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



1 assault, and infliction of emotional distress, or invasion of
2 privacy).

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



1 First Circuit, recently rendered rulings awarding ERS service-
2 connected disability retirement and accidental death benefits
3 beyond the legislature's original intent.

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

20 If there is any perceived ambiguity regarding the
21 legislative intent of the ERS's service-connected disability



1 retirement and accidental death statutes, as reflected in recent
2 court decisions, this Act addresses such perceived ambiguities.

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

5 1. By adding five new definitions to be appropriately
6 inserted and to read as follows:

7 ""Accident"":

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

10 (A) Is not expected or designed;

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

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

15 (D) Precedes and precipitates:

16 (i) A medical condition, injury, disability, or
17 symptom of the foregoing that naturally and
18 proximately results in the member's
19 permanent incapacity for duty; or

20 (ii) Death of the member; and

21 (2) Does not include:



1 (A) A medical condition, injury, disability, mental
2 or physical incapacity, symptom of the foregoing,
3 or death itself; and

4 (B) An unexpected result of a routine performance of
5 duty, without external force or unusual stress or
6 strain.

7 "Actual performance of duty" means the performance of duty:

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

13 (2) During the work hours of the position, appointment, or
14 office; and

15 (3) At either:

16 (A) The work premises of the position, appointment,
17 or office; or

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

20 "Definite and exact time and place" means:



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

4 (2) An exact place or geographic location that is
5 identified and is of a limited and small size.

6 "Incapacitated for duty" and "incapacitated for the further
7 performance of duty":

8 (1) Means incapacitated for duties prescribed in the
9 official position description or actual job duties of
10 the position, appointment, or office on which the
11 member's membership in the system is based, and for
12 which all contributions required to be made to the
13 system by the employee or the employer, or both, have
14 been made; and

15 (2) Does not include incapacitated for duties under
16 environmental conditions particular to the member's
17 position, appointment, or office, such as a particular
18 location in proximity to or under the supervision of
19 particular individuals, or under other particular
20 environmental conditions, but not incapacitated for



1 duties of the position, appointment, or office as a
2 whole.

3 "Occupational hazard":

4 (1) Means danger or risk inherent in, and concomitant to,
5 a particular occupation, the causative factors of
6 which are not ordinarily incident to employment in
7 general, and are different in character from those
8 found in the general run of occupations; and

9 (2) Does not include:

10 (A) A job-related condition that results in
11 incapacitation for further performance of duty or
12 death, without a danger or risk inherent in, and
13 concomitant to, a particular occupation;

14 (B) Work activities that are common to many
15 occupations, such as repetitive motion of hands
16 and arms, lifting, and carrying; and

17 (C) Dangers or risks that are particular to a
18 member's workplace, but not particular to the
19 member's occupation as a whole, such as a lack of
20 proper tools or malfunctioning equipment at the
21 workplace."



2. By amending the definition of "accidental death" to read as follows:

"Accidental death" means death of a member while employed in a position in which all contributions required to be made to the employees' retirement system by the employee or the employer, or both, have been made, that is the natural and proximate result of an accident occurring at ~~[some]~~ a definite and exact time and place while the member ~~[was employed in a position in which all contributions required to be made to the employees' retirement system by the employee or the employer, or both, have been made,]~~ was in the actual performance of duty~~[r]~~ of the position, appointment, or office upon which the employee's membership is based, and not caused by wilful negligence on the part of the member."

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

"§88-79 Service-connected disability retirement. (a) Under rules the board of trustees may adopt, upon application of a member, or the person appointed by the family court as guardian of an incapacitated member, any member while employed



1 in a position in which all contributions required to be made to
2 the employees' retirement system by the employee or the
3 employer, or both, have been made, who has been permanently
4 incapacitated for duty as the natural and proximate result of an
5 accident occurring at a definite and exact time and place while
6 in the actual performance of duty [~~at some definite time and~~
7 ~~place,~~] or as the cumulative result of [~~some~~] an occupational
8 hazard[~~,~~] of the position, appointment, or office upon which the
9 member's membership is based, through no wilful negligence on
10 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,



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

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

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 at a definite and exact time and place while
14 in the actual performance of duty. 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 an occupational hazard of the position, appointment,
18 or office upon which the member's membership is based, unless
19 the pre-existing condition itself was caused by the occupational
20 hazard. In the case of an application for service-connected
21 disability retirement, where there is evidence that the member



1 claiming permanent incapacity had a pre-existing condition, the
2 member shall have the burden of proving by a preponderance of
3 the evidence that the member's permanent incapacity was not
4 primarily caused by the pre-existing condition.

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

14 Notwithstanding any other law to the contrary, any
15 condition of impairment of health caused by any disease of the
16 heart, lungs, or respiratory system, resulting in permanent
17 incapacity to a firefighter, police officer, or sewer worker,
18 shall be presumed to have been suffered in the actual
19 performance of duty in such position, at ~~[some]~~ a definite and
20 exact time and place, through no wilful negligence on the
21 firefighter's, police officer's, or sewer worker's part, and as



1 a result of the inherent occupational hazard of such position,
2 of exposure to and inhalation of smoke, toxic gases, chemical
3 fumes, and other toxic vapors, unless the contrary be shown by
4 competent evidence; provided that [~~such~~] the firefighter, police
5 officer, or sewer worker shall have passed a physical
6 examination on entry into [~~such~~] service or subsequent to [~~such~~]
7 entry[~~7~~] into service, which examination failed to reveal any
8 evidence of [~~such~~] the condition.

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

18 [~~(d)~~] (e) The system may determine whether [~~or not~~] the
19 disability is the result of an accident occurring while in the
20 actual performance of duty at [~~some~~] a definite and exact time
21 and place, and that the disability was not the result of wilful



1 negligence on the part of the member. The system may accept as
2 conclusive:

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

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

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

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

15 **"§88-82 Petition for contested case hearing regarding**
16 **disability retirement or accidental death benefits; attorney's**
17 **fees and costs.** (a) A member or applicant who is not satisfied
18 with the preliminary decision of the board to grant or deny an
19 application for disability retirement benefits or accidental
20 death benefits based on the certifications and findings of the
21 medical board may file a petition for contested case hearing



1 with the board within sixty days after receiving written
2 notification of the preliminary decision of the board.

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



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

13 SECTION 5. Section 88-85.5, Hawaii Revised Statutes, is
14 amended to read as follows:

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



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

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

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

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

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

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

19 (c) Upon the system's receipt of the application and
20 documents specified in subsection (b), the medical board or
21 other entity designated by the board of trustees shall determine



1 and certify to the system whether the member's death was an
2 accidental death as defined in section 88-21.

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



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

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

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

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

"(a) The following words and phrases as used in this part shall have the same meanings as defined in section 88-21, unless a different meaning is plainly required by the context:

"accident"; "accidental death"; "accumulated contributions";
"actual performance of duty"; "actuarial equivalent"; "average
final compensation"; "beneficiary"; "board"; "county"; "definite
and exact time and place"; "employee"; "incapacitated for duty;"
"incapacitated for the further performance of duty;" "medical
board"; "occupational hazard"; "retirant"; "retirement
allowance"; "service"; and "system"."



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

"§88-336 Service-connected disability retirement. (a)

Under rules the board of trustees may adopt, upon application of a class H member, or the person appointed by the family court as guardian of an incapacitated member, any class H member, employed in a position in which all contributions required to be made to the employees' retirement system by the employee or the employer, or both, have been made, who has been permanently incapacitated for duty as the natural and proximate result of an accident occurring at a definite and exact time and place while in the actual performance of duty [~~at some definite time and place~~] or as the cumulative result of some occupational hazard[~~r~~] of the position, appointment, or office upon which the member's membership is based, through no wilful negligence on the member's part, may be retired by the system for service-connected disability; provided that:

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



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

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

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

16 (b) Permanent incapacity that is primarily caused by the
17 natural deterioration, degeneration, or progression of a pre-
18 existing condition is not the natural and proximate result of an
19 accident occurring at some definite and exact time and place
20 while in the actual performance of duty. Permanent incapacity
21 that is primarily caused by the natural deterioration,



1 degeneration, or progression of a pre-existing condition is not
2 the cumulative result of some occupational hazard of the
3 position, appointment, or office upon which the member's
4 membership is based, unless the pre-existing condition itself
5 was caused by the occupational hazard. In the case of an
6 application for service-connected disability retirement, where
7 there is evidence that the member claiming permanent incapacity
8 had a pre-existing condition, the member shall have the burden
9 of proving by a preponderance of the evidence that the member's
10 permanent incapacity was not primarily caused by the pre-
11 existing condition.

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

20 Notwithstanding any other law to the contrary, any
21 condition of impairment of health caused by any disease of the



1 heart, lungs, or respiratory system resulting in permanent
2 incapacity to a sewer worker shall be presumed to have been
3 suffered in the actual performance of duty in such position, at
4 ~~[some]~~ a definite and exact time and place through no wilful
5 negligence on the sewer worker's part, and as a result of the
6 inherent occupational hazard of such position, of exposure to
7 the inhalation of smoke, toxic gases, chemical fumes, and other
8 toxic vapors, unless the contrary be shown by competent
9 evidence; provided that the 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 the fraud, misrepresentation, or deceit of
19 any person, or because the applicant was undergoing treatment
20 for the disability, or was receiving vocational rehabilitation
21 services occasioned by the disability.



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

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

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

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

17 SECTION 8. Section 88-339, Hawaii Revised Statutes, is
18 amended by amending subsection (b) to read as follows:

19 "(b) Notwithstanding any other law to the contrary, any
20 condition of impairment of health caused by any disease of the
21 heart, lungs, or respiratory system, resulting in death to a



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

12 SECTION 9. This Act does not affect rights and duties that
13 matured, penalties that were incurred, and proceedings that were
14 begun before its effective date.

15 SECTION 10. Statutory material to be repealed is bracketed
16 and stricken. New statutory material is underscored.

17 SECTION 11. This Act shall take effect on December 25,
18 2040.



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. Effective 12/25/2040. (HD1)

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

