



State of Wisconsin
Department of Employee Trust Funds
Robert J. Conlin
SECRETARY

801 W Badger Road
PO Box 7931
Madison WI 53707-7931
1-877-533-5020 (toll free)
Fax 608-267-4549
etf.wi.gov

Correspondence Memorandum

Date: November 17, 2016
To: Employee Trust Funds Board
Teachers Retirement Board
Wisconsin Retirement Board
From: David H. Nispel, General Counsel
Dan Hayes, Attorney
Subject: Status of Proposed Administrative Rules

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

This memorandum is presented quarterly to inform board members about the status of administrative rules being promulgated by the Department of Employee Trust Funds (ETF) that require approval of one or more of the Boards.

CR 16-033: Technical Rule

Clearinghouse Rule 16-033 makes technical updates to existing ETF rules, deletes obsolete language in ETF rules, and makes other minor substantive changes. The changes include allowing the department to release retirement account information to a named joint survivor if the member dies or experiences a disabling injury or disease, and deleting obsolete language related to guardianships. The rule was approved by the Employee Trust Funds, Wisconsin Retirement and Teachers Retirement Boards on September 29, 2016. It is currently under review by the Governor. If the Governor approves the rule, it will then go to the Legislature for further review.

SS 036-16: Employer Participation in the Wisconsin Retirement System

Statement of Scope 036-16 proposes changes to the administrative code in order to properly administer provisions enacted by 2015 Wisconsin Act 174 in relation to employer election to participate in the Wisconsin Retirement System (WRS). The proposed administrative rule would also include clarification of requirements under

Reviewed and approved by Robert J. Conlin, Secretary

Electronically Signed 11/23/16

Board	Mtg Date	Item #
JM	12.15.16	4E

federal tax law relating to employers' elections to include or exclude employees in a tax-qualified governmental pension plan.

2015 Wisconsin Act 174 allows an employer that elects to be included within the provisions of the WRS (participating employer) to elect to be a participating employer only with respect to employees hired on or after the date on which the employer elects to participate in WRS. The Act also provides that a municipal employer that elects to be a participating employer on or after March 2, 2016, only with respect to employees hired on or after the date on which the employer makes the election, may offer its current employees the option of becoming participating employees in the WRS. An employee who exercises this option must do so in writing, on a form provided by the Department of Employee Trust Funds, prior to the effective date on which the employer becomes a participating employer. Finally, the Act allows a municipal employer that elects to be a participating employer on or after March 2, 2016, to choose not to include its public utility employees as WRS participants.

On May 9, 2016, the Governor approved the statement of scope, and it was published in the Wisconsin Administrative Register on May 16, 2016. ETF is now in the process of drafting the rule.

Disability Programs Redesign

ETF proposes to close the Long-Term Disability Insurance program (LTDI) to new claims and re-open the Wis. Stat. §40.63 Disability Annuity Program to all eligible employees effective January 1, 2018. This proposal is intended to eliminate program duplication, reduce costs, reduce confusion, and make the most efficient use of program resources. The concept was approved by the ETF Board on September 29. A draft Statement of Scope was submitted to the Governor on November 3, 2016, and is pending approval.

Staff will be available at the Board meeting to answer questions.

Attachment: Statement of Scope

STATEMENT OF SCOPE

Department of Employee Trust Funds

Rule No.: Chapter ETF 50 (revised)

Relating to: Disability Benefit Programs Redesign

Rule Type: Permanent

1. Detailed description of the objective of the proposed rule:

The Department of Employee Trust Funds (ETF) intends to close the Long-Term Disability Insurance program (LTDI) to new claims and re-open the Wis. Stat. §40.63 Disability Annuity Program (40.63) to all eligible employees effective January 1, 2018.

2. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

LTDI and 40.63 are long-term disability income benefit programs for state and local government employees who become disabled while actively employed with a WRS participating employer. LTDI was created in 1992 as a replacement for the 40.63 program and the two programs share many similarities. The concern at that time was that the structure of the 40.63 program could violate recent changes in the Age Discrimination in Employment Act (ADEA). A 2008 US Supreme Court decision (*Kentucky Retirement Systems vs. EEOC*) ruled that Kentucky's disability annuity program, which is similar to the 40.63 program, did not violate ADEA. As a result of this court decision, ETF is now administering two long-term disability benefit programs when only one is needed.

ETF proposes to eliminate one of the two long-term disability benefit programs, LTDI, in order to eliminate program duplication, reduce costs, reduce confusion, and make the most efficient use of program resources. LTDI was created to replace the 40.63 program. But because the 40.63 program is still accepting claims and approximately 44,000 WRS members, who began WRS employment prior to October 16, 1992, are still eligible for the benefit, this program will not close for many years, possibly 50 years or longer. After a period of evaluation, ETF determined that it would be advantageous to reopen the 40.63 program and close the LTDI program. The advantages include slightly higher benefits for members under the 40.63 program (including death benefits), in-house administration for 40.63 vs. third party administration for LTDI, eliminating duplicative programs, and the ability to save approximately \$1 million annually in administration costs. In addition, the 40.63 program has a marginally higher eligibility standard of 0.5 years of service in five of the previous seven years of employment (or a total of 5 years of service in the previous seven year period) compared to 0.33 years of service in five of the previous seven years for LTDI. However, ETF has determined that approximately seven employees out of roughly 255,000 WRS employees will be affected by this change annually.

An alternative to closing LTDI to new claims is to continue to run out the 40.63 program and eventually leave LTDI as the only remaining long-term disability benefit for WRS members. But it is difficult to estimate how long the 40.63 program will take to run out because it is a lifetime benefit and it is still approving new claims. So running both programs simultaneously would continue for decades and the advantages mentioned above would not be realized.

In addition, maintaining LTDI in its current form will necessitate development in ETF's new Benefit Administration System (BAS – a major project that is currently under development) and require ETF to continue to request bids from outside vendors to administer the program. ETF estimates that the contracted amount for third-party administration will cost at least \$1.2 million annually. There is also a concern with obtaining competitive bids for Income Continuation Insurance (ICI) program administration

when LTDI and ICI are combined in the procurement of an administrator for ETF disability insurance programs. LTDI is a unique program that vendors are not familiar with administering, which makes the RFP process challenging. Administering LTDI in-house would eliminate the need for a third party administrator, so the bidding process for administration of ICI becomes more competitive since ICI is a more traditionally designed program that vendors are experienced with administering. The 40.63 program, conversely, is already administered in-house as a part of ETF's current systems. As a result, it will be part of the BAS development, will not incur costs for third-party administration and will not hinder the bidding process for ICI.

A similar alternative to maintaining the status quo also includes maintaining the current LTDI program but bringing administration of the program in-house, rather than contracting for its administration. This alternative will require additional development in BAS. Although ETF estimates this alternative would also save approximately \$1.2 million annually in TPA fees, it raises the same issues with running out the 40.63 program as the previous alternative.

Additionally, neither of these alternatives will reduce the amount of program complexity and confusion that currently exists for members, employers, and ETF staff. ETF is currently administering five separate disability income programs. Since members may be eligible for more than one disability benefit there is a great deal of interplay between the programs and these benefits must be coordinated to ensure that benefits are being properly and accurately determined. Closing LTDI will reduce the complexity among these benefits by reducing the number of programs available.

3. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Authority for the ETF Secretary to promulgate rules affecting ETF-administered programs is found at Wis. Stat. § 40.03 (2) (i): "The secretary... Shall promulgate, with the approval of the board, all rules, except rules promulgated under par. (ig) or (ir), that are required for the efficient administration of the fund or of any of the benefit plans established by this chapter. In addition to being approved by the board, rules promulgated under this paragraph relating to teachers must be approved by the teachers retirement board and rules promulgated under this paragraph relating to participants other than teachers must be approved by the Wisconsin retirement board, except rules promulgated under s. 40.30."

General rulemaking authority for state agencies is found at Wis. Stat. § 227.11 (2):

Rule-making authority is expressly conferred as follows:

- (a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:
1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
 2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
 3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.
- (b) Each agency may prescribe forms and procedures in connection with any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but

this paragraph does not authorize the imposition of a substantive requirement in connection with a form or procedure.

(c) Each agency authorized to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating the policies as rules which the agency shall follow until they are amended or repealed. A rule promulgated in accordance with this paragraph is valid only to the extent that the agency has discretion to base an individual decision on the policy expressed in the rule.

(d) An agency may promulgate rules implementing or interpreting a statute that it will enforce or administer after publication of the statute but prior to the statute's effective date. A rule promulgated under this paragraph may not take effect prior to the effective date of the statute that it implements or interprets.

(An agency may not inform a member of the public in writing that a rule is or will be in effect unless the rule has been filed under s. 227.20 or unless the member of the public requests that information.)

4. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

State employees will spend an estimated 80 hours to develop this rule.

5. List with description of all entities that may be affected by the proposed rule:

The proposed rule will affect all WRS employers and employee participants and applies to disability benefit applications filed after December 31, 2017.

6. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

N/A

7. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

ETF anticipates that the proposed rule will have no economic impact locally or statewide and will not impact small businesses.

Contact Person: ETF General Counsel David H. Nispel. Phone: (608) 264-6936



Robert J. Conlin, Secretary
Department of Employee Trust Funds

11/2/2016
Date Submitted