



2011 SENATE BILL 413

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.

Analysis by the Legislative Reference Bureau

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

6 **SECTION 1.** 40.02 (15) (b) of the statutes is amended to read:
7 40.02 (15) (b) The creditable military service under par. (a) shall be in the same
8 type employment category, as set forth in s. 40.23 (2m) (e), as in which the participant
9 was receiving employed immediately prior to entry into the U.S. armed forces.
10 **SECTION 2.** 40.02 (15) (c) 3. of the statutes is amended to read:

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1 40.02 (15) (c) 3. Creditable military service under this paragraph shall be
2 allocated at the time of retirement in proportion to the amount of the participant's
3 creditable service for each of the ~~types of creditable service~~ employment categories
4 as set forth in s. 40.23 (2m) (e), unless a higher benefit would result from the prorated
5 allocation of creditable military service based on the amount of the participant's
6 creditable service for each of the types of creditable service on the date the
7 participant attains the greater of 5, 10, 15 or 20 years of creditable service.

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

9 40.02 (15) (d) Contributions, benefits, and service credit with respect to
10 qualified military service, as defined in 38 USC 43, taken on or after December 12,
11 1994, are governed by section 414 (u) of the Internal Revenue Code and the federal
12 Uniformed Services Employment and Reemployment Rights Act of 1994.

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

14 40.02 (15) (e) 1. Effective with deaths occurring on or after January 1, 2007,
15 while a participant is performing qualified military service, as defined in 38 USC 43,
16 death benefits shall be calculated as though the participant was a participating
17 employee subject to par. (d) during the period or periods of military service between
18 the date that the participant left participating employment to enter active military
19 service and the date of death.

20 2. Effective with disabilities occurring on or after January 1, 2007, if a
21 participant becomes disabled while performing qualified military service, as defined
22 in 38 USC 43, to the extent permitted by section 414 (u) (8) of the Internal Revenue
23 Code, and is unable to return to participating employment due to the disability
24 incurred while performing such military service, for benefit calculation purposes the
25 participant shall be treated as though the participant was a participating employee

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

4 3. Beginning January 1, 2009, an individual receiving differential wage
5 payments while the individual is performing qualified military service, as defined in
6 38 USC 43, from an employer shall be treated as employed by that employer, and the
7 differential wage payment shall be treated as compensation for purposes of applying
8 the limits on annual additions under section 415 (c) of the Internal Revenue Code.
9 This provision shall be applied to all similarly situated individuals in a reasonably
10 equivalent manner.

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

12 40.02 **(20m)** “Differential wage payment” means any payment, including
13 specifically a payment under s. 230.315, that satisfies all of the following:

14 (a) The payment is made by an employer to a participating employee with
15 respect to any period during which the participating employee is performing service
16 in the uniformed services, as defined in 38 USC 4303, while on active duty for a
17 period of more than 30 days.

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

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

22 40.02 **(22)** (a) Except as provided in pars. (b) to (f) and s. 40.63 (1) (c), means
23 the gross amount paid to an employee by a participating employer as salary or wages,
24 including amounts provided through deferred compensation or tax shelter
25 agreements, for personal services rendered to or for an employer, or which would

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1 have been available for payment to the employee except for the employee's election
2 that part or all of the amount be used for other purposes; any amount considered
3 earnings under sub. (15) (d) and (e); and ~~also includes~~ the money value, as
4 determined by the employer, of any board, lodging, fuel, laundry and other
5 allowances provided for the employee in lieu of money. For purposes of this
6 paragraph, the gross amount shall be determined prior to deductions for taxes,
7 insurance premiums, retirement contributions or deposits, charitable contributions
8 or similar amounts and shall be considered received as of the date when the earnings
9 would normally be payable by the employer. For reporting and computation
10 purposes, fractions of a dollar shall be disregarded in determining annual earnings.

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

12 40.02 **(22)** (e) ~~For an employee serving in a position covered under and meeting~~
13 ~~the requirements of 38 USC 4301, et. seq., except purposes of the Wisconsin~~
14 retirement system, but not for OASDHI purposes, means compensation determined
15 as required under 38 USC 4318 (b) (3) and regulations adopted thereunder with
16 respect to a person who has actually returned to employment under section 414 (u)
17 (9) (A) of the Internal Revenue Code, 38 USC 4312, or any predecessor veteran's
18 reemployment rights provision under federal law, provided contributions and
19 premiums on the compensation are paid as required under s. 40.05. If the participant
20 does not pay any portion of the employee contributions that the participant would
21 have paid if the participant had not left employment to enter military service, the
22 value of the benefits payable from the participant's account shall be reduced by the
23 value of the unpaid contributions plus interest as provided by rule.

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

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1 40.02 **(26)** (intro.) “Employee” means any person who receives earnings as
2 payment for personal services rendered for the benefit of any employer including
3 officers of the employer. An employee is deemed to have separated from the service
4 of an employer at the end of the day on which the employee last performed services
5 for the employer, or, if later, the day on which the employee–employer relationship
6 is terminated because of the expiration or termination of leave without pay, sick
7 leave, vacation or other leave of absence. Except as provided in s. 40.82 (4), a
8 participant receiving a differential wage payment or earnings, contributions, or
9 service credit under sub. (15) (e) is considered an employee of the employer making
10 the payment. A person shall not be considered an employee if a person:

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

12 40.82 **(3)** Each deferred compensation plan under this subchapter shall be
13 maintained and administered as an eligible deferred compensation plan, as defined
14 in section 457 of the Internal Revenue Code, and shall meet the requirements of
15 section 401 (a) (37) of the Internal Revenue Code.

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

17 40.82 **(4)** (a) Beginning on December 31, 2008, a participating employee who
18 is receiving differential wage payments shall be considered as having terminated
19 covered employment during any period in which the person is performing service in
20 the uniformed services, as defined in 38 USC 4303, on active duty for a period of more
21 than 30 days, for purposes of receiving a distribution under section 457 (d) (1) (A) (ii)
22 of the Internal Revenue Code.

23 (b) A person who is described under par. (a) and who elects to receive a
24 distribution may not subsequently make an elective deferral or employee

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1 contribution into a deferred compensation plan during the 6-month period following
2 the distribution.

3 **SECTION 11. Nonstatutory provisions.**

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

9 **SECTION 12. Initial applicability.**

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

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

16 (END)