

## CHAPTER 14 – TERMINATION RULE AND REPORTING

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### 1400 Introduction

Federal law requires a “good-faith” termination of employment to qualify for a benefit distribution from a qualified retirement plan such as the WRS. A good-faith termination from WRS employment has two requirements:

- Fulfill a Minimum Break in Service
- Meet All Required Conditions to be a Valid Termination

**Note:** Some exceptions to Wis. Admin. Code ETF 10.08 exist when a participating employee is terminating employment due to disability and applying for benefits from either of the disability programs administered by ETF.

### 1401 Minimum Break in Service

To be eligible for a WRS benefit, terminating employees must fulfill a **minimum break in service** as required by law and rule. The length of the minimum break in service is dependent on the employee’s final WRS termination date.

#### WRS Termination Date

Employees who terminate WRS-covered employment are ineligible for any benefit (including retirement annuities, lump sum retirement benefits, and separation benefits) per Wis. Stat. §40.23 (1) (a) 1., if they return to WRS-eligible employment before:

- The 76th day after termination of participating employment.

The employee’s annuity or lump sum benefit will be canceled if the return to WRS-eligible employment occurs before the required break in service is fulfilled. Any benefit payments received must be repaid.

Wis. Adm. Code ETF 10.08 (2) (a) provides that “No person may receive any retirement annuity, separation benefit or lump sum payment from the Wisconsin retirement system without first terminating from his or her current participating employment with all participating employers....”

**Note:** Refer to subchapter 1505 on Waiver of Part-time Local Elected Official for exception.

### 1402 Required Conditions of a Valid Termination

Wis. Admin. Code ETF 10.08 defines the conditions a termination **must** meet to qualify for a WRS benefit. There are some exceptions for terminations when an employee is applying for WRS administered disability benefits, as described in subchapter 1504. ETF reserves the right to investigate any termination (or

subsequent hiring of a WRS annuitant) when it appears there was not a good-faith termination.

### **A valid termination meets all the following conditions:**

1. The employee ceases to render compensable services.

**Note:** “Compensable” refers not only to wages, but also includes contributions to a section 457, 403(b), 401(k), or any other Internal Revenue Code retirement savings account, as well as any other item of value.

2. The employee and employer comply with the employer’s policies for voluntary termination, including the filing of a letter of resignation.
3. As of the termination date, the employer has no “rights” to **any** future services to be rendered by the employee that meet the qualifications for WRS coverage for which compensation has or will be paid. No agreement for future services can be entered prior to the employee’s termination. School districts or other employers seeking to establish such programs need to wait until after the employee terminates before entering such agreements. This means the rule:
  - Prohibits an agreement as of the termination date for any future WRS compensable employment with the **same** WRS employer, regardless of whether that employment would meet WRS participation standards.
  - Prohibits an agreement as of the termination date for future employment with a **different** WRS employer that would meet WRS participation standards.

**Note:** This restriction includes “emeritus” programs where compensation in any form is a condition for future services. Entering an emeritus agreement with a retiring employee prior to their termination, regardless of the number of future work hours expected, may violate ETF 10.08 and result in termination of the employee’s WRS benefit.

**Note:** Contracts or agreements for WRS employment entered during the minimum break in service period bring into question whether the termination was done in “good faith.” To ensure compliance with section 401(a) of the federal Internal Revenue Code (IRC), ETF may investigate situations where it appears a contract or agreement was entered during the minimum break in service period.

4. The employee is treated consistently with the status of a former employee.
5. The terminated employee has no authority to act as a representative of the employer or exercise any authority/control over employees of the employer, except as provided above. For example, Emeritus professors could render services for the university after termination on the condition that they do not receive any form of compensation, including employer contributions to IRC §403 (b) accounts.
6. The employer has paid the employee any accumulated benefits that are customarily paid to employees at the time of termination.

**Note:** These conditions do not prohibit an agreement as of the termination date for future employment with a different WRS employer that **does not** meet WRS participation standards or prohibit an agreement prior to termination for purely voluntary future services for which no compensation has been or will be paid.

## **1403 Determining the Termination Date**

The termination rule provides criteria for determining the termination date. The date reported to ETF should be the earliest of:

1. The date the employer determines that the employment relationship terminates.

**Note:** The effective date of the termination cannot be earlier than the date the employer notifies the employee of the termination.

2. The date on which the employer discharges the employee.
3. The last date for which the employee receives earnings for personal services rendered to, or on behalf of, the employer, unless the employer has granted an unpaid leave of absence for a period after this date.

**Note:** Teachers employed under a 9-10-month contract may be considered terminated as of the last day they are required to perform district related work rather than the last day of the contract's fiscal year.

4. The date the employee's voluntary resignation is effective as accepted by the employer or, if later, the date the employer receives the employee's notice of resignation. **Retroactive resignation is not permissible.**
5. The date an unpaid leave of absence expires when an employee fails to return to work following the leave.
6. The date three years after an unpaid leave of absence began, except for military leave or union service leave.
7. The date of the employee's death.

Refer to Chapters 9 and 10 for instructions on reporting terminations.

## 1404 Rehired Annuitants and Valid Terminations

For an employee to receive a WRS benefit (including retirement annuities, lump sum retirement benefits, and separation benefits) and return to WRS eligible employment, **the two requirements of a good-faith termination must be met:**

- Fulfill a minimum break in service as outlined in subchapter 1401.
- Meet all valid termination conditions as outlined in subchapter 1402.

If the minimum break in service or any termination requirement is not met, the termination is not in good faith and the member is potentially ineligible for their benefits.

Contracts or agreements for WRS employment entered during the minimum break in service period bring into question whether the termination was done in good faith. To ensure compliance with federal IRC §401 (a), ETF may investigate situations where a contract or agreement was entered during the minimum break in service period. Each situation is evaluated independently on the facts and circumstances of the individual case.

ETF may also investigate the termination of any WRS employee to ensure compliance with federal IRC §401 (a). During an investigation, the burden of demonstrating that a termination was done in good faith and met all termination requirements will fall on the employer and employee. Should ETF determine that the conditions of a good-faith termination were not met, the WRS benefit will be considered invalid and need to be repaid. The consequences of this decision have the following effect on the employer and employee:

- Any retirement benefit would be considered paid in error. If an annuitant is receiving a monthly retirement benefit, the monthly payments will be discontinued and ETF will collect any monthly payments paid in error. ETF will also collect any lump sum paid in error.
- Once the determination is made that a benefit has been paid in error, the employer is required to report the hours and earnings that would have been reported had the termination not been reported. ETF will assess interest if the earnings adjustment is not part of the

current processing year.

- Other ETF-administered benefits such as health, life, and income continuation insurance may also be affected. In some cases, insurance coverage may be lost, as Wis. Stat. Chapter 40 does not allow enrollment due to employer error.
- When the employee eventually engages in a good-faith termination, the employer must submit a termination report and the employee must reapply for the retirement benefit.

Refer to Chapter 15 for further information regarding rehired annuitants.

Questions concerning valid terminations, termination conditions, disability termination requirements and/or minimum breaks in service can be directed to the Employer Communication Center toll free 1-877-533-5020 or 608-266-3285.

## 1405 Frequently Asked Questions Concerning Valid Terminations

- Q.1** An employee is an elected county sheriff whose term in office expires December 31. The preceding October, the sheriff was reelected to another two-year term. However, on November 15, the sheriff plans to resign and terminate employment with the county. The sheriff plans to return to office on January 1, due to his October reelection to another two-year term. Is the sheriff eligible to retire as of November 15, and return to work January 1, as a rehired annuitant?
- A.1** No. The employee is not eligible for a retirement benefit if the employee has a right to compensable employment at the end of the day on which the employee terminates. The right to compensable employment includes a contract for future employment or election to a public office. In this case, reelection prior to termination is considered a contract for future employment and the November 15, termination date would be invalid. The sheriff would, therefore, not be eligible for a retirement benefit.
- Q.2** An elected county sheriff whose term in office expires December 31, is currently up for reelection. The sheriff plans to resign the position prior to the November election and apply for a WRS annuity. If reelected, the sheriff will return to work on January 1, as a rehired annuitant. Is the sheriff eligible to retire prior to the November election and return to work as sheriff on January 1, if reelected?
- A.2** Yes, if the sheriff is being opposed in the election and meets the statutory minimum required break in service. In the event there is opposition for the sheriff position, no guarantee of future employment with the county exists because the results of the election are unknown. In addition, the sheriff's termination must meet the conditions of a valid termination as specified in Admin. Code ETF 10.08 (2) (b), the minimum break in service requirements and the sheriff must comply with all statutory mandates to notify the Office of the Governor of the vacancy in the office of sheriff. Provided all these conditions are met, the sheriff is eligible for a WRS retirement benefit.
- Note:** In the event the sheriff is unopposed in the election, the termination would not be valid because victory in the election is assured, consequently, a contract of/for future employment exists.
- Q.3** A nine-month contract teacher submitted a WRS retirement application and planned to retire the day after the current school year. The teacher completed all classwork and grading duties on June 15 and was no longer obligated to report to the district. Technically, the contract ran from July 1 through June 30. Is the June 15 termination date valid?
- A.3** Yes, because the teacher fulfilled all contractual obligations to the district on June 15. That date is a valid termination date and the teacher is eligible for a WRS annuity.

- Q.4** A nine-month contract teacher signed on for the upcoming school year. The current school year was completed on June 15, with the teacher having completed all classwork and grading duties. The teacher then decided not to return to teaching for the upcoming school year and submitted a letter of resignation effective August 1. The teacher requested that the school district submit a termination date of June 15, the date their obligations under the preceding contract were met. Will a June 15 termination date be valid?
- A.4** No. The teacher entered a contract for the upcoming school year. As a result, the school district had a “right” to their services until the effective date of the resignation. In this example, the valid termination date for WRS reporting is August 1, the effective date of resignation.
- Q.5** In order to be eligible for a WRS benefit, an employee must meet the statutory minimum break in service requirement [refer to subchapter 1401] even if the employee returns to “non-eligible” employment with the same employer. Our school district covers only teachers under the WRS. Our non-teaching employees are not eligible to participate in the WRS. In this situation, does a teacher who terminates and takes a WRS benefit have to complete the minimum required break in service before returning to work in a non-teaching position at the school district?
- A.5** Yes, IRC provisions mandate that the employee must terminate any and all employment with the retirement plan sponsor (i.e. their employer) regardless if they move to a non-WRS eligible position. The former employee must have a valid and “good faith” termination that lasts at least 75 days to be eligible for a WRS benefit.
- Q.6** As the employer, we have had discussions with an employee who plans to terminate and take a WRS benefit about possibly returning to work. If the employee returns to work (after completing the minimum break in service), will the fact that these discussions took place invalidate the termination, although a contract was not in force at the time of termination?
- A.6** It is not in the best interest of the employee to engage in any discussion about returning to work following a termination since it goes against the notion of a good-faith termination taking place. Although there is no specific provision in the termination rule that prohibits the employer and employee from simply discussing the possibility of the employee returning to work, you should be cautious to avoid even the appearance of a verbal agreement of re-employment. These facts, combined with other facts and circumstances, could invalidate WRS benefit eligibility.
- Q.7** An employee terminates on July 3. The employee’s WRS benefit is effective July 4. Can the employee return to work for a couple of days prior to completing the minimum required break in service without jeopardizing their benefit?
- A.7** No, the employee must complete the minimum required break in service when returning to the same employer, even if the employee only returns for a short period. In this situation, the employee’s benefit would cease and the employer is required to re-enroll the employee in WRS, as provided in Wis. Stat. §40.22 (3m).
- Q.8** An employee terminated employment on June 14. The employee began receiving a WRS benefit on June 15. On July 2, the employer entered a written contract with the former employee for a September 1, return-to-work date. Does this contract entered during the minimum required break in service period invalidate the termination?
- A.8** ETF will not invalidate a termination for this condition alone, but contracts or agreements entered during the minimum break in service period bring into question whether the termination was done in good faith. However, this fact, combined with other facts and circumstances, could invalidate WRS benefit eligibility. To ensure compliance with federal IRC §401 (a), ETF may investigate situations where a contract or agreement was entered during the minimum break in service period. During an investigation, the burden of

demonstrating that a termination was done in good faith and met all termination conditions will fall on the employer and employee. If ETF determines that a termination was not in good faith, the annuity or benefit may be discontinued and ETF may collect all payments made in error. Please refer to subchapter 1404, Rehired Annuitants and Valid Terminations.

**Q.9** An employee terminates employment, applies for a WRS benefit and returns to work for you as an independent contractor within the minimum break in service period. Will this affect the employee's retirement benefit?

**A.9** An answer will depend on the specific facts of each situation. The IRS generally requires that there exists a clear indication of the complete severance of the employment relationship with an individual's former employer for that individual to be eligible for a retirement benefit. Evidence of that complete severance includes both a good-faith termination and break in service. If a question were to later arise about the individual's intent to retire, ETF would look at all the circumstances surrounding the termination and subsequent return to work to determine whether a good-faith termination existed.

In addition, if a WRS annuitant who terminated WRS employment after July 1, 2013 directly enters a contract with a WRS employer to work at least two-thirds of full-time employment for 12 months or more, 2013 Wisconsin Act 20 requires that the annuity be suspended until the annuitant again terminates employment. The new law was not intended to apply to annuitants who return to work via a third-party contract.

## **1406 Disability Termination Requirements**

Effective April 1, 2006, an employee applying for ETF administered disability benefits does not have to completely sever the employee/employer relationship. An employee may be kept on a leave of absence (LOA) for purposes of maintaining fringe benefits not administered under Chapter 40, such as an employer's private health insurance or other non-ETF administered benefits.

Prior to implementation of this policy change, ETF required the employer to completely sever the employee/employer relationship for the employee to receive §40.63 Disability Retirement. As a result, employees were required to forfeit non-Chapter 40 benefits such as private health insurance offered through their employers. Legal opinions sought by ETF determined that such a policy was unnecessarily restrictive and led to the creation of Chapter 40 terminations.

Chapter 40 terminations still require that employees terminating employment due to disability who are in the process of applying for ETF administered disability benefits be treated as terminated for all Chapter 40 benefits they participate in while remaining in a leave of absence status for non-Chapter 40 benefits the employer may offer. Chapter 40 authorized benefits include health insurance, sick leave credit usage, life insurance, income continuation insurance, Employee Reimbursement Account, long-term care, EPIC, Spectra, WRS coverage, death benefits and making deferred compensation contributions.

Sick leave balances with which the employee intends to pay for health insurance premiums are considered unpaid earnings. Should a sick leave balance remain, a Chapter 40 termination is not an option. Both state and local employees must sever the employee/employer relationship if they convert sick leave balances to pay for health insurance premiums. They cannot remain on LOA as permitted with a Chapter 40 termination. To remain on LOA for non-Chapter 40 benefits, all sick leave balances must be paid out, with the Chapter 40 termination date extended accordingly.