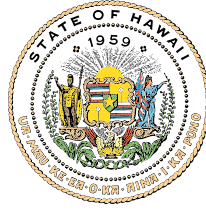


JOSH GREEN, M.D.
GOVERNOR




THOMAS WILLIAMS
EXECUTIVE DIRECTOR

KANOE MARGOL
DEPUTY EXECUTIVE DIRECTOR

STATE OF HAWAII
EMPLOYEES' RETIREMENT SYSTEM

December 28, 2023

TO: State and County Directors
Human Resources, Personnel and Payroll Officers

FROM: Thomas Williams, Executive Director
Employees' Retirement System 

SUBJECT: Employee/Employer Settlement Agreements
Act 46, Session Laws of Hawaii 2023

I am writing to provide notice of Act 46, Session Laws of Hawaii 2023, signed by Gov. Josh Green, M.D., on June 1, 2023. Act 46 allows service credits and compensation for the purposes of calculating Employees' Retirement System (ERS) benefits to include retroactive reinstatement, retroactive rescission of suspension, and back pay/retroactive payment, that are restored to an employee as part of a certified Final Resolution of Claims.

Act 46 (SLH 2023) can be found here:

https://www.capitol.hawaii.gov/sessions/session2023/bills/GM1146_.PDF

The requirements for certification of service and compensation by the ERS pursuant to Act 46 generally include (but are not limited to):

1. An employee's appeal or challenge to an employer's termination or suspension of employment, or denial of compensation available to comparable employees;
2. A final resolution of claims of the employee's appeal or challenge, that meets the requirements of Act 46, including but not limited to:
 - a. Provisions requiring the employer's retroactive reinstatement or retroactive rescission of termination or suspension of the employee, and retroactive adjustment of pay for the period and in the amount the employee would have earned had the employee not been terminated or suspended, or the employer's retroactive adjustment of pay in the amount the employee would have earned had the employee received compensation available to comparable employees;
 - b. Provisions requiring the employer's payment of back pay for the period and in the amount the employee would have earned had the employee not been terminated or



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- suspended, or retroactive pay in the amount the employee would have earned had the employee received the compensation available to comparable employees; and
- c. A specification of the amount, purpose and nature of back pay/retroactive payments ordered, awarded or agreed to, for each monthly or semi-monthly period in which the employee would have provided service or received compensation had the employee not been suspended or terminated, or had the employee received the compensation available to comparable employees;
3. The employer's retroactive reinstatement or retroactive rescission of termination or suspension of the employee, and retroactive adjustment of pay for the period and in the amount the employee would have earned had the employee not been terminated or suspended, or the employer's retroactive adjustment of pay in the amount the employee would have earned had the employee received the compensation available to comparable employees;
 4. The employer's payment of back pay for the period and in the amount the employee would have earned had the employee not been terminated or suspended, or retroactive pay in the amount the employee would have earned had the employee received the compensation available to comparable employees, and all other amounts due under the final resolution of claims;
 5. Proposed employer reporting meeting the requirements of Hawaii Revised Statutes §§ 88-103.7 (Information from the State and counties) and 88-21.5 (Compensation);
 6. A terminated or retired employee's lump sum payment to the ERS of the actuarial present value (to be determined by the ERS) of all accumulated contributions, hypothetical account balances and/or retirement allowances previously provided by the ERS to the employee;
 7. The employer's lump sum payment of the actuarial present value of employee contributions (to be determined by the ERS) for the service and compensation to be certified; and
 8. The employer's lump sum payment of the actuarial present value of employer contributions (to be determined by the ERS) for the service and compensation to be certified.

All requirements must be met before certification of service and compensation can be made.

Attached is the form for certification of service credits and compensation pursuant to Act 46. The filing of the form starts the review process. The form is to be completed by the employer, employee or their authorized representative, and should be filed together with documents listed in Section D (REQUIRED DOCUMENTS) of the form. Other than those documents and records identified in Section D of the application form, no additional personnel or payroll documents or contributions should be reported until requested by the ERS. The ERS may request additional documents from the employer while processing the application. The ERS will then provide the employee and employer with the actuarial present value of amounts due to the ERS which must be paid in full as part of the certification process.

Certain retroactive payments are not subject to Act 46 and should continue to be reported following the usual reporting requirements of HRS § 88-21.5 and § 88-103.7. Retroactive payments are not subject to Act 46 where made:

1. To all comparable employees;
2. Pursuant to terms of employment (i.e., collective bargaining agreement provisions), that provide for the payments based on employment, work and (where applicable) conditions/circumstances under which work was rendered, in the subject position; and
3. Based on:
 - a. The employee's actual employment in the subject position;
 - b. The employee's actual work rendered in the subject position; and
 - c. where applicable, actual conditions/circumstances under which work was rendered in the subject position (e.g., conditions/circumstances required for overtime, differentials and supplementary payments);that satisfy the terms of employment.

Thus, retroactive payments not subject to Act 46 include, for example, retroactive payments of normal periodic pay made to remedy clerical errors, retroactive hazard pay made applicable and paid at the same time to all comparable employees pursuant to existing collective bargaining agreements, and retroactive pay increases made applicable and paid at the same time to all comparable employees pursuant to re-negotiated collective bargaining agreements, where there is no adoption of artificially created employment, work, or conditions/circumstances set forth in a final resolution of claims to establish service and/or compensation.

This memorandum supersedes my memorandum regarding Employee/Employer Settlement Agreements and Awards issued on December 17, 2021, and my memorandum regarding Act 46 issued on October 23, 2023.

If you have any questions, please contact Bart Asato, Program Specialist, at 808-586-1768 or email dbf.ers.admin.programspecialist@hawaii.gov.