

JAN 22 2008

A BILL FOR AN ACT

RELATING TO FEDERAL TAX QUALIFICATION OF THE EMPLOYEES'
RETIREMENT SYSTEM.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Employees' Retirement System of the State
2 of Hawaii (the "system") is intended to be a tax-qualified
3 retirement plan under section 401(a) of the Internal Revenue
4 Code of 1986, as amended (the "Code"). Section 414(h)(2) of the
5 Code provides favorable tax treatment for employee contributions
6 "picked up" (made by the employer on behalf of the employee) to
7 a tax-qualified retirement plan established by a state or county
8 or by an agency or instrumentality of a state or county.
9 However, the tax-qualified status of the system may be
10 jeopardized by the provisions of chapter 88, Hawaii Revised
11 Statutes, that provide for optional membership in the system.
12 These provisions include provisions allowing elective officers
13 to exercise their option to join the system at any time during
14 their term of office and provisions allowing elective officers
15 and judges to withdraw from ERS membership while remaining in
16 office. As defined by section 88-21, Hawaii Revised Statutes,
17 an elective officer includes, but is not limited to, those

1 persons elected to the county councils, the office of Hawaiian
2 affairs, and the legislature.

3 This bill repeals the provisions of chapter 88, Hawaii
4 Revised Statutes, that make membership in the system by elective
5 officers optional and replaces those provisions with a new
6 section that requires elective officers to exercise a one-time
7 irrevocable election to join the system when they are elected
8 for the first time (or, in the case of existing office holders,
9 by October 1, 2008). The new section also sets forth the
10 requirements that must be satisfied for retirants to return to
11 service as elective officers without suspension of retirement
12 benefits.

13 This bill also repeals the statutory provision that allows
14 elective officers and judges who have reached the statutory cap
15 on retirement benefits to withdraw from membership in the system
16 by nominally retiring even though they remain in office.

17 SECTION 2. Chapter 88, Hawaii Revised Statutes, is amended
18 by adding a new section to be appropriately designated and to
19 read as follows:

20 "§88-A Membership of elective officers. (a) An elective
21 officer shall have a one-time election to be excluded from
22 membership in the system.

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1 (b) Unless the elective officer is a member of the system,
2 a former member of the system, or a retirant, an elective
3 officer shall make an election to be excluded from membership in
4 the system no later than thirty days following the elective
5 officer's taking office. The election shall be irrevocable. If
6 the elective officer fails to make an election to be excluded
7 from membership in the system within the period allowed for
8 making the election, the elective officer shall become a member
9 effective as of the date the elective officer takes office.

10 (c) Notwithstanding section 88-21, 88-98, 88-273(c), or
11 88-344, or any other law to the contrary, the retirement
12 allowance of a retirant who returns to service as an elective
13 officer shall not be suspended if the retirant:

14 (1) Retired pursuant to section 88-73(d); or
15 (2) Has been retired for at least twelve consecutive
16 months prior to return to service and elects to have
17 the retirement allowance continue. The election
18 whether or not to have the retirant's retirement
19 allowance continue shall be irrevocable and shall be
20 made no later than thirty days following the
21 retirant's first return to service as an elective
22 officer.

1 If the retirant's retirement allowance is not suspended, the
2 retirant shall not become a member of the system and shall not
3 earn additional service credit or gain any additional retirement
4 benefits.

5 (d) An elective officer who retired pursuant to section
6 88-73(d) shall not be eligible for membership in the system
7 while serving as an elective officer."

8 SECTION 3. Section 88-21, Hawaii Revised Statutes, is
9 amended by amending the definition of "employee" to read as
10 follows:

11 "Employee": any employee or officer of the State or any
12 county, including inspectors, principals, teachers and special
13 teachers, regularly employed in the public schools, cafeteria
14 managers and cafeteria workers, apprentices and on-the-job
15 trainees whether or not supported in whole or in part by any
16 federal grants, members of the legislature and other elective
17 officers, including the trustees of the office of Hawaiian
18 affairs, year-round legislative employees who are employed on a
19 full-time basis, probationary and provisional employees, any
20 employee of the educational nonprofit public corporation as
21 provided in section 88-49.7, per diem employees and others who
22 are made eligible by reason of their employment to membership in

1 the system by or pursuant to any other provision of law, but
2 excluding:

- 3 (1) Per diem employees who elect to withdraw or not to
4 become members as provided in section 88-42;
- 5 (2) [~~Members of the legislature~~] Elective officers who do
6 not elect to be members as provided in section [~~88-~~
7 ~~42~~] 88-A;
- 8 (3) Session employees of the legislature employed after
9 October 31, 2006, in accordance with section 88-54.2;
10 and
- 11 (4) Persons excluded by rules of the board pursuant to
12 section 88-43.

13 An individual is an employee during the period of a leave
14 of absence if the individual is in service, as defined in this
15 part, during the period of the leave of absence and the board
16 shall determine who are employees within the meaning of this
17 part."

18 SECTION 4. Section 88-42, Hawaii Revised Statutes, is
19 amended to read as follows:

20 "**§88-42 Membership generally.** Except as otherwise
21 provided in this part, all employees of the Territory or any
22 county on July 1, 1945, shall be members of the system on [~~such~~]

1 that date, and all persons who thereafter enter or reenter the
2 service of the State or any county shall become members at the
3 time of their entry or reentry.

4 Per diem workers shall become eligible for membership on
5 January 1, 1952, and all persons who are employed as per diem
6 workers after December 31, 1951, shall become members of the
7 system. Any person who was a per diem worker before January 1,
8 1952, shall not, so long as the person is employed as a per diem
9 worker, be required to become a member or to remain a member if
10 the person has elected before October 2, 1953, to withdraw as a
11 member.

12 Members of the legislature shall become eligible for
13 membership on July 1, 1951. Any member of the legislature in
14 service on July 1, 1951, or thereafter entering [~~or reentering~~]
15 the legislature, [~~may~~] shall become a member [~~upon the~~
16 ~~legislator's own election.~~] as provided in section 88-A."

17 SECTION 5. Section 88-43, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "**§88-43 Persons ineligible for membership** [~~, optional~~
20 **membership**]. Except with respect to faculty members or
21 lecturers employed on one or more campuses of the University of
22 Hawaii who hold multiple part-time appointments or positions, in

1 such capacities, any of which may be less than one-half of a
2 full-time equivalent but all of which, when added together,
3 aggregate to at least one-half of a full-time equivalent
4 position, the board [~~of trustees~~] may deny membership to any
5 class of part-time employees or persons engaged in temporary
6 employment of three months or less[~~, or it may, in its~~
7 ~~discretion, make optional with persons in such classes their~~
8 ~~individual entrance into membership~~]; provided that no officer
9 or employee entering service after January 1, 1928, who is
10 entitled to become a member of any pension system under part III
11 shall be entitled to become a member of the system.

12 [~~Elective officers shall be eligible for membership, and~~
13 ~~their individual entrance into membership shall be at their~~
14 ~~option.~~]"

15 SECTION 6. Section 88-54.5, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "**§88-54.5 Service while a member of the board of trustees**
18 **of the office of Hawaiian affairs.** Notwithstanding any
19 provisions of section 10-9 that may previously have precluded a
20 member of the board of trustees of the office of Hawaiian
21 affairs from participating as a member of the employees'
22 retirement system:

- 1 (1) Any trustee of the office of Hawaiian affairs in
2 service on July 1, 2002, may become a member [~~upon the~~
3 ~~trustee's election~~] in accordance with section 88-43
4 by October 1, 2002;
- 5 (2) Any trustee of the office of Hawaiian affairs elected
6 or appointed after July 1, 2002, may become a member
7 [~~upon the trustee's election~~] in accordance with
8 section [~~88-43;~~] 88-A;
- 9 (3) Any service as a trustee of the office of Hawaiian
10 affairs during the period of July 1, 1993, through
11 July 1, 2002, if claimed by the member, shall be
12 credited in the member's class at the time the service
13 is acquired; provided that membership service shall be
14 credited in accordance with sections 88-59, 88-272,
15 and 88-324; and
- 16 (4) Any former trustee of the office of Hawaiian affairs
17 who retired from service prior to July 1, 2002, shall
18 not be entitled to claim membership service as a
19 trustee during the period July 1, 1993, through June
20 30, 2002."

21 SECTION 7. Section 88-59, Hawaii Revised Statutes, is
22 amended to read as follows:

1 "§88-59 Acquisition of membership service. (a) Under
2 rules as the board [~~of trustees~~] may adopt, any member may file
3 with the board a statement of all service as an employee or
4 other service paid for by the State or a county rendered prior
5 to the member's last becoming a member that is not credited to
6 the member, for which the member claims prior service credit,
7 and also a statement of the services for which the member claims
8 membership service credit and for which the member agrees to
9 have additional deductions made from the member's compensation
10 or to make a lump sum payment as described in this section.

11 (b) After the filing of the statement, the board shall
12 verify the service claimed and determine the service credit
13 allowable. Verified prior service shall be credited. Verified
14 membership service shall be paid for by the member in any one of
15 the following methods, at the member's option:

16 (1) By deductions from the member's compensation pursuant
17 to section 414(h)(2) of the Internal Revenue Code of
18 1986, as amended, under the employer pick up plan
19 under section 88-46. An irrevocable payroll
20 authorization filed by the member for a period not to
21 exceed sixty months shall remain in effect until the
22 completion of the payroll payments or termination of

1 employment, whichever is earlier. The member may
2 elect to have:

3 (A) Deductions from the member's compensation of
4 twice the contribution rate provided for in
5 section 88-45 over a period equal to the period
6 for which membership service credit is allowable
7 not to exceed sixty months; or

8 (B) Deductions from the member's compensation of one
9 and one-half times the contribution rate provided
10 for in section 88-45 over a period equal to twice
11 the period for which membership service credit is
12 allowable not to exceed sixty months; or

13 (2) By lump sum payment of contributions computed at the
14 contribution rate provided for in section 88-45
15 applied to the member's monthly rate of compensation
16 at the time of payment multiplied by the number of
17 months for which membership service credit is
18 allowable; provided that after July 1, 1982, this
19 method shall not be available to any new member with
20 fewer than five years of membership service exclusive
21 of any previous service acquired under paragraph (1).

1 The deductions from compensation or lump sum payment shall be
2 paid to the system and shall be credited to the member's
3 individual account and become part of the member's accumulated
4 contributions.

5 (c) Membership service credit, in addition to any other
6 service credited to the member, shall be allowed for the period
7 for which the deductions from compensation or lump sum payment
8 have been made as described in this section.

9 (d) The contribution rates under section 88-45 shall be
10 reduced by one and eight-tenths per cent for any service being
11 claimed that was rendered prior to July 1, 1961.

12 ~~[Any member of the legislature who reenrolls as an active~~
13 ~~member in accordance with section 88-62 and who desires to~~
14 ~~obtain membership service for a period of service as a member of~~
15 ~~the legislature during which the member received a retirement~~
16 ~~allowance, in addition to complying with this section, shall~~
17 ~~refund while a reenrolled active member the retirement allowance~~
18 ~~received during the period of legislative service.]"~~

19 SECTION 8. Section 88-61, Hawaii Revised Statutes, is
20 amended to read as follows:

21 "**§88-61 Termination of membership.** (a) Except as
22 otherwise provided by section 88-96, any member absent from

1 service for four calendar years following the calendar year in
2 which the member's employment terminated shall cease to be a
3 member, and the former member's credited service shall be
4 forfeited.

5 (b) Any member who withdraws the member's contributions,
6 becomes a retirant, or dies, ceases to be a member as of the
7 date of withdrawal, retirement, or death.

8 ~~[(c) The membership of an elective officer or judge in the
9 system may be terminated upon election of the member to retire
10 whenever the allowance for the member reaches seventy five per
11 cent of the member's average final compensation. The member's
12 right to receive the retirement allowance prescribed in section
13 88-74 after the member's future separation from service as
14 provided in section 88-73 shall vest on the date of the
15 election. Upon the date of the election, the member shall be
16 entitled to receive the portion of the accumulated
17 contributions, if any, which would be required to be returned to
18 the member under section 88-74(3) as if the member's retirement
19 allowance had commenced on that date, and after the date of the
20 election the member shall not be allowed or required to make any
21 future contributions.]"~~

1 SECTION 9. Section 88-73, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§88-73 Service retirement.** (a) Any member who has at
4 least five years of credited service and who has attained age
5 fifty-five or any member who has at least twenty-five years of
6 credited service or any member who has at least ten years of
7 credited service, which includes service as a judge before July
8 1, 1999, an elective officer, or a legislative officer, shall
9 become eligible to receive a retirement allowance after the
10 member has terminated service.

11 (b) Any member who first earned credited service as a
12 judge after June 30, 1999, and who has at least five years of
13 credited service and has attained age fifty-five or has at least
14 twenty-five years of credited service shall become eligible to
15 receive a retirement allowance after the member has terminated
16 service.

17 (c) A member may retire upon the written application
18 specifying the date of retirement, which shall not be less than
19 thirty days nor more than one hundred fifty days subsequent to
20 the date of filing. Retirement shall be effective on the first
21 day of a month, except for the month of December when retirement
22 on the first or last day of the month shall be allowed.

1 (d) Any member of the legislature who attains age sixty-
2 five may retire and receive a service retirement allowance
3 although the member continues to fill the elective position.

4 ~~[(e) For the purpose of computing or determining benefits~~
5 ~~for an elective officer or judge, or any beneficiary of either,~~
6 ~~the date upon which the elective officer or judge makes an~~
7 ~~election to retire, as provided by section 88-61(c), after~~
8 ~~attaining an allowance of seventy five per cent of the member's~~
9 ~~average final compensation, shall be used as the date the member~~
10 ~~is eligible to receive a service retirement benefit. The~~
11 ~~elective officer or judge may continue in active service, but~~
12 ~~shall not receive a retirement allowance until termination of~~
13 ~~active service. Upon leaving active service, the elective~~
14 ~~officer or judge shall receive the retirement allowance provided~~
15 ~~for in section 88-74, together with the post retirement~~
16 ~~allowances provided for in section 88-90, effective on the first~~
17 ~~day of a month except the month of December when retirement~~
18 ~~benefits shall be effective on the first or last day of the~~
19 ~~month. Post retirement allowances shall be computed from the~~
20 ~~date of the election as though the elective officer or judge had~~
21 ~~left active service on that day.~~

1 ~~(f)~~] (e) In the case of a class A or B member who also has
2 prior credited service under part VII or part VIII, total
3 credited service as a class A, class B, class C, and class H
4 member shall be used to determine the eligibility for retirement
5 allowance."

6 SECTION 10. Section 88-251, Hawaii Revised Statutes, is
7 amended to read as follows:

8 "**§88-251 Applicability.** The following provisions of part
9 II shall apply to this part:

- 10 (1) Subpart A, except the definitions provided in section
11 88-21, unless expressly adopted in section 88-261;
- 12 (2) Subpart B, except sections 88-45, 88-45.5, 88-46,
13 88-48, 88-52, 88-59, 88-59.5, [~~88-59.6,~~] 88-61, and
14 88-62;
- 15 (3) Subpart C, except sections 88-71, 88-72, 88-73, 88-74,
16 88-74.6, 88-75, 88-76, 88-80, 88-83, 88-84, 88-85, 88-
17 87, 88-88, 88-96, 88-97, and 88-98;
- 18 (4) Subpart D, except sections 88-112 and 88-113; and
19 (5) Subpart E."

20 SECTION 11. Section 88-301, Hawaii Revised Statutes, is
21 amended to read as follows:

1 "~~§88-301~~ **Applicability.** The following provisions of part
2 II of this chapter shall apply to this part:

3 (1) Subpart A;

4 (2) Subpart B, except sections 88-45, 88-46, 88-48, 88-52,
5 88-59, 88-59.5, [~~88-59.6,~~] 88-61, and 88-62;

6 (3) Subpart C, except sections 88-71, 88-72, 88-73, 88-74,
7 88-74.6, 88-75, 88-76, 88-79, 88-80, 88-83, 88-84,
8 88-85, 88-88, 88-96, 88-97, and 88-98;

9 (4) Subpart D; and

10 (5) Subpart E."

11 SECTION 12. Section 88-59.6, Hawaii Revised Statutes, is
12 repealed.

13 ["~~§88-59.6 Previous membership service credit for judges.~~

14 ~~(a) Notwithstanding any other law to the contrary, any judge~~
15 ~~who retires under section 88-61(c) and continues in service as a~~
16 ~~judge shall be allowed membership in the system and entitlement~~
17 ~~to membership service credit for any eligible class A service;~~
18 ~~provided that the membership service shall be credited in~~
19 ~~accordance with section 88-59; and provided further that when~~
20 ~~the judge retires, it shall be as if it were for the first time,~~
21 ~~and sections 88-73(a), 88-74(3), and 88-76 shall be used to~~
22 ~~determine the retirement allowance.~~

1 ~~(b) Those judges who are entitled to membership service~~
2 ~~credit under this section may elect to cancel retirement under~~
3 ~~section 88-61(c) and, no later than July 1, 1993, begin to make~~
4 ~~additional deductions or make a lump sum payment for such~~
5 ~~service pursuant to section 88-59."]~~

6 SECTION 13. Elective officers in office on the effective
7 date of this Act, who are not retirants of the employees'
8 retirement system, shall be deemed to have exercised the one-
9 time election under subsection (a) of the new section added to
10 chapter 88, Hawaii Revised Statutes, by section 2 of the Act.

11 SECTION 14. Elective officers who are retirants of the
12 employees' retirement system of the State of Hawaii shall make
13 an election, not later than the effective date of this Act,
14 whether or not to have their retirement allowance continue as
15 provided by section 2 of this Act. If the elective officer
16 makes no election, the elective officer's retirement allowance
17 shall continue. An elective officer whose retirement allowance
18 continues pursuant this section shall not be eligible for
19 membership in the employees' retirement system of the State of
20 Hawaii while serving as an elective officer.

21 SECTION 15. The requirement of section 2 of this Act, that
22 a retirant who returns to service as an elective officer shall

1 have been retired for a least twelve consecutive months prior to
2 return to service to be eligible to make an election to have the
3 retirant's retirement allowance continue, shall not be
4 applicable to any retirant who returns to service as an elective
5 officer prior to January 3, 2009, provided that the retirant did
6 not retire as an elective officer.

7 SECTION 16. Sections 8 and 9 of this Act shall not be
8 applied to affect the rights of any retirants, as defined in
9 section 88-21, Hawaii Revised Statutes, who retired prior to the
10 effective date of this Act, or rights of the beneficiaries or
11 survivors of those retirants.

12 SECTION 17. In codifying the new section added to chapter
13 88, Hawaii Revised Statutes, by section 2 this Act, the revisor
14 of statutes shall substitute an appropriate section number for
15 the letter used in the designation of the new section and the
16 references to that new section in this Act.

17 SECTION 18. Statutory material to be repealed is bracketed
18 and stricken. New statutory material is underscored.

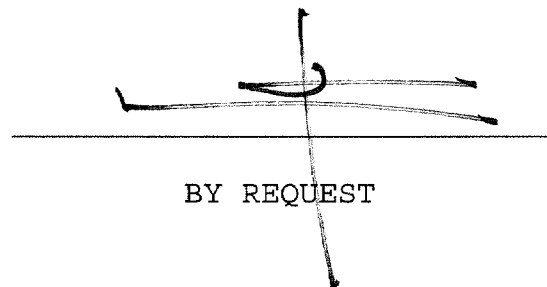
19 SECTION 19. This Act shall take effect on October 1, 2008.

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INTRODUCED BY:



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BY REQUEST

Report Title:

ERS; Membership of Elective Officers and Judges

Description:

Repeals the provisions that (1) make ERS membership by elective officers optional and (2) allow elective officer and judges to withdraw from ERS membership by nominally retiring even though they remain in office. Provides for service by retirants as elective officers without suspension of retirement benefits.

SB. NO. 3005

JUSTIFICATION SHEET

DEPARTMENT: Budget and Finance

TITLE: A BILL FOR AN ACT RELATING TO FEDERAL TAX QUALIFICATION OF THE EMPLOYEES' RETIREMENT SYSTEM.

PURPOSE: To repeal the provisions of chapter 88, Hawaii Revised Statutes, that provide for optional membership in the Employees' Retirement System ("ERS").

MEANS: Add a new section to chapter 88, Hawaii Revised Statutes, amend sections 88-21, 88-42, 88-43, 88-54.5, 88-59, 88-61, 88-73, 88-251, and 88-301, Hawaii Revised Statutes, and repeal section 88-59.6, Hawaii Revised Statutes.

JUSTIFICATION: The ERS is intended to be a tax-qualified retirement plan under section 401(a) of the Internal Revenue Code of 1986, as amended ("Code"). Section 414(h)(2) of the Code provides favorable tax treatment for employee contributions "picked up" (made by the employer on behalf of the employee) to a tax-qualified retirement plan established by a state. However, the tax-qualified status of the ERS may be jeopardized by the provisions of chapter 88, Hawaii Revised Statutes, that provide for optional membership in the ERS. These provisions allow elective officers to exercise their option to join the ERS at any time during their term of office and also allow elective officers and judges to withdraw from ERS membership while remaining in office.

The bill repeals the provisions of chapter 88, Hawaii Revised Statutes, that make ERS membership by elective officers optional and replaces those provisions with a new section that requires elective officers to exercise a one-time irrevocable election to join the ERS when they are elected for the first time. The new section also sets forth the

circumstances under which retirants may return to service as elective officers without suspension of retirement benefits.

The bill also repeals the statutory provision that allows elective officers and judges who have reached the statutory cap on retirement benefits to withdraw from ERS membership by nominally retiring even though they remain in office. Even though the judges and elective officials do not receive a retirement allowance until they actually leave office, the practice of nominal retirement raises issues of optional membership and of impermissible "in-service" refunds of pre-tax contributions, which may jeopardize the ERS' tax-qualified status.

Impact on the public: None.

Impact on the department and other agencies:

The amendments will require newly elected State and county officials to make a one-time irrevocable election whether or not to join the ERS when they take office. Judges and elective officers will have to terminate service in order to retire.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: BUF-141/Retirement.

OTHER AFFECTED
AGENCIES: The judiciary and all elected State and county officials.

EFFECTIVE DATE: October 1, 2008.