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CORRESPONDENCE MEMORANDUM

DATE: May 7, 2013

TO: David L. Lovell, Senior Analyst
Wisconsin Legislative Council

FROM: Tarna Hunter, Legislative Liaison

SUBJECT: Participation in the Wisconsin Retirement System (WRS) by Tribal Law Enforcement Officers

This memorandum is provided in response to your request that the Department of Employee Trust Funds (ETF) review draft legislation (WLC: 00781/1) that would permit tribe or tribal law enforcement officers to participate in the WRS. These remarks have been prepared to provide the Special Committee on State-Tribal Relations/Legislative Council Staff with the Department's recommendations on drafting language which will meet the intent of enabling tribal law enforcement officers to participate in the WRS.

Compliance with Internal Revenue Code

We support the language in the current draft that would require:

- Prior to participation in the WRS, the tribe or tribal law enforcement agency first obtain a written ruling from the IRS specifying that the tribe or tribal law enforcement agency is an agency, instrumentality or political subdivision of the state for WRS purposes, and
- that such participation will not jeopardize WRS's status as a governmental plan or a tax-qualified plan.

We further recommend that the draft require:

- The tribe or tribal law enforcement agency should request that the IRS ruling state which positions in the tribe or tribal law enforcement agency would be eligible for inclusion under the WRS. This requirement would protect the WRS' status as a qualified plan by specifically identifying which tribal employees would be considered governmental employees for WRS purposes. This requirement would also assist tribes and tribal law enforcement agencies in identifying which employees would be eligible for WRS participation, and how that eligibility might change if an employee's position were to change.

- An addition to Section 8 reflecting that an employee of a tribe or tribal law enforcement agency shall only be included as a WRS participating employee to the extent the employee performs services in a position identified in writing by the IRS as eligible for inclusion in the WRS.

Avenues for Recovery of Unpaid Employer Contributions

We support the language in the current draft that would:

- Authorize ETF to recover amounts from state aids payable to the tribe, and
- Require the tribe or tribal law enforcement agency to maintain a performance bond.

We further recommend that the draft require:

- Language in 40.21(7)(c)1. that the amount of the performance bond cover any unfunded liability for purchase of prior service.
- That both avenues of recovery (state aid and a performance bond) be available to ETF, as state aid to the tribes may vary, and state aid may not cover the full extent of WRS employee- and employer-required contributions.

Waiver of Sovereignty

We support the language in the current draft that would require a waiver of sovereign immunity as a prerequisite to WRS participation for ETF to properly enforce and administer all WRS requirements.

We would recommend tribes or tribal law enforcement agencies be aware of any potential consequences of becoming a governmental employer for IRC and WRS purposes. For example, Chapter 40 contains certain restrictions on who may pay the WRS employee-required contributions, and Chapter 111 contains similar restrictions, as well as limitations on collective bargaining. It is unclear to what extent provisions outside of Chapter 40 may apply to tribes or tribal law enforcement agencies.

Additional Recommendations:

- Clarification of the “full time” reference in Section 2. For the WRS, full time for non-teachers is interpreted as 1,904 hours per year.
- In *Mattila v. Employee Trust Funds Board*, 243 Wis.2d 90, 105, 626 N.W.2d 33, 41 (Ct. App. 2001), the court of appeals concluded that being deputized by a county sheriff did not automatically make an employee a protective occupation participant for WRS purposes. In order to avoid confusion regarding whether a

tribal law enforcement officer would be a WRS protective occupation participant, we have two recommendations:

1. Deletion of 40.02(55t)(b) in Section 3. Even though the definition of “tribal law enforcement officer” encompasses more than having been deputized by a county sheriff, Wis. Stat. §165.92(2)(a) provides the cross-over basis to suggest tribal law enforcement officers may be governmental employees eligible for WRS participation.
2. A new paragraph under the 40.02(48) definition of “protective occupation participant” to include tribe or tribal law enforcement officers and to allow the tribal employer to classify a participant who is a tribal law enforcement officer as a protection occupation participant without making a determination that the principal duties of the participant involve active law enforcement or active fire suppression. There is a similar paragraph for emergency medical technicians in 40.02(48)(bm).

We look forward to working with you further to help you achieve your goal of providing the opportunity for tribal law enforcement to participate in the WRS.