 156-103, supra, an entirely different question would be involved and the answer might be different.

The arrangement that you suggest would have the legal effect of completely absolving the employer of any possible liability, at no cost whatever to the employer. It would, in effect, be a contract terminating employer's liability insofar as its employees are concerned, and would come within the prohibition of the general rule expressed in 13 C. J., Contracts, Section 437, which provides as follows:

"* * * the general rule is that it is against the policy of the law to permit a master to contract against liability for the negligence of rise servants while acting within the scope of their employment."

39 C. J., Master and Servant, Section 435, states that according to the general rule, a contract, insofar as it attempts to relieve the master from liability for a future injury resulting from his negligence, is invalid and against public policy.

The same rule is in substance stated in 35 Am. Jur., Master and Servant, in Sections 136, 137 and 412.

In view of the foregoing, it is conceivable that a contract wherein the employees agree to pay the employer's compensation policy would be invalid as against the public policy of this state. However, this question has not been ruled on by our Supreme Court, and it is impossible to say with certainty that they would follow *{*277}* the general rule, as expressed in the leading legal encyclopedias, which is followed in a large number of states in this country.

If such a contract should be held invalid as against the public policy of this state, the only result would be that neither the insurance company nor the employer could compel the employees to contribute to such insurance policy. Therefore, there would be no binding contract by the employees to so contribute, although, if they should voluntarily contract to do so, and voluntarily comply with their invalid contract, no law would be violated.

A further reason exists why such a plan might be considered contrary to public policy. The fundamental idea behind the Workmen's Compensation Law is, as expressed by Schneider in his second edition, Workmen's Compensation Law, Volume 1, Section 1:

"The scheme is to charge upon the business through insurance, the losses caused by it, making the business and the ultimate consumer of its product, and not the injured employee, bear the burden of the accidents incident to the business. The statute contemplates the protection, not only of the employee, but of the employer, at the expense of the ultimate consumer.

"The establishment of the fact of fault or negligence of employer, under our common law system through an action in damages by the injured employee has been one of the thorns of that system, in that it 'involves intolerable delay and great economic waste, gives inadequate relief, operates unequally and whether viewed from the standpoint of the employer or that of the employee, it is inequitable and unsuited to the conditions of the modern industry.'

"The ultimate purpose of the Workmen's Compensation Act is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business'."

Obviously, such a plan defeats this purpose and would enable the employer to completely absolve itself of all possible liability toward its employees and pass the complete costs of its risk on to the employees.

It would appear to me that the solution to these employees' problems would be to agree on some form of group insurance which would cover their risk and would, at the same time, leave them their remedy against their employer, who is not entitled to be benefited under our laws in the way these employees seem to think they are compelled to do because of the failure of their employer to take out adequate insurance.

Trusting that the foregoing sufficiently answers your inquiry, I am

By HARRY L. BIGBEE,

Asst. Atty. General