

# Clearinghouse Rule 99-111

STATE OF WISCONSIN )  
 )  
DIVISION OF MERIT RECRUITMENT AND SELECTION ) SS

I, Robert J. Lavigna, Administrator of the Division of Merit Recruitment and Selection in the Department of Employment Relations and custodian of the official records, certify that the annexed rules, relating to reinstatement eligibility and employment register expiration for state employment and minor and technical rule changes, were duly approved and adopted by this Division on October 15, 1999.

I further certify that this copy has been compared by me with the original on file in this Division and that it is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand as Administrator of the Division of Merit Recruitment and Selection at 345 West Washington Avenue in the city of Madison, this 15th day of October, 1999.



*Robert J. Lavigna*  
Robert J. Lavigna, Administrator,  
Division of Merit Recruitment and Selection  
Department of Employment Relations

**ORDER OF THE ADMINISTRATOR**  
**OF THE DIVISION OF MERIT RECRUITMENT AND SELECTION**  
**OF THE DEPARTMENT OF EMPLOYMENT RELATIONS**  
**ADOPTING RULES**



To amend ER-MRS 1.02 (29), 11.03 (1), 16.025, 16.035 (1), (2) and (3), 16.04 (2), 22.11 (2) and 34.08; to amend and consolidate 22.11 (title) and (1) (a), (b), (c) and (d); and to create ER-MRS 22.11 (1m), relating to reinstatement eligibility and employment register expiration for state employment and minor and technical rule changes.

**ANALYSIS PREPARED BY DEPARTMENT OF EMPLOYMENT RELATIONS**

This rule order is intended to bring the Administrator's administrative rules into conformity with statutory changes made by 1997 Wisconsin Act 307 regarding the eligibility period for reinstatement and the life of employment registers. The rule order also makes minor policy and technical changes in the rules.

Act 307 increased the eligibility period for reinstatement for state employees from three to five years. This rule order amends references to reinstatement in the administrative rules to conform to this statutory change.

("Reinstatement" is currently defined in the rules to mean the act of permissive reappointment without competition of an employe or former employe under specified statutes to a position: (a) in the same class in which the person was previously employed; (b) in another class to which the person would have been eligible to transfer had there been no break in employment; or (c) in a class having a lower pay rate or pay range maximum for which the person is qualified to perform the work after the customary orientation provided to newly hired workers in the position.)

The increased reinstatement eligibility applies to employees who are initially eligible for reinstatement on or after July 5, 1998, which is the same effective date as Act 307.

Act 307 also permits the Administrator to allow an employment register to expire after three months. The normal life of a register will remain at six months. This rule order amends the administrative rules to reflect this new option, which may be exercised only after considering the impact on equal employment opportunity and affirmative action policies.

Act 307 did not increase the three-year restoration period; thus, provisions relating to the three-year period for restoration rights in the administrative rules are retained.

Minor technical changes are also made in the rule order, including:

- The rules are clarified to provide that a reinstatement is valid after the expiration of the applicable period of eligibility if the employe or former employe submitted a specific request or application for a specific vacancy during the eligibility period. This change codifies a ruling by the Wisconsin Court of Appeals: FRANK v. PERSONNEL COMMISSION, 141 Wis.2d 431 (Ct. App. 1987). The court stated: "We conclude that because Frank sought reinstatement within the three-year period provided in sec. 230.31(1), Stats., the department should have acted on her application even if it could not do so until after the three-year period."

- More precise words are substituted to describe the different ways of leaving a position which trigger restoration rights or reinstatement eligibility.

The statutory authority for these rule changes is found in the following:

1. S. 230.05(5), Stats., grants the Administrator of the Division of Merit Recruitment and Selection general authority to promulgate rules on provisions for which the administrator has statutory responsibility.
2. The specific statutory authority to increase the reinstatement eligibility period is found in ss. 230.31(1)(a), 230.33 (1) and 230.40 (3), Stats., which were amended by Act 307 to increase the eligibility period from three to five years.
3. S. 230.31 (2) Stats., permits the Administrator to provide for the reinstatement of persons who separate from a position while serving a probationary period.
4. S. 230.25(3)(b), Stats., as created by Act 307, states that the Administrator of the Division of Merit Recruitment and Selection may allow a register to expire after 3 months, but only after considering the impact of such an action on the policy of this state to provide for equal employment opportunity and to take affirmative action

The statutes being interpreted are ss. 230.25(3)(b); 230.31(1)(a) and (2); 230.33 (1) and 230.40 (3), Wis. Stats.

### **TEXT OF PROPOSED RULE**

**SECTION 1.** ER-MRS 1.02 (29) is amended to read:

ER-MRS 1.02 (29) "Reinstatement" means the act of permissive re-appointment without competition of an employe or former employe under s. 230.31, 230.33 ~~er~~, 230.34 or 230.40 (3), Stats., to a position:

**SECTION 2.** ER-MRS 11.03 (1) is amended to read:

ER-MRS 11.03 (1) OPEN COMPETITIVE OR PROMOTIONAL REGISTERS. Eligibility on a register continues for 6 months from the date the register was established or, on an integrated register, 6 months from the date the individual is placed on the register. The administrator may allow a register to expire after 3 months, but only after considering the impact of such an action on the policy of this state to provide for equal employment opportunity and to take affirmative action, as specified in s. 230.01 (2), Stats.

**SECTION 3.** ER-MRS 16.025 is amended to read:

ER-MRS 16.025 PERIOD OF ELIGIBILITY ~~The-Except as otherwise provided in ss. 230.33 and 230.40 (3), Stats.,~~ the period of eligibility for all reinstatements and restorations shall begin and end as follows:

(1) For reinstatements based on reinstatement eligibility earned prior to July 5, 1998, the period of eligibility shall begin with the date of separation from the position in which the eligibility was earned and end with the last day of the 3rd year after the date of separation.

(2) For reinstatements based on reinstatement eligibility earned on or after July 5, 1998, the period of eligibility shall begin with the date of separation from the position in which the eligibility was earned and end with the last day of the 5th year after the date of separation.

(3) For restorations, the period of eligibility shall begin with the date of separation from the position in which the eligibility was earned and end with the last day of the 3rd year after the date of separation.

Any (4) (a) Except as provided in par. (b), any act of reinstatement or restoration must become effective during the 3-year-applicable period of eligibility specified in subs. (1) to (3) or in ss. 230.33 or 230.40(3), Stats.

(b) An employe may be reinstated after the expiration of the applicable period of eligibility if the employe submitted a specific request or application for reinstatement to a specific vacancy during the applicable period of eligibility and the employe is reinstated to the specific vacancy.

**SECTION 4.** ER-MRS 16.035 (1), (2) and (3) are amended to read:

ER-MRS 16.035 TYPES AND CONDITIONS OF REINSTATEMENT (1) GENERAL. An employe who, prior to July 5, 1998, has ~~terminated~~ separated from a position in the classified service without misconduct or delinquency or who has accepted a voluntary demotion for personal reasons shall be eligible for reinstatement in any agency for 3 years from the date of such ~~resignation~~ separation or demotion. An employe who, on or after July 5, 1998, has separated from a position in the classified service without misconduct or delinquency or who has accepted a voluntary demotion for personal reasons shall be eligible for reinstatement in any agency for 5 years from the date of such separation or demotion.

(2) RETURN FROM UNCLASSIFIED POSITION. Any employe who left the classified service prior to July 5, 1998 to accept an appointment to an unclassified position shall have reinstatement eligibility in any agency for 3 years following the appointment to the unclassified service or one year after termination of the unclassified appointment, whichever is longer. Any employe who left the classified service on or after July 5, 1998 to accept an appointment to an unclassified position shall have reinstatement eligibility in any agency for 5 years following the appointment to the unclassified service or one year after termination of the unclassified appointment, whichever is longer. The benefit under this subsection is in addition to any benefit under s. ER-MRS 16.03 (4).

(3) DOWNWARD REALLOCATION OR RECLASSIFICATION OF A POSITION. An employe whose position has been reallocated or reclassified to a ~~classification with a lower pay rate or pay range~~ maximum lower class prior to July 5, 1998 shall have reinstatement eligibility in any agency for 3 years from the date of the action. An employe whose position has been reallocated or reclassified to a lower class on or after July 5, 1998, shall have reinstatement eligibility in any agency for 5 years from the date of the action. For definitions of reallocation and reclassification, see s. ER 3.01 (2) and (3), respectively.

**SECTION 5.** ER-MRS 16.04 (2) is amended to read:

ER-MRS 16.04 (2) (title) SEPARATION DURING THE PROBATIONARY PERIOD. A person who ~~resigns or who is terminated,~~ prior to July 5, 1998, separates from a position without misconduct or delinquency while serving a probationary period may be reinstated to a position in a class in the same ~~class pay range or counterpart pay range~~ or in a lower class than the position from which the employe ~~resigned or was terminated by an appointing authority~~ separated at any time during a 3 year period from the date of ~~termination~~ separation providing the person is qualified to perform the work after the customary orientation provided to a newly hired worker in the position. A person who, on or after July 5, 1998, separates from a position without misconduct or delinquency while serving a probationary period may be reinstated to a position in a class in the same pay range or counterpart pay range or in a lower class than the position from which the employe separated at any time during a 5 year period from the date of separation providing the person is qualified to perform the work after the customary orientation provided to a newly hired worker in the position. The probationary time already served may be carried over by the appointing authority, except as provided in s. 230.32 (2) (b), Stats. The appointing authority shall determine the amount of carry-over at the time of the reinstatement and shall give written notice of the amount to the employe. The appointing authority shall keep a copy of that notice on file.

Note: For movement to a position in a lower class while serving an original probationary period, see ER-MRS 17.02 (1).

**SECTION 6.** ER-MRS 22.11 (title) and (1) (a), (b), (c) and (d) are consolidated and amended to read:

ER-MRS 22.11 (title) REINSTATEMENT ELIGIBILITY AND CONDITIONS.

(1) When a vacancy, for which the employe is qualified, occurs in another employing unit of the agency in any class other than the approved layoff group from which the employe was terminated:

~~(a) As~~ as a result of layoff;

~~(b) Exercised~~ exercised displacement rights;

~~(c) Demoted~~ demotion as a result of layoff; or

~~(d) Transferred~~ transfer or ~~demoted~~ demotion between agencies as a result of layoff; and the employe was terminated while on probation, the employe may be reinstated at the discretion of the appointing authority within a 3-year period from the date of any of the actions taken in this subsection as a result of being subject to layoff, if the action taken as a result of being subject to layoff occurred before July 5, 1998.

**SECTION 7.** ER-MRS 22.11 (1m) is created to read:

ER-MRS 22.11 (1m) When a vacancy, for which the employe is qualified, occurs in another employing unit of the agency in any class other than the approved layoff group from which the employe was terminated as a result of layoff, exercised displacement rights, demotion as a result of layoff, or transfer or demotion between agencies as a result of layoff and the employe was terminated while on probation, the employe may be reinstated at the discretion of the appointing authority within a 5-year period from the date of any of the actions taken in this subsection as a result of being subject to layoff, if the action taken as a result of being subject to layoff occurred on or after July 5, 1998.

**SECTION 8.** ER-MRS 22.11 (2) is amended to read:

ER-MRS 22.11 (2) When a vacancy, for which the employe is qualified, occurs anywhere in state service other than the agency from which the employe was terminated as a result of layoff, exercised displacement rights, or demotion as a result of layoff, the employe may be reinstated at the discretion of the appointing authority within:

(a) a 3-year period from the date of action resulting from layoff if the action occurred prior to July 5, 1998, or;

(b) A 5-year period from the date of action resulting from layoff if the action occurred on or after July 5, 1998.

**SECTION 9.** ER-MRS 34.08 is amended to read:

ER-MRS 34.08 TERMINATION ~~[s. 230.27 (2), Stats.]~~ (1) Employes on a project appointment may be terminated at any time.

(2) Employes so terminated prior to July 5, 1998 do not have layoff, reinstatement, restoration or displacement rights or reinstatement eligibility to any permanent, seasonal or sessional position unless those rights or eligibilities were previously earned in a permanent, seasonal, or sessional position and are being applied within three years of the date of separation from that position or prior to the expiration of an approved leave of absence.

(3) Employes so terminated on or after July 5, 1998 do not have layoff, restoration or displacement rights to any permanent, seasonal or sessional position unless those rights were previously earned in a permanent, seasonal, or sessional position and are being applied within three years of the date of separation from that position or prior to the expiration of an approved leave of absence.

(4) Employees so terminated on or after July 5, 1998 do not have reinstatement eligibility to any permanent, seasonal or sessional position unless the eligibility was previously earned in a permanent, seasonal, or sessional position and is being applied within five years of the date of separation from that position or prior to the expiration of an approved leave of absence.

**EFFECTIVE DATE**

This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2)(intro), Stats.

**CONTACT PERSON**

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