

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

ATTENDANCE AND LEAVE MANUAL

Absence With Pay  
Leave for Subpoenaed Appearance and Jury Attendance

Section 21.9

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Purpose

The primary purpose of this Section is to ensure that employees do not suffer undue hardship by loss of pay or leave credits because of extended absences while performing jury service or appearing as a subpoenaed witness.

Eligibility

All employees subject to the Attendance Rules are eligible for paid leave under this Section.

Conditions Under Which Leave Is Granted

Whenever the presence of an employee is required for jury duty, or as a subpoenaed or otherwise ordered witness in court, or before a quasi-judicial body, such employee is entitled to leave with pay without charge to leave credits if he/she is not a party to the action (i.e., defendant or plaintiff). The appointing authority may require satisfactory proof that the employee's presence is required for such purposes and pursuant to subpoena or other order.

An employee is not entitled to leave under this Section if the employee is a party to the action regardless of having received a subpoena or other order. In a civil action, both plaintiff and defendant are parties to the action and neither is entitled to leave under this Section. In a criminal proceeding, the parties to the action are the State and the defendant; the "victim" is not a party to the action and, if required to appear in accordance with a subpoena or other order, would be entitled to leave under this Section.

Employees who appear in court in their official capacity either as parties to the action or as subpoenaed witnesses are appearing in duty status and are not granted leave pursuant to this Section.

Leave under this Section is not granted for preinduction or pre-enlistment medical examinations for military service. (See "Use of Personal Leave Credits," Section 21.6 of this Manual.)

A person who receives a fee for testifying in a court of law as an expert witness does not appear in response to a subpoena or other order and is not eligible for leave under this Section.

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#### Appearance Before a Quasi-Judicial Board or Law Enforcement Body

Provided an employee is not a party to the action and provided such employee has received an official order to appear, leave under this Section shall be granted to an employee required to appear before:

- a. a quasi-judicial board conducting an investigation or a review (some examples are a Motor Vehicle hearing, a Selective Service Board review and a legislative committee investigation) or
- b. a law enforcement body such as the local or State police or the FBI.

#### Disqualification, Exemption, Excusal and Postponement from Jury Service

Section 524 of the New York State Judiciary Law provides that a person who has served on a grand or trial jury within the State, including a Federal court, within four years of the next proposed grand or trial jury service in a State or Federal court is disqualified from such proposed service. The courts consider one day of service sufficient to disqualify a juror from further service for the four-year period. The Commissioner of Jurors may reduce the period of disqualification to two years. In the case where an agency believes an employee to be disqualified under Section 524, the agency may so advise the court. However, the court's determination of qualification is final. Section 511 of the New York State Judiciary Law also provides that certain occupational groups are automatically disqualified from jury service. Section 512 identifies persons that although not automatically disqualified, may claim exemption from jury duty service. Covered employees in this latter group are exempted only upon claiming such exemption. Employees may be requested, but not required, to seek exemption. Agencies cannot request exemption on behalf of such employees.

Although employees should be encouraged to fulfill their civic obligations, they may be requested, but not required, to ask the Commissioner of Jurors for excusal or postponement of jury duty responsibilities pursuant to Section 517 of the New York State Judiciary Law when deemed necessary for the efficient conduct of State business. The standard applied by the court in granting such applications is that attendance for jury service "would cause undue hardship or extreme inconvenience to the

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applicant, a person under his care or supervision, or the public." If the employee declines to request excusal or postponement, or if such request is denied, the employee must be granted jury duty leave in accordance with this Section. Agencies cannot request excusal or postponement on behalf of such employees.

##### Extent of Leave

Employees should report for duty in their agencies at all times when their attendance for court or jury purposes is not required. A reasonable amount of travel time should be allowed in this connection. The appointing authority may require satisfactory proof of the actual hours of attendance at court or for jury purposes. The appointing authority may approve additional absence(s) from work, but such additional absence(s) must be charged to appropriate credits. For example, if the amount of time remaining in an employee's work shift after calculating reasonable travel time from jury duty site to work site is such that the agency considers requiring the employee to return to work to be impractical, the agency may permit the employee to charge the remaining time to accrued leave credits.

Employees are not granted compensatory time off in lieu of ordered appearances and jury attendance on a pass day or a holiday.

Employees scheduled to work a full shift other than a regular day shift may be allowed (and in most cases probably should be allowed) leave with pay, without charge to credits, for a full day whenever a full day has been devoted to jury duty or to a subpoenaed or ordered appearance. It is not intended that such employees be given time off on an "hour-for-hour" basis. The appointing authority should consider each case primarily on the elements of hardship and reasonableness. For example, a two-hour ordered appearance outside the employee's regularly scheduled shift should not be sufficient to warrant leave with pay under this Section. (In the interest of safety or to avoid split shifts, the appointing authority might consider switching the employee from an evening or early morning shift to a regular day shift for the period of jury duty or ordered court appearance.)

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Compensation

Employees entitled to leave under this Section receive full pay for such leave. Pursuant to Section 521 of the Judiciary Law, State employees are not entitled to receive payment from the State Court System of the per diem allowance authorized by that law for any regularly scheduled workday on which jury service is rendered and for which their wages were not withheld.

Related Legal Provisions

New York State Judiciary Law, Article 16, Selection of Jurors, establishes the right of jurors to be absent from employment, and specifies criteria and procedures for disqualification, exemption, excusal and postponement.

Related  
Contract  
Provisions

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POLICY BULLETIN NO. 98-01

Sections 21.9 & 21.12

Appendix A

July 6, 1998

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

TO: Attendance and Leave Manual Recipients  
FROM: Robert W. DuBois  
SUBJECT: Amendments to the Attendance Rules for Employees  
in New York State Departments and Institutions  
DATE: July 6, 1998

Effective February 4, 1998, the Attendance Rules for Employees in New York State Departments and Institutions were amended to bring State policy for overtime exempt employees into conformance with requirements under the Fair Labor Standards Act for positions designated as overtime ineligible.

The Second Circuit Court of Appeals, in Yourman v. Dinkins, affirmed a decision of the District Court which held that certain high salaried New York City employees, who would otherwise be exempt from the provisions of the FLSA, were overtime eligible because they were subject to personnel policies and rules which, among other things, required charge to leave credits for absences for temporary military duty in excess of 30 days and appearances in court as a witness where the employee is a party to the action.

The State's Attendance Rules contain provisions almost identical to those of New York City which the Court held violated the "salary basis" test. To bring our Rules regarding military leave and witness leave in conformance with Yourman, the following amendments were made to the Attendance Rules.

These amendments provide additional paid leave for certain temporary military duty for overtime ineligible employees who have exhausted paid leave under Section 242 of the Military Law and also provide paid leave for overtime ineligible employees for certain ordered court appearances regardless of whether the employee is a party to the action.

Specifically, new sections – Section 21.16 of the Non-Managerial Confidential Attendance Rules and Section 28-1.18 of the Managerial Confidential Rules – were added to provide that when employees who are designated as overtime ineligible have exhausted their military leave with pay entitlement under Section 242 of the New York State Military Law, they must be granted leave with pay without charge to leave credits for any period of less than a workweek during which they are ordered to temporary military duty.

Additionally, Section 21.9 of the Non-Managerial Confidential Attendance Rules and Section 28-1.9 of the Managerial Confidential Attendance Rules were amended to provide that an overtime ineligible employee who appears as a witness in response to a subpoena or other order of a court or quasi-judicial body for any period of less than a workweek is entitled to paid leave regardless of whether the employee is a party to the action (i.e., defendant or plaintiff).



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These amendments, which are applicable only to overtime ineligible employees and only for absences of less than a workweek, remove the restriction that paid leave for court appearance cannot be granted if the employee is a party to the action. For absences of a full workweek, paid leave continues to be available only if the employee is not a party to the action.

The term "workweek" referred to in these Sections is based on the Thursday through Wednesday payroll workweek and includes all days in the employee's normal work schedule that fall within that Thursday through Wednesday workweek period. The following examples relate to military leave; however, the same principle applies to absences for ordered appearance as a witness when the employee is a party to the action.

An overtime ineligible employee who works a normal Monday through Friday schedule and has exhausted his entitlement to paid military leave under Section 242, receives military orders for Friday through Monday. This employee is eligible for paid leave for Friday and Monday in accordance with these amendments since the absence was for less than a workweek.

A month later, the same employee receives another set of military orders for a period that runs from Monday through Friday. This employee is entitled to paid leave for this entire five-day period since three days (Monday through Wednesday) fall in one workweek and two days (Thursday and Friday) fall in the second workweek. The employee was absent on military duty for less than a full workweek in two separate workweeks.

If this employee later receives military orders which run from Thursday through Wednesday, the employee would not be entitled to any leave with pay for this period because the absence was for an entire workweek. If the military orders run from Thursday through the following Thursday (a workweek and a day), the employee is not eligible for paid leave under these provisions for the full workweek but is eligible to receive paid leave for the one-day absence in the second workweek.

The same principle applies to employees who work fewer than five days per week (for example, employees on compressed workweeks or part-time employees subject to the Attendance Rules who work fewer than five days per week). For example, the overtime ineligible employee who works a four-day compressed workweek from Monday through Thursday and who receives military orders for this same period is eligible for paid leave for this period since three days fall in one workweek and one day falls in a second workweek, resulting in military duty for less than a full workweek in two separate workweeks.

Questions about these amendments should be directed to the Employee Relations Unit of this Department at (518) 457-2295. A copy of these amendments is attached.

Attachment



STATE OF NEW YORK  
CIVIL SERVICE COMMISSION  
THE STATE CAMPUS  
ALBANY, NEW YORK 12239

GEORGE C. SINNOTT  
PRESIDENT

LEO J. KESSELRING  
COMMISSIONER

MARGARET DADD  
COMMISSIONER

At a meeting of the State Civil Service Commission held November 17, 1997, the following resolution was adopted pursuant to Section 6 of the Civil Service Law, as emergency rulemaking authorized by section 202(6) of the State Administrative Procedure Act upon a finding of necessity for the preservation of the general welfare:

RESOLVED, That subject to the approval of the Governor, Parts 21 and 28 of the Attendance Rules for Employees in New York State Departments and Institutions be and hereby are amended, as follows:

FIRST: A new section 21.16 and 28-1.18 is added to read as follows:

Upon exhaustion of military leave with pay provided pursuant to section 242 of the New York State Military Law, an employee holding a position designated as overtime ineligible may be granted leave with pay without charge to leave credits for any period(s) of less than a workweek during which such employee is ordered to temporary military duty.

SECOND: Section 21.9 is amended to read as follows:

(a) Except as provided in subdivision (b) of this section, [O]n proof of the necessity of jury service or appearance as a witness pursuant to subpoena or other order of a court or body, an employee shall be granted a leave of absence with pay with no charge against leave credits; provided, however, that this section shall not apply to any absence by an employee occasioned by such an appearance [if he] in an action to which such employee is a party.

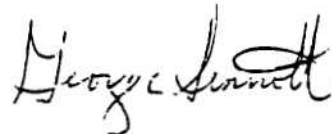
(b) An employee holding a position designated as overtime ineligible may be granted a leave of absence with pay with no charge against leave credits on proof of necessity of jury service or appearance as a witness pursuant to subpoena or other order of a court or body for any period(s) of less than a workweek, regardless of whether such employee is a party to the action.

THIRD: Section 28-1.9 is amended to read as follows:

(a) Except as provided in subdivision (b) of this section, [O]n proof of the necessity of jury service or appearance as a witness pursuant to subpoena or other order of a court or body, an employee shall be granted a leave of absence with pay with no charge against leave credits; provided, however, that this section shall not apply to any absence by an employee occasioned by such an appearance [as] in an action to which such employee is a party.

(b) An employee holding a position designated as overtime ineligible may be granted a leave of absence with pay with no charge against leave credits on proof of necessity of jury service or appearance as a witness pursuant to subpoena or other order of a court or body for any period(s) of less than a workweek, regardless of whether such employee is a party to the action.

ATTEST:



President

APPROVED:

DATE: December 22, 1997



Governor



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September 30, 1994

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TO: State Departments and Agencies

FROM: Peter Elmendorf, Director  
Personnel Services Division

SUBJECT: Payment for Jury Duty for Employees NOT Eligible for  
Leave With Pay Under the Attendance Rules

This memorandum provides information on a 1991 amendment to the State Judiciary Law, Section 519, and its impact on New York State as an employer. The law as amended is reproduced below.

This statute gives New York State employees ineligible for paid leave under Attendance Rules Section 21.9, who would normally receive no wages for time spent on jury duty, entitlement to certain payments. Specifically, when an employee not eligible for leave is called to jury duty, the employer must pay the employee \$15 a day for the first three days of jury duty which conflict with the employee's regular work schedule. For example, a full-time hourly employee who has not completed 19 consecutive pay periods of service is not yet covered by the Attendance Rules and would previously not have been paid while on jury duty. With this change in the law, the agency/facility is required to pay the employee \$15 a day for the first three days of jury duty which coincide with the employee's regularly scheduled workdays.

Your agency contact person at the Office of the State Comptroller can advise you on appropriate payroll processing for these payments.

Any questions concerning this provision should be referred to the Employee Relations Section of the Department of Civil Service, (518) 457-2295.

**§ 519. Right of juror to be absent from employment**

*Any person who is summoned to serve as a juror under the provisions of this article and who notifies his or her employer to that effect prior to the commencement of a term of service, shall not, on account of absence from employment by reason of such jury service, be subject to discharge or penalty. An employer may, however, withhold wages of any such employee serving as a juror during the period of such service; provided that an employer who employs more than ten employees shall not withhold the first fifteen dollars of such juror's daily wages during the first three days of jury service. Withholding of wages in accordance with this section, shall not be deemed a penalty. Violation of this section shall constitute a criminal contempt of court punishable pursuant to section seven hundred fifty of this chapter.*

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Negotiating Units:

Administrative Services Unit Article 32.6  
Institutional Services Unit Article 32.6  
Operational Services Unit Article 32.6  
Security Services Unit Article 14.8  
Security Supervisors Unit Article 14.8

Effect:

The articles in the Administrative, Institutional and Operational Services Units provide that, when shift employees who do not work days are granted leave for jury duty, they are entitled to have their shift changed if they so request, wherever practicable, to the normal day shift for the duration of jury duty.

The articles further provide that such shift change shall not occur more frequently than once every two years. (Section 511 of the Judiciary Law disqualifies persons who have served on a grand or petit jury within the State, including in a federal court, within two years of the next proposed term of jury service. However, such persons may lawfully serve on more than one petit or grand jury during the term of service for which they have been called.)

In cases where the shift of an employee called for jury duty cannot be changed consistent with the provisions of Article 32.6 of these Agreements, the agency shall provide the employee with a letter explaining why the shift change cannot be accommodated. This letter may be used by the employee should he or she desire to seek to be excused from jury duty.

Employees who do not request to have their shifts changed pursuant to this article continue to be eligible for leave in connection with jury service, pursuant to the provisions of the Attendance Rules.

The Security Services and Security Supervisors Units contract articles do not provide any leave privileges not already provided by the Attendance Rules. However, they do extend such privileges to employees in the Security Services and Security Supervisors Units who may not be subject to the Attendance Rules. They also make appointing authority determinations concerning employee requests for jury leave or leave for court ordered appearances, for employees in these two Units, subject to contract grievance procedures.