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CORRESPONDENCE MEMORANDUM

DATE: December 5, 2006
TO: Employee Trust Funds Board
FROM: John Vincent, Administrator
Trust Finance and Employer Services Division
SUBJECT: Question Regarding Wis. Stat. § 40.22

Following the September meeting of the Employee Trust Funds Board, Assistant Attorney General Charlotte Gibson asked, on behalf of the Board, that the Department comment on the policy implications of changing one aspect of the Wisconsin Retirement System (WRS) employee eligibility requirements. In particular, the Department was asked to comment on the ramifications of requiring retroactive coverage for a non-covered employee when the work expectations for that employee change such that he or she becomes eligible for WRS coverage. This memorandum responds to that request.

Background

As noted below, presently, an employee who is not expected to work at least one-third of what is considered full-time employment at the time of hire will immediately be enrolled to become a participating employee when certain circumstances occur. The employee does not gain eligibility retroactively to the date of hire.

This policy, which is based upon state law, has evolved over the years relative to the responsibility of employers for evaluating and determining each employee's eligibility for WRS participation. It is the intent of the statutes that all employees participate in WRS upon hire, unless the employee is excluded as defined in Wis. Stat. § 40.22. Anyone who receives earnings for personal services rendered must be evaluated for WRS eligibility, including individuals who are hired as seasonal, project, temporary and/or part-time employees, members of all boards and commissions, and elected officials.

At the center of whether an employee is eligible to be enrolled in the WRS are the employer's two-fold expectations of (1) the employee's number of hours of actual performance and (2) the duration of employment. Over the years, the standard for WRS eligibility has been liberalized and has resulted in more employees becoming enrolled in the WRS.

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Current Law

1989 Wisconsin Act 13 revised Wis. Stat. § 40.22 to require that all employees who meet **both** of the following criteria upon hire must be enrolled in the WRS:

1. The employee is expected to work one-third of full-time per year (600 hours for non-teaching employees and 440 hours for teachers).

and

2. The employee is expected to be employed for at least one year (365 consecutive days, 366 in leap year) from date of hire.

Note: An employee who is not expected to work at least one-third of what is considered full-time employment (600 hours for non-teaching employees and 440 hours for teachers) at the time of hire shall become a participating employee on the day after s/he has been employed for at least one year for at least one-third of what is considered full-time employment.

Previous Law

Prior to 1989 Wisconsin Act 13, the law provided for the following WRS eligibility criteria:

1. The employee was hired with the expectation that there would be at least 600 hours (440 hours for teachers) of actual performance of duty per calendar year.

and

2. The expected duration of employment was 24 months.

Note: Ineligible employees became eligible after completing 600 hours of actual performance of duty in each of three consecutive calendar years. Coverage then began on the 601st hour in the third year.

Policy Discussion

Although there are policy implications involved in providing retroactive WRS coverage when the expectations of employment change, it must be emphasized that the change in current policy would necessitate a change in the statutes.

Current law provides that an employee who does not meet eligibility requirements for WRS participation on the date of hire may become eligible and must be enrolled any time one of the following occurs:

1. Expectations Change.

If the employer's expectation of either the hours to be worked or the duration of employment change after an employee is hired, the employee must be enrolled as soon as the employee is expected to meet the eligibility requirements.

2. Evaluation on the One-Year Anniversary Date of Employment.

If, one year after the initial date of employment, the employee has worked over 440 hours (teacher) or 600 hours (non-teacher), the employee must be enrolled on the one-year anniversary date (not retroactively to the hire date), since both WRS eligibility criteria were met on that date.

3. Evaluation on a 12-month Rolling Look-Back.

If on the employee's one-year anniversary date, the employee has not worked the required number of hours for WRS participation, the employer must begin to continuously monitor the employee's eligibility on a rolling 12-month basis. The employee must be enrolled in the WRS on the day after he or she has worked over 440 hours (teacher) or 600 hours (non-teachers) in any immediately preceding 12-month period.

Each of the above illustrates developments that warrant an employee being enrolled in the WRS, prospectively. If the law were changed so that enrollment was to be done retroactively to the date of hire, a number of consequences would result for both the employer and employee. The change would go beyond the WRS to involve other benefits offered under Chapter 40, e.g., health insurance, life insurance, Income Continuation Insurance (ICI), disability programs.

The following consequences would result if, upon a change in expectations, the employer were required to report the employee retroactively to the date of hire.

1. Positive Consequences

- a. The employee's enrollment date would be earlier (date of hire). Thus, the employee would accrue more creditable service.
- b. The change may provide a recruitment or retention tool for employers and employees.

2. Negative Consequences (state and local employers)

- a. The cost for employers and employees for unpaid retroactive WRS contributions would be higher.
- b. The employer and employee may be liable for interest on late reported earnings, if effective date is in a prior calendar year.
- c. Administrative and eligibility issues with other benefit programs under Chapter 40 (health insurance, life insurance, Income Continuation Insurance, disability programs) would need to be considered. For example:
 - Can an employee file a claim for prior prescriptions and medical expenses?
Would require change in contract language.

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- Would the employee be eligible for enrollment in any health insurance plan retroactively? Expectation may have changed after the first 6-month enrollment for health insurance when the employee is limited to the Standard Plan.
 - Can an employee file a claim for a prior injury? Under ICI, coverage needs to be effective prior to the injury or illness.
 - Could result in an employee over age of 70 being retroactively eligible for ICI coverage and benefits.
 - Process would need to be established for collection of retroactive premiums.
 - How is sick leave affected? ICI and 40.63 require a certain amount of sick leave to be exhausted before a benefit can begin.
 - Would employee be eligible for earning sick leave and vacation retroactively?
- d. WRS and insurance eligibility determination appeals may increase.
- e. The administrative workload of employers and ETF staff would increase.

In addition to the above, further policy questions present themselves and contribute to the complexity that accompanies consideration of the Board's question. For example, is it legitimate to cover an employee who the employer did not intend to cover? If the employee were to be covered, what public policy issue is served by requiring retroactive coverage? Finally, could eligibility criteria for other Chapter 40 benefits be de-coupled from those of the WRS? To de-couple would cause confusion. For example, differing enrollment dates for WRS and other benefits could lead to future uncertainty about when an employee would be eligible to receive benefits. This would raise a question of liability for the employer and the program.

Conclusion

Historical changes to the statutes have been effective in satisfying the intent of the legislature's public policy that all employees participate in WRS when a specific period of time or expectation of employment duration has been met. A key element in the process involves employers assessing their expectations of the position, in order to properly enroll employees. To permit employees to be enrolled retroactively would cause significant administrative and programmatic issues for both employers and employees, which could lead to a significant increase in administrative error and appeals.