Publication Date: **December 28, 2009**
Effective Dates: **January 1, 2010 through May 30, 2010**

NOTICE OF ORDER OF THE DEPARTMENT OF EMPLOYEE TRUST FUNDS

The Wisconsin Department of Employee Trust Funds (ETF) proposes an order to adopt an emergency rule to repeal s. ETF 10.01 (9) and 10.78 (2), to amend ss. ETF 10.01 (3m), 10.70 (1), 20.055, 40.01 (2m) (a), 40.01 (2m) (a) and (b), 40.01 (3) (a), 41.02 (1) (a), to repeal and recreate s. ETF 10.01 (2), and to create ss. ETF 10.01 (1r), 20.08 and 20.10, Wis. Adm. Code, relating to the implementation of benefit changes mandated in 2009 Wisconsin Act 28; specifically, domestic partner benefits and the expansion of health insurance coverage to adult dependents up to the age of 27 years.

STATEMENT OF EMERGENCY FINDING

ETF finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is: ETF cannot promulgate a permanent rule in compliance with the mandated changes by January 1, 2010, which is the effective date of the domestic partnership and the health insurance provisions of 2009 Wisconsin Act 28. Without an emergency rule in place, the ability of ETF to enroll and cover participants' domestic partners and to provide health insurance to adult dependents would be seriously impaired. ETF would be unable to provide health insurance and other benefits to domestic partners and adult dependents.

ANALYSIS PREPARED BY THE DEPARTMENT OF EMPLOYEE TRUST FUNDS

Statutes Interpreted: ss. 40.02, *et. seq.*
Statutory Authority: ss. 40.03 (2) (i), 40.03 (2) (ig), 40.03 (2) (ir), 227.11 (2) (a), Stats.

Explanation of Agency Authority: Under s. 40.03 (2) (i), Stats., the Secretary of the Department of Employee Trust Funds, with the approval of the ETF Board, may promulgate all rules, except rules that relate to group insurance under par. (ig) or deferred compensation under par. (ir). In addition to ETF Board approval, rules relating to teachers must be approved by the Teachers Retirement Board and rules relating to participants other than teachers must be approved by the Wisconsin Retirement Board.

Under s. 40.03 (2) (ig), Stats., the ETF Secretary, with the approval of the Group Insurance Board, may promulgate rules required for the administration of group health, long-term care, income continuation or life insurance plans established under subchapters IV to VI.

Under s. 40.03 (2) (ir), Stats. the ETF Secretary, with the approval of the Deferred Compensation Board, may promulgate rules required for the administration of deferred compensation plans established under subchapter VII.

As provided by s. 227.11 (2) (a), Stats., each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

Related Statutes or Rules: There are no other statutes or rules that provide for benefits administered by ETF to be extended to the domestic partners of state and local government employees. 2009 Wisconsin Act 28 contains changes to many statutes, including a new Chapter 770, regarding domestic partnership, but these provisions relate to the creation of a registered domestic partnership and the benefits flowing from a Chapter 770 domestic partnership. These provisions are not linked with the provisions regarding Chapter 40 domestic partnerships. The expansion of health insurance to adult dependents up to the age of 27 years relates to an insurance mandate in s. 632.885, Stats.

Plain Language Analysis: 2009 Wisconsin Act 28 provides in essence that domestic partners that meet the statutory requirements for domestic partnership in Chapter 40 are to be considered as equivalent to spouses for the purpose of the benefits administered by ETF. Domestic partnerships have not previously been recognized for Chapter 40 benefit purposes. 2009 Wisconsin Act 28 also mandates the extension of health insurance coverage to

eligible adult children up to the age of 27 years. ETF previously covered eligible adult children up to the age of 25 years if the child was a full time student. Many new rules and amendments are necessary to effectuate the new provisions, including but not limited to:

New Rules

- A rule that the statutory definition of "decree date" applies to a termination of a domestic partnership for qualified domestic relations order purposes.

- A rule that for the purpose of determining a beneficiary under the statutory standard sequence (in the absence of a beneficiary designation or where the named beneficiary(ies) are deceased), a divorce, legal separation, or annulment terminates the marital relationship, and a domestic partnership terminates as defined by this rule.

- A rule that a completed and notarized *Affidavit of Domestic Partnership* must be received by the department before the domestic partnership becomes effective for Chapter 40 benefit purposes.

- A rule permitting the department to reject any Affidavit that is illegible or missing necessary information, and requiring rejection of Affidavits that are not notarized and/or signed by both partners.

- A rule clarifying that the registration of domestic partnership under Chapter 770, Wis. Stats., does not create a domestic partnership for Chapter 40 benefit purposes. ETF needs a separate affidavit because there are differences between the definitions of domestic partnership in Chapter 40 and in Chapter 770. For example, ETF's definition of domestic partnership permits same-sex and opposite-sex domestic partners, while Chapter 770 permits only same-sex domestic partners.

- A rule establishing the effective date of Chapter 40 domestic partnerships based on ETF's Affidavit receipt date. The rule determines exactly when and how domestic partnerships are created and terminated for Chapter 40 benefit purposes. For example, upon the Department's receipt of a properly executed *Affidavit of Termination of Domestic Partnership*, ETF will consider the domestic partnership to be irrevocably dissolved.

- A rule that permits ETF to consider a domestic partnership to be terminated, based on evidence that the partnership no longer meets the statutory definition of a domestic partnership, such as failing to share a common residence or marrying, or that the Chapter 40 domestic partnership terminates at such time as neither partner has any benefit rights under Chapter 40.

Amendments to Existing Rules

ETF must amend existing administrative rules to comply with 2009 Wisconsin Act 28. Most changes are technical, such as including "domestic partner" where "spouse" or "dependent" are referenced. Administrative rules requiring amendment include:

- Ch. ETF 10 ADMINISTRATION
  - 10.01 (2) definition of 'dependent' to include domestic partners and any child of the domestic partner, as well as any adult child up to age 27 years in accordance with s. 632.885, Stats.
  - 10.01 (3m) definition of 'medical record' to include confidentiality of information about condition of a spouse or domestic partner
  - 10.01 (9) delete definition of 'widow or widower'
  - 10.70 (1) definition of 'individual personal information' to include both marital and domestic partnership status

- Ch. ETF 20 WISCONSIN RETIREMENT SYSTEM
  - 20.055 Spouse's signature on annuity application amended to include domestic partner's signature when applicable, except when a participant is prohibited by federal law from selecting a joint and survivor annuity option with the domestic partner as the named survivor.

- Ch. ETF 40 HEALTH CARE BENEFITS

- 40.01 (2m) (a) Responsible Person. *Multiple surviving insured dependents, with surviving spouse.*
- 40.01 (2m) (b) Responsible Person. *Multiple surviving insured dependents, without surviving spouse.*
- 40.01 (3) (a) Duration of Continuing Coverage. *Surviving spouse.*

- Ch. ETF 41 LONG-TERM CARE INSURANCE
  - 41.02 (1) (a) Standards for long-term care policies

- Ch. ETF 60 SURVIVOR BENEFITS
  - 60.60 (8) (d) When life insurance coverage has been converted to pay premiums for health and long-term care insurance, the surviving insured spouse, dependent, or domestic partner may not continue payment of premiums from the conversion account after the death of the insured member, but may choose, if otherwise eligible, to continue coverage as provided in ETF s. 40.01.

Summary of, and Comparison with, Existing or Proposed Federal Regulations:
There are no existing federal regulations that specifically address benefits for the domestic partners of state and local government employees/retirees. However, there is some pending federal legislation relating to domestic partnerships and to the expansion of health insurance to adult dependents to the age of 27 years:

- America's Affordable Health Choices Act of 2009 (HR 3200): a provision has been added to the health care reform bill (H.R. 3200) that would allow adults up to 27 years old to be covered by a parent's health insurance policy.

- Domestic Partnership Benefits and Obligations Act (*S. 1102, H.R. 2517)*: provides to domestic partners of federal employees (excluding military) health insurance and enhanced dental and vision benefits, retirement and disability benefits, family, medical, and emergency leave, group life insurance, long-term care insurance, compensation for work injuries, and benefits for disability, death, or captivity. Last action on the bill was in July 2009, with the bill going to the Oversight and Government Reform Committee.

- Tax Equity for Health Plan Beneficiaries Act (*S. 1153, H.R. 2625)*: The bill would exclude the value of employer-provided health insurance for a domestic partner or other non-spouse beneficiary from an eligible employee's income, as it does for benefits provided for a spouse or dependent. Last action on the bill was in May 2009, with the bill going to the House Ways and Means Committee.

Comparison with Rules in Adjacent States:

Illinois:

- *Domestic Partnership Benefits*. There are no comparable state-level administrative rules on domestic partnership benefits for state and local government employees. Some Illinois municipalities have ordinances that provide for domestic partner benefits.

- *Health Insurance Coverage of Adult Dependents*. For policies issued after July 1, 2009, Group or individual health insurance policies are permitted to cover unmarried dependents until they reach age 26, regardless of student status and to age 30 for dependents who are veterans and have not been dishonorably discharged. Illinois law Sections 356z.11 and 356z.12.

Iowa:

- *Domestic Partnership Benefits.* There are no comparable state-level administrative rules on domestic partnership benefits for state and local government employees. However, Iowa legalized same-sex marriage in April 2009.

- *Health Insurance Coverage of Adult Dependents.* Health insurance providers are required to continue to cover unmarried children under their parents' coverage provided that the child 1) is under the age of 25 and a current resident of Iowa, 2) is a full-time student, or 3) has a disability. Iowa Code § 509.3 and Iowa Code § 514E.7.

Michigan:

- *Domestic Partnership Benefits.* There are no comparable state-level administrative rules on domestic partnership benefits for state and local government employees. Some municipalities, such as Ann Arbor, have ordinances providing for domestic partner benefits.
- *Health Insurance Coverage of Adult Dependents.* There are no comparable administrative rules relating to the expansion of health insurance coverage of adult dependents.

Minnesota:

- *Domestic Partnership Benefits.* There are no comparable state-level administrative rules on domestic partnership benefits for state and local government employees. The city of Minneapolis has an ordinance that provides for domestic partner benefits. Minnesota's Governor vetoed a Bill in 2008 for domestic partnership benefits.

- *Health Insurance Coverage of Adult Dependents.* Minnesota Chapter 62E.02 defines "dependent" as a spouse or unmarried child under age 25, or a dependent child of any age who is disabled.

Summary of Factual Data and Analytical Methodologies: 2009 Wisconsin Act 28 created a requirement for the Department of Employee Trust Funds to recognize domestic partners who meet the qualifications of a Chapter 40 domestic partnership for the various benefit programs administered by ETF. 2009 Wisconsin Act 28 also mandated the extension of health insurance coverage to adult children to the age of 27 years. These requirements of the Act have been set forth in the newly created rule provision, as directed by the legislature.

Effect on Small Business: *There is no effect on small business.*

Analysis and Supporting Documentation Used to Determine Effect on Small Business: The proposed rule is created to reflect changes in Wisconsin law relating to benefits for state and local government employees. As the proposed rule does not impose any significant financial or other compliance burden on small businesses, ETF has determined that the rule does not have an effect on small business.

Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person shown below no later than one week after the public hearing on this emergency rule is conducted. The place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

Agency Contact Person: Steve Hurley, Policy Director, Department of Employee Trust Funds, 801 W Badger Rd, Madison, WI 53713-7931, P.O. Box 7931 (use ZIP Code 53707 for PO Box); Phone: 608-267-2847; E-mail: Steve.Hurley@etf.state.wi.us

TEXT OF PROPOSED RULE

Section 1. ETF 10.01 (1r) is created to read:

ETF 10.01 (1r) "Decree date" as defined in s. 40.02 (18f), Stats., includes the first day of the month in which a participant's domestic partnership is terminated by a court under a final judgment, decree or order.

Section 2. ETF 10.01 (2) is repealed and recreated to read:

ETF 10.01 (2) "Dependent" means:
(a) For life insurance purposes, an eligible employee's spouse or domestic partner and an employee's unmarried child, including natural child, stepchild, child of the domestic partner, adopted child and a child in an adoptive placement under s. 48.837 (1), Stats., who is dependent upon the employee for at least 50% of support and maintenance and who is:

1. More than 14 days of age, but under the age of 19,
2. Age 19 or over but less than age 25 if a full−time student, or
3. Age 19 or older and incapable of self−support because of a physical or mental disability which is expected to be of long-continued or indefinite duration.

(b) For health insurance purposes, an eligible employee's spouse or domestic partner and an eligible employee's unmarried child who is dependent upon the employee or the other parent for at least 50% of support and maintenance. This support and maintenance requirement does not apply to eligible adult children as described in s. 632.885, Stats. A dependent includes an eligible employee's grandchild as provided in s. 632.895 (5m), Stats. It also includes the eligible employee's unmarried dependent child, regardless of age, when he or she is:

1. Under the age of 19,
2. Age 19 or older but less than age 27 as provided in s. 632.885, Stats.
3. Age 27 or older and incapable of self−support because of a physical or mental disability which is expected to be of indefinite duration or for at least one year or a full-time student as provided in s. 632.885, Stats.

In this section, "child" includes a natural child, stepchild, child of the domestic partner, adopted child, child in an adoptive placement under s. 48.837 (1), Stats., and legal ward who became a permanent legal ward of the employee or the employee's spouse or domestic partner prior to age 19.

Section 3. ETF 10.01 (3m) is amended to read:

ETF 10.01 (3m) "Medical record" includes medical evaluation, diagnosis, prognosis, rehabilitation potential, medication, treatment, diet, limitations on activities, symptoms, general physical or mental condition, x-rays, lab tests or results, or any communication or information related to the health, medical, surgical, dental, optometric, chiropractic, podiatric or hospital care or condition of a participant or the spouse, domestic partner or dependent of the participant.

Section 4. ETF 10.01 (9) is repealed.

Note: *Section 10.01 (9) was repealed to remove the obsolete terms 'widow' and 'widower.' The part of section 10.01 (9) that refers to the termination of a marital relationship and the determination of a beneficiary under s. 40.02 (8) (a) (2), is retained in a new section 20.08.*

Section 5. ETF 10.70 (1) is amended to read:

ETF 10.70 (1) Individual personal information, within the meaning of s. 40.07, Stats., is all information in any individual record of the department, including but not limited to the date of birth, earnings, contributions, interest credits, beneficiary designations, creditable service, marital or domestic partnership status, address, and social security number, but not including information in any statistical report, other report or summary in which individual identification is not possible.

Section 6. ETF 10.78 (2) is repealed:

Note: *Repealed because the department is already granted such authority under s. 40.08 (9), Stats.*

Section 7. ETF 20.055 is amended to read:

ETF 20.055 Spouse's or domestic partner's signature on ~~an annuity~~ a benefit application. Documentation of inability to obtain a spouse's or domestic partner's signature on an annuity application as required under s. 40.24 (7) (a), Stats., or on a separation benefit application as provided in s. 40.25 (3m), shall be accepted for the following reasons only:

(1) The spouse or domestic partner is incompetent as defined under s. 54.10 (3), ~~880.01 (4),~~ Stats., and a copy of the court order appointing the spouse's or domestic partner's guardian is submitted to the department, except guardianship papers are not required when ~~payment~~ the benefit payable is a single sum benefit payable under s. 40.25 (1), Stats. The guardian's signature shall be required on the annuity application in lieu of the spouse's or domestic partner's signature if the participant chooses an annuity option other than an option specified under s. 40.24 (7) (a), Stats.; or

~~***Note:*** *Section 880.01 (4), Stats., was repealed by 2005 Wis. Act 387. See s. 54.10 (3), Stats., for requirements to find an individual incompetent.*~~

(2) The participant certifies, on a form provided by the department, that the participant does not now know and has not known the whereabouts of the spouse or domestic partner for at least the 90 days immediately prior to the date the application is signed.

(3) The requirements in s. 40.24 (7) (a) (intro) and (b), Stats., related to the requirement for the domestic partner's signature on benefit applications, shall not apply if the participant is prohibited under the internal revenue code from selecting a joint and survivor annuity with the domestic partner as the named survivor, based on the participant's and domestic partner's respective ages.

Section 8. ETF 20.08 is created to read:

ETF 20.08 For purposes of determining a beneficiary under s. 40.02 (8) (a) 2., Stats., a judgment, order or decree of divorce, legal separation or an annulment of the marriage terminates the marital relationship. A domestic partnership terminates as specified in ETF 20.10 (3) for the purposes of determining a beneficiary under s. 40.02 (8) (a) 2., Stats.

Section 9. ETF 20.10 is created to read:

ETF 20.10 Domestic partner benefits. (1) For the purposes of this section, "member" means any of the following persons:

(a) Participant.
(b) Annuitant.
(c) Eligible employee.
(d) Beneficiary.
(e) Alternate payee.
(f) Recipient of duty disability benefits under s. 40.65, Stats.

(2) (a) For the purposes of the benefits authorized under Chapter 40, Stats., a domestic partnership as defined in s. 40.02 (21d), Stats., becomes effective on the date that the department receives a completed and notarized *Affidavit of Domestic Partnership* form (ET-2371), except that a domestic partnership cannot become effective before January 1, 2010.
(b) The department may at its discretion reject any *Affidavit of Domestic Partnership* (ET-2371) that is illegible or missing information necessary for benefit administration purposes. Affidavits that are missing the name or signature of either domestic partner or are not notarized shall be rejected. Any affidavit so rejected shall have no force or effect, and for the purposes of the benefits authorized in Chapter 40, the effective date of the domestic partnership shall be based on the date the department receives a completed, notarized *Affidavit of Domestic Partnership* form (ET-2371) signed by both partners.

(c) Registering as domestic partners under the provisions of Chapter 770, Stats., does not establish a domestic partnership for the purposes the benefits authorized in Chapter 40, Stats.

(d) Establishing a domestic partnership or a same-sex marriage in another state does not establish a domestic partnership for the purposes of the benefits authorized in Chapter 40, Stats.

(3) Once a domestic partnership becomes effective it remains in force until the earlier of the following dates;
(a) The date on which the department receives a notarized *Affidavit of Termination of Domestic Partnership* form (ET-2372) signed by either the member or the domestic partner.

(b) Based on evidence provided to the department, the date established to the department's satisfaction that the domestic partnership no longer met all of the conditions in s. 40.02 (21d), Stats. Examples of no longer meeting such conditions include, but are not limited to, one of the domestic partners marrying another person or establishing a new domestic partnership with a different partner under sub. (2), or no longer sharing a common residence.

(c) The date on which neither domestic partner is a member as defined in sub. 1.

(d) The date determined by the court that a domestic partnership terminated.

(e) The department may at its discretion reject any *Affidavit of Termination of Domestic Partnership* (ET-2372) that is illegible or missing information necessary for benefit administration purposes. Any affidavit terminating a domestic partnership that is missing the name of either domestic partner, the signature of the domestic partner who is terminating the domestic partnership, or is not notarized shall be rejected, and shall have no force or effect. Except as provided in par. (b) and (c), for the purposes of the benefits authorized in Chapter 40, the effective date of the termination of the domestic partnership shall be based on the date the department receives a completed, signed and notarized Affidavit of Termination of Domestic Partnership form (ET-2372).

(f) Terminating a domestic partnership created under the provisions of Chapter 770, Stats., does not terminate a domestic partnership established under sub. (2) for the purposes the benefits authorized in Chapter 40, Stats.

(g) The domestic partnership is not in force on the effective date that the partnership is terminated as defined in this sub.

(4) Affidavits certifying or terminating a domestic partnership that are received after the date of death of either domestic partner are invalid, and shall have no force or effect.

(5) The domestic partner provisions in s. 40.08 (8) (a) 4. and s. 40.23 (4) (e) 1. and (f), Stats., shall not apply if such provisions are inconsistent with any internal revenue code provisions that authorize and regulate the benefit plan.

Note: *The Affidavit of Domestic Partnership form (ET-2371) and the Affidavit of Termination of Domestic Partnership form (ET-2372)* can be found on ETF's Web site, http://etf.wi.gov, or by contacting the department at 1-877-533-5020.

Section 10. ETF 40.01 (2m) is amended to read:

ETF 40.01 (2m) RESPONSIBLE PERSON. (a) *Multiple surviving insured dependents, with surviving spouse or domestic partner*. If the deceased insured employee is survived by a spouse or domestic partner and other dependents of the deceased insured employee, then the family coverage shall continue in effect and the surviving spouse or domestic partner shall be the responsible person and have the same control and responsibilities with respect to the insurance coverage of the insured surviving dependents as the insured employee had while living.

(b) *Multiple surviving insured dependents, without surviving spouse or surviving domestic partner*. If the deceased insured employee is not survived by a spouse or domestic partner but by more than one insured dependents, then the family coverage will continue in effect. The oldest surviving insured dependent, or that person's guardian, shall be the responsible person and have the same rights and responsibilities with respect to the insurance coverage of the insured surviving dependents as the insured employee had while living. Upon reasonable request from any adult surviving insured dependent or the guardian of any minor surviving insured dependent, the department may designate another surviving insured dependent, or that person's guardian, as the responsible person.

Section 11. ETF 40.01 (3) is amended to read:

ETF 40.01 (3) DURATION OF CONTINUING COVERAGE. (a) *Surviving spouse or surviving domestic partner*. A surviving spouse or surviving domestic partner entitled to insurance coverage under this section and s. 40.02 (25) (b) 3., Stats., is entitled to continuous coverage under this section for life, unless sooner cancelled voluntarily or for non−payment of premiums. A suspension of coverage because of the operation of s. 40.05 (4) (b) or (be), Stats., does not affect this entitlement. The surviving spouse or surviving domestic partner may not add new dependents to this coverage.

Note: *Section 40.02 (25) (b) 3., Stats., defines the surviving spouse or domestic partner of an employee, or retired employee, as an "eligible employee" having, under rules to be promulgated by this department, the same right to health insurance coverage as the deceased employee or retired employee except without any state contribution. Section 40.05 (4) (b) and (be), Stats, concern the accumulated sick leave conversion credit benefit plan. It permits a surviving insured dependent to delay deductions from a deceased employee's accumulated sick leave conversion credits to pay for group health insurance under ch. 40, Stats., because the surviving insured dependent is covered by a health insurance plan or*

policy comparable to the standard plan during the period deductions are delayed. Health insurance coverage under ch. 40, Stats., is, in effect, suspended unless and until the dependent elects to reinstate coverage and resume the deductions from accumulated sick leave conversion credits.

(b) *Other surviving insured dependents.* The duration of coverage for other surviving insured dependents shall be established by the terms of the group health insurance contract approved by the group insurance board.

Section 12. ETF 41.02 (1) (a) is amended to read:

ETF 41.02 (1) (a) Provide employees and annuitants meaningful protection for themselves, their spouses, their domestic partners and their parents from the potentially catastrophic costs of financing long–term care;

Section 13. ETF 60.60 (8) (d) is amended to read:

ETF 60.60 (8) (d) An insured surviving spouse, domestic partner, or dependent child may not continue payment of premiums from the conversion account after the death of the insured but may elect, if otherwise eligible, to continue coverage as provided in s. ETF 40.01.

Fiscal Estimate
Regarding Employee Trust Funds Emergency Rule Revising Chapters ETF 10, 20, 40 and 41, relating to domestic partner benefits and the expansion of health insurance coverage to adult dependents up to the age of 27 years.

The rule will have a minimal fiscal effect in that it will require the creation and processing of new forms used to track new categories of dependents for the various benefit programs administered by the Department. Most of the fiscal effect will be one-time. These costs are anticipated to be insignificant and the Department can absorb these costs within the existing base budget.

The rule will not create any additional fiscal impact on any county, city, village, town, school district, technical college district, or sewerage districts.

The rule will not create any additional fiscal impact on the state for the current biennium.

The rule will not have any fiscal impact on the private sector.