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STATE

Littler on

Hawaii Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in Hawaii employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see **LITTLER ON CLASSIFYING WORKERS**.

1.1(b) *State Guidelines on Classifying Workers*

In Hawaii, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

The Hawaii Department of Labor and Industrial Relations (HDLIR) has entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[5]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	HDLIR, Civil Rights Commission	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.
Income Taxes	Hawaii Department of Taxation	Under Hawaii's income tax law, employee is defined "the same as in the Internal Revenue Code."[6] There is no relevant case law identifying a test for independent contractor status in this context.

[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] The Memorandum of Understanding (MOU) with the HDLIR is available at https://www.dol.gov/whd/workers/MOU/hi.pdf, and an amendment to the MOU is available at https://www.dol.gov/whd/workers/MOU/hi_1.pdf.

[6] HAW. REV. STAT. § 235-1.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Unemployment Insurance	HDLIR, Unemployment Insurance	Statutory ABC test. "Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the department of labor and industrial relations that: (1) 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; (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and (3) 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."[7]
Wage & Hour Laws	HDLIR, Wage Standards Division	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.
Workers' Compensation	HDLIR, Disability Compensation Division	Common-law "right to control" test. Under this test, "an employment relationship is established when the person on whose behalf the work is done has the power, express or implied, to dictate the means and methods by which the work is to be accomplished."[8]
Workplace Safety	Hawaii Occupational Safety and	While Hawaii has an approved state plan under the federal Occupational Safety and Health Act, there are no relevant statutory definitions or case law

[7] HAW. REV. STAT. § 383-6; *see also* Hawaii Dep't of Labor & Indus. Relations, Unemployment Ins., *Handbook for Employers*, *available at* http://labor.hawaii.gov/ui/test-handbook-for-employers/.

[8] *Locations, Inc. v. Hawaii Dep't of Labor & Indus. Relations*, 900 P.2d 784, 787 (Haw. 1995) (quotation omitted). In *Locations*, the Hawaii Supreme Court cited to a long line of cases relying on the control test to determine worker status in the workers' compensation context, and held "the control test, and not the relative nature of the work test, is the proper test to determine whether an employer-employee relationship exists for purposes of workers' compensation laws." 900 P.2d at 787-89.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
	Health Division (HIOSH)	identifying a test for independent contractor status in this context.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[9]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[10] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license

[9] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[10] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[11]

For more information on these topics, see **LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS**.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

1.2(b)(i) *Private Employers*

Hawaii does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in Hawaii should follow federal law requirements regarding employment eligibility and verification.

1.2(b)(ii) *State Contractors*

Employers that are state contractors and subcontractors on certain contracts cannot knowingly or intentionally employ anyone who is not eligible to work in the United States under federal law.[12] Covered contracts are those that exceed $2,000 for the construction of a public works and to which a governmental contracting agency is a party.[13] Contractors and subcontractors are not required to use E-Verify or another electronic verification system to verify employment eligibility, however.

1.2(b)(iii) *State Enforcement, Remedies & Penalties*

The state contractors' licensing board may revoke or suspend a contractor's license or refuse to renew a license if the contractor violates the provisions regarding the hiring of only documented workers on covered public works projects.[14]

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[15] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's

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[11] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

[12] HAW. REV. STAT. § 444-17(22).

[13] HAW. REV. STAT. § 104-2(a).

[14] HAW. REV. STAT. § 444-17.

[15] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.

2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

Under Hawaii's anti-discrimination law, an employer may not refuse to hire, bar, discharge, or otherwise discriminate against any individual in compensation or in the terms, conditions, or privileges of employment because of the individual's arrest or court record.[16] Moreover, under Hawaii's "ban-the-box" law, an employer may not print or circulate any statement, advertisement, publication, nor use any application for employment, which expresses, either directly or indirectly, any limitations, specifications, or discrimination on the basis of an arrest or court record. Further, an employer may neither ask about nor consider arrest or court records that did not result in conviction. Such inquiries are unlawful, except as expressly required by law.[17]

Arrest and court record is defined as "any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to any law enforcement or military authority."[18]

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

Once an employer has extended a conditional offer of employment, the employer may inquire about and consider an applicant's conviction record for the purposes of hiring, termination, or the terms, conditions, or privileges of employment, if that conviction record "bears a rational relationship to the duties and responsibilities of the position."[19] If a prospective employee's conviction record bears a rational relationship to the position for which the individual has applied, the employer may withdraw the

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[16] HAW. REV. STAT. §§ 378-2(a)(1), 378-2.5(a).

[17] HAW. REV. STAT. §§ 378-2, 378-2.5; *see also* Hawaii Civil Rights Comm'n, *Guideline for Pre-Employment Inquiries (Application Forms and Job Interviews)* (Oct. 2013), *available at* https://labor.hawaii.gov/hcrc/files/2013/01/Pre-Employment-Inquiries-11-9-2020.pdf.

[18] HAW. REV. STAT. § 378-1.

[19] HAW. REV. STAT. § 378-2.5.

conditional offer of employment.[20] These provisions apply only to convictions within the most recent seven years for felony convictions and the most recent five years for misdemeanor convictions, excluding periods of incarceration, and do not include final judgments required to be kept confidential by the courts.[21]

The "ban-the-box" provisions discussed in **1.3(a)(ii)** are applicable to all inquiries regarding conviction records made prior to a conditional offer of employment. Employers that are required or expressly permitted by state or federal law to consider or inquire into an applicant's criminal history for employment purposes may do so before making a conditional offer and may consider convictions outside of the applicable statutory period.[22]

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

In Hawaii, an individual who was arrested for or charged with a crime for which there was no resulting conviction may petition to have the arrest expunged.[23] An applicant who has been issued a certificate of expungement is treated as though the applicant has never been arrested, is not required to disclose information about the expunged arrest record, and may not be subject to any adverse action for denying the existence of the record.[24]

Juvenile Records. An applicant whose juvenile arrest record has been expunged is also not required to disclose information about the record in response to any inquiry, and may not be subject to any adverse action based on this response.[25]

1.3(a)(v) *State Enforcement, Remedies & Penalties*

The restrictions on inquiry into and use of criminal records are enforced by the Hawaii Civil Rights Commission and subsequently the courts, which may order appropriate affirmative relief.[26] Employers that violate the provisions may be liable for damages and other appropriate relief.[27]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[28] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[29] regarding job applicants for use in

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[20] HAW. REV. STAT. § 378-2.5; *see also* Hawaii Civil Rights Comm'n, *Guideline for Pre-Employment Inquiries (Application Forms and Job Interviews)* (Oct. 2013).

[21] HAW. REV. STAT. § 378-2.5.

[22] HAW. REV. STAT. § 378-2.5(d); *see also* Hawaii Civil Rights Comm'n, *Guideline for Pre-Employment Inquiries (Application Forms and Job Interviews)* (Oct. 2013).

[23] HAW. REV. STAT. § 831-3.2(a).

[24] HAW. REV. STAT. § 831-3.2.

[25] HAW. REV. STAT. § 571-88(c)-(d).

[26] HAW. REV. STAT. § 378-4.

[27] HAW. REV. STAT. §§ 368-17, 378-5.

[28] 15 U.S.C. §§ 1681 *et seq*.

[29] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any

hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[30]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

An employer cannot refuse to hire or employ, bar, or terminate from employment, or otherwise discriminate against an individual in compensation or in the terms, conditions, or privileges of employment on the basis of the individual's credit history or credit report, unless the information directly relates to a *bona fide* occupational qualification.[31] Nevertheless, an employer cannot inquire into or consider a prospective employee's credit history or report until after the prospective employee has received a conditional offer of employment, which may be withdrawn if the information in the credit history or credit report is directly related to a *bona fide* occupational qualification.[32]

Exceptions. The antidiscrimination provisions do not apply to:

- employers that are expressly permitted or required to inquire into an individual's credit history for employment purposes pursuant to any federal or state law;

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communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

[30] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

[31] HAW. REV. STAT. § 378-2(a)(8).

[32] HAW. REV. STAT. § 378-2.7(a)(1).

- managerial or supervisory employees; and
- employers that are financial institutions in which deposits are insured by a federal agency having jurisdiction over the financial institution.[33]

Managerial employee "means an individual who formulates and effectuates management policies by expressing and making operative the decisions of the individual's employer."[34] *Supervisory employee* "means an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."[35]

Additionally, the above provisions do not prohibit or prevent the establishment and maintenance of *bona fide* occupational qualifications that are reasonably necessary to the normal operation of a business or enterprise and that have a substantial relationship to the functions and responsibilities of prospective or continued employment.[36]

1.3(b)(iii) *State Enforcement, Remedies & Penalties*

Employers that violate the provisions regarding discrimination based on credit history may be liable for damages and other appropriate relief.[37] The restrictions are enforced by the Hawaii Civil Rights Commission and subsequently the courts, which may order appropriate affirmative relief.[38]

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.

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[33] HAW. REV. STAT. § 378-2.7.

[34] HAW. REV. STAT. § 378-2.7.

[35] HAW. REV. STAT. § 378-2.7.

[36] HAW. REV. STAT. § 378-3(2).

[37] HAW. REV. STAT. §§ 368-17, 378-5.

[38] HAW. REV. STAT. § 378-4.

- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

The Uniform Employee and Student Online Privacy Protection Act establishes privacy protections for employees' online accounts. The Act prohibits employers from requiring, coercing, or requesting an employee to disclose the login information for a protected personal online account.[39]

The Act further prohibits employers from requiring, coercing, or requesting an employee to:

- disclose the contents of the account, except that, without coercion and pursuant to a clear statement that acceptance is voluntary and not required, an employer may request an employee to add the employer to or to not remove the employer from accessing an account;
- alter the settings of the account in a manner that makes the login information for or content of the account more accessible;
- access the account in the presence of the employer in a manner that enables the employer to observe the login information or content of the account; or
- give the employer an unlocked personal device to gain access to a protected personal online account.[40]

Employers may not threaten or take adverse action against an employee for failing to comply with an employer's requirement, coercive action, or request to access the employee's personal online account.[41]

Exceptions:

- **Public Information**: Employers may access information about an employee that is publicly available.
- **Legal Compliance**: The law does not prevent an employer from complying with the requirements of federal or state law.
- **Investigations**: An employer may request that an employee share specifically identified content for the purposes of investigating an allegation of noncompliance with work-related employee misconduct or disclosure of information the employer has a proprietary interest in. Further, employers may investigate threats to safety including unlawful harassment or threats of violence in the workplace, threats to employer technology or community systems, or threats to employer property.

[39] HAW. REV. STAT. § 487G-3.

[40] HAW. REV. STAT. § 487G-3(a)(1).

[41] HAW. REV. STAT. § 487G-3(a)(2).

- **Employer Devices and Accounts**: An employer may request or require that an employee provide a username or password that is necessary to access an employer-issued electronic device.[42]

An employer receiving content for one of these purposes may not access or view unshared content, use the content for any other purpose, or alter shared content.

An employer that acquires an employee's login information online by otherwise lawful technology is not be liable for violation of this law on the sole basis of having the login information. However, the employer may not use that information to access or enable another person to access the account and must make reasonable efforts to keep that information secure. The login information may not be shared and must be disposed.[43]

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[44] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see **LITTLER ON EMPLOYMENT TESTING**.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

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[42] HAW. REV. STAT. § 487G-3(c).

[43] HAW. REV. STAT. § 487G-3(d)(5).

[44] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

Private employers in Hawaii cannot require an applicant or employee to submit to a lie detector test as a condition of employment or continued employment.[45] An employer that chooses to administer a lie detector test must inform the employee or prospective employee both orally and in writing that the test is voluntary, and that refusal to submit to the test will not result in termination of the employee or jeopardize the prospective employee's chances of being hired for a job.[46]

Moreover, an employer cannot:

- fire or otherwise discriminate against any applicant or employee for refusing to submit to a lie detector test;
- subject an applicant to a lie detector test which includes inquiries deemed unlawful under Hawaii's fair employment practices law (inquiries based on race, sex, sexual orientation, religion, ancestry, disability, marital status, or arrest and court record);[47]
- use any device that intrudes into any part or cavity of the body for truth verification;
- incorporate any questions regarding taking a lie detector test as part of an application form;
- ask an applicant or employee if they are willing to have a relative submit to a lie detector test, unless there is a substantial relationship to the issues under investigation; or
- administer a lie detector test on an applicant or employee without the prior permission and knowledge of the examinee.[48]

A *lie detector test* is "a test to detect deception or to verify the truth of statements through the use of any psychophysiological measuring device, such as, but not limited to, polygraph tests and voice stress analyzers."[49]

Antiretaliation Provisions. An employer cannot fire or otherwise discriminate against an applicant or employee because they filed a complaint, testified, or assisted in any proceeding respecting the unlawful practices prohibited by the law.[50]

1.3(d)(iii) *State Enforcement, Remedies & Penalties*

An aggrieved individual can file a written complaint with the state labor department.[51] If, after an investigation, the department determines a violation occurred, it can impose penalties and order appropriate affirmative action, including, but not limited to, hiring, reinstatement, or upgrading of

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[45] HAW. REV. STAT. § 378-26.5(1).

[46] HAW. CODE R. § 12-26-22. The employer must provide the written notification by providing a copy to the employee or prospective employee, and having the employee or prospective employee sign a copy to acknowledge receipt and maintain the copy for at least one year. HAW. CODE R. § 12-26-22(b).

[47] HAW. REV. STAT. § 378-2.

[48] HAW. REV. STAT. § 378-26.5; HAW. CODE R. §§ 12-26-21, 12-26-23.

[49] HAW. REV. STAT. § 378-26.

[50] HAW. CODE R. § 378-26.5(6).

[51] HAW. REV. STAT. § 378-27.5; HAW. CODE R. § 12-26-5.

employees—with or without back pay.[52] The labor department may also file a civil action. If the individual prevails, a court can order the aforementioned affirmative action, or other equitable relief it deems appropriate, along with reasonable attorney's fees and costs.[53] Additionally, a violation is punishable by a civil fine per violation, and each violation is a separate offense. Employers that intentionally resist, prevent, impede, or interfere with the department or its agents or representatives performing their duties under the law, or that intentionally violate the law, can be subject to a criminal fine, imprisoned up to one year, or both.[54]

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[55] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[56] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

Private employers that voluntarily choose to have drug- and alcohol-free workplaces must follow specific drug and alcohol testing and policy guidelines.[57] Prior to testing, the employer must give notice to prospective employees and employees who will be tested, including: (1) a list of substances for which the employer is testing; and (2) a statement that use of prescribed drugs and over-the-counter medications can produce positive test results.[58] The employer may not use the presence of drugs or alcohol by a substance abuse on-site screening test to deprive or deny any person of employment or any benefit, or take adverse action against any employee or prospective employee, unless the employee or prospective

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[52] HAW. REV. STAT. § 378-28.

[53] HAW. REV. STAT. § 378-28.

[54] HAW. REV. STAT. § 378-29.3.

[55] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[56] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[57] HAW. REV. STAT. §§ 329B-1 *et seq.*

[58] HAW. REV. STAT. § 329B-5.

employee refuses or fails to report for a laboratory test and is previously notified in writing of such a requirement and the possibility of adverse action.[59]

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *State Restrictions on Job Application Fees, Deductions, or Other Charges*

Employers cannot charge or otherwise require prospective employees or applicants to pay a job application processing fee.[60]

Additionally, unlawful deductions include medical or physical examination or medical report expenses that accrue due to services rendered to employees or job applicants, where the reports or examinations are requested or required by the employer or prospective employer, or required by any law.[61]

1.3(f)(ii) *Restrictions on Salary History Inquiries*

An employer, including an employment agency, or employee or agent thereof, is prohibited from:

- inquiring about the salary history of an applicant for employment; or
- relying on an applicant's salary history in determining the salary, benefits, or other compensation for the applicant during the hiring process, including the negotiation of an employment contract.[62]

Salary history includes an applicant for employment's current or prior wage, benefits, or other compensation, but does not include any objective measure of the applicant's productivity, such as revenue, sales, or other production reports. *Inquire* means to:

- communicate any question or statement to an applicant for employment, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing, verbally, or otherwise, for the purpose of obtaining an applicant's salary history; or
- conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history.[63]

The new provisions build in exceptions to the prohibition:

- Without inquiring about salary history, an employer may engage in discussions with an applicant for employment about the applicant's expectations with respect to salary, benefits, and other compensation.
- An employer may inform an applicant, in writing or otherwise, about the proposed or anticipated salary or salary range for the position.

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[59] HAW. REV. STAT. § 329B-5.5.

[60] HAW. REV. STAT. § 388-51.

[61] HAW. REV. STAT. § 388-6(6).

[62] HAW. REV. STAT. § 378-2.4(2).

[63] HAW. REV. STAT. § 378-2.4(d)(1)(2).

- If an applicant voluntarily and without prompting discloses their salary history, the employer may consider salary history in determining salary, benefits, and other compensation for the applicant, and may verify the applicant's salary history.[64]

In addition, the prohibition does not apply:

- to applicants being considered for internal transfer or promotion with their current employer;
- any attempt by an employer to verify an applicant's disclosure of nonsalary related information or conduct a background check; provided that if a verification or background check discloses the applicant's salary history, the employer cannot rely upon that disclosure during the hiring process for purposes of determining the applicant's salary, benefits, or other compensation, including the negotiation of an employment contract; and
- public employee positions.[65]

These protections are enforced via the antidiscrimination statute, as discussed in **3.11**.

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[66] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[67] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if

[64] HAW. REV. STAT. § 378-2.4(1)(b).

[65] HAW. REV. STAT. § 378-2.4(c)(3).

[66] 26 U.S.C. § 36B.

[67] 42 U.S.C. § 18071.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[68] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[69]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[70] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[71]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[72] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[73]

[68] 29 U.S.C. § 218b.

[69] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[70] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[71] 29 C.F.R. § 2590.606-1.

[72] 29 C.F.R. § 825.300(a).

[73] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[74]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[75] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[76]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[77]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped

[74] 29 C.F.R. § 825.300(a).

[75] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[76] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[77] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[78]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: Hawaii Family Leave	At the time of hire, employers covered by the law (those with 100 or more employees for each working day of 20 or more calendar weeks in the current or preceding calendar year) must notify employees, in writing, of their rights and responsibilities under the statute, including any employer policy regarding the statute. The notice must contain, but not be limited to: • any requirement for the employee to furnish certification, and the consequences of failing to do so;[79] • the employee's right to substitute accrued paid leave, and whether the employer will require the substitution of any paid leave; • any requirement for the employee to make any premium payments to maintain health and other benefits and the arrangements for making such payments; • information on employee right to restoration to the same or equivalent position as required under the law; and • other information as required by the Department of Labor and Industrial Relations.[80]
Drug & Alcohol Testing Documents	Employers choosing to test prospective employees and employees for drug and alcohol use must provide to them: • a list of substances for which the employer is testing; and • a statement that use of prescribed drugs and over-the-counter medications can produce positive test results.[81]

[78] 29 C.F.R. § 531.59.

[79] HAW. REV. STAT. § 398-6; HAW. CODE R. § 12-27-11.

[80] HAW. CODE R. § 12-27-10.

[81] HAW. REV. STAT. § 329B-5.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Fair Employment Practices Documents	No notice requirement located.
Lie Detector Testing Documents	An employer must inform an employee or prospective employee, both orally and in writing, that a lie detector test is voluntary, and that the refusal to submit to testing will not result in the termination of the employee or jeopardize the prospective employee's chance of a job. The employer must: (1) provide written notice of this information to the employee or prospective employee; and (2) have the employee or prospective employee sign a copy to acknowledge receipt of the notice. Employers must maintain the acknowledgement on file for not less than one year.[82]
Tax Documents	On or before the date employment begins, an employee must furnish the employer with a signed certificate (Form HW-4) relating to the number of exemptions which the employee claims, and showing whether the employee is married and entitled to make a joint return.[83]
Wage & Hour Documents	At the time of hiring, employers must notify employees, in writing, of: • pay rate; and • day, hour, and place of payment.[84]
Wage & Hour Documents: Tipped Employees	At the time of hire, an employer must notify all employees in writing if a tip credit is to be used.[85]
Workers' Compensation	All employers must ensure that each employee is informed if the employer is a self-insurer or, if insured, of the name of the workers' compensation insurance carrier and general agent, as applicable. A notice of insurance on a form prescribed by the state must be signed by an authorized representative of the insurance carrier and must contain the following certification: "This certifies that all employees of the named employer will be provided all benefits as required by the Hawaii Workers' Compensation Law."[86]

[82] HAW. CODE R. § 12-26-22. The workplace poster regarding lie detector tests is available at https://labor.hawaii.gov/wp-content/uploads/2022/06/20220624Labor-Laws-Poster.pdf.

[83] HAW. REV. STAT. § 235-61. Form HW-4 (Employee's Withholding Exemption and Status Certificate) is available at https://tax.hawaii.gov/forms/a1_b1_5whhold/.

[84] HAW. REV. STAT. § 388-7.

[85] HAW. CODE R. § 12-20-11(c).

[86] HAW. CODE R. 12-10-92. Employers can obtain this notice from the insurance carrier.

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[87] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[88]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;

[87] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[88] 42 U.S.C. § 653a.

- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information	
Contact By Mail or Fax	**Contact Online**
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[89] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of Hawaii's new hire reporting law.

Who Must Be Reported. Employers must report newly-hired employees, rehired employees (an employee who was previously employed by the employer but has been separated from the prior employment for at least 60 consecutive days), or employees recalled to work.[90]

Report Timeframe. Employers must report new hires within 20 days of the hiring date. Employers that submit reports magnetically or electronically should report twice per month, not less than 12 days nor more than 16 days apart.[91]

Information Required. The report must include the employee's name, address, Social Security number, and the date services for remuneration were first performed, along with the employer's name, address, and federal identification number.[92]

Form & Submission of Report. The federal Form W-4 or its equivalent is the applicable form for reporting. The report may be submitted by first-class mail, magnetically, or electronically.[93]

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[89] HHS offers the form online at https://www.acf.hhs.gov/css/form/multistate-employer-registration-form-instructions.

[90] HAW. REV. STAT. § 576D-16(a),(d).

[91] HAW. REV. STAT. § 576D-16(a).

[92] HAW. REV. STAT. § 576D-16(a).

[93] HAW. REV. STAT. § 576D-16(a).

Location to Send Information.

Child Support Enforcement Agency
New Hire Reporting
Kakuhihewa Building
601 Kamokila Blvd., Suite #251
Kapolei, HI 96707
(808) 692-7029
(808) 692-7001 (fax)

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after the individual's employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[94] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see **LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS**.

[94] 18 U.S.C. §§ 1832 *et seq.*

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

Under Hawaii statute, the following types of noncompetition agreements are lawful if they serve a legitimate purpose:

- a covenant or agreement by the transferor of a business not to compete within a reasonable area and within a reasonable period of time in connection with the sale of the business;
- a covenant or agreement between partners not to compete with the partnership within a reasonable area and for a reasonable period of time upon the withdrawal of a partner from the partnership;
- a covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal in competition with the employee's or agent's employer or principal, during the term of the agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.[95]

Hawaii public policy does not favor noncompete agreements, as they are a restraint on trade.[96]

To determine whether a noncompete agreement is reasonable, Hawaiian courts will hold a provision unreasonable if:

- it is greater than required for the protection of the person for whose benefit it is imposed;
- it imposes undue hardship on the person restricted; or
- its benefit to the covenantee is outweighed by injury to the public.[97]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with consideration in return for the agreement to be binding. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

In Hawaii, noncompetes signed at inception likely show sufficient consideration; however, the Hawaii Supreme Court has not directly taken up the issue. Courts have generally found continued employment to constitute adequate consideration to support a noncompete agreement.[98]

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[95] HAW. REV. STAT. § 480-4(c) (specifically allows noncompetes preventing use of trade secrets in competition with employer).

[96] *UARCO, Inc. v. Lam*, 18 F. Supp. 2d 1116, 1126 (D. Haw. 1998).

[97] *See Technicolor, Inc. v. Traeger*, 551 P.2d 163, 170 (Haw. 1976).

[98] In *Technicolor, Inc. v. Traeger*, the employee was promoted approximately five months after he began working for the employer. When he was promoted, he entered into an employment agreement containing the noncompete. The Court held that the employee's continued employment at a substantial salary was adequate

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

Hawaii courts have not considered modification of noncompete agreements.

2.3(b)(iv) *State Trade Secret Law*

Hawaii is one of many states to have adopted the Uniform Trade Secrets Act.[99] The Act prohibits the misappropriation of *trade secrets*, defined as information, including a formula, patter, compilation, program, computer program, device, method, technique, or process, that:

a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[100]

Misappropriation is the improper acquisition or disclosure of a trade secret by one who knows or has reason to know it is a trade secret.[101] Actual or threatened misappropriation may be enjoined.[102] Further, Hawaii law authorizes damages for misappropriation. These damages may include actual loss and the unjust enrichment cause by the misappropriation.[103]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Hawaii does not have statutory guidelines addressing ownership of employee inventions and ideas.

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consideration for the postemployment restriction. 551 P.2d at 169 (citing to Tennessee authority as part of this holding). Additionally, in *Standard Register Co. v. Keala*, a federal court similarly concluded that the Hawaii Supreme court would not require additional consideration beyond continued at-will employment as consideration for a restrictive covenant. This case involved various restrictions entered into during employment. In so finding, the District Court reasoned that while still "an open issue in Hawaii law," Hawaii courts has generally found forbearance to be sufficient consideration. 2015 WL 3604265, at **3-4 (D. Haw. June 8, 2015).

[99] HAW. REV. STAT. §§ 482B-1 *et seq*.

[100] HAW. REV. STAT. § 482B-2.

[101] HAW. REV. STAT. § 482B-2.

[102] HAW. REV. STAT. § 482B-3.

[103] HAW. REV. STAT. § 482B-4.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 51 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[104]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[105]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[106]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[107]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language

[104] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[105] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[106] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[107] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	common to migrant or seasonal agricultural workers who are not fluent or literate in English.[108]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[109]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[110]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[111]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[112] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[113]

[108] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[109] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[110] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[111] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[112] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[113] 41 C.F.R. §§ 60-300.44, 60-741.44.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[114]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[115]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[116]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[117]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[118]

[114] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[115] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[116] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[117] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[118] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[119]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[120] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[121]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[122]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where

[119] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[120] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[121] 29 C.F.R. § 13.5.

[122] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
(contracts entered into on or after January 30, 2022)	accessible to employees, summarizing the applicable minimum wage rate and other required information.[123]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Family Leave	Employers (with 100 or more employees for each working day during each of 20 or more calendar weeks in the current or preceding calendar year) must post and maintain notice setting forth the rights of employees under the Family Leave law. Notice must be posted in conspicuous places, in every establishment where any employee is employed.[124]
Benefits & Leave: Breast Feeding Accommodations	Employers must post notice of protections and obligations regarding breast feeding. Employers must post this notice in a conspicuous place accessible to employees, and use other appropriate means to keep employees informed of the law. Although all employers are required to post this notice, not all employers are covered by the law. Employers with fewer than 20 employees may be able to show that the law's requirements would cause an undue hardship.[125]
Benefits & Leave: Employee Benefits	Employers must provide to each employee, in writing or through posted notice in an accessible place, policies with regard to vacation and sick leave.[126]
Dislocated Workers & Plant Closings Poster	Covered employers (with 50 or more employees) must notify dislocated workers and the Director of Labor and Industrial Relations of plant closings, divestitures, partial closings, or relocations at least 60 days

[123] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

[124] HAW. REV. STAT. § 398-1.5; HAW. CODE R. § 12-27-10. This poster is also included in Hawaii's all-in-one "Labor Law Poster."

[125] HAW. REV. STAT. § 378-92. This poster is available at http://labor.hawaii.gov/wp-content/uploads/2015/11/Breast-Feeding20151110.pdf.

[126] HAW. REV. STAT. § 388-7.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	prior to the occurrence. Employers must post notice informing employees of this right and their right to allowances and unemployment compensation.[127]
Fair Employment Practices: Employment Discrimination	The Department of Labor and Industrial Relations advises employers to post notice of laws prohibiting employment discrimination.[128]
Human Trafficking Resource Center Hotline	Certain employers are obligated to post and maintain notice about human trafficking and access to the National Human Trafficking Resource Center. Notice is required for employers that: (1) hold a class 5 or class 11 liquor license; (2) maintain a massage therapy establishment with five or more employees; or (3) employ at least one erotic or nude massager or dancer. The notice must be posted in a place readily accessible to employees, on a poster no smaller than 8 and 1/2 inches by 11 inches in size.[129]
Unemployment Compensation	Employers must post and maintain information and posters about unemployment benefits in accessible and conspicuous places where workers perform services.[130]
Wage & Hour: Minimum Wage and Overtime Notice	Employers must post and maintain notices regarding application of the wage and hour laws. These notices must be posted in conspicuous places in ever establishment where any employee is employed.[131]
Wage & Hour: Tip Credit	Employers must provide notification of changes in the employer's policy on tip credit to affected employees in writing or through a posted notice prior to the commencement of the pay period.[132]

[127] HAW. REV. STAT. § 394B-9. This poster is available at http://labor.hawaii.gov/wp-content/uploads/2015/05/Dislocated-Workers-Plant-Closing20150514.pdf. This poster is also included in Hawaii's all-in-one "Labor Law Poster."

[128] This poster is available at http://labor.hawaii.gov/wp-content/uploads/2015/11/Employment-Discrimination-Poster201511101.pdf. This poster is also included in Hawaii's all-in-one "Labor Law Poster" available at http://labor.hawaii.gov/wp-content/uploads/2015/11/Labor-Law-Complete201511101.pdf.

[129] HAW. REV. STAT. § 371-20. This poster is available at http://labor.hawaii.gov/wp-content/uploads/2014/01/Act-245-SLH-201320131021.pdf.

[130] HAW. CODE R. § 12-5-77. This poster is available at http://labor.hawaii.gov/wp-content/uploads/2015/11/Unemployment-Insurance-Poster20151110.pdf. This poster is also included in Hawaii's all-in-one "Labor Law Poster."

[131] HAW. REV. STAT. §§ 387-6(b), 387-2 (minimum wage). This poster is available at http://labor.hawaii.gov/wp-content/uploads/2015/11/Wage-and-Hour-Poster201511091.pdf. This poster is also included in Hawaii's all-in-one "Labor Law Poster."

[132] HAW. CODE. R. § 12-20-11(c). Employers must create their own notices to satisfy this requirement.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Wage & Hour: Wage Payment	Employers must notify each employee of any changes to: rate of pay and the day, hour, or place of payment, at the time of the change. This notice must be provided in writing or through a posting in a place accessible to employees. Employers must also post notices about general provisions of the wage payment law. These notices must be posted in a place accessible to employees.[133]
Whistleblower Protection	Employers must post notices and use other appropriate means to keep employees informed of their protections and obligations under the whistleblower protection law.[134]
Workers' Compensation, Temporary Disability Insurance & Prepaid Health Care	Employers must post and maintain notices regarding workers' compensation, temporary disability insurance, and prepaid health care. Notice must be posted in places readily accessible to employees. The notice about temporary disability insurance must be typewritten or printed, and must state that the employer has obtained insurance to provide for the payment of disability benefits required by law.[135]
Workplace Safety: No Smoking Signs	Generally speaking, smoking is prohibited in enclosed or partially enclosed places of employment. Employers must post a sign that is clearly legible and includes the words "Smoking Prohibited by Law" with letters of not less than one inch in height or the international "No Smoking" symbol consisting of consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it. The sign must be clearly and conspicuously posted in and at the entrance to every place open to the public and every place of employment where smoking is prohibited by the owner, operator, or other person in control.[136]
Workplace Safety: Carrying Licensed Firearms on Private Property	A person licensed to carry a firearm cannot enter or remain on the private property of another person while carrying a firearm, unless the person has been given express authorization to carry a firearm on the property by the owner, lessee, operator, or manager of the property. A

[133] HAW. REV. STAT. § 388-7(2). This poster is available at http://labor.hawaii.gov/wp-content/uploads/2015/11/Wage-and-Hour-Poster201511091.pdf. This poster is also included in Hawaii's all-in-one "Labor Law Poster."

[134] HAW. REV. STAT. § 378-68. This poster is available at http://labor.hawaii.gov/wp-content/uploads/2015/11/whistleblower20151110.pdf.

[135] HAW. CODE R. §§ 12-10-68, 12-11-56. This poster is available at http://labor.hawaii.gov/wp-content/uploads/2015/11/Disability-Compensation-Law-Poster20151110.pdf. This poster is also included in Hawaii's all-in-one "Labor Law Poster."

[136] HAW. REV. STAT. §§ 328J-8 (an owner, operator, manager, or other person in control of an establishment, facility, or outdoor area may declare that an entire establishment, facility, or outdoor area, or any part thereof, is a place where smoking is prohibited; a sign must be posted in any place where smoking is prohibited), 328J-9 (sign requirements). This poster is available at http://health.hawaii.gov/tobacco/files/2013/10/New-law.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	property owner may use the following methods for giving express authorization to carry or possess a firearm on the premises: • unambiguous written or verbal authorization; or • posting clear and conspicuous signage at the entrance of the building or the premises.[137]
Workplace Safety: Safety & Health on the Job	Employers must post prominent notice informing employees of their rights and responsibilities under the Hawaii occupational safety and health laws.[138]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[139]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings;	At least 1 year from the date of the personnel action to which any records relate.

[137] HAW. REV. STAT. § 134-E.

[138] HAW. REV. STAT. § 396-6(f). This poster is available at http://labor.hawaii.gov/wp-content/uploads/2015/11/Occupational-Safety-Health-Poster-20151110.pdf. This poster is also included in Hawaii's all-in-one "Labor Law Poster."

[139] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[140]	
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[141]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[142]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the

[140] 29 C.F.R. § 1627.3(b).

[141] 29 C.F.R. § 1627.3(b).

[142] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[143]	litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[144]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[145]	At least 3 years following the date on which the polygraph examination was conducted.
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This	At least 6 years after documents are filed or would have been filed but for an exemption.

[143] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[144] 29 C.F.R. § 1602.7.

[145] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	includes vouchers, worksheets, receipts, and applicable resolutions.[146]	
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[147]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[148]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours;	3 years from the last day of entry.

[146] 29 U.S.C. § 1027.

[147] 29 C.F.R. § 1620.32(a).

[148] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[149] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[150]	

[149] 29 C.F.R. §§ 516.2, 516.5.

[150] 29 C.F.R. § 516.28.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[151]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[152]	At least 3 years from the last effective date.
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[153]	At least 2 years from the date of last entry.

[151] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[152] 29 C.F.R. § 516.5.

[153] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records*	At least 3 years.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	required by the second series with respect to any secondary employees. *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[154]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration:	At least 4 years after the date the tax is due or paid, whichever is later.

[154] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[155]	
Immigration	Employers must retain all completed Form I-9s.[156]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required	Required to be maintained for "so long as the contents [of the records] may become material in the

[155] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[156] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	to be shown by such person in any return of such tax or information.[157]	administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[158]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[159]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.

[157] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[158] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[159] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[160]	
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and	At least 30 years.

[160] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[161]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[162]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[163]	At least 30 years.

[161] 29 C.F.R. § 1910.1020(d).

[162] 29 C.F.R. § 1910.1020(d).

[163] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[164]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[165]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes;	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from

[164] 29 C.F.R. §§ 1904.33, 1904.44.

[165] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[166]	the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[167]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s);	3 years.

[166] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[167] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	• rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[168]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee;	During the course of the covered contract as well as after the end of the contract.

[168] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[169]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[170]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation;	At least 3 years from the completion of the work records containing the information.

[169] 29 C.F.R. § 13.25.

[170] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[171]	
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[172]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Benefits & Leave: Family & Medical Leave Records	*Employers must retain the following information, which the Department of Labor and Industrial Relations may review and request to determine if an employer is in compliance with the family leave law:* • basic payroll and identifying data; • terms and conditions of, and expenses for, employee benefits, including but not limited to, policies and any employment agreements relating to leave benefits; and	None specified.

[171] 29 C.F.R. § 4.6.

[172] 41 C.F.R. § 50-201.501.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• records, documents, correspondence, and other material relating to family leave granted or denied.[173]	
Fair Employment Practices: Complaint of Discrimination under Lie Detector Statute	*If a complaint has been filed or a civil action brought under the lie detector law, all records relevant to the complaint or civil action must be preserved, including:* • personnel or employment records relating to the complainant and to all other employees holding a similar position to that held or sought by the complainant; and • applications or test papers completed by complainant and all other candidates for the same position for which the complainant applied and was rejected.[174]	Until final disposition of the complaint or action, defined as: the date of expiration of the statute of limitations for a civil action court; or, where civil action is brought, the date on which the litigation is terminated by entry of a final order and when the time for filing a notice of appeal has expired and no appeal has been filed.[175]
Fair Employment Practices: Lie Detector Tests	*An employer that performs a lie detector test must retain the general personnel records listed below, and additionally, forms, applications, and records about:* • the employee's or applicant's acknowledgement of being informed about their rights regarding such tests; • correspondence; and • tests results and general reports.[176]	Not less than 1 year from the date of the making of the record or the personnel action involved, whichever is later.

[173] HAW. CODE R. § 12-27-13.

[174] HAW. CODE R. § 12-46-24(c).

[175] HAW. CODE R. § 12-26-24(c).

[176] HAW. CODE R. § 12-26-24(a).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices: Personnel Records	*Employers must retain any personnel and employment records, forms, and applications made or kept, having to do with, but not limited to:* • hiring, promotion, demotion, layoff, or termination; • rate of pay or other terms of compensation; • labor organization membership; • selection for training or apprenticeship; and • employment referrals.[177]	Not less than 1 year from the date of the making of the record or the personnel action involved (*e.g.*, 1 year from date of involuntary termination), whichever is later
Unemployment Compensation	*Records must be maintained for each worker employed, including:* • name, Social Security number, and type of work performed; • place where worker's services are performed (if out of state, then worker's residence); • date of hire, rehire, or return to work after temporary layoff; • last day worked; • date separated and reason; • rates of pay and dates of payment (showing separately, cash payments, cash value of payment not in cash, and amount of gratuities); • amounts paid as allowances or reimbursement for expenses, date of payment, and amount of expenditures actually incurred; and • hours spent and wages earned in subject work and nonsubject work.[178] *Additionally, employers must keep records regarding:* • the beginning and ending dates of each pay period; and • the total amount of remuneration with respect to employment paid in any quarter, showing separately the	Not less than five years after the calendar year in which the remuneration to which they relate was earned.

[177] HAW. REV. STAT. § 378-6; HAW. CODE R. § 12-46-21.

[178] HAW. REV. STAT. § 383-94; HAW. CODE R. § 12-5-13.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	portion of remuneration on which contributions are payable.[179]	
Wages, Hours & Payroll	*Employers must maintain and keep in and about the premises where any employee is employed, records in English containing the following information on each employee covered under Hawaii's minimum wage and overtime laws:* • name, Social Security number, and any identifying symbol or number used in place of or in addition to a name on any record kept by the employer relating to the employee; • home address, and occupation of each employee; • date of birth if under 19 years old; • amount paid each pay period to each employee; • gross wages; • net wages; • hours worked each day and each work week; • rate(s) of pay and rate basis (hourly, per shift, daily, weekly, salary, per piece, commission, or other); • length of pay period; • total daily or weekly straight-time wages; • total weekly overtime wages; • amounts and purposes of additions to and deductions from wages each pay period; • allowances claimed as part of the minimum wage; • total wages paid each pay period, date of payment, and pay period covered; and • date of hire and termination.[180]	At least 6 years.
Wages, Hours & Payroll: Sub-Minimum Wages	The employer's payroll records must identify any student-workers, handicapped workers or trainees, or paroled wards of the Hawaii Youth Correctional Facility who work for the employer for less than minimum wage.[181]	At least 6 years.
Wages, Hours & Payroll: Tipped Employees	*Every employer claiming tip credits must, in addition to the general payroll records listed above, keep payroll and other records containing the following information and data with respect to each tipped employee:*	At least 6 years.

[179] HAW. REV. STAT. § 383-94; HAW. CODE R. § 12-5-13.

[180] HAW. REV. STAT. §§ 387-6, 388-7; HAW. CODE R. §12-20-8.

[181] HAW. CODE R. §§ 12-20-8, 12-20-84, 12-20-95, and 12-20-105.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• a symbol on the pay records identifying each employee whose wage is partially determined by tips; • weekly amount of tips; • amount by which the wages of each employee have been increased due to the tips; • the amount per hour that the employer takes as tip credit; and • hours worked each workday in any occupation where the employee receives tips and the hours worked in occupations where they do not, along with the total weekly straight time payment for each.[182]	
Workers' Compensation	Employers must keep records of all injuries, fatal or otherwise, received by employees in the course of employment when known to the employer or brought to the employer's attention.[183]	None specified.
Workplace Safety	Hawaii has incorporated the Fed-OSHA recording and reporting standards, with minor revisions.[184]	See federal requirements.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

Hawaii law does not address access to personnel files for private-sector employees.

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.3**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

Under Hawaii's antidiscrimination law, employers cannot make inquiries into an applicant or employee's criminal or credit history, and may not refuse to hire, discharge, or otherwise discriminate against any

[182] HAW. CODE R. § 12-20-12.

[183] HAW. REV. STAT. § 386-95.

[184] HAW. REV. STAT. §§ 396-6(e), 396-7; HAW. CODE R. §§ 12-52.1-1, 12-52.1-2, and 12-60-2.

individual because of the individual's criminal or credit history.[185] Hawaii does not have any applicable provisions regarding employer access to social media, but it does restrict the use of polygraph examinations. For more information on background screening of current employees, see **1.3**.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

For information on drug and alcohol testing of current employees, see **1.3(e)(ii)**.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[186]

3.2(c)(ii) *State Guidelines on Marijuana*

While Hawaii does not allow the recreational use of marijuana, Hawaii law permits the use of medical marijuana.[187] However, the state's medical marijuana provisions do not permit the use of marijuana in the workplace.[188] Further, the medical marijuana laws do not permit medical use of marijuana in a moving vehicle, or any use that endangers the health or well-being of another person.[189] The statute contains no other employment-related guidelines.

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.

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[185] HAW. REV. STAT. § 378-2(a)(1),(8).

[186] 21 U.S.C. §§ 811-12, 841 *et seq*.

[187] *But see, e.g.*, *Lambdin v. Marriott Resorts Hosp. Corp.*, 2017 WL 4079718 (D. Haw. Sep. 14, 2017) (marijuana use not lawful without state-issued registration certificate).

[188] HAW. REV. STAT. § 329-122.

[189] HAW. REV. STAT. § 329-122.

- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[190]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[191]

3.2(d)(ii) *State Data Security Breach Guidelines*

Hawaii's data security breach notification statute defines *security breach* as an incident of unauthorized access to and acquisition of unencrypted or unredacted records or data containing personal information where illegal use of the personal information has occurred, or is reasonably likely to occur, and that creates a risk of harm to any person.[192] When a covered entity discovers or is notified of a breach, the covered entity must provide notice to any affected individuals.[193] Waivers of rights under this statute are deemed void.[194]

Covered Entities & Information. With some exceptions, a *covered entity* is any business that owns or licenses personal information of Hawaii residents and any business that conducts business in Hawaii that owns or licenses personal information in any form. A financial institution that is subject to and in compliance with the Federal Interagency Guidance on Response Programs for Unauthorized Access to Consumer Information and Customer Notice will be deemed in compliance with the statute. Likewise, any health plan or health care provider that is subject to and in compliance with the federal HIPAA laws and regulations is also deemed in compliance.[195]

Under the statute, *personal information* is an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security number;
- driver's license number or Hawaii identification card number; or
- account number, credit or debit card number, access code, or password that would permit access to an individual's financial account.[196]

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[190] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[191] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[192] HAW. REV. STAT. § 487N-1.

[193] HAW. REV. STAT. § 487N-2(a).

[194] HAW. REV. STAT. § 487N-2.

[195] HAW. REV. STAT. § 487N-2(g).

[196] HAW. REV. STAT. § 487N-1.

Content & Form of Notice. The required notice must be clear and conspicuous and include a description of the following:

- the security breach incident in general terms;
- the type of personal information that was subject to the unauthorized access and acquisition;
- actions taken by the business or government agency to protect the personal information from further unauthorized access;
- a telephone number that the person may call for further information and assistance, if one exists; and
- advice that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports.[197]

A covered entity may provide notice in one of the following formats:

- written notice to the last available address the covered entity has on record;
- email notice, for those individuals for whom the covered entity has a valid email address and who have agreed to receive communications electronically if it is compliant with the federal E-SIGN Act;
- telephonic notice, provided that contact is made directly with the affected individuals; or
- substitute notice (by email, posting on the entity's website, and publication in statewide media), if the covered entity demonstrates that:
  - the cost of providing notice would exceed $100,000;
  - the affected class of individuals to be notified exceeds 250,000; or
  - the covered entity does not have sufficient contact information, except that the covered entity may use substitute notice only for those individuals for whom the covered entity does not have information.[198]

Timing of Notice. Notice must be given without unreasonable delay. However, notification may be delayed if:

- a law enforcement agency indicates that notification will impede a criminal investigation and a request is made in writing, or the business or government agency documents the request contemporaneously in writing, including the name of the law enforcement officer making the request and the officer's law enforcement agency engaged in the investigation;
- a covered entity needs to determine sufficient contact information;
- a covered entity needs time to determine the scope of the breach; or
- a covered entity needs time to restore the reasonable integrity, security, and confidentiality of the data system.[199]

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[197] HAW. REV. STAT. § 487N-2(d).

[198] HAW. REV. STAT. § 487N-2(e).

[199] HAW. REV. STAT. § 487N-2(c).

Additional Provisions. If more than 1,000 individuals at a single time will be notified of a security breach, then the covered entity must also notify in writing, without unreasonable delay, the State of Hawaii's Office of Consumer Protection and all consumer reporting agencies of the timing, distribution, and content of the notice.[200]

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see **LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS**.

As a general rule, federal wage and hour laws do not preempt state laws.[201] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[202]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[203]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[204]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[205] For more information on exemptions to the federal minimum wage and/or overtime obligations, see **LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS**.

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200 HAW. REV. STAT. § 487N-2(f).

201 29 U.S.C. § 218(a).

202 29 U.S.C. § 206.

203 29 U.S.C. §§ 203, 206.

204 29 U.S.C. § 3(m)(2)(B).

205 29 U.S.C. § 207.

3.3(b) *State Guidelines on Minimum Wage Obligations*

3.3(b)(i) *State Minimum Wage*

The minimum wage in Hawaii is $14.00 per hour for most nonexempt employees, but is scheduled to increase multiple times, see Table 9 in **3.3(b)(ii)**. However, the minimum wage law does not apply to employers covered by the FLSA unless the federal minimum wage provisions would result in a lower minimum hourly wage than provided in Hawaii. Currently, the federal minimum wage is lower than the state minimum wage, so the exemption does not apply.[206]

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If its employees earn tips, an employer may take a maximum tip credit of up to a specific dollar amount per hour so long as the combined amount an employee receives in tips and cash wage is at least $7.00 more than the applicable minimum wage. However, if the combined result of the minimum cash wage plus the employee's tips is not at least $7.00 more than the minimum wage, the employee must be paid the full minimum wage.[207] An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee. Table 9 demonstrates the amounts for the minimum wage, tip credit, and minimum cash wage.

Table 9. Minimum Wage, Tip Credit & Minimum Cash Wage

Year	Minimum Wage	Tip Credit	Cash Wage	Tips + Cash Wage ≥
January 1, 2024	$14.00	$1.25	$12.75	$21.00
January 1, 2026	$16.00	$1.25	$14.75	$23.00
January 1, 2028	$18.00	$1.50	$16.50	$25.00

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

The definition of *employee* for purposes of Hawaii's minimum wage law does not include:

- individuals earning a guaranteed compensation totaling $4,000 or more a month, whether paid weekly, biweekly, or monthly;
- agricultural workers, for any workweek in which the employer of the individual employs less than 20 employees or any workweek in which the individual is engaged in coffee harvesting;
- individuals working in or about the home of the individual's employer in domestic service on a casual basis or providing companionship services for the aged or infirm;
- house parents in or about any home or shelter maintained for child welfare purposes by a tax-exempt charitable organization;
- an individual employed by their brother, sister, brother-in-law, sister-in-law, son, daughter, spouse, parent, or parent-in-law;

[206] HAW. REV. STAT. § 387-2.

[207] HAW. REV. STAT. § 387-2; HAW. CODE R. §§ 12-20-11, 12-20-12.

- *bona fide* executive, administrative, supervisory, or professional employees and outside salespeople or outside collectors;
- individuals responsible for propagating, catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacean, sponge, seaweed, or other aquatic forms of animal or vegetable life, including going to and returning from work and loading and unloading of such products prior to first processing;
- individuals employed on a ship or vessel and who has a Merchant Mariners Document issued by the U.S. Coast Guard;
- drivers of a vehicle carrying passengers for hire operated solely on call from a fixed stand;
- golf caddies;
- an individual working in a nonprofit school during the time such individual is a student attending such school;
- a seasonal youth camp staff member in a resident youth camp sponsored by charitable, religious, or nonprofit organizations or accredited by the American Camping Association; or
- an automobile salesperson primarily engaged in the selling of automobiles or trucks if employed by certain licensed automobile or truck dealers.[208]

3.3(c) *State Guidelines on Overtime Obligations*

In Hawaii, nonexempt employees must receive one-and-one-half times their regular rate of pay for all hours worked over 40 in a workweek. However, the overtime law does not apply to employers that are covered by the FLSA unless the federal minimum wage provisions would result in a lower minimum hourly wage than provided in Hawaii or the federal maximum hour provisions would be higher than those provided in Hawaii. Currently, federal and state minimum wage and maximum hours requirements are the same.[209]

3.3(d) *State Guidelines on Overtime Exemptions*

Hawaii's overtime law sets forth overtime exemptions for executive, supervisory, administrative, and professional employees, as well as outside salespeople. Like federal law, Hawaii law contains no express exemption for commissioned sales employees.

Hawaii does not have a computer professional or an hourly computer employee exemption. Although Hawaii has an exemption for individuals employed in a *bona fide* professional capacity, an employee must be paid on a salary or fee basis.[210]

3.3(d)(i) *Executive Exemption*

If an employer is not covered by the FLSA, Hawaii's executive exemption will apply to an individual:

- who is compensated on a fixed salary of not less than $210 per week (exclusive of the reasonable cost to the employer of board, lodging, or other facilities);

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[208] HAW. REV. STAT. § 387-1.

[209] HAW. REV. STAT. §§ 387-1, 387-3.

[210] *See* HAW. REV. STAT. § 387-1; HAW. CODE R. § 12-20-5.

- whose primary duty consists of the management of the enterprise in which the individual is employed or of a customarily recognized department or subdivision thereof;
- who customarily and regularly directs the work of two or more employees;
- who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
- who customarily and regularly exercises discretionary powers.[211]

3.3(d)(ii) *Supervisory Exemption*

If an employer is not covered by the FLSA, Hawaii's supervisor exemption will apply to an individual:

- who is paid a fixed salary of at least $210 per week, excluding of the reasonable cost to the employer of board, lodging, or other facilities;
- whose primary duty consists of the supervision or direction of other employees; and
- who customarily and regularly directs the work of at least five employees in the enterprise in which the individual is employed.[212]

3.3(d)(iii) *Administrative Exemption*

If an employer is not covered by the FLSA, Hawaii's administrative exemption will apply to an individual:

- who is compensated on a fixed salary of not less than $210 per week (exclusive of the reasonable cost to the employer of board, lodging, or other facilities); and
- whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgment. The individual may be a person:
  - who regularly and directly assists a proprietor or an individual employed in a *bona fide* executive or administrative capacity (as the terms are defined per Hawaii law); or
  - who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or
  - who executes under only general supervision special assignments or tasks.[213]

3.3(d)(iv) *Professional Exemption*

If an employer is not covered by the FLSA, Hawaii's professional exemption will apply to an individual:

- who is compensated on a fixed salary or fixed fee of not less than $210 per week (exclusive of the reasonable cost to the employer of board, lodging, or other facilities); provided that the salary requirement does not apply in the case of an individual:

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[211] HAW. CODE R. § 12-20-2; HAW. REV. STAT. § 387-1.

[212] HAW. CODE R. § 12-20-4.

[213] HAW. CODE R. § 12-20-3; HAW. REV. STAT. § 387-1.

- who holds a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof; or
- who holds the requisite academic degree for the general practice of medicine and is engaged in an internship or residency program pursuant to the practice of medicine or any of its branches; or
- who is employed and engaged as a teacher;

- whose primary duty consists of the performance of:
  - work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or
  - work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the individual; or
  - teaching, tutoring, instructing, or lecturing and who is employed and engaged in this activity as a teacher certified or recognized in the school system or educational establishment or institution by which the person is employed;
- whose work requires the consistent exercise of discretion and judgment in its performance; and
- whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.[214]

3.3(d)(v) *Outside Sales Exemption*

Overtime provisions in Hawaii do not apply to an individual employed in the capacity of outside salesperson, which is defined as an individual:

- who is employed for the purpose of, and who is customarily and regularly engaged away from the employer's place or places of business in:
  - making sales; or
  - obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- whose nonsales (*i.e.*, sales/obtaining) hours do not exceed 40% of the hours worked in the workweek;
  - provided that the hours of work do not include hours of work of a nature other than sales or solicitations which exceed 5% of the hours worked.

[214] HAW. CODE R. § 12-20-5; HAW. REV. STAT. § 387-1.

Exempt work includes work performed incidental to and in conjunction with the employee's own outside sales or solicitations. The term *sales* includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition with respect to tangible and intangible property.[215]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[216] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[217]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[218] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[219] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[220] Exemptions apply for smaller employers and air carriers.[221]

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[215] HAW. REV. STAT. § 387-1; HAW. CODE R. § 12-20-6.

[216] 29 C.F.R. § 785.19.

[217] 29 C.F.R. § 785.18.

[218] 29 U.S.C. § 218d.

[219] 29 U.S.C. § 218d(b)(2).

[220] 29 U.S.C. § 218d(a).

[221] 29 U.S.C. § 218d(c), (d).

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[222] Lactation is considered a related medical condition.[223] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[224] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

There are no generally applicable meal or rest period requirements for adults in Hawaii.

3.4(b)(ii) *State Meal & Rest Periods for Minors*

Minors between the ages of 14 and 15 may not work more than five hours without at least a 30-minute break for rest or lunch.[225] Special requirements apply in the coffee harvesting and theater industries.[226]

3.4(b)(iii) *State Enforcement, Remedies & Penalties*

Employers that knowingly violate the state's child labor laws commit a misdemeanor.[227] The state labor department enforces the child labor laws, and there is no private right of action.[228]

Employers that knowingly violate the meal and rest period requirements for minor employees commit a misdemeanor.[229] Hawaii's child labor laws are discussed in further detail in **3.6(b)**.

3.4(b)(iv) *Lactation Accommodation Under State Law*

In Hawaii, individuals are allowed to breast feed in public. No place of public accommodation may discriminate against an individual breast feeding in public.[230] Specific to the workplace, an employer cannot discriminate against, refuse to hire or employ, bar or discharge from employment, withhold pay, demote, or penalize a nursing employee because they breast feed or express milk at the workplace.[231]

Employers must provide "reasonable" break time to employees who need to express milk for a nursing child for one year after the child's birth. However, the requirement does not apply to employers with less than 20 employees if an employer demonstrates the law would impose an undue hardship by causing

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[222] 42 U.S.C. § 2000gg–1.

[223] 29 C.F.R. § 1636.3.

[224] 29 C.F.R. § 1636.3.

[225] HAW. REV. STAT. § 390-2.

[226] *See* HAW. CODE R. §§ 12-25-23, 12-25-33.

[227] HAW. REV. STAT. § 390-7.

[228] HAW. REV. STAT. § 371-12.

[229] HAW. REV. STAT. § 390-7.

[230] HAW. REV. STAT. § 489-21.

[231] HAW. REV. STAT. § 378-2.

significant difficulty or expense relative to the business's size, financial resources, nature, or structure.[232] Employers must also provide a location, other than a restroom, where an employee can express breast milk. The location must be shielded from view where neither coworkers nor the public can enter.[233]

Covered employers must conspicuously post a notice in the workplace and keep employees informed of the law's protections and obligations by "other appropriate means," although this term is not defined.[234]

Aggrieved employees can file a private lawsuit for injunctive relief, actual damages, or both, within two years of an alleged violation. Moreover, "damages" includes reasonable attorneys' fees. Finally, a $500 civil fine can be imposed per violation.[235]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[236] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[237]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

Hawaii does not have a general statute addressing the general hours of work or compensable activities. That being said, there are a number of issues considered when determining whether particular activities constitute work. This publication looks more closely at pay requirements for reporting time, waiting or on-call time, and travel time. Hawaii law only addresses the requirements for split shifts.

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[232] HAW. REV. STAT. § 378-92.

[233] HAW. REV. STAT. § 378-92.

[234] HAW. REV. STAT. § 378-92.

[235] HAW. REV. STAT. § 378-93.

[236] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[237] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

Employees may not be employed in split shifts unless all of the shifts within a period of 24 hours fall within a period of 14 consecutive hours, except in the case of an extraordinary emergency.[238]

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[239] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[240] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

Hawaii limits the hours and types of jobs minors may perform. The general purpose of these statutes is to ensure that minors are not employed in an occupation or manner detrimental to their health, safety or well-being.

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. Table 10 summarizes the state restrictions on type of employment by age.

Table 10. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*Minors under age 18 cannot work in, about, or in connection with adult entertainment or an occupation that is legally prohibited or declared hazardous for minors.* *The following occupations have been declared hazardous for minors under age 18:* • motor vehicle driver (includes driver of an automobile, truck, truck-tractor, trailer, semi-trailer, motorcycle, or similar vehicle); • outside helper (includes any individual, other than a driver, whose work includes riding on a motor vehicle outside the cab for the purpose of assisting in transporting or delivering goods); • operation of various power-driven machinery;

[238] HAW. REV. STAT. § 387-3.

[239] 29 C.F.R. §§ 570.36, 570.50.

[240] 29 C.F.R. § 570.6.

Table 10. State Restrictions on Type of Employment by Age	
	• occupations involving exposure to radioactive substances and ionizing radiation; • operation of elevators or power-driven hoisting apparatus; • slaughtering and meat packing; • brick, tile, and kindred product manufacturing; • operations involving operation of circular saws, band saws, and guillotine shears; • wrecking, demolition, and ship-breaking; • roofing; • excavation; • mining; • logging; • saw, lath shingle, or cooperage milling; or • certain agricultural positions.[241] *However, operation of automobiles or trucks not exceeding 6,000 pounds gross vehicle weight by a minor who is at least age 17 is not hazardous if:* • operation is restricted to daylight hours; • the minor holds a valid license for the type of driving involved; • the vehicle is equipped with a seat belt or similar device for the driver and for each helper; and • the employer has instructed each minor to use the seat belts or other safety devices, and has taken appropriate steps to assure such use.[242]
Under Age 16	*In addition to the hazardous occupations listed above, the following occupations in retail, food service, and gasoline establishments have been declared hazardous for minors under age 16:* • work performed in or about a boiler or engine room; • work in connection with maintenance or repair of the establishment, machines, or equipment; • outside window washing that involves working from window sills, and all work requiring the use of ladders, scaffolds, or other substitutes; • cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking; • occupations involving operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers and cutters, and bakery type mixers; • work in freezers and meat coolers; • loading and unloading goods to and from trucks, trailer-containers, or conveyors; and

[241] HAW. REV. STAT. § 390-2; HAW. CODE R. §§ 12-25-42 to 12-25-57.

[242] HAW. CODE R. § 12-25-42.

Table 10. State Restrictions on Type of Employment by Age	
	• all occupations in warehouses (except office and clerical work).[243] Special rules apply to minors age 15 involved in pineapple harvesting.[244]
Age 14 & Older	*The following occupations in retail, food service, and gasoline service establishments are not hazardous for minors age 14 and above:* • office and clerical work, including the operation of office machines; • cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping; • price marking and tagging by hand or by machine, assembling orders, packing, and shelving; • bagging and carrying out customers' orders; • errand and delivery work by foot, bicycle, and public transportation; • clean-up work, including vacuuming, floor waxing, and maintenance of grounds (does not include the use of power-driven mowers or cutters); • kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used in the performance of work such as, but not limited to, dishwashers, toasters, dumbwaiters, popcorn poppers, milk-shake blenders, and coffee grinders; • work in connection with cars and trucks if confined to dispensing gasoline and oil, courtesy service, car cleaning, washing and polishing, and other occupations permitted by this section (does not include work involving the use of pits, racks, or lifting apparatus or involving the inflation of any tire mounted on a rim equipped with a removable retaining ring); and • cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing, and stocking goods when performed in areas physically separate from those where goods are manufactured or processed or stored in warehouses.[245]

Restrictions on Selling or Serving Alcohol. For purposes of the following provisions, *minor* is defined as a person under the age of 21.[246] Hawaii law does not permit any liquor to be sold or served by a minor between the ages of 18 and 21 except in licensed establishments where selling or serving the intoxicating liquor is part of the minor's employment, and where there is proper supervision of minor employees to ensure that they do not consume liquor.

In addition, minors under age 18 cannot sell or serve alcohol in any licensed premises, except in individually specified licensed establishments found to be otherwise suitable by the state liquor commission in which an approved program of job training and employment for dining room waiters and

[243] HAW. CODE R. § 12-25-58.

[244] HAW. CODE R. §§ 12-25-71 to 12-25-74.

[245] HAW. CODE R. § 12-25-59.

[246] HAW. REV. STAT. § 281-1.

waitresses is being conducted in cooperation with the University of Hawaii, the state community college system, or a federally sponsored personnel development and training program, under arrangements that ensure proper control and supervision of employees.[247]

3.6(b)(ii) *State Limits on Hours of Work for Minors*

Ages 16 & 17: In Hawaii, minors age 16 and 17 can work during periods when they are not legally required to attend school or when they are excused from attending school by school authorities.[248]

Ages 14 & 15: When school is in session in Hawaii, minors ages 14 and 15 cannot work:

- more than three hours per day;
- more than 18 hours per calendar week;
- more than six consecutive days in a week; or
- between the hours of 7:00 P.M. and 7:00 A.M. on school days or days preceding school days.[249]

When school is not in session in Hawaii, minors ages 14 and 15 cannot work:

- more than eight hours per day on nonschool days;
- more than 40 hours in a nonschool week;
- more than six consecutive days in a week; or
- between the hours of 9:00 P.M. and 6:00 A.M. on nonschool days and days before a nonschool day.[250]

3.6(b)(iii) *State Child Labor Exceptions*

Hawaii's child labor restrictions on the types of work and permissible hours of work do not apply to minors:

- employed by their parent or legal guardian;
- engaged in the sales or distribution of newspapers;
- engaged in domestic service in or about a private home;
- employed as golf caddies; and
- employed by a religious, charitable, or nonprofit organization so long as:
  - employment is during periods when the minor is not legally required to attend school or when the minor has been excused by school authorities from attending school;
  - the occupation has not been declared hazardous; and

[247] HAW. REV. STAT. § 281-78.

[248] HAW. REV. STAT. § 390-2.

[249] HAW. REV. STAT. § 390-2.

[250] HAW. REV. STAT. § 390-2.

- the job is not in connection with adult entertainment.[251]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

Certificates of age and employment are issued by the state labor department. Employers must return certificates to the department immediately when a minor's employment terminates.[252]

Ages 16 & 17: In Hawaii, an employer must record and keep on file the number of a valid age certificate issued by the state labor department.[253]

Ages 14 & 15: An employer must obtain and keep on file a valid certificate of employment.[254]

3.6(b)(v) *State Enforcement, Remedies & Penalties*

Any person, other than the minor employee, who knowingly violates any provision of the state's child labor provisions will be guilty of a misdemeanor.[255]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[256]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[257]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the

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[251] HAW. REV. STAT. § 390-5; HAW. CODE R. § 12-25-82.

[252] HAW. REV. STAT. § 390-3.

[253] HAW. REV. STAT. § 390-2.

[254] HAW. REV. STAT. § 390-2.

[255] HAW. REV. STAT. § 390-7.

[256] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[257] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[258]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[259] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[260]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[261] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[262]

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[258] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[259] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[260] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[261] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[262] 12 C.F.R. § 1005.18.

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[263]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[264]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[265] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[266] Accordingly, among

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[263] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[264] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[265] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[266] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[267] tools and equipment,[268] and business transportation and travel.[269] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[270]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[271]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[272]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[273]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[274]

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[267] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[268] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[269] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[270] 29 C.F.R. § 778.217.

[271] 29 C.F.R. § 531.38.

[272] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[273] 29 C.F.R. § 531.40.

[274] 29 C.F.R. § 531.40.

- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[275] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[276]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[277]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[278] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[279]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[280]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles

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[275] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[276] 29 C.F.R. § 825.213.

[277] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[278] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[279] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[280] 29 C.F.R. § 531.36.

that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[281]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[282]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. Wages may be paid in cash, by check, direct deposit, or pay card. Paychecks must be convertible into cash upon demand at full value.[283] Hawaii law defines *wages* as compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation, and includes the reasonable cost to the employer of furnishing an employee with board, lodging, or other facilities if items are customarily furnished by the employer to employer's employees. It generally does not include tips or gratuities of any kind, except for purposes of prohibited deductions.[284]

Direct Deposit. Mandatory direct deposit is not permitted. An employer can only pay wages by direct deposit if all the following requirements are met:

- the employee voluntarily authorized, in writing or via electronic signature, direct deposit to an account at an employee-selected financial institution;
- the financial institution's deposits and accounts are insured by the FDIC or any other comparable federal or state agency;
- the employee can cancel direct deposit at any time with reasonable notice;
- the employer provides a required pay statement;[285]
- an employee cannot be required to pay any costs or fees for direct deposit; and
- an employee cannot be disciplined or otherwise penalized for authorizing or refusing to authorize direct deposit.[286]

Payroll Debit Card. An employer can pay wages by pay card if all the following requirements are met:

- the employee is given the option of receiving wages by direct deposit to an employee-selected account, paper check, or pay card before the employee selects direct deposit, pay card, or paper check;

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[281] 29 C.F.R. § 531.37.

[282] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[283] HAW. REV. STAT. § 388-2.

[284] HAW. REV. STAT. § 388-1.

[285] HAW. REV. STAT. § 388-7.

[286] HAW. REV. STAT. § 388-2.

- an employer cannot mandate that employees use a pay card;
- an employer cannot make participation in the pay card program a condition of hire or continued employment;
- an employee must voluntarily authorize payment by pay card in writing or via electronic signature, without intimidation, coercion, or fear of discharge or reprisal for refusing to accept a pay card or pay card account; and
- before obtaining an employee's consent, an employer must provide the employee in writing, in plain language in at least ten-point font:
    - a description of the employee's options for receiving wages;
    - the pay card fee schedule in a form the employee can retain stating the dollar amount of all fees;
    - a notice that states whether third parties may assess additional fees relating to pay card use; and
    - a list of the services available to the employee at no cost to the employee;
- the employer is responsible for fees that have been assessed against the employee outside the pay card fee schedule;
- the employer agrees to honor a written request by the employee to change the method of receiving wages from a pay card to another method offered by the employer within two pay periods from the time of the request;
- the pay card must provide for all of the following, at no cost to the employee:
    - a pay card on which an employee may receive wages, with no charges for the application, initiation, transfer, loading of wages by the employer, privilege of participation, or distribution or delivery of the initial pay card;
    - the ability during each pay period for the employee to make at least three free withdrawals from the pay card, at least one of which permits withdrawal of the full amount of the employee's net wages on the card at a federally insured depository institution or at that institution's affiliated ATMs;
    - the means to access the balance or other account information online and via telephone offered in conjunction with the pay card in a manner that allows access to account information 24 hours a day, seven days a week without charging a fee;
    - a readily accessible electronic history of the employee's account transactions covering at least 60 days preceding the date the employee electronically accesses the account;
    - upon an employee's oral or written request or electronic signature, a written history of the account transactions covering at least 60 days prior to the request;
    - a pay card cannot assess an overdraft fee or charge pursuant to its issuer's overdraft service against an employee or their account; and
    - the ability to close a pay card account and obtain the remaining card balance;
- a pay card cannot impose fees based on an employee's account balance;

- an employer must ensure the pay card account provides one free replacement pay card per year at no cost to the employee at least 15 days before the pay card's expiration date; provided that the replacement pay card need not be issued if the pay card has been inactive for at least 12 months or the employee is no longer employed by the employer;
- pooled pay card accounts are permitted; provided that each subaccount is for the sole and exclusive benefit of the named employee, and not subject to the claims of the employer's creditors, and that each employee's pay card account is eligible for deposit insurance on a pass through basis, including:
    - the account records of the federally insured depository institution must disclose the existence of the agency or custodial relationship;
    - the records of the federally insured depository institution, custodian, or other party must disclose the identities of the employee cardholders who actually own the deposits and the amounts owned by each employee cardholder; and
    - the funds in the account must be owned by the individual employee cardholders under an agreement among the parties or pursuant to applicable law and cannot be used by the employer's creditor; and
- the funds in the pay card account cannot expire. The pay card account may be closed after six continuous months of inactivity, with reasonable notice to the employee; provided that the remaining funds in the pay card account must be refunded to the employee at no cost to the employee.[287]

An employer must deposit all wages into the employee's pay card account on or before the employee's designated payday. An employee is deemed paid when wages are deposited into the employee's pay card account and the employee has access to those wages. If there is any delay of an employee's access to wages due to an error by the issuer, an employer is not liable for this delay if it deposited the proper amount of wages into the account on or before the designated payday and complied with the above 12 requirements.[288]

An employer is liable for any wages due and not timely paid onto a pay card.[289]

An employer must provide 21 days' written notice before any change to the pay card program can take effect. The notice must state in plain language in at least ten-point font any change to any of the terms and conditions of the pay card account, including any changes in the itemized list of fees.[290]

An employer must comply with all applicable record-keeping requirements under the wage payment laws and under the minimum wage and overtime record-keeping statute.[291]

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[287] HAW. REV. STAT. § 388-5.7.

[288] HAW. REV. STAT. § 388-5.7.

[289] HAW. REV. STAT. § 388-5.7.

[290] HAW. REV. STAT. § 388-5.7.

[291] HAW. REV. STAT. § 387-6.

An employer's obligation under the pay card statute ceases 60 days after the employer-employee relationship ends and the employee has been paid their final wages.[292]

3.7(b)(ii) *Frequency of Payment Under State Law*

An employer must pay its employees at least twice during each calendar month, on regular paydays designated in advance by the employer. When establishing a pay schedule, employers should be mindful that all earned wages must be paid within seven days after the end of the pay period.

A majority of an employer's employees, or a majority of employees in a recognized collective bargaining unit, may elect in a secret ballot election to be paid on a monthly basis. Such employees may not hold elections more frequently than once in every two years and each election shall be valid for a period of two years.[293]

Furthermore, upon application showing good and sufficient reasons, the state labor department may permit an employer to: (1) establish less frequent paydays provided that employees will be paid in full at least once each calendar month on a regularly established schedule; and/or (2) pay wages within 15 days after the end of each pay period. The labor department may grant an exception if it is shown that: (1) the employer will suffer undue hardship if the application is denied; or (2) the employer will give a semi-monthly advance equivalent to approximately half of the monthly "take home" pay to each employee. An exception is valid for two years.[294]

Additional special rules apply to public works contractors.[295]

3.7(b)(iii) *Final Payment Under State Law*

Discharge. An employer must pay a discharged employee their final wages at the time of discharge. If the discharge occurs under conditions that prevent immediate payment, final wages must be paid to a discharged employee no later than the working day following discharge. When work is suspended as a result of a labor dispute, or an employee is laid off, final wages must be paid no later than the next regular payday.[296]

Resignation. When an employee quits or resigns, final wages must be paid no later than the next regular payday. If the employee gives at least one pay period's notice, however, the employer must pay final wages to the employee at the time of quitting.[297]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

Hawaii law requires that each payday, an employer must furnish to each employee a legible printed, typewritten, or handwritten record with an itemized statement showing:

- employee's name;

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[292] HAW. REV. STAT. § 388-5.7.

[293] HAW. REV. STAT. § 388-2.

[294] HAW. REV. STAT. § 388-2; HAW. CODE R. § 12-21-3.

[295] HAW. REV. STAT. § 388-2.

[296] HAW. REV. STAT. § 388-3.

[297] HAW. REV. STAT. § 388-3.

- employer's name;
- employer's address and telephone number;
- employee's total hours worked;
- employee's regular and overtime hours;
- employee's straight-time compensation;
- employee's overtime compensation;
- any other compensation, including allowances, if any, claimed as part of the minimum wage;
- employee's total gross compensation;
- amount and purpose of each deduction;
- employee's total net compensation;
- date of payment;
- pay period covered; and
- rate(s) of pay and rate basis (hourly, per shift, daily, weekly, salary, per piece, commission, other), including overtime rate(s).

For piece-rate workers, the statement must also indicate the applicable piece rate or pay rate(s), and number of pieces completed at each piece rate.[298]

The wage statement must be provided in a form that the employee may retain as a personal record. It may be in the form of a section detachable from the check or a separate form.[299]

In lieu of the printed, typewritten or handwritten notice, and with the employee's written authorization, an employer may provide an electronic notice that may be electronically accessed by the employee. The employer must retain the record for at least six years.[300]

3.7(b)(v) *Wage Transparency*

An employer cannot retaliate or discriminate against an employee for, nor prohibit an employee from, disclosing the employee's wages, discussing and inquiring about the wages of other employees, or aiding or encouraging other employees to exercise their rights under the equal pay provisions.[301]

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

Employers must notify each employee in writing or through a posted notice maintained in a place accessible to employees of any changes to the day, hour, and place of payment before the change occurs.[302]

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[298] HAW. REV. STAT. § 387-6.

[299] HAW. REV. STAT. §§ 388-7, 387-6; HAW. CODE R. § 12-21-5.

[300] HAW. REV. STAT. §§ 387-6, 388-7.

[301] HAW. REV. STAT. § 378-2.3(b).

[302] HAW. REV. STAT. § 388-7.

Employers must notify each employee in writing or through a posted notice maintained in a place accessible to employees of pay rate changes before the change occurs.[303]

3.7(b)(vii) *Paying for Expenses Under State Law*

In Hawaii, there is no general obligation to indemnify an employee for business expenses, although state law does address whether an employee must pay for their own uniforms, tools, and equipment.

The cost of furnishing facilities which are primarily for the employer's benefit or convenience cannot be included as wages. These facilities may include, but are not limited to uniforms and their laundering, where the nature of the business requires the employee to wear a uniform.[304] Such facilities may also include tools of the trade and other materials and services incidental to carrying on the employer's business.[305]

3.7(b)(viii) *Wage Deductions Under State Law*

Permissible Deductions. An employer can make deductions from employees' wages if:

- a deduction is required under federal or state law;
- a deduction is required by court order; or
- an employee provides written authorization.[306]

However, an employee cannot authorize a deduction for the following items:

- fines;
- cash shortages;
- fines, penalties, or replacement costs for breakage;
- losses due to acceptance by an employee of checks which are subsequently dishonored;
- losses due to defective or faulty workmanship, lost or stolen property, damage to property, default of customer credit, or nonpayment for goods or services received by customer if such losses are not attributable to employee's willful or intentional disregard of employer's interest; or
- medical or physical examination or medical report expenses which accrue due to services rendered to an employee or prospective employee, where such examination or report is requested or required by the employer or prospective employer or required by any law or regulation of federal, state, or local governments or agencies thereof.[307]

Note that an adjustment in wages for an advance in pay or for a correction of computation errors from previous payrolls is not considered a deduction under the general deduction statute. It is strongly

[303] HAW. REV. STAT. § 388-7.

[304] HAW. CODE R. § 12-20-9.

[305] HAW. CODE R. § 12-20-9.

[306] HAW. REV. STAT. § 388-6.

[307] HAW. REV. STAT. § 388-6.

recommended that an employee's written authorization be obtained prior to adjusting an employee's wages for either of these reasons.[308]

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Orders of Support. Upon receiving a wage assignment order from the family court, an employer must withhold the applicable amount owed from the employee-obligor's income and transmit the funds to the state Child Support Enforcement Agency. *Income* means an employee's salaries, wages, earnings, workers' compensation, unemployment compensation, disability benefits, commissions, independent contractor income, and any other entitlement to money including moneys payable as a pension or as an annuity or retirement or disability or death or other benefit, or as a return of contributions and interest thereon from the U.S. government, or from the state or a political subdivision, or from any retirement, disability, or annuity system.[309] The employee's garnishable income does not include amounts required to be withheld pursuant to other state or federal laws.[310]

Withholding must begin no later than the first pay period that occurs within seven business days after the date the income withholding order was mailed to the employer.[311] In addition, the employer may deduct an administrative fee from the employee's wages for each withholding and payment.[312] The employer must continue to withhold wages pursuant to the wage assignment order until the court or the Child Support Enforcement Agency issues a new order or notifies the employer that the order has been terminated.[313]

It is unlawful for an employer to refuse to hire an applicant, to discharge an employee, or to take any other disciplinary action against an employee based in whole or part upon a wage assignment order. An employer that violates this section is guilty of a misdemeanor. An employer that fails to comply with this subsection may be subject to a fine of up to $250.[314]

Debt Collection. Upon receipt of a garnishee summons, the employer-garnishee is required to withhold an employee's wages in order to satisfy the judgment or debt the employee owes.[315] The employer may, but is not required, to make a disclosure by filing a response in the court that issued the summons that confirms the debtor is the employer's employee and whether the employee is owed wages that may be garnished. If the employer elects not to make a disclosure, the debtor will be assumed to be the employer's employee.[316]

Only an employee's disposable income may be garnished, that is, the employee's wages, salary, stipend, commissions, annuity, or net income under a trust remaining after the deduction of any amounts required

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[308] HAW. CODE R. § 12-21-4; HAW. REV. STAT. § 388-6.

[309] HAW. REV. STAT. § 576E-16(f).

[310] HAW. REV. STAT. § 571-52(a).

[311] HAW. REV. STAT. § 576E-16(c).

[312] HAW. REV. STAT. § 576E-16(c).

[313] HAW. REV. STAT. §§ 571-52(c), 576E-16(c).

[314] HAW. REV. STAT. §§ 571-52(d), 576E-16(e)..

[315] HAW. REV. STAT. § 652-1(a).

[316] HAW. REV. STAT. § 652-1(c).

by law to be withheld.[317] The amount that may be withheld in satisfaction of the writ of garnishment is capped. Under federal law, for each workweek, a creditor may garnish the lesser of 25% of the employee's disposable earnings, or the amount by which the employee's weekly disposable earnings exceed 30 times the federal hourly minimum wage.[318] Under Hawaii law, only 5% of the first $100 of monthly disposable income may be garnished, 10% of the second $100 per month, and 20% of all sums in excess of $200 per month.[319] The employer must apply the law most favorable to the employee in determining how much to withhold, and must continue to withhold the required amounts until the judgment is satisfied.[320]

3.7(b)(x) *State Enforcement, Remedies & Penalties*

The Wage Standards Division of the Hawaii Department of Labor and Industrial Relations enforces the state's minimum wage, overtime, and wage payment statutes.[321] In case of a dispute as to the amount of wages owed to an employee, Hawaii law requires the employer to pay, without condition and within the time required by law, all wages conceded by the employer to be due, leaving to the employee all remedies the employee might otherwise be entitled to as to any balance claimed.[322] An employee's acceptance of payment does not constitute a release or agreement with respect to the disputed amount, and any release required by an employer as a condition to payment violates the wage payment statute and is null and void.[323]

An employee alleging a claim for unpaid minimum wages or overtime, or other wage payment violations, may file suit in state court, and is also permitted to proceed on behalf of similarly situated employees.[324] Though the labor department enforces the state wage and hour laws and has the authority to investigate violations, an employee is not required to exhaust administrative remedies by filing a wage complaint with the state labor department prior to filing suit. A prevailing employee may recover unpaid wages, attorneys' fees, liquidated damages, and prejudgment interest.[325] Violations of the Hawaii wage and hour laws may also result in civil and criminal penalties.

Minimum Wage & Overtime. The following violations constitute a misdemeanor and are punishable by a fine between $500 and $5,000, imprisonment up to one year, or both:

- willfully violating the state minimum wage and overtime provisions; or
- firing or discriminating against an employee for exercising protected rights.[326]

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[317] HAW. REV. STAT. § 652-1(a)(4).

[318] 15 U.S.C. § 1673(a).

[319] HAW. REV. STAT. § 652-1(a)(4).

[320] HAW. REV. STAT. §§ 652-1, 652-4.

[321] HAW. REV. STAT. §§ 387-5, 388-9.

[322] HAW. REV. STAT. § 388-5.

[323] HAW. REV. STAT. § 388-5.

[324] HAW. REV. STAT. §§ 387-12, 388-11.

[325] HAW. REV. STAT. §§ 387-12, 388-11.

[326] HAW. REV. STAT. § 387-12, as amended by S.B. 2298 (Haw. 2022).

Paying or agreeing to pay an employee less than the minimum wage or overtime rate is a class C felony and is punishable by a fine of not less than $500 per offense, with each violation deemed a separate offense.[327]

Wage Payment. An employer that fails to pay wages in accordance with the wage payment provisions is liable to the employee for a civil penalty of not less than $500 or $100 for each violation, whichever is greater. There are also criminal penalties, which subject an employer to a fine between $100 and $10,000, imprisonment up to one year, or both. The violations subject to a criminal penalty include:

- firing or discriminating against an employee for exercising protected rights; or
- willfully failing to comply with any other requirements of the wage payment provisions.[328]

The below violations are a class C felony and are punishable by a fine of not less than $500 per offense, with each violation deemed a separate offense:

- failure to pay wages in accordance with the wage payment provisions; or
- a corporate office who knowingly permits a corporation to violate wage payment provisions.[329]

If an employer pays an employee and has insufficient funds to cover the wages, the employer is liable for any special handling fees that the employee may incur from the bank as a result.[330]

An employer commits the criminal offense of nonpayment of wages if it intentionally or knowingly or with intent to defraud fails or refuses to pay wages to the employee, except where required by federal or state statute or by court process. In addition to any other penalty, a person convicted of nonpayment of wages will be fined between $2,000 and $10,000 per offense.[331] A person commits a separate offense for each pay period during which the employee earned wages that the person failed or refused to pay the employee. If no set pay periods were agreed upon between the person and the employee at the time the employee commenced the work, then each "pay period" is deemed to be biweekly.[332]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal

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[327] HAW. REV. STAT. § 387-12, as amended by S.B. 2298 (Haw. 2022).

[328] HAW. REV. STAT. § 388-10, as amended by S.B. 2298 (Haw. 2022).

[329] HAW. REV. STAT. § 388-10, as amended by S.B. 2298 (Haw. 2022).

[330] HAW. REV. STAT. § 388-5.5.

[331] If the amount owed to the employee is equal to or greater than $2,000 of if the employer falsely denies the amount or validity of the wages owed, the employer may be guilty of a class C felony. If the amount owed to the employee is less than $2,000, the employer may be guilty of a misdemeanor. HAW. REV. STAT. § 707-786.

[332] HAW. REV. STAT. § 707-786.

Employee Retirement Income Security Act (ERISA).[333] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[334] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[335]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

Hawaii state law does not require employers to provide their employees with paid vacations or to establish written vacation policies. Vacation benefits are a matter of agreement between employer and employee. However, Hawaii employers that do maintain vacation or similar paid time off policies must provide employees with notice, in writing or through a notice posted in a place accessible to employees, of the employer's policy regarding vacation and sick leave.[336]

Once an employer does establish a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. It is important to draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice. Because vacation and similar paid time off is a matter of contract or employer policy in Hawaii, an employer may institute a "use-it-or-lose-it" policy or require forfeiture of accrued vacation at the end of employment.[337] Even if a policy does not contain a forfeiture provision, payout is not required when employment ends.[338]

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

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[333] 29 U.S.C. § 1002.

[334] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[335] 490 U.S. 107, 119 (1989).

[336] HAW. REV. STAT. § 388-7.

[337] *Lim v. Motor Supply*, 364 P.2d 38 (Hawaii 1961) (employee not entitled to payment in lieu of vacation time accumulated from prior years in the absence of any express agreement; court commenting, "Though plaintiff's annual vacation of two weeks may have been a matter of right, when this right was not insisted upon each year and instead was tacked on to the current two weeks' vacation time, it became as to the excess merely a privilege which might be and in fact was lost.").

[338] *Casumpang v. ILWU Local 142*, 121 P.3d 391 (Hawaii 2005) (former employee failed to establish any proof that the union had a written or oral policy, house rule, convention resolution, or practice which afforded employees the right to convert unused vacation leave benefits at the time of separation or termination from employment into "pay").

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Hawaii does not require employers to provide employees with a day of rest each week, or compensate employees at a premium rate for work performed on the seventh consecutive day of work or on holidays. Special rules apply to certain individuals working on a public work project.[339]

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[340] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[341] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[342] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

Hawaii recognizes civil unions. Under state law, both same-sex and opposite-sex couples are eligible to enter a civil union, and a domestic partnership lawfully formed in another state will be recognized in Hawaii as a civil union.[343] Hawaii law also provides for reciprocal beneficiary relationships, which operate in a manner similar to a domestic partnership, but a reciprocal beneficiary relationship is only available to individuals who are legally prohibited from marrying one another.[344] Thus, as same-sex marriage is legal

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339 HAW. REV. STAT. § 104-2.

340 29 U.S.C. § 1144.

341 29 U.S.C. § 1161.

342 29 U.S.C. § 1167(3).

343 HAW. REV. STAT. §§ 572B-2, 572B-10.

344 HAW. REV. STAT. §§ 572C-1, 572C-4.

throughout the United States,[345] it may well be that reciprocal beneficiary relationships are no longer a common arrangement in Hawaii.

A party to a civil union is included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote a spousal relationship, as those terms are used throughout the Hawaii Revised Statutes.[346] Further, partners to a lawful civil union are afforded all the same rights, benefits, protections, and responsibilities under state law, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil law, as are granted to married couples.[347]

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[348]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[349]
- to take medical leave when the employee is unable to work because of a serious health condition;[350]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[351] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the

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[345] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

[346] HAW. REV. STAT. § 572B-11.

[347] HAW. REV. STAT. § 572B-9.

[348] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[349] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[350] 29 C.F.R. §§ 825.112, 825.113.

[351] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

last 12 months at a location where 50 or more employees work within 75 miles of each other.[352] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

Coverage & Eligibility. The Hawaii Family Leave Law covers employers that employ 100 or more employees for each working day during each of 20 or more calendar weeks in the current or preceding calendar year. All employees who work in Hawaii (including full-time, part-time, temporary, and intermittent employees) are counted.[353]

Employees who have worked for their employer for six consecutive months without a break due to resignation, termination, or layoff are covered. Periods of paid leave or authorized leave without pay are not considered a break in service.[354]

As discussed in **3.8(c)(ii)**, Hawaii's civil union law extends the same rights, benefits, protections, and responsibilities of spouses in a marriage to partners in a civil union.[355] Therefore, in Hawaii, parties to a civil union can be considered spouses for FMLA and state leave law purposes.[356]

Purpose & Length of Leave. Permissible reasons for leave include: (1) the birth or adoption of a child; or (2) the serious health condition of child, parent, grandparent, grandchild, sibling, stepparent, spouse, reciprocal beneficiary, parent-in-law, or grandparent-in-law.[357]

The length of leave is up to four weeks per calendar year.[358]

An employee's entitlement to leave upon the birth of a child expires 12 months after the birth.[359] Family leave need not be taken immediately upon a birth, placement for adoption, or commencement of a serious health condition.[360]

Reduced Schedule & Intermittent Leave. An employee may take leave intermittently during each calendar year. The employer may determine the size of the shortest intermittent leave increment so long as it is one hour or less.[361]

An employer may offer to modify the existing duties and job conditions of an employee on an intermittent leave to better accommodate the intermittent leave. The employer may also offer a temporary transfer

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[352] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[353] HAW. REV. STAT. §§ 398-1, 398-2; HAW. CODE R. §§ 12-27-1, 12-27-5.

[354] HAW. REV. STAT. § 398-1; HAW. CODE R. §§; 12-27-1, 12-27-5.

[355] HAW. REV. STAT. § 572B-9.

[356] HAW. REV. STAT. §§ 572B-9, 572B-10.

[357] HAW. REV. STAT. §§ 398-1, 398-3(a); HAW. CODE R. §§ 12-27-1, 12-27-5.

[358] HAW. REV. STAT. § 398-3(a).

[359] HAW. REV. STAT. § 398-3.

[360] HAW. CODE R. § 12-27-7.

[361] HAW. REV. STAT. § 398-3(b); HAW. CODE R. § 12-27-7(c).

to an alternative position that better accommodates intermittent leave. The modification or transfer will be permitted if:

- the employee agrees;
- the transfer or modification is in compliance with any applicable collective bargaining agreement as well as federal and state law; and
- the employee receives the equivalent pay and benefits as the employee's regular job, even if the employer must increase the pay and benefits of the alternative job.[362]

Employer Obligations. Upon return from leave, an employee is entitled to be restored to the same or equivalent position unless the employee would have been laid off in a reduction in force had the employee not been on leave. In such circumstances, the employee retains all rights under the *bona fide* layoff and recall system. A position is considered equivalent if it essentially has the same pay, benefits, working conditions, duties, seniority, etc. as the original position. If an employee provides the employer with reasonable advance notice (at least two days) that the employee is requesting to return to work earlier than originally planned, the employer must promptly reinstate the employee to their original position or an equivalent position.[363]

There can be no loss of benefits accrued prior to the leave. However, leave benefits earned in one year but not carried over to the following year by contract, policy, or practice are not protected.[364]

Interference with an employee's leave rights or discrimination against or retaliation for exercising the right to take leave is unlawful.[365]

Employers must post a state-created notice in every establishment where any employee is employed. Additionally, employers must give notice to each new employee at the time of hiring of their rights under the law.[366]

Employee Rights & Obligations. Where need for a family leave is foreseeable, the employee must provide the employer with at least 30 days' written notice. If it is not possible or practicable to give 30 days' notice, the employee must provide at least verbal notification to the employer within two working days before commencement of leave, and written notice to follow as soon as practicable. If the need for a leave is not foreseeable, the employee must give at least verbal notice within two working days of learning of the need for leave, or as soon as is practicable. If the employer requires subsequent written notice to confirm the verbal notice, the employee must submit that notice as soon as practicable. The employee must provide notice of the general reason for the request as well as the anticipated start and duration of the leave, if known.

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362 HAW. CODE R. § 12-27-7(d).

363 HAW. REV. STAT. § 398-7; HAW. CODE R. § 12-27-12.

364 HAW. REV. STAT. § 398-7; HAW. CODE R. § 12-27-12.

365 HAW. REV. STAT. § 398-8.

366 HAW. REV. STAT. § 398-1.5; HAW. CODE R. § 12-27-10.

The employer may delay the start of leave until the employee is able to provide proper notice, or until at least 30 days after the employee first notifies the employer of the need for leave.[367]

Medical Certification. An employer may require that an employee support their request for family leave with written confirmation documenting the need for leave.

For the birth or adoption of a child, a health care provider or the family court must issue certification. For the placement of a child for adoption, the certification must be issued by a recognized adoption agency, the attorney handling the adoption, or the individual officially designated by the parent to select and approve the adoptive family. The employee also may provide the petition the employee filed with the court.

When leave is to care for a family member, the family member's health care provider must issue certification that includes:

- the patient's name and relationship to the employee;
- the health care provider's name, title, type of practice, location, and signature;
- a statement that the condition qualifies as a serious health condition;
- a statement that the employee is needed to participate in the care of the patient;
- a statement that the patient's condition requires hospitalization or continuing treatment of supervision;
- the approximate date the serious health condition commenced and the probable duration that the employee will be needed to provide care; and
- whether it will be necessary for the employee to take leave intermittently and, if so, the estimated period of time the employee will be needed to care for the patient.

Unless the employer provides otherwise, such certification is at the employee's expense.

When the need for leave is foreseeable, the employee must provide the certification before the leave starts. If the leave is unforeseeable, the employee must provide certification no later than two working days after the leave commences.

At the employer's expense, an employer may require re-certification during the leave, but not more often than 30 days if: (1) the circumstances described in the previous certification have changed significantly, or (2) the employee receives information that casts doubt on the employee's stated reason for the absence. An employer may also require another certification when the employee requests an extension.

An employer may also require an employee to provide documentation or a statement of the relationship between the employee and the family member.[368]

[367] HAW. REV. STAT. § 398-5; HAW. CODE R. § 12-27-10.

[368] HAW. REV. STAT. § 398-6; HAW. CODE R. § 12-27-11.

Use of Paid Time Off. An employee may elect to substitute accrued paid leave, including vacation, personal or paid family leave, for any part of the four-week period. The employer may not require the use of accrued paid leave.

An employer that provides sick leave for employees must permit employees to use up to 10 days of accrued and available sick leave during the four-week period (unless a collective bargaining agreement authorizes the use of more). All restrictions on the use of sick leave by an employee apply. For employers that are self-insured for temporary disability insurance purposes, only the accrued and available sick leave in excess of the temporary disability insurance plan is available for family leave purposes.[369]

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[370] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

Hawaii law does not address paid sick leave for private-sector employees.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[371] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individual's with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because she is pregnant, as long as she is able to

[369] HAW. REV. STAT. § 398-4; HAW. CODE R. §§ 12-27-8, 12-27-9.

[370] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[371] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

perform her job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for her own serious health condition, such as severe morning sickness.[372] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[373] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**.To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

Employers with one or more employees must make every reasonable accommodation to the needs of female employees disabled due to pregnancy, childbirth, or related medical conditions.

Employers must consider disability due to pregnancy, childbirth, or related medical conditions justification for a leave, with or without pay, for a reasonable period of time. A *reasonable period of time* is to be determined by the employee's physician with regard for the employee's physical condition and the job requirements. An employer may request a doctor's certification estimating the commencement and termination dates of the leave, and the length of the leave. An employer may also require a fitness for duty certification before the employee returns.

An employee must be reinstated to her original job or to a position of comparable status and pay, without loss of service credits and privileges.[374]

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[372] 29 C.F.R. § 825.202.

[373] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

[374] HAW. CODE R. § 12-46-108; *Sam Teague, Ltd. v. Hawaii Civil Rights Comm'n*, 971 P.2d 1104 (Hawaii 1999) (an employer's policy prohibiting any extended leave during the first year of employment contravenes the plain language of section 12-46-108(a)).

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

As set forth in 3.9(a)(ii), an eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under Hawaii's Family Leave Law.[375]

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

Hawaii law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

Hawaii employers with 50 or more employees must provide to an employee a leave of absence for organ, bone marrow, or peripheral blood stem cell donation.[376] The leave may not exceed:

- seven days each calendar year to serve as a bone marrow donor or peripheral blood stem cell donor; and
- 30 days each calendar year to serve as an organ donor.[377]

Qualifying leave may be taken in one or more periods, but in no event can leave exceed the amount prescribed above.[378]

To be eligible for leave, the employee must submit written verification to the employer that the employee is an organ, bone marrow, or peripheral blood stem cell donor and that there is a medical necessity for the donation.[379]

An employer may require, as a condition of an employee's initial receipt of leave, that the employee take up to three days of earned but unused sick leave, vacation, or paid time off, or unpaid time off for bone

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[375] HAW. REV. STAT. §§ 398-1 *et seq.*; HAW. CODE R. §§ 12-27-1 *et seq.*

[376] HAW. REV. STAT. §§ 398A-1, 398A-3.

[377] HAW. REV. STAT. § 398A-3.

[378] HAW. REV. STAT. § 398A-3.

[379] HAW. REV. STAT. § 398A-3.

marrow or peripheral blood stem cell donation and up to two weeks of earned but unused sick leave, vacation, or paid time off, or unpaid time off for organ donation unless doing so would violate the provisions of any applicable collective bargaining agreement. Qualifying leave cannot be taken concurrently with any leave taken pursuant to the FMLA.[380]

Any period of time during which an employee is required to be absent from work to serve as a covered donor does not constitute a break in the employee's continuous service for purposes of the employee's right to salary adjustments, sick leave, vacation, annual leave, or seniority. During any period that an employee takes qualifying leave, the employer must maintain and pay for coverage under a group health plan for the full duration of the leave in the same manner as coverage would have been maintained if the employee had been actively at work during the leave period.[381]

The law does not affect an employer's obligation to comply with any collective bargaining agreement or employee benefit plan that provides greater leave rights to employees under the law.[382]

Restoration of Employment. An employer, upon qualifying leave expiring, must restore an employee to the position the employee held when leave began, or to a position with equivalent seniority status, employee benefits, pay, and other terms and conditions of employment. An employer may decline to restore an employee for conditions unrelated to the exercise of employee's leave rights.[383]

Antiretaliation Provisions. An employer cannot not interfere with, restrain, or deny the exercise of, or an attempt to exercise, a qualifying leave right. An employer cannot discharge, fine, suspend, expel, discipline, or in any other manner discriminate against an employee who:

- exercised a protected leave right; or
- opposes a practice made unlawful by the leave law.[384]

State Enforcement, Remedies & Penalties. An employee may bring a civil action to enforce alleged violations of the statute. Notably, the available remedies appear to be limited to equitable relief, *e.g.*, reinstatement. The statute does not reference the availability of damages.[385]

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

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[380] HAW. REV. STAT. § 398A-3.

[381] HAW. REV. STAT. § 398A-3.

[382] HAW. REV. STAT. § 398A-3.

[383] HAW. REV. STAT. § 398A-4.

[384] HAW. REV. STAT. § 398A-5.

[385] HAW. REV. STAT. § 398A-6.

3.9(g)(ii) *State Voting Time Guidelines*

Hawaii has repealed the law requiring an employer to provide time off for voting. Thus, employers are no longer required to provide employees with any time off, whether paid or unpaid, for voting. The bill repeals section 11-95 of the Hawaii Revised Statutes.[386]

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

Hawaii law does not address leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[387] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[388] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. An employer may not discharge, threaten, or coerce an employee because an employee receives a jury duty summons, responds to the summons, attends court for prospective jury service, or serves as a juror.[389]

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386 S.B. 560 (Haw. 2019).

387 28 U.S.C. § 1875.

388 *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

389 HAW. REV. STAT. § 612-25.

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Hawaii law affords a leave of absence for employees who are victims of domestic abuse, sexual assault, and related crimes. An employee is eligible for time off if the employee:

- has worked for the employer for at least six consecutive months; and
- the employee or the employee's minor child (including a biological, adopted, or foster son or daughter; stepchild; or legal ward) is a victim of domestic abuse, sexual assault, or stalking.[390]

Purpose & Length of Leave. A qualifying employee may take a "reasonable period" of unpaid leave from work for one of the following:

- to seek medical attention for the employee or employee's minor child to recover from physical or psychological injury or disability caused by domestic or sexual violence;
- to obtain services from a victim services organization;
- to obtain psychological or other counseling;
- to temporarily or permanently relocate; or
- to take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic or sexual violence, or other actions to enhance the physical, psychological, or economic health or safety of the employee or the employee's minor child or to enhance the safety of those who associate with or work with the employee.[391]

For an employer with 50 or more employees, an eligible employee may take a reasonable period of leave up to 30 days of leave per calendar year. For an employer with fewer than 50 employees, an eligible employee may take a reasonable period of leave of up to five days of leave per calendar year. The following rules apply to determine the amount of leave that an employee may take.

- When the leave is due to physical or psychological injury or disability to the employee or employee's minor child, the attending health care provider will determine what is a reasonable amount of time, taking into consideration the employee's or child's condition and the job requirements.
- When the leave is due to the employee's need to take legal or other actions (including preparing for or participating in a civil or criminal legal proceeding, obtaining services from a victim services organization, or permanently or temporarily relocating), the employee's or

[390] HAW. REV. STAT. §§ 378-71, 378-72.

[391] HAW. REV. STAT. § 378-72.

child's attorney or advocate, court, or victims services organization personnel will determine what is a reasonable period.[392]

Certification. Where an employee is a victim of domestic or sexual violence and seeks leave for medical attention to recover from injuries caused by domestic or sexual violence, the employer may request that the employee provide a certificate from a health care provider estimating the number of leave days necessary and the estimated commencement and termination dates of leave required by the employee. The employer may also request that prior to the employee's return, the employee provide a medical certificate from the employee's attending health care provider attesting to the employee's condition and approving the employee's return to work. If certification is required, the leave will not be protected until the certification is provided to the employer.[393]

Where an employee has taken five or fewer days of leave for nonmedical reasons, the employer may request that the employee provide certification to the employer in the form of a signed statement, within a reasonable period after the employer's request, that the employee or the employee's minor child is a victim of domestic or sexual violence and the leave is for one of the purposes enumerated in the statute. If certification is required, the leave will not be protected until the employee provides certification to the employer.[394]

If the leave exceeds five days per calendar year, the employee must provide certification by one of the following methods: (1) certified or exemplified restraining orders, injunctions against harassment, and documents from criminal cases; (2) documentation from a victim services organization or domestic or sexual violence program, agency, or facility, including a shelter or safe house for victims of domestic or sexual violence; or (3) documentation from a medical professional, mental health care provider, attorney, advocate, social worker, or member of the clergy from whom the employee or the employee's minor child has sought assistance in relation to the domestic or sexual violence.[395]

Notice. An employee must provide the employer with reasonable notice of the employee's intention to take leave, unless notice is not practicable due to imminent danger to the employee or the employee's minor child.[396] In addition, during the leave, an employer may require an employee on victim leave to report once a week to the employer on the employee's status and intention to return to work.[397]

Reinstatement & Employment Benefits. Upon return from leave, the employer must reinstate the employee to their original job or to a position of comparable status and pay, without loss of accumulated service credits and privileges. An employee is not entitled to the accrual of seniority or employment benefits during leave, unless the seniority or benefits would be provided to a similarly-situated employee who was on leave due to a reason other than domestic or sexual violence. An employee is not entitled to

[392] HAW. REV. STAT. § 378-72.

[393] HAW. REV. STAT. § 378-72.

[394] HAW. REV. STAT. § 378-72.

[395] HAW. REV. STAT. § 378-72.

[396] HAW. REV. STAT. § 378-72.

[397] HAW. REV. STAT. § 378-72.

any right, benefit, or position of employment to which the employee would not have otherwise been entitled.[398]

There is no requirement that the employee be compensated for absences taken pursuant to the statute. If an employee is entitled to take paid or unpaid leave pursuant to another law, or pursuant to an employment agreement, a collective bargaining agreement, or an employment benefits program or plan, which may be used for the purposes listed in the statute, the employee may be required to exhaust such other paid and unpaid leave benefits before victim leave benefits may be applied. The statute does not create a right to more than 30 days of combined victim leave and such other leave.[399]

Confidentiality. Information provided to the employer under the statute, including the employee's statements or any other documentation, record, or corroborating evidence, and the fact that the employee or employee's minor child has been a victim of domestic or sexual violence or the employee has requested leave pursuant to the statute, must be maintained in the strictest confidence by the employer, and may not be disclosed, except to the extent that disclosure is:

- requested or consented to by the employee;
- ordered by a court or administrative agency; or
- otherwise required by applicable federal or state law.[400]

Reasonable Accommodation for a Victim of Domestic or Sexual Violence. An employer must make reasonable accommodations in the workplace for an employee who is a victim of domestic or sexual violence, including:

- changing the employee's work contact information, such as telephone numbers, fax numbers, or email addresses;
- screening telephone calls for the employee;
- restructuring the employee's job functions;
- changing the employee's work location;
- installing locks and other security devices; and
- allowing the employee to work flexible hours.

An employer will not be required to make these reasonable accommodations if they would cause undue hardship on the employer's work operations.[401]

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed

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[398] HAW. REV. STAT. § 378-72.

[399] HAW. REV. STAT. § 378-73.

[400] HAW. REV. STAT. § 378-72.

[401] HAW. REV. STAT. § 378-81.

information on these statutes, including notice and other requirements, see **LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES**.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[402]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[403] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.404 Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

An employee who is a member of the National Guard is entitled to take a leave of absence from employment duties while engaged in performing government-ordered National Guard service and while

[402] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[403] 29 C.F.R. § 825.126(a).

[404] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

going to and returning from such service.[405] It is a discriminatory practice under Hawaii Employment Practices Act for employers to violate the state's military leave law.[406]

Employment Benefits. Military leave is unpaid. The employee is considered as having been on furlough or leave of absence, and the employer must restore or reemploy the employee without loss of seniority at the conclusion of the leave. The employee is entitled to participate in insurance or other benefits offered by the employer pursuant to the employer's established rules and practices relating to employees on furlough or leave of absence in effect at the time the employee was ordered to National Guard service.

Reinstatement. The employee should be restored to the status the employee would have enjoyed had the employee been continuously employed. The employer cannot deny the employee retention in employment or any promotion or other incident or advantage of employment because of the employee's obligation as a member of the National Guard.[407]

Unless impossible or unreasonable, employees returning from National Guard duty must be reinstated to their previous position or a position of comparable seniority, status, and pay. To qualify for reinstatement, the employee must still be qualified to perform the duties of the job. If the employee is not qualified because of a disability sustained during ordered National Guard service, but is qualified to perform the duties of any other position, the employer (or employer's successor) must reinstate the employee in another position with like seniority, status, and pay, or the nearest approximation thereof, consistent with the circumstances in the employee's case, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

An employee returning from military leave cannot be discharged without cause for one year after reinstatement.[408]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

There are no statutory requirements for other categories of leave for private-sector employees in Hawaii.

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to

[405] HAW. REV. STAT. § 121-43(a).

[406] HAW. REV. STAT. § 378-2.

[407] HAW. REV. STAT. § 121-43(b)(2).

[408] HAW. REV. STAT. § 121-43(b)(1).

employees.[409] Employers are also required to comply with all applicable occupational safety and health standards.[410] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see **LITTLER ON WORKPLACE SAFETY**.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[411] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

Hawaii, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[412] Thus, Hawaii is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. The Hawaii Occupational Safety and Health Law ("HIOSH Act") was enacted to permit and encourage employer and employee efforts to reduce injury and disease arising out of employment.[413] The HIOSH Act requires every employer to furnish a place of employment that is safe as well as free from recognized hazards.[414] Every employer must furnish and use safety devices and safeguards, and must adopt and use practices, means, methods, operations, and processes that are reasonably adequate to render employment and the place of employment safe. Employers must also prominently post posters and information informing employees of their rights and obligations under the HIOSH Act.[415]

Authorized representatives of the Department of Labor and Industrial Relations have the right to enter a place of employment without delay during regular working hours and at other reasonable times to inspect the premises and investigate potential violations.[416] The department may investigate the cause of all industrial injuries resulting in disability or death that occur during employment or in a place of employment. As part of the investigation, the department may privately question any employer, owner, operator, agent, or employee.[417]

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[409] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[410] 29 U.S.C. § 654(a)(2).

[411] 29 U.S.C. § 667(c)(2).

[412] 29 U.S.C. § 667.

[413] HAW. REV. STAT. § 396-2.

[414] HAW. REV. STAT. § 396-6.

[415] HAW. REV. STAT. § 396-6.

[416] HAW. REV. STAT. § 396-4.

[417] HAW. REV. STAT. § 396-4.

The department may grant variances from the standards set forth in the HIOSH Act upon application by an employer.[418]

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

In Hawaii, a driver may not operate a motor vehicle while holding a mobile electronic device. *Operate a motor vehicle* means to drive or assume actual physical control of the vehicle upon a public way, street, road, or highway. Notably, the prohibition extends to use of a mobile electronic device while temporarily stationary because of traffic, a traffic light, or a stop sign, and does not include vehicles that are at a complete stop, while the engine is turned off, in a safe location by the side of the road out of the way of traffic.

The statute defines *mobile electronic device* as any handheld or other portable electronic equipment capable of providing wireless or data communication between two or more persons or of providing amusement, including but not limited to a cellular phone, text messaging device, paging device, personal digital assistant, laptop computer, video game, or digital photographic device.[419]

The statute does not address hands-free use of a mobile electronic device.[420] These restrictions apply to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, state law.

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Under Hawaii law, a person licensed to carry a firearm cannot enter or remain on the private property of another person while carrying a firearm, unless the person has been given express authorization to carry a firearm on the property by the owner, lessee, operator, or manager of the property. A property owner may use the following methods for giving express authorization to carry or possess a firearm on the premises:

- unambiguous written or verbal authorization; or
- posting clear and conspicuous signage at the entrance of the building or the premises.

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[418] HAW. REV. STAT. § 396-4.

[419] HAW. REV. STAT. § 291C-137.

[420] HAW. REV. STAT. § 291C-137.

The private property of another person refers to residential, commercial, industrial, agricultural, institutional, or undeveloped property that is privately owned or leased by an individual other than the person carrying the firearm.[421]

- A person may transport a firearm into a parking lot of a property where carrying a firearm is otherwise prohibited. A licensed person may:
  - Carry a firearm in the immediate area surrounding the person's vehicle within a parking area for the limited purpose of storing or retrieving the firearm.
  - Store or otherwise leave a firearm inside a vehicle, but only if the person securely locks the firearm in a safe storage depository that is out of sight from outside the vehicle.

A safe storage depository is a secure impact-and tamper-resistant locked container that is incapable of being opened without a key or other unlocking mechanism. The vehicle's locked trunk or glove box alone is not a safe storage depository.[422]

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

Smoking is prohibited in Hawaii in enclosed or partially enclosed places of employment and 20 feet from any window, ventilation intake, or entrance to a workplace.[423] Electronic smoking devices are also prohibited in places where smoking is prohibited. *Smoking* means inhaling, exhaling, burning, or carrying any lighted or heated tobacco product or plant product intended for inhalation in any manner or in any form, and includes the use of an electronic smoking device. *Electronic smoking device* means any electronic product that can be used to aerosolize and deliver nicotine or other substances to the person inhaling from the device, including but not limited to an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, hookah pipe, or hookah pen, and any cartridge or other component of the device or related product, whether or not sold separately.[424]

Posting Requirements. An employer must display a "Smoking is Prohibited by Law" poster or the international no smoking sign with letters of not less than one inch at all entrances to a workplace.[425]

Antiretaliation Provisions. Employers may not discharge or retaliate against an employee for reporting a violation or otherwise exercising their rights under this law.[426]

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[421] HAW. REV. STAT. § 134-9.5.

[422] HAW. REV. STAT. § 134-9.3.

[423] HAW. REV. STAT. §§ 328J-4, 328J-6.

[424] HAW. REV. STAT. §§ 328J-1 *et seq*.

[425] HAW. REV. STAT. § 328J-9.

[426] HAW. REV. STAT. § 328J-10.

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

Hawaii law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

Hawaii law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[427] (2) the Americans with Disabilities Act (ADA);[428] (3) the Age Discrimination in Employment Act (ADEA);[429] (4) the Equal Pay Act;[430] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[431] (6) the Civil Rights Acts of 1866 and 1871;[432] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;

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[427] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[428] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[429] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[430] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. §203.

[431] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[432] 42 U.S.C. §§ 1981, 1983.

- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[433]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[434] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[435]

3.11(a)(ii) *State FEP Protections*

The Hawaii Employment Protections Act prohibits employment discrimination on the basis of:

- race;
- sex (includes actual or perceived gender identity or expression, and pregnancy, childbirth, or related medical conditions);
- sexual orientation (includes history of one or more sexual preferences, or being identified with one or more preference);
- age;
- religion;
- color;
- ancestry;
- disability (includes being regarded as; also includes consideration of genetic information / genetic testing);
- marital status (married or single—*e.g.*, unmarried, divorced, separated, widowed);
- arrest and court records;
- reproductive health decision; and
- domestic or sexual violence victim status, if the employee provides notice to the employer of their status as a victim or the employer has actual knowledge of such status.[436]

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[433] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[434] The EEOC's website is available at http://www.eeoc.gov/.

[435] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

[436] HAW. REV. STAT. § 378-2; HAW. CODE R. §§ 12-46-1 *et seq.*

Further, an employer cannot discriminate against an employee because the employee:

- is a member of the National Guard;
- has child support obligations;
- has a relationship or association with a person with a known disability; or
- needs lactation accommodation.[437]

An employer is also prohibited from discriminating against an applicant or employee based on their credit history or report under Hawaii's Employment Protections Act. Hawaii also prohibits discrimination against domestic or household worker employees on the basis of race, sex, gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, or marital status.[438]

The Employment Practices Act applies to employers with one or more employees.[439]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

An employee claiming to have suffered an alleged unlawful discriminatory practice has 180 days to file a claim with the state agency.[440] Upon the written request of the complainant, the Hawaii Civil Rights Commission may issue a notice of right to sue. The complainant may then bring a civil action within 90 days.[441]

Following an investigation, the commission must issue a determination within 180 days of filing, unless an extension is granted. If the commission finds reasonable cause that a violation occurred, the commission will attempt informal resolution through methods such as conference, conciliation, and persuasion. If no agreement can be reached within 180 days, a final conciliation demand will be made.[442]

If a resolution is not reached within 15 days of the final conciliation demand, the commission will appoint a hearing examiner and schedule a contested case hearing. The hearing officer will present a proposed decision to the parties, and any party may file exceptions to the decision and present argument. If the hearing officer finds unlawful discrimination, a formal decision will issue.[443]

The commission may order compensatory, punitive, legal, and equitable remedies.[444]

Both the complainant and respondent have the right to appeal from a final order of the commission.[445]

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[437] HAW. REV. STAT. § 378-2.

[438] HAW. REV. STAT. § 378-2.

[439] HAW. REV. STAT. § 378-1.

[440] HAW. REV. STAT. § 368-11; *see also* http://labor.hawaii.gov/hcrc/.

[441] HAW. REV. STAT. § 368-12.

[442] HAW. REV. STAT. § 368-13.

[443] HAW. REV. STAT. § 368-14.

[444] HAW. REV. STAT. § 368-17.

[445] HAW. REV. STAT. § 368-16.

3.11(a)(iv) *Additional Discrimination Protections*

Captive Audience. An employer is prohibited from discharging, disciplining, otherwise penalizing, or threatening any adverse employment action against an employee because the employee declines to attend or participate in any portion of an employer-sponsored meeting that communicates the employer's opinion on political matters; or declines to receive or listen to a communication of the employer's opinion on political matters.[446]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[447] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[448]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

Equal Pay. Under Hawaii's equal pay statute, employers of one or more employees cannot discriminate between employees in the same establishment because of sex by paying wages at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.[449] Wage differentials are permissible if resulting from:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production;

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[446] HAW. REV. STAT. § 377-6.

[447] 29 U.S.C. § 206(d)(1).

[448] 42 U.S.C. § 2000e-5.

[449] HAW. REV. STAT. §§ 378-1, 378-2.3.

- a *bona fide* occupational qualification; or
- a differential based on any other permissible factor other than sex.[450]

In 2023, the state enacted amendments to the equal pay statute to extend its protections to members of any protected classification under state law.[451] Beginning in 2024, an employer cannot discriminate between employees in the same establishment because of an employee's protected classification (race, color, ancestry, sex, gender identity or expression, sexual orientation, age, religion, disability, marital status, criminal history, reproductive health decisions, domestic violence victim status). In addition, the amendments modify the standard for determining whether an equal pay violation has occurred. As amended, the statute provides that an employer cannot engage in pay discrimination on the basis of a protected classification by paying wages at a rate less than the rate at which the employer pays wages to other employees for *substantially similar work* on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

An employee alleging a violation of the equal pay statute may file an administrative complaint with the Hawaii Civil Rights Commission within 180 days of the alleged violation, or may elect to file a civil action.[452]

Hawaii's wage and hour statute also prohibits all employers from discriminating in any way in the payment of wages on the basis of race, religion, or sex.[453] The law does not prohibit variation in wage rates for employees engaged in the same classification of work based upon a difference in seniority, length of service, substantial difference in duties or services performed, or a difference in the shift or time of day worked or hours of work.[454]An employee alleging a violation of the wage discrimination provision may file a civil action within six years of the alleged violation.[455]

Pay Transparency. Beginning in 2024, Hawaii employers must disclose the rate of pay for a job position when advertising the position. Specifically, an employer must disclose the hourly rate or salary range that reasonably reflects the actual expected compensation for the position being advertised in all job listings. However, this requirement does not apply to job listings for:

- positions with employers that have fewer than 50 employees;
- positions that are internal transfers or promotions with a current employer; and
- public employee positions for which salary, benefits, or other compensation are determined pursuant to collective bargaining.[456]

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[450] HAW. REV. STAT. § 378-2.3.

[451] S.B. 1057 (Haw. 2023).

[452] HAW. REV. STAT. §§ 378-5, 378-11.

[453] HAW. REV. STAT. §§ 387-1, 387-4.

[454] HAW. REV. STAT. § 387-4.

[455] HAW. REV. STAT. §§ 387-12, 657-1.

[456] HAW. S.B. 1057 (2023).

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[457]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[458]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

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[457] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[458] 29 C.F.R. § 1636.3.

An employee seeking a reasonable accommodation must request an accommodation.[459] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[460] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[461]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
    - the composition, structure, and functions of the workforce; and
    - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[462]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and

[459] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[460] 29 C.F.R. § 1636.3.

[461] 29 C.F.R. § 1636.4.

[462] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

- allowing an employee to take breaks to eat and drink, as needed.[463]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

Hawaii's law requiring reasonable accommodation for pregnancy, childbirth, or related medical conditions primarily focuses on leave accommodations; therefore, it is discussed in **3.9(c)(ii)**.

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[464] Multiple decisions of the U.S. Supreme Court[465] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[466] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see **LITTLER ON HARASSMENT IN THE WORKPLACE** and **LITTLER ON EMPLOYEE TRAINING**.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in Hawaii.

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[463] 29 C.F.R. § 1636.3.

[464] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[465] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[466] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

Hawaii does not have a general whistleblower law addressing protections for private-sector employees. The Hawaii Whistleblowers' Protection Act provides protections for public employees.[467]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[468] and the Railway Labor Act (RLA)[469] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

Hawaii does not have a right-to-work law. The Hawaii Employment Relations Act gives employees the right of self-organization and the right to form, join or assist labor organizations, to collectively bargain, and

[467] HAW. REV. STAT. § 378-70.

[468] 29 U.S.C. §§ 151 to 169.

[469] 45 U.S.C. §§ 151 *et seq*.

engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.[470] The Act also makes it an unfair labor practice for an employer to interfere, restrain, or coerce their employees in the exercise of these rights.[471]

An employer also may not encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. Employers may not deduct labor organization dues or assessments from an employee's earnings, unless the employer has received written authorization from the employee.[472]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[473] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[474] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

Under Hawaii's mini-WARN statute, a covered employer must provide at least 60 days' notice to affected employees and the Hawaii Department of Labor and Industrial Relations prior to a closing, divestiture, partial closing, or relocation.[475] A covered *employer* is an industrial, commercial or other business entity that has employed 50 or more workers at any time in the preceding 12-month period.[476]

Triggering events include:

- **Closings.** The permanent shutting down of all operations within a covered establishment because of a sale, transfer, merger, other business takeover or transaction of business interests, bankruptcy or other close of business transaction that results in, or may result in the layoff or termination of employees.

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[470] HAW. REV. STAT. § 377-4.

[471] HAW. REV. STAT. § 377-6.

[472] HAW. REV. STAT. § 377-6.

[473] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[474] 20 C.F.R. §§ 639.4, 639.6.

[475] HAW. REV. STAT. § 394B-9.

[476] HAW. REV. STAT. § 394B-2.

- **Partial Closings.** The permanent shutting down of a portion of operations within a covered establishment because of a sale, transfer, merger, takeover, or other business transaction that results in, or may result in, the termination of a portion of the workforce of the establishment.
- **Relocations.** The removal of all, or substantially all, of the covered establishment's industrial, commercial, or business operations to a location outside of Hawaii.
- **Divestiture.** The transfer of a covered establishment from one employer to another because of the sale, transfer, merger, bankruptcy, or other business takeover or transaction of business interest that causes the establishment's employees to become dislocated workers.[477]

Written notice to affected employees must include:

- the date of proposed closing, partial closing or relocation; and
- information that the employee may be eligible for dislocated worker allowance for which the employee must receive a determination of eligible for unemployment compensation from the department.

Written notice to the department must include:

- name and address of the employer;
- person to contact;
- date of the closing, partial closing, or relocation;
- number of employees at the covered establishment; and
- approximate number of employees to be laid off or terminated.[478]

An employer of a covered establishment that is actively seeking a buyer for sale, transfer, or merger is not required to provide the required notice until it has entered into a binding agreement for the sale, transfer, or merger of the covered establishment that results in a divestiture.[479]

State Enforcement, Remedies & Penalties. The employer must pay a dislocated worker allowance to each employee who applies for and is found eligible for unemployment compensation for a particular week based at least in part upon employment in the closed, partially closed, or relocated plant. An affected employee is eligible to receive the allowance if the employee:

- was laid off or terminated as a result of a closing, partial closing, or relocation;
- has not received any supplemental unemployment compensation benefits pursuant to a collective bargaining agreement; and
- filed a claim to receive the allowance in accordance with the employer's procedures.

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[477] HAW. REV. STAT. § 394B-2.

[478] HAW. CODE R. § 12-506-7.

[479] HAW. REV. STAT. § 394B-9.

A *dislocated worker* is an individual who:

- has been terminated or laid off (or has received notice of termination or layoff), is eligible for or has exhausted entitlement to unemployment compensation, and is unlikely to return to the person's pervious industry or occupation;
- has been terminated (or has received a notice of termination of employment) as a result of any permanent closure of a business, partial closing, or relocation; or is long term unemployed and has limited opportunities for employment or reemployment in the same or a similar occupation in the area where the individual resides (including older individuals who have substantial barriers to employment because of age).[480]

Upon receipt of an eligibility determination, an employer must promptly make the payment to the employee. The employer must pay the difference between the employee's average weekly wages prior to the closing, partial closing, or relocation and the unemployment compensation weekly benefit amount, for up to four weeks. Receipt of the allowance does not affect an employee's eligibility for unemployment compensation or the amount of such benefits. A collective bargaining agreement that results in providing supplemental unemployment compensation benefits for an affected employee will supersede the above requirements.[481]

Covered employers must pay, on the effective date of a closing, partial closing, or relocation, all wages, benefits, and other forms of compensation due and owing to each affected employee.[482]

4.1(c) *State Mass Layoff Notification Requirements*

An employer that anticipates termination of a "mass separation" or large number of employees should contact the Unemployment Insurance Division to give notice of the scheduled layoff. The Unemployment Insurance Division will assist the employer in expediting claim service.[483]

The term *mass separation* means a separation (permanently or for an indefinite period or for an expected duration of seven or more days) of 50 or more workers, employed in a single establishment, at or about the same time and for the same reason whether or not there is a severance of the employment relationship.[484]

The department may take the initial claims of individuals who are affected by a mass separation as a group.[485]

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under federal law.

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480 HAW. REV. STAT. § 394B-2.

481 HAW. REV. STAT. § 394B-10; HAW. CODE R. § 12-506-8.

482 HAW. REV. STAT. § 394B-11.

483 HAW. CODE R. § 12-5-81(h).

484 HAW. CODE R. § 12-5-81(h).

485 HAW. CODE R. § 12-5-81(h).

Table 11. Federal Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[486] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[487]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 12 lists the documents that must be provided when employment ends under state law.

Table 12. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	No notice requirement located. Hawaii does not have an insurance coverage continuation statute.
Unemployment Notice	**Generally.** Hawaii does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, the employer generally must post, and provide a copy of, printed statements concerning benefit rights, claims for benefits, and other matters relating to unemployment. Accordingly, it is recommended that

[486] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[487] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

Table 12. State Documents to Provide at End of Employment	
Category	**Notes**
	an employer provide a copy of the unemployment notice when employment ends.[488] **Multistate Workers.** Whenever an individual covered by an election is separated from employment, an employer must again notify the individual as to the jurisdiction under whose unemployment insurance law such individual's services have been covered. If at the time of termination the individual is not located in the elected jurisdiction, an employer must notify the individual as to the procedure for filing interstate benefit claims. Additionally, employers should follow that state's general notice requirement, if applicable.[489]

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

References. Under Hawaii law, an employer that provides a prospective employer with information or opinion about a current or former employee's job performance is presumed to be acting in good faith and has qualified immunity from civil liability for disclosing the information and for the consequences of the disclosure. The good faith presumption can be rebutted only upon a showing by a preponderance of the evidence that the information or opinion disclosed was knowingly false or knowingly misleading.[490]

It is considered an unfair labor practice for an employer to make, circulate, or cause to be circulated an employee blacklist.[491] Blacklisting is the intentional prevention of the future employment of an employee by the former employer. Blacklisting usually occurs when the former employer makes representations to prospective employers that an individual should not be hired. It should be distinguished from a reference, which is essentially a request for information about job performance.

Reason for Firing. Hawaii does not require employers to provide explanations in writing to employees who have been involuntarily discharged. Per the state labor department, "an employer does not need to

[488] HAW. REV. STAT. § 383-31; HAW. CODE R. § 12-5-77. This notice is available at http://labor.hawaii.gov/wp-content/uploads/2015/11/Unemployment-Insurance-Poster20151110.pdf. It is included in Hawaii's all-in-one "Labor Law Poster."

[489] HAW. CODE R. 12-5-179.

[490] HAW. REV. STAT. § 663-1.95.

[491] HAW. REV. STAT. § 377-6.

give you a reason to let you go, lay you off, or fire you unless . . . you have a contract with the employer that requires you be notified of the reason."[492]

[492] Hawaii Dep't of Labor & Indus. Relations, *Illegal Termination from Your Job*, *available at* http://labor.hawaii.gov/wsd/illegal-termination-from-your-job/.