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## CORRESPONDENCE MEMORANDUM

**DATE:** March 25, 2005

**TO:** David L. Lovell, Senior Analyst  
Joint Legislative Council

**FROM:** John J. Vincent, Acting Administrator  
Division of Trust Finance and Employer Services

**SUBJECT:** Steps to Satisfy the Barriers for Tribal Law Enforcement Officers to be Eligible to Participate in the State Retirement System

In response to your request, of March 22, 2005, the attached document provides information to address the following questions that I presented in my remarks to the Special Committee on State-Tribal Relations on February 25, 2005.

1. Does the Employer meet Internal Revenue Service (IRS) guidelines that the Employer is an agency or instrumentality of the State or political subdivision thereof for purposes of Section 414(d) of the Internal Revenue Code?
2. Is the Employer a separate legal jurisdiction for OASDHI (Social Security) purposes and does the Employer resolve to provide Social Security coverage under the State of Wisconsin's Section 218 Agreement with the Social Security Administration (SSA)?
3. Does the Employer meet the definition of employer in §40.02(28), of the Wisconsin Statutes?
4. Will the Employer, with participation in the WRS, meet the criteria of covering all eligible employees, as provided in §40.22(1), of the Wis. Stats.?

In addition, I've included on the attached the following issues that need to be addressed by any legislation signed into law that would amend the Wisconsin Statutes so that tribal government law enforcement officers would be eligible to participate in the Wisconsin Retirement System.

1. That tribal governments are subject to all statutory provisions and any other applicable laws as they relate to the provision of benefits, including administrative and judicial provisions, such as §40.08(12), of the Wis. Stats.
2. That there are binding guarantees regarding payment of obligations that can be enforced by ETF.
3. That participation in the WRS by any tribal government would be expected to be in perpetuity just like other employers.

Please contact me if you have any questions or if I can provide any additional information.

CC: Dave Stella, Deputy Secretary, DETF



## **Steps to Satisfy the Following Barriers for Tribal Law Enforcement Officers to be Eligible to Participate in the State Retirement System**

- 1. Does the Employer meet Internal Revenue Service (IRS) guidelines that the Employer is an agency or instrumentality of the State or political subdivision thereof for purposes of Section 414(d) of the Internal Revenue Code?**

### Step:

Each Indian Tribal Band would need to obtain a Private Letter Ruling from the IRS that the Indian Tribal Band would be considered a political subdivision or instrumentality of the state for purposes of participating and contributing to the WRS.

- 2. Is the Employer a separate legal jurisdiction for OASDHI (Social Security) purposes and does the Employer resolve to provide Social Security coverage under the State of Wisconsin's Section 218 Agreement with the Social Security Administration (SSA)?**

Internal Revenue Code (IRC): Internal Revenue Service Publication 963 Rev. 3-2005:

**Workers Covered Under Section 218 Agreements** – “Indian tribal governments are not treated as states for purposes of Section 218. See IRC section 7871. [IRS]”

### Step:

- Each Indian Tribal Band would need to obtain a ruling from the Social Security Administration (SSA) affirming all of the following:
  1. The respective Indian Tribal Band is a separate legal jurisdiction for OASDHI purposes.
  2. The SSA is willing to amend the Section 218 Agreement.
  3. The SSA has no issues/concerns related to the State of Wisconsin's 218 Agreement if it is opined by the State's Attorney General that the respective Indian Tribal Band meets the definition of employer for WRS purposes.

NOTE: Questions #1 and #2 need to be successfully completed, before the following can be addressed.

- 3. Does the Employer meet the definition of employer in §40.02(28), of the Wisconsin Statutes?**

### *Definition of employer in §40.02(28), of the Wis. Stats.:*

“...the state, including each state agency, any county, city, village, town, school district, other governmental unit or instrumentality of 2 or more units of government now existing or hereafter created within the state...”

ETF conclusion: Indian Tribal Bands do not meet the definition of “governmental unit or instrumentality of 2 or more units of government now existing or hereafter created within the state” for purposes of Chapter 40, Wis., Stats., and for purposes of Social Security coverage under the State of Wisconsin 218 Agreement with the Social Security Administration (SSA).

Steps:

- For Tribal Government to acquire a legal opinion from the State of Wisconsin Attorney General affirming that tribal governments, within the State of Wisconsin, meet the statutory definition of employer within §40.02(28), Wis. Stats., and affirming that it is not unconstitutional to extend State of Wisconsin benefit provisions to tribal government employees, or despite not being an instrumentality of the state, it is not unconstitutional to extend State of Wisconsin benefit provisions to tribal government employees.
- Legislation would need to be introduced, adopted and signed into law by the Governor, to amend the definition of employer in §40.02(28), Wis. Stats., to include tribal governments. Further, as part of the legislative process, the Joint Survey Committee on Retirement Systems would need to determine that it would be good public policy to consider tribal employees to be governmental employees, and therefore, eligible for the same benefits that other state and local government employees have.

**4. *Will the Employer, with participation in the WRS, meet the criteria of covering all eligible employees, as provided in §40.22(1), of the Wis. Stats.?***

Current provisions of §40.22(1), Wis. Stats., requiring all eligible employees to be covered in WRS:

“...each employe currently in the service of, and receiving earnings from,  
a...participating employer shall be included within the provisions of the Wisconsin retirement system...”

Step:

- Current law requires all eligible employees to be included. To cover only tribal government law enforcement (protective occupation) employees, legislation would need to be introduced, adopted and signed into law by the Governor, to amend the definition of employer in §40.22(1), Wis. Stats., to allow only tribal governments to cover subsets of employees in the WRS. Further, as part of the legislative process, the Joint Survey Committee on Retirement Systems would need to determine that it would be good public policy and would not cause undue financial burden on the WRS or on participating employers by allowing only tribal governments to cover subsets of employees in the WRS.

**In addition to the above, legislation should address these issues:**

- 1. That tribal governments are subject to all statutory provisions and any other applicable laws as they relate to the provision of benefits, including administrative and judicial provisions, such as §40.08(12), of the Wis. Stats., which reads,*

*“Notwithstanding [s. 227.52](#), any action, decision or determination of the board, the Wisconsin retirement board, the teachers retirement board, the group insurance board or the deferred compensation board in an administrative proceeding shall be reviewable only by an action for certiorari in the circuit court for Dane County that is commenced by any party to the administrative proceeding, including the department, within 30 days after the date on which notice of the action, decision or determination is mailed to that party, and any party to the certiorari proceedings may appeal the decision of that court.”*

- 2. That there are binding guarantees regarding payment of obligations that can be enforced by ETF.*
- 3. That participation in the WRS by any tribal government would be expected to be in perpetuity just like other employers.*