

MAR 20 2000



WISCONSIN LEGISLATIVE COUNCIL STAFF

***RULES CLEARINGHOUSE***

**Ronald Sklansky**  
Director  
(608) 266-1946



**Terry C. Anderson, Director**  
Legislative Council Staff  
(608) 266-1304

**Richard Sweet**  
Assistant Director  
(608) 266-2982

One E. Main St., Ste. 401  
P.O. Box 2536  
Madison, WI 53701-2536  
FAX: (608) 266-3830

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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 00-043**

AN ORDER to amend ETF 50.30 (1m) and 50.50 (1) (c) 3.; and to create ETF 50.32 (4) and 50.42 (8m), relating to eligible disability applicants.

Submitted by **DEPARTMENT OF EMPLOYE TRUST FUNDS**

02-25-00 RECEIVED BY LEGISLATIVE COUNCIL.

03-16-00 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 00-043

### 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 50.30 (1m), "since" should be shown as stricken through and the underscored material should be inserted following "since." The provision would read ". . . during any ~~month~~ since 12 consecutive calendar months beginning with the first of the month following the date service for the participating employer terminated . . ."

b. The definition of termination of employment in SECTION 2 states that termination of employment "means the last day rendered service as defined under sub. (2)." The definition in s. ETF 50.32 (2) is a description of the term "last rendered services." Therefore, the definition of termination of employment should be rewritten "means the last rendered services as defined under sub. (2)" or "the date on which the person last rendered services as defined under sub. (2)." [See also SECTION 3 of the rule.]

c. In s. ETF 50.50 (1) (c) 3., the notation "ETF" should be inserted after the notation "s."

**State of Wisconsin**  
**DEPARTMENT OF EMPLOYE TRUST FUNDS – OFFICE OF THE SECRETARY**  
**and**

**EMPLOYEE TRUST FUNDS BOARD**  
**GROUP INSURANCE BOARD**  
**WISCONSIN RETIREMENT BOARD**  
**TEACHER RETIREMENT BOARD**

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**NOTICE OF HEARING AND PROPOSED RULE**

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NOTICE IS HEREBY GIVEN That pursuant to § 40.03 (1), (6), (7) and (8), Stats., and interpreting § 40.03 (6) and 40.63, Stats., the Department of Employee Trust Funds will hold a public hearing at the Department of Employee Trust Funds, 801 W. Badger Road in the city of Madison, WI, on the 4th day of April, 2000, at 1:00 PM to consider the amendment of § ETF 50.30 (1m) and ETF 50.50 (1) (c) 3., and creation of § ETF 50.32 (4) and ETF 50.42 (8m), Wisconsin Administrative Code, relating to eligible disability applicants.

The public record on this proposed rule making will be held open until 4:30 PM on Thursday, April 6, 2000 to permit the submission of written comments from persons unable to attend the public hearing in person, or who wish to supplement testimony offered at the hearing. Any such written comments should be addressed to Diane M. Bass, Disability Programs Bureau, Division of Insurance Services, Department of Employee Trust Funds, 801 W. Badger Road, P.O. Box 7931, Madison, Wisconsin 53707-7931.

Analysis Prepared by the Wisconsin Department of Employee Trust Funds

Under §40.63, Wis. Stats., to be eligible for a disability benefit from the Wisconsin Retirement System (WRS), an employe, prior to reaching their normal retirement age, must be totally disabled by a mental or physical impairment which is likely to be permanent and meet the requirements listed below:

- The employe must be a participating WRS employe.
- The employe must have a total of at least five years of creditable service or at least one-half year of creditable service in each of five of the years. The seven full calendar years before the received date of the disability application will be used to determine whether the service requirement is met. *40.03(1)(a)*
- The employe must not be entitled to any further earnings from the employer.
- The employer must certify that the employe ceased employment due to a disability.
- The employe must be totally and permanently disabled as certified by two licensed physicians.

Pursuant to § 40.63 (2), Stats., a participant shall be considered a participating employe only if no other employment which is substantial gainful activity has intervened since service for the participating employer terminated and if the termination of active service for the participating employer was due to disability. Wisconsin Statutes, § 40.63 (11), defines “substantial gainful activity” as employment for which the annual compensation exceeds a specified dollar amount for a specific period of time. The current rule, § ETF 50.30 (1m) for disability benefits under § 40.63, Stats., relies on a monthly test to determine if the employe was gainfully employed since employment terminated with the WRS covered employer. The amended rule will clarify that the Department will rely on a twelve consecutive month period of time rather than the monthly test to determine whether the employe was gainfully employed.

The Long Term Disability Insurance (LTDI) program provides an alternative to § 40.63, Stats., disability benefits. Many of the provisions under § 50.40, Wis. Admin. Code, are very similar to the eligibility provisions for disability benefits under § 40.63, Stats. The current rule, § 50.50 (1) (c) 3. for disability benefits under the LTDI program, also relies on a monthly test to determine gainful employment. The rule will be amended to clarify that the Department will rely on a twelve consecutive month period of time rather than the monthly test to determine whether the employe was gainfully employed.

The rule applies to the disability applicant who applies for either a disability benefit under § 40.63, Stats., or LTDI benefit under § 50.40, Wis. Admin. Code. The LTDI program will eventually replace the WRS disability program under § 40.63, Stats.

Under the provisions of § 40.63, Stats., and LTDI §50.40, Wis. Admin. Code, to be eligible to apply for either of these benefits, the applicant must be totally disabled by a mental or physical impairment which is likely to be permanent. In addition to meeting the service requirement, the medical definition, and the employer certifying that the applicant ceased employment due to a disability, the applicant must be a participating WRS employe. An employe who has terminated employment with the WRS covered employer shall be considered a participating employe only if no other employment which is substantial gainful activity has intervened since service for the participating employer terminated.

The proposed rules define the “termination of employment” for purpose of determining whether a person is a participating employe as used in the eligibility criteria for WRS disability and LTDI benefits. The rules clarify the earned income test used to determine whether a terminated employe had intervening employment since the employe last worked for a covered Wisconsin Retirement System (WRS) employer. With the amended rule the Department will rely on an entire twelve consecutive month period of time rather than the monthly test to determine whether the employe was gainfully employed. This amendment to the current rule is intended to not only look at the “level of earnings” as required under substantial gainful activity, but to also look at the disability applicant’s ability to sustain the level of earnings.

TEXT OF RULE

SECTION 1. ETF 50.30 (1m) is amended to read:

**ETF 50.30 (1m)** For purposes of eligibility under s. 40.63 (2), Stats., employment which is substantial gainful activity has intervened if, during any ~~month~~ twelve (12) consecutive calendar months beginning with the first of the month following the date since service for the participating employer terminated, the participant received aggregate earnings, wages, salary and other earned income exceeding ~~one twelfth~~ of the annual dollar amount determined under s. 40.63 (11), Stats., that is in effect at the end of the 12 consecutive calendar month period.

SECTION 2. ETF 50.32. (4) is created to read:

**ETF 50.32 (4)** "Termination of employment" for the purpose of determining whether a person is a participating employe means the last <sup>day</sup> ~~day~~ <sup>on which the person</sup> rendered services as defined under sub. (2).

SECTION 3. ETF 50.42 (8m) is created to read:

**ETF 50.42 (8m)** "Termination of employment" for the purpose of determining whether a claimant is a participating employe means the last <sup>day</sup> ~~day~~ <sup>on which the person</sup> rendered services as defined under sub. (4).

SECTION 4. ETF 50.50 (1) (c) 3. is amended to read:

**ETF 50.50 (1) (c) 3.** Excluding earnings from the claimant's last participating employer, the claimant has not received aggregate earnings, wages, salary and other earned income in any ~~month since~~ twelve (12) consecutive calendar months beginning with the first of the month following the date the claimant last rendered services to the participating employer exceeding ~~one twelfth of the earnings limit in effect during the period in question~~ the annual dollar amount determined under s. <sup>ETF</sup> 50.32 (3) that is in effect at the end of the 12 consecutive calendar month period.

(END OF RULE TEXT)

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

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.

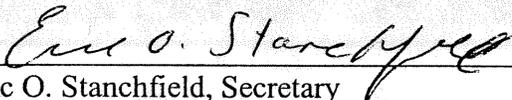
Copies of Rule and Contact Person. Copies of this rule are available without cost by making a request to the Department of Employee Trust Funds, Office of the Secretary, P.O. Box 7931, Madison, Wisconsin 53707-7931, telephone (608) 266-1071. For questions about this rule making, please call Diane M. Bass, Disability Programs Bureau, Division of Insurance Services, (608) 266-8083.

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

Approved for publication: This proposed rule making is approved for submission to the Legislative Council Staff for review under § 227.15, Stats., and for submission to the Revisor of Statutes under § 227.17, Stats., in order to provide notice of the scheduled public hearing.

Signed at Madison, Wisconsin this 25<sup>th</sup> day of February, 2000.

WISCONSIN DEPARTMENT OF EMPLOYEE TRUST FUNDS

  
Eric O. Stanchfield, Secretary



STATE OF WISCONSIN

JUN 29 2000

**Department of Employee Trust Funds**

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

June 29, 2000

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

Re: CR # 00-043 relating to eligible applicants for disability benefits

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  
Legislation and Planning  
(608) 267-2929  
FAX (608) 267-0633

Enclosure

**STATE OF WISCONSIN  
DEPARTMENT OF EMPLOYEE TRUST FUNDS, EMPLOYEE TRUST FUNDS BOARD  
TEACHERS RETIREMENT BOARD, WISCONSIN RETIREMENT BOARD, AND  
GROUP INSURANCE BOARD**

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**FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #00-043**

A RULE       amending § ETF 50.30 (1m) and ETF 50.50 (1) (c) 3; and creating § ETF 50.32 (4) and ETF 50.42 (8m), Wisconsin Administrative Code, relating to eligible disability applicants.

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### **Agency Person to be Contacted for Questions**

For information about this rule, Diane M. Bass, ICI Contract Monitor, Disability Programs Bureau, Division of Insurance Services, Department of Employee Trust Funds, 801 W. Badger Road, P.O. Box 7931, Madison, Wisconsin 53707-7931. Telephone: (608) 266-8083. FAX: (608) 264-8338.

### **Statement Explaining Need for Rule**

The Department of Employee Trust Funds is required by Wis. Stats. § 227.10 (1) to promulgate as a rule each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.

The current rules for disability benefits under § 40.63, Stats., and the Long-Term Disability Insurance (LTDI) program rely on a monthly test to determine if the employe was gainfully employed since employment terminated with the WRS covered employer. Amended rules are needed to clarify that the Department will rely on a twelve consecutive month period of time rather than the monthly test to determine whether the employe was gainfully employed and capable of sustaining this level of earnings.

Amended rules are needed to clarify “participating employe” for WRS disability benefits. The rules are needed to clarify the earned income test used to determine whether a terminated employe had intervening employment since the employe last worked for a covered Wisconsin Retirement System (WRS) employer.

### **Analysis Prepared by the Wisconsin Department of Employee Trust Funds**

*Authority for Rule:* Wis. Stats. § 40.03 (1), (6), (7) and (8)

*Statutes Interpreted:* Wis. Stats. § 40.03 (6) and 40.63.

Under §40.63, Wis. Stats., to be eligible for a disability benefit from the Wisconsin Retirement System (WRS), an employe, prior to reaching normal retirement age, must be totally disabled by a mental or physical impairment which is likely to be permanent and meet the requirements listed below:

- The employe must be a participating WRS employe.
- The employe must have a total of at least five years of creditable service or at least one-half year of creditable service in each of five of the years. The seven full calendar years before the received date of the disability application will be used to determine whether the service requirement is met.
- The employe must not be entitled to any further earnings from the employer.
- The employer must certify that the employe ceased employment due to a disability.

- The employe must be totally and permanently disabled as certified by two licensed physicians.

Pursuant to § 40.63 (2), Stats., a participant shall be considered a participating employe only if no other employment which is substantial gainful activity has intervened since service for the participating employer terminated and if the termination of active service for the participating employer was due to disability. Wisconsin Statutes, § 40.63 (11), defines “substantial gainful activity” as employment for which the annual compensation exceeds a specified dollar amount for a specific period of time. The current rule, § ETF 50.30 (1m) for disability benefits under § 40.63, Stats., relies on a monthly test to determine if the employe was gainfully employed since employment terminated with the WRS covered employer. The amended rule clarifies that the Department will rely on a twelve consecutive month period of time rather than the monthly test to determine whether the employe was gainfully employed.

The Long-Term Disability Insurance (LTDI) program provides an alternative to § 40.63, Stats., disability benefits. Many of the provisions under § 50.40, Wis. Admin. Code, are very similar to the eligibility provisions for disability benefits under § 40.63, Stats. The current rule (§ 50.50 (1) (c) 3). for disability benefits under the LTDI program, also relies on a monthly test to determine gainful employment. The rule is amended to clarify that the Department will rely on a twelve consecutive month period of time rather than the monthly test to determine whether the employe was gainfully employed.

The rule applies to the disability applicant who applies for either a disability benefit under § 40.63, Stats., or LTDI benefit under § 50.40, Wis. Admin. Code. The LTDI program will eventually replace the WRS disability program under § 40.63, Stats.

Under the provisions of § 40.63, Stats., and LTDI § 50.40, Wis. Admin. Code, to be eligible to apply for either of these benefits, the applicant must be totally disabled by a mental or physical impairment which is likely to be of long-continued and indefinite duration. In addition to meeting the service requirement, the medical definition, and the employer certifying that the applicant ceased employment due to a disability, the applicant must be a participating WRS employe. An employe who has terminated employment with the WRS covered employer shall be considered a participating employe only if no other employment which is substantial gainful activity has intervened since service for the participating employer terminated.

### **Fiscal Estimate**

The Department estimates that there will be no direct fiscal impact from this proposed rule 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.

### **Final Regulatory Flexibility Analysis**

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

(BEGINNING OF RULE TEXT)

SECTION 1. ETF 50.30 (1m) is amended to read:

**ETF 50.30 (1m)** For purposes of eligibility under s. 40.63 (2), Stats., employment which is substantial gainful activity has intervened if, during any ~~month since~~ twelve (12) consecutive calendar months beginning with the first of the month following the date service for the participating employer terminated, the participant received aggregate earnings, wages, salary and other earned income exceeding ~~one twelfth of the~~ annual dollar amount determined under s. 40.63 (11), Stats., that is in effect at the end of the 12 consecutive calendar month period.

SECTION 2. ETF 50.32. (4) is created to read:

**ETF 50.32 (4)** The date on which service for the participating employer terminated, for purposes of s. 40.63 (2), Stats., is the date on which the person last rendered services as defined under sub. (2).

SECTION 3. ETF 50.50 (1) (c) 3. is amended to read:

**ETF 50.50 (1) (c) 3.** Excluding earnings from the claimant's last participating employer, the claimant has not received aggregate earnings, wages, salary and other earned income in any ~~month since~~ twelve (12) consecutive calendar months beginning with the first of the month following the date the claimant last rendered services to the participating employer exceeding ~~one twelfth of the earnings limit in effect during the period in question~~ the annual dollar amount

determined under s. ETF 50.32 (3) that is in effect at the end of the 12 consecutive calendar month period.

(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 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 Rules**

No persons appeared or registered either for or against the rule at the public hearing April 4, 2000. The record was held open for written comments until April 6, 2000, but no comments were received.

**Legislative Council Staff Clearinghouse Report on CR #00-043**