

1       **AN ACT** *to amend* 40.02 (28), 40.06 (4) (a) and 40.22 (1); and *to create* 40.02 (55r),  
 2           40.02 (55w), 40.06 (4) (c), 40.21 (7), 40.22 (2e) and 40.41 (6) (g) of the statutes;  
 3       **relating to:** participation of tribes and tribal agencies in the Wisconsin retirement  
 4       system.

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

**JOINT LEGISLATIVE COUNCIL PREFATORY NOTE:** This is a preliminary bill draft, prepared for the joint legislative council’s special committee on state–tribal relations, relating to participation by the employees of an American Indian tribe or band (tribe) in the Wisconsin retirement system (WRS). Drafting instructions were based on the special committee’s April 15, 2005, discussion of Memo No. 5 to the special committee, *Participation of Tribal Law Enforcement Officers in the Wisconsin Retirement System*, dated April 13, 2005.

Under current law, only the employees of an “employer” as defined in the statutes (primarily state agencies and municipal governments) may participate in the WRS. As interpreted by the department of employee trust funds (ETF), the definition of “employer” does not include tribes or tribal agencies. Thus, the employees of tribes and tribal agencies are not eligible to participate in the WRS. This draft amends the definition of “employer” to include tribes and tribal agencies, allowing tribes and tribal agencies to enroll their employees in the WRS. The draft also creates a number of requirements of participating tribes and tribal agencies that are designed to protect the integrity of the WRS.

As noted, this is a preliminary draft. It was prepared to illustrate the statutory language that would be required to expand the WRS to include tribes and tribal agencies. A complete draft would require a detailed study of ch. 40, stats., and possibly other statutes, to determine which of the many features and requirements of the WRS should apply to tribes and tribal agencies and how the draft might affect other statutes and programs.

In addition to amending the definition of “employer” the draft includes the following provisions.

Under current law, a participating employer must transmit money to the ETF each month, representing the combined employer and employee contributions to the retirement account of each covered employee. In the event that an employer does not transmit the required contributions, the ETF has the power to recover those amounts directly from the budgets of state agencies and from state aids to municipal governments. These mechanisms do not apply to tribes or tribal agencies. The draft creates two mechanisms for the ETF to recover any contributions that a tribe or tribal agency fails to transmit:

--The draft authorizes the ETF to recover those amounts from state aids to the tribe or other funds administered by the state and payable to the tribe.

--The draft requires that a tribe or tribal agency that participates in the WRS maintain a performance bond from which the ETF may withdraw funds to cover any contributions that the tribe or tribal agency fails to transmit to it.

**COMMENT:** The committee could choose to include either or both of these mechanisms for the recovery of unpaid contributions.

Under current law, ETF is required to ensure that the WRS remains a "government plan" under rules of the federal internal revenue service (IRS), thereby maintaining the federal income tax exempt status of the WRS. One requirement of this is that all participating employers in the WRS must be "agencies or instrumentalities of the state". The draft requires that, before it may participate in the WRS, a tribe or tribal agency must obtain a written ruling from the IRS that the tribe or tribal agency is an agency or instrumentality of the state for purposes of participation in the WRS and that participation of the tribe or tribal agency will not adversely affect the WRS's status as a governmental plan.

The draft requires that, for a tribe or tribal agency to participate in the WRS, the tribe or the tribe that created the tribal agency must adopt and maintain in effect a resolution waiving the tribe's sovereign immunity to the extent necessary to allow the ETF to enforce, in state courts, compliance by the tribe or tribal agency and by the participating employees of the tribe or tribal agency with all statutes, rules, and requirements of the WRS, the terms of any contract between the tribe or tribal agency and the ETF, and all decisions, determinations, rulings or orders of the ETF, the employee trust funds board, or the Wisconsin retirement board.

Under current law, a participating employer in the WRS must enroll all of its eligible employees in the WRS. The draft allows a tribe or tribal

agency that participates in the WRS to designate the categories of its employees that it will enroll in the WRS.

The ETF is the state administrator of social security in Wisconsin under what is termed a “218 agreement” with the social security administration. Under current law, with limited exceptions, all participating employees in the WRS must also participate in social security through the state’s 218 agreement. The draft exempts employees of a tribe or tribal agency from this requirement.

1           **SECTION 1.** 40.02 (28) of the statutes is amended to read:

2           40.02 **(28)** “Employer” means the state, including each state agency, any county, city,  
3 village, town, school district, other governmental unit or instrumentality of 2 or more units of  
4 government now existing or hereafter created within the state, any federated public library  
5 system established under s. 43.19 whose territory lies within a single county with a population  
6 of 500,000 or more, a local exposition district created under subch. II of ch. 229 ~~and~~, a family  
7 care district created under s. 46.2895, except as provided under ss. 40.51 (7) and 40.61 (3) and  
8 subch. X. For purposes of this subchapter and subch. II, “employer” includes a tribe or a tribal  
9 agency. “Employer” does not include a local cultural arts district created under subch. V of  
10 ch. 229. Each employer shall be a separate legal jurisdiction for OASDHI purposes, except  
11 that a tribe or tribal agency is not required to be a separate legal jurisdiction for OASDHI  
12 purposes.

13           **SECTION 2.** 40.02 (55r) of the statutes is created to read:

14           40.02 **(55r)** “Tribal agency” means an entity that is created by a tribe to perform  
15 functions or provide services that are similar to the functions performed and the services  
16 provided by state agencies, counties, cities, villages, towns, school districts, or other general  
17 or special purpose governmental units created under the laws of this state. “Tribal agency”  
18 includes an instrumentality of 2 or more tribal governments or of a tribal government and one  
19 or more governmental units created under the laws of this state.

1           **SECTION 3.** 40.02 (55w) of the statutes is created to read:

2           40.02 (**55w**) “Tribe” means a federally recognized American Indian tribe or band in this  
3 state.

4           **SECTION 4.** 40.06 (4) (a) of the statutes is amended to read:

5           40.06 (**4**) (a) Whenever any employer, other than the state, a tribe, or a tribal agency,  
6 fails to pay to the department any amount due, the department shall certify the amount or the  
7 estimated amount to the department of administration which shall withhold the amount or the  
8 estimated amount from the next apportionment of state aids or taxes of any kind payable to  
9 the employer or, if so directed by the department, collect the amount as provided in sub. (2)  
10 (c) and shall pay the amount so withheld or collected to the department. When the exact  
11 amount due is determined and the department receives a sum in excess of the exact amount,  
12 the department shall pay the excess amount to the employer from whose aid the excess was  
13 withheld.

**NOTE:** Excludes tribes and tribal agencies from the provisions used to  
          recover unpaid contributions from municipal governments.

14           **SECTION 5.** 40.06 (4) (c) of the statutes is created to read:

15           40.06 (**4**) (c) Whenever any employer that is a tribe or a tribal agency fails to pay to the  
16 department any amount due, the department shall certify the amount or the estimated amount  
17 to the department of administration which shall withhold the amount or the estimated amount  
18 from future apportionments of state aids of any kind or any other funds administered by the  
19 state payable to the employer or, if the employer is a tribal agency, the tribe of which the  
20 employer is an agency, and shall pay the amount so withheld to the department. If the aid or  
21 other funds are administered or disbursed by another agency, the department of administration  
22 shall direct that agency to withhold the amount due from the aid or other funds to which the

1 tribe is eligible and pay the amount so withheld to the department. When the exact amount  
2 due is determined and if the department has received a sum in excess of the exact amount, the  
3 department shall pay the excess amount to the tribe from whose aid or other funds the excess  
4 was withheld.

**NOTE:** Authorizes the ETF to recover unpaid contributions from a tribe or tribal agency by deducting that amount from state aid or other funds payable to the tribe.

5 **SECTION 6.** 40.21 (7) of the statutes is created to read:

6 40.21 (7) (a) Before a tribe or tribal agency may be included within the provisions of  
7 the Wisconsin retirement system, the tribe or tribal agency shall obtain a written ruling from  
8 the federal internal revenue service that states all of the following:

9 1. The tribe or tribal agency is an agency or instrumentality of the state for the purpose  
10 of inclusion within the provisions of the Wisconsin retirement system.

11 2. Inclusion of the tribe or tribal agency within the provisions of the Wisconsin  
12 retirement system does not adversely affect the status of the Wisconsin retirement system as  
13 a government plan within the meaning of section 414 (d) of the federal internal revenue code.

**NOTE:** Paragraph (a) requires a tribe or tribal agency to obtain a ruling from the IRS regarding participation of a tribe or tribal agency in the WRS.

**COMMENT:** The Mille Lacs Band of Chippewa Indians obtained an IRS ruling stating that the Mille Lacs Police Department is an agency or instrumentality of the state of Minnesota. The rationale in the ruling was based on the fact that Mille Lacs police, at times, enforce state laws, as authorized by state statutes, and that the state exerts considerable control over them when they are doing so. The IRS may provide a similar ruling regarding a tribal police department in Wisconsin, by applying the same reasoning to the similar fact situation that exists in Wisconsin. It seems much less likely that the IRS would provide such a ruling regarding a tribal government or most, if not all, tribal agencies.

1 (b) For a tribe or a tribal agency to be included within the provisions of the Wisconsin  
2 retirement system, the tribe or the tribe that created the tribal agency shall adopt and keep in  
3 effect a resolution in which the tribe waives its sovereign immunity to the extent necessary  
4 to allow the state to enforce, in the courts of this state, all of the following:

5 1. Compliance by the tribe or tribal agency with all statutes, rules, and requirements that  
6 apply to a participating employer, including the obligation under s. 40.21 (1) of a participating  
7 employer to participate in the Wisconsin retirement system in perpetuity, with the terms of any  
8 contract between the tribe or tribal agency and the department, and with all decisions,  
9 determinations, rulings, or orders of the department, the board, or the Wisconsin retirement  
10 board.

11 2. Compliance by all employees of the tribe or tribal agency who are participating  
12 employees with all statutes, rules, and requirements that apply to a participating employee and  
13 with all decisions, determinations, rulings, or orders of the department, the board, or the  
14 Wisconsin retirement board.

**NOTE:** Paragraph (b) requires a tribe to waive its sovereign immunity for  
the enforcement of all requirements and obligations of the tribe or its  
tribal agency and participating employees under the WRS.  
“Department” refers to the ETF, and “board” refers to the employee trust  
funds board.

15 (c) For a tribe or tribal agency to be included within the provisions of the Wisconsin  
16 retirement system, the tribe or tribal agency shall obtain and keep in effect a performance bond  
17 to which all of the following apply:

18 1. The bond is in an amount not less than the sum of the tribe’s or tribal agency’s required  
19 contribution under s. 40.05 (2) and the employees’ required contributions under s. 40.05 (1)  
20 for the succeeding [1] [3] [6] [12] months, as estimated by the department. The tribe or tribal

1 agency shall, at least annually, adjust the amount of the bond to reflect changes in the estimated  
2 amount of required contributions.

3 2. The bond authorizes the department to withdraw funds from the bond under par. (d).

4 (d) If a tribe or tribal agency fails to make the contributions under s. 40.05 (1) and (2)  
5 for a period of [3] [6] [12] months, the department shall withdraw funds from the bond  
6 described in par. (c) and treat those funds as contributions under s. 40.05 (1) and (2). If the  
7 department withdraws funds under this paragraph, the tribe or tribal agency shall replenish the  
8 bond to the level specified in par. (c) 1. within [3] [6] [12] months.

**NOTE:** Paragraphs (c) and (d) require a performance bond from which the ETF can withdraw amounts to recover unpaid contributions from a tribe or tribal agency.

**COMMENT:** There are 3 choices for the committee to make in pars. (c) and (d), regarding how many months contributions the bond must cover, how many months in arrears a tribe or tribal agency must be before the ETF may withdraw from the bond, and within how many months the bond must be replenished. As an alternative, legislation could direct the ETF to determine these matters in rules. In addition, ETF could set the amount of the required bond in rules, or determine it annually based on criteria specified in rules.

9 **SECTION 7.** 40.22 (1) of the statutes is amended to read:

10 40.22 (1) Except as provided in ~~sub. (2)~~ subs. (2) and (2e), each employee currently in  
11 the service of, and receiving earnings from, a state agency or other participating employer  
12 shall be included within the provisions of the Wisconsin retirement system as a participating  
13 employee of that state agency or participating employer.

14 **SECTION 8.** 40.22 (2e) of the statutes is created to read:

15 40.22 (2e) A tribe or tribal agency that is a participating employer may designate the  
16 categories of its employees who will be included within the provisions of the Wisconsin  
17 retirement system.

**COMMENT:** Current statutes require participating employers to include all employees in the WRS, with very limited exceptions that apply primarily to part-time and limited term employees. This provision of the draft represents a quite radical departure from current statutes in that it allows tribes and tribal agencies a privilege not allowed to any other participating employer. The committee should recognize that it will be controversial, if included in a final draft.

1           **SECTION 9.** 40.41 (6) (g) of the statutes is created to read:

2           40.41 (6) (g) Services performed in the employ of a tribe or tribal agency.

**NOTE:** Exempts employees of a tribe or tribal agency from the requirement that all participating employees in the WRS must also participate in social security through the state's 218 agreement.

3

(END)