OFFICIAL OPINION NO. 28

June 14, 1956

Mr. George F. Hinkle
Commissioner of Labor
225 State House
Indianapolis, Indiana

Dear Mr. Hinkle:

This is in reply to your request for an Official Opinion which reads, in part, as follows:

> "Under the Wage Scale Law (Acts of 1935, Chapter 319, Section 1; Burns' 53-301), a representative of this department is appointed by the Governor to be on a committee to set the prevailing wage scale for labor that is to be performed on any type of government construction. Since there is confusion throughout the state as to what constitutes wages, it is imperative for me to render a determination. In order to do so, I will need an official opinion from you upon which to base my determination.
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> "This request is based upon the question of whether certain payments by the contractor constitute wages to the employee. These payments are made into various funds for welfare, retirement, pensions, holiday pay, and vacation pay. The contractor credits each employee with the amount necessary and then sends the total amount into the fund.
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> "The welfare fund is used for payment to the employee when he is absent from work due to illness. It is probably used in extreme hardship cases too. We are not familiar with the operation of the other funds."

The Indiana Legislature has defined wages on different occasions in several Acts. The Employment Security Act, Acts of 1947, Ch. 208, Sec. 402, as amended, as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 52-1528a, provides as follows:

> " 'Wages,' wherever used in this Act, except as otherwise herein specifically provided, means all remunera-

tion, as defined in Section 401 hereof, including but not limited to the cash value of all remuneration in any medium other than cash, paid to an individual by an employer; Provided, however, That such term shall not include any amounts paid as compensation for services specifically excluded by the subsections of Section 803 hereof, from the definition of employment as defined in Sections 801 and 802 hereof, and; Provided, further, That the term shall include, but shall not be limited to, any payments made on and after January 1, 1946, by an employer to an employee, or former employee, under order of the National Labor Relations Board, or a successor thereto, or agency named to perform the duties thereof, as additional pay, back pay or for loss of employment, or any such payments made in accordance with an agreement made and entered into by an employer, a union and said National Labor Relations Board; Provided, further, That the term 'wages' shall not include:

"(a) Effective January 1, 1951, that part of remuneration which, after remuneration equal to $3,000 has been paid in a calendar year to an individual by an employer or his predecessor with respect to employment during any calendar year, is paid to such individual by such employer during such calendar year, unless that part of the remuneration is subject to a tax under a Federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment fund. For the purposes of this subsection, the term employment shall include service constituting employment under any employment security law of another State or of the Federal government, or of this State; Provided, that nothing in this subsection shall be taken as an approval or disapproval of any related federal legislation.

"(b) Prior to January 1, 1951, the amount of any payment made to, or on behalf of, an employee under a plan or system established by an employer which makes provision for his employees generally or for a class or classes of his employees (including any amount paid by an employer for insurance or annuities, or into a fund,

to provide for any such payment), on account of retirement, or sickness or accident disability, or medical and hospitalization expenses in connection with sickness or accident disability, or death, provided the employee has not the option to receive, instead of provisions for such death benefit, any part of such payment, or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by his employers, and has not the right, under the provisions of the plan or system or policy of insurance providing for such death benefit, to assign such benefit, or to receive a cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his employment with such employer; or

"(1) The amount of any payment made on and after January 1, 1951 (including any amount paid by an employing unit for insurance or annuities, or into a fund to provide for any such payment), to, or on behalf of, an individual or any of his dependents under a plan or system established by an employing unit which makes provision generally for individuals performing service for it (or for such individuals generally and their dependents) or for a class or classes of such individuals (or for a class or classes of such individuals and their dependents), on account of (i) retirement, or (ii) sickness or accident disability, or (iii) medical or hospitalization expenses in connection with sickness or accident disability, or (iv) death;

"(2) The amount of any payment made on and after January 1, 1951, by an employing unit to an individual performing service for it (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment) on account of retirement;

"(3) The amount of any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made on and after January 1, 1951, by an

employing unit to, or on behalf of, an individual performing services for it after the expiration of six calendar months following the last calendar month in which the individual performed services for such employing unit;

"(4) The amount of any payment made on and after January 1, 1951, by an employing unit to, or on behalf of, an individual performing services for it or his beneficiary (i) from or to a trust exempt from tax under section 165(a) of the Federal Internal Revenue Code at the time of such payment unless such payment is made to an individual performing services for the trust as remuneration for such services and not as a beneficiary of the trust, or (ii) under or to an annuity plan which, at the time of such payments, meets the requirements of section 165(a) (3), (4), (5), and (6) of the Federal Internal Revenue Code;

"(5) Remuneration paid on and after January 1, 1951, in any medium other than cash to an individual for service not in the course of the employing unit's trade or business;

"(6) The amount of any payment (other than vacation or sick pay) made on and after January 1, 1951, to an individual after the month in which he attains the age of sixty-five, if he did not perform services for the employing unit in the period for which such payment is made; or

"(c) The payment by an employer (without deduction from the remuneration of the employee) of the tax imposed upon an employee under the Federal Insurance Contributions Act, or

"(d) Prior to January 1, 1952, remuneration in lieu of notice or termination allowances which the employing unit is not required to make by contract or statute."

The Acts of 1947, Ch. 208, Sec. 401, as amended by the Acts of 1955, Ch. 317, Sec. 1, as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 52-1528, reads as follows:

> " 'Remuneration,' whenever used in this act, unless the context clearly denotes otherwise, means all compensation for personal services, including, but not limited to, commissions, bonuses, dismissal pay, vacation pay, sick pay (subject to the provisions of sub-section (b) (3) of section 402) payments in lieu of compensation for services, and cash value of all compensation paid in any medium other than cash. The reasonable cash value of compensation paid in any medium other than cash may be estimated and determined in accordance with rules prescribed by the Board. Such terms shall not, however, include the value of meals, lodging, books, tuition or educational facilities furnished to a student while such student is attending an established school, college, university, hospital or training course, for services performed within the regular school term or school year, including the customary vacation days or periods falling within such school term or school year."

The Old-Age and Survivors Insurance Act, Acts of 1951, Ch. 313, Sec. 2, as last amended by the Acts of 1955, Ch. 340, Sec. 1, as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 60-1902 (a), provides as follows:

> "The term 'wages' means all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than cash, except that such term shall not include that part of such remuneration which, even if it were for 'employment' within the meaning of the Federal Insurance Contributions Act (F. C. A., tit. 26, §§ 1400, 1410), would not constitute 'wages' within the meaning of that act."

The Acts of 1939, Ch. 95, Sec. 1, as found in Burns' Indiana Statutes (1952 Repl.), Section 40-124 (b) provides:

> "The term 'wages' means all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece or commission basis, or in any other method of calculating such amount."

The Workmen's Compensation Act, Acts of 1929, Ch. 172, Sec. 73, as last amended by the Acts of 1955, Ch. 337, Sec. 1, as found in Burns' Indiana Statutes (1952 Repl., 1955 Supp.), Section 40-1701 (c), provides:

> " 'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two [52] weeks immediately preceding the date of injury, divided by fifty-two [52]; but if the injured employee lost seven [7] or more calendar days during such period, although not in the same week, then the earnings for the remainder of such fifty-two [52] weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than fifty-two [52] weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided results just and fair to both parties will thereby be obtained. Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the casual nature or terms at the employment, it is impracticable to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two [52] weeks previous to the injury was being earned by a person in the same grade employed at the same work by the same employer, or if there is no person so employed, by a person in the same grade employed in that same class of employment in the same district. Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings."

The Indiana Workmen's Occupational Diseases Act, Acts of 1937, Ch. 69, Sec. 11, as last amended by the Acts of 1955, Ch. 276, Sec. 1, as found in Burns' Indiana Statutes (1952 Repl., 1955 Supp.), Section 40-2211 (b), provides:

" 'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the last exposure during the period of fifty-two [52] weeks immediately preceding the last day of the last exposure divided by fifty-two [52]; but if the employee lost seven [7] or more calendar days during such period, although not in the same week, then the earnings for the remainder of such fifty-two [52] weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. Where the employment prior to the last day of the last exposure extended over a period of less than fifty-two [52] weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed provided results just and fair to both parties will thereby be obtained. Where by reason of the shortness of the time during which the employee has been in the employment of employer or of the casual nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard shall be had to the average weekly amount which during the fifty-two [52] weeks previous to the last day of the last exposure, was being earned by a person in the same grade employed at the same work by the same employer, or if there is no person so employed, by a person in the same grade employed in that same class of employment in the same district.

"Whenever allowances of any character made to an employee in lieu of wages or a specified part of the wage contract, they shall be deemed a part of his earnings."

The Acts of 1935, Ch. 319, Sec. 1, as found in Burns' Indiana Statutes (1951 Repl.), Section 53-301, provides:

"Any firm, individual, partnership or corporation which is hereafter awarded a contract by this state, or by any political subdivision thereof, or by a municipal corporation, for the construction of any public work, and any subcontractor thereon, shall be required to pay for each class of work on such project a scale of

wages which shall in no case be less than the prevailing scale of wages being paid in the immediate locality for such class of work as hereinafter to be determined. For the purpose of ascertaining what the prevailing wage scales are in such immediate locality, the awarding governmental agency, prior to advertising for such contract, shall set up a committee of three [3] persons; one [1] representing labor, to be named by the president of the state federation of labor; one [1] representing industry, to be named by the awarding agency; and a third member to be named by the governor. As soon as appointed said committee shall meet and shall fix and determine in writing as follows: A classification of the labor to be employed in the performance of the contract for such project, into three [3] classes: skilled, semiskilled and unskilled labor, *and the wage per hour to be paid each of such classes:* Provided, That the rate of wages so to be fixed and determined shall not exceed the prevailing wage scales being at the time paid in such locality for such class of work: Provided further, That the provisions of this act shall not apply to contracts let by the state highway commission of Indiana for the construction of highways, streets and bridges: Provided further, That on all such contracts let by the state highway commission of Indiana, the contract-price for which is to be paid in whole or in part with funds of the state of Indiana, the scale of wages and the classification of labor shall be the same as that approved by the bureau of public roads of the United States department of agriculture on highway projects. Such determination shall be made and filed with such awarding agency at least two [2] weeks prior to the date fixed for such letting, and a copy thereof shall be furnished upon request to any person desiring to bid on such contract. Said schedule shall be open to the inspection of the public. If such committee fails to act and to file such determination at or before the time hereinbefore provided, the awarding agency shall make such determination, and its finding shall be final. It shall be a condition of such contract that the successful bidder and all of his subcontractor (subcontractors) shall comply strictly with such determination made as

above provided. None of the provisions of this section, however, shall be interpreted as permitting the payment of wages for skilled, semiskilled or unskilled labor on any such public project in this state the letting of which is subject to the provisions hereof which are less than the minimum provided for in the applicable national code of fair competition, or regional agreement approved by the president of the United States if there be any such: Provided further, That the provisions of this act shall not apply to any such public projects in this state the letting of which would otherwise be subject to the provisions hereof, and which are to be paid for in whole or in part with funds granted by the federal government, unless the department of the federal government making such grant shall consent in writing that the provisions of this act shall be applicable to such project; Provided further, That the provisions of this act shall not apply to any such project the letting of which is being advertised for at the time this act takes effect." (Our emphasis)

The Acts of 1935, Ch. 319, Sec. 2, as found in Burns' Indiana Statutes (1951 Repl.), Section 53-302, provides:

"The state or any municipal corporation thereof, letting any such contracts, shall require any contractor or subcontractor performing such public work to *file a schedule of the wages to be paid to such laborers,* workmen or mechanics thereon, with the state or with such municipal corporation; such schedule shall be filed before any work is performed on such contract or subcontract; Provided, Such scale shall not be less than the scale determined as provided in section one hereof; Provided further, That nothing in this act provided shall prevent such contractor or subcontractor from paying a higher rate of wages than set out in the schedule of wages filed by him." (Our emphasis)

You will note that the Sections of the Employment Security Act, Burns' Indiana Statutes, Sections 52-1528 and 52-1528a, *supra,* provide that remuneration for dismissal pay, vacation pay and sick pay are wages. However, it is clear that they

become wages only at the time they are paid or payable to the employee and not at the time the employer pays into the fund. Burns' Indiana Statutes, Section 40-124 (b), *supra,* provides that wages are all amounts at which the labor or service rendered is recompensed which would certainly mean that the individual has actually received payment for his labor or service. The Workmen's Compensation Act and the Workmen's Occupational Diseases Act, *supra,* hold that wages shall mean the earnings of the injured employee, and the word "earnings" is a broader term than "wages" and earnings would certainly include all compensation for services. Sections 53-301 and 53-302 of Burns' Indiana Statutes, *supra,* refer to wages as "wage per hour to be paid" and "wages to be paid."

In order for an employee to receive any benefits from a fund for welfare, retirement, pension, holiday pay, and vacation pay, certain conditions would have to be met subsequent to the time of being hired, and it would be problematical as to whether an employee would receive *any* remuneration from such a fund. In this connection see the United States Treasury Department Internal Revenue Service ruling of May 29, 1956, I. R., 156 (Revenue Ruling 56-249) which held that fringe benefits occasioned by supplemental unemployment compensation plans were income for Federal Income Tax purposes at the time they were received by the employee but were not "wages" when paid into the fund.

In view of the foregoing, my answer to your question is as follows:

Payments made by a contractor into various funds for welfare, retirement, pensions, holiday pay and vacation pay, and not paid directly to the employee, do not constitute wages under the Acts of 1935, Ch. 319, *supra,* at the time of payment into said fund.