

ACT 154

H.B. NO. 1997

A Bill for an Act Relating to Family Leave.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature enacted Act 328, Session Laws of Hawaii 1991, to require employers with one hundred or more employees to provide four weeks of unpaid or paid leave upon the birth of a child of an employee or the adoption of a child or to care for the employee's child, spouse, or parent with a serious health condition. Act 328 took effect on January 1, 1992, for public sector employers and on July 1, 1994, for private sector employers.

The purpose of this Act is to provide procedures and remedies needed to enforce the state family leave law.

SECTION 2. Chapter 398, Hawaii Revised Statutes, is amended by designating sections 398-1 to 398-11 as part I and inserting a title before section 398-1 to read as follows:

“PART I. GENERAL PROVISIONS”

SECTION 3. Chapter 398, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

“PART . ENFORCEMENT

§398-A Filing of complaint. (a) Any individual claiming to be aggrieved by an alleged unlawful act may file with the department a verified complaint in writing.

(b) The attorney general or the department, in like manner, may file a complaint on behalf of an individual.

(c) A complaint may be filed on behalf of a class by the attorney general or the department.

(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.

(e) After the filing of any complaint, the attorney general or the department, as applicable, shall serve a copy of the complaint upon the employer.

§398-B Predetermination settlement. At any time after the filing of a complaint, but prior to a determination by the department that this chapter has been violated, the parties may agree to resolve the complaint through a predetermination settlement.

§398-C Investigation and conciliation. (a) The department may investigate and conciliate any complaint filed under this chapter.

(b) Every employer shall furnish or provide to the department access to records, documents, and other material to determine compliance with this chapter. The department shall have the right to examine, photograph, or copy the material and interview witnesses at the place of employment or business during regular working hours with respect to any matter under this chapter.

(c) The department may require by subpoena the attendance and testimony of witnesses and the production of all records, payrolls, correspondence, documents, and other material relative to any matter under investigation.

(d) If the department determines after investigation that this chapter has been violated, the department shall inform the employer and endeavor to remedy the violation by informal methods, such as conference or conciliation.

(e) If the department finds that methods in subsection (d) will not resolve the complaint, the department shall issue an order and a demand for compliance.

(f) If the department issues an order that finds that an employer has violated the requirements of this chapter, the department may prescribe relief as provided under this chapter.

§398-D Appeal and hearing. (a) Upon appeal by the employer, the order issued by the department shall be subject to a de novo review by a hearings officer appointed by the director.

(b) The hearings officer shall schedule a contested case hearing that shall be heard in accordance with chapter 91.

(c) At any time after the filing of an appeal under subsection (a), but prior to the hearing, the hearings officer may hold a prehearing conference with the parties or their representatives.

(d) If a hearing is held as provided under subsection (b), the hearings officer shall issue a decision and grant relief as provided under this chapter.

(e) Any person aggrieved by the decision of the hearings officer shall be entitled to judicial review as provided by section 91-14.

(f) The hearings officer may administer oaths, take or cause to be taken depositions of witnesses, and may issue subpoenas to compel the attendance and testimony of witnesses or the production of records, payrolls, correspondence, documents, or other material relating to any matter to be heard.

§398-E Civil action. (a) If an employer fails or neglects to comply with the:

(1) Final order of the department from which no appeal has been taken as provided by this chapter; or

(2) Final decision of the hearings officer,

the department or the affected employee may apply to any court of competent jurisdiction to enforce the provisions of the final order or decision and for any other appropriate relief. In any proceeding to enforce the provisions of the final order or decision, the department or the affected employee need only file with the court proof that a certified copy of the final order or decision was served. In the case of the final decision, proof that the notice of hearing was given also must be filed with the court.

(b) Any action to enforce this chapter, or to recover damages or equitable relief prescribed by this chapter, may be maintained in any court of competent jurisdiction by any one or more employees for and on behalf of the employee or employees, or the employee or employees may designate an agent or representative to maintain the action.

(c) In any action brought under this chapter, the court shall allow, in addition to any judgment awarded to the plaintiff, costs of action, including fees of any nature, and reasonable attorney's fees to be paid by the defendant.

§398-F Remedies. (a) In addition to all employment terms and benefits provided under section 398-7, remedies prescribed and ordered by the department or the court under this chapter may include any legal, equitable, and other relief the department or court deems appropriate.

(b) Relief under this section may include:

(1) The amount of any wages, salary, employment benefits, or other compensation denied or lost to the employee by reason of the violation; or

(2) In a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to four weeks of wages or salary for the employee.

(c) An employer may be liable for an additional amount as liquidated damages equal to the sum of the applicable amount in subsection (b)(1) and (2); provided that if an employer who has violated this chapter proves to the satisfaction of the department or the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter, the department or the court may reduce the amount of the liability to the applicable amount determined under subsection (b)(1) or (2).

§398-G Notice of right to sue and employee remedies. (a) The department may issue a notice of right to sue. Within ninety days after the receipt of a notice of right to sue, the complainant may bring a civil action under this chapter. The department may intervene in a civil action brought pursuant to this chapter if the case is of general importance.

(b) An action by an employee to enforce the provisions of this chapter may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of oneself or themselves, or the employee or employees may designate an agent or representative to maintain the action.

(c) The court in any action brought under this section, in addition to any judgment awarded to the plaintiff or plaintiffs, shall allow costs of action, including costs of fees of any nature, and reasonable attorney's fees, to be paid by the defendant.

(d) The court also may provide injunctive relief in appropriate circumstances.

§398-H Compliance review. The department may investigate whether the terms of an agreement, settlement, order, or decision are being complied with by the employer. If the employer is not in compliance, the department shall take appropriate action as provided under this chapter.

§398-I Penalty. Any employer who intentionally resists, prevents, impedes, or interferes with the department in the performance of duties pursuant to this chapter, or who in any manner intentionally violates this chapter, shall be guilty of a petty misdemeanor.”

SECTION 4. Section 398-1, Hawaii Revised Statutes, is amended as follows:

1. By adding a new definition to be appropriately inserted and to read:

““Department” means the department of labor and industrial relations.”

2. By amending the definition of “child” to read:

““Child” means an individual who is a biological, [step,] adopted, or foster son or daughter; a stepchild; or a legal ward of an employee.”

3. By amending the definition of “serious health condition” to read:

““Serious health condition” means [an acute, traumatic, or life-threatening illness, injury, or impairment, which involves treatment or supervision by a health care provider.] 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

- (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.”

SECTION 5. Section 398-4, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§398-4]]~~ **Unpaid leave permitted; relationship to paid leave.** (a) Pursuant to section 398-3, an employee shall be entitled to four weeks of family leave. The family leave shall consist of unpaid [or] leave, paid leave, or a combination of paid and unpaid leave. If an employer provides paid family leave for fewer than four weeks, the additional period of leave added to attain the four-week total may be unpaid. [Further, an]

(b) An employee or employer may elect to substitute any of the employee's accrued paid leaves such as sick, vacation, personal, or family leave for any part of the four-week period[,] in subsection (a); provided that an employer or employee may not substitute an employee's accrued sick leave in any situation under this chapter unless:

- (1) Sick leave is normally granted for such purposes by an employer's policy or practice; or
- (2) Upon mutual agreement by the employer and the employee."

SECTION 6. Section 398-6, Hawaii Revised Statutes, is amended to read as follows:

“[§398-6] Certification. (a) An employer may require that a claim for family leave be supported by written certification [of].

(b) For the birth of [the] a child, certification shall be issued by a health care provider[,] or the family court[, or certification of]. For the placement of [the] a child for adoption with the employee, certification shall be issued by a recognized adoption agency, the attorney handling the adoption, or by the individual officially designated by the birth parent to select and approve the adoptive family.

(c) When leave is to care for a child, spouse, or parent who has a serious health condition, certification shall be issued by the health care provider of the individual requiring care. Certification shall be considered sufficient if it provides information as required by the director."

SECTION 7. Section 398-9, Hawaii Revised Statutes, is amended to read as follows:

“[§398-9] Enforcement and administration. **Administration.** (a) The director shall have jurisdiction over those prohibited acts made unlawful by this chapter. [Any individual claiming to be aggrieved may file with the director a verified complaint in writing that shall state the name and address of the employer alleged to have committed the unlawful act complained of, set forth the particulars thereof, and contain other information as may be required by the director. The attorney general, or the director upon the director's initiative, may, in like manner, make and file a complaint.

(b) A complaint may be filed on behalf of a class by the attorney general or the director, and a complaint so filed may be investigated, conciliated, heard, and litigated on a class action basis.

(c) (b) The [director] department shall assist employers in the [training and] placement of temporary help to perform the work of those employees on family leave.

(d) (c) The director also may [also] hire, subject to chapters 76 and 77, [assistants and] investigators, hearings officers, clerical, stenographic, and other [help] staff as may be necessary to administer and enforce this chapter."

SECTION 8. In codifying the new part added to chapter 398, Hawaii Revised Statutes, by section 3 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 9. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 10. This Act shall take effect on July 1, 1995; except that section 398-D of section 3 of this Act shall take effect on July 1, 1996.

(Approved June 13, 1995.)

Note

1. Should be underscored.