



Rehiring Annuitants

All teachers are mandated by state law to be enrolled in the Wisconsin Retirement System (WRS) administered through the State of Wisconsin's Department of Employee Trust Funds (ETF) if they meet participation eligibility, and educational support staff may be enrolled if their district has filed a resolution to participate in WRS. The WRS retirement funds are subject to regulation by the Internal Revenue Code as a 401(a) plan.¹ One of the areas in which 401(a) plans are regulated is the rehiring of plan participants who are receiving retirement benefits ("annuitants"). State law also regulates the rehiring of annuitants.² These state law provisions were amended by legislation designed to tighten the rules governing rehiring annuitants.³ This legislation increased the required minimum break-in-service period from 30 to 75 days and, for district employees who retired on or after July 2, 2013, provided for the automatic suspension of these employees' annuities if they are hired to work in a position that meets current WRS participation standards ("WRS position"). This *Legal Comment* will review the rules on rehiring WRS annuitants and examine common scenarios involving districts and rehired annuitants.

■ "Good-Faith" Termination of Employment.

In order to qualify for a benefit distribution from WRS under the Internal Revenue Code's requirements for 401(a) plans, there must be a "good-

faith" termination of employment. A "good-faith" termination from WRS requires a minimum break in service. Under state law, the earliest date that an annuitant may return to a WRS position is the later of (1) the day after the effective date of the retiree's annuity, or (2) the 76th day after the annuitant retires from a WRS position ("75-day break-in-service period").⁴ Teachers employed under a 9- or 10-month contract are 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 (June 30). In addition, a "good faith" termination must meet all of the following conditions:

- The employee must cease to render compensable services, *i.e.*, does not receive wages, contributions to retirement plans, or any other item of value from the district;
- The employee and district must comply with the district's policies for voluntary termination, including, when appropriate, the filing of a letter of resignation;
- As of the termination date, the district must have no rights to any future services to be rendered by the employee that might meet the qualifications for WRS coverage for which compensation has or will be paid. No agreement for future services can be entered into prior to the employee's termination. This restriction includes emeritus programs, where com-

pensation in any form is a condition for future services. A contract between an annuitant and a district for future employment with respect to a WRS position entered into during the minimum break-in-service period may lead ETF to investigate whether the termination was done in good faith. This is not, however, an issue with respect to a contract entered into during the 75-day break-in-service period for future employment with a different WRS participating employer that is not a WRS position;

- The employee must be treated consistently with the status of a former employee;
- The terminated employee must have no authority to act as a representative of the district and must not exercise any authority/control over district employees; and
- The employer must have paid the employee any accumulated benefits that are customarily paid to employees at the time of termination.⁵

■ Rehiring Annuitants Who Terminated All WRS Covered Employment Prior To July 2, 2013

Districts may hire, or in the case of the same district rehire (collectively "rehire"), an annuitant in a WRS position if his/her termination met the "good faith" standards and the

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75-day break-in-service period. The rehired annuitant may elect to suspend receipt of his/her annuity and again become a WRS participating employee or elect to continue receiving his/her WRS annuity and not be a WRS participating employee.

The WRS participation standards for annuitants who terminated all WRS covered employment prior to July 2, 2013, require an annuitant's position to be expected to last at least 365 consecutive days, and the annuitant must be expected to work at least one-third of full-time employment. For WRS eligibility purposes, annuitants who terminated all WRS covered employment prior to July 2, 2013, and are rehired by a district in a position in which the annuitants are expected to work at least 440 hours per fiscal year are considered to be working one-third of full-time.

If a rehired annuitant in a WRS position elects to continue receiving his/her WRS annuity and not be a WRS participating employee, neither the annuitant nor the district is required to make statutory contributions to WRS on behalf of the annuitant. However, the annuitant may elect to suspend his/her WRS annuity and participate in WRS at any time, at which point both the annuitant and the district are required to make statutory contributions to WRS on behalf of the annuitant. Independent contractors are not WRS eligible, and therefore, an annuitant that returns to work as an independent contractor with a district is not permitted to re-enroll in WRS and make the statutory contributions to WRS.

■ Rehiring Annuitants Who Retired On or After July 2, 2013

A district from which an annuitant retired may not rehire that annuitant during the 75-day break-in-service period, even if the new position is not a WRS position. Other districts may not hire that retired annuitant

during this period if the position is a WRS position, but may do so if the new position is not a WRS position.

The WRS participation standards for annuitants who retired on or after July 2, 2013, require an annuitant's position to be expected to last at least 365 consecutive days, and the annuitant must be expected to work at least two-thirds of full-time hours. For WRS eligibility purposes, annuitants who retired on or after July 2, 2013, and are rehired by a district in positions in which the annuitants are expected to work at least 880 hours per fiscal year are considered to be working two-thirds of full-time.

An annuitant who retires on or after July 2, 2013, and who is hired in a WRS position (expected to last 365 consecutive days and 880 hours per fiscal year) does not have the option to choose whether to be a participating WRS employee. Instead, such an annuitant's WRS annuity is automatically suspended when he/she is hired in a WRS position, at which point both the annuitant and the district are required to make statutory contributions to WRS on behalf of the annuitant. The suspension of an annuity simply delays payments, but does not impose any sanction or penalty on the annuitant. An annuitant that returns to work in a WRS position as an independent contractor will have his/her annuity suspended, but will not be permitted to re-enroll in WRS or make statutory contributions to WRS because independent contractors are not WRS eligible.

■ Scenarios

Based upon these rules, the following are examples of common situations involving the rehiring of an annuitant.

1. A nine-month teacher with a contract running from July 1 through June 30 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. Is the June 15 termination date valid?

Answer: Because the teacher fulfilled all contractual obligations to the district on June 15, that date is the teacher's termination date.

2. A nine-month teacher signed a contract for the upcoming school year. The current school year was completed on June 15 and the teacher finished all classwork and grading duties on that date. The teacher decided not to return to teaching the following school year and submitted a letter of resignation effective August 1. The teacher requested that the district submit to ETF a termination date of June 15. Is the June 15 termination date valid?

Answer: Because the teacher entered into a contract for the upcoming school year, the district had a "right" to the teacher's services until the effective date of the resignation, so the valid termination date is August 1.

3. An annuitant retired from a WRS position on or after July 2, 2013, is rehired by the same district after having satisfied the 75-day break-in-service period, and is expected to work 800 hours per fiscal year for 365 consecutive calendar days.

Answer: Because the annuitant is expected to work less than 880 hours per fiscal year (two-thirds of full-time), the annuitant is entitled to keep his/her annuity and will not become a WRS participating employee requiring contributions to WRS, even though the position is expected to last 365 consecutive calendar days. However, following the one-year anniversary of employment, the hourly criterion must be monitored on a day-by-day basis, and if the 880 hours per fiscal year criterion is reached in the preceding rolling 12-month period, the annuitant's WRS annuity will be suspended, and the annuitant will again

be a WRS participating employee.

4. An annuitant retired from a WRS position on or after July 2, 2013, is rehired by the same district after having satisfied the 75-day break-in-service period, and is expected to work 2,000 hours per fiscal year on a 364-day contract as an interim administrator beginning on August 25.

Answer: Because the annuitant is not expected to work 365 consecutive days or more, the annuitant is entitled to keep his/her annuity and will not be a WRS participating employee. However, if the annuitant is expected to return for the following year, the WRS eligibility criteria will be met upon hire, or if the annuitant is still an employee on the 365th day, the WRS annuity will be suspended, and the annuitant will again be a WRS participating employee.

5. An annuitant retired from a WRS position on or after July 2, 2013, is rehired by the same district after having satisfied the 75-day break-in-service period, and is expected to work 1,500 hours on a 195-day contract spanning from August 25 through June 10 as a long-term substitute teacher. The annuitant is then contacted in August of the subsequent year by the same district to serve in a different long-term substitute position and is expected to work 1,600 hours on a subsequent 195-day contract spanning from August 25 through June 10.

Answer: Upon commencement of employment in August of the subsequent year, the annuitant will have met the WRS participation standards. The annuitant's WRS annuity will be suspended, and the annuitant will become a WRS participating employee. However, the answer in this scenario is different if the annuitant is hired in the subsequent school year by a different district to serve in a long-term substitute position, regardless of

the number of hours the annuitant is expected to work, as long as the position is only for a school year that will not last 365 consecutive days or longer. Each employment relationship with a different district is treated separately and not combined.

6. An annuitant retires from a WRS position on or after July 2, 2013, is rehired by the same district after having satisfied the 75-day break-in-service period, and is expected to work 1,500 hours on a 195-day contract spanning from August 25 through June 10 as a long-term substitute teacher. The annuitant is then contacted on June 25 of the subsequent year by the same district to become a regular contracted teacher and is expected to work 1,500 hours on a 195-day contract spanning from August 25 through June 10.

Answer: As of June 25 of that subsequent year, the annuitant is expected to work at least 365 days and 880 hours in a WRS position. Therefore, as of that date, the annuity will be suspended, and the annuitant will again be a WRS participating employee.

7. An annuitant retires from a WRS position on or after July 1, 2013. After having satisfied the 75-day break-in-service period, the annuitant contracts with the same district from which the annuitant retired and with other districts for which the annuitant has never worked, and works in multiple districts throughout the school year as an available per-diem substitute teacher.

Answer: Because the annuitant's new position in any given district is not a WRS position, the annuity is not suspended, and the annuitant does not become a WRS participating employee. Moreover, because the annuitant's new position is not a WRS position, the annuitant is not required to satisfy the 75-day break-

in-service period with respect to the districts which are not the employer from which the annuitant retired. However, per diem substitute teachers are subject to the 880-hour limitation on a rolling twelve-month basis for each separate employer for purposes of determining whether their annuities are suspended.

■ Conclusion

In a time when districts are increasingly turning to retirees to fill vacancies, it is important for districts to know and understand the federal and state laws governing the hiring of retirees. This requires districts to determine when the retiree retired from employment from a WRS position, assess the applicability of and calculate, if necessary, the 75-day break-in-service period, and assess its expectations with respect to the number of hours and days the rehired annuitant will work. Depending on this assessment, the rehired annuitant may be required to suspend his/her annuity and become a WRS participating employee again. This would require both the annuitant and the district to make their respective contribution to WRS. This could be a potential disincentive for the district in rehiring that person, but could also potentially provide more overall compensation to the annuitant. Because of the complexity and fact-specific nature of this assessment, districts are advised to consult with legal counsel and ETF in these situations. ■

■ End Notes

1. 29 U.S.C. s. 401(a).
2. Wis. Stat. s. 40.26.
3. 2013 Wis. Act 20.
4. Wis. Admin. Code s. ETF 10.08.
5. Wis. Admin. Code s. ETF 10.08(2).

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