

State of Colorado




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October 4, 2018

TO: June Taylor, Executive Director of the Department of Personnel & Administration
FROM: Dana Shea-Reid, State Personnel Board Director 
RE: Comments Regarding Rulemaking on Director's Procedure 5-7

Thank you for the opportunity to comment on rulemaking regarding proposed changes to Director's Procedures pursuant to the deployment of HRWorks.

With regards to the proposed changes to Director's Procedure 5-7, I have no comment on the modifications to the table itself. I do, however, have some thoughts I'd like to share about a "footnote" in Director's Procedure 5-7.

Under the "Annual Leave" table that serves as procedure 5-7, is a double asterisk "footnote" stating "***Over-accrued amounts are forfeited at the beginning of the new fiscal year (July 1)". Although the "footnote" isn't a part of the proposed changes in this rulemaking, I think that this would be an opportune time to take a look at 5-7 and make adjustments that could improve the procedure under the Colorado Wage Protection Act.

The (2015) Colorado Wage Protection Act classifies earned vacation pay as wages or compensation. Under the law, use-it-or-lose-it policies are acceptable providing that the employer does not use the policy to deprive an employee of earned vacation time or wages associated with that time. The Colorado Department of Labor and Employment (CDLE) notes that use-it-or-lose-it policies are acceptable under the law if the policy is included in the terms of an agreement between the employer and employee defining when vacation pay is "earned". To a degree, procedure 5-7 establishes basic terms, but it seems to me that in order to meet the standard of "terms" this (as well as any leave policy) should be clearly stated in a stand-alone, written policy, not a footnote attached to a table.

According to CDLE, if there is a challenge to a use-it-or-lose-it policy, the agency would investigate the wage complaint, and as part of that investigation may consider *1. The employer's historical practices; 2. Industry standards; and 3. The subjective understanding of the employer and employee.*

As historical practice goes, an almost identical table appears in the 1999 Director's Procedures as P-5-11. The forfeiture statement read, "***Over-accrued accounts are forfeited each 7/1". (Attachment "A")

In 2001, P-5-11 appeared as a full policy titled "General Provisions" providing leave information and was adopted to accompany the table. (Attachment "B")

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Rulemaking 5-7

By 2005, when the entire body of rules and procedures were repealed and new, permanent rules were adopted, procedure 5-11 included the same table, the same layout and content, and the forfeiture footnote was identical to the 1999 footnote. Somewhere between 2001 and 2005, the P-5-11 "General Provisions" policy was eliminated and its content was moved into the body of the table. (Attachment "C")

And, in 2018, the table is now procedure 5-7, with modest changes from the same table from almost 20 years ago. The forfeiture statement remains as a footnote. (Attachment "D")

My concern is that a footnote isn't an adequate means of defining a policy for leave accrual and therefore, may not provide what CDLE refers to as "a subjective understanding of the intent of the policy".

Lastly, best practices in public and private sector lean towards using a cap for the maximum allowable accrual for vacation leave. If an employer doesn't want employees accumulating unlimited amounts of time off, a reasonable limit can be placed on what they can earn. A use-it-or-lose-it policy results in the forfeiture of earned vacation pay, but a "cap" simply places a limit on the amount of vacation that can accrue rather than taking away vacation time that has already been earned. Once the cap is reached, no further vacation leave accrues until the balance falls below the cap. When the employee takes some time off, accruals will begin again. Automated accrual systems are designed to track accruals up to a capped maximum then freeze accruals at that capped number. I don't know if HRWorks provides that option, but it seems it should in one form or another.

Since paid leave is generally a component of total compensation and total comp is how employees are paid by the state, it's important to avoid the negative impression that a use-it-or-lose-it forfeiture policy may give people. Considering all of the hard work DPA has contributed towards improvements for recruiting and retaining quality state employees, a modification to the current accrual policy in 5-7 could be a move in the right direction.

Again, thanks for the opportunity to comment.

Attachments:

"A" 1999 P-5-11 Table with Preceding Page Confirming Year

"B" 2001 P-5-11 Table and General Provisions Policy

"C" 2005 Preamble Confirming Year and 5-11 Table

"D" 2018 Proposed Rulemaking Changes 5-7 Table

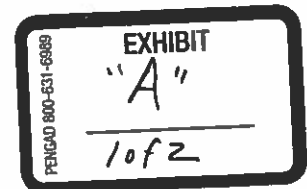
Certification may also be required for absences of fewer days at the discretion of the appointing authority to determine if family/medical leave applies or when a pattern of absences indicates possible abuse. Additional medical certificates may be required every 30 days or the time period established in the original certificate, whichever is longer, unless circumstances change or new information is received. Failure to provide the certificate will result in denial of leave and possible corrective/disciplinary action.

P-5-7. If the condition is covered by FML and does not involve workers' compensation or a reasonable accommodation under the Americans with Disability Act, there shall be no contact with the employee's health care provider. If the agency employs a health care provider and the employee has given written permission, that health care provider may contact the employee's health care provider to clarify content or verify authenticity.

P-5-8. The appointing authority has the right to request a second opinion on the original certificate. The agency must pay the expenses for the second opinion and chooses a health care provider who is not employed by, or on contract with, the state. If the original and second opinions conflict, the appointing authority may require a third opinion which is final and binding. Again, the agency must pay the expenses but the health care provider is mutually agreed upon.

P-5-9. If an absence is more than 30 days for the employee's own condition, a fitness-to-return certification is required for that condition. The certification may be required for absences of 30 or fewer days when it is a business necessity given the nature of the condition in relation to the assignment. It cannot be required for those taking intermittent family/medical leave. The employee is allowed at least 15 calendar days from the date of the request to provide the required certificate. Failure to provide a fitness-to-return certification as instructed could result in delay of return, a requirement for a new medical certification, or administrative discharge as defined in P-5-10.

P-5-10. If an employee has exhausted all sick leave and is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave-without-pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication. The notice must inform the employee of appeal rights and the need to contact PERA on eligibility for retirement. No employee may be administratively discharged if FML and/or short-term disability leave (includes the 30-day waiting period) apply and/or if the employee is a qualified individual with a disability who can be reasonably accommodated without undue hardship. When an employee has been terminated under this procedure and subsequently recovers, a certified employee has reinstatement privileges. (Effective January 1, 2000: Statement of Basis and Purpose adopted November 12, 1999).



P-5-11.

PERSONAL LEAVE EARNING, ACCRUAL, PAYOUT, AND RESTORATION									
Annual Leave					Sick Leave				
Yrs. of Service*	Hrs./Mon.	Max. Accrual**	Restoration	Payout	Hrs./Mon.	Max. Accrual*	Restoration	Payout	
1st through 5th	8	192 hrs.	Earning and accrual rates restored when eligible for reinstatement or reemployment.	Upon termination or death, unused leave paid out up to the maximum accrual rate.	6.66	Hired 7/1/86 or later, 360 hrs. Hired before 7/1/86, individual amount equal to 6/30/88 amount + 360 hrs.	Previously accrued sick leave is restored when eligible for reinstatement or reemployment.	If eligible to receive upon termination, or death, 1/4 of unused leave paid out to the maximum accrual rate.	
6th through 10th	10	240 hrs.							
11th through 15th	12	288 hrs.							
16th and above	14	336 hrs.							

* Computed from 1st calendar day of the month following hire unless employee began work on the 1st working day (then that month).

** Over-accrued sick leave up to 80 hrs. is converted to annual leave each 7/1 on a 5:1 ratio (5 hrs of sick converts to 1 hr. annual leave).

** Over-accrued amounts are forfeited each 7/1.

PERIOD: 800-631-6889
 EXHIBIT
 "A"
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P-5-11.

PERSONAL LEAVE EARNING, ACCRUAL, PAYOUT, AND RESTORATION									
Annual Leave					Sick Leave				
Yrs. of Service*	Hrs./Mon.	Min. Accruals	Restoration	Payout	Hrs./Mon.	Max. Accruals	Restoration	Payout	Notes
1st through 5th	8	192 hrs.	Earning and accrued rates restored when eligible for reinstatement or reemployment.	Upon termination or death, unused leave paid out up to the maximum accrual rate.	6.66	Hired 7/1/88 or later, 360 hrs. accrued before 7/1/88.	Previously accrued sick leave is restored when eligible for reinstatement or reemployment.	If eligible to return upon termination, or death, 1/4 of unused leave paid out to the maximum accrual rate.	
6th through 10th	10	240 hrs.				Individual amounts equal to 6/30/88 amount + 360 hrs.			
11th through 15th	12	288 hrs.							
16th and above	14	336 hrs.							

* Computed from 1st calendar day of the month following hire unless employee began work on the 1st working day (then that month).

** Over-accrued amounts are forfeited each 7/1.

* Over-accrued sick leave up to 80 hrs. is converted to annual leave each 7/1 on a 3:1 ratio (5 hrs of sick converts to 1 hr. annual leave).

PENGAD 800-631-6989
 EXHIBIT
 "B"
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P-5-11.

GENERAL PROVISIONS:

Employees must be at work or on paid leave to earn monthly leave. Leave is not available for use until the beginning of the next month after it was earned but terminating employees shall be compensated for such leave if they work or are on paid leave through the date of termination. Movement to the next higher leave earning rate is adjusted one month forward for each 173.33 working hours leave without pay in a 12-month period. (Effective February 1, 2001; Statement of Basis and purpose adopted November 21, 2000).

An employee on paid leave for an entire month earns leave based on the regular monthly schedule but it is not credited until the end of the month after return to continuous, regular employment.

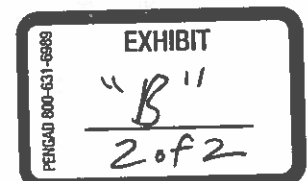
Part-time employees who work regular, non-fluctuating schedules earn leave on a pro-rated basis based on the percentage of the regular appointment, rounded to the nearest 1/100 of an hour. Leave for part-time employees who work irregular, fluctuating schedules and full-time employees who work or are on paid leave less than a full month is calculated by subtracting the hours of leave without pay from 173.33 and dividing this figure by 173.33. The percentage is then multiplied by the employee's leave earning rate to derive the leave earned. Overtime hours are not included in leave calculations. The annualized hourly rate is used to pay unused accrued leave to eligible employees. (Effective May 1, 2001; Statement of Basis and Purpose adopted March 16, 2001.)

Borrowing against any leave that may be earned in the future or "buying back" leave already used is not allowed.

Forfeiture of leave as a disciplinary action or a condition of promotion, demotion, or transfer is not allowed.

Use of annual leave cannot be required for an employee being laid off.

Worker's Compensation: When an employee is receiving worker's compensation payments, accrued sick and annual leave are used in an amount that is closest to the difference between the temporary compensation payment and the employee's gross base pay, excluding any pay differentials.



**DEPARTMENT OF PERSONNEL
4 CCR 801 PERSONNEL BOARD RULES AND PERSONNEL DIRECTOR'S
ADMINISTRATIVE PROCEDURES**

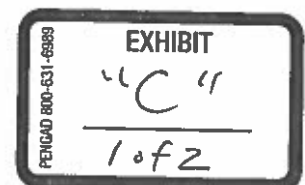
The purpose of Personnel Board Rules (indicated by a code ending with B) and Director's Administrative Procedures is to establish simple and concise statewide human resource requirements that apply throughout the state personnel system. Rules adopted by the Board and procedures adopted by the Director require the formal rulemaking process defined in the Administrative Procedures Act. Operational detail and process and local practice are purposely excluded from this document.

Unless otherwise noted, the rules and procedures were effective July 1, 2005.

Preamble

Unless otherwise noted in a specific provision, the following State Personnel Board Rules were adopted by the State Personnel Board on April 19, 2005, pursuant to a Statement of Basis and Purpose dated April 19, 2005. Such rules were effective July 1, 2005.

Unless otherwise noted in a specific provision, the following State Personnel Director's Administrative Procedures were adopted by the State Personnel Director on May 5, 2005, pursuant to a Statement of Basis and Purpose dated May 5, 2005. Such procedures were effective July 1, 2005.



Personal Leave Earning, Accrual, Payout, And Restoration

Annual Leave				Sick Leave				
Yrs. of Service*	Hrs./Mon.	Max. Accrual**	Restoration	Payout	Hrs./Mon.	Max. Accrual*	Restoration	Payout
1st through 5th	8	192 hrs.	Earning and accrual rates restored when eligible for reinstatement or reemployment.	Upon termination or death, unused leave paid out up to the maximum accrual rate.	6.66	360 hrs.	Previously accrued sick leave up to 360 hrs. is restored when eligible for reinstatement or reemployment.	Upon death or if eligible to retire upon initial termination, 1/4 of unused leave paid out to the maximum accrual rate.
6th through 10th	10	240 hrs.						
11th through 15th	12	288 hrs.						
16th and above	14	336 hrs.						
<p>* Computed from 1st calendar day of the month following hire unless employee began work on the 1st working day (then computed that month). Employees with prior state service, in or out of the state personnel system, earn leave based on the total whole months of service.</p>				<p>* Over-accrued sick leave up to 80 hrs. is converted to annual leave each 7/1 on a 5:1 ratio (5 hrs of sick converts to 1 hr. annual leave). An employee may have an individual maximum accrual rate if continuously employed in the state personnel system prior to 7/1/88 (8/30/88 accrual plus 360 hrs.).</p>				
<p>** Over-accrued amounts are forfeited each 7/1.</p>								
<p>General Provisions: Employees must be at work or on paid leave to earn monthly leave. Leave is credited on the last day of the month in which it is earned and is available for use on the first day of the next month. A terminating employee shall be compensated for leave earned through the last date of employment provided the employee is at work or on paid leave through the termination date. Movement to the next higher leave-earning rate is adjusted one month forward for each 173 working hours of unpaid leave in a 12-month period, except for unpaid military leave.</p>								
<p>Part-time employees who work regular, non-fluctuating schedules earn leave on a pro-rated basis based on the percentage of the regular appointment, rounded to the nearest 1/100 of an hour. Leave for part-time employees who work irregular, fluctuating schedules and full-time employees who work or are on paid leave less than a full month is calculated by dividing the number of hours worked by the number of work hours in the pay period. The percentage is then multiplied by the employee's leave earning rate to derive the leave earned. Overtime hours are not included in leave calculations. Leave payouts at separation are calculated using the annualized hourly rate of pay.</p>								
<p>Borrowing against any leave that may be earned in the future or "buying back" leave already used is not allowed.</p>								
<p>Forfeiture of leave as a disciplinary action or a condition of promotion, demotion, or transfer is not allowed.</p>								
<p>Use of annual leave cannot be required for an employee being laid off.</p>								
<p>Workers' Compensation: When an employee is receiving workers' compensation payments, accrued paid leave is used in an amount that is closest to the difference between the temporary compensation payment and the employee's gross base pay, excluding any pay differentials.</p>								
<p>Employees are required to use paid leave during the 30-day waiting period for short-term disability benefits.</p>								

EXHIBIT
 "C"
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 6869-139-006 (07/2014)

5-7. Table (02/2017)(1/1/19)

Monthly Leave Earning, Accrual, Payout, and Restoration for Permanent Employees									
Annual Leave					Sick Leave				
Years of Service*	Hrs. / Mon.	Hrs./Fiscal Year	Max. Accrual**	Payout	Hrs.:Mins./Mon.	Hrs./Fiscal Year	Max. Accrual***	Restoration	Payout
Years 1 - 5 (01 - 60 Months)	8	96	192 hours	Upon termination or death, unused leave is paid out up to the maximum accrual rate.	6:68 6:40	Up to 80 hours	360 hours	Previously accrued sick leave up to 360 hours is restored when eligible for reinstatement or reemployment.	Upon death or if eligible to retire, 1/4 of unused leave paid out to the maximum accrual rate. PERA's age and service requirements under the Defined Benefit plan are applied regardless of the plan actually enrolled in.
Years 6 - 10 (61 - 120 Months)	10	120	240 hours						
Years 11 - 15 (121 - 180 Months)	12	144	288 hours						
Year 16 or Greater (181 or more Months)	14	168	336 hours						
*Years of service is computed from the 1st calendar day of the month following the hire date; except if the employee began work on the 1st working day of a month, include that month in the count. Employees with prior permanent state service, in or out of the state personnel system, earn leave based on the total whole months of service, excluding temporary assignments.					*** Over-accrued sick leave up to 80 hours is converted to annual leave each new fiscal year (July 1st) at a 5:1 ratio (5 hours of sick converts to 1 hour annual leave). An employee may have an individual maximum accrual that is greater than 360 hours if continuously employed in the state personnel system prior to 7/1/88. Maximum accrual for these employees is calculated by adding 360 hours to the leave balance on 6/30/88.				
** Over-accrued amounts are forfeited at the beginning of the new fiscal year (July 1st).									
<p>General Provisions:</p> <p>Employees must be at work or on paid leave to earn monthly leave. Leave is credited on the last day of the month in which it is earned and is available for use on the first day of the next month, subject to any limitations elsewhere in Chapter 5, Time Off. A terminating employee shall be compensated for annual leave earned through the last day of employment.</p> <p>Part-time employees who work regular, non-fluctuating schedules earn leave on a prorated basis based on the percentage of the regular appointment, rounded to the nearest 1/100 of an hour. Leave for part-time employees who work irregular, fluctuating schedules and full-time employees who work or are on paid leave less than a full month is calculated by dividing the number of hours paid by the number of work hours in the monthly pay period. The percentage is then multiplied by the employee's leave earning rate to derive the leave earned. Overtime hours are not included in leave calculations.</p> <p>Leave payouts at separation are calculated using the annualized hourly rate of pay (annual salary divided by 2080 hours for full-time employees), and employees are only eligible for the sick leave payout one time - initial eligibility for retirement.</p> <p>Borrowing against any leave that may be earned in the future or "buying back" leave already used is not allowed.</p> <p>Forfeiture of leave as a disciplinary action or a condition of promotion, demotion, or transfer is not allowed.</p> <p>Use of annual leave cannot be required for an employee being laid off.</p> <p>Make Whole: When an employee is receiving workers' compensation payments, accrued paid leave is used to make the employee's salary whole in an amount that is closest to the difference between the temporary compensation payment and the employee's gross base pay, excluding any pay differentials. Leave earning is not prorated when an employee is being made whole.</p> <p>Short-Term Disability: Employees are required to use paid leave during the 30-day waiting period for short-term disability benefits, including the use of accrued annual leave and/or compensatory time once sick leave has been exhausted. Any remaining sick leave beyond the 30-day waiting period must be exhausted prior to eligibility for short-term disability benefit payments.</p>									

