

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 Governmental Oversight and Accountability

BILL: SB 1156

INTRODUCER: Senator Burton

SUBJECT: Florida Retirement System

DATE: March 21, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McVaney	McVaney	GO	Pre-meeting
2.			CA	
3.			RC	

I. Summary:

SB 1156 allows a retiree to provide certain volunteer services to a Florida Retirement System employer while maintaining his or her bona fide termination status, which is required for the payment of retirement benefits to the retiree.

Under the bill, the Department of Management Services is granted rulemaking authority to establish criteria for determining volunteer services.

The bill is not expected to impact state and local government revenues and expenditures. See V. Fiscal Impact Statement below.

The bill takes effect on July 1, 2023.

II. Present Situation:

The Florida Retirement System (FRS)

The Florida Retirement System (FRS) was established in 1970 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 Judicial Retirement System was consolidated into the FRS, and in 2007, the Institute of Food and Agricultural Sciences Supplemental Retirement Program was consolidated under the Regular Class of the FRS as a

closed group.¹ The FRS is a contributory system, with active members contributing 3 percent of their salaries.²

The FRS is a multi-employer plan, governed by ch. 121, F.S., the “Florida Retirement System Act.” As of June 30, 2022, the FRS had 629,073 active non-retired members, 448,846 annuitants, 14,858 disabled retirees, and 28,827 active participants of the Deferred Retirement Option Program (DROP).³ As of September 2022, the FRS consisted of 990 total employers; it is the primary retirement plan for employees of state and county government agencies, district school boards, Florida College institutions, and state universities, and includes the 180 cities and 153 special districts that have elected to join the system.⁴

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

- The Regular Class⁵ consists of 537,128 active members and 7,806 in renewed membership;
- The Special Risk Class⁶ includes 72,925 active members and 1,100 in renewed membership;
- The Special Risk Administrative Support Class⁷ has 104 active members and one in renewed membership;
- The Elected Officers’ Class⁸ has 2,075 active members and 109 in renewed membership; and
- The Senior Management Service Class⁹ has 7,610 active members and 210 in renewed membership.¹⁰

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

Members of the FRS have two primary plan options available for participation:¹¹

¹ Florida Department of Management Services (DMS), Division of Retirement, *Florida Retirement System Pension Plan and Other State Administered Retirement Systems FY 2021-22 Annual Comprehensive Financial Report*, 35, available at https://employer.frs.fl.gov/forms/2020-21_ACFR.pdf. (last visited Mar. 7, 2023).

² Prior to 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. *See*, ch. 2011-68, s. 33, Laws of Fla. Members in the Deferred Retirement Option Program do not contribute to the system.

³ DMS, Division of Retirement, *Florida Retirement System Pension Plan and Other State Administered Retirement Systems FY 2021-22 Annual Comprehensive Financial Report*, at 260, available at https://employer.frs.fl.gov/forms/2020-21_ACFR.pdf. (last visited Mar. 7, 2023).

⁴ DMS, Division of Retirement, *Participating Employers for Fiscal Year 2022-2023* (Sept. 2022), available at <https://employer.frs.fl.gov/forms/part-emp.pdf> (last visited Mar. 7, 2023).

⁵ The Regular Class is for all members who are not assigned to another class. Section 121.021(12), F.S.

⁶ The Special Risk Class is for members employed as law enforcement officers, firefighters, correctional officers, probation officers, paramedics and emergency technicians, among others. Section 121.0515, F.S.

⁷ The Special Risk Administrative Support Class is for a special risk member who moved or was 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 such a position under the Florida Retirement System. Section 121.0515(8), F.S.

⁸ The Elected Officers’ Class includes elected state and county officers, and those elected municipal or special district officers whose governing body has chosen Elected Officers’ Class participation for its elected officers. Section 121.052, F.S.

⁹ The Senior Management Service Class is for members who fill senior management level positions assigned by law to the Senior Management Service Class or authorized by law as eligible for Senior Management Service designation. Section 121.055, F.S.

¹⁰ All figures are from *Florida Retirement System Pension Plan and Other State Administered Retirement Systems FY 2021-22 Annual Comprehensive Financial Report*, at 263.

¹¹ Florida State Board of Administration (SBA), *Plan Comparison Chart* (Jul. 2020), available at <https://www.myfrs.com/pdf/forms/plancomparison.pdf> (last visited Mar. 7, 2023).

- The defined contribution plan, also known as the Investment Plan; and
- The defined benefit plan, also known as the Pension Plan.

Investment Plan

In 2000, the Public Employee Optional Retirement Program (investment plan) was created as a defined contribution plan offered to eligible employees as an alternative to the FRS Pension Plan.¹²

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.¹³

A member vests immediately in all employee contributions paid to the investment plan.¹⁴ With respect to the employer contributions, a member vests after completing one work year of employment with an FRS employer.¹⁵ Vested benefits are payable upon termination or death as a lump-sum distribution, direct rollover distribution, or periodic distribution.¹⁶ The investment plan also provides disability coverage for both in-line-of-duty and regular disability retirement benefits.¹⁷ An FRS member who qualifies for disability while enrolled in the investment plan may apply for benefits as if the employee were a member of the pension plan. If approved for retirement disability benefits, the member is transferred to the pension plan.¹⁸

The State Board of Administration (SBA) is primarily responsible for administering the investment plan.¹⁹ The Board of Trustees of the SBA is comprised of the Governor as chair, the Chief Financial Officer, and the Attorney General.²⁰

¹² See, ch. 2000-169, Laws of Fla.

¹³ Section 121.4501(1), F.S.

¹⁴ Section 121.4501(6)(a), F.S.

¹⁵ If a member terminates employment before vesting in the investment plan, the nonvested money is transferred from the member's account to the SBA for deposit and investment by the SBA in its suspense account for up to five years. If the member is not reemployed as an eligible employee within five years, 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.

¹⁶ Section 121.591, F.S.

¹⁷ See s. 121.4501(16), F.S.

¹⁸ Pension plan disability retirement benefits, which apply for investment plan members who qualify for disability, compensate a line-of-duty disabled member up to 65 percent of the average monthly compensation as of the disability retirement date for special risk class members. Other members may receive up to 42 percent of the member's average monthly compensation for disability retirement benefits. If the disability occurs other than in the line-of-duty, the monthly benefit may not be less than 25 percent of the average monthly compensation as of the disability retirement date.

Section 121.091(4)(f), F.S.

¹⁹ Section 121.4501(8), F.S.

²⁰ FLA. CONST. art. IV, s. 4.

Pension Plan

The pension plan is administered by the Secretary of Management Services (DMS) through the Division of Retirement.²¹ The State Board of Administration manages the pension fund's assets.²²

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.²³ For members initially enrolled on or after July 1, 2011, the member vests in the pension plan after eight years of creditable service.²⁴ Benefits payable under the pension plan are calculated based on the member's years of creditable service multiplied by the service accrual rate multiplied by the member's average final compensation.²⁵ For most current members of the pension plan, normal retirement (when first eligible for unreduced benefits) occurs at the earliest attainment of 30 years of service or age 62.²⁶ 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 55.²⁷ Members initially enrolled in the pension plan on or after July 1, 2011, have longer service 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 60.²⁸

Optional Retirement Programs

Eligible employees may choose to participate in one of three retirement programs instead of participating in the FRS:

- Members of the Senior Management Service Class may elect to enroll in the Senior Management Service Optional Annuity Program;²⁹
- Members in specified positions in the State University System may elect to enroll in the State University System Optional Retirement Program;³⁰ and

²¹ Section 121.025, F.S.

²² Florida SBA, *Summary Overview of the State Board of Administration of Florida*, 4, available at https://www.sbafla.com/fsb/Portals/FSB/Content/Topics/SBAOverview_20211025.pdf?ver=2021-10-28-120954-217 (last visited Mar. 7, 2023).

²³ Section 121.021(45)(a), F.S.

²⁴ Section 121.021(45)(b), F.S.

²⁵ Section 121.091, F.S. *See also*, *Florida Retirement System Pension Plan and Other State Administered Retirement Systems FY 2021-22 Annual Comprehensive Financial Report*, 35-37, *supra* at 1.

²⁶ Section 121.021(29)(a)1., F.S.

²⁷ Section 121.021(29)(b)1., F.S.

²⁸ Sections 121.021(29)(a)2. and (b)2., F.S.

²⁹ The Senior Management Service Optional Annuity Program (SMSOAP) was established in 1986 for members of the Senior Management Service Class. Employees in eligible positions may irrevocably elect to participate in the SMSOAP rather than the FRS. Effective July 1, 2017, the SMSOAP is closed to new members. Section 121.055(6), F.S. *See also*, Florida DMS, *Senior Management Service Optional Annuity Program*, https://www.dms.myflorida.com/workforce_operations/retirement/optional_retirement_programs/senior_management_service_optional_annuity_program (last visited Mar. 7, 2023).

³⁰ Eligible participants of the State University System Optional Retirement Program (SUSORP) are automatically enrolled in the SUSORP. However, the member must execute a contract with a SUSORP provider within the first 90 days of employment or the employee will default into the pension plan. If the employee decides to remain in the SUSORP, the decision is irrevocable and the member must remain in the SUSORP as long as the member remains in a SUSORP-eligible position. Section 121.35, F.S.

Members in specified positions at a Florida College institution may elect to enroll in the State Community College System Optional Retirement Program.³¹

Maintaining Status as a Qualified Plan

The FRS includes a governmental defined benefit plan under Internal Revenue Code section 414(d) and is qualified under Internal Revenue Code section 401(a). This means that the contributions to the FRS qualify for tax deductions, and that investment earnings are tax-deferred until they are distributed to retirees.

“In order for a pension plan to be a qualified plan under section 401(a), the plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, *after retirement* (emphasis added) or attainment of normal retirement age”³²

A termination of employment must be bona fide (i.e., not a mere subterfuge in order to initiate an otherwise impermissible distribution where no substantial change in employment has occurred).³³ “Retirement does not include a mere reduction in the number of hours that an employee works. Accordingly, benefits may not be distributed prior to normal retirement age solely due to a reduction in the number of hours that an employee works.”³⁴

Current law relating to the FRS requires an employee to terminate his or her employment in order to commence a retirement benefit, either before or after normal retirement age. The determination of whether a bona fide termination from employment has occurred is critical for both the tax qualification of the FRS and Florida statutory compliance purposes.³⁵

To address the requirement of bona fide termination, the FRS states “termination” occurs “when a member ceases all employment relationships with participating employers.”³⁶ This includes a relationship with an FRS-participating employer as an officer, employee, or volunteer. If the retiree is reemployed by an FRS-participating employer within the first 6 calendar months after the month of retirement, termination is deemed not to have occurred, and the retiree must return all retirement distributions, including DROP accumulations.³⁷ Generally, if the retiree is employed by an FRS-participating employer during the 7th through 12th calendar months after the month of retirement, the retiree’s benefit for those months is suspended and is forfeited.³⁸ There are no restrictions on receiving salary and retirement benefits from FRS-participating employers after the 12th calendar month from retirement.

³¹ If the member is eligible for participation in a State Community College System Optional Retirement Program, the member must elect to participate in the program within 90 days of employment. Unlike the other optional programs, an employee who elects to participate in this optional retirement program has one opportunity to transfer to the FRS. Section 1012.875, F.S.

³² Treas. Reg. section 1.401(a)-1(b)(1)(i).

³³ Private Letter Ruling 201147038 (Apr. 20, 2010).

³⁴ Treas. Reg. section 1.401(a)-1(b)(3).

³⁵ Memorandum to David DiSalvo, Director, Division of Retirement, *Re: Bona Fide Terminations from Employment and Bona Fide Volunteer Services* (dated January 8, 2021).

³⁶ Section 121.021(39), F.S.

³⁷ Section 121.091(9), F.S.

³⁸ Section 121.091(9)(c), F.S.

III. Effect of Proposed Changes:

Section 1 amends s. 121.021, F.S., to state that “termination” with an FRS employer occurs when the member ceases all employment relationships with, and ceases providing services to, all FRS employers. The term is further described so that “volunteer services” do not constitute employment by, or provision of services to, an employer.

Section 1 defines “volunteer services” to mean services provided in accordance with any rules adopted under s. 121.091(15), F.S. (a new subsection created in section 2 of this bill).

Section 2 amends s. 121.091, F.S., to grant the Division of Retirement rule-making authority to establish criteria for volunteer services that retirees may provide to an employer while still being deemed to have a bona fide termination. Employers are permitted to establish volunteer programs in accordance with the division’s rules.

Section 3 provides that the bill takes effect on July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties’ or municipalities’ ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Lines 127 through 131 grant rulemaking authority to the DMS to establish criteria for volunteer services that retirees may provide to an employer and still maintain a bona fide termination. The statutory language gives no guidance to the DMS in establishing the criteria. Thus, the grant of rulemaking authority may be an unlawful delegation of legislative authority.

The Legislature may not delegate its constitutional duties to another branch of government.³⁹ While the Legislature must make fundamental policy decisions, it may delegate the task of implementing that policy to executive agencies with “some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.”⁴⁰ Moreover, the Legislature can permit “administration of legislative policy by an agency with the expertise and flexibility to deal with complex and fluid conditions.”⁴¹

Florida courts have found an unlawful delegation of legislative authority in the following instances:

- Where the Legislature allowed the Department of State to “in its discretion allow such a candidate to withdraw...”;⁴² and
- Where the Legislature created a criminal penalty for escape from certain classifications of juvenile detention facilities, but delegated the classification (or determination whether to classify at all) to an agency.⁴³

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill is not expected to impact state and local government revenues and expenditures. However, if the DMS adopts rules relating to volunteer services that are not consistent with the FRS being a qualified plan under the Internal Revenue Code, employer and employee contributions paid into the FRS Trust Fund will be taxable at the time of the contribution, and investment earnings will no longer be tax-deferred.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

³⁹ See FLA. CONST. art. II, s. 3.

⁴⁰ *Askew v. Cross Key Waterways*, 372 So.2d 913, 925 (Fla. 1978).

⁴¹ *Microtel, Inc. v. Fla. Public Serv. Comm'n.*, 464 So.2d 1189, 1191 (Fla. 1991).

⁴² *Fla. Dep't. of State, Div. of Elections v. Martin*, 916 So.2d 763 (Fla. 2005).

⁴³ *D.P. v. State*, 597 So.2d 952 (Fla. 1st DCA, 1992)(disapproved on other grounds).

VIII. Statutes Affected:

This bill substantially amends sections 121.021 and 121.091 of the Florida Statutes.

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.
