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NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

Attendance and Leave Manual

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Section 21.8 - Worker's Compensation Leave

- [21.8 Rules pages - Worker's Compensation Leave](#)
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- [General Information Bulletin 96-01](#), Physical Capabilities Form
- [General Information Bulletin 95-02](#), Workers' Compensation Update
- [General Information Bulletin 94-03](#), Revised Workers' Compensation Benefit Overview Chart
- [Policy Bulletin 94-02](#), M/C Workers' Compensation Program - Effective September 1, 1994
- [Policy Bulletin 93-05](#), M/C Interim Workers' Compensation Program
- [Policy Bulletin 93-04](#), Workers' Compensation Medical Evaluation Program - 1991-1995 Negotiated Agreement for the Professional, Scientific and Technical Services Unit
- [General Information Bulletin 93-04](#), Reporting Workers' Compensation Incidents to the State Insurance Fund for Individuals Participating in the Working Toward Independence Program
- [General Information Bulletin 93-03](#), Workers' Compensation Update
- [Policy Bulletin 93-02](#), State/Council 82 Workers' Compensation Leave Program - 1991-1995 Negotiated Agreements for Security Services and Security Supervisors Units
- [General Information Bulletin 93-02](#), Workers' Compensation Statutory Benefit Program Update
- [Policy Bulletin 93-01](#), State/CSEA and State/DC-37 Mandatory Alternate Duty Policies -1991-95 Negotiated Agreements
- [Policy Bulletin 92-04](#), Access to Employee Personal History Records by State Insurance Fund Investigators
- [General Information Bulletin 92-03](#), Revised Sample Workers' Compensation Letter to Inform Employees of the Statutory Benefit Program
- [General Information Bulletin 92-02](#), New State Insurance Fund Report based on Form C-8, "Notice That Payment of Compensation for Disability has been Stopped or Modified"
- [Policy Bulletin 92-01](#), Workers' Compensation Items 1991-1995 Negotiated Agreements ASU, ISU, OSU and RRSU
- [General Information Bulletin 91-01](#), Workers' Compensation Supplemental Pay Program: Use of Sick Leave and Sick Leave at Half-Pay
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Service and its impact on Sections 28.1 and 28-1.8 of the Attendance Rules

- [General Information Bulletin 90-02](#), ...changes specified in the office of the State Comptrollers Payroll Bulletin No. P-665 issued on September 4, 1990
- [General Information Bulletin 90-01](#), Workers' Compensation Program Update
- [Advisory Memorandum 89-02](#), Workers' Compensation Supplemental Pay Program - Restoration of Credits Charged After 39 Weeks of Benefit

[Drawing of Earned Credits Upon Separation \(Part 23\)](#)

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General Information Bulletin No. 1994-03

Section 21.8 Workers' Compensation Leave - December 1994

TO: State Departments and Agencies

FROM: Peter Elmendorf, Director; Personnel Services Division

SUBJECT: Revised Workers' Compensation Benefit Overview Chart

The attached Workers' Compensation Benefit Chart has been revised to include the workers' compensation program that applies to employees designated Managerial/Confidential for accidents occurring on or after September 1, 1994.

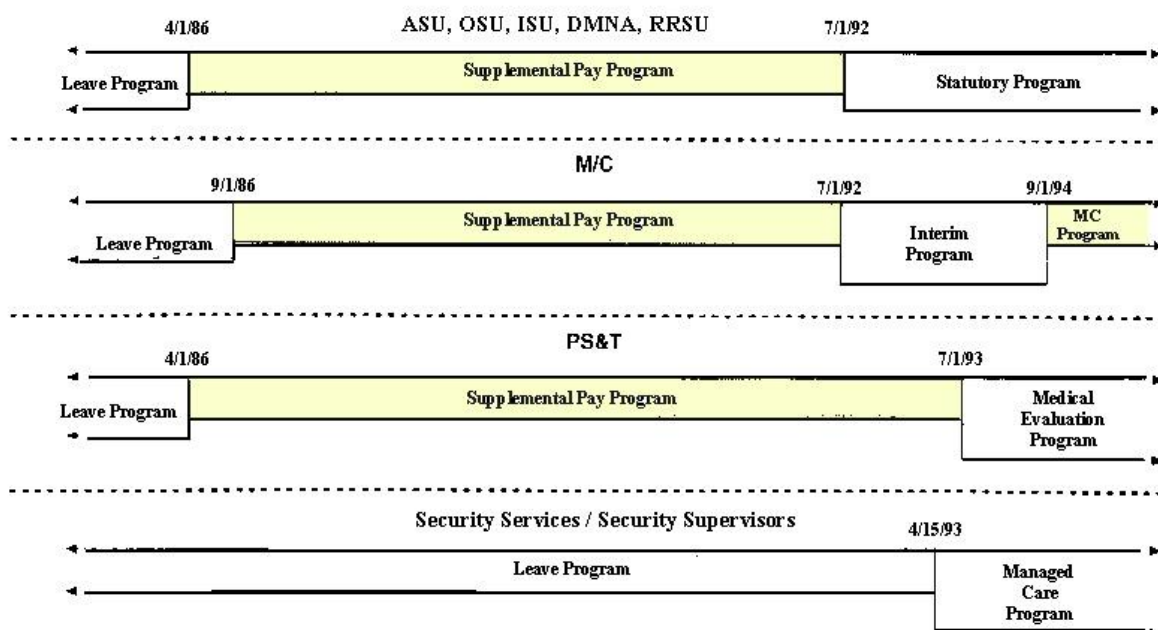
This revised chart is intended to provide agencies with a brief summary of the major components of each of the workers' compensation programs applicable to State employees. This incorporates and updates the information provided on the charts included as Appendix B in Policy Bulletins #92-01 and #93-04. Please refer to Section 21.8 of the Attendance and Leave Manual for a detailed description of each benefit.

Also included is a Workers' Compensation Benefit timeline detailing the effective dates of implementation by negotiating unit.

For assistance or further information in determining an employee's workers' compensation entitlement, please contact the Employee Relations Section at (518) 457-5167.

Attachments:

TIMELINE OF WORKERS' COMPENSATION PROGRAMS*



*The Program is determined by the date of the accident and negotiating unit regardless of the date of absence.

WORKER'S COMPENSATION BENEFIT OVERVIEW

BENEFIT	EMPLOYEE GROUPS COVERED	WAITING PERIOD	BASIC PROVISIONS
NYS Workers' Compensation Law	All <i>employees</i>	7 calendar days for wage replacement; after 14 calendar days, retroactive to first day of disability	Medical expenses Wage Replacement 2/3 avg. wkly. salary up to: \$340 max 7/1/90 \$350 max 7/1/91 \$400 max 7/1/92
Leave Program	Security Services & Security Supervisors (<i>accidents prior to 4/15/93</i>)	None	<ul style="list-style-type: none"> 6 months' leave with full pay without charge to credits with benefit continuation Use of credits after 6 months SL at 1/2 pay or IPP LWOP Section 71 coverage
	ASU, ISU, OSU, DMNA, PS&T, RRSU (<i>accidents prior to 4/1/86</i>) M/C (<i>accidents prior to 9/1/86</i>)	<ul style="list-style-type: none"> 10 workdays per year/per accident Provision for waiver Advance of sick leave if credits are exhausted 	
Supplemental Pay Program	ASU, ISU, OSU, DMNA, RRSU (<i>accidents on or after 4/1/86 and prior to 7/1/92</i>) M/C (<i>accidents on or after 9/1/86 and prior to 7/1/92</i>) PS&T (<i>accidents on or after 4/1/86 and prior to 7/1/93</i>)	Same as WC Law	<ul style="list-style-type: none"> 9 months' leave with <i>net</i> pay without charge to credits with benefit continuation Use of credits SL at 1/2 pay or IPP LWOP Section 71 coverage
Statutory Program	ASU, ISU, OSU, DMNA, RRSU (<i>accidents on or after 7/1/92</i>)	Same as WC Law	<ul style="list-style-type: none"> 12 months' leave without pay with benefit continuation Section 71 coverage <i>plus</i> Mandatory Alternate Duty for employees found to be 50% or less disabled and within 45 days of full recovery Out-of-title work allowed
Council 82 Managed Care Program	Security Services & Security Supervisors (<i>accidents on or after 4/15/93</i>)	Same as WC Law or	Choice of WC Law Benefit only or
		-----	-----

		None	<p>Managed Care Program including:</p> <ul style="list-style-type: none"> • Leave Program <i>plus</i> • Mandatory Medical Evaluation <i>plus</i> • Mandatory Limited Duty for employees 50% or less disabled <p>No out-of-title work allowed</p>
PS&T Medical Evaluation Program	PS&T (<i>accidents on or after 7/1/93</i>)	Same as WC Law	<p>Medical Evaluation Program including</p> <ul style="list-style-type: none"> • 9 months' leave without pay with benefit continuation plus 60% gross pay minimum for disability greater than 50% • LWOP • Section 71 coverage <i>plus</i> • Mandatory Medical Evaluation <i>plus</i> • Mandatory Alternate Duty for employees found to be 50% or less disabled and within 45 days of full recovery <p>Out-of-title work allowed (Program may be waived, at employee request, which provides WC Law benefit only)</p>
M/C Interim Program	M/C (<i>accidents on or after 7/1/92 and prior to 9/1/94</i>)	None	<ul style="list-style-type: none"> • Leave with full pay with charge to credits from first day of disability • Use of all credits • Sick Leave at 1/2 pay or IPP • LWOP • Section 71 coverage
M/C Program	M/C (<i>accidents on or after 9/1/94</i>)	None	<ul style="list-style-type: none"> • Leave with full pay with charge to credits from first day of disability with benefit continuation • Use of all credits • Sick Leave at 1/2 pay or IPP • LWOP • Section 71 coverage

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Policy Bulletin 93-04

June 23, 1993

Section 21.8

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File this material in the section of the manual referenced above.

TO: State Departments and Agencies

FROM: Josephine L. Gambino, Commissioner *J.L.G.*

SUBJECT: Workers' Compensation Medical Evaluation Program -
1991-1995 Negotiated Agreement for the
Professional, Scientific and Technical Services Unit

The following material has been prepared to assist you in implementing the new workers' compensation provisions contained in the 1991-1995 agreement between the State and PEF which are effective for accidents on or after July 1, 1993.

If you have any questions concerning the implementation or administration of the PS&T Workers' Compensation Medical Evaluation Program, please contact the Employee Relations Section of this Department at (518) 457-5167.

Attachments

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NEW YORK STATE DEPARTMENT OF CIVIL SERVICE State Personnel Management Manual

Policy Bulletin #93-02

2200 Separations and Leaves

May 12, 1993

This Policy Bulletin is a re-Issuance of Policy Bulletin #90-02, issued July 5, 1990, which it replaces. A topic on the Americans with Disabilities Act has been added (see below). The original sample notification letters have been revised to include reference to the ADA and a fourth letter, to be used upon denial of a request to be restored to duty, has been added. In other respects this bulletin remains unchanged.

SEPARATION FOR OCCUPATIONAL DISABILITY AND SUBSEQUENT REINSTATEMENT Procedures for §71- Rule 5.9

Background

The State Legislature granted security in employment to certain classes of State employees during good conduct and efficient service by enacting §75 of the Civil Service Law. Disciplinary proceedings under that section were the sole means of abrogating that right of tenure. The Legislature, over the years, enacted §§71, 72, and 73, to provide more humane procedures to abrogate that right of tenure in cases where a medical condition causes inability to perform the essential duties of the job.

The State Court of Appeals and the United States Supreme Court have held that a leave of absence, imposed by the employer, either without pay, or with pay dependent on the employee's expenditure of an accrued leave account balance, is a sufficient infringement of the property right in employment granted by Civil Service Law §75 as to trigger a right to due process in any proceeding to diminish that property right. Voluntary leave can become involuntary leave when one is prevented by the employer from returning to duty. The courts have also held that an employee cannot be held to the requirement to exhaust administrative procedures, unless the employee is first advised that they exist and provided notice of time limits and other technical requirements.

It must also be understood that §§71, 72, and 73 do not grant tenure to employees who do not have tenure under §75 or an applicable collective bargaining agreement.

It is in that framework that the new Rule 5.9 was drafted, not to establish new procedural requirements, but to inform State agencies of presumably

acceptable minimum standards of procedure as those standards have evolved in the courts over the past decade.

Legal Basis

Section 71 provides that covered employees shall be entitled to a leave of absence for at least one cumulative year (unless found to be permanently disabled) when disabled due to an occupational injury or disease as defined in the Workers' Compensation Law. This section then goes on to authorize reinstatement procedures following recovery from the disability for a person whose public employment was terminated because that disability exceeded a cumulative year or for a person whose employment terminated because of a finding of permanent disability. It gives little procedural guidance. There has been no change in this section of law; rather, Rule 5.9 was adopted to provide procedural guidance in connection with the granting of leave, return to duty during the course of that leave, termination of employment, and reinstatement to employment pursuant to §71. Section 71 Civil Service Law and Rule 5.9 relate to workers' compensation disabilities only. Sections 72 and 73 of the Civil Service Law provide for leave, termination and associated standards of due process for proceedings in connection with ordinary disability. They are not interchangeable.

Applicability

Rule 5.9 applies to all employees subject to §71 of the Civil Service Law. This includes all State employees within the classified service, including probationers. The only limitation on that inclusion is that the rights and procedures of §71 do not serve to extend employment beyond the point at which it would otherwise lawfully end. For example, an unsatisfactory probationer could be terminated without resort to these procedures, if the required minimum eight weeks of active employment under Rule 4.5 of the Rules for the Classified Service had already expired. Similarly the employment of a temporary or provisional employee is not extended by §71 beyond the point it would otherwise lawfully end. The appointing authority should be mindful, however, of the prohibition in the Workers' Compensation Law against any form of retaliation against an individual for prosecuting a claim under that law.

Summary of Changes

The major changes effected by Rule 5.9 include:

- an initial notice requirement no later than the 21st day of absence from work (cumulative total of 21 workdays);
- notice of pending termination at least 30 days prior to the proposed effective date of termination;
- procedures for resolving disputes concerning fitness for duty in connection with alleged permanent disability, return from leave, or reinstatement following termination under §71.

Initial Notice Requirement

Rule 5.9(b) requires that no later than the 21st workday of the employee's absence, the appointing authority provide written notice of the terms and conditions of the leave to the employee who is granted leave due to an on-the-job injury or illness. Specifically, this notice must contain the following information: beginning date of the leave; entitlement to absence for at least one cumulative year during continuing disability unless sooner found to be permanently disabled, or terminated for some other lawful reason; entitlement to apply to the appointing authority for return to duty at any time during leave; entitlement to a hearing to contest a finding of unfitness for restoration to duty during leave pursuant to Rule 5.9(d); termination of employment at the end of the workers' compensation leave which is one cumulative year unless extended by the appointing authority or ended earlier due to a finding of permanent disability; entitlement to apply to the Department of Civil Service for reinstatement following termination but within one year of the end of the disability, including entitlement to a hearing to contest a finding of unfitness for reinstatement pursuant to §71 and Rule 5.9(e).

Notice of Pending Termination

Except where termination occurs as the result of a hearing, the appointing authority is required to provide an employee with at least 30 days' notice of the effective date of the proposed termination. The notice should not be served more than 60 days before the proposed termination date. Such notice may be served in person or by mail and must include the following information: the effective date of the proposed termination; the reason for the termination (e.g., a finding of permanent disability, completion of a cumulative year of absence, etc.); entitlement to apply before the proposed termination date for restoration to duty if found medically fit; obligation to submit to any required medical examinations; entitlement to a hearing to contest a finding of unfitness for restoration to duty pursuant to Rule 5.9(d); entitlement after termination to apply to the Department of Civil Service for reinstatement within one year of the end of disability, including entitlement to a hearing to contest a finding of unfitness for reinstatement pursuant to §71 and Rule 5.9(e).

While not required by the Civil Service Law, it would be good practice to include a suggestion in this notice, and in the final notice of termination, that the disabled employee contact the Employees' Retirement System promptly to determine whether an application for disability retirement is appropriate. There are short time limits for such applications that are rigidly applied.

Return from Leave

An employee may request to return from leave at any point during the leave, including during the 30-day period following notice of proposed

termination. However, the appointing authority need not entertain such requests more frequently than once every six months except that one such application must be acted on in any event if submitted during the final 30 days of workers' compensation leave. The appointing authority may permit return to work based solely on its own internal criteria which may include medical documentation provided by the employee.

Alternatively, the appointing authority may require that the employee be examined by a physician designated by the appointing authority, such as the Employee Health Service, prior to allowing return to work. Where a medical examination is required, the appointing authority must provide both the examining physician and the employee with a statement of the employee's regularly assigned duties. An employee found fit to perform these duties by the examining physician shall be returned to duty. Where the designated physician finds an employee unfit for duty, the appointing authority, based upon consideration of all information available, may permit the employee to return to duty in accordance with his/her request or may deny the return to work.

An employee who has been denied return to work or found to be permanently disabled shall be provided written notice of that decision. This written notice must be delivered in person or by certified mail and must include the following information:

the reason for the decision;

- entitlement to a hearing to appeal the decision;
- the procedures and time limits to apply for a hearing;
- a copy of the medical report and any other records on which the decision is based.

The employee has ten working days to appeal in writing. If the employee does not appeal, the workers' compensation leave continues until the expiration of such leave or until the employee makes another application to return to duty. Upon expiration of one year of leave, or upon an unappealed finding of permanent disability, the employee may be separated from service. (An employee can submit a written application to return to duty once every six months, or, in the discretion of the appointing authority, more frequently, and in any event during the final 30 days of the workers' compensation leave.)

If the employee appeals the denial of return to work or finding of permanent disability, a hearing officer appointed by the appointing authority will conduct a hearing. The employee may be represented by an attorney or an authorized union representative. The hearing officer shall receive documents, testimony, written and oral argument on the issues of the medical condition of the employee, the duties of the position and the employee's ability to perform those duties. The hearing officer shall submit the record and recommendations to the appointing authority, who shall, based on the record assembled by the hearing officer, issue a written finding of facts and a determination regarding the employee's status. The

employee may be returned to duty, continued on workers' compensation leave, or terminated upon a finding of permanent disability. Appointing authority determinations are final, subject only to judicial review under Article 78 of the Civil Practice Law and Rules.

In cases where the workers' compensation leave expires before the appointing authority has rendered a decision, and the delay was not occasioned by any action or inaction of the employee, the leave must be extended to include the date of the appointing authority's decision.

Notice of Termination

Upon termination, the employee must once again be notified of the right after termination to apply to the Department of Civil Service for reinstatement within one year of the end of disability, including entitlement to a hearing to contest a finding of unfitness for reinstatement. It also would be good practice to include a suggestion that the employee contact the Employees' Retirement System promptly to determine whether an application for disability retirement is appropriate. There are short time limits for such applications, which are rigidly applied.

Reinstatement Following Termination

Section 71 of the Civil Service Law provides that an employee terminated under that section who subsequently recovers at any time following termination has one year from the date the disability ceases to make application to the Department of Civil Service for reinstatement. Employees found medically fit to return to duty shall be reinstated or placed on a preferred list in accordance with that section.

Rule 5.9 establishes detailed procedures in connection with such reinstatement requests, which may not be made more than once every six months.

When the Department of Civil Service receives an application from a former employee for reinstatement, Civil Service will request from the former agency a statement of duties regularly required of employees in the title to which reinstatement is requested.

If receipt of that statement of duties would unduly delay the process, the Department of Civil Service will use the classification standard for the title. The Department of Civil Service will in turn provide to the former employee a copy of this statement of duties, along with notice of the date, time and place of the medical examination. Following the medical examination, the Department of Civil Service will notify the former employee by certified mail of the findings of the examining physician.

A former employee who is found by the examining physician to be fit to return to duty will be reinstated or placed on a preferred list in accordance with §71.

A former employee who is found unfit to return to duty will be notified by the Department of Civil Service of the right to apply in writing to the President of the Civil Service Commission, within ten days of service of the notice of the results of the medical examination, for a hearing.

If the former employee applies for a hearing, a hearing officer appointed by the Department of Civil Service will conduct a hearing. The former employee may be represented by an attorney or an authorized union representative. The hearing officer shall receive documents, testimony, and written and oral arguments on the issues of the medical condition of the former employee, the duties of the position, and the former employee's ability to perform those duties. The hearing officer shall submit the record and recommendations to the President of the Civil Service Commission who shall issue, based on the record assembled by the hearing officer, a written finding of facts and a determination either directing or denying the reinstatement.

The former employee may accept the President's determination or may file a written request within 30 days of service of that determination for review by the Civil Service Commission. The Commission's review is limited to the issue of manifest error and is based solely on the written record. The Commission's decision is final, subject to judicial review under Article 78 of the Civil Practice Law and Rules.

Americans with Disabilities Act: Reasonable Accommodation

Title 1 of the Americans with Disabilities Act (ADA) requires employers to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability to enable such employee to perform the essential duties of their position. The obligation to provide reasonable accommodation applies to all aspects of employment, including separations and leaves, and is ongoing, arising any time an employee's disability changes.

While the Technical Assistance Manual on Title I of the ADA issued by the Equal Employment Opportunity Commission notes that, in general, it is the responsibility of the employee to request an accommodation, it also provides that employers are responsible for notifying employees of its obligation to provide reasonable accommodation. Therefore, the Sample Notification Letters provided in this policy bulletin have all been revised to reflect the language required by the ADA.

Sample Notification Letters

The following sample letters meet the informational requirements of Rule 5.9. You should personalize these letters as appropriate. For example, you may want to include expressions of concern about the injury and the employee's condition, information about impact on insurances and other benefits, information on agency procedures, including return to work

procedures, etc. Alternatively, you should feel free to substitute your own letters provided they contain the same information included in the sample letters.

Sample Initial Notification

(to be sent before the expiration of 21 cumulative workdays of absence)

Dear

You have been placed on workers' compensation leave effective
--(DATE)--z

You have a right to a leave of absence from your position during your disability for one cumulative year or until sooner found to be permanently disabled, or terminated for some other reason. For specific information regarding workers' compensation benefits, please refer to the employee contract for your bargaining unit, or consult with this office.

You also have the right to apply for return to duty at any time during this leave; but this agency does not have to process more than one application in any six month period. In the event that you are scheduled for a medical examination to verify your fitness to return to duty and it is determined that you are not fit to return to duty, you have the right to a hearing to contest that finding. If you are found fit for duty by this agency, your leave will be terminated, and you will be scheduled to return to work.

If you do not return to work prior to the expiration of your workers' compensation leave, your employment can be terminated as a matter of law. You have the right thereafter to apply to the Department of Civil Service within one year of the end of your disability for a medical examination to determine your fitness to return to work. If you are fit to return to work, we will consider you for reinstatement to your position, if vacant, or to a similar position. If you cannot be reinstated at that time, your name will be placed on a preferred list pursuant to §71 of the Civil Service Law and Rule 5.9 of the Rules for the Classified Service.

As required by the Americans with Disabilities Act (ADA), it is the policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. If you are an individual with a disability, as defined by the ADA, you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office for an application for requesting such an accommodation or for further information concerning the ADA.

If you have any questions regarding the above, please contact this office by telephone at (PHONE).

Sample Notice of Pending Termination

(to be sent at least 30 and no more than 60 days prior to proposed termination date)

Dear

Pursuant to §71 of the Civil Service Law and Rule 5.9 of the Rules for the Classified Service, your workers' compensation leave will end, and your employment will terminate on --(DATE)--due to-- (REASON, E.G., FINDING OF PERMANENT DISABILITY /COMPUTATION OF ONE CUMULATIVE YEAR, ETC.)--

You have the right to apply to this office prior to that date for restoration to duty if you are medically fit to perform the duties of your position. If you apply, you may be required to submit to a medical examination to determine your fitness. If the examining physician finds that you are not fit, you have the right to a hearing to contest that finding pursuant to Subdivision (d) of Rule 5.9 of the Rules for the Classified Service. If you are found fit for duty by this agency, your leave will be terminated, and you will be scheduled to return to work.

After the termination of your employment, you have the right to apply to the Department of Civil Service within one year of the end of your disability for a medical examination to determine your fitness to return to work. If you are fit to return to work, we will consider you for reinstatement to your position, if vacant, or to a similar position. If you cannot be reinstated at that time, your name will be placed on a preferred list pursuant to §71 of the Civil Service Law and Subdivision (e) of Rule 5.9 of the Rules for the Classified Service.

As required by the Americans with Disabilities Act (ADA), it is the policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. If you are an individual with a disability, as defined by the ADA, you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office for an application for requesting such an accommodation or for further information concerning the ADA.

You may wish to contact the Employees' Retirement System by calling or writing the New York State Employees' Retirement System, The Alfred E. Smith State Office Building, Albany, New York 12244, phone (518) 474-7736, to determine your eligibility for various retirement benefits, including accidental disability retirement. You should do so as soon as possible in order to avoid possible ineligibility due to lateness.

If you have any questions regarding the above, please feel free to contact this office at ---(ADDRESS, PHONE)--

Sample Notice of Refusal to Restore to Duty

(to be sent to an employee upon denial of a request to be restored to duty)

Dear

Pursuant to §71 of the Civil Service Law and Rule 5.9(d) of the Rules for the Classified Service, your request for restoration to duty from your workers' compensation leave is being denied based on the results of the medical examination conducted by (EXAMINING PHYSICIAN on (DATA, which found that you are (unfit to return to duty at this time) or (permanently incapacitated from performing the duties of your position).

You have the right to a hearing to contest this determination. You have the right to be represented at the hearing by an attorney or a representative of your labor organization. To request a hearing, you must apply in writing to this office at (ADDRESS, PHON\$ within 10 working days of service of this letter. A copy of the medical report on which this determination is based is enclosed. (ANY OTHER RECORDS ON WHICH THE REFUSAL TO RESTORE TO DUTY WAS BASED SHOULD ALSO BE INCLUDED).

As required by the Americans with Disabilities Act (ADA), it is policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. If you are an individual with a disability, as defined by the ADA, you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office at the address noted above for an application for requesting such an accommodation or for further information concerning the ADA.

If you have any questions, please feel free to contact this office at - ADDRESS -, - PHONE.

Sample Notice of Termination

(to be sent following termination)

Dear

Your workers' compensation leave ended and your employment with this agency ended effective close of business on --- (DATE) --- due to --- (REASON) ---.

If you recover from your disability in the future, you have the right under Section 71 of the Civil Service Law and Rule 5.9 of the Rules for the Classified Service, to apply to the New York State Department of Civil Service within one year of the end of your disability for a medical

examination to determine your fitness to return to work. If you are fit to return to work, we will consider you for reinstatement to your position, if vacant, or to a similar position. If you cannot be reinstated at that time, your name will be placed on a preferred list.

Your application for medical examination may be addressed to the New York State Department of Civil Service, Employee Health Service, The W. Averell Hardman State Office Building Campus, Albany, New York 12239.

If you are not found medically fit for return to duty by the Department of Civil Service, you have the right to a hearing to contest that finding.

As required by the Americans with Disabilities Act (ADA), it is the policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. If you are an individual with a disability, as defined by the ADA, you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office for an application for requesting such an accommodation or for further information concerning the ADA.

You should consider contacting the Employees' Retirement System by calling or writing the New York State Employees' Retirement System, The Alfred E. Smith State Office Building, Albany, New York 12244, phone (518) 474-7736, to determine your possible eligibility for various retirement benefits; including accidental disability retirement. If you intend to do so, you should act promptly.

If you have any questions, please feel free to contact this office at
-(ADDRESS, PHONE)

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**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Advisory Memorandum #09-04**

2200 Separations and Leaves

December 2009

THIS ADVISORY MEMORANDUM SUPPLEMENTS POLICY BULLETIN 93-02 IN SECTION 2200, SEPARATIONS AND LEAVES. PLEASE FILE THIS MEMORANDUM WITH POLICY BULLETIN 93-02. NOTE THAT THE "SAMPLE NOTICE OF PENDING TERMINATION" (PAGE 9) SHOULD BE AMENDED TO INCLUDE THE LANGUAGE BELOW. FOR REFERENCE, A NEW "SAMPLE NOTICE OF PENDING TERMINATION" APPEARS ON PAGE 2 OF THIS ADVISORY MEMORANDUM.

Section 5.9 of 4 NYCRR (Rules for the Classified Service) requires that appointing authorities provide 30 days notice of proposed termination to employees facing dismissal under §71 of the CSL.

An appointing authority recently asked this question: if an employee so notified of ensuing termination returned to work briefly, and then was absent *due to the same disabling condition*, would the appointing authority be required to provide another 30-days notice of termination? **The answer is "NO, not if the absence occurs within 30 days of the restoration to service."**

Section 5.9(c) requires that termination from service shall not be effective until 30 days from service upon the employee of a notice of impending termination containing a proposed effective date for termination. This section does not require a new notice after a short-lived return to work as long as the employee is initially notified how the effective termination date is determined if the employee is again absent and exhausts all leave within 30 days of restoration to service.

The initial letter of termination should notify employees that if a return to duty is short-lived and the employee again goes out on leave for the same occupational injury or disease, termination will ensue without any additional notice as soon as any remaining leave is exhausted. Employers should also notify any employee restored to service of the amount of remaining leave, if any, so the employee is aware in advance of the effective date for termination if absence recurs within 30 days of restoration. Counsel advises that this language should be used in the Notice of Pending Termination:

If restored to duty, you will be informed of any remaining worker's compensation leave and if you return to workers' compensation leave for the same occupational injury or disease WITHIN 30 DAYS OF RESTORATION, you may be immediately terminated without further notice when your cumulative year of leave has been exhausted.

A complete "Sample Notice of Pending Termination" appears on the next page.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Advisory Memorandum #09-04

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December 2009

Sample Notice of Pending Termination

(to be sent at least 30 and no more than 60 days prior to the proposed termination date)

Dear _____:

Pursuant to §71 of the New York State Civil Service Law and §5.9 of the Rules for the Classified Service, your workers' compensation leave will end, and your employment will terminate on [DATE] due to ____ [REASON: E.G. FINDING OF PERMANENT DISABILITY/COMPLETION OF ONE CUMULATIVE YEAR OF LEAVE/ETC.] ____.

You have the right to apply to this office prior to that date for restoration to duty if you are medically fit to perform the duties of your position. If you apply, you may be required to submit to a medical examination to determine your fitness. If the examining physician finds that you are not fit, you will have the right to a hearing to contest that finding, pursuant to Subdivision (d) of §5.9 of the Rules for the Classified Service. If you are found fit for duty by this agency, your leave will be terminated and you will be scheduled to return to work. If restored to duty, you will be informed of any remaining worker's compensation leave and if you return to workers' compensation leave for the same occupational injury or disease WITHIN 30 DAYS OF RESTORATION, you may be immediately terminated without further notice when your cumulative year of leave has been exhausted.

After the termination of your employment, you have the right to apply to the Department of Civil Service within one year of the end of your disability for a medical examination to determine your fitness to return to work. If you are fit to return to work, we will consider you for reinstatement to your position, if vacant, or to a similar position. If you cannot be reinstated at that time, your name will be placed on a preferred list pursuant to §71 of the Civil Service Law and §5.9(e) of the Rules for the Classified Service.

As required by the Americans with Disabilities Act (ADA) and the New York State Human Rights Law (HRL) it is the policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee who has a disability. If you are an individual with a disability as defined by the ADA or HRL you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office for an application for requesting such an accommodation or for further information about the ADA or HRL.

You may wish to contact the Employees' Retirement System to determine your eligibility for various retirement benefits, including accidental disability retirement. You should do so as soon as possible in order to avoid possible ineligibility due to lateness. You may contact the Retirement System at 1-866-805-0990 or 518-474-7736 (in the Albany area), or by writing to: The New York State Employees' Retirement System, 110 State Street, Albany, NY 12236.

If you have questions regarding this letter, please contact this office at:

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Sick Leave at Half-Pay

Time spent on workers' compensation disability leave with percentage supplement counts as time worked for purposes of calculating an employee's maximum available sick leave at half-pay entitlement. For example, an otherwise eligible employee on workers' compensation disability leave with percentage supplement for six months earns an additional payroll period of sick leave at half-pay eligibility.

Employees absent under this Medical Evaluation Program are not permitted to use sick leave at half-pay except when they would be permitted to charge leave accruals, if available, for full day absences (see Charging Leave Accruals).

Restoring Leave Accruals

Under this Program, leave accruals charged and sick leave at half-pay eligibility used are restored to the employee on a prorated basis only following a Notice of Decision by the Workers' Compensation Board (WCB) crediting New York State for wages paid. There is no recrediting of leave accruals under this Program.

The restoration of leave credits is proportional, based on the credit New York State receives from the State Insurance Fund and the supplement for which the employee may be eligible. The information needed to determine the proportion of credits to be restored is obtained from the C-8 EMP form issued by the State Insurance Fund following a Workers' Compensation Board hearing and the payroll register. If you have a question, please contact your agency's regular claims examiner at the State Insurance Fund upon receipt of the C-8 EMP to verify the number of days for which New York State received credit and the total net dollar amount credited to NYS (the total net credit is the total dollar credit to NYS minus any deductions authorized by the WCB). Using these figures, the supplement amount, if any, and the employee's normal biweekly gross salary at the time of the accident, a percentage of proration of credits to be restored is calculated.

The following procedure explains this process:

- Divide the total net credit from SIF plus the gross supplement paid on the State payroll by the number of days credited to obtain the daily rate for restoration;

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- Divide the employee's normal biweekly gross salary at the time of the accident by 10 to obtain the employee's daily rate (for purposes of proration we are using this simplified version of the daily rate);
- Divide the daily rate for restoration by the employee's daily rate and multiply by 100 to obtain the proration percentage;
- This proration percentage is then applied separately to each category of leave credits charged by the employee to determine the number of days of leave in each category to be restored. (NOTE - the amount of restored credits cannot exceed the actual number of credits charged;)
- Convert the number of days to be restored to hours by multiplying the number of days by either 7.5 or 8 as applicable;
- Round the number of hours up to the nearest quarter hour;
- Sick leave at half-pay eligibility is restored in the same manner. However, there is no conversion to hours, the days restored are rounded up to the nearest whole day.

In each case, the employee will be restored a percentage of the number of days charged and/or sick leave at half-pay granted during the period covered by the Workers' Compensation Board award. Except in controverted cases, most restorations will involve only those credits charged during the seven calendar day initial waiting period for employees whose disability extends beyond 14 calendar days. An exception will occur for employees whose absence does not extend beyond 14 calendar days who receive a schedule loss award. Under Workers' Compensation Law, certain disabilities require the employee to receive an award of a specific number of days of compensation (which are listed on a schedule in the Law) without regard to the number of days actually lost from work due to the injury. In the case of a schedule loss award, the employee will have any credits charged during the initial waiting period restored on a prorated basis because New York State will receive a credit for wages paid.

Credits restored cannot be used again in connection with absences attributable to the same accident or injury. When restoration of leave accruals causes the employee to exceed

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applicable maximums for vacation and/or sick leave, the employee has one year from restoration of credits or return to work, whichever is later, to reduce accruals below applicable maximums. During this period of time, the employee continues to earn vacation and sick leave. There is no restoration of expired personal leave, holiday leave or floating holidays.

Example:

An employee charged 4 days of leave accruals, (3 days of sick leave and 1 day of personal leave) and was granted 1 day of sick leave at half-pay, upon exhaustion of credits, to cover the initial waiting period following a workers' compensation injury.

After the WCB hearing, the C-8 EMP from the SIF detailed a credit to NYS of a total of 5 days (1 week) with a net monetary credit of \$300 (\$400 minus \$100 attorney's fee). The employee's supplement from OSC is \$140 per week, so the total on which the prorated restoration of credits is made is \$440. The employee's biweekly gross salary is \$1800. The basic workweek of this employee is 40 hours.

1.
$$\frac{\text{Total net credit}}{\text{Days Credited}} = \frac{\$440}{5} = \$88 - \text{daily rate for restoration}$$
2.
$$\frac{\text{Biweekly Gross Salary}}{10 \text{ Day}} = \frac{\$1800}{10} = \$180 - \text{employee's daily rate}$$
3.
$$\frac{\text{Daily Rate for Restoration}}{\text{Employee's daily rate}} = \frac{\$88}{180} \times 100 = 48.888\% \text{ proration}$$

Sick Leave Restoral

$$48.888\% \text{ of 3 days} = .48888 \times 3 = 1.466 \text{ days}$$

$$1.466 \times 8 \text{ hrs/day} = 11.75 \text{ hrs (rounded to nearest 1/4 hr)}$$

Personal Leave Restoral

$$48.888\% \text{ of 1 day} = .48888 \text{ days}$$

$$.48888 \times 8 \text{ hrs/day} = 4.00 \text{ hrs (rounded to nearest 1/4 hr)}$$

Sick Leave at Half-Pay

$$48.888\% \text{ of 1 day} = .48888 \text{ days} = 1 \text{ day restored (rounded up to nearest whole day)}$$

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Summary

Sick leave hours: 24 hrs used - 11.75 hrs restored

Personal leave hours: 8 hrs used - 4.00 hrs restored

Sick leave at half-pay: 1 day used - 1 day restored

Eligibility for Overtime

For purposes of determining whether an employee has met the 40-hour per week threshold for eligibility for overtime compensation, time spent on workers' compensation disability leave with percentage supplement counts as time worked. For example, a 40-hour per week employee who has two days of intermittent workers' compensation disability leave with percentage supplement in a workweek and who works or charges credits for the remaining three days in that workweek is deemed to have met the 40-hour threshold and any additional work performed in that workweek is paid at the overtime rate.

Controverted or Contested Claims

Eligibility for the workers' compensation benefit under the contract is dependent upon the State Insurance Fund/Workers' Compensation Board determination that a disability exists which resulted from an occupational injury or disease. Whenever the SIF controverts a claim (because it is alleged that the injury or disease did not occur on the job or it is alleged that the employee has not suffered any such injury or disease), the employee is not eligible for benefits under the contract.

In the case of a nonwork-related illness or injury, the employee continues to be eligible to use his/her leave credits and to be granted sick leave at half-pay as is the case for any ordinary disability. On the other hand, if the SIF has denied benefits because they believe there is no illness or injury, an employee is expected to be present at work. Any such absence may be considered unauthorized, until such time as the controversy is resolved, if the employee does not, in fact, return to work. Such employee should be placed on leave without pay pending resolution of the claim, return to work or termination pursuant to Civil Service Law, whichever occurs first.

If the controverted claim is resolved in favor of an employee by the Workers' Compensation Board, the SIF must begin making