

Clearinghouse Rule 07-068

**State of Wisconsin  
Department of Employee Trust Funds,  
Employee Trust Funds Board, Teachers Retirement Board  
and  
Wisconsin Retirement Board**

**PROPOSED RULE** to create ETF 20.37 regarding the status of a non-annuitant Wisconsin Retirement System participant at death, for purposes of determining the applicable death benefit.

**Notice of Public Hearing**

A public hearing on this proposed rule will be held on August 14, 2007 at 10:30 AM in Conference Room GA at the offices of the Department of Employee Trust Funds, 801 West Badger Road, Madison, Wisconsin. Persons wishing to attend should come to the reception desk up the stairs (or elevator) from the main entrance.

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

**1. Statute interpreted:**

Section 40.71 (1) (b), Stats.

**2. Statutory authority:**

Sections 40.03 (2) (i) and 227.11 (2) (a), Stats.

**3. Explanation of agency authority:**

By statute, the DETF Secretary is expressly authorized, with appropriate Board approval, to promulgate rules required for the efficient administration of any benefit plan established in ch. 40 of the Wisconsin Statutes. Also, each state agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency if the agency considers it necessary to effectuate the purpose of the statute.

**4. Related statute or rule:**

Section 40.02 (46), Stats., which defines a participating employee, including the criteria that the person be "... an employee who is currently in the service of, or an employee who is on a leave of absence from, a participating employer ... ."

Section 40.02 (26), Stats., which defines “employee” and provides in part that, “... 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. ... .”

Section ETF 10.08 (3) (a), Wisconsin Admin. Code, governs the date of termination for purposes of establishing eligibility to receive benefits from the Wisconsin retirement system, including separation benefits, lump sum benefits and retirement annuity benefits. That rule expressly provides that the date of termination is the earliest of several listed alternatives, among which are the expiration of an unpaid leave of absence (when the termination is based on failing to return to work after such a leave), the date the employer discharged the employee, the date the employee’s resignation is effective, and the date of the employee’s death.

#### 5. Plain language analysis:

The purpose of this rule is to codify an interpretation of s. 40.71 (1) (b), Stats., and eliminate a potential misunderstanding. The clarified interpretation will better effectuate the purpose of the statute and also reflect the Department’s general policies of treating participants in the Wisconsin Retirement System impartially and of administering benefits in accord with the statutory eligibility criteria.

This rule applies to death benefits payable because of the death of a person who was not an annuitant of the Wisconsin Retirement System. The rule will codify that a person’s actual status on the date of the person’s death determines whether the death benefits payable from the Wisconsin Retirement System are those for an active employee or a former employee. If the person’s employment was terminated prior to the date of death, then the benefits payable will be those appropriate for a former employee. The date the employer’s report is received by the Department will not dictate the benefits due.

Section 40.71 (1) (b), Stats., is one of several statutes that determines whether a deceased participant is treated as an active employee, a former employee or an annuitant for purposes of paying the applicable death benefits from the Wisconsin Retirement System. This particular provision states:

If the date of death is less than one year after the last day for which earnings were paid, a participant is deemed a participating employee on leave of absence, notwithstanding

the fact that no formal leave of absence is in effect, if the participating employer for which the participant last performed services as a participating employee has not filed notice of the termination of employment prior to the employee's death.

The purpose of the statute is clearly to treat a decedent whose employment had not been formally terminated as a person on leave of absence, for up to a year. Participating employees granted a leave of absence continue to be participating employees, as expressly provided by s. 40.02 (46), Stats.

It has come to the Department's attention that a misreading of the last clause of the statute is possible. The last clause might be misread to imply that if an employer terminated an employee, but did not report the termination to the Department until after the employee died, then the death benefits would be determined as if the decedent was "deemed" to be an active employee at the time of death. A clear interpretation of the last clause of s. 40.71 (1) (b), Stats., is necessary in order for the Department to calculate and pay the correct death benefits.

The interpretation to be promulgated by this rule will do nothing to change the one-year presumption in s. 40.71 (1) (b), Stats., that a deceased employee who was not terminated prior to death was an employee at death, even if no formal leave of absence had been granted.

6. Summary of, and comparison with, existing or proposed federal regulations:

There are no known existing or proposed federal regulations that are intended to address the activities regulated by this rule.

7. Comparison with rules in adjacent states:

Although there are a number of governmental retirement plans in Illinois, Iowa, Minnesota and Michigan, their administrative rules are not directly relevant to interpreting the Wisconsin statutes governing the Wisconsin Retirement System. Governmental plans differ in the degree to which the terms of the plan are established by enabling legislation or left to subsequent administrative rulemaking or other means.

Illinois

There appear to be no Illinois administrative rules relating to the belated reporting of the severance or termination of employment of a person who subsequently dies, and the computation of death benefits from a public employee pension system.

A rule adopted by the State Employees Retirement System, Ill. Admin. Code title 80 § 1540.255 e), does not deal with the computation of a death benefit, but does provide that if the member has elected to use payroll deductions for the purchase of permissive service credits or reinstating past service credits, the deductions end upon the earliest of several alternative events, including the employee's death or termination of employment.

For purposes of making distributions, the rules governing the State of Illinois Employees Deferred Compensation Plan treat the employee's severance from employment or death as two distinctly different events. Death is not included in the definition of severance from employment. See Ill. Admin. Code title 80 §§ 2700.200 and 2700.700 b) 1) and 2).

#### Iowa

There appear to be no Iowa administrative rules relating to the belated reporting of the severance or termination of employment of a person who subsequently dies, and the computation of death benefits from a public employee pension system.

#### Michigan

There appear to be no Michigan administrative rules relating to the belated reporting of the severance or termination of employment of a person who subsequently dies, and the computation of death benefits from a public employee pension system.

#### Minnesota

There appear to be no Minnesota administrative rules relating to the belated reporting of the severance or termination of employment of a person who subsequently dies, and the computation of death benefits from a public employee pension system.

### 8. Summary of factual data and analytical methodologies:

The Department considered, and rejected, the alternative interpretation of the statute that would permit an employer to delay reporting a termination and thereby possibly increase the benefits payable if the former employee should die. The Department has a duty to administer benefits in accord with the laws governing the Wisconsin Retirement System. These laws include requirements for employers to make accurate, regular and timely reports to the Department concerning covered employees. The alternative interpretation would conflict with those duties by appearing to permit a delay in reporting terminations of employment. Any effort to administer

such an interpretation would also likely give rise to differing treatment of similarly situated former employees. The Department has a duty to treat participants impartially within the laws governing the retirement system.

**9. Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:**

The rule can have no effect on small businesses because private employers and their employees do not participate in, and cannot be covered by, the Wisconsin Retirement System. The Wisconsin Retirement System is required to be maintained and administered as a qualified governmental plan, covering only governmental employees.

**10. Anticipated costs incurred by private sector:**

None.

**11. Effect on small business:**

No effect.

**12. Agency contact person:**

Please direct any questions about the proposed rule to Robert Weber, Chief Counsel, Office of Legal Services, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Telephone: (608) 266-5804. E-mail address: rob.weber@etf.state.wi.us.

**13. Place where comments are to be submitted and deadline for submission:**

Written comments on the proposed rule may be submitted to Robert Weber, Department of Employee Trust Funds, 801 W. Badger Road, P.O. Box 7931, Madison, WI 53707-7931. Written comments must be received at the Department of Employee Trust Funds no later than 4:30 PM on Wednesday, August 15, 2007.

**Initial Regulatory Flexibility Analysis:**

The proposed rule has no effect on small businesses.

**Fiscal Estimate:**

The rule will have no effect on county, city, village, town, school district, technical college district or sewerage district fiscal liabilities or revenues. The rule will have no effect on state funds.

**Free Copies of Proposed Rule:**

Copies of the proposed rule are available without cost from the Office of the Secretary, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707-7931, telephone (608) 266-1071.

## **Text of Proposed Rule**

**SECTION 1.** ETF 20.37 is created to read:

**ETF 20.37 Death benefits.** (1) TERMINATION PRIOR TO DEATH. If employment with a participating employer actually terminated prior to the death of the participant, then the participant may not be treated as a participating employee for purposes of s. 40.71, Stats., regardless of when notice of the termination is filed with the department.

Note. If the termination of employment occurs on the last day on which the employee actually performs services for the employer, and the death occurs on the same day, the participant will be treated as an employee through the end of that day, as provided by s. 40.02 (25), Stats.

(end of rule text)

### **Proposed Effective Date:**

This rule shall take effect on the first day of the month commencing after the date of publication as provided by s. 227.22 (2) (intro.), Stats.

### **Approved for Publication:**

This proposed rule is approved for publication in the Administrative Register.

Dated this 2<sup>nd</sup> day of July, 2007.

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David Stella, Deputy Secretary  
Department of Employee Trust Funds