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I. AT-WILL EMPLOYMENT

A. Statute

There is no statutory codification of the at-will employment doctrine in Hawaii.

B. Case Law

The general rule in Hawaii is that where an employee is hired under a contract of indefinite duration, it "will generally be construed as giving rise to an at-will employment relationship and as therefore terminable at the will of either party for any reason or no reason." *Shope v. Gucci Am., Inc.*, 14 P.3d 1049, 1064, 94 Haw. 368, 383 (2000); *see also, Vlasaty v. Pac. Club*, 670 P.2d 827, 4 Haw.App. 556 (1983); *Douglas v. Pflueger Haw., Inc.*, 135 P.3d 129, 110 Haw. 520 (2006). However, "at-will does not mean the nonexistence of an agreement of employment between the parties." *Douglas*, 135 P.3d at 134, 110 Haw. at 525.

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

The right of employers to discharge employees "can be contractually modified and, thus, qualified by statements contained in employee policy manuals or handbooks issued by employers to their employees." *Kinoshita v. Canadian Pac. Airlines*, 724 P.2d 110, 116, 68 Haw. 594, 601 (1986).

In *Kinoshita*, the employer promulgated Employee Rules, partly in response to attempts to unionize, containing specific provisions regarding discipline, suspension, and discharge. In a further attempt to defeat unionization, the employer disseminated a letter stating that there were arrangements "which constitute an enforceable contract." *Id.* at 114, 68 Haw. at 598. The employer suspended and terminated two part-time passenger agents arrested on suspicion of conspiracy to promote cocaine. The employer did not follow the provisions outlined in the Employee Rules and did not allow either employee to appeal the discharges. The Hawaii Supreme Court found that the employer had been striving to create an atmosphere of job security and fair treatment. The court indicated that the employees relied on the Employee Rules by their continued employment, and furthermore, the employees did not have to receive all the communications in order to rely on them. *Id.*

2. Provisions Regarding Fair Treatment

If an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship. *Shope v. Gucci Am., Inc.*, 14 P.3d 1049, 94 Haw. 368 (2000).

3. Disclaimers

Employee handbook disclaimers do not per se preclude a claim for breach of an implied contract. *Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd.*, 58 P.3d 1196, 100 Haw. 149 (2002). The handbooks must contain disclaimers expressly stating that the handbook or manual is not a contract and does not alter the employment at-will relationship. The effectiveness of a disclaimer in an employee handbook may be vitiated for a number of reasons, including disclaimers that: (1) are not clear, conspicuous, and understandable, (2) contradictory language in the manual, or (3) subsequent oral or written statements by the employer.

Hawaii pattern jury instruction 16.13 sets forth the elements for disclaimer of implied employment contract; an employer must prove both of the following elements:

1. The employer made no written guarantees of continued employment to its employees; and
2. Disclaimers in the employer's handbooks/policy manuals/rules and regulations clearly state that the employees can be terminated at will.

Shope v. Gucci America, Inc., 94 Hawai'i 368, 385-86, 14 P.3d 1049, 1066-67 (2000).

4. Implied Covenants of Good Faith and Fair Dealing

The Hawaii Supreme Court has specifically declined to imply a covenant of good faith and fair dealing in an employment contract. *Calleon v. Miyagi*, 876 P.2d 1278, 76 Hawaii 453 (1994).

B. Public Policy Exceptions

1. General

An employer may be held liable in tort where the discharge of an employee violates a clear mandate of public policy. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 65 Haw. 370 (1982). Public policy is found in the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. *Fawkner v. Atlantis Submarines, Inc.*, 135 F. Supp. 2d 1127 (D.Haw. 2001). If, however, the statutory or regulatory provision evidencing the public policy provide a remedy for the wrongful discharge, provision of a further remedy under the public policy exception is unnecessary. *Takaki v. Allied Mach. Corp.*, 951 P.2d 507, 87 Haw. 57 (1998); *Ross v. Stouffer Hotel*, 879 P.2d 1037, 76 Haw. 454 (1994).

To be considered discriminatory, the action must have been taken "because" of the employee conduct. The employee has the burden of showing his or her conduct was a "substantial or motivating

factor" in the discharge or challenged action. *Crosby v. State Dep't of Budget & Fin.*, 876 P.2d 1300, 76 Haw. 332 (1994).

2. Exercising a Legal Right

Exercising a statutory right or privilege can be the basis for a claim for discharge in violation of public policy. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir.2002). However, as with a retaliation claim under Title VII of the Civil Rights Act of 1964, the employee must show a causal connection with the protected action and the adverse employment action. *Id.*

A plaintiff establishes a prima facie case of retaliation by demonstrating that: (a) the plaintiff (i) opposed a practice forbidden by statute or (ii) filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practices prohibited by statute, (b) his or her employer, labor organization, or employment agency has discharged, expelled, or otherwise discriminated against the plaintiff, and (c) a causal link existed between the protected activity and the adverse action. *Schefke v. Reliable Collection Agency, Ltd.*, 32 P.3d 52, 96 Haw. 408 (2001).

3. Refusing to Violate the Law

Discharge intended to prevent an employee from giving information to government investigators can constitute a violation of public policy. *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 65 Haw. 370 (1982). In *Parnar*, the employee was the secretary to the comptroller of a hotel. The federal government began an anti-trust investigation of certain hotels in the state. The employee met with the hotel's attorney to discuss any knowledge she had regarding the charged violations. Shortly thereafter, she was terminated, prompting a lawsuit for wrongful retaliatory discharge. Because violation of the antitrust laws harms the public interest in free competition, firing an employee who would testify truthfully as to such violations contravenes public policy.

4. Exposing Illegal Activity (Whistleblowers)

The Hawaii Whistleblowers' Protection Act (HWPB), HAW. REV. STAT. §§ 378-61 to 378-69, protects at-will and non-at-will employees who are discharged for exposing illegal activity. Under the HWPB, an employer may not discharge, threaten, or discriminate against an employee reporting a violation or suspected violation of a law, rule, ordinance, or regulation unless the employee knows that the report is false. HAW. REV. STAT. § 378-62(1).

[T]he legislature intended to safeguard the general public by giving certain protection to individual employees who "blow the whistle" for the public good. The legislature did not restrict such protection to at-will employees. On the contrary, it left open for the courts to further determine the development of the common law retaliatory discharge cases.

Norris v. Hawaiian Airlines, Inc., 842 P.2d 634, 636, 74 Haw. 235, 261 (1992), aff'd 512 U.S. 246 (1994) (exposing unsafe safety practices).

III. CONSTRUCTIVE DISCHARGE

It is well established in the Ninth Circuit Court of Appeals that an employee who resigns his or her employment and later prevails in a Title VII action may not receive back pay unless the employee was constructively discharged by his employer. In *Kishaba v. Hilton Hotels Corp.*, 737 F. Supp. 549 (D. Haw. 1990), the United States District Court held that a constructive discharge occurs when, looking at the totality of circumstances, a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable and discriminatory working conditions. A plaintiff alleging a constructive discharge must show some "'aggravating factors,' such as a 'continuous pattern of discriminatory treatment.'" *Id.* at 556.

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

If an employment contract specifies the contract can be terminated for cause, the employee may bring an action disputing whether sufficient cause existed for termination. See *Vieira v. Robert's Hawaii Tours*, 630 P.2d 120, 2 Haw.App. 237 (1981)(affirming trial court's ruling that employee satisfied provision of contract that his job performance met the reasonable satisfaction of employer).

B. Status of Arbitration Clauses

Arbitration clauses are enforceable when there is a meeting of the minds on all essential elements or terms to create a binding contract. An arbitration agreement in an employment application was enforceable and met unambiguous "agreement in writing" requirements of the Federal Arbitration Act. *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 82 Haw. 226 (1996). But when the facts lack an unambiguous intent to submit to arbitration, the court will not compel the enforcement of an arbitration provision. *Douglass v. Pflueger Haw., Inc.*, 135 P. 3d 129, 143, 110 Haw. 520, 534 (2006).

Hawaii is among the minority of jurisdictions that have adopted the Revised Uniform Arbitration Act. HAW. REV. STAT., Ch. 658A.

V. ORAL AGREEMENTS

A. Promissory Estoppel

In *Ravelo v. County of Hawaii*, 658 P.2d 883, 5 Haw.App. 680 (1983), the court adopted the SECOND RESTATEMENT OF CONTRACTS § 90 which provides: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise."

In *Mcintosh v. Murphy*, 469 P.2d 177, 52 Haw. 29 (1970), the Hawaii Supreme Court held that an employee was entitled to claim breach of contract under promissory estoppel where the employee was induced and was fired after working two and a half months.

In *Morishige v. Spencecliff Corp.*, 720 F. Supp. 829 (D. Haw. 1989), the court held that a discharged employee could recover under Hawaii law on a promissory estoppel claim where he had detrimentally relied on representations of long-term, continued employment, to the extent that he could prove the

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elements of the claim. Any recovery would be limited to restitution, damages, or specific relief based on the extent of plaintiff's reliance rather than by the terms of the promises.

An oral promise to an employee regarding the disciplinary process can be enforceable, provided the promise is not in violation of public policy. *Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd.*, 58 P.3d 1196, 100 Haw. 149 (2002). In *Gonsalves*, an employee was accused of sexual harassment by a female co-worker. A vice-president informed the employee of the allegations, which the employee denied. The vice-president promised the employee a "fair and thorough" investigation and that the employee did not have to "worry" about losing his job. The employee was terminated after an independent investigation corroborated the sexual harassment claim. The alleged promise that the employee could keep his job regardless of the findings of the investigation was against public policy supporting sexual harassment laws. *Id.* at 1213. Furthermore, the employer was found not to have breached any promise to conduct a "fair and thorough" investigation.

B. Fraud

The elements of a fraud claim in Hawaii are: (1) false representations made by the defendants, (2) with knowledge of their falsity or without knowledge of their truth or falsity, (3) in contemplation of the plaintiff's reliance upon these false representations, (4) the plaintiff did rely upon these representations, and (5) the plaintiff suffered substantial pecuniary damage. *Hawaii's Thousand Friends v. Anderson*, 768 P.2d 1293, 70 Haw. 276 (1989).

To be actionable as fraud, a false representation "must relate to a past or existing material fact and not to the happening of future events." *Hawaii Comm. Fed. Credit Union v. Keka*, 11 P.3d 1, 94 Haw. 213 (2000), citing *Honolulu v. Fed. Sav. & Loan Ass'n v. Murphy*, 753 P.2d 807, 811-12 (Haw.App. 1998). "A promise relating to future action or conduct [may] be actionable if the promise was made without the present intent to fulfill the promise." *Pancakes of Hawaii, Inc. v. Pomare Props. Corp.*, 944 P.2d 97, 85 Haw. 300 (1997).

C. Statute of Frauds

The Statute of Frauds is codified in HAW. REV. STAT. § 656-1, providing that no action may be maintained in the following, unless a contract, memorandum, or note is in writing and signed by the party to be charged: (1) to charge a personal representative to answer for damages out of the personal representative's own estate; (2) to charge any person to answer for the debt, default, or misdoings of another; (3) to charge any person upon an agreement made in consideration of marriage; (4) upon any contract for the sale of lands; (5) upon any agreement not to be performed within one year from the making; (6) to charge any person upon any agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission; (7) to charge the estate of any deceased person upon any agreement which by its terms is not to be performed during the lifetime of the promisor; or (8) to charge any financial institution upon an agreement to lend money or credit in an amount greater than \$50,000.

VI. DEFAMATION

A. General Rule

1. Libel

There are four elements necessary to sustain a claim for defamation in Hawaii: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher, or actual malice if the plaintiff is a public figure, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Gold v. Harrison*, 962 P.2d 353, 88 Haw. 94 (1998). Hawaii has adopted the three-part test for establishing whether statements are false and defamatory: (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible of being proved true or false. *Id.*

2. Slander

See discussion under "Libel" above.

B. References

An employer who provides a prospective employer information or opinions about a current or former employee's job performance is presumed to be acting in good faith and shall have qualified immunity from civil liability for disclosing the information and for the consequences of disclosure. The good faith presumption may be rebutted if the information or opinion was knowingly false or knowingly misleading. HAW. REV. STAT. § 663-1.95.

In *Russell v. Am. Guild of Variety Artists*, 497 P.2d 40, 53 Haw. 456 (1972), a former employer's response to the inquiry about a former employee's circumstances by an entertainer's booking agent was protected by qualified privilege. The employer detailed the circumstances of Plaintiff's termination and reported erroneously that Plaintiff had been committed to a hospital for a year as a result of a mental examination. There was a common interest in Plaintiff's work status and the former employer reasonably believed that Plaintiff had been committed, thus the employer did not abuse the privilege.

C. Privileges

A qualified privilege arises when the author of a defamatory statement acts in the discharge of some public or private duty, legal, moral, or social, and where the publication concerns a subject matter in which the author and the recipients have a correlative interest or duty. *Aku v. Lewis*, 477 P.2d 162, 52 Haw. 366 (1970).

In *Chow v. Alston*, 634 P.2d 430, 2 Haw.App. 480 (1981), an employee brought a defamation claim against his supervisor for writing a memorandum to the supervisor's immediate superior detailing the employee's performance issues. The Intermediate Court of Appeals of Hawaii found the memorandum was not libelous per se, but indicated that even if the memorandum was, that it was subject to a qualified privilege.

The case of *Kainz v. Lussier*, 667 P.2d 797, 4 Haw.App. 400 (1983), involved a defamation case arising from a series of letters sent by the corporate secretary to various shareholders, discussed how the qualified privilege may be abused and therefore lost by the defendant. The Intermediate Court of Appeals stated: "The qualified privilege may be abused by (1) excessive publication, (2) use of the occasion for an

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improper purpose, or (3) lack of belief or grounds for belief in the truth of what is said." *Id.* at 797, 4 Haw.App. at 400.

In *Vlasaty v. Pac. Club*, 670 P.2d 827, 4 Haw. 556 (1983), the club's president accused an employee of stealing, and an assistant manager overheard the statement; the statement was still privileged because the president and supervisory employees shared a common interest in the conduct of business affairs.

D. Other Defenses

1. Truth

Truth is a complete defense to an action for defamation. *Basilus v. Honolulu Publ'g. Co., Ltd.*, 711 F. Supp. 548, aff'd, 888 F.2d 1394 (D. Haw. 1989). Truth is measured by ordinary implication of the words used in the allegedly defamatory statement. *Dunlea v. Dappen*, 924 P.2d 196, 83 Haw. 28 (1996). Where the question of truth or falsity of the allegedly defamatory statement is a close one, the court should err on the side of non-actionability. *Fasi v. Gannett Co., Inc.*, 930 F. Supp. 1403 (D.Haw.), aff'd, 114 F.3d 1194 (9th Cir. 1997).

2. No Publication

As the law of defamation protects the interests of reputation, there is no actionable tort unless there has been a publication. *Vlasaty v. Pac. Club*, 670 P.2d 827, 4 Haw.App. 556 (1983).

3. Self-Publication

Compelled self-publication to prospective employers of the reason for a former employee's termination does not satisfy the publication requirement for defamation. *Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd.*, 58 P.3d 1196, 101 Haw. 1 (2002). If the person defamed repeats statements made only to him, the statements will not support a defamation action.

4. Invited Libel

There are no reported cases in Hawaii regarding the defense of invited libel.

5. Opinion

The threshold question is whether a reasonable fact-finder could conclude that the contested statement implies an assertion of objective fact. *Stearn Press Holdings, Inc. v. Hawaii Teamsters, Allied Workers Union, Local 996*, 302 F.3d 998 (D. Haw.2002). However, simply couching statements in terms of opinion does not dispel defamatory implications because the speaker may still imply knowledge of facts which lead to the defamatory conclusion. *Fasi v. Gannett Co., Inc.*, 930 F. Supp. 1403 (D.Haw. 1995), aff'd, 114 F.3d 1194 (9th Cir. 1997).

E. Job References and Blacklisting Statutes

It is an unfair labor practice for an employer "[t]o make, circulate, or cause to be circulated a blacklist." HAW. REV. STAT. § 377-6(11). For further discussion, see Section VI. B., supra, regarding References.

F. Non-Disparagement Clauses

There are no statutes in Hawaii prohibiting non-disparagement clauses.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

HAW. REV. STAT. § 386-3 (1996) limits remedies under the Hawaii Workers' Compensation statute to "personal injury...by accident... arising out of and in the course of the employment." However, an employee's claim for intentional infliction of emotional distress against an employer is not barred by Workers' Compensation exclusivity when brought under HAW. REV. STAT. Ch. 378, prohibiting discriminatory employment practices. *Takaki v. Allied Mach. Corp.*, 951 P.2d 507, 87 Haw. 57 (1998). Furthermore, Hawaii courts have suggested that intentional conduct of the employer does not amount to a work-related accident, and thus, Workers' Compensation exclusivity does not apply. *Furukawa v. Honolulu Zoological Soc'y*, 936 P.2d 643, 85 Hawai'i 7 (1997).

Hac v. Univ. of Hawaii, 73 P.3d 46, 102 Haw. 92 (2003), adopts the RESTATEMENT (SECOND) OF TORTS § 46, which provides that the elements for the tort of intentional infliction of emotional distress are: (1) that the act allegedly causing the harm was intentional or reckless, (2) that the act was outrageous, and (3) that the act caused (4) extreme emotional distress to another.

Under the RESTATEMENT (SECOND), the likelihood of illness is no longer a necessary element of the tort. Rather, severe emotional distress is the prohibited result. "Severe emotional distress" is defined as "mental suffering, mental anguish, mental or nervous shock and including all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." *Hac*, 73 P.3d at 60, 102 Haw. at 106.

The question of whether an act is unreasonable or outrageous is for the court; but where reasonable people may differ it should be left to the jury. *Ross v. Stouffer Hotel*, 879 P.2d 1037, 76 Haw. 454 (1994).

B. Negligent Infliction of Emotional Distress

Civil claims for negligent infliction of emotional distress arising out of employment and termination situations, except for sexual harassment claims, are barred by the exclusivity provision of the Workers' Compensation statutes. *Kahale v. ADT Auto.Servs.*, 2 F. Supp. 2d 1295 (D. Haw. 1998).

Furthermore, no party shall be liable for the negligent infliction of emotional distress or disturbance if the distress or disturbance arises solely out of damage to property or material objects. The only exception is if there is physical injury to or mental illness of the person who experiences the emotional distress. HAW. REV. STAT. § 663-8.9.

Hawaii does not allow for recovery of emotional distress damages for breach of contract, but still allows damages for emotional distress arising out of a breach of a contract in two exceptional situations: (1) where "the emotional distress accompanies a bodily injury;" and (2) where "the contract is of such a

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kind that serious emotional [distress] is a particularly foreseeable result if a breach [occurs]." *Francis v. Lee Enterprises*, 971 P.2d 707, 89 Haw. 234 (1999)

VIII. PRIVACY RIGHTS

A. Generally

Article I, § 7 of the Hawaii Constitution, is worded similarly to the Fourth Amendment of the United States Constitution and applies to the government. Hawaii has not recognized protection of a privacy interest against a private employer.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Hawaii follows federal law: U.S. employers are required by law to verify the employment authorization of all workers they hire, regardless of the workers' immigration status. Employers who hire or continue to employ individuals knowing that they are not authorized to be employed in the United States, or who fail to comply with employment authorization verification requirements, may face civil and, in some cases, criminal penalties. Form I-9, Employment Eligibility Verification, must be completed for each newly hired employee, including U.S. citizens, permanent residents, and temporary foreign workers, to demonstrate the employer's compliance with the law and the employee's work authorization.

2. Background Checks

Hawaii has adopted criminal background check laws for employment for public and private schools, adult foster and developmental disabilities homes, childcare facilities and institutions, youth correctional facilities, correctional facilities and the insurance business. The state of Hawaii may retain fingerprints of employment and licensing applicants for whom criminal history record checks are authorized statutorily so that the state can implement a statewide program which will allow employers to request notification if applicants are arrested in the future. HAW. REV. STAT. § 846-2.7.

HAW. REV. STAT. § 378-2.5 allows for an employer "to inquire about and consider an individual's criminal conviction record concerning hiring, termination, or the terms, conditions, or privileges of employment." There are a few additional things to keep in mind when conducting a criminal background check for employment:

- Anti-discrimination laws apply to criminal background checks. An employer cannot single out individuals from any legally protected category—including race, national origin, color, sex, religion, age, or sexual orientation—to undergo a criminal background check. Criminal background checks need to be applied fairly and consistently.
- Using a third-party service comes with additional compliance requirements. Businesses that sell background information on individuals are regulated as "consumer reporting agencies" and thus subject to the Fair Credit Reporting Act (FCRA). FCRA imposes strict obligations on employers who choose to conduct criminal background checks through these companies. These obligations include: a stand-alone notice to the candidate about the check; written permission from the candidate to conduct the background check; and written assurances to the reporting agency that the information will not be misused. In addition, employers must comply with the FCRA's disclosure

and notification requirements *prior* to taking any adverse action.

- Double-check employment applications. Often, local employers use universal, off-the-shelf application templates, which may include questions about criminal convictions. Ensure applications and pre-employment screening interviews do not include prohibited questions.

C. Other Specific Issues

1. Workplace Searches

Hawaii courts recognize that a third party can give consent to a search if the third party has access to the area being searched, and either common authority over it, a substantial interest in it, or permission to exercise that access. *State v. Mahone*, 701P.2d 171, 67 Haw. 644 (1985).

2. Electronic Monitoring

It is a felony to intentionally intercept, endeavor to intercept, or procure others to intercept any wire, oral, or electronic communication. HAW. REV. STAT. § 803-42. It is also a felony to intentionally or knowingly install or use, in any private place, without consent of the persons entitled to privacy therein, any device for observing, photographing, videotaping, filming, recording, amplifying, or broadcasting another person in a stage of undress or sexual activity. HAW. REV. STAT. § 711-1110.9.

It is a felony to manufacture, assemble, possess, or distribute, with knowledge or reason to know that the design of a device renders it primarily useful for surreptitious interception of wire, oral, or electronic communications. If prior consent is given, however, communications may be intercepted. HAW. REV. STAT. § 803-43.

It is a misdemeanor to violate privacy by intentionally intercepting, without consent of the sender or receiver, a message by telephone, telegraph, letter, electronic transmission, or other means of communicating privately. It is illegal to install or use, in any private place, without consent of persons entitled to privacy, any device to observe, photograph, record, amplify, or broadcast sounds or events. HAW. REV. STAT. § 711-1111.

3. Social Media

Hawaii has no statutes, nor instructive case law, regarding the use of social media in the workplace. Employers and employees alike are using social media for business and personal reasons. Consequently, it is critical that both employers and individuals take steps to protect their reputation and to the extent possible ensure that unflattering postings and images are kept off or “wiped off” the web. Companies need to understand that there are risks to viewing employees’ or potential employees’ online activities. Looking up an applicant’s profile could be grounds for a lawsuit if the job seeker claims they were snubbed because of information garnered from the web regarding their race, religion, sexual orientation, or other protected classification.

4. Taping of Employees

In *State v. Bonnell*, 856 P.2d 1265, 76 Haw. 124 (1993), the police hid cameras in a government employee break room to investigate gambling, in violation of the employees' reasonable expectation of privacy. The employer could not have given consent. The court did leave the door open, however, for

employer-initiated surveillance. The surveillance in *State v. Bonnell* was illegal because it was a search for evidence of criminal conduct and not an investigation of work-related employee misconduct. *See also*, HAW. REV. STAT. §§ 803-43 and 711-1111.

5. Release of Personal Information on Employees

Employers are required to safeguard employee medical information, Social Security numbers and other personal information. Personnel and related records present risk to employers if not stored, maintained, and disposed of appropriately. Employers should designate at least three levels of security for access to employee information/records. A person receiving one or more of the three designations should be given the authorization in writing. The levels are as follows:

Level One: Personnel Records: Whether in hard-copy form or in computer files, personnel records must remain secure at all times. There is no valid reason that any person should have access to an employee's personnel file unless that individual is required to work with information in the file for a legitimate purpose, such as accessing an employee's file for information on an accident for a workers' compensation claim. Even in this situation, Hawaii and federal law require workers' compensation records to be maintained separately from the employee's human resources file.

Level Two: Employment Tests (Excluding Drug Tests): The results of employment testing, whether for initial employment, promotions or reassignments, should be retained in a separate, secure location and maintained by an employee or employees who is/are specifically authorized to perform this function, whether on a full- or part-time basis.

Level Three: Medical Records and Drug Tests Results: What is true for personnel files and employment tests is especially important for medical records and the results of drug testing. These records should be protected by extraordinary access limitations. In hard-copy form, medical records should be kept in separate, sealed folders with initials across the seal. No one should be permitted to review medical records, even those who are regularly required to post information in personnel folders or files. The only individuals who should be permitted to see medical records are those specifically authorized in writing by the top HR manager. Medical records should be filed in a separate location, away from personnel records and employment testing records, under the custody of specifically designated individuals. Depending on the circumstances, and the context in which the records are being maintained, such records might also need to be maintained consistent with HIPAA.

6. Medical Information

Any state agency, facility, or individual that holds or maintains records that indicate a person has HIV, ARC, or AIDS, must hold these records strictly confidential except for certain enumerated exceptions. HAW. REV. STAT. § 325-101.

Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), covered entities, including any covered employers, are required to adhere to standards for the security and privacy of individual health data.

7. Restrictions on Requesting Salary History

Employers cannot consider the salary history of a potential applicant or rely on an applicant's salary history to determine the applicant's compensation, including benefits, during the hiring process. HAW. REV. STAT. § 378-2.4 (2019). However, if an applicant volunteers his or her salary history to the employer, the employer can consider the history to determine the applicant's compensation. HAW. REV. STAT. § 378-2.4 (2019).

IX. WORKPLACE SAFETY

A. Negligent Hiring/Supervision/Retention

"A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless in the employment of improper person or instrumentalities in work involving the risk of harm to others." *Janssen v. Am. Haw. Cruises, Inc.*, 731 P.2d 163, 69 Haw. 31 (1987), citing RESTATEMENT (SECOND) OF AGENCY § 213 (1958). "The existence of a duty under a negligent hiring theory depends upon ... whether the risk of harm from the dangerous employee to a person such as the plaintiff was reasonably foreseeable as a result of the employment." *Janssen*, 731 P.2d at 166, 69 Haw. at 34.

Hawaii recognizes an action for negligent supervision. See *Costa v. Able Distributors, Inc.*, 653 P.2d 101, 3 Haw.App. 486, 490 (1982). In *Dairy Road Partners v. Island Insurance*, 992 P.2d 93, 92 Haw. 398, 426-27 (2000), the Hawaii Supreme Court looked to the RESTATEMENT (SECOND) OF TORTS § 317 for the standards for a claim of negligent supervision by an employer. According to RESTATEMENT (SECOND) OF TORTS § 317, an employer may be liable for negligent supervision if its employee intentionally harms another when the employee (i) commits the harm on the employer's property or with the use of the employer's chattels, (ii) the employer knows or should have known that it has the ability to control its employee and (iii) the employer knows or should have known that the employee needed to be controlled.

Under the theory of negligent supervision, "an employer's duty to control the conduct of his employee may arise when the acts complained of are so connected in time and place with the employment as to give the employer a special opportunity to control the employee." *Costa v. Able Distributors, Inc.*, 3 Haw.App. at 490. "[I]n order for the plaintiff to recover, he must show that the employer knew or should have known of the necessity and opportunity for exercising control over the employee." *Id.* For example in *Costa*, the Hawaii Court of Appeals stated that the employer's duty would arise only if the employer knew or should have known that the employee had a "propensity for causing automobile collisions while driving under the influence of alcohol, and thus, [the employer] should have prevented [the employee] from consuming beer on its premises." *Id.* In *Domingo v. Doe*, 985 F. Supp. 1241 (D.Haw. 1997), it was held as a matter of law that a hospital did not have a duty to supervise a surgeon's surgical procedure simply because the surgeon exercised "bad judgment" in becoming addicted to alcohol and drugs over seven years earlier.

Unlike the theory of respondeat superior where the employer is vicariously liable for the acts of its employees "that occur within the scope of employment," a claim for negligent supervision, requires that the employee acted "outside of his or her employment." See *Dairy Road Partners v. Island Insurance*, 92 Haw. 398, 426-27 (2000). Therefore, a complaint fails to state a claim for negligent supervision if the complaint fails to assert that the employee acted outside the scope of his employment. *Dairy Road Partners* at 427.

B. Interplay with Worker's Comp. Bar

HAW. REV. STAT. § 386-5 provides an exclusive remedy for recovery for workplace injuries; this exclusivity extends not only to the employee, but also to the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto. See *also*, Section VII, A., *supra*.

In *Yang v. Abercrombie & Fitch Stores, et al.* (2012), the Hawaii Intermediate Court of Appeals affirmed that HAW. REV. STAT. § 386-5 barred a plaintiff's claims against her employer for personal injuries (i.e., stress) she allegedly suffered arising out of and in the course of her employment, which were allegedly caused by the willful acts of her co-employees acting in the course and scope of their employment. In that case, the plaintiff – a former Abercrombie and Fitch (“A&F”) employee – was interrogated at work by security personnel about money that was missing from a wallet that a patron had lost in the store. After the interrogation, the plaintiff was escorted out of the A&F store. She subsequently filed a claim for, and received, workers' compensation benefits due to “stress” she suffered as a result of the interrogation and related incidents. The plaintiff also filed a lawsuit against A&F and the security personnel, alleging claims such as false imprisonment, defamation, and invasion of privacy, among others. A&F sought to dismiss the suit on the grounds that workers' compensation benefits were the plaintiff's exclusive remedy for workplace stress. The circuit court denied A&F's motion, and A&F filed an appeal. On appeal, the ICA reversed the decision of the circuit court, and ruled that HAW. REV. STAT. § 386-5 barred the plaintiff's lawsuit with regards to injuries she suffered (a) because of her employment (b) that were caused by the willful acts of the security personnel acting in the course and scope of their employment. The ICA also made sure to clarify, however, that HRS § 386-5 did not bar all intentional torts. Rather, the torts must be committed “because of the employee's employment.” Finally, the ICA noted that that HRS § 386-5 did not bar the plaintiff's claims against the security personnel individually. While the *Yang* decision did not create any new law, it certainly clarified that workers' compensation benefits generally serve as the exclusive remedy for injuries sustained in the course of employment. The Court's decision also clarified that intentional torts committed because of on an individual's employment are covered by workers' compensation (such as in the *Yang* instance), whereas intentional torts that are not committed because of an individual's employment are not.

Nakamoto v. Kawauchi, 142 Haw. 259, 418 P.3d 600 (2018) partially overturned *Yang*, holding that the torts of defamation and false light are beyond the Workers' Compensation's exclusivity provision. Specifically, in *Nakamoto* the court held that the exclusivity provision is not a remedy for “reputational injuries.” *Id.* at 273.

D. Firearms in the Workplace

There is no Hawaii statute or regulation specifically governing firearms in the workplace.

E. Use of Mobile Devices

There are presently no statutes, regulations, or case law governing mobile devices in the workplace.

X. TORT LIABILITY

A. Respondeat Superior Liability

The doctrine of respondeat superior allows an employer to be vicariously liable for the negligent acts of its employees when the acts occur within the scope of employment. *Abraham v. Onorato Garages*, 446 P.2d 821, 825, 50 Haw. 628, 632, (1986), citing *Matsumura v. County of Hawaii*, 19 Haw. 496 (1909). See also *Kang v. Charles Pankow Associates*, 675 P.2d 803, 5 Haw.App. 1, (1984) and *Costa v. Able Distributors, Inc.*, 653 P.2d 101, 3 Haw.App. 486, (1982). Whether an employee is acting within the scope of employment is “a question of fact to be determined in the light of the evidence of each particular case.” *Nordmark v. Hagadone*, 620 P.2d 763, 765, 1 Haw.App. 487, 489, (1980). To prove that an act falls within the scope of employment, there usually must be some evidence that “the employee intended to act in the employer’s interest” and there must be “some direct benefit to the employer.” *Costa v. Able Distributors, Inc.*, supra 653 P.2d at 1053, Haw.App. at 490.

The elements of respondeat superior liability are (1) employee negligence (2) within the scope of the employee’s employment. *Id.* (citations omitted). In defining the scope of an employee’s employment, the Hawaii Supreme Court reiterated its approval of RESTATEMENT (SECOND) OF AGENCY § 228 (1958) which states as follows: Conduct of a servant is within the scope of employment if, but only if: a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master. RESTATEMENT (SECOND) OF AGENCY § 228 (1958). “An employer may be liable for the intentional torts of its employees as the law now imposes liability whether the employee’s purpose, however misguided, is wholly or in part to further the master’s business.” *State v. Hoshijo ex rel. White*, 102 Haw. 307, 319, FN 27 (2003).

In *Nordmark v. Hagadone*, supra, 620 P.2d at 765, where the employee was intoxicated at the time of a midday automobile accident, the Court noted that it did not “think that the doctrine of respondeat superior is to be so narrowly construed so as to preclude employer liability at every instance where it is shown that an employee conducts a personal activity in the course of a business day.” Consider also, *Wong-Leong v. Hawaiian Ind. Refinery*, 879 P.2d 538, 76 Haw. 433, (1994), wherein the Court recognized a theory of respondeat superior when an employee consumed alcohol at an after-work hours promotion party at a picnic area on company property and subsequently got into an automobile accident while driving home. In *Wong-Leong*, the Court held that “respondeat superior liability may be imposed notwithstanding the fact that the foreseeable effects of the actor’s negligent conduct occur outside the scope of employment” [during the drive home from the company promotion party]. *Id.* 879 P.2d at 544. However, as noted by the Court in *Henderson v. Professional Coatings Corp.*, 819 P.2d 84, 72 Haw. 387, 819 P.2d 84 (1991), “the liability imposed upon the employer is not open-ended and unlimited. The employer’s liability is limited by the test of whether the employer’s risks are incident to his enterprise,... or the ‘enterprise theory’ which finds liability if ‘the enterprise of the employer would have benefited by the context of the act of the employee but for the unfortunate injury,’” citing *Kang*, supra, 675 P.2d at 809.

B. Tortious Interference with Business/Contractual Relations

The elements of tortious interference with contractual advantageous relationship claim are: 1) a contract between the plaintiff and a third party; 2) the defendant's knowledge of the contract; 3) the defendant's intentional inducement of the third party to breach the contract; 4) the absence of justification on the defendant's part; 5) the subsequent breach of the contract by the third party; and 6) damages to the plaintiff. *Lee v. Aiu*, 936 P.2d 655, 668, 85 Haw. 19, 32 (1997).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is illegal." HAW. REV. STAT. § 480-4(a). Despite this general rule, there are many exceptions enumerated in HAW. REV. STAT. § 480(c): (1) Following the transfer of a business, a non-compete agreement shall be reasonable regarding area and time, HAW. REV. STAT. § 480(c)(1); (2) A noncompete agreement between partners shall be reasonable regarding area and time, HAW. REV. STAT. § 480(c)(2); (3) A lease agreement may limit or restrict the leasee to certain business uses, HAW. REV. STAT. § 480(c)(3); and (4) An agreement with an employee to not use trade secrets in competition with the employer following termination for such time as is necessary for the employer without imposing undue hardship for the employee, HAW. REV. STAT. § 480(c)(4).

The legislative history of HAW. REV. STAT. § 480(c) also reveals that it was based upon Section 1 of the Sherman Antitrust Act. *Technicolor, Inc. v. Traeger*, 551 P.2d 163, 169, 57 Haw. 113, 121 (1976), citing Conference Committee Report No. 16 1961 Hawaii House Journal 1067-68. Accordingly, restrictive covenants should be analyzed in harmony with federal courts interpretation of Section 1 of the Sherman Antitrust Act. *Technicolor*, 551 P.2d at 170, 57 Haw. at 121. Moreover, the four exceptions of HAW. REV. STAT. § 480(c) were not meant to be exclusive. *Id.* Lastly, whether an agreement is "reasonable" is a matter of law where "the court must examine such factors as geographical scope, length of time, and breadth of restriction placed on a given activity." *Technicolor*, 551 P.2d at 170, 57 Haw. at 122. *See also, Island Tobacco Co., Ltd. v. R.J. Reynolds Indus., Inc.*, 513 F. Supp 726 (D. Haw. 1981), and *UARCO, Inc. v. Lam*, 18. F. Supp.2d 1116 (D. Haw. 1998).

On June 26, 2015, the Governor of Hawaii signed Act 158, which voids any non-compete clause relating to an "employee of a technology business." It does not affect any non-compete covenants implemented prior to July 1, 2015.

B. Blue Penciling

There are no reported Hawaii cases regarding blue penciling.

C. Confidentiality Agreements

There are no reported Hawaii cases regarding enforcement of confidentiality agreements.

D. Trade Secrets Statute

Hawaii has adopted the Uniform Trades Secrets Act, which prohibits misappropriation of trade secrets. HAW. REV. STAT., Ch. 482B. As stated above, HAW. REV. STAT. § 480-4(c)(4) allows for agreements preventing employees from using employer trade secrets in competition with the employer for as long as is reasonably necessary for the protection of the employer without imposing undue hardship on the employee.

E. Fiduciary Duty and Other Considerations

Information obtained by the Department of Labor and Industrial Relations is confidential and the appeals board may issue orders protecting the confidentiality of trade secrets. HAW. REV. STAT. § 396-13.

1. Injunctive Relief

HAW. REV. STAT. §378-63 provides for injunctive relief in employment disputes, in addition to monetary damages:

- (a) A person who alleges a violation of this part may bring a civil action for appropriate injunctive relief, or actual damages, or both within two years after the occurrence of the alleged violation of this part.
- (b) An action commenced pursuant to subsection (a) may be brought in the circuit court for the circuit where the alleged violation occurred, where the complainant resides, or where the person against whom the civil complaint is filed resides or has a principal place of business.
- (c) As used in subsection (a), "damages" means damages for injury or loss caused by each violation of this part, including reasonable attorney fees.

2. Forum Selection Clauses

Forum selection clauses are generally enforceable under Hawaii law.

3. Enforcement by Successors and Assigns

Generally, enforcement by succession or assignment is not recognized in Hawaii. In *UARCO Inc. v. Lam*, 18 F.Supp.2d 1116 (D. Haw. 1998), an employer and its successor brought an action against two former employees of the predecessor and moved for a temporary restraining order and preliminary injunction prohibiting the two former employees from breaching their nonsolicitation agreements with the predecessor. Apparently, the agreements were silent as to assignability. The court denied the plaintiffs' motion for a temporary restraining order on the grounds the nonsolicitation agreements were not assignable. *Id.* at 1122. However, the court later granted the plaintiffs' motion for a preliminary injunction because, subsequent to the court's decision on the motion for a temporary restraining order, the plaintiffs merged. Thus, the transaction at issue was a merger and not an asset purchase. "Statutory and case law are clear, however, that following a merger, the successor corporation possesses all obligations and rights of the predecessor corporation." *Id.* However, the court also stated "[a] covenant not to compete is not assignable because it is essentially a personal services contract," and the court referenced its earlier unpublished decision denying the motion for a temporary restraining order where it held that a successor could not enforce a predecessor's noncompete with its employees because "covenants not to compete are not assignable." *Id.*

XII. DRUG TESTING LAWS

A. Public Employers

There is no general prohibition against drug testing of public employees, with the exception of applicable Fourth Amendment considerations.

For both public and private employers, laboratories that test samples must be licensed and certified by the State and authorizes the Director of the Department of Health to promulgate testing procedures.

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HAW. REV. STAT., Ch. 329B. Effective July 1, 2013, employers are allowed to conduct pre-employment, random, and reasonable-suspicion drug tests on-site. If an on-site test returns a positive result, the new law requires employers to have the employee or applicant tested at a laboratory within four hours. It also provides for sanctions against an applicant or employee who refuses a request to take an on-site test or fails to report to a testing center after an on-site positive result.

Employees must receive a written statement of specific substances tested for and a statement that over-the-counter medications and prescription drugs may result in a positive test result. HAW. REV. STAT. § 329B-5.

Information concerning a test is confidential and any person receiving or coming into possession of any protected information is subject to the same obligation of confidentiality as the party from whom the information was received. HAW. REV. STAT. § 329B-5.5.

In May 2007, the Hawaii State Teachers Association (which represents Hawaii's 13,500 public school teachers) agreed to a contract allowing random testing for alcohol and other drugs of its union members. The ACLU has since demanded the state halt the planned tests arguing that the tests violate the constitutional right to privacy. In July 2011, the Hawaii State Teachers Association agreed to a new contract that repealed the 2007 random drug test policy and instituted a drug testing policy only after a teacher is reasonably suspected of being impaired while at school.

B. Private Employers

Hawaii is a "mandatory" state, meaning any private employer wishing to conduct drug and/or alcohol testing of non-regulated employees within the state must do so according to the state constitution, statutes, regulations, local ordinances, and court decisions that apply (the rules). See discussion above under "Public Employers."

XIII. STATE ANTI-DISCRIMINATION STATUTES

A. Employers/Employees Covered

The Hawaii Fair Employment Practices Act covers employers defined as "any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States." HAW. REV. STAT. § 378-1.

B. Types of Conduct Prohibited

Discrimination or discharge on the basis of race, religion, color, sex, age, disability, marital status, ancestry, arrest and court record, sexual orientation or domestic or sexual violence victim status is prohibited. HAW. REV. STAT. § 378-2(1). In 2011, the Statute was amended to prohibit employers from discriminating against employees on the basis of "gender identity or expression." The way the law is written, discrimination based on "gender identity or expression" is considered a form of sex discrimination. The legislature defined "gender identity or expression" as "a person's actual or perceived gender, as well as a person's gender identity, gender related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression, is different from that traditionally associated with the person's sex at birth."

Effective July 2, 2019, Haw. Rev. Stat. §§ 378-1 and 378-2 were amended to include reproductive health decisions as a protected class under Hawaii's anti-discrimination laws. The law defines reproductive health decisions as the "use or attempted use of any legal drug, device, or medical service intended to prevent or terminate a pregnancy, or the use or attempted use of any assisted reproductive technology."

Employers shall not discriminate against employees on the basis of sex by paying employees in an establishment a rate less than a rate that the employer pays wages to the opposite sex in the establishment for equal work that requires equal skill, effort, and responsibility under similar working conditions. HAW. REV. STAT. § 378-2.3(a) (2019). However, payment differentials are allowed if the differential is based on one of the following: (1) seniority; (2) merit; (3) a system that measures earnings by quantity or quality of production; (4) a bona fide occupational qualification; or (3) a factor other than sex. *Id.*

HAW. REV. STAT. § 378-2.3(b) (2019) also provides that employers cannot discriminate or retaliate "against an employee for, nor prohibit an employee from, disclosing the employee's wages, discussing and inquiring about the wages of other employees, or aiding or encouraging other employees to exercise their rights" under Hawaii's equal pay law.

Employers cannot consider the salary history of a potential applicant or rely on an applicant's salary history to determine the applicant's compensation, including benefits, during the hiring process. HAW. REV. STAT. § 378-2.4 (2019). However, if an applicant volunteers his or her salary history to the employer, the employer can consider the history to determine the applicant's compensation. *Id.*

C. Administrative Requirements

Every employer, employment agency, and labor organization is required to make and keep records, documents and other materials relevant to a potential claim for unlawful discriminatory practice and also make such reports therefrom, as the Civil Rights Commission shall prescribe by rule or order. HAW. REV. STAT. § 378-6(b).

Every employer, employment agency, and labor organization shall also provide the Civil Rights Commission's authorized representative access to such records, documents and other materials following the investigation of a complaint. HAW. REV. STAT. § 378-6(a).

D. Remedies Available

The statutory remedies available include: (1) hiring, reinstatement or upgrading of employees, with or without back pay, HAW. REV. STAT. §§ 378-5(a) and 368-17(a)(1); (2) admission or restoration of the individual to a labor organization, HAW. REV. STAT. §§ 378-5(a) and 368-17(a)(2); (3) on the job training, occupational training, or retraining, HAW. REV. STAT. § 368-17(a)(2); (4) admission to a public accommodation or educational institute, HAW. REV. STAT. § 368-17(a)(3); (5) sale, exchange, lease, rental, assignment, or sublease of real property, HAW. REV. STAT. § 368-17(a)(4); (6) an injunction of the unlawful discriminatory practice, HAW. REV. STAT. § 378-5(b); (7) in addition to any judgment awarded, the court may also award costs of action including reasonable attorney's fees and costs to be paid by the defendant, HAW. REV. STAT. § 378-5(c); and (8) other relief the Civil Rights Commission or the court deems appropriate, HAW. REV. STAT. § 368-17(a)(10).

XIV. STATE LEAVE LAWS**A. Jury/Witness Duty**

No employee may be discharged or threatened with discharge for serving on a jury or attending court for prospective jury service. HAW. REV. STAT. § 612-25(a). Similarly, no employee may be discharged or threatened with discharge for responding to a summons, serving as a witness, or attending court as a prospective witness. HAW. REV. STAT. § 621-10.5(a). An employer who violates HAW. REV. STAT. § 621-10.5(a) is guilty of a petty misdemeanor. HAW. REV. STAT. §§ 621-10.5(b), 612-25(a) or 612-25(b).

An employee discharged in violation of HAW. REV. STAT. §§ 612-25(a) or 621-10.5(a) may, within 90 days of the date of discharge, bring a civil action for the recovery of lost wages and for an order requiring reinstatement of the employment. Damages shall not exceed lost wages for six weeks. If the employee prevails, reasonable attorneys' fees shall be allowed. HAW. REV. STAT. §§ 612-25(c) and 621-10.5(c).

B. Voting

Effective July 1, 2019, Hawaii repealed its prior protections afforded employees regarding voting rights. Repealed HAW. REV. STAT. § 11-95 previously permitted employees to take two consecutive hours off (excluding any lunch or rest periods) to vote without fear of penalty, rescheduling of normal hours, or deduction of the employee's salary or wages for such absence. The 2019 repeal came on the heels of Hawaii adopting statewide elections by mail.

C. Family/Medical Leave

The Hawaii Family Leave Act ("HFLA"), HAW. REV. STAT. § 398-3, requires employers who employ one hundred (100) or more employees for each working day during each of twenty (20) or more calendar weeks in the current or preceding calendar year to provide up to four (4) weeks of family leave during any calendar year upon the birth of a child or the adoption of a child, or to care for the employee's reciprocal beneficiary, child, spouse, or parent with a serious health condition. The family leave may consist of unpaid or paid leave, or a combination. An employee or employer may elect to use any of the employee's applicable accrued paid leave such as sick, vacation, personal, or family leave for any part of the four (4) week period.

Employers who are covered by the HFLA are required to allow eligible employees to use up to ten (10) days per year of their accrued and available sick leave for any of the purposes listed in the HFLA (birth or adoption of a child, or to care for the employee's child, spouse, reciprocal beneficiary, or parent with a serious health condition). HAW. REV. STAT. § 398-4(c). However, the HFLA exempts temporary disability benefits from the definition of "sick leave" if an employer establishes a self-insured TDI plan (which must be approved by the Hawaii Department of Labor and Industrial Relations) which incorporates sick leave benefits, the benefits provided under its self-insured plan to the extent they exceed the statutory minimum required to comply with the TDI law, may be used for HFLA purposes.

HAW. REV. STAT. Ch. 398 also provides for employment and benefits protection and a grievance and hearing procedure with the Department of Labor and Industrial Relations.

D. Pregnancy/Maternity/Paternity Leave

There are no further provisions under Hawaiian law for parental leave beyond what is provided under the HFLA.

E. Day of Rest Statutes

Hawaii has no specific "day of rest" statute. However, HAW. REV. STAT. § 387-3(a) specifies that an employee may work a minimum of 40 hours per week without overtime and may indirectly implicate a day of rest.

F. Military Leave

HAW. REV. STAT. § 121-43 precludes termination and protects seniority of persons fulfilling National Guard duties, as well as requires employers to accommodate employees who are unable to perform their original job due to disability from injuries sustained during National Guard service. HAW. REV. STAT. § 378-2(4) makes it a discriminatory employment practice to violate HAW. REV. STAT. § 121-43.

G. Sick Leave

Employers are not required to provide employees with sick leave, unless the employee is entitled to sick leave under FMLA or Hawaii's Family Leave Law. However, if an employer provides its employees with sick leave, the employer must give the employees written notice of the sick leave policy. HAW. REV. STAT. § 388-7(3) (2019).

H. Domestic Violence Leave

Employers with 50 or more employees are required to allow an employee up to 30 days of unpaid leave per calendar year if the employee or the employee's minor child is a victim of domestic or sexual violence, as long as the leave is for: (1) medical attention to recover from physical or psychological injury caused by the violence; (2) services from a victim services organization; (3) psychological or other counseling; (4) relocation; (5) civil or legal action related to the violence; or (6) other actions to increase the health and safety of the victim or those who associate with or work with the victim. HAW. REV. STAT. § 378-72(a) (2019). Employers with less than 50 employees are required to give employees up to five days of unpaid leave per calendar year for such violence, so long as one of the aforementioned factors applies. *Id.* If an employer willfully violates an employee's right to leave under this section, the employee may file a lawsuit against the employer to enforce their rights, and the employee may be entitled to costs and reasonable attorney's fees. HAW. REV. STAT. § 378-72(j) (2019).

I. Other Leave Laws

Employers are not required to provide employees with leave for vacation. However, if an employer provides its employees with vacation leave, the employer is required to provide its employees with written notice of the employer's policies regarding its leave policy. HAW. REV. STAT. § 388-7(3) (2019). In addition, "an employee is not entitled to 'pay' for vacation benefits which are unused during the period of employment, unless there is an express policy (or contractual obligation) to the contrary." *Casumpang v. ILWU Local 142*, 121 P.3d 391, 395 (Haw. 2005).

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Employers are not required to provide employees with bereavement leave or leave to attend funerals.

Employers are not required to provide employees with leave – paid or unpaid – for holidays.

XV. STATE WAGE AND HOUR LAWS

In June 2019, the Hawaii State Department of Labor & Industrial Relations (DLIR) and the U.S. Department of Labor (DOL) announced that they will be collaborating to promote compliance with wage and hour laws. This could result in stepped up enforcement of wage payment violations, as well as increasing penalties, levying double back wages with interest, plus \$500 minimum administrative penalties, on employers who fail to comply.

Violations of wage payment include:

- Failing to pay within seven days of the end of the pay period.
- Failing to provide final pay timely to a separated employee.
- Neglecting to provide a pay stub each payday.
- Shorting hours on a paycheck or not paying at the appropriate rate (including overtime).
- Making unlawful deductions from an employee's paycheck for cash shortages, damages, or fines.

A. Current Minimum Wage in State

The minimum wage in Hawaii was raised to \$10.10 per hour on January 1, 2018. HAW. REV. STAT. § 387-2(3). This was fourth rise in the minimum wage since 2015: from \$7.25 to \$7.75 on Jan. 1, 2015, to \$8.50 on Jan. 1, 2016, and to \$9.25 on Jan. 1, 2017. Previously, the minimum wage had stayed the same for eight years (\$7.25 Jan. 1, 2007—Jan. 1, 2015).

Under HAW. REV. STAT. § 387-3, an employee shall not work more than forty hours in a work week unless he receives overtime compensation at the rate of one and one-half times the regular rate at which the employee is employed. An employee earning a guaranteed monthly income of \$2000 is exempt from the wage and hour law. HAW. REV. STAT. § 387-1. The Department of Labor and Industrial Relations is charged with promulgating rules and regulations necessary to carry out HAW. REV. STAT. Ch. 387. Hawaii state labor law excludes from coverage any employee that is subject to the Federal Fair Labor Standards Act unless the state wage rate is higher than the Federal Minimum Wage.

Tipped employees may be paid 75 cents per hour less than the minimum wage so long as the combined amount the employee receives from the employer and in tips is at least 50 cents more than the minimum wage. HAW. REV. STAT. § 387-2.

B. Deductions from Pay

An employer can only make deductions from an employee's paycheck when authorized by federal or state laws, such as taxes and garnishments, or with the written consent of the employee. An employer cannot deduct from an employee's paycheck the following items, even with written consent from the employee: fines; cash shortages from a common money till, cash box or register used by two or more people; cash shortages from a money till, cash box, or register under control of a single employee if the

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employee is not given an opportunity to account for all money received at the start of a shift and all money turned in at the end of a shift; cost for breakage; losses due to accepting a bad check if the employee is given discretion to accept or reject checks; losses due to: faulty workmanship, lost or stolen property, damage to property, default of customer credit, nonpayment for goods or services received by customers if such losses are not attributable to the employee's willful or intentional disregard of employer's interests; medical or physical examination or medical report expenses of an employee or prospective employee required by the employer or by law. HAW. REV. STAT. § 388-6.

C. Overtime Rules

Most hourly employees in Hawaii are entitled to a special overtime pay rate for any hours worked over a total of 40 in a single work week (defined as any seven consecutive workdays by the Fair Labor Standards Act). While some states have daily overtime limit which entitles any employee who works for more than a certain number of hours in a single day to be paid overtime, Hawaii does not have a daily overtime limit.

Hawaii's overtime minimum wage is \$15.15 per hour, one and a half times the regular Hawaii minimum wage of \$10.10. Employees earning more than the Hawaii minimum wage rate, are entitled to at least 1.5 times their regular hourly wage for all overtime worked.

Effective January 1, 2020, the standard salary level for the executive, administrative, and professional exemptions will increase from \$23,660 to \$35,568 per year. In addition, employers will be able to use an employee's nondiscretionary compensation, bonuses, and incentive payments (including commissions), to satisfy up to 10 percent of the employee's new standard salary level.

D. Time for Payment upon Termination

Employees who are fired, discharged, terminated, or permanently laid off: An employer must pay an employee who is discharged their wages in full at the time of discharge. If circumstances prevent an employer from paying a discharged employee immediately, the employer must pay the employee their wages in full no later than the workday following the discharge. HAW. REV. STAT. § 388-3. If an employer has a policy requiring employees to give advanced notice of their intent to quit and an employee gives the required notice, an employer cannot terminate the employee, except for cause, during the notice period to avoid paying wages for that time. An employer must pay the employee the anticipated wages of the entire notice period if the employee has given the required notice, unless the employee voluntarily quits or is terminated for cause prior to the last day of the notice period. HAW. REV. STAT. § 388-41.

Employees who quit or resign: An employer must pay an employee who quits or resigns their wages in full no later than the next regular payday if the employee does not give notice of their intent to quit more than one pay period in advance. If an employee gives more than one pay period's notice, the employer must pay the employee their wages in full at the time of quitting. An employee can request the employer send their final paycheck through the mail, but if no such request is made, the employer shall pay the employee through the regular pay channels. HAW. REV. STAT. § 388-3.

Employees who are suspended or resign due to a labor dispute (strike): An employer must pay an employee who is suspended due to a labor dispute wages in full not later than their next regular payday. An employee can request the employer send their final paycheck through the mail, but if no such request is made, the employer may pay the employee through the regular pay channels. HAW. REV. STAT. § 388-3.

Employees who are temporarily laid off: An employer must pay employees who are temporarily laid off their wages in full not later than their next regular payday. An employee can request the employer send their final paycheck through the mail, but if no such request is made, the employer may pay the employee through the regular pay channels. HAW. REV. STAT. § 388-3.

E. Breaks and Meal Periods

Employers are required to provide at least a 30-minute break or meal period to employees who are 14 or 15 years old after the employee has worked five consecutive hours. HAW. REV. STAT. § 390-2(c)(3) (2019). There are no laws in Hawaii that require an employer to give breaks or meal periods to employees 16 years or older. Accordingly, federal law applies.

F. Employee Scheduling Laws

Pursuant to HAW. REV. STAT. § 387-3(f) (2019), “[n]o employer shall employ any employee in split shifts unless all of the shifts within a period of twenty-four hours fall within a period of fourteen consecutive hours, except in the case of extraordinary emergency.”

Minors who are 16 or 17 years old may work when the minor is not required to be at school. HAW. REV. STAT. § 390-2(b) (2019).

Employees who are 14 or 15 years old are permitted to work, but only when the minor is not required to be at school. HAW. REV. STAT. § 390-2(c)(1) (2019). Employees who are 14 or 15 years old are only permitted to work between 7:00 a.m. and 7:00 p.m., unless the minor is on a school break, in which case, the minor can work between 6:00 a.m. and 9:00 p.m. HAW. REV. STAT. § 390-2(c)(4) (2019). Employees who are 14 or 15 years old can work no more than six consecutive days, and can work no more than 18 hours in a calendar week when the minor is required to attend school or no more than 40 hours a calendar week when the minor is not required to be at school. HAW. REV. STAT. § 390-2(c)(5)-(6) (2019). In addition, minors who are 14 or 15 can work no more than three hours on a school day and no more than eight hours on a non-school day. HAW. REV. STAT. § 390-2(c)(7)-(8) (2019).

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

Pursuant to HAW. REV. STAT. §§ 328J-1 to 328J-15, workplace smoking laws apply to any enclosed or partially enclosed area. Smoking is prohibited throughout the entire enclosed workplace and within a "presumptively reasonable" distance of 20 feet from any entrance, exit, or ventilation intake. Hawaii laws do not address the specific areas of a workplace where smoking may be permitted.

Remember that some workplaces might already be subject to Hawaii or local laws that regulate smoking in public or smoking in or around certain kinds of businesses. Hawaii does not require employers to create designated smoking areas or provide other accommodations for smokers in the workplace. Hawaii does not specifically require employers to provide workplace accommodations for nonsmoker employees.

An employer may not discharge, refuse to hire, or retaliate against employee or applicant for attempting to prosecute a violation of this law.

B. Health Benefit Mandates for Employers

Hawaii's Prepaid Health Care Act, which has been in effect since 1974, requires employers to provide health insurance to employees working 20 or more hours per week on a regular basis. HAW. REV. STAT. Ch. 393-3.

C. Immigration Laws

Hawaii Legislature has adopted measures promoting immigration. For example, Hawaii is among the few states still issuing driver's licenses to illegal immigrants, and does not require Hawaii residency for state job applicants. Immigration measures were further expanded in June 2013, when the Hawaii approved an immigration reform bill which included restoring Medicaid eligibility for compact migrants.

D. Right to Work Laws

Under HAW. REV. STAT. § 377-1 et seq., employees have the right of self-organization and right to form, join, or assist labor organization, and the right to refrain from organizing. Employers are prohibited from interfering, restraining, or coercing employees' rights to organize, and are further prohibited from influencing the outcome of any employment relations controversy. Failure to adhere to the statute may result in fines and/or criminal penalties.

E. Lawful Off-Duty Conduct (including lawful marijuana use)

HAW. REV. STAT. § 329-122 authorizes persons with debilitating medical conditions to medically use marijuana to alleviate the symptoms or effect of the medical condition. However, the authorization does not apply to the medical use of marijuana in the workplace.

F. Gender/Transgender Expression

Under Hawaii State law, HAW. REV. STAT. § 378-1, sexual orientation is defined as having a preference for heterosexuality, homosexuality, or bisexuality; having a history of any one or more of these preferences; or being identified with any one or more of these preferences. Hawaii employment law expressly prohibits employment discrimination and harassment because of sexual orientation. Effective May 2011, transsexuals, transgendered individuals, and transvestites were also established as a protected class under Hawaii employment law.

G. Volunteer Activities and Reports

There are no reported Hawaii cases on this subject.

H. Commission Sales Representatives

In a commission arrangement, the employer sets the policy and terms under which commissions are earned and paid.

HAW. REV. STAT. § 388-7(1), of the Payment of Wages and Other Compensation Law, requires every employer to notify the employer's employees in writing, at the time of hiring, of the rate of pay (if paid by

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commissions, the commission agreement), and of the day, hour, and place of payment. As opined by California's Division of Labor Standards Enforcement, the commission agreement should be "clear and unambiguous" as to how and when commissions are "earned." As it relates to Section 388-2, HRS, until those conditions as stipulated in the commission agreement are met, the commissions would not be considered "earned." However, once the conditions for earning a commission have been met, the earned commissions must be paid within seven days after the end of the pay period in which the commissions were earned.

I. Commercial Motor Vehicle Operators

HAW. REV. STAT. § 286-202.5 requires employers to provide driver improvement program. Such program shall include a system for continuous driver evaluation and annual driver safety courses approved by the director. For drivers with five years of continuous employment with one employer, this requirement shall be at least once every two years. Every job placement center through which a driver who drives a motor vehicle with a gross vehicle weight rating in excess of ten thousand pounds is employed on a casual or sporadic basis, and not as a regularly employed driver for any one employer, shall be responsible for providing the driver improvement program for all its drivers, who drive a motor vehicle with a gross vehicle weight rating in excess of ten thousand pounds. For purposes of this subsection only, "job placement center" means any place where persons may register for purposes of employment, and the dispatching of those persons to various jobs as they become available. Any employer or job placement center that violates this subsection shall be fined not more than \$500.

J. Local Ordinances

K. New Developments (including Covid permanent changes)

Employers are required to have worker's compensation insurance, to include COVID coverage. COVID-19 may be recognized as a work-related injury if the employee was exposed to or directly contracted COVID-19 in the course of his or her work duties.

L. Other Key State Statutes

1. Lie Detector Tests: Pursuant to Haw. Rev. Stat. § 378-26.5 an employer may not require employee or applicant to take lie detector test. An employer may request test if current or prospective employee is told, orally and in writing, that refusing to take test will not result in being fired or hurt chances of getting job.
2. No employee may be discharged for filing a workers' compensation claim. HAW. REV. STAT. § 378-32(2).
3. No employee may be discharged for refusing to take a lie detector examination. HAW. REV. STAT. § 378-26.5.
4. No employee may be discharged for exercising any rights under Occupational Safety and Health Act or participating in proceedings under that Act. HAW. REV. STAT. § 396-8(e).

5. No employee may be discharged for filing a complaint, testifying, or assisting in any proceedings respecting discriminatory practices. HAW. REV. STAT. § 378-2(2).
6. No employee may be discharged for assignment of income for the purpose of satisfying the individual's child support obligations. HAW. REV. STAT. § 378-2(5).
7. No qualified employee may be discharged because of a known disability of an individual with whom the qualified employee is known to have a relationship or association. HAW. REV. STAT. § 378-2(6).
8. Employers who have (a) 100 or more employees and (b) a collective bargaining agreement with those employees, are prohibited from barring, discharging from employment, withholding pay, or demoting an employee who uses accrued and available sick leave. HAW. REV. STAT. § 378-32.
9. Employers are prohibited from discriminating against employees or applicants who are the victims of sexual or domestic violence, if the victim notifies the employer of such status or the employer has actual knowledge of such status. This new law also re-titles Hawaii's "Victim Leave" law to "Victim Protections" and requires employers to make "reasonable accommodations in the workplace" for victims of domestic violence, such as changing the contact information of the employee, screening phone calls for the employee, restructuring the job functions of the employee, changing the work location of the employee, installing locks and other security devices, and allowing the employee to work flexible hours, unless providing such an accommodation would cause "undue hardship" on the work operations of the employer. HAW. REV. STAT. § 378-81.
10. It is a criminal offense not to pay wages owed to an employee. The law states that a person commits the offense of "nonpayment of wages" if the person, acting in the capacity as an employer, intentionally or knowingly or with intent to defraud fails or refuses to pay wages to an employee. There is an exception to this rule, where an employer is required to make deductions from an employee's wages under federal or state law, or court order. A failure to pay wages of \$2,000 or more constitutes a Class C felony. In addition, it will also be a Class C felony if a person convicted of nonpayment of wages falsely denies the amount or validity of the wages owed. A failure to pay wages of under \$2,000 constitutes a Misdemeanor. Finally, the law provides that each missed pay period will constitute a separate offense. HAW. REV. STAT. § 707-786.
11. An employer must pay all wages due to the employer's employees at least twice per month, on regular paydays designated in advance by the employer. The earned wages of all employees shall be due and payable within seven days after the end of each pay period. HAW. REV. STAT. § 388-2.
12. Effective January 1, 2014, employers must maintain in their payroll records expanded information. The new law requires that, for each and every employee, employers must keep current and accurate records of: The employee's name, address, and occupation; The amount paid each pay period; The hours worked

each day and each work week; Rates of pay and whether pay is by the hour, shift, day, week, salary, piece, commission, or other basis; Gross wages, deductions, any allowances claimed as part of the minimum wage, and net wages. Furthermore, at every pay period employers must furnish each employee with a record, commonly called a “paystub,” showing the following details: The name of the employee; The name, address and telephone number of the employer; Regular, overtime and total hours worked by the employee; The employee's total gross compensation, straight-time compensation, overtime compensation, and any other compensation, including any allowances claimed as part of the minimum wage; The amount and purpose of each deduction; The employee's total net compensation, date of payment, and pay period covered; Rates of pay and whether pay is by the hour, shift, day, week, salary, piece, commission, or other basis, including overtime rate(s) of pay. For employees paid a piece rate, paystub records must also indicate the applicable piece rates and the number of pieces completed at each rate during the pay period. Paystubs must be provided to employees as printed, typewritten, or handwritten records. However, if the employee signs a written authorization to receive the pay information electronically, “the employer may provide an electronic record that may be electronically accessed by the employee.” HAW. REV. STAT. § 387-6.

13. Effective July 1, 2020, Haw. Rev. Stat. 286-109 was amended to allow Hawaii drivers to select “X” as a gender designation on their license, if they prefer not to identify with male or female. Furthermore, individuals are not required to show proof of documentation, like a birth certificate, for their chosen gender designation. Though this bill relates specifically to Hawaii driver’s license, it could pose new challenges for employers when it comes to gender reporting on employment related forms, like job applications, tax forms, and even benefits enrollment. Federal law does not currently require employers to recognize or track gender designations other than male or female, but the move is a testament to the growing local and national trend for a more inclusive workplace.
14. Under HB1383, Hawaii became the 26th state to decriminalize possession of small amounts of marijuana. Starting January 11, 2020, those caught with up to three grams of marijuana will no longer face jail time, but will instead be charged a \$130 fine. The new law does not provide employment protections for recreational marijuana users, nor does it modify Hawaii’s existing medical cannabis law. However, it signals the increasing social acceptance of marijuana. Decriminalization also continues to bring attention to uncertainty around marijuana policy in the workplace, including issues related to recruitment, drug testing, and on-the-job drug use.