

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 838

INTRODUCER: Senator Bradley

SUBJECT: Justices and Judges

DATE: March 2, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>AP</u>	_____

I. Summary:

SB 838 reduces to 1 calendar month the time period that a retired judge must be terminated from employment to retain his or her full retirement benefits while working as a part-time senior judge.

Under existing law, the ability to engage in reemployment without jeopardizing retirement payments is based on the concept of “termination.” To be considered a lawful termination period, a retiree who is reemployed must “sit out” for a full 6 calendar months. If the retiree returns to employment at the workplace of an employer who participates in the Florida Retirement System within the 6 calendar months, the ability to continue to withdraw retirement benefits ceases during the term of reemployment. Also, the retiree must have to refund to the FRS retirement distributions already made.

This bill reduces from 6 calendar months to 1 calendar month the required termination period for required justices and judges to return to work as a senior judge while maintaining retirement benefits.

II. Present Situation:

The Florida Retirement System

The 1970 Florida Legislature established the Florida Retirement System (FRS) when the Legislature consolidated the Teachers’ Retirement System, the State and County Officers and Employees’ Retirement System, and the Highway Patrol Pension Fund. In 1972, the Legislature consolidated the Judicial Retirement System into the FRS.¹

¹ *The Florida Retirement System Annual Report, July 1, 2012 – June 30, 2013*, Department of Management Services, at 16. http://www.dms.myflorida.com/workforce_operations/retirement/publications/annual_reports

The FRS is a multi-employer, contributory plan governed by the Florida Retirement System Act in chapter 121, F.S. All employee members contribute 3 percent of their salaries to the plan.² More than 1,000 employers participate in the FRS. As of June 30, 2013, the FRS had 621,774 active members, 346,678 retired members and beneficiaries, and 38,724 active members in the Deferred Retirement Option Program (DROP).³

FRS Membership

The membership of the FRS is divided into five membership classes:

- Regular Class, for members who are not specifically assigned to another class;⁴
- Special Risk Class, for law enforcement officers, firefighters, correctional officers, probation officers, paramedics, and emergency technicians;⁵
- Special Risk Administrative Support Class, for special risk members who moved or were reassigned to a nonspecial risk law enforcement, firefighting, correctional, or emergency medical care administrative support position with the same agency, or who is subsequently employed in one of these positions under the FRS;⁶
- Elected Officers' Class, for elected state and county officers, and for those elected municipal or special district officers whose governing body has chosen Elected Officers' Class participation for its elected officers;⁷ and
- Senior Management Service Class, for members who fill senior management level positions assigned by law to the Senior Management Service Class or authorized in law as eligible for Senior Management Service designation.⁸

Each class is funded separately based upon the costs attributable to the members of that class.

Plan Options

Investment Plan

In 2000, the Legislature created the Public Employee Optional Retirement Program (investment plan), a defined contribution plan offered to eligible employees as an alternative to the FRS Pension Plan.

Benefits under the investment plan accrue in individual member accounts funded by both employee and employer contributions and earnings. Benefits are provided through employee-directed investments offered by approved investment providers.

² Before 1975, members of the FRS were required to make employee contributions of either 4 percent for Regular Class employees or 6 percent for Special Risk Class members. Employees were again required to contribute to the system after July 1, 2011.

³ *The Florida Retirement System Annual Report, July 1, 2012 – June 30, 2013*, at 16-17.

⁴ Section 121.021(12), F.S.

⁵ Section 121.0515, F.S.

⁶ Section 121.0515(8), F.S.

⁷ Section 121.052, F.S.

⁸ Section 121.055, F.S.

A member vests immediately in all employee contributions paid to the investment plan.⁹ With respect to the employer contributions, a member vests after completing 1 work year with an FRS employer.¹⁰ Vested benefits are payable upon termination or death as a lump-sum distribution, direct rollover distribution, or periodic distribution.¹¹ The investment plan also provides disability coverage for both inline-of-duty and regular disability retirement benefits.¹²

The State Board of Administration (SBA) is primarily responsible for administering the investment plan.¹³ The SBA is comprised of the Governor as chair, the Chief Financial Officer, and the Attorney General.¹⁴

Pension Plan

The pension plan is administered by the secretary of the Department of Management Services through the Division of Retirement.¹⁵ Investment management is handled by the State Board of Administration.

Any member initially enrolled in the pension plan before July 1, 2011, vests in the pension plan after completing six years of service with an FRS employer.¹⁶ For members enrolled on or after July 1, 2011, the member vests in the pension plan after 8 years of creditable service.¹⁷ Benefits payable under the pension plan are calculated based on years of service multiplied by the accrual rate multiplied by the average final compensation.¹⁸ For most members of the pension plan, normal retirement occurs at the earliest attainment of 30 years of service or age 62.¹⁹ For public safety employees in the Special Risk and Special Risk Administrative Support Classes, normal retirement is the earliest of 25 years of service or age 55.²⁰ Members initially enrolled in the pension plan on or after July 1, 2011, have longer vesting requirements. For members initially enrolled after that date, the member must complete 33 years of service or attain age 65, and members in the Special Risk classes must complete 30 years of service or attain age 60.²¹

The Deferred Retirement Option Program (DROP)

The Deferred Retirement Option Program (DROP) is a program available to eligible members of the FRS. Under DROP, the member may elect to defer receipt of retirement benefits while continuing employment with his or her FRS employer. The employee financially benefits from participation in DROP as deferred monthly benefits accrue in the FRS, with interest compounded

⁹ Section 121.4501(6)(a), F.S.

¹⁰ If a member terminates employment before vesting in the investment plan, the nonvested money is transferred from the member's account to the State Board of Administration (SBA) for deposit and investment by the SBA in its suspense account for up to 5 years. If the member is not reemployed as an eligible employee within 5 years, then any nonvested accumulations transferred from a member's account to the SBA's suspense account are forfeited. Section 121.4501(6)(b) – (d), F.S.

¹¹ Section 121.591, F.S.

¹² See s. 121.4501(16), F.S.

¹³ Section 121.4501(8), F.S.

¹⁴ Section 4, Art. IV, Fla. Const.

¹⁵ Section 121.025, F.S.

¹⁶ Section 121.021 (45)(a), F.S.

¹⁷ Section 121.021(45)(b), F.S.

¹⁸ Section 121.091, F.S.

¹⁹ Section 121.021(29)(a)1., F.S.

²⁰ Section 121.021(29)(b)1., F.S.

²¹ Section 121.021(29)(a)2. and (b)2., F.S.

monthly while the employee is in DROP. Upon termination of employment, the employee the member receives the total DROP benefits and the previously determined normal retirement benefits.²²

The following are the current employer contribution rates for each class as of July 1, 2014:²³

Membership Class	Normal Cost
Regular Class	3.53%
Special Risk Class	11.01%
Special Risk Administrative Support Class	4.18%
Elected Officers' Class	
• Legislators, Governor, Lt. Governor, Cabinet Officers, State Attorneys, Public Defenders	6.30%
• Justices and Judges	10.10%
• County Officers	8.36%
Senior Management Class	4.80%
DROP	4.30%

Employment with an FRS Employer after Retirement

Some FRS members wish to return to work with an FRS employer after retirement while receiving monthly retirement payments. To do so, the law requires that the member actually have satisfied the requirement of termination of employment. Before July 1, 2010, retirement followed by employment required just 1 calendar month of separation from an FRS employer to satisfy the requirement of termination.²⁴

The 2010 Legislature changed the 1 month requirement to 6 months so that a member who is employed within 6 months after retirement is considered not to have terminated employment.²⁵ As a result, if an FRS retiree is employed with an FRS employer within the first 6 calendar months after retirement, termination is considered not to have occurred and any retirement benefits paid, including a DROP payout, must be refunded to the FRS.

After meeting the definition of termination, a retiree is also subject to reemployment limitations in the seventh through 12th calendar months after the DROP termination date or the effective retirement date. A retirement benefit cannot be received in the same month as salary from a FRS participating employer.²⁶ In other words, the retirement benefits of a retiree who returns to work with an FRS employer during the 7th through 12th months after retirement are suspended during that time period.

²² Section 121.091(13), F.S.

²³ Section 121.71(4), F.S.

²⁴ Section 121.021(39)(a)1., F.S.

²⁵ Section 121.021(39)(a)2., F.S.; Chapter 2009-209, Laws of Fla., increased the time to “sit out” from 1 calendar month to 6 calendar months.

²⁶ Section 121.091(9), F.S.

Twelve calendar months after the DROP termination date or the effective retirement date, a retiree can receive a retirement benefit in the same month as a salary from a FRS participating employer.

Federal Law on Pension Plans and Termination of Employment

The Internal Revenue Code as it has been interpreted by the IRS generally requires that a bona fide termination occur before an employee is paid retirement benefits.²⁷ An employer who does not require a bona fide termination jeopardizes the qualified status of its retirement plan. Thus, upon disqualification, the plan's trust may lose its tax exempt status and, among other things, the employer contributions to the plan become taxable to the employees and the plan trust may owe income taxes on the trust earnings.²⁸

Generally, the existence of a bona fide termination is “based on whether facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date” or that the services of the employee would not exceed 20 percent of the employee's previous level of services.²⁹ A bona fide termination, for example, would not occur if an employee were to “retire” on one day in order to qualify for the early retirement subsidy, and then immediately return to work.³⁰ However, a short time period between an employee's retirement and reemployment might not jeopardize the qualified status of a retirement plan if the only employees who are allowed to resume work after a short separation are at least 62 years of age.³¹

In other words, the IRS would be interested in whether an employee and employer both had the intent for the employee, upon retirement, to permanently separate from service.³²

Law and Court Rules on Retired Judges

Florida Law

Section 25.073, F.S., authorizes retired judges to resume service as a judge on a temporary basis, provided that the judge:

- Has not lost reelection or retention in his or her last judicial office; and
- Is not engaged in the practice of law.³³

²⁷ Tax Exempt and Government Entities Division, Internal Revenue Service, Department of the Treasury, *Private Letter Ruling 201147038* (Apr. 2010).

²⁸ Internal Revenue Service, *Tax Consequences of Plan Disqualification* (last updated Feb. 2, 2015) <http://www.irs.gov/Retirement-Plans/Tax-Consequences-of-Plan-Disqualification>.

²⁹ 26 C.F.R. s. 1409A-1(h)(1)

³⁰ Tax Exempt and Government Entities Division, *supra* note 27.

³¹ See 26 U.S.C. s. 401(a)(36) (stating “[a] trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section solely because the plan provides that a distribution may be made from such trust to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.”).

³² *Id.*

³³ Section 25.073(1) and (2), F.S.

Court Rules

Under the Florida Rules of Judicial Administration, Rule 2.205(a)(3):

(A) The chief justice may, either upon request or when otherwise necessary for the prompt dispatch of business in the courts of this state, temporarily assign justices of the supreme court, judges of district courts of appeal, circuit judges, and judges of county courts to any court for which they are qualified to serve.

(B) ... a “retired judge” is defined as a judge not engaged in the practice of law who has been a judicial officer of this state.

(C) When a judge who is eligible to draw retirement compensation has entered the private practice of law, the judge may be eligible for recall to judicial service upon cessation of the private practice of law and approval of the judge’s application to the court. The application shall state the period of time the judge has not engaged in the practice of law, and must be approved by the court before the judge shall be eligible for recall to judicial service.

(D) A “senior judge” is a retired judge who is eligible to serve on assignment to temporary judicial duty.

III. Effect of Proposed Changes:

Termination of Employment as a Requirement of a Valid Retirement

SB 838 modifies the timeframe required for retired judges and justices to “sit out” between retirement and subsequent reemployment as a senior judge. This bill reduces from 6 calendar months to 1 calendar month the required termination period to be eligible for full retirement benefits.

The bill also allows termination to occur for retired justices and judges based on when the retiree has reached the later of his or her normal retirement age or the age when vested.

Under existing law, the Florida Retirement System Act treats all retirees the same regardless of profession, class membership, or potential employment, for purposes of reemployment after termination upon retirement. Under current law, a retiree who is reemployed must “sit out” for 6 calendar months to continue to draw retirement upon reemployment. If the time is too short, or the retiree intended to, and established a return to reemployment prior to retirement, the IRS may consider the retirement to be a “sham” retirement and potentially disqualify a state pension plan. If a member retires with an expectation of returning to work with an FRS employer and has proceeded accordingly, the termination may not qualify as a “bona fide termination.” Additionally, carving out the 1 month exception for judges means that the FRS will treat judges more favorably than other employees of FRS employers who want to return to work after retirement.³⁴

³⁴ *Impact Statement on Senate Bill 838*, State Board of Administration (Feb. 24, 2015) (on file with the Senate Committee on Judiciary).

Funding Mechanism

Because the bill is likely to result in justices and judges retiring earlier than currently expected, the bill provides a funding mechanism to accommodate the retirement rate increase. The bill increases the required employer contribution rates for the:

- Elected Officers' Class for Justices and Judges by 0.45 percentage points;
- DROP by 0.01 percentage points; and
- Unfunded actuarial liability for the Elected Officers' Class for Justices and Judges by 0.91 percentage points.

Impact on the State Courts System

The Office of the State Courts Administrator indicates that the current 6 month minimum termination requirement is too long, as some retired judges and justices take employment with private law firms instead of returning to the courts as a senior judge. At the discretion of the chief justice of the Supreme Court, retired judges who enter private legal practice may not be permitted to return to the bench under the Florida Rules of Judicial Administration.

Legislative Intent

Legislative intent in the bill provides that this bill serves an important state interest. Specifically, the Legislature finds that assigning retired judges and justices to temporary employment assist the state courts system in managing caseloads, particularly due to the backlog in foreclosure cases in the state.

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Although judicial salaries and retirement are paid by the state, contributions for DROP are paid by local governments. To the extent this bill requires cities and counties to spend money or take action that requires the expenditure of money, the mandates provision of Art. VII, s. 18, of the State Constitution may apply. If those constitutional provisions do apply, in order for the law to be binding upon the cities and counties, the Legislature must find that the law fulfills an important state interest (included in section 14 of the bill), and one of the following relevant exceptions must be met:

- Funds estimated at the time of enactment sufficient to fund such expenditures are appropriated;
- Counties and cities are authorized to enact a funding source not available for such local government on February 1, 1989, that can be used to generate the amount of funds necessary to fund the expenditures;
- The expenditure is required to comply with a law that applies to all persons similarly situated; or

- The law must be approved by two-thirds of the membership of each house of the Legislature.

This bill contains a statement indicating that the bill fulfills an important state interest. Although the state funds the FRS, local governments must contribute to DROP. The Department of Management Services estimates the following fiscal impact to local government:

- From 7/2015 through 6/2016, \$192,000;
- From 7/2016 through 6/2017, \$198,000;
- From 7/2017 through 6/2018, \$205,000;
- From 7/2018 through 6/2019, \$211,000; and
- From 7/2019 through 6/2020, \$218,000.³⁵

However, these estimates are based on the 2012 Milliman actuarial study. As stated below, these figures cannot be used as they are no longer accurate (See discussion in D. Other Constitutional Issues below.)

Additionally, the important state interest cited in the legislative intent in SB 838 cites as causative the continued backlog in foreclosure cases in the state. However, in the most recent report by the Florida Supreme Court certifying a need for additional judges, the Court does not cite foreclosure cases as a reason for the creation of additional judgeships.³⁶

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article X, Section 14 of the Florida Constitution provides:

A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

An actuarial study will need to be conducted to comply with Art. X, sec. 14, Fla. Const. The bill provides adjustments to contribution rates, but bases these percentage points on a

³⁵ 2015 Legislative Bill Analysis, Department of Management Services (Feb. 13, 2015) (on file with the Senate Committee on Judiciary).

³⁶ *In Re: Certification of Need for Additional Judges*, No. SC 14-2350 (Dec. 22, 2014) (on file with the Senate Committee on Judiciary).

2012 special study.³⁷ Given that the actuarial assumptions have changed since 2012, the study is no longer valid.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill enables retired judges and justices to return to the bench as senior judges in a shorter time frame (1 versus 6 calendar months).

In a 2011 survey, the Office of State Courts Administrator (OSCA) estimates that 167 senior judges and 2 senior justices are eligible to serve as senior judges, including 26 volunteer senior judges.³⁸

C. Government Sector Impact:

State Board of Administration (SBA)

The SBA, Office of Defined Contribution Programs, expects to incur recurring and nonrecurring costs to implement this bill.

Recurring costs are estimated to be:

- From 7/15 through 6/16, \$1.62 million;
- From 7/16 through 6/17, \$1.67 million;
- From 7/17 through 6/18, \$1.72 million;
- From 7/18 through 6/19, \$1.78 million; and
- From 7/19 through 6/20, \$1.84 million.

Nonrecurring costs, estimated to be less than \$1 million, relate to system programming changes, revisions to printed materials, training service provider personnel, and coordination of service provider systems for data transfers and file formats.³⁹

³⁷ Kathryn M. Hunter and Robert Dezube, *Milliman Study Reflecting the Impact to the Blended Rates of the Florida Retirement System of Exempting Retired Judges from Termination and Reemployment Limitations* and *Milliman Study Reflecting the Impact to the Florida Retirement System Defined Benefit Plan of Exempting Retired Judges from Termination and Reemployment Limitations* (Feb. 9, 2012) (on file with the Senate Committee on Judiciary).

³⁸ *State Courts System Statistics for Retired Judges 2006-2011*, OSCA (Dec. 13, 2011) (on file with the Senate Committee on Judiciary).

³⁹ *Impact Statement on Senate Bill 838*, State Board of Administration (Feb. 24, 2015) (on file with the Senate Committee on Judiciary).

Office of the State Courts Administrator (OSCA)

The Office of the State Courts Administrator expects that this bill will have a positive impact on areas of the court where there is a higher workload.⁴⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 121.021, 121.091, and 121.591.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁴⁰ Office of the State Courts Administrator, *2015 Judicial Impact Statement* (Mar. 2, 2015) (on file with the Senate Committee on Judiciary).