

STATE OF WISCONSIN)
) SS
 DEPARTMENT OF EMPLOYE TRUST FUNDS)

I, Eric O. Stanchfield, Secretary of the Department of Employee Trust Funds and custodian of the official records, certify that the annexed rule, relating to the definition of termination of employment for purposes of eligibility for Wisconsin Retirement System benefits, was duly approved and adopted by the State of Wisconsin Teachers Retirement Board and Wisconsin Retirement Board on March 19, 1998 and by the State of Wisconsin Employee Trust Funds Board on March 20, 1998.

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

(no seal)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department of Employee Trust Funds at 801 West Badger Road in the city of Madison, this

13th day of May 1998

Eric O. Stanchfield
 Eric O. Stanchfield



State of Wisconsin
DEPARTMENT OF EMPLOYE TRUST FUNDS -- OFFICE OF THE SECRETARY
and
EMPLOYE TRUST FUNDS BOARD
TEACHER RETIREMENT BOARD
WISCONSIN RETIREMENT BOARD

Clearinghouse Rule #CR 97-073

AN ORDER creating ss. ETF 10.08, Wisconsin Administrative Code, relating defining termination of employment for purposes of eligibility for benefits administered by the Department of Employee Trust Funds.

REPORT OF THE WISCONSIN DEPARTMENT OF EMPLOYE TRUST FUNDS
ON THE FINAL DRAFT RULE

This report, prepared in compliance with ch. 227, Wis. Stats., includes the following:

Part 1 - Analysis prepared by the Department of Employee Trust Funds;

Part 2 - Rule text in Final Draft Form;

Part 3 - Recommendations of the Legislative Council Staff;

Part 4 - Report prepared pursuant to the provisions of s. 227.19 (3),
Wis. Stats., including:

- (a) Statement of the Need for the Rule;
- (b) Explanation of Modifications to the Rule after Public Hearings;
- (c) List of Persons Appearing or Registering an Opinion;
- (d) Response to Legislative Council Staff Recommendations;
- (e) Final Regulatory Flexibility Analysis.

Submitted by:

Linda Owen
Division of Retirement Services
Wisconsin Department of Employee Trust Funds
801 East Badger Road
P.O. Box 7931
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Analysis Prepared by the Wisconsin Department of Employee Trust Funds

To qualify for a separation benefit, lump sum payment or retirement annuity under ss. 40.23, 40.24 and 40.25 a participant must terminate from all Wisconsin Retirement System (WRS) participating employment as specified in ss. 40.22. Many individuals who retire and begin receiving WRS benefits subsequently return to work for a WRS employer. They frequently return to the same WRS employer from which they retired, sometimes doing the same type of work, and this often occurs within a short period of time after the termination date. In some cases there may be a question as to whether a valid termination of employment actually occurred, particularly in cases where the employer may have made a commitment of future employment before the "termination" occurred.

The purpose of this rule is to define the conditions which must be met to be considered a valid termination of employment that would qualify a participant to receive WRS benefits, and the other benefits administered by the Department that are associated with termination of employment.

General Summary of Rule

The rule applies to terminations of participating Wisconsin Retirement System employment that occur on or after the effective date of this rule. ETF 10.08 defines the conditions which a termination of employment must meet to be considered a valid termination for benefit eligibility purposes.

As of the termination date the participant cannot have rights to any future employment that meets the WRS participation standards in § 40.22. The employee must have ceased to render services to the employer, and the employer from which the participant is terminating must treat the employee in all respects in a manner consistent with other similarly situated employees with whom the employer-employee relationship has been permanently severed. This includes payout or expiration of all accrued leave, such as sick leave, vacation, leave of absence or other accrued benefits normally payable to terminated employees. As of the termination date the participant may not have been elected to a term of office beginning after the termination date which would meet the participation standards in § 40.22, other than a part-time elected position for which the participant has waived coverage under § 40.23 (1) (am).

The termination date shall be the earliest of the dates on which certain conditions are met, including the date on which the employee last renders services to the employer, the date a leave of absence expires, the effective date of an employer's discharge for cause or of the employee's date of resignation, or the employee's date of death. The date of termination is subject to review by the Department, and the Department may determine a termination date in accord with ETF 10.08 and § 40.02 (26) upon evidence satisfactory to the Department.

Authority for Rule.

Sections 40.02 (26) and 40.22, Stats.

Statutes Interpreted:

Sections 40.02 (26), 40.22 and 40.23 (1) (a) 1., Stats.

Initial Fiscal Estimate. The Department estimates that there will be no direct fiscal impact from this rule making upon the state and anticipates no effect upon the fiscal liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education school district or sewerage district.

Initial Regulatory Flexibility Analysis. The Department anticipates that the provisions of this proposed rule will have no direct adverse effect on small businesses.

Copies of Rule and Contact Persons. Copies of this rule are available without cost by making a request to the Department of Employee Trust Funds, Office of the Secretary, P.O. Box 7931, Madison, Wisconsin 53707, telephone (608) 266-1071. For questions about this rule making, please call Linda Owen, Benefit Plan Policy Analyst, (608) 261-8164.

Contact Persons. Persons with questions about this rule may write to the above address or call Linda Owen, Benefit Plan Policy Analyst, (608) 261-8164. Legal questions about this rule may be addressed to Robert Weber, Wisconsin Department of Employee Trust Funds, P.O. Box 7931, Madison, WI 53707, telephone (608) 266-5804.

TEXT OF RULE

SECTION 1. ETF 10.08 is created to read:

ETF 10.08 SEPARATION FROM EMPLOYMENT (1) SCOPE. (a) This section defines separation of employment under § 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 § 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 employe under § 40.25 (5) and s. ETF 10.01 (3t), or because the employe received remedial payments deemed to be earnings under s. ETF 20.12 for a period in question, and shall thereby be treated as employed during that period.

(b) The effective date of disability annuity benefits shall be determined as provided by § 40.23 (1) (b) and (bm) and § 40.63 (8) (intro.) and (f), Stats.

(2) TERMINATION OF EMPLOYMENT. (a) 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 employe or an involuntary termination by the employer, the employer and employe shall act with the good-faith intent of ending the employe-employer relationship.

(b) Termination from participating employment occurs when all of the following conditions are met: 1. The employe ceases to render compensable personal services to or on

behalf of the employer, and the employer has no further rights to any future services from the employe for which the employe will receive compensation. This paragraph does not apply to services rendered as a part-time elected official after the effective date of a participant's waiver of part-time elected service under § 40.23 (1) (am), Stats.

2. If the employe's termination is voluntary, the employe and employer comply with the employer's policies for voluntary termination, including the filing of a letter of resignation if applicable.

3. As of the end of the day that participating employment terminates, the employe has no rights to any future compensable employment that meets the qualifications for inclusion under the Wisconsin retirement system provided under § 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 § 40.23 (1) (am), Stats. NOTE: This subd. shall not preclude employes of any WRS participating employer from expressing willingness or interest in providing compensable services at some time in the future. For example, retiring judges would not be precluded from expressing interest in serving as a reserve judge after terminating employment.

4. Upon termination of employment the participant is treated consistently with the status of a former employe. This includes, but is not limited to the terminated employe no longer being eligible for benefits available only to active employes. Examples of such benefits may include

health, life insurance, income continuation insurance coverage, making deferred compensation or tax-sheltered annuity contributions, worker's compensation coverage, internal grievance, promotion or transfer rights, or rights available to active employees under a collective bargaining agreement. This subd. shall not apply to benefits that may be available to the employer's retired employees, such as severance pay, post-retirement insurance coverage and/or employer payment of premiums, or post-retirement benefits or other rights provided through collective bargaining or other retirement agreements. However, agreements made after the termination date for future compensable services to be rendered by the employe would not be precluded under subd. 3.

5. Immediately upon termination of employment, the participant has no authority to act as a representative of the employer in any capacity or to exercise any authority or control over other employes of the employer, and the employer has no responsibility or liability for any actions of the terminated employe. This subd. shall not apply to employes of any WRS participating employer who provide services for which they have not and will not receive compensation of any kind, including but not limited to payment at some other time or compensatory paid leave. EXAMPLE: Emeritus professors could render services for the university after termination for which they would not receive any form of compensation.

6. As of the termination of employment the employer has paid to the employe any accumulated benefits that similarly situated employes of that employer customarily receive upon termination of employment, including but not limited to accumulated vacation, compensatory time and sick leave, and the employe has no entitlement to any such remaining benefits.

(c) In order to receive a benefit under § 40.23 or § 40.25, Stats., a person terminated from participating employment on or after July 1, 1996, shall remain terminated from all employment

meeting the qualifications for inclusion under § 40.22, Stats., throughout a period beginning with the date of termination from all participating employment and ending on the latest of the following dates: 1. The day after the date which would be the effective date of the annuity as determined in accordance with § 40.23 (1) (b) and (bm), Stats., as applicable to the annuity in question.

2. The thirty-first day after the benefit application is received by the department as provided in § 40.23 (1) (a), Stats.

3. The thirty-first day after termination of employment in accordance with this section.

(d) For purposes of determining whether employment meets the qualifications under § 40.22, Stats., the exclusion of § 40.22 (2) (L), Stats., does not apply unless the person has met all qualifications for entitlement to an annuity, including termination from participating employment for the period specified in par. (c) 1., 2. and 3. Payment of an annuity or other benefits in error does not qualify a person as an annuitant for purposes of § 40.22 (2) (L), Stats.

NOTE: Refer to s. ETF 20.02 (2).

(3) DETERMINING THE DATE OF TERMINATION. (a) The employer shall make the initial determination that an employe has terminated from employment under this section. Except as provided under par. (b), (c) or (d) the date of termination shall be the earliest of the dates determined under all the following applicable subdivisions: 1. The date an unpaid leave of absence expires, if the employer-employe relationship is terminated because the employe fails to return to work following an unpaid leave of absence granted by the employer.

2. The date 3 years after an unpaid leave of absence began, in accordance with § 40.02 (40), Stats. This subdivision does not apply to a military leave or union service leave.

3. The effective date that the employer discharges the employe, other than as provided in subd. 1.

4. The effective date that the employer determines that the employer-employe relationship terminates, except that the effective date of the termination cannot be earlier than the date on which the employer notifies the employe of the termination.

5. The last date for which the employe receives earnings for personal services rendered to or on behalf of the employer. If the employer has granted an unpaid leave of absence for a period of time after this date, this subdivision does not apply.

6. The date on which the employe's voluntary resignation is effective as accepted by the employer or, if later, the date on which the employer receives the employe's notice of resignation.

7. The date of the employe's death.

(b) Any report of a termination is subject to review by the department. Notwithstanding par. (a), the department is not bound by an employer's report and may determine a different termination date in accordance with this section and § 40.02 (26), Stats., upon evidence satisfactory to the department.

(c) Except as expressly provided by law, no termination may be effective retroactive to a date earlier than the date on which the employe or employer notifies the other of the decision to terminate the participant's employment.

NOTE: See s. ER 18.14 (4) and 21.03 (2) concerning termination retroactive to the date the leave of absence expired.

(d) No termination date may predate the last date for which the employe receives earnings for personal services rendered to or on behalf of the employer, except as provided in sub. (2) (b) 1.,

and except that operation of § 40.29, Stats., does not preclude termination of an employe prior to the expiration of a period for which the employe receives temporary disability compensation under § 102.43, Stats.

(END OF RULE TEXT)

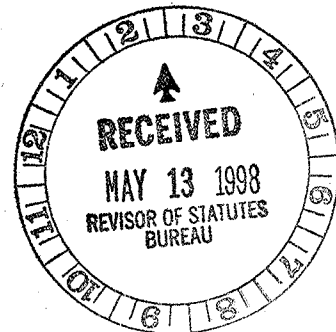
Effective Date: This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Wis. Stats.

Signed at Madison, Wisconsin this 24th day of March, 1998.

WISCONSIN DEPARTMENT OF EMPLOYE TRUST FUNDS

/s/ Eric O. Stanchfield

Eric Stanchfield, Secretary



WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 97-073

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

2. Form, Style and Placement in Administrative Code

a. All of the statutory citations in the rule should conclude with the notation ", Stats." Also, all of the references in the rule to Administrative Code provisions should be preceded by the notation "s." or "ss.", as applicable.

b. Since the first sentence of s. ETF 10.08 (1) (a) provides that the section defines separation of employment under s. 40.23 (1) (a) 1., Stats., the statement of statutes interpreted in the analysis to the rule should include a reference to this statutory section.

c. In s. ETF 10.08 (1) (a), "shall be construed to supersede" should be replaced by "supersedes."

d. In s. ETF 10.08 (2) (a), the phrase "is entitled to" should be replaced by the word "may."

e. Section ETF 10.08 (2) (b) (intro.) would be clearer if rewritten to read: "Termination from participating employment occurs when all of the following conditions are met:".

f. In s. ETF 10.08 (2) (b) 1. and 4., in the last sentence of each subdivision, "shall" should be replaced by "does." This same change should also be made in s. ETF 10.08 (3) (d).

g. Section ETF 10.08 (2) (c) (intro.) should be restructured along the following lines:

WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
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RULES CLEARINGHOUSE

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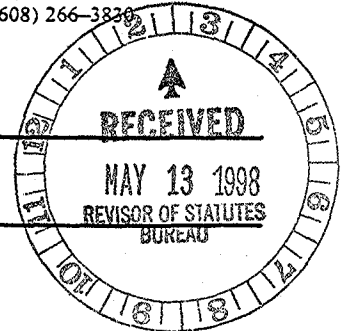


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CLEARINGHOUSE REPORT TO AGENCY



[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 97-073

AN ORDER to create ETF 10.08, relating to defining termination of employment for purposes of eligibility for benefits administered by the department of employe trust funds.

Submitted by **DEPARTMENT OF EMPLOYE TRUST FUNDS**

05-01-97 RECEIVED BY LEGISLATIVE COUNCIL.

05-29-97 REPORT SENT TO AGENCY.

RS:GAA:kjf;kja

Part 4

Report Required by s. 227.19 (3), Wis. Stats.

(a) Need for the Rule. This rule would codify the criteria for a valid termination of WRS employment to be eligible for benefits administered by the Department that are available only upon termination of employment, such as a separation or retirement benefit. Internal Revenue Code requires a good-faith termination of employment prior to a distribution from a qualified retirement plan. Clarification of the standards for a good-faith termination are needed to assure the Wisconsin Retirement System's continued status as a qualified plan,

(b) Modifications to the Rule.

Several non-substantive changes were made based on recommendations by the Legislative Council staff. Based on the testimony received at the first public hearing on June 11, 1997, the Department also modified the rule to clarify several key issues:

- SS. ETF 10.08 (2) (b) 1, 3 and 5 were revised to clarify that there is no prohibition against the employer and employe forming an agreement before termination for the employe to provide future voluntary services for which no compensation has been or will be paid.
- SS. ETF 10.08 (2) (b) 3. was revised to clarify that WRS employes and employers are free to discuss the possibility of future employment at any time; only enforceable verbal or written agreements before termination for future compensable employment are prohibited.
- SS. ETF 10.08 (2) (b) 1 and 3 were revised to clarify that part-time local elected officials who waive coverage under § 40.23 (1) (am), Stats., are exempted from the prohibition against having been elected to a term of public office as of the termination date.
- SS ETF 10.08 (2) (b) 4 was revised to clarify that after the termination of employment, only *coverage* for benefits available only to active employes (such as income continuation insurance) is prohibited; a participant may still receive *benefits* from such programs after termination.
- SS ETF 10.08 (2) (b) 4 was revised to clarify that after the termination date there is no prohibition against the employer and former employe forming an agreement for future compensable services.

(c) List of Persons Who Appeared or Registered For or Against the Proposed Rule at a Public Hearing.

The Department held a second public hearing to provide an opportunity for public comment on a revised version of the proposed rule. Three individuals provided testimony at the hearing and one person provided written testimony by the deadline published in the public

hearing notice. All expressed appreciation for the changes the Department made to the rule based on the testimony provided at the first public hearing.

The following individuals provided testimony:

1. John Torphy, representing the University of Wisconsin - Madison. Mr. Torphy spoke in favor of the rule, and suggested an amendment.*
2. Simon Karter, representing the Wisconsin Educational Association Council. Mr. Karter spoke in favor of the rule.
3. Mary Anglim, representing the University of Wisconsin System Administration. Ms. Anglim spoke for informational purposes only, and suggested an amendment to the rule.*
4. Esther Olson, representing the University of Wisconsin Academic Staff Public Representation Organization, submitted written testimony in which she proposed an amendment to the rule.*

* Mr. Torphy and Ms. Olson requested an amendment to the rule that would exempt employees who have reached normal retirement age from the restrictions in s. ETF 10.08 (2) (b) 3., which prohibits the employee and any WRS employer from having a contract on the termination date for future compensable employment. Ms. Anglim recommended an amendment that would recognize a termination that entails loss of tenure as a valid termination of employment, even if that employee has a contract on the termination date for future compensable non-tenured employment.

While the Department acknowledges the University's concerns in this area, our interpretation of Chapter 40 of the Wisconsin Statutes is that we have no authority to interpret the statutory requirement to terminate employment to qualify for a WRS benefit differently for different groups of employees, either based on age or the nature of the participant's employment.

Mr. Torphy, Ms. Anglim and Ms. Olson also expressed their support for a Department initiative to explore statutory changes that would:

1. Exempt participants who have reached normal retirement age from the requirements set forth in s. ETF 10.08 to qualify for a WRS benefit, and
2. Changing the statutory definition of normal retirement age for purposes of determining whether a termination of employment has occurred to a combination of age and service that would qualify a participant for a formula retirement benefit with no actuarial reduction.

(d) Response to Legislative Council Staff Recommendations.

The minor technical changes recommended by the Legislative Council staff have been incorporated into the final draft. The Clearinghouse report also recommended a substantive change to s. ETF 10.08 (2) (b) 3. The language currently specifies that as of the termination date

a participant cannot already have been elected to a future term of public office meeting the qualifications for participating employment, other than a term as part-time elected official for which the participant has waived WRS coverage under § 40.23 (1) (am). This would permit the participant to be an unopposed candidate for public office as of the termination date and still meet the requirements in s. ETF 10.08. The suggested remedy in the report is to provide that the participant cannot be a candidate for public office as of the termination date.

After thoughtful consideration of this approach, the Department's decision was not to include the suggested change. The fact that a participant is a candidate for public office does not constitute a contract for future employment. There are many possible outcomes that would not result in a term of office; for example, any candidate can lose an election, including an unopposed candidate who is defeated by a write-in candidate, or a candidate could decide for health or other reasons not to accept a public office even if elected, but is still technically a candidate on the ballot. There are too many uncertainties about the outcome for a candidacy to be treated as a right to future employment that meets the qualifications for inclusion under the WRS.

(e) Final regulatory flexibility analysis. The proposed rule itself does not directly affect small businesses.

(END OF FINAL DRAFT REPORT)



STATE OF WISCONSIN

Department of Employee Trust Funds

May 12, 1998

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

GARY L. POULSON, DEPUTY REVISOR
REVISOR OF STATUTES BUREAU
8TH FLOOR
131 W WILSON ST
MADISON, WISCONSIN 53707

RE: Clearinghouse Rule No. 97-073

Dear Mr. Poulson:

Enclosed is a Certificate and two copies of an Order creating and adopting rules. A certified copy of this Order has been forwarded to the Secretary of State.

I request that the rule be published in the June 30 issue of the administrative register. I also enclose a copy of the rule on disk, in Wordperfect format.

Please contact me if you have any questions.

Sincerely,

David Stella, Administrator
Division of Retirement Services
(608) 267-9038
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TDD # (608) 267-0676

