

2023 Wisconsin Act 4

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On April 6, 2023, Governor Tony Evers signed 2023 Wisconsin Act 4 (“Act 4” or the “Act”) into law, which will have widespread impacts on the classification of jailers employed by Wisconsin counties under the Wisconsin Retirement System (“WRS”) as of January 1, 2024 (the Act’s effective date). Act 4 will impact all counties, including those that presently classify jailers as “general employees” for WRS purposes. Although there are still some unknowns arising out of Act 4, below are a number of key questions Act 4 brings to bear and the relevant considerations Wisconsin counties should keep in mind as they navigate the new law.

1. What is the intended outcome of Act 4?

Act 4 was passed to allow all county jailers, both current and new hires, the opportunity to be classified as a “protective occupation participant” under the WRS, regardless of whether a respective jailer’s employer classifies the jailer as a “general employee.” If an employee elects to be classified as a protective occupation participant, that employee will be required to pay the higher employee contribution associated with that classification. The protective occupation participant status will be automatic as of January 1, 2024, for all jailers, unless an employee opts out, even for jailers that do not primarily perform the duties previously required to attain protective occupation participant status (*i.e.*, primarily performing active law enforcement prevention). Thus, Act 4 does not require the assignment of additional duties to jailers for them to attain the protective occupation participant status.

With the exception of jailers who were classified as protective occupation participants before January 1, 2024, Act 4 does not require county employers to make the full, statutorily required employer-WRS contribution for protective occupation participants. Instead, county employers who did not classify jailers as protective occupation participants before January 1, 2024, will continue making the contribution associated with general employees, and jailers who do not opt out of Act 4 will be required to contribute the difference between the general employee contribution and the protective occupation participant contribution required of employers. Jailers will make this additional contribution in addition to their required employee-WRS contribution. Jailers can avoid this additional contribution by opting out of Act 4, provided they do so within 60 days of January 1, 2024 or, if hired thereafter, within 60 days of being hired.

By way of example, for 2023, the combined contribution (employer and employee) is 13.6% for general municipal employees and 20% for protective employees. Had Act 4 been in place for 2023, jailers designated as protective post-Act 4 would be responsible for the 6.4% difference between the contribution amounts (20% vs. 13.6%); counties would not be responsible for any additional contributions beyond the employer contribution for general municipal employees (6.8% for 2023).

2. Are all jailers required to become “protective occupation participants” under WRS as of January 1, 2024?

No. Although Act 4 automatically reclassifies all county jailers as protective occupation participants as of January 1, 2024, including all jailers hired thereafter, every jailer who is designated as a protective occupation participant on or after January 1, 2024, must be provided the option to make a one-time, irrevocable decision to opt-out of the protective occupation classification and, instead, be classified as a general employee. The decision to opt out must be made within sixty days of January 1, 2024, or, in the case of a new hire, within sixty days of beginning employment.

3. What happens to jailers who were “protective occupation participants” before January 1, 2024?

For jailers who were classified as protective occupation participants before January 1, 2024, Act 4 does not impact them unless the county eventually chooses to reclassify its jailers as general employees.

If a county chooses to do this, the county’s jailers remain protective occupation participants under Act 4, but they: (1) now must be provided the option to, within sixty days of reclassification, make a one-time irrevocable decision to be classified as a general employee; and (2) if they remain a protective occupation participant, they must now make an additional WRS contribution each paycheck to account for the higher employee contribution required of protective employees and the difference between the statutorily required employer contribution for protective employees and general employees.

4. For counties that classified jailers as protective before Act 4 and will continue to do so following Act 4, how are jailers hired after January 1, 2024, impacted by Act 4?

Provided the county does not eventually reclassify its jailers as general employees, all jailers employed by such a county, both pre- and post-Act 4, are not impacted by Act 4. Once Act 4 is effective, a newly hired jailer in these counties must make the higher employee contribution associated with protective status, but the employing county must make the entire employer contribution associated with protective status (as opposed to the jailer making up the difference). Jailers hired into these counties post-Act 4 also are not impacted by Act 4 in terms of duty disability benefits, death benefits, or their retirement annuity (provided the counties do not eventually reclassify the jailers to general employees).

5. How does Act 4 treat jailer contributions in terms of pre-tax or post-tax status?

Jailers who were classified as protective occupation participants before January 1, 2024, are not impacted by Act 4 with regard to their contributions, absent a county choosing to reclassify their jailers as “general employees” following January 1, 2024. If this occurs, the jailers who do not opt out of protective occupation participant status must make their additional WRS contributions on a post-tax basis.

Jailers who work in a county that classified its jailers as general employees as of January 1, 2024, and who thereafter do not opt out of Act 4 are required to make their additional WRS contributions on a post-tax basis.

Jailers who are hired after Act 4 into a county that classifies its jailers as general employees and who do not opt out of Act 4 may make their additional WRS contributions on a pre-tax basis.

6. What specific notice obligations exist under Act 4 for employers?

Interestingly, Act 4 does not appear to create specific notice obligations for jailers who are employed as general employees as of January 1, 2024; however, such jailers have 60 days after January 1, 2024, to make a one-time irrevocable decision to opt-out of their reclassification to protective occupation participant, and that opt-out must be done on an employer-provided form. This suggests, at a minimum, counties that do not presently classify jailers as protective occupation participants must prepare a written form for current jailers to use between January 1, 2024, and sixty days thereafter.

Act 4 requires that all new hires into a county that does not classify jailers as protective, either because it never did or because it reclassified jailers post-Act 4, be provided the one-time option to irrevocably opt-out of protective status. Here too, the opt-out must occur in writing on an employer-provided form. The requirement that the employer provide the option to opt-out, in combination with the requirement that any such opt-out be in writing, suggests counties would be best served providing new hires with written notice of their right to opt out immediately upon hire as part of the on-boarding process. ETF has not yet published an opt-out form for counties to utilize, but it should be noted they have until January 1, 2024, so a form may be forthcoming.

No notice is required in counties that classified jailers as protective prior to January 1, 2024, unless a county decides to reclassify its jailers after Act 4 goes into effect. In that case, the employer must also provide the jailer with written notice of their one-time, irrevocable right to opt out of protective status. This opt-out must occur within sixty days of the reclassification.

While not explicitly required by Act 4, we recommend counties incorporate clear language into employee opt-out forms notifying jailers that their decision to opt-out is a one-time, irrevocable decision. Language confirming the jailer's acknowledgement of the one-time, irrevocable nature of their decision is also recommended. The deadline associated with the opt-out decision should also clearly be identified.

7. How does Act 4 impact duty disability benefits under Wis. Stat. § 40.65?

Act 4 does not impact jailers who were classified as protective occupation participants before the Act from a duty disability standpoint.

For jailers who become protective occupation participants as a result of Act 4, such jailers are prohibited from filing a duty disability claim with regard to an injury arising before January 1, 2024. To the extent an employer would be assessed additional fees due to a high volume of employee duty disability claims, Act 4 also assigns any additional experience ratings to these jailers via additional contributions. These contributions are to be made in the same fashion as the normal WRS contributions in terms of pre- vs. post-tax, depending on how and when the jailer became a protective occupation participant.

8. How does Act 4 impact death benefits under Wis. Stat. § 40.73?

Act 4 does not impact death benefits for jailers who were classified as protective occupation participants pre-Act 4 from a death benefit standpoint.

For jailers who become protective occupation participants as a result of Act 4, the death benefit they are entitled to is lesser than the normal death benefits available to protective occupation participants and is tied to the new contributions created under Act 4 and associated interest that has accumulated.

9. How does Act 4 impact the retirement benefit provided to jailers who were not protective as of January 1, 2024?

The retirement annuity provided to these jailers is adjusted to account for the additional contributions they made as a result of being classified as protective. All service credited to jailers under Act 4 is forward looking, meaning jailers who are reclassified as a result of Act 4 only accrued service from January 1, 2024, and beyond with regard to their classification as protective status. Act 4 does not result in retroactive creditable service.

10. Does Act 4 provide jailers with bargaining rights under Chapter 111 of the Wisconsin Statutes?

No, Act 4 explicitly notes that it does not impact the classification of jailers under Chapter 111 of the Wisconsin Statutes who, as of January 1, 2024, were not treated as “public safety employees” by their employing county. This results in such jailers remaining “general municipal employees” under Chapter 111 and they retain only the right to bargain over total base wages upon properly forming a union.

For jailers treated as public safety employees by their employing counties prior to January 1, 2024, those jailers remain classified as public safety employees unless the county raises a question concerning the appropriateness of including county jailers in a collective bargaining unit that includes public safety employees. In that case, Act 4 prohibits any jailer employed by the county from being treated as a public safety employee.

11. What are the unknowns arising out of Act 4?

It is unclear if a specific timeline is attached to the employer-notice required under Act 4. While the Act imposes a 60-day time period on jailers to make the one-time irrevocable decision, the Act does not speak to when the employer must first notify them of that 60-day time period. Best practices would suggest notice occur as soon as practicable, but it is not clear what result occurs, if any, if notice is substantially delayed.

In addition, it is unclear how Act 4 will impact recruitment and retention in various counties. Counties can anticipate greater pressure to increase wages to make up for higher employee contributions to their WRS retirement and disability benefits. Counties with other attractive but less costly benefits may be considered more attractive to candidates who do not find retirement benefits to be enticing. While the law still requires employee WRS contributions following Act 10, Act 4 may economically impact counties in wages and other benefits to make up for the employee contributions regardless of the Legislature’s intent behind the Act.

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