

JAN 27 2021

A BILL FOR AN ACT

RELATING TO EMPLOYEES' RETIREMENT SYSTEM BENEFITS.

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

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

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1 There are no similar policies or purposes behind the ERS's
2 service-connected disability retirement and accidental death
3 provisions. Consequently, the ERS's service-connected
4 disability retirement and accidental death provisions do not
5 contain a presumption favoring coverage, and should not be
6 construed liberally in favor of awarding compensation for all
7 injuries and death occurring in the workplace, regardless of
8 questions of ERS membership position, negligence, proximate
9 cause, the difference between an accident and injury/incapacity,
10 and the burden of proof. Courts in the cases of *Quel v. Bd. of*
11 *Trustees, Employees' Ret. Sys.*, 146 Haw. 197, 457 P.3d 836
12 (2020), *Pasco v. Bd. of Trustees of the Employees' Ret. Sys.*,
13 142 Haw. 373, 420 P.3d 304 (2018), as corrected (May 29, 2018),
14 as corrected (June 4, 2018), as corrected (June 15, 2018), *Stout*
15 *v. Bd. of Trustees of the Employees' Ret. Sys.*, 140 Haw. 177,
16 398 P.3d 766, reconsideration denied, 141 Haw. 90, 404 P.3d 1279
17 (2017), *Panado v. Bd. of Trustees, Employees' Ret. Sys.*, 134
18 Haw. 1, 332 P.3d 144 (2014), and *Fores v. Bd. of Trustees of the*
19 *Employees' Ret. Sys.*, Civ. 14-1-1270-06, Circuit Court of the
20 First Circuit, recently rendered rulings awarding ERS service-
21 connected disability retirement and accidental death benefits
22 beyond the legislature's original intent.

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1 These rulings have required the ERS to provide service-
2 connected disability retirement and accidental death benefits
3 that were never contemplated in determining employer
4 contributions, employee contributions, and employee benefits
5 (including monthly retirement allowance benefits to be provided
6 for an extended duration and at a higher rate, plus the refund
7 of employee contributions), and consequently, increased the
8 State's unfunded liability as a whole. Furthermore, ERS members
9 are not foreclosed from collecting ERS service retirement, ERS
10 ordinary disability retirement, ERS ordinary death, workers'
11 compensation, or social security disability; the ERS's service-
12 connected disability retirement and accidental death programs
13 should therefore not be awarded in a manner similar to an award
14 of ERS service retirement, ERS ordinary disability retirement,
15 ERS ordinary death, workers' compensation, and social security
16 disability benefits.

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

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

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

3 "Accident":

4 (1) Means a single traumatic unlooked-for mishap or
5 untoward event that:

6 (A) Is not expected or designed;

7 (B) Is not a risk inherent in the member's
8 performance of routine or normal job duties;

9 (C) Interrupts the member's performance of routine or
10 normal job duties; and

11 (D) Precedes and precipitates:

12 (i) A medical condition, injury, disability, or
13 symptom of the foregoing that naturally and
14 proximately results in the member's
15 permanent incapacity for duty; or

16 (ii) Death of the member; and

17 (2) Does not include:

18 (A) A medical condition, injury, disability, mental
19 or physical incapacity, symptom of the foregoing,
20 or death itself; and

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1 (B) An unexpected result of a routine performance of
2 duty, without external force or unusual stress or
3 strain.

4 "Actual performance of duty": means the performance of
5 duty:

6 (1) Of the position, appointment, or office on which the
7 member's membership in the system is based, and for
8 which all contributions required to be made to the
9 system by the employee or the employer, or both, have
10 been made;

11 (2) During the working hours of the position, appointment,
12 or office; and

13 (3) At either:

14 (A) The work premises of the position, appointment,
15 or office; or

16 (B) Wherever the member's duties of the position,
17 appointment, or office require the member to be.

18 "Occupational hazard":

19 (1) Means danger or risk inherent in, and concomitant to,
20 a particular occupation, the causative factors of
21 which are not ordinarily incident to employment in

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1 general, and are different in character from those
2 found in the general run of occupations; and

3 (2) Does not include:

4 (A) A job-related condition that results in
5 incapacitation for further performance of duty or
6 death, without a danger or risk inherent in, and
7 concomitant to, a particular occupation;

8 (B) Work activities that are common to many
9 occupations, such as repetitive motion of hands
10 and arms, lifting, and carrying; and

11 (C) Dangers or risks that are particular to a
12 member's workplace, but not particular to the
13 member's occupation as a whole, such as a lack of
14 proper tools or malfunctioning equipment at the
15 workplace.

16 "Incapacitated for duty" and "incapacitated for the further
17 performance of duty":

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

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1 system by the employee or the employer, or both, have
2 been made; and

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

11 "Some definite time and place": means

12 (1) An exact time or time period that is identified, is
13 limited and short in duration, and does not include
14 more than a single work shift, and

15 (2) An exact place or geographic location that is
16 identified and is of a limited and small size."

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

19 ""Accidental death": means death that is the natural and
20 proximate result of an accident occurring at some definite time
21 and place while the member [~~was employed in a position in which~~
22 ~~all contributions required to be made to the employees'~~

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1 ~~retirement system by the employee or the employer, or both, have~~
2 ~~been made,]~~ was in the actual performance of duty, or due to the
3 result of some occupational hazard, and not caused by wilful
4 negligence on the part of the member."

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

7 **"§88-79 Service-connected disability retirement.**

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

20 (1) In the case of an accident occurring after July 1,
21 1963, the employer shall file with the system a copy

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1 of the employer's report of the accident submitted to
2 the director of labor and industrial relations;

3 (2) An application for retirement is filed with the system
4 within two years of the date of the accident, or the
5 date upon which workers' compensation benefits cease,
6 whichever is later;

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

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

18 (b) The member or applicant initiating the proceeding
19 shall have the burden of proof, including the burden of
20 producing evidence as well as the burden of persuasion. The
21 degree or quantum of proof shall be a preponderance of the
22 evidence. The member or applicant shall have the responsibility

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

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

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1 purpose of determining occupational disability retirement under
2 this section.

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

18 [~~(e)~~] (d) The system may waive strict compliance with the
19 time limits within which a report of the accident and an
20 application for service-connected disability retirement must be
21 filed with the system if it is satisfied that the failure to
22 file within the time limited by law was due to ignorance of fact

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1 or law, inability, or to the fraud, misrepresentation, or deceit
2 of any person, or because the applicant was undergoing treatment
3 for the disability or was receiving vocational rehabilitation
4 services occasioned by the disability.

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

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

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

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

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

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1 "§88-82 Petition for contested case hearing regarding
2 **disability retirement or accidental death benefits; attorney's**
3 **fees and costs.** (a) A member or applicant who is not satisfied
4 with the preliminary decision of the board to grant or deny an
5 application for disability retirement benefits or accidental
6 death benefits based on the certifications and findings of the
7 medical board may file a petition for contested case hearing
8 with the board within sixty days after receiving written
9 notification of the preliminary decision of the board.

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

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1 evidence that the member's permanent incapacity was not
2 primarily caused by the pre-existing condition.

3 [~~b~~] (c) If the member or applicant is the prevailing
4 party in the contested case, and disability retirement or
5 accidental death benefits are awarded to the member or applicant
6 by the board or court of the appropriate jurisdiction under
7 section 88-75, 88-79, 88-85, 88-284, 88-285, 88-286(c), 88-334,
8 88-336, or 88-339, the member or applicant shall be paid
9 reasonable attorney's fees together with any costs payable by
10 the system. The attorney's fees and costs shall be subject to
11 the approval of the board or approval by a court of appropriate
12 jurisdiction after evidence has been provided by the member or
13 applicant regarding the reasonableness of the claimed attorney's
14 fees and costs."

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

17 "**§88-85.5 Applications for accidental death benefits;**
18 **approval by the system.** (a) Under rules the board of trustees
19 may adopt, an application for service-connected accidental death
20 benefits may be filed with the system by or on behalf of the
21 claimant pursuant to section 88-85, 88-286, or 88-339, on a form

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1 provided by the system. The application shall be filed no later
2 than three years from the date of the member's death.

3 (b) After the claimant files an application for service-
4 connected accidental death benefits, the system shall obtain the
5 following:

6 (1) A copy of the employer's report of the accident
7 submitted by the employer to the department of labor
8 and industrial relations, workers' compensation
9 division, and other reports relating to the accident;

10 (2) A certified statement from the head of the department
11 in which the deceased member was employed, stating the
12 date, time, and place of the accident, and the nature
13 of the service being performed when the accident
14 occurred. The statement shall also include an opinion
15 as to whether or not the accident was the result of
16 wilful negligence on the deceased member's part;

17 (3) A copy of the latest position description of the
18 deceased member's duties and responsibilities;

19 (4) A certified copy of the death certificate; and

20 (5) A copy of an autopsy report, if performed.

21 (c) Upon the system's receipt of the application and
22 documents specified in subsection (b), the medical board or

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1 other entity designated by the board of trustees shall determine
2 and certify to the system whether the member's death was an
3 accidental death as defined in section 88-21.

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

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

21 (1) A certification made by the head of the agency in
22 which the member is employed; or

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1 (2) A finding by the medical board or other entity
2 designated by the board of trustees.

3 [~~(e)~~] (f) After the medical board or other entity
4 designated by the board of trustees submits its certification to
5 the system, the system shall approve or disapprove the
6 application. Upon approval of an application, benefits shall be
7 paid as provided in section 88-85, 88-286, or 88-339."

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

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

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

21 "**§88-336 Service-connected disability retirement.**

22 (a) Under rules the board of trustees may adopt, upon

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

12 (1) In the case of an accident occurring after July 1,
13 1963, the employer shall file with the system a copy
14 of the employer's report of the accident submitted to
15 the director of labor and industrial relations;

16 (2) An application for retirement is filed with the system
17 within two years of the date of the accident, or the
18 date upon which workers' compensation benefits cease,
19 whichever is later;

20 (3) Certification is made by the head of the agency in
21 which the member is employed, stating the time, place,
22 and conditions of the service performed by the member

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1 resulting in the member's disability and that the
2 disability was not the result of wilful negligence on
3 the part of the member; and

4 (4) The medical board or other entity designated by the
5 board of trustees certifies that the member is
6 incapacitated for the further performance of duty at
7 the time of application and that the member's
8 incapacity is likely to be permanent.

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

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1 evidence that the member's permanent incapacity was not
2 primarily caused by the pre-existing condition.

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

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

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1 ~~(e)~~ (d) The system may waive strict compliance with the
2 time limits within which a report of the accident and an
3 application for service-connected disability retirement must be
4 filed with the system if it is satisfied that the failure to
5 file within the time limited by law was due to ignorance of fact
6 or law, inability, or the fraud, misrepresentation, or deceit of
7 any person, or because the applicant was undergoing treatment
8 for the disability, or was receiving vocational rehabilitation
9 services occasioned by the disability.

10 ~~(d)~~ (e) The system may determine whether the disability
11 is the result of an accident occurring while in the actual
12 performance of duty at some definite time and place and that the
13 disability was not the result of wilful negligence on the part
14 of the member. The system may accept as conclusive:

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

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

19 ~~(e)~~ (f) Upon approval by the system, the member shall be
20 eligible to receive a service-connected disability retirement
21 benefit after the member has terminated service. Retirement
22 shall be effective on the first day of a month, except for the

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1 month of December when retirement on the first or last day of
2 the month shall be allowed."

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

5 SECTION 9. This Act shall take effect upon its approval
6 and shall apply to applications and claims filed after its
7 effective date.

8

9

INTRODUCED BY:



BY REQUEST

10

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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.*

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JUSTIFICATION SHEET

DEPARTMENT: Budget and Finance

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

PURPOSE: Clarify the requirements of service-connected disability retirement and accidental death benefits of the Employees' Retirement System ("ERS") to reduce future increases to the unfunded liability of the ERS and supports the legislative intent.

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 that 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,

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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 and shall apply to applications and claims filed after its effective date.