

JAN 23 2020

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**A BILL FOR AN ACT**

RELATING TO EMPLOYEES' RETIREMENT SYSTEM DISABILITY RETIREMENT.

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

1           SECTION 1. The Employees' Retirement System of the State  
2 of Hawaii's ("ERS") service-connected disability retirement and  
3 accidental death provisions are intended to provide benefits  
4 different than those of Hawaii's workers' compensation program.  
5 The paramount purpose of Hawaii's workers' compensation law is  
6 to provide compensation for an employee for all work-connected  
7 injuries, regardless of questions of negligence, and the  
8 legislature has decided that work injuries are among the costs  
9 of production that industry is required to bear. Accordingly,  
10 the workers' compensation statute is to be construed liberally  
11 in favor of awarding compensation, and specifically creates a  
12 presumption that an employee's claim is for a covered work  
13 injury, in exchange for providing an employer with exclusion of  
14 all other liability on account of a work injury (except for  
15 sexual harassment, sexual assault and infliction of emotional  
16 distress, or invasion of privacy).

17           There are no similar policies or purposes behind the ERS's  
18 service-connected disability retirement and accidental death

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1 provisions. Consequently, the ERS's service-connected  
2 disability retirement and accidental death provisions do not  
3 contain a presumption favoring coverage, and should not be  
4 construed liberally in favor of awarding compensation for all  
5 injuries and death occurring in the workplace, regardless of  
6 questions of ERS membership position, negligence, proximate  
7 cause, the difference between an accident and injury/incapacity,  
8 and the burden of proof. Courts in the cases of *Pasco v. Bd. of*  
9 *Trustees of the Employees' Ret. Sys.*, 142 Haw. 373, 420 P.3d 304  
10 (2018), as corrected (May 29, 2018), as corrected (June 4,  
11 2018), as corrected (June 15, 2018), *Stout v. Bd. of Trustees of*  
12 *the Employees' Ret. Sys.*, 140 Haw. 177, 398 P.3d 766,  
13 reconsideration denied, 141 Haw. 90, 404 P.3d 1279 (2017),  
14 *Panado v. Bd. of Trustees, Employees' Ret. Sys.*, 134 Haw. 1, 332  
15 P.3d 144 (2014), and *Fores v. Bd. of Trustees of the Employees'*  
16 *Ret. Sys.*, Civ. 14-1-1270-06, Circuit Court of the First  
17 Circuit, recently rendered rulings awarding ERS service-  
18 connected disability retirement and accidental death benefits  
19 beyond the legislature's original intent.

20         These rulings have required the ERS to provide service-  
21 connected disability retirement and accidental death benefits  
22 that were never contemplated in determining employer

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1 contributions, employee contributions, and employee benefits  
2 (including monthly retirement allowance benefits to be provided  
3 for an extended duration and at a higher rate, plus the refund  
4 of employee contributions), and consequently, increased the  
5 State's unfunded liability as a whole. Furthermore, ERS members  
6 are not foreclosed from collecting ERS service retirement, ERS  
7 ordinary disability retirement, ERS ordinary death, workers'  
8 compensation, or social security disability; the ERS's service-  
9 connected disability retirement and accidental death programs  
10 should therefore not be awarded in a manner similar to an award  
11 of ERS service retirement, ERS ordinary disability retirement,  
12 ERS ordinary death, workers' compensation, and social security  
13 disability benefits.

14 If there is any perceived ambiguity regarding the  
15 legislative intent of the ERS's service-connected disability  
16 retirement and accidental death statutes, as reflected in recent  
17 court decisions, this bill addresses such perceived ambiguities.

18 SECTION 2. Section 88-21, Hawaii Revised Statutes, is  
19 amended as follows:

20 (1) By adding new definitions to be appropriately inserted  
21 and to read as follows:

22 "Accident":

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- 1        (1) Means a single traumatic unlooked-for mishap or  
2        untoward event which:
- 3        (A) Is not expected or designed;  
4        (B) Is not a risk inherent in the member's  
5        performance of routine or normal job duties;  
6        (C) Interrupts the member's performance of routine or  
7        normal job duties; and  
8        (D) Precedes and precipitates:
- 9            (i) Medical condition, injury, disability, or  
10           symptom of the foregoing that naturally and  
11           proximately results in the member's  
12           permanent incapacity for duty; or  
13           (ii) Death of the member; and
- 14        (2) Does not include:
- 15        (A) A medical condition, injury, disability, mental  
16        or physical incapacity, symptom of the foregoing,  
17        or death itself; and  
18        (B) An unexpected result of a routine performance of  
19        duty, without external force, unusual stress or  
20        strain.

21        "Actual performance of duty": means the performance of  
22        duty:

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1       (1) Of the position, appointment, or office on which the  
2       member's membership in the system is based, and for  
3       which all contributions required to be made to the  
4       system by the employee or the employer, or both, have  
5       been made;

6       (2) During the working hours of such the position,  
7       appointment, or office; and

8       (3) At either:

9           (A) The work premises of such the position,  
10          appointment, or office; or

11          (B) Wherever the member's duties of such the  
12          position, appointment, or office require the  
13          member to be.

14       "Incapacitated for duty" and "incapacitated for the further  
15 performance of duty":

16       (1) Means incapacitated for duties prescribed in the  
17       official position description, or actual job duties,  
18       of the position, appointment, or office on which the  
19       member's membership in the system is based, and for  
20       which all contributions required to be made to the  
21       system by the employee or the employer, or both, have  
22       been made; and

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1       (2) Does not include incapacitated for duties under  
2       environmental conditions particular to the member's  
3       position, appointment, or office, but not  
4       incapacitated for duties of the position, appointment,  
5       or office as a whole, such as an incapacitated for  
6       duties at a particular location, in proximity to or  
7       under the supervision of particular individuals, or  
8       under other particular environmental conditions.

9       "Occupational hazard":

10      (1) Means danger or risk inherent in, and concomitant to,  
11      a particular occupation, the causative factors of  
12      which are not ordinarily incident to employment in  
13      general, and are different in character from those  
14      found in the general run of occupations; and

15      (2) Does not include:

16      (A) A job-related condition that results in  
17      incapacitation for the further performance of  
18      duty or death, without a danger or risk inherent  
19      in, and concomitant to, a particular occupation;

20      (B) Work activities that are common to many  
21      occupations, such as repetitive motion of hands  
22      and arms, lifting, and carrying; and

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1           (C) Dangers or risks that are particular to a  
2           member's workplace, but not particular to the  
3           member's occupation as a whole, such as a lack of  
4           proper tools or malfunctioning equipment at the  
5           workplace.

6           "Some definite time and place": means

7           (1) A specific time or time period that is identified and  
8           is of a limited and short duration, and

9           (2) A specific place or geographic location that is  
10           identified and is of a limited and small size, and

11           (3) Does not include a time period more than a single work  
12           shift."

13           (2) By amending the definition of "accidental death" to  
14 read as follows:

15           ""Accidental death": means death that is the natural and  
16 proximate result of an accident occurring at some definite time  
17 and place while the member [~~was employed in a position in the~~  
18 ~~system which all contributions required to be made to the~~  
19 ~~employees' retirement system by the employee or the employer, or~~  
20 ~~both, have been made,~~] was in the actual performance of duty, or  
21 due to the result of some occupational hazard, and not caused by  
22 wilful negligence on the part of the member."

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1 SECTION 3. Section 88-79, Hawaii Revised Statutes, is  
2 amended to read as follows:

3 **"§88-79 Service-connected disability retirement.**

4 (a) Under rules the board of trustees may adopt, upon  
5 application of a member, or the person appointed by the family  
6 court as guardian of an incapacitated member, any member while  
7 employed in a position in which all contributions required to be  
8 made to the employees' retirement system by the employee or the  
9 employer, or both, have been made, who has been permanently  
10 incapacitated for duty as the natural and proximate result of an  
11 accident occurring while in the actual performance of duty at  
12 some definite time and place, or as the cumulative result of  
13 some occupational hazard, through no wilful negligence on the  
14 member's part, may be retired by the system for service-  
15 connected disability; provided that:

16 (1) In the case of an accident occurring after July 1,  
17 1963, the employer shall file with the system a copy  
18 of the employer's report of the accident submitted to  
19 the director of labor and industrial relations;

20 (2) An application for retirement is filed with the system  
21 within two years of the date of the accident, or the



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1 date upon which workers' compensation benefits cease,  
2 whichever is later;

3 (3) Certification is made by the head of the agency in  
4 which the member is employed, stating the time, place,  
5 and conditions of the service performed by the member  
6 resulting in the member's disability and that the  
7 disability was not the result of wilful negligence on  
8 the part of the member; and

9 (4) The medical board or other entity designated by the  
10 board of trustees certifies that the member is  
11 incapacitated for the further performance of duty at  
12 the time of application and that the member's  
13 incapacity is likely to be permanent.

14 (b) The member or applicant initiating the proceeding  
15 shall have the burden of proof, including the burden of  
16 producing evidence as well as the burden of persuasion. The  
17 degree or quantum of proof shall be a preponderance of the  
18 evidence. The member or applicant shall have the responsibility  
19 of furnishing all medical evidence available or which can be  
20 made available to the member or applicant pertaining to the  
21 member's death or disability. Any determination of the  
22 disability compensation division of the department of labor and

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1 industrial relations, the labor and industrial relations appeals  
2 board, and the Social Security Administration relating to the  
3 same incapacity for which the applicant or member is claiming a  
4 disability or death benefit may be taken into consideration;  
5 however, that determination shall not be binding upon the  
6 medical board. The medical board may or may not, at its  
7 discretion, subject the member to a physical examination in  
8 arriving at its certifications and findings on all matters  
9 referred to it; provided the burden of proof is not shifted to  
10 the medical board, and the member or applicant has the burden of  
11 proof.

12 [~~(b)~~] (c) In the case of firefighters, police officers,  
13 and sewer workers, the effect of the inhalation of smoke, toxic  
14 gases, chemical fumes, and other toxic vapors on the heart,  
15 lungs, and respiratory system shall be construed as an injury  
16 received or disease contracted while in the performance of their  
17 duty and as the result of some occupational hazard for the  
18 purpose of determining occupational disability retirement under  
19 this section.

20 Notwithstanding any other law to the contrary, any  
21 condition of impairment of health caused by any disease of the  
22 heart, lungs, or respiratory system, resulting in permanent

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1 incapacity to a firefighter, police officer, or sewer worker,  
2 shall be presumed to have been suffered in the actual  
3 performance of duty at some definite time and place through no  
4 wilful negligence on the firefighter's, police officer's, or  
5 sewer worker's part, and as a result of the inherent  
6 occupational hazard of exposure to and inhalation of smoke,  
7 toxic gases, chemical fumes, and other toxic vapors, unless the  
8 contrary be shown by competent evidence; provided that such  
9 firefighter, police officer, or sewer worker shall have passed a  
10 physical examination on entry into such service or subsequent to  
11 such entry, which examination failed to reveal any evidence of  
12 such condition.

13        [~~e~~] (d) The system may waive strict compliance with the  
14 time limits within which a report of the accident and an  
15 application for service-connected disability retirement must be  
16 filed with the system if it is satisfied that the failure to  
17 file within the time limited by law was due to ignorance of fact  
18 or law, inability, or to the fraud, misrepresentation, or deceit  
19 of any person, or because the applicant was undergoing treatment  
20 for the disability or was receiving vocational rehabilitation  
21 services occasioned by the disability.

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1           ~~(d)~~ (e) The system may determine whether or not the  
2 disability is the result of an accident occurring while in the  
3 actual performance of duty at some definite time and place and  
4 that the disability was not the result of wilful negligence on  
5 the part of the member. The system may accept as conclusive:

6           (1) The certification made by the head of the agency in  
7           which the member is employed; or

8           (2) A finding to this effect by the medical board or other  
9           entity designated by the board of trustees.

10          ~~(e)~~ (f) Upon approval by the system, the member shall be  
11 eligible to receive a service-connected disability retirement  
12 benefit after the member has terminated service. Retirement  
13 shall become effective on the first day of a month, except for  
14 the month of December when retirement on the first or last day  
15 of the month shall be allowed."

16          SECTION 4. Section 88-82, Hawaii Revised Statutes, is  
17 amended to read as follows:

18          "**§88-82 Petition for contested case hearing regarding**  
19 **disability retirement or accidental death benefits; attorney's**  
20 **fees and costs.** (a) A member or applicant who is not satisfied  
21 with the preliminary decision of the board to grant or deny an  
22 application for disability retirement benefits or accidental

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1 death benefits based on the certifications and findings of the  
2 medical board may file a petition for contested case hearing  
3 with the board within sixty days after receiving written  
4 notification of the preliminary decision of the board.

5 (b) Permanent incapacity that is primarily caused by the  
6 natural deterioration, degeneration, or progression of a pre-  
7 existing condition is not the natural and proximate result of an  
8 accident occurring while in the actual performance of duty at  
9 some definite time and place. Permanent incapacity that is  
10 primarily caused by the natural deterioration, degeneration, or  
11 progression of a pre-existing condition is not the cumulative  
12 result of some occupational hazard, unless the pre-existing  
13 condition itself was caused by the occupational hazard. In the  
14 case of an application for service-connected disability  
15 retirement, where there is evidence that the member claiming  
16 permanent incapacity had a pre-existing condition, the member  
17 shall have the burden of proving by a preponderance of the  
18 evidence that the member's permanent incapacity was not  
19 primarily caused by the pre-existing condition.

20 [~~(b)~~] (c) If the member or applicant is the prevailing  
21 party in the contested case, and disability retirement or  
22 accidental death benefits are awarded to the member or applicant

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1 by the board or court of the appropriate jurisdiction under  
2 section 88-75, 88-79, 88-85, 88-284, 88-285, 88-286(c), 88-334,  
3 88-336, or 88-339, the member or applicant shall be paid  
4 reasonable attorney's fees together with any costs payable by  
5 the system. The attorney's fees and costs shall be subject to  
6 the approval of the board or approval by a court of appropriate  
7 jurisdiction after evidence has been provided by the member or  
8 applicant regarding the reasonableness of the claimed attorney's  
9 fees and costs."

10 SECTION 5. Section 88-85, Hawaii Revised Statutes, is  
11 amended to read as follows:

12 **"§88-85.5 Applications for accidental death benefits;**  
13 **approval by the system.** (a) Under rules the board of trustees  
14 may adopt, an application for service-connected accidental death  
15 benefits may be filed with the system by or on behalf of the  
16 claimant pursuant to section 88-85, 88-286, or 88-339, on a form  
17 provided by the system. The application shall be filed no later  
18 than three years from the date of the member's death.

19 (b) After the claimant files an application for service-  
20 connected accidental death benefits, the system shall obtain the  
21 following:

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- 1           (1) A copy of the employer's report of the accident  
2                   submitted by the employer to the department of labor  
3                   and industrial relations, workers' compensation  
4                   division, and other reports relating to the accident;
- 5           (2) A certified statement from the head of the department  
6                   in which the deceased member was employed, stating the  
7                   date, time, and place of the accident, and the nature  
8                   of the service being performed when the accident  
9                   occurred. The statement shall also include an opinion  
10                  as to whether or not the accident was the result of  
11                  wilful negligence on the deceased member's part;
- 12          (3) A copy of the latest position description of the  
13                  deceased member's duties and responsibilities;
- 14          (4) A certified copy of the death certificate; and
- 15          (5) A copy of an autopsy report, if performed.
- 16          (c) Upon the system's receipt of the application and  
17 documents specified in subsection (b), the medical board or  
18 other entity designated by the board of trustees shall determine  
19 and certify to the system whether the member's death was an  
20 accidental death as defined in section 88-21.
- 21          (d) Death that is primarily caused by the natural  
22 deterioration, degeneration, or progression of a pre-existing

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1 condition is not the natural and proximate result of an accident  
2 occurring while in the actual performance of duty at some  
3 definite time and place. Death that is primarily caused by the  
4 natural deterioration, degeneration, or progression of a pre-  
5 existing condition is not the cumulative result of some  
6 occupational hazard, unless the pre-existing condition itself  
7 was caused by the occupational hazard. In the case of an  
8 application for accidental death benefits, where there is  
9 evidence that the member had a pre-existing condition, the  
10 applicant shall have the burden of proving by a preponderance of  
11 the evidence that the member's death was not primarily caused by  
12 the pre-existing condition.

13 [~~d~~] (e) The system may accept as conclusive as to  
14 whether or not the member's death was caused by wilful  
15 negligence on the part of the member:

- 16 (1) A certification made by the head of the agency in  
17 which the member is employed; or  
18 (2) A finding by the medical board or other entity  
19 designated by the board of trustees.

20 [~~e~~] (f) After the medical board or other entity  
21 designated by the board of trustees submits its certification to  
22 the system, the system shall approve or disapprove the



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1 application. Upon approval of an application, benefits shall be  
2 paid as provided in section 88-85, 88-286, or 88-339."

3 SECTION 6. Section 88-261, Hawaii Revised Statutes, is  
4 amended by amending subsection (a) to read as follows:

5 "(a) The following words and phrases as used in this part  
6 shall have the same meanings as defined in section 88-21, unless  
7 a different meaning is plainly required by the  
8 context: "accident"; "accidental death"; "accumulated  
9 contributions"; "actual performance of duty"; "actuarial  
10 equivalent"; "average final compensation"; "beneficiary";  
11 "board"; "county"; "employee"; "medical board"; "occupational  
12 hazard"; "retirant"; "retirement allowance"; "service"; "some  
13 definite time and place"; and "system"."

14 SECTION 7. Section 88-336, Hawaii Revised Statutes, is  
15 amended to read as follows:

16 "**§88-336 Service-connected disability retirement.** (a)  
17 Under rules the board of trustees may adopt, upon application of  
18 a class H member, or the person appointed by the family court as  
19 guardian of an incapacitated member, any class H member who has  
20 been permanently incapacitated for duty as the natural and  
21 proximate result of an accident occurring while in the actual  
22 performance of duty at some definite time and place, or as the

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1 cumulative result of some occupational hazard, through no wilful  
2 negligence on the member's part, may be retired by the system  
3 for service-connected disability; provided that:

4 (1) In the case of an accident occurring after July 1,  
5 1963, the employer shall file with the system a copy  
6 of the employer's report of the accident submitted to  
7 the director of labor and industrial relations;

8 (2) An application for retirement is filed with the system  
9 within two years of the date of the accident, or the  
10 date upon which workers' compensation benefits cease,  
11 whichever is later;

12 (3) Certification is made by the head of the agency in  
13 which the member is employed, stating the time, place,  
14 and conditions of the service performed by the member  
15 resulting in the member's disability and that the  
16 disability was not the result of wilful negligence on  
17 the part of the member; and

18 (4) The medical board or other entity designated by the  
19 board of trustees certifies that the member is  
20 incapacitated for the further performance of duty at  
21 the time of application and that the member's  
22 incapacity is likely to be permanent.

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1        (b) Permanent incapacity that is primarily caused by the  
2 natural deterioration, degeneration, or progression of a pre-  
3 existing condition is not the natural and proximate result of an  
4 accident occurring while in the actual performance of duty at  
5 some definite time and place. Permanent incapacity that is  
6 primarily caused by the natural deterioration, degeneration, or  
7 progression of a pre-existing condition is not the cumulative  
8 result of some occupational hazard, unless the pre-existing  
9 condition itself was caused by the occupational hazard. In the  
10 case of an application for service-connected disability  
11 retirement, where there is evidence that the member claiming  
12 permanent incapacity had a pre-existing condition, the member  
13 shall have the burden of proving by a preponderance of the  
14 evidence that the member's permanent incapacity was not  
15 primarily caused by the pre-existing condition.

16        [~~(b)~~] (c) In the case of sewer workers, the effect of the  
17 inhalation of smoke, toxic gases, chemical fumes, and other  
18 toxic vapors on the heart, lungs, and respiratory system shall  
19 be construed as an injury received or disease contracted while  
20 in the performance of their duty and as the result of some  
21 occupational hazard for the purpose of determining occupational  
22 disability retirement under this section.

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1           Notwithstanding any other law to the contrary, any  
2 condition of impairment of health caused by any disease of the  
3 heart, lungs, or respiratory system resulting in permanent  
4 incapacity to a sewer worker shall be presumed to have been  
5 suffered in the actual performance of duty at some definite time  
6 and place through no wilful negligence on the sewer worker's  
7 part, and as a result of the inherent occupational hazard of  
8 exposure to the inhalation of smoke, toxic gases, chemical  
9 fumes, and other toxic vapors, unless the contrary be shown by  
10 competent evidence; provided that the sewer worker shall have  
11 passed a physical examination on entry into such service or  
12 subsequent to such entry, which examination failed to reveal any  
13 evidence of such condition.

14           [~~(e)~~] (d) The system may waive strict compliance with the  
15 time limits within which a report of the accident and an  
16 application for service-connected disability retirement must be  
17 filed with the system if it is satisfied that the failure to  
18 file within the time limited by law was due to ignorance of fact  
19 or law, inability, or the fraud, misrepresentation, or deceit of  
20 any person, or because the applicant was undergoing treatment  
21 for the disability, or was receiving vocational rehabilitation  
22 services occasioned by the disability.

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1            [~~d~~] (e) The system may determine whether the disability  
2 is the result of an accident occurring while in the actual  
3 performance of duty at some definite time and place and that the  
4 disability was not the result of wilful negligence on the part  
5 of the member. The system may accept as conclusive:

6            (1) The certification made by the head of the agency in  
7                which the member is employed; or

8            (2) A finding to this effect by the medical board or other  
9                entity designated by the board of trustees.

10           [~~e~~] (f) Upon approval by the system, the member shall be  
11 eligible to receive a service-connected disability retirement  
12 benefit after the member has terminated service. Retirement  
13 shall be effective on the first day of a month, except for the  
14 month of December when retirement on the first or last day of  
15 the month shall be allowed."

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

18           SECTION 9. This Act shall take effect upon its approval.

19

20

INTRODUCED BY: \_\_\_\_\_

*M. D. M.*

21

BY REQUEST

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**Report Title:**

Employees' Retirement System; Service-Connected Disability;  
Accidental Death

**Description:**

Clarifies the Employees' Retirement System's eligibility  
requirement definitions for service-connected disability and  
accidental death benefits.

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

JUSTIFICATION SHEET

DEPARTMENT: Budget and Finance

TITLE: A BILL FOR AN ACT RELATING TO EMPLOYEES' RETIREMENT SYSTEM DISABILITY RETIREMENT.

PURPOSE: This bill supports the legislative intent and clarifies the requirements of service-connected disability retirement and accidental death benefits of the Employees' Retirement System ("ERS")

MEANS: Amend sections 88-21, 88-79, 88-82, 88-85.5, 88-261(a), and 88-336, Hawaii Revised Statutes.

JUSTIFICATION: The ERS's service-connected disability retirement and accidental death provisions do not contain a presumption favoring coverage, and should not be construed liberally in favor of awarding compensation for all injuries and death occurring in the workplace, regardless of questions of ERS membership position, negligence, proximate cause, the difference between an accident and injury/incapacity, and the burden of proof.

Courts in several cases recently rendered rulings awarding ERS service-connected disability retirement and/or accidental death benefits beyond the legislature's original intent.

These rulings have required the ERS to provide service-connected disability retirement and/or accidental death benefits which were never contemplated in determining employer contributions, employee contributions, and employee benefits (including monthly retirement allowance benefits to be provided for an extended duration and at a higher rate, plus the refund of employee contributions), and

consequently, increased the State's unfunded liability as a whole.

Furthermore, ERS members are not foreclosed from collecting ERS service retirement, ERS ordinary disability retirement, ERS ordinary death, workers' compensation, or social security disability.

By amending sections 88-21, 88-79, 88-82, 88-85.5, 88-261, 88-336, and 88-339, HRS, this bill clarifies the definitions and requirements of ERS service-connected disability and death benefits in order to preserve them as originally intended.

Impact on the public: None.

Impact on the department and other agencies: None.

GENERAL FUND:	None.
OTHER FUNDS:	None.
PPBS PROGRAM DESIGNATION:	BUF-141/Retirement.
OTHER AFFECTED AGENCIES:	None.
EFFECTIVE DATE:	Upon approval.