

ACT 120

S.B. NO. 336

A Bill for an Act Relating to the Defense of State Employees.

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

SECTION 1. The legislature finds that Act 44, Session Laws of Hawaii 2022 (Act 44), clarified the personal liability requirements for professionally licensed or certified employees of the State. However, the legislature notes that Act 44 did not clarify the circumstances under which the State has a duty to defend professionally licensed or certified state employees. Act 44 also did not establish a procedure that would allow the attorney general to confidentially withdraw from representing a professionally licensed or certified state employee. The legislature believes that the prejudice that the professionally licensed or certified state employee would suffer from the public disclosure of the attorney general's reasons for withdrawing from representation outweighs the public's right to access said information.

Accordingly, the purpose of this Act is to:

- (1) Declare that the State has a duty to defend professionally licensed or certified state employees from civil actions when the employee's actions were within the scope of employment and were not grossly negligent or wanton, as long as the employee is cooperating with the State's defense;
- (2) Clarify that professionally licensed or certified state employees may employ their own attorneys at their own expense;

- (3) Require the attorney general to work with the professionally licensed or certified state employee to amicably transfer representation to the successor counsel chosen by the employee if the State declines to defend the employee from a civil action on certain grounds; and
- (4) Require the attorney general to file a confidential motion to withdraw as counsel if the attorney general and professionally licensed or certified state employee cannot amicably transfer representation to the successor counsel.

SECTION 2. Chapter 662, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§662- Defense of professionally licensed or certified state employees; decision not to defend. (a) The attorney general, on behalf of the State, shall defend any civil action or proceeding brought in any court against any professionally licensed or certified employee of the State for damage to property or personal injury, including death, resulting from the act or omission of the professionally licensed or certified state employee while acting within the scope of the employee’s employment; provided that the attorney general shall have no obligation to defend when the civil action or proceeding results from the professionally licensed or certified state employee’s gross negligence or wanton act or omission, or if the employee does not provide all information and assistance that the attorney general deems necessary to the defense of the employee.

(b) The professionally licensed or certified state employee may employ an attorney at the employee’s own expense, in lieu of the attorney general, to defend any civil action or proceeding brought in any court against the employee.

(c) If the attorney general declines to defend a civil action or proceeding against a professionally licensed or certified state employee who was acting within the scope of the employee’s employment on the grounds that the civil action or proceeding results from the employee’s gross negligence or wanton act or omission or that the employee is not providing all information and assistance that the attorney general deems necessary, the attorney general shall work with the professionally licensed or certified state employee to amicably transfer representation to the successor counsel chosen by the professionally licensed or certified state employee.

(d) If the attorney general and the professionally licensed or certified state employee cannot amicably transfer representation to the successor counsel, the attorney general shall file a motion to withdraw as counsel not less than thirty days before the close of discovery in the action or proceeding.

(e) Any motion to withdraw as counsel, and all related pleadings, records, notices, exhibits, and other evidence regarding the motion, shall be designated as confidential and shall be submitted by means of a confidential information form or other appropriate manner pursuant to court rules.

(f) After the attorney general’s motion to withdraw as counsel is filed, the professionally licensed or certified state employee shall have not less than thirty days to respond to the motion.

(g) Upon the filing of the attorney general’s motion to withdraw as counsel, the court shall conduct a hearing regarding the attorney general’s duty to defend the professionally licensed or certified state employee in the civil action or proceeding.

(h) At any proceeding regarding the motion to withdraw as counsel, only the court, court personnel, attorney general, employees of and counsel retained by the department of the attorney general, professionally licensed or certified state employee and the employee’s attorney, if retained, and other individuals approved by the court may be present.”

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 4. New statutory material is underscored.¹

SECTION 5. This Act shall take effect on July 1, 2025.
(Approved May 29, 2025.)

Note

1. Edited pursuant to HRS §23G-16.5.