

Clearinghouse Rule 96-127



STATE OF WISCONSIN

Department of Employee Trust Funds

Eric O. Stanchfield  
Secretary  
801 West Badger Road  
P.O. Box 7931  
Madison, Wisconsin 53707-7931

STATE OF WISCONSIN

In Reply Refer To:

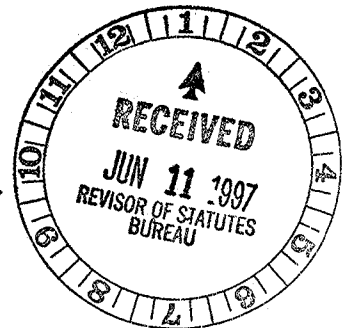
DEPARTMENT OF EMPLOYEE TRUST FUNDS

I, Eric O. Stanchfield, Secretary of the Department of Employee Trust Funds and custodian of the official records of this office, certify that the attached rule-making order affecting ss. ETF 10.03 (3t) and 20.12, WI Administrative Code, relating to conditions under which the Department of Employee Trust Funds will treat payments received under a court order or compromise settlement as earnings for retirement benefit purposes, was issued by this office on June 11, 1997.

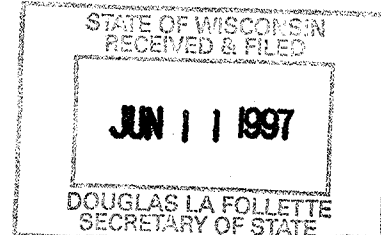
I further certify that I have compared this copy with the original on file in this office and that it is a true copy of the whole of the original.

Dated at Madison, Wisconsin, this 11<sup>th</sup> day of June, 1997.

*Eric O. Stanchfield*  
Eric O. Stanchfield, Secretary  
Department of Employee Trust Funds

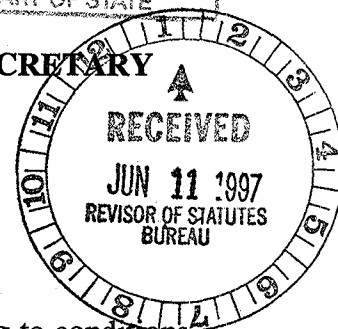


8-1-97  
96-127



**Order of the**

**DEPARTMENT OF EMPLOYE TRUST FUNDS -- OFFICE OF THE SECRETARY  
EMPLOYE TRUST FUNDS BOARD  
TEACHER RETIREMENT BOARD  
WISCONSIN RETIREMENT BOARD**



**Creating an Order**

To create ss. ETF 10.03 (3t) and 20.12, Wisconsin Administrative Code, relating to conditions under which the Department of Employee Trust Funds will treat payments received under a court order or compromise settlement as earnings for retirement benefit purposes.

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Analysis Prepared by the Department of Employee Trust Funds

A person's retirement benefits under the Wisconsin Retirement System (WRS) are dependent on three elements: creditable service, earnings paid in return for the service, and retirement contributions paid as a percent of the earnings. An employe cannot receive creditable service under the WRS for a period when no earnings are received. This proposed rule defines how the department will credit earnings when they are paid as part of the resolution of an employment dispute.

Improper terminations, disciplinary actions or wage disputes sometimes result in court orders or compromise settlements which grant the appellant reinstatement, restoration of benefits, or back wages. Section 40.02 (22) (b) 9., Stats., excludes from earnings for WRS purposes any payments for damages, attorney fees, interest or penalties paid under court judgement or by compromise settlement to satisfy a grievance or wage claim. However, prior to May 16, 1996, if the order or settlement directed that salary be paid for a specific period of time, the salary was considered covered earnings even if offset by amounts earned from other sources. Retirement contributions were paid on these earnings and creditable service was granted, thus making the reinstated employe whole with regard to WRS benefits for the period in dispute.

Federal tax law limits contributions to a qualified retirement plan to a percentage of the employe's taxable compensation. 1995 Wisconsin Act 302 repealed the provision in s. 40.02 (22) (b) 9., Stats., which allowed actual or deemed salary payments arising from employment disputes to be considered as WRS earnings. Instead, the statute now authorizes the Department of Employee Trust Funds (ETF) to provide by rule that specific types of payment included in a judgement or settlement qualify as earnings for WRS purposes. The payment must be treated as taxable income and must be consistent with previous payments for hours of service rendered by the employe. Eligible payments are restricted to the following:

- Additional wages paid to a continuously participating employe, and

- Salary paid to a participant for any period of improper termination of participating employment.

("Participating employe" and "participant" are statutory terms meaning, respectively, a person who is currently employed in a WRS-covered position and a person who is included in the WRS due to current or previous WRS-covered employment.)

The statute as amended prevents settlements in which retirement contributions and WRS service are reported although salary or wages were not actually paid. It also prevents WRS recognition of *any* payment arising from a wage or termination dispute until the Department promulgates a rule.

#### General Summary of Rule.

The rule applies to court orders and compromise settlements effective on or after May 16, 1996. "Compromise settlements" are defined to mean binding written agreements between employer and employe to resolve a wage claim or employment dispute, including final orders of the personnel commission and arbitration awards. The "effective date" of court orders and compromise settlements is defined. Payments made to all eligible members of a bargaining unit under a collective bargaining agreement are not included under the rule (such payments are subject to all statutory provisions).

A payment to a person whose WRS account was closed by receipt of a separation or lump sum retirement benefit may not be treated as WRS earnings; and a participant who is receiving a WRS annuity may not be credited with earnings for a period after the annuity began. This does not apply if the employe is reinstated under the settlement: in this case the employe's WRS account will be reestablished as provided in s. 40.25 (5), Stats. Section 1 of the rule contains a definition of "reinstate" for this purpose.

The following requirements apply in order for wages or salary paid under a court order or compromise settlement to be considered as WRS earnings:

- The employe must be living on the effective date of the settlement.
- The wages or salary and associated hours of service may not exceed the earnings and service that would properly have been credited to the employe had there been no dispute.
- The settlement must specify the amount to be paid as wages or salary in each annual earnings period and the employer may be required to provide ETF with a detailed report of the earnings and service by pay period.

- The employer must submit an appropriately-coded transaction report to the department. A copy of the court order or compromise settlement must also be submitted if the dispute involved termination or the award is in excess of 80 hours of pay.
- Required contributions, including interest if applicable, must be paid on the earnings. These contributions may not exceed the contribution limits under s. 415 (c) of the Internal Revenue Code and s. 40.32, Stats.

If the dispute involves a termination from participating employment, there are additional requirements:

- The original termination date must be rescinded and expunged under the terms of the settlement. If the employe is not reinstated, a new termination date must be reported.
- The employer must pay the employe all wages from the rescinded termination date to the date the employe returns to work or to the new termination date. However, the settlement may provide that the back wages be reduced to reflect a period of unpaid suspension, or be offset by amounts the employe earned from other sources. In the latter case, the employe may receive full earnings and service credit provided the required contributions would not exceed the Internal Revenue Code s. 415(c) limits on retirement contributions.
- If the employe has other WRS-covered employment during the disputed period, the total earnings and service credited to the employe after implementation of the settlement may not exceed the totals that would normally have been credited.

The ordinary provisions of s. 40.02 (22), Stats., apply to payments made under a court order or compromise settlement. This subsection excludes from WRS earnings a variety of payments that employers make to or on behalf of employes (e.g., "cash-outs" of accumulated leave time at termination). The rule also specifically prohibits crediting WRS earnings for payments to compensate for improper hiring decisions, payments in excess of the wages that would normally have been reported for the employe, payments assigned to annual earnings periods other than those in which service was actually rendered, and payments made for services rendered after the termination.

Authority for Rule:

Sections 40.02 (22) (b) 9. and 40.03 (2) (i) and (t), Stats., as affected by 1995 Wisconsin Act 302

Statutes Interpreted:

Sections 40.02 (22) and 40.25 (5), Stats.

Related Federal Statutes and Regulations

IRC Section 415 (b) and (c); Treas. Reg. ss.1.415-2(d), 1.415-3, and 1.415-6

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SECTION 1. ETF 10.01 (3t) is created to read:

ETF 10.01 (3t) "Reinstate," for purposes of s. 40.25 (5) (a), Stats., means to restore a discharged employe to the previously held position, or a like position, with the participating employer, at the same pay and benefit level to which the employe would have been entitled if the employment had not been interrupted by the discharge. The court order, arbitration award or compromise settlement must direct that the disputed termination be expunged and the employe made whole with respect to all wages and benefits that the employe would have received if continuously employed by the participating employer under the conditions in effect prior to the disputed termination, except that the court order, arbitration award or compromise settlement may direct that back wages paid for the period of discharge be reduced by amounts earned from other sources and may identify a period of disciplinary suspension for which wages and benefits are not paid.

SECTION 2. ETF 20.12 is created to read:

ETF 20.12 PAYMENTS CONSIDERED WISCONSIN RETIREMENT SYSTEM EARNINGS. (1) (a) The purpose of this section is to establish the circumstances under which some or all payments made as a remedy for an employment dispute may be treated as earnings for Wisconsin retirement system purposes and to state the elements required for such treatment.

(b) This section applies to court orders and compromise settlements having an effective date which is on or after May 16, 1996.

(c) This section does not apply to retroactive or other wage payments made to all eligible employees in a bargaining unit under a collective bargaining contract.

(2) Definitions. (a) "Compromise settlement," for purposes of this section, means a written, binding agreement between a participating employer and a current or former participating employee of that employer, to settle a wage claim or a dispute involving an involuntary suspension or termination of participating employment. For purposes of this section only, the department shall treat a final order issued by the personnel commission or an arbitration award under a collective bargaining agreement, for which all appeal opportunities have expired without an appeal being filed, as a compromise settlement.

(b) "Effective date" of the court order or compromise settlement, for purposes of this section, means the date an order of the court, the personnel commission, or an arbitrator is issued or, when the matter is resolved by a compromise settlement signed by the parties rather than a final order, the date on which the compromise settlement in its final form is first signed by all of the parties.

(3) Except as provided in this section, no payment resulting from a court order or compromise settlement may be considered as earnings for Wisconsin retirement system purposes. The department may decline to act on a court order or compromise settlement which does not contain all of the information required under this section or is otherwise defective.

(4) Subject to all provisions of this section, the department shall treat as earnings for Wisconsin retirement system purposes a payment made under a court order or compromise settlement by a participating employer to an employee or former employee provided all of the following conditions are met: (a) The payment is one of the following:

1. Retroactive wages paid to a participant for a period following an involuntary termination of the employee's participating employment by that participating employer, which are paid under court order or the terms of a compromise settlement which also expunges the previously reported termination.

2. Retroactive wages paid to a participant for a period during which the participating employe was involuntarily placed on unpaid leave or suspension by that participating employer.

3. Additional wages properly due to a continuously participating employe from that participating employer for hours of service actually rendered and previously reported to the department.

4. Additional wages properly due to a continuously participating employe from that participating employer for hours of service actually rendered but not previously reported to the department.

(b) The employe or former employe is living on the effective date of the court order or compromise settlement.

(c) The court order or compromise settlement is in writing and is signed and dated by the issuing authority or by the parties to the agreement.

(d) The court order or compromise settlement specifies the wages to be paid to the employe for each annual earnings period and the associated hours of service actually rendered by the employe or that would have been rendered but for the disputed suspension or termination.

NOTE: "Annual earnings period" is defined by s. 40.02 (3), Stats.

(e) The employer reports the wages and hours of service to the department under a transaction code designated by the department for actions resulting from court orders and

compromise settlements. At the department's request, the employer shall report wages and hours of service in sufficient detail to enable the department readily to calculate the wages and hours for each payroll period during the period under dispute and shall distinguish between additional wages, if any, paid for hours of service previously reported to the department, and wages and hours of service not previously reported.

NOTE: Employer reporting is described in detail in ET-1127, WRS Administration Manual, which is available from the Department at no charge.

(f) If the dispute concerns a termination of participating employment or if the amount of wages reported under par. (e) exceeds the employee's current basic rate of pay multiplied by 80, the employer submits with the transaction report the original court order or compromise settlement or a complete copy thereof. The department may require submittal of the court order or compromise settlement associated with a smaller wage payment. If the employer fails to submit the transaction report and the court order or compromise settlement, if required, within 90 days after the effective date, the employee, the collective bargaining agent, or the issuing court or agency may submit a complete copy of the court order or compromise settlement to the department for purposes of requesting employer reporting.

(g) The employer remits required contributions on the wages, or that portion of the wages which the department treats as earnings, including interest computed under s. 40.06 (5), Stats., and s. ETF 10.635.

(h) If the remedy includes payment of wages for a period following a disputed termination of participating employment, the court order or compromise settlement does all of the following:

1. Directs the employer to rescind the termination date previously reported to



the department and, if the employee is not to be reinstated, specifies the date on which the employee-employer relationship terminated, which date shall be treated as the termination date for Wisconsin retirement system purposes. This date may not be later than the effective date of the court order or compromise settlement.

2. Directs the employer to pay the employee all wages from the rescinded termination date to the date the employee returns to work or the new termination date reported under subd. 1. as if the employee had been continuously employed throughout the period under the conditions of employment prevailing prior to the termination, except that the court order or compromise settlement may direct that wages be reduced by amounts earned from other sources and may identify a period of suspension for which wages are not paid.

(5) The department may not consider any of the following payments as earnings:

(a) A payment that results from resolution of a dispute over the employer's failure to hire a person. Any payment in such cases shall be considered by the department as a damage award. This paragraph does not exclude retroactive wages related to a participating employer's failure to hire a participating employee of that employer for another position, provided the court order or compromise settlement also directs that the employee's basic pay rate be permanently increased.

(b) A payment directed by a court order or compromise settlement if either the specified hours of service or associated wages exceed the creditable service and earnings which would have been properly reported for the employee if the employee had been continuously employed through the period at issue under the conditions of employment prevailing prior to the dispute.

(c) A payment directed by a court order or compromise settlement which purports to pay earnings in one annual earnings period which actually result from employment during another annual earnings period or a combination of annual earnings periods.

(d) A payment for actual or constructive services rendered, or deemed to have been rendered, after termination of employment.

(e) A payment directed by a court order or compromise settlement which is excluded from earnings under s. 40.02 (22) (b), Stats., including all of the following:

1. A payment which is other than wages or salary for personal services actually rendered to that participating employer by the participating employee, or which would have been rendered but for the disputed termination or suspension;

2. A payment, including a wage payment, made in return for, or in order to secure, the employee's resignation or termination from participating employment, whether immediately or at some specified time in the future, or to secure release from an unexpired contract of employment, including the employee's voluntary waiver of grievance rights under a collective bargaining contract. This subparagraph does not prevent a remedy from including both a wage payment and a payment to secure the employee's agreement to other conditions, provided the court order or compromise settlement specifies the portion of the total payment that represents wages.

3. A lump sum payment for accumulated vacation, sick leave, or compensatory time, unless the payment is broadly applicable to the employees of the employer regardless of age, length of service or likelihood of employment termination.

4. A payment for damages, attorney fees, interest or penalties included in the court order or compromise settlement, regardless of whether the amount of the payment reflects previous salary levels.

5. A payment based on a change in the method of computing the base compensation of the employe during the last five years of employment, unless resulting from application of a broader change permitted under s. 40.02 (22) (b) 10., Stats.

6. A payment made in lieu of fringe benefits normally paid for or provided by the employer.

(6) The department may not consider as earnings a payment for wages for a period during which the employe was an annuitant, or a payment made to a person whose Wisconsin retirement system account was closed by receipt of a benefit under s. 40.25 (1), (2), or (2m), Stats., on or before the effective date of the court order or compromise settlement. This subsection shall not be construed to affect a reinstatement as provided under s. 40.25 (5), Stats.

(7) (a) Except as provided in par. (b), if the court order or compromise settlement directs that the retroactive earnings to be paid first be reduced by amounts earned from other sources, the department shall determine the earnings to be credited in each annual earnings period based on the unreduced amount, subject to the limitations of section 415 of the internal revenue code and to par. (5) (b). The department may determine the hours of service to be credited in each annual earnings period from data available to the department or by dividing the unreduced amount otherwise treatable as earnings in accord with this section for each affected annual earnings period by the rate of pay the department determines applied during the period under dispute.

(b) If the employe has other participating employment during the disputed period, the department shall reduce the amount of earnings and service it credits under the court order or compromise settlement by the earnings and service resulting from the other participating employment.

EXAMPLE: An employe who normally earns \$12.00 per hour in a full-time position works half-time in another participating position for \$10.00 per hour during the disputed termination. In each week, the employe earns \$200.00 and 20 hours of service. If the employe is made whole for wages and benefits under the compromise settlement and receives back wages of \$480.00 per week for the period of termination, the department will credit only an additional \$280 in earnings and an additional 20 hours of service for each week.

(c) In cases of part-time participating employment the department may increase the service and earnings credited under par. (b) if the employe submits satisfactory evidence showing that the total earnings and service credited during the disputed period, if properly reported, would have been greater than those prevailing before the dispute.

(8) Regardless of when payment to the employe actually occurs and regardless of whether payment is reported as taxable income in the year payment was made or by revising reports of taxable income for previous years, any payments considered as earnings under this section shall be treated for the purposes of the Wisconsin retirement system as earnings in the annual earnings period in which the earnings should normally have been paid.

(9) (a) Except as limited by sub. (10), resolution of any employment dispute between a participating employer and participating employe may include making additional contributions to the participant's account.

(b) The department shall respond to reasonable requests by a participant or a participating employer to estimate the amount of additional contribution necessary to fund a benefit equivalent to a hypothetical Wisconsin retirement system benefit.

(10) (a) Regardless of the terms of a court order or compromise settlement, if the department finds that a contribution exceeds the limits on contributions to qualified pension plans established by the internal revenue code and regulations promulgated thereunder, as determined by the department, the department shall refuse to accept the contribution. If any excess contribution is accepted in error, the department shall refund or credit it as provided in s. 40.08 (6), Stats.

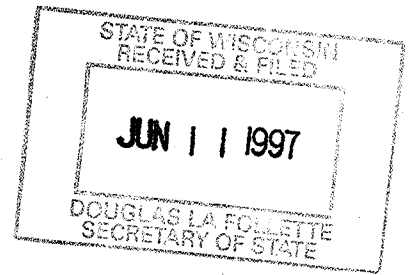
(b) In order to establish the amount of an employee's reportable income for a specified year, as necessary to compute contribution limits, and in order to verify that payments requested to be considered as earnings under this section were reported as taxable income, the employee shall furnish to the department upon request proof of all taxable compensation received and all retirement contributions made to all retirement plans during each year at issue.

SECTION 3. 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 (20 (intro.)), Wis. Stats.



Signed at Madison, Wisconsin this 11th day of June, 1997

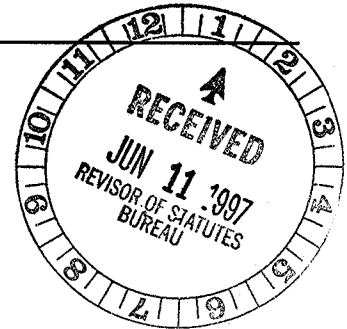
Eric O. Stanchfield, Secretary  
Department of Employee Trust Funds



**STATE OF WISCONSIN  
DEPARTMENT OF EMPLOYE TRUST FUNDS  
801 West Badger Road  
Madison, WI 53713**

**CORRESPONDENCE MEMORANDUM**

**DATE:** June 11, 1997  
**TO:** Gary Poulson  
Revisor of the Statutes  
**FROM:** Sandy Drew  
Director of Legislation and Planning  
**SUBJECT:** Sections ETF 10.03 (3t) and 20.12, WI Administrative Code, relating to conditions under which the Department of Employee Trust Funds will treat payments received under a court order or compromise settlement as earnings for retirement benefit purposes. Clearinghouse Rule No. CR-96-127.



Enclosed are two copies of the above-referenced order of the Secretary of the Department of Employee Trust Funds.

Pursuant to S. 227,114 (6), Stats., I have also enclosed the following:

Summary of Final Regulatory Flexibility Analysis. The Department of Employee Trust Funds has determined that this rule will not have a significant economic impact on a substantial number of small businesses. Therefore, a final regulatory flexibility analysis is not required.

Summary of Comments of Legislative Standing Committees. The legislative standing committees had no comments on this rule.

SD:s  
Encs.