A BILL FOR AN ACT

RELATING TO EMPLOYEES' RETIREMENT SYSTEM DISABILITY RETIREMENT.

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

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

There are no similar policies or purposes behind the ERS's service-connected disability retirement and accidental death
provisions. Consequently, 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 the cases of Pasco v. Bd. of
Trustees of the Employees' Ret. Sys., 142 Haw. 373, 420 P.3d 304
(2018), as corrected (May 29, 2018), as corrected (June 4,
2018), as corrected (June 15, 2018), Stout v. Bd. of Trustees of
the Employees' Ret. Sys., 140 Haw. 177, 398 P.3d 766,
reconsideration denied, 141 Haw. 90, 404 P.3d 1279 (2017),
Panado v. Bd. of Trustees, Employees' Ret. Sys., 134 Haw. 1, 332
P.3d 144 (2014), and Fores v. Bd. of Trustees of the Employees'
Ret. Sys., Civ. 14-1-1270-06, Circuit Court of the First
Circuit, recently rendered rulings awarding ERS service-
connected disability retirement and accidental death benefits
beyond the legislature's original intent.
These rulings have required the ERS to provide service-
connected disability retirement and 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 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; the ERS's service-
connected disability retirement and accidental death programs
should therefore not be awarded in a manner similar to an award
of ERS service retirement, ERS ordinary disability retirement,
ERS ordinary death, workers' compensation, and social security
disability benefits.

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

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

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

""Accident":

BUF-14(20)
(1) Means a single traumatic unlocked-for mishap or untoward event which:

(A) Is not expected or designed; 

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

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

(D) Precedes and precipitates: 

(i) Medical condition, injury, disability, or symptom of the foregoing that naturally and proximately results in the member's permanent incapacity for duty; or 

(ii) Death of the member; and 

(2) Does not include: 

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

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

"Actual performance of duty": means the performance of duty:
(1) Of the position, appointment, or office on which the member's membership in the system is based, and for which all contributions required to be made to the system by the employee or the employer, or both, have been made;

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

(3) At either:

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

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

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

(1) Means incapacitated for duties prescribed in the official position description, or actual job duties, of the position, appointment, or office on which the member's membership in the system is based, and for which all contributions required to be made to the system by the employee or the employer, or both, have been made; and
(2) Does not include incapacitated for duties under environmental conditions particular to the member's position, appointment, or office, but not incapacitated for duties of the position, appointment, or office as a whole, such as an incapacitated for duties at a particular location, in proximity to or under the supervision of particular individuals, or under other particular environmental conditions.

"Occupational hazard":

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

(2) Does not include:

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

(B) Work activities that are common to many occupations, such as repetitive motion of hands and arms, lifting, and carrying; and
(C) Dangers or risks that are particular to a member's workplace, but not particular to the member's occupation as a whole, such as a lack of proper tools or malfunctioning equipment at the workplace.

"Some definite time and place": means

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

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

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

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

""Accidental death": means death that is the natural and proximate result of an accident occurring at some definite time and place while the member [was employed in a position in the system 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, or due to the result of some occupational hazard, 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 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 while in the actual performance of duty at some definite time and place, or as the cumulative result of some occupational hazard, 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;

(2) An application for retirement is filed with the system within two years of the date of the accident, or the
(3) Certification is made by the head of the agency in which the member is employed, stating the time, place, and conditions of the service performed by the member resulting in the member's disability and that the disability was not the result of wilful negligence on the part of the member; and

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

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

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

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

[d] The system may waive strict compliance with the time limits within which a report of the accident and an application for service-connected disability retirement must be filed with the system if it is satisfied that the failure to file within the time limited by law was due to ignorance of fact or law, inability, or to the fraud, misrepresentation, or deceit of any person, or because the applicant was undergoing treatment for the disability or was receiving vocational rehabilitation services occasioned by the disability.
The system may determine whether or not the disability is the result of an accident occurring while in the actual performance of duty at some definite time and place and that the disability was not the result of wilful negligence on the part of the member. The system may accept as conclusive:

1. The certification made by the head of the agency in which the member is employed; or
2. A finding to this effect by the medical board or other entity designated by the board of trustees.

Upon approval by the system, the member shall be eligible to receive a service-connected disability retirement benefit after the member has terminated service. Retirement shall become effective on the first day of a month, except for the month of December when retirement on the first or last day of the month shall be allowed."

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

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

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

(c) If the member or applicant is the prevailing party in the contested case, and disability retirement or accidental death benefits are awarded to the member or applicant
by the board or court of the appropriate jurisdiction under
88-336, or 88-339, the member or applicant shall be paid
reasonable attorney's fees together with any costs payable by
the system. The attorney's fees and costs shall be subject to
the approval of the board or approval by a court of appropriate
jurisdiction after evidence has been provided by the member or
applicant regarding the reasonableness of the claimed attorney's
fees and costs."

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

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

(b) After the claimant files an application for service-
connected accidental death benefits, the system shall obtain the
following:
(1) A copy of the employer's report of the accident submitted by the employer to the department of labor and industrial relations, workers' compensation division, and other reports relating to the accident;

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

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

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

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

(c) Upon the system's receipt of the application and documents specified in subsection (b), the medical board or other entity designated by the board of trustees shall determine and certify to the system whether the member's death was an accidental death as defined in section 88-21.

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

[+e+] (e) The system may accept as conclusive as to whether or not the member's death was caused by wilful 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"; "employee"; "medical board"; "occupational
hazard"; "retirant"; "retirement allowance"; "service"; "some
definite time and place"; and "system"."
cumulative result of some occupational hazard, 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;

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

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

(4) The medical board or other entity designated by the board of trustees certifies that the member is incapacitated for the further performance of duty at the time of application and that the member's incapacity is likely to be permanent.
(b) Permanent incapacity that is primarily caused by the natural deterioration, degeneration, or progression of a pre-existing condition is not the natural and proximate result of an accident occurring while in the actual performance of duty at some definite time and place. Permanent incapacity that is primarily caused by the natural deterioration, degeneration, or progression of a pre-existing condition is not the cumulative result of some occupational hazard, unless the pre-existing condition itself was caused by the occupational hazard. In the case of an application for service-connected disability retirement, where there is evidence that the member claiming permanent incapacity had a pre-existing condition, the member shall have the burden of proving by a preponderance of the evidence that the member's permanent incapacity was not primarily caused by the pre-existing condition.

(c) In the case of sewer workers, the effect of the inhalation of smoke, toxic gases, chemical fumes, and other toxic vapors on the heart, lungs, and respiratory system shall be construed as an injury received or disease contracted while in the performance of their duty and as the result of some occupational hazard for the purpose of determining occupational disability retirement under this section.
Notwithstanding any other law to the contrary, any
condition of impairment of health caused by any disease of the
heart, lungs, or respiratory system resulting in permanent
incapacity to a sewer worker shall be presumed to have been
suffered in the actual performance of duty at some definite time
and place through no wilful negligence on the sewer worker's
part, and as a result of the inherent occupational hazard of
exposure to the inhalation of smoke, toxic gases, chemical
fumes, and other toxic vapors, unless the contrary be shown by
competent evidence; provided that the sewer worker shall have
passed a physical examination on entry into such service or
subsequent to such entry, which examination failed to reveal any
evidence of such condition.

The system may waive strict compliance with the
time limits within which a report of the accident and an
application for service-connected disability retirement must be
filed with the system if it is satisfied that the failure to
file within the time limited by law was due to ignorance of fact
or law, inability, or the fraud, misrepresentation, or deceit of
any person, or because the applicant was undergoing treatment
for the disability, or was receiving vocational rehabilitation
services occasioned by the disability.
The system may determine whether the disability is the result of an accident occurring while in the actual performance of duty at some definite time and place and that the disability was not the result of wilful negligence on the part of the member. The system may accept as conclusive:

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

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

Upon approval by the system, the member shall be eligible to receive a service-connected disability retirement benefit after the member has terminated service. Retirement shall be effective on the first day of a month, except for the month of December when retirement on the first or last day of the month shall be allowed."

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

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

INTRODUCED BY: [Signature]

BY REQUEST
Report Title:
Employees' Retirement System; Service-Connected Disability; Accidental Death

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

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

<table>
<thead>
<tr>
<th>DEPARTMENT:</th>
<th>Budget and Finance</th>
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<tbody>
<tr>
<td>TITLE:</td>
<td>A BILL FOR AN ACT RELATING TO EMPLOYEES' RETIREMENT SYSTEM DISABILITY RETIREMENT.</td>
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<tr>
<td>PURPOSE:</td>
<td>This bill supports the legislative intent and clarifies the requirements of service-connected disability retirement and accidental death benefits of the Employees' Retirement System (&quot;ERS&quot;)</td>
</tr>
<tr>
<td>JUSTIFICATION:</td>
<td>The ERS's service-connected disability retirement and accidental death provisions do not contain a presumption favoring coverage, and should not be construed liberally in favor of awarding compensation for all injuries and death occurring in the workplace, regardless of questions of ERS membership position, negligence, proximate cause, the difference between an accident and injury/incapacity, and the burden of proof. Courts in several cases recently rendered rulings awarding ERS service-connected disability retirement and/or accidental death benefits beyond the legislature's original intent. These rulings have required the ERS to provide service-connected disability retirement and/or accidental death benefits which were never contemplated in determining employer contributions, employee contributions, and employee benefits (including monthly retirement allowance benefits to be provided for an extended duration and at a higher rate, plus the refund of employee contributions), and</td>
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BUF-14(20)
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.