



## The Ohio Retirement Study Council

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# *Analysis*

## **H.B. 404 - Rep. Faber** *As Introduced*

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## **Staff Recommendation**

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The bill would make any person employed full time by a county or independent agricultural society (county or multi-county fair board) whose employment commences *on or after the effective date of the bill* a member of the Public Employees Retirement System (PERS). Under existing law, employees of a county or independent agricultural society are not “public employees” as defined under R.C. 145.01 and, therefore, are not eligible for PERS membership (O.A.C. §145-5-08). These employees are currently covered under Social Security.

The bill would provide that any person employed full time by a county or independent agricultural society *prior to the effective date of the bill* may elect to become a member of PERS by giving notice no later than 90 days after the effective date of the bill on a form supplied by PERS. Once made, such election shall be irrevocable.

**Background** - There are 87 county and 7 independent agricultural societies in Ohio with approximately 130 full-time employees. These societies are nonprofit corporations established, organized and governed under Chapter 1711. of the Ohio Revised Code and rules promulgated by the Ohio Department of Agriculture as opposed to the general nonprofit corporation provisions of Chapter 1702. of the Ohio Revised Code. Their purpose is to promote the agricultural and household manufacturing interests of the county and of the state through public instruction, the advancement of learning and the dissemination of useful information. Under Chapter 1711, these societies are declared to be “bodies corporate and politic,” and are therefore capable of suing and being sued, holding in fee simple real estate purchased by them as sites for their fairs, and mortgaging such real estate for purposes of extending pre-existing debts or furnishing money to purchase additional land.

These societies receive revenues from their annual fairs; non-fair rentals of buildings and grounds; self promoted events; annual membership dues; distributions from the Ohio fair fund; and appropriations from the board of county commissioners to purchase or lease real estate, repair or erect buildings and pay the rental thereof, meet the indebtedness of the society, reimburse the cost of junior club work (up to \$500), encourage agricultural fairs (up to \$2,000), and generally aid the establishment of such societies (up to \$800). Upon voter approval, the board of county commissioners may issue bonds to liquidate the society’s indebtedness or acquire a new site and may levy property taxes to redeem such bonds. In addition, the board of county commissioners shall insure the buildings on the fair grounds. The receipt of any public funds is contingent upon the presentation of a certificate from the Ohio Department of Agriculture indicating the society is in compliance with the laws of the state and rules promulgated by the Department.

As indicated above, the law governing county and independent agricultural societies is separate from the general nonprofit corporation provisions contained in Chapter 1702. It is also very explicit on how the societies are formed, their purpose, authority, membership, election procedures, reporting requirements, activities prohibited by the society, public aid to the society, appropriation procedures, etc.

**Staff Comments** - The inclusion of employees of a nonprofit corporation in PERS is not simply a matter of public policy but also a matter of federal law governing governmental plans. Under the Employees Retirement Income Security Act (ERISA) and Internal Revenue Code (IRC), “governmental plan” is defined in pertinent part as: “a plan established or maintained for its employees by ... the government of the state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.” The extension of coverage to nongovernmental employees can adversely affect the plan’s status as a governmental plan, and cause the plan to become subject to the federal

fiduciary, vesting, funding, and reporting requirements under ERISA, all of which governmental plans are otherwise exempted. Moreover, it can cause the plan to become subject to various federal tax qualification requirements applicable to private pension plans, including the nondiscrimination provisions and qualified domestic relations orders (QDRO's). Certain favorable tax treatment accorded to governmental plans under federal law, including the tax-deferred employer pick-up of mandatory employee contributions, can be denied. Therefore, caution should be exercised before PERS coverage is extended to employees of the numerous IRC 501(c)(3) nonprofit organizations that exist throughout Ohio in order to ensure that PERS' status as a governmental plan is not jeopardized.

In the instant case, there are a number of factors that distinguish county and independent agricultural societies from other nonprofit organizations. They are established, organized and governed under separate authority (i.e., Chapter 1711), and are declared to be "bodies corporate and politic," similar to regional transit authorities, regional transit commissions, and the petroleum underground storage tank release compensation board, all of which are covered under PERS. Under Chapter 1711, authority is granted for the issuance of bonds and the levy of county property taxes on behalf of county agricultural societies; authority is also granted for the appropriation of land for the purpose of holding an agricultural fair. They are also subject to rules promulgated by the Ohio Department of Agriculture. *It is recommended, however, that the bill be amended to declare the exercise of the powers granted to county and independent agricultural societies under Chapter 1711 to be "an essential governmental function," similar to the authority governing the petroleum underground storage tank release compensation board and the tuition trust authority. In addition, it is recommended that the bill be amended to declare full-time employees of the society to be public employees for purposes of PERS membership, similar to the authority governing the Ohio historical society.*

County agricultural societies have been found to be public entities for various purposes. In 1984, the Attorney General opined that county agricultural societies are "public authorities" that must pay prevailing wages when expending public funds for public improvements under Chapter 4115. In 1988, the Attorney General opined that county agricultural societies are "political subdivisions" for purposes of self-insurance programs and joint self-insurance pools authorized under Chapter 2744 (A.G.O. No. 88-034). The Attorney General reasoned that the primary purpose of county agricultural societies has repeatedly been identified as education and that the promotion of educational goals traditionally has been regarded as an appropriate governmental activity. In 1992, the Attorney General opined that the boards of county agricultural societies are "public bodies" subject to the open meeting requirements under Chapter 121 (O.A.G. 92-078). In 2000, the Ohio Supreme Court ruled that county agricultural societies are "political subdivisions" for purposes of applying the tort liability provisions under Chapter 2744. And most recently, the Auditor of State concluded that county agricultural societies are "public entities" for purposes of audits required under Chapter 117. While county agricultural societies certainly possess some characteristics that suggest their activities are proprietary in nature, they are responsible for governmental activities similar to other "bodies corporate and politic" that are covered under PERS.

As indicated above, full-time employees of county and independent agricultural societies are currently covered under Social Security. In the early 1950's, IRC 501(c)(3) nonprofit organizations, like county agricultural societies, were permitted to waive their exemption from Social Security by filing a certificate with the Internal Revenue Service to elect coverage for their employees under Social Security. It appears that at least some county agricultural societies sought to elect coverage under Social Security as the Attorney General opined in 1951 that county agricultural societies are not prohibited by Ohio law from electing Social Security coverage for their employees (1951 O.A.G. No.

597). In an attempt to shore up the solvency of the Social Security System, Congress enacted the 1983 amendments to the Social Security Act which, among other things, prohibited nonprofit organizations from terminating Social Security coverage for their employees on or after March 31, 1983. Moreover, the 1983 amendments mandated Social Security coverage for all employees of IRC 501(c)(3) nonprofit organizations on or after January 1, 1984. In response, the 115th Ohio General Assembly enacted H.B. 232 (eff.2/16/84) which, among other things, permits employees of IRC 501(c)(3) nonprofit organizations who are or become subject to Social Security taxes as a result of the 1983 amendments to opt out of PERS, including various agencies under contract with 648 Boards and certain hospitals. *Therefore, whether employees of a county or independent agricultural society may be excluded from Social Security coverage may, in fact, be determined by the Internal Revenue Service, irrespective of whether the Ohio General Assembly declares them to be "public employees" for purposes of PERS membership.*

Under Social Security, the employee and employer contribute 7.65% each; under PERS, the employee and employer contribute 8.5% and 13.55%, respectively. In addition, PERS members are subject to the Social Security windfall provision which reduces the Social Security benefits otherwise payable for individuals with less than 30 years of Social Security coverage as well as the Social Security government offset provision which reduces and/or eliminates the Social Security benefits otherwise payable based upon a spouse's employment covered under Social Security.

It is our understanding that the bill is intended to be prospective only in order to avoid the creation of any unfunded liabilities resulting from prior service as a full-time employee of a county or independent agricultural society. *Therefore, it is recommended that the bill be amended to prohibit employees of a county or independent agricultural society from purchasing credit under PERS law for service rendered as a full-time employee of such society prior to the effective date of the bill.*

**Fiscal Impact** - There are approximately 130 full-time employees of county or independent agricultural societies as defined under current PERS law. The bill would have no actuarial impact upon PERS, provided the bill is amended to prohibit such employees from purchasing credit for service rendered as a full-time employee of a county or independent agricultural society prior to the effective date of the bill.

**Staff Recommendation** - That the Ohio Retirement Study Council recommend that the Ohio General Assembly approve H.B. 404 upon the adoption of the following amendments:

- declare the exercise of the authority granted to county and agricultural societies to be an essential governmental function and declare full-time employees thereof to be public employees for purposes of PERS membership;
- prohibit the purchase of credit for service rendered as a full-time employee of a county or agricultural society prior to the effective date of the bill.