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GOVERNOR



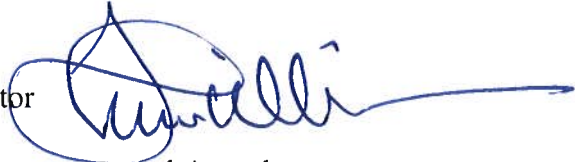
THOMAS WILLIAMS
EXECUTIVE DIRECTOR

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DEPUTY EXECUTIVE DIRECTOR

STATE OF HAWAII
EMPLOYEES' RETIREMENT SYSTEM

December 17, 2021

TO: State and County Directors

FROM: Thomas Williams, Executive Director 

SUBJECT: Employee/Employer Settlement Agreements and Awards

The purpose of this memorandum is to provide notice that ERS benefit eligibility determinations and calculations may not be made, and ERS benefits may not otherwise be provided, pursuant to awards and settlement agreements that resolve claims between employees and employers, by purportedly providing the employee with ERS membership, service credit, compensation for the calculation of pension allowance, retirement eligibility, or other ERS benefits.

For the reasons stated below, should the resolution of claims between an employee and employer hinge upon restitution for ERS membership, service credit, compensation, retirement eligibility, or other ERS benefit that the employee allegedly would have accrued, *arrangements should be made for the value of such restitution to be exchanged between the employee and the employer*, with the understanding that the ERS will not make ERS benefit eligibility determinations and calculations, or otherwise provide ERS benefits, pursuant to awards or agreements that are intended to or in fact resolve claims between employees and employers, and that the ERS will provide benefits only under conditions which comply with applicable statutory and regulatory requirements.

ERS membership, service credit, compensation, retirement eligibility, and other ERS benefits are governed by, and therefore may only be provided pursuant to, Hawaii Revised Statutes ("HRS") Chapter 88, Hawaii Administrative Rules ("HAR") Title 6, and the Internal Revenue Code ("IRC"). Compliance with awards and agreements that resolve claims between employees (current or former) and employers by purportedly providing ERS benefits, could result in the ERS's provision of ERS benefits contrary to governing statutes and rules, and may consequently place the ERS's IRS tax-exempt status at risk. Compliance with such awards and agreements may also result in the ERS's loss of actuarial value should there be untimely/retroactive employer and employee contributions, or employee accrual of benefits. Compliance with such awards and agreements may result in unanticipated and unjustified increases to the ERS's unfunded liability, should there be ex post facto adjustments of purported service, purported



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compensation, or other factors influencing ERS benefit eligibility and calculations, made in anticipation of the employee's retirement and/or receipt of ERS retirement benefits under the terms of an award or settlement, so as to have the ERS bear the cost of resolving disputes between employees and employers. Awards and agreements that resolve claims by purportedly having the ERS provide ERS benefits, may also be unenforceable pursuant to HRS § 663-10.5, which prohibits the imposition of liability upon the ERS for damages attributable to the employer unit of State or county government.

Accordingly, ERS benefit eligibility determinations and calculations may not be made, and ERS benefits may not otherwise be provided, pursuant to awards or agreements that resolve claims between employees and employers. ERS benefit eligibility determinations and calculations must be made, and ERS benefits must otherwise be provided, in accordance with HRS Chapter 88, HAR Title 6, and the IRC, including but not limited to requirements that ERS benefit eligibility determinations and calculations be made, and ERS benefits otherwise be provided, based on:

1. Service:
 - a. Actually rendered to or performed for the State or county;
 - b. As an employee of the State or county; and
 - c. In the position upon which the employee's membership is based;
2. Compensation (as defined by HRS § 88-21.5):
 - a. Paid as remuneration for service;
 - b. Paid by the State or county; and
 - c. Made in normal periodic payments;
3. Verification of service, compensation, and other factors influencing ERS benefit eligibility and calculations, through State or county personnel and payroll records:
 - a. Reported in compliance with the employer reporting requirements set forth in HRS Chapter 88 and HAR Title 6;
 - i. Contemporaneously with the period of time to which the record is applicable; or
 - ii. By adjustment, subject to a showing that retroactive adjustment is:
 1. Not made in anticipation of the employee's retirement and/or receipt of ERS retirement benefits under the terms of an award or settlement; and
 2. Is otherwise supported by the actual events, conditions and circumstances existing at the period of time to which the record is applicable; and
4. Employee and employer contributions paid in compliance with payment requirements set forth in HRS Chapter 88 and the IRC.

If you have any questions, please contact Kanoe Margol, Executive Director, at (808) 586-1702.

c: State and County Human Resource Directors