

## ACT 245

H.B. NO. 1608

A Bill for an Act Relating to Voluntary Employees' Beneficiary Association Trusts.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The purpose of this Act is to allow for the temporary establishment of an employee organization sponsored trust that would provide health benefits for state and county employees of a particular bargaining unit, as well as future retirees of that bargaining unit and existing retirees who wish to participate in such a trust. The trust would be established as a voluntary employees' beneficiary association (VEBA) trust pursuant to section 501(c)(9) of the Internal Revenue Code of 1986, as amended. The trust would be funded by employer contributions negotiated pursuant to a collective bargaining agreement and employee contributions to be determined by the trust's board of trustees for active employees. The Act imposes on the trust all of the standards and requirements of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Even if the trust is deemed to be a governmental plan exempt from ERISA, the legislative intent is that the trust must comply with the standards and requirements of ERISA as a matter of state law and that such shall be enforced by the attorney general as well as participants, beneficiaries, and fiduciaries of the plan or plans established by the trust.

This Act also provides for retiree coverage for any employee who retires from the State or the counties who was a member of an employee organization that establishes a VEBA trust pursuant to a collective bargaining agreement effective on or after July 1, 2005. Existing retirees who are members of an employee organization and who were previously covered by a collective bargaining agreement will be provided a one-time opportunity to join the VEBA trust once established. Retiree coverage for existing retirees provided by an employee organization's VEBA trust would be funded by employer contributions made directly to the VEBA trust by the employer.

The requirement of establishing a VEBA trust in order to be exempt from participation in the Hawaii employer-union health benefits trust fund is intended to be a cost containment measure in response to the ever-increasing costs of health care throughout the state. However, because of the lack of data available on the impact of a VEBA trust on the Hawaii employer-union health benefits trust fund, this Act would allow the establishment of a VEBA trust pilot program for a period of three years. During this period, a thorough analysis of the costs and benefits of a VEBA trust can be evaluated against the Hawaii employer-union health benefits trust fund

to determine what actual savings could be realized by the State through this mechanism.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER  
VOLUNTARY EMPLOYEES’ BENEFICIARY ASSOCIATION TRUSTS**

**§ -1 Definitions.** As used in this chapter:

“Beneficiary” means a person designated by a participant, or by the terms of an employee welfare benefit plan, who is or may become entitled to a benefit thereunder.

“Collective bargaining agreement” means the formal written agreement over wages, hours, amounts of contributions by the State and counties to a trust established under this chapter, and other terms and conditions of employment, entered into between an employer and the exclusive representatives of the employees of the employer.

“Contribution” means money payments made to the trust by the State, counties, or a state or county employee.

“Employee” or “public employee” means any person employed by a public employer except elected and appointed officials and other employees excluded from coverage in section 89-6(g).

“Employee organization” means the employee organization as defined in section 89-2.

“Employee welfare benefit plan” or “plan” shall mean any plan, fund, or program which is established by the trust for the purpose of providing participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, or death.

“Employer” or “public employer” means “employer” or “public employer” as defined in section 89-2.

“Exclusive representative” means “exclusive representative” as defined in section 89-2.

“Fiduciary” means any person, with respect to a plan, to the extent that such person:

- (1) Exercises any discretionary authority or discretionary control respecting management of such plan or exercises authority or control respecting management or disposition of its assets;
- (2) Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has authority or responsibility to do so; or
- (3) Has any discretionary authority or discretionary responsibility in the administration of such plan.

Without limiting the foregoing, “fiduciary” shall include each trustee of the trust.

“Participant” means any employee or retiree who is a member of the trust and is eligible to receive benefits under an employee welfare benefit plan provided by or through the trust.

“Party in interest” means:

- (1) Any fiduciary, counsel, or employee of the trust;
- (2) A person providing services to the trust or its plans;
- (3) An employer, any of whose employees are covered by such plans; and
- (4) An employee organization, any of whose members are covered by the trust’s plans.

“Retiree” means an individual who has retired from the State or its counties.

“Trust” means a voluntary employees’ beneficiary association trust established under this chapter.

§ -2 **Establishment of the trust.** (a) An employee organization shall be exempt from chapter 87A and meet the following requirements in order to establish a voluntary employees’ beneficiary association trust under this chapter:

- (1) The employee organization shall establish a tax-exempt trust pursuant to Title 26 United States Code section 501(c)(9), as amended, and related regulations, known as a voluntary employees’ beneficiary association trust;
- (2) The trust may offer health benefits in accordance with Title 26 United States Code section 501(c)(9), as amended, and related regulations;
- (3) The trust shall meet all the standards and requirements applicable to employee welfare benefit plans under Title 29 United States Code sections 1001-1191, as amended, and related regulations. The assets of any plan provided by or through the trust shall not inure to the benefit of any employee organization and shall be held for the exclusive purposes of providing benefits to participants and beneficiaries and defraying reasonable expenses of administration; provided that this shall not preclude the trust from returning contributions or payments made by an employer under a mistake of fact within one year after the payment of the contributions or payments;
- (4) Each plan offered by the trust shall be established and maintained pursuant to a written instrument that:
  - (A) Provides a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this chapter;
  - (B) Describes any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan;
  - (C) Provides a procedure for amending the plan;
  - (D) Specifies the basis on which payments are made to and from the plan; and
  - (E) Provides a procedure for providing adequate notice in writing to any participant or beneficiary whose claim for benefits has been denied, setting forth the specific reasons for such denial, and affording a reasonable opportunity for any participant whose claim has been denied for a full and fair review. The written instrument shall meet any other standards and requirements of Title 29 United States Code section 1001-1191, as amended, and related regulations;
- (5) The trust shall provide a summary plan description, material modifications or amendments to the summary plan description, and updates to the summary plan description that meet the standards and requirements of this chapter;
- (6) All of the assets of the trust’s plans shall be held in trust by the governing board of the trust, at least one member of which shall be a retiree and a member of the employee organization sponsoring the trust.
- (7) The governing board of the trust shall hold regularly scheduled meetings open to all participants and beneficiaries and shall provide such persons with advance notice of all meetings; and
- (8) The employee organization shall have an applicable collective bargaining agreement with the employer; provided that the agreement

shall specify that the employee organization agrees to comply with all requirements of this chapter without regard to whether or not the trust is deemed a governmental plan under federal law.

§ -3 **Summary plan description.** (a) Each summary plan description provided under this chapter shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan shall be written in a manner calculated to be understood by the average participant.

- (b) The summary plan description shall contain the following information:
- (1) The name and type of administration of the plan;
  - (2) In the case of a group health plan, whether a health insurance issuer is responsible for the financing or administration (including payment of claims) of the plan and if so, the name and address of such issuer;
  - (3) The name and address of the person designated as agent for the service of legal process, if such person is not the administrator;
  - (4) The name and address of the administrator;
  - (5) The names, titles, and addresses of any trustee or trustees;
  - (6) A description of the relevant provisions of any applicable collective bargaining agreement;
  - (7) The plan's requirements respecting eligibility for participation and benefits;
  - (8) Circumstances that may result in disqualification, ineligibility, or denial or loss of benefits;
  - (9) The source of financing of the plan and the identity of any organization through which benefits are provided;
  - (10) The date of the end of the plan year and whether records of the plan are kept on a calendar, policy, or fiscal year basis; and
  - (11) The procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan procedures.

The summary plan description shall contain any other information required under Title 29 United States Code sections 1001-1191, as amended, and related regulations.

§ -4 **Annual report.** (a) The trust shall publish an annual report with respect to every employee welfare benefit plan to which this chapter applies. The report shall be filed with the department of accounting and general services and the respective departments of the counties as their interests may appear.

- (b) The annual report shall contain the following:
- (1) The number of employees, retirees, and other persons covered by the plan;
  - (2) The name and address of each fiduciary;
  - (3) Except in the case of a person whose compensation is minimal and who performs solely ministerial duties, the name of each person (including but not limited to any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding plan year for services rendered to the plan or its participants, the amount of such compensation, the nature of the person's services to the plan or its participants, the person's relationship to the employee organization, and any other office, position, or employment that the person holds with a party in interest;

- (4) An explanation of the reason for any change in appointment of any trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian; and
- (5) A financial statement that meets the requirements of this chapter.

The annual report shall contain any other information required by Title 29 United States Code sections 1001-1191, as amended, and related regulations.

(c) The financial statement of the annual report shall contain the following information with respect to an employee welfare benefit plan:

- (1) A statement of assets and liabilities;
- (2) A statement of changes in fund balance;
- (3) A statement of changes in financial position;
- (4) A statement of receipts and disbursements during the preceding twelve-month period;
- (5) A schedule of all assets held for investment purposes;
- (6) A schedule of each transaction involving a person known to be a party in interest;
- (7) A schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectible;
- (8) A list of all leases that were in default or were classified during the year as uncollectible;
- (9) If some or all of the assets of the plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust, such other information as is required by the administrator in order to comply with this chapter; and
- (10) A schedule of each reportable transaction.

The financial statement shall contain any other information required under Title 29 United States Code sections 1001-1191, as amended, and regulated regulations.

**§ -5 Filing and furnishing of information requirements.** (a) Once established, the trust shall comply with all the form and report filing requirements imposed on the trust by the Internal Revenue Service and Title 29 United States Code sections 1001-1191, as amended, and regulated regulations.

(b) Within two hundred ten days of the closing of each plan year, the trust shall provide an annual report for each employee welfare benefit plan covered by this chapter to the department of accounting and general services and the respective departments of the counties as their interests may appear. The annual reports shall be government records open to public inspection.

(c) The trust shall provide summary plan descriptions to each participant and beneficiary of each employee welfare benefit plan covered by this chapter within ninety days of a participant becoming enrolled in a plan or within ninety days of a beneficiary first receiving benefits under a plan. No less than every fifth year after a plan is established, the trust shall provide updated summary plan descriptions to each participant and beneficiary. If a material modification or amendment is made to a plan, the trust shall provide a summary description of such modification or amendment to each participant or beneficiary within two hundred ten days after the plan year in which the modification or amendment is made.

(d) Upon request of any participant or beneficiary, the trust shall provide such person with the latest updated summary plan description, the latest annual

report, the applicable collective bargaining agreement, the trust agreement, and any other instruments under which the trust and plan were established or are operated.

(e) The trust shall file a copy of all documents referenced in subsections (a) and (c) with the department of human resources development and the respective departments of the counties as their interests may appear.

**§ -6 Fiduciary duties; prohibited transactions.** (a) A fiduciary of the trust shall with respect to a plan comply with all fiduciary duties imposed on fiduciaries under Title 29 United States Code sections 1001-1191, as amended, and regulated regulations.

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

- (1) For the exclusive purpose of:
  - (A) Providing benefits to participants and their beneficiaries; and
  - (B) Defraying reasonable expenses of administering the plan;
- (2) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity and familiar with those matters would use in the conduct of an enterprise of a similar character and with like aims;
- (3) By diversifying the investments of the plan so as to minimize the risk of large losses, unless, under the circumstances, it is clearly prudent not to do so; and
- (4) In accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this chapter.

(c) In addition to any liability that a fiduciary may have under this chapter, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

- (1) If the fiduciary participates knowingly in, or knowingly undertakes to conceal, an act or omission of the other fiduciary, knowing that act or omission is a breach;
- (2) If, by the fiduciary's failure to comply with subsection (a) or (b), the fiduciary has been enabled such other fiduciary to commit breach; or
- (3) If the fiduciary has knowledge of the breach by such other fiduciary, unless the fiduciary makes reasonable efforts under the circumstances to remedy the breach.

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

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

- (1) Sale or exchange, or leasing, of any property between the plan and a party in interest;
- (2) Lending of money or other extension of credit between the plan and a party in interest;
- (3) Furnishing of goods, services, or facilities between the plan and a party in interest; or
- (4) Transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

(e) A fiduciary shall not:

- (1) Deal with the assets of the plan in the fiduciary's own interest or for the fiduciary's own account;
- (2) In the fiduciary's individual capacity or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party)

whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries; or

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

**§ -7 Liability for breach of fiduciary duty.** (a) Any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by this chapter shall be personally liable to make good to the plan any losses to the plan resulting from each breach, and to restore to the plan any profits of the fiduciary that have been made through the use of assets of the plan by the fiduciary, and shall be subject to any other equitable and remedial relief as the court may deem appropriate, including removal of the fiduciary.

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

- (1) A plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary in the case of a breach of a fiduciary obligation by the fiduciary, if the insurance permits recourse by the insurer against the fiduciary in the case of a breach of fiduciary obligation by the fiduciary;
- (2) A fiduciary from purchasing insurance to cover liability under this chapter from and for the fiduciary's own account; or
- (3) An employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee welfare benefit plan.

**§ -8 State and county contributions to the trust; active employees.** Upon the establishment of a voluntary employees' beneficiary association trust, the State, through the department of budget and finance, the counties through their respective departments of finance, shall pay to the trust a monthly contribution equal to the amount specified in the applicable public sector collective bargaining agreement from July 1, 2005, and thereafter.

**§ -9 State and county contributions to the trust; retired employees.** (a) Any individual who becomes a retiree on or after the establishment of a voluntary employees' beneficiary association trust, and who, immediately prior to retirement, was a member of the bargaining unit of the sponsoring employee organization, shall be enrolled in that voluntary employees' beneficiary association trust. Upon the establishment of a voluntary employees' beneficiary association trust, the State, through the department of budget and finance, and the counties through their respective departments of finance, shall pay to the trust for each retiree who retires on or after July 1, 2005, a monthly contribution pursuant to the applicable collective bargaining agreement that shall not exceed the base monthly contributions or the specific contribution limits set forth in chapter 87A.

(b) Any retiree who, immediately prior to retirement, was a member of an employee organization prior to the establishment of a voluntary employees' beneficiary association trust by the employee organization, and who was previously covered by a collective bargaining agreement, shall be given a one-time option to transfer participation from the Hawaii employer-union health benefits trust fund established under chapter 87A to the organization's voluntary employees' beneficiary association trust once the latter is established. Upon the establishment of the voluntary employees' beneficiary association trust, the State, through the depart-

ment of budget and finance and the counties, through their respective departments of finance, shall pay to the trust for each retiree who opts to transfer into a voluntary employees' beneficiary association trust, a monthly contribution equal to the contribution paid on behalf of a similarly situated retiree under the Hawaii employer-union health benefits trust fund.

(c) Medicare part B reimbursements established pursuant to section 87A-23(2) shall be directly disbursed by the State, through the department of budget and finance, and the counties, through their respective departments of finance, to those retirees and their beneficiaries who qualify and are covered by a voluntary employees' beneficiary association trust to the same extent retirees and their beneficiaries under the Hawaii employer-union health benefits trust fund receive those reimbursements.

(d) For the purposes of this chapter, a collective bargaining agreement shall include provisions specifying contributions to a voluntary employees' beneficiary association trust.

**§ -10 Termination of the trust.** If an employee organization or a collective bargaining agreement that establishes a voluntary employees' beneficiary association trust terminates the voluntary employees' beneficiary association trust, or ceases to provide health benefits, the participants in the trust shall be allowed to return to the Hawaii employer-union health benefits trust fund upon the date that health benefits cease to be provided. All participants electing to return to the Hawaii employer-union health benefits trust fund shall be given the same rights and benefits as if the participant had first participated in the Hawaii employer-union health benefits trust fund from the inception of that trust fund without loss of benefits or accrued time.

**§ -11 Violation of the chapter; enforcement.** (a) A civil action may be brought by a participant, beneficiary, or fiduciary:

- (1) For relief, if a trust fails to provide any information required under this chapter, or if a trust fails to comply with any request for information that the trust is required to furnish to the participant or beneficiary;
- (2) To recover benefits due the participant or beneficiary under the terms of the plan, or to enforce the participant's or beneficiary's rights under the terms of the plan, or to clarify the participant's or beneficiary's rights to future benefits under the terms of the plan;
- (3) For appropriate relief against any breach of fiduciary duty under section -7; or
- (4) To enjoin any act or practice that violates any provision of this chapter or the terms of the plan, or to obtain any other appropriate equitable relief, or to redress such violations, or to enforce any provisions of this chapter or the terms of the plan.

(b) A civil action may be brought by the attorney general:

- (1) For relief, if a trust fails to provide any information required by this chapter, or if a trust fails to comply with any request for information that the trust is required to furnish any state or county department;
- (2) To enjoin any act or practice that violates any provision of this chapter;
- (3) To redress the violations;
- (4) To enforce any provision of this chapter; or
- (5) To suspend contributions from the State and counties made pursuant to a collective bargaining agreement required under section -2(a)(8) made to any trust established under this chapter.

(c) The attorney general shall have the power, in order to determine whether any person has violated or is about to violate any provision of this chapter:

- (1) To conduct an investigation and in connection therewith to require submission of reports, books, and records, and the filing of data in support of any information required to be filed under this chapter; and
- (2) To enter any place, inspect any books and records, and question any persons as the attorney general may deem necessary to enable the attorney general to determine the facts relative to an investigation.

For purposes of any investigation provided for in this chapter, the attorney general may utilize the investigation procedures set forth in section 480-18 and the remedies and penalties of that section are hereby made applicable.

(d) The rights and remedies provided in this section are in addition to any rights or remedies that the participants, beneficiaries, fiduciaries, attorney general, or other state or federal agencies may have over the trust, the plans provided by or through the trust, and fiduciaries of the plans.

**§ -12 Insurance; immunity of State and counties.** (a) The employee organization or the trust's governing board shall procure:

- (1) Fiduciary liability insurance and errors and omissions coverage for members of the governing board; and
- (2) A fidelity bond of a reasonable amount for the chairperson of the governing board and any other person authorized to handle trust moneys.

(b) Notwithstanding any law to the contrary, the State and the counties, and their officers, agents, and employees, shall not be liable for any benefits provided by a trust or which it fails to provide, any losses suffered by a trust, and any losses, damages, or penalties arising out of the operations of a trust or the acts or omissions of a trust's governing board or any fiduciary of a trust."

SECTION 3. Section 89-2, Hawaii Revised Statutes, is amended by amending the definitions of "employee" or "public employee" and "employee organization" to read as follows:

"'Employee' or 'public employee' means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section ~~[[89-6(f)]]~~ 89-6(g).

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii ~~[public employees health]~~ employer-union health benefits trust fund ~~[;]~~ or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees."

SECTION 4. Section 89-3, Hawaii Revised Statutes, is amended to read as follows:

"**§89-3 Rights of employees.** Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit contributions, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4."

SECTION 5. Section 89-6, Hawaii Revised Statutes, is amended to read as follows:

**“§89-6 Appropriate bargaining units.** (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

- (1) Nonsupervisory employees in blue collar positions;
- (2) Supervisory employees in blue collar positions;
- (3) Nonsupervisory employees in white collar positions;
- (4) Supervisory employees in white collar positions;
- (5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent;
- (6) Educational officers and other personnel of the department of education under the same pay schedule;
- (7) Faculty of the University of Hawaii and the community college system;
- (8) Personnel of the University of Hawaii and the community college system, other than faculty;
- (9) Registered professional nurses;
- (10) Institutional, health, and correctional workers;
- (11) Firefighters;
- (12) Police officers; and
- (13) Professional and scientific employees, who cannot be included in any of the other bargaining units.

(b) Because of the nature of the work involved and the essentiality of certain occupations that require specialized training, supervisory employees who are eligible for inclusion in bargaining units (9) through (13) shall be included in bargaining units (9) through (13), respectively, instead of bargaining unit (2) or (4).

(c) The classification systems of each jurisdiction shall be the bases for differentiating blue collar from white collar employees, professional from institutional, health and correctional workers, supervisory from nonsupervisory employees, teachers from educational officers, and faculty from nonfaculty. In differentiating supervisory from nonsupervisory employees, class titles alone shall not be the basis for determination. The nature of the work, including whether a major portion of the working time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees, shall be considered also.

(d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:

- (1) For bargaining units (1), (2), (3), (4), (9), (10), and (13), the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the particular bargaining unit;
- (2) For bargaining units (11) and (12), the governor shall have four votes and the mayors shall each have one vote;
- (3) For bargaining units (5) and (6), the governor shall have three votes, the board of education shall have two votes, and the superintendent of education shall have one vote;
- (4) For bargaining units (7) and (8), the governor shall have three votes, the board of regents of the University of Hawaii shall have two votes, and the president of the University of Hawaii shall have one vote.

Any decision to be reached by the applicable employer group shall be on the basis of simple majority, except when a bargaining unit includes county employees from

more than one county. In such case, the simple majority shall include at least one county.

(e) In addition to a collective bargaining agreement under subsection (d), each employer may negotiate, independently of one another, supplemental agreements that apply to their respective employees; provided that any supplemental agreement reached between the employer and the exclusive representative shall not extend beyond the term of the applicable collective bargaining agreement and shall not require ratification by employees in the bargaining unit.

(f) For the purposes of negotiating contributions by the State and the counties to a voluntary employees' beneficiary association trust as part of a collective bargaining agreement, all prospective retirees who retire on or after July 1, 2005, shall be considered members of the bargaining unit to which they belonged immediately prior to their retirement from the State or the counties.

~~(f)~~ (g) The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:

- (1) Elected or appointed official;
- (2) Member of any board or commission;
- (3) Top-level managerial and administrative personnel, including the department head, deputy or assistant to a department head, administrative officer, director, or chief of a state or county agency or major division, and legal counsel;
- (4) Secretary to top-level managerial and administrative personnel under paragraph (3);
- (5) Individual concerned with confidential matters affecting employee-employer relations;
- (6) Part-time employee working less than twenty hours per week, except part-time employees included in bargaining unit (5);
- (7) Temporary employee of three months' duration or less;
- (8) Employee of the executive office of the governor or a household employee at Washington Place;
- (9) Employee of the executive office of the lieutenant governor;
- (10) Employee of the executive office of the mayor;
- (11) Staff of the legislative branch of the State;
- (12) Staff of the legislative branches of the counties, except employees of the clerks' offices of the counties;
- (13) Any commissioned and enlisted personnel of the Hawaii national guard;
- (14) Inmate, kokua, patient, ward, or student of a state institution;
- (15) Student help;
- (16) Staff of the Hawaii labor relations board; or
- (17) ~~[Employees]~~ Employee of the Hawaii national guard youth challenge academy.

~~(g)~~ (h) Where any controversy arises under this section, the board ~~[shall]~~, pursuant to chapter 91, shall make an investigation and, after a hearing upon due notice, make a final determination on the applicability of this section to specific individuals, employees, or positions."

SECTION 6. Section 89-9, Hawaii Revised Statutes, is amended as follows:  
1. By amending subsection (a) to read:

"(a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii

employer-union health benefits trust fund or a voluntary employees' beneficiary association trust to the extent allowed in subsection (e), and other terms and conditions of employment [which] that are subject to collective bargaining and [which] that are to be embodied in a written agreement as specified in section 89-10, but [such] the obligation does not compel either party to agree to a proposal or make a concession; provided that the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001."

2. By amending subsections (d) and (e) to read as follows:

"(d) Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund[;] or a voluntary employees' beneficiary association trust; recruitment[;] examination[;] initial pricing[;] and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal [which] that would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or [which] that would interfere with the rights and obligations of a public employer to:

- (1) Direct employees;
- (2) Determine qualifications, standards for work, and the nature and contents of examinations;
- (3) Hire, promote, transfer, assign, and retain employees in positions;
- (4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;
- (5) Relieve an employee from duties because of lack of work or other legitimate reason;
- (6) Maintain efficiency and productivity, including maximizing the use of advanced technology, in government operations;
- (7) Determine methods, means, and personnel by which the employer's operations are to be conducted; and
- (8) Take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

The employer and the exclusive representative may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit; the suspension, demotion, discharge, or other disciplinary actions taken against employees within the bargaining unit; and the layoff of employees within the bargaining unit. Violations of the procedures so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

(e) Negotiations relating to contributions to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust shall be for the purpose of agreeing upon the amounts [which] that the State and counties shall contribute under [section 87-4;] sections 87A-32 through 87A-37, toward the payment of the costs for a health benefits plan, as defined in section [87-1(8);] 87A-1 and group life insurance benefits, and the parties shall not be bound by the amounts contributed under prior agreements; provided that section 89-11 for the resolution of disputes by way of arbitration shall not be available to resolve impasses or disputes relating to the amounts the State and counties shall contribute to the Hawaii employer-union health benefits trust fund[;] or a voluntary employees' beneficiary association trust established under chapter \_\_\_\_\_."

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

**SECTION 8.** This Act shall take effect upon its approval, for the purpose of establishing a voluntary employees beneficiary association trust pilot program and shall be repealed on July 1, 2008; provided that sections 89-2, 89-3, 89-6, and 89-9, Hawaii Revised Statutes, are reenacted in the form in which they read on the day before the effective date of this Act.

(Became law on July 12, 2005, without the Governor's signature, pursuant to Art. III, §16, State Constitution.)