



## Legislative Fiscal Bureau

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April 26, 2005

Joint Committee on Finance

Paper #279

### **Payment of Legal Counsel Costs (ETF)**

[LFB 2005-07 Budget Summary: Page 156, #11]

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#### **CURRENT LAW**

The Employee Trust Funds (ETF) Board has the authority, under s. 40.03(1)(c) of the statutes, to employ or select any medical, legal and other independent contractors as are required for the administration of the Public Employee Trust Fund. The appointment of outside legal counsel by the ETF Board requires the approval of the Governor. Except under limited conditions, no state executive branch agency may contract for an attorney until the Governor has approved the action.

In most actions or proceedings, the Attorney General represents ETF and charges the agency for this work. Legal costs are paid from budgeted amounts under the agency's annual administrative appropriation for general program operations.

In cases where the Attorney General is in any way interested adversely to the ETF position, the Governor may employ special counsel under s. 14.11(2) of the statutes to act instead of the Attorney General, if the Governor believes that the public interest requires such action. Compensation of the special counsel appointed under s. 14.11(2) is funded from a GPR sum sufficient appropriation under the Department of Justice (DOJ).

#### **GOVERNOR**

Provide that the contract costs of any legal representation retained by the ETF Board under s. 40.03(1)(c) of the statutes for the administration of the Public Employee Trust Fund would be paid from an off-budget benefits and coverage payments appropriation account that is funded from the Public Employee Trust Fund.

## DISCUSSION POINTS

1. The Governor's recommendation would permit the costs of outside expert legal counsel employed or selected by the ETF Board under s. 40.03(1)(c) of the statutes to be paid from the benefits and coverage payments appropriation account. The effect of this change would be to pay such costs, without budget limitation, from the investment income or reserve accounts of the Wisconsin Retirement System (WRS) or of the appropriate benefit plan.

2. Further, under the bill, if the Governor approved an appointment by the ETF Board of a special counsel under s. 40.03(1)(c) of the statutes, the costs of that type of counsel appointment would also be paid through the off-budget benefits and coverage payments account, rather than from the general fund. Otherwise, if the Governor approved the appointment of a special counsel for ETF, but made the appointment on the Governor's own authority under s. 14.11(2) of the statutes, the costs of that type of appointment would continue to be funded through DOJ's GPR sum sufficient appropriation.

3. ETF officials indicate that the last special counsel was appointed for the agency under s. 14.11(2) of the statutes was in 1999 in connection with the litigation associated with legal challenges to retirement benefits improvement legislation [1999 Wisconsin Act 11]. According to DOJ records, the special counsel costs of this case, which extended from November 1999, to June 2001, totaled \$118,400 GPR. Had the provisions of the bill applied at the time, these costs would have been chargeable to the off-budget benefits and coverage payments account, if the Governor had instead approved a special counsel appointment made by the ETF Board under s. 40.03(1)(c) of the statutes.

4. Except for special counsel costs paid under the DOJ appropriation, the legal counsel costs of the Department, including representation by DOJ, are currently paid from the agency's SEG-funded annual administrative appropriation for general program operations. ETF officials indicate that in 2003-04, DOJ billed the agency \$78,800 for legal representation costs. Further, in that same fiscal year the Governor approved the furnishing of \$257,100 of additional legal services for the agency by private firms.

5. Currently, ETF's use of outside legal firms is approved by the Governor, but is not explicitly authorized in each case by the ETF Board under s. 40.03(1)(c) of the statutes. In practice, the ETF Board does not formally exercise its authority to contract for legal work under s. 40.03(1)(c) of the statutes. The Secretary of ETF generally approves these legal services contracts under the Board's delegation of administrative authority for the day-to-day operation of the Department.

6. Thus, if the AB 100 provision were enacted, legal services costs would likely continue to be paid under the Department's appropriation for general program operations, unless the ETF Board begins to contract for legal assistance under s. 40.03(1)(c) of the statutes. If this occurred in the future, the appropriation account for general program operations would be relieved of these costs and expenditure authority in the appropriation account could be reduced accordingly.

7. If the agency's legal costs were shifted to an off-budget benefits and coverage payments account, these types of expenses would no longer be subject to legislative budget oversight and control. Effectively, payments under this off-budget appropriation account would be expended without limitation, on a sum sufficient basis.

8. The Department has periodically proposed similar types of initiatives to increase its budgetary flexibility. For example, ETF proposed similar language, as part of its 2003-05 biennial budget request, to delete the requirement that the Governor approve requests for legal services by the ETF Board relating to matters within the Board's scope of authority and to pay such legal expenses from the off-budget benefits and coverage payments account. The Governor denied the agency's request.

9. If the Committee agrees that the costs of ETF legal representation appointed under s. 40.03(1)(c) of the statutes, including special counsel costs of appointments made with the approval of the Governor, should be paid by the appropriate benefit plan or the WRS, it could approve the Governor's recommendation.

10. However, the Committee may wish to be apprised of the amount of these legal costs. This information could be provided by requiring ETF to submit an annual report to the Committee, no later than September 30, of each year, detailing all legal expenses for the prior fiscal year paid or encumbered from the benefits and coverage payments appropriation account. To the extent that the agency identified shifts of base level legal services costs to the off-budget benefits and coverage payments account, the Committee would be better able to make adjustments to the agency's administrative appropriation for general program operations during subsequent biennial budget deliberations.

11. In its 2005-07 biennial budget request, the agency proposed that the ETF Board be authorized to appoint outside legal counsel under s. 40.03(1)(c) of the statutes without the Governor's approval, and to pay the costs of *any* legal representation from an off-budget benefits and coverage payments account. However, the Governor's recommendation modified that request so that the Governor's approval would still be required before any outside legal representation could be appointed and charged to the Public Employee Trust Fund.

12. ETF officials now indicate that the AB 100 provision could create a situation where the Governor could, to some extent, direct whether the Public Employee Trust Fund resources would be charged for legal representation. Based on the ETF Board's fiduciary responsibility for the trust fund resources, ETF officials now question the appropriateness of the AB 100 language and have recently advised that the agency would prefer that the provision relating to the payment of legal counsel costs be deleted from the bill.

## **ALTERNATIVES**

1. Approve the Governor's recommendation that the costs of any legal representation retained by the ETF Board under s. 40.03(1)(c) of the statutes for the administration of the Public

Employee Trust Fund be paid from an off-budget benefits and coverage payments account that is funded from the Public Employee Trust Fund.

2. *In addition to Alternative 1*, require ETF to submit an annual report to the Joint Committee on Finance, no later than September 30, of each year, detailing all legal expenses for the prior fiscal year paid or encumbered from the benefits and coverage payments appropriation account.

3. Delete the Governor's recommendation.

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