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FROM HIRE TO SEPARATION: MANAGING THE EMPLOYMENT LIFE CYCLE

by

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I. INTRODUCTION

This seminar is meant to provide you with a broad overview of some of the legal risks and issues that you may encounter as a small business owner – from the hiring stage, during the employment relationship, and through the termination of employment.[1]

II. THE CIVIL RIGHTS LAWS

The default rule in Hawaii is that the employment relationship is at-will. This means that the relationship can be terminated by either party, at any time, with or without notice, and for any reason.

However, federal and state laws have greatly limited this general rule, such that even an at-will employee is protected from termination as well as other adverse actions under a wide range of circumstances. Such laws include, but are not limited to, the following.

A. Title VII Of The 1964 Civil Rights Act

Purpose: Title VII is a federal law which generally prohibits discrimination in employment on the basis of race, color, national origin, religion, and sex. This includes discrimination in recruitment, hiring, discharge, compensation, and other terms and conditions of employment.[2]

Coverage: Title VII applies generally to employers who are engaged in an industry affecting commerce and who have fifteen (15) or more employees.

Enforcement: Title VII is administered by a federal agency called the Equal Employment Opportunity Commission (EEOC). In order to pursue a Title VII claim, an aggrieved individual must file a charge of discrimination with the EEOC within 300 days of the allegedly wrongful action. The EEOC is authorized to receive charges, investigate those charges, seek a settlement with the employer, and institute court action on the complainant's behalf.

The EEOC may also dismiss the charge and issue a "right to sue" notice authorizing the complainant to file his or her own private lawsuit. The complainant has 90 days from receipt of the notice to file a Title VII lawsuit.

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[1] The following provides general information on federal and Hawaii employment laws. It is not intended to constitute legal advice, to substitute for the advice of legal counsel, or to constitute a comprehensive analysis of the labor and employment laws.

[2] In addition, Title VII, along with various other federal and state laws, prohibits "retaliation." Retaliation is discussed in these materials further below.

B. Age Discrimination In Employment Act (ADEA)

Purpose: The ADEA generally prohibits age-based discrimination against persons who are at least 40 years of age. This includes discrimination in recruitment, hiring, discharge, compensation, and other terms and conditions.

Coverage: The ADEA applies to employers who are engaged in an industry affecting commerce and who have 20 or more employees.

Enforcement: Like Title VII, the ADEA is administered by the EEOC.

C. Americans With Disabilities Act (ADA)

Purpose: The ADA prohibits discrimination against any qualified individual with a disability. It also requires the employer to provide reasonable accommodation to such individuals under certain circumstances.

Coverage: The ADA applies to private employers with 15 or more employees.

Enforcement: Like Title VII and the ADEA, the ADA is administered by the EEOC.

D. Hawaii Revised Statutes § 378

Purpose: Under Haw. Rev. Stat. §378-2, an employer may not discriminate on the basis of race, color, ancestry, religion, sex including gender identity or expression, age, disability, association with a disabled individual, credit history (with certain exceptions), sexual orientation, marital status, arrest and court record (with certain exceptions), reproductive health decision, domestic or sexual violence victim status, or because the employee "breastfeeds or expresses milk at the workplace." This includes discrimination in recruitment, hiring, discharge, compensation, and other terms and conditions of employment.

Under Haw. Rev. Stat. § 378-32, an employer may not discriminate against an employee because he or she has suffered a work injury arising out of and in the course of employment, *except* that an employer may suspend or discharge such an employee if: (i) the employee is no longer capable of performing her job, and (ii) the employer has no other work which the employee can perform. However, in the event of such discharge, the employer remains obligated to offer the discharged employee first preference of re-employment into any subsequently available position which the employee can perform.

Under Haw. Rev. Stat. §378-62 (part of the Whistleblowers' Protection Act), an employer may not discriminate against an employee because the employee (or his or her agent) reported or is about to report to the employer or a public body an actual or suspected violation of a federal, state, or municipal law, rule, ordinance, or regulation.

Coverage: Section 378 applies to all employers having one or more employees, except the federal government.

Unlike the ADEA, Section 378 protects not only employees who are 40 years old or above, but also employees of *any age*. Thus, under Hawaii law, a claim may be brought by an employee who is discriminated against for being *too young*.

Furthermore, Hawaii law recognizes individual liability, as it is unlawful "[f]or any person whether an employer, employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the discriminatory practices forbidden by this part, or to attempt to do so[.]" Haw. Rev. Stat. § 378-2(3).

Enforcement: Section 378 is enforced by the Hawaii Civil Rights Commission (HCRC). The commission's powers include investigating and conciliating complaints, holding hearings, administering oaths, issuing subpoenas, examining witnesses, compelling answers to interrogatories, commencing civil actions in state court to seek relief or enforce orders, issuing right-to-sue letters to authorize private lawsuits, ordering appropriate legal and equitable relief, and adopting administrative rules.

III. COMMENCING THE EMPLOYMENT RELATIONSHIP

A. The Pre-Offer Process

At the pre-offer stage, the primary goal of the job interview is to assess an applicant's suitability and qualifications for the position. Accordingly, the interviewer must be well-informed (*e.g.,* the interviewer should be familiar with the job description for the position, as well as with the company's policies, practices, and benefits).

1. Questions That Are *Per Se* Unlawful

Under federal and Hawaii law, it is *per se* illegal for an employer to make certain pre-employment inquiries (*e.g.,* in a classified advertisement, in an application form, or in an in-person interview). Hawaii law generally defines such illegal inquiry as an inquiry "which expresses, directly or indirectly, any limitation, specification, or discrimination" based upon a protected class.

The HCRC has issued a Guideline on unlawful inquiries. https://labor.hawaii.gov/hcrc/files/2013/01/Pre-Employment-Inquiries-11-9-2020.pdf. According to this Guideline, here are some examples of unlawful inquiries:

Sex

- Sex of applicant
- Whether the applicant is addressed as "Mr.", "Mrs.," "Ms.," or "Miss"
- "Are you pregnant?" "Do you use birth control?" "What are your plans for having a family?"
- "Why don't you wear makeup?"
- Applicant's weight or height (unless it is a bona fide occupational qualification)

Marital Status

- Whether the applicant is addressed as "Mr.", "Mrs.," "Ms.," or "Miss"

- Whether the applicant is single, married, divorced, widowed, separated, etc.
- Name and ages of spouse and children
- Spouse's place of employment
- "With whom do you reside?" "Do you live with your parents?"

Age

- Phrases such as "young," "college student," "girl," "boy," "recent college graduate," "retired person," "supplement your pension"
- Age or date of birth
- Dates of attendance/completion of elementary school, high school, or college

NOTE: The employer may inquire into whether the applicant meets the minimum age requirements set by law and, for minors, require proof of age in the form of a work permit or certificate of age.

Religion

- Whether the applicant has a religious affiliation and/or attends religious services
- Any question that might indicate or identify a religious denomination or practice: *e.g.,*"Are you free to work on Sundays?"

NOTE: The employer may advise applicants concerning normal hours and days of work. The employer may also ask, "apart from absences for religious observances, will you be available for work at the following times?" (provided that the employer actually conducts operations during those times.) After a position is offered, the employer may also inquire into the need for reasonable religious accommodation.

Ancestry

- Nationality, descent, lineage
- Nationality of applicant's parents or spouse
- Language commonly used by applicant, e.g., "what is your mother tongue?"

NOTE: The employer may ask the applicant whether he or she can, after being employed, submit verification of legal right to work in the United States.

Race/Color

- Applicant's race
- Color of applicant's skin, eyes, hair, etc. or other questions directly or indirectly indicating race or color
- Applicant's height
- Photograph of applicant
- Views on Black Lives Matter protests

Sexual Orientation

- Questions relating to the applicant's sexual orientation

Conviction Record

- "Have you ever been arrested or convicted?"

Disability

- Whether the applicant has any physical or mental disability
- Whether the applicant has ever collected workers' compensation benefits or temporary disability insurance for a previous illness or injury
- Questions regarding the applicant's general health

The Hawaii Civil Rights Commission has issued compensatory damages where unlawful questions were asked of an applicant and caused him emotional distress. In *Hoshijo v. Life Support Systems Hawaii, Inc.*, Docket No. 96-008 (HCRC 1996), an interviewer asked an applicant about his marital status and why his family moved from Lebanon to California; the applicant believed that these inquiries caused him to lose the job; and these perceptions (even though possibly incorrect) caused him "to become very upset, irritated, short tempered, and distant from his family." The HCRC found that the applicant was entitled to $10,000 in compensatory damages.

Questions relating to an applicant's health and/or disability are also regulated under federal law, *i.e.*, the ADA (Americans with Disabilities Act). Specifically, at the pre-offer stage, the ADA prohibits an employer from asking any disability-related questions. According to the EEOC, a "disability-related question" is one that is "likely to elicit information about a disability."

In an Informal Guidance Letter, the EEOC has stated that a question is not disability-related if, even though it in fact elicits an answer relating to a disability, could also have elicited "many other possible answers that are not disability-related." For example, an interviewer asks the applicant what she enjoys doing in her spare time, and the applicant responds that she spends much of her spare time in physical therapy. The interviewer's question is not a disability-related question because it could have elicited many other possible answers that were not disability-related. By contrast, asking an applicant about prior sick leave usage or workers' compensation claims would be impermissible because it has a greater likelihood of eliciting a disability-related response.

According to EEOC statements and opinion letters, the employer may

- state a job's physical requirements (*e.g.,* lifting requirements) and ask whether the applicant is "able to perform the essential functions of the job, with or without a reasonable accommodation";

- state the employer's attendance/absence policies, and ask whether the applicant can meet them, with or without reasonable accommodation;

- ask how many days the applicant was absent from his or her last job (but may not inquire into how many days the employee has been sick, or the applicant's workers' compensation history);

- ask whether the employee drinks (but not how much the employee drinks);

- request the applicant to describe or demonstrate how he or she would perform essential job functions (if all applicants in the job category are asked to do this and/or if the applicant has an "obvious" disability that the employer reasonably believes may prevent the applicant from performing a job function). For example, the employer might not generally ask its applicants for a lifting demonstration, but might be able to ask an applicant in a wheelchair.

The employer also has an obligation to provide an employee with reasonable accommodation in the hiring process and, therefore, may ask applicants whether such accommodation is needed *for that limited purpose*. For instance, an employer may discuss with a blind applicant whether an alternative to a written application form should be provided. Under such circumstances, a narrowly-tailored inquiry into the applicant's medical condition is permissible.

2. Medical Examinations

Generally, the ADA prohibits not only medical inquiries but also medical examinations at the pre-offer stage. Accordingly, it is helpful to know what constitutes a "medical examination."

The EEOC has identified numerous factors to be used in this inquiry, including but not limited to:

* whether the test is administered and/or interpreted by a health care professional;
* whether the test is invasive (*e.g.,* involves drawing blood, urine or breath);
* whether it measures an applicant's performance or physiological response to a performance; and
* whether medical equipment is used.

According to the EEOC, prohibited medical exams do *not* include:

- tests in which an applicant merely demonstrates the ability to perform actual or simulated job tasks (*e.g.,* a typing test or lifting demonstration)
- physical fitness tests (*e.g.,* requiring the applicant to run or lift) so long as the test measures only the physical performance and not the applicant's physiological response to that performance.[3]

Therefore, an employer who administers a fitness test should not take the applicant's blood pressure or heart rate after the test, if the employer does not want the exam to be subject to ADA requirements.

[3] The EEOC permits employer to "ask an applicant to assume responsibility and release the employer of liability for injuries incurred in performing a physical agility or fitness test."

3. Drug And Alcohol Issues

Under the ADA, current illegal drug is excluded from the definition of "disability." Therefore, an employer may ask applicants about current illegal drug use and/or test applicants for current illegal drug use.

However, alcoholism and the *former* use of illegal drug (if an addiction) can be qualifying disabilities. Therefore, alcohol tests -- like all other medical tests -- are impermissible at the pre-offer stage. Also, questions which relate to the *amount* of alcohol use or to former illegal drug addiction may be "disability-related" and unlawful. According to the EEOC, an employer may ask whether an employee has *ever* used or possessed illegal drugs, but may not ask questions likely to reveal whether such former use resulted from an addiction (*e.g.,* the *amount* of illegal drugs formerly used or possessed).

An employer generally may not ask about *lawful* use of medication because such question might implicate whether the employee has a disability that the employee is treating.

4. Conduct That Suggests Discriminatory Intent

An interviewer should be careful to avoid questions and comments that may be construed as discriminatory.

* Asking questions that implicate a protected class may not only be *per se* unlawful (as described above), but may also create *evidence* of a discriminatory motive in the event that the applicant is ultimately not hired. For instance, an applicant who is not hired may file a charge of religious discrimination, claiming that the interviewer made extensive inquiry into the applicant's religious affiliation and therefore had a religious bias.

* Asking otherwise permissible questions, *but only to applicants of a certain protected class*, might create an inference of discrimination.

5. Avoiding Implied Contracts and Promissory Estoppel

In an interview setting (as well as in all other communications, oral or written to an applicant or employee), the employer must be mindful not to create any unintended representations or promises, lest they become binding.

An implied contract may arise when the company makes a promise of specific treatment in specific situations, and the applicant or employee accepts the promise.

Promissory estoppel may arise when the company makes a promise which the company should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. In *Ravelo v. County of Hawaii*, 66 Haw. 194 (1983), a policeman who lived in Honolulu was offered employment by the County of Hawaii Police Department. In reliance upon that offer, the policeman and his wife prepared to relocate by

quitting their respective jobs and withdrawing their children from private school. Thereafter, the county rescinded its offer, and the policeman brought suit. Reversing the trial court's dismissal of the complaint, the Hawaii Supreme Court held that the policeman could state a cause of action under the theory of promissory estoppel (aka detrimental reliance).

6. Documentation

Generally, the interview/screening process should be documented. In the event that a rejected applicant files a claim of discrimination based upon their non-hire, the employer will be better able to defend itself by showing a legitimate, non-discriminatory reason for its actions (*e.g.,* interview notes memorializing the applicant's poor answers given in the job interview).

7. Background Checks

Background checks on applicants can help an employer screen out employees who have engaged in violent and/or other disruptive behavior. The failure to investigate an applicant's background may give rise to a claim of negligent hiring.

Generally, a company may want to consider the following practices for its hiring process: (1) Review the application for completeness; (2) Confirm the accuracy of past employment, education, and references; (3) Ask about employment gaps; and (4) Try to secure a consent for release of information, which can make it easier to obtain information from prior employers.

If an employer uses an outside company to provide background check information, both the employer and the outside company may be subject to the Fair Credit Reporting Act (FCRA). Specifically, the FCRA imposes obligations on employers who hire "consumer reporting agencies" to compile and provide "consumer reports" or "investigative consumer report" about job applicants or employees.

B. Post-Offer / Pre-Employment

The employer's ability to make certain inquiries and conduct examinations expands after a conditional offer of employment has been extended.

1. Medical Examinations

For the purposes of the ADA, and according to the EEOC, an "offer" has been given if the employer "has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer."

At the post-offer stage, the employer may ask any disability-related questions and may require any medical examinations, as long as all offerees in the job category are treated similarly. For example, employers may ask about an employee's workers' compensation history, prior sick leave usage, illnesses, and general physical and mental health. Furthermore, the disability-related questions and/or medical examinations need not be related to the job position.

However, this does not necessarily make it prudent for an employer to do so. Extensive investigation into an employee's medical condition may set up a future disability discrimination claim. For instance, if an employer acquires knowledge about an employee's medical condition and then later terminates the employee, the employee might claim that the employer's knowledge of the disability was a reason for the termination. Put another way, an employer's lack of knowledge of an employee's (non-obvious) disability can be an important defense to a claim of discrimination.

2. Conviction Record

Once a conditional offer has been extended, the employer may inquire into and consider an offeree's criminal conviction record so long as the record bears a "rational relationship" to the duties and responsibilities of the position. "Conviction" means a court adjudication that the offeree has committed a felony (within the most recent seven years) or misdemeanor (within the most recent five years), excluding periods of incarceration.[4]

The offer of employment may be withdrawn if the offeree's conviction record bears a rational relationship to the duties and responsibilities of the position.

C. Working Interviews

As some companies apply it, a "working interview" is part of the candidate review process and involves the candidate's application of their skills in an actual work setting. For instance, if the company is a dental practice and the candidate is seeking a hygienist position, the working interview might involve the candidate's performance of dental hygienist services on actual patients over the course of a day or a few days. The company then decides whether to extend a job offer to the candidate.

This creates potential pitfalls: Because such working interview benefits the company's business and is under the control of the employer, it will likely create an employment relationship requiring the employer at the outset to provide payroll wages and applicable benefits such as workers' compensation and temporary disability insurance. If the company is unaware of these obligations and fails to meet them, the company could face liability under tax, wage, and/or employment benefits laws. This is the case even if the candidate agrees that the working interview is not employment, because such agreement would be unenforceable. This is also the case even if the company pays the candidate a non-wage stipend for the working interview because a stipend is not a substitute for payroll wages and benefits. In addition, a candidate in a working interview will not qualify as an independent contractor.

To minimize these risks, companies including dental offices have some options including:

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[4] The post-offer and temporal requirements do *not* apply to employers who are expressly permitted to inquire into an individual's criminal history pursuant to any federal or state law. This means that those employers can make pre-offer inquiries, as well as consider convictions from any time period.

a. Replace the working interview with a skills demonstration. One critical distinction between a working interview and a skills demonstration is that, in a skills demonstration, the candidate's activity does not benefit the employer – for instance, the candidate is not performing services on or with regard to any actual patient and is not otherwise helping to generate revenue or business for the company. Instead, the candidate could demonstrate their skills on a "fake" patient (e.g., one of the company's employees who is role-playing), on a "fake" patient chart (e.g., hypothetical chart created solely for the demonstration), and/or on a "fake" operatory (not to be used for actual patients).

b. Replace the working interview with an employment probationary period. The company could create an employment relationship (e.g., on-boarding, payment of wages, provision of benefits) just as it would for any employee, but in order to manage expectations, the company would give advance written notice as to the limited duration of the employment/probationary period and that employment may not continue beyond the probationary period, depending upon how the individual performs. Just as with any employee: If the individual is injured at work during the probationary period, that could give rise to a worker's compensation claim; and if the individual is terminated at the end of the probationary period, they could apply for unemployment (assuming they meet all other eligibility requirements for unemployment).

c. Use a staffing agency to employ the individual during the employment probationary period. In this option, it is the staffing agency – not the company – that is meeting the employment obligations as to payroll and benefits. The company would pay a fee to the staffing agency, which generally covers the worker's wages and benefits and an additional surcharge to the staffing agency. If the company finds the worker to be unsatisfactory, the staffing agency will typically provide a replacement worker.

D. Employment Contracts

1. Contracts For "Just Cause" Or Fixed Employment

As discussed above, employment is generally at-will. However, an employer may contractually alter an employee's at-will status, *e.g.,* by agreeing that the employee can only be terminated for "just cause" and/or that the employee will be employed for a fixed period of time. Such a contract may be express (*e.g.,* a formal, written agreement executed by both parties) or implied (*e.g.,* an oral or written representation, made by a company agent and upon which the employee relies).

2. Arbitration Agreements

Arbitration is a form of dispute resolution involving the parties and a paid arbitrator. Arbitration does not confer a substantive advantage upon one party over the other; it merely provides an alternative forum, other than the courtroom, for resolving disputes.

There are numerous reasons why an employer may want to submit employment disputes to arbitration instead of litigation. These reasons include:

- Confidentiality: Whereas judicial decisions are of public record, the arbitration decisions generally are not publicly available.

- Shorter Timeframe: The arbitration process is faster than litigation -- hearings are usually scheduled before a trial date would be set, there are generally fewer postponements, the informality of arbitration results in speedier hearings, and arbitrators typically render prompt decisions. Also, arbitration is generally final, so there is much less risk of a costly and time-consuming appeal.

- Lower Costs and Fees: Arbitrations generally involves less production of documents, less motions practice, and/or fewer disputes about the obtaining and admissibility of evidence. This, along with the shorter timeframe, means reduced costs and attorneys' fees. Furthermore, the shorter timeframe means less corporate disruption, allowing the employer to better focus upon its primary business.

- No "Runaway Jury": The conventional wisdom is that arbitrators are less likely to be swayed by sympathy for the "underdog" employee or by antipathy for the "giant" corporate employer and that, even if the arbitrator renders an award for the employee, the arbitrator would be more conservative in awarding punitive damages.

- Arbitrator selection: Parties can select their arbitrator and, thus, can agree on someone with particular expertise in the employment area. Also, arbitrators have an incentive to issue reasonable decisions so that the parties may consider using them again for future arbitrations.

There are some limits on arbitration agreements. For instance:

- A pre-dispute arbitration agreement is not enforceable with respect to a case which is filed under state law and relates to a sexual harassment dispute.

- An arbitration agreement may be unenforceable where the employee shows that he or she would incur prohibitively high costs associated with the arbitration, such as the arbitrator's fees (to minimize this risk, the arbitration agreement could have the employer pay all or most of the arbitrator's fees).

- An arbitration agreement between a company and employee does not preclude the EEOC from independently investigating and litigating on the employee's behalf and seeking broad as well as victim-specific relief.

3. Covenants Restricting Post-Employment Competition

An employer may want to consider an agreement which restricts an employee's conduct during and/or after the termination of the employment relationship. Such agreements include:

- **Non-Compete Agreement**. Such agreement generally prevents an ex-employee from competing against his employer (i) in a particular geographic area, (b) for a certain period of time, and (c) with regards to a particular activity. The agreement is subject to a "reasonableness" test: It will not be enforced if it establishes a greater protection than necessary for the employer, imposes an undue hardship on the ex-employee, and/or creates an injury to the public interest. In addition, the agreement must be ancillary to a "legitimate purpose" which must be something other than merely preventing competition; the legitimate purpose potentially could be protecting confidential information or special customer relationships.

- **Confidentiality Agreement**. Such agreement generally prevents an ex-employee from disclosing confidential information learned while in the employment of the company. The agreement generally may last as long as the information is treated as confidential.

- **Non-Solicitation Agreement**. Such agreement generally prevents an ex-employee from soliciting the employer's customers or remaining employees. Like non-compete agreements, non-solicitation agreements are also subject to a "reasonableness" test.

IV. INDEPENDENT CONTRACTOR RELATIONSHIPS

Determining whether an individual who provides services to the company is an employee or an independent contractor is crucial for several reasons. For instance, an employer may be vicariously liable for the acts of its employees which are committed within the scope of their employment; however, an employer generally is *not* liable for the acts of its independent contractors. Second, unlike employees, an independent contractor is not protected by employment antidiscrimination laws, guarantees of minimum wage or overtime pay, and employment benefits such as health insurance or workers' compensation insurance.

Merely labeling someone in a contract as an "independent contractor" does not in itself establish an independent contractor relationship. The analysis is fact-specific and must be done on a case-by-case basis.

Although each employment statute has its own test as to whether a person is an employee or an independent contractor, all the tests, to some extent, look to the degree of *control* which the employer exerts over the individual. Under the "ABC" test which applies to the Hawaii Prepaid Health Care Act and the Hawaii unemployment statute, an individual is an independent contractor only if they meet all three of the following:

A. The individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact; and

B. The service is either outside the usual course of the business for which the service performed or that the service is performed outside all the places of business of the enterprise for which the service is performed; and

C. The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

Where an employer misclassifies an employee as an independent contractor, it may be liable for its failure to provide statutory benefits. For example:

* If the employer fails to pay minimum wage and/or overtime, it may owe those amounts plus liquidated damages.
* If the employer fails to properly withhold social security and income tax, and fails to make social security and income tax contributions, it may owe those amounts plus various, substantial penalties.
* If the employer fails to provide health insurance pursuant to the Hawaii Prepaid Health Care Act, Haw. Rev. Stat. § 393, it may be liable for actual health care costs incurred and/or a daily penalty for each day of non-coverage (not less than $25/day).
* If the employer fails to make contributions to unemployment insurance under Haw. Rev. Stat. § 383, it may be liable for the owed contributions, plus costs, penalties, and interests.

V. THE EMPLOYMENT RELATIONSHIP

A. The Employee Handbook

The employee handbook can be an effective way to explain your company benefits, rules, and other policies. Furthermore, *if properly drafted*, an employee handbook can reduce legal risks for your company. Conversely, *if poorly drafted*, the handbook can actually generate legal risks for your company, such as by inadvertently creating an implied contract.

- By explaining disciplinary policies and/or "House Rules," a Handbook can warn employees, deter misconduct, and – if misconduct does occur and discipline is issued – reduce the risk that the employee will feel unfairly targeted.

- A handbook can preserve employees' at-will status and disclaim the creation of any employment contracts.

- A handbook can lower the employees' privacy expectation, such as by stating that the employees may be subject to drug testing, that company lockers may be searched, etc.

- A handbook can reduce the risk of a harassment claim by including appropriate anti-harassment language, as further discussed below.

B. Personnel Files

1. Contents

Employee personnel files can generally include all employment-related documentation concerning an employee (with some exceptions, discussed below). This includes documentation relating to I-9 and hiring; orientation; the employee's acknowledgments of at-will status and receipt of handbook and other policies; emergency contact information; data such as home address, phone number, and social security number; benefits; payroll; performance and evaluations; discipline and commendations; and separation from employment.

The personnel file should not include employee medical information, such as medical examination records, notes and certifications from health care providers, drug testing records, sick leave information, and workers' compensation claims. Medical information should be kept in a separate, confidential medical file. Pursuant to the Americans with Disabilities Act, medical information can be disclosed only in limited circumstances (discussed further below).

The personnel files should also not include information relating to workplace investigations, other than any discipline imposed on the employee as a result of the investigation.

2. Privacy and Access to Personnel Files

Generally, employees' personnel information and records should be treated as confidential and should not be disclosed unless there is a legitimate business need to do so.

Unlike some other states, Hawai`i does not have a statute *requiring* that employees be given access to their personnel files. Thus, Hawai`i employers need *not* allow employees to inspect or copy their personnel (as distinguished from *medical*) files, unless they voluntarily agree to do so (*e.g.*, via an employment contract, collective bargaining agreement, or policy).

Many employers nevertheless allow employees at least limited access to personnel records about themselves, pursuant to employer-established procedures or guidelines. For example, employers may allow employees to inspect, but not copy, their files; set specific times and locations for review of files; or require review in the presence of Human Resources or other management personnel. It is recommended that employers establish a policy regarding employee access to personnel files to help ensure uniform treatment and to provide employees with notice of the employer's policy.

The law is different for employees' *medical* (as opposed to other personnel) records. Certain laws require employers to allow employees to access their own medical records. For example, regulations under OSHA provide "employees and their designated representatives a right of access to relevant exposure and medical records."[5] Employee exposure and medical

[5] The OSHA regulations apply to "each general industry, maritime, and construction employer who makes, maintains, contracts for, or has access to employee exposure or medical records, or analyses

records are broadly defined to include virtually any record concerning the health status of an employee, but the disclosure requirement is only triggered if there has been an OSHA-covered exposure. 29 C.F.R. § 1920.1020. The employer has fifteen days within which to either allow the employee the requested access or to apprise the employee of the reason the employer is unable to allow access within fifteen days. The employer may not require any information from the requesting employee other than information that may be necessary to locate or identify the records that are being requested (*e.g.*, the employer cannot require a reason for the request). The employer must either make a copy of the requested records for the employee, or allow the employee to make his or her own copy, free of charge (except in the case of original x-rays).

The OSHA regulations further require that employers provide notice to employees at the time of hire and "at least annually thereafter" of the following information:

* The existence, location, and availability of any records covered by section 1910.1020 of the OSHA regulations;

* The person responsible for maintaining and providing access to records; and

* Each employee's rights of access to the records.

Furthermore, the employer must make available a copy of section 1910.1020, along with its supporting appendices, to employees upon request. The employer must also distribute to employees "any informational materials concerning this section which are made available to the employer by the Assistant Secretary of Labor for Occupational Safety and Health." 29 C.F.R. § 1910.1020(g).

3. Retention of Personnel Files

The amount of time that an employer should retain an individual's personnel records depends on the type of records. Apart from medical records, a conservative universal rule for personnel record retention is seven years following employment, although the period could be shorter for certain types of personnel documents. For most personnel medical records, OSHA requires that they be maintained for 30 years following employment.

An employer should also suspend usual practices in certain cases, such as where the employer is on notice of a pending lawsuit or claim or where an internal or external investigation or audit is on-going. For instance, where personnel documents would normally be scheduled for purging but are relevant to ongoing litigation, they should be retained.

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thereof, pertaining to employees exposed to toxic substances or harmful physical agents." 29 C.F.R. § 1910.1020(b)(1).

C. Workplace Harassment

Harassment is unlawful because it is a form of discrimination. Under Title VII, for instance, it is unlawful for an employer

> [...] to discriminate against any individual -- with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin [...]

Harassment is unlawful to the extent that it affects the "terms, conditions, or privileges of employment" and to the extent that it is "because of" a protected class. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (U.S. 1986). Thus, is unlawful to harass employees based upon not only sex but also other protected classes, such as race, national origin, religion, or age. Generally, the principles described below (concerning sexual harassment) also apply to other forms of harassment.

Abusive workplace behavior that is not based on a protected class or protected conduct may not be unlawful harassment, although it is still inappropriate.

1. What Constitutes Sexual Harassment?

Hostile work environment harassment can assume many forms, such as demands for sex, lewd comments, physical gestures, and/or visual displays. To create liability, however, such harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* Furthermore, whether this "severe or pervasive" standard is met should be viewed from the perspective of a reasonable person of the plaintiff's gender -- *e.g.,* a "reasonable woman." *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

In addition, harassing conduct (for which the employer could be liable) can come from *anybody* -- a supervisor, a co-worker, a subordinate, or even a non-employee such as a customer or vendor.

An issue that commonly arises is what is sufficiently "severe or pervasive" to constitute a hostile work environment. A hostile work environment can result not only from repeated conduct (*e.g.,* a series of insults or propositions) but also from a single act if it is sufficiently "severe" (*e.g.,* sexual assault). The following provides some examples from court decisions.

* *Arquero v. Hilton Hawaiian Village*, 91 P.3d 505 (Haw. 2004): The plaintiff (Madonna Arquero) and the alleged harasser (German Rodas) were co-workers who worked as wait-help at the Hilton's Rainbow Lanai restaurant. On March 29, 1998, Rodas squeezed Arquero's buttock for one second. Reversing the trial court's dismissal of the lawsuit, the Supreme Court held that a jury should decide whether this was "severe" harassment.

* *Poff v. Oak Tree Mortgage Corp.*, 61 FEP Cas. (BNA) 1562, 1563 (E.D. La. 1993). The female plaintiff attended a corporate dinner, during which the company president used the plaintiff's name to tell an off-color joke about a "large-breasted" woman; the court refused to dismiss the claim, stating that the case should proceed to trial to determine "whether [...] such conduct rises to the level of sexual harassment."

* *Bowman v. Heller*, 66 FEP Cas. (BNA) 195 (Mass. Sup. Ct. 1993). The plaintiff's co-worker prepared two photocopies of nude female bodies in sexually-explicit poses, with the plaintiff's face superimposed upon them. He then distributed them to the office staff at-large. The court found the conduct to be both severe and pervasive, and awarded the plaintiff $35,000 and attorneys' fees.

2. When Is An Employer Liable?

a. Harassment By Non-Supervisor

Even if the plaintiff can show that the harassment was "severe or pervasive," the plaintiff still must show that the employer should be liable for the harasser's conduct. If the harasser is a non-supervisor (*e.g.,* a co-worker or a third-party), the plaintiff needs to show that the employer (1) knew or should have known of the harassment; and (2) failed to take steps reasonable calculated to end the harassment. For example, a failure to investigate or impose appropriate discipline (as discussed below) might be evidence of the employer's negligence.

b. Harassment By Supervisor

Under federal law, an employer may be able to avoid liability for its supervisor's harassing acts by establishing an affirmative defense that the harassment did not involve a tangible employment action; that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

However, this affirmative defense does not exist under Hawaii law. Rather, the Hawaii Civil Rights Commission's position is that an employer is *always* liable for the harassing acts of a supervisor, "regardless of whether the specific acts complained of were authorized or even forbidden, and regardless of whether the employer or other covered entity knew or should have known of their occurrence." Haw. Admin. R. § 12-46-109(c).

3. What Should Be Included In A Harassment Policy?

An anti-harassment policy is a way to reduce the risk of harassment claim. Such policy generally should include the following:

Statement that the company is committed to compliance with all anti-discrimination laws, including but not limited to laws against harassment on the basis of sex and other characteristics.

* Use gender-neutral language (*e.g.,* do not describe the victim only as "she" and the perpetrator only as "he") as persons of any gender can be victims of sexual harassment. Furthermore, same-sex harassment is unlawful, so long as it is based upon the victim's gender.

* Do not limit the policy just to sexual harassment. Title VII and Haw. Rev. Stat. 378 also prohibit gender-based harassment, even if it is not sexual in nature.

* Do not limit the policy just to gender/sexual harassment. The policy should be expanded to cover all classes protected by federal and state law: *e.g.*, race, color, national origin, religion, age, disability, marital status, sexual orientation, and arrest & court record. As with sexual harassment claims, a harassment claim on any of these other bases might be based upon a single incident (if it is sufficiently severe).

* Include a statement that the company also prohibits all offensive, disruptive, and/or harassing behavior, regardless of whether it rises to the level of unlawful harassment under federal or state law. Why? If the policy only prohibits unlawful harassment, and the company investigates and disciplines an alleged harasser, the company -- by its own policy -- has admitted that what occurred was unlawful harassment under the law. This can be used against the company in court.

<u>Definition of harassment</u>

* Give examples of verbal harassment: *e.g.,* using gender-based and/or sexual terms such as "doll," "babe," "hunk"; whistling at someone or making catcalls; making a sexual comment about someone's appearance; telling dirty jokes; or repeatedly asking out someone who is not interested.

* Give examples of non-verbal harassment: *e.g.,* staring at someone; following someone; displaying sexual pin-ups and other images in the office; and making obscene or sexual gestures.

* Consider using the definition of harassment provided in the EEOC and HCRC regulations.[6]

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[6] Those regulations state as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or visual forms of harassment of a sexual nature . . . when:
>
> · Submission to that conduct is made either explicitly or implicitly a term or condition of employment; or
>
> · Submission to or rejection of that conduct by an individual is used as the basis for employment decisions affecting that individual; or
>
> · Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Procedures for reporting misconduct

* This might include a phone hotline, a written form, and/or in-person meetings with designated individuals.

* If a written form is used, make sure it is easily available.

* Consider allowing anonymous reports. The advantage is that it will allow employees to feel more comfortable in making complaints, thereby allowing the company to better identify harassment problems. A possible disadvantage is that it may result in spurious complaints.

Identification of multiple individuals who are charged with receiving complaints.

* Ensure that there are multiple persons. A policy will not be user-friendly if it requires the victim to submit her complaint to the manager who is harassing her.

Assurance of no retaliation against the complainant.

* If the company does not expressly forbid retaliation, it may discourage an employee from complaining, thereby making it harder for the company to prove that the employee's inaction was "unreasonable." Put another way, if the company does not implement a no-retaliation policy, it may have failed to take all reasonable measures to elicit harassment complaints.

Assurance of a prompt investigation under the circumstances.

* This will encourage employees to submit complaints by assuring them that the complaints will be taken seriously.

Assurance that the investigation will be kept confidential on a need-to-know basis.

* This will also encourage complaints.

* However, the company should avoid any *absolute* promise of confidentiality. An absolute promise is problematic because there may be agencies or individuals to whom the employer may need to disclose information (*e.g.,* in conducting its investigation).

Identification of disciplinary actions.

* State that harassment will be disciplined with measures up to and including termination. This strengthens the deterrent effect of the policy.

4. What Other Steps Should The Company Take?

Ensure that the policy is distributed to all employees.

* One simple way to do this is to include the policy in the employee handbook. However, the policy could also be a standalone form.

Obtain written documentation of each employees' receipt of the policy.

* For example, have them sign an acknowledgment form and keep this form in their personnel file. If an employee later sues the company for sexual harassment, the acknowledgment form provides evidence that they knew (or at least should have known) of their rights under the harassment policy.

Post the policy in conspicuous places, such as bulletin boards in break rooms.

Train all employees (either in-house or through your attorneys).

* When new employees first receive the policy, it should be specifically reviewed with them. If the policy is contained in a handbook, the employees should be directed to the policy (regardless of whether other parts of the handbook are also reviewed with them).

* Conduct periodic re-training and obtain acknowledgments that the employees have received such training.

* Train employees charged with receiving complaints (*e.g.*, certain managers or human resources personnel) on how to conduct appropriate investigations.

* Knowledge of harassment will be imputed to the employer if it is possessed by any of the employer's "agents" -- that is, a "supervisor or manager possessing substantial authority to hire, fire, promote, or discipline employees" *or* any employee who has "responsibility for relaying sexual harassment complaints pursuant to an express policy promulgated by the employer." *Lamb v. Household Credit Services*, 956 F. Supp.1511, 1516 (N.D.Cal. 1997). *Thus, the company's supervisors and managers must be trained to recognize informal harassment complaints and to convey such information appropriately* (*e.g.*, to human resources personnel).

When the employer becomes aware (formally or informally) of potential harassment, take responsive actions.

* As appropriate, separate the complainant and the accused in a manner that does not prejudice the complainant.

* Conduct a timely investigation.
The investigation should proceed even if the accused voluntarily ceases the misconduct or the complainant leaves the company.

* There should be a thorough interview of the complainant. Goals of the interview should include: (1) receiving a complete version of the complainant's story; (2) eliciting names of all witnesses; and (3) checking on the complainant's safety and otherwise determining if immediate interim measures are necessary for his or her protection.

* There should be a thorough interview of the accused. The accused should also be notified/reminded that retaliation is prohibited.

* There should be a thorough interview of at least key witnesses.

* All witness statements should be documented contemporaneously in writing and ideally signed or confirmed by the witness.

* As appropriate, take appropriate discipline against the harasser.
The discipline must be reasonably calibrated to stop any further harassment. The fact that the investigation fails to prevent subsequent harassment of the complainant may suggest the investigation's inadequacy.

  In *Mockler*, the Ninth Circuit affirmed a judgment of $195,000 in compensatory damages and $30,000 in punitive damages against the employer, holding that the employer failed to take appropriate remedial action. The court looked to the fact that, while the harasser was given a one-day suspension without pay, he was permitted to work overtime the next day to recoup his lost wages and, furthermore, that this punishment was the *same* discipline imposed upon a deputy who had been involved in a traffic accident. As the court stated, "[t]his suggests that [the harasser's] punishment was not proportionate to his offense -- which is clearly more egregious than a traffic accident." *Id.*, 140 F.3d at 813 n. 4.

Case Study #1

Peter is the office manager of a dental clinic, and the only male on the staff. At staff meetings, the female staff make jokes about men behaving badly, although not specifically as to Peter. Peter has never complained and sometimes laugh as the jokes.

Is the dental clinic at risk?

What, if anything, should the dental clinic do?

Case Study #2

Bernard is the dentist-owner of his clinic. Each dental hygienist at the clinic is assigned to a group of patients. Dental hygienist Andrea's patient group includes a patient named Jack. During his past three visits, when Jack came for his appointments, Jack brought small gifts for Andrea and eventually asked her on a date, which she declined. Andrea never complains to Bernard about Jack, but Bernard suspects she is uncomfortable.

Is the dental clinic at risk?

What, if anything, should Bernard do?

D. Medical Information

1. Examinations and Inquiries

Once an employment relationship exists, medical examinations and disability-related questions are permissible *only to the extent that they are "job related and consistent with business necessity*." The EEOC has stated that this test is met when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."

Courts have permitted fitness-for-duty medical examinations in numerous circumstances, usually involving concerns about employee performance. *See Watson v. City of Miami*, 177 F.3d 932 (11th Cir. 1999) (medical exam of police officer was job-related and consistent with business necessity where City reasonably believed that officer had become paranoid and hostile); *Arnold v. Stark County District Library*, 1998 U.S. App. LEXIS 31469 (6th Cir. 1998) (unpublished) (librarian could be required to submit to medical examination where she had repeatedly lost her temper, raised her voice, used profanity, slammed books and doors, and walked out of meetings).

As discussed *supra*, alcohol tests are medical tests and, therefore, must be job-related and consistent with business necessity when required of employees. According to the EEOC, the fact that an employee has been involved in an accident or has violated a personnel rule does not, by itself, justify an alcohol test. Rather, there must be some "triggering event or circumstance" that justifies the test, "such as a supervisor's reasonable belief, based on personal observation or other relevant factor, that alcohol is involved."

2. Medical Records

There are a number of state and federal laws that regulate an employer's disclosure of an employee's medical records, either to third parties or to the employee him/herself.

a. Americans With Disabilities Act (ADA)

Under the ADA, all medical information regarding an employee -- no matter how it is obtained -- must be "collected and maintained on separate forms and in separate medical files" and must also be "treated as a confidential medical record." 42 U.S.C. § 12112(d)(3). This includes medical information concerning an individual's occupational injuries and/or workers' compensation claims.

Disclosure of confidential medical information is allowed *only* so that

* supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and any necessary accommodations;
* first aid or safety personnel may be informed, when appropriate, if the disability might require emergency treatment;
* government officials investigating ADA compliance may be given relevant information upon request;
* employers may give information to state workers' compensation offices, state second injury funds or workers' compensation insurance carriers in accordance with state workers' compensation laws; and
* employers may use the information for insurance purposes.

b. Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Portability and Accountability Act (HIPAA) is a federal law broadly affecting the health care industry and certain other entities that receive, use or disclose health information.

In its capacity as a clinical practice, a dental office is a HIPAA "covered entity" and thus is subject to HIPAA privacy rules vis-à-vis the office's patients.

In its capacity as an employer, a dental office is not directly regulated by HIPAA.

E. Accommodations based on Disability

The Americans With Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* and Haw. Rev. Stat. § 378 prohibit discrimination against a "qualified individual with a disability."

1. Defining "Disability"

A "disability" is (1) a physical or mental impairment that substantially limits one or more of the major life activities; (2) a record of such an impairment; or (3) the state of being regarded as having such an impairment.

"Physical or mental impairment": The EEOC defines "physical or mental impairment" to mean: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"Major Life Activities: The ADA includes a statutory list of major life activities, as follows:

> [M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> [A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"Substantially limits": The EEOC explains that the term "substantially limits" should be liberally construed.

> The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.
>
> An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.
>
> * * *
>
> [I]n determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.
>
> Consideration of fact such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily functions.

The ADA states: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

The ADA states that "substantially limits" should be analyzed "without regard to the ameliorative effects of mitigating measures such as – (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eye-glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable

hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications." However, "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."

The regulations list impairments that will "virtually always" substantially limit a major life activity. These include deafness, blindness, intellectual disability (formerly termed mental retardation), missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

Conversely, the ADA expressly excludes certain disorders from qualifying as "disabilities." These include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavioral disorders; compulsive gambling, kleptomania, and pyromania; and psychoactive substance use disorders resulting from the current illegal use of drugs.

2. Defining "Qualified Individual"

Even if an individual has a "disability," they must still be "otherwise qualified" in order to be covered under the ADA. The EEOC has stated that, to be a "qualified individual" under the ADA, an employee must (1) satisfy the requisite skill, experience, education, and any other job-related requirements of the position that such employee holds or desires; and (2) be able to perform the essential functions of that position, either with or without reasonable accommodation.

The EEOC has said that an "essential function" must be "fundamental" and not "marginal." The "essential function" analysis can look to:

- whether the position exists to perform the function;
- whether there are a limited number of employees available to perform the function;
- whether the function is highly specialized;
- the employer's judgment;
- a written job description prepared before advertising or interviewing for the job;
- the amount of time spent performing the function;
- the consequences of not requiring someone in the job to perform the function;
- the terms of a collective bargaining agreement; and/or
- the work experience of people who have performed the job.

Courts have commented that certain requirements *may* be essential to most jobs (even if not expressly stated in a job description). These requirements may include: regular and predictable attendance at work; the avoidance of violent behavior; the ability to get along with co-workers; and the ability to follow a supervisor's instructions. However, the court may still engage in a case-by-case factual analysis.

3. Direct Threat

An employer may exclude someone from a job if that person would pose a direct threat to the health or safety of him/herself or other individuals in the workplace. "Direct threat" means "a significant risk to the health or safety [of onself or others] that cannot be eliminated by reasonable accommodation."

In analyzing whether someone poses a direct threat, the EEOC has stated that courts should consider the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. Such analysis should be made "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job."

> Example: A stockroom employee suffers from fainting episodes. According to the medical evidence, the fainting episodes make it "possible" but nevertheless "unlikely" for her to faint and drop a heavy object on another or himself. The employee does not pose a direct threat.

4. Reasonable Accommodation

The ADA statute and the EEOC regulations recognize the following types of reasonable accommodation:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities

- job restructuring

  - EEOC example: A cleaning crew works in an office building. One member of the crew wears a prosthetic leg which enables him to walk very well, but climbing steps is painful and difficult. Although he can perform his essential functions without problems, he cannot perform the marginal function of sweeping the steps located throughout the building. The marginal functions of a second crew member include cleaning the small kitchen in the employee's lounge, which is something the first crew member can perform. The employer can switch the marginal functions performed by these two employees.

- part-time or modified work schedules

  - EEOC example: A day care worker requests that she be allowed to change her hours from 7:00 a.m. - 3:00 p.m. to 10:00 a.m. - 6:00 p.m. because of her disability. The day care center is open from 7:00 a.m. - 7:00 p.m. and it will still have sufficient coverage at the beginning of the morning if it

grants the change in hours. In this situation, the employer must provide the reasonable accommodation.

- EEOC example: An employee works for a morning newspaper, operating the printing presses which run between 10 p.m. and 3 a.m. Due to her disability, she needs to work in the daytime. The essential function of her position, operating the printing presses, requires that she work at night because the newspaper cannot be printed during the daytime hours. Since the employer cannot modify her hours, it must consider whether it can reassign her to a different position.

- reassignment to a vacant position
  - The duty to accommodate includes offering reassignment to a vacant, lateral (or, if not lateral, lower) position for which the employee is qualified.
  - If the employee is interested in the position, the employer should directly place the employee into the position, not merely let the employee apply for and compete for the position.

- acquisition or modification of equipment or devices

- appropriate adjustment or modifications of examinations

- training materials or policies

- the provision of qualified readers or interpreters, and

- other similar accommodations for individuals with disabilities.

a. Requesting Accommodation

Initiating the accommodation process typically begins with an employee request. This request should inform the employer of the need for an adjustment due to a medical condition. The request can be in "plain English" and need not mention the ADA or use the phrase "reasonable accommodation." The request may also be made by the employee's representative, such as a spouse.

> **Example:** Employee Ed works as a stockroom clerk. One day, he approaches Supervisor Sam and says that his back has been flaring up and he is having a hard time lifting. Employee Ed has made a *de facto* request for accommodation.

Because the request for accommodation need not be a formal one, *it is critical that supervisors be aware of when the company has a duty to engage in the interactive process*. For instance, in the above example, if Supervisor Sam is unaware of the ADA's requirements and

summarily refuses to consider the issue and does not inform Human Resources, his failure to accommodate could be imputed to the company.

In limited circumstances, the employer might have a duty to raise the subject of accommodation. This occurs if the employer (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

b. Interactive Process / Certification

Once the employer is on notice of a possible duty to accommodate, there generally should be an "interactive process" between employer and employee to determine what accommodation(s) may be appropriate.

The EEOC has outlined the four steps that the employer should follow during the interactive process. These steps include the employer's duty to do the following:

1. analyze the particular job involved and determine its purpose and essential functions;
2. consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
3. in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
4. consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

In this process, an employer should deal with the employee directly (*i.e.*, not respond only in writing or through an intermediary); act with diligence and without undue delay or obstruction;[7] and exchange essential information.[8]

Typically, an employer may want an appropriate health care provider to certify:

- that the employee has a disability (physical or mental impairment that substantially limits one or more major life activities);
- that the disability prevents the employee from performing one or more essential functions;
- what accommodation(s), if any, is medically needed so that the employee can perform such essential function(s); and

[7] The reasonableness of delay may depend upon factors such as the length of the delay, the reasons for the delay, and whether the employer offered alternative accommodations or otherwise acted in good faith.

[8] Employers have superior knowledge regarding the range of possible positions and can more easily perform analyses regarding the essential functions of each, while employees generally know more about their own capabilities and limitations.

- in a situation where the accommodation involves leave, the reason the employee needs leave (for example, surgery and recuperation, adjustment to a new medication regimen, or doctor's visits or physical therapy), whether the leave will be a block of time (for example, three weeks or four months) or intermittent (for example, one day per week, six days per month, occasional days throughout the year), when the need for leave will end, and whether accommodation other than or in addition to leave may be effective (perhaps removing or reducing the need for leave).

c. Reasonableness

According to the EEOC, a modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases."

Courts have generally held that the following accommodations are not reasonable – *i.e.,* not required under the ADA:

- Granting leave for an indefinite period
  - The fact that an employee's leave is repeatedly extended does not *necessarily* mean it is indefinite.
- Eliminating essential functions
- Lowering production standards
- Creating a new job
- Reassigning an employee to:
  - A position for which the employee is not qualified (*e.g.* in terms of the positon's required certifications, qualifications, experience, etc.), although the employer might still have to provide accommodations to enable the employee to perform the new job's essential functions
  - A higher position (which typically involves higher pay)
  - A position already occupied by another employee, thereby displacing that other employee
- Violates a *bona fide* seniority system, at least if the seniority system is enshrined in a collective bargaining agreement
- An accommodation that is not at least plausibly likely to be effective in enabling the employee to perform essential functions.
  - But this also means that, if the accommodation *is* at least *plausibly* effective, the employer may not deny accommodation merely because it is not *certain* to be effective.

d. Undue Hardship

According to the EEOC, an accommodation imposes an undue hardship when it constitutes "an action requiring significant difficulty or expense, when considered in light of the factors set forth" below:

- the nature and net costs of the accommodation;

- the financial resources of the facility, the number of employees at the facility, the effect on expenses and resources, or other impact on the operation of the facility;
- the overall financial resources of the entity, the size of the business with respect to the number of employees, and the number, type, and location of its facilities; and
- the type of operations of the entity, including the composition, structure, and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility in question to the covered entity.

Specific to leave of absence as an accommodation, the EEOC has stated that the undue hardship analysis may consider the following:

- the amount and/or length of leave required;
- the frequency of the leave;
- whether there is any flexibility with respect to the days on which leave is taken (for example, whether treatment normally provided on a Monday could be provided on some other day during the week);
- whether the need for intermittent leave on specific dates is predictable or unpredictable (for example, absence due to seizure is unpredictable, but intermittent leave to obtain chemotherapy is predictable);
- the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner (for example, only one coworker has the skills of the employee on leave and the job duties involved must be performed under a contract with a specific completion date, making it impossible for the employer to provide the amount of leave requested without over-burdening the coworker, failing to fulfill the contract, or incurring significant overtime costs);
- the impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which takes into account, for example, the size of the employer.

The EEOC has specified that the lack of an exact date of return does not necessarily constitute undue hardship:

> In certain situations, an employee may be able to provide only an approximate date of return. Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return. In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss, if necessary, the need for continued leave beyond what might have been granted originally.

e. Maximum Leave policies

A "maximum leave" policy might be one where an employee will not excuse leave beyond a certain point– for instance, the FMLA duration, the employee's accrued paid leave, or the timeframe stated in a collective bargaining agreement.

According to the EEOC, although employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit, they may have to grant leave *beyond this amount as a reasonable accommodation* to employees who require it because of a disability, unless the employer can show that doing so will cause an undue hardship. Thus, any maximum leave policy should recognize that exceptions will be made for disability accommodations.

F. Accommodations based on Religion

An employer must provide work accommodations for an employee's sincerely held religious belief, unless doing so would pose undue hardship.

According to the EEOC, "sincerely held" religious beliefs are not limited to traditional religions. They can include beliefs that are non-theistic, new, and/or uncommon, so long as they involve convictions held with the strength of traditional religious views and address ultimate ideas about life, purpose, and death.

However, personal preferences, as well as social, political, or economic philosophies – by themselves – do not qualify as religious beliefs.

"Undue hardship" in the religious accommodation context means a burden that is "substantial" (more than a minor cost/difficulty) in the conduct the employer's business, taking into account all relevant factors including the accommodation's practical impact in light of the nature, size, and operating cost of the employer.

The EEOC has stated that "undue hardship requires more than proof that some coworkers complained or are offended by an unpopular religious belief," but undue hardship could arise where the accommodation infringes on coworkers' abilities to perform their duties or subjects coworkers to a hostile work environment.

In *Kluge v. Brownship Community School*, 150 F.4th 792 (7th Cir. 2025), the defendant school implemented a policy to allow transgender students to change their first names and pronouns in the school database, if they first submitted letters from a parent and a healthcare professional regarding the need for a name change. This policy conflicted with plaintiff Kluge's religious beliefs to not encourage transgender identifies. Kluge proposed an accommodation that he be allowed to call all students by their last name only (and without pronouns or honorifics), which the school initially agreed to. However, following this accommodation, complaints were raised in which some transgender students felt "emotional distress" due to Kluge's new approach, another student felt that everyone knew why Kluge adopted this new approach thereby singling out transgender students, and several teachers indicated they believed that Kluge's approach was causing harm to students.

The district court granted summary judgment to the school (dismissing the lawsuit), but the appeals court reversed (reinstating the lawsuit), holding that the record did not definitively show that any student's safety was jeopardized or that calling students by their last names, without more, would inflict emotional harm on a reasonable person.

A different outcome was reached in *Trueblood v. Valley Cities Counseling and Consultation*, 748 F. Supp. 3d 988 (W.D. Wash. 2024). In that case, defendant VCCC was a nonprofit counseling and treatment center that serves vulnerable individuals, including transgender youth. In 2020, VCCC implemented a protocol for staff to use clients' preferred names and pronouns, which was aligned with "research and evidence showing that it is extremely detrimental to mental and behavioral health to deny transgender people their authentic experience of who they are by misgendering them and not validating them, which significantly increases rates of suicide." Plaintiff Trueblood requested accommodation, based on her religious beliefs, that she not use preferred pronouns. VCCC denied Trueblood's requests. After Trueblood maintained that she could not comply with the protocol, VCCC terminated her employment, and Trueblood sued.

The district court granted summary judgment to VCCC, holding:

> Granting any of the Disputed Accommodations would have authorized discrimination on the basis of gender identity in a manner that denies transgender individuals "the authentic experience of who they are," which "is extremely detrimental to mental and behavioral health." (Blenz Dep. 61:8-12.) Accommodations that actively harm VCCC's transgender clients and staff would wholly undermine VCCC's efforts to provide "quality and recovery-oriented" gender-affirming care in pursuit of "healthy and compassionate communities." (Manual at 403.) Put differently, requiring VCCC to inflict the very harm it aims to remedy is nothing short of antithetical to VCCC's "particular business" as a matter of common sense

The district court also held that granting the accommodation could create legal exposure for VCCC: "VCCC could not grant the Disputed Accommodations without discriminating against its transgender staff and clients, and without at least some danger of liability under federal and state anti-discrimination law."

G. Accommodations based on Pregnancy

Under Hawaii law, "an employer shall make every reasonable accommodation to the needs of the individual affected by pregnancy, childbirth, or related medical conditions."

Under federal law (Pregnant Workers Fairness Act which applies to employers with 15 or more employees), an employer must provide a reasonable accommodation to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship" (significant difficulty or expense). The following examples of accommodations are provided:

- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom;
- Changing food or drink policies to allow for a water bottle or food;

- Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing;
- Changing a uniform or dress code or providing safety equipment that fits;
- Changing a work schedule, such as having shorter hours, part-time work, or a later start time;
- Telework;
- Temporary reassignment;
- Temporary suspension of one or more essential functions of a job;
- Leave for health care appointments;
- Light duty or help with lifting or other manual labor; or
- Leave to recover from childbirth or other medical conditions related to pregnancy or childbirth.

H. Accommodations for Expressing Milk

Under Hawaii law, an employer must provide reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth; as well as a location, other than the restroom, that is shielded from view and free from intrusion from coworkers and the public that may be used by an employee to express breast milk. However, an employer with fewer than 20 employees is exempt if it can show that such requirements would impose an undue hardship (significant difficulty or expense in relation to the size, financial resources, nature, or structure of the employer's business).

Under federal law, similar obligations apply. However, an employer with fewer than 50 employees is exempt if it can show that such requirements would impose an undue hardship (significant difficulty or expense in relation to the size, financial resources, nature, or structure of the employer's business).

I. Insurance Benefits

Hawaii employers are generally required to provide employees with:

- Worker's compensation insurance for work-related injuries.
    - Where an employee claims that their injury is work-related, there is a strong presumption of work-relatedness, and the burden is on the employer to present "substantial evidence" to rebut this presumption.
    - However, a workplace injury is not compensable if it is caused by the employee's intoxication or willful intention to injure himself or another. Also generally not compensable is "mental stress resulting solely from disciplinary action taken in good faith."

- Temporary disability insurance for non-occupational illness or injury (which includes pregnancy, childbirth, and termination of pregnancy).

- Health insurance.
    - The employer must provide a qualifying prepaid health care plan to employees

who have worked at least 20 hours per week for the previous four consecutive weeks.

- The employer must pay at least one-half of the premium. The employee's contribution to the premium, if any, shall not exceed one-half of the premium or 1.5% of the employee's monthly wages, whichever is less.

J. Employee Leave [9]

1. Americans With Disabilities Act (ADA)

An employer may be required to provide a leave of absence as a reasonable accommodation to a qualifying individual with a disability. *Supra.*

2. Hawaii Victim Leave

This applies to employees who have been employed for at least six consecutive months. Their leave entitlement is as follows:

* For employers with 50 or more employees: Employer must grant unpaid victim leave for a "reasonable time," not to exceed 30 days per calendar year, if an employee or the employee's minor child is a victim of domestic or sexual violence.

* For employers with 49 or fewer employees: Employer must grant unpaid victim leave for a "reasonable time," not to exceed 5 days per calendar year, if an employee or the employee's minor child is a victim of domestic or sexual violence.

The employee must exhaust other applicable paid or unpaid leaves before being entitled to unpaid victim leave; maximum period of entitlement remains at 30 or 5 days.

More generous victim leave benefits provided by agreement or benefit plan shall continue to apply.

Victim leave may be taken for any of the following reasons: (i) seek medical attention for employee's or minor child's physical or psychological injury caused by domestic or sexual violence; (ii) obtain services from victim services organization; (iii) obtain psychological or other counseling; (iv) temporarily or permanently relocate; or (v) take legal action related to or resulting from the domestic or sexual violence or other action to enhance the health or safety of the employee or minor child, or the safety of those who associate or work with the employee.

Upon return from victim leave, reinstatement to the employee's original position or a position of "comparable status and pay," without loss of accumulated service credits and privileges; provided that the employee is entitled only to the same seniority and benefit accruals

[9] On the assumption that dental offices likely have well under 50 employees, these materials do not discuss the Family and Medical Leave Act (which applies to employers with 50 or more employees) and the Hawaii Family Leave Law (which applies to employers with 100 or more employees).

during victim leave to which employees on other types of unpaid leaves are entitled, and the employee is not entitled to "any right, benefit or position of employment to which the employee would not have otherwise been entitled."

All information relating to the domestic or sexual violence and/or the employee's request for leave shall be maintained "in the strictest confidence" and shall not be disclosed absent the employee's consent, a court or administrative order, or other requirement of federal or state law.

When leave is requested to seek medical attention, employer may request certification from health care provider that (i) estimates number of leave days necessary; (ii) estimates the commencement and termination dates of the leave; and (iii) attests to the employee's ability to return to work at the end of the leave period.

When leave is requested for a non-medical reason, first five days of leave may be authorized by the employee's self-certification; beyond five days, certification is required from victim services organization, employee's or minor child's attorney or advocate, medical or other professional, or police or court record.

Employer may require an employee on victim leave to report "not less than once a week" on the employee's status and intention to return to work.

3. Pregnancy / Maternity Leave, Haw. Rev. Stat. § 378 and Haw. Admin. R. § 12-46-108

Under Hawaii law, an employer must provide leave for a physician-determined "reasonable period of time" because of an employee's disability due to and resulting from pregnancy, childbirth or related medical conditions. The employer may request a doctor's certification regarding the estimated duration of leave. Upon returning from leave, the employee is entitled to reinstatement to the same or comparable position, without loss of seniority or privileges. The employer may require a medical certification that the employee is able to return to work. Haw. Admin. Rules § 12-46-108.

In Sam Teague, Ltd., 89 Haw. 269, the Hawaii Supreme Court recently held that an employer (with only one employee) committed sex/pregnancy discrimination when it enforced its "no leave" policy and refused to reinstate its sole employee after she had taken a six-week maternity leave. The Court expressly relied upon the applicable administrative rules.

4. Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4310 et seq.

This law affords rights based upon an applicant's or employee's prior, current, or future honorable service with the uniformed services (including active duty, inactive duty training, full-time National Guard duty, etc.). Specifically, there can be no discrimination (with regards to initial hire, reemployment, retention in employment, promotion, and benefits) based upon such past, present, or future service.

An employee who takes leave for uniformed service has a right of re-employment, as long as he or she properly communicates with the employer, as follows:

If leave is for 1-30 days

* Employee must report to employer by the beginning of the first, full regularly scheduled work period following the completion of service, a period allowing for transportation back to the employee's residence, and eight hours (or, if doing so is impossible or unreasonable, then as soon as possible). Any failure to report (or to submit an application, as described below) within the time limits does not forfeit reinstatement rights, but does constitute an unexcused absence subject to the employer's normal house rules.

If leave is for 31-180 days

* Employee must submit application for re-employment no later than 14 days after completion of service (or, if doing so is impossible or unreasonable, then as soon as possible).
* Employer may request documentation that application is timely, that the employee's cumulative length of service (with respect to this employer) does not exceed five years (with certain exceptions), and that the separation from service was not disqualifying (e.g., not dishonorable discharge).

If leave is for 181+ days

* Employee must submit application for re-employment no later than 90 days after completion of service.
* Employer may request documentation that application is timely, that the employee's cumulative length of service (with respect to this employer) does not exceed five years (with certain exceptions), and that the separation from service was not disqualifying (e.g., not dishonorable discharge).

If the service was for 1-90 days, a qualifying employee should be "promptly reemployed" to the position that he or she would have held but for the absence, or otherwise to the position the employee last held prior to commencement of service. If the service was more than 91 or more days, the employee should be promptly reemployed to the position he or she would have held but for the absence or a position of like status and pay, or otherwise in the position the employee last held prior to commencement of leave or a position of like status and pay.

The employer must use reasonable efforts to qualify the employee for the positions described above, unless doing so would pose an undue hardship. If the employee cannot become qualified for those positions, he or she should be placed in any other position which is the nearest approximation to such positions. For 180 days or one year following re-employment (depending upon the length of service), the employee may not be discharged except for cause.

The employee is entitled to seniority and all seniority-based rights (as well as rights associated with pension benefits) that such person would have attained if continuously employed. With regard to non-seniority based benefits, the employee should be treated like other employees

on furlough or leave. An employee is entitled to COBRA or COBRA-like health care continuation (even if the employer does not have 20 employees to be subject to COBRA).

An employee may elect, but cannot be required, to use paid leave (e.g., vacation) during uniformed service.

5. Jury Duty, Haw. Rev. Stat. § 612-25

Under Hawaii law, an employer shall not deprive an employee of employment or threaten or otherwise coerce the employee with respect thereto, because receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service.

6. Leaves Not Required By Law

Employers are not obligated to provide vacation, sick leave, and other personal leaves, but may do so at their own discretion. In addition, private employers are not obligated to recognize state and federal holidays, but may do so at their own discretion.

If an employer decides to provide non-mandatory leave, it is required to provide such policy in writing or in a posted notice. Haw. Rev. Stat. § 388-7.

K. Disciplining Employees

1. Avoiding Retaliation

Before taking any disciplinary action (including termination), an employer should ensure that the reasons for its proposed action are properly documented. Furthermore, discipline should be meted out in a fair and uniform manner. In other words, similar offenders (with similar records of prior misconduct) should be treated similarly. Title VII, the ADA, the ADEA, and Haw. Rev. Stat. § 378 all have provisions which make it unlawful for an employer to discriminate against an employee because the employee has engaged in "protected activity." A prima facie case of retaliation involves the following elements: (1) the plaintiff engages in protected conduct, (2) the plaintiff thereafter suffers an "adverse action" by the employer (such as termination), and (3) there is a "causal link" between the employee's protected conduct and the employer's adverse action (such as a short period of time).

a. Protected Activity

"Protected activity" means that the employee has either (a) opposed any practice made unlawful by the applicable statute; or (b) made a charge, testified, assisted, or otherwise participated in an investigation or hearing pursuant to the statute.

Addressing various scenarios, courts have held that an employee can engage in protected activity if he or she:

* files an internal sexual harassment complaint;

* verbally expresses to the company the belief that his or her transfer was based upon a discriminatory motive;
* files an EEOC or HCRC charge, or threatens to do so;
* refuses to comply with a supervisor's order which he or she believes is discriminatory (e.g., a directive to not hire any African-American applicants);
* writes a letter to a newspaper, alleging that the company has a glass ceiling for female executives;
* participates as a witness in a co-worker's EEOC or HCRC investigation; or
* refuses to testify on the employer's behalf in an EEOC or HCRC investigation.

In *Gonsalves v. Nissan Motors Corp.*, 100 Haw. 149 (Haw. 2002), the plaintiff did not engage in protected activity where his complaint alleged that the "hostile work environment" was "for myself and members of my staff," which included both men and women. In other words, the plaintiff had not complained about any discrimination under HRS 378.

b. Adverse Action

A retaliatory adverse action is employer conduct that would dissuade a reasonable employee from engaging in the protected conduct. Various courts have found that adverse action could include:

* a disparaging reference, even if the prospective employer does not rely upon it.
* changing work duties in a manner that results in loss of responsibility and/or supervisory control.
* transferring the plaintiff to an isolated corner in the workplace.
* requiring the plaintiff to relocate her personal files and denying her use of company stationary and various office machines.
* singling out the plaintiff to be closely monitored (e.g. by fellow employees) in order to marshal evidence for a future discharge.
* transferring the plaintiff to a position with higher pay, where that position does not have supervisory status and presents fewer opportunities for advancement.
* filing criminal charges against the plaintiff.
* cancelling a pre-scheduled symposium in the plaintiff's honor.
* transferring the plaintiff to a position offering the same pay and ranking but with the knowledge that the plaintiff could not perform the position's duties.

c. Causal Link

A "causal link" could be based upon:

- direct statements of retaliatory intent;
- close timing between the protected activity and the adverse action; and/or
- other circumstantial evidence

In *Schefke v. Reliable Collection Agency, Ltd.*, 96 Haw. 408 (Haw. 2001), the plaintiff filed an HCRC discrimination charge. Thereafter, the plaintiff was subjected to numerous adverse actions, including being denied a Christmas bonus. The employer argued that this denial

was not retaliatory because the bonus was discretionary and there were other employees who had been denied a bonus. However, a finding of retaliation (and a punitive damages award of $300,000) was upheld where, among other things, the plaintiff had always received a bonus, he had received an excellent evaluation, and the company owner stated that he would not give the plaintiff a bonus because plaintiff was "stabbing him in the back with the complaint."

Thus, an employer must ensure that any discipline imposed against an employee who has engaged in protected conduct (particularly recently) is well documented and justified, without the employee having been unduly targeted.

2. Other Protected Activity

Employees can engage in other types of protected activity. For instance, requesting a disability accommodation, complaining about wage violations, or reporting suspected illegality (*i.e.,* whistleblowing) can be protected.

Under the National Labor Relations Act, all employees (including non-unionized employees) of covered employers are protected to the extent that they engage in: (a) concerted activity; (b) that is for mutual aid or protection (*i.e.*, relating to some employment-related issue); and (c) that is not deliberately false or otherwise unduly disloyal or disruptive.

V. ENDING THE EMPLOYMENT RELATIONSHIP

A. Termination Procedures

If an employee is considering terminating an employee for misconduct, the employer might want to confront the employee with evidence of such misconduct and cite to the company rule(s) which has been violated. This may minimize the risk that the employee feels he or she is being unfairly or discriminatorily treated. The employee might also admit to the misconduct or give a provably false excuse, which could further strengthen the grounds for termination.

The employer should consider providing a written notice of termination, provided that the notice is carefully drafted to be accurate and materially complete in stating the reasons for termination. Such notice could help deter the employee – and any attorney whom the employee consults – from pursuing legal claims.

In terminating an employee, the employer must follow the procedures outlined in its handbook or other policies, if any are applicable.

The employer should maximize the employee's privacy during the termination session to minimize the risk of any invasion of privacy or defamation claim. For instance, the employer might want to consider conducting the session before or after the workday. The employer might also want to have one other manager (in addition to the person administering the termination) present as a witness. Additional personnel should not be present unless there is good reason.

The employer should not allow the termination session to sidetrack into a negotiation or argument, which could result in the employer inadvertently making inconsistent statements about

the reason for termination. The employer should be steadfast and consistent in its reasons for termination.

B. Payment Of Wages

If an employer discharges an employee (regardless of the reason), the employer must pay the employee's wages in full at the time of discharge or, if the discharge occurs under circumstances which prevent immediate payment, then not later than the working day following discharge.

If an employee resigns, the employer must pay the employee's wages in full no later than the next regular payday, except that if the employee gives at least one pay period's notice of his or her intent to resign, then the employer shall pay all wages on the employee's last day.

Hawaii law also requires that an employer pay the employee's wages for any resignation notice period that the employee complies with:

> If an employer requires an employee to give advance notice of termination and the employee gives such notice, the employer shall be liable for the wages which the employee would have earned during the stated period in such notice starting from the day such notice is given, providing that the employee does not voluntarily terminate the employment or the employment is not terminated for cause prior to the last day of such period.

Although arguably not necessary, it is safest to have an express "forfeiture" policy stating that accrued unused vacation, sick leave, and/or PTO will be forfeited (*i.e.,* not paid out) at the time of termination, if that is the employer's practice or desire.

C. Job References

Under Haw. Rev. Stat. § 663-1.95, an employer that provides to a prospective employer information or opinion about a current or former employee's job performance is presumed to be acting in good faith and shall have a qualified immunity from civil liability for disclosing the information and for the consequences of the disclosure. The good faith presumption can be rebutted only by a showing that the disclosure was knowingly false or knowingly misleading.

Nevertheless, an employer may still want to consider sticking to a policy of disclosing only the employee's last position held and dates of employment (i.e., a "neutral" reference). Notwithstanding § 663-1.95, an employer still risks legal liability if does otherwise. Specifically, a negative reference invites the former employee to sue for defamation, retaliation, or tortious interference with contract. A positive reference (if relied upon to the detriment of the next prospective employer) might give rise to a claim for negligent referral.