

**Note from the Attorney General's Office:**

1987 Op. Att'y Gen. No. 87-029 was overruled by  
2013 Op. Att'y Gen. No. 2013-013.

**OPINION NO. 87-029****Syllabus:**

1. Neither a board of county commissioners nor an elected county official mentioned in R.C. 325.27 may institute a sick leave donation policy in which county employees may voluntarily elect to contribute a portion of their accumulated sick leave to another county employee, since R.C. 124.38 limits the permissible uses for sick leave by county employees.
2. Although R.C. 124.38 constitutes a minimum entitlement to hours of paid sick leave for, among others, the county employees compensated in accordance with R.C. 325.17, which may be increased in amount by an appointing authority pursuant to R.C. 325.17 for employees within the appointing authority's office, R.C. 124.38 does not provide authority for either a board of county commissioners or the county elected officials mentioned in R.C. 325.27 to allow sick leave to be used for any purpose other than those stated in R.C. 124.38.
3. There is no authority for a board of county commissioners to institute a countywide policy to increase hours of paid sick leave or to increase the permissible uses for sick leave beyond those set forth in R.C. 124.38. The authority to increase hours of paid sick leave is vested in an

appointing authority pursuant to the power to fix compensation for employees within his office, but such authority is limited in that the increased hours of paid sick leave may only be used for the purposes stated in R.C. 124.38.

To: Jeffrey M. Welbaum, Miami County Prosecuting Attorney, Troy, Ohio  
By: Anthony J. Celebrezze, Jr., Attorney General, May 29, 1987

You have asked for my opinion on several questions regarding the authority of a board of county commissioners or the elected county officials to increase sick leave benefits and to institute a sick leave donation program in which county employees may voluntarily elect to contribute a portion of their sick leave credit to a sick leave bank for use by other county employees who are terminally ill and who have exhausted all other paid leave. Specifically, you have asked the following questions:

1. Would such a policy be within the lawful authority of the elected county officials or board of county commissioners under Ohio Revised Code 124.38 or Ohio Revised Code 325.17?
2. Is R.C. 124.38 merely a guarantee of a minimum benefit which may be increased by the county elected officials or the board of county commissioners?
3. May a board of county commissioners lawfully institute a county-wide policy to increase sick leave benefits, or is the authority to increase or regulate sick leave limited to county elected officials via R.C. 325.17?

Since a response to your first question necessitates an analysis of the statutory scheme governing compensation, including sick leave, for county employees and an explanation of the roles of individual county appointing officers and the board of county commissioners in regard to compensation, I will address all three of your questions in response to the first.

You have inquired about the authority of either a board of county commissioners or the elected county officials to institute a sick leave donation policy pursuant to either R.C. 124.38 or R.C. 325.17. It is necessary, initially, to distinguish the general authority of the board of county commissioners and individual county officials<sup>1</sup> in regard to the compensation of county employees. As for the authority

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<sup>1</sup> Since you have asked specifically about R.C. 325.17, I will assume that your question concerns a sick leave donation policy for county employees appointed by the officials mentioned in R.C. 325.27. The authority of such officials to employ, appoint, and compensate arises from R.C. 325.17, which provides, in part:

The officers mentioned in section 325.27 of the Revised Code [county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, county recorder] may appoint and employ the necessary deputies.

of a board of county commissioners, I explained in 1984 Op. Att'y Gen. No. 84-092 at 2-315 to 316:

With regard to the compensation of county employees generally, the board of county commissioners has limited authority. As a general rule, in the absence of a controlling collective bargaining agreement,<sup>2</sup> the compensation of county employees is fixed by the appointing authority, subject to any statutory limitations<sup>[3]</sup>....

The General Assembly has granted the board of county commissioners limited authority with respect to the compensation of county employees. For example, concerning the provision of a policy for the payment of accumulated, unused sick leave, R.C. 124.39(C) authorizes a board of county commissioners to vary the policy set for county employees by R.C. 124.39(B). See Op. No. 84-061; 1983 Op. Att'y Gen. No. 83-073. Pursuant to R.C. 305.171, the board of county

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assistants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employees and discharge them, and shall file certificates of such action with the county auditor. Such compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for such office. (Emphasis added.)

I note, however, that there are elected county officials other than those mentioned in R.C. 325.27, who are authorized to fix compensation, including sick leave, for their employees. See, e.g., R.C. 305.13-.17; Op. No. 84-092 (the board of county commissioners is the appointing authority for some, but not all, county employees); R.C. 309.06 (the prosecuting attorney "may appoint such assistants, clerks, and stenographers as are necessary...and fix their compensation, not to exceed, in the aggregate, the amount fixed by the judges of [the court of common pleas]"); 1983 Op. Att'y Gen. No. 83-042; R.C. 313.05 (county coroner). The analysis set forth herein will apply to all county appointing authorities, who are authorized to fix compensation, subject to any statutes which may constrict that authority with regard to a particular office. For purposes of this opinion, however, my discussion of the board's authority will assume the board is not acting in the capacity of an appointing authority.

<sup>2</sup> I assume for purposes of this opinion that the employees about whom you are inquiring are not governed by a collective bargaining agreement which defines the wages, hours, and terms and conditions of their public employment. See R.C. 4117.10(A); 1984 Op. No. 84-092.

<sup>3</sup> 1984 Op. No. 84-092 cites, as an example, the limitation provided in R.C. 325.17 which states that the "compensation [of employees of those offices mentioned in R.C. 325.27] shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for such office."

commissioners may procure and pay for the cost of various group insurance policies for county officers and employees and their immediate dependents. See generally 1981 Op. Att'y Gen. No. 81-082 (county commissioners' provision of dental and eye care insurance for county welfare department employees); Op. No. 80-030 (uniformity of insurance benefits for county employees provided by county commissioners not required).

I am, however, not aware of any statute which authorizes the board of county commissioners to equalize all components of compensation for all employees of the county. (Footnotes in original omitted, footnote added.)

Similarly, there is no authority for a board of county commissioners to institute sick leave policies on a countywide basis since the board's authority to fix compensation which includes sick leave and other fringe benefits, see Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (per curiam), is limited to those instances in which the board of county commissioners is the appointing authority. See R.C. 305.13-.17; note 1 supra.

The power to fix compensation, including sick leave, is vested in county appointing authorities such as those mentioned in R.C. 325.27. R.C. 124.38<sup>4</sup> does not address an appointing authority's power to fix compensation, nor does it provide authority for either a board of county commissioners or county elected officials to grant sick leave. Rather, it merely establishes an entitlement to receive a statutory minimum number of hours of paid sick leave for each eighty hours of completed service. Ebert; see also Cataland v. Cahill, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984) (sick leave and vacation leave prescribed by statute are minimums only). The power to fix compensation, including sick leave, which is vested in those county appointing authorities mentioned in R.C. 325.27, is distinguishable from the minimum entitlement to receive sick leave which is conferred upon employees by R.C. 124.38. As previously indicated, R.C. 325.17 vests those officers mentioned in R.C. 325.27 with the authority to "appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices" and to "fix the compensation of such employees." The Ohio Supreme Court has established that such power to employ and fix compensation necessarily includes the power to allow sick leave and other fringe benefits as forms of compensation. Ebert; see 1986 Op. Att'y Gen. No. 86-027; 1984 Op. Att'y Gen. No. 84-061; 1981 Op. Att'y Gen. No. 81-052; 1980 Op. Att'y Gen. No. 80-007. In Op. No. 81-052, my predecessor explained at 2-202 that:

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<sup>4</sup> R.C. 124.38 provides, in part:

Each employee in the various offices of the county, municipal, and civil service township service, each employee of any state college or university, and each employee of any board of education for whom sick leave is not provided by [R.C. 3319.141], shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. (Emphasis added.)

The authority [of a public employer] to provide fringe benefits flows directly from the authority to set compensation and is circumscribed only by apposite statutory authority which either ensures a minimum benefit entitlement or otherwise constricts the employer's authority vis a vis a particular fringe benefit....If an applicable statute constitutes a minimum statutory entitlement to a particular benefit, the public employer may, pursuant to its power to compensate and in the absence of any statute constricting its action in the particular case, choose to provide such benefit in excess of the minimum statutory entitlement. If an applicable statute limits the general authority of the public employer to compensate its employees with the particular fringe benefit in question, it must, of course, be viewed as a restriction upon the employer's authority to grant the particular benefit.

The authority to grant sick leave benefits as a component of compensation, pursuant to R.C. 325.17, is subject to the minimum statutory entitlement conferred by R.C. 124.38. R.C. 124.38 constricts the appointing authorities' power to allow sick leave in that it establishes a minimum entitlement to all county employees who have completed the requisite number of hours of service. Ebert. The statute "neither establishes nor limits the power of a political subdivision. Rather, it ensures that the employees of such offices will receive at least a minimum sick leave benefit or entitlement." Id. at 32, 406 N.E.2d at 1099-1100 (emphasis in original). It is clear, therefore, that each appointing authority must provide his employees with at least "four and six-tenths hours" of paid sick leave for "each completed eighty hours of service." R.C. 124.38. Beyond this minimum, an appointing authority may allow his employees a greater number of accruable hours of paid sick leave but he may not decrease allowable sick leave below the amount set forth therein. Ebert.

The authority to grant sick leave benefits as a component of compensation pursuant to R.C. 325.17 is limited not only by the statutory minimum in R.C. 124.38, but is also limited "to the [aggregate] amount [of compensation] fixed by the board of county commissioners for such office." R.C. 325.17. This limitation does not give the board of county commissioners any authority with regard to the number of employees to be appointed or the amount of compensation to be paid to individual employees; it allows the board authority only to place a ceiling upon the aggregate amount of compensation which may be expended for the employees of each office. See generally 1987 Op. Att'y Gen. No. 87-018.

While the board of county commissioners sets the aggregate amount of compensation for each of the offices mentioned in R.C. 325.27, it has no other authority with regard to sick leave policies which may be set by the individual appointing authorities under R.C. 325.17. Rather, it is the appointing authorities who are authorized to determine whether their employees will receive fringe benefits beyond those prescribed by statute. Op. No. 84-061 at 2-198. Since R.C. 124.38 sets a minimum entitlement to sick leave, Ebert, an appointing authority must provide, as a minimum, the amount set forth therein.

In addition to the minimum set by R.C. 124.38; and the aggregate amount of compensation set by the board of county commissioners, there is a further restriction in R.C. 124.38 which prohibits the type of sick leave donation program you have proposed. R.C. 124.38 provides, in part, that "[e]mployees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the employee's immediate family" (emphasis added). Thus, while Ebert approves the allowance of a greater number of hours of paid sick leave, an employee may use sick leave only for those purposes stated in R.C. 124.38.<sup>5</sup> South Euclid Fraternal Order of Police v. D'Amico, 13 Ohio App. 3d 46, 468 N.E.2d 735 (Cuyahoga County 1983). There is a distinction between an appointing authority's power to increase the number of hours of allowable sick leave and the authority to allow sick leave to be used for a purpose not stated in R.C. 124.38. R.C. 124.38 establishes a minimum entitlement to a number of hours of paid sick leave, but, in stating the permissible uses for sick leave, limits the scope of the benefit. The list of permissible uses provided for in R.C. 124.38 is not a minimum as is the entitlement to four and six-tenths hours for every eighty hours of completed service, but rather, the stated uses define sick leave. See South Euclid. The proposed sick leave donation policy, in which employees may donate sick leave to be used by other employees, clearly goes beyond the authorized uses of sick leave prescribed by R.C. 124.38. Therefore, I am of the opinion that such a policy is not permissible under R.C. 124.38.

Further, with regard to the authority of a board of county commissioners, it is axiomatic that as a creature of statute, it has only those powers expressly granted by statute or necessarily implied therefrom. State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947). In this instance, there is no statute authorizing the board of county commissioners to institute a sick leave donation policy on a countywide basis.

R.C. 124.38 constricts the power of appointing authorities in fixing compensation by establishing a minimum entitlement to hours of paid sick leave and by defining the permissible uses for sick leave. Thus, while the employees of the offices mentioned in R.C. 325.27 may receive the minimum entitlement to sick leave under R.C. 124.38 or a greater amount of sick leave pursuant to the appointing authority's power to fix

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<sup>5</sup> I note, also, that the rules promulgated by the Department of Administrative Services, regarding sick leave for employees of county offices, apply a restrictive interpretation to the allowable uses for sick leave, see 1 Ohio Admin. Code 123:1-32-05(A)(1)-(6) (an employee may use sick leave "only" for the reasons stated therein), and provide that in the event an employee has inadequate sick leave, "[i]f any disabling illness or injury continues past the time for which an employee has accumulated sick leave, the appointing authority may authorize a leave of absence without pay...or if the employee is eligible, recommend disability leave benefits in accordance with Chapter 123:1-33 of the Administrative Code." 1 Ohio Admin. Code 123:1-32-06.

compensation under R.C. 325.17, they are limited to the defined uses for sick leave set forth in R.C. 124.38, and the appointing authorities are without power to vary the permissible uses set forth therein. In addition, the county commissioners' authority under R.C. 325.17 is limited to fixing the aggregate amount of compensation for each office mentioned in R.C. 325.27 and does not extend to establishing fringe benefit policies since such benefits flow from the power to fix compensation. Furthermore, although R.C. 124.38 entitles all county employees to the statutory minimum amount of sick leave, no statute authorizes a board of county commissioners, or other elected county official, to establish a sick leave policy which permits sick leave to be used for purposes beyond those set forth in R.C. 124.38. It is, therefore, my opinion, and you are advised that:

1. Neither a board of county commissioners nor an elected county official mentioned in R.C. 325.27 may institute a sick leave donation policy in which county employees may voluntarily elect to contribute a portion of their accumulated sick leave to another county employee, since R.C. 124.38 limits the permissible uses for sick leave by county employees.
2. Although R.C. 124.38 constitutes a minimum entitlement to hours of paid sick leave for, among others, those county employees compensated in accordance with R.C. 325.17, which may be increased in amount by an appointing authority pursuant to R.C. 325.17 for employees within the appointing authority's office, R.C. 124.38 does not provide authority for either a board of county commissioners or the county elected officials mentioned in R.C. 325.27 to allow sick leave to be used for any purpose other than those stated in R.C. 124.38.
3. There is no authority for a board of county commissioners to institute a countywide policy to increase hours of paid sick leave or to increase the permissible uses for sick leave beyond those set forth in R.C. 124.38. The authority to increase hours of paid sick leave is vested in an appointing authority pursuant to the power to fix compensation, for employees within his office, but such authority is limited in that the increased hours of paid sick leave may only be used for the purposes stated in R.C. 124.38.