

ADMINISTRATIVE RULES

TITLE 12

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

CHAPTER 27

THE ADMINISTRATION AND ENFORCEMENT OF
THE FAMILY LEAVE LAW

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SUBCHAPTER 1

ADMINISTRATION AND ENFORCEMENT

§12-27-1 Definitions. As used in this chapter:

"Attorney general" means the State attorney general or any deputy of the State attorney general.

"Benefit" means any employment benefit (other than salary or wages) provided or made available to an employee by an employer, including group life insurance, health insurance, disability insurance, paid and unpaid leave, educational benefits, and pension, regardless of whether the benefit is provided by a policy or practice of an employer or by an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)).

"Calendar week" means the period from Sunday to Saturday of each week.

"Calendar year" means the period from January to December of each year.

"Child" means an individual who is a biological, adopted, or foster son or daughter; a stepchild; or a legal ward of an employee. For purposes of this chapter:

- (1) For the serious health condition of a child of the employee, there is no age limitation, except as imposed by a court under the terms of a foster care order.
- (2) A foster child means an individual who is placed with the employee for care under court appointed supervision or through other authorized child service agencies pursuant to foster custody provisions of chapter 587, HRS. When the court or authorized agency terminates the foster care arrangement, the individual no longer meets this definition.
- (3) A stepchild means the biological son or daughter of the employee's spouse. When an employee is divorced from the biological parent of the child, the stepparent-child relationship ceases.

"Complaint" means a verified written statement filed with the department, alleging an unlawful practice within the meaning of the statute.

"Complainant" means the person who has filed a complaint.

"Department" means the department of labor and industrial relations.

"Director" means the director of labor and industrial relations.

"Employee" means a person who performs services for hire for not fewer than six consecutive months for the employer from whom benefits are sought under the statute.

"Employer" means any individual or organization, including the State, any of its political subdivisions, any instrumentality of the State or its political subdivisions, any partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or receiver or trustee in bankruptcy, or the legal representative of a deceased person, who employs one hundred or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.

"Employment" or "employed" means service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, express or implied, with an employer.

"Health care provider" means a physician as defined under section 386-1, HRS, which includes a doctor of medicine, a dentist, a chiropractor, an osteopath, a naturopath, a psychologist, an optometrist, and a podiatrist.

"Hearings officer" means a person appointed by the director to conduct hearings under the statute.

"HRS" means Hawaii Revised Statutes.

"Parent" means a biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, a grandparent, or a grandparent-in-law. For purposes of the statute:

- (1) When the foster care arrangement is terminated by the court or authorized agency, the individual no longer meets this definition.
- (2) Parent-in-law means the parent of the employee's spouse.
- (3) Stepparent means the spouse of the employee's biological parent.
- (4) Grandparent means the biological or adoptive grandparent of the employee.
- (5) Grandparent-in-law means the biological or adoptive parent of the employee's spouse.

"Reciprocal beneficiary" shall be as recognized in Hawaii under chapter 572C, HRS. Requisites of a valid reciprocal relationship and registration as reciprocal beneficiaries are as provided in sections 572C-4 and 572C-5, HRS.

"Serious health condition" means a physical or mental condition that warrants the participation of the employee to provide care during the period of treatment or supervision by a health care provider, and:

- (1) Involves inpatient care in a hospital, hospice, or residential health care facility; or

- (2) Requires continuing treatment or continuing supervision by a health care provider.

To further clarify, "serious health condition" under Title 29, subpart A, section 825.114, and subpart H, section 825.800, of the Code of Federal Regulations as it existed on April 6, 1995, are incorporated by reference, subject to the following:

- (1) Under section 825.114(a)(2)(ii), and under the section 825.800 definition of "serious health condition", pregnancy and prenatal care are not considered serious health conditions unless certified by a health care provider;
- (2) Where the term appears in sections 825.114 and 825.800, "health care provider" shall be as defined under the statute; and
- (3) "Serious health condition" is limited to the employee's child, parent, spouse or reciprocal beneficiary as defined under the statute, and does not apply to an employee's own serious health condition.

"Spouse" means a husband or wife as recognized under chapter 572, HRS, relating to marriage in Hawaii.

"Statute" means chapter 398, HRS.

"Verified" means sworn to or affirmed before a notary public or an authorized departmental representative.

"Wages" or "pay" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, salary, or other basis of calculation. It shall include the reasonable cost, as determined by the department under chapter 387, HRS, to the employer of furnishing an employee with board, lodging, or other facilities if such board, lodging, or other facilities are customarily furnished by the employer to the employer's employees, but shall not include tips or gratuities of any kind.

"Week" means the equivalent number of hours in the employee's regular workweek. For an employee with work hours that vary each week, the average number of

work hours during the four weeks prior to the request for family leave will constitute a week for purposes of this chapter. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §§398-11)

§12-27-2 General provisions. This chapter sets forth the procedures for the administration and enforcement of the statute. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-9)

§12-27-3 Computation of time. Except where otherwise specified, the time in which any act provided by this chapter is to be done is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or holiday pursuant to section 8-1, HRS, and then it is also excluded. This section shall not apply to section 12-27-9. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-9)

§12-27-4 Employment relationship determination. Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to the statute unless and until it is shown to the satisfaction of the department 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.
[Eff 2/3/05] (Auth: HRS §398-11)
(Imp: HRS §398-1)

§12-27-5 Employer coverage and employee eligibility. (a) To meet the employee count for employer coverage under the definition of "employer" in section 398-1, HRS, and section 12-27-1:

- (1) The count of employees includes all employees maintained on the employer's payroll who work within the State of Hawaii. Employees of employers doing business in Hawaii who are stationed at worksites outside of Hawaii are not included in the count.
- (2) All employees of the employer, regardless of their months of employment, shall be counted. The count is not limited to only employees who are eligible for family leave under the statute.
- (3) Full-time, part-time, temporary and intermittent employees are counted as long as they are maintained on the payroll for the week.
- (4) Employees on authorized paid or unpaid leave, including, but not limited to, family leave, leaves of absence, and disciplinary suspension, are counted as long as the employer has a reasonable expectation that the employee will return to active employment.

(b) It is not necessary that every employee actually perform work on each working day. For practical purposes, "each working day" shall be recognized as the regular workweek established by the employer. Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. An employee who does not begin to work for an employer after the first working day of a calendar

week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(c) The count of employees to determine employer coverage is done at the time an employee gives notice of the need for family leave. Whether the family leave is to be taken at one time or intermittently, once an employee is determined eligible for the family leave, the employee's eligibility is not affected by any subsequent change in the count of employees. Similarly, an employer may not terminate any family leave that has already started if the employee count drops below one hundred.

(d) For purposes of this chapter, Title 29, subpart A, sections 825.104(c) and 825.106, of the Code of Federal Regulations as it existed on April 6, 1995, pertaining to integrated and joint employers, are incorporated by reference, except that under the example used in subsection (d), the employee count must total 100 or more.

(e) To be eligible, an employee must have performed actual work for at least six consecutive months without a break due to resignation, termination, or layoff. Periods of paid leave or authorized leave without pay are not considered to cause a break in employment. [Eff 2/3/05]
(Auth: HRS §398-11) (Imp: HRS §§398-1, 398-2)

§12-27-6 Family leave entitlement and use.

(a) Pursuant to chapter 398, HRS, an employee is entitled to a total of four weeks of family leave each calendar year:

- (1) Upon the birth of a child of the employee or the adoption of a child by the employee; or
- (2) To care for the employee's child, spouse or reciprocal beneficiary, or parent with a serious health condition.

(b) The use of family leave is limited to a twelve-month period.

(c) For purposes of subsection (b), any fixed and consecutive period of twelve months established by

the employer, that is consistently and uniformly applied with respect to all eligible employees, shall be recognized. A twelve-month period may include, but not be limited to, a:

- (1) Calendar year;
- (2) Fiscal year or similar fixed leave year, such as an employee anniversary date;
- (3) Period beginning with the first use of family leave for an event, with the next twelve-month period beginning with the first time family leave is used after the completion of the previous twelve-month period; or
- (4) "Rolling" period measured backward from the date the employee uses family leave. Under this method, each time an employee takes family leave, the remaining leave entitlement shall be any balance of the four weeks which has not been used during the immediately preceding twelve months.

(d) Family leave entitlement per calendar year is not cumulative, and any unused amount shall not carry over or accrue to the next calendar year. However, if an employee begins to take family leave in a calendar year which ends before the four-week limitation is met, the employee may take the balance of the four weeks of family leave in the twelve-month period by relying upon part of the next calendar year's four-week entitlement.

(e) An employee's entitlement to four weeks of family leave upon the birth of a child of the employee expires twelve months after the child's birth. In cases where the employee is adopting a child and has filed a petition for adoption, the court or authorized agency may place or allow the employee to retain custody of the child and be responsible for care before the actual adoption decree is issued. In these situations, the employee is entitled to family leave upon the placement of the child for adoption.

(f) Family leave for a serious health condition applies to an employee who is needed to care for the employee's child, spouse, parent, or reciprocal

beneficiary with a serious health condition, but shall not include the serious health condition of the employee.

(g) Use of family leave is limited to four weeks during any twelve-month period for any and all reasons that qualify under the statute. As such, during an established twelve-month period, if an employee uses the four-week maximum of family leave for one or more qualifying reasons, the employee will have exhausted the amount of allowable family leave for that particular twelve-month period.

(h) An eligible employee's right to family leave shall not be limited by the availability of other family members as long as the leave is for a qualifying reason and the employee provides required certification of the reason. The need for family leave may encompass both physical and psychological care or comfort.

(i) When the same employer employs both husband and wife, each spouse is entitled to four weeks of family leave. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §§398-1, 398-3)

§12-27-7 Intermittent family leave. (a) Family leave may be taken intermittently during each calendar year. Family leave need not be taken immediately upon the birth or adoption of a child, or upon commencement of a serious health condition. Because family leave may be taken intermittently and for less than a week, an employer is allowed to convert the four-week entitlement to an equivalent number of hours based on the current regular workweek of the employee as follows:

- (1) Where the employee has a part-time regular workweek schedule, the amount of family leave entitlement is determined on a proportional or equivalent basis by comparing with the employee's normal work schedule;
- (2) Where an employee's regular workweek schedule varies, a weekly average of the

hours worked over the four weeks prior to the beginning of family leave shall be used to calculate the employee's normal workweek.

(c) An employer may determine the size of intermittent family leave increments as the shortest period of time that the employer's payroll system uses to account for use of leave, provided that the shortest incremental period is one hour or less.

(d) If an employee takes family leave on an intermittent basis, the employer may offer to modify existing duties and conditions of the employee's regular job to better accommodate the intermittent leave. The employer may also offer the employee a temporary transfer to an available alternative position for which the employee is qualified and which better accommodates intermittent periods of leave than does the employee's regular position. The position modification or transfer will be permitted if:

- (1) The employee agrees to the alternative position transfer or modification of the employee's regular position;
 - (2) The transfer or modification is in compliance with any applicable collective bargaining agreement and any federal and state law; and
 - (3) The alternative transfer or modified position has equivalent pay and benefits of the employee's regular job, even if the employer must increase the pay and benefits of the alternative position in order to meet the equivalency. [Eff 2/3/05]
- (Auth: HRS §398-11) (Imp: HRS §398-3)

§12-27-8 Unpaid and paid leave. (a) Notwithstanding section 12-27-9, the four weeks of family leave consists of unpaid leave. However, the employee's accrued paid leaves, including, but not limited to, vacation, personal, or family leave provided by policy or contract, may be substituted for any part of the four weeks as follows:

- (1) An employer may not deny the right of an employee to elect to substitute those accrued paid leaves for any part of the unpaid family leave.
- (2) If the employee does not elect to substitute the employee's accrued paid leaves, the employer may require the employee to substitute those accrued paid leaves for any part of the four weeks of family leave. However, if an employer requires an employee to substitute those accrued paid leaves for all or part of the four weeks of family leave, the employer must provide notice to the employee in advance of the intended action.
- (3) If neither the employer nor the employee elects to substitute those accrued paid leaves, the four weeks of family leave will be considered unpaid, and the employee will remain entitled to all those paid leaves which are earned or accrued prior to or during the family leave.
- (4) Except as mutually agreed upon by both parties, an employer may not retroactively apply accrued paid leaves against family leave after the employee has returned to work.

(b) Section 825.207(i) of the Code of Federal Regulations, as it existed on April 6, 1995, is incorporated by reference. That section states in part that Section 7(o) of the Fair Labor Standards Act (29 U.S.C. §7(o)) permits public employers under prescribed circumstances to give compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the federal Fair Labor Standards Act. This compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid family leave. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-4)

§12-27-9 Use of sick leave for family leave.

(a) An employer who provides paid sick leave shall permit an employee to use up to ten days of the employee's accrued and available sick leave per year for family leave purposes unless an express provision of a valid collective bargaining agreement authorizes the use of more than ten days of sick leave for family leave purposes.

(b) All conditions and restrictions placed by the employer upon the use by an employee of sick leave shall also apply to the use by an employee of sick leave for family leave purposes.

(c) For employers who are self insured for temporary disability insurance purposes, only the accrued and available sick leave that is in excess of the temporary disability insurance plan approved pursuant to chapter 392, HRS, is available for family leave purposes.

(d) For purposes of this section:

"Accrued and available" means accumulated sick leave that the employee may immediately use.

"Sick leave" means accrued increments of compensated leave provided by an employer to an employee for use by the employee during an absence from the employment for any of the following reasons:

- (1) The employee is physically or mentally unable to perform the employee's duties due to illness, injury, or a medical condition of the employee;
- (2) The absence is for the purpose of obtaining professional diagnosis or treatment for a medical condition of the employee; or
- (3) The absence is for other medical reasons of the employee, such as pregnancy or obtaining a physical examination.

"Sick leave" shall not include any benefit provided under an employee welfare benefit plan subject to the federal Employee Retirement Income Security Act of 1974 and shall not include any insurance benefit, workers' compensation benefit, unemployment compensation disability benefit, temporary disability

insurance benefit, or benefit not payable from the employer.

"Year" means a calendar year.

[Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §§398-1, 398-4)

§12-27-10 Notice requirements. (a) Every employer covered by the statute shall notify employees in writing at the time of hire of their rights and responsibilities under the statute, including any employer policy regarding the statute. The notice, and any revision, shall contain, but not be limited to:

- (1) Any requirement for the employee to furnish certification in accordance with section 398-6, HRS, and section 12-27-11, and the consequences of failure to do so;
- (2) The employee's right to substitute accrued paid leave, and whether the employer will require the substitution of any paid leave;
- (3) Any requirement for the employee to make any premium payments to maintain health and other benefits and the arrangements for making such payments;
- (4) Information on employee right to restoration to the same or equivalent position as required under the statute; and
- (5) Other information as required by the department.

(b) An employee shall give notice to the employer of the need for family leave as follows:

- (1) If foreseeable, at least thirty days written notice before the date family leave is expected to commence;
- (2) For foreseeable notice in which it is not possible or practicable to give as much as thirty days written notice before commencement of family leave, at least verbal notification to the employer within two working days before the commencement of

family leave, and written notice to follow as soon as practicable; or

- (3) If the need for family leave is not foreseeable, the employee shall give at least a verbal notice to the employer within two working days of learning of the need for family leave, or as soon as practicable under the facts and circumstances of the particular situation. If the verbal notice is provided as soon as practicable, the employer shall not deny or delay family leave. If the employer requires a subsequent written notice to confirm the verbal notice, the employee shall submit that notice as soon as practicable.

(c) Notice in subsection (b) is considered sufficient if it is provided by correspondence, facsimile, or other electronic means, except that notice in paragraph (b)(3) is considered sufficient if it is provided in person or by telephone. In cases where the employee is unable to provide notice personally, the employee's designated spokesperson, such as the spouse, adult family member, or other responsible party, is allowed to provide the notice.

(d) If known, the employee shall provide notice to the employer of the general reason for the request, the anticipated start of family leave, and the anticipated duration of family leave. In cases where the start or duration of family leave is not known, the employer shall not deny or delay family leave if the employee has otherwise provided timely verbal or other notice in accordance with subsection (b). The employer may request further information in order to make a determination as to whether certification under section 12-27-11 will be needed to support the approval of family leave.

(e) If an employee fails without a reasonable excuse to provide notice to the employer as required under this section, the employer may delay the taking of family leave until the employee is able to provide proper notice, or until at least thirty days after the

date the employee first notified the employer of the need for family leave. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-5)

§12-27-11 Certification. (a) An employer may require that a claim for family leave be supported by written certification. Unless the employer provides otherwise, certification requested by the employer under this section shall be at the employee's expense, except as provided in subsection (e).

(b) When the request for family leave is foreseeable, the employee shall furnish certification prior to the commencement of the family leave. In the case of unforeseeable family leave, the employee shall furnish certification no later than two working days after the family leave commences.

(c) The following shall be deemed acceptable certification:

- (1) For the birth of a child of an employee, a written statement issued by a health care provider or the family court;
- (2) For the placement of a child for adoption with an employee:
 - (A) The petition filed by the employee with the court; or
 - (B) A written statement issued by:
 - (i) A recognized adoption agency;
 - (ii) The attorney handling the adoption; or
 - (iii) The individual officially designated by the birth parent to select and approve the adoptive family.
- (3) For the serious health condition of a child, spouse, parent, or reciprocal beneficiary, a written statement by a health care provider. Certification shall contain the following information:
 - (A) The patient's name and relationship to the employee;

- (B) The health care provider's name, title, type of practice or field of specialization, location, and signature;
- (C) A statement that the patient's condition qualifies for family leave as a serious health condition as defined under section 12-27-1;
- (D) A statement that the employee is needed to participate in the care of the patient;
- (E) A statement that the patient's condition requires hospitalization or the health care provider's continuing treatment or continuing supervision;
- (F) The approximate date the serious health condition commenced, and the probable duration that the employee will be needed to care for the patient with a serious health condition; and
- (G) Whether it will be necessary for the employee to take leave intermittently; and, if so, the estimated period of time that the employee will be needed to care for the patient with a serious health condition.

(d) For situations where the serious health condition is chronic and continuous, and the employee foresees the need for family leave in another twelve-month period, the employer may require the employee to provide certification by the health care provider of the serious health condition for each twelve-month period of family leave.

(e) At the employer's expense, an employer may also require re-certification during the course of any twelve-month period, but not more often than thirty days, if:

- (1) Circumstances described by the previous certification have changed significantly; e.g., the duration of the illness, the nature of the illness, and complications; or

- (2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(f) In cases where the employee's original family leave request was under the four-week maximum, and the employee requests an extension of the approved family leave within the twelve-month period, the employer may require another certification from the employee of the need for the extension.

(g) For purposes of confirming family relationships in granting of family leave, the employer may require the employee who gives notice of the need for family leave to provide reasonable documentation or statement of the relationship. Reasonable documentation may include, but is not limited to, a court document, or a birth, marriage, or reciprocal beneficiary certificate.

(h) If an employer finds a certification incomplete under paragraph (c)(3), the employer shall advise the employee and provide the employee a reasonable opportunity to remedy such deficiency.

(i) Notwithstanding subsection (c), for a birth or a serious health condition occurring or situated outside the State of Hawaii, certification shall be deemed sufficient if provided by a health care provider who is:

- (1) Authorized and performing within the scope of practice as defined under a state law; or
- (2) Authorized to practice in accordance with the law of another country, and who is performing within the scope of the practice as defined under that law.

[Eff 2/3/05] (Auth: HRS §398-11)

(Imp: HRS §§398-1, 398-6)

§12-27-12 Employment and benefits protection.

(a) Upon the return of an employee from family leave, the employer is required to restore an employee to the employee's original position, or if no longer available, an equivalent position with equivalent terms and conditions of employment. A position is

considered equivalent if it essentially has, but is not limited to, the same pay, benefits, working conditions, privileges, perquisites, status, duties, responsibilities, seniority, and authority as the original position. These terms and conditions may include worksite location, shift, work schedule, opportunity for bonuses, tips, profit sharing, and other similar discretionary and non-discretionary payments or benefits.

(b) Upon the employee's return to work from family leave, all benefits earned prior to taking family leave which were not used during that leave shall be restored to the employee. This includes, but is not limited to, all benefits which are earned, accrued, or cumulative, based on statute, contract, policy, or practice prior to or during the family leave. Leave benefits earned in one year, but not carried over to the following year by contract, policy, or practice, are not protected.

(c) For purposes of changes in pay and benefits, an employee on family leave is entitled to changes as if no leave had been taken, except where the change is contingent upon seniority or accrual by policy or contract.

(d) If an employee provides to the employer reasonable advance notice of at least two days requesting a return to work earlier than originally granted, the employer is obligated to promptly reinstate the employee to his or her original or equivalent position of employment.

[Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-7)

§12-27-13 Record keeping. In order to make a determination on whether an employer is in compliance with the statute, the department may request and review the following:

- (1) Basic payroll and identifying employee data, such as the employee's name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours

worked per pay period; itemized additions to or deductions from wages; and total compensation paid;

- (2) Terms and conditions of, and expenses for, employee benefits, including, but not limited to, policies and any employment agreements relating to leave benefits; and
- (3) Records, documents, correspondence, and other material relating to any family leave granted or denied. [Eff 2/3/05]
(Auth: HRS §398-11) (Imp: HRS §398-23)

§§12-27-14 to 12-27-19 (Reserved)

SUBCHAPTER 2

COMPLAINT AND INVESTIGATION PROCEDURES

§12-27-20 Filing of complaint. (a) A complaint alleging a violation of the statute shall be filed in accordance with sections 398-21, HRS, and 12-27-21.

(b) Where feasible, the complaint shall be filed on forms furnished by the department.

(c) The complaint shall be signed by the complainant, and the complainant shall certify that:

- (1) The complaint is filed to the best of the complainant's knowledge, information, or belief;
- (2) The complaint is not filed for an invalid or improper purpose, such as to harass; and
- (3) The allegations and other statements of fact have evidentiary support or are likely to have evidentiary support after further investigation.

(d) No complaint shall be filed after the expiration of ninety days after the:

- (1) Date of the alleged unlawful act; or
- (2) Date of discovery by the employee of the alleged unlawful act; however, in no event shall such a complaint be filed after the

expiration of one hundred eighty days of the alleged unlawful act. The filing date of a complaint is the date the complaint is received by the department.

[Eff 2/3/05] (Auth: HRS §398-11)
(Imp: HRS §398-21)

§12-27-21 Contents of complaint. In addition to the conditions of section 12-27-20, each complaint shall contain, but is not limited to, the following:

- (1) The full name, address, and telephone number of the complainant;
- (2) The full name, address, and telephone number of the employer, including alternate names and locations of the employer, if known;
- (3) A clear and concise statement of the facts constituting the alleged violation;
- (4) The date or dates on which the alleged violation occurred or was discovered by the complainant; and
- (5) Other pertinent information as requested by the department. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-21)

§12-27-22 Service of complaint and answer.

(a) Within ten days after a complaint has been filed, the department or the attorney general, as applicable, shall serve a copy of the complaint on the employer by certified mail, return receipt requested, or by personal delivery.

(b) The employer may submit a written answer to the complaint within fifteen days from the date of the mailing of the complaint or the date of delivery.
[Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-21)

§12-27-23 Withdrawal of complaint. (a) A complaint, or any part thereof, may be withdrawn only upon written consent of the department.

(b) When requesting withdrawal of a complaint, the complainant shall submit a written and signed request to the department.

(c) If the notice of complaint has been issued to the employer, the department shall notify the employer of the withdrawal in writing.

[Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-21)

§12-27-24 Dismissal of complaint. (a) The department shall dismiss a complaint if:

- (1) The department determines that the complaint was not filed in accordance with sections 12-27-20 and 12-27-21;
- (2) At any point after the filing of a complaint, it is determined that the department does not have jurisdiction over the allegations contained in the complaint;
- (3) It is determined after investigation that the alleged unlawful act by the employer was not substantiated or supported by available evidence;
- (4) The complainant failed to cooperate with the department regarding the complaint or investigation, and the department received no response from the complainant within ten days after the date of the mailing of the notice to the complainant of the department's intent to dismiss the complaint; or
- (5) The complainant could not be located, and the complainant did not respond within ten days to a notice sent by the department to the complainant's last known address.

(b) In the event of a dismissal of a complaint, the department shall issue a written notification to the complainant and employer of the reason or reasons for dismissal by certified mail, return receipt requested. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §§398-9, 398-21, 398-23)

§12-27-25 Predetermination settlement.

(a) Pursuant to section 398-22, HRS, the department may dismiss a complaint in which the complainant and employer agree to settle prior to the issuance of a determination.

(b) The department may dismiss a complaint when the complainant refuses to accept an offer by the employer which the department determines would afford a just resolution for the harm alleged by the complainant, and the complainant fails to accept the offer within thirty days after the actual notice of the offer.

(c) Any predetermination settlement shall be in writing and specific in its terms. The written terms of the settlement shall be signed by the complainant, the employer, and the department.

(d) If approved, the case will be closed without a finding on the merits of the complaint, and a copy of the final predetermination settlement shall be mailed or delivered to the complainant and employer.

(e) Participation by the employer in a predetermination settlement attempt will not be construed as evidence of a violation of the statute, or a waiver of the right to a department determination on the issues raised by the complaint if a settlement cannot be achieved. [Eff 2/3/05] (Auth: HRS §398-11)(Imp: HRS §398-22)

§12-27-26 Investigation and fact-finding

conference. (a) After the filing of a complaint, the department shall conduct an investigation in accordance with section 398-23, HRS.

(b) As part of the investigation, the department may require the complainant and employer to attend a fact-finding conference.

(c) The fact-finding conference is primarily for the purposes of:

- (1) Ascertaining the positions of the complainant and employer;
- (2) Identifying the issues in dispute;
- (3) Resolving those issues that can be resolved;

- (4) Obtaining evidence; and
- (5) Determining the possibility of a predetermination settlement.
- (d) The department is authorized to issue subpoenas for the production of documents or the examination of witnesses deemed necessary for the investigation of a complaint, and to require complainant and employer to provide written responses to requests for information.
- (e) If the employer or a witness fails to respond to a subpoena within the time allowed, the department is authorized to file a petition for appropriate relief in the circuit court.
- (f) When the department determines after an investigation that the statute has been violated, the department shall notify the complainant and employer of its determination. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-23)

§12-27-27 Conference and conciliation. (a) After a determination has been made pursuant to subsection 12-27-26(f), the department shall endeavor to remedy the violation by informal methods, such as conference or conciliation, and obtain agreement that the employer will eliminate the unlawful practice and provide appropriate relief or remedy.

(b) The department may require the complainant, the employer, or both to attend a conciliation conference for the purpose of attempting to informally resolve the matter. The department shall give notice of the time and place of the conciliation conference.

(c) Where conciliation efforts are successful, or when deemed to be appropriate by the department, a conciliation agreement shall be executed in accordance with section 12-27-28.

(d) Should the employer fail or refuse to confer or to make a good faith effort to resolve any dispute, or otherwise fail or refuse to cooperate, the department shall terminate its efforts to conciliate and shall issue a demand and order in accordance with

section 12-27-29. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-23)

§12-27-28 Conciliation agreement. (a) The terms of a successful conciliation shall be reduced to a written agreement, which shall be signed by the complainant, the employer, and the department; provided that, in the judgment of the department, the agreement provides full and fair relief to the complainant. A copy of the signed conciliation agreement shall be sent to the complainant and employer.

(b) Where the complainant has refused to accept a proposed conciliation agreement, the department and the employer may enter into a conciliation agreement to which the complainant is not a party if the agreement does not affect the complainant's rights and if, in the department's opinion, the agreement provides for:

(1) A just resolution of all violations found; and

(2) The elimination of the unlawful practice. In that event, the department shall close the case without the complainant's consent and shall issue a notice of right to sue in accordance with section 12-27-31.

(c) The department may refuse to approve a conciliation agreement, even though the complainant and employer have agreed on the proposed terms, if the department believes the remedies outlined in the agreement are inadequate to eliminate the unlawful practice complained of or fail to provide appropriate action. In that event, the case may be closed as having been settled on terms not approved by the department, and the department need not take any action to enforce the agreement if its terms are violated. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-23)

§12-27-29 Demand and order. (a) If the department finds that informal methods in section 12-27-27 will not resolve the complaint, the department shall issue an order and a demand for compliance by certified mail, return receipt requested, or personal delivery.

(b) The demand and order shall require the employer to:

(1) Cease and desist from engaging in the alleged unlawful practice; and

(2) Take appropriate remedial action.

(c) Within twenty days after the date of the demand and order, the employer may either:

(1) Notify the department of the employer's decision to comply by signing and returning the demand and order; or

(2) File a written appeal in accordance with section 12-27-32.

(d) If an employer fails to take any action as provided in subsection (c), the department or the complainant may initiate civil action pursuant to Section 398-25, HRS. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-23)

§12-27-30 Compliance review and reports.

(a) The department is authorized to request proof of compliance by an employer with the terms of a predetermination settlement, conciliation agreement, demand and order, or decision.

(b) In order to obtain proof of compliance, the department may require an employer to submit reports that the department deems necessary to show the manner of compliance. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-28)

§12-27-31 Notice of right to sue. (a) A notice of right to sue shall authorize a complainant alleging a violation of the statute to bring a civil suit pursuant to section 398-25, HRS, within ninety days after receipt of the notice.

(b) At any time after the filing of a complaint with the department, a complainant may request, in writing, that the department issue a notice of right to sue.

(c) Upon a request made under subsection (b), the department may issue a notice of right to sue, provided that the department has not:

- (1) Previously issued a notice;
- (2) Entered into a conciliation agreement to which the complainant is a party; or
- (3) Filed a civil action.

(d) The department may issue a notice of right to sue:

- (1) Upon dismissal of a complaint pursuant to sections 12-27-24 and 12-27-25; or
- (2) Where the department has entered into a conciliation agreement to which the complainant is not a party, pursuant to subsection 12-27-28(b).

[Eff 2/3/05] (Auth: HRS §398-11)

(Imp: HRS §§398-9, 398-25, 398-27)

§12-27-32 Appeal. (a) An employer may appeal a demand and order issued by the department pursuant to section 12-27-29.

(b) The appeal must be in writing and must be filed with the department no later than twenty days after the date of the demand and order.

(c) A hearing on the appeal shall be scheduled in accordance with section 398-24, HRS, and subchapter 3. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-24)

§§12-27-33 to 12-27-39 (Reserved)

SUBCHAPTER 3

HEARING OF APPEAL

§12-27-40 Definitions. As used in this subchapter:

"Party" or "parties" means the employer or employer representative, the department, or both.
[Eff 2/3/05] (Auth: §398-11) (Imp: §398-24)

§12-27-41 Prehearing conference. (a) At any time after the filing of an appeal by the employer, but prior to a hearing, the hearings officer may hold a prehearing conference with the parties.

(b) Any matter not raised at the prehearing conference shall not be allowed during the hearing. Matters to be discussed at the prehearing conference may include, but are not limited to, the following:

- (1) A discussion of the issues raised by the department and the explanations and defenses to be presented by the parties at the hearing;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining stipulations which will avoid unnecessary proof;
- (4) The possibility of a settlement between the parties; and
- (5) Other matters that may aid in the disposition of the case.

(c) If the parties agree to the terms of a settlement at the prehearing conference, the settlement shall be reduced to writing, signed by the parties, and approved by the hearings officer. If approved, the case will be dismissed without a finding on the merits of the complaint and a copy of the final prehearing settlement shall be sent by mail to the complainant and the employer.

(d) A prehearing settlement shall not affect the processing of any other case, including, but not limited to, complaints in which the allegations are

like or related to the individual allegations settled.
[Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS
§398-24)

§12-27-42 Hearing. (a) Any hearing under this subchapter shall be held in accordance with chapter 91, HRS.

(b) All parties shall be given written notice of hearing by registered or certified mail with return receipt requested at least fifteen days before the hearing.

(c) The parties shall be present at the hearing, and shall be allowed to call, examine, and cross-examine witnesses, and introduce papers, documents, or other evidence, in person or by counsel.

(d) At the discretion of the hearings officer, any other person may be allowed to participate, in person or by counsel, for the purposes and to the extent that the hearings officer shall determine.

(e) Witnesses at the hearing shall be examined orally, under oath or affirmation, and a record of the proceedings shall be made by the hearings officer. The hearings officer or a person designated by the hearings officer may administer oaths or affirmations at the hearing.

(f) The hearings officer may continue a hearing from day to day or adjourn it to a later day or to a different place by announcement thereof at the hearing or by appropriate notice to all parties. The hearings officer may also continue a hearing upon request of any party. At the discretion of the hearings officer, a hearing may be reopened.

(g) If the employer or employer's representative is absent without notice, the hearings officer shall base the decision on the available evidence.

[Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS
§§91-9.5, 398-9, 398-24)

§12-27-43 Powers and duties of hearings officer.

(a) The hearings officer shall have full power and

authority to:

- (1) Control the procedures of the hearing;
- (2) Admit or exclude testimony or other evidence;
- (3) Rule upon all motions and objections;
- (4) Call and examine witnesses;
- (5) Direct the production of papers or other matter present in the hearings room; and
- (6) Take other actions that are necessary and proper for the conduct of the hearing.

(b) The hearings officer may issue subpoenas either at will or upon written request of a party to the proceeding whenever necessary to compel the attendance of witnesses and the introduction of books, records, correspondence, documents, papers, or any other evidence, which relates to any matter in question before the hearings officer. Where a subpoena is issued at the instance of a party to the proceeding other than the hearings officer, the cost of service and witness and mileage fees shall be borne by the party at whose request the subpoena is issued. Witness and mileage fees shall be the same as fees paid witnesses in the circuit court.

(c) The hearings officer shall, whenever necessary or required during the hearing and on terms and conditions as the hearings officer may determine, take or cause to be taken deposition of witnesses residing within or without the State of Hawaii in the manner prescribed by law for deposition in civil actions. A request by a party other than the hearings officer for deposition of witnesses shall be in writing. The cost of any deposition shall be borne by the party at whose request the deposition was taken.

[Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-24)

§12-27-44 Evidence. (a) Notwithstanding provisions in section 398-24(f), HRS, the admissibility of evidence at a hearing shall not be governed by the laws of evidence, and all relevant oral or documentary evidence shall be admitted if it

is the kind of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Irrelevant, immaterial, or unduly repetitious material shall not be admitted into evidence. The hearings officer shall give effect to the rules of privilege recognized by law.

(b) Documentary evidence may be received in the form of copies, provided that, upon request, all other parties to the proceeding shall be given an opportunity to compare the copy with the original. If the original is not available, a copy may still be admissible, but the unavailability of the original and the reasons therefor shall be considered by the hearings officer when considering the weight of the documentary evidence.

(c) An employer who files an appeal shall bear the burden of proof, including the burden of producing evidence and the burden of persuasion. Proof of a matter shall be by a preponderance of the evidence. [Eff 2/3/05] (Auth: HRS §§91-2, 398-11) (Imp: HRS §§91-10, 398-24)

§12-27-45 Decision. (a) The hearings officer shall render a written decision which shall include findings of fact and conclusions of law.

(b) A certified copy of the decision shall be served by personal delivery or by mail upon each party. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-24)

§12-27-46 Judicial review. Any party aggrieved by the decision of the hearings officer shall be entitled to judicial review as provided by section 91-14, HRS. [Eff 2/3/05] (Auth: HRS §398-11) (Imp: HRS §398-24)

