



# Judicial Impact Statement

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## House Bill 202 Retire & Rehire

House Bill 202  
Rep. Richard Hollington

### TITLE INFORMATION

House Bill 202 amends the Revised Code to limit the retirement benefit of a re-employed retiree of a public retirement system and eliminate the deferred retirement option plan in the Ohio Police and Fire Pension Fund and State Highway Patrol Retirement System.

Specifically, the bill requires a public pension fund retiree who has been re-hired by a public employer for a salary in excess of \$14,160 to forfeit one dollar of retirement benefit for each two dollars of earnable salary. By eliminating the exemption for elected officials, the bill would apply to judges who retire and win re-election. (R.C. 145.38)

### IMPACT SUMMARY

House Bill 202 makes changes to R.C. 145.38 that will increase the complexity of property division orders in divorces involving couples where one or both parties have a public retirement pension. The changes will reduce the financial incentive for retired judges to run for elected office, seek public employment elsewhere in government, or serve as visiting judges. Ohio courts also rely on retired police officers and other public retirees to provide security and other services at Ohio courthouses and in Ohio courtrooms. House Bill 202 would reduce the availability of retired judges, police officers, and others and would be detrimental to Ohio's judiciary and to the administration of justice.

#### What is a Judicial Impact Statement?

A Judicial Impact Statement describes as objectively and accurately as possible the probable, practical effects on Ohio's court system of the adoption of the particular bill. The court system includes people who use the courts (parties to suits, witnesses, attorneys and other deputies, probation officials, judges and others). The Ohio Judicial Conference prepares these statements pursuant to R.C. 105.911.

**JUDICIAL IMPACT**

House Bill 202 will impact the judiciary in a variety of ways. It will increase the complexity of property division orders in divorces involving couples where one or both parties have a public retirement pension. It will reduce the availability of retired judges, police officers, and other public service retirees for employment by Ohio's courts. It will discourage retired judges from running for re-election, as well as from serving as acting or visiting judges. Moreover, many judges believe that House Bill 202 is an unconstitutional seizure of property in violation of the 14<sup>th</sup> Amendment's due process clause. Each of these issues will be discussed separately below.

*Division of Property Cases.* Judges with domestic relations jurisdiction often encounter difficulties when dividing retirement benefits between parties in a divorce case. These issues are often complex and highly contentious. House Bill 202 will exacerbate an already difficult and confusing area of the law when it is applied to a public employee who is divorced or about to become divorced. Judges estimate that public pensions are typically divided at 50% of the pension that was earned during the marriage. After passage of House Bill 202, any division of pension benefits would have to include an analysis of the impact of a potential \$1 forfeiture for each \$2 of earnings should the retiree decide to continue working in the public sector after retirement. In this circumstance, courts would surely be asked to revisit or change the division of property orders (DOPO) for the divorces that had taken place prior to the enactment of House Bill 202. The courts would have to take this new forfeiture requirement into account when making property division orders on subsequent divorces. The major questions that would have to be resolved would include who would pay for forfeiture and whether one party would be responsible for the forfeiture, whether the two parties would share the forfeiture equally or whether the two parties would share the forfeiture on a pro-rata basis. Depending on a variety of factors, the answer to these questions could have significantly different consequences.<sup>1</sup>

*Re-employment of Retired Police Officers and Others.* The courts of Ohio often rely on the services of retired police officers for providing court security in the courthouse and in courtrooms. House Bill 202 will reduce the availability of these qualified workers and increase expenses related to hiring a qualified security staff.

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<sup>1</sup> One common pleas judge with domestic relations jurisdiction offered the following scenario using a judge as an example:

The judge retires at 30 years of public employment and should receive about \$79,000 in benefits, and gets re-elected as judge. He earns a salary of \$120,000+. Subtracting the \$14,000+, he makes \$106,000 for HB 202 purposes, giving him a \$53,000 forfeit of pension benefits. His pension benefit would net him an additional \$26,000 to his salary.

Now, assuming the judge was divorced at 20 years of public employment. His wife would receive \$26,000 upon his retirement as her share established as of the divorce date. The retired judge's pension benefit would be \$53,000.

If they share the forfeit equally, the judge would receive \$26,500, and his divorced wife would receive -\$500.

If the retiree assumed the entire forfeiture burden, the judge would receive \$0 on his retirement, and his ex-spouse would get \$26,000.

If the retiree and the ex-spouse shared it pro-rata, the judge would receive \$53,000 - \$35,300 (2/3), or \$17,700; the ex-spouse would get \$26,000 - \$17,700 (1/3), or \$8,300.

*Re-election after Retirement.* Retired Judges are a rare gem among public employees. Judges distinguish themselves in numerous respects, but particularly in their interest to continue working throughout their life. OPERS will tell you that judges work long past the typical age of retirement, and even after they retire judges are likely to continue in some line of public service. In the last several years we have numerous examples of retired judges serving as the Executive Director of the Judicial Conference, working as a magistrate or other court employee, and being elected to the Ohio General Assembly.

The State of Ohio will not benefit from a policy that penalizes or discourages judges from continuing to serve the public after retirement. That is why Revised Code Section 145.38 contains an exemption for elected officials. House Bill 202 would eliminate this exemption and make judges and other elected officials forfeit a portion of their retirement benefits.

*Acting judge.* Sitting judges are authorized under R.C. 1901.10 to appoint substitute or acting judges when the sitting judge is temporarily absent, incapacitated, or otherwise unavailable. If the sitting judge is unable to make the appointment, the Chief Justice of the Supreme Court of Ohio shall appoint a substitute or acting judge. Under these circumstances the sitting judge typically calls upon a local attorney or retired judge to serve as an “acting judge.” Retired judges are particularly well qualified and necessary during these situations. Without the retired judge, caseload will not be handled in a timely manner and there will be unnecessary delays that could burden the court system.

*Visiting judge.* Visiting judges are authorized under R.C. 2701.03 to temporarily serve in place of a common pleas judge and under R.C. 2701.031 to temporarily replace a municipal or county court judge. Retired judges, not defeated judges, are eligible to be appointed to serve as a visiting judge and the Chief Justice of the Supreme Court of Ohio makes these appointments. The entire judiciary relies on and benefits from the unique qualifications and experience of the visiting judge.

Ohio Revised Code Section 145.01 defines “earnable salary” as “all salary, wages, and other earnings paid to a contributor by reason of employment in a position covered by the retirement system.” Visiting judges receive earnings for temporarily filling a judicial position that is covered by the retirement system, though the position of visiting judge is not itself covered by the retirement system.

The role the retired judge serves is crucial to the integrity of the judicial process, the fair administration of justice, and public trust and confidence in the judicial system. Often these judges are brought in to conduct a trial when the sitting judge has a conflict of interest or when the sitting judge is restricted by the Code of Judicial Conduct from conducting the trial in a particular case. These are typically trials that raise very difficult questions and that present exceedingly challenging fact patterns. These are instances where fair and impartial justice demands an experienced judge. While sometimes this responsibility can be met by a sitting judge in a neighboring community, most of the time the judge from a surrounding county is unable to take over a docket or even handle a case that would last more than a couple of days because that judge needs to take care of business in the judge’s home county.

The caseload and workload of Ohio judges is already very demanding and judges find it difficult to leave their home counties to attend professional and educational meetings and workshops that are needed to maintain their legal credentials and otherwise ensure their knowledge of changes in the law and legal system. To have additional burdens of covering the caseload and workload in neighboring counties would be much too burdensome and would require the creation of additional judgeships, which would be a costly arrangement.

The judiciary will suffer significantly if the Ohio General Assembly adopts a policy that would penalize or discourage retired judges from serving in the capacity of a visiting judge. If enacted, House Bill 202 would have the following consequences:

- Reduce the number of retired judges who would be willing and/or able to serve as a visiting judge;
- Cause delays in trials as judges with a conflict of interest wait for a judge from a neighboring county/city to hear the trial;
- Create scheduling and case management nightmares for local courts (i.e., courts would have to hold trials at a non-traditional time of day to accommodate a judge from a neighboring county/city or have to transfer a case to a location that would be inconvenient for the parties or the prosecutor, but that would be more convenient for a sitting judge in another jurisdiction;)
- Increase reliance on sitting judges that lack the jurisdictional expertise that is best suited for the trial;
- Undermine public confidence in the system of justice,
- Undermine the integrity of the judicial system by jeopardizing the fair and impartial results, and
- Subject the results of the trial to legal challenges or appeals.

Visiting judges are absolutely essential to the operation of Ohio courts. The visiting judge program is an exceedingly cost-effective way of administering justice in situations where a conflict of interest or other problem prevents the sitting judge from performing a trial or other duties temporarily. If the supply of visiting judges dwindles because retired judges are prevented or discouraged from performing the necessary role of visiting judge, then the state would have to find some other alternative, which inevitably would require hiring or electing judges who would serve this purpose. This would have the unintended consequence of being unnecessarily disruptive and costly to the judiciary.

*Unconstitutional State Action.* To reduce a retirement benefit in any proportion and for any reason is tantamount to an unconstitutional seizure of property without due process, which is a state action that is prohibited by the Fourteenth Amendment of the U.S. Constitution.

## **RECOMMENDATIONS**

The Ohio Judicial Conference recommends that the Ohio General Assembly consider that the following changes and/or clarifications be made to House Bill 202:

- (1) Exemption for Visiting Judges and Acting Judges. Although House Bill 202 (Section 145.38) may not apply to visiting and acting judges, clarify Section 145.38 (or seek uncodified section) to ensure that visiting judges are exempt from the reach of this mandate; Make clear that there is an exemption for all income that is paid by a public employer for temporary replacement of an existing employee.
- (2) Salary Amount Subject to Forfeiture Requirements. Clarify if the full amount of the income (or only the amount over \$14,160) is subject to the forfeiture.
- (3) Elected Officials Exemption. Retain the exemption for elected officials who notify the board of elections 90 days prior to the primary election.
- (4) Exemption for Judges. Provide an exemption for judges who retire and seek employment elsewhere in the public sector; judges do not receive step increases and do not receive increases in salary based on experience, and they are the only elected official who have a constitutionally mandated retirement age; after retirement judges appropriately seek employment as court magistrates, members of the Ohio General Assembly, employees of the Ohio Judicial Conference, and other positions of trust within the public sector.
- (5) Exemption for Ohio courts. Provide an exemption for Ohio courts to hire retired police officers and other retired public employees as needed.

Besides the benefit that these recommendations will bring to the judiciary, there will not be any deleterious effects on the solvency of OPERS. Additional years of service after retirement will not change the retirement payments the judge receives. Moreover, the judge who is re-elected after retirement will continue to receive medical coverage as a public employee and will save the medical costs that would otherwise be covered by the OPERS system. Overall, adoption of these recommendations will have a positive impact on the judiciary and no negative consequences for the OPERS system or for the State of Ohio as an employer.