



## 2011 SENATE BILL 413

January 31, 2012 – Introduced by Senators WANGGAARD, MOULTON and HOLPERIN, cosponsored by Representatives PETRYK, WYNN, KRUG, SPANBAUER, KOOYENGA, ENDSLEY, RIVARD, BALLWEG and A. OTT. Referred to Committee on Economic Development and Veterans and Military Affairs.

1     **AN ACT** *to amend* 40.02 (15) (b), 40.02 (15) (c) 3., 40.02 (22) (a), 40.02 (22) (e) and  
2             40.02 (26) (intro.); and *to create* 40.02 (15) (d), 40.02 (15) (e), 40.02 (20m), 40.82  
3             (3) and 40.82 (4) of the statutes; **relating to:** calculation of creditable military  
4             service and treatment of differential wage payments for benefits purposes for  
5             participants in the Wisconsin Retirement System.

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### ***Analysis by the Legislative Reference Bureau***

Under current law, some participating employees in the Wisconsin Retirement System (WRS) receive differential wage payments from their employers while they are on active duty in the uniformed services for any period of more than 30 days. Currently, federal law requires that differential wage payments be treated as covered earnings for fringe benefit purposes. This bill requires that under the WRS differential wage payments must be treated as earnings for WRS purposes and that individuals who receive differential wage payments must be treated as regular employees for purposes of the WRS.

In addition, the bill provides that, for purposes of death or disability benefits, a WRS participant who dies or becomes disabled while performing military service is treated as though the person was a participating employee in the WRS. This new provision of law applies retroactively to a participant who died or became disabled on or after January 1, 2007.

Because this bill relates to public employee retirement or pensions, it may be referred to the Joint Survey Committee on Retirement Systems for a report to be printed as an appendix to the bill.

**SENATE BILL 413**

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

1           **SECTION 1.** 40.02 (15) (b) of the statutes is amended to read:

2           40.02 (15) (b) The creditable military service under par. (a) shall be in the same  
3 type employment category, as set forth in s. 40.23 (2m) (e), as in which the participant  
4 was receiving employed immediately prior to entry into the U.S. armed forces.

5           **SECTION 2.** 40.02 (15) (c) 3. of the statutes is amended to read:

6           40.02 (15) (c) 3. Creditable military service under this paragraph shall be  
7 allocated at the time of retirement in proportion to the amount of the participant's  
8 creditable service for each of the ~~types of creditable service~~ employment categories  
9 as set forth in s. 40.23 (2m) (e), unless a higher benefit would result from the prorated  
10 allocation of creditable military service based on the amount of the participant's  
11 creditable service for each of the types of creditable service on the date the  
12 participant attains the greater of 5, 10, 15 or 20 years of creditable service.

13           **SECTION 3.** 40.02 (15) (d) of the statutes is created to read:

14           40.02 (15) (d) Contributions, benefits, and service credit with respect to  
15 qualified military service, as defined in 38 USC 43, taken on or after December 12,  
16 1994, are governed by section 414 (u) of the Internal Revenue Code and the federal  
17 Uniformed Services Employment and Reemployment Rights Act of 1994.

18           **SECTION 4.** 40.02 (15) (e) of the statutes is created to read:

19           40.02 (15) (e) 1. Effective with deaths occurring on or after January 1, 2007,  
20 while a participant is performing qualified military service, as defined in 38 USC 43,  
21 death benefits shall be calculated as though the participant was a participating

**SENATE BILL 413**

1 employee subject to par. (d) during the period or periods of military service between  
2 the date that the participant left participating employment to enter active military  
3 service and the date of death.

4 2. Effective with disabilities occurring on or after January 1, 2007, if a  
5 participant becomes disabled while performing qualified military service, as defined  
6 in 38 USC 43, to the extent permitted by section 414 (u) (8) of the Internal Revenue  
7 Code, and is unable to return to participating employment due to the disability  
8 incurred while performing such military service, for benefit calculation purposes the  
9 participant shall be treated as though the participant was a participating employee  
10 subject to par. (d) during the period or periods of military service between the date  
11 that the participant left participating employment to enter active military service  
12 and the date of discharge from military service.

13 3. Beginning January 1, 2009, an individual receiving differential wage  
14 payments while the individual is performing qualified military service, as defined in  
15 38 USC 43, from an employer shall be treated as employed by that employer, and the  
16 differential wage payment shall be treated as compensation for purposes of applying  
17 the limits on annual additions under section 415 (c) of the Internal Revenue Code.  
18 This provision shall be applied to all similarly situated individuals in a reasonably  
19 equivalent manner.

20 **SECTION 5.** 40.02 (20m) of the statutes is created to read:

21 40.02 (20m) “Differential wage payment” means any payment, including  
22 specifically a payment under s. 230.315, that satisfies all of the following:

23 (a) The payment is made by an employer to a participating employee with  
24 respect to any period during which the participating employee is performing service

**SENATE BILL 413****SECTION 5**

1 in the uniformed services, as defined in 38 USC 4303, while on active duty for a  
2 period of more than 30 days.

3 (b) The payment represents all or part of the earnings the participating  
4 employee would have received from the employer if the participating employee were  
5 performing services for the employer.

6 **SECTION 6.** 40.02 (22) (a) of the statutes is amended to read:

7 40.02 **(22)** (a) Except as provided in pars. (b) to (f) and s. 40.63 (1) (c), means  
8 the gross amount paid to an employee by a participating employer as salary or wages,  
9 including amounts provided through deferred compensation or tax shelter  
10 agreements, for personal services rendered to or for an employer, or which would  
11 have been available for payment to the employee except for the employee's election  
12 that part or all of the amount be used for other purposes; any amount considered  
13 earnings under sub. (15) (d) and (e); and ~~also includes~~ the money value, as  
14 determined by the employer, of any board, lodging, fuel, laundry and other  
15 allowances provided for the employee in lieu of money. For purposes of this  
16 paragraph, the gross amount shall be determined prior to deductions for taxes,  
17 insurance premiums, retirement contributions or deposits, charitable contributions  
18 or similar amounts and shall be considered received as of the date when the earnings  
19 would normally be payable by the employer. For reporting and computation  
20 purposes, fractions of a dollar shall be disregarded in determining annual earnings.

21 **SECTION 7.** 40.02 (22) (e) of the statutes is amended to read:

22 40.02 **(22)** (e) ~~For an employee serving in a position covered under and meeting~~  
23 ~~the requirements of 38 USC 4301, et. seq., except purposes of the Wisconsin~~  
24 ~~retirement system, but not~~ for OASDHI purposes, means compensation determined  
25 as required under 38 USC 4318 (b) (3) and regulations adopted thereunder with

**SENATE BILL 413**

1 respect to a person who has actually returned to employment under section 414 (u)  
2 (9) (A) of the Internal Revenue Code, 38 USC 4312, or any predecessor veteran's  
3 reemployment rights provision under federal law, provided contributions and  
4 premiums on the compensation are paid as required under s. 40.05. If the participant  
5 does not pay any portion of the employee contributions that the participant would  
6 have paid if the participant had not left employment to enter military service, the  
7 value of the benefits payable from the participant's account shall be reduced by the  
8 value of the unpaid contributions plus interest as provided by rule.

9 **SECTION 8.** 40.02 (26) (intro.) of the statutes is amended to read:

10 40.02 **(26)** (intro.) "Employee" means any person who receives earnings as  
11 payment for personal services rendered for the benefit of any employer including  
12 officers of the employer. An employee is deemed to have separated from the service  
13 of an employer at the end of the day on which the employee last performed services  
14 for the employer, or, if later, the day on which the employee-employer relationship  
15 is terminated because of the expiration or termination of leave without pay, sick  
16 leave, vacation or other leave of absence. Except as provided in s. 40.82 (4), a  
17 participant receiving a differential wage payment or earnings, contributions, or  
18 service credit under sub. (15) (e) is considered an employee of the employer making  
19 the payment. A person shall not be considered an employee if a person:

20 **SECTION 9.** 40.82 (3) of the statutes is created to read:

21 40.82 **(3)** Each deferred compensation plan under this subchapter shall be  
22 maintained and administered as an eligible deferred compensation plan, as defined  
23 in section 457 of the Internal Revenue Code, and shall meet the requirements of  
24 section 401 (a) (37) of the Internal Revenue Code.

25 **SECTION 10.** 40.82 (4) of the statutes is created to read:

**SENATE BILL 413****SECTION 10**

1           40.82 (4) (a) Beginning on December 31, 2008, a participating employee who  
2 is receiving differential wage payments shall be considered as having terminated  
3 covered employment during any period in which the person is performing service in  
4 the uniformed services, as defined in 38 USC 4303, on active duty for a period of more  
5 than 30 days, for purposes of receiving a distribution under section 457 (d) (1) (A) (ii)  
6 of the Internal Revenue Code.

7           (b) A person who is described under par. (a) and who elects to receive a  
8 distribution may not subsequently make an elective deferral or employee  
9 contribution into a deferred compensation plan during the 6-month period following  
10 the distribution.

11           **SECTION 11. Nonstatutory provisions.**

12           (1) DEATH BENEFITS. The department of employee trust funds shall review and  
13 recalculate, as necessary, death benefits under section 40.73 of the statutes paid to  
14 any participant who died between January 1, 2007, and the effective date of this  
15 subsection, while performing qualified military service, as defined in section 414 (u)  
16 (5) of the Internal Revenue Code.

17           **SECTION 12. Initial applicability.**

18           (1) DEATH AND DISABILITY BENEFITS. The treatment of section 40.02 (15) (e) 1. and  
19 2. of the statutes applies retroactively to a participant in the Wisconsin retirement  
20 system who died or became disabled on or after January 1, 2007.

21           (2) CREDITABLE MILITARY SERVICE. The treatment of section 40.02 (15) (c) 3. of the  
22 statutes first applies to individuals who are participating employees in the  
23 Wisconsin retirement system on the effective date of this subsection.

24           **(END)**