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# A BILL FOR AN ACT

RELATING TO THE HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST  
FUND.

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

1           SECTION 1. Chapter 87A, Hawaii Revised Statutes, is  
2 amended by adding three new sections to be appropriately  
3 designated and to read as follows:

4           "§87A-A Selection of benefit plan carriers, third-party  
5 administrators, consultants, actuaries, auditors, or  
6 administrator. Procurement of a carrier, third-party  
7 administrator for any benefits plan, consultants, actuaries,  
8 auditors, or an administrator shall be exempt from chapter 103D.

9           §87A-B Fiduciary duties; prohibited transactions. (a) A  
10 fiduciary of the trust shall comply, with respect to a plan,  
11 with all fiduciary duties imposed on fiduciaries under Title 29  
12 United States Code Sections 1001-1191c, as amended, and related  
13 regulations.

14           (b) All fiduciaries of the trust shall discharge their  
15 duties with respect to a plan solely in the interest of the  
16 participants and beneficiaries and:

17           (1) For the exclusive purpose of:

- 1           (A) Providing benefits to participants and their  
2           beneficiaries; and
- 3           (B) Defraying reasonable expenses of administering  
4           the plan; and
- 5           (2) With the care, skill, prudence, and diligence under  
6           the circumstances then prevailing that a prudent  
7           person acting in a similar capacity and familiar with  
8           those matters would use in the conduct of an  
9           enterprise of a similar character and with like aims;
- 10          (3) By diversifying the investments of the plan so as to  
11          minimize the risk of large losses, unless, under the  
12          circumstances, it is clearly prudent not to do so; and
- 13          (4) In accordance with the documents and instruments  
14          governing the plan insofar as those documents and  
15          instruments are consistent with this chapter.
- 16          (c) In addition to any liability that a fiduciary may have  
17          under this chapter, a fiduciary with respect to a plan shall be  
18          liable for a breach of fiduciary responsibility of another  
19          fiduciary with respect to the same plan in the following  
20          circumstances:
- 21               (1) If the fiduciary participates knowingly in, or  
22               knowingly undertakes to conceal, an act or omission of

1           the other fiduciary, knowing that act or omission is a  
2           breach;

3           (2) If, by the fiduciary's failure to comply with  
4           subsection (a) or (b), the fiduciary has enabled the  
5           other fiduciary to commit a breach; or

6           (3) If the fiduciary has knowledge of the breach by the  
7           other fiduciary, unless the fiduciary makes reasonable  
8           efforts under the circumstances to remedy the breach.

9           If the assets of the plan are held by two or more trustees,  
10          each shall use reasonable care to prevent a co-trustee from  
11          committing a breach, and each shall be responsible for jointly  
12          managing and controlling the assets of the plan.

13          (d) A fiduciary shall not cause a plan to engage in a  
14          transaction, if the fiduciary knows or should know that the  
15          transaction constitutes a direct or indirect:

16          (1) Sale or exchange, or leasing, of any property between  
17          the plan and a party in interest;

18          (2) Lending of money or other extension of credit between  
19          the plan and a party in interest;

20          (3) Furnishing of goods, services, or facilities between  
21          the plan and a party in interest; or

1       (4) Transfer to, or use by or for the benefit of, a party  
2       in interest, of any assets of the plan.

3       (e) A fiduciary shall not:

4       (1) Deal with the assets of the plan in the fiduciary's  
5       own interest or for the fiduciary's own account;

6       (2) In the fiduciary's individual capacity or in any other  
7       capacity, act in any transaction involving the plan on  
8       behalf of a party (or represent a party) whose  
9       interests are adverse to the interests of the plan or  
10       the interests of its participants or beneficiaries; or

11       (3) Receive any consideration for the fiduciary's own  
12       personal account from any party dealing with the plan  
13       in connection with a transaction involving the assets  
14       of the plan.

15       **§87A-C Liability for breach of fiduciary duty.** (a) Any  
16       person who is a fiduciary with respect to a plan and who  
17       breaches any of the responsibilities, obligations, or duties  
18       imposed on fiduciaries by this chapter shall be personally  
19       liable to reimburse any losses to the plan resulting from each  
20       breach, and to restore to the plan any profits of the fiduciary  
21       that have been made through the use of assets of the plan by the  
22       fiduciary, and shall be subject to any other equitable and

1 remedial relief as the court may deem appropriate, including  
2 removal of the fiduciary.

3 (b) Any provision in any agreement or instrument that  
4 purports to relieve a fiduciary of responsibility or liability  
5 for any responsibility, obligation, or duty under this chapter  
6 shall be void as against public policy. However, nothing in  
7 this section shall preclude:

8 (1) A plan from purchasing insurance for its fiduciaries  
9 or for itself to cover liability or losses occurring  
10 by reason of the act or omission of a fiduciary in the  
11 case of a breach of a fiduciary obligation by the  
12 fiduciary, if the insurance permits recourse by the  
13 insurer against the fiduciary in the case of a breach  
14 of fiduciary obligation by the fiduciary;

15 (2) A fiduciary from purchasing insurance to cover  
16 liability under this chapter from and for the  
17 fiduciary's own account; or

18 (3) An employee organization from purchasing insurance to  
19 cover potential liability of one or more persons who  
20 serve in a fiduciary capacity with regard to an  
21 employee welfare benefit plan."

1 SECTION 2. Section 28-8.3, Hawaii Revised Statutes, is  
2 amended by amending subsection (a) to read as follows:

3 "(a) No department of the State other than the attorney  
4 general may employ or retain any attorney, by contract or  
5 otherwise, for the purpose of representing the State or the  
6 department in any litigation, rendering legal counsel to the  
7 department, or drafting legal documents for the department;  
8 provided that the foregoing provision shall not apply to the  
9 employment or retention of attorneys:

10 (1) By the public utilities commission, the labor and  
11 industrial relations appeals board, and the Hawaii  
12 labor relations board;

13 (2) By any court or judicial or legislative office of the  
14 State; provided that if the attorney general is  
15 requested to provide representation to a court or  
16 judicial office by the chief justice or the chief  
17 justice's designee, or to a legislative office by the  
18 speaker of the house of representatives and the  
19 president of the senate jointly, and the attorney  
20 general declines to provide such representation on the  
21 grounds of conflict of interest, the attorney general  
22 shall retain an attorney for the court, judicial, or

- 1 legislative office, subject to approval by the court,  
2 judicial, or legislative office;
- 3 (3) By the legislative reference bureau;
- 4 (4) By any compilation commission that may be constituted  
5 from time to time;
- 6 (5) By the real estate commission for any action involving  
7 the real estate recovery fund;
- 8 (6) By the contractors license board for any action  
9 involving the contractors recovery fund;
- 10 (7) By the trustees for any action involving the travel  
11 agency recovery fund;
- 12 (8) By the office of Hawaiian affairs;
- 13 (9) By the department of commerce and consumer affairs for  
14 the enforcement of violations of chapters 480 and  
15 485A;
- 16 (10) As grand jury counsel;
- 17 (11) By the Hawaiian home lands trust individual claims  
18 review panel;
- 19 (12) By the Hawaii health systems corporation, or its  
20 regional system boards, or any of their facilities;
- 21 (13) By the auditor;
- 22 (14) By the office of ombudsman;

- 1 (15) By the insurance division;
- 2 (16) By the University of Hawaii;
- 3 (17) By the Kahoolawe island reserve commission;
- 4 (18) By the division of consumer advocacy;
- 5 (19) By the office of elections;
- 6 (20) By the campaign spending commission;
- 7 (21) By the Hawaii tourism authority, as provided in
- 8 section 201B-2.5; [~~or~~]
- 9 (22) By the Hawaii employer-union health benefits trust
- 10 fund, as provided in section 87A-9; or
- 11 [~~(22)~~] (23) By a department, in the event the attorney
- 12 general, for reasons deemed by the attorney general
- 13 good and sufficient, declines to employ or retain an
- 14 attorney for a department; provided that the governor
- 15 thereupon waives the provision of this section."

16 SECTION 3. Section 87A-5, Hawaii Revised Statutes, is

17 amended to read as follows:

18 "**§87A-5 Composition of board.** (a) The board of trustees

19 of the employer-union health benefits trust fund shall consist

20 of [~~ten~~] trustees appointed by the governor in accordance with

21 the following procedure:



- 1           (1)   ~~[Five]~~ Six trustees ~~[, one of whom shall represent~~  
2           ~~retirees,~~] to represent employee-beneficiaries and to  
3           be selected as follows:
- 4           ~~[(A) Three trustees shall be appointed from a list of~~  
5           ~~two nominees per trustee selected by each of the~~  
6           ~~three exclusive representative organizations that~~  
7           ~~have the largest number of employee-~~  
8           ~~beneficiaries;~~
- 9           ~~(B) One trustee shall be appointed from a list of two~~  
10          ~~nominees selected by mutual agreement of the~~  
11          ~~remaining exclusive employee representative~~  
12          ~~organizations; and~~
- 13          ~~(C) One trustee representing retirees shall be~~  
14          ~~appointed from a list of two nominees selected by~~  
15          ~~mutual agreement of all eligible exclusive~~  
16          ~~representatives; and~~
- 17          ~~(2) Five trustees to represent public employers.]~~
- 18                (A) One trustee to be appointed by the governor from  
19                a nominee submitted by bargaining units 2, 3, 4,  
20                6, 8, 9, and 13;
- 21                (B) One trustee to be appointed by the governor from  
22                a nominee submitted by bargaining unit 5;

- 1           (C) One trustee to be appointed by the governor from  
2           a nominee submitted by bargaining unit 7;
- 3           (D) One trustee to be appointed by the governor from  
4           a nominee submitted by bargaining units 1 and 10;
- 5           (E) One trustee to be appointed by the governor from  
6           a nominee submitted by bargaining unit 11; and
- 7           (F) One trustee to be appointed by the governor from  
8           a nominee submitted by bargaining unit 12; and
- 9           (2) Six trustees, five to represent public employers and  
10           one to represent retiree beneficiaries, as follows:
- 11           (A) One trustee shall be appointed by the governor to  
12           represent the State of Hawaii administration;
- 13           (B) One trustee shall be appointed by the governor  
14           from a nominee submitted by the University of  
15           Hawaii board of regents;
- 16           (C) One trustee shall be appointed by the governor  
17           from a nominee submitted by the board of  
18           education;
- 19           (D) Two trustees shall be appointed by the governor  
20           from a list of nominees submitted by the mayors  
21           of the counties of Hawaii, Kauai, and Maui, and  
22           the city and county of Honolulu, which list shall

1           consist of one nominee selected by each of those  
2           counties; provided that the two nominees not  
3           appointed by the governor shall serve as  
4           alternate trustees to sit in the absence of the  
5           trustees appointed by the governor; and

6           (E) One trustee shall be appointed by the governor to  
7           represent retiree beneficiaries;

8           provided that all trustees shall serve at the pleasure of  
9           the appointing authority.

10          (b) If an exclusive bargaining representative negotiates a  
11          specific contribution to apply to only that bargaining unit,  
12          that unit shall have a sub-board of trustees to administer that  
13          exclusive bargaining unit's contributions and benefits. The  
14          benefits for the bargaining unit, including the type and level,  
15          shall be determined by the sub-board of trustees or established  
16          pursuant to the collective bargaining agreement. There shall be  
17          two trustees appointed by the employer, and two trustees  
18          appointed by the exclusive bargaining representative to the sub-  
19          board.

20          (c) Section 26-34 shall not apply to board member  
21          selection and terms. Notwithstanding any other provision of  
22          this section, no exclusive representative of a bargaining unit

1 that sponsors or participates in a voluntary employee  
2 beneficiary association shall be eligible to select nominees or  
3 to be represented by a trustee on the board.

4 (d) As used in this section, the term "exclusive  
5 representative" shall have the same meaning as in section 89-2."

6 SECTION 4. Section 87A-6, Hawaii Revised Statutes, is  
7 amended to read as follows:

8 "~~§87A-6 Term of a trustee; vacancy.~~ [~~The term of office~~  
9 ~~of each trustee shall be four years; provided that a trustee may~~  
10 ~~be reappointed for one additional consecutive four-year term.~~

11 ~~A vacancy on the board shall be filled in the same manner~~  
12 ~~as the trustee who vacated that position was nominated or~~  
13 ~~appointed; provided that the criteria used for nominating or~~  
14 ~~appointing the successor shall be the same criteria used for~~  
15 ~~nominating or appointing the person's predecessor; provided~~  
16 ~~further that vacancies on the board for each trustee position~~  
17 ~~representing retirees and employee beneficiaries appointed under~~  
18 ~~section 87A-5(1) (A) and (B) shall be filled by appointment of~~  
19 ~~the governor as follows:~~

20 ~~(1) If a vacancy occurs in one of the trustee positions~~  
21 ~~described in section 87A-5(1) (A), then the vacancy~~  
22 ~~shall be appointed from a list of two nominees~~

1 ~~submitted by the exclusive employee representative~~  
2 ~~from among the three largest exclusive employee~~  
3 ~~representatives that does not have a trustee among the~~  
4 ~~three trustee positions;~~

5 ~~(2) If a vacancy occurs in a trustee position described in~~  
6 ~~section 87A-5(1)(B), then the vacancy shall be~~  
7 ~~appointed from a list of two nominees submitted by~~  
8 ~~mutual agreement of the exclusive employee~~  
9 ~~representatives described in section 87A-5(1)(B); and~~

10 ~~(3) If a vacancy occurs in the retiree position described~~  
11 ~~in section 87A-5(1)(C), then the vacancy shall be~~  
12 ~~appointed from a list of two nominees submitted by~~  
13 ~~mutual agreement of all eligible exclusive employee~~  
14 ~~representatives.~~

15 ~~If by the end of a trustee's term the trustee is not~~  
16 ~~reappointed or the trustee's successor is not appointed, the~~  
17 ~~trustee shall serve until the trustee's successor is appointed.]~~

18 The term of office of each trustee shall be at the pleasure of  
19 the nominating or appointing authority. If the appointing  
20 authority fails to appoint an employer trustee to fill a vacant  
21 position, the chief justice of the supreme court of Hawaii shall  
22 make the appointment upon petition by two or more employee

1 beneficiary trustees. If the appointing authority fails to  
2 appoint an employee beneficiary trustee to fill a vacant  
3 position, the chief justice of the supreme court of Hawaii shall  
4 make the appointment upon petition by two or more employer  
5 trustees."

6 SECTION 5. Section 87A-9, Hawaii Revised Statutes, is  
7 amended to read as follows:

8 "~~[§]87A-9[§]~~ **Legal adviser.** The ~~[attorney general shall]~~  
9 board may appoint or retain by contract an attorney who is  
10 independent of the attorney general to serve as legal adviser to  
11 the board and ~~shall~~ provide legal representation for the  
12 Hawaii employer-union health benefits trust fund. The legal  
13 adviser shall have Employee Retirement and Income Security Act  
14 (ERISA) employee benefits experience, either from the private or  
15 public sector."

16 SECTION 6. Section 87A-11, Hawaii Revised Statutes, is  
17 amended to read as follows:

18 "~~[§]87A-11[§]~~ **Quorum; board actions; voting.** (a) ~~[Six]~~  
19 Eight trustees, ~~[three]~~ four of whom represent the public  
20 employer and ~~[three]~~ four of whom represent employee-  
21 beneficiaries, shall constitute a quorum for the transaction of  
22 business.

1 (b) Trustees representing the public employers shall  
2 collectively have one vote. Trustees representing the employee-  
3 beneficiaries shall collectively have one vote.

4 For any vote of the trustees representing the public  
5 employers to be valid, [~~three~~] four of these trustees must  
6 concur to cast [~~such~~] a vote. In the absence of [~~such~~] a  
7 concurrence, the trustees representing the public employers  
8 shall be deemed to have abstained from voting.

9 For any vote of the trustees representing the employee-  
10 beneficiaries to be valid, [~~three~~] four of these trustees must  
11 concur to cast [~~such~~] a vote. In the absence of [~~such~~] a  
12 concurrence, the trustees representing the employee-  
13 beneficiaries shall be deemed to have abstained from voting.

14 An abstention shall not be counted as either a vote in  
15 favor or against a matter before the board.

16 (c) Any action taken by the board shall be by the  
17 concurrence of at least two votes. In the event of a tie vote  
18 on any motion, the motion shall fail. Upon the concurrence of  
19 [~~six~~] eight trustees, the board shall participate in dispute  
20 resolution."

21 SECTION 7. Section 87A-15, Hawaii Revised Statutes, is  
22 amended to read as follows:

SB2849 SD1.DOC  
\*SB2849 SD1.DOC\*  
\*SB2849 SD1.DOC\*

1           "~~[+]§87A-15[+]~~ **Administration of the fund.** The board  
2 shall administer and carry out the purpose of the fund. Health  
3 and other benefit plans shall be provided [~~at a cost affordable~~  
4 ~~to both the public employers and the public employees.~~] as  
5 follows:

- 6           (1) For collective bargaining units based on the  
7           collectively bargained contributions from both the  
8           employers and the employees;  
9           (2) For retirees within the appropriation adopted by the  
10           legislature and the respective counties; and  
11           (3) For all other eligible beneficiaries based on the  
12           contribution from the employer and employees."

13           SECTION 8. Section 87A-30, Hawaii Revised Statutes, is  
14 amended to read as follows:

15           "**§87A-30 Hawaii employer-union health benefits trust fund;**  
16 **establishment.** There is established outside the state treasury,  
17 a trust fund to be known as the "Hawaii Employer-Union Health  
18 Benefits Trust Fund". The fund shall consist of contributions,  
19 interest, income, dividends, refunds, rate credits, and other  
20 returns. It is hereby declared that any and all sums  
21 contributed or paid from any source to the fund created by this  
22 part, and all assets of the fund including any and all interest



1 and earnings on the same, are and shall be held in trust by the  
2 board for the exclusive use and benefit of the employee-  
3 beneficiaries and dependent-beneficiaries and shall not be  
4 subject to appropriation for any other purpose whatsoever. The  
5 fund shall be under the control of the board of trustees and  
6 placed under the department of [~~budget and finance~~] human  
7 resources development for administrative purposes."

8 SECTION 9. Statutory material to be repealed is bracketed  
9 and stricken. New statutory material is underscored.

10 SECTION 10. This Act shall take effect upon its approval.

11

**Report Title:**

Hawaii Employer-Union Health Benefits Trust Fund; Trustee

**Description:**

Adds three new sections on selection of benefit plan carriers, fiduciary duties, and liability for breach of fiduciary duty; exempts the Hawaii employer-union health benefits trust fund from the requirement to use the attorney general; increases the members of the board of trustees from ten to twelve and changes membership and terms; authorizes the board to retain an attorney who is independent of the attorney general as legal advisor; transfers the fund from the department of budget and finance to the department of human resources development. (SD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*