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

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.
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:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**SECTION 10.** 40.82 (4) of the statutes is created to read:
40.82 (4) (a) Beginning on December 31, 2008, a participating employee who is receiving differential wage payments shall be considered as having terminated covered employment during any period in which the person is performing service in the uniformed services, as defined in 38 USC 4303, on active duty for a period of more than 30 days, for purposes of receiving a distribution under section 457 (d) (1) (A) (ii) of the Internal Revenue Code.

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


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

SECTION 12. Initial applicability.

(1) Death and disability benefits. The treatment of section 40.02 (15) (e) 1. and 2. of the statutes applies retroactively to a participant in the Wisconsin retirement system who died or became disabled on or after January 1, 2007.

(2) Creditable military service. The treatment of section 40.02 (15) (c) 3. of the statutes first applies to individuals who are participating employees in the Wisconsin retirement system on the effective date of this subsection.