

Clearinghouse Rule 11-042

State of Wisconsin
Department of Employee Trust Funds,
Employee Trust Funds Board, Teachers Retirement Board
and Wisconsin Retirement Board

DRAFT REPORT ON CLEARINGHOUSE RULE

AN ORDER to amend administrative rule ETF 10.08 (1) (a), (2) (a) and (b) (intro), (b) (2), (b) (3), (b) (5), (c), and (d), to amend ETF 20.02 (1), (2), and (3); and to create ETF 20.02 (4) related to governing rehired annuitants and separation from employment.

Agency Person to be Contacted for Questions..... 2

Statement Explaining Need for Rule..... 2

Analysis Prepared by Department of Employee Trust Funds..... 2

Statutes interpreted..... 2

Statutory authority 2

Explanation of agency authority..... 2

Related statutes or rules..... 3

Plain language analysis..... 3

Summary of, and comparison with, existing or proposed federal regulations..... 4

Comparison with rules in adjacent states..... 4

Summary of factual data and analytical methodologies..... 5

Analysis and documentation concerning effect on small businesses.....6

Statement of effect on small business..... 6

Agency contact person.....6

Proposed Effective Date..... 6

Fiscal Estimate..... 6

Text of Rule 7

Economic Impact Report.....NONE
 Department of Administration s. 227.138 Report..... NONE
 Energy Impact Report.....NONE

Agency Person to be Contacted for Questions

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Statement Explaining Need for Rule

This rule-making is needed to create a stronger and clearer relationship between ETF 20.02 and 10.08, to clarify rule language for general readability, and to make amendments needed to ensure compliance with the Internal Revenue Code (IRC).

Analysis Prepared by the Department of Employee Trust Funds

1. Statutes Interpreted:

40.23 (1) (a), 40.22, Stats.; IRC 401 (a).

2. Statutory Authority:

Sections 40.03 (2) (i), (ig), (ir), (t), and 227.11 (2) (a)(intro), 1. to 3., Stats.

3. Explanation of Agency Authority:

By statute, the ETF Secretary is expressly authorized, with appropriate board approval, to promulgate rules required for the efficient administration of any benefit plan established in ch. 40 of the Wisconsin statutes. Also, each state agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency if the agency considers it necessary to effectuate the purpose of the statute.

This rule is not subject to s. 227.135 (2), as affected by 2011 Wis. Act 21. The statement of scope for this rule, submitted to the LRB on 01/20/2011 and published in the Administrative Register on 02/15/2011, was received by the LRB prior to the effective date of 2011 Wis. Act 21.

4. Related Statute or Rule:

- 1) 40.23 (1) (a), Stats., governs minimum break in service requirements as referenced in both ETF 20.02 and 10.08 for proper termination from employment.
- 2) 40.22, Stats., sets forth the eligibility criteria for inclusion under the Wisconsin retirement system. Plan eligibility is relevant to both proper termination as well as becoming a rehired annuitant, and is referenced in both regulations.

5. Plain Language Analysis:

The rule changes result from a need for general language clarification, stronger linkage between regulations, and better compliance with the IRC. These changes include the following:

- ETF 20.02 and 10.08 are related regulations: 20.02 governs the requirements for rehired annuitants while 10.08 provides the terms for an initial separation from employment. By definition, rehired annuitants must first have a valid separation from employment as set forth under 10.08. Language has been added to both sections to clarify the interconnected nature of the sections through direct cross-reference. In addition, the change includes an amendment to the definition of rehired annuitant to specifically require a valid termination of employment as defined in ETF 10.08. The language has been added to improve understanding of the sections, as well as to ensure compliance with the IRC which requires a valid separation of service before an annuitant returns to employment.
- An additional section, 20.02 (4), was added to require employers to report to the Department all rehired employees, regardless of whether they meet the requirements in 40.22, Stats., as a WRS participating employee. Employer reporting of all rehired employees will allow ETF to more accurately monitor whether rehires have had a proper separation from employment under ETF 10.08 so they qualify as a rehired annuitant under ETF 20.02. This will allow ETF to maintain compliance with the IRS break-in-service requirements under IRC s. 401 (a).
- A note following ETF 10.08 (2) (b) 3 was removed for risk of IRC noncompliance. Prior to retirement, discussion with one's employer regarding re-employment of any kind is impermissible for IRS purposes. Doing so provides evidence against the intent to completely sever the employee-employer relationship. The note in this section could be construed to suggest that such agreements or discussions are acceptable.
- Language was added to an example provided under ETF 10.08 (2) (b) 5 to clarify that emeritus professors, as provided in the example, can only return to service if there is no compensation of any kind, including employer contributions

to 403 (b) accounts. Contributions to 403 (b) accounts have been an issue in the past for emeritus-type programs.

6. Summary of, and Comparison with, Existing or Proposed Federal Regulations:

IRC 401 (a), governing the qualified status of the pension plan, requires that there be a valid severance from employment before one can become a rehired annuitant. The changes and clarifications made to ETF 10.08 and 20.02 are intended in part to clarify language to strengthen understanding and to maintain compliance with this federal regulation. Under IRS guidelines, the IRS has made it clear that there must be a complete separation of the employee-employer relationship for a “bona fide” separation of service. The IRS has focused greatly on the intent of the employee to completely retire, with no prior arrangements to return to work for the employer. It was necessary to remove sections in the current regulation to clarify that such agreements are not permissible.

7. Comparison with Rules in Adjacent States

- Illinois – The relevant code for the State Retirement System of Illinois (SRS) is 40 ILCS 5/14-111, *Re-entry After Retirement*. The Illinois statute indicates that, with some exceptions, an annuitant who reenters service after retirement shall receive no payments from the retirement annuity during the time of employment. Only if the annuitant accepts temporary employment for a period not exceeding 75 working days in any calendar year can the employee continue to receive annuity payments.

Unlike WRS, SRS statutes do not set forth conditions for a valid separation of service as a requirement for an annuitant’s reemployment under the system. Therefore the proposed changes to ETF 10.08 and 20.02 do not bear relationship to regulations governing SRS due to an absence of analogous regulatory standards. As such the SRS administrative code also does not include language for full reporting of all rehired annuitants to the agency, as created under the proposed changes to ETF 20.02 (4).

- Iowa –The relevant codes governing the Iowa Public Employees’ Retirement System (IPERS) includes: Iowa Admin. Code 495-12.8, *Reemployment of retired members*; and Iowa Admin. Code 495-11.5, *Bona fide retirement and bona fide refund*. The relationship between these administrative codes does in fact bear a similar resemblance to the relationship being emphasized between ETF 10.08 and 20.02 in the current rule change.

One code is devoted to proper termination from employment (bona fide retirement in Iowa’s case) and the other to rehired annuitants (reemployment of retired members). However, there is less direct reference in the Iowa language between the regulations, in part because Iowa’s rehired annuitant code is devoted instead to a type of benefit payments that does not apply to WRS.

Some of the amendments currently proposed in the ETF rule changes are, however, reflected in the Iowa code. There is a section under Iowa Admin.

Code 495-11.5, for example, indicating that a school employee will not be considered to have a bona fide termination in service unless all of the employee's compensated duties for their current employer cease. Similarly, in the ETF rule change, language was added to ETF 10.08 (2) (b) 5 regarding "emeritus" professors to clarify that contributions to 403 (b) accounts are included in impermissible compensation. The Iowa code also indicates that a member will fail to have a bona fide separation of service if a contract for reemployment (of any nature) is made prior to the expiration of that state's minimum separation of service. A note following ETF 10.08 (2) (b) 3 was removed to make certain the no-contract requirement is properly reflected in the ETF code.

The Iowa administrative code does not, however, include language for full reporting of all rehired annuitants to the agency, as created under the proposed changes to ETF 20.02 (4).

- Michigan – Mich. Admin. Code R. 38.38 states that a "retirement allowance" shall be suspended during any time period that the "retirant" returns to work in a covered position, unless there was a bona fide termination of employment. The statutes and regulations, however, do not set forth a definition of a bona fide termination of employment, nor do they lay out conditions for proper termination. Therefore the proposed changes to ETF 10.08 and 20.02 do not bear relationship to regulations governing SRS due to an absence of analogous regulatory standards.
- Minnesota – The relevant code for the Minnesota State Retirement System (MSRS) is M.S.A. § 352.115 Subd. 10, *Reemployment of annuitant*. The statute only indicates the maximum earnings allowable. Unlike WRS, MSRS does not have a regulation that sets forth conditions for a valid separation of service as requirement for rehired annuitants. Therefore the proposed changes to ETF 10.08 and 20.02 do not bear relationship to regulations governing SRS due to an absence of analogous regulatory standards.

8. Summary of Factual Data and Analytical Methodologies:

The proposed rule amendment is intended to make ETF's regulations governing rehired annuitants and proper separation from employment clearer and more flexible, as well as to bring it into closer harmony with federal statutes. Factual data was collected from ETF departments as to the current procedures and requirements for reporting of rehired annuitants from the employer. Data was also collected from the procedures and regulations of nearby states and comparable government pension systems. Analytical methodologies included discussion with legal counsel as to using the amendments to achieve the goal of the strengthening compliance with IRS requirements for a bona fide separation of service and proper re-employment of annuitants. ETF also utilized comparative analysis to draw from other pensions' methods and regulations, as well as position ETF's proposed amendments within the statutes and regulations that present the greatest compliance with the IRC.

9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of Economic Impact Report:

The rule does not have an effect on small businesses because private employers and their employees do not participate in, and are not covered by, the Wisconsin Retirement System.

10. Effect on small business:

There is no effect on small business.

11. Agency contact person:

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12. Proposed Effective Date:

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

13. Fiscal Estimate:

The rule will not have any fiscal effect on the administration of the Wisconsin Retirement System, nor will it have any fiscal effect on the private sector, the state or on any county, city, village, town, school district, technical college district, or sewerage districts.

14. Free Copies of Proposed Rule:

Copies of the proposed rule are available without cost from the Office of the Secretary, Department of Employee Trust Funds, P.O. Box 7931, Madison, WI 53707-7931. The telephone number is: (608) 266-1071.

Text of Proposed Rule

Section 1. ETF 10.08 (1) (a) is amended to read:

ETF 10.08 (1) (a) This section defines separation of employment under s. 40.23 (1) (a) 1., Stats., for purposes of establishing eligibility to receive benefits from the Wisconsin retirement system, including separation benefits, lump sum benefits and retirement annuity benefits as provided by ss. 40.23, 40.24 and 40.25, Stats. For purposes of the Wisconsin retirement system, the terms “separation from employment” and “termination” are used interchangeably. An otherwise valid termination may become void and without effect as the result of reinstatement of the employee under s. 40.25 (5), Stats., and s. ETF 10.01 (3t), ~~or~~ because the employee received remedial payments deemed to be earnings under s. ETF 20.12 for a period in question, or who failed to meet the minimum break in service requirements as a rehired annuitant under ETF 20.02 and 40.23 (1) (a), Stats., and shall thereby be treated as employed during that period.

Section 2. ETF 10.08 (2) (a) and 10.08 (2) (b) are amended to read:

ETF 10.08 (2) (a) INTENT TO TERMINATE. No person may receive any retirement annuity, separation benefit or lump-sum payment from the Wisconsin retirement system without first terminating from his or her current ~~participating~~ employment with all participating employers. Whether the termination is a voluntary termination by the employee or an involuntary termination by the employer, the employer and employee shall act with the good-faith intent of ending the employee-employer relationship.

ETF 10.08 (2) (b) REQUIRED CONDITIONS. Termination from participating employment occurs when all of the following conditions are met:

Section 3. ETF 10.08 (2) (b) (2), 10.08 (2) (b) (3) and 10.08 (2) (b) (5) are amended to read:

ETF 10.08 (2) (b) (2) If the employee’s termination is voluntary, the employee and employer comply with the employer’s policies for voluntary termination, including the filing of a letter of resignation, ~~if applicable.~~

ETF 10.08 (2) (b) (3) As of the end of the day that participating employment terminates, the employee has no rights to any future compensable employment that meets the qualifications for inclusion under the Wisconsin retirement system provided under s. 40.22, Stats. A right to future compensable employment includes, but is not limited to, a contract for future employment with any participating employer, or having already been elected as of the termination date to a term of public office meeting the qualifications for participating employment, which term commences on or after the date of termination of employment, other than a term of public office as a part-time elected official for which the participant has waived WRS coverage under the provisions of s. 40.23 (1) (am), Stats.

49 ~~**Note:** This subdivision shall not preclude employees of any WRS~~
50 ~~participating employer from expressing willingness or interest in providing~~
51 ~~compensable services at some time in the future. For example, retiring~~
52 ~~judges would not be precluded from expressing interest in serving as a~~
53 ~~reserve judge after terminating employment.~~

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55 **ETF 10.08 (2) (b) (5)** Immediately upon termination of employment, the
56 participant has no authority to act as a representative of the employer in any
57 capacity or to exercise any authority or control over other employees of the
58 employer, and the employer has no responsibility or liability for any actions of
59 the terminated employee. This subdivision shall not apply to employees of
60 any WRS participating employer who provides services for which they have
61 not and will not receive compensation of any kind, including but not limited to
62 payment at some other time or compensatory paid leave.

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64 **Example:** Emeritus professors could render services for the university after
65 termination on condition that for which they do would not receive any form of
66 compensation, including employer contributions to 403 (b) accounts.

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69 **Section 4. ETF 10.08 (2) (c) and 10.08 (2) (d) are amended to read:**

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71 **ETF 10.08 (2) (c) REHIRED ANNUITANTS.** In order to receive a benefit under s.
72 40.23 or 40.25, Stats., a person terminated from participating employment on
73 or after July 1, 1996, shall remain terminated from all employment meeting
74 the qualifications for inclusion under s. 40.22, Stats., throughout a period
75 beginning with the date of termination from all participating employment and
76 ending on the latest of the following dates:

- 77
78 1. The day after the date which would be the effective date of the annuity as
79 determined in accordance with s. 40.23 (1) (b) and (bm), Stats., as applicable
80 to the annuity in question.
81
82 2. The thirty-first day after the benefit application is received by the
83 department as provided in s. 40.23 (1) (a), Stats.
84
85 3. The thirty-first day after termination of employment in accordance with this
86 section.

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88 **ETF 10.08 (2) (d) TERMINATED ANNUITIES.** For purposes of determining
89 whether employment meets the qualifications under s. 40.22, Stats., the
90 exclusion of s. 40.22 (2) (L), Stats., does not apply unless the person has
91 met all qualifications for entitlement to an annuity, including termination from
92 participating employment for the period specified in par. (c) 1., 2. and 3.
93 Payment of an annuity or other benefits in error does not qualify a person as
94 an annuitant for purposes of s. 40.22 (2) (L), Stats.

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96 **Note:** Refer to s. ETF 20.02 (2) on rehired annuitants.

Text of Proposed Rule

Section 1. ETF 20.02 (1), 20.02 (2) and 20.02 (3) are amended to read:

ETF 20.02 (1) In this section, “rehired annuitant” means a participant on or after July 1, 1996, who has applied for and is eligible to receive a monthly annuity under s. 40.21, Stats., including satisfying the requirement to remain separated from participating employment for the period specified under s. 40.23 (1) (a) 1., Stats., and who subsequently is employed by a participating employer in employment which would meet the eligibility criteria for inclusion under the provisions of the Wisconsin retirement system specified in s. 40.22, Stats., but for the exclusion of s. 40.22 (2) (L), Stats., and whose termination of employment meets all criteria under ETF 10.08 (2) (b).

ETF 20.02 (2) BREAK IN SERVICE. The minimum break in service period required under s. 40.23 (1) (a), Stats., is satisfied when the rehired annuitant returns to work no earlier than the latest of the following dates:

- (a) The day after the annuity effective date.
- (b) The thirty-first day after the date participating employment terminated.
- (c) The thirty-first day after the date the benefit application was received by the department.

ETF 20.02 (3) REQUIRED CONTRIBUTIONS. (a) The department shall include a rehired annuitant under the provisions of the Wisconsin retirement system as a participating employee if all of the following conditions apply:

1. The rehired annuitant is employed in a position which meets the requirements for participation specified in s. 40.22, Stats.;

2. The rehired annuitant files with the department a written election to be included under the provisions of the Wisconsin retirement system as a participating employee. The election shall be on a form provided by the department.

Note: A “Rehired Annuitant Election” form, ET-2319, is available from the department of employee trust funds.

(~~e~~b) An election filed pursuant to par. (a) shall take effect on the first day of the month following its receipt by the department. The department shall terminate the annuity on the day prior to the effective date of the election, unless the department receives the rehired annuitant’s written notice revoking the election prior to the effective date of the election.

Note: A rehired annuitant or employer may secure a copy of the election form required by s. ETF 20.02 at no charge by contacting the department of employee trust funds and asking for form ET-2319.

48 **Section 2. ETF 20.02 (4) is created to read:**

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ETF 20.02 (4) EMPLOYER REPORTING. Employers shall report to the department all rehired employees receiving an annuity from the Wisconsin retirement system, regardless of whether the employee qualifies as a rehired annuitant under this section and whether the employee's position meets the qualifications for inclusion under s. 40.22, Stats. Employers shall report rehired annuitants in the manner, form, and at the time requested by the department.