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the next most consecutive winning selections. It is clear, therefore, that pick six wagering is inconsistent with the responsibility of the holder of a permit under the statute to provide for the distribution of all net sums deposited in each pool to the winners thereof. Rather, in the case of pick six, only a portion of the total net accumulated fund would be distributed to the winning patrons who have successfully selected winning horses in a race or races for which the common fund of wagers has been created. For this reason, it is our opinion that a form of pari-mutuel wagering on horse races known as pick six, which contains a provision for a carry-over of an undistributed percentage of a pari-mutuel pool to horse races conducted on the next racing day, is inconsistent with N.J.S.A. 5:5-64. Therefore, it would be necessary for enabling legislation to be enacted to authorize this form of pari-mutuel wagering.

Very truly yours
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
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October 24, 1980

JOHN J. HORN, *Commissioner*
Department of Labor and Industry
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 20—1980

Dear Commissioner Horn:

You have asked whether sick leave payments to employees constitute "wages" within the meaning of the Unemployment Compensation Law and the Temporary Disability Benefits Law. If they do, the worker may include them as part of his base year earnings when he files a claim for benefits.¹ The total amount of a worker's base year earnings is a crucial part of his claim, because they are used to determine both his eligibility for benefits and the amount of benefits he will receive.² The remuneration earned by employees is also crucial in one other respect. It is used in computing the unemployment and disability insurance taxes paid each year by the worker and his employer. For the following reasons, it is our

1. Your inquiry does not encompass sick payments made to employees in accordance with an employer's state-approved private plan under the Temporary Disability Benefits Law. It is clear that those sick payments in which an employer is paying the equivalent of statutory disability benefits are compensation for wage loss during illness or disability and would not be deemed wages or remuneration. *Bartholf v. Board of Review*, 36 N.J. Super. 349 (App. Div. 1955).

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opinion that sick leave payments are wages within the meaning of those laws.

Unemployment benefits are payable to otherwise eligible claimants who, during the base year preceding the filing of their claim, have earned in covered employment a total of at least \$2,200, or, alternatively, have earned a minimum of \$30 for each of 20 weeks. N.J.S.A. 43:21-4(e) and 19(t). The term "wages" is defined in the act as "remuneration paid by employers for employment . . ." N.J.S.A. 43:21-19(o). "Remuneration" is defined as "all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash." N.J.S.A. 43:21-19(p). And "employment" means "service . . . performed for remuneration or under any contract of hire, written or oral, express or implied." N.J.S.A. 43:21-19(i)(1)(A).

These definitions, liberal on their face, have been construed expansively by our courts. In particular, the decisions make clear that payments to employees may constitute "remuneration" under the act even where made for weeks in which the employee performed no services. Thus, the term has been held to include holiday pay, *DiMicele v. General Motors Corp.* 29 N.J. 427 (1959); vacation pay, *Butler v. Bakelite Co.*, 32 N.J. 154, 164-165 (1960); severance pay, *Owens v. Press Publishing Co.*, 20 N.J. 537 (1956) and *Dingleberry v. Bd. of Review*, 154 N.J. Super. 415 (App. Div. 1977), and compensation drawn by corporate officers on an irregular basis, *Paramus Bathing Beach v. Div. of Employment Sec.*, 31 N.J. Super. 128 (App. Div. 1954).

In *Paramus Bathing Beach* the court enunciated the principle in these words:

The presence of the relationship of employer and employee is not necessarily conditional upon the concurrent and coexistent performance of some actual exertion by the employee. An employer may hire a man to do something who does nothing, or a man may be hired 'to stand by' during intervening periods of the year. And then there are holidays, *intervals of illness or disability*, lack of work, and the like, during which the employment with pay continues. [*Id.* at 133.] [Emphasis added.]

While no New Jersey decision directly addresses the subject of sick leave payments, the underscored words of the above quotation suggest in dictum that such benefits likewise constitute remuneration under the act. This conclusion is supported by the Appellate Division's comments on *Paramus*

2. The definitions of wages and other pertinent terms in the Temporary Disability Benefits Law, N.J.S.A. 43:21-27, are virtually identical to those in the Unemployment Compensation Law, N.J.S.A. 43:21-19. The two laws, moreover, are construed *in pari materia* since they "are 'mutually complementary and . . . illuminat[e] each other.'" *Continental Gas, Co. v. Knuckles*, 142 N.J. Super. 162, 166 (App. Div. 1976); see N.J.S.A. 43:21-42(a). In the interest of simplicity, therefore, there will be no further reference to the Disability Benefits Law in this opinion; references to the Unemployment Compensation Law should be understood to apply to the other act as well.

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Bathing Beach in *Bartholf v. Bd. of Review*, 36 N.J. Super. 349 (App. Div. 1955), decided a year later. The court there specifically quoted the reference to "Intervals of illness or disability . . . during which the employment with pay continues." While declaring it unnecessary to definitively resolve the matter, the court explicitly agreed that "periods of occasional or incidental illness for which the employer nevertheless pays the employee the usual wages as a matter of custom or policy may be regarded as qualifying base weeks" *Id.* at 356.

Finally, in the only reported decision elsewhere squarely addressing the issue, the Commonwealth Court of Pennsylvania held that paid sick leave constitutes remuneration under that state's unemployment compensation law. In *Unemployment Comp. Board of Review v. Buss*, 362 A. 2d 1113 (Pa. Commw. Ct. 1976), the functions being performed by the claimant for the Postal Service were transferred to another city. He was then offered the right to go on paid annual leave or sick leave, but chose instead to go on unpaid leave status in order to qualify for a pension. In holding him ineligible for unemployment benefits for this period, the court stated:

Claimant was entitled to annual and/or sick leave pay for services performed. This leave pay, which he chose not to accept, accrued to him as a result of services performed. Since he is owed remuneration for the claim weeks, the Board did not err when it denied claimant unemployment compensation benefits. [*Id.* at 1115.]

Similarly, sick leave payments would, for the same reason, constitute remuneration properly includable in a worker's base year earnings for purposes of determining his benefit eligibility and amount.

The Pennsylvania court's holding, in *Buss*, and the dicta to the same effect expressed by our Appellate Division in *Paramus Bathing Beach* and *Bartholf*, are consistent with the nature of paid sick leave. Such leave as generally understood in public and private employment represents a remunerative benefit granted an ill or injured worker in consideration for services performed for a specific period of time or as a general incident of the employment relationship. In the public sector the Civil Service Act, for example, defines sick leave as "absence from post of duty of an employee because of illness, accident, exposure to contagious disease, attendance upon a member of the employee's immediate family seriously ill requiring the care or attendance of such employee, or absence caused by death in the immediate family of said employee." N.J.S.A. 11:4-2. The act allows classified public employees one day of paid sick leave for each month of service in the first calendar year following permanent appointment, and 15 days in each succeeding year. *Ibid.* This allowance is similar to sick leave benefits typically granted in private employment, whether under a collective bargaining agreement or as a matter of customary practice.³

In sum, as the Pennsylvania Supreme Court has put the matter, "sick leave like vacation pay is an incident or benefit provided under the work agreement and is an entitlement like wages for services performed." *Temple*

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v. Pennsylvania Dept. of Highways, 285 A. 2d 137, 139 (1971). *Cf. Bd. of Ed. Piscataway Tp. v. Piscataway Main.* 152 N.J. Super. 235, 243-244 (App. Div. 1977) ("Unquestionably, sick leave or other leaves of absence are matters that directly and intimately affect the terms and conditions of employment.") No less than vacation, holiday and severance pay, therefore, paid sick leave constitutes remuneration for purposes of the Unemployment Compensation and Temporary Disability Benefits Law.

For these reasons, it is our opinion that sick leave payments to public or private employees are "wages" within the meaning of the Unemployment Compensation Law and the Temporary Disability Benefits Law. They must therefore be included in a worker's earnings in determining his eligibility for benefits and in computing the payroll taxes paid by the worker and his employer under these programs.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: MICHAEL S. BOKAR
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3. The same is not true, on the other hand, of sick leave injury (SLI) benefits paid to public employees under the Civil Service Act. In addition to the 15 days of paid sick leave to which classified employees are entitled under N.J.S.A. 11:4-2, that provision directs the Civil Service Commission to adopt regulations allowing payments "for longer periods" at or below the worker's regular salary where he sustains a work-related injury or illness. The Commission's regulations governing SLI, as amended in January 1980 (*see* 12 N.J.R. 383(b)), state that where benefits are recommended by the appointing authority and approved by the Department of Civil Service, an employee who is unable to perform his job shall receive benefits at full pay for a period not exceeding one year. N.J.A.C. 4:1-17.9(a). Significantly, the regulations provide that SLI benefits must be reduced by the amount of any worker's compensation benefits awarded the employee for the same disability. *Ibid.* It is implicit from these regulations that SLI constitutes, like worker's compensation itself, wage-loss replacement benefits rather than remuneration for services rendered. Hence, SLI benefits are not "wages" or "remuneration" within the meaning of the unemployment and temporary disability benefits law.
