

1 welfare, and other forms of social security compensation.
2 Transfers of ownership and divestiture have also often led to
3 periods of labor unrest, and disruption of the services provided
4 to residents and visitors served by such establishments.

5 The public interest of the State is best served by seeking
6 to ameliorate the financial and social problems caused by these
7 economic dislocations and resultant unemployment. Accordingly,
8 the legislature finds that retaining existing employees when a
9 divestiture, sale, or acquisition occurs will not only minimize
10 the economic and social disruption caused by these transactions
11 but will assure the harmonious continuity of needed services.
12 Incumbent employees possess invaluable knowledge and experience
13 with work practices, policies, and clientele and constitute a
14 resource worthy of preservation. Therefore, the retention of
15 incumbent workers furthers the State's interest in providing
16 stable employment to its residents, uninterrupted and efficient
17 service for its visitors, and a healthy consumer base for its
18 businesses.

19 § -2 **Definitions.** As used in this chapter:

20 "Covered establishment" means any industrial, commercial,
21 or other business entity that has employed, at any time in the
22 preceding twelve-month period, twenty or more persons.



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

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

5 "Divestiture" means the transfer of any covered
6 establishment from one employer to another due to the sale,
7 transfer, merger, or other business takeover or transaction of
8 business interests.

9 "Employer" means any individual or entity that directly or
10 indirectly, owns, operates, or has a controlling interest in a
11 covered establishment.

12 "Length of service" means the number of years, months, and
13 days spent by an employee in service to an employer.

14 § -3 **Notification.** An employer in a covered
15 establishment shall provide to each employee and the director
16 written notification of a divestiture at least ninety days prior
17 to its occurrence. If the divestiture shall result in the loss
18 or suspension of employment, the notification shall also furnish
19 an explanation of the reasons for such action.

20 § -4 **Worker retention.** (a) In the event of a
21 divestiture of a covered establishment, the successor employer
22 shall retain incumbent employees of the affected establishment.



1 (b) In the event the successor employer determines that
2 fewer employees are required to provide the required services,
3 the successor employer shall retain employees by their length of
4 service, within their job classifications, with employees with
5 the longest length of service given preference over employees
6 with shorter lengths of service.

7 (c) Any employee not retained in accordance with
8 subsection (a) shall be placed on a preferential rehiring list
9 in order of length of service, which shall be provided to each
10 affected employee and the director. In the event the successor
11 employer determines a need to increase its workforce, it shall
12 hire from the preferential rehiring list, giving preference to
13 employees with the longest length of service within their job
14 classification over employees with shorter lengths of service
15 within the affected classification. The successor employer
16 shall exhaust all possibilities of hiring from the preferential
17 rehiring list prior to hiring new employees.

18 (d) Except as provided in subsection (b), the successor
19 employer shall not discharge without cause an employee retained
20 pursuant to this chapter. "Cause" for this purpose shall be
21 limited to misconduct connected with the individual's work.



1 § -5 **Wages, benefits, and other compensation.** A
2 successor employer shall compensate each employee retained in
3 accordance with section -4 by payment of:

4 (1) The average regular wages, benefits, and other
5 compensation received by the employee during the
6 twelve-month period prior to divestiture; or

7 (2) The wages, benefits, and other compensation in effect
8 at the time of divestiture.

9 § -6 **Collective bargaining.** Notwithstanding this
10 chapter, any contractual agreement arrived at through collective
11 bargaining that provides benefits greater than those contained
12 in this chapter shall supersede the benefits required under this
13 chapter. In the event, however, that a collective bargaining
14 agreement is silent or provides benefits less than those
15 provided by this chapter, this chapter shall supersede the
16 collective bargaining agreement.

17 § -7 **Employer liability.** Any employer who fails to
18 conform to this chapter shall be liable to each of the employees
19 affected in an amount equal to the value of their wages,
20 benefits, and other compensation, including interest, for the
21 duration of the employer's violation of this chapter.



1 § -8 **Employee remedies.** (a) An action by an employee
2 to enforce this chapter may be maintained in any court of
3 competent jurisdiction by any one or more employees, or the
4 employee or employees may designate an agent or representative
5 to maintain the action.

6 (b) The court in any action brought under this section, in
7 addition to any judgment awarded, may allow costs of action,
8 including costs and fees of any nature, reasonable attorney's
9 fees, interest, and consequential damages, if any, as deemed
10 appropriate.

11 (c) The court may also provide injunctive relief in
12 appropriate circumstances.

13 (d) In the alternative, an employee who alleges that the
14 rights afforded by this chapter have been violated, at the
15 employee's election, may file a charge with the department that
16 shall state the name and address of the employer alleged to have
17 committed the violation, a summary of the facts upon which the
18 charge is based, and any other information the department may
19 require. The department shall serve the charge upon the
20 employer by personal service or by mail. The employer shall
21 answer the charge within twenty days following its service.



1 (e) Where the department finds there is reasonable cause
2 to believe that this chapter has been violated, and cannot
3 obtain voluntary compliance from the employer, the director
4 shall appoint a hearings officer and schedule a contested case
5 hearing in accordance with chapter 91. Following the completion
6 of the contested case hearing, the hearings officer shall issue
7 a decision that shall include a determination of the issues of
8 fact or law and that shall be served upon the parties. The
9 hearings officer may order any relief specified in subsection
10 (b).

11 (f) Any party adversely affected by the decision of the
12 hearings officer may file exceptions and present argument to the
13 director. If the director sustains a finding that a violation
14 of this chapter has occurred, the director shall issue a
15 decision and order in accordance with chapter 91 requiring the
16 respondent to cease and desist from the violation and ordering
17 such other authorized relief as is just and proper. If the
18 director finds no violation, the charge shall be dismissed.

19 § -9 **Judicial review.** Any person aggrieved by the order
20 of the director shall be entitled to judicial review as provided
21 by section 91-14.



1 § -10 **Other available relief.** This chapter shall not be
2 construed to limit an employee's right to bring legal action for
3 wrongful termination, or to participate in the dislocated
4 workers program under chapter 394B in the case of a permanent
5 shutdown of operations within a covered establishment.

6 § -11 **Rules.** The director shall adopt rules under
7 chapter 91 as the director deems necessary for the purpose of
8 carrying out this chapter."

9 SECTION 2. Section 383-66, Hawaii Revised Statutes, is
10 amended by amending subsection (a) to read as follows:

11 "(a) The department, [~~for the nine-month period April 1,~~
12 ~~1941, to December 31, 1941, and for each calendar year~~
13 ~~thereafter,~~] except as otherwise provided in this part, shall
14 classify employers in accordance with their actual experience in
15 the payment of contributions and with respect to benefits
16 charged against their accounts with a view to fixing the
17 contribution rates to reflect this experience. The department
18 shall determine the contribution rate of each employer in
19 accordance with the following requirements:

20 (1) The standard rate of contributions payable by each
21 employer for any calendar year [~~through 1984 shall be~~
22 ~~three per cent. For the calendar year 1985 and~~



1 ~~thereafter, the standard rate of contributions payable~~
2 ~~by each employer]~~ shall be five and four-tenths per
3 cent;

- 4 (2) No employer's rate for the calendar year [~~1942 and for~~
5 ~~any calendar year thereafter]~~ shall be other than the
6 maximum rate unless and until the employer's account
7 has been chargeable with benefits throughout the
8 thirty-six consecutive calendar month period ending on
9 December 31 of the preceding calendar year, except
10 that, [~~for the calendar year 1956 and for each~~
11 ~~calendar year thereafter,~~] an employer who has not
12 been subject to the law for a sufficient period to
13 meet this requirement may qualify for a rate other
14 than the maximum rate if the employer's account has
15 been chargeable throughout a lesser period but in no
16 event less than the twelve consecutive calendar month
17 period ending on December 31 of the preceding calendar
18 year. [~~For the calendar years 1985 through 1991, the~~
19 ~~contribution rate for a new or newly covered employer~~
20 ~~shall be the sum of the employer's basic contribution~~
21 ~~rate of three and six-tenths per cent and the fund~~
22 ~~solvency contribution rate determined for that year~~



1 ~~pursuant to section 383-68(a), until the employer's~~
2 ~~account has been chargeable with benefits throughout~~
3 ~~the twelve consecutive calendar month period ending on~~
4 ~~December 31 of the preceding calendar year; except~~
5 ~~that no employer's contribution rate shall be greater~~
6 ~~than five and four-tenths per cent and no employer~~
7 ~~with a negative reserve ratio shall have a~~
8 ~~contribution rate less than the employer's basic~~
9 ~~contribution rate.] For calendar years 1992 and~~
10 thereafter, the contribution rate for a new or newly
11 covered employer shall be the contribution rate
12 assigned to any employer with .0000 reserve ratio,
13 until the employer's account has been chargeable with
14 benefits throughout the twelve consecutive calendar
15 month period ending on December 31 of the preceding
16 calendar year;

- 17 (3) Any amount credited to this State under section 903 of
18 the Social Security Act, as amended, which has been
19 appropriated for expenses of administration, whether
20 or not withdrawn from the trust fund, shall be
21 excluded from the fund for the purposes of this
22 paragraph. Any advance that may be made to this State



1 under section 1201 of the Social Security Act, whether
2 or not withdrawn from this trust fund, shall be
3 excluded from the fund for the purposes of this
4 paragraph. No employer's rate shall be reduced in any
5 amount that is not allowable as an additional credit,
6 against the tax levied by the federal Unemployment Tax
7 Act pursuant to section 3302(b) of the federal
8 Internal Revenue Code or pursuant to any other federal
9 statute, successor to section 3302(b), which provides
10 for the additional credit now provided for in section
11 3302(b);

- 12 (4) If, when any classification of employers is to be made
13 (which may be after the commencement of the period for
14 which the classification is to be made), the
15 department finds that any employer has failed to file
16 any report required in connection therewith or has
17 filed a report that the department finds incorrect or
18 insufficient, the department shall notify the employer
19 thereof by mail addressed to the employer's last known
20 address. Unless the employer files the report or a
21 corrected or sufficient report, as the case may be,
22 within fifteen days after the mailing of the notice,



1 the maximum rate of contributions shall be payable by
2 the employer for the period for which the contribution
3 rate is to be fixed. Effective January 1, 1987, the
4 director, for excusable failure, may redetermine the
5 assignment of the maximum contribution rate in
6 accordance with this section, provided the employer
7 files all reports as required by the department and
8 submits a written request for redetermination before
9 December 31 of the year for which the contribution
10 rate is to be fixed;

- 11 (5) For the purpose of sections 383-63 to 383-69, if after
12 December 31, 1939, any employing unit in any manner
13 succeeds to or acquires the organization, trade, or
14 business, or substantially all the assets thereof
15 (whether or not the successor or acquiring unit was an
16 "employing unit", as that term is defined in section
17 383-1 prior to the acquisition), or after
18 December 31, 1988 and prior to December 31, [~~1992,~~
19 2007, acquires a clearly identifiable and segregable
20 portion of the organization, trade, or business of
21 another that at the time of the acquisition was an
22 employer subject to this chapter, and the successor



1 continues or resumes the organization, trade, or
2 business and continues to employ all or nearly all of
3 the predecessor's employees, or the successor
4 continues or resumes the clearly identifiable and
5 segregable portion of the organization, trade, or
6 business and continues to employ all or nearly all of
7 the employees of the clearly identifiable and
8 segregable portion, an application may be made for
9 transfer of the predecessor's experience record. If
10 the predecessor employer has submitted all information
11 and reports required by the department including
12 amended quarterly wage reports identifying the
13 employees transferred or retained and executed and
14 filed with the department before December 31 of the
15 calendar year following the calendar year in which the
16 acquisition occurred on a form approved by the
17 department a waiver relinquishing the rights to all or
18 the clearly identifiable and segregable portion of the
19 predecessor's prior experience record with respect to
20 its separate account, actual contribution payment, and
21 benefit chargeability experience, annual payrolls and
22 other data for the purpose of obtaining a reduced



1 rate, and requesting the department to permit the
2 experience record to inure to the benefit of the
3 successor employing unit upon request of the successor
4 employing unit, the experience record for rate
5 computation purposes of the predecessor shall
6 thereupon be deemed the experience record of the
7 successor and the experience record shall be
8 transferred by the department to the successor
9 employing unit and shall become the separate account
10 of the employing unit as of the date of the
11 acquisition. Benefits chargeable to the predecessor
12 employer or successor employer in case of an
13 acquisition of a clearly identifiable and segregable
14 portion of the organization, trade, or business, after
15 the date of acquisition on account of employment prior
16 to the date of the acquisition shall be charged to the
17 separate account of the successor employing unit. In
18 case of an acquisition of a clearly identifiable and
19 segregable portion of the organization, trade, or
20 business, the experience record that inures to the
21 benefit of the successor employer shall be determined
22 as follows:



1 (A) Wages, as used in section 383-61, attributable to
2 the clearly identifiable and segregable portion
3 shall be for the period beginning with the most
4 recent three consecutive calendar years
5 immediately preceding the determination of rates
6 under sections 383-63 to 383-69 and through the
7 date of acquisition; and

8 (B) Reserve balance attributable to the clearly
9 identifiable and segregable portion shall be the
10 amount determined by dividing the wages, as used
11 in section 383-61, of the clearly identifiable
12 and segregable portion in the three calendar
13 years (or that lesser period as the clearly
14 identifiable and segregable portion may have been
15 in operation) immediately preceding the
16 computation date of the rating period prior to
17 which the acquisition occurred by the total
18 taxable payrolls of the predecessor for the
19 three-year period (or that lesser period as the
20 clearly identifiable and segregable portion may
21 have been in operation) and multiplying the
22 quotient by the reserve balance of the



1 predecessor employer calculated as of the
2 acquisition date;
3 provided the waiver or waivers required herein are
4 filed with the department within sixty days after the
5 date of acquisition, the successor employing unit,
6 unless already an employer subject to this chapter,
7 shall be subject from the date of acquisition to the
8 rate of contribution of the predecessor or of two or
9 more predecessors if they have the same contribution
10 rate. If there are two or more predecessors having
11 different contribution rates, the successor shall be
12 subject to the rate prescribed for new or newly
13 covered employers under paragraph (2) until the next
14 determination of rates under sections 383-63 to
15 383-69, at which time the experience records of the
16 predecessors and successor shall be combined and shall
17 be deemed to be the experience record of a single
18 employing unit and the successor's rate shall
19 thereupon be determined upon the basis of the combined
20 experience. If the successor at the time of the
21 transfer is an employer subject to this chapter, the
22 rate of contribution to which the successor is then



1 subject shall remain the same until the next
2 determination of rates under sections 383-63 to
3 383-69, at which time the experience records of the
4 predecessor and successor shall be combined and shall
5 be deemed to be the experience record of a single
6 employing unit and the successor's rate shall
7 thereupon be determined upon the basis of the combined
8 experience. For the purpose of determination of rates
9 under sections 383-63 to 383-69 of all successor
10 employing units, waivers as required herein, if not
11 previously filed as hereinabove provided, shall be
12 filed with the department not later than March 1 of
13 the year for which the rate is determined; provided
14 that no waiver shall be accepted by the department for
15 filing unless the employing unit executing the waiver
16 has filed all reports and paid all contributions
17 required by this chapter;

- 18 (6) The department may prescribe rules for the
19 establishment, maintenance, and dissolution of joint
20 accounts by two or more employers, and, in accordance
21 with the rules and upon application by two or more
22 employers to establish such an account, or to merge



1 their several individual accounts in a joint account,
2 shall maintain the joint account as if it constituted
3 a single employer's account. The rules shall be
4 consistent with the federal requirements for
5 additional credit allowance in section 3303 of the
6 federal Internal Revenue Code and consistent with this
7 chapter;

8 (7) Whenever there is an amendment to this chapter which,
9 if immediately effective, would change an employer's
10 rate of contributions, the rate of the employer shall
11 be changed in accordance with the amendment and the
12 new rate shall apply for the remainder of the calendar
13 year beginning with the calendar quarter immediately
14 following the effective date of the amendment
15 providing for the change, unless otherwise provided by
16 the amendment;

17 (8) For the purposes of this section "contribution rate"
18 shall mean the basic contribution rate as defined in
19 section 383-68 when applied to calendar year 1978 or
20 any calendar year thereafter; and

21 (9) For the purposes of this section, the terms "employing
22 unit", "employer", "predecessor", and "successor"



1 shall include both the singular and the plural of each
2 term. Nothing in this section shall prevent two or
3 more successor employing units, which each succeed to
4 or acquire a clearly identifiable and segregable
5 portion of a predecessor employing unit, from gaining
6 the benefit of the clearly identifiable and segregable
7 portion of the predecessor's experience record;
8 provided that the terms of this section are complied with,
9 nothing herein shall bar a predecessor employer from waiving the
10 rights to all or the clearly identifiable and segregable portion
11 of the predecessor's prior experience record in favor of a
12 successor employer where the successor acquired a clearly
13 identifiable and segregable portion of the predecessor's
14 organization, trade, or business after December 31, 1988 and
15 prior to December 31, [~~1992.~~] 2007."

16 SECTION 3. Statutory material to be repealed is bracketed
17 and stricken. New statutory material is underscored.

18 SECTION 4. This Act shall take effect upon its approval;
19 provided that the sixty-day time limit to apply for a waiver

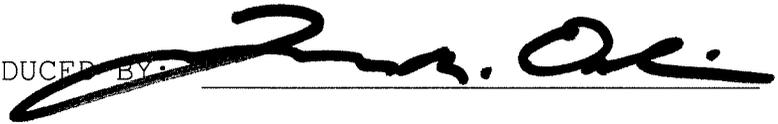


H.B. NO. 388

1 under section 383-66(a)(5), Hawaii Revised Statutes, shall not
2 apply to waiver applications filed pursuant to this Act.

3

INTRODUCED BY:



JAN 18 2007



Report Title:

Employment

Description:

Requires successor employers to retain incumbent employees upon the divestiture, sale, or acquisition of a business. Enables certain successor companies that acquire a business to also acquire its predecessor's unemployment insurance contribution assessment rate through 12/31/07.

