

**STATE OF WISCONSIN**  
**DEPARTMENT OF EMPLOYEE TRUST FUNDS**  
**EMPLOYEE TRUST FUND BOARD**  
**WISCONSIN RETIREMENT BOARD**  
**TEACHERS RETIREMENT BOARD**  
**GROUP INSURANCE BOARD**  
**DEFERRED COMPENSATION BOARD**

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**FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #09-047**

**FINAL RULE** to amend ETF 11.11, relating to legal counsel advising the boards that are attached to the department while a board considers a final decision pertaining to an appeal.

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**Agency Person to be Contacted for Questions**

Please direct any questions about the proposed rule to David Nispel, General Counsel, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Telephone: (608) 264-6936. E-mail address: [david.nispel@etf.state.wi.us](mailto:david.nispel@etf.state.wi.us).

**Statement Explaining Need for Rule**

This rule-making is needed to allow board staff to arrange for legal counsel for the boards as deemed necessary and in accordance with s. 40.63, Stats., to provide that the legal counsel shall provide legal representation to the board, and to provide the boards with additional flexibility in the use of legal counsel.

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

1. Statute interpreted:

Section 40.03, Stats.

2. Statutory authority:

Sections 40.03 (2) (i), (ig), (ir) 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:

Ch. ETF 11, Wis. Admin. Code, establishes a procedure for the review of appealable department determinations by the board responsible for the subject matter. Section 40.03 (3), Stats., provides that the department of justice shall provide legal counsel and prosecute and defend all actions brought by or against the boards or the department. There are no other related administrative rules or statutes.

5. Plain language analysis:

The purpose of this rule is to allow board staff to arrange for legal counsel for the boards as deemed necessary and in accordance with s. 40.03, Stats., to provide that the legal counsel shall provide legal representation to the board, and to provide the boards with additional flexibility in the use of legal counsel.

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

There are no existing or proposed federal regulations that directly pertain to this proposed rule.

7. Comparison with rules in adjacent states:

The department did not locate any comparable rule or statute in any adjacent states.

8. Summary of factual data and analytical methodologies:

Currently, s. ETF 11.11 provides that board staff arrange for legal counsel to advise the boards attached to the department from one of three sources: 1) the Department of Justice, if the department is a party to the appeal; 2) the department's chief counsel, if the department is not a party to the appeal; and 3) outside counsel, if neither the department's chief counsel nor the Department of Justice is able to provide legal counsel. The current rule also prescribes a number of specific duties of the legal counsel.

The proposed revision would allow board staff to arrange for legal counsel for the boards as deemed necessary and in accordance with Wis. Stat. s. 40.03 (3). In

addition, the proposed rule would simply provide that the legal counsel shall provide legal representation to the board, rather than specifying specific duties. These changes will provide the boards with additional flexibility in using legal counsel services.

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

This rule does not have an effect on small businesses because private employers and their employees do not participate in, and are not covered by, the Wisconsin Retirement System.

10. Anticipated costs incurred by private sector

None.

11. Statement of effect on small business:

The rule has no effect on small businesses.

**Regulatory Flexibility Analysis:**

The proposed rule has no significant effect on small businesses because only governmental employers and their employees may participate in the benefit programs under ch. 40 of the statutes administered by the Department of Employee Trust Funds.

**Fiscal Estimate:**

The proposed rule has no direct fiscal impact. The proposed rule generates no revenues for any employer. The proposed rule itself has no effect on the fiscal liabilities of any county, city, village, town, school district, technical college district or sewerage. The rule has no state fiscal effect during the current biennium and no fiscal impact on state funds.

**Text of Rule**

Section 1. ETF 11.11 (1) and (2) are amended to read:

**ETF 11.11 Counsel for the board. (1)** In accordance with s. 40.03 (3), Stats., board staff shall arrange for legal counsel to advise the board during its consideration of a final decision.

(2) Any legal counsel asked to represent the board under sub. (1) shall fully disclose any real or apparent conflict of interest to the board chair and state whether counsel is able to render objective advice to the board. The board chair may waive the conflict on behalf of the board.

Section 2. ETF 11.11 (3) is repealed and recreated to read

(3) Counsel appointed under sub. (1) shall provide legal representation to the board including all of the following:

- (a) Advising the board during its deliberations and making specific recommendations for action by the board.
- (b) Drafting findings of fact and conclusions of law.

(end of rule text)

### **Response to Legislative Council Staff Recommendations**

The DETF implemented all of the Legislative Council Staff recommendations contained in the Clearinghouse Report. This involved making changes in form, style and placement in the administrative code.

### **List of Persons Appearing or Registering For or Against the Rules.**

No persons registered either for or against the rule at the public hearing on August 13, 2009.

### **Summary of Comments Received at Public Hearing.**

No person wished to testify concerning the rule. The record was held open for written comments until 4:30 p.m. on August 13, 2009, but no comments were received.

### **Modifications to Rule as Originally Proposed as a Result of Public Comments**

None.

### **Modifications to the Analysis Accompanying the Proposed Rule.**

None.

### **Modifications to the Initial Fiscal Estimate**

None.

**Board Authorization for Promulgation**

This final draft report on Clearinghouse Rule #09-047 has been duly approved for submission to the Legislature, and for promulgation, by the Department of Employee Trust Funds, and by the Employee Trust Funds Board, Wisconsin Retirement Board and Teachers Retirement Board at their meetings on September 17, 2009, and by the Group Insurance Board at its meeting on November 10, 2009.

**Effective Date**

This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2), Stats.

Respectfully submitted,

**DEPARTMENT OF EMPLOYEE TRUST FUNDS**

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David A. Stella  
Secretary

Date: \_\_\_\_\_