



1. Citation for the state's workers' compensation statute.

Hawai'i Revised Statutes, Chapter 386.

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

"Any individual in the employment of another person" (Haw. Rev. Stat. § 386-1, Definition of Employee) or any employee, who are not employees as defined by Haw. Rev. Stat. § 386-1, that the employer elects to provide coverage for (Haw. Rev. Stat. § 386-4).

3. Identify and describe any "statutory employer" provision.

Haw. Rev. Stat. § 386-1, Definition of Employee. A loaned employee, who is loaned for the purpose of furthering the borrowing employer's trade, business, occupation, or profession, is considered the employee of the borrowing employer, until control of the employee is returned. However, the employee will be deemed to remain the employee of the original employer if the borrowing employer fails to secure compensation to the employee as provided in Haw. Rev. Stat. § 386-121.

Haw. Rev. Stat. § 386-1, Definition of Employee. An independent contractor is deemed the employer of all employees performing work in the execution of the contract, including employees of the independent contractor's subcontractors and their subcontractors. However, the direct employer of an employee has primary liability and the other employers have secondary liability in their order. A secondarily liable employer who satisfies a liability is entitled to indemnity against loss from the employer primarily liable.

**4. What types of injuries are covered and what is the standard of proof for each:**

**A. Traumatic or “single occurrence” claims.**

In order to be compensable, an injury must be caused by an accident, which includes the willful act of a third person directed against an employee because of the employee’s employment, arising out of and in the course of the employment. Haw. Rev. Stat. § 386-3(a). Under the common law, however, one must simply find that “the injury reasonably appears to have flowed from the conditions under which the employee is required to work” (the “Work Connection Test”). *Royal State Nat’l Ins. Co. v. Labor and Indus. Relations Appeals Bd.*, 53 Haw. 32, 487 P.2d 278 (1971).

**B. Occupational disease (including respiratory and repetitive use).**

In order to be compensable, the disease must be proximately caused by or resulting from the nature of the employment. Haw. Rev. Stat. § 386-3(a). The common law Work Connection Test applies. *Royal State Nat’l Ins. Co. v. Labor and Indus. Relations Appeals Bd.*, 53 Haw. 32, 487 P.2d 278 (1971).

**5. What, if any, injuries or claims are excluded?**

No compensation is allowed for an injury caused by the employee’s willful intention to injure himself or herself or another by actively engaging in any unprovoked non-work related physical altercation other than self-defense, or by the employee’s intoxication. Haw. Rev. Stat. § 386-3(b).

No compensation is allowed for mental stress resulting solely from disciplinary action taken in good faith or under the standards set by a collective bargaining or employment agreement. Haw. Rev. Stat. § 386-3(c).

**6. What psychiatric claims or treatments are compensable and is PTSD a compensable diagnosis?**

**7. What are the applicable statutes of limitations?**

A written claim must be filed: 1) within two years after the date on which effects of the injury become manifest; and 2) within five years after the date of accident. Haw. Rev. Stat. § 386-82. For chemical or radioactive exposures, a claim must be made within two years after knowledge that the injury was proximately caused by the employment. Haw. Rev. Stat. § 386-82. There is no limitation of time for a mentally incompetent or minor dependent, as long as there is no guardian or next friend. Haw. Rev. Stat. § 386-84. With a showing of substantial evidence, on the ground of a change in or mistake in a determination of fact related to the physical condition of the injured employee, a case may

be reopened within eight years after the date of the last payment of compensation. Haw. Rev. Stat. § 386-89(c).

**8. What are the reporting and notice requirements for those alleging an injury?**

The employee is required to give written notice to the employer as soon as practicable after an accident. Haw. Rev. Stat. § 386-81. However, notice need not be given when: 1) the employer has actual knowledge of the injury; 2) medical benefits have been furnished by the employer; or 3) there is some satisfactory reason why notice was not given and the employer is not prejudiced. Haw. Rev. Stat. § 386-81. The notice defense is waived if the employer is not prejudiced or fails to raise such a defense at the first hearing on the claim. Haw. Rev. Stat. § 386-81.

**9. Describe available defenses based on employee conduct:**

**A. Self-inflicted injury.**

Compensation is not allowed for an injury caused by the employee's willful intention to injure himself or herself by actively engaging in any unprovoked non-work related physical altercation other than in self-defense. Haw. Rev. Stat. § 386-3(b).

**B. Willful misconduct, "horseplay," etc.**

Compensation is not allowed for an injury caused by the employee's willful intention to injure oneself or another, or actively engaging in any unprovoked non-work related physical altercation other than in self-defense. Haw. Rev. Stat. § 386-3(b). The willful act of a third person directed against an employee must be "because of the employee's employment" in order to be compensable. Haw. Rev. Stat. § 386-3(a).

**C. Injuries involving drugs and/or alcohol.**

Injuries caused by the employee's intoxication are similarly not compensable. Haw. Rev. Stat. § 386-3(b).

**10. What, if any, penalties or remedies are available in claims involving fraud?**

Penalties for fraud are detailed in Haw. Rev. Stat. § 386-98.

Criminal penalties: 1) a Class C felony if the value of moneys obtained or denied is not less than \$2,000; 2) a Misdemeanor if the value of the moneys obtained or denied is less than \$2,000; and 3) a Petty Misdemeanor if the providing of false information did not cause any monetary loss. Haw. Rev. Stat. § 386-98(d). In addition, the person shall be ordered to

make restitution to an insurer or any other person for any financial loss sustained by the insurer or other person caused by the fraudulent act.

Administrative Penalties: In lieu of criminal penalties any person who violates Haw. Rev. Stat. §§ 386-98(a) and 386-98(b), may be subject to the administrative penalties of restitution of benefits to the source from which the compensation was received and one or more of the following: 1) a fine of not more than \$10,000 for each violation; 2) suspension or termination of benefits in whole or in part; 3) suspension or disqualification from providing medical care or services, vocational rehabilitation services, and all other services rendered for payment; 4) suspension or termination of payments for medical, vocational rehabilitation and all other services rendered; 5) recoupment by the insurer of all payments made for medical care, medical services, vocational rehabilitation services, and all other services rendered; and 6) reimbursement of attorney's fees and costs of the party or parties defrauded. Haw. Rev. Stat. § 386-98(e).

**11. Is there any defense for falsification of employment records regarding medical history?**

Haw. Rev. Stat. Chapter 386 does not establish any statutory defense(s) for the falsification of employment records regarding medical history. Similarly, Hawai'i's common law has not established any defense(s) for the falsification of employment records regarding medical history.

**12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?**

Hawai'i follows the unitary work-connection test, which requires a finding of a causal connection between the injury and any incidents or conditions of employment. *Ostrowski v. Wasa Elec. Servs., Inc.*, 87 Hawai'i 492, 960 P.2d 162 (App. 1998). With regard to recreational or social activities, the injury is compensable if 1) the activities occur on the employer's premises during lunch or a recreation period as a regular incident of employment; or 2) employer, by expressly or impliedly requiring participation or by making the activity part of services of the employee, brings the activity within the orbit of employment; or 3) the employer derives substantial direct benefit from the activity beyond intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. *Ostrowski v. Wasa Elec. Servs., Inc.*, 87 Hawai'i 492, 960 P.2d 162 (App. 1998).

**13. Are injuries by co-employees compensable?**

Yes, as long as the willful act by the co-employee can be shown to be directed against the employee because of the employee's employment. Haw. Rev. Stat. § 386-3. A causal connection between a willful act and the employee's employment may be shown by connecting the subject matter of the willful act with the employee's employment. *Zemis*

*v. SCI Contractors, Inc.*, 80 Hawai'i 442, 911 P.2d 77 (1996). For example, if a co-employee assaults an employee because of an automobile accident that occurred between the employee and the co-employee's wife, then the injuries are not compensable because the subject matter of the assault was not related to the employee's employment. *Zemis v. SCI Contractors, Inc.*, 80 Hawai'i 442, 911 P.2d 77 (1996).

**14. Are acts by third parties unrelated to work but committed on the premises, compensable (e.g. "irate paramour" claims)?**

No, as long as it can clearly be shown that the third party's act was not directed against the employee because of the employee's employment. Haw. Rev. Stat. § 386-3. In other words, the injury is not compensable if the subject matter of the third party's act cannot be connected to the employee's employment. *Zemis v. SCI Contractors, Inc.*, 80 Hawai'i 442, 911 P.2d 77 (1996).

## **BENEFITS**

**15. What criterion is used for calculating the average weekly wage?**

Average weekly wage is to be computed in a manner that most fairly represents the employee's average weekly wages from all covered employment at the time of the injury. Haw. Rev. Stat. § 386-51. For the calculation of temporary partial disability and temporary total disability benefits, such wages must not be computed to be less than the employee's hourly pay rate multiplied by 35. Haw. Rev. Stat. § 386-51. Where the employee holds part-time employment of fewer than 35 hours per week, the employee's average weekly wages is the hourly rate at the average hours worked in the 52 weeks (or portions thereof) preceding the week in which the injury occurred. Haw. Rev. Stat. § 386-51. Other benefits including permanent partial disability, permanent total disability, and death shall be calculated as if the employee had been a full-time employee. Haw. Rev. Stat. § 386-51.

Where appropriate, such computation is made on the basis of earnings from covered employment for twelve months preceding the date of injury, excluding time lost for sickness or personal reasons exceeding one week. Haw. Rev. Stat. § 386-51(1). Unless otherwise provided, the total average weekly wages of any employee are capped by the average weekly wage earned at the time of injury by an employee in comparable employment and employed full-time on an annual basis. Haw. Rev. Stat. § 386-51(4).

**16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?**

Benefits are paid at the weekly benefit rate of sixty-six and two-thirds of the employee's average weekly wage. Haw. Rev. Stat. § 386-31(b). The rate cannot exceed the state

average weekly wage as determined by the Director of Labor and Industrial Relations (the "Director"). Haw. Rev. Stat. §§ 386-31(a) and 386-31(b). If the employee's weekly wages are less than the minimum weekly benefit rate (\$38 or 25% of the state average weekly wage, whichever is higher), the rate is 100% of the employee's average weekly wage. Haw. Rev. Stat. §§ 386-31(a) and 386-31(b).

**17. How long does the employer/insurer have to begin temporary benefits from the date disability begins?**

If a claim is not controverted, benefits first become due no later than the tenth day after the employer is notified of the occurrence of total disability. See Haw. Rev. Stat. § 386-31(b).

**18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out \_\_\_\_\_ days before recovering benefits for the first \_\_\_\_\_ days)?**

The employee is not paid for the first three days following the injury. Haw. Rev. Stat. § 386-31(b).

**19. What is the standard/procedure for terminating temporary benefits?**

If the employer/insurer is of the opinion (i.e., has medical evidence) that the employee "is able to resume work," then it must give the employee and the Director written notification two weeks prior to the date when the last payment is to be made. Haw. Rev. Stat. § 386-31(b). An employer/insurer must provide a reason for stopping payment and must inform the employee of the right to make a written request to the Director for a hearing. Haw. Rev. Stat. § 386-31(b). If an employee has returned to work, there is no need for notification and payments can be stopped. Haw. Rev. Stat. § 386-31(b).

**20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?**

No. However, the employer/insurer can request a credit for voluntary payments made during disability. Haw. Rev. Stat. § 386-52. An employer may, with the approval of the Director, deduct from an amount payable as compensation any advance payments made to the injured employee if the employee had been notified in writing at the time the advance was made that the payments were in lieu of compensation. Haw. Admin. R. 12-10-24.

**21. What disfigurement benefits are available and how are they calculated?**

Disfigurement up to \$30,000, may be awarded as the Director deems proper and equitable. Haw. Rev. Stat. § 386-32(a). This includes scarring and other disfiguring

consequences caused by medical, surgical and hospital treatment. Haw. Rev. Stat. § 386-32(a).

22. How are permanent partial disability benefits calculated, including minimum and maximum rates?

A. How many weeks are available for scheduled members/parts, and the standard for recovery?

Scheduled disabilities are as follows:

<u>Bodily Loss</u>	<u>Maximum Weeks</u>
Thumb	75
Index finger	46
Middle finger	30
Ring finger	25
Little finger	15
One phalanx of thumb or finger	
Thumb	56.25
Index finger	23
Middle finger	15
Ring finger	12.5
Little finger	7.5
Great toe	38
Other toes	16
One phalanx of toe	
Great toe	19
Other toe	8
Hand	244
Arm	312
Foot	205
Leg	288
Eye	
Loss of eye by enucleation	160
Loss of vision (one eye)	140
Ear:	
Loss of hearing in both ears	200
Loss of hearing in one ear	52
Loss of both ears	80
Loss of one ear	40

Haw. Rev. Stat. § 386-32(a).

Where permanent partial disability results from partial loss of use of a scheduled member, compensation is paid for a period that stands in the same proportion to the period specified for total loss of the member as the partial loss of use of that member stands to the total loss thereof. Haw. Rev. Stat. § 386-32(a). The formula for non-whole person recovery is (state average weekly wage) x (period of scheduled disability) x (percentage of permanent impairment). Haw. Rev. Stat. § 386-32(a).

**B. Number of weeks for “whole person” and standard for recovery.**

Where permanent partial disability must be rated as a percentage of the total loss or impairment of the whole person, the maximum compensation is computed as follows: (312 weeks) x (state average weekly wage rate) x (percentage of permanent impairment). Haw. Rev. Stat. § 386-32(a).

**23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?**

Employees who have or may suffer permanent disability as the result of work injuries may be referred to vocational rehabilitation, if feasible. Haw. Rev. Stat. § 386-25(b). Vocational rehabilitation is not mandatory, and the employee must approve of the proposed rehabilitation plan or program. Haw. Rev. Stat. § 386-25(c). The employee may select the certified provider of rehabilitation services. Haw. Rev. Stat. § 386-25(c). After selection, the employee and the certified provider must give notice to the employer. Haw. Rev. Stat. § 386-25(c).

**24. How are permanent total disability benefits calculated, including the minimum and maximum rates?**

Permanent total disability benefits are calculated on two-thirds of the employee’s average weekly wage, not to exceed the state average weekly wage, nor be less than \$38 or 25% of the state average weekly wage (whichever is higher). Haw. Rev. Stat. § 386-31(a).

**25. How are death benefits calculated, including the minimum and maximum rates?**

**A. Funeral expenses.**

Funeral expenses may be recovered in an amount up to ten times the maximum weekly benefit rate, and burial expenses recovered up to five times the maximum weekly benefit rate. Haw. Rev. Stat. § 386-41(a).

**B. Dependency claims.**

The maximum benefits paid to the deceased's dependents is the maximum weekly benefit rate prescribed in Haw. Rev. Stat. § 386-31 divided by .6667. Haw. Rev. Stat. § 386-41(b). The minimum benefits paid to the deceased's dependent is the minimum weekly benefit rate prescribed in Haw. Rev. Stat. § 386-31 divided by .6667. Haw. Rev. Stat. § 386-41(b). Benefits are paid at fractions: One-half of the deceased employee's average weekly wage to a surviving spouse with no dependent children and two-thirds of the deceased employee's average weekly wage to a surviving spouse with dependent children are the most common fractions paid. Haw. Rev. Stat. § 386-41(b). Two-thirds the deceased employee's average weekly wage is the largest fraction paid. Haw. Rev. Stat. § 386-41(b).

**26. What are the criteria for establishing a "second injury" fund recovery?**

A previous partial disability must satisfy an initial threshold of at least 32 weeks of compensation in order to trigger fund involvement in cases of permanent total disability or death. Haw. Rev. Stat. § 386-33(b). Furthermore, fund involvement occurs only after the employer has paid 104 weeks of compensation. Haw. Rev. Stat. § 386-33(a).

**27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?**

Re-opening is permitted upon the application of any party in interest, at any time prior to eight years after the date of last compensation, whether or not a decision awarding compensation has been issued, or at any time prior to eight years after the rejection of a claim. Haw. Rev. Stat. § 386-89(c).

**28. What situation would place responsibility on the employer to pay an employee's attorney fees?**

It is within the Director's discretion both to approve an employee's attorney fee and to determine whether the fee will be a lien upon compensation payable by the employer. Haw. Rev. Stat. § 386-94. Reimbursement of attorney's fees and costs is also an administrative penalty available to a defrauded party. Haw. Rev. Stat. § 386-98(e).

**29. Are there any specific compensability requirements or applicable statutes for hybrid employees?**

## EXCLUSIVITY/TORT IMMUNITY

**30. Is the compensation remedy exclusive?**

**A. Scope of immunity.**

There has been fairly strict interpretation that workers' compensation is the exclusive remedy for "work-connected" accidents and resulting injuries. Haw. Rev. Stat. § 386-5.

**B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).**

Exclusivity may be waived by a contractual indemnity agreement. *See Keawe v. Hawaiian Elec. Co.*, 65 Haw. 232, 649 P.2d 1149 (1982); *Kamali v. Hawaiian Elec. Co.*, 54 Haw. 153, 504 P.2d 861 (1972). The workers' compensation scheme does not apply to claims of intentional discrimination. *See Furukawa v. Honolulu Zoological Soc'y*, 85 Hawai'i 7, 936 P.2d 643 (1997). It also does not apply to injuries involving sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto. Haw. Rev. Stat. § 386-5. It also does not apply to the bad faith handling of a claim against a worker's compensation insurer. *See Hough v. Pac. Ins. Co.*, 83 Hawai'i 457, 927 P.2d 858 (1996).

**31. Are there any penalties against the employer for unsafe working conditions?**

None under Haw. Rev. Stat. Chapter 386.

**32. What is the penalty, if any, for an injured minor?**

None under Haw. Rev. Stat. Chapter 386.

**33. What is the potential exposure for "bad faith" claims handling?**

The Hawai'i Supreme Court recognized a claim for bad faith filed by an employee against the workers' compensation insurer in *Hough v. Pac. Ins. Co.*, 83 Hawai'i 457, 927 P.2d 858 (1996). In this case, the Hawai'i Supreme Court held that the injuries alleged (including a claim of breach of the common law duty of good faith) were not "work injuries" within the scope of Haw. Rev. Stat. Chapter 386 and claimant was not precluded by the exclusivity provision of Haw. Rev. Stat. § 386-5 from seeking common law tort remedies against the insurer. The common law tort remedies include a claim for bad faith. The court held that a breach of the implied contractual duty of good faith gives rise to the independent tort cause of action for a third-party beneficiary, under the same limitations for punitive damages as discussed in *Best Place, Inc. v. Penn Am. Ins. Co.*, 82 Hawai'i 120, 920 P.2d 334 (1996).

The Hawai'i Supreme Court expanded the *Hough* holding in *Catron v. Tokio Marine Mgmt, Inc.*, 90 Hawai'i 407, 978 P.2d 845 (1999). In *Catron*, the Court held that an insurer's harassment of an employee which occurred after the settlement of a workers' compensation claim could support an action for the bad faith handling of a workers' compensation claim.

**34. What is the exposure for terminating an employee who has been injured?**

Any employee who is discharged because of such work injury shall be given first preference of reemployment by the employer in any position which the employee is capable of performing and which becomes available after the suspension or discharge and during the period thereafter until the employee secures new employment. Haw. Rev. Stat. § 386-142. For descriptions of other unlawful employment practices involving termination of an employee, see Haw. Rev. Stat. §§ 378-2 and 378-32. Remedies can include retroactive hire/promotion/reinstatement; back pay; fringe benefits; injunctive relief; other equitable relief; and reasonable attorneys' fees and costs. Haw. Rev. Stat. §§ 378-2 and 378-32.

## **THIRD PARTY ACTIONS**

**35. Can third parties be sued by the employee?**

Yes. Haw. Rev. Stat. § 386-8(b).

**36. Can co-employees be sued for work-related injuries?**

Co-employees acting within the scope of their employment are immune from suit, but they are not relieved of liability for willful and wanton misconduct leading to injury. See *Wangler v. Hawaiian Elec. Co.*, 742 F.Supp. 1465 (D. Haw. 1990). Willful and wanton misconduct is defined under the law as conduct either 1) motivated by an actual intent to cause injury or 2) committed in circumstances indicating that the injured employee a) has knowledge of the peril to be apprehended, b) has knowledge that the injury is a probable, as opposed to a possible, result of danger, and c) consciously fails to avoid the peril. *Iddings v. Mee-Lee*, 82 Hawai'i 1, 919 P2d 263 (1996). Willful and wanton misconduct must be proven by clear and convincing evidence. *Iddings v. Mee-Lee*, 82 Hawai'i 1, 919 P2d 263 (1996).

**37. Is subrogation available?**

Yes. Haw. Rev. Stat. § 386-8(c).

## MEDICALS

38. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

Yes. An employer/insurer has 60 days from the time of the bill to notify the provider if a claim is being controverted. Haw. Admin. R. 12-15-94(b). Failure to notify renders the employer/insurer liable for services rendered until it controverts additional services. Haw. Admin. R. 12-15-94(b). The employer/insurer, after accepting liability, must pay all charges billed within sixty calendar days of receipt except where there is a reasonable disagreement. Haw. Admin. R. 12-15-94(c). If more than sixty calendar days lapse between the employer/insurer's receipt of an undisputed billing and date of payment, payment of billing is increased by one per cent per month of the outstanding balance. Haw. Admin. R. 12-15-94(c). In the event of disagreement, the employer/insurer must pay for all acknowledged charges within sixty calendar days of receipt and must negotiate with the service provider on times in disagreement. Haw. Admin. R. 12-15-94(d).

39. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

The Director may excuse the failure to make a medical report within the prescribed period, or a non-submission of the report, when the Director finds it in the best interest of justice to do so. Haw. Rev. Stat. § 386-96(b). Without such excuse, the delinquent physician will be fined up to \$500. Haw. Rev. Stat. § 386-96(b). *See also* Haw. Admin. R. 12-15-80 (Reports of providers of service).

Generally, an executed medical authorization remains the subject of mutual cooperation between parties. Note re: previous answers to this question: Haw. Admin. R. 12-10-66 has been repealed.

40. What is the rule on (a) Claimant's choice of a physician; (b) Employer's right to second opinion and/or Independent Medical Examination?

A. Claimant's choice of a physician.

A claimant may choose his or her own physician or surgeon. Haw. Rev. Stat. § 386-21(b). Changes in attending physician by an employee subsequent to the first change require prior approval by the Director or the employer. Haw. Rev. Stat. § 386-21(b). *See also* Haw. Admin. R. 12-15-38.

**B. Employer's right to second opinion and/or Independent Medical Examination.**

*[Note: In 2017, Haw. Rev. Stat. § 386-79 was amended and will be reinstated to its original form on June 30, 2019. Said amendment does not affect the following answer.]* The employee is required to submit to examination, at reasonable times and places, for examination by a duly qualified physician or surgeon designated and paid by the employer. Haw. Rev. Stat. § 386-79. The employee has the right to have his own physician or surgeon present at the examination. Haw. Rev. Stat. § 386-79. If the employee refuses to submit or obstructs the examination, the employee's compensation benefits can be suspended until the refusal or obstruction ceases. Haw. Rev. Stat. § 386-79. There cannot be more than one IME per case unless good and valid reasons exist with regard to the medical progress of the employee's treatment. Haw. Rev. Stat. § 386-79.

**41. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?**

The standard for covered treatment is set forth in Title 12, Chapter 15, Hawai'i Administrative Rules. These rules address the frequency and extent of treatment allowed for various types of providers: 1) Haw. Admin. R. 12-15-32 (physicians); and 2) Haw. Admin. R. 12-15-34 (providers of service other than physicians) The general standards are as follows: 1) physicians do not need authorization for the initial 15 treatments during the first 60 days, thereafter, the physician must submit a treatment plan for the next 120 days covering a maximum of 15 treatments during that time; 2) other service providers require prescriptions from the attending physician, which may authorize to 15 treatments during the first 60 days, however for therapist, the prescription may authorize 20 treatments during the first 60 days, thereafter, the attending physician must submit a treatment plan for the next 120 days covering a maximum of 15 treatments during that time. Haw. Admin. R. 12-15-32 and Haw. Admin. R. 12-15-34.

**42. Which prosthetic devices are covered, and for how long?**

Where injury results in amputation of an arm, hand, leg or foot, enucleation of an eye, loss of natural or artificial teeth, or loss of vision, the employer must furnish such other aids, appliances, apparatus, and supplies as are required to cure or relieve such injury. Haw. Rev. Stat. § 386-22.

**43. Are vehicle and/or home modifications covered as medical expenses?**

Such expenses may be covered, if proper medical certification is submitted to and approved by the Director. Haw. Rev. Stat. § 386-24.

**44. Is there a medical fee guide or schedule, or other provisions for cost containment?**

Yes, charges for medical services shall not exceed 110% of participating fees prescribed in the Medicare Resource Based Relative Value Scale System fee schedule applicable to Hawaii that is in effect as of January 1 of the year of the injury. Haw. Admin. R. 12-15-90.

**45. What, if any, provisions or requirements are there for “managed care”?**

There are no provisions or requirements for managed care under Haw. Rev. Stat. Chapter 386.

## **PRACTICE/PROCEDURE**

**46. What is the procedure for contesting all or part of a claim?**

The employer/insurer files a report of industrial injury denying liability. Haw. Admin. R. 12-10-73(a). When the employer/insurer denies compensation, it must submit a written report to the Director and the employee within 30 calendar days supporting the denial. Haw. Admin. R. 12-10-73(a). If the Director believes the injury to be compensable, the Director must notify the employer/insurer and give it 30 days to request a hearing. Haw. Admin. R. 12-10-73(b). If the employer/insurer fails to request a hearing, it will be considered a waiver and the Director may issue a decision holding the injury compensable. Haw. Admin. R. 12-10-73(b).

**47. What is the method of claim adjudication?**

**A. Administrative level.**

The Director has original jurisdiction over all controversies and disputes over employment and coverage arising under Chapter 386. Haw. Rev. Stat. § 386-73.5. Typically, cases are adjudicated by an administrative hearing at the Disability Compensation Division (DCD). Haw. Admin. R. 12-10-61. The outcome of the DCD hearing can be appealed *de novo* to the Labor and Industrial Relations Appeals Board (LAB) for another administrative hearing. Haw. Rev. Stat. §§ 386-87(a) and 386-87(b).

**B. Trial court.**

For all practical purposes, the “trial” of a workers’ compensation case occurs at the DCD and LAB administrative hearings. Local circuit courts are available for enforcement of decisions awarding compensation. Haw. Rev. Stat. § 386-91.

**C. Appellate.**

A DCD decision can be appealed to the LAB. Haw. Rev. Stat. § 386-87(a). A decision of the LAB can be appealed to the Hawai'i Supreme Court for review on matters of law only. Haw. Rev. Stat. § 386-88.

**48. What are the requirements for stipulations or settlements?**

Stipulations and settlements must be approved by the Director. Haw. Rev. Stat. § 386-78(a). Any compromise in which the employee waives or otherwise prejudices his or her right to reopen the claim, or to future medical benefits, requires written approval of the Appeals Board. Haw. Rev. Stat. § 386-87(d).

**49. Are full and final settlements with closed medicals available?**

Yes. The Director periodically sets an informal minimum amount required to obtain complete waivers of an employee's re-opening rights. The amounts are presently \$9,000 for waiver of future medicals and \$6,000 for waiver of future indemnity benefits.

**50. Must stipulations and/or settlements be approved by the state administrative body?**

Yes. Haw. Rev. Stat. § 386-78. This also includes settlements obtained under collective bargaining agreements. See Haw. Admin. R. 12-10-2(k).

## **RISK FINANCE FOR WORKERS' COMPENSATION**

**51. What insurance is required, and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?**

Employers must secure workers' compensation to their employees through private insurance, security, proof of financial ability to provide self-insurance, or as part of a self-insurance group. Haw. Rev. Stat. § 386-121(a).

**52. What are the provisions/requirements for self-insurance?**

**A. For individual entities.**

Employers may become self-insured by furnishing to the Director satisfactory proof of their solvency and financial ability to pay compensation and benefits. Haw. Rev. Stat. § 386-121(a)(3). Note re: previous answers to this question: Haw. Admin. R. 12-10-94 has been repealed.

**B. For groups or “pools” of private entities.**

Workers’ compensation self-insurance groups may be formed by filing appropriate documentation with the Insurance Commissioner, posting the appropriate security, and providing proof that the net worth of all members exceeds \$1,000,000.00. Haw Rev. Stat. § 386-194(b).

- 53. Are illegal aliens entitled to benefits of workers’ compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of “employee”?**

The statutes and administrative rules are silent on the entitlement of illegal aliens to workers’ compensation benefits. The State’s statutes would probably be liberally interpreted in favor of finding any illegal alien entitled to benefits.

- 54. Are terrorist acts or injuries covered or excluded under workers’ compensation law?**

The statutes and administrative rules are silent as to terrorist acts or injuries under workers compensation. Haw. Rev. Stat. § 386-85 presumes that in the absence of substantial evidence otherwise any claim for workers’ compensation is for a covered work injury, lending to the possible liberal interpretation finding work injuries as a result of terrorist acts compensable. However, terrorist acts are not those under control of Employer and a strong argument could be made that such injuries are not work related.

- 55. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare’s interests pursuant to the Medicare Secondary Payer Act?**

Hawai’i workers compensation law does not impose any specific requirements vis-à-vis the Medicare Secondary Payer Act. However, as settlements require the Director’s approval, addressing the reimbursement of Medicare benefits may be required as part of a settlement, and carriers will generally require satisfaction of Medicare liabilities to protect themselves.

- 56. How are subrogation liens of Medicaid and health insurers treated under workers’ compensation law?**

If the Department of Human Services has provided medical assistance or burial payment to a person who was injured, suffered a disease, or died under circumstances creating a tort or other liability or payment obligation against a third person, the department shall have a right to recover from the third person an amount not to exceed the full amount of the costs of medical assistance or burial payment furnished or to be furnished by the

department. Haw. Rev. Stat. § 346-37(c). The department, as to this right of reimbursement, shall also be subrogated to all rights or claims that a claimant has against the third person for all damages not to exceed the full extent of the costs of medical assistance or burial payment furnished or to be furnished by the department. Haw. Rev. Stat. § 346-37(d).

**57. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?**

HIPAA, 45 C.F.R. parts 160-164 and 65 C.F.R. 82462 provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. 45 C.F.R. 164.512(l). Therefore, the current practice of obtaining medical records could proceed under state law.

There are no specific requirements for confidentiality and privacy records under workers' compensation law in Hawai'i. However, a Claimant provides his or her authorization for the release of records upon initiating a claim by filing a WC-5.

There is no state privacy law regarding medical records. Haw. Rev. Stat. Chapter 323C, governing the Privacy of Health Care Information was enacted in 1999 and repealed in 2001. However, the Courts have found that the privacy provisions of the Hawai'i State Constitution, Article I, Section 6 protects a claimant's health information against disclosure outside the underlying litigation. *Cohan v. Ayabe*, 132 Hawai'i 408, 322 P.3d 948 (Hawai'i 2014).

**58. What are the provisions for "Independent Contractors"?**

Whenever an independent contractor undertakes to perform work for another person pursuant to contract, express or implied, oral or written, the independent contractor is deemed the employer of all employees performing work in the execution of the contract, including employees of the independent contractor's subcontractors and their subcontractors. Haw. Rev. Stat. § 386-1, Definition of Employee. However, the liabilities of the direct employer of an employee who suffers an injury is primary and that of the others secondary in their order. Haw. Rev. Stat. § 386-1, Definition of Employee. An employer secondarily liable who satisfies a liability under this chapter is entitled to indemnity against loss from the employer primarily liable. Haw. Rev. Stat. § 386-1, Definition of Employee.

**59. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?**

There are no specific statutes or regulations regarding professional employment organizations/temporary service companies/temporary service companies. However, by

custom and in practical application before the DCD and LAB, the Department considers the claimant to be the employee of the PEO, temp agency, or leasing company.

60. Are there any specific provisions for “Independent Contractors” pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

No.

61. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits, costs and losses?

62. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare’s interests when settling the right to medical treatment benefits under a claim?

63. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Workers’ Compensation law?

Yes. Hawaii enacted its medical use of cannabis statute in 2000, which was most recently amended in 2017. Haw. Rev. Stat. § 329-122.

Haw. Rev. Stat. § 329-122(c) specifically states “[t]he authorization for the medical use of cannabis ... shall not apply to ... [t]he medical use of cannabis ... in the workplace of one’s employment ....”

Haw. Rev. Stat. Chapter 386 has not yet been amended to address cannabis use.

64. Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Workers’ Compensation law?

No.