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Law and Practice

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Contents

Goodsill Anderson Quinn & Stifel offers a broad range of practices and our experienced team of over 50 attorneys can navigate the complexities of most legal matters relating to business in Hawaii. Our Labor and Employment practice group includes two partners and two associates. Together, they provide a complete range of services from initial counseling to appellate court practice, striving to assist employers in maintaining positive relations with their employees and avoiding the expense and disruption of litigation.

Authors

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1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 "Gig" Economy and Other Technological Advances

Since becoming a state in 1959, Hawaii politics has been dominated by the Democratic Party. The result is a legislature, executive and judiciary that has tended to favor promoting the rights of workers. Consequently, Hawaii law, regulation and judicial decisions tend to add a layer of protections for workers, and obligations for employers, on top of federal mandates. Worker protections also extend more comprehensively under Hawaii law because, while many federal laws impacting the employment relationship exempt smaller employers (those with fewer than 15 or 20 employees), most Hawaii laws impacting the employment relationship apply to all employers, regardless of number of employees.

1.2 "Me Too" and Other Movements

With the advent of the #Me Too movement, Hawaii has experienced legislative attention to #Me Too issues such as the disclosure of sexual harassment settlements. To date, the efforts in this regard have been unsuccessful.

1.3 Decline in Union Membership

Hawaii remains a strong union state, with arguably the highest rate of unionized workforce in the US. It has not seen the decline in private sector union membership that other US markets may have experienced.

1.4 National Labor Relations Board

There are no Hawaii-specific issues related to the National Labor Relations Board (NLRB). What is challenging for employers doing business in the US is the often-changing direction of labor relations law under the NLRB due to changes in the political party controlling the executive branch.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

In deciding how to structure the relationship between the entity and those performing work on its behalf, it is critical to understand how the relationship will be characterized under local law, regardless of how the parties involved may choose to characterize the relationship. Failing to properly classify a relationship as one of employment when this is dictated by law can result in liability for, among other things, failure to withhold and pay taxes, failure to provide benefits and the consequences thereof, and failure to properly pay minimum wage or overtime amounts due.

Each law applicable to the employment relationship defines 'employee' or 'employment'. In general, Hawaii law does so expansively, often incorporating relationships the parties may have characterized differently.

Examples of this are the test to define employment under unemployment insurance, temporary disability insurance and prepaid health care (the latter two both being state mandated benefits in Hawaii for employees working 20 or

more hours per week). Under those laws, payment for services creates a presumption of an employment relationship. The entity bears the burden of demonstrating otherwise by showing:

- the individual is free from control by the entity over the performance of such service;
- the service is either;
  (a) outside the usual course of the entity's business; or
  (b) performed outside of all the entity's places of business; and
- the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature.

Recent state appellate court decisions held this language to control and dictate the existence of an employment relationship between an entity and individuals contracted to provide merchandising services. Spar Mktg. Servs., Inc. v. Dep't of Labor & Indus. Relations, Employment Sec. Appeals Referees' Office, 144 Haw. 122, 436 P.3d 1205 (Ct. App. 2019); Spar Mktg. Servs., Inc. v. Dep't of Labor & Indus. Relations, Employment Sec. Appeals Referees' Office, 144 Haw. 70, 435 P.3d 1084 (Ct. App. 2019).

Under these tests, individuals performing the work the entity holds itself out as providing will generally be construed to be employees, regardless of whether the parties sought to characterize their relationship as one of independent contractor or franchisee. Examples of structures that should avoid this characterization would be entities that merely provide a platform for the exchange of services. Where the entity does not hold itself out as in the business of the services provided, merely a referral business, it may be able to safely characterize the service providers as independent contractors. US Department of Labor, FLSA2019-6.

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

Within the context of an employment relationship there are a number of classifications to consider.

At-will vs. Contractual

Under Hawaii law, employment is 'at-will' unless there is some promise, express or implied, between the parties to the contrary. Under at-will employment either party may terminate the relationship at any time for any lawful reason, with or without notice, without further liability.

An employer may create a contractual employment relationship by express written agreement such as an individual employment agreement or a collective bargaining agreement. These agreements can govern many aspects of the employment relationship from term, pay, benefits, bases for termination and processes for grieving disputes.

An employer may also inadvertently bind itself to certain terms of employment. This can occur through its own policy statements or rules, in a manual or otherwise, by effectively encouraging employees to rely upon them. For instance, where an employer sought to stem a union organizing drive by distributing rules stating permanent employees would not be discharged without investigation and that employees had a right to grieve unfair treatment and obtain a hearing, and later issued a memorandum stating that the employer's written arrangements constituted an enforceable contract, the employer could not summarily discharge two employees following their arrest on suspicion of conspiracy to promote cocaine without affording the employees the due process promised by the employer's policies. (Kinoshita v. Canadian Pac. Airlines, Ltd., 68 Haw. 594, 724 P.2d 110 (1986)).

Employees seeking to preserve the at-will nature of the relationship should take care to ensure the language of offer letters, employment policies and handbooks clearly articulate the nature of the at-will employment relationship and do not create binding obligations that limit the employer's ability to terminate the relationship or create other commitments that lessen the employer's autonomy in the workplace.

Limits of At-Will Employment

Notwithstanding the nominal status of employment as 'at-will', decisions by the Hawaii Supreme Court effectively require employers to treat employees as subject to a 'for cause' basis for termination.

The Hawaii Supreme Court has required that employers seeking summary judgment in employment cases provide admissible evidence of their reasons for challenged employment decisions that are related to the ability of an employee or applicant to perform the work in question. Adams v. CDM Media USA, Inc., 135 Haw. 1, 346 P.3d 70 (2015).

The Adams case and subsequent decisions create a legal environment where employers should make decisions as if a for-cause standard for termination exists. Thus, reasons for an employer's decisions that are not related to an individual's ability to perform the job, not previously disclosed, or not related to genuine operational, business or budgetary needs may not be viewed as legitimate and should not be relied upon to defend a challenged decision. Employers should document all employment decisions in regular business records that can serve as admissible evidence of the legitimate business reasons for employment decisions.

Joint Employment

Joint employment issues may still exist under possible interpretations of Hawaii law, notwithstanding more employer-oriented positions under federal law in this area.

Franchising
Franchising arrangements may be subject to scrutiny as potential employment relationships and should be structured with consideration for the described tests for employment in Hawaii law.

Exempt vs. Non-Exempt Status and What That Means
The federal Fair Labor Standards Act (FLSA) provides that employers must pay employees a minimum wage of USD7.25 per hour and must pay an overtime rate of one and a half times the employee's straight time wage for workweek hours in excess of 40. Hawaii has its own wage and hour law (HRS chapter 387) which generally provides greater worker protection than the FLSA. Because Hawaii currently mandates a minimum wage of USD10.10 per hour, covered Hawaii employers are bound by the higher minimum wage. Because the FLSA and Hawaii law both have a 40-hour maximum workweek, after which overtime is owed, the FLSA controls most overtime claims.

There are three principal 'white-collar' exemptions recognized in the FLSA and Hawaii law. In addition, Hawaii law exempts any employee at a guaranteed compensation totaling USD2,000 or more per month (HRS § 387-1). As a result, Hawaii overtime law is often not applicable.

The three principal exemptions to the minimum wage and overtime requirements are for 'executive', 'administrative' and 'professional' employees. To qualify for the exemption, the employee must perform exempt duties and meet the salary requirements.

For executive exemption, the employee's primary duty must be management of the enterprise or a customarily recognized department or subdivision. The employee must customarily and regularly, direct the work of two or more other employees. The employee must have the authority to hire or fire employees and their recommendations must be given particular weight.

For administrative exemption, the employee's primary duty must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers". The primary duty must include "the exercise of discretion and independent judgement with respect to matters of significance."

For professional exemption, the employee's primary duty must be performing work requiring knowledge of an advanced type in a field of science or "learning customarily acquired by a prolonged course of specialized intellectual instruction" (learned professional) or "requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor" (creative professional).

The salary requirements to maintain the exemption include payment of a threshold amount and payment on a 'salary basis'. The minimum salary amount for exemption is currently USD455 per week or USD23,660 per year. On 24 September 2019 the US Department of Labor implemented a final rule increasing the salary level to USD684 per week or USD35,568 per year, effective 1 January 2020. Under the new rule, up to ten percent of the salary amount may be satisfied by the payment of non-discretionary bonuses, incentives and commissions, that are paid annually or more frequently. Also under the new rule, if by the last pay period of the year or other 52-week period the employer designates the sum of the employee's weekly salary plus non-discretionary bonus, incentive, and commission payments received is less than 52 times the weekly salary amount, the employer may make one final payment sufficient to meet the required level no later than the next pay period, which payment will count only toward the prior year's salary amount. Otherwise, payment on a 'salary basis' means that the employee receives "a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed". There are a limited number of exceptions to the requirement to pay the full weekly salary and any practice of making improper deductions from salary can result in loss of the exemption during the period of the practice for employees in similar positions. To avoid the potential loss of the exemption, employers should maintain a policy prohibiting improper deductions from salary and provide a procedure for reporting and correcting any improper deductions that do occur.

In addition to the above exemptions, the FLSA and Hawaii law contain exemptions for outside sales employees, certain computer employees and numerous less-frequently encountered exemptions. These include exemptions for employees of retail or service establishments paid on a commission basis; agricultural employees; employees of seasonal recreational establishments, camps, or religious or nonprofit educational conferences; employees engaged in fishing or first processing at sea of aquatic products; casual-basis babysitters and domestic companionship service providers; employees covered under the Motor Carrier Act; railroad employees; air transportation employees; seamen; announcers, news editors or chief engineers of certain small market radio or television stations; certain employees of auto, truck or farm implement dealers; and salespersons of trailers, boats and aircraft.

Employers should identify any potential exemptions and, for all positions, maintain up-to-date position descriptions that accurately state the duties of the position and identify the exempt/non-exempt status.

Supervisory Status
The National Labor Relations Act (NLRA) gives employees the right to engage in protected, concerted activities to, among other things, improve their wages, benefits and working conditions, and to support and join a union. 'Supervisors' are exempt from the NLRA and therefore may not vote in a union election and are not protected by the NLRA if an employer takes employment action based on union-related activities. In addition, supervisory employees may be enlisted in an employer's efforts to avoid successful union organizing. For these reasons, it is critical to accurately classify supervisory employees.

Under the NLRA, a 'Supervisor' must have authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action" (29 U.S.C. §152(11)). Exercise of this authority must not be merely routine or clerical in nature but must require the individual to use 'independent judgment'.

Employers should be able to document instances of exercise of this authority in order to demonstrate supervisor status.

2.3 Immigration and Related Foreign Workers
One of the most significant issues related to foreign workers in Hawaii is the employment of expatriates from Asian companies doing business in Hawaii. Care needs to be exercised to ensure that the proper work authorizations and visas are obtained and kept current.

2.4 Collective Bargaining Relationship or Union Organizational Campaign
Union organizing campaigns have been on a steady decline in Hawaii, similar to trends seen on the US Mainland.

3. Interviewing Process

3.1 Legal and Practical Constraints
A legally compliant recruiting process should begin with up to date position descriptions for positions, open for applicants, that accurately identifies the essential duties and required qualifications for the position. This focuses recruiting on the ability of candidates' to perform the functions of the job.

In 2018, Hawaii enacted a prohibition on employers inquiring about or considering an applicant's pay history during the hiring process or negotiation of an employment contract. This was motivated by the legislative determination that enquiries of this kind contributed to gender pay disparities. This new law does not prohibit employers from discussing an applicant's expectations regarding salary, benefits and other compensation. Additionally, if the applicant voluntarily and without prompting discloses salary history, an employer may consider it in determining salary, benefits, other compensation, and may verify the applicant's salary history. Prohibited inquiries include those made to the applicant, current or prior employers and searches of publicly available records.

Federal and state antidiscrimination laws create boundaries for inquiries in the hiring process, including interviews. Federal discrimination law prohibits private employers from discriminating on the basis of race, color, religion or creed, national origin or ancestry, citizenship, sex, age, disability, genetic information and veteran status.

Hawaii law adds to this list of protected categories and includes: gender identity and expression, sexual orientation, marital status, arrest and court record, reproductive health decisions, domestic or sexual violence victim status, breastfeeding or expressing milk at the workplace, credit history, work injury, bankruptcy and assignment of income for child support.

As a result, an employer should not directly or indirectly inquire about any of the above areas during the interview process. Interviewers should be trained accordingly, and focus on the applicant's ability to perform the functions of the job. Any prohibited inquiry may be considered an unlawful act.

Hawaii employers may consider criminal convictions only after making a conditional offer of employment. Employers may only take action based on convictions occurring in the previous ten years, excluding periods of incarceration, if the conviction bears a "rational relationship to the duties and responsibilities of the position" (HRS §378-2.5).

After making a conditional offer of employment, Hawaii employers may consider credit history if it constitutes a bona fide occupational qualification (BFOQ) for the position and may withdraw the offer if information in the credit history or report is directly related to the BFOQ (HRS §378-2(a)(8) and §378-2.7(a)(1)). To establishing a BFOQ, the employer must show that the employee's credit history or report is reasonably necessary to the normal operations of the business and has a substantial relationship to the functions and responsibilities of the position. The Hawaii Civil Rights Commission provides the example of a position that requires an employee to be bonded in order to perform the duties and responsibilities of the position. The prohibitions against discriminating on the basis of credit history or report do not apply to supervisory or managerial employees, federally insured financial institutions or to employers who are expressly permitted or required by federal or state law to inquire into credit history for employment purposes (HRS §378-2(a)(2), (3) and (4)).

4. Terms of the Relationship

4.1 Restrictive Covenants

Hawaii law voids non-compete or non-solicitation clauses "in any employment contract relating to an employee of a technology business" (HRS §480-4(d)). A 'noncompete clause' in this context means a post-employment restriction from working in a specific geographic area for a specific period of time after leaving employment. A 'nonsolicit clause' means a post-employment restriction on soliciting the employer's employees (not customers). A technology business means one that derives the majority of its gross income from the sale or license of products or services resulting from its software development or information technology development, or both. It does not include broadcast industry or telecommunications carriers.

Notwithstanding the above, Hawaii courts have been receptive to enforcing reasonable post-employment restrictions in the form of non-competition or non-solicitation provisions in employment contracts. Although the published case law is limited, the Hawaii Supreme Court has twice upheld three-year post-employment non-compete agreements (Technicolor, Inc. v. Traeger, 57 Haw. 113, 551 P.2d 163 (1976); 7's Enterprises, Inc. v. Del Rosario, 111 Haw. 484, 143 P.3d 23 (2006)).

In both cases, the Hawaii Supreme Court upheld injunctions against the former employee continuing in competing employment. Hawaii courts will analyze such agreements for 'reasonableness'. They must be supported by adequate consideration, be based on protecting a 'legitimate business reason' and be reasonable in geographic scope, duration and breadth of restriction on a given activity.

In deciding whether the duration of a restrictive covenant is reasonable, Hawaii courts will analyze whether the duration of the restraint:

- is necessary for the protection of the legitimate interests of the employer;
- will not injure the employee by precluding the employee from pursuing his or her occupation and thus preventing him or her from supporting him or herself; and
- will not interfere with the public interest by depriving it of the restricted party's industry or services.

Hawaii recognizes that protecting special employer-designed training that is often confidential and proprietary to the employer's business, may constitute a legitimate business interest properly protectable by a covenant not to compete (7's Enterprises).

The Hawaii federal district court has followed Hawaii state court holdings to enjoin reasonable limits on post-employment solicitation of customers by sales employees with knowledge of customer preferences that likely constituted trade secrets (UARCO Inc. v. Lam, 18 F.Supp.2d 1116 (Haw. Dist. 1998)). More recently, a Hawaii federal district court decision held that continuing at-will employment constituted adequate consideration to support the enforcement of non-competition provisions of employment agreements, predicting that the Hawaii Supreme Court would follow the holdings of a majority of other state holdings to that effect (Standard Register Co. v. Keala, 2015 WL 3604265 (Haw. Dist. June 8, 2015)).

Given the limited case law, however, questions remain about the enforceability of restrictive covenants. For instance, there are no holdings indicating whether it is appropriate for a Hawaii court to reform or 'blue pencil' a restrictive covenant that is overbroad and enforce a narrower restriction.

As a result, prudent Hawaii employers limit their use of post-employment restrictions on competition, and only enter such agreements with employees in a position that threatens to unfairly deprive the employer of business. These agreements should be no broader than necessary in terms of activity restrictions, scope and duration in order to have the best chance of surviving judicial scrutiny.

An additional consideration for any employer considering legal action to enforce a restrictive covenant is an attorneys' fee-shifting provisions. The traditional 'American Rule' regarding attorneys' fees is that each party to litigation bears their own attorneys' fees in the absence of a specific statutory or contractual basis for deviating from that rule. By statute, if an employee, or former employee, prevails in litigation involving the interpretation or enforcement of an agreement purporting to restrict the employee from competing with an employer or former employer, "the employee who prevails shall be awarded reasonable attorneys' fees and costs" (HRS §607-14.9).

4.2 Privacy Issues

Hawaii law allows employers to protect trade secrets from misappropriation. 'Trade secrets' include information that has value in being secret and that a business takes measures to keep secret (HRS §482B-2). The Federal Defend Trade Secrets Act (DTSA) contains a similar definition of 'trade secret' and now provides a federal right of action to enforce trade secret misappropriation (18 U.S.C. §1839(3)). The remedies provided for under state and federal law are similar. However, to be entitled to the full measure of relief under the DTSA, employers must provide a notice to employees of DTSA immunity and anti-retaliation provisions.

It is imperative that businesses take reasonable steps to identify and protect trade secret information, as failing to do so will result in lack of protection. This should include requiring employees with access to sensitive information to enter non-disclosure agreements as a condition of employ-

ment. This may include non-competition and non-solicitation agreements with appropriate employees. This may also include marking secret documents and files as confidential and adopting and implementing policies and practices to limit physical and electronic access to files or allow for their reproduction. This extends to equipment, facilities and other sources or repositories of company trade secrets.

4.3 Discrimination, Harassment and Retaliation Issues

Federal and Hawaii law bars discrimination in employment on the basis of a number of protected categories. See **3.1 Legal and Practical Constraints** for further details. Under federal law, age claims may only be brought by workers 40 years of age or older. Hawaii law prohibits age discrimination without such limitations.

Harassment, in relation to the protected categories, is when that conduct is made a term or condition of employment, when submission to, or rejection of, that conduct is used as the basis for employment decisions, or when the conduct has the purpose or effect of unreasonably interfering with an individual's work performance (HAR §12-46-109). Federal law affords employers an affirmative defense to claims of sexual harassment by supervisors where the plaintiff has not suffered an adverse employment action, the employer has exercised reasonable care to prevent and promptly correct harassing behavior and the employee unreasonably fails to take advantage of preventive or corrective opportunities the employer provided (Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 724 (1998)). However, Hawaii law makes employers strictly liable for sexual harassment by its agents and supervisory employees (HAR §12-46-109(c)).

When sexual harassment occurs between co-workers, or between employees and non-employees, an employer may be liable when the employer, its agents or supervisory employees know or should know of the conduct and fail to take immediate and appropriate corrective action (HAR §12-46-109(d) and HAR §12-46-109(e), respectively).

Under federal discrimination law, actions must be brought against 'employers' which does not include individuals. Under Hawaii discrimination law, however, there is potential for individual liability. Hawaii law makes it unlawful for "any person, whether an employer, employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the discriminatory practices forbidden" by the prohibitions against discrimination and retaliation (HRS §378-2). As interpreted by a recent court, a CEO and human resources director who allegedly ignored the plaintiff's complaints about harassment and failed to investigate could face potential liability for aiding and abetting harassment (Sirois v. East West Partners, Inc., 285 F.Supp.3d 1152 (Haw. Dist. 2018)).

Potential monetary remedies vary significantly between federal and Hawaii anti-discrimination law. Under federal discrimination law, Title VII of the Civil Rights Act of 1964, there are statutory caps on the total amount of compensatory and punitive damages a plaintiff can recover in a case, depending on the size of the employer:

- for employers with 15-100 employees, the limit is USD50,000;
- for employers with 101-200 employees, the limit is USD100,000;
- for employers with 201-500 employees, the limit is USD200,000; and
- for employers with more than 500 employees, the limit is USD300,000.

Monetary damages for age discrimination claims under the federal Age Discrimination in Employment Act are limited to recovery of lost wages and a potential award of 'liquidated damages' in an amount equal to an award of backpay.

Hawaii law does not place any of the above limitations on recovery of damages. Hawaii discrimination law allows affirmative remedies including hiring, reinstatement, upgrading of employees, backpay, injunctive relief, payment of compensatory damages, payment of punitive damages, payment of reasonable attorneys' fees, posting of notices and reporting on the manner of compliance (HRS §368-17 and §378-5).

4.4 Workplace Safety

Workplace safety regulation is accomplished primarily through the Hawaii state agency (HIOSH).

4.5 Compensation and Benefits

While the Employee Retirement Income Security Act (ERISA) and Comprehensive Omnibus Budget and Reconciliation Act (COBRA) govern aspects of employee benefits nationally, Hawaii law creates additional benefit obligations employers must consider.

Health Benefits

Hawaii law requires employers to provide prepaid health care coverage for employees working 20 or more hours per week. Employers may secure coverage through purchase of approved health care plans, adopting an approved self-insured plan or negotiating a collective bargaining agreement.

Employer-provided health coverage must meet certain benefit thresholds and must be approved by the Hawaii Department of Labor and Industrial Relations (DLIR).

Employees become eligible for coverage after working four consecutive weeks at 20 or more hours per week. An employ-

ee may claim an exemption by annually completing a form HC-5 notifying their employer they are:

- covered by Medicare, Medicaid, medical care benefits for military dependents, retirees and their dependents or other federally established prepaid health care plan;
- covered as a dependent under another qualified health care plan;
- receiving public assistance or covered by a State-legislated heath care plan; or
- a follower of a religious group that depends on prayer or other spiritual means for healing.

Employers may not require eligible employees to pay more than 1.5% of the employee's monthly wages toward the premium cost.

In the event a covered employee becomes disabled from working, the employer must continue its share of premium costs for three months following the month in which the employee became disabled or the period the employer has undertaken to pay the employees regular wages, whichever is longer. Hawaii law does not contain any provisions that afford employees, or their dependents covered under employer provided health plans, greater notice or benefit continuation rights than available under COBRA.

Employers that fail to comply may be subject to penalties. Furthermore, a non-compliant employer may become "liable to pay for the health care costs incurred by an eligible employee during the period in which the employer failed to provide coverage" (HRS §393-24).

Temporary Disability Insurance (TDI)

Hawaii law requires employers to maintain insurance coverage to provide partial wage replacement for eligible employees who suffer non-work-related injury or illness, including pregnancy. Employees become eligible after working 14 weeks for 20 hours or more. Employers may provide coverage by purchasing an insured plan from a list of carriers approved by the DLIR or adopting a DLIR-approved self-insured plan.

Employees are entitled to 58% of their average weekly wages up to a maximum weekly benefit amount, set by the DLIR, from the 8th day of disability and for a maximum of 26 weeks.

Employers cannot require employees to contribute more than 0.5% of the employee's weekly wages to the premium costs for TDI.

Family and Medical Leave

The federal Family and Medical Leave Act (FMLA) requires private sector employers with 50 or more employees to allow eligible employees up to 12 weeks of job protected unpaid leave per year to cover the employee's or a family member's serious health condition or to engage in qualifying exigencies related to a family member's military service, and up to 26 weeks to care for a covered servicemember with a serious injury or illness.

Hawaii law requires employers with 100 or more employees in Hawaii to provide up to four weeks of job protected leave per year to care for a family member with a serious health condition or because of the birth, adoption or foster placement of a child (HRS §398-3). Unlike the FMLA, the Hawaii Family Leave Law (HFLL) does not cover time off for the employee's own serious health condition.

While there is significant overlap in the coverage of the FMLA and HFLL that would allow an employer to simultaneously reduce an employee's leave entitlement under both laws (eg, the employee takes time off to care for a child with a serious health condition), there are also many technical differences that can cause one, and not the other, to apply. For instance, an employee who takes 12 weeks off for her own surgery and recovery would exhaust their FMLA entitlement but would still be eligible to take four weeks, if necessary, to care for a parent with a serious health condition.

Other differences in the laws can cause similar lack of overlap, such as the work requirements required to become eligible (FMLA: 12 months and 1250 hours in the preceding 12 months; HFLL: six consecutive months), and varying coverage of family members for whom an employee may take time off to care for (eg, HFLL covers grandparents, parents- and grandparents-in-law and siblings, which FMLA does not, and FMLA includes 'in loco parentis' relationships, which HFLL does not).

Hawaii law, applicable to all employers, adds protections for women disabled due to pregnancy, childbirth or related medical conditions. This includes "mak[ing] every reasonable accommodation" (HAR §12-46-108). Specifically, Hawaii law requires employers to permit job-protected leave for a reasonable period of time, as determined by the employee's physician (HAR §12-46-108). Employers may request a doctor's certificate estimating the length of leave and the commencement and termination dates, but the law makes no provision for further opinion or inquiry except that the employer may request a return to work certificate. There is no provision for denial of such leave or other reasonable accommodation based on undue hardship.

Hawaii requires employers to provide leave when employees or their minor children are victims of domestic or sexual violence (HRS §378-72). Employers with 50 or more employees must provide up to 30 days leave per calendar year for this reason. Smaller employers must provide up to five days leave per calendar year. Employers must also consider reasonable workplace accommodations (that do not cause undue hard-

ship) for employees who are victims of domestic or sexual violence, such as changing contact information or work location, screening calls, restructuring job functions, installing locks or other security devices, or allowing flexible hours.

Hawaii law also requires that employers with 50 or more employees provide eligible employees up to seven days absence per calendar year to serve as a bone marrow or peripheral blood stem cell donor and up to 30 days per calendar year to serve as an organ donor. This leave may not be taken concurrently with FMLA or HFLL leave and may be taken in one or more periods.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

Employers may have a range of legitimate reasons to terminate an employment relationship, from individual employee conduct, performance concerns or policy violations to business needs including reorganizations, reductions in workforce or other economic needs. Constructive terminations may also occur, for instance due to intolerable working conditions or when triggered by change in control provisions in an employment agreement.

Employers considering any termination must initially determine whether there are any contractual limits on the employer's ability to terminate the relationship or whether the relationship is at-will. If there is an individual employment contract, a collective bargaining agreement or other actual or implied contractual constraint, the employer must consider those limitations. These may include for cause standards for termination, applicable grievance procedures or severance benefits.

An employer should evaluate the risk of potential legal claims that may result from the termination. When termination is for performance or behavioral reasons, the employer should evaluate whether the employer has admissible evidence documenting that:

- the expectations violated and potential consequences were clearly communicated to and understood by the employee prior to the incident leading to discharge;
- the employer has properly investigated the final incident including consideration of the employee's explanation or excuse and can articulate why that is not sufficient; and
- any differences in treatment of other employees for similar issues can be explained as based on non-protected factors.

An employer should assess the risks of discrimination claims by considering any protected categories into which the employee may fall, and whether others outside the protected category have been treated more favorably for similar conduct or performance. An employer should assess retaliation/whistleblower claims by considering whether the employee has engaged in protected conduct, such as taking protected leave, reporting discrimination, harassment, law violation, safety or other concerns or participating in an investigation, and if so when and whether that is influencing the termination decision. An employer should assess whether anyone making or influencing the termination decision harbors discriminatory or retaliatory animus in making decisions contributing to the termination, such as prior discipline, and be able to demonstrate why termination remains appropriate, notwithstanding improper animus if it exists.

In the event termination(s) result from reorganization, reduction in workforce, or other business or economic reasons, the employer should thoroughly document the legitimate business or economic justification and ensure any criteria used to select employees for termination are objective and that no protected class of employees is disproportionately impacted.

In the event of terminations resulting from a reduction in force or closure or transfer of business operations, employers must consider the applicability of the federal Worker Adjustment and Retraining Notification (WARN) Act or Hawaii's Dislocated Worker Act (DWA).

WARN applies to employers with 100 or more full time employees or 100 or more employees collectively working at least 4,000 hours per week, excluding overtime. The law requires employers to provide 60-days' notice to union representatives, affected non-union employees, state dislocated worker units and the chief local elected official upon a plant closing or mass layoff. A 'plant closing' is a permanent or temporary shutdown resulting in at least 50 employees losing employment. A 'mass layoff' is a reduction in force, not a result of a plant closing, that results in 50 or more full time employees, who make up at least 33% of active employees, or at least 500 full time employees losing employment.

The DWA requires covered establishments (50 or more employees) to provide employees and the Director of Labor and Industrial Relations 60-days written notice of a closing, divestiture, partial closing, or relocation. 'Closing' means the permanent shutting down of all operations within a covered establishment due to the 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 of a covered establishment by the employer. Covered establishments are businesses with 50 or more employees.

Because the law covers a 'partial closing' which includes "the permanent shutting down of a portion of operations within a covered establishment..." for triggering reasons, the 60-day

notice may be required when fewer than 50 employees are affected (HRS §394B-2). Employers who fail to provide the required notice owe affected employees an amount equal to back pay and benefits for the period of violation, not to exceed 60 days and reduced by any wages unconditionally paid during the notice period. If an employer fails to pay the employee wages for 60 days after a notice was required, the employer is subject to a civil penalty, not to exceed $500 for each day of violation. The DWA requires employers to pay, to affected employees who apply, a dislocated worker allowance for four weeks in the amount of the difference between the employee's average weekly wages prior to closing and the employee's weekly unemployment compensation benefits received.

Where the employer perceives a risk of claims resulting from the termination, the employer should consider whether offering a separation agreement, providing consideration to the employee in exchange for a waiver of claims, is warranted. In preparing this agreement, employers should include a valid waiver of federal age claims for any employee 40 years of age or older.

A valid waiver of federal age claims must be 'knowing and voluntary'. This means the separation agreement containing an age waiver must be in writing and in language that the employee(s) can understand (plain language, without technical jargon or long, complex sentences). The agreement must specifically refer to rights arising under the Age Discrimination in Employment Act (ADEA). The agreement should state the individual does not waive claims arising after the date the waiver is executed. The employee must receive consideration in addition to anything of value to which the employee is already entitled. The agreement should explicitly recite that the employee "is advised to consult an attorney prior to executing this Agreement".

For individual terminations, employees must be given at least 21 days to consider the agreement. For an exit incentive or other termination program offered to a group or class of employees (two or more), the employees must be given at least 45 days to consider the agreement. The employee may sign and return the agreement before the end of the consideration period and thereby waive the balance of the period, so long as it is done voluntarily. After executing the agreement, the employee must be given at least seven days to revoke the agreement. The agreement shall not become effective until the revocation period has expired.

If the waiver is requested in connection with an exit incentive or other termination program, the employer must provide each employee, at the beginning of the consideration period, information written in a manner that is understood by the average individual eligible to participate, information relating to any class, unit, or group of individuals covered by such program, any eligibility factors, and any applicable time limits and the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected (29 U.S.C. §626(f); 29 C.F.R. §1625.22).

In all cases, the employer should consider any potential alternatives to termination. This could include further counseling, performance improvement plans, a last chance agreement or final warning, or whether there are other positions the employee might be suited to. When business or economic reasons are at play, employers should consider whether other cost savings approaches such as reductions in pay, hours or production or transfers are feasible alternatives.

When the employer decides to terminate, they should document the basis for the decision and prepare the appropriate individuals to communicate the decision to the employee. Employers must consider potential security concerns if there is any basis for believing the employee has the potential to respond to the termination with violence. This may include contacting local law enforcement or private security to be present or on the premises during a termination meeting.

Terminations for performance or conduct reasons, in particular, should take place in a timely manner once the decision is made. Allowing time to pass, particularly if the employee continues to attend work, can undermine the legitimacy of the termination.

Termination meetings should be brief and should not be allowed to degenerate into extended discussion or argument with the employee regarding the reasons. The employer should have the employee's final paycheck ready to deliver at the time of discharge unless the discharge occurs at a time, and under conditions, which prevent an employer from making immediate payment, in which case payment should be no later than the working day following discharge (HRS §388-3).

The employee should be reminded of any applicable post-employment restrictions on competition, solicitation or disclosure of confidential information. Employers should ensure any employer property is returned and the employee's physical and electronic access to employer facilities is disabled.

6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

6.1 Contractual Claims

Any contractual claim brought in Hawaii must arise from an actual or implied agreement that negates the at-will status of employment in Hawaii. Hawaii law does not recognize a generalized claim for 'wrongful termination'.

6.2 Discrimination, Harassment and Retaliation Claims

Employers may face discrimination, harassment or retaliation claims during all stages of the employment relationship and even outside of establishing an employment relationship. Claims can come from applicants that are rejected or not provided reasonable accommodation in the hiring process or that are subject to unlawful recruiting practices. Claims can also arise after the employment relationship has ended, for instance, if the claim involved an allegation of a retaliatory negative job reference.

6.3 Wage and Hour Claims

The FLSA requires that employers pay non-exempt employees a minimum wage of USD7.25 per hour and overtime at time and a half for hours worked in excess of 40 in a workweek. However, he FLSA generally defers to local legislation when more favourable to employees, Therefore, because Hawaii law imposes a higher minimum wage of USD10.10 per hour, this overrides the FLSA's miminum wage provisions in Hawaii.

Minimum wage and overtime claims can arise in a variety of contexts. Employers may improperly classify employees as exempt when the position fails to meet the duties necessary for exempt status or because the employer fails to properly pay the employee on a salary basis. Employers may improperly classify individuals as independent contractors when the economic realities of the relationship mean the individual is legally an employee. Employees may be performing work off the clock or time worked may not be properly recorded and paid.

When employers fail to pay minimum wage or overtime, the FLSA and state law create causes of action to recover unpaid wages. Under the FLSA, employees may recover unpaid wages going back two years unless the violation was willful, in which case the employee may recover unpaid wages going back three years. Employees seeking to recover under Hawaii statutes have the benefit of a six-year statute of limitations. Furthermore, employees may rely upon the Hawaii payment of wages statute to effectively enforce otherwise stale FLSA claims for unpaid overtime or minimum wages, notwithstanding the two or three-year limitations period applicable to the FLSA (Fabro v. Aqua-Aston Hospitality, LLC, 2017 WL 449587, 2017 Wage & Hour Cas.2d (BNA) 32, 608 (Dist. Haw. February 2, 2017); Pelayo v. Platinum Limousine Services, Inc., 2015 WL 5768949, 2015 Wage & Hour Cas.2d (BNA) 321, 736 (Dist. Haw. September 30, 2015)).

Employers failing to pay minimum wages or overtime may also be liable for liquidated damages in the amount equal to the unpaid wages, if the failure was not in good faith, based on reasonable grounds for believing the employer's action was not in violation of the FLSA or, under Hawaii law, was without equitable justification (20 U.S.C. §216(b) and §260; HRS §388-10).

6.4 Whistle-blower/Retaliation Claims

There are a number of federal and state statutes that provide protections for employees who report violations of law or government contracts. Examples include the whistleblower protections of the 2002 Sarbanes-Oxley Act (SOX), expanded by the 2010 Dodd Frank Wall Street Reform and Consumer Protection Act.

Unlike the above statutes, which create whistleblower protections for individuals who engage in protected activity related to the particular statutory scheme, Hawaii law has a generalized whistleblower statute that protects employees from retaliation for reporting actual or suspected violations of any federal, Hawaii state or local law or regulation or government contract (HRS §378-62). Protected activity under the Hawaii Whistleblower Protection Act (HWPA) includes reports to a 'public body' and also internal reports to the employer. Reporting may be by the individual directly or through another. Protected activity extends not only to those who actually report but also one 'about to report'. To be protected, a report need not be in good faith – it will be protected "unless the employee knows that the report is false".

The law also prohibits retaliation against an employee "requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action". Prohibited retaliation includes actual or threatened discharge or discrimination against an employee for engaging in protected activity. There is no minimum threshold in terms of the severity of any alleged retaliatory conduct as the Hawaii Supreme Court has held the law to prohibit "any form of retaliation by their employers" (Crosby v. State Dep't of Budget & Fin., 76 Haw. 332, 876 P.2d 1300 (1994)). Thus, merely reassigning a project away from an employee may be unlawful retaliation if done because of protected activity. Remedies under the HWPA include reinstatement, backpay, general compensatory damages (emotional distress) and reasonable attorneys' fees (but not punitive damages).

Hawaii employees who are discharged because of whistleblowing may also bring tort claims against their employers for discharge in violation of public policy. This is a judicially created exception to at-will employment (Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982)). These claims are often brought along with HWPA claims where the employee was discharged and can be a basis for the employee to recover punitive damages.

6.5 Dispute Resolution Forums

The economics of employment litigation behooves employers to seek resolution without resorting to the litigation of disputes in the court system. Employers with employees' subject to collective bargaining agreements will, on the

whole, have grievance mechanisms for workplace disputes that could constitute contract violations. This will generally not preclude an employee from pursuing statutory claims, such as discrimination charges, with outside agencies or in court.

Employers may require employees to enter agreements to arbitrate any disputes arising from the recruitment and employment relationship. Federal and state law both strongly support arbitration and such agreements may be upheld in the employment context as well. This requirement may benefit employers by reducing the unpredictability inherent in court litigation, particularly before a jury. Employers may also include class action waivers in arbitration agreements that can require employees to forego litigating employment matters on a class basis (Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018)).

In the employment context, however, where the parties to an employment relationship generally do not have equal bargaining power, such agreements may be subject to attack if unconscionable toward the employee. The Hawaii Supreme Court has held an employer's arbitration agreement with an employee to be unenforceable where the provision ostensibly required the employee to bear half the costs of arbitration (Gabriel v. Island Pacific Academy, Inc. 140 Haw. 325, 400 P.3d 526 (2017)). In Gabriel, the parties' agreement to arbitrate incorporated the rules of a local provider of dispute prevention and resolution services. Those rules provided that both parties submit advance deposits on an equal basis and the court accepted that this would mean the plaintiff would be expected to bear one half of the estimated USD20,419.84 cost of a four-day arbitration. The court found this to be invalid as it applied to a terminated schoolteacher whose former salary ranged from USD35,000 to USD45,000. The court refused to sever this provision and allow the parties to proceed to arbitration with the employer paying the full cost, as the lower court had ordered. The court carefully scrutinized the entire agreement to arbitrate and concluded it was not salvageable as substantively unconscionable terms pervaded the agreement.

In Gabriel, the Hawaii Supreme Court also held that, under Hawaii law, a party may immediately appeal an order compelling arbitration. These appeals are not available under federal arbitration law. Consequently, employers should carefully draft such arbitration agreements to ensure they are enforceable, cover all potential disputes, eliminate potential class actions and are enforced pursuant to the most advantageous applicable law.

Because employers can rarely expect to recover any significant portion of the costs or fees associated with defending most employment disputes, even if fully successful, negotiated resolutions between the parties are common and mediation often facilitates such settlements. Mediation is a non-binding negotiation process guided by an experienced mediator. Mediation is commonly conducted over the course of a single day, with the parties in one location but much of the time in separate rooms. The mediator shuttles between, hearing the concerns of each party and facilitating the exchange of demands and offers to try to reach a mutually agreeable resolution.

6.6 Class or Collective Actions

Unless employees waive their right to pursue class or collective relief in an agreement to arbitrate disputes with their employers, employers may potentially face litigation of employment claims on a class basis. This can include, among others, wage and hour claims as well as discrimination claims, employee benefits claims and Fair Credit Reporting Act claims. While these claims, particularly wage and hour class actions, have become more pervasive across the continental United States, they have, so far, been less prevalent in Hawaii.

Class or collective litigation can pose substantial exposure to adverse judgments and attorneys' fees to defend often complex matters. 'Class actions' refer to litigation pursuant to federal or state rules of procedure that allow representative litigants to litigate on behalf of a larger group where:

- the potential class is sufficiently numerous that joining them all as parties is impracticable;
- there are common questions of law or fact;
- the claims or defenses of the representatives are typical of the class; and
- the representatives can fairly and adequately protect the interest of the class.

The process necessitates a layer of litigation around the class issues on top of the substance of the claims. To proceed as a class action, the class must be certified, class members notified and generally given an opportunity to opt-out and pursue their claims individually.

FLSA claims and federal age discrimination claims operate under a different 'collective action' process for 'similarly situated' individuals, which requires prospective members to opt-in. It is not uncommon for actions to include both federal and state law claims requiring simultaneous use of both the class and collective action processes. Furthermore, once certified, or proposed to be certified for settlement purposes, any voluntary resolution of class litigation requires court approval.

In addition to the above procedures, government agencies, such as the EEOC, may pursue relief on behalf of groups of employees without necessarily abiding by the class certification requirements applicable to private plaintiffs.

6.7 Possible Relief

The potential relief available to an employee or former employee plaintiff bringing a complaint with an agency, or in court or arbitration, varies by type of claim and is covered throughout **6. Employment Disputes: Claims; Dispute Resolution Forums; Relief**.

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7. Extraterritorial Application of Law

Hawaii employment, TDI and prepaid healthcare laws generally apply when the employee primarily works in Hawaii, is based in, directed or controlled from Hawaii, or resides in Hawaii (if the employee's service is not directed or controlled from any state where the employee performs some part of their service) (HRS §383-3, 392-4, 393-4).

Hawaii workers' compensation law will apply to work injuries sustained in Hawaii and work injuries sustained outside Hawaii if the employee was hired in Hawaii (HRS §386-6). Other employees may be able to enforce their rights accruing under the workers' compensation law of other jurisdictions if the DLIR Director can reasonably determine and deal with the employee's rights.