

STATE OF WISCONSIN  
Department of Employee Trust Funds

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**CORRESPONDENCE MEMORANDUM**

**DATE:** November 8, 2010  
**TO:** Employee Trust Funds Board  
Teachers Retirement Board  
Wisconsin Retirement Board  
**FROM:** Shawn Smith, Director, Member and Employer Services Bureau  
Anne Boudreau, Deputy Administrator  
Division of Retirement Services  
**SUBJECT:** Rehired Annuitants

**This memo is for informational purposes only. No Board action is required.**

**INTRODUCTION**

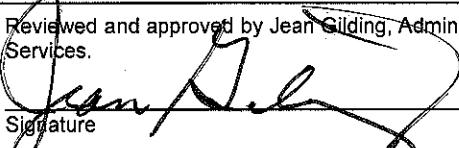
This memorandum is in response to a request for information regarding policies and practices for rehired Wisconsin Retirement System (WRS) annuitants, which was made at the September 16, 2010, Joint Informational meeting. This document provides information about:

- 1. Department of Employee Trust Funds (ETF) current policies.
- 2. Operational issues and questions that have arisen.
- 3. The federal regulatory landscape.
- 4. Comparison to peer systems.
- 5. Next steps.

**Current WRS Return to Work Policy**

For an employee to receive a WRS benefit (including retirement annuities, lump-sum retirement benefits, and separation benefits) and return to WRS eligible employment, two requirements must be met; a valid termination and a break-in-service.

Termination, whether voluntary or involuntary, must be made with the good-faith intent of ending the employee-employer relationship. A valid termination, for purposes of establishing eligibility to receive benefits (including retirement annuities, lump-sum

Reviewed and approved by Jean Gilding, Administrator, Division of Retirement Services.  
  
Signature \_\_\_\_\_ Date 11/19/10

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retirement benefits, and separation benefits) under Wis. Stat. § 40.23 (1) (a) 1., must meet the conditions in Wis. Admin. Code ETF 10.08 (2). All of the following must be met:

1. The member ceases to render compensable services to the employer;
2. The member is under no obligation to provide any future services to the employer;
3. The employee and employer comply with all their own policies governing termination of employment, including the filing of a resignation letter when applicable;
4. The employee has no rights to any future compensable employment (including having a verbal or written contract in place for future employment as of the termination date);
5. The employee is treated consistent with the status of a former employee (meaning that they are not eligible for the benefits that only active employees receive); and,
6. The employee has no authority to act on behalf of the employer.

The second criterion is a required break-in-service. Employees who terminate WRS-covered employment are ineligible for any benefit if they return to WRS-eligible employment before the latest of the following dates:

- The day after the annuity effective date.
- The 31st day after termination of participating employment.
- The 31st day after ETF receives the benefit application.

Rehired annuitants who have fulfilled these requirements, and who meet the eligibility criteria for participation under the WRS, are supposed to submit a "*Rehired Annuitant Election Form*" (ET-2319) that is co-signed by their employer. Completion and submittal of this form is the only means ETF currently has of being notified that an annuitant was rehired. The ET-2319 tells ETF whether or not the annuitant is electing WRS participation for their employment.

If a rehired annuitant elects to return to active WRS coverage, the annuity is cancelled until the employee again retires and reapplies for an annuity. The employee earns creditable service and is eligible for ETF-administered insurance benefits offered by the employer. Retirement contributions are due on the employee's earnings.

Should the annuitant elect not to return to active WRS coverage, the annuity continues but no creditable service is earned. In that case, the employee is ineligible for active ETF administered insurance, and no WRS retirement contributions are due. Though initially declining WRS participation, an election to participate can be made at any time in the future.

It should be noted that prior to Wisconsin Act 13 (effective 1/1/1990 for non-teachers), rehired annuitants were immediately enrolled in the WRS when they returned to work if they met the WRS eligibility criteria. The employee was simultaneously an active employee and a WRS annuitant. Furthermore, the minimum break-in-service requirement was not effective until Wisconsin Act 302 (effective 5/16/1996). It is a common misunderstanding

that policies are still in effect that allow an annuitant to collect an annuity and additional service simultaneously. This is no longer the case.

### **Observations about the Current Return to Work Policy**

Questions have been raised about member and employer compliance with both the valid termination and minimum break-in-service requirements for rehired annuitants.

One line of query poses specific case scenarios that are brought to the attention of the department. Since May 2009, ETF has opened queries into at least seven questionable cases involving allegations that established criteria were not met. These queries were instigated at the behest of several different kinds of sources including media reports, anonymous letters, and from questions raised by the staff of the particular governmental entity that is involved.

Below are several case examples:

- An employee whose retirement and subsequent rehire were jointly announced. Employer and employee maintain there was no verbal agreement for rehire prior to termination.
- An employee received an approved employment contract in a public board meeting prior to termination and who waited until Day 31 after termination to sign the contract offered. Employer and employee claim the offer could have been revoked at any time, meaning the contract was not enforceable.
- School district that has had at least five employees retire at the end of a spring term, only to be rehired that fall.

Often, the difficulty of specific case examples is that it cannot be determined if there was a true intent to sever the employer-employee relationship from a review of the facts of the case. Moreover, since ETF does not learn about rehired annuitants unless so notified by the appointing authorities, many cases are not identified for review. Such cases still become known and openly discussed in the public, however, and can call into question the enforcement mechanisms of the department.

A second question that has been raised relates to the enthusiasm of employers and employees to adhere to the regulations. In this economic climate, employers have a lot to gain by hiring qualified and trained staff that has fewer fringe benefits costs than regular employees. It is telling that of the over 2,700 annuitants that have been rehired since January 2008, 49 have elected to forego their annuity and re-enter the WRS. Finally, WRS employers run the gamut from highly sophisticated state agencies to (for example) local housing authorities that may only have one or two covered employees. The capacity to administer all the rules and regulations of a complex system like the WRS can be difficult to come by with limited resources.

ETF conducted a survey in October 2010 to determine how best to follow-up on employer training plans to ensure that the current policies and requirements are well understood. To date, over 1100 WRS employers have responded. We are still awaiting responses from some employers as of the publication of this memo. Nevertheless, the results of the survey to date indicate that a substantial number of employers lack systematic policies and procedures that could ameliorate the potential for a misapplication of the rehired annuitant regulations.

For example:

- 28% of all responding employers indicate that they do not have “documented recruitment and hiring procedures that must be followed to fill all vacancies.”
- 43% of responding employers either admitted that they did not have, or were unsure if they have, a systematic procedure in place to ensure all rehired annuitants meet the mandatory break-in-service.
- 27% of responding employers said it was “possible to offer a position or employment contract with only a verbal agreement.”

From an operational perspective, increasing employer training opportunities to cover rehired annuitant policies would help address some of the issues brought to light by the survey results. In August 2010, ETF has issued revised guidance to employers about the requirements for rehired annuitants and discussed this issue at recently completed training sessions. However, the policy at its core *governs the intent* of the employer and employee and is therefore very difficult to enforce systematically. The 30 day break-in-service requirement of the policy means that intent can change within a relatively short period of time.

### **Federal Regulatory Landscape**

As a qualified governmental retirement plan, the WRS is required to fully comply with all provisions of the Internal Revenue Code (IRC). The payment of retirement benefits without a *bona fide* separation of service is prohibited under federal law. Separation of service has been interpreted to mean termination of employment in which the employer/employee relationship is *completely severed*. Such severance must be more than just a technical or formal written change in the employee/employer relationship.

The Internal Revenue Service (IRS) uses many factors to determine whether there has been a valid termination of employment. While the length of time between retirement and re-employment is a factor, it is clear that the **intent to return to work** is the decisive element in establishing whether a valid termination has occurred.

There is no IRC rule prohibiting an employer from rehiring an employee who is receiving a retirement pension, nor does the IRS specify a minimum number of days for which the employee must be separated from service for a valid termination of employment to have occurred.

## **Wisconsin's Policy as Compared to Peer Systems**

In 2008, the National Association of State Retirement Administrators (NASRA) conducted a survey of state public retirement systems regarding return to work policies. The results seem to indicate that states are split with respect to their policies governing rehired annuitants, and that Wisconsin's policies offer wide latitude for employers and employees. For example, in 23 states, retirees who return to work are required to make retirement contributions while Wisconsin is among the 19 states that do not require this. Twenty-six states make employers contribute. Sixteen states, including Wisconsin, have no such mandate that employers continue to pay into the Trust when they rehire an annuitant.

Similarly, data from peer public retirement plans indicates a significant range of minimum time requirements for the required break-in-service, ranging from one month to a year, with an average of just under four months.

A 2010 survey conducted by the National Conference of State Legislatures (NCSL) indicated that 10 states have recently enacted statutory changes related to rehired annuitant policies. All of the 10 states tightened their return-to-work policy. Changes included increasing break-in-service requirements (New Mexico extended 3 months to 12 months, and Utah extended 6 months to 12 months), imposing or adjusting earnings limits, and requiring the suspension of retirement annuities for rehires during the period of return to service.

### **Next Steps**

The Department will continue to seek survey results from employers who have not responded; however, the preliminary findings of the survey indicate that the Department should increase efforts to educate and train WRS employers and members about the current return-to-work regulations. In addition, the Department will examine the effectiveness of the current regulations and whether (and to what extent) over 2,700 rehired annuitants have an effect on the funding and sustainability of the WRS. Ultimately, there are a range of options available to address issues concerning rehired annuitants, such as continuing to educate and train members and employers, increasing enforcement efforts and pursuing law changes.

We will be at the meeting to discuss this memo and respond to any questions.

# WRS REHIRED ANNUITANTS

## *EDUCATIONAL DISCUSSION JOINT INFORMATIONAL MEETING*

*DECEMBER 2, 2010*

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# WHAT WILL THIS PRESENTATION COVER?

- Expanded content from memo sent to the Board prior to the meeting:
  - Current WRS return-to-work policies
  - Landscape assessment
  - Operational issues and questions
  - What ETF has done to date
  - WRS policy as compared to other states
  - Discussion about possible next steps

# WHAT IS THE POLICY?

- Two basic criteria must be met:
  1. There must have been a valid termination.
  2. There must be a minimum break-in-service.
  
- A “valid termination” includes six factors.
  1. Ceases to render compensable services to the employer,
  2. Is under no obligation to provide any future services to the employer (no verbal or written contract),
  3. The employee and employer comply with all policies governing termination of employment, including the filing of a resignation letter when applicable,
  4. The employee has no rights to any future compensable employment (including having a verbal or written contract in place for future employment as of the termination date),
  5. The employee is treated consistently with the status of a former employee, meaning that they are not eligible for benefits only active employees receive; and,
  6. The employee has no authority to act on behalf of the employer.
  
- Policy has changed a lot over time.



# HOW MANY ARE AFFECTED?

- Almost every annuitant is a potential rehired annuitant.
- At least 3,900 members right now.
  - 81% return to the same employer.
  - Less than 2% cancel their annuity.
- National trends point to more in the future.

# WHAT'S AT STAKE?

- Impacts ETF, Members and Employers.
- The payment of a retirement benefit from a qualified plan like the WRS without a bona fide separation of service is prohibited under federal law.
- Member impacts.
- Employer responsibilities.

# WHAT ARE THE OPERATIONAL ISSUES?

## ETF Perspective:

- A 30-day break is easy to measure, intent is not.
- ETF only knows of rehires that are reported to us.
- Leads to questions being asked and follow up to ensure consistent application of the rules.

# WHAT ARE THE OPERATIONAL ISSUES?

## Employer Administration Perspective?

- Staff turnover
- Diversity of needs
- Competing demands
- Lack of capacity

## HOW HAS ETF ADDRESSED THESE ISSUES?

- Revised *WRS Administration Manual*.
- Issued new *Employer Bulletin*.
- Developed member and internal staff training materials and tools.
- Modified “*Rehired Annuitant Election Form*”.
- Employer training in every service delivery district.
- Mandatory survey of employers which helped compile information.
- Lots of ad hoc technical assistance to employers.
- Opened investigations.

# HOW DOES THE WRS COMPARE?

- States are split on key policy choices:
  - Most allow rehires, but average break-in-service requirement is just under four months.
  - Most allow rehired annuitants to work and collect their pension simultaneously. However:
    - 19 states (of 41 surveyed) require the employee to make contributions.
    - 26 states (of 41) require employer contributions.
- Many states are considering changes. Many others have already enacted them.

# WHAT ARE THE NEXT STEPS?

- Respond effectively to issues learned in the survey.
- Explore and consider new compliance tools and resources.
- Examine effectiveness of regulations.
- Analyze long-term impact on sustainability.

# THANKS AND DISCUSSION

- Questions?