

98-169 E.T.F. 10.55 - REPORT CREW/BLK  
SERVICE - JOMT EMP. - WRS

WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC  
FORM 2

***RULES CLEARINGHOUSE***

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**CLEARINGHOUSE REPORT TO AGENCY**

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[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)]

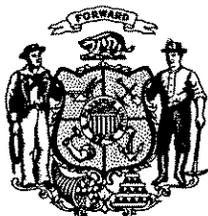
Comment Attached      YES       NO

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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 (2) (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 . . . ."

**STATE OF WISCONSIN  
DEPARTMENT OF EMPLOYE TRUST FUNDS**

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**PROPOSED RULE**    creating § ETF 10.55 concerning 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.

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**NOTICE OF HEARING AND PROPOSED RULE**

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**PUBLIC HEARING NOTICE**

In accord with Wis. Stat. § 227.16 (1), the Wisconsin Department of Employee Trust Funds will hold a public hearing to discuss a proposed rule, which creates § ETF 10.55 of the Wisconsin Administrative Code 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.

**HEARING INFORMATION**

<b>Day:</b> Monday	<b>Building:</b> Department of Employee Trust Funds
<b>Date:</b> November 30, 1998	<b>Room:</b> Conference Room 2A
<b>Time:</b> 3:00-4:30 PM	<b>Address:</b> 801 West Badger Road Madison, Wisconsin

**WRITTEN COMMENTS**

The record will be held open until 4:30 p.m. on December 2, 1998, for the receipt of any written comments from persons unable to attend the public hearing. Written comments should be addressed to Robert F. Weber, Chief Counsel, Department of Employee Trust Funds, P.O. Box 7931, Madison, Wisconsin, 53707-7931.

**CONTACT PERSON & COPIES OF RULE**

For copies of the proposed rule, which are available free upon request, and for other 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.

**ANALYSIS OF THE PROPOSED RULE  
PREPARED BY THE DEPARTMENT OF EMPLOYE TRUST FUNDS**

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

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

271            27,39

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), are contributed to the Public Employe 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 Employe Trust Funds.

The rule will specify 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 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 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.

**Initial 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 employee, 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 employees. 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.

**Initial Regulatory Flexibility Analysis:** This rule affects only a retirement program open exclusively to qualifying employees of the state, counties (except Milwaukee County) and municipalities which have elected to participate under Wis. Stat. § 40.21. The 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 employees of these joint instrumentalities. The Department therefore anticipates that the provisions of this proposed rule will have no direct adverse impact on small businesses.

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SECTION 1. ETF 10.55 is created to read:

ETF 10.55 JOINT INSTRUMENTALITIES; REPORTING PARTICIPATING EMPLOYES, SERVICE AND EARNINGS. (1) SCOPE. This rule 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 duly 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 effectively loaned or assigned to perform services for a joint instrumentality. Those individuals remain the employees of their employing unit of government which are 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.

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

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

7 (b) Nothing in this section ~~shall~~<sup>s</sup> prevent the units of government forming a joint  
8 instrumentality subject to this section from providing for their appropriate share of  
9 responsibility for the retirement benefits of the employes of the joint instrumentality in the  
10 agreement establishing the joint instrumentality. If they fail to expressly address the issue  
11 then the share of each participating employer shall be determined as provided in this section.

12 (c) Whether an employe of a joint instrumentality covered by this section is a  
13 participating employe under s. 40.22<sup>Stats</sup> is not affected by the number of different units of  
14 government which form the joint instrumentality.

15 (3) PARTICIPATING EMPLOYEES. (a) An employe of a joint instrumentality subject to  
16 this section is a participating employe for Wisconsin retirement system purposes if any of the  
17 units of government forming the joint instrumentality is a participating employer under s.  
18 40.21, Stats., unless the employe is excluded under s. 40.22 (2), Stats.

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

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

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

7 (4) REPORTING REQUIREMENTS. (a) Report participating employe. Among the  
8 units of government which formed the joint instrumentality, each unit which is a participating  
9 employer under Wis. Stat. § 40.21, shall report each employe of the joint instrumentality who  
10 qualifies as a participating employe under sub. (3) to the department as its own participating  
11 employe.

12 (b) Reported earnings. *OK* Earnings shall be reported by each participating employer, in the  
13 same manner and subject to the same requirements as for its other participating employes,  
14 with respect to each employe of the joint instrumentality required to be reported as a  
15 participating employe under sub. (3). The amount of earnings to be reported shall be  
16 determined by prorating the gross amount paid to the employe for services rendered to the  
17 joint instrumentality which would qualify as "earnings" under ~~Wis. Stat. § 40.02 (22)~~ <sup>5</sup> *Stats.* if the  
18 joint instrumentality were itself the employer among the units of government which created  
19 the joint instrumentality. If the proration is not specified by the agreement establishing the  
20 joint instrumentality, it shall be in accord with the agreed proration of <sup>any</sup> like expenses. If no  
21 such proration is *of expenses* clearly provided in the agreement, each participating employer shall report  
22 the total amount of earnings divided by the number of units of government forming the joint

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

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

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

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

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

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

3 (END OF RULE TEXT)

This proposed rule has been duly approved for submission to the Legislative Counsel Staff and the incorporated notice for hearing is approved for publication by authority delegated to me by the Employe Trust Funds, Teacher Retirement and Wisconsin Retirement Boards.

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

*eff. date?*