

STATE OF WISCONSIN
DEPARTMENT OF EMPLOYEE TRUST FUNDS

FINAL DRAFT REPORT ON CLEARINGHOUSE RULE 98-169

AN ADMINISTRATIVE RULE creating § ETF 10.55 concerning the proper reporting of creditable service, earnings and participating employees of instrumentalities of two or more units of government when the joint instrumentality does not qualify as a separate employer for WRS purposes.

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Agency Person to Be Contracted for Substantive Questions:

For information about this rule, please contact: Robert F. Weber, Chief Counsel, Department of Employee Trust Funds, P.O. Box 7931, Madison, Wisconsin, 53707-7931. Telephone: (608) 266-5804. FAX: (608) 267-0633.

Statement Explaining Need for Rule:

Employees who meet the qualifications of "participating employees" as defined by Wis. Stat. § 40.22, are covered by the Wisconsin Retirement System (WRS). They are granted "creditable service" under the WRS as provided by Wis. Stat. § 40.02 (17). A percentage of their "earnings," as defined by Wis. Stat. § 40.02 (22), is contributed to the Public Employee Trust Fund to pay for their retirement benefits as those benefits are accrued.

Under state law, some local units of government are permitted to join together to create joint instrumentalities. A newly created unit of government may have the option of choosing whether its employees will be covered by the WRS, but only if the unit is separate and distinct from other employers and is so recognized by the Social Security Administration. It is possible for two or more WRS participating employers to create a joint instrumentality which is not recognized as a separate unit of government for purposes of Titles II and XVIII of the federal Social Security Act and for WRS purposes. One example would be a joint library district. This rule specifies (1) how to determine whether an employe of the instrumentality qualifies as a participating employe under the WRS and (2) how to apportion responsibility among the participating employers for payment of the employer-required contributions and for reporting earnings and services rendered by the employe. Included in this rule is provision for the possibility that the joint instrumentality is created by two or more local units of government, including one or more units which are not participating employers under the WRS. The rule codifies responsibility for (1) reporting affected participating employes and their earnings and service, and (2) making required contributions to the Department of Employee Trust Funds.

Analysis Prepared by Department of Employee Trust Funds

Authority for rule: Wis. Stat. §§ 40.03 (2)(i) and 40.22 (5)

Statutes interpreted: Wis. Stat. §§ 40.02 (17), (22)

This rule specifies that an employe of a joint instrumentality, which itself is not a separate and distinct "employer" for WRS purposes, is a participating employe under the Wisconsin Retirement System if any of the units of government forming the joint instrumentality is a participating employer under Wis. Stat. § 40.21, unless the employe is excluded by Wis. Stat. § 40.22 (2).

In determining whether an employe is not expected to work at least one-third of what is considered full time employment by Wis. Admin. Code § ETF 20.015, the employe's work for the joint instrumentality shall be considered as a whole, without regard for the number of separate units of government which created the joint instrumentality or any agreement among them apportioning responsibility for the retirement contributions. Thus, a librarian in a permanent position working 900 hours per year for a joint library district created by six towns and villages, at least one of which is a participating employer, would qualify as a participating employe under the WRS.

Among the units of government which formed the joint instrumentality, each unit which is a participating employer under Wis. Stat. § 40.21, shall report each employe of the joint instrumentality who qualifies as a participating employe to the DETF as its own employe. Each participating employer shall transmit as required contributions to the DETF the same percentages of the employe's earnings as is required for its other employes.

The amount of earnings to be reported by each participating employer with respect to an employe of the joint instrumentality shall be determined by first determining the gross amount paid to the employe for services rendered to the joint instrumentality which would qualify as "earnings" under Wis. Stat. § 40.02 (22) if the joint instrumentality were itself the employer, then prorating the earnings among the employer which created the joint instrumentality. If the proration is not specified by the agreement establishing the joint instrumentality, it shall be in accord with the agreed proration of other expenses. If no such proration is provided in the agreement, each WRS participating employer shall report as earnings the total amount divided by the number of units of government forming the joint instrumentality.

The employe's hours of service shall be handled in the same manner for creditable service purposes. Thus, if the librarian worked 1,800 hours annually and was paid \$20,000 per year by a joint library district created by a town and a village, both of which are participating employers, and they had agreed to split the expenses, with the town paying 80% and the village 20%, then the town would report 1,440 hours of service and \$16,000 in earnings, while the village reported 360 hours of service and \$4,000 in earnings, with each making the associated contributions. If the village was not a participating employer, it would have no obligation whatsoever, while the town's responsibilities would be exactly the same.

The policies intended to be codified by this rule-making are:

1. Each participating employer in a joint instrumentality (which is not itself a separate employer for WRS purposes) ought to be responsible for its share of the retirement benefits of the employes of the instrumentality who meet the qualifications for participating employes.
2. What that share should be is initially best determined by the units of government forming the joint instrumentality, but if they fail to address the issue, then their appropriate share will be determined by assuming each unit is equally responsible.

3. The employe of such a joint instrumentality should not be penalized by the number of different units of government which formed the instrumentality. So, for example, a librarian working more than 600 hours per year for a joint library district should be treated the same for WRS purposes regardless of the number of towns and villages which formed the joint library district.

Fiscal Estimate:

The Wisconsin Retirement System (WRS) is funded by contributions paid by participating employes and their participating state, municipal and local government employers. See Wis. Stat. § 40.05. The rule does not expand the liabilities of any employer or employe, as it codifies current existing policy and interpretations of law. However, it is possible that some employers who will revise their understanding of the WRS reporting or qualification requirements based upon the clarifications in this rule and will consequently report previously unreported employes. Contributions and interest may be due for earnings which should previously have been reported. See Wis. Stat. § 40.06 (5). The proposed rule may therefore result in changes to the amounts of required contributions from affected employers. The Department estimates that there are very few affected employers.

Final Regulatory Flexibility Analysis:

This rule concerns a retirement program open exclusively to qualifying employes of the state, counties (except Milwaukee County) and municipalities which have elected to participate in the Wisconsin Retirement System, as provided in Wis. Stat. § 40.21. This rule affects only the participating governmental units which additionally create a joint instrumentality which is not sufficiently independent to qualify as an employer in its own right, and the employes of these joint instrumentalities. The Department therefore anticipates that the provisions of this proposed rule will have no direct adverse impact on small businesses.

(BEGINNING OF RULE TEXT)

SECTION 1. ETF 10.55 is created to read:

ETF 10.55 JOINT INSTRUMENTALITIES; REPORTING PARTICIPATING EMPLOYEES, SERVICE AND EARNINGS. (1) SCOPE. This section applies to reporting and contributions with respect to employment by joint instrumentalities created by two or more units of government, when all of the following apply:

(a) At least one of the units of government creating the joint instrumentality is, or subsequently becomes, a participating employer in the Wisconsin retirement system.

(b) The joint instrumentality is not a separate and independent employer within the meaning of s. 40.02 (28), Stats., as determined by the department. A joint instrumentality which has not established itself as a separate unit of government for OASDHI purposes is not a separate and independent employer under this paragraph.

EXAMPLE: A joint library district is not a separate and independent employer.

(c) There are persons employed by the joint instrumentality. This section does not apply with respect to employees of a unit of government loaned or assigned to perform services for a joint instrumentality. Those individuals remain the employees of their employing unit of government which is subject to the usual reporting and contribution requirements.

EXAMPLE: If a joint library district's library board hired a librarian but the library was located on the premises of one of the units of government establishing the joint library district, which assigned one of its janitors to the library, then this section would apply with respect to the librarian but not the janitor.

(2) PURPOSE. With respect to the employees of joint instrumentalities subject to this section::

(a) Each participating employer forming a joint instrumentality covered by this section shall be responsible for its share of the retirement benefits of the instrumentality's employees who meet the qualifications for participating employees as both the share and qualifications are determined under this section.

(b) Nothing in this section prevents the units of government forming a joint instrumentality subject to this section from providing for their share of responsibility for the retirement benefits of the employees of the joint instrumentality in the agreement establishing the joint instrumentality. If they fail to expressly address the issue then the share of each participating employer shall be determined as provided in this section.

(c) Whether an employee of a joint instrumentality covered by this section is a participating employee under s. 40.22, Stats., is not affected by the number of units of government which form the joint instrumentality.

(3) PARTICIPATING EMPLOYEES. (a) An employee of a joint instrumentality subject to this section is a participating employee for Wisconsin retirement system purposes if any of the units of government forming the joint instrumentality is a participating employer under s. 40.21, Stats., unless the employee is excluded under s. 40.22 (2), Stats.

(b) In making determinations concerning the work expected of or services rendered by an employee of a joint instrumentality, including determining whether an employee is expected to work at least one-third of what is considered full time employment by s. ETF 20.015, the employee's work for the joint instrumentality shall be considered as a whole, without regard

for the number of separate units of government which created the joint instrumentality or any agreement among them apportioning responsibility for expenses or for retirement contributions.

EXAMPLE: A librarian working 900 hours per year for a joint library district created by six towns and villages, at least one of which is a participating employer, would not be barred from being a participating employe under the WRS by s. 40.22 (2)(a).

(4) REPORTING REQUIREMENTS. (a) Report participating employe. Among the units of government which formed the joint instrumentality, each unit which is a participating employer under s. 40.21, Stats., shall report each employe of the joint instrumentality who qualifies as a participating employe under sub. (3) to the department as its own participating employe.

(b) Reported earnings. Earnings shall be reported by each participating employer, in the same manner and subject to the same requirements as for its other participating employes, with respect to each employe of the joint instrumentality required to be reported as a participating employe under sub. (3). The amount of earnings to be reported shall be determined by prorating the gross amount paid to the employe for services rendered to the joint instrumentality which would qualify as "earnings" under Wis. Stat. § 40.02 (22) if the joint instrumentality were itself the employer among the units of government which created the joint instrumentality. If the proration is not specified by the agreement that establishes the joint instrumentality, proration shall be made as are expenses for the joint instrumentality. If no proration of expenses is provided in the agreement, each participating employer shall report the total amount of earnings divided by the number of units of government forming the

joint instrumentality during that annual earnings period. If a unit of government joins or leaves a joint instrumentality during an annual earnings period, reported shares of earnings shall be adjusted as of the date of that event.

(c) Contributions. Each participating employer shall transmit as required contributions to the department the same percentages of the employee's reportable earnings determined under par. (a) as is required, and in the same manner as, contributions on earnings for its other participating employees in the same employment category.

(d) Service. The employee's hours of service for creditable service purposes shall be prorated in the same manner as earnings under par. (a) and reported to the department by each participating employer in the same manner as is required for its other employees.

EXAMPLE: If a librarian qualifying as a participating employee worked 1,800 hours annually and was paid \$20,000 per year by a joint library district created by a town and a village, both of which are participating employers, and they had agreed to split the expenses, with the town paying 80% and the village 20%, and the agreement was silent on allocating responsibility for the employee, then the town would report 1,440 hours of service and \$16,000 in earnings, while the village reported 360 hours of service and \$4,000 in earnings, with each making the associated contributions. If the village in this example was not a participating employer, it would have no obligation whatsoever while the town's responsibilities would remain exactly as stated.

(5) NON-PARTICIPATING EMPLOYERS. Nothing in this section shall be construed to require any employer which does not participate in the Wisconsin retirement system to

make any report to the department or to pay any contributions to the public employe trust fund.

(END OF RULE TEXT)

Effective Date:

This rule shall take effect on the first day of the month following publication in the register, as provided in Wis. Stat. § 227.22 (2).

Explanation of Modifications as Result of Testimony at Public Hearing:

No testimony was offered at the public hearing. The only modifications made to the text of the rule were in response to the recommendations of the Legislative Council Staff or minor editorial changes to clarify the analysis of the rule.

List of persons appearing or registering for or against the rule:

No persons appeared or registered either for or against the rule at the public hearing on November 30, 1998. The record was held open for written comments until December 2, 1998, but no comments were received.

WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
FORM 2

RULES CLEARINGHOUSE

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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 98-169

AN ORDER to create ETF 10.55, relating to the proper reporting of creditable service, earnings and participating employes of instrumentalities of two or more units of government when the joint instrumentality does not qualify as a separate employer for WRS purposes.

Submitted by **DEPARTMENT OF EMPLOYE TRUST FUNDS**

10-30-98 RECEIVED BY LEGISLATIVE COUNCIL.
11-20-98 REPORT SENT TO AGENCY.

RS:GAA;jal;rv

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO

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CLEARINGHOUSE RULE 98-169

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 September 1998.]

2. Form, Style and Placement in Administrative Code

- a. In s. ETF 10.55 (1), the word "rule" should be replaced by the word "section."
- b. In s. ETF 10.55 (1) (b), "duly" should be deleted. [See s. 1.01 (9) (c), Manual.]
- c. In s. ETF 10.55 (1) (c), "effectively" should be deleted. [See s. 1.01 (9) (c), Manual.]
- d. In s. ETF 10.55 (2) (b), "shall prevent" should be replaced by "prevents." [See s. 1.01 (1), Manual.] Also, "appropriate" should be deleted.
- e. In s. ETF 10.55 (2) (c), ", Stats.," should be inserted after "s. 40.22." [See s. 1.07 (2), Manual.] Also, "different" should be deleted.
- f. In the example following s. ETF 10.55 (3) (b), ", Stats.," should follow "s. 40.22 (a)." [See s. 1.07 (2), Manual.]
- g. In s. ETF 10.55 (4) (a) and (b), "Wis. Stats." should be deleted. The correct format is "s. ---, Stats." [See s. 1.07 (2), Manual.]
- h. The rule does not contain an effective date provision. [See s. 1.02 (4), Manual.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

- a. In the third sentence of the first paragraph of the analysis, the word "are" should be replaced with the word "is." [See also the use of the word "are" in s. ETF 10.55 (1) (c).]

b. In s. ETF 10.55 (4), the third sentence, beginning on line 19, is unclear. It is suggested that it be rewritten as: "If the proration is not specified by the agreement that establishes the joint instrumentality, proration shall be made as are expenses for the joint instrumentality." The fourth sentence should also be rewritten to provide: "If no proration of

expenses is provided in the agreement"

Response to Legislative Council Staff Recommendations:

Each of the Legislative Council Staff recommendations concerning form and style was adopted. The text of the rule was modified accordingly. These modifications affected s. ETF 10.55 (1)(intro.), (b) and (c), (2) (b) and (c), (3) (b), (4) (a) and (b). As suggested, an effective date provision was added following the text of the rule.

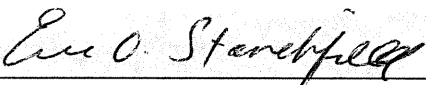
The DETF also modified the rule text to conform to each of the Legislative Council Staff recommendations concerning clarity, grammar, punctuation and use of plain language. These modifications affected the analysis, and s. ETF 10.55 (1) (c) and (4) (b).

Board Authorizations for Promulgation:

This final draft report on Clearinghouse Rule #98-169 has been duly approved for submission to the Legislature and for promulgation by the Employee Trust Funds Board at its meeting on December 11, 1998, and by both the Teacher Retirement and Wisconsin Retirement Boards at their respective meetings on December 10, 1998.

Respectfully Submitted,

DEPARTMENT OF EMPLOYE TRUST FUNDS



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



FEB 28 2000

STATE OF WISCONSIN

Department of Employee Trust Funds

Eric O. Stanchfield
Secretary

*801 West Badger Road
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February 25, 2000

THE HONORABLE JUDITH ROBSON, CO-CHAIR
JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES
STATE SENATE
15 SOUTH, STATE CAPITOL
MADISON WI 53702

Re: ETF CR # 98-169 relating to proper reporting of creditable service, earnings and participating employees of instrumentalities of two or more units of government

Dear Senator Robson:

In accordance with Wis. Stats. § 227.19 (2), I am enclosing a copy of this proposed rule in final draft form. The report required under Wis. Stats. § 227.19 (3) is also enclosed.

Sincerely,

Pam Henning, Director
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Enclosure