

The Employees Retirement System of Texas (ERS) proposes to repeal the following rules in 34 Texas Administrative Code (TAC) Chapter 69, concerning Membership, Pension Revocation, and Refunds (f/k/a Membership and Refunds): §69.3 (Members of Governing Boards), §69.5 (Interest Payable at Time of Refund), and §69.7 (Reinstatement of Refunded Accounts within 15 days). ERS further proposes the following new rules concerning the same or similar subject matter: §69.2 (Definitions Related to Annuity Termination), §69.3 (Termination of Annuities), §69.4 (Pre-Existing Qualified Domestic Relations Orders), §69.5 (Awards to Spouses), §69.6 (Notice of Conviction), §69.7 (Members of Governing Boards and Commissions), and §69.8 (Reinstatement of Refunded Accounts within 30 Days). Finally, ERS proposes amendments to existing rules by amending §69.1 (Employees Covered by Teacher Retirement System), and §69.9 (Trustee to Trustee Transfers). This proposal and the rules as repealed, amended, or added as new rules by this proposal are referred to collectively as the “proposed rules.”

ERS is a constitutional trust fund established as set forth in Article XVI, §67, Texas Constitution, and further organized pursuant to Title 8, Tex. Gov’t Code, as well as 34 Tex. Admin. Code, §§61.1 *et seq.*

Section 69.3 is proposed to be repealed because the rule language will be added as a new rule in §69.7. Section 69.5 is proposed to be repealed because the rule language is obsolete. Section 69.7 is proposed to be repealed because the rule language will be added as a new rule in §69.8.

The amendments and additions to Chapter 69 are being proposed as part of ERS’ ongoing statutory responsibility to review its rules and in order to implement Tex. Gov’t Code §810.003, enacted by the 85th Legislature, Regular Session (2017) in S.B. 500, and §810.004, enacted by the 86th Legislature, Regular Session (2019) in S.B. 1570, regarding the termination of annuities of certain elected officials and corrections employees convicted of a felony.

#### GOVERNMENT GROWTH IMPACT STATEMENT

ERS has determined that during the first five-year period the amended rule will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not require the creation of new employee positions or eliminate existing employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the proposed rules will not require an increase or decrease in fees paid to the agency;
- (5) the proposed rules will create a new rule or regulation;

- (6) the proposed rules will repeal an existing rule or regulation;
- (7) the proposed rules will not increase or decrease the number of individuals subject to the rule's applicability; and
- (8) the proposed rules will not adversely affect the state's economy.

Ms. Robin Hardaway, Director of Customer Benefits, has determined that for the first five-year period the rule is in effect, there will be no fiscal implication for state or local government or local economies as a result of enforcing or administering the rule; and small businesses, micro-businesses, and rural communities will not be affected.

The proposed rules implement Texas Government Code §810.003 concerning Certain Elected Officials Ineligible for Retirement Annuity and §810.004 concerning Certain Corrections Employees Ineligible for Retirement Annuity. The proposed rules do not constitute a taking. Ms. Hardaway has also determined that, to her knowledge, there are no known anticipated economic effects to persons who are required to comply with the rule as proposed, and the proposed rules do not impose a cost on regulated persons.

Ms. Hardaway also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of adopting and complying with the rule is to terminate the annuities of elected officials and corrections officers who committed an applicable felony while employed.

Comments on the proposed rules may be submitted to Cynthia C. Hamilton, Acting General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Hamilton at *Cynthia.Hamilton@ers.texas.gov*. The deadline for receiving comments is Monday, November 29, 2021, at 10:00 a.m.

The rules are proposed under Tex. Gov't Code §815.102, which provides authorization for the ERS Board of Trustees to adopt rules necessary for the administration of the funds of the retirement system and regarding the transaction of any other business of the Board, as well as §810.003(j) and §810.004(i) which instruct the governing body of a retirement system to adopt rules and procedures to implement these sections.

No other statutes are affected by the proposed rules.

<rule>

CHAPTER 69. MEMBERSHIP, ~~PENSION REVOCATION, ANNUITY TERMINATION,~~ AND  
REFUNDS

§69.1. Employees Covered by Teacher Retirement System.

The [Although all other appointive state officers and employees of state agencies are members of the Employees Retirement System, the] following persons employed by [working for] state agencies and departments are members of the Teacher Retirement System of Texas (TRS);  
[.]

(1) a person who holds a [Those persons whose salaries are paid from foundation school funds that are holding] coaching, teaching, or administrative position [positions] with an independent school district, the salary for which is paid with foundation school funds; and[.]

(2) a person [Persons] who elected to retain membership in TRS [pursuant to law] when the agency or department that employs the person [in which they were employed was] transferred out of TRS. [that system .Teacher Retirement System membership will be in effect at any time these employees are working for that agency.]

#### §69.2. Definitions Related to Annuity Termination.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) “Qualifying felony” for the purposes of §69.3(a) of this chapter means a felony described by Tex. Gov’t Code §810.003(a).

(2) “Qualifying felony” for the purposes of §69.3(b) of this chapter means a felony described by Tex. Gov’t Code §810.004(a).

(3) “Elected official” means a person described by Tex. Gov’t Code §810.003(b). The retirement of an elected official prior to the termination of an annuity under this chapter does not prevent annuity forfeiture under this chapter.

(4) “Corrections officer” means a person described by Tex. Gov’t Code §810.004(b). The retirement of a corrections officer prior to the termination of an annuity under this chapter does not prevent annuity forfeiture under this chapter.

(5) “Alternate payee” means a spouse, former spouse, child, or other dependent of an elected official or corrections officer who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable by a public retirement system with respect to the elected official or corrections officer.

(6) “Suspension period” means the period of time between the date an annuity is terminated under this chapter and the date the system determines the annuity should be reinstated because the conviction was overturned on appeal or the person meets the requirements for innocence under Tex. Civ. Prac. & Rem. Code §103.001(a)(2).

§69.3. Termination of Annuities.

(a) The annuity of an elected official shall be terminated if:

- (1) the elected official is convicted of a qualifying felony committed while in office; and
- (2) the conduct underlying the qualifying felony arose directly from the official duties of the elected official's office.

(b) The annuity of a corrections officer shall be terminated if:

- (1) the corrections officer is convicted of a qualifying felony; and
- (2) the conduct underlying the qualifying felony arose directly from the person's service as a corrections officer.

(c) If the elected official or corrections officer is receiving an annuity at the time that the system receives notice of the conviction, the final annuity payment shall be paid on the last day of the month following the month in which the system receives the notice of conviction.

(d) If the annuity of an elected official or corrections officer is terminated pursuant to subsection (a) or (b) of this section, the system shall issue a refund of the person's remaining service retirement annuity contributions, including service purchase funds, with interest, unless the annuity is subject to an order of a court awarding any part of the annuity to a spouse, former spouse, or other alternate payee. A refund under this section is subject to an order of a court awarding all or part of the person's service retirement annuity contributions to a former spouse as provided by Tex. Gov't Code §810.003(f), except as otherwise provided by §69.4 and §69.5 of this chapter.

(e) The system shall reinstate the annuity and refund payments withheld during the suspension period, with interest, **or if not retired shall reinstate membership and canceled service credit** if:

- (1) the conviction is overturned on appeal or the elected official or corrections officer meets all requirements for innocence under Tex. Civ. Prac. and Rem. Code §103.001(a)(2); and
- (2) the system receives a completed application **for reinstatement to reinstate the annuity** and a payment equal to the refund provided under subsection (d) of this section, not later than the 120<sup>th</sup> day after the conviction is overturned or the person meets all requirements for innocence.

(f) Interest under this chapter shall be calculated at the rate provided by Tex. Gov't Code §815.311 in effect at the time the system reinstates the annuity.

(g) Subject to applicable federal law, an elected official or a corrections officer whose annuity is terminated under this chapter is no longer an annuitant for purposes of Tex. Ins. Code Chapter 1551. Coverage shall terminate on the first day of the month following the final annuity payment.

(h) Service credit previously earned in any class by an elected official or corrections officer whose annuity is terminated under this chapter is no longer creditable service and may not be used, transferred, or repurchased under Tex. Gov't Code Chapter 803, 805, or 813 or under §833.102 or §838.102 unless the system reinstates the annuity because the conviction has been overturned or the person has met all requirements for innocence. If the conviction has been overturned or the person has met all requirements for innocence, interest shall be calculated as if there was no suspension period.

(i) A decision by the system under this chapter constitutes final agency action and no administrative appeal from the decision is available.

#### §69.4. Pre-existing Qualified Domestic Relations Orders.

(a) If an elected official is subject to a qualified domestic relations order established prior to June 6, 2017, and the retirement of the elected official has caused benefits to be payable to the alternate payee prior to annuity termination, the system shall retain an actuarially determined portion of the person's remaining service retirement annuity contributions, including service purchase funds, with interest, in order to continue to satisfy the obligation to the alternate payee.

(b) If a corrections officer is subject to a qualified domestic relations order established prior to June 10, 2019, and the retirement of the corrections officer has caused benefits to be payable to the alternate payee prior to annuity termination, the system shall retain an actuarially determined portion of the person's remaining service retirement annuity contributions, including service purchase funds, with interest, in order to continue to satisfy the obligation to the alternate payee.

(c) An alternate payee described by subsection (a) or (b) of this section shall continue to receive the alternate payee's portion of the annuity. Annuity payments shall stop at the death of the elected official/corrections officer or the alternate payee, whichever is earlier. Any remaining portion of the elected official's or corrections officer's service retirement annuity contributions, including service purchase funds, shall be refunded with interest.

(d) If an elected official or corrections officer does not retire prior to annuity termination, the system shall satisfy any obligation to an alternate payee under a qualified domestic relations order by paying the alternate payee a portion of a refund of the elected official's or corrections officer's service retirement annuity contributions, including service purchase funds, with interest.

#### §69.5. Awards to Spouses.

(a) If a court awards a portion of an elected official's or corrections officer's forfeited annuity under Tex. Gov't Code §810.003(h) or §810.004(g) the awarded portion is payable only for the lifetime of the elected official/corrections officer or the spouse, whichever ends earlier.

(b) The maximum portion of a forfeited annuity payable to a spouse under Tex. Gov't Code §810.003(h) or §810.004(g) is fifty percent.

(c) The system may not pay any portion of a forfeited annuity to a common law or informal spouse or to a spouse who fails to provide written notice of an award as required by this section. An award of a portion of a forfeited annuity under Tex. Gov't Code §810.003(h) or §810.004(g) is payable only if:

(1) the award is made to a spouse that the elected official or corrections officer married as evidenced by a properly issued and completed marriage license; and

(2) the spouse provides written notice of the award to the system not later than the 30<sup>th</sup> day after the conviction of the elected official or corrections officer.

(d) If the spouse of an elected official or corrections officer is convicted of the qualifying felony as a party to the offense or convicted of another related offense arising out of the same criminal episode, the spouse forfeits any interest in the elected official's or corrections officer's annuity or service retirement contributions to the same extent as the elected official or corrections officer. The divorce of an elected official or corrections officer prior to the termination of an annuity under this chapter shall not prevent the forfeiture of the spouse's interest in the annuity and service retirement contributions, including service purchase funds.

#### §69.6. Notice of Conviction.

(a) The system shall terminate the annuity of an elected official or corrections officer convicted of a qualifying felony pursuant to §69.3 of this chapter upon receipt of notice of the conviction as specified in Tex. Gov't Code §810.003 or §810.004 or other proper notice of the conviction.

(b) Proper notice of the conviction must include:

(1) a copy of the court's judgment and sentence or documentation equivalent to a judgment and sentence; and

(2) identifying information establishing that the person named in the judgment and sentence is an elected official or corrections officer who is a contributing member or annuitant of the system, including, but not limited to, the person's date of birth or social security number.

(c) The person convicted of a qualifying felony must provide proper notice of the conviction to the system not later than the 30<sup>th</sup> day after the judgment and sentence are entered by the court. If the person fails to provide such notice on or before the 30-day deadline, the person must repay to the system all annuity payments that would have been forfeited if timely notice had been provided. The system shall recoup the annuity payments prior to making any payment to an alternate payee, except as provided by Tex. Gov't Code §810.003(g) or §810.004(f), and shall offset such payments against a refund of the person's remaining service retirement annuity contributions, including service purchase funds, if any.

(d) For an elected official, the governmental entity to which the person was elected or appointed must provide proper notice of the conviction to the system not later than the 30<sup>th</sup> day after the judgment and sentence are entered by the court.

(e) For elected officials and corrections officers, the court entering the judgment and sentence must provide proper notice of the conviction to the system as soon as practicable but not later than the 30<sup>th</sup> day after the judgment and sentence are entered by the court.

(f) For elected officials and corrections officers, the lead prosecuting attorney must provide proper notice of the conviction to the system as soon as practicable but not later than the 30<sup>th</sup> day after the judgment and sentence are entered by the court. The lead prosecuting attorney also shall provide a copy of the indictment to the system.

(g) A court's, governmental entity's, or lead prosecuting attorney's failure to comply with the notice requirements under subsection (d), (e), or (f) of this section shall not prevent the system from terminating an annuity.

#### §69.7. Members of Governing Boards and Commissions.

(a) Payment of contributions by a person who is a member of the system by virtue of service on a governing board or commission shall be made to the corresponding department or agency. Contributions are due on the last day of the month for which retirement service credit is to be established.

(b) If payment has not been received by the system when the department's or agency's retirement report is received, notice that payment has not been made and of the pending loss of eligibility to establish retirement service credit shall be sent to the member and to the chief fiscal officer and the head of the department or agency.

(c) If a board or commission member's contributions are not paid to the system within 60 days after they are due, the member shall lose all rights to establish retirement service credit as a member of the board or commission.

§69.8. Reinstatement of Refunded Accounts within 30 Days.

(a) If a former employee with 10 or more years of retirement service credit requests a refund, the former employee may withdraw the refund request by returning the refund warrant within 30 days of the date the warrant was mailed by the system.

(b) This section does not apply to any of the provisions in §69.2 through §69.6 of this chapter.

§69.9 Trustee to Trustee Transfers.

(a) Effective for distributions made after December 31, 1992, the system [Employees Retirement System of Texas] shall permit the distributee of an eligible rollover distribution to elect to have such distribution paid directly to an eligible retirement plan specified by the distributee in the form of a direct trustee to trustee transfer.

(b) The system [Employees Retirement System of Texas] shall develop procedures to implement this section in accordance with the Internal Revenue Code of 1986, §401(a)(31), as amended, and related regulations. Terms used in this section shall have the meanings assigned in the Internal Revenue Code of 1986 as amended.

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The rule repeals are proposed under Tex. Gov't Code §815.102, which provides authorization for the ERS Board of Trustees to adopt rules necessary for the administration of the funds of the retirement system and regarding the transaction of any other business of the Board, as well as §810.003(j) and §810.004(i) which instruct the governing body of a retirement system to adopt rules and procedures to implement these sections.

No other statutes are affected by the proposed repeals.

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§69.3. Members of Governing Boards.

§69.5. Interest Payable at Time of Refund.

§69.7. Reinstatement of Refunded Accounts within 15 days.