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1 **AN ACT** *to amend* 40.02 (28) and 40.06 (4) (a); and *to create* 40.02 (55p), 40.02 (55t),
 2 40.02 (55x), 40.06 (4) (c), 40.21 (7) and 40.22 (2) (n) of the statutes; **relating to:**
 3 enrollment of tribal police officers in the Wisconsin retirement system.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This draft was prepared for the Joint Legislative Council’s Special Committee on State–Tribal Relations. It relates to participation in the Wisconsin retirement system (WRS) by law enforcement officers employed by an American Indian tribe or band (tribe). The WRS is administered by the department of employee trust funds (ETF).

Under current law, only the employees of an “employer” as defined in the statutes (primarily state agencies and municipal governments) may participate in the WRS. The definition of “employer” does not include tribes or tribal agencies. Thus, the employees of tribes and tribal agencies are not eligible to participate in the WRS. This draft amends the definition of “employer”, for purposes of the WRS only, to include tribes and tribal law enforcement agencies, and allows tribes and tribal law enforcement agencies to enroll their law enforcement officers in the WRS.

The draft includes optional language limiting the scope of the draft to officers empowered to enforce state law under s. 165.92, stats., and officers deputized by a county sheriff. See the comment at the end of this prefatory note for a discussion of this option.

The draft also creates the following requirements of participating tribes and tribal law enforcement agencies, which are designed to protect the integrity of the WRS:

1. Under current law, a participating employer must transmit money to ETF each month, representing the combined employer and employee contributions to the retirement account of each covered employee. In the event that an employer does not transmit the required contributions, ETF has the power to recover those amounts directly from the budgets of state agencies and from state aids to municipal governments. The draft creates two mechanisms for ETF to recover any contributions that a tribe or tribal law enforcement agency fails to transmit:

- The draft authorizes ETF to recover those amounts from state aids to the tribe or other funds administered by the state and payable to the tribe.
- The draft requires that a tribe or tribal law enforcement agency that participates in the WRS maintain a performance bond from which ETF may withdraw funds to cover any contributions that the tribe or tribal law enforcement agency fails to transmit to it.

COMMENT: The committee could choose to include either or both of these mechanisms for the recovery of unpaid contributions.

2. Under current law, ETF is required to ensure that the WRS remains a qualified “governmental plan” under the federal internal revenue code and rules of the federal internal revenue service (IRS), thereby maintaining the federal income tax exempt status of the WRS. One requirement of this is that all participating employers in the WRS must be either: (a) the state or a political subdivision of the state; or (b) an agency or instrumentality of the state or of a political subdivision of the state. The draft requires that, before it may participate in the WRS, a tribe or tribal law enforcement agency must obtain a written ruling from the IRS that the tribe or tribal law enforcement agency is an agency or instrumentality of the state or of a political subdivision of the state for purposes of participation in the WRS and that participation of the tribe or tribal law enforcement agency will not adversely affect the WRS’s status as a governmental plan.

3. Under current law, ETF has the ability to enforce compliance with all requirements of the program that apply to participating employers and employees in the state court system. The draft requires that, for a tribe or tribal law enforcement agency to participate in the WRS, the tribe must adopt a resolution permanently waiving the tribe’s sovereign immunity to the extent necessary to allow ETF to enforce compliance within then rules applicable to participation in the WRS. The waiver must apply to enforcement actions against the tribe or tribal law enforcement agency, the participating employees of the tribe or tribal law enforcement agency, and annuitants formerly employed by the tribes or tribal law enforcement agency. The waiver must apply to enforcement of all statutes, rules, and requirements of the WRS, the terms of any contract between the tribe or tribal law enforcement agency and ETF, and all decisions, determinations, rulings, or orders of ETF, the employee trust funds board (the board), or the Wisconsin retirement board.

COMMENT: As described earlier, the draft requires that, before a tribe or tribal law enforcement agency may participate in the WRS, it must obtain a ruling from the IRS that it is an agency or instrumentality of the

state or of a political subdivision of the state. The IRS provided such a ruling regarding the Mille Lacs Band of Chippewa Indians, in Mille Lacs County, Minnesota. While that ruling cannot be cited as precedent, it provides useful insights. The IRS based its ruling primarily on the degree of control the state or its political subdivisions exercise over the tribe's law enforcement agency. In Minnesota, this control is substantial. In particular, Minnesota statutes grant the powers of a law enforcement agency under state law to the band if the band meets a number of requirements that, collectively, give the state the same degree of control over the Mille Lacs police department as it has over the police departments of its own political subdivisions. The ruling also notes that mutual aid agreements with 2 sheriff's departments grant to those departments substantial control over daily activities of the Mille Lacs police department to those sheriff's departments.

The Wisconsin statutes do not treat tribal police departments in the same manner that the Minnesota statutes treat the Mille Lac Band's police department. Tribal police departments in Wisconsin employ at least some officers who are authorized to enforce state laws under s. 165.92, stats., or under deputation by a sheriff. While this gives the state significant control over those tribal officers when acting in this capacity, it does not give the state control over the operations of the tribe's department. Mutual assistance agreements with county sheriffs or municipal chiefs of police could give those officials some control over the operations of the tribe's department, though the extent of such control would depend on the terms of individual agreements.

It is not possible to say how the IRS would rule in any particular instance. It might be more inclined to rule that a tribal department is an agency or instrumentality of the state or of a political subdivision of the state if participation in the WRS were limited to those tribal officers authorized to enforce state laws under s. 165.92 or by deputation. Note that this observation is speculative. Note also that control of the tribal department is only one factor the IRS will consider. Nonetheless, the option of limiting applicability of the draft to officers empowered to enforce state laws is offered for the special committee's consideration. See SECTION 3 of the draft.

- 1 **SECTION 1.** 40.02 (28) of the statutes is amended to read:
- 2 40.02 **(28)** "Employer" means the state, including each state agency, any county, city,
- 3 village, town, school district, other governmental unit or instrumentality of 2 or more units of
- 4 government now existing or hereafter created within the state, any federated public library

1 system established under s. 43.19 whose territory lies within a single county with a population
2 of 500,000 or more, a local exposition district created under subch. II of ch. 229, and a
3 long-term care district created under s. 46.2895, except as provided under ss. 40.51 (7) and
4 40.61 (3). For purposes of this subchapter, subch. II, and ss. 40.63, 40.65, 40.71, 40.73, and
5 40.75, “employer” includes a tribe or a tribal law enforcement agency. “Employer” does not
6 include a local cultural arts district created under subch. V of ch. 229. Each employer shall
7 be a separate legal jurisdiction for OASDHI purposes, except that an employer that is a tribe
8 or tribal law enforcement agency is not required to be a separate legal jurisdiction for OASDHI
9 purposes.

10 **SECTION 2.** 40.02 (55p) of the statutes is created to read:

11 40.02 (55p) “Tribal law enforcement agency” means an agency of a tribe that employs
12 one or more persons full time for the purpose of preventing and detecting crime on the
13 reservation or trust lands of the tribe and enforcing the tribe’s laws or ordinances.

14 **SECTION 3.** 40.02 (55t) of the statutes is created to read:

15 40.02 (55t) “Tribal law enforcement officer” means a person who is employed by a tribe
16 for the purpose of detecting and preventing crime and enforcing the tribe’s laws or ordinances
17 and who is authorized by the tribe to make arrests of members of the tribe for violations of the
18 tribe’s laws or ordinances [and to whom one of the following applies:

19 (a) The officer is empowered to act under s. 165.92 (2) (a).

20 (b) The officer has been deputized by a county sheriff.]

COMMENT: Should the draft apply to all tribal law enforcement officers,
or only to those empowered to enforce state laws under s. 165.92, stats.,
those deputized by a county sheriff, or both? See the discussion in the
comment following the prefatory note, beginning on page 2 of this draft.

21 **SECTION 4.** 40.02 (55x) of the statutes is created to read:

1 40.02 (55x) “Tribe” means a federally recognized American Indian tribe or band in this
2 state.

3 **SECTION 5.** 40.06 (4) (a) of the statutes is amended to read:

4 40.06 (4) (a) Whenever any employer, other than the state, a tribe, or a tribal law
5 enforcement agency, fails to pay to the department any amount due, the department shall
6 certify the amount or the estimated amount to the department of administration which shall
7 withhold the amount or the estimated amount from the next apportionment of state aids or
8 taxes of any kind payable to the employer or, if so directed by the department, collect the
9 amount as provided in sub. (2) (c) and shall pay the amount so withheld or collected to the
10 department. When the exact amount due is determined and the department receives a sum in
11 excess of the exact amount, the department shall pay the excess amount to the employer from
12 whose aid the excess was withheld.

NOTE: Excludes tribes and tribal law enforcement agencies from the
 provisions used to recover unpaid contributions from municipal
 governments.

13 **SECTION 6.** 40.06 (4) (c) of the statutes is created to read:

14 40.06 (4) (c) Whenever any employer that is a tribe or a tribal law enforcement agency
15 fails to pay to the department any amount due, the department shall certify the amount or the
16 estimated amount to the department of administration, which shall withhold the amount or the
17 estimated amount from future apportionments of state aids of any kind or any other funds
18 administered by the state payable to the employer or, if the employer is a tribal law
19 enforcement agency, the tribe of which the employer is an agency, and shall pay the amount
20 so withheld to the department. If the aid or other funds are administered or disbursed by
21 another agency, the department of administration shall direct that agency to withhold the
22 amount due from the aid or other funds to which the tribe is eligible and pay the amount so

1 withheld to the department. When the exact amount due is determined and if the department
2 has received a sum in excess of the exact amount, the department shall pay the excess amount
3 to the tribe from whose aid or other funds the excess was withheld.

4 **SECTION 7.** 40.21 (7) of the statutes is created to read:

5 40.21 (7) (a) Before a tribe or tribal law enforcement agency may be included within
6 the provisions of the Wisconsin retirement system, the tribe or tribal law enforcement agency
7 shall obtain a written ruling from the federal internal revenue service that states all of the
8 following:

9 1. The tribe or tribal law enforcement agency is an agency or instrumentality of the state
10 or of a political subdivision of the state for the purpose of inclusion within the provisions of
11 the Wisconsin retirement system.

12 2. Inclusion of the tribe or tribal law enforcement agency within the provisions of the
13 Wisconsin retirement system does not adversely affect the status of the Wisconsin retirement
14 system as a governmental plan within the meaning of section 414 (d) of the federal internal
15 revenue code.

16 (b) For a tribe or a tribal law enforcement agency to be included within the provisions
17 of the Wisconsin retirement system, the tribe or the tribe that created the tribal law
18 enforcement agency shall adopt a resolution in which the tribe permanently waives its
19 sovereign immunity to the extent necessary to allow the state to enforce, in the courts of this
20 state, all of the following:

21 1. Compliance by the tribe or tribal law enforcement agency with all statutes, rules, and
22 requirements that apply to a participating employer, including the obligation under s. 40.21
23 (1) of a participating employer to participate in the Wisconsin retirement system in perpetuity;
24 with the terms of any contract between the tribe or tribal law enforcement agency and the

1 department; and with all decisions, determinations, rulings, or orders of the department, the
2 board, or the Wisconsin retirement board.

3 2. Compliance by all employees of the tribe or tribal law enforcement agency who are
4 participating employees and by all annuitants formerly employed by the tribe or tribal law
5 enforcement agency with all statutes, rules, and requirements that apply to a participating
6 employee and with all decisions, determinations, rulings, or orders of the department, the
7 board, or the Wisconsin retirement board.

8 (c) For a tribe or tribal law enforcement agency to be included within the provisions of
9 the Wisconsin retirement system, the tribe or tribal law enforcement agency shall obtain and
10 keep in effect a performance bond to which all of the following apply:

11 1. The bond is in an amount not less than the sum of the tribe's or tribal law enforcement
12 agency's required contribution under s. 40.05 (2) and the employees' required contributions
13 under s. 40.05 (1) for the succeeding [3] [6] [12] months, as estimated by the department. The
14 tribe or tribal law enforcement agency shall, at least annually, adjust the amount of the bond
15 to reflect changes in the estimated amount of required contributions.

16 2. The bond authorizes the department to withdraw funds from the bond under par. (d).

17 (d) If a tribe or tribal law enforcement agency fails to make the contributions under s.
18 40.05 (1) and (2) for a period of [3] [6] [12] months, the department shall withdraw funds from
19 the bond described in par. (c) and treat those funds as contributions under s. 40.05 (1) and (2).
20 If the department withdraws funds under this paragraph, the tribe or tribal law enforcement
21 agency shall replenish the bond to the level specified in par. (c) 1. within [3] [6] [12] months.

COMMENT: There are 3 decisions for the committee to make in pars. (c) and (d): how many months contributions the bond must cover; how many months in arrears a tribe or tribal law enforcement agency must be before ETF may withdraw from the bond; and within how many months a tribe or tribal law enforcement agency must replenish the bond. As an

alternative, legislation could direct ETF to determine these matters in rules. In addition, ETF could set the amount of the required bond in rules, or determine it annually based on criteria specified in rules.

1 **SECTION 8.** 40.22 (2) (n) of the statutes is created to read:

2 40.22 (2) (n) The employee is employed by a tribe or a tribal law enforcement agency

3 in any capacity other than that of a tribal law enforcement officer.

NOTE: Limits tribal employees' participation in the WRS to tribal law enforcement officers. It does so by adding all other employees of a tribe or a tribal law enforcement agency to a list of employees not eligible to participate in the WRS.

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(END)